

**Nos. 10-2339 and 10-2466
In the United States Court of Appeals
For the Seventh Circuit**

ANDREA FIELDS, et al.,) Appeals from the United States
Plaintiffs-Appellees,) District Court
Cross-Appellants,) For the Eastern District of Wisconsin.
)
) v.)
) No. 2:06-cv-00112-CNC
JUDY P. SMITH, et al.,)
Defendant-Appellants,) Charles N. Clevert, Jr.,
Cross Appellees.) Chief Judge

**BRIEF AND APPENDIX OF PLAINTIFFS-APPELLEES,
CROSS-APPELLANTS**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-2339

Short Caption: Fields et al. v. Smith et al.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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JURISDICTIONAL STATEMENT

The jurisdictional statement of the Defendants is complete and correct.

ISSUES PRESENTED BY DEFENDANTS' APPEAL

1. Whether Defendants' enforcement of 2005 Wisconsin Act 105 ("Act 105") to deny medically necessary treatment to Plaintiffs violates the Eighth Amendment.
2. Whether 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.
3. Whether Act 105, on its face, violates the Eighth Amendment and the Equal Protection Clause.

ISSUE PRESENTED BY PLAINTIFFS' CONDITIONAL CROSS-APPEAL

Whether the district court abused its discretion by refusing to certify a class of transsexual inmates for whom Defendants' medical staff would have prescribed either hormone therapy or sex reassignment surgery but for Act 105.

STATEMENT OF THE CASE

Plaintiffs supplement Defendants' Statement of the Case as follows. On April 27, 2006, Plaintiffs moved for certification of a class of current or future prisoners or patients who are transgender, have been diagnosed with gender identity disorder ("GID"), or meet the criteria for a GID diagnosis. [R.35: 2].¹ On February 16, 2007 the district court denied that motion, because Plaintiffs were already receiving hormone therapy whereas the proposed class would increase the scope of the lawsuit to include inmates not receiving hormones, [R.102: 5; Pltf. App. 5], and the claims of the proposed class were not "common or typical to those of the" Plaintiffs. *Id.* As a result of this narrow characterization of the case, the district court found that the proposed class failed the numerosity test. [R.102: 5-6; Pltf. App. 5-6].

Plaintiffs moved on March 5, 2007 for reconsideration of the court's denial of class certification and moved for leave to amend to add as plaintiffs two inmates diagnosed with GID by Wisconsin Department of Corrections ("DOC") medical providers who had not been evaluated for hormone therapy because such evaluation was rendered futile by Act 105. [R.104; R.105]. Plaintiffs proposed a class of:

All current or future residents housed in prisons identified in Wis. Stat. § 302.01 who have been, or will in the future be, denied

¹ Record citations list the docket number followed by the page, paragraph, or exhibit number, [Docket number: page, paragraph, or exhibit number]. Defendants-Appellants, Cross-Appellees' Appendix is cited as "App.", while Plaintiffs-Appellees, Cross-Appellants is cited as "Pltf. App.".

hormone therapy or sex reassignment surgery to treat a serious medical need because of the Inmate Sex Change Prevention Act, 2005 Wisconsin Act 105, codified at Wis. Stat. § 302.386(5m).

[R.104: 2]. The court denied the motion to amend and for reconsideration, because the Plaintiffs have been prescribed hormone therapy while the proposed class members have not. [R.131: 5; Pltf. App. 12].

After trial, the district court held Act 105 to be unconstitutional on its face and as applied to Plaintiffs. Granting Plaintiffs' request for facial relief, the court reached a different conclusion about the relationship between the claims of inmates already receiving hormones, such as the Plaintiffs, and inmates newly prescribed them in prison. The court concluded that: "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." [R.212: 59; App. 205].

STATEMENT OF FACTS

I. Department Of Corrections' Medical Leadership Criticized Act 105's Ban On Treatment For GID.

The Inmates Sex Change Prevention Act provides:

302.386(5m) (a) In this subsection:

1. "Hormonal therapy" means the use of hormones to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender.

2. "Sexual reassignment surgery" means surgical procedures to alter a person's physical appearance so that the person appears more like the opposite gender.

(b) The department may not authorize the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery for a resident or patient specified in sub. (1).

2005 Wisconsin Act 105.

Neither DOC nor any of Defendants was involved in the drafting of the bill that became Act 105. [R.187: ¶58] DOC's mental health director, Dr. Kallas, and medical director, Dr. Burnett, provided the only medical or correctional expertise during the legislative hearings regarding Act 105, [R.187: ¶45; R.212: 6, 58; App. 152, 204]. Dr. Kallas was *highly critical* of the Act, explaining that hormone therapy is "medically necessary treatment," [R.201: 187; R.236: Ex. 17], that ending the therapy may cause inmates to "become distressed and despondent . . . to the point of clinical depression or an anxiety disorder or suicidality," [R.201: 191], and that Act 105 would increase costs to the state for clinical staff time to prevent suicide, additional psychotropic medication, and staff time addressing behavioral disruptions, and costs to inmates in the form of pain and suffering. [R.212: 58; App. 204; R.201: 190-195; R.236: Ex. 17]. Both doctors critiqued the law, because it takes the medical decision regarding hormone therapy out of

the hands of health care practitioners and is “contrary to [their] medical judgment.” [R.201: 183, 185; R.236: Ex. 11]. Dr. Burnett agreed that medical decisions should be left to clinicians and that it was medically inappropriate to taper and terminate hormone therapy for inmates with GID. [R.201:229-230; R.236: Ex. 612 at p. 4]. The legislative sponsors of the Act issued multiple press releases prior to its passage stating that it was intended to prevent “bizarre taxpayer funded sex change procedures” and to stop the DOC policy of “[allowing] pharmacists within the correction system to give hormones to an inmate diagnosed with gender identity disorder.” [R.187: ¶44].

II. Act 105 Injured Plaintiffs And Other Inmates With GID By Banning The Hormone Therapy Treatment They Had Been Prescribed By Department Of Corrections (“DOC”) Physicians.

Plaintiffs are male-to-female transsexual people², all of whom were diagnosed with GID and prescribed hormone therapy by DOC medical staff. [R.187: ¶¶1- 3 (Sundstrom); ¶¶8-10 (Fields); ¶¶13, 15, 16 (Blackwell); ¶¶21, 22, 24 (Davison); ¶¶27, 28, 30 (Moaton)]. A person with GID has persistent cross-gender identification, persistent discomfort with his or her assigned sex, no concurrent intersex condition, and clinically significant distress. [R.202: 259-260]. Ms. Moaton described feeling feminine as early as four years old, dressing in girl’s clothing, and thinking she was a girl “until being told otherwise.” [R.201:

² A “transsexual” person is someone with severe GID. [R.202: 268].

140]. She said: “I used to come home and before I’d go to bed at night I’d say, God, let me wake up and be a girl.” *Id.* at 141. Most of the Plaintiffs had received hormone therapy to treat their GID for several years. [R.187: ¶3 (Sundstrom, since 1990); ¶10 (Fields, since 1996); ¶16 (Blackwell, since 1998); ¶24 (Davison, since 2005); ¶30 (Moaton, since the late 1990s)]. At least four of the Plaintiffs had attempted suicide or had suicidal thoughts. [R.236: Ex. 1013 at pp. 21-22 (Sundstrom, three suicide attempts, one hospitalization for suicidal ideation); R.187: ¶14 (Blackwell, suicide attempt as result of her GID); R.187: ¶23 (Davison suicide attempt); R. 187: ¶29; R.201: 143, 150 (Moaton suicidal ideation because of her GID)]. Someone who has previously attempted suicide is at greater risk of suicide. [R.200: 42].

Plaintiffs suffered when Defendants began tapering their hormone dosages in response to Act 105. [R. 187: ¶4 (Sundstrom suffered “mood swings, hot flashes, severe headaches, bloating, and crying fits”); ¶11 (Fields suffered “nausea, muscle weakness, loss of appetite, . . . and depression”); 3, ¶18 (Blackwell); 4, ¶25 (Davison); 4, ¶31 (Moaton)]. Plaintiffs’ symptoms abated when their hormone therapy was reinstated after the court issued a preliminary injunction. [R.212: 2-3, 57-58; App. 148-149, 203-204].

In addition to Plaintiffs, Kenneth a/k/a Karen Krebs and Erik, a/k/a Erika Huelsbeck are male-to-female transsexuals who were in DOC custody and diagnosed with GID by DOC medical staff. [R.187: ¶¶40, 53]. Plaintiffs’ expert, Dr. R. Ettner, examined Ms. Krebs and Ms. Huelsbeck and confirmed that both

had been accurately diagnosed with GID and should have been prescribed hormone therapy. [R.200: 46-48].

III. Hormone Therapy And Sex Reassignment Surgery Are Medically Necessary Treatment For GID.

The district court found that GID is a “serious medical need” that requires evaluation and treatment. [R.212:55; App.201; R.201:227-228; 202: 258-259]. For those who reach a clinical threshold, individualized treatment, as set out in the Standards of Care published by the World Professional Association for Transgender Health (“WPATH”), is required and includes cross-sex hormone therapy, and in some cases surgery. [R.200: 29-30; R.202: 269].

Hormone therapy is medically necessary treatment for the Plaintiffs. [R.201: 225, 228 (Dr. Burnett testifying that each of the Plaintiffs had been prescribed hormone therapy by DOC doctors and that DOC doctors only prescribe medically necessary treatment); R.200: 43 (R. Ettner concluded that all Plaintiffs should be treated with hormone therapy)]. In addition, DOC’s medical and mental health directors agreed with Plaintiffs’ experts that hormone therapy is medically necessary treatment. [R.201: 177 (Dr. Kallas: “I do believe there are individuals where hormonal treatment is medically necessary for the gender dysphoria.³”); R.200: 55 (Dr. R. Ettner: hormone treatment is medically necessary

³ “*Gender dysphoria* . . . may be defined as discontent with one’s biological sex, the desire to possess the body of the opposite sex, and the wish to be regarded as a member of the opposite sex.” Richard Green & Ray Blanchard, *Gender Identity Disorders*, in Kaplan & Sadock’s *Comprehensive Textbook of Psychiatry*

for Plaintiffs because “nothing short of it will provide an attenuation or relief from the severe distress caused by GID at that level.”); R.202: 273-274 (Plaintiffs’ expert Dr. Brown: There is no “other equally effective treatment for [these patients].”). Whether a patient should have hormone therapy depends on the intensity of the disorder and the distress that the disorder causes her. [R.200: 35] Treatment is in no way optional. [R.202: 278 (Dr. Brown: “Once a person reaches the clinical threshold and they have the diagnosis, I don’t consider treatment optional. It’s individualized to a given patient, . . . but the treatment itself is not optional . . .”).]

The district court concluded, “Act 105 prevents DOC doctors from providing the treatment that they have determined is medically necessary to treat the plaintiffs’ serious conditions.” [R.212: 56; App. 202]. In addition to hormone therapy, Act 105 bans provision of sex reassignment surgery (“SRS”). Although SRS has not been prescribed for any of the Plaintiffs, it is medically necessary treatment for the most severe cases of GID, which make up a minority of all cases. [R.202: 270-272, 276 (Dr. Brown: Surgery was “life saving” for some of his patients)].

IV. Psychiatric And Psychological Services Alone Are Ineffective Treatment.

Psychiatric and psychological services alone are ineffective treatment for persons with severe GID, because such palliative care fails to address gender

(Benjamin J. Sadock, M.D. & Virginia A. Sadock, M.D. eds., 2000). [R.236: Ex. 610 at p. 1646].

dysphoria. [R.200: 38-39, 103; R.202: 272-273, 278, 284]. Such an approach would be “absolutely inconsistent” with the accepted medical standards in addressing GID. [R.202: 330-332 (Dr. Brown: “Psychotherapy is not intended to nor designed to cure or eliminate the symptoms that they have; it’s to help them understand more about themselves, it’s educational, it’s to help them understand the implications of the treatment alternatives that they’re being presented with potentially by other physicians or surgeons, and to help them adjust to who it is that they are because that’s never gonna change”).]. Furthermore, GID cannot be adequately managed through psychotropic medications because they “don’t at all treat the underlying condition.” [R.202: 284 (Dr. Brown: “You may be able to take the edge off of some symptoms by using a variety of medications, but it’s like putting a Band-Aid over a burst appendix or giving somebody with a burst appendix pain medication . . . you might make them feel a little bit better but the underlying condition is what needs to be treated.”)].

V. Act 105 Prevents DOC Medical Personnel From Prescribing Treatment They Deem Medically Necessary for Inmates With GID.

Act 105 requires that DOC withdraw hormone therapy from inmates who are receiving it to treat GID, but not from inmates who require hormones for estrogen replacement therapy in postmenopausal years or for congenital or hormonal disorders. [R.212: 4-5, 64; App. 150-151; R.201: 228]. No other Wisconsin law or DOC policy bans medically necessary treatment for inmates. [R.212: 64; App. 210; R.201:187; R.236: Ex. 612 at p. 4].

The district court found that Act 105 bars doctors and other DOC medical personnel from providing treatment that they deem medically necessary, both by stopping medically necessary treatment to Plaintiffs who have been on hormones for many years and by denying medically necessary care to inmates who are newly diagnosed with GID and prescribed treatment for the first time by DOC health care professionals. [R.212: 59, 61-62; App. 205, 207-208]. DOC decided to stop thorough evaluations of inmates with GID, such as Ms. Huelsbeck and Ms. Krebs, to determine whether hormone therapy was medically necessary for them because Act 105 made the evaluations futile. [R.212: 7, 61-62; App. 153, 208; R.201: 182; R.187: ¶53].

VI. The Denial Of Hormone Therapy For Inmates With GID Places Them At Risk For Severe Health Problems And Defendants Are Aware Of These Risks.

The district court also found, based on the testimony of the experts and DOC's medical and mental health directors, that denial of treatment for severe GID places inmates at risk for depression, anxiety, suicidal ideation, suicide attempts, and self-mutilation or autocastration. [R.212:58; App.204; R.202:274 (Dr. Brown: "It's uniformly a very bad thing to do medically and psychiatrically."); R.200:114 (Dr. F. Ettner: "[I]t is not medically acceptable to take [someone] off [of hormone therapy] if they don't have to come off for some other medical reason."); R.200:41 (Dr. R. Ettner: "[T]he risk psychologically would be depression, autocastration, and suicide."); R.201:190-191 (Dr. Kallas: "[I]f the

[DOC] were to take away hormones from individuals with gender identity disorder, those individuals may become distressed and despondent, may go to the point of clinical depression or an anxiety disorder or suicidality.”)]. Indeed, the Court found that two Plaintiffs have a history of suicidal ideation when not receiving hormone therapy, and one even attempted suicide by jumping off a roof. [R.212:57; App.203].

