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 OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

This case is not about State Defendants' desire to harm, demean, or otherwise punish any beneficiaries of the Wisconsin Group Health Insurance Program because they are transgender. State Defendants have no such desire—and Plaintiffs identify no evidence that shows otherwise. State Defendants do not bar these transgender people from living out their gender identity. Transgender people are not fired from state employment for being transgender, they are not forbidden from marrying who they choose, they are not altogether excluded from state health insurance coverage, and they are not barred from obtaining plastic surgery to align their body with their gender identity. Simply put, State Defendants do not wish to interfere with how transgender people choose to live their lives.

This case presents a more difficult issue, one that concerns only those transgender people who suffer from gender dysphoria, a serious mental condition that unquestionably requires treatment: Must Wisconsin taxpayers finance expensive plastic surgery treatments that may not actually treat gender dysphoria, when coverage for similar procedures is denied to both cisgender and transgender persons to treat other psychological conditions? For a male-to-female transition, such plastic surgery can include genital surgeries, breast augmentation, facial feminization (such as rhinoplasty, reduction of the Adam's apple, and face-lifts), contour modeling of the waist,

liposuction, and gluteal (i.e. buttock) augmentation. (State Defendants' Proposed Findings of Fact (DFOF) ¶ 145.[1]) For a female-to-male transition, such plastic surgery can include genital surgeries, mastectomies, liposuction, and pectoral implants. (DFOF ¶ 146.)

It is obvious that providing health insurance coverage for such extensive surgery would impose a meaningful cost on taxpayers, who ultimately finance state employees' health insurance costs. And Plaintiffs have not identified a single well-designed study showing that any of these plastic surgeries effectively treat gender dysphoria. Rather, they point to studies showing, at most, that a patient's self-image may improve after receiving such procedures. But it is unremarkable that someone's self-image might improve after receiving thousands of dollars of plastic surgery. The real metric is whether this kind of plastic surgery reduces the incidence and prevalence of gender dysphoria—the mark of any true "treatment" for a disease or disorder. No such evidence exists. Accordingly, the state entity with a fiduciary duty to prudently manage state employees' health insurance—the Wisconsin Group Insurance Board (GIB)—could reasonably decide not to provide insurance coverage for these kinds of treatments.

[1] Citations to DFOF paragraphs 119 and above reference State Defendants' Additional Proposed Findings of Fact, filed concurrently with this brief. (Dkt. 121.) Citations to DFOF paragraphs 1 through 118 reference State Defendants' original proposed findings of fact at Docket number 88.

Nothing in that reasoning relies on irrational animus against transgender people, which explains why Plaintiffs' claims ultimately fail and summary judgment in their favor should be denied.

BACKGROUND FACTS

For a complete factual history of this case, State Defendants refer this Court to the Statement of Facts in their motion for summary judgment. (Dkt. 81:8–16.) To the extent Plaintiffs have misstated the facts in their summary, that is addressed below when relevant and in the concurrently-filed response to Plaintiffs' proposed findings of fact.

State Defendants and Plaintiffs largely agree that no material dispute of fact exists. As for the "who, what, where, and when," those facts are undisputed. Both sides agree that GIB acted in 2016 to remove and then reinstate the longstanding coverage exclusion for "[p]rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" (the "Exclusion"). (DFOF ¶¶ 24, 61–66; Plaintiffs' Proposed Findings of Fact (PFOF) ¶¶ 103, 125.) And both sides agree that Wisconsin Employee Trust Funds (ETF) and Secretary Conlin had no power over GIB's decision, but that, as required by state law, they took steps to implement that decision. (DFOF ¶¶ 33–36; PFOF ¶¶ 79–81, 83.)

The only disputed facts here revolve around the "why"—that is, the accuracy of GIB's asserted interests in (1) containing costs and (2) declining to

cover plastic surgeries with uncertain safety and efficacy when used to treat gender dysphoria, a psychological condition. State Defendants' experts say that the procedures would cost around $300,000 per year and have not been shown to be safe and effective for treating gender dysphoria (DFOF ¶¶ 91, 101–02); Plaintiffs' experts disagree. (PFOF ¶¶ 48–50, 53.)

But neither this Court (nor a jury) needs to resolve this battle of the experts to decide the case. Rather, this Court need only decide whether GIB's cost and medical concerns supply a reasonable basis for its decision. *See, e.g.*, *Turner Broad. v. FCC*, 910 F. Supp. 734, 739 (D.D.C. 1995) (in intermediate scrutiny case, "[a]s long as there is no material dispute that there is substantial evidence from which Congress could have drawn a reasonable inference, then the government is entitled to summary judgment"). Summary judgment is appropriate even if the Exclusion saves the State of Wisconsin $200,000 rather than $300,000 a year, or even if some studies might suggest that some gender dysphoric patients may feel better after undergoing gender reassignment surgery. What matters is that it is undisputed that removing the Exclusion would impose meaningful costs on taxpayers and that serious doubts exist regarding the state of the scientific evidence regarding the safety and efficacy of surgical treatments for gender dysphoria. That is enough to defeat Plaintiffs' motion for summary judgment and resolve this case in State Defendants' favor, as discussed further below.

ARGUMENT

I. State Defendants do not dispute standing, at least for purposes of this summary judgment motion.

State Defendants do not dispute that, under this Court's decision on standing in its order on their motion to dismiss (Dkt. 67:4–13), Plaintiffs have standing to sue ETF, GIB, and Secretary Conlin. However, State Defendants reserve the right to challenge that decision in any appeal and renew their standing challenge, if the case is ultimately remanded on those grounds.

II. Plaintiffs should be denied summary judgment on their Title VII claims against ETF and GIB.

Plaintiffs are not entitled to summary judgment on their Title VII claims against ETF and GIB for two reasons. First, they fail to offer facts showing that either one is a proper Title VII defendant—GIB does not have the requisite 15 employees, and ETF is not an agent of Plaintiffs' employer because it had no discretion over the challenged benefits policy. Second, even if ETF or GIB were proper defendants, Plaintiffs cannot show that the Exclusion discriminates against them on the basis of sex, and so Title VII does not apply here.

