

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

CODY FLACK,
SARA ANN MAKENZIE,
MARIE KELLY, and
COURTNEY SHERWIN,

Plaintiffs,

v.

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

Defendants.

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

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

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INTRODUCTION

This is a quintessential case in which class certification under Rule 23(b)(2) is warranted: a challenge to the lawfulness of a uniformly-applied governmental policy seeking a declaratory judgment of the policy’s unlawfulness and an across-the-board injunction of its future enforcement. The policy at issue here—the blanket ban on Wisconsin Medicaid coverage for gender-confirming treatments for gender dysphoria contained in Wisconsin’s medical assistance regulations, Wis. Adm. Code § DHS 107.03(23)-(24) (the “Challenged Exclusion”)—is enforced by Defendants Wisconsin Department of Health Services (“DHS”) and DHS Secretary Linda Seemeyer to categorically deny coverage for gender-confirming health care to all transgender Wisconsin Medicaid beneficiaries seeking such care to treat gender dysphoria.¹

Plaintiffs Cody Flack, Sara Ann Makenzie, Marie Kelly, and Courtney Sherwin (the “Named Plaintiffs”) ask the Court to certify a class for declaratory and injunctive relief under Federal Rules of Civil Procedure 23(a) and 23(b)(2). The Proposed Class is defined as follows:

All 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 Named Plaintiffs are all members of this Proposed Class. Like all other transgender Wisconsin Medicaid beneficiaries needing gender-confirming treatments for gender dysphoria, the Named Plaintiffs are categorically barred under the Challenged Exclusion from obtaining coverage for such care. Accordingly, on behalf of the Proposed Class, the Named Plaintiffs seek a class-wide declaratory judgment that the Challenged Exclusion violates Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (“Section 1557”); the availability

¹ For brevity, the phrases “gender-confirming health care” or “gender-confirming treatments” in this brief refer to medical and surgical services for the treatment of gender dysphoria.

and comparability requirements of the federal Medicaid Act, 42 U.S.C. § 1396a(a)(10)(A)-(B); and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. They also seek preliminary and permanent injunctions barring Defendants' enforcement of the Challenged Exclusion to categorically deprive transgender Wisconsin Medicaid beneficiaries with gender dysphoria access to gender-confirming health care treatments and services.

The Named Plaintiffs easily meet each of the four threshold requirements for class certification under Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. The Challenged Exclusion applies equally to them and every member of the Proposed Class by imposing a structural barrier to obtaining Wisconsin Medicaid coverage for gender-confirming health care. Hundreds or even thousands of Wisconsin Medicaid beneficiaries, including the Named Plaintiffs, are or will be injured in the same way by being categorically denied coverage for gender-confirming care pursuant to the Challenged Exclusion. The declaratory and injunctive relief the Named Plaintiffs seek for themselves is identical to those they seek for the entire class. And because each Named Plaintiff shares the same interest in obtaining this relief as the Proposed Class, the Named Plaintiffs and their attorneys will adequately represent the class's interests.

The case further satisfies the requirements of Rule 23(b)(2) because Defendants are categorically refusing to provide all class members Medicaid coverage for gender-confirming-related care on a basis generally applicable to the class: Defendants' enforcement of the Challenged Exclusion. The systemic relief Plaintiffs seek—a permanent injunction barring Defendants from enforcing the Challenged Exclusion to categorically deny gender-confirming treatments to *all* members of the Proposed Class, and a corresponding declaration that the

exclusion is unconstitutional and violates Section 1557 and the Medicaid Act—are most effectively resolved on a class-wide basis.

For the reasons explained herein, Plaintiffs ask the Court to certify the Proposed Class, designate them as class representatives, and appoint their undersigned attorneys as class counsel.

RELEVANT PROCEDURAL HISTORY

Plaintiffs Flack and Makenzie initiated this lawsuit on April 30, 2018, and then moved for a preliminary injunction barring Defendants' enforcement of the Challenged Exclusion during the pendency of the case. On July 25, 2018, this Court preliminarily enjoined Defendants from enforcing the Challenged Exclusion against Mr. Flack and Ms. Makenzie and asked the parties for supplemental briefing on whether the Challenged Exclusion should be enjoined fully during the pendency of this litigation. Op. & Order at 39 [Dkt. No. 70] ("PI Op."). Defendants submitted a supplemental brief on August 23, 2018 [Dkt. No. 73]. In lieu of a response, Plaintiffs notified the Court that they wished to amend their complaint to raise class action allegations and to seek class-wide relief thereafter [Dkt. No. 79]. With the leave of the Court, on September 25, 2018, Mr. Flack, Ms. Makenzie, and two additional plaintiffs, Marie Kelly and Courtney Sherwin, filed an Amended Complaint with Class Action Allegations. Am. Compl. [Dkt. No. 85]. Plaintiffs now ask the Court to certify a class for declaratory and injunctive relief.

FACTUAL BACKGROUND

Wisconsin Medicaid and the Challenged Exclusion

Wisconsin Medicaid, administered by Defendants DHS and DHS Secretary Linda Seemeyer, is a joint federal-state program to provide medical assistance to eligible low-income individuals. PI Op. at 5. Federal funding from the U.S. Department of Health and Human Services reimburses DHS for more than half of Wisconsin Medicaid's annual budget, which is

currently about \$9.7 billion. *Id.* Approximately 1.2 million Wisconsin residents are currently enrolled in Wisconsin Medicaid. *Id.* Wisconsin Medicaid is subject to federal requirements, including those set forth in the federal Medicaid Act. *Id.* The program is also governed by Wisconsin’s medical assistance statute, Wis. Stat. §§ 49.43-.65, and DHS’s medical assistance regulations, Wis. Adm. Code §§ 101.01-36. *Id.* at 6.

