IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs, Case No. 17-cv-264

v.

STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

**PLAINTIFFS' BRIEF IN OPPOSITION TO
STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, Alina Boyden and Shannon Andrews ("Plaintiffs"), through their undersigned attorneys, submit this brief, along with the accompanying response to Defendants' Proposed Findings of Fact, Plaintiffs' Supplemental Proposed Findings of Fact, and supporting evidentiary materials, in opposition to the State Defendants'[1] Motion for Summary Judgment. (See Dkt. # 80, Defs.' Mot. for Summary Judgment; Dkt. # 81 Defs.' Br. in Supp. of Mot. for Summary Judgment ("Defs.' Br.")[2]; Dkt. # 82, Defs.' Proposed Findings of Fact ("Defs.' PFOF")).

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[1] The "State Defendants" are the State of Wisconsin Department of Employee Trust Funds ("ETF"), the Wisconsin Group Insurance Board ("GIB"), and Robert J. Conlin, the Secretary of ETF ("Conlin" or "the Secretary"). This Court also recently granted in part Plaintiffs' motion for leave to file an amended complaint adding individual GIB board members as defendants to Plaintiffs' Section 1983 claims. (Dkt. 109). This Court has dismissed several other state defendants on standing grounds (Dkt. 67) and Dean Health Care on the ground it is not an "employer" or agent of an employer for Title VII purposes. (Dkt. 44).

[2] All page citations to Defendants' brief refer to the page numbers at the bottom of the page and not the Electronic Filing page numbers.

INTRODUCTION

Plaintiffs, Alina Boyden and Shannon Andrews, work for the State of Wisconsin. (Dkt. # 96, Plaintiffs' Proposed Findings of Fact ("Pls.' PFOF") ¶¶ 1, 2, 4). Both are transgender women, meaning their female gender identity does not match the gender they were assigned at birth. (*Id.* ¶ 5). Both have gender dysphoria, a serious medical condition that affects only people who are transgender. (*Id.* ¶¶ 8, 13, 31, 63). Their medical providers have prescribed gender confirmation surgery ("GCS"), in accordance with the accepted medical standards of care, to treat their dysphoria. (*Id.* ¶¶ 8, 9, 13, 14). The medical profession and the standards of care recognize such treatment as reconstructive, not cosmetic. (Pls.' Supplemental Proposed Findings of Fact in Response to Defs.' Mot. for Summary Judgment ("Pls.' Supp. PFOF") ¶ 2).

The Defendants provide state employees with group health insurance as a benefit of employment. (Pls.' PFOF ¶ 4). That insurance excludes coverage of "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." (*Id.* ¶¶ 43, 56; *see also* Pls.' Resp. to Defs.' PFOF ¶ 27). Coverage for the same reconstructive surgeries that are provided to state employees with other medical conditions is denied to transgender employees who need those same surgeries to treat gender dysphoria. (Pls.' PFOF ¶¶ 41-43).

Despite the facially discriminatory nature of the exclusion, Defendants argue that Plaintiffs' claims should be dismissed on summary judgment by dismissively conflating Plaintiffs' gender dysphoria – a specific, serious and well recognized

medical condition, *see Fields v. Smith*, 653 F.3d 550, 553-55 (7th Cir. 2011) – with being "depressed because of [their] appearance." (Defs' Br. at 1, 16-20). Defendants then mischaracterize gender confirmation surgeries as "costly cosmetic treatments," like breast augmentation (*id.)*, which would be denied to cisgender employees under the benefits exclusion for treatments "for cosmetic or beautifying purposes." (Pls.' Resp. to Defs.' PFOF ¶ 30).

But depression is not an indicator for cosmetic surgery, and no physician would prescribe surgery as medically necessary care to treat such depression. (Pls.' Supp. PFOF ¶¶ 3-4). Gender dysphoria is not mere dissatisfaction with one's appearance and GCS does not "beautify" a person or "enhance" the size or shape of physical characteristics the person already has, but *changes* the transgender person's primary and secondary sex characteristics to match the person's gender identity in order to relieve severe distress and reduce suicidal ideation and improve quality of life. (Defs.' PFOF ¶ 72; Pls.' Supp. PFOF ¶ 13); *see also id.* at 553 (noting that some people with gender dysphoria "become unable to function without taking steps to correct the disorder" and "may attempt to commit suicide or to mutilate their own genitals"). As even Defendants' expert concedes, for some patients, hormone therapy and gender confirming surgeries are "the only treatment[s] that reduce[] dysphoria and can prevent the severe emotional and physical harms associated with it." *Id.* at 556; Pls.' Resp. to Defs.' PFOF ¶ 106 (acknowledging "certainly there are some cases in which it [gender confirming treatment] is called for"). While refusing to cover cosmetic treatments to beautify or enhance appearance may be permissible, "[r]efusing to

provide effective treatment for a serious medical condition . . . amounts to torture." *Id.*

Defendants also miss the mark in asserting that cost-containment concerns justify the exclusion. (*See* Defs' Br. at 2, 30-32). The cost containment rationale is a post-hoc justification for the exclusion that played no role in the Defendants' decision to eliminate and then to reinstate the exclusion, and accordingly cannot satisfy the heightened scrutiny to which classifications based on sex and transgender identity are subjected. (*See* Pls.' Resp. to Defs.' PFOF ¶ 67); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017); *Robinson v. Lake Station*, 630 F. Supp. 1052, 1060 (N.D. Ind. 1986) (stating in a sex discrimination case that "post hoc explanations are unworthy of credence. . .").

Moreover, while cost containment may be a legitimate governmental purpose, that purpose cannot be achieved by singling out one group -- especially a disfavored group -- to bear the entire cost-saving burden. *See Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Plyler v. Doe*, 457 U.S. 202, 229 (1982); *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011). In addition, Defendants not only pay for these very same procedures when they are prescribed as reconstructive treatments for other conditions, they also cover other expensive surgeries, such as transplants. (Pls.' PFOF ¶¶ 39-43; Pls.' Supp. PFOF ¶ 6); *cf. Fields*, 653 F.3d at 555-56 (noting that, while gender confirming surgeries can be expensive, "other significant surgeries," such as coronary bypass and kidney transplant, "may be more expensive"). And, because gender dysphoria and gender confirmation surgeries are so rare, the cost of covering

them amounts to about 0.01% of the state's total premiums -- a miniscule amount that is immaterial to the state group health plan's finances. (Pls.' Resp. to Defs.' PFOF ¶ 91; Pls.' PFOF ¶ 53).

Defendants, relying on an "expert" who is not a clinician and has not treated anyone with gender dysphoria, also attempt to argue that "medical science has not yet produced *definitive* evidence that gender reassignment surgery is safe and effective for treating gender dysphoria." (Pls.' Supp. PFOF ¶ 22; Defs.' Br. at 2, 33-35 (emphasis added)). As with the cost-containment rationalization, the safety and efficacy argument is a post-hoc justification that played no role in the Defendants' consideration of the exclusion. (Pls.' Resp. to Defs.' PFOF ¶ 67). Moreover, a substantial body of research, along with the fact that the same procedures are covered for other conditions, demonstrates that the procedures themselves are safe and the State's decision to deny coverage for them is unrelated to concerns about safety and efficacy. (Pls.' PFOF ¶ 35). A similarly significant body of research supports the efficacy of these procedures. (*Id.)* While the evidence may not be "definitive," that is not – and could not be – the standard for medical practice. All scientific knowledge is provisional, rather than "definitive," but gender confirmation surgeries are as well-supported in the research literature as other covered treatments. (Pls.' PFOF ¶¶ 35-37).

