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; and 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.

Appeal from the U.S. District Court for the Middle District of North Carolina
Case No. 1:19-cv-272-LCB-LPA

BRIEF FOR EQUALITY NORTH CAROLINA AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE

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DISCLOSURE STATEMENT

No. 20-1409

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Defendants.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Equality North Carolina, which is an amicus curiae, makes the following disclosure:

1. Is amicus a publicly held corporation or other publicly held entity? ☐YES ☒NO

2. Does amicus have any parent corporations? ☐YES ☒NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☒NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae does not complete this question) ☐YES ☐NO

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☒NO
If yes, identify any trustee and the members of any creditors' committee:

Dated: October 7, 2020

/s/ *Michael W. Weaver*

Counsel for Amicus Curiae
Equality North Carolina

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INTEREST OF AMICUS CURIAE[1]

Founded in 1979, Equality North Carolina (Equality NC) is a non-profit, non-partisan organization dedicated to securing rights and protections for lesbian, gay, bisexual, transgender, and queer (LGBTQ) North Carolinians. In service of its mission, Equality NC tirelessly lobbies the North Carolina General Assembly, executive branch, and local governments; broadcasts LGBTQ news, stories and content; and mobilizes communities on issues that matter most to North Carolinians, including parental rights, inclusive anti-bullying policies, employment discrimination, hate violence, privacy rights, sexuality education, adoption, youth homelessness, criminalization, and HIV/AIDS.

Equality NC is particularly concerned by the refusal of the North Carolina State Health Plan for Teachers and State Employees to cover critical gender-confirming healthcare for state employees and their dependents.

[1] All parties to this appeal have consented to the filing of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amicus curiae and its counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The district court held that the North Carolina State Health Plan for Teachers and State (the State Plan or Plan) waived sovereign immunity for discrimination claims under Section 1557 of the Patient Protection and Affordable Care Act (ACA) as a condition of receiving federal healthcare funds. JA230–34. The State Plan acknowledges on appeal that Congress can do this, but contends that it was not sufficiently clear to State officials that Congress *had* done so.

In support, the Plan repeatedly advances the principle that "[t]he clarity of the demand for a waiver [must be] viewed 'from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the] funds and obligations that go with those funds.'" Opening Br. 15, 20, 23–24, 26 (quoting *Arlington Cent. Sch. Dis. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Applying it, the Plan suggests that State officials had no way of knowing that the Plan could be sued for discrimination under Section 1557. That is false. The State Plan long knew it could be sued for discriminating in violation of Section 1557 and continues to publicly recognize that it can be sued to this day.

Through public record requests, Equality NC obtained documents showing precisely what the State Plan knew about its amenability to suit.[2] Time and again, these records show that State Plan officials engaged in deciding whether to accept federal funds and the corresponding obligations and knew (1) that the Plan had to eliminate its categorical exclusion of gender-confirming healthcare coverage; (2) that not doing so was discrimination in violation of Section 1557; and, ultimately, (3) that discriminating under Section 1557 would subject the Plan to a lawsuit.

The public records are replete with State Plan officials acknowledging their non-discrimination obligation and that their failure to satisfy it would subject them to litigation:

- In July 2016, "[t]he availability and use of this [discrimination] grievance procedure does not prevent a person from pursuing other legal or administrative remedies, including filing a complaint of discrimination on the basis of race, color, national origin, sex, age, or disability in court . . . ." EQNC A.12 at 13.
- In November 2016, "we also risk being sued by members who think our coverage is discriminatory. Should that be noted as well?" EQNC A.18 at 18.

[2] Equality NC has placed pertinent documents obtained through public record requests (*see* EQNC A.1, 2, 4, 5, 9) into a document repository available online at https://go.mwe.com/amicus-brief. An index of the cited documents is appended to this brief (*see infra* pp. 30–33). We cite to these documents as "EQNC A._" and have included a hyperlink on each citation to the cited document.

In response, the Plan chose to cover gender-confirming healthcare for the 2017 plan year to comply with Section 1557 and avoid the inevitable discrimination lawsuit. In the Plan's words in December 2016:

> If the Plan did not take action to comply with the federal law and federal regulation, the Plan would have risked losing millions of dollars in federal funding and faced discrimination lawsuits for non-compliance.

EQNC A.20 at 22.

The Plan changed its tune on the substance of coverage when a new Treasurer took office, but not on the procedure:

> Until the court system . . . tells [the State] that we "have to," "when to," and "how to" spend taxpayers money on sex change operations, [Treasurer Folwell] will not make a decision that has the potential to discriminate against those who desire other currently uncovered elective, non-emergency procedures.

