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

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

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# REPLY BRIEF OF PLAINTIFFS-APPELLEES, CROSS APPELLANTS

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## I. Defendants' Entire Argument Against Class Certification is Directed at the Wrong Class Definition.

Defendants' entire argument opposes a class definition that is not actually at issue because Plaintiffs proposed a new definition in their Motion for Leave to Amend and Motion to Reconsider Certification of Modified Class Definition. [R.104]. ("Motion to Amend"). Nevertheless, without citation to any authority, Defendants claim that they need defend on appeal only the district court's denial of the initial class definition proposed by Plaintiffs, because the modified class definition was "improperly raised for the first time on reconsideration . . ." Def. Resp. Br. at 35 n.7. This argument is without merit. Pursuant to Fed. R. Civ. P. 23(c)(1)(C), a district court has broad authority to alter or amend any order that grants or denies class certification at any time before final judgment. Thus, a district court may alter or amend its order denying class certification sua sponte, or alternatively, it may alter its grant or denial of class certification pursuant to a motion of either of the parties. Fed. R. Civ. P. 23(c)(1)(C); *see also Alliance to End Repression v. Rochford,* 565 F.2d 975, 977 (7th Cir. 1977) ("[T]he district court has the power at any time before final judgment to revoke or alter class certification ...") Plaintiffs filed a timely Motion to Amend and proposed a new, more narrow, definition of the class.[1] Thus, the modified definition of the class, which

[1] Plaintiffs proposed a new class definition in their Motion to Amend, citing Fed. R. Civ. P. 15(a) and 23(b)(2), as well as 54(b). It is the substance of this motion, rather than its label, which determines its legal significance. In *Gary v. Sheahan*, 188 F.3d 891 (7th Cir. 1999), for example, the defendant's motion to decertify a class was, in substance, a motion to reconsider under a different name, because it

was also denied certification by the district court, is properly at issue on appeal.[2] However the motion advancing the second class definition is characterized, the Defendants had an opportunity to contest it below and should not now be permitted to have this Court ignore it on appeal.

## II. The District Court Did Not Deny Certification On The Bases Defendants Assert, But Even if it Had, That Denial Would Have Been in Error.

Defendants wrongly assert that the district court denied certification of a Plaintiff class because some members of the proposed class lacked standing since they were at no risk of suffering an injury. Def. Resp. Br. at 35-39. Defendants also wrongly argue that the district court held that the class was overly broad and indefinite. *Id.* Even if the court had denied class certification on these bases, that decision would have been in error.

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sought to relitigate whether the same class had been properly certified. *Id. at* 893. Here, in contrast, the Plaintiffs sought, through a motion styled a motion to amend and reconsider, to certify a different class than that proposed in their earlier motion. Whether characterized as a motion to amend to propose a new class definition or a motion to certify a newly-defined class, the standard on review is abuse of discretion. *Iqbal v. Ashcroft*, 574 F.3d 820 (2d Cir. 2009) (per curium) (grant or denial of motion to amend is reviewed under abuse of discretion standard); *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 573 (7th Cir. 2008) (class certification decision is reviewed for abuse of discretion). However, "purely legal determinations made in support of [the class certification] decision are reviewed *de novo*." *Id.*

[2] Plaintiffs' Motion to Amend defined the proposed class as: "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 Prevention Act, 2005 Wisconsin Act 105, codified at Wis. Stat. §302.386 (5m). [R. 104:¶5].

Here, the class is defined as all persons residing in a Wisconsin prison identified by 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 Act 105. [R. 104:¶5]. As demonstrated in Plaintiffs' first brief, all members of this proposed class will be injured by the denial of treatment. Pl. Br. at 46-54. In fact, membership in the class is *contingent on the injury* of being denied medical treatment pursuant to Act 105. Act 105 violates the rights of Plaintiffs *and other* current and future inmates with GID who would be prescribed hormone therapy or surgery by Wisconsin Department of Corrections ("DOC") medical staff, *but for the existence of Act 105* and its ban on such treatment. *See* Pl. Br. at 48-50. Thus, for Defendants to argue that the proposed class members lack standing because they have not been injured is clearly wrong.

