RECORD NO. 20-1409

In The

United States Court Of Appeals For The Fourth Circuit

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents; SAM SILVAINE

Plaintiffs - Appellees,

v.

NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,

Defendant - Appellant,

and

DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO

JOINT APPENDIX

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U.S. District Court
North Carolina Middle District (NCMD)
CIVIL DOCKET FOR CASE #: 1:19-cv-00272-LCB-LPA

KADEL et al v. FOLWELL et al
Assigned to: JUDGE LORETTA C. BIGGS
Referred to: MAG/JUDGE L. PATRICK AULD
Case in other court: Fourth Circuit, 20-01409
Cause: 42:1983

Date Filed: 03/11/2019
Jury Demand: Both
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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Date Filed	#	Docket Text
03/11/2019	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0418-2527770.), filed by C.B., Connor Thonen-Fleck, Sam Silvaine, Jason Fleck, Maxwell Kadel, Julia McKeown, Michael D Bunting Jr..(RICHARDSON, AMY) (Entered: 03/11/2019)
03/11/2019		CASE REFERRED to Mediation pursuant to Local Rule 83.9b of the Rules of Practice and Procedure of this Court. Please go to our website under Attorney Information for a list of mediators which must be served on all parties. (Coyne, Michelle) (Entered: 03/11/2019)
03/11/2019	2	NOTICE of Appearance by attorney TARA L. BORELLI on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (BORELLI, TARA) (Entered: 03/11/2019)
03/11/2019	3	NOTICE of Appearance by attorney NOAH E. LEWIS on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (LEWIS, NOAH) (Entered: 03/11/2019)
03/11/2019	4	NOTICE of Appearance by attorney MEREDITH T. BROWN on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (BROWN, MEREDITH) (Entered: 03/11/2019)
03/11/2019	5	NOTICE of Appearance by attorney OMAR F. GONZALEZ-PAGAN on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (GONZALEZ-PAGAN, OMAR) (Entered: 03/11/2019)
03/11/2019		Case ASSIGNED to JUDGE LORETTA C. BIGGS and MAGISTRATE JUDGE L. PATRICK AULD. (Coyne, Michelle) (Entered: 03/11/2019)
03/11/2019	6	Summons Issued as to All Defendants. (Coyne, Michelle) (Entered: 03/11/2019)
03/11/2019	7	Notice of Right to Consent. Counsel shall serve the attached form on all parties. (Attachments: # 1 Consent Form)(Coyne, Michelle) (Entered: 03/11/2019)
03/12/2019	8	NOTICE of Appearance by attorney DEEPIKA H. RAVI on behalf of Plaintiffs

		MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (RAVI, DEEPIKA) (Entered: 03/12/2019)
03/14/2019	9	WAIVER OF SERVICE Returned Executed by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. DALE FOLWELL waiver sent on 3/13/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/14/2019)
03/14/2019	10	WAIVER OF SERVICE of SUMMONS by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. DEE JONES waiver sent on 3/13/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/14/2019)
03/14/2019	11	WAIVER OF SERVICE of SUMMONS by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES waiver sent on 3/13/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/14/2019)
03/22/2019	12	WAIVER OF SERVICE of SUMMONS by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL waiver sent on 3/14/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/22/2019)
03/22/2019	13	WAIVER OF SERVICE of SUMMONS by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. UNIVERSITY OF NORTH CAROLINA AT GREENSBORO waiver sent on 3/14/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/22/2019)
03/22/2019	14	WAIVER OF SERVICE of SUMMONS by C.B., CONNOR THONEN-FLECK, SAM SILVANIE, JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, MICHAEL D. BUNTING, JR. NORTH CAROLINA STATE UNIVERSITY waiver sent on 3/14/2019, answer due 5/13/2019. (RICHARDSON, AMY) (Entered: 03/22/2019)
03/26/2019	15	NOTICE of Appearance by attorney CATHERINE F. JORDAN on behalf of Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO (JORDAN, CATHERINE) (Entered: 03/26/2019)
03/26/2019	16	Corporate Disclosure Statement by UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (JORDAN, CATHERINE) (Entered: 03/26/2019)
03/26/2019	17	Corporate Disclosure Statement by NORTH CAROLINA STATE UNIVERSITY. (JORDAN, CATHERINE) (Entered: 03/26/2019)
03/26/2019	18	Corporate Disclosure Statement by UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL. (JORDAN, CATHERINE) (Entered: 03/26/2019)
05/06/2019	19	NOTICE of Appearance by attorney OLGA E. VYSOTSKAYA DE BRITO on behalf of Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES (VYSOTSKAYA DE BRITO, OLGA) (Entered: 05/06/2019)
05/06/2019	20	Consent MOTION for Extension of Time to File Answer re 1 Complaint by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # 1 Text of Proposed Order) (VYSOTSKAYA DE BRITO, OLGA) (Entered: 05/06/2019)

05/06/2019		**ORDER** granting 20 Motion for Extension of Time to Answer for DALE FOLWELL; DEE JONES; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Answer due by 6/12/2019. Signed by John Brubaker, Clerk of Court, on 5/6/2019. (Brubaker, John) (Entered: 05/06/2019)
05/07/2019	21	MOTION for Extension of Time to File Answer re 1 Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # 1 Text of Proposed Order Granting Extension of Time)(JORDAN, CATHERINE) (Entered: 05/07/2019)
05/08/2019		**ORDER** granting 21 Motion for Extension of Time to Answer for UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL and UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. Answer due by 6/12/2019. Signed by John Brubaker, Clerk of Court, on 5/8/2019. (Brubaker, John) (Entered: 05/08/2019)
06/07/2019	22	NOTICE of Appearance by attorney MARK A. JONES on behalf of Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES (JONES, MARK) (Entered: 06/07/2019)
06/07/2019	23	NOTICE of Appearance by attorney KEVIN GUY WILLIAMS on behalf of Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES (WILLIAMS, KEVIN) (Entered: 06/07/2019)
06/07/2019	24	MOTION for Extension of Time to File Answer *or Appropriate Responsive Pleading* by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # 1 Text of Proposed Order) (JONES, MARK) (Entered: 06/07/2019)
06/10/2019	25	Joint MOTION for Extension of Time to File Answer re 1 Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # 1 Text of Proposed Order Granting Extension of Time)(JORDAN, CATHERINE) (Entered: 06/10/2019)
06/10/2019		Motions Referred: RE: 24 MOTION for Extension of Time to File Answer *or Appropriate Responsive Pleading*, 25 Joint MOTION for Extension of Time to File Answer re 1 Complaint , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 06/10/2019)
06/11/2019		**TEXT ORDER** finding as moot 24 Motion for Extension of Time and granting 25 Motion for Extension of Time. Defendants shall answer or otherwise respond by 07/08/2019. Plaintiffs shall file any response to any timely file motion to dismiss by 08/05/2019 and Defendants shall file any reply by 08/19/2019. Issued by MAG/JUDGE L. PATRICK AULD on 06/11/2019. (AULD, L.) (Entered: 06/11/2019)
06/17/2019	26	NOTICE of Appearance by attorney JOHN G. KNEPPER on behalf of Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES (KNEPPER, JOHN) (Entered: 06/17/2019)
07/03/2019	27	MOTION to Withdraw as Attorney OLGA E. VYSOTSKAYA DE BRITO by on behalf of DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # 1 Text of Proposed Order Draft Proposed Order Allowing a Motion to Withdraw)(VYSOTSKAYA DE BRITO, OLGA) (Entered: 07/03/2019)
07/03/2019		Motion Referred: RE: 27 MOTION to Withdraw as Attorney OLGA E. VYSOTSKAYA DE BRITO , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 07/03/2019)
07/04/2019		**TEXT ORDER** granting 27 Motion for Leave to Withdraw. Attorney OLGA E.

		VYSOTSKAYA DE BRITO is terminated as counsel of record for Defendants Dale Folwell, Dee Jones, and the North Carolina State Health Plan. Issued by MAG/JUDGE L. PATRICK AULD on 07/04/2019. (AULD, L.) (Entered: 07/04/2019)
07/05/2019	28	NOTICE of Appearance by attorney SAM M. HAYES on behalf of Defendant DALE FOLWELL (HAYES, SAM) (Entered: 07/05/2019)
07/08/2019	29	NOTICE of Appearance by attorney KIMBERLY D. POTTER on behalf of Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO (POTTER, KIMBERLY) (Entered: 07/08/2019)
07/08/2019	30	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. Response to Motion due by 7/29/2019 (POTTER, KIMBERLY) (Entered: 07/08/2019)
07/08/2019	31	MEMORANDUM filed by Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO re 30 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # 1 Exhibit A March 20, 2019 Advisory Letter, # 2 Exhibit B June 20, 2013 Advisory Letter)(POTTER, KIMBERLY) (Entered: 07/08/2019)
07/08/2019	32	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Response to Motion due by 7/29/2019 (WILLIAMS, KEVIN) (Entered: 07/08/2019)
07/08/2019	33	MEMORANDUM filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re 32 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (WILLIAMS, KEVIN) (Entered: 07/08/2019)
08/05/2019	34	RESPONSE in Opposition re 32 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by DALE FOLWELL, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, DEE JONES filed by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Replies due by 8/19/2019 (RICHARDSON, AMY) (Entered: 08/05/2019)
08/05/2019	35	RESPONSE in Opposition re 30 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO, NORTH CAROLINA STATE UNIVERSITY filed by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. Replies due by 8/19/2019 (RICHARDSON, AMY) (Entered: 08/05/2019)
08/14/2019	36	MOTION for Extension of Time to File Response/Reply as to 35 Response in Opposition to Motion, by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # 1 Text of Proposed Order Granting Extension of Time) (JORDAN, CATHERINE) (Entered: 08/14/2019)
08/14/2019		Motion Referred: RE: 36 MOTION for Extension of Time to File Response/Reply as to 35 Response in Opposition to Motion, to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie)

		(Entered: 08/14/2019)
08/14/2019		**TEXT ORDER** granting 36 Motion for Extension of Time. Defendants University of North Carolina at Chapel Hill, North Carolina State University, and University of North Carolina at Greensboro shall file any reply to 35 Response by 09/18/2019. Issued by MAG/JUDGE L. PATRICK AULD on 08/14/2019. (AULD, L.) (Entered: 08/14/2019)
08/19/2019	37	REPLY Memorandum filed by Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES re 32 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (WILLIAMS, KEVIN) Modified on 8/20/2019 to correctly reflect pleading title. (Garland, Leah) (Entered: 08/19/2019)
08/22/2019	38	Suggestion of Subsequently Decided Authority by Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 08/22/2019)
09/18/2019	39	REPLY, filed by Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO, to Response to 30 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (JORDAN, CATHERINE) (Entered: 09/18/2019)
09/23/2019		Motions Submitted: 30 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM , 32 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 09/23/2019)
01/02/2020	40	Suggestion of Subsequently Decided Authority re 34 Response in Opposition to Motion, 35 Response in Opposition to Motion, by Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 01/02/2020)
02/21/2020	41	MOTION for Entry of Tolling Stipulation (Unopposed) by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (RICHARDSON, AMY) (Entered: 02/21/2020)
02/21/2020	42	MEMORANDUM filed by Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK re 41 MOTION for Entry of Tolling Stipulation (Unopposed) filed by MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. (Attachments: # 1 Exhibit A, # 2 Text of Proposed Order)(RICHARDSON, AMY) (Entered: 02/21/2020)
02/21/2020		Motion Submitted: 41 MOTION for Entry of Tolling Stipulation (Unopposed) to JUDGE LORETTA C. BIGGS. (Blay, Debbie) (Entered: 02/21/2020)
02/26/2020	43	**ORDER** signed by JUDGE LORETTA C. BIGGS on 02/26/2020, that the motion for approval and entry of the Tolling Stipulation is GRANTED. The Tolling Stipulation, entered on the docket as ECF No. 42 -1, shall be deemed filed as of the date of this order. (Garland, Leah) (Entered: 02/26/2020)
02/28/2020	44	NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK. AMY E. RICHARDSON is substituted as counsel for Plaintiffs. Attorney MEREDITH T. BROWN terminated. (RICHARDSON, AMY) (Entered: 02/28/2020)

03/11/2020	45	**MEMORANDUM OPINION AND ORDER** signed by JUDGE LORETTA C. BIGGS on 03/10/2020, that University Defendants' Motion to Dismiss, (ECF No. 30), and State Defendants' Motion to Dismiss, (ECF No. 32), are each DENIED in their entirety. (Garland, Leah) (Entered: 03/11/2020)
03/19/2020	46	MOTION for Extension of Time to File Answer re 1 Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # 1 Text of Proposed Order Proposed Order on Motion for Extension of Time)(JORDAN, CATHERINE) (Entered: 03/19/2020)
03/20/2020		**ORDER** granting 46 Motion for Extension of Time to Answer for NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; and UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. Answer due by 4/24/2020. Signed by John Brubaker, Clerk of Court, on 3/20/2020. (Brubaker, John) (Entered: 03/20/2020)
03/20/2020	47	Consent MOTION for Extension of Time to File Answer *until April 24, 2020* by DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. (Attachments: # 1 Text of Proposed Order) (WILLIAMS, KEVIN) (Entered: 03/20/2020)
03/23/2020		Motion Referred: RE: 47 Consent MOTION for Extension of Time to File Answer *until April 24, 2020*, to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 03/23/2020)
03/23/2020		**TEXT ORDER** granting 47 Motion for Extension of Time. Defendants DALE FOLWELL, DEE JONES, and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES shall answer or otherwise respond by 04/24/2020. Issued by MAG/JUDGE L. PATRICK AULD on 03/23/2020. (AULD, L.) (Entered: 03/23/2020)
04/08/2020	48	NOTICE of Appearance by attorney DAVID BROWN on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (BROWN, DAVID) (Entered: 04/08/2020)
04/08/2020	49	NOTICE of Appearance by attorney ALEJANDRA L. CARABALLO on behalf of Plaintiffs MICHAEL D. BUNTING, JR, C.B., JASON FLECK, MAXWELL KADEL, JULIA MCKEOWN, SAM SILVANIE, CONNOR THONEN-FLECK (CARABALLO, ALEJANDRA) (Entered: 04/08/2020)
04/08/2020	50	NOTICE OF INTERLOCUTORY APPEAL as to 45 Memorandum Opinion and Order, by NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. Filing fee $ 505, receipt number 0418-2785530. (JONES, MARK) (Entered: 04/08/2020)
04/09/2020	51	Electronic Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: 50 Notice of Interlocutory Appeal. (Garland, Leah) (Entered: 04/09/2020)
04/09/2020	52	NOTICE of Docketing Record on Appeal from USCA re 50 Notice of Interlocutory Appeal filed by NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. USCA Case Manager is Cathy Poulsen. USCA Case Number 20-1409. (Garland, Leah) (Entered: 04/09/2020)
04/22/2020	53	NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL on behalf of Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT

		GREENSBORO. NORA F. SULLIVAN is substituted as counsel for Defendants. Attorney CATHERINE F. JORDAN terminated. (SULLIVAN, NORA) (Entered: 04/22/2020)
04/22/2020	54	Consent MOTION for Extension of Time to File Answer re 1 Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # 1 Text of Proposed Order Consent Motion for Second Extension of Time to Answer)(SULLIVAN, NORA) (Entered: 04/22/2020)
04/22/2020		Motion Referred: RE: 54 Consent MOTION for Extension of Time to File Answer re 1 Complaint , to MAG/JUDGE L. PATRICK AULD. (Blay, Debbie) (Entered: 04/22/2020)
04/23/2020		**TEXT ORDER** granting 54 Consent Motion for Second Extension of Time. Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, and UNIVERSITY OF NORTH CAROLINA AT GREENSBORO shall answer or otherwise respond by 05/26/2020. Issued by MAG/JUDGE L. PATRICK AULD on 04/23/2020. (AULD, L.) (Entered: 04/23/2020)
04/24/2020	55	NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL on behalf of Defendants DALE FOLWELL, DEE JONES, NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES. JAMES BENJAMIN GARNER is substituted as counsel for Defendants. Attorney SAM M. HAYES terminated. (GARNER, JAMES) (Entered: 04/24/2020)
04/24/2020	56	ANSWER to 1 Complaint with Jury Demand by DALE FOLWELL, DEE JONES. (JONES, MARK) (Entered: 04/24/2020)
05/20/2020	57	NOTICE of Appearance by attorney ZACHARY A. PADGET on behalf of Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO (PADGET, ZACHARY) (Entered: 05/20/2020)
05/20/2020	58	Consent MOTION for Extension of Time to File Answer re 1 Complaint by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (Attachments: # 1 Text of Proposed Order Consent Motion for Third Extension of Time to Answer)(SULLIVAN, NORA) (Entered: 05/20/2020)
05/21/2020		**TEXT ORDER** granting 58 Consent Motion for Third Extension of Time. Defendants NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, and UNIVERSITY OF NORTH CAROLINA AT GREENSBORO shall answer or otherwise respond by 06/09/2020. Issued by MAG/JUDGE L. PATRICK AULD on 05/21/2020. (AULD, L.) (Entered: 05/21/2020)
06/09/2020	59	ANSWER to 1 Complaint with Jury Demand by NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, UNIVERSITY OF NORTH CAROLINA AT GREENSBORO. (SULLIVAN, NORA) (Entered: 06/09/2020)
06/10/2020	60	NOTICE of Initial Pretrial Conference Hearing: Initial Pretrial Conference Hearing set for 8/3/2020 09:30 AM in Greensboro Courtroom #1A before MAG/JUDGE L. PATRICK AULD. (Garrett, Kim) (Entered: 06/10/2020)

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PACER Login:	Tmstuckey:2830027:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	1:19-cv-00272-LCB-LPA
Billable Pages:	17	**Cost:**	1.70

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents, JASON FLECK and ALEXIS THONEN; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents, MICHAEL D. BUNTING, JR. and SHELLEY K. BUNTING; and SAM SILVAINE,

Plaintiffs,

v.

DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,

Defendants.

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF

INTRODUCTION

1. Plaintiffs are current or former enrollees in the North Carolina State Health Plan for Teachers and State Employees ("NCSHP"). As part of compensation for employment, the State of North Carolina provides its employees with health care coverage

for them and their dependents through the NCSHP, a self-funded plan. However, by categorically depriving transgender enrollees of coverage for the treatment of gender dysphoria—the clinically significant distress that can result from the dissonance between an individual's gender identity and sex assigned at birth—Defendants unlawfully discriminate against people like Plaintiffs, who either are transgender or have transgender family members who depend on them for health care coverage. In doing so, Defendants deny equal compensation for equal work to employees who are transgender or have transgender dependents, as well as harm employees' transgender family members who depend on them for health care coverage.

2. The sweeping exclusion contained within the NCSHP denies coverage for health care, including counseling, hormone therapy, surgical care, and any other health care provided in relation to a person's transgender status and/or gender transition. This exclusion contravenes the well-established medical consensus that gender-confirming health care can be medically necessary and even life-saving. Other NCSHP enrollees who are not transgender do not face a categorical exclusion barring coverage for health care that is medically necessary for them based on their sex and receive coverage for the same care that is denied to transgender enrollees.

3. Plaintiffs have all been denied coverage for medically necessary gender-confirming health care because they or their dependents are transgender, based on the categorical exclusion of gender-confirming health care in the NCSHP. Some Plaintiffs have forgone medically necessary gender-confirming health care, while others have been

forced to incur financial hardship without the financial protection afforded by coverage through the NCSHP. Plaintiffs have also suffered emotional distress, stigmatization, humiliation, and a loss of dignity because of the NCSHP's targeted discrimination against transgender enrollees, which wrongly deems their health care needs as unworthy of equal coverage.

4. The NCSHP covers more than 720,000 teachers, state employees, retirees, current and former lawmakers, state university and community college personnel, state hospital staff members, and their dependents. The NCSHP's mission is "to improve the health and health care of North Carolina teachers, state employees, retirees, and their dependents, in a financially sustainable manner, thereby serving as a model to the people of North Carolina for improving their health and well-being"—but when it comes to transgender enrollees, the NCSHP is not fulfilling that mission.

5. This targeted discrimination against transgender people violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title IX of the Education Amendments of 1972 ("Title IX"), and Section 1557 of the Patient Protection and Affordable Care Act (the "ACA").

6. Plaintiffs bring this lawsuit to challenge the categorical exclusion of gender-confirming health care contained within the NCSHP and to obtain a judgment to redress their individual injuries and to have the exclusion declared unlawful, thereby preventing its enforcement.

PARTIES

A. Plaintiffs

7. Plaintiff Maxwell Kadel is a 36-year-old transgender man. Mr. Kadel is an employee of the University of North Carolina at Chapel Hill. Mr. Kadel lives in Carrboro, North Carolina.

8. Plaintiff Jason Fleck is the father of Connor Thonen-Fleck ("Connor"), a 16-year-old transgender young man.[1] Mr. Fleck is an employee of the University of North Carolina at Greensboro, and Connor receives health coverage as a dependent of Mr. Fleck. Alexis Thonen is Connor's mother. Connor sues pursuant to Federal Rule of Civil Procedure 17(c) by and through his next friends and parents, Mr. Fleck and Ms. Thonen. Mr. Fleck, Ms. Thonen, and Connor all live in High Point, North Carolina.

9. Plaintiff Julia McKeown is a 43-year-old transgender woman. Ms. McKeown is employed by North Carolina State University. Ms. McKeown lives in Apex, North Carolina.

10. Plaintiff Michael D. Bunting, Jr. is the father of C.B., a 13-year-old transgender boy. Mr. Bunting is an employee of the University of North Carolina at Chapel Hill, and C.B. receives health coverage as a dependent of Mr. Bunting. Shelley K. Bunting is C.B.'s mother. C.B. sues pursuant to Federal Rule of Civil Procedure 17(c) by and

[1] Pursuant to Fed. R. Civ. P. 5.2(h), Connor Thonen-Fleck waives the privacy protections afforded by Fed. R. Civ. P. 5.2(a).

through his next friends and parents, Mr. Bunting and Ms. Bunting. Mr. Bunting, Ms. Bunting, and C.B. all live in Chapel Hill, North Carolina.

11. Plaintiff Sam Silvaine is 30 years old, transgender, and has a male affirmed sex. Mr. Silvaine was formerly employed by the North Carolina State University Counseling Center from August 2016 until July 2018. Mr. Silvaine resides in Syracuse, New York.

B. Defendants

12. Defendant Dale Folwell is sued in his official capacity as the North Carolina State Treasurer. As Treasurer, Mr. Folwell serves as Chair of the Board of Trustees of the State Health Plan for Teacher and State Employees and is responsible for designing, operating, and/or administering the NCSHP. Pursuant to N.C. Gen. Stat. § 135-48.30, the State Treasurer has the power and duty to: administer and operate the NCSHP and to set benefits, subject to approval by the majority of the Board of Trustees; design and implement coordination of benefits policies; and set administrative and medical policies. N.C. Gen. Stat. § 135-48.30 provides that the State Treasurer may delegate his powers and duties under this section to the Executive Administrator, the Board of Trustees, and employees of the Plan, but nonetheless maintains responsibility for the performance of those powers or duties. Additionally, as described below, Mr. Folwell has publicly announced that until he is ordered or required to do otherwise, he will maintain the discriminatory exclusion in the NCSHP. Mr. Folwell is a "person" within the meaning of

42 U.S.C. § 1983 and is, and was, acting under the color of state law at all times relevant to this Complaint.

13. Defendant Dee Jones is sued in her official capacity as Executive Administrator of the NCSHP. As Executive Administrator, Ms. Jones is statutorily authorized to negotiate, renegotiate, and execute contracts with third parties in the performance of her duties and responsibilities, pursuant to N.C. Gen. Stat. § 135-48.23. Ms. Jones is a "person" within the meaning of 42 U.S.C. § 1983 and is, and was, acting under the color of state law at all times relevant to this Complaint.

14. Defendant University of North Carolina at Chapel Hill ("UNC") is the flagship institution for the University of North Carolina system. UNC is an education program or activity receiving federal financial assistance.

15. Defendant University of North Carolina at Greensboro ("UNCG") is a constituent institution of the University of North Carolina. UNCG is an education program or activity receiving federal financial assistance.

16. Defendant North Carolina State University ("NCSU") is a constituent institution of the University of North Carolina. NCSU is an education program or activity receiving federal financial assistance.

17. Defendant NCSHP, a corporation, administers comprehensive group health insurance to eligible teachers and other North Carolina state employees, pursuant to N.C. Gen. Stat. § 135-48.2. The NCSHP is self-funded and empowered to determine, define, adopt, and remove health care benefits and exclusions, such as the categorical exclusion of

gender-confirming health care that targets transgender enrollees for discriminatory treatment.

18. Defendants, through their respective duties and obligations, are responsible for the discriminatory exclusion of gender-confirming health care in the NCSHP. Each Defendant, and those subject to their direction, supervision, or control, has or intentionally will perform, participate in, aid and/or abet in some manner the acts alleged in this complaint, has or will proximately cause the harm alleged herein, and has or will continue to injure the plaintiffs irreparably if not enjoined. Accordingly, the relief requested herein is sought against each Defendant and their successors, as well as all persons under their supervision, direction, or control, including, but not limited to, their officers, employees, and agents.

JURISDICTION AND VENUE

19. This action arises under 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights secured by the United States Constitution, under Title IX, 20 U.S.C. § 1681, *et seq.*, and under Section 1557 of the ACA, 42 U.S.C. § 18116.

20. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 because the matters in controversy arise under the Constitution and laws of the United States; and pursuant to 28 U.S.C. §1343(a)(3) and (4) because the action is brought to redress deprivations, under color of state authority, or rights, privileges, and immunities secured by the U.S. Constitution and seeks to secure

damages and equitable relief under an Act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights.

21. Declaratory relief is authorized by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by 28 U.S.C. §§ 2201 and 2202.

22. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because Defendants UNC and UNCG reside within the District, and all Defendants reside within the State of North Carolina; and because a substantial part of the events that gave rise to Plaintiffs' claims took place within the District.

23. This Court has personal jurisdiction over Defendants because they are all domiciled in the State of North Carolina.

FACTUAL ALLEGATIONS

A. Sex, Gender Identity, and Gender Dysphoria

24. Gender identity refers to an individual's fundamental, internal sense of being a particular gender. It is an essential element of human identity that everyone possesses. Gender identity is innate, has biological underpinnings, and is fixed at an early age.

25. An individual's sex is generally assigned solely on the basis of external genitalia at the time of birth. External genitalia are but one of several sex-related characteristics and are not always indicative of a person's sex. Other sex-related characteristics, such as chromosomes, hormone levels, internal reproductive organs, secondary sex characteristics, and gender identity, are typically not assessed or considered during the assignment of sex at birth.

26. Where an individual's gender identity does not match that individual's sex assigned at birth, gender identity is the critical determinant of sex. A scientific consensus recognizes that attempts to change an individual's gender identity to bring it into alignment with the sex assigned at birth are ineffective and harmful.

27. For transgender people, an incongruence between gender identity and the body's other sex characteristics can result in gender dysphoria—i.e., a feeling of clinically significant stress and discomfort born out of experiencing that something is fundamentally wrong. Gender dysphoria is a medical condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition; the World Health Organization's International Classification of Diseases, which is the diagnostic and coding compendia for medical professionals; and by other leading medical and mental health professional groups, including the American Medical Association ("AMA") and the American Psychological Association ("APA").

28. In addition to clinically significant distress, gender dysphoria can also result in severe anxiety, depression, and suicidal ideation or suicide without adequate treatment.

29. Untreated gender dysphoria often intensifies with time. The longer an individual goes without adequate treatment, the greater the risk of severe harms to the individual's health.

30. Gender dysphoria can be treated in accordance with internationally recognized Standards of Care formulated by the World Professional Association for Transgender Health ("WPATH"). These Standards of Care are recognized as authoritative

by national medical and behavioral health organizations such as the AMA and APA, which have called for an end to exclusions of gender-confirming care from health insurance plans.

31. The process by which transgender individuals come to live in a manner consistent with their gender identity, rather than the sex they were designated at birth, is known as gender transition. The ability to live in a manner consistent with one's gender identity is critical to the health and well-being of transgender individuals and is a key aspect in the treatment of gender dysphoria.

32. The steps that transgender individuals take to transition are individualized, but typically include social, legal, and medical transition.

33. Social transition entails a transgender individual living in accordance with their gender identity in all aspects of life. For example, for a man who is transgender (designated female at birth), social transition can include wearing typically male attire, using male pronouns, and otherwise living openly as a man in all aspects of everyday life.

34. Legal transition involves steps to formally align a transgender individual's legal identity with their gender identity, such as legally changing one's name and updating the name and gender marker on their driver's license, birth certificate, and other forms of identification.

35. Medical transition, a critical part of transitioning for many transgender individuals, includes treatments that bring the sex-specific characteristics of a transgender individual's body into alignment with their gender identity, such as counseling to obtain a diagnosis of gender dysphoria, hormone replacement therapy, or surgical care.

36. Hormone replacement therapy involves taking hormones for the purpose of bringing one's secondary sex characteristics into typical alignment with one's gender identity. Secondary sex characteristics are bodily features not associated with external and internal reproductive genitalia (primary sex characteristics). Secondary sex characteristics include, for example, hair growth patterns, body fat distribution, and muscle mass development. Hormone replacement therapy can have significant masculinizing or feminizing effects and can assist in bringing a transgender individual's secondary sex characteristics into alignment with their true sex, as determined by their gender identity, and therefore is medically necessary care for transgender people who need it to treat their gender dysphoria.

37. Gender-confirming surgical care or treatment—also known as gender confirmation surgery or "sex reassignment" surgery—refers to any surgical procedure undergone by a transgender individual to better align their primary or secondary sex characteristics with their gender identity. Such surgical care can include but is not limited to vaginoplasty, phalloplasty, hysterectomy, gonadectomy, mammoplasty, and mastectomy. These treatments deliberately change sex characteristics for the purpose of treating gender dysphoria.

38. Surgical care is medically necessary for transgender people who need it to treat their gender dysphoria.

39. An established body of medical research demonstrates the effectiveness and medical necessity of gender dysphoria treatment, including counseling, hormone therapy,

and surgical treatment. Health care experts have recognized that such treatments are not "cosmetic," "elective," or "experimental." Rather, they are safe, effective, and medically necessary treatments for a serious health condition.

40. For example, WPATH has explained that, like hormone therapy and other gender-confirming treatments, "[t]he medical procedures attendant to gender affirming/confirming surgeries are not 'cosmetic' or 'elective' or 'for the mere convenience of the patient.' These reconstructive procedures are not optional in any meaningful sense, but are understood to be medically necessary for the treatment of the diagnosed condition. In some cases, such surgery is the only effective treatment for the condition, and for some people genital surgery is essential and life-saving."

41. Similarly, in 2014, the federal Department of Health and Human Services Departmental Appeals Board confirmed that surgical treatment is safe and effective treatment for gender dysphoria. After reviewing expert medical testimony and published studies, the Appeals Board concluded that the Medicare program's then-existing exclusion of such treatment from coverage was "not reasonable."

42. These various components associated with transition—social, legal, and medical transition—do not change an individual's gender, as that is already established by gender identity, but instead bring the individual's appearance, legal identity, and sex-related characteristics into greater typical alignment with the individual's gender identity and lived experience.

B. The State's Targeted and Discriminatory Exclusion of Gender-Confirming Health care

43. The NCSHP offers three health care plans to eligible state employees: the (1) 80/20 PPO Plan, the (2) 70/30 PPO Plan, and the (3) High Deductible Health Plan (collectively referred to as the "Health Plans"). Across all three plans, Blue Cross and Blue Shield of North Carolina ("BCBSNC") serves as the claims administrator, and CVS Caremark ("CVS") administers pharmacy benefits.

44. Covered services under the NCSHP include medically necessary pharmacy benefits, mental health benefits, and medical care such as surgical benefits at inpatient and outpatient facilities.

45. The NCSHP Health Plans are distinguished primarily by coverage ratios, deductible amounts, and general costs to the insured employee and their dependent-enrollees. The Health Plans do however have at least one feature in common. At all relevant times, the Health Plans have contained a categorical exclusion of coverage for transition-related health care, with the exception of the 2017 plan year.

46. Because the only people who require treatments related to gender-confirming health care are transgender people, denying coverage for such health care necessarily discriminates against transgender people. As a result of the exclusion in the Health Plans, non-transgender enrollees receive coverage for medically necessary mental health, prescription drug, and surgical needs that, because of their sex, transgender enrollees do not.

47. The medical consensus recognizes that discriminatory exclusions of gender-confirming health care in health insurance plans have no basis in medical science. Preeminent medical and behavioral health organizations, such as the AMA and the APA, have called for an end to these exclusions.

48. In keeping with such medical consensus, BCBSNC has maintained a Corporate Medical Policy on Gender Confirmation Surgery and Hormone Therapy that acknowledges the general medical necessity of this care since 2011, and CVS similarly maintains coverage criteria policies for hormone replacement therapy as it pertains to the treatment of gender dysphoria.

49. Absent a categorical plan exclusion, claims for gender-confirming care would be evaluated under the BCBSNC and CVS criteria for individual medical necessity and covered under the plan in the same manner any other claims for medical, mental health, or pharmacy benefits.

50. In 2016-2017, the North Carolina State Treasurer's Office ("Treasurer's Office") and the NCSHP Board of Trustees seemingly came to the same conclusion as many other states. The then-North Carolina State Treasurer and a majority of the NCSHP Board of Trustees voted to remove the exclusion of gender-confirming health care for the 2017 Health Plans. In an email about the removal, then-Press Secretary for the Treasurer's Office Brad Young explained, "If the [Health] Plan[s] did not take action to comply with federal law and federal regulation, the [Health] Plan[s] would have risked losing millions

of dollars in federal funding and faced discrimination lawsuits for non-compliance." The resolution that removed the exclusion was only applicable to the 2017 Health Plans.

51. Prior to the removal of the categorical exclusion, the Treasurer's Office engaged a consulting firm to analyze the applicability of Section 1557 of the ACA to the NCSHP, and to estimate the fiscal impact of removing the gender-confirming health care exclusion. The consulting firm's November 2016 analysis concluded that the NCSHP is likely a covered entity within the meaning of the ACA and thus needed to comply with the statute's non-discrimination provisions.

52. Ultimately the report concluded that, "[b]ased on approximately $3.2 billion of premiums, the cost for the NCSHP is estimated to be between .011% and .027% of premium." Accordingly, the cost of removing the exclusion of gender-confirming health care in the NCSHP would be minimal.

