UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

KARI SUNDSTROM, *et al.*,

Plaintiffs,

v. Case No. 06-C-0112 (CNC)

MATTHEW J. FRANK, *et al.*,

Defendants.

PLAINTIFFS' TRIAL BRIEF

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SUMMARY OF MATERIAL FACTS

Gender Identity Disorder and its Treatment.

Gender Identity Disorder ("GID") is a serious mental health condition that typically requires treatment. Its diagnostic criteria are set out in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), the official diagnosis manual published by the American Psychiatric Association ("APA"). Persons with GID often describe their experience as being born into the wrong body, since they were born with the anatomy typically associated with one gender (e.g., male), but identify with the other (e.g., female). The DSM criteria include "a strong and persistent cross-gender identification," and "a persistent discomfort with one's sex or a sense of inappropriateness in the gender role of that sex" that cause "clinically significant distress or impairment in social, occupational, or other important areas of functioning." "Clinically significant distress or impairment" refer to the existence of serious, persistent symptoms that impede one's life by compromising work, social or intimate relationships, or some combination of these or other life functions. There are different levels of severity of GID. Persons who experience higher levels of distress as a result of the condition have severe or profound GID.

The established medical treatments for severe GID – cross-sex hormone therapy and, in some cases, sex reassignment surgery ("SRS") – reduce and can even cure the serious distress of persons with GID by making their anatomy and appearance conform to their gender identity. For treatment to be medically necessary, the condition need not be a life-threatening emergency condition but may be a chronic illness, such as GID, whose symptoms improve or cease because of the treatment. The persons with GID for whom

hormone therapy or SRS is medically necessary are transsexuals.[1] Hormone therapy and SRS are the only treatments that effectively relieve, or even cure, the suffering caused by severe GID, and a substantial body of scientific research demonstrates that these treatments are effective at reducing the distress, or dysphoria, caused by GID. Psychotherapy may, for example, help persons understand their GID and manage the stresses associated with GID, its treatment, and the reactions of family, friends and employers, but it does not obviate the need for hormones or SRS nor can it cure the disorder. Experts in GID agree that hormone therapy is medically necessary for persons with severe or profound GID, and for others SRS is medically necessary.

The decision whether hormone therapy and surgery are medically necessary requires an individual assessment of the severity of someone's GID. For some transsexuals, hormone therapy is sufficiently effective at treating the person's dysphoria such that SRS is not medically necessary. For a smaller subset of transsexuals, SRS is medically necessary. A substantial body of scientific research shows that these treatments are the only effective ones for severe GID and that psychotherapy, anti-depressants, and other medications are not successful alternatives. As with almost all medical treatment, a patient has the right to refuse the treatment for GID prescribed by medical providers. However, the existence of this choice does not show that the treatment is elective or cosmetic rather than medically mandated.

Male-to-female transsexuals who cannot access treatment often experience serious anxiety, depression, suicidal ideation, and a strong impulse to self-castrate in order to remove their testicles and rid themselves of the effects of testosterone. The

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[1] Although there are some subtle differences in the way different sources define transsexual, Plaintiffs use the word here to describe persons with severe Gender Identity Disorder who have a serious medical need for hormone therapy or sex reassignment surgery.

symptoms of persons with GID who have another psychiatric disorder typically worsen when their GID is not treated. Untreated, studies show that twenty to thirty-five percent of persons with GID will commit suicide or attempt it. A significant percentage of male-to-female transsexual inmates whose GID is untreated either attempt or succeed at castrating themselves. The likelihood of self-castration or suicide among persons with untreated serious GID is especially great in prison, since there are no alternative means for the inmate to access treatment. A transsexual who attempted suicide in the past because of her GID is at greater risk of attempting suicide again. A male-to-female transsexual whose hormone therapy is interrupted faces a serious risk of negative health consequences to her body and will likely experience menopause-like symptoms, hot flashes, and mood swings, in addition to the psychological symptoms experienced by other transsexuals denied initiation of treatment. Re-starting a transsexual on hormone therapy will reverse many of the harmful physical and psychological effects of that treatment's cessation.

Plaintiffs are Inmates with GID for Whom Hormone Therapy is Medically Necessary.

All of the Plaintiffs are inmates with GID who have taken feminizing cross-sex hormone therapy for many years, and consequently all have, to varying degrees, feminine physical characteristics. In addition, some of them have undergone further procedures to make themselves appear more feminine. For example, Plaintiff Andrea Fields has undergone breast augmentation surgery. All of the Plaintiffs identified and expressed themselves as women from an early age (well before they began hormone therapy) by using stereotypically female names, dressing in female clothing, wearing makeup,

choosing feminine hairstyles, and walking and talking in stereotypically feminine ways. Several of the Plaintiffs attempted suicide several times prior to incarceration, in some cases expressly because of their transsexualism.

All of the Plaintiffs were diagnosed with GID by DOC medical providers who also prescribed hormone therapy for them, because the providers determined that hormone therapy was medically necessary for them. However, because of Act 105, DOC began to taper the hormone dosages of the Plaintiffs, and they consequently experienced a number of negative symptoms, including mood swings, hot flashes, severe headaches, bloating, crying fits, nausea and depression, until, as a result of the preliminary injunction entered in this case, the hormone dosages were returned to their previous levels. The reinstatement of hormone therapy ended the adverse withdrawal symptoms experienced by the Plaintiffs.

Other inmates whom DOC medical personnel have diagnosed with GID have not been evaluated to determine whether hormone therapy is medically necessary for them, because of Act 105. One of those inmates is Kenneth Krebs, a/k/a Karen Krebs. Another, Erik Huelsbeck, a/k/a Erika Huelsbeck, was in DOC-administered facilities until she was transferred to the Wisconsin Resource Center in July 2007. Dr. Randi Ettner examined Karen Krebs and concluded that hormone therapy is medically necessary for her.

Defendants are Aware that GID is a Serious Medical Condition Requiring Treatment.

DOC medical personnel agree that GID is a serious health condition that requires treatment, and that hormone therapy and sex reassignment surgery are medically

necessary treatments for some individuals with GID. Prior to the passage of Act 105, DOC's practice was to prescribe hormone therapy for inmates with GID who were receiving it prior to incarceration and to initiate hormone therapy for inmates with GID for whom they concluded it was medically necessary. If not for Act 105, DOC would continue its former policy of prescribing hormone therapy to inmates who were taking it when incarcerated and to other inmates for whom they conclude it is medically mandated. DOC policy prior to the passage of Act 105, as set out in Executive Directive 68, prohibited medical personnel from prescribing SRS as a treatment for GID, but DOC leadership could have overridden that policy if medical judgment required them to do so in order to treat a severe case of transsexualism.

