UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

KARI SUNDSTROM, *et al.*,

Plaintiffs,

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

MATTHEW J. FRANK, *et al.*,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs are transsexual[1] inmates who have alleged that Act 105, which went into effect on January 24, 2006, is unconstitutional as applied to them and on its face because it violates both the Eighth Amendment's prohibition of cruel and unusual treatment and the Equal Protection Clause of the Fourteenth Amendment.

Defendants ask for judgment on one of Plaintiffs' two legal theories – Plaintiffs' equal protection claim – and on Plaintiffs' request for facial relief. Defendants also seek summary judgment on Plaintiff Moaton's as-applied claim for hormone therapy and judgment as to Plaintiffs Sundstrom and Blackwell on mootness grounds. This case is currently set for trial on October 22, 2007.

[1] Although there are some subtle differences in the way different sources define transsexual, the word is used in this Brief to describe those persons who meet the GID diagnostic criteria and have a serious medical need for hormone therapy or sex reassignment surgery. (PFOF ¶¶ 2, 7.)

ARGUMENT

In the context of a summary judgment motion, "the non-movant need not ... persuade the court that her case is convincing, she need only come forward with appropriate evidence demonstrating that there is a pending dispute of material fact." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921 (7th Cir. 1994).

In deciding the motion, the court must construe all evidence, and all reasonable inferences that can be drawn from the evidence, in the light most favorable to the nonmoving party. *Sallenger v. Oakes*, 473 F.3d 731, 739 (7th Cir. 2007). "Rule 56(c) mandates an approach in which summary judgment is proper only if there is *no reasonably contestable issue of fact* that is potentially outcome-determinative." *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000) (emphasis supplied). The court is not to "make a credibility determination [or] choose between competing inferences," as these are functions for trial. *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1041 (7th Cir. 1993). "Summary judgment is inappropriate when alternate inferences can be drawn from the available evidence." *Spiegla v. Hull*, 371 F.3d 928, 935 (7th Cir. 2004).[2]

[2] Defendants set forth the five elements of a permanent injunction, (Def. Br. 4), but direct their Motion only to arguing that Plaintiffs cannot meet the first element, success on the merits. The disastrous consequences that may result from refusing to provide medical care for GID (Plaintiffs' Proposed Findings of Fact ("PFOF") ¶¶ 7, 14), show that no adequate remedy at law exists and that irreparable harm will result without injunctive relief. Further, the risk of harm to Plaintiffs outweighs any potential harm to Defendants, *see* IV.B.1 & 2, *infra*, and the public interest will be served by granting the constitutionally mandated relief. Similarly, Defendants set out the requirements of the *Prison Litigation Reform Act*, 18 U.S.C. § 3626(a)(1) applicable to prospective relief, but fail to show any way in which that statute supports their Motion.

I. Plaintiffs' Evidence Shows Genuine Disputes of Material Fact Regarding Vankemah Moaton's Eighth Amendment Claim for Continued Hormones.

This Court should not grant Defendants' motion for summary judgment as to Vankemah Moaton's as-applied Eighth Amendment claim because there remain genuine issues of material fact to be resolved at trial.

Defendants argue that Vankemah Moaton's as-applied challenge to the termination of her hormone therapy should be dismissed on summary judgment, despite the following facts developed in discovery: (1) DOC's own medical personnel have diagnosed Ms. Moaton with gender dysphoria and repeatedly prescribed these medically necessary hormones for her.[3] (PFOF ¶ 39)[4]; (2) Dr. Randi Ettner, an expert in GID diagnosis and treatment, has confirmed that Ms. Moaton has GID, that hormones are medically necessary for her, and that termination of her hormones would have devastating and potentially life-threatening consequences (PRESP ¶ 4, PFOF ¶ 40) (If hormones are unavailable the gender "dysphoria becomes crippling, and depression, substance abuse, autocastration or suicide result. . . . Vankemah Moaton [has] undergone partial or complete hormonal reassignment. Discontinuation of these hormones can have devastating biological effects."); (3) Dr. Kevin Kallas, DOC's Mental Health Director, and Dr. David Burnett, DOC's Medical Director, agree that such therapy is medically necessary for some prisoners with GID (PFOF ¶¶ 8-13) and that taking a GID patient off

[3] When Ms. Moaton first entered the Wisconsin prison system in September 2006, she was prescribed delestrogen, estrace and spironolactone for GID. (PFOF ¶ 39.) However, her hormone dosages were tapered because of Act 105. (PFOF ¶ 39.) Once Ms. Moaton was added as a plaintiff in this case, DOC medical staff concluded that "legally the meds may be restarted," and accordingly restored hormones, which would not have been terminated but for the passage of Act 105. (PFOF ¶ 39.)

[4] To preserve space and readability, Plaintiffs will cite only to their Proposed Findings of Fact (PFOF) and Response to Proposed Findings of Fact (PRESP) in this brief. Citations to testimony and supporting documents are set out in full in the Proposed Findings of Fact and Response to Proposed Findings of Fact.

of hormones could lead to physical symptoms as well as significant psychological consequences, such as suicidal ideation, anxiety, and depression (PFOF ¶ 15); and (4) Defendants' expert in a similar case concluded that termination of hormones for someone already taking them is "cruel and clinically inappropriate." (PFOF ¶ 41.)

Defendants' argument for summary judgment depends on two false premises: (1) that Ms. Moaton's limited invocation of her Fifth Amendment privilege during her deposition should result in exclusion of all evidence of her need for hormones; and (2) that their theory of defense depends on an individualized assessment of each plaintiff's medical need for hormones, which was thwarted by Ms. Moaton's invocation of the privilege.

