**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WISCONSIN**

CODY FLACK,
SARA ANN MAKENZIE,
MARIE KELLY, and
COURTNEY SHERWIN,
*individually and on behalf of all others similarly situated,*

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES, *et al.*,

Defendants.

Case No. 3:18-cv-00309-wmc
Judge William Conley

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

There is no dispute that Defendants, pursuant to Wis. Adm. Code §§ DHS 107.03(23)-(24), 107.10(4)(p) (the "Challenged Exclusion"), categorically deny gender-confirming care to transgender Wisconsin Medicaid beneficiaries with gender dysphoria, including surgeries and other treatments covered under Wisconsin Medicaid for other medical conditions. Absent any dispute of material fact, Defendants' liability in this case turns on the purely legal questions of whether the Challenged Exclusion violates federal law. Plaintiffs' liability claims are well-suited for disposition on summary judgment.

Plaintiffs Cody Flack, Sara Ann Makenzie, Marie Kelly, and Courtney Sherwin (the "Named Plaintiffs"), on behalf of themselves and the class of all similarly situated individuals certified by this Court on April 23, 2019 (the "Class"), submit this brief in support of their motion for summary judgment on their individual and class action claims against Defendants Wisconsin Department of Health Services ("DHS"), *et al.*, under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 ("Section 1557"); the availability and comparability provisions of the federal Medicaid Act, 42 U.S.C. § 1396a(a)(10)(A)-(B), 42 C.F.R. §§ 440.230(b)-(c), 440.240(b); and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Defendants' continuing enforcement of the Challenged Exclusion violates the rights of the Named Plaintiffs and all members of the Class in need of these treatments.

There are no material facts in dispute; to the contrary, the parties have stipulated to nearly all the salient facts needed to resolve the matter. *See* Pls.' Proposed Findings of Fact (Apr. 23, 2019) ("PFOF"); Joint Stipulation to Findings of Fact (Apr. 23, 2019) ("SFOF"). The parties agree that the Challenged Exclusion, on its face, bars Wisconsin Medicaid coverage for surgical

and hormone treatments for gender dysphoria, and that it has been enforced since 1997 to deny coverage of gender-confirming treatments for gender dysphoria to transgender Medicaid beneficiaries. Defendants acknowledge that untreated or inadequately treated gender dysphoria is associated with serious mental health harms, including serious mental distress, depression, anxiety, self-harm, and suicidality, and recognize the medical consensus that gender-confirming treatments are safe, effective, and medically necessary treatments for gender dysphoria in many transgender people. Defendants admit that while Wisconsin Medicaid excludes from coverage a range of surgical procedures and other services when intended to treat transgender beneficiaries' gender dysphoria, it covers those *identical* services when they are medically necessary to treat other conditions.

There is no genuine dispute that the Challenged Exclusion denies coverage for medically necessary care. Notably, Defendants have not offered *any* admissible evidence to rebut Plaintiffs' body of evidence demonstrating that gender-confirming surgical treatments are medically accepted as safe, effective, and medically necessary for many people suffering from gender dysphoria, including the Named Plaintiffs and members of the Class. They even concede that they have no knowledge that DHS has ever studied or reviewed evidence as to the efficacy, medical necessity, or cost of covering gender-confirming care before implementing the Challenged Exclusion or at any time since. In fact, DHS's clinical staff consider the exclusion to have no clinical basis and to be at odds with current medical practice and the generally accepted standards of care.[1]

[1] This Court has recognized as much, noting that excluding gender-confirming treatments is "contrary to what has become accepted, best practice" among medical professionals who treat individuals with gender dysphoria. Op. & Order at 6, 23 [ECF No. 150] ("*Flack II*").

In the absence of any disagreement on material facts, the Court is left with contested questions of law that are appropriately resolved on summary judgment: whether the Challenged Exclusion violates Section 1557, the Medicaid Act, and the Equal Protection Clause. As this Court has already found in this case, this is "a straightforward case of sex discrimination." Op. & Order at 26 [ECF. No. 70] ("*Flack I*"). Shortly after issuing the preliminary injunction in this case, this Court found the equivalent categorical exclusion in Wisconsin's state employee health plan to violate Section 1557 and the Equal Protection Clause, granting summary judgment to plaintiffs on both claims. *Boyden v. Conlin*, 341 F. Supp. 3d 979, 982 (W.D. Wis. 2018). As this case presents the same questions of law, the Court should rule the same way here. Moreover, given DHS's admission that it covers the same treatments and services for other conditions but not for gender dysphoria, the Court should further find the Challenged Exclusion to violate the Medicaid Act's availability and comparability provisions.

Accordingly, Plaintiffs are entitled to judgment as a matter of law on their claims under Section 1557, the Medicaid Act, and the Equal Protection Clause. They respectfully ask the Court to enter a declaratory judgment that the Challenged Exclusion violates these laws and permanently enjoin Defendants' enforcement of the exclusion. Plaintiffs request the opportunity for the parties, jointly or separately, to propose a remedial plan with appropriate equitable relief for the Court's consideration. Plaintiffs further request a trial limited to the individual Named Plaintiffs' damages available to them under Section 1557.

## RELEVANT PROCEDURAL HISTORY

Cody Flack and Sara Ann Makenzie initiated this lawsuit on April 30, 2018 as individuals. Compl. [ECF No. 1]. They moved for a preliminary injunction barring Defendants' enforcement of the Challenged Exclusion during the pendency of the case. Mot. for Prelim. Inj.

[ECF No. 18]. With the parties' agreement, the Court limited the scope of the requested preliminary injunction to Mr. Flack and Ms. Makenzie only. *See Flack I* at 38 n.33. On July 25, 2018, the Court granted the motion for a preliminary injunction and enjoined Defendants from enforcing the Challenged Exclusion against Mr. Flack or Ms. Makenzie during the pendency of this litigation. *Id.* at 39.

On September 25, 2018, with leave of the Court, 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. [ECF No. 85]. On October 18, 2018, the Named Plaintiffs filed a motion to certify a class for declaratory and injunctive relief 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"), Mot. for Class Cert. at 1 [ECF No. 89], which Defendants did not oppose. Defs.' Resp. to Pls.' Mot. for Class Cert. [ECF No. 115]. On October 25, 2018, Plaintiffs moved the Court to expand the preliminary injunction to enjoin the Challenged Exclusion for all class members. Pls.' Mot. to Modify Prelim. Inj. [ECF No. 107].

On April 23, 2019, the Court granted Plaintiffs' class certification motion and motion to amend the preliminary injunction to fully enjoin Defendants' enforcement of the Challenged Exclusion during the pendency of this lawsuit. Op. & Order [ECF No. 150] ("*Flack II*"). The Court reiterated its earlier ruling that Plaintiffs are likely to succeed on the merits of their Section 1557 and Fourteenth Amendment claims, and found that members of the Class faced irreparable injury without the broader injunction. *Id.* at 17-21.

Plaintiffs now move for summary judgment on each of their claims.

## SUMMARY OF UNDISPUTED FACTS

### *The Challenged Exclusion*

The Challenged Exclusion bars Wisconsin Medicaid coverage for "[t]ranssexual surgery" and "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics." Wis. Adm. Code § DHS 107.03(23)-(24), 107.10(4)(p); PFOF ¶ 2.[2] DHS admits that, though the term "transsexual surgery" is "outdated" and not defined by the statute, the agency interprets the term to refer to *any* surgical procedure intended to treat gender dysphoria—the clinically significant distress or impairment in social, occupational, or other areas of function associated with the incongruence between a transgender person's gender identity and assigned sex. PFOF ¶¶ 52, 80.

Approximately 20 percent of Wisconsin Medicaid beneficiaries have fee-for-service coverage administered directly by DHS. PFOF ¶¶ 27, 28. DHS has directly denied coverage to Medicaid beneficiaries in its fee-for-service program seeking chest and genital reconstruction surgeries based on the Challenged Exclusion, without any individualized consideration of the medical necessity of those procedures to those beneficiaries. PFOF ¶¶ 6, 7, 93, 97.

The rest of Wisconsin Medicaid beneficiaries receive their Medicaid benefits through a third-party managed care organization ("HMO") that must follow DHS's rules in making coverage determinations. PFOF ¶¶ 27, 93. Based on the Challenged Exclusion, these HMOs are

[2] In their Amended Complaint and earlier briefing, Plaintiffs referred only to Wis. Adm. Code §§ DHS 107.03(23)-(24) when describing the Challenged Exclusion. Since then, they have identified a separate provision of Wisconsin's medical assistance regulations, Wis. Adm. Code § DHS 107.10(4)(p), which repeats the language from Wis. Adm. Code § DHS 107.03(23), stating that "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics," are "excluded services" under Wisconsin Medicaid. Accordingly, Plaintiffs now ask the Court to include that provision as a part of the Challenged Exclusion at issue in this case.

compelled by DHS to deny coverage for gender-confirming care, including surgeries, hormone treatments, and other services. PFOF ¶¶ 93, 94, 112. In fact, in recent years, most of the HMOs have categorically denied treatments for gender dysphoria—including surgeries, hormone treatments, and other services—under the Challenged Exclusion. PFOF ¶¶ 7, 93, 94.

DHS has made clear that it will not reimburse HMOs who pay for excluded treatments. DHS has never provided formal guidance to the HMOs on the definition of the terms of "transsexual surgery" or "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics," or on what treatments and services are subject to the exclusion. PFOF ¶¶ 94, 110-12. In fact, the only written communication DHS has made to participating HMOs pertaining to the Challenged Exclusion was a letter, dated January 4, 2017, sent from former Wisconsin Medicaid Director Michael Heifetz, a political appointee, to contract administrators at the managed care organizations offering Wisconsin Medicaid plans. PFOF ¶ 112. The letter stated that DHS would continue to enforce the Challenged Exclusion and "*will not reimburse* entities for procedures that fall outside the Department's regulations." PFOF ¶ 112 (emphasis added). The letter, as well as denials of coverage for gender-confirming treatments made by HMOs or DHS since then, were not based on medical necessity determinations or any clinical considerations. PFOF ¶ 112.

