Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ADREE EDMO,

Plaintiff-Appellee,

v.

IDAHO DEPARTMENT OF CORRECTION, *et al.*

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Idaho, No. 1:17-cv-00151-BLW

BRIEF OF AMICI CURIAE CIVIL RIGHTS & NON-PROFIT ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLEE ADREE EDMO AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amici curiae hereby certify that none of the amici curiae have a parent corporation. Amici curiae are civil rights and non-profit organizations and have no shares or securities that are publicly traded.

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STATEMENT OF AMICI CURIAE'S IDENTITY AND INTEREST[1]

Amici curiae are civil rights and non-profit organizations that advocate for equality and greater legal rights for lesbian, gay, bisexual, and transgender (LGBT) people across contexts, including in prisons and jails under the Eighth Amendment. Amici curiae have an interest in this case because they are committed to ensuring that correctional facilities fulfill their constitutional obligation to provide adequate medical and mental health care to persons in their custody—including transgender persons.

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal seeks to advance and protect the rights of transgender individuals to access medically necessary health care and has appeared as counsel on behalf of numerous individuals, including prisoners, who have wrongly been denied such care. *See, e.g.*, *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015) (per curiam) (reinstating transgender prisoner's complaint alleging that denial of

[1] Amici curiae state that no party or party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amici curiae or their counsel contributed money intended to fund preparing or submitted this brief.

gender-confirming surgery violated 8th Amendment); *Fields v. Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011) (statute barring gender-confirming treatment for transgender inmates held unconstitutional); *Hicklin v. Precynthe*, 2018 WL 806764, at *12 (E.D. Mo. Feb. 9, 2018) (holding that denial of gender-confirming care and enforcement of blanket rule preventing individualized assessments of transgender prisoners' medical needs violated Eighth Amendment).

The Center for Constitutional Rights (CCR) is a national, not-for-profit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases on behalf of individuals impacted by arbitrary and discriminatory criminal justice policies, including policies that disproportionately impact LGBTQI communities of color and policies that violate the Eighth Amendment's prohibition against cruel and unusual punishment and cause significant harm to people in prison. CCR successfully mounted a challenge regarding the use of solitary confinement in prisons and jails in its class action *Ashker v. Brown*, No. 09-cv-05796-CW (N.D. Cal. 2009).

The National Center for Transgender Equality (NCTE) is a non-profit legal organization devoted to advancing justice, opportunity, and well-being for

transgender people through education and advocacy. Since 2003, NCTE has been engaged in educating policymakers and the public on issues affecting transgender people's lives. NCTE has long worked to protect the safety and dignity of incarcerated transgender people, including through the adoption and implementation of National Standards to Prevent, Detect, and Respond to Prison Rape and guidelines for the clinical care of transgender prisoners.

The National Women's Law Center (NWLC) is a nonprofit legal organization that is dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination including in education, the workplace and in the context of healthcare. Since 1972, NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution, Title IX, and other laws prohibiting sex discrimination. To that end, NWLC has long sought to ensure that rights and opportunities are not restricted based on gender stereotypes and that all individuals enjoy the protection against sex discrimination that is promised by federal law. NWLC has led and participated as counsel or amicus curiae in a range of cases before the Supreme Court and the federal courts of appeals.

Southern Poverty Law Center (SPLC) is a non-profit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Since its founding in 1971, the SPLC has

won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. SPLC was counsel in *Diamond v. Owens*, No. 15-cv-50-MTT (M.D. Ga. 2015) (ending the Georgia Department of Corrections' policy of denying hormone therapy to transgender inmates on a blanket basis).

Transgender Law Center (TLC) is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community driven strategies to keep transgender and gender nonconforming ("TGNC") people alive, thriving, and fighting for liberation. TLC was counsel in *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Cal. 2015), which ordered the State of California to provide medically-necessary gender-confirmation surgery to an incarcerated transgender woman, and *Quine v. Beard*, No. 14-cv-02726-JST (N.D. Cal. 2014), which required corrections officials to furnish access to gender-affirming clothing, commissary items, and surgery.

Transgender Legal Defense and Education Fund, Inc. (TLDEF) is a national civil rights organization committed to achieving full recognition of transgender persons civil rights in the United States. Since its founding in 2003, TLDEF has represented transgender persons, including incarcerated individuals, who have experienced health care discrimination through advocacy, administrative

appeals, administrative charges of discrimination, and federal impact litigation throughout the country.

GLBTQ Legal Advocates & Defenders (GLAD) is a legal rights organization that seeks equal justice for all persons under the law, regardless of their sexual orientation, gender identity, or HIV/AIDS status. Since 1978, GLAD has worked in New England and nationally through strategic litigation, public policy advocacy, and education. GLAD is lead counsel in *Doe v. Massachusetts Department of Correction*, No. 17-cv-12255-RGS (D. Mass. 2017), which held that failing to provide adequate treatment for gender dysphoria to transgender persons behind bars can constitute a violation of the Americans with Disabilities Act.

The National Trans Bar Association (NTBA) is a non-profit bar association of trans and gender non-conforming legal professionals and allies committed to promoting equality both in the legal profession and under the law. In addition to promoting the advancement of trans and gender non-conforming individuals within the legal profession, NTBA seeks to educate and advocate for legislative changes that expand formal legal protections and access to legal representation for trans and gender non-conforming people.