A. ETF and GIB are not proper Title VII defendants.

Plaintiffs maintain that ETF and GIB can be held liable under Title VII because they are "agents of [Plaintiffs'] direct employer, the Board of Regents, for purposes of health insurance coverage." (Dkt. 97:20).) In their view, GIB is

liable "for establishing the discriminatory terms of Plaintiffs' health insurance coverage and contracting with private insurance companies to administer that coverage," and "ETF is liable for implementing and enforcing the terms of the discriminatory coverage." (Dkt. 97:20.)

First, Plaintiffs misplace their reliance on *Alam v. Miller Brewing Co.*, 709 F.3d 662, 668–69 (7th Cir. 2013). (Dkt. 97:20–21.) *Alam* did not actually hold that non-employing entities like ETF can be "employers" under Title VII when they receive delegated control over traditional employer rights. Rather, *Alam* assumed *arguendo* that this *could* be a viable Title VII theory, relying on non-precedential decisions from other circuit and district courts. 709 F.3d at 668–69. Moreover, *Alam* avoided resolving the agency issue altogether by holding that the plaintiff was an independent contractor, not an employee of any defendant. *Id.* at 669. This Court should not depart from established Seventh Circuit holdings that require an employer-employee relationship for Title VII liability to attach.

Further, as explained in State Defendants' summary judgment brief, neither GIB nor ETF is a proper Title VII defendant here, even if the agency theory addressed in *Alam* is correct. As for ETF, Plaintiffs have not developed facts that support this Court's holding at the pleading stage 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. 81:50–52.) Rather, the facts show that ETF did not receive any delegated "responsibility" or authority from the Board of Regents to determine any covered services under the Uniform Benefits (and in fact opposed GIB's decision). (Dkt. 81:50–52; DFOF ¶¶ 33–36, 46–50, 55.) This explains why *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) does not allow for Title VII liability against ETF. The state benefits administrator there freely chose to offer a discriminatory benefits plan to its employees, whereas here, ETF had no such freedom—it had to offer the plans GIB approved. *Id.* at 1075–76, 1088–89.

And as for GIB, it does not employ 15 people and thus cannot be an "employer" under Title VII's definition, regardless of Plaintiffs' *Alam* agency theory. (Dkt. 81:48–49.)

Plaintiffs respond that these arguments amount to the "magic trick" that this Court rejected at the pleading stage. (Dkt. 97:21 n.6.) This response misses the mark for two reasons. First, the fact that GIB lacks 15 employees was not (and was not required to be) raised at the pleading stage, and so this Court did not consider it. Second, this Court outlined a Title VII theory that *could* subject ETF to liability, if discovery revealed sufficient facts to support the theory, but discovery did not ultimately support that theory.

Similarly, Plaintiffs contend that the State of Wisconsin cannot "evade responsibility" here by "divid[ing] authority for setting and administering that policy between GIB and ETF." (Dkt. 97:21 n.6.) But State Defendants are not arguing that the State of Wisconsin or state agencies can *never* be liable under Title VII—that argument obviously would be wrong. Rather, State Defendants argue that Title VII simply does not apply to GIB and ETF under the circumstances presented here. Title VII liability is a creature of statute, and it can only be imposed when the defendants fit within the statute's bounds. Employees have no free-floating federal statutory right to sue their employers—whether state agencies or otherwise—for discrimination. Such suits can only be maintained under Title VII when brought against an entity that meets the statutory definition of "employer." Here, neither ETF nor GIB fits that bill—GIB is not an "employer" in the first instance and ETF is not Plaintiffs' employer through an agency theory. Title VII has certain requirements for liability that ETF and GIB simply do not meet, and so Plaintiffs are not entitled to summary judgment on this claim.

Rather, summary judgment in State Defendants' favor on this claim is proper.[2]

Plaintiffs cite *Quinones v. City of Evanston,* 58 F.3d 275, 278 (7th Cir. 1995), arguing that ETF can be subjected to Title VII liability, even though it had no control over the Exclusion here. *Quinones* was a case about prospective pension relief for certain firefighters based on the Age Discrimination in Employment Act (ADEA). The plaintiff there properly sued the City of Evanston for a discriminatory pension plan, even though Evanston was simply following state law. But the holding meant that Evanston had to prospectively fund the plaintiff's pension fund, not pay retrospective damages. That is the difference from Plaintiffs here, who seek compensatory damages against ETF under Title VII for simply carrying out its statutory obligation to implement GIB's decisions. Further, *Quinones* noted that Evanston could have resolved any conflict between state and federal law by disestablishing its fire department, 58 F.3d at 278, but here, ETF would have no legal basis for similarly declining to offer health insurance to state

[2] This does not mean no proper defendant exists here. Official capacity claims under 42 U.S.C. § 1983 alleging constitutional violations by the state officials who made the decision about which Plaintiffs complain—GIB members—would be proper, at least with respect to the proper defendants' identity. (To be clear, this does not suggest that GIB would be liable on the merits of the constitutional claim.) Official capacity § 1983 claims can run against government officials who create allegedly unconstitutional policies and, if proven on the merits, could entitle Plaintiffs to the prospective equitable relief that they seek.

employees. *See* Wis. Stat. § 40.52(1). Another difference is that *Quinones* did not consider the legal standard for agency liability under Title VII—there is no obvious reason why *Quinones*' analysis of proper governmental ADEA defendants has anything to do with the issue here, which is whether ETF can be held liable under a Title VII agency theory.

Quinones can also be distinguished at a more fundamental level. There, the defendant itself believed that the policy it implemented, as required by state law, "conflict[ed] with federal law." *Quinones*, 58 F.3d 277. Here, even assuming GIB's decision was contrary to Title VII, it was not obviously so, as explained in State Defendants' summary judgment brief. (Dkt. 81:46–54.) What exactly was ETF supposed to do when faced with, on one hand, a clear state law requirement to implement GIB's Exclusion decision and, on the other hand, ambiguous Title VII obligations? Unlike in *Quinones*, ETF did not knowingly choose to follow state rather than federal law. It would make little sense to hold ETF liable for money damages under Title VII just because ETF did not adopt Plaintiffs' novel reading of that statute, in the absence of any binding Seventh Circuit or Supreme Court precedent. *Quinones* thus is not applicable here, and summary judgment for Plaintiffs' on their Title VII claims against ETF and GIB should be denied.

B. Even assuming GIB or ETF is a proper Title VII defendant, neither one discriminated against Plaintiffs on the basis of sex or transgender status.

