No. 11-561

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

BRIEF IN OPPOSITION

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2. Whether an injunction to prohibit enforcement of an unconstitutional ban on medically necessary treatment for Gender Identity Disorder is narrowly drawn to remedy an Eighth Amendment violation caused by failing to prescribe, or even evaluate inmates with Gender Identity Disorder for, treatments that the lower courts found as a matter of fact after trial are the only effective ones for some individuals with GID.

COUNTER-STATEMENT OF THE CASE

This case involves a challenge to 2005 Wisconsin Act 105 (Act 105) (Wis. Stat. § 302.386(5m)), which prohibits Wisconsin Department of Corrections (DOC) physicians from *ever* prescribing hormone therapy or sex reassignment surgery to treat a prisoner with Gender Identity Disorder (GID), regardless of the severity of the GID or the medical necessity of hormones or surgery to effectively treat the GID and alleviate unnecessary pain and suffering. GID is a rare but well-recognized condition that affects one in 11,900 genetic males. *Fields v. Smith*, 712 F. Supp. 2d 830, 841 (E.D. Wis.

2010) [App. A40-41].[1] It is characterized by a strong and persistent cross-gender identification, a persistent discomfort with one's sex, and clinically significant distress or impairment in social, occupational or other important areas of functioning. *Id.* at 835-36 [A26].

Respondents are male-to-female transsexual people in the custody of the Wisconsin DOC who have severe GID. [R.200: 43]. Denial of treatment for severe GID causes, or creates a serious risk of, depression, anxiety, suicidal ideation, suicide attempts, and self-mutilation or autocastration for transsexual people, such as Respondents. *Fields v. Smith*, 653 F.3d 550, 553 (7th Cir. 2011) [R.App. 6a]; 712 F. Supp. 2d at 843, 844, 847, 863-64 [App. A46-47, 49, 57, 104-105].

The district court decided this case after a four-day bench trial in which the district judge heard the testimony of experts on the diagnosis and treatment of GID, as well as testimony from the medical and psychiatric leadership of the Wisconsin DOC. Based on the trial testimony and other evidence, the district court rendered a thorough decision making numerous factual findings on which

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[1] The Petition for a Writ of Certiorari is cited as "Pet." Petitioners' Appendix is cited as "[App.]," while Respondents' Appendix is cited as "[R.App.]" Petitioners' reproduction of the Court of Appeals decision in their appendix contains what appear to be inadvertent interpolations of text from other parts of the decision and repetitions of some of the text. *See* [App. A6-9]. Accordingly, Respondents have included a clean reproduction of the Court of Appeals decision as an appendix to this brief. Record citations list the docket number followed by the page, paragraph, or exhibit number, "[Docket number: page, paragraph, or exhibit number]."

its holding turned. The district court found that GID is a serious medical condition, 712 F. Supp. 2d at 862 [App. A101]; that the hormone therapy prescribed to Respondents by DOC physicians was medically necessary to effectively treat Respondents' GID, *id.* at 862 [A101-102] ("DOC doctors evaluated the plaintiffs clinically and determined that hormone therapy is medically necessary to treat their conditions"); and that Act 105 prevents DOC medical personnel from providing necessary treatment, *id.* at 863 [A102] ("[T]he enforcement of Act 105 prevents DOC doctors from providing the treatment that they have determined is medically necessary to treat the plaintiffs' serious conditions."), by forcing them to stop treating those already receiving it and by preventing them from evaluating inmates and prescribing GID treatment when, in their medical judgment, it is medically necessary for inmates not already receiving it. *Id.* at 864-65 [A106-107].

Contrary to Petitioners' assertion that "psychotherapy, antipsychotics and antidepressants are appropriate and work to reduce the risk of harm" (Pet. at 11), there was *no* evidence controverting the testimony of numerous witnesses that, for some people with severe GID, such as Respondents, psychotherapy or psychotropic medication alone, without hormone therapy treatment (and in some cases, sex reassignment surgery), is simply not effective. *See, e.g.*, 653 F.3d at 556 [R.App. 12a] (Petitioners "did not produce any evidence that another treatment could be an adequate replacement for hormone therapy. [Respondents'] witnesses repeatedly made the point that, for certain patients with GID, hormone therapy is the only treatment that reduces dysphoria and can prevent the severe

emotional and physical harms associated with it."); *id*. [14a] ("Although Act 105 permits DOC to provide plaintiffs with *some* treatment, the evidence at trial indicated that plaintiffs could not be effectively treated without hormones."); *id*. at 557 [15a] (Petitioners "did not present any medical evidence that alternative treatments for GID are effective"); 712 F. Supp. 2d at 845 [App. A49] (expert testified that psychotherapy on its own is not effective as treatment for patients with severe GID for whom he has prescribed hormones and, in some cases, surgery); *id*. at 846-47 [A55-57] (DOC Mental Health Director testified hormones are sometimes medically necessary to treat GID (*i.e.*, there are adverse consequences to psychological well-being without hormones) and admitted that there are some individuals for whom it is difficult to imagine effective management of GID without hormones); *id.* at 847-48 [A58-59] (expert testified psychotherapy alone is never adequate treatment for severe GID); *id.* at 848 [A62] (expert testified GID cannot be adequately managed with psychotropic medication alone).

Act 105 also bans provision of sex reassignment surgery. The standard of care for GID patients involves a sequence of therapy that, for persons with the most severe cases of GID, includes sex reassignment surgery. 653 F.3d at 553-54 [R.App. 6a]. Uncontroverted expert testimony indicated and the lower courts also found that surgery is medically necessary treatment for some persons with GID. *Id.* at 554 [R.App. 6a] ("In the most severe cases, sexual reassignment surgery may be appropriate."); 712 F. Supp. 2d at 845 [App. A50-51] (citing expert testimony that where surgery is

prescribed, psychotherapy alone is not effective); [R.200: 99] (Respondents' expert testimony that "[f]or those patients with severe dysphoria . . . [sexual reassignment surgery] is an indicated and necessary surgical procedure."); [R.202: 271-272] (another expert testified that sex reassignment surgery was medically necessary for some patients to prevent deterioration of functioning and that he has had patients for whom GID was not adequately treated unless they had surgery). For those who need it, sex reassignment surgery can be life-saving. [R.202: 276]. Accordingly, Petitioners' assertion that 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" (Pet. at 10) is inaccurate.