Defendants also raise a series of procedural defenses identical to or reminiscent of their "magic trick" efforts in their motion to dismiss to bait and switch the Court into finding that, even though the exclusion violates the Equal Protection

Clause, Title VII and Section 1557, none of the Defendants can be held liable for those violations. For example, Defendants argued, successfully, that Plaintiffs' direct employers could not be liable under Title VII because the employers did not create the exclusion that harmed them, but now argue that ETF and GIB are not "agents" of those employers and that GIB, which adopted the exclusion, cannot be held liable because it does not have fifteen (15) employees, even though the state employers who delegated benefits authority to Defendants have hundreds, if not thousands of employees. (Defs.' Br. at 3-4). They also attempt to resurrect the argument, already rejected by this Court in its ruling on Defendants' motion to dismiss, that Defendant Robert Conlin, Secretary of ETF, was not sufficiently "personally involved" in the deprivation of Plaintiffs' rights to be liable in his individual capacity. (Dkt. # 67 at 14). Defendants' new contentions – that Section 1557 does not authorize a private right of action and that application of it would impermissibly breach the State's Eleventh Amendment immunity – have been rejected by other courts considering them.

STATEMENT OF FACTS

I. Gender Reassignment Surgery is Safe and Effective

"There is no single sex-based characteristic that defines an individual's sex" because "sex-related characteristics such as internal or external genitalia, reproductive capacity, chromosomes, or gender identity" may be inconsistent, such as with transgender people, people with intersex conditions, or people with sex chromosome conditions. (Pls.' Resp. to Defs.' PFOF ¶ 84). Gender identity, a person's

internal sense of their own sex, is an immutable characteristic. (Pls.' Resp. to Defs.' PFOF ¶¶ 84, 86). Gender dysphoria, the medical and psychiatric term for psychological distress caused by the incongruence between a transgender person's gender assigned at birth and their gender identity, is distinct from anxiety and mood disorders. (Pls.' PFOF ¶¶ 30-31; Pls.' Supp. PFOF ¶ 7). The term "dysphoria" on its own is not a diagnosis, and it is not the same as depression. (*Id.* ¶ 8).

The medical profession recognizes surgeries performed to treat gender dysphoria as reconstructive, and not elective surgeries, even though the same procedures may be considered "cosmetic" when performed on someone without a gender dysphoria diagnosis. (*Id.* ¶¶ 2, 9). Gender dysphoria is not the same as an anxiety or mood disorder like depression. (*Id.* ¶ 10). According to the standards of care for transgender patients, surgeries to treat gender dysphoria are only to be undertaken after a qualified mental health professional has assessed the patient and documented that they have met the criteria for such treatment. (*Id.* ¶ 11). Studies that measure gender dysphoria as a specific outcome of transition-related care have found that gender dysphoria is significantly reduced after medical intervention. (Pls.' PFOF ¶ 30). Research focused on psychological outcomes of hormone therapy and GCS indicate improvement in mental and physical health for patients with gender dysphoria. (Pls.' PFOF ¶ 33). Further, studies using control groups have found that hormone therapy is effective for reducing gender dysphoria. (Pls.' Supp. PFOF ¶ 12). Studies have also indicated that transgender persons undergoing GCS have reduced

suicidal ideation as compared to those who did not have surgery or hormones, and have an improved quality of life. (*Id.* ¶ 13).

Gender confirmation surgeries "have been shown to be an effective treatment for gender dysphoria," and professional organizations including the World Professional Association for Transgender Health ("WPATH") Standards of Care, the Endocrine Society, American Medical Association, American Psychological Association, American Psychiatric Association, American College of Obstetricians and Gynecologists, American Academy of Family Physicians, and World Health Organization, recognize GCS and hormone therapy as appropriate and necessary treatment for many people with gender dysphoria. (Pls.' Resp. to Defs.' PFOF ¶ 101). Peer-reviewed studies support the conclusion that GCS is effective in alleviating gender dysphoria. (*Id.*) The federal Department of Health and Human Services has concluded that surgical care to treat gender dysphoria is safe, effective, and not experimental. (Pls.' Resp. to Defs.' PFOF ¶ 106).

Defendants' medical expert, Dr. Lawrence Mayer, claims that "[m]edical and surgical treatments have not been demonstrated to be safe and effective for gender dysphoria." (Defs.' PFOF ¶ 101). His report and testimony do not support this claim. Some studies cited by Dr. Mayer as evidence of the lack of effectiveness of gender confirmation surgery and hormone therapy for gender dysphoria do not support his assertion that these treatments are ineffective. (Pls.' Resp. to Defs.' PFOF ¶ 102). Mayer's only support for his contention that there is "minimal" support for the conclusion that these treatments are safe and effective is his own article in a non-

peer-reviewed publication and an amicus brief that is similarly not peer reviewed, which themselves rely on studies that Mayer himself admits have major limitations. (Pls.' Resp. to Defs.' PFOF ¶ 101).

Moreover, Mayer is not licensed to practice medicine, has never practiced medicine or psychiatry, and has no specific training dealing with gender dysphoria. (Pls.' Supp. PFOF ¶ 22). Instead, he has reviewed research papers on gender dysphoria, but acknowledges that "reading the papers alone wouldn't make you an expert in anything." (*Id.* ¶ 23). Mayer testified that he is "not an expert in what is medically necessary," and admitted that whether a treatment is "medically necessary" is determined by a clinician. (*Id.* ¶ 24). Further, Mayer conceded that because he is not a clinician, he cannot opine as to whether hormone therapy or surgery are appropriate treatments for the Plaintiffs or anyone who is transgender. (*Id.* ¶ 28). In fact, Mayer conceded that there are cases in which surgical treatment for people with gender dysphoria is called for. (Pls.' Resp. to Defs.' PFOF ¶ 106).

In contrast to the medical need transgender persons with gender dysphoria have for reconstructive surgeries, non-transgender persons seeking cosmetic surgery to change or enhance their bodies do not have a medical need for such surgeries. (Pls.' Supp. PFOF ¶¶ 13-14). Cosmetic and elective surgeries performed to enhance an individual's self-esteem are not treatments for psychological disorders, and studies indicate that cosmetic surgery does not improve outcomes for patients with depression, anxiety, or body dysmorphic disorder. (Pls.' Supp. PFOF ¶ 14). Cosmetic surgery is not recognized as a treatment for depression, and individuals suffering

from depression may not be candidates for cosmetic surgery unless their depression is being treated. *(Id.* ¶ 15). Plaintiffs' expert, surgeon Loren Schechter, M.D., is unaware of any studies in which individuals with depression were treated with cosmetic surgery. (*Id.* ¶ 16). Nor is cosmetic surgery a treatment for suicidal ideation in cisgender individuals. (*Id.* ¶ 17).

II. The Excluded Benefits Are Not Costly

Lisa Ellinger, former head of the Office of Strategic Health Policy ("OSHP"), testified that when she met with Segal Consulting on February 12, 2015, to discuss benefits changes for 2016, Segal informed her that they had helped other states develop benefits to cover gender confirmation surgery and hormone therapy and that those states "found it was cheaper and easier" to cover the care. (Pls.' Resp. to Defs.' PFOF ¶ 40).

It may well be more costly in the long run to deny coverage to transgender patients, because denial of care is associated with increased disparities of other conditions that are costly to treat. (Pls.' Resp. to Defs.' PFOF ¶ 90). ETF has also recognized that coverage of these benefits would have an extremely low cost and would not increase premiums. (*Id.*) Segal Consulting estimated the annual cost to "range from $100,000 to $250,000" or 0.007% to 0.018% of premiums. (Pls.' Resp. to Defs.' PFOF ¶ 93).

According to Plaintiffs' cost expert, health care actuary Joan Barrett, the impact of removing the exclusion would be $140,000 or 0.01% of total costs. (Pls.' Resp. to Defs.' PFOF ¶ 91). It is highly unlikely that these costs could jump as high

as $800,000, as posited by Defendants' expert David Williams, because while there may be growth in the number of such surgeries performed over time, a doubling in the near future is not likely, and this benefit has been offered by employers for over a decade so the cost of the service is reasonably well known. (Pls.' Resp. to Defs.' PFOF ¶ 92). While Williams opined that a "risk margin" that would effectively double the total cost estimate was "reasonable," he conceded that this risk margin represented a "bad case," if not a "worst case" scenario and admitted that he was aware of no other similar risk margins for comparable benefits. (Pls.' Supp. PFOF ¶ 37).