Defendants' standing argument should also be disregarded because the law does not require members of a class to have already suffered an injury to demonstrate standing. For standing to exist, it is sufficient that the Defendants' pattern of unconstitutional conduct has placed members of the proposed class *at risk of harm*. *See e.g. Walters v. Edgar,* 163 F.3d 430, 434, (7th Cir. 1998) ("A probabilistic harm, if nontrivial, can support standing.") This is particularly true with regard to classes, such as the present one, that seek certification under 23(b)(2) because injunctive relief will apply to future members of the class who are at risk of being harmed by the challenged policy but who have not yet been harmed. *Walters v. Reno,* 145 F.3d 1032, 1047 (9th Cir. 1998) (certifying a class of

immigrants subject to a deportation procedure "generally applicable to the class as a whole" even though "some of the class members have not been injured by the challenged practice . . ."); *Hassine v. Jeffes,* 846 F.2d 169, 178-79 (3d Cir. 1988) (certifying a class comprising an entire prison population subject to the same challenged conditions, such as double bunking and inadequate security, even though some inmates had not experienced or been injured by those conditions). Thus, a class that includes persons at risk of future injury may be certified.

Furthermore, the appropriate question with respect to standing is not whether the unnamed class members have standing to sue, but whether the named plaintiffs have standing to assert the rights of the proposed class. *See* Newberg on Class Actions §2:6, p. 88 (4th ed. 2002) (in contrast to the named plaintiff, unnamed class members "need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether [] absent class members are properly before the court."); *cf. Walters v. Edgar,* 163 F.3d 430 (affirming district court's dismissal of a proposed class action because the named plaintiff lacked standing at the time the suit was filed). Here, the Defendants do not dispute that the named Plaintiffs themselves have the requisite standing to represent the proposed class. Def. Resp. Br. at 37.

Defendants are wrong again when they argue that because the proposed class included some members who were at no risk of injury, the class definition

was overly broad and indefinite.[3] Def. Resp. Br. at 35-39. First, as shown above, all class members have, or in the future will, be injured. Moreover, a class definition need only be precise enough to enable a court to determine whether at any time a particular individual is or is not a member of the class. *Alliance,* 565 F.2d at 978 (a class definition must not be so vague that it is impossible to determine whether a given individual is in or out of the alleged class). Nothing more than this level of precision is required and Plaintiffs' proposed class definition easily meets this standard.[4]

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[3] The district court appears to have denied class certification at least in part because "the proposed class would increase the scope of this lawsuit beyond those claims upon which the named plaintiffs are proceeding." [R. 102:5; 131:7; Pltf. App. 5, 14]. "[I]ncreasing the scope" of a lawsuit cannot be a proper basis for denying class certification, so long as the class proposed otherwise meets the requirements of Rule 23. If it were, no class action would be certified, since any class expands the scope of a lawsuit beyond the individual claims of the party requesting a class. The district court's answer to Plaintiffs' request for broader relief was that Plaintiffs had no need for class certification because they had requested a ruling on the constitutionality of Act 105, which "has the potential to impact more than the five plaintiffs in this case." [R. 131:5-6, Pltf. App. 12-13]. But lack of "need for class certification" is not a basis for refusing to certify one. *See, e.g., Brown v. Scott*, 602 F.2d 791, 795 (7th Cir. 1979). Where, as here, it is unclear whether the district court based its ruling on one or more erroneous grounds, this Court should remand the class certification decision for further proceedings. *See Williams v. Chartwell Fin. Servs.,* 204 F.3d 748, 760-61 (7th Cir. 2000) (remanding where it was uncertain whether or not the district court had denied class certification on an erroneous basis).

[4] In general, class certification may be denied based on the "indefiniteness" of a class where the "primary defect in the class definition [is] that membership in the class was contingent on the state of mind of the prospective class members." *Alliance,* 565 F.2d at 978. Here, the proposed class is defined, not by the state of mind of the plaintiff, but rather by the acts of the Defendants and the impact of Act. Plainly, Defendant can identify those inmates who are members of the class.

Finally, the two cases on which Defendants rely to support their standing and definiteness arguments are distinguishable. Def. Resp. Br. 35-39. Plaintiffs' proposed class is a clearly defined group of inmates who have suffered, or will in the future suffer, the same constitutional violation as the named Plaintiffs: the deprivation of medically necessary treatment for a serious medical condition. In contrast, the proposed class in *Adashunas* was defined to include "suspected-to-exist children with learning disabilities who are not . . . identified." *Adashunas v. Negley,* 626 F.2d 600, 603 (7th Cir. 1980) (quotations omitted). Presented with a class definition that included members who may or may not even exist, and who, as defined, had an "abstract, conjectural, or hypothetical" injury, the *Adashunas* court concluded that the class was not sufficiently definite or ascertainable. *Id.* at 604. Similarly, in *O'Neill,* the proposed plaintiff class was rejected because its members included "an untold number of persons who are at *no risk* of suffering the injury about which plaintiff complains." *O'Neill v. Gourmet Sys. Of Minn. Inc.,* 219 F.R.D. 445, 451 (W.D. Wis. 2002) (emphasis added). Because Act 105 violates the rights of Plaintiffs and other current and future inmates with GID who would be provided hormone therapy or surgery were it not for the Act's existence, all of the members of the proposed class have suffered, or will in the future suffer, an injury. *See* Pl. Br. at 48-50. Accordingly, Plaintiffs' proposed class contains none of the defects Defendants assert.[5] For all of the reasons listed above, Defendants' arguments about standing and the breadth and definiteness of the class fail.