Petitioners acknowledge that the Respondents were diagnosed with GID. Pet. at 4. However, Petitioners fail to note that all Respondents were diagnosed and prescribed hormone therapy by the Wisconsin Department of Corrections' own medical staff, and that DOC's medical director testified that its staff prescribes only medically necessary treatment. [R.201: 225, 228]. Petitioners also fail to note that no DOC medical staff disagreed with either the GID diagnoses or the prescription of hormone therapy to treat Respondents' GID. In fact, DOC's medical and mental health directors *agreed* with Respondents' experts that hormone therapy is medically necessary treatment for prisoners with severe GID and that terminating or failing to provide hormone therapy can lead to serious consequences. [R.201: 177, 190-191] (DOC Mental Health Director testified that, "I do believe there are individuals where hormonal treatment is medically necessary for

the gender dysphoria," and that "if the [DOC] were to take away hormones from individuals with gender identity disorder, those individuals may become distressed and despondent, may go to the point of clinical depression or an anxiety disorder or suicidality."). Thus, this is *not* a case in which medical professionals disagree about the appropriate course of treatment. Nor did the court of appeals require that the "state completely eliminate a risk or cure a serious medical condition," as Petitioners contend (Pet. at 11), since the court only required that the state end its categorical ban on the effective and medically necessary treatment prescribed by its own medical staff.

Petitioners appealed to the Seventh Circuit Court of Appeals, which affirmed the district court in a unanimous panel decision, holding that Act 105 violated the Eighth Amendment on its face and as applied. Petitioners did not seek rehearing en banc and the circuit court did not order en banc review sua sponte.

REASONS FOR DENYING THE PETITION

Petitioners list two questions as presented in this case. Their first question – "Did the Seventh Circuit Court of Appeals err by upholding the injunction as to sexual reassignment surgery for inmates?" – highlights the central problem with their petition: Petitioners fail to demonstrate, or even seriously attempt to show, that the circuit court's decision conflicts with decisions of this Court or other circuit courts or that it presents an important federal question that this Court should decide. Petitioners' second question is directed at the Seventh Circuit's

finding of an Eighth Amendment violation from the ban on access to medical treatment for GID. Because the scope of the injunction (Petitioners' Question 1) is determined by the scope of the constitutional violation (Petitioners' Question 2), Respondents have reversed the order of the questions.

Petitioners rephrase their second question in the text of the petition as "How much and what kind of medical treatment is a state required to make available to inmates under the Constitution in cases involving . . . [GID]?" (Pet. at 10), but that question is not presented here because neither of the courts below ruled on the particular level or type of medical treatment required to treat inmates with GID. Petitioners' framing of the question, however, underscores that the decision below is consistent with the federal courts' longstanding practice of deferring to the decisions of informed prison medical staff regarding individual treatment decisions, rather than having a legislature, prison administrator, or a court dictate what treatments and procedures are categorically precluded. In doing so, the court below vindicated the principles underlying the Eighth Amendment that "establish the government's obligation to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). The Seventh Circuit properly ruled that a state statute that prohibits prison doctors from providing what they deem to be medically necessary treatment for a serious medical condition violates the Eighth Amendment.

I. The Petitioners' Attack On The Substantive Ruling Below Fails To Satisfy Any Standard For Granting Certiorari.

Petitioners fail to cite, let alone satisfy, the criteria for a writ of certiorari set forth in Rule 10 of this Court. Petitioners cite no conflict between the decision below and any of this Court's decisions (*see* S.Ct. R. 10(c)); indeed, they have not cited any Eighth Amendment decision of this Court. Petitioners argue that the decision below, which could result in Respondents receiving hormone therapy, conflicts with the results of other inmate litigation in the Fifth, Seventh, Eighth, and Tenth Circuits where the inmate was unsuccessful in securing such treatment. However, this argument ignores the crucial distinction that here *prison medical staff* determined that hormone therapy was medically necessary to treat Respondents, in contrast to the cited cases where the inmate was challenging the state's doctors' medical determination that the prisoner's preferred treatment was not indicated. Indeed, in deferring to the informed judgment of prison medical staff regarding an individual's treatment, the cited cases support the decision below, which does not mandate any treatment for any individual prisoner but merely removes the absolute barrier to hormone treatment and surgery that Act 105 sought to impose. The ruling below is both modest and unremarkable, given the substantial body of law covering a corrections system's constitutional obligations regarding inmate health care.

Petitioners argue that this case presents the question of how much and what kind of specific medical treatment a state is required to make available to inmates under the Constitution in cases involving psychological conditions such as GID. The question that the Seventh Circuit actually decided is: "may a state categorically prohibit prison doctors from prescribing medical treatments for GID, where the lower courts found as a matter of fact after trial that those treatments are the only effective ones for some individuals with GID?" Deciding this question in the negative, the Seventh Circuit invalidated the categorical exclusions in Act 105, and Petitioners fail to cite a single case in which a court has upheld a comparable across-the-board ban on medical treatment for inmates. The decision below reflects the principle recognized in the cases cited by Petitioners – that decisions about the proper course of medical treatment should be made by prison medical staff on an individualized basis, so long as those decisions conform to constitutional standards. Thus, the decision below is not in conflict with other circuits or earlier Seventh Circuit cases.

To the extent that Petitioners try to satisfy Rule 10(c) by arguing that this case involves an important federal question that this Court should resolve, they fare no better. Rule 10(c) is implicated when the court below actually "decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10. Here, however, where the challenged legislation banning medical treatment for GID is unique to one state, and the decision enjoining it rests on principles accepted by circuits around the country, there are no

"compelling reasons" to grant certiorari. S.Ct. Rule 10.

Petitioners also fail in their attempt to diminish the significance of mental health conditions in order to contend that a state may preclude every treatment for GID except counseling and psychotropic medication. The factual record in this case is clear that counseling and psychotropic medication are insufficient to prevent harm for many inmates with GID. *See* pp. 3-4, *supra*.

A. Certiorari Is Not Warranted Because The Decision Below Correctly Follows The Established Principle That Treatment Decisions Should Be Made By Informed Prison Medical Staff Based Upon An Examination Of The Inmate.

Petitioners try to defend Wisconsin's blanket ban on hormone therapy and sex reassignment surgery by citing cases in which a transgender inmate was denied the treatment he or she preferred. Petitioners' simplistic approach ignores the fundamental principle on which those courts upheld the denial of the inmate's preferred treatment, *viz.*, deference to the reasoned decision of informed prison medical staff in individual cases. The cited cases actually lend support to the decision below, which rejected a categorical ban, thus leaving specific treatment decisions to prison medical staff.