EQNC A.24 at 25.

The Treasurer's invitation remains open today. Even as the Plan asserts to this Court that it had no way of knowing that it could be sued for discrimination under Section 1557, the Plan's current Section 1557 grievance procedure, available on its website as revised March 23, 2020, explicitly states that it can be sued for discrimination under Section 1557:

> The Plan receives funding from the United States Department of Health and Human Services through the Retiree Drug Subsidy Program. Therefore, the Plan is subject to Section 1557 of the Affordable Care Act (42 U.S.C. 18116) and its implementing regulations at 45 CFR Part 92, issued by the U.S. Department

> of Health and Human Services. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities. . . .
>
> The availability and use of *this procedure does not prevent a person from* pursuing other legal or administrative remedies, including *filing a complaint of discrimination on the basis of* race, color, national origin, *sex*, age, or disability *in court* or with the United States Department of Health and Human Services, Office for Civil Rights.

N.C. Dep't of State Treasurer, State Health Plan, *Section 1557 Grievance procedure* (visited Sept. 23, 2020), perma.cc/27X3-8TAY (emphasis added).

The State Plan's litigation-inspired contention that it couldn't have known it waived sovereign immunity is cut out of whole cloth. The Court should accept the Treasurer's invitation, affirm the district court on sovereign immunity, and remand this case for adjudication on the merits.

ARGUMENT

I. THE STATE PLAN COVERED GENDER-CONFIRMING HEALTHCARE IN 2017 TO COMPLY WITH SECTION 1557 AND AVOID GETTING SUED.

Beginning in May 2016, after the Department of Health and Human Services (HHS) confirmed that Section 1557 protects transgender individuals from sex discrimination,[3] the State Plan (administered by the State

[3] On May 18, 2016, the Department of Health and Human Services (HHS) promulgated a final rule interpreting Section 1557. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016). Among other things, the rule interpreted Section 1557's prohibition against discriminating on the basis of "sex" to include gender identity. *Id.* at 31,471–

Treasurer) took immediate action. From May through November 2016, Plan officials comprehensively evaluated the Plan's Section 1557 compliance obligations and concluded that the Plan must comply with Section 1557, that Section 1557 requires coverage for gender-confirming healthcare, and that failing to comply with Section 1557 would subject the Plan to a federal lawsuit by a harmed member. In December 2016, the Plan's Board of Trustees (which must approve any changes to benefits, N.C. Gen. Stat. §§ 135-48.30(a)(1)–(2), 135-48.20(a)) adopted the Plan's recommendation to end the Plan's exclusion of coverage for gender dysphoria in compliance with Section 1557 and to avoid liability. Time and again, State officials voiced their understanding that refusing to comply with Section 1557 would jeopardize the Plan's federal funding and open it up to suit.

A. The Plan knew in summer 2016 it needed to comply with Section 1557 to avoid getting sued.

Section 1557 prohibits discrimination on the basis of sex. *See* 42 U.S.C. § 18116. As a recipient of federal funds, the State Plan knew that it

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72. Litigation soon followed, and a district court issued a nationwide preliminary injunction enjoining HHS from enforcing the rule. *See Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016). The court found the plaintiffs likely to succeed on the merits in part on the ground that HHS could not interpret "sex" in Section 1557 to protect transgender individuals (*see id* at 668–69), a conclusion the Supreme Court has now vitiated in holding that Title VII's prohibition on discrimination because of sex extends to transgender persons (*see Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1737 (2020)).

was subject to these laws and took various steps throughout the summer of 2016 to investigate its obligations under Section 1557.

The Plan's investigation began no later than May 2016. On May 27, 2016, Ashley Gillihan, an attorney with Alston & Bird LLP who had previously provided "outside legal counsel to [the Plan] regarding the ACA" (EQNC A.27 at 28), emailed Lotta Crabtree, the Deputy Executive Administrator & Legal Counsel to the Plan[4] (*see* EQNC A.36 at 36), asking if Ms. Crabtree had time to speak "[a]bout the new 1557 rules" (EQNC A.38 at 38). They confirmed a meeting, and Ms. Crabtree remarked that she "look[ed] forward to chatting about this fascinating topic." *Id.*

The Plan's investigation continued into July. At the start of the month, the Plan's claim administrator, Blue Cross Blue Shield of North Carolina (BCBSNC), arranged a meeting with Ms. Crabtree to discuss "Non-Discrimination Rule 1557." EQNC A.39 at 39. Around the same time, Ms. Crabtree asked Mark Collins, a Plan financial analyst, to investigate the "cost of coverage for gender dysphoria." EQNC A.41 at 42. She did so because "*[t]he Plan believes that we will need to cover treatment and services*