As explained more fully in Plaintiffs' Brief in Opposition to Defendants' Motions *in Limine*, the first premise is false because exclusion of all evidence related to a fact in issue is an impermissible sanction for assertion of the privilege against self-incrimination. *See, e.g., SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 191 (3rd Cir. 1994) ("a complete bar to presenting any evidence, from any source, that would in all practical effect amount to the entry of an adverse judgment, would be an inappropriate sanction."); 8 Wright, Miller & Marcus, *Fed. Prac. & Proc. Civ.2d* § 2018 (Westlaw through 2007 update) ("To dismiss a party's action, or to grant an adverse judgment, or to foreclose him or her entirely from litigating an issue properly in the case, merely for claiming the constitutional privilege certainly makes resort to the privilege too 'costly.' It is difficult to believe that sanctions of this kind can be defended."). Moreover, Ms. Moaton has agreed to waive the privilege and permit Defendants to depose her about her use of hormones and other feminizing treatments, eliminating whatever limited harm to the Defendants'

case may have arisen from invocation of the privilege. Even without testimony related to the period from January 2001 through September of 2002, about which Ms. Moaton previously refused to testify, there is ample evidence of Ms. Moaton's current need for continued hormone therapy to take this case to a jury. For example, as noted above, Defendants' own medical professionals repeatedly have prescribed hormone therapy for Ms. Moaton,[5] DOC Mental Health Director Kevin Kallas has testified that hormone treatment is medically necessary for some prisoners, and Defendants' expert in the Konitzer case has opined that terminating a prisoner who is already on hormones would be "cruel." (PFOF ¶ 41.)

Defendants' second premise – that facts related to Ms. Moaton's particularized need for hormone treatment are relevant to their defense – is false, because they have offered no medical opinion to suggest that Ms. Moaton does not have a serious medical need for hormones. Defendants' only evidence supporting a finding that *any* plaintiff does not have a serious medical need for hormones is the testimony of Defendants' proffered psychology expert, Daniel Claiborn, that *no person* has such a need, because Gender Identity Disorder is not a valid psychiatric diagnosis and, even if it were, no treatment, including hormone therapy, would be "necessary." (PFOF ¶ 42.) Dr. Claiborn specifically disclaimed any opinion about the validity of any particular plaintiff's diagnosis or need for treatment. (PFOF ¶ 43.) Consequently, Defendants have not shown any way in which Ms. Moaton's limited invocation of her Fifth Amendment rights impaired their ability to defend this case. Only if they had chosen to offer *individualized*

[5] Although the continuation of hormones was made possible by the court's order of December 22, 2006 (Docket No. 94), it was DOC doctors who decided that the hormones were still medically necessary since the order provided that defendants are "enjoined from *withdrawing* any hormonal therapy prescribed to Moaton and are directed to *continue* administration of Moaton's hormone therapy at the level Moaton was receiving before that level was reduced to comply with" Act 105. *Id.* at 1-2 (emphasis added).

medical testimony or other evidence to show that Ms. Moaton has no serious medical need for hormones or that knowing her history of prior hormone use was essential to determining such need could her refusal to answer a handful of questions about past hormone use affect their defense. Even if Defendants could present such medical testimony, the ample evidence showing that hormones are medically necessary for Ms. Moaton would preclude summary judgment.

All the facts in the record that relate to Ms. Moaton's individual need for hormones – her medical records, the testimony of experts, and the testimony of Defendants' own medical staff – support her claim. (PFOF ¶¶ 39-40.) Viewing these facts in the light most favorable to Ms. Moaton, as required under Rule 56, summary judgment on her as-applied challenge to the statute must be denied.

II. Disputed Facts Material To Whether Act 105 Is Facially Unconstitutional Preclude Granting Summary Judgment On Plaintiffs' Facial Challenge.

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court wrote that a statute will be struck down as unconstitutional on its face only where the challenger shows "that no set of circumstances exists under which the Act would be valid." Defendants' assertion that Plaintiffs' facial challenge must be dismissed prior to trial is wrong for two primary reasons, as explained in more detail below. First, Defendants misconstrue what it means for a statute to have a constitutional application, and therefore come to the incorrect conclusion that there are "sets of circumstances" where Act 105 would be constitutional. Supreme Court precedent makes clear that only the *relevant* applications are to be considered, rejecting states' attempts to defend legislation by pointing to the fact that some members of the general public remain unaffected. The Act

is unconstitutional in all of its applications because the Act applies only where it makes a difference by actually preventing a DOC doctor from following her own medical judgment and providing medically necessary care. All of those applications violate the Eighth Amendment and the Equal Protection Clause.

Second, whether Plaintiffs can make out a facial challenge depends on the resolution of disputed factual issues – such as whether hormone therapy is necessary to meet a serious medical need – so their facial challenge cannot be dismissed on summary judgment. Plaintiffs will demonstrate at trial that Act 105 prohibits prison doctors from prescribing specific medical care that is medically necessary for their patients, thus violating Plaintiffs' rights under the Eighth Amendment and the Equal Protection Clause.

A. The Act applies only when it bars doctors from prescribing medically necessary health care.

Defendants' argument that Act 105 is not facially invalid because it has many constitutional applications is based on a fundamental misunderstanding of what constitutes an "application" of a statute. Defendants assert that Plaintiffs' facial challenge fails because "the Act applies to all inmates, regardless of their diagnosis status." (Def. Br. 8.) They point to the obvious reality that the prohibition in Act 105 has no effect on thousands of inmates for whom no DOC doctor ever prescribes hormone therapy or sex reassignment surgery, and reason from there that the statute is constitutional as applied to all of those inmates. But the Act does not apply to inmates who do not have both GID and a serious medical need for hormones or sex reassignment surgery – it is simply irrelevant as to them.[6] As the Court explained in *Planned*

[6] The Act is relevant to – and therefore applies to – all inmates who have GID and would be prescribed hormones or surgery by DOC physicians as medically necessary treatment but for the Act. This

Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 894 (1992), "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." The Act, therefore, "must be judged by reference to those for whom it is an actual rather than an irrelevant restriction...." *Id.* at 895. This construction of "application" has been widely followed in cases applying *Salerno.*

Casey involved, in part, a challenge to a statutory spousal notification requirement, and the state defended the provision:

> ... by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. They begin by noting that only about 20 percent of the women who obtain abortions are married. They then note that of these women about 95 percent notify their husbands of their own volition. Thus, respondents argue, the effects of [the statutory provision] are felt by only one percent of the women who obtain abortions. For this reason, [the state argues,]...the statute cannot be invalid on its face.

