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' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This employee benefits case presents one key question: can Wisconsin, consistent with federal anti-discrimination law, decline to provide state employees with health insurance coverage for potentially costly cosmetic treatments that have not been demonstrated to be safe and effective? The answer must be yes. State employees do not receive coverage for procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment. Three key reasons support this policy, none of which reflect invidious discrimination against Plaintiffs—two transgender women—on the basis of their sex or transgender status.

First, the policy is one element of a broader scheme that declines to cover cosmetic procedures meant to treat psychological disorders. Just as a cisgender woman severely depressed because of her appearance cannot obtain coverage for procedures like breast augmentation or rhinoplasty, a transgender woman cannot obtain coverage for those same procedures to treat her gender dysphoria.[1] Since the coverage exclusion at issue applies neutrally to both men and women, whether cisgender or transgender, it does not discriminate on the basis of sex or transgender status.

[1] "Cisgender" people identify with the gender corresponding to their birth sex, while "transgender" people do not.

Second, the policy controls healthcare costs for the State of Wisconsin and its employees. Wisconsin has no obligation to provide health insurance coverage for every surgical procedure its employees desire, whether medically necessary or not. Moreover, the State has a substantial interest in declining to cover emerging categories of cosmetic procedures—like gender reassignment surgery—since those procedures impose extra costs on the State's group health insurance program. So, to help contain the ever-increasing growth in health insurance costs, Wisconsin has rationally decided not to extend coverage to gender reassignment surgical procedures.

Third, medical science has not yet produced definitive evidence that gender reassignment surgery is safe and effective for treating gender dysphoria—a psychological disorder. Although individual clinicians may find that gender reassignment surgery is medically necessary for specific patients, that conclusion does not address the broader issue of whether the procedures have been shown over the long-term to be safe and efficacious. As a matter of protecting public health, the State has a significant interest in declining to provide coverage for such treatments.

Taken together, these three reasons demonstrate that the coverage exclusion that Plaintiffs challenge does not represent invidious discrimination on the basis of sex or transgender status. Therefore, Defendants should be granted summary judgment on Plaintiffs' discrimination claims under the

equal protection clause, Title VII of the Civil Rights Act of 1964, and Section 1557 of the Affordable Care Act (ACA), codified at 42 U.S.C. § 18116.

Separately, summary judgment should be granted to Defendants on Plaintiffs' statutory claims under Title VII and the ACA because those statutes do not encompass discrimination claims on the basis of transgender status. They expressly prohibit only "sex" discrimination, and that prohibition is not capacious enough to permit claims based on transgender status. Section 1557 of the ACA also contains no private right of action and does not abrogate the State's Eleventh Amendment immunity, which also precludes Plaintiffs' claims under that statute.

Summary judgment should be granted for other reasons in favor of the specific defendants remaining in this case—the Wisconsin Department of Employee Trust Funds (ETF), its chief administrator, Secretary Bob Conlin, and the Wisconsin Group Insurance Board (GIB). Plaintiffs' individual capacity claims against Secretary Conlin under 42 U.S.C. § 1983 fail because he had inadequate personal involvement in any constitutional violation to be held liable and otherwise enjoys qualified immunity. As for ETF, Plaintiffs' Title VII claim against it fails because it is neither Plaintiffs' employer nor properly viewed as an agent. Moreover, both the Title VII and ACA claims against ETF fail because there is no evidence that ETF discriminated against Plaintiffs because of their sex. And as for the remaining Title VII claim against

GIB, it fails because GIB does not have 15 employees and thus cannot be liable under Title VII.

STATEMENT OF FACTS

I. State employees may not receive health insurance coverage for "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment."

A. State employees receive health insurance with coverage terms defined by the Uniform Benefits.

Eligible state employees in Wisconsin may participate in the Wisconsin Group Health Insurance Program (the "Group Health Program") through their state employers. (Defendants' Proposed Findings of Fact (DFOF) ¶ 11.) Most insurance plans offered through the Group Health Program are fully insured. In these plans, benefit claims are processed and paid by third-party insurance carriers with whom GIB contracts (such as former defendant Dean); state employees and their employers both pay a share of the insurance premium to ETF, which transmits those funds to third-party carriers. (DFOF ¶ 12.) The pharmaceutical portion of the Group Health Program, however, is self-insured. For these prescription drug benefits, ETF pays these claims directly out of its health coverage reserves, while a third-party administrator assists with claims processing and other administrative tasks. (DFOF ¶ 13.)

The scope of the Group Health Program's benefits—that is, which medical services, treatments, procedures, and the like are covered—is defined

in a document called the "Uniform Benefits." (DFOF ¶ 14.) The Uniform Benefits define the coverage terms that apply to all insurance plans offered to state employees through the Group Health Program. (DFOF ¶ 15.) Insurance carriers that contract to provide health insurance to state employees must offer the coverage terms defined in the Uniform Benefits; those terms are not subject to negotiation and may not be modified. (DFOF ¶ 16.) Not all services and procedures prescribed or deemed to be medically necessary by a member's clinician are covered under the Uniform Benefits; certain medically necessary procedures may be excluded from coverage. (DFOF ¶ 17.)

GIB is the state entity that sets coverage terms in the Uniform Benefits. (DFOF ¶ 18.) Made up of 11 appointees and designees of the Governor and heads of various agencies (DFOF ¶ 19; Wis. Stat. § 15.165(2)), GIB has the statutory authority to set "[t]he terms and conditions of the insurance contract or contracts, including the amount of premium." (DFOF ¶ 20.) Wis. Stat. § 40.03(6)(d)(5). Neither ETF nor its Secretary has any statutory authority to make final decisions on the Uniform Benefits' content. (DFOF ¶ 21.)

ETF does, however, assist GIB with benefits design policy. Based on input from stakeholders—including state employees, state employers, and insurance carriers—and its own policy analysis, ETF commonly recommends changes to the Uniform Benefits and other aspects of the Group Health Program. (DFOF ¶ 22.) But ETF has no authority to alter the Uniform Benefits

themselves; it can only make recommendations to GIB, which GIB may accept or reject at its sole discretion. (DFOF ¶ 23.)

B. The Uniform Benefits exclude coverage for gender reassignment surgery and other cosmetic procedures meant to treat psychological disorders, and they do not cover all medically necessary treatments.

The current Uniform Benefits provide that "[p]rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" are excluded from coverage (hereafter, the "Exclusion"). (DFOF ¶ 24.) Since 1994, the Uniform Benefits have contained an exclusion materially identical to the one at issue here. (DFOF ¶ 25.) GIB originally added the Exclusion because it was standard industry practice; services associated with gender reassignment surgery were generally accepted by health insurance companies and health care providers to be experimental and not medically necessary. (DFOF ¶ 26.)

The Exclusion does not apply to hormone therapy or mental health counseling as stand-alone treatments for gender dysphoria, when those treatments are not related to gender reassignment surgery. That is, if a Group Health Program member indicates that both (1) they have not had gender reassignment surgery in the past, and (2) they do not intend to have that surgery in the future, the person may obtain coverage for sex hormones associated with the sex that differs from their birth sex. (DFOF ¶ 27.)

Similarly, mental health counseling as a stand-alone treatment for gender dysphoria is covered under the Uniform Benefits. (DFOF ¶ 28.) But when hormone therapy is part of a treatment plan meant to culminate in gender reassignment surgery (or involves follow-up treatments after such surgery), those services are not covered under the Uniform Benefits. (DFOF ¶ 29.)

The Exclusion is consistent with the broader Uniform Benefits provision that excludes coverage for "treatment, services and supplies for cosmetic . . . purposes." (DFOF ¶ 30.) This provision further states that "[p]sychological reasons do not represent a medical/surgical necessity." (DFOF ¶ 30.) The Uniform Benefits also explain that "[s]ome of the listed exclusions may be MEDICALLY NECESSARY, but still are not covered under this program." (DFOF ¶ 31.)

II. After ETF's initial consideration in 2015, GIB removed the Exclusion from the Uniform Benefits in 2016 due to a federal mandate and then reinstated the exclusion when that mandate was invalidated.

A. In 2015, ETF declined to recommend that GIB remove the Exclusion, largely due to cost concerns.

In 2015, ETF considered but ultimately declined to recommend to GIB that the Exclusion be removed from the Uniform Benefits. (DFOF ¶ 38.) In response to correspondence from a University of Wisconsin–Madison professor, ETF sought input from its independent benefits consultant, Segal Consulting ("Segal"), on whether to recommend removing the Exclusion to GIB.

(DFOF ¶ 39.) Segal opined that the financial impact of such a change would be "moderate" and said its position was "neutral" regarding whether to remove the Exclusion. (DFOF ¶ 40.)

