UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CODY FLACK, *et al.*,
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

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

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INTRODUCTION

In their opposition brief, Defendants have abandoned their argument that the Challenged Exclusion does not facially discriminate against transgender Medicaid beneficiaries on the basis of sex under Section 1557 of the Affordable Care Act and the Fourteenth Amendment's Equal Protection Clause. Indeed, they now acknowledge that *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017), is "binding precedent" in the Seventh Circuit on those questions. *See* Opp. Br. at 8-9 & n.2. Accordingly, they also concede that the Challenged Exclusion must survive intermediate scrutiny to pass constitutional muster under the Equal Protection Clause.

On Defendants' Section 1557 claim, their remaining defense—that the statute violates the Spending Clause because Wisconsin lacked notice that transgender people might be protected under the law—has already been rejected by this Court as "[n]onsense." Op. & Order, July 25, 2018, at 30 [ECF No. 70] ("*Flack I*"). On Plaintiffs' Medicaid Act and Equal Protection Clause claims, Defendants again label gender-confirming surgeries as "unproven," and then point to this unsubstantiated label as their ostensible justification for excluding Medicaid coverage for all gender-confirming surgeries.[1] But Defendants have already conceded that there is no evidence that DHS's predecessor agency actually undertook any analysis of the medical necessity of the excluded treatments. They also admit that Wisconsin has *never* made a determination that the excluded services were experimental, unsafe, or ineffective at treating gender dysphoria; nor has

[1] In their brief, Defendants ignore the undisputed fact that "transsexual surgery" is not a discrete medical service suitable for a categorical coverage determination. Proposed Findings of Fact ¶¶ 67, 80 [ECF No. 153] ("PFOF"). Rather, the category of gender-confirming surgeries includes an array of surgical procedures to treat gender dysphoria (in addition to a host of other conditions). *Id.* ¶¶ 67, 80, 98-99, 103-106.

the State *ever* considered the public health effects of enforcing the Challenged Exclusion over the last two decades. Stip. Facts ¶¶ 70-78 [ECF No. 154] ("SFOF").

Defendants have offered no credible or admissible evidence to dispute Plaintiffs' strong showing—through the testimony of multiple experts on gender dysphoria and transgender health and Defendants' own actions and admissions—that gender-confirming surgeries are clinically indicated treatments for gender dysphoria and generally accepted by the medical community as safe, effective, and medically necessary treatments for gender dysphoria when clinically indicated and performed according to the relevant standards of care. Proposed Findings of Fact ¶¶ 66-71 [ECF No. 153] ("PFOF").

Although many of their arguments hinge on Defendants' proposition that gender-confirming surgeries are "unproven," Defendants have offered no admissible or credible evidence that gender-confirming surgeries are "unproven," unsafe, or ineffective. Their own admissions belie the assertion that these concerns motivated the State's promulgation or enforcement of the Challenged Exclusion. PFOF ¶¶ 82-83. Defendants have stipulated that:

- DHS is not aware of information indicating that when the Challenged Exclusion was promulgated, the determination by the Wisconsin Department of Family and Health Services (DHFS) that the services to be excluded by the Challenged Exclusion were not medically necessary was based on any systematic study or review of relevant peer-reviewed scientific or medical literature relating to the excluded services conducted by or on behalf of DHFS, SFOF ¶ 70;

- DHS is not aware of information indicating that prior to its implementation on February 1, 1997, the Challenged Exclusion was based on a determination by DHS or its predecessor, the Wisconsin Department of Family and Health Services (DHFS), that any or all of the excluded services were experimental, SFOF ¶ 71;

- DHS is not aware of information indicating that prior to its implementation on February 1, 1997, the Challenged Exclusion was based on a determination by DHS or its predecessor, the Wisconsin Department of Family and Health Services (DHFS), that any or all of the excluded services were unsafe, SFOF ¶ 72; and

- DHS is not aware of information indicating that prior to its implementation on February 1, 1997, the Challenged Exclusion was based on a determination by DHS or its predecessor, the Wisconsin Department of Family and Health Services (DHFS), that any or all of the excluded services were ineffective at treating gender dysphoria or, as the condition was known at that time, gender identity disorder, SFOF ¶ 73.