Id. at 894. The Court rejected this argument, reasoning that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there," since a statute is judged "by its impact on those whose conduct it affects." *Id.* The "real target" of the spousal notification provision in *Casey* "is 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." *Id.* at 895.

More recently, in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the Court considered whether the so-called partial birth abortion statute was facially invalid because it banned use of that procedure in all situations, with no exception for protecting the health of the mother. The Court held that the statute's ban "applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the

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includes inmates with a serious medical need for these therapies who have not even been evaluated by DOC medical personnel because of the futility of such an evaluation. (PFOF ¶ 31.)

woman suffers from medical complications." *Id.* at 1639. Because the ban applied to a number of situations, only some of which were unconstitutional, the statute was not facially invalid.

If the *Gonzales* Court had adopted the argument advanced by Defendants here, it would have rejected the facial challenge because the statute banned the partial birth abortion procedure for all patients, even where no doctor had recommended it. But that is not what the Court did. Under both *Casey* and *Gonzales*, a statute *applies* for purposes of a facial challenge only when it actually bars treatment, such as when it prevents a DOC medical provider from administering medically necessary care. DOC doctors only prescribe the treatments prohibited by the Act when they are medically necessary for an inmate with GID. (PFOF ¶¶ 13, 19.)

While the test for facial challenges is slightly different in the abortion context (Def. Br. 7-8), the definition of "application" is the same both under *Salerno* and the abortion cases. The primary difference between *Salerno* and *Casey* is how many applications of a statute – a "large fraction" under *Casey*, rather than *all* under *Salerno* – must be unconstitutional before a facial challenge is sustained. *Compare Casey*, 505 U.S. at 895, *with Salerno*, 481 U.S. at 745. In both the abortion cases and cases following *Salerno*, courts have started the facial challenge analysis with the same conception of what qualifies as an application before considering the separate question of whether it is unconstitutional in a sufficient proportion of cases.

Indeed, the Seventh Circuit interprets *application* the same way as *Casey* and *Gonzales* in facial challenges outside the abortion context. In *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003) and *Daniels v. Area Plan Comm'n*, 306 F.3d 445 (7th Cir. 2002), the

Seventh Circuit upheld as-applied challenges to statutes that provided the government with authority to act but dismissed facial challenges on the ground that the challenged statutes had other constitutional applications. In doing so, the court considered only applications that actually would be authorized by the statutes rather than conduct unaffected by them.

In both *Heck*[7] and *Daniels*[8], the courts looked at the authority actually conveyed by the statutes, rather than at actions that the state could take regardless of the statute, as Defendants would have the court do here. The laws at issue in *Heck* and *Daniels apply* by allowing certain kinds of government actions that could not happen without the challenged statutory authority, while in the present case the Act *applies* when it bars some conduct that would take place absent the legal effect of the Act. In both situations, the question for the Court is whether any of those actual applications are constitutional, rather than whether there is a constitutional problem in situations unaffected by the restriction – or the authority – set forth in the statute. *See Casey*, 505 U.S. at 895; *Gonzales*, 127 S. Ct. at 1639.

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[7] In *Heck*, parents challenged a Wisconsin statute that allowed government officials to interview children, without parental permission, where the officials suspected child abuse. The court held that the statute's authorization of child interviews without parental permission was unconstitutional as applied to a situation where the officials had no reasonable suspicion of abuse. 327 F.3d at 528. However, the court rejected the facial challenge because there were situations in which the government could choose to exercise this statutory authority in a constitutional manner, e.g., "when government officials interview a child on public school property because they 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. In finding constitutional applications of the statute, the court pointed to a situation where the statute gave the officials authority that they could use in a constitutional manner, rather than to situations (such as interviews where the officers sought and received parental consent) where the statute would be irrelevant to their conduct.

[8] 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 468.

Furthermore, none of the other cases cited by Defendants rejects a facial challenge by pointing to "applications" of a statute in situations where the statute is irrelevant. Instead, they either reject a facial challenge based on constitutional "applications" that are examples of government actions authorized by the statute, *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); or actions actually prohibited by the statutes, *Ben's Bar v. Village of Somerset*, 316 F.3d 702, 708, 728 (7th Cir. 2003) (rejecting facial challenge to ordinance barring sale of liquor at sexually oriented business because application of the ordinance to this plaintiff was constitutional); or they find a statute facially unconstitutional, *Joelner v. Village of Washington Park*, 378 F.3d 613, 629 (7th Cir. 2004) (remarking, on consideration of preliminary injunction, that challenged statute was likely facially unconstitutional).

B. The Act is unconstitutional every time it applies because it categorically prevents DOC medical providers from exercising their medical judgment to provide medically necessary treatment.

Plaintiffs' facial challenge cannot be dismissed on summary judgment because that challenge depends in part on the resolution of whether the medical care prohibited by Act 105 is necessary to meet a serious medical need. Defendants concede that they are required to "provide medically necessary treatment" (Def. Br. 8), but fail to grapple with the reality that Act 105 prevents them from doing just that. (PFOF ¶¶ 8, 13, 28-29.) Plaintiffs do not claim that they are constitutionally entitled to "whatever treatment [they] desire[ ]," as Defendants suggest. (Def. Br. 8.) Rather, Plaintiffs seek the hormones and surgery that the evidence shows DOC doctors would prescribe when medically necessary

but for Act 105. (PFOF ¶¶ 28-29.) This evidence presents a genuine dispute of fact for trial.

