IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CODY FLACK and
SARA ANN MAKENZIE,

Plaintiffs,

v. Case No. 18-CV-0309

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
LINDA SEEMEYER, in her official
capacity as Secretary of the Wisconsin
Department of Health Services,

Defendants.

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' PROPOSED FACTS SUBMITTED IN SUPPORT OF
THEIR MOTION FOR PRELIMINARY INJUNCTION**

Defendants Wisconsin Department of Health Services (DHS) and Linda Seemeyer, by their counsel, respond to the Plaintiffs' proposed facts submitted in support of their motion for preliminary injunction (Dkt. 20) as follows:

Jurisdiction and Venue

1. The Court has jurisdiction over the claims asserted herein under 28 U.S.C. §§ 1331 and 1343(a)(3)-(4).

RESPONSE: Defendants OBJECT to this proposed fact as a legal conclusion.

2. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. § 1983, and Rules 57 and 65 of the Federal Rules of Civil Procedure.

RESPONSE: Defendants OBJECT to this proposed fact as a legal conclusion.

3. Under 28 U.S.C. § 1391, venue is proper in the Western District of Wisconsin because Defendants reside and are subject to personal jurisdiction in the District, a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in the District, and Plaintiff Sara Ann Makenzie resides in the District. *See generally* Decl. of Cody Flack; Decl. of Sara Ann Makenzie.

RESPONSE: Undisputed that venue is proper in the Western District of Wisconsin. (Dkt. 51:1 ¶ 1 (Stipulated Findings of Fact, (hereinafter "SFOF").)

Parties

4. Plaintiff Cody Flack is an adult male resident of Green Bay, Brown County, Wisconsin. Flack Decl. ¶ 2.

RESPONSE: For purposes of the preliminary injunction only, do not dispute that Flack is an adult resident of Green Bay, Brown County, Wisconsin. Dispute that Flack is male. While Flack has a male gender identity and is enrolled in Medicaid as "male," his birth sex is female. (Dkt. 28-1:1; Dkt. 1:15 ¶ 57 (Compl.).) Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. (Dkt. 21-1:5; Roth Decl. Ex. 1000 (Mayer Report 3,

Boyden v. ETF, No. 17-CV-0264, Apr. 19, 2018).[1]) Gender, on the other hand, refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. (Roth Decl. Ex. 1000 (Mayer Report 3).) An individual's sex is immutable, whereas their gender identity is a developmental process. (Roth Decl. Ex. 1000 (Mayer Report 3).) Though one is born with the chromosomes, hormone prevalence, and external and internal anatomy of a particular sex, one is socially conditioned to take on the roles, behaviors, activities, and attributes of a gender identity. (Roth Decl. Ex. 1000 (Mayer Report 3).) As such, there is a concrete distinction between "sex" as a biological designation and "gender" or "gender identity" as a cultural construct. (Roth Decl. Ex. 1000 (Mayer Report 3).)

5. Plaintiff Sara Ann Makenzie is an adult female resident of Baraboo, Sauk County, Wisconsin. Makenzie Decl. ¶ 2.

RESPONSE: For purposes of the preliminary injunction only, do not dispute that Makenzie is an adult resident of Baraboo, Sauk County, Wisconsin. Dispute that Makenzie is female. While Makenzie has a female gender identity, is enrolled in Medicaid as "female," and her revised DHS-issued birth certificate classifies her as "female," her birth sex is male. (Dkt. 1:22 ¶ 83 (Compl.).) Sex is assigned at birth, refers to one's biological status as

[1] Hereinafter "Mayer Report."

either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. (Dkt. 21-1:5; Roth Decl. Ex. 1000 (Mayer Report 3).) Gender, on the other hand, refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. (Roth Decl. Ex. 1000 (Mayer Report 3).) An individual's sex is immutable, whereas their gender identity is a developmental process. (Roth Decl. Ex. 1000 (Mayer Report 3).) Though one is born with the chromosomes, hormone prevalence, and external and internal anatomy of a particular sex, one is socially conditioned to take on the roles, behaviors, activities, and attributes of a gender identity. (Roth Decl. Ex. 1000 (Mayer Report 3).) As such, there is a concrete distinction between "sex" as a biological designation and "gender" or "gender identity" as a cultural construct. (Roth Decl. Ex. 1000 (Mayer Report 3).)

6. Defendant Wisconsin Department of Health Services ("DHS") is the Wisconsin state agency charged with the administration of Wisconsin Medicaid. DHS is a recipient of federal funds, including Medicaid funding for Wisconsin Medicaid. Wis. Stat. § 49.45.

RESPONSE: Undisputed. (SFOF ¶¶ 2–3.)

7. Defendant Linda Seemeyer, sued in her official capacity, is the Secretary of DHS. As Secretary, she is responsible for implementing the Medicaid Act consistent with federal Medicaid requirements. Wis. Stat. § 46.014.

RESPONSE: Undisputed. (SFOF ¶ 4.)

Gender Identity and Gender Dysphoria

8. Gender identity is an innate, internal sense of one's sex—*i.e.*, being male or female—and is a basic part of every person's core identity. Decl. of Daniel Shumer, MD, MPH ¶ 12; Decl. of Stephanie L. Budge, PhD, LP ¶ 16.

RESPONSE: Dispute to the extent gender identity is purportedly "innate." Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. (Dkt. 21-1:5; Roth Decl. Ex. 1000 (Mayer Report 3).) Gender, on the other hand, refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. (Roth Decl. Ex. 1000 (Mayer Report 3).) An individual's sex is immutable, whereas their gender identity is a developmental process. (Roth Decl. Ex. 1000 (Mayer Report 3).) Though one is born with the chromosomes, hormone prevalence, and external and internal anatomy of a particular sex, one is socially conditioned to take on the roles, behaviors, activities, and attributes of a gender identity. (Roth Decl. Ex. 1000 (Mayer Report 3).) As such, there is a concrete distinction between "sex" as a biological designation and "gender" or "gender identity" as a cultural construct. Roth Decl. Ex. 1000 (Mayer Report 3).)

9. Everyone has a gender identity. Budge Decl. ¶ 16.

RESPONSE: For purposes of this preliminary injunction only, do not dispute this proposed fact.

10. Most people's gender identity is consistent with the sex they were assigned at birth. Budge Decl. ¶ 17.

RESPONSE: For purposes of this preliminary injunction only, do not dispute this proposed fact.

11. Transgender people, however, have a gender identity that is different from their assigned sex. *Id.* ¶ 17. A transgender man is a man who was assigned female at birth but has a male gender identity. *Id.* ¶ 19. A transgender woman is a woman who was assigned male at birth but has a female gender identity. *Id.*

RESPONSE: Do not dispute that transgender people have a gender identity that is different from their assigned sex, that a transgender man has a male gender identity, and that a transgender woman has a female gender identity. Dispute the remainder of this proposed fact. Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. (Dkt. 21-1:5; Roth Decl. Ex. 1000 (Mayer Report 3).) Gender, on the other hand, refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. (Roth Decl. Ex. 1000 (Mayer Report 3).) An individual's sex is immutable, whereas their gender identity is a developmental process. (Roth Decl. Ex. 1000 (Mayer Report 3).) Though one is

born with the chromosomes, hormone prevalence, and external and internal anatomy of a particular sex, one is socially conditioned to take on the roles, behaviors, activities, and attributes of a gender identity. Roth Decl. Ex. 1000 (Mayer Report 3).) As such, there is a concrete distinction between "sex" as a biological designation and "gender" or "gender identity" as a cultural construct. (Roth Decl. Ex. 1000 (Mayer Report 3).)

12. Gender dysphoria is a serious medical condition experienced by transgender people whose gender identity conflicts with the sex they were assigned at birth. *See* Am. Psychiatric Ass'n, Diagnostic & Statistical Manual, 5th ed. 451-59 (2013) ("DSM-5"); [Decl. of Orly May, Ex. 1];[2] Budge Decl. ¶ 24.

