Nos.10-2339 and 10-2466

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ANDREA FIELDS, et al.,

Plaintiffs-Appellees,
Cross-Appellants

v.

JUDY P. SMITH, et al.,

Defendants-Appellants,
Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, NO. 06-C-112,
THE HONORABLE JUDGE C. N. CLEVERT, JR., PRESIDING

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS, CROSS-APPELLEES

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JURISDICTIONAL STATEMENT

The Plaintiffs-Appellees-Cross-Appellants ("plaintiffs") filed a complaint for declaratory and injunctive relief in the United States District Court for the Eastern District of Wisconsin on January 24, 2006, pursuant to 42 U.S.C. §1983, alleging that 2005 Wisconsin Act 105 (hereinafter "the Act" or "Wis. Stat. § 302.386(5m)") violates the

Eighth and Fourteenth Amendments of the United States Constitution. [R.1] The district court had jurisdiction under 28 U.S.C. § 1331. On March 31, 2010, the United States District Court for the Eastern District of Wisconsin entered an Order declaring Wis. Stat. § 302.386(5m) unconstitutional and enjoining enforcement of the statute. [R.206; App. 101] On May 13, 2010, the district court entered a memorandum decision setting forth the findings of fact and conclusions of law. [R.212; App. 104] The Defendants-Appellants-Cross-Appellees ("defendants") filed a timely notice of appeal on June 2, 2010. [R.214] On June 9, 2010, the plaintiffs filed a motion for additional findings pursuant to Fed. R. Civ. P. 52(b). [R.222] On June 16, 2010, the plaintiffs timely filed a notice of cross appeal. [R.228] On June 22, 2010, the district court entered a final judgment. [R.235; App. 172] On June 29, 2010, the plaintiffs made an unopposed motion to amend/correct judgment by making additional findings. [R.237] And on July 9, 2010, the district court granted the plaintiffs' unopposed motion for additional findings and issued a final order disposing of all remaining post judgment motions. [R.239; App. 173] This court has appellate jurisdiction under 28 U.S.C. § 1291, as the appeal is from the final order of a district court.

ISSUES PRESENTED

1. Whether the district court erred in holding that Wis. Stat. § 302.386(5m) violates the Eighth Amendment as-applied to the plaintiffs where the statute only limits certain treatment options.

2. Whether the district court erred in holding that Wis. Stat. § 302.386(5m) violates the Eighth Amendment on its face where the statute is not unconstitutional in all, or most, applications.

3. Whether the district court erred in finding that Wis. Stat. § 302.386(5m) violates the Fourteenth Amendment, both as-applied and on its face, where the statute is rationally related to a legitimate governmental security interest.

STATEMENT OF THE CASE

The plaintiffs, all current inmates in the Wisconsin prison system, filed this action on January 24, 2006, against the defendants, all Wisconsin Department of Corrections (DOC) officials. [R.95 at ¶¶5-15] The plaintiffs have all been diagnosed as suffering from some form of gender identity disorder. In their Third Amended Complaint (Complaint), the plaintiffs challenge the Inmate Sex Change Prevention Act (the Act), Wis. Stat. § 302.386(5m), which prevents state or federal resources to be used to provide hormone therapy or sexual reassignment surgery to Wisconsin prisoners. [R.95 at ¶2] The statute defines "hormonal therapy" as "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." Wis. Stat. § 302.386(5m)(a)(1). It also defines "sexual reassignment surgery" as "surgical procedures to alter a person's physical appearance so that the person appears more like the opposite gender." Wis. Stat. § 302.386(5m)(a)(2).

The Complaint set forth essentially three claims: (1) the Act, as applied to the plaintiffs, violates the Eighth Amendment; (2) the Act, on its face, violates the Eighth Amendment; and (3) the Act violates the plaintiffs' Fourteenth Amendment equal protection rights both on its face and as-applied. [R.95 at ¶¶62-72] As relief, the plaintiffs requested injunctive relief against DOC's enforcement of the Act against them, along with declaratory relief holding the Act, both on its face and as applied to plaintiffs, violates the Eighth and Fourteenth Amendments to the constitution. [R.95 at page 13]

The defendants moved for summary judgment on July 31, 2007, which the district court granted in part, dismissing plaintiffs Sundstrom and Blackwell, along with Defendants Humphreys and Nygren. [R.175; App. 176] The case proceeded to trial on October 22, 2007, through October 25, 2007. [R.200-203] On March 31, 2010, the court issued an Order declaring the Act unconstitutional under both

the Eighth Amendment and Equal Protection Clause and enjoining its enforcement. [R.206; App. 101] On May 13, 2010, the court issued a Memorandum Decision outlining its findings and conclusions. [R.212; App. 104] On June 22, 2010, the district court entered a final judgment. [R.235; App. 172] On June 29, 2010, the plaintiffs made an unopposed motion to amend/correct judgment and make additional findings. [R.237] And on July 9, 2010, the district court granted the plaintiffs' unopposed motion for additional findings and issued a final order disposing of all remaining post judgment motions. [R.239; App. 173] This appeal followed.

STATEMENT OF THE FACTS[1]

The plaintiffs are all male-to-female transsexuals in DOC custody who have been diagnosed with Gender Identity Disorder (GID). [R.212:2-3; App. 105-106] GID is classified as a psychiatric disorder in the DSM-IV-TR, the current edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM"). *Id*. In prior editions, the DSM classified "transsexualism" as a psychiatric disorder. *Id*. The following diagnostic criteria are listed in the DSM for GID: 1) a strong and

[1]The district court's memorandum decision, filed May 13, 2010, sets for a detailed recitation of the stipulated facts and trial testimony. That decision accompanies this brief as pages 147 through 214 of the appendix. [R.212; App.147]

persistent cross-gender identification; 2) a persistent discomfort with one's sex or a sense of inappropriateness in the gender role of that sex; 3) the disturbance is not concurrent with a physical intersex condition; and 4) the disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. [R.212:2-3; App. 105-106] Having a diagnosis in the DSM does not dictate a specific treatment; treatment is individualized. [R.202:256] Hormone therapy and gender reassignment surgery (GRS) are two of the treatment options for GID recommended by the World Professional Association for Transgender Health (WPATH) in their "triadic treatment" approach. [R.200:29-30] Hormone therapy, and especially gender reassignment surgery, are extreme measures reserved for serious cases. [R.202:289 (testimony that Dr. Brown has only seen one inmate that he thought was eligible for sex reassignment surgery); R.200:6 (plaintiffs' counsel arguing that hormone therapy is only required treatment in "severe cases of Gender Identity Disorder" and sex reassignment surgery is required "for an even smaller group."); R.201:175 (Kallas testimony that hormones are one of the central ways to treat those with "severe gender dysphoria."); R.200:118-119 (Dr. F. Ettner testifying that there are lots of alternatives in treatment

therapies); R.201:186 (Dr. Kallas testifying that not all gender dysphoria requires hormones or surgery); R.200:60-61 (Dr. R. Ettner testifying that not all individuals with GID need hormones, a diagnosis of GID does not require treatment in every case, and under the standards of care, therapists are directed to let GID patients simply choose among treatment options); R.200:64 (Dr. R. Ettner testifying that it is possible that inmates may request hormone therapy when it is not an appropriate treatment for them)]

Wis. Stat. § 302.386(5m) (2009) was enacted in 2006 – as 2005 Wisconsin Act 105 ("Act 105" or "the Act") – by the Wisconsin State Legislature to address the use of hormone therapy and gender reassignment in medical care in correctional facilities. The legislative sponsors of Act 105 labeled it the "Inmate Sex Change Prevention Act." Act 105 provides:

> SECTION 1. 302.386(5m) of the statutes is created to read:
>
> 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).
>
> SECTION 2. Initial applicability.
>
> (1) PROVISION OF HORMONAL THERAPY OR SEXUAL REASSIGNMENT THERAPY. This act first applies to hormonal therapy, as defined in section 302.386 (5m) (a) 1. of the statutes, as created by this act, or sexual reassignment surgery, as defined in section 302.386 (5m) (a) 2. of the statutes, as created by this act, provided on the effective date of this subsection.