In an advisory memo provided to GIB in May 2015, ETF recommended that GIB defer consideration of removing the Exclusion to 2017 or later. (DFOF ¶ 41.) ETF made this recommendation for two primary reasons. First, GIB in 2015 generally hoped to hold current benefits stable, since it was considering a broad redesign of the Group Health Program, including a possible shift to self-insurance for all program aspects. (DFOF ¶ 42.) Second, the 2015–17 State of Wisconsin budget required GIB to identify $25 million in cost savings in the Group Health Program over those two fiscal years. (DFOF ¶ 43.) This meant that ETF's recommendations to GIB at the time were focused on cost reduction strategies, not expanding benefits. (DFOF ¶ 44.) Because removing the Exclusion would have expanded benefits under the Group Health Program, it did not fit into GIB's mission for the program at the time, and so ETF did not recommend the change. (DFOF ¶ 45.)

B. In July 2016, GIB removed the Exclusion from the Uniform Benefits due to federal regulations.

ETF revisited the Exclusion in May 2016 in response to federal government action. On May 18, 2016, the federal Department of Health and Human Services (HHS) published regulations implementing the Affordable

Care Act's (ACA) anti-discrimination provision, Section 1557. *See* 81 Fed. Reg. 31376 (May 18, 2016) (codified at 45 C.F.R. pt. 92). Section 1557 prohibits discrimination on the basis of "sex" in "any health program or activity, any part of which is receiving Federal financial assistance," and it empowered HHS to issue regulations implementing the provision. 42 U.S.C. § 18116(a), (c). HHS's regulations ultimately barred "categorical exclusion[s] or limitation[s] for all health services related to gender transition" and "[o]therwise deny[ing] or limit[ing] coverage . . . for specific health services related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual." 45 C.F.R. § 92.207(b)(4)–(5).

ETF analyzed these federal regulations and concluded in a June 22, 2016, memorandum to GIB that the regulations required the Exclusion to be removed from the Uniform Benefits. (DFOF ¶ 46.) First, ETF concluded that ETF was a "covered entity" for the purpose of the HHS regulations—that is, that the HHS regulations applied to ETF because ETF received federal financial assistance in the form of Medicare Part D subsidies. (DFOF ¶¶ 47–48.) Second, ETF concluded that, under the HHS regulations, the Exclusion amounted to a prohibited benefit exclusion. (DFOF ¶ 49.) ETF thus recommended that GIB remove the Exclusion. (DFOF ¶ 50.)

GIB approved ETF's recommendation to remove the Exclusion at its July 12, 2016 meeting. (DFOF ¶ 51.) The change did not go into effect immediately;

it was scheduled to take place on January 1, 2017—the first day of the following full benefits year. (DFOF ¶ 52.)

C. In December 2016, GIB reinstated the Exclusion when the applicable federal regulations were enjoined.

GIB revisited its decision to remove the Exclusion at its next meeting, on August 16, 2016. At that meeting, GIB considered a memorandum authored by the Wisconsin Department of Justice (DOJ), which opined that the new HHS regulations were unlawful, at least as applied to the Exclusion. (DFOF ¶ 53.) Accordingly, DOJ suggested that "[t]o the extent [GIB] believes that the new HHS rules compel it to accept ETF's recommended changes, it should reconsider." (DFOF ¶ 54.) ETF submitted to GIB a response to DOJ's memorandum; ETF did not recommend that GIB reconsider its July 2016 decision to remove the Exclusion primarily due to concerns about possible fiduciary liability for declining to follow federal regulations. (DFOF ¶ 55.) GIB did not act on the Exclusion at the August 16 meeting. (DFOF ¶ 56.)

The Exclusion next arose at GIB's December 13, 2016 meeting. That day, DOJ attorneys attended the meeting to discuss DOJ's earlier recommendations. (DFOF ¶ 57.) A DOJ attorney told GIB that the State of Wisconsin had joined federal litigation in the Northern District of Texas

challenging the legality of the HHS regulations. (DFOF ¶ 57.)[2] He further explained that Wisconsin was seeking an injunction against enforcement of the HHS regulations and that a hearing was scheduled for December 20, 2016. (DFOF ¶ 58.) But since the HHS regulations had not yet been enjoined, the DOJ attorney advised that GIB continue with its July 2016 decision to remove the Exclusion. (DFOF ¶ 59.) GIB followed this advice and took no action, noting that it would revisit the issue if and when an injunction was issued. (DFOF ¶ 60.)

At its December 30, 2016 meeting, GIB issued a contingent decision to reinstate the Exclusion. (DFOF ¶ 61.) After a closed session discussion to discuss GIB's legal strategy in light of pending or potential litigation regarding the Exclusion, GIB voted to reinstate the Exclusion if and when four contingencies were met: (1) a court decision that "enjoin[ed], rescind[ed] or invalidate[d] the HHS Rule"; (2) confirmation that the decision would "maintain or reduce premium costs" in compliance with Wis. Stat. § 40.03(6)(c); (3) a DOJ opinion that the decision would not breach GIB members' fiduciary duties; and (4) renegotiation of contracts with third-party insurers to reinstate the Exclusion. (DFOF ¶¶ 62–65.) That is, under GIB's decision, the Exclusion

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[2] That litigation remains ongoing. *See State of Texas v. Burwell,* No. 16-cv-00108 (N.D. Tex.).

would be removed from the Uniform Benefits as of January 1, 2017, but would be reinstated if and when all four contingencies were met. (DFOF ¶ 66.)

At one or more of the August 16, December 13, and December 30, 2016, meetings, at least one GIB member raised concerns about the costs of removing the Exclusion and the medical efficacy and nature of services associated with gender reassignment surgery. (DFOF ¶ 67.)

On January 30, 2017, ETF sent a memorandum to GIB confirming that all four contingencies had been met: (1) the Northern District of Texas issued a preliminary injunction against the HHS regulations (which remains in effect as of the date of this filing); (2) GIB's actuary predicted that reinstating the Exclusion would not increase premiums; (3) DOJ opined that reinstating the Exclusion would not breach GIB's fiduciary duties; and (4) ETF issued contract amendments reinstating the Exclusion. (DFOF ¶¶ 68–69.) The Exclusion became effective again on February 1, 2017, and has remained in place since then. (DFOF ¶ 70.)

ARGUMENT

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party 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). The opposing party may not rely solely on allegations in their complaint to defeat a summary judgment motion. Rather,

they must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c); *see also Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 627 (7th Cir. 2014). "[I]nferences that are supported by only speculation or conjecture" cannot defeat summary judgment. *Harper v. C.R. England, Inc.*, 687 F.3d 297, 306 (7th Cir. 2012) (citation omitted). Likewise, the opposing party must show there is more than a "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

I. Summary judgment should be granted to Secretary Conlin on Plaintiffs' equal protection claims under 42 U.S.C. § 1983.

The Constitution imposes no obligation on the State of Wisconsin to provide medical coverage or otherwise subsidize the medical expenses of its state employees. *See Maher v. Roe*, 432 U.S. 464, 469–70 (1977). But when the State decides to offer an employee health plan, "the manner in which it dispenses benefits is subject to constitutional limitations." *Id* at 40. The equal protection clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The guarantee of equal protection . . . a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from

treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

When reviewing a claim that state action violates the equal protection clause, a court must first determine the applicable level of scrutiny. *See Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). Discrimination on the basis of sex faces intermediate scrutiny: "To succeed, the defender of the challenged action must show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citation omitted). By contrast, state action that does not target a suspect class will be upheld if it bears a rational relation to some legitimate end. *Turkhan v. Perryman*, 188 F.3d 814, 828 (7th Cir. 1999).

Plaintiffs allege that Secretary Conlin, in both his official and individual capacities, is violating the equal protection clause and 42 U.S.C. § 1983 by "engaging in impermissible sex-based discrimination" and "discrimination on the basis of transgender status. (Dkt. 27 ¶¶ 85, 90.) To establish a sex discrimination claim under the equal protection clause, a plaintiff must demonstrate: (1) disparate treatment in relation to other similarly situated individuals, and (2) that the discriminatory treatment was based on sex. *See Johnson v. City of Fort Wayne*, 91 F.3d 922, 944 (7th Cir. 1996).

A. Summary judgment is proper on Plaintiffs' § 1983 official capacity claim against Secretary Conlin.

Plaintiffs' official capacity claim against Secretary Conlin seeks equitable relief against the Exclusion itself. But the claim fails first because the Exclusion does not discriminate based on sex or transgender status. Instead, it prohibits coverage for cosmetic surgery[3] meant to treat a psychological condition. Such treatments are not covered for anyone, regardless of their sex or transgender status. And even if the Exclusion does implicate the Plaintiffs' equal protection rights, it survives both rational basis and intermediate scrutiny because it advances the state's interests controlling health insurance costs and protecting public health.[4]

1. Rational basis scrutiny is proper.

Plaintiffs seek heightened equal protection scrutiny by alleging discrimination on two bases: transgender status and sex. But the Exclusion does not discriminate on either basis, and so it is only subject to rational basis review. And even if the Exclusion does discriminate on the basis of transgender

[3] *Cosmetic surgery* is surgery "devoted to the improvement or alteration of the human appearance." Collins Dictionary of Medicine (2004, 2005). The term "cosmetic" is merely a descriptor for the type of procedure at issue; it does not determine whether a clinician might deem the procedure medically necessary.