The Challenged Exclusion, Wis. Adm. Code § DHS 107.03(23)-(24), is a part of Defendant DHS’s medical assistance regulations. *Id.* The provision categorically excludes coverage for transition-related medical care. The exclusion was adopted in 1996 and has been in effect since 1997. *Id.* At the time the policy was promulgated, it was based on the premise that “transsexual surgery” and related “drugs, including hormone therapy,” were medically unnecessary. *Id.* Although Defendants cover these same services when medically necessary for other conditions, they continue to enforce the Challenged Exclusion to categorically deny Medicaid coverage for transition-related surgeries and other treatments for gender dysphoria to transgender Wisconsin Medicaid beneficiaries. *Id.* at 7.

Gender Dysphoria

A transgender person is one whose gender identity—one’s core knowledge of being male or female—conflicts with the person’s assigned sex at birth. *Id.* at 2; Decl. of Daniel Shumer, MD, MPH ¶ 12 [Dkt. No. 25] (“Shumer Decl.”); Decl. of Stephanie L. Budge, PhD, LP ¶ 16 [Dkt. No. 24] (“Budge Decl.”). A transgender man was assigned female at birth but has a male gender identity. PI Op. at 2. A transgender woman was assigned female at birth but has a male gender identity. *Id.*

Many transgender people experience gender dysphoria, the “clinically significant distress or impairment in social, occupational, or other areas of functioning” associated with the

incongruence between a transgender person's gender identity and assigned sex. Am. Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* 453 (5th ed. 2013) ("DSM-5") [excerpted at Dkt. No. 21-1]; *see also* PI Op. at 3; Budge Decl. ¶ 24. Gender dysphoria is a serious medical condition that, if untreated or inadequately treated, can result in psychological distress, depression, anxiety, suicidality, and other harms. PI Op. at 3-4; DSM-5 at 451; Budge Decl. ¶¶ 24, 36; Decl. of Jaelyn White Hughto, PhD, MPH ¶ 50 [Dkt. No. 26] ("Hughto Decl."). The DSM-5 contains the diagnostic criteria for a gender dysphoria diagnosis. PI Op. at 3; DSM-5 at 452-53; Budge Decl. ¶¶ 24-27.

Under the internationally-accepted standards of care for transgender health, treatment options for gender dysphoria include psychotherapy, hormone therapy to feminize or masculinize the body, and various surgical procedures that align one's physical characteristics with one's gender identity (collectively referred to as gender-confirming surgeries). World Professional Association of Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th Version 2011); Decl. of Loren S. Schechter, MD ¶¶ 23-32 [Dkt. No. 27] ("Schechter Decl."); Shumer Decl. ¶¶ 29-30; Hughto Decl. ¶ 21; Budge Decl. ¶¶ 23, 28. Generally-accepted gender-confirming procedures for transgender women include chest reconstruction (augmentation mammoplasty), genital reconstruction surgeries (including orchiectomy and vaginoplasty), facial feminizing surgeries, and hair removal procedures, among others. Schechter Decl. ¶ 29; Shumer Decl. ¶ 39. Generally-accepted gender-confirming procedures for transgender men include chest surgeries (mastectomy and male chest reconstruction) and genital surgeries (including hysterectomy/salpingo-oophorectomy, vaginectomy, and phalloplasty), among others. Schechter Decl. ¶ 30; Shumer Decl. ¶ 39. The DSM-5 and the medical community recognizes gender-confirming surgeries as

safe and effective treatments for gender dysphoria. PI Op. at 5; Schechter Decl. ¶¶ 23-28; Shumer Decl. ¶ 17; Budge Decl. ¶ 30; *see also Boyden v. Conlin*, No. 17-cv-264-wmc, 2018 WL 4473347, at *5 (W.D. Wis. Sept. 18, 2018).

Plaintiff Cody Flack

Cody Flack is a 30-year-old transgender man who lives in Green Bay, Wisconsin. Decl. of Cody Flack ¶¶ 2, 4 [Dkt. No. 22] (“Flack Decl.”). Mr. Flack, who was assigned female at birth and raised as a girl, has a male gender identity and has known himself to be male since childhood. *Id.* ¶ 4. He has undergone a gender transition and has lived fully in accordance with his male gender identity since 2012. *Id.* ¶¶ 8-9. He has been diagnosed with gender dysphoria. *Id.* ¶ 5; Decl. of Daniel P. Bergman, MS, LPC, NCC ¶ 5 [Dkt. No. 28]. He has been enrolled in Wisconsin Medicaid since 2012 and relies on it for his health care needs. Flack Decl. ¶ 3.

Mr. Flack has suffered and continues to suffer exacerbated symptoms of gender dysphoria because of his female-appearing breasts and genitalia. *Id.* ¶¶ 14-17; Supp. Decl. of Cody Flack ¶ 6 (“Flack Supp. Decl.”). In 2017, he sought to obtain chest reconstruction surgery (a double mastectomy and male chest reconstruction). Flack Decl. ¶ 18. Wisconsin Medicaid denied the prior authorization request for this surgery submitted by his surgeon based solely on the Challenged Exclusion. Flack Decl. ¶ 20; Decl. of Clifford King, MD, PhD ¶¶ 4-6 [Dkt. No. 30].² Following his recovery and in consultation with his doctors, Mr. Flack will consider additional gender-confirming surgeries, including male genital reconstruction (phalloplasty), to further treat his gender dysphoria. Flack Supp. Decl. ¶ 6. Wisconsin Medicaid coverage for that surgery would be categorically barred by the Challenged Exclusion without an injunction. Mr.

