UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CODY FLACK and SARA ANN MAKENZIE, Plaintiffs, v. WISCONSIN DEPARTMENT OF HEALTH SERVICES and LINDA SEEMEYER, in her official capacity as Secretary of the Wisconsin Department of Health Services, Defendants.	Case No. 3:18-cv-00309-wmc Judge William Conley

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Cody Flack and Sara Ann Makenzie are two transgender Wisconsin Medicaid beneficiaries who are being denied Medicaid coverage for critical, medically necessary treatments for gender dysphoria because of a discriminatory state regulation, Wis. Adm. Code § DHS 107.03(23)-(24) ("the Challenged Exclusion"), that categorically excludes coverage for gender-confirming health care. Due to the significant harm this exclusion has caused them and many other low-income transgender people who rely on Wisconsin Medicaid, Plaintiffs move to preliminarily enjoin Defendants Wisconsin Department of Health Services ("DHS") and DHS Secretary Linda Seemeyer (collectively, "Defendants" or the "State") from further enforcement of the regulation, including its application to Plaintiffs, during the pendency of this case.

Gender dysphoria—the clinically significant distress associated with having a gender identity (the innate, internal sense of one's sex, *i.e.*, being male or female) that conflicts with one's sex assigned at birth—is a serious medical condition often requiring medical interventions. Enacted in 1997, the Challenged Exclusion prohibits Wisconsin Medicaid from covering medically necessary treatments for gender dysphoria, including gender-confirming surgeries and other medical treatments. The regulation expressly bans coverage for "[t]ranssexual surgery" or "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics." *Id*. This exclusion solely disadvantages transgender people; indeed, Wisconsin Medicaid covers the same services when they are used to treat conditions other than gender dysphoria, like cancer or traumatic injuries.

The Challenged Exclusion—which wrongly assumes that transgender people's transition-related health care needs are always "medically unnecessary"—subjects transgender people in Wisconsin to second-class status, sends the message that their health care is "unnecessary," and

denies them the ability to live in accordance with their gender identities. The Challenged Exclusion flies in the face of the medical consensus that gender-confirming medical care is a safe and effective medical treatment for gender dysphoria. And it ignores the significant, predictable, and avoidable harms to individual transgender people resulting from categorically denying coverage for critical and often life-saving care. The fact that the State covers the same services when needed to treat other conditions exposes the perniciousness of this policy.

Mr. Flack and Ms. Makenzie are suffering ongoing, significant harms—exacerbated gender dysphoria, depression, anxiety, thoughts of self-harm and suicide, social isolation, and fears for their safety—because the State is denying them medically necessary gender-confirming surgeries to treat their gender dysphoria. Their treating providers—as well as a clinical psychologist who recently evaluated each of them—agree that their health and well-being will deteriorate considerably if they cannot obtain the necessary surgeries promptly. Many other transgender Wisconsin Medicaid beneficiaries are silently suffering similar harms.

The Challenged Exclusion, on its face and as applied to Plaintiffs, discriminates against transgender people on the basis of sex in violation of Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 ("Section 1557"); violates the Medicaid Act's availability and comparability requirements, 42 U.S.C. §§ 1396a(a)(10)(A)-(B); and violates the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sex and subjecting transgender Wisconsin Medicaid beneficiaries, as a group, to inferior health care.

Plaintiffs are likely to prevail on their claims and face irreparable harm with no adequate legal remedy if the exclusion remains in force. To the contrary, the State will incur no injury and the public interest will be served by enjoining enforcement of the Challenged Exclusion during the pendency of this case. Accordingly, the Court should grant Plaintiffs' motion.

BACKGROUND

Gender Identity and Gender Dysphoria

Gender identity is an innate, internal sense of one's sex—*i.e.*, being male or female—and is a basic part of every person's core identity. Decl. of Daniel Shumer, MD, MPH ¶ 12; Decl. of Stephanie L. Budge, PhD, LP ¶ 16. Everyone has a gender identity. Budge Decl. ¶ 16. Most people's gender identity is consistent with the sex they were assigned at birth. *Id.* ¶ 17.[1] Transgender people, however, have a gender identity that is different from their assigned sex. *Id.* ¶ 19. A transgender man is a man who was assigned female at birth but has a male gender identity. A transgender woman is a woman who was assigned male at birth but has a female gender identity. *Id.*

Gender dysphoria is a serious medical condition experienced by transgender people whose gender identity conflicts with their assigned sex. *See* Am. Psychiatric Ass'n, Diagnostic & Statistical Manual 451-59 (5th ed. 2013) ("DSM-5") [Decl. of Orly May, Ex. 1];[2] Budge Decl. ¶ 24. Gender dysphoria is the "clinically significant distress or impairment in social, occupational, or other areas of functioning" associated with the incongruence between a transgender person's gender identity and assigned sex.[3] DSM-5 at 451-53. When gender dysphoria is left untreated, or is inadequately addressed, the consequences can be dire—often

[1] Although the term "biological sex" is often used as a synonym for assigned sex that is inaccurate, as there are multiple biological indicators of sex (*e.g.*, primary and secondary sex characteristics, hormones, chromosomes) that do not always align. Shumer Decl. ¶ 14.

[2] This Court may take judicial notice of the DSM-5. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1040 n.4 (7th Cir. 2017).

[3] DSM-5 replaced "Gender Identity Disorder" with "Gender Dysphoria" to clarify that being transgender is not itself a disorder, but that the clinically relevant condition is the distress experienced when one's gender identity conflicts with one's assigned sex. *See* DSM-5 at 451. Earlier editions of the DSM (DSM-III and III-R) referred to the condition as "Transsexualism."

including serious distress, thoughts or attempts at self-harm or suicide, and stigma. Budge Decl. ¶ 24, 36; Decl. of Jaclyn White Hughto, PhD, MPH ¶ 50.

A transgender person's gender dysphoria can be alleviated when the person is able to live, and be treated by others, as the sex matching the person's gender identity. Budge Decl. ¶¶ 34-35, 37. Symptoms of gender dysphoria can be mitigated, and often prevented altogether, for transgender people with access to appropriate individualized medical care as part of their gender transitions. *Id.* ¶ 28. Under the World Professional Association of Transgender Health's *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version* (2011) ("WPATH Standards of Care")—the internationally-accepted standards of care for gender dysphoria—treatment options for gender dysphoria include psychotherapy, hormone therapy to feminize or masculinize the body, and various surgical procedures that align one's physical characteristics with one's gender identity (collectively referred to in this brief as gender-confirming or transition-related surgeries).[4] Decl. of Loren S. Schechter, MD ¶¶ 23-32; Shumer Decl. ¶¶ 29-30; Hughto Decl. ¶ 21. The medical community recognizes gender confirming surgeries as safe and effective treatments for gender dysphoria. Schechter Decl. ¶¶ 23-28; Shumer Decl. ¶ 17; Budge Decl. ¶ 30; May Decl. Exs. 2-9 (position statements of various major medical organizations). Not all transgender people need surgery to alleviate their gender dysphoria; however, for many transgender people, surgery is the only medically effective treatment to alleviate symptoms of the condition. Schechter Decl. ¶¶ 28-39; Shumer Decl. ¶ 40; Budge Decl. ¶¶ 34-37.

[4] Transition-related procedures are sometimes referred to as "sex reassignment surgery" or the disfavored term "sex change surgery." Under the contemporary understanding of gender identity, transition-related medical treatments confirm, not "change," an individual's sex by aligning primary and secondary sex characteristics with a person's gender identity. Decl. of Loren S. Schechter, MD ¶ 1, n. 1. Thus, Plaintiffs do not use those terms in this brief.

Gender-confirming medical treatments can also reduce the discrimination, mistreatment, and harassment that transgender people suffer for being visibly gender nonconforming. Hughto Decl. ¶¶ 28-46. Transgender people who are visibly gender nonconforming experience more discrimination and worse health outcomes than those whose appearance better matches their gender identity. *Id*. ¶ 30. Therefore, transgender individuals who are unable to access or afford gender-confirming procedures due to cost and lack of insurance coverage, which would increase gender conformity, are at greater risk of discrimination and other harms. Hughto Decl. ¶¶ 30, 45.

Federal Medicaid Program

Established in 1965 under Title XIX of the Social Security Act, Medicaid is a joint federal-state program that provides medical assistance to eligible low-income individuals. *See* 42 U.S.C. §§ 1396-1396w-5 (the "Medicaid Act"). Medicaid enables states to furnish medical services to persons whose incomes and resources are insufficient to meet the cost of necessary medical services by reimbursing participating states for a substantial portion of the costs in providing medical assistance. 42 U.S.C. §§ 1396-1; 1396b. Participating states must cover certain health care services when medically necessary, including inpatient and outpatient hospital services and physician services. 42 U.S.C. §§ 1396a(a)(10)(A), 1396d. The Medicaid Act specifically provides that "the medical assistance made available to any individual . . . shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." 42 U.S.C. § 1396a(a)(10)(B)(i). Also, a state "Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c).

Wisconsin Medicaid Program

Wisconsin, like every other state, participates in Medicaid. Defendant DHS is the Wisconsin agency charged with the administration of Wisconsin Medicaid consistent with state and federal requirements. Wis. Stat. § 49.45. DHS receives federal funding from the U.S. Department of Health and Human Services, including reimbursement of over half of the State's Medicaid expenditures. *See* 42 U.S.C. § 1396b; Wis. Legis. Fiscal Bureau, *Medical Assistance Cost-to-Continue (Health Services – Medicaid Services)* (Paper #320, May 25, 2017) [May Decl. Ex. 10] ("LFB Report"). Annual Wisconsin Medicaid spending is currently about $9.7 billion, roughly 59 percent of which is from federal funds. LFB Report at 2, 8.