VII. Act 105 Does Not Increase Security.

The district court found that “no reasonably conceivable state of facts provides a rational tie between Act 105 and prison safety and security.” [R.212:66; App.212] The district court found “nothing in the record to support a finding that withdrawing hormone therapy from the plaintiffs will decrease the risk that they will become victims of sexual assault.” [R.212: 66; App. 212] It is undisputed that inmates can look effeminate without hormone therapy. [R.212: 66; App. 212; R.202:423]

Defendants’ security expert, Eugene Atherton, described the connection between the hormone therapy barred by Act 105 and sexual assaults as “an incredible stretch.” [R.212:66-67; App.212-213]. The district court credited Atherton’s testimony regarding his experience working at the Colorado DOC, where the policy allows prisoners with GID to have hormone therapy. [R.212: 66; App. 212]. Atherton testified that he considers the Colorado policy reasonable and that it “has a good history and security staff are able to implement it well.” [R.212: 66; App. 212; R.202: 432-433]. Responding to whether correctional needs

should override the medical staff's decision to provide medical treatment, he stated "correctional needs, security and safety needs need to be heard in a partnership relationship with medical and mental health." [R.202: 431].

VIII. Act 105 Does Not Reduce Costs And Likely Imposes Additional Expenses.

The district court found that the "cost to the DOC of withdrawing hormone therapy may be greater than the cost of continuing the treatment prescribed by DOC health care professionals." [R.212:56; App.202] Defendants' mental health director testified that discontinuing treatment for inmates with GID would likely require DOC to expend additional resources which would offset any savings from not prescribing hormones. [R.212: 58; App. 204 (district court summarizing Dr. Kallas's testimony that discontinuing treatment "may also lead to disruptive behavior and segregation time, or an increase in psychotropic medications particularly antidepressants, which would offset any cost savings that would be directly attributable to not prescribing hormones"); R.201: 183-185; R.236: Ex. 17].

SUMMARY OF ARGUMENT

Plaintiffs received medically necessary hormone therapy to treat their GID until the passage of Act 105 took away DOC doctors' discretion to prescribe it. Even though Defendants knew the serious consequences of denying this treatment, they would have ceased providing it had the district court not entered a preliminary injunction. Moreover, other inmates with GID were not even

evaluated to see if hormone therapy was necessary for them because DOC decided that Act 105 rendered such evaluations futile. The blanket denial of hormone therapy for inmates already receiving it and the ban on hormone therapy and SRS for inmates to whom DOC doctors prescribe these treatments violates the Eighth Amendment.

Additionally, the denial of medically necessary treatment only for transsexual inmates, but not for other inmates, violates the Equal Protection Clause, since there is no rational connection between the ban on medical care for transgender inmates and Defendants' asserted interests in security and avoiding civil liability. Nor is there a rational connection between the ban on medical care and an interest in cost savings.

Act 105 violates the Constitution not only as applied to Plaintiffs but also facially. Transsexual inmates do not receive hormone therapy or SRS unless a DOC doctor prescribes it, and DOC doctors only prescribe medical treatment if they find it medically necessary. The ban on treatment is therefore facially unconstitutional under both the Eighth Amendment and the Equal Protection Clause, since the law discriminates against transsexual persons, always trumps the medical judgment of DOC doctors, and bans the only treatment that is effective for inmates with serious GID.

The district court's conclusion after trial that the denial of hormone therapy to inmates with GID who are already receiving it does not distinguish their Eighth Amendment and Equal Protection claims from those of inmates who

would be prescribed it in the future but for the Act shows that the court abused its discretion when it refused to certify a class of current and future inmates denied hormone therapy or SRS because of Act 105. If this Court reverses the district court's decision to grant facial relief, it should reverse the district court's denial of class certification and remand the case for reconsideration.

STANDARD OF REVIEW

Defendants' statement of the standard of review for the district court's permanent injunction decision is accurate. Plaintiffs' conditional cross-appeal of the district court's denial of class certification is reviewed for an abuse of discretion. *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 573 (7th Cir. 2008). However, "purely legal determinations made in support of that decision are reviewed *de novo*." *Id.*

ARGUMENT

I. Defendants' Enforcement Of Act 105 Violates The Eighth Amendment.

A. The Eighth Amendment Forbids Deliberate Indifference To Serious Medical Needs.

"[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 Reed v. McBride*, 178 F.3d 849, 852 (7th Cir. 1999); *Meriwether v. Faulkner*, 821 F.2d 408, 411 (7th Cir. 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. A

plaintiff asserting a deliberate indifference claim must satisfy both an objective and a subjective test. *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005).

To satisfy the objective component, the plaintiff must prove that she has an objectively serious medical need. To satisfy the subjective component, a plaintiff must show that the responsible prison official acted or failed to act with “deliberate indifference.” *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). Prison officials who deny prescribed treatment for GID because of Act 105’s flat prohibition of such treatment, despite the undisputed medical judgment of the prison physicians that such treatment is medically necessary for Plaintiffs, act with deliberate indifference to the prisoners’ serious medical needs in violation of the Eighth Amendment. Deliberate indifference to serious medical needs violates the Eighth Amendment “whether the indifference is manifested” by prison doctors’ provision of inadequate care or by prison officials “intentionally interfering with the treatment once prescribed.” *Estelle*, 429 U.S. at 104–105. Here, it is undisputed that Defendants, because of Act 105, are intentionally denying hormone therapy prescribed to Plaintiffs by DOC physicians to treat their GID.⁴

⁴ Defendants argue that “security interests” may justify “imping[ing] on medical needs.” Def. Br. at 18. However, courts do not apply a highly deferential standard to prison officials’ assertions of “penological interests” to justify deprivations of Eighth Amendment rights. See *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”). “This is because the integrity of the criminal justice system depends on full compliance with the Eighth

B. GID Presents an Objectively “Serious Medical Need.”

A medical or mental health condition diagnosed by a health care professional that requires treatment is a serious medical need. *See Edwards v. Snyder*, 478 F.3d 827, 830–31 (7th Cir. 2007). 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. Indeed, Defendants do not contest the district court’s finding that GID is a serious medical need that requires treatment. Def. Br. at 15.

C. Refusal To Provide Medically Necessary Hormone Therapy Or Sex Reassignment Surgery Constitutes Deliberate Indifference To A Serious Medical Need.

To be liable for a violation of the Eighth Amendment, a prison official “must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer*, 511 U.S. at 837. However, a successful plaintiff “need not show that a prison official acted or failed to act *believing* that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his *knowledge of a substantial risk* of serious harm.” *Id.* at 842 (emphasis added); *see also Haley v. Gross*, 86 F.3d 630, 641 (7th Cir. 1996) (“a prisoner claiming deliberate

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)).

indifference need not prove that the prison officials intended, hoped for, or desired the harm that transpired"). "Whether a prison official has the requisite knowledge of a substantial risk is a question of fact [.]" *Farmer*, 511 U.S. at 842. The district court made a finding, supported by the record, that Defendants were aware of a substantial risk of harm yet would disregard that risk because of Act 105. [212: 55-59; App. 201-205]. This factual finding is by no means clearly erroneous.

In this case, Defendants diagnosed the Plaintiffs with GID, [R.187: ¶2, ¶9, ¶15, ¶22, ¶28], prescribed hormone therapy for them as medically necessary treatment for their GID, [R.201: 225, 228], and knew the serious risks caused by denying the treatment [R.201: 178-79, 228-29]. Nonetheless, they would deny the hormones because of Act 105. [R.201: 182]. This is sufficient to establish deliberate indifference.

DOC's medical and mental health directors criticized Act 105 because hormone therapy is legitimate and effective treatment, the decision to give it is guided by research and well-established standards of care, and denying it causes serious harm to inmates with GID. According to Dr. Burnett, hormone therapy is not "experimental or investigational," and has "good sound medical evidence to back its use." [R.201: 233]. When Dr. Kallas testified before the legislature, he informed legislators that the Harry Benjamin Standards (now called the WPATH standards) are the "most authoritative guideline for the treatment of [GID]," [R.201: 189], GID is a condition "worthy of treatment" [R.201: 188; R.236: Ex. 17],

hormone therapy is valid treatment even if surgery is not provided, and that hormones should be provided to inmates if in the judgment of physicians “they are medically necessary.” [R.201: 188, 189; R.236: Ex. 17]. He also testified about the serious risks of harm from withdrawing hormone therapy from inmates with GID, including depression and suicidality, explained that inmates with GID are a psychologically vulnerable group of prisoners,⁵ and outlined the increased costs from forcing inmates to withdraw from hormone therapy. [R. 201: 188, 190-92; R.236: Ex. 17].

Responding to an earlier request for information about the bill that became Act 105, Dr. Kallas noted that in another lawsuit against DOC the “state’s own experts have opined that to discontinue hormones would be cruel and irresponsible for [the] inmate.” [R.201: 185; R.236: Ex. 11]. Denying hormone therapy “would be contrary to the medical judgment of the WDOC’s Medical Director and Mental Health Director.” [R.201: 185; R.236: Ex. 11].

Despite an awareness of these significant risks of substantial harm to Plaintiffs from failing to provide the hormone therapy prescribed by DOC medical personnel, Defendants would, but for the preliminary injunction in this case, refuse to provide it because of the command of Act 105. [R. 201: 182]. Such “intentional[] interferenc[e] with the treatment once prescribed” constitutes a

⁵ At trial, Dr. Kallas identified other potential results of denying hormone to patients with GID, including anxiety, difficulty in social functioning, and self-castration or mutilation. [R.201: 178-79].

quintessential form of deliberate indifference to a serious medical need. *Estelle*, 429 U.S. at 105.

This is not a case involving disagreements in medical judgment about the appropriate treatments for the Plaintiffs, as Defendants suggest. Def. Br. at 14-15, 23-26. DOC physicians diagnosed GID and prescribed hormone therapy as medically necessary treatment for Plaintiffs. There is no medical or mental health testimony questioning these diagnoses or the necessity of the treatment for Plaintiffs.⁶ Defendants are not refusing these treatments based on a *medical* judgment that such treatment is unnecessary, but because of a *non-medical* judgment made by legislators that such treatment is politically undesirable. Indeed, DOC's medical professionals objected to Act 105 precisely because it prevented them from exercising medical judgment to provide necessary care. [R. 201: 182-83, 185-87].

A decision to deny effective medical treatment for reasons unrelated to the exercise of medical judgment violates the Eighth Amendment. *See, e.g., Edwards v. Snyder*, 478 F.3d 827, 831 (7th Cir. 2007) (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 v. Daley*, 414 F.3d 645, 654 (7th Cir. 2005) (denying summary judgment where

⁶ Defendants' expert, Dr. Claiborn, did not evaluate the Plaintiffs and did not base his testimony on any facts about them. [R. 202: 376-377, 388]. Indeed, he did not doubt that the Plaintiffs met the diagnostic criteria for GID. *Id.* at 388.

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 v. McGinnis*, 899 F.2d 612, 616 (7th Cir. 1990) (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)); *see also Durmer v. O’Carroll*, 991 F.2d 64, 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”). Denying effective medical treatment for reasons unrelated to medical judgment is exactly what Act 105 does. Accordingly, denying hormone therapy pursuant to Act 105 violates the Eighth Amendment.

D. There Is No Merit To Defendants’ Arguments That They Can Ban Necessary Medical Treatment For GID Because The Wisconsin Legislature Has Unfettered Authority Over Prison Health Care, The Care Is Expensive And “Curative,” And There Are Treatment Alternatives.

Defendants make three arguments in an attempt to absolve their interference with the medical judgment of their own staff in this case. First, Defendants argue that the legislature should have the authority to prohibit certain treatments to prisoners, especially when there is “medical uncertainty” regarding them. Def. Br. at 15-21. Second, they argue that the state has no

Eighth Amendment obligation to provide expensive “curative” treatment to prisoners. Def. Br. at 22-28. Third, they argue that, because they continue to provide *some* treatment to prisoners with GID, the ban on hormone therapy and SRS does not violate the Plaintiffs’ Eighth Amendment rights. Def. Br. at 28-33. None of these arguments has merit.

1. Defendants’ Argument that the Legislature Can, Without Any Medical Basis, Prohibit Treatment Deemed Medically Necessary for Plaintiffs By Defendants’ Medical Leadership Has No Merit.

Defendants’ arguments about legislative authority boil down to the hyperbolic claim that the district court’s holding will override reasonable legislative control over medical care in Wisconsin’s prisons. *See* Def. Br. at 20 (characterizing the district court’s ruling as “prohibiting the state legislature from placing any limits on a medical professional’s discretion” and thus “elevat[ing] the subjective opinions of medical professionals above the legislature and the law”).⁷ In addition, Defendants assert that there is scientific uncertainty about the treatment of GID that justifies legislative intervention over prison medical care decisions. Neither argument finds support in the law or the factual record.

⁷ Defendants’ assertion that, under the district court’s decision, “[i]ndividual doctors would have the power to decide what treatments can and cannot be legally regulated” in the prison is preposterous. Def. Br. at 21. The district court recognized that mere difference of opinion among physicians is insufficient to establish deliberate indifference. However, here, the treating prison doctors, backed up by the medical and mental health directors, have concluded that hormone therapy is medically necessary treatment, so the government cannot interfere for non-medical reasons.

a. Prison Medical Care Denials Because Of A Statute Are Subject To The Same Constitutional Standards As Other Inmate Health Care Denials

Defendants cite no law in support of their suggestion that the unconstitutional actions of a prison official taken pursuant to statutory command should be treated differently from the unconstitutional actions of prison officials acting independently. The source of the decision makes no difference, since it is “the *government’s* obligation to provide medical care for those whom it is punishing by incarceration.” *Estelle*, 429 U.S. at 103 (emphasis added).