[4] Defendants also maintain that, as argued in their motion to dismiss, Secretary Conlin is not a proper official capacity defendant under the *Ex Parte Young* exception to Eleventh Amendment immunity. (Dkt. 29:12–15.) His office does not have a sufficient connection to the challenged policy, given its lack of authority over that policy.

status, that is not a suspect class entitled to heightened scrutiny under the equal protection clause.

a. The Uniform Benefits exclude coverage for all cosmetic treatments for psychological conditions and, as such, do not discriminate based on either sex or transgender status.

To establish discrimination on the basis of sex or transgender status, Plaintiffs must first establish that they were treated differently than similarly situated cisgender individuals. *Johnson*, 91 F.3d at 944. They cannot, because the Uniform Benefits neutrally exclude all coverage for cosmetic procedures meant to treat psychological conditions. The Exclusion merely states that surgical services associated with gender dysphoria are subject to the same generally-applicable cosmetic exclusion. As such, Plaintiffs are not being treated differently from similarly situated cisgender Group Health Plan participants and their equal protection claim fails.

The Exclusion provides that "[p]rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" are not covered under the Uniform Benefits. (DFOF ¶ 24.) Sex reassignment surgery includes any surgery that alters an individual's primary or secondary sex characteristics to align with their current gender identity. (DFOF ¶ 72.) These procedures thus adjust an individual's outward appearance to align it more closely with their perceived gender. As such, the procedures fall within the

definition of *cosmetic surgery*, which is surgery "devoted to the improvement or alteration of the human appearance." Collins Dictionary of Medicine (2004, 2005).[5]

In addition to the Exclusion at issue here, the Uniform Benefits *also* exclude coverage for "treatment, services and supplies for cosmetic . . . purposes." (DFOF ¶ 71.) This provision further states that "[p]sychological reasons do not represent a medical/surgical necessity." (DFOF ¶ 71.) So, for example, a hypothetical cisgender female diagnosed with severe depression due to negative body self-image could not obtain coverage for surgical procedures that modify her appearance (such as breast augmentation or rhinoplasty) in an effort to treat her depression. (DFOF ¶ 80.)

Rather than discriminate against transgender persons, the Exclusion thus ensures that cisgender and transgender members are treated equally. *Neither* cisgender nor transgender members may obtain coverage for cosmetic procedures meant to treat psychological distress. As the State Defendants' medical expert, Dr. Lawrence S. Mayer, explains, both transgender and cisgender individuals can suffer psychological distress associated with their

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[5] It is important to emphasize that Group Health Program members are not entitled to coverage for all medically necessary treatments. Rather, the Uniform Benefits provide that "[s]ome of the listed exclusions may be MEDICALLY NECESSARY, but still are not covered under this program." (DFOF ¶ 17.) Accordingly, a clinician's determination that a cosmetic procedure is medically necessary does not, alone, entitle any member to coverage, whether that member is seeking treatment for gender dysphoria or any other psychological condition.

outward appearance. (DFOF ¶ 81.) And Plaintiffs' own expert agrees that the purpose behind sex reassignment procedures is to "reliev[e] psychological distress" for transgendered individuals. (DFOF ¶ 74.) Therefore, transgender persons with gender dysphoria may not receive coverage to modify their body to treat their psychological condition, just as cisgender persons with psychological disorders regarding their physical appearance may not do so.

This coverage scheme conforms with *Geduldig v. Aiello,* 417 U.S. 484 (1974), which held that an insurance plan can choose to cover some risks while excluding others without running afoul of the equal protection clause. In *Geduldig,* the Supreme Court held that a disability insurance plan complied with the equal protection clause even though it declined to cover pregnancy-related disabilities. *Id.* at 494. The Court explained that the plan was not facially nondiscriminatory because "[t]here [was] no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'" *Id.* at 496–97. The Court further reasoned that:

> It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has.

Id. at 495–96.

Other cases, like *Geduldig*, confirm that health insurance benefit exclusions do not facially discriminate on the basis of sex, so long as they exclude coverage for comparable procedures for both sexes. For example, in *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679–81 (8th Cir. 1996), the court held that a benefits exclusion for infertility treatment did not discriminate against women because it applied to all infertile workers, both men and women. Likewise, *Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d Cir. 2003), held that a benefits exclusion for surgical impregnation procedures did not discriminate against women because "male and female employees afflicted by infertility are equally disadvantaged by the exclusion of surgical impregnation procedures." And *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 943–45 (8th Cir. 2007) upheld a benefits exclusion for contraception, again because it fell equally on both men and women.

Just as in *Geduldig* and these other cases, the Uniform Benefits provisions at issue are sex- and transgender-neutral. A transgender woman could not receive coverage for facial feminization surgery because she suffers distress from gender dysphoria. Nor could a cisgender woman receive coverage for facial feminization because she suffers severe depression related to her outward facial appearance which she perceives as masculine. Both the transgender and cisgender women receive no coverage for cosmetic procedures

to alleviate psychological distress, and so they are both treated equally under the Uniform Benefits. The State is entitled to make these distinctions in its insurance coverage, because it "may select one phase of one field and apply a remedy there, neglecting others" without violating equal protection. *Geduldig*, 417 U.S. at 494–95 (citation omitted).[6]

Since the Exclusion simply specifies procedures that are generally excluded for all Group Health Plan members—cosmetic procedures meant to alleviate psychological distress—Plaintiffs are not subjected to discrimination on the basis of sex or transgender status. Since there is no discrimination on the basis of a suspect class, rational basis review applies.

b. Any discrimination on the basis of transgender status only merits rational basis review.

Even if the Exclusion is viewed as discriminating on the basis of transgender status, rational basis review would still be appropriate. The Supreme Court has not recognized transgender status as a suspect class under the equal protection clause. And the Court has cautioned that the appropriate response to allegations of discrimination against a group is "not to create a new

[6] By asking this Court to invalidate the Exclusion, Plaintiffs effectively request *more* favorable treatment than the Uniform Benefits give to cisgender persons. If transgender people are entitled to coverage for cosmetic procedures that treat their gender dysphoria, that would be more favorable coverage than that given to cisgender people who enjoy no coverage for the same procedures that might treat their psychological disorders.

quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *see also id.* at 441 (noting that "courts have been very reluctant, as they should be in our federal system" to create new suspect classes). Accordingly, many district courts and courts of appeal have rejected treating transgender status as a protected class under the equal protection clause, and this Court should follow that approach.[7]

c. Treating Plaintiffs differently because of their psychological condition is not discrimination on the basis of sex.

Plaintiffs also assert an alternative basis for heightened equal protection scrutiny: sex discrimination. (Dkt. 27:20.) This argument also fails because the Exclusion does not treat Plaintiffs differently on the basis of sex, for reasons in addition to those in Argument I.A.1.a. above.

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[7] *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015); *Etsitty v. Utah Transit Auth.,* 502 F.3d 1215, 1227–28 (10th Cir. 2007); *Brown v. Zavaras,* 63 F.3d 967, 970-71 (10th Cir. 1995); *Doe v. Alexander,* 510 F. Supp. 900, 904 (D. Minn. 1981); *Braninburg v. Coalinga State Hosp.,* No. 1:08-CV-01457-MHM, 2012 WL 3911910, at *8 (E.D. Cal. Sept. 7, 2012); *Jamison v. Davue,* No. CIV S-11-2056 WBS, 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012); *Kaeo-Tomaselli v. Butts,* No. CIV. 11-00670 LEK, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013); *Lopez v. City of New York,* No. 05 CIV. 10321(NRB), 2009 WL 229956, at *13 (S.D.N.Y. Jan. 30, 2009); *Starr v. Bova,* No. 1:15 CV 126, 2015 WL 4138761, at *2 (N.D. Ohio July 8, 2015); *Murillo v. Parkinson,* No. CV 11-10131-JGB VBK, 2015 WL 3791450, at *12 (C.D. Cal. June 17, 2015); *Druley v. Patton,* 601 F. App'x 632, 635 (10th Cir. 2015); *Stevens v. Williams,* No. 05-CV-1790-ST, 2008 WL 916991, at *13 (D. Or. Mar. 27, 2008); *Rush v. Johnson,* 565 F. Supp. 856, 868 (N.D. Ga. 1983).

(1) The terms "gender identity" and "sex" are not synonymous.

Plaintiffs contend that "[d]iscrimination on the basis of transgender status, gender transition, or gender nonconformity is discrimination on the basis of sex." (Dkt. 27:20.) But classifying an individual because they are transgender (assuming the Exclusion does so) is not the same as classifying someone because of their sex.