53. Defendant Dale Folwell, Treasurer-elect at the time and now Treasurer of North Carolina, and Defendant Dee Jones, nevertheless failed to take action to block the reinstatement of the exclusion of gender-confirming health care in the 2018 Health Plans, and negotiated contracts to ensure the NCSHP would be administered to exclude coverage of such medical care. Defendants Folwell and Jones took the same steps for the 2019 Health Plans, which continue to exclude coverage for gender-confirming health care. At a NCSHP Board of Trustees meeting, affected state employees and their dependents testified about the devastating impact the loss of gender-confirming health care benefits has had on them and their families.

54. In a public statement, Treasurer Folwell stated, "Until the court system, a legislative body or voters tell us that we 'have to,' 'when to,' and 'how to' spend taxpayers' money on sex change operations, I will not make a decision" to treat gender-confirming health care equally in the NCSHP.

55. Accordingly, the 2018 and 2019 Health Plans categorically exclude coverage for all gender-confirming health care for the purpose of treating gender dysphoria. Specifically, the 2018 and 2019 Health Plans exclude "[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation" and "[t]reatment or studies leading to or in connection with sex changes or modifications and related care," (hereinafter, the "Exclusion").

56. As a result of this sweeping Exclusion of medically necessary health care coverage, the Health Plans single out employees who are transgender, or who have transgender dependents, for unequal treatment by excluding coverage of medically necessary care for the treatment of gender dysphoria.

C. The State's Denial of Medically Necessary Care to Plaintiffs

1. Plaintiff Maxwell Kadel

57. Plaintiff Maxwell Kadel ("Max") is a transgender man. Max was designated female at birth but has a male gender identity. Max lives all aspects of his life in accordance with his male gender identity. Originally born in Nebraska, Max grew up in New Jersey and attended college in Indiana. Max moved to North Carolina over six years ago.

58. Max is an employee of the UNC School of Government. Max began working at UNC in August of 2014 through a temporary job placement agency. Max obtained a permanent position with the UNC School of Government in October 2016, working as an Administrative Support Associate.

59. As a North Carolina state employee, Max is enrolled in the NCSHP, and receives health care benefits from this plan as part of his compensation. He contributes each month to the plan via a paycheck deduction.

60. Max has been a model employee, even winning a 2018 "Star Heel Award" for his job performance. This annual award program allows departments across UNC to recognize and reward employee excellence.

61. While doing his best to excel in his position, Max lives with significant distress caused by gender dysphoria. Max has struggled with gender dysphoria since childhood and was formally diagnosed with gender dysphoria at the age of 33. As part of his prescribed treatment, Max began hormone therapy in June 2016.

62. Max has also obtained a legal name change and has corrected his name and gender marker on his North Carolina state driver's license, Social Security Card, and U.S. Passport.

63. In 2017, Max considered pursuing chest surgery to create a more typically masculine chest, but he decided to wait and see whether hormone therapy would be sufficient to relieve his gender dysphoria.

64. In 2018, Max, in consultation with his health care providers, determined that chest surgery was necessary to alleviate his gender dysphoria, and was ready to move forward with further consultations leading to surgery. Max then discovered that the NCSHP had reinstated its categorical Exclusion of gender-confirming health care, effective January 1, 2018, in all of its Health Plans.

65. Since 2018, Max has been unable to obtain insurance coverage for medically necessary hormone therapy or gender-confirming surgical care. Max pays out-of-pocket for hormone therapy. To lessen the financial burden of paying out-of-pocket for testosterone every month, Max will often ration and use a vial of testosterone past the expiration date.

66. Having to forgo chest surgery, Max still experiences significant gender dysphoria-related distress on a daily basis. Max wears a binder to compress his chest, but it causes him physical discomfort and breathing difficulties. Max also has asthma, which is exacerbated by having to bind his chest because he cannot obtain a permanent medically necessary solution.

2. Plaintiffs Jason Fleck and Connor Thonen-Fleck

67. Jason Fleck has been employed by UNCG since 1997 and currently works as a Business Application Analyst. Connor Thonen-Fleck ("Connor"), his son, is a transgender young man. Connor was designated female at birth but has a male gender identity. Connor's mother, Alexis Thonen, is also a UNCG employee. Mr. Fleck and Ms. Thonen bring this suit on their son's behalf.

68. Connor is a high school student, and he is involved in several extracurricular activities. Connor has excelled academically and attends Early College at Guilford College in Greensboro, North Carolina. In addition to his rigorous academic responsibilities, Connor also works at a veterinary clinic. Connor is passionate about veterinary medicine and plans to pursue studies and a career in the veterinary field.

69. Connor lives with gender dysphoria, which he has struggled with since childhood. Mr. Fleck and Ms. Thonen realized that Connor demonstrated stereotypically masculine tendencies and characteristics from a young age. But until Connor began to transition, he was in serious and increasing distress. Ultimately, Connor came out as transgender to his parents and explained his need to transition.

70. Connor and his family developed a plan to secure treatment for his gender dysphoria. Connor initially began seeing a psychiatrist and therapist. By the time he was 15 years old, he had socially transitioned and was living in his authentic male gender identity in all aspects of his life.

71. In January of 2018, Connor began hormone therapy as part of treatment for his gender dysphoria. In March of 2018, Connor obtained a legal name and gender marker change and subsequently obtained a corrected birth certificate and driver's license.

72. Counseling, hormone therapy, and social transition have significantly improved Connor's quality of life by reducing his gender dysphoria. However, Connor still experiences significant gender dysphoria on a daily basis because he is a male with a typically female chest.

73. As part of treatment for his gender dysphoria, Connor's health care providers have recommended chest surgery that would give Connor a more typical male chest. This medically necessary surgery will bring Connor's body into better alignment with his gender identity and lived experience, and will further reduce his gender dysphoria.

74. As a North Carolina state employee, Plaintiff Jason Fleck is enrolled in the NCSHP, and receives health care benefits from this plan as part of his compensation. As a dependent of Mr. Fleck, Connor is also enrolled in the NCSHP. Mr. Fleck contributes each month to the plan via a paycheck deduction.

75. In 2017, Connor was enrolled in the 80/20 Health Plan. His visits with his psychiatrist and therapist were covered that because the categorical Exclusion of gender-confirming health care had been removed from the plan. During the fall of 2017, Connor's father re-enrolled himself and Connor in the 80/20 plan for the 2018 plan year.

76. Mr. Fleck and Connor have struggled since then to obtain coverage of Connor's required office visits to his endocrinologist, who prescribes and monitors Connor's masculinizing hormone therapy. Because Connor has received that care in connection with his gender dysphoria, insurance coverage for those visits has been inconsistent, and in some instances denied. Where coverage has been denied, Mr. Fleck and Connor have been left with full financial responsibility for the cost of the care.

77. On April 9, 2018, CVS issued a Notice of Determination ("ND") denying prior authorization for coverage of Connor's testosterone prescription. The ND explained that the diagnosis code submitted, F64.0 "Transsexualism," was not a covered diagnosis

code for prescription testosterone under the NCSHP covering Connor. The ND explained that the prescription would be covered for males with "primary or hypogonadotropic hypogonadism," but not for Connor.

78. Like any person with a medical condition, Connor and his family are doing their best to access medically necessary health care. Paying out-of-pocket for health care that has been denied under the plan has been an emotional and financial burden on Connor and his parents.

79. Connor lives with daily distress caused by having a typically female chest, and urgently requires gender-confirming surgery to treat his gender dysphoria. Connor and his parents cannot easily afford to pay for the surgery out of pocket, as it imposes a financial hardship on his family. Indeed, notwithstanding his full academic workload, Connor works in an effort to earn and save money so that he may contribute to the out-of-pocket costs for his surgery.

80. Connor's parents witness his daily distress due to his inability to access health insurance coverage for medically necessary care and are worried about the effects his untreated gender dysphoria is having on his mental and physical health, his education, and his future plans.

3. Plaintiff Julia McKeown

81. Plaintiff Julia McKeown ("Julia") is a transgender woman. Julia was designated male at birth, but her gender identity is female. Julia lives in accordance with her female gender identity in all aspects of her life.

82. Originally from Florida, Julia has struggled with gender dysphoria since childhood. Julia had to suppress her gender identity for much of her early life into adulthood. During her time in Florida, Julia completed her higher education, including a bachelor's degree, two master's degrees, and a doctoral degree. During this time, Julia was also battling severe, untreated gender dysphoria.

83. In 2010, while pursuing her doctorate, Julia could no longer suppress who she really was. Julia made the life-saving decision to live authentically, in accordance with her gender identity. In 2013, Julia began the medical part of her transition and started hormone therapy. Between 2010 and 2016, Julia was progressing in her career, life, and transition.

84. In 2016, Julia accepted a position with NCSU and moved to North Carolina from Florida. Since 2016, Julia has been employed as a Teaching Assistant Professor in the Teaching Education and Learning Design Department of the NCSU College of Education. She currently teaches in the Learning, Design, and Technology Program. Julia also serves as the Graduate Coordinator for the Learning, Design, and Technology Program.

85. As a North Carolina state employee, Julia is enrolled in the NCSHP, and receives health care benefits from this plan as part of her compensation. She contributes each month to the plan via a paycheck deduction.

86. While hormone therapy and social transition have been important aspects of Julia's transition, Julia was still dealing with significant distress related to gender

dysphoria. By 2017-2018, Julia's medical provider referred her for vaginoplasty, as part of treatment for her gender dysphoria. After consulting with a surgeon, Julia and her surgeon requested preauthorization for vaginoplasty in or around July 2018. Towards the end of July, the preauthorization was denied because of the reinstatement of the Exclusion of gender-confirming health care in the NCSHP.

87. Julia filed a grievance with the NCSHP Section 1557 Coordinator after the denial of preauthorization. The grievance was denied in or around August 2018.

88. At that point in her life, Julia could no longer wait for surgery. Left with no other options, Julia made the difficult decision to withdraw funds from her retirement and savings accounts, in order to pay for her medically necessary surgery. Julia's surgical costs totaled over $14,000.00.

89. Julia is also prescribed hormone therapy as part of treatment for her gender dysphoria, which is also excluded under the NCSHP. The Exclusion also prohibits Julia from seeking future medically necessary gender-confirming health care.

4. Plaintiffs Michael D. Bunting, Jr. and C.B.

90. Michael D. Bunting, Jr. is employed by UNC. C.B., his son, is a transgender boy. C.B. was designated female at birth but has a male gender identity. C.B.'s mother, Shelley K. Bunting, is a nurse practitioner in private practice. Mr. Bunting and Ms. Bunting bring this suit on their son's behalf.

91. Mr. Bunting has worked for UNC since 1990.

92. C.B. is a middle school student. He likes swimming, parkour, and really enjoys playing lacrosse. His favorite subjects in school are math and science.

93. Ever since he was a young child, C.B. would reject stereotypically female clothing and would dress in a more masculine manner. Beginning at a young age, C.B. would refuse to wear stereotypically female swimming suits, opting instead for board shorts and a shirt. In late 2016, he began wearing a short, typically masculine haircut.

94. Though C.B. always got along with people and has many friends, he exhibited high levels of anxiety, which his parents later came to understand was associated with his untreated gender dysphoria.

95. In early 2017, C.B. informed his parents that he was transgender. Soon after, C.B. and his parents met with a therapist in April 2017. After consultation with his family and therapist, C.B. asked to be placed on treatment to delay female puberty.

96. In April of 2017, C.B. and his parents sought an appointment with the Duke Child and Adolescent Gender Care Clinic ("Duke"), ultimately scheduled for August 2017.

97. During the summer of 2017, C.B. socially transitioned to living as his true self, informing friends and family of his male gender identity, wearing more masculine clothes, and living openly as the boy he is. However, as his breasts began to develop during the summer, C.B. began to experience additional anxiety.

98. As a result of the distress associated with his birth-designated sex (female), C.B. was diagnosed with gender dysphoria. In August 2017, C.B. began obtaining care

from medical and mental health professionals and was prescribed puberty-delaying treatment, in the form of an implant, as part of his treatment for gender dysphoria.

99. Following the beginning of C.B.'s treatment, C.B.'s parents noticed that the anxiety he had been experiencing diminished and that he was now a happy, outgoing, and personable teenage boy.

100. C.B. is treated and known as a boy at school and in all other aspects of his life. He legally changed his name to a more typically male name in the Spring of 2018.

101. As a North Carolina state employee, Plaintiff Michael D. Bunting, Jr. is enrolled in the NCSHP, and receives health care benefits from this plan as part of his compensation. As a dependent of Mr. Bunting, C.B. is also enrolled in the NCSHP. Mr. Bunting contributes each month to the plan via a paycheck deduction.

102. Because in 2017 the NCSHP did not contain an Exclusion for gender-confirming health care, C.B.'s puberty-delaying treatment was covered by the NCSHP.

103. C.B.'s puberty-delaying implant only lasts 12 to 18 months. Accordingly, C.B. needed the implant to be removed and replaced in early 2019.

104. However, in mid-2018, Ms. Bunting learned of the reinstitution of the Exclusion of gender-confirming care within the NCSHP.

105. Worried that they could not afford out-of-pocket the puberty-delaying treatment that C.B. needs, Mr. Bunting and Ms. Bunting communicated with the NCSHP Board of Trustees, urging them to once again eliminate the Exclusion of gender-confirming health care within the NCSHP, with no success.

106. In mid-December 2018, following the lack of action by the NCSHP Board of Trustees at their December 2018 meeting to eliminate the Exclusion, Mr. Bunting and Ms. Bunting decided to purchase an additional health insurance plan that would cover puberty-delaying treatment for C.B. Through the federally-run ACA health care exchange they purchased an insurance plan from BCBSNC. Though Mr. Bunting and C.B. remain enrolled in the NCSHP and will continue to do so, purchasing additional coverage for C.B. was necessary in order for the Bunting family to be able to afford C.B.'s gender-confirming care. As a result, Mr. Bunting and Ms. Bunting have had to pay an additional monthly premium and a $6,750.00 deductible for C.B., separate and apart from C.B.'s existing coverage under the NCSHP.

107. In early 2019, C.B. began obtaining puberty-delaying treatment via injection, rather than a longer-lasting implant, because that is the only puberty-delaying treatment on the formulary of the additional health insurance purchased to supplement the coverage under the NCSHP.

108. Aside from the additional high deductible and extra monthly premiums, Mr. Bunting and Ms. Bunting must now pay out-of-pocket costs each time C.B. receives a round of puberty-delaying medication via injection instead of the longer lasting implant, until the extra annual deductible is met.

109. The additional costs associated with C.B.'s gender-confirming care and the lack of coverage under the NCSHP due to the discriminatory Exclusion contributed to Mr. Bunting's decision in early January to retire from UNC. By the date of his retirement, Mr.

Bunting will have dedicated nearly 30 years of service to UNC and the North Carolina Tar Heels.

110. Mr. Bunting and C.B. will continue to be enrolled in the NCSHP as a retiree and dependent, respectively, following Mr. Bunting's retirement on April 1, 2019.

111. The Exclusion also serves to stigmatize C.B. as a transgender person and has caused pain, anger, and distress to C.B., Mr. Bunting, and the rest of the Bunting family.

5. Plaintiff Sam Silvaine

112. Plaintiff Sam Silvaine ("Sam") is transgender. Sam was designated female at birth but has a male affirmed sex. Sam lives all aspect of his life in accordance with his gender identity.

113. Sam moved to North Carolina in 2012 to pursue a master's degree. After obtaining his master's degree, Sam accepted a two-year fellowship with NCSU as a post-master's counseling fellow.

114. As a North Carolina state employee, Sam was enrolled in the NCSHP, and received health care benefits from this plan as part of his compensation. Sam was enrolled in the 80/20 NCSHP for plan years 2016, 2017, and 2018.

115. In January 2017, Sam began therapy as treatment for his gender dysphoria. Sam began hormone therapy in April 2017. Hormone therapy masculinized Sam's voice, some of his secondary sex characteristics, and physical appearance. As his body became more masculine and in greater alignment with his gender identity, his typically female chest

began to be even more noticeable to Sam. The marked incongruence increased Sam's gender dysphoria.

116. Sam used a binder daily to compress his chest. While binding lessened his gender dysphoria to an extent, it was not a permanent solution and caused Sam physical discomfort and restricted his physical activities. Sam's ability to do the things he loved, like hiking, backpacking, and climbing, were limited because of the need to wear the binder. The appearance of Sam's chest also presented a safety issue for Sam. Sam lives and is generally recognized as male in all aspects of his life. Being visibly male with a typically female chest invited undesired, invasive, and dangerous attention.

117. Eventually Sam, in consultation with and support from his health care providers, made the decision to seek chest surgery as part of treatment for his gender dysphoria.

118. In 2017, Sam's NCSHP did not contain a categorical Exclusion for gender-confirming health care. Sam's counseling and hormone therapy were covered. In August 2017, Sam and his surgeon sought prior authorization for reconstructive chest surgery. The prior authorization process took until October 2017 and at that time, the earliest available surgery date that Sam could obtain was March 1, 2018. Sam accepted the March 2018 date in order to avoid an even greater delay in the treatment he required.

119. After the categorical Exclusion of gender-confirming care was reinstated on January 1, 2018, the prior authorization for Sam's surgery was rendered invalid.

120. When Sam found out that his health insurance was no longer going to cover the surgery he desperately needed, he was devastated mentally and emotionally. Like other transgender North Carolina state employees who suddenly found themselves without health insurance coverage for their medically necessary health care, Sam was placed in a difficult position.

121. Sam was living with severe gender dysphoria and ultimately, he could not delay the surgery. Sam paid for the surgery out of pocket and underwent chest surgery on March 6, 2018.

122. The surgery proved life-changing for Sam and has significantly reduced the distress caused by his gender dysphoria. Sam has not been reimbursed by Defendants for his surgery costs or other out-of-pocket costs he incurred due to the Exclusion of gender-confirming health care in the 2018 plan.

123. Because of the Exclusion of gender-confirming health care from the Health Plans, all Plaintiffs have suffered emotional distress, humiliation, degradation, embarrassment, emotional pain and anguish, violation of their dignity, loss of enjoyment of life, and other compensatory damages, in an amount to be established at trial.

CLAIMS FOR RELIEF

COUNT I
Deprivation of Equal Protection
U.S. Const. amend. XIV

(All Plaintiffs Against Defendants Dale Folwell and Dee Jones)

124. Plaintiffs re-allege and incorporate each and every foregoing allegation contained in the preceding paragraphs of this Complaint, as though fully set forth herein.

125. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

126. Plaintiffs state this cause of action against Defendants Dale Folwell and Dee Jones, in their official capacities, for purposes of seeking declaratory and injunctive relief, and challenge their adoption and enforcement of the discriminatory sex-based classifications in the NCSHP Health Plans both facially and as applied to Plaintiffs.

127. Each Defendant is a person acting under color of state law for purposes of 42 U.S.C. § 1983 and has acted intentionally in denying Plaintiffs equal protection of the law.

A. Discrimination on the Basis of Sex

128. Under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, discrimination based on sex is presumptively unconstitutional and subject to heightened scrutiny.

129. Discrimination on the basis of sex characteristics, gender, gender identity, nonconformity with sex stereotypes, transgender status, and gender transition is discrimination on the basis of sex.

130. By categorically excluding, "[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation," and "[t]reatments or studies to or in connection with sex changes and modifications and related care," Defendants are engaging in constitutionally impermissible sex-based discrimination.

131. Through their duties and actions to design, negotiate, administer, and implement the NCSHP's categorical Exclusion, Defendants Folwell and Jones have unlawfully discriminated—and continue to unlawfully discriminate—against Plaintiffs based on sex-related considerations.

132. The NCSHP's categorical Exclusion treats Plaintiffs differently from other persons who are similarly situated.

133. Under the NCSHP's categorical Exclusion, health plan participants who require gender-confirming care, or whose dependents require gender-confirming care, are denied coverage for that medically necessary care, while other health plan participants can access the same care as long as it is not required for gender transition.

B. Discrimination on the Basis of Transgender Status

134. By categorically excluding coverage for gender-confirming health care in the NCSHP Health Plans, Defendants are engaging in constitutionally impermissible discrimination on the basis of transgender status.

135. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on transgender status is presumptively unconstitutional and subject to strict, or at least heightened, scrutiny.

a. Transgender people have suffered a long history of discrimination in North Carolina and across the country, and continue to suffer such discrimination to this day.

b. Transgender people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Transgender people have largely been unable to secure explicit state and federal protections to protect them against discrimination.

c. A person's transgender status bears no relation to a person's ability to contribute to society.

d. Gender identity is a core, defining trait and is so fundamental to one's identity and conscience that a person cannot be required to abandon it as a condition of equal treatment.

e. Gender identity generally is fixed at an early age and highly resistant to change through intervention.

136. Because the NCSHP's categorical Exclusion on its face and as applied to Plaintiffs deprives transgender enrollees of their right to equal dignity, liberty, and autonomy by stigmatizing them and branding them as second-class citizens, it denies transgender persons of the equal protection of the laws, in violation of the Equal Protection

Clause of the Fourteenth Amendment. The NCSHP's categorical Exclusion similarly serves to stigmatize NCSHP enrollees whose dependents are transgender; it brands them as second-class citizens and deprives them of their equal treatment and dignity.

137. Defendants' discriminatory Exclusion of gender-confirming care is not narrowly tailored or substantially related to any compelling or important government interest. Indeed, it is not even rationally related to any legitimate government interest.

138. Without injunctive relief from Defendants' discriminatory Exclusion of coverage for gender-confirming care, Plaintiffs will continue to suffer irreparable harm in the future.

COUNT II
Violation of Title IX of the Education Amendments of 1972
20 U.S.C. § 1681, *et seq*.

(Plaintiffs Maxwell Kadel, Michael D. Bunting, Jr., and C.B. against Defendant University of North Carolina at Chapel Hill; Plaintiffs Julia McKeown and Sam Silvaine against Defendant North Carolina State University; Plaintiffs Jason Fleck and Connor Thonen-Fleck against Defendant University of North Carolina at Greensboro)

139. Plaintiffs re-allege and incorporate the allegations in paragraphs 1 through 123 of this Complaint, as though fully set forth herein.

140. Title IX provides that no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

141. Under Title IX, discrimination on the basis of sex includes, but is not limited to, discrimination based on sex characteristics, gender, nonconformity with sex stereotypes, transgender status, and gender transition.

142. Defendants UNC, NCSU, and UNCG are recipients of federal financial assistance from the Department of Health and Human Services, the Department of Agriculture, and the Department of Education, and are therefore subject to Title IX.

143. By offering Health Plans to their employees with categorical exclusions for gender-confirming care, Defendants UNC, NCSU, and UNCG have and continue to discriminate on the basis of sex against NCSHP enrollees who require gender-confirming care, or whose dependents require gender-confirming care.

144. In offering Health Plans that categorically exclude coverage of gender-confirming health care on the basis of sex, Defendants UNC, NCSU, and UNCG deny enrollees who require gender-confirming care, or whose dependents require gender-confirming care, the benefits of and subject them to discrimination in educational programs and activities. This impermissible discrimination based on sex, including sex characteristics, nonconformity with sex stereotypes, transgender status, and gender transition, violates Title IX.

145. By knowingly and intentionally offering health insurance that denies coverage to Plaintiffs on the basis of sex, Defendants UNC, NCSU, and UNCG harm Plaintiffs by: stigmatizing them; treating them as a secondary class compared to other non-transgender enrollees who have access to the same care for themselves or their non-

transgender dependents; and causing the transgender health plan participants mental and physical health complications due to their inability to access medically necessary health care.

146. By knowingly and intentionally offering a compensation package that denies fringe benefits to Plaintiffs on the basis of sex, Defendants UNC, NCSU, and UNCG have intentionally violated Title IX, for which Plaintiffs are entitled to compensatory damages, including but not limited to out-of-pocket damages, and consequential damages.

147. Without injunctive relief from Defendants' discriminatory Exclusion of coverage for gender-confirming care, Plaintiffs will continue to suffer irreparable harm in the future.

COUNT III
Violation of the Patient Protection and Affordable Care Act
42 U.S.C. § 18116

(All Plaintiffs Against Defendant North Carolina State Health Plan for Teachers and State Employees)

148. Plaintiffs re-allege and incorporate the allegations in paragraphs 1 through 123 of this Complaint, as though fully set forth herein.

149. Section 1557 of the ACA, 42 U.S.C. § 18116, provides, in relevant part that, "an individual shall not, on the ground prohibited under … title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681, et seq.)"—which prohibits discrimination "on the basis of sex"—"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."

150. Discrimination on the basis of sex characteristics, gender, nonconformity with sex stereotypes, transgender status, and gender transition are all encompassed by the prohibition of discrimination on the basis of sex under Section 1557.

151. Upon information and belief, Defendant NCSHP receives federal financial assistance such that it is a "covered entity" for purposes of Section 1557 of the ACA. Indeed, Defendant NCSHP has acknowledged in its publicly available Policies and Procedures, effective July 15, 2016, that it "receives funding from the [federal] Department of Health and Human Services" and "is subject to Section 1557 of the Affordable Care Act (42 U.S.C. [§] 18116) and its implementing regulations at 45 CFR Part 92."

152. A covered entity, such as Defendant NCSHP, cannot provide or administer health care insurance coverage which contains a categorical Exclusion from coverage for gender-confirming health care, or otherwise impose limitations or restrictions on coverage for specific health services related to gender transition if such limitation or restriction results in discrimination against a transgender individual.

153. Because Defendant NCSHP receives federal funding that flows to health programs or activities, Plaintiffs have a right under Section 1557 to receive health insurance through the NCSHP free from discrimination on the basis of sex, sex characteristics, gender, nonconformity with sex stereotypes, transgender status, or gender transition.

154. Defendant NCSHP has discriminated against Plaintiffs on the basis of sex in violation of Section 1557 and has thereby denied Plaintiffs the full and equal participation in, benefits of, and right to be free from discrimination in a health program or activity.

155. By categorically excluding all coverage for medically necessary "[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation," and "[t]reatments or studies to or in connection with sex changes or modifications and related care," Defendant NCSHP has drawn a classification that has unlawfully discriminated—and continues to discriminate—against Plaintiffs based on sex, in violation of Section 1557.

156. As a result of the Exclusion, Plaintiffs have suffered harm, including but not limited to financial harm. By knowingly and intentionally offering health care coverage to Plaintiffs that discriminates on the basis of sex, Defendant NCSHP has intentionally violated the ACA, for which Plaintiffs are entitled to compensatory damages, including but not limited to out-of-pocket damages, and consequential damages.

157. Without injunctive relief from Defendants' discriminatory Exclusion of coverage for gender-confirming care, Plaintiffs will continue to suffer irreparable harm in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendants on all claims, as follows:

A. Enter a declaratory judgement that Defendants, including through enforcement of the North Carolina State Health Plan for Teachers and State Employees' categorical Exclusion of treatment for gender-confirming care, violated Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment, Title IX, and the ACA; and that the North Carolina State Health Plan for Teachers and State Employees' categorical Exclusion of gender-confirming health care discriminates on its face and as applied against transgender state employees and enrollees because of sex and transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment, and on the basis of sex in violation of Title IX and the ACA;

B. Preliminarily and permanently enjoin Defendants, their agents, employees, successors, and all others acting in concert with them, from administering or offering health coverage that categorically excludes coverage for gender-confirming health care;

C. Award compensatory and consequential damages in an amount that would fully compensate Plaintiffs for their financial harm, emotional distress and suffering, embarrassment, humiliation, pain and anguish, violations of their dignity, and other damages that have been caused by Defendant's conduct in violation of Title IX and the ACA;

D. Award pre- and post-judgement interest;

E. Award of Plaintiffs' costs, expenses, and reasonable attorneys' fees incurred in this action pursuant to 42 U.S.C. § 1988 and any other applicable laws;

F. Other legal and equitable or injunctive relief as this Court deems just and appropriate; and

G. The declaratory relief requested in this action is also sought against Defendants' officers, agents, servants, employees, and attorneys, as well as any other persons who are in active concert or participation with them.

H. Plaintiffs demand a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure.

* * *

Dated: March 11, 2019

Respectfully submitted,

/s/ Amy E. Richardson

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:19-cv-272

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents, JASON FLECK and ALEXIS THONEN; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents, MICHAEL D. BUNTING, JR. and SHELLEY K. BUNTING; and SAM SILVAINE, Plaintiffs, v. DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, Defendants.	**MOTION TO DISMISS**

Defendants Dale Folwell ("Folwell"), Dee Jones ("Jones"), and the North Carolina State Health Plan for Teachers and State Employees (the "Health Plan") (collectively,

"Defendants") move this court for entry of an Order dismissing the Plaintiffs' first claim for relief against Folwell and Jones and the Plaintiffs' third claim for relief against the State Health Plan, pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(7) of the Federal Rules of Civil Procedure on the bases of lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and failure to join a party under Rule 19. The grounds for this motion are more fully set forth in the memorandum filed contemporaneously herewith.

Respectfully submitted this 8th day of July, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

This the 8th day of July, 2019.

/s/ Kevin G. Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:19-cv-272

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents, JASON FLECK and ALEXIS THONEN; JULIA MCKEOWN; MICHAL D. BUNTING, JR.; C.B., by his next friends and parents, MICHAEL D. BUNTING, JR. and SHELLEY K. BUNTING; and SAM SILVAINE,	)
Plaintiffs,	)
v.	)
DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,	)
Defendants.	)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY TREASURER DALE FOLWELL, EXECUTIVE ADMINISTRATOR DEE JONES, AND THE NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES

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I. NATURE OF THE MATTER BEFORE THE COURT

Plaintiffs (or their children) are transgender individuals. Complaint ¶1. Transgender individuals "have a gender identity—an internalized, felt sense of who they are as male or female—that does not align with their assigned sex at birth." *Doe 2 v. Shanahan*, 917 F.3d 694, 708 (D.C.Cir. 2019) (Williams, J., concurring). Plaintiffs also suffer from gender dysphoria, which is "a mental health condition from which only a subset of transgender people suffer." *Doe 2*, 917 F.3d at 708.

The North Carolina State Health Plan for Teachers and State Employees ("the Health Plan" or "the Plan") does not distinguish between transgender individuals and other participants. Health Plan benefits do not, however, include hormone therapy or surgical gender reassignment to treat gender dysphoria. Plaintiffs argue that because transgender individuals are disproportionately affected by this lack of coverage, this Court should order payment for the medical treatment they seek pursuant to the Equal Protection Clause and a non-discrimination provision enacted as part of the Affordable Care Act (usually referenced by its location in that Act: Section 1557).

Plaintiffs' constitutional claim should be dismissed because the Equal Protection Clause requires only that the Health Plan provide the same coverage for every beneficiary; it does not require a Plan design that is equally helpful for every beneficiary's specific medical needs. Plaintiffs' statutory claim should be dismissed for this same reason and because no waiver of sovereign immunity allows federal court jurisdiction over this claim against the State of North Carolina.

II. STATEMENT OF FACTS—INTRODUCTION TO THE HEALTH PLAN

North Carolina's Health Plan insures more than 727,000 members, including teachers, state employees, retirees, and their eligible dependents. Complaint ¶4. As a self-insurer, the Plan uses employee premiums, combined with employer contributions appropriated by the North Carolina General Assembly, to pay over $3.2 billion annually for health care. *Release on 2019 Premiums*, N.C. Treasurer, *available at* bit.ly/2LtEpPK (July 12, 2018).

The Plan's long-term unfunded liability is staggering: $34.4 billion for medical care for future retirees. Medical and pharmaceutical costs rise 5-9% annually, and the Plan is projected to be insolvent by 2023 unless premiums rise, benefits fall, or additional funding appears. *Release on S&P Global Report*, N.C. Treasurer *available at* bit.ly/300LA5Z (Dec. 6, 2018).

Until 2011, the North Carolina General Assembly administered the Health Plan; now the North Carolina Treasurer does. 2011 N.C. Sess. Laws 119, 132. The Treasurer determines Plan benefits "subject to approval by" the Plan's ten-member Board of Trustees. N.C. Gen. Stat. §135-48.30(a)(2); N.C. Gen. Stat. §135-48.20(a).

The Health Plan provides an array of benefits for members but also excludes coverage for numerous medical treatments that its members want (*e.g.* acupuncture, psychoanalysis). Members can petition the Board to add health coverage. *See*, *e.g.*, *Minutes of February 25, 2019 Board Mtg.*, at 1-2, *available at* https://bit.ly/3286QsA (requests for

coverage of certain wellness exams, hearing aids, and nutritional formula). Relevant to this case, since the 1990s the Health Plan has excluded coverage for:

- Psychological assessment and psychotherapy treatment in conjunction with proposed gender transformation.
- Treatment or studies leading to or in connection with sex changes or modifications and related care.

2019 Employee Benefit Booklets *available at* https://bit.ly/2JiG2gr (70/30 Plan at 55,67; 80/20 Plan at 42,52; High-deductible Plan at 40,50); Complaint ¶43,55.

In 2016, a U.S. Department of Health and Human Services regulation declared that coverage exclusions for gender transformation were discriminatory, and the prior Treasurer and the Board of Trustees suspended the coverage exclusions at issue here. Complaint ¶50,51; 45 C.F.R. §92.207(b)(5). Because of pending lawsuits against the HHS regulation, however, the Board and the prior Treasurer limited this suspension to the 2017 Plan year. *Minutes of December 1-2, 2016 Board Meeting* at 6-8, *available at* https://bit.ly/2KVkhqr. A federal court subsequently invalidated the HHS regulation and issued a nationwide injunction; HHS recently proposed a new rule that does not require coverage for gender transformation. *Franciscan All. v. Burwell,* 227 F.Supp.3d 660, 696 (N.D.Tex.2016); 84 Fed. Reg. 27846 (June 14, 2019). The Board has taken no further action since the federal court's injunction. Complaint ¶53.

Treasurer Dale Folwell released a statement when the suspension expired:

> The State Health Plan's policy of not covering sex change operations as a benefit is the same now as it was during the entire eight years of Treasurer Janet Cowell's administration and all previous North Carolina Treasurers.

> The legal and medical uncertainty of this elective procedure has never been greater.
>
> Until the court system, a legislative body or voters tell us that we "have to," "when to," and "how to" spend taxpayers money on sex change operations, I'm reluctant to make a decision that has the potential to discriminate against those who desire other currently uncovered elective procedures.
>
> We empathize with all members' desires but cannot provide them all with every service they want.

Rose Hoban, *Transgender People Protest Lost Access to Medical Therapies*, N.C. Health News (Oct. 25, 2018) *available at* https://bit.ly/2q71Oea (quoting entire statement); Complaint ¶54 (quoting part of statement).