[4] The Treasurer administers and operates the State Plan. N.C. Gen. Stat. § 135-48.30. By law, the State Plan must have an Executive Administrator. *Id.* § 135-48.23. The Treasurer may delegate any powers to the Executive Administrator (*id.* § 135-48.30) and may employ staff, like Ms. Crabtree, to assist the Executive Administrator (*id.* § 135-48.23).

for gender dysphoria beginning with Plan year 2017." *Id.* (emphasis added). Mr. Collins obliged, forwarding the request to a consulting firm, which advised that estimated costs nationally were "about 0.1%." *Id.* Applied to the Plan's $3 billion budget, the initial rough estimate was that removing the gender-dysphoria exclusion would cost the Plan only $3 million. *Id.*

A week later, Ms. Crabtree sent an email to a fellow North Carolina employee providing "information on the requirements for the Plan regarding compliance with Section 1557 of the ACA." EQNC A.44 at 44. She stated, "we need to ensure coverage under *our benefits do not discriminate on the basis of* age, race, religion, ethnicity, or *sex*. *Sex includes gender identity* and so we are trying to determine what we need to cover for individuals diagnosed with gender dysphoria." *Id.* (emphasis added).

Ms. Crabtree also noted that the Plan needed to establish a policy for processing discrimination claims. *Id.* Shortly after, the Plan issued a policy on July 15, 2016, providing a "Section 1557 Grievance Procedure." EQNC A.12 at 12. In its opening paragraph, the policy explains that the Plan must comply with Section 1557's non-discrimination rule:

> [The Plan] receives funding from the Department of Health and Human Services through the Retiree Drug Subsidy Program. Therefore, *[the Plan] is subject to Section 1557 of the Affordable Care Act* (42 U.S.C. 18116) and its implementing regulations at 45 CFR part 92, issued by the U.S. Department of Health and Human Services. *Section 1557 prohibits discrimination on the basis of* race, color, national origin, *sex*, age, or disability in certain health programs and activities.

Id. (emphasis added). After setting out the grievance procedure, the policy specifically preserves a person's right to pursue litigation against the Plan: "The availability and use of this grievance procedure does not prevent a person from pursuing other legal or administrative remedies, including filing *a complaint of discrimination on the basis* of race, color, national origin, *sex*, age, or disability *in court* . . . ." *Id.* at 13 (emphasis added). That is to say, the Plan's official policy was that an individual could file *exactly this lawsuit*, challenging discrimination under Section 1557.

In short, the Plan's own documents confirm that by July 2016, the Plan (1) knew it had to provide some measure of gender-confirming healthcare coverage; (2) not doing so was discrimination in violation of Section 1557; and (3) discriminating under Section 1557 would subject the Plan to a lawsuit.

B. The Plan knew in fall 2016 it needed to comply with Section 1557 to avoid getting sued.

It did not stop there. Through fall 2016, the Plan acted on its understanding that it needed to comply with Section 1557 to avoid a lawsuit and, to do so, it had to remove the exclusion for gender dysphoria. In a November 16, 2016 preview for the upcoming December 2016 board meeting, the Plan included a full-page summary of Section 1557. EQNC A.46 at 46–47. The

Plan reiterated Section 1557's prohibition on discrimination and acknowledged that rules implementing Section 1557 "appl[y] to the State Health Plan" *Id.* at 47 (emphasis added). The Plan explained that it:

- "Cannot deny health coverage solely on the basis of gender identity."
- "Cannot categorically exclude all health services related to gender identity."
- "Cannot categorically exclude all services related to gender transition."

Id. What if it failed to comply? The Plan knew the consequences there too:

- "Individuals participating in the Plan may file a grievance with the Plan, the Office of Civil Rights (OCR), *and have a private right of action to sue for violations of the rule*."
- "If OCR finds noncompliance it may require remedial action and has the ability to reduce or eliminate any financial assistance, and refer the matter to the Department of Justice for litigation."

Id. (emphasis added). This shows that in early November 2016, Plan officials knew that the Plan had to comply with Section 1557, that it had to provide coverage for gender-confirming healthcare coverage, and that, were it noncompliant, the Plan could lose its funding *and* be sued by private individuals harmed by the noncompliance.