III. Defendants Did Not Consider Cost, Safety, or Efficacy When Voting to Reinstate the Exclusion

Contrary to Defendants' assertions now, there is no evidence that GIB or any GIB members considered the cost, safety, or medical efficacy of gender reassignment surgery and/or hormone therapy when voting to reinstate the exclusion. (Pls.' Resp. to Defs.' PFOF ¶ 67). GIB President Farrell instead testified that the only reason discussed for reinstatement at the December 30, 2016 closed session was the pending Texas litigation relating to the HHS non-discrimination rules. (*Id.*) Board member J.P. Wieske recalled discussing the Texas litigation and potential notification issues with making a change after the plan year began at the December 12, 2016 meeting, but did not mention any discussion of cost. (*Id.*)

Board member Herschel Day recalled that board member J.P. Wieske brought up the issue of reinstating the exclusion, with "some question about the constitutionality of the portion of the Affordable Care Act that it enacted" and made a comment "about not being able to put the toothpaste back in the tube," but did not

recall any comments about cost at the December 30, 2016 meeting. (*Id.*) Day recalled some discussion about the potential cost of *reinstating* the exclusion during the December 30, 2016 closed session, but not of the cost of *removing* the exclusion. (*Id.*) Nor did he recall any discussion during this meeting of the safety or efficacy of gender confirmation surgery and hormone therapy. (*Id.*) Similarly, Ellinger did not recall any discussions about cost raised at either the July 12, 2016 GIB meeting or the August 16, 2016 meeting. (*Id.*) Tara Pray testified that the expected costs of eliminating the exclusion were not raised as a reason for reinstatement. (*Id.*) Wieske testified that he thinks there was "a discussion about costs being a factor" at the December 30, 2016 meeting, but does not know what was said about costs, or who said it, and also stated, "I don't believe there was broader discussion of cost at any other meeting." (*Id.*) Nor did Wieske recall any discussion of "medical necessity" of the treatment by the Board. (*Id.*; *see also* Pls.' Resp. to Defs.' PFOF ¶ 107). Board member Nancy Thompson recalled discussion of the legality of the HHS regulations, but not of the cost, efficacy, or safety of gender reassignment surgery at the August 12, 2016 meeting, the December 13, 2016 meeting, or the December 30, 2016 meeting. (*Id.* at ¶ 67).

While the August 2016 memorandum by the DOJ encouraging GIB to reinstate the exclusion asserted ETF could "point to the high costs the State must bear for covering services and procedures related to gender transition" as a rationale for reinstatement, DOJ provided no evidence of such "high costs" at the time. (Pls.' Resp. to Defs.' PFOF ¶ 99). Nor did GIB perform any cost estimate when voting to remove the exclusion in July 2016, or when voting to reinstate it on December 30, 2016. (*Id.*)

Similarly, the DOJ memo suggested that "potential safety concerns" could be a reason for reinstating the exclusion, but again provided no evidence to support that claim. Further, Board members present at the closed session at which the reinstatement decision was made have testified that neither cost nor efficacy was discussed as the reason for reinstatement. (Pls.' Resp. to Defs.' PFOF ¶ 109).

IV. Secretary Conlin and GIB Are Proper Defendants

The OSHP, which is part of ETF, is the "policy office" for state health insurance programs, and "sets the policy with the GIB for the group health insurance program." (Pls.' PFOF ¶ 71). GIB relies on ETF staff to make policy decisions, and ETF staff have significant control over the new benefits added to state employee health plans because GIB generally does not adopt new benefits that are not recommended by ETF. (Pls.' PFOF ¶¶ 76-77).

ETF has concluded that it is a "covered entity" for the purposes of HHS regulations, including those pertaining to the Affordable Care Act, because ETF receives federal financial assistance. (Pls.' Resp. to Defs.' PFOF ¶¶ 48-49). After GIB voted in July 2016 to remove the exclusion, Wisconsin's DOJ, at the behest of the Governor's office, provided a memorandum to GIB which claimed that HHS did not have authority to issue its nondiscrimination rules, that those rules did not mandate coverage for any particular procedure, and that GIB should reconsider its decision to remove the exclusion. (Pls.' Resp. to Defs.' PFOF ¶¶ 53-54).

GIB, a board within ETF, votes on the uniform benefit recommendations of ETF staff, typically at its quarterly meeting in May or August, for inclusion in

contracts with the private insurance companies that provide coverage to state employees. (Pls.' PFOF ¶ 78). GIB considers recommendations from ETF and establishes health insurance benefits for Wisconsin state employees each contract year, and the benefits adopted by GIB govern all state employee plans. (*Id.* at ¶¶ 80, 82).

Conlin, as Secretary of ETF, administers the department and administers health insurance plans for state employees. (*Id.* at ¶¶ 68-69). He has ultimate responsibility for carrying out GIB's decisions about the health care plan. (*Id.* at ¶ 72). As secretary, Conlin reviewed the final HHS nondiscrimination rule and requested a legal opinion as to the applicability of that rule to ETF, reviewed memos by OSHP and ETF relating to the proposed removal of the exclusion, and discussed the coverage exclusion with ETF attorneys on multiple occasions. (*Id.* at ¶ 74). Conlin was also personally involved in the administrative process leading up to the reinstatement of the exclusion, determining that ETF did not need to re-negotiate contracts with insurance plans in order to reinstate the exclusion, determining that the contingencies had been met, and preparing and sending the contract amendment to participating plans. (*Id.* at ¶ 137-142).

LEGAL STANDARDS

The court shall only grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Accordingly, summary judgment is not available when, based on the evidence

presented, the jury can reasonably find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must look at the evidence in the light most favorable to the non-movant. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003).

ARGUMENT

I. The "Gender Reassignment" Exclusion Administered and Enforced by Conlin Violates Equal Protection

A. Discrimination Based on Transgender Status Is Subject to Heightened Scrutiny Under the Equal Protection Clause

As shown in Plaintiffs' Brief in Support of their Motion for Partial Summary Judgment, discrimination on the basis of transgender status is subject to heightened scrutiny under the Equal Protection Clause for two (2) independent reasons. (Dkt. # 97 ("Pls.' S.J. Br.") at 27-29). First, as the Seventh Circuit has already recognized, discrimination based on transgender status is a form of sex discrimination and accordingly must be reviewed under heightened scrutiny. *See Whitaker*, 858 F.3d at 1048. In addition, classifications based on transgender status independently meet all the criteria for being recognized as a suspect or quasi-suspect class under Supreme Court precedent.

Under the Seventh Circuit's decision in *Whitaker*, discrimination based on transgender status is a form of sex discrimination because it inherently rests on sex stereotypes and gender-based assumptions. The Supreme Court held in *Price Waterhouse v. Hopkins* that "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex. 490 U.S. 228, 251 (1989) (plurality). And, as the Seventh Circuit has recognized: "By

definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker*, 858 F.3d at 1048. Discrimination against a person for being transgender is therefore, by definition, discrimination based on sex for purposes of equal protection analysis, as well as under Title VII and similar civil rights statutes.[3]

In addition to constituting discrimination on the basis of sex, courts have recognized that discrimination based on transgender status is at least a quasi-suspect classification in its own right. Although the Seventh Circuit has not yet decided "whether transgender status per se is subject to heightened scrutiny," *Whitaker*, 858 F.3d at 1051, courts in other jurisdictions have already recognized that transgender status meets all the criteria established by the Supreme Court for recognizing suspect and quasi suspect classifications. *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 720-21 (D. Md. 2018) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)); (*see* additional cases cited at Pltfs' S.J. Br. at 29).[4]

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[3] *See Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011) ("[A] person is defined as transgender precisely because" that person "transgresses gender stereotypes"); *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004). *See also Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, 2018 WL 3016864, at *14 (3d Cir. June 18, 2018) ("Title IX prohibits discrimination against transgender students in school facilities just as Title VII prohibited discrimination against [gender non-conforming man] in the workplace"); *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018) ("Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait"); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000) (holding that transgender individuals are people "whose outward behavior and inward identity do not meet social definitions" associated with the sex assigned to them at birth and "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII").

