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

CODY FLACK and
SARA ANN MAKENZIE,

Plaintiffs,

v. Case No. 18-CV-0309

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
LINDA SEEMEYER, in her official
capacity as Secretary of the Wisconsin
Department of Health Services,

Defendants.

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs Cody Flack and Sara Makenzie, two Wisconsin Medicaid beneficiaries with a psychological condition known as gender dysphoria, seek an order from this Court enjoining Defendants Department of Health Services and its Secretary Linda Seemeyer (collectively "DHS") from enforcing a long-standing Wisconsin Medicaid regulation that excludes coverage for surgical procedures that purport to treat gender dysphoria (the "Exclusion").

Their request for this extraordinary relief should be denied because they cannot satisfy a dispositive threshold requirement—that they will suffer irreparable harm absent an injunction.

First, Defendants' clinician expert—Dr. Chester Schmidt, a Johns Hopkins psychiatrist with over 45 years' experience in treating patients with gender dysphoria—has found inadequate evidence in Plaintiffs' medical records to substantiate their claim that without the surgeries they seek they will engage in self-harm or commit suicide. Most importantly, Plaintiffs' medical records do not appear to contain a current mental status exam, the psychiatric equivalent of a yearly physical. In Dr. Schmidt's experience, that examination is required before drawing any firm conclusions about a patient's risk of self-harm. Second, their irreparable harm argument assumes that the surgical treatments they seek will effectively treat their gender dysphoria, but that is one of the major disputed issues in this case and it cannot be resolved at this early stage. Third, Plaintiffs' assertion that the denial of Medicaid coverage has exacerbated their gender dysphoria symptoms cannot be reasonably separated from the symptoms of gender dysphoria itself—that is, there is no basis to conclude that they are suffering *more* than previously, because they were denied coverage.

Plaintiffs' motion should also be denied because they are not likely to succeed on the merits of the two claims at issue here: (1) an official capacity claim under the Fourteenth Amendment's equal protection clause; and (2) a claim under Section 1557 of the Affordable Care Act.[1] As to Plaintiffs' equal protection claim, the Exclusion survives either rational basis or intermediate scrutiny review, given DHS's strong interests in both saving costs and protecting public health by declining to cover unproven surgical treatments for gender dysphoria. And as for their Section 1557 claim, it fails because that statute does not address transgender status claims and, in any event, does not contain a private right of action.

Both because Plaintiffs fail to show irreparable harm absent an injunction and because their claims are unlikely to succeed, Plaintiffs are not entitled to an injunction ordering DHS to immediately provide Medicaid coverage for the surgeries they seek. The parties should be allowed to fully litigate this important and complex case to its conclusion before the Court makes any decision as to Plaintiffs' entitlement to relief.

[1] Plaintiffs' complaint also contains a Medicaid Act claim, but at the June 5, 2018, status conference, Plaintiffs agreed not to pursue that claim at the preliminary injunction stage. (Dkt. 52 (Hrg. Tr. 9:9–14).)

DEFENDANTS' RESPONSE TO PLAINTIFFS' PROPOSED FINDINGS OF FACT

Any disputes between the parties as to Plaintiffs' proposed findings of fact are addressed both in the Argument section below, when relevant, and in Defendants' Response to Plaintiffs' Proposed Findings of Fact.

For the purposes of this preliminary injunction, Defendants and Plaintiffs largely agree that the "who, what, where, and when" facts are undisputed. They agree that the DHS regulation at issue, Wis. Admin. Code § DHS 107.03(23)–(24), prohibits Medicaid coverage for surgical procedures meant to treat gender dysphoria. (Dkt. 51 (Stipulated Findings of Fact (hereinafter "SFOF") ¶¶ 10–15, 36, 42).) They agree that Plaintiffs Flack and Makenzie, two Wisconsin Medicaid beneficiaries, (1) suffer from gender dysphoria, (2) over the years have taken steps to further their gender transition, (3) seek surgeries that purport to treat their gender dysphoria, procedures that their treating medical providers have approved, but that (4) the Exclusion does not allow Medicaid coverage for the surgeries they seek. (*See generally,* SFOF ¶¶ 24–55.)

Only two material factual disputes exist at this stage: First, whether Plaintiffs' face irreparable harm if their preliminary injunction request is denied; and second, on the merits, whether DHS's interests in having the Exclusion—specifically, protecting public health by declining coverage for

surgical procedures of uncertain safety and efficacy and containing health insurance costs—suffice to support the Exclusion. Defendants offer the following evidence on these disputed issues.

Dr. Chester W. Schmidt, M.D.

In the expert opinion of Dr. Chester W. Schmidt, Jr., M.D., there is an "insufficient clinical basis to conclude that either Flack or Makenzie will suffer imminent, irreparable harm if they do not receive gender reassignment surgery prior to the conclusion of this case." (Schmidt Decl. ¶ 8.) The following reasons support Dr. Schmidt's expert opinion.

Dr. Schmidt has extensive experience treating gender dysphoria. He is a Professor of Psychiatry and Behavioral Sciences at the Johns Hopkins University School of Medicine. He is also co-founder and Associate Medical Director of the Sexual Behaviors Consultation Unit at Johns Hopkins Hospital. He has provided direct clinical treatment to patients with gender dysphoria for 47 years. (*Id.* ¶ 2.) Here, Dr. Schmidt reviewed Plaintiffs' declarations, the medical records Plaintiffs produced before July 5, 2018, declarations from six of Plaintiffs' treating physicians, and declarations of four non-treating medical experts. (*Id.* ¶ 7.)

First, Dr. Schmidt did not locate within Plaintiffs' medical records a current mental status examination. This standard psychiatric report, akin to a yearly physical exam, should be performed "when a patient presents with

potential signs and symptoms of gender dysphoria." (*Id.* ¶ 9.) Without such an examination, there was "insufficient basis for any clinician to conclude that either Flack or Makenzie faces an imminent risk of suicide or other self-harm, whether due to gender dysphoria or any other psychiatric disorder." (*Id.*) Plaintiffs' treating physicians' failures to refer to a current medical status examination is a "serious omission that undermines their opinions on their patients' mental state." (*Id.*)

Second, as to Flack, recent outpatient notes indicate that he is "experiencing psychiatric issues, but they do not indicate that he is so destabilized such that a substantial risk of imminent self-harm exists." (*Id.* ¶ 10.) Further, Dr. Schmidt explained that Flack has had no prior incidents of self-harm, despite being in the process of gender transitioning for several years. Thus, this is "further indication he does not present a substantial risk of self-harm in the near term." (*Id.* ¶ 12.)

Third, as of July 5, 2018, Dr. Schmidt had not been provided any similar outpatient notes from Makenzie. However, Makenzie's own treating psychotherapist, reports that, as of June 14, 2018, her "psychiatric symptoms appear to be quite stable" and that she "denies a current or recent history of self-harming behaviors and/or suicidal thoughts." (Roth Decl. Ex. 1018 (Therapist Ltr.).)

