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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v. Case No. 17-CV-0264

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

Defendants.

STATE DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs offer no convincing response to either of the two basic points that entitle State Defendants to summary judgment: first, the Exclusion does not discriminate on the basis of sex or transgender status; and second, the Exclusion is justified by the state interests of containing the growth of health insurance costs and avoiding insurance coverage for surgical treatments of uncertain safety and efficacy.

First, State Defendants explained that the Exclusion is one element of a broader policy that declines to offer health insurance coverage to state employees and their families for surgical procedures meant to treat psychological conditions, whether gender dysphoria, depression, or anything else. (Dkt. 81:16.[1]) Just as a cisgender person diagnosed with clinical depression who has severe distress regarding their appearance would not receive coverage for surgical procedures to modify their appearance, so too for a transgender person suffering from gender dysphoria. That is a neutral policy that does not extend a certain category of benefits to any state employees, not an invidious one.

[1] Pin cites to Docket number 81 reference the ECF header page numbers, not numbers at the bottom of the page.

Plaintiffs' response does nothing to undermine this point. They primarily argue that gender dysphoria is the *only* psychological condition susceptible to effective surgical treatment, and that surgical treatments do not effectively treat depression and other psychological conditions. But even if true, that changes nothing. Even if gender dysphoria is the sole psychological condition presenting a medical need for surgery, that just means Plaintiffs seek a unique type of medical care that no other state employees can or do receive. If that is the case, no basis for a discrimination claim exists, since the State is free to restrict benefits where comparable benefits are not given to anyone else.[2]

And it is hard to understand Plaintiffs' position on a conceptual level. If studies really show (as Plaintiffs say) that plastic surgery has no benefit for a patient's depression, anxiety, personality disorders, or body dysmorphic disorder, how can the result be any different for gender dysphoria? Gender dysphoria requires clinically significant distress, and that distress must manifest itself through traditional psychological conditions like depression and anxiety. Indeed, that is exactly what Plaintiffs' expert, Dr. Budge, says about the Plaintiffs here. (State Defs.' Resp. to Pls.' Suppl. Findings of Fact

[2] Plaintiffs' assertion that State Defendants' position "amounts to torture" (Dkt. 115:4) is absurd—State Defendants are not prohibiting Plaintiffs from obtaining medical care, they are declining to extend insurance coverage.

(PSFOF) ¶ 7.) If plastic surgery does not reduce clinical depression and anxiety in non-gender dysphoric patients, why would it do so in gender dysphoric patients? Plaintiffs' argument about other psychological conditions only lends credibility to scientific findings of Dr. Lawrence Mayer—that there is no evidence to support that reassignment surgery and related procedures effectively treats gender dysphoria.

Second, Plaintiffs' argument highlights the exact uncertainty that needs to be addressed through well-designed clinical studies, and it is one key reason why the Exclusion does not rest on discriminatory animus. Plaintiffs respond that this rationale is a post-hoc justification, but GIB members considered it at the time and it necessarily underlies most (if not all) insurance coverage decisions. Moreover, applying a strict post-hoc rule here would be inequitable. Since no clear law established that heightened scrutiny would apply to the Exclusion when GIB acted in 2016, GIB should be allowed to rely on expert analysis generated after the Seventh Circuit first indicated that heightened scrutiny might apply to certain transgender status claims.

On the substance, Plaintiffs fail to show that concerns regarding the efficacy of these treatments are illegitimate. They point out that certain procedures at issue (like hysterectomies) are covered for other purposes, but that misses the point. Just because a treatment can be covered for certain well-established purposes—for example, a hysterectomy to treat cancer—does

not mean that the treatment is equally effective for other purposes. In any event, Plaintiffs still do not identify studies that adequately address the concerns identified by Dr. Mayer, an expert psychiatrist and epidemiologist.

The potential cost of these extensive plastic surgery procedures are an additional legitimate concern, and those concerns further compound the uncertainty regarding safety and efficacy. First, containing cost is a legitimate state interest here. Unlike in the cases Plaintiffs cite, GIB is not targeting a disfavored group, it is addressing procedures of an uncertain efficacy in treating psychological conditions. Moreover, cost concerns were addressed when GIB acted in 2016 and form part of every insurance coverage decision. Plaintiffs' other main objection is that the potential costs are too small to matter, especially since the State covers other expensive procedures. (Dkt. 115:4–5.) But that line of reasoning could be used to justify an unlimited expansion of benefits, since *every* benefit, taken individually, is a small part of the whole. Yet, it cannot be true that GIB must offer unlimited benefits. Rather, where to draw the line to control costs is a policy decision properly vested in GIB, the body entrusted with the fiduciary responsibility to decide which costs the State should and should not bear. Disagreements about that policy judgment do not give rise to liability.

Plaintiffs also fail to rebut State Defendants' other arguments. It remains undisputed that Secretary Conlin opposed reinstating the Exclusion

and had no discretion over implementing GIB's decision. No cases impose personal liability on government officials under similar circumstances. As for Title VII, Plaintiffs seem to simply assume that ETF or GIB *must* be liable and work backwards from that assumption. However, GIB does not employ 15 people, as required to be covered, and Plaintiffs' employers delegated no control over health insurance policy to ETF. Plaintiffs do not dispute these two basic facts that entitle ETF and GIB to judgment on the Title VII claims. And Plaintiffs fail to show that Section 1557 of the Affordable Care Act (ACA), codified at 42 U.S.C. § 18116, applies to transgender status claims, contains a private right of action, or effectively waives the State's Eleventh Amendment immunity under these novel circumstances.

State Defendants are entitled to summary judgment.

RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

I. Inadequate evidence exists regarding the safety and efficacy of gender reassignment surgery for treating gender dysphoria.

Plaintiffs' try to muddy the waters regarding basic definitions and dispute the state of the medical evidence regarding gender dysphoria treatments, depending on which expert one asks. But as discussed in the argument section of this and previous briefs, these debates are legally irrelevant. At best, they may point to medical or policy debates, but they do not establish that State Defendants lack a legitimate concern regarding the safety and efficacy of surgical treatments for gender dysphoria.

Plaintiffs' factual errors begin with basic definitions. While the term "sex" does refer to various biological characteristics such as genitalia, reproductive capacity, and chromosomes, as Plaintiffs concede (Dkt. 115:6–7), they err by defining "sex" in terms of "gender identity." Gender, as even Plaintiffs' expert conceives of it, is "an individual's social, cultural, and psychological characteristics that are considered masculine or feminine based on cultural stereotypes, norms, and traits." (Pls.' Resp. to DFOF ¶ 85.) By conflating "sex" with "gender," Plaintiffs seek to redefine a term that has always reflected objective biological realities—"sex"—as one that now reflects both objective biological realities and subjective cultural stereotypes.