In the run-up to the December 2016 board meeting, the Plan also investigated whether other state health plans intended to comply with Section

1557. On November 22, 2016, Ms. Crabtree (the Plan lawyer) asked Matthew Grabowski (a health policy analyst and legislative liaison for the North Carolina Treasurer) to contact other states "regarding whether or not they intend to provide coverage for gender transition services are [sic] required under Section 1557 of the ACA beginning January 1, 2017." EQNC A.52 at 54–55. Mr. Grabowski subsequently contacted various states, including Wisconsin, Alaska, Virginia, and Kentucky, inquiring whether each state's respective health plan had "taken steps to comply with this aspect of the final rule for Section 1557" requiring coverage for "gender dysphoria/gender transition." EQNC A.57 at 59 (Wisconsin); EQNC A.60 at 60 (Alaska); EQNC A.61 at 61 (Virginia); EQNC A.62 at 62 (Kentucky).

Mr. Grabowski then shared the results of his research with Ms. Crabtree. Of the fifteen to twenty states he contacted, he received clear responses from five, four of which were either compliant or would soon be compliant with Section 1557. EQNC A.63 at 63. He also shared a Wisconsin memorandum explaining in detail the state's rationale for "[r]emoving the current exclusion related to benefits and services related to gender reassignment or sexual transformation." EQNC A.65 at 66. Thus, not only did the Plan's own employees and consultants conclude that Section 1557 applied, it also had, at least one other state's opinion that it applied and required removing a gender dysphoria exclusion.

The Plan also received information on other states' Section 1557 compliance from BCBSNC. EQNC A.79 at 79. BCBSNC shared a spreadsheet with the Plan that included information for seven states (*id.*): four were in compliance, two were finalizing decisions, and one was involved in litigation regarding Section 1557. EQNC A.81 at 81. Mr. Grabowski, was then tasked with generating a summary PowerPoint to present to the Board of Trustees on other states' compliance. EQNC A.52 at 53–54.

Contemporaneously, the Plan was investigating the costs associated with providing coverage for gender-confirming healthcare. Also on November 22, 2016, Ms. Crabtree asked Mr. Collins, the state financial analyst, to use various information "to create a range for the annual cost of gender transition services." EQNC A.82 at 82. A few days later, a consultant provided a memorandum addressed to Mona Moon, the Plan's Executive Administrator and Deputy Treasurer, providing a "Transgender Cost Estimate." EQNC A.84 at 84; EQNC A. 86 at 86. The memorandum explained:

> Section 1557 of the ACA prohibits discrimination in health programs on the basis of age, race, sex, national origin, color, or disability. . . . It is likely that you are subject to the law ("covered entities"), because the State has a Medicaid program that receives federal funding from the Department of HHS and you also receive federal HHS funding from the RDS program.[5]

[5] The "RDS program" is the Retiree Drug Subsidy Program, a federal subsidy available to plans who continue to provide prescription drug coverage

EQNC A.86 at 86. The memorandum also attached a Segal Consulting publication from June 2016, which reiterated that "a covered entity may not deny or limit coverage or impose additional cost sharing or other limitations for sex specific health services provided to transgender individuals because the individual's gender identity or recorded gender is different from the one to which such health services are ordinarily provided." EQNC A.88 at 88. Of course, the Plan already knew this. But it served as yet another reminder that the Plan needed to comply with Section 1557.

The Plan also informed the public that it knew it needed to act on its categorical exclusion. Noah Lewis, an attorney from Transcend Legal, emailed Janet Cowell, the then acting Treasurer of North Carolina and administrator of the State Plan, on November 25, 2016, concerning coverage for transgender healthcare. EQNC A.92 at 92–93. Mr. Lewis wrote that he understood that BCBSNC "has stated that the state must sign a waiver if it wished to maintain the [gender dysphoria] exclusion in 2017." *Id.* at 92. Mr. Lewis's email reached Ms. Moon who clarified that "BCBSNC is asking [administrative service only] clients who do not cover services to treat gender dysphoria beginning in 2017 to sign a letter indemnifying BCBSNC as their third party administrator." *Id.* She explained that "based on the advice of

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to Medicare-eligible retirees. The Plan at least admits receipt of these federal funds in its opening brief. Opening Br. 27 n.5.

counsel, staff is recommending [the Plan] remove the exclusion," indicating that this was not an issue since the Plan intended to comply. *Id.*

The State Plan also began preparing a press release in anticipation of the upcoming Board of Trustees meeting. Schorr Johnson, a State employee, circulated a draft press release on November 28, 2016, which provided:

> The State Health Plan Board of Trustees will be voting on complying with the federal Department of Health and Human Services final rule interpreting section 1557 of the Affordable Care Act, *which the Plan's outside legal counsel determined must take effect before January 1, 2017. The Plan risks losing millions of dollars in federal funding for non-compliance.*

EQNC A.18 at 18. (emphasis added). Ms. Moon responded twenty minutes later: "Schorr, *we also risk being sued by members who think our coverage is discriminatory*. Should that be noted as well?" Enter a proposed revision to the draft press release: "The Plan risks losing millions of dollars in federal funding and *could face discrimination lawsuits for non-compliance*." *Id.* (emphasis in original).