To be clear, the Health Plan exclusion does not restrict medical treatment. Plaintiffs can seek treatment or insurance elsewhere, and some have. Complaint ¶¶65,78,88,106,108, 121. Moreover, North Carolina allows public employers to provide *additional* health coverage to employees at their own cost. Under N.C. Gen. Stat. §116-17.2, Universities can cover treatments *not* included under the Health Plan, such as treatment for gender dysphoria. *See also* N.C. Gen. Stat. §126.95 (state agencies); N.C. Gen. Stat. §115D-25.2 (community colleges); N.C. Gen. Stat. §115C-341.1 (school boards). The Health Plan provides baseline coverage; it does not prevent employers from offering additional benefits.

III. QUESTIONS PRESENTED

Courts apply heightened scrutiny when the government classifies people by race, gender or certain other characteristics; actions without a facial classification, but with a disparate impact, receive rational-basis review. Plaintiffs allege only that transgender individuals are disproportionately affected by the benefits exclusions for gender transformation. Should the Court dismiss Plaintiffs' constitutional claim because officials could rationally decide not to incur the cost of expanding Plan coverage?

Congress must clearly demand that States waive their sovereign immunity as a condition of federal funding. Section 1557 of the ACA does not mention sovereign immunity or transgender discrimination. Has North Carolina waived its sovereign immunity against Plaintiffs' claims? If so, have Plaintiffs stated a claim for relief?

IV. SUMMARY OF ARGUMENT

The Court should dismiss Plaintiffs' claims against Treasurer Dale Folwell, Executive Administrator Dee Jones, and the Health Plan for failure to state a claim, for lack of jurisdiction, and for failure to join necessary parties under Rule 19.[1] F.R.Civ.P. 12(b)(1),(6),&(7).

Count I alleges that the Equal Protection Clause requires coverage of gender transformation. Plaintiffs assert that because the Plan provides medically necessary treatment for other illnesses—but does not cover gender transformation—the Plan imposes a "discriminatory sex-based classification" that harms transgender individuals. Complaint ¶¶124-38.

Plaintiffs confuse allegations of *discriminatory intent* with allegations of *disparate impact*. Discriminatory intent can be shown through facial classifications, which receive heightened scrutiny, but the Health Plan does not classify beneficiaries. The Plan does not cover "gender transformation" or "sex changes or modifications" for anyone. Plaintiffs allege this exclusion affects transgender individuals more than others but that is an allegation about *effect*, not a classification.

Without a facial classification, Plaintiffs must allege "discriminatory intent or purpose…to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). To make an allegation of

[1] The Treasurer and the Board of Trustees must agree to alter Plan benefits, so the Court must join the Board members or dismiss Count I pursuant to Rule 12(b)(7). Fed.R.Civ.P.19(a)(1)(A). Administrator Jones does not determine Plan benefits, so she should be dismissed from this suit.

discriminatory intent, Plaintiffs must allege that officials exclude coverage for gender transformation at least in part "because of" the adverse effect on transgender individuals, not merely "in spite of" or "with indifference to" this effect. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

The Complaint, however, includes only allegations of disparate impact: lack of coverage "necessarily discriminates" "[b]ecause the only people who require treatments related to gender-conforming health care are transgender people." Complaint ¶46; *id.* ¶¶1,2,3,18,46,56,126,130,131,132,133, 136,137,150,155,157. *Feeney* requires more, so Plaintiffs' Equal Protection challenge receives only rational-basis review.

Under rational-basis review, the coverage exclusions enjoy a "strong presumption of validity" that they are "rationally related to a legitimate state interest." *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008). Even on a motion to dismiss, defendants need provide only "rational speculation unsupported by any evidence or empirical data," while Plaintiffs must "negate every conceivable basis which might support" the coverage exclusions. *Id.*

Plaintiffs cannot meet their burden because treatment for gender dysphoria costs money. Complaint ¶¶52,78,88,106,121. Plaintiffs allege this cost is low when spread across all Plan members, Complaint ¶52, but this is irrelevant. The Health Plan pays billions each year for medical treatment, and officials can rationally decide against new benefits when trying to control the cost of current ones. The Constitution does not second-guess coverage decisions, even when a plaintiff has a fundamental right to the medical procedure and

failure to pay for it will harm that plaintiff. *Maher v. Roe*, 432 U.S. 464 (1977) (Medicaid need not cover abortion). Count I should be dismissed.[2]

Count III asserts that the coverage exclusions violate Section 1557 of the Affordable Care Act ("ACA"), which states "an individual shall not, on the ground prohibited under…title IX…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…." 42 U.S.C. §18116(a).

Plaintiffs' Section 1557 claim should be dismissed for three reasons.

First, no statute waives North Carolina's sovereign immunity for a Section 1557 claim. To waive sovereign immunity as a condition of "Federal financial assistance," 42 U.SC. §18116(a), the trade-off must be "unequivocally expressed in the text" of the relevant statute. *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). Section 1557 says only that the "enforcement mechanisms" of other anti-discrimination statutes apply; it does not present the required choice between funding and lawsuits asserting discrimination against transgender individuals.

Second, Section 1557 has the same operative text as Title VI and Title IX, so it prohibits only intentional discrimination, not actions with a disparate impact. While Title VI and Title IX have implementing *regulations* that prohibit actions with a disparate impact, Section 1557 does not. A federal court has permanently enjoined the 2016 HHS

[2] Undersigned counsel represent Treasurer Folwell, Administrator Jones and the Health Plan, not Plaintiffs' University employers, so this memorandum does not discuss Count II.

regulation that would have allowed Plaintiffs' claim of discrimination. Moreover, Congress has not authorized a private right of action to enforce Section 1557 regulations, even if a regulation were to exist.

Finally, even if Plaintiffs identify a waiver of sovereign immunity and show they have authority to bring a Section 1557 disparate impact claim, they have not stated a claim for relief under that provision. Section 1557 references Title IX, but discrimination against transgender individuals is not discrimination on the basis of sex. Title IX prohibits discrimination based on biological sex, not gender identity.

V. ARGUMENT

A. Only facially discriminatory classifications receive heightened scrutiny under the Equal Protection Clause, and no such classifications exist here. Plaintiffs' allegation that the failure to pay for gender transformation has a discriminatory effect receives only rational basis review. The decision to conserve financial resources is rational, so the Court should dismiss Count I.

1. Complaints about discriminatory effect receive rational basis review, not heightened scrutiny, under the Equal Protection Clause.

The U.S. Constitution does not prescribe health insurance benefits. In fact, the Constitution confers "no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). Thus, for example, State health insurance need not cover abortion. *Maher*, 432 U.S. at 469; N.C. Gen. Stat. §135-48.50(1) (coverage exclusion for abortion).

The Health Plan cannot, of course, selectively deny health insurance coverage, *Deshaney*, 489 U.S. at 197 n.3, but the Health Plan does not provide different health insurance *benefits* to transgender individuals. Plaintiffs challenge a coverage exclusion that applies to *everyone*, arguing their health insurance is less valuable because an excluded treatment is "medically necessary" for them. Complaint ¶133.

For heightened scrutiny, however, the Plaintiffs must show the Health Plan divides beneficiaries into categories. "A denial of equal protection entails, at a minimum, a classification that treats individuals unequally." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 707–08 (9th Cir. 1997). Nowhere do Plaintiffs allege the Health Plan classifies on the basis of gender or transgender status, because the Plan does not. The challenged benefits

exclusions do not mention transgender individuals; no person—regardless of gender or gender identity—receives assistance with "gender transformation" or "sex changes or modifications."

Plaintiffs' Equal Protection claim is that the coverage exclusions discriminate because they treat Plaintiffs "differently from other persons who are similarly situated" by covering "medically necessary care" for others but not "gender-confirming care" for Plaintiffs. Complaint ¶¶132-33.

"[A] showing of disproportionate impact" alone does not establish an equal protection violation. *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 825 (4th Cir. 1995). A facially neutral policy with a "disproportionately adverse effect" violates the "the Fourteenth Amendment … only if a discriminatory purpose can be shown." *Crawford v. Board of Ed. of Los Angeles,* 458 U.S. 527, 537-38 (1982).

The Health Plan's exclusions are legally identical to the exclusion upheld in *Geduldig v. Aiello*. 417 U.S. 484 (1974). In *Geduldig*, California's disability insurance program excluded pregnancy as a covered disability, and the plaintiff argued she "suffered discrimination because she encountered a risk that was outside the program's protection," and that risk only affected a protected class (women). *Id.* at 497. This is Plaintiffs' argument: "Because the only people who require treatments related to gender-conforming health care are transgender people, denying coverage for such health care necessarily discriminates against transgender people." Complaint ¶46.

The Supreme Court upheld the California's plan because—like this Health Plan—the challenged policy "does not discriminate with respect to the persons or groups which are eligible for … insurance protection under the program." *Id.* at 494. "While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification[.]" *Id.* at 497 n.20. So long as the Plaintiffs "receive[] insurance protection equivalent to that provided all other participating employees," and "[t]here is no risk from which men are protected and women are not," coverage exclusions need only be rational. *Id.* at 496-97.[3]

"The proper comparator is the provision of the medical benefit in question," not each policyholder's medical needs. *In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 944 (8th Cir.2007) (upholding exclusion for contraception). *See also Alexander v. Choate*, 469 U.S. 287, 303 (1985) (Medicaid's "package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered—not 'adequate health care.'"). The plaintiff's need for a particular medical procedure does not affect this legal analysis. Even when (1) an individual has a fundamental right to a medical procedure and (2) the individual cannot afford to pay for that treatment, the Constitution does not require a State to provide it. *Maher*, 432 U.S. at 470-71.

[3] A Federal statute now prohibits "sex discrimination on the basis of pregnancy," 42 U.S.C. §2000(k), but *Geduldig* remains good law. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993).

Because the Health Plan's coverage exclusions for gender transformation apply to everyone, regardless of gender or transgender status, rational basis review applies.

2. Plaintiffs do not allege intentional discrimination by the Health Plan.

The Equal Protection Clause forbids actions motivated by discriminatory intent, but—to show discriminatory intent—Plaintiffs must prove the Health Plan does not cover gender transformation "at least in part 'because of'" the harmful effect of the coverage exclusions on transgender individuals, not merely "in spite of" or "with indifference to" that effect. *Feeney*, 442 U.S. at 279.

Plaintiffs do not allege the additional "circumstantial and direct evidence of intent" that must supplement any allegation of disparate impact. *Peters v. Jenney*, 327 F.3d 307, 321 n.18 (4th Cir. 2003). Complaint ¶46 ("denying coverage for such health care *necessarily* discriminates against transgender people"); Complaint ¶56 (The exclusions "single out employees who are transgender, or who have transgender dependents, for unequal treatment by excluding coverage of medically necessary care for the treatment of gender dysphoria.").

Plaintiffs allege Treasurer Folwell and Administrator Jones are each "a person acting under color of state law for purposes of 42 U.S.C. § 1983 and [each] has acted intentionally in denying Plaintiffs equal protection of the law." Complaint ¶127. This is not an allegation of discriminatory intent. It is, at most, an allegation of intentional conduct: Treasurer Folwell and Administrator Jones have not *accidentally* failed to provide coverage under the Health Plan. Further, this allegation is just the sort of "naked assertion devoid of

further factual enhancement" that cannot overcome Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Plaintiff's selective quotation of Treasurer Folwell does not show discriminatory intent either. Complaint ¶54. Plaintiffs allege that Treasurer Folwell does not support expanding benefits; the Complaint says nothing about his reasoning. The Treasurer's full statement—not Plaintiffs' warped excerpt—does not reflect animus. His statement indicates his awareness that, like every insurance program, the Health Plan must provide some benefits and exclude others: "[w]e empathize with all members' desires but cannot provide them all with every service they want." While Plaintiffs no doubt disagree that the "legal and medical uncertainty of [surgical gender modification] has never been greater," this is a debate for "a legislative body" or the "voters," not the courts. Plaintiffs cannot evade Rule 12(b)(6) by selectively quoting the public statement of a government official.

Because the Plaintiffs allege only discriminatory effect, and because the Health Plan can rationally limit its expenditures, Plaintiffs fail to allege a violation of the Equal Protection Clause.

3. The Health Plan's coverage exclusions are rational because they save money.

Health care is not free. If Plan leaders could rationally conclude that the Plan cannot afford to cover all possible medical treatment, the coverage exclusions must be upheld.

These trade-offs are the essence of insurance, as the Supreme Court has acknowledged. In *Alexander v. Choate*, plaintiffs argued that Tennessee's Medicaid plan discriminated against the disabled because Medicaid covered only 14 days of inpatient

hospital care; disabled Medicaid beneficiaries disproportionately require more time. 469 U.S. 287 (1985). Writing for the Court, Justice Marshall rejected this argument. Even though disabled individuals have a greater *need* for certain services, the suggestion that equal treatment requires additional benefits is "simply unsound." *Id.* at 303.[4]

Insurance premiums and employer contributions pay for medical treatment, so "the underinclusiveness of the set of risks that the State has selected [to] insure" is "reflected in the level of annual contributions exacted from participating employees." *Geduldig*, 417 U.S. at 494-95.

All Plan members, including Plaintiffs, receive this actuarial benefit. Just as not all women are pregnant, not all transgender individuals require treatment for gender dysphoria. *Doe 2*, 917 F.3d at 708. Plaintiffs' Complaint subtly acknowledges this "lack of identity." *Geduldig*, 417 U.S. at 496 n.20. Complaint ¶32 (Gender transition is "individualized"); *Id.* ¶27 (Incongruence between gender identity and the body's other sex characteristics "can result" in gender dysphoria.). *See also* American Psychological Association, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) (DSM-5) (Transgender "identity per se" is **not** a mental illness requiring treatment; gender dysphoria, the diagnosed "clinical problem," reflects the "distress" that many but "not all [transgender] individuals" experience.).

[4] Plaintiffs in *Alexander* sued under Section 504 of the Rehabilitation Act, which prohibits both discriminatory intent and disparate impact. 469 U.S. at 294. Even under disparate impact analysis, the Court rejected "the boundless notion that all disparate-impact showings constitute prima facie cases," *id.* at 299, holding nothing in Section 504 requires treatment of certain "illnesses, *i.e.,* those particularly affecting the handicapped, as more important than others and more worthy of cure through government subsidization," *id.* at 303-04.

Moreover, it is a "legitimate purpose" to "limit[] health care costs." *Saah v. Contel Corp.*, 978 F.2d 1256 (4th Cir.1992) (per curiam). *See also Boyd v. Bulala*, 877 F.2d 1191, 1197 (4th Cir.1989) ("[C]ap on [malpractice] liability bears a reasonable relation to a valid legislative purpose—the maintenance of adequate health care services.") *Geduldig* holds that "so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point" even though members of a protected class are disproportionately affected by the lack of coverage. 417 U.S. at 495.

Plaintiffs suggest that this rationale weakens if the cost for additional coverage is low. Complaint ¶52. First, Plaintiffs cannot allege they suffer a "financial burden" from health care costs and then dismiss these same costs as insignificant. Complaint ¶65; *id.* ¶¶78,88,106,121. The Health Plan has greater assets, but it also has greater liabilities, and Plan officials must "carry out their duties and responsibilities," including coverage decisions, "as fiduciaries for the Plan." N.C. Gen. Stat. §135-48.2(a). Moreover, rational-basis review has no *de minimus* exception permitting Court supervision if only "moderate alterations" to premium "variables" are needed. *Geduldig*, 417 U.S. at 495-96. "The State has a legitimate interest in maintaining the self-supporting nature of its insurance program" and nothing in the Constitution requires a "more comprehensive" program. *Id.* at 496.

This same logic underlies courts' reluctance to mandate health care coverage under the Americans with Disabilities Act. Health insurance plans do not discriminate when "underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law." 42 U.S.C. §12201(c)(1). "The ADA's 'safe harbor' provision

and the related legislative history suggest that Congress did not intend for the ADA to force a change in the way insurers do business." *Rogers v. Dep't of Health & Envtl. Control*, 174 F.3d 431, 435 (4th Cir.1999). [5]

B. Plaintiffs' claim under Section 1557 of the Affordable Care Act fails because no waiver of sovereign immunity allows jurisdiction in this Court and because Plaintiffs fail to state a claim for relief.

1. The Eleventh Amendment bars federal jurisdiction over the Health Plan.

The Health Plan is an agency of the State of North Carolina, and "[t]he Eleventh Amendment bars suit in federal court against an unconsenting state and any governmental units that are arms of the state unless Congress has abrogated the immunity." *Coleman v. Md. Ct. of App.*, 626 F.3d 187, 191 (4th Cir.2010), *aff'd* 566 U.S. 30 (2012). No waiver of sovereign immunity allows a claim against a State under Section 1557 of the ACA. Count III should be dismissed.

a. No waiver of sovereign immunity allows enforcement of Section 1557 of the ACA against the Health Plan.

Congress can require States to waive sovereign immunity as a condition of receiving federal funds. Section 1557's application to "any health program or activity" receiving "Federal financial assistance" suggests a Spending Clause nexus, but to require waiver of North Carolina's sovereign immunity, Congress must demand the waiver "expressly and unequivocally in the text of the relevant statute." *Sossamon*, 563 U.S. at 290. The ACA is

[5] Plaintiff Sam Silvaine no longer lives or works in North Carolina. Complaint ¶114 (Silvaine "was enrolled" in the Health Plan). He therefore lacks standing to seek injunctive and declaratory relief, and his claim under Count I should be dismissed.

the "relevant statute," as its provisions provide the federal question underlying Count III. This Court lacks jurisdiction because Section 1557 says nothing about sovereign immunity or lawsuits or States at all:

> [A]n individual shall not, on the ground prohibited under title VI…title IX…the Age Discrimination Act…or [Section 504 of the Rehabilitation Act], 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…. The enforcement mechanisms provided for and available under such title VI, title IX, [Section 504], or such Age Discrimination Act shall apply for purposes of violations of this subsection.

42 U.S.C. §18116(a).

Spending Clause conditions are "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981). Congress must "unequivocally" demand that a State waive its immunity from suit "in the **text of the relevant statute**." *Sossamon*, 563 U.S. at 284 (emphasis added).

As noted above, neither Section 1557 nor any other provision in the ACA's 906 pages mentions "sovereign immunity" or "immunity." 124 Stat. 119 at 119-1049 (2010). If Congressional authorization of "appropriate relief against a government" does not clearly demand a waiver of sovereign immunity, *Sossamon*, 563 U.S. at 285-86, then reference to "enforcement mechanisms" fails as well.

This should end the inquiry: only statutory text can demand a waiver of sovereign immunity; other legislative materials are irrelevant. *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 104 (1989). Despite the absence of any reference to sovereign

immunity, however, two federal district courts have found a waiver of sovereign immunity for Section 1557 by doing what the Supreme Court forbids: *inferring* a waiver from the reference to "enforcement mechanisms" for various civil rights statutes. *Boyden v. Conlin*, 341 F.Supp.3d 979, 998 (W.D.Wis. 2018); *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, 2017 WL 4791185, at *6 (E.D.La. Oct.24, 2017).

Both district courts cited the Civil Rights Remedies Act of 1986, which was enacted more than 20 years before the ACA:

> A State shall not be immune…from suit in Federal court for a violation of section 504…,title IX….,the Age Discrimination Act of 1975, title VI…, **or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.**

42 U.S.C. §2000d-7(a)(1) (emphasis added).

These district courts incorrectly concluded that §2000d-7 creates a perpetual waiver even though "mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985). More significantly, the Fourth Circuit has considered 42 U.S.C. §2000d-7 and specifically requires language that "clearly and unambiguously appl[ies]" a §2000d-7 waiver to the other statute. *Madison v. Virginia*, 474 F.3d 118,132 (4th Cir.2006). As in *Madison*, §2000d-7 "makes no mention" of the ACA. *Id.* Therefore, "[e]ven if a catch-all provision could suffice as an 'unequivocal textual waiver,'" this Court must find the ACA is "like the statutes expressly listed" in §2000d-7. *Id.* Section 1557 does not meet this test.

Section 1557 of the ACA prohibits discrimination, but the ACA—the 'Federal statute' enacted by Congress—is most assuredly not a similar anti-discrimination statute.

The ACA was historic reform of the health care industry, not a "**statute** [that is] aimed at discrimination" by those who receive federal funds. *Id.* (emphasis added); *see*, *e.g.*, Remarks on the Patient Protection and Affordable Care Act, 2010 Daily Comp.Pres.Doc. 197 (March 23, 2010) (ACA is "health care reform"). A single provision in a large bill does not suffice. *Levy v. Ks. Dep't of Soc. & Rehab. Servs.*, 789 F.3d 1164, 1171 (10th Cir. 2015) (ADA not similar because statute "has a much broader focus than discrimination by recipients of federal financial assistance."). Moreover, the Age Discrimination Act, Section 504 of the Rehabilitation Act, Title IX and Title VI are each "antidiscrimination statutes" that broadly prohibit a specific type of discrimination for recipients of federal funding. Section 1557, in contrast, prohibits multiple types of discrimination by *specific* recipients of federal funding.[6]

b. Even if this Court finds a waiver of sovereign immunity for some Section 1557 claims, nothing in the ACA waives sovereign immunity for claims of discrimination based on transgender status.

Congress has never demanded a waiver of sovereign immunity for claims of discrimination on the basis of transgender status. Without such a clear statement, the Plaintiffs cannot use a general waiver of sovereign immunity to bring suit against the Health Plan.

[6] This interpretation of §2000d-7 does not leave the Plaintiffs without a federal forum. North Carolina has waived its sovereign immunity for Title IX claims. *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir.1999). These claims are only against the University employers, not the Health Plan defendants, so the waiver does not preserve Count III.

Even if this Court finds a general waiver for Title IX claims in Section 1557, the Court would still have to conclude—given the contractual nature of a Spending Clause waiver—that in Section 1557 "Congress spoke so clearly that [the court] can fairly say that the State could make an informed choice" to expect federal lawsuits alleging discrimination by transgender individuals rather than being "surpris[ed]" "with post acceptance or 'retroactive' conditions." *Pennhurst*, 451 U.S. at 25.

Congress does not "unambiguously" require waiver with vague terms that place "upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley,* 458 U.S. 176, 190 n.11 (1982). The clarity of the demand for a waiver is viewed "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the] funds and the obligations that go with those funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296 (2006).

Nothing in the text of Section 1557 references discrimination on the basis of gender identity or transgender status. More importantly, when the ACA was passed in 2010, federal courts did not "unambiguously" or "clearly" conclude that civil rights laws prohibited discrimination against transgender individuals. *See*, *e.g.*, Edward J. Reeves & Lainie D. Decker, *Before Enda: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 Law & Sexuality 61, 75 (2011) ("Federal courts have conclusively held that transgender individuals are not afforded protection under Title VII

when the discrimination is based on transsexuality itself."); *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007); *Ulane v. E. Airlines*, *Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder.").

To be sure, some courts had reached the opposite conclusion, *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004), but this disagreement reinforces the lack of a knowing waiver for Plaintiffs' claims. State officials do not give "knowing acceptance" of grant conditions when the "State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17. Even if this Court finds a waiver for some Title IX claims under Section 1557, this waiver cannot expand to Plaintiffs' allegations here.

2. Section 1557 authorizes only claims based on discriminatory intent, not disparate impact.

Section 1557 of the ACA does not authorize disparate impact claims. Even were this Court to find a waiver of sovereign immunity for Section 1557 claims, Plaintiffs' allegations of disparate impact do not state a claim for relief.

The prohibited acts under Section 1557 are identical to Title VI and Title IX: an individual shall not be "excluded from participation in, be denied the benefits of, or be subjected to discrimination under" any health program or activity. 42 U.S.C. §18116(a); 42 U.S.C. §2000d; 20 U.S.C. §1681(a). The courts have held that Title VI and Title IX prohibit only *intentional* acts of discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (Title VI); *Cannon v. Univ. of Chicago*, 648 F.2d 1104, 1109 (7th Cir. 1981) (Title

IX). It is the implementing regulations for these antidiscrimination statutes—not the statutes themselves—that authorize claims based on disparate impact alone. *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 584 n.2 (1983).

Plaintiffs must therefore identify regulations that authorize disparate impact claims by transgender individuals under Section 1557, but none exist. While an HHS regulation in 2016 put forth such an interpretation, 81 Fed. Reg. 31376 (May 18, 2016), a federal court has enjoined its enforcement on a nationwide basis to the extent the regulation prohibits "discrimination on the basis of gender identity." *Franciscan All.*, 227 F.Supp.3d at 696.

Further, a Section 1557 regulation cannot authorize suit by private individuals for disparate impact. While the Secretary of HHS can promulgate regulations, 42 U.S.C. §18116(c), this authorization lacks the "rights-creating language" needed to authorize a right of action for private plaintiffs to enforce the Secretary's regulation. *Alexander v. Sandoval*, 532 U.S. 275, 288-899 (2001).

Therefore, even were Title IX's waiver of sovereign immunity to apply, the plain text of Section 1557 prohibits only claims of discriminatory intent, and Plaintiffs cannot raise their disparate impact claims against the Health Plan.

3. Title IX does not require a health insurer to cover treatment of gender dysphoria, as Plaintiffs claim.

Even were this Court to find a waiver of sovereign immunity, and authority under Section 1557 for a disparate impact claim, enforceable by a private right of action, Plaintiffs do not present a viable claim for relief.

Plaintiffs argue that Title IX's prohibition against discrimination "on the basis of sex" includes discrimination based on gender identity, not just biological sex. This is incorrect. Those courts that have allowed Title IX and Title VII claims for transgender discrimination have done so based upon a theory of sex stereotyping. *See EEOC v. R.G. &. G.R. Harris Funeral Homes*, 884 F.3d 560, 571 (6th Cir.2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019) (set for argument Oct. 8, 2019).

As an initial matter, these courts misread the text of these statutes, neither of which define the term "sex." Undefined statutory words should have "their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel*, 571 U.S. 220, 227 (2014). In 1972, when Title IX was enacted, "sex" was linked to an individual's biological sex: "the physiological distinctions between males and females, particularly with respect to their reproductive functions." *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 736 (4th Cir. 2016) (Niemeyer, J., dissenting) (collecting definitions), *vacated and remanded* 137 S. Ct. 1239 (2017). *Cf.* DSM-5 at 451 (term "sex" "refer[s] to biological indicators of male and female").

Moreover, Plaintiffs' theory of sex stereotyping omits the requirement that an individual *suffer discrimination* on the basis of a sex stereotype. As the Supreme Court explained in the Title VII context, "[t]he critical issue" for identifying discrimination, "is whether members of one sex are exposed to disadvantageous terms or conditions of

employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998).

Neither the *Price Waterhouse* plurality nor concurring opinions hold that sex stereotypes alone *are* discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-252 (1989) (plurality opinion). Rather, "sex stereotyping" is evidence a plaintiff can use to prove "the employer actually relied on [plaintiff's] gender in making its decision." *Id.* at 251. *Price Waterhouse* is about the burden and standard to prove an employment decision was motivated by an employee's sex. 490 U.S. at 232 (plurality opinion); *id.* at 237-258; *id.* at 258-261 (White, J., concurring in judgment); *id.* at 261-279 (O'Connor, J., concurring in judgment).

The oft-cited language of the plurality, concluding "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" refers to employers who *reward* behavior consistent with a particular sex stereotype and *punish* those of the opposite gender who engage in the same behavior. "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." *Id.*

Plaintiffs must still identify—as in *Price Waterhouse*—a discriminatory action that disadvantages them on the basis of sex. "The critical issue" is whether "members of one sex" suffer disadvantages "which members of the other sex" do not. *Oncale*, 523 U.S. at 80. This does not happen when a policy imposes the same burden on similarly situated

members of both sexes as the Health Plan coverage exclusions do. Plaintiffs have not stated a claim for relief from discrimination on the basis of sex under Title IX.

VI. CONCLUSION

Plaintiffs seek coverage for medical treatment of their gender dysphoria, a condition that can lead to "severe anxiety, depression, and suicidal ideation or suicide." Complaint ¶¶28-29. Plaintiffs are not, unfortunately, unique. Every day, the Health Plan denies medical treatment requested by its 727,000 beneficiaries, understanding that each denial could result in suffering or even death. This is not from malice, but because North Carolina cannot afford unlimited health care. Decisions about the scope of health coverage are complex and tremendously important, and federal law does not allow Plaintiffs to adjust these coverage decisions for their benefit.

For the foregoing reasons, Count I against Treasurer Folwell and Administrator Jones and Count III against the Health Plan should be dismissed.

Dated this 8th day of July, 2019.

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CERTIFICATE OF WORD COUNT

Pursuant to L.R. 7.3(d)(1), the undersigned certifies that this Brief complies with the word limit contained in L.R. 7.3(d)(1), using the word count feature of the word processing software in making this certification.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

This the 8th day of July, 2019.

/s/ Kevin G. Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents, JASON FLECK and ALEXIS THONEN; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents, MICHAEL D. BUNTING, JR. and SHELLEY K. BUNTING; and SAM SILVAINE,

Plaintiffs,

v.

DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,

Defendants.

Case No. 1:19-cv-00272-LCB-LPA

PLAINTIFFS' OPPOSITION TO THE MOTION TO DISMISS BY DEFENDANTS FOLWELL, JONES, AND THE NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES

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INTRODUCTION

The North Carolina State Health Plan for Teachers and State Employees ("NCSHP" or the "Plan") provides health coverage to eligible state employees and dependents. Unlike non-transgender enrollees in NCSHP, transgender enrollees face a sweeping exclusion that denies coverage for medically necessary gender-confirming health care, including counseling, hormone therapy, and surgical care (the "Exclusion"). The same medical treatment, however, is insured for non-transgender Plan members. While all health plans must draw coverage lines, they may not be drawn along invidious lines to balance the budget on the backs of a vulnerable minority, while the favored majority receives that care. This is what the Exclusion does.

Plaintiffs are current and former state employees and their dependents who challenge the Exclusion, as relevant here, under the Equal Protection Clause and Affordable Care Act. Defendants Dale Folwell, Dee Jones, and NCSHP (collectively, "NCSHP Defendants") move to dismiss those claims. ECF No. 33 ("Mot."). Plaintiffs' well-pleaded allegations that the Exclusion expressly and intentionally targets transgender enrollees for discriminatory treatment based on sex and transgender status more than satisfy the plausibility threshold required at this stage. Defendants articulate no adequate justification for the Exclusion, much less one that can be credited at the pleading stage. Plaintiffs' claims should be allowed to proceed.

STATEMENT OF FACTS

Plaintiffs Maxwell Kadel, Julia McKeown, Sam Silvaine, Connor Thonen-Fleck,

and C.B. are transgender. Compl. ¶¶ 7-11. Their health care providers have prescribed medically necessary treatment, which may include counseling, hormone therapy, and surgery. Compl. ¶¶ 61,64,72,73,86,95,115,117. NCSHP contains a categorical Exclusion that discriminates against them on the basis of sex and transgender status by denying them coverage for these medically necessary treatments. Compl. ¶ 2. These same treatments are covered for non-transgender enrollees. *Id.*

In 2016, the Treasurer's Office removed the Exclusion of gender-confirming care for the 2017 Plan. Compl. ¶ 50. Defendants Folwell and Jones, however, ensured that the Exclusion was reinstated for the 2018 and 2019 Plans, which exclude all coverage for treatment in connection with "gender transformation" and "sex changes or modifications," in the outmoded parlance of the Plan. Compl. ¶¶ 54,55. The only people who require treatments related to gender-confirming health care are transgender people. Compl. ¶ 46. Further, because the Exclusion is only for gender-confirming health care, non-transgender enrollees receive coverage for the same treatments that transgender enrollees do not. Compl. ¶ 46.

QUESTIONS PRESENTED

1. Does Count I state a plausible claim that the Exclusion violates the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sex and transgender status?

2. Does Count III state a plausible claim that the Exclusion violates the Affordable Care Act by discriminating on the basis of sex?

LEGAL STANDARD

Defendants invoke Rules 12(b)(1), (6), and (7) in their motion to dismiss. Defendants' sole, terse reference to 12(b)(1), however, provides no explanation of why they say Plaintiffs' claims should be purportedly be dismissed. Mot. at 7.

"To survive a Rule 12(b)(6) motion to dismiss, a complaint must state a claim to relief that is plausible on its face." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013) (quote omitted). This requires merely that a plaintiff advance their claim "across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Defendants also reference dismissal under Rule 12(b)(7) for failure to join a necessary party, but in the sparest of terms. Mot. at 7 n.1. The party asserting a Rule 12(b)(7) defense bears the burden of showing that a person not joined is necessary and indispensable pursuant to Rule 19. *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir.2005). Defendants fail to carry this burden.

ARGUMENT

I. PLAINTIFFS HAVE STATED A VALID EQUAL PROTECTION CLAIM

Although Defendants' motion to dismiss rests on several errors, they concede the crux of Plaintiffs' case by acknowledging that the Plan "cannot, of course, selectively deny health insurance coverage." Mot. at 11-12. That selective, discriminatory denial of coverage to transgender members lies at the heart of Plaintiffs' claims, and Plaintiffs'

well-pleaded allegations about this discriminatory treatment state a plausible equal protection claim.

A. The Exclusion discriminates based on sex, which requires heightened scrutiny.

1. The Exclusion discriminates facially and intentionally.

To state an equal protection claim, a plaintiff must plausibly allege that "he has been treated differently from others with whom he is similarly situated," either facially or as "the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). Defendants repeatedly claim that Plaintiffs have alleged mere disparate impact, Mot. at 7-8, 12, but this is inaccurate. Plaintiffs' well-pleaded allegations show the Exclusion's facial discrimination, obviating the need to show discriminatory intent. *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 177 (3rd Cir. 2005). Here, the express text of the Exclusion itself—which prohibits coverage for "treatment in conjunction with proposed *gender* transformation" and "*sex* changes"—lays bare the intent to discriminate based on sex. Compl. ¶ 55. Even if the Exclusion did not explicitly refer to "gender transformation" and "sex changes"—thus expressly targeting treatments that concern the physical characteristics of a person's sex—where a "policy cannot be stated without referencing sex," it is expressly "based upon a sex-classification." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017).

While no further inquiry into intent is required, there can be no question that the Exclusion is intentional, and Defendants' arguments otherwise strain credulity. Mot. at

14-15. Under the prior Treasurer, the discriminatory Exclusion was removed from the 2017 Plan. Compl. ¶ 50. Defendant Folwell, however, commented publicly on it, ensured that it was reinstated in 2018 after he assumed office, and Defendants Folwell and Jones negotiated and approved the Exclusion in the 2018 and 2019 contracts. Compl. ¶¶ 53-54. Eliminating coverage for gender-confirming care thus was not accidental or inadvertent, but targeted and deliberate.