The Defendants know the serious medical and psychiatric risks of denying hormone therapy to inmates with GID, including gender dysphoria, depression, anxiety, and suicidal ideation. DOC medical and psychiatric personnel agree that hormone therapy is medically necessary treatment for Plaintiffs. They also admit that certain inmates with GID who have not received hormone therapy in the past, such as Karen Krebs, should be evaluated to determine whether hormone therapy is medically necessary for them. DOC would have evaluated Ms. Krebs for hormone therapy, if Act 105 did not make that evaluation futile.

DOC medical personnel agree that medically necessary treatment should not be decided solely based on the care commonly reimbursed by health insurance, since inmates do not have the freedom of choice over health insurance and care available to others. They also not that many inmates receive better health care in prison they did before incarceration, because so many people are uninsured or underinsured.

Consequently, the fact that some inmates with GID did not have insurance to pay for their GID treatment does not distinguish them from other inmates.

Act 105 Takes Away the Medical Discretion of DOC Medical Personnel to Prescribe the Medical Treatment for GID They Deem Medically Necessary.

Act 105 prevents DOC from prescribing hormone therapy or SRS to alter a "person's physical appearance so that the person appears more like the opposite gender." Wis. Stat. § 302.386(5m). Although the Act is directed at the funding of these therapies, the result, in light of DOC's policy against allowing inmates to pay for or seek insurance coverage to pay for their health care, is a complete bar on these treatments in DOC administered prisons. DOC medical staff can prescribe hormone therapy to treat conditions other than GID, such as estrogen replacement therapy in post-menopausal women, without violating the Act. Only transsexuals are denied across-the-board medically necessary treatment without the exercise of any individualized medical judgment. No laws other than Act 105, and no DOC policies, completely deprive DOC personnel of their ability to exercise medical judgment to provide appropriate treatment.

Act 105 was drafted without the involvement of DOC, was passed against the advice of DOC medical personnel who testified before the Legislature, and was motivated by skepticism about the legitimacy of GID and hostility toward transsexuals. DOC's Mental Health Director, Dr. Kevin Kallas, testified that the negative consequences of Act 105 outweighed any benefit from the Act, since barring hormone therapy can cause significant health risks whose treatment would offset any cost savings from not providing hormones. In the legislative hearing at which Dr. Kallas testified, some legislators expressed skepticism that GID is a valid diagnosis, notwithstanding the

fact that no other medical personnel spoke. No medical or correctional personnel testified before the legislature other than Dr. Kallas and Dr. David Burnett, the Medical Director for DOC. The legislative sponsors of the bill that became Act 105 labeled it the "Inmate Sex Change Prevention Act," stating in press releases that it aimed to prevent "bizarre taxpayer funded sex procedures," "outlandish taxpayer funded medical procedures," and "the most ridiculous program I've seen yet in the state government." "[I]f [DOC] can't do the right thing on their own, it looks like we'll have to legislate common sense," wrote the legislative sponsors.

Act 105 Offers No Material Improvement in Security for Transsexuals or Cost Savings for DOC.

Even if effeminate inmates are at greater risk of harassment or assault by other inmates in a male prison than are more masculine ones, Plaintiffs and other male-to-female transsexual inmates have long-standing female identities and find various ways to identify themselves as women and express their femininity even in the absence of hormone therapy. They do so by the way they dress, style their hair, groom, walk and talk and by their choice of female names and pronouns. They also simply disclose their female identity to others, whether or not they are on hormone therapy. They are motivated to identify and express themselves as women, even in prison, in those ways that are available to them even before they have taken hormone therapy to help them alleviate their gender dysphoria. However, even though these efforts may reduce slightly the gender dysphoria, the failure of these efforts by themselves to successfully treat transsexuals' GID is virtually assured.

Plaintiffs and other inmates, such as Karen Krebs, have expressed and identified

themselves as women while in prison, since their female identity does not go away even though they are in a male prison. The appearance of each of the Plaintiffs has been feminized to varying degrees by taking hormones for many years, and some of those feminine physical characteristics are permanent. Plaintiffs have made themselves appear feminine in ways other than the feminine physical characteristics that are the result of their years of hormone usage. In order to protect themselves from harassment or assault, some of the Plaintiffs take precautions to avoid attracting attention from the male inmates, such as avoiding tight or revealing clothing, that are the same kinds of measures any woman placed in a male prison would be expected to take. However, none of the Plaintiffs has denied her female identity, refused to accept feminizing hormones, or tried to prevent others from seeing them as women while in prison. Karen Krebs has not received hormone therapy, but wears her hair in a long, feminine style, shaves her face, legs and armpits, and tells prison staff and other inmates that she identifies as a woman.

All of the Plaintiffs, and former Plaintiffs Kari Sundstrom and Lindsey Blackwell, have been or were in the general population for most of their sentences, largely without experiencing serious harassment or assault. The one remarkable exception is Jessica Davison, who was raped in prison. Ms. Davison had identified and expressed herself as a woman for a number of years and had also taken feminizing hormones *before* she was incarcerated. There is no evidence to suggest that she became significantly more feminine in appearance or presentation during her stay in prison than she already was. Most importantly, there is no evidence that Ms. Davison's rape could have been prevented by denying her medically necessary hormone therapy while in DOC custody, nor is that a reasonable conclusion to draw from the evidence.

DOC is responsible for protecting Ms. Davison and other vulnerable inmates from harassment and assault, and it can and often does do so through readily available means, such as closer monitoring of inmates and moving those who need protection to different housing units. These measures cost DOC little or nothing. Their failure to protect Ms. Davison does not show that their procedures are generally ineffective. Plaintiffs Davison and Andrea Fields, former Plaintiff Kari Sundstrom, and Karen Krebs were or are housed at Oshkosh Correctional Institution (OSCI). The Warden of OSCI testified that an inmate who is effeminate in appearance or behavior is not at a higher risk of sexual assault than other inmates and does not require more correctional resources. There is no evidence that refusing to provide a transsexual hormone therapy or SRS will reduce any security risk transsexuals present. Similarly, there is no evidence that cutting someone off of hormone therapy makes her more secure against assault or harassment. Additionally, transsexuals are not the only effeminate inmates in prison, and effeminate inmates are not the only ones who may be at risk of harassment or assault. Medical conditions, other than GID, and their treatment present security challenges to which DOC has responded and must continue to respond.

The cost of hormone therapy is very small in comparison to other medications regularly prescribed for inmates by DOC medical personnel. Although more expensive than hormone therapy, SRS is no more expensive than some of the surgeries DOC provides for other serious medical conditions, such as organ transplants and open heart procedures.