***Gender Dysphoria and its Treatment***

As DHS admits, untreated or inadequately treated gender dysphoria is associated with serious mental health harms, including serious distress, depression, anxiety, self-harm, and suicidality. PFOF ¶¶ 3, 57; *see also Flack II* at 18-19. DHS also concedes that gender-confirming surgical and hormone treatments can be medically necessary treatments for gender dysphoria. PFOF ¶¶ 3, 64, 69, 70, 95. The agency acknowledges that the American Medical Association,

American Psychological Association, American Psychiatric Association, Endocrine Society, and other major medical organizations view surgeries as medically accepted, safe, and effective treatments for gender dysphoria. PFOF ¶ 68. It further acknowledges that, under the World Professional Association of Transgender Health's *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version* (2011) ("WPATH Standards of Care"), accepted treatment options include hormone therapy and various surgical procedures. PFOF ¶¶ 61-63, 71. The agency even recognizes that, when used to treat gender dysphoria, surgical treatments that might otherwise be considered "cosmetic" are considered by the medical community to be reconstructive in nature. PFOF ¶ 72.

Indeed, the medical officials in DHS's Bureau of Benefits Management ("BBM"), who are charged with making clinical coverage determinations for Medicaid coverage decisions, recognize the medical consensus that gender-confirming surgeries are safe, effective, medically necessary treatments for gender dysphoria for many transgender people when conducted under the prevailing standards of care, including the WPATH Standards of Care and the Endocrine Society's clinical practice guidelines for the treatment of transgender people. PFOF ¶¶ 29, 30, 63, 71, 96. Those same officials, when not precluded from doing so by the Challenged Exclusion, have determined gender-confirming surgeries to be medically necessary for particular individuals with gender dysphoria. PFOF ¶¶ 96, 107. For example, when reviewing Plaintiff Cody Flack's request for chest reconstruction surgery after the preliminary injunction in this case was issued, Dr. Julie Sager, one of BBM's medical directors, used the WPATH Standards of Care to determine that the requested surgeries were medically necessary. PFOF ¶ 147. If the Challenged Exclusion did not categorically exclude coverage for these services, Dr. Sager would similarly use these standards of care in reviewing any other request for gender-confirming

surgery, given her clinical opinion that they are generally accepted by the medical community. PFOF ¶¶ 63, 71, 148.

Gender-confirming surgeries include a wide range of procedures and do not refer to one particular surgery. PFOF ¶ 67. These include surgeries that Wisconsin Medicaid covers when medically necessary to treat conditions other than gender dysphoria. PFOF ¶ 103. Treatments for gender dysphoria that are categorically excluded by the Challenged Exclusion (many of which have actually been denied by DHS and its participating managed care organizations), include chest reconstruction surgeries (e.g., mastectomy, reduction mammoplasty, breast reconstruction) and genital surgeries (e.g., penectomy, orchiectomy, vaginoplasty, phalloplasty, hysterectomy, oophorecetomy). PFOF ¶ 98. These treatments are all recognized as safe and effective treatments for gender dysphoria under the WPATH Standards of Care. PFOF ¶ 99. What is more, Wisconsin Medicaid covers most of them when needed to treat other conditions. PFOF ¶ 104-06.

In addition to treating gender dysphoria, gender-confirming surgeries facilitate transgender people's gender transition by helping them conform their bodies to the sex they know themselves to be, reducing the discrimination, stigma, isolation, and other mistreatment so many transgender people face. PFOF ¶¶ 73, 74. As Plaintiffs' experts Dr. Shumer and Dr. Hughto explain, a benefit of gender-confirming surgery is to enhance a transgender person's ability to "pass" as the sex corresponding to their gender identity. PFOF ¶¶ 73, 74. Peer-reviewed research on transgender health indicates that transgender people who are visibly gender nonconforming experience more discrimination and worse health outcomes than those whose appearance matches their gender identity. PFOF ¶¶ 74-76. Accordingly, gender-confirming surgeries can reduce the discrimination, mistreatment, and harassment that transgender people suffer for being visibly gender nonconforming. PFOF ¶¶ 74-76. The experienced stigma of being

transgender—which is heightened for transgender people unable to "pass" because of their inability to get gender-confirming medical care—frequently results in a higher risk of violence, mistreatment, chronic stress, and ensuing long-term harm. PFOF ¶¶ 73-76.

Defendants have offered no evidence—expert or otherwise—to rebut the opinions of Plaintiffs' expert witnesses that (1) gender-confirming surgeries are generally accepted, safe, and effective treatments for gender dysphoria, PFOF ¶¶ 66, 99; (2) denying these procedures to transgender people otherwise unable to afford them forces them to live inconsistently with their gender identity and exposes them to significant harm, PFOF ¶¶ 39, 59; (3) the already substantial rates of discrimination, harassment, and violence experienced by transgender people are even worse for those who are visibly gender nonconforming because of their inability to obtain gender-confirming care, PFOF ¶¶ 41, 74, 75, 121; and (4) there are serious public health consequences of denying medically necessary gender-confirming care to low-income transgender people, including the social and economic costs associated with untreated gender dysphoria, increased psychological distress, preventable suicides and suicide attempts, and heightened exposure to mistreatment, harassment, sexual assault, and violence. PFOF ¶¶ 76, 77.

***DHS Has Never Been Motivated by Clinical or Cost Concerns in Adopting or Enforcing the Challenged Exclusion***

Defendants concede they have no evidence that the Challenged Exclusion was ever motivated by legitimate concerns that the excluded procedures are medically unnecessary, unsafe, or ineffective, either at the time the policy was promulgated or at any time in the more than two decades since. PFOF ¶¶ 5, 78, 85, 89. While DHS suggested at the preliminary injunction stage that its enforcement was motivated by concerns about safety or efficacy of the excluded treatments, it now admits that its recent enforcement has not been motivated by any clinical concerns, but by political ones. PFOF ¶¶ 6, 97. Defendants have abandoned reliance on

the opinions of Dr. Lawrence Mayer and Dr. Daniel Sutphin, whose declarations they submitted to the Court during briefing on Plaintiffs' preliminary injunction motions, having designated neither as an expert witness at the merits stage of the litigation.[3]

Defendants also admit that, other than an actuarial report prepared solely for this litigation, they have *never* analyzed the fiscal impact of continuing or ending the Challenged Exclusion. PFOF ¶¶ 85, 89, 91. They have no evidence that a cost study was conducted before the Challenged Exclusion was adopted; indeed, DHS's predecessor agency, the Department of Health and Family Services ("DHFS"), assumed the cost savings from the exclusion would be "nominal." PFOF ¶¶ 84, 85, 91. Defendants' expert's own analysis estimates that covering gender-confirming surgeries now may result in additional costs of $300,000 to $1.2 million annually, and that the cost impact would be, at most, 0.03 percent of the State's $3.9 billion share of the total $9.7 billion annual Wisconsin Medicaid budget. PFOF ¶ 91. That is considered immaterial from an actuarial perspective. PFOF ¶ 91.

Finally, DHS's Rule 30(b)(6) representative testified that, for at least the last three years, DHS's decision to continue vigorously enforcing the Challenged Exclusion was based on political, not medical, considerations. PFOF ¶¶ 6, 97. The agency's position is not motivated by

[3] Defendants have offered no expert opinion on whether gender-confirming surgeries are safe, effective, or medically necessary treatments for gender dysphoria. Defendants have designated an expert witness, Dr. Michelle Ostrander, a program manager for a medical research company with no clinical or research expertise on gender dysphoria, to opine on the overall quality of the scientific evidence showing the efficacy of gender-confirming surgeries. Plaintiffs anticipate filing a motion to exclude Dr. Ostrander's testimony as her report fails to meet the most basic requirements of Rule 26. In any event, as Dr. Ostrander does not purport to opine on the medical necessity of gender-confirming care, her opinion on the quality of the evidence, even if admissible, raises no genuine issue of material fact. *See* Schechter Rep. at 16-17 (acknowledging the inherent limitations in the clinical research of gender-confirming surgeries).

a view that the excluded services are medically unnecessary or any other legitimate consideration. PFOF ¶¶ 5, 78, 85, 89.

## LEGAL STANDARD

Under Rule 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A factual dispute can preclude summary judgment, but only if the 'facts might affect the outcome of the suit under governing law.'" *One Wis. Now v. Kremer*, 354 F.Supp.3d 940, 949 (W.D. Wis. 2019) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "[A] genuine dispute of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Gallo v. Mayo Clinic Health Sys.-Franciscan Med. Ctr., Inc.*, 907 F.3d 961, 965 (7th Cir. 2018) (citing *Anderson*, 477 U.S. at 248). "For a fact to be considered 'material,' the fact under dispute must be outcome-determinative under governing law." *Badger Sheet Metal Works of Green Bay, Inc. v. Process Partners, Inc.*, No. 15-C-1051, 2017 WL 2559982, at *2 (E.D. Wis. June 13, 2017) (citing *Contreras v. City of Chicago*, 119 F.3d 1286, 1291 (7th Cir. 1997)).

## ARGUMENT

The Challenged Exclusion (1) violates Section 1557 of the Affordable Care Act by discriminating against transgender Wisconsin Medicaid beneficiaries on the basis of sex; (2) violates the Medicaid Act's availability and comparability requirements by refusing coverage for treatments and services for gender dysphoria that are medically necessary and covered for other conditions; and (3) deprives those beneficiaries of the equal protection of the laws on the basis of sex and for being transgender in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court should grant summary judgment to Plaintiffs on all three claims.

## I. THE CHALLENGED EXCLUSION VIOLATES SECTION 1557'S PROHIBITION ON SEX DISCRIMINATION IN FEDERALLY-FUNDED HEALTH PROGRAMS.

