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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs, Case No. 17-cv-264

vs.

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

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, Alina Boyden and Shannon Andrews,[1] ("Plaintiffs"), through their undersigned attorneys, submit this brief in support of their Motion for Partial Summary Judgment against the Defendants.[2] Plaintiffs seek: (1) a declaration that Defendants' policy of excluding "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment" (the "exclusion") from coverage in state employee health insurance plans violates Title VII of the

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[1] Plaintiffs have requested leave to add another plaintiff, Wren Logan, in their Motion to Amend the Complaint. (Dkt. # 74.). If this Court grants leave to add Ms. Logan, Plaintiffs request that any declaratory and injunctive relief granted in response to this Motion for Summary Judgment be granted to her as well and have therefore referred to evidence regarding her in this brief.

[2] For purposes of this motion, the Defendants are the State of Wisconsin Department of Employee Trust Funds ("ETF"), the Wisconsin Group Insurance Board ("GIB") and Robert J. Conlin, the Secretary of ETF ("Conlin" or "the Secretary"). Plaintiffs have also moved to add the eleven (11) members of the GIB as defendants to the section 1983 claim. (Dkt. # 74.) This Court has dismissed as defendants the Board of Regents of the University of Wisconsin System; Raymond W. Cross, the President of the University of Wisconsin System; Rebecca M. Blank, Chancellor of the University of Wisconsin Madison; the University of Wisconsin School of Medicine and Public Health ("SMPH"); Robert N. Golden, Dean of SMPH; and Dean Healthcare. (Dkt. # 44 & 67).

Civil Rights Act, the Equal Protection Clause of the Fourteenth Amendment, and section 1557 of the Affordable Care Act; and (2) an injunction barring Defendants from enforcing the exclusion and ordering them to cover medically-necessary procedures, services and supplies related to gender confirmation surgery and sex hormones for treatment of gender dysphoria. Plaintiffs request a trial on damages.

INTRODUCTION

Plaintiffs are three (3) women who are transgender, which means the gender assigned to them at birth does not match their core understanding of their gender, or gender identity. (Plaintiffs' Proposed Findings of Fact ("PPFOF") ¶¶ 5, 24). All three (3) have been diagnosed with gender dysphoria – severe distress caused by the incongruence between their sex assigned at birth and their gender identity – and have been prescribed hormone therapy and gender confirmation surgery ("GCS") to treat their dysphoria. (PPFOF ¶¶ 8, 13, 18, 31).

Plaintiff, Alina Boyden, works at the University of Wisconsin; Plaintiff, Shannon Andrews, works at the School of Medicine and Public Health as a researcher in the Carbone Cancer Center; and proposed Plaintiff, Wren Logan, is employed as a Resident Physician at the University of Wisconsin Hospital and Clinics. (PPFOF ¶¶ 1-3). Defendants have violated their rights to Equal Protection, to equal terms and conditions of employment under Title VII of the Civil Rights Act of 1964, and to equal treatment in health coverage under section 1557 of the Affordable Care Act ("ACA"), by adopting and enforcing a categorical exclusion of coverage of "procedures, services, and supplies related to surgery and sex hormones

associated with gender reassignment" in all state employee health insurance plans. (PPFOF ¶ 43). The challenged exclusion causes concrete injury to Plaintiffs, in that it prevents them from obtaining medically-necessary care on equal terms with their co-workers. Ms. Boyden cannot obtain the GCS she needs, because she cannot afford it without insurance coverage. (PPFOF ¶ 55). Ms. Andrews has had GCS, but had to pay out-of-pocket. (PPFOF ¶ 59). Similarly-situated state employees have had medically necessary surgical procedures paid for by the Defendants' group health insurance plans. (PPFOF ¶¶ 42-46).

Because Defendants adopted, administer, and enforce the unlawful employee health insurance policy that has caused their injury, Plaintiffs have standing to sue them under 42 U.S.C. § 1983, Title VII, and the ACA. ETF and GIB created the discriminatory exclusion in state employee health insurance contracts in 1994. (PPFOF ¶ 95). ETF and Secretary Conlin administer the health insurance policies and enforced the discriminatory exclusion to deny Plaintiffs coverage for transition-related care. (PPFOF ¶¶ 69, 72, 74).

Defendants ETF and GIB have violated Title VII by enacting and enforcing a health insurance policy that facially discriminates against state employees who are transgender by denying them access to transition-related medical care. ETF and GIB are liable under Title VII because the State of Wisconsin has delegated the employee benefits functions for all state employers, including Plaintiffs' employers, to GIB and ETF. (PPFOF ¶¶ 65, 66, 75-82). GIB and ETF's administration of their policy of excluding coverage for transition-related care constitutes sex

discrimination under well-established law in this circuit and others. As Plaintiffs have been denied coverage pursuant to a facially discriminatory policy, no other proof of discriminatory intent is required. In addition, Defendants Conlin and the members of GIB have violated Plaintiffs' rights to equal protection by adopting and administering the discriminatory coverage policy. Classifications that discriminate against transgender persons must be reviewed under heightened scrutiny, which Defendants are plainly unable to satisfy. Indeed, Defendants' exclusionary coverage policy fails any level of review because it lacks a rational connection to any legitimate governmental interest. Finally, ETF is liable under the ACA for enforcing the discriminatory coverage exclusion against Plaintiffs. For these reasons, Plaintiffs request that their Motion for Summary Judgment be granted.

FACTS

Plaintiffs, Alina Boyden and Shannon Andrews, as well as Proposed Plaintiff, Wren Logan, are women who are transgender. (PPFOF ¶ 5). All three (3) are state employees eligible for state-provided health insurance. (PPFOF ¶ 4).

Their health care providers have concluded that they have gender dysphoria that should be treated with hormone therapy and GCS, conclusions with which Plaintiffs' expert concur, and which are not contradicted by Defendants or their experts. (PPFOF ¶¶ 8, 13, 18; Dkt. # 90, Expert Report of Dr. Lawrence S. Mayer). Their employee health insurance policies contain an exclusion that discriminates against them based on their sex and transgender status by denying them coverage for these medically necessary treatments. (PPFOF ¶ 43).

I. Gender Dysphoria and Its Treatment

All human beings have a gender identity -- an internal core sense of one's own sex, such as male or female -- which is an innate, immutable characteristic. (PPFOF ¶¶ 21-22). Indeed, attempts to change a person's gender identity are harmful and unethical, according to professional medical organizations. (PPFOF ¶ 23). Transgender individuals experience incongruence between their gender assigned at birth and their own gender identity. (PPFOF ¶ 24). Gender dysphoria is clinically defined as the psychological distress caused by the incongruence or conflict between a transgender person's assigned gender at birth and their gender identity. (PPFOF ¶ 31). Gender dysphoria is a serious and often debilitating medical condition that requires competent treatment. (PPFOF ¶ 31-34). Transgender individuals diagnosed with gender dysphoria who do not obtain necessary treatment suffer severe, foreseeable, and needless harms such as depression, anxiety, self-harm, and even suicidal ideation or attempts. (PPFOF ¶ 32).