Extensive authority demonstrates that prison officials' refusal to provide medically necessary care based on a blanket rule such as that in Act 105, rather than on a doctor's individualized medical judgment, constitutes deliberate indifference. *See, e.g.*, *De'lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003) (Virginia Department of Corrections' "policy . . . not to provide hormone therapy to prisoners, supports the inference that [defendant prison officials'] refusal to provide hormone treatment to De'lonta was based solely on the Policy rather than on a medical judgment concerning De'lonta's specific circumstances" in violation of the Eighth Amendment); *Jones v. Simek*, 193 F.3d 485, 488-91 (7th Cir. 1999) (prison doctor's refusal without explanation to follow specialist's medical judgment violated Eighth Amendment); *Chance v. Armstrong*, 143 F.3d 698, 704 (2d Cir.1998) (Eighth Amendment prohibits treatment based on "ulterior motives" rather than "sound medical judgment"); *Kosilek v. Maloney*, 221 F.Supp.2d 156, 183-92 (D. Mass. 2002) (denial of hormones to transgender inmate based on blanket policy, rather than individualized medical evaluation, constitutes deliberate indifference); *Barrett v. Coplan*, 292 F. Supp.2d 281, 286 (D.N.H. 2003) ("the Eighth Amendment does not permit necessary medical care to be denied to a prisoner because the care is expensive or because it might be controversial or unpopular.... 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"); *Allard v. Gomez*, 9 Fed. Appx. 793 (9th Cir. June 8, 2001).

As will become clear at trial, disputes of fact divide the parties regarding whether hormone therapy and sex reassignment surgery are medically necessary treatments for individuals with GID. Plaintiffs have submitted evidence that hormone therapy is medically necessary for many individuals with GID, and that sex reassignment surgery is medically necessary for some of them. (PFOF ¶¶ 7, 11, 13, PRESP ¶¶ 1, 3, 5.) Several DOC medical administrators agree that hormone therapy and sex reassignment surgery are medically necessary for some people with GID (PFOF ¶¶ 8-10, 12), and that DOC provided medically necessary hormone therapy for inmates with GID prior to the passage of Act 105. (PFOF ¶ ¶ 13, 19.) In contrast, Defendants' proffered expert has asserted that neither form of treatment barred by Act 105 is ever medically necessary. (PFOF ¶ 42.) This dispute of fact precludes summary judgment on Plaintiffs' challenges to Act 105, both facial and as-applied.

Defendants' assertions that hormone therapy is not medically necessary for every inmate with GID, and that sex reassignment surgery is not medically necessary for any individual Plaintiff (Def. Br. 9), both miss the point: Act 105 prohibits a DOC doctor from prescribing either of these treatments. Additionally, DOC doctors do not even evaluate some inmates who have a serious need for hormones because the Act makes the evaluation futile. (PFOF ¶ 31.) This denial of medical care without any medical basis violates the Eighth Amendment. The fact that some inmates (even those with GID) do not have a serious medical need for either treatment is beside the point. In those situations, Act 105 presents no bar and causes no harm.

III. Kari Sundstrom and Lindsey Blackwell's Claims for Declaratory and Injunctive Relief Are Not Moot.

Defendants seek dismissal of the claims of Plaintiffs Kari Sundstrom and Lindsey Blackwell on the grounds that their release from prison on supervised release renders their claims moot.[9]

Although a change in the relations between the parties during the course of litigation may render a case moot, if there is a reasonable likelihood that in the future the plaintiff will again be subjected to the defendant's allegedly unlawful conduct, the case is not moot. *See Kikimura v. Turner*, 28 F.3d 592, 597 (7th Cir. 1994). "[T]he burden of proving mootness – which is on the defendant – 'is a heavy one.'" *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

A prisoner's unconditional release from prison generally moots any declaratory or injunctive claims challenging a prison policy, since a former prisoner would have to be convicted of a crime again in order to be subject to the policy.[10] Courts consider the possibility of a plaintiff being convicted of a crime in the future too speculative to confer standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (no standing to challenge arrest practices, because court assumes conduct in conformity with law to avoid prosecution and conviction, as well as arrest). However, release on parole does not necessarily render declaratory or injunctive claims challenging prison policies moot,

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[9] Defendants also ask that Robert Humphreys, the Warden at Racine Correctional Institution (RCI), and Susan Nygren, Manager of the Health Services Unit at RCI, be dismissed as defendants because none of the current plaintiffs are housed at RCI. Plaintiffs do not oppose the dismissal of Mr. Humphries and Ms. Nygren, but reserve the right to seek to amend the pleadings should a plaintiff be assigned to RCI prior to judgment.

[10] None of the cases cited by Defendants at page 11 of their Brief other than *Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996), *see* n. 8, involves *conditional* release. In contrast to the decisions in *Morales v. Schmidt*, 489 F.2d 1335, 1336 (7th Cir. 1973), *decision on reh'g en banc*, 494 F.2d 85 (7th Cir. 1974); *Chapman v. Pickett*, 586 F.2d 22, 26 (7th Cir. 1978), discussed *infra.*, none of these courts mentioned any conditions on the plaintiffs' release or transfer from the facility or unit that could result in their return to the facility where the allegedly unconstitutional conditions existed.

because a parolee could be returned to prison for violating conditions of release, even if the violations do not amount to a criminal act or would not lead to criminal prosecution. *See Morales v. Schmidt*, 489 F.2d 1335, 1336 (7th Cir. 1973), *decision on reh'g en banc*, 494 F.2d 85 (7th Cir. 1974); *Chapman v. Pickett*, 586 F.2d 22, 26 (7th Cir. 1978)[11]; *accord, Armstrong v. Davis*, 275 F.3d 849, 860-61, 866 (9th Cir. 2001).

