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' REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Alina Boyden and Shannon Andrews ("Plaintiffs"), through their undersigned attorneys, submit this reply brief in further support of their motion for partial summary judgment (Dkt. 95) against the Defendants.[1]

INTRODUCTION

Defendants assert that this case challenging an exclusion of coverage for "gender reassignment" under the Wisconsin Group Health Insurance Program has nothing to do with discrimination against transgender employees, because the State allows such employees to live consistent with their gender identity in various ways

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[1] 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 will seek relief against the GIB members recently added as defendants by this Court's order granting in part Plaintiffs' motion for leave to amend (Dkt. 109) at an appropriate time.

without interference. (Defs' Opp. Br. (hereafter Defs' Br.) (Dkt. 120) at 1.[2]) But the failure to discriminate in certain ways does not justify discrimination in others, such as Defendants' blanket bar against insurance coverage for the gender confirming surgery and associated hormone therapy that are life-saving medical treatments for those transgender people who need them. Because the State's harmful exclusion affects only transgender employees, it constitutes unlawful discrimination under the Equal Protection Clause of the United States Constitution, Title VII of the Civil Rights Act, and the Affordable Care Act.

Despite the fact that the cost to the State of treating gender dysphoria would be actuarially immaterial and that the efficacy of these treatments is widely accepted by experts who actually practice in the field, Defendants advance post-hoc rationalizations of cost containment and safety and efficacy concerns as justifications for the exclusion. Such post-hoc, pretextual justifications for a facially discriminatory policy cannot withstand the constitutional scrutiny applied to classifications that discriminate based on transgender status and gender or the anti-discrimination demands of Title VII and Section 1557 of the ACA. The evidence shows that concerns about efficacy or costs of the excluded treatments were not the real basis for imposing or reinstating the exclusion. Indeed, the asserted justifications are so attenuated and unsupported that they cannot survive even rational basis review.

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[2] Page citations to Defendants' Brief are to the page numbers at the bottom of the page, rather than those assigned in the caption by the ECF system.

FACTS

Transgender state employees cannot obtain medically necessary gender confirming care due to a specific exclusion of "gender reassignment" treatments in Defendants' health insurance plans for state employees. Pls.' PFOF (Dkt. 96) ₱56. Plaintiffs Alina Boyden and Shannon Andrews are transgender state employees who have suffered and continue to suffer physical, emotional, and financial harms as well as an ongoing risk of physical and emotional harms because of the exclusion. Pls.' PFOF ₱₱4, 5, 10, 16 (describing harms, including Boyden's side effects from testosterone suppressing medications, which would be alleviated by gender confirmation surgery that would naturally suppress testosterone).

Defendants do not question that Plaintiffs suffer emotionally and physically from gender dysphoria (Def. Resp. to Pl. PFOF ₱₱10, 16) and that transgender individuals suffering from gender dysphoria require medical treatment. Def. Resp. to Pl. PFOF ₱₱27, 32. Both Boyden and Andrews' health care providers, and an expert in gender dysphoria who has evaluated them, have concluded that treating Plaintiffs' gender dysphoria with hormone therapy and gender confirmation surgery ("GCS") is medically necessary treatment for them. Pls.' PFOF ₱₱8, 13; Pl. Reply to Def. Resp. to Pl. PFOF ₱₱10, 14. Defendants' own expert concedes that GCS and hormone therapy can be medically necessary to treat individual cases of gender dysphoria under some circumstances. Pl. Reply to Def. Resp. to Pl. PFOF ₱10. He expresses no opinion about whether the gender confirmation surgeries prescribed for Plaintiffs Boyden and Andrews are medically necessary for them.

Because of the small number of expected procedures in a given year, Defendants cannot seriously dispute that the cost of covering this benefit would be small as compared to the total cost of the group health insurance program. In fact, as Plaintiffs' expert explains and GIB member Herschel Day agrees, the cost of providing such care is immaterial or negligible in actuarial terms. Pl. Reply to Def. Resp. to Pl. PFOF ¶53.

Moreover, medically necessary GCS and hormone therapy treatment for gender dysphoria are widely accepted in the medical community as safe and effective. PFOF ¶3335, 36; Pl. Reply to Def. Resp. to Pl. PFOF ¶¶33, 35, 36. Defendants, relying on an expert who has never treated a transgender patient and has done no original research on gender identity or gender dysphoria, attempt to introduce uncertainty about the effectiveness of GCS and hormone therapy, contrary to a broad scientific consensus. Pl. Reply to Def. Resp. to Pl. PFOF ¶¶9, 33; Pls.' Supp. PFOF ¶22, . Studies demonstrate that GCS and hormone therapy significantly reduce gender dysphoria. Pl. Reply to Def. Resp. to Pl. PFOF ¶¶9, 30, 32, 35, 47; Pls.' Supp. PFOF ¶¶31, 33. Leading guidelines on treatment of gender dysphoria ("WPATH Standards of Care"), medical advice from licensed psychiatrists and physicians, and the concessions of Defendants' own expert, all support the effectiveness of GCS and hormone therapy to treat gender dysphoria. PFOF ¶¶35, 36, 37; Pl. Reply to Def. Resp. to Pl. PFOF ¶10, 35, 64.[3] Moreover, even if there were

[3] Defendants assert that gender confirmation surgery is merely "cosmetic," because it makes people appear "more feminine" or "more masculine." (See, e.g., Defs.' Br. at 12-14). This is simply false. Cosmetic surgery is intended to "beautify" or improve appearance and is not indicated for or effective

uncertainty about the efficacy and safety about GCS and hormone therapy, that would not be a reason to deny coverage for it, since other kinds of medical treatments that are recognized as effective in the medical community would fail to meet the same standard, as Defendants' own expert admits. Pls.' Resp. to Def. Add'l PFOF ¶125; Pls.' PFOF ¶50.

State Defendants claim they do not wish to interfere with how their transgender employees live their lives, and yet deprive them of medically necessary, effective care for a serious condition that affects only transgender people. Pl. Reply to Def. Resp. to Pl. PFOF ¶10. Denying Plaintiffs such care directly interferes with their ability to live healthy lives as transgender people.

ARGUMENT

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

A. ETF and GIB are Proper Defendants Under Title VII.

Defendants' primary arguments that ETF is not a proper defendant under Title VII boil down to the claims that to be liable ETF must have actively and intentionally discriminated against Plaintiffs and that the Board of Regents must have actively chosen to delegate responsibility for health insurance benefits to ETF and GIB. Neither is a requirement under Title VII.

