Case No. 19-36019

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCO SANTIAGO,

Plaintiff-Appellant,

v.

BRUCE C. GAGE, *et al.,*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

No. 3:18-cv-05825-RBL

BRIEF OF *AMICI CURIAE* NON-PROFIT & CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT MARCO SANTIAGO

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 non-profit and civil rights organizations and have no shares or securities that are publicly traded.

FED. R. APP. P. 29(a) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *Amici* have received Appellant and Appellee's written consent to file this amicus brief. Pursuant to Rule 29(a)(4)(E), no party or party's counsel authored the brief or contributed money that was intended to fund preparing or submitting the brief.

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STATEMENT OF *AMICI CURIAE'S* IDENTITY AND INTERESTS

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 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 people in their custody.

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. 4:09-cv-05796-CW (N.D. Cal 2009).

Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders** ("GLAD") works in New England and nationally

to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has represented numerous incarcerated transgender people and has an enduring interest in ensuring their health and safety, including the delivery of prompt and appropriate medical care.

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 LGBT 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 people 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), (reinstating transgender prisoner's complaint alleging that denial of 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*, No. 4:16–cv–01357–NCC, 2018 WL 806764(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 National Center for Lesbian Rights ("NCLR") is a national legal organization committed to protecting and advancing the rights of lesbian, gay, bisexual, and transgender people, including LGBT individuals in prison, through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other civil rights organizations.

The National Center for Transgender Equality ("NCTE") is a national social justice organization devoted to advancing justice, opportunity and well-being for transgender people through education and advocacy on national issues. Since 2003, NCTE has been engaged in educating legislators, policymakers, and the public, and advocating for laws and policies that promote the health, safety, and equality of transgender people. NCTE provides informational referrals and other resources to thousands of transgender people every year, including many individuals in prisons, jails, and civil detention settings, and has been extensively involved in efforts to implement the Prison Rape Elimination Act (PREA) and other efforts to address the vulnerability of transgender people in confinement settings.

Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization working in partnership with communities to dismantle white

supremacy, strengthen intersectional movements, and advance the human rights of all people. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of society's most vulnerable members, including the LGBTQ community and transgender incarcerated people. SPLC was counsel in *Diamond v. Owens*, 5:15-cv-50-MTT (M.D. Ga. 2015) (ending the Georgia Department of Corrections' policy of denying hormone therapy to transgender incarcerated people on a blanket basis) and *amicus curiae* in *Keohane v. Florida Department of Corrections Secretary*, 18-14096 (11th Cir. 2019) (challenging the Florida Department of Corrections' denial of constitutionally adequate treatment for gender dysphoria).

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 believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression.

TLC works to achieve this goal through leadership development and by connecting TGNC people to legal resources. It also pursues impact litigation and policy advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.

Transgender Legal Defense and Education Fund, Inc. ("TLDEF") is a national, transgender-led civil rights organization committed to ending discrimination and achieving equality for transgender people throughout the nation, particularly those in our most vulnerable communities. TLDEF's Trans Health Project works to end unscientific and discriminatory exclusions of transgender health care from health plans, and TLDEF's impact litigation program brings suits to root out bias and ensure the primacy of science in healthcare coverage, including in prisons and jails. Along with co-counsel, TLDEF recently reached a settlement with the sheriff of Steuben County, New York, which included the adoption the nation's most up-to-date policies for safeguarding the rights of transgender inmates—among these, the provision of healthcare that is constitutionally-adequate and based in science. TLDEF believes that what a county jail in Western New York can achieve, the State of Washington can as well.

INTRODUCTION

For over forty years, it has been well established that the Eighth Amendment of the U. S. Constitution requires that the Washington Department of Corrections ("Washington DOC") and its officials must not deny medically necessary care to people in its custody or intentionally delay or interfere with the treatment once prescribed. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). There is no exception to this well-established law for particular medical conditions, including gender dysphoria. Indeed, this court has recognized that delays or interference with medical treatment for transgender people can cause irreparable harm, including emotional distress, anxiety, depression, attempts at self-treatment, and in some cases death by suicide.

While incarcerated at Stafford Creek Correction Center ("SCCC"), Ashley Moon Raelynn[1], a transgender woman, was diagnosed with gender dysphoria on April 27, 2017 by her primary therapist. ER 223-228. The Washington DOC Offender Health Plan ("Health Plan"), that was in effect at the time,[2] required that

[1] *Amici* refer to Plaintiff-Appellant by her chosen name "Ashley Moon Raelynn" and female pronouns.

