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

ANDREA FIELDS,
MATTHEW DAVISON, and
VANKEMAH MOATON,

Plaintiffs,

v. Case No. 06-C-0112

MATTHEW J. FRANK, et al.,

Defendants.

DEFENDANTS' TRIAL BRIEF

The defendants by their attorneys, J.B. Van Hollen, Attorney General, and Jody J. Schmelzer, Assistant Attorney General, hereby submit this trial brief to clarify the applicable law in this case.

I. THE EIGHTH AMENDMENT FACIAL CHALLENGE TO ACT 105.

As acknowledged by the court, to succeed on a facial challenge to Act 105, the plaintiffs must establish that no set of circumstances exists under which the Act would be valid. Order, 10-15-07, Docket No. 175, p. 33; *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court emphasized that "[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." *Id.* at 894. The plaintiffs' argue that the only relevant applications of the law are those in which a DOC doctor as determined hormones or surgery to be medically necessary

for an inmate. (Pl. Resp. Brief, Docket No. 138, pp. 6-7). However, this argument improperly narrows the controlling class to the point where the facial and as-applied challenges become one-in-the same. Under the majority holding in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), this type of narrowing of the controlling class was expressly rejected.

In *Gonzalez*, the Court held that Partial Birth Abortion Act of 2003 "applies to all instances in which the doctor *proposes to use* the prohibited procedure, not merely those in which the woman suffers from medical complications." *Id.* at 1639 (emphasis added). In Justice Ginsberg's dissent in *Gonzalez*, she defined a slightly different class--one composed of women whose doctors have concluded that the procedure was medically necessary:

> *Casey* makes clear that, in determining whether any restriction poses an undue burden on a "large fraction" of women, the relevant class is *not* all women, nor "all pregnant women," nor even all women "seeking abortions". . . . Rather, a provision restricting access to abortion, "must be judged by reference to those [women] for whom it is an actual rather than an irrelevant restriction" . . . . Thus the absence of a health exception [in the challenged statute] burdens *all* women for whom it is relevant—women who, in the judgment of their doctors, require an intact D & E because other procedures would place their health at risk.

Id. at 1651 (citations omitted). The majority in *Gonzalez*, though, clearly did not adopted Justice Ginsberg's narrowed class in upholding the law's facial validity.

Just as in *Gonzalez*, the plaintiffs seek to define the controlling class under Act 105 to just those inmates in which DOC medical staff have determined have a medical need for the prohibited treatments. However, just as in *Gonzalez*, this is too narrow a definition for those affected by Act 105. Act 105 removes *even the consideration of* hormones or surgery for inmates with gender issues. It is undisputed that DOC halted evaluations of inmates with GID for hormones because of the Act (Stip. FOF ¶ 52). Whether it is ultimately determined by DOC personnel that they have a medical need for hormones or not, the Act undisputedly affects them.

The proper class definition should include inmates for whom hormone therapy and/or surgery would be considered as treatment for gender issues. This definition is consistent with the majority's holding in *Gonzalez*, and also with the plaintiffs' prior motion for class certification in this case in which they proposed a class consisting of:

> prisoners … who are transgender, including those who have been diagnosed with Gender Identity Disorder and those who have a strong persistent cross-gender identification and either a persistent discomfort with their sex or a sense of inappropriateness in the gender role of that sex.

(Pl. Brief, Docket No. 36, p. 1); *see also, City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who *may also be* adversely impacted by the statute in question.") (Emphasis added).

In this case, there is no dispute that not all individuals with GID want or qualify for hormones and/or reassignment surgery. Therefore, the evidence will show that Act 105 is not unconstitutional in all circumstances where Act 105 would be applied, and a facial challenge must fail.