Someone who is transgender has an incongruence between their sex (or gender assigned at birth) and their gender identity. (DFOF ¶ 77.) According to the American Psychological Association, sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. (DFOF ¶ 83.) Gender, on the other hand, refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. (DFOF ¶ 83.) Though one is born with the chromosomes, hormone prevalence, and external and internal anatomy of a particular sex, one is socially conditioned to take on the roles, behaviors, activities, and attributes of a gender identity. (DFOF ¶¶ 83–85.) As such, there is a distinction between "sex" as a biological designation and "gender" or "gender identity" as a cultural construct. (DFOF ¶ 85.)

Courts have recognized that heighted scrutiny should be reserved for "immutable" characteristics, such as sex. For example, in *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973), the Supreme Court reasoned that heightened scrutiny was appropriate for sex because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth," unlike "non-suspect statuses as intelligence or physical disability." *Id. See also Ulane v. E. Airlines, Inc.,* 742 F.2d 1081, 1087 (7th Cir. 1984) ("[I]f the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."); *Etsitty,* 502 F.3d at 1222 ("[T]here is nothing in the record to support the conclusion that the plain meaning of 'sex' encompasses anything more than male and female."); *Knussman v. Maryland,* 272 F.3d 625, 635 (4th Cir. 2001) (quoting *Frontiero*); *Sommers v. Budget Mktg., Inc.,* 667 F.2d 748, 750 (8th Cir. 1982) ("[T]he plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise."); *Johnston,* 97 F. Supp. 3d at 676 (sex "means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex.").

Thus, for equal protection clause purposes, sex and transgender status are not the same thing—sex is an immutable characteristic, whereas gender identity is a developmental, cultural process. (DFOF ¶¶ 83–86.) Plaintiffs'

claims alleging discrimination because of transgender status thus should not be treated like a traditional sex discrimination claim that enjoys heightened scrutiny.

(2) The Exclusion does not represent a form of sex stereotyping.

Plaintiffs may respond by citing *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), but there the Seventh Circuit declined to hold that "transgender status" was itself a suspect classification subject to heightened scrutiny. The court nevertheless subjected a single-sex bathroom policy to heightened scrutiny on the theory that the policy "show[ed] sex stereotyping." *Id.* at 1051. But the Exclusion here does not subject Plaintiffs to sex stereotyping, and so heightened scrutiny does not apply under *Whitaker*.

To see why, it is worth revisiting the case on which *Whitaker* primarily relied: *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the female plaintiff was denied partnership in an accounting firm, partly because members of the firm said that she was "macho," "somewhat masculine," needed to take "a course in charm school," and "overcompensated for being a woman." 490 U.S. at 235 (citation omitted). She was advised that she could improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have

her hair styled, and wear jewelry." *Id* (citation omitted). The Supreme Court found this to be adequate evidence that sex motivated the employment decision, reasoning that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250.[8] The gravamen of a sex stereotyping claim thus is behaviors, mannerisms, or appearances.

Unlike *Whitaker* or *Price Waterhouse,* the Exclusion here does not punish Plaintiffs based on a sexual stereotype. In all those cases, the plaintiffs suffered adverse action because they adopted cultural stereotypes of the gender that differed from their biological sex—e.g. aggressive workplace behavior (a male stereotype) by a biological woman. But here, the Exclusion does not require that Plaintiffs act in a certain way, dress in a certain way, use a certain bathroom, or otherwise conform with cultural stereotypes associated with their birth sex. Both Plaintiffs already identify as women—the Exclusion has not stopped them from doing so or otherwise punished them for their decision. (DFOF ¶ 3.)

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[8] *See also Glenn v. Brumby*, 663 F.3d 1312, 1318–20 (11th Cir. 2011) (applying sex stereotyping theory to biological male who "appear[ed] at work dressed as a woman" and giving example of a male "wearing jewelry that was considered too effeminate, carrying a serving tray too gracefully, or taking too active a role in childrearing"). Title IX sex stereotyping cases also focus on appearance and mannerisms. *See, e.g.*, *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1307 (D. Kan. 2005) (male student wore earrings, maintained unusual hairstyle, and declined to play basketball or football).

Instead, Plaintiffs want health insurance coverage to help them conform to cultural sex stereotypes. Plaintiffs—who already identify as female—demand coverage for treatment that would simply make them appear *more* feminine. As their own expert explains, Alina Boyden has the "intention of transforming secondary sex characteristics *that are considered feminine*," and Shannon Andrews "has always been drawn to femininity and expressions that explicitly are not male." (DFOF ¶ 87 (emphasis added).) They thus want health insurance coverage to give them sex characteristics "that are considered feminine." But "considered feminine" in what sense? The only possible meaning can be "considered feminine *based on sex stereotypes*." Providing coverage for such procedures would insert the State directly into the business of encouraging surgeries meant to conform peoples' appearances to their own perceived sex stereotypes.

The Exclusion's real effect is thus to remove the State from participating in surgical procedures that have anything to do with helping people conform to sex stereotypes. That principle applies in both directions—for example, cisgender women do not receive coverage for breast augmentation to appear (as they might perceive) more feminine, and neither do transgender women. In both cases, the member hopes to conform to a sex stereotype, but the state denies insurance coverage. Since the Exclusion is ultimately neutral regarding

sex stereotypes, *Whitaker* does not apply here and rational basis scrutiny applies.[9]

2. The state interests served by the Exclusion satisfy either intermediate scrutiny or rational basis review.

Regardless of the applicable standard of review—rational basis or heightened scrutiny—the Exclusion complies with the equal protection clause. The Exclusion furthers important government interests in minimizing the growth in health insurance costs and protecting public health, and so Plaintiffs equal protection claims fail.

a. Applicable law

To prevail under rational basis review, Plaintiffs must show that "(1) the state actor intentionally treated plaintiffs differently from others similarly situated; (2) this difference in treatment was caused by the plaintiffs' membership in the class to which they belong; and (3) this different treatment was not rationally related to a legitimate state interest." *Srail v. Vill. of Lisle*, 588 F.3d 940, 943 (7th Cir. 2009). "It is the plaintiff's burden to prove the government's action irrational." *Smith v. City of Chi.*, 457 F.3d 643, 652 (7th Cir. 2006). The presence or absence of animus is irrelevant; "a given action

[9] If this Court finds that *Whitaker* does control here, State Defendants respectfully submit that the case was wrongly decided because, among other reasons, it conflicts with the Seventh Circuit's prior decision in *Ulane*. State Defendants reserve the right to seek *en banc* or Supreme Court review regarding *Whitaker*'s applicability.

can have a rational basis and be a perfectly logical action for a government entity to take even if there are facts casting it as one taken out of animosity." *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 547 (7th Cir. 2008). Moreover, no evidentiary proof is required to support the proffered state interests—the government may "mak[e] decisions based on rational suspicions not confirmed by evidence satisfying some burden of proof." *RJB Properties, Inc. v. Bd. of Educ.*, 468 F.3d 1005, 1011 (7th Cir. 2006). Any state interest may be offered, "not just the one articulated at the time of decision (if a reason was given at all)." *Smith*, 457 F.3d at 652.

Intermediate scrutiny sets a higher bar. To succeed, "a party seeking to uphold government action . . . must establish an exceedingly persuasive justification for the classification and must show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. at 524 (citations omitted). The asserted state interests must be "genuine, not hypothesized or invented post hoc in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences" of the classification at issue. *Virginia*, 518 U.S. at 533. The asserted state interests need "not necessarily [be] recorded." *Id.* at 562 (Rehnquist, J., concurring). And unlike strict scrutiny which is often strict in theory but fatal in fact, intermediate scrutiny recognizes

that sex "has never been rejected as an impermissible classification in all instances." *Tagami v. City of Chi.*, 875 F.3d 375, 380 (7th Cir. 2017) (citation omitted).

Courts have recognized that containing health care costs and protecting public health are important government interests. *See IMS Health Inc. v. Sorrell*, 630 F.3d 263, 276 (2d Cir. 2010), *aff'd*, 564 U.S. 552 (2011) ("[W]e agree with the district court that Vermont does have a substantial interest in both lowering health care costs and protecting public health."); *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008), *abrogated on other grounds by Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) ("[C]ost containment is most assuredly a substantial governmental interest."; the state has a "substantial interest in reducing overall healthcare costs"). *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1127 (10th Cir. 2015) ("administrative convenience and economic cost-saving" are "relevant" to intermediate scrutiny analysis); *Stuart v. Camnitz*, 774 F.3d 238, 250–51 (4th Cir. 2014) (government has an important interest in "promoting psychological health" and preventing "psychological harm").

Likewise, the Supreme Court has recognized that conserving scarce resources and the related issues of "economic supply and distributional fairness" also qualify as important government interests. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 568 (1980). *See also id.* at 576

("[P]reventing . . . low quality health care [is a] 'substantial,' legitimate, and important state goal[].") (Blackmun, J., concurring).

b. The Exclusion is substantially related to the important government interest of containing health insurance costs.