[2005 Wisconsin Act 105]

Hormone treatments feminize inmates by rendering effects on "secondary sexual characteristics such as hair, fatty metabolism, muscle, and . . . breasts." [R.201:197] The Act serves to prevent sexual violence in prison, the risk of which is increased when an inmate presents an effeminate manner. [R.202:412-435]

The plaintiffs challenge the Act because it prevents state or federal resources to be used to provide hormone therapy or sexual reassignment surgery to Wisconsin prisoners. [R.95 at ¶2] As a result of the Act, certain inmates were denied evaluations for determining the suitability of the prohibited treatments. [R.212:7; App. 110] It is undisputed, however, that the psychiatric and psychological services provided by DOC to treat psychoses, adjustment disorders, or mood

disorders like depression or anxiety, would all be available to inmates with GID despite the Act. [R.201:199-200] Additionally, the array of medical treatment available to treat any gastrointestinal problems, cardiovascular problems, muscle weakness, endocrine problems, diabetes, osteoporosis, and healing issues related to withdrawal of hormones would all be available to inmates with GID with the Act in effect. [R.201:216-222]

SUMMARY OF THE ARGUMENT

The Act does not violate the Eighth Amendment on its face because there is no evidence in the record to support a conclusion that there is "no set of circumstances" under which the Act does not effectuate deliberate indifference with regards to inmates with GID who are interested in being evaluated for hormones or surgery. In fact, the vast majority of the evidence supports the opposite conclusion, that the medical experts believe the prohibited treatments are only medically necessary in limited, serious cases. The Act does not violate the Eighth Amendment as applied to the plaintiffs because the Act merely limits treatment options, the State has no constitutional obligation to provide curative treatment, and legislation limiting medical discretion as to treatment options does not effectuate *per se*

deliberate indifference. Finally, the Act does not violate the Equal Protection Clause, either as-applied or on its face, because it is rationally related to legitimate security interests. The district court misapplied the rational basis standard by not affording appropriate weight to the evidence identifying and supporting the State's security interests in preventing sexually motivated violence in prisons.

STANDARD OF REVIEW

On appeal, a decision granting a permanent injunction is reviewed for abuse of discretion. *Knapp v. Northwestern University*, 101 F.3d 473, 478 (7th Cir. 1996). Factual determinations are reviewed under a clearly erroneous standard and legal conclusions are given *de novo* review. *Id.; see also, 3M v. Pribyl*, 259 F.3d 587, 607 (7th Cir. 2001).

ARGUMENT

I. WIS. STAT. § 302.386(5M) DOES NOT VIOLATE THE EIGHTH AMENDMENT OF THE CONSTITUTION AS APPLIED TO THE PLAINTIFFS.

A. The Eighth Amendment Standard

"Cruel and unusual punishment" of individuals is prohibited by the Eighth Amendment and this theory applies to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666 (1962); *Redding v. Pate*, 220 F. Supp. 124, 127 (N.D. Ill. 1963). The Eighth Amendment prohibits unnecessary and wanton infliction of pain. *Hudson v. McMillian*, 503 U.S. 1, 5 (1992), *Outlaw v. Newkirk*, 259 F.3d 833, 837 (7th Cir. 2001). The prohibition against unnecessary and wanton infliction of pain has been extended to the treatment of an inmate's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Wynn v. Southward*, 251 F.3d 588, 593 (7th Cir 2001). A serious medical need is one that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily recognize the necessity for doctor's attention. *Wynn,* 251 F. 3d at 593.

To establish an Eighth Amendment violation based on deliberate indifference to a serious medical need, the plaintiffs must first demonstrate that they had an objectively serious medical need. *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002). Second, they must

demonstrate that the defendants were subjectively deliberately indifferent to their serious medical condition. *Id.*

1. The serious medical need standard

Deliberate indifference to medical needs is an Eighth Amendment violation only if an inmate's needs are "serious." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (citing *Estelle v. Gamble*, 429 U.S. at 103-04). Courts objectively distinguish medical needs that are serious from those that are trivial. *Gutierrez v. Peters*, 111 F.3d 1364, 1372 (7th Cir. 1997) (noting that not every medically recognized condition involving discomfort can support an Eighth Amendment claim). The deprivation alleged must be, objectively, sufficiently serious. *Henderson v. Sheahan*, 196 F.3d 839, 845 (7th Cir. 1999) (explaining that for liability to exist the prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities). An objectively serious medical need is one that has either "been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Zentmyer v. Kendall County, Ill.*, 220 F.3d 805, 810 (7th Cir. 2000) (an ear infection that inflicted prolonged suffering for months and led to permanent loss of hearing was an objectively serious

medical condition). A condition is objectively serious if "failure to treat [it] could result in further significant injury or unnecessary and wanton infliction of pain." *Reed v. McBride*, 178 F.3d 849, 852 (7th Cir. 1999) (quoting *Gutierrez*, 111 F.3d at 1373).

2. The deliberate indifference standard

The second prong of deliberate indifference requires the plaintiffs to establish that the defendants acted with a specific state of mind. Deliberate indifference to a serious medical need is more than "mere negligence," as it requires that the prison official was "subjectively aware of the prisoner's serious medical needs and disregarded an excessive risk that a lack of treatment posed to the prisoner's health and safety." *Wynn v. Southward*, 251 F.3d at 593 (holding that denial of heart medication after repeated oral and written requests demonstrates deliberate indifference). A prison official is not deliberately indifferent "unless the official knows of and disregards an excessive risk to inmate health or safety; the 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 v. Brennan*, 511 U.S. 825, 837 (1994). Thus, "[u]nder the subjective standard, it is not enough to show that a state actor should have known

of the danger his actions created. Rather, a plaintiff must demonstrate that the defendant had actual knowledge of impending harm which he consciously refused to prevent." *Hill v. Shobe*, 93 F.3d 418, 421 (7th Cir. 1996). The Court must examine the totality of the inmate's medical care in determining whether the care demonstrates deliberate indifference of a serious medical need. *Gutierrez*, 111 F.3d at 1375 (holding that isolated delays in treatment over a ten-month period of treatment did not constitute deliberate indifference) (citing *DeMallory v. Cullen*, 855 F.2d 442, 445 (7th Cir. 1988)).

Furthermore, an inmate's disagreement with the course of treatment cannot establish deliberate indifference violating the Eighth Amendment. *Snipes v. DeTella*, 95 F.3d 586, 591 (7th Cir. 1996) (holding that a disagreement over the deliberate decision not to use local anesthetic did not meet the deliberate indifference standard). The Court in *Snipes* approached the inmate's treatment as a whole, refusing to evaluate one specific medical decision for deliberate indifference. *Id*. Medical decisions that may be characterized as classic examples of matters for medical judgment, such as whether one course of treatment is preferable to another, are beyond the Amendment's

purview. *Id*. Such matters are questions of tort, not constitutional law. *Id*.

B. Wis. Stat. § 302.386(5m) Does Not Violate the Eighth Amendment As Applied to the Plaintiffs Because It Does Not Effectuate Deliberate Indifference.