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in treating depression, body dysmorphic disorder or any other psychiatric condition. (Pls.' Supp. PFOF ¶¶2, 4). In contrast, GCS is *reconstructive* – in that it provides otherwise absent, primary and/or secondary sex characteristics or otherwise conforms a person's body to accord with a patient's gender identity – and is often the only effective treatment for serious gender dysphoria. Pls.' Supp. PFOF ¶2, 9.

ETF staff members' desire to eliminate the exclusion is irrelevant, because good intentions are not a defense to Title VII liability. An employer violates Title VII when it relies on an employment policy that discriminates on the basis of sex, even if the differential treatment is based on factually accurate generalizations about people of different genders. *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) (policy of requiring woman to pay more for pension benefits was sex discrimination, even though based on the "unquestionably true" generalization that "[w]omen, as a class, . . . live longer than men."). A discriminatory employment practice violates Title VII even when the gender-based policy is motivated by a good faith desire to protect employees. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination[.]"). "[I]t is only necessary for [an employee] to establish that the [employer] engaged in employment practices proscribed by Title VII." *Williams v. Gen. Foods Corp.*, 492 F.2d 399, 404 (7th Cir. 1974). "[T]he [employer]'s intention is not pertinent." *Id.*

Defendants try unsuccessfully to distinguish the application to this case of *Quinones v. City of Evanston*, 58 F.3d 275 (7th Cir. 1995), which held that an employer may not rely on state law as a defense to a federal employment discrimination claim. They claim that GIB's decision was not "obviously" in violation of Title VII and that ETF was "faced with . . . a clear state law

requirement to implement GIB's Exclusion decision" and therefore "did not knowingly choose to follow state law rather than federal law." (Def. Br. at 10.) But ample Supreme Court and Seventh Circuit precedent make it clear that ETF's intentions were irrelevant; what mattered was the discriminatory nature of the policy it administers and assisted GIB to put in place. *See Johnson Controls*, 499 U.S. at 199 ("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."). Title VII "prohibits sex-based classifications in terms and conditions of employment," *id.* at 197, such as the "gender reassignment" exclusion that ETF administers, enforces, and had a role in developing. Defendants latch on to the *Quinones* court's observation that Evanston could have disbanded its fire department in order to comply with both federal and state law. (Def. Br. at 9 (citing *Quinones*, 58 F.3d at 278). But the existence of this potential, and likely unrealistic,[4] way out played no role in the Seventh Circuit's holding that an employer may not rely on "[a] discriminatory state law" as "a *defense* to liability under federal law." *Quinones,* 58 F.3d at 277. Similarly, the fact that Evanston was required to prospectively fund the plaintiff's pension fund, rather than pay damages for the harm caused to

[4] Defendants' reliance on state law to explain why ETF could not also choose to avoid the discrimination in this case by choosing not to provide health insurance benefits ignores the basic holding of *Quinones* – that an employer may not rely on state law as a defense to a federal employment discrimination case. More fundamentally, ETF (and the Board of Regents) are both part of the State. If the State of Wisconsin does not want to provide insurance coverage to state employees in compliance with federal non-discrimination laws, then it presumably is also free to stop providing health insurance coverage to state employees – an action no less plausible than the suggestion that Evanston disband its fire department.

Plaintiffs, as is the case here, is a distinction without any legal significance. Under Title VII, both damages as well as prospective injunctive relief are available. 42 U.S.C. § 2000e–5(g)(1) ("[C]ourt may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate").

Additionally, to establish the liability of an agent, Title VII does not require an employee to prove that her direct employer *chose* to delegate control over an employee benefit, such as health insurance coverage, as Defendants claim. (Def. Brf. at 6-7). But even if it did, ETF and GIB are liable under Title VII because of the *State*'s decision to delegate responsibility over health insurance coverage to them, as this Court recognized in its decision denying in part Defendants' motion to dismiss. (Dkt. 67 at 4, 7 ("For legal purposes, plaintiffs are employed by the State of Wisconsin. Much like the divisions of a large corporation, however, the Wisconsin Legislature has seen fit to divide up the employment responsibilities of the state, delegating them to various government agencies. . . . Health insurance falls under the domain of ETF and GIB.")).

The Seventh Circuit's reasoning in *Alam v. Miller Brewing Co.*, 709 F.3d 662 (7th Cir. 2013), does not impose a requirement that Plaintiffs prove that the Board of Regents intentionally delegated its responsibility over health insurance to ETF and GIB. Rather, the court indicated that an agent's "exercise . . . [of] control over an important aspect of [the plaintiff's] employment," an agent's action that "significantly affects access of any individual to employment opportunities," *or* an

"employer['s] delegat[ion]" of "sufficient control of some traditional rights over employees to a third party," *id.* at 669 (citations omitted), are sufficient for liability under Title VII.[5] It is the delegation *or* exercise of control over an important aspect of employment that determines whether an entity is liable as an agent under Title VII; here the facts show both delegation and an exercise of control over Plaintiffs' health insurance coverage by ETF and GIB.

In *Carparts Distribution Center., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), the court found that entities could qualify as employers under the ADA if they "exist solely for the purpose of enabling entities such as [the employer] to delegate their responsibility to provide health insurance for their employees" *id.* at 17, or if they "act on behalf of the entity in the matter of providing and administering employee health benefits." *Id.* Similarly, in *Spirt v. Teachers Insurance & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983), it was the insurance agency's exercise of control over pension benefits that "significantly affect[ed] access of any individual to employment opportunities," as well as the employer's "delegation of responsibility for employee benefits" to the insurance company, that were significant. *Id.* at 1063. The motivation behind the employers' decision to delegate responsibility to a third party – whether it was to avoid liability or simply

[5] Defendants' other arguments about *Alam* should also be rejected, (Def. Br. at 6), since this Court may plainly rely on the Seventh Circuit's reasoning as well as the fact that it cited approvingly decisions from other circuits regarding the circumstances under which an entity such as ETF may be held liable under Title VII as an agent.

to ease the administrative burden associated with health or pension benefits – was not a part of these courts' analyses.