ARGUMENT

I. Defendants' enforcement of Act 105 to deny medically necessary treatment to Plaintiffs violates the Eighth Amendment.

"[C]oncepts of dignity, civilized standards, humanity, and decency" embodied in the Eighth Amendment "establish the government's obligation to provide medical care for those whom it is punishing by incarceration," because "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle v. Gamble*, 429 U.S. 97, 102-103 (1976). *See also Boyce v. Moore*, 314 F.3d 884, 888-89 (7th Cir. 2002); *Meriwether v. Faulkner*, 821 F.2d 408, 411 (7th Cir.), *cert. denied*, 484 U.S. 935 (1987). Prison officials violate the Eighth Amendment when their actions or failures to act in response to prisoners' health conditions evince "deliberate indifference to serious medical needs of prisoners." *Estelle*, 429 U.S. at 104. An Eighth Amendment plaintiff must prove that the prison's care was objectively inadequate to treat an objectively serious medical need and that the responsible prison official acted or failed to act with subjective "deliberate indifference." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

Defendants' enforcement of Act 105 results in objectively inadequate care for an objectively serious medical need, GID. A serious medical need is a medical or mental health condition diagnosed by a health care professional that requires treatment. *See Monmouth Co. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987); *see also Edwards v. Snyder*, 478 F.3d 827, 830-31 (7th Cir. 2007) (the objective "serious medical need" element of Eighth Amendment claim is satisfied by "a medical condition 'that has been diagnosed by a physician as mandating treatment'"). "A prescription medication is,

by definition, medical treatment that has been deemed necessary by a medical professional." *Chambers v. Eppolito*, No. 06-cv-449-PB, 2007 WL 1892093 *5 (D.N.H. June 29, 2007). Transsexuals' need for medically prescribed treatment for their GID is, therefore, a serious medical need.

Psychiatric or psychological conditions have long been recognized as serious medical needs in this Circuit, *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983), and GID, a recognized mental health condition, is no exception. *Meriwether*, 821 F.2d at 413 (GID "may present a 'serious medical need'" under Eighth Amendment); *see also De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) (serious medical need for treatment of compulsion to self-castrate caused by termination of transsexual prisoner's hormones); *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Gammett v. Idaho State Bd. of Corrections*, No. CV05-257-S-MHW, 2007 WL 2186896, *14-15 (D. Idaho July 27, 2007); *Barrett v. Coplan*, 292 F.Supp.2d 281, 286 (D.N.H. 2003); *Brooks v. Berg*, 270 F. Supp. 2d 302, 309-10 (N.D.N.Y. 2003), *vacated on other grounds*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003), *and rev'd on other grounds sub nom. Lewis v. Berg*, No. 9:00-CV-1433 (GLS/DEP), 2006 WL 1064174 (N.D.N.Y. April 20, 2006); *Kosilek v. Maloney*, 221 F.Supp.2d 156, 184 (D.Mass. 2002) (severe GID is serious medical need);*Wolfe v. Horn*, 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001); *Phillips v. Michigan Dep't of Corrections*, 731 F.Supp.792, 799 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991).

The Eighth Amendment requires that treatment for serious medical needs be objectively "adequate." *Meriwether*, 821 F.2d at 411. "To prevail on an Eighth Amendment claim 'a prisoner is not required to show that he was literally ignored.'"

Greeno v. Daley, 414 F.3d 645, 653-54 (7th Cir. 2005) (quoting *Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000)). Nor must a plaintiff "prove a 'complete failure to treat.'" *Gammett*, 2007 WL 2186896, *12 (quoting *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989); *see also Edwards*, 478 F.3d at 831 ("[A] plaintiffs' receipt of *some* medical care does not automatically defeat a claim of deliberate indifference if a fact finder could infer the treatment was . . . blatantly inappropriate . . .") (citation omitted). Rather, the determination of what care is adequate for a particular inmate's condition "is a question of judgment that does not lend itself to mechanical resolution." *Ralston v. McGovern*, 167 F.3d 1160, 1161-62 (7th Cir. 1999) (ascertaining whether medical care is "adequate" is "a matter of determining the civilized minimum of public concern for the health of prisoners, which depends on the *particular circumstances of the individual prisoner*") (emphasis added). As another court explained, "[a]dequate medical care requires treatment by qualified medical personnel who provide services that are of a quality acceptable when measured by prudent professional standards in the community, tailored to an inmate's particular medical needs, and that are based on medical considerations." *Barrett*, 292 F. Supp. 2d at 285 (citing *United States v. DeCologero*, 821 F.2d 39, 42-43 (1st Cir. 1987)).

While recognizing that "medical 'need' runs the gamut," *Ralston*, 167 F.3d at 1161-62, the Seventh Circuit has made clear that providing plainly ineffective or substantially less effective treatment violates the obligation to provide objectively adequate treatment. *Kelley v. McGinnis*, 899 F.2d 612, 616 (7th Cir. 1990); *Harrison v. Barkley*, 219 F.3d 132, 138 (2d Cir. 2000) ("Even if prison officials give inmates access to treatment, they may still be deliberately indifferent to inmates' needs if they fail to

provide prescribed treatment.") (citation omitted); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985) ("[M]edical care . . . so cursory as to amount to no treatment at all" violates Eighth Amendment); *West v. Keve*, 571 F.2d 158, 162 & n.6 (3d Cir. 1978) (providing "easier and less efficacious treatment" may result in liability) (citation omitted). This is equally true where the care at issue is psychiatric care. *See, e.g., Steele v. Shah*, 87 F.3d 1266, 1269 (11th Cir. 1996) (psychiatric care that deviates so substantially from the accepted standards of care for that condition can constitute deliberate indifference).

Likewise, the Seventh Circuit has held on numerous occasions that delaying or denying medical treatment for reasons unrelated to the exercise of medical judgment can amount to a violation of the Eighth Amendment. *See, e.g.*, *Edwards*, 478 F.3d at 831 (inmate stated Eighth Amendment claim where he was denied medical treatment for two days because prison doctor was "ringing in the new year" and did not want to be disturbed); *Greeno*, 414 F.3d at 654 (denying summary judgment where there was a factual dispute regarding whether denial of medication to inmate was a product of erroneous medical judgment or a desire to make inmate suffer); *Foelker v. Outagamie County,* 394 F.3d 510, 513 (7th Cir. 2005) (same); *Kelley*, 899 F.2d at 616 (holding that inmate could recover if he could prove that "clinic personnel deliberately gave him a certain kind of treatment knowing that it was ineffective, either as a means of toying with him or as a way of choosing 'the easier and less efficacious treatment'") (quoting *Estelle,* 429 U.S. at 104 n.10 (internal quotations omitted)). Other circuits have ruled likewise. *See, e.g., Durmer v. O'Carroll*, 991 F.2d 64, 67-69 (3d Cir. 1993) ("if the failure to

provide adequate care . . . was deliberate, and motivated by non-medical factors, then [plaintiff] has a viable claim").

This is not a situation where hormones or surgery were denied because a doctor decided, in the exercise of medical judgment, that they were not medically necessary. To the contrary, in this case, Plaintiffs will present evidence that each of them suffers from Gender Identity Disorder of such a severity that hormone therapy is a necessary part of adequate treatment for them. That showing will establish that they have a serious medical need for hormone therapy.