Wisconsin's medical assistance statute, Wis. Stat. §§ 49.43-.65, and its implementing regulations, Wis. Adm. Code § DHS 101.01-.36, govern Wisconsin Medicaid. Under the regulations, DHS "shall reimburse providers for medically necessary and appropriate health care services" listed in the statute, including inpatient and outpatient hospital services and physician services. Wis. Adm. Code § DHS 107.01(1). The State's medical assistance statute, Wis. Stat. §§ 49.43-.65, does not explicitly address, let alone exclude, coverage for transgender individuals seeking care for the treatment of gender dysphoria.

Currently, Wisconsin Medicaid has approximately 1.2 million enrollees. DHS, Current Month Health Care Enrollment At A Glance (April 2018) [May Decl. Ex. 11]. Of these, an estimated 5,000 individuals are transgender adults. Hughto Decl. ¶ 49. The annual Wisconsin Medicaid budget is approximately $9.7 billion, over half of which is the federal contribution. LFB Report at 2, 8.

The Challenged Exclusion

The Challenged Exclusion, Wis. Adm. Code § DHS 107.03(23)-(24), is a part of Wisconsin's Medicaid regulations. The provision categorically excludes coverage for transition-related medical care. The policy was adopted as an amendment to the Medicaid regulations in 1996, and went into effect on February 1, 1997. *See* Wis. Dep't of Health & Fam. Servs. ("DHFS"), Clearinghouse Rule 96-154, 1 (Dec. 11, 1996) ("CR 96-154") [May Decl. Ex. 12]. At the time the policy was promulgated, it was based on the premise that "transsexual surgery" and related "drugs, including hormone therapy," were medically unnecessary. *See id.*; DHFS, *Summary of Amendments to Medicaid Rules that Discontinue Coverage of Medically Unnecessary Services* 1 (Jan. 6, 1995) ("DHFS Amendments Summary") [May Decl. Ex. 13].

The same amendments excluded "tattoo removal," "ear lobe repair," "services related to surrogate parenting," and "non-medical food" from Medicaid coverage. CR 96-154, at 1. These exclusions were not motivated by cost savings. *Id.* ("Under current rules the MA program requires prior authorization for most of these services and pays infrequently for them."); DHFS, *Fiscal Estimate: Medical Assistance: Medically Unnecessary Services* 1 (Sept. 27, 1996) ("DHS Fiscal Est.") [May Decl. Ex. 14] ("The rule changes are expected to result in nominal savings for state government.") Indeed, DHFS admitted that "the program has hardly ever paid for any of these services or for those purposes, but questions about coverage continue to come up." *Id.* at 2.

Defendants enforce this regulation through the present day to deny Medicaid coverage for transition-related medical treatments and publicize the exclusion on the DHS website. *See* DHS, LGBT Health – Transgender Persons, www.dhs.wisconsin.gov/lgbthealth/transgender.htm (last accessed May 21, 2018) [May Decl. Ex. 15].

Wisconsin Medicaid covers the same services when medically necessary to treat conditions other than gender dysphoria. *See, e.g.*, DHS, ForwardHealth, Online Handbook, Covered and Non-Covered Services (sections on breast reconstruction, reduction mammoplasty) ("DHS Online Handbook") [May Decl. Ex. 16]; *see also* Schechter Decl. ¶¶ 38-39.

Plaintiff Cody Flack

Cody Flack, a 30-year-old resident of Green Bay, Wisconsin, is a transgender man. Decl. of Cody Flack ¶¶ 2, 4. Because of his disabilities, including cerebral palsy, Mr. Flack is unable to work. *Id.* ¶ 3. He relies on Supplemental Security Income (SSI) for his living expenses and Wisconsin Medicaid for his health care. *Id.* ¶ 3. Mr. Flack has gender dysphoria. *Id.* ¶ 5; Decl. of Daniel Bergman, MS, LPC, NCC ¶ 5; Budge Decl. ¶ 58.

Mr. Flack's gender identity is male. Flack Decl. ¶ 4. While he was assigned female at birth and was raised as a girl, he became aware of his male gender identity around the age of four or five. *Id.* At age 18, he took steps to begin his gender transition. *Id.* ¶ 7. He began seeing a gender therapist, adopted a traditionally male name, and took other steps to outwardly present as the male he is. *Id.* Due to a lack of support and resources, and fears that coming out as transgender might isolate him from his family and others, Mr. Flack felt unable to undergo a full transition for several more years—despite experiencing significant gender dysphoria. *Id.*

In 2012, after moving to Wisconsin and feeling more supported in his gender identity, Mr. Flack resumed his gender transition. *Id.* ¶ 8. He took steps to socially transition to living and presenting as a man in all aspects of his life. *Id.* Specifically, he began to exclusively use a traditionally male name, Cody, began to use masculine pronouns to refer to himself, and started wearing traditionally men's clothing and cutting his hair. *Id.* He legally changed his name and obtained a corrected Wisconsin state identification card listing his male sex. *Id.* ¶ 9.

To treat his gender dysphoria and further his gender transition, Mr. Flack has obtained ongoing therapy and medical care for the last several years. *Id.* ¶ 10. Since 2015, Mr. Flack has seen a psychotherapist, Daniel Bergman, who has treated him for gender dysphoria and other mental health conditions. *Id.*; Bergman Decl. ¶¶ 4-5. Since August 2016, Mr. Flack has been receiving hormone therapy (testosterone) under the supervision of Dr. Amy DeGueme, an endocrinologist. Decl. of Amy DeGueme, MD, ECNU ¶ 4; Flack Decl. ¶ 11. As a result of the testosterone, he has developed facial and body hair, a deeper voice, and a more masculine appearance. DeGueme Decl. ¶ 7; Flack Decl. ¶ 11.

In October 2016, Mr. Flack had a hysterectomy with bilateral salpingo-oophorectomy—the total removal of his uterus, cervix, fallopian tubes, and ovaries. Flack Decl. ¶ 13; DeGueme Decl. ¶ 8. These surgeries were primarily to treat two serious medical conditions: dysmenorrhea, a condition characterized by pelvic or lower abdominal pain during menstruation, and premenstrual dysphoric disorder ("PMDD"), a severe form of premenstrual syndrome. Flack Decl. ¶ 13; DeGueme Decl. ¶ 8. As the procedure was necessary to treat these conditions, Wisconsin Medicaid covered the procedure. Flack Decl. ¶ 13. However, in addition to treating these conditions, the surgery also helped significantly reduce his gender dysphoria by better aligning his body with his male identity. Flack Decl. ¶ 13; DeGueme Decl. ¶ 8.

While this procedure and the hormone therapy has been effective, Mr. Flack still experiences severe gender dysphoria related to the presence of female-appearing breasts on his body. Flack Decl. ¶¶ 14-17; Budge Decl. ¶¶ 61-65; Bergman Decl. ¶ 9. Because of his breasts, he is regularly mistaken as female and mistreated as a result. Flack Decl. ¶¶ 14-17. As his breasts cause people to mistake him as female, Mr. Flack avoids social situations whenever possible. *Id.* ¶ 29. When in public, Mr. Flack is ashamed of his breasts. *Id.*

Despite his efforts to present as the man he is, he considers the breasts an undesired, highly visible marker of something he is not—female—and a source of significant distress. *Id.* ¶¶ 16-17. When he becomes aware that others might notice them, he experiences immediate distress and does whatever he can to conceal them from view. *Id.* To do so, he has engaged in a technique called "binding," which flattens or reduces the appearance of breasts. *Id.* ¶ 17; Ctr. of Excellence for Transgender Health, *Guidelines for the Primary & Gender-Affirming Care of Transgender & Gender Nonbinary People*, "Binding, packing, and tucking" 155 (M. Deutsch, ed,. 2d ed. 2016) [May Decl. Ex. 17] ("CoE Guidelines"). However, he finds binding extremely painful and, because of his disabilities, difficult to do himself. Flack Decl. ¶ 17. He has suffered respiratory distress, skin irritation, and sores as a result. *Id.*; DeGueme Decl. ¶ 9.

Since early 2017, with the support of his therapist and doctors, Mr. Flack has sought to obtain chest reconstruction surgery to treat his gender dysphoria and continue his gender transition. Flack Decl. ¶ 18; Bergman Decl. ¶ 10; DeGueme Decl.¶¶ 9-14. In particular, he wants a double mastectomy and male chest reconstruction. Flack Decl. ¶ 18; Decl. of Clifford King, MD, PhD ¶ 3. These procedures are widely accepted and effective treatments for gender dysphoria in transgender men. Schechter Decl. ¶ 30; Shumer Decl. ¶ 39.

Mr. Flack consulted Dr. Clifford King, a plastic surgeon in Madison who specializes in providing transition-related surgeries for transgender people. Flack Decl. ¶ 19; King Decl. ¶ 1. He provided Dr. King with letters of support from four medical providers—his primary care doctor, therapist, endocrinologist, and physician who performed his hysterectomy and oopherectomy. Flack Decl. ¶ 20; King Decl. ¶ 4. Each of these providers confirmed that Mr. Flack has gender dysphoria and met the criteria for surgery. Flack Decl. ¶ 20; King Decl. ¶ 4. Dr. King determined that Mr. Flack was eligible for male chest reconstruction under the WPATH

Standards of Care. King Decl. ¶ 5. On July 18, 2017, Dr. King submitted a request for prior authorization for Wisconsin Medicaid coverage of the chest reconstruction surgeries. King Decl. ¶ 6. On August 2, 2017, DHS denied the request, noting simply that "[p]er WI administrative code DHS 107.03(24) transsexual surgery is a non-covered service." King Decl. ¶ 6; Flack Decl. ¶ 22; Ltr. from DHS to Dean Health Sys. (Aug. 2, 2017) [May Decl. Ex. 18]; DHS Notice of Appeal to C. Flack (Aug. 2, 2017) [May Decl. Ex. 19].