Even focusing on the act of delegation, rather than ETF and GIB's exercise of control, does not change the result here. It is the *State of Wisconsin* that employs both Plaintiffs through their direct employer, the Board of Regents. Allowing ETF and GIB to rely on the fact that the Board of Regents had no choice in the *State*'s decision to delegate responsibility to them over health insurance benefits to avoid their obligations under Title VII "would seriously impair the effectiveness of Title VII." *Id.*

The Seventh Circuit reached the same result in *DeVito v. Chicago Park District,* 83 F.3d 878 (7th Cir. 1996), where it found that because the Personnel Board "adjudicates employment disputes on behalf of the Park District," the Park District was liable for the actions of the Board, "[e]ven assuming that the Personnel Board is an entity separate and distinct from the Park District." *Id.* at 881. A contrary result would allow employers to "disclaim liability under the ADA by asserting that its hiring committee, rather than the employer itself, made the challenged decision." *Id.* at 881 n. 6; *see also Lee v. Cal. Butchers' Pension Tr. Fund*, 154 F.3d 1075, 1078–79 (9th Cir. 1998) (holding that plaintiff butcher, who was directly employed by Safeway, could sue the pension trust fund set up by his

employer under the ADEA even though "[t]he Trust was not [plaintiff's] employer in a common law sense, because it did not hire him to cut meat.").[6]

Defendants only argument against finding GIB liable under Title VII is that it does not employ 15 people, but GIB and ETF should be treated as a single entity for purposes of the 15 employee requirement for Title VII liability, since GIB directs the "discriminatory act, practice, or policy of which [Plaintiffs] are complaining." *Papa v. Katy Industries, Inc.*, 166 F.3d 937, 941 (7th Cir. 1999); (*see also* Pltfs' Br. in Opp. to Defs' M for SJ at 37-38). GIB is part of ETF even if it is an independent attached board of ETF. *See* Wis. Stat. § 15.165(2) ("There is created in the department of employee trust funds a group insurance board"). It is "a distinct unit of that department," Wis. Stat. § 15.03, which "exercise[s] its powers, duties and functions prescribed by law . . . independently of the head of the department . . . , but budgeting, program coordination and related management functions shall be performed under the direction and supervision of the head of the department." *Id.* As such, even if GIB is seen as independent from ETF for some purposes, ETF and

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[6] Defendants focus on the fact that, in *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), the state benefits administrator chose the companies that established the discriminatory terms of the retirement plans. (Def. Br. at 7.) But the Supreme Court made clear that Arizona was liable under Title VII, even if there were not any non-discriminatory plans available on the market. *Id.* at 1088 ("It is no defense that all annuities immediately available in the open market may have been based on sex-segregated actuarial tables."). "[E]mployers are ultimately responsible for the 'compensation, terms, conditions, [and] privileges of employment' provided to employees, [so] an employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of race, religion, sex, or national origin violates Title VII regardless of whether third parties are also involved in the discrimination,", *id.* at 1089, and "regardless of which party initially suggested inclusion of the discriminatory provision." *Id.* at 1090.

GIB should be treated, for Title VII purposes, as a "single entity" that collectively establishes and administers the benefits available to state employees in Wisconsin.

B. ETF and GIB Discriminated Against Plaintiffs on the Basis of Sex.

Discrimination against someone because they are transgender constitutes discrimination on the basis of sex. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017). Defendants rely on *Ulane v. Eastern Airlines, Inc.*, 742 F.3d 1081 (7th Cir. 1984), and *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007), even though the Seventh Circuit in *Whitaker* rejected the school district's reliance on these cases to justify its refusal to allow Ash Whitaker to use the same restrooms as other boys because he is transgender. 858 F.2d at 1047. *Ulane*'s "reasoning . . . cannot and does not foreclose Ash and other transgender students from bringing sex-discrimination claims based upon a theory of sex-stereotyping as articulated four years later by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)." *Id. Etsitty* relied on the Seventh Circuit's reasoning in *Ulane*, 502 F.3d at 1221, so it has no persuasive authority in the Seventh Circuit after *Whitaker*.[7]

Defendants first attempt to distinguish *Whitaker* and *Harris, see infra* p. 14, by ignoring the fact that the "gender reassignment" exclusion facially discriminates against transgender people and claiming that the state excludes all cosmetic

[7] Moreover, even the *Etsitty* court recognized the possibility that a transgender person could bring a sex stereotyping claim under a different set of facts. 502 F.3d at 1224 ("we assume, without deciding, that . . . a [sex stereotyping] claim is available and that Etsitty has satisfied her prima facie burden," but conclude that "Etsitty has not presented a genuine issue of material fact as to whether UTA's stated motivation for her termination is pretextual.").

surgical treatments for psychological conditions, (Defs. Br. at 11), but the facts show otherwise. The "gender reassignment" exclusion at issue here is separate from the "cosmetic surgery" exclusion, (Pls.' Supp. PFOF ¶ 21), and Plaintiffs were expressly denied coverage because of this "gender reassignment" exclusion, not a "cosmetic" surgery exclusion. (Pls.' PFOF ¶¶ 57-58).

Moreover, surgical treatment for transgender employees with gender dysphoria is not "cosmetic" surgery, but "reconstructive." Pls.' Supp. PFOF ₱2, 9. It is not directed at improving someone's appearance consistent with their gender assigned at birth, but changing their primary and /or secondary sex characteristics to conform with their gender identity. Pls.' PFOF ₱30. Such surgery is the recognized medical standard of care for resolving the clinically significant distress experienced by transgender persons with serious gender dypsphoria. (Pls.' PFOF ¶ 30; Pls.' Resp. to Defs.' PFOF ¶ 101). In contrast, non-transgender persons seeking cosmetic surgery to "beautify" or enhance characteristics their bodies already possess do not have a similar medical need for such surgery, nor does the medical community recognize cosmetic surgery as a treatment for depression. (Pls.' Supp. PFOF ¶¶ 3-4, 14-16); *see also* Pltfs' Br. in Opp. to Defs' M for SJ at 18-20.

For these same reasons, Defendants' open-the-floodgates argument (Defs. Br. at 13-14) lacks any merit. Ending the exclusion for reconstructive surgery to treat gender dysphoria does not entail a requirement of coverage for cosmetic surgery for non-transgender persons, since the two forms of surgery are entirely different. Pls.' Supp. PFOF ₱2. Surgery to treat gender dysphoria changes a person's body to

conform with a gender different than the gender they were assigned at birth, while cosmetic surgery is intended to "improve" a person's existing body parts to approximate some ideal of beauty. More importantly, as just noted, surgery to treat gender dysphoria is a widely accepted and effective treatment for a serious medical condition, while cosmetic surgery to treat depression or any other medical condition is not. Finding that the exclusion of coverage for surgical treatment of gender dysphoria does not require this or any other court to conclude that cosmetic surgery must also be provided.