² Only as a result of the preliminary injunction issued in this case on July 25, 2018, DHS granted Mr. Flack’s prior authorization request in August 2018 and he underwent chest reconstruction surgery on September 25, 2018. Flack Supp. Decl. ¶ 3.

Flack also anticipates remaining on gender-confirming hormone therapy indefinitely. *Id.* ¶ 5. He is concerned that, based on the language of the Challenged Exclusion, his existing coverage for hormone therapy may cease at any time without an injunction in place. *Id.*

Plaintiff Sara Ann Makenzie

Plaintiff Sara Ann Makenzie is a 42-year-old transgender woman who resides in Baraboo, Wisconsin. Decl. of Sara Ann Makenzie ¶¶ 2-3 [Dkt. No. 23] (“Makenzie Decl.”). Ms. Makenzie, who was assigned male at birth and raised as a boy, has a female gender identity and has known herself to be female since childhood. *Id.* ¶¶ 3-7. She commenced a gender transition and has been living in accordance with her female gender identity since approximately 2012. *Id.* ¶¶ 11, 13-17. Ms. Makenzie has been diagnosed with gender dysphoria. *Id.* ¶ 11; Decl. of Trisha E. Schimek, MD ¶ 4 [Dkt. No. 31] (“Schimek Decl.”); Budge Decl. ¶ 45. She has been enrolled in Wisconsin Medicaid for many years and relies on it for her health care needs. Makenzie Decl. ¶¶ 2, 4.

Ms. Makenzie experiences significant gender dysphoria because of her male-appearing characteristics, including her genitalia. *Id.* ¶¶ 23-24; Budge Decl. ¶ 44. As part of her medical treatment for gender dysphoria and to further her gender transition, Ms. Makenzie’s medical providers have recommended that she obtain genital reconstruction (orchiectomy and vaginoplasty) to treat her gender dysphoria. Makenzie Decl. ¶¶ 29-30; Schimek Decl. ¶¶ 9-10. In early 2018, on the referral of her primary care physician, Ms. Makenzie had a consultation with Dr. Katherine Gast, a surgeon specializing in gender-confirming care, who agreed to perform these surgeries. Makenzie Decl. ¶¶ 29-30. However, Dr. Gast’s office informed Ms. Makenzie that the surgery was a non-covered service under Wisconsin Medicaid due to the Challenged Exclusion, so Ms. Makenzie could not schedule surgery at the time. *Id.* ¶¶ 32-33. Based solely on

the preliminary injunction issued in this case on July 25, 2018, the prior authorization request for Ms. Makenzie's surgery was granted. Second Supp. Decl. of Sara Ann Makenzie ¶ 2 ("Makenzie Second Supp. Decl."). She is on a waiting list to schedule the surgery due to the limited availability of her surgeon; as a result, she expects to undergo the surgery sometime in 2019. *Id.* ¶ 3. Wisconsin Medicaid coverage for that surgery would be categorically barred by the Challenged Exclusion without an injunction in effect at the time of surgery. Ms. Makenzie also anticipates remaining on gender-confirming hormone therapy. Makenzie Decl. ¶ 16. She is concerned that, based on the language of the Challenged Exclusion, her existing coverage for hormone therapy may cease at any time without an injunction in place. *Id.*

Plaintiff Marie Kelly

Plaintiff Marie Kelly is a 38-year-old transgender woman who lives in Milwaukee, Wisconsin. Decl. of Marie Kelly ¶ 3 ("Kelly Decl."). Ms. Kelly, who was assigned male at birth, has a female gender identity and has known herself to be female for most of her life. *Id.* ¶¶ 3, 6. She has lived fully in accordance with her female gender identity since 2010. *Id.* ¶¶ 3, 9. She has been diagnosed with gender dysphoria. *Id.* ¶ 4. She has been enrolled in Wisconsin Medicaid since approximately 2014 and relies on it for her health care needs. *Id.* ¶ 5.

Ms. Kelly experiences exacerbated symptoms of gender dysphoria related to her male-appearing genitalia, chest, and facial hair. *Id.* ¶ 14. To alleviate this dysphoria and continue her medical transition, she needs to obtain gender-confirming surgeries, including female genital reconstruction (orchiectomy and vaginoplasty), female chest reconstruction, and electrolysis for facial hair removal. *Id.* ¶ 18. Ms. Kelly's primary care provider has determined that these procedures are medically necessary treatments for gender dysphoria. Decl. of Linda Wesp, MSN, RN, APNP, FNP-C, AAHIV-S ¶ 14. Ms. Kelly has inquired several times over the years,

including as recently as August 2018, about whether Wisconsin Medicaid would cover these procedures and has been told each time that they are not covered by Wisconsin Medicaid pursuant to the Challenged Exclusion. Kelly Decl. ¶¶ 19-20. She would like to obtain these gender-confirming treatments as soon as possible to treat her gender dysphoria. Because Wisconsin Medicaid categorically excludes those surgeries pursuant to the Challenged Exclusion, she is currently unable to obtain those or any gender-confirming surgeries.

Plaintiff Courtney Sherwin

Plaintiff Courtney Sherwin is a 35-year-old transgender woman who resides in Janesville, Wisconsin. Decl. of Courtney Sherwin ¶¶ 2-3. Ms. Sherwin, who was assigned male at birth, has a female gender identity and has known herself to be female since childhood. *Id.* ¶¶ 3, 6. She began a gender transition in December 2017 and has been living fully in accordance with her female gender identity since early 2018. *Id.* ¶ 6. Ms. Sherwin has been diagnosed with gender dysphoria. *Id.* ¶ 5. Ms. Sherwin has been enrolled in Wisconsin Medicaid for approximately two years and relies on it for her health care needs. *Id.* ¶ 4.

