Nos. 10-2339 and 10-2466

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ANDREA FIELDS, et al.,

Plaintiffs-Appellees,
Cross-Appellants

v.

JUDY P. SMITH, et al.,

Defendants-Appellants,
Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, NO. 06-C-112, THE HONORABLE JUDGE C. N. CLEVERT, JR., PRESIDING

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS, CROSS-APPELLEES

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COMBINED REPLY BRIEF AND RESPONSE BRIEF OF DEFENDANTS-APPELLANTS, CROSS-APPELLEES

SUMMARY OF THE ARGUMENT

The Act at issue in this case does not violate the Eighth Amendment as applied to the plaintiffs because it does not effectuate deliberate indifference. This position is supported by the fact that a legislative act denying some medical discretion does not effectuate *per se* deliberate indifference, especially where, as here, the Act has not denied plaintiffs all or even most of

the treatment available to those clinically diagnosed with severe GID. Additionally, it is well-established that the state has no obligation to provide curative treatment to its prisoners in order to comply with the Eighth Amendment.

The plaintiffs' claim – that the defendants were deliberately indifferent simply because their decision to deny hormone treatments was based on the law and not their individual medical judgment – is unsupported by both case law and the record in this case. The defendants denied a specific type of treatment in this case because such treatment poses security concerns and the legislature enacted a law prohibiting it. The defendants did not consciously disregard an excessive risk to the plaintiffs' health. None of the cases cited by the plaintiffs stand for either the proposition that, with other treatment available, the denial of hormones or surgery is unconstitutional, or the proposition that denying a specific treatment option based on anything other than medical judgment constitutes *per se* deliberate indifference. In fact, the great weight of case law supports the position that, with other treatment available, the denial of hormones or sexual reassignment surgery is not unconstitutional in any case.

The plaintiffs' argument that the legislature cannot limit treatment options prescribed by a doctor any more freely than an individual prison official can is contrary to the body of case law holding that state and federal legislatures have wide discretion to pass legislation in areas where there is

medical and scientific uncertainty. The plaintiffs' argument is also contrary to the record in this case which establishes that there is uncertainty in the field of GID and its treatment.

Similarly, the Act does not violate the Eighth Amendment on its face because the denial of a specific treatment deemed medically necessary does not constitute deliberate indifference in every set of circumstances. Both case law and the record in this case show that just because one treatment might be deemed "medically necessary" by a particular physician, it does not mean other alternate treatments are "blatantly inappropriate."

The Act also survives scrutiny under the Equal Protection Clause because the record establishes that the Act is reasonably related to a legitimate security interest in reducing sexual assault and violence in the institutions. The district court misapplied the rational basis standard by not affording the defendants' security expert with proper deference where there was no opposing expert.

Finally, the district court did not abuse its discretion by denying the plaintiffs' request for class certification because the requested class was overly broad, lacked commonality and typicality, and included individuals that lacked standing in this case. No evidence in the record supports the allegation that anyone has ever determined that female hormones are medically necessary for any of the proposed class members. Certainly, there is no evidence in the record that female hormones are medically necessary for

all transgender persons, nor is there any evidence in the record to support that all transgendered persons have Gender Identity Disorder or gender dysphoria.

The district court properly found that a class of five or six prisoners, five of whom had already been joined in the case, was not sufficient to meet the numerosity requirement of Rule 23(a)(1). Courts have routinely held that classes of fewer than 25 members fail to satisfy the numerosity requirement because joinder of all the potential class members was not impracticable. Additionally, the plaintiffs provided no reasonable estimate of the number of future members of their proposed class. Finally, since the district court did not find the group of plaintiffs numerous, it did not abuse its discretion by not explicitly considering the interests of judicial economy.

ARGUMENT

I. WIS. STAT. § 302.386(5M) DOES NOT VIOLATE THE EIGHTH AMENDMENT OF THE CONSTITUTION AS APPLIED TO THE PLAINTIFFS.

A. The Plaintiffs' Claim, That The Defendants Were Deliberately Indifferent Simply Because Their Decision To Deny Hormone Treatments Was Based On The Law And Not Their Individual Medical Judgment, Is Unsupported.

The plaintiffs' main claim on appeal is that the defendants acted with deliberate indifference because they denied hormone treatments to the plaintiffs based on the Act and not their independent medical judgment. [Pl.

Br. at 17-21][1] The plaintiffs essentially claim that denying a specific treatment option based on anything other than medical judgment constitutes *per se* deliberate indifference. [Pl. Br. at 20-21] This position, however, is not supported by case law.

Neither the plaintiffs, nor the district court, cite any case that stands for either the proposition that, with other treatment available, the denial of hormones or surgery is unconstitutional, or that denying a specific treatment option based on anything other than medical judgment is *per se* deliberate indifference.

The plaintiffs cite *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3rd Cir. 1993) for the proposition that "if the failure to provide adequate care in the form of physical therapy was deliberate, and motivated by non-medical factors, then [the inmate] has a viable claim." In *Durmer*, however, the issue did not involve a treatment prohibited by law. The inmate in *Durmer* was simply not provided with the physical therapy he needed and had been receiving prior to his incarceration. The defendant was the doctor responsible for his care in prison and did not get Durmer physical therapy. *Id.* at 66. The court found that issues of material fact existed as to why the doctor denied Durmer treatment and overturned the lower court's order granting summary judgment in the defendant's favor. Such is not the case here. Here we know why the defendants denied the plaintiffs hormone treatments – because such

[1]"Pl. Br." refers to the combined response and cross-appeal brief filed by the plaintiffs-appellees-cross-appellants.

treatments pose security concerns and the legislature enacted a law prohibiting them.

The remaining cases the plaintiffs cite are also inapposite to this case. The plaintiffs cite *Edwards v. Snyder,* 478 F.3d 827 (7th Cir. 2007) in support of their claim that any decision to deny treatment that is not based on an individualized medical judgment constitutes deliberate indifference. [Pl. Br. at 20] The plaintiffs note that, in *Edwards,* the Court found that an inmate stated a claim "where he was denied medical treatment for two days because prison doctors were 'ringing in the new year' and did not want to be disturbed." [Pl. Br. at 20] The *Edwards* case is clearly not analogous to the case before us. *Edwards* involved medical personal clearly and simply disregarding any risk to the inmate for no legitimate reason. In the case before us, the defendants denied a specific type of treatment because the law prohibited it. The defendants in this case did not consciously disregard an excessive risk to the plaintiffs' health. *See Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1978 (1994). To the contrary, the record shows that the defendants were prepared to provide the plaintiffs with a variety of legal treatment options in an effort at reducing any such health risks. [Burnett Test., R.201:215-221; Kallas Test., R.201:197-201]

Next, the plaintiffs cite *Greeno v. Daley*, 414 F.3d 645 (7th Cir. 2005), where the Court denied summary judgment because there was a factual dispute regarding whether denial of medication was due to a desire to make

an inmate suffer. [Pl. Br. at 20-21] The *Greeno* case is not analogous because it involved an alleged malicious intent, which formed the basis of a viable deliberate indifference claim. No such intent is at issue here.

