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

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v. Case No. 17-CV-0264

STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OR TESTIMONY FROM DAVID V. WILLIAMS

ARGUMENT

Plaintiffs seek to prevent Defendants from offering at trial expert evidence related to one of the key issues in this case—the cost of providing insurance coverage for surgical gender dysphoria treatments. (Dkt. 173.) Defendants' expert David V. Williams, a healthcare benefits consultant who frequently helps large entities to project the cost of new health insurance benefits, authored a report estimating the cost of removing the coverage exclusion for procedures, services, and supplies related to surgery and sex hormones associated with gender reassignment (the "Exclusion") from the Uniform Benefits. (Dkt. 91.) Plaintiffs contend that this evidence should be

excluded because it is irrelevant and will not help the jury decide any disputed issues. (Dkt. 173:2–3.)

But Williams' cost report is plainly relevant to Plaintiffs' equal protection clause claim, whether rational basis review or heightened scrutiny applies. (Dkt. 108-1:25–27 ¶¶ 106–16.) Under rational basis review, Plaintiffs must show that any purported differential treatment was "not rationally related to a legitimate state interest." *Srail v. Vill. of Lisle*, 588 F.3d 940, 943 (7th Cir. 2009). While no evidence is required to satisfy rational basis review, *RJB Properties, Inc. v. Bd. of Educ.*, 468 F.3d 1005, 1011 (7th Cir. 2006), Defendants offer Williams' cost report as evidence of a legitimate state interest underlying the Exclusion. Likewise, Plaintiffs contend that heightened scrutiny applies here. Defendants disagree but, assuming heightened scrutiny does apply, they must establish with evidence that the Exclusion "serves important governmental objectives" and is "substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996). Williams' cost report will help the jury decide that fact of consequence, too.[1]

[1] As for Plaintiffs' assertion that cost concerns cannot amount to a legitimate state interest here, Defendants have rebutted that argument elsewhere. (*See* Dkt. 126:31.)

Plaintiffs wrongly respond that GIB did not consider costs when deciding whether to reinstate the Exclusion, and thus that Williams' report relates to an irrelevant state interest. (Dkt. 173:2–3.) But evidence shows that GIB did consider costs. (Dkt. 128:25, 43–47 ¶¶ 67, 95–100.) Most obviously, one contingency that GIB required to be met before reinstating the Exclusion was confirmation that doing so would not raise premium costs. (Dkt. 128:24 ¶ 63.) On its face, this contingency shows that GIB was considering costs related to the Exclusion. This suffices to show that GIB did not create cost concerns as a mere post hoc justification during litigation. In any event, courts consider state interests that were "always implicit" and "intimately bound up" in the challenged decision, which is surely the case when state officials consider whether to expand health insurance benefits. *See Dudum v. City & Cty. of San Francisco*, No. C 10-00504, 2010 WL 3619709, at *13 n.1 (N.D. Cal. Sept. 9, 2010) *aff'd sub nom. Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011).

Moreover, the fact that Williams' report was created during this litigation changes nothing. (Dkt. 173:3.) Plaintiffs identify no authority holding that the decision-maker must have considered before acting each piece of evidence offered during litigation to support a state interest. That is, it is enough that GIB considered costs when it reinstated the Exclusion. It did not also need to have Williams' cost report before it in order to, in later

litigation, further support its cost concerns with that additional evidence. Indeed, courts often consider expert evidence created during litigation that provides more detail regarding a state interest than a decision-maker had considered when it acted earlier. *See, e.g.*, *Heller v. District of Columbia*, 801 F.3d 264, 270 (D.C. Cir. 2015); *Gratz v. Bollinger*, 135 F. Supp. 2d 790, 796–801 (E.D. Mich. 2001); *Dudum*, 2010 WL 3619709 at *2, *7 n.6.

Lastly, Plaintiffs offer the puzzling argument that Williams' report should be excluded because it is "complicated," would take up trial time, and will mislead the jury. (Dkt. 173:4.) All expert testimony is "complicated" to some degree—that is why an expert is needed to opine on the issue. Plaintiffs do not explain why Williams' testimony is any more "complicated" than the average expert's. These types of expert opinions "should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Moreover, Plaintiffs do not challenge the reliability of Williams' opinion under *Daubert*. As for Plaintiffs' argument that Williams' testimony will take time to explain to the jury, that is a truism; all expert testimony obviously takes time to explain to the jury. But that does not make it inadmissible, especially when the evidence is directly relevant to a key state interest in an equal protection claim. And Plaintiffs' rehash of their legal argument that Williams' testimony will

mislead the jury because cost considerations are irrelevant adds nothing and fails for the same reasons discussed above. Cost concerns are plainly relevant to the equal protection issues presented here.

CONCLUSION

Plaintiffs' motion in limine seeking to preclude Defendants from offering testimony or evidence from David V. Williams should be denied.

Dated this 14th day of September, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

Electronically signed by:

s/ Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

JODY J. SCHMELZER
Assistant Attorney General
State Bar #1027796

Attorneys for State Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 264-6219 (CTR)
(608) 266-3094 (JJS)
(608) 267-2223 (Fax)
kilpatricksc@doj.state.wi.us
rothct@doj.state.wi.us
schmelzerjj@doj.state.wi.us