RESPONSE: Undisputed that gender dysphoria is a serious medical condition (Dkt. 1:7 ¶ 23 (Compl.); Dkt. 45:5 ¶ 23 (Amend. Answer).) Dispute that this is a complete definition or diagnostic criteria for gender dysphoria. (*See* Dkt. 21-1.) Further dispute the implication that all transgender people have gender dysphoria. (Roth Decl. Ex. 1002 (Mayer Dep. 41:2–4, *Boyden v. ETF*, No. 17-CV-0264, June 15, 2018,[3] explaining that there are "people who are transgender who don't have gender dysphoria. There can be perfectly well-adjusted people who are transgender ….").)

13. Gender dysphoria is the "clinically significant distress or impairment in social, occupational, or other areas of function" associated with the incongruence between a transgender person's gender identity and assigned sex. DSM-5 at 451-53.

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[2] This Court may take judicial notice of the DSM-5. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1040 n.4 (7th Cir. 2017).

[3] Hereinafter "Mayer Dep."

RESPONSE: Dispute that this is a complete definition or diagnostic criteria for gender dysphoria. (*See* Dkt. 21-1.)

14. When a transgender person's gender dysphoria is left untreated, or is inadequately addressed, the consequences can be dire—ranging from serious mental distress to self-harm and suicide. Budge Decl. ¶ 24, 36; Decl. of Jaclyn White Hughto, PhD, MPH ¶ 50.

RESPONSE: Undisputed that when a transgender person's gender dysphoria is left untreated, or is inadequately addressed, adverse symptoms can result (Dkt. 1:7 ¶ 24 (Compl.); Dkt. 45:5 ¶ 24 (Amend. Answer)), and that untreated gender dysphoria can result in psychological distress. (SFOF ¶ 18.) Dispute that only untreated gender dysphoria can result in serious psychological distress, self-harm, or suicide, as people with gender dysphoria have high suicide rates, whether or not they obtain gender reassignment surgery. (Roth Decl. Ex. 1002 (Mayer Dep. 54:18–25 ("These transgender or gender dysphoric people have very high suicide rates, treated or not. You're saying there are people . . . who can show, had they not had treatment, they would have been suicidal. I do not know of that study. I would be interested if you'd send it to me.")).)

15. A transgender person's gender dysphoria can be alleviated when the person is able to live, and be treated by others, consistently with the person's gender identity. Budge Decl. ¶¶ 34-35, 37.

RESPONSE: Dispute to the extent that this proposed fact implies that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. (Roth Decl. Ex. 1000 (Mayer Report 3, 7); Roth Decl. Ex. 1002 (Mayer Dep. 49:21–50:15 ("There is not a single study that shows the incidence of gender dysphoria goes down as a function of plastic surgery or reassignment surgery. . . . In other words, gender dysphoria isn't about people feeling better. . . . Gender dysphoria is a very serious illness leading to a high risk of suicide, for example. You need to cure that dysphoria. . . . [W]e do not have long-term follow-up studies of what percentage of them are still dysphoric."), 35:25–36:4 ("[L]et's say [the AMA] said that surgery was a major treatment for the dysphoric part of being transgender. That may be true, but where is the evidence? I couldn't find any evidence. I searched and searched."), 88:6–8 ("[T]here has been no demonstration that they're safe and effective. There's argument, but there is no demonstration."), 100:10–21 ("There was an extensive search I did of the literature, probably a thousand papers. I probably reviewed the biography of 500 of them in the abstract, and probably read 200 of them over the course of four years now trying to find studies on gender dysphoria. Q. So you are saying there are no studies about efficacy and safety of treatment for gender dysphoria? A. I wouldn't say there are no studies.

I'd say there are no decent studies. There's not a simple controlled study in which gender dysphoria is actually measured.")).)

16. Symptoms of gender dysphoria can be mitigated, and often prevented altogether, for transgender people with access to appropriate individualized medical care as part of their gender transitions. *Id.* ¶ 28.

RESPONSE: Dispute to the extent that this proposed fact implies that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

17. Under the World Professional Association of Transgender Health's *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th Version* (2011) ("WPATH Standards of Care")—the internationally-accepted standards of care for gender dysphoria—treatment options for gender dysphoria include psychotherapy, hormone therapy to feminize or masculinize the body, and various surgical procedures that align one's physical characteristics with one's gender identity (collectively referred to in this brief as gender-confirming or transition-related surgeries). Decl. of Loren S. Schechter, MD ¶¶ 23-32; Shumer Decl. ¶¶ 29-30; Hughto Decl. ¶ 21.

RESPONSE: Defendants OBJECT to this proposed fact because the cited evidentiary materials testify as to the contents of other documents, which is inadmissible under Fed. R. Evid. 802 and 1002. Defendants FURTHER OBJECT that the cited evidence does not support that the WPATH Standards of Care are "internationally-accepted standards of care for gender dysphoria," in that the declarants' testimony lack foundation to establish that purported fact.

Notwithstanding and without waiving this objection, do not dispute that the WPATH guidelines discuss these surgical procedures, but dispute that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

18. The medical community recognizes gender confirming surgeries as safe and effective treatments for gender dysphoria. *Id.*; Schechter Decl. ¶¶ 23-28; Shumer Decl. ¶ 17; Budge Decl. ¶ 30; Exs. 2-9 to May Decl. (position statements of various major medical organizations).

RESPONSE: Defendants OBJECT that the term "medical community" is vague and ambiguous. Defendants FURTHER OBJECT that the cited evidence does not establish what the entire "medical community" recognizes, in that the declarants' testimony lack foundation to establish that purported fact. Notwithstanding and without waiving these objections, dispute. There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

19. Not all transgender people need surgery to alleviate their gender dysphoria; however, for many transgender people, surgery is the only medically effective treatment to alleviate symptoms of the condition. Schechter Decl. ¶¶ 28-39; Shumer Decl. ¶ 40; Budge Decl. ¶¶ 34-37.

RESPONSE: Undisputed that not all transgender people need surgery to alleviate their gender dysphoria. Dispute the remainder of this proposed fact. There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

20. Gender-confirming medical treatments can also reduce the discrimination, mistreatment, and harassment that transgender people suffer for being visibly gender nonconforming. Hughto Decl. ¶¶ 28-46.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this generalized statement, but OBJECT to any finding that either Flack or Makenzie has suffered or is at risk of suffering irreparable harm due to discrimination, mistreatment, or harassment, because the evidentiary materials cited lack foundation to support such a finding. Notwithstanding and without waiving this objection, defendants assert that the social stress model, (i.e., the concept that the LGBT population faces distinct social challenges such as stigma, overt discrimination, and harassment) should not be assumed to offer a complete explanation of the causes of mental health challenges faced by the LGBT community. (Roth Decl. Ex. 1000 (Mayer Report, Appx. D 76, 85).)

21. Transgender people who are visibly gender nonconforming experience more discrimination and worse health outcomes than those whose appearance matches their gender identity. *Id.* ¶ 30.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this generalized statement, but OBJECT to any finding that either Flack or Makenzie has suffered or is at risk of suffering irreparable harm due to discrimination or a worse health outcome because of nonconformity with their gender identity, because the evidentiary materials cited lack foundation to support such a finding. Notwithstanding and without waiving this objection, defendants assert that the social stress model, (i.e., the concept that the LGBT population faces distinct social challenges such as stigma, overt discrimination, and harassment) should not be assumed to offer a complete explanation of the causes of mental health challenges faced by the LGBT community. (Roth Decl. Ex. 1000 (Mayer Report, Appx. D 76, 85).)