Blake Thomas (a Treasurer deputy general counsel) responded with his proposed edits. EQNC A.94 at 94–95. He suggested adding that "**If the Plan does not take action to comply,** the Plan risks losing millions of dollars in federal funding and could face discrimination lawsuits for non-compliance." *Id.* at 94 (emphasis in original). He also proposed advising that "States such as Indiana, Wyoming, Wisconsin, and Kentucky have already taken this compliance action." *Id.*

Once again, internal documents confirm again that the State Plan knew (1) it had to eliminate its categorical exclusion of gender-confirming healthcare coverage; (2) not doing so was discrimination in violation of Section 1557; and (3) discriminating under Section 1557 would subject the Plan to a lawsuit.

C. The Plan removed its gender-dysphoria exclusion for 2017 to comply with Section 1557 and avoid getting sued.

After investigating its obligations under Section 1557, the State Plan requested that the Board act by removing the Plan exclusion for gender dysphoria. The Board agenda designated a session during its December 2, 2016, meeting to Section 1557 compliance. EQNC A.97 at 98. Under the subject "ACA Section 1557 Requirements—Coverage for Gender Dysphoria," Dr. Patti Forest (the Plan's Medical Director) was scheduled to explain "Gender Dysphoria Condition and Treatment," Ms. Crabtree (the Plan's counsel) would describe the "Proposed Benefit Change," and Mr. Gillihan (outside counsel at Alston & Bird) would provide an "Overview of Legal and Compliance Risks." *Id.*

The official Board minutes (signed by Chair Janet Cowell) confirm the Board's understanding of what Plan officials already knew about Section 1557 and the risk of lawsuits for noncompliance. *See* EQNC A.99. In one session, Heather Freeman from the Attorney General's Office "discussed the

legalities and the non-compliance impact of Affordable Care Act (ACA) Section 1557 requirements as they pertain to the Board of Trustees." *Id.* at 102.

The following day, the State Plan and its outside counsel presented a fuller picture of Section 1557 and the Plan's need to cover gender-confirming healthcare. *Id.* at 103–05. Dr. Forest explained "the gender dysphoria diagnosis criteria and standard of care," (*id.* at 104) including some patients' need for treatment to "reduce or remove the distressing feelings of a mismatch between biological sex and gender identity" (EQNC A.112 at 115). From Dr. Forest's presentation, the Board learned that established "elements of care for transgender people [are] a 'medical necessity'" and that "[d]elaying treatment for GID can cause and/or aggravate additional serious and expensive health problems, such as stress-related physical illnesses, depression, and substance abuse problems, which further endanger patients' health and strain the health care system." *Id.* at 117; *see also id.* at 118 (explaining that the American College of Physicians and American College of Obstetricians and Gynecologists support treatment for gender dysphoria).

The Board then heard from Mr. Gillihan on legal and compliance risks under Section 1557. EQNC A.99 at 104. The minutes summarized Mr. Gillihan's presentation:

> Mr. Gillihan, attorney with Alston & Byrd, introduced himself, stating that he has provided outside legal counsel to the Plan

> regarding the ACA for the past three years. His area of expertise is employee health benefits.
>
> The Plan receives federal funds from Retiree Drug Subsidy (RDS) and currently excludes coverage for gender dysphoria. Section 1557 prohibits discrimination based on race, color, national origin, sex, age or disability. *If the Plan continues to receive federal funding without including coverage for the treatment of gender dysphoria, the Plan will be considered non-compliant as of January 1, 2017*. This could result in the suspension or termination of the RDS funding and/or the *possibility of civil action* by someone challenging the violation.

Id. (emphasis added). That is, Mr. Gillihan, a health benefits attorney who had advised the Plan on ACA issues for the past three years, expressly told the Board of Trustees: (1) the Plan was subject to Section 1557; (2) the Plan needed to provide coverage for gender-confirming healthcare; and (3) the failure to provide such coverage could result in losing federal funding and subject the Plan to civil litigation.