This fundamental problem infects their entire case, which rests on the foundation that people with gender dysphoria are entitled to "reconstructive" surgery to modify their biological sex characteristics to match their internal view of their gender. (Dkt. 115:7.) But plastic surgery cannot properly be conceived as "reconstructive" if performed to conform a person's body to cultural stereotypes about how people of a particular gender should appear. Compare that to a woman receiving breast augmentation after a mastectomy or facial surgery after a catastrophic accident—in both those examples, the plastic surgery restores (or "reconstructs") the body's original appearance. Not so for surgical procedures meant to treat gender dysphoria—those procedures create a new appearance meant to match "cultural stereotypes, norms, and

traits." (Pls.' Resp. to DFOF ¶ 85.) Even the World Professional Association for Transgender Health (WPATH) guidelines concede that some dispute exists over the extent to which these surgical procedures can be considered "reconstructive." (State Defs.' Resp. to PSFOF ¶ 2.)

Plaintiffs also assert that gender dysphoria "is not the same as an anxiety or mood disorder like depression." (Dkt. 115:7.) That may be true, but they manifest through similar symptoms. Gender dysphoria is not characterized solely by a person's "perception of her body," but primarily by "her inability to function day-to-day." (State Defs.' Resp. to PSFOF ¶ 3.) The "underlying features" of gender dysphoria are "depression, anxiety, alienation, [and] withdrawal," and the goal of treatment should be to "make them [i.e. gender dysphoric patients] more comfortable, reduce their anxiety, [and] reduce their depression." (*Id.*) Even Plaintiffs' expert, Dr. Budge, agrees that gender dysphoria "can often lead to depression, anxiety, [and] suicidality." (*Id.*)

Relying on the tenuous distinction between gender dysphoria and other psychological conditions, Plaintiffs contend that surgical treatments for gender dysphoria are unlike surgical procedures that enhance the self-image of cisgender people. (Dkt. 115:9–10.) They argue that "studies indicate that cosmetic surgery does not improve outcomes for patients with depression, anxiety, or body dysmorphic disorder." (Dkt. 115:9.) It is unclear why plastic

surgery would improve outcomes for gender dysphoria, as it is largely characterized by those same psychological conditions. Indeed, available studies do *not* demonstrate improved gender dysphoria outcomes due to plastic surgery. (DFOF ¶¶ 101–06, 120–39.) And Plaintiffs' position that cisgender people ought not be recommended plastic surgery to treat their psychological disorders (Dkt. 115:9–10) is remarkably similar to State Defendants' decision not to cover such treatments for gender dysphoria. Plaintiffs may want to carve out an exception for surgical gender dysphoria treatments, but State Defendants are entitled to treat cisgender and transgender people with psychological conditions the same.

Plaintiffs would respond that the state of the research provides the difference, but that is unconvincing. (Dkt. 115:8.) None of their arguments undermine GIB's ultimate position that enough doubt exists regarding safety and efficacy to support its decision to withhold coverage for surgical gender dysphoria treatments.

Plaintiffs first reference the positions of various professional organizations, but an appeal to authority does not itself demonstrate the safety and efficacy of gender reassignment surgery. State Defendants' medical expert, Dr. Mayer, explained why: these large organizations have previously adopted clinical guidelines that are not supported by sound medical science, and thus they cannot be simply trusted on authority.

(DFOF ¶¶ 138–39.) Plaintiffs also appeal to the clinical expertise of treating physicians (Dkt. 115:5), but that is an unreliable source of knowledge. Commentators explain that "epidemiological studies offer a better foundation for making treatment decisions than the traditional tendency among physicians to rely on their numerically far more limited direct encounters with comparable patients." Lars Noah, *Medicine's Epistemology: Mapping the Haphazard Diffusion of Knowledge in the Biomedical Community*, 44 Ariz. L. Rev. 373, 387 (2002). As for the studies in Plaintiffs' supplemental expert reports, those do not alter his conclusion that medical and surgical treatments have not been demonstrated to be safe and effective for treating gender dysphoria. (Mayer Decl. ISO State Defs.' MSJ Reply ("Mayer Decl.") ¶ 3.)

To undercut Dr. Mayer's opinion, which rests on an "extensive search [he] did of the literature," including reviewing around 500 abstracts and 200 full articles, Plaintiffs argue that he expressed his opinions in non-peer-reviewed outlets. (Dkt. 115:8–9.) But that does not respond to Dr. Mayer's core point about the lack of good safety and efficacy evidence. It does not matter *where* Dr. Mayer's opinion was published; it matters *whether* his opinion is accurate. And although his New Atlantis article referenced studies with "important limitations" showing little evidence of effective results from gender reassignment surgeries (Dkt. 115:9), that simply

reinforces his point that no good research supports the safety and efficacy of these treatments.

Dr. Mayer is not the only medical professional with doubts about the safety and efficacy of these treatments. The Hayes Medical Technology Directory, an organization that evaluates the effectiveness of various medical treatments, also found very poor evidence regarding the effectiveness of hormone therapy, gender reassignment surgery, and ancillary procedures. On gender reassignment surgery, Hayes surveyed 19 peer-reviewed studies and found them to be "very low" quality evidence and explained that "[d]ata were too sparse to draw conclusions regarding whether [gender reassignment surgery] conferred additional benefits to hormone therapy alone." (Mayer Decl. Ex. A:3–4.) Hayes further noted that "[t]he medical necessity of SRS [sex reassignment surgery] for the treatment of GD [i.e. gender dysphoria] is under debate" since "[t]he condition does not readily fit traditional concepts of medical necessity [and] since research to date has not established anatomical or physiological anomalies associated with GD." (Mayer Decl. Ex. A:2.) Likewise, for ancillary procedures (like facial feminization/masculinization), Hayes found "very low" quality evidence and concluded that "effect of these procedures on overall individual well-being is unknown." (Mayer Decl. Ex. A:12.) Similar findings were made by the federal government's Centers for Medicare and Medicaid Services (CMS), which found "inconclusive"

clinical evidence regarding the efficacy of gender reassignment surgery. (DFOF ¶ 106.)

Plaintiffs' attacks on Dr. Mayer's expertise also miss the mark.[3] He is "an expert in the epidemiology of gender dysphoria, having reviewed a tremendous amount of literature on what the science has to say." (State Defs.' Resp. to PSFOF ¶ 22.) His "expertise is to review the literature and say, what does biology have to say, and to review these different models of the relationship between gender and sex, and try to figure out . . . what the best data says." (*Id.*) Dr. Mayer "became an expert on the epidemiology" of gender dysphoria by "dissecting the studies" by "[going] back to the original data" and "spen[ding] two years day in and day out trying to find the best studies and figure out what those studies said." (*Id.* at ¶ 23.) This experience can be contrasted with a plastic surgeon like Dr. Schechter, Plaintiffs' medical expert, "[who] obviously knows no epidemiology." (*Id.*)

Although Dr. Mayer does lack expertise in clinical treatment and medical necessity with respect to specific patients, that is beside the point. This case does not turn on the clinical judgments of the physicians who treated the two individual plaintiffs. Rather, the relevant inquiry is into the

[3] Plaintiffs have not filed a *Daubert* motion to exclude Dr. Mayer's testimony, and so their critiques of his expertise are largely beside the point.

broader state of the scientific evidence regarding the safety and efficacy of gender dysphoria treatments. That issue fits within Dr. Mayer's expertise. If anything, it is Plaintiffs' experts—a plastic surgeon and counseling psychologist—who are not qualified to opine on the quality and nature of the scientific evidence at issue here. Unlike Dr. Mayer, they have no apparent training in epidemiology, statistical methods, clinical trial design, or anything else that would enable them to render credible conclusions on the overall state of the scientific evidence regarding gender dysphoria treatments.

