UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CODY FLACK, SARA ANN MAKENZIE, MARIE KELLY, and COURTNEY SHERWIN, 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 TO MODIFY PRELIMINARY INJUNCTION

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INTRODUCTION

This Court already recognized that Wisconsin Medicaid's categorical exclusion of coverage for gender-confirming medical care causes serious harms to transgender Wisconsin Medicaid beneficiaries when it enjoined Defendants from enforcing the policy against Plaintiffs Cody Flack and Sara Ann Makenzie. As the Court wrote, the Medicaid regulation at issue, Wis. Adm. Code § DHS 107.03(23)-(24) (the "Challenged Exclusion"), "creates a different rule governing the medical treatment of transgender people" and "expressly *singles out and bars* a medically necessary treatment solely for transgender people suffering from gender dysphoria." Op. & Order at 29 [Dkt. No. 70] ("PI Op."). In turn, the Court found that the Challenge Exclusion, on its face, likely violates all transgender Wisconsin Medicaid beneficiaries' rights under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 ("Section 1557"), and the Equal Protection Clause of the Fourteenth Amendment, as an impermissible form of sex discrimination. The Court rejected Defendants' contention that public health would be harmed by an injunction, finding a "substantial likelihood that this interest would be served, rather than hindered, by covering plaintiffs' recommended surgical procedures," and noting "the public interest in providing medically necessary procedures" to individuals in need. PI Op. at 36, 37.

Defendants' continuing enforcement of the Challenged Exclusion exposes all transgender Wisconsin Medicaid beneficiaries seeking treatment for gender dysphoria to common irreparable harms, including (1) untreated or inadequately treated gender dysphoria, and the associated risks of the psychological, social, interpersonal, and physical harms and related stigma that predictably result from the inability to obtain such care; and (2) a deprivation by Defendants of their

Constitutional right, as a group, to equal protection under the law from being singled out, as a group, for second-class and inferior health care under the Challenged Exclusion.

Since the Court's entry of the preliminary injunction, Plaintiffs Cody Flack, Sara Ann Makenzie, Marie Kelly, and Courtney Sherwin (the "Named Plaintiffs"), on behalf of themselves and "[a]ll transgender individuals who are or will be enrolled in Wisconsin Medicaid, have or will have a diagnosis of gender dysphoria, and who are seeking or will seek surgical or medical treatments or services to treat gender dysphoria" (the "Proposed Class") (collectively, "Plaintiffs"), moved the Court to certify this case as a class action. Mot. for Class Cert. at 1 [Dkt. No. 89] ("Class Cert. Mot."). Based on the ongoing harm to transgender Wisconsin Medicaid beneficiaries unable to obtain gender-confirming care, Plaintiffs now ask the Court to fully preliminarily enjoin Defendants' enforcement of the Challenged Exclusion.

The Court's earlier finding that Mr. Flack and Ms. Makenzie have a reasonable likelihood of success on their Section 1557 and equal protection claims applies with equal force to Plaintiffs' renewed request for a full preliminary injunction on behalf of the Proposed Class. Moreover, Plaintiffs are also likely to succeed on their Medicaid Act claims. That likelihood of success independently warrants preliminary injunctive relief. The minimal (if any) cost impact to Defendants of covering gender-confirming care under a preliminary injunction is far outweighed by the benefits to the entire Proposed Class of preventing the harms resulting from Defendants' enforcement of this facially discriminatory and harmful state policy. In short, the equities tip almost entirely in Plaintiffs' favor.

For the reasons stated herein and in Mr. Flack and Ms. Makenzie's original brief, Mem. of Law in Support of Mot. for Prelim. Inj. [Dkt. No. 19] ("PI Br."), the Court should expand the preliminary injunction to fully enjoin the enforcement of the Challenged Exclusion.

RELEVANT PROCEDURAL HISTORY

Cody Flack and Sara Ann Makenzie initiated this lawsuit on April 30, 2018 as individuals. Compl. [Dkt. No. 1]. They subsequently moved for a preliminary injunction barring Defendants' enforcement of the Challenged Exclusion during the pendency of the case. Mot. for Prelim. Inj. [Dkt. No. 18]. With the parties' agreement, the Court limited the scope of the requested preliminary injunction to Mr. Flack and Ms. Makenzie only. *See* PI Op. at 38 n.33.

On July 25, 2018, the Court granted the motion for a preliminarily injunction and enjoined Defendants from enforcing the Challenged Exclusion against Mr. Flack or Ms. Makenzie during the pendency of this litigation. *Id.* at 39.[1] In that order, the Court requested supplemental briefing on whether it should fully enjoin the Challenged Exclusion. *Id.* On August 23, 2018, Defendants filed a supplemental brief addressing, *inter alia*, the estimated cost impact of a statewide injunction. Defs.' Supp. Br. Regarding Expanding Prelim. Inj. to Apply to All Medicaid Beneficiaries, at 8 [Dkt. No. 73] ("Defs.' Supp. Br."). In response, Mr. Flack and Ms. Makenzie notified the Court that they wished to amend their complaint to raise class action allegations and to seek class-wide relief prior to any ruling by the Court on a possible statewide injunction, and concurrently moved for leave to amend. [Dkt. Nos. 78, 79]. On August 31, 2018, the Court granted leave to file an amended complaint on or before September 28, 2018, raising class allegations and possibly adding additional named plaintiffs. Text Order [Dkt. No. 82]. The Court noted that, "[s]hould they so choose, it will be incumbent upon plaintiffs to move for broader preliminary relief." *Id.*

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[1] Defendants have appealed that preliminary injunction to the Seventh Circuit. Notice of Appeal [Dkt. No. 75]. Defendants' opening brief in that appeal is currently due on November 13, 2018. *See* Order, *Flack v. Wis. Dep't of Health Servs.*, No. 18-2861 (7th Cir. Sept. 19, 2018).

On September 25, 2018, Mr. Flack, Ms. Makenzie, and two additional plaintiffs and putative class representatives, Marie Kelly and Courtney Sherwin, filed an Amended Complaint with Class Action Allegations. Am. Compl. [Dkt. No. 85]. On October 18, 2018, the Named Plaintiffs filed a motion to certify this case as a class action under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, seeking a class-wide declaratory judgment that the Challenged Exclusion is facially unlawful and preliminary and permanent injunctions against further enforcement of the exclusion. Class Cert. Mot. at 1. That motion is currently pending.

Plaintiffs now formally renew their request to the Court that it fully enjoin Defendants' enforcement of the Challenged Exclusion during the pendency of this case.