Defendants further attempt to distinguish *Whitaker* and *Harris* on the ground that the plaintiffs in those cases supposedly "wanted to act in ways that *differed* from cultural sexual stereotypes," whereas the exclusion purportedly prevents Plaintiffs from "*conform[ing]* to cultural sex stereotypes." (Defs' Br. at 13.)[8] But this argument conflates the sex stereotypes associated with a person's gender assigned at birth, which are the basis for the discrimination in *Whitaker*, *Harris*, and the present case, with those that may be associated with a person's gender identity. The discrimination in *Whitaker* and *Harris* is the same as the discrimination at issue here. In *Whitaker*, a school district denied a student the ability to use the boys' restroom because he "fail[ed] to conform to the sex-based

[8] Defendants suggest that cultural variations in conceptions or ideals of masculinity and femininity somehow undermine the need for gender confirmation surgery. But the aspects of gender that vary from culture to culture are generally in the areas of social roles and behaviors, not the primary and secondary sex characteristics associated with one gender or another. Indeed, the fact that transgender people throughout the world seek the same surgeries demonstrates the shared understanding regarding the medical necessity of surgical treatment to conform sex-based physical characteristics to a person's gender identity. Pls.' Resp. to Def. Add'l PFOF ¶140.

stereotypes associated with [his] assigned sex at birth," 858 F.3d. at 1051. Similarly, in *Harris,* a transgender woman was fired because her decision to live and dress as the woman she knew herself to be failed to conform to the gender she was assigned at birth. *Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018) (firing employee because "Stephens was 'no longer going to represent himself as a man' and 'wanted to dress as a woman,' . . . falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* . . . forbid[s]."). Here, Boyden and Andrews are denied surgical treatment pursuant to a "gender reassignment" exclusion that enforces that same societal sex stereotype at play in *Whitaker* and *Harris* – that persons assigned a gender at birth should look and act in conformity with that gender.

In *Whitaker*, the Seventh Circuit recognized that "[a] policy that requires an individual to use a bathroom that does not *conform* with his or her gender identity punishes that individual for his or her gender non-conformance." 858 F.3d at 1049. The same is true here where Defendants' "gender reassignment" exclusion punishes Boyden and Andrews for their gender non-conformance in seeking necessary medical treatment to conform their bodies to be consistent with their gender identity, rather than the gender they were assigned at birth. As in *Whitaker* and *Harris* where plaintiffs were denied a benefit – use of the restroom and employment

– because they are transgender, Boyden and Andrews are denied health insurance coverage because they are transgender.[9]

And as in *Hively v. Ivy Tech Community. College of Indiana*, 853 F.3d 339, 345 (7th Cir. 2017), Plaintiffs are disadvantaged by their employer because of their sex. Hively was denied a job because she is a woman married to a woman; Boyden and Andrews are denied insurance coverage because their sex assigned at birth was male, rather than female. *See* Pls.' Reply to Def. Resp. to PFOF ¶42. *See Denegal v. Farrell*, No. 15-01251, 2016 WL 3648956, at *7 (E.D. Cal. July 8, 2016) (plaintiff stated valid claim that prison "discriminate[s] against transgender women by denying surgery (vaginoplasty) that is available to cisgender women"). By its very nature, the "gender reassignment" exclusion discriminates on the basis of sex by denying transgender state employees surgery for purposes of transitioning. *Harris*, 884 F.3d 560, 575 (6th Cir. 2018) (discrimination "because of sex" inherently includes discrimination against employees because of a change in their sex).

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

A. Heightened scrutiny applies to review of Defendants' facially discriminatory "gender reassignment" exclusion.

Defendants' health insurance coverage exclusion should be reviewed under heightened scrutiny both because it discriminates on the basis of sex and because it

[9] Defendants' attempt to redefine this coverage as a "subsidy" (Defs' Br. at 12) fails to change the discriminatory nature of the "gender reassignment" exclusion. All of the benefits covered by Defendants plan can be characterized as "subsidies" of medically necessary treatments, but Defendants discriminatorily single out the "subsidy" for a treatment that is medically necessary for transgender people for exclusion.

discriminates on the basis of transgender status. (See Pltf. Br. ISO MSJ at pp. 27-29). Plaintiffs have shown in Section I.B above that the exclusion discriminates on the basis of sex, so Defendants' argument to the contrary (Def. Br. at 17) should be rejected. Defendants' argument that the "gender reassignment" exclusion does not discriminate on the basis of transgender status (Dr. Br. at 17-18) similarly has no merit for the reasons explained in Section I.B. Plaintiffs are denied coverage based on an exclusion applicable only to transgender people, and surgery to treat gender dysphoria is entirely different from the cosmetic surgeries to which Defendants attempt to analogize them. The suggestion that surgeries for body dysmorphic disorder are also denied fails for the same reasons, since the "gender reassignment" exclusion does not apply to such hypothetical surgeries and since surgery is not a treatment for body dysmorphic disorder. Pls.' PFOF ⁋⁋42, 43; Pls.' Resp. to Def. Reply to PFOF ⁋⁋42, 43.

The fact that the surgical exclusion does not "target all transgender people" (Def. Br. at 18) since not all transgender people have a medical need for surgery is irrelevant. The question is whether the exclusion discriminates on the basis of transgender status, *not* whether it discriminates against everyone with that status. *See Whitaker*, 858 F.3d at 1049 ("A policy that requires an *individual* to use a bathroom that does not conform with his or her gender identity" discriminates against students who are transgender, regardless of whether *every* transgender student wants to use the restroom that matches their gender identity or if some may prefer to use a gender-neutral alternative) (emphasis added); *see also Wolf v.*

Walker, 986 F. Supp. 2d 982, 1016 (W.D. Wis.) (Wisconsin's ban on same-sex marriage discriminates on the basis of sexual orientation, even though not all persons who are lesbian, gay or bisexual wish to marry), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

This Court should decline Defendants' effort to redefine the discrimination at issue here as discrimination on the basis of a disability. (Def. Br. at 18-19). The exclusion here is directed at "gender reassignment" rather than a particular medical condition. But even if the exclusion were defined in terms of the medical condition experienced by Plaintiffs (gender dysphoria), the exclusion of coverage impacts transgender persons alone and transgender status meets all the qualifications for review under heightened scrutiny. (See Pltfs' Br. ISO MSJ at 27-29). Defendants claim wrongly that a person's status as transgender is not immutable, but the evidence shows that it is a "distinguishing characteristic[] that define[s]" transgender individuals "as a discrete group." *See Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *see also Wolf*, 986 F. Supp. 2d at 1013 ("Rather than asking whether a person could change a particular characteristic, the better question is whether the characteristic is something that the person should be required to change because it is central to a person's identity.") (emphasis omitted). Defendants cherry pick data regarding persistence rates among transgender children (Def. Br. at 19-20), but the research and medical consensus show that among post-pubescent adolescents and adults a person's status as transgender is highly stable and cannot be changed by so-called "reparative" or "conversion" therapies. Pls.' Resp. to Def. Add'l PFOF ¶150.

