No. 22-13626-U

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANNA LANGE,
Plaintiff-Appellee,

v.

HOUSTON COUNTY, GEORGIA, AND HOUSTON COUNTY SHERIFF CULLEN TALTON, IN HIS OFFICIAL CAPACITY,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Georgia
No. 5:19-cv-00392-MTT

EN BANC BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NATIONAL WOMEN'S LAW CENTER, AND PRIDE AT WORK, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND IN FAVOR OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Civil Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, the National Women's Law Center, the American Civil Liberties Union Foundation, and the ACLU Foundation of Florida, counsel for amici curiae, certify their belief that the Certificate of Interested Persons filed with Defendants-Appellants' brief filed on September 30, 2024, is complete, subject to these amendments:

1. ACLU Foundation of Florida (Amicus Curiae for Plaintiff-Appellee);
2. American Civil Liberties Union Foundation (Amicus Curiae for Plaintiff-Appellee);
3. Joshua A. Block (Counsel for Amicus Curiae American Civil Liberties Union Foundation);
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American Civil Liberties Union Foundation, ACLU of Florida Foundation, National Women's Law Center, and Pride at Work, AFL-CIO, are nonprofit entities and have no parent corporations. No publicly owned corporation owns 10% or more of the stocks of any of these organizations.

s/*Joshua A. Block*

Attorney of record for Amici Curiae

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INTEREST OF AMICI CURIAE

National Women's Law Center (NWLC) fights for gender justice — in the courts, in public policy, and in our society — working across the issues that are central to the lives of women and girls. NWLC uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us — especially women of color, LGBTQI+ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights for women and girls and has participated as counsel or amicus curiae in a range of cases in the U.S. Supreme Court, lower federal courts, and state courts.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles of liberty and equality embodied in the Constitution. The American Civil Liberties Union of Florida Foundation ("ACLU of Florida") is one of the ACLU's statewide affiliates.

All amici are dedicated to protecting the equal rights of LGBTQI+ people and have a strong interest in the proper interpretation of Title VII to ensure that transgender insurance beneficiaries have nondiscriminatory access to gender-affirming medical care.

STATEMENT OF THE ISSUE

Whether an employer's policy that facially excludes coverage for health care pertaining to "sex change" procedures, but does not exclude coverage of the same procedures for other purposes, violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), by affording its employees different "terms, conditions, or privileges of employment" based on sex.

SUMMARY OF THE ARGUMENT

Under *Bostock v. Clayton County*, 590 U.S. 644 (2020), Defendants' exclusions of care for "[s]ervices and supplies for a sex change" and "[d]rugs for sex change surgery," Doc. 205 at 3-4, facially discriminate because of sex. *Bostock* explained that sex discrimination occurs whenever a person's sex is a but-for cause of an adverse employment action, even assuming for argument's sake that "sex" refers to a person's sex designated at birth. Defendants' exclusions of coverage for "sex change surgery" easily satisfies *Bostock*'s test. Whether a surgery qualifies as a "sex change" is determined by (a) the employee's sex designated at birth and (b) whether the employee's sex designated at birth is typically associated with the anatomical and physiological characteristics produced by the surgery. Whether the exception applies to an employee's surgery therefore depends, in part, on the employee's sex assigned at birth, which makes sex a but-for cause of the employer's denial of coverage for certain medically necessary surgeries.

In attempting to distinguish *Bostock*, Defendants and the panel dissent assert that the "sex change surgery" exclusions do not "draw a line" based on sex or transgender status because transgender people who require non-surgical treatment for gender dysphoria are still covered by the Plan. According to the dissent, "[t]hat the plan covers transgender people and gender dysphoria raises a reasonable inference that there is a 'but for' cause *other than transgender status* for the plan to decline coverage for sex change operations." Panel Dissent at 8-9. But *Bostock* makes clear a policy is facially discriminatory when sex is *one* but-for cause, not the *only* but-for cause. And *Bostock* explained that, because sex need not be the sole "but for" cause under Title VII, a policy is facially discriminatory even when it does not adversely affect *all* members of a particular sex or *all* transgender people. The dispositive question is whether the "sex change surgery" exclusions rely on a person's sex designated at birth as a but-for cause—not whether the exclusions "draw a line" between all transgender people and all cisgender people, or between all treatments for gender dysphoria and all other treatments.