22. Transgender individuals who are unable to access or afford gender confirming procedures, which would increase gender conformity, are at greater risk of discrimination and other harms. Hughto Decl. ¶¶ 30, 45.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this generalized statement, but OBJECT to any finding that either Flack or Makenzie is has suffered or is at risk of suffering irreparable harm due to discrimination or other harms because of nonconformity with their gender identity, because the evidentiary materials cited lack foundation to support such a finding. Flack asserts that he has been transitioning since age 13, and Medicaid records support that he started hormone therapy in 2016 to support his transition. (Dkt. 22:2–3 ¶¶ 6–11 (Flack Decl.).) Flack also considers

his 2016 hysterectomy with bilateral salpingo-oophorectomy a medical treatment that assisted in his transition. (Dkt. 22:2–3 ¶13 (Flack Decl.).) Makenzie asserts that she has been transitioning since 2012, and started medical treatments (hormone therapy) in 2013. (Dkt. 23:2–3 ¶¶ 8–10, 13 (Makenzie Decl.).) Makenzie also considers her 2016 breast augmentation surgery a medical treatment that assisted in her transition. (Dkt. 23:2–3 ¶ 18–22 (Makenzie Decl.).) Notwithstanding and without waiving this objection, defendants assert that the social stress model, (i.e., the concept that the LGBT population faces distinct social challenges such as stigma, overt discrimination, and harassment) should not be assumed to offer a complete explanation of the causes of mental health challenges faced by the LGBT community. (Roth Decl. Ex. 1000 (Mayer Report, Appx. D 76, 85).)

The Transgender Population

23. Transgender people have historically been subjected to discrimination in virtually every facet of life—including in the health care context—and continue to face pervasive discrimination today. Hughto Decl. ¶¶ 28-46.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this generalized statement, but OBJECT to any finding that either Flack or Makenzie has suffered or is at risk of suffering irreparable harm due to discrimination, because the evidentiary materials cited lack foundation to support such a finding.

24. Transgender people suffer discrimination and harassment in employment, education, housing, health care, and their own families and communities. *See generally,* Nat'l Ctr. for Transgender Equality, *Exec. Summ. of Report of 2015 U.S. Transgender Survey* (2017) ("USTS Exec. Summ.") [May Decl. Ex. 23].

RESPONSE: For purposes of the preliminary injunction only, do not dispute this generalized statement, but OBJECT to any finding that either Flack or Makenzie has suffered or is at risk of suffering irreparable harm due to discrimination and harassment in employment, education, housing, health care, and their own families and communities, because the evidentiary materials cited lack foundation to support such a finding.

25. In Wisconsin, more than a quarter of transgender adults live in poverty, more than twice the overall national poverty rate. Nat'l Ctr. for Transgender Equality, *2015 U.S. Transgender Survey: Wisconsin State Report* 1 & n.3 (2017) [May Decl. Ex. 24].

RESPONSE: For purposes of the preliminary injunction only, do not dispute this generalized statement.

26. One in five transgender residents in Wisconsin is unemployed. *Id.* at 1.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this generalized statement, but dispute to the extent it implies that Plaintiffs here are unemployed because they are transgender. Flack is unable to work because he suffers from "cerebral palsy and other disabilities," and Makenzie is unable to work because of her disabling bipolar disorder. (Dkt. 22:1 ¶ 3 (Flack Decl.); Dkt. 23:1 ¶ 4 (Makenzie Decl.).)

27. Nearly 60 percent of transgender people in Wisconsin have recently experienced mistreatment by law enforcement officers who perceived or knew them to be transgender. *Id.* at 2.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this generalized statement, but OBJECT to any finding that either Flack or Makenzie has suffered or is at risk of suffering irreparable harm due to experiencing mistreatment by law enforcement officers, because the evidentiary materials cited do not support such a finding.

28. In the health care context, 30 percent of transgender adults in Wisconsin had been denied insurance coverage for being transgender; a third had at least one recent negative experience with a health provider for being transgender; and a quarter had opted not to see a doctor when needed out of fear of mistreatment. *Id.* at 3.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this generalized statement, but OBJECT to any finding that either Flack or Makenzie has suffered or is at risk of suffering irreparable harm due to being denied insurance coverage for being transgender, having a negative experience with a health provider for being transgender, or opting not to see a doctor when needed out of fear of mistreatment, because the evidentiary materials cited do not support such a finding.

Federal Medicaid Program

29. Established in 1965 under Title XIX of the Social Security Act, Medicaid is a joint federal-state program that provides medical assistance to eligible low-income individuals. *See* 42 U.S.C. § 1396-1396w-5 (the "Medicaid Act").

RESPONSE: Undisputed. (SFOF ¶ 5.)

30. Medicaid enables states to furnish medical services to persons whose incomes and resources are insufficient to meet the cost of necessary medical services by reimbursing participating states for a substantial portion of the costs in providing medical assistance. 42 U.S.C. §§ 1396-1; 1396b.

RESPONSE: Undisputed. (SFOF ¶ 6.)

31. Participating states must cover certain health care services when medically necessary, including inpatient and outpatient hospital services and physician services. 42 U.S.C. §§ 1396a(a)(10)(A), 1396d.

RESPONSE: Defendants OBJECT to this proposed fact as a legal conclusion. Defendants further note that Plaintiffs' Medicaid Act claim is no longer at issue in this preliminary injunction, and so this proposed fact is irrelevant.

32. The Medicaid Act specifically provides that "the medical assistance made available to any individual . . . shall not be less in amount, duration or scope than the medical assistance made available to any other such individual." 42 U.S.C. § 1396a(a)(10)(B)(i).

RESPONSE: Defendants OBJECT to this proposed fact as a legal conclusion. Defendants further note that Plaintiffs' Medicaid Act claim is no longer at issue in this preliminary injunction, and so this proposed fact is irrelevant.

33. A state "Medicaid agency may not arbitrarily deny or reduce the amount or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c).

RESPONSE: Defendants OBJECT to this proposed fact as a legal conclusion. Defendants further note that Plaintiffs' Medicaid Act claim is no longer at issue in this preliminary injunction, and so this proposed fact is irrelevant.

Wisconsin Medicaid Program

34. Wisconsin, like every other state, participates in Medicaid. Defendant DHS is the Wisconsin state agency charged with the administration of Wisconsin Medicaid consistent with state and federal requirements. Wis. Stat. § 49.45.

RESPONSE: Undisputed. (SFOF ¶ 7.)

35. DHS receives federal funding from the U.S. Department of Health and Human Services, including reimbursement of over half of the State's Medicaid expenditures. *See* 42 U.S.C. § 1396b; Wis. Legis. Fiscal Bureau, *Medical Assistance Cost-to-Continue (Health Services – Medicaid Services)* (Paper #320, May 25, 2017) [May Decl. Ex. 10] ("LFB Report").

RESPONSE: Undisputed. (SFOF ¶ 8.)

36. Wisconsin's medical assistance statute, Wis. Stat. §§ 49.43-.65, and its implementing regulations, Wis. Admin. Code § DHS 101.01-.36, govern Wisconsin Medicaid.

RESPONSE: Undisputed. (SFOF ¶ 9.)

37. Under the regulations, DHS "shall reimburse providers for medically necessary and appropriate health care services" listed in the statute, including inpatient and outpatient hospital services and physician services. Wis. Adm. Code § DHS 107.01(1).

RESPONSE: Defendants OBJECT to this proposed fact as a legal conclusion.

38. The State's medical assistance statute does not explicitly address, let alone exclude, coverage for transgender individuals seeking care for the treatment of gender dysphoria. Wis. Stat. §§ 49.43–.65.

RESPONSE: Defendants OBJECT to this proposed fact as a legal conclusion.

39. Currently, Wisconsin Medicaid has approximately 1.2 million enrollees. DHS, Current Month Health Care Enrollment At A Glance (April 2018) [May Decl. Ex. 11].

RESPONSE: Undisputed. (SFOF ¶ 12.)