Turning to the substance of Plaintiffs' Title VII claim, they first argue that the Exclusion facially discriminates against them under Title VII "because they are transgender." (Dkt. 97:22.) This argument fails because Seventh Circuit precedent (which Plaintiffs do not even mention) forecloses it. In *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984), the court expressly held that "Title VII does not protect transsexuals." This means that discrimination because of "sex" under Title VII does not encompass discrimination because of a "sexual identity disorder or discontent with the sex into which [one was] born." *Id.* at 1085, *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) ("[D]iscrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII.").

To avoid *Ulane*, Plaintiffs argue that the Exclusion violates Title VII because it rests on sex stereotyping, citing *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018). (Dkt. 97:22.) That argument fails because, as explained in State Defendants' summary judgment brief, (1) the Uniform Benefits exclude coverage for all surgical treatments for psychological conditions

(Dkt. 81:20–24[3]), and (2) the Exclusion does not represent the kind of sex stereotyping at issue in those cases. (Dkt. 81:28–31.)[4]

Rather, the Exclusion essentially removes the State from subsidizing any procedures that are meant to conform gender dysphoric individuals to sex stereotypes. As State Defendants' psychiatric expert explains, "gender transition seems to be culturally defined. What it means to transition to be more male or more female is a cultural definition." (DFOF ¶ 140.) Mayer also explains that "the characteristics that we identify as being male or female are very culturally dependent." (DFOF ¶ 141.) So when Plaintiffs like Boyden and Andrews seek state insurance coverage for surgery that will modify their appearance to make them appear "more female," they effectively ask the State to help them conform to cultural stereotypes about how the female body "should" appear. By declining to provide that kind of coverage, the State takes

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

[4] Plaintiffs also offer a misleading quotation of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). (Dkt. 97:22.) *Price Waterhouse* said only that employers cannot "evaluate employees by assuming or insisting that they matched the stereotype associated with their group." 490 U.S. at 251. It said nothing about "employees' anatomy." Moreover, the case had nothing to do with insurance coverage to alter anatomy—it concerned only employees who did not conform to behavioral sex stereotypes. The other cases Plaintiffs cite all also relied on a sex stereotyping theory and thus they do not apply here for the same reasons. *See Kastl v. Maricopa Cty. Cmty. Coll. Dist.,* No. CIV 02-1531-PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 214 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–03 (9th Cir. 2000).

an agnostic position on how men and women "should" appear, as determined by cultural stereotypes.

GIB's inaction—a refusal to help Plaintiffs conform to sex stereotypes—is precisely the opposite of the actions at issue in *Whitaker* and *Harris*. There, the plaintiffs were disadvantaged because they wanted to act in ways that *differed* from cultural sex stereotypes. Here, Plaintiffs want insurance coverage to help them *conform* to cultural sex stereotypes. Put differently, the defendants in *Whitaker* and *Harris* actively sought to prevent transgender people from transgressing sex stereotypes. In *Whitaker*, that meant barring a transgender boy from using a school's restrooms for boys. 858 F.3d at 1040–42. In *Harris*, that meant firing a transgender woman for presenting as a woman at work. 884 F.3d at 567–69. But GIB is not stopping Plaintiffs from transgressing sex stereotypes—they may use the restroom of their choice or present as women at work. By declining to provide an insurance subsidy, GIB refuses either to prevent Plaintiffs from transgressing sex stereotypes or to encourage them to do so. Refusing to subsidize Plaintiffs' physical transformation through health insurance coverage is not the same as actively barring them from expressing their gender identity through behavior.

Plaintiffs' sex stereotyping theory also should be rejected because it would open the floodgates to mandatory insurance coverage for many plastic surgeries, and not just for transgender people. The Uniform Benefits do not

cover plastic surgery for cisgender people to better align their gender identity with sex stereotypes. So, for instance, a clinically depressed cisgender women cannot obtain coverage for breast augmentation to make her appear "more female." (DFOF ¶ 80.) But it is unclear how such a policy would be permissible under Plaintiffs' sex stereotyping theory. So long as the cisgender person could find a clinician who saw the plastic surgery as medically necessary, Plaintiffs' sex stereotyping theory would mean GIB could not deny that coverage under Title VII (or the equal protection clause, for that matter). It cannot be correct that Title VII (or the Constitution) entitles both cisgender and transgender people to insurance coverage for plastic surgery to make them appear "more male" or "more female," whichever it may be. This was not the holding of *Whitaker* or *Harris*, and those decisions should not be extended to find that questionable new right in Title VII.

Lastly, any reliance on *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc) would also be inapt. The court there used a thought experiment to find that Title VII outlaws sexual orientation discrimination: if the plaintiff (a woman discriminated against for having a female partner) had instead been a man, she would not have suffered the same treatment. *Id.* at 345–46. Sexual orientation discrimination thus discriminates on the basis of sex, contrary to Title VII. But that same approach breaks down here. If Plaintiffs had been born as the female sex,

they would not be seeking any surgical treatments at all, since their birth sex would match their female gender identity. It is thus nonsensical to swap their sex, as the *Hively* court imagined. The only conceivable characteristic that, if swapped, could possibly result in different treatment is gender identity—but that characteristic is different from sex, and thus does not trigger Title VII. (DFOF ¶¶ 84, 151; PFOF ¶ 21.) Moreover, even swapping Plaintiffs' gender identities would not reveal disparate treatment, since neither transgender nor cisgender people receive coverage for surgical treatments for psychological conditions. (DFOF ¶¶ 71, 80.) *Hively* thus does not apply here.

For these reasons, and all others described in the Title VII portion of State Defendants' summary judgment brief (Dkt. 81:50–58), summary judgment to Plaintiffs' should be denied on their Title VII claims.

III. Plaintiffs should be denied summary judgment on their equal protection claims under 42 U.S.C. § 1983 against Secretary Conlin.

Plaintiffs' equal protection claims against Secretary Conlin in both his official and individual capacities fail.[5] The official capacity claims fail for two reasons. First, Plaintiffs fail to show that the Exclusion discriminates on the basis of a protected class and it passes muster under rational basis review. Second, the Exclusion would survive heightened scrutiny as a measure designed to contain costs and to avoid subsidizing unproven surgical treatments for gender dysphoria. As for the individual capacity claims, Plaintiffs do not expressly seek summary judgment. They make no argument that Secretary Conlin is personally liable for GIB's decision, except to reference their standing arguments—which have little if anything to do with an official's personal liability under § 1983. In any event, Conlin does not have sufficient personal involvement to substantiate a discrimination claim against him, and he is otherwise entitled to qualified immunity.