Under rational basis review, the State's interest in containing health insurance costs easily justifies denying coverage for procedures and services related to gender reassignment surgery. Since this is an important government interest that satisfies intermediate scrutiny, it is also necessarily a legitimate government interest under rational basis review. *See Sorrell*, 630 F.3d at 276; *Ayotte*, 550 F.3d at 55. And there is an obvious logical connection between the Exclusion and containing health insurance costs, which is all the State needs to show to satisfy rational basis review. For each procedure, service, and supply related to gender reassignment surgery undertaken by a group health member that, absent the Exclusion, would be otherwise covered, the State saves a corresponding amount of health insurance costs.[10] (DFOF ¶ 90.) Given these cost savings, the Exclusion survives rational basis review.

[10] For the State's fully-insured plans, both the State and all covered members bear a share of those costs through their respective contributions to health insurance premiums. (DFOF ¶ 88.) For the State's self-insured plan—the pharmacy benefit—state employers directly bear all costs beyond those covered by members' premiums, co-pays, and deductibles. (DFOF ¶ 89.)

On this same basis, the Exclusion also survives intermediate scrutiny. The only difference here is that evidence is required to establish the connection between the important government interest—avoiding costs—and the Exclusion. Both the expert report of David Williams and analyses by actuaries at Segal Consulting demonstrate that providing health insurance coverage for gender reassignment surgery and related services (including lab tests, office visits, and the like) would impose a cost on the State. Based on Williams' analysis of insurance claims data from 2016 and the risk posed by uncertainties in that data, the State could expect to bear around $300,000 in yearly costs by removing the Exclusion. (DFOF ¶ 91.) Williams further explained that, in an adverse year, costs could even jump to around $800,000. (DFOF ¶ 92.) A report provided in January 2017 to GIB by Segal Consulting, a company that provides actuarial consulting services to ETF and GIB, estimated slightly lower costs of up to around $240,000 per year. (DFOF ¶ 93.)

As Williams opines, a number of factors explain the wide range in estimated costs, such as the relatively low proportion of covered members who will seek the treatment, the high range in costs of the treatment, the low amount of available claims data, and ambiguities in the claims data itself. (DFOF ¶ 94.) Despite these uncertainties and no matter what the specific dollar amount, no doubt exists that removing the Exclusion would impose costs on the State. And since every dollar spent on these procedures is a dollar that

drives up health insurance costs for the State and its members, there is necessarily a substantial relationship between the Exclusion and the State's interest in containing health insurance costs.

Lastly, ETF and GIB were considering the need to contain health insurance costs when evaluating the Exclusion throughout 2015 and 2016:

- The Governor and Wisconsin Legislature, through the 2015–17 State Budget, had required ETF and GIB to identify $25 million in savings in the Group Health Program. (DFOF ¶ 95.) Given this budget requirement, ETF and GIB were focused during 2015 and 2016 on cost reduction strategies, not on expanding coverage for additional categories of services, like those at issue in the Exclusion. (DFOF ¶ 96.)

- GIB members discussed how the Exclusion would help contain health care costs at one or more GIB meetings in late 2016. (DFOF ¶ 97–98.)

- A DOJ memorandum considered by GIB mentioned costs as a government interest served by the Exclusion. (DFOF ¶ 99.)

- Segal Consulting delivered to GIB in January 2017 a memorandum analyzing projected costs associated with removing the Exclusion. (DFOF ¶ 100.)

Given this evidence, it is undisputed that containing health care costs was one of the actual reasons behind the Exclusion.

Accordingly, whether under rational basis or intermediate scrutiny, the Exclusion passes muster as a measure designed to contain health insurance costs and survives Plaintiffs' equal protection challenge.

c. The Exclusion is substantially related to the important government interest of protecting public health.

In addition to controlling costs, the Exclusion passes rational basis review since it protects public health, another important government interest. *See Sorrell*, 630 F.3d at 276; *Stuart*, 774 F.3d at 250–51. Again, under rational basis review, no evidence is needed to support the government's policy—it need only have a logical connection to the interest. *RJB Properties*, 468 F.3d at 1011. GIB could rationally believe that gender reassignment surgery has not been adequately shown to be safe and effective for treating gender dysphoria. By declining to provide insurance coverage for gender reassignment surgery, the State avoids encouraging its members to undergo these unproven treatments. Logically, more members will undergo gender reassignment surgery if they can shift some or all of the cost onto their health insurance carriers. The Exclusion thus is rationally related to protecting public health and survives rational basis review.

This state interest also adequately supports the Exclusion under intermediate scrutiny, even assuming that standard applies. State Defendants' medical expert, Dr. Lawrence Mayer, a research biostatistician and psychiatrist, opines that "[m]edical and surgical treatments have not been demonstrated to be safe and effective for gender dysphoria." (DFOF ¶ 101.) He

similarly opines that "[t]he evidence that these interventions are safe, effective, and optimal is minimal." (DFOF ¶ 102.)

Mayer's opinion rests on a survey of evidence regarding both children and adults. An article he co-wrote explains that even though "epidemiological data on the outcomes of medically delayed puberty is quite limited, referrals for sex-reassignment hormones and surgical procedures appear to be on the rise, and there is a push among many advocates to proceed with sex reassignment at younger ages." (DFOF ¶ 103.) As for adults, Mayer notes that "[t]he high level of uncertainty regarding various outcomes after sex-reassignment surgery makes it difficult to find clear answers about the effects on patients of reassignment surgery." (DFOF ¶ 104.)

Moreover, Mayer notes that "[t]he potential that patients undergoing medical and surgical sex reassignment may want to return to a gender identity consistent with their biological sex suggests that reassignment carries considerable psychological and physical risk, especially when performed in childhood, but also in adulthood." (DFOF ¶ 105.) Even the federal government's Centers for Medicare and Medicaid Services found "inconclusive" clinical evidence regarding gender reassignment surgery. (DFOF ¶ 106.) This evidence establishes intermediate scrutiny's required substantial relationship between the Exclusion and the State's interest in promoting public health.

Evidence also shows that GIB considered the State's public health interest in late 2016:

- J.P. Wieske discussed at one or more GIB meetings in 2016 his view that private insurers were not providing coverage for gender reassignment surgery because, based on a medical review, they did not view such procedures as medically necessary. (DFOF ¶ 107–08.)

- The Wisconsin Department of Justice memorandum considered by GIB addressed potential safety concerns associated with gender reassignment surgeries. (DFOF ¶ 109.)

Again, this evidence shows that protecting public health was one of the actual reasons behind the Exclusion.

Since the Exclusion is substantially related to protecting public health, it survives Plaintiffs' equal protection challenge under either rational basis review or intermediate scrutiny.

B. Summary judgment is proper for Plaintiffs' § 1983 individual capacity claims against Secretary Conlin.

Plaintiffs' also seek to hold Secretary Conlin personally liable for the Exclusion under 42 U.S.C. § 1983, but those individual capacity claims fail for two reasons. First, no evidence shows that he had the necessary personal involvement in deciding to impose the Exclusion. Secretary Conlin's administrative role in implementing the Exclusion—over which he had no choice—does not suffice to hold him personally liable. Second, qualified immunity shields him from liability. No clearly established law shows either that the Exclusion violated the equal protection clause or that an official in

Secretary Conlin's position—i.e. one with no discretionary authority over the challenged policy—could be held personally liable for implementing a policy, as required by state law.

1. No evidence shows that Secretary Conlin had the requisite personal involvement in any discriminatory action.

To sustain an equal protection claim against individual defendants, "a plaintiff must [prove] that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal,* 556 U.S. 667, 676 (2009). In *Iqbal*, the Supreme Court made clear that an equal protection claim against a government supervisor requires a showing of intentional discrimination—that is, a showing that the official intended to discriminate on the basis of a protected class. *Id.* Purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." *Id.* (quoting *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279 (1979)). It instead involves a decisionmaker acting "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Id.* at 677 (alteration in original) (citation omitted).

