QUESTIONS PRESENTED

I. Is an inmate who is represented by counsel permitted to benefit from the prison mailbox rule when submitting his notice of appeal where the inmate's attorney is incapacitated, and if so, has Respondent satisfactorily complied with Fed. R. App. P. 4?

II. Is it a violation of an inmate's Eighth Amendment right against cruel and unusual punishment for a prison facility to impose a blanket ban against gender affirmation surgery without permitting those inmates suffering from gender dysphoria to un-dergo an individualized examination to demonstrate necessity for such surgery, and then providing inmates with such surgery when found necessary?

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The opinion of the United States District Court for the District of Silphium ("District Court") is unreported but set out in the record. R. 22-29. The opinion of the United States Court of Appeals for the Fourteenth Circuit ("Fourteenth Circuit") is also unreported and set out in the record. R. 30-47.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

Inmate's Diagnosis and Treatment of Gender Dysphoria. The Respondent in this case, Mr. Lucas Escoffier is a transgender man. Record at 1. Assigned female at birth, Respondent suffered from depression and suicidal ideation into adulthood. *Id.* He was formally diagnosed with gender dysphoria (GD) on March 9, 2011. *Id.* Following his formal diagnosis, Respondent began his "social transition" by informally changing his name to Lucas and adopting male-specific pronouns. *Id.* In early 2012, Respondent began gender alignment therapies and treatment for his GD. *Id.* With his social transition and therapies proceeding well, Respondent underwent a chest-reconstructive surgery which brought his body into closer alignment with his gender identity. *Id.* In early 2018 Respondent legally changed his name to Lucas Escoffier. *Id.*

Respondent's battles with depression and suicidal ideation, however, were not over. *Id.* By April 2018, Respondent began to suffer again from his GD. *Id.* Following consultations with his doctors, Respondent elected to proceed with gender affirmation surgery—a sex reassignment surgery—as a last-ditch way to treat his GD. *Id.* Before Respondent could schedule a gender affirmation procedure, however, he was arrested, charged, and indicted for criminal tax fraud in the first degree, among other

charges. *Id.* at 2. On March 1, 2020, Respondent struck a deal with the prosecution in which he agreed to plead guilty to criminal tax fraud in the third degree in exchange for a lesser sentence. R. at 2. On March 7, 2020, Respondent began his sentence at Garum Correctional Facility ("Garum"), the only facility for individuals incarcerated in the State of Silphium. *Id.*

Miasmic Syndrome. In the Spring of 2020, a highly contagious and deadly viral disease—now known as Miasmic Syndrome—was discovered. *Id.* By the Summer of 2020, the virus became a global pandemic. *Id.* In response to Miasmic Syndrome's campaign across the world, local, state, and federal governments implemented public health measures aimed at protecting their communities. *Id.* Prisons, with inherently close living quarters and constant turnover of inmates, struggled to control the spread of Miasmic Syndrome. To combat the virus, Garum implemented its own strict public health measures, including cancelling classes and job training courses, limiting access to medical facilities, and reducing time for recreational activities. *Id.* at 3. For their own protection, inmates remained in their cells for the vast majority of the day. *Id.* Garum also implemented policies to limit interactions between inmates and visitors. *Id.* For example, all in-person visitations between inmates and visitors were prohibited. *Id.* As a result, inmates were required to meet with their counsel and attend judicial hearings via videoconference. *Id.* Garum, however, has only five computers which are accessed via appointment. *Id.*

Crafting a Uniform Policy. In 2019, Garum implemented the Garum Correctional Facility Medical Policy Handbook ("the Policy") which prescribes

Garum's process for treating inmates with GD. *Id.* at 4; App'x. A. The Policy, which was written by a committee that reports to Dr. Laridum, the Director of Health Division, and Administrator Posca, states in relevant part that an inmate with documented or claimed GD will undergo a physical and mental health evaluation by a licensed psychiatrist. App'x. A. If, after the physical and mental evaluation the licensed psychiatrist finds that the inmate requires treatment for GD, the inmate may only receive hormone therapy as treatment. Garum does not permit surgical intervention as a means to treat an inmate's GD. *Id.*

The Policy also provides a detailed appeals process in which inmates may contest the denial of clinical services by petitioning the Division of Health. *Id.* If an inmate's appeal is granted at any level of the appeals process, the inmate is entitled to those clinical services sought. *Id.* The inmate, however, is never entitled to any clinical service "not ordinarily available" at Garum, like surgical intervention as treatment for GD. *Id.* The Policy, although implemented before the spread of Miasmic Syndrome, has been a crucial aspect of Garum's efforts to protect inmates from unnecessary interactions with non-inmates and limit the spread of the virus.

Denial of Inmate's Preferred Treatment. As his time at Garum continued, Respondent's medical condition worsened. *Id.* Despite being treated through hormone therapy, Respondent requested gender affirmation surgery. *Id.* Respondent met with several Garum medical professionals who informed him of Garum's Policy which prohibited gender affirmation surgery. *Id.* Unsatisfied, Respondent proceeded through the Garum appeals process where each appeal received its own investigation

and administrative review. *Id.* at 5. On September 15, 2020, Respondent's final appeal was denied. *Id.*

Following the denial of his final appeal, Respondent retained Ms. Sami Pegge as counsel and sought to bring a civil rights claim against Garum for denying him surgical intervention as a violation of Respondent's Eighth Amendment rights. *Id.* On October 5, 2020, the Inmate filed a 42 U.S.C. § 1983 complaint against Administrator Posca as administrator of Garum. *Id.* The complaint alleged Garum's blanket ban on gender affirmation surgery and the denial of the Respondent's request for surgery violated his Eighth Amendment Rights to be free of cruel and unusual punishment. *Id.* On October 25, 2020, Administrator Posca filed his response and moved to dismiss Respondent's complaint, arguing that the blanket ban on gender affirmation surgery was not a violation of Respondent's Eighth Amendment rights because the policy was not specifically targeted at Respondent and that other similar blanket ban policies were held constitutional. *Id.* On February 1, 2021, the District Court of Silphium converted Administrator Posca's motion to dismiss into a motion for summary judgment which it then granted in favor of Administrator Posca. *Id.*

Untimely Filing. Following the grant of summary judgment, Respondent and Ms. Pegge decided to appeal the District Court's ruling with Ms. Pegge continuing to represent Respondent. R. at 6. Unbeknownst to Respondent, Ms. Pegge fell ill with Miasmic Syndrome soon after their conversation and required extensive hospitalization for nearly two weeks. *Id.* Despite Ms. Pegge's attempts to ensure the continued representation of Respondent by other attorneys at her firm, a clerical

error prevented Respondent's legal matters from being transferred to another associate. *Id.* at 6-7. Throughout Ms. Pegge's absence during the month of February, Respondent attempted to contact her to no avail. *Id.* at 7.