In order to alleviate potentially life-threatening gender dysphoria, a transgender individual may seek individualized medical care and treatment that allows them to transition to the gender associated with their identity. (PPFOF ¶ 27). Transition-related care for a transgender individual may include hormone therapy or GCS, treatments which are recognized by medical and mental health professionals as medically necessary for people with gender dysphoria. (PPFOF ¶¶ 28-30). GCS is, for many transgender individuals, medically necessary treatment

due to its efficacy in relieving the psychological distress associated with their gender dysphoria. (PPFOF ¶ 30). Transitioning to the sex that matches the individual's identity is also more cost-effective than denying such care, because denial of care is associated with increased incidence of depression and other costly-to-treat conditions. (PPFOF ¶ 52).

According to the World Professional Association of Transgender Health's Standards of Care ("WPATH Standards of Care"), which are widely recognized guidelines on how to effectively treat transgender individuals with gender dysphoria, hormone therapy and GCS are safe and effective treatments. (PPFOF ¶¶ 47-49).

Transgender state employees cannot obtain medically necessary gender confirming care due to a specific exclusion in the uniform benefits plan for health insurance coverage. (PPFOF ¶ 43). State employees may, however, obtain the same surgical procedures that are denied to employees for treatment of gender dysphoria for treatment of injuries and other medical conditions, such as cancer or traumatic injuries. (Id.). Research and clinical expertise show that surgical procedures used for treatment of gender dysphoria are similar in safety to surgeries used to treat other conditions. (PPFOF ¶ 50).

II. The Plaintiffs

Plaintiff, Alina Boyden, has worked for the University of Wisconsin as a teaching assistant and a fellow since August 2013. (PPFOF ¶ 1). Boyden has received several fellowships and scholarships to support her academic work at UW-

Madison. (PPFOF ¶ 6). Boyden's doctors have determined that hormone therapy and GCS are medically necessary treatments for her gender dysphoria, but she has not been able to access surgery as a result of Defendants' exclusion of such benefits. (PPFOF ¶¶ 8, 9, 55). Because she is not receiving her prescribed treatments, Boyden experiences emotional and physical suffering. (PPFOF ¶ 10).

Plaintiff, Dr. Shannon Andrews, is a molecular biologist working as a researcher in the Carbone Cancer Center at the University of Wisconsin School of Medicine and Public Health. (PPFOF ¶¶ 2, 12). She has been prescribed hormone therapy and GCS to treat her dysphoria. (PPFOF ¶ 13). Andrews paid out-of-pocket for her medically necessary GCS, but her insurer refused to pay for her claim because of the exclusion in her health plan. (PPFOF ¶ 59). Without this medically necessary care, Andrews believes she would have attempted suicide. (PPFOF ¶ 15).

Proposed Plaintiff, Dr. Wren Logan, is a Psychiatry Resident at the University of Wisconsin Hospitals and Clinics Authority. (PPFOF ¶ 3). She has been prescribed hormone therapy and GCS to treat her gender dysphoria. (PPFOF ¶ 18). As part of her psychiatric residency, Logan was placed at the University of Wisconsin. (PPFOF ¶ 60). She learned that as a state employee, all insurance available to her would exclude the transition-related care she needs. (Id.). Her requests for GCS were denied, and she continues to experience distress, panic, and suicidal thoughts because she has been denied this care. (PPFOF ¶ 20).

Boyden, Andrews and Logan are all state employees, and therefore subject to Defendants' exclusion of health care related to gender identity. (PPFOF ¶¶ 4, 43).

III. The Defendants

Defendant, ETF, is the executive branch agency charged with providing and administering retirement, health insurance and other benefit programs to state and local government employees. (*See* Wis. Stat. § 15.16 (creating ETF); Wis. Stat. § 40.01(1) (ETF's statutory purposes include providing "aid [to] public employees in protecting themselves . . . against the financial hardships of . . . illness and accident . . . by establishing equitable benefit standards throughout public employment. . ."); (PPFOF ¶ 65).

Defendant, Conlin, as Secretary of ETF, is "in charge of the administration of the department and exercise[s], as head of the department, all powers and duties" exercised by other department secretaries. (Wis. Stat. § 40.03(2)(a).) As Secretary of ETF, Conlin generally has the authority and duty to administer all ETF programs, including the group health insurance program. (PPFOF ¶ 68). Conlin and subordinate ETF staff within the Office of Strategic Health Policy ("OSHP") administer health insurance plans for state employees. (PPFOF ¶ 69 (Conlin is "ultimately responsible for administering" health insurance programs)). As Secretary, Conlin oversaw a reorganization of ETF that created OSHP and hired Lisa Ellinger, who was the OSHP director during the time when Defendants rescinded and then reinstated the exclusion. (PPFOF ¶ 70).

OSHP is the "policy office" for state health insurance programs, and "sets the policy with the Group Insurance Board for the group health insurance program." (PPFOF ¶ 71). Policy analysts in OSHP, sometimes with assistance from contracted

consultants, evaluate the package of employee health insurance benefits (called the "Uniform Benefits") throughout the year and analyze and make recommendations to the GIB about changes to that package, typically in late winter and early spring. (PPFOF ¶ 73). Staff analyze and make uniform benefit recommendations to GIB biannually. (Id.). ETF staff advise GIB on benefits changes and other policy and GIB relies on ETF staff in making policy decisions. (PPFOF ¶¶ 76-80). ETF staff have significant control over what new benefits are added to the uniform benefits package, because GIB generally does not adopt new benefits not recommended by ETF. (PPFOF ¶ 77).

Defendant, GIB, is "a policymaking board that directs ETF staff on matters related to the group insurance plan for the State of Wisconsin." (PPFOF ¶ 79). It makes decisions and establishes health insurance benefits for Wisconsin State employees each contract year, including voting on proposed changes to the uniform benefits recommended by ETF staff. (PPFOF ¶¶ 78-80). ETF administers the GIB's decisions for purposes of group health insurance and Conlin, as Secretary, is ultimately responsible for making sure the GIB's decisions are executed. (PPFOF ¶¶ 69, 81).

ETF staff implement the decisions of the GIB regarding the uniform benefits package. (PPFOF ¶ 81). After GIB approves changes to the benefit package, ETF staff make changes to the contract document to incorporate the changes. (PPFOF ¶ 83). ETF acts as the point of contact for the contracts with the private health plans. (PPFOF ¶ 86; *see also* Wis. Stat. § 40.02(37) (authorizing GIB to enter "contractual

arrangements which may include, but are not limited to, indemnity or service benefits, or prepaid comprehensive health care plans, which will provide full or partial payment of the financial expense incurred by employees and dependents as the result of injury, illness or preventive medical procedures")). With respect to pharmacy benefits, ETF and GIB are both identified as contracting parties. (PPFOF ¶ 87).