Here, no evidence indicates that Secretary Conlin was personally involved in any decision—discriminatory or otherwise—to exclude Plaintiffs from health care benefits. The fact that ETF, under Conlin's direction, administers GIB's decisions does not suffice, since Conlin has no control over

those decisions. For example, in *Alicea v. Luzerne County Housing Authority*, the court dismissed a Title VII discrimination claim against the city defendant for lack of personal involvement. 2017 WL 489686, *3 (M.D. Pa. Jan. 3, 2017) (R & R), *adopted by* 2017 WL 489415 (M.D. Pa. Feb. 6, 2017). The complaint alleged discrimination by the housing authority, which operated under the city's apparent authority. *Id.* The court rejected the argument that this established the city's personal involvement, since the housing authority was a separate legal entity and "was fully vested with the power to administer [the city's] public housing program under Pennsylvania law." *Id.* The court dismissed the city because there was no showing that it was personally involved in the discriminatory conduct, and *respondeat superior* did not make it liable for the housing authority's actions. *Id.*

In another case, *Nolan v. Cuomo*, the plaintiff argued that the Commissioner of the New York State Division of Criminal Justice Services violated his equal protection rights by denying him the opportunity to be "declassified" as a registered sex offender. 2013 WL 168674, *1 (E.D.N.Y. Jan. 16, 2013). The court held that even though the Commissioner was responsible for establishing and maintaining the registry, state law did not authorize the Commissioner to make any determinations as to a sex offender's status. *Id.* at *10. Therefore, the Commissioner lacked personal involvement. *Id.*

Just as in *Alicea* and *Nolan*, Secretary Conlin's position as ETF's Secretary does not render him liable for GIB's decisions. While Conlin does ensure effective administrative and oversight of ETF operations, he does not decide the coverage provided under those plans—GIB sets the Uniform Benefits, and GIB decided to reinstate the Exclusion. (DFOF ¶¶ 61, 110–11, 113.) Moreover, after the final HHS regulations implementing Section 1557 were released, Conlin and ETF recommended that GIB remove the Exclusion; he was pleased when GIB voted to remove the Exclusion at its July 12, 2016 meeting. (DFOF ¶¶ 114–16.) When GIB began considering whether to reinstate the Exclusion, ETF's August 11, 2016, memorandum represented one of Conlin's efforts to persuade GIB not to do so. (DFOF ¶ 117.) 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. (DFOF ¶¶ 110–11, 113.) He has no personal opposition to providing the benefits at issue under the Exclusion, as a matter of employee benefits policy. (DFOF ¶ 118.)

There is no evidence of purposeful discrimination by Secretary Conlin, which "requires more than intent 'as volition or intent as awareness of consequences.'" *Iqbal*, 556 U.S. at 676–77 (citation omitted). Conlin's supervisory position at ETF alone is not sufficient to confer liability for GIB's decision. *Id.* at 677. Just as in *Nolan*, state law does not allow Conlin to make

coverage decisions other than what the Uniform Benefits require, and so he cannot be held personally liable. Summary judgment should be granted in his favor.

2. Qualified immunity shields Secretary Conlin from personal liability.

Qualified immunity shields officials from liability where their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (citation omitted). The court undertakes a two-step analysis to determine whether government officials are entitled to qualified immunity. First, it must determine whether the facts, viewed in the light most favorable to the plaintiff, show a violation of a constitutional right. *Gill v. City of Milwaukee*, 850 F.3d 335, 340 (7th Cir. 2017). Second, it must evaluate whether the constitutional right was clearly established at the time of the alleged violation. *See id.*

Here, the facts do not demonstrate that Secretary Conlin violated the Plaintiffs' rights under the equal protection clause. *See supra* Arg. I.A. And even if he did, such rights were not clearly established when Conlin acted.

a. Qualified immunity applies unless Plaintiffs can establish that the constitutional question was beyond debate under existing precedent.

State officials are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time." *Reichle v. Howards,* 566 U.S. 658, 664 (2012). "Clearly established" means that, at the time of the official's conduct, the law was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *Ashcroft v. al–Kidd,* 563 U.S. 731, 741 (2011). In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." *Id.* "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The plaintiff has the burden to establish that an action violated a clearly established right. *Kemp v. Liebel,* 877 F.3d 346, 351 (7th Cir. 2017).

b. Plaintiffs cannot provide case law clearly establishing that Secretary Conlin violated equal protection.

Plaintiffs' allege that Secretary Conlin, in his role as ETF's Secretary, personally discriminated against them because of their sex and transgender status. (Dkt. 27:20–21.) But no Supreme Court or Seventh Circuit precedent placed it beyond debate that Conlin can be held personally liable under these

circumstances. No binding precedent established any of the key principles at issue in this case: (1) whether coverage exclusions neutrally applicable to psychological disorders can be viewed as discrimination on the basis of sex or transgender status; (2) whether transgender status entitles Plaintiffs to heightened equal protection scrutiny; (3) whether states may justify coverage exclusions like the one here by pointing to health care costs or public health concerns; or (4) whether state officials with no authority over state employees' health insurance benefits can be held personally liable for the decisions of a separate entity that does have such authority.

The closest the Supreme Court has come to addressing any of these issues was in cases challenging school bathroom restrictions brought by transgender students. *See Whitaker,* 858 F.3d at 1039; *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720 (4th Cir. 2016). But petitions for certiorari were ultimately dismissed in both cases. *See Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker,* 138 S. Ct. 1260 (2018) (cert dismissed); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (cert dismissed). Thus the Supreme Court has not yet provided guidance regarding how to apply equal protection principles to transgender individuals.

In the absence of controlling case law concluding that state health plans must cover gender reassignment procedures, and that health plan administrators who oppose exclusions like this one can be held personally

liable for the decisions of a separate governing board, Secretary Conlin is entitled to qualified immunity. Conlin could not have known that either the Exclusion or his administration of the Group Health Program violated Plaintiffs' equal protection rights. Conlin is entitled to summary judgment.

II. Summary judgment should be granted to ETF and GIB on Plaintiffs' Title VII claims.

Plaintiffs also assert Title VII claims against ETF and GIB. Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate 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(a)(1). Plaintiffs argue that the Exclusion improperly discriminates against them because of their sex and transgender status in violation of Title VII. (Dkt. 27:23.)

ETF and GIB are entitled to summary judgment on these claims. First, Plaintiffs' claims fail as a matter of law because Title VII does not cover transgender status. Second, the claims fail because neither ETF nor GIB is an "employer" subject to liability under the circumstances here. GIB does not have the required 15 employees, and ETF is not an agent of Plaintiffs' employer because it has no discretionary authority over their health insurance benefits.

Third, the claims fail because Plaintiffs lack evidence that they were discriminated against because of their sex or transgender status.

A. Title VII allows claims based on "sex," not "transgender status."

Plaintiffs' Title VII claims fail as a matter of law because "Title VII does not protect transsexuals." *Ulane*, 742 F.2d at 1084. The *Ulane* court explained why Title VII prohibits discrimination because of person's "sex," not transgender status:

> The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e–2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies.

742 F.2d at 1085. *See also Etsitty*, 502 F.3d at 1222 (10th Cir. 2007) ("[T]ranssexuals are not a protected class under Title VII . . . .").

Plaintiffs may respond that *Ulane*'s holding does not apply here, citing a sex-stereotyping theory for transgender status claims like the one outlined in *Whitaker*, 858 F.3d at 1047–50. Plaintiffs may also cite *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc), a recent decision holding that Title VII covers sexual orientation claims. But *Hively* does not

control here because it did not address transgender status claims. And although *Hively* and *Whitaker* both endorsed a "sex stereotyping" rationale for expanding Title VII's protections to new classes of people, that theory does not support a claim based on the Exclusion. For the reasons discussed in Argument I.A.1.c.(2), the Exclusion does not discriminate based on sex stereotypes.

B. Plaintiffs' Title VII claims must be dismissed because neither GIB nor ETF is an "employer" subject to liability.

1. GIB cannot be liable because is not an "employer" under Title VII.

Title VII prohibits an "employer" from discriminating against individuals in the employment context because of their sex. 42 U.S.C. § 2000e-2(a)(1). An "employer" is defined as a "person engaged in an industry affecting commerce who has 15 or more employees . . . ." 42 U.S.C. § 2000e(b). Therefore, under Title VII, "an employer may be liable for its actions *only if* it . . . has 15 or more employees." *Chavero v. Local 241, Div. of the Amalgamated Transit Union*, 787 F.2d 1154, 1155 (7th Cir. 1986) (per curiam) (emphasis added).

Even assuming that GIB engages in an "industry affecting commerce," it does not have at least fifteen employees and thus does not meet the "employer" definition. GIB is comprised of only *11* members. (DFOF ¶ 19.) *See also* Wis. Stat. § 15.165(2). Further, GIB does not "employ" these members since it pays no wages nor provides benefits to them—or to any other person. (DFOF ¶ 32.)

Since GIB does not have 15 or more employees, it is not an "employer" and cannot be subject to Title VII liability.

Nor can GIB be found liable as an "agent" of Plaintiffs' employer, the Board of Regents. This Court held only that Plaintiffs adequately pleaded that GIB could be considered Plaintiffs' Title VII "employer" under an agency theory, even though GIB did not employ them. (Dkt. 67:17–18.) But even "agents" under Title VII must meet the statute's fifteen-employee threshold. The Seventh Circuit has explained that although the Title VII definition of "employer" includes an employer's "agent," that inclusion "is simply a statutory expression of traditional *respondeat superior* liability and imposes no individual liability on agents." *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995) (citing *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995) (interpreting the similar Americans with Disabilities Act definition of "employer").) In *Williams*, the court squarely held that an individual supervisor could not be liable for Title VII sex discrimination because he did not meet the definition of "employer." *Id.* at 555. Title VII liability thus cannot attach to an employer's "agent" when that agent does not meet the threshold that it employs at least 15 people.