On March 1, 2021, Respondent sent an email from a Garum computer to Ms. Pegge's firm website. *Id.* The following day, another associate, Mr. Sharafi contacted Respondent and informed him of Ms. Pegge's illness and directed Respondent to submit his Notice of Appeal to the prison mailbox immediately. *Id.* Respondent placed his Notice of Appeal in the Garum prison mailbox on March 2, 2021, attached to a prison mailing form. *Id.* The Notice of Appeal was not mailed to the District Court until March 7, 2021, however, due to delays caused by the pandemic. *Id.* The Notice of Appeal was received by the District Court on March 10, 2021, 9 days after the appeal deadline. *Id.*

1. **Nature of the Proceedings**

The District Court. Respondent's § 1983 claim against Administrator Posca was filed on October 5, 2020. The complaint alleged his Eighth Amendment rights were violated by Administrator Posca's enforcement of Garum's blanket ban against gender affirmation surgery and the denial of his "necessary medical transition surgery." Administrator Posca's Motion to Dismiss was converted into a Motion for Summary Judgment by the District Court which it granted in favor of Administrator Posca on February 1, 2020.

The Court of Appeals. Under the direction of Mr. Sharafi, Respondent placed his Notice of Appeal in the Garum prison mailbox on March 2, 2021. The Notice was

received on March 10, 2021, by the Fourteenth Circuit Court of Appeals who analyzed the following questions: First, can an inmate represented by counsel take advantage of the prison mailbox rule provided for under Federal Rule of Appellate Procedure 4 where the inmate's counsel was temporarily incapacitated at the time of submission? And second, is a blanket ban prohibiting gender affirmation surgery at Garum an unconstitutional violation of an inmate's Eighth Amendment right to be free of cruel and unusual punishment?

The Fourteenth Circuit reversed the District Court's grant of summary judgment and found Respondent's Notice of Appeal timely filed under the prison mailbox rule and that Respondent was entitled to utilize the prison mailbox rule despite his continued representation by counsel. The Fourteenth Circuit also held that Garum's blanket ban on gender affirmation surgery violated Respondent's Eighth Amendment rights. On August 15, 2021, Administrator Posca petitioned this Court for a writ of certiorari which was granted on September 22, 2021.

2. STANDARD OF REVIEW

When challenging a lower court's determination of questions of law, the Court must make an independent judgment on the facts of the case, and thus, review the case de novo. See *Bose Corp. v. Consumer Union*, 466 U.S. 485, 499 (1984). In reviewing a case de novo, this Court "makes an independent determination of the issues and does not give any special weight to the prior determination of the lower court." *United States v. Raddatz*, 447 U.S. 667, 690 (1980).

SUMMARY OF THE ARGUMENT

I.

The Fourteenth Circuit held there is "no good reason" to limit the prison mailbox rule to justify the holding that Respondent's notice of appeal was properly before the court. However, the Fourteenth Circuit could have found several "good reasons" by examining this Court's decision in *Houston.* At the heart of the prison mailbox rule is fairness. The rule was established to put inmates seeking an appeal on equal footing with litigants who are not incarcerated. In extending this rule to *all* inmates, the Fourteenth Circuit overcorrects the imbalance by creating an advantage for inmates. While an unrepresented litigant that is not incarcerated has to strictly adhere to the filing requirements, a represented inmate gets significant leeway. The result of this decision is a deviation from the fairness and equity that motivated the *Houston* Court.

Respondent was represented by counsel from start to finish. Thus, his notice of appeal is not properly before the court because the prison mailbox rule was intended to only apply to unrepresented inmates. Moreover, even if the Court decides to extend the prison mailbox exception to *all* inmates, Respondent's appeal is still not properly before the court because he failed to comply with the instructions prescribed by the Federal Rules of Appellate Procedure.

II.

Respondent's Eighth Amendment rights were not violated by the implementation of the Policy. All Eighth Amendment analyses require both an

objective inquiry into the alleged deprivation at issue, and a subjective inquiry into the alleged culpable state of mind of the accused depriver. An Eighth Amendment claim cannot succeed without the claimant establishing that the defendant acted with deliberate indifference to their Eighth Amendment rights.

Here, the Eighth Amendment does not require Garum or Administrator Posca to deviate from the medically advised Policy instituted at Garum. First, the Policy was created with the assistance of medical staff and a committee of individuals to ensure its fairness, safety, and benefit to all individuals at Garum. The Policy was crafted taking in mind the pandemic, the discord amongst the medical community as to the necessity of gender affirmation surgery, and the offering of alternative treatment for GD to inmates.

Although advocacy groups certainly can provide useful information about their chosen specialty, special interest groups, other non-judicial entities do not set constitutional minimums. The WPATH guidelines may even represent a social or general consensus on an issue, but constitutional minimums cannot and have never been set by third-parties.

Finally, Administrator Posca's decision to both implement and not deviate from the Policy was reasonable and did not show deliberate indifference. A show of reasonableness on the part of prison officials rebuts the contention of deliberate indifference from the moving party. When viewing Administrator Posca's actions in light of the pandemic, the medical advice he received, and the legitimate health and security interests posed by allowing the surgery, his decision was reasonable.

Further, the Policy is held legally reasonable under the *Turner* test. The Garum Policy is both validly and rationally related to the valid governmental and prison interest in ensuring inmate and public health and safety, particularly during a public health crisis. The Policy is also reasonable under the *Turner* test as Garum provided Respondent with alternative treatments through hormone replacement therapy during Respondent's time at Garum. Finally, the Policy is reasonable under the *Turner* standard as the risks to Respondent, guards, medical staff, the public, and the other inmates at Garum is great in light of the pandemic and prison resources would be unfairly allocated to such a procedure.

ARGUMENT AND AUTHORITIES

I. RESPONDENT'S APPEAL IS NOT PROPERLY BEFORE THE COURT BECAUSE IT IS UNTIMELY AND DOES NOT COMPLY WITH THE FEDERAL RULES OF APPELLATE PROCEDURE.

A timely notice of appeal is a mandatory jurisdictional prerequisite of the right to appeal. *United States v. Robinson*, 361 U.S. 220, 224 (1960). Rule 4(a) of the Federal Rules of Appellate Procedure ("FRAP") requires that parties to civil actions must file a notice of appeal within 30 days after the entry of judgement. *See* Fed. R. App. P. 4(a)(1)(A). In *Houston v. Lack*, the Supreme Court held that a *pro se* prisoner's notice of appeal is filed at the moment of delivery to prison authorities for forwarding to the district court, effectively establishing what is referred to as the "prison mailbox rule." *Houston v. Lack,* 487 U.S. 266 (1988). The "prison mailbox rule" (PMR) adopted in *Houston* was later codified in Rule 4(c) of the FRAP. Rule 4(c) provides that "if an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely

if it is deposited in the institution's internal mail system on or before the last day for filing and it is accompanied by (a) a declaration in compliance with 28 U.S.C. § 1746." Fed. R. App. P. 4(c).

Circuits are split over whether an inmate's *pro se* status is required for Rule 4(c). Petitioner contends that it does not. The Respondent's notice of appeal is not properly before the court for several reasons. First, the PMR is only afforded to inmates that are not represented by legal counsel. Furthermore, the inmate was represented by legal counsel, effectively placing him outside of the benefit afforded by the PMR. Finally, even if the court finds the inmate should be afforded the benefit of the PMR, his appeal is still not properly before the court because he did not comply with rule 4(c).

