STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

CASE TYPE: Other Civil

OutFront Minnesota, OutFront Minnesota Community Services, and Evan Tysilio Thomas,

Plaintiffs,

vs.

Emily Johnson Piper, in her official capacity as Commissioner of the Minnesota Department of Human Services,

Defendant.

Case No. 62-cv-15-7501
Judge William H. Leary, III

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO STAY

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INTRODUCTION

Defendant's motion to stay is predicated on the future promulgation of a federal nondiscrimination rule that, Defendant suggests, might dispose of this entire case. The motion reveals, however, that Defendant has no idea when the proposed rule will actually become effective or whether the final rule will be the same as the proposed rule. While Defendant cannot necessarily be faulted for not knowing these things, the pertinent point is that there is great uncertainty about the timing and content of the final nondiscrimination rule. Granting a stay pending the finalization of the proposed rule is therefore risky. The stay may prove to last for an indeterminate period and not to accomplish the things Defendant proclaims.

Defendant can and should, however, be held accountable for things within her control. And Defendant's motion fails provide any assurance that Defendant (or her agency, DHS) has evaluated the proposed rule and concluded that it will actually preempt the statute at issue in this case. Defendant offers no excuse for this oversight. She and her agency have known about the proposed rule, and this case, for a long time.

Further, there is substantial reason to doubt that Defendant and DHS will interpret the proposed rule to preempt the statute at issue. They have not interpreted the nondiscrimination provisions in the U.S. Constitution, Minnesota Constitution, or Affordable Care Act ("ACA") to preempt the statute. Other Minnesota agencies (Commerce and Health) have already concluded that the ACA bars gender identity discrimination without waiting for promulgation of the proposed rule, but not Defendant or DHS.

Defendant not only fails to establish that a stay is justified on the merits of the proposed rule, she fails to establish that she will suffer any meaningful harm (other than litigation) if the stay is denied. Defendant argues that the stay might permit the Court to avoid resolving a constitutional issue, but the canon of constitutional avoidance applies to the interpretation of statutes – it is not a basis for staying a case.

The balance of harms clearly favors Plaintiffs. While Plaintiffs suffer substantial daily injuries from the discriminatory statute at issue, Defendant's only alleged harm is the prospect of litigation. Defendant thus falls far short of the standard for obtaining a stay, and her motion should be denied.

STATEMENT OF THE FACTS

I. THE STATUTE AT ISSUE IS DISCRIMINATORY AND INFLICTS DAILY INJURIES ON PLAINTIFFS AND OTHERS

This case challenges the validity of a statute related to Minnesota's Medicaid programs that discriminates against transgender individuals. The federal Medicaid program reimburses states for medical care provided to disadvantaged individuals. 42 U.S.C. 1396 *et. seq.* Minnesota operates two Medicaid programs: Medical Assistance ("MA") and MinnesotaCare ("MC"). The state agency responsible for administering the MA and MC programs is the Department of Human Services ("DHS"). Defendant, Emily Johnson Piper, is the current head of DHS.

A. The Minnesota Legislature Has Enacted a Statute that Bars Medicaid Coverage of Sex Reassignment Surgery

In 1998, the Minnesota Legislature amended the MA statute to exclude "[g]ender reassignment surgery and other gender reassignment medical procedures including drug

therapy for gender reassignment . . . unless the individual began receiving gender reassignment services prior to July 1, 1998." Minn. Stat. § 256B.0625, subd. 3a (2004).

In 2005, the Legislature amended the statute to say that "[s]ex reassignment surgery is not covered." Minn. Stat. § 256B.0625, subd. 3a (2014) (hereafter, the "Statute"). In other words, the Statute bars coverage for sex reassignment surgery.

B. The Statute Discriminates Against Transgender Individuals Because Sex Reassignment Surgery Is Only Prescribed for Transgender Individuals

Sex reassignment surgery is only prescribed for diagnoses of "gender dysphoria," a medical condition that afflicts transgender individuals who suffer from acute distress caused by the difference between their birth-assigned sex and their gender identity. Declaration of Erin Conti ("Conti Decl."), Ex. A (Expert Report of Katie Spencer, Ph. D.) at 6. Gender dysphoria is a recognized medical condition in both the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and the Internal Classification of Diseases (ICD-10), which are authoritative references for healthcare professionals and insurers worldwide. *Id.*, Ex. A at 6-7. The empirically supported treatments for gender dysphoria include sex reassignment surgery. *Id.*, Ex. A at 7.

As the Statute bars coverage of sex reassignment surgery, and the primary if not only group who need sex reassignment surgery are transgender individuals with gender dysphoria, the Statute thus discriminates against transgender individuals and limits their treatment options. By legislating medical treatments, the Statute's "purpose and practical effect" is "to impose a disadvantage, a separate status, and so a stigma upon" transgender Minnesotans. *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013).

C. The Statute Imposes Significant Daily Harm on Transgender Individuals Who Are Denied Medical Treatment for Gender Dysphoria

Plaintiff Evan Thomas is a transgender man and MA recipient whose request for sex reassignment surgery (*i.e.*, a bilateral mastectomy) was denied under the Statute. Complaint, ¶¶ 58-60. Plaintiffs OutFront Minnesota and OutFront Minnesota Community Services (collectively "OutFront") are related organizations whose mission (in part) is to assist transgender people and educate the community about transgender issues. Complaint, ¶¶ 35-47.

Plaintiffs allege that the Statute is invalid and unconstitutional and inflicts daily injury based on its discriminatory impact on transgender individuals. *Id.*, ¶¶ 42-47, 54-56, 65-110.

It is critical to Plaintiffs that this case proceeds at the expeditious pace that the Court has thoughtfully established in the case schedule. The case schedule sets a discovery deadline of May 27 and a summary judgment heard-by date of July 8.

This motion will necessarily result in an extension of the case schedule. In acknowledgement of Defendant's interest in staying this case, Plaintiffs agreed to postpone depositions until after the May 19 hearing on this motion. As this

postponement entails that discovery cannot possibly be completed by May 27, the parties have agreed in principle to an extension certain case deadlines.[1]

II. DEFENDANT'S MOTION IS BASED ON THE EXPECTED PROMULGATION OF A FEDERAL GENDER NONDISCRIMINATION RULE IN JUNE 2016

The putative basis for Defendant's stay motion is that the U.S. Department of Health and Human Services ("DHHS") has issued a proposed rule pursuant to § 1557 of the Affordable Care Act that would apply to Medicaid programs and is entitled Nondiscrimination in Health Programs and Activities ("Proposed Rule"). *See* Def. Mem. at 2-3; Affidavit of Jacob Campion, Ex. 1 at 2.

Defendant states that the Proposed Rule "prohibits exclusions for medically-necessary transgender-related services." Def. Mem. at 3. Defendant quotes the Proposed Rule at length in its Memorandum.

III. DEFENDANT FAILS TO SHOW THAT THE EVENTUAL FINALIZATION OF THE PROPOSED RULE IS A BASIS FOR A STAY

Although Defendant states in her motion that the Proposed Rule is expected to become "finalized" in June 2016 or earlier, *see* Def. Mem. at 2; Campion Aff., Ex. 2, Defendant provides no guarantees. Defendant also fails to explain the precise process of "finalization" and how uncertain it is. While the final rule is predicted to be issued in June 2016, the final rule will not become effective as to DHS until 60 days thereafter to

[1] Specifically, the parties have agreed that (1) the May 27 discovery deadline shall be extended to June 24, (2) the deadline to bring discovery motions shall be extended from May 27 until such time in July or later that the Court's schedule permits such motions to be heard, and (3) the summary judgment "heard-by" deadline shall be extended from July 8 to July 15. This agreement was reached shortly before the time this motion was filed. The parties will file a stipulation and proposed order as soon as possible.

allow for a potential legislative veto. *See* 42 U.S.C. §§ 801-02. During that 60-day period, not only can Congress act to suspend or alter the rule, private litigants can seek judicial stays of the effective date. Substantial uncertainty thus remains regarding when, if ever, the Proposed Rule will become effective and what its final contents will be.

Defendant also fails to provide any assurances that, even if the Proposed Rule were timely enacted as proposed, it will actually affect this case, or how, or when. Defendant observes that the federal agency (DHHS) believes the Proposed Rule will preempt state law "where the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute." *Id.* at 4 (quoting Campion Ex. 1 at 54211). Defendant also observes that OutFront submitted a comment on the Proposed Rule that expressed a belief it would "override" the Statute. Campion Aff., Ex. 3.

But the actual impact of the Proposed Rule on this case is not easy to determine – even if it were enacted as proposed. The Proposed Rule is 51-pages long. Campion Aff., Ex. 1. In her motion, Defendant provides no analysis by DHS of the expected impact of the Proposed Rule, either generally or in this case. Nor does DHS explain when, if ever, it would implement a final effective rule or make a coverage determination on Mr. Thomas' request for sex reassignment surgery.

ARGUMENT

I. THE STANDARD TO OBTAIN A STAY OF DISCOVERY IS HIGH

A motion to stay discovery is a type of injunctive relief, and the standard to obtain injunctive relief requires showings that the movant is likely to prevail on the merits, that movant will suffer irreparable harm if a stay is not granted, and that the balance of harms

favors the movant. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). Defendant's motion meets none of these standards.[2]

II. DEFENDANT DOES NOT MEET THE STANDARD TO OBTAIN A STAY

Defendant falls far short of the necessary showings to obtain a stay of discovery. Her motion is based on the premise that the Proposed Rule will preempt the Statute and dispose of this case.[3] But Defendant fails to establish that the Proposed Rule will have the effects she claims, that she will suffer any meaningful harm if a stay is denied, or that the balance of harms favors her.

A. Defendant Fails To Show That the Enactment of the Proposed Rule Will Make Any Difference, Much Less Dispose of This Case

Defendant fails to provide any assurance that the Proposed Rule – even if it were enacted as proposed – will affect this case.

1. Defendant Fails To Explain How DHS Will Interpret the Proposed Rule To Affect the Statute or Plaintiffs

In support of her argument that the Proposed Rule will be dispositive of this case, Defendant cites the opinions of persons other than DHS. Defendant observes that DHHS

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[2] Defendant fails to identify the legal basis for her motion. Rule 26.03 of the Minnesota Rules of Civil Procedure, which relates to protective orders, does not appear to relate to motions to stay all discovery completely. Nevertheless, even if Rule 26.03 were presumed to be applicable and Defendant's motion were presumed to have been brought under it, she must still establish "good cause" – and she hasn't done that.

[3] Defendant's motion also refers to bills that have been introduced in the Minnesota legislature and argues that, if enacted, these bills would repeal or override the statute. Defendant offers no prognosis as to the likelihood these bills will become law (Plaintiffs believe the chances are minimal), or when such laws would take effect. These grounds are far too vague to justify a stay or warrant expedited stay proceedings, and Defendant does not even attempt to tie the length of her requested stay to the Minnesota law-making process.

believes the Proposed Rule will preempt state law, Def. Mem. at 4 (quoting Campion Ex. 1 at 54211), and that OutFront believes it will "override" the Statute. Campion Aff., Ex. 3. But the views of DHHS and OutFront are irrelevant. The only meaningful view is that of Defendant and DHS. The Proposed Rule does not identify the Statute and target it for preemption. Any preemptive effect will be the result of DHS (or judicial) action. The key question is – assuming the Proposed Rule is enacted as proposed – will Defendant and DHS interpret it to preempt the Statute? Defendant's motion does not answer this question.

Defendant and DHS have known about the Proposed Rule and this case for a long time. They have had ample time to evaluate the impact of the Proposed Rule on this litigation. In her motion, however, Defendant provides no analysis by DHS of the expected impact of the Proposed Rule. Defendant also expresses no opinion as to whether the Proposed Rule – assuming it were enacted as proposed – will be interpreted by DHS preempt the Statute. Defendant also expresses no opinion whether enactment of the Proposed Rule will prompt DHS to consent to Mr. Thomas' request that MA cover his sex reassignment surgery.

In fact, Plaintiffs pointed out these very defects over a month ago – when they responded to Defendant's first attempt to obtain a stay on an expedited basis in early April. Conti Decl. Ex. D (Pl. Letter-Brief) at 2-4. Yet Defendant has taken no steps in the intervening month to correct these obvious defects in her motion.

2. DHS Has Disregarded Numerous Other Nondiscrimination Laws that It Could Have Already Interpreted To Preempt the Statute

There is substantial reason to believe that DHS will not interpret the Proposed Rule to have the effects Defendant proclaims. Defendant and DHS could have interpreted numerous other nondiscrimination laws to preempt or invalidate the Statute – but they have declined to do so.

(a) The United States Constitution Preempts the Statute

The United States Constitution contains an Equal Protection Clause that says: no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, 14th Amendment. The Equal Protection Clause requires States to treat all persons similarly situated alike or, conversely, to avoid all classifications that are "arbitrary or irrational" and those that reflect "a bare ... desire to harm a politically unpopular group." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985) (internal quotation marks omitted).

The federal courts of appeal have held that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *accord Smith v. City of Salem*, 378 F.3d 566, 569 (6th Cir.2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1198–1203 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000).

Nevertheless, DHS has not interpreted any of this 16-year old federal case law to preempt the Statute.

(b) The Minnesota Constitution Invalidates the Statute

The Minnesota Constitution likewise contains a provision that has been interpreted to be a type of equal protection clause. *See* Minn. Const. Art. 1 § 2 ("No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."). This section has been interpreted to be a "mandate that all similarly situated individuals shall be treated alike." *Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 725 (Minn. 2008).

As under federal law, Minnesota courts apply strict scrutiny to "equal protection" challenges under the Minnesota Constitution if the statute involves a "suspect classification or a fundamental right." *In re Guardianship, Conservatorship of Durand*, 859 N.W.2d 780, 784 (Minn. 2015) (quoting *Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 725 (Minn. 2008)). When it is unclear whether a statutory classification violates the equal protection clause of the Minnesota Constitution, Minnesota courts apply the test from *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979), which mandates, among other things, that "the distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs." *Gluba ex rel. Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 721 (Minn. 2007)

Although Minnesota courts have not yet addressed the issue whether suspect classes include transgender individuals, Minnesota courts have repeatedly stated that the

Minnesota constitution provides broader protections than the U.S. Constitution. *See, e.g.*, *Kahn v. Griffin*, 701 N.W. 2d. 815, 828 (Minn. 2005) ("It is now axiomatic that we can and will interpret our state constitution to afford greater protections of individual civil and political rights than does the federal constitution."); *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (more stringent interpretation of equal protection); *Doe v. Ventura*, 2001 WL 543734, 8-9 (Minn. App. 2001) (privacy).

Nevertheless, DHS has not interpreted the Minnesota Constitution to invalidate the Statute.

(c) The Affordable Care Act Preempts the Statute, Regardless of the Contents of the Proposed Rule

As Defendant's own motion acknowledges, § 1557 of the Affordable Care Act contains a nondiscrimination provision. 42 U.S.C. § 18116. This section bars state Medicaid programs from discriminating against individuals on any ground prohibited under various other federal acts. These federal acts include Title VII of the Civil Right Act, which the EEOC has interpreted as prohibiting discrimination on the basis of transgender status. *See Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012). *See also Schroer v. Billington*, 444 F. 3rd, 1104 (D.D.C. 2008) (holding Title VII sex discrimination encompasses gender identity discrimination).

