No. _____

In The

Supreme Court of the United States

———— ♦ ————

JUDY P. SMITH, ET AL.,

Petitioners,

v.

ANDREA FIELDS, ET AL.,

Respondents.

———— ♦ ————

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

———— ♦ ————

PETITION FOR A WRIT OF CERTIORARI

———— ♦ ————

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QUESTION PRESENTED

In 2006, the State of Wisconsin prohibited the use of public funds for hormonal therapy or sexual reassignment surgery to Wisconsin inmates. The Seventh Circuit Court of Appeals affirmed the district court's decision finding that the law violated the Eighth Amendment and the Equal Protection Clause and enjoining the law. The questions presented are:

1. Did the Seventh Circuit Court of Appeals err by upholding the injunction as to sexual reassignment surgery for inmates?

2. Does the Eighth Amendment of the United States Constitution require state prisons to treat gender identity disorder (GID) with hormone therapy to make an inmate look more like the opposite gender?

LIST OF PARTIES

The petitioners, who were the defendants at the district court level and the defendants-appellants-cross-appellees before the Seventh Circuit Court of Appeals, are Judy P. Smith, Thomas Edwards, James Greer, Roman Kaplan, MD, and Rick Raemisch (hereinafter "petitioners" or "defendants"). The petitioners are all Wisconsin Department of Corrections employees. The respondents, who were the plaintiffs before the district court and the appellees-cross-appellants before the Seventh Circuit Court of Appeals, are Andrea Fields, Matthew Davidson (aka Jessica Davidson), and Vankemah D. Moaton (hereinafter "respondents" or "plaintiffs"). The respondents are all inmates in the Wisconsin correctional system who have been diagnosed as suffering from some form of gender identity disorder (GID).

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PETITION FOR WRIT OF CERTORARI

The petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) and is reprinted in the appendix to this petition at A1. The decision of the United States District Court for the Eastern District of Wisconsin, enjoining the law, is reported at 712 F. Supp. 2d 830 and is reprinted in the appendix to this petition at A21.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit issued its final decision on August 5, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

Wis. Stat. § 302.386(5m) (2009):

SECTION 1. 302.386(5m) of the statutes is created to read:

302.386(5m) (a) In this subsection:

1. "Hormonal therapy" means the use of hormones to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender.

2. "Sexual reassignment surgery" means surgical procedures to alter a person's physical appearance so that the person appears more like the opposite gender.

(b) The department may not authorize the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery for a resident or patient specified in sub. (1).

> SECTION 2. Initial applicability.
>
> (1) PROVISION OF HORMONAL THERAPY OR SEXUAL REASSIGNMENT THERAPY. This act first applies to hormonal therapy, as defined in section 302.386 (5m) (a) 1. of the statutes, as created by this act, or sexual reassignment surgery, as defined in section 302.386 (5m) (a) 2. of the statutes, as created by this act, provided on the effective date of this subsection.

[2005 Wisconsin Act 105]

The Eight Amendment to the United States Constitution reads:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Equal Protection Clause of the United States Constitution reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

> any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondents sued for declaratory and injunctive relief in the United States District Court for the Eastern District of Wisconsin on January 24, 2006, pursuant to 42 U.S.C. §1983, alleging that 2005 Wisconsin Act 105 (hereinafter "the Act" or "Wis. Stat. § 302.386(5m)") violates the Eighth and Fourteenth Amendments of the United States Constitution. The district court had jurisdiction under 28 U.S.C. § 1331.

The respondents, all current or former inmates in the Wisconsin prison system, have all been diagnosed with some form of gender identity disorder (GID). Their Third Amended Complaint (Complaint) challenges the Inmate Sex Change Prevention Act (the Act), Wis. Stat. § 302.386(5m), which prevents state or federal resources from being used to provide hormone therapy or sexual reassignment surgery to Wisconsin prisoners. The statute defines "hormonal therapy" as "the use of hormones to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender." Wis. Stat. § 302.386(5m)(a)(1). It also defines "sexual reassignment surgery" as "surgical procedures to alter a person's physical appearance so that the

person appears more like the opposite gender." Wis. Stat. § 302.386(5m)(a)(2).

The Complaint sets forth essentially three claims: (1) the Act, as applied to the plaintiffs, violates the Eighth Amendment; (2) the Act, on its face, violates the Eighth Amendment; and (3) the Act violates the plaintiffs' Fourteenth Amendment equal protection rights both on its face and as-applied. As relief, the plaintiffs requested injunctive relief against DOC's enforcement of the Act against them, along with declaratory relief holding the Act, both on its face and as applied to plaintiffs, violates the Eighth and Fourteenth Amendments to the Constitution.

The case was tried on October 22, 2007, through October 25, 2007. On March 31, 2010, the court issued an Order declaring the Act unconstitutional under both the Eighth Amendment and Equal Protection Clause and enjoining its enforcement. On May 13, 2010, the court issued a Memorandum Decision outlining its findings and conclusions.

On August 5, 2011, after briefing and argument, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision and upheld the injunction in its entirety.