[2] Effective October 1, 2020, the Washington DOC has implemented new guidelines for treating people with gender dysphoria. Under this new plan, hormone therapy may be prescribed by the Practitioner following an evaluation to determine transgender identification, informed consent has been obtained and no major medical contraindications exist. Diagnosis of Gender Dysphoria does not need to be present for hormone therapy. If there is a difference of opinion about providing hormone therapy, the case will be

decisions concerning the treatment for gender dysphoria, including hormone therapy, must be approved by the Gender Dysphoria Care Review Committee ("the GD-CRC"). ER 382-384. The patient's primary care providers were not authorized to vote on the committee and were not allowed to intervene in a committee decision unless they re-present the case if circumstances change significantly. ER 383, 128. On September 21, 2017, Ms. Raelynn's psychiatrist and therapist sent a request for hormone therapy to the GD-CRC. ER 106-107. After the referral, in the remaining months of 2017, Ms. Raelynn experienced serious physical and emotional distress, as she had been prior to her diagnosis and referral. ER 232. She filed grievances and sent numerous kites[3] reporting weight loss, stress, panic attacks, nightmares, depression, and extreme anxiety. ER 408–12, 414–16. Months after her diagnosis, and without receiving hormone therapy, on January 5, 2018, Ms. Raelynn attempted to remove her testicles with a razor blade, which required immediate medical and psychological treatment. ER 235-236. At this time, her therapist noted she was at risk for suicide. ER 236. Ms. Raelynn was still not

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reviewed by the GD-CRC. And if a Practitioner does not initiate hormone therapy, the individual may grieve the decision. *See Washington Department of Corrections (DOC) Guideline for Healthcare Support for Transgender Individuals*, Disability Rights Washington, https://www.disabilityrightswa.org/wp-content/uploads/2020/11/2020-Guideline-for-Transgender-Health-NEW-GD-PROTOCOL.pdf.

[3] Wash. State Dep't of Corrs., *Definitions*, https://www.doc.wa.gov/information/definitions.htm (defining "Kite" as "[a] form for official handwritten correspondence from inmates to employees, contract staff, and volunteers").

provided with hormone therapy to treat her gender dysphoria and continued to experience and report to officials her symptoms, including emotional pain and stress that impeded her daily functioning. ER 418, 422, 423, 426. Despite the urgency of her medical need, and knowing of her continued risk of self-harm, including previous suicide attempts, defendants only provided her with psychotherapy while knowing that it was insufficient treatment given the prior recommendation for more holistic treatment, including hormone therapy.

Ultimately, defendants delayed authorization to start hormone therapy for nearly 19 months after her initial diagnosis, and 14 months after the referral to the GD-CRC. Finally, Ms. Raelynn was provided with hormone therapy in November 2018, but only after she suffered serious psychological and physical harm because of delayed treatment. Ms. Raelynn filed suit in the district court alleging violations of her Eighth Amendment right to be free from cruel and unusual punishment against defendants. Ms. Raelynn relied on the Health Plan and the World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (7th Version, 2011), https://www.wpath.org/publications/soc ("WPATH Standards")[4] to

[4] The WPATH Standards of Care were formerly referred to as the "Harry Benjamin Standards of Care" and were initially promulgated by WPATH under its former name, the "Harry Benjamin International Gender Dysphoria Association." *Kosilek v. Spencer*, 774 F.3d 63, 70 & n.3 (1st Cir. 2014).

establish that defendants' actions were outside of accepted professional standards for her treatment, and that the intentional delay in her treatment caused her harm, and put her at risk for future harm. The district court dismissed her complaint.

In dismissing Ms. Raelynn's complaint by granting qualified immunity to all defendants, the district court disregarded clearly established law that intentional delays or interference with treatment can establish deliberate indifference. The district court incorrectly defined the right at issue here too narrowly. The right at issue in this case is Ms. Raelynn's clearly established right to timely medical care for her serious medical need. The district court disregarded this right and relied on its own assumption as to how long an evaluation for hormone therapy should take. The court held that there was an ambiguity about the appropriate length of the evaluation process for hormone therapy, and as such defendants' actions that caused delays were not clearly unconstitutional. *Santiago v. Gage*, No. 3:18-cv-05825-RBL, 2019 WL 6052492 (W.D. Wash. November 15, 2019).