The federal courts of appeal have held that "state laws that 'hinder or impede' the implementation of the ACA run afoul of the Supremacy Clause." *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022 (8th Cir. 2015). Defendant offers no explanation why

the ACA's nondiscrimination provision (§ 1557) did not already preempt the Statute, regardless of the Proposed Rule.

This section was sufficiently clear and applicable to Minnesota state law that two other state agencies responsible for healthcare issues -- the Minnesota Department of Commerce and Minnesota Department of Health –issued a bulletin last year barring gender nondiscrimination by private insurers. Conti Dec. Ex. B (Administrative Bulletin 2015-5: Gender Identity Nondiscrimination Requirements (dated November 24, 2015)) at 1. The bulletin states: "Section 1557(a) under the Affordable Care Act (ACA) ***prohibits discrimination on the basis of gender identity and sex stereotyping in any health program receiving federal funds*** or by an entity established under the ACA, including exchanges. *Id.* (emphasis added).

Nevertheless, DHS did not reach the same conclusion as its coordinate agencies that ACA § 1557 preempts or invalidates the Statute.[4] And Defendant has not made any commitment in her letter that DHS will interpret the Proposed Rule under ACA § 1557 to preempt the Statute – yet her entire motion is based on this premise.

B. Defendant Fails To Show Any Likelihood of Irreparable Harm

Defendant argues that undergoing "burdensome" discovery would injure her unnecessarily if the Proposed Rule, in fact, preempts Plaintiffs' claims and disposes of them. Def. Mem. at 5. Defendant, however, makes no attempt to quantify this injury or

[4] Ironically, DHS's health plan for its own employees offers coverage for sex reassignment surgery. Conti Decl. Ex. C. (Summary of Benefits 2016-2017 for the State Employee Group Insurance Plan) at 58.

demonstrate it is extraordinary. Defendant cites no case for the proposition that a stay is justified merely because litigation itself is burdensome.

Defendant also argues that a stay is appropriate because "courts should not reach constitutional issues if matters can be resolved otherwise." Def. Mem. at 2, 5 (quoting *In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998)). But the canon of constitutional avoidance is a tool of statutory interpretation where there are competing interpretations of a statute. *See State v. Irby*, 848 N.W.2d 515, 522 (Minn. 2014) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them.*") (quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (emphasis added)). The canon of constitutional avoidance is not a basis for a stay. Defendant does not cite a single case that relied upon this principle to stay litigation.

III. THE BALANCE OF HARMS FAVORS DENIAL OF THE STAY

The only harm that Defendant identifies in her motion is the burden of undergoing litigation. Plaintiffs, however, suffer daily physical, psychological, and financial injuries from DHS's denial of coverage of medically necessary treatments for transgender individuals. This balance obviously weights in favor of Plaintiffs, and denial of the stay.

In addition, while Defendant portrays the length of her requested stay (*i.e.*, 60 days from issuance of the Proposed Rule) as innocuous, it is obvious that Defendant might later seek to extend the stay for numerous reasons. First, the Proposed Rule might not be enacted by June 2016, as the federal government predicts. Second, the Proposed Rule

might not be enacted as proposed. Third, Defendant fails to mention that Proposed Rule will not become effective on the date it is first issued. Instead, the Proposed Rule will become effective 60 days after the issue date to allow for a legislative veto. *See* 42 U.S.C. §§ 801-02. Fourth, Defendant also fails to mention that possibility that a court might stay the effective date of the rule in response to unforeseen (but not unforeseeable) litigation. Defendant's motion does not explain what happens to the stay if any of these contingencies occur.

CONCLUSION

Defendant concedes that the current case schedule allows her to address the significance of the Proposed Rule in summary judgment briefs. Def. Mem. at 5. This is an appropriate and efficient way to address the effects of the Proposed Rule and the timing of those effects – both of which are completely unknown at this time.

In civil cases, the court gives effect to the Minnesota Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action." Minn. R. Civ. P. 1. Here, Defendant's stay motion, if granted, would jeopardize the just and speedy resolution of this action.

Respectfully submitted,

Dated: May 12, 2016

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