Petitioners argue that the court of appeals' panel decision conflicts with three previous Seventh Circuit cases. Pet. at 12-13, citing *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987); *Jones v.*

Flannigan, 949 F.2d 398, 1991 WL 260880 (7th Cir. 1991) (unpublished opinion), and *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997). This Court generally does not grant review to resolve intra-circuit conflicts, *Wisniewski v. United States*, 353 U.S. 901, 902 (1957), and no such conflict is present here. All three cited cases support the principles on which the court below ruled: that GID is a serious medical condition, the treatment of which should be based on evaluation of the inmate by medical professionals.

Meriwether strongly supports the decision below. The Seventh Circuit held in *Meriwether* that the plaintiff stated a claim that transsexualism was a serious medical need and that prison officials acted with deliberate indifference in refusing all treatment. 821 F.2d at 413. In evaluating that claim, *Meriwether* recognized that a federal court should "defer to the informed judgment of prison officials as to the appropriate form of medical treatment," but specifically held that the inmate's constitutional rights were violated when she was denied treatment despite "no such informed judgment ha[ving] been made." *Id.* at 413-414. In this case, the courts below struck down a state statute that committed the same constitutional violation condemned in *Meriwether*: denying medical treatment without reference to the medical judgment of prison staff. Prison doctors deemed hormone therapy medically necessary for Respondents and concluded that "nothing short of [it would] provide an attenuation or relief." *Fields*, 712 F. Supp. 2d at 840, 862 [App. A38, A101-102] ("DOC doctors evaluated the plaintiffs clinically and

determined that hormone therapy is medically necessary to treat their conditions.").[2]

In both *Jones* and *Maggert*, the inmate was examined by prison medical staff and disagreed with the resulting diagnosis of no GID. *Jones*, 1991 WL 260880, at *1; *Maggert*, 131 F.3d at 671. In each case, the court sided with the medical judgment of prison officials based on their evaluation of the inmate. In both cases, moreover, the court highlighted the inmate's failure to submit any contrary medical records or affidavits supporting the inmate's contention of having GID. *Jones*, 1991 WL 260880, at *1; *Maggert*, 131 F.3d at 671.[3] Like

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[2] Petitioners rely on the dicta from *Meriwether* observing that only "some type of medical treatment" is necessary for GID. Pet. at 12, citing *Meriwether*, 821 F.2d at 413; *see also* Pet. at 12 ("inmates are not entitled to the best care possible," citing *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997)). However, the plaintiffs here are not asking for the best treatment, or even any particular form of treatment; they seek only to get the treatment that doctors deem to be effective and medically necessary, in accord with *Meriwether's* "defer[ence] to the informed judgment of prison officials." 821 F.2d at 414.

[3] The *Maggert* court noted in dicta that there is no duty to provide "curative treatment" under the Eighth Amendment and that the provision of "esoteric" treatments like hormone therapy and sexual reassignment therapy are "protracted and expensive." *Fields,* 653 F.3d at 555 [R.App. 10a], quoting *Maggert*, 131 F.3d at 671-72. The court below addressed the *Maggert* decision by noting that *Maggert*'s discussion regarding hormone therapy and sex reassignment surgery was based on "certain empirical assumptions" regarding high cost and the existence of adequate treatment alternatives that were disproved when "put to the test" at trial. *Id.* at 555 [R.App. 11a]. This is hardly surprising. Since the *Maggert* decision fifteen years ago, the medical standards for treatment of GID have progressed considerably, as recognized by the court below.

Meriwether, therefore, both decisions rest on the principle of deference to prison doctors' reasoned determinations regarding individual inmates. And like *Meriwether*, both decisions support, rather than conflict with, the decision below.

Petitioners' attempt to suggest that there is a split in circuit authority fails for the same reason. In *Praylor v. Texas Dept. of Criminal Justice*, 430 F.3d 1208 (5th Cir. 2005), the Fifth Circuit affirmed the district court's denial of a motion for an injunction for an inmate who requested hormone therapy for treatment of gender dysphoria. The court denied relief based on testimony from the medical director of the prison that hormone therapy was not medically necessary for this inmate. *Id.* at 1209. *Praylor* also supports the result reached here, rejecting an attempt to take medical decisions out of the hands of the prison doctors. *See White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988) (deferring to doctors where question remained as to whether an inmate was a transsexual and whether any treatment is required under the Eighth Amendment; "Physicians are entitled to exercise their medical judgment."); *Supre v. Ricketts*, 792 F.2d 958, 960-961 (10th Cir. 1986)

Id. [11a]. ("More than a decade after this court's decision in *Maggert*, the district court in this case held a trial in which these empirical assumptions were put to the test."). Based on record evidence, the district court concluded in this case that the DOC might actually incur greater costs by refusing to provide hormones and, at oral argument, counsel for defendants disclaimed any reliance on purported cost savings. *Id.* at 555-56 [11a-12a]. Similarly, after reviewing the evidence, the district court found in this case that hormone therapy is the only treatment that is effective for certain patients with GID. *Id.* at 556-557 [13a-15a].

(inmate was examined by a battery of medical professionals and was provided treatment recommended by some, over the conflicting views of the others).[4]

A blanket ban on necessary medical treatment violates the Eighth Amendment, because it results either in a complete denial of treatment or the provision of "easier and less efficacious treatment" rather than the exercise of individualized professional judgment. *Estelle*, 429 U.S. at 104-105 & n.10. *See also Roe v. Elyea*, 631 F.3d 843, 859-61 (7th Cir. 2011) (rejecting qualified immunity because law was clearly established that a "categorical treatment policy" that prevented provision of individualized treatment for a prisoner's particular medical needs violated Eight Amendment). Indeed, blanket bans on hormone therapy for prisoners with GID, like the blanket ban challenged here, have been uniformly found to violate the Eighth Amendment. *See*, *e.g.*, *De'Lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003) (plaintiff may prevail by proving that "refusal to provide hormone treatment to [plaintiff] was based solely on the Policy rather than on a medical judgment concerning [plaintiff's] specific circumstances"); *Allard v. Gomez*, 9 F. App'x. 793, 794-95 (9th Cir. 2001) (unpublished) (triable issue as to "whether hormone therapy was denied . . . on the