As the record establishes in this case, defendants acted in a medically unacceptable manner by deviating from the Health Plan and WPATH Standards, the professional benchmark regarding treatment for gender dysphoria – thus evidencing deliberate indifference. They also deviated from their own standard medical practices by mandating that care for gender dysphoria go through a long and arduous committee process.

Granting qualified immunity to the officials, who acted with deliberate indifference to Ms. Raelynn's gender dysphoria, was not only legal error but would, going forward, allow prison officials to deprive incarcerated people of their constitutional right to medical care, harming them immeasurably. For transgender people, who are incarcerated at disparate rates in comparison to cisgender people and face disproportionately high rates of suicide and self-harm, denial of medical care for gender dysphoria is cruel and unusual punishment.

ARGUMENT

I. QUALIFIED IMMUNITY DOES NOT APPLY BECAUSE THE CONSTITUTIONAL RIGHT TO MEDICAL CARE WAS CLEARLY ESTABLISHED.

The district court granted qualified immunity to all defendants despite Ms. Raelynn's clearly established right to medical care for her gender dysphoria, including hormone therapy. Under qualified immunity, a government official can only be exposed to liability if "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *Easley v. City of Riverside*, 890 F.3d 851, 856 (9th Cir. 2018) (quoting *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) (internal quotation omitted)). The second element further breaks down into "two discrete sub-elements: 'whether the law governing the conduct at issue was clearly established' and 'whether the facts as alleged could support a reasonable belief that the conduct in question conformed to the established law.'" *Id*. (*quoting Green v. City & Cnty.*

of San Francisco, 751 F.3d 1039, 1052 (9th Cir. 2014)). The U. S. Supreme Court has held that there need not be a "case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *See also*, *Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2018) (the court "need not identify a prior identical action to conclude that the right is clearly established").

To defeat qualified immunity, a plaintiff need not show "the very action in question has previously been held unlawful," rather a plaintiff need show only that Government officials had "fair warning that their alleged treatment [of plaintiff] was unconstitutional" under the existing state of the law, or where otherwise a violation "was so obvious that . . . Eighth Amendment cases gave respondents fair warning that their conduct violated the constitution." *Hope v. Pelzer*, 536 U.S. 730, 739, 741 (2002). *See also*, *Taylor v. Riojas,* No. 19-1261, 2020 WL 6385693 (U.S. Nov. 2, 2020) (per curiam) (endorsing *Hope* framework and summarily reversing grant of summary judgment to prison officials on qualified immunity grounds where violation would have been "obvious" to reasonable official and where there was "no evidence that the conditions of Taylor's confinement were compelled by necessity or exigency.").

A. The Eighth Amendment Requires Treatment for Gender Dysphoria, a Serious Medical Condition, Free from Intentional Delays or Intentional Interference.

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. To meet the objective requirement of the deliberate indifference standard, an incarcerated individual must demonstrate the existence of a serious medical need, *Estelle*, 429 U.S. at 104, or demonstrate a substantial risk of future serious harm resulting from the action or inaction of prison officials, *Helling v. McKinney*, 509 U.S. 25, 35 (1993). It is clearly established that deliberate indifference can be "manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 429 at 104–05 (footnotes omitted); *Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000); *Portillo v. Johnson*, 94 F. App'x 457, 459 (9th Cir. 2004).

1. Gender Dysphoria is a Serious Medical Condition.

Transgender people are individuals whose gender identity and internal sense of self differ from the sex they were assigned at birth.[5] In this case, it was

[5] WPATH Standards at 97.

undisputed that gender dysphoria is a serious medical condition, as the parties agreed on this issue. ER 77, 191. Gender dysphoria is a medical condition defined by the clinically significant distress caused by the incongruence between a person's sex assigned at birth and gender identity, which has been recognized as a serious condition by medical professionals and associations in the United States and from across the globe.[6] Left untreated, the distress of gender dysphoria can be severe—including depression, anxiety, and suicide ideation—which has also led to its inclusion in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.[7] For over thirty years, this and many other courts have recognized gender dysphoria is a sufficiently serious medical need to implicate the Eighth Amendment. *See Edmo v. Corizon, Inc.,* 935 F.3d 757, 785 (9th Cir. 2019) (Recognizing that gender dysphoria is a sufficiently serious medical need to implicate the Eighth Amendment) (collecting cases). In *Edmo*, this