To try to gin up a factual dispute over whether gender-confirming surgeries are "unproven," Defendants have submitted a four-page "expert" declaration from Dr. Michelle Ostrander, an executive at the health consultancy Hayes, Inc., who has no expertise on gender dysphoria and is admittedly unqualified to offer an opinion on gender-confirming medical care. For the reasons detailed in Plaintiffs' brief in support of their accompanying motion to strike, which Plaintiffs incorporate by reference here, Dr. Ostrander's declaration and testimony must be excluded under Fed. R. Evid. 26(a)(2)(B), Fed. R. Evid. 702 and 802, and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Regardless, Defendants never labeled gender-confirming surgeries as "unproven" until the State's attorneys asserted as much in this lawsuit—and never considered the Hayes reports attached to Dr. Ostrander's brief (or, indeed, any research at all) in promulgating or enforcing the Challenged Exclusion. PFOF ¶¶ 82-91. Their last-ditch effort to justify the Exclusion on this baseless and previously unarticulated basis cannot absolve their liability under the Medicaid Act and the Equal Protection Clause.

Finally, Defendants argue, incredibly, that the actuarially immaterial *potential* cost savings from excluding gender-confirming care from coverage—amounting to 0.007 and 0.03 percent of the State's annual Medicaid funding under the estimates of Defendants' own actuarial expert—is an "important government interest" that justifies a blanket coverage exclusion on medically necessary health care for transgender people. This Court rejected this argument in *Boyden v. Conlin*, 341 F. Supp. 3d 979, 1000-01 (W.D. Wis. 2018), where the estimated cost impact was even higher, and should do so here as well.

Because Defendants have failed to offer any valid legal or factual defense to the Challenged Exclusion, this Court should grant summary judgment to Plaintiffs on all claims.

I. DEFENDANTS' ONLY REMAINING SECTION 1557 DEFENSE HAS ALREADY BEEN REJECTED BY THIS COURT AS "NONSENSE" AND REMAINS MERITLESS NOW.

Defendants acknowledge that *Whitaker* is "binding precedent" on the question of whether federal sex discrimination laws prohibit discrimination against transgender people, *see* Opp. Br. at 8-9 & n.2. Their sole remaining defense against Plaintiffs' Section 1557 claim is that the statute violates the Spending Clause because "the State of Wisconsin could not have understood that Title IX would impose on it a new anti-discrimination requirement when this federal law passed" in 1972. *Id.* at 6-7. This Court summarily dismissed this argument in its first preliminary injunction opinion in this case, calling it "defendants' least persuasive, though most creative, argument." *Flack I* at 29-30. On the contention that "Wisconsin could have had no idea that this interpretation would someday prevail when it chose to accept federal Medicaid funding," this Court had one word: "Nonsense." *Id.* at 30. This Court should reject it again now.

Defendants' contention that they were not on "clear notice" that Section 1557 might apply to transgender people is untenable. First, they incorrectly assume that the "clear notice" requirement applies to their understanding in 1972, when Title IX was passed, as Section 1557 incorporates Title IX's protections. Opp. Br. at 7, 9. But this ignores two important facts: that Section 1557 was passed in 2010 and that Wisconsin must choose whether to accept federal Medicaid funding *every single year* and consents to its obligations under the law each year. By continuing to accept billions of dollars in federal Medicaid funds every year since 2010, Wisconsin has continuously agreed to comply with Section 1557's prohibition on sex discrimination. As this Court found in *Flack I*, "[b]y the time that the Affordable Care Act was enacted, federal courts had already interpreted prohibitions on sex discrimination to cover

adverse treatment of transgender people, and the Supreme Court had already recognized that 'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.'" *Flack I* at 30 (citing *Whitaker*, 858 F.3d at 1048 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998))).

There has been no intervening authority to change this outcome. The only subsequent federal court decisions to address similar arguments—this Court's decision in *Boyden* and another transgender rights case in Minnesota—have also rejected them. *See Boyden*, 341 F. Supp. 3d at 998-99 (rejecting defendants' Spending Clause argument that they were immune from suit under Section 1557 due to lack of notice that prohibited discrimination might cover transgender people as "novel" and having "*no* support"); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953 (D. Minn. 2018) (rejecting defendants' Spending Clause argument because "[t]he plain language of Section 1557 incorporates Title IX and its prohibition on sex discrimination," such that "[b]y way of the reasoning and holdings set forth in cases such as *Price Waterhouse* and *Oncale*, Defendants were on notice that Section 1557's nondiscrimination requirements encompassed gender-identity discrimination").

The Seventh Circuit in *Whitaker* did not create a "new anti-discrimination requirement" or add a distinct prohibition on "transgender status" discrimination, as Defendants suggest, Opp. Br. at 2, 7. Rather, the court interpreted the *existing* prohibition on sex discrimination under Title IX to include discrimination against transgender people. As the Supreme Court has repeatedly held, the fact that the text of Title IX did not expressly list all of the various forms sex discrimination might take does not raise Spending Clause concerns. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181-84 (2005). Indeed, as the Supreme Court has recognized, "'[d]iscrimination" is a term that covers a wide range of intentional unequal treatment; by using

such a broad term, Congress gave the statute a broad reach." *Id.* at 175 (citing *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)).

In *Jackson*, the Supreme Court rejected the defendant school board's argument it could not be sued for retaliatory conduct under Title IX simply because the statute "makes no mention" of retaliation. *Id.* at 174. The Court held that Title IX gave sufficient notice to recipients that intentional discrimination on the basis of sex was prohibited, and that the school board was therefore on notice that all forms of intentional sex discrimination, including retaliation, were prohibited. *Id.* at 173-74. The Court explained that "[f]unding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979," when it decided *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (finding an implied private right of action under Title IX), and in its subsequent decisions that "defined the contours of that right of action" in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (holding monetary damages are available in Title IX suits); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290–291 (1998) (finding Title IX violation for funding recipient's deliberate indifference to teacher-on-student harassment); and *Davis v. Monroe County Board of Education*, 526 U.S. 629, 642-43 (1999) (same for peer-on-peer sexual harassment). *Jackson*, 544 U.S. at 173, 182. In short, the fact that Title IX was silent on the availability of a private right of action, damages, harassment claims, or retaliation was immaterial since the defendant school board, and other recipients, were on notice that intentional sex-based discrimination in all its forms was prohibited. *Id.* at 174-75. Likewise, the fact that Title IX (or, by extension, Section 1557) did not expressly mention discrimination against transgender people does not immunize Wisconsin from Plaintiffs' claims here.

Because Defendants' sole defense to Plaintiffs' Section 1557 claim has no merit, this Court should grant summary judgment to Plaintiffs on this claim.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR MEDICAID ACT CLAIMS.

Defendants concede most of the elements of Plaintiffs' Medicaid Act claims, arguing only that they are entitled to maintain a blanket coverage exclusion for gender-confirming surgeries based on their "legally 'reasonable' determination that such treatment is not 'medically necessary' because it is unproven." Opp. Br. at 24. Defendants acknowledge that, under the Medicaid Act's Availability Provision, 42 U.S.C. § 1396a(a)(10)(A), 42 C.F.R. § 440.230(b), they are required to make mandatory medical services (as well as optional medical services that the State has elected to cover) available in a sufficient amount, duration, and scope, when medically necessary for an individual. Opp. Br. at 23-24. They further acknowledge that the Act's Comparability Provision, 42 U.S.C. § 1396a(a)(10)(B), 42 C.F.R. § 440.240(b), bars them from "arbitrarily deny[ing] or reduc[ing] the amount, duration, or scope of a required service . . . solely because of the diagnosis, type of illness, or condition" that it would treat. Opp. Br. at 26. Finally, they admit that they cover these same services when necessary to treat other conditions *and* that DHS has already determined such services to be medically necessary to treat gender dysphoria in individual cases not covered by the Challenged Exclusion, including for Plaintiff Cody Flack following the preliminary injunction entered by this Court. PFOF ¶¶ 96, 147.

As Defendants have failed to substantiate their claim that the Challenged Exclusion is nevertheless warranted because the excluded services are "unproven," this Court may grant summary judgment to Plaintiffs on both Medicaid Act claims.

A. The Challenged Exclusion Does Not Constitute a Reasonable Limit on Medicaid Services.

Defendants claim that the categorical exclusion constitutes a reasonable exercise of the State's discretion to exclude "unproven" services from its Medicaid program as medically unnecessary. But the categorical exclusion on "transsexual surgeries" and "associated" hormone

treatments on that basis is unreasonable here, given the unrefuted medical consensus that these services are safe and effective treatments for gender dysphoria for many people.

There is no dispute that the Medicaid Act gives states the discretion to "place appropriate limits on a service based on such criteria as medical necessity." *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 608 (7th Cir. 2012) (quoting 42 C.F.R. § 440.230(d)). Here, however, there is no basis in the record supporting Defendants' categorical labeling of all gender-confirming procedures as medically unnecessary. In fact, the Court already determined that gender-confirming chest and genital reconstruction surgeries "meet the prevailing standard of care" and constitute "medically necessary treatment" when recommended by treating providers consistent with the WPATH Standards of Care. *Flack I* at 2, 16. And, Defendants have now conceded as much. They readily admit that "there are instances when gender reassignment surgery can be medically necessary in an individual case," Opp. Br. at 24-25, as DHS has already concluded in at least two individual cases, including for Cody Flack. PFOF ¶¶ 90, 147. Thus, Defendants have admitted that the original "determination" that the excluded services were categorically "medically unnecessary" is not reasonable now, if it ever was.

Indeed, this Court has already recognized that gender-confirming surgeries are "commonly offered and performed across the country to ease the suffering of those with gender dysphoria." *Flack I* at 26 n.22. And Defendants concede that "the American Medical Association, American Psychological Association, American Psychiatric Association, Endocrine Society, and other major medical organizations" take this view, offering no evidence to rebut this prevailing medical consensus. PFOF ¶ 68.

Unable to create any issue of fact as to whether gender-confirming surgery meets prevailing standards of care, Defendants try to move the legal goalposts in order to argue that the

effectiveness of surgery to treat gender dysphoria is "unproven."[2] Opp. Br. at 24. They argue that there is a "dearth of quality clinical evidence that gender reassignment surgery and related hormone therapy is efficacious and safe for persons suffering from gender dysphoria," *id.* at 28, and that they can find procedures medically unnecessary despite general acceptance by the medical community because of lack of "*authoritative evidence* . . . that attests to a procedure's safety and effectiveness," *id.* at 11 (emphasis in original) (quoting *Miller v. Whitburn*, 10 F.3d 1315, 1320 (7th Cir. 1993)). This argument seriously misconstrues *Miller*, which does not permit exclusion of generally accepted procedures on such grounds.

What *Miller* actually held, contrary to Defendants' arguments here, is that "the best indicator that a procedure is experimental is its rejection by the professional medical community as an unproven treatment." *Miller*, 10 F.3d at 1320. Accordingly, it stated, "a basic consideration is whether the service has come to be generally accepted by the professional medical community as an effective and proven treatment for the condition for which it is being used." *Id.* (quoting *Rush v. Parham*, 625 F.2d 1150, 1156 n. 11 (5th Cir. 1980). Under *Miller*, authoritative evidence of the sort Defendants claim is necessary is not needed when, as here, the procedures at issue are generally accepted by the medical community. In any event, Plaintiffs have offered significant evidence demonstrating that these services are safe, effective, and medically necessary—and Defendants have offered no admissible evidence to suggest otherwise.

The bottom line is that Defendants cannot deny coverage for a service that already is generally accepted in the community by simply calling it "unproven." While there are inherent limitations in studying any surgical procedures—namely, that it is impossible to do controlled,

[2] Defendants do not claim, however, that the services are "experimental," Opp. Br. at 23, nor have they ever done so. PFOF ¶¶ 5, 83, 88.

double-blind, placebo based studies—all available evidence and the clinical consensus, taken as a whole, definitively establishes that gender-confirming procedures are safe and effective treatments for gender dysphoria. *See* PFOF ¶ 66; Schechter Rep. 16-17. Certainly Defendants have not put forth any evidence that suggests that gender-affirming surgeries are *ineffective* or *unsafe* treatments.

In sum, Defendants have not raised any genuine issue of material fact to dispute Plaintiffs' evidence showing that both the medical community and the clinical literature agree that gender-affirming surgery is a safe and effective treatment for gender dysphoria.

B. Defendants Have Never Made a Determination That Gender-Confirming Surgeries are "Unproven" or Categorically Medically Unnecessary.

Defendants' plea for deference to a reasonable agency determination fails, first, because they *have never made a determination* that could receive such deference. When the Challenged Exclusion was promulgated, DHS's predecessor agency, DHFS, simply labeled "transsexual surgery" as "medically unnecessary" in completely conclusory fashion. Neither the Challenged Exclusion itself nor any evidence presented by Defendants explain the basis for this characterization—or, indeed, whether this label was the actual product of any medical determination by DHFS at the time. Rather, the well-developed record here supports the opposite conclusion: that DHFS's "medically unnecessary" label has always been mere *ipse dixit*. Defendants stipulate that they are unaware of any evidence showing that the agency ever made a determination that any or all of the excluded services under the Challenged Exclusion were experimental, unsafe, or ineffective at treating gender dysphoria, or that the agency undertook any systematic review of scientific or medical research before labeling the excluded services as "medically unnecessary." SFOF ¶¶ 70-78. Nor have Defendants presented any evidence that the agency undertook any review at all of the safety, efficacy, or medical necessity of those services.

DHS now points to three sources—an inadmissible and unreliable expert report from Dr. Ostrander of Hayes, Inc., a 2016 report from the Centers for Medicare and Medicaid Services ("CMS") on gender-confirming services for Medicare recipients, and inapposite court decisions from other circuits—to assert that, *had* DHS relied on these sources to support a determination that gender-confirming services were medically unnecessary, its determination would have been "reasonable." This argument is irrelevant, since DHS patently did *not* rely on these sources. It also fails on its own terms, as the evidence DHS proffers does not create a question of fact as to whether gender-confirming services can *ever* be medically necessary.

First, Dr. Ostrander's opinion, even if it were admissible, does not support a blanket coverage ban on all gender-confirming procedures on the ground that such procedures are medically unnecessary. Dr. Ostrander expressly takes no position on medical necessity. Ostrander Decl. ¶ 12. The Hayes literature reviews she attaches to her report as her "opinion" at most offer Hayes's proprietary assessment of the state of the evidence about these services. For the reasons fully briefed in Plaintiffs' accompanying motion to strike, incorporated here by reference, this narrow "opinion" about the state of the research (as opposed to the safety, efficacy, or medical necessity of the procedures) does not support the Challenged Exclusion in the face of Plaintiffs' unrebutted evidence of a medical consensus.

Multiple federal courts have found that state Medicaid agencies' and other insurers' *actual* reliance on similar Hayes assessments to exclude coverage for gender-confirming care and other treatments was improper. *Cruz v. Zucker*, 195 F. Supp. 3d 554, 574-75 (S.D.N.Y. 2016), *reconsideration on other grounds granted*, 218 F. Supp. 3d 246 (S.D.N.Y. 2016); *K.G. ex rel. Garrido v. Dudek*, 981 F. Supp. 2d 1275, 1285-86 (S.D. Fla. 2013); *Potter v. Blue Cross Blue Shield of Mich.*, No. 10-cv-14981, 2013 WL 4413310, at * 9-11 (E.D. Mich. Mar. 30, 2013); *Berge v. United States*, 879 F. Supp. 2d 98, 134-36 (D.D.C. 2012), *amended and vacated*

in part on other grounds on reconsideration, 949 F. Supp. 2d 36 (D.D.C. 2013); *Whitley v. Carolina Care Plan, Inc.*, No. C/A 3:06-257-CMC, 2006 WL 3827503, at *30 (D.S.C. Dec. 28, 2006). And here, unlike the defendants in these cases, Wisconsin Medicaid never—prior to this litigation—actually considered or relied upon Hayes reports in promulgating and enforcing the Challenged Exclusion. PFOF ¶¶ 82-83, 85-87. This Court can easily join its sister courts in rejecting this purported "basis" for the exclusion.

Second, the 2016 CMS study referenced in Defendants' brief also fails to support their claimed "reasonableness" determination. Once again, DHS does not claim to have relied on this document in any way in enforcing the Challenged Exclusion, nor have they offered any expert witnesses who can claim to rely on it. Since Defendants have not designated any expert whose opinion was informed by the CMS study—and have admitted that DHS has considered no scientific medical evidence in enforcing the Challenged Exclusion in recent years, PFOF ¶ 97, the CMS study itself and the research it collects are all inadmissible hearsay. But even if Defendants could introduce the report at trial, it ultimately does not support Defendants' policy and is therefore irrelevant.

When presented with the same document by the state defendant in *Cruz*, the case challenging New York's Medicaid exclusion on gender-confirming care, Judge Rakoff found it to be unpersuasive, writing, "[t]his document is of little relevance to the present inquiry and the Court gives it little weight. The proposed decision memorandum is not a binding document and is primarily a literature review of studies that are inadmissible hearsay." *Cruz*, 195 F. Supp. 3d at 575 n.8. For these same reasons, the document is inapposite here: it is a four-year-old literature review focusing on older adults. Moreover, the CMS memo did not support a blanket exclusion such as Defendants' (nor does Medicare have such an exclusion); rather, it recommended that Medicare continue to cover gender-confirming surgeries when medically necessary for a

particular individual. *Id.*; *see also* Nat'l Ctr. for Transgender Equality, *Know Your Rights: Medicare*, https://transequality.org/know-your-rights/medicare (last visited June 2, 2019).