Where circumstances make it likely that a plaintiff will return to the prison setting in which she again will be subjected to the allegedly unlawful practice, the plaintiff's claim is not moot. *Compare Washington v. Harper*, 494 U.S. 210, 218-19 (1990) (challenge to involuntary administration of medication did not become moot when prisoner transferred out of prison's psychiatric center where medical history indicated strong likelihood of return to psychiatric center, where he could be subject to involuntary medication again); *Williams v. Anderson*, 959 F.2d 1411, 1417 (7th Cir. 1992) (same); *Clark v. Brewer*, 776 F.2d 226, 229 (8th Cir. 1985) (prisoner retained standing to challenge conditions in "close management" unit, because recent disciplinary reports resulted in "reasonable expectation" that prisoner would return to close management); *with Knox v. McGinnis*, 998 F.2d 1405, 1412-15 (7th Cir. 1993) (claim challenging practices in segregation moot when prisoner transferred out of segregation and no particular likelihood of his return to segregation).

In this case, Plaintiffs Kari Sundstrom and Lindsey Blackwell have been released from prison, but both remain on extended supervision and thus have a substantial

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[11] Defendants cite *Kerr*, 95 F.3d at 475, for the proposition that release on parole renders a claim for injunctive relief moot. (Def. Br. 11.) *Kerr* did state that one of plaintiff's injunctive claims (but not another) was mooted by his release on parole. However, the court in *Kerr* did not engage in any analysis of the plaintiff's risk of reincarceration and failed to address *Chapman* or *Morales*. The court cited *Lyons*, a case involving a challenge to arrest procedures by individuals who would not be subject to arrest again unless they committed a crime, and *Knox v. McGinnis*, 998 F.2d 1405 (7th Cir. 1993), a case involving the transfer of a prisoner, not release on parole, but did not explain how these cases apply to parolees who can be returned to prison for violations of their conditions of release that would not otherwise be criminal.

likelihood of returning to prison, where they will be subject to Act 105's prohibition on hormone therapy. (PFOF ¶¶ 44-47.) Under DOC regulations, an offender on parole or extended supervision may be revoked and returned to prison if she "fails to comply with the written conditions or rules of his or her supervision." Wis. Adm. Code, § DOC 328.04(5). The conditions and rules of supervision must include requirements that the offender, *inter alia*, "[i]nform the [parole] agent of his or her whereabouts and activities as directed"; "[s]ecure advance approval from an agent for a change of residence or employment . . ."; "[o]btain the advance permission of an agent and a travel permit before leaving the state"; "[o]btain advance permission from an agent to purchase, trade, sell, or operate a motor vehicle"; "[m]ake himself or herself available for searches ordered by the agent . . ."; "[r]efrain from the abuse of alcohol . . ."; attend periodic face-to-face meetings with the agent; and "[f]ollow any specific rules that may be issued by an agent to achieve the goals and objectives of this chapter." Wis. Adm. Code, § DOC 328.04(3) & (4); *see also* PFOF ¶¶ 44-47. Because these conditions apply to Ms. Sundstrom and Ms. Blackwell, they may have their extended supervision revoked and return to custody without committing or being convicted of a criminal act.

The state cannot argue otherwise, given its attempts to return Kari Sundstrom to prison. On April 20, 2007, a criminal complaint against Ms. Sundstrom was filed in Dane County Circuit Court. (PFOF ¶ 46.) A felony warrant was issued the same day. (PFOF ¶ 46.)[12] The state thus views Ms. Sundstrom's return to prison as a "virtual certainty," not a matter of speculation. *Clark*, 776 F.2d at 229. For Lindsey Blackwell,

[12] The DOC directory, Vinelink, lists Ms. Sundstrom has having "absconded." (PFOF ¶ 45.) "Absconding" results in issuance of a warrant, Wis. Adm. Code § DOC 328.14(1), and is another grounds for revocation of parole.

too, another arrest or violation of parole conditions, though not resulting in a criminal prosecution, would be sufficient to revoke her supervised release and return her to prison.

IV. There Is a Genuine Dispute of Fact Whether Act 105 Violates the Equal Protection Clause of the Fourteenth Amendment.

A. Plaintiffs' evidence shows that Act 105 intentionally discriminates between similarly situated classes.

"[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). The evidence offered by Plaintiffs shows that Act 105: (1) singles out a definable minority, transsexuals, (2) denies them necessary medical care not denied other similarly situated inmates who are not transsexual, and (3) discriminates intentionally.

Transsexuals are individuals with severe or profound GID, a medically recognized health condition defined by a conflict between assigned sex and gender identity and by clinically significant psychological distress or impairment. (PFOF ¶¶ 2, 4.) Any treatment for GID that seeks to change gender identity is futile. (PFOF ¶ 5.) The only medical treatment that effectively relieves suffering caused by severe GID is hormone therapy or surgery to bring anatomy and appearance into alignment with gender identity. (PFOF ¶¶ 7-8, PRESP ¶¶ 1, 3, 5.) Accordingly, persons who meet the GID diagnostic criteria and have a serious medical need for hormone therapy or sex reassignment surgery are a definable minority – transsexuals. (PFOF ¶¶ 2, 4, 7, PRESP ¶¶ 1, 3, 5.)