Contrary to Defendants' suggestion, showing animus is not necessary. Mot. at 15. Its presence is an additional indicator of discriminatory intent, but as the Supreme Court has repeatedly clarified, it does not matter whether governmental discrimination is motivated by hostility, misunderstanding, or even a well-intentioned desire "to compensate for … past discrimination." *Orr v. Orr*, 440 U.S. 268, 283 (1979). The Equal Protection Clause's command remains the same: the government may not discriminate based on sex without exceedingly persuasive justification.

Defendants claim that the Exclusion is unreviewable because "*everyone*" is denied coverage for "gender transformation" or "sex changes or modifications." Mot. at 11-12. This is not a serious argument. As Plaintiffs allege, "the only people who require treatments related to gender-confirming health care are transgender people." Compl. ¶ 46. Defendants do not, and could not, claim otherwise. The Supreme Court has rejected Defendant's argument in other contexts, and this Court should do the same. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 21–22 (1948) (rejecting argument that racially restrictive

covenants were not discriminatory because such covenants could be enforced against the privileged white majority).

Defendants misleadingly suggest that Plaintiffs seek a "fundamental right to a medical procedure" or "governmental aid." Mot. at 11, 13. That is not Plaintiffs' claim. Plaintiffs invoke the Equal Protection Clause, not a due process right, and seek coverage only on the same terms that others similarly situated already receive. While it may be true, to use Defendants' example, that a state may not be required to "cover abortion," Mot. at 11, no state could fund abortions to terminate pregnancies for only women of a certain race. Once a state offers coverage, it must do so on non-discriminatory terms. That is all Plaintiffs seek here.

Finally, *Geduldig v. Aiello*, 417 U.S. 484 (1974), has no relevance to this case. First, *Geduldig* was decided before the Supreme Court recognized the viability of sex stereotyping claims in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), and has no bearing on that claim here. Second, *Geduldig* did not hold that pregnancy-based classifications *never* violate the Equal Protection Clause, instead concluding more narrowly that not every pregnancy classification is an explicit sex-based classification "like those considered in" *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 411 U.S. 677 (1973). *Geduldig*, 417 U.S. at 496. n.20. Here, courts have had no trouble identifying the sex-based classification explicit in refusals of coverage for gender-confirming care. *See, e.g.*, *Boyden v. Conlin*, 341 F. Supp. 3d 979, 995 (W.D. Wis. 2018); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 948 (W.D. Wis. 2018).

Subsequent decisions of the Supreme Court make clear that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and … happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993); *id.* (a "tax on wearing yarmulkes is a tax on Jews"). *Bray* aptly describes the Exclusion here, since the need to undergo medical transition exclusively applies to transgender people. Compl. ¶ 46; *see also Boyden*, 341 F. Supp. 3d at 1000 (rejecting arguments about *Geduldig*).

2. The Exclusion constitutes sex discrimination.

"All gender-based classifications … warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quotes omitted). The burden of demonstrating the actual justification for the classification "is demanding" and "rests entirely on the State." *Id.* at 533. The Exclusion constitutes a sex-based classification for at least three independent reasons. First, as explained above, the Exclusion facially discriminates based on sex. *See Whitaker*, 858 F.3d at 1051 (policy barring transgender students from sex-specific restrooms was facially discriminatory because it "[could not] be stated without referencing sex"); *see also Boyden*, 341 F. Supp. 3d at 995 (denying access to coverage because of one's sex assigned at birth—*e.g.*, covering vaginoplasty for a woman whose sex assigned at birth is female, but not a transgender woman whose sex assigned at birth was male—is a "straightforward" sex discrimination).

Second, the great weight of case law holds that discrimination because a person is transgender inherently relies on impermissible sex stereotypes. *See, e.g.*, *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 747 (E.D. Va. 2018) ("this Court joins the District of Maryland in concluding that discrimination on the basis of transgender status constitutes gender stereotyping because by definition, transgender persons do not conform to gender stereotypes") (quotation marks omitted); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018).

For close to half a century the Supreme Court has "viewed with suspicion laws that rely on 'overbroad generalizations' based on gender." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017). Consistent with this guidance, the First, Sixth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals have found that discrimination based on a transgender person's failure to adhere to gender stereotypes is discrimination on the basis of sex. *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000); *Barnes v. City of Cincinnati*, 401 F.3d 729, 739 (6th Cir. 2005); *Whitaker*, 858 F.3d at 1047; *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312, 1318-19 (11th Cir. 2011). Indeed, "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn*, 663 F.3d at 1316.

As *Boyden* explained, an exclusion for gender-confirming care requires transgender people to maintain the "characteristics of their [birth-assigned] sex," which "entrenches" the sex-stereotyped "belief that transgender individuals must preserve the

genitalia and other physical attributes of their [birth-assigned] sex over not just personal preference, but specific medical and psychological recommendations to the contrary." 341 F. Supp. 3d at 997. So too, here.

Third, discrimination based on gender transition is necessarily because of sex, just as discrimination based on religious conversion is necessarily because of religion. Firing an employee because she converted religion "would be a clear case of discrimination 'because of religion,'" even if the employer "harbors no bias toward either Christians or Jews but only 'converts.'" *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008); *accord Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016). The same principle applies here. The Exclusion expressly prohibits care when it is for purposes of "treatment in conjunction with proposed gender *transformation*" and "sex *changes*"—making clear that the fact of transition is targeted for discriminatory treatment. Compl. ¶ 55; *see also Flack*, 328 F. Supp. 3d at 949.

Like the exclusion of care for "gender reassignment" in *Boyden*, and "transsexual surgery" in *Flack*, the Exclusion here "singles out a … claimant's transgender status (as gender non-conforming) as the basis for denying medical treatment … [t]his is text-book discrimination based on sex." *Flack*, 328 F. Supp. 3d at 950. Accordingly, the Exclusion's sex-based classification must "be subject to close judicial scrutiny"—although it cannot survive any level of review. *Frontiero*, 411 U.S. at 682; *Virginia*, 518

U.S. at 530.[1]

B. The Exclusion discriminates on the basis of transgender status, which also requires heightened scrutiny.

Heightened scrutiny applies for the additional reason that the Exclusion also classifies based on transgender status. Courts have repeatedly subjected government classifications based on transgender status to heightened scrutiny, including in this circuit. *See Grimm*, 302 F. Supp. 3d at 749-50; *M.A.B.*, 286 F. Supp. 3d at 719-22. Courts often consider whether the class (1) has been historically "subjected to discrimination," *Bowen v. Gillard*, 483 U.S. 587, 602 (1987); (2) has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); (3) has "obvious immutable, or distinguishing characteristics that define them as a discrete group," *Bowen*, 483 U.S. at 602; and (4) is "a minority or politically powerless." *Id.* While not all considerations need point toward heightened scrutiny, and the first two alone may be dispositive, *Plyler v. Doe*, 457 U.S. 202, 216 n.14, (1982), all indicia are present for transgender people.

[1] Defendants incorrectly argue that "[o]nly facially discriminatory classifications receive heightened scrutiny." Mot. at 11. Instead, the level of scrutiny is determined by the classification itself. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (race-based classifications are strictly scrutinized regardless of whether the law evinces that classification on its face, or is "ostensibly neutral but … an obvious pretext for racial discrimination") (quote omitted). Regardless of whether the Court views the classifications here as facial or intentional, they must be reviewed under heightened scrutiny because they are based on sex and transgender status.

"[T]ransgender people as a class have historically been subject to discrimination or differentiation; [] they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society; [] as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group; and [] as a class, they are a minority with relatively little political power." *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); Compl. ¶ 135. Multiple courts, including courts in this circuit, have come to the same conclusion. *See*, *e.g.*, *Grimm*, 302 F. Supp. 3d at 749-50; *M.A.B.*, 286 F. Supp. 3d at 719-22; *Flack*, 328 F. Supp. 3d at 953; *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-140 (S.D.N.Y. 2015).

C. Cost savings cannot excuse invidious discrimination, let alone justify dismissal of Plaintiffs' claims.

While heightened scrutiny should apply, Defendants' main justification for the Exclusion—that healthcare "is not free"—cannot satisfy any level of review, let alone support dismissal of Plaintiffs' claims. Mot. at 15. It is beyond peradventure that a state may not "protect the public fisc by drawing an invidious distinction." *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974); *see also Graham v. Richardson*, 403 U.S. 365, 374-75 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *Windsor v. U.S.*, 699 F.3d 169, 186-87 (2d Cir. 2012) (rejecting cost as basis for refusal to recognize same-sex

couples' marriages), *aff'd*, 570 U.S. 744 (2013); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012). Defendants must "do more than show" that denying equal coverage to transgender people "saves money," *Shapiro*, 394 U.S. at 633—otherwise, this does nothing "more than justify [the] classification with a concise expression of an intention to discriminate," *Plyler*, 457 U.S. at 227.[2] This applies under any level of review. *See Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (cost savings could not justify denying family health coverage to same-sex domestic partners even under rational basis review); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 851-54 (E.D. Mich. 2014).

Defendants observe that medical care for transgender people is individualized, Mot. at 16—as is true of all medical care. The fact that transition-related needs may vary does not excuse a categorical ban on all such care—just as discrimination against the subset of women with pre-school-age children cannot be justified simply because not all women have children. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam).

Defendants' cited authorities do not help their argument. Mot. at 15-16. *Alexander v. Choate*, for example, was a case about a Medicaid benefit—inpatient hospital care—that *every* plan member could access. 469 U.S. 287, 289 (1985). This

[2] The cost-saving rationale also is implausible given that any savings would be negligible, if not "illusory." *See Mem'l Hosp.*, 415 U.S. at 265 (delayed medical care can cause a patient needless deterioration, requiring more expensive future care and possibly causing disability, which can strain state social services); *Bassett*, 59 F. Supp. 3d at 853.

case is different, where Plaintiffs challenge terms that allow non-transgender people to access care that transgender people are categorically denied. *See also* Mot. at 17 (citing *Saah v. Contel Corp.*, 978 F.2d 1256, 2 (4th Cir. 1992) (generally applicable insurance cap on psychiatric care); *Boyd v. Bulala*, 877 F.2d 1191, 1193 (4th Cir. 1989) (generally applicable cap on medical malpractice recovery)). Reliance on the Americans with Disabilities Act ("ADA"), Mot. at 17-18, also is misplaced, given the different analytical framework that applies to constitutional claims. Nor does anything about Plan officials' fiduciary duties, Mot. at 17, allow the burden of cost savings to be shunted onto the backs of transgender Plan members alone. No one contests that insurers must set limits for coverage; the Equal Protection Clause requires that the benefits and burdens be shared among all Plan members alike.[3]

D. Ms. Jones is a proper defendant, and no joinder of additional parties is required.

Defendants assert in a single, unsupported sentence that Executive Administrator Dee Jones should be dismissed because she does not determine Plan benefits. Mot. at 7 n.1. But *Ex Parte Young* confirms the propriety of suing officials with *enforcement* power to ensure effective injunctive relief, regardless of their role in enacting the challenged policy. 209 U.S. 123, 161 (1908); *see also Bostic v. Schaefer*, 760 F.3d 352, 371-72 (4th Cir. 2014) (finding county clerk and state registrar proper defendants in

[3] Plaintiffs agree that Plaintiff Sam Silvaine's equal protection claim under Count I of the complaint may properly be dismissed without prejudice since he is no longer enrolled in NCSHP. Mot. at 18 n.5.

challenge to Virginia's marriage ban, even though they had no role in enacting it). Here, Ms. Jones' connection to enforcement is direct and expressly codified, since she is "statutorily authorized to negotiate, renegotiate, and execute contracts with third parties" for health insurance with the consent of the Treasurer. Compl. ¶ 13. Retaining Ms. Jones as a defendant thus ensures that an "injunction will be effective with respect to the underlying claim." *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008).

Defendants also claim in passing that this court must either join all members of the Board of Trustees or dismiss Plaintiffs' equal protection claim. Mot. at 7 n.1. Defendants misconstrue Rule 19, which requires that a person "be joined as a party if … in [their] absence, the court cannot accord *complete* relief among *existing parties*." F.R.C.P. 19(a)(1)(A) (emphasis added). *See also United States v. Arlington Cty., Va.*, 669 F.2d 925, 929 (4th Cir. 1982) ("Complete relief refers to relief as between the persons already parties, not as between a party and the absent person whose joinder is sought.") (citations omitted). Here, complete resolution between Plaintiffs and NCSHP Defendants does not require joinder of every Board member. Even if the Court concluded that all Board members are necessary, the proper remedy is joinder or leave to amend the complaint—not dismissal. *See RPR & Assocs. v. O'Brien/Atkins Assocs., P.A.*, 921 F. Supp. 1457, 1463 (M.D.N.C. 1995), *aff'd sub nom. RPR & Assocs., Inc. v. O'Brien/Atkins Assocs., P.A.,* 103 F.3d 120 (4th Cir. 1996).

II. PLAINTIFFS HAVE STATED A VALID CLAIM UNDER THE ACA

A. NCSHP has waived sovereign immunity by accepting funds subject to ACA nondiscrimination requirements.

Defendants argue that Plaintiffs fail to state a viable ACA claim because NCSHP retains Eleventh Amendment immunity. Mot. at 18. NCSHP has waived its immunity, however, by accepting funds unequivocally conditioned on compliance with the ACA's nondiscrimination obligations. The two other district courts to consider similar claims have also concluded that acceptance of those funds waives immunity.

Congress may rely on the Spending Clause to attach nondiscrimination conditions to federal funding. *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006). This is a permissible method of encouraging conformance with federal policy, because states may decide whether to decline the grant. *Id*. Congress has no obligation to disburse funds free of conditions because "such funds are gifts" that states may choose to accept. *Litman v. George Mason Univ.*, 186 F.3d 544, 552 (4th Cir. 1999) (quote omitted). A state thus waives immunity by accepting funds "when Congress expresses a clear intent to condition participation in the programs" on waiver of immunity. *Litman*, 186 F.3d at 550 (quotes omitted).

Defendants' primary argument is that no waiver can be found because the ACA does not "expressly and unequivocally" demand it. Mot. at 18; *id.* at 19. But that unequivocal waiver is provided by the Civil Rights Remedies Equalization Act ("CRREA"), which governs claims under Section 1557 of the ACA.

Congress enacted CRREA as a response to *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which held that Congress had not clearly abrogated states' immunity in the Rehabilitation Act. *See Lane v. Pena*, 518 U.S. 187, 198 (1996). CRREA was intended to provide that abrogation, stating in relevant part:

> A State shall not be immune under the Eleventh Amendment … from suit in Federal court for a violation of section 504 of the Rehabilitation Act …, title IX …, the Age Discrimination Act …, title VI …, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1). In other words, "Congress struck a bargain with the states: if a federal statute prohibits discrimination on a certain basis by recipients of federal money, then a state entity that receives federal money is subject to suit … for violations of that nondiscrimination provision." *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. CV 17-4803, 2017 WL 4791185, at *6 (E.D. La. Oct. 24, 2017).

As the Supreme Court has recognized, CRREA "provide[s] the sort of unequivocal waiver that our precedents demand." *Lane*, 518 U.S. at 198; *see also Litman*, 186 F.3d at 554. CRREA's waiver of immunity is not limited to the four statutes expressly named, but applies equally to the ACA as a "[f]ederal statute prohibiting discrimination by recipients of [f]ederal financial assistance." 42 U.S.C. § 2000d-7(a)(1).

Defendants argue that CRREA's reference to any other "[f]ederal statute prohibiting discrimination" does not effect a waiver under *Madison*, but that misreads the case. Mot. at 20-21. *Madison* involved a prisoner seeking damages under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). *Madison*, 474 F.3d at

122-23. Virginia argued that its immunity had not been waived pursuant to RLUIPA, which *Madison* rejected, and that it could not be subjected to monetary damages, which *Madison* accepted. *Id.* at 130-32. This distinction is important: Defendants seek to dismiss Plaintiffs' ACA claim wholesale, but even *Madison* found that there was "nothing unfair about holding Virginia to its side of the bargain" and finding liability after the state accepted funds subject to RLUIPA's requirements. *Madison* instead rejected only plaintiff's claims for money damages under CRREA—but for reasons wholly inapplicable here.

Madison found that for CRREA's catchall provision to authorize damages, RLUIPA "must be like the statutes expressly listed" in CRREA. 474 F.3d at 133. "At a minimum, this would seem to require that a statute be aimed at discrimination." *Id.* As Defendants concede, that is what Section 1557 does. Mot. at 20 (admitting "Section 1557 of the ACA prohibits discrimination"); *see also* 42 U.S.C. § 18116(a). Defendants strain to distinguish Section 1557 from the other statutes listed in CRREA, casting Section 1557 as different because it is part of a healthcare reform law, and because the statutes listed in CRREA involve only one kind of discrimination, while Section 1557 prohibits multiple kinds of discrimination. Mot. at 20-21. This misses the point.

Section 1557 is not just similar to the statutes listed in CRREA, but *expressly incorporates* their prohibited grounds of discrimination and enforcement mechanisms. *Compare* 42 U.S.C. § 2000d-7(a)(1) (CRREA's express waiver of immunity under Section 504, Title IX, the Age Discrimination Act, and Title VI) *with* 42 U.S.C.

§ 18116(a) (Section 1557's prohibition of discrimination the grounds in those identical statutes). For these reasons, *Boyden* and *Esparza* offer more persuasive analysis than *Levy v. Kansas Dep't of Soc. & Rehab. Servs*., 789 F.3d 1164, 1171 (10th Cir. 2015)). Mot. at 21. As *Esparza* explains, the waiver provisions applicable to ADA and Rehabilitation Act at issue in *Levy* are simply different than the "clear evidence of Congress's intent" supplied by CRREA for ACA claims. *Esparza*, 2017 WL 4791185, at *7 n.36.

Defendant also claims that *Sossamon v. Texas*, 563 U.S. 277, 290 (2011), requires that a waiver of sovereign immunity appear in the ACA itself. Mot. at 18-19. But that would render CRREA superfluous and ignores that CRREA's waiver of immunity has been upheld repeatedly. *See, e.g.*, *Lane*, 518 U.S. at 192, 198 (although a waiver is lacking in the Rehabilitation Act, CRREA provides the "unequivocal waiver that our precedents demand"); *Litman*, 186 F.3d at 554 (Title IX need not contain express waiver of immunity; finding CRREA's waiver effective).

Two district courts have considered this specific question, both concluding that CRREA applies to Section 1557. *Boyden*, 341 F. Supp. 3d at 998-99; *Esparza*, 2017 WL 4791185, at *7 (if an entity is subject to Section 1557, "then—pursuant to the terms of § 2000d-7—that entity has waived its immunity"); *cf. Flack*, 328 F. Supp. 3d at 950 (rejecting argument that transgender plaintiffs could not hold Wisconsin liable under ACA because of insufficient notice). As *Esparza* explains, "Congress does indeed know

how to draft an effective waiver—and Congress did so with § 1557," which "fits within the four corners" of CRREA. 2017 WL 4791185, at *8.

B. The law has never required that nondiscrimination statutes name specific kinds of claims or plaintiffs to waive immunity.

Defendants next argue that acceptance of funds does not waive immunity absent a "clear statement" from Congress about the ACA's application to transgender plaintiffs. Mot. at 21. But there is no requirement that each application of a statute, or potential plaintiff, be identified before defendants are subject to suit. In fact, this argument was rejected in *West Virginia Department of Health & Human Resources v. Sebelius*, 649 F.3d 217, 223 (4th Cir. 2011). West Virginia claimed that, under *Pennhurst*, it could not be subject to Medicaid Act conditions based on its acceptance of funding without "a 'super-clear statement' of conditions in the Medicaid Act." *Id*. But this "misreads *Pennhurst*," which does not require Congress to "prospectively resolve every possible ambiguity concerning particular applications" of a statute. *Id.* at 223-24 (quoting *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985)). There is no requirement that each violation be "specifically identified and proscribed in advance." *Bennett*, 470 U.S. at 666; *see also Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *20 (N.D. Ill. Oct. 18, 2016) (rejecting argument that Title IX does not provide notice of transgender plaintiffs' claims) (quotations omitted), report and recommendation adopted, No. 16-CV-4945, 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).

"[S]o long as a spending condition has a clear and actionable prohibition of discrimination, it does not matter that the manner of that discrimination can vary widely."

Benning v. Georgia, 391 F.3d 1299, 1306 (11th Cir. 2004); *see also Tovar v. Essentia Health*, No. CV 16-100, 2018 WL 4516949, at *3 (D. Minn. Sept. 20, 2018) (finding adequate notice that Title IX encompasses discrimination against transgender people). Indeed, "Title IX funding recipients 'have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979,' … and 'have been put on notice by the fact that ... cases ... have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination.'" *Grimm*, 302 F. Supp. 3d at 746 n.11 (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005)).

This is particularly true of Title IX, which has an implied cause of action and does "not list *any* specific discriminatory practices." *Jackson*, 544 U.S. at 175. *See also Flack*, 328 F. Supp. 3d at 950 ("defendants' least persuasive … argument is that § 1557 cannot … cover transgender status without violating the Spending Clause"); *Boyden*, 341 F. Supp. 3d at 999 (rejecting argument that "States would not have known that Title IX or Section 1557 reached [transgender status] claims").

Defendants' other cited cases—involving different statutes—shed no light on the notice that has long-existed about the availability of sex discrimination claims under Title IX. Mot. at 22 (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 190 n.11 (1982) (involving the Education for All Handicapped Children Act) and *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (involving the Individuals with Disabilities Education Act)). Nor is

Defendants' position improved by claiming that notice of every specific application of a statute must exist at the statute's conception, "when the ACA was passed in 2010." Mot. at 22. *See Boyden*, 341 F. Supp. 3d at 999 (rejecting argument that waiver turns on "the reach of federal antidiscrimination law only so far as anticipated at the time a state accepted federal funds"). Defendants misrepresent the state of the law protecting transgender plaintiffs from sex discrimination, which spans nearly two decades. *See, e.g.*, *Schwenk*, 204 F.3d at 1202.[4] Defendants also misunderstand how these principles operate for nondiscrimination funding conditions. For example, no funding recipient could reasonably claim immunity for sexual harassment, even though it "had not been recognized or considered by the courts" when Congress first enacted Title IX. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting). Defendants' argument fares no better here.

C. Plaintiffs state a valid ACA claim because the Exclusion discriminates facially and intentionally.

As explained in Section I.A.1, the Exclusion discriminates based on sex both facially and intentionally. That analysis applies equally to Plaintiffs' ACA claim. Defendants' assertion that no disparate impact claim can be raised under Title IX or the

[4] Defendants also cite *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), Mot. at 23, but the Seventh Circuit has since held that sex stereotyping claims are indeed available to transgender plaintiffs. *Whitaker*, 858 F.3d at 1047. Additionally, *Etsitty v. Utah Transit Authority* assumed without deciding that a sex stereotyping claim *is* available to transgender plaintiffs. 502 F.3d 1215, 1224 (10th Cir. 2007).

ACA, Mot. at 24—while questionable—need not be resolved.[5] Defendants' attempt to recast Plaintiffs' claim as sounding in "disparate impact" is simply incorrect and fails under the same analysis for Plaintiffs' equal protection claim. Mot. at 23; Section I.A.1.

D. Title IX prohibits health coverage discrimination based on sex.

Defendant claims that Plaintiffs' ACA claim must fail because differential treatment of transgender people falls outside the statute's prohibition on sex discrimination. But the Exclusion discriminates based on sex for the same reasons as described in Section I.A.2; *see also Prescott v. Rady Children's Hosp. San Diego*, 265 F. Supp. 3d 1090, 1098 (S.D. Cal. 2017) (ACA prohibits discrimination based on transgender status). Defendants' sole argument is that "sex" must be restricted to its meaning in dictionaries at Title IX's enactment in 1972. Mot. at 25. Defendants cite the *dissent* in *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736 (4th Cir. 2016), vacated and remanded, 137 S. Ct. 1239, (2017), but the *majority* found that dictionaries did not "universally" prescribe any rigid definition. *Id.* at 721-22;[6] *Adams v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1321 (M.D. Fla. 2018) (same; collecting authorities);

[5] While not central here, Defendants repeatedly misconstrue *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016), as a "nationwide injunction" that "invalidated the HHS regulation" clarifying that blanket exclusions of gender-confirming care violate the ACA. Mot. at 4, 24. Far from it, *Franciscan* merely preliminarily enjoined HHS from enforcing the regulation, with no effect on private litigants' claims. *Id.* at 696.

[6] Although the Supreme Court vacated the judgment in *G.G.*, 822 F.3d 709, two courts in this circuit have recognized that the decision "remains binding law" in the absence of a superseding en banc or Supreme Court opinion—neither of which has occurred here. *Grimm*, 302 F. Supp. 3d at 743 n.6; *M.A.B.*, 286 F. Supp. 3d at 712 n.5; *see also United States v. Giddins*, 858 F.3d 870, 886 n.12 (4th Cir. 2017).

Highland, 208 F. Supp. 3d at 866, n.4 ("dictionaries from that era defined 'sex' in myriad ways"); *Fabian*, 172 F. Supp. 3d at 526. Regardless, "statutory prohibitions often go beyond the principal evil" contemplated at a given time; it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998).

Defendants also argue that Plaintiffs have not identified an "action that disadvantages them," but that fundamentally misconstrues the complaint. Mot. at 26. Plaintiffs do not claim that "sex stereotypes alone *are* discrimination." Mot. at 26. Far from it, Plaintiffs have alleged multiple concrete harms imposed on them by the denial of coverage. Compl. ¶¶ 65-66,76-80,88-89,106-111,120-123.

Defendants also err in arguing that a claim is only stated where "members of one sex suffer disadvantages which members of the other sex" do not. Mot. at 26 (quote omitted). The Exclusion challenged here is not immunized from review because it subjects both transgender men and women to sex-based discrimination. The key question under the ACA and Title IX is whether the *individual's* sex has been taken into account. As *Manhart* explained in the Title VII context, that statute makes it "unlawful 'to discriminate against any *individual* ... because of such *individual's* ... sex.'" *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978) (quote omitted). The "focus on the individual is unambiguous," and "precludes treatment of individuals as simply components" of a sex-based class. *Id.* It requires instead "that we focus on fairness to individuals rather than fairness to classes." *Id.* at 709.

"This same principle of *individual* fairness is embodied in Title VI," *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 416 n.19 (1978), and as Defendants concede, "Section 1557 has the same operative text as Title VI and Title IX." Mot. at 9; *see also* 42 U.S.C. § 18116(a) (ACA's requirement that "an *individual* shall not … be subjected to discrimination") (emphasis added); 20 U.S.C. § 1681(a) (Title IX's requirement that "[n]o *person* … be subjected to discrimination") (emphasis added). Accordingly, the "simple test" that applies is whether a person has been treated "in a manner which but-for that person's sex would be different." *Manhart*, 435 U.S. at 711 (quote omitted). That describes the Exclusion exactly. Plaintiff Kadel, for example, is denied hormone therapy because his birth-assigned sex was female; but-for his birth-assigned sex, he would otherwise qualify for this care under the Plan. Compl. ¶ 2,65; *see Whitaker*, 858 F.3d at 1051 (exclusion barring both transgender boys and girls from restrooms matching their identity still classifies each of them based on sex).

CONCLUSION

For the reasons above, Defendants' motion to dismiss Counts I and III of Plaintiffs' complaint should be denied.

* * *

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Respectfully submitted,

/s/ Amy E. Richardson

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I hereby certify that the foregoing brief is in compliance with Local Rule 7.3(d)(1) because the body of this brief, including headings and footnotes, does not exceed 6,250 words as indicated by Microsoft Word, the program used to prepare this document.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:19-cv-00272

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents, JASON FLECK and ALEXIS THONEN; JULIA MCKEOWN; MICHAL D. BUNTING, JR.; C.B., by his next friends and parents, MICHAEL D. BUNTING, JR. and SHELLEY K. BUNTING; and SAM SILVAINE,	)
Plaintiffs,	)
v.	)
DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,	)
Defendants.	)

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY TREASURER DALE FOLWELL, EXECUTIVE ADMINISTRATOR DEE JONES, AND THE NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES

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I. PLAINTIFFS' COMPLAINT DOES NOT CONTAIN SUFFICIENT ALLEGATIONS OF DISCRIMINATORY INTENT TO STATE A CLAIM FOR RELIEF UNDER THE EQUAL PROTECTION CLAUSE.

A Motion to Dismiss tests whether Plaintiffs' complaint states "a claim to relief that is plausible on its face." *U.S. ex rel. Oberg v. Penn. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014). The Complaint is especially important here because Plaintiffs nowhere allege a violation of Title VII of the Civil Rights Act, although their Response repeatedly cites Title VII cases. *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). By citing cases from this related, but distinct, area of law, Plaintiffs improperly shift the burden of production, if not the burden of proof, onto the Plan Defendants to justify the coverage exclusion. But it is Plaintiffs who must, in their Complaint, "negate every conceivable basis which might support" the decision not to spend additional taxpayer funds for specific medical treatments, in this case for gender dysphoria. *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008).

To allege an Equal Protection violation, a plaintiff "must first demonstrate that he has been treated differently from others with whom he is similarly situated" and that this "unequal treatment was the result of intentional or purposeful discrimination." *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 82 (4th Cir. 2016). Such intentional discrimination can be shown by (1) a law or policy that "**expressly classifies**" on the basis of a protected category, (2) "a facially neutral law or policy that has been applied in an intentionally discriminatory manner," or (3) "a facially neutral statute or policy that is neutrally applied" but which "nonetheless has an adverse effect on a protected group" and

"**the adoption of the statute or policy was motivated by discriminatory animus.**" *Williams v. Hansen*, 326 F.3d 569, 584 (4th Cir. 2003) (emphasis added).

The Complaint must include "well-pleaded facts" that "permit the court to infer more than the possibility," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), that the coverage exclusion exists partially "because of" its adverse effects upon transgender individuals, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Plaintiffs' Complaint lacks such allegations, so it should be dismissed.[1]

A. The coverage exclusion is not a discriminatory classification.

As with other health insurers, the Plan makes its coverage decisions based on medical diagnoses, not a beneficiary's gender. "[A] function of medical diagnosis is to determine in what ways individuals are *not similarly situated* so that they can be treated accordingly." *Gann v. Schramm*, 606 F. Supp. 1442, 1447 (D. Del. 1985). Providing different medical treatment for different medical diagnoses is not discriminatory.

This remains true even when different diagnoses might have the same prescribed treatment. "A diagnosis of degenerative disc disease with chronic low back pain is different in fact from a diagnosis of cancer" though both patients can benefit from the same pain medicine. *Flaming v. Univ. of Texas Med. Branch*, No. CV H-15-2222, 2016 WL 727941, at *9 (S.D. Tex. Feb. 24, 2016). An individual with testicular cancer may need testosterone injections, but that person is not 'similarly situated' to someone with gender dysphoria. *See*

[1] Even without a Title VII claim, this Court should pause further proceedings and await the Supreme Court's decision in *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019). The Supreme Court will hear argument three weeks after briefing is complete on Defendants' motions to dismiss, and the Court's reasoning will be instructive. The Plan Defendants have proposed this course of action to the other parties since the grant of certiorari in April without success.

McMain v. Peters, No. 2:13-CV-01632-AA, 2018 WL 3732660, at *3–4 (D. Or. Aug. 2, 2018), *aff'd,* No. 18-35766, 2019 WL 3321883 (9th Cir. July 24, 2019) (no violation of Equal Protection of inmate seeking testosterone injections even though inmates with similar symptoms *and* a diagnosis of Klinefelter Syndrome receive injections). Gender dysphoria is not a covered illness under the Plan, so the Plan does not provide Plaintiffs' desired medical treatment. Conversely, if Plaintiffs have appendicitis, the Plan will pay for an appendectomy. In neither case, does the Plan make a coverage decision based on Plaintiffs' gender or gender identity.[2]

Because the coverage exclusion relies upon medical diagnoses, not gender, the cases involving transgender bathroom usage are inapposite. In those cases, officials segregated bathrooms *based on gender*. As the Seventh Circuit noted, this makes the bathroom policy inherently a sex-classification because the "policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use **based upon the sex listed on the student's birth certificate**." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (emphasis added); Response at 4 (partial quote from *Whitaker*).

[2] Plaintiffs cannot avoid dismissal by re-characterizing the Complaint. The Complaint does not allege that the Plan denies transgender individuals "coverage for these medically necessary treatments" while "[t]hese same treatments are covered for non-transgender enrollees." Response at 2. Rather, the Complaint asserts that "[o]ther NCSHP enrollees who are not transgender do not face a categorical exclusion barring coverage for health care that is medically necessary for them based on their sex and receive coverage for the same care that is denied to transgender enrollees." Complaint ¶2. This latter statement represents the kind of "naked assertions devoid of further factual enhancement" that cannot withstand a motion to dismiss. *Oberg*, 745 F.3d at 136.

The coverage exclusion's "vocabulary is not sex specific," so it is not a facial classification.[3] *Adkins v. Rumsfeld*, 464 F.3d 456, 468 (4th Cir. 2006). *Geduldig* therefore controls. This Court cannot—as Plaintiffs urge—invoke other Supreme Court decisions and "conclude [these] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Only the Supreme Court has "the prerogative of overruling its own decisions," *id.*, and *Geduldig* squarely rejected Plaintiffs' argument. Like Plaintiffs, Justice Brennan's dissent argued that whenever "the State employs a legislative classification that distinguishes between beneficiaries solely by reference to gender-linked disability risks, the Court is not … free to sustain the statute on the ground that it rationally promotes legitimate governmental interests." *Geduldig v. Aiello*, 417 U.S. 484, 503 (1974) (Brennan, J., dissenting). The Court held otherwise: "[w]hile it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification," so officials can exclude coverage "on any reasonable basis" as with "any other physical condition." *Id.* at 497 n.20.

