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

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1409 Caption: Kadel, et al. v. North Carolina State Health Plan

Pursuant to FRAP 26.1 and Local Rule 26.1,

The North Carolina State Health Plan for Teacher and State Employees
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/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? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Mark A. Jones Date: 4/24/2020

Counsel for: North Carolina State Health Plan

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STATEMENT OF JURISDICTION

Appellant, North Carolina State Health Plan for Teachers and State Employees (the "State Health Plan" or the "Plan"), was named as a Defendant in the case below in the U.S. District Court for the Middle District of North Carolina (Biggs, J.). Appellees (Plaintiffs below and who will be referred to as Plaintiffs herein for ease of understanding) sought to invoke federal question jurisdiction—under 28 U.S.C. § 1331—to bring suit for injunctive relief and money damages against the State Health Plan alleging a violation of § 1557 of the Affordable Care Act. (J.A. 24, 54 (Complaint ¶¶ 19-20, 156-57)).

The State Health Plan moved to dismiss the Plaintiffs' claim against it, citing sovereign immunity. (J.A. 59, 82-85, 143-47). On March 11, 2020, the district court denied this motion, concluding that North Carolina had waived its sovereign immunity by accepting federal funds. (J.A. 215-34). The State Health Plan filed its Notice of Appeal on April 8, 2020. (J.A. 240-42). Pursuant to the collateral order doctrine of 28 U.S.C. § 1291, states and state agencies can immediately appeal a federal court's refusal to recognize the sovereign immunity reflected in the Eleventh Amendment. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

"The 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). The Eleventh Amendment not only prevents federal court judgments, but it also prevents "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct*, 506 U.S. at 147. As a result, this Court has acknowledged it is "important to resolve Eleventh Amendment immunity questions as soon as possible after the State asserts its immunity." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 482 (4th Cir. 2005). This Court has the authority to determine, now, whether and to what extent the State of North Carolina has waived its sovereign immunity to the Plaintiffs' suit. *See also Madison v. Virginia*, 474 F.3d 118, 129 n.2 (4th Cir. 2006) (Interlocutory review extends to whether Congress has abrogated sovereign immunity and whether a state has waived sovereign immunity.).[1]

[1] The Plaintiffs' Complaint includes claims against other Defendants who have not asserted sovereign immunity. (J.A. 47-50 (Complaint ¶¶ 124-38 (claim under *Ex Parte Young* for injunctive relief against two state officials in their official capacity)); (J.A. 50-52 (Complaint ¶¶ 139-47 (suit under Title IX of the Education Amendments of 1972 against the Plaintiffs' university employers))). These claims remain in the court below and are proceeding forward. *See also Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (subsequent authority not yet briefed below).

STATEMENT OF THE ISSUES

Congress can insist that a state waive its sovereign immunity in exchange for federal funds. The Supreme Court, however, instructs that Congress's demand must be "unequivocally expressed in the text of the relevant statute" and requires a "clear declaration" of the state's consent to suit before it will recognize such a waiver. Did the district court err in concluding that two federal statutes—enacted twenty years apart (in 1986 and in 2010)—combine to unequivocally express Congress's clear intent to require the waiver of North Carolina's sovereign immunity?

STATEMENT OF THE FACTS AND OF THE CASE

The State Health Plan is an agency of the State of North Carolina which uses a combination of employee premiums and appropriations from the State's General Assembly to pay over $3.2 billion annually for health care services for approximately 720,000 members. *See generally* N.C. Gen Stat. § 135-48. Until 2011, the North Carolina General Assembly administered the State Health Plan; now the North Carolina Department of State Treasurer does. 2011 N.C. Sess. Laws 119, 132. The North Carolina State Treasurer is an elected official, and he 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 Plaintiffs are either transgender individuals or the legal guardians of two transgender minors. The Plaintiffs receive health insurance coverage through the State Health Plan, and they suffer from gender dysphoria, which is "a mental health condition from which only a subset of transgender people suffer." *Doe 2 v. Shanahan*, 917 F.3d 694, 708 (D.C. Cir. 2019) (Williams, J., concurring). If a transgender person has gender dysphoria, then this person has a "cognitive discontent" leading to diagnosed "distress" from the "incongruence between one's experienced or expressed gender and one's assigned gender." American Psychological Association, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013). Transgender "identity per se" is not mental illness; gender dysphoria, however, is a diagnosed "clinical problem": "distress" that many, but "not all individuals" "experience as a result of such incongruence." *Id.*

The State Health Plan pays for medical treatment for the Plaintiffs, but the Plan's covered medical services do not include counseling, prescriptions, or surgeries provided in connection with gender transition, which the Plaintiffs assert is a medically necessary treatment for their gender dysphoria. (J.A. 19 (Complaint ¶ 2)). Since the 1990s, the State Health Plan has not covered:

- 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.