[5] Defendants also argue that Act 105 "does not directly affect all transgender

## III. The District Court Improperly Denied Class Certification Based On Commonality And Typicality.

The district court did not deny class certification because some members of the proposed class were not impacted by Act 105, but because it believed the impact of Act 105 on the named Plaintiffs was different from the impact on the unnamed plaintiffs. The district court apparently concluded that this perceived difference defeated the commonality and typicality prongs of Rule 23. ("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 DOC; the latter have not."); [R. 131:5; Pltf. App. 12, 14][6]

With the benefit of a full trial record, the district court ultimately concluded that the claims of the unnamed plaintiffs are both common and typical of the named Plaintiffs' claims because they arise out of the same course of conduct required of the DOC by Act 105. This is clear from the district court's

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inmates." Def. Resp. Br. at 38. Plaintiffs agree that some transgender inmates will not be immediately affected by Act 105. However, all inmates with GID and transgender issues are at *risk of injury* from Act 105, which is all that is required. Additionally, Defendants' observation has no application to the class definition at issue, which is not defined by an inmate's status as transgender.

[6] Defendants assert that "[t]he plaintiffs did not argue . . . that the other members of their proposed class were affected by 2005 WI Act 105." Def. Resp. Br. 38. This assertion is simply wrong. Indeed, Plaintiffs offered ample evidence in their class certification briefing to show that the proposed class members were affected by Act 105. [R.97: 11-12 (summarizing affidavits of 6 inmates who were not Plaintiffs and who sought evaluation for hormone therapy, all of 1 of whom were denied it); R. 105: 3-5]. In addition, the district court concluded based on evidence Plaintiffs offered at trial, *see* [R.187: ¶¶40, 53; R.200: 46-48], that inmates with GID other than Plaintiffs were affected by Act 105. [R.212:7, 61-62; App. 153, 207-208].

adoption of Plaintiffs' argument that "[t]he 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 . . ." [R.212: 59; App. 205]. Defendants' suggestion that the district court did not embrace Plaintiffs' assertion that a legal commonality existed between the named Plaintiffs and the proposed class is disingenuous. The district court quoted from Plaintiffs' trial brief the statement set forth above and then stated without qualification "[t]his court agrees." *Id.* Moreover, the district court's finding that Act 105 was unconstitutional *on its face* necessarily demonstrates its acceptance of the argument that the claims of Plaintiffs and unnamed class members share common legal and factual questions. Given that the proposed class members share the same legal theory and a common nucleus of operative fact, denial of class certification on this basis was in error. *See Patterson v. Gen. Motors,* 631 F.2d 476, 481 (7th Cir. 1980); Pl. Br. at 57-61. [7]

[7] Defendants assert essentially the same argument related to typicality as they do regarding commonality. For the reasons already identified as to Rule 23's commonality requirement, Defendants are wrong. Plaintiffs met Rule 23's typicality requirement because their claim "arises from the same event or practice or course of conduct that gives rise to the claims of the other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokley-Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir. 1983); Pl. Br. at 59-61.

## IV. Defendants Ignore Act 105's Impact On Current and Future Class Members And Misconstrue The Standard for Providing a "Reasonable Estimate" Of the Number Of Proposed Class Members.

With regard to numerosity, the Defendants first argue that Plaintiffs have "provided no reasonable estimate of the number of *future* members of their proposed class" and have failed to provide a "reasonable estimate of the number of *future* inmates for whom it may be determined that female hormones and or gender reassignment surgery are medically necessary." Def. Resp. Br. at 42. (emphasis added). Contrary to Defendants' assertion, there is no requirement that Plaintiffs identify, or even estimate, the number of *future* inmates who may become part of the plaintiff class. Indeed, where, as here, the relief sought is injunctive, and will impact future class members whose number is obviously unknown, joinder is inherently impracticable and must be considered in assessing Rule 23(a)(1). *See* Newberg on Class Actions §3.6 at 250 (4th ed. 2002) ("Courts . . . have found it easy to slip into the pattern of referring to Rule 23(a)(1) simply as a test of numerosity . . . However, number is only one of several considerations . . . relevant to joinder impracticability."); *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."); *Rosario v. Cook County*, 101 F.R.D. 659, 661 (N.D. Ill. 1983) (Rule 23(a)(1)'s requirement that joinder be impracticable is met where the decision would necessarily impact future plaintiffs because "[r]egardless of their number, the joinder of future alleged discriminatees is inherently impracticable.")