The plaintiffs also cite *Kelley v. McGinnis*, 899 F.2d 612 (7th Cir. 1990) for the proposition that clinic personnel are deliberately indifferent if they provide a certain kind of treatment knowing that it is ineffective, as a way of choosing "the 'easier and less efficacious treatment.'" *Id*. at 616. However, *Kelley* was quoting the case of *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976), which was quoting *Williams v. Vincent*, 508 F.2d 541 (2nd Cir. 1974). *Williams* involved a doctor throwing away the prisoner's ear and stitching the stump because it was easier. *Id*. That is certainly not what happened in this case. The plaintiffs here were not denied hormone treatments because it was easier. They were denied hormone treatments because such treatments pose security concerns and the legislature enacted a law prohibiting them.

There is a difference between the deliberate indifference exhibited in *Williams, Durmer, Edwards,* and *Greeno*, and the denial of hormone treatments in this case. Here, the defendants denied a specific type of treatment because such treatments pose security concerns and they were prohibited by law. The defendants in this case did not consciously disregard an excessive risk to the plaintiffs' health. And, in fact, the record shows that the defendants were prepared to provide the plaintiffs with a variety of legal

treatment options in an effort at reducing any such health risks. [Burnett Test., R.201:215-221; Kallas Test., R.201:197-201]

None of the cases cited by the plaintiffs stand for either the proposition that, with other treatment available, the denial of hormones or surgery is unconstitutional, or the proposition that denying a specific treatment option based on anything other than medical judgment constitutes *per se* deliberate indifference. In fact, the great weight of case law supports the position that, with other treatment available, the denial of hormones or sexual reassignment surgery is not unconstitutional in any case.

In *Praylor v. Texas Department of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005), the court concluded that the denial of hormone treatment did not violate the Eighth Amendment. In so doing, the court noted that circuits that have considered the issue of providing hormone treatment to transsexual inmates have concluded that declining to provide a transsexual with hormone treatment does not amount to acting with deliberate indifference to a serious medical need. *Id*. (citing *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); and *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986)).

This case law is consistent with the well-established principles that an inmate has no constitutional right to receive a particular or requested course of treatment, *id*.; *see also Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996); and that a prison official may enact a security measure, even one that impinges

on medical needs, if the measure "was applied in a good faith effort to maintain or restore discipline." *Whitley v. Albers,* 475 U.S. 312, 320-21 (1986).[2]

B. Wis. Stat. § 302.386(5m) Does Not Violate The Eighth Amendment As Applied To The Plaintiffs Because It Does Not Effectuate Deliberate Indifference.

The Act, does not violate the Eighth Amendment as applied to the plaintiffs because it does not effectuate deliberate indifference. As set forth in the defendants' opening brief, this position is supported by the fact that a legislative act denying some medical discretion does not effectuate *per se* deliberate indifference, especially where, as here, the Act has not denied plaintiffs all or even most of the treatment available to those clinically diagnosed with severe GID. [Def. Br. at 15-28][3] Additionally, the state has no obligation to provide a particular curative treatment to its prisoners in order to comply with the Eighth Amendment. [Def. Br. at 21]

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[2]The plaintiffs' broad position that denying certain medical treatment based on reasons unrelated to medical judgment violates the constitution is also inconsistent with other cases where courts have upheld legislation limiting treatment options based on considerations unrelated to individualized medical judgment. *See Mitchell v. Clayton*, 995 F.2d 772, 775-776 (7th Cir. 1993) (finding no fundamental right to treatment by unlicensed physicians and upholding legislation denying such treatment based on the state's interest in protecting the public); *Gonzales v. Carhart*, 550 U.S. 124, 162-165 (U.S. 2007) (upholding legislation that prohibited certain abortion procedures based on state's interest in protecting the life of the unborn); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding a state law criminalizing physician assisted suicide based, in part, on state's interest in maintaining integrity and ethics of the medical profession).

[3]"Def. Br." refers to the opening brief of the Defendants-Appellants-Cross-Appellees.

The plaintiffs respond to this position by arguing that 1) prison medical care denials based on a state statute are held to the same standard as denials based purely on prison personnel judgment and denial of certain treatments for GID is not justified by medical uncertainty; 2) plaintiffs do not seek curative treatment; and 3) the fact that the defendants are willing to provide alternate treatment options does not satisfy the Constitution. [Pl. Br. at 22-34] The plaintiffs' arguments are unconvincing because they are inconsistent with established principles of law and are unsupported by the record.

1. State legislatures have broad authority to pass legislation in areas where there is medical and scientific uncertainty and the record in this case establishes that there is significant uncertainty in the field of GID.

The plaintiffs argue that the legislature cannot limit treatment options prescribed by a doctor any more freely than prisons can; and they claim that scientific uncertainty does not justify the denial of hormones or sexual reassignment surgery. [Pl. Br. at 22] The plaintiffs' arguments, however, are inconsistent with the broad grant of authority given to state legislatures to pass legislation in areas where there is medical and scientific uncertainty, *Gonzales*, 550 U.S. at 162-165; and the plaintiffs' argument ignores the record, which established that there is significant uncertainty in the field of GID.

a. The legislature has authority to restrict treatment options in areas of medical uncertainty.

The plaintiffs allege that the Eighth Amendment does not allow prisons, or legislatures, to categorically deny certain forms of treatment. The plaintiffs' argument is not supported by the cases they cite and their argument is misguided because it fails to recognize that the cases the district court used to support its decision are not cases where a state legislature restricted treatment options, but instead, are merely cases where prison officials either disobey a medical professional's recommendation for no good reason, or where prison doctors denied all treatment for an inmate with GID. [*See* Def. Br. at 15-28] The difference in this case is that the defendants would be denying only certain treatments based on a state law that was enacted to advance security interests.

The defendants are not arguing that the legislature can constitutionally enact a blanket ban on any treatment it wants for any ailment or condition. As such, the cases the plaintiffs cite in opposition to such a position are inapposite to this case. For example, the plaintiffs cite *Jorden v. Farrier*, 788 F.2d 1347, 1349 (8th Cir. 1986) in support of their example that a blanket prohibition on the use of insulin for treatment of diabetes would be unconstitutional. [Pl. Br. at 23] However, there is not the level of medical uncertainty regarding diabetes treatment that there is regarding GID.