SUPPLEMENTAL FACTUAL BACKGROUND

Plaintiffs incorporate by reference the factual background in their original brief, PI Br. at 3-14; the parties' Stipulation to Findings of Fact [Dkt. No. 51]; and the undisputed facts previously found by the Court, PI Op. at 2-15, and provide the following additional facts in support of their present motion.

A. Untreated or Inadequately Treated Gender Dysphoria

Each member of the Proposed Class is a transgender Wisconsin Medicaid beneficiary with a diagnosis of gender dysphoria who is currently seeking, or may in the future seek, gender-confirming treatments for gender dysphoria. Class Cert. Mot. at 1.[2] Defendants categorically deny all members of the Proposed Class—including each of the Named Plaintiffs—Wisconsin Medicaid coverage for gender-confirming treatments for gender dysphoria pursuant to the

[2] As the Court has noted, not every transgender person has gender dysphoria, and for those that do, not all of them will seek gender-confirming surgery or related medical care. *See* PI Op. at 3. However, the Proposed Class, as defined, includes only the subset of transgender Wisconsin Medicaid enrollees who are or will be diagnosed with gender dysphoria and are seeking or will seek medical treatments for it that are subject to the Challenged Exclusion. Class Cert. Mot. at 1.

Challenged Exclusion. PI Op. at 6-7.[3] As this Court previously found, and Defendants have conceded, gender dysphoria is "a serious medical condition, which if left untreated or inadequately treated can cause adverse symptoms." PI Op. at 3; *see also* Defs.' Resp. to Pls.' Proposed Facts, at 8 [Dkt. No. 54] ("Defs.' PFOF Resps."); Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* 451-59 (5th ed. 2013) ("DSM-5").

Untreated or inadequately treated gender dysphoria prevents transgender individuals from living fully in accordance with their gender identities, and consequently harms their quality of life, interpersonal and vocational functioning, and overall well-being. Decl. of Stephanie L. Budge, PhD, LP ¶¶ 24, 32, 34-37 [Dkt. No. 24] ("Budge Decl."). Untreated gender dysphoria is associated with comorbid psychological distress, which can manifest itself through exacerbated depression, anxiety, suicidal ideation, self-harm, increased substance use, and other serious and debilitating symptoms. *See* PI Op. at 3; PI Br. at 3-5; Budge Decl. ¶ 24; Decl. of Jaclyn White Hughto, PhD, MPH ¶ 19 [Dkt. No. 26] ("Hughto Decl."); Decl. of Daniel Shumer, MD, MPH ¶ 34 [Dkt. No. 25] ("Shumer Decl."). There is a scientific and medical consensus that gender-confirming treatments yield significant psychosocial benefits to those who have received them. Budge Decl. ¶¶ 34-37.

Because of the health harms that predictably flow from the denial of gender-confirming treatments—and the attendant health benefits resulting from these treatments—the medical community recognizes these treatments as medically necessary when recommended by a person's medical providers in accordance with the prevailing standards of care. *Id*. ¶ 32 (citing

[3] Although questions remain regarding the Challenged Exclusion's applicability to hormone treatments, PI Op. at 6 n.6, *see also supra* at 10 (noting Plaintiff Sherwin has not received coverage for all of her hormone treatments), Defendants have not disputed that Wisconsin Medicaid coverage for gender-confirming surgeries is categorically denied by the exclusion, and in fact advertise the exclusion on the DHS website. *See* PI Op. at 6-7; Defs.' PFOF Resps. at 21.

Am. Psychological Ass'n, *Report of the Task Force on Gender Identity & Gender Variance* 32 (2009)); Hughto Decl. ¶¶ 21-26.

Supporting this broad scientific and medical support for gender-confirming treatments for gender dysphoria are the experiences of primary care providers in Wisconsin who treat transgender patients on Medicaid. These providers confirm that their patients on Wisconsin Medicaid who are unable to access appropriate medical treatment face significant risks to their health, occupational and interpersonal functioning, and safety; that the Challenged Exclusion categorically limits their ability to provide appropriate, adequate treatment for gender dysphoria to their patients; and that their patients suffer needlessly as a result. *See* Decl. of Linda Wesp, MSN, RN, APNP, FNP-C, AAHIV-S ¶ 16 [Dkt. No. 94] ("Wesp Decl."); Decl. of Kathy Oriel, MD ¶¶ 13, 14 ("Oriel Decl.").

The Challenged Exclusion also stigmatizes all members of the Proposed Class for being transgender, resulting in an increased risk of discrimination, harassment, and violence. As this Court has found, gender dysphoria "is associated with high levels of stigmatization, discrimination, and victimization, leading to negative self-concept, increased rates of mental disorder comorbidity, school dropout, and economic marginalization, including unemployment, with attendant social and mental health risks." PI Op. at 3 (quoting DSM-5 at 12). The Challenged Exclusion contributes to and exacerbates the rampant discrimination and mistreatment transgender Wisconsin residents suffer, which, as this Court has recognized, include high poverty rates, pervasive health care discrimination, and mistreatment by the police and others. *Id*. at 33-35. Thirty percent of transgender individuals have been denied health

insurance for being transgender. *Id.* at 34.[4] "[V]isibly nonconforming transgender individuals suffer worse health outcomes and more discrimination than transgender individuals whose appearance aligns with their gender identity." *Id.*; *see also* Hughto Decl. ¶¶ 30-33. "Gender-confirming medical care may decrease mistreatment caused by being visibly gender-nonconforming" and, in turn, "transgender people unable to afford (or otherwise unable to access) gender-confirming surgical procedures are more at-risk for discrimination and other harms." PI Op. at 34. The experienced stigma for being transgender—which is heightened for transgender individuals unable to "pass" because of visibly gender-nonconforming features—also frequently results in a higher risk of violence, mistreatment, chronic stress, and ensuing long-term psychological and physical harms. Hughto Decl. ¶¶ 30-40.

B. Plaintiffs Have Suffered Predictable and Avoidable Harms Resulting from the Categorical Denial of Gender-Confirming Care

The experiences of each of the Named Plaintiffs and other members of the Proposed Class illustrate the common, class-wide harms resulting from Defendants' enforcement of the Challenged Exclusion. Each has been categorically denied Medicaid coverage for gender-confirming treatments for gender dysphoria, has suffered exacerbated symptoms of gender dysphoria and resulting harms, and has experienced mistreatment from having visibly gender-nonconforming traits due to the inability to obtain the treatments they need. To illustrate the severity of these common harms, Plaintiffs supplement the stories of Cody Flack and Sara Ann Makenzie previously shared with the Court, *see* PI Br. at 1-2, 8-14; PI Op. at 7-15, with those of newly-added plaintiffs Marie Kelly and Courtney Sherwin, as well as three other members of the Proposed Class being denied care pursuant to the Challenged Exclusion.