Contrary to Defendants’ assertions, Plaintiffs do not claim -- and the district court did not hold -- that the legislature has no authority to limit medical discretion; what the legislature cannot do is establish a blanket ban against inmates receiving medically necessary treatment prescribed by prison doctors for a serious medical condition, as Act 105 did. *See, supra*. Section I.C. The legislature (and prison administrators) certainly may regulate medical practice in the prisons through “reasonable regulations for the orderly operation of a prison and for the safety and health of all prisoners, including those directives reasonably designed to prevent abusive use of drugs,” such as a drug formulary. *Jorden v. Farrier*, 788 F.2d 1347, 1349 (8th Cir. 1986) (citation omitted). But a formulary that excluded insulin for the treatment of diabetes without exception, for example, would be plainly unconstitutional. *See id.* at 1348-49 (factual issue as to whether prison medical administrators’ application of formulary to

preclude use of medicine prescribed by treating physician was reasonable response to safety concern or “an arbitrary decision amounting to cruel and unusual punishment” precludes summary judgment); *see also Gil v. Reed*, 381 F.3d 649, 663 n.3 (7th Cir. 2004) (reserving judgment on whether “the government or a prison doctor may avoid liability for deliberate indifference by seeking shelter behind an inadequate formulary” because adequacy of formulary had not been challenged).

The Eighth Amendment does not allow prisons to deny categorically certain forms of medically necessary treatment prescribed by the prison medical staff. *See, e.g., De'Lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003) (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 v. Gomez*, 9 Fed. Appx. 793, 794–95 (9th Cir. 2001) (unpublished) (triable issue as to “whether hormone therapy was denied . . . on the basis of an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to [plaintiff’s] medical needs”); *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); *Monmouth Co. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) (“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”).⁸

In *De'Lonta*, the court ruled that if the plaintiff proved that her denial of hormone therapy was based on a blanket policy rather than an individualized medical opinion and that psychiatric treatment was not a “reasonable method of preventing further” self harm, she could prevail on an Eighth Amendment claim. 330 F.3d at 634–635.⁹ In the present case, Plaintiffs have proven the very facts that would have entitled them to relief under *De'Lonta's* reasoning: they were denied hormone therapy prescribed by DOC doctors.

⁸ A number of district courts have concluded that blanket bans on hormone therapy for prisoners with GID violate the Eighth Amendment. See *Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003) (“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”); *Bismark v. Lang*, No. 2:02-cv-FtM-29SPC, 2006 WL 1119189, *19 (M.D. Fla. April 26, 2006) (“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.”); *Kosilek v. Maloney*, 221 F. Supp.2d 156, 186 (D.Mass. 2002).

⁹ The fact that *De'Lonta* “merely” reversed a lower court’s dismissal of a suit challenging a denial of hormone therapy allegedly based on policy against providing it, Def. Br. at 27, does not diminish its persuasiveness here.

b. The Denial Of Hormone Therapy And SRS Is Not Justified By Scientific Uncertainty.

Defendants rely heavily on *Gonzales v. Carhart*, 550 U.S. 124 (2007), to support their argument that the legislature had authority to regulate medical care here, because they assert incorrectly that there is scientific uncertainty concerning the treatment of GID. *Gonzales* upheld the federal ban on a particular abortion procedure against a facial substantive due process challenge finding that the law on its face did not impose an undue burden on a woman's right to an abortion, but left open the possibility of a pre-enforcement as-applied challenge. *Id.* at 167-68. In upholding the ban, the Court relied on testimony that created "uncertainty over whether the barred procedure *is ever necessary* to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives." 550 U.S. at 166-167 (emphasis added). The Court said that the existence of safe alternatives made use of the banned procedure a "mere convenience." 550 U.S. at 166. Still, the "prohibition [of the "partial birth" abortion procedure] would be unconstitutional . . . if it 'subject[ed] [women] to significant health risks.'" 550 U.S. at 161 (citations omitted).

Here, in contrast to *Gonzales*, the evidence that hormone therapy is *medically necessary* to treat these Plaintiffs' GID is uncontradicted. DOC's own medical personnel prescribed the hormone therapy to Plaintiffs as medically necessary treatment. [R. 201: 225, 228]. In addition, while there are alternative

procedures for an abortion, there are no effective alternatives to hormone therapy for Plaintiffs. *See infra.*, Section I.D.3. Consequently, hormone therapy for Plaintiffs is treatment that is “*not* for the convenience of the patient or the physician.” [R. 202: 233 (emphasis added)]. Finally, in contrast to *Gonzales*, denying hormone therapy to Plaintiffs not only placed them at *risk* of significant health risks, of which the DOC medical and mental health directors were aware, [R. 202: 203-205], but actually caused them harm after their hormone dosages were tapered in response to Act 105. [R.187: ¶¶4, 11, 18, 25, 31].

There is no “medical or scientific uncertainty” about the substantial risk of significant harm to Plaintiffs from denying them hormone therapy. [R.200: 42 (Dr. R. Ettner: “Among professionals,” there is no controversy about treatments.); R.202: 260 (Dr. Brown: There is no controversy among professionals who work in the field of GID regarding the treatment for GID); R.202: 297-298 (Dr. Brown: There is a body of medical evidence that supports the effectiveness of hormone therapy and SRS)]. Defendants cite to testimony of Dr. Randi Ettner and Defendants’ expert, Dr. Daniel Claiborn, to support their assertion that “GID is a condition about which there is limited knowledge and vast uncertainty.” Def. Br. 19. That was not their testimony. Dr. Ettner acknowledged that there is uncertainty about the *causes* of GID, not about the effectiveness of hormone therapy or SRS for those with severe GID. [R.200: 59-60.] Defendants’ expert, Daniel Claiborn, Ph.D., never examined the Plaintiffs and rendered no opinion as to the appropriate diagnosis or treatment of the Plaintiffs themselves. [R.202:

376-77, 388]. He testified only to his more general “personal opinion” that GID is not a mental disease or disorder in the first place, [R.202: 357], and thus is not a serious medical need. [R.202: 370-72]. However, Defendants have expressly abandoned this position by not challenging the district court’s finding that GID *is* a serious medical need. Def. Br. at 15. The district court’s finding that hormone therapy is medically necessary treatment for the Plaintiffs is thus uncontradicted. [R.212:56; App.202 (“[T]he enforcement of Act 105 prevents DOC doctors from providing the treatment that they have determined is medically necessary to treat the plaintiffs’ serious conditions”).

The physician-assisted suicide and abortion cases Defendants rely on involve very different questions from the right at issue here. In its regulation of abortion, the government may constitutionally balance the interests of the woman seeking abortion services against the fetus. *See, e.g., Gonzales*, 550 U.S. at 146. Here, in contrast, the government’s interest in providing minimal effective care to prisoners is not counterbalanced against any comparable interest. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the asserted right to physician-assisted suicide implicated the Court’s “reluctan[ce] to expand the concept of substantive due process[.]” *Id.* at 720 (citation omitted). Plaintiffs here are not asking this Court to expand substantive due process rights, but to apply the established Eighth Amendment right to adequate care for their serious medical needs. As the district court correctly concluded on the facts before it, refusal to

provide the hormone therapy prescribed to treat Plaintiffs' GID is deliberately indifferent to Plaintiffs' serious medical needs.¹⁰

2. Plaintiffs Do Not Seek Expensive Curative Treatment But Only The Treatment Prescribed For Them By DOC Doctors.

Defendants assert that there is "no precedent" for requiring prisons to "completely eliminate a risk or cure a serious medical condition." Def. Br. at 22. Their primary support for this position is *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997), in which this Court found no Eighth Amendment violation in denying hormone therapy to an inmate who had no GID diagnosis, but went on to opine in dicta that even with the diagnosis an inmate would not have been entitled to "curative treatment," which this Court asserted must include *both* hormone therapy *and* SRS. *Id.* at 671-72.

¹⁰ *Kansas v. Hendricks*, 521 U.S. 346 (1997) (Def. Br. at 16), is even further afield, since it deals not with an individual's asserted right to certain medical procedures, but with the state's police power to establish civil commitment criteria to protect citizens from dangerous persons. *Id.* at 356-57. Here, there is no suggestion that providing hormone therapy to these prisoners will be dangerous to the public. *Whitley v. Albers*, 475 U.S. 312 (1986) (Def. Br. at 18), does not support the proposition for which Defendants cite it. *Whitley* held that infliction of pain in the course of quelling a prison riot did not violate the Eighth Amendment unless that infliction of pain was "unnecessary and wanton." *Id.* at 319. Nowhere does it hold that a security measure "that impinges on medical needs" is permissible if applied in a good faith effort to impose order. Def. Br. at 18. In fact, the *Whitley* Court, in setting the higher "unnecessary and wanton" standard, *contrasted* government officials' obligations in the medical care context, where "the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities," with actions taken "involving the use of force to restore order in the face of a prison disturbance," where there is a "hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." 475 U.S. at 320.

Defendants' reliance on *Maggert* is misplaced. *Maggert's* conclusion that the Eighth Amendment does not generally oblige the State to provide "curative treatment" depends upon factual premises the district court has rejected: (1) the only effective treatment for GID is SRS (i.e., hormone therapy alone does not work); and (2) effective GID treatment is expensive.

The *Maggert* court's assumption that the only effective treatment for most cases of GID involves SRS, 131 F.3d at 671, was disproven at trial in this case. In most cases, hormones, which are relatively inexpensive [R. 187: ¶51], can be effective treatment. [R. 201: 190 (Dr. Kallas testified that "many individuals find successful accommodations just with hormonal treatment and do not desire to go on or need to go on to surgical reassignment."); R. 200: 33-34; 69 (R. Ettner); R. 200: 98, 102-103 (F. Ettner recommends hormone therapy for about 90% of patients with GID, but surgery for only about 10-15%); R. 202: 270-71 (George Brown, M.D., testified that "there are many people who will not be appropriate for sex reassignment surgery, even though they have GID")]. In addition, the cost of SRS is approximately \$20,000, [R.187: ¶50], instead of the \$100,000 estimate in *Maggert*. 131 F.3d at 672. The annual cost of hormone therapy is between \$300 and \$1000 per inmate. [R.187: ¶51].

Given the fact that a majority of prisoners with severe GID can be treated effectively without surgery, the district court's decision is not undermined by *Maggert's* dicta regarding cost-benefit analysis based on assumptions contrary to the factual record in this case.

Finally, *Maggert's* emphasis on the cost of treatment and the rarity of insurance coverage for such treatment as a sufficient justification for denying care is inconsistent with settled Eighth Amendment law. This Court has stated,

[m]edical 'need' runs the gamut from a need for an immediate intervention to save the patient's life to the desire for medical treatment of trivial discomforts and cosmetic imperfections that most people ignore. . . . [T]he civilized minimum is a function both of objective need and of cost. The lower the cost, the less need has to be shown, but the need must still be shown to be substantial.

Ralston v. McGovern, 167 F.3d 1160, 1161–62 (7th Cir. 1999) (internal citations omitted). Although cost may be a factor in the deliberate indifference analysis, *id.* at 1162, cost considerations alone cannot justify the denial of medically necessary care. *Revere v. Mass. Gen. Hosp.*, 563 U.S. 239, 245 (1983) (Due process clause requires that “[i]f . . . the governmental entity can obtain the medical care needed for a detainee only by paying for it, then it must pay.”); *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983); *see also Durmer v. O’Carroll*, 991 F.2d 64, 68–69 (3d Cir. 1983)(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 v. Prison Health Servs.*, 769 F.2d 700, 705 (11th Cir. 1985) (“Lack of funds . . . cannot justify an unconstitutional lack of competent medical care and treatment for inmates.”); *Berry v. Peterman*, 604 F.3d 435, 441 (7th Cir. 2010) (Although “courts may consider the ‘cost of treatment alternatives [when] determining what constitutes adequate, minimum-level care’

... ‘medical personnel cannot simply resort to an easier course of treatment that they know is ineffective”).

The basic principles underlying *Estelle*, 429 U.S. at 103, and its progeny make clear that the fact that many persons not in custody do not have private or public health insurance for medically necessary treatment simply cannot, on its own, be a basis for denying that treatment to people in prison. *See also Farmer*, 511 U.S. at 833 (“[H]aving stripped [prisoners] of virtually every means of self protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course”).¹¹

Defendants argue that “the Eight[h] Amendment does not entitle inmates to demand specific care and inmates are not entitled to the best care possible,” Def. Br. at 22. But Plaintiffs here ask only for the care the DOC doctors determined was medically necessary and would prescribe for them but for Act 105’s strict ban. For the same reason, *Meriwether, Jones v. Flannigan*, 949 F.2d 398, (unpublished opinion) (7th Cir. 1991),¹² and the decisions from other circuit courts cited by Defendants, Def. Br. at 25-26, are all distinguishable. None of those cases involves a prison’s refusal to provide the medical treatment prescribed by prison doctors as medically necessary.

¹¹ Significantly, even if Plaintiffs had family with sufficient financial resources to pay for their treatments, state law would prevent them from doing so. [R. 187: ¶57].

¹² Defendants have cited *Jones* in violation of Circuit Rule 32.1(d), which prohibits the citation of unpublished orders issued before January 1, 2007, except to support a claim preclusion argument or to establish the law of the case.

3. Defendants' Provision Of Ineffective Treatment For GID Does Not Absolve Them Of Eighth Amendment Liability.

Defendants' final argument regarding the Eighth Amendment is that the DOC's provision of psychiatric and psychological services and medical treatments for the effects of withdrawal from hormones satisfies the Eighth Amendment. However, as noted above, the expert testimony in this case established without contradiction that psychotherapy and anti-depressant medications were insufficient to treat GID. [R.200: 54-55 (R. Ettner); R.202: 273-74, 284 (George Brown, M.D.); *see also* R.201: 176-77 (Dr. Kallas acknowledges that treatment without hormones unlikely to be successful for some persons with GID)]. Moreover, DOC doctors had already decided that hormones were the medically necessary treatment for Plaintiffs' GID, rather than limiting their treatment to psychotherapy or anti-depressants.

Prisons cannot simply choose an "easier course of [medical] treatment that they know is ineffective." *Berry*, 604 F.3d at 441. *See also Edwards*, 478 F.3d at 831 (A prisoner's "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"). Treating the *symptoms* of GID with psychological and medical services instead of treating GID with hormone therapy is not only ineffective, but "blatantly inappropriate," medical care. *Edwards*, 478 F.3d at 831. Knowingly

providing such ineffective treatment violates the Eighth Amendment. *Berry*, 604 F.3d at 441.¹³

II. Defendant's Enforcement Of Act 105 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). Even applying rational basis, the most deferential level of review,¹⁴ to Act 105's discriminatory classification¹⁵ the district court found that:

¹³ In *Kosilek*, 221 F. Supp. 2d 156 (D.Mass. 2002), 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 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.

