IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN, *et al.*,
Plaintiffs,

Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge

v.

WILLIAM CROUCH, *et al.*,
Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Now come Defendants, by counsel, Lou Ann S. Cyrus, Roberta F. Green, Caleb B. David, Kimberly M. Bandy, and Shuman McCuskey Slicer PLLC, and respond in opposition to Plaintiffs' Motion for Class Certification (ECF Nos. 248, 249) ("Class Motion") on the basis that the evidence as adduced in discovery has demonstrated the inappropriateness of these claims for class treatment and, therefore, the saliency of WVDHHR's initial arguments against class certification.

Background.

In its Memorandum Opinion and Order,[1] this Court relied upon *Wal-Mart Stores, Inc., v. Dukes* in finding that "'plaintiff shows that the class members have suffered the same injury,' and that the common injury arises from 'a common contention.'"[2] The Court further stated that "Plaintiffs allege that the class members suffer from a common injury which arises from a general policy of discrimination: the denial of coverage for '[t]ranssexual surgery' in the WVDHHR Medicaid Policy Manual. *Compl.* ¶ 61. As alleged, this denial generally affects the proposed class, which includes '[a]ll transgender people who are or will be enrolled in West Virginia 'Medicaid and who are seeking or will seek gender-confirming care barred by the Exclusions.' *Id.* at ¶ 108.[5]" In so finding, the Court held as follows:

Based on this common contention, Plaintiffs have appropriately framed the

[1] ECF No. 57.
[2] ECF No. 57 at 11.

> common questions as follows: (1) whether WVDHHR's Exclusion facially, and as applied to the proposed Class, violates the U.S. Constitution, the ACA, and the federal Medicaid Act; and (2) whether WVDHHR should be enjoined from enforcing the Exclusion and denying Mr. Fain and members of the proposed Medicaid Class coverage for and access to gender-confirming care. *See Compl*. ¶¶ 118-56. These questions are primarily legal and have the potential to relieve the common injury "in one stroke." *See Wal-Mart*, 564 U.S. at 350.
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> These claims are purely legal and require little to no fact development. Having failed to identify any ground upon which the Parties will be required to make particularized and individualized factual findings, WVDHHR's argument must be rejected. The Court denies WVDHHR's Motion for Partial Dismissal of Plaintiffs' Class Action Complaint (ECF No. 23) and Motion to Dismiss (ECF No. 32).[3]

Per the Court's holding, Plaintiffs have proceeded through discovery relative to, *inter alia,* the Class Claims, yet the course of that discovery has proven that the majority of gender-confirming care is indeed available to these Plaintiffs and was available even prior to and absent this litigation, despite Plaintiffs' erroneous assertion in both the Complaint and the First Amended Complaint to the contrary. Further, through discovery, Plaintiffs' experts have opined that the determinations of when and whether gender-confirming surgery is appropriate is a highly individualized determination, with multiple predicates to reaching any conclusion that such care is medically indicated and/or medically necessary. Indeed, where the Court's initial holding was based in part upon a "fail[ure] to identify any ground upon which the Parties will be required to make particularized and individualized factual findings," Plaintiffs' experts have demonstrated that the claims are inherently, inescapably, individualized, based in each individual's mental health and health background and condition. Indeed, Plaintiffs' expert Dan H. Karasic, M.D., dedicates almost sixty paragraphs of his expert report to particularizing just the mental health and psycho-social background of the proposed class representatives.[4] That evaluation does not include medical assessments or pre-surgical assessments. Each of Plaintiffs' experts relies upon and emphasizes

[3] ECF No. 57 at 11-12, 13.
[4] Expert Report of Dan H. Karasic, M.D. (ECF No. 250-20) at 15ff.

the individual nature of the presentation and response. Therefore, Plaintiffs have identified the grounds upon which the Parties will be required to make particularized and individualized factual findings and allow for the mandated particularized and individualized defense. Plaintiff's Class Motion must be denied, as these claims are inherently poorly suited for class handling.

Argument.

The parties agree that class action claims constitute a deviation from the general rule that litigation must be conducted by and on behalf of the individual named parties only[5] and that the deviation is justified only to the extent the class representatives possess, *inter alia,* the same interests and suffer the same injury as the proposed class members.[6] After all, pursuant to Rule 23, a plaintiff may bring suit on behalf of a class of individuals

> only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.[7]

A motion for class certification must be subjected to rigorous analysis, especially in the instance of medical claims such as these, which Plaintiffs' discovery has proven finally are not 'cohesive enough' to gain economies through class action and conversely are incohesive enough to mandate individualized defenses.[8] Because by Plaintiffs' case (as now fully demonstrated through discovery) the majority of the factual, and, therefore, legal questions both for Plaintiffs and Defendants are unique to each class member, Plaintiffs' Class Motion must be denied. Plaintiffs' discovery confirmed that a class of transgender individuals is too broad a category, as that process