40. An estimated 5,000 transgender adults are enrolled in Wisconsin Medicaid. Hughto Decl. ¶ 49.

RESPONSE: For purposes of the preliminary injunction only, do not dispute.

The Challenged Exclusion

41. Wis. Adm. Code § DHS 107.03(23)-(24) (the "Challenged Exclusion"), a provision of Wisconsin's Medicaid regulations, categorically excludes coverage for transition-related medical care, including "[t]ranssexual surgery" or "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics." Wis. Adm. Code § DHS 107.03(23)-(24).

RESPONSE: Undisputed. (Dkt. 1:1 ¶ 2 (Compl.); Dkt. 45:2 ¶ 2 (Amend. Answer).)

42. The policy was adopted as an amendment to the Medicaid regulations in 1996, and went into effect on February 1, 1997. *See* Wis. Dep't of Health & Fam. Servs. (DHFS), Clearinghouse Rule 96-154, 1 (Dec. 11, 1996) ("CR 96-154") [May Decl. Ex. 12].

RESPONSE: Undisputed. (SFOF ¶ 10.)

43. At the time the policy was promulgated, it was based on the premise that "transsexual surgery" and related "[d]rugs, including hormone therapy," were medically unnecessary. *See id.*; DHFS, *Summary of Amendments to Medicaid Rules that Discontinue Coverage of Medically Unnecessary Services* at 1 (Jan. 6, 1995) ("DHFS Amendments Summary") [May Decl. Ex. 13].

RESPONSE: Do not dispute, but assert that this is not a complete representation of the Jan. 6, 1995, document cited. (Dkt. 21-13.) Defendants further assert that there is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria, and so Defendants dispute that such treatments for Flack and Makenzie are medically necessary. (*See* Response to PFOF ¶ 15, above.)

44. The 1996 Amendments also excluded "tattoo removal," "ear lobe repair," "services related to surrogate parenting," and "non-medical food" from Medicaid coverage. CR 96-154, at 1.

RESPONSE: Do not dispute, but assert that this is not a complete representation of the Jan. 6, 1995, document cited. (Dkt. 21-13.)

45. The exclusions in the 1996 Amendments were not motivated by cost savings. *Id.*; DHFS, Fiscal Estimate: Medical Assistance: Medically Unnecessary Services 1 (Sept. 27, 1996) ("DHS Fiscal Est.") [May Decl. Ex. 14].

RESPONSE: Defendants OBJECT to this proposed fact because the evidentiary materials cited do not support this assertion. Notwithstanding and without waiving that objection, dispute. The cited fiscal estimate notes "Decreased Costs," and that "[t]he rule changes are expected to result in nominal savings for state government." (Dkt. 21-14:2.) Defendants assert that

covering the benefits in the Challenged Exclusion would cost around $300,000 a year in an insured population of around 167,500 (i.e. the pool of state employees and their covered dependents). (Roth Decl. Ex. 1004 (Williams Report 13.) Since there are around 1.2 million Medicaid enrollees in Wisconsin, arithmetic suggests that the cost of coverage for this larger population would be around $2.1 million. ((1,200,000/167,500) * $300,000 = $2,149,253.73.)

46. Defendants enforce the Challenged Exclusion through the present day to deny Medicaid coverage for transition-related medical treatments and publicize the Challenged Exclusion on the DHS website. *See* DHS, LGBT Health – Transgender Persons, www.dhs.wisconsin.gov/lgbthealth/transgender.htm (last accessed May 21, 2018) [May Decl. Ex. 15].

RESPONSE: Undisputed that the Defendants enforce the Challenged Exclusion through the present day. (SFOF ¶ 11.) Dispute that the Exclusion prohibits all transition-related medical treatments, as hormone therapy is still provided to Flack and Makenzie for their gender dysphoria. (Dkt. 1:17, 22–23 ¶¶ 64, 86 (Compl.); Dkt. 45:10 ¶ 64 (Amend. Answer).)

47. Wisconsin Medicaid covers the same services when medically necessary to treat conditions other than gender dysphoria. *See, e.g.*, DHS, ForwardHealth, Online Handbook, Covered and Non-Covered Services (sections on breast reconstruction, reduction mammoplasty) ("DHS Online Handbook") [May Decl. Ex. 16]; *see also* Schechter Decl. ¶¶ 38-39.

RESPONSE: Defendants do not dispute that Medicaid may cover services as medically necessary when not excluded by law, and that such services may also be addressed by the Women's Health and Cancer Rights Act of 1998. Defendants dispute any implication that there is adequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria, and so Defendants dispute that such treatments for Flack and Makenzie are medically necessary. (*See* Response to PFOF ¶ 15, above.)

Plaintiff Cody Flack

48. Cody Flack is a 30-year-old transgender man. Flack Decl. ¶¶ 2, 4.

RESPONSE: Undisputed that Flack is transgender and has a male gender identity (SFOF ¶ 19), but his birth sex is female. (Dkt. 28-1:1; Dkt. 1:15 ¶ 57 (Compl.).) Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. (Dkt. 21-1:5; Roth Decl. Ex. 1000 (Mayer Report 3).) Gender, on the other hand, refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. (Roth Decl. Ex. 1000 (Mayer Report 3).) An individual's sex is immutable, whereas their gender identity is a developmental process. (Roth Decl. Ex. 1000 (Mayer Report 3).) Though one is born with the chromosomes, hormone

prevalence, and external and internal anatomy of a particular sex, one is socially conditioned to take on the roles, behaviors, activities, and attributes of a gender identity. (Roth Decl. Ex. 1000 (Mayer Report 3).) As such, there is a concrete distinction between "sex" as a biological designation and "gender" or "gender identity" as a cultural construct. (Roth Decl. Ex. 1000 (Mayer Report 3).)

49. Because of his disabilities, including cerebral palsy, Mr. Flack is unable to work. *Id.* ¶ 3.

RESPONSE: For purposes of the preliminary injunction only, do not dispute.

50. Mr. Flack relies on Supplemental Security Income (SSI) for his living expenses and Wisconsin Medicaid for his health care. *Id.*

RESPONSE: Undisputed that Flack receives SSI and is enrolled in Wisconsin Medicaid. (SFOF ¶ 21). For purposes of the preliminary injunction only, do not dispute the remainder of this proposed fact.

51. Mr. Flack has been diagnosed with gender dysphoria. *Id.* ¶ 5; Decl. of Daniel Bergman, MS, LPC, NCC, ¶ 5; Budge Decl. ¶ 58.

RESPONSE: Undisputed. (SFOF ¶ 20.)

52. Mr. Flack's gender identity is male. Flack Decl. ¶ 4.

RESPONSE: Undisputed. (SFOF ¶ 19.)

53. While he was assigned female at birth and was raised as a girl, he became aware of his male gender identity around the age of four or five. *Id.*

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact, with the clarification that at birth, his sex was female. (*See* Response to PFOF ¶ 48, above.)

54. At age 18, Mr. Flack took steps to begin his gender transition. *Id.* ¶ 7. He began seeing a gender therapist, adopted a traditionally male name, and took other steps to outwardly present as the male he is. *Id.*

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact if corrected to state that he began his transition at age 13, when he "began taking a few steps to live as a man," as Flack asserts (Dkt. 22:2 ¶ 6 (Flack Decl.).)

55. Due to a lack of support and resources, and fears that coming out as transgender might isolate him from his family and others, Mr. Flack felt unable to undergo a full transition for several more years—despite experiencing significant gender dysphoria. *Id.*

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

56. In 2012, after moving to Wisconsin and feeling more supported in his gender identity, Mr. Flack resumed his gender transition. *Id.* ¶ 8. He took steps to socially transition to living and presenting as a man in all aspects of his life, including, exclusively using a traditionally male name, Cody, wearing traditionally men's clothing, and cutting his hair. *Id.*

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

57. Mr. Flack legally changed his name and obtained a corrected Wisconsin state identification card listing his male sex. *Id.* ¶ 9.