Fourth, while Dr. Schmidt considered Plaintiffs' threats of self-harm, those statements "are an insufficient basis to conclude that a serious risk of self-harm exists, let alone that receiving the surgical procedures Flack and Makenzie seek will reduce or eliminate that risk." (Schmidt Decl. ¶ 11.) In other words, Flack's and Makenzie's self-harm threats are not enough to allow Plaintiffs' experts and treating physicians to conclude that Plaintiffs are at a meaningful risk of self-harm. In Dr. Schmidt's experience, when patients present with self-harm thoughts, they often are "created by accompanying depression, anxiety, or other psychiatric disorders." Dr. Schmidt would first "treat those accompanying disorders, and only then proceed with any potential gender reassignment surgical procedures." (*Id.*)

In sum, according to Dr. Schmidt, "Flack and Makenzie have been in the process of successfully transitioning for years and without a current complete psychiatric evaluation, which includes a mental status examination, there is no medical basis for determining the severity of their threats of self-harm." (*Id.* ¶ 13.)

Dr. Lawrence Mayer, M.D., M.S., Ph.D.,

Dr. Lawrence Mayer, who is also Defendants' expert in a similar case before this Court, *Boyden v. ETF,* No. 17-CV-0264 (W.D. Wis.), opines that "[m]edical and surgical treatments have not been demonstrated to be safe and effective for gender dysphoria." (Roth Decl. Ex. 1000 (Mayer Report 3).)

Dr. Mayer is a research physician and epidemiologist who focuses on the intersection among biostatistics, medicine, and public health. (Roth Decl. Ex. 1000 (Mayer Report 2).) He has reviewed hundreds of manuscripts submitted for publication to many of the major medical, statistical and public health journals such as *The New England Journal of Medicine*, *The Journal of the American Statistical Association* and *The American Journal of Public Health*. Specific to this case, he is "an expert in the epidemiology of gender dysphoria, having reviewed a tremendous amount of literature on what the science has to say." (Roth Decl. Ex. 1002 (Mayer Dep. 32:25–33:3).) His "expertise is to review the literature and say, what does biology have to say, and to review these different models of the relationship between gender and sex, and try to figure out . . . what the best data says." (Roth Decl. Ex. 1002 (Mayer Dep. 23:11–16).) His notable opinions are the following.

In Dr. Mayer's opinion, having reviewed hundreds of available studies regarding surgical and medical treatments for gender dysphoria, there is inadequate evidence to conclude that surgical treatments safely and effectively treat gender dysphoria. (Roth Decl. Ex. 1000 (Mayer Report 6–8, Appx. D 106–13); Roth Decl. Ex. 1002 (Mayer Dep. 35:25–36:4, 42:20–43:1, 49:21–50:15, 62:21–63:14, 65:9–66:5, 88:6–8, 100:10–21).) The studies Plaintiffs' expert, Dr. Budge, has cited are scientifically flawed and do not

prove that gender reassignment surgeries actually treat gender dysphoria. Dr. Mayer has explained a few reasons why:

> [T]hey don't actually measure the gender dysphoria, they don't actually break it down into the incident rate, and they don't show, which is clinical trials 101, a significant difference between people who get the treatment and people who don't in terms of risk of being gender dysphoric. So . . . [the patients] improve body image, feel better about themselves, [and have a] more positive outlook in life. . . .[T]hose are fine [outcomes] . . . for surgery[; t]hey aren't fine in psychiatry. The question is are these people having serious life adjustment problems, and are those problems alleviated by the surgery?

(Roth Decl. Ex. 1002 (Mayer Dep. 178:10–21).) And Dr. Mayer identifies a placebo effect that could explain why subjects of Plaintiffs' favored studies show improved well-being:

> [T]o do a study of -- giv[ing] people $50,000 worth of plastic surgery and then ask[ing] them if they feel better about themselves is a little bit silly. The outcome has got to be dysphoria. And we've got to look at the treatment versus an active control. I bet anybody you do $50,000 worth of cosmetic surgery on feels better about themselves.

(Roth Decl. Ex. 1002 (Mayer Dep. 42:6–14).)

Dr. Mayer is not the only medical professional with doubts about the safety and efficacy of these treatments. The Hayes Medical Technology Directory, an organization that evaluates the effectiveness of various medical treatments, also found very poor evidence regarding the effectiveness of hormone therapy, gender reassignment surgery, and ancillary procedures. On gender reassignment surgery, Hayes surveyed 19 peer-reviewed studies and found them to be "very low" quality evidence and explained that

"[d]ata were too sparse to draw conclusions regarding whether [gender reassignment surgery] conferred additional benefits to hormone therapy alone." (Roth Decl. Ex. 1003 (Mayer Decl. Ex. A 3–4).) Hayes further noted that "[t]he medical necessity of SRS [sex reassignment surgery] for the treatment of GD [gender dysphoria] is under debate" since "[t]he condition does not readily fit traditional concepts of medical necessity [and] since research to date has not established anatomical or physiological anomalies associated with GD." (Roth Decl. Ex. 1003 (Mayer Decl. Ex. A 2).) Likewise, for ancillary procedures (like facial feminization/masculinization), Hayes found "very low" quality evidence and concluded that "effect of these procedures on overall individual well-being is unknown." (Roth Decl. Ex. 1003 (Mayer Decl. Ex. A 12).) Similar findings were made by the federal government's Centers for Medicare and Medicaid Services (CMS), which found "inconclusive" clinical evidence regarding the efficacy of gender reassignment surgery. (Roth Decl. Ex. 1001 (CMS Report 1).)

David Williams

David Williams, a health insurance benefits consultant and another of Defendants' experts in *Boyden, v. ETF* has opined that covering similar benefits at issue here would cost around $300,000 a year in an insured population of around 167,500 (i.e. the pool of state employees and their covered dependents). (Roth Decl. Ex. 1004 (Williams Report 13).) While those figures

are not precisely scalable here given the different population at issue—state employees versus Medicaid beneficiaries—they provide a rough analogue to the potential costs of removing the Medicaid Exclusion. Since there are around 1.2 million Medicaid enrollees in Wisconsin, arithmetic suggests that the cost of coverage for this larger population would be around $2.1 million.[2]

PRELIMINARY INJUNCTION LEGAL STANDARD

A preliminary injunction is an extraordinary and drastic remedy, and is never awarded as a matter of right. *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008); *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 823 (7th Cir. 1998). "[A]n injunction requiring an affirmative act by the defendant" must be "cautiously viewed" and granted only "sparingly." *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997). "Preliminary relief is properly sought only to avert irreparable harm to the moving party." *Chi. United Indus., Ltd. v. City of Chicago,* 445 F.3d 940, 944 (7th Cir. 2006).

A "moving party must show that it has '(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits.'" *Wis. Right To Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014) (citation omitted); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "For preliminary relief to be

[2] (1,200,000/167,500) * $300,000 = $2,149,253.73.

granted, the irreparable harm must . . . be likely. That is, there must be more than a mere possibility that the harm will come to pass . . . ." *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 788 (7th Cir. 2011).