[4] As the Court has noted, Defendants have not disputed the widespread discrimination faced by the transgender population generally. PI Op. at 34 n.28. *See* Defs.' PFOF Resps. at 12-17.

1. Marie Kelly

Plaintiff Marie Kelly, a 38-year-old transgender woman who lives in Milwaukee, joined this case as a named plaintiff and putative class representative after the Court's entry of the preliminary injunction in July. Decl. of Marie C. Kelly ¶¶ 2, 3 [Dkt. No. 93] ("Kelly Decl."). Ms. Kelly has a diagnosis of gender dysphoria. *Id.* ¶ 4. She has been enrolled in Wisconsin Medicaid, which she relies on for her health care needs, since approximately 2014. *Id.* ¶ 5. Like each of the other Named Plaintiffs—and all members of the Proposed Class—Ms. Kelly is being categorically denied surgical treatments that would treat her gender dysphoria based solely on the Challenged Exclusion.

Although Ms. Kelly was assigned male at birth, she has a female gender identity and has known herself to be female for nearly all of her life. *Id.* ¶¶ 3, 6. She has lived fully in accordance with her female gender identity since 2010. *Id.* ¶¶ 3, 9. In her late 20s, after deciding to "live [her] truth" and begin living fully as the woman she had long known herself to be, Ms. Kelly took steps to begin her gender transition "[a]fter years of living in denial." *Id.* ¶¶ 3, 6-7. In 2009, she began seeing a therapist and participating in local gender identity support groups. *Id.* ¶ 8. Since 2010, at the age of 30, she has been living full-time as a woman. *Id.* ¶ 9. Two years later, in 2012, she obtained a court-ordered name change from her traditionally male birth name to her chosen name, Marie Claire Kelly, as well as a Wisconsin state identification card with that name and a female sex marker. *Id.* ¶ 10.

To further her gender transition and treat her gender dysphoria, Ms. Kelly has taken feminizing hormone treatments under the supervision of her primary care providers since 2011. *Id.* ¶ 12. Although the hormone treatments have helped reduce her gender dysphoria, Ms. Kelly still experiences exacerbated symptoms of gender dysphoria and daily anxiety related to her

male-appearing genitalia, male-appearing chest, and facial hair. *Id.* ¶¶ 12, 14-17. She is constantly afraid that someone may notice her genitalia and attack her. *Id.* ¶ 15. She has tried to make her chest look more feminine by wearing breast forms, but stopped after the back pain they caused became unbearable. *Id.* ¶ 16. She has significant dysphoria related to her facial hair and takes steps to hide her face in public so that she will not be mistaken for a man. *Id.* ¶ 17.

To further her gender transition and treat her daily symptoms of gender dysphoria and related anxiety and distress, Ms. Kelly is seeking Wisconsin Medicaid coverage for gender-confirming surgical treatments, including female genital reconstruction (orchiectomy and vaginoplasty), female chest reconstruction, and electrolysis for facial hair removal. *Id.* ¶ 18. Her medical providers have deemed these procedures medically necessary treatments for her gender dysphoria. *Id.*; Wesp Decl. ¶ 14. Ms. Kelly has inquired several times over the years, including as recently as August 2018, about whether Wisconsin Medicaid would cover these procedures and has been told each time that they are not covered because of the Challenged Exclusion. Kelly Decl. ¶¶ 19-20. She experienced distress each time she was told she would be unable to get these procedures. *Id.* Because she cannot afford to pay for these procedures herself, she is currently unable to obtain those or any gender-confirming surgeries and is suffering ongoing gender dysphoria as a result. *Id.* ¶¶ 20-21.

2. Courtney Sherwin

Courtney Sherwin is a 35-year-old transgender woman who lives in Janesville, Wisconsin. Decl. of Courtney Sherwin ¶¶ 2-3 [Dkt. No. 95]. Along with Ms. Kelly, Ms. Sherwin joined this case as a named plaintiff and putative class representative after the Court's entry of the preliminary injunction in July. Ms. Sherwin has been on Wisconsin Medicaid for about two years and relies on it for her health care needs. *Id.* ¶ 4. Like the other Named Plaintiffs and

members of the Proposed Class, Ms. Sherwin has been diagnosed with gender dysphoria and has been denied Wisconsin Medicaid coverage for treatments for that gender dysphoria because of the Challenged Exclusion. *Id.* ¶¶ 5, 13, 18, 26, 28-29.

Ms. Sherwin, who was assigned male at birth, has known herself to be female since around age 10. *Id.* ¶ 3, 6. She came out as transgender in late 2017 and began her gender transition in early 2018, which is when she began living full-time as a woman. *Id.* ¶ 6. Before coming out as transgender, she suffered significant gender dysphoria (including anxiety, depression, and stress) resulting from the incongruence resulting from her identity as a woman and being perceived as a man by others. *Id.* ¶ 8. She even considered suicide on several occasions. *Id.* After coming out and starting her gender transition, Ms. Sherwin began wearing traditionally women's clothing, began using the name Courtney instead of her traditionally male birth name, and started a medical transition to further her transition and treat her gender dysphoria. *Id.* ¶ 9.

Since March 2018, Ms. Sherwin has taken feminizing hormone treatments under the care of her primary care doctor. *Id.* ¶ 11. Wisconsin Medicaid does not cover several of her hormone medications and she has been forced to pay out-of-pocket for them. *Id.* ¶ 13. While the hormone treatments have reduced her gender dysphoria, she continues to experience significant dysphoria related to her masculine voice and her male-appearing chest, genitals, and facial hair. *Id.* ¶¶ 10, 12, 19, 21, 23. The dysphoria from her facial hair causes her daily social anxiety and embarrassment, and she tries to cover her face when she is in public. *Id.* ¶ 19. She also fears others will see her genitals and engages in painful tucking to hide her genitals from view so that others do not notice them. *Id.* ¶¶ 19, 21.