Id. at 186. See also *Wolfe v. Horn*, 130 F. Supp. 2d 648, 653 (E.D.Pa. 2001) (raising the possibility that prescribing Prozac and psychotherapy may be adequate for treatment of depression but inadequate for treatment of GID).

¹⁴ The care exercised in applying the rational basis test is greater in cases involving laws intended to disadvantage a particular group, such as Act 105. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) ("We have been most likely to apply rational basis review to hold a law unconstitutional . . . where . . . the challenged legislation" reflects "a desire to harm a politically unpopular group.") (O'Connor, J., concurring) (collecting cases); *Romer*, 517 U.S. at 634 ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that

(1) [T]he defendant[s] intentionally treated [Plaintiffs] differently from others similarly situated, (2) the defendant[s] intentionally treated [Plaintiffs] differently because of [their] membership in the class to which [they] belong, and (3) the difference in treatment was not rationally related to a legitimate state interest.”

[R.212: 63-67; App. 209-213] (quoting *Smith v. City of Chicago*, 457 F.2d 643, 650-51 (7th Cir. 2006).

A. Act 105 Intentionally Discriminates Against Transsexuals, Who Are Similarly Situated To Other Inmates With Serious Medical Needs.

The court found that “Act 105 takes away the DOC’s discretion to provide ‘hormonal therapy’ to the plaintiffs” and other inmates with GID, and only them, since “DOC sometimes prescribes hormone therapy for reasons that do not have

a bar . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (deferential rational basis “absent some reason to infer antipathy . . .”). See also *Bell v. Duperrault*, 367 F.3d 703, 710 (7th Cir. 2004) (“the ‘rational purpose’ test is no longer as toothless as it once seemed”) (collecting cases) (Posner, J., concurring).

The record shows that Act 105 was based on the bare desire to harm a politically unpopular group – transsexual inmates, [R.212: 6, App. 152] – and has no rational connection to any other governmental purpose. In the face of such evidence of irrational hatred or fear, “it is difficult to argue that the law is rational if ‘rational’ in this setting is to mean anything more than democratic preference,” and rationality review “must mean something more if the concept of equal protection is to operate, in accordance with its modern interpretations, as a check on majoritarianism.” *Milner v. Apfel*, 148 F.3d 812, 817 (7th Cir. 1998).

¹⁵ Because Act 105 cannot withstand even rational basis review, Plaintiffs need not show that the Act is subject to strict or intermediate scrutiny. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) (“[i]f the statutory scheme cannot pass even the minimum rationality test, our inquiry ends.”).

to do with GID, such as estrogen replacement therapy in post-menopausal years, or for congenital or hormonal disorders.” [R.212: 64; App. 210]. Similarly, the evidence showed that DOC provided surgery, including very expensive surgery, for conditions other than GID, [R.212: 6; App. 152], and that there are no other bans on medically necessary treatment. [R.212: 64; App. 210]. Based on this evidence, the district court found “the plaintiffs have satisfied the first two prongs of an equal protection claim.” *Id.*

Defendants assert that Act 105 “does not, as a matter of language” discriminate, Def. Br. at 47, but, of course, intentional discrimination “may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself.” *Snowden v. Hughes*, 321 U.S. 1, 8 (1944) (citations omitted). Act 105 is directed only against medical treatment that is needed by transsexual people. Wis. Stat. § 302.386(5m).¹⁶ Moreover, in practice, Act 105 is enforced only against transsexual people. [R.187: ¶¶4, 11, 18, 25, 31 (tapering Plaintiffs’ hormones because of Act 105)]. *See also M.L.B. v. S.L.J.*, 519 U.S. 102, 126–27 (1996) (distinguishing disparate enforcement from disparate impact).

¹⁶The legislative history of Act 105 offers additional evidence that the Act was directed intentionally at transsexual people [R.212: 6; App. 152].

Transsexuals – individuals with severe GID, [R.202:268] – are denied access to medical treatment needed only by them; no other inmates face a categorical denial of medically necessary treatment.

B. There Is No Rational Connection Between The Denial Of Hormone Therapy And Surgery For Transsexuals And Security.

After carefully reviewing the evidence, the district court concluded that “no reasonably conceivable state of facts provides a rational tie between Act 105 and prison safety or security.” [R.212: 66; App. 212]. The court found that “defendants’ security expert was not particularly helpful for the defendant,” since he testified that the Colorado Department of Corrections, where he had worked, also had a policy that allowed inmates with GID to be treated with hormone therapy and that the policy was reasonable and did not negatively impact security. [R.212: 67; App. 213]. In addition, the expert stated that it was “an incredible stretch” to suggest that denying inmates hormone therapy would prevent sexual assaults. R.212: 66; App. 212]. There was “nothing in the record to support a finding that withdrawing hormone therapy from the plaintiffs will decrease the risk that they will become victims of sexual assault.” *Id.* Secondly, “it is undisputed that inmates can look effeminate without hormone therapy.” *Id.* Finally, the court found it significant that DOC’s policy prior to the passage of Act 105 authorized hormone therapy. [R.212: 67; App. 213]. The court rejected what it characterized as “Defendants’ argument that the ‘evidence supports the obvious.’” *Id.*

Defendants argue that the district court “did not afford appropriate weight” or “proper weight” to evidence that feminized inmates are at risk of assault. Def. Br. at 51, 53. While district courts should be cautious about rejecting prison administrators’ judgment about security, “[a]s long as the concerns expressed by correctional authorities are plausible, and the burden that a challenged regulation of jail or prison security places on protected rights [is] a light or moderate one,” *Keeney v. Heath*, 57 F.3d 579, 581 (7th Cir. 1995), this Court has cautioned against “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). *See also Williams v. Lane*, 851 F.2d 867, 872 (7th Cir. 1988) (“[A] court’s deference to administrative expertise and discretionary authority of correction officials must be schooled, not absolute.”) (internal quotations omitted); *Wellman*, 715 F.2d at 272 (“[T]he policy of deferring to the judgment of prison officials in matters of prison discipline and security does not usually apply in the context of medical care to the same degree as in other contexts”).

The relationship between the discriminatory classification and the governmental interest must be rational when viewed in its “factual context.” *Romer v. Evans*, 517 U.S. 620, 632–33 (1997); *see also Heller v. Doe*, 509 U.S. 312, 321 (1993) (rational basis review must have “footing in the realities of the subject matter addressed by the legislation”); *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 343 (1989) (facts show no rational connection between

classification and governmental objective); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational”). A district court’s weighing of the evidence regarding prison officials’ security explanations is factual. *Williams*, 851 F.2d at 872; *see also May v. Sheahan*, 226 F.3d 876, 882 (7th Cir. 2000) (assessing “the strength and nature of [sheriff’s] security concerns as . . . factual assessments”).¹⁷

Defendants criticize the district court’s decision to give greater weight to their security expert’s testimony about the impact the Colorado Department of Correction’s policy on hormone therapy had on security than to his testimony

¹⁷Defendants incorrectly label their argument about the district court’s allegedly improper weighing of the evidence a “misapplication of the law” that should be reviewed *de novo*. Def. Br. at 53. In support, Defendants cite *Smith v. City of Chicago*, 457 F.3d at 650 n. 2, and *United States v. Turner*, 93 F.3d 275, 286 (7th Cir. 1996), but neither case supports this position. The misapplication of law addressed in *Smith* was not a challenge to the weight given evidence, but involved the “rule of law” on which the district court based its decision – whether the City’s decision to pay attorneys’ fees for aldermen who opposed the mayor in unrelated litigation in the mid-1980s required it to pay the fees of aldermen who opposed a different mayor’s position in remap litigation in the 1990s. 457 F.3d at 653–54. Similarly, in *Turner*, the criminal defendant’s argument that a penalty scheme was “subject to arbitrary enforcement” required statutory interpretation only. 93 F.3d at 286–87. In contrast, weighing of evidence is the role of the district court as fact finder, *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (“If the district court’s account of the evidence is plausible . . . , the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently”), and must not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a)(6).

that effeminate inmates present a security risk. The expert testified that he had various security positions in the Colorado Department of Corrections where there was a policy in place allowing inmates with GID to take hormone therapy, that the policy was reasonable, that he had never argued that the policy should be changed, that the policy is one that “security is able to implement fairly well,” and that he has “never heard of any serious problems” from its implementation. [R.202: 408, 432-33]. The court’s focus on this testimony is eminently reasonable, since the pertinent legal question is whether there is a rational connection between the denial of two forms of medical treatment for GID and security. In contrast, even the expert’s testimony that effeminate inmates present a security risk in a male prison does not show that the denial of hormones will enhance security.¹⁸ The only testimony in the record from a DOC employee with security responsibility – that of Warden Judy Smith – confirmed that transgender

¹⁸ Defendants seek to diminish the impact of their expert’s testimony that “it was a stretch” to say that “preventing inmates from taking hormones was a way to prevent sexual assaults” by reinterpreting it. They claim that the expert was answering the question “[w]hether withdrawal would *necessarily* lead to a reduction in sexual assaults” instead of “whether the State could reasonably conceive that withdrawal of hormone therapy would further a legitimate interest.” Def. Br. at 54. But he was asked: “Are you then suggesting that preventing inmates with GID from getting hormones is a way to prevent sexual assaults from happening in the future?”, and the answer he gave was: “That question is an incredible stretch between hormonal therapy and preventing sexual assaults.” [R.202: 426-427]. He was not asked whether there was a *necessary* connection denying hormone therapy and the prevention of sexual assault. His testimony was probative regarding the key question whether there was a rational connection between the denial of hormones and security.

inmates, including the two to five inmates at Oshkosh Correctional where she is warden, do not present a higher security risk. [R.236: Ex. 613 at pp. 7-9].

In addition to the district court's conclusion that the factual record failed "to support a finding that withdrawing hormone therapy from the plaintiffs will decrease the risk that they will become victims of sexual assault," [R.212: 66; App. 212], the court also relied on the fact "that inmates can look effeminate without hormone therapy." *Id.* In particular, 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 caused by a body that fails to conform with their feminine identity. [R.200: 45-46; R.202: 282-284]. To alleviate the psychological distress or impairment caused by their GID, many such individuals whose gender identity is feminine express it through their appearance, voice pitch, mannerisms, name and pronoun choices, or by otherwise identifying and expressing themselves as women. [R.200: 45-47 (Karen, a/k/a, Kenneth Krebs, who was not prescribed hormones while incarcerated, "disclosed to members of staff and other inmates that she was a transsexual and wanted to be referred to in the female gender."); R.187: ¶42]. Significantly, many seek to do so even absent SRS or hormone therapy. [R.236: Ex. 238; R.187: ¶40 (Plaintiffs expressed femininity prior to starting hormone therapy)]. Thus, even absent the medical treatments at issue, many transsexual

prisoners will still identify or present themselves femininely.¹⁹ Consequently, the hormones place them at no greater risk than they would face without them.

Other courts have scrutinized and rejected illogical and unsupported claims that prison rules promote security. In *Turner*, the Supreme Court struck down a prison regulation that restricted the right to marry. In doing so, the Court rejected “[t]he security concern emphasized by [the government] . . . that ‘love triangles’ might lead to violent confrontations between inmates.” *Turner*, 482 U.S. at 97 (citation omitted). The Court rejected the regulation as unrelated to serving that concern: prison administrators “have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing” love triangles, moreover, “[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, inmate rivalries are as likely to develop without a formal marriage ceremony as with one.” *Id.* at 98. In other words, because the regulation did not meaningfully mitigate the risk of violence, it did not rationally further the government’s interest in reducing the risk of violence.

Similarly, in *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988), this Court reinstated a challenge to a prison regulation that prohibited the wearing of

¹⁹ Female transsexual inmates – those for whom at least hormones are medically necessary – are highly likely to express their feminine identity, since their willingness to accept medically-prescribed hormones in prison notwithstanding any risks they perceive from appearing feminine in prison strongly suggests a similar willingness to express their femininity in other ways.

dreadlocks. In doing so, the Court rejected “a security concern for potential racial conflict from the professed Rastafarian belief that the dreadlock symbolizes black superiority.” *Id.* at 962. It did so because “it is not easy to see how forcing Rastafarians to cut their hair is going to change this belief.” *Id.* at 963. Again, because the regulation did not meaningfully mitigate the risk of violence, it did not rationally further the government’s interest in reducing the risk of violence. In *Reed*, this Court recognized that “to suppose that the wearing of dreadlocks would lead to racial violence is . . . the piling of conjecture upon conjecture.” *Id.* Similarly, here the suggestion that denying hormones to inmates with GID will reduce their risk of assault is nothing more than “conjecture upon conjecture.”

Employing similar reasoning, the Ninth Circuit struck down a prison regulation prohibiting same-sex affection between prisoners and visitors. *Whitmire v. Arizona*, 298 F.3d 1134 (9th Cir. 2002). “[T]he [government] assert[ed] that its visitation policy protect[ed] inmates from being labeled as homosexuals and from being targeted for physical, sexual, or verbal abuse on account of such labeling.” *Id.* at 1136. The regulation, however, did not meaningfully mitigate the risk of violence:

The [government’s] visitation policy . . . does not possess a common-sense connection to the concern against homosexual labeling Common sense indicates that an inmate who intends to hide his homosexual sexual orientation from other inmates would not openly display affection with his homosexual partner during a prison visit. Rather, prisoners who are willing to display affection toward their same-sex partner during a prison visit likely are already open about their sexual orientation In situations

like this, [the government's] policy prohibiting same-sex displays of affection during visitation does nothing to prevent the marking of homosexual prisoners.

Id. (citation omitted).

For these reasons, the Act does not rationally further Defendants' interest in mitigating any such risk.²⁰

C. There Is No Rational Connection Between The Denial Of Hormone Therapy And Surgery For Transsexuals And Avoidance Of Civil Liability.

Defendants claim that their constitutional obligation to protect transsexual prisoners from harm, and more particularly their desire to protect the state from civil liability, justifies their denial to transsexuals – and only transsexuals – their constitutional right to medically necessary care. Def. Br. at 56-58. Unsurprisingly, they fail to cite any case support

²⁰ In rejecting Defendants' assertion that Act 105 promotes security, evidence that the asserted interest is "pretextual" should be considered to determine whether the intonation of a *security* rationale "masks [the government's] *real* delinquencies." *Williams*, 851 F.2d at 881 (emphasis added).