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[5] *Wal-Mart Stores, Inc., v. Dukes,* 564 U.S. 338, 349 (2011), *quoting Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979).
[6] *Dukes,* 564 U.S. at 349, *quoting East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977) (*quoting Schlessinger v. Reservists Comm. To Stop the War,* 418 U.S. 208 (1974)).
[7] Fed. R. Civ. P. 23(a).
[8] *Rhodes v. E.I. DuPont de Nemours & Co.,* 253 F.R.D. 365, 367, 370 (SD WV 2008).

and determination have been expressed by Plaintiffs' experts here.

Now, at the close of discovery, Plaintiffs' proposed class of "[a]ll transgender people who are or will be enrolled in West Virginia Medicaid and who are seeking or will seek gender-confirming care barred by the Exclusions"[9] is unsupported by the facts and law of the case, as Plaintiffs' discovery has demonstrated that class treatment of those precise claims is inappropriate and unworkable. As demonstrated by Plaintiffs' retained experts, the availability of the relief Plaintiffs seek is limited to individuals who undergo particularized assessment and approval prior to being a potential treatment recipient. Thereafter, in mounting their defense to the class claim, Defendants would need to conduct the same sort of careful evaluation of each particularized assessment and approval, making this claim and this litigation inappropriate for class treatment.

Plaintiffs have not established Numerosity.

Plaintiffs do not meet the numerosity requirement. While Plaintiffs Fain and Anderson each assert that they seek gender-confirming surgery, Plaintiffs do not have any evidence that any other Medicaid beneficiary seeks gender-confirming surgery. Instead, Plaintiffs acknowledge that the record does not reveal the number of Medicaid participants who may seek gender-confirming surgery.[10] Because the policy at issue only potentially affects those individuals who are diagnosed with gender dysphoria, seeking gender-confirming surgery, are determined to be candidates for surgery, approved for surgery, and who actually submit a claim for such services to Medicaid, this is a much smaller group of people than all Medicaid members who have a transgender identity. The "class" based on the evidence is comprised of Mr. Fain and Ms. Anderson, the two individual Plaintiffs. Numerosity of class membership is completely absent.

[9] *First Amended Compl.* ¶108.
[10] ECF 255 at 19.

Plaintiffs' characterization of the number of Medicaid members seeking gender-confirming care is also not entirely accurate. Plaintiffs allege that "the number of West Virginia Medicaid participants who submit claims related to a diagnosis of gender dysphoria alone exceeds 600 people annually."[11] However, as explained by the Medicaid employee that compiled the information, the number 686 captures all individuals who made claims for any reason during the first nine months of 2021 who also had a diagnosis code for one or more of the following: transsexualism, gender identity disorder of childhood, other gender identity disorders, or gender identity disorder, unspecified.[12] The number captured those who had made claims whether or not the transsexualism or gender identity disorder diagnosis was the primary diagnosis or the reason for the requested service.[13] Thus, 686 represents the number of members with a diagnosis related to gender dysphoria who made claims (not necessarily for gender-confirming care) during the first nine months of 2021.

Even assuming the claims were appropriate for class treatment (which they are not), Plaintiffs' discovery has proven that even the proposed class as initially crafted is unworkable. That is, while Plaintiffs continue in their efforts to certify a class populated by "[a]ll transgender people who are or will be enrolled in West Virginia Medicaid and who are seeking or will seek gender-confirming care barred by the Exclusions,"[14] Plaintiffs' experts have opined that not all transgender people are affected by the policy. As Plaintiffs' experts have expressly stated, not all

[11] ECF No. 249 at 3.
[12] ECF No. 252-14 at 32-35.
[13] ECF 252-14, Tr. pp. 32-35.
[14] Plaintiffs have not demonstrated that Medicaid has any exclusion of coverage that pertains categorically to transgender individuals. All services that are considered covered services by Medicaid are covered for transgender participants to the same extent and based on the same criteria as cisgender participants. ECF 257-1 at 34, 100. No evidence has been adduced in discovery indicating that any covered services are denied to members on the basis of transgender identity. Plaintiffs' discovery indicates that the determination of services available and the determination of medical necessity are both individualized. ECF No. 182 at 15ff.