The LGBT Bar Association of New York (LeGaL) is dedicated to promoting equality and access to justice for members of the LGBT community. In

2018, LeGaL established a Prisoners' Rights Project to address the legal needs of LGBT prisoners.

Freedom Overground Corp. (Freedom Overground) is a grass-roots, non-profit organization that uplifts and supports the transgender and gender non-conforming (TGNC) incarcerated community. Freedom Overground's programs are structured around improving the life expectancy and quality of life for TGNC people by working to ensure their dignity and safety while they are incarcerated. The organization is led by trans and formerly incarcerated advocates who use their lived experiences to guide educational activities, engage the public on TGNC incarceration issues, and facilitate programs that support mental health to reduce the impact of Incarceration PTSD on returning citizens. Since 2016, Freedom Overground has supported dozens of incarcerated and returning TGNC citizens with health care, mental health, education, and gender-related services.

INTRODUCTION

The Eighth Amendment principles that govern this case are well established and make no exception for incarcerated transgender persons or the treatment that is medically necessary to address gender dysphoria. As both the Supreme Court and this Court have held, the Eighth Amendment requires prison officials like the Idaho Department of Correction (Idaho) and its healthcare provider Corizon, Inc. (collectively, Defendants) to provide medically necessary treatment to incarcerated persons with serious medical needs in a manner consistent with widely-accepted and prudent professional standards and appropriate to the individual incarcerated person's current medical condition.

Consistent with these principles, the district court determined that Defendants had failed to provide medically necessary care to Ms. Edmo, and ordered that they provide adequate medical care including gender confirmation surgery. The district court held that Defendants' failure to apply medically accepted criteria and provide safe and effective treatment to Ms. Edmo despite the high risk of future harm constituted deliberate indifference to her medical needs. ER 39-40 ¶¶ 33-36. Defendants cannot find shelter in dissenting medical views that depart from an established consensus of prudent professionals to sanction its treatment denials. The Supreme Court and the courts of appeals consistently look to the views of the relevant medical or professional community to

inform judgments on the propriety of treatment decisions and other Eighth Amendment considerations. In accord with these principles, the district court properly credited the experts who testified on Adree Edmo's behalf about the Standards for the Health of Transsexual, Transgender, and Gender-Nonconforming People issued by the World Professional Association for Transgender Health (WPATH Standards)—the recognized articulation of professional consensus on the treatment of gender dysphoria—and about medical necessity of gender confirmation surgery for Ms. Edmo under WPATH guidance. ER 36 ¶¶ 21-23.

In doing so, the district court did not substitute the standards set forth by WPATH for the requirements of the Eighth Amendment any more than the Supreme Court did by crediting the views of the American Psychological Association when it concluded that the Constitution prohibits the execution of a person with severe intellectual disabilities. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). Recognizing the WPATH Standards as the "generally accepted medical standards for the treatment of gender dysphoria," the district court concluded that by ignoring those standards, Defendants displayed "deliberate indifference to Ms. Edmo's serious medical needs and violate[d] her rights under the Eighth Amendment to the United States Constitution." ER 4. The district court rejected the misrepresentation of those standards made by Defendants' experts, ER 36 ¶¶ 24-25, and concluded that Defendants' reliance on the opinions

of an individual considered "an outlier in the field of gender dysphoria"—whose materials "do not reflect opinions that are generally accepted in the field of gender dysphoria"—reflected bias against providing appropriate gender confirming care to Ms. Edmo, ER 38 ¶ 29.

The district court determined that faithful application of established constitutional principles required that Defendants provide Ms. Edmo with gender confirmation surgery to treat her severe gender dysphoria. ER 1-2. The dispute here is not about a difference of professional opinion, as Defendants contend. The Eighth Amendment does not allow a prison healthcare provider to abandon medically accepted standards of treatments and then justify its decision as a matter of professional discretion. To the contrary, the case law makes clear that such actions constitute deliberate indifference, and the district court's issuance of a preliminary injunction should be affirmed.

ARGUMENT

I. THE EIGHTH AMENDMENT REQUIRES INDIVIDUALIZED, MEDICALLY NECESSARY TREATMENT AS DICTATED BY PRUDENT PROFESSIONAL STANDARDS

The baseline constitutional principles are not in dispute. The Eighth Amendment proscribes "cruel and unusual punishment[]," including the failure to provide medical care to prisoners in government custody. U.S. Const. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97, 102-103 (1976). Because "society takes from

prisoners the means to provide for their own needs," *Brown v. Plata*, 563 U.S. 493, 510 (2011), the government has an "obligation to provide medical care for those whom it is punishing by incarceration," *Estelle*, 429 U.S. at 103. The failure to do so could cause a prisoner to "suffer or die," a possibility that is plainly "incompatible with the concept of human dignity and has no place in civilized society." *Plata*, 563 U.S. at 510-511 (articulating the "basic concept" that animates the Eighth Amendment (internal quotation marks omitted)).

At the same time, not all medical needs trigger the government's Eighth Amendment obligations, and not every failure to treat runs afoul of the Constitution. Prison officials need only treat a prisoner's objectively "serious medical needs." *Estelle*, 429 U.S. at 104, 106; *see also Farmer v. Brennan*, 511 U.S. 825, 834 (1994) ("[T]he deprivation alleged must be, objectively, 'sufficiently serious[.]'"). A medical need is "serious" if "'a reasonable doctor or patient would find [the need] important and worthy of comment or treatment.'" *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014); *accord Blackmore v. Kalamazoo Cty.*, 390 F.3d 890, 897 (6th Cir. 2004) ("[A] medical need is objectively serious if it is 'one that has been diagnosed by a physician as mandating treatment.'").