II. Providing coverage for the procedures at issue would impose a meaningful cost on the Wisconsin Group Health Insurance Program and, in turn, state taxpayers.

State Defendants' financial expert, David Williams, performed a detailed analysis of data regarding insurance claims in 2016 for gender dysphoria treatments. His analysis showed that a reasonable estimate of the potential yearly cost came to $300,000. (DFOF ¶ 91.) To be sure, that cost represents a relatively small percentage of the entire Wisconsin Group Health Insurance Program. But that does not prevent GIB—a policy-maker with a fiduciary duty to prudently manage assets under its control—from concluding that it should avoid that potential cost. At the time GIB considered this issue in 2016, it was under a mandate from the Legislature to identify $25 million in savings from the Group Health Insurance Program—while under that mandate, adding additional benefits would have been

imprudent. (*Id*. at ¶ 95.) Moreover, Williams opined that, in his experience, states with similarly large health insurance programs frequently scrutinize costs of this general amount before deciding whether to provide benefits. (*Id*. at ¶ 144.)

Plaintiffs do not cite any evidence that meaningfully undermines this conclusion. They first reference an ambiguous note from ETF staffer Lisa Ellinger saying that providing these benefits was "cheaper and easier" (Dkt. 115:10), but compared to what remained unsaid and no more details were provided (and Ellinger could not recall any at her deposition).

Next, Plaintiffs offer speculation that it "may" be more costly not to provide the benefits at issue. (Dkt. 115:10) But the counseling psychologist who states that view has no apparent training or expertise in pricing health care benefits. (State Defs.' Reply to DFOF ¶ 90.) Williams, a health benefits consultant, explained that studies of the kind on which Plaintiffs' psychologist relied "are not used in the actuarial sciences for benefit pricing purposes." (*Id*.) And ETF's single throwaway line in a legal memorandum to GIB that adding these benefits "would not increase premiums" is incorrect and lacks foundation—rather, the line referenced a Segal Consulting study that *did* place a cost on the benefits at issue. (*Id*.) As Williams explains, "new health plan benefits impose a cost that the employer pays . . . through an increased premium that reflects the health plans' increased claims risk." (*Id*.)

Other estimates identified by Plaintiffs from Segal Consulting and their own actuarial expert—who did not actually perform an analysis of her own—do not meaningfully change the conclusion. (Dkt. 115:10–11.) Their estimates are relatively close to that offered by Williams.[4] The only major difference arises from the risk margin the different experts applied. Williams larger risk margin was properly based on the "small numbers" of patients who seek surgical benefits, "balancing between pent-up demand and an expected . . . increase in utilization over time," the "potential for variability [that is] quite high" in cost and utilization of services, and "newness of the data, and . . . uncertainty about what we might expect in the next year or two." (State Defs.' Resp. to PSFOF ¶ 37.) Plaintiffs offer a lower risk margin, but present it merely as a disagreement with Williams' judgment rather than a fundamental rebuke of his methodology. (*Id*. at ¶ 40.)

Plaintiffs also misrepresent Williams' testimony. (Dkt. 115:11.) Contrary to Plaintiffs' characterization, Williams' identified $800,000 as his "worst case" scenario for a year, not $300,000, which was his best estimate for a year. (State Defs.' Resp. to PSFOF ¶ 37.) And there is no reason why a fiduciary (like GIB) examining a new insurance benefit should *not* plan for a "bad case" scenario.

[4] Plaintiffs do not accurately describe their own expert's conclusion. She estimated $175,000 in total yearly costs, not $140,000. (PSFOF ¶ 40.)

III. Concerns about cost and medical safety and efficacy underlie the Exclusion.

Plaintiffs' focus on what a few GIB members recalled about GIB meetings at the end of 2016 is too narrow. (Dkt. 115:11–13.) The Exclusion has existed since 1994—focusing on what GIB said at the end of 2016 does not demonstrate that the proffered state interests do not actually underlie the Exclusion. Rather, evidence shows that cost and medical safety and efficacy necessarily underlie coverage exclusions of the kind at issue here, and that those issues were in fact on the mind of GIB members when considering the Exclusion in 2016.

On the topic of medical safety and efficacy, ETF explained that the Exclusion "was included in the Uniform Benefits [in 1994] by the Group Insurance Board (GIB) because the . . . benefits and services were generally accepted by health insurance companies and health care providers to be experimental and not medically necessary." (DFOF ¶ 26.) GIB member J.P. Wieske, who also serves as the Deputy Commissioner of Insurance for the State of Wisconsin, similarly explained that "insurers put that [exclusion] in place" because "administratively having the exclusion made the policies clearer because . . . their medical review did not provide coverage for the gender reassignment treatment." (State Defs.' Reply to DFOF ¶ 67.) Wieske also understood that insurers "were finding these [gender dysphoria services] consistently not medically necessary" and that, even without a blanket

exclusion, gender reassignment surgery "wouldn't end up being covered because it wouldn't fall under their . . . their medical necessity." (*Id.*) Likewise, GIB chairman Michael Farrell, a long-time insurance broker, testified that "medical necessity is the basis . . . for all coverage decisions with health insurance plans" and that insurance "plan[s] dictate[] whether the claim is going to be covered, subject to medical necessity, and exclusions play a part in that." (*Id.*) And in 2016, Secretary Conlin recalled J.P. Wieske discussing medical efficacy at a late 2016 GIB meeting (even if Wieske and others may not recall), and a DOJ memo written to the board in August 2016 generally raised gender reassignment surgery safety issues. (DFOF ¶¶ 107–09.)

As for costs, Farrell testified that "there [are] multiple reasons for including exclusions, including the fact that they would create cost for a plan" and that Wisconsin avoids costs by having the Exclusion here. (State Defs.' Reply to DFOF ¶ 67.) Wieske testified explicitly that "[t]here was a discussion about costs being a factor" regarding reinstating the Exclusion and that "when you're adding a benefit, there is going to be a cost that attaches to it." (*Id.*) Further, one of the contingencies to reinstating the Exclusion was compliance with Wis. Stat. § 40.03(6)(c), which requires benefits changes to "maintain or reduce premium costs" for the state. (DFOF ¶ 63.) Secretary Conlin also recalled a GIB member addressing costs at a 2016 GIB meeting

(*Id*. at ¶ 98), and the August 2016 DOJ memorandum to GIB mentioned generally costs as a government interest served by the Exclusion (*Id*. at ¶ 99.)

IV. ETF and Secretary Conlin have no authority over GIB's decisions.

Plaintiffs correctly note that ETF conducts independent policy analysis and makes policy recommendations to GIB. (Dkt. 115:13.) But they are only "recommendations." ETF does not "set[] the policy . . for the group health insurance program"—as a matter of state law, GIB makes the final decision on what policies to implement. (DFOF ¶¶ 22–23, 33–34.)