2020 Employee Benefit Booklets available at https://bit.ly/2JiG2gr (70/30 Plan at 55,67; 80/20 Plan at 42, 52; High Deductible Health Plan at 40,50); (J.A. 30, 33 (Complaint ¶ 43, 55)).

The Plaintiffs sued the State Health Plan in the U.S. District Court for the Middle District of North Carolina on March 11, 2019. (J.A. 18-57 (Complaint)). In their Complaint, the Plaintiffs allege that the State Health Plan's failure to include gender transformation as a covered benefit is discrimination "on the basis of sex" in a "health program or activity." (J.A. 52-53 (Complaint ¶¶ 149-50)). The Plaintiffs argue that § 1557 guarantees the "right … to receive health insurance through [the Plan] free from discrimination on the basis of sex, sex characteristics, gender, nonconformity with sex stereotypes, transgender status, or gender transition." (J.A. 53 (Complaint ¶ 153)). Because the State Health Plan does not cover their requested treatment options for gender transformation, the Plaintiffs seek compensatory damages, consequential damages, and injunctive relief against the State Health Plan. (J.A. 54 (Complaint ¶¶ 156-57)).

The State Health Plan filed a Motion to Dismiss the Plaintiffs' Complaint on July 8, 2019, asserting that sovereign immunity prevents suit in federal court against the Plan itself. (J.A. 58, 82-85). The Plaintiffs filed a Response on August 5, 2019, (J.A. 95-131), and the State Health Plan filed its Reply on August 19, 2019, (J.A. 132-49). Without holding oral arguments, the district court denied the State Health

Plan's Motion to Dismiss on March 11, 2020, (J.A. 215-39), concluding that North Carolina had waived its sovereign immunity by receiving federal financial assistance. (J.A. 230-34). Specifically, the district court concluded that § 1557 of the Affordable Care Act (enacted in 2010) combines with the residual clause of 42 U.S.C. § 2000d-7 (enacted in 1986) to waive North Carolina's sovereign immunity.

Relevant Statutory Background

The Residual Clause of § 1003 the Rehabilitation Act Amendments of 1986 (42 U.S.C. § 2000d-7)

In 1985, the Supreme Court held that the States were not subject to suit for violations of § 504 of the Rehabilitation Act, which prohibits discrimination based on an individual's disability in "any program or activity receiving Federal financial assistance." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). The Rehabilitation Act's "general authorization for suit in federal court [was] not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 246.

In October 1986, Congress enacted the "Rehabilitation Act Amendments of 1986." Pub. L. No. 99-506, 100 Stat. 1807 (1986). One provision folded into this Act during Senate committee consideration was a "technical and conforming amendment" stating that a State "shall not be immune under the Eleventh Amendment" from private lawsuit under certain identified civil rights statutes (Title VI, Title IX, the Age Discrimination Act of 1975, and § 504 of the Rehabilitation

Act) or "any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986) (codified at 42 U.S.C. § 2000d-7). This amendment mirrored a smaller Senate bill pending in the U.S. Senate at the same time entitled the "Civil Rights Remedies Equalization Act." *Compare* Rehabilitation Act Amendments of 1986, S.2515, 99th Cong. (1986) (containing no provision) *with* S. Rep. No. 99-388, at 27-28, 41 (1986) (committee report). *See also* 131 Cong. Rec. 22344-46, 22425 (1985) (Speech by Sen. Cranston on S.1579, the "Civil Rights Remedies Equalization Act"). The bill that passed the House of Representatives had no analogous provision, and the enacted law reflects, in the main, the Senate's provision. *See* H.R. Rep. No. 99-955 at 40-41, 78-79 (1986) (conference report).

This 1986 provision did not amend the Rehabilitation Act of 1973 or the other enumerated statutes. It has, however, been codified with title VI of the Civil Rights Act of 1964 and it provides:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of § 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.

> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7. The Supreme Court has noted in dicta that this provision provides "the sort of unequivocal waiver" for suits under § 504 of the Rehabilitation Act that the Court's precedents demand. *Lane v. Pena*, 518 U.S. 187, 198 (1996).[2] In subsequent cases, lower courts have cited *Lane* and this 1986 provision to find a waiver of state sovereign immunity for suits under the four enumerated statutes. *See, e.g.*, *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999) (Title IX). *See also Gruver v. Louisiana Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 181 n.2 (5th Cir. 2020) (collecting cases, all of which involve the statutes enumerated in 42 U.S.C. § 2000d-7).

Fourteen years ago, in *Madison v. Virginia*, this Court considered, but did not decide, whether the residual clause in the 1986 provision is sufficiently clear to demonstrate an "unequivocal textual waiver" of state sovereign immunity for other, unidentified "Federal statute[s] prohibiting discrimination." 474 F.3d 118, 132 (4th

[2] Some courts refer to this provision by the title of Senator Cranston's bill: the "Civil Rights Remedies Equalization Act" or "CRREA." *See, e.g.*, *Buck v. Washington Metro. Area Transit Auth.*, 427 F. Supp. 3d 60, 68 (D.D.C. 2019). *But see Sossamon v. Texas*, 563 U.S. 277, 291-92 (2011) (referring to "§ 1003 of the Rehabilitation Act Amendments of 1986").