Defendants' numerosity argument is also doomed because of their insistence on arguing in opposition to the wrong class definition. According to Defendants, Plaintiffs overestimate the number of affected prisoners because "Act 105 affects only the inmates currently receiving female hormones . . ." Def. Resp. Br. at 43. This assertion is incorrect. The proposed class includes all inmates "who have been, or will in the future be, denied hormone therapy or sex reassignment surgery to treat a serious medical need" because of Act 105. [R.105:¶5]. This definition includes the following categories of inmates: (1) current and future inmates for whom DOC medical providers newly prescribe hormone therapy or sex reassignment surgery; and (2) current and future inmates who are already receiving hormone therapy when they entered DOC custody or when they enter DOC custody in the future. The proposed class definition and the district court's opinion on the merits make clear that Act 105 impacts inmates beyond those who are already receiving hormone therapy. [R.212:59; App. 205]; s*ee also* Pl. Br. at 46-54.

Defendants also argue that "even if the correct number of class members is closer to 13, a class of 13 does not meet the numerosity requirement of FRCP 23(a)(1)." Def. Resp. Br. at 43. This argument conveniently ignores two things. First, it ignores the record evidence showing, based on discovery responses provided by the Defendants, that at least 25 current inmates were being impacted by Act 105 because it placed them at risk of the denial of hormone therapy or surgery, or denied them hormone therapy that had already been

prescribed. [R.97:3-4; R.110:8 n.4]. Second, it also ignores an untold number of future class members who must be considered in the assessment of whether Rule 23(a)(1) has been satisfied.

Moreover, Plaintiffs' estimate of the number of class members was derived by reference to Defendants' own interrogatory answers which disclosed the number of inmates with GID or transgender issues over three different time periods. [R.110:8 n.4]. Plaintiffs' estimate of class size was all they were required to provide. *See James v. City of Dallas,* 254 F.3d 551, 570 (5th Cir. 2001) ("To satisfy the numerosity prong, a plaintiff must ordinarily demonstrate some evidence or *reasonable* estimate of the number of purported class members.") (emphasis added, internal quotations omitted); *Barragan v. Evanger's Dog and Cat Food Co., Inc.,* 259 F.R.D. 330, 333 (N.D. Ill. 2009) (to establish 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.") Furthermore, Plaintiffs' estimate should be deemed sufficient since the Defendants themselves, in whose custody the class members reside, refused to provide Plaintiffs with the names of inmates they had identified as having "transgender issues" or a diagnosis of GID. [R.36:6-7; 66; 67]. Without disclosure of that information, Plaintiffs were left with no choice but to make their best, albeit conservative, estimate based on the numbers provided by Defendants. [8]

[8] Defendants argue that "Act 105 affects only the inmates currently receiving female hormones, not the entire group of persons with 'transgender issues.'" Def.

For all of the reasons cited above, Defendants' arguments in opposition to Plaintiffs' request for reversal and remand of the class certification decision should be rejected. In the event this Court reverses the district court's finding of facial invalidity, Plaintiffs' request for reversal and remand of the class certification decision should be granted.

Dated this 10th day of January, 2011. Respectfully Submitted:

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Resp. Br. at 43. The term "transgender issues" is one coined by the Defendants in their responses to interrogatory requests. *See, e.g.*, [R.67: Ex.B at p. 2] (In answer to Plaintiffs' Interrogatory No. 1, Defendants disclosed that during the time period "13 inmates were identified who either had known transgender issues or a diagnosis of GID."). After Defendants refused to provide Plaintiffs with the names of putative class members or, alternatively, to give notice to these inmates of the pendency of this lawsuit, Plaintiffs unsuccessfully moved to compel the information sought. [R. 66; 67; R. 90]. All inmates with GID or transgender issues are at risk of injury by Act 105. Moreover, given this procedural history, Defendants should not be permitted to underestimate the number in the class by taking advantage of ambiguities in the record which are of their own making.

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