Nor can Defendants' exclusions be recharacterized as a facially neutral prohibition on all "top of the line" procedures. The exclusions facially classify based on sex—not based on expense—and thus exclude coverage for medically necessary common surgeries such as hysterectomies, which are not particularly expensive and are routinely covered for other conditions. And even if the reason

for the exclusions were a sex-neutral desire not to cover "top of the line" procedures, Title VII would still prohibit an employer from using a sex-based classification like the "sex change" exclusions to accomplish that alleged goal. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc*., 499 U.S. 187, 199 (1991) (holding that whether policy facially discriminates "does not depend on why the employer discriminates but rather on the explicit terms of the discrimination").

Unable to square their arguments with controlling precedent, Defendants and the panel dissent instead resurrect the same faulty reasoning used in *General Electric Co. v. Gilbert*, 429 U.S. 125, 138 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (the "PDA"). *Gilbert* held that an insurance exclusion for pregnancy-related disability was facially neutral under Title VII because the plan's coverage had "'no risk from which men are protected and women are not.'" *Id*. (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)). Without explicitly mentioning *Gilbert*, Defendants and the panel dissent embrace this same reasoning, arguing that the "sex change surgery" exclusions are facially neutral because, they

insist, the plan covers no identical surgery for cisgender women. Panel Dissent at 12.[1]

But Congress overturned *Gilbert*'s holding and reasoning when it passed the PDA. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983) (explaining PDA "not only overturned the specific holding in [*Gilbert*], but also rejected the test of discrimination employed by the Court in that case"). As the Supreme Court explained in *Newport News*, "[a]lthough *Gilbert* concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face," the PDA "unequivocally rejected that reasoning" because "only women can become pregnant." *Id.* at 684. Thus, a plan that excludes a sex-related condition such as pregnancy care—or "sex change surgery"—is facially discriminatory under the PDA regardless of whether there is an exactly comparable procedure that is covered for others. *See* 42 U.S.C. § 2000e(k).

Finally, remedying facially sex-based exclusions like the ones here does not create a "most favored nation" any more than striking down an exclusion on

[1] But as the district court observed: "The fact of the matter is, for example, that the plan pays for mastectomies when medically necessary for cancer treatment but not when mastectomies are medically necessary for sex change surgery. And the plan pays for hormone replacement therapy medically necessary for the treatment of menopause, but not hormone replacement therapy medically necessary for 'sex change.'" Doc. 205 at 23.

pregnancy care does. It simply ends sex-based disfavoritism—the exact result Congress intended when it passed Title VII and the PDA.

ARGUMENT

I. Defendants' Categorical Exclusions of Coverage for Gender-Affirming Surgery Facially Discriminate Because of Sex Under *Bostock*.

Under *Bostock*, Defendants' exclusions of care for "[s]ervices and supplies for a sex change" and "[d]rugs for sex change surgery," Doc. 205 at 3-4, are "textbook sex discrimination." *Kadel v. Folwell*, 100 F.4th 122, 153 (4th Cir. 2024). Excluding care based solely on the fact that the care is for purposes of "sex change surgery" relies on an individual's sex as a "but for" cause of discrimination, and it penalizes individuals for failing to conform to their sex designated at birth.

In arguing that Defendants' exclusions for "sex change surgery" do not discriminate because of sex under *Bostock*, Defendants and the panel dissent paraphrase *Bostock*'s holding while ignoring its underlying reasoning. Under *Bostock*, the relevant question is not whether Defendants' exclusions "draw a line" solely based on sex or transgender status, nor is it whether the exclusions are motivated by allegedly neutral reasons. The relevant question is whether sex or transgender status is a but-for cause of the policy's operation. If it is, and the policy cannot function without using sex or transgender status, then it is facially

discriminatory under Title VII regardless of whether the policy turns *solely* on sex or transgender status and regardless of the employer's motivations for adopting it.