Cir. 2006) (considering whether residual clause authorized monetary claims by institutionalized persons under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc). In its most recent decision providing guidance on waivers of state sovereign immunity, *Sossamon v. Texas*, the U.S. Supreme Court noted—but also did not resolve—this same question. 563 U.S. 277, 291-92 (2011).

§ 1557 of the Affordable Care Act (42 U.S.C. § 18116)

In 2010, Congress enacted the Affordable Care Act, described as a historic remaking of the health care industry. *See, e.g.*, Remarks on the Patient Protection and Affordable Care Act, 2010 Daily Comp. Pres. Doc. 197 (March 23, 2010) (referring to the ACA as "health care reform"). Within this larger legislation, Congress included § 1557, which reads as follows:

> Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, § 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

42 U.S.C. § 18116(a).

The District Court's Reasoning

In denying the State Health Plan's Motion to Dismiss, the district court first summarily concluded that "the parties do not appear to dispute that the Plan is a health program or activity" under § 1557. (J.A. 230).[3] The district court then concluded that North Carolina waived its sovereign immunity because § 1557 is "sufficiently similar" to the enumerated statutes in the 1986 provision that the State "would clearly understand that the acceptance of federal funds would subject it to suit" pursuant to the residual clause. (J.A. 232). Section 1557 of the ACA "when read in conjunction with the CRREA, effectuates a valid waiver of sovereign immunity." (J.A. 234). This appeal follows.

On appeal, this Court must first determine whether the provision underlying Plaintiffs' claim—§ 1557 of the Affordable Care Act—contains a "clear declaration" that a state must, in exchange for federal funds, waive sovereign immunity for injunctive relief and monetary damages. Second, this Court must decide whether, even if § 1557 does not itself demand a waiver of sovereign immunity, North

[3] The State Health Plan has not conceded this point or any other arguments that might support its position that no valid waiver of sovereign immunity exists. The Plan objected to the district court's jurisdiction, and the court below denied the Plan's Motion to Dismiss without oral argument. If the district court needed clarity on the Plan's arguments in support of the lack of jurisdiction, it could have granted argument and sought additional information. Waivers of sovereign immunity cannot be implied. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). The courts should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*

Carolina has already waived its sovereign immunity through the residual clause in the Rehabilitation Act Amendments of 1986.

SUMMARY OF ARGUMENT

To demand a waiver of a state's sovereign immunity, Congress must make the demand "expressly and unequivocally in the text of the relevant statute." *Sossamon*, 563 U.S. at 290. The district court's principal error arises from its failure to follow this command and to identify "the relevant statute" that expresses this demand for a "clear declaration" by the state of its waiver. The district court's opinion does not identify the "relevant statute" because none exists. Rather, the district court stacked multiple statutes—enacted over more than twenty years—to infer a waiver. However appropriate such a holistic approach may be as a matter of statutory interpretation, this is not the test for a waiver of sovereign immunity. "There is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-81 (1999). "In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that *the State* made an 'altogether voluntary' decision to waive its immunity." *Id.* at 681 (emphasis in the original). The statutes at issue here

do not present a clear choice to the State Health Plan, and North Carolina has not waived its sovereign immunity. The district court's contrary decision should be reversed with instructions to dismiss the claim against this Defendant.

ARGUMENT

I. To find a waiver of state sovereign immunity in exchange for federal funds, the Supreme Court requires that Congress's demand be "unequivocally expressed in text of the relevant statute" and result in a "clear declaration" by the state that it has accepted this demand and knowingly waived immunity from suit.

A. Standard of Review

The State Health Plan moved to dismiss the Plaintiffs' Complaint for a lack of subject matter jurisdiction, citing the Plan's sovereign immunity. (J.A. 58, 82-85); Fed. R. Civ. P. 12(b)(1). This Court will "review the district court's factual findings with respect to jurisdiction for clear error and the legal conclusion that flows therefrom de novo." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014).

B. The legal test to find a waiver of sovereign immunity is stringent.

The Eleventh Amendment to the U.S. Constitution stands "not so much for what it says, but for the presupposition which it confirms." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54 (1996) (internal punctuation omitted). Each state "is a sovereign entity in our federal system," and "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Id.* This "fundamental aspect of sovereignty constrains federal judicial authority." *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020).

Congress may, under some circumstances, abrogate a state's immunity from suit. *See, e.g., Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (Congress may abrogate sovereign immunity to recover preferential transfers in a bankruptcy proceeding.). Outside of "bankruptcy exceptionalism," however, Congressional authority to abrogate a state's sovereign immunity has only been recognized for enforcement of the guarantees of the Fourteenth Amendment. *Allen*, 140 S. Ct. 994, 1002. Even then, Congress must make its intention to abrogate sovereign immunity—and "alter the usual constitutional balance between the States and the Federal Government"—"unmistakably clear in the language of the statute." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65-66 (1989). For example, even though Congress intended 42 U.S.C. § 1983 to "provide[] a federal forum to remedy many deprivations of civil liberties" guaranteed by the Fourteenth Amendment, this was not enough to overcome the assumption that the statute does not apply to the states as sovereigns. *Id.*

The district court below did not find Congress has abrogated North Carolina's sovereign immunity. (J.A. 230-34). Rather, the district court concluded that North Carolina has voluntarily waived its immunity to suit. The Supreme Court's most recent guidance on waivers of state sovereign immunity is *Sossamon v. Texas*. 563 U.S. 277 (2011). The "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.* at 284.

> A State's consent to suit must be unequivocally expressed in the text of the relevant statute. Only by requiring this clear declaration by the State can we be certain that the State in fact consents to suit. Waiver may not be implied.

Id. (citations and internal punctuation omitted). Any waiver will be "strictly construed, in terms of its scope, in favor of the sovereign" and "must extend unambiguously" to monetary claims. *Id.* at 285.

While the district court cited *Sossamon*, it failed to apply its commands. Instead, the district court followed the lead of two district courts in other circuits that have found a waiver of sovereign immunity for § 1557 of the Affordable Care Act by doing what the Supreme Court does not permit: *inferring* a waiver from § 1557's reference to "enforcement mechanisms" under 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).

II. The Plaintiffs' Complaint alleges that the State Health Plan has violated § 1557 of the Affordable Care Act. Congress, however, has not "unequivocally expressed" in "the text of the relevant statute" that the Plan must waive its sovereign immunity as a condition of receiving federal funds.

A. Section 1557 of the Affordable Care Act does not demand that the State Health Plan waive its sovereign immunity in exchange for federal funds.

The district court's first error arises from its failure to identify the "relevant statute" that must "unequivocally express" a demand for a waiver of sovereign immunity. This is not a mere formality. "States 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). In assessing whether a federal statute provides clear notice of the conditions attached, the court "must view the [statute] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds." *Id.*

Section 1557 provides the rule of decision that Plaintiffs seek to impose on the State Health Plan. The Plaintiffs allege "discrimination" in a "health program or activity" that "is receiving Federal financial assistance." (J.A. 50-52 (Complaint ¶¶ 140-50)); 42 U.S.C. § 18116. Section 1557 is also the provision that identifies the federal financial assistance that is at issue, referring to "any program or activity that

is administered by an Executive Agency or any entity established *under this title* (or amendments)." 42 U.S.C. § 18116 (emphasis added).[4]

Section 1557 is thus the "relevant statute" wherein Congress must have "unequivocally express[ed]" its demand for a waiver of sovereign immunity. *Sossamon*, 563 U.S. at 284. Critically, however, neither § 1557—nor any other provision in the Affordable Care Act's 906 pages—mentions "sovereign immunity" or even uses the word "immunity." 124 Stat. 119 at 119-1049 (2010). This should end the inquiry. Nothing in § 1557 authorizes or references suits against the states. "Congress, acting responsibly, would not be presumed to take such action silently." *Employees of Dep't of Pub. Health & Welfare, Missouri v. Dep't of Pub. Health & Welfare, Missouri*, 411 U.S. 279, 284-85 (1973).

Moreover, the enforcement language in § 1557 supports the conclusion that Congress has not expressed its desire for a waiver of state sovereign immunity. Section 1557 identifies how plaintiffs will assert claims of a violation of its prohibitions. The "enforcement mechanisms *provided for and available under* such title VI, title IX, § 794, or such Age Discrimination Act shall apply for purposes of

[4] The final rule just issued by the Department of Health and Human Services (HHS) interprets this provision to include (1) programs receiving assistance provided by HHS (not other federal agencies), (2) programs administered by HHS under Title I of the Affordable Care Act, and (3) a program created under Title I of the Affordable Care Act (such as an insurance exchange). 85 Fed. Reg. 37244 (June 19, 2020) (new 45 C.F.R. § 92.3(a), effective August 18, 2020).

violations of this subsection." 42 U.S.C. § 18116 (emphasis added). But the "enforcement mechanisms" for these enumerated statutes do not extend to the states. This was the reason the 1986 provision was needed in the first instance.

Statutory interpretation must "give effect, if possible, to every clause and word of a statute." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). This careful attention to statutory interpretation is heightened in the context of sovereign immunity. The Plaintiffs' 'enforcement mechanism' under § 1557 must meet two criteria. It must be "[1] provided for and [2] available under" the enumerated statutes. 42 U.S.C. § 18116.

The Supreme Court has, in other contexts, made clear that relief is "available" when a statute is "'capable of use' to obtain 'some relief for the action complained of.'" *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016) (considering exhaustion of "available" remedies under the Prison Litigation Reform Act). The word "under" "specifies where to look to find out" what is available; one must look to the specifically identified statutory provisions. *Pereira v. Sessions*, 138 S. Ct. 2105, 2114 (2018).

For the Plaintiffs, then, this means that no waiver of sovereign immunity is available for § 1557. The 1986 provision in the Rehabilitation Act Amendments was passed precisely because the enforcement mechanism 'provided for and available under' § 504 of the Rehabilitation Act "falls far short of manifesting a clear intent

to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247. As Congress explained, the 1986 provision was needed to "explicitly provide[] that in a suit against a State for a violation of any of these statutes, remedies, including monetary damages, are available to the same extent as they would be available for such a violation in a suit against any public or private entity other than a State." S. Rep. No. 99-388, at 28 (1986).

The 1986 Amendment also included Title IX, Title VI, and the Age Discrimination Act of 1975 "in the specific abrogation of state immunity" because those acts have "language similar to that of § 504." *Id.* at 28. For each of the enumerated statutes, it is the 1986 provision itself—a separately enacted law that references, but does not amend, the enumerated statutes—that requires a waiver of sovereign immunity. See *Gruver*, 959 F.3d at 181 n.2 (collecting cases finding waiver, each of which rely upon the 1986 provision). The enforcement mechanisms available under Title VI, Title IX, the Age Discrimination Act, and § 504 do not pierce the states' sovereign immunity, so § 1557 does not either.

Because the Plaintiffs seek a waiver of sovereign immunity, the courts cannot now interpret the phrase "provided for and available under" as a generalized reference that extends beyond the specific authority in the enumerated statutes to related laws. The phrase 'available under' must be "strictly construed, in terms of its

scope, in favor of the sovereign." *Sossamon*, 563 U.S. at 285. The enforcement mechanisms are therefore only those "provided for *and* available under" the enumerated statutes. The Supreme Court has already considered a similar argument in the context of federal sovereign immunity. In *Ardestani v. I.N.S.*, the Supreme Court held that the reference in the Equal Access to Justice Act to adjudications "under § 554" of the Administrative Procedure Act [5 U.S.C. § 554] meant that other contested cases, which were conducted pursuant to other statutes but in a manner similar to the APA, were not eligible for attorney fee awards. 502 U.S. 129 (1991). Attorney fee awards require a waiver of sovereign immunity, so the reference to proceedings "under § 554" "does not merely describe a type of agency proceeding" but refers to proceedings conducted pursuant to the listed statute only. *Id.* at 136. Similarly, the enforcement mechanisms "available under" the enumerated statutes in § 1557 can be read to incorporate only the "specific statutory provision[s]" identified. *Id.* The stringent test for a waiver of sovereign immunity does not allow this Court to treat the enumerated statutes as merely a "general indication of the types of proceedings" available. *Id.* Therefore, the text of § 1557 does not "unequivocally demand" that states waive their sovereign immunity.

Only statutory text can supply a waiver of sovereign immunity; legislative history, floor statements, and the like are irrelevant. "If congressional intent is unmistakably clear in the language of the statute, reliance on committee reports and

floor statements will be unnecessary, and if it is not, *Atascadero* will not be satisfied." *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 104 (1989). The failure of § 1557 to mention sovereign immunity, the Eleventh Amendment, suits against the states, or even states means that this provision lacks the "clarity of expression necessary" to clearly demand a waiver of sovereign immunity in return for federal funds. *Lane*, 518 U.S. at 192. The State has retained its immunity to suit, and the Plaintiffs' claims should be dismissed.

B. Section 1557 does not "extend unambiguously" to the State Health Plan because the State Health Plan is not clearly a "health program or activity."

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). Additionally, 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." *Murphy*, 548 U.S. at 296. The Court must conclude—given the contractual nature of a Spending Clause waiver—that in § 1557 "Congress spoke so clearly that [the court] can fairly say that the State could make an informed choice" rather than being "surpris[ed]" "with post acceptance or 'retroactive' conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981).

This "canon applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate." *Id.* at 24. The phrase "health program or activity" is vague, and thus it should be no surprise that the U.S. Department of Health and Human Services ("HHS") has already issued contradictory rules on the subject. In June 2020, HHS adopted a final rule stating that "an entity principally or otherwise engaged in the business of providing health insurance shall not, by virtue of such provision, be considered to be principally engaged in the business of providing healthcare." *Id.* at 37244-45 (new 45 C.F.R. § 92.3(c), effective August 18, 2020). As the Plaintiffs will no doubt point out, HHS previously adopted the opposite interpretation of the same phrase. *See* 45 C.F.R. § 92.4 (2019). Accordingly, the district court's conclusion that North Carolina has waived its sovereign immunity improperly relies, in part, on an interpretation of the ACA that has been rejected by the very federal agency administering the act. "[W]here a statute is susceptible of multiple plausible interpretations, including one preserving immunity, we will not consider a State to have waived its sovereign immunity." *Sossamon*, 563 U.S. at 287. The restrictions of § 1557 do not, as of the latest interpretation from HHS, apply to the State Health Plan at all. If this is so, or even if this is arguable, then § 1557 cannot provide the "clear declaration" required to waive a state's sovereign immunity.