Ms. Sherwin experiences exacerbated symptoms of gender dysphoria related to her male-appearing genitalia and chest, as well as her masculine voice. *Id.* ¶¶ 10, 21. To further her gender transition and treat her gender dysphoria, Ms. Sherwin's medical providers have prescribed her hormone therapy and have recommended that she obtain gender-confirming surgeries (including orchiectomy, vaginoplasty, and chest reconstruction) and other gender-confirming treatments (including feminizing voice therapy). *Id.* ¶¶ 11, 15, 16, 22, 26, 27. Her medical providers recently submitted prior authorization requests to her Wisconsin Medicaid HMO for an orchiectomy and voice therapy, both of which were denied pursuant to the Challenged Exclusion. *Id.* ¶¶ 17, 29.

Ms. Sherwin would like to complete her surgical treatments for gender dysphoria within the next year. She is currently consulting with medical providers about obtaining genital reconstruction and chest reconstruction surgeries, and expects her providers to submit prior authorization requests for these procedures in the near future. Because Wisconsin Medicaid categorically excludes those surgeries pursuant to the Challenged Exclusion, she expects that those prior authorization requests will be denied and that she will be unable to obtain those or any gender-confirming surgeries as long as the Challenged Exclusion is in effect.

LEGAL STANDARD

“The purpose of class action litigation is to avoid repeated litigation of the same issue and to facilitate prosecution of claims that any one individual might not otherwise bring on her own.” *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 433 (7th Cir. 2015). To certify a class under Rule 23, the Court must undertake a two-step analysis. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). First, the Court must determine that the Proposed Class satisfies the four threshold requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. *Id.* Second, the Court must find that movants satisfy one of the conditions outlined in Rule 23(b). *Chicago Teachers Union*, 797 F.3d at 433-34. Where, as here, Plaintiffs seek certification under Rule 23(b)(2), the Court must find that Defendants have “acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2); *Chicago Teachers Union*, 797 F.3d at 441.

Because the class certification proponent must prove by a preponderance of the evidence that Rule 23’s requirements have been met, *Bell v. PNC Bank, Nat. Ass’n*, 800 F.3d 360, 373 (7th Cir. 2015), there may be some overlap between the Rule 23 analysis and the merits of the case.

Schilling v. PGA Inc., 293 F. Supp. 3d 832, 836 (W.D. Wis. 2018) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351-52 (2011)). Therefore, the Court may make a preliminary inquiry into the merits in undertaking a Rule 23 analysis, *id.* (citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001)), but “should not turn the class certification proceedings into a dress rehearsal for the . . . merits.” *Messner*, 669 F.3d at 811. Accordingly, “the court should delve no further into the merits than is necessary to decide whether to certify a class.” *Koss v. Norwood*, 305 F. Supp. 3d 897, 915 (N.D. Ill. 2018) (citing *Wal-Mart*, 564 U.S. at 352).

ARGUMENT

I. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23(A).

Plaintiffs satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation under Rule 23(a). Numerosity is met because there is no dispute that the number of transgender Wisconsin Medicaid beneficiaries who have gender dysphoria and may seek gender-confirming treatment far exceeds the minimal threshold of 40 individuals.

Commonality is satisfied because the Challenged Exclusion imposes the identical barrier to Wisconsin Medicaid coverage to all members of the Proposed Class, subjecting them to the same harm from this categorical coverage ban and raising common questions of law and fact capable of class-wide resolution. Typicality is satisfied because the Named Plaintiffs’ claims arise from the same source—Defendants’ enforcement of the Challenged Exclusion—and contest the lawfulness of the exclusion under the same legal theories. Adequacy is met because the Named Plaintiffs have a shared interest with the Proposed Class in enjoining the Challenged Exclusion and obtaining a declaration of its unlawfulness, have no interests antagonistic to those of the class, and are represented by counsel experienced in litigating complex class actions and handling Medicaid and transgender rights issues.

A. The size of the Proposed Class exceeds the numerosity requirement and joinder of all class members is impracticable.

The numerosity requirement is met when the class is so “numerous that joinder of all parties is impracticable.” Fed. R. Civ. P. 23(a)(1). While there is no fixed numerical threshold, “proposed classes in excess of 40 generally satisfy the numerosity requirement.” *Schilling*, 293 F. Supp. 3d at 837 (quoting Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:5 (8th ed. 2011)); *see also Pruitt v. City of Chicago*, 472 F.3d 925, 926-27 (7th Cir. 2006). “[A] class can be certified without determination of its size, so long as it’s reasonable to believe it large enough to make joinder impracticable and thus justify a class action suit.” *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014); *see also N.B. v. Hamos*, 26 F. Supp. 3d 756, 770 (N.D. Ill. 2014) (noting that where the “precise number” of affected Medicaid beneficiaries is unknown, “a finding of sufficient numerosity does not require that degree of precision.”). “A plaintiff does not need to demonstrate the exact number of class members as long as a conclusion is apparent from good-faith estimates.” *Koss*, 305 F. Supp. 3d at 916 (citations and modifications omitted).

Here, the numerosity requirement is easily satisfied. The expert estimates the parties have already presented to the Court suggest that hundreds or even thousands of transgender Wisconsin Medicaid beneficiaries need or will in the future need gender-confirming treatments that are subject to the Challenged Exclusion. Plaintiffs’ expert, Jaclyn White Hughto, PhD, MPH, estimates that approximately 5,000 transgender adults are *currently* enrolled in Wisconsin Medicaid and may need transition-related surgical care treatments for gender dysphoria now or at some point in their lives. Hughto Decl. ¶ 49. This estimate does not include future Wisconsin Medicaid beneficiaries, so the size of the Proposed Class is likely even larger than this estimate. Supp. Decl. of Jaclyn White Hughto ¶ 22 (“Hughto Supp. Decl.”).