A. Categorical Exclusions of Coverage for "Sex Change" and "Drugs for Sex Change Surgery" Inherently Rely on an Individual's Sex as a "But For" Cause of the Discrimination.

As the Supreme Court explained in *Bostock*, discrimination based on a person's transgender status "necessarily entails discrimination based on sex; the first cannot happen without the second." 590 U.S. at 669. Because a transgender person is someone whose gender identity is different from their sex designated at birth, a classification based on sex designated at birth is embedded within the definition of what it means to be transgender. Thus, "[w]hen an employer fires an employee because she is . . . transgender, two causal factors may be in play—*both* the individual's sex [designated at birth] *and* something else (the sex . . . with which the individual identifies)." *Id.* at 661. But "[s]o long as the plaintiff's sex [designated at birth] [is] one but-for cause of that decision, that is enough to trigger the law." *Id.* at 656. "By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today." *Id.* at 669.

Under *Bostock*, Defendant's exclusions of coverage for "[s]ervices and supplies for a sex change" and "[d]rugs for sex change surgery" also facially discriminate because of sex. "[T]ry writing out instructions for" implementing the

exclusions "without using the words man, woman, or sex (or some synonym). It can't be done." *Bostock*, 590 U.S. at 668-69. That is because, as with the definition of being transgender, a classification based on a person's sex designated at birth is embedded within the term "sex change." Whether a surgery qualifies as "sex change" surgery is determined by (a) the person's sex designated at birth and (b) whether the person's sex designated at birth is typically associated with the anatomical and physiological characteristics produced by the surgery. Thus, if a person's sex designated at birth is female, and she has breast augmentation surgery, the surgery is not a "sex change." But if a person's sex designated at birth is male, and they have a breast augmentation, the surgery is a "sex change." The person's sex designated at birth plays an "unmistakable and impermissible role." *Bostock*, 590 U.S. at 660.[2]

The same reasoning applies if the "sex change surgery" exclusions are characterized as turning on a diagnosis of gender dysphoria versus other conditions. An exclusion based on "gender dysphoria" is—by definition—an exclusion based in part on a person's sex. Gender dysphoria is defined as

[2] Nor do the exclusions become neutral by virtue of also excluding "reversal" of "sex change" surgeries. Because a "reversal" can occur only after the initial gender-affirming surgery takes place, a plan administrator must still make a determination that an initial "sex change" has occurred, which necessarily depends on an individual's sex designated at birth as a "but for" element.

incongruence between a person's gender identity and their sex designated at birth accompanied by clinically significant distress. Docs. 179-3 ¶¶ 1-3; 195 ¶¶ 1-3. Thus, as with the definition of being transgender, the definition of gender dysphoria incorporates a classification based on an individual's sex designated at birth, making it impossible to discriminate based on the former without also discriminating based on the latter.[3]

B. "Discrimination" Occurs When the Incongruence Between Sex Designated at Birth and Gender Identity Is *One* "But For" Cause—Not the Only "But For" Cause.

The panel dissent concluded that the "sex change" surgery exclusions are facially neutral because they do not exclude *all* coverage for gender dysphoria—just gender-affirming surgery—and thus "do[] not draw a line between procedures transgender people need and procedures that other people need. Instead, the plan draws a line between sex-change operations and other operations." Panel Dissent at

[3] The exclusions also discriminate against individuals based on their gender nonconformity, which, under *Bostock*, is a form of discrimination based on sex designated at birth. As *Bostock* explained, "an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female" but "retains an otherwise identical employee who was identified as female at birth" has "penalize[d] a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Id.* at 660. A categorical exclusion of coverage for gender-affirming surgery similarly "implicates sex stereotyping by . . . requiring transgender individuals to maintain the physical characteristics of their natal sex," and penalizing them for failing to do so. *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018).

8. According to the dissent, "[t]hat the plan covers transgender people and gender dysphoria raises a reasonable inference that there is a 'but for' cause *other than transgender status* for the plan to decline coverage for sex change operations." *Id.* at 8-9.