transgender individuals are diagnosed with gender dysphoria. Plaintiffs' evidence is that there is a difference between a transgender identity and gender dysphoria.[15] Being transgender is an identity.[16] Gender dysphoria can result in a DSM-V disorder in some transgender individuals.[17] According to Plaintiffs' expert Dan Karasic, M.D., roughly one in 200 people identifies as transgender.[18] About one in a thousand is in clinical care for gender dysphoria.[19] Even though the numbers have not been precisely established [or established for West Virginia], only a fraction of individuals who identify as transgender actually receive care for gender dysphoria, according to Dr. Karasic.[20] Although Plaintiffs alleged in their First Amended Complaint that the Defendants herein had a "categorical exclusion" that denied coverage for "gender-confirming care," defined by Plaintiffs as "including but not limited to, counseling, hormone therapy, and surgical care," discovery established that several forms of gender-confirming care, including counseling and hormone therapy, and many others, are indeed covered by Medicaid, by and through its existing programs.[21] Further, through Plaintiffs' discovery, it was confirmed that any class made up of transgender individuals generally who are seeking the gender-confirming care not currently available would be overly broad. Plaintiffs' evidence is that the proposed class of transgender individuals is actually a group of differently situated persons who must be individually assessed and their propriety determined on a case-by-case basis prior to inclusion.[22] Per Plaintiffs' experts,

[15] ECF 252-8 at 8.
[16] ECF 252-8 at 8.
[17] ECF 252-8 at 8-9.
[18] ECF No. 252-8 at 10.
[19](ECF No. 252-8 at 10..
[20] ECF No. 252-8 at 10-11.
[21] ECF No. 1 at 1-2; ECF No 140 at 1-2. *See also* Memorandum of Law in Support of Defendants' Motion for Summary Judgment (5.31.22) (ECF No. 253) at 2 stating that "[i]t is undisputed that Medicaid does not exclude, but in fact covers, psychiatric diagnostic evaluation, psychotherapy, psychological evaluation, counseling, office visits, hormones, and lab work as treatment related to gender-confirming care. (Ex. 4 pp. 142, 146, 151, 161-162, 164; Ex. 5 pp. 62-63, 65, 71, 73; Ex. 6; Ex.7 pp. 28-30; Ex. 1 pp. 168-169)."
[22] Expert Disclosure Report of Dan H. Kurasic (ECF No. 182) at ¶ 34, 41.

"[f]or a person to be diagnosed with [gender dysphoria], there must be a marked difference between the individual's expressed/experienced gender and their assigned sex at birth, present for at least six months."[23] Then, beyond the diagnosis, "for gender-confirming medical care, there is the additional safeguard of the assessment by a mental health professional, who, in addition to diagnosing gender dysphoria, also assesses capacity to consent and reviews the risks and benefits of treatment with the patient."[24]

Plaintiffs have not established Commonality or Typicality.

And as the law drives the class, so, too, the law drives the defenses, which are equally individualized and impossible to accomplish with any of the efficiencies that mitigate in favor of or would support class treatment (as opposed to individual claims).[25] Defendants must be allowed to raise individual affirmative defenses to whether Plaintiffs and any putative class members would qualify for the gender-confirming care they seek. For these reasons and those set out further below, Plaintiffs' Class Motion fails to meet the commonality and typicality requirements of Rule 23.

Beyond the fact that, in their First Amended Complaint, Plaintiffs particularized their claims to their precise diagnoses, their precise medical needs, and their precise claims histories,[26] Plaintiffs' experts have done likewise, even conducting detailed evaluations of the proposed Class Representatives, which evaluations were appended to the expert's report.[27] Indeed, the detailed, personalized assessments are affixed to the expert's opinions, inextricably bound as a portion of the support the expert provides here – the detailed, individualized assessments without which the

[23] Expert Rebuttal Report of Dr. Johanna Olson-Kennedy, M.D., M.S. (ECF No. 250-22) at ¶ 26.
[24] Expert Disclosure Report of Dan H. Kurasic (ECF No. 182) at ¶ 41.
[25] *Dukes,* 564 U.S. at 362, citing in pertinent part *Teamsters v. United States,* 431 U.S. 324, 361 (1977), for the proposition that a class cannot be certified if that certification precludes the defendant from litigating its defenses to individual claims.
[26] First Am. Compl. (ECF No. 140) at ¶¶ 75-156.
[27] Expert Disclosure Report of Dan H. Karasic (ECF No. 182) at 15ff.