Only if the moving party shows likelihood of success on the merits and a suffering of irreparable harm if the injunction does not issue, then "the court weighs the competing harms to the parties if an injunction is granted or denied and also considers the public interest." *Wis. Right To Life*, 751 F.3d at 830 (citation omitted). "The equitable balancing proceeds on a sliding-scale analysis; the greater the likelihood of success on the merits, the less heavily the balance of harms must tip in the moving party's favor." *Id.* (citation omitted).

A preliminary injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Granting a preliminary injunction involves the "exercise of a very far-reaching power" and is "never to be indulged in except in a case clearly demanding it." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984) (citations omitted).

ARGUMENT

Plaintiffs cannot meet their burden of proving that they are entitled to the extraordinary remedy of a preliminary injunction. First, they cannot show that they will suffer irreparable harm if the injunction is not issued. That alone prevents the Court from granting their motion. Second, even if they could prove irreparable harm, they cannot show some likelihood of success on the merits of their equal protection and Affordable Care Act claims.

I. Neither Plaintiff can show they will suffer irreparable harm without a preliminary injunction.

A plaintiff seeking preliminary relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* Without proving irreparable harm, the Court need not decide any other question. *See Abbott Labs v. Mead Johnson & Co.,* 971 F.2d 6, 19 & n. 6 (7th Cir. 1992) (plaintiff's failure to demonstrate irreparable harm "dooms a plaintiff's case and renders moot any further inquiry").

Plaintiffs argue that they face irreparable harm if their motion for preliminary injunction is denied because they cannot access surgical gender dysphoria treatments, their mental health is worsening, their gender dysphoria is exacerbated by the denial, and they are at risk of self-harm or suicide. (Dkt. 19:24.) None of these arguments are persuasive.

Plaintiffs first assert that the mere fact that they are being denied coverage to prescribed surgeries to treat gender dysphoria causes them irreparable harm. (Dkt. 19:24.) They cite *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 611 (7th Cir. 2012), for the proposition that denial of medically necessary care to a plaintiff results in irreparable harm, but the holding is not so broad and is distinguishable. In *Bontrager*, the court held that Indiana's Medicaid coverage cap of $1,000 for dental services violated the Medicaid Act. Because Indiana was required to cover medically necessary dental services and the cap excluded medically necessary procedures above $1,000, Medicaid beneficiaries would suffer irreparable harm absent a preliminary injunction. *Id.*

Here, however, the medical necessity of the surgeries Plaintiffs seek is in dispute. Dr. Mayer, Defendants' expert, opines that there are no scientifically reliable studies confirming that gender reassignment surgeries safely and effectively treat gender dysphoria. (Roth Decl. Ex. 1000 (Mayer Report 6–8, Appx. D 106–13; Roth Decl. Ex. 1002 (Mayer Dep.

35:25–36:4, 42:20–43:1, 49:21–50:15, 62:21–63:14, 65:9–66:5, 88:6–8, 100:10–21.) Thus, unlike in *Bontrager*, there is no proven medical benefit to the procedures for which Plaintiffs seek Medicaid coverage, and so Plaintiffs here will not face irreparable harm absent a preliminary injunction. Put differently, there is inadequate evidence to demonstrate that the relief Plaintiffs seek—insurance coverage for gender dysphoria surgeries—will actually treat the condition that they say constitutes an irreparable harm.

Plaintiffs similarly contend that their mental health is worsening because the Exclusion prevents them from completing their transitions. More specifically, they both claim to have thoughts of self-harm and suicide. (Dkt. 19:18–19, 21, 25–26.) This does not establish that irreparable harm is likely for two reasons.

First, it relies on the same faulty assumption as Plaintiffs' citation to *Bontrager*—that the surgical treatments they seek will effectively treat their gender dysphoria. Again, as Dr. Mayer opines, there is insufficient scientific evidence to conclude that this is true. (Roth Decl. Ex. 1000 (Mayer Report 6–8).) Plaintiffs thus cannot show that obtaining coverage for these procedures will treat their gender dysphoria, the cause of the symptoms they say constitute an irreparable harm.

Second, Plaintiffs offer insufficient evidence to establish a meaningful risk of self-harm in the absence of an injunction. Importantly, Dr. Schmidt, Defendants' other medical expert, points out the lack of a current mental status examinations in Plaintiffs' medical records. (Schmidt Decl. ¶ 9.) These standard psychiatric reports are necessary to conclude that either Flack or Makenzie faces an imminent risk of self-harm or suicide. (*Id.*) Dr. Schmidt also opines that Plaintiffs' alleged threats of suicide suggest a psychiatric condition that needs immediate treatment, even before considering whether they should receive the surgical procedures they seek. (*Id.* ¶ 11.)

Moreover, although Flack has testified to suicidal thoughts because he cannot obtain surgery to remove his breasts, he has not acted on them. (Dkt. 19:18.) And because he has been transitioning for years without acting on those thoughts, this is further indication that Flack does not present a substantial risk of self-harm "in the near term." (Schmidt Decl. ¶ 12.) As for Makenzie, she claims to have expressed suicidal thoughts and engaged in self-harm. (Dkt. 19:21.) But Makenzie's psychotherapist wrote in a June 14, 2018, letter that Makenzie's "psychiatric symptoms appear to be quite stable. *Sara Ann [Makenzie] denies a current or recent history of self-harming behaviors and/or suicidal thoughts*." (Roth Decl. Ex. 1018 (Therapist Ltr.).) (emphasis added).) Further, Dr. Budge's report states that Makenzie's suicidal

ideations have *decreased* since being involved in the lawsuit. (Dkt. 24:14 ¶ 49 (Budge Report).)

Next Plaintiffs contend that "exacerbated symptoms of gender dysphoria resulting from discriminatory policies or actions amount to irreparable injury." (Dkt. 19:24.) This argument has three problems.

First, like all of Plaintiffs' irreparable harm arguments, they assume that the treatments they seek will effectively treat their gender dysphoria. But that is one of the key disputed issues in this case, and it cannot be adequately resolved at the preliminary injunction stage.

Second, there is no convincing way to distinguish between Plaintiffs' pre-existing symptoms—whether caused by gender dysphoria or their other psychological conditions—and the purported incremental gender dysphoria symptoms caused by the denial of coverage. Again, without current mental status examinations in Plaintiffs' medical records, and having only Plaintiffs' unreliable—and in the case of Makenzie, conflicting—statements, evidence of "exacerbated symptoms" of gender dysphoria simply does not exist. Both Plaintiffs have gender dysphoria and suffered from it long before they knew of the Exclusion. (Dkt. 22:2–4 ¶¶ 5–8, 10–11, 14–17 (Flack Decl.); Dkt. 23:1–4 ¶¶ 5–10, 13–14 (Makenzie Decl.).) And Makenzie suffers from several other mental health disorders, such as post-traumatic stress disorder and social anxiety disorder. (Dkt. 24:13 ¶ 45 (Budge Report).) So Plaintiffs'

further distress *from the Exclusion* cannot reasonably be separated from the distress that is a result of the gender dysphoria diagnosis in the first place.