Third, unable to point to evidence in the record of this case to defend their policy, Defendants resort to citation to decades-old, out-of-Circuit cases with fundamentally different records to argue that gender-confirming surgeries are *currently* medically unnecessary. This argument is wholly unpersuasive. Those cases, *Rush* and *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001), found that certain treatments for gender dysphoria could be excluded from Medicaid because, at the time and based on the records made before those courts, they were experimental or not generally accepted in the medical community. Even assuming *arguendo* that those cases were correct when decided, both the scientific literature and clinical practice have developed significantly in the intervening decades since those decisions. PFOF ¶¶ 59, 61-63; *cf. Flack I* at 20 n.15 (distinguishing a Tenth Circuit case that refused to consider scientific advances in the treatment of gender dysphoria since a prior decision in 1986).[3] Indeed, the Iowa Supreme Court recently invalidated the exact Iowa policy upheld in *Smith*—the State's

[3] While Defendants also cite Eighth Amendment cases from the First and Fifth Circuits, the central issue in those cases was whether withholding gender-confirming surgeries from prisoners is cruel and unusual punishment. That standard is certainly higher than the one used to determine whether particular services are medically necessary under the Medicaid Act. *See Kosilek v. Spencer*, 774 F.3d 63, 83 (1st Cir. 2014) (en banc) (noting that even simple medical malpractice does not rise to the level of cruel and unusual punishment) (citation and quotation marks omitted). Moreover, in *Kosilek*, the question before the Court was whether the defendants unconstitutionally denied medically necessary care to the *individual* plaintiff (based on a record from 2006 when the applicable standards of care were different than they are now), not whether the defendants could constitutionally impose a blanket rule (such as the one here) that denied such care to *all* prisoners no matter the individual circumstances. Other federal courts have reached the opposite conclusion as to particular factual circumstances, finding gender-confirming surgeries to be medically necessary for individual prisoners based on the current WPATH Standards of Care. *See, e.g.*, *Edmo v. Idaho Dep't of Corr.*, 358 F. Supp. 3d 1103, 1124-28 (D. Idaho 2018); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1186-92 (N.D. Cal. 2015). In any event, the Seventh Circuit has not ruled on this issue in the prison context.

categorical exclusion on Medicaid coverage for gender-confirming health care—affirming a lower court's ruling that the exclusion was inconsistent with contemporary medical practice and violated state law. *See Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853, 856 (Iowa 2019).

C. Plaintiffs are Entitled to Summary Judgment under the Medicaid Act's Availability Provision Because Wisconsin is Denying Medically Necessary Care to Medicaid Beneficiaries with Gender Dysphoria.

Defendants do not dispute that the gender-affirming treatments at issue here are coverable services under the Medicaid Act, only that they are medically unnecessary. *See* Opp. Br. at 12-14. As described in detail above, Plaintiffs have established that these services are medically necessary for many individuals. Thus, Defendants are obligated to cover them in an amount, duration, and scope that is sufficient for beneficiaries who need them.[4] Because Defendants completely exclude *all* gender-affirming surgical treatments from coverage, they have violated the Medicaid Act's Availability Provision. *See Bontrager*, 697 F.3d at 610 (holding that "denying coverage for medically necessary services outright by functionally excluding certain procedures" violated the provision); *see also Collins v. Hamilton*, 349 F.3d 371, 376 (7th Cir. 2003). Thus, Plaintiffs are entitled to summary judgment on this claim.

D. Plaintiffs Are Also Entitled to Summary Judgment under the Medicaid Act's Comparability Provision Because Wisconsin Provides the Services at Issue to Medicaid Beneficiaries to Treat Conditions Other Than Gender Dysphoria.

The parties do not dispute that the Comparability Provision requires Wisconsin to ensure that services made available to any individual enrolled in Medicaid are not "less in amount, duration, or scope than the medical assistance made available to any other such individual." 42 U.S.C. § 1396a(a)(10)(B); 42 C.F.R. §§ 440.240(a), 440.230(c). And, Defendants have conceded

[4] 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.* §§ 107.06(1), 107.08.

that while they do not cover surgical and hormone services to treat gender dysphoria, they provide the very same services to treat other conditions. Opp. Br. at 26. Defendants nevertheless argue that their coverage policy does not run afoul of the Comparability Provision, claiming that individuals with gender dysphoria do not have "the same levels of medical need" for the services—in other words, that the services are not medically necessary. *Id*. at 28 (citing *Davis v. Shah*, 821 F.3d 231, 257 (2d Cir. 2016)). For the reasons described above, they are wrong. The evidence overwhelmingly shows that surgical and hormone services are medically necessary for many individuals with gender dysphoria. Thus, by refusing to cover those services when medically necessary to treat gender dysphoria, Defendants are squarely violating the Comparability Provision. *See, e.g.*, *id. at* 258; *Cruz*, 195 F. Supp. 3d at 576. Plaintiffs are entitled to summary judgment on their claim under the Comparability Provision.

