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' SUPPLEMENTAL BRIEF REGARDING EXPANDING THE PRELIMINARY INUNCTION TO APPLY TO ALL MEDICAID BENEFICIARIES

Pursuant to this Court's July 25, 2018, order preliminarily enjoining the Defendants Wisconsin Department of Health Services (DHS) and its Secretary Linda Seemeyer from enforcing the Medicaid coverage exclusion for "transsexual surgery"[1] (Wis. Admin. Code § DHS 107.03(24), hereafter the "Exclusion") against the two named plaintiffs in this case, Defendants submit this supplemental brief regarding whether this Court should expand the preliminary injunction to cover all potential Medicaid beneficiaries. (Dkt. 70:39.)

[1] This brief will refer to the relevant procedures as "transsexual surgeries" in order to maintain consistency with the relevant administrative code provision.

ARGUMENT

This Court should decline to expand the preliminary injunction for two reasons. First, this Court lacks authority to expand it beyond the named plaintiffs, Cody Flack and Sarah Makenzie ("Plaintiffs"), because this case is not a class action. Second, even if the Court had this authority, Plaintiffs cannot show that the balance of hardships tips in their favor. They have presented inadequate evidence of irreparable harm to anyone aside from themselves—as even this Court has acknowledged.[2] (Dkt. 52 Tr. 9:2–3 (noting that the named plaintiffs "are the only ones who have documented having immediate impacts").) Any speculation of irreparable harm to other non-parties is outweighed by the concrete costs that expanding the injunction would impose on Defendants. The injunction should not be expanded.

I. This Court lacks authority to expand the preliminary injunction to all potential Medicaid beneficiaries because this case is not a class action.

In asking this Court to enjoin Defendants from applying the Exclusion to any Wisconsin Medicaid beneficiary who applies for coverage for transsexual surgical procedures, Plaintiffs effectively seek to skip the requirement of certifying this case as a class action under Federal Rule of

[2] Defendants still contend that the named plaintiffs have not shown irreparable harm, for the reasons described in their original opposition to the preliminary injunction motion. (Dkt. 53:13–19.)

Civil Procedure 23. Other Medicaid beneficiaries who might apply for coverage affected by the Exclusion are not parties to this case, and it would be improper to resolve their rights absent class certification under Rule 23. As the Seventh Circuit has noted, "the scope of the injunctive relief . . . is in large part determined by the class action question." *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1072 (7th Cir. 1976). This is because "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Accordingly, this Court should decline to expand the injunction unless and until Plaintiffs obtain class certification.

The Ninth Circuit explored this precise issue in *Zepeda v. I.N.S.*, 753 F.2d 719, 728 (9th Cir. 1983). There, seven individual plaintiffs alleged that the Immigration and Naturalization Service's (INS) immigration law enforcement efforts violated their constitutional rights and sought a preliminary injunction. Before certifying the case as a class action, the district court granted a preliminary injunction enjoining INS from engaging in any of the challenged enforcement efforts against anyone.

The Ninth Circuit reversed, holding that "the scope of the injunction [was] too broad" and that "[o]n remand, the injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs." *Id.* at 727. It explained that "[w]ithout a properly certified class,

a court cannot grant relief on a class-wide basis," a limitation that was "consistent with the traditional rule that injunctive relief should be narrowly tailored to remedy the specific harms shown by plaintiffs, 'rather than to enjoin all possible breaches of the law.'" *Id.* at 727 n.1 (citation omitted); *see also M.R. v. Dreyfus*, 697 F.3d 706, 738 (9th Cir. 2012) (same holding, citing *Zepeda*). The Ninth Circuit observed that named plaintiffs "are not entitled to relief for people whom they do not represent," explaining further that

> [i]f this elementary principle were not true, there would be no need for class actions. Whenever any individual plaintiff suffered injury as the result of official action, he could merely file an individual suit as a pseudo-private attorney general and enjoin the government in all cases. But such broad authority has never been granted to individual plaintiffs absent certification of a class.

Zepeda, 753 F.2d at 727 n.1.

The Seventh Circuit reached a similar result in *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997), another case in which the plaintiff sought to enjoin a government entity from enforcing a policy against anyone, including non-parties. The district court granted that broad injunction, but the Seventh Circuit reversed, explaining that "[t]he fundamental problem with this injunction is that plaintiffs lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties." *Id.* Like the Ninth Circuit in *Zepada*, the Seventh Circuit noted that "[b]ecause a

class has not been certified, the only interests at stake are those of the named plaintiffs." *Id.*[3]

Other cases have similarly concluded that preliminary injunctive relief should run only to the named plaintiffs, if no class has been certified. *See, e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (preliminary injunction against enforcement of criminal statute only enjoins enforcement "with respect to the particular federal plaintiffs," leaving the state "free to prosecute others who may violate the statute"); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011) (remanding "for entry of an injunction that is no broader, and no more burdensome to the defendant, than necessary to provide complete relief to [the named plaintiff]"); *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 392 (4th Cir. 2001) (injunction applying to non-parties overbroad since "[a]n injunction covering [the named plaintiffs] alone adequately protect[ed] it from the feared

[3] Although a Seventh Circuit panel in *City of Chicago v. Sessions*, 888 F.3d 272, 292 (7th Cir. 2018), recently affirmed a nation-wide injunction that applied beyond the named plaintiffs, the portion of the decision affirming the nation-wide injunction was vacated by the Seventh Circuit sitting *en banc*. (Appeal No. 17-2991, 6/4/18 Order.) The *en banc* court also stayed that portion of the district court's injunction. (Appeal No. 17-2991, 6/26/18 Order.) Although developments in the district court led the Seventh Circuit to reverse its decision to hear the case *en banc*, the relevant portion of the panel opinion was not reinstated and so it does not control here.

prosecution"); *Nat'l Ctr. for Immigrants Rights, Inc. v. I.N.S.*, 743 F.2d 1365, 1371 (9th Cir. 1984) ("The INS asserts that in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs. We agree."); *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) (per curiam) (preliminary injunction enjoining enforcement of school regulation against anyone other than individual named plaintiff did not serve the purpose of maintaining the parties' status quo pending trial on the merits).

While some decisions hold that injunctive relief may appropriately benefit non-parties, that approach only applies when a broad injunction is necessary to ensure full relief to the named plaintiffs. For instance, in *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501–02 (9th Cir. 1996), the Ninth Circuit affirmed a state-wide injunction against a particular police practice because, absent such a broad injunction, there would be no assurance that the 14 named plaintiffs would be safe from the challenged practice. Here, enjoining DHS from enforcing the Exclusion as to the two named plaintiffs alone ensures that they will obtain the full relief they seek. There is no need to enjoin DHS more broadly since, unlike in *Easyriders*, there is no risk the named plaintiffs will suffer harm absent a broader injunction.

Limiting relief to the named plaintiffs here is not a technical objection. Rule 23 is meant to ensure that a class of purportedly similarly-situated individuals who all seek relief are, in fact, similarly situated. That is why, in order to obtain class certification, Rule 23 requires a showing that "there are questions of law or fact common to the class" and that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Perhaps Plaintiffs here can make that showing, but unless and until they do, it is improper to assume that all potential Medicaid beneficiaries are similarly situated to them such that they all meet the requirements for preliminary injunctive relief—a likelihood of success on the merits and irreparable harm. Accordingly, it would be improper to expand the injunction to apply to individuals regarding whom Plaintiffs have made no Rule 23 showing whatsoever.

II. Expanding the preliminary injunction to all potential Medicaid beneficiaries tips the balance of hardships in Defendants' favor.

Even if this Court concludes it has authority to expand the preliminary injunction, it should decline to do so. Expanding the preliminary injunction to apply to all potential Medicaid beneficiaries seeking Medicaid coverage for transsexual surgeries would tip the balance of harms in Defendants' favor. This analysis examines whether "the balance of harms favors [the plaintiffs] or whether the harm to other parties or the public is sufficiently weighty that

the injunction should be denied." *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1058 (7th Cir. 2016).

A. The monetary cost.

Based on the preliminary analysis of David Williams, a professional health care benefits consultant, enjoining DHS from applying the Exclusion to any Medicare beneficiaries may impose a potentially unrecoverable cost of around $300,000 per year. (Roth Decl. Ex. A, Williams Report at 3.) That cost estimate accounts for both the different prevalence rate of gender dysphoria in the Medicaid population (compared to the general population) and the different reimbursement rates that apply to Medicaid claims (compared to commercial claims). Specifically, the prevalence rate is likely to be higher in the Medicaid population than the general population, but Medicaid reimbursement rates are substantially lower than commercial rates.

It is reasonable to assume that the preliminary injunction will remain in place for at least a year. In the similar case of *Boyden v. ETF*, No. 17-cv-264 (W.D. Wis.), this Court's magistrate judge set the trial date just over one year after the date of the pretrial conference order. (*See Boyden*, Dkt. 37:5 (setting trial 14 months later).) It is likely that a similar schedule will be set in this case at the September 7, 2018, preliminary pretrial conference. Therefore, Williams' one-year estimate is a reasonable one of the monetary cost that would be imposed by expanding the injunction.

B. The balance of harms.

Expanding the Exclusion would likely impose irreparable harm on Defendants. As Plaintiffs have conceded, "[t]he State's potential budgetary concerns are entitled to . . . consideration." (Dkt. 19:48 (citing *Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 611 (7th Cir. 2012)).) As explained above, Defendants could expect to pay around $300,000 to cover claims affected by the Exclusion while the preliminary injunction remains in place. Plaintiffs have argued that this monetary cost cannot constitute irreparable harm (Dkt. 19:47–48), but it is unclear how Defendants could ever recoup those costs if they ultimately prevail. By the time a final judgment is entered in this case, claims will already have been paid to providers involved in the affected surgical procedures.[4] No clear legal remedy for recovering those costs from providers exists, once they have been made for the services provided. And this Court indicated its inclination not to require a bond from the indigent plaintiffs, which further exposes the State to unrecoverable costs while a preliminary injunction remains in place. Spending that money would also disrupt Defendants' operations because they did not budget for such an expenditure during the next fiscal year.

[4] As with any kind of health insurance coverage, Medicaid payments are not made directly to Medicaid beneficiaries. Rather, they are made directly to the providers who bill for their services, or as part of the capitated rate to HMOs whom providers bill.

Connected to this cost is the harm Defendants would suffer from being forced to fund procedures with a meaningful risk of harm (*see* Dkt. 55-6:62–64) that have not been proven to effectively treat gender dysphoria (*see generally* Dkt. 55-1).[5] That fact distinguishes this case from *Bontrager*, where no debate existed over appropriateness of the routine dental services at issue. 697 F.3d at 606. Defendants' core mission of advancing public health (*see* Wis. Stat. § 250.03(1)) would be compromised by being forced to provide such coverage, a significant irreparable harm.

Lastly, Defendants would be irreparably harmed by the mere fact of being prevented from enforcing a valid law. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) ("[T]he [State's] inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State."); *Maryland v. King*, 567 U.S. 1301 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (Roberts, C.J., in chambers) (citation omitted). This Court has only concluded that Plaintiffs have shown a "reasonable" likelihood of success on the merits of their Affordable Care Act claim, and it did not resolve whether their equal protection claim would likely succeed.

[5] Defendants have already suffered this harm, in part, by complying with this Court's order not to enforce the Exclusion against the named plaintiffs, Cody Flack and Sara Ann Makenzie. (Dkt. 70:39.)

(Dkt. 70:1–2.) Defendants are likely to prevail on the merits, whether after a final judgment in this Court or on appeal, which means that they would be forbidden from enforcing a valid regulation while the preliminary injunction remains in place—an inherently irreparable harm.

On Plaintiffs' side of the ledger, this Court has only concluded that they have demonstrated irreparable harm with regard to themselves. In its preliminary injunction order, this Court rested its irreparable harm finding almost exclusively on the evidence presented by Plaintiffs' treating doctors. (Dkt. 70:16–19.) Those doctors opined that Plaintiffs' themselves face irreparable harm, not any non-parties to this case. Likewise, the Court rejected Defendants' efforts to distinguish *Bontrager* because the named plaintiffs were "the only individuals the court [was] concerned about at this stage," and the evidence—i.e. that of their treating doctors—showed that enforcing the Exclusion "threatens their well-being." (Dkt. 70:19 n.14.) (*See also* Dkt. 70:22 (citing the "informed opinions of plaintiffs' treating physicians").) And in addressing Defendants' argument that surgical gender dysphoria treatments have not been shown to be safe and effective, the Court noted that, thus far, the record has not been developed to address the Defendants' general policy: "[Defendants' expert opinion] lays at most the foundation for defendants' general policy, while the only question at this point is whether Cody Flack and Sara Ann Makenzie have a medical need for these

surgeries such that denial will be detrimental to their health. On the current record, the answer clearly is yes." (Dkt. 70:21.)