Third, in support of their "exacerbated symptoms" argument, Plaintiffs cite *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034, 1044 (7th Cir. 2017). (Dkt. 19:24.) But *Whitaker* is unhelpful to their case because it is distinguishable. In *Whitaker*, the issue was a high school's policy of forcing a transgender boy to use a different bathroom than all the other high school students, thereby stigmatizing him. *Id.* at 1045. The court found that this stigma caused him distress. Here, however, the Exclusion does not shine a spotlight on either Flack or Makenzie every day in front of others like the school's policy did to the boy in *Whitaker*. In other words, the Exclusion does not stigmatize Plaintiffs like *Whitaker*'s bathroom policy. Plaintiffs' reliance on *Hicklin v. Precynthe*, No. 4:16-cv-01357-NCC, 2018 WL 806764, at *10 (E.D. Mo. Feb. 9, 2018) (Dkt. 19:24–25), is also misplaced, since that non-precedential Eighth Amendment case did not consider evidence like that presented here by Dr. Schmidt and Dr. Mayer—namely, that Plaintiffs' own threats to self-harm do not suffice to establish a serious risk, and that inadequate scientific evidence exists regarding the safety and efficacy of surgical gender dysphoria treatments.

Finally, Plaintiffs argue that, even without considering the medical evidence, this Court may nonetheless find irreparable harm merely by holding that may prevail on the merits of their equal protection claims. (Dkt. 19:27.) The problem with this argument is Plaintiffs need to show "likely" irreparable harm, *Winter*, 555 U.S. at 22, and thus they must show they are *likely* to succeed on the merits of their constitutional claim. *Doe v. The Ohio State Univ.*, 136 F. Supp. 3d 854, 871 (S.D. Ohio 2016) ("[I]f a court finds it unlikely that a plaintiff will succeed on the merits of a constitutional claim, the 'argument that he is entitled to a presumption of irreparable harm based on the alleged constitutional violation is without merit.'") (citation omitted). They cannot do so, as explained further below.

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Plaintiffs Makenzie and Flack cannot show that they will likely suffer irreparable harm if they do not obtain a preliminary injunction enjoining DHS from enforcing the Exclusion. Because of this failure, Plaintiffs cannot meet their burden and their motion for a preliminary injunction must be denied.

II. Plaintiffs cannot show a likelihood of success on the merits of either their equal protection or Section 1557 Affordable Care Act claim.

Per Plaintiffs' agreement during the Court's telephone hearing on June 5, 2018, their motion for preliminary injunction is limited to claims brought under the Equal Protection Clause and Section 1557 of the Affordable Care Act.[3] (Dkt. 52 (Hrg. Tr. 9:9–14).) Under either claim, Plaintiffs have not shown a likelihood of success on the merits and, as a result, their motion must be denied.

A. Plaintiffs cannot show that they are likely to prevail on the merits of their equal protection claim.

The Equal Protection Clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The guarantee of equal protection . . . [is] a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). "[It] does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

[3] Plaintiffs also agreed that any decision by the Court on their preliminary injunction motion would apply only to the two named plaintiffs, Cody Flack and Sara Makenzie. (Dkt. 52 (Hrg. Tr. 9:9–14).)

When reviewing a claim that state action violates equal protection, a court must first determine the applicable level of scrutiny. *See Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). Discrimination on the basis of sex faces intermediate scrutiny: "To succeed, the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citation omitted). By contrast, state action that does not target a suspect class will be upheld if it bears a rational relation to some legitimate end. *Turkhan v. Perryman*, 188 F.3d 814, 828 (7th Cir. 1999). This level of review is exceedingly deferential: "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319.

Plaintiffs' official capacity claim against DHS Secretary Seemeyer under 42 U.S.C. § 1983 and the equal protection clause seeks to enjoin enforcement of the Exclusion. But this claim fails because the Exclusion survives both rational basis review and intermediate scrutiny: it advances the State's interests in avoiding increased Medicaid costs and protecting public health.

1. Rational basis scrutiny is proper.

Plaintiffs seek heightened equal protection scrutiny by alleging discrimination on two bases: transgender status and sex. (Dkt. 19:41–42.) Both arguments fail, thereby requiring this Court to apply the deferential rational basis standard of review.

a. Any discrimination on the basis of transgender status only merits rational basis review.

Even if the Exclusion is viewed as discriminating on the basis of transgender people as a class, rational basis review would still be appropriate. The reason is because the Supreme Court has not recognized transgender people as a suspect class under the equal protection clause. Indeed, the Supreme Court has repeatedly declined to apply heightened scrutiny in related areas. For example, in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court declined three separate opportunities to extend heightened scrutiny to gays and lesbians. That is unsurprising, because the Supreme Court has long expressed skepticism at creating new protected classes. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441, 446 (1985).

Applying heightened scrutiny here based on transgender status thus would place this Court outside the mainstream of Supreme Court jurisprudence. Claims based on sexual orientation have been percolating in the

federal courts for far longer than transgender status claims, and yet the Supreme Court still has not recognized heightened scrutiny based on sexual orientation. Although some lower courts outside Wisconsin have applied heightened scrutiny to transgender status claims (Dkt. 19:42–43), those decisions ignore the Supreme Court's restrained approach in *Cleburne*, *Romer*, *Lawrence*, and *Obergefell* and should be disregarded. Rather, this Court should follow the approach of district courts and courts of appeal that have adhered to the Supreme Court's restrained approach.[4]

Plaintiffs rely heavily on *Whitaker* but acknowledge, as they must, that even *Whitaker* did not hold that transgender people necessarily enjoy heightened scrutiny. (Dkt. 19:42.) *See Whitaker*, 858 F.3d at 1051 ("[T]his case does not require us to reach the question of whether transgender status is per se entitled to heightened scrutiny.") That explains why Plaintiffs urge this

[4] *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015); *Etsitty v. Utah Transit Auth.,* 502 F.3d 1215, 1227–28 (10th Cir. 2007); *Brown v. Zavaras,* 63 F.3d 967, 970–71 (10th Cir. 1995); *Doe v. Alexander,* 510 F. Supp. 900, 904 (D. Minn. 1981); *Braninburg v. Coalinga State Hosp.,* No. 1:08-CV-01457-MHM, 2012 WL 3911910, at *8 (E.D. Cal. Sept. 7, 2012); *Jamison v. Davue,* No. CIV S-11-2056 WBS DAD P., 2012 WL 996383, at *3 (E.D. Cal. Mar. 23, 2012); *Kaeo-Tomaselli v. Butts,* Civ. No. 11-00670 LEK/BMK, 2013 WL 399184, at *5 (D. Haw. Jan. 31, 2013); *Lopez v. N.Y.C.,* No. 05 Civ. 10321(NRB), 2009 WL 229956, at *13 (S.D.N.Y. Jan. 30, 2009); *Starr v. Bova,* No. 1:15 CV 126, 2015 WL 4138761, at *2 (N.D. Ohio July 8, 2015); *Murillo v. Parkinson,* No. CV 11-10131-JGB (VBK), 2015 WL 3791450, at *12 (C.D. Cal. June 17, 2015); *Druley v. Patton,* 601 F. App'x 632, 635 (10th Cir. 2015); *Stevens v. Williams,* No. 05-CV-1790-ST, 2008 WL 916991, at *13 (D. Or. Mar. 27, 2008); *Rush v. Johnson,* 565 F. Supp. 856, 868 (N.D. Ga. 1983).