Moreover, one of Plaintiffs' cited cases, *Bray v. Alexandria Women's Health Clinic,* re-affirms *Geduldig*. *Bray* held that opposition to abortion—a policy affecting only women—does not "*ipso facto* [] discriminate invidiously against women as a class." 506 U.S. 263, 271 (1993). Individuals with gender dysphoria are a subset of transgender

[3] While the exclusion uses the word "sex" once—excluding coverage of "sex changes"—the use of that word is not enough to require heightened scrutiny. The coverage exclusion must treat one person "differently from others with whom he is similarly situated" on the basis of gender. *Kerr*, 824 F.3d at 82. *See Adkins*, 464 F.3d at 468 (Statute that defines "spouse" as "husband or wife" is facially gender-neutral.).

individuals; they are not a protected class of their own. A "class cannot be defined simply as the group of victims of the tortious action." *Id.* at 269. ("women seeking abortion" not protected class).[4]

Indeed, *Geduldig*'s logic is more important now than ever before, when genetic medicine promises cures tied to the quintessential immutable characteristic: the human genome. The Equal Protection Clause does not require medical treatment without regard to cost whenever an illness—whether genetic hemophilia or gender dysphoria—is linked to an immutable characteristic and is more common for individuals of one race, religion, ethnicity, or other protected class than the general population.

B. Plaintiffs have not alleged either intentional discriminatory application or that adoption of the coverage exclusion was motivated by discriminatory animus.

"If a classification is not explicitly stated, the plaintiff bears the initial burden of proving that a classification was nonetheless intentionally utilized." *Sylvia Dev. Corp. v. Calvert Cty., Md.*, 48 F.3d 810, 819 (4th Cir. 1995) (citing *Snowden v. Hughes,* 321 U.S. 1, 8 (1944)).

As with other allegations, Plaintiffs must plead facts that show discrimination, not just "labels and conclusions or a formulaic recitation of the elements of a cause of action." *Iqbal*, 556 U.S. at 678. Fourth Circuit caselaw identifies what Plaintiffs must allege:

> Several factors have been recognized as probative of whether a decision making body was motivated by a discriminatory intent, including: (1) evidence of a "consistent pattern" of actions by the decision making body

[4] *Bray* acknowledged that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed," 506 U.S. at 270, but this simply restates the Court's longstanding law on pretext, and the Complaint makes no such allegations.

> disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decision making body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings.

Sylvia Dev. Corp., 48 F.3d at 819.

Plaintiffs allege none of these facts; the Complaint alleges only what the coverage exclusion explicitly provides: the Health Plan does not cover gender transformation. Indeed, the Complaint demonstrates that the coverage exclusion is a longstanding policy that predates Plaintiffs' new medical research. *Compare* Complaint ¶¶27,30,41 (citing information dated from 2011-14) *with id.* ¶45 ("At all relevant times, the Health Plans have contained a categorical exclusion of coverage for transition-related health care, with the exception of the 2017 plan year."). Nor does the Complaint allege that the 2017 Plan year changes, or their expiration, reflect discriminatory intent. The change was "to comply with federal law and federal regulation," Complaint ¶¶50,53, and a federal court enjoined the applicable regulation only a few weeks after the Health Plan acted, *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. Dec. 31, 2016). Finally, Plaintiffs cite only one statement by the Treasurer, and that statement provides a gender-neutral, legitimate basis for government decision-making: cost. *See* Mem. in Support of Mtn. to Dismiss at 14-15.[5]

[5] Again, Plaintiffs re-characterize the Complaint. The Response states the Treasurer and Administrator Jones "ensured that [the exclusion] was reinstated in 2018" and "negotiated and approved the Exclusion in the 2018 and 2019 contracts." Response at 15. This is incorrect. In 2016, the prior Treasurer and the Board removed the coverage exclusion for the 2017 Plan year only. Complaint ¶50. Reinstatement occurred by operation of law, which is why the Complaint says only that Plan Defendants "failed to take action to block the reinstatement" of the coverage exclusion. Complaint ¶53.

C. Cost is a rational basis for insurance coverage decisions.

Plaintiffs' citation to Title VII cases improperly shifts the burden of production to the Plan Defendants. This is because, under Title VII, a plaintiff need not allege an improper motive to survive a motion to dismiss. Unlike here, Title VII prohibits "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). Thus, in Title VII cases, the defendant and not the plaintiff must "articulate some legitimate, nondiscriminatory reason" to justify the disproportionately adverse effect. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Because this is an Equal Protection challenge, not a Title VII case, Defendants do not need to provide *any* justification for the coverage exclusion. Rather, Plaintiffs' Complaint must demonstrate that no rational person could imagine "any reasonably conceivable state of facts that could provide a rational basis" for the policy. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

"[C]ost savings may serve as a rational basis for classifications." *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1012 (7th Cir. 2019) (citing *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 84 (1988)). The Supreme Court has even upheld the "interest[] in reducing … administrative costs" as sufficient. *Armour v. City of Indianapolis*, 566 U.S. 673, 684 (2012).

Plaintiffs cannot overcome their burden by citing cases from the Supreme Court's fundamental rights jurisprudence, which are limited to specific areas of law. *See* Response at 11 (citing *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (right of interstate travel);

Graham v. Richardson, 403 U.S. 365 (1971) (immigration classifications by States); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel)). In those cases, the Court went beyond rational basis review. *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring) ("[T]he Court properly may require that the State's interests be substantial and that the means bear a 'fair and substantial relation' to these interests.").

At current spending rates, the Plan estimates that it will run out of money by 2023. "NC State Health Plan Announces Network for 2020," Press Release, N.C. Department of the State Treasurer (Aug. 8, 2019) *available at* https://bit.ly/2OPuyak. North Carolina has legitimate interests in "maintaining the self-supporting nature of its insurance program," "distributing the available resources in such a way as to keep benefit payments at an adequate level," and "maintaining the contribution rate at a level that will not unduly burden participating employees." *Geduldig*, 417 U.S. at 496. Decisions not to expand coverage are part of this effort.

II. NORTH CAROLINA'S SOVEREIGN IMMUNITY PRECLUDES JURISDICTION OVER PLAINTIFFS' AFFORDABLE CARE ACT CLAIM.

"[T]he Constitution does not provide for federal jurisdiction over suits against nonconsenting States." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). Catch-all language in a provision enacted in 1986 does not supply the waiver of sovereign immunity needed to enforce § 1557.

First, nothing in 42 U.S.C. § 2000d-7 indicates it was intended to apply to future statutes. Section 2000d-7 was not a standalone piece of legislation entitled the "Civil Rights Remedies Restoration Act." The provision was one of the "Technical and Miscellaneous

Provisions" attached to the Reauthorization of the Rehabilitation Act of 1973 during Senate consideration. 100 Stat. 1807, 1845 (1986). The Senate Committee report says the provision's intent is to reverse the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 926 (1985), which held sovereign immunity barred suits against States to enforce the Rehabilitation Act. S.Rep.No. 99-388 at 27 (1986). The Committee report notes that similar language to the Rehabilitation Act exists in Title VI, Title IX, and the Age Discrimination Act of 1973. *Id.* The Committee then says: "Other federal statutes which prohibit discrimination by recipients of Federal financial as[s]istance are also included." *Id.* Nothing indicates Congress clearly intended this waiver to apply to statutes enacted *in the future*. "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Nor has the Fourth Circuit rejected the need for a clear statement for a waiver of sovereign immunity. In *W. Virginia Dep't of Health & Human Res. v. Sebelius,* West Virginia argued that the federal government could not deduct an overpayment from the State's Medicaid allocation because the deduction was not authorized in statute. 649 F.3d 217 (4th Cir. 2011). The court was not considering a waiver of sovereign immunity when it held that "given the ever-increasing complexity of modern legislation, Congress need not spell out every condition with flawless precision for a provision to be enforceable." *Id.* at 223. For a waiver of sovereign immunity, flawless precision is required: demand for a waiver "must be unequivocally expressed in the text of the relevant statute." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011).

Plaintiffs' other cases, again involving bathroom facilities in educational institutions, reinforce the lack of a clear demand for waiver. Those cases held that the meaning of "sex" in Title IX was ambiguous and could therefore be interpreted by federal regulation.[6] *Students v. U.S. Dep't of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *18 (N.D. Ill. Oct. 18, 2016) (holding "sex" is ambiguous in Title IX and, therefore, permits interpretation by federal agency). Plaintiffs' theories of discrimination cannot be upheld because the underlying statute is "ambiguous" for purposes of interpretative deference and then become "clearly expressed" for purposes of a waiver of sovereign immunity. Section 1557 does not provide the "clear and actionable prohibition of discrimination" needed to enforce Plaintiffs' claims against the States. *Benning v. Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004).

Finally, unlike the underlying provisions identified in §1557 of the ACA, there is no indication in §1557 that *any* federal funds will be withheld for a failure to waive sovereign immunity. Plaintiffs may argue that this means that *all* federal funding connected to health care will be withheld, but the Supreme Court has already concluded that such threats, when they include all of the Medicaid program, represent "economic dragooning that leaves the States with no real option" but to acquiesce. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 582 (2012). Such conditions are unconstitutionally coercive under the Spending Clause. Though "Congress' power to legislate under the spending power is

[6] The Fourth Circuit's decision in *Grimm* has no effect here. Lower courts are not free to defy the Supreme Court, which has vacated that opinion. Vacatur "rightly strips the decision below of its binding effect" and "clears the path for future relitigation." *Camreta v. Greene*, 563 U.S. 692, 713 (2011).

broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions." *Id.* at 584.

III. THE UNIVERSITY DEFENDANTS MISSTATE THEIR AUTHORITY TO OFFER ADDITIONAL BENEFIT COVERAGE TO PLAINTIFFS.

Plan Defendants agree that University Defendants cannot **replace** the State Health Plan with a different comprehensive health insurance program. University Defendants Mem. in Support of Mtn. to Dismiss at 10. This is not to say, however, that the University Defendants cannot **supplement** the Plan's coverage. They do so now. University Defendants provide their employees the option to purchase a limited insurance policy for (1) Cancer and twenty-nine other specified diseases, such as muscular dystrophy, and (2) the additional costs of a critical illness.[7] University Defendants could provide coverage for gender dysphoria treatment if they chose to do so.

[7] These plans are described at https://unc.live/2KJC4yg (UNC-Chapel Hill); https://bit.ly/2YXywll (UNC-Greensboro); and https://bit.ly/2MlvOA1 (NCSU).

Dated this 19th day of August, 2019.

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Pursuant to L.R. 7.3(d)(1), the undersigned certifies that this Brief complies with the word limit contained in L.R. 7.3(d)(1), using the word count feature of the word processing software in making this certification.

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This the 19th day of August, 2019.

/s/ Kevin G. Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents, JASON FLECK and ALEXIS THONEN; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents, MICHAEL D. BUNTING, JR. and SHELLEY K. BUNTING; and SAM SILVAINE,

Plaintiffs,

v.

DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,

Defendants.

Case No. 1:19-cv-00272-LCB-LPA

PLAINTIFFS' SUGGESTION OF SUBSEQUENTLY DECIDED AUTHORITY

PLAINTIFFS' SUGGESTION OF SUBSEQUENTLY DECIDED AUTHORITY

Pursuant to Local Rule 7.3(i), Plaintiffs Maxwell Kadel, Jason Fleck, Connor Thonen-Fleck, Julia McKeown, Michael D. Bunting, Jr., C.B., and Sam Silvaine (collectively, the "Plaintiffs'), respectfully submit this suggestion of subsequently decided authority as an addendum to their briefs in opposition to Defendants' motions to dismiss. (ECF No. 34, 35)

Plaintiffs filed their briefs on August 9, 2019. The opinion and order in *Flack v. Wis. Dep't of Health Servs.*, 3:18-cv-00309 (W.D. Wis.), was issued on August 16, 2019. A copy of the opinion and order is attached hereto as Exhibit A.

***

Dated: August 22, 2019

Respectfully submitted,

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EXHIBIT A

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

CODY FLACK, et al.,
Individually and on behalf of all others similarly situated

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES, et al.,

Defendants.

OPINION AND ORDER

18-cv-309-wmc

Over a year ago, this court preliminarily enjoined enforcement of Wis. Admin. Code §§ DHS 107.03(23)-(24) (the "Challenged Exclusion") against the originally named plaintiffs, Cody Flack and Sara Ann McKenzie, who are transgender individuals with severe gender dysphoria. The Challenged Exclusion denied coverage for medically prescribed gender-conforming surgery and related hormones under Wisconsin Medicaid. Since then, the court broadened the preliminary injunction enjoining enforcement during the pendency of the lawsuit and certified a class.[1] (Prelim. Injunction Op. & Order (dkt. #70) 39; Class Cert. & Prelim. Injunction Amend. Op. (dkt. #150) 27.) Presently before the court is plaintiffs' motion for summary judgment, seeking declaratory and permanent

[1] Previously, the Challenged Exclusion only referred to Wis. Admin. Code § DHS 107.03(23)-(24). (*See, e.g.*, Class Cert. & Prelim. Injunction Amend. Op. (dkt. #150) 1; Prelim. Injunction Op. & Order (dkt. #70) 6.) However, plaintiffs were granted leave to file a second amended complaint to (1) include Wis. Admin. Code § DHS 107.10(4)(p) as part of the "Challenged Exclusion," (2) replace former defendant Seemeyer with DHS Secretary-Designee Andrea Palm, and (3) conform the class definition to that already certified by the court. (*See* Consent Mot. for Leave to File 2d Amend. Compl. (dkt. #189) 1; June 26, 2019 Order (dkt. #208).) Accordingly, throughout the rest of the opinion, the "Challenged Exclusion" will include § DHS 107.10(4)(p) and defendants refer to DHS and Palm.

injunctive relief. (Pls.' Mot. Summ. J. (dkt. #151) 1-2.) For the reasons that follow, plaintiffs' motion will be granted.[2]

UNDISPUTED FACTS[3]

A. Gender Dysphoria

1. Diagnosis

At its most basic level, gender identity is understood by the medical profession to mean one's internal sense of one's sex. Everyone has a gender identity, and for most people, their gender identity is consistent with the sex designated on their birth certificate (variously referred to in medical literature as one's "assigned," "designated" or "natal" sex). Transgender people have a gender identity that differs from their natal sex. Accordingly, a transgender woman was assigned a natal sex of male but has a female gender identity, while a transgender man was assigned a natal sex of female but has a male gender identity.

[2] Also before the court is plaintiffs' motion to strike the declaration and testimony of Michelle Ostrander, Ph.D. (Mot. Strike (dkt. #192) 1-2.) That motion will be denied.

[3] Viewing the facts in the light most favorable to defendants as the non-moving parties, the following facts are material and undisputed for purposes of summary judgment, except where noted below. These facts are drawn from the parties' stipulated facts (dkt. #154) and plaintiffs' proposed findings of fact (dkt. #153), as well as defendants' responses (dkt. #183) and plaintiffs' replies (dkt. #196). The court also relies on findings of fact set forth in its prior opinions to which neither party has objected. While the court greatly appreciates the parties stipulating to certain proposed findings of fact, doing so is significantly less helpful when they largely overlap with plaintiffs' separate, proposed findings of fact. (*Compare* Stip. PFOF (dkt. #154) ¶¶ 2-9, 12, 92-95 *with* Pls.' PFOF (dkt. #153) ¶¶ 13-25.) Likewise, parties are reminded that in proposing facts, "[e]ach fact must be proposed in a separate, numbered paragraph, *limited as nearly as possible to a single factual proposition*." (Prelim. Pretrial Packet (available at dkt. #114) 3 (emphasis added).) While objecting to the inclusion of more than one fact per numbered paragraph is often times a matter of form over substance, streamlining proposed facts is nevertheless appreciated by both the court and opposing counsel.

According to plaintiffs' experts, one's gender identity is an immutable characteristic. Defendants dispute this. In particular, defendants argue that "[o]ne's self-awareness as male or female changes gradually during infant life and childhood" based on "interactions with parents, peers, and environment," noting that "[n]ormative psychological literature" fails "[to] address if and when gender identity becomes crystallized and what factors contribute to the development of a gender identity that is not congruent with the gender of rearing." (Defs.' Resp. to Pls.' PFOF (dkt. #183) ¶¶ 35-36 (quoting Endocrine Society's Clinical Practice Guidelines (dkt. #166-9) 7).)

Regardless of its origins, there is now a consensus within the medical profession that gender dysphoria is a serious medical condition, which if left untreated or inadequately treated can cause adverse symptoms, such as anxiety, depression, serious mental distress, self-harm, and suicidal ideation, all of which can cause social and occupational dysfunction. DSM-5 contains the psychiatric consensus as to its definition, diagnostic criteria and features:

> *Gender dysphoria* refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender. Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and/or surgery are not available. The current term is more descriptive than the previous DSM-IV term *gender identity disorder* and focuses on dysphoria as the clinical problem, not identity per se.

(DSM-5 (dkt. #21-1) 5.)[4] Not every transgender person suffers from gender dysphoria, and for those who do, the severity of the symptoms and necessary treatment will vary by individual.

2. Treatment

The World Professional Association of Transgender Health outlines the clinical guidelines for treating gender dysphoria in its *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th Edition (2011) (the "WPATH Standards of Care").[5] The WPATH Standards of Care identify psychotherapy, hormone therapy, and a number of surgical procedures as accepted treatment options for gender dysphoria. In 2017, the Endocrine Society also published clinical practice guidelines addressing hormone treatments for gender dysphoria.[6]

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[4] DSM-5 is the fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, which "is the handbook used by health care professionals in the United States and much of the world as the authoritative guide to the diagnosis of mental disorders." *DSM-5: Frequently Asked Questions*, Am. Psychiatric Ass'n, https://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions (last visited Aug. 8, 2019).

[5] WPATH "is an international, multidisciplinary, professional association whose mission is to promote evidence-based care, education, research, advocacy, public policy, and respect in transsexual and transgender health." (WPATH Standards of Care (dkt. #166-8) 8.) The Standards of Care "are based on the best available science and expert professional consensus," with the goal of "provid[ing] clinical guidance for health professionals to assist transsexual, transgender, and gender-nonconforming people with safe and effective pathways to achieving lasting personal comfort with their gendered selves, in order to maximize their overall health, psychological well-being, and self-fulfillment." (*Id.*)

[6] The Endocrine Society is "the primary professional home for endocrine scientists and clinical practitioners," and is "devoted to advancing hormone research, excellence in the clinical practice of endocrinology, broadening understanding of the critical role hormones play in health, and advocating on behalf of the global endocrinology community." *About the Endocrine Society*, Endocrine Soc'y, https://www.endocrine.org/about-us (last visited Aug. 6, 2019).

Dr. Julie Sager, DHS's medical director for Wisconsin Medicaid's Bureau of Benefits Management ("BBM") from 2016 until April 24, 2019, considered both sources to be generally accepted in the medical community and to outline the appropriate standards for assessing the medical necessity of treatment for gender dysphoria. Transition-related medical interventions have the following goals: (1) preventing or eliminating the development of unwanted secondary sex characteristics of the assigned sex; (2) promoting or reconstructing the development of desired secondary sex characteristics of the sex associated with the patient's gender identity; (3) reducing symptoms of gender dysphoria; and (4) enhancing the patient's ability to "pass" as the sex associated with the patient's gender identity, decreasing harassment, mistreatment, and other discrimination to which transgender people are subjected because they are gender nonconforming.

The WPATH Standards of Care state that "sex reassignment surgery is effective and medically necessary," while also recognizing that many transgender people who are diagnosed with gender dysphoria will not require surgery. (WPATH Standards of Care (dkt. #166-8) 61 (capitalization altered).) "While most professionals agree that genital surgery and mastectomy cannot be considered purely cosmetic, opinions diverge as to what degree other surgical procedures (e.g., breast augmentation, facial feminization surgery) can be considered purely reconstructive." (*Id.* at 65.) For appropriate candidates, however, major medical organizations, including the American Medical Association, Endocrine Society, and American Psychiatric Association view gender-confirming surgeries as medically accepted, safe, and effective treatments for severe gender dysphoria. Even defendants acknowledge that DHS does not consider surgical treatments for gender

dysphoria to be experimental. (*See* Prelim. Injunction Op. & Order (dkt. #70) 26 n.22 (recognizing defendants' concession).)

B. Wisconsin Medicaid

Medicaid, a joint federal-state program, was established in 1965 under Title XIX of the Social Security Act to provide medical assistance to eligible low-income individuals. *See* 42 U.S.C. §§ 1396-1396w-5 (the "Medicaid Act"). Medicaid allows states to provide medical services to individuals whose resources and income are insufficient to cover the cost of necessary medical services through federal reimbursement to participating states for a substantial portion of the medical costs. The program's total budget is approximately $9.7 billion and approximately 1.2 million people rely on Wisconsin Medicaid.

Defendant Wisconsin Department of Health Services ("DHS") is responsible for administering the Wisconsin Medicaid program. It receives Medicaid funding from the federal government, including reimbursement for over half the state's Medicaid expenditures from the U.S. Department of Health and Human Services.[7] Defendant Andrea Palm serves as DHS's secretary-designee, making her responsible for implementing the Medicaid Act consistent with both state and federal requirements. At the state level, Wisconsin Medicaid is governed by Wis. Stat. §§ 49.43-.65 and its implementing regulations are found at Wis. Admin. Code § DHS 101-09.

Wisconsin Medicaid beneficiaries receive health care coverage through either a fee-

[7] Like all other states, Wisconsin participates in Medicaid. On average, Wisconsin pays 40.6% of that amount.

for-service plan administered directly by DHS or an HMO Medicaid plan offered through third-party managed care organizations. For the fee-for-service plans, DHS uses its own staff to review prior authorization requests, instead of using a third-party administrator. The prior authorization staff typically uses DHS's published guidelines to make clinically appropriate and coverage determinations for requested services. Where published guidelines do not exist -- as is currently true here for gender-confirming surgeries -- medical doctors in BBM, which is part of DHS's Division of Medicaid Services, review the request under statutory and regulatory limits.[8] Dr. Lora Wiggins is BBM's chief medical officer and until April 24, 2019, Dr. Julie Sager served as BBM's medical director.

The vast majority -- approximately 80% -- of Wisconsin Medicaid beneficiaries are enrolled in HMO Medicaid plans, which are offered by the following managed care organizations: (1) Blue Cross Blue Shield of Wisconsin; (2) Care Wisconsin Health Plan; (3) Children's Community Health Plan; (4) Dean Health Plan, Inc.; (5) Group Health Cooperative of Eau Claire; (6) Group Health Cooperative of South Central Wisconsin; (7) Independent Health Care Plan; (8) MHS Health Wisconsin; (9) MercyCare Insurance Company; (10) Molina Healthcare of Wisconsin; (11) Network Health Plan; (12) Quartz Health Solutions, Inc.; (13) Security Health Plan; (14) Trilogy Health Insurance, Inc.; and

[8] Unsurprisingly, the BBM medical directors are responsible for overseeing the clinical appropriateness and content of DHS policies, setting clinical policy, and supporting DHS's prior authorization staff when requests are made outside the published guidelines or when a clarification is needed.

(15) UnitedHealthcare Community Plan.[9] These managed care organizations are responsible for administering, managing and overseeing the Medicaid benefits provided to enrolled beneficiaries in their plans in accordance with DHS's published guidelines and minimum standards. Accordingly, each managed care organization's clinical staff is responsible for reviewing and addressing prior authorization requests. Following a prior authorization denial, a beneficiary has the option of submitting his or her request to DHS for a determination whether DHS would have covered the service under the DHS fee-for-service plan. If the treatment was medically necessary and the fee-for-service plan would have covered it, DHS compels the managed care organization to cover the treatment as well.

C. Challenged Exclusion

1. Overview

The Medicaid regulations were amended to include Wis. Admin. Code §§ DHS 107.03(23)-(24) in 1996, and they have been enforced since 1997, resulting in the denial of coverage for medical and surgical treatment for gender dysphoria for a majority of the period since.[10] They exclude from Wisconsin Medicaid coverage "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration

[9] For various periods since January 1, 2009, Children's Community Health Plan Central, Compcare, CommunityConnect, Physicians Plus Insurance Corporation, Deal Health Plan SE, Gundersen, HTHP, and Unity also offered Wisconsin Medicaid plans.

[10] While the parties stipulated that "Defendants enforce the Challenged Exclusion through the present day" (Stip. of Facts (dkt. #154) ¶ 11), the court previously enjoined them from doing so in this case (Class Cert. & Prelim. Injunction Amend. Op. (dkt. #150) 27).

of sexual anatomy or characteristics" and "[t]ranssexual surgery." Wis. Admin. Code §§ DHS 107.03(23)-(24).[11] "Transsexual surgery" is not defined in the regulations, but DHS interprets it to mean any surgical procedure intended to treat gender dysphoria.[12] Across the country, only nine states -- including Wisconsin -- have categorical Medicaid exclusions on gender-confirming healthcare.

Even though managed care organizations offering Wisconsin Medicaid plans are primarily responsible for enforcing the Challenged Exclusion by denying their plan members' prior authorization requests for services and treatment, DHS has not provided the managed care organizations formal guidance on how to interpret the Challenged Exclusion. Participating managed care organizations have denied coverage to transgender beneficiaries for gender-confirming treatments, including hormone therapy, surgery and related services under the Challenged Exclusion.

2. DHS's Evaluation of the Exclusion

When the Challenged Exclusion went into effect on February 1, 1997, DHS's predecessor, the Wisconsin Department of Family and Health Services, opined that the excluded services were "medically unnecessary" and that the Challenged Exclusion was

[11] The amendment labeled "transsexual surgery" and the associated "drugs, including hormone therapy" as "not medically necessary," along with other excluded services including "ear lobe repair," "non-medical food," "services related to surrogate parenting," and "tattoo removal." (Clearinghouse Rule 96-154 (dkt. #21-12) 3.)

[12] In fact, for purposes of summary judgment, DHS acknowledges "transsexual surgery" is itself an outdated term that is inconsistent with current medical terminology. (*See* Defs.' Resp. to Pls.' PFOF (dkt. #183) ¶ 80.)

"expected to result in nominal savings for state government."[13] (Clearinghouse Rule 96-154 (dkt. #21-12) 2, 3; Fiscal Estimate (dkt. #21-14) 2.) However, DHS has been unable to find evidence that before implementation of the Challenged Exclusion it or its predecessor ever found or opined that the excluded services were experimental, ineffective or unsafe.[14] Likewise, DHS is unaware of any information indicating that the conclusion that the excluded services were not medically necessary was based on any systematic study or review of the medical literature. Nor is DHS aware of information indicating that it undertook any study or review of the costs associated with enforcing, amending or eliminating the Challenged Exclusion between its effective date and the start of this lawsuit.

Since the filing of this lawsuit, the only investigations into the financial impact on DHS, Wisconsin Medicaid or the State of Wisconsin from enforcing, amending or eliminating the Challenged Exclusion were the August and November 2018 reports of David Williams, submitted in connection with this lawsuit. Similarly, the only investigation into the safety or efficacy of the medical or surgical treatments for gender dysphoria performed by DHS since February 1, 1997, were the reports of Lawrence Mayer, Michelle Ostrander, Chester Schmidt and Daniel Sutphin, also submitted in connection with this lawsuit. In contrast, DHS's own medical providers, the individuals charged with making clinical coverage determinations for Wisconsin Medicaid, acknowledge that

[13] The fiscal estimate notes that Wisconsin Medicaid "has hardly ever paid for any of those services or for those purposes, but questions about coverage continue to come up." (Fiscal Estimate (dkt. #21-14) 3.)

[14] In addressing the analyses that were or were not undertaken, further references to DHS include its predecessor, the Wisconsin Department of Family and Health Services, as applicable.

gender-confirming hormone and surgical treatments for gender dysphoria can be medically necessary and that the Challenged Exclusion conflicts with current medical practice.[15]

Finally, since its enactment, neither DHS nor its predecessor have studied the public health effects or costs of enforcing, amending or eliminating the Challenged Exclusion outside of this lawsuit. Nor is DHS aware of information indicating that it formally considered amending or eliminating the Challenged Exclusion between February 1, 1997, and July 17, 2016. DHS is also unaware of information indicating that it reviewed or considered the efficacy of the Challenged Exclusion following the publication of Version 7 of the WPATH Standards of Care in 2011 or DSM-5's information about the treatment of gender dysphoria following its publication in 2013. For purposes of this lawsuit, defendants estimate that removing the Challenged Exclusion and covering gender-confirming surgeries would cost between $300,000 and $1.2 million annually. There is no dispute that these amounts are actuarially immaterial as they are equal to approximately 0.008% to 0.03% of the State's $3.9 billion share of Wisconsin Medicaid's $9.7 billion annual budget.

3. Enforcement

Since January 1, 2009, DHS has denied Wisconsin Medicaid coverage to ten fee-for-service beneficiaries; since 2014, HMOs administering Wisconsin Medicaid have denied numerous requests for gender-confirming surgical procedures, hormone treatments

[15] Although defendants unsurprisingly dispute the characterization (and presumably its relevance), plaintiffs argue that continued enforcement of the Challenged Exclusion is, therefore, "exclusively" motivated by politics. (Defs.' Resp. to Pls.' PFOF (dkt. #183) ¶ 6.)

and other medical treatments and services. Each of these denials was based on application of the Challenged Exclusion, since the denied procedures are covered by Wisconsin Medicaid when deemed medically necessary for other conditions.

Even so, DHS has no published coverage guidelines for gender-confirming health care, nor has it provided formal guidance to Wisconsin Medicaid HMOs about what is excluded by the Challenged Exclusion. As a result, before 2016, DHS sporadically covered chest surgeries to treat gender dysphoria under a regulation allowing coverage for procedures to treat a condition that significantly interferes with a person's personal/social adjustment or employability. *See* Wis. Admin. Code § DHS 107.06(2)(c) (requiring prior authorization for "[s]urgical or other medical procedures of questionable medical necessity but deemed advisable in order to correct conditions that may reasonably be assumed to significantly interfere with a recipient's personal or social adjustment or employability, an example of which is cosmetic surgery."). Moreover, in 2016, BBM's clinical staff wrote to DHS management, opining that the Challenged Exclusion conflicted with federal law because of a final rule implementing the Affordable Care Act's § 1557 prohibiting discrimination on the basis of gender identity (the "Section 1557 Final Rule") and asking if gender-confirming surgeries could be approved. BBM never received a formal written response. Instead, mid-level DHS management, which the parties agree was comprised of political appointees, explained informally that DHS's upper management instructed that BBM medical directors were to just leave prior authorization requests, so that they would expire.

Following this letter, BBM received no further direction from DHS management,

and BBM's clinical staff never received written clarification about what procedures were subject to the Challenged Exclusion. As a result, Dr. Sager and Dr. Wiggins concluded that the best option was to deny *all* requests for surgery and related gender-conforming hormones to comply with the Department's directives to the HMOs, even though doing so was contrary to their clinical opinion that the treatments could be both medically necessary and acceptable under current medical standards.

On January 4, 2017, following a preliminary injunction from the Northern District of Texas enjoining part of the "Section 1557 Final Rule," the former director of Wisconsin Medicaid, Michael Heifetz, wrote contract administrators at Wisconsin managed care organizations, informing them that Wisconsin Medicaid would continue to enforce the Challenged Exclusion. (Jan. 4, 2017 Letter (dkt. #165-1) 1.) In part, the letter advised that:

> The Department will continue to abide by its own regulations related to covered services under Medical Assistance/Medicaid ("MA"). Specifically, under the Department's MA regulations, transsexual surgery and medically unnecessary hormone therapy are not covered services. (*See* Wis. Admin. Code §§ DHS 107.03(23), (24); 107.10(4)(p)). . . . The Department will continue to make coverage decisions under its regulations, and will not reimburse entities for procedures that fall outside the Department's regulations.

(*Id.*)

As a result, Wisconsin Medicaid's current policy under the Challenged Exclusion is to exclude from coverage certain medical procedures, services or treatments that are deemed medically necessary by a beneficiary's medical provider to treat gender dysphoria, even though those same procedures are covered when deemed medically necessary to treat

other conditions. These treatments include orchiectomy, penectomy, vaginoplasty, mastectomy, reduction mammoplasty, breast reconstruction, hysterectomy, oophorectomy, and salingo-oophorectomy. The Challenged Exclusion also categorically excludes from coverage feminizing genitoplasty, chondrolaryngoplasty, phalloplasty, metoidioplasty, masculinizing genitoplasty, and intersex surgery (both male to female and female to male). While the Challenged Exclusion categorically excludes some hormone therapy treatments, Wisconsin Medicaid covers the following hormones when medically necessary to treat conditions other than gender dysphoria: estradiol, medroxyprogesterone acetate (Provera), micronized progesterone, and testosterone cypionate. Wisconsin Medicaid also covers some hormones for the treatment of gender dysphoria, but only if not associated with surgery.[16]

In 2019, Dr. Julie Sager sought to have a formal discussion with DHS leadership about providing Wisconsin Medicaid coverage for gender-confirming treatment. She was asked to prepare a proposal about an appropriate policy. In preparation for these discussions, she requested and received a spreadsheet from BBM's medical coder identifying gender-confirming procedures and the coverage for those procedures when treating conditions other than gender dysphoria. A large majority of those procedures are covered by Wisconsin Medicaid when not treating gender dysphoria. (*See generally* Gender Reassignment Procedure Code List (dkt. #166-10).)[17]

[16] Despite this latter exception, the parties agree that some hormone treatments for gender dysphoria have been denied because Wisconsin Medicaid managed care organizations make their own drug coverage determinations.

[17] At least as of mid-April 2019, further discussions between DHS management and BBM about

Finally, DHS applies the Challenged Exclusion *only* to beneficiaries who are at least 21 years old. For younger beneficiaries, DHS considers requests for coverage under the Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT") provisions. *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(b); Wis. Admin. Code § DHS 107.22. (*But see* Vordermann Decl. (dkt. #99) ¶¶ 8-12 (recounting denial of coverage for orchiectomy for 19-year-old sufferer of gender dysphoria by HMO).) When reviewing an HMO denial of a request for gender confirming surgery for a beneficiary who was under 21 years old in July 2018, Wisconsin Medicaid's then-medical director, Dr. Sager, concluded that the requested surgery was medically necessary, recommending approval for coverage. In making that decision, Dr. Sager considered the WPATH Standards of Care, the Endocrine Society Guidelines and other state Medicaid agencies' guidelines.

D. Named Plaintiffs[18]

Plaintiffs Cody Flack, Sara Ann Makenzie, Marie Kelly and Courtney Sherwin are all adult, transgender, residents of Wisconsin enrolled in Wisconsin Medicaid. They all suffer from gender dysphoria. Each of their individual treatment providers have concluded that hormone therapy and gender-confirming surgery are medically necessary. After nevertheless being denied coverage under the Challenged Exclusion, they each joined this suit on behalf of themselves and a class of similarly-situated plaintiffs.

Cody Flack, one of the two originally named plaintiffs, sought Medicaid coverage for chest reconstructive surgery that his treatment providers deemed medically necessary.

policy changes had not occurred.