Because the GIB is not an "employer," it cannot be liable under Title VII and Plaintiffs' claims against it necessarily fail.

2. ETF cannot be held liable under Title VII because it is not an agent of Plaintiffs' employer.

This Court also held that Plaintiffs adequately pleaded that ETF was an "agent" of their direct employer for Title VII purposes because "the factual allegations suggest that plaintiff's employers delegated to ETF/GIB the responsibility to determine which [services] should be covered under all of the offered health insurance plans." (Dkt. 67:18.) However, the undisputed facts fail to support this liability theory.

The Seventh Circuit has suggested that a plaintiff may maintain a Title VII claim "against an entity acting as an agent of the employer," but, even if this is a correct statement of law, that is a narrow exception that applies only "under certain circumstances." *Alam v. Miller Brewing Co.*, 709 F.3d 662, 668–69 (7th Cir. 2013). It applies only where the agent [1] "exercise[s] control over an important aspect of [the plaintiff's] employment, [2] 'significantly affects access of any individual to employment opportunities', or [3] where 'an employer delegates sufficient control of some traditional rights over employees to a third party.'" *Id.* at 669. (alteration in original) (citations omitted).

It is now undisputed that ETF had no "control" over whether the Exclusion should be applied to members of the Group Health Program, and thus it does not meet the first or third *Alam* agency factors. Although ETF administers aspects of the Group Health Program in certain ways, it has no

policy-making authority over the Uniform Benefits. (DFOF ¶ 34.) That is, ETF has no power to determine the scope of benefits offered to state employees under the Group Health Program. (DFOF ¶ 33.) Rather, it must follow and implement GIB's decisions regarding what benefits to provide. (DFOF ¶ 34.) Likewise, ETF has no authority to provide supplemental coverage to Plaintiffs or resolve any appeals regarding their coverage in any way other than in conformance with the Uniform Benefits. (DFOF ¶ 35.) ETF even issued memoranda advising GIB to *remove* the Exclusion from the Uniform Benefits. (DFOF ¶¶ 46–50, 55.) Once GIB voted to reinstate the Exclusion on December 30, 2016, ETF had no choice but to implement GIB's decision. (DFOF ¶ 36.) [11]

In effect, ETF is in the same position as the Dean Health Plan defendant that this Court already dismissed. This Court dismissed the Title VII claim against Dean because it was "only responsible for administering its health plans according to . . . dictated terms" and therefore "Dean [was] not an agent of plaintiff's employer with respect to employment practices, but rather a provider or vendor of services." (Dkt. 44:7.) Just like Dean, ETF must administer the Group Health Program according to the "dictated terms" that GIB places in the Uniform Benefits—including the Exclusion. So, just like

[11] The second *Alam* factor—significantly affecting access to employment opportunities—has no relevance here. Plaintiffs were not seeking employment opportunities; they sought health insurance benefits.

Dean, ETF is not acting as an agent of Plaintiffs' employer given its lack of control over the Exclusion and the content of health insurance benefits, generally.

Because ETF is not Plaintiffs' employer nor an "agent" of Plaintiffs' employer, it cannot be liable under Title VII for sex discrimination.

C. Plaintiffs' Title VII disparate treatment claims fail because there is no evidence of intentional discrimination.

Assuming that Plaintiffs' Title VII disparate treatment claim may proceed against either ETF or GIB, Plaintiffs must provide evidence that ETF or GIB purposely discriminated against them because of their sex. To evaluate any such evidence, the Seventh Circuit in *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016) instructed courts to "stop separating 'direct' from 'indirect' evidence and proceeding as if they were subject to different legal standards." In a disparate treatment claim, the test "is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's . . . sex . . . caused the . . . adverse employment action." *Id.* Here, this Court may "assess cumulatively all the evidence presented . . . to determine whether it permits a reasonable factfinder to determine" that either ETF or GIB purposely discriminated against Plaintiffs because of their sex. *Id.*

No such evidence exists. First, Plaintiffs cannot show that the Exclusion is facially discriminatory on the basis of transgender status or sex, for the same

reasons explained in Argument I.A.1. above. Since Plaintiffs lack evidence that the Exclusion is facially discriminatory, they must identify some other evidence of discrimination to survive summary judgment. But they have no other such evidence, as nothing in the record indicates that GIB created or reinstated the Exclusion for discriminatory reasons. To the contrary, legitimate, non-discriminatory reasons support the Exclusion for the same reasons explained in Arguments I.A.2.b.–c. above: a desire to contain health insurance costs and refrain from encouraging treatments that have an uncertain medical efficacy. Neither of these reasons represents invidious discrimination based on sex or transgender status. Rather, they are legitimate government interests that GIB can advance through policy means of its choosing.

As for ETF, this Court allowed Title VII claims against it to proceed because it was "not at all clear at [the pleading] stage" that "ETF took no intentionally discriminatory action." (Dkt. 67:16.) It noted the "uncertain" scope of ETF's role and explained that "[a]t this stage, it is not yet clear how much discretionary power ETF has during the appeal process, if any, or whether it could act to rectify a policy that it found illegal under federal law." (Dkt. 67:16.) Now that the record has been developed, there is no dispute that ETF had no authority to act in any other than that it did, for all the reasons explained in Argument II.B.2. above. Given ETF's lack of discretion regarding

how to administer the Uniform Benefits, including the Exclusion, no reasonable jury could find that it intentionally discriminated against Plaintiffs.

Since Plaintiffs lack evidence that they were discriminated against because of their sex or transgender status, summary judgment on their Title VII claims should be granted.

III. Summary judgment should be granted to ETF on Plaintiffs' Affordable Care Act Section 1557 claims.

In parallel with their Title VII claim, Plaintiffs also contend that the Exclusion violates Section 1557 of the ACA. This Court dismissed Plaintiffs' Section 1557 claim against GIB at the pleading stage; only a claim against ETF remains. (Dkt. 67:18–20.)

Section 1557 says that "an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity." 42 U.S.C. § 18116(a). Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity." 20 U.S.C. § 1681(a). Taken together, Title IX and Section 1557 prohibit "discrimination under any health program or activity" on the basis of "sex."

Plaintiffs' Section 1557 claim fails for four reasons. First, just like Title VII, Section 1557 does not extend to discrimination claims on the basis of transgender status. Second, no private right of action exists under Section 1557. Third, Congress did not expressly abrogate states' Eleventh Amendment immunity through Section 1557. Fourth, like under Title VII, Plaintiffs lack evidence that they were discriminated against because of their sex or transgender status.

A. Section 1557 allows claims based on "sex," not "transgender status."

Plaintiffs' Section 1557 fails as a matter of law first because Title IX—the anti-sex discrimination provision that Section 1557 incorporates—does not apply to claims based on transgender status. Since transgender status is not a protected class under Title IX, Plaintiffs Section 1557 claim fails.

At least two district courts have reached the same result under either the ACA or Title IX—the anti-discrimination statute from which Section 1557 borrows its prohibition on "sex" discrimination. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 687–89 (N.D. Tex. 2016) ("HHS's expanded definition of sex discrimination"—i.e. to include transgender status—"exceeds the grounds incorporated by Section 1557."); *Johnston.*, 97 F. Supp. 3d at 674–78 ("Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute.").

Nothing in Title IX's text suggests that the statute covers "transgender status." The statute's plain language is clear: "No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 28 U.S.C. § 1681 (emphasis added). The statute expressly prohibits exclusions "on the basis of sex," not "on the basis of sex or transgender status."

When Congress has intended to bar discrimination on the basis of transgender status in other statutes, it has said so explicitly. *See, e.g.*, 18 U.S.C. § 249(a)(2) (prohibits inflicting "bodily injury to any person, because of [his or her] actual or perceived religion, national origin, gender, sexual orientation, *gender identity,* or disability") (emphasis added); 42 U.S.C. § 12291(b)(13)(A) (prohibits discrimination "on the basis of actual or perceived race, color, religion, national origin, sex, *gender identity* . . ., sexual orientation, or disability") (emphasis added). That Congress did not use the same term in Title IX is strong evidence that it did not intend for the statute to cover transgender status.