Similarly, Defendants' expert estimated that 63 transgender Wisconsin Medicaid beneficiaries would seek some form of gender-confirming surgical treatments for gender dysphoria *every year* if such services were covered by Medicaid. Expert Report of David V. Williams [Dkt. 74-1] at 2, 6. By that estimate, at least 300 Wisconsin Medicaid beneficiaries would face denial of Wisconsin Medicaid coverage for these services because of the Challenged Exclusion over just a five-year period, with many more over time.

By either estimate, the number of individuals in the Proposed Class is significant and greatly exceeds the minimum threshold of 40 people needed to meet the numerosity requirement. Where, as here, the "evidence suggests that the class numbers in the hundreds, if not thousands, of members," the numerosity requirement is easily satisfied. *N.B.*, 26 F. Supp. 3d at 770.

Although the numerosity requirement is satisfied by these estimates alone, the requirement is further met because joinder of all members of the Proposed Class is impracticable given the particular circumstances of the class. In *N.B.*, the court found that the putative class of Medicaid beneficiaries satisfied the numerosity requirement based both on the estimated size of the class and because the class "consists of an extremely vulnerable population . . . [with] severe health issues, and limited financial means," and who are "scattered throughout the state, impeding their ability to participate even if joinder could be accomplished." *N.B.*, 26 F. Supp. 3d at 770. So too here. As this Court has found, transgender individuals are a vulnerable group who "have been subjected to harassment and discrimination in virtually every aspect of their lives, including in housing, employment, education, and health care," and "transgender people unable to afford (or otherwise access) gender-confirming surgical procedures are more at-risk for discrimination and other harms." PI Op. at 1, 34. By definition, Medicaid beneficiaries have limited financial means. And, as evidenced by the geographic dispersion of the Named Plaintiffs

and the declarants who are members of the Proposed Class—who live in Green Bay, Baraboo, Milwaukee, Janesville, Madison, and Middleton—members of the Proposed Class live throughout Wisconsin. PI Op. at 7, 11; Kelly Decl. ¶ 2; Sherwin Decl. ¶ 2; Decl. of Tori Vancil ¶ 2; Decl. of Emma Grunenwald-Ries ¶ 2; Decl. of Lexie Vordermann ¶ 2. Because transgender individuals, particularly those seeking treatment for gender dysphoria, have an understandable desire to keep information about their gender identity private to avoid mistreatment and stigma, it would be unreasonable to expect every affected individual to join this suit or bring their own case to vindicate their rights (particularly where participation in this or other litigation would demand disclosing their identity and private, highly sensitive medical information to the Court, Defendants, and the public). *Accord Planned Parenthood Ark. & E. Okla. v. Selig*, 313 F.R.D. 81, 87 (E.D. Ark. 2016) (finding joinder of Planned Parenthood’s individual Medicaid patients impractical because of the “highly sensitive and personal nature” of reproductive health care decisions).

For all of these reasons, joinder of all members of the Proposed Class is impracticable and Plaintiffs satisfy Rule 23(a)’s numerosity requirement.

B. Commonality is satisfied because the Challenged Exclusion subjects all class members to the same categorical ban on gender-confirming care.

The commonality requirement of Fed. R. Civ. P. 23(a)(2) is met because Plaintiffs challenge the lawfulness and constitutionality of a uniformly applied policy—the Challenged Exclusion—and Defendants’ systematic enforcement of the exclusion to categorically deny Medicaid coverage for gender-confirming treatments to transgender beneficiaries with gender dysphoria. Although a single common question of law or fact would suffice to establish commonality, *Chicago Teachers Union*, 797 F.3d at 434 (citing *Wal-Mart*, 564 U.S. at 359),

Plaintiffs present multiple common questions of law and fact, the common answers to which will “generate common answers apt to drive the resolution of the litigation.” *Id.* (quoting same).

Courts routinely find commonality in class actions challenging the lawfulness of systemic policies or practices. *See Lacy v. Cook Cty.*, 897 F.3d 847, 865-66 (7th Cir. 2018) (in Americans with Disabilities Act case, finding “commonality abounds” where class members all had same disability and all challenged “the same failure” by county to implement and enforce reasonable accommodation policies); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (“Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.”); *Schilling*, 293 F. Supp. 3d at 838 (the question of whether a challenged policy violates the law is “capable of classwide resolution, thus easily satisfying the commonality requirement”); *N.B.*, 26 F. Supp. 3d at 773 (where “every plaintiff is suffering the same injury as a result of a general policy of the State,” challenge to the lawfulness of that policy “is resolvable on a class-wide basis”). Thus, challenges to a uniformly applied state policy like the Challenged Exclusion are inherently based on a “common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*, 564 U.S. at 350.

Where, as here, a case challenges lawfulness of a systemic policy or practices of a state Medicaid agency, the commonality requirement is satisfied. *See, e.g., Koss*, 305 F. Supp. 3d at 917 (certifying class challenging systemic failure of Illinois Medicaid agency to process and administer applications for eligibility for long-term Medicaid benefits); *O.B. v. Norwood*, No. 15 C 10463, 2016 WL 2866132, at *1 (N.D. Ill. May 17, 2016) (certifying class challenging Illinois Medicaid’s failure to provide in-home nursing services to Medicaid-eligible children); *N.B.*, 26

F. Supp. 3d at 773-74 (certifying class challenging Illinois Medicaid’s “systemic failure to provide required coverage for home and community based services” to plaintiff class of children); *B.E. v. Teeter*, No. C16-0227-JCC, 2016 WL 3939674, at *1, 3 (W.D. Wash. July 21, 2016) (certifying class challenging Washington’s failure to provide coverage for certain Hepatitis C treatments pursuant to the state Medicaid agency’s published treatment policy); *Wood v. Betlach*, 286 F.R.D. 444, 447 (D. Ariz. 2012) (certifying class challenging federal approval and Arizona’s implementation of increased copayments for participants in Medicaid demonstration project).