Court to label transgender people as a quasi-suspect class. (Dkt. 19:44.) This invitation should be declined.

Plaintiffs point to four factors sometimes used to establish new suspect classes: (1) a history of discrimination against the class; (2) the class's ability to contribute equally to society; (3) whether the class's defining characteristic is immutable; and (4) whether the class is politically powerless. (Dkt. 19:43–44 (citing *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).)

While transgender people have surely experienced discrimination and can contribute equally to society, Plaintiffs fail to establish the third and fourth factors. Contrary to Plaintiffs' experts' assertions, no scientific evidence demonstrates that transgender status is "immutable." (Roth Decl. Ex. 1000 (Mayer Report 2, 4, 6).) Rather, studies indicate that gender dysphoria persists into adulthood for only 12–27% of children—a fact which strongly suggests that some of those people no longer adopted a transgender gender identity as adults. (Roth Decl. Ex. 1005 (WPATH Guidelines 11).) Nor have Plaintiffs shown that transgender people are politically powerless. To the contrary, sufficient political will existed during the Obama administration to enact measures meant to protect transgender rights. (Roth Decl. Ex. 1006 (Dear Colleague Ltr.).) Similarly, several states and cities have enacted legislation to protect gender identity and prohibit discrimination based on gender identity in either employment, housing, or public accommodation. (Roth Decl. Ex. 1007–1009.)

Many non-governmental organizations devote significant resources to promoting transgender rights. (Roth Decl. Ex. 1010–1014.) Likewise, editorial boards of prominent, nation-wide newspapers support transgender rights. (Roth Decl. Ex. 1015–1017.) This robust legislative, social, and political movement in favor of transgender rights "negates any claim that" transgender individuals "are politically powerless in a sense that they have no ability to attract the attention of the lawmakers." *City of Cleburne,* 473 U.S. at 445.

To be sure, the current presidential administration has taken a different position than the prior one on some transgender issues, but that simply indicates that transgender topics are subject to the push-and-pull of ordinary politics. It does not show that transgender people are so politically powerless that they cannot defend themselves without the special constitutional shield of heightened scrutiny, a shield which the Supreme Court has hesitated to extend beyond the traditional suspect classes of race, national origin, and sex. *City of Cleburne*, 473 U.S. at 445–47. Nor does the fact that transgender people make up a small percentage of the population combined with past discrimination suffice. Past discrimination is logically distinct from current political powerlessness.

Since transgender status does not entitle Plaintiffs' to heightened scrutiny, rational basis review of Plaintiffs' equal protection challenge to the Exclusion is proper.

b. The Exclusion does not discriminate on the basis of sex.

Plaintiffs also argue that the Exclusion discriminates against them on the basis of sex, thereby entitling them to heightened equal protection scrutiny on that independent basis. (Dkt. 19:41–42.) This argument also fails.

(1) The terms "gender identity" and "sex" are not synonymous.

Plaintiffs contend that discrimination on the basis of sex equates to discrimination on the basis of transgender status and gender transition. (Dkt. 19:29–34, 41.) But classifying an individual because they are transgender or going through a transition (assuming for now the Exclusion does so) is not the same as classifying someone because of their sex.

Someone who is transgender has an incongruence between their sex assigned at birth and their gender identity. (Roth Decl. Ex. 1000 (Mayer Report Appx. D 94.) Dr. Mayer opines that "sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy." (Roth Decl. Ex. 1000 (Mayer Report 3).) Gender, on the other hand, "refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women." (Roth Decl. Ex. 1000 (Mayer Report 3).) Though one is born with the chromosomes, hormone prevalence, and external and internal anatomy of

a particular sex, one is socially conditioned to take on the roles, behaviors, activities, and attributes of a gender identity. (Roth Decl. Ex. 1000 (Mayer Report 3–4, 6).) As such, there is a concrete distinction between "sex" as a biological designation and "gender" or "gender identity" as a cultural construct.

Courts have recognized that heighted scrutiny should be reserved for "immutable" characteristics, such as sex. Since sex is immutable and gender identity is not, that further supports distinguishing between the two for equal protection purposes. For example, in *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973), the Supreme Court reasoned that heightened scrutiny was appropriate for sex because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth," unlike "non-suspect statuses as intelligence or physical disability." *Id. See also Ulane v. E. Airlines, Inc.,* 742 F.2d 1081, 1087 (7th Cir. 1984) ("[I]f the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."); *Etsitty,* 502 F.3d at 1222 ("[T]here is nothing in the record to support the conclusion that the plain meaning of 'sex' encompasses anything more than male and female."); *Knussman v. Maryland,* 272 F.3d 625, 635 (4th Cir. 2001) (quoting *Frontiero,* 411 U.S. at 686)); *Sommers v. Budget Mktg., Inc.,* 667 F.2d 748, 750 (8th Cir. 1982) ("[T]he plain meaning must be ascribed to the term 'sex' in

absence of clear congressional intent to do otherwise."); *Johnston,* 97 F. Supp. 3d at 676 (sex "means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex.").

Thus, for equal protection purposes, sex and gender identity are not the same thing—sex is an immutable characteristic, whereas gender identity is a developmental, cultural process. Plaintiffs' claim alleging discrimination because of transgender status thus should not be treated like a traditional sex discrimination claim that enjoys heightened scrutiny.

(2) The Exclusion does not represent a form of sex stereotyping.

Plaintiffs also try to obtain heightened scrutiny on the basis of sex by citing *Whitaker* (Dkt. 19:41–42). Even though *Whitaker* declined to extend heightened scrutiny to transgender status per se, the court nevertheless applied heightened scrutiny on the theory that the single-sex bathroom policy "show[ed] sex stereotyping." *Id.* at 1051. But the Exclusion here does not subject Plaintiffs to sex stereotyping, and so heightened scrutiny does not apply under *Whitaker*.

To see why, it is worth revisiting the case on which *Whitaker* primarily relied: *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the female plaintiff was denied partnership in an accounting firm, partly

because members of the firm said that she was "macho," "somewhat masculine," needed to take "a course in charm school," and "overcompensated for being a woman." 490 U.S. at 235 (citation omitted). She was advised that she could improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id* (citation omitted). The Supreme Court found this to be adequate evidence that sex motivated the employment decision, reasoning that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250.[5] The gravamen of a sex stereotyping claim thus is behaviors, mannerisms, or appearances.