[4] The only case Petitioners cite that does not clearly involve deference to prison medical staff is *Qz'etax v. Ortiz*, 170 F. App'x 551, 553 (10th Cir. 2006) (unpublished). The brief, cryptic opinion does not describe the regulation or the nature of the pro se litigant's challenge, but does state that the inmate was provided treatment for her gender identity disorder and that a difference of opinion regarding treatment "is not tantamount to deliberate indifference." *Id.*

bases of an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to [plaintiff's] medical needs"); *Houston v. Trella*, No. 04-1393 (JLL), 2006 WL 2772748, at *20-21 (D.N.J. Sept. 25, 2006); *Bismark v. Lang*, No. 2:02-cv-556-FtM-29SPC, 2006 WL 1119189, at *19 (M.D. Fla. April 26, 2006); *Barrett v. Coplan*, 292 F. Supp.2d 281, 286 (D.N.H. 2003); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 186-189 (D. Mass. 2002). Courts have similarly recognized that blanket bans on treatment for other medical conditions violate the Eighth Amendment. *See, e.g., Roe*, 631 F.3d at 860-61 (7th Cir. 2011) (blanket policy preventing exercise of medical judgment regarding interferon treatment for hepatitis C); *Johnson v. Wright*, 412 F.3d 398, 404-06 (2d Cir. 2005) (blanket policy preventing the use of rebetron therapy to treat hepatitis C). Only Wisconsin has codified what has been recognized as cruel and unusual punishment into a state statute.

Thus, there is no split in the circuits on whether a statute creating a blanket exclusion of medically necessary care for inmates with a serious condition can be constitutional.

B. The State Can No More Bar Medically Necessary Treatment For Mental Health Conditions Than It Can For Physical Conditions.

Petitioners attempt to diminish the significance and potential severity of "psychological conditions," such as GID, by contrasting those with lethal cancers. Pet. at 14. Petitioner cites no authority for such a distinction, and any suggestion that the Eighth Amendment tolerates disregard of an

inmate's mental condition should have met its death-knell in this Court's decision last term in *Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding a prisoner release mandate based on the constitutional violations suffered by both prisoners with mental illness and prisoners with physical medical conditions). Indeed, psychological conditions long have been considered "serious medical needs," *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983); *see also Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991); *White v. Farrie*r, 849 F.2d 322, 325 (8th Cir. 1988), and inadequate or ineffective psychiatric care may constitute deliberate indifference to such needs. *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004); *Steele v. Shah*, 87 F.3d 1266, 1269 (11th Cir. 1996) ("[T]he quality of psychiatric care one receives can be so substantial a deviation from accepted standards as to evidence deliberate indifference to those serious psychiatric needs."); *Dolihite v. Maughon*, 74 F.3d 1027, 1042-43 (11th Cir. 1996); *Smith v. Jenkins*, 919 F.2d 90, 92-93 (8th Cir. 1990); *Langley v. Coughlin*, 888 F.2d 252, 254 (2d Cir. 1989).

Petitioners' attempt to downplay the significance of psychological needs is apparently in service of their blithe assertion, with no citation to the record, that "psychological treatments such as psychotherapy, antipsychotics and anti-depressants are appropriate and work to reduce the risk of self-harm" for people with GID. Pet. at 11. That assertion was specifically rejected by the court of appeals, which cited trial testimony that, "for certain patients with GID, hormone therapy is the only treatment that reduces dysphoria and can prevent

the severe emotional and physical harms associated with it." *Fields,* 653 F.3d at 556 [R.App. 12a].

By reaffirming that GID is a serious medical need and holding that a state cannot categorically preclude a treatment that in some cases is the only means to prevent harm to an inmate, the decision below was both correct and consistent with the approach taken by other circuits.

II. Certiorari Is Not Warranted To Review The Scope Of The Injunction.

Certiorari is not warranted to review the scope of the injunction, both because Petitioners waived their objections to the scope of the injunction and because the courts below narrowly tailored the relief granted to fit the constitutional violation.

A. The State Waived Its Objections To The Scope Of The Injunction.

The record supports the court of appeals' finding that Petitioners had admitted the injunction entered by the district court complied with the "need-narrowness-intrusiveness" requirement of the Prison Litigation Reform Act, 18 U.S.C. § 3626(a). *Fields*, 653 F.3d at 558 [R.App. 18a]. Defendants agreed that "the *substance* of the Order as tendered, is as narrow as is required and should be entered," even though they did "not believe that any relief should be give[n] to the Plaintiffs . . . ." [App. A124-125] (emphasis added). Following that concession, the district court again asked the Petitioners whether the order was "as narrow[ ] as is warranted under the circumstances," [A125], and again the Petitioners agreed that it was. *Id.* Even though the district judge specified that he was asking about the

substance of the order, the State seeks to explain away its response as a concession only as to the *form* of the Order. Pet. at 7.

In any event, responding only that "Plaintiffs are not entitled to any relief and that the Court . . . incorrectly decided the matter" without specifying its objections to the breadth of the injunction was insufficient to avoid waiver. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (preserving an issue for appeal "requires that the lower court be fairly put on notice as to the substance of the issue."); *In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003) (objection to injunction's breadth waived by failing "to suggest alternative language either in the district court or in this court," since "arguments made but not developed do not preserve issues for appellate review."); *Keenan v. City of Phila.*, 983 F.2d 459, 471 (3d Cir. 1992) (to prevent waiver, a party must "present[ ] the argument with sufficient specificity to alert the district court."). Petitioners' general objection to *any* relief being granted was insufficient to put the district court on notice of their objection that the injunction's inclusion of Act 105's surgical ban rendered it overly broad.

Other circuit courts have found that a party's objections to the scope of an injunction will be waived if not raised before the district court. *Celsis in Vitro, Inc. v. Cellzdirect, Inc.*, 664 F.3d 922, __, 2012 WL 34381, at *8 (Fed. Cir. 2012); *Barrientos v. 1801-1825 Morton LLC*, 583 F. 3d 1197, 1215-1216 (9th Cir. 2009); *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 883 (9th Cir. 2003); *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 679-680 (1st Cir. 1998); *People v. Terry*, 45 F.3d 17,

24 (2d Cir. 1995); *Grand Lodge, Frat. Order of Police v. Labor Council Michigan Frat. Order of Police, Inc.*, 38 F.3d 1215, 1994 WL 589569, at *4 (6th Cir. 1994) (unpublished); *U.S. v. Zenon* 711 F.2d 476, 478 (1st Cir. 1983) (Breyer, J.).