As an initial matter, based on the testimony at trial, the district court found that GID constitutes a serious medical need, thus establishing the first prong of the plaintiffs' Eighth Amendment claim. [R.212:55; App. 158] Although the defendants disagree, they acknowledge that review of such a finding is conducted using the deferential "clearly erroneous" standard. The defendants believe the crux of this appeal relates to the deliberate indifference prong of the analysis and, therefore, are electing not to challenge the lower court's finding as to serious medical need.

1. A legislative act denying some medical discretion does not effectuate *per se* deliberate indifference under the Eighth Amendment.

The district court's decision that the Act violates the Eighth Amendment hinges primarily on its conclusion that "prison officials may not substitute their judgments for a medical professional's prescription." [R.212:62; App. 165] The problem is that that conclusion

has no basis in case law and its extension to legislative acts would produce an absurd result.

Both the Supreme Court and the Seventh Circuit Court of Appeals have repeatedly affirmed the right of the state to limit the discretion of medical professionals both directly (through regulation) and indirectly (through public financing restrictions). *See Gonzales v. Carhart*, 550 U.S. 124, 162-165 (U.S. 2007) ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."); *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997) ("[I]t is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes…when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation'"); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding a state law criminalizing physician assisted suicide). The Supreme Court's latest foray into this particular question endorsed a broad view of this issue:

> A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to

> regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where 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.

Gonzales, 550 U.S. 166-167. Speaking directly to the issue of transsexuals in prison, this court noted that many states' Medicaid statutes "contain a blanket exclusion" of coverage for sex-change operations. *Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997). Indeed, Wisconsin's own Medicaid program denies coverage of both hormone therapy and gender reassignment surgery. [Wis. Stat. § 49.46(2) (2010); Wis. Stat. § 49.47(6)(a); Wis. Admin. Code § DHS 107.10 (2010); *see also* Burnett Test., R.201:221-222][2] Moreover, Courts have routinely recognized that even a private insurance plan governed by the Employee Retirement Income Security Act may exercise its discretion to cover treatment prescribed by healthcare providers provided that the decision not to cover is intended to be discretionary under ERISA and is not arbitrary and capricious. *Summers v. Touchpoint Health Plan, Inc.*, 2006 WI App 217, 296 Wis.

[2]Record entries 200-203 are the transcripts from the court trial.

2d 566, 723 N.W.2d 784. Finally, a prison official may enact a security measure, even one that impinges on medical needs, if the measure "was applied in a good faith effort to maintain or restore discipline." *Whitley v. Albers,* 475 U.S. 312, 320-21 (1986).

Instead of addressing this considerable reservoir of support for the notion that the state may cabin the discretion of medical professionals, especially when those medical professionals are operating within correctional institutions, the lower court, in insulating the medical profession from all state interference, focused on (and arguably distorted) dicta from *Zentmyer*, which is itself worth quoting at length:

> This is not to say that prison officials may substitute their judgments for a medical professional's prescription. Of course they cannot. *See Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir.1999); *Johnson v. Hay*, 931 F.2d 456, 461 (8th Cir.1991). If a defendant consciously chose to disregard a nurse or doctor's directions in the face of medical risks, then he may well have exhibited the necessary deliberate indifference. But deliberate indifference is an onerous standard for the plaintiff, and forgetting doses of medicine, however incompetent, is not enough to meet it here. Zentmyer cites several cases from other circuits decided before *Estelle* and *Farmer* finding that denial of prescribed medication, when combined with other privations, violated a prisoner's substantive due process rights. None of these cases hold that failure to administer medication exactly as prescribed without additional exacerbating hardships violates the Eighth or Fourteenth Amendment. *See Campbell v. Beto*, 460 F.2d 765 (5th Cir.1972); *Martinez v. Mancusi*, 443 F.2d 921 (2d Cir.1970); *Tolbert v. Eyman*, 434 F.2d 625 (9th Cir.1970); *Edwards v. Duncan*, 355 F.2d 993 (4th Cir.1966).

Zentmyer v. Kendall County, Ill. 220 F.3d 805, 812 (7th Cir. 2000). This passage simply does not support the broad proposition attributed to it by the lower court that a state legislature may not substitute its judgment for that of medical professionals. In fact, it appears to allow even some administrative departures from prescribed treatments, and therefore is not particularly supportive of plaintiffs' case. At most, the passage supports the proposition that prison officials may not substitute their judgment for that of medical professionals in the absence of regulation, but that is not the issue in this case.

Here, the state legislature acted to limit treatment options. The people of the state, through their elected officials, passed a law prohibiting certain treatments for GID using public funds. The Supreme Court in *Gonzales* explicitly stated that state and federal legislatures have wide discretion to pass legislation in areas where there is medical and scientific uncertainty. *Gonzales*, 550 U.S. at 162-165. The record in this case shows that GID is a condition about which there is limited knowledge and vast uncertainty. [R.200:59-60 (testimony by Dr. R. Ettner indicating that the standards of care for GID acknowledge that there is limited knowledge in the area of GID, that there are clinical uncertainties that are hoped to be resolved in the

future, and that the standards of care are evolving and flexible); R.202:357-358 (testimony by Dr. Claiborn that GID is not a mental disease or disorder and that there is a difference of opinion on whether GID is a mental disorder)]

This is a very different situation than a prison official simply disregarding a doctor's recommendation for a legal and medically necessary treatment option, which was the scenario discussed in *Zentmyer*. The passage in *Zentmyer* does not reach the question of whether the state legislature can regulate the judgments of medical professionals, let alone hold that such regulation is improper. This is fortunate since such a limit on the state's power would produce the absurd result that medical professionals contracted by the state would have authority over the state treasury superseding even that of elected officials in state legislatures.

If adopted, the district court's extension of *Zentmyer* to the state legislature – and its extreme position that the Eighth Amendment prohibits a state legislature from placing any limits on a medical professional's discretion – would have far-reaching and unintended consequences. Such an interpretation would elevate the subjective opinions of medical professionals above the legislature and the law.

Individual doctors would have the power to decide what treatments can and cannot be legally regulated. If a vocal group of physicians declared assisted suicide, partial-birth abortions, or medical marijuana medically necessary, the legislature would be barred from prohibiting such treatments under the Eighth Amendment. Notably, in this case, the plaintiffs' expert, Dr. R. Ettner, testified that if a patient has GID and desires hormone treatment, such treatment is medically necessary. [R.200:62] Surely more is required to render the treatment constitutionally necessary and bind the hands of the state legislature.

Moreover, it cannot be the case that any limit on medical discretion at all would be *per se* an instance of deliberate indifference. Such a *per se* rule would be in direct contradiction with the cases recognizing that the Eighth Amendment poses no duty on the state to cure all serious medical ailments and eliminate all serious risks. *See* Section I(B)(2) *infra*. If a physician employed by the state decided to only offer curative treatment, the states would be forced to acquiesce to that decision by the lower court's *per se* rule.

2. The state has no obligation to provide curative treatment to its prisoners in order to comply with the Eighth Amendment.

There is no precedent for imposing the additional requirement under the Eighth Amendment that defendants completely eliminate a risk or cure a serious medical condition, yet that is what the plaintiffs would have this Court do. This Court has explained that the Eight Amendment does not entitle inmates to demand specific care and inmates are not entitled to the best care possible. *Forbes v. Edgar*,112 F.3d 262, 267 (7th Cir. 1997). The Eighth Amendment does not require prevention of all harm, it merely provides a right to "reasonable measures to meet a substantial risk of serious harm." *Id.* (emphasis added).