The Supreme Court in *Gonzales* explicitly stated that state and federal legislatures have wide discretion to pass legislation in areas where there is medical and scientific uncertainty. *Gonzales*, 550 U.S. at 162-165 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."); *see also Kansas v. Hendricks*, 521 U.S. 346, 360 (1997) ("[I]t is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes…when a Legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation'"); *see also generally Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding a state law criminalizing physician assisted suicide based, in part, on state's interest in maintaining integrity and ethics of the medical profession).

In *Gonzales*, the Court explained that "the law need not give [certain] doctors unfettered choice in the course of their medical practice." *Gonzales*, 550 U.S. at 163. The Court also noted that the medical uncertainty about the risks of the prohibited procedure provided a basis for upholding the act and the conclusion that the act is constitutional was supported by the fact that alternatives are available to the prohibited procedure. *Gonzales*, 550 U.S. at 164.

As discussed in the defendants' opening brief, the record in this case shows that GID is a condition about which there is limited knowledge and vast uncertainty. [R.200:59-60 (testimony by Dr. R. Ettner indicating that the standards of care for GID acknowledge that there is limited knowledge in the area of GID, that there are clinical uncertainties that are hoped to be resolved in the future, and that the standards of care are evolving and flexible); R.202:357-358 (testimony by Dr. Claiborn that GID is not a mental disease or disorder and that there is a difference of opinion on whether GID is a mental disorder)] As such, the Wisconsin Legislature has greater discretion to legislate in the field of GID.

The plaintiffs attempt to cite cases in support of their general position that a denial of treatment based on a policy, rather than individualized medical judgment, is unconstitutional. [Pl. Br. at 24-25] The problem with this argument, and the cases cited, is that they do not take into account the fact that this case involves a law enacted to further legitimate security interests. The plaintiffs' cases also fail to recognize that the case before us has a record establishing medical uncertainties in the field of GID, as well as alternate available treatment options that exist in this case.

The plaintiffs cite *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003), which merely reversed a lower court's dismissal of a suit by a GID plaintiff and allowed the case to go forward and is of extremely limited precedential value. In *De'Lonta,* again the inmate alleged that she did not receive *any*

treatment to suppress her compulsion to self-mutilate. *Id.* at 635. This total lack of treatment was one of the reasons the court allowed the inmate's claim to proceed.

The plaintiffs also cite the unpublished case of *Allard v. Gomez*, 9 Fed.Appx. 793, 2001 WL 638413 (9th Cir. 2001). The *Allard* case does not stand for the proposition that any blanket rule prohibiting hormone treatments to inmates with GID violates the Eight Amendment. The court in *Allard* simply remanded the case for the district court to determine issues of fact related to whether treatment was denied based on an unconstitutional policy. *Id.* at 795.

Next, the plaintiffs cite *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14 (1st Cir. 1995), for the proposition that "'inflexible' application of 'policy relating to prescription medications' that prevents the use of medication necessary to treat a serious medical need may violate Eighth Amendment." [Pl. Br. at 24] The plaintiffs' use of the *Mahan* quotations is somewhat misleading. What the court actually said was,

> We add that the seemingly inflexible PHC policy relating to prescription medicines, coupled with the limited "medical officer" hours, could well have resulted in serious harm to Mahan during the extended and stressful period the medicine needed to control his previously diagnosed condition was withheld. *See Miranda*, 770 F.2d at 259 (detainee died after epileptic seizure).

Mahan, 64 F.3d at 18, fn 6. The court went on to find that there was no deliberate indifference, even with the "seemingly inflexible" policy in place. *Id*. at 18.

The last case the plaintiffs cite as support for their argument that the Wisconsin Legislature cannot prohibit a treatment option prescribed by a doctor as medically necessary is *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987). The plaintiffs quote the court as stating that, "by specifically categorizing elective abortions as beyond its duty to provide, the County denies to a class of inmates the type of individualized treatment normally associated with the provision of adequate medical care." [Pl. Br. at 24-25] However, the plaintiffs do not reference the subsequent discussion where the court recognized "that categorization of a prison's medical obligations alone may be insufficient to establish the deliberate indifference." The court went on to find deliberate indifference in that case because the policy at issue resulted in a failure to consider other critical factors, unrelated to the prohibited procedure. *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d at 347, fn 32. Additionally, the court found that the prohibition did not serve any legitimate penological purpose. *Id*. at 348. Such is not the case here.

Finally, the plaintiffs cite a string of cases in a footnote seemingly to support the proposition that any blanket prohibition, whether in the form of an agency policy or a state statute, is unconstitutional. [Pl. Br. at 25, fn 8]

The cases are unpersuasive because again they do not involve analogous facts and none stand for such a general proposition.

The plaintiffs cite *Barrett v. Coplan*, 292 F. Supp.2d 281, 286 (Dist. N.H., 2003), but in that case, the court was merely conducting an initial screening of the complaint, and found that the inmate stated a claim under the Eighth Amendment, indicating that "neither the prison's administration, medical staff or mental health staff evaluated [the inmate] for diagnosis and treatment for GID or provided her with any treatment for GID. These facts sufficiently allege that the defendants have been deliberately indifferent to [the inmate's] serious medical needs to allow this action to proceed against the defendants." *Id.* *Barrett* is not persuasive authority in this case, both because it was merely a screening order that did not have a record of the medical uncertainties and alternate available treatment options that exists in this case, and because the inmate in *Barrett* was denied evaluation and all treatment, which did not occur in the case before us.

Next, the plaintiffs cite *Houston v. Trella*, No. 04-1393 (JLL), 2006 WL 2772748, *21 (D.N.J. Sept. 25, 2006), which is a case involving a detainee who, like in *Barrett*, did not receive any treatment for GID. The plaintiffs also cite *Bismark v. Lang*, 2006 WL 1119189 (M.D.Fla. 2006); but contrary to the plaintiffs' claim, *Bismark* does not involve a blanket ban on hormone therapy for inmates with GID. In fact, it does not involve GID at all. Finally, the plaintiffs cite *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D.Mass. 2002),

which does involve a blanket administrative rule on hormones; but the case is distinguishable because in *Kosilek*, the court determined that the security concerns with providing hormones was undermined by the fact that policy at issue allowed hormones for inmates who were prescribed them prior to incarceration. Notably, in *Kosilek*, the court acknowledged that concern for security is a legitimate consideration when considering an inmate's Eighth Amendment right to adequate medical care. *Id*. at 162.