Even Defendants' expert agrees that the condition is very resistant to change and that it is very rare that a transgender person's gender identity would change. Pl. Resp. to Def. Add'l. PFOF ¶119. Numerous other courts have reached the same conclusion. (Pltf. Br. ISO MSJ at 29).

Defendants' argument regarding political powerlessness is equally unpersuasive. The evidence they cite to support transgender people's supposed political power – the executive support offered under the previous Presidential administration, the existence of non-discrimination laws in some cities and states (but not in Wisconsin), the support from certain non-profits, and among editorial boards—is very thin indeed. While it is "difficult to assess the degree of underrepresentation of transgender people in positions of authority without knowing their number relative to the cisgender population . . . , in at least one way this underrepresentation inquiry is easier with respect to transgender people" than for lesbians, gays, and bisexuals. *Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015). "Although there are and were gay members of the United States Congress . . . , as well as gay federal judges, there is no indication that there have ever been any transgender members of the United States Congress or the federal judiciary." *Id.* At the very least, transgender people are "inherently vulnerable in the context of the ordinary political process, either because of [the transgender population's] size or history of disenfranchisement," *Wolf*, 986 F. Supp. 2d at 1014, and Defendants' efforts to show otherwise are entirely unpersuasive.

B. The Exclusion Does Not Satisfy Heightened Scrutiny or Rational Basis Review.

As Plaintiffs demonstrated in their opening brief in support of this motion (Dkt. 97 at 29-36) and their brief in opposition to Defendants' motion for summary judgment (Dkt. 115 at 22-25), the Exclusion cannot survive any level of scrutiny under the Equal Protection Clause. To withstand heightened scrutiny, the government alone bears a "demanding" burden to demonstrate an "exceedingly persuasive" justification for a sex-based action or classification, and "that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 524, 533(1996) [hereinafter *VMI*] (internal quotations omitted).[10] And even "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).

Defendants assert two justifications for the gender transition exclusion: (1) the costs of providing such care; and (2) purported uncertainties about its safety and efficacy. As Plaintiffs have shown, these justifications are nothing but pretextual and post-hoc rationalizations that were not actually material to Defendants'

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[10] Defendants again rely inappropriately on cases applying First Amendment "intermediate scrutiny" tests for content-neutral regulations or regulations of commercial speech, rather than the "heightened" scrutiny applied to sex discrimination under the Equal Protection Clause. (Defs.' Br. at 4 (citing *Turner Broad. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995) and 30 n.8 (citing *IMS Health Inc. v. Sorrell*, 630 F.3d 263 (2d Cir. 2010), *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), *Cent. Hudson Gas & Elec. Corp. v. Publ. Serv. Comm'n*, 447 U.S. 557 (1980)).

decisions regarding the exclusion. Pls.' PFOF ¶¶111, 128, 133; Pl. Reply to Def. Resp. to Pl. PFOF ¶133.

Defendants argue that, even under heightened scrutiny, this Court should give deferential consideration to their post-hoc rationalizations for the exclusion (Defs' Br. at 22-24), despite clear case law to the contrary. Defendants claim that *VMI*, which squarely held that the government's "justification[s] must be genuine, not hypothesized or invented *post hoc* in response to litigation," *VMI*. *518* U.S. at 533, somehow supports this argument. They note that the Supreme Court summarized trial court testimony about Virginia's purported justification of "diversity in educational approaches," and assert that the Court "considered that evidence on the merits." (Defs' Br. at 23). But that is simply untrue. The Court rejected the diversity rationale for VMI's exclusion of female students *because* it was a post-hoc justification, not because it was unsupported "on the merits": "Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying . . . educational opportunities within the Commonwealth. . . . [A] tenable justification must describe *actual state purposes*, *not rationalizations* for actions in fact differently grounded. . . . Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options." *VMI*, 518 U.S. at 535-36 (emphasis added). To the extent the Court considered any evidence of a state interest in diversity, it was only for purpose of supporting this conclusion – that diversity was a rationalization, rather than an actual purpose. *Id.* at 539 ("[W]e find no persuasive evidence in this record that VMI's male-only

admission policy is in furtherance of a state policy of diversity.") (internal quotations omitted). Defendants point to the district court's review of evidence regarding the second alleged state interest asserted by Virginia – the claim "that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women," *id.* at 540 – but no similar review of the merits took place regarding the state's claim that VMI's exclusion of women served an interest in diversity.

Defendants also assert that the record contains evidence that cost and efficacy were "discussed" at GIB meetings. (Defs.' Br. at 21 (citing Defs' Br. Opposing Pltfs' Motion for Partial SJ (Dkt 81)). However, some of the cited "evidence" has nothing to do with the cost or efficacy of the exclusion itself, such as the general legislative and executive branch directive to ETF and GIB to reduce costs. (Dkt. 81 at 32 (citing DFOF 95-96)). Some of the purported "evidence" was created *after* the decision to reinstate was already made, and thus could not have been a reason *for* the decision, such as the Segal report, which was dated January 23, 2017, nearly a month after the GIB voted to reinstate the exclusion. (*Id.*, citing DFOF 100). Defendants refer to one sentence assertions (without any citations to factual support) about cost, safety and efficacy in a Wisconsin DOJ memorandum (*Id.* at 32, 36, citing DFOF 99, 109) as "evidence" supporting reinstatement, but GIB witnesses testified that there was no discussion of that memo's assertions about cost, safety or effectiveness at any GIB meetings. (Pltfs' Resp. to DFOF (Dkt. 113) ¶¶ 99, 109).