II. THE EIGHTH AMENDMENT AS-APPLIED CHALLENGE TO ACT 105.

The Eighth Amendment forbids cruel and unusual punishment; it does not require the most intelligent, progressive, humane, or efficacious prison administration. *Oliver v. Deen,* 77 F.3d 156, 161 (7th Cir. 1996). The Constitution "does not mandate comfortable prisons," *Rhodes v. Chapman,* 452 U.S. 337, 349 (1981), but neither does it permit inhumane ones. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). It is well established that prisoners have a right to receive adequate medical care. *Estelle v. Gamble,* 429 U.S. 97 (1976). There can be little doubt that this right encompasses a right to receive mental health treatment. *Jones 'El v. Berge,* 164 F. Supp.2d 1096 (W.D. Wis. 2001) (citing *Meriwether v. Faulkner,* 821 F.2d 408, 413 (7th Cir.1987);

Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir.1983)). *But see Lewis v. Sullivan,* 279 F.3d 526, 529 (7th Cir. 2002) (prisoners "do not have a *fundamental* right to psychiatric care at public expense") (dicta) (emphasis in original).

A prison inmate's dissatisfaction with the adequacy of medical treatment actually received, though, does not state a claim under 42 U.S.C. § 1983. Courts will not attempt to second-guess licensed physicians as to the propriety of a particular course of medical treatment for a given prisoner-patient. *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir. 1974), *vacated on other grounds sub nom Cannon v. Thomas,* 419 U.S. 813 (1974) (a difference of opinion does not raise a material issue of fact). A difference of opinion between physician and patient concerning the adequacy of medical treatment actually provided does not rise to a claim under § 1983. *Davis v. Schmidt*, 57 F.R.D. 37, 41 (W.D. Wis. 1972). Where medical experts disagree, a prison official does not act indifferently by following the advice of one of the experts. *Thomas,* 493 F.2d at 158; *Jorden v. Farrier,* 788 F.2d 1347 (8th Cir. 1986) (states in dicta that following the advice of one treating medical official over another does not raise a constitutional claim); *see also United States v. Rovetuso*, 768 F.2d 809, 825 (7th Cir. 1985), *cert. denied,* 474 U.S. 1076 (1986) (a prisoner has no right to a doctor of his own choice).

Indeed, courts have specifically held that transsexual inmates have no constitutional right to any particular type of treatment, including hormone therapy. *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986); *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kansas 1986); *White v. Farrier*, 849 F.2d 322, 327 (recognizing other courts' holdings that inmates are not constitutionally entitled to hormone therapy); *Tiller v. Owens*, 719 F. Supp. 1256, 1308 (W.D. Penn. 1989); *Long v. Nix*, 877 F. Supp. 1358 (S.D. Iowa

1995). Moreover, the controlling case in the Seventh Circuit further supports Act 105 and limiting the availability of specific forms of treatment for inmates with GID.

In *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997), a prisoner sought estrogen therapy under the Eighth Amendment for his gender dysphoria. The court affirmed dismissal of the case, holding that:

> except in special circumstances that we do not at present foresee, the Eighth Amendment does not entitle a prison inmate to curative treatment for his gender dysphoria.

Id. at 672. In so holding, the court reasoned that:

> A prison is not required by the Eighth Amendment to give a prisoner medical care that is as good as he would receive if he were a free person, let alone an affluent free person. (Citation omitted). He is entitled only to minimum care.

Id. at 671. The court went on to state:

> Gender dysphoria is not, at least not yet, generally considered a severe enough condition to warrant expensive treatment at the expense of others than the person suffering from it. That being so, making the treatment a constitutional duty of prisons would give prisoners a degree of medical care that they could not obtain if they obeyed the law.

Id. at 672.

The evidence in this case will clearly show that, under the holding in *Maggert*, Act 105 does not violate the Eighth Amendment by preventing specific forms of "curative treatment" for gender dysphoria.

III. THE FOURTEENTH AMENDMENT EQUAL PROTECTION CHALLENGES TO ACT 105.

The plaintiffs assert that Act 105 violated the Fourteenth Amendment equal protection clause both on its fact and as applied to these three inmates. It is important to note the difference between a facial and as-applied equal protection challenge.