III. The district court should not have applied the 1986 residual clause to create a waiver of sovereign immunity because it is not clearly linked to § 1557.

A. Congress, in 1986, cannot be assumed to have clearly expressed its desire for a waiver of sovereign immunity under § 1557 when that anti-discrimination provision did not exist and would not exist for more than twenty years.

The district court's analysis should have ended with § 1557. Instead, the district court extended this Court's decision in *Litman v. George Mason Univ.* as an alternative analysis. 186 F.3d 544 (4th Cir. 1999). In *Litman*, the Fourth Circuit concluded that Virginia had waived its sovereign immunity for suits under Title IX. The panel concluded that "any state reading [42 U.S.C. § 2000d–7(a)(1) (the 1986 provision)] in conjunction with 20 U.S.C. § 1681(a) [Title IX] would clearly understand the following consequences of accepting Title IX funding: (1) the state must comply with Title IX's antidiscrimination provisions, and (2) it consents to resolve disputes regarding alleged violations of those provisions in federal court." *Id.* at 554. This decision is neither remarkable nor controlling given that the 1986 provision (42 U.S.C. § 2000d-7) specifically enumerates "title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.)" as one of four statutes for which a state shall not be immune from suit. The U.S. Supreme Court, in dicta in 1996, noted that the 1986 provision "sought to provide the sort of unequivocal waiver that [the Supreme Court's] precedents demand" for waiver of state sovereign immunity. *Lane*, 518 U.S. at 198.

Litman, notably, did not examine or rely upon the residual clause of the 1986 provision, which extends to "any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(1). However, despite the limited holding of *Litman*, the district court nevertheless concluded that the appropriate inquiry is whether § 1557 is "sufficiently similar" to one of the four specifically listed statutes such that the states would "clearly understand" that the acceptance of federal funds waives sovereign immunity. (J.A. 232).

The very premise of the analysis is wrong. The question is not whether § 1557 is "sufficiently similar" to other civil rights statutes. "Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts." *Sossamon*, 563 U.S. at 284. Under *Sossamon*, the "stringent" inquiry is whether the consent to suit is "unequivocally expressed" as a condition of federal funds with a demand for a "clear declaration" by the state of such a waiver. *Id.*

Waiver of sovereign immunity cannot therefore be inferred by the sort of statutory analysis by analogy performed by the district court. Rather, Congress must clearly express that particular federal funds are conditioned on a waiver of sovereign immunity and convey this demand to state officials. "Without such a clear statement from Congress and notice to the States, federal courts may not step in and abrogate state sovereign immunity." *Id.* at 291. Such a clear statement from Congress is necessary because the clarity of the waiver is based on "the perspective of a state

official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds." *Murphy*, 548 U.S. at 295.

In this case, there is no clear evidence that Congress intended to combine the 1986 residual clause and § 1557 of the Affordable Care Act. Unlike the statutes in *Litman*, neither statute here cites to the other. The Supreme Court's requirement for a clear statement in the statutory text ensures that Congress has considered state sovereign immunity and intentionally legislated on the matter. *Sossamon*, 563 U.S. at 290. As the Supreme Court suggested in *Sossamon*, and this Court suggested in *Madison*, the very existence of a residual waiver of sovereign immunity is inconsistent with a clear statement requirement. A residual clause imposes waiver as a condition in unforeseen circumstances without further deliberation by the Congress.

When the district court identified similarities between the 1986 residual clause and § 1557 of the Affordable Care Act, it substituted "the judicial for the legislative department of government." *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983). The Supreme Court has recently invalidated several residual clauses in the federal criminal code, citing similar concerns to those present here. A criminal statute must "give ordinary people fair notice of the conduct it punishes." *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015). "In that sense, the [void-for-vagueness] doctrine

is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

Vague criminal statutes are objectionable because they shift the responsibility to define the criminal law away from Congress and thereby "erod[e] the people's ability to oversee the creation of the laws they are expected to abide." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019). The Supreme Court's sovereign immunity jurisprudence operates the same way. Demand for a waiver of sovereign immunity must be "unequivocally expressed in the text of the relevant statute" to ensure that Congress has intentionally decided to the disturb the dual sovereignty that underlies our constitutional structure. *Sossamon*, 563 U.S. at 284. Respect for sovereign immunity does not permit a district court to take the place of Congress and use a generic residual clause to assume control over an issue "central to sovereign dignity." *Sossamon*, 563 U.S. at 283, 284.