Mr. Flack administratively appealed that decision without success. Flack Decl. ¶¶ 23-26; Decision by Administrative Law Judge B. Schneider, at 1 (Nov. 21, 2017) [May Decl. Ex. 20] ("ALJ Dec."); Order by Administrative Law Judge B. Schneider (Dec. 11, 2017) [May Decl. Ex. 21]. During that appeal, DHS conceded that its denial was based solely on the Challenged Exclusion and that it did not consider the medical necessity of the requested surgery. Flack Decl. ¶ 24; Ltr. from J. Sager to Dep't of Admin., Div. of Hearings & Appeals, *et al*. (Sep. 25, 2017) [May Decl. Ex. 22] ("Sager Letter"). DHS further conceded that "gender dysphoria . . . is an *accepted medical indication* for the surgical treatment requested [by Mr. Flack]." Sager Letter (emphasis added). In November 2017, an administrative law judge concluded that while "the proposed surgery presumably would favorably address [Mr. Flack's] gender dysphoria," he was bound by the Challenged Exclusion to rule against Mr. Flack. Flack Decl. ¶ 25; ALJ Dec. at 2.

Since initially being denied coverage for surgery last summer, Mr. Flack's gender dysphoria has worsened considerably. Flack Decl. ¶¶ 27-28; Bergman Decl. ¶ 11; Budge Decl. ¶¶ 66-67. Without the means to pay for surgery, he feels hopeless and has experienced profound depression and distress because of the denial and his inability to complete his gender transition. Flack Decl. ¶¶ 27-31. He has recently contemplated suicide and the possibility of performing chest surgery himself, but has not acted on those thoughts. Flack Decl. ¶ 28; Budge Decl. ¶ 66.

He experiences ongoing, severe gender dysphoria from his chest. Flack Decl. ¶ 28; Budge Decl. ¶ 66; Bergman Decl. ¶ 11.

Without chest reconstruction surgery, Mr. Flack is at substantial risk of short- and long-term harm to his health and well-being. Budge Decl. ¶¶ 71-73; Bergman Decl. ¶¶ 13-14.

Plaintiff Sara Ann Makenzie

Plaintiff Sara Ann Makenzie is a 42-year-old transgender woman who lives in Baraboo, Wisconsin. Decl. of Sara Ann Makenzie ¶¶ 2-3. Ms. Makenzie is unable to work due to her disabilities. *Id.* ¶ 4. She relies on SSI for her income and Wisconsin Medicaid for health care. *Id.* Ms. Makenzie is a lifelong Wisconsin resident and has been enrolled in Wisconsin Medicaid for many years. *Id.* ¶¶ 2, 4.

Ms. Makenzie's gender identity is female. *Id.* ¶¶ 3, 5; Decl. of Trisha Schimek, MD ¶ 4; Budge Decl. ¶ 41. While she was assigned male at birth and raised as a boy, she is female. Makenzie Decl. ¶¶ 3, 5. Ms. Makenzie has gender dysphoria. *Id.* ¶ 11; Schimek Decl. ¶ 4; Budge Decl. ¶ 45. She has understood herself to be female since childhood and has experienced gender dysphoria for most of her life. Makenzie Decl. ¶¶ 5-7. She has lived consistently as a woman since at least 2012. Makenzie Decl. ¶¶ 3, 8. Ms. Mackenzie legally changed her name to a traditionally female name, Sara Ann, uses feminine pronouns to refer to herself, wears traditionally women's clothing, and has corrected her birth certificate, driver's license, and U.S. Passport to reflect her name change and her female sex. *Id.* ¶ 12.

To further treat her gender dysphoria and continue her transition, Ms. Mackenzie has received therapy and medical care since about 2012. Makenzie Decl. ¶¶ 11, 13-17; Schimek Decl. ¶ 5. Since 2013, Ms. Makenzie has received hormone therapy, which has helped decrease her symptoms of gender dysphoria. Makenzie Decl. ¶¶ 13-16; Schimek Decl. ¶ 5; Decl. of Beth

E. Potter, MD ¶ 6. In 2017, Ms. Makenzie also sought chest surgery in the form of breast augmentation because her lack of a developed chest was exposing her to frequent misgendering. Makenzie Decl. ¶ 18. When Ms. Makenzie inquired about whether Wisconsin Medicaid would cover the surgery, DHS advised her that it was not a covered benefit. *Id.* ¶ 19.

After learning that Wisconsin Medicaid would not cover this surgery, Ms. Makenzie got a $5,000 personal loan from her bank to pay out-of-pocket for the procedure, a considerable hardship. *Id.* ¶ 20. Dr. Venkat Rao, a plastic surgeon at UW Health, performed the surgery in August 2016. *Id.* ¶ 21. This surgery was an effective treatment for her gender dysphoria. *Id.* ¶ 22. She has experienced fewer instances of being mistaken as male and of being mistreated for having masculine features. *Id.*; Budge Decl. ¶ 43.

While the hormone therapy and chest reconstruction have been effective treatments for her gender dysphoria, Ms. Makenzie still experiences dysphoria and profound distress because of her male genitalia. Makenzie Decl. ¶¶ 23-24; Budge Decl. ¶ 44. This negatively impacts her social life, sexuality, and occupational functioning. Budge Decl. ¶ 44. Ms. Makenzie's medical providers have recommended that she obtain genital reconstruction in the form of a bilateral orchiectomy and vaginoplasty, which would create female-appearing external genitalia. *Id.* ¶¶ 29-30; Schimek Decl. ¶¶ 9-10. These procedures are effective in treating gender dysphoria in transgender women. Schechter Decl. ¶ 29; Shumer Decl. ¶ 39. In 2014, Ms. Makenzie consulted with her primary care physician, Dr. Trisha Schimek, about obtaining genital reconstruction. Makenzie Decl. ¶¶ 25-26; Schimek Decl. ¶¶ 7-8. However, Dr. Schimek told her that Wisconsin Medicaid would not cover the surgery. Makenzie Decl. ¶¶ 25-26; Schimek Decl. ¶ 7.

In February 2018, on the referral of her primary care doctor, Dr. Beth Potter, Ms. Makenzie consulted with Dr. Katherine Gast, a plastic surgeon at UW Health who focuses on the

treatment of transgender people. Makenzie Decl. ¶ 30; Decl. of Katherine M. Gast, MD, MS ¶¶ 1-2; Potter Decl. ¶ 7. Dr. Gast advised Ms. Makenzie that once she submitted letters of support from two mental health providers, which she was prepared to do, she would be eligible for genital reconstruction under the applicable standards of care. Makenzie Decl. ¶ 30; Gast Decl. ¶ 3. Dr. Gast informed her, however, that Wisconsin Medicaid would not cover the procedure. Makenzie Decl. ¶ 32. Learning this caused her extreme distress, including thoughts of suicide and removing her genitals herself. *Id*. ¶ 33.

Without Medicaid coverage, Ms. Makenzie lacks the means to pay for the surgery herself. *Id.* ¶ 33. Her inability to obtain this necessary care has exacerbated her gender dysphoria and caused significant emotional distress, particularly related to her genitalia. *Id.* ¶¶ 23, 33-34; Budge Decl. ¶¶ 71-72. She is constantly afraid that someone will be able to see her genitals through her clothing. Makenzie Decl. ¶ 23. To avoid that, she wears multiple pairs of underwear and engages in a practice called "tucking" to hide her genitals. *Id.*; CoE Guidelines at 155. However, she finds tucking very painful and uncomfortable. Makenzie Decl. ¶ 23. Though she tries to conceal her genitals, she is constantly worried that someone may notice them—and then mistreat or attack her once they realize she is transgender. *Id.* ¶ 24. Ms. Makenzie avoids sex with her fiancée, but that only compounds her anxiety and depression. *Id.* ¶ 34; Budge Decl. ¶ 44. Even showering or seeing herself in the mirror is painful. Budge Decl. ¶ 44. Because she cannot complete her gender transition, she continues to experiences suicidal thoughts and has engaged in self-harm, including cutting in her genital area. Makenzie Decl. ¶ 34.

Because of her ongoing inability to obtain genital reconstruction surgery, Ms. Makenzie is at high risk of short- and long-term harm to her health and well-being. Budge Decl. ¶¶ 71-72.

LEGAL STANDARD

A preliminary injunction is "[a]n equitable, interlocutory form of relief." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1085 (7th Cir. 2008). "A preliminary injunction is an extraordinary remedy" that "is never awarded as a matter of right." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). Its purpose "is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit." *Platinum Home Mortg. Corp. v. Platinum Fin. Grp.*, 149 F.3d 722, 726 (7th Cir. 1998) (citation and quotation marks omitted).

This Court applies a two-part analysis in determining whether a preliminary injunction should issue: a threshold phase and a balancing phase. *See Whitaker*, 858 F.3d at 1044. First, the moving party must show that the party (1) will likely suffer irreparable harm prior to the case's final resolution without the requested preliminary relief, (2) has no adequate remedy at law for that harm, and (3) has a reasonable likelihood of success on the merits. *Id.* To establish the requisite likelihood of success, the moving party "need not demonstrate a likelihood of absolute success on the merits," but rather that the "chances to succeed on [his or her] claims are 'better than negligible.'" *Id.* at 1046 (citation omitted). "This is a low threshold." *Id.*

If the movant clears this threshold, the court then weighs the equities "to determine whether the balance of harm favors the moving party or whether the harm to the other parties or the public sufficiently outweighs the movant's interests." *Id.* at 1044. The court (1) weighs the irreparable harm the plaintiff faces against the potential irreparable harm to defendants, if any, if the injunction is wrongly granted, and (2) considers the effects, if any, on the public interest. *Turnell v. Centimark Corp.*, 796 F.3d 656, 661-62 (7th Cir. 2015). This "is done on a 'sliding scale' measuring the balance of harms against the moving party's likelihood of success."