A. The Inmate Was Represented By Legal Counsel Who Unfortunately Failed To Take Corrective Actions.

The attorney-client relationship is governed by the Model Rules of Professional Conduct ("MRPC"). *See generally*, Model Rules of Pro'l Conduct (2020). The MRPC prescribes a lawyer's duty to end representation if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." Id. at R. 1.16. If termination is necessary, the MRPC requires a lawyer to "take steps to the extent reasonably practicable to protect a client's interests." Id. The rules even provide attorneys with several measures they may take to protect their client's interests. MRPC Rule 1.16(d) These include but are not limited to "giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance

payment of fee or expense that has not been earned or incurred," and finally, "the lawyer may retain papers relating to the client to the extent permitted by other law." MRPC at R. 1.16. Comment (3) to Rule 1.16 notes once a lawyer has been appointed to a client, "withdrawal ordinarily requires approval of the appointing authority..." and "...court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation." Id. at Comment (3).

When viewing the MPRC as a whole, a lawyer's duty of diligence is vital in all situations. While the actual rule surrounding a lawyer's diligence is brief, it is the drafter's comments which give the rule meaning. MRPC Rule 1.3 provides, "A lawyer shall act with reasonable diligence and promptness in representing a client." MRPC at R 1.3. This duty of heightened diligence falls primarily on the attorney, rather than the client. Comment (4) to Rule 1.3 states, "Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so." Id. at Comment (4) . Importantly, the comments provide requirements for sole practitioner's "death or disability," in which case "the duty of diligence may require that each sole practitioner prepare a plan … that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action." Id. at Comment (5).

A case similar to the one at bar was heard by the 7th Circuit in *Modrowski v. Mote*. 322 F.3d 965 (2003). In *Modrowski*, Petitioner Modrowski was an Illinois

prisoner serving a life sentence. He hired an attorney to file a petition under 28 U.S.C. § 2254 for him, but due to his attorney's "physical and mental ailments" Modrowski's petition was filed one day late. Id. at 966. The attorney claimed his illnesses or struggles prevented him from filing the petition on time. *Id.* In ruling Modrowski bore the burden of his attorney's incapacity, the court hinged its decision on the important relationship between attorney negligence and attorney incapacity. The 7th Circuit ruled Modrowski's petition untimely "because an attorney's failure to act as a result of incapacity is analogous to an attorney's failure to act as a result of negligence, for which we do not permit equitable tolling." *Id.*

When viewing this issue for the first time, the 7th Circuit set the standard for equitable tolling high, stating "Equitable tolling excuses an untimely filing when "[e]xtraordinary circumstances far beyond the litigant's control … prevented timely filing." We rarely deem equitable tolling appropriate – in fact, we have yet to identify a circumstance that justifies equitable tolling in the collateral relief context." Id. at 967 (internal citations omitted). In supporting this contention, the *Modrowski* Court notes numerous cases where equitable tolling has been rejected, even in cases more extreme than the one at bar. See, e.g., *Montenegro v. United States*, 248 F.3d 585, 594 (7th Cir. 2001) (equitable tolling not awarded where there was minimal response from attorneys, a language barrier, attorneys lack of legal knowledge, and client transfer between prisons) *overruled on other grounds by Ashley v. United States*, 266 F.3d 671 (7th Cir. 2001); *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) (equitable tolling not awarded where attorney's father died during representation);

see also Brooks v. Walls, 279 F.3d 518, 525 (7th Cir. 2002) (finding courts have little room for interpretation in cases where petitioner does not fall within one of the statutorily provided acceptable circumstances for equitable tolling in 28 U.S.C. § 2244(d)). Without approval from the court, statutory allowance, or any communication to Respondent about the termination of an attorney-client relationship, Respondent was represented by Forme Cury at all times relevant to this action.

Moreover, a client, even an incarcerated one, has a duty to "vigilantly oversee" their case and the actions of their attorney. *Johnson v. McCaughtry*, 265 F.3d 559, 566 (2001). In *McCaughtry*, the incarcerated Plaintiff Johnson argued the "time period should be equitably tolled because the delays were due to his incompetent attorney." *Id.* at 566. In response to the Plaintiff's argument, the *McCaughtry* Court notes the general rule that "a lawyer's mistake is not an extraordinary circumstance justifying the application of equitable tolling." *Id.*

This duty placed on the client to personally maintain their case applies equally to both incarcerated and non-incarcerated clients. In his claim for ineffective assistance of counsel, "Johnson argues that his case is unique because he was incarcerated, and therefore was unable to demand better representation from his counsel. He argues that the circumstances of incarceration make it difficult for a prisoner-petitioner to ensure that petitions are filed on a timely basis." *Id.* The 7th Circuit was not persuaded by Johnson's incarceration argument noting "habeas relief, by definition, is almost always sought by an incarcerated petitioner, and we must

decline to find that this circumstance is so extraordinary as to warrant the application of this rarely-applied doctrine." *McCaughtry* at 566. The reality within our legal system is that "Unfortunately, many clients, whether in prison or not, must vigilantly oversee the actions of their attorneys and, if necessary, take matters into their own hands." *Id.*

In cases where incarcerated petitioners have argued ineffective assistance of counsel or lack of adequate representation, courts have noted actions which can be taken by both the client and attorney to mitigate the damage done to the client's case. As seen in the Fifth Circuit, where an inmate's counsel became incapacitated, the incarcerated client requested new counsel, and was awarded both new court-appointed counsel and an extension to file his habeas petition. *See generally Davis v. Johnson*, 158 F.3d 806 (1998). In discussing an allegation of ineffective assistance of counsel, the *Davis* Court noted the difficult standard for ineffective assistance of counsel saying, "An attorney's performance is deficient only when the representation falls below an objective standard of reasonableness." *Davis* at 812. Turning to possible actions to be taken by the attorney at issue, the Tenth Circuit was unsympathetic to an attorney's medical condition as "the district court noted that counsel 'had four months to file a habeas petition after being retained in May 2007.'" *Bradford v. Horton*, 350 Fed.Appx. 307, 309 (2009). In its denial of equitable tolling, the Tenth Circuit provided Petitioner Bradford's counsel with multiple actions which could have been taken to mitigate impact to representation in light of medical emergencies including "filing a 'skeletal' petition or withdrawing representation so that Bradford

could hire another attorney or represent himself." *Bradford* at 309. Neither Respondent, or his legal counsel attempted to take any appropriate corrective action surrounding Respondent's notice of Appeal and as such, it is untimely.

1. The inmate's relationship with his attorney was never terminated

At no point in the case did Forme Cury formally withdraw as Petitioner's legal representation. As required under MRPC Rule 1:16, in order for Ms. Pegge or Forme Cury to no longer represent Petitioner, Forme Cury and Ms. Pegge was required to "comply with applicable law requiring notice or permission of a tribunal" if she intended to discontinue representation of Petitioner. Ms. Pegge did neither. Further, if Ms. Pegge or Forme Cury believed termination of Petitioner as a client had occurred, Ms. Pegge or another member of Forme Cury was required to "protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel," and more. Neither Ms. Pegge nor Forme Cury exercised statutory authority to terminate, or judicial authority to terminate and further certainly did not take the required steps if the attorney-client relationship had ended.