The district court's reasoning also relied upon the extension of a legal fiction. The district court concluded that, if § 1557 of the ACA is "like the statutes expressly listed" in the 1986 provision, then Congress *must have intended* to condition federal funds under § 1557 on a waiver of sovereign immunity and state officials must have understood this condition. The statutes listed in the 1986 provision and § 1557 are both "aimed at discrimination" and "require identical treatment of similarly situated

individuals." (J.A. 232). Therefore, the district court concluded, state officials knew what they must do. This reasoning implies a legislative omniscience that the Supreme Court has never accepted. Both judges and scholars have long criticized the assumption that Congress itself knows all prior statutes. *Cf.* Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 327-28 (2012) (The presumption against implied repeal is not based on the notion that Congress knows how statutes will interact, but rather on the need for consistent application of a code of laws.). Creation of a residual clause in 1986 is not evidence that Congress intended to demand a waiver of sovereign immunity from North Carolina in 2010.

More importantly, no court has identified a persuasive basis to extend this presumption of omniscience to state officials. Courts must examine a waiver of sovereign immunity from the perspective of a state official to ensure that "the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17. The district court's analysis creates an erroneous presumption that *state* officials knew to connect the residual clause from a provision in a 1986 law to a second provision enacted in 2010, and further that the state officials should understand that these two provisions—when combined—mean that the state's decision to accept federal funds in 2003 was also a broad-based waiver of sovereign

immunity.[5] "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). This concatenation of separate statutory provisions, spread over more than twenty years, does not respect the Supreme Court's conclusion that "[s]overeign immunity principles enforce an important constitutional limitation on the power of

[5] Congress enacted the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 seventeen years after passage of the 1986 residual clause to provide prescription drug coverage to Medicare recipients. Pub. L. No. 108-173, 117 Stat. 2066 (2003). As part of the creation of "Medicare Part D," Congress created a subsidy for health plans that provide prescription drug coverage to Medicare-eligible retirees. 42 U.S.C. § 1395w-132. The subsidy is to prevent the Medicare benefit from eroding existing prescription drug coverage under employer and union sponsored plans. *See* "Overview of the Retiree Drug Subsidy Option," U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, *available at* https://go.cms.gov/39s9xJt (Nov. 2, 2005). The State Health Plan has chosen to maintain its pre-existing drug coverage program for state retirees, and it participates in the "Retiree Drug Subsidy Program." *See* https://bit.ly/2BjDrDi. ("The Plan receives funding from the United States Department of Health and Human Services through the Retiree Drug Subsidy Program."). These Medicare Part D subsidies are the only Federal financial assistance the State Health Plan receives.

Funds from the 2003 Retiree Drug Subsidy have never been specifically conditioned on a waiver of sovereign immunity. This is unsurprising. "The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." *Edelman*, 415 U.S. at 673. The same holds true for a Congressional program explicitly designed to forestall insurers like the State Health Plan from leaving the prescription drug insurance marketplace.

the federal courts." *Sossamon v. Texas*, 563 U.S. at 284. "Dual sovereignty is a defining feature of our Nation's constitutional blueprint," and the decision to waive is ultimately that of the state officials. *Id.* at 283. The district court usurps this role with its statutory interpretation.

The district court makes much of the use of the phrase "discrimination" in both § 1557 and the four enumerated statutes in the 1986 provision. The word discrimination alone, however, cannot define what, precisely, is at issue. The Age Discrimination Act, § 504 of the Rehabilitation Act, Title IX, and Title VI are all "antidiscrimination statutes" that "deal solely with discrimination by recipients of federal financial assistance." *Cronen v. Tx. Dep't of Human Servs.*, 977 F.2d 934,937-38 (5th Cir.1992). These statutes thus prohibit a certain type of discrimination in *any* federally-funded program: that is their unmistakable purpose. Section 1557, in contrast, prohibits multiple types of discrimination in a *specific* type of program.

Further, while § 1557 of the ACA prohibits discrimination, 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). 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 to

enumerated statutes in 1986 provision because ADA "has a much broader focus than discrimination by recipients of federal financial assistance."). Further, the Age Discrimination Act, § 504 of the Rehabilitation Act, Title IX, and Title VI are each "antidiscrimination statutes" that broadly prohibit a specific type of discrimination for all recipients of federal funding. In contrast, § 1557 prohibits multiple types of discrimination by specific recipients of federal funding. These are not so similar that a state official would know that the residual clause of the 1986 provision must apply.[6]

B. Nothing in the legislative history or the text of the residual clause in the 1986 provision indicates that Congress intended the waiver of sovereign immunity to apply to statutes enacted in the future.