Nevertheless all inmates for whom hormones or surgery are medically necessary will be denied these forms of treatment because of Act 105's blanket ban on their use to treat GID. Because Defendants are barred by Act 105 from providing treatments that the evidence will show that DOC health care staff believes are medically required, the care they provide is objectively inadequate. *Durmer*, 991 F.2d at 69 (If the failure to provide adequate care is "deliberate and motivated by non-medical factors," it gives rise to Eighth Amendment liability.); *see also Edwards*, 478 F.3d at 830 (allegation that plaintiff "failed to receive adequate, timely care for a nonmedical reason" states deliberate indifference claim); *Lanzaro*, 834 F.2d at 347 ("by specifically categorizing elective abortions as beyond its duty to provide, the County denies to a class of inmates the type of individualized treatment normally associated with the provision of adequate medical care").

In fact, since the enactment of Act 105, the evidence will show that Defendants have failed to evaluate for the appropriateness of hormone therapy some prisoners who have been diagnosed with GID, but have never previously received hormones, because

such evaluations are made futile by Act 105. Yet the Eighth Amendment right to adequate medical care requires that prisoners be provided not only with adequate treatment but also with necessary diagnostic and evaluative services to determine what treatment is necessary. *Bismark v. Lang*, No. 2:02-cv-FtM-29SPC, 2006 WL 1119189, *13 (M.D. Fla. April 26, 2006) (adequate medical care "may include diagnostic tests known to be necessary, not just medicinal and surgical care.") (quoting *Harris v. Coweta County*, 21 F.3d 388, 394 (11th Cir. 1994)). Accordingly, by not evaluating prisoners with GID and not forming individualized medical judgments as to whether hormone therapy or sex reassignment surgery is medically necessary for them, Defendants are deliberately indifferent to those prisoners' serious medical needs. *Brooks*, 270 F. Supp. 2d at 312 ("Prison officials cannot deny transsexual inmates all medical treatment simply by referring to a prison policy which makes a seemingly arbitrary distinction between inmates who were and were not diagnosed with GID prior to incarceration").

In addition to being objectively inadequate, Defendants' decision to deny adequate treatment for Plaintiffs' serious medical need also runs afoul of the "subjective" prong of the *Estelle* standard. As the Seventh Circuit has explained,

> To satisfy the subjective component, a prisoner must demonstrate that prison officials acted with a "'sufficiently culpable state of mind.'" *Farmer,* 511 U.S. at 834, 114 S.Ct. 1970 (quoting *Wilson v. Seiter,* 501 U.S. 294, 297, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). The officials must know of and disregard an excessive risk to inmate health; indeed they must "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and "must also draw the inference." *Farmer,* 511 U.S. at 837. This is not to say that a prisoner must establish that officials intended or desired the harm that transpired. *Walker [v. Benjamin],* 293 F.3d [1030,] 1037 [(7th Cir. 2002)]. Instead, it is enough to show that the defendants knew of a substantial risk of harm to the inmate and disregarded the risk. *Id.* Additionally, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer,* 511 U.S. at 842.

Greeno, 414 F.3d at 653.

Plaintiffs will show that Defendants have restricted access to medically necessary care for transsexual inmates knowing that there was a high risk that serious harm could result from denying them hormones or surgery. Defendants are subjectively aware of the serious medical and psychiatric risks of denying hormone therapy for Plaintiffs and other transsexuals for whom it is medically necessary. Specifically, DOC medical personnel will testify that for some individuals with GID, failure to provide medically necessary hormone therapy could cause adverse consequences to psychological well-being, including ongoing gender dysphoria, depression, anxiety, substance abuse, and, for some, even suicidal ideation. DOC medical personnel also acknowledge that hormone therapy might relieve the desire to self-castrate that is sometimes caused by GID and that, for some inmates with GID, SRS could be medically necessary. This is sufficient to satisfy the "subjective" prong of the Eighth Amendment test. *Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996) ("a prisoner claiming deliberate indifference need not prove that the prison officials intended, hoped for, or desired the harm that transpired").

In an attempt to frame this case as merely a dispute about particular medical decisions, Defendants insist that psychotherapy alone can constitute adequate medical care. This argument cannot withstand scrutiny. First of all, as a factual matter, the testimony of Plaintiffs' experts and Defendants' medical staff will establish that each of the Plaintiffs suffers from Gender Identity Disorder of such a severity that hormone therapy is a necessary part of adequate treatment for them. The fact that some transsexual individuals may not need hormone therapy or SRS to alleviate the distress associated with their GID does not make these treatments any less medically necessary

for Plaintiffs. *See, e.g., Lanzaro*, 834 F.2d at 348 (existence of alternative approaches of childbirth or abortion to pregnancy does not "affect the legal characterization of the nature of the medical treatment necessary to pursue either alternative").[2] Consequently, this case is unlike either *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997), or *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986), cases in which there was no definitive medical judgment by treating physicians that hormone therapy was medically necessary to treat the plaintiffs' alleged GID.[3] In contrast to those cases, Plaintiffs here are prisoners with gender identity issues who *both* have been diagnosed with GID and have been prescribed medically necessary treatment for that condition by DOC medical providers. But for Act 105, Plaintiffs' DOC doctors would proscribe GID treatment for Plaintiffs.

More importantly, however, courts have repeatedly rejected prisons' attempts to institute a "one size fits all" approach to the treatment of GID as constitutionally unsound. For example, in *Kosilek*, the warden contended that the fact that the inmate had received "some therapy" – i.e., psychotherapy – precluded the inmate from challenging the policy denying her access to hormones. The court rejected this argument, noting that the prison guidelines

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[2] Likewise, the fact that some private insurance policies do not provide coverage for hormone therapy or SRS for transsexual individuals does not undermine the fact that this care is medically necessary for Plaintiffs. As the court explained in *Kosilek*, "The Supreme Court has never held that a law-abiding private citizen has a right to adequate medical care. It is, however, clearly established that an inmate has such a right." 221 F. Supp. 2d at 192 (noting that the Seventh Circuit's reasoning in *Maggert* regarding the lack of Medicaid coverage for hormone therapy and SRS "ignores [this] crucial constitutional consideration"). *See also Johnson v. Daley*, 339 F.3d 582, 587-88 (7th Cir. 2003) (prisons have an obligation to "provide care appropriate to [inmates'] serious medical needs because imprisonment takes away their ability to fend for themselves.") (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989)).

[3] In *Maggert*, the plaintiff had never even been diagnosed with GID, so the Circuit Court's subsequent discussion of the "broader issue" of its appropriate treatment in prison was unnecessary to the decision of the case, as the court itself recognized, and thus is *dictum*. *Maggert*, 131 F.3d at 670 (affirming dismissal where the prison "psychiatrist does not believe that Maggert suffers from gender dysphoria . . . Maggert has not submitted a contrary affidavit by a qualified expert and so has not created a genuine issue of material fact that would keep this case alive."). In *Supre*, although the plaintiff clearly had GID, the prison medical professionals involved in her care disagreed about whether hormone therapy was medically necessary. *Supre*, 792 F.2d at 960.