At no point was the attorney-client relationship between Petitioner and Forme Cury terminated. Petitioner enlisted the services of Forme Cury which is "a medium-size local firm … with approximately 25 attorneys and 40 working staff members (including secretaries, legal assistants, paralegals, docketing staff, and filing room staff)." R at 5. While the MRPC do not specify the precise method by which a case must carry on within a firm, MRPC Rule 1.3, Comment ___ provides an affirmative

duty to sole practitioners to create and employ contingency plans, it is reasonable to assume an attorney working in a law firm has a contingency plan built in. In other words, it is likely the MRPC do not specify what a lawyer practicing within a firm must do in the case of their incapacitation, as it is generally assumed another attorney within the firm will take up the case in the interest of the firm.

Indeed, Petitioner's case was not the first of its kind that Forme Cury or Ms. Pegge had participated in. In fact, "Ms. Pegge was a senior associate who had informally specialized in prison litigation at the firm. Ms. Pegge handled the cases of almost all of the firm's incarcerated clients." R at 5. Not only did Forme Cury frequently handle claims of this kind, Ms. Pegge specifically was deemed the firm's informal specialist on the matter. As an informal specialist of sorts, Ms. Pegge and Forme Cury should have been and were in fact well equipped to handle Petitioner's case in Ms. Pegge's absence. Further, the fact that Forme Cury handles cases of this nature frequently, makes the advise of Mr. Sharafi to Petitioner all the more egregious. After Forme Cury failed to inform Petitioner they were no longer adequately handling his case, Mr. Sharafi, another associate at Forme Cury, advised Petitioner "that since Mr. Escoffier did not have any attorney to help him, Mr. Escoffier would need to submit his Notice of Appeal to the prison mailbox on his own immediately." R at 7. As Forme Cury had never formally withdrawn from representation in Petitioner's matter, Mr. Sharafi's advice is ill-founded, and ill-advised. Without approval from the court, statutory allowance, or any communication

to Petitioner about the termination of an attorney-client relationship, Mr. Escoffier was represented by Forme Cury at all times relevant to this action.

2. Counsel, counsel's firm and or Prisoner should have taken corrective action.

Petitioner took minimal if any action to ensure his appeal was filed timely. According to the uncontroverted record, Respondent spoke with Ms. Pegge shortly after the district court dismissed Respondent's claim on February 1, 2021. R at 6. During the February 1, 2021, call, Ms. Pegge assured Respondent she and her firm would continue to represent him throughout his appeal and Pegge further notified Respondent "she would be in touch – they would continue to build the case and she would need to get [Respondent's] signature on "some documents" by "early March."" R at 6. Although Respondent did attempt to contact Ms. Pegge and Forme Cury during February and early March 2021, Respondent at no time filed any petitions with the court or attempted to request the court appoint him new counsel. R. at 7.

Unfortunately, when Respondent was able to get in touch with Mr. Sharafi at Forme Cury on March 2, 2021, Respondent was informed of Ms. Pegge's condition and was told by Sharafi that he was not familiar with Petitioner's case and as such Respondent "did not have any attorney to help him." R at 7. At this time, neither Respondent nor his counsel attempted any action to mitigate Ms. Pegge's ill-health. Respondent and Forme Cury were able to petition for an extension, work to replace Ms. Pegge with another associate at Forme Cury, or having Forme Cury withdraw from representing Respondent altogether if they were unable to fulfill the obligations of the representation.

Respondent is responsible for the actions and resulting consequences of his attorney. Uncontroverted case law and stare decisis show, Respondent's request for equitable tolling cannot be granted due to purported negligence on the part of Respondent's legal counsel. As noted in *McCaughtry*, at attorney's negligence, as is at issue here, is not grounds for awarding the impactful grant of equitable tolling meaning equitable tolling is not appropriate for the case at bar, either. Further, Respondent's claims of his incarcerated status hindering his communication with counsel are rendered null and void under the *McCaughtry* principle which recognizes that the very nature of habeas petitions involves prisoners and a petitioner's status as incarcerated is not reason alone for equitable tolling.

B. The Mailbox Rule Does Not Extend To Those Who Are Represented By Counsel.

The majority of circuits addressing the issue, have maintained the PMR as posited by the *Houston* Court, declining to extend its benefit to prisoners with legal representation. *United States v. Camilo*, 686 F. App'x 645, 646 (11th Cir. 2017);*Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002); *United States v. Rodriguez-Aguirre*, 30 F. App'x 803, 805 (10th Cir. 2002); *Burgs v. Johnson County*, 79 F.3d 701, 702 (8th Cir. 1996). These circuit courts have not extended the measure to represented inmates because the *Houston* Court's decision was—in large part—based on the "unique" position of the *pro se* inmate. *Houston v. Lack*, 487 U.S. 266, 267 (1988). Following *Houston's* codification, only two circuits chose to expand the PMR to inmates who have retained legal counsel. *United States v. Moore*, 24 F.3d 624 (4th Cir. 1994)(finding notice of appeal was filed when it was delivered to prison

officials, though inmate was represented by counsel in the criminal matter); *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004)(finding the mailbox rule does not depend on whether prisoner is represented). These circuits used the words of Rule 4(c)—a strictly procedural measure—in justifying their decision to disregard the legal reasoning fundamental to the Court's decision in Houston which centered around equity. *Houston*, 487 U.S. at 270

The Court should adopt the reasoning of the First, Fifth, Eleventh, and Eighth Circuits because (1) the policy concerns highlighted by *Houston* are not the same for inmates who have representation, (2) the conclusion reached by the Fourth and Seventh Circuit do not apply to this case, and (3) *Rule* 4(c) was meant to reflect this Court's holding in *Houston*, not abandon it.

1. The policy concerns highlighted in Houston are not the same for inmates that are represented by counsel.

The court's rationale behind the PMR was to offset the practical limitations disadvantaging *pro se* prisoners in an attempt to place them on equal footing with litigants who are not incarcerated. *Garvey v. Vaughn*, 992 F. 2d 776, 781 (11th Cir. 1993)(explaining that the mailbox rule "fashion[s] an equitable resolution to the *pro se* prisoner's filing dilemma*"); Lewis v. Richmond City Police Dep't*, 947 F.2d 733, 736 (4th Cir.1991)("rule of equal treatment ... to ensure that imprisoned litigants are not disadvantaged by delays which other litigants might readily overcome."). The *Houston* Court explained:

> The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court

> clerk receives and stamps their notices of appeal before the 30-day deadline. Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse to see that the notice is stamped "filed" or to establish the date on which the court received the notice... *Pro se* prisoners cannot take any of these precautions; *nor... do they have lawyers who can take these precautions for them.*

Houston, 487 U.S. at 269.