The Challenged Exclusion, on its face, discriminates against transgender Wisconsin Medicaid beneficiaries by denying them medically necessary treatments for gender dysphoria, although it covers the same treatments for other beneficiaries when medically necessary to treat other conditions. PFOF ¶¶ 103-06. As this Court initially found when ruling on Plaintiffs' preliminary injunction motion, the Challenged Exclusion impermissibly "creates a different rule governing the medical treatment of transgender people" since it "expressly *singles out and bars* a medically necessary treatment solely for transgender people suffering from gender dysphoria," and also "denies coverage for medically necessary surgical procedures based on a patient's *natal* sex." *Flack I* at 25-26, 29. Accordingly, this Court held that Plaintiffs were reasonably likely to succeed on their claim that the Challenged Exclusion violates the prohibition on sex discrimination in federally-funded health programs under Section 1557 of the Affordable Care Act, *id.* at 23, and this Court later struck down a similar categorical exclusion on gender-confirming care in Wisconsin's state employee health plan. *Boyden*, 341 F. Supp. 3d at 982.

Because the full record presently before the Court offers no basis to depart from its earlier reasoning here or in *Boyden*, the Court should now hold that the Challenged Exclusion violates Section 1557 as a matter of law.

### A. Section 1557 prohibits discrimination on the basis of sex in federally-funded health programs and activities, including Wisconsin Medicaid.

Under Section 1557, "an individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance," on the grounds prohibited by Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("Title IX"); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; the Age Discrimination Act of 1975, 42 U.S.C. § 6101;

and Section 794 of Title 29, incorporating the enforcement mechanisms and remedies available under those laws. 42 U.S.C. § 18116(a); *see also Flack I* at 23-24; *Boyden*, 341 F. Supp. 3d at 998. Thus, Section 1557 prohibits discrimination "on the basis of sex" in federally-funded health programs and activities based on Title IX. *See Flack I* at 25-26; *see also Boyden*, 341 F. Supp. 3d at 996-97; *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 952 (D. Minn. 2018); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017). As the Court has already noted, "there is no dispute that Wisconsin Medicaid is 'a health program or activity' that 'receiv[es] Federal financial assistance'" in the form of federal Medicaid funds. *Flack I* at 25. Accordingly, DHS subjects itself to Section 1557's nondiscrimination requirements and enforcement mechanisms in its operation of Wisconsin Medicaid.

### B. The Challenged Exclusion discriminates against transgender Wisconsin Medicaid beneficiaries on the basis of sex in violation of Section 1557.

In *Flack I*, this Court held that Plaintiffs were reasonably likely to succeed on their Section 1557 claim that the Challenged Exclusion discriminates against transgender Medicaid beneficiaries on the basis of sex. *Flack I* at 23. In reaching this conclusion, the Court found that the exclusion (1) impermissibly creates a different rule governing Wisconsin Medicaid coverage for transgender beneficiaries by singling out and barring coverage for services only needed by transgender people, *id.* at 29, (2) "denies coverage for medically necessary surgical procedures based on a patient's *natal* sex" by denying coverage for treatments that would be covered if the beneficiary's assigned sex were different," *id.* at 25-26, and (3) constitutes impermissible sex stereotyping by "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" and "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 27, 31.

This Court subsequently adopted the same reasoning in *Boyden*, where it held that Wisconsin's similar categorical exclusion on gender-confirming care in the state employee health benefits plan violated Section 1557, granting summary judgment on that claim to the plaintiff state employees. *Boyden*, 341 F. Supp. 3d at 994-97. With regard to that categorical exclusion—which was virtually identical to the Challenged Exclusion here—the Court concluded that "[w]hether because of differential treatment based on natal sex, or because of a form of sex stereotyping where an individual is required effectively to maintain his or her natal sex characteristics, the Exclusion on its face treats transgender individuals differently on the basis of sex, thus triggering the protections of . . . the ACA's anti-discrimination provision." *Id.* at 997.

For these same reasons, summary judgment on Plaintiffs' Section 1557 claim is appropriate here.

*1. On its face, the Challenged Exclusion creates a different rule governing the medical care of transgender Wisconsin Medicaid beneficiaries than for others.*

Under the Seventh Circuit's decision in *Whitaker*, which held that a policy that subjects transgender students to differential treatment relative to non-transgender students violates Title IX, this Court has correctly held that a policy subjecting transgender individuals to differential healthcare coverage is unlawful sex discrimination under Section 1557. *Flack I* at 29 (citing *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017)). Applying *Whitaker*, this Court found that 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." *Flack I* at 29. "[B]y excluding 'transsexual surgery' from coverage, the Challenged Exclusion directly singles out a Medicaid claimant's transgender status as the basis for denying medical treatment." *Id.*

The undisputed facts support the same finding now. The Challenged Exclusion, on its face, categorically excludes Wisconsin Medicaid coverage for "[t]ranssexual surgery" and "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics." Wis. Adm. Code § DHS 107.03(23)-(24); 107.10(4)(p); PFOF ¶ 2. Although DHS's regulations do not define the term "transsexual surgery," the agency interprets the term to refer to *any* surgical procedure intended to treat gender dysphoria, a condition experienced solely by transgender people. PFOF ¶¶ 51, 80. DHS acknowledges that, under the Challenged Exclusion, it is Wisconsin Medicaid's policy to exclude from coverage both gender-confirming surgeries *and* hormone therapy treatments for gender dysphoria, even when those services are deemed medically necessary by a transgender beneficiary's treating providers. *Id.* ¶¶ 103, 122.

It is impossible to discuss the Challenged Exclusion without reference to sex. The exclusion, by its own terms, refers to the "alteration of sexual anatomy or characteristics." Wis. Adm. Code § DHS 107.03(24); 107.10(4)(p). DHS admits that the excluded procedures—including chest and genital surgeries, as well as feminizing or masculinizing hormone treatments—are intended to align a transgender person's primary and secondary sex characteristics with the sex corresponding to the person's gender identity, and not the person's assigned sex. PFOF ¶¶ 73, 118. Moreover, by excluding coverage for "trans*sex*ual surgery," an undefined term considered "outdated" by DHS's own clinical staff, the policy is inherently based

on sex-based considerations (being transgender, or "transsexual," and undergoing a gender transition).

Moreover, the Challenged Exclusion cannot be justified by legitimate reasons. There is no genuine dispute that gender-confirming hormone treatments and surgeries are medically necessary treatments for gender dysphoria. *See Flack II* at 18 (noting "plaintiffs have provided overwhelming evidence that gender-confirming surgical treatments can be medically necessary"). DHS stipulates that hormone treatments are medically necessary to treat gender dysphoria for many transgender people. PFOF ¶ 64. It stipulates the American Medical Association, American Psychiatric Association, American Psychological Association, Endocrine Society, and other major medical organizations recognize gender-confirming surgeries as medically necessary. PFOF ¶ 68. It stipulates that the WPATH Standards of Care are the clinical guidelines for the treatment of gender dysphoria, and that surgeries are accepted treatments under those standards. PFOF ¶ 71.

Wisconsin Medicaid has, in individual cases where the Challenged Exclusion did not apply, determined that gender-confirming surgeries are medically necessary treatments for gender dysphoria.[4] Wisconsin Medicaid's medical director, Dr. Julie Sager, considers gender-confirming surgeries to be generally accepted treatments for gender dysphoria, and testified that removing the Challenged Exclusion would be consistent with those standards of care and current

[4] These included DHS's review of Cody Flack's request for surgery after the preliminary injunction in this case barred DHS from enforcing the Challenged Exclusion against him, and a review of a Medicaid HMO's prior authorization denial for a beneficiary under 21, whose request DHS reviewed for medical necessity under the Medicaid Act's Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provisions. PFOF ¶¶ 93 n.1, 96, 97, 146, 147.

medical practice. PFOF ¶¶ 107, 117.[5] Defendants have offered no expert evidence to refute the expert opinions from Plaintiffs' experts—Dr. Stephanie Budge, Dr. Loren Schechter, and Dr. Daniel Shumer—who all treat transgender patients and are experts on transgender health, that gender-confirming surgeries are medically necessary, safe, and effective treatments for gender dysphoria. PFOF ¶ 8, 78.

Moreover, the agency admits that the same treatments excluded by the Challenged Exclusion when intended to treat gender dysphoria are covered for other beneficiaries when deemed medically necessary to treat conditions other than gender dysphoria. PFOF ¶¶ 4, 103, 106. Among other surgeries, Wisconsin Medicaid covers mastectomies, reduction mammoplasties, breast/chest reconstruction surgeries, penectomies, vaginoplasties, orchiectomies, oophorectomies, and hysterectomies when medically necessary to treat conditions other than gender dysphoria. PFOF ¶¶ 104, 105. But it categorically excludes these same procedures from coverage *only* when they are needed to treat gender dysphoria, a condition that only transgender people suffer. PFOF ¶¶ 51, 103, 106.

In short, there is no dispute that, pursuant to the Challenged Exclusion, DHS "expressly *singles out and bars* a medically necessary treatment solely for transgender people suffering from gender dysphoria." *Flack I* at 29. On its face, it violates Section 1557.

*2. The Challenged Exclusion is based on impermissible sex stereotypes.*

It is well-established that a policy based on impermissible sex stereotypes is unlawful under federal sex discrimination laws, including Section 1557. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 350-52 (7th

[5] Dr. Sager was DHS's designated representative at Plaintiffs' Rule 30(b)(6) deposition of the agency on April 15, 2019. During that deposition, she provided certain personal opinions based on her professional clinical views.

Cir. 2017) (en banc); *Whitaker*, 858 F.3d at 1047-48; *Flack I* at 27; *Boyden*, 341 F. Supp. 3d at 996. As the Seventh Circuit and this Court have held, discrimination against transgender people is inherently based on sex stereotypes since, "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Flack I* at 27 (quoting *Whitaker*, 858 F.3d at 1048; citing *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1136 (D. Idaho 2018)); *Boyden*, 241 F. Supp. 3d at 996-97.

