

Respectfully,

CHRISTOPHER C. MYERS & ASSOCIATES

/s/ David W. Frank

David W. Frank, #31615-02

Christopher C. Myers, #10043-02

Skyler Spurling-Newsome, #33833-02

809 South Calhoun Street, Suite 400

Fort Wayne, IN 46802-2307

Telephone: (260) 424-0600

Facsimile: (260) 424-0712

E-mail: dfrank@myers-law.com

Counsel for Plaintiff, Ms. Rebecca Haviland

**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION ON CLAIM FOR EQUAL PROTECTION**

Ms. Haviland respectfully moves the Court to enjoin Defendants pursuant to T.R. 65(A) from further and without rational basis discriminatorily denying her hormone therapy to treat her serious condition of gender dysphoria all in violation of her rights to Equal Protection under the Fourteenth Amendment to the U.S. Constitution.

The requested injunction should be issued because (1) Ms. Haviland's success at trial is reasonably likely; (2) Ms. Haviland's remedies at law are inadequate to afford her relief; (3) Ms. Haviland's threat of further serious injury far outweighs any speculative harm to Defendants caused by the issuance of the request injunction; and (4) Ms. Haviland's requested injunction would serve the public interest. *Gleeson v. Preferred Sourcing*, 883 N.E.2d 164, 172 (Ind. Ct. App. 2008).

**I. FACTS & PROCEDURAL HISTORY OF VIOLATIONS
OF MS. HAVILAND'S RIGHT TO EQUAL PROTECTION**

Ms. Haviland has filed her Complaint in this case contemporaneously with this Motion.

In her Complaint, Ms. Haviland, a transgender female prisoner incarcerated at New Castle Correctional Facility, states that Defendants have and are violating her right to Equal Protection under the Fourteenth Amendment by denying her hormone therapy treatment from 2015 to present for her serious condition of gender dysphoria, even though non-transgender prisoners are not denied effective treatments, including hormone therapy, for serious medical conditions. *See* Compl. ¶¶ 1, 3, 9-15, 20-23.

Ms. Haviland alleges that Defendant Carter as commissioner of Indiana's Department of Correction is responsible for state prisons' policy of services, care, and protection of transgender

prisoners. *Id.* ¶ 4. Ms. Haviland alleges that Defendant Geo Group as the contracted operator of New Castle Correctional Facility is responsible for the prison's policy services, care, and protection of transgender prisoners. *Id.* ¶ 5. Ms. Haviland alleges that Defendant Corizon as the contracted medical provider at New Castle Correctional Facility and direct employer of Defendant Person is responsible for the prison's medical services and care to transgender prisoners at New Castle Correctional Facility. *Id.* ¶ 6. Ms. Haviland alleges that Defendant Person is the Corizon employee responsible for the prison's medical services and care to transgender prisoners at New Castle Correctional Facility. *Id.* ¶¶ 7, 20. Ms. Haviland alleges that Defendant Hinton is Defendant Carter's employee responsible for review of state contractors' services and care to transgender prisoners at New Castle Correctional Facility. *Id.* ¶¶ 8, 21.

Ms. Haviland alleges that as a result of the intentional and discriminatory policies, practices, supervision, and training of Defendants Carter, Geo Group, and Corizon and as a result of the intentional and discriminatory acts and omissions of Defendants Person and Hinton she suffered and is suffering physical injury, pain, mental anguish, emotional distress, permanent mental injury, and other damages and injury. *Id.* ¶¶ 14, 29-30.

In support of her allegations, Ms. Haviland incorporates four exhibits into her Complaint. *Id.* at Ex. A-D. The first, Exhibit A, is evidence from July 2015 that Ms. Haviland has exhausted the administrative grievance procedure requesting hormone therapy and, that as a result of the denial of the treatment for her serious condition of gender dysphoria, she has become suicidal and attempted to castrate herself. *Id.* at Ex. A. The second, Exhibit B, is record that Defendants' response to Ms. Haviland's attempt to castrate herself was to discipline

her and revoke privileges. *Id.* at Ex. B. The third, Exhibit C, is Defendants' record that on July 9, 2015, Defendants' finally granted Ms. Haviland's request to begin hormone therapy to treat her gender dysphoria. *Id.* at Ex. C. The fourth document, Exhibit D, is Defendants' record that on November 11, 2015 Defendant Person revoked Defendants' agreement to provide Ms. Haviland hormone therapy and that by July 16, 2016, all Defendants – Defendants Carter, Geo Group, Corizon, Person, and Hinton – had approved the denial of hormone therapy to Ms. Haviland to treat her serious condition of gender dysphoria. *Id.* at Ex. D.