Ms. Crabtree (the Plan's in-house counsel) then summarized the Plan's work over the course of 2016. She reiterated the Section 1557 requirements, risks of non-compliance, and protections under the rule. *Id.* at 104–05. Slides presented to the Board also explained the risks of non-compliance:

- The Department of Health and Human Services (HHS) Office of Civil Rights (OCR) is responsible for accepting and investigating Section 1557 complaints.
- Failure to correct noncompliance may result in:
  - Suspension of, termination of, or refusal to grant or continue to grant Federal financial assistance, i.e. loss of Retiree Drug Subsidy;

- Referral to the Department of Justice to enforce compliance;
- *Civil action filed by an individual to challenge a Section 1557 violation*.

EQNC A.112 at 121 (emphasis added). Ms. Crabtree conveyed to the Board what the State Plan knew the entire year: the Plan's failure to comply with Section 1557 would subject it to lawsuits. Ms. Crabtree also presented the state survey from November (EQNC A.99 at 105), identifying the numerous sister states taking action to comply with Section 1557 (EQNC A.112 at 127–29).

Ms. Crabtree then outlined the proposed benefit change. EQNC A.99 at 105. She explained Plan estimates that covering gender-confirming healthcare would cost only $350,000 to $850,000 per year. *Id.* In her closing message, Ms. Crabtree confirmed: "Plan staff recommends approval of coverage for the treatment for gender dysphoria as follows: Removing the blanket exclusions resulting in the provision of medically necessary services for the treatment of gender dysphoria." EQNC A.112 at 134.

The Board also heard from impacted individuals. EQNC A.99 at 105. The first citizen offered her son's life story, illustrating what it means to be transgender. *Id.* The second citizen explained "the mental health aspects of gender dysphoria and stated that the decisions for some people can be a matter of life and death." *Id.*

Armed with the recommendation to remove the gender-dysphoria exclusion from health professionals, legal counsel, Plan employees, and impacted citizens, the Board deliberated. After some initial debate, a Board member proposed a resolution to remove the exclusion for gender dysphoria for only the 2017 plan year. *See id. at* 106. A board member explained the resolution would "ensure that the State Health Plan follows all applicable laws and regulations" while "recogniz[ing] that the validity of the federal regulation and interpretation of related laws are currently the subject of litigation and may change over time."[6] *Id.* (emphasis added). Ultimately, the Board unanimously, with one abstention, removed the blanket exclusion for gender dysphoria for the 2017 benefit year, with the intention of revisiting the exclusion for the 2018 benefit year as legal challenges to federal rules matured. *Id.*

After removing the exclusion for gender dysphoria, the Plan needed to update its policies and notify members. The Plan needed to remove from its booklets "[l]anguage restricting Transgender services" "in order to comply with non-discrimination laws." EQNC A.147 at 147. Plan employees also drafted a member alert to advise members that "[t]he Plan is offering coverage for the treatment of gender dysphoria as outlined in the Affordable

[6] For an overview of the litigation, see note 3 above.

Care Act (ACA) Section 1557 Requirement." EQNC A. 148 at 148; EQNC A.149 at 149.

The Plan also explained the change to media. Brad Young, the Press Secretary for the Office of the State Secretary, explained to a reporter that the Board "voted to comply with the federal Department of Health and Human Services rule interpreting section 1557 of the Affordable Care Act for calendar year 2017." EQNC A.20 at 21–23. He further explained that "*[i]f the Plan did not take action to comply with the federal law* and federal regulation, *the Plan would have* risked losing millions of dollars in federal funding and *faced discrimination lawsuits for non-compliance*." *Id.* at 22 (emphasis added).

In sum, internal documents throughout 2016 and into 2017 confirm that the Plan and its Board (1) knew the Plan had to eliminate the categorical exclusion of gender-confirming healthcare coverage; (2) not doing so was discrimination in violation of Section 1557; and, critically here, (3) that discriminating under Section 1557 would subject the Plan to a lawsuit.

II. THE STATE PLAN KNEW IT WOULD GET SUED WHEN IT REINSTATED THE GENDER DYSPHORIA EXCLUSION.

In November 2016, in the midst of the State Plan's assessment of its Section 1557 obligations, Dale Folwell was elected Treasurer of North Carolina. Though the Board authorized coverage for gender-confirming

healthcare for the 2017 plan year before Mr. Folwell took office, it was immediately clear upon Mr. Folwell's entry into office that the Plan would change its substantive stance on covering gender-confirming healthcare. Still, internal documents confirm that as the Plan worked to undo this critical coverage, it knew full well that it could be sued for discrimination for the choice. Indeed, Mr. Folwell publicly dared the courts to order him to stop the Plan's discrimination on the basis of transgender status. Though the Plan under Mr. Folwell's leadership ultimately reverted to excluding gender dysphoria, its understanding that it could be sued for violating Section 1557 never wavered. Indeed, to this day, the State Plan policy remains that the Plan must comply with Section 1557 and can be sued for violations.

