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., Defendant-Appellants, Cross Appellees.	)))))))))	Appeals from the United States District Court For the Eastern District of Wisconsin. No. 2:06-cv-00112-CNC Charles N. Clevert, Jr., Chief Judge

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BRIEF AND APPENDIX OF PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-2339

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

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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TABLE OF AUTHORITIES

Cases

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JURISDICTIONAL STATEMENT

The jurisdictional statement of the Defendants is complete and correct.

ISSUES PRESENTED BY DEFENDANTS' APPEAL

1. Whether Defendants' enforcement of 2005 Wisconsin Act 105 ("Act 105") to deny medically necessary treatment to Plaintiffs violates the Eighth Amendment.

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

3. Whether Act 105, on its face, violates the Eighth Amendment and the Equal Protection Clause.

ISSUE PRESENTED BY PLAINTIFFS' CONDITIONAL CROSS-APPEAL

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

STATEMENT OF THE CASE

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

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

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

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

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

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

After trial, the district court held Act 105 to be unconstitutional on its face and as applied to Plaintiffs. Granting Plaintiffs' request for facial relief, the court reached a different conclusion about the relationship between the claims of inmates already receiving hormones, such as the Plaintiffs, and inmates newly prescribed them in prison. The court concluded that: "The denial of necessary medical care to persons who have had it in the past does not distinguish Plaintiffs under the Eighth Amendment and Equal Protection Clause from transsexuals newly diagnosed with GID and prescribed the treatment for the first time by DOC health care professionals." [R.212: 59; App. 205].

STATEMENT OF FACTS

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

The Inmates Sex Change Prevention Act provides:

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

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

> 2. "Sexual reassignment surgery" means surgical procedures to alter a person's physical appearance so that the person appears more like the opposite gender.
>
> (b) The department may not authorize the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery for a resident or patient specified in sub. (1).

2005 Wisconsin Act 105.

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

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

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

Plaintiffs are male-to-female transsexual people[2], all of whom were diagnosed with GID and prescribed hormone therapy by DOC medical staff. [R.187: ¶¶1- 3 (Sundstrom); ¶¶8-10 (Fields); ¶¶13, 15, 16 (Blackwell); ¶¶21, 22, 24 (Davison); ¶¶27, 28, 30 (Moaton)]. A person with GID has persistent cross-gender identification, persistent discomfort with his or her assigned sex, no concurrent intersex condition, and clinically significant distress. [R.202: 259-260]. Ms. Moaton described feeling feminine as early as four years old, dressing in girl's clothing, and thinking she was a girl "until being told otherwise." [R.201:

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

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

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

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

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

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

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

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

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

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

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

IV. Psychiatric And Psychological Services Alone Are Ineffective Treatment.

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

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

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

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

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

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

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

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

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

VII. Act 105 Does Not Increase Security.

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

"[C]oncepts of dignity, civilized standards, humanity, and decency" embodied in the Eighth Amendment "establish the government's obligation to provide medical care for those whom it is punishing by incarceration," because "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle v. Gamble*, 429 U.S. 97, 102-103 (1976); s*ee also Reed v. McBride*, 178 F.3d 849, 852 (7th Cir. 1999); *Meriwether v. Faulkner*, 821 F.2d 408, 411 (7th Cir. 1987).

Prison officials violate the Eighth Amendment when their actions or failures to act in response to prisoners' health conditions evince "deliberate indifference to serious medical needs of prisoners." *Estelle*, 429 U.S. at 104. A

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

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

[4] Defendants argue that "security interests" may justify "imping[ing] on medical needs." Def. Br. at 18. However, courts do not apply a highly deferential standard to prison officials' assertions of "penological interests" to justify deprivations of Eighth Amendment rights. *See Johnson v. California*, 543 U.S. 499, 511 (2005) ("We judge violations of [the Eighth] Amendment under the 'deliberate indifference' standard, rather than" under lesser standards, such as "*Turner*'s 'reasonably related' standard"). "This is because the integrity of the criminal justice system depends on full compliance with the Eighth

B. GID Presents an Objectively "Serious Medical Need."

A medical or mental health condition diagnosed by a health care professional that requires treatment is a serious medical need. *See Edwards v. Snyder*, 478 F.3d 827, 830–31 (7th Cir. 2007). Psychiatric or psychological conditions have long been recognized as serious medical needs in this Circuit, *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983), and GID, a recognized mental health condition, is no exception. *Meriwether*, 821 F.2d at 413. Indeed, Defendants do not contest the district court's finding that GID is a serious medical need that requires treatment. Def. Br. at 15.