It is well settled that psychiatric and psychological needs can be sufficiently serious to trigger a constitutional obligation to provide medically necessary care. *See, e.g.*, *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002)

(observing that the "duty to provide medical care encompasses detainees' psychiatric needs"); *accord Clark-Murphy v. Foreback*, 439 F.3d 280, 292 (6th Cir. 2006); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); *Partridge v. Two Unknown Police Officers of Houston*, 791 F.2d 1182, 1187 (5th Cir. 1986). It is likewise well settled that a medical need may be "serious" even if some delay in providing treatment will not result in immediate death or injury. *See, e.g.*, *Singleton v. Lopez*, 577 F. App'x 733, 735-736 (9th Cir. 2014) (reversing grant of summary judgment for prison officials on prisoner's claim that one-year delay in treating eye pain violated Eighth Amendment); *Hartsfield v. Colburn*, 371 F.3d 454, 456-458 (8th Cir. 2004) (reversing grant of summary judgment for jail officials on pretrial detainee's claim that nearly two-month delay in care violated Eighth Amendment); *Farrow v. West*, 320 F.3d 1235, 1243-1248, 1249 (11th Cir. 2003) (reversing grant of summary judgment for prison officials on prisoner's claim that fifteen-month delay in provision of dentures constituted deliberate indifference to serious medical need); *Harrison v. Barkley*, 219 F.3d 132, 137 (2d Cir. 2000) ("[B]ecause a tooth cavity will degenerate with increasingly serious implications if neglected over sufficient time, it presents a 'serious medical need' within the meaning of our case law.").

Courts have recognized that gender dysphoria is a serious medical need requiring treatment within the Eighth Amendment framework. *See, e.g.*, *Kosilek v.*

Spencer, 774 F.3d 63, 86 (1st Cir. 2014) (en banc); *Battista v. Clarke*, 645 F.3d 449, 452-456 (1st Cir. 2011); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (referring to gender dysphoria by a predecessor phrase, transsexualism); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1187 (N.D. Cal.), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015). Here, Defendants concede (Br. 7) that Ms. Edmo has a diagnosis of gender dysphoria.

Once a prisoner demonstrates an objectively serious medical need, prison officials are obligated by the Eighth Amendment to provide treatment. *Estelle*, 429 U.S. at 103 (explaining "the government's obligation to provide medical care for those whom it is punishing by incarceration"). But not just any treatment will do; prison officials must provide treatment "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards." *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987); *see also Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (noting that treatment decisions are constitutionally inadequate when they are "'far afield of accepted professional standards'"); *accord Plata v. Schwarzenegger*, 2005 WL 2932253, at *7 n.2 (N.D. Cal. Oct. 3, 2005) (applying a community standard of care for expert review of care provided in prisoner deaths).

Put another way, prison officials have an obligation to provide a prisoner with medically necessary treatment based on an individualized assessment of the

prisoner's serious needs. *See, e.g.*, *Estelle*, 429 U.S. at 107 (focusing on the prisoner's particular medical condition and whether the state's treatment protocol—bed rest, muscle relaxants, and pain relievers—sufficiently addressed his symptoms); *Roe v. Elyea*, 631 F.3d 843, 859 (7th Cir. 2011) ("[I]nmate medical care decisions must be fact-based with respect to the particular inmate, the severity and stage of [her] condition, the likelihood and imminence of further harm and the efficacy of available treatments."); *Rouse v. Plantier*, 182 F.3d 192, 199 (3d Cir. 1999) (alleged violations of the Eighth Amendment "obviously var[y] depending on the medical needs of the particular prisoner"); *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 & n.32 (3d Cir. 1987) (by virtue of a blanket policy, "the County denies to a class of inmates the type of individualized treatment normally associated with the provision of adequate medical care").

This much appears to be common ground for the parties to this appeal. They part ways, however, on two issues: (1) whether it is appropriate for a court to consult professional consensus in establishing the prudence of a particular treatment decision when a state healthcare provider has deviated from that consensus, and (2) whether an Eighth Amendment violation can be found where the state provides a prisoner with some, but not all, medically necessary treatment, while citing professional judgment as its purported rationale. Defendants answer

both of these questions in the negative but their position is wrong on both counts, as settled by well-established Eighth Amendment precedent.

A. Professional Consensus Informs Eighth Amendment Analysis And Departures From That Consensus Cannot Justify Defendants' Refusal To Provide Medically Necessary Treatment

Defendants argue (Br. 35) that the district court erred by finding that Eighth Amendment deliberate indifference can be established when a provider does not strictly follow the WPATH guidelines. Defendants incorrectly conflate consideration of the accepted standards of care and practice within the medical profession with the mechanical adoption of those standards. And to the extent Defendants argue that the recognized consensus of medical professionals in the relevant field may not bear on a court's Eighth Amendment analysis, they are mistaken as a matter of law.