Plaintiffs have made no showing of irreparable harm for any other potential Medicaid beneficiaries. They have not presented evidence from treating doctors that transsexual surgeries are necessary treatments for anyone but themselves. There is simply no comparable evidentiary basis on which this Court can find that non-parties will be irreparably harmed by the Exclusion, as it found for the two named plaintiffs. This means that there is no irreparable harm to other potential Medicaid beneficiaries that can outweigh the concrete harms described above Defendants will suffer from providing this coverage. Indeed, this Court identified the very problem Plaintiffs now face, noting that the named plaintiffs "are the only ones who have documented having immediate impacts." (Dkt. 52 Tr. 9:2–3.) Plaintiffs have not developed the record on this crucial point since this Court's observation.

Plaintiffs will likely respond that testimony from their non-treating experts suffices to establish irreparable harm for other potential Medicaid beneficiaries. This argument would fail because it would require this Court to resolve a core disputed issue in this case—whether Plaintiffs or Defendants are correct regarding the state of scientific evidence regarding the efficacy of surgical treatments for gender dysphoria. That is, this Court can only find

irreparable harm to non-parties if it rejects the testimony from Defendants' expert in *Boyden* that such treatments are not generally safe and effective, something it has so far declined to do. And since Plaintiffs lack testimony from treating physicians that anyone other than themselves faces irreparable harm, that removes this Court's basis for discounting Defendants' expert's opinion at the preliminary injunction stage.[6]

Put simply, Plaintiffs have provided inadequate evidence that other potential Medicaid beneficiaries will face irreparable harm absent an injunction. Since the concrete harms that Defendants would face outweigh those speculative harms, the balance of equities tips in Defendants' favor and the injunction should not be expanded beyond the two named plaintiffs.

III. If the injunction is expanded, Defendants request that Plaintiffs post a bond.

Federal Rule of Civil Procedure 65(c) provides that a "court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). It is true that, as this Court noted in its earlier order, the bond

[6] Moreover, since this Court declined to hold that Plaintiffs had a reasonable likelihood of success on their equal protection claim (Dkt. 70:31), the constitutional violation they allege cannot support a finding of irreparable harm for non-parties.

requirement may be waived for indigent plaintiffs. (Dkt. 70:38.) But given the significant costs that may be imposed upon Defendants if the injunction is expanded, they respectfully request that Plaintiffs be required to post a bond that covers at least some of that projected cost. Where preliminary injunctions grant relief to a class of plaintiffs, courts have required bonds that account for the cost of granting relief to the entire class, not just to the named plaintiffs. *See, e.g.*, *Hinckley v. Kelsey-Hayes Co.*, 866 F. Supp. 1034, 1046, 147 (E.D. Mich. 1994); *Alexander v. Primerica Holdings, Inc.*, 811 F. Supp. 1025, 1038 (D.N.J. 1993).

If this Court is inclined to again waive the bond requirement, that is another reason why Defendants will suffer irreparable harm if the injunction is expanded, harm that outweighs the nominal showing Plaintiffs have made with respect to non-party Medicaid beneficiaries.

CONCLUSION

Defendants respectfully request that this Court not expand the scope of its preliminary injunction beyond the named plaintiffs. If this Court does enjoin broader enforcement of the Exclusion, given the similarities between the legal standards for a preliminary injunction and a stay request, Defendants respectfully request guidance regarding whether this Court would entertain a motion to stay the expanded injunction pending relief from the Seventh Circuit. *See* Fed. R. App. P. 8(a).

Dated this 22nd day of August, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

JODY J. SCHMELZER
Assistant Attorney General
State Bar #1027796

Attorneys for Defendants
State of Wisconsin Department of Health Services
and Linda Seemeyer

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (Kilpatrick)
(608) 264-6219 (Roth)
(608) 266-3094 (Schmelzer)
(608) 267-2223 (Fax)
rothct@doj.state.wi.us
schmelzerjj@doj.state.wi.us
kilpatricksc@doj.state.wi.us