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

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

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Amendment." *Id.* "Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary." *Id.* (quoting *Spain v. Procunier*, 600 F.2d 189, 193-94 (9th Cir. 1979)).

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

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

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

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

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

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

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

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

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

A decision to deny effective medical treatment for reasons unrelated to the exercise of medical judgment violates the Eighth Amendment. *See, e.g.*, *Edwards v. Snyder*, 478 F.3d 827, 831 (7th Cir. 2007) (inmate stated Eighth Amendment claim where he was denied medical treatment for two days because prison doctor was "ringing in the new year" and did not want to be disturbed); *Greeno v. Daley*, 414 F.3d 645, 654 (7th Cir. 2005) (denying summary judgment where

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

there was a factual dispute regarding whether denial of medication to inmate was a product of erroneous medical judgment or a desire to make inmate suffer); *Foelker v. Outagamie County,* 394 F.3d 510, 513 (7th Cir. 2005) (same); *Kelley v. McGinnis*, 899 F.2d 612, 616 (7th Cir. 1990) (inmate could recover if he could prove that "clinic personnel deliberately gave him a certain kind of treatment knowing that it was ineffective, either as a means of toying with him or as a way of choosing 'the easier and less efficacious treatment'") (quoting *Estelle,* 429 U.S. at 104 n.10 (internal quotations omitted)); *see also Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993) ("if the failure to provide adequate care . . . was deliberate, and motivated by non-medical factors, then [plaintiff] has a viable claim"). Denying effective medical treatment for reasons unrelated to medical judgment is exactly what Act 105 does. Accordingly, denying hormone therapy pursuant to Act 105 violates the Eighth Amendment.

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

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

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

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

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

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

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

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

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

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

The Eighth Amendment does not allow prisons to deny categorically certain forms of medically necessary treatment prescribed by the prison medical staff. *See, e.g., De'Lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003) (plaintiff may prevail by proving that "refusal to provide hormone treatment to [plaintiff] was based solely on the Policy rather than on a medical judgment concerning [plaintiff's] specific circumstances"); *Allard v. Gomez,* 9 Fed. Appx. 793, 794–95 (9th Cir. 2001) (unpublished) (triable issue as to "whether hormone therapy was denied . . . on the basis of an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to [plaintiff's] medical needs"); *Mahan v. Plymouth County House of Corr.*, 64 F.3d 14, 18 & n.6 (1st Cir. 1995) ("inflexible" application of "policy relating to prescription medications" that prevents use of a medication necessary to treat a serious medical need may violate Eighth Amendment); *Monmouth Co. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987) ("by specifically categorizing elective abortions as beyond its duty to provide, the County denies to a class of inmates

the type of individualized treatment normally associated with the provision of adequate medical care").[8]

In *De'Lonta*, the court ruled that if the plaintiff proved that her denial of hormone therapy was based on a blanket policy rather than an individualized medical opinion and that psychiatric treatment was not a "reasonable method of preventing further" self harm, she could prevail on an Eighth Amendment claim. 330 F.3d at 634–635.[9] In the present case, Plaintiffs have proven the very facts that would have entitled them to relief under *De'Lonta*'s reasoning: they were denied hormone therapy prescribed by DOC doctors.