As in these other Medicaid cases, this case presents a common challenge to the lawfulness of a uniformly enforced Medicaid policy. The Named Plaintiffs and all members of the Proposed Class suffer the same injury resulting from the Challenged Exclusion—the categorical unavailability of Wisconsin Medicaid coverage for gender dysphoria treatments pursuant to the exclusion. *Accord Koss*, 305 F. Supp. 3d at 917 (finding plaintiffs’ class claims “all derive from a single course of conduct by the defendant—namely, defendant Norwood’s failure to timely process applications and provide Medicaid benefits,” an injury common to the entire class); *O.B.*, 2016 WL 2866132, at *4 (finding commonality where plaintiffs alleged that “a ‘systemic failure’ to comply with the Medicaid Act’s EPSDT component . . . has harmed all putative plaintiffs”); *N.B.*, 26 F. Supp. 3d at 772-74 (finding commonality where “every plaintiff is suffering the same injury as a result of a general policy of the State,” the wholesale inability to get coverage for integrated care and resulting inappropriate isolation in institutional settings). Here, Defendants’ categorical refusal to provide Medicaid coverage for gender-confirming treatments pursuant to the Challenged Exclusion is a generally applicable policy that harms all

members of the Proposed Class by denying them the opportunity to obtain coverage for treatments for gender dysphoria.

Plaintiffs have presented multiple questions of law common to the Named Plaintiffs and the Proposed Class. At the broadest level, these questions include whether, as a matter of law, the Challenged Exclusion violates: (1) Section 1557's prohibition on sex discrimination in federally-funded health programs; (2) the Medicaid Act's availability requirement by eliminating mandatory coverage for medically necessary services; (3) the Medicaid Act's comparability requirement by denying Medicaid coverage for services to treat gender dysphoria while covering those same services when needed to treat other conditions; and (4) the Equal Protection Clause, whether as a form of sex discrimination or as discrimination on the basis of being transgender. These common legal questions about the lawfulness of the Challenged Exclusion each suffice to establish commonality. *See N.B.*, 26 F. Supp. 3d at 773; *B.E.*, 2016 WL 3939674, at *3.

Wrapped up in these overarching legal questions are numerous common questions of law and fact that can be resolved on a uniform basis. As this Court has already observed, common questions of law raised by Defendants include, *inter alia*, whether Section 1557 contains a private right of action, PI Op. at 23; whether Section 1557's sex discrimination prohibition extends to discrimination based on gender identity and being transgender, *id.* at 25; whether intermediate scrutiny of the Challenged Exclusion is warranted because the policy draws sex-based distinctions, *id.* at 32; and whether, for purposes of assessing Plaintiffs' equal protection claim that the Challenged Exclusion discriminates against transgender people as a class, the transgender population of Wisconsin is a suspect or quasi-suspect class separately warranting heightened scrutiny of the Challenged Exclusion, *id.* at 33.

Although many of the material facts at issue in this case are undisputed, *see id.* at 2-15, there are a number of disputed factual questions that are appropriate for and capable of class-wide resolution. Of note, a central factual question raised by Defendants is whether gender-confirming surgeries and other treatments are *ever* medically necessary to treat gender dysphoria. *Id.* at 6-7. The answer to this question is material to Plaintiffs' Medicaid Act claims (where medical necessity is a central factor in assessing whether Defendants are obligated to cover specific services), as well as to the Court's assessment of Defendants' asserted defense that gender-confirming surgeries have no "proven medical value or usefulness for treating gender dysphoria." *Id.* at 4-5. Another common question of fact is whether Wisconsin Medicaid covers any or all of the treatments and services for conditions other than gender dysphoria that are denied to members of the Proposed Class pursuant to the Challenged Exclusion, which is germane to resolution of Plaintiffs' sex discrimination claims and the Medicaid Act's comparability claim.

For the above reasons, Plaintiffs have presented multiple common questions of law and fact, the answers to which can be made on a class-wide basis in furtherance of this litigation. The commonality requirement is therefore met.

C. The Named Plaintiffs' claims are typical of those of the Proposed Class.

Plaintiffs satisfy the typicality requirement of Rule 23(a)(3) because "the claims . . . of the representative parties are typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). Typicality "requires that a named plaintiff's claim 'arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.'" *Bitner v. Wyndham Vacation Resorts, Inc.*, No. 13-cv-451-wmc, 2016 WL 7480428, at *9 (W.D. Wis. Dec. 29, 2016) (quoting *Keele v. Wexler*, 149 F.3d

589, 595 (7th Cir. 1998)). “For this reason, typicality often tends to overlap with the commonality requirement.” *Id.* (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)). “Applied with care, however, the typicality standard should ensure that a plaintiff with typical claims will pursue his or her own self-interest in the litigation and in so doing will advance the interests of the class members, which are aligned with those of the representative.” *Id.* (internal citation, quotation marks, and modifications omitted). “Typicality requires ‘enough congruence between the named representative’s claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group.’” *Koss*, 305 F. Supp. 3d at 918 (quoting *Spano v. Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011)).

For the reasons explained above, each of the Named Plaintiffs’ claims arises from the same source as the class-wide claim: Defendants’ enforcement of the Challenged Exclusion to categorically deny Wisconsin Medicaid coverage for gender dysphoria treatments. The legal theories that the Named Plaintiffs will advance under Section 1557, the Medicaid Act, and the Equal Protection Clause are identical to those they assert on behalf of the entire class.