Here, the Petitioners did not simply *fail to object* to the scope of the injunction entered by the district court; they *admitted* that the injunction was narrowly tailored. *See Fields*, 653 F.3d at 558 [R.App. 18a] ("the record establishes an admission, not a waiver"). If Petitioners believed that the district court's ruling on the merits did not justify a particular component of the relief provided by the injunction, then they should have spoken up when queried about the injunction's scope. As they failed to do so, the court of appeals properly found the issue waived.

B. The Scope Of The Injunction Affirmed By The Seventh Circuit Is Consistent With The Rulings Of This Court.

Petitioners argue that the Seventh Circuit's decision "is in conflict with relevant decisions of this Court" (Pet. at 9) but cite only one decision: *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006), a case with which the Seventh Circuit's decision is in accord. The injunction entered here struck down so much, and only so much, of Act 105 as violated the Constitution. As explained above, the core constitutional problem with Act 105 was that it prevented prison doctors from exercising individualized medical judgment regarding treatment for an inmate with GID by prohibiting them from prescribing hormone therapy or sex

reassignment surgery. The ban on both kinds of medical care suffers from the same constitutional defect and warrants the same constitutional remedy. The injunction appropriately covered both hormone therapy and surgery, since Act 105 injured Respondents and other inmates with GID both by threatening them with the loss of the hormone therapy treatment they were already receiving and by preventing them from being evaluated for or treated with sex reassignment surgery. *Fields*, 653 F.3d. at 559 [R.App. 20a-22a] ("[T]he constitutional violation stemmed from removing even the consideration of hormones and surgery"; evaluations for these treatments "would be futile in light of Act 105's ban on the treatment.")(internal citations and quotations omitted).[5]

Like other medical conditions, GID involves a course of treatment that differs depending on the severity of the condition. Persons living with coronary heart disease, for example, may be prescribed blood pressure and cholesterol medication before they are advised to undergo angioplasty or coronary artery bypass grafting, and will usually be evaluated for such more serious interventions where other treatments have been unsuccessful. Similarly, surgery is typically prescribed only where hormone therapy alone has been unsuccessful at treating GID. [R.202: 270-71] (sex reassignment surgery is "the last resort after everything else has been tried."). GID's

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[5] Although DOC had a policy against providing sex reassignment surgery prior to the enactment of Act 105, it had the discretion to override that policy in order to provide the treatment where prison doctors concluded it was medically necessary. [R.236: Ex. 612; R.236: Ex. 14].

severity appears to increase over the life span of an individual. [R.200: 24].

While incarcerated, inmates do not dictate their own course of GID treatment; prison doctors do. *Fields*, 712 F. Supp. 2d at 864 [App. A106]. And since, as a result of Act 105, DOC medical personnel were not even evaluating inmates with GID for surgery, *id.* at 865 [A107], much less providing it, no doctor had evaluated whether surgery was medically necessary to treat any of the Respondents' severe GID, and no Respondent had been given the information a doctor must provide before a patient can refuse medical treatment that may be medically necessary for her.[6] *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition."); *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) ("[O]ne does not have to await the consummation of threatened injury to obtain preventive relief.") (quoting *Pennsylvania v. West Virginia,* 262 U.S. 553, 593 (1923)).

"The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees

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[6] Informed consent requires that:

> [a] physician who proposes to treat a patient or attempt to diagnose a medical problem must make such disclosures as will enable a reasonable person under the circumstances confronting the patient to exercise the patient's right to consent to, or to refuse the procedure proposed or to request an alternative treatment or method of diagnosis.

Martin v. Richards, 192 Wis. 2d 156, 176 (Wis. 1995).

must directly address and relate to the constitutional violation itself." *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977).

> [F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . . But where . . . a constitutional violation has been found, the remedy does not exceed the violation if the remedy is tailored to cure the condition that offends the constitution.

Id. at 282 (inner quotations and citations omitted).[7]

In *Estelle*, this Court recognized that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." 429 U.S. at 104 (internal citations omitted). Such indifference can be shown by intentional denials of treatment, interference with already prescribed treatment, or prison doctors' choices to provide "easier and less efficacious treatment," evidencing the failure to exercise individualized medical judgment regarding the treatment. *Id.* at 104-05 & n. 10. The court of appeals and district court had before them a robust

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[7] The PLRA did not substantially change the existing requirements for litigated injunctions. *See Fields*, 653 F.3d at 558, citing *Gomez v. Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001); *Smith v. Arkansas Dep't of Corr.*, 103 F.3d 637, 647 (8th Cir. 1996); *Williams v. Edwards*, 87 F.3d 126, 133 n. 21 (5th Cir. 1996).

factual record that included expert testimony showing the medical necessity of hormone therapy and surgery for some persons with GID, the serious harm caused by denying such treatment to those who need it, and the inadequacy of other measures to treat GID. Based on this and other evidence, the court of appeals correctly concluded that Act 105's absolute ban on hormone therapy and surgery violated the Eighth Amendment by denying "effective treatment for a serious medical condition." *Fields*, 653 F.3d at 556 [R.App. 14a].

CONCLUSION

For the reasons discussed above, the petition for certiorari should be denied.

Respectfully submitted,

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United States Court of Appeals
for the Seventh Circuit

ANDREA FIELDS, et al., Nos. 10–2339 and 10–2466

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
Chief Judge Charles N. Clevert, Jr., Presiding

Argued: Feb. 7, 2011.
Decided: Aug. 5, 2011.

Before ROVNER and WOOD,
Circuit Judges
and GOTTSCHALL,
District Judge.

The Honorable Joan B. Gottschall, United States District Judge

Opinion for the court by *District Judge* GOTTSCHALL.

COUNSEL

JOHN A KNIGHT, Roger Baldwin Foundation of ACLU, Inc., of Chicago, Illinois, argued for plaintiffs-appellees.

ABIGAIL C.S. POTTS, Office of the Attorney General, Wisconsin Department of Justice, Madison, Wisconsin, argued for defendants-appellants. With her on the brief was J.B. VAN HOLLEN of Madison, Wisconsin.

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for the Northern District of Illinois, sitting by designation.

OPINION

GOTTSCHALL, *District Judge*.

In this appeal, we are asked to review the decision of the district court invalidating a Wisconsin state statute which prohibits the Wisconsin Department of Corrections ("DOC") from providing transgender inmates with certain medical treatments.[1] The Inmate Sex Change Prevention Act ("Act 105") provides in relevant part:

> (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 [Wisconsin Department of Corrections] may not authorize the payment of any funds or the use of any resources of this state or the payment of any

[1] A group of medical and mental health professionals sought leave from the court to submit a brief as *amici curiae*. The motion is granted.

> federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery....

2005 Wis. Act 105, codified at Wis. Stat. § 302.386(5m) (2010). The district court concluded that this provision violates the Eighth Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's Equal Protection Clause. Defendants, various DOC officials, now appeal.

I

A number of DOC inmates filed this lawsuit as a putative class action in the Eastern District of Wisconsin on behalf of all current and future DOC inmates with "strong, persistent cross-gender identification." The district court denied plaintiffs' motion for class certification, but permitted the case to proceed to trial on the individual claims of three plaintiffs.

The three plaintiffs—Andrea Fields, Matthew Davison (also known as Jessica Davison), and Vankemah Moaton—are male-to-female transsexuals. According to stipulated facts, each has been diagnosed with Gender Identity Disorder ("GID"). GID is classified as a psychiatric disorder in the DSM–IV–TR, the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Individuals with GID identify strongly with a gender that does not match

their physical sex characteristics. The condition is associated with severe psychological distress. Prior to the passage of Act 105, each of the plaintiffs had been diagnosed by DOC physicians with GID and had been prescribed hormones.

After a trial in which both sides presented expert testimony about GID, its treatment, and its potential effects on prison security, the district court ruled in favor of plaintiffs. The court ruled that Act 105 was unconstitutional, both as applied and on its face, under the Eighth and Fourteenth Amendments. The district court ultimately issued an injunction barring defendants from enforcing Act 105. We need not recount all the evidence presented at trial—the district court's 40–page opinion thoroughly describes the trial testimony, *see Fields v. Smith,* 712 F.Supp.2d 830 (E.D.Wis.2010)—but a brief review of the district court's critical factual findings is warranted.

The district court credited much of the testimony from plaintiffs' witnesses, including three experts in the treatment of GID. Plaintiffs' experts testified that, collectively, they had treated thousands of patients with GID and published numerous peer-reviewed articles and books on the subject. One expert had specifically studied transsexuals in the correctional setting. These experts explained that GID can cause an acute sense that a person's body does not match his or her gender identity. Even

before seeking treatment and from an early age, patients will experience this dysphoria and may attempt to conform their appearance and behavior to the gender with which they identify.

The feelings of dysphoria can vary in intensity. Some patients are able to manage the discomfort, while others become unable to function without taking steps to correct the disorder. A person with GID often experiences severe anxiety, depression, and other psychological disorders. Those with GID may attempt to commit suicide or to mutilate their own genitals.

The accepted standards of care dictate a gradual approach to treatment beginning with psychotherapy and real life experience living as the opposite gender. For some number of patients, this treatment will be effective in controlling feelings of dysphoria. When the condition is more severe, a doctor can prescribe hormones, which have the effect of relieving the psychological distress. Hormones also have physical effects on the body. For example, males may experience breast development, relocation of body fat, and softening of the skin. In the most severe cases, sexual reassignment surgery may be appropriate. But often the use of hormones will be sufficient to control the disorder.

When hormones are withdrawn from a patient who has been receiving hormone treatment, severe complications may arise. The dysphoria and

associated psychological symptoms may resurface in more acute form. In addition, there may be severe physical effects such as muscle wasting, high blood pressure, and neurological complications. All three plaintiffs in this case experienced some of these effects when DOC doctors discontinued their treatment following the passage of Act 105.[2]

Plaintiffs also called Dr. David Burnett, the DOC's Medical Director, and Dr. Kevin Kallas, the DOC Mental Health Director, to testify at trial. These officials explained that, prior to the enactment of Act 105, hormone therapy had been prescribed to some DOC inmates, including plaintiffs. DOC policies did not permit inmates to receive sex reassignment surgery. Drs. Kallas and Burnett served on a committee of DOC officials that evaluated whether hormone therapy was medically necessary for any particular inmate. Inmates are not permitted to seek any medical treatment outside the prison, regardless of their ability to pay. The doctors testified that they could think of no other state law or policy, besides Act 105, that prohibits prison

[2] Defendants began reducing plaintiffs' hormone levels on January 12, 2006; on January 27, 2006, the district court granted a preliminary injunction barring defendants from continuing to withdraw plaintiffs' hormone therapy and ordering defendants to return plaintiffs to their previous hormone levels.

doctors from providing inmates with medically necessary treatment.

II

We evaluate both the district court's grant of injunctive relief and the scope of that relief for abuse of discretion. *Knapp v. Nw. Univ.,* 101 F.3d 473, 478 (7th Cir.1996); *see Brown v. Plata,* —— U.S. ——, 131 S.Ct. 1910, 1957, 179 L.Ed.2d 969 (2011) (Scalia, J., dissenting) (noting that under the Prison Litigation Reform Act ("PLRA"), "when a district court enters a new decree with new benchmarks, the selection of those benchmarks is ... reviewed under a deferential, abuse-of-discretion standard of review"); *Russian Media Group, LLC v. Cable Am., Inc.,* 598 F.3d 302, 307 (7th Cir.2010) ("[T]he appropriate scope of the injunction is left to the district court's sound discretion."); *Thomas v. Bryant,* 614 F.3d 1288, 1321 (11th Cir.2010) (applying abuse of discretion standard to evaluate scope of injunction in conformity with PLRA); *Crawford v. Clarke,* 578 F.3d 39, 43 (1st Cir.2009) (holding that district court did not abuse its discretion in awarding system-wide relief under the PLRA). The court's factual findings are reviewed for clear error, and any legal determinations are reviewed de novo. *Knapp,* 101 F.3d at 478.

"Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment

when they display 'deliberate indifference to serious medical needs of prisoners.' " *Greeno v. Daley,* 414 F.3d 645, 652–53 (7th Cir.2005) (quoting *Estelle v. Gamble,* 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). In this case, the district court held that plaintiffs suffered from a serious medical need, namely GID, and that defendants acted with deliberate indifference in that defendants knew of the serious medical need but refused to provide hormone therapy because of Act 105. Defendants do not challenge the district court's holding that GID is a serious medical condition. They contend that Act 105 is constitutional because the state legislature has the power to prohibit certain medical treatments when other treatment options are available. And defendants argue that Act 105 is justified by a legitimate need to ensure security in state prisons.