In *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987), this Court held that a transsexual prisoner stated a valid claim under the Eighth Amendment when she was denied treatment of any kind, including hormone therapy, for her GID. *Meriwether*, 821 F.2d at 413. However, the Court made it very clear that the problem was the complete denial of all treatment for a serious medical need and that the outcome would have been different had she been provided "some type of medical treatment." *Id.* at 413. Indeed, the Court broadly concluded that "given the wide variety of options available for the treatment of gender dysphoria and the highly controversial nature of some of those

options, courts should defer to the informed judgment of prison officials as to the appropriate form of medical treatment." *Id*. at 414. The Seventh Circuit has subsequently hewed closely to the analysis in *Meriwether*. In *Jones v. Flannigan*, this court endorsed in dicta the *Meriwether* approach, referring to the administration of "continuous psychological treatment" as enough to satisfy any constitutional requirements and noting that "although a transsexual inmate is entitled to some type of treatment, the inmate 'does not have a right to any particular type of treatment.'" *Jones v. Flannigan,* 949 F.2d 398 (7th Cir. 1991) (quoting *Meriwether*, 821 F.2d at 413). More recently, this court has formulated the same basic concept in terms of "curative treatment:" "it does not follow that the prisons have a duty to authorize the hormonal and surgical procedures that in most cases at least would be necessary to 'cure' a prisoner's gender dysphoria." *Maggert,* 131 F.3d at 671-72.

The lower court's opinion attempted to distinguish this established line of Seventh Circuit precedent, but the attempt was unavailing. First, the opinion notes that here the doctors evaluated the plaintiffs and prescribed the hormone therapy prohibited by the Act. [R.212:55; App. 158] This may be true, but this case is also dealing

with a legislative act limiting treatment options, not merely a prison official disregarding a doctor's medical decision. Maggert is applicable and relevant because it supports the position that the Eighth Amendment does not require that inmates with GID receive hormones or surgery as long as some treatment is provided. As a result, legislation does not effectuate deliberate indifference simply by limiting treatment options. Second, the district court opinion asserts that the fact that the plaintiffs in this case were receiving hormone therapy before incarceration eliminates the concerns voiced in *Maggert* about transsexual individuals committing crimes simply so the state can pay for their care. But it should hardly have to be pointed out that 1) prior use of hormone therapy does not eliminate the incentive to commit crimes to have therapy covered since having this therapy covered by the state is precisely what the plaintiffs wish to happen in this case; and 2) this perverse incentive structure was not the only policy justification noted by the *Maggert* decision. In *Maggert*, the Court relied heavily on the principal that prisons are not required by the Eighth Amendment to give a prisoner medical care that is as good as he would receive if he were a free person, let alone a free affluent person. *Maggert*, 131 F.3d at 671-672. Finally, the opinion asserts that "the

plaintiffs in this case are not arguing entitlement to a specific treatment, rather they are simply contending that Act 105 violates their rights under the Eighth Amendment because it deprives DOC medical personnel of their ability to provide inmates with appropriate treatment." *Id.* As discussed in section I(C)(1) above, however, a denial of some medical discretion does not effectuate a *per se* violation of the Eighth Amendment.

None of the distinguishing features identified by the district court undermines the central position taken by the Seventh Circuit over the years: that the Eighth Amendment does not prohibit prison officials, prison medical personnel, and, most certainly, a state legislature, from denying a small subset of the wide variety of treatments available for a particular diagnosis.

The Seventh Circuit's treatment of the duty of the state vis-à-vis transsexual prisoners is in accord with the treatment given by the overwhelming majority of other circuits. The Fifth Circuit upheld a decision to deny hormone therapy to a particular individual, noting that the denial was based on ineligibility and lack of medical necessity and that the plaintiff had not asked for any other form of treatment. *Praylor v. Texas Dept. of Criminal Justice*, 430 F.3d 1208 (5th Cir.

2005). The Eighth Circuit has likewise held that a denial of hormone therapy is not unconstitutional "provided that some other treatment is made available to him." *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988) (referencing the decision in Meriweather). The Tenth Circuit has also held that, though GID is a serious medical condition, "[A] mere difference in opinion regarding the proper course of treatment is not tantamount to deliberate indifference." *Qz'etax v. Ortiz*, 170 Fed.Appx. 551, 553, 2006 WL 515612 (C.A.10(Colo.)); *see also Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986) (holding that the DOC was not required by the Constitution to provide an inmate hormone therapy where such treatments are controversial).

Instead of bowing to this considerable controlling and persuasive precedent, the lower court placed disproportionate emphasis on an analysis of several district court opinions in other circuits. First, the lower court turned to *Phillips v. Michigan Department of Corrections*, which found an Eighth Amendment violation when a prison physician discontinued a prisoner's estrogen treatment, which had begun prior to incarceration, and denied requests for brassieres. *Phillips v. Michigan Dept. of Corrections,* 731 F.Supp. 792, 801 (W.D. Mich. 1990). In particular, the lower court pointed to the *Phillips* court's discussion of

the "measurably worse" decision to "actually reverse the effects of years of healing medical treatment." *Id.* at 800. But it must be noted that this factor was only one of several factors, including the fact that the plaintiff was denied "treatment of any kind," which drove the court to that conclusion. *Id.* at 800. Next, the lower court turned to *Kosilek v. Maloney*, which held that prison officials' policy of denying access to doctors for undiagnosed GID patients was unconstitutional because the treatment offered was "not sufficient" given the circumstances. *Kosilek v. Maloney,* 221 F.Supp.2d 156, 185 (D.Mass. 2002). Again, it must be noted that *Kosilek* ultimately only held that *some* adequate treatment must be given, and it even expressly recognized that "genuine psychotherapy," "psychopharmacology," or some combination of the two "may be sufficient to reduce the anguish caused by Kosilek's gender identity disorder so that it no longer constitutes a serious medical need." *Id.* at 193-195. Notably, neither psychotherapy nor psychopharmacology are barred by Wis. Stat. § 302.386(5m). Next, the lower court turned to *De'Lonta v. Angelone*, which merely reversed a lower court's dismissal of a suit by a GID plaintiff and allowed the case to go forward and is of extremely limited precedential value. *De'Lonta v. Angelone,* 330 F.3d 630 (4th Cir. 2003). Finally, the lower court

considered *Brooks v. Berg*, which found an Eighth Amendment violation when the plaintiff's numerous requests for treatment were ignored, but again the court hewed closely to the Seventh Circuit in noting the problem was simply that the plaintiff had been denied "all medical treatment" and that he was entitled to "at least some treatment." *Brooks v. Berg,* 270 F.Supp.2d 302 (N.D.N.Y. 2003).

In short, all of the persuasive authority relied on by the lower court can be squared with *Meriwether*'s and *Maggert*'s holding that there is no Eighth Amendment violation when some treatment is available to transsexual prisoners.

3. Enforcement of the statute on these plaintiffs is constitutional because it has not denied plaintiffs all or even most of the treatment available to those clinically diagnosed with severe GID.