The Proposed Class seeks the same declaratory judgment: that the Challenged Exclusion violates Section 1557, the Medicaid Act, and the Equal Protection Clause. Am. Compl., Request for Relief ¶ D. And they seek the same preliminary and permanent injunctions enjoining Defendants from enforcing the Challenged Exclusion based on the policy’s illegality. *Id.*, Request for Relief ¶ C. If Plaintiffs succeed in obtaining the class-wide declaratory and injunctive relief they seek, each of them and all members of the Proposed Class will benefit from the elimination of the structural barrier to care currently imposed by the Challenged Exclusion. Plaintiffs are not asking the Court to adjudicate their individual eligibility for coverage for transition-related care; rather, they seek only to have the *opportunity* for themselves, and for all

other transgender Medicaid beneficiaries in Wisconsin, to have their individual medical needs considered. The fact that each member of the class has specific transition-related medical needs is irrelevant to the class-wide inquiry of whether Wisconsin's categorical ban on any and all coverage for surgical and medical treatments for gender dysphoria is lawful. *See Koss*, 305 F. Supp. 3d at 918 (quoting *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009)).

Because the Named Plaintiffs' claims arise from the same source, the Challenged Exclusion, and the declaratory and injunctive relief they seek for themselves is identical to those they seek for every other class member, Rule 23(a)'s typicality requirement is satisfied.

D. The Named Plaintiffs and their counsel will adequately represent the Proposed Class.

Rule 23(a)'s final requirement is satisfied because the Named Plaintiffs and their undersigned counsel will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see also Schilling*, 293 F. Supp. 3d at 838. Adequacy is established because (1) the Named Plaintiffs are able to effectively protect the interests of the class as a whole as class representatives, and (2) Plaintiffs' undersigned counsel at Relman, Dane & Colfax PLLC, McNally Peterson, S.C., and the National Health Law Program are capable of representing the Proposed Class as class counsel. *See* Fed. R. Civ. P. 23(a)(4) & (g)(1).

1. The Named Plaintiffs are adequate class representatives.

The Named Plaintiffs are adequate class representatives because no conflicts of interest exist between them and the Proposed Class, and because they each have sufficient interest in the outcome of the case. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997); *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); *Jones v. Cruisin' Chubbys Gentlemen's Club*, No. 17-CV-125-JDP, 2018 WL 1175412, at *6 (W.D. Wis. Mar. 6, 2018).

Here, there are no conflicts of interest between the Named Plaintiffs and the class as a whole. Indeed, Mr. Flack, Ms. Makenzie, Ms. Sherwin, and Ms. Kelly all suffer the same injuries and have the same interests as the class members, and they will rigorously advocate for the class. The Named Plaintiffs, along with all the members of the Proposed Class, suffer the same injury resulting from the Challenged Exclusion—a categorical denial of Medicaid coverage for gender-confirming medical treatments for gender dysphoria. *See* Makenzie Decl. ¶¶ 19, 30-32; Flack Decl. ¶¶ 22, 24-25; Flack Supp. Decl. ¶ 6; Kelly Decl. ¶¶ 19-20; Sherwin Decl. ¶ 13, 18-19, 28-33; Vancil Decl. ¶¶ 4, 14; Vordermann Decl. ¶¶ 9, 11; Grunenwald-Ries Decl. ¶¶ 4, 18. Not only do the Named Plaintiffs share the same injuries with members of the Proposed Class, but their interests are also co-extensive with those unnamed members. Mr. Flack, Ms. Makenzie, Ms. Sherwin, and Ms. Kelly each have an interest in permanent declaratory and injunctive relief. Specifically, each is seeking or plans to seek treatments for gender dysphoria that would be categorically excluded from Wisconsin Medicaid coverage by the Challenged Exclusion without a final declaratory judgment and permanent injunction. Makenzie Decl. ¶¶ 18, 25; Flack Supp. Decl. ¶ 6; Sherwin Decl. ¶¶ 32, 34; Kelly Decl. ¶ 18. As explained above, the declaratory and injunctive relief Named Plaintiffs seek will benefit all Proposed Class members equally by eliminating the categorical coverage ban imposed by the Challenged Exclusion and allowing class members the opportunity to seek and obtain gender-confirming treatments for gender dysphoria.

Lastly, not only do their harms and interests align with the Proposed Class, but Mr. Flack, Ms. Makenzie, Ms. Sherwin, and Ms. Kelly are also committed to fighting for the rights and dignity of transgender Wisconsin Medicaid beneficiaries whose health care needs are categorically excluded from coverage pursuant to the Challenged Exclusion. Flack Supp. Decl.

¶ 7; Makenzie Second Supp Decl. ¶ 4; Sherwin Decl. ¶ 34; Kelly Decl. ¶ 24. Each chose to participate in this case to ensure that they, and others like them, are not obstructed from seeking gender-confirming health care and are not made to suffer the consequences of not receiving that care. Flack Supp. Decl. ¶ 7; Makenzie Second Supp Decl. ¶ 4; Sherwin Decl. ¶ 34; Kelly Decl. ¶ 24. Based on this shared desire to vindicate their own rights and those of others like them, the Named Plaintiffs will rigorously pursue the class's interests.

There are no conflicts of interest between members of the Proposed Class, and the Named Plaintiffs will adequately and fairly represent the class.