experts' opinions are incomplete. Beyond that, it is important to note that Plaintiffs' discovery has been that the sole remaining gender-confirming care not currently available as such (gender-confirming surgery) mandates predicates: a more precise, particularized diagnosis than simply having a transgender identity and mental health assessments prior to any individual's being considered for the only gender-confirming care not currently provided by Defendants.[28] For these reasons, Plaintiffs' case reflects the reality that Rule 23 offers no economies to what must become multiple, separate determinations, joined only in the broadest sense. As clarified by the Supreme Court of the United States in *Wal-Mart Stores, Inc., v. Dukes,* if plaintiffs generalize their claims broadly enough, certainly any and all persons could qualify as class members so as to meet the commonality mandate.[29] However, "'[w]hat matters to class certification is not the raising of common 'questions'--even in droves--but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within a proposed class are what have the potential to impede the generation of common answers.'"[30] Finally, in *Dukes,* the Court found that even a close assessment of the millions of employment decisions made by Wal-Mart could not result in the answer to the question of 'why was I disfavored.'[31] In determining the propriety of class certification, the Court was searching for the 'glue' that would hold the members to the class; finally, the Court found that employment decisions are multifactorial, such that a related claim would not be workable as a class.[32]

Likewise here, the evaluations/interviews Plaintiffs' expert conducted of the proposed class representatives are lengthy and detailed, with 26 paragraphs of detailed social, psycho-social,

[28] *See* ECF No. 253 at 2.
[29] *Dukes,* 564 U.S. at 348.
[30] *Dukes,* 564 U.S. at 350, quoting Naguerenda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009).
[31] *Dukes,* 564 U.S. at 352.
[32] *See, e.g., Dukes,* 564 U.S. at 352.

psychological and physical history and assessment of Mr. Fain alone.[33] Plaintiffs' expert expends additional paragraphs on Ms. Anderson with the same sort of analysis. All of this rigorous, detailed assessment aside, none of these individuals has undergone the pre-surgical assessment and clearance mandated per the testimony of yet another of Plaintiffs' experts. Even assuming that the individuals were approved through this detailed mental healthcare process, the gender-confirming surgical procedures would need to be determined by healthcare professionals to be medically indicated and necessary for the Plaintiffs and/or for the putative class members through a series of evaluations[34] and, in fact, finally, are medically indicated and necessary to only the segment of gender dysphoric individuals approved through the individualized assessments that are a universal prerequisite for same, based upon the Standards of Care relied upon by Plaintiffs:

> [T]he [SOC] note that "[t]he number and sequence of surgical procedures may vary from patient to patient, according to their clinical needs." (Standards of Care at 58.) Evidence shows that while some transgender individuals do not require surgery, "for many others surgery is essential and medically necessary to alleviate their gender dysphoria.[35]
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> The accepted protocols for the treatment of transgender people with gender dysphoria provide for mental-health assessments, including of co-occurring conditions; criteria for eligibility for each treatment; and an informed consent process before medical interventions are initiated.[36]
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> Medical and surgical treatment interventions are determined by the care team (usually a medical and mental health professional) in collaboration with the patient, and the patient's family. These medical decisions are made by the care team in conjunction with the patient and the patient's family and consider the patient's social situation, the level of gender dysphoria, developmental stage, chronological age, existing medical conditions and other relevant factors.[37]

Therefore, even assuming that this Court were to find the scope of Defendants' coverages

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[33] Expert Report of Dan H. Karasic, M.D. (ECF No. 250-20) at 15.
[34] *See, e.g.,* Expert Disclosure Report of Dan Karasic, MD (ECF No. 250-20) at ¶ 2; Expert Disclosure Report of Loren S. Schechter, MD (ECF No. 250-23) at ¶ 23.
[35] Expert Disclosure Report of Loren S. Schechter, MD (ECF No. 250-23) at ¶ 23 (partial).
[36] Expert Disclosure Report of Dan Karasic, MD (ECF No. 250-20) at ¶ 2 (partial).
[37] Expert Rebuttal Report of Johanna Olson-Kennedy, M.D., M.S. (ECF No. 250-26) at ¶ 39 (partial).

discriminatory and/or unconstitutional, a finding Defendants oppose, nonetheless, particularized determinations mitigate against use of the class form here. Determining class membership would require the detailed mental health and surgical healthcare assessments set out by Plaintiffs' experts for each putative class member – and Defendants would need to conduct the same particularized challenge in their defense.

As a matter of law, individualized claims necessitate individualized defenses, and the Defendants will have the right to raise any individual affirmative defenses they may have and to "'demonstrate that the individual applicant was denied an . . . opportunity for lawful reasons.'" *Dukes*, 564 U.S. at 366-67. The Supreme Court has considered ingenuous workarounds for accomplishing detailed discovery and providing the opportunity for detailed defenses when the class is large and has individualized and particularized situations. In *Dukes,* the Court of Appeals suggested just such a workaround to fast-track the detailed determination of defenses. Specifically, in recognition of the size of the class and the particularized assessment that could be indicated relative to the hiring decision-making process (which would need detailed discovery to demonstrate class inclusion and to provide opportunities for meaningful defense), the *Dukes* Appeals Court suggested Trial by Formula, where a "sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master." In disapproving of this shortcut, the Supreme Court stated as follows:

> We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b*)*; see *Ortiz*, 527 U.S., at 845, 119 S. Ct. 2295, 144 L. Ed. 2d 715, a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being 'incidental' to the classwide injunction, respondents' class could not be certified even assuming, *arguendo*, that 'incidental'

monetary relief can be awarded to a 23(b)(2) class.[38]

Further, the class representatives do not possess, *inter alia,* the same interests and suffer the same injury as the proposed class members.[39] As the Supreme Court of the United States has held, class form is appropriate only where economical to combine the claims and that determination as to whether it is economical is a practical one – when a common injury can be addressed and resolved by a class litigation without doing damage to either. Here, the economies of the class form are unavailable, as particularized discovery would be necessary to determine the individualized facts relative to each class member. In *Dukes,* the Supreme Court recognized, *inter alia,* that, if plaintiffs generalize their claims broadly enough, certainly any and all persons could qualify as class members so as to meet the commonality mandate. The Supreme Court considered common questions that, finally, were generalized to the point that they no longer meaningfully constituted a basis of commonality: "Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?"[40] While all of the *Dukes* plaintiffs truly had these questions at the heart of their claims, the *Dukes* Court found the questions too broad to provide meaningful class inquiry or relief – and that the workaround proposed to fast-track discovery and defense was unacceptable. [41]

While the class is "[a]ll transgender people who are or will be enrolled in West Virginia Medicaid and who are seeking or will seek gender-confirming care barred by the Exclusion," the procedures are only potentially medically necessary and therefore medically indicated in the

[38] *Dukes,* 564 U.S. at 367.
[39] ECF No. 25, relying in part on *Dukes,* 564 U.S. 338, 349 (2011), quoting *Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979), *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977) (quoting *Schlessinger v. Reservists Comm. To Stop the War,* 418 U.S. 208 (1974)).
[40] *Dukes,* 564 U.S. at 349.
[41] *Dukes,* 564 U.S. at 349.

instance of a diagnosis of gender dysphoria. [42] Therefore, while the Plaintiffs' class has been and remains now at the close of discovery 'transgender people,' Plaintiffs' experts only support a class that would be transgender persons with a diagnosis of gender dysphoria who seek gender-confirming surgery and qualify for such care. "For a person to be diagnosed with [gender dysphoria], there must be a marked difference between the individual's expressed/experienced gender and their assigned sex at birth, present for at least six months."[43] Then, beyond the diagnosis, "for gender-confirming medical care, there is the additional safeguard of the assessment by a mental health professional, who, in addition to diagnosing gender dysphoria, also assesses capacity to consent and reviews the risks and benefits of treatment with the patient."[44]

> The surgeon receives in writing one or more assessments of the patient's diagnosis and medical necessity of the care by one or more mental health professionals, as required for the relevant procedure under the Standards of Care. But that is only one step in the assessment for surgical interventions. The surgeon remains ultimately responsible for deciding whether a particular surgical intervention is medically indicated. The surgeon evaluates the patient and makes the final decision about whether it is safe and medically indicated to proceed. This includes an evaluation of the patient's understanding of the condition, their self-awareness, and their goals and expectations for the intervention. The surgeon also evaluates other health factors that would affect the patient's fitness for the surgery, and determines whether additional studies might be required, such as x-rays or laboratory work. The surgeon also typically obtains an assessment from their primary care physician about their overall health. In my own clinical practice, I have had occasion to decline to perform a requested intervention based on my exercise of professional judgment.[45]

In *Dukes,* the Supreme Court held that when a plaintiff seeks individualized relief, "'a district court must usually conduct additional proceedings . . . to determine the scope of individual relief.' *Teamsters, 431 U.S., at 361, 97 S. Ct. 1843, 52 L. Ed. 2d 396*. At this phase, the burden of proof will shift to the [defendant], but it will have the right to raise any individual affirmative

[42] Expert Disclosure Report of Loren S. Schechter, MD (ECF No. 250-23) at ¶ 21.
[43] Expert Rebuttal Report of Dr. Johanna Olson-Kennedy, MD, MS (ECF No. 250-26) at ¶ 26.
[44] Expert Disclosure Report of Dan H. Karasic, M.D. (ECF No. 250-20) at ¶ 41.
[45] Expert Rebuttal Report of Loren S. Schechter, M.D. (ECF No. 250-24) at 51.

defenses it may have, and to 'demonstrate that the individual applicant was denied an . . . opportunity for lawful reasons.' *Id., at 362, 97 S. Ct. 1843, 52 L. Ed. 2d 396*."[46] Relying upon the Rules Enabling Act's prohibition against interpreting any rule (here Rule 23) so as to "'abridge, enlarge or modify any substantive right,' *28 U.S.C. § 2072(b)*; see *Ortiz, 527 U.S., at 845, 119 S. Ct. 2295, 144 L. Ed. 2d 715*," the Supreme Court found that a class cannot be certified if that certification precludes the defendant from litigating its defenses to individual claims.