[5] Plaintiffs vaguely assert that "members of GIB" have violated Plaintiffs' rights (Dkt. 97:25), but they do not develop any arguments regarding individual capacity claims against GIB members. Moreover, this Court granted State Defendants leave until August 1, 2018, to file a dispositive motion regarding these newly-added defendants. (Dkt. 109:3 n.4.) Accordingly, State Defendants will not address individual capacity claims regarding GIB members in this opposition but reserve the right to do so in a later motion.

A. Plaintiffs' official capacity claims fail because the Exclusion survives equal protection scrutiny.

1. Rational basis review, not heightened scrutiny, applies here.

Much like under Title VII, Plaintiffs argue that the Exclusion amounts to a sex classification that triggers heightened equal protection scrutiny because it rests on sex stereotyping, citing *Whitaker*, 858 F.3d at 1051, and *Glenn v. Brumby*, 663 F.3d 1312, 1318–20 (11th Cir. 2011). (Dkt. 97:27.) That argument fails under equal protection for all the reasons described in the Title VII section above and in State Defendants' motion for summary judgment. (Dkt. 81:28–31.)

Separately, Plaintiffs argue that they are entitled to heightened scrutiny as transgender individuals. This argument fails first because the Exclusion does not classify anyone on the basis of transgender status. As explained in State Defendants' summary judgment brief, the Exclusion differentiates on the basis of psychological conditions. (Dkt. 81:20–24.) No state employees (or their adult and minor family members) are entitled to cosmetic surgery to treat psychological conditions, whether they have gender dysphoria, severe depression, body dysmorphic disorder, or any other condition. Moreover, the Exclusion only applies to people with gender

dysphoria, and not all transgender people have gender dysphoria.[6] (DFOF ¶ 152.) This shows that the Exclusion does not indiscriminately target all transgender people because of their transgender status; rather, it affects only the subset of transgender people who, like other non-transgender state employees, may seek surgical treatment for a psychological condition.

Essentially, GIB has chosen to treat individuals with psychological conditions differently from those with other types of illness or injury. This is permissible because persons suffering from mental disorders are not a suspect class. In *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 445–46 (1985), the Court held that rational basis review applied to a city zoning ordinance that discriminated against mentally handicapped individuals. *Id.* The Court found that heightened scrutiny should not apply because "it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." *Id.* at 445. The Court mentioned "the aging, the disabled,

[6] The World Professional Association for Transgender Health (WPATH) guidelines on which Plaintiffs rely state that "[s]urgery . . . is often the last and the most considered step in the treatment process for gender dysphoria." (DFOF ¶ 155 (alteration in original).) Since one must have a gender dysphoria diagnosis to obtain the surgical treatment at issue under the Exclusion, the provision applies only to people with gender dysphoria.

the mentally ill, and the infirm" as among these groups, declining to extend heightened scrutiny. *Id.* at 446. For these same reasons, Plaintiffs—suffering from gender dysphoria—are not burdened because of their membership in a suspect class.

Even if the Exclusion did rely on transgender status, whether that status enjoys heightened scrutiny remains an open question in the Seventh Circuit. *See Whitaker*, 858 F.3d at 1051 ("[T]his case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny.")[7] Plaintiffs point to four factors sometimes used to establish new suspect classes: (1) a history of discrimination against the class; (2) the class's ability to contribute equally to society; (3) whether the class's defining characteristic is "immutable"; and (4) whether the class is "politically powerless." (Dkt. 97:27–28 (citing *Wolf v. Walker*, 986 F. Supp. 2d 982, 1011 (W.D. Wis.), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014)).)

While transgender people have surely experienced discrimination and can contribute equally to society, Plaintiffs fail to establish the third and fourth factors. No scientific evidence demonstrates that transgender status is "immutable." (DFOF ¶ 84.) Rather, studies indicate that gender dysphoria

[7] Many cases from other circuits agree that transgender people are not a protected class entitled to heightened scrutiny. (*See* Dkt. 81:25 n.7.)

persists into adulthood for only 12–27% of children—a fact which strongly suggests that some of those people no longer adopted a transgender gender identity as adults. (DFOF ¶ 150.) Nor have Plaintiffs shown that transgender people are politically powerless. To the contrary, sufficient political will existed during the Obama administration to enact measures meant to protect transgender rights. (DFOF ¶ 156.) Similarly, several states and cities have enacted legislation to protect gender identity and prohibit discrimination based on gender identity in either employment, housing, or public accommodation. (DFOF ¶ 157.) Many non-governmental organizations devote significant resources to promoting transgender rights. (DFOF ¶ 158.) Likewise, editorial boards of prominent, nation-wide newspapers support transgender rights. (DFOF ¶ 159.) This robust legislative, social, and political movement in favor of transgender rights "negates any claim that" transgender individuals "are politically powerless in a sense that they have no ability to attract the attention of the lawmakers." *City of Cleburne,* 473 U.S. at 445.

To be sure, the current presidential administration has taken a different position than the prior one on some transgender issues, but that simply indicates that transgender topics are subject to the push-and-pull of ordinary politics. It does not show that transgender people are so politically powerless that they cannot defend themselves without the special

constitutional shield of heightened scrutiny, a shield which the Supreme Court has hesitated to extend beyond the traditional suspect classes of race, national origin, and sex. *City of Cleburne*, 473 U.S. at 445–47. Nor does the fact that transgender people make up a small percentage of the population combined with past discrimination suffice. Past discrimination is logically distinct from current political powerlessness, and Plaintiffs make no effort to demonstrate the latter.

Rational basis, not heightened scrutiny, thus applies to Plaintiffs' equal protection claims.

2. Plaintiffs' claims fail under either heightened scrutiny or rational basis review.

a. The Exclusion survives heightened scrutiny.

Plaintiffs argue that the Exclusion fails heightened scrutiny first because the asserted state interests were "proposed after the fact in response to litigation" and "not the basis for GIB's decision." (Dkt. 97:30.) This ignores the evidence described in State Defendants' motion showing that both cost and medical efficacy were, in fact, discussed at GIB meetings around the time that it was considering the Exclusion in 2016. (Dkt. 81:36, 39.) Plaintiffs ignore this evidence and instead cite the fact that State Defendants supplemented their interrogatory responses during this litigation, a fact that

has nothing to do with the state interests underlying the Exclusion. (Dkt. 97:30 (citing PPFOF ¶¶ 148–49).)