Inmates who acquire legal representation, are in a similar position to represented litigants that are not institutionalized because both parties are able to rely on counsel to file documents on their behalf. The Fourth Circuit reasoned that represented prisoners are in the same "unique" circumstances discussed in *Houston* because jail authorities can impede on an inmate's access to counsel. *Moore*, 24 F.3d at 625. However, the Fourth Circuit's concern regarding an inmate's access to counsel is not entirely justified. If an inmate has legal representation, their counsel can take legal action against prison officials who delay access to their client. Moreover, extending the PMR to inmates that have representation would accord them an unfair advantage over unconfined persons who, notably, may not even have the benefit of legal counsel. In effect, it allows represented inmates to have more time to file their appeals than unrepresented litigants, despite their legal disadvantage, simply because they are not in jail. The Fourth Circuit in *Moore* asserted that "*Houston* itself was premised upon fairness." *Moore*, 24 F.3d at 625. However, the result of adopting the Fourth Circuit's decision to expand the PMR is inconsistent with this Court's original premise—*fairness.*

Respondent, like the prisoner in *Houston,* who was unable to actively monitor his appeal or take steps to ensure his notice was delivered timely, had to deal with

limitations when trying to file his notice of appeal. However, while the prisoner in *Houston* had no other means of effectively filing his appeal, Respondent had a lawyer who was responsible for doing so. Further, the unfortunate circumstance of having representation that mishandles your appeal is not unique to inmates. Just like Respondent, those who are not institutionalized also face the unfortunate possibility of hiring counsel that drops the ball.

Moreover, while Respondent certainly had to overcome substantial obstacles *similar* to the prisoner in *Houston*, the important difference concerns *why* he was faced with those obstacles. Respondent, unlike the prisoner in *Houston,* was only forced to use the prison mailing system because his representation his representation was inadequate, and the ongoing pandemic slowed down his ability to effectively contact her. However, Respondent's limitations were not unique to his status as a prisoner, but rather, unique to the practical implications stemming from the pandemic. The negative impact of Miasmic Syndrome effected the entire population of Silphium state, including all attorneys—not just the ones representing inmates. It is unlikely that Respondent was the only client hindered by a sick attorney. The conclusion reached in *Moore* and *Craig* do not apply to this case.

2. The conclusion reached in Moore and Craig should not apply here.

Respondent's circumstances are distinguishable from both *Craig* and *Moore*. Both of those cases involved defendants appealing a *criminal conviction*, not a civil judgement. This distinction is not insignificant. As a practical matter, the deadline for filing a notice of appeal in a criminal case is less than half of the time allotted for

civil cases.[1] Respondent had twice the amount of time to file his notice of appeal than the prisoner in both *Moore* and *Craig*. In addition to the stricter timing requirements, the severity of missing an opportunity to appeal a criminal judgement is far greater than that of a civil case. When reaching their decision, even the *Moore* Court recognized the heightened implications surrounding criminal matters in comparison to civil cases. *Moore*, 24 F.3d at 625 (noting "[i]t would indeed be perverse to hold that *Houston* applies to…civil damages but does not apply when a prisoner's freedom is at stake.").

3. 4(c) did not eliminate the Houston court's pro se requirement, rather it set guidelines for when the notice is considered filed.

While a lot of the discussion surrounding *Houston* regards the implications of a *pro se* status, the practical discussion concerned a rule interpretation. *See Houston,* 487 U.S. at 273. In *Houston* the court explained that the FRAP did not specify "when a notice of appeal has been 'filed' or designate the person with whom it must be filed" as it concerns litigants filing from prison. *Houston,* 487 U.S. at 273 (explaining "the question is one of timing, not destination: whether the moment of "filing" occurs when the notice is delivered to the prison authorities or at some later juncture in its processing."). Further, the promulgation of Rule 4(c) was a procedural measure intended eliminate the timing dilemma presented in *Houston*. *See* Fed. R. App. P.

[1]Pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure, "in a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days." Fed. R. App. P. 4(b)(1)(A). By contrast Rule 4(a) states that "in a civil case...must be filed with the district clerk within 30 days after entry of the judgment." Fed. R. App. P. 4(a)(1)(A).

4(c)(1)(stating "the notice is timely if it is deposited...on or before the last day for filing.").

Importantly, Rule 4(c) does not govern which inmates can take advantage of the exception because the *Houston* court already expressed that. *See Houston,* 487 U.S. at 273. In fact, the Advisory Committee Note to Rule 4(c)(1), FRAP comment in Rule 4, explains that the rule was meant to mirror the *Houston* decision. *See* Advisory Committee Note to Rule 4(c)(1)(noting "[t]he amendment [adding Rule 4(c)] reflects th[e] decision" of the Supreme Court in *Houston*.). Since the Rule's stated purpose was to "reflect" *Houston*, which only applied the mailbox rule to *pro se* inmates, it should not be construed in a way that is inconsistent with *Houston's* approach. Furthermore, Rule 4(c) should not negate the *pro se* requirement posited by this Court.

C. Even if the court finds that he does benefit from the mailbox rule, notice is still untimely because he did not comply with 4(c)

Federal Rules of Appellate Procedure ("FRAP"), Rule 4 governs appeal in a civil case from a judgment order of a district court and thus is applicable to the case at bar. FRAP Rule 4(1)(A) provides a bright-line rule for appeals stating that, with limited exceptions, "the notice of appeal must be filed with the district clerk within 30 days after entry of the judgment or the order appealed from." Fed. R. App. R. 4(1)(A).

FRAP Rule 4(c) discusses appeals by inmates who are confined in an institution. Subsection (c) applies in situations where "an institution has a system designed for legal mail." *Id.* at 4(c). Where the institution has such a mail system, the

appealing inmate "must use that system to receive benefit of this Rule 4(c)(1)." *Id.* at 4(c)(1). Under Rule 4(c)(1), an inmate's notice of appeal is timely "if it is deposited in the institution's internal mail system on or before the last day of filing," and meets the other requirements laid out in subsection (c). *Id.* An inmate looking to benefit from Rule 4(c) after depositing their appeal in the mail system within the appropriate time must also accompany that filing with either: "(i) a declaration in compliance with 28 U.S.C. § 1746 –or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or (ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited, and that postage was prepaid." *Id.* The only other time an inmate filing may be deemed timely is if "the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i)." *Id.*

After the decision in *Houston v. Lack*, Rule 4 took on a broader meaning. 487 U.S. at 266. Since *Houston*, Rule 4 has incorporated the Houston holdings and now states:

> "If an inmate confined in an institution files a notice of appeal in either a civil or criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid."

Prince v. Philpot, 420 F.3d 1158, 1164 (2005).

In a case similar to the one at bar, Mr. Ceballos-Martinez attempted to take advantage of the PMR, but the Tenth Circuit found his "notice of appeal lacks a

declaration in compliance with 28 U.S.C. § 1746 or notarized statement setting forth the notice's date of deposit with prison officials." *U.S. v. Ceballos-Martinez*, 387 F.3d 1140, 1143 (2004). In providing an in-depth analysis of Rule 4(c), the *Ceballos-Martinez* Court noted, "First, when placed into the context of Fed. R.App. P. 4(c)(1) as a whole, we find that 'may,' as used in the last sentence of the Rule, references a choice between the means of proving compliance – not an option to ignore the provisions of the third sentence altogether." *Id.* at 1144.