[18] Additional information about the named plaintiffs can be found in the court's prior opinions.

His prior authorization request was denied and then affirmed on appeal under the Challenged Exclusion without considering his treatment providers' determination that surgery was a medical necessity given the severity of his gender dysphoria. Following this court's entry of a preliminary injunction last summer, DHS reviewed Cody's prior authorization request for the chest surgery for medical necessity. Dr. Sager, then Wisconsin Medicaid's BBM medical director, concluded that his requested surgeries were medically necessary to treat his gender dysphoria. In making her determination, Sager relied on the WPATH Standards of Care and the Endocrine Society Guidelines as indicia of the prevailing, accepted medical standards of care.[19]

After entry of the court's preliminary injunction and Dr. Sager's finding that the surgery was medically necessary, plastic surgeon Clifford King performed Cody's double mastectomy and male chest reconstruction on September 25, 2018. Following surgery, Cody's gender dysphoria has greatly diminished. He was relieved that his outward appearance matched his male gender and that he would no longer be misgendered because of his breasts. He began looking forward to going out in public. He felt "more upbeat and hopeful about [his] life in general." (Flack Suppl. Decl. (dkt. #91) ¶ 4.) He is considering obtaining a phalloplasty to further his gender transition.

Sara Ann Makenzie, the other originally named plaintiff, first encountered the Challenged Exclusion when she sought a chest reconstruction prescribed by her doctors. She contacted DHS to inquire about Wisconsin Medicaid coverage for the procedure, but

[19] Dr. Sager testified that she would use the same type of review if considering similar, prior authorization requests and denials if not bound by the Challenged Exclusion.

was informed that it was not a covered benefit.[20] (Makenzie Decl. (dkt. #23) ¶ 19.) She then obtained a personal loan from her bank to pay for the surgery out-of-pocket. UW Health plastic surgeon Venkat Rao performed the surgery in August 2016. She contends that this surgery helped alleviate her gender dysphoria. After her medical providers recommended that she obtain a bilateral orchiectomy and vaginoplasty to create female-appearing external genitalia, Sara Ann was twice told Wisconsin Medicaid would not cover the surgery. Following this court's preliminary injunction in July 2018, Sara Ann's HMO, Care Wisconsin, reviewed her prior authorization request for coverage for genital reconstruction surgery and related procedures, determining that the surgeries were medically necessary and coverage for the surgery was appropriate.

Since 2011, plaintiff Marie Kelly has taken feminizing hormones to treat her gender dysphoria and to further her gender transition.[21] While the hormones have helped, she still suffers "exacerbated" gender dysphoria and anxiety because of her facial hair, male-appearing chest, and male-appearing genitalia. Her medical providers have recommended that she obtain electrolysis for facial hair removal, a female chest reconstruction, and a female genital reconstruction. The providers consider each of these procedures to be

[20] Defendants object to this proposed fact as 'vague, ambiguous, and lack[ing] sufficient foundation to enable Defendants to adequately respond." (Defs.' Resp. to Pls.' PFOF (dkt. #183) ¶ 156.) However, the court finds this objection entirely unpersuasive. Sara Ann can testify to her communications with defendants' representative. Moreover, defendants were free to take discovery to refute her claim of a coverage denial, but absent that, the court will accept her representation, particularly since it is wholly consistent with defendants' *admitted* policy of denying coverage under the Challenged Exclusion without regard to medical necessity.

[21] Unlike the other named plaintiffs, Marie's history with Wisconsin Medicaid is more complicated. Following placement by a staffing agency at a temporary position in January 2019, her income surpassed the Wisconsin Medicaid limits. After leaving that position, Marie then re-enrolled in Wisconsin Medicaid.

medically necessary. After inquiring whether Wisconsin Medicaid would provide coverage for these procedures -- including as recently as in August 2018 -- Marie was repeatedly told that they were not covered because of the Challenged Exclusion. Since then, Marie has been unable to obtain these treatments for her gender dysphoria, and she cannot afford to pay for them herself.

In March 2018, plaintiff Courtney Sherwin began taking feminizing hormones under the supervision of her primary care physician. She has been denied coverage for some of the hormone treatments prescribed by her doctors under the Challenged Exclusion, forcing her to pay out-of-pocket for them. Moreover, while the hormones have helped, Courtney continues to suffer from severe gender dysphoria because of her male-appearing body and her male-sounding voice, as well as the harassment they engender. Courtney's medical providers have concluded that a genital reconstruction, consisting of an orchiectomy, penectomy and vaginoplasty, and a breast augmentation are medically necessary to treat her gender dysphoria. They also believe that the orchiectomy is particularly urgent because it would stop her body from producing testosterone and alleviate the adverse side effects from her testosterone-blocking spironolactone. Her current HMO, Quartz, has denied coverage for these gender-confirming surgical treatments based on the Challenged Exclusion, and she cannot afford to pay for these procedures herself.

Although their exact number is unknowable, other transgender Wisconsin Medicaid beneficiaries with gender dysphoria have also been denied coverage for gender-confirming surgeries under the Challenged Exclusion (or at least are likely to have been discouraged

from applying because of it). Defendants concede for purposes of summary judgment that there are potentially hundreds of transgender Wisconsin Medicaid beneficiaries (if not more) who may be denied gender-confirming surgeries and related hormone treatments during their lifetimes if the Challenged Exclusion remains in place. For example, Lexie Vordermann is a 19-year-old transgender Wisconsin Medicaid beneficiary who has been denied coverage for an orchiectomy by her HMO, Quartz, in early 2018 because of the Challenged Exclusion. In September 2018, her doctor submitted a second prior authorization request, but Quartz denied it as well, citing the Challenged Exclusion. While DHS has maintained that the Challenged Exclusion does not apply to beneficiaries under 21 years of age, Lexie's denials have been based on the Challenged Exclusion.

Another class member, Emma Grunenwald-Ries, a transgender Wisconsin Medicaid beneficiary, experiences significant gender dysphoria related to her voice, chest and genitalia. She is seeking a number of surgeries recommended by her primary care physician, including facial feminization, chest reconstruction, and genital reconstruction. UW Health surgeon Katherine Gast agreed to perform genital reconstruction surgery, but has not submitted a prior authorization request, believing it would be denied because of the Challenged Exclusion. Emma suffers from daily anxiety, worry, and stress about her inability to obtain treatment. She is also upset that the Challenged Exclusion stands in the way of her completing her medical transition.

OPINION

I. Plaintiffs' Motion to Strike

Before turning to plaintiffs' motion for summary judgment, the court must first address their lengthy motion to strike the declaration and exclude testimony of defense expert Michelle Ostrander, Ph.D. (Mot. to Strike (dkt. #192) 1.) Plaintiffs raise three arguments: (1) failure to comply with Federal Rule of Civil Procedure 26(a)(2)(B); (2) failure to meet the requirements of Daubert and Federal Rule of Evidence 702; and (3) the Hayes reports that she purports to incorporate as her opinions are inadmissible hearsay. (Mot. to Strike Br. (dkt. #193) 18.) Defendants contend that Ostrander "adequately disclosed her opinions," has appropriate "expertise to opine on the available scientific evidence regarding the safety and efficacy of surgical gender dysphoria treatments," and plaintiffs' motion seeks "to exclude her testimony without having to grapple with its substance." (Mot. to Strike Opp'n (dkt. #200) 1, 3.)

While Plaintiffs' motion will be denied, the actual relevance of Ostrander's "opinion" is quite limited. First, Ostrander expressly "take[s] no position on the medical necessity of any particular medical procedure or service for any particular patient, including the named plaintiffs in this case" (Ostrander Decl. (dkt. #188) ¶ 12), something that should be obvious on its face given that she has no medical degree. Likewise, she makes no claim of any medical expertise, including treatment methods for gender dysphoria, nor did she review DSM-5, WPATH or other standards of care for gender dysphoria. (*See* Ostrander Dep. (dkt. #206) 84:25-85:25 ("I believe the DSM-5 is the current standard for diagnosis. As far as the specific for those, I'm not familiar with those off the top of my

head."; "I am aware of the WPATH standards of care for the treatment of gender dysphoria; but as to the specifics, I could not speak to those."); *see also id.* at 109:10-111:9 (relying on a report's summary of the difference between "gender identity disorder" and "gender dysphoria," adding that the diagnostic criteria are "outside of [her] area of expertise").)

Second, even accepting her declaration on its face, she does nothing more than compile "[i]n [her] role as Product Manager at Hayes, Inc.," various "custom research" prepared largely by unnamed others at Hayes for unnamed "healthcare providers, payers, [or] policy makers" which purport to analyze "the available scientific evidence regarding the efficacy and safety of" "Sex Reassignment Surgery" and "Ancillary Procedures and Services for the treatment of Gender Dysphoria" in 2014 and 2018. (Ostrander Decl. (dkt. #188) ¶¶ 3, 11-9.) While she "worked with analysts in authoring and developing the August 2018 report and reviewed and approved the report prior to its publication," she had no role in developing the other three reports. (*See id.* ¶ 9.) "The analyses and conclusions" found in these reports, attached to her barebones declaration, "represent [her] professional opinion about the available scientific evidence regarding the efficacy and safety of the medical procedures and services . . . as of the dates of those documents." (*Id.* ¶ 11.) Ostrander's declaration does not explain the methodology for assigning grades, although she provides some detail during her deposition. (Ostrander Dep. (dkt. #206) 50:15-51:23; 122:20-123:8.)

Third, whatever the evidentiary value these private analyses may have, it pales in comparison to that of the peer reviewed studies they purport to criticize, and, more

importantly, to the consensus of medical professionals as to the efficacy and safety of gender-confirming surgery.[22]

Fourth, and finally, Ostrander's "opinions" are entirely unhelpful to the issue of fact here: whether gender-confirming surgery and related hormones are now a generally accepted form of medical treatment for gender dysphoria. Even accepting Ostrander's conclusion that studies provide "very low" quality evidence, that does not change the fact that the larger medical community considers these treatments to be acceptable. (*See* Am. Med. Assoc. (dkt. #21-5) 2 ("[M]edical and surgical treatments for gender dysphoria, as determined by shared decision making between the patient and physician, are medically necessary as outlined by generally-accepted standards of medical and surgical practice."); Am. Endocrine Soc'y (dkt. #21-9) 3 ("Medical intervention for transgender individuals (including both hormone therapy and medically indicated surgery) is effective, relatively safe (when appropriately monitored), and has been established as the standard of care.").) Further, it is somewhat perplexing that at summary judgment, defendants relied only on the "opinions" of a lone, non-medical, professional researcher, rather than on the previously filed declarations of the few medical professionals who had questioned the efficacy and safety of gender-confirming care. (*See* Sutphin Decl. (dkt. #118); Schmidt Decl. (dkt. #56); Mayer Decl. (dkt. #55-4); Mayer Rpt. (dkt. #55-1).) For all these reasons, Ostrander's "opinions" are of limited value. Even so, plaintiffs' motion to strike is denied.

[22] Ostrander's declaration and deposition also both fail to identify any consumers of these reports.

II. Summary Judgment

Summary judgment is appropriate where the moving party: (1) "shows that there is no genuine dispute as to any material fact" and (2) it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Plaintiffs move for summary judgment on their claims under: (1) § 1557 of the Affordable Care Act; (2) the Medicaid Act's Availability and Comparability provisions; and (3) the Equal Protection Clause of the Fourteenth Amendment. The court addresses each claim in turn.

A. Affordable Care Act

Plaintiffs contend that the Challenged Exclusion violates § 1557 of the Affordable Care Act by unlawfully discriminating on the basis of sex and ask the court not to change its analysis from that undertaken at the preliminary injunction stage of this litigation. (Summ. J. Br. (dkt. #152) 20.) In response, defendants merely repeat their creative "Spending Clause" argument: "Wisconsin could not have understood that Title IX would impose on it a new anti-discrimination requirement when this federal law passed" because "the Seventh Circuit did not hold that sexual orientation and transgender status discrimination were covered under Title VII and Title IX, respectively, until decades after the enactment of Title IX." (Opp'n (dkt. #182) 5, 7-9.)

The court found defendants' argument less than persuasive before and that has not changed. (Prelim. Injunction Op. & Order (dkt. #70) 29-30 ("Perhaps defendants' least persuasive, though most creative, argument is that § 1557 cannot be read to cover transgender status without violating the Spending Clause of the United States Constitution because 'Wisconsin could have had no idea that this interpretation would

someday prevail when it chose to accept federal Medicaid funding.' Nonsense." (internal citation omitted)).) Indeed, the court adopts the same analysis contained in the preliminary injunction opinion and order, finding that the Affordable Care Act's § 1557 provides a private right of action and the Challenged Exclusion discriminates on the basis of sex. (*Id.* at 23-31.) Accordingly, plaintiffs' motion for summary judgment on their § 1557 claim is granted.

B. Medicaid Act

Plaintiffs next contend that the Challenged Exclusion violates the Availability and Comparability Provisions of the Medicaid Act by denying coverage for medically necessary treatments for gender dysphoria despite those treatments being covered for other diagnoses. (Summ. J. Br. (dkt. #152) 30-37.) In response, defendants argue that the exclusion of "transsexual surgery" and associated hormones is entitled to "[s]ignificant deference" because there is evidence that these treatments are unproven and thus "not medically necessary" under Wis. Admin. Code § DHS 101.03(96m). Accordingly, defendants assert, plaintiffs have not -- and cannot -- show that "the Challenged Exclusion is unreasonable as a matter of law" in violation of the Medicaid Act. (Opp'n (dkt. #182) 10, 22, 23.)

As an initial matter, "[a]lthough participation in Medicaid is optional, once a state has chosen to take part . . . it must comply with all federal statutory and regulatory requirements." *Bontrager v. Ind. Family and Soc. Servs. Admin.*, 697 F.3d 604, 605 (7th Cir. 2012) (quoting *Miller ex rel Miller v. Whitburn*, 10 F.3d 1315, 1316 (7th Cir. 1993)). Accordingly, while a state "provid[ing] federally subsidized medical assistance to low-

income individuals and families" "may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures," *id.* at 605, 608 (internal citations and quotation marks omitted), these limits must be "'reasonable' and 'consistent with the objectives' of the [Medicaid] Act," *Rush v. Parham*, 625 F.2d 1150, 1155 (5th Cir. 1980) (quoting *Beal v. Doe*, 432 U.S. 438, 444 (1977)).

Still, as defendants point out, states have "significant discretion to decide which treatments to cover" and the Medicaid Act does not require participating states to fund experimental procedures as "such treatments are 'medically *un* necessary.'" *Miller*, 10 F.3d at 1318, 1321 (quoting *Rush*, 625 F.2d at 1156) (emphasis in original). Indeed, in *Rush*, the Fifth Circuit held that "Georgia's definition of medically necessary services can reasonably exclude experimental treatment" when confronted with plaintiff's complaint that Georgia refused to pay for her "transsexual surgery" that was prescribed by her doctor. 625 F.2d at 1156. As the Seventh Circuit has explained, however, "the best indicator that a procedure is experimental is its rejection by the professional medical community as an unproven treatment"; put another way, "[i]f 'authoritative evidence' exists that attests to a procedure's safety and effectiveness, it is not 'experimental.'" *Miller*, 10 F.3d at 1320.

Here, whatever the Fifth Circuit held in 1980, defendants' assertion that "transsexual surgery" and the associated hormone treatments are not medically necessary is no longer reasonable. Even at the time the Challenged Exclusion became effective in 1997, DHS's predecessor did not conclude that the excluded services were experimental, ineffective or unsafe. Moreover, at the time of implementation, DHS's predecessor conducted *no* systematic study or review of the available medical literature to conclude that

the excluded services were not medically necessary, nor can defendants point to any now. To the contrary, as noted above, the medical profession has reached a formal consensus as to the safety *and* efficacy of surgical treatments for severe gender dysphoria. Finally, *DHS* has not examined the public health effects of enforcing, amending, or repealing the Challenged Exclusion, aside from the analyses specifically performed and submitted for use in this lawsuit.

Perhaps most compelling, when not constrained by the Challenged Exclusion, even DHS through BBM medical personnel found gender-confirming surgery to be medically necessary for some Medicaid patients, falling in line with the vast majority of states and the American Medical Association, Endocrine Society, American Psychiatric Association, and other medical organizations, all of which have already endorsed gender-confirming surgeries as medically accepted, safe, and effective treatments for gender dysphoria.

Defendants' arguments to the contrary are simply unpersuasive. (Opp'n (dkt. #182) 13-22.) First, defendants rely on two federal circuit court decisions that upheld state prohibitions on coverage for treatment of gender-confirming surgery. (*Id.* at 13-14 (citing *Smith v. Rasmussen*, 249 F.3d 755, 760-61 (8th Cir. 2001); *Rush*, 625 F.2d at 1154-57).) The state of medical knowledge has evolved as to the treatment of gender dysphoria, making these earlier cases medically suspect. *Compare Smith*, 249 F.3d at 760 (noting "the lack of consensus in the medical community" about sex-reassignment surgery) *with Good v. Iowa Dept. of Human Servs.*, 924 N.W.2d 853, 857 (Iowa 2019) (noting uncontradicted testimony establishing "the accepted standards of medical care to alleviate gender dysphoria . . . involve the following options: socially transitioning to live consistently with

one's gender identity, counseling, hormone therapy, and gender-affirming surgery to conform one's sex characteristics to one's gender identity"); *Hicklin v. Precynthe*, No. 4:16-cv-01357-NCC, 2018 WL 806764, at *3 (E.D. Mo. Feb. 9, 2018) (noting testimony establishing that the WPATH Standards of Care are "the internationally recognized guidelines for the treatment of persons with gender dysphoria"). Indeed, even the *Rush* court recognized that "if defendants simply denied payment for the proposed surgery because it was transsexual surgery [as opposed to being 'experimental' or 'inappropriate'], Georgia should now be required to pay for the operation, since a 'state may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . solely because of the diagnosis, type of illness, or condition.'" 625 F.2d at 1156 n.12 (quoting 42 C.F.R. § 440.230.(c)(1), as corrected by 43 Fed. Reg. 57253 (Dec. 7, 1978)).

Defendants also point to a 2016 Centers for Medicare and Medicaid Services Report, the Hayes, Inc. reports attached to the Ostrander Declaration, and two more recent circuit court decisions rejecting prisoners' Eighth Amendment claims for gender-confirming surgery as evidence of "conflicting views about the efficacy of treatment." (Opp'n (dkt. #182) 14-22.) However, these documents do not create a material dispute of fact in large part because they were not relied on by DHS in evaluating the Challenged Exclusion, either before *or* after it became effective.

Moreover, the two circuit court decisions are factually and legally distinguishable. Although decided in 2014, the First Circuit sitting *en banc* in *Kosilek*, 774 F.3d 63 (1st Cir. 2014), was actually considering an evidentiary record from *2006*, at which time medical experts disagreed as to whether anything less than a "sex reassignment surgery" for a

Massachusetts inmate's gender dysphoria would constitute such inadequate medical care as to be cruel and unusual under the Eighth Amendment.[23] Because there was a disagreement among the medical experts in 2006 as to whether surgery, as opposed to hormone and other therapy, would be necessary to treat Kolisek's disorder, the First Circuit held the decision of the Massachusetts' DOC not to approve it did not violate the Eighth Amendment, particularly in light of other, larger security and safety concerns within the prison. Although the majority opinion and the DOC both emphasized that it was only reaching this decision as to Kolisek's individual treatment plan, one of the dissenters suggested this result amounted to "a de facto ban on sex reassignment surgery for inmates in this circuit." 774 F.3d at 106-07. Regardless, the First Circuit's majority opinion only addressed WPATH's 2011 recognition of the need for "flexible directions in treatment" for gender dysphoria, which was not part of the evidentiary record, and the only mention of DSM-5 is in recognition of the adoption of a "new" term "gender dysphoria," likely because it was only released around the time of the opinion itself.

In *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019), *petition for cert. filed*, a panel of the Fifth Circuit purported to follow the reasoning of *Kosilek*, by finding that the Texas Department of Criminal Justice ("TDCJ") could adopt a blanket prohibition on "sex reassignment surgeries," without regard to any individualized assessment of prisoners, without offending the Eighth Amendment. As the dissent explains, the majority's reasoning is difficult to follow given some procedural anomalies, not least of which was the

[23] In *Kosilek*, the First Circuit still referred in its opinion to "gender identity disorder," because that was the accepted term in 2006, even though the court acknowledged that the recently adopted DSM-5 had already adopted the more apt diagnosis of "gender dysphoria."

pro se plaintiff Gibson's (and later his appointed appellate counsel's) decision not to challenge what the Fifth Circuit described as "respected medical experts fiercely question[ing] whether sex reassignment surgery, rather than counseling and hormone therapy, is the best treatment for gender dysphoria." *Gibson*, 920 F.3d at 215, 220, 223.

The oddest part of the *Gibson* decision is that the *only* "evidence" on this issue came not from the record in that case, but rather from adoption of the same *2006* expert testimony relied upon by the First Circuit in *Kosilek*. *Gibson*, 920 F.3d at 221-25. Regardless, based on Gibson's failure to establish that surgery "is so universally accepted" that its denial in favor of mental health counseling and hormone therapy "amounts to deliberate indifference," the Fifth Circuit found no Eighth Amendment violation. *Id.* at 220-21. More specifically, the court found that "it cannot be cruel *and unusual* to deny treatment that no other prison has ever provided -- to the contrary, it would only be unusual if a prison decided *not* to deny such treatment." *Id.* at 216 (emphasis original).

Even if the reasoning of *Gibson*, or at least *Kosilek* (which only endorsed the right of a prison to deny reassignment surgery after an individualized assessment of the inmate's treatment needs for gender dysphoria), were adopted as law by the Seventh Circuit in applying an Eighth Amendment "cruel and unusual" standard, both opinions hold the plaintiff to a much higher burden of proof *and* rely on medical testimony now some thirteen

years old.[24] (*See* Prelim. Injunct. Op. & Order (dkt. #70) 20 n.15 (recognizing the limited value of dated medical knowledge). At summary judgment, the only "opinion" offered to dispute the current medical consensus is from a professional researcher purporting to discount the reliability of peer reviewed studies rather than a medical society (or even a lone doctor), disagreeing as to the existence of such a consensus.

As noted above, any attempt by defendants or their experts to contend that gender-confirming care -- including surgery -- is inappropriate, unsafe, and ineffective is unreasonable, in the face of the existing medical consensus. The few documents cited by defendants do not change the unreasonableness of the decision-making process or its conclusion. Accordingly, the state's adoption, or at least continued enforcement, of the Challenged Exclusion is unreasonable as a matter of law and not entitled to deference. *See Lankford v. Sherman*, 451 F.3d 496, 511 (8th Cir. 2006) ("While a state has discretion to determine the optional services in its Medicaid plan, a state's failure to provide Medicaid coverage for non-experimental, medically-necessary services within a covered Medicaid category is both per se unreasonable and inconsistent with the stated goals of Medicaid.") (collecting cases); *White v. Beal*, 555 F.2d 1146, 1151 (3d Cir. 1977) ("[W]hen a state decides to distribute a service as part of its participation in Title XIX, its discretion to determine how the service shall be distributed, while broad, is not unfettered: the service

[24] Defendants also offer a fleeting cite here to *Smith*, 249 F.3d at 760-61. However, it, too, is unavailing. First, the decision is 18 years old. Second, unlike DHS, the state there contracted with a medical peer review organization that had "conducted a review of the medical literature and contacted various organizations" to "report[] a lack of consensus on definition, diagnosis, and treatment." *Id.* Third, the Iowa Supreme Court recently affirmed a lower court decision invalidating the prohibition on Medicaid coverage for gender-affirming procedures. *See Good*, 924 N.W.2d at 856.

must be distributed in a manner which bears a rational relationship to the underlying federal purpose of providing the service to those in greatest need of it"); *Rush*, 625 F.2d at 1156 n.12 ("[A] 'state may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . solely because of the diagnosis, type of illness, or condition.'" (quoting 42 C.F.R. § 440.230(c)(1), as corrected by 43 Fed. Reg. 57253 (Dec. 7, 1978))).

Finally, plaintiffs' claims under the Availability and Comparability Provisions of the Medicaid Act rise or fall together. The Availability Provision requires states to make covered treatment available in "sufficient . . . amount, duration and scope to reasonably achieve its purpose," subject to "appropriate limits," such as "medical necessity" or "utilization control procedures." 42 U.S.C. § 1396a(a)(10)(A); 42 C.F.R. § 440.230(b); *see also Bontrager*, 697 F.3d. at 608 (Under federal regulations, "a state's Medicaid plan must 'specify the amount, duration, and scope of each service that it provides,' and '[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.'" (quoting 42 C.F.R. §§ 404.230(a)-(b), (d))). The Comparability Provision "prohibits discrimination among individuals with the same medical needs stemming from different medical conditions," *Davis v. Shah*, 821 F.3d 231, 258 (2d Cir. 2016) (citations omitted), by requiring participating States to provide medical assistance to all participants in equal "amount, duration, [and] scope," 42 U.S.C. § 1396a(a)(10)(B)(i); 42 C.F.R. § 440.240(a)-(b) (requiring "services available to any individual" be provided in "equal . . . amount, duration, and scope for all beneficiaries"). As such, these provisions require that states make offered services sufficiently available to treat beneficiaries without discriminating based on diagnosis.

Here, there is no dispute that the Challenged Exclusion prevents Wisconsin Medicaid from covering the medical treatment needs of those suffering from gender dysphoria, at least for breast reconstruction, hysterectomy, mastectomy, oophorectomy, orchiectomy, penectomy, reduction mammoplasty, salingo-oophorectomy and vaginoplasty, as well as estradiol, medroxyprogesterone acetate (Provera), micronized progesterone, and testosterone cypionate hormone treatments. Nor is there any dispute that these treatments *are* covered when used to treat other medical conditions. Accordingly, the Challenged Exclusion both fails to make covered treatments available in sufficient "amount, duration and scope" *and* discriminates on the basis of diagnosis. As such, plaintiffs are entitled to summary judgment on these claims as well. *See Davis*, 821 F.3d at 256 ("By denying plaintiffs access to such services purely on the basis of the nature of their medical conditions, New York's restrictions thus provide some categorically needy individuals lesser medical assistance than is available to others with the same levels of medical need," thereby "offer[ing] an unequal 'scope' of benefits" in violation of the Comparability Provision.) (affirming summary judgment for plaintiffs on their Comparability Provision claim); *White*, 555 F.2d at 1151 ("We find nothing in the federal statute that permits discrimination based upon etiology rather than need for the service.") (affirming injunction prohibiting enforcement of state regulation limiting Medicaid coverage for glasses to beneficiaries with eye disease); *id.* at 1152 ("The regulations permit discrimination in benefits based upon the degree of medical necessity but not upon the medical disorder from which the person suffers."); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 571 (S.D.N.Y. 2016) (holding that "a state cannot say 'never' when it comes to medically

necessary treatments, because there are no such reasons justifying categorical bans on medically necessary treatment. A categorical ban on medically necessary treatment for a specific diagnosis would not 'adequately . . . meet the needs of the Medicaid population of the state'" (internal citation omitted)) (granting plaintiffs summary judgment that ban on coverage for presumptive cosmetic procedures violated Medicaid Availability Provision and Comparability Provision).[25]

C. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment prevents a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This "is essentially a direction that all persons similarly situated should be treated alike" and accordingly "protects against intentional and arbitrary discrimination." *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017) (internal citations and quotation marks omitted), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260, 200 L. Ed. 2d 415 (2018). Plaintiffs contend that "the Challenged

[25] The district court in *Cruz* had originally granted defendant's motion for summary judgment in part on plaintiffs' Availability Provision claim relating to off-label uses of hormones to provide hormone therapies to minors with gender dysphoria, and denied plaintiffs' motion for summary judgment in part on their Comparability Provision claim as to "drugs promoting hair growth or loss," because they did not appear to be covered by New York Medicaid for other conditions. 195 F. Supp. 3d at 573, 577. The court further denied motions for summary judgment on plaintiffs' Availability and Comparability Provision claims relating to the medical necessity of providing gender-confirming surgeries and specific hormone therapies for minors. *Id.* at 573-78. On reconsideration, however, the court "direct[ed] the entry of final judgment for plaintiffs in all respects" after the defendant published a Notice of Proposed Rulemaking that would authorize New York Medicaid to "cover medically necessary surgeries and hormone therapies to treat gender dysphoria ('GD') in individuals under age 18," thereby resolving all disputes of fact. *Cruz v. Zucker*, 218 F. Supp. 3d 246, 247-49 (S.D.N.Y. 2016).

Exclusion subjects transgender people to disparate and inferior health care on the basis of sex," and it further subjects them to discriminatory treatment because they are transgender, which, they contend, is itself a suspect or quasi-suspect class. (Summ. J. Br. (dkt. #152) 37.) Regardless, there is no longer a disagreement between the parties that some form of heightened scrutiny applies here. (*Compare id.* (arguing whether viewed as discrimination on the basis of sex or transgender status "some form of heightened scrutiny" applies) *with* Opp'n (dkt. #182) 29 n.7 ("In light of *Whitaker* and this Court's previous decisions, and in the furtherance of efficiency, the Department does not repeat its arguments for rational basis review here.")).[26]

When a classification is based on sex, the state action is subject to heightened scrutiny meaning that "the burden rests with the state to demonstrate that its proffered justification is 'exceedingly persuasive.'" *Whitaker*, 858 F.3d at 1050 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). More specifically, the state 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.* (quoting *Virginia*, 518 U.S. at 524). In addition, "the justification must be genuine" and cannot be hypothesized, created in response to litigation, or based on "overbroad generalizations about sex." *Id.* (citing *Virginia*, 518 U.S. at 533).

While defendants identify two possible government interests -- "containing costs

[26] Accordingly, the court need not consider whether transgender status is a suspect or quasi-suspect class and will proceed to analyze the Challenged Exclusion as a sex-based classification. *See Boyden v. Conlin*, 341 F. Supp. 3d 979, 1000 n.16 (W.D. Wis. 2018) (outlining factors to determine whether heightened scrutiny applies based on suspect or quasi-suspect class).

and protecting public health in face of uncertainty" (Opp'n (dkt. #182) 32) -- they do not meet their burden of demonstrating that either justification was genuine, nor that the Challenged Exclusion was substantially related to achieving those objectives.[27] As to protecting public health, for reasons already discussed above, defendants provide *no* evidence that, *before adopting the Challenged Exclusion*, DHS or its predecessor: (1) conducted "any systematic study or review of relevant peer-reviewed scientific or medical literature relating to the excluded services" to conclude that the services "were not medically necessary"; or (2) made an informed determination that any of the excluded services were experimental, unsafe, or ineffective in treating gender dysphoria. (Stip. PFOF (dkt. #154) ¶¶ 70-73.) To the contrary, DHS concedes that neither is true. Even after adoption of the Challenged Exclusion, DHS neither "undertook any study or review of the safety or efficacy of medical or surgical treatments for gender dysphoria," nor "undertook any study or review of the public health effects of enforcing, amending or eliminating the Challenged Exclusion," aside from the expert reports specially prepared in defense of plaintiffs' present lawsuit. (*Id.* ¶¶ 76-78.) Defendants stipulated to as much by agreeing that "DHS is not aware of information indicating" that any of these things occurred. (*Id.* ¶¶ 70-73, 76-78.)

As also set forth in detail above, the medical consensus is that gender-confirming treatment, including surgery, is accepted, safe, and effective in the treatment of gender dysphoria, meaning that the denial of Medicaid benefits for needed medical treatment

[27] For reasons discussed below, even accepting defendants' argument that "intermediate scrutiny does not require that a regulation *perfectly* solve the problem it was enacted to solve -- the regulation is valid even if it only partially solves the problem" (*id.* at 30) (emphasis added), defendants' evidence falls short of that mark.

completely fails to protect the public health. (*See* Mayer Rpt. (dkt. #55-1) 8-9 (recognizing that gender dysphoria "is a serious medical condition that deserves to be treated" so that "reducing or eliminating the very real distress associated with the condition is the "[o]ptimality consideration[]").) In fact, this consensus is so strong that it includes DHS's own former BBM medical director, Dr. Julie Sager, who acknowledged that removing the Challenged Exclusion would be consistent with accepted medical practice and standards of care, as well as BBM's chief medical officer, Dr. Lora Wiggins, who considers surgical treatment for gender dysphoria to be medically reasonable. So, too, Wisconsin Medicaid has concluded that gender-confirming surgeries were medically necessary in at least a handful of cases, including the approvals of chest surgeries before 2016.[28] Accordingly, there is no evidence from which a reasonable jury could conclude that protecting the public health was a genuine motivation for the Challenged Exclusion.[29]

Defendants' other, stated justification, based on cost-savings, fares no better on summary judgment. While documents predating the Challenged Exclusion concluded that it -- along with a larger list of excluded services -- "was expected to result in nominal

[28] Defendants' citation to the Ostrander Declaration and the attached reports does not help them. There is no evidence to suggest that DHS or its predecessor entity considered these reports -- or their underlying studies -- in adopting the Challenged Exclusion. In fact, it would have been disingenuous to do so: the Hayes reports post-date the Challenged Exclusion by nearly two decades and no medical literature search was performed. Likewise, there is no indication that these reports have been relied on since then -- except, of course, during this litigation.

[29] This conclusion is only strengthened by the uncontradicted evidence that: (1) mid-level DHS management -- comprised of political appointees -- instructed BBM medical directors to just leave prior authorization requests so that they would expire; and (2) Dr. Sager was ultimately unsuccessful in her attempt to discuss with management the possibility of providing Wisconsin Medicaid coverage for gender-confirming treatment. While plaintiffs argue political considerations motivated the Challenged Exclusion, the court need not reach that.

savings," those same documents add that Wisconsin Medicaid "has hardly ever paid for any of those [excluded] services or for those purposes." (Fiscal Estimate (dkt. #21-14) 2-3.) Likewise, since the Challenged Exclusion's effective date, the only investigation DHS has made into any actual cost savings from adoption of the Exclusion was performed in connection with defendants' defense of this lawsuit. (Stip. PFOF (dkt. #154) ¶¶ 74-75.) Moreover, even these analyses reveal such small estimated savings resulting from the Challenged Exclusion that they are both practically and actuarially immaterial. Defendants estimate that removing the Challenged Exclusion and covering gender-confirming surgeries would cost between $300,000 and $1.2 million annually, which actuarially speaking amounts to one hundredth to three hundredth of one percent of the State's share of Wisconsin Medicaid's annual budget. As in *Boyden*, 341 F. Supp. 3d at 1000-01, "the court is hard-pressed to find that a reasonable factfinder could conclude that the cost justification was an 'exceedingly persuasive' reason or that this minuscule cost savings would further 'important government objectives."[30] Defendants' argument that "a penny saved is a penny earned" simply does not meet its burden under any form of intermediate scrutiny. Indeed, no reasonable jury could conclude that cost concerns were genuine or an "exceedingly persuasive" justification for the Challenged Exclusion. Accordingly, plaintiffs are entitled to summary judgment on this claim as well.