> preclude[d] the possibility that Kosilek will ever be offered hormones or sex reassignment surgery, which are the treatments commensurate with modern medical science that prudent professionals in the United States prescribe as medically necessary for some, but not all, individuals suffering from gender identity disorders. The Guidelines, in effect, prohibit forms of treatment that may be necessary to provide Kosilek any real treatment.

221 F. Supp. 2d at 186. Other courts have likewise held that the Eighth Amendment does not allow prisons to deny categorically certain forms of medical treatment (e.g., hormone therapy) simply by pointing to the fact that inmates have access to other forms of treatment (e.g., psychotherapy or psychotropic medications) that may be wholly inadequate in their particular case. *See, e.g., De'Lonta*, 330 F.3d 630, 635 (4th Cir. 2003) (contrasting individualized decisions about propriety of hormone therapy and blanket policy prohibiting provision of hormones in all cases); *Allard v. Gomez,* 9 Fed. Appx. 793, 794-95 (9th Cir. 2001) (unpublished) (accord); *Wolfe*, 130 F. Supp. 2d at 653 (prescribing Prozac and psychotherapy may be adequate for treatment of depression but inadequate for treatment of GID).

Making a treatment decision by mechanical application of a general rule or blanket policy (e.g., that psychotherapy is always sufficient), rather than by applying independent medical judgment about an individual prisoner's need for a particular treatment, constitutes deliberate indifference. *Bismark*, 2006 WL 1119189 at *19 ("This is not a case where plaintiff simply disagrees with the treatment modality of prison doctors. . . . While doctors can disagree with one another without violating Eighth Amendment rights, the facts of this case are overwhelmingly in support of deliberate policy decisions not to provide needed medical care which was known to have been prescribed by the experts."); *Mahan v. Plymouth County House of Corr.*, 64 F.3d 14, 18

& n.6 (1st Cir. 1995) ("inflexible" application of "policy relating to prescription medications" that prevents use of a medication necessary to treat a serious medical need may violate Eighth Amendment); *Jorden v. Farrier*, 788 F.2d 1347, 1348-49 (8th Cir. 1986) (prison medical administrators' application of pharmaceutical formulary to preclude use of medicine prescribed by treating physician may be "an arbitrary decision amounting to cruel and unusual punishment").

Consequently, Defendants' application of Act 105 to deny hormone therapy to Plaintiffs, contrary to the medical judgment of Plaintiffs' care providers and other medical experts that such therapy is necessary for them, constitutes deliberate indifference to Plaintiffs' serious medical need for hormone therapy to treat their GID, in violation of the Eighth Amendment. *De'Lonta*, 330 F.3d at 635 (plaintiff may prevail by proving that "refusal to provide hormone treatment to [plaintiff] was based solely on the policy rather than on a medical judgment concerning [plaintiff's] specific circumstances"); *Allard,* 9 Fed. Appx. at 794-95 (unpublished) (triable issue as to "whether hormone therapy was denied . . . on the basis of an individualized medical evaluation or as the result of a blanket rule, the application of which constituted deliberate indifference to [plaintiff's] medical needs"); *Wolfe*, 130 F. Supp.2d at 653 (E.D. Penn. 2001) ("abrupt termination of prescribed hormonal treatments by a prison official with no understanding of Wolfe's condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute 'deliberate indifference.'"); *Phillips*, 731 F.Supp. at 800 (noting that withdrawal of hormones would "wreak havoc on plaintiff's physical and emotional state" and concluding that "[t]aking measures which actually reverse the effects of years of healing medical treatment . . . is measurably

worse" than "fail[ing] to provide an inmate with care that would improve his or her medical state," thus "making the cruel and unusual determination much easier"); *Barrett*, 292 F.Supp.2d at 285 ("A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs and prescribing and providing adequate care to treat those needs violates the Eighth Amendment."); *Houston v. Trella*, No. 04-1393 (JLL), 2006 WL 2772748, * 21 (D.N.J. Sept. 25, 2006) (existence of "agreement banning female hormone therapy as a form of treatment to all INS detainees regardless of the transitional state in which they are in [*sic*] is sufficient to show a deliberate policy of denying treatment" that "is sufficient to create a genuine issue of material fact as to [jail medical personnel's] deliberate indifference to a medical need").[4]

Defendants also argue that they are permitted to deny Plaintiffs adequate medical treatment for their serious medical needs due to concerns about security. While courts acknowledge that "'the realities of prison administration' are relevant to the issue of deliberate indifference," *Kosilek*, 221 F. Supp. 2d at 191 (quoting *Helling v. McKinney*, 509 U.S. 25, 37 (1993)), they repeatedly emphasize that "judgments concerning the care to be provided to inmates for their serious medical needs generally must be based on medical considerations." *Id.* (citing, *inter alia*, *Estelle*, 429 U.S. at 104 n.10; *Durmer*, 991 F.2d at 67-69). For this reason, "the policy of deferring to the judgment of prison officials in matters of prison discipline and security does not usually apply in the context

[4] A condition need not be life-threatening and the medical treatment need not be "essential" to qualify as a "serious medical need." *See Gutierrez v. Peters*, 111 F.3d 1364, 1370-71 (7th Cir. 1997) (Eighth Amendment prohibits "deliberate indifference to *serious*, not *essential*, medical needs"; delay in treating painful conditions "that are not life-threatening can support Eighth Amendment claims") (emphasis in original). Even if there were such a requirement, the evidence shows that untreated GID is often life-threatening.

of medical care to the same degree as in other contexts." *Wellman*, 715 F.2d at 272.[5]

In *Kosilek*, the court acknowledged that prison administrators might have legitimate security concerns if inmates were given hormone therapy or SRS. Nevertheless, the court made clear that the existence of such concerns did not give the prison free rein to deny transsexual inmates appropriate medical care for their GID. *Kosilek*, 221 F. Supp. at 161 (noting that the Eighth Amendment "proscribes the *unnecessary* infliction of pain on the prisoner") (emphasis in original). Rather, a court must assess whether denying the inmate adequate medical care is *necessary* to address the prison's security concerns. Specifically, in determining whether the denial of hormones and SRS would constitute the infliction of "unnecessary" punishment in the *Kosilek* case, the court enumerated a number of factors that would need to be taken into account, including the existence (or absence) of security concerns already posed by the transsexual inmate,[6] the fact that other penal institutions have successfully implemented health care programs that allow patients to access hormone therapy and SRS where medically necessary, *id.* at 194, and the existence of alternative placements for the transsexual inmate or others who might pose a risk to the transsexual inmate.[7] *Id.* at 194-

[5] Even if Defendants were able to show that the Act's ban on medical treatment was rationally related to legitimate penological interests in security, and they cannot, Defendants would still violate the entirely different, and less deferential, Eighth Amendment standard. *Johnson v. California*, 543 U.S. 499, 511 (2005) ("We judge violations of [the Eighth] Amendment under the 'deliberate indifference' standard, rather than" under lesser standards, such as "*Turner*'s 'reasonably related' standard" or rational basis review). "This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment." *Id.* "Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary." *Id.* (quoting *Spain v. Procunier*, 600 F.2d 189, 193-94 (9th Cir. 1979)).

[6] Specifically, the court commented that, "if this [security] issue arises, [Warden] Maloney may wish to consider that Kosilek is already living largely as a female in the general population of a medium security male prison. This has not presented security problems." 221 F. Supp. 2d at 194.

[7] The existence of one constitutional duty – to keep transsexual inmates safe – does not negate the prison's constitutional duty to provide adequate medical care for transsexual inmates' serious medical needs. *Cf. Fricke v. Lynch*, 491 F. Supp. 381, 385, 387 (D.R.I. 1980) (school's duty to keep gay students safe does not justify school censoring gay students' speech). As the *Kosilek* court explained, "[p]rison officials must take

95. As the prison had not yet engaged in an individual assessment of Kosilek, the district court found it premature to rule on whether any "security" defense to care deemed medically necessary for Kosilek could survive an Eighth Amendment challenge.

All of the factors identified by the *Kosilek* court are equally applicable here. First of all, the transsexual women who need access to hormone therapy and SRS are already presenting as feminine in the context of a male prison. Yet, the warden of one of the facilities where several of the Plaintiffs in this case have been housed testified that transsexual prisoners have not created increased security risks or required special security measures to prevent other prisoners from assaulting them. Even assuming, however, that there is some increase in risk of assault for effeminate prisoners, Defendants offer no plausible argument for why denying hormones or surgery to transsexual prisoners would mitigate any such risk. Male-to-female transsexuals, by definition, have a strong female gender identity and experience a persistent discomfort with their assigned male sex. For this reason, they express their female gender identity in whatever ways that they can – namely, through their appearance, mannerisms, name and pronoun choices, and other ways, including by explicitly identifying themselves as women. They do so even if denied hormones or surgery. Thus, even if male-to-female transsexual prisoners are denied medically appropriate hormone therapy or surgery, many will continue to identify or present themselves femininely. Moreover, these Plaintiffs were taking hormones when

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reasonable measures to guarantee the safety of inmates, as well as to provide them with adequate medical care. One way to attempt to discharge both of these duties to a transsexual inmate taking hormones is to make reasonable efforts to incarcerate him with a less dangerous population of other prisoners." 221 F. Supp. 2d at 194 (internal citations and quotations omitted). While this case involves GID, the dangers associated with crediting a "security concern" defense to Eighth Amendment claims extend beyond this medical condition. Yet, no court would allow a prison to justify denying a female prisoner a medically necessary hysterectomy on the ground that she would be more vulnerable to sexual assault by guards because her infertility makes the offense less detectable. Nor could a prison justify denying a diabetic prisoner a medically necessary amputation because his lack of mobility might make him a more likely target of abuse.

they were incarcerated, so they already appeared feminine to varying degrees. Taking them off of hormones would not completely rid them of the female sex characteristics that result from taking hormones, since many of those characteristics are irreversible. Therefore, Defendants simply cannot plausibly assert that denying transsexual inmates' Eighth Amendment rights is necessary to ensure security.

Moreover, this court, like the court in *Kosilek*, can take judicial notice of the fact that other correctional systems have not felt it necessary (or appropriate) to categorically deny transsexual inmates certain types of medically appropriate care in order to meet their security concerns and safety obligations. 221 F. Supp. at 194. Finally, in the event that certain transsexual inmates are victims of harassment or violence, or certain inmates are perpetrating violence against transsexual inmates, Defendants have tools at their disposal, including administrative segregation and discipline, to address those problems on a case-by-case basis. *See Jorden*, 788 F.2d at 1348-49 (8th Cir. 1986) (formulary restriction driven by concerns about drug hoarding and abuse had to be applied on case-by-case basis to avoid unnecessary denial of adequate medical care to particular inmate); *Sawyer v. Sigler*, 320 F. Supp. 690, 694 (D. Neb. 1970) (accord), *aff'd*, 455 F.2d 818, 819 (8th Cir. 1971). Therefore, Defendants have no constitutionally sufficient justification for denying transsexual inmates adequate medical care for their GID.

Other justifications for denying medically necessary hormone therapy or SRS to transsexual inmates likewise cannot withstand scrutiny. "[C]oncern for controversy is not a constitutionally permissible basis for denying an inmate necessary medical care." *Kosilek*, 221 F. Supp. 2d at 192. Nor can cost considerations justify the denial of medically necessary care. *Wellman*, 715 F.2d at 274; *see also Durmer*, 991 F.2d at 68-69

(deliberate indifference exists where "motive for deliberately avoiding" a treatment was that the treatment "would have placed a considerable burden and expense on the prison and was therefore frowned upon," rather than individual medical considerations); *Ancata*, 769 F.2d at 705 ("Lack of funds . . . cannot justify an unconstitutional lack of competent medical care and treatment for inmates."); *Kosilek*, 221 F. Supp. at 161 ("It is not . . . permissible to deny an inmate adequate medical care because it is costly. In recognition of this, prison officials at times authorize CAT scans, dialysis, and other forms of expensive medical care required to diagnose or treat familiar forms of serious illness.").[8]

II. Defendants' enforcement of Act 105 to deny medically necessary treatment to Plaintiffs even though they provide necessary medical treatment to other inmates violates the Equal Protection Clause.

"[T]he Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority." *Nabozny v. Podlesny*, 92 F.3d 446, 457 (7th Cir. 1996).

Persons who meet the GID diagnostic criteria and have a serious medical need for cross-sex hormone therapy or sex reassignment surgery are a definable minority – transsexuals. The classification created by Act 105 discriminates between similarly situated classes. By its terms, Act 105 categorically prohibits hormone therapy or surgery that is intended "to alter [a prisoner's] physical appearance so that the [prisoner] appears more like the opposite gender." Wis. Stat. Ann. § 302.386(5m). In doing so, Act 105 categorically denies access to medical treatment that is needed by transsexual

[8] The evidence in this case will show that hormone therapy is a relatively low cost treatment and that the alternative costs of psychiatric and other care to treat the severe depression, anxiety, suicidal ideation and other symptoms that typically result when hormones are denied far outweigh that cost. Sex reassignment surgery is more costly than hormone therapy, but the evidence will show that other expensive surgical procedures are provided by DOC, and that SRS may, in some cases, be the only treatment that will effectively prevent attempts at suicide or self-mutilation.

prisoners, but does not categorically deny access to medical treatment that is needed by other prisoners (including hormone therapies and surgeries that are not intended to induce gender transition, such as treatments for hormone deficiencies or estrogen treatments for post-menopausal women). Additionally, Act 105 sets transsexuals apart from other inmates and denies only them essential medical care, since there is no other law or DOC policy that bans necessary medical care across the board.

Discrimination is intentional "whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918); *see also Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Act 105 is directed only against medical treatment that is needed by transsexuals. Wis. Stat. Ann. § 302.386(5m). Moreover, since, in practice, Defendants enforce Act 105 only against transsexuals, they intentionally discriminate. S*ee also M.L.B. v. S.L.J.*, 519 U.S. 102, 126-27 (1996) (distinguishing disparate enforcement from disparate impact).

Act 105: (1) singles out a definable minority, transsexuals, (2) denies them necessary medical care not denied other similarly situated inmates who are not transsexual, and (3) discriminates intentionally. Because the unequal and intentional treatment of transsexuals under Act 105 cannot be justified under even the most deferential standard applicable to these facts, Defendants' enforcement of Act 105 violates Plaintiffs' rights to equal protection.

Assuming that Act 105 employs, as Defendants claim, a non-suspect classification to deny equal access to a non-fundamental right, it is unconstitutional because the Act does not rationally further a legitimate penological interest. *City of Cleburne v. Cleburne*

Living Ctr., 473 U.S. 432, 440 (1985) ("[T]he classification drawn by the statute [must be] rationally related to a legitimate state interest.") (citations omitted); *see also Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment*, Case No. 2:06-C-112 (E.D. Wis. 10/15/07)[Doc. # 175] at p. 43.[9] There is no rational connection between Act 105 and the interest Defendants claim it supports -- prison security. Firstly, the Seventh Circuit has admonished that "we do not read anything in [the case law] as requiring this court to grant automatic deference to ritual incantations by prison officials that their actions foster the goals of order and discipline." *Lock v. Jenkins*, 641 F.2d 488, 498 (7th Cir. 1981); *accord Williams*, 851 F.2d at 886 (Flaum, J., concurring) ("[P]rison officials whose actions are challenged cannot avoid court scrutiny by reflexive, rote assertions that existing conditions are dictated by security concerns and that the cost of change is prohibitive."); *see also, e.g., Martin v. Rison*, 741 F. Supp. 1406, 1425 (N.D. Cal. 1990), *vacated as moot sub nom. Chronicle Publ'g Co. v. Rison*, 962 F.2d 959 (9th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) ("[T]he word 'security' cannot be just a label invoked to shield all actions from scrutiny.").

More to the point, Act 105 does not rationally further Defendants' interest in mitigating the risk of assault against transsexual inmates. *Turner*, 482 U.S. at 97-98 (the Court rejected "[t]he security concern emphasized by [the government] . . . that 'love triangles' might lead to violent confrontations between inmates," because "[c]ommon sense . . . suggests that there is no logical connection between the marriage restriction and the formation of love triangles: surely in prisons housing both male and female prisoners,

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[9] Plaintiffs preserve for purposes of appeal their alternative arguments that the classification at issue is subject, not to rational basis review, but rather to either intermediate scrutiny as a sex classification or the standard set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *See* Plaintiffs' Brief in Opposition to Defendants' Motion for Partial Summary Judgment [Doc. # 138].
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inmate rivalries are as likely to develop without a formal marriage ceremony as with one.") (citation omitted);[10] *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (prison regulation prohibiting the wearing of dreadlocks failed meaningfully to reduce the risk of violence, since forcing Rastafarians to cut their hair is unlikely to change their belief in black superiority); *Whitmire v. Arizona*, 298 F.3d 1134, 1136 (9th Cir. 2002) (regulation prohibiting same-sex affection between prisoners and inmates failed to meaningfully mitigate the risk of violence, since "prisoners who are willing to display affection toward their same-sex partner during a prison visit likely are already open about their sexual orientation...."); *see also Salaam v. Lockhart*, 905 F.2d 1168, 1175 (8th Cir. 1990) ("It is not apparent . . . why the addition of [the prisoner's] new [Muslim] name [to his clothing] would cause a net increase in the incidence of confrontation. Moreover, if the rights of those who would cooperate could be sacrificed in fear of those who would cause trouble under any regime, officials could ignore any individual right. Inmates do not abandon their rights to individualized judgments about their behavior.").

There is no reasonable connection between the Act's denial of hormones or surgery and a reduction in the risk that transsexual inmates will be assaulted. Even assuming some increase in risk of assault for effeminate prisoners, the relevant inquiry is not whether transsexual prisoners who present femininely are at risk of assault, but rather whether denying hormones or surgery mitigates any such risk. As set out above, male-to-female transsexuals express their feminine identity, whether or not they are taking hormones, because GID compels them to do what they can to resolve the dysphoria

[10] The *Turner* factors include whether "the governmental objective [is] a legitimate and neutral one" and whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89. The analysis undertaken with respect to this factor is identical to the analysis undertaken under rational basis review. Accordingly, *Turner* and its progeny are relevant to this case to the extent that they apply this factor.

caused by a body that fails to conform with their feminine identity. Consequently, the hormones place them at no greater risk than their denial.

Transsexual inmates, such as the Plaintiffs are, therefore, like the lesbian and gay inmates in *Whitmire*, whose willingness to display same-sex affection shows that they likely have already identified themselves as lesbian or gay. Transsexual inmates are similarly willing to express their femininity, even if denied hormones. Their serious need to identify and express themselves as women – with or without hormones -- strongly outweighs their fears of harassment or harm, and shows that Act 105 is not related to security. Moreover, these Plaintiffs were taking hormones when they were incarcerated, so they already appeared feminine to varying degrees. Taking them off of hormones would not completely rid them of the female sex characteristics that result from taking hormones, since many of those characteristics are irreversible.

Moreover, there is no reasonable connection between Act 105 and cost savings, since there is no rational explanation for singling out transsexuals to be denied medically necessary care as compared to other inmates. *Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.") (citation omitted); *Shapiro v. Thompson*, 394 U.S. 618, 633 & n.11 (1969) (a state may not limit government spending "by invidious distinctions between classes of its citizens"); *Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966) ("The Equal Protection Clause ... imposes a requirement of some rationality in the nature of the class singled out.") (citation omitted).

Act 105 is unconstitutional because it does not rationally further Defendants' purported interest in mitigating the risk of assault against transsexual inmates, and there

is no reasonable relationship between the Act and cost savings. This is especially so in light of the fact that the legislative history of Act 105 reveals a discriminatory intent against transsexual people. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

III. Defendants' enforcement of Act 105 to deny medically necessary treatment to transsexual inmates violates, on its face, the Eighth Amendment and the Equal Protection Clause.

The evidence shows that there is "no set of circumstances . . . under which [Act 105] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Doe v. Heck*, 327 F.3d 492, 528 (7th Cir. 2003). Every time Act 105 is applied, it results in the denial of either hormones or surgery for an inmate with GID since the only circumstances under which the Act has any effect are instances when a DOC medical provider has prescribed one of these treatments. Otherwise, the Act is irrelevant.

The evidence shows that inmates do not dictate what medical care they receive; only DOC medical personnel can determine what treatments are medically necessary and appropriate. Consequently, even if an inmate with GID requested hormones or surgery, DOC's practice – even before the passage of Act 105 – would have been to deny such medical care unless it was medically necessary. The passage of Act 105 did not change this practice. What it did is deny DOC medical personnel the discretion they had before to prescribe hormones or surgery, when, in their judgment, they were medically necessary.

This blanket denial of medical judgment mandated by Act 105 in all the statute's applications violates the Eighth Amendment, for the same reasons that Act 105's application to Plaintiffs violates that Amendment. Plaintiffs have been taking hormones for many years, so cutting off their hormone therapy is the denial of necessary medical treatment that places them at great risk of harm, and induces certain withdrawal symptoms. The denial of necessary medical care to persons who have had it in the past does not distinguish Plaintiffs under the Eighth Amendment and Equal Protection Clause from transsexuals newly diagnosed with GID and prescribed the treatment for the first time by DOC health care professionals.

Act 105's blanket denial of medical judgment regarding the treatment that is medically necessary *only* for transsexual inmates violates the Equal Protection Clause on its face, *Romer v. Evans*, 517 U.S. 620 (1996), for the same reason its application to Plaintiffs violates that clause of the Fourteenth Amendment. Consequently, Act 105 is unconstitutional on its face because it violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

IV. Plaintiffs are entitled to a permanent injunction against the enforcement of Act 105 against them and on its face.

A permanent injunction is appropriately granted where: "(1) the moving party has succeeded on the merits; (2) no adequate remedy at law exists; (3) the moving party will suffer irreparable harm without injunctive relief; (4) the irreparable harm suffered without injunctive relief outweighs the irreparable harm the nonprevailing party will suffer if the injunction is granted; and (5) the injunction will not harm the public

interest." *Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1081 (7th Cir. 1998).

The evidence will show that Act 105 violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment as applied to them and on its face.

Plaintiffs and other transsexual inmates do not have an adequate remedy at law and they will suffer irreparable harm without entry of a permanent injunction. "In saying that the plaintiff must show that an award of damages at the end of trial will be inadequate, we do not mean wholly ineffectual; we mean seriously deficient as a remedy for the harm suffered." *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984).

The evidence shows that denying Plaintiffs and other transsexual inmates medically necessary treatment for their serious GID places them in a perilous state of psychological and emotional pain and distress, causing depression, suicidal ideation, anxiety, and a high risk of self-harm. The denial of hormone therapy to Plaintiffs, who have been on it for many years, causes them additional negative health consequences.

The balance of harms strongly supports the entry of a permanent injunction. As set out in these Conclusions of Law, Defendants have not made a substantial showing that the Eighth Amendment permits a blanket denial of medical treatment as a security measure. Defendants must show much more than a reasonable connection to show that they were not deliberately indifferent to a serious medical need, and they have failed to do even that. There is no reasonable connection between Defendants' asserted interests in security and Act 105. Similarly, there is no reasonable connection between minimizing costs to the state and denying necessary medical care for transsexual inmates

only. Furthermore, the public interest will be served by granting a preliminary injunction here and "safeguarding Eighth Amendment rights in the prisons in [Wisconsin]." *Phillips,* 731 F. Supp. at 801.

The Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, mandates that "[p]rospective relief in any civil action with respect to prison conditions … extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *Id.* at § 3626(a)(1)(A). A court may not grant any prospective relief "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correction the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.* "The court shall give substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief." *Id.*

The limits on prospective relief set out in the PLRA are no different than those that governed federal court injunctions prior to the PLRA's passage. *Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000); *Smith v. Arkansas Dept. of Correction*, 103 F.3d 637, 647 (8th Cir. 1996) (finding PLRA "merely codifies existing law and does not change the standards for determining whether to grant an injunction"); *Morales Feliciano v. Calderon Serra*, 300 F.Supp. 2d 321, 332 (D.P.R. 2004) ("This language mimics long standing requirements for injunctive relief under Rule 65 of the Federal Rules of Civil Procedure...."), *aff'd*, 378 F.3d 42, 54-56 (1st Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005). *See Duran v. Elrod*, 760 F.2d 756, 760-61 (7th Cir. 1985) (pre-PRLA limitations on federal court injunctions).

In cases governed by the PLRA, "[t]he scope of injunctive relief is dictated by the extent of the violation established." *Clement v. California Dept. of Corrections*, 364 F.3d 1148, 1153 (9th Cir. 2004) (per curiam) (citations omitted). The PLRA does not foreclose the possibility of facial or class-wide relief if dictated by the scope of the violation. *Id.* (district court properly found in case challenging one prison's policy banning internet-generated mail that all similar policies adopted in California prisons violate the First Amendment, since there was "no indication ... that the policies that other California prisons have enacted differ in any material way from" the policy applicable to the plaintiff).

An injunction against the enforcement of Act 105 is narrowly drawn, since it enjoins only the enforcement of a statute that is unconstitutional every time it comes into play for purposes of barring the treatment ordered by DOC medical personnel for transsexual inmates. *Id.* ("injunction is ...sufficiently narrow to avoid unnecessary disruption to the state agency's normal course of proceeding" since "it closely matched the identified violation....") (citation and quotations omitted); *Asker v. California Dep't of Corrections,* 350 F.3d 917, 921-22, 924 (9th Cir. 2003) (affirming injunction against a requirement that "approved vendor labels" be affixed to all books sent to prisoners). *Compare Lindell v. Frank*, 377 F.3d 655, 660 (7th Cir. 2004) (injunction that reached conduct not a part of the identified First Amendment violation, in as-applied challenge, was overbroad).

Neither public safety nor the operation of the criminal justice system is harmed by restoring discretion to the medical personnel of the DOC over what kind of medical treatment is medically necessary for transsexual inmates in Wisconsin. An injunction

that restores discretion to DOC personnel does not "require for its enforcement the continuous supervision by the federal court over the conduct of [state officers]." *Clement*, 364 F.3d at 1153 (citations omitted). It is sufficiently narrow "to avoid unnecessary disruption to the state agency's normal course of proceeding." *Id.* (quotation and citation omitted).

CONCLUSION

The evidence will show, under the governing law set forth in this brief, that Plaintiffs are entitled to a judgment for permanent injunctive relief, a declaration that the Act, both on its face and as applied to Plaintiffs, violates the Eighth and Fourteenth Amendments, costs and fees, and the other relief that the Court deems just and proper.

Dated this 17th day of October, 2007.

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