The evidence also shows that the classification created by Act 105 discriminates between similarly situated classes. By its terms, Act 105 categorically prohibits hormone

therapy or surgery that is intended "to alter [a prisoner's] physical appearance so that the [prisoner] appears more like the opposite gender." Wis. Stat. Ann. § 302.386(5m). In doing so, Act 105 categorically denies access to medical treatment that is needed – uniquely -- by transsexual prisoners, but does not categorically deny access to medical treatment that is needed by other prisoners (including hormone therapies and surgeries that are not intended to induce gender transition, such as treatments for hormone deficiencies or estrogen treatments for post-menopausal women). (PFOF ¶ 20.)

Plaintiffs' evidence shows further that the discrimination effected by the Act is intentional. Discrimination is intentional "whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 352 (1918); *see also Snowden v. Hughes*, 321 U.S. 1, 8 (1944) ("[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.") (citations omitted). Act 105 is directed only against medical treatment that is needed by transsexual people. Wis. Stat. Ann. § 302.386(5m).[13] Moreover, in practice, Act 105 is enforced only against transsexual people. (PFOF ¶¶ 22-24, 29); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 126-27 (1996) (distinguishing disparate enforcement from disparate impact).

[13] The legislative history of Act 105 offers additional evidence that the Act was directed intentionally at transsexual people (PFOF ¶¶ 21-24).

B. Plaintiffs' evidence shows that Act 105 cannot withstand the Constitutionally-mandated level of scrutiny.

In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court held that, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89-90; *see also Beard v. Banks*, 126 S. Ct. 2572, 2580 (2006) (*Turner* standard requires "more than simply a logical relation;" it requires "a *reasonable* relation") (emphasis in original). In doing so, the Court identified "several factors ... relevant in determining the reasonableness of the regulation at issue:" (1) whether "the governmental objective [is] a legitimate and neutral one" and whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;" (2) "whether there are alternative means of exercising the right that remain open to prison inmates;" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;" and (4) whether "the existence of obvious, easy alternatives" suggests "an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 89-90 (quotation omitted).

In the Seventh Circuit, the *Turner* standard is the standard under which a court evaluates a classification that is neither a suspect class such as race nor involves a fundamental right. In *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988), *cert. denied sub nom. Lane v. Williams*, 488 U.S. 1047 (1989), the Seventh Circuit, recognizing that "[p]risoners do not surrender their rights to equal protection at the prison gate," *id.* at 881, struck down the denial of equal access to a non-fundamental right ("programming and living conditions," *id.*, specifically, "educational and occupational instruction, recreational opportunities, and food service," *id.* at 874) based on a classification not

deemed suspect ("protective custody prisoners[ ]," *id.* at 873). *Id.* at 881-82. In doing so, the Court applied the *Turner* standard, *id.* at 876-77, ultimately accepting the factual finding that "[defendants'] purported justification in terms of security concerns [was] an arbitrary and exaggerated response and mask[ed] defendants' real delinquencies," *id.* at 881. Because the classification at issue similarly employs what Defendants claim is a non-suspect classification to deny equal access to a non-fundamental right, it, too, would be subject to the *Turner* standard.[14] *See also, e.g., Ghashiyah v. Wisconsin Dep't of Corrections*, No. 04-C-0176, 2007 WL 1029523, at *5 (E.D. Wis. Mar. 30, 2007) (classification that denied non-suspect class equal access to non-fundamental right subject to *Turner* standard); *Shaw v. Smith*, No. 04-C-979, 2006 WL 587667, at *12 (E.D. Wis. Mar. 10, 2006), *aff'd*, 206 Fed. Appx. 546 (7th Cir. 2006) (same).

Because Plaintiffs' evidence shows that Act 105 cannot withstand the *Turner* standard, there are genuine disputes of material fact that preclude summary judgment on Plaintiffs' equal protection claim.[15]

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[14] *Compare Johnson v. California*, 543 U.S. 499, 509-12 (2005) (finding race classification should be subjected to strict scrutiny rather than the *Turner* standard, because the Court had previously subjected prison race classifications to strict scrutiny, because banning race discrimination "bolsters the legitimacy of the entire criminal justice system," and because the Court had "refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion."). But *see* n.13 *infra*.

[15] Even if the *Turner* standard is not the standard under which a court evaluates a classification of the type at issue, there are genuine disputes of material fact that preclude summary judgment on Plaintiffs' equal protection claim.

Plaintiffs' evidence shows that Act 105 cannot withstand even rational basis review. *See* §§ IV.B.1.a., IV.B.2. *infra*; *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("[T]he classification drawn by the statute [must be] rationally related to a legitimate state interest.") (citations omitted). This is especially so in light of the fact that the legislative history of Act 105 reveals a discriminatory intent against transsexual people. (PFOF ¶¶ 21-24); *see also Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

Because Act 105 cannot withstand even rational basis review, Plaintiffs need not prevail on their argument that Act 105 is instead subject to intermediate scrutiny because it is also a sex-based classification. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) ("[I]f the statutory scheme

1. Plaintiffs' evidence shows that Act 105 is not justified by Defendants' interest in maintaining prison security, because it is not reasonably related to it.