All that remains of Defendants' purported "evidence" of GIB "discussion" of costs and efficacy during the GIB's deliberations, then, are a few ambiguous statements about a GIB member – J.P. Wieske – who may have mentioned costs or medical necessity at a meeting. (Dkt. 81 at 32 (citing DFOF 97-98), 36 (citing DFOF 107-108)). But there is no evidence that the GIB member who may have mentioned cost or medical necessity, or anyone else, provided any evidence to support those statements at the time, that there was any discussion of those statements among board members, or that anyone actually voted for or against reinstatement based on those statements. In fact, the testimony is uniformly to the contrary: cost, safety and efficacy were *not* the reasons for the reinstatement. (Dkt. 113 at ¶¶67, 99); Pltfs PFOF (Dkt. 96 at ¶¶ 127-135). The only reason for reinstatement cited by GIB witnesses (other than Wieske) was the issuance of a preliminary injunction against enforcement of the regulations implementing Section 1557 of the ACA, which reduced GIB's risk of liability for breach of fiduciary duty. *Id.*[11]

Even if these were not pretextual *post hoc* justifications, they are so attenuated as to be irrational. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (under rational basis review, connection between justifications and classification cannot be "so attenuated as to render the distinction arbitrary or irrational"). Such attenuated justifications indicate that the classification simply

[11] Ironically, Defendants argue that the Court should not "delve into the minds" of GIB members to ascertain whether the State's asserted justifications are pretextual (Defs. Br. at 22), but insist elsewhere that Conlin cannot be liable for violating Plaintiffs' Equal Protection rights because he personally opposed reinstatement of the exclusion. (*Id.* at 37-39).

disfavors the affected group, rather than genuinely serving a governmental interest. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (requiring justification be "grounded in a sufficient factual context" to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law").

With respect to the Defendants' cost rationale – as Plaintiffs' actuarial expert attests and GIB member Herschel Day, himself an actuary, acknowledges – the cost of covering transition-related care is actuarially immaterial.[12] Indeed, it is immaterial whether one uses the prudent cost estimate of Plaintiffs' expert or Defendants' expert's inflated estimate of $0.15 per member per month, which still amounts to only 0.03% of total costs, well below the 0.1% threshold for materiality. (Dkt. 113 ¶ 88).

Defendants fail to contend with case law making clear that the government cannot balance its budget on the backs of a disfavored class of people. Although "a state has a valid interest in preserving the fiscal integrity of its programs" and "may legitimately attempt to limit its expenditures . . . a [s]tate may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Shapiro v. Thompson*, 394, U.S. 618, 633 (1969); *accord Plyler v. Doe*, 457 U.S. 202, 229 (1982); *Diaz v. Brewer* 656 F.3d 1008, 1014 (9th Cir. 2011) (finding costs are insufficient to justify law that denies insurance coverage to same-sex couples under rational basis

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[12] For actuaries, an "item or a combination of related items is material if its omission or misstatement could influence a decision of its intended user." (Actuarial Standards Board, Actuarial Standard of Practice No. 1 Pls.' Reply. to Def. Resp. to PFOF ¶53). Plaintiffs' actuarial expert states that a benefit whose cost is below 0.1% of total program cost is immaterial, in that it amounts to a rounding error (*Id.*; Pls.' Resp. to Def. Add'l PFOF ¶143) and, in her experience, "no employer has made a benefits decision based on cost for a benefit that costs less than 0.1%." (Id. at 8).

review). Defendants' efforts to distinguish these cases are unpersuasive and their citations to First Amendment "intermediate scrutiny" cases are inapposite. (Defs' Br. at 30 & n.8). For example, Defendants attempt to distinguish *Shapiro* by pointing to the fact that it alleges an interest in containing health care costs, rather than the costs of welfare benefits. But the point of *Shapiro* is that a state "may legitimately attempt to limit its expenditures . . . [b]ut [it] may not accomplish such a purpose by invidious distinctions between classes of its citizens," 394 U.S. at 633, as Wisconsin is trying to do here.

Defendants make much of the fact that not *all* transgender state employees are harmed by the exclusion, because not all such employees have gender dysphoria, and not all of those who do will need gender confirmation surgery to effectively treat it. (Defs' Br. at 32-33). The fact that only a subset of transgender employees is directly harmed is irrelevant; it does not diminish the fact that *only* transgender employees are targeted by the exclusion, because only transgender people need the "gender reassignment" procedures excluded. "[T]here is no requirement that every girl, or every boy, be subjected to the same stereotyping" for a policy to violate the constitution's prohibition on sex discrimination. *Whitaker*, 858 F.3d at 1051. "It is enough that [the plaintiff] has experienced this form of sex discrimination." *Id.* Not all women would seek admission to the Virginia Military Institute and some would not be able to meet some of its physical demands, but the Supreme Court nonetheless struck down the exclusion of women from VMI, because those women who would be capable and interested were excluded. *VMI*, 518 U.S. at

540-41. So, too, here, it is enough that *some* transgender employees need the surgical treatments forbidden them by the exclusion.

Defendants attempt to distinguish *Diaz* and *Bassett v. Snyder*, 59 F. Supp. 3d 837 (E.D. Mich. 2014), on this same ground – that the "gender reassignment" exclusion does not impact all transgender persons. (Def. Br. at 32-33). But the same was true for those cases, where the exclusion of health insurance coverage for same-sex domestic partners of government employees only impacted those employees who had such partners in need of health insurance coverage. *Diaz*, 656 F.3d at 1011; 59 F. Supp. 3d at 839 (case involved challenge to law that "prohibited local units of government from continuing to furnish health care and other fringe benefits to the domestic partners of their employees.").

Defendants further point to *Wisconsin Education Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013), to support its argument that cost savings as well as its assertions regarding the efficacy of surgery to treat gender dysphoria provide a rational basis to justify the "gender reassignment" exclusion, but that case is entirely different from the current one. There, the questions was whether the "differential treatment of public safety and general employee unions," *id.* at 655, was rational in contrast to the differential treatment between lesbian, gay and bisexual and heterosexual employees at issue in *Diaz* and *Bassett*. "[W]hen [a] protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible, a different, more searching form of rational basis review [goes to work] to strike down such laws under the

Equal Protection Clause." *Bassett*, 59 F. Supp. 3d at 845 (inner quotations and citations omitted); *see also Wolf v. Walker*, 986 F. Supp. 2d 982, 1010 (W.D. Wis.), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (finding that the Supreme Court had applied a form of rational basis review with more "bite" when reviewing classifications that burdened persons on the basis of their sexual orientation). Like *Baskin* and *Wolf*, the current case calls for a more careful form a rational basis review than what was applied in *Walker*, since it involves a classification that burdens a historically disadvantaged group. Finally, in *Walker*, there were differences between the two types of unionized state employees that were rationally related to the legitimate state interests, in contrast to here, where there is no similar rational justification to explain the differential treatment of transgender state employees as compared to other state employees. *See Walker*, 705 F.3d at 655 (recognizing that "the differential treatment of public safety and general employee unions must also be rational").