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR EQUAL PROTECTION CLAIMS BECAUSE DEFENDANTS' PURPORTED JUSTIFICATIONS FAIL TO WITHSTAND INTERMEDIATE SCRUTINY.

Defendants now concede that intermediate scrutiny applies to Plaintiffs' equal protection claims, but rehash their claim that Wisconsin's asserted interests in cost savings and public health withstand that level of scrutiny. Defendants are wrong. They have failed to offer any evidence to show that they have ever been genuinely motivated by cost or public health concerns in adopting or enforcing the Challenged Exclusion. This Court, in *Boyden*, already rejected Wisconsin's similar argument that immaterial cost savings could justify a blanket exclusion on gender-confirming health coverage, particularly where, as here, there is no evidence that this was ever a motivating factor at all. *Boyden*, 341 F. Supp. 3d at 1000-01. And Defendants themselves concede that they never determined that gender-confirming surgeries were unsafe or ineffective before this litigation. They cannot now point to an inadmissible and unreliable expert report to suggest they have now made such a finding. In short, Defendants have offered no genuine

justification for the Challenged Exclusion, let alone made a compelling case that the exclusion at all furthers their newfound justifications. The Challenged Exclusion is unconstitutional and the Court should grant Plaintiffs summary judgment on their equal protection claims.

A. The State's Purported Interest in Cost Savings from Categorically Denying Gender-Confirming Care Fails to Withstand Any Level of Scrutiny.

In their opposition brief, Defendants ignore this Court's reasoning in *Boyden* that a categorical exclusion on coverage for gender-confirming care cannot be justified by an actuarially immaterial cost impact. *Id*. In *Boyden*, the evidence before the Court showed that covering gender-confirming health care would result in a potential cost to the State representing "0.1% to 0.2% of the total cost of providing health insurance to state employees, even adopting defendants' cost estimation." *Id.* at 1000. The Court noted that the parties' experts, David Williams for defendants and Joan Barrett for plaintiffs, agreed that this cost impact was immaterial from an actuarial perspective, concluding that, "on this record, the court is hard-pressed to find 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 1001 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). The Court further held that defendants' contention that they were actually motivated by cost savings was "contradicted by the record." *Id*. at 1000-01.

The record here compels the same result. The parties' actuarial experts here, David Williams for Defendants and Joan Barrett for Plaintiffs, are the same as in *Boyden*. There is no dispute between them that, under any of the savings estimates put forward by Mr. Williams, the potential cost savings to Wisconsin Medicaid (between 0.007 and 0.03 percent of the State's annual Medicaid funding, under any of Mr. Williams's estimates), would be a mere fraction of the already inconsequential impact to the Group Insurance Board in *Boyden*. This tiny impact—

which would likely be offset even further by reduced costs to Wisconsin Medicaid associated with treating previously inadequately-treated gender dysphoria—is actuarially immaterial.

Defendants concede that "the costs [sic] savings are a relatively small portion of Wisconsin's total Medicaid costs," but that "every dollar saved directly contributes to the important interest of cost savings." Opp. Br. at 35. Defendants point to no authority, however, that categorically denying coverage of medically necessary health services to Medicaid beneficiaries for the sake of cost savings is an important, let alone rational, interest. Nor can they. For the same reasons it would be constitutionally intolerable to categorically exclude Medicaid coverage for women's health services like breast or ovarian cancer treatments because doing so might save the State some money, categorically denying a host of medically necessary gender-confirming treatments to transgender people for cost-saving purposes is also constitutionally infirm. Defendants' argument that covering gender-confirming care "could be used to justify an unlimited expansion of benefits, since *every* benefit, taken individually, is a small part of the whole," and that "it cannot be true that the Department must offer unlimited benefits," is untethered from the facts of this case or DHS's legal obligations to provide Medicaid coverage for medically necessary services in a nondiscriminatory manner. *Id*. While it may be true that "where to draw the line to control costs is a policy decision," drawing that line around a protected class of beneficiaries to deny the same services available to other beneficiaries is clearly out of bounds. *Id*.

Finally, as in *Boyden*, the record contradicts Defendants' assertion that cost savings *motivated* the Challenged Exclusion at the time it was promulgated. At best, the limited historical record shows that the 1997 regulatory changes (adding several exclusions, of which "transsexual surgery" was just one) were expected to result in "nominal" cost savings. PFOF ¶ 84. There is

nothing in the record to suggest this was anything more than a pro forma statement in the regulatory materials, let alone a motivating factor for the Challenged Exclusion.

