

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,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740
HON. ROBERT C. CHAMBERS

**PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION PURSUANT TO FED. R. CIV. P. 23**

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I. INTRODUCTION

Plaintiffs Christopher Fain and Shauntae Anderson (“Plaintiffs”) have brought this class action to answer two main questions. First, does the Exclusion in health plans offered by West Virginia Medicaid to its transgender participants facially violate the U.S. Constitution, Section 1557 of the Patient Protection and Affordable Care Act, and the Medicaid Act’s Availability and Comparability Requirements? Second, should Defendants be enjoined from enforcing the Exclusion and denying Plaintiffs and members of the proposed class coverage for and access to gender-confirming surgical care? The answers should be provided only once, by one court, for all transgender West Virginians impacted by Defendants’ discriminatory Exclusion.

Plaintiffs’ request for class certification is not novel under these circumstances. Trial courts throughout the country have certified similar classes for similar claims. *See, e.g., Flack v. Wisconsin Dep’t of Health Servs.*, 331 F.R.D. 361 (W.D. Wis. 2019); *Toomey v. Arizona*, No. CV190035TUCRMLAB, 2020 WL 2465707, at *5 (D. Ariz. May 12, 2020), *report and recommendation adopted*, No. CV1900035TUCRMLAB, 2020 WL 3197647 (D. Ariz. June 15, 2020). This Court should rule similarly and certify Plaintiffs’ proposed class.

II. ARGUMENT

A. Plaintiffs Have Satisfied the Numerosity Requirement.

Citing no case law whatsoever and not even attempting to address the cases Plaintiffs cite, Defendants argue against numerosity. But Defendants’ argument ignores the actual numerosity requirements, including impracticability of joinder, and conveniently blurs the concept of medical necessity with its facially discriminatory Exclusion.

The numerosity inquiry asks whether “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Critically, the “practicability of joinder depends on

factors such as the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion.” *Cyrus ex rel. McSweeney v. Walker*, 233 F.R.D. 467, 470 (S.D.W. Va. 2005) (internal quotations and brackets omitted). As this District has held, because “there is no bright-line rule to establish numerosity, a court must use its practical judgment in light of the facts of the case before it.” *Id.*

Here, the proposed class is defined as “all 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[].”¹ Thus, it is likely that the proposed class is too numerous for each member to be joined, “especially since some members of the class are not capable of being identified until sometime in the future.” *Flack*, 331 F.R.D. at 370. And “even if joinder were possible, it would be ill-advised and difficult to achieve due to the sensitive nature of the claims, the plaintiffs’ limited financial means, and their varied locations across the state.” *Id.* (certifying class of “[a]ll transgender individuals who are or will be enrolled in Wisconsin Medicaid, have or will have a diagnosis of gender dysphoria, and who are seeking or will seek surgical or medical treatments or services to treat gender dysphoria”).

What is more, Defendants themselves admit that there are 686 West Virginia participants “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.”² This means that, there have been at least 686 transgender West Virginia Medicaid participants and there are likely more when considering the entire statutory period and those who have not yet made claims. Indeed, the

¹ ECF No. 140, First Am. Compl. ¶ 147 (emphasis added).

² ECF No. 259, Defs.’ Br. at 5.

Williams Institute estimates that 0.4% of West Virginia's adult population identifies as transgender, amounting to 5,700 adults.³ That percentage rises to 0.68% of West Virginia's youth population identifying as transgender, or 700 youth.⁴ And, if any one of those 686-plus people had sought or were to seek gender-confirming surgery barred by the Exclusion, they would both fall within the class and also be denied care without any analysis of medical necessity.⁵

In arguing against numerosity, Defendants now point to the need to consider the individual issues of each participant, in addition to whether the care is medically necessary. Due to the categorical exclusion of gender-confirming surgical care, however, Defendants deny coverage for medically necessary care regardless of the hypothetical individual issues Defendants offer. To be clear, Defendants' Exclusion prevents any inquiry into such matters. Rather, the Exclusion is a threshold bar that stops the inquiry before it begins. To put a finer point on it, whether surgery would ultimately be deemed medically necessary for each class member is irrelevant to class certification. The injury and legal violations in this case exist because the Exclusion fails to

³ Jody L. Herman, Andrew R. Flores, and Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States?*, The Williams Institute, UCLA School of Law (June 2022), <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/>.

⁴ *Id.*

⁵ Notably, courts within this Circuit have applied a preponderance of the evidence standard when evaluating whether a plaintiff has satisfied Rule 23's requirements. *See e.g., In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 336 (D. Md. 2012), *amended*, 962 F. Supp. 2d 840 (D. Md. 2013); *In re Mills Corp. Sec. Litig.*, 257 F.R.D. 101, 104 (E.D. Va. 2009); *In re Safety-Kleen Corp. Bondholders Litig.*, No. 3:00-1145-17, 2004 WL 3115870, at *2 (D.S.C. Nov. 1, 2004). Though the Fourth Circuit has not specifically ruled on the standard, numerous other Circuits have held that the standard is preponderance of the evidence. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 27 (1st Cir. 2015); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228 (5th Cir. 2009); *Teamsters Loc. 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 204 (2d Cir. 2008); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008), *as amended* (Jan. 16, 2009); *see also Brown v. Nucor Corp.*, 785 F.3d 895, 931 (4th Cir. 2015) (Agee, G.S., dissenting) (decided on other grounds).

consider medical necessity or anything other than the participant's sex and transgender status. Each and every class member would need the Exclusion lifted to proceed beyond a categorical coverage denial and reach any type of individualized inquiry.

Accordingly, in this case where joinder is impracticable and where the core issue is the Exclusion itself and not coverage questions that could only arise if the Exclusion was lifted, Plaintiffs have established numerosity.

B. Plaintiffs Have Satisfied the Commonality Requirement.

As to commonality, *Dukes v. Wal-Mart* is not the silver bullet Defendants make it out to be. There, as Defendants point out,⁶ the Supreme Court stated, “[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.” 564 U.S. 338, 352 (2011). But that is not this case. Here, on its face, the Exclusion—which explicitly prohibits “[t]ranssexual surgery”⁷—unequivocally targets transgender Medicaid participants for discrimination based on their sex and transgender status. As Plaintiffs explain in opposing Defendants’ motion for summary judgment, the targeting of transgender people appears on the face of the Exclusion: the outmoded term “transsexual” refers to transgender people and transgender people only.⁸ So, the reason for the Exclusion? Class members’ sex and transgender status. And why was any class member disfavored? Because of their sex and transgender status. These are “common answers” that “drive the resolution of [this]

⁶ ECF No. 259, Defs.’ Br. at 8.

⁷ ECF No. 250-27, BMS Manual Ch. 100 at CFAIN0001662; ECF No. 250-28, BMS Manual Ch. 519 at 77.

⁸ ECF No. 250-27, BMS Manual Ch. 100 at CFAIN0001662; ECF No. 250-28, BMS Manual Ch. 519 at 77.

litigation.” *See Dukes*, 564 U.S. at 350.⁹

For this reason, Defendants’ argument that “Plaintiffs’ claims by necessity focus on mental health assessments, medical clearances, and coverage determinations – all under particularized policies and procedures” rings hollow.¹⁰ Just as with their numerosity arguments, Defendants miss the point. Every class member—again, defined as “all 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[]”¹¹—will face that bar because of their sex and transgender status. Declaring the Exclusion unlawful will, thus, require no examination of medical necessity or any of the other issues Defendants point out. As explained above, whether surgery would ultimately be deemed medically necessary for each class member is irrelevant to class certification because this case simply asks for the Exclusion to be struck down so that class members can move beyond the threshold bar, and their individual circumstances—not simply their sex or transgender status—can be considered *after* this lawsuit ends. *See, e.g., A.A. by & through P.A. v. Phillips*, 339 F.R.D. 232, 246 (M.D. La. 2021) (“According to Plaintiffs, [defendant] does not provide *any* [intensive home and community-based services], opting instead to provide only basic outpatient counseling and medication management. If so, then every plaintiff has suffered the same injury as a result of [defendant]’s general policy—even if the recommended mental health interventions vary among class members. This issue is resolvable on a class-wide basis.”).

On this point, Defendants’ confusion is made all the more evident by their assertion that a “facial challenge does not require class treatment” and insistence that “as-applied” claims also

⁹ See also ECF No. 251 Pls.’ Summ. J. Br. at 12-14; ECF No. 262, Pls.’ Summ. J. Opp’n at 1-3.

¹⁰ ECF No. 259, Defs.’ Br. at 14.

¹¹ ECF No. 140, First Am. Compl. ¶ 147.

preclude class treatment.¹² Both are wrong.¹³ Plaintiffs’ facial claim involves “several questions of law and fact common to the class in this case. These include, (1) whether the blanket Exclusion in health plans offered to Medicaid participants facially violate the U.S. Constitution, the ACA, and the federal Medicaid Act; and (2) whether Defendants should be enjoined from enforcing the Exclusion and denying Plaintiffs and members of the proposed class coverage for and access to gender-confirming surgical care.”¹⁴ Moreover, facial challenges such as this are perfectly suited to class treatment. *See Toomey*, 2020 WL 2465707, at *4 (“In this case, [plaintiff] brings a facial challenge to the ‘gender reassignment surgery’ exclusion under Title VII and the Fourteenth Amendment Equal Protection Clause. The legal issues in this case are the same for all class members. The court finds the commonality prerequisite is satisfied.”); Fed. R. Civ. P. 23(b)(2) (“A class action may be maintained if Rule 23(a) is satisfied and if... the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]”).

A significant portion of Defendants’ response blurs the merits of Plaintiffs’ claims with the requirements for class certification under Rule 23. For example, Defendants march through each of Plaintiffs’ claims and restate many of the arguments Defendants make in support of summary judgment.¹⁵ However, Defendants demonstrate a fundamentally incorrect view of Plaintiffs’ claims and how they operate, as explained in Plaintiffs’ motion for summary judgment as well as

¹² ECF No. 259, Defs.’ Br. at 14-15.

¹³ Plaintiffs’ as-applied claims do not conflict in any way with the class certification and facial relief sought here. The Exclusion can (and does) discriminate both facially and as applied to Plaintiffs, and the Court already found that the futile act of seeking preauthorization for banned surgical care is not necessary for standing. ECF No. 57.

¹⁴ ECF No. 249, Pls.’ Class Cert. Br. at 10.

¹⁵ ECF No. 259, Defs.’ Br. at 14-19.

Plaintiffs' opposition to Defendants' motion for summary judgment.¹⁶ And Defendants' arguments regarding the merits do nothing to mitigate against class treatment.

Similarly, the cases that Defendants cite regarding commonality are inapposite. For example, Defendants cite *Paulino v. Dollar Gen. Corp.*, No. 3:12-CV-75, 2014 WL 1875326 (N.D.W. Va. May 9, 2014) to support their contention that Plaintiffs' discovery has been "particularized" and "individualized."¹⁷ However, in denying class certification in *Paulino*, the court held that "a common question is not enough when the answer may vary with each class member and is determinative of whether the member is properly part of the class." *Id.* at *5. Here, Plaintiffs have aptly demonstrated that the common questions they raise are threshold questions and that the answers will not vary among members of the class.¹⁸ *See, e.g., Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 207 (E.D. Va. 2015) ("In this case, common evidence applicable across all class members... will resolve a common contention and drive the litigation forward by common answers."). Defendants' citation to *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 (1982) does no more to advance their argument against commonality. Defendants attempt to use *Gen. Tel. Co.* in support of their bald assertion that "Plaintiffs' discovery has proven Plaintiffs' claims inherently poorly suited for class treatment in a post-*Dukes* world."¹⁹ This belies logic, as the Supreme Court authored *Gen. Tel. Co.* nearly twenty years prior to *Dukes*. Setting that aside, Plaintiffs have in fact shown the "existence of a class of persons who have suffered the same injury as [the named plaintiffs], such that the [named plaintiffs'] claims and the class claims will share common questions of law or fact and that the [named plaintiffs'] claims will be typical of the class

¹⁶ *See, generally*, ECF No. 251, Pls.' Summ. J. Br.; ECF No. 262, Pls.' Opp'n to Defs.' Mot. for Summ. J.

¹⁷ ECF No. 259, Defs.' Br. at 13-14.

¹⁸ ECF No. 249, Pls.' Class Cert. Br. at 8-11.

¹⁹ ECF No. 259, Defs.' Br. at 14.

claims.” *Id.* at 157. After all, as this Court noted, commonality “can be met when the plaintiff shows that the defendant ‘operated under a general policy of discrimination.’” *Fain v. Crouch*, 540 F. Supp. 3d 575, 585 (S.D.W. Va. 2021) (quoting *Dukes*, 564 U.S. at 353 (quoting *Gen. Tel. Co.*, 457 U.S. at 159 n.15)). Plaintiffs have satisfied the commonality requirement.

C. Plaintiffs Have Satisfied the Typicality and Adequacy Requirements.

“[T]he claims and defenses of [Mr. Fain and Ms. Anderson] are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Mr. Fain and Ms. Anderson are transgender West Virginia Medicaid participants.²⁰ So are all class members.²¹ Mr. Fain and Ms. Anderson seek or will seek gender-confirming care barred by the Exclusion.²² So do or will all class members.²³ Further, as explained above and in Plaintiffs’ summary judgment briefing, Plaintiffs argue that the Exclusion is facially unlawful because it is based on sex and transgender status. Thus, the Exclusion is unlawful in the same way for Mr. Fain and Ms. Anderson as it is for each and every class member. *See Flack*, 331 F.R.D. at 369 (“Plaintiffs easily meet [the typicality] requirement because their claims and the relief sought are *identical* to those of other class members. In fact, all the claims arise from defendants’ enforcing the Challenged Exclusion, and the relief sought simply seeks to allow the class members the right to individually seek treatment based on medical necessity, free from enforcement of the Challenged Exclusion.”).

And, tellingly, Defendants argue that the Exclusion is not facially unlawful—but base that argument on universally applicable notions of budget and CMS guidelines. As such, Mr. Fain and

²⁰ ECF No. 250-01, Fain Decl. ¶ 3-5; ECF No. 250-02, Anderson Decl. ¶ 3-5.

²¹ ECF No. 140, First Am. Compl. ¶ 147 (class definition).

²² Mot. to Seal, Ex. A, Karasic Rep. ¶¶ 73, 93.

²³ ECF No. 140, First Am. Compl. ¶ 147 (class definition).

Ms. Anderson are typical. *See, e.g., Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1061 (7th Cir. 2016) (finding that “there is an inherent tension in defendant’s position on class certification and its position on the merits” where defendant argues both that individualized issues prevent class treatment of its employees and that uniform treatment of its employees supports defendant’s argument on the merits).

Mr. Fain and Ms. Anderson are also adequate class representatives. Notably, Defendants do not challenge anything specific to Mr. Fain or Ms. Anderson in arguing against adequacy.²⁴ Nor do Defendants argue that Plaintiffs’ counsel would be inadequate class counsel.²⁵ Rather, Defendants’ sole focus is on Plaintiffs’ arguments that Defendants should cover puberty-delaying treatment.²⁶ But those arguments do not make Mr. Fain or Ms. Anderson inadequate.

Rather, to the extent Defendants are arguing that no “exclusion for puberty-delaying treatment exists,”²⁷ there is no issue. If there is no such exclusion, then all class members—including Mr. Fain and Ms. Anderson—are the same as to puberty-delaying treatment because no claim for such coverage would be denied based on sex or transgender status.

Defendants’ argument that Mr. Fain and Ms. Anderson have not sought puberty-delaying treatment fares no better.²⁸ Puberty-delaying treatment—just like surgery, hormones, and counseling—is gender-confirming care. Thus, whether Defendants exclude any one, a combination, or all such types of care from coverage through their Exclusion, they are acting unlawfully. Moreover, Rule 23 does not require class representatives and members of the class to be identical. *See, e.g., G.T. by Michelle v. Bd. of Educ. of Cnty. of Kanawha*, No. 2:20-CV-00057,

²⁴ ECF No. 259, Defs.’ Br. at 19-20.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* (internal quotations omitted).

²⁸ ECF No. 259, Defs.’ Br. at 19-20.

2021 WL 3744607, at *16 (S.D.W. Va. Aug. 24, 2021) (certifying a class of “students with disabilities who need behavioral support and have experienced disciplinary removals from their classrooms” because “[t]his case is about fixing systemic problems with the way [defendant] addresses disability-related behavioral problems to ensure that students receive a free and appropriate public education, not about the content of each student’s IEP or the disciplinary decisions made following each behavioral infraction”). Thus, Mr. Fain and Ms. Anderson are both typical and adequate representatives of the proposed class.²⁹

D. Plaintiffs Have Satisfied the Requirements of Rule 23(b)(2), and Defendants Do Not Argue Otherwise.

Defendants do not even mention the requirements of Rule 23(b)(2) in their response, let alone challenge that Plaintiffs have satisfied those requirements. As a result, there is no dispute that Plaintiffs’ proposed injunctive and declaratory relief are suitable class-wide remedies.³⁰ Certification is warranted under Rule 23(b)(2) “because the categorical coverage ban on gender-confirming care under the Challenged Exclusion is generally applicable to the class, making a final injunction and corresponding declaratory judgment appropriate to the full class.” *Flack*, 331 F.R.D. at 370.

III. CONCLUSION

Mr. Fain and Ms. Anderson have presented sufficient evidence to demonstrate the requirements of Rule 23 are met for the following proposed class:

All 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.

Their claims are best resolved on a class-wide basis. Accordingly, Plaintiffs respectfully request

²⁹ ECF No. 249, Pls.’ Class Cert. Br. at 11-13.

³⁰ *Id.* at 17-18.

the Court certify the case as a class action and appoint the undersigned counsel as class counsel.

Dated: June 21, 2022

Respectfully submitted,

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I hereby certify that the foregoing document was served electronically on June 21, 2022,
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