Likewise, Plaintiffs are correct that GIB votes on benefits recommendations from ETF staff. It did exactly that in this case, by approving in July 2016 ETF's recommendation to remove the Exclusion from the Uniform Benefits. (DFOF ¶¶ 46, 50–51.) Further, ETF opposed reinstating the Exclusion, but GIB declined to follow ETF's recommendation when it voted to do so in December 2016. (DFOF ¶¶ 55, 61.) These undisputed facts demonstrate that GIB remains the ultimate decision-maker.

Secretary Conlin is in charge of ETF, which has a role in administering the Uniform Benefits. (Dkt. 115:14.) But that does not give Conlin any more power than ETF has over the content of the Uniform Benefits—none. It is undisputed that Conlin has no discretionary authority over the Uniform Benefits, once GIB has made a policy decision. (DFOF ¶¶ 111, 113.) Conlin,

like the rest of ETF, is bound by state law to implement GIB's decision. (DFOF ¶¶ 20–22, 111, 113.)

ARGUMENT

I. Summary judgment is proper in Secretary Conlin's favor on Plaintiffs' equal protection claims.

A. Official capacity claims.

1. Rational basis scrutiny applies to Plaintiffs' equal protection claims.

As with almost every equal protection challenge, rational basis scrutiny applies here. Rational basis review is highly deferential and gives State Defendants' substantial leeway to set policy, and State Defendants have supplied multiple sufficient bases for the Exclusion under that standard. (Dkt. 81:31–39.)

Seeking to avoid that outcome, Plaintiffs contend that their claims enjoy heightened scrutiny under *Whitaker*. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F. 3d 1034 (7th Cir. 2011). But in *Whitaker* the Seventh Circuit declined to extend heightened scrutiny to transgender status *per se*, instead relying on a strained "sex stereotyping" rationale that State Defendants maintain misapplies *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). And even if *Whitaker* was correctly decided, it does not apply here. The Exclusion declines to subsidize Plaintiffs' desire to conform to sex

stereotypes, rather than punishing Plaintiffs for transgressing them. (Dkt. 81:28–31; Dkt. 120:14–17.[5])

Alternatively, Plaintiffs argue that transgender status *per se* is entitled to heightened scrutiny, acknowledging that *Whitaker* did not decide that issue. (Dkt. 115:16–17.)[6] However, the Supreme Court has repeatedly declined to extend heightened scrutiny in related areas. For example, in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court declined three separate opportunities to extend heightened scrutiny to gays and lesbians. That is unsurprising. The Supreme Court has long expressed skepticism at creating new protected classes. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441, 446 (1985). Applying heightened scrutiny here based on transgender status thus would place this Court outside the mainstream of Supreme Court jurisprudence. Claims based on sexual orientation have been percolating in the federal courts for far longer than transgender status claims, and yet the Supreme Court still has not

[5] Pin cites to Docket number 120 reference the ECF header page numbers, not numbers at the bottom of the page.

[6] Plaintiffs offer a puzzling footnote (Dkt. 115:16 n.4) arguing that State Defendants improperly cite out-of-circuit case law for the proposition that transgender status claims are not per se entitled to heightened scrutiny. But Plaintiffs admit that *Whitaker* did not decide that issue, and so State Defendants offered persuasive authority from other circuits on this open issue.

recognized heightened scrutiny for sexual orientation. Although some lower courts outside Wisconsin have applied heightened scrutiny to transgender status claims, those decisions ignore the Supreme Court's restrained approach in *Cleburne*, *Romer*, *Lawrence*, and *Obergefell* and should be disregarded.

Further, State Defendants have explained why the four factors sometimes used to evaluate new suspect classes do not cut in favor of establishing one for transgender status. (Dkt. 120:22–24.) Most importantly, transgender status is not an immutable trait, and transgender people are not politically powerless, as evidenced by a wave of support for the transgender population by the prior presidential administration, major media organizations, and non-governmental organizations. (DFOF ¶¶ 156–59.) Plaintiffs respond that it does not matter whether transgender status is immutable, so long as it is a "distinguishing characteristic" (Dkt. 115:17)—but that cannot suffice, as disabled persons are not entitled to heightened scrutiny under *City of Cleburne*, despite having a "distinguishing" immutable characteristic. And the vague, unbounded "central to a person's identity" test that Plaintiffs cite from *Wolf v. Walker* is a substantial departure from established doctrine and was not adopted by the Seventh Circuit in its affirming decision. 986 F. Supp. 2d 982, 1013 (W.D. Wis. 2014), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014). Such a free-ranging test would

lead this Court far astray from *City of Cleburne*'s admonition to be wary of creating new suspect classes.

Plaintiffs' transgender status thus does not trigger heightened scrutiny, as they are not members of a suspect class.

2. The Exclusion does not facially discriminate against transgender employees.

The Exclusion does not facially discriminate against transgender people, as Plaintiffs wrongly argue. (Dkt. 115:17–22.) No state employees or their family members, whether cisgender or transgender, receive coverage for plastic surgery to treat psychological conditions. Transgender persons are thus not "singled out" for disparate treatment, they are treated the same as cisgender persons. Since there is no facial discrimination, Plaintiffs' equal protection claim fails.

Plaintiffs respond that the vaginoplasties for which they seek coverage are sometimes provided to cisgender people as treatments following medical problems, such as cancer, traumatic injury, or infections. (Dkt. 115:17–18.) But those situations differs from Plaintiffs'—even though the *procedure* is the same, it is being used for an entirely different *purpose*. In the context of cancer, traumatic injuries, or infections, the vaginoplasty is being used as a well-accepted treatment for a physical malady that caused damage to the normally-functioning vagina. (State Defs.' Resp. to PSFOF ¶ 19.)

Any cisgender or transgender state employee could enjoy coverage when the vaginoplasty is used for that purpose—no discrimination exists in that regard. (*Id.*)

But using the vaginoplasty to treat a psychological condition is fundamentally different from using it to treat a woman who suffered a traumatic injury, cancer, or an infection. As a gender dysphoria treatment, the vaginoplasty is not being used to return or restore the physical body to a prior state. Rather, it purports to reduce distress due to the appearance of a transgender woman's genitals by essentially creating a new vagina. That is more like a surgical treatment meant to relieve any other kind of psychological distress caused by physical appearances. But no Uniform Benefits beneficiaries receive coverage for procedures used for that purpose (DFOF ¶¶ 71, 80), so denying coverage to Plaintiffs here does not discriminate against them on the basis of sex or transgender status.[7] This distinction explains why the district court cases that Plaintiffs cite reached the wrong result—those cases improperly assumed that the purpose for which

[7] Even though post-cancer breast reconstruction can be covered under the Uniform Benefits and may have some psychological benefit, that does not undermine State Defendants' position. (Dkt. 115:18, 19 n.7.) It remains the case that the reconstruction returns the breast to its previous form—it reconstructs, not newly constructs. Further, such coverage is mandated by federal law—the Women's Health and Cancer Rights Act (codified at 29 U.S.C. § 1185b)—and was not chosen by GIB.