In turn, the Challenged Exclusion, which categorically denies care to transgender people because they are transgender, is based on unlawful sex stereotypes. Just as "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX," *Whitaker*, 858 F.3d at 1049, a policy that denies medically necessary gender-confirming health care to transgender people punishes them for their gender nonconformity, in violation of Section 1557. *Accord Hively*, 853 F.3d at 346-47, 350-51. Furthermore, just as "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align," *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576-77 (6th Cir. 2018), *cert. granted in part*, 2019 WL 1756679 (U.S. Apr. 22, 2019), "discrimination 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 *still* discrimination based on sex" because it is a form of sex stereotyping. *Flack I* at 27 (citing *Harris Funeral Homes*, 844 F.3d at 571; *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008)).

As this Court has already explained, "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." *Flack I* at 31 (citing *Harris Funeral Homes*, 844 F.3d at 576-77). In *Boyden*, the Court reached the same conclusion, noting "the Exclusion implicates sex stereotyping by limiting the availability of medical transitioning, if not rendering it economically infeasible, thus requiring transgender individuals to maintain the physical characteristics of their natal sex . . . over not just personal preference, but specific medical and psychological recommendations to the contrary." *Boyden*, 341 F. Supp. 3d at 997.

The Challenged Exclusion is based on the rigid sex stereotype—which is not supported by the weight of medical and scientific evidence—that an individual's assigned sex *must* be their true sex. Insistence on this stereotypical view inflicts serious harm. The Challenged Exclusion, on its face, recognizes that the excluded treatments are meant for the "alteration of sexual anatomy or *characteristics*," Wis. Adm. Code § DHS 107.03(24), 107.10(4)(p) (emphasis added). The exclusion therefore denies transgender men the ability to obtain gender-confirming treatments to masculinize their appearance and sex traits, and transgender women the ability to feminize their appearance and sex traits. Thus, like the exclusion struck down in *Boyden*, the Challenged Exclusion "entrenches the belief that transgender individuals must preserve the genitalia and other physical attributes of their natal sex over not just personal preference, but specific medical and psychological recommendations to the contrary," *Boyden*, 341 F. Supp. 3d at 997, showing that the policy is based on sex stereotypes.

Defendants have offered nothing to refute the scientific and medical research presented by Plaintiffs' experts that categorically excluding coverage for gender-confirming healthcare to

transgender people forces many transgender Medicaid beneficiaries to retain the sex-based characteristics of their assigned sex, based on the stereotypical sex-based assumption that one's sex traits should never change, unnecessarily subjecting them to exacerbated gender dysphoria, social isolation, harassment and violence, and other harms. PFOF ¶¶ 74-76, 121-23.

The experiences of the Named Plaintiffs and other transgender Wisconsin Medicaid beneficiaries elucidate the harms that this stereotype-based policy inflicts. Cody Flack, for example, was so ashamed and self-conscious of his breasts that he refused to go out in public or engage socially. PFOF ¶¶ 131, 132. Likewise, Sara Ann Makenzie was so afraid that others might notice her male genitalia through her clothing—and then subject her to scorn, harassment, or violence—that she took physically painful steps to conceal her genitals when in public. PFOF ¶ 163. Courtney Sherwin, who has been denied both hormone therapies and surgical treatments that would help reduce her body's production of testosterone, and which would in turn help feminize her appearance and voice, has been harassed when others discover her transgender status as soon as they hear her voice. PFOF ¶¶ 179-82. These experiences are not atypical, but are shared in various ways by all transgender individuals unable to afford medically necessary treatments for gender dysphoria. PFOF ¶ 123.

Because Wisconsin Medicaid beneficiaries are all low-income individuals, these medically necessary treatments are financially out of reach without Medicaid coverage. PFOF ¶ 22. Consequently, the policy forces transgender beneficiaries to conform, against their wishes and the recommendations of their doctors, to their assigned sex, at the risk of substantial harm to their health and well-being. PFOF ¶¶ 122, 123.

*3. The Challenged Exclusion categorically bars coverage for treatments for transgender beneficiaries that would be covered if their assigned sex were different.*

As the Court has recognized, not only does Seventh Circuit precedent make clear that discrimination against transgender people for being transgender is sex discrimination, but the Challenged Exclusion still amounts to discrimination based on a person's assigned sex at birth, or "natal sex." *Flack I* at 25-26. Because Wisconsin Medicaid excludes coverage for procedures it would otherwise pay for if a transgender beneficiary's assigned sex were different, this is a "straightforward case of sex discrimination." *Flack I* at 25-26; *see also Boyden*, 341 F. Supp. 3d at 995. As this Court previously explained, "if 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." *Flack I* at 26. In other words, it covers procedures for cisgender people (i.e., those whose assigned sex and gender identity match) that it refuses to cover for transgender people (i.e., those whose assigned sex and gender identity conflict). For example, if a cisgender man "were in a car accident and required a phalloplasty, that surgery would be covered if deemed medically necessary," but coverage for that same surgery would be denied to a transgender man to treat gender dysphoria. *Flack I* at 26. Likewise, while a cisgender woman "born without a vagina qualifies for coverage of a vaginoplasty," a transgender woman would be denied coverage for that same surgery. *Boyden*, 341 F. Supp. 3d at 995; *see also Flack I* at 25-26.

This reasoning applies with equal force to all other transgender Wisconsin Medicaid beneficiaries seeking treatments that would otherwise be covered if their assigned sex and gender identities matched. PFOF ¶¶ 103-06. Wisconsin Medicaid denies coverage to transgender beneficiaries for a range of surgical procedures that it covers for other conditions. PFOF ¶¶ 104,

105. Thus, as this Court has already found, "[t]his is text-book discrimination *based on sex*." *Flack I* at 29.

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Under any of these analyses, the Challenged Exclusion unlawfully discriminates against transgender Wisconsin Medicaid beneficiaries on the basis of sex in violation of Section 1557.

## II. WISCONSIN IS VIOLATING THE AVAILABILITY AND COMPARABILITY REQUIREMENTS OF THE MEDICAID ACT BY DENYING MEDICALLY NECESSARY TREATMENTS FOR GENDER DYSPHORIA.

There is no dispute that Wisconsin Medicaid excludes a range of medical treatments and services, including surgeries and hormones, when medically necessary to treat gender dysphoria, but covers those same services when medically necessary to treat other conditions. PFOF ¶¶ 103-06. In so doing, Defendants are violating two key provisions of the federal Medicaid Act: the Availability Provision and the Comparability Provision.[6]

### A. Wisconsin is Violating the Medicaid Act's Availability Provision by Failing to Make Medically Necessary Medical Assistance Available to Transgender Medicaid Beneficiaries.

By categorically excluding gender-confirming surgical and hormone treatments it recognizes to be medically necessary in individual cases, Defendants are violating the Medicaid Act's Availability Provision, by failing to make mandatory medical (as well as optional medical

[6] By opting to participate in the Medicaid program, Wisconsin "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).

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).[7]

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 . . . ."); *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 610 (7th Cir. 2012) (holding that state may not "den[y] coverage for medically necessary [dental] services outright"); *Alvarez v. Betlach*, 572 F. App'x 519, 520-21 (9th Cir. 2014) (finding that the Medicaid Act "prohibits states from denying coverage of 'medically necessary' services that fall under a category covered 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."); *see also Collins v. Hamilton*, 349 F.3d 371, 376 (7th Cir. 2003) (holding that state may not categorically exclude coverage of residential psychiatric treatment needed by children and youth under age 21 because "[in] some circumstances, [such] treatment may be medically necessary").

Notably, another federal district court recently found that a state Medicaid policy that categorically denies coverage for certain gender-confirming services on the basis that the

[7] 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), § DHS 107.08 (requiring coverage of medically necessary inpatient hospital services).

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). This case is no different. There is no dispute that gender-confirming surgical and medical treatments fall within the categories of mandatory medical services outlined in the Medicaid Act and covered by DHS, as they would be performed by a physician on an inpatient or outpatient basis. [8] *See, e.g.*, PFOF ¶¶ 103-06 (noting that DHS covers these services to treat conditions other than gender dysphoria).

Were it not for the Challenged Exclusion, Defendants would evaluate the services using the general definition of medically necessary services in the state medical assistance regulations. *See* Wis. Adm. Code § DHS 101.03(96m)(b); *see also Flack I* at 7 (noting that the State admits that Wisconsin Medicaid may cover services as medically necessary when not excluded by law). Instead, Defendants do not consider *any* of the nine factors listed in that regulation when processing requests or claims for gender-confirming care for adults. PFOF ¶¶ 29, 33, 97. Rather, DHS denies these requests or claims based on the false and unsupported premise that gender-confirming services are *never* medically necessary. *See Flack I* at 6; *see also* PFOF ¶¶ 82-87 (DHS is not aware of any information indicating that the agency, at any time prior to the commencement of this litigation, reviewed the relevant research on gender-confirming services and determined that the excluded services were ineffective, unsafe, or experimental).

Defendants have not provided any evidence to counter the opinions of Plaintiffs' experts that the excluded treatments are medically necessary for many individuals with gender

[8] Similarly, while prescription drugs are optional medical services under the Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(12), there is no dispute that: (1) Wisconsin has elected to cover that category of services; and (2) many drugs used to treat gender dysphoria fall within that category of services. *See, e.g.*, *Lankford*, 451 F.3d at 504 ("Once the state offers an optional service, it must comply with all federal statutory and regulatory mandates.").

dysphoria, are safe and effective treatments for the condition, and are not experimental. As discussed above, there is no evidence that DHS or its predecessor ever considered any materials that would have supported such a position while promulgating or enforcing the Challenged Exclusion.

