

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

CODY FLACK and
SARA ANN MAKENZIE,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF
HEALTH SERVICES and
LINDA SEEMEYER, in her official capacity
as Secretary of the Wisconsin Department of
Health Services,

Defendants.

Case No. 3:18-cv-00309-wmc
Judge William Conley

PLAINTIFFS' RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF

Plaintiffs Cody Flack and Sara Ann Makenzie ("Plaintiffs") submit this response to Defendants' Supplemental Brief Regarding Expanding the Preliminary Injunction to Apply to All Medicaid Beneficiaries [Dkt. No. 73] ("Supp. Br.").

In their brief, Defendants argue, *inter alia*, that "this Court lacks authority to expand [the preliminary injunction] beyond the named plaintiffs . . . because this case is not a class action." Supp. Br. at 2. Plaintiffs disagree with this argument and believe it is within the Court's remedial powers under the current posture of the case to enjoin the Challenged Exclusion—which, on its face, deprives all transgender Wisconsin Medicaid beneficiaries of nondiscriminatory access to medically necessary care and exposes them to attendant stigma, health harms, and other injuries. However, Plaintiffs are prepared to proceed with this case as a class action to avoid any dispute over the Court's authority to issue a broader injunction.

Accordingly, by separate motion filed concurrently with this response, Plaintiffs will seek this Court's leave to file an amended complaint raising class action allegations within 30

days. Plaintiffs anticipate filing a motion for class certification and renewed motion for a broader preliminary injunction fully enjoining the Challenged Exclusion shortly thereafter. Plaintiffs therefore request that the Court withhold any decision on a broader injunction of the Challenged Exclusion until such motions are filed.

Dated: August 29, 2018

Respectfully submitted,

/s/ Joseph J. Wardenski

Joseph J. Wardenski

Jennifer I. Klar

Orly T. May

RELMAN, DANE & COLFAX PLLC

1223 19th Street, NW, Suite 600

Washington, DC 20036

Telephone: (202) 728-1888

Facsimile: (202) 728-0848

jwardenski@relmanlaw.com

jklar@relmanlaw.com

omay@relmanlaw.com

Robert Theine Pledl

Mark A. Peterson

Daniel A. Peterson

MCNALLY PETERSON, S.C.

1233 North Mayfair Road, Suite 200

Milwaukee, WI 53226-3255

Telephone: (414) 257-3399

Facsimile: (414) 257-3223

rpled@mcpetelaw.com

mpeterson@mcpetelaw.com

dpeterson@mcpetelaw.com

Abigail Coursolle

Catherine McKee

NATIONAL HEALTH LAW PROGRAM

200 N. Greensboro Street, Suite D-13

Carrboro, NC 27510

Telephone: (919) 968-6308

Facsimile: (919) 968-8855

coursolle@healthlaw.org

mckee@healthlaw.org

Attorneys for Plaintiffs