In cases where the particular law or policy is fair on its face, but is applied in a way that treats similarly situated individuals differently, the equal protection clause requires plaintiffs to allege and prove the presence of an unlawful intent to discriminate against the plaintiff for an invalid reason. *Hamlyn v. Rock Island County Metropolitan Mass Transit Dist.*, 986 F. Supp. 1126, 1133 -1134 (C.D. Ill. 1997), citing *Snowden v. Hughes,* 321 U.S. 1, 8 (1944). Thus, the unequal application of a law or policy is not enough. *Id.; see also Batra v. Bd. of Regents,* 79 F.3d 717, 721 (8th Cir.1 996). The goal of requiring intent is to protect the government from liability for mere negligence in the application of otherwise valid laws. Thus, in order to give rise to a constitutional grievance, a departure from the norm must be rooted in design and not derive merely from error or fallible judgment. *Hamlyn*, 986 F. Supp. at 1133, citing *Esmail v. Macrane,* 53 F.3d 176, 180 (7th Cir. 1995) (C.J. Posner) (refusal to renew liquor license actionable under equal protection clause if defendants' action "was a spiteful effort to 'get' [plaintiff] for reasons wholly unrelated to any legitimate state objective.").

Facial challenges to a law, however, are different. *Hamlyn*, 986 F. Supp. at 1133. When a law can be shown, on its face, to classify persons similarly situated for different treatment without any legitimate basis, rather than in its application or its impact, then the question of discriminatory intent is subsumed by the determination that the classification established by the terms of the challenged law or policy is, itself, discriminatory. *Id.* Presumably, the state actors designing a discriminatory classification, and then giving it the force of law, intended the resulting discrimination. *Id.* Thus,

> [a] classification within a law can be established ... "on its face." This means that the law by its own terms classifies persons for different treatment. In such a case there is no problem of proof and the court can proceed to test the validity of the classification by the appropriate standard.

J. Nowak and R. Rotunda, Constitutional Law § 14.4 (1992).

In other words, analysis of facial challenges alleging an improper classification involves only two steps: (1) plaintiff must first show that the challenged statute or policy, on its face, results in members of a certain group being treated differently from other persons based on membership in that group; and (2) if it is demonstrated that a cognizable class is treated differently, then the court must analyze under the appropriate level of scrutiny whether the distinction made between the groups is justified. *Hamlyn*, 986 F. Supp. at 1134, citing *Jones v. Helms,* 452 U.S. 412, 423-24 (1981)*Plyler v. Doe,* 457 U.S. 202, 217-18 (1982). The defense to a facial challenge is, therefore, not whether the defendants intended to discriminate *Id.* Rather, the defense is ultimately whether the classification established on the face of the law is rationally related to those legitimate government objectives.

As to the facial challenge of Act 105, the individual legislator's motives for introducing and/or voting for the law are irrelevant—if a law, on its face, results in transsexual inmates being treated differently than other inmates, we proceed directly to determining whether the Act survives rational basis scrutiny. Under the rational basis test, there is no constitutional violation if "any reasonably conceivable state of facts" would provide a rational basis for government action. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The burden is upon the challenging party to eliminate any "reasonably conceivable state of facts that could provide a rational basis for the classification." *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006). This basic formulation also applies to the plaintiffs' as-applied challenge. *Id.*

In this case, the evidence will support the obvious. Hormone therapy and/or reassignment surgery results in a more effeminate appearance, and the more effeminate a male inmate looks, the more likely he will be victimized in prison. By eliminating the availability of these

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feminizing procedures, Act 105 is rationally related to DOC's interests in protecting these inmates from harm and maintaining the safety and security of other inmates, staff and the institution. Thus, the plaintiffs' equal protection claim must fail.

CONCLUSION

The evidence will show that based upon the applicable law set forth in this brief, along with the law set forth by the Court in its decision on summary judgment and in the defendants' proposed conclusions of law, that the plaintiffs' are not entitled to injunctive or declaratory relief, and that Act 105 is constitutional both on its face and as applied to these three plaintiffs.

Dated at Madison, Wisconsin, this 19th day of October, 2007.

Respectfully submitted,

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