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

CODY FLACK,
SARA ANN MAKENZIE,
MARIE KELLY, and
COURTNEY SHERWIN,

Plaintiffs,

v. Case No. 18-CV-0309

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
ANDREA PALM, in her official capacity
as Secretary-Designee of the Wisconsin
Department of Health Services,

Defendants.

DEFENDANT'S BRIEF IN SUPPORT OF PROPOSAL REGARDING EQUITABLE RELIEF

Defendants Wisconsin Department of Health Services (DHS) and Andrea Palm, in her official capacity as DHS Secretary-Designee (collectively "Defendants"), submit this brief in support of their proposal regarding equitable relief, as directed by the Court.

INTRODUCTION

This is a class action lawsuit where Plaintiffs seek equitable relief for themselves and "[a]ll transgender individuals who are or will be enrolled in Wisconsin Medicaid, have or will have a diagnosis of gender dysphoria, and

who are seeking or will seek surgical or medical treatments or services to treat gender dysphoria"—the certified Class. (*See* Dkt. 150:9–15.) In their motion for class certification, Plaintiffs clarified the equitable relief sought:

> Plaintiffs seek a declaratory judgment that the Challenged Exclusion violates Section 1557, the Medicaid Act, and the Equal Protection Clause, and a permanent injunction enjoining enforcement of the Challenged Exclusion based on that illegality.

(Dkt. 90:28.) In granting Plaintiffs' motion for class certification, the Court credited Plaintiffs' argument that

> the categorical coverage ban on gender-confirming care under the Challenged Exclusion is generally applicable to the class, making a final injunction and corresponding declaratory judgment appropriate to the full class.

(Dkt. 150:15.)

In its August 16, 2019 Opinion and Order, the Court found that the Challenged Exclusion (Wis. Admin. Code §§ DHS 107.03(23)–(24), 107.10(4)(p)) violates Section 1577 of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18116; the Medicaid Act's availability requirement, 42 U.S.C. § 1396a(a)(10)(A); the Medicaid Act's comparability requirement, 42 U.S.C. § 1396a(a)(10)(B); and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (*See* Dkt. 217). Given these findings, the Court ordered that parties submit proposals as to permanent injunctive relief.

Consistent with the relief described by Plaintiffs and contemplated by the Court when it certified the Class, Defendants propose that a declaratory judgment stating that the Challenged Exclusion is unconstitutional under the Equal Protection Clause and violates the ACA and Medicaid Act, is sufficient to remedy the violations found by the Court. Such a declaration is tailored to remedy the violations found and is applicable to the Class as whole. Any corresponding permanent injunction would be redundant and unnecessary to effectuate the Court's findings.

However, if the Court intends to enter a permanent injunction, it should also be consistent with what Plaintiffs articulated in their motion for class certification—an injunction enjoining enforcement of the Challenged Exclusion. Such an injunction goes no further than necessary and is consistent with equitable relief ordered in similar cases.

ARGUMENT

I. The Court should limit relief to a declaratory judgment; a permanent injunction is not necessary.

A permanent injunction is a drastic and extraordinary remedy. *Monsato Co. v. Geerston Seedfarms, Inc.*, 561 U.S. 139, 165–66 (2010). For this reason, the Seventh Circuit favors declarations over injunctions. *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010) (citing *Horne v. Flores,* 557 U.S. 433 (2009) (discouraging the use of regulatory injunctions in litigation

against parts of state government)). As the court explained, "If the entry of a regulatory injunction can be avoided by a simpler declaratory judgment, everyone comes out ahead." *Badger Catholic, Inc.*, 620 F.3d at 782. The decision to grant declaratory relief over injunctive relief is a discretionary one. *Id*.

The Supreme Court has also repeatedly observed that the issuance of declaratory relief should have a strong deterrent effect rendering more coercive remedies unnecessary. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 710-14 (1977); *Doran v. Salem Inn Incorporated*, 422 U.S. 922, 931 (1975); *Perez v. Ledesma*, 401 U.S. 82, 124-26 (1971) (Brennan, J., concurring); *Samuels v. Mackell,* 401 U.S. 66, 73 (1971). When a declaratory judgment is ordered, the defendant's obligation to comply with that order is established, and "adding an injunction to the mix does little more than enjoin the defendant to obey the law, a practice [the Seventh Circuit] ha[s] criticized." *U.S. v. P.H. Glatfelter Co.*, 768 F.3d 662, 682 (7th Cir. 2014).

The Challenged Exclusion expressly states that the following services are not covered under Wisconsin Medicaid: "Drugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics," Wis. Admin. Code §§ DHS 107.03(23), 107.10(4)(p), and "[t]ransexual surgery," Wis. Admin. Code § DHS 107.03(24). Thus, by this Court declaring that the Challenged Exclusion

violates two federal statutes and a provision of the federal constitution, Defendants will not consider these services as "non-covered services." Further, Defendants understand that they must conform their conduct to any declaratory judgment. *Badger Catholic*, 620 F.3d at 782 ("A litigant who tries to evade a federal court's judgment—and a declaratory judgment is a real judgment, not just a bit of friendly advice—will come to regret it.").