Courts of appeals have routinely recognized that "the contemporary standards and opinions of the medical profession … are highly relevant in determining what constitutes deliberate indifference to medical care." *Howell v. Evans*, 922 F.2d 712, 719 (11th Cir. 1991), *vacated pursuant to settlement*, 931 F.2d 711 (11th Cir. 1991), *opinion reinstated by Howell v. Burden*, 12 F.3d 190, 191 n.* (11th Cir. 1994); *see also Allard v. Baldwin*, 779 F.3d 768, 772 (8th Cir. 2015) ("[I]n cases where some medical care is provided, a plaintiff 'is entitled to prove his case by establishing [the] course of treatment, or lack thereof, so deviated

from professional standards that it amounted to deliberate indifference.'"); *Henderson v. Ghosh*, 755 F.3d 559, 566 (7th Cir. 2014) (per curiam) (deliberate indifference can be shown by "'a substantial departure from accepted professional judgment, practice, or standards'"). That follows from the cardinal principle of Eighth Amendment law that adequate medical care is tested against "prudent professional standards." *DeCologero*, 821 F.2d at 43.

Eighth Amendment jurisprudence thus abounds with reference to, and reliance on, the views of the relevant medical communities. To take one salient example: In a recent line of cases, the Supreme Court has regularly referred to the professional consensus of mental health experts in determining when the execution of certain persons with intellectual disabilities violates the constitutional guarantee against cruel punishment. *See Hall v. Florida*, 572 U.S. 701, 709-710 (2014) (explaining, in striking down Florida's IQ threshold for death penalty eligibility, that it is "proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores" and "to consult the medical community's opinions" in determining how intellectual disability should be measured); *id.* at 712 ("Florida's rule disregards established medical practice[.]"); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (citing "clinical definitions of mental retardation" and noting that particular limitations of persons with intellectual disabilities "diminish their personal culpability"); *see also Roper v. Simmons*, 543

U.S. 551, 570-571, 573 (2005) (striking down death penalty for juveniles and relying on established scientific and sociological studies about minors' underdeveloped sense of responsibility, propensity to engage in reckless behavior, and susceptibility to peer pressure); *accord Indiana v. Edwards*, 554 U.S. 164, 176-178 (2008) (relying on American Psychiatric Association's settled position to hold that a defendant may have the capacity to stand trial but not to represent himself); *Baze v. Rees*, 553 U.S. 35, 67 (2008) (Alito, J., concurring) ("[A]n inmate challenging a method of execution should point to a well-established scientific consensus."). Courts of appeals have likewise referred to and relied on evidence of professional consensus in determining whether officials' conduct violates the Eighth Amendment. *See, e.g.*, *Villegas v. Metropolitan Gov't of Nashville*, 709 F.3d 563, 572-573 (6th Cir. 2013) (citing the views of the American Medical Association and the American College of Obstetricians and Gynecologists in considering detainee's Eighth Amendment challenge to shackling during labor); *accord Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1253 (9th Cir. 2016).

Moreover, as the Supreme Court has explained, because courts are routinely called upon to make findings based on '"reasonable medical judgments given the state of medical knowledge,"' *School Board of Nassau County v. Arline*, 480 U.S. 273, 288 (1987), recourse to professional standards of care is critically important when a court is presented with conflicting positions about the appropriate medical

response. Where a professional consensus exists, state actors must demonstrate compelling bases to disregard that consensus. *See Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (court should take due account of the views of health experts; dissenting view may be credited only when the expert provides "a credible scientific basis for deviating from the accepted norm"); *accord Massachusetts v. EPA*, 549 U.S. 497, 507-510, 534 (2007) (agency could not make "reasoned judgment" against regulating greenhouse gases based merely on "residual uncertainty" about the effects of climate change); *Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008) (affirming administrative law judge's "sensible" decision to discredit company expert's opinion because it conflicted with scientific community "consensus" on clinical significance of medical condition).

Courts have routinely held that the medical decisions of prison officials do not warrant reflexive deference, but rather must be evaluated by reference to the relevant professional consensus to ensure that the decision under consideration is "prudent." *DeCologero*, 821 F.2d at 43; *Estate of Cole v. Fromm*, 94 F.3d 254, 261-262 (7th Cir. 1996) (deliberate indifference may be inferred from "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment"); *see also Mendiola-Martinez*, 836 F.3d at 1254 ("Such deference is

generally absent from serious medical needs cases … .'" (citation omitted)). This Court, for example, has expressly held that "[i]n deciding whether there has been deliberate indifference to an inmate's serious medical needs, [a court] need not defer to the judgment of prison doctors or administrators." *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989). Courts must instead review the record based on all relevant facts—including both the judgments of prison medical officials and the views of prudent professionals in the field—to ensure the medical decision under consideration comports with Eighth Amendment standards. A contrary approach that eschews professional standards would empower Defendants' "non-specialist and non-treating medical officials" to make decisions based on administrative convenience, cost-saving, or politics, rather than an incarcerated person's serious medical needs. *See Colwell*, 763 F.3d at 1069.

In particular, Defendants may not evade liability by relying on a single, dissenting expert or an outlier set of medical views to manufacture a purported difference of medical opinion over whether a specific treatment is medically necessary. Such a rule would give a State broad authority to avoid the medical needs of those in their care, for it is hard to imagine a medical consensus from which some professional, somewhere, did not dissent.