Although maintaining prison security is a legitimate interest, the Seventh Circuit has admonished that "we do not read anything in [the case law] as requiring this court to grant automatic deference to ritual incantations by prison officials that their actions foster the goals of order and discipline." *Lock v. Jenkins*, 641 F.2d 488, 498 (7th Cir. 1981); *accord Williams*, 851 F.2d at 886 (Flaum, J., concurring) ("[P]rison officials whose actions are challenged cannot avoid court scrutiny by reflexive, rote assertions that existing conditions are dictated by security concerns and that the cost of change is prohibitive."); *see also, e.g., Martin v. Rison*, 741 F. Supp. 1406, 1425 (N.D. Cal. 1990), *vacated as moot sub nom. Chronicle Publ'g Co. v. Rison*, 962 F.2d 959 (9th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) ("[T]he word 'security' cannot be just a label invoked to shield all actions from scrutiny."). Because Plaintiffs' evidence shows that Act 105 is not reasonably related to Defendants' interest in maintaining prison security, there are

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cannot pass even the minimum rationality test, our inquiry ends."); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) (proffered justification for sex-based classification must be "exceedingly persuasive"). Act 105 is, however, a sex-based classification. By its terms, Act 105 is intended to prohibit "[the alteration of] [a prisoner's] physical appearance so that the [prisoner] appears more like the opposite gender." Wis. Stat. Ann. § 302.386(5m). The legislative history of Act 105 only confirms the intent to enforce sex-stereotyped physical appearance. (PFOF ¶¶ 21-24.) The Supreme Court has long recognized that enforcement of sex stereotypes is a form of sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51, 256 (1989); *see also, e.g., Bellaver v. Quanex Corp.*, 200 F.3d 485 (7th Cir. 2000); *Doe ex rel. Doe v. City of Bellville*, 119 F.3d 563 (7th Cir. 1997), *vacated on other grounds sub nom City of Bellville v. Doe ex rel. Doe*, 523 U.S. 1001 (1998). Numerous courts have recognized that enforcement of sex stereotypes against transsexual people is no less a form of sex discrimination. *See, e.g., Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001). *But see Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (finding in a case that pre-dates *Price Waterhouse* that discrimination against a transsexual did not violate Title VII's prohibition on sex discrimination because of the court's now-discredited narrow interpretation of Congressional intent).

genuine disputes of material fact that preclude summary judgment on Plaintiffs' equal protection claim.

a. Plaintiffs' evidence shows that Act 105 does not rationally further Defendants' interest in maintaining prison security.

Even if transsexual prisoners who present femininely are at risk of assault at the hands of male prisoners, Plaintiffs' evidence shows that denying the medical treatment at issue does not rationally further Defendants' interest in mitigating the risk of assault. By definition, male-to-female transsexuals experience a persistent discomfort with their assigned male sex and a strong female gender identity. (PFOF ¶¶ 2-4.) To alleviate the psychological distress or impairment caused by their GID, many such individuals whose gender identity is female express it through their appearance, mannerisms, name and pronoun choices, or by otherwise identifying and expressing themselves as women. (PFOF ¶ 6.) Significantly, many seek to do so even absent surgery or hormone therapy. (PFOF ¶¶ 6, 18.) Thus, even without the medical treatments at issue, many male-to-female transsexual prisoners will still identify or present themselves femininely, and therefore will still be at risk of assault at the hands of male prisoners.[16] Defendants' mischaracterization of Plaintiffs' expert's testimony does not change the analysis. The relevant inquiry is not whether transsexual prisoners who present femininely are at risk of assault, but rather whether denying hormones or surgery mitigates any such risk. Because denying Plaintiffs hormones or surgery does not reduce any risk of assault, it does not rationally further Defendants' interest in mitigating the risk of assault.

[16] 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 (PFOF ¶ 18) strongly suggests a similar willingness to express their femininity in other ways.

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 did not question the security concern proffered by the prison officials but instead rejected the regulation as unrelated to serving that concern: " [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), the Seventh Circuit reinstated a challenge to a prison regulation that prohibited the wearing of dreadlocks. In doing so, the Court rejected "a security concern for potential racial conflict from the professed Rastafarian belief that dreadlock symbolizes black superiority." *Id.* at 963. It did so because "it is not easy to see how forcing Rastafarians to cut their hair is going to change this belief." *Id.* Again, because the regulation did not meaningfully mitigate the risk of violence, it did not rationally further the government's interest in mitigating the risk of violence. In *Reed*, the Seventh Circuit 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." (PFOF ¶¶ 32, 35-36.)

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.[17]

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[17] In order to determine whether Act 105 furthers Defendants' purported security interest, the court should also inquire whether the asserted interest is "pretextual," *Williams*, 851 F.2d at 877; *see also id.* at 881 ([un]mask[ing] [the government's] *real* delinquencies") (emphasis added).

Plaintiffs' evidence shows that Defendants' proffered interest in maintaining prison security is pretextual. The only correctional expertise offered with respect to Act 105 is that of Defendants' correctional medical personnel who opined that the harm caused by the Act far outweighed any benefits, which failed to include an increase in prison security. (PFOF ¶ 26.) The legislative history evidences anti-transsexual animus which is neither a legitimate nor neutral interest. (PFOF ¶¶ 21-24); *see also United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). That the security interest is pretextual is further confirmed by the overinclusiveness and underinclusiveness of the classification – Defendants claim Act 105 would protect transsexual prisoners, who are adequately safeguarded from assault by alternative measures (PFOF ¶ 36), but do not claim that it would protect other prisoners who present femininely or who otherwise are at risk of assault. *See also Williams*, 851 F.2d at 875 (rejecting proffered interest in prison security because classification included not only prisoners in administrative segregation for disciplinary purposes, who posed security concerns, but also prisoners in administrative segregation for protective purposes, who did not); *id.* at 875 (rejecting proffered interest in prison security because classification included only select scenarios in which prison security was compromised by interaction between prisoners in administrative segregation and prisoners in general

b. Plaintiffs' evidence shows that there are no alternative means of accessing the medical treatment at issue that remain open to prisoners.

The evidence submitted by Plaintiffs shows that, on account of Act 105, transsexual prisoners have no access to hormones or sex reassignment surgery – medical treatment that they uniquely need. (PFOF ¶¶ 7, 8, 28, 29.) *See Johnson v. Daley*, 339 F.3d 582, 587-88 (7th Cir. 2003) ("States have extra obligations toward prisoners and must provide care appropriate to their serious medical needs because imprisonment takes away their ability to fend for themselves.") (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989)). Because "other avenues" do not "remain available for the exercise of the asserted right," this Court need not "be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation," *Turner*, 482 U.S. at 90 (quotation and citation omitted), especially since Act 105 is not based on such discretion.

c. Plaintiffs' evidence shows that accessing hormones and surgery has no significant impact on prison guards or other prisoners, or on the allocation of prison resources.