Unlike *Whitaker* or *Price Waterhouse,* the Exclusion here does not punish Plaintiffs based on a sexual stereotype. In all those cases, the plaintiffs suffered adverse action because they adopted cultural stereotypes of the gender that differed from their biological sex—e.g. aggressive workplace behavior (a male stereotype) by a biological woman. But here, the Exclusion

[5] *See also Glenn v. Brumby*, 663 F.3d 1312, 1318–20 (11th Cir. 2011) (applying sex stereotyping theory to biological male who "appear[ed] at work dressed as a woman" and giving example of a male "wearing jewelry that was considered too effeminate, carrying a serving tray too gracefully, or taking too active a role in childrearing"). Title IX sex stereotyping cases also focus on appearance and mannerisms. *See, e.g.*, *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1307 (D. Kan. 2005) (male student wore earrings, maintained unusual hairstyle, and declined to play basketball or football).

does not require that Plaintiffs act in a certain way, dress in a certain way, use a certain bathroom, or otherwise conform with cultural stereotypes associated with their birth sex. The Exclusion has not stopped them from identifying as a man (for Flack) or as a woman (for Makenzie) or otherwise punished them for their decision.

Instead, Plaintiffs want Medicaid coverage to help them conform to cultural sex stereotypes. Plaintiffs Makenzie and Flack—who already identify as female and male, respectively—demand coverage for treatment that would simply make them appear *more* feminine and *more* masculine. As Plaintiffs explain, they want Medicaid coverage to give them sex characteristics that are considered feminine (for Makenzie) and masculine (for Flack). (Dkt. 22:3–5 ¶¶ 11, 14, 16, 18 (Flack Decl.); Dkt. 23:1–2, 4–5 ¶¶ 5–7, 10, 17–18 (Makenzie Decl.); Dkt. 24:6, 12–13, 16 ¶¶ 22–23, 44, 56 (Budge Report).) But considered feminine and considered masculine in what sense? The only possible meaning can be considered feminine and masculine *based on sex stereotypes*.

Providing Medicaid coverage for such procedures would insert DHS directly into the business of encouraging surgeries meant to conform persons' appearances to their own perceived sex stereotypes. So, the Exclusion's effect is to remove DHS from participating in surgical procedures that have anything

to do with helping people conform to sex stereotypes. The *Whitaker* sex-stereotyping theory does not apply here and rational basis scrutiny applies.

2. The state interests served by the Exclusion satisfy either intermediate scrutiny or rational basis review.

Regardless of the applicable standard of review—rational basis or heightened scrutiny—the Exclusion complies with the equal protection clause. The Exclusion furthers important governmental interests in containing Medicaid costs and protecting public health, and so Plaintiffs' equal protection claims fail.

a. Applicable law

To prevail under rational basis review, Plaintiffs must show that "(1) the state actor intentionally treated plaintiffs differently from others similarly situated; (2) this difference in treatment was caused by the plaintiffs' membership in the class to which they belong; and (3) this different treatment was not rationally related to a legitimate state interest." *Srail v. Vill. of Lisle*, 588 F.3d 940, 943 (7th Cir. 2009). "It is the plaintiff's burden to prove the government's action irrational." *Smith v. City of Chi.*, 457 F.3d 643, 652 (7th Cir. 2006). The presence or absence of animus is irrelevant; "a given action can have a rational basis and be a perfectly logical action for a government entity to take even if there are facts casting it as one taken out of animosity." *Flying J Inc. v. City of New Haven*, 549 F.3d 538, 547 (7th Cir. 2008).

Moreover, no evidentiary proof is required to support the proffered state interests—the government may "mak[e] decisions based on rational suspicions not confirmed by evidence satisfying some burden of proof." *RJB Props., Inc. v. Bd. of Educ.*, 468 F.3d 1005, 1011 (7th Cir. 2006). Any state interest may be offered, "not just the one articulated at the time of decision (if a reason was given at all)." *Smith*, 457 F.3d at 652.

Intermediate scrutiny sets a higher bar. To succeed, "a party seeking to uphold government action . . . must establish an 'exceedingly persuasive justification' for the classification" and "must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Virginia*, 518 U.S. at 524 (citations omitted). The asserted state interests must be "genuine, not hypothesized or invented post hoc in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences" of the classification at issue. *Id.* at 533. The asserted state interests need "not necessarily [be] recorded." *Id.* at 563 n. * (Rehnquist, J., concurring). And unlike strict scrutiny which is often strict in theory but fatal in fact, intermediate scrutiny recognizes that sex "has never been rejected as an impermissible classification in all instances." *Tagami v. City of Chi.*, 875 F.3d 375, 380 (7th Cir. 2017) (citation omitted).

Intermediate scrutiny does not require that a regulation perfectly solve the problem it was enacted to solve—the regulation is valid even if it only partially solves the problem. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 795, 799, 801 (1987) ("[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the governments interests in an individual case. . . ." Thus, a regulation is valid of it could reasonably have been determined that the overall interests sought to be protected would be served less effectively without the regulation); *One World One Family v. City of Honolulu*, 76 F.3d 1009, 1013, 1014 n. 9 (9th Cir. 1996) (peddling ordinance was narrowly tailored to serve the interests asserted, among them, privacy and freedom from harassment, because they "would be achieved less effectively absent the regulation" and even though the ordinance was "a 'valuable but perhaps imperfect' means of addressing the targeted problem"); *Sciarrino v. City of Key West*, 83 F.3d 364, 369 n. 7 (11th Cir. 1996) ("The Supreme Court has conclusively indicated that a regulation may 'directly advance' its asserted ends, though it strikes at less than the entire problem.").

Courts have recognized that containing health care costs and protecting public health are important government interests. *See IMS Health Inc. v. Sorrell*, 630 F.3d 263, 276 (2d Cir. 2010), *aff'd*, 564 U.S. 552 (2011) ("[W]e agree with the district court that Vermont does have a substantial interest in both

lowering health care costs and protecting public health."); *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008), *abrogated on other grounds by Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) ("[C]ost containment is most assuredly a substantial governmental interest."; the state has a "substantial interest in reducing overall healthcare costs"). *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1127 (10th Cir. 2015) ("administrative convenience and economic cost-saving" are "relevant" to intermediate scrutiny analysis); *Stuart v. Camnitz*, 774 F.3d 238, 250–51 (4th Cir. 2014) (government has an important interest in "promoting psychological health" and preventing "psychological harm").

Likewise, the Supreme Court has recognized that conserving scarce resources and the related issues of "economic supply and distributional fairness" also qualify as important government interests. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 569 (1980). *See also id.* at 576 ("[P]reventing . . . low quality health care [is a] 'substantial,' legitimate, and important state goal[ ].") (Blackmun, J., concurring).

b. The Exclusion is substantially related to the important government interest of containing Medicaid costs.

Under rational basis review, DHS's interest in containing Medicaid costs easily justifies denying coverage for procedures and services related to gender reassignment surgery. Since this is an important government interest that satisfies intermediate scrutiny, it is also necessarily a legitimate government

interest under rational basis review. *See Sorrell*, 630 F.3d at 276; *Ayotte*, 550 F.3d at 55. An obvious logical connection exists between the Exclusion and containing Medicaid costs, which is all DHS needs to show to satisfy rational basis review. For each procedure, service, and supply related to gender reassignment surgery undertaken by a Medicaid beneficiary that, absent the Exclusion, would be otherwise covered, DHS saves a corresponding amount of Medicaid costs. Indeed, in 1996, the Wisconsin Legislative Research Bureau concluded that the Exclusion would "[d]ecrease [c]osts." (Dkt. 21-14:2.) Given these cost savings, the Exclusion survives rational basis review.