II. STANDARD OF REVIEW FOR ENJOINING DEFENDANTS' VIOLATIONS OF MS. HAVILAND'S RIGHT TO EQUAL PROTECTION

An Indiana trial court may grant a plaintiff's request for a preliminary injunction after notice to the defendants, the opportunity to be heard by the defendants, and upon making findings of fact and conclusion of law on the record. T.R. 52(A), 65(A); *Clark's Sales & Serv., Inc. v. Smith*, 4 N.E.3d 772, 780 (Ind. Ct. App. 2014).

The court may grant the requested preliminary injunction after finding that (1) the plaintiff has a reasonable likelihood of success on the merits at trial; (2) the plaintiff's remedies at law are inadequate and irreparable harm will occur during the pendency of the action; (3) the threatened injury to the plaintiff outweighs the potential harm to the defendants by the granting of an injunction; and (4) the public interest would not be disserved by granting the injunction. *Cent. Ind. Podiatry, RC. v. Krueger*, 882 N.E.2d 723, 727 (Ind. 2008); *Gleeson v. Preferred Sourcing*, 883 N.E.2d 164, 172 (Ind. Ct. App. 2008); *Curley v. Lake Cnty. Bd. of Elections*, 896 N.E.2d 24, 33 (Ind. Ct. App. 2008).

A trial court's grant of preliminary injunction will be upheld upon review unless it is clearly an abuse of discretion. *Apple Glen Crossing, LLC v. Trademark Retail, Inc.*, 784 N.E.2d

484, 487 (Ind. 2003)

III. ARGUMENT FOR ENJOINING DEFENDANTS' VIOLATIONS OF MS. HAVILAND'S RIGHT TO EQUAL PROTECTION

This Court should enjoin Defendants from barring Ms. Haviland receipt of hormone therapy because their denial of care and services is discriminatory, unconstitutional, and not reasonably related to a legitimate governmental interest. *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996).

Because Defendants have and are clearly violating her rights under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, (1) Ms. Haviland's success at trial is reasonably likely; (2) Ms. Haviland's remedies at law are inadequate to afford her relief; (3) Ms. Haviland's threat of further serious injury far outweighs any speculative harm to Defendants caused by the issuance of the request injunction; and (4) Ms. Haviland's requested injunction will serve the public interest. *Gleeson*, 883 N.E.2d at 172.

1. MS. HAVILAND HAS A REASONABLE LIKEHOOD OF PREVAILING ON EQUAL PROTECTION CLAIM AT TRIAL

Ms. Haviland meets the first element of obtaining grant of an order enjoining Defendants from discriminatorily denying her services because she is reasonably likely to prevail on her Equal Protection claim at trial. *Curley*, 896 N.E.2d at 33. Ms. Haviland is not required to prove her claim but only to show that success on this particular claim is probable. *See Avemco Ins. Co. v. McCarty*, 812 N.E.2d 108, 118 (Ind. Ct. App. 2004).

A plaintiff who is not part of traditional suspect class¹ states a claim for violation of her

¹ Though Ms. Haviland is arguing that Defendants' actions are discriminatory even under rational basis review, it should be noted that courts are increasingly willing to recognize transgender individuals as a suspect class and apply intermediate scrutiny to their claims of discrimination. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Mitchell v. Price*, Case No. 11-cv-260-wmc, 2014 U.S. Dist. LEXIS 171561, at *4. (W.D. Wis. Dec. 10, 2014).

right to equal protection where (1) the plaintiff has been intentionally treated differently from others similarly situated, and (2) there is no rational basis for different treatment. *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 601 (2008); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); *Nabozny*, 92 F.3d at 453. Discrimination against transgender individuals is barred under this standard. *Barnes v. Cincinnati*, 401 F.3d 729, 735 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 624. (2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Cummings v. Greater Cleveland Reg'l Transit Auth.*, No. 1:14-cv-01729, 2015 WL 410867, at *4 (N.D. Ohio Jan. 29, 2015). Under rational basis review, therefore, Ms. Haviland must show it is at least probable that Defendants acted intentionally or with deliberate indifference in their mistreatment of her as a transgender woman. *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002).