There is no dispute in this case that other treatment options are available to the plaintiffs. At the close of the trial the plaintiffs expressly admitted that there was no evidence that the defendants were not prepared to treat the plaintiffs using means other than hormone therapy and no evidence that the defendants would provide nothing to the plaintiffs in terms of treatment. [R.203:452] In fact, there is extensive testimony by the DOC medical professionals on the other treatment options available to treat inmates with GID. [*See, e.*g.,

Burnett Test., R.201:215-221; Kallas Test., R.201:197-201] Dr. Kallas testified that the psychiatric and psychological services provided by DOC to treat psychoses, adjustment disorders, or mood disorders like depression or anxiety, would all be available to inmates with GID. [R.201:199-200] Dr. Burnett testified that the array of medical treatment available to treat any gastrointestinal problems, cardiovascular problems, muscle weakness, endocrine problems, diabetes, osteoporosis, and healing issues related to withdrawal of hormones would all be available to inmates with GID. [R.201:216-222]

Additionally, the plaintiffs' expert, Dr. R. Ettner, testified that hormone therapy merely "attenuates psychopathology" by attenuating or remitting anxiety or depression. [R.200:31-32] In fact, Dr. Frederick Ettner testified that starting hormone therapy actually causes certain health risks. Hormone therapy increases propensity to blood clotting, pulmonary embolism, pituitary tumors, infertility, waking, emotional liability, liver disease, gallstone formation, somnolence, hypertension, diabetes, sexual desire, cardiovascular disease. [R.200:123-125]

Dr. Claiborn explained that anxiety and depression are treated separately from GID, [R.202:368], and as just noted above, Dr. Kallas testified that the psychiatric and psychological services provided by

DOC to treat mood disorders like depression or anxiety would all still be available to inmates with GID. [R.201:199-200]

The district court noted that the Act prevented the DOC from undertaking thorough evaluations of two inmates in order to determine if hormone therapy is necessary and appropriate. [R.212:7; App. 110] This discussion is misleading and implies the Act kept inmates from actually getting evaluated for treatment generally. However, while it may be true that the Act made evaluations for hormone treatments unnecessary, it does not mean that the Act prevented inmates with GID from being evaluated with regards to other treatment options, such as psychotherapy and/or mood disorder medications. It is not a surprise that the Act would keep inmates from being evaluated for the specific treatment option it prohibits, but there is no evidence that the Act precluded any inmates with GID from being diagnosed or evaluated for treatment generally.

The fact is that there is a dispute here as to whether hormones and/or surgery are medically necessary to address GID. The plaintiffs' experts' claims of necessity are more accurately views on preferred treatment. For example, as noted above, Dr. R. Ettner testified that if a patient has GID and desires hormone treatment, such treatment is

medically necessary. [R.200:62] Dr. F. Ettner testified that "there are lots of alternatives in treatment therapies" and if a certain treatment is "not acceptable for whatever reason" they go onto another level. [R.200:118] Additionally, the plaintiffs' attorneys tried to get Dr. Kallas to testify that there may be inmates for whom no treatment other than hormone therapy would be satisfactory; but Dr. Kallas did not agree with that characterization. [R.201:175-176] Instead, Dr. Kallas stated that there are individuals for whom it would be difficult to envision that other routes would be "as satisfactory." [R.201:175-176] He also testified that "there are a number of ways in which individuals with gender dysphoria can [sic] accommodate." *Id.* at 175. Finally, Dr. Claiborn testified that GID, like homosexuality, is not actually a mental disease or disorder itself and that there is a difference of opinion on whether GID is a mental disorder. [R.202:357-358]

The Act does not effectuate deliberate indifference merely by barring a treatment option that some medical professionals deem the appropriate treatment. Deliberate indifference only occurs if the only course of treatment available is "blatantly inappropriate." *Edwards v. Snyder*, 478 F.3d 827, 831 (7th Cir. 2007). *See, e.g., Estate of Cole by*

Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996). As noted above, the Eight Amendment does not entitle inmates to demand specific care and inmates are not entitled to the best care possible. *Forbes v. Edgar*,112 F.3d 262, 267 (7th Cir. 1997). The Eighth Amendment merely provides a right to "reasonable measures to meet a substantial risk of serious harm." *Id*. (Emphasis added).

As the district court noted, most of the medical experts that testified in this case agreed that some treatment is necessary for inmates with severe GID. [Decision, R.212:18-22; App. 121-125; Burnett Test., R.201:227-228; Brown Test., R.202:259, 268; R. Ettner Test., R.200:29] And Dr. Brown and Dr. F. Ettner both testified that psychotherapy alone is not an effective treatment for severe GID. [Decision, R.212:22, 28; App. 125, 131; F. Ettner Test., R.200:103; Brown Test., R.202:272-273] However, there was no evidence, or finding by the court, that the DOC was not prepared to make some form of treatment available to the plaintiffs or that the DOC was limiting the available treatment options to psychotherapy alone. There is no finding, or evidence to support such a finding, that the Act left available only "blatantly inadequate" treatment options. *See Edwards*, 478 F.3d 827, 831 (7th Cir. 2007). There is no basis in the record to

support the district court's finding that the Act effectuates deliberate indifference as to these plaintiffs.

II. WIS. STAT. § 302.386(5M) DOES NOT VIOLATE THE EIGHTH AMENDMENT OF THE CONSTITUTION ON ITS FACE BECAUSE IT IS NOT UNCONSTITUTIONAL IN EVERY APPLICATION OR EVEN IN A LARGE FRACTION OF CASES.

A. The Applicable Test

"[A]s-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (quoting Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000)). Proceeding cautiously, if at all, in facial challenges is appropriate because "exercising judicial restraint in a facial challenge 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

This posture of avoidance is engrafted into the law of this jurisdiction. While the familiar *Salerno* "no set of circumstances" test is unsettled law at the Supreme Court level, *United States v. Salerno*,

481 U.S. 739, 745 (1987)("[A] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992)("[I]n a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."); *Gonzales*, 550 U.S. at 167 (declining to resolve the debate between the "no set of circumstances" and "large fraction of cases" approach to facial challenges), it has been consistently applied in the Seventh Circuit. *E.g., Joelner v. Village of Wash. Park*, 378 F.3d 613, 621 (7th Cir. 2004); *Doe v. Heck*, 327 F.3d 492, 528 (7th Cir. 2003); *Home Builders Ass'n v. United States Army Corps of Eng'rs*, 335 F.3d 607, 619 (7th Cir. 2003); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 708 (7th Cir. 2003); but see *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002). When instruction from the Supreme Court is unclear (e.g., when the Supreme Court has not expressly overruled a line of cases that nevertheless seem somewhat incompatible with Supreme Court precedent), lower courts are to apply their circuit precedent, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), and the

balance of precedent appears to be in favor of the *Salerno* "no set of circumstances" approach in the Seventh Circuit. At the very least, "all [justices of the Supreme Court] agree that a facial challenge must fail where the statute has a "'plainly legitimate sweep.'" *Wash. State Grange* at 449 (citing *Glucksberg*, 521 U.S. at 739-740). In considering the sweep of a statute, reviewing courts are not permitted to consider the "worst case scenario" or "hypotheticals" and "imaginary" cases. *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990); *Raines*, 362 U.S. at 22.

In this case, the district court properly acknowledged the "no set of circumstances" test outlined in *United States v. Salerno*, 481 U.S. 739, 745 (1987), when analyzing the plaintiffs' facial challenge. [R.212:60; App. 163] Where the court erred, however, is in its application of the test.

B. The Relevant Class

The district court erred in its analysis of the facial challenge by applying the "no set of circumstances" test to too narrow a class of inmates. Here, the relevant class is, at its narrowest, all inmates with GID that are interested in hormone therapy or surgery.

The district court quoted the United States Supreme Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992), as support for its conclusion that the relevant class of inmates in this case is limited to those with severe GID for whom hormones or surgery have been prescribed as medically necessary. [R.212:60-62; App. 163-165] Although the Supreme Court's analysis in *Casey* is relevant and instructive, the district court misapplied the Court's mode of analysis, in part, because the district court failed to recognize the differences between the regulation here and the regulation in *Casey*. As a result, the district court applied the "no set of circumstances" test to far too narrow a class. In *Casey*, the relevant provision required married women to sign a statement indicating that they notified their husband of an intended abortion. *Casey*, 505 U.S. at 833. The *Casey* Court held that the relevant class of women for a facial challenge to the notification provision was limited to those women for whom the provision was a relevant restriction; therefore, the class was limited to married women that wanted to have an abortion and would not choose to tell their husbands on their own volition. *Id.* at 894-895. This disputed provision in *Casey* did not ban all abortions, it merely created a spousal notification requirement. The specific nature of the provision

narrowed the affected class. In this case, however, the Act is much broader; it broadly prevents state or federal resources from being used to provide hormone therapy or sexual reassignment surgery to Wisconsin prisoners. Wis. Stat. § 302.386(5m).