Defendants' position that gender-confirming services are *never* medically necessary is unsupportable, for all the reasons described above. *See supra* at 6. Indeed, Defendants do not consistently act as though they believe these treatments are unnecessary, as they do not interpret the Challenged Exclusion to apply to individuals under age 21. *See* PFOF ¶ 93 n.1. Under the Medicaid Act, individuals under age 21 are entitled to the Early and Periodic Screening, Diagnostic and Treatment benefit (EPSDT). 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B). EPSDT requires states to provide any service described in section 1396d(a) of the Medicaid Act when "necessary . . . to correct or ameliorate" illnesses or conditions regardless of whether the service is covered under the State Plan for adults. 42 U.S.C. § 1396d(r)(5). Thus, to be covered under EPSDT, a service must be medically necessary. *See, e.g.*, *Miller*, 10 F.3d at 1319-20 (noting state may exclude coverage of a particular service under EPSDT if it reasonably determined service is experimental and as a result, not medically necessary).

DHS evaluates prior authorization requests for gender-confirming care for individuals under age 21 on a case-by-case basis to determine if the services are needed to correct or ameliorate the individuals' condition and thus covered under EPSDT. *See* PFOF ¶ 93 n.1. With this policy and process, DHS has implicitly conceded that gender-confirming surgical services may be medically necessary for certain beneficiaries. *See* Defs.' Resp. to Pls.' Interrog. No. 12 [Ex. 1 to Second May Decl.]. In fact, it recently found that a surgical procedure requested by a beneficiary under 21 was a medically necessary treatment for gender dysphoria. PFOF ¶ 90. If

such services were *never* medically necessary, there would be no reason for DHS to assess requests for the services on a case-by-case assessment under EPSDT. Moreover, DHS's ultimate clinical determination that Cody Flack's requested surgeries were medically necessary for him, made after the preliminary injunction compelled a medical necessity review, PFOF ¶¶ 146, 147, shows that even DHS acknowledges that these services can be medically necessary.

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. The Challenged Exclusion does just that. This Court should grant Plaintiffs' Motion for Summary Judgment on their Medicaid Act claim.

### B. The Challenged Exclusion Also Violates the Medicaid Act's Comparability Provision.

By categorically banning coverage for surgical and medical services to treat gender dysphoria—when, as Defendants readily admit, Wisconsin Medicaid covers those exact same services to treat other conditions—Defendants are also violating the Medicaid Act's Comparability Provision. Defendants admit that there is no single procedure known as "transsexual surgery," that they apply the Challenged Exclusion to bar coverage for the full range of surgical procedures that may treat gender dysphoria, and that most of these treatments are covered when medically necessary to treat other conditions. These concessions require a finding that Defendants are violating the Comparability Requirement in enforcing the exclusion.

Under the Comparability Provision, services made available by a state Medicaid agency 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"). "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." 42 C.F.R. § 440.230(c).

Courts have repeatedly applied the Comparability Provision to prohibit states from providing particular services to some Medicaid beneficiaries but not others based solely on their medical diagnoses. *See, e.g.*, *White v. Beal*, 555 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 covering 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 241-42. 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 services, the State violated the Comparability Provision. *Id.* at 256. Citing *Davis*, the *Cruz* court similarly held that New York violated the Comparability Provision by covering surgeries for individuals with diagnoses other than gender dysphoria while 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. Simply put, it restricts treatments based exclusively on whether they are intended to treat gender dysphoria, regardless of individual medical need. PFOF ¶¶ 97, 103. 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." *Flack I* at 25-26; *see also Boyden*, 341 F. Supp. 3d at 997.

And Defendants admit as much, stipulating that, pursuant to the Challenged Exclusion, the State denies coverage of certain medical services, treatments, and procedures when needed to

treat gender dysphoria, but covers those same procedures when needed to treat certain other conditions. *See* PFOF ¶¶ 104, 105 (noting that the Challenged Exclusion prohibits Medicaid coverage of mastectomy, reduction mammoplasty, breast reconstruction, hysterectomy, oophorectomy, salpingo-oophorectomy, orchiectomy, penectomy, and vaginoplasty to treat gender dysphoria in adults, but that Medicaid covers these same services when medically necessary to treat conditions other than gender dysphoria); PFOF ¶ 119 (listing hundreds of procedure codes Wisconsin Medicaid covers to treat conditions other than gender dysphoria).

In sum, 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. This Court should grant summary judgment on Plaintiffs' Medicaid Act claims.

## III. BY CATEGORICALLY DENYING PLAINTIFFS AND OTHER TRANSGENDER WISCONSIN MEDICAID BENEFICIARIES ACCESS TO GENDER-CONFIRMING MEDICAL CARE, THE CHALLENGED EXCLUSION VIOLATES THE EQUAL PROTECTION CLAUSE.

For the reasons explained above, the Challenged Exclusion subjects transgender people to disparate and inferior health care on the basis of sex. *See supra* Section I. Moreover, the exclusion subjects transgender people, as a suspect class or quasi-suspect class, to discriminatory treatment. Under either analysis, this Court must review the policy with some form of heightened scrutiny. *See Flack I* at 34-35; *Whitaker*, 858 F. 3d at 1039, 1051; *Boyden*, 341 F. Supp. 3d at 1000. As Defendants have failed to offer any legitimate justification for the exclusion—let alone one that can survive any level of heightened scrutiny—the Court should declare the policy unconstitutional.

### A. Heightened scrutiny applies to the Challenged Exclusion both because it is based on impermissible sex-based classifications and because it subjects transgender people as a group to inferior and inadequate healthcare.

In its preliminary injunction decision in this case, the Court preliminarily held that heightened scrutiny "may be appropriate either on the basis of sex discrimination or through the recognition of transgender as a suspect or quasi-suspect class." *Flack I* at 32-33 (citing *Whitaker*, 858 F.3d at 1051). Subsequently, in *Boyden*, this Court ruled definitively that heightened scrutiny was the appropriate level of review in reviewing Wisconsin's analogous categorical exclusion on gender-confirming health care in the state employee health benefits plan. *Boyden*, 341 F. Supp. 3d at 1000. For the following reasons, the Court should apply that same level of review again here.

#### *1. Discrimination on the Basis of Sex*

Heightened scrutiny applies to governmental policies relying on sex- or gender-based classifications, including policies like the Challenged Exclusion that discriminate against transgender individuals because they are transgender. *See Whitaker*, 858 F.3d at 1051 (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994)); *Glenn*, 663 F.3d at 1316; *Barron*, 286 F. Supp. 3d at 1140-41, 1144-45. Where a challenged policy "cannot be stated without referencing sex," heightened scrutiny applies. *Whitaker*, 858 F.3d at 1051. Further, a policy premised on sex-based stereotypes is also sex discrimination triggering heightened scrutiny. *Id.* at 1050-51 (citing *J.E.B.*, 511 U.S. at 138; *Glenn*, 663 F.3d at 1318).

For the reasons explained above, the Challenged Exclusion treats transgender Wisconsin Medicaid beneficiaries differently than others based on sex: the policy excludes medical treatments for transgender people that would be covered if their assigned sex at birth were different, cannot be stated without referencing sex or gender, and, on its face, describes the

excluded treatments in terms of their effect on a person's "sexual anatomy or characteristics." For all of these reasons, heightened scrutiny is appropriate here.

*2. Discrimination Against Transgender People as a Suspect or Quasi-Suspect Class*

Some form of heightened scrutiny is independently warranted because transgender people, as a group, are a quasi-suspect or suspect class that Defendants subject to inferior health care coverage under the Challenged Exclusion. *See, e.g.*, *F.V.*, 286 F. Supp. 3d at 1134-35, 1145; *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 718 (D. Md. 2018); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 872-74 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 138-40 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015). Because the policy "creates a different rule governing the medical treatment of transgender people"—a discrete, vulnerable, and politically powerless group—at least intermediate scrutiny is warranted. In its preliminary injunction decision, this Court found that transgender people, as a group, are likely to be a suspect or quasi-suspect class. *Flack I* at 33. The same reasoning warrants application of heightened scrutiny on summary judgment.

Heightened scrutiny is appropriate here under the analysis described by the Seventh Circuit in *Baskin v. Bogan*, 766 F.3d 648, 655 (7th Cir. 2014); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1014 (W.D. Wis. 2014). The Challenged Exclusion: (1) "involve[s] discrimination, rooted in a history of prejudice, against some identifiable group of persons, resulting in unequal treatment harmful to them," and (2) results in "unequal treatment based on some immutable or at least tenacious characteristic of the people discriminated against (biological, such as skin color, or a deep psychological commitment, as religious belief often is, both types being distinct from

characteristics that are easy for a person to change, such as the length of his or her fingernails) . . . that isn't relevant to a person's ability to participate in society." *Baskin*, 766 F.3d at 655.

In its preliminary injunction decision, the Court found that "[a]s to whether the transgender population in Wisconsin is a suspect or quasi-suspect class, plaintiffs' proffered evidence is equally strong," detailing the significant discrimination and adversity faced by transgender people as a group and concluding 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." *Flack I* at 32-33. The record now before the Court warrants the same finding on summary judgment.

First, transgender people are a small, politically powerless group historically and currently subjected to significant discrimination rooted in a history of prejudice, both in Wisconsin and across the country. PFOF ¶¶ 41-50; *see also, e.g.*, *F.V.*, 286 F. Supp. 3d at 1145; *Bd. of Educ. of Highland Local Sch. Dist.*, 208 F. Supp. 3d at 874. An estimated 0.43 percent of the Wisconsin's adult population—fewer than 20,000 people—are transgender. PFOF ¶ 40. Only about 5,000 of the 1.2 million Wisconsin residents on Medicaid are transgender adults. PFOF ¶ 40. There are no transgender state legislators or statewide officeholders in Wisconsin (indeed, only three state legislators in the entire country are transgender). PFOF ¶¶ 50. And there are no express state-level protections against gender identity discrimination in employment, housing, education, or otherwise in Wisconsin. *Cf. F.V.*, 286 F. Supp. 3d at 1145 (finding same in Idaho). On the issue central to this case, Wisconsin is now one of just nine states with a categorical exclusion on gender-confirming care in its Medicaid program. PFOF ¶ 9.