[4] Defendants cite out-of-circuit case law to support their assertion that transgender status is not a protected class under the Equal Protection Clause. (Defs. Br. at 21, n. 7), rather than the binding precedent found in *Whitaker*, 858 F.3d at 1048.

Defendants attempt to distinguish transgender status from other suspect and quasi-suspect classifications by asserting that "sex is an immutable characteristic, whereas gender identity is a developmental, cultural process." (Defs.' Br. 23). To the contrary, a person's transgender status is an immutable trait. (Pls.' PFOF ¶ 22).[5] In any event, regardless of whether transgender status is immutable, it is a "distinguishing characteristic[] that define[s]" transgender individuals "as a discrete group." *See Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *see also Wolf v. Walker*, 986 F. Supp. 2d 982, 1013 (W.D. Wis. 2014), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) ("Rather than asking whether a person could change a particular characteristic, the better question is whether the characteristic is something that the person should be required to change because it is central to a person's identity").

B. The "Gender Reassignment" Exclusion Facially Discriminates Against Transgender Employees

On its face, Wisconsin's exclusion of all health care "associated with gender reassignment" singles out transgender employees for different and unequal treatment. Under the exclusion, the same procedures that are covered as medically necessary treatments for non-transgender employees are excluded from coverage when related to "gender reassignment." For example, a vaginoplasty for which Plaintiffs Boyden and Andrews seek coverage, is similar to reconstructive surgeries provided to non-transgender persons to correct conditions such as congenital absence of the vagina or reconstruction of the vagina/vulva following oncologic resection,

[5] The consensus in the medical and psychological community is that a post-pubescent person's gender identity is immutable. (Pls.' Supp. PFOF ¶ 1).

traumatic injury, or infection. (Pls.' PFOF ¶¶ 57, 58; Pls.' Supp. PFOF ¶ 19). Other examples to illustrate the discriminatory nature of the exclusion include the "gender reassignment" coverage ban on chest reconstruction surgery for transgender men while chest reconstruction is covered for cancer and other medical conditions. (Pls.' Supp. PFOF ¶ 20).[6]

That disparate treatment is, on its face, discriminatory. *See Denegal v. Farrell*, No. 15-01251, 2016 WL 3648956, at *7 (E.D. Cal. July 8, 2016) (holding that plaintiff stated valid claim that prison "discriminate[s] against transgender women by denying surgery (vaginoplasty) that is available to cisgender women"); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1120 (N.D. Cal. 2015) (holding that plaintiff stated claim for sex discrimination because, "considering her need for medically necessary surgery, and vaginoplasty in particular, Defendants treated her differently from a similarly situated non-transgender woman in need of medically necessary surgery"); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 580 (S.D.N.Y. 2016) (holding that "categorical exclusion on treatments of gender dysphoria" discriminates on the basis of "sex" under Section 1557).

Defendants attempt to deny the facially discriminatory nature of the policy by asserting that transgender and non-transgender employees are treated equally because they both "receive no coverage for cosmetic procedures to alleviate

[6]The State's assertion that "[t]he Exclusion merely states that surgical services associated with gender dysphoria are subject to the same generally-applicable cosmetic exclusion," is simply wrong; the gender reassignment exclusion says nothing about "cosmetic," because such a claim would in any event be unsupportable by mainstream medical science. (Defs.' Br. at 16).

psychological distress." (Def. Br. 19-20). However, the "gender reassignment" exclusion at issue here is entirely separate from the "cosmetic surgery" exclusion. (Pls.' Supp. PFOF ¶ 21). Moreover, the denials of coverage Plaintiffs actually received cited Defendants' explicit "gender reassignment" exclusion, not an exclusion for "cosmetic" surgery. (Pls.' PFOF ¶¶ 57-58). And surgical treatment for transgender employees with gender dysphoria is entirely different from cosmetic surgery for non-transgender persons, since it is directed at changing primary and secondary sex characteristics to resolve the clinically significant distress resulting from the gender dysphoria of Plaintiffs and other transgender employees. (Pls.' PFOF ¶ 30). Such surgery is recognized as the medical standard of care to treat transgender persons with serious gender dysphoria in order to resolve the incongruence between a person's body and their gender identity. (Pls.' Resp. to Defs.' PFOF ¶ 101). Non-transgender persons seeking cosmetic surgery to "beautify" or enhance their bodies do not have a similar medical need for such surgery, nor does the medical community recognize cosmetic surgery as a treatment for depression. (Pls.' Supp. PFOF ¶¶ 3-4, 14-16).[7]

[7] Coverage for other reconstructive surgeries, such as breast reconstruction surgery after cancer, is provided and has a psychological, rather than a purely functional benefit. (Pls.' Supp. PFOF ¶ 18). Moreover, the benefits of surgery to treat gender dysphoria extend beyond improving a person's psychological well-being to include curing peoples' suicidal ideation and impulse to self-harm and allowing them to function in their daily lives at work, school, and in maintaining healthy relationships with family and friends. Surgery can also reduce the serious side effects and risks that can be associated with the high dosages of hormone therapy that are necessary for some persons, such as Ms. Boyden, who otherwise have difficulty maintaining the appropriate hormone levels. (Pls.' Resp. to Defs.' PFOF ¶ 78). Surgery to treat gender dysphoria can save peoples' lives; the same is not true for surgery to improve a non-transgender person's physical appearance. (*Compare* Pls.' Supp. PFOF ¶¶ 5, 13 (studies showing gender confirmation surgery reduces suicidal ideation for transgender persons) *with* ¶ 17 (cosmetic surgery not considered treatment for suicidal ideation)).

Defendants cannot categorically exclude transition-related care simply by declaring it to be cosmetic. Indeed, the "gender reassignment" exclusion is virtually identical to a Wisconsin statute regarding health care for prisoners that the Seventh Circuit has already struck down as facially unconstitutional. In *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011), the Seventh Circuit struck down a Wisconsin statute that prohibited prison officials from providing prisoners with hormones "to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender," as well as gender confirmation surgery "to alter a person's physical appearance so that the person appears more like the opposite gender." Wis. Stat. § 302.386(5m)(a). The Seventh Circuit held the categorical exclusion was facially unconstitutional because it denied transition-related care even in circumstances in which it was medically necessary, in violation of the Eighth Amendment. *Fields*, 653 F.3d at 557. The Court further noted that "[r]efusing to provide effective treatment for a serious medical condition . . . amounts to torture." *Fields*, 653 F.3d at 556.