More fundamentally, the nature of health insurance makes it obvious that cost and medical efficacy lie at the foundation of nearly (if not every) coverage decision. Every additional benefit provided imposes some cost on a health insurance program, a fact GIB members have acknowledged. (DFOF ¶¶ 161, 172–73.) And coverage decisions must rest, in part, on whether the treatments at issue have been shown to be safe and efficacious. (DFOF ¶¶ 162, 169–71.) With that in mind, it makes little sense to delve into the minds of the specific GIB members who voted to reinstate the Exclusion in 2016. As Plaintiffs argued in seeking leave to amend their complaint, they "challenge the exclusion itself, not one decision to reinstate it" and "[t]he exclusion has existed since 1994, but was not removed by Defendants until 2016." (Dkt. 107:6.) Since Plaintiffs do not simply challenge "one decision," then GIB should not be limited to the evidence considered immediately before that "one decision."

Plaintiffs rely on *United States v. Virginia*, 518 U.S. 515 (1996), to convince this Court to ignore State Defendants' expert witnesses, arguing that their reports were not written until after this litigation began. But the policy at issue in *Virginia* originated with the Virginia Military Institute's founding in 1839 as a single-sex school. Yet the Supreme Court still

considered expert testimony that Virginia developed and presented at trial, one which took place over 150 years after the policy's origin. *See, e.g.*, *id.* at 523 ("Trial of the action consumed six days and involved an array of expert witnesses on each side."), 540–41 (discussing expert testimony Virginia presented at trial). While the Supreme Court ultimately dismissed Virginia's evidence as "generalizations," *id.* at 550–51, it still considered that evidence on the merits.

This approach makes sense, especially when dealing with new constitutional challenges to old policies, and even more if those policies were enacted when the affected class was not clearly entitled to heightened scrutiny. The policy in *Virginia* otherwise would have been struck down based on the lack of evidence regarding its motivations in 1839 when founding the school; no trial would have been necessary. Similarly, when GIB reinstated the Exclusion in December 2016, no Seventh Circuit or Supreme Court precedent established that transgender status was a protected class. (*Whitaker* now comes closest, but that case was not decided until May 2017, after GIB reinstated the Exclusion.) GIB thus acted on the presumption that rational basis review would apply to its decision, the default mode of review for all government policies that do not affect a protected class. *See Heller v. Doe*, 509 U.S. 312, 319 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong

presumption of validity."). It would be fundamentally unfair to forbid GIB from relying on evidence generated once the Seventh Circuit indicated that heightened scrutiny might apply to transgender status claims.

On the merits, the state interests reflected in State Defendants' expert reports do not rest on "overgeneralizations and speculation," as Plaintiffs argue. (Dkt. 97:31.) Rather, they reflect a detailed analysis of the costs of providing the coverage at issue in the Exclusion (DFOF ¶¶ 91–92, 142–44) and the paucity of medical evidence to support the safety and efficacy of the relevant surgical procedures as a treatment for gender dysphoria. (DFOF ¶¶ 101–105, 120–39.)

And Plaintiffs' argument that the Exclusion is not "substantially related" to the asserted state interests rings hollow. On cost, Plaintiffs' major objection seems to be that the potential costs would likely amount to a small percentage of total premium costs for Wisconsin's Group Health Insurance Program. (Dkt. 97:31.) But that is a non sequitur. The state interest at issue is to contain overall health care costs that state taxpayers must bear; retaining the Exclusion avoids imposing around $300,000 a year of additional costs on the Group Health Insurance Program. (DFOF ¶¶ 92–93.) That establishes a direct relationship between the Exclusion and the asserted state interest—especially at a time GIB had a budget mandate to identify $25 million in savings. (DFOF ¶ 95.) Plaintiffs cite no authority that establishes

some threshold dollar amount that must be saved by a health insurance decision before that decision is "substantially related" to avoiding increased health insurance costs.

What Plaintiffs really argue is that the projected cost is too low to be important, but that argument is flawed for two reasons. First, it assumes small costs can never add up to a meaningful one—but a $300,000 yearly cost adds up to $3 million over ten years, and ten similar health insurance provisions that each cost $300,000 add up to $3 million in one year. Under Plaintiffs' view, GIB would have no real reason to address any such "low-cost" provisions even though, when taken together, they clearly impose significant costs. (DFOF ¶ 144.) Second, the decision about which costs are significant enough to address is up to the body with a fiduciary responsibility to manage the Group Health Insurance Program—GIB—who, again, needed to find $25 million in savings at the time. (DFOF ¶¶ 95–96, 143.) In essence, Plaintiffs argue that the Constitution prevents the GIB from considering even relatively small costs. It does no such thing.

Separate from costs, State Defendants' medical expert shows that there is insufficient evidence to demonstrate the safety and efficacy of surgical treatments for gender dysphoria. (DFOF ¶¶ 101–105, 120–39.) Plaintiffs respond by highlighting studies that suggest improved psychological

well-being in transgender persons after receiving gender reassignment surgeries. But Dr. Mayer explained why such studies are flawed:

> They don't actually measure the gender dysphoria, they don't actually break it down into the incident rate, and they don't show, which is clinical trials 101, a significant difference between people who get the treatment [and] people [who] don't in terms of risk of being gender dysphoric. So . . . [the patients] improve body image, feel better about themselves, [and have a] more positive outlook in life. Those are fine [outcomes], . . . for surgery; they aren't fine in psychiatry. The question is are these people having serious life adjustment problems, and are those problems alleviated by the surgery.

(DFOF ¶ 122 (alteration in original).) And Dr. Mayer identifies a placebo effect that could explain why subjects of Plaintiffs' favored studies show improved well-being:

> [T]o do a study of giv[ing] people $50,000 worth of plastic surgery and then ask[ing] them if they feel better about themselves is a little bit silly. The outcome has got to be dysphoria. And we've got to look at the treatment versus an active control. I bet anybody you do $50,000 worth of cosmetic surgery on feels better about themselves.

(DFOF ¶ 123 (alteration in original).) Since the surgeries at issue here are irreversible and carry a meaningful risk of serious complications (PFOF ¶ 49), it is perfectly reasonable for GIB to decide not to provide insurance coverage for them, absent adequate scientific evidence of safety and efficacy.

Moreover, even the WPATH guidelines on which Plaintiffs rely show that this issue is not as clear-cut as Plaintiffs say. They assert only that "*most* professionals agree that genital surgery and mastectomy cannot be considered *purely* cosmetic" and concede that "opinions diverge as to what

degree other surgical procedures (e.g., breast augmentation, facial feminization surgery) can be considered purely reconstructive." (DFOF ¶ 147.) The Constitution does not require the State of Wisconsin to fall in line with majority opinion. *Oregon v. Ice*, 555 U.S. 160, 171 (2009) (The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems."). Thus, it is entirely sensible for GIB to take a position on an issue for which "opinions diverge" and conclude that it does not want to provide insurance coverage for procedures that at least some professionals—as WPATH concedes—would consider cosmetic.

This issue is especially important in the context of care for children. Minor dependents of state employees are covered by the Uniform Benefits. (DFOF ¶ 163.) If no Exclusion existed, children could start obtaining state health insurance coverage for plastic surgery as gender dysphoria treatments. Although WPATH recommends against genital surgery for minors, it advocates chest surgery in some circumstances. (DFOF ¶ 148.) Its position on other forms of surgical treatment for children short of genital surgery remains unstated, so claims for these forms of treatment are not foreclosed by WPATH standards. (DFOF ¶ 148.) Yet WPATH concedes that "there is greater fluidity and variability in outcomes" in children and that "formal epidemiologic studies on gender dysphoria—in children, adolescents, and

adults—are lacking." (DFOF ¶ 149.) Studies indicate that gender dysphoria persists into adulthood for only 12–27% of children. (DFOF ¶ 150.)

What this means is that some (perhaps around 70–80%) children grow out of their gender dysphoria, which creates a meaningful risk that such children could receive irreversible surgical treatment for gender dysphoria, when they otherwise would have naturally grown out of the condition. Without solid evidence to establish that surgical treatments are safe and efficacious for children, it is entirely appropriate for GIB to exclude insurance coverage for such treatment.

b. The Exclusion survives rational basis review.

Plaintiffs also contend, in the alternative, that the Exclusion cannot survive rational basis review. But this level of review is exceedingly deferential:

> [R]ational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Nor does it authorize the "judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.

Heller, 509 U.S. at 319 (second alteration in original) (citations omitted). And even the standard that Plaintiffs cite shows how difficult this argument is to win: The Exclusion must be "inexplicable by anything but animus toward the class it affects." *Romer v. Evans*, 517 U.S. 620, 632 (1996). That is not true

here, for the reasons described above—containing costs and concerns about medical safety and efficacy easily clear this low hurdle. Given these state interests, even circumstantial evidence of animus would not help Plaintiffs prevail, since "a given action 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).

And the circumstances Plaintiffs cite surrounding GIB's decision to reinstate the Exclusion at the end of December 2016 do not show animus, even if they were unique. (Dkt. 97:32–33.) In May 2016, HHS issued regulations prohibiting provisions like the Exclusion, and on December 31, 2016, those regulations were enjoined by a federal district court in Texas. (DFOF ¶¶ 164, 166.) Since GIB had expected the federal mandate to be lifted, it acted on December 30, 2016, to restore the pre-mandate status quo by reinstating the Exclusion. (DFOF ¶ 165.) It chose that date and used a contingent vote because the Exclusion was scheduled to be removed on January 1, 2017, and GIB hoped to act to reinstate the Exclusion before that date. (DFOF ¶ 165.) But since the Texas federal court had not yet acted as the end of December 2016 neared, GIB voted on a contingent basis—the Exclusion would be removed, when and if the Texas court enjoined the HHS rules. (DFOF ¶¶ 62, 165.) That happened the very next day. (DFOF ¶ 166.)

Next, Plaintiffs argue that the Exclusion fails rational basis review because it only impacts people who are transgender. (Dkt. 97:33–34.) First, that is not true. As previously explained, no Uniform Benefits beneficiary receives coverage for surgical procedures meant to treat psychological conditions. (DFOF ¶¶ 71, 80.) Second, the Exclusion is not "clearly intended to injure" transgender people for "arbitrary or irrational" reasons. *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring); *City of Cleburne*, 473 U.S. at 446. The state interests described above in containing costs and declining to cover procedures without adequate medical evidence of safety and efficacy suffice.

The cases Plaintiffs cite regarding cost savings do not invalidate the legitimate state interest offered here. (Dkt. 97:34.) In *Shapiro v. Thompson*, 394 U.S. 618, 627–34 (1969), the court held that states cannot avoid welfare costs by denying benefits to first-year state residents, at least as a measure meant to deter indigent migration, since that was not a "constitutionally permissible state objective." But courts have recognized containing health care costs as important, legitimate government interests.[8] Any measure that

[8] *See IMS Health Inc. v. Sorrell*, 630 F.3d 263, 276 (2d Cir. 2010), *aff'd*, 564 U.S. 552 (2011); *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); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 576 (1980) (Blackmun, J., concurring).

contains cost by excluding health insurance coverage for certain benefits invariably falls on a certain class of people—those with medical conditions that require the excluded treatments. For instance, the Uniform Benefits also exclude coverage for bariatric surgery, which is invariably only recommended for obese patients. (DFOF ¶ 167.) And they exclude coverage for infertility services, where the person is merely diagnosed as infertile. (DFOF ¶ 168.) It cannot be correct that these exclusions would also fail rational basis review, simply because they "directly impact[] one (1) group of people—and one (1) group only"—people who are obese and infertile, respectively. (Dkt. 97:33.)

Cases about denying all health insurance benefits to same-sex domestic partners do not change the analysis. (Dkt. 97:34 (citing *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) and *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854 (E.D. Mich. 2014)).) First, those non-precedential cases are inconsistent with traditional rational basis review, in that they seemingly apply a heightened level of scrutiny due to the affected classification. *Diaz*, for instance, stated that "distinguishing between homosexual and heterosexual employees, similarly situated, . . . cannot survive rational basis review." 656 F.3d at 1014. But in *Wisconsin Education Ass'n Council v. Walker*, 705 F.3d 640, 653–56 (7th Cir. 2013) the Seventh Circuit emphasized that rational basis review allows line-drawing that might appear arbitrary, holding that Wisconsin could permissibly classify some police organizations

but not others as "public safety employees" not subject to collective bargaining restrictions. Here, too, rational basis review does not permit second-guessing GIB's decision on which health insurance costs state taxpayers should bear, especially where, as here, those costs are associated with surgeries of uncertain safety and efficacy.

Second, the Uniform Benefits do not deny all health insurance benefits to transgender people, whether state employees or their dependents. Rather, they only deny benefits for a narrow category of services associated with gender reassignment surgery—all other benefits are provided equally to cisgender and transgender beneficiaries.[9] Third, the Exclusion does not target all transgender people, unlike the provisions that targeted all benefits for all homosexual partners in *Diaz* and *Bassett*. The Exclusion only affects people with gender dysphoria, a psychological disorder that afflicts only a portion of transgender people.[10] GIB can rationally choose not to cover costs associated with treating that psychological condition, just as it has rationally chosen not

[9] Moreover, beneficiaries with gender dysphoria can obtain coverage for hormone therapy treatment, under certain circumstances. (DFOF ¶ 27.) It is only treatment associated with surgical procedures that are excluded from coverage. (DFOF ¶¶ 24, 29.)

[10] As Dr. Mayer explains, psychiatrists worked to remove gender identity disorder from the Diagnostic and Statistical Manual (DSM), as that approach assigned a mental disorder to all transgender people. (DFOF ¶ 152.) Now, only those suffering from gender dysphoria qualify for a diagnosis under the DSM. (DFOF ¶ 152.)

to cover surgical treatments associated with all other psychological conditions. (DFOF ¶¶ 30, 71, 80.)

And as for Plaintiffs' argument that the estimated costs are supposedly "so insignificant as to be material," that decision is up to the policymaker—GIB—not Plaintiffs or this Court. Plaintiffs offer no principle that determines when a cost ever would be "material"—although their proffered experts offer their say-so from an actuarial perspective (PFOF ¶ 53), there is no reason GIB must follow that arbitrary approach.

Moving on to the lack of safety and efficacy evidence for these treatments, Plaintiffs say that this interest "lacks credible factual support." (Dkt. 97:35.) Yet they have not identified a single study that responds to the central critique from State Defendants' psychiatric expert, outlined above—that no studies demonstrate the safety and efficacy of surgical gender reassignment procedures at treating gender dysphoria, since none of them use a proper control group. (DFOF ¶¶ 101–05, 120–23.) Rather, they cite "every major expert medical association," but, as State Defendants' psychiatric expert pointed out, at one time the AMA supported smoking and believed being gay was a psychiatric disorder. (DFOF ¶ 138.) He likewise testified that, for some time, the AMA supported bans on vaginal births after cesarean delivery, but that "when we finally did a study of Canadian experiences versus ours, we found out that VBACs [i.e. vaginal births after

cesarean delivery] were safe." (DFOF ¶ 139.) The point is that the clinical guidelines that professional organizations issue "have got to be based on scientific studies." (DFOF ¶ 138.) Plaintiffs' appeal to authority does not undermine the expert opinion on which the Exclusion relies, since these large professional associations can (and do) get it wrong.

Plaintiffs also contend that GIB's safety and efficacy rationale is hollow, because gender reassignment procedures are similar to other covered treatments. (Dkt. 97:35.) But procedures that are safe and efficacious for one purpose may not be so for another. For example, a hysterectomy may be safe and efficacious for treating ovarian cancer, in that the procedure's possible cancer treatment benefits outweigh the risk of complications and of not performing the procedure at all. But that means little when considering whether a hysterectomy is also safe and efficacious for treating gender dysphoria—while the complications risks likely remain the same, the possible benefits and risks for the latter purpose have not been established through proper medical research. (DFOF ¶¶ 101–05, 120–39.) The risk of causing complications and spending taxpayer money without any solid basis for believing that the treatment might work could logically lead GIB to cover hysterectomies for treating cancer but not gender dysphoria. This kind of line-drawing has a rational basis and thus is proper. *See Walker*, 705 F.3d at 655 (explaining that Supreme Court has "continually rejected" arguments

that, under rational basis, "the way in which [the policymaker] separated . . . two groups negates the legitimacy of the classifications").

Plaintiffs' grab-bag of other rational basis arguments also fail. (Dkt. 97:36.) That Plaintiffs received no justification for the coverage denial aside from the Exclusion means nothing; the Exclusion rests on the rational bases outlined above, and those bases do not need to be reiterated each time a coverage request is made. Next, Plaintiffs argue that the Exclusion is redundant because cosmetic and experimental procedures are already excluded. But that can be explained by administrative efficiency—the Uniform Benefits are not statutes, they are policy guidelines that administrative personnel at third-party insurance carriers must use to make coverage decisions. Clarifying that gender reassignment procedures fall within the broader exclusion for cosmetic procedures meant to treat psychological conditions simply helps those third-party administrators efficiently make the correct coverage decisions under the Uniform Benefits. (DFOF ¶ 169.) Lastly, the generic description of "medical necessity" in the Uniform Benefits resolves nothing, since, as shown, inadequate evidence exists to show that these gender reassignment procedures are safe and effective when used to treat gender dysphoria. (DFOF ¶¶ 101–05, 120–39.)

B. Plaintiffs are not entitled to summary judgment on their equal protection claims against Secretary Conlin in his individual capacity.

Plaintiffs do not expressly seek summary judgment against Conlin on their individual capacity equal protection clause claims. But to the extent such a request is implicit in their motion,[11] the request must be denied because Conlin had inadequate personal involvement in any constitutional violation to be held liable and, in any event, he enjoys qualified immunity. These arguments are addressed more fully in the State Defendants' brief in support of summary judgment. (*See* Dkt. 81:43–50.)

A plaintiff may only state a § 1983 claim against individuals who were personally involved in the alleged constitutional deprivations. *Vinning–El v. Evans,* 657 F.3d 591, 592 (7th Cir. 2011). "Only persons who cause or participate in the violations are responsible." *George v. Smith*, 507 F.3d 605, 609 (7th Cir. 2007). And not just any participation suffices; the official must "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye." *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988).

[11] Conlin is a defendant in his individual capacity on Plaintiffs' equal protection claims. (Dkt. 27:20–21.) A component of Plaintiff's motion for partial summary judgment requests a court order "declaring that Defendants' policy" set forth in the Exclusion violates the equal protection clause. (Dkt. 95:1.) They go on to "request a trial on damages." (Dkt. 97:2.) Presumably, then, Plaintiffs seek a judgement against Conlin in his individual capacity for violating the equal protection clause, such that they may proceed directly to the issue of damages.