Whitaker, 858 F.3d at 1054. "The more likely [movant] is to succeed on the merits, the less the scale must tip in his favor," and "the less likely [movant] is to win, the more the balance of harms must weigh in [movant's] favor for an injunction to issue." *Id.* The Court should also consider whether the injunction "is in the public interest." *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013).

ARGUMENT

I. WITHOUT A PRELIMINARY INJUNCTION, PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITH NO ADEQUATE REMEDY AT LAW.

Because both Mr. Flack and Ms. Makenzie "will likely suffer irreparable harm absent obtaining preliminary injunctive relief" without an adequate remedy at law, *Whitaker*, 858 F.3d at 1044-46, each of them easily clears this threshold requirement. Both Plaintiffs are at high risk of worsening mental health, exacerbated gender dysphoria, self-harm, and stigma—none of which has an adequate remedy at law. Moreover, given the strong likelihood of success on their constitutional claims, as explained below, this Court can presume irreparable injury to both Plaintiffs even without the considerable evidence of the risks to their health and well-being.

A. Plaintiffs are suffering significant harm to their health and well-being—and are at grave risk of irreparable harm—because the Challenged Exclusion prevents them from obtaining medically necessary care.

To show irreparable injury, plaintiffs must show "more than a mere possibility of harm." *Whitaker*, 458 F.3d at 1045. "[H]arm is considered irreparable if it 'cannot be prevented or fully rectified by the final judgment after trial.'" *Id.* (quoting *Girl Scouts*, 549 F.3d at 1089); *see also Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 740 (7th Cir. 2013) (defining irreparable harm as harm "not fully compensable or avoidable by the issuance of a final judgment (whether a damages judgment or a permanent injunction, or both) in the plaintiff's favor"). Even when damages are available, no adequate legal remedy exists if "any

award would be 'seriously deficient as compared to the harm suffered.'" *Whitaker*, 858 F.3d at 1046 (quoting *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003)).

Federal courts have recognized the precise harms facing Mr. Flack and Ms. Makenzie—including delayed or denied access to health care, worsening mental health, exacerbated gender dysphoria, and risk of self-harm or suicide—to be irreparable injuries without adequate remedies at law. First, governmental actions delaying or denying access to necessary medical care can impose irreparable harm to affected individuals. *See, e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 483-84 (1986) (finding that denial of disability benefits irreparably injured plaintiffs by exposing them to severe medical setbacks or hospitalization); *Marcus v. Sullivan*, 926 F.2d 604, 614 (7th Cir. 1991) (finding irreparable harm where delayed receipt of disability benefits "potentially subjects claimants to deteriorating health, and even death"). This includes delayed or denied Medicaid benefits for medically necessary care. *See Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 611 (7th Cir. 2012) (affirming preliminary injunction against Indiana Medicaid's annual coverage cap for medically necessary dental care since "[plaintiff] and similarly situated individuals will likely suffer irreparable harm if the injunction is not granted, as they would be denied medically necessary care").

Second, the Seventh Circuit and other courts have found that exacerbated symptoms of gender dysphoria resulting from discriminatory policies or actions amount to irreparable injury. *See Whitaker*, 858 F.3d at 1045-46; *Hicklin v. Precynthe*, No. 4:16-cv-01357-NCC, 2018 WL 806764, at *10, 14 (E.D. Mo. Feb. 9, 2018) (enjoining prison system's denial of medically necessary transition-related treatments to transgender plaintiff in Eighth Amendment case, finding plaintiff showed irreparable harm based on evidence of worsening emotional distress and a substantial risk of self-harm, including "intrusive thoughts of self-castration" and suicidal

ideation);[5] *accord Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (affirming injunction of Wisconsin's policy of denying gender dysphoria treatments to transgender inmates).

In *Whitaker*, the Seventh Circuit affirmed a preliminary injunction enjoining the defendant school district from enforcing its policy barring Ash Whitaker, a transgender boy, from using boys' restrooms. *Whitaker*, 858 F.3d at 1039. The court credited evidence, including expert declarations, "that supported Ash's assertion that he would suffer irreparable harm absent preliminary relief." *Id.* at 1045. The court specifically cited the opinions of Dr. Stephanie Budge—a clinical psychologist who is also submitting a declaration in this case—who concluded that the discriminatory treatment Ash faced stigmatized him and had "significantly and negatively impacted his mental health and overall well-being," including exacerbating his depression, anxiety, and suicidality. *Id.* Dr. Budge further opined that the school district's actions, "which identified Ash as transgender and therefore, 'different,' were 'directly causing significant psychological distress and place[d] Ash at risk for experiencing life-long diminished well-being and life-functioning." *Id.* The Seventh Circuit found all of these harms could not be rectified by damages alone, finding that there is no "adequate remedy for preventable 'life-long diminished well-being and life-functioning.'" *Id.* at 1046.

Mr. Flack and Ms. Makenzie have presented considerable evidence that they will be harmed by their continuing inability to obtain medically necessary surgical care. As summarized by Dr. Budge, who conducted a clinical interview and psychological assessment of each plaintiff, "[b]oth plaintiffs reported significant distress that was directly related to the denial of surgery

[5] On May 22, 2018, the court entered a permanent injunction and declaratory judgment finding that the state's policy of denying medically necessary hormone treatments to transgender prisoners violated the Eighth Amendment, facially and as applied to the plaintiff. *Hicklin v. Precynthe*, No. 4:16-cv-01357-NCC, slip op. at 10 (E.D. Mo. May 22, 2018).

that cannot be accounted for based on any other physical or mental health concerns" and "that if neither plaintiff is able to obtain gender confirmation surgery, they will continue to experience a significant negative impact on their mental health (currently and in the future)." Budge Decl. ¶ 71. These harms are preventable if Mr. Flack and Ms. Makenzie can obtain the surgeries they need. Budge Decl. ¶ 70; Bergman Decl. ¶ 14; DeGueme Decl. ¶ 14; Schimek Decl. ¶ 9.

For Mr. Flack, the presence of female-appearing breasts, and Wisconsin's policy preventing him from obtaining a mastectomy, signify to others that he is "transgender and, therefore, 'different,'" *see Whitaker*, 858 F.3d at 1045, exposing him to increased gender dysphoria, stigma, and anxiety. Mr. Flack's treating providers predict that his emotional health will continue to deteriorate—and that his depression, anxiety, suicidality, and thoughts of self-harm (including thoughts of removing his breasts himself) will worsen—if he remains unable to obtain chest reconstruction surgery. Bergman Decl.¶ 13; DeGueme Decl. ¶ 13. Dr. Budge concurs, concluding that "if Mr. Flack is not able to obtain gender confirmation surgery, the negative impact on his short-term and long-term mental health will be significant." Budge Decl. ¶ 73. Mr. Flack is at significant risk of self-harm without the surgery. *Id.*; Bergman Decl. ¶ 13.

Similarly, Ms. Makenzie is experiencing depression, anxiety, and thoughts of suicide and self-harm if she cannot obtain female genital reconstruction. Based on her clinical assessment of Ms. Makenzie, Dr. Budge observed that Ms. Makenzie's "confidence related to people understanding that she is a woman (which is directly tied to genital reconstruction) impacts her daily functioning, where she is not able to work, have social relationships, and complete daily tasks." Budge Decl. ¶ 72. Dr. Budge concluded that "[i]t is likely that her difficulty functioning will either remain the same or worsen as time goes on." *Id.*

Were Plaintiffs to ultimately prevail on the merits in this case and obtain a final court order requiring Defendants to cover their surgeries, the attendant delay in obtaining that medically necessary care would nevertheless expose them to irreparable harm. *See Bowen*, 476 U.S. at 483-84; *Marcus*, 926 F.2d at 614. In short, a preliminary injunction enjoining further enforcement of the Challenged Exclusion and permitting Mr. Flack and Ms. Makenzie to obtain the necessary care is essential to protecting their health and well-being while this case proceeds.

B. This Court can presume irreparable harm to Plaintiffs and other transgender Wisconsin Medicaid beneficiaries based on the likelihood of success of Plaintiffs' constitutional claims.

Even without the ample evidence of ongoing and future injury to Plaintiffs discussed above, it is well-established in the Seventh Circuit that violation of constitutional rights is presumed to be an irreparable injury. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (Second Amendment); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (First Amendment); *Kissick v. Huebsch*, 956 F. Supp. 2d 981, 1006 (W.D. Wis. 2013) (same); *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 738 (S.D. Ind. 2016), *aff'd*, 838 F.3d 902 (7th Cir. 2016) (Fourteenth Amendment equal protection); *Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014) (same).

A number of courts have applied this principle to equal protection claims brought by transgender plaintiffs. *See, e.g.*, *Stone v. Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017) (Fifth Amendment equal protection); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 216 (D.D.C. 2017) (same); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 877-78 (S.D. Ohio 2016) (Fourteenth Amendment equal protection).

Given Plaintiffs' strong likelihood of success on their Fourteenth Amendment equal protections claims, this Court can presume irreparable injury here.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF EACH OF THEIR CLAIMS.

A. The Challenged Exclusion violates Section 1557's prohibition on sex discrimination in federally-funded health programs.

Plaintiffs have a substantial likelihood of success on their Section 1557 claims. Section 1557 bans discrimination "on the basis of sex" in federally-funded health programs, including Wisconsin Medicaid. 42 U.S.C. § 18116(a) (incorporating Title IX). The Seventh Circuit has held that discrimination against someone for being transgender is impermissible discrimination based on sex. *Whitaker*, 858 F.3d at 1049. The Challenged Exclusion—which expressly prohibits treatments for "transsexual surgery" and associated treatments for gender dysphoria—plainly takes sex into account in depriving Plaintiffs and other transgender Wisconsin residents access to necessary care. As a result of this exclusion, Mr. Flack and Ms. Makenzie have suffered from stigma, exacerbated gender dysphoria, and other injuries because of the incongruence between aspects of their physical appearance and their respective gender identities. Consequently, they far exceed the "better than negligible" chance of success needed for a preliminary injunction.

1. Section 1557's nondiscrimination requirement applies to Wisconsin Medicaid.

Under Section 1557, "an individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance," on the grounds prohibited by Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("Title IX"); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; the Age Discrimination Act of 1975, 42 U.S.C. § 6101; and Section 794 of Title 29, 42 U.S.C. § 18116(a). Thus, Section 1557 prohibits discrimination "on the basis of sex" in federally-funded health programs and activities. *See Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *7 (D. Minn. Mar. 16, 2015).

Section 1557 also incorporates the enforcement mechanisms available under Title IX and the other enumerated statutes. 42 U.S.C. § 18116(a); *see also Audia v. Briar Place, Ltd.*, No. 17-cv-6618, 2018 WL 1920082, at *3 (N.D. Ill. Apr. 24, 2018); *Palacios v. MedStar Health, Inc.*, No. 17-cv-0867, 2018 WL 992875, at *2 (D.D.C. Feb. 20, 2018). Thus, the statute provides a private right of action. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175, 181-82 (2005) (recognizing implied right of action under Title IX); *Audia*, 2018 WL 1920082, at *3 ("Section 1557's incorporation of '[t]he enforcement mechanisms' of other statutes is congressional recognition that the act can be enforced through the private right of action authorized by the referenced statutes.") (collecting cases); *Prescott*, 265 F. Supp. at 1101 (relying on Title IX to conclude that damages are available under Section 1557).

Wisconsin Medicaid, a medical assistance program administered by Defendant DHS to provide health care to low-income individuals and families, is a health program or activity that receives federal financial assistance—namely, federal Medicaid funds.[6] 42 U.S.C. §§ 1396-1, 1396b; LFB Report at 1-2. By accepting these funds, DHS subjects itself to Section 1557's nondiscrimination requirements and enforcement mechanisms in its operation of Wisconsin Medicaid. 42 U.S.C. § 18116(a).

2. The Challenged Exclusion violates Section 1557's ban on sex discrimination.

a. *Section 1557's prohibition on discrimination on the "basis of sex" covers discrimination for being transgender and undergoing a gender transition.*

Because Section 1557 incorporates Title IX, it should be interpreted consistently with that statute. *See Prescott*, 265 F. Supp. 3d at 1099. In *Whitaker*, the Seventh Circuit held that

[6] The incorporated statutes each define "program or activity" to include a department or agency of a state government that receives or distributes federal financial assistance. 20 U.S.C. § 1687(1); 42 U.S.C. § 2000d-4a(1); 42 U.S.C. § 6107(4)(a); 29 U.S.C. § 794(b)(1).

Title IX—which prohibits discrimination "on the basis of sex" in federally-funded education programs and activities—must be construed broadly to include gender identity discrimination. 858 F.3d at 1048-49. The Seventh Circuit's interpretation of discrimination "on the basis of sex" under Title IX applies with equal force to Plaintiffs' Section 1557 claims here. Moreover, this Court can look to case law under Title VII and other federal sex discrimination laws in construing Section 1557's sex discrimination prohibition. *See Whitaker*, 858 F.3d at 1047 (noting courts may "look[] to Title VII when construing Title IX"); *Prescott*, 265 F. Supp. 3d at 1098-99.

Discrimination based on sex stereotypes is actionable under Title IX and other federal laws. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 350-52 (7th Cir. 2017); *Whitaker*, 858 F.3d at 1047-48. In *Whitaker*, the Seventh Circuit held that discrimination against someone for being transgender is sex discrimination under the sex-stereotyping theory, and affirmed a preliminary injunction enjoining a school district from enforcing its policy barring transgender students from using school restrooms matching their gender identities against the plaintiff, a transgender boy. *Id.* at 1039, 1049-50. The court held that the plaintiff student demonstrated a likelihood of success on the merits of his Title IX claims, finding that, "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Id.* at 1048. "A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Id.* at 1049. In other words, a policy that subjects a transgender person to differential treatment because the person is transgender "punishes that individual for his or her gender non-conformance" and is, therefore, a form of sex discrimination prohibited by Title IX.

Whitaker's conclusion tracks the Seventh Circuit's earlier *en banc* decision in *Hively*, which similarly held that Title VII's prohibition on sex discrimination must be interpreted broadly to bar sexual orientation discrimination as a form of sex discrimination based on gender stereotypes. *Hively*, 853 F.3d at 346-47, 350-51 (describing plaintiff's sexual orientation "the ultimate case of failure to conform to the female stereotype" and reasoning that sexual orientation discrimination is *per se* sex discrimination because "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation'"). *Whitaker*'s interpretation of Title IX's protections also aligns with the majority view of federal courts that discrimination against transgender people for being transgender is sex discrimination. *See, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571, 574-77 (6th Cir. 2018) ("Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex."); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

Expressly applying the Seventh Circuit's reasoning in *Hively*, the Sixth Circuit recently held that a transgender woman could bring an employment discrimination claim under Title VII, as "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." *Harris Funeral Homes*, 884 F.3d at 575. The court held that "Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait." *Id.* at 577. *Harris* carefully explored the broad applications of the sex-stereotyping doctrine to transgender people's discrimination claims, writing, "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align." *Id.*

at 576. Echoing the Seventh Circuit in *Hively*, the court went on, "[t]here is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try." *Id.* at 577. Moreover, the court concluded that discrimination against a transgender person for undergoing a gender transition is, in and of itself, an actionable form of sex discrimination based on stereotyping. *Id.* at 575-76.

Read together, the Seventh Circuit's decisions in *Whitaker* and *Hively*—reinforced by the similar holdings of other courts in Title IX and Title VII cases cited above—compel a construction of Section 1557's prohibitions of discrimination "on the basis of sex" to prohibit discrimination both for being transgender and undergoing a gender transition. Just as it is impossible "to remove the 'sex' from 'sexual orientation,'" *Hively*, 853 F.3d at 350, so too is it impossible to remove "gender" from "gender identity" (or, for that matter, from "transgender," "gender dysphoria," or "gender transition").[7] And just as "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX," *Whitaker*, 458 F.3d at 1049, a policy that denies medically necessary health care to a transgender individual, which would enable that person to live in accordance with his or her gender identity, punishes that individual for being gender nonconforming. That, in turn, violates Section 1557.

The Challenged Exclusion, on its face, impermissibly takes sex into account to categorically deny transgender people Medicaid coverage for medically necessary care to treat gender dysphoria and further a gender transition. The regulation prohibits Wisconsin Medicaid from covering "[t]ranssexual surgery" or "[d]rugs, including hormone therapy, associated with

[7] Courts generally use the terms "sex" and "gender" synonymously when interpreting federal civil rights protections. *Hively*, 853 F.3d at 343 n.1.

transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics." Wis. Adm. Code § DHS 107.03(23)-(24). Tellingly, the regulation does not define "transsexual surgery," but rather defines the prohibition in terms of the class of people (transgender people, or, in the parlance of the regulation, "transsexuals") from whom coverage for these health care services is being withheld.[8] Moreover, the regulation also expressly excludes treatments resulting in the "alteration of sexual anatomy and characteristics," based on the invalid assumption that medical treatments that align one's appearance to one's gender identity are always "medically unnecessary." *See* DHFS Amendments Summary at 1; CR 96-154 at 1. Notably, the State covers these same treatments for other conditions, *see supra* at 8—in effect, singling out transition-related medical services for gender dysphoria that, by definition, only transgender people need.

There is simply no way to read the Challenged Exclusion without reference to sex—by its own terms and with respect to the transition-related medical needs of Cody Flack, Sara Ann Makenzie, and other transgender people the policy prevents from obtaining such care. DHS's continued enforcement of the Challenged Exclusion—including its application to Mr. Flack and Ms. Makenzie to deny them coverage for their health needs—plainly violates Section 1557.

b. *Plaintiffs have been harmed by the violation of their Section 1557 rights.*

As a result of the application of the Challenged Exclusion to them, Mr. Flack and Ms. Makenzie have both been harmed. As summarized above, they have suffered exacerbated gender dysphoria, stigma, and other harms based on the policy that treats their transition-related health care needs as unnecessary.

[8] There is no single surgery to treat gender dysphoria, but rather a range of clinically accepted surgeries and other medical treatments that may be appropriate for a particular individual in consultation with his or her doctors. *See* Schechter Decl. ¶¶ 1 n.1, 27-30; Shumer Decl. ¶¶ 39-40.

The Seventh Circuit recognized similar injuries in *Whitaker*, in which plaintiff, a transgender boy, challenged his school district's policy of banning him from boys' restrooms and requiring him, and him alone, to use gender-neutral restrooms. 858 F.3d at 1045. The Seventh Circuit, finding that plaintiff was likely to succeed on his Title IX claim, observed that the policy "stigmatized [him], indicating that he was 'different' because he was a transgender boy," and "invited more scrutiny and attention," including "intrusive questions about his transition." *Id*.