Transgender prisoners in Indiana have long been guaranteed the constitutional right to adequate services and treatment for gender dysphoria/GID.² See *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *Meriweather v. Faulkner*, 821 F.2d 408 (7th Cir. 1987); *Norington v. Mitcheff*, Case No. 3:11-cv-282 RM, 2012 WL 6600101 (N.D. Ind. Dec. 18, 2012). Hormone therapy is recognized as an “effective treatment for a serious condition like GID.” *Fields*, 653 F.3d at 557. For GID, there is “no evidence of uncertainty about the efficacy of hormone therapy as a treatment.” *Id.* No legitimate interest is served by barring transgender prisoners with gender

² The fifth edition of the American Psychiatric Association’s Diagnostic & Statistical Manual of Mental Disorders (“DSM-5”) describes “gender dysphoria” as “an individual’s affective/cognitive discontent with the assigned gender” and “transgender” as “the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender.” AMER. PSYCHIATRIC ASSOC., DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).

dysphoria from effective treatment.³ *Norington*, Case No. 3:11-cv-282 RM, at *5.

Here, Defendants are intentionally treating Ms. Haviland differently from similarly situated non-transgender prisoners by denying her treatment otherwise offered to non-transgender prisoners and doing so without a rational basis for discriminatorily denying these effective services to her as a transgender woman. *Olech*, 528 U.S. at 564; *Nabozny*, F.3d at 453. Because Defendants do not reasonably have an interest in permitting then revoking, let alone barring altogether, hormone therapy to her, it is probable that Ms. Haviland will demonstrate at trial that Defendants have discriminated against her in offering at most ineffective and maliciously limited services. *Fields*, 653 F.3d at 557; *McCarty*, 812 N.E.2d at 118. No adequate relief will be volunteered by Defendants to Ms. Haviland in the interim. *See* Pl. Compl. at Ex. D.

Therefore, Ms. Haviland, by showing that she has a likelihood of succeeding on her Equal Protection claim at trial, has met her initial burden in her request for an order enjoining Defendants from denying her hormone therapy.

2. MS. HAVILAND WILL SUFFER IRREPRABLE HARM ABSENT AN INJUNCTION BARRING DEFENDANTS' DISCRIMINATION

Ms. Haviland also meets the second element for obtaining grant of an order enjoining Defendants from discriminatorily denying her services because remedies at law are inadequate to afford her relief pending trial resulting in irreparable harm to her. *Robert's Hair Designers, Inc.*

³ The clinically accepted Standards of Care (SOC) for the Health of Transsexual, Transgender, and Gender Nonconforming People published by World Professional Association for Transgender Health establish that psychological counseling alone for transgender individuals, including prisoners, without additional care such as hormone therapy to treat gender dysphoria is a gross departure from medically accepted practice. WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 67-68 (7th ed. 2011).

v. Pearson, 780 N.E.2d 858, 864 (Ind. Ct. App. 2002). Invocation of the Court's equitable powers is therefore necessary here. *Washel v. Bryant*, 770 N.E.2d 902, 906 (Ind. Ct. App. 2002).

A plaintiff establishes she will suffer irreparable harm where the harm cannot be compensated through damages or other relief available at the final resolution of the suit. *Ind. Family & Soc. Svcs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 162 (Ind. 2002); *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 912 (Ind. Ct. App. 2011). Any remedy short of an injunction is only adequate where the harm can be "completely offset by a subsequent award of damages or other legal relief." *Maxim's Ltd. v. Badonsky*, 772 F.2d 388, 390 (7th Cir. 1985); see also *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1095 (7th Cir. 2008). Damages are inadequate where they are shown to be seriously deficient, though they need not wholly deficient, as a remedy for the harm. *Roland Machine Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984). In such an instance, the trial court may award injunctive relief to the plaintiff because economic damages are inefficient "to the ends of justice and its prompt administration," *Pearson*, 780 N.E.2d at 864 (quoting *Washel v. Bryant*, 770 N.E.2d 902, 906-907 (Ind. Ct. App. 2002)). Put simply, relief must be effective relief. *Girl Scouts*, 549 F.3d at 1095.