Although a State's decision to undertake one of multiple viable treatment options, in view of a legitimate difference of medical opinion, may not amount to

deliberate indifference, the opinion supporting the denial of care (or use of lesser alternatives) must be medically acceptable given all of the circumstances. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (Eighth Amendment is violated where "the course of treatment the doctors chose was medically unacceptable under the circumstances"). Relying on a dissenting medical view that departs substantially from '"accepted professional judgment, practice, or standards"' may, in fact, constitute deliberate indifference. *Roe*, 631 F.3d at 862-863 (quoting *Sain v. Wood*, 512 F.3d 886, 895 (7th Cir. 2008)); *see also Arnett*, 658 F.3d at 751 (noting that treatment decisions may be constitutionally inadequate when they are "'far afield of accepted professional standards'"); *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992) ("By choosing to rely upon a medical opinion which a reasonable person would likely determine to be inferior, the prison officials took action which may have amounted to the denial of medical treatment, and the 'unnecessary and wanton infliction of pain.'"), *overruled in part on other grounds as recognized in Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1045 (9th Cir. 2002); *cf. Pickup v. Brown*, 740 F.3d 1208, 1222-1224, 1232 (9th Cir. 2013) (legislature had rational basis to ban gay conversion therapy for minors based on "well-documented, prevailing opinion of the medical and psychological community"; deferring to "overwhelming consensus" of "mainstream mental

health professional associations" notwithstanding dissenting views from other professionals).

Courts of appeals have rightly recognized that any rule to the contrary would significantly undermine the protections of the Eighth Amendment. To that end, even a court that rejected an Eighth Amendment claim concerning a prison's refusal to provide gender confirmation surgery to a transgender prisoner warned that its "holding in no way suggests that correctional administrators wishing to avoid treatment need simply to find a single practitioner willing to attest that some well-accepted treatment is not necessary." *Kosilek*, 774 F.3d at 90 n.12.

B. The Provision Of Some Medical Care Does Not Discharge Defendants' Eighth Amendment Obligations When Additional Treatment Is Medically Necessary

Defendants insist (Br. 46) that by providing Ms. Edmo with hormone therapy and counseling they fulfilled their constitutional obligations, notwithstanding that those interventions did not effectively treat Ms. Edmo's gender dysphoria and that (as the district court found) additional treatment is medically necessary to treat her condition. Defendants' position again is contrary to established Eighth Amendment law.

As this Court has explained, "[a] prisoner need not prove that he was completely denied medical care" to make out an Eighth Amendment claim. *Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc); *see also Langford v.*

Norris, 614 F.3d 445, 460 (8th Cir. 2010) (stating that "a total deprivation of care is not a necessary condition for finding a constitutional violation"; "'a doctor's decision to take an easier and less efficacious course of treatment"' constitutes deliberate indifference); *Jones v. Muskegon Cty.*, 625 F.3d 935, 944 (6th Cir. 2010) ("'[P]rison officials may not entirely insulate themselves from liability under § 1983 simply by providing some measure of treatment.'"); *Simkus v. Granger*, 1991 WL 138483, at *2 (4th Cir. July 30, 1991) (per curiam) (unpublished) ("The fact that an inmate has received some care for his condition does not preclude recovery under the eighth amendment."). For example, treatments that simply address a prisoner's pain without attending to the underlying condition, or that are appropriate to a less aggravated form of that condition, are constitutionally inadequate. *Arnett*, 658 F.3d at 752 (pain medication insufficient to address prisoner's serious medical needs because prisoner was entitled to "medication to treat, not simply mask, his condition"); *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999) ("[D]eliberate indifference may be established by a … decision to take an easier but less efficacious course of treatment.").

When medical conditions persist or worsen, prison officials must respond accordingly. Their constitutional obligations require them, in the "'exercise of professional judgment,"' *Estelle*, 429 U.S. at 104 n.10, to determine what treatment is medically necessary *at the time* for a *particular prisoner*. That determination

must give proper weight to a prisoner's *current* symptoms and needs. *See, e.g.*, *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011) (per curiam) (even though the initial course of treatment for hernia was constitutionally adequate for the first five years, prison doctors acted with deliberate indifference when they "never altered their response to his hernia as the condition and associated pain worsened over time"); *Hathaway v. Coughlin*, 37 F.3d 63, 68 (2d Cir. 1994) (even though prison official initially referred prisoner to a specialist, official acted with deliberate indifference by not referring plaintiff for a reevaluation when subsequent complaints showed that the initial "course of treatment was largely ineffective"); *Cooper v. Dyke*, 814 F.2d 941, 945 (4th Cir. 1987) ("Continued complaints by Cooper, or the manifest symptoms described by Dr. Theodore, would have put defendants on notice that additional care was required.").

Providing *some* treatment, when that treatment is not a medically suitable response to the prisoner's current condition, is constitutionally insufficient, even if that treatment might have been appropriate for the prisoner at an earlier stage. *See, e.g.*, *Edwards v. Snyder*, 478 F.3d 827, 831 (7th Cir. 2007) ("[A] plaintiff['s] receipt of *some* medical care does not automatically defeat a claim of deliberate indifference."); *Lopez*, 203 F.3d at 1132 (same). The Fourth Circuit aptly analyzed an argument made by the Commonwealth of Virginia:

> [I]magine that prison officials prescribe a painkiller to an inmate who has suffered a serious injury from a fall, but that the inmate's symptoms, despite the medication, persist to the point that he now, by all objective measure, requires evaluation for surgery. Would prison officials then be free to deny him consideration for surgery, immunized from constitutional suit by the fact they were giving him a painkiller? We think not.

De'lonta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013).

Here, Defendants contend that they have provided Ms. Edmo with adequate treatment under the circumstances and that any additional treatment is unnecessary because of the professional judgment of Defendants' experts—even if that judgment involves a departure from generally accepted guidelines about what the full scope of treatment should be. In any other context, these facts would plainly establish an Eighth Amendment violation. Defendants contend that they do not here because some lesser rules apply to transgender persons and the treatment of gender dysphoria in incarcerated settings. That is incorrect.

II. THERE IS NO EXCEPTION TO THE EIGHTH AMENDMENT FOR TRANSGENDER PRISONERS OR THE TREATMENT OF GENDER DYSPHORIA

Ms. Edmo and Defendants share some common ground. The parties agree that Ms. Edmo's gender dysphoria presents a serious medical need, and Defendants do not dispute that they are required to provide her with medically necessary treatment. The parties disagree, however, as to the role of the WPATH Standards in gender dysphoria care and whether Defendants—notwithstanding the treatment

it previously provided—must now provide Ms. Edmo with gender confirmation surgery. Defendants' position concerning the application of accepted medical standards creates an exception for gender dysphoria that the Eighth Amendment does not permit. The district court in evaluating these questions determined that the WPATH Standards were dispositive for care and that surgery was a necessary component of treatment for Ms. Edmo. ER 6-7. The Court's analysis is well-supported by caselaw, as discussed further below.

A. Gender Dysphoria Is A Serious Medical Need For Which Treatment Is Constitutionally-Mandated

Under the Eighth Amendment, prisons officials are obligated to provide individuals with gender dysphoria treatment tailored to their individualized needs. *See, e.g.*, *Kosilek*, 774 F.3d at 91; *Battista*, 645 F.3d at 454-455; *Norsworthy*, 87 F. Supp. 3d at 1188-1192; *Fields v. Smith*, 653 F.3d 550, 555-559 (7th Cir. 2011) (striking down statute barring gender dysphoria treatment for inmates); *Hicklin v. Precynthe*, 2018 WL 806764, at *12, *14 (E.D. Mo. Feb. 9, 2018) (enjoining policy restricting gender dysphoria treatment); *Diamond v. Owens*, 131 F. Supp. 3d 1346, 1371-1375 (M.D. Ga. 2015) (sustaining Eighth Amendment claim concerning the denial of gender dysphoria care). Furthermore, the treatment provided must be "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional

standards." *DeCologero*, 821 F.2d at 43. *See also* Statement of Interest of the United States 17, ECF No. 29, *Diamond v. Owens*, 15-cv-50-MTT (M.D. Ga. 2015) ("Diamond SOI") (United States affirming the broad healthcare rights of incarcerated persons with gender dysphoria).

Like prisoners with other serious medical needs, prisoners with gender dysphoria can prevail on an Eighth Amendment claim if they received partial but inadequate care. *See, e.g.*, *Kothmann v. Rosario*, 558 F. App'x 907, 910 (11th Cir. 2014) (per curiam) (denying qualified immunity to prison official who denied incarcerated transgender person hormone therapy while providing '"anti-anxiety and anti-depression medications, mental health counseling, and psychotherapy treatments"'); *Fields*, 653 F.3d at 556 ("Although DOC can provide psychotherapy as well as antipsychotics and antidepressants, defendants failed to present evidence rebutting the testimony that these treatments do nothing to treat the underlying [gender dysphoria]."); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 246-250 (D. Mass. 2012) (blanket ban on laser hair removal and surgery was deliberately indifferent even though transgender plaintiff was receiving some treatment, including psychotherapy and hormones); *accord Lopez*, 203 F.3d at 1132 (discussing standard generally).

B. WPATH's Standards Of Care Provide A Relevant Benchmark For Judging The Prudence Of Treatment Decisions For Gender Dysphoria

As discussed above, it is a pillar of Eighth Amendment jurisprudence that "the contemporary standards and opinions of the medical profession … are highly relevant in determining what constitutes deliberate indifference to medical care." *Howell*, 922 F.2d at 719. In the context of transgender health, the Standards of Care adopted by WPATH reflect those standards and opinions, and are the indispensable starting point for judging the prudence of treatment decisions for transgender prisoners.

Defendants erroneously deride the scientific validity of the WPATH guidelines as less than certain, Defendants' Br. 36. To the contrary, the WPATH Standards have been "recognized as authoritative standards of care by the American Medical Association, the American Psychiatric Association, and the American Psychological Association." *Norsworthy*, 87 F. Supp. 3d at 1170. An "international interdisciplinary, professional organization" founded in 1979, WPATH seeks to "promote evidence based care, education, research, advocacy, public policy and respect in transgender health."[2] Since 1979, WPATH (then known as the Harry Benjamin International Gender Dysphoria Association) has

[2] WPATH, *Missions and Vision* (last visited Apr. 10, 2019).

also published and periodically updated its *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (2012) ("WPATH Standards"). Now in its seventh version, the Standards are the result of a rigorous and thorough process that distills existing literature and research into documents reflecting professional consensus on the treatment of gender dysphoria. This exhaustive process allows practitioners, caregivers, and prison officials to provide persons with gender dysphoria "evidence-based care" that is "based on the best available science and expert professional consensus." *Id*. at 1. Further, major medical and professional organizations have recognized WPATH as the leading professional organization for medical experts who specialize in the diagnosis and treatment of persons with gender dysphoria and recognize the primacy of the WPATH Standards in the field.[3]

As a result, courts consistently rely on the Standards of Care in Eighth Amendment cases involving medical care for or treatment of transgender prisoners. *See, e.g.*, *De'lonta*, 708 F.3d at 522-523 ("The Standards of Care … are the