As noted above, the cases cited by the plaintiffs are unpersuasive because they do not involve analogous facts and none of them stand for the general proposition that any blanket ban on hormone treatments and/or sexual reassignment surgery is unconstitutional. They either cite dicta in cases involving complete denials of treatment, or they merely involve administrators making medical decisions with no rational basis. The case before us is distinguishable because it involves a state legislature prohibiting certain treatments based on security reasons; and it involves a trial record establishing that the Act does not prohibit all, or most, of the treatments available to treat GID, and that there is significant uncertainty in the field of GID.

b. The record in this case establishes medical uncertainty in the field of GID.

As noted above, the record in this case shows that GID is a condition about which there is significant uncertainty. [R.200:59-60 (testimony by

Dr. R. Ettner indicating that the standards of care for GID acknowledge that there is limited knowledge in the area of GID, that there are clinical uncertainties that are hoped to be resolved in the future, and that the standards of care are evolving and flexible); R.202:357-358 (testimony by Dr. Claiborn that GID is not a mental disease or disorder and that there is a difference of opinion on whether GID is a mental disorder)] The plaintiffs' expert testified that the standards of care for GID state that all readers should be aware of the limitations of knowledge in this area. [R.200:59-60] In fact, Dr. R. Ettner testified that, in her opinion, if a patient has GID and desires hormone treatment, such treatment is medically necessary. [R.200:62] Yet, Dr. Claiborn testified that GID is not a mental disease or disorder and that the serious medical needs identified by the plaintiffs (depression, anxiety, suicidal tendencies) are separate from the biological condition of GID. [R.202: 357-358, 371] Notably, Dr. Claiborn also testified that individuals with GID are not going to die or kill themselves or never be happy simply because they do not get hormones or surgery. [R.202:371]

The plaintiffs argue that, while there might be uncertainty over the *causes* of GID, there is no uncertainty with regards to *treatment* of GID. [Pl. Br. at 27] However, the plaintiffs' treatment recommendations come from the standards of care published by the World Professional Association for Transgender Health ("WPATH"). [Pl. Br. at 7] There is no evidence in the record, and the plaintiffs do not even allege, that the WPATH standards have

been adopted by any other professional organization, such as the American Psychiatric Association. And notably, the plaintiffs' expert, Dr. R. Ettner, testified that to be a member of the WPATH group you must subscribe to its ethical statement and agree with its mission. [R.200:60] Essentially, the only organization establishing standards of care for treatment of GID is an advocacy group for transgender individuals.

The plaintiffs argue that it is undisputed that hormones have been prescribed as medically necessary for these plaintiffs. [Pl. Br. at 26] Although it is true that the plaintiffs have been prescribed hormone treatment, and there is testimony that DOC doctors only prescribe necessary treatment, that does not mean that the legislature's blanket denial of that treatment option constitutes deliberate indifference, even as applied to the plaintiffs. [*See* Def. Br. at 15-28]

Finally, the plaintiffs try and distinguish the *Gonzales* case by noting that the government may balance the interests of a woman seeking an abortion against the interests of the fetus. [Pl. Br. at 28] The plaintiffs then claim that, in this case, there is no comparable interest to counterbalance the decision to restrict treatment options. *Id*. This claim ignores the significant security interests that the Act furthers. [*See* Def. Br. at 50-56]

2. The Act does not effectuate deliberate indifference as applied to the plaintiffs because it does not eliminate all treatment options and the state has no obligation to provide curative treatment.

The Act at issue does not effectuate deliberate indifference as applied to the plaintiffs because it does not eliminate all treatment options and the state has no obligation to provide curative treatment. The plaintiffs' response to these arguments is that the plaintiffs do not seek expensive curative treatment and that the availability of alternate treatments does not satisfy the Eighth Amendment. [Pl. Br. at 29 and 33] The plaintiffs' responses, however, do not address the real issues.

The plaintiffs argue that they do not seek expensive curative treatment and, therefore, the *Maggert* case is inapposite. [Pl. Br. at 29-32] The plaintiffs' attempt to distinguish *Maggert* is unavailing because *Maggert* is relevant and, even if it weren't, the plaintiffs' argument ignores the remaining body of case law that supports the defendants' position that merely limiting treatment options for inmates with GID does not violate the Eighth Amendment. *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) ("We agree with the Tenth Circuit that given the wide variety of options available for the treatment of gender dysphoria and the highly controversial nature of some of those options, a federal court should defer to the informed judgment of prison officials as to the appropriate form of medical treatment."); *Praylor v. Texas Dept. of Criminal Justice*, 430 F.3d 1208 (5th Cir. 2005) (holding that the refusal to provide hormone therapy did not constitute deliberate indifference and noting that other circuits that have considered the issue have concluded that declining to provide a transsexual

with hormone treatment does not amount to acting with deliberate indifference to a serious medical need); *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988) (concluding that courts that have addressed the issue have concluded that inmates do not have a constitutional right to hormone therapy); *Supre v. Ricketts*, 792 F.2d 958 (10th Cir.1986) (concluding that where other treatment options were available to treat the inmates' psychological and physical medical conditions, the defendants were not deliberately indifferent by denying hormone treatment and noting that denying hormones until further study does not constitute cruel and unusual punishment); and *Lamb v. Maschner*, 633 F. Supp. 351, 353-354 (D.Kansas 1986) (finding that the relevant question is whether the defendants have provided the plaintiff "some kind of treatment, regardless of whether it is what the plaintiff desirers," and noting that experts find sexual reassignment surgery inadvisable in the prison setting). [*See also* Def. Br. at 22-26]

Despite the plaintiffs' argument to the contrary, the case of *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997) is relevant and applicable because it supports the position that, where other treatment is provided, the Eighth Amendment does not require that inmates with GID receive hormones or surgery. As a result, legislation does not effectuate deliberate indifference simply by limiting treatment options. Although the court in *Maggert* did discuss the expense of the treatment, the Court explicitly stated that "[i]t is

not the cost *per se* that drives this conclusion." *Id*. at 672. Furthermore, to the extent that cost was a factor in *Maggert,* the fact that the hormone treatments prescribed the plaintiffs in this case are arguably more reasonable in terms of cost does not affect the security interest furthered by the Act or the fact that states can limit treatment options based on such an interest as long as other options remain available. In fact, the Court's decision in *Maggert* undermines the plantiffs' general position that treatment denials not based purely on individualized medical judgment are *per se* unconstitutional. In *Maggert* the Court acknowledged the legitimacy of adminsitrative considerations such as cost. *See also Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006) ("The cost of treatment alternatives is a factor in determining what constitutes adequate, minimum-level medical care.").

Finally, the plaintiffs' claim that the alternative treatment options available are insufficient to satisfy the Eighth Amendment as to these plaintiffs is unsupported and contrary to the vast body of case law discussed above.