Irreparable injury is defined as "harm that cannot be prevented or fully rectified by the final judgment after trial." *Roland Machine Co.*, 749 F.2d at 386. Continuing and future threats of transgressions against an individual sufficiently satisfy this definition. *Szymankiewicz v. Esthers*, 915 F.2d 1575 (7th Cir. 1990). Crucially, a violation of an individual's constitutional rights in and of itself is viewed as irreparable injury. See, e.g., *Overstreet v. Lexington-Fayette*

Urban County Gov't, 305 F.3d 566, 578 (6th Cir. 2002). Courts, including the U.S. Seventh Circuit Court of Appeals, have found that denial of hormone therapy to a transgender prisoner may rise to the level of such a constitutional violation. See, e.g., *Fields*, 653 F.3d at 559; *Gammett v. Idaho State Bd. of Corr.*, Case No. CV05-257-S-MHW, 2007 WL 2186896, at *18 (D. Idaho July 27, 2007) (hormone therapy required to be provided to inmate with gender dysphoria); *Phillips v. Michigan Dept. of Corrections*, 731 F. Supp. 792, 800 (W.D. Mich. 1990) (irreparable harm found where estrogen therapy halted to transgender female prisoner). In the case of denial of estrogen therapy to a transgender female prisoner: “The irreparable harm element is clear . . . the effects of the lack of estrogen will wreak havoc on plaintiff’s physical and emotional state. Such harm is neither compensable nor speculative.” *Phillips*, 731 F. Supp. at 800.

Here, Ms. Haviland will suffer not only a violation of her right to equal protection under law if Defendants are not enjoined, but is also likely to suffer further serious physical injury and mental anguish. See Pl. Compl. at Ex. A, B. Monetary compensation is an inadequate substitute for equitable relief in this case, especially because the complained of harm is avoidable by the relief requested. *Girl Scouts*, F.3d 549 at 1095. The services and treatment that should properly be provided to Ms. Haviland are entirely in the control of Defendants and, given the harm at stake, there is no just reason for further delay. *Pearson*, 780 N.E.2d at 864.

Therefore, Ms. Haviland has shown she will suffer irreparable harm not compensable by future remedies absent the requested injunction from this Court. Fortunately, the requested injunction will place little burden on Defendants.

3. THREAT OF SERIOUS INJURY TO MS. HAVILAND
OUTWEIGHS SPECULATIVE BURDEN PLACED ON DEFENDANTS

Ms. Haviland further meets the third element for obtaining an order enjoining Defendants from discriminatorily denying her services because the real threat of serious harm to her greatly outweighs any slight potential speculative burden that may be placed on Defendants by the requested injunction. *Gleeson*, 883 N.E.2d at 172.

A plaintiff shows the balance of harms weighs in favor of granting injunctive relief where the irreparable harm she will suffer is greater than whatever harm the defendants in the matter will face. *See Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc.*, 128 F.3d 1111, 1121-22 (7th Cir. 1997). “Sitting as a court of equity, the court then weighs all these factors employing a sliding-scale approach.” *Promatek Industries, Ltd. v. Equitrac Corp.*, 300 F.3d 808, 811 (Fed. 7th Cir. 2002) (citation omitted). A court will also be mindful of issues of public interest in a case and consider that the “more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor.” *Roland Machine Co.*, 749 F.2d at 387. In fact, “when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of hardship in his favor.” *Sadler v. State ex rel. Sanders*, 811 N.E.2d 936, 953 (Ind. Ct. App. 2004). A government suffers no harm by being required to observe an individual’s constitutional rights. *See Christian Legal Soc’y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006); *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983).

Here, Defendants will suffer no harm if the requested injunction is granted. However, Ms. Haviland will suffer severe and irreparable harm if it is not. At most, Defendants would be required to facilitate and not impede the ordering and administration of common prescriptions for a single prisoner. Ms. Haviland, however, would unfortunately suffer likely physical injury

and surely mental anguish and the real possibility of death. Other courts have found that balance of harms “sharply” favors the plaintiff in the case of a transgender prisoner seeking hormone therapy. *See e.g., Gammett*, 2007 WL 2186896, at *15-16.

Therefore, Ms. Haviland has shown Defendants will suffer little to no inconvenience if this Court grants the requested injunction but the irreparable harm she would face if equitable relief is denied would be great.

4. PUBLIC INTEREST SERVED IN ENJOINING DEFENDANTS
FROM VIOLATING MS. HAVILAND’S RIGHT TO EQUAL PROTECTION

Ms. Haviland also meets the final element for obtaining an order enjoining Defendants from discriminatorily denying her services because the public interest would be served by the issuance of the requested preliminary injunction.

