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 MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

I. INTRODUCTION

This case is ready for decision and summary judgment should be granted in Plaintiffs' favor. Defendants can create no dispute as to the core material fact: Defendants exclude coverage for "transsexual surgery," while covering the same or similar procedures for cisgender people. Defendants' opposition attempts to recast the Exclusion as merely discrimination based on a neutral medical condition to evade the heightened scrutiny required here. But the targeting of transgender people appears on the face of the Exclusion: the outmoded term "transsexual" refers to transgender people and transgender people—only. As the overwhelming weight of courts have found in similar cases, the Exclusion's explicitly sex-based terms clearly evince discrimination based on sex and transgender status.

Defendants also continue to misstate the discretion granted to them under the Medicaid Act, which simply does not authorize the discrimination here.[1] As Plaintiffs opposition brief made clear, that discretion is not boundless and there is no basis in the record supporting Defendants' arbitrary decision to deny coverage for surgical care to treat gender dysphoria while covering the same surgical care for other reasons.[2]

Defendants argue again that Plaintiffs lack standing. But Plaintiffs Christopher Fain and Shauntae Anderson have not been denied coverage for gender-confirming *surgical* care because Defendants "enacted a clear policy that excludes gender-confirming surgical care with no exceptions" and they need not subject themselves to the futile and painful act of being denied. *Fain v. Crouch*, 540 F. Supp. 3d 575, 583 (S.D.W. Va. 2021). Although Defendants flagrantly mischaracterize the deposition testimony of Mr. Fain and flippantly dismiss that of Ms. Anderson,

[1] ECF No. 261, Defs.' Summ. J. Opp. at 3.
[2] ECF No. 262, Pls.' Summ. J. Opp. at 18-20.

this does not take away from the fact that Plaintiffs are challenging the categorical Exclusion *of surgery*. Ultimately, Defendants have failed to offer any valid legal defenses for the Exclusion, and identify no dispute of material fact. This Court should grant summary judgment to Plaintiffs on all claims.[3]

II. DEFENDANTS' EXCLUSION DISCRIMNATES BASED ON SEX AND TRANSGENDER STATUS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

As a threshold matter, Defendants quibble with certain factual assertions Plaintiffs have made, but none are material to the legal questions this Court must decide. The parties agree that there are hundreds of Medicaid participants who have a gender dysphoria diagnosis, ECF No. 261, Defs.' Summ. J. Opp. at 4; that an Exclusion for "transsexual surgery" has been "maintained year-to-year" dating back to at least 2004, *id.* at 5; and that Defendants will not reimburse MCOs if they voluntarily provide this care (and as a result, none do), *id*. Defendants also clarify the way budgetary projections work for the Medicaid program, but are *silent* on the established case law that the government cannot balance the public fisc on the backs of a vulnerable minority group. *See* ECF No. 262, Pls.' Summ. J. Opp. at 10-12; *see also id.* at 11 (without dispute this issue has never been researched or analyzed by any decision-maker, and BMS has not had to cut coverage based on budget shortfalls during the organizational representative's more than 20-year tenure). Finally, Defendants argue again that the procedures Plaintiffs seek are not similar to those covered for cisgender people, but their only point is that transgender participants are denied coverage for gender-confirming surgical care, while cisgender participants receive these procedures for other

[3] Defendants' arguments about puberty-delaying treatment do not change the analysis. To the extent Defendants are arguing that no exclusion "for puberty-delaying treatment exists," there is no issue. ECF No. 261, Defs.' Summ. J. Opp. at 3 n.2. But to the extent Defendants do deny such care based on the Exclusion, Plaintiffs challenged that in their complaint, which defines the care at issue as any "care denied pursuant to [the Exclusion]." ECF No. 140 ¶ 1.

reasons.[4] This is, in fact, what makes the Exclusion discriminatory.

As Plaintiffs explained in their motion for summary judgment and opposition brief, there are at least four ways that the Exclusion constitutes impermissible discrimination based on sex; and the Exclusion discriminates based on transgender status as well.[5] Each ground is sufficient independently to demonstrate that the Exclusion discriminates based on sex or transgender status and that should end the matter. Defendants do not seriously engage with (or even respond to) any of these well-established theories. Instead, Defendants posit three deeply flawed arguments: (1) Plaintiffs are purportedly not similarly situated to cisgender Medicaid participants who receive the same kinds of care Plaintiffs seek[6]; (2) Plaintiffs have not shown that the Exclusion is facially or intentionally discriminatory; and (3) the Exclusion purportedly singles out only a neutral, generally applicable medical treatment and not sex or transgender status.[7] None of these arguments is true, for all the reasons in Plaintiffs' prior briefing and below.