[6] WPATH Standards at 1.; see also World Health Org., *International Classification of Diseases and Related Health Problems* (11th ed. 2018), https://icd.who.int/browse11/l-m/en (using the term "gender incongruence"); Am. Med. Ass'n House of Delegates*, Removing Financial Barriers to Care for Transgender Patients, Res. 122 (A-08)* (2008), http://www.imatyfa.org/assets/ama122.pdf; Am. Psych. Ass'n, *APA Resolution on Transgender, Gender Identity and Gender Expression Non-discrimination* (2008), https://www.apa.org/about/policy/transgender.aspx; Am. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-V"); Nat'l Comm'n on Corr. Healthcare, *Transgender and Gender Diverse Health Care in Correctional Settings* (2020), https://www.ncchc.org/transgender-and-gender-diverse-health-care ("NCCH Trans Healthcare Policy").
[7] DSM-V at 451.

court found that a doctor who knew Ms. Edmo attempted to remove her testicles, that she suffered from gender dysphoria, and that she experienced "clinically significant" distress that impaired her ability to function, acted with deliberate indifference by continuing with an ineffective treatment plan. *Id.* at 793. In *Rosati v. Igbinoso*, 791 F.3d 1037, 1039-1040 (9th Cir. 2015), this Court found that an incarcerated transgender woman's allegations were sufficient to state a claim of deliberate indifference where the complaint plausibly alleged that she had severe gender dysphoria, experienced multiple attempts at self-castration despite ongoing hormone therapy treatment, that prison officials were aware of her medical history and need for treatment, but refused to provide gender confirmation surgery, despite it being medically accepted treatment for gender dysphoria. For more than forty years, it has been clearly established that delayed medical care can violate the Eighth Amendment. The precise care at issue in this case meets that standard as well, as this court has recognized for many years.

2. This Court Has Recognized Additional Serious Medical Needs of the Kind Experienced by Transgender People with Gender Dysphoria.

It is also well established that serious medical needs include psychiatric and psychological needs. *See, e.g., Gibson v. Cnty. 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). Furthermore, in *De'lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) (*De'lonta I*), the Fourth Circuit held that an incarcerated individual with diagnosed gender dysphoria's "need for protection against continued self-mutilation constitutes a serious medical need to which prison officials may not be deliberately indifferent." *See also Lee v. Downs*, 641 F.2d 1117, 1121 (4th Cir. 1981)("[P]rison officials have a duty to protect prisoners from self-destruction or self-injury."); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 244-52 (D. Mass. 2012) (incarcerated individual with gender identity disorder and history of suicide attempts and self-mutilation has serious medical condition for which surgery must be considered).[8] The law is clear that "a remedy for unsafe conditions need not await a tragic event." *Helling*, 509 U.S. at 33 (holding that Eighth Amendment protection against deliberate indifference to prison health problems extends to conditions that threaten to cause health problems in future, as well as current serious health problems). Thus, the need for protection from foreseeable, self-harm is a serious medical need.

The district court ignored this court's decisions and sibling courts holding that protection from self-harm is a serious medical need. Defendants knew that Ms.

[8] "Gender Identity Disorder" was the diagnosis listed in the DSM-IV. It was replaced by "Gender Dysphoria" in the DSM-V.

Raelynn had additional serious medical needs, including that she was at risk of self-harm. She had previously attempted suicide and after she attempted to auto-castrate – a potentially life threating act of self-treatment- she was placed on suicide watch. Despite this, defendants continued to delay providing her with adequate treatment for many more months.

B. There is Medical Consensus that the Provision of Hormone Therapy is Medically Necessary Treatment for Gender Dysphoria.

Once an incarcerated person establishes a sufficiently serious medical need, they must then "show the [official's] response to the need was deliberately indifferent." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). A prison official is deliberately indifferent to a serious medical need if he or she "knows of and disregards an excessive risk to inmate health." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). To show deliberate indifference, plaintiff must show "that the course of treatment the [official] chose was medically unacceptable under the circumstances and that the [official] chose this course in conscious disregard of an excessive risk to the plaintiff's health." *Edmo*, 935 F.3d at 786.

1. A Course of Treatment that Substantially Deviates from Professional Standards Establishes Deliberate Indifference.

Courts 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'") (internal citations omitted); s*ee Moore v. Duffy*, 255 F.3d 543, 545 (8th Cir. 2001) ("[M]edical treatment may so deviate from the applicable standard of care as to evidence a physician's deliberate indifference."); *Estate of Cole v. Fromm*, 94 F.3d 254, 262 (7th Cir. 1996) (Eighth Amendment violation where treatment represents "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"); *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987) (Eighth Amendment guarantees medical care "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards"). Moreover, courts have recognized that whatever treatment is provided for gender dysphoria, it must comport with accepted standards of care. *See Edmo*, 935 F.3d at 786*; Fields*

v. Smith, 712 F. Supp. 2d 830, 856 (E.D. Wis. 2010); *Konitzer v. Frank*, 711 F.Supp.2d 874, 908 (E.D. Wis., 2010).

2. Federal Courts Have for Years Recognized the WPATH Standards as the Standard of Care for Treatment of Gender Dysphoria.

The WPATH Standards "are the internationally recognized guidelines for the treatment of individuals with gender dysphoria." *Edmo* , 935 F.3d at 769 (internal citation omitted); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1171, 1188 (N.D. Cal. 2015); *See also Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1289 n.4 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011) (affirming that "statements of WPATH are accepted in the medical community"); *De'Lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013) (*De'lonta II*) (describing the Standards of Care as "the generally accepted protocols" for the treatment of gender dysphoria); *O'Donnabhain v. Comm'r of Internal Revenue*, 134 T.C. 34, 65 (2010) (the Standards of Care are "widely accepted in the psychiatric profession").[9] The WPATH Standards are fully applicable in the prison context.[10] "The WPATH Standards of Care apply equally to all individuals 'irrespective of their housing

[9] *See, e.g.*, Am. Med. Ass'n House of Delegates, *Removing Financial Barriers to Care for Transgender Patients*; NCCH Trans Healthcare Policy; Am. Psych. Ass'n, *APA Resolution on Transgender, Gender Identity and Gender Expression Non-discrimination*.

[10] WPATH Standards at 67.

situation' and explicitly state that health care for transgender individuals 'living in an institutional environment should mirror that which would be available to them if they were living in a non-institutional setting within the same community.'" *Edmo*, 935 F.3d at 771 (citing WPATH Standards at 67).

Under the WPATH Standards, persons with gender dysphoria should be individually assessed by qualified health care providers and referred for treatment, which can include: (1) living in another gender role that is consistent with one's gender identity; (2) hormone therapy to feminize or masculinize the body; and/or (3) surgery to change primary and/or secondary sex characteristics.[11] Counseling can also provide support for some individuals, but it is not a substitute for medical intervention, and exclusive reliance on it constitutes a gross departure from medically accepted practice. *Wolfe v. Horne*, 130 F. Supp. 2d 648, 653 (E.D. Pa. 2001); *Hicklin v. Precytnthe*, No. 4:16–cv–01357–NCC, 2018 WL 806764, *12 (E.D. Mo. 2018) (finding that psychiatric care and counseling alone are constitutionally inadequate to address Ms. Hicklin's gender dysphoria). The WPATH Standards also recognize that hormone therapy, in particular, is fundamental to the treatment of gender dysphoria, and that the denial of hormone treatment leads to significant deterioration and impairment in patients, including a high likelihood of depression, suicidal ideation, and surgical self-treatment by

[11] WPATH Standards at 9-10.

auto-castration (removal of the testicles) or auto-penectomy (removal of the penis).[12]

The WPATH Standards explain that treatment for gender dysphoria is individualized: "What helps one person alleviate gender dysphoria might be very different from what helps another person."[13] The WPATH Standards address a variety of therapeutic options, including changes in gender expression and role, hormone therapy, surgery, and psychotherapy.[14] In addition to the WPATH, the American Medical Association, the Endocrine Society, the American Psychiatric Association, and the American Psychological Association all agree that hormone therapy is medically necessary treatment for many people with gender dysphoria.[15]

Merely providing counseling and/or psychotropic medication to a person with severe gender dysphoria, when additional treatment is deemed medically necessary by a qualified doctor, is a gross departure from medically accepted