With respect to Defendants' safety and efficacy rationales, Defendants do not argue – because they could not – that gender confirmation surgery is unsafe or not efficacious. Instead, they say the evidence is uncertain or not conclusive enough. (Def. Br. at 4 ("surgeries with uncertain safety and efficacy when used to treat gender dysphoria"; "serious doubts exist regarding the state of scientific evidence regarding the safety and efficacy" of gender confirmation surgery); 25 ("there is insufficient evidence to demonstrate the safety and efficacy of surgical treatments for gender dysphoria").) The alleged "uncertainty," however, is based entirely on

the musings of Defendants' "expert" – an unlicensed psychiatrist who has never treated a transgender patient or done any original research on gender dysphoria or its treatment. (Dkt. 114 ¶¶ 22, 23, 28, 29).[13] Moreover, Defendants' expert made it clear that his critiques of the research support for surgical and hormonal treatments of gender dysphoria do not distinguish these treatments from a number of other medical treatments that are widely accepted by the medical community. Accordingly, putting aside the fact that Defendants' expert is unqualified to challenge the medical consensus supporting the safety and efficacy of these treatments, his critiques fail to provide a factual basis to support this blatantly discriminatory exclusion on insurance coverage.[14]

Dr. Mayer criticizes some of the research for failing to use blinded, controlled research designs and failing to use "gender dysphoria," rather than other measures of well-being, as the dependent variable in the study designs. (Defs' Br. at 26). But he admits he could not design such a study himself (Dkt. 114 ¶ 29) and fails to

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[13] Defendants engage in unfounded scare tactics when they suggest implausibly that children who express a gender identity different from their gender assigned at birth will undergo gender confirmation surgery they may later regret. (Defs' Br. at 27-28). Defendants acknowledge that the WPATH standards of care take a much more stringent approach to any surgical treatment of minors and actually forbid genital surgery for such patients. They point to no example of such surgery on a minor, which is unsurprising, because it could only happen with the consent of the child and one or both parents and the participation of a licensed mental health professional and a licensed surgeon. Defendants' assertions regarding a high rate of desistance among children are based on a misreading of the research and ignore the fact that experts in the field carefully screen young people before any medical intervention may take place. Pls.' Resp. to Def. Add'l PFOF ₱148.

[14] Defendants make a great deal of their expert's critiques of past AMA positions but fail to explain how these opinions undermine the weight of the scientific and clinical support for the efficacy of the surgical treatments at issue in this case. Additionally, their expert stated that he does not disagree with the APA's position that "social transition, hormone therapy and sex reassignment surgery is appropriate and medically necessary care for some people with gender dysphoria," saying that he has "no doubt that some people benefit from the treatment." Pls.' Resp. to Def. Add'l PFOF ₱138).

address the fact that it is impossible to have a blinded experiment involving a surgical procedure. (*Id.* ¶ 34). Most importantly, he is simply wrong when he claims that there are no studies that use "gender dysphoria" as the outcome measure; in fact, there *are* studies that measure gender dysphoria as a specific outcome of transition-related care that have found that gender dysphoria is significantly reduced after the medical interventions, including gender confirmation surgery and hormone therapy. (*Id.* ¶ 31).

Defendants' efforts (Defs' Br. 26-27) to rely on the ways in which the WPATH standards describe surgeries for treatment as serving both reconstructive and cosmetic purposes fail to undermine the basic point that other treatments, such as psychotherapy, are ineffective on their own (Pls.' Resp. to Def. Add'l PFOF ₱121), and thus surgery is the only effective treatment for addressing the serious harm resulting from untreated, or inadequately treated, gender dysphoria. *Id.* Other surgical treatments for which medical coverage is provided by the state similarly include a cosmetic component and improve a person's self-esteem and quality of life by improving their appearance, rather than simply addressing an underlying medical condition, such as breast reconstruction surgery after a mastectomy due to cancer or another medical condition. (Pls.' Supp. PFOF ₱18). Some of the surgeries provided to treat gender dysphoria are similar to other reconstructive procedures performed for other diagnoses. Pls.' Supp. PFOF ₱19. As Dr. Schechter explained, "no particular surgery is inherently cosmetic or inherently reconstructive; rather, the underlying diagnosis determines whether the procedure is considered cosmetic

or reconstructive." Pls.' Resp. to Def. Add'l PFOF ¶147. Moreover, many reconstructive surgeries in addition to breast reconstructive surgery, such as surgeries to reconstruct the external genitalia of a non-transgender person -- because of cancer, an infection, or another medical or congenital condition—have both a functional and cosmetic purposes. *Id.*

Moreover, hypothetical uncertainty is no justification for discrimination. *VMI*, 518 U.S. at 533 ("The justification must be genuine, not hypothesized . . . ."). The Supreme Court and Seventh Circuit have both rejected a similar argument that scientific uncertainty about the effects of same-sex marriages on society justifies a ban on recognition of such marriages. *Baskin v. Bogan*, 766 F.3d 648, 669 (7th Cir. 2014).

Where a classification such as Defendants' "gender reassignment" exclusion 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, and "[d]iscriminations of an unusual character especially suggest careful consideration[.]" *United States v. Windsor*, 570 U.S. 744, 768 (2013) (internal quotation marks omitted). *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 547 (7th Cir. 2008), cited by Defendants (Def. Br. at 29), is not to the contrary. There, the zoning ordinance burdened large-scale service stations (those larger than two acres) in contrast to smaller-scale service stations, rather than disfavoring a historically disadvantaged or unpopular group, as does the classification here. In addition, the facts of *Flying J* did not involve this and other indicia of animus or targeting, which were at play in *Romer*, *Windsor* and

with respect to the "gender reassignment" exclusion challenged in this case. (*See* also Pltfs' Br. ISO MSJ at pp. 32-34). Moreover, there were rational justifications to support the burden placed on large-scale service stations, but there are no similar rational reasons supporting the differential treatment of transgender state employees who need health care coverage for treatment of gender dysphoria.[15]

Defendants' remaining arguments amount to a plea for deference to government decision-making, no matter how flawed, arbitrary or irrational. (*See, e.g.*, Defs' Br.at 25 (decision should be "up to the body with a fiduciary responsibility to manage" employee health plans); 32 ("rational basis review does not permit second-guessing GIB's decision"); 33 ("decision is up to the policymaker – GIB – not Plaintiffs or this Court").) But "[m]inorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin*, 766 F.3d at 671. Under either heightened scrutiny or rational basis review, Plaintiffs are entitled to a judgment that Defendants' exclusion violates their equal protection rights.