Recognizing that, "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order," the Supreme Court has held that the proper inquiry is whether "accommodation of an asserted right will have a *significant* 'ripple effect' on fellow inmates or on prison staff." *Turner*, 482 U.S. at 90 (quotation and citation omitted) (emphasis added); *see also Williams*, 851 F.2d at 876 (discussing alternatives "without any *significantly* increased security burdens") (emphasis

population); *Abbott v. Smaller*, 1990 WL 131359, *3 (E.D. Pa. Sept. 5, 1990) (rejecting proffered interest in prison security because classification included only select scenarios in which prison security was compromised by interaction between prisoners of different races).

added); *id.* at 885 ("The increased administrative burden that the [government] assert[s] a decision in [the prisoners'] favor would impose upon the prison system is inconsequential when compared with the value of a proper and humane system."). Plaintiffs' evidence shows that accessing the medical treatment at issue has no significant adverse impact. *See* § IV.B.1.a. *supra*; §§ IV.B.1.d., IV.B.2. *infra*. As a result, this Court need not "be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90 (citation omitted).

d. Plaintiffs' evidence shows that Act 105 is an exaggerated response to defendants' prison security concern.

Plaintiffs' evidence shows that Act 105 is an exaggerated response to Defendants' prison security concern. (PFOF ¶¶ 32, 35-36.) "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Turner*, 482 U.S. at 91. Here, to mitigate the risk of assault, Defendants can avail themselves of alternatives that already exist in light of Defendants' constitutional duty to protect prisoners, *e.g.*, closer monitoring, transfer of the vulnerable inmate or the aggressor to an alternative housing unit, and the like. (PFOF ¶¶ 36-38); *see also Farmer v. Brennan*, 511 U.S. 825 (1994) (constitutional duty to protect prisoners includes transsexual prisoners). The sufficiency of these alternatives is confirmed by the fact that, before Act 105 was enacted, transsexual prisoners who presented femininely – including those who had access to hormones – were adequately protected from assault at the hands of male prisoners. (PFOF ¶¶ 34-35; PRESP ¶ 9); *see also Turner*, 482 U.S. at 98-99 (rejecting government's security concern

because, before prison regulation was promulgated, prisoners who married were adequately protected from violence); *id.* at 99 (rejecting government's rehabilitation concern because only one prisoner who married exhibited excessive dependency, and finding that prison regulation "operated on the basis of excessive paternalism"); *Williams*, 851 F.2d at 876 ("[The government] did have the ability to overcome security and operational concerns when it chose to do so."); *Kosilek v. Maloney*, 221 F. Supp.2d 156, 194 (D. Mass. 2002) (prison administrator ordered to assess any security concerns presented by starting an inmate with GID on hormones in light of the fact that the inmate "is already living largely as a female in the general population of a medium security male prison" without resulting "security problems.").[18] This is only confirmed by the fact that Act 105 was enacted against the advice of Defendants' own correctional staff. (PFOF ¶¶ 25-29, 33); *see also O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349 (1987) (deference owed to "prison administrators, who are actually charged with and trained in the running of the particular institution under examination") (quotation omitted). In light of the sufficiency of these alternatives, Act 105 is an exaggerated response to Defendants' prison security concern.

[18] Defendants' argument that Jessica Davison's rape occurred because of her use of hormones in prison cannot reasonably suggest that there is no genuine dispute of fact that denying hormones would significantly reduce the risk of inmate assault. Ms. Davison had been taking hormones before she was incarcerated and she did *not* testify that her hormone usage during prison led to her rape. Even if she had, it is irrational to assume that Ms. Davison or anyone else could know that she would not have been raped if she had never taken hormones. (PFOF ¶ 18.) Plaintiffs' evidence shows that Act 105 is an exaggerated and misplaced response to the possibility of sexual assault on transsexual inmates.

2. Plaintiffs' evidence shows that Act 105 is not justified by an interest in achieving cost savings.[19]

The Supreme Court has long recognized that, standing alone, cost savings can never be a constitutionally sufficient justification for any classification, even under the most deferential level of scrutiny: "Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (citation omitted). As the Court has explained:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.

Shapiro v. Thompson, 394 U.S. 618, 633 & n.11 (1969). In other words, because a classification always creates a class of "haves" and a class of "have-nots" and therefore always achieves cost savings, the proper inquiry is not whether a classification achieves cost savings but rather whether it rationally does so. There must be a justification for the decision to achieve cost savings on the backs of the "have-nots" but not the backs of the "haves." "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi*, 384 U.S. at 308-309 (citation omitted).

Plaintiffs' evidence shows that the classification at issue does not rationally achieve cost savings. The cost of providing the medical treatment at issue is outweighed by the cost of denying it. (PFOF ¶ 26.) Moreover, the cost of providing the medical

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[19] Defendants do not proffer an interest in achieving cost savings. Indeed, Defendants' own medical staff believe that cost savings do not justify denying the medical treatment at issue. (PFOF ¶ 30.) Plaintiffs nevertheless address the issue out of an abundance of caution.

treatment at issue is low, both in absolute terms and in terms relative to the cost of providing comparable medical treatment (*i.e.*, hormone therapies and surgeries that are not intended as treatment for GID). (PFOF ¶ 30.)

CONCLUSION

For the above-stated reasons, Plaintiffs ask the Court to deny Defendants' Motion for Partial Summary Judgment.

Dated this 30th day of August, 2007.

Respectfully submitted,

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