Here, the Challenged Exclusion similarly exposes Mr. Flack and Ms. Makenzie to stigma and mistreatment. Flack Decl.¶¶ 27-31; Makenzie Decl.¶¶ 23-24, 28, 33-34; Budge Decl. ¶¶ 72-73; Hughto Decl. ¶¶ 46, 53. Plaintiffs wish to align their outward physical appearance to conform to their gender identity, both to avoid being mistaken as the wrong gender or being involuntarily "outed" as transgender because of nonconforming physical traits. Flack Decl. ¶¶ 29-30; Makenzie Decl. ¶¶ 23-24; Budge Decl. ¶¶ 44, 49. Mr. Flack and Ms. Makenzie have legally changed their names to traditionally male and female names, respectively. Flack Decl. ¶ 9; Makenzie Decl. ¶ 12. Each has obtained identity documents reflecting their correct sex: Mr. Flack's Wisconsin state identification card lists his sex as male, and Ms. Makenzie has corrected her birth certificate, obtained a driver's license, and holds a U.S. Passport, all indicating that she is female. Flack Decl. ¶ 9; Makenzie Decl. ¶ 12. Because of hormone treatments and past surgeries, Mr. Flack and Ms. Makenzie have each developed the secondary sex traits of their respective gender identities. Flack Decl. ¶ 11; Makenzie Decl. ¶ 14; DeGueme Decl. ¶ 7. And each outwardly presents—in clothing, hairstyle, grooming, and otherwise—as the sex with which he or she identifies. Flack Decl. ¶ 8; Makenzie Decl. ¶ 10.

Despite all of this, both Mr. Flack and Ms. Makenzie have been frequently misgendered because of their inability to obtain necessary gender-confirming surgeries. Mr. Flack is often

mistaken for a woman because of his breasts and takes pains to hide them when in public. Flack Decl. ¶¶ 14, 17. He avoids social situations altogether to avoid mistreatment from others. *Id*. ¶ 29; Budge Decl. ¶ 61. This social isolation magnifies his depression, social anxiety, and gender dysphoria. Bergman Decl. ¶ 7; Budge Decl. ¶ 61.

Similarly, before she paid out of pocket for chest surgery in 2016, Ms. Makenzie was frequently misgendered as male because of the incongruence between her feminine gender expression and her underdeveloped breasts. Makenzie Decl. ¶ 17. She was also perceived as transgender by others because of the incongruence between her physical features and gender presentation. *Id.* Even now, Ms. Makenzie is severely distressed about the possibility of people noticing her genitalia through her pants, and she suffers profound anxiety and distress from the sight of her own penis. *Id.* ¶ 23. Like Mr. Flack, she remains anxious about being in public or in social situations. *Id.* ¶ 24; Budge Decl. ¶ 46. Each has experienced and continues to suffer from exacerbated symptoms of gender dysphoria, including depression, anxiety, and thoughts of self-harm and suicide, because of their inability to complete their medical transitions. Budge Decl. ¶¶ 48-49, 65-67, 72-73; Bergman Decl. ¶ 13

In short, Mr. Flack and Ms. Makenzie have been denied medically necessary treatments because they are transgender, because the medical treatments they need are to treat gender dysphoria, and because the procedures are a part of their respective gender transitions. If they sought these same services to treat any condition *unrelated* to gender—like cancer or a traumatic injury—Wisconsin Medicaid would have covered these services. Plaintiffs have been, and will continue to be, harmed if Defendants continue to deny them care. For these reasons, they have a high likelihood of success on their Section 1557 claim.

B. Wisconsin is violating the availability and comparability requirements of the Medicaid Act by denying medically necessary treatments for gender dysphoria.

Because Wisconsin has opted to participate in the Medicaid program, it "must comply with requirements imposed both by the [Medicaid] Act itself and by the Secretary of Health and Human Services." *Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981); *see also Miller v. Whitburn*, 10 F.3d 1315, 1316 (7th Cir. 1993). While the State retains some discretion in determining which medical services to cover under Wisconsin Medicaid, it must cover certain "mandatory medical services," including inpatient and outpatient hospital services and physician services. 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(1), (2)(A), (5); *see also Miller*, 10 F.3d at 1316. All services covered in a state's Medicaid program must be provided in "sufficient . . . amount, duration, and scope to reasonably achieve [their] purpose." 42 C.F.R. § 440.230(b); 42 U.S.C. § 1396a(a)(10)(A). In addition, the state must provide the same amount, duration, and scope of services to all Medicaid beneficiaries. 42 U.S.C. § 1396a(a)(10)(B). With the Challenged Exclusion, Wisconsin is violating these requirements.

1. Wisconsin is violating the Medicaid Act's availability requirements by failing to make medically necessary medical assistance available to Plaintiffs.

The Medicaid Act requires states to make mandatory medical services (as well as optional medical services that a state has opted to cover) available to eligible individuals. 42 U.S.C. § 1396a(a)(10)(A). This requirement is known as the "Availability Provision."

A primary objective of Medicaid is "to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of *necessary* medical services." *Beal v. Doe*, 432 U.S. 438, 444-45 (1977) (emphasis added). Since *Beal*, courts, including the Seventh Circuit, have uniformly held that the Availability Provision requires "medically necessary" services to be covered in state Medicaid programs. *See, e.g., Miller*, 10 F.3d at 1319-20 (finding that state must cover a service that is "generally accepted by the professional medical community

as an effective and proven treatment for the condition for which it is being used"); *Bontrager*, 697 F.3d at 608 (holding that state may not "den[y] coverage for medically necessary services outright"); *Collins v. Hamilton*, 349 F. 3d 371, 376 (7th Cir. 2003) (holding a state's categorical exclusion on residential psychiatric treatment inconsistent with Availability Provision since "[i]n some circumstances, [such] treatment may be medically necessary").

Indeed, Wisconsin's own Medicaid regulations affirm that covered services must be provided to Medicaid beneficiaries when they are "medically necessary and appropriate." Wis. Adm. Code § DHS 107.01(1); *see also id.* § 107.06(1) ("Physician services covered by the [Medicaid] program are . . . any medically necessary diagnostic, preventive, therapeutic, rehabilitative or palliative services provided in a physician's office, in a hospital, in a nursing home, in a recipient's residence or elsewhere, and performed by or under the direct, on-premises supervision of a physician within the scope of the practice of medicine and surgery . . . . [provided] in conformity with generally accepted good medical practice."); *id.* § 107.08(1) ("Covered hospital inpatient services are those medically necessary services which require an inpatient stay ordinarily furnished by a hospital for the care and treatment of inpatients, and which are provided under the direction of a physician or dentist in an institution . . . . [and c]overed hospital outpatient services are those medically necessary preventive, diagnostic, rehabilitative or palliative items or services provided by a hospital . . . and performed by or under the direction of a physician or dentist for a recipient who is not a hospital inpatient.").

Here, the surgical treatments Plaintiffs seek unquestionably fall into the categories of mandatory medical services outlined in the Act, as they would be performed by physicians on an inpatient or outpatient basis. The surgical procedures are well-accepted treatments for gender dysphoria that are established as safe and effective within the medical community. Moreover,

Plaintiffs' treating providers have recommended these interventions for Plaintiffs because they are medically necessary to treat their gender dysphoria.

Wisconsin, through the Challenged Exclusion, nevertheless categorically classifies these surgeries as "medically unnecessary" when they are used to treat gender dysphoria and will not cover them when transgender beneficiaries seek them for that purpose. Wis. Adm. Code § DHS 107.03(23)-(24); CR 96-154, at 1. This blanket prohibition plainly violates the Medicaid Act, which requires Defendants to ensure that services are available to beneficiaries in a sufficient amount, duration, and scope. *See* 42 C.F.R. § 440.230(b); 42 U.S.C. § 1396a(a)(10)(A).

The Challenged Exclusion renders the surgeries that Mr. Flack and Ms. Makenzie need unavailable in any amount, duration, or scope to treat gender dysphoria. As the Seventh Circuit has recognized, where, as here, "a service goes completely unprovided, it has obviously not been provided in an amount sufficient to achieve its purpose." *Bontrager*, 697 F.3d at 610; *see also Alvarez v. Betlach*, 572 Fed. Appx. 519, 521 (9th Cir. 2014) (Medicaid Act "prohibits states from denying coverage of 'medically necessary' services that fall under a category in their Medicaid plans"); *Lankford v. Sherman*, 451 F.3d 496, 511 (8th Cir. 2006) ("[F]ailure to provide Medicaid coverage for non-experimental, medically-necessary services within a covered Medicaid category is both per se unreasonable and inconsistent with the stated goals of Medicaid.").

New York's similar categorical exclusion on certain gender-confirming treatments was recently struck down by the Southern District of New York. *Cruz v. Zucker*, 195 F. Supp. 3d 554, 571 (S.D.N.Y. 2016), *reconsideration granted on other grounds*, 218 F. Supp. 3d 246 (S.D.N.Y. 2016). The court held that the policy violated the Availability Provision since "a state may not place an outright ban on medically necessary treatments," adding:

> The Availability Provision and its implementing regulations do allow a state to say "only sometimes" and to limit coverage of specific treatments when the state has

> good reasons for doing so—reasons that ultimately uphold the provision of necessary medical care to needy individuals. But a state cannot say "never" when it comes to medically necessary treatments, because there are no such reasons justifying categorical bans on medically necessary treatment.

Id. at 571 (citations omitted).