[3] Am. Med. Ass'n House of Delegates, *Removing Financial Barriers to Care for Transgender Patients*, Res. 122 (A-08); Am. Psychological Ass'n, *Transgender, Gender Identity, & Gender Expression Non-Discrimination*, adopted by the American Psychological Association Council of Representatives (Aug. 2008) ("APA 2008 Resolution"); Hembree, et al., Endocrine Society, *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94 J. Clin. Endocrinol Metab. 3132, 3134 (2009) (discussing how the SOC have provided the field with general guidelines for treatment).

generally accepted protocols for the treatment of GID."); *Norsworthy*, 87 F. Supp. 3d at 1170 (same); *Lynch v. Lewis*, 2015 WL 1296235, at *10 (M.D. Ga. Mar. 23, 2015) (noting, approvingly, that "[o]ther courts have held that the standards for [gender dysphoria] treatment set out by [WPATH] are the accepted standards for [gender dysphoria] treatment in the medical community"); *see also Soneeya*, 851 F. Supp. 2d at 231-232 ("The course of treatment for [gender dysphoria] followed in the community is governed by the 'Standards of Care' promulgated by [WPATH]."); *Fields v. Smith*, 712 F. Supp. 2d 830, 844 (E.D. Wis. 2010) ("The Standards of Care 'are a document that articulates professional consensus about the treatment of gender [dysphoria], and it's produced by the WPATH organization and distributed throughout the world to organizations such as the World He[alth] Organization and other providers of health care worldwide.'"), *aff'd*, 653 F.3d 550 (7th Cir. 2011); *cf. Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1289 n.4 (N.D. Ga. 2010) (rejecting defendant's claim that Standards of Care do not reflect consensus of medical professionals and finding "'sufficient evidence that statements of WPATH are accepted in the medical community'").

Defendants contend that their providers were "not required to strictly follow the WPATH guidelines" because their "scientific validity" is "less than certain." Defendants' Br. 36. Thus, despite the WPATH Standards' status as a consensus document within the medical community, Ms. Edmo's providers, by their own

admission, departed from the Standards in the course of her treatment, as the district court correctly found. *See* ER 23 ¶ 54; ER 36-37 ¶¶ 25, 27. Defendants contend (Br. 40) that Ms. Edmo's treating physicians were justified in straying from the WPATH Standards because they are somehow less applicable to persons with gender dysphoria who are incarcerated. However, the WPATH Standards are fully applicable in the prison context as they state outright, and as professional organizations including the National Commission on Correctional Health Care (NCCHC) have recognized. *See, e.g.*, WPATH Standards 67; NCCHC, *Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings* (rev. Apr. 2015); APA 2008 Resolution.

Courts have also affirmed the applicability of the WPATH Standards to prison environments and repeatedly relied on the WPATH Standards in cases involving the healthcare rights of incarcerated transgender persons under the Eighth Amendment. Diamond SOI 4-5 & n.6 (confirming that WPATH Standards are authoritative in prisons); *accord De'lonta*, 708 F.3d at 522-523; *Norsworthy*, 87 F. Supp. 3d at 1170; *Soneeya*, 851 F. Supp. 2d at 231-232.

As with other medical and mental health conditions, the proper treatment for gender dysphoria depends on the individual patient's medical needs. Defendants appear to contend that because the district court concluded that gender confirmation surgery was medically necessary for Ms. Edmo, it impermissibly

ignored Eighth Amendment case law regarding the role of the WPATH Standards as well as the criteria for application of the WPATH Standards. Defendants' Br. 37-38. That is incorrect. The district court made extensive findings of fact regarding the Standards of Care, observing that "WPATH Standards of Care are 'flexible clinical guidelines" that are '"intended to be flexible in order to meet the diverse health care needs"' of transgender individuals. ER 6 ¶ 5. Furthermore, the district court carefully evaluated the WPATH criteria that should have been used to evaluate Ms. Edmo's need for gender confirmation surgery, ER 9-10 ¶¶ 14-18, as well as the additional criteria used by Defendants in their evaluation, ER 23 ¶ 54. The court thus did not reflexively apply the Standards of Care to conclude that gender confirmation surgery was medically necessary for Ms. Edmo, but rather used them as a framework to evaluate the parties' contentions as to the adequacy of Ms. Edmo's treatment regimen.

Defendants contend that the district court erroneously disregarded the opinions and professional judgment of its treating physicians when in reality the court assessed the credibility of Defendants' experts and determined that the experts lacked credibility and had a bias against providing gender confirmation surgery. ER 36-38 ¶¶ 23-32. In support of these findings, the district court determined that the only guidelines issued by Defendants did not include gender confirmation surgery as an option, that training provided to Defendants' treating

physicians by Dr. Steven Levine, an outlier in the field, discourages providing surgery to incarcerated persons with gender dysphoria, and, significantly, that none of Defendants' providers had ever recommended gender confirmation surgery to any incarcerated person in custody, regardless of the circumstances. ER 37-38 ¶¶ 27-30; ER 40-41 ¶¶ 39-41. Accordingly, the record indicates that Defendants did not engage in a good faith application of the WPATH Standards in Ms. Edmo's case.