At the legislative hearing regarding Act 105, the only correctional expertise offered with respect to the Act was that of Defendants' correctional medical personnel who opined that the harm caused by the Act outweighed any benefits. [R.187: ¶45; R.201: 183, 185, 188, 190-195]. The legislative history evidences anti-transsexual animus, rather than a concern about security. [R.212: 6; App. 152]. Even though a government is free at any time to assert new governmental interests, *Smith*, 457 F.3d at 652, the absence of any supportive testimony from Wisconsin prison personnel -- based on security or any other rationale -- in the legislature or at trial is compelling evidence that the security rationale is pretextual. *Williams*, 851 F.2d at 875 (prison's "articulated security concerns are belied by its" conduct).

for this argument that Defendants may sacrifice Plaintiffs' constitutional right to medical care in order to avoid liability for violating their constitutional right to be protected from harm. The district court's well-supported factual finding that no reasonably conceivable state of facts connects the denial of medical care required by Act 105 to prison safety or security also means that there is no rational connection between the Act and the avoidance of civil liability.

D. Act 105 Is Not Justified By An Interest In Cost Savings.

Cost savings can never be a constitutionally sufficient justification for any classification, even under the most deferential level of scrutiny. *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (“[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), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974) (a state may not preserve finances “by invidious distinctions between classes of its citizens”). “The Equal Protection Clause . . . imposes a requirement of some rationality in the nature of the class singled out” to bear the burden of cost savings. *Rinaldi v. Yeager*, 384 U.S. 305, 308–309 (1966) (citation omitted).

Plaintiffs' evidence shows that Act 105 does not rationally achieve cost savings. The cost of providing the medical treatment at issue is outweighed by the cost of denying it. [R.212: 56, 58; App. 202, 204; R.201: 183-185; R.236: Ex. 11].

Moreover, the cost of providing the medical treatment at issue is low, both in absolute terms and relative to the cost of providing comparable medical treatment (*i.e.*, hormone therapies and surgeries that are not intended as treatment for GID). [R.187: ¶¶ 50, 51].

Defendants have failed to show the implausibility of the district court's conclusion that there was no reasonably conceivable tie between Act 105 and security, as they must do. *Anderson*, 470 U.S. at 574. Additionally, there is no rational connection between Act 105 and avoidance of liability or cost savings.

III. Act 105 Violates The Eighth Amendment And The Equal Protection Clause On Its Face.

Under *United States v. Salerno*, 481 U.S. 739 (1987), a statute is unconstitutional on its face if Plaintiffs show that “no set of circumstances exists under which [it] would be valid, *i.e.*, that the law is unconstitutional in all of its applications.” *Washington State Grange v. Washington State Repub. Party*, 552 U.S. 442, 449 (2008) (quoting *Salerno*, 481 U.S. at 745). The *Washington State Grange* Court noted the criticism by members of the Court of the *Salerno* test and set out an alternative formulation: “all agree that a facial challenge must fail where the statute has a ‘plainly legitimate sweep.’” *Id.* (quoting *Glucksberg*, 521 U.S. at 739–740 & n. 7 (Stevens, J, concurring in judgments)).²¹ Since Act 105 is facially unconstitutional under the *Salerno* formulation, it plainly meets the more lenient “plainly legitimate sweep” test. *Glucksberg*, 521 U.S. at 740 & n. 7.

²¹ First Amendment overbreadth challenges represent a second type of facial challenge. *Washington State Grange*. 552 U.S. at 450 n. 6.

The district court found Act 105 facially invalid under *Salerno*, [R.212: 59-67; App. 205-213], since the Act

bars doctors and other [Department of Corrections] medical personnel from providing treatment, namely, hormone therapy and sex reassignment surgery, that they may determine to be medically necessary. . . . If DOC doctors evaluate any DOC inmates and find that hormone therapy is medically necessary, then that inmate is within the group or class of inmates to whom Act 105 applies.

[R.212: 62; App. 208]. For the group or class of inmates to whom Act 105 applies – inmates for whom DOC doctors find treatment banned by the Act to be medically necessary – the Act violates the Eight Amendment and the Equal Protection Clause. [R.212: 59; App. 205].

Only relevant applications -- circumstances where Act 105 makes a difference -- are considered for purposes of the facial challenge. Invalidating a spousal abortion notification provision, the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), judged the statute “by its impact on those whose conduct it affects,” *id.* at 894, since a law “must be judged by reference to those for whom it is an actual rather than an irrelevant restriction” *Id.* at 895. Similarly, in *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007), the Court noted that the challenged Act “applies to all instances in which the doctor proposes to use the prohibited procedure”²² Here, in the restricted context

²² Even though the numerator in the “large fraction” test applied in *Casey*, 505 U.S. at 895, and *Gonzales*, 550 U.S. at 168, is different from the numerator in either the “all of its applications” or “plainly legitimate sweep” standards, the analysis

of a prison, hormone therapy and surgery are only available if prescribed by DOC medical providers as medically necessary treatment for a serious medical condition. Every time the Act is applied, it violates the Constitution.

Defendants argue incorrectly that the most narrow “relevant class is . . . all inmates with GID that [sic] are interested in hormone therapy or surgery.” Def. Br. at 35. In support, they rely on the district court’s finding that “Act 105 has prevented the DOC from undertaking thorough evaluations . . . to determine whether hormone therapy is medically necessary for them,” [R.212: 7; App. 153], but ignore the court’s explanation – that DOC medical personnel are not evaluating inmates for hormone therapy, “because such evaluation[s] would be futile in light of Act 105’s ban on the treatment they may determine to be medically necessary for the health of the inmate.” [R.212: 61-62; App. 207-208]. The evidence that DOC has stopped evaluating inmates for hormone therapy shows that there are additional inmates with GID – other than the current Plaintiffs – who might be prescribed hormone therapy based on DOC evaluations. DOC has chosen to cease futile evaluations even though the only conduct prohibited by Act 105 is the provision of treatment. The district court correctly concluded that the banned conduct is all that should be considered in deciding the facial challenge.

of what constitutes an application (i.e., the denominator of the fraction) for purposes of a facial challenge is no different.

Additionally, Defendants contend that the differences between the spousal notification provision at issue in *Casey* and Act 105 led the district court to misapply *Casey*'s reasoning. Def. Br. at 36-37. However, for purposes of facial analysis, the two statutory provisions are the same. In *Casey*, that class was "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." 505 U.S. at 895. Contrary to Defendants' assertion that "[t]he specific nature of the provision narrowed the affected class," it was the *operation* of the spousal notification statute that defined the class. All married women were required to give notice to their spouses, but the provision acted as a restriction only for women who did not wish to notify their husbands and did not qualify for a statutory exception. Similarly, although Defendants assert that Act 105 applies "to Wisconsin prisoners," Def. Br. at 37, it *operates* as an actual restriction only for inmates with GID who are prescribed hormone therapy or SRS by a DOC doctor, since those treatments for GID are unavailable in prison by any other means. Regardless of the differences between the spousal notification provision and Act 105, it is the class of persons whose rights the laws restrict that determines the relevant applications (the denominator of the fraction) for deciding the facial validity of the statutes.²³

²³ Contrary to Defendants' effort to misconstrue the record, there are no alternatives to the banned treatments for prisoners with severe GID. See Statement of Facts, Sec. IV; Argument, Sec. I.D.3. And the treatments are not dictated by patient choice among treatment options, Def. Br. at 42, or

Defendants assert that it “is manifestly illogical” to follow the direction of the *Casey* and *Gonzales* Courts regarding the relevant class of inmates for purposes of Plaintiffs’ facial challenge “because it would make judicial invalidation of a statute on its face redundant of the as-applied analysis.” Def. Br. at 39. But as the Supreme Court recently noted in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 893 (2010), the “distinction between facial and as-applied challenges is not so well defined” but “goes to the breadth of the remedy employed by the Court.” The similarity between what qualifies as an “application” for as-applied and facial challenges is consistent with the concept that “[a]s applied challenges are the basic building blocks of constitutional adjudication.” *Gonzalez*, 550 U.S. at 168 (citing Richard H. Fallon, *As-Applied and Facial Challenges*, 113 HARV. L. REV. 1321, 1328 (2000)). Act 105 violates the rights of Plaintiffs and other current and future inmates with GID who would be prescribed hormone therapy or SRS by DOC medical staff, but for the existence of the Act. The constitutional violation is the same; the “breadth of the remedy,” however, is different. There is no redundancy or illogic in the award of both facial and as-applied relief where the constitutional flaw affects more individuals than the plaintiffs before the court.

“determined largely by the patient simply telling the medical professional what they are feeling.” *Id.* at 38. Like other mental health conditions, a diagnosis and treatment is determined based on clinical evaluations by experienced mental health practitioners. [R.202: 263-264]. The treatment is dictated by medical necessity, not by inmate choice. See Statement of Facts, Sec. III.

Gonzales is consistent with the district court's description of the relevant class for Plaintiffs' facial challenge, since the Court found that the statute there "applies to all instances in which a doctor proposes to use the prohibited procedure." 550 U.S. at 168. Defendant's assertion that Act 105 is just like the act challenged in *Gonzales*, which banned one kind of abortion but "left open another 'commonly used and generally accepted method' to obtain an abortion" ignores the ample evidence in the record that there are no other effective treatments for serious GID other than the ones banned by the Act.

Defendants argue that if the district court's description of the relevant class for facial analysis were the correct approach, then the *Gonzales* Court would have defined the relevant class of women affected by the prohibited abortion procedure more narrowly to include only those women for whom the procedure was medically necessary. Def. Br. at 39. However, the *Gonzales* Court found that "there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives." 550 U.S. at 166-167. Nowhere did the Court find that the challenged abortion procedure is medically necessary treatment as the district court has in this case.

This Court has interpreted *application* outside the abortion context consistently with the analysis in *Casey* and *Gonzales*. In *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003) and *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445 (7th Cir. 2002), the Seventh Circuit upheld as-applied challenges to statutes providing

the government with authority to act, but dismissed facial challenges because the challenged statutes had other constitutional applications. In doing so, the court considered only applications actually authorized by the statutes rather than conduct unaffected by them. The *Heck*²⁴ and *Daniels*²⁵ courts looked at the authority conveyed by the statutes, rather than at actions that the state could take independent of the statute's authority. The laws in *Heck* and *Daniels* apply where they authorize government actions that could not happen without the challenged statutory authority. Act 105 applies when it bars specific medical care prescribed by a DOC physician. In both situations, the question for the court is whether any of those actual applications are constitutional, rather than whether there is a

²⁴ In *Heck*, parents challenged a statute that allowed government officials to interview children, without parental permission, when the officials suspected child abuse. Child interviews without parental permission were unconstitutional when the officials had no reasonable suspicion of abuse. 327 F.3d at 528. However, if the government officials "have definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused by his parents or is [in] imminent danger of parental abuse," *id.* at 528, then the official may conduct an interview without parental permission so the facial challenge failed. In finding constitutional applications of the statute, the court pointed to a situation where the statute gave the officials authority, rather than to situations (such as interviews where the officers sought and received parental consent) where the statute would be irrelevant to their conduct.

²⁵ Similarly, in *Daniels*, a state statute authorized a local planning commission to vacate covenants restricting the use of private property. 306 F.3d at 449. Where the planning commission used its statutory authority to vacate a covenant in order to further a private purpose, rather than a public one, the court ruled that the statute authorized an unconstitutional taking. *Id.* at 465-66. While the statute was unconstitutional as applied in that situation, the court held that it was not facially unconstitutional because there were circumstances under which the statute could be applied constitutionally, by, for example, using the statutory authority to, "vacate a covenant [that] was rationally related to a public interest already authorized by legislative enactment." *Id.* at 469.

constitutional problem in situations unaffected by the restriction – or the authority – set forth in the statute. See *Casey*, 505 U.S. at 895; *Gonzales*, 550 U.S. at 168. See also *Home Builders Ass’n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 619–20 (7th Cir. 2003) (rejecting facial challenge where challenged authority could be exercised constitutionally in other contexts).

As shown in Section I, GID is a serious medical need and Defendants know of the harm caused by denying treatment for this condition. Without any medical basis, Act 105 bans medical treatment for GID, and that ban applies only when a DOC doctor decides the treatment is medically necessary and prescribes it. The statute violates the Eighth Amendment, and it does so every time it applies. In addition, Section II shows that Act 105 intentionally denies two forms of treatment to transsexuals for whom it is medically necessary -- and only to them -- and that there is no rational tie between the denial of that treatment and any legitimate government interest. Act 105 violates Equal Protection on its face and does so any time it applies.²⁶

²⁶ Equal protection facial challenges have been resolved without consideration of *Salerno*'s unconstitutional-in-all-of-its-applications test. E.g., *Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *United States v. Virginia*, 543 U.S. 499 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). See *Berkley v. United States*, 287 F.3d 1076, 1090 n. 14 (Fed. Cir. 2002) (“[I]n equal protection cases involving facial challenges, the Supreme Court has thus far not discussed or applied the *Salerno* test”).

The relevant constitutional test is what determines the approach to the question whether a particular statute is facially unconstitutional. Richard H. Fallon, *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV.

IV. The District Court Properly Applied The PLRA In Deciding The Scope Of The Injunction.

The Prison Litigation Reform Act (PLRA) requires that prospective relief be narrowly drawn, extend no further than necessary to correct the violation of a federal right, and be the least intrusive means necessary to correct the violation. 18 U.S.C. § 3626(a)(1).

After concluding that Act 105 violates the Eighth Amendment prohibition on cruel and unusual punishment and the Equal Protection clause on its face, the district court permanently enjoined Defendants from enforcing Act 105. The court found that an injunction forbidding all applications of the Act satisfied the PLRA's "need, narrowness and intrusiveness" requirements, because any application of the Act was unconstitutional. [R. 239:1-3; App. 216-218]. The court reached the conclusion that all applications of the Act were unconstitutional, because it correctly interpreted the Act to come into play only when a DOC physician prescribes hormone therapy or SRS as medically

1321 (2000); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 421-56 (1998). Because equal protection statutory challenges are facially unconstitutional because of an "invalid purpose" or an impermissible burden on "too narrow . . . a range of conduct," no attempt to sever applications of the statute will fix the constitutional problem. Fallon, *supra* at 1345-46.

Because of Act 105's invalid purpose and the impermissible burden it places only on transsexual inmates, it violates the Equal Protection Clause on its face.

necessary treatment for GID. [R. 212: 62; App. 208].