The unequal treatment created by the "gender reassignment" exclusion is, by definition, on the basis of sex. Like the restroom policy struck down in *Whitaker*, the exclusion "is inherently based upon a sex-classification." 858 F.3d at 1051 (7th Cir. 2017). Moreover, despite Defendants' argument to the contrary, the "gender reassignment" exclusion on its face discriminates based on sex stereotypes and gender nonconformity because a person's "transitioning status constitutes an inherently gender non-conforming trait." *Equal Employment Opportunity Comm'n v.*

R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 577 (6th Cir. 2018). By excluding coverage for this medically necessary care, Defendants are "insisting that [employees' anatomy] match[] the stereotype associated with their" sex assigned at birth. *Price Waterhouse*, 490 U.S. at 251; *cf. Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CIV 02-1531-PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 2, 2004) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait").[8]

In addition, singling out medically necessary treatment related to "gender reassignment" for unequal treatment also inherently discriminates based on transgender status. "The defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look." *Doe v. Trump*, 275 F. Supp. 3d 167, 210 (D.D.C. 2017). Just as the Supreme Court has "declined to distinguish" between the status of being gay and the conduct

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[8] Defendants are wrong to claim that sex discrimination occurs only where a policy discriminates against *all* men or *all women*. (Def. Br. at 18-20). "[T]he Supreme Court has made it clear that a policy need not affect every woman [or every man] to constitute sex discrimination... A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 n.3 (7th Cir. 2017). "The statute's focus on the individual is unambiguous. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) (quoting 42 U.S.C. § 2000e-2(a)(1); *see also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (discrimination against subclass of women with children is sex discrimination); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387 (7th Cir. 1975) (airline's policy of employing only subclass of unmarried female flight attendants violated Title VII). *Whitaker*, 858 F.3d at 1059 (discrimination against transgender student is sex discrimination); *Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 578 (6th Cir. 2018) (discrimination against employee because she is transgender is sex discrimination).

of entering into romantic relationships with a person of the same sex, *see Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 689 (2010), it is similarly impossible to distinguish between discrimination based on "gender reassignment" and discrimination against transgender individuals as a class. *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews").[9] The Exclusion is directed at preventing treatment necessary to transgender persons because they fail to conform to stereotypes regarding how a person of the assigned sex should look. It facially discriminates against transgender state employees on the basis of their sex.

C. The "Gender Reassignment" Exclusion Cannot Survive Heightened Scrutiny or Rational-Basis Review

Under heightened scrutiny, Defendants must show "at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (brackets omitted). Moreover, the discriminatory classification must "substantially serve an important governmental interest *today*, for in interpreting the equal protection guarantee, [the Supreme Court has] recognized that 'new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged.'" *Id.* (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)

[9] The exclusion discriminates between transgender and non-transgender state employees and is therefore distinguishable from the limitations on pregnancy-related disability, infertility, and contraception benefit exclusion considered by the cases cited by Defendants at pp. 18-20 of their Brief.

(alterations incorporated) (emphasis in *Morales-Santana*). The Court must, therefore, determine whether the "gender reassignment" exclusion substantially serves its asserted interests in light of current insights and understandings regarding transgender people and gender dysphoria.

Defendants cannot satisfy that rigorous standard. Defendants chose to reinstate the "gender reassignment" exclusion based solely on the injunction entered in a different case to prevent the federal government from enforcing the Affordable Care Act final regulations. (Pls.' PFOF ¶¶ 127-129). There is no evidence that GIB or any GIB members considered the cost, safety or efficacy of gender reassignment surgery and/or hormone therapy when voting to reinstate the exclusion. (Pls.' Resp. to Defs.' PFOF ¶ 67). Defendants' after-the-fact justifications for the "gender reassignment" exclusion fail heightened scrutiny, since under that standard the government may not rely on justifications that are "hypothesized or invented post hoc in response to litigation" to defend a discriminatory classification. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Even if the Court were to consider Defendants' post hoc justifications, they would still fail to satisfy heightened scrutiny and rational basis review. Defendants assert first that the exclusion saves money. But the Supreme Court has consistently held that cost reduction is not a sufficiently important interest to justify using a discriminatory sex-based classification.[10] To the contrary, the Supreme Court has

[10] Most of the cases cited by Defendants for that proposition are actually cases involving commercial speech which hold that cost reduction is a "substantial" governmental interest for purposes of the deferential *Central Hudson* standard—not the more rigorous heightened scrutiny standard requiring

made clear that although "a state has a valid interest in preserving the fiscal integrity of its programs" and "may legitimately attempt to limit its expenditures ... a state may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Shapiro*, 394 U.S. at 633; *accord Plyler*, 457 U.S. at 229; *Diaz*, 656 F.3d at 1014 (finding costs are insufficient to justify law that denies insurance coverage to same-sex couples under rational basis review).

The impact of removing the exclusion would be $140,000 or 0.01% of total costs. (Pls.' Resp. to Defs.' PFOF ¶ 91). While defendants' expert has opined that a "risk margin" that would effectively double the total cost estimate was "reasonable," he conceded that this risk margin represented a "bad case," if not a "worst case" scenario and admitted that he was aware of no other similar risk margins for comparable benefits. (Pls.' Supp. PFOF ¶ 37). And, even if his exaggerated cost estimate were used, the cost would remain well below 0.1% of premiums – effectively a rounding error for actuarial purposes – and therefore would not be material to a decision on coverage. (*Id.* ¶ 41).

Defendants also assert that the "gender reassignment" exclusion is justified to protect public health. However, the experts in the field all agree that thirty (30) years of studies show that surgery is safe and effective treatment. (Pls.' PFOF ¶ 36). Defendants' assertions to the contrary rely on an "expert" who is not a clinical expert

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defendants to demonstrate the existence of "important" governmental interests. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447, U.S. 557 (1980). Defendants' only case applying heightened scrutiny is a Second Amendment decision where the Tenth Circuit held that cost considerations are "relevant," but "are not, by themselves, conclusive justifications for burdening a constitutional right under intermediate scrutiny." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1127 (10th Cir. 2015).

in the field, who has never treated a patient with gender dysphoria, who admits that surgery may be the only treatment available, who acknowledges that many treatments for which there is not strong scientific support are covered, and who agrees that they should be covered where there is some evidence to support doing so. (Pls.' Supp. PFOF ¶¶ 22, 24, 28). Moreover, the research supporting the efficacy and safety of surgery to treat gender dysphoria is at least as good as the scientific support for other medical treatments (Pls.' PFOF ¶ 50).

D. Conlin Is a Proper Defendant for Plaintiffs' Individual Capacity Claims[11]

1. Conlin Is Sufficiently Involved in the Violation of Plaintiffs' Equal Protection Rights to Be Held Liable in his Individual Capacity

In order to be held liable for damages under Section 1983, a defendant must have some "personal involvement" in the deprivation of the plaintiffs' rights. The personal involvement test requires "some causal connection" or "affirmative link" between the action complained about and the official sued to obtain damages under Section 1983. *See Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983). The defendants' involvement need not be direct. *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir. 1985).

In denying Defendants' motion to dismiss Plaintiffs' Section 1983 claims against Conlin, this Court held that the allegations that "Conlin is in charge of the administration of ETF, which includes providing health insurance coverage to state employees and promulgating all rules required for the administration of health

[11] Defendants do not argue that Conlin is not amenable to suit for injunctive relief in his official capacity.

insurance plans" were "sufficient to satisfy the personal involvement requirement." (Dkt. 67 at 14). As set forth in Plaintiffs' motion for summary judgment, discovery confirms the extensive role Conlin and his subordinates at ETF played in the process of adopting, enforcing and administering the exclusion that has harmed the Plaintiffs. (Dkt. # 97 at 8-12, 16-18).

Conlin admitted he was personally involved in the policy process surrounding the exclusion, including the process that led to the ultimate reinstatement of the exclusion. (Pls.' Supp. PFOF ¶ 43; *see also* Pls.' PFOF ¶¶ 74, 137-142). Conlin – with input from the GIB chair but without a GIB vote – also made the final determination that the contingencies for reinstatement of the exclusion were met. (Pls.' PFOF ¶ 140 (citing Conlin Dep. ("Q: You had determined all of the contingencies were met? A: That is what the memo is telling the board, yes.")). He also ensured the policy was implemented: he issued a memorandum indicating the exclusion was to be reinstated, was personally involved in the drafting of the contract amendment reinstating the exclusion, and had that amendment sent to health plans under his name. (Pls.' Supp. PFOF ¶ 43, Pls.' PFOF ¶¶ 141-142).

Defendants nonetheless argue that Conlin was not "personally involved" in the alleged constitutional deprivations. (Defs' Br. 36-37). They continue to insist that, because Conlin did not have the authority to "decide" to adopt the exclusion or reinstate it, he cannot be said to be "personally involved."[12] But that is not the law.

[12] This Court's recent decision to permit amendment of the complaint to add the individual GIB members who voted to reinstate the exclusion cures any arguable defect from naming Conlin, but not the GIB members, as defendants.

"[A] person aggrieved by the application of a legal rule does not sue the rule maker…[h]e sues the person whose acts hurt him." *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995); *see also Smith v. Jensen, 14-cv-226*, 2016 WL 3566281, at *7 n.3 (W.D. Wis. June 27, 2016) (rejecting argument that Section 1983 defendant who "had the authority to enforce the rule" was "not personally involved," even though he did "not [have] the authority to create the rule") (emphasis in original); *Richards v. Dayton*, CIVIL NO. 13-3029 (JRT/JSM), 2015 WL 1522204, at *12 (D. Minn. Jan. 30, 2015) (proper defendants in prisoner's Section 1983 claim are "persons responsible for administering DOC's rules") (emphasis added). "[W]hen a plaintiff challenges…a rule of law, it is the state official designated to enforce that rule who is the proper defendant." *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993). Plaintiffs may sue state officials in their individual capacities for damages caused by those officials' participation in administration or enforcement of an unconstitutional policy, regardless of those officials' authority to adopt the policy in question.

Defendants point to Conlin's personal view that GIB should remove the exclusion and his and ETF's efforts to convince GIB not to reinstate it. (Defs' Br. 38). However, Conlin's views of, or even opposition to, the exclusion are irrelevant to the question of whether he is sufficiently "personally involved" in the deprivation of Plaintiffs' rights to be held liable for damages resulting from that deprivation. As a matter of substantive equal protection law, when a statute or policy discriminates on its face, as is the case with the "gender reassignment" exclusion a fact-intensive inquiry into a government official's intent or motivation is unnecessary. *Wayte v.*

United States, 470 U.S. 598, 608 n.10 (1985) ("A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification").

Even where a defendant's state of mind *is* relevant, personal involvement can be shown without the defendant's affirmative agreement with the challenged action. A defendant may be personally involved in a constitutional deprivation simply if it occurs with the defendant's knowledge and he fails to act to stop it. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995) (citing *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir. 1985)); *see also Crowder v. Lash*, 687 F.2d 996, 1005 (7th Cir. 1982). A Plaintiff may prove personal involvement in a constitutional deprivation without showing malicious intent; [13] all that is required is the defendant "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye." *Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1988). Conlin certainly knew about and facilitated implementation of the deprivation of transgender state employees' equal protection rights when he determined the contingencies had been met and prepared and sent the contract amendment to the plans.

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[13] A plaintiff asserting an equal protection claim need not show that a defendant harbors malice, hatred or ill-will toward those disadvantaged by a discriminatory law. *See Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985) (discrimination motivated by "negative attitudes," "fear" or "irrational prejudice" actionable, even when not motivated by ill-will). Even benevolent intentions do not insulate a facially discriminatory policy from invalidation. *See Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991) ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy"); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) ("legislative assurances of good intention cannot suffice" to support a facially discriminatory policy); *Johnson v. California*, 543 U.S. 499, 506 (2005) (segregating inmates by race at jail intake subject to strict scrutiny, even where purpose was to prevent racial violence).

The cases cited by Defendants are inapposite. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), involved the question of whether a supervisory defendant may be held liable for the discriminatory actions of a subordinate; the question here, in contrast, is whether the defendant may held liable for *his own* actions in administering and enforcing a discriminatory rule. In *Iqbal*, the Court reiterated the longstanding rule that a supervisor cannot be held liable under Section 1983 on a theory of *respondeat superior* alone – the defendant must have participated in or at least known of and ignored the actions of the subordinate. In *Alicea v. Luzerne Cty. Hous. Auth.*, 2017 WL 489686 (M.D. Pa. Jan. 3, 2017), the magistrate judge similarly rejected application of a species of *respondeat superior* liability to a city for the discriminatory actions of a separate legal entity about which the city apparently had no knowledge. Here, Plaintiffs do not seek to hold Conlin liable for the actions of his subordinates of which he was unaware, but for his own actions in implementing and administering the discriminatory exclusion. The district court in *Nolan v. Cuomo*, another case cited by Defendants, found that one defendant who had a role in maintaining a sex offender registry was not personally involved in denial of the plaintiff's asserted right to be "declassified" as an offender. 2013 WL 168674 (E.D.N.Y. Jan. 16, 2013). However, in that case, the defendant was not authorized to make "any determinations or recommendations" as to the plaintiff's status; the defendant's agency had no authority to commence proceedings or otherwise enforce the registration requirement, but simply maintained the sex offender registry. *Id.* at *10. Conlin and ETF, in contrast, are authorized to and do make recommendations to GIB about

benefits policy -- indeed GIB rarely changes benefits without a recommendation from ETF. (Pls.' PFOF ¶ 77). And Conlin made the crucial determination that the contingencies for reinstatement of the exclusion were satisfied and implemented the reinstatement by preparing and issuing the contract amendment that embodied it.

2. Qualified Immunity Does Not Shield Conlin from Liability for Damages

"[Q]ualified immunity operates 'to ensure that before they are subjected to suit, [government] officers are on notice that their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). Under the doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[14] "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

The extent of "qualified immunity available to a particular officer depends upon the scope of his discretion and responsibilities in his office, and upon all the circumstances as they reasonably appeared to the official at the time the challenged conduct took place." *Crowder v. Lash*, 687 F.2d 996, 1006-7 (7th Cir. 1982).[15] The

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[14] Qualified immunity does not bar Plaintiffs' claims for declaratory or injunctive relief against Conlin. *Hydrick v. Hunter*, 669 F.3d 937, 939-40 (9th Cir. 2012).

[15] Qualified immunity "generally is available only to officials performing discretionary functions." *Harlow*, 457 U.S. at 816. In arguing that he was not "personally involved" in the deprivation of Plaintiffs' rights, Conlin essentially claims he had no discretion to alter the GIB's decision to exclude benefits for treatment of transgender people with gender dysphoria. (Defs' Br. at 38-39 ("While Conlin

"breathing room" of qualified immunity is most crucial in situations in which the official's actions are highly discretionary and taken under time constraints – such as the actions of police officers making split-second decisions on the streets, *see, e.g., Brosseau v. Haugen,* 543 U.S. 194, 199-200 (2004) or national security officials responding to novel terrorist threats. *Ashcroft, supra.*

In other circumstances, such as those presented in this case, where defendants have time to deliberate or have limited discretion, qualified immunity's "balance [of] competing values" – the availability of "a damages remedy to protect the rights of citizens" weighed against the need to "protect officials who are required to exercise their discretion" from liability – may tip further toward providing relief for harm caused by unconstitutional government actions. *Crowder*, 687 F.2d at 1006. The purpose of the doctrine, after all, is not to simply immunize questionable government conduct, but also "to ensure principled and conscientious governmental decision-making." *Id.* Thus, while a split-second decision by a police officer to use deadly force is entitled to qualified immunity, *see Sanzone v. Grey*, 884 F.3d 736 (7th Cir. 2018), a police chief who deliberately implements a reorganization in which promotions and

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does ensure effective administrative [sic] and oversight of ETF operations, he does not decide the coverage provided under those plans . . . . Although Conlin believed that the Exclusion should be removed from the Uniform Benefits, he lacked (and still lacks) the authority to implement such a change"); see also Conlin Dep. 138:14-17). While the continued vitality and extent of the "ministerial-duty" exception to qualified immunity is in some doubt, *see Sellers v. Baer*, 28 F.3d 895, 902 (8th Cir. 1994) (referring to exception as "dead letter"), some courts continue to describe the "discretionary function" requirement as a "threshold matter." *Becker v. City of Evansville*, No. 3:12-cv-182, 2015 WL 328895, *20 (S.D. Ind. Jan. 26, 2015, *aff'd & remanded sub nom. Becker v. Elfreich*, 821 F.3d 920 (7th Cir. 2016). In any event, the Defendants' assertion that Conlin had no discretion in implementing the exclusion cuts against his claim of qualified immunity, which is generally designed to protect against second-guessing of discretionary decisions.

demotions are based on race is not. *Auriemma v. Rice*, 910 F.2d 1449, 1457 (7th Cir. 1990) ("No reasonable police chief could have objectively and reasonably concluded that he could . . . demote and promote only along allegedly clear racial lines").