ARGUMENTS FOR GRANTING THE PETITION

This case warrants review by this Court because the court of appeals' decision conflicts with relevant decisions of this Court and because this case presents an important question of federal law that has not been, but should be, settled by this Court.

I. THE DECISION BELOW CONFLICTS WITH REVLEVANT DECISIONS BY THIS COURT BY UPHOLDING THE INJUNCTION AS TO SEXUAL REASSIGNMENT SURGERY WHEN THERE WAS NO EVIDENCE THAT SUCH SURGERY WAS NEEDED OR EVEN DESIRED.

The court of appeals' decision conflicts with relevant decisions of this Court, and is without any proper legal basis, because it is undisputed that none of the plaintiffs needed surgery or even desired it. Therefore, denial of such treatment cannot violate the Constitution, either as-applied or facially.

A. The court of appeals erroneously found this issue admitted.

The court of appeals sidestepped the defendants' challenge to the scope of the injunction by claiming that the issue was waived or admitted. *Fields v. Smith*, 653 F.3d 550, 558 (7th Cir. 2011)

[A16-A17]. The court of appeals based this determination on the fact that at a post-decision status conference, "the court asked defendants' counsel not once, but twice, 'whether or not the Defense believes the order as tendered ... is as narrow as is required'; counsel replied that it was. (See Pls.' App. 19.)" *Id.* The court of appeals determined that, as a result, the defendants were not allowed to raise any argument as to the scope of the injunction on appeal. This conclusion is not supported by the record or sound jurisprudence.

First, at the June 17, 2010 status conference in question, the district court asked the defense whether the substance of the order, as tendered, was "as narrow as is required and should be entered with due regard for the fact that you do not believe that any relief should be given to the plaintiffs in this matter." [A124] The respondents stated that, "I think that's a fair statement, your honor. The position of the Defendants is that the Plaintiffs are not entitled to any relief and that the Court, with all due respect, incorrectly decided the matter. But given those concerns we believe that the proposed order is fair." *Id.* The court then followed up by asking whether the defendants believed the order is as narrow as is warranted *under the circumstances* and the defendants said yes. *Id.*

The "circumstances" were that the district court had upheld plaintiffs' claims and was soliciting input on the *form* of the order, rather than the *substance.* Therefore, the court of appeals

erroneously found that this exchange prohibited the defendants from challenging the scope of the injunction on appeal. The district court's decision in this case expressly found the Act unconstitutional on its face as to both hormone therapy and gender reassignment surgery. In essence, what the court of appeals said is that, at the post-decision status conference, the defendants should have re-challenged the merits of the case by claiming that the injunction should not have issued as to surgery. That would have been inappropriate under the circumstances because that issue is one of substance, not merely procedure. The court of appeals' position also ignores the fact that the defendants explicitly preserved their argument by indicating at the status conference that, "[t]he position of the Defendants is that the Plaintiffs are not entitled to any relief and that the Court, with all due respect, incorrectly decided the matter. But given those concerns we believe that the proposed order is fair." [A125] On appeal, the defendants' argument is not that the order is worded incorrectly; the defendants' argument is that there is no basis to support the court's decision enjoining the prohibition of gender reassignment surgery. This is not an argument that could be waived or admitted in the manner suggested by the court of appeals.

The court of appeals blatantly sidestepped this issue, which if addressed, would have required overturning the district court's decision enjoining the ban on surgery.

B. The ban on sexual reassignment surgery cannot violate the Constitution, either as-applied or on its face, because there was no evidence that any of the plaintiffs needed or desired such treatment.

The court of appeals' decision upholding the injunction in its entirety – including as to the ban on sexual reassignment surgery – is in conflict with relevant decisions of this court, holding that, when a court confronts a constitutional flaw in a statute, the court should "fit the solution to the problem" and enjoin only the unconstitutional applications while leaving the other applications in force. Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328-29, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006).

Wis. Stat. § 302.386(5m) prevents state or federal resources to be used to provide hormone therapy or sexual reassignment surgery to Wisconsin prisoners.

Here, the court of appeals upheld the injunction as to a procedure that no one had requested, let alone shown was medically necessary to prevent a significant risk of serious harm. It is undisputed that none of the plaintiffs were deemed in need of surgery or even requested it. The court of appeals ignored this lack of evidence and claimed that, since the law was invalid facially, it did not matter that the plaintiffs did not need or desire surgery. *Fields v. Smith*, 653 F.3d 550, 558-559 (7th

Cir. 2011) [A19]. The court's argument is troublesome because there was no evidence that any inmate does, or ever did, need or want surgery. So, the court of appeals' decision on this issue assumes a hypothetical relevant class of fictional inmates with respect to the facial validity of the ban on surgery. Without an actual class, there is no basis to find that the Act is facially invalid because there is no evidence that prohibiting sexual reassignment surgery creates an unreasonable risk of serious harm or that the remaining available treatments are blatantly inappropriate.