As this Court has found and the record reflects, transgender people suffer discrimination and harassment in health care, employment, education, housing, the criminal justice system, and in their everyday interactions with their neighbors and even members of their family. PFOF ¶¶ 41, 48. According to the 2015 U.S. Transgender Survey, a nationwide survey with 27,000 respondents, more than half of transgender people who sought insurance coverage in the previous year were denied that coverage. PFOF ¶ 47. As this Court summarized it, in Wisconsin alone:

> Greater than a quarter of adult transgender Wisconsinites live in poverty, which is greater than twice the overall national poverty rate. One in five is unemployed. Nearly 60% of Wisconsin's transgender people have recently experienced mistreatment by law enforcement officers who perceived or knew them to be transgender. In terms of health care, 30% of transgender adults in Wisconsin have been denied insurance coverage because of their transgender status; one-third had a recent negative experience with a health care provider because of their transgender status; and a quarter had chosen not to go to the doctor because of concerns about being mistreated. Further, visibly gender nonconforming transgender individuals suffer worse health outcomes and more discrimination than transgender individuals whose appearance aligns with their gender identity. . . . Likewise, transgender people unable to afford (or otherwise unable to access) gender-confirming surgical procedures are more at-risk for discrimination and other harms.

*Flack I* at 33-34 (internal quotation marks and citations omitted). DHS does not question or refute the uncontroversial fact that transgender people face discrimination and mistreatment in health care and other aspects of life. Moreover, as explained by Plaintiffs' expert, Dr. Hughto, transgender people in the United States face widespread stigma, discrimination, harassment, sexual assault, and other violence because they are transgender. Defendants have not offered expert evidence or any other evidence to dispute this.

Second, the Challenged Exclusion discriminates against transgender people for an "immutable or at least tenacious characteristic," *Baskin*, 766 F.3d at 655—being transgender—that has no relevance to their ability to participate in or contribute to society. Gender identity is a

core, immutable aspect of one's identity. PFOF ¶ 35, 36 (expert opinions from Dr. Daniel Shumer, Dr. Stephanie Budge, and Dr. Jaclyn White Hughto that gender identity is an innate, internal sense of one's sex that cannot be changed). As Dr. Budge explains, "[g]ender identity is innate and generally considered an immutable characteristic." Budge Rep. at 6. Similarly, according to Dr. Shumer, "[a]n individual's gender identity is likely the product of both biological factors (including brain structures and hormonal makeup) and environmental factors." Shumer Rep. at 6. As Dr. Shumer explains, "where an individual experiences progressive gender dysphoria during or after puberty—and, in turn, consistently and persistently lives in accordance with their gender identity—the permanence of the individual's cross-gender identity is extremely likely." PFOF ¶ 36. Accordingly, it is Dr. Shumer's opinion that, "[g]iven the literature regarding the biological underpinnings of gender identity, adults with a diagnosis of gender dysphoria have not chosen to be transgender, but rather have an immutable difference in gender." PFOF ¶ 36. In other words, being transgender is an immutable characteristic. Defendants have offered nothing to suggest otherwise, effectively conceding the point.

For these reasons, transgender people as a group are at least a quasi-suspect class. Accordingly, as the Challenged Exclusion subjects transgender people to disparate and inferior treatment both on the basis of sex and because they are transgender, this Court must review the policy with heightened scrutiny.

### C. The Challenged Exclusion cannot withstand heightened scrutiny.

Under intermediate scrutiny, "the burden rests with the state to demonstrate that its proffered justification is 'exceedingly persuasive.'" *Whitaker*, 858 F.3d at 1050 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"); *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577 (7th Cir. 2014)); *Boyden*, 341 F. Supp. 3d at 1000. "[T]he burden coming

forward with such a reason 'rests entirely on the State.'" *Boyden*, 341 F. Supp. 3d at 1000 (quoting *VMI*, 518 U.S. at 533). To meet this burden, the State must "show that the 'classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Whitaker*, 858 F.3d at 1050 (quoting *VMI*, 518 U.S. at 524). "It is not sufficient to provide a hypothesized or *post hoc* justification created in response to litigation." *Id.* (citing *VMI*, 518 U.S. at 533). "Nor may the justification be based upon overbroad generalizations about sex" or another quasi-suspect classification, like being a transgender person. *Id.* (citing same). "Instead, the justification must be genuine." *Id.* (citing same).

On the full record now before the Court, the Challenged Exclusion cannot withstand heightened scrutiny. Defendants have yet to offer *any* genuine, legitimate justification for the Challenged Exclusion, let alone one that is exceedingly persuasive. Earlier in the case, the State argued that its interests in enforcing the exclusion were based on the estimated additional costs of covering gender-confirming care to Medicaid beneficiaries who need it, and that gender-confirming surgeries are not medically necessary because their safety and efficacy is "unproven." Defendants concede that they have no evidence that they were ever motivated by these concerns when promulgating the exclusion or continuing to enforce it in the years since. PFOF ¶¶ 82, 83, 85. Rather, these were (and remain) *post hoc* justifications made in response to this litigation that the Court need not consider. *Whitaker*, 858 F.3d at 1050; *Boyden*, 341 F. Supp. 3d at 1002-03.

Indeed, in *Boyden*, the State defendants asserted these same purported rationales, each of which was found by this Court to be insufficient to withstand heightened scrutiny. The same outcome is merited here for the reasons that follow.

*1. Defendants' adoption and enforcement of the Challenged Exclusion was not motivated by cost savings, which, in any event, would be immaterial and not further any important governmental objective.*

Defendants have offered no evidence that the Challenged Exclusion has ever been based on cost concerns. At the time the exclusion was promulgated, DHS predicted that any associated cost savings would be "nominal," suggesting any fiscal impact would be negligible. PFOF ¶ 84. The State has offered no evidence to substantiate even that minimal assertion. Since the exclusion's implementation, DHS never assessed the cost impact of continuing, amending, or abandoning the exclusion before this lawsuit. PFOF ¶¶ 85, 89. In fact, DHS now stipulates that it is not aware of any information indicating that between February 1, 1997, the implementation date of the Challenged Exclusion, and April 29, 2018, the day before this lawsuit was filed, that it "undertook any study or review of . . . the fiscal impact of enforcing, amending, or eliminating the Challenged Exclusion." PFOF ¶ 85. And, since the lawsuit was filed, DHS has undertaken no such study or review, other than what is contained in the reports of David Williams that were prepared and submitted to the Court in connection with this lawsuit. PFOF ¶ 89. At best, any cost impact identified in those studies is a *post hoc* rationalization in response to litigation, not a genuine basis for DHS's enforcement of the exclusion.

Even if DHS could show that it was actually motivated to enact and perpetuate the Challenged Exclusion by the potential cost to the State of covering gender-confirming surgeries under Wisconsin Medicaid had ever been considered by DHS—which it cannot—the estimated cost impact is immaterial from an actuarial perspective. PFOF ¶¶ 91. The State's own expert, Mr. Williams, estimated an annual cost impact to DHS of between $300,000 and $1.2 million

annually. PFOF ¶ 91.[9] Accepting Mr. Williams's highest estimate as true, that represents just 0.3 percent of the State's $3.9 billion share of the $9.7 billion annual Wisconsin Medicaid budget, amounting to nothing more than a "rounding error" in the State's Medicaid budget. PFOF ¶ 91; Barrett & Corrough Rep. at 1-2. In *Boyden*, the estimated cost impact of eliminating covering gender-confirming care in the state employee health plan was much larger—approximately 0.1 percent to 0.2 percent of the total cost of providing health insurance to state employees. *Boyden*, 341 F. Supp. 3d at 1000. The Court noted that this marginal cost was "immaterial" and found that, even had the cost concern been a genuine one, "the court is hard-pressed to conclude that a reasonable factfinder could conclude that the cost justification was an 'exceedingly persuasive' reason or that this miniscule cost savings would further 'important governmental objectives.'" *Id.* at 1000-01 (citing *VMI*, 518 U.S. at 533). For these same reasons, the considerably smaller estimated cost impact here cannot justify the Challenged Exclusion.

Finally, even if Defendants could argue that DHS was motivated by cost concerns (which they have not and cannot), such considerations alone would be insufficient to survive heightened scrutiny. As the Seventh Circuit recognized in *Bontrager*, the cost to a state Medicaid agency of covering medically necessary care in a nondiscriminatory manner is not a cognizable harm to the agency, and therefore cannot be an "exceedingly persuasive" reason to maintain this exclusion. *Bontrager*, 697 F.3d at 611-12. In short, Wisconsin Medicaid is obligated to cover medically

[9] Mr. Williams's higher estimate of a $1.2 million annual impact was based on an assumption that the estimated 5,000 transgender individuals on Wisconsin Medicaid would all seek coverage for excluded procedures in the next 10 years. In *Flack II*, the Court noted that the assumption supporting Mr. Williams's higher $1.2 million estimate "seems wholly unfounded." *Flack II* at 7. While Plaintiffs agree with the Court, even assuming the $1.2 million figure is accurate, it would represent just 0.03 percent of the State's annual Medicaid budget, still significantly below the threshold considered "immaterial" in *Boyden*. Any dispute over the actual cost impact is therefore academic and not material to the Court's analysis.

necessary care for *all* of its beneficiaries, even those suffering from gender dysphoria, and cannot rely on the possible costs of covering such treatments to justify discriminatory exclusion, especially in the absence of any evidence that this ever motivated the policy.