Nothing in the 1986 provision's residual clause (42 U.S.C. § 2000d-7) indicates it was intended to apply to future statutes. This provision was not a standalone piece of legislation entitled the "Civil Rights Remedies Restoration Act." Rather, the provision was one of the "Technical and Miscellaneous Provisions" attached to Reauthorization of the Rehabilitation Act of 1973 during Senate

[6] Unlike the statutes referenced in § 1557, the text of § 1557 itself does not indicate federal funds will be withheld for failure to comply with its commands. The initial HHS rule implementing § 1557 extended the covered funds to reach the entirety of the state Medicaid program. 45 C.F.R. § 92.4. The Supreme Court has already concluded that threats to defund Medicaid 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 broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions." *Id.* at 584.

consideration. 100 Stat. 1807, 1845 (1986). The Senate committee report on the broader 1986 bill explains the provision was intended 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 then notes that similar language to the Rehabilitation Act exists in Title VI, Title IX, and the Age Discrimination Act of 1973. *Id.* Finally, the committee report says: "Other federal statutes which prohibit discrimination by recipients of Federal financial as[s]istance are also included." *Id.* Nothing indicates Congress intended this waiver to apply to statutes enacted *in the future*.

The district court rejected this argument below, noting that a "straightforward reading" of the residual clause would apply to statutes enacted at any time. (J.A. 232 n.9). For a waiver of sovereign immunity, however, the presumption rests with the states. It is not enough that a straightforward reading of the residual clause could apply to statutes not yet enacted. Congress must 'unequivocally express' that it intends this result. *Sossamon*, 563 U.S. at 284.

The introductory statement of Senator Alan Cranston for S.1579, the bill which ultimately became § 1003 of the Rehabilitation Act Amendments of 1986, provides the greatest detail to be found about the statute's effect. His remarks, which might have been delivered on the Senator floor or might have been submitted for the

Congressional Record, are notable for their lack of clarity about application to statutes other than those specifically enumerated. During his time in Congress, Senator Cranston was a strong advocate for the rights of the disabled, so it is unsurprising that his speech mostly discussed § 504 of the Rehabilitation Act. He gave little attention to the residual clause:

> QUESTIONS RAISED WITH RESPECT TO CIVIL RIGHTS LAWS OTHER THAN § 504
>
> Mr. President, it appears that the holding in *Atascadero* may create problems in carrying out congressional intent with respect to the availability of Federal court suit for damages against States under other civil rights laws in addition to § 504 of the Rehabilitation Act. In terms of the entities that § 504 prohibits from discriminating and against which it thus creates a right of action for violations of that prohibition, § 504 was patterned after title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972. In addition, the Age Discrimination Act of 1975 incorporates the basic structure of these three laws. Thus, it appears that legislation is needed to ensure that Federal court remedies are available against the States to the same extent that they are available against all other entities within the scope of these three statutes as well as any other Federal law prohibiting discrimination by recipients of Federal funds.

131 Cong. Rec. 22345-46 (1985).

"[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane*, 518 U.S. 187, 192 (1996). The legislative history shows that Congress never considered whether the residual clause would be a perpetual condition on financial assistance to enforce yet-

to-be-considered-or-enacted legislation. *Cf.* 131 Cong. Rec. 22425 (1985) (The initial proposal by Senator Cranston was that the waiver of sovereign immunity would be retroactively effective "as of the date on which the statutory provisions under which the remedy is sought became effective." This is a further indication Congress was considering only statutes that had already been enacted. There would be no need for such an effective date for future statutes.). For sovereign immunity, the question is not, as the district court assumed, whether the residual clause of the 1986 provision *could* be read to apply to statutes enacted in the future. The question is whether the residual clause *must* be read to apply in this manner. Without a clear indication in the statutory text, and with a muddled legislative history, Congress has not unequivocally expressed such a demand.

CONCLUSION

The district court concluded that the residual clause of the 1986 provision creates a perpetual sovereign immunity waiver for future statutes prohibiting discrimination. But the Supreme Court's caselaw on sovereign immunity does not allow Congress to give such broad authority over the waiver of sovereign immunity. Section 1557 of the Affordable Care Act makes no mention of the 1986 waiver provision, and the 1986 waiver provision does not refer to § 1557. This lack of a cross-reference prevents clear notice to the state officials who must consent to such a condition on federal funds.[7]

"[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). The residual clause in a provision enacted in 1986 does not supply the unmistakable demand for a waiver of sovereign immunity needed to enforce § 1557. The decision below should be reversed and remanded with instructions to dismiss the State Health Plan for lack of jurisdiction.

[7] The State Health Plan's sovereign immunity does not leave the Plaintiffs without any claim, as North Carolina has unmistakably waived its sovereign immunity for claims under Title IX. *See Litman*, 186 F.3d 544. Plaintiffs' claims under Title IX, however, are against their university employers, not the State Health Plan. *See also Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (subsequent authority relevant to such claims that has not yet been briefed below).

REQUEST FOR ORAL ARGUMENT

The State Health Plan respectfully requests oral argument on the issues presented herein.

Respectfully submitted, this the 30th day of July, 2020.

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