As an initial matter, the plaintiffs state that, "Treating the *symptoms* of GID with psychological and medical services instead of treating GID with hormone therapy is not only ineffective, but 'blatantly inappropriate,' medical care. *Edwards*, 478 F.3d at 831." [Pl. Br. at 33] This statement is misleading and inaccurate. First, the *Edwards* case did not address GID or

hormone treatments. The only relevant principle the *Edwards* case addressed was the general principle cited earlier by the plaintiffs that, "a plaintiff's receipt of some medical care does not automatically defeat a claim of deliberate indifference if a fact finder could infer the treatment was 'so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate' a medical condition." *Edwards*, 478 F.3d at 831. Notably, the plaintiffs do not cite any case law for the proposition that, where other treatment options are available to treat the psychological and physical symptoms of GID, denial of hormone therapy is unconstitutional. In fact, such a proposition is contrary to the cases that hold that an inmate is not entitled to the best care possible and they are only entitled "to reasonable measures to ***meet*** a substantial risk of serious harm," not prevent all risk of harm. *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006) (emphasis added); *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997)) (emphasis added).

Additionally, although the plaintiffs list record cites showing that hormones were prescribed for the plaintiffs and the plaintiffs' expert Dr. Brown testified that he could not think of an "equally effective" treatment to hormones [R.202:273-274], there is no evidence in the record that the alternate treatments available to address the psychological and physical symptoms of GID are "blatantly inappropriate," as the plaintiffs now suggest. Just because a treatment is not considered equally effective does not mean it is blatantly inappropriate.

Similarly, the record shows that just because one treatment might be deemed "medically necessary" by a physician, it does not mean other alternate treatments are "blatantly inappropriate."[4] Dr. Kallas indicated that there are individuals where hormone treatment is medically necessary, but he would not say that hormone therapy would be the only route those individuals could take to accommodate their gender dysphoria. [R.201:177] Additionally, as previously noted, Dr. R. Ettner testified that if a patient has GID and desires hormone treatment, such treatment is medically necessary. [R.200:62] Yet, Dr. F. Ettner, testified that there are lots of alternatives in treatment therapies and when one option is not acceptable for some reason, he would move on to another option. [R.200:118] Dr. F. Ettner's testimony is consistent with the case law holding that merely *some* treatment is necessary. Dr. F. Ettner testified that medical problems can develop if an individual is not treated, "whether it be by talk therapy *and/or* hormones." [R.200:94] (Emphasis added).

The plaintiffs' claim that the alternative available treatment options are insufficient to satisfy the constitution, simply because hormones were

[4]Notably, the district court did not make a specific finding that hormones are medically necessary or that alternate treatments are blatantly inappropriate. The district court merely found that, "the enforcement of Act 105 prevents DOC doctors from providing the treatment that they have determined is medically necessary to treat the plaintiffs' serious conditions." [R.212:56; App. 159]

prescribed as "medically necessary," is not supported by either case law or the record in this case.[5]

C. The District Court's Decision On The As-Applied Eighth Amendment Challenge Violates The PLRA.

As discussed above, and in the defendants' opening brief, no application of the Act violates the plaintiffs' Eighth Amendment rights. Even if the Court disagrees, however, there is clearly no evidence in the record that the portion of the Act that prohibits gender reassignment surgery is unconstitutional as applied to the plaintiffs. There is no evidence that any of the plaintiffs have desired or been prescribed surgery. The fact that the district court found the Act – in its entirety – unconstitutional as applied to the plaintiffs establishes that the district court violated the PLRA's requirement that any injunction be narrowly tailored. As discussed in the defendants' opening brief, the PLRA requires that prospective relief:

> [S]hall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal

[5]In fact, the plaintiffs' assertion that denial of any treatment option deemed medically necessary by a physician is contrary to cases such as *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006), which explained that "[N]ot every refusal of medical treatment constitutes cruel and unusual punishment. Medical "need" runs the gamut from a need for an immediate intervention to save the patient's life to the desire for medical treatment of trivial discomforts and cosmetic imperfections that most people ignore. At the top of the range a deliberate refusal to treat is an obvious violation of the Eighth Amendment, and at the bottom of the range a deliberate refusal to treat is obviously not a violation."

> right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a).

The court did not find that the relief ordered extends "no further than necessary to correct the violation of the Federal right ***of a particular plaintiff or plaintiffs.***" 18 U.S.C. § 3626(a) (emphasis added).

II. WIS. STAT. § 302.386(5M) DOES NOT VIOLATE THE EIGHTH AMENDMENT OF THE CONSTITUTION ON ITS FACE BECAUSE IT IS NOT UNCONSTITUTIONAL IN EVERY APPLICATION OR EVEN IN A LARGE FRACTION OF CASES.

As the plaintiffs discuss in their brief, the district court properly applied the "no set of circumstances" test from *United States v. Salerno*, 481 U.S. 739, 745 (1987). Where the district court and the plaintiffs err, however, is in the application of that test. [*See* Def. Br. at 35-40]

The plaintiffs' argument on the appropriate class for a facial challenge fails to recognize that the statute at issue here is broader than the restriction in the *Casey* case. Here, the Act prohibits the use of public funds for all hormone therapy that is intended to alter the person's physical appearance so that the person appears more like the opposite gender. Wis. Stat. § 302.386(5m) (a) and (b). The affected class are those for which the Act is an actual restriction – people who want such treatment. There are no exceptions in the Act. That said, even if the relevant class is limited by the practical fact

that, prior to the Act, prison policy generally limited such treatment to inmates for whom a doctor had prescribed the treatment, the Act still survives the facial challenge.

The plaintiffs claim that, "in the restricted context of a prison, hormone therapy and surgery are only available if prescribed by DOC medical providers as medically necessary treatment for a serious medical condition." [Pl. Br. at 47-48] The plaintiffs, however, do not reference any record cite for this proposition. Notably, the plaintiffs go on to more generally state in their brief that the Act, "*operates* as an actual restriction only for inmates with GID who are prescribed hormone therapy or SRS by a DOC doctor, since those treatments for GID are unavailable in prison by any other means." [Pl. Br. at 49] Again there is no citation to the record for this proposition. Although, practically speaking, the plaintiffs' claim that the prohibited treatments are only available through a prescription by a DOC doctor may be true, one can imagine many scenarios where DOC doctors would prescribe treatments that are consistent with standards of care for a particular condition, but that do not rise to the level of being "medically necessary" (*e.g.* prescription of various creams for skin conditions or aspirin for pain).