*2. DHS's adoption and enforcement of the Challenged Exclusion has never been motivated by genuine concerns of the medical necessity, efficacy, or safety of the range of excluded procedures barred from coverage.*

At the preliminary injunction stage, Defendants argued, unsuccessfully, that they were justified in enforcing the Challenged Exclusion because the excluded treatments' efficacy in treating gender dysphoria was "unproven." Defs.' Opp'n to Mot. for Prelim. Inj. 3, 37 [ECF No. 53]. Defendants have now abandoned that purported justification. Whereas they previously submitted "expert" declarations from Dr. Lawrence Mayer and Dr. Daniel Sutphin (neither of whom had any expertise in the treatment of gender dysphoria), they have not subsequently designated either as an expert witness, nor put forth any evidence questioning the medical necessity of gender-confirming surgical or hormone treatments. Even if they had, any such evidence would be purely in response to litigation and, as such, insufficient to survive intermediate scrutiny.

With respect to gender-confirming hormone treatments, the State now concedes that for many transgender people with gender dysphoria, hormone therapy is a medically necessary treatment for that condition. PFOF ¶ 3. Having conceded the point, the State does not contest the invalidity of the two provisions in the Challenged Exclusion that facially exclude hormone treatments from coverage.

With respect to gender-confirming surgeries, DHS further concedes that there is no evidence that the agency has *ever* made a reasoned determination that gender-confirming procedures are medically unnecessary, ineffective at treating gender dysphoria, or unsafe. PFOF

¶¶ 78, 85. Although DHS's predecessor agency, DHFS, labeled "transsexual surgeries" and related care as "medically unnecessary" in a conclusory manner when the Challenged Exclusion was adopted, that characterization was not based in science or medicine. PFOF ¶¶ 81-83. Indeed, DHS now stipulates that it is not aware of any information indicating that DHFS's description of these treatments as "medically unnecessary" was based on any systematic study or review of relevant peer-reviewed scientific or medical literature available at the time. PFOF ¶ 82. Nor is it aware of any information that this designation was based on a determination by DHFS that any or all of the excluded services were experimental, unsafe, or ineffective at treating the condition then known as gender identity disorder. PFOF ¶¶ 78, 83. DHS further concedes that at no point prior to the filing of this lawsuit did it, or its predecessor, DHFS, undertake any such study of the safety, efficacy, or medical necessity of any or all gender-confirming surgeries, or of the public health impacts of enforcing the Challenged Exclusion (nor, except for the expert reports prepared for this case, has it done so since). PFOF ¶¶ 82, 85. Moreover, the State conceded at the preliminary injunction hearing last July that is does not consider these services "experimental." *Flack I* at 26 n.22; PFOF ¶ 88.

The weight of scientific and medical evidence, and the prevailing medical consensus, is that gender-confirming surgeries are safe and effective treatments for gender dysphoria. PFOF ¶¶ 3, 66, 69, 70, 99 (expert opinions of Plaintiffs' experts); *see also Flack II* at 6, 23 (citing *Flack I* at 21 n.17; *Good v. Iowa Dep't of Human Servs.*, No. 18-1158, 2019 WL 1086614, at *2 (Iowa Mar. 8, 2019); *Hicklin v. Precynthe*, No. 4:16-cv-1357, 2018 WL 806764, at *3 (E.D. Mo. Feb. 9, 2018)). Defendants have neither refuted this evidence nor offered any admissible evidence to contradict this strong medical consensus.

Even if Defendants had offered evidence showing that DHFS's original characterization of "transsexual surgery" and related hormone treatments as "medically unnecessary" was reasonable at the time the Challenged Exclusion was promulgated, which they have not, the continued enforcement of the exclusion in recent years, even after DHS internally recognized the medical necessity of these services, cannot withstand constitutional muster. DHS did nothing to revisit the Challenged Exclusion after the most recent version of the WPATH Standards of Care was published in 2011. PFOF ¶ 86. Nor did the agency consider changing the exclusion after the diagnosis of gender dysphoria was introduced with the DSM-5 in 2013. PFOF ¶ 87. DHS officials now concede that, consistent with the WPATH Standards of Care and current medical practice, gender-confirming surgeries *are* medically necessary treatments for gender dysphoria. In fact, prior to 2016, DHS sporadically approved Medicaid coverage for "top" surgeries for transgender beneficiaries based on their medical benefits. PFOF ¶ 113, 116. Were the Challenged Exclusion to be enjoined or otherwise ended, it is those same officials' clinical opinion that this would be medically sound and consistent with prevailing medical standards. PFOF ¶ 6.

DHS admits that its recent enforcement decisions have been motivated by politics, not medicine. The agency's actions in the last several years belie any assertion now that the agency is motivated by bona fide concerns about the safety or efficacy of gender-confirming surgeries. In 2016, when the clinical officials in the Bureau of Benefits Management asked for direction on whether the Challenged Exclusion was enforceable in light of changes in federal law, DHS upper management instructed those officials not to approve prior authorization requests for gender-confirming surgeries and to let them "sit and age out," in contravention of mandated agency procedures for reviewing prior authorization requests and denials. PFOF ¶ 144. That directive was a political one with no clinical basis. PFOF ¶ 144. As discussed above, *see supra* at 6, a

DHS political appointee notified the third-party HMOs administering Medicaid plans that the agency would continue to deny gender-confirming surgeries and hormone treatments under the Challenged Exclusion, and would not reimburse any HMO that covered such procedures. PFOF ¶ 112. That directive also had no clinical basis. PFOF ¶ 122. Following that letter, Wisconsin Medicaid's chief medical officer and medical director adopted a uniform practice of denying all coverage requests for gender-confirming surgeries, to comply with the political directives of senior leadership. PFOF ¶ 117. Since then, DHS's clinical staff did not review any of such requests for medical necessity (with the exception of Mr. Flack's request and the appeal from the beneficiary under 21 under EPSDT). PFOF ¶ 93 n.1, 117, 146. DHS's 30(b)(6) deponent admitted that this practice had no clinical basis, but instead was motivated by "the increased number of requests for gender conforming [sic] surgeries since Medicare lifted its moratorium on the same in 2014, the increased political spotlight on the issue, the lack of clear direction or guidance from upper Medicaid management and the seemly [sic] clear stance of the state of WI not to cover such surgeries." PFOF ¶ 117.

In short, DHS has offered no evidence showing that the Challenged Exclusion was *ever* motivated by concerns about medical efficacy or safety, and DHS's vigorous enforcement of the exclusion *since* 2016 has specifically been motivated by political, not clinical, considerations, including DHS's apparent view that the Texas injunction of the Section 1557 regulations eliminated any legal obligation to cover medically necessary gender-confirming care under Section 1557 itself or other laws (including, evidently, the Medicaid Act and the Fourteenth Amendment). "[W]ithout any evidence to support a finding that defendants were *actually* concerned about efficacy" in adopting or enforcing the exclusion, "the court need not consider whether defendants have raised a genuine issue of material fact . . . as to the efficacy of

[surgeries] for the treatment of gender dysphoria." *Boyden*, 341 F. Supp. 3d at 1001. As in *Boyden*, the actual reason for DHS's recent post-2016 enforcement of the exclusion had to do with "the belief that the Texas court's entry of an injunction absolved defendants of any legal obligation to provide coverage." *Id.* at 1002. That is an insufficient basis to withstand heightened scrutiny. *Id.*

Because DHS has failed to provide any evidence that it was motivated by concerns about safety, efficacy, or medical necessity of gender-confirming surgeries in adopting or enforcing the exclusion—and against the weight of Plaintiffs' evidence that gender-confirming surgical care is a generally accepted, effective, safe, and often medically necessary treatment for transgender people suffering from gender dysphoria, PFOF ¶¶ 5, 8, 78, 85—the Challenged Exclusion, like the one at issue in *Boyden*, cannot survive heightened scrutiny.

*3. The Challenged Exclusion offers no "offsetting benefit" to society, but harms both affected beneficiaries and the broader public.*

Lastly, the Challenged Exclusion has no "offsetting benefit" to society. *Baskin*, 766 F.3d at 655. To the contrary, it harms one of the most vulnerable groups in the state—transgender people living in poverty, many with disabilities, all of whom lack the personal means to pay for medically necessary gender-confirming care out-of-pocket—by consigning them to second-class status and exposing them to avoidable and potentially lifelong harms to their health, safety, and well-being. PFOF ¶¶ 57, 59. As previously explained, it also spurs structural stigmatization and discrimination against the transgender community. PFOF ¶ 74. Any additional costs associated with covering gender-confirming care would be immaterial from an actuarial perspective. PFOF ¶ 91. And covering this care would provide public health benefits—including improved psychological functioning and overall quality of life for transgender people, reductions in suicide and suicide attempts, lower levels of substance abuse, reductions in sexual assault and

interpersonal violence, and increased access to HIV prevention services—along with the associated reductions in health care costs associated with these improved outcomes. PFOF ¶¶ 74, 77. DHS, which has never studied the public health costs and benefits associated with the Challenged Exclusion, has offered nothing in this case to refute Plaintiffs' evidence that eliminating the Challenged Exclusion would advance important public health interests.

Plaintiffs' experts unanimously agree that categorical exclusions on health care coverage for gender-confirming health care, including the Challenged Exclusion, are harmful to transgender people and are inconsistent with generally accepted medical standards. Budge Rep. at 18-19; Shumer Rep. at 16-17; Schechter Rep. at 18-19; Hughto Rep. at 25-27. Defendants have presented no expert evidence to refute this conclusion. Moreover, Defendants have provided no evidence credibly showing that the Challenged Exclusion benefits society in any way. The Court can easily find that discrimination against transgender people generally, and Defendants' enforcement of the Challenged Exclusion in particular, have no "offsetting benefit" to society.

###

The Challenged Exclusion, which is rooted in sex-based classifications and targets transgender people as a group for inferior treatment, furthers no important government interest. It cannot withstand Constitutional scrutiny and the Court should declare it unconstitutional under the Equal Protection Clause.