RESPONSE: Undisputed that Flack was granted a legal name change to Cody Jason Flack. (SFPF ¶ 22.) For purposes of the preliminary injunction only, do not dispute that Flack has a Wisconsin state identification card listing his sex as male. Dispute that Flack had a male sex when he was born. (*See* Response to PFOF ¶ 48, above.)

58. To treat his gender dysphoria and further his gender transition, Mr. Flack has obtained ongoing therapy and medical care for the last several years. *Id.* ¶ 10.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact, with the clarification that there is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Flack's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

59. Since 2015, Mr. Flack has seen a psychotherapist, Daniel Bergman, who has treated him for gender dysphoria and other mental health conditions. *Id.*; Bergman Decl. ¶¶ 4-5.

RESPONSE: Undisputed. (SFOF ¶ 23.)

60. Since August 2016, Mr. Flack has been receiving hormone therapy (testosterone) under the supervision of Dr. Amy DeGueme, an endocrinologist. Decl. of Amy DeGueme, MD ¶ 4; Flack Decl. ¶ 11. As a result of the testosterone, he has developed facial and body hair, a deeper voice, and a more masculine appearance. DeGueme Decl. ¶ 7; Flack Decl. ¶ 11.

RESPONSE: Undisputed. (SFOF ¶¶ 24–25.)

61. In October 2016, Mr. Flack had a hysterectomy with bilateral salpingo-oophorectomy—the total removal of his uterus, cervix, fallopian tubes, and ovaries. Flack Decl. ¶ 13; DeGueme Decl. ¶ 8. These surgeries were

primarily to treat two serious medical conditions: dysmenorrhea, a condition characterized by pelvic or lower abdominal pain during menstruation, and premenstrual dysphoric disorder ("PMDD"), a severe form of premenstrual syndrome. Flack Decl. ¶ 13; DeGueme Decl. ¶ 8.

RESPONSE: Undisputed. (SFOF ¶ 26.)

62. As Mr. Flack's hysterectomy with bilateral salpingo-oophorectomy was necessary to treat to treat his PMDD and dysmenorrhea, Wisconsin Medicaid covered the procedure. Flack Decl. ¶ 13. However, in addition to treating these conditions, the surgery also helped significantly reduce his gender dysphoria by better aligning his body with his male identity. Flack Decl. ¶ 13; DeGueme Decl. ¶ 8.

RESPONSE: Undisputed that Wisconsin Medicaid covered the procedure. (SFOF ¶ 26.) For purposes of the preliminary injunction only, do not dispute that Flack's hysterectomy with bilateral salpingo-oophorectomy was necessary to treat to treat his PMDD and dysmenorrhea. Dispute the remainder of this proposed fact. There is adequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Flack's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

63. While his surgery and the hormone therapy have been effective, Mr. Flack still experiences severe gender dysphoria related to the presence of female-appearing breasts on his body. Flack Decl. ¶¶ 14-17; Budge Decl. ¶¶ 61-65. Bergman Decl. ¶ 9.

RESPONSE: For purposes of the preliminary injunction only, do not dispute that Flack experiences gender dysphoria and has female-appearing breasts on his body. Dispute the remainder of this proposed fact. There is inadequate evidence to conclude that surgical treatments are of proven medical

value or usefulness for treating Flack's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

64. Because of his breasts, Mr. Flack is regularly mistaken as female and mistreated as a result. Flack Decl. ¶¶ 14-17.

RESPONSE: For purposes of the preliminary injunction only, do not dispute that Flack is regularly mistaken as female. Defendants OBJECT to the remainder of the proposed fact on the grounds that it is conclusory and speculative; as a result, the evidentiary materials lack sufficient foundation to support these assertions.

65. As his breasts cause people to mistake him as female, Mr. Flack avoids social situations whenever possible. *Id.* ¶ 29.

RESPONSE: For purposes of the preliminary injunction only, do not dispute that Flack avoids social situations whenever possible. Defendants OBJECT to the remainder of the proposed fact on the grounds that it is conclusory and speculative; as a result, the evidentiary materials lack sufficient foundation to support these assertions.

66. When in public, Mr. Flack is ashamed of his breasts. *Id.*

RESPONSE: For purposes of the preliminary injunction only, do not dispute.

67. Despite his efforts to present as the man he is, he considers the breasts an undesired visible marker of something he is not—female—and a source of significant distress. *Id.* ¶¶ 16-17

RESPONSE: For purposes of the preliminary injunction only, do not dispute, with the clarification that Flack is transgender and has a male gender identity (SFOF ¶ 19), but his birth sex is female. (*See* Response to PFOF ¶ 48, above.)

68. In an effort to conceal his breasts from public view, Mr. Flack has engaged in a technique called "binding," which flattens or reduces the appearance of breasts. *Id.* ¶ 17. Ctr. of Excellence for Transgender Health, *Guidelines for the Primary & Gender-Affirming Care of Transgender & Gender Nonbinary People*, "Binding, packing, and tucking" 155 (M. Deutsch, ed,. 2d ed. 2016) [May Decl. Ex. 17] ("CoE Guidelines").

RESPONSE: Undisputed. (SFOF ¶ 27.)

69. Mr. Flack finds binding extremely painful and, because of his disabilities, difficult to do himself. Flack Decl. ¶ 17. He has suffered respiratory distress, skin irritation, and sores as a result. *Id.*; DeGueme Decl. ¶ 9.

RESPONSE: Undisputed. (SFOF ¶ 28.)

70. Since early 2017, with the support of his psychotherapist and medical providers, Mr. Flack sought to obtain chest reconstruction surgery; specifically, a double mastectomy and male chest reconstruction. Flack Decl. ¶ 18; Bergman Decl. ¶ 10; DeGueme Decl.¶¶ 9-14; Decl. of Clifford King, MD, PhD ¶ 3.

RESPONSE: Undisputed. (SFOF ¶ 29.)

71. A double mastectomy and male chest reconstruction are widely accepted and effective treatments for gender dysphoria in transgender men. Schechter Decl. ¶ 30; Shumer Decl. ¶ 39.

RESPONSE: Dispute. There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

72. Mr. Flack consulted with Dr. Clifford King, a plastic surgeon in Madison who specializes in providing transition-related surgeries for transgender people. Flack Decl. ¶ 19; King Decl. ¶ 1.

RESPONSE: Undisputed. (SFOF ¶ 30.)

73. Mr. Flack provided Dr. King with letters of support from four medical providers—his primary care doctor, therapist, endocrinologist, the physician who performed his hysterectomy and oopherectomy, and his primary care doctor. Flack Decl. ¶ 20; King Decl. ¶ 4. Each of the four providers confirmed that Mr. Flack has gender dysphoria and met the criteria for surgery. Flack Decl. ¶ 20; King Decl. ¶ 4.

RESPONSE: Undisputed (SFOF ¶ 31), except to the extent it implies there is adequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. (*See* Response to PFOF ¶ 15, above).

74. Dr. King determined that Mr. Flack was eligible for male chest reconstruction under the WPATH Standards of Care. King Decl. ¶ 5.

RESPONSE: Undisputed (SFOF ¶ 32), except to the extent it implies there is adequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. (*See* Response to PFOF ¶ 15, above).

75. On July 18, 2017, Dr. King submitted a request for prior authorization to DHS for Wisconsin Medicaid coverage of the chest reconstruction surgeries. King Decl. ¶ 6.

RESPONSE: Undisputed. (SFOF ¶ 33.)

76. On August 2, 2017, DHS denied the request, noting simply that "[p]er WI administrative code DHS 107.03(24) transsexual surgery is a non-covered service." King Decl. ¶ 6; Flack Decl. ¶ 22; Ltr. from DHS to Dean Health Sys. (Aug. 2, 2017) [May Decl. Ex. 18].