[30] In *Boyden*, the cost of covering gender-confirming care was "immaterial at 0.1% to 0.2% of the total cost of providing health insurance to state employees." 341 F. Supp. 3d at 1000.

ORDER

IT IS ORDERED that:

1) Plaintiffs' motion for summary judgment (dkt. #151) is GRANTED and defendants are PERMANENTLY ENJOINED from enforcing the Challenged Exclusion (Wis. Admin. Code §§ DHS 107.03(23)-(24), 107.10(4)(p)) against the named plaintiffs and other members of the class.

2) The parties may have fourteen (14) days to meet and confer on the scope of this and any other permanent relief, at which point they are to submit a joint, proposed injunction or competing proposals.

3) Plaintiffs' motion to strike (dkt. #192) is DENIED.

4) The telephonic scheduling conference before Magistrate Judge Crocker remains scheduled for August 27, 2019, at 2:30 p.m.

Entered this 16th day of August, 2019.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents, JASON FLECK and ALEXIS THONEN; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents, MICHAEL D. BUNTING, JR. and SHELLEY K. BUNTING; and SAM SILVAINE,

Plaintiffs,

v.

DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,

Defendants.

Case No. 1:19-cv-00272-LCB-LPA

PLAINTIFFS' SUGGESTION OF SUBSEQUENTLY DECIDED AUTHORITY

PLAINTIFFS' SUGGESTION OF SUBSEQUENTLY DECIDED AUTHORITY

Pursuant to Local Rule 7.3(i), Plaintiffs Maxwell Kadel, Jason Fleck, Connor Thonen-Fleck, Julia McKeown, Michael D. Bunting, Jr., C.B., and Sam Silvaine (collectively, the "Plaintiffs'), respectfully submit this suggestion of subsequently decided authority as an addendum to their briefs in opposition to Defendants' motions to dismiss. (ECF No. 34, 35)

Plaintiffs filed their briefs on August 9, 2019. The opinion and order in *Toomey v. State of Arizona*, No. 4:19-CV-00035-RM-LAB (D. Ariz.), was issued on December 23, 2019. A copy of the opinion and order is attached hereto as Exhibit A

***

Dated: January 2, 2020

Respectfully submitted,

/s/ Amy E. Richardson

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* Appearing by special appearance pursuant to L.R. 83.1(d)

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: January 2, 2020

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EXHIBIT A

WO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Russell B Toomey,

Plaintiff,

v.

State of Arizona,

Defendants.

No. CV-19-00035-TUC-RM (LAB)

ORDER

Pending before the Court are Defendants State of Arizona, Gilbert Davidson, and Paul Shannon's (collectively, "State Defendants") Motion to Dismiss (Doc. 24), Magistrate Judge Leslie A. Bowman's Report and Recommendation ("R&R") on the Motion to Dismiss (Doc. 46), and the parties' Objections to the R&R (Docs. 49, 51, 52.)[1] The Court held oral argument on October 2, 2019, at which time it took under advisement the Motion, the R&R, and the Objections. (Doc. 65.) For the following reasons, the R&R will be adopted in part, modified in part, and rejected in part, and State Defendants' Motion to Dismiss will be denied.

. . . .

. . . .

[1] Also pending is Plaintiff's Motion to Certify Class (Doc. 28), which will be resolved separately.

I. Background

Plaintiff Dr. Russell B. Toomey is a transgendered male. (Doc. 1 at 12.) "He has a male gender identity, but the sex assigned to him at birth was female." (*Id*.) Dr. Toomey has been living as a male since 2003 and has received medically necessary hormone therapy and chest reconstruction surgery as treatment for diagnosed gender dysphoria. (Doc. 1 at 12; Doc. 24 at 2.) Dr. Toomey is employed as an Associate Professor at the University of Arizona. (Doc. 1 at 4.) His health insurance ("the Plan") is a self-funded plan provided by the State of Arizona. (*Id*. at 3, 10.) While the Plan provides coverage for most medically necessary care, including care related to transsexualism and gender dysphoria such as mental health counseling and hormone therapy, "gender reassignment surgery" is excluded from coverage. (*Id*. at 3, 10, 13; Doc. 24 at 3.)

At the recommendation of his doctor, Dr. Toomey sought preauthorization for a total hysterectomy from his provider, Blue Cross Blue Shield of Arizona ("BCBSAZ"). (Doc. 24 at 3.) BCBSAZ refused to approve the procedure due to the Plan's exclusion of "gender reassignment surgery." (*Id*. at 4.) Subsequently, Dr. Toomey filed an Equal Employment Opportunity Commission ("EEOC") Charge against the Arizona Board of Regents ("ABOR") alleging sex discrimination under Title VII. (Doc. 24–1.) Upon receiving a Notice of Right to Sue, he filed this lawsuit. (Doc. 39 at 15.) Plaintiff seeks declaratory relief, "including but not limited to a declaration that Defendants . . . violated Title VII and . . . the Equal Protection Clause," as well as permanent injunctive relief "requiring Defendants to remove the Plan's categorical exclusion of coverage for gender reassignment surgery and evaluate whether [Plaintiff's] . . . surgical care for gender dysphoria is 'medically necessary' in accordance with the Plan's generally applicable standards and procedures." (Doc. 1 at 22.)

State Defendants filed the pending Motion to Dismiss on March 18, 2019. (Doc. 24.) State Defendants argue this action should be dismissed because: (1) Plaintiff failed to exhaust the Plan's internal appeals process before bringing suit; (2) Plaintiff fails to properly state a Title VII sex discrimination claim; (3) Plaintiff fails to properly state a

Fourteenth Amendment Equal Protection claim; (4) sovereign immunity bars Plaintiff's claims against State Defendants; and (5) Plaintiff failed to exhaust his Title VII remedies because he failed to file an EEOC charge against the State of Arizona or the Arizona Department of Administration ("ADOA") (Doc. 24; *see also* Doc. 41).

On June 24, 2019, Magistrate Judge Bowman issued an R&R recommending that State Defendants' Motion to Dismiss be partially granted and partially denied. (Doc. 46.) The R&R rejects State Defendants' argument concerning failure to exhaust the Plan's internal appeals process, finding that the Plans' exhaustion provision was ambiguous and that it was unclear whether the parties intended the appeals process to apply to Title VII and Equal Protection challenges. (*Id.* at 5.) The R&R recommends dismissing Plaintiff's Title VII claim as non-viable and therefore does not reach the issue of administrative exhaustion with respect to the Title VII claim. (*Id.* at 5–8, 11.) The R&R recommends denying State Defendants' Motion to Dismiss with respect to Plaintiff's Equal Protection claim on the grounds that Plaintiff has "alleged facts that, if true, could justify a heightened level of scrutiny" under the Equal Protection Clause. (*Id.* at 9.) With respect to sovereign immunity, the R&R finds that this case "falls comfortably within the *Ex Parte Young* exception." (*Id*. at 10.)

All parties filed Objections (Docs. 49; 51; 52) and Plaintiff and State Defendants filed Responses (Docs. 56; 57; 60). Defendants Arizona Board of Regents, Ron Shoopman, Larry Penley, Ram Krishan, Bill Ridenour, Lyndel Manon, Karrin Taylor Robson, Jay Heiler, and Fred DuVal object to the R&R only "to the extent that the dismissal of the Title VII claim does not apply to all parties." (Doc. 51.) State Defendants object to the R&R's findings and recommendations regarding Plaintiff's Equal Protection claim, exhaustion of the Plan's internal appeals process, and sovereign immunity. (Doc. 52.) Plaintiff objects to the R&R's findings and recommendations regarding his Title VII claim. (Doc. 49.)

On October 22, 2019, Judge Bowman denied State Defendants' Motion to Stay Proceedings Pending U.S. Supreme Court Decision in *R.G. & G.R. Harris Funeral Homes v. EEOC*, 2019 WL 1756679 (2019). (Docs. 41, 66.)

II. Standard of Review

A. Review of Report and Recommendation

A district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations" made by a magistrate judge. 28 U.S.C. § 636(b)(1). The district judge must "make a de novo determination of those portions" of the magistrate judge's "report or specified proposed findings or recommendations to which objection is made." *Id.*

B. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) permits a defendant to file a motion to dismiss for failure "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A dismissal under Rule 12(b)(6) "may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (internal quotation omitted). To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A court evaluating a motion to dismiss must view the complaint "in the light most favorable to the plaintiff." *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir. 1990). All well-pleaded factual allegations of the complaint must be accepted as true; however, legal conclusions and other conclusory statements are not entitled to a presumption of truth. *Iqbal*, 556 U.S. at 678–79, 681.

Federal Rule of Civil Procedure 12(b)(1) permits dismissal of a claim when the Court lacks subject-matter jurisdiction over the claims presented. Fed. R. Civ. P. 12(b)(1). "[W]hen a federal court concludes that it lacks subject-matter jurisdiction, [it] must dismiss the complaint in its entirety." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). A failure to exhaust administrative remedies bars federal subject-matter jurisdiction "where the exhaustion statute explicitly limits the grant of subject matter jurisdiction and is an integral part of the statute granting jurisdiction." *McBride Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 979 (9th Cir. 2002).

III. Discussion

A. Administrative Exhaustion

Regulations implementing the Public Health Services Act require health insurance plans to provide internal processes for "full and fair review" of adverse benefits decisions. *See* 45 C.F.R. § 147.136(b); 29 C.F.R. § 2560.503–1(h). These requirements apply both to those health plans subject to the Employee Retirement Income Security Act ("ERISA") and those not subject to ERISA. Although ERISA does not explicitly require exhaustion of administrative remedies, federal courts have held that "an ERISA plaintiff claiming a denial of benefits must avail himself or herself of a plan's own internal review procedures before bringing suit in federal court." *Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 626 (9th Cir. 2008) (internal quotation omitted); *see also Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980) ("federal courts have the authority to enforce the exhaustion requirement in suits under ERISA" and "as a matter of sound policy they should usually do so").

Exhaustion is not required if "resort to the administrative route is futile or the remedy inadequate." *Amato*, 618 F2d at 568 (internal quotation omitted); *see also Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 252 (3d Cir. 2002) (courts require exhaustion of administrative remedies for ERISA claim benefits but not for claims of substantive statutory violations). Furthermore, ERISA's court-created exhaustion requirement applies only if the relevant plan requires exhaustion. *Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1298–99 (9th Cir. 2014).

Here, the Plan contains an exhaustion provision stating that "no action at law or in equity can be brought to recover on this Plan until the appeals procedure has been exhausted as described in this Plan." (Doc. 1–2 at 77.) The R&R found that this exhaustion provision was ambiguous and that it was not clear if the parties intended the internal appeals process to apply to a Title VII or Equal Protection Clause challenge to a Plan exclusion; therefore, the R&R held that the intent of the parties was a matter for determination by the trier of fact based on extrinsic evidence. (Doc. 46 at 3–5.) State

Defendants object, arguing that the Plan's exhaustion provision is unambiguous and that it required Plaintiff to exhaust the Plan's internal appeals process prior to suing. (Doc. 52 at 2-6; *see also* Doc. 26 at 6–8.) Plaintiff responds that the exhaustion requirement is inapplicable because Plaintiff is not seeking to recover on the Plan but, instead, is seeking to have the Plan declared unlawful under Title VII and the Equal Protection Clause. (Doc. 57 at 3–6.)

The Court agrees with Plaintiff that the Plan's exhaustion provision is inapplicable to the claims asserted in this litigation. Contrary to State Defendants' assertions, Plaintiff is not seeking to "recover on th[e] Plan." Rather, Plaintiff is seeking declaratory and injunctive relief for alleged violations of Title VII and the Equal Protection Clause. (Doc. 1 at 16–22.) Neither the administrative exhaustion doctrine, nor the Plan itself, bars Plaintiff's suit. The Court will deny State Defendants' Motion to Dismiss to the extent it argues that Plaintiff's claims are barred by a failure to exhaust administrative remedies.

B. Sovereign Immunity

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state . . ." U.S. Const. Amend. XI. The doctrine of sovereign immunity has been interpreted to bar suits against an unconsenting state brought by private parties, whether or not they are citizens of that state, and regardless of the nature of the relief sought. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54 (1996); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890); *but see* 42 U.S.C. § 2000d-7 (sovereign immunity does not bar suit against a state for a violation of specified federal statutes prohibiting discrimination, including Title VI, if the state receives federal funds).

The *Ex Parte Young* exception to the doctrine of sovereign immunity permits actions seeking prospective injunctive relief against a state officer whose acts allegedly violate federal law. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) ("a court need only conduct a straightforward inquiry into whether [the] complaint

alleges an ongoing violation of federal law and seeks relief properly characterized as prospective"); *but see Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (the Eleventh Amendment bars a retroactive payment by the state of benefits found to have been wrongfully withheld).

Defendants contend that the doctrine of sovereign immunity bars Plaintiff's claims against Defendants Davidson and Shannon as state officers. (Doc. 24 at 14–15.) Defendants contend that Plaintiff is actually seeking "a reversal of the Health Plan's August 10, 2018 denial of coverage for his gender reassignment surgery." (*Id.* at 15.) Defendants characterize Plaintiff's remedy as "in fact, a 'retroactive payment of benefits'" that is barred by the Eleventh Amendment pursuant to *Edelman v. Jordan*, 415 U.S. 651 (1974). (*Id.*)

The R&R found that Plaintiff's "proposed remedy is entirely prospective" and therefore "falls comfortably within the *Ex Parte Young* exception." (Doc. 46 at 10.) As discussed *supra*, Plaintiff is seeking injunctive and declaratory relief, not a recovery of benefits under the Plan. He is not seeking any remedy based on his past denial of coverage but, instead, prospective relief requiring his surgery to be evaluated for medical necessity under the Plan's generally applicable standards and procedures. State Defendants' Motion to Dismiss, and their Objection to the R&R's findings on sovereign immunity, rely upon a mischaracterization of Plaintiff's requested relief. The R&R is adopted in full with respect to its findings on sovereign immunity. The Court will deny the Motion to Dismiss to the extent it argues that this action is barred by the doctrine of sovereign immunity.

C. Title VII of the Civil Rights Act

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Health insurance is a term, condition, or privilege of employment under Title VII. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983). An employer violates Title VII if, but for the individual's sex, the employer's treatment of the individual would

be different. *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978). Gender discrimination at work based on sex stereotyping or perceived gender nonconformity is also prohibited by Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). Both men and women are protected by Title VII's prohibition on sex discrimination. *See id.* at 251 (Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (internal quotation omitted)); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–81 (1998) (same-sex sexual harassment is actionable under Title VII).

Sex discrimination can occur in the context of either "disparate treatment" or "disparate impact." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009); *see also Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 131 (3d Cir. 1996). Under a disparate impact theory, a prima facie case of discrimination occurs when a facially neutral policy affects members of a protected class in a discriminatory manner. *Dothard v. Rawlinson*, 433 U.S. 321, 328–29 (1977). This triggers a burden-shifting analysis wherein the employer must prove that its practices are legitimately related to job performance or business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, (1973). "Proof of discriminatory motive is not required under a disparate impact theory." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (internal quotation and alteration omitted).

Under a disparate treatment theory, a prima facie case is made when "an employer has treated a particular person less favorably than others because of a protected trait." *Ricci*, 557 U.S. at 577 (internal quotation and alterations omitted). Such cases present "the most easily understood type of discrimination." *Id.* (internal quotation omitted). Where the policy at issue is facially discriminatory, a disparate treatment—rather than disparate impact—analysis is appropriate. *Healey*, 78 F.3d at 131. "[A] disparate treatment claim cannot succeed unless the employee's protected trait [] played a role in the [employer's decision-making process] and had a determinative influence on the outcome." *Hazen Paper Co.*, 507 U.S. at 610. In some situations, discriminatory motive can "'be inferred from the

mere fact of differences in treatment.'" *Id*. at 609 (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n. 15 (1977)).

United States Circuit Courts are divided on whether discrimination based on a person's transgender or transsexual identity constitutes sex discrimination for purposes of Title VII. Some courts have found that transgender individuals are a protected class in and of themselves; others have found that such individuals are protected, not by virtue of their status as transgendered, but by applying the analysis used in cases finding sex discrimination against cisgendered (i.e. not transgendered) individuals. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (a transgender individual states a viable sex discrimination claim if the perpetrator was motivated by the victim's real or perceived non-conformance to socially constructed gender norms); *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) ("discrimination on the basis of transgender and transitioning status violates Title VII"); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("transsexuals are not a protected class under Title VII"); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) ("a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity"); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("discrimination against a transgender individual because of her gender-nonconformity is sex discrimination").

District Courts in the Ninth Circuit have found that discrimination based on transgender or transsexual identity violates Title VII. *See Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) ("discrimination on the basis of transgender identity is discrimination on the basis of sex"); *Roberts v. Clark Cnty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016) ("discrimination against a person based on transgender status is discrimination 'because of sex' under Title VII"); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) ("disparate treatment based on unique, sex-based characteristics . . . is sex discrimination prohibited by Title

VII.")

In the current 2019–2020 term, the Supreme Court will address whether Title VII prohibits discrimination against transgender people based on (1) their status as transgendered or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019). Congress has not explicitly added transgender status to the list of protected classes under Title VII, though such legislation has been proposed. *See, e.g.*, The Equality Act: H.R. 5, 116th Cong. (2019).

The R&R found that Plaintiff's Title VII claim fails as a matter of law because discrimination based on a person's transsexual status is not discrimination based on sex. (Doc. 46 at 8.) The Court disagrees and finds that Plaintiff has alleged a sufficient factual and legal basis to survive dismissal of his Title VII claim. Discrimination based on transgender status or identity is discrimination based on sex because, but for the individual's sex, the employer's treatment of the individual would be different. *Manhart*, 435 U.S. at 711. The sex characteristic is inseparable from transgender identity: had Plaintiff been born a male, rather than a female, he would not suffer from gender dysphoria and would not be seeking gender reassignment surgery. *See Schwenk*, 204 F.3d at 1201–02 (Plaintiff's transsexuality was at least one motivating factor for the attack and therefore it occurred "because of gender"). Title VII's prohibition against sex discrimination is not limited to acts of overt harassment, and *Schwenk*'s reasoning is persuasive here.

Like the plaintiff in *Schwenk*, Plaintiff's alleged harm occurred because his natal sex does not match his gender identity. The Plan at issue covers cisgender individuals requiring medically necessary hysterectomies but does not cover transgender individuals requiring medically necessary hysterectomies for the purpose of gender reassignment. Had Plaintiff required a hysterectomy for any medically necessary purpose other than gender reassignment, the Plan would have covered the procedure. This narrow exclusion of coverage for "gender reassignment surgery" is directly connected to the incongruence between Plaintiff's natal sex and his gender identity. Discrimination based on the

incongruence between natal sex and gender identity—which transgender individuals, by definition, experience and display—implicates the gender stereotyping prohibited by Title VII. *See Prescott*, 265 F. Supp. 3d at 1099 ("by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth") (internal quotation and alteration omitted); *see also Price Waterhouse*, 490 U.S. at 250.

Defendants assert that the State must engage in line-drawing in order to contain health care costs. This may be so, but such line drawing, when it results in unjustified disparate treatment or impact based on sex or gender, violates Title VII. Were Plaintiff a cisgender female, the Plan would cover Plaintiff's medically necessary hysterectomy. The Plan's disparate treatment of Plaintiff's medical needs—its exclusion of coverage for gender reassignment surgery—potentially qualifies as sex discrimination because it negatively impacts those, and only those, who do not conform to the gender identity typically associated with the sex they were assigned at birth.

Defendants also assert that the exclusion targets a "service" rather than transgender individuals. However, transgender individuals are the only people who would ever seek gender reassignment surgery. No cisgender person would seek, or medically require, gender reassignment. Therefore, as a practical matter, the exclusion singles out transgender individuals for different treatment. Defendants' bare assertion that the exclusion is "neutral" is insufficient to support dismissal of the claim.

Whether the Plan's categorical exclusion of a surgical procedure necessary to treat a medical condition arising from Plaintiff's transgender status constitutes impermissible sex discrimination or gender-stereotyping is not a matter for the Court to determine on a motion to dismiss. However, the Court finds that Plaintiff has alleged facts sufficient to proceed with his Title VII claim. Therefore, the Court rejects the R&R's findings on the Title VII claim. State Defendants' Motion to Dismiss will be denied as to the Title VII claim.[2]

[2] Based on the Court's denial of State Defendants' Motion to Dismiss as to Plaintiff's Title VII claim, the Objection of Defendants Arizona Board of Regents, Ron Shoopman, Larry Penley, Ram Krishan, Bill Ridenour, Lyndel Manon, Karrin Taylor Robson, Jay Heiler, and Fred DuVal (Doc. 51) will be denied as moot. The Court notes, however, that if these

D. Title VII Exhaustion

Title VII requires a complainant to file a charge with the EEOC within one hundred and eighty days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1). The Complainant must provide notice of the charge to "the person against whom such charge is made within ten days" of filing the charge." *Id*. "One function of the administrative charge is to provide information to enable the EEOC to determine the scope of the alleged violation and to attempt conciliation." *Kaplan v. Int'l All. of Theatrical & Stage Emp. & Motion Picture Mach. Operators of U.S. & Canada*, 525 F.2d 1354, 1359 (9th Cir. 1975), *abrogated on other grounds by Laughon v. Int'l Alliance of Theatrical Stage Employees*, 248 F.3d 931 (9th Cir. 2001). The charge must be sufficient to notify the recipient that employment discrimination is claimed. *See Cooper v. Bell*, 628 F.2d 1208, 1211 (9th Cir. 1980).

A plaintiff's failure to "substantially comply" with the EEOC claim presentation requirements requires the dismissal of Title VII claims for lack of subject-matter jurisdiction. *Sommatino v. United States*, 255 F.3d 704, 707–11 (9th Cir. 2001) (district court lacked subject-matter jurisdiction over Title VII claims where complainant communicated with EEOC counselor but never filed formal charge). "[T]he jurisdictional scope of a Title VII claimant's court action depends upon the scope of both the EEOC charge and the EEOC investigation." *Id.* at 709 (internal quotation omitted). The court has jurisdiction over "charges of discrimination that are like or reasonably related to the allegations in the EEOC charge, or that fall within the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Id*. (internal quotation omitted).

Generally, "Title VII claimants may sue only those named in the EEOC charge[.]" *Sosa v. Hiraoka*, 920 F.2d 1451, 1458 (1990). However, "Title VII charges can be brought against persons not named in an E.E.O.C. complaint as long as they were involved in the acts giving rise to the [] claims." *Id.* at 1458–59 (internal quotation omitted). Furthermore,

Defendants sought dismissal of Plaintiff's Title VII claim, they should have filed a Motion to Dismiss or joined the State Defendants' Motion to Dismiss.

the court has jurisdiction over defendants not named in the charge if "the EEOC or defendants themselves should have anticipated" that they would be named in a Title VII suit. *Id*. at 1459 (internal quotation omitted). Additionally, "if the respondent named in the EEOC charge is a principal or agent of the unnamed party, or if they are substantially identical parties, suit may proceed against the unnamed party." *Id*. (internal quotation omitted).

State Defendants contend that because Plaintiff named only ABOR in his EEOC Charge and not the State of Arizona or the ADOA, he failed to exhaust his administrative remedies and this Court lacks subject-matter jurisdiction over his Title VII claim. (Doc. 24 at 16–17). The R&R did not reach this argument. The Court finds that the State of Arizona was involved in the acts giving rise to Plaintiff's Title VII claim. *See Sosa*, 920 F.2d at 1458–59. Furthermore, the State of Arizona reasonably should have anticipated that it would be named in a Title VII suit arising from Plaintiff's EEOC charge. *Id*. at 1459. Therefore, the Court has jurisdiction over the Title VII claim against the State of Arizona. The Court will deny State Defendants' Motion to Dismiss to the extent it argues failure to exhaust Title VII administrative remedies.

E. Equal Protection

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "[L]egislation is presumed to be valid" under the Equal Protection Clause unless it classifies people based on inherently suspect characteristics such as race, national origin, or gender. *Id.* at 440–41; *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Heightened judicial scrutiny may apply where the individual is a member of a "discrete and insular minority," *Graham*, 403 U.S. at 372, or has an "immutable characteristic determined solely by the accident of birth" that bears no relationship to his or her ability to contribute to society, *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973).

In the case of governmental classifications based on gender, an "exceedingly persuasive" justification is required. *United States v. Virginia*, 518 U.S. 515, 531 (1996). A gender classification fails unless it is "substantially related to the achievement of an important governmental interest." *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 855 (9th Cir. 2001). Application of this "heightened" or "intermediate" scrutiny standard shifts the burden of proof to the government to show that the standard has been met. *Id.* at 855. The burden of proof creates "a rebuttable presumption of unconstitutionality for state-sponsored gender discrimination." *Id*. Heightened scrutiny for gender-based classifications, as opposed to classifications based on non-suspect statuses, is necessary because "the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686.

In contrast, a government action or classification "neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity" and is subject to only rational-basis review. *Heller v. Doe*, 509 U.S. 312, 319–21 (1993). "[L]egislation is presumed to be valid and will be sustained if the classification [] is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 439. There must be "a rational relationship between the disparity of treatment and some legitimate government purpose." *Heller*, 509 U.S. at 320. The burden rests with the party attacking the classification to "negative every conceivable basis which might support it." *Id*.

The difference between non-suspect classifications and suspect classifications is whether "individuals in the group . . . have distinguishing characteristics relevant to interests the State has the authority to implement[.]" *Cleburne*, 473 U.S. at 441 (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976)). Classes warranting heightened scrutiny are those "discrete and insular" groups that are "saddled with such disabilities," "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Murgia*, 427 U.S. 307, 313 (1976) (internal quotation omitted).

"[A] bare desire to harm a politically unpopular group cannot constitute a legitimate

government interest." *Romer v. Evans*, 517 U.S. 620, 634 (1996). Furthermore, a state's "valid interest in preserving [] fiscal integrity" and limiting its expenditures do not justify "invidious classification[s]" between citizens. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *see also Collins v. Brewer*, 727 F. Supp. 2d 797, 811 (D. Ariz. 2010), *aff'd sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (cost concerns could not justify denying insurance coverage to same-sex couples under rational basis review); *but see IMS Health Inc. v. Sorrell*, 630 F.3d 263, 276 (2d Cir. 2010) (state has a "substantial interest" in lowering health care costs). When the cost of health insurance for a class of persons excluded from coverage comprises only a small percentage of the State's health insurance expenditures for its employees, an Equal Protection claim is strengthened. *Collins*, 727 F. Supp. 2d at 811-12.

The R&R found that Plaintiff "has alleged facts that, if true, could justify a heightened level of scrutiny," and that State Defendants had not shown that the Plan's exclusion of gender reassignment surgery would survive a heightened level of scrutiny. (Doc. 46 at 9-10.) State Defendants object, arguing that rational basis review is applicable and that, even if a heightened level of scrutiny were to apply, the Plan's exclusion would survive such scrutiny based on the governmental interest in containing and reducing health care costs. (Doc. 52 at 6-10.) Plaintiff responds that, in the Ninth Circuit, transgender status is a suspect or quasi-suspect classification subject to heightened scrutiny. (Doc. 57 at 9 (citing *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019).) Plaintiff further argues that, under any standard of scrutiny, State Defendants' asserted interest in reducing health care costs is insufficient as a matter of law to justify "treating the costs associated with transition-related surgery differently from the costs associated with other medically necessary treatments." (*Id.* at 10-11.)

Plaintiff has alleged a sufficient factual and legal basis to survive the Motion to Dismiss on his Equal Protection claim. The Court agrees with the R&R that Plaintiff has alleged sufficient facts that, if true, could justify a heightened level of scrutiny. But even

were the Court to apply rational basis review to Plaintiff's Equal Protection claim—requiring the government to show only that the exclusion of gender reassignment surgery is rationally related to a legitimate interest—it is not certain that Plaintiff's claim would fail that test. The Court finds *Romer v. Evans* instructive. 517 U.S. 620 (1996). In that case, the United States Supreme Court held that a Colorado state law that precluded any government action designed to protect people who were not heterosexual from discrimination violated the Equal Protection clause. *Id*. at 624. The Court applied rational basis review to the state law and found that it bore no rational relationship to a legitimate state interest. *Id*. at 632–35. The Court also found that the state law was motivated by animosity toward non-heterosexuals and that classifications based purely on animosity toward a "politically unpopular group" are unconstitutional. *Id*. at 634–35.

Limiting health care costs is a legitimate state interest, but that interest cannot be furthered by arbitrary classifications or by harming a politically unpopular or vulnerable group. *See Collins*, 727 F. Supp. 2d at 811. Plaintiff has alleged facts plausibly showing that the Plan's exclusion of gender reassignment surgery is not rationally related to a legitimate government interest. Therefore, the Motion to Dismiss will be denied as to the Equal Protection claim.

IT IS ORDERED:

1. Plaintiff's Objection to the Report and Recommendation (Doc. 49) is **granted**.
2. Defendants State of Arizona, Andy Tobin, and Paul Shannon's Objection (Doc. 52) is **overruled**.
3. Defendants Arizona Board of Regents, Ron Shoopman, Larry Penley, Ram Krishna, Bill Ridenour, Lyndel Manson, Karrin Taylor Robson, Jay Heiler, and Fred DuVal's Objection (Doc. 51) is **overruled as moot**.
4. The Report and Recommendation (Doc. 46) is **adopted in part, rejected in part, and modified in part**, as set forth above.

. . . .

. . . .

5. Defendants State of Arizona, Andy Tobin, and Paul Shannon's Motion to Dismiss (Doc. 24) is **denied**.

Dated this 20th day of December, 2019.

Honorable Rosemary Márquez
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents, JASON FLECK and ALEXIS THONEN; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents, MICHAEL D. BUNTING, JR. and SHELLEY K. BUNTING; and SAM SILVAINE,	)	
Plaintiffs,	)	
v.	)	1:19CV272
DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

LORETTA C. BIGGS, District Judge.

North Carolina offers healthcare coverage to its employees through a State Health Plan (the "State Health Plan" or the "Plan"). N.C. Gen. Stat. § 135-48.2. While enrollees can access a wide array of medical benefits, the Plan categorically excludes coverage for treatment sought "in conjunction with proposed gender transformation" or "in connection with sex changes or

modifications" (the "Exclusion"). (ECF No. 1 ¶ 155.) Plaintiffs allege that the Exclusion violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;[1] Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*; and Section 1557 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18116. (*Id.* ¶¶ 124–157.)

Before the Court are two motions to dismiss: Defendants University of North Carolina at Chapel Hill, North Carolina State University, and University of North Carolina at Greensboro (together, the "University Defendants") move to dismiss Plaintiffs' Title IX claim (ECF No. 30), whereas Defendants Dale Folwell, Dee Jones, and the North Carolina State Health Plan for Teachers and State Employees ("NCSHP") (together, the "State Defendants") seek dismissal of Plaintiffs' Equal Protection and ACA claims, (ECF No. 32). For the reasons that follow, both motions will be denied.

I. BACKGROUND

Plaintiffs are all current or former employees of University Defendants, or the dependents of said employees. (ECF No. 1 ¶¶ 7–11.) All are enrolled, or were enrolled, in the State Health Plan. (*Id.* ¶ 1.) Further, all are, or are the parents of, transgender individuals with a condition called gender dysphoria. (*See id.* ¶¶ 3, 61, 69, 82, 98, 115.)

According to Plaintiffs' complaint, each of us has an internal sense of being a particular gender; a gender identity. (*Id.* ¶ 24.) For most people, gender identity is consistent with the sex we are assigned at birth. However, transgender men and women have gender identities which differ from their assigned sexes. This incongruence can result in gender dysphoria—

[1] Plaintiffs bring their Equal Protection claim pursuant to 42 U.S.C. § 1983. (ECF No. 1 ¶ 125.)

"a feeling of clinically significant stress and discomfort born out of experiencing that something is fundamentally wrong." (*Id.* ¶ 27.) Gender dysphoria is a recognized medical condition which, if left untreated, may result in severe anxiety, depression, or suicidal ideation. (*See id.* ¶¶ 27–29.)

Further, the complaint alleges that treatment for gender dysphoria includes gender transition, which is the process of "com[ing] to live in a manner consistent with . . . gender identity." (*Id.* ¶ 31.) For some people, medical intervention is "a critical part" of gender transition. (*Id.* ¶ 35.) Obtaining a psychological diagnosis of gender dysphoria is a first step. (*Id.*) Later, certain secondary sex characteristics (for example, hair-growth patterns and body fat distribution) can be masculinized or feminized through hormone replacement therapy. (*Id.* ¶ 36.) In some cases, gender-confirming surgery is ultimately needed to "better align . . . primary or secondary sex characteristics with . . . gender identity." (*Id.* ¶¶ 37–38.) These treatments are not "cosmetic, elective, or experimental"; rather, they are "safe, effective, and medically necessary treatments for a serious health condition." (*Id.* ¶ 39 (quotations omitted).)

With the exception of the 2017 plan year, the State Health Plan has categorically excluded coverage for transition-related healthcare since the 1990s. (*Id.* ¶ 45; ECF No. 33 at 8.) The Plan's third-party administrators—Blue Cross Blue Shield of North Carolina ("BCBSNC"), which administers claims, and CVS Caremark ("CVS"), which administers pharmaceuticals—maintain coverage policies for the treatment of gender dysphoria outside of the Plan. (ECF No. 1 ¶¶ 43, 48.) This means that, absent the Exclusion, "claims for gender-confirming care would be evaluated under the BCBSNC and CVS criteria for individual medical necessity" and covered in the same manner as other claims. (*Id.* ¶ 49.) However, as

it now stands, the Plan denies coverage for medically necessary treatment if the need stems from gender dysphoria, as opposed to some other condition. (*See id.* ¶ 46.) For example, a cisgender[2] woman's medically necessary mastectomy would be covered; a transgender man's would, too, so long as the reason for surgery was not related to gender transition; however, the same procedure would not be covered if needed to treat gender dysphoria.