Respondent's notice of appeal was untimely under FRAP 4(c) as no declaration was made, and the evidence offered is inconclusive. Rule 4(c)'s mandate is clear in its requirement of either a declaration or evidence showing the notice was deposited into the appropriate internal mailbox, neither of which Respondent did. The record shows Respondent only filed the notice, and no declaration was attached along with it, falling short of Rule 4(c)(1)(i). Further, the form seen in Appendix F states Respondent deposited a document to be mailed, with no mention of the name of the document, contents of the document, or nature of the document in any way. R. pp'x F. This vague and incomplete description offered by the Garum Facility form falls short of the requirement housed in Rule 4(c)(1)(ii).

When viewed in light of the updated Rule 4 and the *Ceballos-Martinez* opinion, Respondent's lack of a declaration and subsequent filing of the inadequate form found in Appendix F fall below the legal standard required to take advantage of Rule 4. Further, Respondent's filed confirmation of mailing provides no confirmation by Respondent as to the document to be filed, the contents of the document, or any

substantive information which would have alerted prison officials, or the court that Respondent was attempting to file a notice of appeal, as required by *Prince*.

II. THE EIGHTH AMENDMENT DOES NOT REQUIRE MR. POSCA TO DEVIATE FROM A UNIFORM POLICY CREATED BY EXPERIENCED MEDICAL OFFICIALS PROSCRIBING GENDER AFFIRMATION SURGERY AS TREATMENT FOR GENDER DYSPHORIA IN INMATES.

The original intent behind the Eighth Amendment's prohibition of "cruel and unusual punishment" was to protect wrongdoers from barbaric and inhumane methods of punishment. *Estelle v. Gamble*, 429 U.S. 97, 102-103(1976)("It suffices to note that the primary concern of the drafters was to proscribe 'torture(s)' and other 'barbar(ous)' methods of punishment."). While measure for "cruel and unusual punishment" has marginally evolved with the times, it still only extends to punishments involving "the unnecessary and wanton infliction of pain." *Id.* In *Estelle*, the Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." *Id.*

A deliberate-indifference claim entails both an objective and a subjective component. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). First, the inmate must establish that the alleged "deprivation" is "sufficiently serious" enough to "constitute a denial of the minimal civilized measure of life's necessities." *Id.* at 834 (quoting *Wilson*, 501 U.S., at 298);*Brown v. Johnson*, 387 F.3D 1344, 1351 (11th Cir. 2004)(inmate must establish "an objectively serious medical need"). Second, inmates must show that the official had the "culpable state of mind," one of "deliberate indifference" to inmate health or safety. *Farmer*, 511 U.S. at 834. Further, the Eighth

Amendment is not violated when prison officials act reasonably. *See Helling v. McKinney,* 509 U.S. 25, 32 (1993)(noting the Eighth Amendment only requires that prison officials provide "reasonable safety"). Here, parties agree that gender dysphoria is a serious medical need so there is no debate about the objective component. The dispute turns on the subjective component. Particularly, the parties disagree over whether the specific form of treatment that the Inmate desires is medically necessary, such that any policy prohibiting it is constitutes deliberate indifference.

This Court should reverse the Fourteenth Circuit because the actions of Administrator Posca and his medical staff were reasonable and did not constitute deliberate indifference to the serious medical needs of the Respondent.

A. The Medical Advisors reasonably exercised professional judgement when creating the Uniform Policy as their opinion was consistent with accepted medical standards.

The World Professional Association for Transgender Health ("WPATH") is a noble advocacy group dedicated to forming medical policies that promote "equality for transexual, transgender, and gender nonconforming people." WPATH, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 1 (7th ed. 2011); *See Kosilek v. Spencer*, 774 F.3D 63 (1st Cir. 2014)(noting that the WPATH is "an advocacy group for the transgendered" and the Standards are "not a politically neutral document."). Nearly ten years ago, the WPATH published Standards of Care ("WPATH Recommendations") which provided recommended courses of treatment for people with GD. WPATH at 1.

Several circuit courts have acknowledged that the debate regarding the necessity of gender affirmation surgery is ongoing—despite the recommendations published by the WPATH. *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019)("the WPATH Standards ... reflect not consensus, but merely one side in a sharply contested medical debate over sex reassignment surgery");*Kosilek*, 774 F.3d at 93(holding that the "medically acceptable treatment of gender dysphoric prisoners is not synonymous with the demands of WPATH."); *Lamb v. Norwood*, 899 F.3D 1159, 1163 (10th Cir. 2018)(stating "the treatment of gender dysphoria is a highly controversial issue for which there are differing opinions");*See Keohane v. Florida Department of Corrections Secretary*, 952 F.3D 1257 (11th Cir. 2020)(finding the district court erred when rejecting medical testimony that deviated from the WPATH guidelines). The Ninth Circuit solely relies on the on the Recommendations published by the WPATH to support their hasty conclusion that the debate surrounding the GAS has already ended. *See Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019)(discrediting the opinions of medical officials who deviated from the recommendations set by WPATH). Moreover, a decision made by a medical professional is "presumptively valid," may only evidence deliberate indifference if the decision is "such a substantial departure from accepted professional judgement, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgement." *Youngberg v. Romeo,* 457 U.S. 307 (1982); *See Bell v. Wolfish* 441 U.S. 520, 544(1979). (courts should not "second-guess the expert administrators on matters on which they are better informed").

The Ninth Circuit's hasty conclusion regarding the ongoing debate being over is unfounded. Even the WPATH expressed the need for more studies and evidence to assess the long-term efficacy of gender affirmation surgery. As such, the Medical Advisors' decision to proscribe gender affirmation surgery for treatment of gender dysphoria in prisoners did not establish deliberate indifference because the necessity of gender affirmation is a matter of medical opinion, and the alternate treatment the medical staff supplied was medically acceptable.

1. The necessity of gender affirmation surgery is an ongoing debate within the medical community and thus a matter of medical opinion.

The process for drafting the Recommendations involved a extensive revisions and "debates" regarding "various controversial areas," and ultimately could only rely on "the best *available* science." The WPATH Recommendations include several options for treating gender dysphoria including counseling, hormone therapy, gender affirmation surgery, and even recommend patients express the gender role consistent with their identity. WPATH at 9. In respects to gender affirmation surgery ("GAS"), the WPATH acknowledges that "the specific magnitude of benefit is uncertain from the currently available evidence," and "[m]ore studies are needed that focus on the outcomes of current assessment and treatment approaches for gender dysphoria." WPATH at 108. Significantly, Appendix D of Recommendations acknowledges the historical limitations with evidentiary standards in discussing one of the studies cited explaining:

> "Neither of these studies questioned the efficacy of sex reassignment; indeed, both lacked an adequate comparison group of transsexuals who either did not receive treatment or who received treatment other than genital surgery.