A. The new Treasurer investigated Section 1557 again and learned the Plan could be sued.

Mr. Folwell took office on January 1, 2017. *See Dale R. Folwell, CPA Sworn in as N.C. State Treasurer*, N.C. Dep't of State Treasurer (Jan. 1, 2017), perma.cc/7CG4-NZ5V. Almost immediately, he instituted his own official investigation into Section 1557. *See* EQNC A.151 at 151.

But Mr. Folwell had started his investigation into Section 1557 well before. Leading up to the December 2016 board meeting, Ms. Moon (the Plan's Executive Administrator) provided Mr. Folwell various information about Section 1557 in response to a request from him. EQNC A.152 at 152. And the Plan already knew that "the incoming Treasurer" (*i.e.*, Mr. Folwell)

opposes the coverage change and "will likely speak out." EQNC A.154 at 154.[7] After officially taking office, Mr. Folwell requested a meeting with Plan executives to learn the advice the Department of Justice provided to the Board during its December 2016 meeting. EQNC A.151 at 151.

Contemporaneously, Ms. Crabtree arranged a meeting with the Plan's outside counsel, Mr. Gillihan, to discuss the preliminary injunction against enforcement of portions of the Section 1557 rule. EQNC A.157 at 157. The Department of Health and Human Services (HHS) notice summarizing the preliminary injunction acknowledged that HHS could not enforce the regulation as drafted based on gender identity.[8] *Id.* at 158. But it reiterated:

> *HHS's Office for Civil Rights will continue to enforce the law* - including its important protections against discrimination on the basis of race, color, national origin, age, or disability and its provisions aimed at enhancing language assistance for people with limited English proficiency, as well as other *sex discrimination provisions* - to the full extent consistent with the Court's order.

Id. (emphasis added). Thus, the State Plan was aware the federal government would continue enforcing Section 1557 even though HHS was preliminary enjoined from enforcing particular provisions in the regulation.

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[7] Ms. Moon abruptly resigned in May 2017 over disagreements with Mr. Folwell's vision. David Ranii, *NC State Health Plan's Top Administrator Abruptly Resigns, Says Folwell Has "Different Vision*," The News & Observer (May 25, 2017), https://www.newsobserver.com/news/business/article152352622.html.

[8] For an overview of the litigation, see note 3 above.

BCBSNC confirmed to the State Plan a few days later that it would continue to comply with Section 1557 notwithstanding the preliminary injunction. BCBSNC advised the Plan that "the injunction does not invalidate the underlying statute which could be interpreted . . . to have the same interpretation as the regulation." EQNC A.159 at 159. Again, the State Plan learned that the discrimination provisions of Section 1557 remained in effect and that excluding coverage for gender-confirming healthcare could still discriminate under Section 1557.

B. The Plan evaluated its contractors' Section 1557 compliance because it knew it could be sued.

The State Plan conducted a survey in the spring of 2017 to ensure compliance with Section 1557 because it knew the Plan could be sued for discriminating on the basis of sex. On March 30, 2017, Chris Almberg sent an email titled "ACA Section 1557 Compliance Questionnaire" to various state contractors. EQNC A.161 at 161. Mr. Almberg, a Plan Compliance Officer, explained:

> The *State Health Plan is evaluating its compliance with* federal disability access requirements of the Americans with Disabilities Act (ADA), the Rehabilitation act of 1973 (Rehabilitation Act), *Section 1557 of the Affordable Care Act (Section 1557)*, and other applicable federal law. *As a recipient of federal funding, the Plan is required to comply with these and all applicable federal laws.* As a contractor of the Plan, you are also required to comply with all laws that apply to the Plan, as stated in our contract.

Id. (emphasis added). The attached questionnaire specifically asked whether the "organization modified its coding to address gender-coding mismatch." EQNC A.162 at 164. It then stated that "1557 does not permit denying or limiting health services to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily exclusively available."[9] *Id.* The remaining discrimination questions all included specific references to sex discrimination. *See id.* at 164–66.

Several contractors responded, certifying that each had (1) changed its gender coding to be non-discriminatory and (2) did not deny health services ordinarily or exclusively available to individuals of one sex. *See, e.g.*, EQNC A.167 at 167; EQNC A.169 at 171–73. The Plan's efforts to confirm that its vendors were not violating Section 1557 further confirms the Plan's understanding that it was subject to Section 1557 and could not discriminate against transgender North Carolinians.

[9] Notably, this statement was made *after* HHS's enforcement of the Section 1557 regulation was preliminarily enjoined, but it expresses understanding that Section 1557 itself bars discrimination on account of gender identity.