In this way, Plaintiffs allege, the Plan "single[s] out employees who are transgender, or who have transgender dependents, for unequal treatment." (*Id.* ¶ 56.) On March 11, 2019, they initiated this action against their employers and the Plan's administrators for declaratory and injunctive relief, as well as damages. (*Id.* at 38.) Their three-count complaint asserts the following claims: (1) that by maintaining the Exclusion, Defendants Folwell and Jones discriminate on the bases of both sex and transgender status in violation of the Fourteenth Amendment's Equal Protection Clause; (2) that by offering the Plan to their employees, the University Defendants discriminate on the basis of sex in violation of Title IX; and (3) that by administering the Plan, Defendant NCSHP discriminates on the basis of sex in violation of Section 1557 of the ACA. (*Id.* ¶¶ 124–57.) Defendants now move to dismiss all three claims pursuant to Federal Rules of Civil Procedure 12(b)(1), (6), and (7).[3] (ECF Nos. 30; 32.)

[2] A cisgender individual is "a person whose gender identity corresponds with the sex the person had or was identified as having at birth." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/cisgender (last visited Mar. 9, 2020).

[3] University Defendants reference Rule 12(b)(2) as an alternative ground for dismissal in their motion and accompanying support brief. (ECF Nos. 30; 31 at 2, 4–5, 18.) However, University Defendants do not actually argue that this Court lacks personal jurisdiction over them. Although traceability concerns—which University Defendants do express, (*see* ECF No. 31 at 7–11)—can have a personal-jurisdiction-like quality to them, those arguments are appropriately analyzed as part of standing.

II. LEGAL STANDARDS

Under Rule 12(b)(1), a party may seek dismissal based on the court's "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Subject matter jurisdiction is a threshold issue that relates to the court's power to hear a case and must be decided before a determination on the merits of the case. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 479–80 (4th Cir. 2005). A motion under Rule 12(b)(1) raises the question of "whether [the plaintiff] has a right to be in the district court at all and whether the court has the power to hear and dispose of [the] claim." *Holloway v. Pagan River Dockside Seafood, Inc.*, 669 F.3d 448, 452 (4th Cir. 2012). The burden of proving subject matter jurisdiction rests with the plaintiff, and the trial court may "consider evidence by affidavit, depositions or live testimony without converting the proceeding to one for summary judgment." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Furthermore, when evaluating a Rule 12(b)(1) motion to dismiss, the court should grant the motion "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Richmond, Fredericksburg & Potomac* R.R. *Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

A motion to dismiss filed pursuant to Rule 12(b)(6) "challenges the legal sufficiency of a complaint." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). To survive, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing a claim's plausibility, a court must draw all reasonable inferences in the plaintiff's favor. *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 539 (4th Cir. 2013). However, "mere conclusory and speculative allegations" are insufficient

to withstand dismissal, *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013), and a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments," *Vitol*, 708 F.3d at 548 (quoting *Jordan v. Alt. Res. Corp.*, 458 F.3d 332, 338 (4th Cir. 2006)).

Finally, Rule 12(b)(7) provides that an action may be dismissed for failure to join a required party under Rule 19. *See* Fed. R. Civ. P. 12(b)(7). "The inquiry contemplated by Rule 19 is a practical one" which is left "to the sound discretion of the trial court." *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1108 (4th Cir. 1980). First, the court must determine whether an absent party is "necessary" to the action, as detailed in Rule 19(a). *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005). If joinder is necessary, but infeasible, the court must then determine whether the party is "indispensable" under Rule 19(b), such that the action cannot continue in that party's absence. *See id.* "In general, federal courts are extremely reluctant to grant motions to dismiss based on nonjoinder, and dismissal will be ordered only when the defect cannot be cured and serious prejudice or inefficiency will result." *RPR & Assocs. v. O'Brien/Atkins Assocs., P.A.*, 921 F. Supp. 1457, 1463 (M.D.N.C. 1995), *aff'd*, 103 F.3d 120 (4th Cir. 1996).

III. DISCUSSION

The Court's analysis will proceed as follows. Objections to the two statutory claims (Title IX and ACA) will be evaluated first. Next, the Court will analyze whether Plaintiffs have sufficiently pleaded an Equal Protection claim. Last, the Court will address joinder and Defendants' suggestion that, barring dismissal, this Court should stay proceedings during the pendency of *R.G. & G.R. Harris Funeral Homes*, which is now before the Supreme Court.

A. Title IX Claim

i. Article III Standing

University Defendants challenge Plaintiffs' Title IX claim on three fronts. The first is standing. Parties invoking federal jurisdiction bear the burden of establishing that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). As it relates to the Title IX claim, University Defendants contend that the second and third elements—traceability and redressability—are lacking. (*See* ECF No. 31 at 6–13.)

The State Health Plan's structure and core operating procedures are dictated by statute. NCSHP is the Plan's corporate body, and the State Treasurer "administer[s]" the Plan by setting benefits and rates—subject to approval by a Board of Trustees—with the aid of an Executive Administrator. N.C. Gen. Stat. §§ 135-48.2; 135-48.22; 135-48.23; 135-48.30. All new state employees "must be given the opportunity to enroll or decline enrollment [in the Plan] for themselves and their dependents." *Id.* § 135-48.42(a). This is true whether someone's "employing unit" is a state agency, a state department, or, as relevant here, a state university. *See id.* §§ 135-48.1, 135-48.40.

University Defendants argue that Plaintiffs' alleged injuries are not "fairly traceable" to their conduct because, under the statutory framework detailed above, they cannot dictate the Plan's terms, benefits, or exclusions. (*See* ECF No. 31 at 7–11.) However, Article III traceability is not so rigid. As the Fourth Circuit has explained, "the fairly traceable standard is not equivalent to a requirement of tort causation." *See Hutton v. Nat'l Bd. of Exam'rs in*

Optometry, Inc., 892 F.3d 613, 623 (4th Cir. 2018) (quotations omitted); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate 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."). Rather, traceability merely requires a causal connection between the defendant's conduct and the plaintiff's injury, such that "there is a genuine nexus" between the two. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000). Moreover, at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" to establish traceability, as "each element [of standing] must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561; *see also Bennett v. Spear*, 520 U.S. 154, 171 (1997) (acknowledging that, at the pleading stage, the traceability burden is "relatively modest").

As alleged in the complaint, University Defendants "offer[ ]" (or offered) the Plan to Plaintiffs, and "participate" (or participated) in its availability. (ECF No. 1 ¶¶ 18, 143.) Indeed, had University Defendants not hired Plaintiffs, they would not have been permitted to enroll in the Plan at all. The Court finds that, at this stage, those facts provide a sufficient nexus between the alleged injuries and University Defendants. However, the case for traceability is further bolstered by other aspects of the statutory scheme governing the Plan.[4] For example,

[4] It also appears that the plan is funded, in part, via direct contributions from the University Defendants. *See, e.g.*, NC State University, *Employee Wellness and Work Life*, https://benefits.hr.ncsu.edu/employer-benefits-contributions/ ("NC State pays $518.64 per month towards the State Health Plan insurance coverage for each full-time non-temporary employee . . . ."); UNC-Chapel Hill, *Benefits at UNC-Chapel Hill*, https://hr.unc.edu/benefits/plans/health/ ("The University contributes toward the monthly cost of coverage for regular full-time employees.").

as "employing units," University Defendants play an active role in collecting erroneous payments, N.C. Gen. Stat. § 135-48.37A(b), and settling claims regarding health benefits, *id.* § 135-48.46. *Cf. Tovar v. Essentia Health*, 857 F.3d 771, 778 (8th Cir. 2017) (concluding that two entities—one designated as plan administrator, the other named as claim recipient—were both appropriately named as defendants at the pleading stage because neither was "wholly uninvolved" in operation of the healthcare plan). In short, Plaintiffs' allegations are "plausible on their face with respect to traceability." *Hutton*, 892 F.3d at 624.

University Defendants also argue that a judgment against them would be unlikely to redress Plaintiffs' alleged injuries. (*See* ECF No. 31 at 11–13.) To satisfy the redressability prong, a plaintiff must show that it is "likely, and not merely speculative, that a favorable decision will remedy the injury." *Friends of the Earth*, 204 F.3d at 154 (citing *Lujan*, 504 U.S. at 561). University Defendants contend that they are incapable of remedying Plaintiffs' alleged injuries because only State Defendants have the ability to formally lift the Exclusion. (*See* ECF No. 31 at 12–13.) Be that as it may, there are other ways in which a favorable ruling on Plaintiffs' Title IX claim could give them the relief they seek. First, Plaintiffs have asked for—and "personally would benefit in a tangible way" from—an award of damages. *See Friends of the Earth*, 204 F.3d at 162 (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)); (ECF No. 1 at 38). Second, it appears that University Defendants could offer supplemental healthcare coverage, beyond what the Plan provides, for the treatment of gender dysphoria. The parties disagree as to whether University Defendants actually have such power under state law; University Defendants insist they do not,[5] (*see* ECF No. 31 at 10), while Plaintiffs and State

[5] In support of their position, University Defendants call the Court's attention to two North Carolina Attorney General Advisory Letters which concluded that certain state agencies could not purchase

Defendants insist they do, (*see* ECF Nos. 33 at 9; 35 at 13). Regardless, it is clear that a favorable decision by this Court has the potential to redress Plaintiffs' injuries. Thus, Plaintiffs have plausibly alleged sufficient facts to support standing at this stage of the litigation and may pursue their Title IX claim against University Defendants.

ii. Zone of Interests

Next, University Defendants argue that Plaintiffs Connor Thonen-Fleck and C.B. (the "minor plaintiffs"), as well as their respective parents, Plaintiffs Jason Fleck and Michael Bunting Jr. (the "parent plaintiffs"), lack a statutory cause of action under Title IX. (*See* ECF Nos. 31 at 15–17; 39 at 7–9). A plaintiff who seeks relief for violation of a statute must fall "within the class of plaintiffs whom Congress has authorized to sue" under that statute—the "zone of interests." *Lexmark*, 572 U.S. at 128–29. "To determine if a plaintiff is within the 'zone of interests,' we simply look to the statute itself." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 656 (4th Cir. 2019). The test is therefore straightforward, "requir[ing] nothing more than [the application of] 'traditional principles of statutory interpretation.'" *Id.* (quoting *Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697, 708 (4th Cir. 2016)).

Title IX provides, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). This sweeping language has long been understood as creating a private

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excess liability insurance policies for their employees. (*See* ECF Nos. 31-1 at 3; 31-2 at 7.) However, the Court notes that, in a separate Advisory Opinion, the Attorney General's office concluded that state employers *can* offer voluntary indemnity health plans, so long as said plans do not "duplicate the benefits offered by the State Health Plan." *See* N.C. Att'y Gen. Op. Re: N.C. Gen. Stat. §§ 116-17.2 and 143-34.1(d), 2001 WL 1821361, at *1–2 (N.C.A.G. Oct. 3, 2001).

cause of action for victims of discrimination by institutes of higher learning, including university employees. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). However, the minor and parent plaintiffs' alleged injuries are somewhat indirect. The minor plaintiffs' only ties to University Defendants are through their parents' employment. Meanwhile, the parent plaintiffs' claims spring not from their own gender status, but from the gender status of their children.

University Defendants argue that these connections are too tenuous to put Plaintiffs within the zone of interests. The language of Title IX says otherwise. The minor plaintiffs are "person[s] in the United States" who, as dependents, are entitled to the "benefits of" their parents' employment, and they allege that University Defendants have "denied" them said benefits on the "basis of [their] sex."[6] *See* 20 U.S.C. § 1681(a). The parent plaintiffs, too, are persons who have been denied benefits on the basis of sex—the sex in question just happens to be that of their children, rather than their own. Title IX is typically accorded "a sweep as broad as its language" so as to best fulfill its anti-discriminatory purpose. *See N. Haven Bd.*, 456 U.S. at 521 ("Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the [statute's] scope."). The parent and minor plaintiffs fall within its wide purview.

As explained above, "the breadth of the zone of interests" hinges on the statute at issue. *See Lexmark*, 572 U.S. at 130 (citation omitted). Nevertheless, University Defendants argue that another statute—Title VII of the Civil Rights Act of 1964—should bear on the

[6] University Defendants do not address whether discrimination against a person for being transgender amounts to discrimination "on the basis of sex" for Title IX purposes. However, as explained below, the Court concludes that such discrimination does fall under Title IX's protections. *See infra* at III.A.iii.

Court's determination as to whether the parent plaintiffs may bring claims on their children's behalf. (*See* ECF No. 31 at 16.) It is true that courts sometimes look to Title VII for guidance in interpreting Title IX. *See Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007). However, in key respects, the two are "vastly different statute[s]." *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Title IX is a broadly written general prohibition on discrimination . . . [while] Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute."). As is relevant here, Title VII's text limits its scope to discrimination against an individual "because of *such individual's* . . . sex." 42 U.S.C. § 2000e-2(a) (emphasis added). In contrast, Title IX reaches claims of discrimination "*on the basis of* sex." 20 U.S.C. § 1681(a) (emphasis added). Thus, while Title VII plaintiffs may only allege discrimination due to their *own* sex, *see, e.g.*, *Tovar*, 857 F.3d at 775–76, "Title IX contains no such limitation," *see Jackson*, 544 U.S. at 179. Accordingly, the parent plaintiffs, like their children, are within the class of plaintiffs protected under Title IX and may press their claim.

iii. 12(b)(6)

The last objection University Defendants make is that Plaintiffs have failed to state a cognizable claim for relief against them. (ECF No. 31 at 13.) To state a claim under Title IX, a plaintiff must allege: "(1) that he was [denied the benefits of] an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion;[7] and (3) that the improper discrimination caused [him] harm." *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016), *vacated on other grounds*, 137 S. Ct. 1239 (2017).

[7] Plaintiffs have alleged, and University Defendants have not denied, that all three university employers were receiving federal financial assistance during the relevant times. (*See* ECF No. 1 ¶ 142.)

The Supreme Court recently heard arguments in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*. *See* No. 18-107, 139 S. Ct. 1599 (Mem) (2019). A decision is expected this term. The central question in that case is whether Title VII's sex discrimination provisions cover discrimination against transgender individuals based on (1) their status as transgender, or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See id.* Because courts in this circuit often look to Title VII when construing like terms in Title IX, *see Jennings*, 482 F.3d at 695, the Supreme Court's decision could potentially impact the viability of the Title IX claim in this case.

At this time, however, this Court is left to make its own determination as to whether discrimination "on the basis of sex" encompasses discrimination on the basis of transgender status. While the Fourth Circuit has not ruled on the question, two district courts in this circuit have concluded that claims of discrimination on the basis of transgender status are per se actionable under Title VII (and, by extension, Title IX). *See Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 746–47 (E.D. Va. 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018). This Court agrees with their reasoning and follows it here.

In *Price Waterhouse*, six Justices agreed that Title VII bars discrimination not just on the basis of gender, but on the basis of gender stereotyping as well. 490 U.S. at 250–51; *id.* at 259 (White, J. concurring); *id.* at 272–73 (O'Connor, J., concurring). In that case, a woman was denied partnership in an accounting firm for acting too masculine. *See id.* at 235 ("[I]n order to improve her chances for partnership . . . Hopkins [was advised to] "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."). Noting that "we are beyond the day when an employer could evaluate employees

by assuming or insisting that they matched the stereotype associated with their group," the *Price Waterhouse* Court recognized that discrimination "because of sex" includes discrimination based on nonconformity with the norms and behaviors typically associated with a given sex. *See id.* at 251.

Over the last two decades, courts across the country have followed the logic of *Price Waterhouse* in allowing claims of sex discrimination brought by transgender individuals, who, by definition, do not adhere to the stereotypes associated with their assigned sexes. *See, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048–50 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir. 2011); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *see also G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 654 F. App'x 606, 607 (4th Cir. 2016) (Davis, J., concurring in denial of stay) (agreeing "that discrimination . . . based on . . . transgender status is discrimination because of sex under federal civil rights statutes").

More recently, in *Boyden v. Conlin*, the Western District of Wisconsin applied the principles outlined in *Price Waterhouse* to a case with facts extraordinarily similar to those here. *See* 341 F. Supp. 3d 979 (W.D. Wis. 2018). Like North Carolina, Wisconsin's health insurance plan for state employees excluded medical services "associated with gender reassignment." *Id.* at 988. Siding with the transgender employees challenging the state's plan, the court reasoned that the exclusion unavoidably "implicate[d] sex stereotyping by limiting the availability of medical transitioning . . . thus requiring individuals to maintain the physical characteristics of their natal sex." *Id.* at 997. This amounted to differential treatment "on the basis of sex," the

court held, and triggered the protections of both Title VII and the ACA's anti-discrimination provision. *Id.*

The same is true here. By denying coverage for gender-confirming treatment, the Exclusion tethers Plaintiffs to sex stereotypes which, as a matter of medical necessity, they seek to reject. *See id.* ("[T]he Exclusion entrenches the belief that transgender individuals must preserve the . . . attributes of their natal sex."). This Court therefore finds that, under the reasoning outlined in *Price Waterhouse*, Plaintiffs have properly alleged discrimination "on the basis of sex."

The Exclusion also discriminates on the basis of natal sex—that is, the sex one was assigned at birth—by denying equal access to certain medical procedures, depending on whether an individual's assigned sex is male or female. For example, a cisgender woman born without vagina may qualify for a vaginoplasty (the surgical creation of a vagina) to correct that congenital defect; however, a transgender woman (whose natal sex is male) would not be able to seek the same procedure, even if deemed medically necessary to treat gender dysphoria. Likewise, while a cisgender woman may opt to undergo breast reconstruction after a cancer-related mastectomy, a person whose assigned sex is male cannot receive coverage for breast augmentation to aid in gender transition. In this way, the Exclusion discriminates not just based on nonconformance with sex stereotypes, but based on employee's physical sex characteristics as well.

University Defendants do not seriously contest that discrimination because of transgender status is discrimination because of sex (though State Defendants do). Rather, in moving to dismiss for failure to state a claim, they simply rephrase their arguments related to

standing. (*See* ECF No. 31 at 13–15.) There is no dispute that "a recipient of federal funds may be liable in damages under Title IX *only for its own misconduct*," *see Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629, 640 (1999) (emphasis added); the parties just disagree over whether University Defendants' conduct is sufficiently implicated in this case, (*compare* ECF No. 31 at 14, *with* ECF No. 35 at 16). Plaintiffs have alleged that, as employing units, University Defendants offer the Plan and play a role in its operation. At this stage, those allegations are enough—both to plausibly allege standing and to support a Title IX claim against the universities. Accordingly, University Defendants' motion to dismiss must be denied.

B. ACA Claim

Plaintiffs' second statutory claim is brought under Section 1557 of the ACA, which provides, in relevant parts, (1) that "an individual shall not, on the ground prohibited under . . . [T]itle IX . . . 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," and (2) that "[t]he enforcement mechanisms provided for and available under . . . Title IX . . . shall apply for purposes of violations of this subsection." 42 U.S.C. § 18116(a). The parties do not appear to dispute that the Plan is a "health program or activity . . . receiving Federal financial assistance" within the meaning of Section 1557. However, State Defendants argue that Section 1557 cannot reach the Plan because, as an "agency of the State of North Carolina," the Plan is shielded by sovereign immunity. (*See* ECF No. 33 at 22–27.)

In our federalist system, Article III judicial power is constrained by principles of dual sovereignty. The Eleventh Amendment guarantees that, in the ordinary course, a private party may not sue an unconsenting state (or its governmental units) in federal court. *See Bd. of Trs.*

of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001); *Madison v. Virginia*, 474 F.3d 118, 129 (4th Cir. 2006). However, nothing prevents a state from choosing to waive its immunity. *See Sossamon v. Texas*, 563 U.S. 277, 284 (2011). For instance, Congress often conditions participation in federal spending programs on a waiver of sovereign immunity. *See Madison*, 474 F.3d at 124 ("The Spending Clause is a permissible method of encouraging a State to conform to federal policy choices, because the [State] . . . can always decline the federal grant." (quotations omitted)). A state may waive its immunity by participating in such programs, so long as Congress has expressed "a clear intent to condition participation . . . on a State's consent to waive its constitutional immunity." *Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4th Cir. 1999) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985)). Waiver may never be implied under these circumstances; rather, the requirement of consent must be "unmistakably clear in the language of the statute." *Sossamon*, 563 U.S. at 284–85 (citation omitted).

Section 1557 does not purport to condition a state's acceptance of federal funding on a waiver of sovereign immunity. Nor does any other provision of the ACA. However, in the Civil Rights Remedies Equalization Act of 1986 ("CRREA"), Congress explicitly stated that a state shall not be immune from suit in federal court "for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance*." 42 U.S.C. § 2000d-7(a)(1) (emphasis added). The Fourth Circuit has explained that, in passing CRREA, "Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal condition

of waiver of [sovereign] immunity," such that "any state reading [CRREA] in conjunction with" an applicable nondiscrimination provision "would clearly understand" that it consents to suit for violations of the statute in question. *See Litman*, 186 F.3d at 554; *see also Lane v. Pena*, 518 U.S. 187, 198, 200 (1996). Importantly, CRREA does not apply to every federal program. To fit within CRREA's catch-all language as a "a provision[ ] of any other Federal statute prohibiting discrimination," a provision must "be like the statutes expressly listed."[8] *See Madison*, 474 F.3d at 133. The question, then, is whether Section 1557 is sufficiently similar to the four nondiscrimination statutes named in CRREA, such that a state "would clearly understand" that the acceptance of federal funds would subject it to suit.

Like the four statutes named in CRREA, Section 1557 is a nondiscrimination provision which is directly aimed at recipients of federal funding. *See id.* (reasoning that, "[a]t a minimum" a provision must "be aimed at discrimination" and "require identical treatment of similarly situated individuals" to fit within CRREA's catch-all language). In fact, the kinds of discrimination prohibited by Section 1557 coincide with those referenced in CCREA. *Compare* 42 U.S.C. § 18116(a) (barring discrimination "on the ground prohibited under [T]itle VI . . .

[8] Defendants do not dispute that Section 1557 is a nondiscrimination provision. Rather, they argue that the ACA *as a whole* "is most assuredly not a[n] . . . anti-discrimination statute" similar to those named in CRREA. (*See* ECF No. 33 at 24–25.) This frames the inquiry too broadly. CCREA's catch-all applies to "*the provisions* of any other Federal statute" which, like Section 1557, tie nondiscrimination to federal funding. 42 U.S.C. § 2000d-7(a)(1) (emphasis added). Defendants cite to an out-of-circuit case, *Levy v. Kansas Department of Social and Rehabilitation Services*, 789 F.3d 1164 (10th Cir. 2015), for the proposition that "[a] single provision in a large bill does not suffice." (ECF No. 33 at 25.) However, the provision analyzed by the Tenth Circuit in that case—Section 12203 of the Americans with Disabilities Act—neither mentions federal funding nor the statutes named in CRREA, and therefore could not have provided the link necessary to effectuate a waiver. Section 1557, by contrast, is applicable only to recipients of federal funding and incorporates the grounds and enforcement mechanisms of the statutes named in CRREA.

[T]itle IX . . . the Age Discrimination Act. . . or [Section 504 of the Rehabilitation Act]"), *with* 42 U.S.C. §2000d-7(a)(1) (waiving immunity for violations of "[Section 504] . . . [T]itle IX . . . the Age Discrimination Act . . . [and] [T]itle VI"). Further, the enforcement mechanisms provided for in Section 1557 are exactly those "provided for and available under" the statutes expressly named in CRREA. 42 U.S.C. § 18116(a). In short, it is hard to see how Section 1557 could be any more "like the statutes expressly listed."[9] The two district courts to have directly considered this question agree. *See Boyden*, 341 F. Supp. 3d at 998; *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. 17-4803, 2017 WL 4791185, at *8 (E.D. La. Oct. 24, 2017) ("[CRREA] is an example of a valid waiver . . . and the plain text of § 1557 fits within the four corners of that waiver.").

Nevertheless, State Defendants argue that North Carolina could not have waived its immunity with respect to *this particular lawsuit*, as "[n]othing in the text of Section 1557 [or CRREA] references discrimination on the basis of gender identity or transgender status." (*See* ECF No. 33 at 26.) Of course, "[s]tates cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). However, North Carolina's potential exposure to suits brought by transgender individuals for discrimination on the basis of sex should not have been "surprising." *See*

[9] In their reply brief, State Defendants also argue that CRREA's catch-all provision was never meant to apply to statutes passed after its enactment. (*See* ECF No. 37 at 12–13.) State Defendants do not provide, and the Court cannot locate, any case which addresses this particular argument. However, a straightforward reading of the catch-all provision strongly suggests that its scope is not limited to past statutes. Instead, it appears that Congress intended to effectuate a waiver of sovereign immunity not just under the four named nondiscrimination statutes, but for all statutory provisions sufficiently like them, regardless of their date of origin.

Pennhurst, 451 U.S. at 25. As explained above, *see supra* at III.a.iii, courts across the country have acknowledged for decades that sex discrimination can encompass discrimination against transgender plaintiffs. Further, as a general matter, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). That is particularly true for the nondiscrimination statutes at issue here—in their drafting, the "Federal Government simply [could not] prospectively resolve every possible ambiguity concerning particular applications" of their prohibitions. *See Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985). Surely State Defendants would agree that Title IX (and, by implication, Section 1557) effectuates a waiver of sovereign immunity for sexual harassment claims, despite the fact that the word "harassment" never appears in the statute. *See Davis*, 526 U.S. at 649–50. By the same token, Section 1557 need not include the precise phrasing State Defendants demand to provide sufficient notice of a condition of waiver.

In sum, the Court concludes that Section 1557, when read in conjunction with CRREA, effectuates a valid waiver of sovereign immunity. In light of that waiver, and because Plaintiffs have plausibly alleged a claim of sex discrimination under Title IX, *see supra* at III.A.iii, they have likewise succeeded in stating a plausible claim of discrimination under Section 1557. *See* 42 U.S.C. § 18116(a). Accordingly, State Defendants' motion to dismiss Plaintiffs' ACA claim will be denied.

C. Equal Protection Claim

In addition to their Title IX and ACA claims, Plaintiffs bring an Equal Protection claim against Defendants Folwell and Jones[10] in their official capacities. (ECF No. 1 ¶¶ 124–38.)

[10] In a single sentence, State Defendants argue that Defendant Jones "should be dismissed from this suit" because she "does not determine Plan benefits." (ECF No. 33 at 11 n.1.) However, by statute,

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This principle "is not and cannot be absolute because it is a 'practical necessity that most legislation classify for one purpose or another, with resulting disadvantage to various groups or persons.'" *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)). State action is therefore "presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). "The general rule gives way," however, when the government targets a suspect or quasi-suspect class. *See id.* at 440. State classifications based on race, national origin, or, as relevant here, gender, are subject to heightened scrutiny, as those factors "generally provide[ ] no sensible ground for differential treatment." *Id.*

Discrimination is not always obvious. A policy may appear facially neutral, but nonetheless be discriminatory by design or applied in a discriminatory fashion. *See generally Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977); *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). Sometimes, however, the government's chosen classification will be clear from the text of the law or policy itself. Plaintiffs argue that that is the case here, (*see* ECF No. 34 at 14), and the Court agrees.

On its face, the Exclusion bars coverage for "treatment in conjunction with proposed *gender* transformation" and "*sex* changes or modifications." (ECF No. 1 ¶ 55 (emphasis

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the Plan's Executive Administrator is empowered to "negotiate, renegotiate and execute contracts with third parties," thereby playing a primary role in the operation of the Plan. *See* N.C. Gen. Stat. § 135-48.23. This statutory "*proximity to* and *responsibility for*" the Plan makes Jones a proper defendant in this case. *See S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333–33 (4th Cir. 2008) (explaining that an official is a proper defendant under *Ex parte Young*, 209 U.S. 123 (1908), when the office bears a "special relation" to the challenged state action).

added).) The characteristics of sex and gender are directly implicated; it is impossible to refer to the Exclusion without referring to them. State Defendants attempt to frame the Exclusion as one focused on "medical diagnoses, not . . . gender." (ECF No. 37 at 6.) However, the diagnosis at issue—gender dysphoria—only results from a discrepancy between assigned *sex* and *gender* identity. *Cf. McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) ("[A]n employer cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination," such as "gray hair as a proxy for age."). In short, the Exclusion facially discriminates on the basis of gender, and heightened scrutiny applies.[11]

A policy that classifies on the basis of gender violates the Equal Protection Clause unless the state can provide an "exceedingly persuasive justification" for the classification. *See United States v. Virginia*, 518 U.S. 515, 531 (1996). "The burden of justification is demanding," and the state must show "at least that the challenged classification [1] serves important governmental objectives and [2] that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 533 (citation omitted). At this early stage, State Defendants have failed to satisfy this demanding standard. In fact, the only

[11] Plaintiffs separately argue for heightened scrutiny on "the basis of transgender status," as distinct from the basis of sex. (*See* ECF Nos. 1 ¶¶ 134–38; 34 at 20–21.) The Supreme Court has been reluctant to recognize new suspect or quasi-suspect classifications. *See, e.g.*, *City of Cleburne*, 473 U.S. at 445–46 (refusing to recognize "mental retardation" as a quasi-suspect classification, as "it would be difficult to find a principled way to distinguish" that classification from "a variety of other groups"); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976) (determining that age classifications get rational-basis review). However, multiple lower courts, including some in this circuit, have concluded that "transgender status" is a distinct classification deserving of heightened scrutiny. *See, e.g.*, *Grimm*, 302 F. Supp 3d. at 749 ("[T]ransgender individuals constitute at least a quasi-suspect class."); *M.A.B.*, 286 F. Supp. 3d at 719 (same). Here, Plaintiffs allege that "transgender status" satisfies the factors typically used to identify suspect and quasi-suspect classifications. *Compare M.A.B.*, 286 F. Supp. 3d at 719–20 (outlining four such factors), *with* (ECF No. 1 ¶ 135). However, having already determined that the Exclusion discriminates on the basis of sex, and that Plaintiffs' Equal Protection claim withstands State Defendants' motion to dismiss, the Court declines to reach the issue at this time.

justification presented thus far is that the Exclusion "save[s] money." (ECF No. 33 at 19.) Under ordinary rational-basis review, that could potentially be enough to thwart Plaintiffs' claim. *See, e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 673, 682 (2012) (holding that concerns about administrative expense provided a rational basis for classification). However, when heightened scrutiny applies, "a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens." *Mem. Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974). Accordingly, at this juncture, Plaintiffs' Equal Protection claim must be permitted to move forward.

D. Joinder

As its final ground for dismissal, State Defendants assert that Plaintiffs have failed to join the Plan's Board of Trustees as a required party. (*See* ECF No. 33 at 11 n.1.) State Defendants are correct that, under North Carolina law, "[t]he Treasurer and the Board of trustees must agree to alter Plan benefits." *Id.* However, that does not mean that the Board's absence would prevent this Court from "accord[ing] complete relief among [the] *existing* parties." *See* Fed. R. Civ. P. 19(a)(1)(A) (emphasis added). State Defendants share primary responsibility for the operation and administration of the Plan; an award of declaratory, injunctive, and monetary remedies against them would give plaintiffs all the relief they seek. As complete resolution of the dispute between Plaintiffs and State Defendants does not require joinder of the Plan's Board of Trustees, State Defendants' motion will be denied on this ground as well. *See United States v. Cty. of Arlington*, 669 F.2d 925, 929 (4th Cir. 1982).

E. Request for Stay

The Court will now consider Defendants' alternative request that this action be stayed pending the Supreme Court's resolution of *Harris Funeral Homes*, 139 S. Ct. 1599 (2019). (*See* ECF Nos. 31 at 17–18; 37 at 6 n.1.) As acknowledged above, *Harris* could have a significant effect on this case. *See Hickey v. Baxter*, 833 F.2d 1005 (4th Cir. 1987) (unpublished table decision) (affirming district court's discretionary stay pending Supreme Court resolution of relevant issues). Nevertheless, "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). A party seeking a stay must therefore "justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). Accepting their allegations as true, the potential harm to Plaintiffs resulting from even a mild delay is significant, as they will continue to be denied healthcare coverage for medically necessary procedures. In contrast, the "harm" to Defendants of not staying this case appears to be nothing more than the inconvenience of having to begin discovery.

Judicial economy is, of course, a consideration. However, this case is in its infancy, and it may be months before a decision is issued in *Harris*—a substantial delay for those seeking to vindicate their civil rights. *See, e.g.*, *Sehler v. Prospect Mortg., LLC*, No. 1:13cv473(JCC/TRJ), 2013 WL 5184216, at *3 (E.D. Va. Sept. 16, 2013) (denying stay because four to six months represented a "significant period of delay"). Given the ongoing harm to Plaintiffs, and Defendants' failure to present "clear and convincing circumstances" outweighing that harm, this Court declines to exercise its discretion to stay the proceedings.

IV. CONCLUSION

For the foregoing reasons, the Court will deny Defendants' motions to dismiss and alternative request for stay. Plaintiffs have stated cognizable claims under Tile IX, the ACA, and the Equal Protection Clause. They have sufficiently alleged both Article III standing and entitlement to pursue statutory causes of action under Title IX and the ACA. State Defendants' claim of sovereign immunity also fails here, as does its argument that the absence of the Plan's Board of Trustees would preclude complete relief among the parties.

ORDER

IT IS THEREFORE ORDERED that University Defendants' Motion to Dismiss, (ECF No. 30), and State Defendants' Motion to Dismiss, (ECF No. 32), are each DENIED in their entirety.

This, the 10th day of March 2020.

/s/ Loretta C. Biggs
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:19-cv-272-LCB

MAXWELL KADEL; JASON FLECK; CONNOR THONEN-FLECK, by his next friends and parents, JASON FLECK and ALEXIS THONEN; JULIA MCKEOWN; MICHAEL D. BUNTING, JR.; C.B., by his next friends and parents, MICHAEL D. BUNTING, JR. and SHELLEY K. BUNTING; and SAM SILVAINE, Plaintiffs, v. DALE FOLWELL, in his official capacity as State Treasurer of North Carolina; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; NORTH CAROLINA STATE UNIVERSITY; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO; and NORTH CAROLINA STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, Defendants.	**NOTICE OF APPEAL**

Notice is hereby given that Defendant North Carolina State Health Plan for Teachers and State Employees hereby appeals to the United States Court of Appeals for the Fourth Circuit. This appeal is taken from the *Memorandum Order and Opinion*, (Doc. No. 45), entered on March 11, 2020.

Respectfully submitted, this the 8th day of April, 2020.

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**Notice of Special Appearance Forthcoming*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

This the 8th day of April, 2020.

/s/ Mark A. Jones