On this same basis, the Exclusion also survives intermediate scrutiny. The only difference here is that evidence is required to establish the connection between the important government interest—avoiding costs—and the Exclusion. Expert analysis conducted in the *Boyden* litigation suggests that removing the Exclusion here could impose roughly $2.1 million in costs on Wisconsin's Medicaid program. (Roth Decl. Ex. 1004 (Williams Report 13); *supra* at 10–11.) Of course, further analysis specific to Wisconsin's Medicaid population is necessary to arrive at a more precise cost projection, but this analysis suffices to demonstrate that removing the Exclusion would impose a meaningful cost.

Plaintiffs will likely respond that this cost is too small to satisfy heightened scrutiny. But, again, a regulation is valid under intermediate

scrutiny even if it only partially solves the problem at hand. *Ward*, 491 U.S. at 799, 801. Although the costs at issue are a relatively small proportion of total Medicaid costs, every dollar saved by the Exclusion directly contributes to the important interest in cost savings, which is enough to survive heightened scrutiny.

Plaintiffs may also respond that cost savings cannot suffice, when a protected class alone bears the burden of those cost savings. But the cost savings do not rest on an arbitrary classification; rather, they target surgical procedures of dubious safety and efficacy when used to treat gender dysphoria. That is not an invidious basis for cost savings—it is an eminently reasonable one.

Accordingly, whether under rational basis or intermediate scrutiny, the Exclusion passes muster as a measure designed to contain health insurance costs and survives Plaintiffs' equal protection challenge.

c. The Exclusion is substantially related to the important government interest of protecting public health.

In addition to controlling costs, the Exclusion passes rational basis review since it protects public health, another important government interest. *See Sorrell*, 630 F.3d at 276; *Stuart*, 774 F.3d at 250–51. Again, under rational basis review, no evidence is needed to support the government's policy—it need only have a logical connection to the interest. *RJB Properties*, 468 F.3d at 1011.

DHS could rationally believe that surgical treatments have not been adequately shown to be safe and effective for treating gender dysphoria. By declining to provide Medicaid coverage for gender reassignment surgeries, DHS avoids encouraging Medicaid beneficiaries to undergo these unproven treatments. The Exclusion thus is logically related to protecting public health and survives rational basis review.

This state interest also adequately supports the Exclusion under intermediate scrutiny, even assuming that standard applies.[6] Dr. Mayer, a research biostatistician and psychiatrist, opines that "[m]edical and surgical treatments have not been demonstrated to be safe and effective for gender dysphoria." (Roth Decl. Ex. 1000 (Mayer Report 3).) He similarly opines that "[t]he evidence that these interventions are safe, effective, and optimal is minimal." (Roth Decl. Ex. 1000 (Mayer Report 7.)

Dr. Mayer's opinion rests on a survey of evidence regarding both children and adults. An article he co-wrote explains that even though "epidemiological data on the outcomes of medically delayed puberty is quite limited, referrals for sex-reassignment hormones and surgical procedures appear to be on the

[6] If Plaintiffs argue that this interest should not be considered because it is was created post hoc in response to litigation, they would be wrong. In 1996, the Wisconsin Legislative Research Bureau concluded that the Exclusion was part of a set of policies meant to "eliminate coverage of some services that the Department has determined are not medically necessary." (Dkt. 21-14:2.) That shows DHS was considering issues much like the ones Dr. Mayer highlights.

rise, and there is a push among many advocates to proceed with sex reassignment at younger ages." (Roth Decl. Ex. 1000 (Mayer Report Appx. D 106.) As for adults, Mayer notes that "[t]he high level of uncertainty regarding various outcomes after sex-reassignment surgery makes it difficult to find clear answers about the effects on patients of reassignment surgery." (Roth Decl. Ex. 1000 (Mayer Report Appx. D 109).)

Moreover, Dr. Mayer notes that "[t]he potential that patients undergoing medical and surgical sex reassignment may want to return to a gender identity consistent with their biological sex suggests that reassignment carries considerable psychological and physical risk, especially when performed in childhood, but also in adulthood." (Roth Decl. Ex. 1000 (Mayer Report Appx. D 108).) Even the federal government's Centers for Medicare and Medicaid Services found "inconclusive" clinical evidence regarding gender reassignment surgery. (Roth Decl. Ex. 1001 (CMS Memo 1).)

This evidence establishes intermediate scrutiny's required substantial relationship between the Exclusion and the State's interest in promoting public health.

B. Plaintiffs cannot show that they are likely to prevail on the merits of their Section 1557 Affordable Care Act claim.

Section 1557 of the Affordable Care Act says that "an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity." 42 U.S.C. § 18116(a). Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity." 20 U.S.C. § 1681(a). Taken together, Title IX and Section 1557 prohibit "discrimination under any health program or activity" on the basis of "sex."

Plaintiffs' Section 1557 claims against DHS fail for two reasons. First, like the Equal Protection Clause, Section 1557 only covers "sex" discrimination; it does not extend to discrimination claims on the basis of transgender status. Second, no private right of action exists under Section 1557.

1. Section 1557 does not extend to discrimination claims on the basis of transgender status.

Plaintiffs' Section 1557 fails as a matter of law because Title IX—the anti-sex discrimination provision that Section 1557 incorporates—applies only to claims based on "sex." It does not apply to claims based on transgender

status, as Plaintiffs contend. (Dkt. 19:22–26.) Since transgender status is not a protected class under Title IX, Plaintiffs' Section 1557 claims necessarily fail.

Title IX's text does not cover "transgender status." The statute's plain language is clear evidence of that: "No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 28 U.S.C. § 1681 (emphasis added). The statute expressly prohibits exclusions "on the basis of sex," not "on the basis of sex or transgender status." At least two district courts have agreed that the statute does not include transgender status protection. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 687–89 (N.D. Tex. 2016) ("HHS's expanded definition of sex discrimination"—i.e. to include transgender status—"exceeds the grounds incorporated by Section 1557."); *Johnston*, 97 F. Supp. 3d at 674–78 ("Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute."). And Seventh Circuit Title VII precedent affirms this adherence to the statutory text, too. *See Ulane*, 742 F.2d at 1084–85 ("[The district court] concluded that it is reasonable to hold that the statutory word 'sex' literally and scientifically applies to transsexuals even if it does not apply to homosexuals or transvestites. We must disagree."). *See also Etsitty*,

502 F.3d at 1222 (10th Cir. 2007) ("[T]ranssexuals are not a protected class under Title VII . . . .").

Also, when Congress has intended to bar discrimination on the basis of transgender status in other statutes, it has said so explicitly. *See, e.g.*, 18 U.S.C. § 249(a)(2)(A) (prohibits inflicting "bodily injury to any person. . . because of [his or her] actual or perceived religion, national origin, gender, sexual orientation, *gender identity,* or disability") (emphasis added); 42 U.S.C. § 12291(b)(13)(A) (prohibits discrimination "on the basis of actual or perceived race, color, religion, national origin, sex, *gender identity*. . .sexual orientation, or disability") (emphasis added). That Congress did not use the same term in Title IX is strong evidence that it did not intend for the statute to cover transgender status.