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[12] WPATH Standards at 67 (citing G.R. Brown, *Autocastration and Autopenectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder*, 12 Int'l J. Transgenderism 31 (2010)).
[13] WPATH Standards at 5.
[14] *Id*. at 8.
[15] *See* Am. Med. Ass'n House of Delegates, *Removing Financial Barriers to Care for Transgender Patients*; Wylie C. Hembree et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94 The J. of Clinical Endocrinology & Metabolism 3132 (2009), https://academic.oup.com/jcem/article/94/9/3132/2596324; Am. Psych. Ass'n, *APA Resolution on Transgender, Gender Identity and Gender Expression Non-discrimination*.

practice. Inadequate treatment of this medical condition puts an individual at serious risk of psychological and physical harm.[16]

II. DEFENDANTS ACTED WITH DELIBERATE INDIFFERENCE TO MS. RAELYNN'S SERIOUS MEDICAL NEED BY DELAYING HER TREATMENT DESPITE THE HARM SHE SUFFERED.

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

As this court has explained in *Edmo*, "The provision of some medical treatment, even extensive treatment over a period of years, does not immunize officials from the Eighth Amendment's requirements." *Edmo*, 935 F.3d at 793; *see Lopez v. Smith,* 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc) (explaining that "[a] prisoner need not prove that he was completely denied medical care" to make out an Eighth Amendment claim); *see also De'lonta II*, 708 F.3d at 526 ("[J]ust because [officials] have provided De'lonta with some treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with constitutionally adequate treatment."). Other circuits have held the same. *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

[16] WPATH, *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A* (2016), https://www.wpath.org/newsroom/medical-necessity-statement.

treatment" constitutes deliberate indifference) (internal citations omitted); *Jones v. Muskegon Cnty.*, 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.'")(internal citations omitted); *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."). 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 v. Webster*, 658 F.3d 742, 752 (7th Cir. 2011) (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.").

Courts have also held that general mental health services that treat only symptoms of gender dysphoria such as depression but do not specifically address a person's gender dysphoria are insufficient. *See Hicklin*, 2018 WL 806764, *12 (finding that a freeze-frame policy that provides "some treatment" for gender dysphoria but prohibits providing hormone therapy for someone who was not receiving hormone therapy prior to incarceration is inadequate and

unconstitutional); *Wolfe*, 130 F. Supp. 2d at 653 (triable fact question whether prisoner "received any treatment for transsexualism" just because she was treated for depression); *Farmer v. Hawk*, 991 F. Supp. 19, 29 (D.D.C 1998) (same); *see also Chance v. Armstrong*, 143 F. 3d 698, 703 (2nd Cir. 1998) (prison can be deliberately indifferent when it "chooses an easier and less efficacious treatment plan") (internal citations omitted); *Edwards v. Snyder*, 478 F. 3d 827, 831 (7th Cir. 2007) (a prisoner's "receipt of *some* medical care does not automatically defeat a claim of deliberate indifference if a fact finder could infer the treatment was . . . 'blatantly inappropriate'") (emphasis in original)(internal citation omitted).

B. Transgender People, Including Ms. Raelynn, Suffer Harm and Risk of Harm When Treatment for Gender Dysphoria is Intentionally Delayed.

Intentionally delaying access to medical care can establish deliberate indifference. *Estelle*, 429 U.S. at 104-05. A prison official will be found to have been deliberately indifferent to a serious medical need, including in the context of delay in treatment, when a plaintiff shows "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." *Jett*, 439 F.3d at 1096 (citing *McGuckin v. Smith,* 974 F.2d 1050 (9th Cir.1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.1997). This includes future harms, as well as current harms. *Helling*, 509 U.S. at 33. Inexplicable delays in medical treatment, where the delays serve no

penological purpose, can constitute deliberate indifference. *Petties v. Carter*, 836 F.3d 722, 730 (7th Cir. 2016); *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011) (extreme "composite of delays, poor explanations, missteps, changes in position and rigidities" regarding prisoner's request for hormone therapy showed deliberate indifference).

Courts have routinely reversed grants of summary judgment in favor of prison officials, where officials intentionally delayed medical treatment for an incarcerated person which caused harm or risk of harm. *See, e.g., Jett,* 439 F.3d at 1100 (reversing grant of summary judgment in favor of prison officials on prisoner's claim that nineteen-month delay in providing recommended treatment of setting prisoner's broken thumb in a permanent cast violated the Eighth Amendment even where some medical treatment was provided to prisoner); *Singleton v. Lopez*, 577 F. App'x 733, 736-737 (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).

Transgender people who are denied treatment for gender dysphoria face significant health risks including psychological distress, depression, anxiety, self-harm (including attempts at auto-castration), and suicidal ideation.[17] These health risks are well-known to those who provide treatment for gender dysphoria, as they are articulated in the WPATH Standards of Care, as well as in many published studies on this subject.[18] If untreated, gender dysphoria can contribute to debilitating distress, depression, impairment of function, substance use, self-mutilation to alter one's genitals or secondary sex characteristics, other self-injurious behaviors, and suicide.[19]

This court has held, the "severe, ongoing psychological distress and the high risk of self-castration and suicide" caused by lack of medical treatment for gender dysphoria constitutes irreparable harm. *Edmo*, 935 F.3d at 797-798. Additionally, the deprivation of a prisoner's Eighth Amendment right to medically adequate care

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[17] WPATH Standards at 67; G.R. Brown, at 15; Annette Brömdal et al., *Whole-incarceration-setting approaches to supporting and upholding the rights and health of incarcerated transgender people*, 20 Int'l J. Transgenderism 341 (2019), https://www.tandfonline.com/doi/full/10.1080/15532739.2019.1651684 (citing numerous studies).

[18] See, *Id.*

[19] See, e.g., DSM-V, at 455, 458; Stephanie A. Brill & Rachel Pepper, *The Transgender Child: A Handbook for Families and Professionals* 202 (2008) (discussing risk of self-mutilation).

independently establishes an irreparable harm. *Edmo*, 935 F.3d at 798; *Hicklin*, 2018 WL 806764, *10.

Though a plaintiff must show there was harm or risk of harm caused by the delay in provision of medical care, "neither a finding that a defendant's actions are egregious or that they resulted in significant injury to a prisoner is required in order to establish a violation of the prisoner's federal constitutional rights and create a cause of action under § 1983." *McGuckin*, 974 F.2d at 1061. Courts have repeatedly held that these health risks, due to delay or denial of treatment, constitute harm. *Edmo*, 935 F.3d at 797-798 (psychological distress, high risk of self-castration and suicide); *De'lonta II*, 708 F.3d at 522-523 ("constant mental anguish" and "ongoing risk of self-mutilation"); *Rosati*, 791 F.3d at 1040 (repeated attempts at self-castration). Delay in providing treatment for gender dysphoria can lead to well-known health risks that rise to the level of harm under Eighth Amendment analysis.

III. AFFIRMING THE DISTRICT COURT'S DECISION WOULD DENY INCARCERATED TRANSGENDER PEOPLE THEIR CONSTITUTIONAL RIGHT TO MEDICAL CARE.

Studies have shown that although just 0.6% of the adult U.S. population—about 1.4 million individuals—identify as transgender, transgender people are significantly overrepresented in prisons and jails because of systemic

discrimination against them.[20] Research conducted over the past two decades has shown that bias and discrimination in housing, employment, education, and policing cumulatively lead transgender people to enter the criminal justice system at disproportionate rates.[21]

Studies have shown that one out of six (or about 16%) transgender people and more than one out of five (or 21%) transgender women have been incarcerated at some point during their lives—a rate that skyrockets to 47% among Black transgender people.[22] A 2015 study polling 28,000 transgender Americans also

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[20] Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, Williams Institute 3 (2016).); Nat'l Ctr. for Transgender Equality, *LGBTQ People Behind Bars* 5 (2018), https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf (noting transgender individuals report being incarcerated at twice the rate of the general population).

[21] See, e.g., Ctr. for Am. Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People of Color* (2016), http://www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf; Christy Mallory et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, Williams Institute (2015), https://williamsinstitute.law.ucla.edu/wpcontent/uploads/LGBT-Discrimination-and-Harassment-in-Law-EnforcementMarch-2015.pdf; Amnesty Int'l, *Stonewalled: Police Abuse and Misconduct Against LGBT People in the U.S.* (2005), https://www.amnesty.org/en/documents/AMR51/122/2005/en/.