ETF staff enforce the contracts with private health plans, which contain the exclusion at issue in this case, through hearing grievances and appeals, conducting audits, and other means. (PPFOF ¶ 88). Andrews, for example, filed an appeal to ETF under these procedures after Wisconsin Physicians Service ("WPS") denied coverage of her surgery. (PPFOF ¶ 61). ETF Office of Legal Services ("OLS") staff also provide legal counsel to GIB. (PPFOF ¶ 89).

IV. Defendants' Policy of Excluding Coverage for Transition-Related Care

The uniform benefits that the GIB adopts govern all state employee plans. (PPFOF ¶ 82). Private insurers that contract with GIB to provide coverage to eligible employees may not deviate from the uniform benefits package. (PPFOF ¶ 85). ETF first adopted the exclusion in 1994. (PPFOF ¶ 95). GIB modified the language of the exclusion in 2015 and 2016, but did not remove it. (PPFOF ¶ 99).

In its current form, the plan excludes coverage of "[p]rocedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." (PPFOF ¶ 43). Employers and participants have requested that ETF and GIB eliminate the exclusion as far back as 2006. (PPFOF ¶¶ 96-97). The

University of Wisconsin, for example, specifically requested that the exclusion be eliminated "to enhance hiring," and provided evidence that the coverage cost would be minimal. (PPFOF ¶ 101). Despite these requests, ETF did not recommend that GIB eliminate the exclusion until July 2016, after Andrews had already had her surgery. (PPFOF ¶¶ 14, 15, 102). ETF recommended and GIB agreed to the change at that time, in order to comply with the final regulations implementing section 1557 of the ACA. (PPFOF ¶¶ 102-03, 117).

Shortly after GIB voted to eliminate the exclusion, the Wisconsin Department of Justice ("DOJ"), at the request of the governor's office, and one (1) GIB board member began urging that the exclusion be reinstated. (PPFOF ¶ 112).

At a hastily-called meeting on December 30, 2016, GIB deviated from normal practice and voted to direct that, upon the satisfaction of four (4) criteria, the ban on coverage of transition-related care be reinstated. (PPFOF ¶¶ 122-26). No information about cost or the efficacy of the treatment was considered when GIB voted to reinstate the exclusion. (PPFOF ¶¶ 131-36).

In January 2017, ETF Secretary Conlin determined that the criteria had been met and approved a reinstatement of the exclusion, effective February 1, 2017. (PPFOF ¶ 140). Secretary Conlin was personally involved in the process leading up to reinstatement of the exclusion. (PPFOF ¶ 137). He determined that ETF would decide when the contingencies for reinstatement were met, rather than go back to GIB for approval. (PPFOF ¶¶ 139-40). He was involved in preparing the contract amendment reinstating the exclusion, including language requiring a person with

"authority to bind" the insurer sign the amendment. (PPFOF ¶ 141). He determined that ETF would not "negotiate" with the health plans over reinstatement of the exclusion, despite the language of the contingency calling for such negotiation. (PPFOF ¶ 138). The contract amendment to the plans went out under Conlin's name because ETF administers GIB's benefits decisions. (PPFOF ¶ 142).

The exclusion remains in the health plans and continues to harm the Plaintiffs and Ms. Logan.

SUMMARY JUDGMENT STANDARD

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The existence of a factual dispute will defeat summary judgment only if the facts at issue are material under the applicable legal standard. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Substantive law will identify which facts are material for purposes of summary judgment, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment; factual disputes that are irrelevant or unnecessary will not be counted."); *McGinn v. Burlington N.R.R.*, 102 F.3d 295, 298 (7th Cir. 1996) ("Only disputes that could affect the outcome of the suit under governing law will properly preclude the entry of summary judgment"). Here, for example, a dispute over whether a post-hoc justification for the exclusion is valid is not material in an

equal protection case decided under heightened scrutiny, because the government may not rely on such justifications to satisfy heightened scrutiny.

ARGUMENT

I. Plaintiffs' Claims Satisfy Article III's Standing Requirements[3]

U.S. Const. art. III, § 2 limits federal courts to adjudicating "cases" or "controversies" between plaintiffs with a concrete "personal stake in the outcome" and adverse defendants. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)); *see also Abrahamson v. Neitzel*, 120 F. Supp. 3d 905, 916 (W.D. Wis. 2015) (Article III "limits federal courts to deciding actual '"Cases" and "Controversies"' between directly involved parties, rather than abstract questions of law.") (quoting *Driehaus*, 134 S. Ct. at 2341). "'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).

To establish standing, a plaintiff must show: (1) that she has suffered or is likely to suffer an "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) "a causal connection between the injury and the conduct complained of, that is, the injury is fairly traceable to the challenged action of the

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[3] Defendants have admitted that this Court has personal jurisdiction over each individually named Defendant in the First Amended Complaint and that venue is proper in the Western District of Wisconsin (Def. Response to Second Set of Requests for Admissions No. 16-17). Because Plaintiffs' claims arise under the United States Constitution or federal statutes, the Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 2000e-5(f)(3).

defendant, not the result of the 'independent action of some third party not before the court;'" and (3) "a favorable decision likely will redress the injury." *O'Sullivan v. City of Chi.*, 396 F.3d 843, 854 (7th Cir. 2005) (citations omitted).

In response to Defendants' Motion to Dismiss, this Court concluded Plaintiffs had sufficiently pleaded standing for Equal Protection claims against Secretary Conlin under 42 U.S.C. § 1983, against the GIB under Title VII, and against the ETF under Title VII and the ACA. (Dkt. # 67). However, Plaintiffs address standing briefly here because the issue is jurisdictional and may be considered *sua sponte*. Moreover, at the summary judgment stage, unlike at the pleading stage, a plaintiff may not rely on "mere allegations" to establish standing, but must provide evidence, by affidavit or otherwise, "which for purposes of the summary judgment motion will be taken to be true." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The evidence accompanying this motion demonstrates the extensive involvement of ETF, GIB, and Conlin in the decision-making, enforcement and administration of the challenged benefit exclusion and establishes all the elements of standing for all of the claims against Conlin, ETF and GIB.

A. Plaintiffs Have Suffered Concrete, Particularized and Actual Harm

The denial of coverage for treatments for gender dysphoria imposes injuries on Plaintiffs that are "concrete and particularized," as well as "actual" or "imminent." Denial of insurance coverage, even if the person does not currently need the coverage, is a sufficient injury in fact to support standing. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1122 (7th Cir. 1987). An injury is "concrete" if it is

"real," as opposed to "abstract," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), but even "intangible" harms may be sufficiently concrete for purposes of standing. *Id.* at 1549. Showing harms that are experienced in a "personal and individual way," satisfies the particularity requirement. *Id.* at 1548.