Defendants argue that if the district court erred in finding Act 105 facially invalid, its injunction also violates the PLRA's need, narrowness and intrusiveness requirements. Def. Br. at 43-45. To the extent that Defendants are simply stating that the scope of the relief must correspond to the scope of the violation, Plaintiffs agree. *Lewis v. Casey*, 518 U.S. 343, 360 (1996) ("The scope of injunctive relief is dictated by the extent of the violation established."); *Clement v. California Dep't of Corrections*, 364 F.3d 1148, 1152-53 (9th Cir. 2004) (upholding statewide injunction against enforcement of policy that applied statewide).

However, in making this argument, Defendants urge that the Act be interpreted more broadly than the district court interpreted it, so it "applies" to all prisoners with GID, regardless of whether they have been prescribed the forbidden treatments. Def. Br. at 45, 46. It is difficult to see what Defendants gain by taking this curious position. As a factual matter, the record makes clear that Plaintiffs cannot obtain any medical treatment that is not prescribed by DOC providers. [R. 187: ¶57]. It is also clear that Defendants and their physician employees prescribe treatment only when it is medically necessary. [R. 201: 228]. Thus, the only time that a prisoner could receive hormones or surgery for GID, and thus be subject to the prohibitions of the Act, would be when a physician prescribes the treatment as medically necessary. The Act is unnecessary to prevent prisoners who do not need hormones or SRS from receiving them.

Defendants also appear to suggest that the PLRA's need, narrowness and

intrusiveness limitations forbid facial relief altogether. Def. Br. at 45. They note that the case is “not a class action” and argue that the district court’s injunction is overbroad because it extends “further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs.” *Id.* (Defendants’ emphasis). Defendants cite no authority for the proposition that the PLRA forbids facial relief except in class actions. In addition, they did not raise this objection to the scope of the injunction in the district court. Indeed, Defendants’ counsel stated on the record at a Status Conference on June 17, 2010, that he agreed that the scope of the proposed injunction was appropriate, given the scope of the district court’s liability determinations. [R.238: 4; Pltf. App. 19]. Accordingly, this argument is waived.

V. If This Court Reverses The Decision That Act 105 Is Unconstitutional On Its Face, Denial Of Class Certification Should Also Be Reversed.

“Nominally prevailing parties are entitled to file . . . cross-appeals against the contingency that this court will reverse an otherwise thoroughly satisfactory judgment.” *Council 31, AFSCME v. Ward*, 978 F.2d 373, 380 (7th Cir. 1992); *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999). If this Court leaves intact the district court’s facial invalidation of Act 105, then it need not reach the merits of Plaintiffs’ class certification appeal.

An appellate court will reverse a denial class certification where the district court abused its discretion. *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998). “[P]urely legal determinations made in support of [a class certification]

decision are reviewed *de novo*.” *Andrews v. Checy Chase Bank*, 545 F.3d 570, 573 (7th Cir. 2008). Moreover, errors of law constitute a *per se* abuse of discretion. *Yokoyama v Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) (“an error of law is an abuse of discretion.”) (emphasis in original); cf *Cooter & Gell v. Hartmarx Corp.* 496 U.S. 384, 405 (1990) (“[a] District Court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . .”). Here, the district court committed errors of law and abused its discretion by denying class certification, so the denial of class certification should be reversed and remanded for reconsideration.

A. The District Court Failed To Consider The Existence Of Legal Commonalities And Incorrectly Concluded That No Factual Or Legal Commonalities Existed.

The district court’s denial of class certification, based largely on the erroneous conclusion that no common facts or legal theories existed, was an abuse of discretion.

Rule 23(a)(2) provides that a class may be certified if there are questions of *either law or fact common to the class*. Fed. R. Civ. P. 23(a)(2); *see also Patterson v. Gen. Motors*, 631 F.2d 476, 481 (7th Cir. 1980). A plaintiff may meet the commonality requirement by demonstrating that the class claim “arise[s] out of the same legal or remedial theory.” *Id.* Additionally, “[a] common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2).” *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1991). “Claims arising

out of Defendants' standardized conduct towards members of the proposed class present a classic case for treatment as a class action." *Hudson v. City of Chicago*, 242 F.R.D. 496, 501 (N.D. Ill. 2007).

Here, contrary to the plain text of the rule, the district court failed to address or assess whether the named Plaintiffs shared common questions of *law* with the class they sought to represent. This lack of analysis was legal error.²⁷ Regardless of whether the assertion that the DOC's "standardized conduct" violated the Eighth and Fourteenth Amendments was characterized as a common fact impacting the proposed class or a common legal theory, or both, Rule 23(a)(2) was satisfied. Also, despite the existence of a "common nucleus of operative fact" and "standardized conduct" by Defendants, the district court concluded that no factual commonalities existed. This too was in error.

The district court's post-trial Memorandum Decision finding Act 105 unconstitutional demonstrates the error in its earlier conclusion that there were no common facts or legal theories. With the benefit of a complete record, the district court held that Plaintiffs and the proposed class members shared both legal and factual commonalities when it embraced the assertion that "the denial of necessary medical care to persons who have had it in the past does not

²⁷ Essentially, the district court concluded that because it *could* find Act 105 unconstitutional *on its face*, it need not certify a broader class to protect all those potential plaintiffs who might be swept up by the reach of Act 105, including those who had not yet begun to receive treatment. [R.131: 5-6]. Because the availability of an alternative remedy is not a cognizable factor for consideration under Rule 23(a), it should not have been considered.

distinguish Plaintiffs under the Eighth Amendment and Equal Protection Clause from transsexuals newly diagnosed with GID and prescribed the treatment for the first time [.]” [R.212: 59; App. 205]. Given this result, it was legal error for the district court to have concluded that no common factual or legal issues existed based on *how* Act 105 impacted the class members, rather than on *whether* it did. [R.102: 4-5; Pltf. App. 4-5]. See *Dunn v. City of Chicago*, 231 F.R.D. 367, 373 (N.D. Ill. 2005) (“commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.”).

Moreover, because Plaintiffs moved for class certification under Rule 23(b)(2), the district court’s emphasis on factual differences was misplaced. Plaintiffs’ proposed remedy was for injunctive relief rather than damages. Given this posture, the relevance of factual differences is minimal. *Baby Neal v. Casey*, 43 F.3d 48, 56–57 (3d Cir. 1994) (“because [(b)(2)] cases do not also involve an individualized inquiry for the determination of damage awards, injunctive actions by their very nature often present common questions satisfying Rule 23(a)(2).”) (internal quotation marks and citation omitted).

The district court’s denial of class certification should be reversed and remanded because, as demonstrated by its own merits opinion, Rule 23(a)(2) was satisfied by the existence of both legal and factual commonalities between the Plaintiffs and the proposed class members.

B. The District Court Committed Legal Error By Ignoring The Presence Of A Common, Typical Legal Question.

The district court committed legal error by ignoring the presence of a common and typical legal question that satisfied Rule 23(a)(3).

The question of whether a representative plaintiff's claim is typical of the class plaintiff seeks to represent often merges with the commonality analysis. *Rosario*, 963 F.2d at 1013 (typicality "is closely related" to commonality); *see also Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 158 n.13 (1982) (commonality and typicality analyses "tend to merge.") "A Plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). Rule 23(a)(3) does not require that class members suffer the same injury as the named class representatives. *Id.* at 232-33.

Although the district court correctly identified the *De La Fuente* standard, it failed to apply it to the facts here. [R.102: 4-5; Pltf. App. 4-5]. The district court simply concluded without analysis that "potential claims of the proposed class members have not been shown to be common or typical to those of the five plaintiffs in this case." *Id.* at 5. This conclusion was contrary to the law of this Circuit, which has consistently followed the *De La Fuente* standard. *See Arreola v. Godinez*, 546 F.3d 788, 798-99 (7th Cir. 2008); *Keele*, 149 F.3d at 595. The error in this analysis is again demonstrated by the district court's conclusion that the legal impact of the DOC's conduct was to violate the proposed class members' Eighth and Fourteenth Amendment rights in the same way as the named

Plaintiffs. [R.212: 59]. The district court's failure to apply the *De La Fuente* standard to the facts here amounts to an abuse of discretion and the district court should also reconsider this issue.

C. The District Court Failed To Consider The Relevant Factors Affecting Numerosity

Pursuant to Rule 23(a)(1), a class must be so numerous that joinder of all members is impracticable. Plaintiffs are not required to specify the exact number of persons in the proposed class. *See* Newberg on Class Actions ("Newberg") §3:5, p. 233-35 (4th ed. 2002). Thus, a reasonable estimate of the number of class members will suffice. *Dhamer v. Bristol-Meyers Squibb Co.*, 183 F.R.D. 520, 525 (N.D.Ill. 1998) (*citing* *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989)). In determining whether numerosity exists, courts should consider several factors relevant to the practicability of joinder, including: judicial economy, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members. *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (the "determination of practicability depends on all the circumstances surrounding a case, not on mere numbers."); *see also* *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 421 (N.D. Ill. 2003). Here, the district court erred by ignoring several factors that should be considered when analyzing Rule 23(a)(1)'s numerosity requirement.

First, Plaintiffs requested injunctive relief which would necessarily affect the interests of *future* class members. Accordingly, the class should have been

certified based on impracticability. *Celani*, 987 F.2d at 936 (injunctive relief is a factor that should be considered when analyzing R. 23(a)(1)); *Rosario v. Cook Co.*, 101 F.R.D. 659, 661 (N.D. Ill. 1983) (certifying a class of 20 seeking injunctive relief because “[r]egardless of their number, the joinder of future alleged discriminatees is inherently impracticable.”). Although Plaintiffs argued that joinder was impracticable based on the presence of future class members, the district court ignored Plaintiffs’ argument and failed to provide any reason for doing so. [R. 36: 7-8; R.102: 5-6; Pltf. App. 5-6].

Additionally, the district court erred in denying class certification based only on its conclusion that the proposed class had just six members. As Plaintiffs asserted, the class was estimated to be 26 in 2006 alone. [R.36: 6-7]. Moreover, this estimate did not include any future class members to whom injunctive relief would have applied. Nevertheless, Plaintiffs’ good faith estimate of class size was rejected by the district court without analysis and without consideration of the other relevant factors. Thus, the district court’s conclusion was reached in error. *Barragan v. Evanger’s Dog and Cat Food Co., Inc.*, 259 F.R.D. 330, 333 (N.D. Ill. 2009) (“In order to show numerosity, a plaintiff does not need to demonstrate the exact number of class members as long as a conclusion is apparent from good-faith estimates.”)

Finally, class actions are designed to serve the interests of judicial economy. Here, a failure to join future class members would “unnecessarily multipl[y] the expense of litigation.” *Rosario*, 101 F.R.D. at 662 (“forcing the

parties to relitigate a common core of issues unnecessarily multiplies the expense of litigation, whereas allowing a suit to proceed as a class action protects defendants as well as plaintiffs.”) Although Plaintiffs asserted this argument, the district court failed to consider or address this factor. [R.36: 7-8; R.102: 1-7; Pltf. App. 1-7].

The district court’s failure to address the factors recognized in this Circuit as being relevant to a Rule 23(a)(1) numerosity analysis was an abuse of discretion. Consequently, the case should be remanded for reconsideration of those factors. Additionally, for the reasons stated above, the district court should be directed to reconsider its commonality and typicality analyses in light of its own decision on the merits.

CONCLUSION

Plaintiffs respectfully request that this Court affirm the district court’s decision and judgment declaring Wis. Stat. § 302.386(5m) unconstitutional as it applies to Plaintiffs and on its face under the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment and enjoining the enforcement of Wis. Stat. § 302.386(5m). If this Court should reverse the district court’s decision to award facial relief, then Plaintiffs respectfully request that this Court reverse the district court’s denial of class certification and remand for reconsideration.

Dated this 23rd day of November, 2010.

Respectfully submitted,

s/ John A. Knight

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) for a brief produced with a proportionally spaced font. Exclusive of the exempted portions, the brief contains 16,497 words.

Dated this 23rd day of November, 2010

/s John A. Knight

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CIRCUIT RULE 31(e) CERTIFICATION

The undersigned certifies that the digital version of the foregoing BRIEF AND APPENDIX OF PLAINTIFF-APPELLEES, CROSS-APPELLANTS was generated by printing to PDF format from the original word processing file and not by scanning paper documents, pursuant to Circuit Rule 31(e).

Dated this 23rd day of November, 2010.

s/ John A. Knight
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CIRCUIT RULE 30(d) CERTIFICATION

The undersigned certifies that all materials required by Circuit Rules 30(a) and 30(b), with the exception of materials included in the Appendix of Defendants-Appellants, Cross-Appellees, are included in the Appendix of Plaintiffs-Appellees, Cross-Appellants.

Dated this 23rd day of November, 2010.

s/ John A. Knight

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Cross-Appellants

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

KARI SUNDSTROM,
ANDREA FIELDS,
LINDSEY BLACKWELL,
MATTHEW DAVISON, also known as JESSICA DAVISON,
and VANKEMAH D. MOATON,

Plaintiffs,

v.

Case No. 06-C-112

MATTHEW J. FRANK,
WARDEN JUDY P. SMITH,
THOMAS EDWARDS,
JAMES GREER,
ROMAN KAPLAN, MD,
WARDEN ROBERT HUMPHREYS, and
MANAGER SUSAN NYGREN,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (DOC. #35), DENYING PLAINTIFFS' MOTION OR LEAVE TO FILE SECOND AMENDED COMPLAINT (DOC. #37), GRANTING PLAINTIFFS' MOTION FOR LEAVE, *INSTANTER*, TO FILE DOCUMENTS WITH A NONPARTY INMATE'S NAME REDACTED AND TO FILE UNREDACTED DOCUMENTS UNDER SEAL (DOC. #80), and GRANTING PLAINTIFFS' MOTION FOR LEAVE, *INSTANTER*, TO FILE DECLARATIONS WITH NONPARTY INMATES' NAMES REDACTED AND TO FILE UNREDACTED DOCUMENTS UNDER SEAL (DOC. #98)

The plaintiffs, who are Wisconsin prison inmates, bring this civil rights action under 42 U.S.C. § 1983 for declaratory and injunctive relief claiming that the defendants have violated the United States Constitution by enforcing 2005 Wisconsin Act 105, codified as Wis. Stat. § 302.386(5m), and abruptly terminating and depriving them of medical treatment for their serious health condition, Gender Identity Disorder (GID). Further, the plaintiffs assert that the defendants acted without exercising individualized medical judgment and in contrast

to the treatment the defendants provide to similarly situated inmates in Wisconsin Department of Corrections (DOC) facilities. The third amended complaint (complaint) seeks an end to the defendants' actions that violate the plaintiffs' Fourteenth Amendment right to equal protection and Eighth Amendment right to be free from cruel and unusual punishment, as well as a declaration that Wis. Stat. § 302.386(5m)¹ is unconstitutional on its face.