Here, based on the evidence adduced by Plaintiffs during discovery by and through each of the Plaintiffs' experts, Defendants must be allowed to raise individual affirmative defenses to whether Plaintiffs and any putative class members would have qualified for the gender-confirming care they seek. After all, even Plaintiff Fain concedes that he is not ready or willing to undergo gender-confirming surgery until he has "completely kicked" his smoking habit, and he is a smoker.[47] Thus, even Mr. Fain's circumstance is particularized in that he is not currently in a position to undergo the surgery he desires based upon his stated understanding of the risks. Plaintiffs' experts and Mr. Fain's testimony both indicate that the coverage process, the process of determining medical necessity, and the process of determining whether the care is medically indicated all are highly individual. While that is the standard of care (as Plaintiffs suggest), it nonetheless renders the determination inappropriate for class treatment.

Further, the particularized, individualized course of Plaintiffs' discovery has proven germane the guidance of the United States District Court for the Northern District of West Virginia when it clarified that

> "[a] common question is one that can be resolved for each class member in a single hearing, such as the question of whether an employer engaged in a pattern and practice of unlawful discrimination against a class of its employees. A question is not common, by contrast, if its resolution turns on a consideration of the individual

[46] *Dukes,* 564 U.S. at 366-67.
[47] ECF No. 252-5 at 87-88.

> circumstances of each class member." "The common questions must be dispositive and over-shadow other issues."[48]

Plaintiffs' claims by necessity focus on mental health assessments, medical clearances, and coverage determinations – all under particularized policies and procedures. Plaintiffs' discovery has proven Plaintiffs' claims inherently poorly suited for class treatment in a post-*Dukes* world.[49]

Here, Plaintiffs' experts have demonstrated that Plaintiffs' claims by necessity will involve a particularized determination of each Plaintiff and putative plaintiff and will require careful and particularized determinations of the applicability of the care and coverage sought. Defendants must have the right to raise their individual affirmative defenses they have and must have the right to demonstrate whether each individual applicant was denied and/or would have been denied or will be denied or was never an appropriate applicant for coverage —all for lawful reasons.

By their precise nature, Plaintiffs' claims mitigate against class treatment.

The inefficiencies of class form also are demonstrated by the claims raised in Plaintiffs' First Amended Complaint[50] itself. Count I alleges violation of the Equal Protection Clause (EPC) of the 14th Amendment; Plaintiffs assert both facial and as-applied challenges. A facial challenge does not require class treatment, such that the Court need not consider whether the deviation from the general rule that litigation must be conducted by and on behalf of the individual named parties only would be unnecessary and unjustified.[51] An as-applied challenge would require 1) a request

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[48] *Paulino v. Dollar Gen. Corp.,* 2014 U.S. Dist. LEXIS 64233 (3:12-CV-75) (ND WV 2014) (citations omitted).

[49] Further, in *General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982)*, the Court considered the "existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims."

[50] ECF No. 140.

[51] *Dukes,* 564 U.S. 338, 349 (2011), *quoting East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977) (*quoting Schlessinger v. Reservists Comm. To Stop the War,* 418 U.S. 208 (1974)), *Califano v. Yamasaki,* 442 U.S. 682, 700-01 (1979).

for coverage, 2) a denial of coverage, 3) a review of the reason for denial.[52] While the defense's expert has disputed whether the gender-confirming surgeries are ever medically necessary procedures,[53] Plaintiffs' experts agree that coverage should only be provided for medically necessary procedures and medical necessity is based upon history, physical examination, review of mental health assessments, basis for request for surgery, goals, expectations, and discussions with primary care and mental health providers.[54] These individualized assessments and determinations predominate over the putative class members' being "transgender," as the class definition requires, because being transgender does not entitle the class members to gender-confirming surgery. Indeed, not all transgender individuals are diagnosed with gender dysphoria and not all individuals diagnosed with gender dysphoria seek gender-confirming surgery and not all individuals who seek gender-confirming surgery meet the criteria Plaintiffs' experts opine are mandatory for a finding of medical necessity.[55] Therefore, Count I does not reach the requisite level to allow class claims to take the place of individualized claims as a matter of law and fact.

Count II alleges violation of Section 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of sex.[56] Again, Plaintiffs assert a facial challenge to Medicaid's policy and as-applied challenges on behalf of themselves and each member of the putative class. For all of the reasons set out relative to Count I, class treatment of Count II is unnecessary and/or inappropriate. However, whereas Count II no longer seeks compensatory damages, nonetheless, Defendants' decision-making may include a review of utilization control procedures, as discussed below. As a result, each Plaintiff and putative plaintiff will need to first

[52] *See, e.g. Lewis v. Thompson,* 252 F.3d 567 (2d Cir. 2001); *Cook v. Barry,* 718 F. Supp. 632 (S.D. OH 1989); *Hillspring Health Care Center v. Dungey,* 2018 U.S. Dist. Lexis 13317 (S.D. OH 2018).
[53] Expert Disclosure Report of Dr. Stephen B. Levine, M.D. (ECF No. 252-11) at 7.
[54] Deposition of Loren S. Schechter (3.8.22) (ECF NO. 252-15) at 194.
[55] *See, e.g.,* Expert Disclosure Report of Dan H. Karasic, M.D. (ECF No. 250-20) at 6ff.
[56] ECF No. 140.

prove the medical necessity of the care and the availability of the care for that patient – along with the relevant costs. For example, Christopher Fain is a transgender man and only desires double mastectomy, not phalloplasty.[57] Shauntae Anderson is a transgender woman and seeks both mammoplasty and vaginoplasty,[58] but not all transgender women will seek these same procedures. Additionally, some individuals may seek any number of procedures, including electrolysis, facial feminization, chest masculinization, tracheal shave, hair implants, and so forth. Thus, an analysis of the medical necessity of each type of procedure for each individual claimant is required (along with the opportunity for a particularized defense of same) and predominates over the broad class-defining term of "transgender."

Count III alleges violation of the Medicaid Act's availability requirements.[59] "The Medicaid Act states, in relevant part, "[a] State plan for medical assistance must … (10) provide—(A) for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17), (21), (28), (29), and (30) of section 1905(a) [42 USCS § 1396d(a)] …." 42 U.S.C. § 1396a(a)(10)(A)." While Plaintiffs' First Amended Complaint fails to identify which provision of Section 1396d they assert provides for gender-confirming surgery, regardless, "nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care." *Beal v. Doe*, 432 U.S. 438, 444 (1977). "Indeed, the statute expressly provides: 'A State plan for medical assistance must… include reasonable standards… for determining eligibility for and the extent of medical assistance under the plan which… are consistent with the objectives of this [Title]….' 42 U.S.C. § 1396a (a)(17) (1970 ed., Supp. V)." *Id.*[60] The Supreme Court's decision in *Beal* is consistent with the

[57] Deposition of Christopher Fain (ECF No. 250-10) at 128.
[58] Deposition of Shauntae Anderson (ECF No. 250-11) at 167-68.
[59] ECF No. 140.
[60] This language appears in the current version of 42 U.S.C. § 1396a(a)(17), although additional language

Medicaid Act's accompanying regulations. The regulations set forth the criteria for availability:

> (a) The plan must specify the amount, duration, and scope of each service that it provides for—
> (1) The categorically needy; and
> (2) Each covered group of medically needy.
> (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
> (c) The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible beneficiary solely because of the diagnosis, type of illness, or condition.
> (d) **The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.**[61]

Thus, the regulations expressly permit a State Medicaid plan to place limits on services even if those services are required to be covered. *See Casillas v. Daines*, 580 F. Supp. 2d 235, 245-46 (S.D.N.Y. 2008) ("Thus, … § 1396a(a), permits a state plan to place 'appropriate limits' upon a 'service' regardless of an individual medical doctor's view of the appropriateness of the categorical limitation."). Therefore, Count III not only mandates particularized proof but also must allow for a particularized defense – all of which mitigates against class treatment.

Count IV alleges violation of the Medicaid Act's comparability requirements.[62] If Plaintiffs' interpretation of this law is correct, then Medicaid would be required to cover all procedures for all people no matter the diagnosis. The Medicaid Act states, in relevant part,

> [a] State plan for medical assistance must … (10) provide … (B) that the medical assistance made available to any individual described in subparagraph (A)—
> (i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and
> (ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in subparagraph (A)[.][63]

Like the availability requirements, the comparability requirements of the Medicaid Act also have

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has been added to this section of the statute.
[61] 42 C.F.R. § 440.230 (emphasis added).
[62] ECF No. 140.
[63] 42 U.S.C. § 1396a(a)(10)(B).

accompanying regulations:

> Except as limited in § 440.250—
> (a) The plan must provide that the services available to any categorically needy beneficiary under the plan are not less in amount, duration, and scope than those services available to a medically needy beneficiary; and
> (b) The plan must provide that the services available to any individual in the following groups are equal in amount, duration, and scope for all beneficiaries within the group:
> (1) The categorically needy.
> (2) A covered medically needy group.[64]