For these reasons, no reasonable factfinder could find that cost savings were a genuine basis for the Challenged Exclusion, let alone one that, on the record before the Court, could be described as "exceedingly persuasive" or one that has been furthered in any way by the Challenged Exclusion.

B. Defendants Have Failed to Show that Their Purported Public Health Justifications Have Any Connection to the Challenged Exclusion.

On the public health front, Defendants repeat that they have an interest in "protecting" transgender beneficiaries from "unproven" treatments, despite offering no evidence to support that characterization or to show DHS was ever motivated by this "concern" in adopting or enforcing the Challenged Exclusion over the years. For all the reasons explained in Plaintiffs' opening brief and above, *see supra* at __, Defendants have offered no evidence that gender-confirming surgeries are "unproven," unsafe, or ineffective. The record before the Court contradicts Defendants' claim that the Challenged Exclusion was ever calculated to protect transgender people or advance any genuine governmental interest.

Lastly, Defendants also fail to rebut Plaintiffs' substantial evidence that significant public health harms—to transgender people and others—result from the Challenged Exclusion. PFOF ¶¶ 58, 74-77, 121, 123, 187; Hughto Rep. at 10-17, 25-27. Nor have they offered anything to rebut the evidence that covering this care will promote legitimate public health interests. PFOF ¶¶ 77; Hughto Rep. at 17-27. Any genuine concern Defendants might now have in protecting transgender people is not advanced in any way by a blanket exclusion on medically necessary, often life-saving medical care, for them.

For these reasons, Defendants have failed to meet their burden of showing that the Challenged Exclusion has any genuine justification or that it serves any important government interest. *See Craig v. Boren*, 429 U.S. 190, 197 (1976); *Virginia*, 518 U.S. at 524; *Whitaker*, 858 F.3d at 1050. Accordingly, this Court should grant Plaintiffs summary judgment on their Equal Protection Clause claim.

IV. THIS COURT SHOULD PERMANENTLY ENJOIN THE CHALLENGED EXCLUSION BUT GIVE THE PARTIES AN OPPORTUNITY TO BRIEF THE SCOPE OF THE INJUNCTIVE RELIEF BEFORE ISSUING A FINAL ORDER.

If the Court grants summary judgment to Plaintiffs on any or all of their claims, a permanent class-wide injunction of the Challenged Exclusion is appropriate. *See* Pls. Br. in Support of Mot. for Summary Judgment at 44-45. This Court has granted permanent injunctions against the State in other cases where it has found a state law unlawful on summary judgment. *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); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015). In short, if the Court concludes that the Challenged Exclusion is unlawful or unconstitutional, it can issue a permanent injunction immediately. There is no reason for supplemental briefing, as Defendants request, on *whether* Plaintiffs are entitled to a permanent injunction.

Defendants argue that because DHS "intends to promulgate emergency and permanent rules that would repeal the Challenged Exclusion," that "there would be nothing for this Court to enjoin" if they are successful in doing so. As Plaintiffs argued in objecting to Defendants' request for a stay of this case during the rulemaking process, that outcome is anything but certain and would likely take from 7.5 to 13 months from the time a permanent rule is introduced, which

has not yet occurred.[5] With a trial date in this case set for September 16 of this year, there is no chance that the Challenged Exclusion will be eliminated through rulemaking by the time this Court rules on the present summary judgment motion.

Plaintiffs agree, however, that supplemental submissions on the issue of the scope of a permanent injunction and other equitable relief—whether in the form of joint or separate remedial plans submitted to the Court or supplemental briefing on the scope of the remedy—is both appropriate and necessary. Accordingly, as Plaintiffs requested in their motion, they reiterate their request that, if the Court grants summary judgment in their favor, that the Court: (1) direct the parties to meet and confer on the terms of a remedial order within 14 days of entry of summary judgment in Plaintiffs' favor (if any); (2) direct the parties to submit a joint or separate remedial plans to the Court; and (3) conduct a hearing on the remedy, if needed, to be held at the conclusion of the damages trial in September or at such other date ordered by the Court.

CONCLUSION

For the reasons stated herein and in Plaintiffs' opening brief, the Court should grant Plaintiffs' Motion for Summary Judgment, permanently enjoin the State's enforcement of the Challenged Exclusion, and direct the parties to submit a proposed remedial plan outlining the scope of the permanent injunctive and equitable relief.

[5] To Plaintiffs' knowledge, DHS has not even promulgated an emergency rule yet, despite representing to the Court previously that they intended to do so on May 13, 2019.

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Respectfully submitted,

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