On January 27, 2006, the court granted plaintiffs Sundstrom and Fields' motion for preliminary injunction. Consequently, the defendants are enjoined from withdrawing any hormone therapy which was prescribed to the plaintiffs as of January 11, 2006, and must return the plaintiffs' hormonal therapy to the level in effect prior to the January 12, 2006, reduction. Later, the preliminary injunction was extended to plaintiffs Lindsey Blackwell, Matthew Davison a/k/a Jessica Davison, and Vankemah Moaton, as these plaintiffs were identified as inmates who had been diagnosed with GID or transsexualism and who faced termination of hormone therapy pursuant to Wis. Stat. § 302.386(5m). The preliminary injunction remains in effect with regard to these five plaintiffs until a trial on the merits, as the parties have stipulated to consolidation of the preliminary injunction hearing and the trial on the merits.

PLAINTIFFS' MOTION TO CERTIFY CLASS

The plaintiffs have filed a motion to certify a class action in this case. They seek certification of the following class pursuant to Federal Rule of Civil Procedure 23(b)(2):

All current or future prisoners or patients as specified in Wis. Stat. 302.386(5m) who are transgender, including those who have

¹ The new law prohibits the use of state funds or "federal funds passing through state treasury to provide or to facilitate the provision of hormonal therapy," for the treatment of transgender prisoners, juvenile detainees, or residents in forensic mental health facilities in Wisconsin. Wis. Stat. § 302.386(5m).

been diagnosed with Gender Identity Disorder and those who have a strong persistent cross-gender identification and either a persistent discomfort with their sex or a sense of inappropriateness in the gender role of that sex.

(Pls.' Br. in Supp. of Mot. for Class Cert. at 1.) The plaintiffs contend that the proposed class meets the requirements of Rule 23(a) and (b)(2).

The defendants oppose the motion. According to the defendants, the court should deny the plaintiffs' motion because the proposed class is overly broad and members of the proposed class lack standing. Moreover, the defendants contend that the proposed class fails to satisfy the numerosity, typicality, and commonality requirements of Rule 23(a).

Under Federal Rule of Civil Procedure 23(a), "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." In addition, to prosecute a class action, the plaintiffs must show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

1. Commonality and Typicality

"A common nucleus of operative fact is usually enough to satisfy the commonality requirement." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). A common nucleus of operative fact is typically found where the "defendants have engaged in standardized conduct towards members of the proposed class." *Keele v. Wexler*, 149 F.3d

589, 594 (7th Cir. 1998); see also *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (stating that “commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members”).

A court’s analysis of whether a representative party’s claims are typical of the class members’ claims is closely related to the court’s commonality inquiry. *Keele*, 149 F.3d at 595. The Seventh Circuit has reasoned that “[a] plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other members and his or her claims are based on the same legal theory’ . . . even if there are factual distinctions between the claims of the named plaintiffs and those of other class members.” *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (citations and internal quotations omitted).

The plaintiffs are proceeding on an Eighth Amendment medical care claim and a Fourteenth Amendment equal protection claim based on allegations that the defendants stopped or threatened to stop their hormone therapy medication to comply with Wis. Stat. § 302.386(5m). The pleadings indicated the following: Plaintiff Sundstrom was diagnosed with GID in 1990 at age 25 and has been on hormone therapy since 1990. During all periods of incarceration until January 12, 2006, the defendants have provided Sundstrom with feminizing hormones and testosterone blockers. Plaintiff Fields was diagnosed with GID in 1993 at age 16 and has been on hormone therapy since 1996. During all periods of incarceration until January 12, 2006, the defendants have provided Fields with feminizing hormone therapy. Plaintiff Blackwell was diagnosed as a transsexual in 1998 at age 15, at which time Blackwell was prescribed feminizing hormones and began living full-time as a woman. During all periods of incarceration until January 23, 2006, the defendants have provided Blackwell with

feminizing hormone therapy. Plaintiff Davison was diagnosed as a transsexual in June 2005 and has taken prescribed feminizing hormones continuously since July 2005. Plaintiff Moaton was diagnosed as a transsexual at Dodge Correctional Institution in September 2006. Moaton has taken prescribed feminizing hormones since 2000. At this time, the five plaintiffs are receiving hormone medication pursuant to this court's order.

The principal allegations in this case are that the plaintiffs have been diagnosed with GID or transsexualism and are taking hormone therapy that is in danger of being withdrawn. (See Court's Order of January 27, 2006) (discussing the dangerous effects of the withdrawal of hormone therapy). The plaintiffs propose a class which includes all prisoners "who have a strong persistent cross-gender identification and either a persistent discomfort with their sex or a sense of inappropriateness in the gender role of that sex." However, the proposed class would increase the scope of this lawsuit beyond the claims upon which the named plaintiffs are proceeding. Moreover, potential claims of the proposed class members have not been shown to be common or typical to those of the five plaintiffs in this case.

2. Numerosity

To establish numerosity, plaintiffs are not required to provide an exact number of class members. *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989). Generally, a plaintiff can satisfy the numerosity requirement by demonstrating that there are at least forty potential plaintiffs. *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (citing 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.22[3][a] (3d ed. 1999)).

In this case, only six prisoners within the DOC have been identified as threatened with withdrawal of their hormone therapy through enforcement of Wis. Stat. §

302.386(5m).² A class of five or six prisoners, five of whom have already been joined in the case, is not sufficient to meet the numerosity requirement of Rule 23(a)(1). See 7A Charles Alan Wright, et al., *Federal Practice and Procedure* § 1762 (3d ed. 2005) (“Of course, if there are no members of the class other than the named representatives, then Rule 23(a)(1) obviously has not been satisfied”). For these reasons, the Motion for Class Certification as well as the related Motion for Leave to File Second Amended Complaint to add class allegations must be denied.

ADDITIONAL MATTERS

On August 2, 2006, the plaintiffs filed a motion to file redacted documents which conceal the personal medical information and the identities of nonparty witnesses. This motion goes along with the plaintiffs’ motion to compel discovery filed on the same date, which was resolved on December 6, 2006. Moreover, the motion is consistent with the parties’ April 6, 2006, Agreed Protective Order and seeks to protect sensitive nonpublic information. For that reason, the motion will be granted.

On January 30, 2007, the plaintiffs filed a motion to seal document and to file declarations with the names of nonparty inmates redacted. This motion was accompanied with the plaintiffs’ reply to the class certification motion. Like the August 2 motion, this motion asks the court to approve the filing of documents which protect from public disclosure the identities of nonparty inmates in Department of Corrections facilities along with their medical treatment and diagnosis. In view of this court’s decision on the plaintiffs’ class certification motion, the privacy interest of the nonparty inmates, and the agreement of the parties,

² The six prisoners are the five named plaintiffs in this case and another prisoner who has a separate case before this court.

IT IS ORDERED that the plaintiffs' Motion for Class Certification (Doc. #35) is **DENIED**.

IT IS FURTHER ORDERED that the plaintiffs' Motion for Leave to File Second Amended Complaint (Doc. #37) is **DENIED**.

IT IS FURTHER ORDERED that the plaintiffs' Motion for Leave, *Instanter*, to File Documents with a Nonparty Inmate's Name Redacted and to File Unredacted Documents under Seal (Doc. #80) is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiffs' Motion for Leave, *Instanter*, to File Declarations with Nonparty Inmates' Names Redacted and to File Unredacted Documents under Seal (Doc. #98) is **GRANTED**.

Dated at Milwaukee, Wisconsin, this 16th day of February, 2007.

BY THE COURT

s/ C. N. CLEVERT, JR.

C. N. CLEVERT, JR.

U. S. DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

KARI SUNDSTROM,
ANDREA FIELDS,
LINDSEY BLACKWELL,
MATTHEW DAVISON, also known as Jessica Davison,
and VANKEMAH D. MOATON,

Plaintiffs,

v.

Case No. 06-C-112

MATTHEW J. FRANK,
WARDEN JUDY P. SMITH,
THOMAS EDWARDS,
JAMES GREER,
ROMAN KAPLAN, MD,
WARDEN ROBERT HUMPHREYS,
and MANAGER SUSAN NYGREN,

Defendants.

**ORDER DENYING MOTION FOR LEAVE TO AMEND (DOC. #104) AND
DENYING MOTION TO RECONSIDER CERTIFICATION OF MODIFIED
CLASS DEFINITION (DOC. #104)**

On March 5, 2007, the plaintiffs filed a joint motion for leave to amend and to reconsider certification of a modified class definition. The plaintiffs request that the court, 1) grant their motion to amend the complaint and allow them to add Erik Huelsbeck, a/k/a Erika Huelsbeck, and Kenneth Krebs, a/k/a Karen Krebs as additional plaintiffs; 2) grant them leave to file a Fourth Amended Complaint, see Exhibit F, adding plaintiffs Huelsbeck and Krebs, and class allegations; and 3) grant their motion to reconsider the February 15, 2007, decision denying class certification, and certify a modified class under Federal Rule of Civil Procedure 23 of:

All current or future residents housed in prisons identified in Wis. Stat. § 302.01 who have been, or will in the future be, denied hormone therapy or sex reassignment surgery to treat a serious medical need because of the Inmate Sex Change Prevention Act, 2005 Wisconsin Act 105, codified at Wis. Stat. § 302.386(5m).

(Pl.'s Mot. ¶ 5.)

The defendants oppose the plaintiffs' motion and contend that allowing the plaintiffs to file a fourth amended complaint would result in substantial delay and unfairly prejudice the defendants. As for reconsideration of class certification the defendants submit that the proposed class still would not satisfy the typicality and numerosity requirements of Rule 23. Also, the defendants argue that allowing this case to proceed as a class action would result in substantial prejudice to the defendants because the scope of the lawsuit would be dramatically increased. Finally, the defendants assert that the plaintiffs' submission is not a motion for reconsideration because the plaintiffs are not asking the court to reconsider its ruling on their first proposed class. Rather, according to the defendants, the plaintiffs are asking the court to rule for the first time on an entirely new definition of a proposed class.

MOTION TO AMEND THE COMPLAINT

Rule 15(a) of the Federal Rules of Civil Procedure states that leave to file an amended complaint "shall be freely given when justice so requires." The Supreme Court has explained the meaning of "freely given" as used in Rule 15(a) by stating:

In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of a movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. - the leave sought should, as the rules require, be freely given.

Foman v. Davis, 371 U.S. 178, 182 (1962).

The five named plaintiffs in this case maintain that they have Gender Identity Disorder (GID). They are proceeding on an Eighth Amendment medical care claim and a Fourteenth Amendment equal protection claim based on allegations that the defendants stopped or threatened to stop their hormone therapy medication to comply with Wis. Stat. § 302.386(5m)¹. The third amended complaint (complaint) seeks an end to purported actions by the defendants that violate the plaintiffs' Fourteenth Amendment right to equal protection and Eighth Amendment right to be free from cruel and unusual punishment, as well as a declaration that Wis. Stat. § 302.386(5m) is unconstitutional on its face. The court has entered a preliminary injunction, enjoining the defendants from withdrawing any hormone therapy which was prescribed to the plaintiffs as of January 11, 2006, and ordering the defendants to return the plaintiffs' hormonal therapy to the levels in effect prior to the January 12, 2006, reduction.

The pending motions seek leave by the plaintiffs to file a fourth amended complaint naming two additional plaintiffs, Erik, a/k/a Erika, Huelsbeck and Kenneth, a/k/a Karen, Krebs. According to the proposed fourth amended complaint, Huelsbeck and Krebs, Wisconsin state prisoners who are being harmed because Wisconsin Department of Corrections (DOC) medical personnel have denied them hormones pursuant to Wis. Stat. § 302.386(5m). The proposed fourth amended complaint charges that Huelsbeck and Krebs were identified as male when born but since childhood have had an innate sense of being female; both have been diagnosed with GID; both experience severe psychological distress

¹ The new law prohibits the use of state funds or "federal funds passing through state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery" for the treatment of transgender prisoners, juvenile detainees, or residents in forensic mental health facilities in Wisconsin. Wis. Stat. § 302.386(5m).

because their bodies do not conform to their female gender identity; and both have attempted suicide in the past and continue to experience depression or suicidal thoughts because of the psychological distress caused by their gender.

In support of the motion to amend, the plaintiffs contend that Wis. Stat. § 302.386(5m) is unconstitutional as applied to inmates who have a serious medical need for treatment for their GID. According to the plaintiffs,

Although both Ms. Huelsbeck and Ms. Krebs could file separate cases seeking hormones, the cases they would file to obtain the hormone therapy denied them because of the Act would be closely related to the present case. The most important facts regarding their cases – the expert testimony about what treatment is medically necessary for persons with GID – and the legal questions regarding whether the Constitution requires treatment for prisoners with GID and a serious medical need for such treatment are the same as the facts and law at issue in this case.

(Pls.' Supporting Br. at 5.) The plaintiffs assert that "refusing to provide hormones to an inmate with GID who has a serious medical need for them inflicts the same kind of serious harm caused by cutting someone off the therapy." *Id.* at 4 (citing Declaration of Randi C. Ettner, Ph.D. ¶ 11.)

Based on the current record, Huelsbeck and Krebs are unlike the plaintiffs and have never been prescribed hormone therapy by the DOC. However, Huelsbeck and Krebs claim that, because of Wis. Stat. § 302.386(5m), the DOC refused to even consider them as candidates for hormone therapy. The proposed fourth amended complaint states that both Huelsbeck and Krebs have "asked DOC medical personnel to evaluate [them] for treatment, but they have refused because 2005 Wisconsin Act 105 prevents them from providing hormone therapy." (Proposed Fourth Amendment Complaint ¶¶ 73-74.) In Huelsbeck and

Krebs' opinion, hormones are medically necessary to treat their GID. However, neither inmate came into the DOC system taking feminizing hormones, although Huelsbeck took Depo-Provera for about three months several years ago. (Proposed Fourth Amended Complaint ¶ 54.)

There is a fundamental difference between the five named plaintiffs and the two proposed plaintiffs. The former have been prescribed and administered hormone therapy by the DOC²; the latter have not. Allowing Huelsbeck and Krebs to participate in this lawsuit as plaintiffs would expand this case to include the factual issue of whether hormone therapy is a medically necessary treatment for them individually. Expanding the nature of this lawsuit at this stage of the proceedings would prejudice the defendants unduly. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Campania Mgmt. Co., Inc., v. Rooks, Pitts & Poust*, 290 F.3d 843, 848 (7th Cir. 2002); *Select Creations, Inc. v. Paliapito America, Inc.*, 830 F. Supp. 1213, 1217-18 (E.D. Wis. 1993).