a procedure is performed is irrelevant to the discrimination analysis. (Dkt. 115:18.[8])

Plaintiffs respond that the Uniform Benefits still facially discriminate against transgender people because the Exclusion is a provision "entirely separate" from the cosmetic surgery exception. (Dkt. 115:19.) But the specific placement of the two exclusions in the Uniform Benefits (or the fact that they are listed separately) is irrelevant. As GIB member J.P. Wieske explained, the Exclusion "administratively simplif[ies] the way that [insurers] were administering gender reassignment coverage issues" because "having the exclusion made the policies clearer." (DFOF ¶ 169.) The Uniform Benefits are not a statute book to be interpreted using canons of statutory construction—they are a set of benefits guidelines that both employees and third-party insurers need to be able to use and understand. Having a specific exclusion applicable to gender reassignment surgery makes it clear to both plan beneficiaries and insurers that those procedures are not covered under the Uniform Benefits. That administrative approach has nothing to do with the legal question of whether comparable benefits are granted to cisgender

[8] Citing *Denegal v. Farrell*, No. 15-01251, 2016 WL 3648956, at *7 (E.D. Cal. July 8, 2016); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1120 (N.D. Cal. 2015); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 580 (S.D.N.Y. 2016).

people, such that evidence of discrimination on the basis of transgender status exists.[9]

What matters to the discrimination question is that there are no comparable benefits granted to cisgender people. Indeed, Plaintiffs make this point themselves. They say that surgical treatment for gender dysphoria is *different from* surgical treatment for other psychological conditions "since [the former] 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." (Dkt. 115:19.) But that proves too much, as it also distinguishes the treatment Plaintiffs seek from vaginoplasties meant to treat patients with cancer, traumatic injury, or infections. None of those treatments are "directed at changing primary and secondary sex characteristics to resolve the clinically significant distress resulting from . . . gender dysphoria," either. (Dkt. 115:19.) Since no one else receives coverage for procedures like the ones Plaintiffs' seek, there is no discrimination here.

[9] Nor does the fact that Plaintiffs' coverage denials referenced only the Exclusion (Dkt. 115:19)—the only relevant inquiry is whether those denials, in substance, discriminated against Plaintiffs on the basis of sex. They did not.

Next, Plaintiffs argue that the lack of Uniform Benefits coverage for cosmetic surgery is irrelevant because surgery for gender dysphoria "is recognized as the medical standard of care," unlike cosmetic surgeries for psychological conditions (Dkt. 115:19.) That argument misses the mark for three reasons. First, they offer only the opinion of a single plastic surgeon to support that position, which does not demonstrate what the entire "medical community" recognizes. Second, it undermines Plaintiffs' position. They say plastic surgery does not improve the condition of psychological disorders *other* than gender dysphoria, but do not explain why gender dysphoria is uniquely amenable to treatment through plastic surgery. Plaintiffs' gender dysphoria distress manifested through depression and anxiety, two conditions they assert *cannot* be properly treated with surgery. (Dkt. 115:3.) Third, if true, the point only bolsters State Defendants' position—if no cisgender people receive plastic surgery to treat psychological conditions, then there is no true comparator to Plaintiffs and they still cannot establish discriminatory treatment.

The Seventh Circuit's decision in *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) is inapposite. (Dkt. 115:20.) Most obviously, that case rested on the Eighth Amendment and involved an absolute statutory ban on gender reassignment hormone and surgical procedures for Wisconsin prisoners. *Id.* at 522. No such ban exists here, and Plaintiffs rely on the equal protection

clause. Plaintiffs are free to obtain the surgical procedures they seek—but Wisconsin taxpayers have no obligation to pay for them through state health insurance coverage. This is unlike *Fields*, since prisoners can only obtain health care through the state prison system. Moreover, *Fields* only considered evidence regarding hormone therapy, not surgery. *Id.* at 553–54. Here, the Uniform Benefits allow state employees to receive coverage for hormone therapy alone. (DFOF ¶ 27.) The *Fields* court had no evidence before it about surgical procedures to treat gender dysphoria, including the evidence cited by State Defendants here. *Id.* at 557. (DFOF ¶¶ 101–06, 120–39.)

Plaintiffs also try to shoehorn this health insurance benefits case into cases where transgender people were actively prevented from acting in ways that transgressed sex stereotypes. (Dkt. 115:20–21 (citing *Whitaker*, *Harris*).) Again, this case does not involve an active bar on Plaintiffs' ability to either conform to or transgress sex stereotypes. Rather, it involves GIB's decision not to subsidize Plaintiffs' desire to alter their appearance to conform to the sex stereotypes of their adopted gender identity.

Last, Plaintiffs contend that excluding coverage for gender dysphoria treatments necessarily discriminates on the basis of transgender status. (Dkt. 115:21–22.) But the Exclusion only affects the subset of transgender people with gender dysphoria. (DFOF ¶ 152.) Drawing that distinction does not rest on transgender status, it rests on the presence of a psychological

condition. And it is important to remember that the Exclusion does not "prevent treatment," as Plaintiffs repeatedly say. It only declines to extend insurance coverage to those treatments—Plaintiffs remain free to obtain the treatments out-of-pocket, like Andrews was able to accomplish.

3. The Exclusion survives either heightened scrutiny or rational basis review.

There can be no serious question that the Exclusion satisfies rational basis review, which requires only a conceivable rational basis. That standard is easily satisfied here through concerns about costs and efficacy. Further, even if Plaintiffs could show that the Exclusion discriminates on the basis of sex such that heightened scrutiny applies, it would still survive constitutional scrutiny.

Plaintiffs first argue that State Defendants improperly offer post hoc justifications. (Dkt. 115:23) This argument fails for three reasons: (1) the relevant time period here is not just 2016, since the Exclusion has existed since 1994 and rests on the background assumptions that cost and medical necessity are by definition part of every health insurance benefits decision; (2) there exists evidence that at least some GIB members were actually considering these two interests at the end of 2016; and (3) it would be unfair to apply these post hoc rules where the law did not require heightened scrutiny when the policy came into being. (Dkt. 120:24–27; DFOF ¶¶ 95–100, 107–09, 161–62, 169–73.)

Plaintiffs also attack the cost justification's substance, saying that cost cannot be a valid state interest under intermediate scrutiny, but they are wrong. (Dkt. 115:23–24.) There is no basis for categorically throwing cost out the window under any level of scrutiny. For example, Plaintiffs concede that *Bonidy v. United States Postal Service*, 790 F.3d 1121, 1127 (10th Cir. 2015), considered costs as a relevant consideration, in concert with other state interests.[10] That is exactly what State Defendants offer here—an interest in containing costs, coupled with concerns regarding medical efficacy. And GIB is not saving costs through an invidious classification, as was the case in *Shapiro v. Thompson*, 394 U.S. 618 (1969). Instead, GIB is saving costs by uniformly declining to subsidize a category of treatments for psychological conditions. Further, those treatments are of dubious efficacy.

As for the magnitude of the savings, Plaintiffs arbitrarily call them "immaterial" and a "rounding error." (Dkt. 115:24) This essentially argues that the Exclusion is not properly tailored to the state interest in cost savings.

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[10] Plaintiffs try to distinguish cases considering costs on the grounds that they are "deferential" commercial speech cases, but there is no meaningful doctrinal difference between the intermediate scrutiny standard applied there and the standard Plaintiffs seek to apply here. *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 275 (2d Cir. 2010), *aff'd*, 564 U.S. 552 (2011) ("[F]or the statute to survive intermediate scrutiny, the government must assert a substantial state interest that is directly advanced by the statute, and the regulation must not be more extensive than necessary to achieve the government's interest."); *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008), *abrogated by Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (applying same standard).

But "[i]n order to survive intermediate scrutiny . . . a law need not solve the . . . problem, it need only further the interest in preventing [the problem]." *Ass'n of Cmty. Organizations for Reform Now v. Town of E. Greenwich*, 453 F. Supp. 2d 394, 410 (D.R.I. 2006), *aff'd sub nom.* 239 F. App'x 612, 2007 WL 1829374 (1st Cir. 2007) (citation omitted); *see also Mariani v. United States*, 212 F.3d 761, 773 (3d Cir. 2000) (noting, in a First Amendment case where heightened scrutiny applied, "the government may 'take steps, albeit tiny ones, that only partially solve a problem without totally eradicating it'") (citation omitted). The decision about how best to save on health insurance costs—which the Exclusion indisputably does—is up to GIB, not Plaintiffs and their actuaries. (DFOF ¶¶ 43–45, 95, 143–44.)

On the topic of medical efficacy, Plaintiffs' critiques miss the mark for all the reasons described in Statement of Facts III. Again, Dr. Mayer's expertise in epidemiology qualifies him to evaluate the state of the medical evidence regarding the efficacy of surgical treatments for gender dysphoria, unlike Plaintiffs' experts, who have no formal training in statistics, epidemiology, or clinical trial design. Those "experts" are treating physicians who have no expertise in evaluating the overall body of available scientific evidence on this issue. As for Dr. Mayer's statements that surgery "may" be the best treatment and should be provided if the evidence supports it, that shows nothing—his fundamental opinion is that the evidence does *not*

support it.[11] (DFOF ¶¶ 101–06, 120–39.) At bottom, Plaintiffs' competing view on the state of available scientific evidence does not undermine State Defendants' concerns about medical efficacy as an important state interest justifying the Exclusion.

B. Individual capacity claims.[12]

1. Secretary Conlin did not violate the Constitution.

The only real difference between the parties' positions on Plaintiffs' individual capacity claim against Secretary Conlin is whether he can be held personally liable for administrative actions over which he had no discretion. There is no dispute over what Conlin did—he (and ETF) repeatedly recommended that GIB *remove* the Exclusion from the Uniform Benefits, and when GIB ultimately rejected that recommendation, he carried out his statutory duty as ETF's Secretary to implement GIB's decision. Wis. Stat. §§ 15.04(1)(a), 40.03(2)(a), 40.03(6)(d)(5), 40.52(1). (DFOF ¶¶ 46–50, 55, 61, 110–18.)

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[11] Dr. Mayer never testified that these treatments "should be covered," contrary to Plaintiffs' misstatement. (Dkt. 115:25.) He disclaimed any opinion about the availability of insurance coverage for the treatments at issue. (State Defs.' Resp. to PSFOF ¶ 28.)

[12] This brief only addresses Plaintiffs' individual capacity claims against Secretary Conlin. State Defendants' will address the new individual capacity claims against GIB members in a separate dispositive motion.

Plaintiffs do not cite a single individual capacity 42 U.S.C § 1983 case holding a government official personally liable for implementing a policy over which he expressly objected to and had no control in deciding. Instead, they cite *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995), which did not concern either a § 1983 claim or a claim against an individual official; rather, it concerned an ADEA claim against a municipality. They also cite *Smith v. Jensen*, 14-cv-226, 2016 WL 3566281, at *7 n.3 (W.D. Wis. June 27, 2016), but this Court in *Smith* did not resolve whether the defendant had adequate personal involvement; rather, it granted summary judgment to the defendant on qualified immunity. As for *Richards v. Dayton*, No. 13-cv-3029-JRT/JSM, 2015 WL 1522204, at *12 (D. Minn. Jan. 30, 2015) the passage Plaintiffs cite concerned official capacity claims for injunctive relief, not individual capacity claims for damages. Likewise, in *ACLU v. The Florida Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993), the issue was whether the plaintiffs had standing to sue an organization, not whether an individual official could be personally liable under § 1983.[13]

[13] Plaintiffs' footnote 12 reveals their misunderstanding of official and individual capacity claims. (Dkt. 115:26 n.12.) They contend that naming individual GIB members "cures any arguable defect from naming Conlin," but the dispute here is over individual liability for damages, not the proper defendants for purposes of standing or injunctive relief. Whether the GIB members are named in their individual or official capacity has nothing to do with whether Conlin acted in a way that subjects him to personal liability and possible money damages under § 1983.

It makes no sense to impose individual liability on Secretary Conlin. The purpose of individual liability under § 1983 is three-fold: to recompense victims of reckless or intentional constitutional violations, to punish state actors for those violations, and to deter state actors from committing future ones. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267–68 (1981).

Neither of the latter two purposes would be served by imposing personal liability on Conlin. Why punish him? He tried to convince GIB to remove the Exclusion. When his efforts were rejected by GIB in late December 2016, he did what state law required him to do as ETF's Secretary—implement GIB's decisions. Nor would personal liability deter similar violations. Secretary Conlin had a clear duty under state law to implement GIB's decision. Of course federal law trumps state law in the event of a conflict between the two, but Conlin did not intentionally or recklessly ignore such a conflict here. There is no controlling case of which State Defendants are aware regarding gender dysphoria health insurance benefits that Conlin could have cited to justify ignoring his state law obligations.

Plaintiffs also respond that Conlin "fail[ed] to act to stop" the constitutional violation here. (Dkt. 115:28.) First, that misstates the § 1983 legal standard, which requires "knowledge and consent," not a simple failure to stop. *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995) (citation omitted). In any event, Plaintiffs never say what Conlin should have done.

Quit his job? Committed an act of civil disobedience by refusing to implement GIB's decision? No case suggests an official can be held individually liable for failing to take such drastic actions in the face of ambiguous federal law, as here. *Gentry* is not to the contrary—there, the constitutional violation occurred with the defendant's "knowledge and consent" such that the violation was effectively "a policy of [the defendant's]." In no reasonable sense did Conlin "consent" to GIB's decision, nor was the Exclusion his policy. Likewise, *Crowder v. Lash*, 687 F.2d 996, 1006 (7th Cir. 1982) dismissed claims against defendants where the challenged actions did not "occur[] at [their] direction or with [their] express consent." That is exactly true for Conlin here. Only the defendants in *Crowder* who had control over the challenged decisions had sufficient personal responsibility, and Conlin had no such control. *Id.* at 1005–06.[14]

2. Secretary Conlin is entitled to qualified immunity because Plaintiffs still identify no "clearly established" law that he violated.

Plaintiffs acknowledge that qualified immunity grants public officials substantial leeway to act when presented with thorny, uncertain constitutional questions. The doctrine recognizes that "permitting damages

[14] Plaintiffs' citations regarding the lack of a malicious intent requirement for an equal protection violation miss the point. (Dkt. 115:28 n.13.) The issue here is whether Conlin can be individually liable, not whether malicious intent is required to find an actionable equal protection violation.

suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (citation omitted). Accordingly, "it protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (citation omitted). "[I]f a reasonable [actor] might not have known for certain that the conduct was unlawful—then the [actor] is immune from liability." *Ziglar*, 137 S. Ct. at 1867.

Plaintiffs make no serious argument that Secretary Conlin knew for certain that his actions were unlawful. *Id.* Rather, they argue for a novel limitation of qualified immunity to situations involving "highly discretionary" actions "taken under time constraints," like policing or counter-terrorism. (Dkt. 115:31.) Relatedly, Plaintiffs contend that qualified immunity is not necessary when officials have "time to deliberate" or "limited discretion." (Dkt. 115:31.) They cite no supporting authority, which is unsurprising because that is not the standard.[15] Rather, qualified immunity applies

[15] Plaintiffs citation to *Auriemma v. Rice*, 910 F.2d 1449, 1457 (7th Cir. 1990) does not help them. That case drew no line between policy decisions and exigent circumstances, as Plaintiffs advocate here; rather, it conducted an ordinary qualified immunity analysis and found that the defendant's actions were obviously unlawful. *Id.*

whenever the actor "might not have known for certain that the conduct"—any conduct—was unlawful. *Ziglar*, 137 S. Ct. at 1867. Courts have applied the doctrine to cases involving allegedly discriminatory policies, unrelated to split-second policing or counterterrorism. *See, e.g.*, *Elwell v. Dobucki*, 224 F.3d 638, 640 (7th Cir. 2000) (applying qualified immunity to prison warden's affirmative action hiring practice based on race); *Erwin v. Daley*, 92 F.3d 521 (7th Cir. 1996) (same, regarding city's affirmative action program).

Next, Plaintiffs wrongly argue that the "contours" of the claim here were clearly established when Secretary Conlin acted. (Dkt. 115:32–33.) Two key aspects of Plaintiffs' claim against Conlin were *not* clearly established: (1) whether the Exclusion violated the equal protection clause; and (2) if it did, whether Conlin can be individually liable for implementing GIB's decision to reinstate it as state law requires.

First, whether transgender identity merits protected status is a hotly contested issue in federal courts around the country—no clear consensus has emerged, and neither the Supreme Court nor the Seventh Circuit has resolved the issue. (*Compare* Dkt. 81:25 n.7 (collecting cases), *with* Dkt. 97:28–29 (collecting cases).) The *Mitchell v. Price*, No. 11-cv-260-wmc, 2014 WL 6982280 (W.D. Wis. Dec. 10, 2014) decision from this Court does not change the equation since, as Plaintiffs note, this Court did not actually

decide the issue—it just adopted the parties' agreed-upon position. As for *Whitaker*, it did not resolved the question and, in any event, was decided *after* Secretary Conlin implemented GIB's decision.

Plaintiffs also argue that Secretary Conlin "*actually* knew that the exclusion likely unlawfully discriminated based on sex and gender identity." (Dkt. 115:34.) First, even if true, that is not enough to dodge qualified immunity. Knowing that the Exclusion was "likely" unlawful is not enough—Conlin must have been "certain." *Ziglar*, 137 S. Ct. at 1867. Second, that assertion twists the facts. Conlin (and ETF) concluded that the HHS regulations implementing Section 1557 of the ACA barred the Exclusion—*not* the equal protection clause. The relevant question here is whether the equal protection clause outlawed the Exclusion, not Section 1557.

And Plaintiffs do not even address the other pieces of their claim that had to be "clearly established" to remove qualified immunity's shield. First, they ignore the actual application of heightened scrutiny—they just argue that it applies here. They do not cite a single case making it "certain" that the state interests offered to support the Exclusion do not survive heightened scrutiny. Second, they ignore the issue of Conlin's personal liability. As explained above, it is exceedingly doubtful that Conlin's administrative, on-discretionary actions can expose him to personal liability.

This case is tailor-made for qualified immunity. The purported "right" at issue is highly novel, and Secretary Conlin was not the decision-maker, anyway. The individual capacity claims against him should be dismissed.

II. Summary judgment is proper in GIB's and ETF's favor on Plaintiffs' Title VII claims.

A. Title VII does not apply to transgender status claims.

Plaintiffs brush off the binding holding in *Ulane v. Eastern Airlines, Inc.*, 742 F.3d 1081, 1087 (7th Cir. 1984) that Title VII does not cover transgender status claims. (Dkt. 115:35–36.) They cite *Whitaker*, but it only held that transgender students can bring sex stereotyping claims, not that Title VII covers every transgender status claim as a matter of law. As explained above and in State Defendant's other summary judgment briefs, *Whitaker*'s sex stereotyping theory does not apply here, and so *Ulane* precludes their Title VII claim.

B. Title VII does not reach GIB and ETF under the circumstances here.

Plaintiffs contend that State Defendants attempt a "bait and switch" by arguing that neither ETF nor GIB are subject to Title VII liability. However, that simply assumes the conclusion they want this Court to reach. (Dkt. 115:36.) Plaintiffs must *show* that Title VII's actual terms extend to ETF or GIB, not simply *assume* that they do.

Plaintiffs begin with ETF, arguing that implementing the Exclusion suffices to subject them to Title VII. (Dkt. 115:36–37.) They are wrong. The facts show that "plaintiff's employers" did not "delegate[] to ETF[] the responsibility to determine which [services] should be covered under all of the offered health insurance plans," which is the standard this Court set for Title VII liability. (Dkt. 67:18; Dkt. 81:50–52.) *Quinones* and *DeVito v. Chicago Park District*, 83 F.3d 878, 881–82 (7th Cir. 1996) do not change the equation. *Quinones* is inapposite because (1) it was not a Title VII agency case, (2) the defendant there faced an obvious conflict between state and federal law, and (3) the defendant there had authority to avoid the conflict by ceasing the entire activity that gave rise to the conflict. And *DeVito* (an ADA case, not a Title VII case) does not apply because there the decision-maker (the Personnel Board) and the employer (the Park District) had an agency relationship, and so *respondeat superior* subjected the employer to liability for the decision-maker's action. Here, ETF was neither the decision-maker nor the direct employer, nor is it in an agency relationship with the decision-maker (i.e. GIB).