This Court should similarly find that the Challenged Exclusion violates the Availability Provision. Because the surgeries at issue are medically necessary for Plaintiffs and other transgender people who need those treatments for gender dysphoria, Wisconsin's policy violates federal Medicaid law and is inconsistent with the prevailing medical consensus.[9] Plaintiffs are likely to succeed on the merits of their claim that the Challenged Exclusion violates the Availability Provision of the Medicaid Act.

2. The Challenged Exclusion also violates the Medicaid Act's comparability requirement.

The Medicaid Act's comparability requirement requires that the "medical assistance made available to any [categorically needy] individual…shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." 42 U.S.C. § 1396a(a)(10)(B); 42 C.F.R. §§ 440.240(a) (stating that services available to categorically needy individuals must be "equal in amount, duration, and scope"), 440.230(c) ("The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible beneficiary solely because of the diagnosis, type of illness, or condition.").

Courts have repeatedly interpreted this provision to prevent states from providing services to some Medicaid beneficiaries but not others based on their medical diagnosis. *See, e.g.*, *White v. Beal*, 555 F.2d 1146, 1148 (3d Cir. 1977); *Davis v. Shah*, 821 F.3d 231, 256 (2d Cir. 2016); *see also Vaughn v. Sullivan*, 83 F.3d 907, 912 (7th Cir. 1996) (to establish a violation

[9] *See* Schechter Decl. ¶¶ 40-43; Shumer Decl. ¶¶ 42-43; Budge Decl. ¶¶ 68-69.

of comparability, plaintiffs must show that the Medicaid "package of benefits they receive is lower than that of some . . . comparable group"). In *White*, the Third Circuit enjoined a Pennsylvania policy that covered eyeglasses for individuals with pathologic need but not for those with ordinary refractive errors. 555 F.2d 1146, 1148 (3d Cir. 1977). While the state contended that limited resources justified the policy, the court enjoined it, in part, because "all persons within a given [eligibility] category must be treated equally." *Id*. at 1149. Similarly, in *Davis*, the Second Circuit struck down a New York policy that denied some Medicaid beneficiaries coverage for services based on the "nature of their medical conditions." 821 F.3d 231, 256 (2d Cir. 2016). The court held that "any genuine enforcement of the . . . comparability requirements must entail some independent judicial assessment of whether a state has made its services available to all . . . individuals with equivalent medical needs." *Id*. at 258. Because the policy treated beneficiaries with a comparable medical need for the same medical services differently based solely on the condition for which they sought treatment, the Second Circuit invalidated it. *Id*. at 259.

As discussed above, the court in *Cruz* considered the exact question posed here: May a state refuse to cover surgeries and other treatments when they are provided to treat gender dysphoria, even though it covers them to treat other medical conditions? The court answered with a resounding "No." 195 F. Supp. 3d at 576. The situation here is no different. Wisconsin covers the surgeries requested by Plaintiffs when they are necessary to treat other conditions, such as cancer, traumatic injuries, or congenital defects, but not when needed to treat gender dysphoria. The State is not providing comparable coverage to individuals with equivalent medical needs—the surgeries are just as necessary for someone with gender dysphoria as they are for someone who requires them as a result of cancer or an injury. Schechter Decl. ¶¶ 31, 38.

Rather, the State has selected some conditions for which treatment is approved, and others for which it can never be covered, regardless of individual need. "[S]uch a selective distribution of medical assistance offers an unequal 'scope' of benefits to individuals [on Medicaid], violating the plain language of [the comparability requirement]." *Davis*, 821 F.3d at 256.

Plaintiffs' comparability claim is likely to succeed on the merits.

C. By categorically denying Plaintiffs and other transgender Wisconsin Medicaid beneficiaries access to gender-confirming medical care, the Challenged Exclusion violates the Equal Protection Clause.

Because the Challenged Exclusion subjects transgender people to disparate and inferior treatment both on the basis of sex and because they are transgender, this Court must review the policy with heightened scrutiny. As the policy has no justification—let alone one that can survive heightened scrutiny—it is unconstitutional. Thus, Plaintiffs are likely to succeed on their Fourteenth Amendment claims.

1. Heightened scrutiny applies to the Challenged Exclusion, which is based on impermissible sex-based classifications and subjects transgender people as a group to second-class treatment.

a. Sex-Based Classifications

For the same reasons the Challenged Exclusion violates Section 1557's prohibitions on sex discrimination, the policy must also be found to impermissibly rely on sex-based classifications in violation of the Equal Protection Clause.

First, as explained above, the Seventh Circuit treats discrimination against transgender individuals as a form of discrimination based on sex stereotyping. "If a state actor cannot defend a sex-based classification by relying upon overbroad generalizations, it follows that sex-based stereotypes are also insufficient to sustain a classification." *Whitaker*, 858 F.3d at 1051 (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 138 (1994)). Second, the Challenged Exclusion

"cannot be stated without referencing sex." *Id.* As discussed above, the text of the policy itself expressly refers to sex and gender-based considerations, including "transsexual surgery" and "sexual anatomy or characteristics." The proscribed medical services are excluded only when sought by transgender people as part of a gender transition and as a treatment for gender dysphoria. It would require "considerable calisthenics," *Hively*, 853 F.3d at 350, to understand this policy without reference to sex. Indeed, the policy would "not exist without taking the [Plaintiffs'] biological sex . . . into account." *Id.* at 347.

The Challenged Exclusion is, therefore, "inherently based upon a sex-classification and heightened review applies." *Whitaker*, 858 F.3d at 1051.

b. Discrimination Against Transgender People as a Class

As in *Whitaker*, this Court can apply heightened scrutiny solely because the Challenged Exclusion involves sex-based classifications. *Id.* However, because the policy discriminates against a discrete, vulnerable, and politically powerless group—transgender people—intermediate scrutiny is warranted on that basis alone.[10]

The Seventh Circuit has not yet reached the question of whether discrimination against transgender people, as a class, warrants heightened scrutiny. *Whitaker*, 858 F.3d at 1051. However, this Court and others have recognized that governmental discrimination against transgender people likely demands at least intermediate scrutiny because transgender people qualify as a suspect or quasi-suspect class. *See, e.g.*, *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *11, 14 (W.D. Wash. Apr. 13, 2018) (holding that strict scrutiny applies to

[10] Other courts and litigants have referred to this as "transgender status" discrimination. Plaintiffs avoid this phrase here because being transgender—like being a woman, being a member of a racial or ethnic group, or being gay or lesbian—reflects membership in a group based on a core aspect of one's identity and is not merely a "status," at least as that term is usually understood.

government's ban on military service by transgender individuals and leaving preliminary injunction of that ban in place); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1134-35, 1145 (D. Idaho 2018) (enjoining state policy barring transgender residents from correcting the sex on their birth certificates as unconstitutional and ordering state to devise replacement policy meeting heightened scrutiny); *Stone*, 280 F. Supp. 3d at 768, 772 (preliminarily enjoining ban on military service by transgender people, applying intermediate scrutiny to equal protection claims because "transgender individuals appear to satisfy the criteria of at least a quasi-suspect classification, and the [policies] are a form of discrimination on the basis of gender"); *Doe 1*, 275 F. Supp. 3d at 208 (same); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018) ("transgender status itself is at least a quasi-suspect classification"); *Bd. of Educ. of Highland Local Sch. Dist.*, 208 F. Supp. 3d at 872-74 ("transgender status is a quasi-suspect class under the Equal Protection Clause"); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 138-40 (S.D.N.Y. 2015) (applying intermediate scrutiny to transgender arrestee's equal protection claim); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (in transgender inmate's challenge to denial of gender-confirming surgery, concluding "that discrimination based on transgender status independently qualifies as a suspect classification under the Equal Protection Clause because transgender persons meet the indicia of a 'suspect' or 'quasi-suspect classification'" and applying heightened scrutiny to plaintiff's equal protection claims); *Mitchell v. Price*, No. 11-cv-260-wmc, 2014 WL 6982280, at *8 (W.D. Wis. Dec. 10, 2014) (applying heightened scrutiny on parties' agreement that this level of review was appropriate).

In *Baskin v. Bogan*, the Seventh Circuit posed four questions in determining whether heightened scrutiny applied to discriminatory policies banning same-sex marriage: (1) whether "the challenged practice involve[s] discrimination, rooted in a history of prejudice, against some

identifiable group of persons, resulting in unequal treatment harmful to them," (2) whether "the unequal treatment [is] based on some immutable or at least tenacious characteristic of the people discriminated against (biological, such as skin color, or a deep psychological commitment, as religious belief often is, both types being distinct from characteristics that are easy for a person to change, such as the length of his or her fingernails) . . . that isn't relevant to a person's ability to participate in society," (3) whether "the discrimination, even if based on an immutable characteristic, nevertheless confer[s] an important offsetting benefit on society as a whole," and (4) if "it does confer an offsetting benefit, [if] the discriminatory policy [is] overinclusive . . . or underinclusive." 766 F.3d 648, 655 (7th Cir. 2014).[11]

Answering these questions here compels a determination that transgender people are at least a quasi-suspect class and that the Challenged Exclusion must fail under heightened scrutiny.

First, transgender people have historically been subjected to discrimination in virtually every facet of life—including in the health care context—and continue to face pervasive discrimination today. *See Whitaker*, 858 F.3d at 1051 ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."); Hughto Decl. ¶¶ 28-46. Transgender people suffer discrimination and harassment in employment, education, housing, health care, and their own families and communities. *See generally* Nat'l Ctr. for Transgender Equality, *Executive Summary of Report of 2015 U.S. Transgender Survey* (2017) [May Decl. Ex. 23]. In Wisconsin, more than a quarter of transgender adults live in poverty, more than twice the overall national poverty rate. Nat'l Ctr. for Transgender Equality, *2015 U.S. Transgender Survey: Wisconsin State Report* 1 & n.3 (2017)

[11] *See also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); *Milner v. Apfel*, 148 F.3d 812, 815-16 (7th Cir. 1998); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1014 (W.D. Wis. 2014).