It is clear that the plaintiffs are concerned that, if their motion to amend is denied, relief upon resolution of this case would be limited to prisoners who find themselves in the current plaintiffs' situation, i.e., subject to withdrawal of hormone therapy because of

² The pleadings indicated the following: Plaintiff Sundstrom was diagnosed with GID in 1990 at age 25 and has been on hormone therapy since 1990. During all periods of incarceration until January 12, 2006, the defendants have provided Sundstrom with feminizing hormones and testosterone blockers. Plaintiff Fields was diagnosed with GID in 1993 at age 16 and has been on hormone therapy since 1996. During all periods of incarceration until January 12, 2006, the defendants have provided Fields with feminizing hormone therapy. Plaintiff Blackwell was diagnosed as a transsexual in 1998 at age 15, at which time Blackwell was prescribed feminizing hormones and began living full-time as a woman. During all periods of incarceration until January 23, 2006, the defendants have provided Blackwell with feminizing hormone therapy. Plaintiff Davison was diagnosed as a transsexual in June 2005 and has taken prescribed feminizing hormones continuously since July 2005. Plaintiff Moaton was diagnosed as a transsexual at Dodge Correctional Institution in September 2006. Moaton has taken prescribed feminizing hormones since 2000. At this time, the five plaintiffs are receiving hormone medication pursuant to this court's order.

Wis. Stat. § 302.386(5m). Moreover, the plaintiffs point out that a blanket policy of failing to treat inmates with GID with hormone therapy can violate the Constitution. However, one of the plaintiffs' claims for relief in this case is a declaration that Wis. Stat. § 302.386(5m) is unconstitutional and a ruling upon the constitutionality of the statute has the potential to impact more than the five plaintiffs in this case.

MOTION FOR RECONSIDERATION

Turning to the motion for reconsideration, the court notes that Federal Rule of Civil Procedure 54(b) allows any order adjudicating fewer than all the claims to be revised at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Motions to reconsider (or more formally, to revise) an order under Rule 54(b) are judged by largely the same standards as motions to alter or amend a judgment under Rule 59(e): to correct manifest errors of law or fact or to present newly discovered evidence. *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987) (quoting *Keene Corp. v. Int'l Fid. Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir. 1984) (citation and footnote omitted)), *amended by*, 835 F.2d 710 (7th Cir. 1987). *Compare Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996) (providing nearly identical standard for motion under Rule 59(e)).

The plaintiffs contend that a class action is the most timesaving and efficient way to address the issues related to the statute's prohibition of medical treatment for "these plaintiffs" and for future inmates. The plaintiffs assert:

The inmate population in the custody of the Department of Corrections is and will likely continue to be dispersed among several prisons. Many of these inmates will not have the knowledge of the law or the financial resources to institute individual suits challenging the Act, future inmates will be

affected by the Act, and those future inmates who have the knowledge and financial resources to file cases for themselves or who manage to find attorneys to file cases for them will create a multiplicity of lawsuits deciding the same or substantially similar questions about the constitutionality of the Act raised in the current case. These factors show the impracticability of joining all inmates harmed now and in the future by the Act and strongly support the certification of a class.

(Pls.' Supporting Br. at 8.) The plaintiffs further contend that granting the relief sought in their motion is well within the court's discretion and will not prejudice the defendants.

On February 16, 2007, the court denied the plaintiffs' motion for class certification, reasoning, in part:

The principal allegations in this case are that the plaintiffs have been diagnosed with GID or transsexualism and are taking hormone therapy that is in danger or being withdrawn. (See Court's Order of January 27, 2006) (discussing the dangerous effects of the withdrawal of hormone therapy). The plaintiffs propose a class which includes all prisoners "who have a strong persistent cross-gender identification and either a persistent discomfort with their sex or a sense of inappropriateness in the gender role of that sex." However, the proposed class would increase the scope of this lawsuit beyond those claims upon which the named plaintiffs are proceeding. Moreover, potential claims of the proposed class members have not been shown to be common or typical to those of the five plaintiffs in this case.

(Court's order of February 16, 2007, at 5.) The plaintiffs' motion for reconsideration of the court's denial proposes a revised class. See *infra*. at 2. However, for the reasons stated in this order with respect to the plaintiffs' motion to amend the complaint as well as the reasons set forth in the February 16, 2007, order, and because the plaintiffs have not presented newly discovered evidence or shown that the order of February 16, 2007, contained a manifest error of law,

IT IS ORDERED that the plaintiffs' motion for leave to amend (Doc. #104) is **DENIED**.

IT IS FURTHER ORDERED that the plaintiffs' motion to reconsider certification of modified class definition (Doc. #104) is **DENIED**.

Dated at Milwaukee, Wisconsin, this 7th day of August, 2007.

BY THE COURT

s/ C. N. CLEVERT, JR.
C. N. CLEVERT, JR.
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

ANDREA FIELDS, ET AL.,)	CASE NO: 2:06-CV-112-CNC
)	
Plaintiffs,)	CIVIL
)	
vs.)	Milwaukee, Wisconsin
)	
JUDY P. SMITH, ET AL.,)	Thursday, June 17, 2010
)	
Defendants.)	(10:23 a.m. to 10:33 a.m.)

MINX GOTTI, ET AL.,)	
)	
Plaintiffs,)	
)	CASE NO: 2:07-CV-928-CNC
vs.)	
)	
RICK RAEMISCH, ET AL.,)	
)	
Defendants.)	

JOINT STATUS CONFERENCE

BEFORE THE HONORABLE CHARLES N. CLEVERT, JR.
CHIEF UNITED STATES DISTRICT JUDGE

Deputy Clerk:	Kris Wilson
Court Reporter:	Recorded; FTR
Transcribed by:	Exceptional Reporting Services, Inc. 14493 S. Padre Island Drive Suite A-400 Corpus Christi, TX 78418-5940 361 949-2988

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transcript produced by transcription service.

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1 Milwaukee, Wisconsin; Thursday, June 17, 2010; 10:23 a.m.

2 (Courtroom and telephonic appearances)

3 (Call to Order)

4 THE CLERK: Case Numbers 2006-C-112, *Fields, et al v*
5 *Smith, et al* and 07-C-928, *Gotti, et al v Raemisch, et al.*

6 This matter is before the court for a joint status conference.

7 May we have the appearances, please, starting with
8 the phone?

9 MR. KNIGHT: John Knight for the Plaintiffs.

10 MR. LEVASSEUR: Dru Levasseur (indiscernible).

11 MR. SULLIVAN: Assistant Attorney General Francis X.
12 Sullivan and Jody Schmelzer for the Defendants.

13 MR. DUPUIS: And Laurence DuPuis for the Plaintiffs.

14 THE COURT: Good morning, counsel. I'd like to begin
15 by noting receipt of a stipulation as well as a motion
16 respecting attorneys' fees and costs on this matter. The
17 parties have asked that the subject of attorneys' fees and
18 costs be held in abeyance and have offered a proposed order
19 consistent with the request.

20 Is there anything you'd like to say to supplement
21 what you submitted in writing?

22 MR. DUPUIS: No, your Honor, on behalf of the
23 Plaintiffs. This is Mr. DuPuis.

24 MR. SULLIVAN: Judge, this is Sullivan. The parties
25 conferred extensively about this and believe that the most

1 expeditious and most effective way to resolve this matter is
2 simply to ask the Court to enter the order.

3 **THE COURT:** Well, given what you've presented and
4 with due regard for your exercise of prudence I will execute
5 the order immediately. And so your request has been requested
6 and the order shall be docketed forthwith.

7 **MR. SULLIVAN:** Thank you, your Honor.

8 **THE COURT:** With that having been said, I'd like to
9 next turn to the permanent injunction and proposed terms of
10 relief as submitted by the Plaintiffs in the Fields case. I
11 have not heard from the Defense on this matter and would like
12 to find out whether or not the Defense believes the order as
13 tendered, at least the substance of the Order as tendered, is
14 as narrow as is required and should be entered with due regard
15 for the fact that you do not believe that any relief should be
16 given to the Plaintiffs in this matter.

17 **MR. SPEAKER:** I think that's a fair statement, your
18 Honor. The position of the Defendants is that the Plaintiffs
19 are not entitled to any relief and that the Court, with all due
20 respect, incorrectly decided the matter. But given those
21 concerns we believe that the proposed order is fair.

22 **THE COURT:** All right. And do you believe that it is
23 as narrowly (indiscernible) as is warranted under the
24 circumstances?

25 **MR. SPEAKER:** I do, your Honor.

1 **THE COURT:** All right. Well, an order will be
2 entered forthwith. I will tell you that I am in trial and have
3 a very complete schedule, but I will try to get this final
4 order entered within the next several days so that you can
5 proceed with the appeal and, of course, so that the relief
6 remains in place in this case.

7 Now, that having been said we then need to turn -- we
8 next need to turn to the Gotti case and how you believe the
9 Gotti matter should be handled under the circumstance. It is
10 my recollection that the Gotti case has been held in abeyance
11 with the understanding that the relief which has been sought in
12 the Fields case should parallel the relief in the Gotti case
13 and the parties will abide by the relief in the Fields case as
14 it may apply in Gotti.

15 Is that how you desire to proceed?

16 **MR. SULLIVAN:** Your Honor, this is Sullivan again.
17 We have had extensive discussions on this matter as well, and I
18 would ask Mr. Knight to correct me if I misspeak in any way.
19 But I think what we decided was this:

20 There are three parties in the Gotti matter. Two of
21 them are already released. The third is set to be released I
22 believe in August of this year. What we would propose would be
23 to simply enter no order at all in the Gotti case at this time,
24 allow events to run their course and the third Plaintiff should
25 be released whereupon we would dismiss the matter as moot.

1 THE COURT: What is the current release date?

2 MR. DUPUIS: Your Honor, this is Mr. DuPuis. I
3 believe it's August 16th, 2010. And that's based on an email
4 forwarded by Mr. Sullivan from Jackie Ryder (phonetic) at DOC.

5 THE COURT: Well, if --

6 MR. DUPUIS: That's not right, Mr. Sullivan?

7 THE COURT: Mr. Sullivan, is it August 16th?

8 MR. SULLIVAN: I believe that's correct. I know it's
9 around there, your Honor. I don't remember that exact date;
10 but, yes.

11 THE COURT: Well, I will do this. In light of what
12 you said I will enter an order which would become -- which
13 would dismiss the case effective at the end of August unless I
14 hear from the parties that the order should not be entered.
15 This will give you time between the projected release date and
16 the actual dismissal to advise the Court if another course
17 would be more prudent. Because I know from time to time
18 release dates get set back because of various things such as
19 disciplinary actions that may occur. And if that should be the
20 situation here, I don't want the case to get off track or for
21 you to have to do anything substantial to maintain the rights
22 of the one Plaintiff in the Gotti case who remains in custody.
23 And I would assume that another reason for pursuing this course
24 is to ensure that that Plaintiff continues to receive the
25 hormone treatment which has been provided under the terms of

1 the Court's preliminary injunction.

2 MR. DUPUIS: Correct, your Honor. I believe that we
3 would prefer to take a course of possibly by joint motion and
4 we submit an order to dismiss the two current -- the Plaintiffs
5 who are currently already released but not enter even a
6 conditional order just because I'm a little concerned about
7 just -- I'd rather we actively take that step --

8 THE COURT: I know.

9 MR. DUPUIS: -- when the person is released than --

10 THE COURT: I know. And I can understand it. The
11 reason I am suggesting this course is all too often I have had
12 cases where things such as you've described were supposed to
13 have been pursued by a party, and the next thing I know a year
14 has passed and a stipulation has not come in. So I want to
15 force the issue.

16 MR. DUPUIS: Right. May I suggest a status
17 conference in this case specifically on the -- perhaps a week
18 after the release date?

19 THE COURT: That's a good alternative. All right.
20 We're on the same page.

21 MR. DUPUIS: All right.

22 THE COURT: We'll set it for a status conference in
23 late August. But I don't want it to go into September,
24 October, November of next year because it's been forgotten.

25 MR. DUPUIS: Right. Unless something unexpected

1 happens. And I believe, your Honor, it would make sense for us
2 to go ahead and proceed with the other two Plaintiffs now so
3 that there are dismissals without prejudice.

4 **THE COURT:** Which Plaintiffs have been released?

5 **MR. DUPUIS:** Right. Gotti, who is also known as
6 Alexander Lefleur (phonetic), and Darrick Walker. The
7 remaining Plaintiff is Jeffrey, also known as Jennifer Knutsen
8 I believe.

9 **MR. SPEAKER:** Sarah.

10 **MR. SPEAKER:** Sarah Knutsen. I'm sorry.

11 **THE COURT:** All right. Then what we will do is enter
12 an apex on the order dismissing Plaintiffs Gotti and Walker
13 from this case, a case where I proceed with the remaining
14 Plaintiff, and will be on the calendar for a status conference
15 on what date?

16 **THE CLERK:** August 30th at 1:30.

17 **THE COURT:** Of course, if things are resolved prior
18 to that time, then you would be able to take it off the
19 calendar by submitting a stipulation for dismissal. No order
20 is required in such an instance if there's a stipulation.

21 **MR. SULLIVAN:** Your Honor, this is Sullivan again.
22 We would ask permission to appear by telephone at that time.

23 **THE COURT:** No. This time I want you in person,
24 Mr. Sullivan.

25 **MR. SULLIVAN:** Okay.

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THE COURT: I'm kidding you. I'm kidding you.

MR. SULLIVAN: Well, your Honor, I just wanted --

(Laughter / Indiscernible)

MR. SPEAKER: May I object to that, your Honor?

THE COURT: It's duly noted. All right. Thank you,
very much.

MR. SPEAKER: Thank you, everybody.

THE COURT: Have a good weekend.

THE CLERK: All rise.

(This proceeding was adjourned at 10:33 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



July 7, 2010

TONI HUDSON, TRANSCRIBER

EXCEPTIONAL REPORTING SERVICES, INC

CERTIFICATE OF SERVICE

I, John A. Knight, hereby certify that on November 23, 2010, I caused two copies of the foregoing BRIEF AND APPENDIX OF PLAINTIFFS-APPELLEES, CROSS-APPELLANTS to be served via the United States Postal Service, first class mail, postage prepaid, upon the following:

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