II. THE QUESTION OF HOW MUCH MEDICAL TREATMENT IS REQUIRED UNDER THE CONSTITUTION IN CASES SUCH AS THIS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents a unique and important question of federal law that requires clarification by this Court – how much and what kind of medical treatment is a state required to make available to inmates under the Constitution in cases involving psychological conditions such as gender identity disorder?

The court of appeals inappropriately attempted to fit this case into the Eighth Amendment framework for purely physical medical conditions. The court of appeals compared this case to a situation where an inmate with cancer was denied cancer treatments and was merely treated with therapy and antidepressants. The court's analogy is faulty because in its scenario the inmate would die of cancer, which is a purely physical condition, despite the psychological treatments. Here, inmates with GID do not have any physical ailment – their bodies are healthy. The condition is a psychological condition and psychological treatments such as psychotherapy, antipsychotics and antidepressants are appropriate and work to reduce the risk of self-harm.

Although the State in this case showed that alternate treatments, such as psychotherapy, antipsychotics and antidepressants, remained available under the Act, the court of appeals found a violation of the Eighth Amendment because, "defendants failed to present evidence rebutting the testimony that these treatments do nothing to treat the underlying disorder." *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011) [A11]. There is no precedent for imposing the additional requirement under the Eighth Amendment that a state completely eliminate a risk or cure a serious medical condition, yet that is what the court of appeals has done.

The Court of Appeals for the Seventh Circuit has previously explained that the Eight Amendment does not entitle inmates to demand specific care and inmates are not entitled to the best care possible. *Forbes v. Edgar*,112 F.3d 262, 267 (7th Cir. 1997). The Eighth Amendment does not require prevention of all harm, it merely provides a right to "reasonable measures to meet a substantial risk of serious harm." *Id.* (emphasis added). The court of appeals' decision in the case here is a significant departure from earlier precedent.

In *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987), the court of appeals held that a transsexual prisoner stated a valid claim under the Eighth Amendment when she was denied treatment of any kind, including hormone therapy, for her GID. *Meriwether*, 821 F.2d at 413. However, the court of appeals made it very clear that the problem was the complete denial of all treatment for a serious medical need and that the outcome would have been different had she been provided "some type of medical treatment." *Id.* at 413. Indeed, the court of appeals broadly concluded that "given the wide variety of options available for the treatment of gender dysphoria and the highly controversial nature of some of those options, courts should defer to the informed judgment of prison officials as to the appropriate form of medical treatment." *Id.* at 414. The Seventh Circuit has subsequently hewed closely to the analysis in *Meriwether*. In *Jones v. Flannigan,* 949 F.2d 398 (7th Cir. 1991) this court endorsed the *Meriwether* approach, referring to the

administration of "continuous psychological treatment" as enough to satisfy any constitutional requirements and noting that "although a transsexual inmate is entitled to some type of treatment, the inmate 'does not have a right to any particular type of treatment.'" *Jones v. Flannigan,* 949 F.2d 398 (7th Cir. 1991) (quoting *Meriwether*, 821 F.2d at 413). More recently, this court has formulated the same basic concept in terms of "curative treatment:" "it does not follow that the prisons have a duty to authorize the hormonal and surgical procedures that in most cases at least would be necessary to 'cure' a prisoner's gender dysphoria." *Maggert v. Hanks*, 131 F.3d 670, 671-672 (7th Cir. 1997).

The court of appeals' panel decision in this case conflicts with the central position taken by the Seventh Circuit over the years: that the Eighth Amendment does not prohibit prison officials, prison medical personnel, and, most certainly, a state legislature, from denying a small, controversial subset of the wide variety of treatments available for a particular diagnosis.

The Seventh Circuit's previous treatment of the duty of the state vis-à-vis transsexual prisoners is in accord with the treatment given by the overwhelming majority of other circuits. The Fifth Circuit Court of Appeals upheld a decision to deny hormone therapy to a particular individual, noting that the denial was based on ineligibility and lack of medical necessity and that the plaintiff had not

asked for any other form of treatment. *Praylor v. Texas Dept. of Criminal Justice*, 430 F.3d 1208 (5th Cir. 2005). The Eighth Circuit Court of Appeals has likewise held that a denial of hormone therapy is not unconstitutional "provided that some other treatment is made available to him." *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988) (referencing the decision in Meriweather). The Tenth Circuit Court of Appeals has also held that, though GID is a serious medical condition, "[A] mere difference in opinion regarding the proper course of treatment is not tantamount to deliberate indifference." *Qz'etax v. Ortiz*, 170 Fed.Appx. 551, 553, 2006 WL 515612 (C.A.10(Colo.)); *see also Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986) (holding that the DOC was not required by the Constitution to provide an inmate hormone therapy where such treatments are controversial).

A state law should be upheld under the Eighth Amendment as long as it allows for the availability of alternate treatments that, although not curative, work to manage the symptoms of a condition and diminish the risk of harm to a reasonable level. The Eighth Amendment should only require that GID be compared to, and treated like, psychological conditions such as schizophrenia, which are managed through drugs and therapy. The fact that GID is a unique psychological condition for which controversial curative treatments exist (altering a healthy body through hormones and/or surgery) does not mean that states are required to provide such treatments under the Constitution.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX