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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

M.H.; T.B., Plaintiffs-Appellees, v. MAGNI HAMSO, in her official capacity as the Medical Director of the Idaho Division of Medicaid and individually, Defendant-Appellant, and DAVE JEPPESEN, in his official capacity as the Director of the Idaho Department of Health and Welfare; IDAHO DEPARTMENT OF HEALTH AND WELFARE, Defendants.	No. 23-35485 D.C. No. 1:22-cv-00409-REP MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Raymond Edward Patricco, Jr., Magistrate Judge, Presiding

Argued and Submitted August 19, 2024
Seattle, Washington

Before: HAWKINS, McKEOWN, and DE ALBA, Circuit Judges.

Dr. Magni Hamso brings an interlocutory challenge to an order denying her Rule 12(b)(6) motion to dismiss Plaintiffs-Appellees' ("Plaintiffs") 42 U.S.C. § 1983 Fourteenth Amendment Equal Protection and procedural Due Process claims. Plaintiffs are adult transgender women and beneficiaries of Idaho Medicaid who suffer from gender dysphoria. Plaintiffs allege that Dr. Hamso denied them Medicaid coverage for medically necessary surgeries based on their transgender status under a then-unwritten policy that deems such surgeries as "cosmetic" specifically when treating gender dysphoria, even though Dr. Hamso grants coverage for the same surgeries when treating all other medical conditions "as a matter of course." Plaintiffs' coverage requests have been denied outright or effectively denied as the requests have been perpetually "under review."

Dr. Hamso argued below that she is entitled to qualified immunity on both constitutional claims and that Plaintiffs failed to state a plausible Equal Protection claim under § 1983. On appeal, she urges this Court to review the sufficiency of Plaintiffs' Equal Protection pleadings while asserting qualified

immunity as a defense to damages under both constitutional claims.[1]

We have interlocutory jurisdiction to review orders denying qualified immunity where the "issue is a purely legal one: whether the facts alleged [by the plaintiff] support a claim of violation of clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526–27, 528 n.9 (1985). We "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Id.* at 528. We review the denial of qualified immunity at the motion to dismiss stage de novo. *Rico v. Ducart*, 980 F.3d 1292, 1298 (9th Cir. 2020). We "accept as true all well-pleaded allegations of material fact, and construe them in the light most favorable to the non-moving party." *Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018) (internal brackets and quotations omitted) (citing *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012)). Denials of qualified immunity at the motion to dismiss stage should be affirmed if "accepting all of Plaintiff's allegations as true, Defendants' conduct (1) violated a constitutional right that (2) was clearly established at the time of the violation." *Polanco v. Diaz*, 76 F.4th 918, 925 (9th Cir. 2023) (internal quotations and citation omitted). Dismissal is not appropriate unless it is clear from the face of the complaint that qualified immunity applies. *Id.* There need not be a binding case directly on point, and absent binding Supreme Court or circuit

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[1] Dr. Hamso acknowledges that qualified immunity only shields her from liability for money damages, and does not bar Plaintiffs' claims for injunctive or declaratory relief.

authority, a "robust consensus" of persuasive authority may clearly establish the law. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741–42 (2011); *Ballou v. McElvain*, 29 F.4th 413, 421 (9th Cir. 2022).

1. The parties dispute whether interlocutory jurisdiction for the denial of qualified immunity includes jurisdiction to review the denial of a Rule 12(b)(6) motion for failure to state a plausible § 1983 claim, which is not ordinarily appealable. *See* 28 U.S.C. § 1291. We decline to decide the extent of our jurisdiction or exercise it, if any exists, to review the denial of Dr. Hamso's motion based on a purported failure to state a § 1983 Equal Protection claim.[2] *See Mitchell*, 472 U.S. at 528; *see also Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (describing the limits of interlocutory review); *Johnson v. Jones*, 515 U.S. 304, 310–11 (1995) (quoting *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)) (articulating the three Cohen requirements for interlocutory review). We resolve this appeal only on qualified immunity grounds, and we affirm in part and reverse in part.[3]

2. We affirm the district court's denial of qualified immunity as to Plaintiffs' Equal Protection claim at this stage. Taking the factual allegations of the

[2] The Supreme Court is expected to address similar Equal Protection issues in the case of *L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023), cert. granted sub. nom. *United States v. Skrmetti*, No. 23-477, 2024 WL 3089532, at *1 (June 24, 2024) (mem.).

[3] We deny as moot Plaintiffs' request for judicial notice and Plaintiffs' motion to strike Dr. Hamso's August 15, 2024, 28j letter response. The cited authorities are not relevant to the qualified immunity analysis, and thus we do not consider them.

complaint as true and viewing them in the light most favorable to Plaintiffs, Dr. Hamso violated the transgender Plaintiffs' clearly established right to be treated equally to other, non-transgender Medicaid beneficiaries when seeking Medicaid coverage for the same medically necessary surgeries. *See Elliot-Park v. Manglona*, 592 F.3d 1003, 1008–09 (9th Cir. 2010) (quotations omitted) (explaining the Equal Protection Clause's non-discrimination principle is "so clear . . . that all public officials must be charged with knowledge of it") As alleged, the policy of treating certain surgeries as "cosmetic" only when treating gender dysphoria creates a classification on the basis of transgender status and sex, which was clearly subject to heightened scrutiny under binding circuit precedent. *See Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019). As Dr. Hamso conceded at oral argument, by singling out gender dysphoria as the only non-covered condition, the policy exclusively burdens transgender beneficiaries relative to cisgender beneficiaries, regardless of individual circumstances or medical necessity. This case is therefore distinct from *Geduldig v. Aiello*, 417 U.S. 484 (1974), where no sex was comparatively disadvantaged in seeking disability insurance coverage.

Dr. Hamso had sufficient notice that the policy created a classification that would be subject to heightened scrutiny. *See, e.g., Karnoski*, 926 F.3d at 1200–01. At the time of Dr. Hamso's coverage denials, a "robust consensus" of district court decisions evaluating the same or similar exclusionary polices across the country also put her on notice of Plaintiffs' Equal Protection rights in the healthcare coverage context. *See, e.g., Fain v. Crouch*, 618 F. Supp. 3d 313,

327–30 (W. Va. 2022) (enjoining West Virginia Medicaid exclusion for gender-affirming surgery as violative of Equal Protection); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951–53 (W.D. Wis. 2018) (same for Wisconsin Medicaid exclusion); *see also Lange v. Houston Cnty.*, Ga., 499 F. Supp. 3d 1258, 1275–77 (D. Ga. 2020) (holding a similar state employee health plan exclusion may plausibly violate Equal Protection on a disparate impact theory). The district court correctly denied qualified immunity at this stage without prejudice to Dr. Hamso to assert it again with a more developed record.

3. We reverse the district court's denial of qualified immunity as to Plaintiffs' procedural Due Process claim. Procedural Due Process claims require Plaintiffs to establish two elements, "(1) a protected property interest … and (2) a denial of adequate procedural protections." *Pinnacle Armor, Inc. v. United States*, 684 F.3d 708, 706 (9th Cir. 2011) (citations omitted). We agree that the complaint alleges a cognizable property interest in Medicaid coverage that was clearly established. However, Plaintiffs do not cite, and we did not find, any clearly established law that is "particularized to the facts of the case" regarding the procedural safeguards that are required for the welfare benefit at issue here. *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam).

Each party shall bear their own costs on appeal.

AFFIRMED IN PART AND REVERSED IN PART.

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

MH and TB, individually, Plaintiffs, vs. DAVE JEPPESEN, in his official capacity as the Director of the Idaho Department of Health and Welfare; DR. MAGNI HAMSO, in her official capacity as the Medical Director of the Idaho Division of Medicaid and individually; and the IDAHO DEPARTMENT OF HEALTH AND WELFARE, Defendants.	Case No.: 1:22-cv-00409-REP **MEMORANDUM DECISION AND ORDER RE: DEFENDANTS' MOTION TO DISMISS** **(Dkt. 19)**

Pending before the Court is Defendants' Motion to Dismiss (Dkt. 19). Having carefully considered the record, participated in oral argument, and otherwise being fully advised, the Court enters the following Memorandum Decision and Order which grants, in part, and denies, in part, Defendants' Motion.

I. GENERAL BACKGROUND[1]

A. Gender Identity and Gender Dysphoria

According to Plaintiffs' Complaint, each of us has an internal sense of their sex – i.e., being male or female. Compl. at ¶ 33 (Dkt. 1). For most, this "gender identity" tracks the sex assigned at birth based solely on a visual assessment of external genitalia, so-called "cisgender" individuals. *Id.* at ¶ 35. However, transgender men and women have gender identities that differ from their assigned sexes. *Id.* at ¶ 36. For example, a transgender man is a man who was assigned female at birth but has a male gender identity, and a transgender woman is a female who was assigned male at birth but has a female gender identity. *Id.* When a person's gender identity does not match their sex assigned at birth, gender identity is the critical determinant of that person's sex. *Id.*

For transgender individuals, the incongruence between their gender identities and assigned sexes can result in clinically-significant distress known as "gender dysphoria." *Id.* at ¶ 38. Gender dysphoria is a recognized medical condition which, if left untreated, can cause anxiety, depression, self-harm, or suicidal ideation. *Id.* at ¶¶ 38-39. Untreated gender dysphoria often intensifies with time; the longer a transgender individual goes without or is denied adequate

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[1] The background and discussion herein is informed by Plaintiffs' Verified Complaint for Injunctive Relief, Declaratory Judgment, and Damages (Dkt. 1). As required in evaluating a motion to dismiss for failure to state a claim, the Court takes Plaintiffs' allegations as true and draws all reasonable inferences in their favor. *See infra*

treatment for gender dysphoria, the greater the risk of severe harm to the individual's health. *Id.* at ¶ 40.

Gender dysphoria is highly treatable and health care providers follow well-established standards of care to treat patients with gender dysphoria. *Id.* at ¶ 41. Treatment for gender dysphoria includes "gender transition," which is the process of living in a manner consistent with one's gender identity. *Id.* at ¶ 43. Transitioning is particular to the individual, but typically includes social, legal, and medical transition. *Id.* at ¶ 46.

Social transition entails a transgender individual living in accordance with their gender identity in all aspects of life (e.g., wearing certain clothing, following particular grooming practices, and using pronouns consistent with that individual's gender identity). *Id.* at ¶ 47. Legal transition involves taking steps to formally harmonize a transgender individual's legal identity with their gender identity (e.g., changing the name and gender marker on an individual's driver's license, birth certificate, or other forms of identification). *Id.* at ¶ 48. Medical transition includes gender-affirming care that brings the sex-specific characteristics of a transgender individual's body into alignment with their gender identity (e.g., mental health counseling, hormone therapy, surgical care, or other medically necessary treatments for gender dysphoria). *Id.* at ¶ 49.

Relevant here, medical transition care like hormone therapy to feminize or masculinize the body and surgery to change primary and/or secondary sex characteristics (e.g., breasts/chest, external and/or internal genitalia, facial features, body contouring) is

often considered medically necessary for transgender individuals with gender dysphoria. *Id.* at ¶¶ 51, 53. Such care is likewise understood by the broader medical community to be safe and effective. *Id.* at ¶¶ 56-58.

B. Plaintiffs MH and TB[2]

Plaintiffs are transgender women – they were assigned male at birth but identify as female today. *Id.* at ¶¶ 23-24, 96, 158. Both have been diagnosed with gender dysphoria and their medical providers have recommended that they receive genital reconstruction surgeries as medically necessary treatment therefor. *Id.* at ¶¶ 106, 116, 163, 169. Being eligible for and enrolled in the Idaho Medicaid program, Plaintiffs submitted prior authorization requests to Defendant Idaho Department of Health and Welfare ("IDHW"),[3] seeking coverage for these procedures. *Id.* at ¶¶ 118, 178. IDHW, however, denied these requests (either outright or by virtue of repeated, unresolved delays). *See infra* (citing Compl. at ¶¶ 119, 154, 188 (Dkt. 1)).

1. <u>MH</u>

On March 10, 2021, MH sought coverage for a penectomy, orchiectomy, and vulvoplasty. Compl. at ¶ 118 (Dkt. 1). On March 26, 2021, the medical director

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[2] Owing to the sensitive nature of this action and its related privacy implications, on November 29, 2022, the Court permitted Plaintiffs to appear using pseudonyms. *See* 11/29/22 DEO (Dkt. 21).

[3] Plaintiffs allege that IDHW is the entity charged with administering Idaho's Medicaid program under Idaho Code § 56-202(a). Compl. at ¶¶ 25, 27 (Dkt. 1)

for IDHW's Division of Medicaid, Defendant Dr. Magni Hamso, denied the request due to a lack of medical necessity. *Id.* at ¶ 119. A single reason was given for the denial: MH's request did not satisfy the World Professional Association for Transgender Health's ("WPATH") recommendation that gender-affirming surgery follow 12 months of hormone therapy. *Id.* at ¶¶ 120, 129, 133. The denial also indicated that MH could resubmit her request after completing the recommended 12 months of hormone therapy. *Id.* at ¶ 120. MH timely filed a request for a fair hearing with IDHW to appeal the denial. *Id.* at ¶ 122.[4]

At the June 3, 2021 hearing, the Nurse Reviewer for IDHW's Division of Medicaid, Susan Scheuerer, testified that Dr. Hamso denied MH's request because it was unclear whether MH completed 12 months of hormone therapy as required by the WPATH Standards of Care. *Id.* at ¶ 128. Later during the hearing, MH explained that the records submitted alongside her original request confirmed that she had already completed 12 months of hormone therapy. *Id.* at ¶¶ 129, 132. Still, in response to subsequent questioning from the hearing officer about the completeness of MH's request, Ms. Scheuerer testified for the first time that, even if MH had completed 12 months of hormone therapy, IDHW would have denied her request anyway because Idaho Medicaid's policy considers the requested surgical procedures for

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[4] In May 2021 (following MH's appeal of IDHW's March 26, 2021 denial), MH received an orchiectomy that was covered by Idaho Medicaid. Compl. at ¶ 123 (Dkt. 1). In seeking prior authorization for that procedure, MH's medical provider noted that it was indicated to treat testicular pain as well as gender dysphoria. *Id.*

transgender individuals to be medically unnecessary and "cosmetic." *Id.* at ¶¶ 130-131.

MH did not call any witnesses at the hearing or submit evidence rebutting IDHW's evolving position on the requested surgical procedures because, up to that point, her request was denied on the basis that she had not yet completed 12 months of hormone therapy. *Id.* at ¶ 133. MH nonetheless testified that extensive peer-reviewed research shows that gender-affirming surgery is accepted treatment for gender dysphoria, stating further: "I didn't bring peer-reviewed articles in because I didn't think I would need to defend the validity of a surgery that has been accepted by the majority of urologists for multiple decades." *Id.* at ¶¶ 133-134.

On July 2, 2021, the hearing officer issued a Preliminary Order to Remand. *Id.* at ¶ 135. Therein, the hearing officer found that (i) the documentation from MH's medical and mental health providers established that she had completed 12 continuous months of hormone therapy; (ii) MH referenced peer-reviewed research supporting the idea that gender-affirming surgery is medically necessary and not just cosmetic; (iii) MH should have another opportunity to provide "clearer documentation showing 12 continuous months of hormone therapy" (though questioning how IDHW "interpreted the documentation to mean anything else," and simultaneously noting how Ms. Scheuerer could not even describe what documentation was missing or what would be needed to show that the requirement was met); (iv) IDHW's March 26, 2021 denial did not provide notice of any basis for the denial other than a lack of 12 months of hormone therapy; and (v) IDHW "somewhat abused its

discretion" when it would have denied MH's request regardless of whether she completed 12 months of hormone therapy. *Id.* at ¶¶ 136-140. The hearing officer then remanded MH's appeal back to IDHW for a new decision. *Id.* at ¶ 141.

Consistent with the hearing officer's direction, on July 28, 2021, MH renewed her prior authorization request to IDHW. *Id.* at ¶ 143. Despite MH's repeated requests for updates immediately thereafter, IDHW refused to formally approve or deny MH's request; rather, IDHW claimed that MH's request remained pending via an active appeal. *Id.* at ¶¶ 144-147.

On November 25, 2021, MH requested a new hearing to address IDHW's unfolding failure to promptly process her latest request. *Id.* at ¶ 148. IDHW, through Dr. Hamso, denied that request on December 23, 2021, reasoning that its ongoing review of MH's coverage request precluded any hearing. *Id.* at ¶ 150.

Finally, on May 6, 2022, Dr. Hamso wrote a "Request for Information" to MH's medical providers, stating: "Medicaid has determined that a medical necessity decision cannot be made at this time because we do not have the necessary medical information." *Id.* at ¶ 153. To date, IDHW has not notified MH of any final decision on her renewed request for coverage of medically necessary gender-affirming surgical care to alleviate her ongoing symptoms of gender dysphoria. *Id.* at ¶ 154. As a consequence, MH has not received complete treatment for her gender dysphoria. *Id.* at ¶ 156.

2. <u>TB</u>

In May 2022, TB sought coverage for gender-affirming surgeries. *Id.* at ¶¶ 168-169. A Notice of Decision followed on May 25, 2022, indicating that, for each of the requested surgeries, the determination was the same: "Outcome Not Rendered." *Id.* at ¶ 170.

Confused, TB reached out to IDHW's Medical Care Unit on May 31, 2022, asking: "I do not understand what 'Outcome Not Rendered' means. Does it mean that my case is still being reviewed or does it mean that my surgery is not covered?" *Id.* at ¶ 171. TB followed up with IDHW's Medical Care Unit on June 1, 2022, asking again: "I have some questions regarding my case. I see its [outcome] is not rendered. I called the number given to me and was told that everything was sent to your medical care unit. Can you give me an idea of how long it takes to review my case?" *Id.* at ¶ 172.

On June 2, 2022, IDHW's Medical Care Unit answered, stating: "The Medical Care Unit has received your request and it is currently pending review by the Medical Director." *Id.* at ¶ 173. Later that day, TB replied with an offer to have her medical providers provide a medical necessity letter and clinic notes, if needed. *Id.* at ¶ 174. The next day, IDHW's Medical Care Unit reiterated that it received TB's request and "it is currently pending review by the Medical Director." *Id.* at ¶ 175.

On June 9, 2022, TB's medical providers submitted a letter to IDHW outlining the medical necessity of the requested procedures. *Id.* at ¶ 177 ("Our surgical team . . . and four independent mental health professionals have thoroughly assessed this

patient using the WPATH Standards of Care and have determined vaginoplasty to be a medically necessary procedure for [TB]. In our assessment, delay or denial of this medically necessary procedure would harm the health of this patient and put her well-being at risk."). This letter was supported by additional letters from TB's psychiatrist in Idaho, her child psychiatrist from Colorado, her licensed clinical social worker in Idaho, and her psychologist in Idaho. *Id.* at ¶ 178. Status inquiries from TB and her parents followed on June 13, 21, and 22, 2022, respectively. *Id.* at ¶¶ 179-181. On June 23, 2022, IDHW's Medical Care Unit acknowledged once more that it received TB's requests and "it is currently pending review by the Medical Director." *Id.* at ¶ 182.

On July 6, 2022, TB relayed to IDHW's Medical Care Unit her frustration with the delay in processing her request and asked for a time frame to expect IDHW's decision. *Id.* at ¶ 183. On July 13, 2022, IDHW's Medical Care Unit responded only that "[t]his is still under review." *Id.* at ¶ 184.

On July 22, 2022, TB emailed IDHW's Medical Care Unit with quoted material stating that discrimination against transgender individuals is prohibited – implying that health care plans cannot exclude transition-related care. *Id.* at ¶ 185.[5] The IDHW's Medical Care Unit never responded and, to

[5] Coincidentally, Plaintiffs allege that IDHW's Director, Defendant Dave Jeppesen, was quoted in a July 22, 2022 article, stating that IDHW "has not approved surgical procedures for diagnoses of gender dysphoria" and "continues to have no policy related to authorizing surgeries or hormone therapies for gender dysphoria . . . ." Compl. at ¶ 84 (Dkt. 1).

date, has not notified TB of its decision on her request for coverage of medically necessary gender-affirming surgical care to treat her gender dysphoria. *Id.* at ¶¶ 186-188. As a result, TB has not received complete treatment for her gender dysphoria. *Id.*

C. This Action and Defendants' Motion to Dismiss

Plaintiffs bring this action to challenge Idaho Medicaid's allegedly discriminatory policies that deny transgender individuals essential and sometimes life-saving healthcare. *Id.* at ¶ 1. They claim that Idaho Medicaid excludes coverage for genital reconstruction surgery that is medically necessary for transgender individuals to treat the clinically-significant distress caused by gender dysphoria. Conversely, cisgender individuals receive coverage for genital reconstruction surgery that is medically necessary as a matter of course. *Id.* at ¶¶ 1, 7, 85-86, 193, 195-196, 201-202, 207-208.

In turn, Plaintiffs assert the following claims against Defendants IDHW, Director Jeppesen in his official capacity, and Dr. Hamso in her official and individual capacities (for all but the Patient Protection and Affordable Care Act claim): (i) unlawful discrimination on the basis of sex in violation of section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (First Claim for Relief); (ii) violation of the Medicaid Act's Availability Requirements, 42 U.S.C. § 1396a(a)(10)(A) (Second Claim for Relief); (iii) violation of the Medicaid Act's Comparability Requirements, 42 U.S.C. § 1396a(a)(10)(B) (Third Claim for Relief); (iv) violation of the Equal Protection

Clause of the Fourteenth Amendment (Fourth Claim for Relief); (v) violation of the Medicaid Act's Due Process Requirements, 42 U.S.C. § 1396a(a)(3) (Fifth Claim for Relief); and (vi) violation of the Due Process Clause of the Fourteenth Amendment (Sixth Claim for Relief). *Id.* at ¶¶ 189-228.

Defendants' Motion to Dismiss does not challenge each one of these claims. It instead targets only two aspects of Plaintiffs' Complaint: (i) the viability of Plaintiffs' Equal Protection claim itself (Fourth Claim for Relief); and (ii) the extent of Dr. Hamso's individual liability given that (a) compensatory damages for emotional distress cannot be awarded under the Medicaid Act (Second, Third, and Fifth Claims for Relief), and (b) she is entitled to qualified immunity in any event (Second, Third, Fourth, Fifth, and Sixth Claims for Relief). Mem. ISO MTD at 3-13 (Dkt. 19-1). Each of these arguments is addressed below.

II. MOTION TO DISMISS STANDARD

Rule 12(b)(6) permits a court to dismiss a case if the plaintiff has "failed to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A dismissal under Rule 12(b)(6) "may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys.*, LP, 534 F.3d 1116, 1121 (9th Cir. 2008) (internal quotation marks and citation omitted). To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Rule 12(b)(6) "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" of truth of the allegations. *Twombly*, 550 U.S. at 556.

A court evaluating a motion to dismiss must view the complaint "in the light most favorable to the plaintiff." *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir. 1990). All well-pleaded factual allegations of the complaint must be accepted as true. *Iqbal*, 556 U.S. at 678-79. But a court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). At bottom, a "complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Id.*

When a court dismisses a complaint under Rule 12(b)(6), it should generally allow the plaintiff to file an amended complaint unless the complaint clearly "could not be saved by any amendment." *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996), overruled on other grounds by *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007); *see also* Fed. R. Civ. P. 15(a)(2).

III. ANALYSIS

A. Whether Plaintiffs State an Equal Protection Claim

1. Equal Protection Framework

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). This aspirational promise, however, must coexist with the practical reality that laws often draw lines between groups of people – classifications – advantaging some while disadvantaging others. *Romer v. Evans*, 517 U.S. 620, 631 (1996). The Supreme Court has attempted to reconcile this tension by developing tiers of judicial scrutiny against which a government's classification can be measured. *Hecox v. Little*, 479 F. Supp. 3d 930, 972 (D. Idaho 2020) (citing *Latta v. Otter*, 19 F. Supp. 3d 1054, 1072-73 (D. Idaho 2014)). "The level of scrutiny depends on the characteristics of the disadvantaged group or the rights implicated by the classification." *Latta*, 19 F. Supp. 3d at 1073; *see also infra*.

All Equal Protection cases confront the same lynchpin issue: Is the government's classification justified by a sufficient, legitimate purpose? Chemerinsky, *Constitutional Law* § 9.1.2, at 685 (4th ed. 2011). This question turns entirely on the type of discrimination under review and requires that a court assess (i) the government's classification, (ii) the level of scrutiny that should be applied to the classification,

and (iii) whether the law or policy incorporating the classification meets the appropriate level of scrutiny. *Id.* at 686; *see also Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017); *see also Latta*, 19 F. Supp. 3d at 1073 ("The Court's principal tasks here are to determine the form of discrimination at issue and next identify and apply the appropriate level of scrutiny.").

a. The Government's Classification

"Equal Protection analysis always must begin by identifying how the government is distinguishing among people" (the government's classification). Chemerinsky, *Constitutional Law* § 9.1.2, at 686; *Thornton v. City of St. Helens*, 425 F.3d 1158, 1166 (9th Cir. 2005) ("The first step in Equal Protection analysis is to identify the [government's] classification of groups."). To do this, a court must search for a "comparative group composed of individuals who are similarly situated to those in the classified group in respects that are relevant to the government's challenged policy." *Roy v. Barr*, 960 F.3d 1175, 1181 (9th Cir. 2020) (internal quotation marks and citation omitted). The groups must be comprised of similarly-situated individuals who are treated differently so that the factor(s) motivating the disparate treatment can be identified. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995). "If the two groups are similarly situated, [the court] determines the appropriate level of scrutiny and then applies it." *Roy*, 960 F.3d at 1181 (internal quotation marks and citation omitted).

Sometimes the classification is clear. For example, a law may establish the classification "on its

face," meaning that the law, by its own terms, draws a distinction among similarly-situated people based on a particular characteristic. Chemerinsky, *Constitutional Law* § 9.12, at 686. In such cases, proof of both a discriminatory impact to the law and a discriminatory purpose behind it is assumed. *See, e.g., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (holding "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect"); *Walker v. Gomez*, 370 F.3d 969, 973-74 (9th Cir. 2004) (when policy is suspect on its face because it considers race as a factor, the inmate need not prove discriminatory intent); *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002) (facial discrimination is "by its very terms" intentional discrimination).

Other times the classification is not so obvious – as when a law or policy appears neutral on its face – and the classification must be divined from its ultimate disparate impact and the discriminatory purpose behind it. For example, a law or policy may be facially neutral but nonetheless applied in a discriminatory way to disadvantage a particular group. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (racially neutral law requiring a permit to operate a laundry, unless the laundry was located in a brick or stone building, applied to systematically deny Chinese applicants). Or a law or policy may be neutral on its face and applied according to its terms, but nonetheless enacted with a purpose of discriminating. *See Hunter v. Underwood*, 471 U.S. 222, 227-33 (1985) (provision of Alabama Constitution that permanently disenfranchised persons convicted

of crimes involving "moral turpitude" was intended to suppress voting right of African Americans).

A plaintiff challenging a facially-neutral law or policy must establish discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). In rare cases, the plaintiff may do so by showing a clear pattern of disparate impact unexplainable on other grounds. *Id.* (citing cases, including Yick Wo). In most cases, where such a clear pattern of disparate impact is lacking, the plaintiff may do so by demonstrating intentional discrimination in the historical background, the specific sequence of events, and the legislative and administrative history precipitating the law or policy. *Id.* at 268-69.

b. The Levels of Scrutiny

Once identified, the underlying nature of the classification determines the level of scrutiny applied to it. The most stringent level of review is strict scrutiny. It applies to a legislative classification that "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

A fundamental right is generally one enshrined in the Constitution and interpreted by the Supreme Court. *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992), overruled on other grounds by *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022). To that end, the Supreme Court has recognized that the Constitution protects a limited number of fundamental rights, including the right to privacy concerning consensual sexual activity and the right to

marriage. *Hecox*, 479 F. Supp. 3d at 973 (collecting cases). A classification is suspect if it is directed to a discrete and insular minority group. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); *Abebe v. Mukasey*, 554 F.3d 1203, 1206 (9th Cir. 2009). Historically, the Supreme Court has recognized that race, alienage, and national origin are examples of suspect classes. *Cleburne*, 473 U.S. at 440-41. Classifications involving a fundamental right or a suspect class are presumed unconstitutional and will survive strict scrutiny only when the government can show the law serves a compelling purpose and that it is the least restrictive means for doing so. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973). Strict scrutiny review is so exacting that most laws subjected to this standard fail. *See Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring: "Indeed, the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact.").

At the other end of the spectrum, a law that neither burdens a fundamental right nor targets a suspect class is subject to rational basis scrutiny. *Latta*, 19 F. Supp. 3d at 1073 (citing *Heller v. Doe*, 509 U.S. 312, 319-21 (1993)). Courts in these types of cases presume the law is valid unless the challenger can show the difference in treatment bears no rational relation to a conceivable government interest. *Id.*; *see also Cleburne*, 473 U.S. at 440 (state action is "presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest"). "A classification does not fail rational basis review

because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Heller*, 509 U.S. at 321 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). Even so, the "State may not rely on a classification whose relationship to the asserted goal is so attenuated as to render the decision arbitrary or irrational." *Cleburne*, 473 U.S. at 446. For this reason, despite the deferential standard, courts "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632; *see also Heller*, 509 U.S. at 321 (explaining that the classification must "find some footing in the realities of the subject addressed by the legislation").

In between the extremes of strict scrutiny review and rational basis review "lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). "These classifications are considered 'quasi-suspect,' and survive heightened constitutional scrutiny only if the [government] shows the classification is 'substantially related to an important governmental objective.'" *Latta*, 19 F. Supp. 3d at 1074 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).[6] "Discrimination against a

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[6] Caselaw suggests that intermediate scrutiny review, like strict scrutiny review, is a subset of heightened scrutiny review. *See F.V. v. Barron*, 286 F. Supp. 3d 1131, 1141 (D. Idaho 2018) ("If a law classifies on the basis of a suspect class or a quasi-suspect class, it is subject to heightened scrutiny review – and, depending on the type of suspect classification, such laws are subject to either strict scrutiny review or intermediate scrutiny

quasi-suspect class . . . must be supported by an 'exceedingly persuasive justification" and "not hypothesized or invented post hoc in response to litigation."' *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). "The purpose of this heightened level of scrutiny is to ensure quasi-suspect classifications do not perpetuate unfounded stereotypes or second-class treatment." *Id.*

Relevant here, the Ninth Circuit has held that heightened scrutiny applies to the Equal Protection rights of transgender individuals. *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019) ("We conclude that the 2018 Policy [banning transgender persons from military service] on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies."). Likewise, courts in this district have held that discrimination against transgender individuals is a form of sex discrimination subject to heightened scrutiny. *See Barron*, 286 F. Supp. 3d at 1143-44 ("[T]o conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning."). These courts also have recognized that transgender status is a quasi-suspect

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review."). That said, courts routinely equate intermediate scrutiny with heightened scrutiny. *See, e.g., Hecox*, 479 F. Supp. 3d at 973 n.28 ("Statutes that discriminate on the basis of sex, a 'quasi-suspect' classification, need to withstand the slightly less stringent standard of 'heightened' scrutiny. . . . Heightened scrutiny is also referred to as 'intermediate scrutiny.' The Court uses the term 'heightened' scrutiny for consistency.") (internal citation omitted).

classification in and of itself, and therefore, independently subject to heightened scrutiny. *See id.* at 1145 ("[T]ransgender people bear all of the characteristics of a quasi-suspect class and any rule developed and implemented by the IDHW should withstand heightened scrutiny review to be constitutionally sound."); *Hecox*, 479 F. Supp. 3d at 974-75 (adopting both parties' positions on the appropriate level of scrutiny in determining that heightened scrutiny applied because the Act in question discriminated on the basis of both sex and transgender status).

c. Does the Government's Action Satisfy the Appropriate Level of Scrutiny?

A perhaps obvious and automatic next step, the proper level of scrutiny that attaches to the government's classification must then be applied to the law or policy being challenged. "In evaluating the constitutionality of a law, a court evaluates both a law's ends and its means." Chemerinsky, *Constitutional Law* § 9.1.2, at 689. This means that, for strict scrutiny, the ends must be deemed compelling for a law to be upheld; for intermediate scrutiny, the ends must be regarded as important; and for rational basis scrutiny, there just has to be a legitimate purpose. *Id.*; *see also supra.*

In evaluating the relationship between a challenged law's ends and the means chosen to accomplish those ends, courts consider the "fit" between the law and its objective. *Id.* at 690. This analysis necessarily compares the class of individuals who come within the scope of the law's objective, and the class of individuals actually affected by the law. A

law may be underinclusive (it does not apply to individuals who are similar to those to whom the law does apply), overinclusive (it applies to those who do not need to be included for the government to achieve its purpose), or both. *Id.* at 689-90.

That a law is underinclusive and/or overinclusive does not automatically render it unconstitutional. What matters is the degree to which it is under- or overinclusive in light of the law's objective and measured against the applicable level of scrutiny. *Id.* at 690. For example, if strict scrutiny applies, a very close fit between inclusiveness and objective is required; if intermediate scrutiny applies, a less close fit between inclusiveness and objective is required; if rational basis scrutiny applies, the least close fit between inclusiveness and objective is required. *See, e.g., McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) ("Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that . . . employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.") (internal quotation marks and citation omitted).

2. Types of Challenges

In alleging that a law or policy violates Equal Protection, a plaintiff can make two kinds of challenges: facial or as-applied. The distinction affects the plaintiff's burden of establishing the alleged unconstitutionality of that challenged law or policy. "A facial challenge is a claim that the legislature has violated the Constitution, while an as-applied challenge is a claim directed at the execution of the

law." *Young v. Hawaii*, 992 F.3d 765, 779 (9th Cir. 2021), *cert. granted, judgment vacated*, 213 L. Ed. 2d 1108, 142 S.Ct. 2895 (2022), *and abrogated by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 213 L. Ed. 2d 387, 142 S.Ct. 2111 (2022). The distinction also affects the proper scope of relief. While "[a] successful challenge to the facial constitutionality of a law invalidates the law itself," a successful as-applied challenge invalidates "only the particular application of the law." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998); *see also Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1175 (9th Cir. 2018) (enjoining a "law in its entirety . . . would have been appropriate only if plaintiffs had prevailed on a facial challenge").

Though facial challenges "do not enjoy a neat demarcation" from as-applied challenges, facial challenges are generally understood as "ones seeking to have a statute declared unconstitutional in all possible applications." *Hecox*, 479 F. Supp. 3d at 968 n.25 (internal quotation marks and citation omitted). For this reason, "[f]acial challenges are 'disfavored' because they: (i) 'raise the risk of premature interpretation of statutes on factually barebone records'; (ii) run contrary 'to the fundamental principle of judicial restraint'; and (iii) 'threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.'" *Id.* at 969 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (internal quotation marks and citations omitted)).

"As such, the Supreme Court has held, a 'facial challenge to a legislative Act is the most difficult challenge to mount successfully, since the challenger

must establish that *no set of circumstances* exists under which the Act would be valid.'" *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added in *Hecox*)). Said another way: the challenged law must be unconstitutional under all circumstances. While *Salerno's* ongoing applicability in this setting is the subject of considerable debate, the Ninth Circuit has consistently held that it remains the appropriate test for "most" facial challenges. *Id.* at 969-70 (collecting cases); *see also Almerico v. Denney*, 378 F. Supp. 3d 920, 924-26 (D. Idaho 2019) (applying *Salerno* to bar Equal Protection claim because the Ninth Circuit adheres to *Salerno*).

Conversely, an as-applied challenge "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." *Cleburne*, 473 U.S. at 447. *Salerno's* "no set of circumstances" test does not apply to as-applied constitutional challenges. Instead, a plaintiff must demonstrate only that the particular execution of the law or policy – as applied to the facts of his or her case – fails to satisfy the requisite level of scrutiny implicated by the law or policy. *See supra*.

3. Plaintiffs State An Equal Protection Claim

Plaintiffs' Equal Protection claim is anchored by their allegation that Defendants have a "policy of refusing to authorize medically necessary genital reconstruction and gender-affirming surgery for the treatment of gender dysphoria." Compl. at ¶¶ 207-208

(Dkt. 1).[7] Plaintiffs claim that Defendants' policy operates to classify transgender people (classified group) and deny them medically necessary genital reconstruction surgery to treat gender dysphoria. Meanwhile, cisgender individuals (similarly-situated group) routinely receive coverage for the same or similar procedures, namely medically necessary genital reconstruction surgery to treat ailments other than gender dysphoria. *See id.* at ¶¶ 1, 7, 85-86, 193, 195-196, 201-202, 207-208. From this disparate

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[7] It bears mentioning that, at the time Plaintiffs filed their Complaint, Defendants' alleged discriminatory policy appeared to be unwritten and simply a reflection of the reasons surrounding Defendants' rejection of Plaintiffs' efforts to secure coverage for their genital reconstruction surgeries. *Supra*. But one day before the hearing on Defendants' Motion to Dismiss, Defendants filed a Notice of Supplemental Information that attached a May 1, 2023, letter from Idaho's Governor, Brad Little, to Director Jeppesen. Not. of Supp. Inf. (Dkt. 33). Governor Little's letter did not contradict Plaintiffs' description of Defendants' alleged policy. If anything, it fully endorsed it and went further, stating in relevant part: "I oppose Idaho Medicaid using public funds to pay for irreversible sex reassignment surgeries, puberty blockers, or hormones for the purpose of changing the appearance of any child's or adult's sex" and "I hereby direct you and the Department of Health and Welfare to take all appropriate steps to implement a policy consistent with state and federal law excluding the same from Medicaid coverage." *Id.* at Ex. A (Dkt. 33-1). The impact, if any, of Governor Little's letter upon Defendants' Motion to Dismiss and moving forward is uncertain and not addressed here – except to say that it supports Plaintiffs' allegations regarding an allegedly discriminatory policy in violation of the Equal Protection Clause.

treatment, Plaintiffs assert both facial and as-applied Equal Protection challenges.[8]

Defendants counter that, even if their policy excludes genital reconstruction surgery for gender dysphoria, it does not violate the Equal Protection Clause. Mem. ISO MTD at 4-6 (Dkt. 19-1). Defendants claim that their policy does not consider gender status at all, but rather, is based on diagnosis and treatment: coverage is not excluded for transgender persons, but rather, just for genital reconstruction surgery to treat the condition of gender dysphoria. *Id.* at 6 ("[T]he Equal Protection claim is based on an asserted denial of payment coverage from a state's social welfare program related to a particular medical condition or, in this case, medical treatment."). Having framed the policy in this way, Defendants argue that transgender persons receive the exact same coverage as cisgender persons: neither group is covered for genital reconstruction surgery to treat gender dysphoria and both groups are covered for genital reconstruction surgery to treat other conditions. *Id.* at 4-5; Reply ISO MTD at 3 (Dkt. 28). They analogize this case to *Geduldig v. Aiello*, 417 U.S. 484 (1974), where the Supreme Court found no Equal Protection violation for a state social welfare program that excluded coverage for pregnancy-

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[8] Plaintiffs' Complaint clearly asserts an as-applied challenge. Compl. at ¶¶ 207-208 (alleging that Defendants' policy, "as applied to MH and TB, impermissibly discriminates against [them] . . . ."). And, during the hearing on Defendants' Motion to Dismiss, Plaintiffs' counsel indicated that Plaintiffs were also asserting a facial challenge.

related costs.[9] Just as California could constitutionally exclude from coverage the condition of pregnancy, Idaho can constitutionally exclude from coverage the treatment of gender dysphoria with genital reconstruction surgery, they say. Thus, Plaintiffs' Equal Protection claim fails at the classification stage, and further analysis of Plaintiffs' facial challenge under *Salerno* or as-applied challenge under the appropriate tier of scrutiny in unwarranted. Mem. ISO MTD at 5.

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[9] In *Geduldig*, the plaintiff brought an Equal Protection claim based on sex discrimination because she had been denied pregnancy-related payments under California's disability insurance program. *Geduldig*, 417 U.S. at 490-91. The Court held that the challenged pregnancy exclusion was not a gender classification warranting more than rational basis review. *Id.* at 496-97. And the program's pregnancy exclusion met rational basis review because the state had a legitimate interest in maintaining the program's fiscal integrity and allocating funds. *Id.* at 495-97. In a footnote, the Court explained: "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition – pregnancy – from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . ." *Id.* at 496 n. 20. The Court reasoned that the "lack of identity between the excluded disability and gender" – women fell into both the classified group (pregnant persons) and similarly-situated group (non-pregnant persons) – demonstrated that the exclusion did not effect gender-based discrimination. *Id.* The Court concluded that: "Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Id.*

At this stage, however, the Court must accept how Plaintiffs' allegations, and the inferences therefrom, have framed the issue. Plaintiffs recognize that, on its face, Defendants' policy appears gender-neutral and directed at a medical condition and treatment therefor: coverage is excluded for genital reconstruction surgery to treat gender dysphoria. Compl. at ¶1 (Dkt. 1). Yet, exclusively transgender persons – and not cisgender persons – suffer from gender dysphoria. *See Fain v. Crouch*, 618 F. Supp. 3d 313, 324-25 (S.D.W.V. 2022) ("[I]nherent in a gender dysphoria diagnosis is a person's identity as transgender. In other words, a person cannot suffer from gender dysphoria without identifying as transgender."). Courts in this district have recognized transgender persons as their own gender-based, quasi-suspect class. *See Barron*, 286 F. Supp. 3d at 1145; *Hecox*, 479 F. Supp. 3d at 974-75. Thus, Defendants' seemingly gender- neutral exclusion is not so. *Fain*, 618 F. Supp. 3d at 327 ("[T]he exclusion [of gender-affirming care] precludes a specific treatment that is connected to a person's sex and gender identity[.]"); *Kadel v. Folwell*, 2022 WL 3226731, at *20-21 (M.D.N.C. 2022) (same); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997-1000 (W.D. Wisc. 2018) (same); *but see Lange v. Houston Cnty.*, 499 F. Supp. 3d 1258, 1275-76 (D. Ga. 2020).[10] Rather, the

[10] Also cited by Defendants in their reply briefing, *Lange* held that, under *Geduldig*, the challenged plan that excluded coverage for genital reconstruction surgery "d[id] not facially classify among groups at all" and was instead facially neutral. *Lange*, 499 F. Supp. 3d at 1276. The court granted defendants' motion to dismiss plaintiff's argument, but only to the extent that the plan's exclusion was argued to be facially

exclusion operates to disadvantage transgender persons – by denying coverage for genital reconstruction surgery to treat gender dysphoria – relative to cisgender persons whose genital reconstruction surgery to treat all other conditions applying to them is covered. *See Fain*, 618 F. Supp. 3d at 327 ("Here, the non-suspect class – those not seeking surgical treatment for gender dysphoria – are treated more favorably, as their materially same surgeries are covered. This is unlike *Geduldig*, where men were not treated more favorably under the challenged policy.").

According to Plaintiffs, then, Defendants' facially-neutral exclusion – causing disparate impact between transgender and cisgender persons – would fall squarely within *Geduldig's* pretext exception. *See Geduldig*, 417 U.S. at 496 n.20. This is otherwise known as proxy discrimination:

> Proxy discrimination is a form of facial discrimination. It arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so

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discriminatory; it left plaintiff's Equal Protection claim intact insofar as defendants never argued that plaintiff failed to allege plausible facts supporting an inference of discriminatory purpose involving a facially-neutral exclusion. *Id.*; *see also Lange v. Houston Cnty.*, 2022 WL 1812306, at *8-9 (D. Ga. 2022) (confirming as much at the summary judgment stage and finding the issue of whether plaintiff can establish invidious discrimination to support her Equal Protection claim as involving a disputed fact). To date, however, *Lange* is at odds with the majority of cases considering the issue. *See Kadel*, 2022 WL 11166311, at *3 (collecting cases).

> closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group. For example, discriminating against individuals with gray hair is a proxy for age discrimination because 'the fit' between age and gray hair is sufficiently close.

Davis v. Guam, 932 F.3d 822, 837-38 (9th Cir. 2019) (internal quotation marks and citations omitted); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (citing as an example of proxy discrimination: "A tax on wearing yarmulkes is a tax on Jews."). Here, just like gray hair and yarmulke-wearing, Plaintiffs' Complaint effectively alleges that Defendants' no-surgery-for-gender-dysphoria policy is a proxy for discrimination against transgender persons. And that allegation, if true, effectively distinguishes this case from *Geduldig* (where pregnancy was not a proxy for discrimination against women because men were not comparatively advantaged).

Alternatively, Plaintiffs' Complaint plausibly supports a claim of facial gender discrimination. Instead of excluding coverage for an objectively identifiable physical condition that happens to be associated with one gender (*Geduldig*), Plaintiffs here allege that Defendants' policy excludes what is effectively a sex-change (affirming) procedure. Whereas the *condition* of pregnancy can be understood without reference to sex, gender, or transgender status, the *treatment* of gender dysphoria with genital reconstruction surgery cannot. *See Kadel*

v. Folwell, 620 F. Supp. 3d 339, 379 (M.D.N.C. 2022) (North Carolina health insurance plan "excludes *treatments* that lead or are connected to sex changes or modifications. Pregnancy can be explained without reference to sex, gender, or transgender status. The same cannot be said of the exclusion at issue here.") (emphasis in original); *see also, e.g., Fain*, 618 F. Supp. 3d at 327 ("[T]he exclusion [of gender-affirming care] precludes a specific treatment that is connected to a person's sex and gender identity – not just a single objectively identifiable physical condition with unique characteristics.") (internal quotation marks omitted); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997-1000 (W.D. Wisc. 2018); *Flack v. Wis. Dept. of Health Servs.*, 328 F. Supp. 3d 931, 950 (W.D. Wisc. 2018). Accordingly, as alleged, Plaintiffs' Complaint supports a cognizable legal theory that Defendants' policy facially discriminates against transgender persons. *See, e.g., Fain*, 618 F. Supp. 3d at 327 (holding that exclusion of coverage for transsexual surgery "discriminates on its face"); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1030 (D. Alaska. 2020) (holding that exclusion of coverage for gender-transition related surgery is facially discriminatory).

In sum, Plaintiffs have demonstrated that they, as transgender individuals, were treated differently than similarly-situated cisgender individuals when, pursuant to Defendants' policy, they were denied medically necessary genital reconstruction surgery to treat their gender dysphoria. Whether framed as proxy discrimination based upon disparate impact or facial discrimination based upon the wording of the policy, Plaintiffs' allegations, and the inferences drawn therefrom, state a plausible Equal Protection claim.

Iqbal, 556 U.S. at 678. At this stage, and on the record before the Court, *Geduldig* does not alter this conclusion. The merits of Plaintiffs' claim are not resolved here. They depend on whether Defendants' exclusion of genital reconstruction surgery under these circumstances satisfies *Salerno* and the appropriate level of scrutiny. *Supra*. Until then, Plaintiffs' Equal Protection claim (Fourth Claim for Relief) must be permitted to move forward.

Defendants' Motion to Dismiss is denied in this respect.

B. Compensatory Damages Against Dr. Hamso in Her Individual Capacity Are Not Available Under the Medicaid Act

Regarding their Medicaid Act claims (Second, Third, and Fifth Claims for Relief), Plaintiffs allege that they are entitled to an award of compensatory damages against Dr. Hamso in her individual capacity. Compl. at ¶¶ 199, 205, 221 (Dkt. 1). Defendants argue that such damages are not recoverable under the Medicaid Act. Mem. ISO MTD at 6-8 (Dkt. 19-1) (citing *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S.Ct. 1562, 1572 (2022)). Plaintiffs ultimately agree with Defendants, admitting that they cannot recover emotional distress damages under the Medicaid Act. Opp. to MTD. at 11-12 (Dkt. 27). Therefore, the Second, Third, and Fifth Claims for Relief are dismissed as against Dr. Hamso in her individual capacity.

Defendants' Motion to Dismiss is granted in this respect.

C. Whether Dr. Hamso Is Entitled to Qualified Immunity on Plaintiffs' Constitutional Claims

Regarding their Equal Protection and Due Process claims (Fourth and Sixth Claims for Relief), Plaintiffs allege that they are entitled to compensatory damages against Dr. Hamso in her individual capacity. Compl. at ¶¶ 213, 228 (Dkt. 1). Defendants argue that these claims should be dismissed against her individually because she is entitled to qualified immunity. Mem. ISO MTD at 8-12 (Dkt. 19-1).[11]

1. Qualified Immunity Framework

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks and citation omitted). The qualified immunity inquiry involves two steps. When a defendant asserts qualified immunity, the Court must evaluate: (i) whether the defendant violated a constitutional right; and (ii) whether the constitutional right was clearly established at the

[11] Defendants originally argued that Dr. Hamso is also entitled to qualified immunity as to Plaintiffs' Second Claim for Relief – violation of Medicaid Act's Availability Requirements, 42 U.S.C. § 1396a(a)(10)(A). Mem. ISO MTD at 3, 12-13 (Dkt. 19-1). However, because the claims against Dr. Hamso in her individual capacity for compensatory damages under the Medicaid Act are dismissed (*supra*), Defendants concede the issue is now moot. Reply ISO MTD at 11 (Dkt. 28).

time of the defendant's conduct, i.e., whether the contours of the right were sufficiently well developed that a reasonable official should have known her conduct was unlawful. *Id.* Unless the answer to both questions is "yes," the defendant is entitled to immunity. *Id.* While district courts retain discretion to decide which prong of the test to tackle first, the Supreme Court has suggested that the "clearly established" prong is the most efficient starting point. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

To be clearly established, a right must be "sufficiently clear that every reasonable official would have understood that what she is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). While a clearly established right should not be defined at a high level of generality, it does not require precedent exactly on point either. *Id.* at 11-12. Rather, existing precedent must place "the statutory or constitutional question beyond debate," such that only those government officials who are either "plainly incompetent or . . . knowingly violate the law" are held liable for monetary damages. *Id.* (quoting *al-Kidd*, 563 U.S. at 741 and *Mallet v. Briggs*, 475 U.S. 335, 341 (1986)). There need not be a Supreme Court or circuit case "directly on point," but "existing precedent must place the lawfulness of the conduct beyond debate." *Tobias v. Arteaga*, 996 F.3d 571, 580 (9th Cir. 2021) (alteration and internal quotation marks omitted) (quoting *District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018)).

The defendant bears the burden of proving they are entitled to qualified immunity. *Greer v. City of Hayward*, 229 F. Supp. 3d 1091, 1106 (N.D. Cal. 2017) (citing *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir.

2005)). In conducting this inquiry, however, the Court adopts the plaintiff's version of the facts. *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014); *Easley v. City of Riverside*, 890 F.3d 851, 856 (9th Cir. 2018) (evaluating a qualified immunity summary judgment motion by drawing factual inferences in the light most favorable to the plaintiff, the nonmoving party).

Applicable here, deciding a motion to dismiss based on qualified immunity requires "[b]alancing [ ] competing rules." *Keates v. Koile*, 883 F.3d 1228, 1235 (9th Cir. 2018). On the one hand, the Supreme Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). On the other hand, determining whether qualified immunity applies at the motion to dismiss stage can be problematic. *See Keates v. Koile*, 883 F.3d 1228, 1234 (9th Cir. 2018) ("Determining claims of qualified immunity at the motion to dismiss stage raises special problems for legal decision making"). The court must balance (i) the fact that a complaint suffices to survive a motion to dismiss by stating a claim to relief that is plausible on its face, with (ii) the fact that qualified immunity sets a "low bar," allowing "government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Id.* (internal quotation marks and citations omitted). These factors are naturally in tension with one another and, at this procedural juncture, depend on the allegations raised in the pleadings.

In considering qualified immunity on a motion to dismiss, the court must consider whether the operative complaint alleges sufficient facts, taken as true, to support the claim that the individual

defendant's conduct violated clearly established constitutional rights of which a reasonable person would be aware in light of the specific context of the case. *Keates*, 883 F.3d at 1234 (internal quotation marks and citation omitted). Crucially, if the complaint "contains even one allegation of a harmful act what would constitute a violation of a clearly established constitutional right," qualified immunity will not apply (at least not at that moment) and plaintiff is entitled to go forward with their claim. *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 872 (9th Cir. 1992). Here, the Court cannot determine, based on the allegations presented in Plaintiffs' Complaint, that Dr. Hamso is entitled to qualified immunity on Plaintiffs' constitutional claims.

2. <u>On the Current Record, Dr. Hamso Is Not Entitled to Qualified Immunity on Plaintiffs' Equal Protection Claim</u>

Defendants argue that Dr. Hamso is entitled to qualified immunity on Plaintiffs' Equal Protection claim because there is no constitutional violation to begin with under *Geduldig*. Mem. ISO MTD at 10 (Dkt. 19-1) ("[C]urrent binding Supreme Court precedent determined that denial of coverage for a particular treatment or condition under a state's social welfare program does not violate the Equal Protection Clause when the individual has received insurance protection equivalent to that provided to all other participants.") (citing *Geduldig*, 417 U.S. at 497). Defendants further claim that, without a violation of constitutional right, Dr. Hamso could not have violated a clearly established law. *Id.* ("Hence, Dr. Hamso did not violate clearly established law,

even if IDHW had a policy to deny genital reconstruction surgery for transgender individuals").

But as the above analysis demonstrates, Plaintiffs have pleaded a plausible Equal Protection violation, *Geduldig* notwithstanding. *Supra* (determining that Plaintiffs have alleged that Defendants' plan facially and by proxy discriminates against them on the basis of sex and transgender status in violation of the Equal Protection Clause). Therefore, whether qualified immunity is available depends on whether the Equal Protection rights at issue were clearly established.

On that score, Plaintiffs allege that Defendants discriminated against them because they are transgender. The right to be free from invidious discrimination "is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it." *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir. 1980). "This is especially true in Equal Protection cases because the non-discrimination principle is so clear." *Elliot-Park v. Manglona*, 592 F.3d 1003, 1008 (9th Cir. 2010).

More particularly, as set forth *supra*, discrimination against transgender individuals is a form of gender-based discrimination subject to intermediate scrutiny. *Barron*, 286 F. Supp. 3d at 1143-44; *see also Bostock v. Clayton*, 140 S.Ct. 1731, 1741 (2020) (in Title VII context: "[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."). As well, transgender status is considered a quasi-suspect classification that is

independently subject to heightened scrutiny. *Barron*, 286 F. Supp. 3d at 1145; *see also Karnoski*, 926 F.3d at 1201 (when discrimination is based on transgender status, the court should apply an intermediate scrutiny standard, "something more than rational basis but less than strict scrutiny"). Plaintiffs have therefore sufficiently alleged a plausible violation of a clearly established constitutional right.

There is no question that there is some nuance to Plaintiffs' Equal Protection claim and Defendants' defenses thereto. For example: To what extent is genital reconstruction surgery medically necessary? To what extent does (or now, did, owing to Governor Little's May 1, 2023 letter) IDHW provide coverage for the treatment of gender dysphoria? Are Plaintiffs actually treated differently than cisgender individuals in this coverage-related context? And, assuming differential treatment, does Defendants' policy satisfy the appliable level of scrutiny? But these outstanding issues, or the absence of caselaw specifically confronting them, do not warrant qualified immunity's application here *at this stage*, especially when contrasted against Plaintiffs' allegations. *See Wong v. United States*, 373 F.3d 952, 956-57 (9th Cir. 2004) (acknowledging the difficulty posed by deciding qualified immunity at the motion to dismiss stage where it requires a court to decide "far-reaching constitutional questions on a nonexistent factual record" and suggesting that, while government officials may raise qualified immunity on a motion to dismiss, "the exercise of that authority is not a wise choice in every case.").

As already stated, interpreting those fact-dependent allegations in Plaintiffs' favor reveals a violation of a clearly established constitutional right, rendering Dr. Hamso's qualified immunity defense premature and thus far underdeveloped. Dr. Hamso may reassert her entitlement to qualified immunity with a more fulsome record and through a motion for summary judgment. *See Keates*, 883 F.3d at 1235 ("[O]ur decision at the motion to dismiss stage sheds little light on whether the government actors might ultimately be entitled to qualified immunity were the case permitted to proceed, at least to the summary judgment stage and the court is presented with facts providing context for the challenged actions.") (internal quotation marks and citation omitted). Until then, Plaintiffs' Equal Protection claim (Fourth Claim for Relief) is permitted to move forward against Dr. Hamso individually.

Defendants' Motion to Dismiss is denied in this respect.

3. On the Current Record, Dr. Hamso Is Not Entitled to Qualified Immunity on Plaintiffs' Due Process Claim

Due process under the Fourteenth Amendment bars "any State [from] depriv[ing] a person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Therefore, to state a procedural Due Process claim, a plaintiff must allege (i) facts showing a deprivation of a constitutionally protected

life, liberty, or property interest, and (ii) a denial of adequate procedural protections. *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 716 (9th Cir. 2011). The order of these events matter. A plaintiff must establish the predicate life, liberty, or property interest before any procedural safeguards attach. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) ("Respondents' federal constitutional claim depends on their having had a property right in continued employment. If they did, the State could not deprive them of this property without due process."); *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) ("In procedural due process claims, the deprivation by state action of a constitutionally protected interest in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.").

In support of their Due Process claim, Plaintiffs allege a property interest in the Medicaid benefits guaranteed by Title XIX of the Social Security Act. Compl. at ¶ 224 (Dkt. 1). They further allege that Defendants failed to provide the requisite due process when denying or delaying their claim to these benefits. *Id.* at ¶¶ 225-226. In response, Defendants argue that the true property interest at issue – Plaintiffs' interest in genital reconstruction surgery – is not clearly covered under Idaho's Medicaid policies. Mem. ISO MTD at 10 (Dkt. 19-1) ("Idaho's laws, rules, and policies or understandings are not sufficiently definite enough to clearly establish that Plaintiffs have a constitutional entitlement to genital reconstruction surgery under Idaho's Medicaid

policies.").[12] Without a clearly established right to coverage for genital reconstruction surgery, Defendants argue that Dr. Hamso is entitled to qualified immunity on Plaintiffs' Due Process claim. *Id.* at 10-12.

Constitutionally protected property interests are not limited to tangible property. *Nozzi v. Hous. Auth. of L.A.*, 806 F.3d 1178, 1191 (9th Cir. 2016). They can be created, with "their dimensions defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). To have a property interest in a government benefit, "a person clearly must have more than an abstract need or desire for it. [They] must have more than a unilateral expectation of it. [They] must instead, have a legitimate claim of entitlement to it." *Id.* The Supreme Court recognizes that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Instead, "[a] reasonable expectation of entitlement is determined largely by the language of the statute and

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[12] Defendants appear to concede that Plaintiffs' Due Process claim alleges a violation of a constitutional right (the first qualified immunity factor) given the deprivation of Plaintiffs' claimed property interest in genital reconstruction surgery without due process. Therefore, for the purposes of Defendants' Motion to Dismiss only, the Court understands Defendants' argument in this regard to focus solely on whether such an interest was clearly established (the second qualified immunity factor) at the time of the alleged Due Process violation.

the extent to which the entitlement is couched in mandatory terms." *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). If government officials have the discretion to grant or deny a benefit, that benefit is not a protected property interest. *Ching v. Mayorkas*, 725 F.3d 1149, 1155 (9th Cir. 2013).

Defendants submit that the Medicaid statutes and regulations give states broad discretion to determine the scope of coverage for medical assistance under the Medicaid Act. Mem. ISO MTD at 11 (Dkt. 19-1) (citing 42 C.F.R. § 440.230(d) ("The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.")). Such discretion, according to Defendants, cuts against Plaintiffs' claim to a property interest in coverage for genital reconstruction surgery. *Id.* at 11-12. But this framing of the issue is too simplistic and fails to account for what Plaintiffs are truly alleging here.

Plaintiffs have alleged that they are eligible for and enrolled in the Idaho Medicaid program. Compl. at ¶¶ 23-24 (Dkt. 1). They further allege that they have received Medicaid benefits in the past. *Id.* at ¶¶ 106-108, 110, 123, 167.[13] It is well-settled that a person can have a property interest in continuing to receive government benefits. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970). And as to genital

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[13] At the hearing on Defendants' Motion to Dismiss, Plaintiffs' counsel raised some doubt about whether Medicaid covered previous hormone therapy for Plaintiffs' gender dysphoria. That issue is not resolved here, deferring to the allegations raised within Plaintiffs' Complaint.

reconstruction surgery specifically, Plaintiffs have alleged that the procedures involved therein have routinely been covered when requested by cisgender individuals for medically necessary reasons applying to them. Compl. at ¶¶ 1, 7, 85-86, 193, 195-196, 201-202, 207-208 (Dkt. 1); *see also, e.g.*, Opp. to MTD at 11 (Dkt. 27) (""The same [Current Procedural Terminology ("CPT")] code or codes apply to a particular procedure regardless of whether the procedure is performed on a transgender person as part of a medical transition or on a cisgender person for some other medical reason."') (quoting *Boyden*, 341 F. Supp. at 989-990). This is the point of Plaintiffs' entire action against Defendants and highlights the crux of Plaintiffs' claims – the alleged arbitrary difference in treatment between transgender and cisgender individuals – independent of the particular surgical procedures themselves or the Medicaid Act's flexibility in providing coverage for the same. *See, e.g.*, Compl. at ¶¶ 128-134 (Dkt. 1) (discussing Defendants' evolving justification for denying MH's request for genital reconstruction surgery). These allegations, taken as true, combine to reflect Plaintiffs' legitimate claim of entitlement to coverage, not just their unilateral expectation of it. This property interest is therefore clearly established (at least for the purposes of Defendants' Motion to Dismiss) and cannot be withheld without due process. *Goldberg*, 397 U.S. at 261-63; *supra*.

As with Plaintiffs' Equal Protection claim and Dr. Hamso's qualified immunity defense to it, there are similar moving parts to Plaintiffs' Due Process claim that will undoubtedly develop over time to better inform the Court's consideration of Dr. Hamso's claim

to qualified immunity there. At this point, however, Plaintiffs' fact-dependent allegations do not compel qualified immunity as a matter of law or a corresponding dismissal. Again, this ruling should not be understood to mean that Dr. Hamso will never be entitled to qualified immunity; rather, the procedural posture of the case and the disputed facts make this a question best resolved through a summary judgment motion. Until then, Plaintiffs' Due Process claim (Sixth Claim for Relief) is permitted to move forward against Dr. Hamso individually.

Defendants' Motion to Dismiss is denied in this respect.

IV. ORDER

Based upon the foregoing, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (Dkt. 19) is GRANTED, IN PART, AND DENIED, IN PART as follows:

1. Plaintiffs have stated an Equal Protection claim (Fourth Claim for Relief). Defendants' Motion to Dismiss is DENIED in this respect.

2. Plaintiffs' Medicaid Act claims (Second, Third, and Fifth Claims for Relief) are dismissed against Dr. Hamso individually. Defendants' Motion to Dismiss is GRANTED in this respect.

3. At this time, Dr. Hamso is not entitled to qualified immunity on Plaintiffs' Equal Protection claim (Fourth Claim for Relief) and Due Process claim (Sixth Claim for Relief). Defendants' Motion to Dismiss is DENIED in this respect.

By separate notice, the Court will request litigation and discovery plans from the parties in anticipation of a scheduling conference to discuss deadlines moving forward.

DATED: June 20, 2023

Honorable Raymond E. Patricco
Chief U.S. Magistrate Judge

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

MH and TB, individually, Plaintiffs vs. DAVE JEPPESEN, in his official capacity as the Director of the Idaho Department of Health and Welfare; Dr. MAGNI HAMSO, in her official capacity as the Medical Director of the Idaho Division of Medicaid and individually; and the IDAHO DEPARTMENT OF HELATH AND WELFARE, Defendants.	CASE NO. 1:22-CV-409 VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY JUDGEMENT, AND DAMAGES **REDACTED** DEMAND FOR JURY TRIAL

For their Complaint against Defendants, Plaintiffs allege as follows:

INTRODUCTION

1. Plaintiffs bring this suit to challenge Idaho Medicaid's discriminatory policies that deny transgender individuals of essential, and sometimes life-saving, health care. Idaho Medicaid excludes coverage for health care – specifically, genital reconstruction surgery – that is medically necessary for transgender individuals to address the clinically significant distress caused by gender dysphoria. While cisgender people receive the same or similar health care as a matter of course, Defendants Jeppesen and Hamso refuse to cover the identical care for transgender Medicaid beneficiaries, under a policy of characterizing gender affirming surgery as "cosmetic" and not medically necessary. Defendants Jeppesen and Hamso also have a policy of indefinitely and unreasonably delaying prior authorization of genital reconstruction surgery and coverage determinations for transgender Idaho Medicaid recipients. This discrimination against transgender Idaho Medicaid recipients is unlawful under the United States Constitution and federal law.

2. Plaintiff "MH" is a 21 year-old transgender Idaho resident who receives health coverage through Idaho's Medicaid program. as established by Title XIX of the Social Security Act.

3. Plaintiff "TB" is an 18 year-old transgender Idaho resident who receives health coverage through Idaho's Medicaid program.

4. Idaho Medicaid is a health insurance program that provides medical assistance to eligible low-income individual Idahoans. Idaho Medicaid is jointly funded by the federal government and the State. The Idaho Department of Health and Welfare ("IDHW") is responsible for administering Idaho's Medicaid program.

5. Gender dysphoria is the clinically significant distress that transgender individuals experience due to having a gender identity that conflicts with the sex they were assigned at birth.

6. There is broad consensus within the medical community that genital reconstruction surgery is a safe, effective, and medically necessary treatment for many transgender individuals with gender dysphoria.

7. Despite this broad consensus, Defendants Jeppesen's, Hamso's, and IDHW's policy is to characterize genital reconstruction surgery as cosmetic and not medically necessary when it is performed to treat gender dysphoria. As a result, Jeppesen's, Hamso's and IDHW's policy is to unreasonably delay and deny prior authorization to cover genital reconstruction surgery when it is undisputed that it is medically necessary to treat a transgender individual diagnosed with gender dysphoria, even though Idaho Medicaid will authorize and cover the same or similar surgical procedures when indicated for the treatment of other conditions.

8. MH has been diagnosed with gender dysphoria. She has undergone a gender transition to live in accordance with her gender identity. As part of her transition, MH has received medical treatment,

including hormone therapy, to align her physical characteristics with her gender identity and treat her gender dysphoria.

9. MH's health care providers have recommended that she undergo genital reconstruction surgery to alleviate her ongoing symptoms of gender dysphoria.

10. MH relies on Idaho Medicaid to cover the costs of her health care. She does not have the financial resources to pay for the surgery out-of-pocket or to obtain private health insurance to cover her medically necessary care.

11. TB has been diagnosed with gender dysphoria. She has undergone gender transition to live in accordance with her gender identity. As part of her transition, MH has received medical treatment, including hormone therapy, to align her physical characteristics with her gender identity and treat her gender dysphoria.

12. TB's health care providers have recommended that she undergo genital reconstruction surgery to alleviate her ongoing symptoms of gender dysphoria.

13. TB relies on Idaho Medicaid to cover the costs of her health care. She does not have the financial resources to pay for the surgery out-of-pocket or to obtain private health insurance to cover her medically necessary care.

14. MH's health care providers determined it was medically necessary that she receive genital reconstruction surgery to treat her gender dysphoria. MH applied to Medicaid for prior authorization of the

surgery. MH was denied authorization for failure to complete twelve (12) months of hormone therapy. MH timely appealed the denial and requested a fair hearing.

15. Medicaid's nurse reviewer and MH testified and presented evidence during a fair hearing. The hearing officer found MH had received twelve (12) months of hormone therapy. The hearing officer asked the nurse reviewer if there was another reasons for denying MH authorization for the genital reconstruction surgery to treat her gender dysphoria. The nurse reviewer indicated it was not medically necessary because under IDHW's and Idaho Medicaid's policy MH's request was considered cosmetic surgery. Defendants Jeppesen, Hamso, and IDHW failed to provide MH adequate notice that her request for the authorization of genital reconstruction surgery was denied because under IDHW's and Idaho Medicaid's policy it was considered a cosmetic surgery and not medically necessary.

16. The hearing officer's decision remanded MH's request for authorization of genital reconstruction surgery to IDHW to provide MH with proper notice of the new reasons for the denial. Defendants Jeppesen, Hamso, and IDHW have unreasonably delayed and refused to take action on her request for authorization and coverage of genital reconstruction surgery. After four months had elapsed following the hearing officer's remand of the appeal, MH requested a hearing to appeal the delay. Defendants Jeppesen, Hamso, and IDHW refused to provide a hearing or allow her to appeal the denial and delay, despite the clear requirement in the

Medicaid Act to make a final decision within ninety (90) days after the filing of an appeal.

17. Seventeen (17) months have passed since MH requested authorization and coverage for surgery that her providers have determined is medically necessary. Defendants still have not provided a final decision or an opportunity for a fair hearing to challenge the denial or delay.

18. Defendants Jeppesen's, Hamso's, and IDHW's refusal to provide MH with a final decision following the hearing officer's remand or a hearing to challenge the denial of medically necessary genital reconstruction surgery violates MH's procedural due process rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Medicaid Act, 42 U.S.C. §1396a(a)(3), and the Medicaid Act's implementing federal regulations, 42 CFR §§ 431.200 *et seq*.

19. TB's health care providers determined it was medically necessary that she receive genital reconstruction surgery to treat her gender dysphoria. TB, through her health care providers, applied to Idaho Medicaid for prior authorization of the surgery. Idaho Medicaid has failed or refused to either authorize the treatment or deny it, depriving TB of both the medically necessary treatment and notice and a meaningful opportunity to appeal the delay and denial.

20. Defendants Jeppesen's, Hamso's, and IDHW's policy of excluding coverage of genital reconstruction surgery for the treatment of gender dysphoria by characterizing the surgery as cosmetic is preventing MH and TB from receiving medically

necessary care. Consequently, they have suffered, and are continuing to suffer severe emotional, mental, and psychological distress.

21. Defendants Jeppesen's, Hamso's, and IDHW's discriminatory policy of refusing to cover genital reconstruction surgery for the treatment of gender dysphoria violates Plaintiffs' civil rights under Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18116 ("Section 1557"); the availability and comparability provisions of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A) and (B); and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

22. MH and TB seek declaratory and injunctive relief to enjoin Defendants Jeppesen, Hamso, and IDHW from continuing to deny their medically necessary treatment, and failing to accord them with an adequate notice and opportunity to be heard about this denial, in violation of the United States Constitution and federal law. MH and TB also seek compensatory damages against Defendant Hamso to compensate them for the injuries arising from being denied medically necessary health care coverage and being discriminated against because MH and TB are transgender. In addition, MH and TB seek their reasonable attorneys' fees and costs and such other relief as the Court deems just and equitable.

PARTIES

23. Plaintiff MH is a transgender woman residing in Idaho. She has been eligible for and enrolled in the Idaho Medicaid program at all times material to this Complaint.

24. Plaintiff TB is a transgender woman residing in Idaho. She has been eligible for and enrolled in the Idaho Medicaid program at all times material to this Complaint.

25. Defendant Jeppesen is the Director of the Idaho Department of Health & Welfare ("IDHW"), the state department charged with the administration of Idaho's Medicaid program to eligible people under Idaho Code § 56-202(a). He is sued in his official capacity for equitable relief.

26. Defendant Hamso is an Idaho licensed physician who previously practiced internal medicine and is presently the Medical Director for the Division of Medicaid. Dr. Hamso is responsible for approving surgical procedures which require prior authorization for individuals enrolled in Idaho's Medicaid program. She has unreasonably delayed and refused MH's and TB's requests to authorize medically necessary genital reconstruction surgery. Dr. Hamso is sued in her official capacity for equitable relief and in her individual capacity for damages.

27. Defendant IDHW is an executive department of the government of the State of Idaho created under I.C. § 56-1002.

28. Defendants' actions or omissions complained of in this Complaint were taken under the color of state law.

JURISDICTION AND VENUE

29. This Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. §§ 1331 and 1343(a)(3)-(4).

30. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201–2202, 42 U.S.C. § 1983, and F.R.C.P. 65.

31. Venue is proper in this Court and District, under 28 U.S.C. § 1391(b), because Defendants are subject to personal jurisdiction here and because the events and omissions giving rise to this action occurred in this District.

FACTS

Gender Identity and Gender Dysphoria

32. Every person's sex is multifaceted and comprised of a number of characteristics, including but not limited to chromosomal makeup, hormones, internal and external reproductive organs, secondary sex characteristics (physical characteristics that develop at puberty and are not directly involved in reproduction, such as hair growth patterns, body fat distribution, and muscle mass development), and most importantly, gender identity.

33. Gender identity is a person's internal sense of their sex – i.e, being male or female. It is a basic part of every person's core identity and a well-established concept in medicine. Gender identity is innate, immutable, and has biological underpinnings, such as the sex differentiation of the brain that takes place during prenatal development.

34. Gender identity is the most important determinant of a person's sex.

35. A person's sex is usually assigned at birth based solely on a visual assessment of external genitalia. External genitalia are only one of several

sex-related characteristics. For most people, these sex-related characteristics all align, and the visual assessment performed at birth serves as an accurate proxy for their gender.

36. Transgender individuals, however, have a gender identity that is different from their assigned sex. A transgender man is a man who was assigned female at birth but has a male gender identity. A transgender woman is a woman who was assigned male at birth but has a female gender identity. When a person's gender identity does not match their sex assigned at birth, gender identity is the critical determinant of that person's sex.

37. Some transgender individuals become aware of having a gender identity that does not match their sex assigned at birth early in childhood. For others, the onset of puberty, and the resulting physical changes in their bodies, leads them to recognize that their gender identity is not aligned with their assigned sex.

38. For transgender individuals, the incongruence between their gender identity and assigned sex can result in clinically significant distress known as gender dysphoria. Gender dysphoria is a serious medical condition recognized by the American Psychiatric Association. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451-53 (5th ed. 2013) ("DSM-5").[1]

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[1] Earlier editions of the DSM included a diagnosis referred to as "Gender Identity Disorder." The DSM-5 removed that diagnosis and replaced it with "Gender Dysphoria," to clarify that being

39. In addition to clinically significant distress, untreated gender dysphoria can cause anxiety, depression, and self-harm, or suicidal ideation.

40. Untreated gender dysphoria often intensifies with time. The longer an individual goes without or is denied adequate treatment for gender dysphoria, the greater the risk of severe harm to the individual's health.

41. Gender dysphoria is highly treatable. As with other medical conditions, health care providers follow well-established standards of care to treat patients with gender dysphoria. The World Professional Association for Transgender Health ("WPATH"), and its predecessors, has set those standards for over four decades. *See* WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th Ver. 2011) ("WPATH Standards of Care 7").

42. WPATH is an international, multidisciplinary, professional association of medical providers, mental health providers, researchers, and others, with a mission of promoting evidence-based health care protocols for transgender people. In September 2022, WPATH released the eight edition of the Standards of Care. *See* E. Coleman et al., *Standards of Care for the Health of Transgender and*

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transgender is not itself a disorder, but that the clinically relevant condition is the dysphoria experienced by individuals whose gender identity conflicts with their assigned sex. *See* DSM-5 at 451 (noting that Gender Dysphoria "is more descriptive than the previous DSM-IV term gender identity disorder and focuses on dysphoria as the clinical problem, not identity per se.").

Gender Diverse People, Version 8, 23 Int'l J. Transgender Health S1 (2022), https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644 ("WPATH Standards of Care 8").

43. The goal of medical treatment for gender dysphoria is to eliminate clinically significant distress by helping a transgender person live in alignment with their gender identity. This treatment is sometimes referred to as "gender transition," "transition-related care," or "gender-affirming care."

44. Gender-affirming care can involve counseling, hormone therapy, surgery, or other services as indicated.

45. As the WPATH Standards of Care recognize, transitioning is the only effective treatment for gender dysphoria. Transitioning refers to the individualized steps that many transgender individuals take to live in a manner consistent with their gender identity, rather than their assigned sex. The health and wellbeing of transgender individuals depends on their ability to live in a manner consistent with their gender identity.

46. Transitioning is particular to the individual, but typically includes social, legal, and medical transition.

47. Social transition entails a transgender individual living in accordance with their gender identity in all aspects of life. For example, social transition can include wearing attire, following grooming practices, and using pronouns consistent with that individual's gender identity.

48. Legal transition involves steps to formally align an individual's legal identity with their gender identity, such as legally changing their name and updating the name and gender marker on their driver's license, birth certificate, or other forms of identification.

49. Medical transition, a critical part of transitioning for many transgender individuals, includes gender-affirming care that brings the sex-specific characteristics of a transgender individual's body into alignment with their gender. Gender-affirming care can involve mental health services, hormone therapy, surgical care, and/or other medically necessary treatments for gender dysphoria.

50. Gender dysphoria is often heightened "when physical interventions by means of hormones and/or surgery are not available." DSM-5 at 451.

51. The WPATH Standards of Care make clear that "[h]ormone therapy to feminize or masculinize the body" and "[s]urgery to change primary and/or secondary sex characteristics (e.g., breasts/chest, external and/or internal genitalia, facial features, body contouring)" are medically necessary services for many transgender individuals with gender dysphoria.[2] WPATH SOC 7 at 8-9, 33-34, 54-55.

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[2] Certain transition-related procedures are sometimes referred to as "sex reassignment surgery," or the archaic and disfavored term "sex change surgery," which is now generally considered inaccurate and offensive. Under the contemporary medical and psychological understanding of gender identity, transition-related medical treatments serve to confirm, not "change," an individual's sex by bringing primary and secondary sex

52. For individuals assigned male at birth, surgery may include augmentation mammoplasty, penectomy (removal of the penis), orchiectomy (removal of the testes), vaginoplasty, clitoroplasty, and/or vulvoplasty (creation of female genitalia). *Id.* at 57.

53. The WPATH Standards of Care set forth criteria for providers to use to evaluate whether hormone therapy and/or gender affirming surgery are appropriate and necessary for a given individual.

54. The criteria for genital surgery for individuals assigned male at birth are: 1) persistent, well documented gender dysphoria, 2) capacity to make a fully informed decision and to consent for treatment; 3) age of majority; 4) if significant medical or mental health concerns are present, they must be well controlled; 5) twelve continuous months of hormone therapy as appropriate to the person's gender goals; and 6) twelve continuous months of living in a gender role that is congruent with the individual's gender identity.

55. Individuals need a referral from two mental health providers demonstrating that the criteria are met. In addition, it is recommended that the individual have regular visits with a mental health or other medical professional. *Id.* at 60-61. WPATH SOC 8 relaxes some of the criteria compared to WPATH SOC 7. For example, SOC 8 recommends only 6 months of continuous hormone therapy as

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characteristics into alignment with the person's gender identity. As such, neither of those terms is used in this Complaint.

opposed to twelve as a prerequisite to genital surgery. *See* WPATH SOC 8 at S129.

56. Decades of research and clinical practice has shown that gender-affirming medical care, including surgery, can be lifesaving treatment and has a positive impact on the short- and long-term health outcomes for transgender people.

57. The broader medical community agrees that, for many transgender individuals, surgical interventions are safe, effective, and medically necessary treatments for gender dysphoria.

58. The American Medical Association, the Endocrine Society, the American Psychiatric Association, the American Psychological Association, the American College of Obstetrics and Gynecology, the American Academy of Family Physicians, and other major professional medical organizations recognize that gender affirming surgeries are safe and effective treatments for gender dysphoria, and that access to such treatments improves the health and well-being of transgender individuals. Each of these groups has issued statements in support of the WPATH Standards of Care. And, each of these groups has publicly opposed prohibitions on insurance coverage for transition-related health care.

Federal Medicaid

59. Established in 1965 under Title XIX of the Social Security Act, Medicaid is a cooperative federal and state program designed to enable states to assist needy individuals "whose incomes and resources are insufficient to meet the cost of necessary medical

services." *See* Medicaid Act, 42 U.S.C. § 1396-1. Title XIX is known as the Medicaid Act.

60. States participating in Medicaid must comply with the requirements imposed by Title XIX of the Social Security Act, see 42 U.S.C. §§ 1396 to 1396w-6, and the implementing regulations promulgated by the United States Department of Health and Human Services ("HHS"), *see* 42 C.F.R. pts. 430 to 456.

61. States are not required to participate in the Medicaid program, but all states do.

62. The Medicaid Act requires each participating state to establish or designate a single state agency that is responsible for administering or supervising the administration of the state's Medicaid program. 42 U.S.C. § 1396a(a)(5).

63. In addition, each participating state must maintain a comprehensive plan for medical assistance approved by the Secretary of Health and Human Services. *Id.* § 1396a. The plan must describe the state's program and affirm its commitment to comply with the Medicaid Act and its implementing regulations.

64. The federal government reimburses participating states for a substantial portion of the cost of providing medical assistance.

65. The Medicaid Act requires that participating states cover certain health care services, including inpatient and outpatient hospital services and physician services, when medically necessary. 42 U.S.C. §§ 1396a(a)(10)(A), 1396d. In addition, the statute gives states the option to provide other

services, including prescription drugs, when medically necessary. *Id.*

66. Under the Medicaid Act, "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." 42 U.S.C. § 1396a(a)(10)(B)(i).

67. In addition, a state "Medicaid agency may not arbitrarily deny or reduce the amount or scope of a required service ... to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c).

68. States must ensure that "[e]ach service must be sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b). Moreover, state Medicaid programs must provide medical assistance "in a manner consistent . . . with the best interests of the recipients." 42 U.S.C. § 1396a(a)(19).

69. The Medicaid Act mandates that states "grant an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." *Id.* § 1396a(a)(3).

70. Federal regulations construing the requirements of section 1396a(a)(3) define the process that is due to Medicaid beneficiaries. *See* 42 C.F.R. §§ 431.200 to 431.246. The regulations specifically require states to meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970). *See* 42 C.F.R. § 431.205(d). They also explicitly require

states to comply with the United States Constitution and Section 1557 of the Affordable Care Act and implementing regulations. *See id.* § 431.205(f).

71. Medicaid beneficiaries are entitled to notice and an opportunity for a fair hearing whenever the state takes any action, including when the state denies a claim or request for authorization for services or benefits or does not act upon the claim "with reasonable promptness." 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.206(b), (c), 431.220(a)(1).

72. States must provide beneficiaries with timely and adequate written notice of their hearing rights. *Goldberg*, 397 U.S. at 267-268; 42 C.F.R. §§ 431.206(b)(c). The notice must describe what action the state intends to take and the effective date of the action, the specific reasons supporting the action, and "[t]he specific regulations that support, or the change in Federal or State law that requires, the action." *Id.* § 431.210(a)-(c). The notice must also explain that the individual has a right to a fair hearing, how to obtain a hearing, that the individual is entitled to represent themselves or use legal counsel or other spokesperson, and the time frames in which the agency must take final administrative action, in accordance with 431. 244(f). *Id.* §§ 431.210(d), 431.206(b), (c)(2).

73. If an individual does request a hearing, they must be given an opportunity to: "examine at a reasonable time before the hearing and during the hearing" the content of their case file and electronic account and all documents and records to be used at the hearing, 42 C.F.R. § 431.424(a); "[e]stablish all pertinent facts and circumstances," *id.* § 431.242(c); "[p]resent argument without undue interference," *id.*

§ 431.424(d); and “[q]uestion or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses,” *id.* § 431.242(e).

74. The hearing decision “must be based exclusively on evidence introduced at the hearing.” *Id.* § 431.244(a).

75. The hearing decision must be in writing, and it must summarize the facts and identify the regulations supporting the decision. *Id.* § 431.244(d)(1)-(2).

76. The state Medicaid agency must ordinarily issue a final decision within 90 days of the fair hearing request, except in unusual circumstances. *Id.* § 431.244(f). Unusual circumstances exist when the beneficiary asks for a delay or fails to take a required action, or when there is an administrative or other emergency that the agency cannot control. *Id.* § 431.244(f)(4)(i). The agency must document the reasons for any delay in the beneficiary’s record. *Id.* § 431.244(f)(4)(ii).

Idaho Medicaid

77. The State of Idaho participates in the federal Medicaid program.

78. The IDHW is the designated single state department that administers Idaho Medicaid in its Division of Medicaid.

79. The federal government reimburses Idaho for approximately 70% of the cost of providing medical assistance through its Medicaid program. *See* 86 Fed. Reg.67479, 67,481 (Nov. 26, 2021).

80. The Idaho Medicaid program is authorized by Idaho's medical assistance statute, Idaho Code § 56-209b(1), which requires that "[m]edical assistance shall be awarded to persons as mandated by federal law" and IDHW's implementing regulations, IDAPA 16.03.09 – Medicaid Basic Plan Benefits.

81. Idaho's medical assistance statute does not explicitly address, let alone exclude, coverage for gender affirming surgery.

82. Under the statute, Idaho does not cover physician, hospital, or other services deemed experimental. *See* Idaho Code § 56-209d(6).

83. In addition, Idaho does not cover "cosmetic surgery, excluding reconstructive surgery that has prior approval by the Department." IDAPA 16.03.09.390.02.b.

84. Department of Health and Welfare Director Jeppesen was quoted in an article, dated July 22, 2022, as stating in an email that IDHW "has not approved surgical procedures for diagnoses of gender dysphoria." He was also quoted as stating: "The department also continues to have no policy related to authorizing surgeries or hormone therapies for gender dysphoria and there are no current plans to implement one." https://idahofreedom.org/idaho-medicaid-should-expressly-ban-sex-change-treatments/

85. Defendants Jeppesen, Hamso, and IDHW have an unwritten, unstated policy that genital surgery for the treatment of gender dysphoria is cosmetic, and as a result, not medically necessary. That determination conflicts with the medical

consensus that gender affirming surgery is medically necessary, reconstructive surgery.

86. On information and belief, Idaho Medicaid does cover genital reconstruction surgery with prior approval when it is medically necessary to treat health conditions other than gender dysphoria. *See, e.g.*, IDAPA 16.03.09.422.

87. On information and belief, transgender Idaho Medicaid recipients other than MH and TB have been denied or deterred from seeking prior authorization for surgery to treat gender dysphoria because of their knowledge or the knowledge of their medical providers that authorization would be denied on the basis that such treatment is considered cosmetic and not medically necessary by Defendants Jeppesen, Hamso, and IDHW.

88. On information and belief, doctors have been denied authorization for medically necessary surgical procedures and have discontinued treatment for gender dysphoria as a result of Defendants Jeppesen's, Hamso's, and IDHW's actions, causing Idaho Medicaid beneficiaries to suffer physical harm and mental health distress.

Idaho Notice and Fair Hearing Appeals

89. IDHW has designated the Fair Hearing Unit within the Idaho Attorney General's Office to conduct administrative fair hearings and issues "Preliminary Decisions" in appeals from Medicaid decisions.

90. IDHW has promulgated state regulations, Contested Case Proceedings, IDAPA 16.05.03, incorporated by reference, to govern the due process

procedures used in Idaho Medicaid administrative fair hearings.

91. The IDHW Contested Case Rules limit the authority of the hearing officer to "consider only information that was available to the Department at the time the decision was made." IDAPA 16.05.03.131.

92. The hearing officer can remand the case to the Department only if the "appellant" shows "good cause" for not presenting additional relevant information that was not presented to the Department. IDAPA 16.05.03.131.

93. If an appeal is remanded to the IDHW, the hearing officer does not retain jurisdiction. IDAPA 16.05.03.131.

94. The hearing officer must issue a Preliminary Order not later than thirty (30) days after the case is submitted for decision. IDAPA 16.05.03.138.

95. Either party may file a request for review of the Preliminary Decision by the Director of IDHW not later than fourteen (14) days from the date the Preliminary Decision was mailed. IDAPA 16.05.03.150.

Plaintiff MH

96. MH is a 21-year-old transgender woman. She has lived in Idaho her entire life.

97. When MH was 11 years old, she started to feel deep psychological distress associated with the physical changes that were happening in her body. At

the time, she did not have the words to express what she was experiencing.

98. She developed [redacted.]

99. MH became aware that she was transgender at age 16. She was afraid to disclose her gender identify to her family, who would not be accepting of her transgender status. As a result, MH went without any medical treatment for her gender dysphoria. Her parents objected to MH receiving counseling to address her [redacted] and

100. After she realized that she was transgender, MH began telling a few close school friends about her gender identity and desire to transition.

101. At age 17, MH left her family home. She went to live with a friend's family who she grew up with, the "H" family.

102. Mr. and Mrs. H filed for guardianship of MH. During the guardianship proceeding, MH was required to live with her grandparents rather than with her parents. The guardianship proceeding was not finalized before MH turned 18 and was dismissed.

103. In connection with the guardianship proceeding, in early 2019 a psychologist assessed MH, diagnosing her with gender dysphoria.

104. After turning 18, MH returned to live with the H family, who were supportive of her gender identity.

105. By that time, MH was consistently using a feminine name and female pronouns and living as a woman in all aspects of her life.

106. MH applied for and was found eligible to receive Idaho Medicaid. In June 2019, MH was finally able to access treatment for her gender dysphoria, as well as for other conditions. She started receiving primary care and mental health services from providers at [redacted]. Her primary care provider, [redacted] DNP, PMHNP-BC, FNP, independently diagnosed MH with gender dysphoria.

107. [Redacted], determined that MH would benefit from hormone therapy to further her gender transition and treat her gender dysphoria. In August 2019, [redacted]began prescribing hormone therapy for MH. Hormone therapy reduced MH's gender dysphoria and improved her quality of life. MH has remained on hormone therapy since August 2019.

108. MH started to receive counseling services at [redacted]. She saw several providers there, including [redacted], LCSW, through May 2020. At that time, she also started to see [redacted], LCPC.

109. In early 2020, MH amended her birth certificate to reflect her female sex. In June 2020, MH was able to legally change her masculine first name to a feminine first name and adopt the last name of the family who cared for her.

110. Hormone therapy and gender affirming counseling improved but did not completely eliminate MH's gender dysphoria. She continued to experience significant distress related to her genitalia.

111. In August 2020, MH consulted with [redacted], PA, a Physician Assistant with the [redacted] Gender Affirmation Team about receiving gender affirming surgery, specifically a penectomy,

orchiectomy, and vulvoplasty. Sealed Exhibit 1, pp. 11-14.

112. The PA concluded that MH was ready for the surgery because she had undergone appropriate counseling and preparation, was informed of the risks, benefits, and alternatives to surgery, and could make a fully informed decision consenting to the surgery and treatment. *Id.*, p. 13.

113. The PA found MH had been living in her gender role for one year and had continuously been on hormone therapy during this time. *Id.*

114. The PA reviewed the WPATH criteria for vulvoplasty with MH and found MH met those criteria. *Id.*

115. In accordance with the WPATH Standards of Care, the PA indicated that MH would need to submit two letters of support from her treating providers before she could proceed with surgery. *Id.*

116. MH gathered letters of support from [redacted], [redacted], [redacted], and Dr. [redacted], who is board certified in family medicine and who has special training in LGBTQIA+ health care and gender-affirming care for adults. *Id.*, pp. 16-19. Dr. [redacted] started managing MH's hormone therapy in October 2020. *Id.*, p. 17. The letters indicate that MH's providers were in agreement that gender-affirming surgery was appropriate and medically necessary treatment for MH. *Id.*, pp. 16-19.

117. Dr. [redacted] has had multiple patients who have suffered significant and consistent psychological and physical harm after being denied

appropriate and medically necessary gender-affirming surgery by Idaho Medicaid. Sealed Exhibit 2.

118. On March 10, 2021, Dr. [redacted], a surgeon with the [redacted], submitted a prior authorization request to IDHW on behalf of MH, seeking coverage for a penectomy, orchiectomy, and vulvoplasty. Dr. [redacted] attached the PA's August 2020 assessment and the four letters of support to the request. Sealed Exhibit 1, pp. 8-14.[3]

119. On March 26, 2021, MH received notice that Defendant Hamso, the Medical Director of the Division of Medicaid, had denied her request for prior authorization due to lack of medical necessity. *Id.*, pp. 30-32.

120. The notice stated Defendant Hamso determined "The World Professional Association for Transgender Health's recommendation is a 12-month continuation of hormones before proceeding with surgery. May resubmit once the participant has completed 12 months of hormone therapy.ss [Susan Scheuerer]" *Id.*, p. 31.

121. The notice did not explain the timeframes in which the agency must take final administrative action as required in 42 CFR § 431.206(b). *Id.*, p. 32.

122. MH timely filed a request for a fair hearing with the IDHW to appeal the denial of prior authorization. *Id.*, pp. 28-29.

[3] In the March 10, 2021, request, MH is referred to by her birth name, "MB." MH legally changed her name pursuant to a Judgment that was entered on June 17, 2020.

123. In May 2021, MH received an orchiectomy at [redacted] that was covered by Idaho Medicaid. In seeking prior authorization for the procedure, the surgeon noted that it was indicated to treat testicular pain, as well as gender dysphoria.

124. The orchiectomy reduced the amount of hormone therapy MH needed – specifically, she no longer has to take a testosterone blocker – but it did not obviate her need for a penectomy and vulvoplasty to treat her ongoing symptoms of gender dysphoria.

125. On June 3, 2021, a hearing officer with the Fair Hearings Unit of the Idaho Attorney General's Office held a telephonic hearing lasting 20 minutes and 30 seconds. Sealed Exhibit 3 (transcript of hearing).

126. Susan Scheuerer, the Nurse Reviewer for the Division of Medicaid, testified during the fair hearing. *Id.*, pp. 5-13.

127. While Defendant Hamso was on the witness list, she did not appear at the hearing. Sealed Exhibit 1, p.1.

128. Ms. Scheuerer first testified that Defendant Hamso denied prior authorization because it was unclear whether MH had completed twelve months of hormone therapy as required by the WPATH Standards of Care. Sealed Exhibit 3, p. 9, ll. 19-25.

129. MH explained during the hearing that the records submitted by MH indicated she had completed twelve (12) months of hormone therapy which was the only reason stated in the notice for the denial of the prior authorization for the surgery. *Id.*,

p. 10, l. 17 – p. 11, l. 14. The Hearing Officer asked Ms. Scheuerer what was missing from the documentation that would lead to IDHW approving the request. *Id.*, p. 12, ll. 3-9 and 14-16.

130. Ms. Scheuerer indicated for the first time that even if it was true that MH had completed twelve (12) months of hormone therapy, the agency still would have denied the prior authorization request because Idaho Medicaid's policy considers the requested surgical procedure for transgender individuals to be cosmetic. *Id.*, p. 12, l. 17 – p. 13, l. 1.

131. Ms. Scheuerer testified that cosmetic surgery was to improve a person's "appearance or self-esteem" similar to a request to change a body part, such as, the removal of a facial scar due to an injury, if a woman with a flat chest requested breast implants, or a request for a breast reduction for large breasts and is considered a non-covered cosmetic procedure that was not medically necessary. *Id.*, p. 8, ll. 16-24.

132. MH testified and presented exhibits from her treating medical and mental health providers documenting her gender dysphoria diagnosis, that she had completed the twelve months of hormone therapy, and that the requested surgery was medically necessary to treat her gender dysphoria. *Id.*, pp 10-11.

133. Prior to the hearing, MH did not receive notice that the Division of Medicaid denied her prior authorization request because it had a policy that gender-affirming surgery needed to treat gender dysphoria was a medically unnecessary "cosmetic" procedure pursuant to Idaho's Medicaid's policy and

regulations. The only reason stated in the notice sent to MH was that the surgery was denied because she had not completed 12 months of continuous hormone therapy. As a result, MH was not able to bring witnesses or submit evidence rebutting Defendants Hamso's and the IDHW's determination that the procedure was cosmetic and not medically necessary at the hearing. *Id.*, p. 13.

134. While MH testified that extensive peer-reviewed research show that gender affirming surgery is appropriate treatment for gender dysphoria, MH stated that she "didn't bring peer-reviewed articles in because I didn't think I would need to defend the validity of a surgery that has been accepted by the majority of urologists for multiple decades." *Id.*

135. On July 2, 2021, the hearing officer issued a Preliminary Order to Remand. Sealed Exhibit 4.

136. The Hearing Officer found the documentation from MH's medical and mental health providers established that MH had completed 12 continuous months of hormone therapy. *Id.*, pp. 2-3, 5-6.

137. The Hearing Officer found "Appellant [MH] referenced peer review research supporting the idea that gender affirmation surgery is medically necessary and not just cosmetic." *Id.*, p. 6.

138. The Hearing Officer decided that MH should have another opportunity to provide "clearer documentation showing 12 continuous months of hormone therapy" however, "the hearing officer does not see how Department interpreted the

documentation to mean anything else—and the Department's representative could not describe what documentation was missing or what would be needed to show that requirement was met." *Id.*. p. 7.

139. The Hearing Officer concluded the Notice of Denial letter did not provide notice of any additional basis or rule for the denial except the surgery was not medically necessary because MH had not completed 12 months of continuous hormone therapy. *Id.*, p. 5.

140. The Hearing Officer concluded the "Department somewhat abused its discretion in this case with its emphasis on Appellant's failure to show 12 continuous months of hormone therapy when—according to the Department's testimony—even if Appellant showed 12 continuous months of hormone therapy, the surgery request would still have been denied because the Department considered the procedure cosmetic." *Id.*, p. 6.

141. The Hearing Officer remanded the appeal, per IDAPA 16.05.03131, to the "Department for consideration if Appellant shows that there is additional relevant information that was not presented to the Department with good cause." *Id.*

142. Defendants Jeppesen, Hamso, and IDHW use Telligen to review services requested for Idaho Medicaid members. Services are reviewed for medical necessity based on the member's medical needs. https://idmedicaid.telligen.com/wp-content/uploads/2021/11/2021-Provider-Manual_FINAL.pdf.

143. On July 28, 2021, Dr. [redacted] of the [redacted] sent Telligen a Pre-service Review Request

Form, again attaching the PA's August 2020 assessment and the four letters of support. Sealed Exhibit 5.

144. Since July of 2021, MH has repeatedly contacted IDHW to request an update on the status of her prior authorization request, but she has never been informed if her request had been approved or denied. At the direction of Dr. Hamso, IDHW staff repeatedly told MH they were still reviewing her request and had not yet made a decision.

145. On October 22, 2021, Elizabeth Kriete of IDHW sent an email to Director Jeppesen, among others, stating that she had spoken with MH and told her that the decision was still pending. Sealed Exhibit 6. She also said that MH had requested the Director's phone number. *Id.*

146. On October 22, 2021, Director Jeppesen replied in an email in which he said: "I do not think that I can speak with [MH] since this is in the appeal process and that appeal could come to me for a decision depending on how the process goes. When there is an active appeal going on, it is not appropriate for me to talk with the appellant." Sealed Exhibit 7.

147. On November 2, 2021, at 03:16 PM, an electronic note was entered into MH's Medicaid file stating "Review is currently pending per the request of IDHW. The Department is currently determining if this is a covered benefit. All calls pertaining to this case can be referred to Dr. Hamso, Medical Director at DHSW." Sealed Exhibit 8.

148. On November 25, 2021, MH requested a new hearing on Defendants Jeppesen's, Hamso's, and

IDHW's failure to make a decision on her request with reasonable promptness. Sealed Exhibit 9.

149. On December 22, 2021, Dr. Hamso wrote an email to Chelsea Kidney and Kimberly Stretch in which she described a phone call with MH. Sealed Exhibit 10. Dr. Hamso said MH expressed that Medicaid still had not made a decision on her request and that she had called everybody she could but was not given an answer as to the status. *Id.* Dr. Hamso wrote: "I said that it is still pending. That she does have Medicaid, but this PA request is pending." *Id.* Dr. Hamso continued: "[MH] was clearly in tears and said I need you to find it and move it from pending to approved. I said that it was still pending and that the Department is determining if this is part of Medicaid benefits." *Id.*

150. At the direction of Dr. Hamso, IDHW refused to provide a hearing, claiming that because her request was under review she was not entitled to a hearing. Sealed Exhibit 11 (letter from Libby Hobbs to MH dated December 23, 2021).

151. On February 18, 2022, Telligen notified the [redacted] of its Notice of Decision for each of the 13 procedure codes included in the prior authorization request. Sealed Exhibit 12.

152. Telligen made the Determination: "Outcome Not Rendered" and gave a "Rationale: Per direction from IDHW, this case was sent to the department for review." *Id.*

153. On May 6, 2022, Defendant Hamso wrote a "Request for Information" to MH's surgeons at the [redacted] stating: "Medicaid has determined that a

medical necessity decision cannot be made at this time because we do not have the necessary medical information." Sealed Exhibit 13.

154. Defendants Jeppesen, Hamso, and IDHW have not notified MH of the final decision on her request for coverage of medically necessary surgery to alleviate her ongoing symptoms of gender dysphoria after remand from the fair hearing appeal more than one year ago.

155. Defendant Hamso's denial of necessary medical treatments to MH has caused significant emotional distress, including, but not limited to, heightened symptoms of gender dysphoria, [redacted], resulting from her inability to obtain medically necessary care.

156. MH has also suffered from her inability to obtain necessary gender- affirming surgical procedures as a result of Defendants' failure to authorize medically necessary surgery to alleviate their ongoing symptoms of gender dysphoria.

157. As a direct and proximate result of Defendants' denial of medically necessary gender-affirming care, MH's symptoms of gender dysphoria and related distress have not abated

Plaintiff TB

158. Plaintiff TB is an 18 year-old transgender female. TB lives with her family in Idaho.

159. TB has identified as a female as long as she can remember. As a child, she strongly preferred female attire and the toys, games, and activities stereotypical of the female gender, and she strongly

rejected typically masculine toys, games, and activities. She has always had a strong dislike for her sexual anatomy and a strong desire for feminine sex characteristics that match her gender identity.

160. When TB was eleven and twelve years old she had to be admitted to two mental health facilities after she attempted to take her life because of [redacted] due to not wanting to live in the world where she could not be true herself. Sealed Exhibit 18 (January 6, 2022, letter from [redacted], LCSW), p. 3; Sealed Exhibit 20, p. 5. She is currently receiving counseling and medication for her depression.

161. TB has lived fully as a female since 2015, including attending school.

162. In 2016, TB legally changed her masculine first name to a feminine first name.

163. TB was diagnosed with gender dysphoria in the spring of 2016 by Dr. [redacted], her psychiatrist in Texas. Sealed Exhibit 14.

164. From 2016 to 2020, TB was treated for gender dysphoria by her health care providers, first in Texas and later, in Colorado.

165. TB began taking a puberty blocker to treat her gender dysphoria in the summer of 2016. The puberty blocker was prescribed by Dr. [redacted], TB's pediatric endocrinologist in Dallas, Texas. Sealed Exhibit 15, p. 1.

166. In 2017-18, TB completed psychotherapy as part of her treatment for gender dysphoria and in preparation for beginning hormone therapy. Dr. [redacted], TB's child psychiatrist in Colorado, found

that she met the criteria for gender dysphoria, and that her decision to transition resulted in a significant reduction of her personal distress surrounding her gender identity. Sealed Exhibit 16.

167. In early 2018, Dr. [redacted] found that TB met the eligibility and readiness criteria in the official WPATH Standards of Care for treatment of gender dysphoria, and that she was a qualified candidate for hormone therapy. *Id.* TB's pediatric endocrinologist in Colorado, Dr. [redacted], agreed. Sealed Exhibit 17. TB started hormone therapy at that time. *Id.*

168. In early May of 2022, having reached the age of 18, TB consulted with her health care providers concerning gender affirming surgery, including physicians from the [redacted].

169. TB's medical care providers at the [redacted] submitted a request for prior authorization for gender affirming surgeries to IDHW, stating that the requested procedures were a matter of medical necessity to treat TB's gender dysphoria.

170. TB received a "Notice of Decision" from Telligen for each of the requested surgical procedures, the determination reached by Telligen was the same: "Outcome Not Rendered." In the "rationale" section of the Notice, again for each requested service, is the following language: "The request was forwarded to the medical care unit for review. For any further questions pertaining to this request please contact the medical care unit via email at medicalcareunit@dhw.idaho.gov." Sealed Exhibit 19.

171. On May 31, 2022, TB sent an email to the IDHW Medical Care Unit in which she wrote: "I do not understand what 'outcome not rendered' means. Does it mean that my case is still being reviewed or does it mean that my surgery is not covered?" Sealed Exhibit 20, p. 1.

172. On June 1, 2022, TB sent an email to the IDHW Medical Care Unit in which she wrote: "I have some questions about my case. I see its output [sic] not rendered. I called the number given to me and was told that everything was sent to your medical care unit. Can you give me an idea of how long it takes to review my case?" *Id.*

173. On June 2, 2022, TB received an email from the IDHW Medical Care Unit that stated: "The Medical Care Unit has received your request and it is currently pending review by the Medical Director." *Id*, p. 2.

174. On June 2, 2022, TB replied to the IDHW Medical Care Unit: "The doctors and surgeon can write a medical necessity letter. We see him June 6th. And he will write a medical necessity letter and also send in clinic notes if needed." *Id.*

175. On June 3, 2022, TB received an email from the IDHW Medical Care Unit that stated: "The Medical Care Unit has received your request and it is currently pending review by the Medical Director." *Id.*, p. 3.

176. On June 7, 2022, TB wrote an email to the IDHW Medical Care Unit that said: "Thank you. I just wanted to add that my surgeon wrote a letter of

medical necessity for me. She said she would make sure your department received it." *Id.*

177. TB's physicians from the surgical team with the [redacted] submitted a letter dated June 9, 2022, to IDHW requesting prior authorization for the surgery based upon medical necessity. The physicians wrote: "Our surgical team at [redacted], and four independent mental health professionals have thoroughly assessed this patient using the WPATH Standards of Care and have determined vaginoplasty to be a medically necessary procedure for [TB]. In our assessment, delay or denial of this medically necessary procedure would harm the health of this patient and put her well-being at risk." (Footnotes omitted.) Sealed Exhibit 21.

178. The June 9, 2022, request for prior authorization for TB's gender-affirming surgery was supported by letters from TB's psychiatrist in Idaho (Sealed Exhibit 22), TB's child psychiatrist from Colorado (Sealed Exhibit 16), her licensed clinical social worker in Idaho (Sealed Exhibit 18), and her psychologist in Idaho (Sealed Exhibit 23).

179. On June 13, 2022, TB wrote another email to the IDHW Medical Care Unit informing them that her surgeon had sent the letter of medical necessity last week. Sealed Exhibit 20, p. 3.

180. On June 21, 2022, TB's parents wrote an email to the IDHW Medical Care Unit in which they informed IDHW that the requested surgery was a matter of life or death for TB. They also described the medical documentation that had been provided supporting the request for authorization and some of the prior medical treatment received by TB for her

gender dysphoria. TB's parents closed the email as follows: "If there is anything more we can do on our part please tell us. Please help us. We have been waiting and we appreciate the time and effort you have given thus far." *Id.*, p. 4.

181. On June 22, 2022, TB wrote an email to the IDHW Medical Care Unit in which she described her history of dealing with gender dysphoria, the medical treatment she had received, and how her family supported her. *Id.*, p. 5.

182. On June 23, 2022, TB received an email from the IDHW Medical Care Unit that stated: "The Medical Care Unit has received your request and it is currently pending review by the Medical Director." *Id.*, p. 6.

183. On July 6, 2022, TB wrote an email to the IDHW Medical Care Unit in which she said: "I was hoping to hear back about my claim this week. It has taken a long time and I am wondering if I could get a time frame." *Id.*

184. On July 13, 2022, TB received an email from the IDHW Medical Care Unit that stated: "This is still under review." *Id.*

185. On July 22, 2022, TB wrote an email to the IDHW Medical Care Unit in which she provided a quote stating that discrimination against transgender persons was prohibited, meaning that health care plans cannot exclude transition related care. *Id.*, p. 7.

186. TB has not received any response to the July 22, 2022, email or any other electronic or written correspondence from Defendants Jeppesen, Hamso,

and IDHW after the July 13, 2022, email described above.

187. TB and her family members have made numerous phone calls to IDHW inquiring about the status of TB's request. The only statement made to them by IDHW representatives is that TB's request is under review.

188. Despite the uncontroverted evidence of supporting the medical necessity for the request prior authorization of gender affirming surgery, and after multiple inquiries from TB and her family members, Defendants Jeppesen, Hamso, and IDHW have not notified TB of its decision on the request for prior authorization.

FIRST CLAIM FOR RELIEF

Unlawful Discrimination on the Basis of Sex in Violation of Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116

189. Plaintiffs reallege and incorporate by reference all paragraphs of this Complaint.

190. Under Section 1557 of the Affordable Care Act, "an individual shall not ... be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title" on the basis of sex. 42 U.S.C. § 18116.

191. Idaho Medicaid is a health program or activity receiving federal financial assistance under Section 1557 of the Affordable Care Act.

192. Section 1557's prohibitions on sex discrimination are enforceable by MH and TB in a judicial action under 20 U.S.C. § 1683, which Section 1557 incorporates by reference. 42 U.S.C. § 18116(a).

193. Defendants Jeppesen's, Hamso's, and IDHW's continuing policy of refusing to authorize medically necessary genital reconstruction and gender-affirming surgery for the treatment of gender dysphoria, as applied to MH and TB, violates Section 1557's prohibition against discrimination on the basis of sex in a health program or activity receiving federal financial assistance.

SECOND CLAIM FOR RELIEF

Violation of the Medicaid Act's Availability Requirements, 42 U.S.C. § 1396a(a)(10)(A)

194. Plaintiffs reallege and incorporate by reference all paragraphs of this Complaint.

195. Defendants Jeppesen's, Hamso's, and IDHW's continuing policy of refusing to authorize medically necessary genital reconstruction and gender-affirming surgery for the treatment of gender dysphoria, as applied to MH and TB, eliminates mandatory Medicaid coverage of medically necessary services, violates Medicaid's availability requirement, 42 U.S.C. § 1396a(a)(10)(A), which is enforceable by Plaintiffs under 42 U.S.C. § 1983.

196. MH and TB have been and continue to be injured by Defendants Jeppesen's, Hamso's, and

IDHW's discriminatory policy of refusing to authorize medically necessary genital reconstruction and gender-affirming surgery for the treatment of gender dysphoria.

197. Defendants Jeppesen's, Hamso's, and IDHW's discriminatory policy punishes vulnerable transgender individuals, including MH and TB, for being transgender and taking necessary steps to live in accordance with their gender identities.

198. Under 42 U.S.C. § 1983, MH and TB are entitled to injunctive and prospective relief prohibiting Defendants from violating their rights under federal law.

199. Under 42 U.S.C. § 1983, MH and TB are entitled to an award of compensatory damages against Defendant Hamso, as an individual acting under color of state law, for continuing to violate their clearly established rights under federal law.

THIRD CLAIM FOR RELIEF

Violation of the Medicaid Act's Comparability Requirements, 42 U.S.C. § 1396a(a)(10)(B)

200. Plaintiffs reallege and incorporate by reference all paragraphs of this Complaint.

201. Defendants Jeppesen's, Hamso's, and IDHW's continuing policy of refusing to authorize medically necessary genital reconstruction and gender-affirming surgery for the treatment of gender dysphoria, while authorize the same or similar surgical procedures for other Idaho Medicaid beneficiaries with different diagnoses, as applied to MH and TB, violates Medicaid's comparability

requirement, 42 U.S.C. § 1396a(a)(10)(B), which is enforceable by Plaintiffs under 42 U.S.C. § 1983.

202. MH and TB have been and continue to be injured by Defendants' discriminatory policy of refusing to authorize medically necessary genital reconstruction and gender-affirming surgery for the treatment of gender dysphoria.

203. Defendants Jeppesen's, Hamso's, and IDHW's discriminatory policy punishes vulnerable transgender individuals, including MH and TB, for being transgender and taking necessary steps to live in accordance with their gender identities.

204. Under 42 U.S.C. § 1983, MH and TB are entitled to injunctive and prospective relief prohibiting Defendants from violating their rights under federal law.

205. Under 42 U.S.C. § 1983, MH and TB are entitled to an award of compensatory damages against Defendant Hamso, as an individual acting under color of state law, for continuing to violate their clearly established rights under federal law.

FOURTH CLAIM FOR RELIEF

Violation of the Equal Protection Clause of the Fourteenth Amendment

206. Plaintiffs reallege and incorporate by reference all paragraphs of this Complaint.

207. Defendants Jeppesen's, Hamso's, and IDHW's policy of refusing to authorize medically necessary genital reconstruction and gender-affirming surgery for the treatment of gender dysphoria, as applied to MH and TB, impermissibly discriminates

against Plaintiffs on the basis of sex and violates their right to Equal Protection under the Fourteenth Amendment to the United States Constitution.

208. Defendants Jeppesen's, Hamso's, and IDHW's continuing policy of refusing to authorize medically necessary genital reconstruction and gender-affirming surgery for the treatment of gender dysphoria, as applied to MH and TB, impermissibly discriminates against Plaintiffs for being transgender and violates their right to equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

209. Defendants Jeppesen's, Hamso's, and IDHW's policy does not serve any rational, legitimate, important, or compelling state interest and only serves to prevent Plaintiffs and other transgender Idaho Medicaid beneficiaries from obtaining medically necessary health care that will enable them to treat their gender dysphoria, complete their gender transitions, and fully live as their authentic selves.

210. MH and TB have been and continue to be injured by Defendants' discriminatory policy of refusing to authorize medically necessary genital reconstruction and gender-affirming surgery for the treatment of gender dysphoria.

211. Defendants Jeppesen's, Hamso's, and IDHW's discriminatory policy punishes vulnerable transgender individuals, including MH and TB, for being transgender and taking necessary steps to live in accordance with their gender identities.

212. Under 42 U.S.C. § 1983, MH and TB are entitled to injunctive and prospective relief

prohibiting Defendants Jeppesen, Hamso, and IDHW from violating their rights, privileges, or immunities under federal law.

213. Under 42 U.S.C. § 1983, MH and TB are entitled to an award of compensatory damages against Defendant Hamso, as an individual acting under color of state law, for continuing to violate their clearly established constitutional rights.

FIFTH CLAIM FOR RELIEF

Violation the Medicaid Act's Due Process Requirements 42 U.S.C. § 1396a(a)(3)

214. Plaintiffs reallege and incorporate by reference all paragraphs of this Complaint.

215. The Medicaid Act requires states to "grant [] an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 1396a(a)(3).

216. The federal regulations at 42 C.F.R. § 431.200, et seq., construe the statutory requirements of § 1396a(a)(3).

217. Defendants Jeppesen's, Hamso's, and IDHW's continuing failure to provide MH with adequate notice when denying her claim for benefits under the Medicaid Act and the continuing delay or refusal to make a final decision in MH's appeal within ninety days and with reasonable promptness violates MH's rights to procedural due process under the Medicaid Act, 42 U.S.C. § 1396a(a)(3), which is enforceable by MH pursuant to 42 U.S.C. § 1983.

218. Defendants Jeppesen's, Hamso's, and IDHW's continuing failure to make a decision on TB's request for prior authorization with reasonable promptness violates TB's rights to procedural due process under the Medicaid Act, 42 U.S.C. § 1396a(a)(3), which is enforceable by TB pursuant to 42 U.S.C. § 1983.

219. Defendants Jeppesen, Hamso, and IDHW have a policy, pattern, and practice of failing to ensure that Idaho Medicaid beneficiaries, including MH and TB, receive adequate written notice and the opportunity for a hearing, when coverage of medically necessary surgical treatment for gender dysphoria is denied or is not acted upon with reasonable promptness.

220. Under 42 U.S.C. § 1983, MH and TB are entitled to injunctive and prospective relief prohibiting Defendants from violating their rights under the Medicaid Act.

221. Under 42 U.S.C. § 1983, MH and TB are entitled to an award of compensatory damages against Defendant Hamso, as an individual acting under color of state law, for continuing to violate their clearly established rights, privileges, or immunities under federal law.

SIXTH CLAIM FOR RELIEF

Violation of the Due Process Clause of the Fourteenth Amendment

222. Plaintiffs reallege and incorporate by reference all paragraphs of this Complaint.

223. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits any State from depriving "any person of life, liberty, or property, without due process of law."

224. Plaintiffs have a protected interest in the Medicaid benefits guaranteed by Title XIX of the Social Security Act.

225. Defendants Jeppesen's, Hamso's, and IDHW's continuing failure to provide MH with adequate notice when denying her claim for benefits under the Medicaid Act and the delay in making a final decision in MH's appeal violate MH's right to Due Process under the Fourteenth Amendment, which is enforceable by Plaintiff pursuant to 42 U.S.C. § 1983.

226. Defendants Jeppesen's, Hamso's, and IDHW's continuing failure to make a decision on TB's request for prior authorization with reasonable promptness violates TB's right to Due Process under the Fourteenth Amendment, which is enforceable by Plaintiff pursuant to 42 U.S.C. § 1983

227. Under 42 U.S.C. § 1983, MH and TB are entitled to injunctive and prospective relief prohibiting Defendants Jeppesen, Hamso, and IDHW from continuing to violate their clearly established rights, privileges, or immunities under federal law.

228. Under 42 U.S.C. § 1983, MH and TB are entitled to an award of compensatory damages against Defendant Hamso, as an individual acting under color of state law, for continuing to violate their clearly established rights, privileges, or immunities under federal law.

DEMAND FOR JURY TRIAL

Plaintiffs, pursuant to the Seventh Amendment to the Constitution and Fed. R. Civ. P. 38, demand a jury trial in this action.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Grant permanent injunctions prohibiting any further enforcement or application of the Defendants Defendants Jeppesen's, Hamso's, and IDHW's policy and practice, as applied to Plaintiffs, of refusing to authorize medically necessary genital reconstruction and gender-affirming surgery for the treatment of gender dysphoria because the practice impermissibly discriminates against transgender individuals on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, and direct Defendants Jeppesen, Hamso, and IDHW to authorize surgery to treat gender dysphoria when medically necessary for a particular Medicaid beneficiary;

B. Enter a declaratory judgment that Jeppesen, Hamso, IDHW and Idaho's Medicaid's practice, as applied to Plaintiffs and other persons similarity situated, of refusing to authorize medically necessary surgery to treatment gender dysphoria violates Equal Protection under the Fourteenth Amendment to the United States Constitution and Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116 because it impermissibly discriminates

against transgender individuals on the basis of sex, including gender identity, sex stereotypes, and sex characteristics;

C. Issue permanent injunctions enjoining any further and continuing violations of the due process requirements in fair hearing procedures and appeals under the IDHW Contested Case Rules in violation of Due Process under the Fourteenth Amendment to the United States Constitution and under the Medicaid Act.

D. Award compensatory damages against Defendant Hamso, individually, for violation of Plaintiffs' clearly established constitutional rights and their rights under the Medicaid Act in an amount that would compensate them for their injuries.

E. Award Plaintiffs their reasonable attorneys' fees, costs, and expenses under 42 U.S.C. § 1988 or other applicable statutes; and

F. Award such other and further relief as the Court may deem as proper.

DATED this 29th day of September, 2022.

/s/ Howard A. Belodoff
Howard A. Belodoff

/s/ Martin C. Hendrickson
Martin C. Hendrickson

Idaho Legal Aid Services, Inc.

VERIFICATION

MH and TB, each being duly sworn on oath, declare under the penalty of perjury pursuant to 28 U.S.C. § 1746 that they have read the foregoing Complaint and know the contents thereof and believe the same to be true and correct.

DATED this 29th day of September, 2022.

/s/ MH

/s/ TB

SEALED EXHIBITS REDACTED