C. The Plan allowed coverage to expire despite knowing Section 1557 applied and requested to be sued instead.

Though the gender-dysphoria exclusion was removed for only the 2017 plan year, the Board agreed in December 2016 to reevaluate continuing the coverage for 2018 and beyond as legal challenges made their way through the court system. Nonetheless, well before the Board had its chance to reevaluate, State Plan employees under Mr. Folwell's governance purposefully ensured that the removal would expire and took affirmative actions in pursuit of eliminating coverage. *See* EQNC A.174 at 174. For example, BCBSNC advised the Plan on August 28, 2017 that it would need to sign a Gender Dysphoria Services Amendment to opt out of covering gender dysphoria. *Id.* Plan employees recognized too that the benefit booklets would need to be edited to reflect the denial of coverage for gender dysphoria. *See* EQNC A.175 at 175–77. As a result, Plan employees drafted a disclaimer regarding coverage for gender dysphoria and removed the benefit from the booklets. *Id.*

In October 2018, Mr. Folwell prepared a statement to release regarding gender dysphoria coverage. In an email to fellow employees, Mr. Folwell sent the proposed draft:

> This plan is dealing with this issue exactly how former Treasurer Cowell administration did . . . (this needs to be cleaned up) *Until the court system* or a legislative body *tells us that we "have to" or "how to" spend taxpayer money on sex change operations*, as Treasurer I am reluctant to make a decision on that could

> discriminate against others who desire other uncovered procedures.

EQNC A.178 at 178 (emphasis added). In other words, Mr. Folwell told fellow state officials that until a court system tells him whether he needs to cover gender dysphoria, he is not going to do so. A revised iteration of Folwell's statement appeared in the publicly released statement. The official statement acknowledged the Plan was no longer covering "sex change operations" and 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 that has the potential to discriminate against those who desire other currently uncovered elective, non-emergency procedures.

EQNC A.24 at 25 (emphasis added). In no uncertain terms, Mr. Folwell demanded that a court be the one to tell the Plan that its discrimination against transgender individuals was impermissible. Of course, for a court to tell Mr. Folwell and the State Plan that it must cover gender-confirming healthcare, the lawsuit must be allowed to proceed.

To this day, the State Plan continues to publicly acknowledge that it can be sued for discrimination under Section 1557. The State Plan's "Section 1557 Grievance procedure," available online and most recently revised as of *March 23, 2020*, continues to provide:

> The Plan receives funding from the United States Department of Health and Human Services through the Retiree Drug Subsidy Program. *Therefore, the Plan is subject to Section 1557 of*

> *the Affordable Care Act (42 U.S.C. 18116)* and its implementing regulations at 45 CFR Part 92, issued by the U.S. Department of Health and Human Services. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities.
>
> The availability and use of this procedure does not prevent a person from pursuing other legal or administrative remedies, including *filing a complaint of discrimination on the basis of* race, color, national origin, *sex*, age, or disability *in court* or with the United States Department of Health and Human Services, Office for Civil Rights.

Section 1557 Grievance procedure, *supra* (emphasis added). That is, even after the filing of *this* lawsuit, the State Plan revised its Section 1557 policy and still continued to represent to the public that it is subject to Section 1557 and can be sued for discriminating in violation of Section 1557. The Plan even instructed its members that they seek redress in court. The Plan's representation to this Court that it did not waive sovereign immunity is hard to take seriously in view of these public statements.

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State Plan officials knew from the outset that the Plan could be hauled into court for discriminating in violation of Section 1557. The Plan heard it could be sued from countless advisors, including legal professionals, consultants, and other state health plans. The Plan's assertion otherwise on appeal—that waiver of sovereign immunity was not "clear and unequivocal"—is flatly inconsistent with its repeated acknowledgment that it would face discrimination lawsuits for violating Section 1557 and its dare to the

judiciary to hold it accountable. The Court should accept Mr. Folwell's invitation, affirm the district court, and remand for the district court to adjudicate whether the State Plan must provide coverage for gender-confirming healthcare.

CONCLUSION

The Court should affirm.

Dated: October 7, 2020

Respectfully submitted,

/s/ *Michael W. Weaver*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7) and Local Rule 32.1 because it contains 6436 words, excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook LT Std font in a size equivalent to 14 points or larger.

Dated: October 7, 2020 /s/ *Michael W. Weaver*

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2020, I electronically filed the foregoing document with the Clerk of this Court using the CM/ECF system, and counsel for all parties will be served by the CM/ECF system.

Dated: October 7, 2020 /s/ *Michael W. Weaver*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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