> Moreover, transsexual people in these studies were treated as far back as the 1970s. However, these findings do emphasize the need to have good long-term psychological and psychiatric care available for this population. More studies are needed that focus on the outcomes of current assessment and treatment approaches for gender dysphoria.

Id. Moreover, while the WPATH do contend that their Recommendations apply to "people living in institutional environments," none of the limited studies the WPATH cites in support of their Recommendations, none involved prisoners. *Id.* at 67, 107-110. In light of the underdeveloped field the Recommendations are generally considered a flexible approach that allows room for medical judgement. WPATH pg.68 ("Reasonable accommodations to the institutional environment can be made in the delivery of care consistent with the Standards of Care")

The Policy adopted all but one of the proposed treatments posited in the WPATH Recommendations. Markedly, the approach adopted by the WPATH in drafting their Recommendations is strikingly similar to the approach used by the Medical Advisors when forming the Policy. The Medical Advisors, like the drafters of the WPATH had to "debate" controversial measures in order to reach their conclusion. When Dr. Cordata asserted that "surgeries were never medically necessary" to treat GD, Dr. Chewtes pointed out that the WPATH Recommendations assert that research suggests GAS provided patients with "relief." Notwithstanding the WPATH's conflicting statements regarding the "need for more studies," the fact that there was even a debate amongst the experienced Medical Advisors, most of who had been practicing for decades, suggests that perhaps the Recommendations are not as conclusory as the Ninth Circuit would have the court believe. The irony of the

Fourteenth Circuit's decision is that it presumes the "debate" undergone by the drafters was medically acceptable for forming the Recommendations, however, the same process and debate that led the Medical Advisors to adopt the Policy was constitutionally inadequate.

2. The treatments adopted by the Medical Advisors were widely accepted in the medical community.

A simple difference in medical opinion as to an appropriate diagnosis or course of treatment does not constitute deliberate indifference. *Estelle,* 429 U.S. at 107 (finding prison physician's actions did not evidence deliberate indifference reasoning that "a medical decision not to order an X-ray, or like measures" is "at most medical malpractice" and "does not represent cruel and unusual punishment."); *Gibson,* 920 F.3d at 220 (stating "no intentional or wanton deprivation of care if a genuine debate exists within the medical community about the necessity or efficacy of that care."). Moreover, "where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of our court to second guess medical judgments or to require that the [physician adopt] the more compassionate of two adequate options." *Kosilek*, 774 F.3d at 64(holding the providers were not deliberately indifferent where the inmate with gender dysphoria was treated with conservative therapies, including mental health therapy and hormones, but she was denied gender affirmation surgery reasoning the treatments were "medically acceptable.).

Moreover, the "accidental or inadvertent failure to provide adequate medical care to a prisoner ...[does]...not violate the Eighth Amendment." *Helling v.*

McKinney, 509 U.S. at 31; *Estelle*, 429 U.S. at 102-103 ("[A]n inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind…"); *Adams v. Poag*, 61 F.3d 1537 (11th Cir.1995)(rejecting inmate's claim that prison physician "did not diligently pursue alternative means of treating plaintiff's condition" constituted deliberate indifference because such allegations "did not rise beyond negligence to the refusal to treat as outlined by *Estelle*."). That is not to say that *any* course of treatment provided by a prison physician suffices to eradicate any deliberate indifference claim. *McElligott v. Foley*, 182 F.3d 1248, 1257 (11th Cir. 1999). The court in *McElligott* only found that a prison nurse's ineffective treatment supported a finding of deliberate indifference only after considering several other actions and omissions making her culpability more probable. *McElligott v. Foley*, 182 F.3D 1248, 1257 (11th Cir. 1999)(concluding a jury could determine the doctor's actions reflected deliberate indifference where he chose an "easier but less efficacious course of treatment," and failed to adequately monitor the inmate's condition by failing to provide care for several days despite the inmate's complaints of feeling "severe" physical pain, and ultimately had to be hospitalized.). *McElligott*, 182 F.3d at 1257 .

Given the medical discourse, the decision to proscribe the controversial surgery was a matter of medical opinion. The Policy created by the Medical Advisors did not evidence deliberate indifference because like the providers in *Kosilek*, the Medical Advisors adopted *all* but one of the treatment options proposed by the WPATH

Recommendations. Moreover, even though the course of treatment adopted by the Medical Advisors for Respondent did not alleviate his symptoms, the failure was "inadvertent" and does not constitute deliberate indifference. Respondent's course of treatment as prescribed in compliance with the Policy was far from the incompetant medical care the nurse provided in *McElligot*. Unlike the prisoner in that case, when Respondent complained that his hormonal treatments were not working, Dr. Chewtes amended his treatment. In addition to continuing the hormonal regiment, Dr. Chewtes ensured that Respondent would be constantly monitored as they were concerned for his safety. By contrast, the nurse in *McElligot* neglected to monitor the prisoner's condition for numerous days, leading to his hospitalization.

B. Even if the Guidelines published by WPATH reflect a general consensus, the failure to strictly adhere to them is insufficient to evidence deliberate indifference.

The mere existence of guidelines set by an advocacy group do not create a constitutional mandate and the failure to strictly adhere to those guidelines in and of itself does not constitute deliberate indifference. Deliberate indifference requires a factual analysis and is "subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer*, 511 U.S. at 834. The *Farmer* Court explained that deliberate indifference under the Eighth Amendment inmates to prove that prison officials (1) were actually "aware of facts from which an inference could be drawn that a substantial risk of harm exists"; (2) drew the inference, but (3) nevertheless disregarded that risk by conduct that was "more than mere negligence." *Brown v. Johnson*, 387 F.3D 1344, 1351 (11th Cir. 2004); *Farmer*, 511 U.S. at 834 (noting prison officials must "disregard a risk of harm of which [they] are aware" to

act with deliberate indifference and are not held liable where they "responded reasonably to the risk, even if the harm was not averted). Importantly, the inmate must provide "*sufficient* evidence from which the inference of deliberate indifference could be drawn." *Id.* (emphasis added).

1. The Ninth Circuit missaplied the deliberate indifference standard.

In *Edmo*, the Ninth Circuit found that the treatment provided by the prison physician did not strictly adhere to the Recommendations set out by the WPATH, and thus the course of treatment he provided was constituted deliberate indifference on its face. The Ninth Circuit essentially relied on a completely objective test for determining culpability—finding deliberate indifference where the defendant knew *or should have known*. *See Edmo,* 935 F.3d at 790. However, that approach has already been rejected by this Court. *Farmer*, 511 U.S. at 834 (rejecting the "civil law" application for deliberate indifference which assesses whether the "risk of harm...is either known or is so obvious that it should be known.").