Insisting that Plaintiffs must point to "binding precedent," Defendants argue that Conlin is entitled to qualified immunity because "no Supreme Court or Seventh Circuit precedent placed it beyond debate that Conlin can be held personally liable under the circumstances." (Defs' Br. 40-41). But that is not the standard for determining whether a government official is on sufficient notice that their actions violate the law.

As the Seventh Circuit has often said, "a case directly on point is not required for a right to be clearly established and an 'official can still be on notice that their conduct violates established law even in novel factual circumstances." *Becker v. Elfreich*, 821 F.3d 920, 929 (7th Cir. 2016) (quoting *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) (quoting *Hope v. Pelzer*, 536 U.S. at 741)). All that is required is that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Becker*, 821 F.3d at 928 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). And, if a case on point is not required at all, a lack of precedent in the Seventh Circuit and the Supreme Court does not dictate a grant of qualified immunity. *See Gustafson v. Adkins*, 803 F.3d 883, 892 (7th Cir. 2015) (while noting that a court "look[s] *first* to controlling precedent on the issue from the Supreme Court and to precedent from this Circuit," concluding "a broad constitutional test . . . is sufficient to clearly establish

the law 'in an obvious case . . . even without a body of relevant case law'") (quoting *Brosseau*, 543 U.S. at 199) (emphasis added).

The "contours" of the equal protection claim in this case are clearly established. Where a policy discriminates on its face, as is the case with the "gender reassignment" exclusion, defendants are on notice that it implicates the Equal Protection clause. *See Auriemma*, 910 F.2d at 1457. And it has long been clear that transgender identity is a suspect or quasi-suspect basis for classification (either because it is a form of sex discrimination or because it is suspect in its own right) that demands that the government satisfy heightened scrutiny. *See Glenn v. Brumby*, 663 F.3d 1312, 1318-20 (11th Cir. 2011) (applying heightened scrutiny to review discrimination against transgender employee); *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (finding that discrimination against transgender people must be reviewed under heightened scrutiny); *Marlett v. Harrington*, No. 1:15–cv–01382–MJS (PC), 2015 WL 6123613, at *4 (E.D. Cal. 2015) (same). Indeed, as long ago as 2014, this Court applied that standard to equal protection claims by a transgender plaintiff, albeit by agreement of the parties. *Mitchell v. Price*, 11-cv-260-wmc, 2014 WL 6982280, *8 (W.D. Wis. Dec. 10, 2014) (applying heightened scrutiny based on parties' agreement, but also citing *Glenn v. Brumby*). The Seventh Circuit's holding in *Whitaker* simply confirmed a body of case law that already established the suspect nature of classifications based on gender identity.

Straight-forward application of the factors that courts use to determine whether a classification is suspect would also put a reasonable government official on notice that a policy discriminating against people based on their gender identity would result in heightened equal protection scrutiny. Transgender persons have historically faced – and continue to face – discriminatory treatment in all areas of their lives, are politically powerless to redress the discrimination they face, their status as transgender bears no relationship to their ability to contribute to society, and their transgender identity is immutable in that it is core to their identity and cannot be changed by outside influence. *See Wolf v. Walker*, 986 F. Supp. 2d 982, 1011-16 (W.D. Wis.) (applying four-part test to find that sexual orientation classification should be reviewed under heightened scrutiny), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *see also Mitchell*, 2014 WL 6982280, *15 ("Despite the strides in acceptance that transgender and intersex persons have made in American society, it is unfortunately true that they have been unfairly stigmatized").

Moreover, Conlin and ETF *actually* knew that the exclusion likely unlawfully discriminated based on sex and gender identity. Although the elimination of the exclusion was most directly precipitated by the issuance of HHS rules implementing Section 1557 of the ACA, ETF's initial memorandum to the GIB in June 2016 recommending elimination noted that employers "will generally be prohibited from discriminating on the basis of sex, gender identity, or sexual orientation under Title VII and EEOC regulations." (Pls.' Supp. PFOF ¶ 44). Similarly, ETF's general counsel

rebutted the Wisconsin DOJ's assertion that the section 1557 regulations did not require Defendants to rescind the exclusion in part by noting that the EEOC had taken the position that discrimination based on gender identity constituted sex discrimination. (*Id.* ¶ 45). A reasonable official in Conlin's position would know that the exclusion violates equal protection, and thus is not entitled to the protections of qualified immunity.

II. The "Gender Reassignment" Exclusion Violates Title VII

A. Discrimination Based on Transgender Status is Sex Discrimination Under Title VII

Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C § 2000e-2. For all the same reasons that discrimination based on transgender status constitutes sex discrimination under the Equal Protection Clause, it also constitutes sex discrimination under Title VII. *Whitaker*, 858 F.3d at 1048.[16] Defendants rely on *Ulane v. Eastern Airlines, Inc.*, 742 F.3d 1081, 1087 (7th Cir. 1984), even though the Seventh Circuit in *Whitaker* rejected the school district's reliance on *Ulane*, because *Ulane* predated *Price Waterhouse*, the case that articulated the sex-stereotyping prohibition that underpins the cases holding that transgender persons are protected by federal laws banning sex

[16] It is well-settled that employer-provided fringe benefit plans, including health insurance, are part of an employee's wages and compensation for purposes of anti-discrimination claims. *See Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1082 (1983); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983). "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984).

discrimination. *Whitaker*, 858 F.3d at 1047 (*Ulane*'s "reasoning, however, cannot and does not foreclose Ash and other transgender students from bringing sex-discrimination claims based upon a theory of sex-stereotyping as articulated four years later by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989)").

B. GIB and ETF are Liable Under Title VII for Discriminating against Plaintiffs

As this Court has already concluded, ETF and GIB are Plaintiffs' employer or agents of their direct employer, the Board of Regents, for purposes of health insurance coverage. (Dkt. # 67 at 17-18 (finding that "GIB and ETF are empowered to provide health insurance benefits to state employees, including plaintiffs," and are therefore "proper suable entities under Title VII")). Defendants' argument that GIB may not be sued under Title VII because it does not have fifteen (15) or more employees must be rejected as yet another example of the bait and switch that Defendants have pursued in this litigation. Defendants first successfully argued that Plaintiffs' direct employers – which have more than fifteen (15) employees – should be dismissed because GIB authored the discriminatory policy, while they now argue that GIB may not be responsible because it fails to employ fifteen (15) employees.

ETF is liable under Title VII for implementing and enforcing the terms of the discriminatory coverage policy chosen by GIB. *See Quinones*, 58 F.3d at 277 (finding that city's enforcement of discriminatory pension policy meant it was liable under the ADEA, even though state law prevented it from exercising any control over the policy or changing it); *see also DeVito v. Chicago Park Dist.*, 83 F.3d 878, 881–82 (7th Cir.

1996) (while the Personnel Board made the decision to terminate an employee, it acted as the Park District's agent, so the Park District was liable since "the ADA imposes *respondeat superior* liability on an employer for the acts of its agents").