First, Plaintiffs are similarly situated to cisgender Medicaid participants who receive the same or similar kinds of care Plaintiffs seek. As Plaintiffs explained in their opposition brief, Defendants cannot defeat Plaintiffs' claim by just pointing to any distinction between the favored majority and the excluded minority, or every equal protection claim would fail.[8] Defendants offer no response except the same circular reasoning as before, asking this Court to find that transgender plaintiffs can only be similarly situated to themselves—*i.e.*, to Medicaid participants with gender dysphoria who seek gender-confirming surgery.[9] This is inconsistent with blackletter law. The

[4] ECF No. 261, Defs.' Summ. J. Opp. at 7-9.
[5] ECF No. 251, Pls.' Summ. J. Br. at 12-14; ECF No. 262, Pls.' Summ. J. Opp. at 1-3.
[6] ECF No. 261, Defs.' Summ. J. Opp. at 10-11.
[7] ECF No. 261, Defs.' Summ. J. Opp. at 12-14.
[8] ECF No. 262, Pls.' Summ. J. Opp. at 5-6.
[9] ECF No. 261, Defs.' Summ. J. Opp. at 10.

legal standard examines whether parties "are in all *relevant* respects alike." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001) (emphasis added; cleaned up). Defendants' only response to this is that cisgender Medicaid participants are different "because the procedures sought by cisgender individuals are not gender-confirming procedures."[10] But that merely articulates that cisgender individuals are not transgender. That does not supply any *relevant* difference for purposes of this analysis, and Defendants offer nothing else to support their position. Moreover, as explained in Plaintiffs' opposition brief, Defendants' own policies and claim processes demonstrate that Plaintiffs are similarly situated to cisgender participants.[11] Defendants offer no contrary facts, let alone a basis to find any material dispute of fact. Plaintiffs are similarly situated to cisgender West Virginia Medicaid participants.

Second, Defendants assert that the Exclusion of "transsexual surgery" "does not facially discriminate based on sex or transgender status."[12] They offer no supporting analysis or authority, perhaps because the case law departs dramatically from their position. Several courts interpreting similar exclusions have found them to be facially discriminatory. *See, e.g.*, *Kadel v. Folwell*, No. 1:19-cv-272, 2022 WL 2106270, at *19 (M.D.N.C. June 10, 2022) ("These exclusions facially discriminate based on sex and transgender status."); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1030 (D. Alaska 2020) ("Here, defendant has adopted and relied upon a formal, facially discriminatory policy.").

Even if the Court agreed that Plaintiffs must demonstrate intent to treat transgender people differently, Defendants concede it in their briefing. As Defendants emphasize yet again in their opposition, the Exclusion "has been *maintained* year-to-year without change," and "Medicaid and

[10] ECF No. 261, Defs.' Summ. J. Opp. at 11.
[11] ECF No. 262, Pls.' Summ. J. Opp. at 6-8.
[12] ECF No. 261, Defs.' Summ. J. Opp. at 11.

the officials who *administer* the state program are acting reasonably in also *declining* to mandate such coverage."[13] As Defendants' own words demonstrate, there is nothing accidental or inadvertent about the Exclusion—instead, the undisputed facts make clear that Defendants intend to deny "transsexual surgery" to transgender participants.[14]

Third, as Plaintiffs explained at length in their opposition brief, Defendants' attempt to paint the Exclusion as facially neutral fails.[15] The fact that the challenged discrimination arises in the healthcare context does not transform the sex and transgender status discrimination evident here into neutral medical condition discrimination. Indeed the "transsexual surgery" care prohibited by the Exclusion names the targeted group on its face—transsexual (or in modern terms, transgender) people.

Additionally, Defendants' argument that a "policy that affects some, but not all,

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[13] ECF No. 261, Defs.' Summ. J. Opp. at 11.

[14] Defendants briefly reference on page 11 of their opposition brief a series of arguments already articulated in their prior briefing, without new analysis or citation. To avoid burdening the Court with a duplicative response, Plaintiffs refer the Court to, and incorporate by reference, the responses Plaintiffs have provided in their prior briefing:

- Regarding Defendants' argument that the Exclusion pre-dated Defendants Crouch and Beane, *see* ECF No. 262, Pls.' Summ. J. Opp. at 10;
- Regarding the U.S. Department of Health and Human Services' decision in 2014 to eliminate the categorical exclusion in the Medicare program, *see* ECF No. 262, Pls.' Summ. J. Opp. at 14-15;
- Regarding the number of vaginoplasty coverage requests made through the Medicaid program, *see* ECF No. 262, Pls.' Summ. J. Opp. at 8 n.27; and
- Regarding the fact that gender dysphoria is included as a diagnosis in the DSM V, *see* ECF No. 262, Pls.' Summ. J. Opp. at 8-9.