## IV. THE COURT SHOULD PERMANENTLY ENJOIN THE CHALLENGED EXCLUSION AND ORDER SUCH OTHER EQUITABLE RELIEF AS IS NECESSARY TO ENSURE TRANSGENDER MEDICAID BENEFICIARIES HAVE ACCESS TO GENDER-CONFIRMING HEALTHCARE.

Because the Challenged Exclusion violates Section 1557, the Medicaid Act, and the Fourteenth Amendment, the Court should permanently enjoin Defendants from enforcing the

exclusion. As a permanent injunction alone may not ensure that DHS, as well as the third-party managed care organizations that administer Wisconsin Medicaid, cover medically necessary gender-confirming medical and surgical treatments for Medicaid beneficiaries, additional equitable relief may be necessary to remedy fully the legal and Constitutional violations here. As the Court has done in other cases, Plaintiffs request that the Court direct the parties to meet and confer promptly on the scope of appropriate equitable relief, submit a joint proposed plan or separate proposals, and, if necessary, hold a hearing on the scope of the appropriate remedy. Plaintiffs also request a trial on the individual Named Plaintiffs' damages that are available to them under Section 1557.

### A. Courts routinely grant permanent injunctions where a violation of federal statutory or Constitutional rights has been found.

A permanent injunction of an unlawful governmental policy is warranted when (1) the plaintiffs or plaintiff class have suffered or will suffer irreparable injury; (2) there are inadequate remedies at law to compensate them for that injury; (3) the balance of harms favors the plaintiffs and plaintiff class; and (4) a permanent injunction serves the public interest. *Sierra Club v. Franklin Cty. Power of Ill., LLC*, 546 F.3d 918, 935 (7th Cir. 2008). "It is an accepted equitable principle that a court does not have to balance the equities in a case where the defendant's conduct has been willful." *Id.* (quoting *EPA v. Envtl. Waste Control*, 917 F.2d 327, 332 (7th Cir. 1990)). Where plaintiffs have prevailed on the merits of their claims, courts find the factors warranting a preliminary injunction to be met. *Id.* (citing *Fogie v. THORN Ams., Inc.*, 95 F.3d 645, 654 (8th Cir. 1996)); *see, e.g.*, *Vaughn v. Wernert*, 357 F. Supp. 3d 720, 723 (S.D. Ind. 2019) (noting that "the Court's discussion of liability, and its decision on the merits at summary judgment 'essentially embraced the remedy and the injunctive relief factors' that a Court routinely considers.") (quoting *Sierra Club*, 546 F.3d at 937). Violations of the Fourteenth

Amendment and federal civil rights laws are deemed irreparable injury with no adequate remedy at law, such that permanent injunctive relief is in the public interest. *See Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest."); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Preston*, 589 F.2d at 303); *Vaughn v. Wernert*, 357 F. Supp. 3d 720 (finding permanent injunction appropriate where plaintiff's rights were violated under the Americans with Disabilities Act, Rehabilitation Act, and Medicaid Act).[10]

Accordingly, this Court has granted permanent injunctions where, on summary judgment, it has found a violation of federal law or the Constitution. *See, e.g.*, *Int'l Ass'n of Machinists Dist. 10 v. Allen*, No. 16-cv-77-wmc, 2016 WL 7475720, at *5 (W.D. Wis. Dec. 28, 2016) (on summary judgment, declaring Wisconsin state statute to be unconstitutional and entering an order permanently enjoining its enforcement); *Planned Parenthood*, 94 F. Supp. 3d at 953 (same). Similarly, this Court and others have, after ruling for plaintiffs on summary judgment, given the parties the opportunity to present proposed injunctive and equitable remedies to the Court. *See, e.g.*, *Union Pac. R.R. Co. v. Wis. Dep't of Revenue*, 360 F. Supp. 3d 861, 869-70

[10] Similarly, Courts have found the likelihood of success on Constitutional claims to show irreparable injury at the preliminary injunction stage. *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (Second Amendment); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (First Amendment); *Kissick v. Huebsch*, 956 F. Supp. 2d 981, 1006 (W.D. Wis. 2013) (same); *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 738 (S.D. Ind. 2016), *aff'd*, 838 F.3d 902 (7th Cir. 2016) (Fourteenth Amendment equal protection); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1040 (S.D. Ind. 2018) (same); *Bd. of Educ. of Highland Local Sch. Dist.*, 208 F. Supp. 3d at 877-78 (same); *Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014) (same). These same principles apply where, as Plaintiffs ask the Court to do here, the Court finds a Constitutional violation as a matter of law on summary judgment.

(W.D. Wis. 2019) (granting plaintiff's motion for summary judgment and directing parties to confer on the appropriate form of a permanent injunction within 14 days and to submit a joint or separate proposed injunctions); *Boyden*, 341 F. Supp. 3d at 1006 (noting that the Court would determine the scope of any equitable relief at trial); *One Wis. Now*, 354 F. Supp. 3d at 956-57 (finding, on summary judgment, that defendants violated plaintiff's First Amendment rights, and directing supplemental briefing on the scope of a permanent injunction); *Vaughn*, 357 F. Supp. 3d at 721 (ordering permanent injunction after post-summary judgment briefing and hearing).

### B. The Challenged Exclusion must be permanently enjoined to protect Plaintiffs and members of the Proposed Class from future denial of gender-confirming healthcare.

In addition to being necessary to bar Defendants from continuing to enforce the illegal and unconstitutional Challenged Exclusion, a permanent injunction is warranted for the simple reason that it is needed to protect the health and well-being of transgender Wisconsin Medicaid beneficiaries by ensuring their ability to obtain medically necessary gender-confirming care. This Court has already found that Defendants' enforcement of the exclusion subjects members of the Class to irreparable harm. *Flack II* at 17-21. Moreover, delayed or denied health care resulting from unlawful state policies or actions is itself 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*, 697 F.3d at 611 (being denied medically necessary dental care constitutes irreparable harm); *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"). In addition, 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; *Flack I* at 22-23.

Here, there is no dispute that the Challenged Exclusion prevents Plaintiffs and members of the Proposed Class from receiving coverage for gender dysphoria treatments. Because Wisconsin Medicaid beneficiaries are, by definition, low-income individuals who rely on Medicaid for their health care, the direct result of the Challenged Exclusion is untreated or insufficiently treated gender dysphoria for every beneficiary who needs such treatments. Each of the Named Plaintiffs expects to need future gender-confirming hormone and surgical treatments that are subject to the Challenged Exclusion. PFOF ¶¶ 1, 123. The Class includes many others who will need such treatments for gender dysphoria and, if the exclusion remains in effect, will be denied those treatments. PFOF ¶¶ 184, 187. Every transgender Wisconsin Medicaid beneficiary unable to obtain this care is likely to suffer continuing gender dysphoria, related adverse mental health effects (which may include exacerbated depression, anxiety, and suicidal ideation), PFOF ¶¶ 57, 76; be at higher risk of discrimination, stigma, mistreatment, harassment, and violence, PFOF ¶¶ 74, 75; and be forced to live and present themselves inconsistently with the sex they know themselves to be, PFOF ¶¶ 39, 56. None of these harms can be rectified without an injunction.

Since the entire 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.

**C. The Balance of Equities and Public Interest Favor a Permanent Injunction.**

Defendants will face no harm if they are enjoined from enforcing the Challenge Exclusion; to the contrary, such an injunction is plainly in the public interest. First, enjoining a

governmental agency from enforcing an unlawful policy does not harm that agency. *See Joelner v. Village of Washington Park,* 378 F.3d 613, 620 (7th Cir. 2004). Relatedly, requiring a state Medicaid agency to cover or provide health treatments in a nondiscriminatory manner does not harm that agency. *See Bontrager*, 697 F.3d at 611-12. To the contrary, "[t]he public has a strong interest in eliminating discrimination and in enforcing [federal civil rights laws] and the Medicaid Act," as well as "a strong interest in the appropriate and efficient administration of healthcare services and programs" by state agencies. *Vaughn*, 357 F. Supp. 3d at 724; *see also Koss v. Norwood,* 305 F. Supp. 3d 897, 924 (N.D. Ill. 2018) ("The public has an interest in ensuring that Medicaid eligible individuals promptly receive necessary medical services, and the public interest in making the state follow federal law outweighs any modest impact on its budget . . . .") (citations, modifications, and quotation marks omitted).

Defendants have made no showing of harm to DHS, the State of Wisconsin, or anyone else if the Challenged Exclusion were to be enjoined. The immaterial cost impact of covering gender-confirming treatments, *see supra* at IV. B., 46-47, is not a cognizable interest, let alone one that outweighs the significant harm to Plaintiffs and the Proposed Class from the continued enforcement of the Challenged Exclusion. In short, requiring DHS to administer Wisconsin Medicaid in a nondiscriminatory manner and in accordance with the Medicaid Act is in the public interest and will not harm the State, other Medicaid beneficiaries, or the public in any way.

###

For the foregoing reasons, the Court should permanently enjoin the Challenged Exclusion and order such other equitable relief as is necessary to ensure the rights of Plaintiffs and the Class are protected. Accordingly, Plaintiffs request that the Court, consistent with past practice,

direct the parties to meet and confer on the terms of a permanent injunction and other equitable relief no later than 14 days following an order of summary judgment in Plaintiffs' favor, and to submit joint or separate proposals to the Court on the terms of an appropriate remedial order. Plaintiffs also request a trial on damages for the individual Plaintiffs and, following a final judgment in this case, that the Court set a schedule for Plaintiffs to submit a petition for their reasonable attorneys' fees and costs.

## CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment, declare the Challenged Exclusion unlawful under Section 1557 of the Affordable Care Act, the Medicaid Act, and the Equal Protection Clause, permanently enjoin the State's enforcement of the Challenged Exclusion, and order other necessary equitable relief.

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Respectfully submitted,

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