This reasoning directly contravenes *Bostock*, which confirmed that Title VII does not require sex—or transgender status—to be the *only* "but for" cause to trigger liability.[4] As *Bostock* explained, "[o]ften in life and law two but-for factors combine to yield a result that could have also occurred in some other way." 590 U.S. at 672. If sex is one of the but-for causes of adverse treatment, "it has no significance [under Title VII] if another factor . . . might also be at work, or even play a more important role in the employer's decision." *Id.* at 665.

Because sex—or transgender status—need not be the sole "but for" cause under Title VII, a policy is facially discriminatory even when it does not adversely affect *all* members of a particular sex or *all* transgender people. Thus, in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam), an employer's policy of not hiring women with young children facially discriminated based on sex even though the company did not discriminate against *all* women. *Bostock* explained that a "woman who was not hired under [such a] policy might have told

[4] As discussed below, that reasoning also contravenes the PDA, which Congress passed to repudiate a similar line of reasoning used in *Gilbert*.

her friends that her application was rejected because she was a mother, or because she had young children. Given that many women could be hired under the policy, it's unlikely she would say she was not hired because she was a woman." *Bostock*, 590 U.S. at 667. "But the Court did not hesitate to recognize that the employer in *Phillips* discriminated against the plaintiff because of her sex. Sex wasn't the only factor, or maybe even the main factor, but it was one but-for cause—and that was enough." *Id.*; *see also Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired."). The same reasoning applies here. Just as the policy in *Phillips* was triggered by the confluence of sex and having young children, the "sex change surgery" exclusions are triggered by the confluence of sex assigned at birth and gender dysphoria requiring surgery. It does not matter whether the "sex change surgery" exclusions "draw a line" between all transgender and all non-transgender people, or between all procedures for gender dysphoria and all other procedures. Sex—or transgender status—is one "but for" element of the line drawn by the policy and "that [i]s enough." *Bostock*, 590 U.S. at 667.

C. The "Sex Change Surgery" Exclusions Are Not Facially Neutral Exclusions of "High End" Procedures.

Despite Defendants' and the panel dissent's assertions to the contrary, the "sex change surgery" exclusions are not based on a general policy of "excluding

the most expensive forms of non-life-threatening care" or not covering "top-of-the-line" treatments. Defs.' En Banc Br. 25; Panel Dissent at 3. The sole criterion for the exclusions is that the surgery is for the purpose of a "sex change" regardless of how expensive—or inexpensive—the surgery is. A hysterectomy, for example, is a routine surgery[5] that is no more expensive when performed to treat gender dysphoria than when performed to treat any other medical condition. As the panel dissent elsewhere acknowledged, gender-affirming surgeries "vary in their purpose, cost, and complexity." Panel Dissent at 2. Yet, under Defendants' policy, all "sex change" surgeries are excluded, whether they are "top of the line," "bottom of the line," or somewhere in between.[6]

In attempting to rewrite the exclusions' explicit terms into a neutral policy of not covering "top of the line" treatments, Defendants and the panel dissent repeat the same mistake the Supreme Court corrected in *Johnson Controls*, 499 U.S. at 199. They conflate the facially discriminatory *terms* of the policy with the allegedly facially neutral *reasons* for the policy. The Seventh Circuit in *Johnson*

[5] Hysterectomies are, in fact, the second-most common surgery among women in the United States after childbirth by cesarean section. Hysterectomy, U.S. Dep't of Health & Hum. Servs., Off. on Women's Health (Dec. 29, 2022), https://www.womenshealth.gov/a-z-topics/hysterectomy.

[6] Nor does the Plan have a general rule against covering "top of the line" procedures for other conditions. *See* Docs. 179-3 ¶ 245; 195 ¶ 245 (listing examples of high-cost procedures covered by the Plan).