GIB too should be found liable under Title VII, because it is part of ETF even if it is an independent attached board of ETF. *See* Wis. Stat. § 15.165(2) ("There is created in the department of employee trust funds a group insurance board"). It is "a distinct *unit of that department*," Wis. Stat. § 15.03 (emphasis added), which "exercise[s] its powers, duties and functions prescribed by law . . . independently of the head of the department . . . , but budgeting, program coordination and related management functions shall be performed under the direction and supervision of the head of the department." *Id.* As such, even if GIB is seen as independent from ETF for some purposes, ETF and GIB should be treated, for Title VII purposes, as a "single entity" that collectively establishes and administers the benefits available to state employees in Wisconsin.

Two employers may be treated as a single entity subject to liability under Title VII, even though one or both of them fails the numerosity requirement of Title VII, where one employer directs the "discriminatory act, practice, or policy of which the employee . . . was complaining." *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 941 (7th Cir. 1999). "The basic principle of affiliate liability is that an affiliate forfeits its limited liability . . . if it *acts* to forfeit it—as by failing to comply with statutory conditions of corporate status, or misleading creditors of its affiliate, or configuring the corporate group to defeat statutory jurisdiction, or *commanding the affiliate to*

violate the right of one of the affiliate's employees. *Id.* (emphasis added); *see also U.S. E.E.O.C. v. Custom Companies, Inc.*, Nos. 02 C 3768, 03 C 2293, 2007 WL 734395, at *1 (N.D. Ill. Mar. 8, 2007) (applying *Papa* to decide that two companies – one that employed the management-level employees directly responsible for the discrimination and another that directly employed the victims of discrimination -- should be treated as a single entity for purposes of determining the applicable damage caps under Title VII).

Here, ETF is the employer of state employee Plaintiffs only for purposes of establishing, administering and providing their employment benefits. GIB and ETF work together to establish and provide those benefits. (Pls.' PFOF ¶¶ 66, 71-73, 76-81). GIB is not directing the entity that directly employed Plaintiffs, but it is the entity that provides employee benefits for all employees of the State of Wisconsin. The policy justification for the numerosity requirement in Title VII – protecting small employers from the expense of responding to discrimination complaints, *Papa*, 166 F.3d at 940 -- is inapplicable here, where GIB and ETF act together to establish, administer and enforce the exclusionary insurance policy affecting all employees of the State of Wisconsin, which employs thousands of people.[17]

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[17] To the extent this Court is inclined to dismiss GIB, Plaintiffs ask this court to reconsider its decision to dismiss the Board of Regents, because the Board of Regents is liable under Title VII for the acts of its agents, ETF and GIB, even though it had no control over the policies established, administered, and enforced by ETF and GIB. *DeVito v. Chicago Park Dist.*, 83 F.3d at 881–82; *Quinones*, 58 F.3d at 277. Alternatively, this Court could allow Plaintiffs to amend to name the State of Wisconsin as Plaintiffs' employer. *See Norris v. Arizona Governing Comm.*, 486 F. Supp. 645, 647 (D. Ariz. 1980) (State of Arizona, as plaintiffs' employer, as well as state department that contracted for discriminatory pension plan, were sued as defendants), *aff'd*, 671 F.2d 330 (9th Cir. 1982), *aff'd in part, rev'd in part sub nom. Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); *Gillespie v. State of Wisconsin*, 771 F.2d 1035 (7th Cir. 1985) (state,

III. The "Gender Reassignment" Exclusion Violates Section 1557 of the Affordable Care Act

A. Discrimination Based on Transgender Status is Sex Discrimination Under Section 1557 of the Affordable Care Act

"Under section 1557 of the ACA, health programs or activities receiving federal financial assistance are prohibited from discriminating against individuals on the basis of any ground listed under four different civil rights statutes including Title IX, which prohibits discrimination on the basis of sex." *Prescott v. Rady Children's Hosp. San Diego*, 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017). Because the Seventh Circuit has already held in *Whitaker* that discrimination on the basis of transgender status constitutes discrimination on the basis of sex under Title IX, discrimination on the basis of transgender status also violates Section 1557.

All of Defendants' arguments regarding the definition of "sex" under Title IX are squarely foreclosed by *Whitaker*. Citing *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984), Defendants assert that the ordinary meaning of the term "sex" and the legislative history "shows that Congress understood 'sex' discrimination in physiological terms that do not extend to 'transgender status." (Defs.' Br. 53). But *Whitaker* rejected that argument and explained that "[t]his reasoning cannot and does not foreclose" transgender people "from bringing sex-discrimination claims based upon a theory of sex-stereotyping as articulated four years later by the Supreme Court in [*Price Waterhouse*]." *Whitaker*, 858 F.3d at 1047.

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state agency for which plaintiff worked, and agency that administered testing to plaintiff, all named as defendants in Title VII action); *Chesser v. State of Illinois*, 895 F.2d 330 (7th Cir. 1990) (state, state police, and superintendent all named as defendants in Title VII action brought by former officer).

Seventh Circuit precedent also forecloses the argument that Congress's explicit reference to "gender identity" in later statutes indicates that discrimination based on transgender status is implicitly excluded from Title IX. (Defs.' Br. 52). The en banc court in *Hively* rejected the same argument in the context of sexual orientation: "Congress may certainly choose to use both a belt and suspenders to achieve its objectives, and the fact that 'sex' and 'sexual orientation'" discrimination may overlap in later statutes is of no help in determining whether sexual orientation discrimination is discrimination on the basis of sex for the purposes of Title VII [or Title IX]." *Hively*, 853 F.3d at 344.

Defendants' arguments that Section 1557 only prohibits "intentional" discrimination, are also inapposite. (Defs.' Br. at 58-60). As this Court recognized in the Title VII context, when a challenged policy like the "gender reassignment" exclusion "involves explicit facial discrimination, the existence of a disparate treatment does not depend upon" a showing of intent, because "facial discrimination is a flavor of disparate treatment." (Dkt. # 67 at 17, n.13).

B. Pursuant to the Spending Clause, Section 1557 Provides a Private Right of Action Against States That Accept Federal Financial Assistance

A number of courts have confirmed that Section 1557 provides a private right of action against state entities that accept federal financial assistance, as does ETF. *Audia v. Briar Place, Ltd.*, No. 17-cv-6618, 2018 WL 1920082, at *3 (N.D. Ill. April 24, 2018) (citing *Briscoe v. Health Care Serv. Corp.*, 281 F.Supp.3d 725, 737 (N.D. Ill. 2017); *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. CV 17-4803, 2017 WL 4791185, at *5 (E.D. La. Oct. 24, 2017); *Se. Pennsylvania Transp. Auth. v. Gilead Scis., Inc.*,

102 F.Supp.3d 688, 698 (E.D. Pa. 2015); *Callum v. CVS Health Corp.*, 137 F.Supp.3d 817, 848 (D.S.C. 2015); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *7 n.3 (D. Minn. Mar. 16, 2015)). "Section 1557's incorporation of '[t]he enforcement mechanisms' of other statutes is congressional recognition that the act can be enforced through the private right of action authorized by the referenced statutes." *Audia*, 2018 WL 1920082, at *3.

Unlike these cases directly on point, none of the cases cited by Defendants addresses the question of whether there is a private right of action under Section 1557, or even under Title IX, the enforcement mechanisms of which the ACA expressly incorporates and therefore fail to support Defendants' bald assertion that there is no private of right of action to enforce Section 1557. (Defs.' Br. at 56-57).

Wisconsin's acceptance of federal funds waives the state's Eleventh Amendment immunity. (Pls.' PFOF ¶ 67). In *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72 (1992), the Supreme Court held that "Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975" – some of the same statutes that supply the substantive non-discrimination rules and enforcement mechanisms incorporated by reference in Section 1557 of the ACA. Defendants' contention that the statute does not contain a sufficiently clear statement of intent to abrogate the Eleventh Amendment immunity of state that accepts federal funds is plainly wrong. (Defs' Br. 57-58).

CONCLUSION

For all these reasons, Plaintiffs respectfully request that this Court deny Defendants' motion for summary judgment.

Dated this 26th day of June, 2018.

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