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[8] A number of district courts have concluded that blanket bans on hormone therapy for prisoners with GID violate the Eighth Amendment. *See Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003) ("A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs and prescribing and providing adequate care to treat those needs violates the Eighth Amendment."); *Houston v. Trella*, No. 04-1393 (JLL), 2006 WL 2772748, * 21 (D.N.J. Sept. 25, 2006) (existence of "agreement banning female hormone therapy as a form of treatment to all INS detainees regardless of the transitional state in which they are in [*sic*] is sufficient to show a deliberate policy of denying treatment" that "is sufficient to create a genuine issue of material fact as to [jail medical personnel's] deliberate indifference to a medical need"); *Bismark v. Lang*, No. 2:02-cv-FtM-29SPC, 2006 WL 1119189, *19 (M.D. Fla. April 26, 2006) ("This is not a case where plaintiff simply disagrees with the treatment modality of prison doctors. . . . While doctors can disagree with one another without violating Eighth Amendment rights, the facts of this case are overwhelmingly in support of deliberate policy decisions not to provide needed medical care which was known to have been prescribed by the experts."); *Kosilek v. Maloney*, 221 F. Supp.2d 156, 186 (D.Mass. 2002).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prisons cannot simply choose an "easier course of [medical] treatment that they know is ineffective." *Berry*, 604 F.3d at 441. *See also Edwards*, 478 F.3d at 831 (A prisoner's "receipt of *some* medical care does not automatically defeat a claim of deliberate indifference if a fact finder could infer" the treatment was "blatantly inappropriate"). Treating the *symptoms* of GID with psychological and medical services instead of treating GID with hormone therapy is not only ineffective, but "blatantly inappropriate," medical care. *Edwards*, 478 F.3d at 831. Knowingly

providing such ineffective treatment violates the Eighth Amendment. *Berry*, 604 F.3d at 441.[13]

II. Defendant's Enforcement Of Act 105 Violates The Equal Protection Clause.

"[T]he Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority." *Nabozny v. Podlesny*, 92 F.3d 446, 457 (7th Cir. 1996). Even applying rational basis, the most deferential level of review,[14] to Act 105's discriminatory classification[15] the district court found that:

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[13] In *Kosilek*, 221 F. Supp. 2d 156 (D.Mass. 2002), the warden contended that the fact that the inmate had received "some therapy" – i.e., psychotherapy – precluded the inmate from challenging the policy denying her access to hormones. The court rejected this argument, noting that the prison guidelines

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Defendants argue that the district court "did not afford appropriate weight" or "proper weight" to evidence that feminized inmates are at risk of assault. Def. Br. at 51, 53. While district courts should be cautious about rejecting prison administrators' judgment about security, "[a]s long as the concerns expressed by correctional authorities are plausible, and the burden that a challenged regulation of jail or prison security places on protected rights [is] a light or moderate one," *Keeney v. Heath*, 57 F.3d 579, 581 (7th Cir. 1995), this Court has cautioned against "automatic deference to ritual incantations by prison officials that their actions foster the goals of order and discipline." *Lock v. Jenkins*, 641 F.2d 488, 498 (7th Cir. 1981). *See also Williams v. Lane*, 851 F.2d 867, 872 (7th Cir. 1988) ("[A] court's deference to administrative expertise and discretionary authority of correction officials must be schooled, not absolute.") (internal quotations omitted); *Wellman*, 715 F.2d at 272 ("[T]he policy of deferring to the judgment of prison officials in matters of prison discipline and security does not usually apply in the context of medical care to the same degree as in other contexts").

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

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

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

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

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

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

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

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

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

Other courts have scrutinized and rejected illogical and unsupported claims that prison rules promote security. In *Turner*, the Supreme Court struck down a prison regulation that restricted the right to marry. In doing so, the Court rejected "[t]he security concern emphasized by [the government] . . . that 'love triangles' might lead to violent confrontations between inmates." *Turner*, 482 U.S. at 97 (citation omitted). The Court rejected the regulation as unrelated to serving that concern: prison administrators "have pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing" love triangles, moreover, "[c]ommon sense . . . suggests that there is no logical connection between the marriage restriction and the formation of love triangles: surely in prisons housing both male and female prisoners, inmate rivalries are as likely to develop without a formal marriage ceremony as with one." *Id.* at 98. In other words, because the regulation did not meaningfully mitigate the risk of violence, it did not rationally further the government's interest in reducing the risk of violence.

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

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

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

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

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

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

Id. (citation omitted).

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

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

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

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

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

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

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

Cost savings can never be a constitutionally sufficient justification for any classification, even under the most deferential level of scrutiny. *Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources") (citation omitted); *Shapiro v. Thompson*, 394 U.S. 618, 633 & n.11 (1969), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974) (a state may not preserve finances "by invidious distinctions between classes of its citizens"). "The Equal Protection Clause . . . imposes a requirement of some rationality in the nature of the class singled out" to bear the burden of cost savings. *Rinaldi v. Yeager*, 384 U.S. 305, 308–309 (1966) (citation omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated this 23rd day of November, 2010.

Respectfully submitted,

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