Further, "[o]rdinarily, a word's usage accords with its dictionary definition." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015). Dictionaries contemporaneous with Title IX's passage define "sex" in physiological terms— the biological differences between men and women. *See Franciscan All.*, 227 F. Supp. 3d at 688 (quoting three dictionaries). And Dr. Mayer similarly opines that "[g]ender is almost uniformly defined as a cultural construct while sex is a biological trait." (Roth Decl. Ex. 1000 (Mayer Report 3).)

Legislative history also confirms that Title IX covers just what it says—"sex," not "transgender status." Nowhere in the Congressional debates over Title IX does the phrase "gender identity" or "transgender" appear. Rather, "[t]he legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions." 44 Fed. Reg. at 71,423. This shows that Congress understood "sex" discrimination in physiological terms that do not extend to "transgender status."

Moreover, Congress has repeatedly refused to amend Title IX to cover "gender identity." In the past decade, Congress has rejected legislation that would have expressly protected "gender identity" in the employment context.[7] Likewise, Congress recently failed to pass legislation that would have added to Title IX express protections for "gender identity."[8] The Senate sponsor of one such Title IX bill said that he hoped to "provide meaningful remedies for discrimination in public schools based on sexual orientation or gender identity, modeled on Title IX's protection against discrimination and harassment based on gender." 157 Cong. Rec. S1558 (2011) (statement of Sen. Franken).

[7] Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011).

[8] Student Non-Discrimination Act of 2012, H.R. 1652, 113th Cong. (2013); Student Non-Discrimination Act of 2015, S. 439, 114th Cong. (2015).

This clearly indicates that Congress does not view Title IX as applying to transgender status claims.

Administrative authority from other federal agencies reinforces this conclusion. On February 22, 2017, the U.S. Department of Justice and U.S. Department of Education (DOE) withdrew a prior "Dear Colleague" letter that had advised school districts of DOE's position that Title IX applies to transgender status claims. U.S. Dep't of Educ. (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf. These agencies noted that the withdrawn letter did not "explain how the position"—that is, that Title IX extends to transgender status—"is consistent with the express language of Title IX." *Id.*

The doctrine of constitutional avoidance supports this analysis. This canon of statutory construction is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

If Section 1557 is interpreted to cover transgender status claims, it would likely violate the Constitution's Spending Clause. Spending Clause "legislation is 'in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182 (2005) (citation omitted). "The legitimacy of

Congress's exercise of the spending power 'thus rests on whether the [entity] voluntarily and knowingly accepts the terms of the contract.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (citation omitted). "[T]here can . . . be no knowing acceptance [of the terms of the contract] if a State is unaware of the conditions [imposed by the legislation on its receipt of funds.]" *Jackson*, 544 U.S. at 182 (alterations in original) (citation omitted).

Interpreting Section 1557 to cover transgender status would violate this Spending Clause principle, since Wisconsin could have had no idea that this interpretation would someday prevail when it chose to accept federal Medicaid funding. As explained above, nothing in the text or history of Title IX indicates that the statute would someday apply to transgender status claims. Therefore, to avoid interpreting Section 1557 in a way that would violate the Spending Clause, it should not be read to cover claims based on transgender status.

Plaintiffs also contend that Section 1557 should be interpreted consistently with Title IX, and that in *Whitaker* the Seventh Circuit held that Title IX must be construed broadly to include gender identity discrimination claims. (Dkt. 19:22–23.) But *Whitaker* relied on a sex-stereotyping theory that does not work here for the reasons discussed in Argument II.A.1.b.(2).

Plaintiffs' reliance on *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc), is also inapt. (Dkt. 19:23–25, 35.) The *Hively* court used a thought experiment to find that Title VII outlaws sexual orientation discrimination: if the plaintiff (a woman discriminated against for having a female partner) had instead been a man, she would not have suffered the same treatment. 853 F. 3d at 345–46. Sexual orientation discrimination thus discriminates on the basis of sex, contrary to Title VII. But that same approach breaks down here. If Plaintiffs had been born with the sexes that they believe match their gender identities, they would not be seeking any surgical treatments at all. It is thus nonsensical to swap their sex, as the *Hively* court imagined. The only conceivable characteristic that, if swapped, could possibly result in different treatment is gender identity—but that characteristic is different from sex, and thus does not trigger Title VII. (Roth Decl. Ex. 1000 (Mayer Report 3–4, 6).) *Hively* thus does not apply here.

2. No private right of action exists under Section 1557.

Plaintiffs' Section 1557 claim also fails because no private right of action exists under this section of the Affordable Care Act.

Plaintiffs argue that, because Section 1557 incorporates the "enforcement mechanisms" available under Title IX, and the Supreme Court has held that Title IX includes an implied private right of action, they have a

private right of action under Section 1557. (Dkt. 19:21–22.) This argument is unpersuasive.

To date, neither the Seventh Circuit nor any other circuit court of appeals has held that a private right of action exists under Section 1557. Therefore, relevant Supreme Court precedent controls. In *Pennhurst v. Halderman*, 451 U.S. 1, 28 (1981), the Supreme Court held that "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." To find a private right of action, Congress must "display[ ] an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). *Sandoval* further explains that "[s]tatutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id*. at 286–87. Other cases have relied on this reasoning to reject section 1983 actions to enforce other federal statutes. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (no section 1983 action to enforce the Family Educational Rights and Privacy Act of 1974); *Suter v. Artist M.*, 503 U.S. 347 (1992) (same, Adoption Assistance and Child Welfare Act of 1980);

Blessing v. Freestone, 520 U.S. 329 (1997) (same, Social Security Act Title IV-D).

As the Seventh Circuit noted, the Supreme Court has been hostile "to implying [private rights of action] in spending statutes." *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003). Section 1557 does not expressly state that private individuals can sue to enforce it. Accordingly, like the statutes at issue in *Sandoval*, *Gonzaga*, *Suter*, and *Blessing*, Section 1557 does not allow for private enforcement.

***

Plaintiffs Flack and Makenzie have not shown that they are likely to succeed on the merits of either their equal protection clause or their Section 1557 claim. Therefore, because some likelihood of success on the merits is a threshold requirement, they are not entitled to a preliminary injunction.[9]

CONCLUSION

Defendants respectfully request that this Court deny Plaintiffs' motion for a preliminary injunction.

[9] If this Court disagrees and finds that Plaintiffs have shown likely irreparable harm and a likelihood of success on the merits, DHS does not contest the "balancing of equities" factor. (Dkt. 19:47–49.)

Dated this 12th day of July, 2018.

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