Controls had erroneously evaluated a policy that explicitly classified based on a person's childbearing capacity as though it were a facially neutral policy of protecting fetal health—with only a disparate impact on women. *See id.* at 198. Correcting that error, the Supreme Court explained that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *Id.* at 199. "Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Id.*

Echoing the Seventh Circuit's erroneous reasoning in *Johnson Controls*, the panel dissent focuses on the alleged *reasons* for the exclusions instead of their explicit *terms*. Defendants' motivation for the exclusions remains disputed. But even if the alleged reasons for the exclusions were a generally applicable desire not to cover "top of the line" procedures, Title VII prohibits an employer from using a sex-based classification like the "sex change" exclusions to achieve a neutral goal like saving money. *See* 29 C.F.R. § 1604.9(e) ("It shall not be a defense under title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."); *see also City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 717 (1978) ("[N]either Congress nor the courts have recognized [a cost justification] defense under Title

VII.") "An employer's intentional discrimination on the basis of sex is no more permissible when it is prompted by some further intention (or motivation), even one as prosaic as . . . actuarial tables." *Bostock*, 590 U.S. at 664. "[N]othing in Title VII turns on the employer's labels or any further intentions (or motivations) for its conduct." *Id.* at 667.

II. Defendants Rely on the Same Flawed Reasoning That Congress Rejected When It Passed the Pregnancy Discrimination Act and Overturned *General Electric v. Gilbert*.

To defend the exclusions in the face of *Bostock*, Defendants repeat the same flawed arguments the Supreme Court previously embraced in the now-overturned decision in *Gilbert*, 429 U.S. at 136, *superseded by statute*, PDA, 92 Stat. at 2076. *Gilbert* held that an insurance exclusion for pregnancy-related disability was facially neutral under Title VII.

In *Gilbert*, the Supreme Court held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination." 429 U.S. at 136. *Gilbert* reasoned that the plan was facially nondiscriminatory because (a) the plan provided the same coverage for men and women, (b) pregnancy "constitute[d] an additional risk [] unique to women," and (c) the exclusion did not harm all women. *Id*. at 135-39. The Court wrongly concluded that excluding pregnancy did not discriminate based on sex because the

plan's coverage had "'no risk from which men are protected and women are not.'" *Id*. at 138 (quoting *Geduldig*, 417 U.S. at 496-97).

Congress reacted swiftly. It passed the PDA in 1978, amending Title VII's text to reject *Gilbert*. *See* 42 U.S.C. § 2000e(k) (clarifying "terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions"). The Supreme Court subsequently recognized in *Newport News*—when it held a pregnancy exclusion *did* facially violate Title VII—that the PDA "not only overturned the specific holding in [*Gilbert*], but also rejected the test of discrimination employed by the Court in that case." 462 U.S. at 676. The Court explained that the PDA "unambiguously expressed [Congress's] disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision," and reflected Congress's views that the dissenting opinions in *Gilbert* had "correctly express[ed] both the principle and the meaning of title VII." *Id.* at 678 (internal quotation marks omitted); *see also Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) (interpreting Title VII based on the "dissenting opinion of Justice Brennan in [*Gilbert*], which Congress adopted in enacting the PDA"). Thus, for purposes of applying Title VII to future cases, lower courts must follow the reasoning of the *Gilbert* dissent, not that of the *Gilbert* majority.

Moreover, because the PDA rejected both the holding and the reasoning of *Gilbert*, the PDA's impact is not limited to the specific context of pregnancy. The PDA added language clarifying that under Title VII, "'because of sex' or 'on the basis of sex' *include, but are not limited to,* because of or on the basis of pregnancy, childbirth, or related medical conditions[.]" 42 U.S.C. § 2000e(k) (emphasis added). The word "include" plainly signals the statute only offers illustrative examples, not an exhaustive list. *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts,* 132-33 (2012). Accordingly, the "include, but are not limited to" language added by the PDA confirms that "because of sex" extends beyond the listed examples to other contexts involving similar reasoning. *See Newport News*, 462 U.S. at 678 n.14 ("The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees.").