[22] Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality & National Gay and Lesbian Task Force 163 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf. *See* Ctr. for Am. Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People*, "Executive Summary," at 9 (Feb. 2016), http://www.lgbtmap.org/file/lgbt-criminal-justice-unjust.pdf (noting that 16% of TGNCI respondents indicated they had spent time in jail or prison, *compared with* 5% of Americans who will spend time in jail or prison during their lifetimes).

revealed that 9% of Black transgender women, 6% of Native American transgender women, and nearly 2% of all transgender people polled had been incarcerated in the previous year—five to ten times the incarceration rate of the general population.[23] In the juvenile justice system, transgender youth are likewise overrepresented. Several surveys indicate that the percentage of LGBT youth in juvenile facilities is at least double that of LGBT youth in the general population. Approximately, 20% of youth in juvenile facilities identify as LGBT.[24] Once incarcerated or in the juvenile justice system, transgender adults and youth are frequently subjected to longer sentences,[25] sexual victimization,[26] and inadequate access to healthcare.[27]

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[23] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey,* Nat'l Ctr. for Transgender Equality at 190 (2016), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

[24] See, e.g., Ctr. for Am. Progress & Movement Advancement Project, *Unjust: How the Broken Juvenile and Criminal Justice Systems Fail LGBTQ Youth.* (2016), https://www.lgbtmap.org/file/lgbt-criminal-justice-youth.pdf.

[25] Ilan H. Meyer, et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012*, 107 Am. J. Pub. Health 234, 239 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5227944/.

[26] Allen J. Beck, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12: Supplemental Tables*, Bureau of Justice Statistics (2014), http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf; Valerie Jenness et al., *Violence in California Correctional Facilities: An empirical Examination of Sexual Assault*, UC Irvine Ctr. For Evidence-Based Corrs., (2007); *see also* Sylvia Rivera Law Project, "*It's War in Here: A Report on the Treatment of Transgender & Intersex People in New York State Men's Prisons*" (2007), https://srlp.org/files/warinhere.pdf.

[27] *See* notes 29-32, *infra.*

Despite that prison officials have known for over forty years that denial or delay of medical care for serious medical needs violates the Eighth Amendment and for over thirty years[28] that gender dysphoria is a sufficiently serious medical need to implicate the Eighth Amendment, incarcerated transgender people with gender dysphoria frequently face denial or delay of their medically necessary care. "[S]ome of the most serious limitations on transgender people's access to health care have been in the US prison system."[29] Studies have shown that one-quarter of transgender prisoners have reported denial of access to health care during incarceration.[30] In a 2015 survey, 37 percent of transgender respondents who had been incarcerated within the previous year reported that they were prohibited from treatment with hormone therapy while incarcerated though they had been prescribed this treatment prior to becoming incarcerated.[31] Another survey indicates that 31 percent of respondents were denied a diagnosis of gender dysphoria while incarcerated, a necessary first step to accessing gender affirming

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[28] *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988).

[29] Daphne Stroumsa, *The State of Transgender Health Care: Policy, Law, and Medical Frameworks*. Am. J. of Pub. Health, 104(3), e31–e38 (2014), https://doi.org/10.2105/AJPH.2013.301789.

[30] Erin McCauley, et al., *Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail*, J. of Transgender Health, *3*(1), 34–41, https://doi.org/10.1089/trgh.2017.0046.

[31] Sandy E. James, et al., *Report of the 2015 National Transgender Survey*, National Center for Transgender Equality, 193.

health care.[32] This survey also found that 44 percent of respondents had been denied hormone therapy and 40 percent had been denied gender confirmation surgeries that they requested.[33] Only 6 percent of respondents had access to special canteen items that are for transgender prisoners to assist with gender presentation.[34]

Without adequate treatment for gender dysphoria including hormone therapy, incarcerated transgender people like Ms. Raelynn will be deprived of their constitutional right to medical care.

[32] Jason Lydon, et al., *Coming Out of Concrete Closets: A Report on Black and Pink's National LGBTQ Prisoner Survey*, at 30 (2015), https://www.issuelab.org/resources/23129/23129.pdf
[33] *Id.* at 31.
[34] *Id.*

CONCLUSION

For all of these reasons, *Amici Curiae* respectfully request that this Court reverse the District Court's judgment.

Dated: November 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2020 I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

DATED: November 17, 2020

/s/ Richard Saenz
Richard Saenz

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FOR THE NINTH CIRCUIT

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