By departing from the WPATH framework, Ms. Edmo's providers did not make an individualized assessment based on medically accepted standards of care for treatment of patients with gender dysphoria. Instead, they abandoned established medical consensus and failed to follow generally accepted treatment protocols as required under the Eighth Amendment as the district court found. ER 40 ¶¶ 35-36. Defendants failed to adhere to the medically accepted WPATH Standards of Care when assessing her need for gender confirmation surgery. *Id.* Thus, Defendants' decision to deny Ms. Edmo's gender confirmation surgery is not a matter of professional judgment that is owed deference, it is a decision that departs from a medically accepted protocol for the treatment of gender dysphoria. *See Norsworthy*, 87 F. Supp. 3d at 1193-1195 (ordering that gender-confirmation surgery be provided to incarcerated transgender woman pursuant to the WPATH standards).

C. Defendants' Provision Of Hormone Therapy And Counseling Does Not Foreclose Ms. Edmo's Claim for Gender Confirmation Surgery

Notwithstanding the legal consensus that the provision of *some* medical care does not foreclose a claim for additional or different medically necessary care[4], Defendants contend that their provision of hormone therapy and counseling precludes a finding of deliberate indifference. The Fourth Circuit dismantled this argument in *De'lonta*, and it should be similarly rejected here. *De'lonta,* 708 F.3d at 525-526. Prison officials have an obligation to provide incarcerated persons with gender dysphoria a full spectrum of medically necessary care—including gender-confirmation surgery where needed. *See, e.g.*, *id.* (providing partial rather than complete gender dysphoria can violate the Eighth Amendment); *Fields*, 653 F.3d at 554-559 (barring state from restricting the gender-dysphoria care available behind bars); *Phillips v. Michigan Dep't of Corr.*, 1991 WL 76205 (6th Cir. May 10, 1991) (per curiam) (unpublished) (same); *Norsworthy*, 87 F. Supp. 3d at 1195 (ordering a state to provide transgender inmate gender dysphoria care including gender-confirmation surgery).

In addition, medical conditions often progress and require different treatment over time. Gender dysphoria is no different, and the fact that gender

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[4] *See* discussion at pp. 20-23, *supra.*

confirmation surgery is the required regimen at a particular point in time for certain prisoners with gender dysphoria does not change the Eighth Amendment standard. *See, e.g.*, *Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003) (holding that prison officials show deliberate indifference by denying medically care because it "is expensive or because it might be controversial or unpopular"). A one-and-done approach to treatment in the face of a continuing or evolving serious medical condition does not meet the standards of the Eighth Amendment. Nor does a plan to manage symptoms without ever treating the prisoner's underlying condition. *See Arnett*, 658 F.3d at 752.

Therefore, even if Defendants' provision of hormone therapy and counseling may have addressed certain of Ms. Edmo's medical needs at a certain point in time, her gender dysphoria now requires more and Defendants are obligated to treat it. *Edwards*, 478 F.3d at 831; *accord Gant v. County of Los Angeles*, 772 F.3d 608, 618 (9th Cir. 2014) ("[D]eliberate indifference to a person's constitutional rights occurs when *the need for more or different action 'is so obvious, and the inadequacy of the current procedure so likely to result in the violation of constitutional rights*, that the policymakers … can reasonably be said to have been deliberately indifferent to the need.'" (emphasis added; brackets and colon omitted)).

Defendants also contend (Br. 46) that under Eighth Amendment doctrine, a difference of opinion between a physician and the prisoner or between medical professionals concerning what medical care is appropriate does not amount to deliberate indifference such that a court cannot question the adequacy of a particular course of treatment that has been decided upon by prison medical providers. But this case presents more than a mere difference of opinion—the district court found, based on an extensive medical and factual record, that gender confirmation surgery was medically necessary to treat Ms. Edmo's gender dysphoria and that without surgery, Ms. Edmo is at serious risk of life-threatening self-harm, including self-castration attempts, cutting, and suicidal ideation. ER 40 ¶ 36; ER 42 ¶ 49. That is the end of the Eighth Amendment analysis, so Defendants cannot avoid the inexorable consequence of the district court's finding.

D. The Court Properly Determined That Defendants Maintained A De Facto Treatment Ban

The district court also found that Defendants were deliberately indifferent because they maintained a de facto ban on gender confirmation surgery instead of individually assessing Ms. Edmo's needs. ER 40 ¶ 37. This Court has recognized that policies and practices de facto restricting the provision of gender dysphoria healthcare behind bars unconstitutionally prohibit the individualized assessments that the Eighth Amendment requires. *Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th

Cir. 2015) (per curiam) (incarcerated person who alleged blanket ban on surgical treatment for gender dysphoria stated valid Eighth Amendment claim). Blanket bans on gender dysphoria treatment inherently depart from the WPATH standards and prohibit individualized assessments of healthcare needs driven by medical necessity. *See, e.g.*, *Fields*, 653 F.3d at 559 (state law that barred hormone therapy and gender-confirming surgery as possible treatments for prisoners with gender dysphoria facially violated the Eighth Amendment); *see also Hicklin*, 2018 WL 806764, at *11 (affirming that denials of gender dysphoria care based on blanket rules violate the Eighth Amendment); *accord Kosilek*, 774 F.3d at 91 (noting that any blanket ban on surgical treatment for gender dysphoria "would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs"). Accordingly, the district court's conclusion that Defendants also violated the Eighth Amendment based on their de facto treatment ban is well-supported by applicable law.

CONCLUSION

For all of these reasons, this Court should affirm the district court's grant of a preliminary injunction.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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