Thus, the plain language of the regulations prohibits three types of discrimination: (1) against the categorically needy, (2) among the categorically needy, and (3) among the medically needy.[65]

Here, Plaintiffs allege that Defendants violate the comparability requirements, presumably by discriminating among the categorically needy, because Defendants do not provide coverage for gender-confirming surgery "while the same or similar services and treatments are covered for cisgender Medicaid beneficiaries." Defendants do not cover gender-confirming surgeries for cisgender Medicaid beneficiaries; thus, Defendants assume that Plaintiffs are alleging that, because Defendants do provide coverage for mastectomy for patients with breast cancer, Medicaid is required to provide coverage for mastectomy for any and all diagnoses, including gender dysphoria. This allegation is not discrimination among categorically needy beneficiaries. Indeed, Plaintiffs have provided no evidence that mastectomy for breast cancer has been denied to any transgender individual. Rather, in Plaintiffs' view, any treatment that is reimbursable for one diagnosis must be a reimbursable treatment for a different diagnosis if it were deemed by the patient's doctor to be a medical necessity. While Defendants assert that gender-confirming care is

[64] 42 C.F.R. § 440.240.
[65] *See Schott v. Olszewski*, 401 F.3d 682, 686 (6th Cir. 2005) ("Under the Act, states must provide comparable medical assistance to all Medicaid recipients within each classification, so long as the medically needy do not receive greater benefits than the categorically needy (although the reverse is permitted).").

covered in all but surgical instances and that the surgical care is not medically necessary,[66] nonetheless, to the extent that Plaintiffs prevail, these distinctions and determinations mitigate against class treatment, as Defendants must be allowed to raise particularized defenses to claims for services on, *inter alia,* these particularized grounds.

Further, the Medicaid Act causes of action require us again to look at every possible procedure that could be considered a "gender-confirming surgery" to determine whether that procedure 1) has been requested by a transgender individual with an associated indication of gender dysphoria, 2) has been provided to a cisgender individual for another indication, or 3) has some similarity with another procedure that could lend itself to a claim for lack of comparability between transgender and cisgender individuals. This individualized determination process would not only require Defendants to look at the putative class members' claims but also the claims of cisgender non-class members to determine whether other procedures have been requested and covered. For example, it is possible that Medicaid provided hair implants to a cisgender individual who was a burn victim. Defendants would be required to look at that individual's claim history to confirm claimant's gender identity, gender assigned at birth, and indication for the procedure. Then, Defendants would have to compare those findings to the hypothetical transgender woman who has male pattern baldness to determine whether the denial of her claim violates the Medicaid Act. Each of these processes would be allowed under the law as part of Defendants' particularized defense – all of them mitigating against class treatment.

Plaintiffs have not established Adequacy of Representation.

While not included in the Amended Complaint, Plaintiffs now argue that a policy of excluding puberty-delaying treatment would also violate the law and is "part of the Exclusion."

[66] Expert Disclosure Report of Dr. Stephen B. Levine, M.D. (ECF No. 252-11) at 7.

(ECF 251 p. 8 FN 38). Plaintiffs have not presented any facts that an "exclusion" for puberty-delaying treatment exists, or the terms of any such "exclusion." Most importantly, the individual Plaintiffs have not sought and do not seek puberty-delaying treatment. They not only lack standing to assert such a challenge, but they also fail to adequately represent any potential class member who would potentially seek relief based upon any alleged policy regarding coverage for puberty-delaying treatment. The record is silent with respect to whether any such potential class members even exist, but if they did, Plaintiffs do not adequately represent their interests.

Conclusion.

Because Plaintiffs' experts have demonstrated unequivocally that the claims here mandate individualized, particularized assessments prior to determining that any Plaintiff and/or any putative class member would be appropriate to include, Plaintiffs have succeeded in proving that these claims cannot be proven on the basis of class. Further, because no substantive right can be compromised in the conversion to class, Defendants must be allowed to conduct discovery and develop defenses, all of which will be an individualized, particularized process. Plaintiffs' discovery has unequivocally identified grounds upon which the Parties will be required to make particularized and individualized factual findings and build factual defenses, such that Plaintiffs' Motion for Class Certification must be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN and **SHAUNTAE ANDERSON;** individually and on behalf of all others similarly situated,

Plaintiffs,

Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge

v.

WILLIAM CROUCH, in his official capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources; **CYNTHIA BEANE,** in her official capacity as Commissioner for the West Virginia Bureau for Medical Services; and **WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES,**

Defendants.

CERTIFICATE OF SERVICE

Now come Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources Bureau for Medical Services, by counsel, and do hereby certify that on the 14th day of June, 2022, a true and exact copy of **"DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR CLASS CERTIFICATION"** was served on counsel via electronic means as follows:

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