The primary harms here – Andrews' out-of-pocket expenditures that would have been covered by employee health insurance and Boyden's and Logan's outright inability to obtain necessary medical procedures are not only real and ongoing tangible injuries of the sort commonly adjudicated by federal courts, but also sufficiently particularized.[4] (PPFOF ¶¶ 57-60).

B. Plaintiffs' Injury is Caused By and Traced To the Actions of Defendants

The "traceability" element of the standing inquiry requires a plaintiff to present evidence of "a causal connection between the injury and the conduct complained of." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). As this Court recognized (Dkt. # 67 at 6), while an injury caused entirely by "the independent action of some third party not before the court" will not satisfy the traceability element, evidence that a defendant's action or inaction is a "but for" cause of the plaintiff's injury will suffice, even if multiple other actors were involved in causing the deprivation. *Lujan*, 504 U.S. at 560-61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); *Lac Du Flambeau Flambeau Band v. Norton*, 422 F.3d 490, 500-01 (7th Cir. 2005) ("The Secretary's silent approval caused that potential to become

[4] Plaintiffs have also suffered more intangible harms, such as emotional distress and dignitary harm, caused by Defendants' discrimination. (PPFOF ¶¶ 10, 15, 20).

a reality because, but for her approval, the compact would have no effect.") (emphasis added).

A showing of "[p]roximate causation is *not* a requirement of Article III standing, which requires *only* that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014) (emphasis added). Similarly, a defendant's actions need not be "the very last step in the chain of causation" to satisfy the traceability requirement. *Bennett*, 520 U.S. at 168-69. So long as the defendant has some involvement in the adoption, administration or enforcement of an unlawful policy that causes harm to a plaintiff, the traceability standard is satisfied.

Ample evidence demonstrates that each of the named Defendants' actions or inactions are in the direct chain of causation that ends with Plaintiffs' injuries. Defendant GIB[5] adopted the policies that govern the group health insurance programs for state employees, including the uniform benefits package that bars coverage of the services Plaintiffs need. (PPFOF ¶¶ 75-80). Defendants ETF and Secretary Conlin recommend, administer and enforce the policies governing group health insurance, including the uniform benefits containing the exclusion Plaintiffs

[5] In their Motion to Dismiss, Defendants argued that Conlin was not an appropriate defendant for purposes of Plaintiffs' Section 1983 claims, because the GIB, rather than Conlin, made the decision to adopt (and reinstate) the exclusion. The GIB is already a named defendant in the Title VII and ACA claims, but, as a state entity, it may not be sued under Section 1983 consistent with the 11th Amendment. While Defendants are wrong that Conlin is not a proper defendant, Plaintiffs have moved to amend their complaint to add the individual GIB board members as Defendants to the Section 1983 claims in their individual and official capacities. (Dkt. # 74). The proposed amended complaint remedies any arguable deficiency arising from omitting GIB members, in addition to Conlin, as defendants in the Section 1983 claims. *Cf. Int'l Ass'n of Machinists Dist. 10 & Local Lodge 873 v. Wisconsin*, 194 F. Supp. 3d 856, 861-63 (W.D. Wis. 2016) (although standing existed as to DWD secretary, court granted leave to amend to add chair of Wis. Empl. Rev. Comm'n where chair was necessary to obtain broad facial relief sought).

challenge here. (PPFOF ¶¶ 66-74). GIB adopted the exclusion in 1994, but despite repeated requests ETF did not recommend removing the exclusion until July 2016, when GIB ended it effective January 2017. (PPFOF ¶¶ 95-103).

However, GIB voted to reinstate the exclusion on December 30, 2016, with the assistance and participation of ETF and Conlin. (PPFOF ¶¶ 125, 137-141). The fact that GIB, rather than Conlin, made the "decision" to adopt the policy is irrelevant for purposes of standing against Conlin. "[A] person aggrieved by the application of a legal rule does not sue the rule maker…[h]e sues the person whose acts hurt him." *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995). In civil rights litigation, one body, often the state legislature, actually decides to adopt an unlawful or unconstitutional policy, but the proper defendant in such cases is not the legislature or individual legislators, but the state official who administers or enforces that statute. "[W]hen a plaintiff challenges…a rule of law, it is the state official designated to enforce that rule who is the proper defendant." *ACLU v. Florida Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993); *see also Wolfson v. Brammer*, 616 F.3d 1045, 1056-57 (9th Cir. 2010). In such cases, as here, "a controversy exists not because the state official is himself a source of injury, but because the official represents the state whose statute is being challenged as the source of the injury." *Wilson v. Stocker*, 819 F.2d 943, 947 (10th Cir. 1987). The same is true for the state agency tasked with administering or enforcing an unlawful policy adopted by a body other than a legislature, like GIB, acting in a legislative capacity. *Florida Bar,* 999 F.2d at 1491 n.11 (absence of Supreme Court of Florida as defendant does not affect

standing to sue Florida Bar, where court was "acting in its legislative capacity"). In this instance, as ETF secretary, Secretary Conlin is ultimately responsible for the implementation of any policy decisions made by the GIB. Those policies harm Plaintiffs and Secretary Conlin is rightly named as a defendant.

Numerous cases find that a state agency is liable under Title VII for discriminatory policies or practices, even if they were not the "source" of those polices. *See, e.g., Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1089 (1983) (finding that state employer and agency that administers employment benefits are liable under Title VII, even though it was the private contractors who set the terms of the policies). *See also Quinones*, 58 F.3d at 278 ("Evanston employs [plaintiff], who is entitled to certain benefits under the ADEA. That Evanston did not make the policy that denies him those benefits is irrelevant"). If such entities are *liable* under Title VII, they must, *a fortiori*, be proper defendants under Title VII for standing purposes.

C. Plaintiffs' Injury Will Be Redressed by a Favorable Decision

Article III also requires a plaintiff to show a likelihood that her "injury will be redressed by a favorable decision." *Bennett*, 520 U.S. at 167 (citing *Defenders of Wildlife*, 504 U.S. at 560-61). As this Court has noted, "a number of possible rulings directed against [GIB, ETF and Conlin] would likely afford plaintiffs redress." (Dkt. # 67 at 11). Enjoining enforcement of the exclusion and requiring any of the Defendants to provide insurance coverage or otherwise pay for Plaintiffs transition-related care would redress their injuries. Similarly, a "favorable decision" awarding

damages to Plaintiff, Shannon Andrews, would redress her injury by compensating her for the costs of GCS that Defendants refused to pay pursuant to their discriminatory coverage exclusion as well as the distress stemming from the discriminatory denial of coverage.