C. Secretary Conlin Is Liable In His Individual Capacity.

To show personal involvement for purposes of individual capacity liability under Section 1983, a plaintiff must show a causal connection or "affirmative link" between the action complained of and the state actor sued. *Rizzo v. Goode*, 423 U.S.

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[15] Defendants assert that the "gender reassignment" exclusion is not redundant, but serves an "administrative efficiency" purpose of distinguishing between surgeries to treat gender dysphoria as compared to other cosmetic surgeries. (Def. Br. at 35.) To the extent that this argument is at all plausible, it fails. *See Diaz,* 656 F.3d at 1014 (recognizing that like cost savings, the administrative burden of providing benefits to one group provides no rational basis for denying those benefits to others).

362, 371 (1976); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983). However, the defendant's involvement need not be direct. *Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003); *Koutnik v. Brown*, 351 F.Supp.2d 871, 876 (W.D. Wis. 2004); *Smith v. Rowe*, 761 F.2d 360, 369 (7th Cir. 1985). Moreover, contrary to Defendants' argument, because the exclusion here is discriminatory on its face, there is no requirement that a state actor personally involved in carrying out a discriminatory policy himself have an intent to discriminate. *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985) ("A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification"); *UAW*, 499 U.S. 187 at 199 ("[w]hether 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.").

Defendants rely principally on *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to support their argument that there must be undisputed evidence of intent to discriminate to show personal involvement. But *Iqbal* involved the question of whether a supervisory defendant may be held liable on a theory of respondeat superior alone for the discriminatory actions of a subordinate; the question here is whether the defendant may be held liable for his own actions in administering and enforcing a discriminatory rule.

Defendants acknowledge that even a supervisory official who merely "know[s] about the conduct [of a subordinate] and facilitate[s] it" may be held individually

liable for the actions of the subordinate. (Defs' Br. at 36 (quoting *Jones v. City of Chicago,* 856 F.2d 985, 992 (7th Cir. 1988).) They acknowledge that Conlin "carried out" the discriminatory policy set by GIB, but nonetheless argue that he did not "facilitate" that policy. (Defs' Br. at 37-38 (Conlin "did not 'facilitate' the Exclusion in any meaningful sense," but "was carrying out GIB's direction").) Without doing extreme violence to the English language, it is difficult to understand how Conlin "carrying out" the GIB's policy – by scheduling a hastily arranged meeting of the GIB to reinstate the exclusion, determining that GIB's contingencies had been satisfied,[16] preparing and sending the contract amendment implementing the reinstatement, and enforcing the contract – does not "facilitate" that policy.

The fact that Conlin is required by state law to carry out GIB's policy decisions does not relieve him of personal liability under Section 1983. As Plaintiffs explained in their opposition to Defendants' motion for summary judgment (Dkt. 115 at 27), an individual aggrieved by a policy need not sue the drafter of the policy, she need only sue the person whose acts hurt her. *See, e.g.*, *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995); *Smith v. Jensen*, 14-cv-226-wmc, 2016 WL 3566281, at *7 n.3 (W.D. Wis. June 27, 2016) (rejecting argument that Section 1983 defendant who "had the authority to *enforce* the rule" was "not personally involved," even though he did "not [have] the authority to *create* the rule").

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[16] Defendants disingenuously attempt to diminish Conlin's role in effectuating the Exclusion by suggesting he passively "acknowledged" the contingencies had been met. (Defs' Br. at 38). This mischaracterization is belied by the facts. Conlin alone, in January 2017, determined all four contingencies for reinstatement were satisfied. Absent Conlin's determination the contingencies had been met and subsequent issuance of the contract amendment to the health plans, the discriminatory Exclusion would not have been reinstated.

Conlin's actions in implementing, administering and enforcing the exclusion confirm his admission (Pls.' PFOF ¶ 137) that he was "personally involved" in depriving Plaintiffs of their rights. Defendants' final argument – that Conlin enjoys qualified immunity – is developed no further than what was said in their opening brief in support of their motion for summary judgment. Plaintiffs' incorporate herein their response in the opposition brief that that argument. (Pltf. Br. in Opp. To Defs. MSJ at pp. 30-35).

III. Defendant ETF has violated the Affordable Care Act by discriminating against Plaintiffs on the basis of sex.

ETF agrees that it is a covered entity under Section 1557, but claims it did not violate the statute for the reasons stated in its motion for summary judgment. Plaintiffs showed that these arguments are wrong in its brief opposing Defendants' motion for summary judgment. ETF is liable for assisting GIB in devising, as well as administering and enforcing, a facially discriminatory policy. Its liability does not depend on a showing that ETF intended to discriminate. The exclusion discriminates on the basis of sex. Cases that have considered the question all hold that there is a private right of action to enforce Section 1557. And Wisconsin waived its Eleventh Amendment immunity by accepting federal funds. (Pltf. Br. in Opp. To Defs' M for SJ at 39-41).

ETF replays its claim that the exclusion does not involve sex stereotyping, but that is wrong for the reasons explained above in Section I.B. Its additional efforts to distinguish *Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017), and *Whitaker* similarly fall flat. That *Prescott* involved a

different form a discrimination (misgendering a patient because he is transgender) from the administration and enforcement of a facially discriminatory policy at issue here does not weaken its authority. *Prescott* recognized that discrimination against someone because they are transgender is sex discrimination in violation of Section 1557, *id.* at 1098. This Court should reach the same result. Moreover, the fact that ETF may not discriminate against transgender state employees in *some* ways is hardly a defense to its discrimination against them in the terms of their employee health insurance. The exclusion does more to *interfere with* transgender state employees ability to live their lives consistent with their core identity by *completely barring* their access to insurance coverage for a serious medical need because they are transgender.

CONCLUSION

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

Dated this 9th day of July, 2018.

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