Here, Plaintiffs sought declaratory relief as a remedy. (Dkt. 210:42–43 ¶ D.1.–4.) They reiterated this in their motion for class certification. (Dkt. 90:28–29.) Because this Court granted Plaintiffs' motion for summary judgment on all their claims (Dkt. 217:24, 32, 37), Defendants acknowledge that a judgment properly would contain a declaration that enforcement of the Challenged Exclusion violates the ACA, the Medicaid Act, and the Equal Protection Clause. (*See* Defendants' Proposal, filed herewith.) Given this, and consistent with direction from both the Supreme Court and the Seventh Circuit, there is no need for any injunctive relief.

While Plaintiffs also sought a permanent injunction (*see* Dkt. 90:28–29), Plaintiffs have not accused Defendants of attempting to avoid the constraints of the preliminary injunctions this Court issued during this litigation. Indeed, in their summary judgment briefing, Plaintiffs did not point to any evidence that Defendants had not complied with them. (Dkt. 152.) So, the record does

not support any dilatory behavior on the part of Defendants that would necessitate repetitive forms equitable relief.

Thus, a declaratory judgment is sufficient to protect Plaintiffs' rights and the rights of the Class going forward.

II. If the Court orders a permanent injunction, it should only enjoin enforcement of the Challenged Exclusion.

Nonetheless, if this Court believes that a permanent injunction is necessary, Fed. R. Civ. P. 65(d) governs the appropriate scope and form of a permanent injunction. Pursuant to Rule 65(d)(1), every order granting an injunction must "state the reasons why it issued; state its terms specifically; and describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." [I]njunctive relief should be no broader than necessary to provide full relief to the aggrieved party." *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986) (*citing Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). "[W]hether the terms of an injunction fulfill the mandates of Rule 65(d) is a question of law." *Int'l Rectifier Corp. v. IXYS Corp.*, 383 F.3d 1312, 1315 (Fed. Cir. 2004).

In this case, the only conceivable permanent injunctive relief is what Plaintiffs previously recognized was in play: "a permanent injunction enjoining enforcement of the Challenged Exclusion." (Dkt. 90:28.) That was the request

in both their pleadings and motion for class certification, and what the Court already ordered as part of its summary judgment decision—a permanent injunction enjoining enforcement of the Challenged Exclusion. (*See* Dkt. 217:38.)

Likewise, this is the only type of injunctive relief consistent with the requirements of Fed. R. Civ. P. 23(b)(2) that such "final injunctive relief" be "appropriate respecting the class as a whole." It is also consistent with permanent injunctions ordered in similar cases. For example, in *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018), this Court invalidated a similar state employee health plan exclusion for gender reassignment surgery and related sex hormones. As a final permanent injunction, this Court ordered that the State defendants were

> PERMANENTLY ENJOINED from enforcing the State of Wisconsin's exclusion of coverage for "[p]rocedures, services, and supplied related to surgery and sex hormones associated with gender reassignment" from health insurance coverage provided to state employees.

(Judgment, Dkt. 240:2), *Boyden v. Conlin,* No. 17-CV-264-wmc (W.D. Wis. Oct. 11, 2018). In another case, *Pinneke v. Preisser*, 623 F.2d 546, 547 (8th Cir. 1980), the court found Iowa's policy of denying Medicaid benefits for sex reassignment surgery invalid. As relief, the district court issued a declaratory judgment and "permanently enjoined the administration and enforcement of the Iowa Medicaid program in a manner to deny benefits for

medically necessary care and treatment incident to sex reassignment surgery or subsequent corrective surgery." *See id.*

As illustrated by the permanent injunctions in *Boyden* and *Pinneke*, the only appropriated permanent injunction, if any, in cases challenging these types of coverage exclusions would be one enjoining enforcement of the offending coverage provisions. Such an injunction goes no further than necessary and is applicable to the class as a whole. Thus, if the Court were to order a permanent injunction as part of its final judgement, only one enjoining enforcement of the Challenged Exclusion would be appropriate.

CONCLUSION

In light of this Court's summary judgment decision, Defendants acknowledge that declaratory relief is appropriate in the judgment, but oppose any permanent injunctive relief. To the extent this Court nonetheless enters an injunction, Defendants submit that only an injunction permanently enjoining Defendants from enforcing the Challenged Exclusion (Wis. Admin. Code §§ DHS 107.03(23)–(24), 107.10(4)(p)) would be appropriate.

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Dated this 6th day of September, 2019.

Respectfully submitted,

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