Although neither Defendants nor the panel dissent explicitly cite *Gilbert*'s dead rationale, both implicitly embrace its flawed arguments. Defendants and the dissent argue the "sex change surgery" exclusions do not discriminate based on sex because a cisgender woman would not need the *precise* type of vaginoplasty that Ms. Lange needs. *See, e.g.*, Panel Dissent at 11. But this reasoning comes straight

from *Gilbert*, which determined a pregnancy exclusion is not sex discrimination against women because men did not receive coverage for pregnancy or anything precisely like it. In *Gilbert*, the Court mistakenly reasoned that "we have here no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to" women because "[p]regnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability." *See Gilbert*, 429 U.S. at 136. According to *Gilbert*, the lack of an exact comparator meant that the plan did not facially discriminate. *Id.* at 138.

The *Gilbert*-esque reasoning of Defendants and the panel dissent cannot be squared with Title VII because Congress passed the PDA to repudiate *Gilbert* and clarify that excluding coverage for sex-related conditions violates Title VII even if there is no exactly comparable procedure that *is* covered. *See* 42 U.S.C. § 2000e(k). As the Court explained in *Newport News*, the PDA "made clear that," because women generally faced a risk of pregnancy that men did not, "it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions" —even though men did not receive the pregnancy coverage that the plan denied women. 462 U.S. at 684. Accordingly, *Newport News* held that the challenged plan violated Title VII where it excised sex-related benefits for a specific subset of employees (pregnancy coverage for male employees' wives),

thereby discriminating against male employees even if female employees' husbands needed no exactly comparable coverage for pregnancy. The same reasoning applies here. Just as an exclusion of coverage for pregnancy facially discriminates against women, the "sex change surgery" exclusion, which Defendants admit affects only transgender employees, is also facially discriminatory regardless of whether a cisgender employee needs a precisely comparable procedure. *See* Defs.' En Banc Br. 9.[7]

In a similar vein, Defendants claim that giving all their employees the same facially discriminatory menu of coverage is evenhanded and nondiscriminatory. They echo *Gilbert*'s argument that because all employees received packages that covered "exactly the same categories of risk," an exclusion of coverage for pregnancy-related disability was "facially nondiscriminatory." *Gilbert*, 429 U.S. at 138; *see* Defs.' En Banc Br. 26 (arguing Plan does not "provide different coverage to Lange because she is transgender—she has the same coverage at the same cost as all other participants."). But as Congress quickly clarified—and the Supreme Court subsequently recognized—that characterization was "inaccurate" because carving out coverage that only women needed "was facially discriminatory." *Newport News*, 462 U.S. at 677. Just so here: it makes no difference that all

[7] And, of course, the Plan *does* deny transgender employees medically necessary treatments despite covering identical treatments for cisgender employees. *See* Doc. 205 at 23.

employees are subject to the "sex change surgery" exclusions when they only exclude care for transgender people. *See* Defs.' En Banc Br. 9 ("sex change surgery" exclusions affect only transgender employees).

Congress's abrogation of *Gilbert* also forecloses Defendants' argument that the "sex change surgery" exclusions are not sex discrimination because they do not draw a line between all procedures transgender people need and all procedures cisgender people need. They argue that the "sex change surgery" exclusions only distinguish between "sex change" procedures and other procedures—even though it is only *transgender* people who need "sex change" procedures. *See, e.g.*, *id.*; Panel Dissent at 8. *Gilbert* likewise argued that the plan didn't draw a line between procedures women and men needed but rather between pregnancy and other conditions—even though only *women* needed pregnancy care. The Court reasoned that "exclusion of pregnancy from coverage . . . was not in itself discrimination based on sex" because pregnancy is "unique" and "the program divides potential recipients into two groups" – pregnant women and "nonpregnant persons," which "includes members of both sexes." *Gilbert*, 429 U.S. at 134-35 (citing *Geduldig*, 417 U.S. at 496-97 n.20).