Nor does the term "sex" encompass "transgender status." Dictionaries contemporaneous with Title IX's passage define "sex" in physiological terms—the biological differences between men and women. *See Franciscan All.*, 227 F. Supp. 3d at 688 (quoting three dictionaries); *see also Yates v. United States*,

135 S. Ct. 1074, 1082 (2015) ("Ordinarily, a word's usage accords with its dictionary definition."). Dr. Mayer similarly opines that "[g]ender is almost uniformly defined as a cultural construct while sex is a biological trait." (DFOF ¶ 85.) As Dr. Mayer further explains, "[t]here is no evidence that gender is innate, immutable, or present at birth." (DFOF ¶ 86.) As noted above, Seventh Circuit precedent affirms this distinction. *See Ulane*, 742 F.2d at 1084–85 ("[The district court] concluded that it is reasonable to hold that the statutory word 'sex' literally and scientifically applies to transsexuals even if it does not apply to homosexuals or transvestites. We must disagree.").

Legislative history also confirms that Title IX covers just what it says—"sex," not "transgender status." Nowhere in the Congressional debates over Title IX does the phrase "gender identity" or "transgender" appear. Rather, "[t]he legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions." 44 Fed. Reg. at 71423. This shows that Congress understood "sex" discrimination in physiological terms that do not extend to "transgender status."

Moreover, Congress has repeatedly refused to amend Title IX to cover "gender identity." In the past decade, Congress has rejected legislation that

would have expressly protected "gender identity" in the employment context.[12] Likewise, Congress recently failed to pass legislation that would have added to Title IX express protections for "gender identity."[13] The Senate sponsor of one such Title IX bill said that he hoped to "provide meaningful remedies for discrimination in public schools based on sexual orientation or gender identity, modeled on Title IX's protection against discrimination and harassment based on gender." 157 Cong. Rec. S1548-01 (2011) (statement of Sen. Franken). This clearly indicates that Congress does not view Title IX as applying to transgender status claims.

Administrative authority from other federal agencies reinforces this conclusion. On February 22, 2017, the U.S. Department of Justice and U.S. Department of Education (DOE) withdrew a prior "Dear Colleague" letter that had advised school districts of DOE's position that Title IX applies to transgender status claims. U.S. Dep't of Educ. (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf. These agencies noted that the withdrawn letter did not "explain how the position"—that is, that Title IX extends to transgender status—"is consistent with the express language of Title IX." *Id.*

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[12] H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 811, 112th Cong. (2011).

[13] H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015).

Lastly, the doctrine of constitutional avoidance supports this analysis. This canon of statutory construction is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

If Title IX is interpreted to cover transgender status, it would likely violate the Constitution's Spending Clause. "Title IX was passed pursuant to Congress' Spending Clause power." *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1028 (7th Cir. 1997). Spending Clause "legislation is 'in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005) (citation omitted). "The legitimacy of Congress's exercise of the spending power 'thus rests on whether the [entity] voluntarily and knowingly accepts the terms of the "contract."'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (citation omitted). "[T]here can . . . be no knowing acceptance of the terms of the contract if a State is unaware of the conditions imposed by the legislation on its receipt of funds." *Jackson*, 544 U.S. at 182.

Interpreting Section 1557 and Title IX to cover transgender status would violate this Spending Clause principle, since Wisconsin could have had no idea that this interpretation would someday prevail when it chose to accept federal funding in the form of Medicare Part D subsidies. (DFOF ¶ 48.) As explained

above, nothing in the text or history of Title IX indicates that the statute would someday apply to transgender status claims. Therefore, to avoid interpreting Section 1557 in a way that would violate the Spending Clause, it should not be read to cover claims based on transgender status.

B. No private right of action exists under Section 1557.

Plaintiffs' ACA claims also fail because no private right of action exists under Section 1557. *Pennhurst v. Halderman*, 451 U.S. 1 (1981) held that "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." To find a private right of action, Congress must "display[] an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). *Sandoval* further explains that "[s]tatutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87. Other cases have relied on this reasoning to reject § 1983 actions to enforce other federal statutes. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (no § 1983 action to enforce the Family Educational Rights and Privacy Act of 1974); *Suter v. Artist M.*, 503 U.S. 347 (1992) (same, Adoption Assistance and

Child Welfare Act of 1980); *Blessing v. Freestone*, 520 U.S. 329 (1997) (same, Social Security Act Title IV-D).

Since Title IX is a Spending Clause provision, Section 1557's prohibition on sex discrimination should be viewed as such, too. Section 1557 does not expressly state that private individuals can sue to enforce it. Accordingly, like the statutes at issue in *Sandoval*, *Gonzaga*, *Suter*, and *Blessing*, Section 1557 does not allow for private enforcement.

C. Section 1557 does not waive the State's Eleventh Amendment immunity.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This means that "[t]he Constitution does not provide for federal jurisdiction over suits against nonconsenting States." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72–73 (2000). *See also Kroll v. Bd. of Tr.*, 934 F.2d 904, 907 (7th Cir. 1991) ("[A] state agency is the state for purposes of the eleventh amendment."). Congress may abrogate Eleventh Amendment immunity, but only if it "unequivocally expressed its intent to abrogate that immunity" and "acted pursuant to a valid grant of constitutional authority." *Kimel,* 528 U.S. at 73.

Here, there is no unequivocal expression of Congressional intent to abrogate states' Eleventh Amendment immunity under Section 1557. Nowhere does the statute mention Eleventh Amendment immunity, and thus Congress has not "[made] its intention unmistakably clear in the language of the statute." *Id* (citation omitted). Even if it had, the attempted abrogation would fail because Congress lacked power under the Spending Clause to abrogate immunity in cases like this one. As explained in Argument III.A. above, interpreting Title IX—the relevant anti-discrimination provision—to cover transgender status claims would violate the Spending Clause. States would not have known that Title IX or Section 1557 reached such claims when originally deciding to accept federal funding. Any attempted abrogation for Section 1557 transgender status claims thus would be invalid.

Since there is no express abrogation here and any such attempt would be invalid, the Eleventh Amendment bars Plaintiffs' Section 1557 claim.

D. Plaintiffs' Section 1557 disparate treatment claim fails because there is no evidence of intentional discrimination.

Even if Section 1557 is found to contain a private right of action, it only contains one that applies to claims of disparate treatment. Title IX "implies a private right of action to enforce its prohibition on intentional sex discrimination." *Jackson,* 544 U.S. at 173. "Plaintiffs cannot proceed with a disparate-impact claim under § 1557, which incorporates Title IX's

enforcement mechanism for sex discrimination claims." *Briscoe v. Health Care Serv. Corp.*, 281 F. Supp. 3d 725, 739 (N.D. Ill. 2017). Plaintiffs thus must show that ETF intentionally discriminated against them in order to sustain their ACA claim.

Just as Plaintiffs lack evidence of discrimination because of their sex or transgender status under Title VII, they lack evidence of the same under Section 1557. *See supra* Argument I.A.1.a., II.C. Plaintiffs also lack evidence that anyone at ETF otherwise acted with discriminatory intent, both because ETF opposed GIB's decision to reinstate the Exclusion and because ETF had no power to do anything other than administer the Exclusion as GIB instructed. *See supra* Argument II.B.2.

In *Hayden ex rel. A.H. v. Greensburg Community School Corp.*, 743 F.3d 569 (7th Cir. 2014), the Seventh Circuit emphasized that Title IX liability for the decisions of another person or entity hinge on the defendant's own authority. There, a coach instituted a hair-length rule that applied only to boys teams, and the issue was whether to impute his intent to hold the school district liable under Title IX. The Seventh Circuit held that it could do so in that case, because the school district had power over the policy but did not modify it:

> Lest there by any question that his policy was the district's, when Mrs. Hayden protested the policy up through the district's chain of

> command, the policy was sustained and remained in place unmodified. The intent to discriminate is thus attributable to the school district.

Id. at 583. Here, by contrast, ETF has no such authority over whether to "sustain" or "modify" GIB's policies. Therefore, it would be improper to impute any intent to ETF under Section 1557, since it incorporates Title IX's substantive principles.

Title IX cases involving harassment claims against educational institutions for their employees' conduct reach the same result. The Seventh Circuit explains that "[i]n enacting Title IX, Congress sought to hold educational institutions liable for their own misconduct, not for the misconduct of an employee." *Hansen v. Bd. of Tr. of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 605 (7th Cir. 2008). Therefore, "[w]hen a Title IX claim for damages against the educational institution is based on a teacher's conduct, the plaintiff must prove that 'an official of the school district *who at a minimum has authority to institute corrective measures* . . . has actual notice of, and is deliberately indifferent to, the teacher's misconduct." *Id.* (emphasis added) (emphasis omitted). Like in *Hayden*, *Hansen* emphasizes that a Title IX defendant must have authority to correct the challenged conduct in order to be held liable. Here, ETF had no such authority and thus cannot be liable under Title IX or Section 1557.

CONCLUSION

For the foregoing reasons, summary judgment should be granted to the defendants and the case dismissed in its entirety. Specifically, summary judgment should be granted to Secretary Conlin on Plaintiffs' § 1983 individual and official capacity claims against him, to ETF and GIB on Plaintiffs' Title VII claims against them, and to ETF on Plaintiffs' Section 1557 claim against it.

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Respectfully submitted,

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