Defendants rely primarily on two Seventh Circuit decisions which addressed constitutional challenges to refusals to provide treatment for gender dysphoria or transsexualism. Over twenty-four years ago, in *Meriwether v. Faulkner,* 821 F.2d 408 (7th Cir.1987), this court reversed the dismissal of a complaint which alleged that the plaintiff, who had previously been taking hormones, was denied all treatment for her gender dysphoria upon entering prison. The court held that the plaintiff stated a claim that transsexualism was a serious medical need and that prison officials acted with deliberate indifference in refusing all treatment. The court noted in dicta that

"[i]t is important to emphasize, however, that she does not have a right to any particular type of treatment, such as estrogen therapy which appears to be the focus of her complaint." *Id.* at 413.

Ten years later, in *Maggert v. Hanks,* 131 F.3d 670 (7th Cir.1997), this court, in two brief paragraphs, upheld a decision granting summary judgment on a similar deliberate indifference claim where the plaintiff did not come forward with any evidence to rebut defendants' expert witness, who testified that plaintiff did not suffer from gender dysphoria. The court's opinion proceeded to address "a broader issue, having to do with the significance of gender dysphoria in prisoners' civil rights litigation." *Id.* at 671. The court commented, again in dicta, that the Eighth Amendment does not require the provision of "esoteric" treatments like hormone therapy and sexual reassignment surgery which are "protracted and expensive" and not generally available to those who are not affluent. *Id.* at 671–72. A prison would be required to provide some treatment for gender dysphoria, but not necessarily "curative" treatment because the Eighth Amendment requires only minimum health care for prison inmates. *Id.* at 672.

The court's discussion of hormone therapy and sex reassignment surgery in these two cases was based on certain empirical assumptions—that the cost of these treatments is high and that adequate

alternatives exist. More than a decade after this court's decision in *Maggert*, the district court in this case held a trial in which these empirical assumptions were put to the test. At trial, defendants stipulated that the cost of providing hormone therapy is between $300 and $1,000 per inmate per year. The district court compared this cost to the cost of a common antipsychotic drug used to treat many DOC inmates. In 2004, DOC paid a total of $2,300 for hormones for two inmates. That same year, DOC paid $2.5 million to provide inmates with quetiapine, an antipsychotic drug which costs more than $2,500 per inmate per year. Sex reassignment surgery is significantly more expensive, costing approximately $20,000. However, other significant surgeries may be more expensive. In 2005, DOC paid $37,244 for one coronary bypass surgery and $32,897 for one kidney transplant surgery. The district court concluded that DOC might actually incur greater costs by refusing to provide hormones, since inmates with GID might require other expensive treatments or enhanced monitoring by prison security.[3] *Fields,* 712 F.Supp.2d at 863. In fact, at oral argument before this court, counsel for defendants disclaimed any argument that

[3] Plaintiff Moaton, for example, experienced suicidal ideation after DOC officials began withdrawing hormone treatments. *Fields*, 712 F.Supp.2d at 835.

Act 105 is justified by cost savings. *See* Oral Argument at 15:18, *Field v. Smith,* Nos. 10–2339 and 10–2466, *available at* http:// www. ca 7. uscourts. gov/ fdocs/ docs. fwx? dname= arg.

More importantly here, defendants did not produce any evidence that another treatment could be an adequate replacement for hormone therapy. Plaintiffs' witnesses repeatedly made the point that, for certain patients with GID, hormone therapy is the only treatment that reduces dysphoria and can prevent the severe emotional and physical harms associated with it. Although DOC can provide psychotherapy as well as antipsychotics and antidepressants, defendants failed to present evidence rebutting the testimony that these treatments do nothing to treat the underlying disorder. Defendants called their own expert to speak about GID: Dr. Daniel Claiborn, a Ph.D. in psychology who estimated he has treated only about fifty clients with GID over a period of twenty years in his private practice. Dr. Claiborn provided no testimony about the appropriate treatment for plaintiffs. He offered his opinion that GID is not properly characterized as a psychological disorder because a person with GID does not typically suffer from an impairment in psychological functions. However, defendants have now conceded that GID is a serious medical condition. Dr. Claiborn's testimony does not support the assertion that plaintiffs can be effectively treated without hormones.

It is well established that the Constitution's ban on cruel and unusual punishment does not permit a state to deny effective treatment for the serious medical needs of prisoners. The Supreme Court articulated this principle in *Estelle v. Gamble:*

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.... We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," proscribed by the Eighth Amendment.

429 U.S. at 103–04, 97 S.Ct. 285 (citations omitted). Surely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture. *Id.*; *see also Roe v. Elyea,* 631 F.3d 843, 861–63 (7th Cir.2011) (upholding verdict for plaintiff that prison policy on treatment of Hepatitis C was deliberately

indifferent); *Kelley v. McGinnis,* 899 F.2d 612, 616 (7th Cir.1990) (reversing dismissal of complaint alleging that prison provided inadequate treatment for inmate's chronic foot problems). Although Act 105 permits DOC to provide plaintiffs with *some* treatment, the evidence at trial indicated that plaintiffs could not be effectively treated without hormones.

Defendants point to the Supreme Court's decision in *Gonzales v. Carhart*, 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007), for the proposition that a legislature may constitutionally limit the discretion of physicians by outlawing a particular medical procedure. In *Carhart,* the Court upheld the constitutionality of the Partial–Birth Abortion Ban Act of 2003 which outlawed a particular procedure used to perform late-term abortions. The Court noted the existence of "medical uncertainty" regarding whether the banned procedure was more dangerous than alternative procedures. *Id.* at 163–64, 127 S.Ct. 1610. Because safe abortion alternatives to the prohibited procedure appeared to exist, the court turned away the facial challenge to the law. *Id.* at 164, 127 S.Ct. 1610.

Carhart is not helpful to defendants in this case because they did not present any medical evidence that alternative treatments for GID are effective. As defendants point out, some medical uncertainty remains as to the causes of GID, but there was no

evidence of uncertainty about the efficacy of hormone therapy as a treatment. Just as the legislature cannot outlaw all effective cancer treatments for prison inmates, it cannot outlaw the only effective treatment for a serious condition like GID.

Defendants argue that even if application of Act 105 to plaintiffs violates the Eighth Amendment, the district court erred in sustaining a facial challenge to the law. Act 105 bans treatment to all prisoners, even those for whom hormones and surgery are not medically necessary. A facial challenge to the constitutionality of a law can succeed only where plaintiffs can " 'establish that no set of circumstances exists under which the Act would be valid.' " *Doe v. Heck,* 327 F.3d 492, 528 (7th Cir.2003) (quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). Nonetheless, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 894, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). The district court, in this case, found that DOC doctors prescribe hormones only when the treatment is medically necessary. *Fields,* 712 F.Supp.2d at 866. Thus, the court correctly concluded that Act 105 is irrelevant to inmates who are not diagnosed with severe GID and in medical need of hormones, and any application of Act 105 would necessarily violate the Eighth Amendment.