Ms. Sherwin's medical providers have determined that gender-confirming surgeries, including genital reconstruction, chest reconstruction, and voice therapy are medically necessary treatments for her gender dysphoria. *Id.* ¶¶ 16-17, 22, 26-27. Of particular urgency is Ms. Sherwin's need for an orchiectomy, a gender-confirming surgery that would stop her body's natural production of testosterone, which her doctors have determined is medically necessary for her because of her gender dysphoria, and to prevent the adverse and dangerous side effects she experiences from one of her hormone treatments, the testosterone blocker spironolactone. *Id.* ¶¶ 14-17. Notwithstanding her doctors' recommendations that she obtain an orchiectomy and voice therapy, Wisconsin Medicaid has denied her coverage for both based on the Challenged Exclusion. *Id.* ¶¶ 18, 26, 29. In addition, she plans to seek genital and chest reconstruction surgeries, but expects that coverage for those surgeries will also be denied pursuant to the exclusion. *Id.* ¶¶ 22, 32-33. Because Ms. Sherwin cannot afford these treatments herself, she is experiencing significant gender dysphoria and consequences of that dysphoria, including social anxiety, adverse physical health symptoms, and other distress. *Id.* ¶¶ 19-21, 23-25, 30-31, 33.

Ms. Sherwin has also faced harassment, threats, and misgendering after others perceive her to be transgender because of her voice and male-appearing physical traits. *Id.* ¶¶ 23-25. She experienced distress, feelings of hopelessness, and suicidality after learning of Wisconsin Medicaid's denials of coverage for her voice therapy and orchiectomy. *Id.* ¶ 30. She worries constantly that if she is unable to receive these treatments, her physical and emotional health will continue to decline, that she will face continued mistreatment and harassment in public, and that she may lose hope and take her own life, which terrifies her. *Id.* ¶¶ 20, 28, 30.

3. Other Class Members

The Challenged Exclusion harms other transgender Wisconsin Medicaid beneficiaries in the same ways as it does the Named Plaintiffs by categorically denying them coverage for gender-confirming care. Three members of the Proposed Class—Tori Vancil, Emma Grunenwald-Ries, and Lexie Vordermann—have submitted declarations sharing their experiences of being denied the ability to further their gender transitions and treat their gender dysphoria because of the Challenged Exclusion. *See* Decl. of Tori Vancil [Dkt. No. 97] ("Vancil Decl."); Decl. of Emma Grunenwald-Ries [Dkt. No. 98] ("Grunenwald-Ries Decl."); Decl. of Lexie Vordermann [Dkt. No. 99] ("Vordermann Decl."). These experiences are typical of many other Wisconsin Medicaid beneficiaries.

Tori Vancil is a 27-year-old transgender man who lives in Madison. Vancil Decl. ¶¶ 2-3. Mr. Vancil is enrolled in Wisconsin Medicaid and relies on it for his health care needs. *Id.* ¶ 4. He has been diagnosed with gender dysphoria and has received medical treatments, including hormone therapy, to further his gender transition and treat his gender dysphoria. *Id.* ¶¶ 5, 8-9. He experiences significant gender dysphoria resulting from his female-appearing chest, causing him daily anxiety and distress. *Id.* ¶¶ 10-14. His physician has recommended that he obtain top surgery (mastectomy and male chest reconstruction) as soon as possible to treat his gender dysphoria. *Id.* ¶ 13. However, without coverage from Wisconsin Medicaid because of the Challenged Exclusion, he is unable to obtain this surgery and fears his gender dysphoria and anxiety will worsen as a result. *Id.* ¶ 14.

Emma Grunenwald-Ries is a 49-year-old transgender woman who lives in Madison. Grunenwald-Ries Decl. ¶¶ 2-3. Ms. Grunenwald-Ries has been enrolled in Wisconsin Medicaid for nine years and relies on it for her health care needs. *Id.* ¶ 4. She has been diagnosed with

gender dysphoria. *Id.* ¶ 5. She has known herself to be female since childhood, began a gender transition about 20 years ago, but put it on hold due to a lack of social support. *Id.* ¶¶ 9-11. Last year, she resumed her gender transition and began feminizing hormone therapy under the care of her physician, which has alleviated her gender dysphoria. *Id.* ¶ 12. She still experiences significant gender dysphoria and daily distress related to her male-appearing genitalia, chest, and masculine facial features. *Id.* ¶¶ 14, 17. Her doctor has recommended that she obtain genital reconstruction surgery (vaginoplasty), chest reconstruction (breast augmentation), and facial feminization surgery to further her transition and treat her gender dysphoria. *Id.* ¶ 17. She is unable to afford these treatments without Wisconsin Medicaid coverage. *Id.* ¶ 18. She fears that she would spiral into depression and have thoughts of self-harm if she were unable to obtain these surgeries and live fully as a woman. *Id.*

Lexie Vordermann is a 19-year-old transgender woman who lives in Middleton, Wisconsin. Vordermann Decl. ¶¶ 2-3. Ms. Vordermann is enrolled in Wisconsin Medicaid and relies on it for her health care needs. *Id.* ¶ 4. She has been diagnosed with gender dysphoria and transitioned to living full-time as female about five years ago. *Id.* ¶¶ 3, 5. To treat her gender dysphoria, she has taken testosterone blockers for about three years and feminizing hormone treatments for about two years. *Id.* ¶ 6. She experiences gender dysphoria because of her male-appearing genitals. *Id.* ¶ 7. About a year ago, her urologist determined that it was medically necessary for her to obtain an orchiectomy and agreed to perform that procedure. *Id.* ¶¶ 7-8. Her Wisconsin Medicaid HMO, Quartz, denied her urologist's prior authorization request, stating that it was a "transsexual surgery" not covered by Wisconsin Medicaid pursuant to the Challenged Exclusion. *Id.* ¶ 9. Her appeal of that decision was denied. *Id.* ¶ 10. Her urologist submitted a second prior authorization request for an orchiectomy in September 2018, which

Quartz again denied based on the Challenged Exclusion. *Id.* ¶ 11. She is fearful that without Wisconsin Medicaid coverage, she may never be able to get gender-confirming surgeries and will experience a constant reminder that her body does not match who she is. *Id.* ¶¶ 12-13. Because the Quartz denial letters stated that hormone treatments are also subject to the Challenged Exclusion, she is also worried that her Wisconsin Medicaid coverage for her existing hormone treatments could end at any time and expose her to harm. *Id.* ¶ 14.

C. Estimated Fiscal Impact of Enjoining the Challenged Exclusion

Defendants' expert has estimated that approximately 63 of Wisconsin Medicaid's 1.2 million beneficiaries (0.005 percent) would seek Medicaid coverage for some form of gender-confirming surgery in a given year, at an estimated annual cost to the State of approximately $300,000. Defs.' Supp. Br. at 8; Report of David V. Williams at 3 [Dkt. No. 74-1] ("Williams Report"); Supp. Decl. of Jaclyn White Hughto, PhD, MPH ¶ 8 [Dkt. No. 96] ("Hughto Supp. Decl."). Assuming, without conceding, that this estimate is correct, this additional cost would represent just 0.008 percent of Wisconsin's approximately $3.9 billion share of its annual Medicaid expenditures.[5] Hughto Supp. Decl. ¶ 6. The State's estimate, however, wholly failed to account for any cost *savings* to Wisconsin Medicaid resulting from covering medically necessary treatments for gender dysphoria. *Id.* ¶¶ 8, 23. Increased availability of gender-confirming care has resulted in cost savings from reductions in negative health outcomes associated with untreated gender dysphoria, including depression, suicidality, drug abuse, HIV infection, mortality, and costs related to physical and sexual assault. *Id.* ¶¶ 10-20. Thus, enjoining or

[5] The federal government pays the remainder of the annual $9.7 billion Wisconsin Medicaid budget. Hughto Supp. Decl. ¶ 6 n.1.

eliminating the Challenged Exclusion would likely yield long-term cost savings to the State that would offset the already minimal estimated cost impact from covering this care. *Id.* ¶¶ 23-24.

ARGUMENT

An expansion of the preliminary injunction to fully enjoin the Challenged Exclusion is appropriate for substantially the same reasons warranting the current injunction. Plaintiffs face irreparable harm with no adequate remedy at law if the Challenged Exclusion is not fully enjoined. The Court has already found that Plaintiffs have a sufficient likelihood of success on their Section 1557 and Equal Protection Clause claims. PI Op. at 1-2. Plaintiffs are also likely to succeed on their Medicaid Act claims.[6] Given the negligible cost impact (and potential long-term cost savings) to Defendants from covering gender-confirming care for all transgender Wisconsin Medicaid beneficiaries who need it, as well as the likely public health benefits from enjoining the exclusion, a full injunction of Defendants' enforcement of the Challenged Exclusion is in the public interest. The equities plainly tip in Plaintiffs' favor.

Because expansion of the preliminary injunction is necessary to protect the Proposed Class and is otherwise in the public interest, it is well within this Court's equitable powers to grant the requested modification. *See Brown v. Plata*, 563 U.S. 493, 542 (2011) ("The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible.") (internal citation omitted); *Commodity Futures Trading Com'n v. Battoo*, 790 F.3d 748, 751 (7th Cir. 2015) ("a district judge has discretion to revise a preliminary remedy if persuaded that

[6] Plaintiffs Flack and Makenzie agreed to have the first motion for preliminary injunction considered based only on their ACA and equal protection claims. Like the constitutional claims, their Medicaid Act claims "may be an alternative basis for the Seventh Circuit to rule on appeal," *see* PI Op. at 31-32, so Plaintiffs request that the Court now consider the likelihood of success on their Medicaid Act claims in deciding the present motion.

change had benefits for the parties and the public interest"); *Weather Shield Mfg., Inc. v. Drost*, No. 17-cv-294-jdp, 2017 WL 7053652, at *2 (W.D. Wis. Nov. 16, 2017).

I. THE CHALLENGED EXCLUSION SUBJECTS ALL MEMBERS OF THE PROPOSED CLASS TO IRREPARABLE HARM.

Defendants' enforcement of the Challenged Exclusion exposes all members of the Proposed Class to the common, serious risk of irreparable harm from untreated or inadequately treated gender dysphoria, including resulting distress, health harms, and stigma. Members of the Proposed Class are also similarly deprived of their Constitutional right to equal protection because the Challenged Exclusion impermissibly discriminates on the basis of sex and also singles out transgender Wisconsin Medicaid beneficiaries, as a group, for second-class and inferior health care relative to all other Medicaid beneficiaries. This constitutional injury is also an irreparable harm warranting a preliminary injunction.

A. The Categorical Exclusion irreparably harms all class members by categorically denying coverage for gender dysphoria and exposing them to the risk of related harms to their health, well-being, and safety.

All members of the Proposed Class are likely to suffer irreparable harm if their needed treatments for gender dysphoria remain subject to the Challenged Exclusion. Irreparable harm "cannot be prevented or fully rectified by the final judgment after trial," but need not be certain to occur for an injunction to issue. PI Op. at 16 (citing and quoting *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1044-45 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018) (internal citation omitted). It is well-established that delayed or denied health care resulting from state Medicaid policies or other governmental actions is a form of irreparable harm. *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); *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"); *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"). "Courts routinely uphold preliminary injunctions where the alleged irreparable harm involves delay in or inability to obtain medical services and the party against whom the injunction is issued claims that the injunction places significant costs on them." *Wilson v. Gordon*, 822 F.3d 934, 958 (6th Cir. 2016) (citing *Blum v. Caldwell*, 446 U.S. 1311, 1315-16 (1980)).

In a class action challenge to a policy or systemic practice of a state Medicaid agency, like this one, plaintiffs demonstrate irreparable harm without an adequate remedy at law by "show[ing] that members of the class face the risk of being denied necessary medical care without a preliminary injunction." *Koss v. Norwood*, 305 F. Supp. 3d 897, 922 (N.D. Ill. 2018) (citations and internal quotation marks omitted) (certifying class of Illinois Medicaid beneficiaries challenging agency's failure to process or administer long-term care applications and granting preliminary injunction based, *inter alia*, on evidence that class members would be denied health care); *see also Wilson*, 822 F.3d at 958-59 (affirming preliminary injunction requiring Tennessee Medicaid agency to grant fair hearings on delayed Medicaid applications for all class members requesting one and finding sufficient "irreparable injury in the form of delays in medical treatment" to class members); *B.E. v. Teeter*, No. C16-227-JCC, 2016 WL 3033500, at *7 (W.D. Wash. May 27, 2016) (granting preliminary injunction fully enjoining state

Medicaid agency's enforcement of Hepatitis C treatment policy where that policy irreparably harmed putative class members by denying them medically necessary treatments).[7]

Here, there can be no dispute that the Challenged Exclusion, by its own terms, categorically prohibits all class members from receiving coverage for gender dysphoria treatments. Class members who need gender-confirming care and seek Wisconsin Medicaid coverage will be denied that coverage pursuant to the Challenged Exclusion. Because Wisconsin Medicaid beneficiaries are, by definition, low-income individuals who rely on Medicaid for their health care needs, the direct result of this categorical denial is untreated or insufficiently treated gender dysphoria in virtually every case. As the Seventh Circuit and this Court have recognized, untreated gender dysphoria, on its own, is a serious, irreparable harm. *See Whitaker*, 858 F.3d at 1045-46; PI Op. at 22-23. Compounding that harm for transgender beneficiaries who need gender-confirming treatments for gender dysphoria and are barred from obtaining it, are the associated but avoidable psychological harms (including anxiety, depression, suicidality, and self-harm), physical injury, interpersonal and social harms, safety risks, and experienced stigma that are closely associated with untreated gender dysphoria. *See supra* at 4-7. Since the entire Proposed Class is at risk of these harms to their health and well-being resulting from Defendants' enforcement of the Challenged Exclusion to deny them care, the irreparable injury requirement has been abundantly satisfied.

B. Plaintiffs are irreparably harmed because the Challenged Exclusion violates the Constitutional rights of all members of the Proposed Class.

Here, Plaintiffs' likelihood of success on their Constitutional claims are sufficient to establish irreparable injury for the requested preliminary injunction. *See Ezell v. City of Chicago*,

[7] The court subsequently certified the class after the entry of this broad preliminary injunction. *B.E.*, 2016 WL 3033500, at *5.

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). In transgender rights cases like this one, courts have found irreparable harm based on the likelihood of success on equal protection claims under the Fifth and Fourteenth Amendments. *See, e.g.*, *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1040 (S.D. Ind. 2018) (preliminarily enjoining school policy denying transgender student access to appropriate restrooms, presuming irreparable harm based on plaintiff's likelihood of success on equal protection claims); *Stone v. Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 216 (D.D.C. 2017); *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).

In its earlier decision, the Court, citing the principle of constitutional avoidance, declined to reach the question of whether the likelihood of success on the constitutional claims raised in this case would independently suffice to establish irreparable harm. PI Op. at 23 n.19. The Court did not need to reach that question after ruling that Mr. Flack and Ms. Makenzie "advanced more than enough evidence . . . that they face a possibility of irreparable harm" to their health and well-being. *Id.* at 19. Here, the class-wide injuries set forth above suffice to establish the requisite irreparable harm. However, should the Court choose to reach this question, it can easily find the necessary irreparable harm from the constitutional injury. Indeed, the Court already found here that Mr. Flack and Ms. Makenzie presented "more than a negligible chance of prevailing on the merits of their equal protection claim" based on their facial challenge to the

Challenged Exclusion. *Id*. at 2. The Court has since squarely held that the substantially similar exclusion on gender-confirming care under Wisconsin's state employee health benefits plan was facially unconstitutional under the Fourteenth Amendment. *See Boyden v. Conlin*, No. 17-cv-264-wmc, 2018 WL 4473347, at *18 (W.D. Wis. Sept. 18, 2018). Since the equal protection analysis is virtually identical here, Plaintiffs remain likely to succeed on their challenge to the constitutionality of the Challenged Exclusion, permitting a finding of irreparable injury to support the broader injunctive relief currently being requested.

II. THIS COURT HAS ALREADY FOUND SUFFICIENT LIKELIHOOD OF SUCCESS UNDER SECTION 1557 AND THE EQUAL PROTECTION CLAUSE.

A. Plaintiffs are likely to succeed on their Section 1557 claim.

As this Court has already found, "plaintiffs have demonstrated . . . at least a reasonable likelihood of success on the merits of their Affordable Care Act claim." PI Op. at 23. The Court found the requisite likelihood of success to meet the threshold requirement for a preliminary injunction based on two distinct analyses, both of which compel the same finding of likely success on the merits for the class-wide claims.

First, the Court found that Wisconsin Medicaid denies coverage for procedures it would otherwise pay for if Plaintiffs' assigned sex, or "natal sex," were different. *Id*. at 25-26. "[I]f plaintiffs' natally assigned sexes had *matched* their gender identities, their requested, medically necessary surgeries to reconstruct their genitalia or breasts would be covered by Wisconsin Medicaid." *Id.* at 26. This "straightforward case of sex discrimination," *id.*, also applies equally to all other transgender Wisconsin Medicaid beneficiaries seeking treatments that would be otherwise be covered if their assigned sex and gender identities matched.

Second, the Court found that the Challenged Exclusion, on its face, subjects transgender Wisconsin Medicaid beneficiaries to inequitable treatment based on impermissible sex

stereotypes. *Id.* at 26-29. Applying the Seventh Circuit's recent decisions in *Whitaker* and *Hively v. Ivy Tech Community College*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc), the Court found that "discriminating on the basis that an individual was going to, had, or was in the process of changing their sex—or the most pronounced physical characteristics of their sex," is a form of impermissible sex stereotyping discrimination. PI Op. at 27-29. The Court further found that Challenged Exclusion "creates a different rule governing the medical treatment of transgender people" and "expressly *singles out and bars* a medically necessary treatment solely for transgender people suffering from gender dysphoria," and that, "[if] anything, the Challenged Exclusion feeds into sex stereotypes by requiring all transgender individuals receiving Wisconsin Medicaid to keep genitalia and other prominent sex characteristics consistent with their natal sex no matter how painful and disorienting it may prove for some." *Id.* at 29, 31 (citing *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576-77 (6th Cir. 2018)). Accordingly, the Court found a likelihood of success under Section 1557 under a sex stereotyping theory. *Id.* at 29, 31. Because this same categorical exclusion applies to all transgender people on Wisconsin Medicaid, this sex stereotyping analysis applies with equal force to the class claims.

Since entering the preliminary injunction in July, this Court has applied this same reasoning to find that the analogous exclusion on gender-confirming care in Wisconsin's employee health benefit program, on its face, discriminates against transgender people on the basis of sex. *Boyden*, 2018 WL 4473347, at *14. Based on this finding, this Court found defendants liable under Section 1557, as a matter of law, for enforcing that exclusion. *Id.* at *21. A federal court in Minnesota also recently held that a transgender individual denied gender-confirming care based on a categorical exclusion in a private insurance plan stated a claim under Section 1557, similarly finding that Section 1557's protections extend to transgender individuals

under the sex stereotyping theory. *See Tovar v. Essentia Health*, No. 16-100, 2018 WL 4516949, at *2, 7 (D. Minn. Sept. 20, 2018).

For these reasons stated above and in Plaintiffs' original brief, they have shown a sufficient likelihood of success on their Section 1557 claims on behalf of the Proposed Class.

B. Plaintiffs are also likely to succeed on their Equal Protection Clause claim.

Previously, the Court also found that Plaintiffs Flack and Makenzie demonstrated a sufficient likelihood of success on their equal protection claims because, whether as a form of sex discrimination or discrimination against transgender people as a group, the Challenged Exclusion was unlikely to survive heightened scrutiny. PI Op. at 2, 31-32. Citing *Whitaker*, the Court suggested that heightened scrutiny was appropriate because, at minimum, "plaintiffs have made a strong showing of sex discrimination." *Id.* at 32-33. Subsequently, in *Boyden*, the Court squarely ruled that Wisconsin's categorical coverage exclusion at issue in that case was indeed subject to heightened scrutiny as a form of sex discrimination. *Boyden*, 2018 WL 4473347, at *17. Here, as in *Boyden*, the State raised speculative concerns about the costs and efficacy of gender-confirming treatments only as *post hoc* rationalizations for the exclusion in response to litigation. *Id.* at *17-18. The Court in *Boyden* ruled that such purported justifications were insufficient to withstand heightened scrutiny and that the exclusion was, therefore, unconstitutional. *Id.* Because the equal protection analysis here is nearly identical to the one the Court undertook in *Boyden*, Plaintiffs are likely to prevail on their claim that the Challenged Exclusion unconstitutionally discriminates on the basis of sex in violation of the Equal Protection Clause.

As this Court recognized, the Challenged Exclusion is also likely subject to heightened scrutiny for an independent reason: the policy disfavors transgender people as a group. PI Op. at

34-35. Observing that "other than certain races, one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people," the Court reasoned that the transgender population is likely a suspect or quasi-suspect class warranting heightened scrutiny. *Id.* Because the Challenged Exclusion "creates a different rule governing the medical treatment of transgender people," the policy clearly discriminates against transgender Wisconsin Medicaid beneficiaries as a group. For the same reasons as above, the Challenged Exclusion cannot withstand heightened scrutiny under this analysis either.

In any event, heightened scrutiny applies. The Challenged Exclusion cannot withstand heightened scrutiny and will likely be found unconstitutional on its face. Plaintiffs have therefore shown sufficient likelihood of success on their equal protection claims.

III. PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THEIR MEDICAID ACT CLAIMS INDEPENDENTLY WARRANTS A FULL INJUNCTION OF THE CHALLENGED EXCLUSION.

Wisconsin is violating the availability and comparability requirements of the Medicaid Act by categorically denying medically necessary treatments for gender dysphoria to all members of the Proposed Class. Because the Challenged Exclusion violates the Medicaid Act's comparability and availability requirements, Plaintiffs' likelihood of success on their Medicaid Act claims provides another basis for a full preliminary injunction of the exclusion.

Wisconsin has opted to participate in the Medicaid program, therefore 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). The Medicaid Act requires participating states to cover certain categories of services ("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)(A); *see also Miller*, 10 F.3d at 1316. States must cover these services 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 Medicaid Act requires states to provide comparable services to all Medicaid beneficiaries without discriminating on the basis of medical condition or diagnosis. *See* 42 U.S.C. § 1396a(a)(10)(B). With the Challenged Exclusion, Wisconsin is violating both of these requirements.

A. Wisconsin is violating the Medicaid Act's Availability Provision by failing to make medically necessary medical assistance available to the Proposed Class.

The Medicaid Act requires states to make mandatory medical services (as well as optional medical services that a state has decided to cover) available in a sufficient amount, duration, and scope. 42 U.S.C. § 1396a(a)(10)(A); 42 C.F.R. § 440.230(b). This requirement is known as the Availability Provision.

The Seventh Circuit and other courts have uniformly held that the Availability Provision requires a state to cover services when they (1) fall within a category of mandatory medical services or optional medical services that the state has elected to provide; and (2) are "medically necessary" for a particular individual. *See, e.g.*, *Beal v. Doe*, 432 U.S. 438, 444 (1977) ("[S]erious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage"); *Miller*, 10 F.3d at 1319-20 (finding that a 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 610 (holding that state may not "den[y] coverage for medically necessary dental services outright"); *Collins v. Hamilton*, 349 F.3d 371, 376 (7th Cir. 2003) (holding that state may not categorically exclude coverage of residential psychiatric treatment because "[i]n some circumstances, [such] treatment may be medically necessary"); *Alvarez v. Betlach*, 572 F. App'x 519, 521 (9th Cir.

2014) (finding that the 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.").

Wisconsin's own Medicaid regulations reflect this federal requirement, affirming that Wisconsin must reimburse providers for services that fall within a category of covered services and are "medically necessary and appropriate." Wis. Adm. Code § DHS 107.01(1); *see also id.* §§ DHS 107.06(1) (requiring coverage of medically necessary physician services), 107.08 (requiring coverage of medically necessary inpatient hospital services).

As other courts have found, a state Medicaid policy that categorically denies coverage for certain gender-confirming services on the basis that the services are not medically necessary violates the Availability Provision. *See 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). Here, surgical and medical treatments and services for gender dysphoria unquestionably fall within the categories of mandatory medical services outlined in the Medicaid Act, as they would be performed by a physician on an inpatient or outpatient basis. In fact, were it not for the Challenged Exclusion, Defendants would cover the services under the general definition of medically necessary services in the state medical assistance regulations. *See* Wis. Adm. Code § DHS 101.03(96m)(b); *see also* PI Op. at 7 (noting that the State admits that Wisconsin Medicaid may cover services as medically necessary when not excluded by law). Instead, Defendants have not considered any of the nine factors listed in that regulation. Rather, the Challenged Exclusion is based on the false and unsupported premise that gender-confirming

services are *never* medically necessary. *See* PI Op. at 6. As the *Cruz* court found, the Availability Provision prohibits states from "plac[ing] an outright ban on medically necessary treatments." *Cruz*, 195 F. Supp. 3d at 571.

Like the exclusion at issue in *Cruz*, the Challenged Exclusion here is an outright ban on care. Wisconsin's categorical refusal to cover these services is inconsistent with the prevailing medical consensus and violates federal Medicaid law.[8] Therefore, Plaintiffs are likely to succeed on the merits of their claim that the Challenged Exclusion violates the Medicaid Act's Availability Provision.

B. The Challenged Exclusion also violates the Medicaid Act's Comparability Provision.

The Challenged Exclusion's categorical ban on coverage for surgical and medical services to treat gender dysphoria—when those exact same services are covered to treat other conditions—violates the Medicaid Act's requirement that services made available to any individual enrolled in Medicaid "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(b) (services available 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 requirement—known as the Comparability Provision—as prohibiting states from providing particular services to some Medicaid beneficiaries but not others based solely on their medical diagnosis. *See, e.g.*, *White v. Beal*, 555

[8] *See* Decl. of Loren S. Schechter, M.D. ¶¶ 40-43 [Dkt. No. 27]; Shumer Decl. ¶¶ 42-43; Budge Decl. ¶¶ 68-69.

F.2d 1146, 1148 (3d Cir. 1977); *Davis v. Shah*, 821 F.3d 231, 258 (2d Cir. 2016); *Cruz*, 195 F. Supp. 3d at 576.