[15] Defendants' argument and citations to relevant authorities remain unchanged. As Plaintiffs previously explained, the portion of the magistrate judge opinion upon which Defendants rely in *Toomey v. Arizona*, 2020 WL 8459367 (D. Ariz. Nov. 30, 2020) was *rejected* by the District Court Judge in that matter. *Toomey v. Arizona*, 19-cv-00035, 2021 WL 753721, at *6 (D. Ariz. Feb. 26, 2021). And the District Court decision in *Lange v. Houston Cnty., Georgia*, 499 F. Supp. 3d 1258 (M.D. Ga. 2020), finding an exclusion for "sex change surgery" facially neutral, is an out-of-Circuit outlier that is not compatible with the analysis *Grimm* requires here. ECF No. 262, Pls.' Summ. J. Opp. at 3-5.

transgender individuals, is not discrimination on the basis of sex or transgender identity" is patently incorrect.[16] This is neither the rule for sex discrimination cases generally, nor for discrimination against transgender people specifically. For example, although the Supreme Court assumed that "most women would not choose [the Virginia Military Institute's] adversative method" of education, that did not affect the state's clear sex discrimination against women who would so choose, but were precluded from enrolling. *United States v. Virginia*, 518 U.S. 515, 542 (1996); *see also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1775 (2020) (it "does [not] matter if an employer discriminates against only a subset of men or women"); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (refusal to hire women with preschool-age children was facial sex discrimination). The case law is replete with similar examples for transgender people. Not all transgender people want to enroll in the military, or are students who need to use restrooms matching their gender identity in the Gloucester County school system, but barring those who do discriminates based on sex and transgender status. *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608-613 (4th Cir. 2020), as amended (Aug. 28, 2020).

Defendants incorrectly analogize this case to *Geduldig v. Aiello*, 417 U.S. 484 (1974), but *Geduldig* does not apply here. *First*, *Geduldig* was decided before the Supreme Court recognized sex stereotyping as a form of discrimination in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and provided guidance in *Bostock*, 140 S. Ct. at 1741-42, for analyzing sex discrimination against transgender people. *Second*, *Geduldig* does not transform the sex discrimination on the face of the Exclusion into a neutral rule. Nor did it hold that pregnancy-based classifications never violate the Equal Protection Clause, instead concluding more narrowly that not every pregnancy classification

[16] ECF No. 261, Defs.' Summ. J. Opp. at 12.

is an explicit sex-based classification "like those considered in" *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973). *Geduldig*, 417 U.S. at 496 n.20. In stark contrast, the Exclusion at issue here cannot be explained without reference to sex and transgender status. It was specifically designed to categorically exclude gender-confirming surgical care from coverage. Courts have had no trouble identifying the sex-based classification explicit in exclusions for gender-confirming care. *See, e.g.*, *Kadel*, 2022 WL 2106270, at *21 (finding *Geduldig* inapplicable because the health plan's exclusion of gender-affirming care "excludes *treatments* that lead or are connected to *sex* changes or modifications"; thus, unlike pregnancy, this kind of care cannot be explained without reference to sex); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 999-1000 (W.D. Wis. 2018) ("Defendants' reliance on *Gedul[d]ig*, however, rests on a finding that the Exclusion does not treat individuals differently based on sex . . . [T]he court has rejected this argument.").[17]

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR ACA CLAIM.

Defendants concede that West Virginia Medicaid is a health program or activity that receives federal financial assistance,[18] and Plaintiffs have demonstrated as a matter of law that they were subjected to discrimination in healthcare services on the basis of sex.[19] This alone requires summary judgment for Plaintiffs. Defendants' opposition brief merely repeats their assertion that there is no discrimination because Title IX refers only "to the binary sex of male and female," and that Plaintiffs do not allege discrimination based on "binary sex."[20] As Plaintiffs have explained,

[17] The same reasoning renders irrelevant Defendant's analogy to *Harris v. McRae*'s ruling on the Hyde Amendment's restrictions on abortion. 448 U.S. 297, 322-24 (1980).
[18] ECF No. 151 ¶¶ 177A, 178A.
[19] ECF No. 251, Pls.' Summ. J. Br. at 17; ECF No. 262, Pls.' Summ. J. Opp. at 15-16.
[20] ECF No. 261, Defs.' Summ. J. Opp. at 15.

Defendants' invention of this "binary sex" theory cannot be found anywhere in *Grimm*, which is binding precedent on claims of discrimination by transgender people under Title IX.[21] *See Grimm*, 972 F.3d at 618-19. *Grimm*'s expansive sex discrimination analysis interprets Title IX consistent with Title VII's broad, remedial protections against sex discrimination, and rejected the notion that transgender people must fit rigid "binary" conceptions of sex. *See id.* at 616 (*Bostock*'s Title VII analysis "guides our evaluation of claims under Title IX"), and 621 (noting that "transgender individuals often defy binary categorization"). This binding decision is the guiding star for Plaintiffs' claims, and Defendants' efforts to distract from it with their invention of a so-called "binary sex" standard should be disregarded.

IV. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR MEDICAID ACT CLAIMS.

A. The Exclusion Violates the Medicaid Act's Comparability Requirements.

As Plaintiffs explained in their opposition brief, the great weight of the Comparability Requirement decisions run against Defendants. *See* ECF No. 262, Pls.' Summ. J. Opp. at 20-22 (collecting cases). Defendants' only response is that those courts must be "incorrect[]."[22] Not so. Defendants point to nothing showing that the cogent analysis in these decisions is wrong, and it is Defendants' position that is unsupported.

Lacking support in the case law, Defendants instead try to move the legal goalposts, projecting yet another non-existent requirement onto the test. The correct test is as follows: the Comparability Requirement in the Medicaid Act ensures that "that the medical assistance made available to any individual . . . shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual" in at least two ways. First, although not

[21] ECF No. 262, Pls.' Summ. J. Opp. at 15-16.
[22] ECF No. 261, Defs.' Summ. J. Opp. at 16.

relevant here, a plan shall not discriminate by denying coverage to the "categorially needy" that it provides to the "medically needy." 42 U.S.C. § 1396a(a)(10)(B)(ii). Second, a plan may not discriminate against Medicaid participants within the same "categorically needy" group, by providing coverage to some within that group that others are denied. 42 U.S.C. § 1396a(a)(10)(B)(i).

The accompanying regulation reinforces these requirements. 42 C.F.R. § 440.240. Section (a) clarifies that a Medicaid plan cannot provide reduced services as between the "categorically needy" and the "medically needy," 42 C.F.R. § 440.240(a); and section (b) explains that a plan cannot provide lesser coverage to participants *within* either category—*i.e.*, a plan cannot provide reduced coverage to some "medically needy" participants but not others, or some "categorically needy" participants but not others. 42 C.F.R. § 440.240(b). That is what Defendants do here. In both categories, some participants (those who are cisgender) receive coverage for medically necessary surgeries such as chest surgery, vaginoplasty and other procedures, while other participants (those who are transgender) do not.

Defendants attempt to blot out the relevant part of the regulation, urging the Court to ignore section (b) and claiming that Plaintiffs must win under section (a) or not at all. *See* ECF No. 261, Defs.' Summ. J. Opp. at 16 (arguing that "the comparability requirements prohibit distinctions between groups of Medicaid recipients as determined by eligibility" only, and Plaintiffs cannot "state any claim" unless they show "they are treated differently than other [medically needy] Medicaid recipients based on their status as categorically needy"). But nothing counsels in favor of ignoring section (b), which affirms the statutory prohibition on discrimination *within* a category of Medicaid participants as well.

Defendants' remaining arguments misconstrue the case law and urge the Court to follow

a single outlier. Defendants claim that Plaintiffs' argument was rejected by *Rodriguez v. City of New York*, 197 F.3d 611, 616 (2d Cir. 1999).[23] This is incorrect. *Rodriguez* involved a different claim, where plaintiffs sought coverage for "safety monitoring as an independent service," which was not offered to *any* participants under New York Medicaid. *Id.* at 614; *see also id.* at 616 (finding that the Medicaid Act "does not require a state to fund a benefit that it currently provides to no one"). As another district court explained, "[t]he right asserted in *Rodriguez* is very different from the right asserted here. The *Rodriguez* plaintiffs sought access to a specific service that the state was not required to provide and that it had not chosen to provide to anyone. Here, by contrast, plaintiffs allege that the specific treatments they seek are already provided to other Medicaid recipients but have been denied to them on the basis of their [gender dysphoria] diagnoses alone." *Cruz v. Zucker*, 116 F. Supp. 3d 334, 346 (S.D.N.Y. 2015). The instant case is distinguishable from *Rodriguez* for the same reason. Without dispute, Defendants *do* cover the kinds of care Plaintiffs seek, just not for transgender people who require it as treatment for gender dysphoria. *Rodriguez* itself recognized that the Comparability Requirement's "proper application is in situations where the same benefit is funded for some recipients but not others." *Rodriguez* at 616. This is that case.

Finally, *Casillas v. Daines*, 580 F. Supp. 2d 235 (S.D.N.Y. 2008), which rejected Comparability and Availability Requirement claims by transgender plaintiffs, is an outlier. Even the same District Court that issued the opinion declined to follow it in a subsequent case. *See Cruz*, 116 F. Supp. 3d at 343 (stating that while "*Casillas* is entitled to this Court's respectful attention . . . in the end, the Court finds itself in disagreement with that decision's reasoning and conclusions"). As *Cruz* held, in "enacting the Comparability Requirement, Congress made clear

[23] ECF No. 261, Defs.' Summ. J. Opp. at 17.

that the states may not blithely provide services to some of their needy residents while denying the same services to others who are equally needy." *Id.* at 346. For that reason, this Court should grant Plaintiffs summary judgment on their Comparability Requirement claim.

B. The Exclusion Violates the Medicaid Act's Availability Requirements.

The test for the Medicaid Act's Availability Requirement is simple—that the services (1) fall within a category of mandatory or optional medical services that the state has elected to provide; and (2) are medically necessary. *See Alvarez v. Betlach*, 572 F. App'x 519, 520-521 (9th Cir. 2014) (finding that the Medicaid Act "prohibits states from denying coverage of 'medically necessary' services that fall under a category covered in their Medicaid plans"); *Bontrager v. Ind. Fam. & Soc. Servs. Admin.*, 697 F.3d 604, 608 (7th Cir. 2012) (noting that a "State is required to provide Medicaid coverage for medically necessary treatments in those service areas that the State opts to provide such coverage"). Defendants claim that Plaintiffs "appear to argue that any State plan deeming *any* service as non-covered violates the Medicaid Act's availability requirement."[24] This grossly distorts Plaintiffs' argument. Plaintiffs' position is not "cover all services." Instead, the Availability Requirement clearly provides that "[w]hile a state has discretion to determine the optional services in its Medicaid plan," once a category of services is covered, "a state's failure to provide Medicaid coverage for . . . medically-necessary services within [that] covered Medicaid category is both per se unreasonable and inconsistent with the stated goals of Medicaid." *Lankford v. Sherman*, 451 F.3d 496, 511 (8th Cir. 2006).

While "states retain broad discretion to determine the extent of medical assistance offered in their Medicaid programs,"[25] nothing confers the discretion to discriminate. Where Defendants

[24] ECF No. 261, Defs.' Summ. J. Opp. at 19 (emphasis added).
[25] ECF No. 261, Defs.' Summ. J. Opp. at 19.

have elected to cover this surgical care, they must do so without discrimination within the categories of surgical care they already cover.[26] The Court should enter summary judgment for Plaintiffs on this claim.

V. PLAINTIFFS HAVE STANDING.

Defendants argue in cursory fashion, once again, that Plaintiffs lack standing to pursue their claims. As stated at the outset of this brief, Defendants "enacted a clear policy that excludes gender-confirming surgical care with no exceptions." *Fain*, 540 F. Supp. 3d at 583. In so doing, Defendants have caused a concrete injury to Plaintiffs Christopher Fain and Shauntae Anderson "by constructing [a] discriminatory barrier between [them] and [their] health insurance coverage." *Id*. Discovery in this matter produced no contrary facts, let alone any material dispute of fact on this point. As this Court correctly held, "[t]his barrier constitutes a concrete, non-speculative injury," and given this injury, Plaintiffs have standing to sue. *Id*. Defendants' opposition raises no new arguments or facts on this point, and Plaintiffs already have explained in their opposition brief why Defendants' arguments grossly misrepresent Plaintiffs' testimony and fail to create any material dispute of fact.[27] For all the reasons Plaintiffs explained in their opposition brief and above, Plaintiffs have standing.

VI. CONCLUSION

For all the reasons above, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment and find that Defendants' Exclusion violates the Equal Protection Clause, Section 1557 of the Affordable Care Act, and the Medicaid Act's Comparability and

[26] Plaintiffs have already responded in detail to Defendants' spurious claim that purported concerns about medical necessity justify the Exclusion here. *See* ECF No. 262, Pls.' Summ. J. Opp. at 12-15, 19-20.

[27] ECF No. 262, Pls.' Summ. J. Opp. at 23-25.

Availability Requirements.

Dated: June 21, 2022

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CHRISTOPHER FAIN, *et al.*, 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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served electronically on June 21, 2022 on the following counsel for Defendants in this case:

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