As the district court explicitly stated in its decision, the Act prevented the DOC from evaluating inmates in order to determine if hormone therapy was necessary and appropriate. [R.212:62; App. 165] If the Act bars *evaluation* for hormones or surgery, at its most narrow extreme, the relevant class for a facial challenge would be all GID inmates that are interested in being evaluated for hormones or surgery, since the Act prohibits all of them from being evaluated for those specific treatments. Yet the district court goes on to ignore this application of the Act and limit the relevant class to inmates that have already been evaluated for hormones or surgery and for whom such treatments were deemed necessary. [R.212:62; App. 165] The district court cannot have it both ways; it cannot claim the Act affects all GID inmates interested in the prohibited treatments and then argue, for purposes of the facial challenge, that the Act only "applies" to inmates with severe GID who have been prescribed the treatment.

This case is closely analogous to *Gonzales*, where the Supreme Court rejected a facial challenge to the Partial-Birth Abortion Ban Act of 2003, finding that the Act, while banning a particular kind of abortion entirely, left open another "commonly used and generally accepted method" to obtain an abortion. *Gonzales*, 550 U.S. at 165.

As noted above, reading the Act in this case so narrowly as to only apply to the sub-class of extreme cases of GID in which hormone therapy or gender reassignment surgery are prescribed as medically necessary, as the lower court appeared to do, [R.212:32; App. 135], ignores the broad sweep of the language used in that statute. That the affected class is larger than this is illustrated by considering the effect facial invalidity would have: if the statute is facially invalid, then there would at least be the theoretical possibility that a prisoner without GID or with only a minor case of GID would be able to obtain these extreme treatments using the usual institutional procedures for requesting treatment. This possibility is heightened by the fact that the severity of GID is determined largely by the patient simply telling the medical professional what they are feeling. [R.200:24] Notably, as Dr. Claiborn testified, many transgender individuals seek GID treatments such as hormone therapy or surgery simply by choice and as a means of moving

forward with changing their circumstances. [R.202:369] In other words, the statute does serve as a restriction on these larger classes of cases, and so, arguably, the relevant class for the purposes of a facial challenge should either be the whole prison population or at least the subset of prisoners with any degree of GID.

Moreover, it is manifestly illogical to assume that the "denominator" (i.e., the relevant or regulated class) in either the "no set of circumstances" or "large fraction of cases" approach to facial challenges should be so narrowly limited to extreme cases because it would make judicial invalidation of a statute on its face redundant of the as-applied analysis. Had this approach been used by the Supreme Court in *Gonzales*, the ban of the dilation and extraction procedure that the Partial-Birth Abortion Ban Act targeted would have been impossible to square with the Court's findings that the procedure might be necessary, 550 U.S. at 162, and that there need not be an exception for when the procedure is necessary to save the life of the mother. *Id.* at 165-166. The approach taken by the lower court is incompatible with *Gonzales*, for it would have held that the relevant class is only the women for whom the dilation and extraction procedure was medically necessary—a move that would have compelled the conclusion that the

Act was facially unconstitutional as an undue burden on the right to an abortion. Of course, the *Gonzales* Court did not hold the Act facially unconstitutional, and it is almost certainly because of the patent absurdity of limiting the scope of a facial challenge to a relevant class so small.

This Court should avoid the tendency to either view the affected class so narrowly or engage in an inappropriate examination of what might be and focus instead on the overwhelming facts at hand: of the over 20,000 inmates it covers, the Act may at worst only run afoul of the constitution as it applies to a handful of individual inmates' need for hormones. These facts are sufficient to satisfy the statute's validity under any of the approaches to facial challenges available to this Court.

C. The Act is Valid on Its Face Because It Does Not Violate the Eighth Amendment in all cases or in a large fraction of cases.

1. The Act does not implicate an Eighth Amendment right, let alone violate it, as to the majority of inmates it affects because only a handful of inmates have been diagnosed with severe GID and prescribed hormone therapy.

In holding that the Act is facially unconstitutional, the lower court's opinion swept too broadly and ignored the many run-of-the-mill

cases in which the statute will not violate the Eight Amendment. First, the Act applies to all inmates, regardless of their diagnosis status:

> 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).

Wis. Stat. § 302.386(5m)(b). Since GID is not a common diagnosis, it is highly unlikely that the prohibition will ever affect the treatment of the vast majority of prisoners in Wisconsin correctional facilities. Second, though the affected class may need to be narrowed to those with gender identity issues, *Casey*, 505 U.S. at 894 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."), the trial record shows that even the plaintiffs' witnesses agree that the treatments prohibited by the Act will not be required whenever a prisoner has gender identity issues. On the contrary, hormone therapy and especially gender reassignment surgery are extreme measures reserved for serious cases. [R.202:289 (testimony that Dr. Brown has only seen one inmate that he thought was eligible for sex reassignment surgery); R.200:6 (plaintiffs' counsel arguing that hormone therapy is only required treatment in "severe cases of Gender Identity Disorder" and sex reassignment surgery is required "for an even smaller group."); R.201:175 (Kallas

testimony that hormones are one of the central ways to treat those with "severe gender dysphoria."); R.200:118-119 (Dr. F. Ettner testifying that there are lots of alternatives in treatment therapies); R.201:186 (Dr. Kallas testifying that not all gender dysphoria requires hormones or surgery); R.200:60-61 (Dr. R. Ettner testifying that not all individuals with GID need hormones, a diagnosis of GID does not require treatment in every case, and under the standards of care, therapists are directed to let GID patients simply choose among treatment options); R.200:64 (Dr. R. Ettner testifying that it is possible that inmates may request hormone therapy when it is not an appropriate treatment for them)] Notably, there is no evidence that any inmate currently has any medical need for gender reassignment surgery.

There is simply no evidence in the record to support a conclusion that there is "no set of circumstances" under which the Act does not effectuate deliberate indifference with regards to inmates with GID who are interested in being evaluated for hormones or surgery. Similarly, there is no evidence to support a conclusion that, as to a "large fraction" of inmates with GID that are interested in being

evaluated for hormones or surgery, the Act violates the Eighth Amendment by preventing evaluation for those specific treatments.

2. The Act is facially valid even under the "large fraction" test and where the relevant class of inmates is all inmates with severe GID for whom hormone therapy or surgery have been prescribes as medically necessary.

For the same reasons that the Act is valid as-applied to the plaintiffs, the Act is facially valid even if the test is the "large fraction" test applied in *Casey*, and the relevant denominator is all inmates with severe GID for whom hormone therapy or surgery have been prescribed as medically necessary. The Act is valid under such a test because other treatment options remain available, the Eighth Amendment does not require curative treatment, and a legislative act limiting medical discretion as to specific treatment options does not effectuate per se deliberate indifference. *See* Sections I(C)(1)-(3) *supra*.

D. For the Same Reasons That the Act is Facially Valid, The District Court Improperly Applied the PLRA and The Injunction Should be Lifted.

The district court erred in its determination that the Act violates the Eighth Amendment on its face; and in so doing, the court also violated the requirements of the Prison Litigation Reform Act (PLRA). The PLRA requires that prospective relief:

> [S]hall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a).