In *White*, the Third Circuit enjoined a Pennsylvania Medicaid policy that covered eyeglasses for individuals with eye disease or pathology, but not for those with ordinary refractive errors. *White*, 555 F.2d at 1148. The court noted that the Comparability Provision requires that "all persons within a given [eligibility] category must be treated equally." *Id*. at 1149. The court highlighted evidence showing that some individuals with refractive errors have more significant visual impairment than individuals with eye disease or pathology and that eyeglasses are not helpful in many cases of eye disease. *Id*. at 1150. While the State contended that limited resources justified the policy, the court disagreed, finding "nothing in the federal statute that permits discrimination based upon etiology rather than need for the service." *Id*. at 1150-51.

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," holding that the Comparability Provision "prohibits discrimination among individuals with the same medical needs stemming from different medical conditions." *Davis*, 821 F.3d at 256, 258. At issue in that case was New York's policy of only covered prescription orthopedic footwear and inserts when necessary to support a lower limb orthotic appliance, to treat diabetes, or to treat growth or developmental issues in children. *Id*. at 240. The state also limited coverage of compression and support stockings to individuals with pregnancy related conditions or venous stasis ulcers. *Id*. at 241. A class of Medicaid beneficiaries who had been prescribed orthopedic footwear or inserts or compression stockings for other serious medical conditions, including multiple sclerosis, paraplegia, lymphedema, cellulitis, psoriatic arthritis, peripheral neuropathy,

and trans-metatarsal amputation, challenged the coverage exclusion. *Id*. at 242. 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 New York offered an unequal scope of benefits to beneficiaries with an equal medical need for the benefits, the State violated the plain language of the Comparability Provision. *Id.* at 256.

The *Cruz* court, citing *Davis*, similarly held that New York's Medicaid exclusion on certain gender-confirming treatments violated the Comparability Provision by covering surgeries for individuals with diagnoses other than gender dysphoria but categorically excluding those same surgeries when necessary to treat gender dysphoria. *Cruz*, 195 F. Supp. 3d at 576-77.

Like the policies at issue in *White*, *Davis*, and *Cruz*, the Challenged Exclusion impermissibly restricts coverage "based upon etiology rather than need for the service." *White*, 555 F.2d at 1151. Like New York did under the Medicaid exclusion at issue in *Cruz*, Wisconsin covers gender-confirming services when needed to treat other conditions, such as cancer, traumatic injuries, or congenital defects, but denies that coverage under the Challenged Exclusion when those same services are needed to treat gender dysphoria. This Court has recognized as much, finding that "if a natal female were born without a vagina, she could have surgery to create one, which would be covered by Wisconsin Medicaid if deemed medically necessary. However, a natal male suffering from gender dysphoria would be denied the same medically necessary procedure." PI Op. at 25-26.

Accordingly, Plaintiffs are likely to succeed on the merits of their claim that the Challenged Exclusion violates the Comparability Provision by categorically denying Medicaid

coverage for gender-confirming treatments while covering those same treatments for conditions other than gender dysphoria.

IV. THE BALANCING OF EQUITIES STRONGLY FAVORS A FULL INJUNCTION.

The balancing of harms tips heavily in favor of the Proposed Class, just as it did with respect to Mr. Flack and Ms. Makenzie. *Id*. at 35-36. The Court must weigh "any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief" against the irreparable harm class members will suffer without the injunction. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008).

Despite being given the opportunity by this Court to do so, Defendants have failed to provide any evidence that they will be irreparably harmed if they are enjoined from enforcing the unlawful and unconstitutional Challenged Exclusion. *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 gender-confirming services 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).

Plaintiffs previously predicted that the marginal additional cost to the State of covering gender-confirming care for Wisconsin Medicaid beneficiaries who need it is likely to be low. PI Br. at 41. After first speculating without support that the cost impact would be $2.1 million annually, PI Op. at 36 n.31, the State has since retained an expert, who estimated that the annual cost impact of a full injunction would actually be only about $300,000. Williams Report at 3.

That new estimated cost represents only 0.008% of Defendants' $3.9 billion share of the $9.7 billion annual Wisconsin Medicaid budget. Hughto Supp. Decl. ¶¶ 6, 8.[9]

Likewise, Defendants' expert's analysis fails to account for the significant countervailing savings—and public health benefits—that can be expected to result from lifting the Challenged Exclusion. As Plaintiffs' experts have shown, covering the full range of transition-related medical care is likely to result in improved psychosocial, socioeconomic, and physical and mental health outcomes for transgender Medicaid recipients. Budge Decl. ¶¶ 35-37; Hughto Supp. Decl. ¶¶ 8-20. As the Court has recognized, these improved outcomes are in the public interest. PI Op. at 37. And they can, in turn, be expected to reduce the costs to Wisconsin Medicaid, and to the State generally, of providing care and services related to suicide and suicide attempts, substance abuse, physical and sexual assault, HIV/AIDS, and unemployment, further reducing the already low budgetary impact on the State. Hughto Supp. Decl. ¶¶ 8-20.

At worst, any added costs to Defendants resulting from a full injunction would amount to a rounding error. At best, the State may realize cost *savings* by covering gender-confirming care when it is needed and, as a result, not incurring the medical costs associated with untreated gender dysphoria. *See supra* at 14-15. In any event, "[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*, 305 F. Supp. 3d at 924 ("The public has an interest in ensuring that Medicaid eligible individuals promptly receive necessary medical

[9] Needless to say, the fact that Defendants failed to undergo any cost analysis until after the Court directed them to do so is further evidence that the cost savings "rationale" is nothing more than a *post hoc* response to litigation and not a genuine basis for the Challenged Exclusion.

services, and the public interest in making the state follow federal law outweighs any modest impact on its budget.") (citations, modifications, and quotation marks omitted).

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

V. THE COURT SHOULD NOT REQUIRE PLAINTIFFS TO POST AN INJUNCTION BOND.

The Court should waive the requirement for a security bond as a condition of the expanded preliminary injunction. The Court has already found Plaintiffs Flack and Makenzie "plainly indigent," warranting a waiver of the bond requirement. PI Op. at 38. As Wisconsin Medicaid beneficiaries, all members of the Proposed Class are also indigent and lack the resources to post a bond. The requirement should again be waived.

CONCLUSION

For the reasons stated herein, the Court should (1) modify the preliminary injunction to fully enjoin Defendants from enforcing the Challenged Exclusion for the pendency of this litigation, and (2) order the related relief requested by Plaintiffs in their Motion to Modify Preliminary Injunction.

Dated: October 25, 2018

Respectfully submitted,

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