The final element in the test for a preliminary injunction requires that the public interest not be disserved by granting the injunction. *Krueger*, 882 N.E.2d at 727. This issue is a question of law for the trial court. *Pearson*, 780 N.E.2d at 868.

The public interest is always served by the vindication of constitutional rights. *Joelner v. Vill. of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992). Equitable remedies are appropriate when the government’s actions threaten the public interest. *Hannon v. Metro. Dev. Comm’n of Marion Co.*, 685 N.E.2d 1075 (Ind. Ct. App. 1997). In analyzing the issue, a court weighs the effect of an injunction upon the public interest along with potential harm to parties. *Hacienda Mexican Rest. of Kalamazoo Corp. v. Hacienda Franchise Group, Inc.*, 569 N.E.2d 661, 666 (Ind. Ct. App. 1991).

Here, the public interest would not only not be disserved, but would be served through

the issuance of the requested injunction in support of the vindication of Ms. Haviland's rights to equal protection under the law. This order would reinforce the rights of all citizens to appropriate constitutional protection. Conversely, the public interest would be actively disserved by denying Ms. Haviland's request for preliminary injunction. Not only would a constitutional wrong go uncorrected, but a denial would make for an ineffective use of court and public resources.

Therefore, Ms. Haviland has shown the public interest would not be disserved by the grant of the request injunction.

MS. HAVILAND'S REQUESTED INJUNCTION SHOULD BE ISSUED WITHOUT BOND

Ms. Haviland asks that her requested preliminary injunction be issued without bond.

The amount of an injunction bond is within the sound discretion of the court. *Am. Hosp. Supply Corp. v. Mueller*, 780 F.2d 589 (7th Cir. 1986); *Titus v. Rheitone, Inc.*, 758 N.E.2d 85, 95 (Ind. Ct. App. 2001). Where required, an injunction bond is ordered for purpose of guarding against potential damage to the defendants. *National Sanitary Supply Co. v. Wright*, 644 N.E.2d 903, 905 (Ind. Ct. App. 1994). At the court's discretion, the bond may be even waived altogether under appropriate circumstances, including where the plaintiff is indigent. *Wayne Chemical, Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972). "Under appropriate circumstances bond may be excused, notwithstanding the literal language of Rule 65(c). Indigence is such a circumstance." *Wayne Chemical, Inc.*, 567 F.2d at 701 (citation omitted).

Here, the Court should waive the T.R. 65(C) requirement and issue the requested injunction without bond. Ms. Haviland is an indigent prisoner of Defendants and would not be

able to post even a modest bond, which is in the Court's discretion to waive. Further, the underlying purpose of a bond when required would not be served by so requiring a bond here. Defendants face no damage pending final resolution of this case on its merits. Again, all that is required of Defendants is to not interfere with Ms. Haviland's receipt of requested treatment and services.

Therefore, Ms. Haviland requests the Court exercise its discretion and issue the preliminary injunction without bond; issue the requested order enjoining Defendants from further barring her the receipt of requested hormone therapy to treat her serious condition of gender dysphoria; provide Defendants the opportunity for a hearing prior to the issuance of the injunction; enter a permanent injunction enforcing the preliminary injunction; and grant all other just and proper relief. Ms. Haviland's success at trial is reasonably likely, her remedies at law are inadequate to afford her relief, her threat of further serious injury far outweighs any speculative harm to Defendants caused by the issuance of the request injunction; and her requested injunction would serve the public interest.

IV. CONCLUSION

Wherefore, based on the law and argument above, Ms. Haviland respectfully moves the Court to:

- A. Issue an order enjoining Defendants from further barring her the receipt of requested hormone therapy to treat her serious condition of gender dysphoria;
- B. Issue the injunction without bond;
- C. Provide Defendants the opportunity for a hearing prior to the issuance of the injunction;
- D. Enter a permanent injunction enforcing the preliminary injunction; and
- E. Grant all other just and proper relief.

Respectfully,

CHRISTOPHER C. MYERS & ASSOCIATES

/s/ David W. Frank

David W. Frank, #31615-02

Christopher C. Myers, #10043-02

Skyler Spurling-Newsome, #33833-02

809 South Calhoun Street, Suite 400

Fort Wayne, IN 46802-2307

Telephone: (260) 424-0600

Facsimile: (260) 424-0712

E-mail: dfrank@myers-law.com

Counsel for Plaintiff, Ms. Rebecca Haviland

DF/