RESPONSE: Undisputed. (SFOF ¶¶ 34–35.)

77. Mr. Flack administratively appealed that decision without success. Flack Decl. ¶¶ 23-26; Decision by Administrative Law Judge B. Schneider, at 1 (Nov. 21, 2017) [May Decl. Ex. 20] ("ALJ Decision"); Order by Administrative Law Judge B. Schneider (Dec. 11, 2017) [May Decl. Ex. 21].

RESPONSE: Undisputed. (SFOF ¶¶ 39–40.)

78. During Mr. Flack's administrative appeal, DHS conceded that its denial was based solely on the Challenged Exclusion and that it did not consider the medical necessity of the requested surgery. Flack Decl. ¶ 24; Ltr. from J. Sager to Dep't of Admin., Div. of Hearings & Appeals, *et al.* (Sep. 25, 2017) [May Decl. Ex. 22] ("Sager Letter").

RESPONSE: Undisputed (SFOF ¶ 42), except to the extent it implies that the lack of adequate evidence regarding whether surgical treatments safely and effectively treat gender dysphoria also support DHS's decision.

79. During Mr. Flack's administrative appeal, DHS further conceded that "gender dysphoria . . . is an accepted medical indication for the surgical treatment requested [by Mr. Flack]." Sager Letter.

RESPONSE: Do not dispute that this a part of the September 25, 2017 letter from Julie Sager, MD, Medical Director, Bureau of Benefits Management, Division of Medicaid Services, Wisconsin Department of Health Services, submitted to the Division of Hearing and Appeals as part of Mr. Flack's administrative appeal of DHS's denial of prior authorization for

the requested surgeries (a true and correct copy of which was filed by Plaintiffs at Dkt. 21–22), but assert that it more fully states:

> Mr. Flack is seeking the aforementioned services [a bilateral complete mastectomy (service code 19303) and breast reconstruction (nipple graft-service code 19350)] as part of gender confirmation surgery. The primary diagnosis listed with the prior authorization request is transsexualism (F64.0). Mr. Flack also carries a diagnosis of gender dysphoria which is an accepted medical indication for the surgical treatment requested.
>
> This request was denied by DMS as Wis. Admin. Code DHS 107.03(24) specifically lists 'transsexual surgery' as a non-covered service under medical assistance.
>
> The medical necessity of the services requested was not taken into account as reimbursement by Medicaid for this type of surgery is currently excluded by DHS regulations.
>
> Furthermore, please take notice of the attached federal court decision staying enforcement of Section 1557 of the Affordable Care Act regulations related to gender identity.

(SFOF ¶ 42.)

80. In November 2017, an administrative law judge concluded that while "the proposed surgery presumably would favorably address [Mr. Flack's] gender dysphoria," he was bound by the Challenged Exclusion to rule against Mr. Flack. Flack Decl. ¶ 25; ALJ Dec. at 2.

RESPONSE: Undisputed that the administrative law judge (ALJ) stated that he based his decision on the Challenged Exclusion. (SFOF ¶ 41.) Do not dispute that the ALJ stated, in part, in the "Discussion" section of his opinion, "While the proposed surgery presumably would favorably address petitioner's gender dysphoria, the surgery is nevertheless is transsexual

surgery that specifically is not covered under the code." (Dkt. 21-20:3.) Dispute that this was a specific "Finding of Fact" considered by the ALJ in his opinion or a complete representation of the ALJ's decision. (Dkt. 21-20:2–4.) In any event, what the ALJ "presumably" found is disputed here.

81. Since initially being denied coverage for surgery last summer, Mr. Flack's gender dysphoria has worsened considerably. Flack Decl. ¶¶ 27-28; Bergman Decl. ¶ 11; Budge Decl. ¶¶ 66-67.

RESPONSE: Dispute. There is no current mental status examination in Flack's medical records. (Schmidt Decl. ¶ 9, July 5, 1018.) This is a standard psychiatric report (akin to a yearly "physical" examination) that should be performed when a patient presents with potential signs and symptoms of gender dysphoria. (*Id.*) Without such an examination, there is an insufficient basis for any clinician to conclude that Flack faces an imminent risk of suicide or other self-harm, whether due to gender dysphoria or any other psychiatric disorder. (*Id.*) None of Flack's treating physicians refer to a current mental status examination which is a serious omission that undermines their opinions on Flack's mental state. (*Id.*) Also, recent outpatient notes for Flack primarily focus on issues unrelated to gender reassignment surgery. (*Id.* ¶ 10.) Those notes do indicate that Flack is experiencing psychiatric issues, but they do not indicate that he is so destabilized such that a substantial risk of imminent self-harm exists. (*Id.*) Flack's own self-reports are an insufficient basis to conclude that a serious risk of self-harm exists, let alone that receiving

the surgical procedures he seeks will reduce or eliminate that risk. (*Id.* ¶ 11.) When patients present with thoughts of self-harm, those thoughts are often created by accompanying depression, anxiety, or other psychiatric disorders. (*Id.*) The first step is to treat those accompanying disorders, and only then proceed with any potential gender reassignment surgical procedures. (*Id.*) Flack has been in the process of gender transitioning for a number of years, with no prior evidence of self-harm. (*Id.* ¶ 12.) That is a further indication he does not present a substantial risk of self-harm in the near term. (*Id.*) Flack has been in the process of successfully transitioning for years, and without a current complete psychiatric evaluation, which includes a mental status examination, there is no medical basis for determining the severity of their threats of self-harm. (*Id.* ¶ 13.) There is an insufficient clinical basis to conclude that Flack will suffer imminent, irreparable harm if he does not receive gender reassignment surgery prior to the conclusion of this case. (*Id.* ¶ 8.) Lastly, there is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Flack's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

82. Without the means to pay for surgery, Mr. Flack feels hopeless and has experienced profound depression and distress because of the denial and his inability to complete his gender transition. Flack Decl. ¶¶ 27-31.

RESPONSE: For purposes of the preliminary injunction only, do not dispute the Flack has these feelings, but assert that there is an insufficient clinical basis to conclude that Flack will suffer imminent, irreparable harm if he does not receive gender reassignment surgery prior to the conclusion of this case. (*See* Response to PFOF ¶ 81, above.) There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Flack's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

83. Mr. Flack has recently contemplated suicide and the possibility of performing chest surgery himself, but has not acted on those thoughts. Flack Decl. ¶ 28; Budge Decl. ¶ 66.

RESPONSE: For purposes of the preliminary injunction only, do not dispute the Flack has these feelings, but assert that there is an insufficient clinical basis to conclude that Flack will suffer imminent, irreparable harm if he does not receive gender reassignment surgery prior to the conclusion of this case. (*See* Response to PFOF ¶ 81, above.) Flack's own self-reports are an insufficient basis to conclude that a serious risk of self-harm exists, let alone that receiving the surgical procedures he seeks will reduce or eliminate that risk. (Schmidt Decl. ¶ 11.) When patients present with thoughts of self-harm, those thoughts are often created by accompanying depression, anxiety, or other psychiatric disorders. (*Id.*) The first step is to treat those accompanying disorders, and only then proceed with any potential gender reassignment surgical procedures. (*Id.*) Also, there is inadequate evidence to conclude that

surgical treatments are of proven medical value or usefulness for treating Flack's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

84. Mr. Flack experiences ongoing, extreme distress because of the dysphoria from his chest. Flack Decl. ¶ 28; Budge Decl. ¶ 66; Bergman Decl. ¶¶ 11.

RESPONSE: For purposes of the preliminary injunction only, do not dispute the Flack has these feelings, but assert that there is an insufficient clinical basis to conclude that Flack will suffer imminent, irreparable harm if he does not receive gender reassignment surgery prior to the conclusion of this case. (*See* Response to PFOF ¶ 81, above.) There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Flack's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

85. Without chest reconstruction surgery, Mr. Flack is at substantial risk of short- and long-term harm to his health and well-being. Budge Decl. ¶¶ 71-73; Bergman Decl. ¶¶ 13-14.

RESPONSE: Dispute. There is an insufficient clinical basis to conclude that Flack will suffer imminent, irreparable harm if he does not receive gender reassignment surgery prior to the conclusion of this case. (*See* Response to PFOF ¶ 81, above.) There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Flack's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

86. If Mr. Flack is not able to obtain chest reconstruction surgery, his emotional health will continue to deteriorate, and his depression, anxiety, suicidal ideation, and thoughts of self-harm (including thoughts of removing his breasts himself) will likely worsen. Bergman Decl. ¶ 13; DeGueme Decl. ¶ 13; Budge Decl. ¶ 73.

RESPONSE: Dispute. (*See* Response to PFOF ¶ 85, above.)

Plaintiff Sara Ann Makenzie

87. Plaintiff Sara Ann Makenzie is a 42-year-old transgender woman. Decl. of Sara Ann Makenzie ¶¶ 2-3.

RESPONSE: Undisputed that Makenzie is transgender and has a female gender identity (SFOF ¶ 46), but her birth sex is male. (Dkt. 1:22 ¶ 83 (Compl.).) Sex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. (Dkt. 21-1:5; Roth Decl. Ex. 1000 (Mayer Report 3).) Gender, on the other hand, refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. (Roth Decl. Ex. 1000 (Mayer Report 3).) An individual's sex is immutable, whereas their gender identity is a developmental process. (Roth Decl. Ex. 1000 (Mayer Report 3).) Though one is born with the chromosomes, hormone prevalence, and external and internal anatomy of a particular sex, one is socially conditioned to take on the roles, behaviors, activities, and attributes of a gender identity. (Roth Decl. Ex. 1000 (Mayer Report 3).) As such, there is a

concrete distinction between "sex" as a biological designation and "gender" or "gender identity" as a cultural construct. (Roth Decl. Ex. 1000 (Mayer Report 3).)

88. Ms. Makenzie is unable to work due to her disabilities. *Id.* ¶ 4.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

89. Ms. Makenzie relies on SSI for her income and Wisconsin Medicaid for health care. *Id.*

RESPONSE: Undisputed that Makenzie receives SSI and is enrolled in Wisconsin Medicaid. (SFOF ¶¶ 44, 45.) Dispute that SSI is Makenzie's only source of income, as she admits to receiving a $5,000 loan from a bank in 2017 to obtain breast augmentation surgery. (Dkt. 23:5 ¶¶ 18, 20 (Makenzie Decl.).)

90. Ms. Makenzie is a lifelong Wisconsin resident and has been enrolled in Wisconsin Medicaid for many years. *Id.* ¶¶ 2, 4.

RESPONSE: Undisputed that Makenzie is enrolled in Wisconsin Medicaid. (SFOF ¶ 44.) For purposes of the preliminary injunction only, do not dispute the remainder of this proposed fact.

91. Ms. Makenzie's gender identity is female. *Id.* ¶¶ 3, 5; Decl. of Trisha Schimek, MD ¶ 4; Budge Decl. ¶ 41.

RESPONSE: Undisputed. (SFOF ¶ 46.)

92. While she was assigned male at birth and raised as a boy, she is female. Makenzie Decl. ¶¶ 3, 5.

RESPONSE: For purposes of the preliminary injunction only, do not dispute, with the clarification that Makenzie is transgender and has a female gender identity (SFOF ¶ 46), but her birth sex is male. (*See* Response to PFOF ¶ 87, above.)

93. Ms. Makenzie has been diagnosed with gender dysphoria. *Id.* ¶ 11; Schimek Decl. ¶ 4; Budge Decl. ¶ 45.

RESPONSE: Undisputed. (SFOF ¶ 47.)

94. Ms. Makenzie has understood herself to be female since childhood and has experienced gender dysphoria for most of her life. Makenzie Decl. ¶¶ 5-7.

RESPONSE: For purposes of the preliminary injunction only, do not dispute.

95. Ms. Makenzie has lived consistently as a woman since at least 2012. Makenzie Decl. ¶¶ 3, 8.

RESPONSE: For purposes of the preliminary injunction only, do not dispute**.**

96. Ms. Mackenzie legally changed her name to a traditionally female name, Sara Ann, uses feminine pronouns to refer to herself, wears traditionally women's clothing, and has corrected her birth certificate, driver's license, and U.S. Passport to reflect her name-change and her female sex. Makenzie Decl. ¶ 12.

RESPONSE: Undisputed that Makenzie legally changed her name to Sara Ann Makenzie and her DHS-issued revised birth certificate classifies her as "female." (SFOF ¶ 48.) For purposes of the preliminary injunction only, do not dispute the remainder of this proposed fact, with the clarification that Makenzie is transgender and has a female gender identity (SFOF ¶ 46), but her birth sex is male. (*See* Response to PFOF ¶ 87, above.)

97. To further treat her gender dysphoria and continue her transition, Ms. Mackenzie has sought therapy and medical care since approximately 2012. Makenzie Decl. ¶¶ 11, 13-17; Schimek Decl. ¶ 5.

RESPONSE: Undisputed that Makenzie began seeking medical treatments and therapy for gender dysphoria in approximately 2012. (SFOF ¶ 49.) However, there is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Makenzie's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

98. Since 2013, Ms. Makenzie has been on hormonal therapy, which has helped diminish her symptoms of gender dysphoria. Makenzie Decl. ¶¶ 13-16; Schimek Decl. ¶ 5; Decl. of Beth E. Potter, MD ¶ 6.

RESPONSE: Undisputed that Makenzie has been on hormonal therapy to treat gender dysphoria since 2013. (SFOF ¶ 50.) For purposes of the preliminary injunction only, do not dispute the remainder of this proposed fact.

99. In 2017, Ms. Makenzie also sought to obtain chest reconstruction surgery, in the form of breast augmentation because her lack of a developed chest was exposing her to frequent misgendering. Makenzie Decl. ¶ 18.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

100. When Ms. Makenzie contacted DHS to inquire whether Wisconsin Medicaid would cover the chest reconstruction, DHS advised her that the procedure was not a covered benefit because of the Challenged Exclusion. *Id.* ¶ 19.

RESPONSE: Defendants OBJECT to this proposed fact because the evidentiary materials cited do not support that Makenzie "contacted DHS." (*See* Dkt. 23:9 ¶ 19 (Makenzie Decl.).) Instead, Makenzie states she "called the insurance office to ask whether Wisconsin Medicaid would cover the chest reconstruction," which is not DHS. (Dkt. 23:9 ¶ 19 (Makenzie Decl.).) Defendants FURTHER OBJECT because the evidentiary materials cited rely on inadmissible hearsay.

101. After learning that chest reconstruction would not be covered by Wisconsin Medicaid, Ms. Makenzie obtained a personal loan from her bank of approximately $5,000 to pay out-of-pocket for the procedure. *Id.* ¶ 20.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

102. Dr. Venkat Rao, a plastic surgeon at UW Health in Madison, performed the surgery in August 2016. *Id.* ¶ 21.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

103. The chest reconstruction procedure has been an effective treatment for Ms. Makenzie's gender dysphoria, and she has experienced fewer instances of being mistaken as male or of being mistreated for having masculine features. *Id.* ¶ 22; Budge Decl. ¶ 43.