Defendants have also argued that Act 105 is justified by the state's interest in preserving prison security. Defendants' security expert, Eugene Atherton, testified that more feminine male inmates become targets for sexual assault in prisons. Because hormone therapy alters a person's secondary sex characteristics such as breast size and body hair, defendants argue that hormones feminize inmates and make them more susceptible to inciting prison violence. But the district court rejected this argument, noting that the evidence showed transgender inmates may be targets for violence even without hormones. Atherton himself, in his deposition, testified that it would be "an incredible stretch" to conclude that banning the use of hormones could prevent sexual assaults. *Id.* at 868. In the Colorado Department of Corrections, where Atherton worked for many years, the state had a policy of providing necessary hormones to inmates with GID. Atherton testified that this policy was reasonable and had been implemented effectively in Colorado.

Defendants cite *Whitley v. Albers* for the proposition that " '[p]rison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " 475 U.S. 312, 321–22, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) (quoting *Bell v. Wolfish,* 441 U.S. 520, 547, 99

S.Ct. 1861, 60 L.Ed.2d 447 (1979)). But deference does not extend to "actions taken in bad faith and for no legitimate purpose." *Id.* at 322, 106 S.Ct. 1078. The district court did not abuse its discretion in concluding that defendants' evidence failed to establish any security benefits associated with a ban on hormone therapy. The legislators who approved Act 105 may have honestly believed they were improving prison security, but courts "retain[ ] an independent constitutional duty to review factual findings where constitutional rights are at stake." *Carhart,* 550 U.S. at 165, 127 S.Ct. 1610.

Finally, defendants contend that the district court's injunction violates the PLRA, 18 U.S.C. § 3626(a), because it enjoins Act 105 in its entirety.[4] They argue that plaintiffs have never demonstrated

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[4] The PLRA provides, in part:

> Prospective relief in any civil action with respect to prison conditions shall 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 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)(1)(A).

a need for sex reassignment surgery, which the law also prohibits. For their part, plaintiffs argue that defendants waived this argument by failing to raise it before the district court. In fact, the record establishes an admission, not a waiver. On June 9, 2010 plaintiffs requested that the district court supplement its findings relating to the PLRA's so-called "need-narrowness-intrusiveness" standard. At a subsequent 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.) As a practical matter, then, defendants are precluded from making this argument now.

Regardless, the district court's orders establish that the court evaluated the record as a whole and identified evidence that fully supports the scope of the injunctive relief granted. *See Armstrong v. Schwarzenegger,* 622 F.3d 1058, 1070 (9th Cir.2010) ("[T]he language of the PLRA does not suggest that Congress intended a provision-by-provision explanation of a district court's findings.... [T]he statutory language [means] that the courts must do what they have always done when determining the appropriateness of the relief ordered: consider the order as a whole."); *Gomez v. Vernon,* 255 F.3d 1118, 1129 (9th Cir.2001) (the PLRA "has not substantially changed the threshold findings and standards required to justify an injunction"); *Smith v. Ark.*

Dep't of Corr., 103 F.3d 637, 647 (8th Cir.1996) (same); *Williams v. Edwards,* 87 F.3d 126, 133 n. 21 (5th Cir.1996) (same). In the district court's May 13, 2010 memorandum order, the court expressly addressed both hormone therapy and sex reassignment surgery. There, the court stated that:

> The defendants acknowledge that Act 105 removes even the consideration of hormones or surgery for inmates with gender issues and that the DOC halted evaluations of inmates with GID for possible administration of hormone therapy because of the Act. However, in determining whether a facial challenge to Act 105 may succeed here, the defendants submit that the court must take into account all inmates in DOC custody for whom hormone therapy or sexual reassignment surgery would be considered as treatment for gender issues. If that is done, they maintain that there are circumstances where Act 105 may be applied without violating the Constitution, and that, as a result, the plaintiffs' facial challenge to the law must fail. Unfortunately, the defendants do not support this point.
>
> ....
>
> In certain cases, as with the plaintiffs in this case, the effect of Act 105 is to withdraw an ongoing course of treatment, the result of which has negative medical consequences. In other cases, the effect of Act 105 is to prevent DOC medical

personnel from evaluating inmates for treatment because such evaluation would be futile in light of Act 105's ban on the treatment they may determine to be medically necessary for the health of the inmate.

....

In this case, Act 105 bars 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," as well as sexual reassignment surgery "to alter a person's physical appearance so that the person appears more like the opposite gender." Wis. Stat. § 302.386(5m)(a). The statute applies irrespective of an inmate's serious medical need or the DOC's clinical judgment if at the outset of treatment, it is possible that the inmate will develop the sexual characteristics of the opposite gender. The reach of this statute is sweeping inasmuch as it is applicable to any inmate who is now in the custody of the DOC or may at any time be in the custody of the DOC, as well as any medical professional who may consider hormone therapy or gender reassignment as necessary treatment for an inmate.

Fields, 712 F.Supp.2d at 865–67. The district court's June 22, 2010 "additional findings" further support its conclusion that the statute is facially

invalid. There, the court found that the injunction was "narrowly tailored in that enjoining the enforcement of [Act 105] prohibits only unconstitutional applications of the statute[,] which this court has found to be unconstitutional any time it is applied," and the injunction extended no further than necessary to correct the Eighth Amendment violation because "enjoining all applications of [Act 105] is necessary to prevent constitutional violations." The district court also specifically referenced its prior finding that the constitutional violation stemmed from "removing 'even the consideration of hormones or surgery.' " (*See* App. 174–75.) We agree. Evaluating the record as a whole, the district court did not abuse its discretion in enjoining the entirety of Act 105.

Having determined that the district court properly held that Act 105 violates the Eighth Amendment, both on its face and as applied to plaintiffs, we need not address the district court's alternate holding that the law violates the Equal Protection Clause. Plaintiffs have asserted a conditional cross-appeal of the district court's denial of class certification. But because we have upheld the district court's injunction, we also do not address the cross-appeal.

III

The judgment of the district court is affirmed.

Chicago, I.L.
February 7. 2011

Joan B. Gottschall
U.S.D.J.