In their Motion to Dismiss, State Defendants argued that because only GIB has the authority under state statutes to set the terms and conditions of health insurance contracts "none of [the other] defendants can redress Plaintiffs' injuries." (Dkt. # 29, Defs.' Mem in Supp. of Mot. to Dismiss at 9). But whether GIB is the only entity that can *voluntarily* "redress" the plaintiffs' injuries by amending the uniform benefits is irrelevant to the redressability question, which is whether a "favorable decision" *by this Court* will remedy Plaintiffs' injury. "[R]edressability does not require a defendant to have *pre-existing* legal authority that will prevent the injury." (Dkt. # 67 at 12 (italics in original)). The fact that these injunctive and monetary remedies will provide the Plaintiffs with relief is sufficient to satisfy the redressability requirement as to those defendants.

II. Defendants, ETF and GIB, Have Violated Title VII by Discriminating Against Plaintiffs on the Basis of Sex

Under Title VII, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. It is well-settled that employer-provided fringe benefit plans, including health insurance, are part of an employee's wages and compensation for purposes of antidiscrimination claims. *See*

Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1082 (1983).

Defendants, ETF and GIB, have violated Plaintiffs' rights under Title VII by creating and administering the "gender reassignment" coverage exclusion that resulted in the denial of the employee health insurance coverage Plaintiffs need. (PPFOF ¶¶ 9, 14, 19, 43, 63). The private companies who administer Plaintiffs' insurance denied their requests for coverage solely because of the discriminatory exclusion. (PPFOF ¶¶ 43, 63).

As agents of Plaintiffs' state employers with respect to health insurance benefits, ETF and GIB are liable under Title VII for their actions that caused the denial of coverage for plaintiffs' medically necessary care pursuant to an exclusion that facially discriminates on the basis of sex, both because it is a sex-based classification and because it discriminates on the basis of transgender status.

A. ETF and GIB are Responsible Under Title VII for the Exclusion

ETF and GIB are Plaintiffs' employer or agents of their direct employer, the Board of Regents, for purposes of health insurance coverage, as this Court has already concluded. (Dkt. # 67 at 17-18 (finding that "GIB and ETF are empowered to provide health insurance benefits to state employees, including plaintiffs, and are therefore "proper suable entities under Title VII")). "Title VII plaintiffs may maintain a suit directly against an entity acting as the agent of an employer" where "'the agent 'exercise[s] control over an important aspect of [the plaintiff's] employment,'" or if "'an employer delegates sufficient control of some traditional

rights over employees to a third party.'" *Alam v. Miller Brewing Co.*, 709 F.3d 662, 669 (7th Cir. 2013) (quoting *Carparts Distrib. Ctr., Inc. v. Automobile Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 17 (1st Cir. 1994) (alterations in original), *Nealey v. Univ. Health Servs., Inc.*, 114 F. Supp. 2d 1358, 1367 (S.D. Ga. 2000)). Here, ETF and GIB are liable under Title VII, because state law requires the Board of Regents and the University of Wisconsin Hospital and Clinics to delegate control over Plaintiffs' health insurance coverage to ETF and GIB and because ETF and GIB exercise that control.[6] (PPFOF ¶ 65).

While GIB is liable under Title VII for establishing the discriminatory terms of Plaintiffs' health insurance coverage and contracting with private insurance companies to administer that coverage (PPFOF ¶ 125), ETF is liable for implementing and enforcing the terms of the discriminatory coverage. *See Quinones*, 58 F.3d at 277 (finding that city's enforcement of discriminatory pension policy meant it was liable under the ADEA, even though state law prevented it from exercising any control over the policy or changing it).[7]

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[6] In their summary judgment brief, Defendants continue to attempt the "magic trick" the Court rejected in ruling on their Motion to Dismiss. (Dkt. # 67 at 4 ("By arguing that only GIB is responsible for health insurance, but that neither GIB nor ETF is an employer, defendants are essentially arguing that the State of Wisconsin is entirely immunized from Title VII claims. That is not the case"). Similarly, Defendants can't evade responsibility for a discriminatory employment policy because the State of Wisconsin divided authority for setting and administering that policy between GIB and ETF. As Plaintiffs will address more fully in responding to Defendants' brief, both are parts of the State, which employs the Plaintiffs, and both have roles in setting and implementing the offending policy, so they are both liable.

[7] The same principle applies under Title VII. *See Williams v. Gen. Foods Corp.*, 492 F.2d 399, 404 (7th Cir. 1974) ("[T]he scheme of Title VII provides that employers are exempted from liability under state laws which require the doing of acts which constitute unlawful employment practices, not that reliance on state statutes resulting in discriminatory practices bars Title VII liability[.]" (internal citations omitted) (emphasis added)).

B. Defendants' "Gender Reassignment" Exclusion Facially Discriminates on the Basis of Sex in Violation of Title VII

GIB and ETF prohibit coverage for "procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment." (PPFOF ¶ 43). Plaintiffs were denied coverage for the necessary medical care they need under this "gender reassignment" exclusion. (PPFOF ¶¶ 9, 14, 19, 57-60). That employee benefit policy violates Title VII, because it is inherently a sex-based classification and because it discriminates against transgender employees *because* they are transgender.

Just as requiring students to use the restroom based on the sex listed on their birth certificate is "inherently based upon a sex-classification," *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017), so is the exclusion of "gender reassignment" treatment from an employer health benefit plan. The "gender reassignment" exclusion on its face discriminates based on sex stereotypes and gender nonconformity because a person's "transitioning status constitutes an inherently gender non-conforming trait." *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018). By excluding coverage for this medically necessary care, Defendants are "insisting that [employees' anatomy] match[] the stereotype associated with their" sex assigned at birth. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); *cf. Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CIV 02-1531-PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 2, 2004) ("[N]either a woman with male genitalia nor a man with

stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait").[8]

Singling out medically necessary treatment related to "gender reassignment" for unequal treatment inherently discriminates based on transgender status. "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth," *Whitaker*, 858 F.3d at 1048, and can therefore bring a claim "for sex discrimination on the basis of a sex-stereotyping theory." *Id.* at 1049. Accordingly, a policy that "subjects . . . a transgender student, to different rules, sanctions, and treatment than non-transgender students" violates Title IX's prohibition on sex discrimination. *Id.* at 1049-50.

Numerous other courts have concluded that discrimination against someone because they are transgender violates federal prohibitions on sex discrimination. *See, e.g., R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 574-81 (transgender plaintiff may bring sex discrimination claim under Title VII for improper sex stereotyping and for discrimination on the basis of transgender and transitioning status); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (recognizing that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."); *Rosa v. Park W. Bank & Tr. Co.*,

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[8] Moreover, the "gender reassignment" exclusion remains a sex-based classification even though it applies equally to transgender men and transgender women. "Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex." *G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 578; *see also Whitaker*, 858 F.3d at 1049 (policy of denying male student use of restroom consistent with his gender identity was discriminatory because it subjected him to differential treatment because he is transgender, not because he was treated differently than female students).

214 F.3d 213, 215–16 (1st Cir. 2000) (transgender person may sue for sex discrimination claim under Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–03 (9th Cir. 2000) (same under Gender Motivated Violence Act).

The Supreme Court has repeatedly recognized that Title VII bars the application of policies that facially discriminate on the basis of sex. In *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), for example, the Court recognized that a state department's policy of requiring women to pay more into the pension fund than men "constitutes discrimination and is unlawful." *Id.* at 711. Similarly, the Court recognized that "[h]ealth insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment,'" and therefore that an employer violates Title VII when it provides men with less favorable pregnancy-related hospitalization benefits for their spouses than it provides to female employees. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682, 685 (1983). More recently, in *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.,* the Court struck down an employer's sex-based fetal-protection policy under Title VII. 499 U.S. 187 (1991). In yet another example, in *Reidt v. Cty. of Trempealeau*, the Seventh Circuit found a Sheriff's department violated Title VII by using "sex as an explicit factor" in filling jailer positions. 975 F.2d 1336, 1338, 1340 (7th Cir. 1992).

Because Defendants have instituted, administered and subjected their employees to a facially discriminatory policy, Plaintiffs are not required to offer any

additional evidence of discriminatory intent. (Dkt. # 67 at 17 ("[D]isparate treatment is demonstrated by the terms of the policy itself"); *Reidt*, 975 F.2d 1340-41). As the Seventh Circuit explained decades ago, where an employer is applying a facially discriminatory policy "intention is not pertinent," since in passing Title VII "'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation…'" *Williams*, 492 F.2d at 404 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)). In *Johnson Controls*, the Supreme Court reiterated that where there is a facially discriminatory policy, the employer's motives are beside the point: "Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." 499 U.S. at 199.

III. Defendants Conlin and the Members of GIB Have Violated Plaintiffs' Constitutional Rights to Equal Protection

Defendants Conlin[9] and the members of GIB have violated Plaintiffs' rights to equal protection by creating, offering, and administering a "gender reassignment" exclusion that discriminates against Plaintiffs on the basis of sex, for the same reasons it violates Title VII. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.

[9] In their Motion for Summary Judgment, Defendants reprise the argument – rejected by this Court's ruling on Defendants' Motion to Dismiss (Dkt. # 67 at 14) -- that Conlin is not sufficiently "personally involved" in the deprivation of Plaintiffs' rights to be held liable for damages in his individual capacity under section 1983. (Dkt. # 81 at 36-39). Plaintiffs will respond to this argument in their opposition to Defendants' motion. Plaintiffs here merely note, as set forth above, that Conlin himself admitted he was personally involved in reinstatement of the exclusion and there is ample evidence of his role in and responsibility for enforcement of that exclusion. Defendants' reliance on cases rejecting respondeat superior liability in Section 1983 cases is inapposite, because Conlin here is sued for his actual participation in Plaintiffs' deprivation by administering and enforcing an unconstitutional policy, not for the independent actions of a subordinate employee.

432, 439 (1985) (Equal Protection Clause requires that "all persons similarly situated should be treated alike"). Plaintiffs are similarly situated to other state employees in their need for insurance coverage for medically necessary care. (PPFOF ¶¶ 9, 14, 19, 63-65; s*ee also* Wis. Stat. § 40.01 ("'public employee trust fund' is created to aid public employees in protecting themselves . . . against the financial hardships of . . . illness, thereby promoting economy and efficiency in public service by facilitating the attraction and retention of competent employees, by enhancing employee morale …. [and] by establishing equitable benefit standards throughout public employment"). However, they are denied the coverage they need because of the facially discriminatory exclusion of coverage for surgery and sex hormones associated with gender reassignment. (PPFOF ¶¶ 62-63).[10]

Relying principally on expert reports produced for this litigation long after the exclusion was reinstated, Defendants assert that the exclusion is justified by the cost of treatments for gender dysphoria and uncertainty about the efficacy and safety of those treatments. (Dkt. # 81, Defs.' Br. in Supp. of Mot. for Summary Judgment at 30-35). However, as explained below, those justifications fail under the heightened scrutiny that applies to classifications based on sex or transgender identity, both because such post-hoc rationalizations can never satisfy such scrutiny and because the discriminatory classification is not "substantially related" to the asserted governmental objectives. Moreover, even if rational basis review were to apply in this case, these justifications fail.

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[10] See also PPFOF ¶ 62 (referring to Texas litigation as challenge to federal government's ruling on removal of transgender exclusions from health plans).

A. The Exclusion Should Be Reviewed Under a Heightened Level of Constitutional Scrutiny

Since the coverage exclusion is a sex classification, it should be reviewed under heightened scrutiny. *See Whitaker*, 858 F.3d at 1051 (applying heightened scrutiny to review discrimination against transgender student); *see also Glenn v. Brumby*, 663 F.3d 1312, 1318-20 (11th Cir. 2011) (applying heightened scrutiny to review discrimination against transgender employee).

In addition, heightened scrutiny should apply to the "gender reassignment" exclusion because it classifies on the basis of transgender status, and transgender persons have historically faced discriminatory treatment, are politically powerless to redress the discrimination they face, their status as transgender bears no relationship to their ability to contribute to society, and their transgender identity is immutable in that it is core to a person's identity and cannot be changed by outside influence. *See Wolf v. Walker*, 986 F. Supp. 2d 982, 1011-16 (W.D. Wis.) (applying four-part test to find that sexual orientation classification should be reviewed under heightened scrutiny), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

There is no doubt that transgender people have faced a long history of discrimination in all aspects of their lives. *See Whitaker*, 858 F.3d at 1051 ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity").[11] Transgender people are also politically

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[11] *See also* James, S.E., *et al.*, The Report of the 2015 U.S. Transgender Survey, Washington, D.C.: National Center for Transgender Equality (2016) ("Transgender Survey"), *available at:*

powerless, as evidenced by the extremely small percentage of the population that identifies as transgender and the historical and ongoing discrimination against them. (PPFOF ¶ 25; *see also Wolf*, 986 F. Supp. 2d at 1014 (finding that lesbians and gay men satisfy the political powerlessness factor "[i]n light of the fact that gay persons make up only a small percentage of the population and that there is no dispute that they have been subjected to a history of discrimination")).

Additionally, gender identity is immutable and highly resistant to change (PPFOF ¶ 22; *see also Baskin*, 766 F.3d at 657 ("sexual orientation, the ground of the discrimination, is an immutable . . . characteristic rather than a choice"), and has no bearing on an individual's ability to contribute to society. (PPFOF ¶¶ 1, 3, 6, 12). Indeed, Boyden is a Ph.D. student, Andrews has a Ph.D. in molecular biology from Princeton University, and Logan is a psychiatric resident. (Id.).

Numerous courts in other jurisdictions have already recognized that transgender status meets all of the Supreme Court's criteria for recognizing suspect and quasi-suspect classifications: "transgender people have historically been subject to discrimination or differentiation;" "transgender status bears no relation to an ability to contribute to society;" "[transgender individuals] exhibit 'obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and "as a class, are a minority or politically powerless." *M.A.B. v. Bd. of Educ. of*

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https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (describing the discrimination, harassment, and even violence that transgender individuals encounter at school, in the workplace, when trying to find a place to live, during encounters with police, in doctors' offices and emergency rooms, at the hands of service providers and businesses, and in other aspects of life).

Talbot Cty., 286 F. Supp. 3d 704, 720-21 (D. Md. 2018) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)); *accord Grimm v. Gloucester Cnty. Sch. Bd.,* No. 4:15CV54, 2018 WL 2328233, at *12 (E.D. Va. May 22, 2018); *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *11 (W.D. Wash. Apr. 13, 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 872–74 (S.D. Ohio 2016); *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (finding that discrimination against transgender people must be reviewed under heightened scrutiny); *Marlett v. Harrington*, No. 1:15–cv–01382–MJS (PC), 2015 WL 6123613, at *4 (E.D. Cal. 2015) (same); *cf. Mitchell v. Price*, 11-cv-260-wmc, 2014 WL 6982280, *8 (W.D. Wis. Dec. 10, 2014) (applying heightened scrutiny based on parties' agreement).

B. The Exclusion Fails Review Under Heightened Scrutiny

Under heightened scrutiny, the government must "demonstrate an exceedingly persuasive justification" for a sex-based action or classification, *United States v. Virginia*, 518 U.S. 515, 531 (1996), and this "demanding" burden rests "entirely on the State." *Id.* at 533. The government must show that the "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 524 (internal quotation marks omitted). Moreover, the

justification must be genuine, rather than a hypothesized or *post hoc* justification created in response to litigation. *Id.* at 533. A rationale based upon overbroad generalizations about sex is insufficient. *Id.* Where the government fails to produce "persuasive evidence" to meet its burden, the challenged action or classification violates equal protection. *Id.* at 539-40.

The exclusion here fails heightened scrutiny because the evidence shows that the state's cost, safety, and efficacy justifications for denying medical coverage to transgender persons were proposed after the fact in response to litigation and were not the basis for GIB's decision to reinstate the exclusion. (PPFOF ¶¶ 148-49 (Defendants initially stated that the reasons for the exclusion were the promotion of the goals of Wis. Stat. § 40.01(1), and only after Plaintiffs requested a more complete answer did Defendants provide their "cost" and "efficacy" rationale)).

Witnesses and defendants, including Conlin and GIB members, have confirmed that the decision to reinstate the exclusion had nothing to do with cost, safety, or efficacy, but instead involved the Board's conclusion that doing so would not entail liability for violating the final regulations of the ACA. (PPFOF ¶¶ 127-135).

Cost was not a serious consideration, while concerns about the safety and efficacy of the surgery played no role at all in the GIB's deliberations. (Id.). Although board member J.P. Wieske ("Wieske") testified that he did not believe that gender confirmation surgery was medically necessary, his only information about medical necessity appears to come from conversations with unidentified people at

insurance companies who he claims told him such procedures were not medically necessary. (PPFOF ¶ 133). He admitted that he had no knowledge about whether the surgery was medically necessary. (PPFOF ¶ 131). Other board members explicitly said that no evidence about safety or efficacy of the excluded procedures was ever presented to or considered by the board. (PPFOF ¶¶ 133, 135).

Overgeneralizations and speculation regarding the necessity, safety, and efficacy of surgery – such as Wieske's musings – are insufficient under a heightened level of constitutional review. *See Virginia*, 518 at 533; *id.* at 541 (reviewing courts must "take a hard look at generalizations or tendencies") (internal citations omitted); *see also Whitaker*, 858 F.3d at 1052 (rejecting assertion that allowing transgender boy to use the boy's restroom would violate privacy interests of other students as "based upon sheer conjecture and abstraction").

Nor is the discriminatory exclusion "substantially related" to the asserted government interests in costs or concerns about efficacy or safety. While the medical procedures at issue here, like all medical procedures, have some costs and carry some risk of complications, the evidence shows that the costs of the excluded services – less than .1% of the state's total premium costs – are immaterial and that the safety and effectiveness of those services in treating gender dysphoria are uniformly accepted in the mainstream medical community and well supported in the literature. (PPFOF ¶ 35, 53).

C. The Exclusion Fails Any Level of Review Because It is Directed at Transgender People and Its Lack of Rational Connection to Any Legitimate Governmental Interest

While heightened scrutiny should apply to the exclusion's sex and transgender-identity-based classification, the exclusion would fail even under rational basis review. Where, as here, a rule is directed at and disfavors a particular class of people – those who are transgender – a more searching level of rational basis review applies. Where a classification is "inexplicable by anything but animus toward the class it affects," *Romer v. Evans*, 517 U.S. 620, 632 (1996), it must be struck down. "In determining whether a law is motived by an improper animus or purpose, [d]iscriminations of an unusual character especially require careful consideration[.]" *United States v. Windsor*, 570 U.S. 744, 768 (2013) (internal quotation marks omitted).

The coverage exclusion easily qualifies under this standard, having been reinstated after less than six (6) months of being ended, against the advice of ETF staff, and after already being eliminated from the contracts with health plans. (PPFOF ¶¶ 103, 118-121, 125). The reinstatement took place in a hastily-arranged meeting of GIB, apparently solely because of developments in litigation in which the State of Wisconsin was participating in another state. (PPFOF ¶¶ 122, 128). The reinstatement was made contingent on a number of future events. (PPFOF ¶ 125). Numerous witnesses, including Defendant Conlin, testified that all of these aspects of the process of reinstating the exclusion – its reversal of existing policy only recently adopted, its timing, its contingent nature – were unprecedented in their

memory. (PPFOF ¶ 143). For example, ETF staffer Jeff Bogardus testified that he could not recall another instance in which a change to benefits was made during a plan year. (*Id.)*.

Moreover, the coverage exclusion directly impacts one (1) group of people – and one (1) group only – persons who are transgender. By definition, only people who are transgender suffer from gender dysphoria, and therefore only transgender people need medical care for "gender reassignment." (PPFOF ¶¶ 24, 31, 34). "[A] court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

Even under rational basis review, the relationship between the classification and governmental interest "must find some footing in the realities of the subject addressed by the" challenged law or policy. *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 321 (1993). And the connection between the purported justifications and the classification cannot be "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause" and "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Baskin,* 766 F.3d at 664 ("A degree of arbitrariness is inherent in government regulation, but when there is no justification for government's treating a traditionally discriminated-

against group significantly worse than the dominant group in the society, doing so denies equal protection of the laws").

Cost savings do not justify the differential treatment of transgender employees with a medical need for transition-related medical care from other state employees who receive insurance coverage for treatment of other medical conditions. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618, 634 (1969); *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (where interest in "cost savings" "depend[s] upon distinguishing between homosexual and heterosexual employees, similarly situated," it "cannot survive rational basis review"); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854 (E.D. Mich. 2014) ("Although a state has a valid interest in preserving the fiscal integrity of its programs and may legitimately attempt to limit its expenditures," it "may not accomplish such a purpose by invidious distinctions between classes of its citizens." (internal quotation marks omitted)). Cost savings cannot explain the exclusion of coverage for state employees who are transgender when coverage is provided for other medical conditions. *Cf. City of Cleburne*, 473 U.S. at 450.

Moreover, any costs associated with providing the coverage are so insignificant as to be immaterial. (PPFOF ¶¶ 53, 54; *cf. Diaz*, 656 F.3d at 1014 (statute stripping same-sex partners of benefits properly enjoined under rational basis review, where evidence showed that the cost of such benefits was between .06% and .27% of state's total spending on health care benefits)).

The state claims that the exclusion furthers an interest in denying coverage for medical care that is "experimental" and has not been "demonstrated to be safe and effective for treating gender dysphoria." (PPFOF ¶ 149). This claim lacks credible factual support and any connection between these asserted interests and the discriminatory exclusion is so attenuated as to be irrational.

First, "every major expert medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people." (PPFOF ¶ 33). More than thirty (30) years of research show the safety and efficacy of this care as well as the serious harm caused by denying the care to those who need it. (PPFOF ¶¶ 35-36). Moreover, these treatments are similar to other treatments for which the state provides insurance coverage in terms of safety, efficacy and acceptance in the medical field. (PPFOF ¶¶ 39-46 (surgeons use many of the same procedures when performing gender confirming surgery that they use to treat other medical conditions, including using the same billing codes for the procedures)).

The exclusion of coverage "is not 'tailored' to the problem," *Baskin*, 766 F.3d at 672, of surgeries that result in complications, as the state provides coverage for very similar procedures with similar complication rates for different medical conditions other than gender dysphoria. As such, it "is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny," as was Wisconsin's ban on marriage for same-sex couples. *Id.* at 656. Laws or policies whose actual purpose was to "degrade" and "demean," such as the exclusion

at issue in this case, are carefully scrutinized for an improper purpose. *See Windsor*, 570 U.S. at 770, 774; *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review not deferential when there is "some reason to infer antipathy").

The same procedures that are covered when medically necessary for treatment of other conditions were not covered for Plaintiffs solely because of the "gender reassignment" exclusion. The only justification given to Plaintiffs for the denial of coverage was the exclusion: there was no reference to a lack of medical necessity and no reference to the supposed "cosmetic" or "experimental" nature of the procedures. (PPFOF ¶¶ 57-60). Indeed, if the excluded procedures are not medically necessary or are truly experimental or cosmetic, as Defendants claim, the exclusion would be redundant, emphasizing its irrational singling out of transgender people for differential treatment. Such gratuitously differential treatment cannot be "rational." Moreover, in general, state employees are provided coverage for medically necessary care, which is care consistent with the symptoms or diagnosis and treatment of the participant's illness or injury based on standards of acceptable medical practice to treat an illness or injury. (PPFOF ¶ 42). Transgender state employees, however, are denied gender affirming care even though it is medically necessary under that standard. (PPFOF ¶ 43).

The Defendants' professed justifications for the coverage exclusion are not based in fact and not rationally connected to a classification based on sex and gender identity, and thus do not satisfy rational basis review.

V. Defendant ETF Has Violated Plaintiffs' Rights Under the ACA

Under Section 1557 of the ACA "an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance . . . ." 42 U.S.C. § 18116.

A. ETF Is a Covered Entity Under the ACA

ETF is a covered entity under the ACA with respect to the health insurance plans it offers state employees, because it is a health program or activity that receives Medicare Part D subsidies. (PPFOF ¶ 67). Courts have confirmed that the receipt of Medicare funds, such as those received by ETF, qualifies as Federal financial assistance for purposes of the *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *13 (D. Minn. Mar. 16, 2015); *see also Massey v. Churchview Supportive Living, Inc.*, No. 17 C 2253, 2018 WL 999900, at *3 (N.D. Ill. Feb. 21, 2018) (for similar statutes such as section 504 of the Rehabilitation Act of 1973).

ETF enforces and administers the State of Wisconsin's state employee health insurance plan, which facially discriminates against Ms. Boyden, Ms. Andrews, and Ms. Logan. (PPFOF ¶¶ 66, 76, 79-83, 86). In addition, ETF assisted GIB in reinstating the exclusion by concluding that the four (4) contingencies had been met and reinstated the exclusion without further action by GIB. (PPFOF ¶¶ 140-41).

B. The Exclusion Discriminates On the Basis of Sex in Violation of Section 1557

ETF violated Section 1557 by denying Plaintiffs "the benefits of" or "subject[ing] [them] to discrimination under, any health program or activity." 42 U.S.C.A. § 18116. Whether this Court applies a unitary standard, *see Rumble*, 2015 WL 1197415, at *12[12], or the standards applicable to Title IX, *see Briscoe v. Health Care Serv. Corp.*, 281 F. Supp. 3d 725 (N.D. Ill. 2017) (dismissing Section 1557 claim because disparate impact claims are not actionable under Title IX), ETF violated Section 1557 by administering a facially discriminatory policy and denying Plaintiffs coverage under that policy. *Whitaker*, 858 F.3d at 1048 (enforcing policy that facially discriminates against transgender people violates Title IX); *see also Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017) (finding that hospital staff's repeated misgendering of transgender boy made out case under Section 1557).

Plaintiffs may seek both damages and injunctive relief from ETF because of its violation of Section 1557, since the enforcement mechanisms of Title IX and the other statutes referenced in Section 1557 apply to violations of the statute, 42 U.S.C.A. § 18116, and damages and injunctive relief are both available under Title IX. *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 76 (1992); *see Audia v. Briar Place, Ltd.*, No. 17-cv-6618, 2018 WL 1920082, *3 (N.D. Ill. April 24, 2018) ("Section 1557's incorporation of '[t]he enforcement mechanisms' of other statutes is

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[12] *Rumble* found that Section 1557 "create[s] a new, health-specific, anti-discrimination cause of action that is subject to a singular standard, regardless of a plaintiff's protected class status." *Rumble*, 2015 WL 1197415, at *12 (citation omitted).

congressional recognition that the act can be enforced through the private right of action authorized by the referenced statutes").

CONCLUSION

For all these reasons, Plaintiffs respectfully request that this Court enter an order granting them partial summary judgment.

Dated this 8th day of June, 2018.

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