RESPONSE: For purposes of the preliminary injunction only, do not dispute that Mackenzie has experienced fewer instances of being mistaken as male or of being mistreated for having masculine features after breast augmentation surgery. Dispute the remainder of this proposed fact, as there is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Makenzie's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

104. While the hormone therapy and chest reconstruction have been effective treatments in mitigating her gender dysphoria, Ms. Makenzie experiences profound distress at the sight of her male-appearing genitalia, which negatively impacts her social life, sexuality, and occupational functioning. Makenzie Decl. ¶¶ 23-24; Budge Decl. ¶ 44.

RESPONSE: For purposes of the preliminary injunction only, do not dispute that Mackenzie experiences distress at the sight of her male-appearing genitalia, which negatively impacts her social life, sexuality, and occupational functioning. Dispute that chest reconstruction have been effective treatments in mitigating her gender dysphoria because there is inadequate evidence to reach such a conclusion. There is no current mental status examination in Makenzie's medical records. (Schmidt Decl. ¶ 9.) This is a standard psychiatric report (akin to a yearly "physical" examination) that should be performed when

a patient presents with potential signs and symptoms of gender dysphoria. (*Id.*) Without such an examination, there is an insufficient basis for any clinician to conclude that Makenzie faces an imminent risk of suicide or other self-harm, whether due to gender dysphoria or any other psychiatric disorder. (*Id.*) None of Makenzie's treating physicians refer to a current mental status examination which is a serious omission that undermines their opinions on Makenzie's mental state. (*Id.*) And a June 14, 2018 note from Makenzie's psychotherapist states that her "psychiatric symptoms appear to be quite stable," and that Makenzie "denies a current or recent history of self-harming behaviors and/or suicidal thoughts." (Roth Decl. Ex. 1018 (Therapist Ltr.).) Makenzie's own self-reports are an insufficient basis to conclude that a serious risk of self-harm exists, let alone that receiving the surgical procedures she seeks will reduce or eliminate that risk. (Schmidt Decl. ¶ 11.) When patients present with thoughts of self-harm, those thoughts are often created by accompanying depression, anxiety, or other psychiatric disorders. (*Id.*) The first step is to treat those accompanying disorders, and only then proceed with any potential gender reassignment surgical procedures. (*Id.*) Makenzie has been in the process of gender transitioning for a number of years, with no prior evidence of self-harm. (*Id.* ¶ 12.) That is a further indication she does not present a substantial risk of self-harm in the near term. (*Id.*) There is an insufficient clinical basis to conclude that Makenzie will suffer imminent,

irreparable harm if she does not receive gender reassignment surgery prior to the conclusion of this case. (*Id.* ¶ 8) Lastly, there is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Makenzie's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

105. Ms. Makenzie's medical providers have recommended that she obtain genital reconstruction in the form of a bilateral orchiectomy and vaginoplasty, which would create female-appearing external genitalia. *Id.* ¶¶ 29-30; Schimek Decl. ¶¶ 9-10.

RESPONSE: Undisputed. (SFOF ¶ 52.)

106. The applicable standards of care recognize a bilateral orchiectomy and vaginoplasty as effective procedures in treating gender dysphoria in transgender women. Schechter Decl. ¶ 29; Shumer Decl. ¶ 39.

RESPONSE: Dispute. There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

107. In 2014, Ms. Makenzie consulted with her primary care physician, Dr. Trisha Schimek, about obtaining genital reconstruction surgery. Makenzie Decl. ¶¶ 25-26; Schimek Decl. ¶¶ 7-8. However, Dr. Schimek told her that Wisconsin Medicaid would not cover the surgery. Makenzie Decl. ¶¶ 25-26; Schimek Decl. ¶¶ 7.

RESPONSE: Undisputed. (SFOF ¶ 51.)

108. In February 2018, on the referral of her primary care doctor, Dr. Beth Potter, Ms. Makenzie consulted with Dr. Katherine Gast, a plastic surgeon at UW Health in Madison, whose practice focuses on the treatment of transgender people. Makenzie Decl. ¶ 30; Decl. of Katherine M. Gast, MD, MS ¶¶ 1-2; Potter Decl. ¶ 7.

RESPONSE: Undisputed. (SFOF ¶ 53.)

109. During the February 2018 consultation, Dr. Gast advised Ms. Makenzie that once she submitted letters of support from two mental health providers, which she was prepared to do, she would be eligible for genital reconstruction under the applicable standards of care. Makenzie Decl. ¶ 30; Gast Decl. ¶ 3.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact, except to the extent it implies that the "applicable standards of care" establish that there is adequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Makenzie's gender dysphoria. There is inadequate evidence to support that conclusion. (*See* Response to PFOF ¶ 15, above.)

110. Dr. Gast informed her, however, that Wisconsin Medicaid would not cover this procedure. Gast Decl. ¶ 32.

RESPONSE: Undisputed. (SFOF ¶ 54.)

111. Learning that Wisconsin Medicaid would not cover her procedure caused Ms. Makenzie extreme distress, including thoughts of suicide and removing her genitals herself. *Id*. ¶ 33.

RESPONSE: For purposes of the preliminary injunction only, do not dispute the Makenzie had these feelings, but assert that there is an insufficient clinical basis to conclude that Makenzie will suffer imminent, irreparable harm if she does not receive gender reassignment surgery prior to the conclusion of this case. (*See* Response to PFOF ¶ 104, above.) There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Makenzie's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

112. Without coverage from Wisconsin Medicaid, Ms. Makenzie lacks the means to pay for genital reconstruction surgery. *Id.* ¶ 33.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

113. Ms. Makenzie's inability to obtain this necessary care has exacerbated her gender dysphoria and caused significant emotional distress, particularly related to her genitalia. *Id.* ¶¶ 23, 33-34; Budge Decl. ¶¶ 71-72.

RESPONSE: Dispute. There is an insufficient clinical basis to conclude that Makenzie will suffer imminent, irreparable harm if she does not receive gender reassignment surgery prior to the conclusion of this case. (*See* Response to PFOF ¶ 104, above.) A June 14, 2018 note from Makenzie's psychotherapist states that her "psychiatric symptoms appear to be quite stable," and that Makenzie "denies a current or recent history of self-harming behaviors and/or suicidal thoughts." (Roth Decl. Ex. 1018 (Therapist Ltr.).) There is inadequate evidence to conclude that surgical treatments are of proven medical value or usefulness for treating Makenzie's gender dysphoria. (*See* Response to PFOF ¶ 15, above.)

114. Ms. Makenzie is constantly afraid that someone will be able to see her genitals through her clothing. Makenzie Decl. ¶ 23.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

115. To minimize the chance that someone will notice her genitals through her clothing, Ms. Makenzie wears multiple pairs of underwear and engages in a practice called "tucking" to hide her genitals. *Id.* CoE Guidelines

at 155. However, she finds tucking very painful and uncomfortable. Makenzie Decl. ¶ 23.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

116. Though Ms. Makenzie tries to conceal her genitals, she is constantly worried that someone may notice them—and then mistreat or attack her once they realize she is transgender. *Id.* ¶ 24.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

117. Ms. Makenzie avoids sex with her fiancée, but that only compounds her anxiety and depression. *Id.* ¶ 34; Budge Decl. ¶ 44.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

118. For Ms. Makenzie, even showering or seeing herself in the mirror is painful. Budge Decl. ¶ 44.

RESPONSE: For purposes of the preliminary injunction only, do not dispute this proposed fact.

119. Because she cannot complete her gender transition, Ms. Makenzie experiences suicidal thoughts and has engaged in self-harm, including cutting in her genital area. Makenzie Decl. ¶ 34.

RESPONSE: Dispute. (*See* Response to PFOF ¶ 104, above.)

120. Because of her continuing inability to obtain genital reconstruction surgery as a treatment for gender dysphoria, Ms. Makenzie is at substantial risk of short- and long-term harm to her health and well-being. Budge Decl. ¶¶ 71-72.

RESPONSE: Dispute. (*See* Response to PFOF ¶ 104, above.)

Dated this 12th day of July, 2018.

Respectfully submitted,

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