Here, Plaintiffs had to set forth undisputed evidence that Conlin intended to discriminate against them on the basis of their sex or transgender status. *See Ashcroft v. Iqbal,* 556 U.S. 662, 676 (2009). That is, they must offer proof that Conlin was acting "because of," not merely "in spite of," the Exclusion's purported adverse effect on transgendered people. *Id* at 677. But the undisputed facts establish that Conlin lacks the requisite personal involvement—although he knew about the Exclusion, he did not "facilitate," "approve," or "condone" the Exclusion in any meaningful sense because he was *required* by state law to implement it and, in fact, opposed GIB's decision to reinstate it.

Plaintiffs assert only that Conlin decided when the contingencies reinstating of the Exclusion were met, and that he was involved in amending contracts with participating health plans to reinstate the Exclusion. (*See* Dkt. 97:11–12.) Because it is undisputed that Conlin had no discretion over these actions and was acting at GIB's direction, these actions do not render Conlin personally liabile for purposeful discrimination.

As for the contingencies, Conlin neither imposed the contingencies nor chose whether they would be carried out. GIB determined what the contingencies would be and directed ETF to implement them. (DFOF ¶¶ 61–66.) Conlin's only involvement was to acknowledge when the four contingencies were met. (DFOF ¶ 68.) Again, in so doing, he was carrying

out GIB's direction. (Resp. to PFOF ¶ 139.) As ETF's Secretary, Conlin had a legal obligation under state statute to administer and execute GIB's decisions. (*Id.*) Conlin's acknowledgement that GIB's contingencies had been met is not purposeful discrimination, and Plaintiffs are not challenging Conlin's acknowledgement—they are challenging the Exclusion, itself. Conlin indisputably had no authority or power to alter GIB's decision to reinstate the Exclusion. (DFOF ¶¶ 21, 23, 111–13.)

Regarding the contract amendments with the health plan providers, Conlin's authority and involvement is similarly limited by state statute. Only GIB is empowered to enter into contracts with third-party insurance entities, not Conlin. (Resp. to PFOF ¶ 87.) And Conlin's conclusion that the third-party health insurance plans had no ability under either state statute or their contracts to negotiate over the Uniform Benefits' content was not discriminatory—it was his understanding of state law. (Resp. to PFOF ¶ 138.) Both ETF and Conlin had a legal obligation to carry out GIB's December 30, 2016, directive to reinstate the Exclusion, which included preparing a contract amendment reinstating the Exclusion. (Resp. to PFOF ¶¶ 141–42.) Again, it is the Exclusion that is challenged as discriminatory, not the administrative actions taken by Conlin—actions that were statutorily required only *after* GIB's decision to reinstate the exclusion was already made.

Conlin could neither make nor change GIB's decision to reinstate the Exclusion—a decision that he advocated against and personally did not agree with. (DFOF ¶¶ 114–18.) There is thus no evidence of purposeful sex discrimination by Secretary Conlin, which "requires more than 'intent as volition or intent as awareness of consequences.'" *Iqbal*, 556 U.S. at 676 (citation omitted). Plaintiffs' summary judgment motion on Conlin's individual liability under the equal protection clause should be denied.

Separately, summary judgment on this claim should be denied because Conlin enjoys qualified immunity, as further explained in State Defendants' summary judgment brief. (Dkt. 81:39–46.)

IV. Plaintiffs' Affordable Care Act Section 1557 claims against ETF do not merit summary judgment.

A. ETF is subject to Section 1557 because it receives federal financial assistance.

State Defendants do not dispute that ETF is a covered entity under the ACA with respect to the health insurance plans it offers state employees. However, the other purported facts Plaintiffs cite in this section are irrelevant to this conclusion (Dkt. 97:37)—the only fact that matters is that ETF receives Medicare Part D subsidies. This amounts to qualifying "Federal financial assistance" that subjects ETF to the non-discrimination requirements of 42 U.S.C. § 18116(a).

B. ETF did not violate Section 1557.

Although Section 1557 does apply to ETF, ETF did not violate it. Plaintiffs' cursory argument that ETF is liable for "administering a facially discriminatory policy" fails for all of the same reasons discussed in State Defendants' summary judgment motion. (Dkt. 81:54–62.) First, ETF has no discretionary authority over the Exclusion, and so it cannot be shown to have intentionally discriminated against Plaintiffs. (Dkt. 81:63–64.) Second, Section 1557 allows claims based on "sex," not "transgender status," and so Plaintiffs cannot state a claim under Section 1557. (Dkt. 81:55–60.) Third, no private right of action exists under Section 1557. (Dkt. 81:60–61.) Fourth, Section 1557 does not waive the State's Eleventh Amendment immunity. (Dkt. 81: 61–62.) And last, no evidence exists of intentional discrimination on the basis of sex or transgender status: the Exclusion is one element of a neutral exclusion for all surgical treatments for psychological disorders and legitimate, non-discriminatory reasons support the Exclusion. (Dkt. 81:63.)

Plaintiffs again cite *Whitaker*, 858 F.3d at 1048 (Dkt. 97:38), but the sex stereotyping theory outlined there does not apply here for the same reasons discussed above in Argument II.B. Again, the Exclusion here *removes* the State from the business of encouraging sex stereotypes through surgery meant to conform people to those stereotypes. Plaintiffs also cite *Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017),

but that case merely relied on *Whitaker's* sex stereotyping theory that does not apply here. In *Prescott*, the court found a valid Section 1557 claim based on allegations that hospital staff repeatedly referred to the plaintiff by the wrong gender pronoun—they used female pronouns when addressing the transgender boy. *Id.* at 1096–98. None of the State Defendants here have refused to recognize Plaintiffs' gender identity in this way—Plaintiffs are free to live out their chosen gender identity, without interference, ridicule, or the like. Further, the Section 1557 claims in both *Whitaker* and *Prescott* ran against the entities with control over the alleged discriminatory activity—the school district that instituted the bathroom policy and the hospital that employed the offending staff. Neither recognizes a claim against an entity with no discretionary authority over the challenged policy, like ETF.

CONCLUSION

Plaintiffs' partial summary judgment motion should be denied in its entirety.

Dated this 29th day of June, 2018.

Respectfully submitted,

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