Again, this distinction brings into play the meaning of the term "medically necessary." As stated above, and in the defendants' opening brief, the plaintiffs' experts' claims of necessity are more accurately views on

preferred treatment. For example, Dr. R. Ettner testified that if a patient has GID and desires hormone treatment, such treatment is medically necessary. [R.200:62] And Dr. Claiborn testified that many transgender individuals seek GID treatments such as hormone therapy or surgery simply by choice and as a means of moving forward with changing their circumstances. [R.202:369] Dr. F. Ettner testified that "there are lots of alternatives in treatment therapies" and if a certain treatment is "not acceptable for whatever reason" they go onto another level. [R.200:118] Notably, the plaintiffs' attorneys tried to get Dr. Kallas to testify that there may be inmates for whom no treatment other than hormone therapy would be satisfactory; but Dr. Kallas did not agree with that characterization. [R.201:175-176] Instead, Dr. Kallas stated that there are individuals for whom it would be difficult to envision that other routes would be "as satisfactory." [R.201:175-176] He also testified that "there are a number of ways in which individuals with gender dysphoria can [sic] accommodate." *Id*. at 175.[6]

[6]The plaintiffs claim in their brief that the district court found that the challenged procedures are medically necessary. [Pl. Br. at 51 ("Nowhere did the Court find that the challenged abortion procedure is medically necessary treatment as the district court has in this case.")] Again the plaintiffs do not cite the record for this proposition, which is not surprising, since their statement is not accurate. The district court never found the prohibited treatments medically necessary. The district court merely found the Act unconstitutional because "enforcement of Act 105 prevents DOC doctors from providing the treatment that ***they*** have determined is medically necessary to treat the plaintiffs' serious conditions." [R.212:56; App. 159 (emphasis added)]

Similarly, the record shows that just because one treatment might be deemed "medically necessary" by a particular physician, it does not mean other alternate treatments are "blatantly inappropriate." Dr. Kallas indicated that there are individuals where hormone treatment is medically necessary, but he would not say that hormone therapy would be the only route those individuals could take to accommodate their gender dysphoria. [R.201:177]

As a result, even if the Court narrows the relevant class to inmates with GID for whom the prohibited treatments have been prescribed – or even prescribed as "medically necessary" – the application of the Act is not unconstitutional in every set of circumstances. This is so because, even where a treatment option is referred to as "medically necessary," that does not mean the remaining options are blatantly inappropriate.

Finally, although the discussion in *Casey* is instructive as to the relevant class, the statute's facial validity in this case hinges on whether it is unconstitutional in every set of circumstances. Unlike in *Casey*, the record does not support a finding that the Act effectuates deliberate indifference in every instance it is applied to members of the relevant class. In *Casey* the Court could determine that the law was unconstitutional in a large fraction of cases where a woman wanted an abortion, did not want to tell her husband, and did not meet one of the exceptions to the law. *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992). The Court was able to determine that the

law was unconstitutional in most of those cases because the Court could determine with some accuracy that the law would impose an undue burden on the mother's right to have an abortion. In this case, however, even if the Court decides to limit the relevant class to inmates for whom the prohibited treatments have been prescribed, whether the Act effectuates deliberate indifference by denying the treatments is much less clear. Denial of a treatment that has been prescribed by a doctor does not *per se* constitute deliberate indifference. [*See* Def. Br. at 15] In fact, as the record shows, in many such instances, the remaining available treatments would be sufficient under the Constitution.

In essence, the plaintiffs seek to have this Court declare that denial of hormones or surgery after they have been prescribed by a doctor is unconstitutional in every set of circumstances. That conclusion is simply not supported by case law or the record in this case. Additionally, such a holding would invite abuse and elevate the opinions of individual doctors above state law.

III. THE ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE EITHER AS APPLIED OR ON ITS FACE.

As thoroughly discussed in the defendants' opening brief, the district court misapplied the rational basis standard by not affording proper deference to the defendants' expert. [*See* Def. Br. at 46] The plaintiffs argue that this is not a question of law, but merely a discretionary determination on the credibility of the evidence. The plaintiffs' argument ignores the fact that there was no expert testimony to rebut Mr. Atherton, who testified that the fact that an inmate's physical appearance changes to become more feminine leads to increased security concerns for the institution. [R.202:435]

The record establishes a legitimate security interest in reducing sexual assault and violence in the institutions. [*See* Def. Br. at 51-53] Yet the court concluded that "no reasonably conceived state of facts provides a rational tie between Act 105 and prison safety and security." [R.212:66; App. 169] In essence, the district court simply disagreed with the defendants' security expert as to whether feminizing inmates constitutes a legitimate security concern. This is a misapplication of the law. The plaintiffs did not call a security expert at trial and so the district court cannot be found to have weighed a different expert's opinion more greatly than the defendants' expert. Very simply, the district court disagreed with the defendants' expert and did not afford the proper discretion.

Even if the relevant issue is characterized as merely a factual issue related to weighing the credibility of the testimony, as the plaintiffs suggest, the district court's decision is improper because its finding that the defendants' security interest is irrational is unreasonable in light of the evidence presented.

"[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' … Nor does it authorize 'the judiciary to sit as a superLegislature to judge the wisdom or desirability of legislative policy determinations." *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637 (1993) (internal citations omitted). Additionally, the legislature need not "strike at all evils at the same time or in the same way." *Sutker v. Illinois State Dental Soc.*, 808 F.2d 632, 635 (7th Cir. 1986) (citing *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610 (1935)). It is sufficient that there is a problem "at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955).

The record shows that Mr. Atherton testified that prisons are highly unique and highly dangerous places which require unusual diligence, oversight, and caution, especially when considering the dangers of sexual activity [R.202:412-414], and that the appearance of femininity makes those inmates an "automatic target for inmates who are interested in sexual

aggression or sexual relationships." [R.202:419] Mr. Atherton testified that if an inmate presents an effeminate manner, whether by dress or behavior, that makes the inmate more likely to be sexually victimized. *Id*. Finally, Mr. Atherton testified that the fact that an inmate's physical appearance changes to become more feminine leads to increased security concerns for the institution. [R.202:435]

The Act prohibits, through funding, hormones and surgery used to make an inmate look more like the opposite gender. It is, therefore, rationally related to the legitimate interest in reducing sexual violence against inmates that like the opposite gender. The Act does not violate the equal protection clause, either as-applied to the plaintiffs, or on its face.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLASS CERTIFICATION.

The plaintiffs' last argument on appeal is that, if the Court reverses the decision that the Act is unconstitutional on its face, then the Court should also reverse the district court's decision denying class certification. [Pl. Br. at 56] This argument fails because the district court's decision denying class certification was based on a variety of factors.

As the plaintiffs accurately note, whether to grant a motion for class certification is a discretionary decision of the district court. *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982). Additionally, the party seeking certification of the class bears the burden of proving that the

requirements for certification have been met. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993).

A. Overview Of The Law

Federal Rule of Civil Procedure 23 outlines the requirements for certification of a class. It reads, in relevant part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > ....
> >
> > (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

FRCP 23.

Rule 23 implicitly contains two additional requirements. *O'Neill v. Gourmet Systems of Minnesota, Inc.*, 219 F.R.D. 445, 450 (W.D. Wis. 2002). The proposed class definition must be "precise, objective and presently ascertainable." *Id.*, *quoting In re Copper Antitrust Litigation*, 196 F.R.D. 348, 353 (W.D. Wis. 2000). Also, the named plaintiffs and members of the

proposed class must have standing to bring the lawsuit. *O'Neill*, 219 F.R.D. at 450. Members of the proposed class lack standing if they have not suffered a constitutional or statutory injury. *Id.* at 452, citing *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980).

B. The District Court Properly Denied Certification Because The Proposed Class Was Overly Broad And Members Of The Proposed Class Lacked Standing.

The plaintiffs originally sought certification of the following class pursuant to Federal Rule of Civil Procedure 23(b)(2):

> All current or future prisoners or patients as specified in Wis. Stat. 302.386(5m) who are transgender, including those who have been diagnosed with Gender Identity Disorder and those who have a strong persistent cross-gender identification and either a persistent discomfort with their sex or a sense of inappropriateness in the gender role of that sex.

[R.102:2-3; PLTF APP 2-3][7]

To state a class action claim upon which relief can be granted, the complaint must allege the following:

> (1) a reasonably defined class of plaintiffs, (2) all of whom have suffered a constitutional or statutory violation (3) inflicted by the defendants.

---

[7]The plaintiffs moved for reconsideration of the court's order on their motion for class certification and, in that reconsideration motion, the plaintiffs attempted to modify the desired class. [R.104] On appeal, the plaintiffs fail to identify which decision they are appealing (the original decision relating to the first class, or the decision on reconsideration, which involved a modified class). Both classes were properly denied, but this response focuses on the initial class, since the modified class was improperly raised for the first time on reconsideration and, essentially, related to the plaintiffs' motion to amend the complaint, which was also denied. [R.131]

Adashunas, 626 F.2d at 604. In *Adashunas*, the plaintiffs sought to certify a plaintiff class composed of "all children within the State of Indiana entitled to a public education who have learning disabilities who are not properly identified and/or who are not receiving such special instruction as to guarantee them of minimally adequate education." *Id.* at 601. The district court denied certification of the plaintiff class, and the plaintiff appealed.

This Court in *Adashunas* affirmed the district court on two grounds. First, it reasoned that the proposed class was "so highly diverse and so difficult to identify that it is not adequately defined or nearly ascertainable." *Id.* at 604. Second, it pointed out the diversity of the proposed class meant that it was not clear that all the proposed class members had suffered a constitutional or statutory violation that warranted relief. *Id.*

> If the conceived injury is abstract, conjectural or hypothetical as here, instead of real, immediate or direct, the complaint fails to cite an actual case or controversy under Article III of the Constitution.

Id.

In *O'Neill*, the plaintiff brought a discrimination claim because a restaurant refused to serve him alcoholic beverages when he presented a tribal ID card as proof of age. *O'Neill*, 219 F.R.D. at 449. O'Neill sought to certify a class of all adults enrolled in the Red Lake Band of Chippewa who had been issued tribal ID cards. *Id.* at 451.

The district court in *O'Neill* denied class certification on several grounds. First, it reasoned that O'Neill's proposed class was overly broad

because it included "an untold number of persons who are at no risk of suffering the injury of which plaintiff complains." *Id*. Secondly, it concluded that the proposed class lacked standing because O'Neill had not alleged that any member of the proposed class had suffered an injury comparable to his. *Id*. at 452.

The class proposed by the plaintiffs suffer from the same defects as the proposed classes in *Adashunas* and *O'Neill*. It is undisputed that Plaintiffs Sundstrom, Fields, and Blackwell were receiving female hormones when 2005 WI Act 105 was passed, and it is undisputed that the Act required the Department to stop providing them with female hormones. It is undisputed that, at some point, one or more medical professionals had determined that each of the three should continue on female hormones for treatment of gender identity disorder, although the parties dispute whether the female hormones are medically necessary for the plaintiffs.

The district court properly found that:

> The principal allegations in this case are that the plaintiffs have been diagnosed with GID or transsexualism and are taking hormone therapy that is in danger of being withdrawn. (*See* Court's Order of January 27, 2006) (discussing the dangerous effects of the withdrawal of hormone therapy). The plaintiffs propose a class which includes all prisoners "who have a strong persistent cross-gender identification and either a persistent discomfort with their sex or a sense of inappropriateness in the gender role of that sex." However, the proposed class would increase the scope of this lawsuit beyond the claims upon which the named plaintiffs are proceeding. Moreover, potential claims of the proposed class members have not been shown to be common or typical to those of the five plaintiffs in this case.

[R.102:5; PLTF APP 5]

The plaintiffs did not argue (nor have they any evidentiary support to do so) that the other members of their proposed class were affected by 2005 WI Act 105. No evidence in the record supports the allegation that anyone has ever determined that female hormones are medically necessary for any of the proposed class members. Certainly, there is no evidence in the record that female hormones are medically necessary for all transgender persons, nor is there any evidence in the record to support that all transgendered persons have Gender Identity Disorder or gender dysphoria. The plaintiffs' argument presumes that all members of their proposed class have suffered injuries identical to theirs. This is incorrect – 2005 WI Act 105 does not directly affect all transgender inmates. For standing purposes, it only directly affects inmates that desire the prohibited treatments or, as the plaintiffs allege in support of their facial challenge, inmates with severe GID for whom hormones have been prescribed. There is no evidence that any of the proposed class members are at risk of suffering the injuries of which the plaintiffs complain, and there is no evidence that any of them have actually suffered comparable injuries.

The plaintiffs argue on appeal that the district court failed to recognize a legal commonality. [Pl. Br. at 57] The plaintiffs claim that "the district court held that Plaintiffs and the proposed class members shared both legal and factual commonalities when it embraced the assertion that 'the denial of

necessary medical care to persons who have had it in the past does not distinguish Plaintiffs under the Eighth Amendment and Equal Protection Clause from transsexuals newly diagnosed with GID and prescribed the treatment for the first time…'" [Pl. Br. at 58-59] This argument is misguided and the plaintiffs' assertion is misleading. First, the district court properly recognized that "'[a] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other members and his or her claims are based on the same legal theory' . . . even if there are factual distinctions between the claims of the named plaintiffs and those of other class members." [R.102:4; PLTF APP 4] Second, the assertion that the plaintiffs claim the district court embraced was merely a line in the decision where the court was quoting the plaintiffs' position, as set forth in their trial brief. [R.212:59; App. 205] It was not a holding of the court, the court did not indicate that it embraced such a characterization, and it does not establish that the court found a legal commonality between the plaintiffs and their proposed class. Notably, the plaintiffs' proposed class for certification purposes is much broader then the group identified in the portion of their trial brief that was quoted by the court. The plaintiffs sought to certify a class of all current and future transgender inmates. [R.102:2-3; PLTF APP 2-3] The group the plaintiffs identified in their trial brief – which they now claim the district court embraced as having a legal commonality with the plaintiffs – are "transsexuals newly diagnosed with GID and prescribed the

treatment for the first time." [Pl. Br. at 58-59] The latter group is significantly more limited; it only consists of transgender inmates that have actually been diagnosed with GID and prescribed the prohibited treatment. Even if the plaintiffs share a common legal question with this group, it does not change the fact that the much larger group requested for certification was overly broad, lacked commonality, and included individuals that lacked standing in this case. The district court properly denied certification.

C. The District Court Properly Denied Certification Because The Plaintiffs Failed To Satisfy The Typicality Requirement Of FRCP 23.

The plaintiffs argue that the district court erred by ignoring the presence of a common and typical legal question that satisfied Rule 23(a)(3). This is not the case and the plaintiffs' claims are not typical.

One authority has framed the typicality requirement as follows:

> [T]he typicality test analysis requires a showing by the plaintiff that the defendants' challenged conduct as it has allegedly injured the plaintiff is reflected in the defendants' similar or other practices toward class members in the same way it is manifested in the defendants' conduct specifically affecting the plaintiff.

1 Newberg & Conte, *Newberg on Class Actions* § 3.19, at 3-111, *cited in O'Neill*, 219 F.R.D. 453. The *O'Neill* court concluded that the plaintiff had failed to satisfy the typicality requirement because it was likely that many members of the proposed class had not actually suffered any injury.

The same analysis applies here. The plaintiffs sought to certify a broad class of "current and future prisoners and patients … who are transgender." [R.35:1] And they claimed below that the claims of the class representatives share the essential characteristics of the class members because the class representatives are:

> [T]ransgender individuals in DOC custody from whom sex reassignment treatments were determined by the DOC's own health care providers to be medically necessary, but who were nevertheless denied those treatments by the Defendants.

[R.35:10]

The plaintiffs now argue on appeal that, for the same reasons the court erred as to the issue of commonality, the district court's decision as to typicality is contrary to law because it ignores a typical legal question. [Pl. Br. at 60] In support of this assertion, the plaintiffs again reference the district court's final memorandum decision on the merits of the case and specifically cite the portion of the decision where the court summarized the plaintiffs' trial brief. [Pl. Br. at 60 (referencing R.212:59)]

However, as explained in the previous section, the court did not find or recognize a typical issue of law between the plaintiffs and the proposed class, and there was no evidence to support the plaintiffs' claims that sex reassignment treatments have been prescribed, or are medically necessary, for any members of their proposed class.

D. The District Court Properly Denied Certification Because The Plaintiffs Failed To Satisfy The Numerosity Requirement Of FRCP 23.

The plaintiffs claim that the district court erred by ignoring several factors relevant to numerosity. [Pl. Br. at 61] The plaintiffs' claims are unavailing because they do not establish that the district court acted arbitrarily or capriciously.

First, the plaintiffs allege that the court failed to consider the fact that their requested injunction would affect future class members and, therefore, the class should have been certified based on impracticality. However, as the plaintiffs themselves acknowledged below, the case of *Long v. Thornton Township High Sch. Dist.* requires them to show "some evidence or reasonable estimate of the number of class members." *Long v. Thornton Township High Sch. Dist.*, 82 F.R.D. 186, 189 (N.D. Ill. 1979). They have provided no reasonable estimate of the number of future members of their proposed class, and they certainly have provided no reasonable estimate of the number of future inmates for whom it may be determined that female hormones and/or gender reassignment surgery are medically necessary. The district court properly found that a class of five or six prisoners, five of whom had already been joined in the case, was not sufficient to meet the numerosity requirement of Rule 23(a)(1).

Second, the plaintiffs argue that the district court erred in determining that the proposed class had but 6 members and allege that the class was

actually estimated at 26 inmates in 2006. [Pl. Br. at 62] As the defendants explained below, this number comes from the defendants' response to an interrogatory asking them to identify the number of "residents" believed to be transgender or to have GID. The defendants responded:

> [T]he Wisconsin Department of Corrections (DOC) first began tracking the number of inmates with transgender issues or a diagnosis of Gender Identity Disorder (GID) in late 2002. … At that time, 13 inmates were identified who either had known transgender issues or a diagnosis of GID. Since 2002, the number of inmates receiving hormone therapy has varied between 2 and 4 inmates.

[R.42:10] At the time, five inmates in the Wisconsin correctional system were receiving female hormones. *Id*.

From this interrogatory response, the plaintiffs argue that they have met the numerosity requirement. This argument fails for two reasons: (1) 2005 Act 105 affects only the inmates currently receiving female hormones, not the entire group of persons who have "transgender issues;" and (2) even if the correct number of class members is closer to 13, a class of 13 does not meet the numerosity requirement of FRCP 23(a)(1). Notably, courts have routinely held that classes of fewer than 25 members fail to satisfy the numerosity requirement because joinder of all the potential class members was not impracticable. *See* Wright, Miller & Kane 7A *Federal Practice and Procedure*, § 1762 (collecting cases).

Finally, the plaintiffs argue that the district court abused its discretion by not adequately considering the interests of judicial economy. [Pl. Br. at

62-63] This argument fails because, since the district court did not find the group of plaintiffs numerous, it did not abuse its discretion by not explicitly considering the interests of judicial economy.

CONCLUSION

For the reasons stated above, and in the defendants' opening brief, the defendants respectfully request that the Court REVERSE the district court's decision and judgment below as to both the Eighth Amendment and Equal Protection claims and DECLARE Wis. Stat. § 302.386(5m) constitutional under both the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment, and AFFIRM the district court's decision denying class certification.

Dated this 16th day of December, 2010.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(A)(7)

The undersigned, counsel of record for the defendants-appellants, cross-appellees furnishes the following in compliance with F.R.A.P. Rule 32(a)(7).

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 10,589 words.

Dated this 16th day of December, 2010.

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CIRCUIT RULE 31(E) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), a version of the brief that is available in non-scanned PDF format.

Dated this 16th day of December, 2010.

_____

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