Next, Plaintiffs reprise their argument that GIB can be liable even without 15 employees because it is "part of" ETF. (Dkt. 115:37–38.) But this Court has already correctly held that "GIB is certainly legally distinct from the rest of ETF." (Dkt. 67:9.) That is because, while GIB is nominally placed

"in the department of employee trust funds," Wis. Stat. § 15.165 classifies it as an "attached board." This means that GIB is "attached" to ETF only for "limited purposes," namely "budgeting, program coordination and related management functions." Wis. Stat. § 15.03. Otherwise—like when setting the health insurance terms at issue—GIB acts as a "distinct unit" that "exercise[s] its powers, duties and functions prescribed by law . . . independently of the head of the department." *Id.* The Wisconsin Supreme Court has confirmed that "attached" entities under Wis. Stat. § 15.03 (like GIB) "exercise[] [their] powers, duties, and functions independently of the head of the department to which [they are] connected." *Racine Harley-Davidson, Inc. v. State, Div. of Hearings & Appeals*, 2006 WI 86, ¶ 32, 292 Wis. 2d 549, 717 N.W.2d 184; *see also State v. Delaney*, 2006 WI App 37, ¶ 17, 289 Wis. 2d 714, 712 N.W.2d 368 (such entities are "not subject to the control of the . . . secretary" of their attached department), *abrogated on other grounds by*, *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.

In an effort to collapse the legal distinction between ETF and GIB, Plaintiffs cite irrelevant Title VII case law that applies to corporations. In *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 939 (7th Cir. 1999), the Seventh Circuit considered "whether an employer that has fewer than 15 or 20 employees . . . should be deemed covered [under the major federal anti-discrimination laws] because it is part of an affiliated group of corporations

that has in the aggregate the minimum number of employees." Whether two distinct government entities can be collapsed under Title VII is obviously a different issue from collapsing affiliated corporations, and Plaintiffs cite no cases doing so in the government context.[16] Moreover, the *Papa* exception on which Plaintiffs rely presents an inverted fact pattern. There, a large parent corporation could be liable if it directed discriminatory acts by its sub-15 employee subsidiary. *Id.* Here, the sub-15 employee entity (GIB) directed the purportedly discriminatory act, not the large affiliated entity (ETF).

Lastly, the policy reasons Plaintiffs offer do not suffice to create a new form of Title VII liability against GIB. They contend that GIB should not enjoy the small employer exception because it need not be protected from responding to discrimination complaints. (Dkt. 115:38.) To the contrary, Plaintiffs novel theory would expose GIB—an 11-member independent board with little budget and no staff—to Title VII suits based on health insurance complaints from any state employee and their family members in Wisconsin. If anything, the *Papa* policy of avoiding litigation burdens on small organizations applies even more strongly under those circumstances. *Id.* at 940. Exposing GIB to such a crush of Title VII lawsuits would severely

[16] *U.S. E.E.O.C. v. Custom Companies, Inc.*, Nos. 02 C 3768, 03 C 2293, 2007 WL 734395, at *4–5 (N.D. Ill. Mar. 8, 2007) likewise concerned affiliated corporations, not government entities.

impede its ability to operate.[17] GIB would likely need to reorient its focus away from setting healthcare policy to compliance with federal antidiscrimination laws and defending against lawsuits, or at minimum spend much more of its time dealing with such litigation.

III. Summary judgment is proper in ETF's favor on Plaintiffs' ACA Section 1557 claims.

A. Plaintiffs fail to show that Title IX covers transgender status claims.

To establish that Title IX (and thus Section 1557) applies to transgender status claims, Plaintiffs put all their eggs in *Whitaker*'s basket. (Dkt. 115:39.) They argue solely that *Whitaker* allows their claims under a sex stereotyping theory, even though both *Ulane* and tools of statutory interpretation show that the term "sex" in Title IX does not cover gender identity-based claims. (Dkt. 81:47–48.) If this Court rejects Plaintiffs' *Whitaker* arguments, as it should for the reasons previously discussed, Plaintiffs offer no other explanation for why Section 1557 should reach their

[17] Plaintiffs' tardy request for reconsideration and leave to amend their complaint for a third time, buried in a footnote, should be denied. (Dkt. 115:38 n.17.) It is procedurally improper to request such relief in a brief. *See* Fed. R. Civ. P. 7(b). And there is no reason why Plaintiffs could not have sought reconsideration or leave to amend earlier in the case and through the proper motion procedure, giving the State Defendants a full and fair opportunity to respond to any substantive and legal arguments. Reinserting the Board of Regents or adding the State of Wisconsin *sua sponte* into this case would significantly delay proceedings, as more discovery and dispositive motions would likely be necessary.

claims. They only respond that Congress's failure to amend civil rights law to add protections for "gender identity" is not dispositive. (Dkt. 115:40.) Even if true, State Defendants offered many other reasons why Plaintiffs' novel reading of Title IX and Section 1557 should be rejected, to which Plaintiffs offer no response. (Dkt. 81:55–60.)

B. Plaintiffs fail to establish a private right of action under Section 1557.

Plaintiffs ignore the lack of an express private right of action in Section 1557, and instead cite to non-precedential district court cases that read that right of action into the statute. (Dkt. 115:40–41.) That approach should be rejected for the reasons outlined in State Defendants' opening brief. (Dkt. 81:60–61.)

C. Plaintiffs fail to establish a waiver of the State's Eleventh Amendment immunity.

ETF's receipt of federal funds alone does not suffice to waive the State's Eleventh Amendment immunity, since Plaintiffs identify no express waiver in Section 1557. They instead cite *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 72 (1992), which found an adequate waiver in Title IX, not Section 1557. That line of argument assumes, but does not support, that express waivers can be found in *other* statutes aside from Section 1557. That view should be rejected.

Similarly, Plaintiffs ignore the fact that any such waiver must rest on a "valid grant of constitutional authority." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). Here, interpreting Title IX or Section 1557 to cover transgender status claims would violate the Spending Clause because there was no understanding when ETF accepted federal funds that such claims would be covered by Section 1557. Any Eleventh Amendment waiver thus cannot extend so far as Plaintiffs' novel claims here.

D. Plaintiffs fail to show that an agency with no discretion over the challenged policy can face Section 1557 liability.

Even though both sides agree that ETF had no discretion over whether to implement the Exclusion, Plaintiffs repeat their argument that the facially discriminatory policy itself suffices to subject ETF to Section 1557 liability. (Dkt. 115:40.) But this does not respond to State Defendants' argument. Even if a facially discriminatory policy could suffice to violate Section 1557, and even if the Exclusion is such a policy, that does not resolve the question of *who* can face Section 1557 liability for that policy. State Defendants cited Seventh Circuit precedent holding that Title IX liability can only attach to entities with authority over the challenged decision. (Dkt. 81:63–64 (citing *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569 (7th Cir. 2014), *Hansen v. Bd. of Tr. of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 605 (7th Cir. 2008).) Plaintiffs do not even attempt to distinguish those cases,

both of which demonstrate that ETF cannot face Section 1557 liability simply for doing its job to implement GIB's policy decision.

CONCLUSION

State Defendants' motion for summary judgment should be granted. Specifically, Secretary Conlin is entitled to summary judgment on Plaintiffs' equal protection claims against him under 42 U.S.C. § 1983; ETF and GIB are entitled to summary judgment on Plaintiffs' Title VII claims against them; and ETF is entitled to summary judgment on Plaintiffs' Section 1557 claim against it.

Dated this 9th day of July, 2018.

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