[May Decl. Ex. 24]. One in five is unemployed. *Id.* at 1. Nearly 60 percent of transgender adults in Wisconsin have recently experienced mistreatment by law enforcement officers who perceived or knew them to be transgender. *Id.* at 2. In the health care context, 30 percent of transgender people in Wisconsin had been denied insurance coverage for being transgender; a third had at least one recent negative experience with a health provider for being transgender; and a quarter had opted not to see a doctor when needed out of fear of mistreatment. *Id.* at 3.

Second, the Challenged Exclusion discriminates against transgender people for an "immutable or at least tenacious characteristic": being transgender. Gender identity is a core, immutable aspect of one's identity. Shumer Decl. ¶¶ 12, 41-42; Budge Decl. ¶ 16; Hughto Decl. ¶ 16. Being transgender has no relevance to a person's ability to participate in or contribute to society. *Karnoski*, 2018 WL 1784464, at *10; *Doe 1*, 275 F. Supp. 3d at 209. Transgender people are, however, a small, politically powerless minority under constant threat by society. *See Karnoski*, 2018 WL 1784464, at *10; *F.V.*, 286 F. Supp. 3d at 1145; *Bd. of Educ. of Highland Local Sch. Dist.*, 208 F. Supp. 3d at 874. An estimated 0.43 percent of the Wisconsin's adult population—fewer than 20,000 people—is transgender. Hughto Decl. ¶ 49. Only about 5,000 of the 1.2 million Wisconsin residents on Medicaid are transgender adults. *Id*. And there are no express state-level protections against gender identity discrimination in employment, housing, education, or otherwise in Wisconsin. *Cf. F.V.*, 286 F. Supp. 3d at 1145 (finding same in Idaho).

Lastly, the Challenged Exclusion has no "offsetting benefit" to society. *Baskin*, 766 F.3d at 655. To the contrary, it harms one of the most vulnerable groups in the state—transgender people living in poverty, many with disabilities—by consigning them to second-class status and exposing them to avoidable and potentially lifelong harms to their health, safety, and well-being. Budge Decl. ¶ 50; Hughto Decl. ¶¶ 44-45, 49-50. It also spurs structural stigmatization and

discrimination against the transgender community. Hughto Decl. at ¶ 50. Any additional costs to the State associated with providing medically-necessary care to the small number of transgender beneficiaries—much of which will be reimbursed with federal funds—will be marginal at best.

For these reasons, transgender people as a group are at least a quasi-suspect class.

2. The Challenged Exclusion cannot withstand heightened scrutiny.

Under intermediate scrutiny, "the burden rests with the state to demonstrate that its proffered justification is 'exceedingly persuasive.'" *Whitaker*, 858 F.3d at 1050 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"); *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577 (7th Cir. 2014)). "This requires the state to show that the 'classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Id.* (quoting *VMI*, 518 U.S. at 524). "It is not sufficient to provide a hypothesized or *post hoc* justification created in response to litigation." *Id.* (citing *VMI*, 518 U.S. at 533). "Nor may the justification be based upon overbroad generalizations about sex" or another quasi-suspect classification, like being a transgender person. *Id.* (citing same). "Instead, the justification must be genuine." *Id.* (citing same).

The Challenged Exclusion cannot survive heightened scrutiny—whether as a sex-based classification or because it targets transgender people, as a group, for discrimination and second-class status among Wisconsin Medicaid beneficiaries. At the time the Challenged Exclusion was enacted, the primary reason stated for singling out and excluding transition-related care from Wisconsin Medicaid coverage was that such care was deemed "medically unnecessary" in all instances. Regardless of whether that was defensible then, any effort by Defendants now to justify their continued enforcement of this regulation on that premise must fail. In light of the

medical consensus that such care is medically necessary in many instances, any assertion that this care is categorically unnecessary falls far short of being "exceedingly persuasive."

The State conceded at the time the regulation was issued that it was not motivated by cost savings, which were expected to be "nominal." *See* DHS Fiscal Est. But even if cost was a factor, that would be insufficient to justify ongoing discrimination that prevents Plaintiffs and others from getting medically necessary care. *Bontrager*, 697 F.3d at 611. Moreover, the long-term costs for mental health services and other care to treat the effects of gender dysphoria may far exceed the costs of timely providing gender-confirming treatments to Plaintiffs and others.

At bottom, the Challenged Exclusion does little more than make it "more difficult for one group of citizens than for all others to seek aid from the government." *Romer v. Evans*, 517 U.S. 620, 633 (1996). This is "a denial of equal protection of the laws in the most literal sense." *Id.* For the foregoing reasons, Plaintiffs are likely to prevail on their equal protection claims.

III. THE BALANCING OF EQUITIES STRONGLY FAVORS PLAINTIFFS.

Because Mr. Flack and Ms. Makenzie have demonstrated a strong likelihood of success on their claims and will suffer irreparable harm without an injunction, this Court must weigh the equities to determine whether the injunction should issue. *Whitaker*, 858 F.3d at 1044. The balancing of harms strongly favors the entry of a preliminary injunction here.

The Court must weigh "any *irreparable* harm the nonmoving party would suffer if the court were to grant the requested relief" against the irreparable harms Plaintiffs will suffer without the injunction. *Girl Scouts*, 549 F.3d at 1086 (emphasis added). Defendants cannot show that they will be harmed—let alone irreparably so—by an injunction barring enforcement of an unlawful and unconstitutional regulation until a final merits determination. *See Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) (enjoining a governmental agency from enforcing

an unconstitutional law causes no irreparable harm to that agency). Requiring Defendants to cover medically necessary care in a nondiscriminatory manner—which they should be doing already—does not harm the state. *See Bontrager*, 697 F.3d at 611-12 (affirming preliminary injunction against annual Medicaid coverage limit for medically necessary dental services).

Defendants will face no administrative burdens in being required to cover medically necessary treatments for gender dysphoria. Wisconsin Medicaid already covers the same procedures Plaintiffs are seeking here for other diagnoses. *See supra* at 8. Applying the same procedures to coverage for transition-related medical treatments as to all other forms of medically necessary care is simply not a burden—let alone an irreparable harm.

Similarly, to the extent Defendants argue that the costs of providing Wisconsin Medicaid coverage for gender-confirming medical treatments will somehow burden the state or harm the public interest, those arguments are unconvincing. The marginal additional cost to the state of covering medically necessary gender-confirming care for the tiny percentage of Wisconsin Medicaid beneficiaries who both are transgender and whose medical providers have deemed such care medically necessary is likely to be low. But even if the prospective fiscal impact was an issue, "[t]he State's potential budgetary concerns are entitled to . . . consideration, but do not outweigh the potential harm to [plaintiff] and other indigent individuals, especially when the State's position is likely in violation of state and federal law." *Bontrager*, 697 F.3d at 611; *see also Koss v. Norwood*, No. 17-cv-2762, 2018 WL 1535068, at *19 (N.D. Ill. Mar. 29, 2018) ("The public has an interest in ensuring that Medicaid eligible individuals promptly receive necessary medical services, and the public interest in making the state follow federal law outweighs any modest impact on its budget.") (citation and quotation marks omitted).

While Defendants will face no injury if the Challenged Exclusion is preliminarily enjoined, the irreparable harms to Cody Flack, Sara Makenzie, and transgender Medicaid beneficiaries not parties to the case will be significant as long as this policy remains in effect. An injunction that "promotes the health, well-being, and safety of transgender people without impacting the rights of others" is in the public interest. *F.V.*, 286 F. Supp. 3d at 1145-46. In short, a preliminary injunction requiring Wisconsin Medicaid to provide medically necessary services is in the public interest. Any marginal cost to Wisconsin of providing medically necessary care to Plaintiffs and other transgender Wisconsin Medicaid beneficiaries pales in comparison to the significant harms they will continue to suffer without this care.

The equities weighs heavily in favor of a preliminary injunction barring further enforcement of the policy until the merits of this case have been resolved.

IV. THE COURT SHOULD NOT REQUIRE PLAINTIFFS TO POST A BOND.

The Court should not require Plaintiffs to post a security bond as a condition for a preliminary injunction. Plaintiffs are low-income individuals who rely on SSI for their income, and are seeking to enjoin an unlawful policy that prevents them from obtaining medically necessary treatments they cannot otherwise afford. In these circumstances, a waiver of the security bond requirement is appropriate. *See Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977); *Wood-Schultz v. Schultz*, No. 11-C-975, 2011 WL 6888702, *3 (E.D. Wis. 2011); *Doe v. Percy*, 476 F. Supp. 324 (W.D. Wis. 1979).

CONCLUSION

For the reasons stated above, Plaintiffs Cody Flack and Sara Ann Makenzie are likely to succeed on their claims under Section 1557, the Medicaid Act, and the Equal Protection Clause; will suffer irreparable injury with no adequate remedy at law unless the Challenged Exclusion is

preliminarily enjoined; and have shown that the benefits to them, other transgender Wisconsin Medicaid beneficiaries, and the public interest far outweigh any negligible harm that Defendants might claim. Thus, Plaintiffs respectfully request that the Court grant the requested injunction.

Dated: May 23, 2018

Respectfully submitted,

/s/ Joseph J. Wardenski

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of May, 2018, I electronically filed the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction and electronically served a copy of same to all counsel of record via the Court's CM/ECF system.

/s/Joseph J. Wardenski
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