As noted above, this reasoning already conflicts with *Bostock* and *Phillips*. And by enacting the PDA, Congress affirmatively repudiated that reasoning too. As the Supreme Court explained in *Newport News*, "[a]lthough *Gilbert* concluded

that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face," the PDA "unequivocally rejected that reasoning" because "only women can become pregnant." 462 U.S. at 684. Thus, under the PDA, it does not matter that "sex change surgery" does not broadly "draw a line between procedures transgender people need and procedures other people need." Panel Dissent at 8. The exclusions still draw a line based on "sex change surgery," and only transgender people require those treatments; they are therefore discriminatory.

III. Ending the Exclusion's Disfavoritism Simply Ends Discrimination; It Creates No "Most Favored Nation."

Echoing the panel dissent, Defendants argue that a decision invalidating the "sex change surgery" exclusions as facially discriminatory would effectively grant transgender employees seeking gender-affirming healthcare a "most-favored-nation" status, contravening *Young v. UPS*, 575 U.S. 206 (2015).[8] But *Young* involved a facially neutral policy, not a facially discriminatory one. The question in *Young* was whether an employer with a facially sex-neutral policy prohibiting "light duty" was required to make an exception to the policy for pregnant employees if the employer had made some exceptions to the policy for other

[8] As used in this context, "most-favored-nation" status essentially means that if any individual gets special treatment, those in the "most favored nation" automatically get it too. *See Young*, 575 U.S. at 221.

people. *Id.* at 221-22. In concluding that a pregnant employee could establish a Title VII violation in those circumstances only by presenting sufficient evidence to give rise to an inference of intentional discrimination, the Court reasoned that it doubted "Congress intended to grant pregnant workers an unconditional 'most-favored-nation' status." *Id.* at 207.

Ms. Lange's case bears no resemblance to *Young*. Defendants do not have a facially neutral policy against covering surgeries. They have a policy of generally covering all medically necessary surgeries and have carved out explicitly sex-based exclusions for "sex change surgery." *See* Panel Opinion 3; Defs.' En Banc Br. 7-9. Striking down this facially sex-based exclusion does not create a "most favored nation." It simply invalidates a form of sex-based disfavoritism—the result Congress intended when it passed Title VII and the PDA. For example, in *Newport News*, the Supreme Court struck down a discriminatory exclusion of coverage for male employees' wives. *Newport News,* 462 U.S. at 676. This Court invalidating Defendants' "sex change" exclusions would no more make transgender employees like Ms. Lange "most favored" than *Newport News* did for pregnant dependents.

Moreover, invalidating the exclusions would not make transgender employees a "most favored nation" because insofar as Defendants do not cover hearing aids, bariatric surgery, or other health-care services *not* related to her sex, Ms. Lange would remain excluded from these services on the same terms as her

coworkers. She is simply—no more and no less—as entitled as her coworkers to be free of sex discrimination in the "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

Defendants, by contrast, argue for something approximating a *least*-favored-nation status. According to Defendants, facially sex-based exclusions must be regarded as facially neutral so long as Defendants can point to some *other* exclusion in the Plan. Under that reasoning, a facial exclusion of care for pregnancy would likewise have to be deemed facially neutral if some other care is also excluded—a result directly contrary to the PDA. The fact that the Plan has a facially sex-neutral exclusion for hearing aids does not somehow allow it to enact a facially sex-based exclusion for pregnancy. And it does not authorize facially sex-based exclusions for "sex change surgery" either.

CONCLUSION

The "sex change surgery" exclusions cannot function without reference to (a) the employee's sex designated at birth and (b) whether the employee's sex designated at birth is typically associated with the anatomical and physiological characteristics the surgery produces. Because sex assigned at birth is perforce *one* but-for cause when the exclusion applies, the exclusions violate Title VII. None of the arguments put forth by Defendants and the panel dissent can be squared with Title VII's simple prohibition on policies that discriminate in the provision of

employment benefits, where sex constitutes at least one but-for cause of the exclusion. Therefore, this Court should affirm the district court's judgment for Ms. Lange.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and 11th Cir. R. 35-8 because it contains 5,237 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f) and 11th Cir. R. 32-4.

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CERTIFICATE OF SERVICE

I certify that on October 30, 2024, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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