2. Plaintiffs' counsel will capably represent the interests of the class.

"Adequacy of representation . . . requires that class counsel be qualified to conduct the litigation." *Bitner*, 2016 WL 7480428, at *10 (citing *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489, 498 (7th Cir. 2013)). Plaintiffs' undersigned counsel at Relman, Dane & Colfax PLLC ("Relman"), McNally Peterson, S.C. ("MP"), and the National Health Law Program ("NHLP") all have substantial experience handling class action litigation and complex civil rights litigation, and bring subject matter expertise relevant to Plaintiffs' claims. *See* Decl. of Jennifer I. Klar ¶¶ 6, 8, 11 ("Klar Decl."); Decl. of Joseph J. Wardenski ¶¶ 7-8 ("Wardenski Decl."); Decl. of Mark Peterson ¶¶ 5-8 ("Peterson Decl."); Decl. of Robert Theine Pledl ¶¶ 4-6 ("Pledl Decl."); Decl. of Abigail Coursolle ¶¶ 2, 6-7 ("Coursolle Decl."); Decl. of Catherine McKee ¶¶ 2, 6-7 ("McKee Decl.").³ Thus, they are qualified to represent the class here and should be appointed class counsel.

³ This Court has credited declarations from named plaintiffs' attorneys in finding adequacy of class counsel. *See, e.g., Bitner*, 2016 WL 7480428, at *10.

Relman is a national civil rights law firm with experience handling complex class action civil rights cases. Klar Decl. ¶¶ 3, 7. Relman also has experience in transgender rights litigation. The lead attorney on this case, Joseph Wardenski, was lead counsel on *Whitaker v. Kenosha Unified School District*, No. 2:16-cv-943, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016), *aff'd*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018), which established in the Seventh Circuit that discrimination against transgender students can be actionable as sex discrimination under federal law. Wardenski Decl. ¶ 8. MP and attorneys Mark Peterson, Robert Pledl, and Daniel Peterson have handled complex litigation matters, including health care cases, civil rights cases (including LGBT discrimination cases), and cases under the Medicaid Act. Peterson Decl. ¶ 5; Pledl Decl. ¶ 5. Mr. Pledl served as co-counsel for plaintiff in the *Whitaker* case. Pledl Decl. ¶ 4. The firm and its undersigned attorneys have been designated as class counsel in many class action cases in federal and state courts in Wisconsin. Peterson Decl. ¶¶ 6, 8; Pledl Decl. ¶ 6. NHeLP is a national health rights advocacy organization with expertise in Medicaid issues and extensive experience litigating Medicaid-related lawsuits, including class actions, in federal and state courts around the country. Coursolle Decl. ¶¶ 1, 607; McKee Decl. ¶¶ 1, 6-7.

Plaintiffs' counsel have the resources, expertise, and experience to prosecute this action effectively on behalf of the Proposed Class. As the Named Plaintiffs and undersigned class counsel are able and willing to effectively represent the Proposed Class, the two prongs of Rule 23(a)'s adequacy requirement are satisfied.

II. THE PROPOSED CLASS SATISFIES THE REQUIREMENTS OF RULE 23(B)(2).

Certification of the Proposed Class is warranted under Rule 23(b)(2) because the categorical coverage ban on gender-confirming care under the Challenged Exclusion is generally

applicable to the class, making a final injunction and corresponding declaratory judgment appropriate to the full class. *See* Fed. R. Civ. P. 23(b)(2); *Wal-Mart*, 564 U.S. at 360; *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 369-70 (7th Cir. 2012). “Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class,” but not “when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.” *Wal-Mart*, 564 U.S. at 360. Where, as here, Plaintiffs’ primary goal is “to require the defendant to do or not do something that would benefit the class,” Rule 23(b)(2) certification is appropriate. *Chicago Teachers Union*, 797 F.3d at 441. “Not surprisingly, ‘civil rights cases against parties charged with unlawful, class-based discrimination are prime examples’ of Rule 23(b)(2) classes.” *Id.* (citing *Amchem Prods.*, 521 U.S. at 614). This is precisely that kind of case.

As explained above, the declaratory and injunctive relief sought in this case is identical for each of the Named Plaintiffs and all members of the Proposed Class. Plaintiffs seek a declaratory judgment that the Challenged Exclusion violates Section 1557, the Medicaid Act, and the Equal Protection Clause, and a permanent injunction enjoining enforcement of the Challenged Exclusion based on that illegality. This type of class-wide relief is typically sought through a Rule 23(b)(2) class. *See, e.g., O.B.*, 2016 WL 2866132, at *4 (an “across-the-board failure to comply with the Medicaid Act’s EPSDT requirements” can be addressed on a class-wide basis under Rule 23(b)(2)); *N.B.*, 26 F. Supp. 3d at 774 (in a Medicaid case, finding “success on the plaintiffs’ claims will require policy modifications to properly implement EPSDT and the integration mandate; by their very nature such policy changes are generally applicable, and therefore would benefit all class members”); *B.E.*, 2016 WL 3939674, at *4 (finding Rule 23(b)(2) certification appropriate where “class members seek relief from systemic

barriers to proper treatment and services” resulting from state Medicaid agency’s Hepatitis C treatment policy). Because Plaintiffs here similarly ask this Court to declare the Challenged Exclusion unlawful—and to enjoin further enforcement of this systemic barrier to gender-confirming for all class members—certification under Rule 23(b)(2) is appropriate.

CONCLUSION

For the reasons explained above, Plaintiffs have met Rule 23’s requirements for certification of a class of “[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.” Plaintiffs respectfully request that the Court certify that class under Rule 23(b)(2) for declaratory and injunctive relief; designate the Named Plaintiffs as class representatives; and designate their undersigned attorneys at Relman, Dane & Colfax PLLC, McNally Peterson, S.C., and the National Health Law Program as class counsel.

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Respectfully submitted,

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