Here, the district court made after-the-fact findings to comply with the PLRA. [R.239; App. 173-175] In so doing, the court found that enjoining the enforcement of the Act "is narrowly tailored in that enjoining the enforcement of Wis. Stat. § 302.386(5m) prohibits only unconstitutional applications of the statute which this court has found to be unconstitutional any time it is applied." [R.239:1; App. 173]

The court went on to find that:

> [A]n injunction against enforcement of Wis. Stat. § 302.386(5m) extends no further than is necessary to correct the Eighth Amendment and Equal Protection violations because any application of the statute would violate the Eighth Amendment and Equal Protection and enjoining all applications of Wis. Stat. § 302.386(5m) is necessary to prevent constitutional violations.

[R.239:2; App. 174] Finally, The court stated that:

> [A]n injunction against enforcement of Wis. Stat. § 302.386(5m) is the least intrusive means possible to correct Eighth Amendment and Equal Protection violations that would be caused in the future through any application of the facially invalid statute. Lastly, the court concludes that the aforementioned injunctive relief will have no significant

> "adverse impact on public safety or the operation of a criminal justice system." 18 U.S.C. § 3626(a)(1).

[R.239:2-3; App. 174-175]

Although the court made most of the findings required by the PLRA, these findings are based on errors in law. *See* Sections II(B) and (C), *supra*. In particular, the court erred in determining that the Act only applied to inmates with GID for whom surgery or hormones have been prescribed as medically necessary. Additionally, the court did not find that the relief ordered extends "no further than necessary to correct the violation of the Federal right ***of a particular plaintiff or plaintiffs.***" 18 U.S.C. § 3626(a) (emphasis added). This is not a class action and the injunction issued by the court extends well beyond any violation to the plaintiffs. The court enjoined enforcement of the entire Act, which includes a prohibition on gender reassignment surgery. There is no evidence that the plaintiffs have been prescribed gender reassignment surgery or even desire such surgery. In fact, there is no evidence that any inmate in DOC custody has a medical need for sexual reassignment surgery.

Finally, the relief ordered by the district court is impermissibly broad because it enjoins enforcement of the Act as to inmates for whom the barred treatments are not medically necessary. The district court,

by its own argument, claims that the Act is only unconstitutional as to inmates for whom the treatments have been prescribed as medically necessary. [R.212:62 (finding that the Act only applies to inmates for whom a doctor has determined that hormone therapy is medically necessary); R.239:1 (claiming that the Act is unconstitutional in every application)] The Act itself makes no distinction as to medical need and, in fact, expressly applies to all inmates. Therefore, banning enforcement of the Act entirely is not narrowly-drawn relief and goes far beyond that which is "necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a).

III. THE ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE EITHER AS APPLIED OR ON ITS FACE.

The Fourteenth Amendment's guarantee of equal protection of the laws must coexist with the fact that almost all legislation classifies people in one way or another. *Romer v. Evans*, 517 U.S. 620, 624 (1996) (citing Personnel Administrator of *Mass. v. Feeney*, 442 U.S. 256, 271-272 (1979)). These principles have been reconciled by the approach that courts will uphold laws that do not burden a protected class or the exercise of a fundamental right as long as the law can pass rational basis review. *E.g.*, *Romer*, 571 U.S. at 624; *Heller v. Doe*, 509 U.S.

312, 319 (1993); *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462 (1988); *Hodel v. Indiana,* 452 U.S. 314, 331-332 (1981).

A. Transgender individuals are not a suspect class for the purposes of the Equal Protection Clause and the Act, therefore, is subject only to rational basis review.

Even if Wis. Stat. § 302.386(5m) does draw a distinction between those with GID and those without it (which the statute does not, as a matter of language, do), the statute would not be subject to strict or heightened scrutiny. Rational basis scrutiny must be applied in this case because the Act does not target a suspect or quasi-suspect class, such as a race, *see, e.g., Loving v. Va.*, 388 U.S. 1, 11 (U.S. 1967), nor does it affect a fundamental right, such as the right to vote, the right to privacy, or the right to travel between states. *See, e.g., Miller v. Carter*, 547 F.2d 1314, 1320 (7th Cir. 1977). Rather, the statute at most draws a distinction based on sexual orientation, which has never been deemed a suspect classification. *See Nabonzy v. Podlesny*, 92 F.3d 446 (7th Cir. 1996); *Ben-Shalom v. Marsh,* 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). Recent cases striking down state statutes arguably targeting those of a particular sexual orientation have explicitly avoided holding that sexual orientation is a suspect class and have instead focused on the fact that the statutes in

question were "divorced from any factual context from which we could discern a relationship to legitimate state interests." *Romer*, 571 U.S. at 635.

Under rational basis review, a governmental classification "must be upheld against equal protection challenge if there is *any* reasonably conceivable state of facts that could supply a rational basis for the classification." *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637 (1993) (emphasis added); *see also* F*CC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). For both facial and as-applied challenges, the burden is upon the challenging party to eliminate any 'reasonably conceivable state of facts that could provide a rational basis for the classification. *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006). Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* Similarly, it does not "authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637 (1993) (citations omitted). "A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Heller,* 509 U.S. at 320-321. "[C]ourts are compelled under

rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* "A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320.

Therefore, legislatures must be given a presumption that they acted within their constitutional power. *Nordlinger v. Hahn,* 509 U.S. 1, 10, 112 S.Ct. 2326 (1992). While the Supreme Court has "consistently held, however, that some objectives, such as 'a bare ... desire to harm a politically unpopular group,' are not legitimate state interests," and has "applied a more searching form of rational basis review" in those circumstances, *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor J., concurring) (citing *Department of Agriculture v. Moreno* 413 U.S. 528, 534 (1973); *Cleburne v. Cleburne Living Center* 473 U.S. 432, 446-47 (1985); *Romer*, 571 U.S. at 632), that triggering animus only exists where a law is "inexplicable by *anything* but animus

toward the class that it affects." *City of Chicago v. Shalala*, 189 F.3d 598 (7th Cir. 1999) (quoting *Romer*, 571 U.S. at 632) (emphasis added).

B. The statute is justified by legitimate security and liability concerns and employs means rationally related to furthering those ends.

1. The statute protects the State's interest in the peaceful administration of the State's corrections facilities by ameliorating or preventing gender-motivated violence or abuse.

In conducting rational basis review of a statute governing prison administration, it is of utmost importance that the reviewing court remain cognizant of the special disciplinary and security needs of corrections facilities and assume the traditional posture of deference to the decisions of prison administrators on the frontlines. There can be no dispute that the provision of security must be central to all other prison goals. *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989). Courts are obligated to defer to prison officials' adoption of policies necessary to preserve security and internal order. *Hewitt v. Helms*, 459 U.S. 460, 474 (1983). In the prison environment, "safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration." *Id.* at 473. The Seventh Circuit has repeatedly recognized this principle:

> Judges should be cautious about disparaging disciplinary and security concerns expressed by the correctional authorities. American jails are not safe places, and judges should not go out of their way to make them less safe.

Keeney v. Heath, 57 F.3d 579, 581 (7th Cir. 1995).

> Less-restrictive-alternative arguments are too powerful: a prison always can do something, at some cost, to make prisons more habitable, but if courts assess and compare these costs and benefits then judges rather than wardens are the real prison administrators. *Wolfish* emphasized what is *the* animating theme of the Court's prison jurisprudence for the last 20 years: the requirement that judges respect hard choices made by prison administrators.

Johnson v. Phelan, 69 F.3d 144, 145 (7th Cir. 1995), *cert. denied*, 519 U.S. 1006 (1996)(emphasis in original).

In its decision, the lower court did not afford appropriate weight to the evidence identifying and supporting the State's security interests in preventing sexual abuse in prisons. First, there can be no doubt that the prohibited treatments feminize inmates by rendering effects on "secondary sexual characteristics such as hair, fatty metabolism, muscle, and . . . breasts." [R.201:197] There can also be little doubt that taking the plaintiffs off of hormone therapy would result in measurable decreases in their femininity. One of the plaintiffs, Vankemah Moaton, confirmed that he "started growing thicker body hair" and experienced a decrease in breast tissue after being withdrawn from hormone therapy while serving another sentence in

federal prison [R.201:149], and flatly agreed that he could not look as feminine without hormone therapy as he could with them. [R.201:162]

The State of Wisconsin's expert witness, Eugene Atherton, testified that sexual assault is something that needs to be prevented in prisons and is difficult to prevent. [R.202:415] Mr. Atherton also concluded that prisons are highly unique and highly dangerous places which require unusual diligence, oversight, and caution, especially when considering the dangers of sexual activity [R.202:412-414], and that the appearance of femininity makes those inmates an "automatic target for inmates who are interested in sexual aggression or sexual relationships." [R.202:419] Mr. Atherton testified that if an inmate presents an effeminate manner, whether by dress or behavior, that makes the inmate more likely to be sexually victimized. *Id*. Finally, Mr. Atherton testified that the fact that an inmate's physical appearance changes to become more feminine leads to increased security concerns for the institution. [R.202:435] Indeed, the heightened risk created by artificially induced femininity in the prison context is nowhere better demonstrated than in some of the plaintiffs' own personal experiences. Vankemah Moaton testified that he took extra precautions to conceal his femininity, including wearing baggier

clothing, specifically because "I am female and I am in a male's prison so I don't do those type of things, leave myself susceptible of being assaulted or possibly leave myself open for sexual assault." [R.201:155] Though Moaton was confident in believing that withdrawing hormone therapy would not reduce the harassment he was receiving while in prison because "I'm still gonna be female," it is certainly not unreasonable for the State to presume that most prisoners will not be as tactful as Moaton in protecting their own security interests.

2. The district court improperly applied the rational basis standard to the evidence.

The lower court did not give the extensive evidence in support of a rational basis proper weight. [R.212:66-67; App. 169-170] It is this misapplication of the law that the defendants challenge on appeal and which this Court should review *de novo*. *See generally Smith v. City of Chicago*, 457 F.3d 643, 650 fn. 2 (7th Cir. 2006); *U.S. v. Turner*, 93 F.3d 276, 286 (7th Cir. 1996).

First, the lower court concluded that the fact that the State's prison expert had not challenged a Colorado policy allowing hormone therapy because he believed it to be reasonable was enough to negate his other testimony on the inherent dangers of increased feminization in the prison context. [R.212:66; App. 169] However, it is clear that

Atherton's opinion on the matter was merely that the Colorado policy was reasonable, and it had no bearing at all on the reasonableness of Wis. Stat. § 302.386(5m)—indeed, both could be reasonable simultaneously without rendering the Act unconstitutional in this case. As noted above, "that rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices…Nor does it authorize 'the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.'" *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637 (1993) (internal citations omitted).

Second, the lower court's opinion notes Atherton's comment that he did not think withdrawal of hormone therapy would necessarily lead to a reduction in risk of sexual assaults, as well as a fruitless counterfactual questioning about whether Davison would have been assaulted without hormone therapy, to argue that the causal connection was insufficient. [R.212:66; App. 169] Again, this analysis betrays the spirit of rational basis review. The only relevant question under rational basis review is whether the State could reasonably conceive that withdrawal of hormone therapy would further any legitimate interest. Whether withdrawal would *necessarily* lead to a

reduction in sexual assaults and whether Davison would have *necessarily* been saved from his sexual assault with a withdrawal of hormone therapy are ultimately irrelevant for the purposes of equal protection analysis.

While plaintiffs point to the lack of discussion about security interests during the legislative debate on Wis. Stat. § 302.386(5m) as evidence that the State has not met its burden to demonstrate a rational basis for the statute, the point is inapposite in the context of an equal protection challenge. The State has no obligation to maintain the same rational basis at all times. Rather, as previously noted, it is free to re-articulate its justification for the law even during litigation:

> The government may defend the rationality of its action on any ground it can muster, not just the one articulated at the time of decision (if a reason was given at all.) Our various departments and agencies of government make thousands of decisions every day; not every one will come with an explanation. The absence of an explanation, or even an incomplete, inadequate, or inaccurate explanation will not equate to a lack of rational basis-otherwise "the federal courts would be drawn deep into the local enforcement of ... state and local laws." Accordingly, the reason stated at the time of the challenged action may be relevant but is not dispositive in the application of rationality review.

Smith v. City of Chicago, 457 F.3d 643, 652 (7th Cir. 2006) (internal citations omitted). Nor is it enough to point, as the plaintiffs do, to other prisoners whose characteristics or conditions might lead to

heightened security risks (such as homosexual inmates or inmates with HIV). The legislature need not "strike at all evils at the same time or in the same way." *Sutker v. Illinois State Dental Soc.*, 808 F.2d 632, 635 (7th Cir. 1986) (citing *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610 (1935)). It is sufficient that there is a problem "at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955).

3. The Act protects the state from civil liability for failure to live up to its duty to provide a safe environment for transsexual prisoners.

Because the State would face civil liability for failure to provide a safe environment for transsexual prisoners, the State should not be denied the ability to adopt a cost-effective mechanism for protecting the constitutional rights of these prisoners. In *Farmer v. Brennan*, the Supreme Court held that a transsexual prisoner who was raped and beaten after being placed in the prison's general population could assert a prima facie case for deliberately indifferent failure to protect prisoner safety. *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994). Though "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause," (*Id.* at 845),

the Supreme Court ultimately found that such action (i.e., treating transsexuals as just like any other prisoner) was not reasonable per se. Rather, the relevant inquiry in determining deliberate indifference was whether the prison officials had subjective knowledge of a substantial risk to the safety of the prisoner, and this inquiry can be satisfied by examining circumstantial evidence of awareness:

> [If] an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."

Id. at 842-843. In *Farmer*, that inquiry was satisfied by evidence that the prison officials admitted "there was a high probability that [petitioner] could not safely function" in the prison and that they believed the petitioner's "youth and feminine appearance" made the petitioner "likely to experience a great deal of sexual pressure." *Id.* at 848-849.

Both direct and circumstantial evidence show that the State is subjectively aware of the problems associated with providing a safe environment for transsexual prisoners. The Act was passed largely out of recognition of these difficulties, and even the plaintiffs' experts admit

that there are difficulties and challenges associated with housing transsexual prisoners among gender-segregated prison populations. [*See e.g.,* R.202:318-319] Given this evidence, it is not implausible to conceive of § 1983 actions against prison officials for failure to deal with the special security challenges surrounding transsexual prisoners. In passing the Act, the State of Wisconsin took positive steps to avoid this kind of civil liability. The Act minimizes the ability of prisoners to change their appearance, thereby making it less dangerous for prison officials to place the prisoners in general prison populations. The denial of hormone therapy, in particular, can help reduce or reverse the acquisition of characteristics of the opposite sex. Instead of continuing hormone therapy and permanently utilizing drastic measures such as segregation or isolation to protect these prisoners, the State has chosen to avoid liability by minimizing the vulnerabilities created by hormone therapy and gender reassignment surgery. The State should not be penalized for taking steps to protect the safety of inmates and their corresponding constitutional rights.

CONCLUSION

For the reasons stated above, the defendants respectfully request that the Court REVERSE the district court's decision and judgment

below as to both the Eighth Amendment and Equal Protection claims and DECLARE Wis. Stat. § 302.386(5m) constitutional under both the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

Dated this 24th day of September, 2010.

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