In applying the foregoing analysis, even if this Court finds that the existence of guidelines established by the advocacy group is sufficient to show a universal consensus regarding necessity of gender affirmation surgery, the subjective test established by this Court does not permit liability to be premised on obviousness or constructive notice. *Canton v. Harris*, 489 U.S. 378.. The mere existence of the guidelines posited by the WPATH do not evidence that the medical staff was (1) aware that gender affirmation surgery is necessary in some circumstances *and* (2) made the conscious decision to proscribe it regardless of its necessity. Rather, the facts on record support the opposite. When the Medical Advisors were considering which

measures to adopt, there was a discussion where Dr. Cordata adamantly believed that GAS was never medically necessary. While Dr. Chewtes did reference the conflict with the Recommendations, he was ultimately convinced by Dr. Cordata's perspective. These facts do not show that Dr. Chewtes knew GAS was medically necessary, as he merely suggested another approach. Moreover, the facts only show that at least one of the Advisors truly believed it was never medically necessary—and her belief was the prevailing medical opinion.

2. More evidence is necessary to support an inference of deliberate indifference.

The district court in *Monroe* ultimately found that the denial of the inmate's request for GAS amounted to deliberate indifference not simply because the "Committee" deciding to deny his request failed to adhere to guidelines set by WPATH, but because none of the members of the "Committee" were qualified to render an opinion on the matter. *Monroe v. Baldwin*, 424 F. Supp. 3d 526, 544 (S.D. Ill. 2019)(observing that not a single person in the five-member "Committee" responsible for making the medical decisions for inmates suffering gender dysphoria had sufficient experience with treating the disorder). The "Committee" in *Monroe* was made of five members. *Id.* at 544. Two had no medical training whatsoever. *Id.* One admitted he was not competent to treat patients with gender dysphoria and deferred to the member with the most experience—the committee Chair. *Id.*. Strikingly, the committee Chair, and member holding the "most experience" had only treated a mere eight GD patients and confessed that he had never "prescribed hormones" to any of them. *Id.* He had never "been involved in monitoring hormone levels" of a GD patient.

Id.. What's more, he was "unaware" of any "standards" or guidelines for hormonal treatment of GD patients. *Id.*. Needless to say, the committee's reliance on his opinion was astounding.

The *Monroe* decision simply follows the line of reasoning espoused by this Court regarding the evidentiary weight granted to *professionals*. *See Youngberg ,* 457 U.S. at 410. Namely, the determination that courts only find medical judgement as "presumptively" valid if the decisionmaker is qualified to provide such opinions. *Youngberg,* 457 U.S. at 310 (1982)(defining a "professional" as "a person competent, whether by education, training or experience, to make the particular decision at issue."). Moreover, the *Monroe* court did not actually opine on the *merits* concerning whether the WPATH sufficed as a constitutional mandate because the evidence on record compelled their conclusion. *Monroe,* 424 F. Supp. 3d at 544 (accepting the WPATH guidelines as the appropriate benchmark for treating GD because "defendants have not put forth a single expert to contest" or provide an alternate "opinion" refuting plaintiff's expert testimony stating the WPATH guidelines are the "floor" for GD treatment).

The "Committee" in *Monroe* was unqualified to make decisions regarding the appropriate treatments for inmates suffering from gender dysphoria, because not a single member of the committee had any significant experience treating gender dysphoria. By contrast, the Medical Advisors at Garum included a wide range of experienced professionals who operated high-volume practices. In fact, Dr. Chewtes—the Garum physician treating Respondent—had treated at least one hundred

patients who suffered from gender dysphoria. Another advisor, Dr.Cordata specialized in diagnosing and treating hormone related diseases and conditions. Additionally, the advisors included both a general and plastic surgeon—who specialized in reconstructive procedures. Additionally, unlike the members in *Monroe* who spent a brief six minutes to assess appropriate treatments for their GD inmates, the Medical Advisors at Garum carefully considered several treatment options—all of which were listed in the WPATH guidelines—and did not even reach the decision to proscribe GAS in a singular day. Moreover, the committee members in *Monroe* determined inmate's course of treatment by majority rule, as opposed to the unanimous support given by the Medical Advisors at Garum in creating the Policy.

C. Administrator Posca's imposition of failure to deviate from the policy was reasonable and did not establish deliberate indifference.

In creating, enacting, and maintaining the policy at issue, Administrator Posca's actions did now show deliberate indifference and were reasonable.

Much litigation has hinged on the definition of "deliberate indifference" and what this state of mind entails. Courts have formulated multiple definitions, some of which, have been incorrectly employed. Indeed, civil, and criminal definitions of the culpable deliberate indifference standard are not synonymous. The *Farmer* Court took notice of these differing standards stating:

> "It is indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk. That does not, however, fully answer the pending question about the level of culpability deliberate indifference entails, for the term recklessness is not self-defining. The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the fact or an unjustifiably

> high risk of harm that is either known or is so obvious that it should be known. The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware."

Farmer, 511 U.S. 825, 836 (1994).

Courts, guided by the Farmer standards, ultimately carved out a specific definition of deliberate indifference with the key consideration being the prison officials subjective and circumstance-dependent knowledge and inference. There is no one size fits all or "mechanical formula for finding pretext and it is thus a fact-intensive inquiry to uncover the DOC defendants' true motives." *Snell v. Neville*, 998 F.3d 474 (2021). When defining deliberate indifference, its bounds are defined as "the poles of negligence at one end and purpose or knowledge on the other." *Farmer* at 835. Further, deliberate indifference has been likened to recklessness as "the Courts of Appeals have routinely equated deliberate indifference with recklessness" and stated that deliberate indifference must include "a state of mind more blameworthy than negligence." *Id.* This current standard is very difficult to meet and "consequently occupies a narrow band of conduct that is so inadequate as to shock the conscience." *Snell* at 497.

When a deliberate indifference claim concerns a policy, rather than a specific instance of conduct, court have treated this set of facts differently. A plaintiff attempting to show a constitutional violation against an individual in a supervisory capacity, must establish that the defendant "instituted a custom or policy that results in deliberate indifference to constitutional rights or directed his subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop

them from doing so." *Goebert v. Lee County* , 510 F.3d 1312, 1331 (11th Cir. 2012).,. Additionally, in those cases where the policy at issue is facially constitutional, a plaintiff is required to show "that the defendant had actual or constructive notice of a flagrant, persistent pattern of violations." *Id.* at 1332. The Supreme Court has taken notice of this high standard of proof for plaintiffs, stating, "deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* Here, Administrator Posca actions were reasonable, and thus did not constitute deliberate indifference for two reasons: (1) the enactment and continuance of the policy is reasonably related to maintaining prison health, safety and security; (2) the policy and actions by the prison fulfill the requirements of the *Turner* test.

1. Administrator Posca's decision to impose the policy was reasonably related to maintaining prison health, safety and security.

Courts have long given deference to prison officials in their efforts to maintain the security of their prisons. The *Turner* Court supported this standard by nothing, "in *Block v. Rutherford* … a ban on contact visits was upheld on the ground that "responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility," and the regulation was "reasonably related" to these safety concerns." *Turner v. Safley*, 482 U.S. 78, 87 (1987) (internal citations omitted).

The Court in *Turner v. Safley* took care to record the history of prisoners' rights cases, noting at the end of its resuscitation that "in none of these four 'prisoners' rights' cases did the Court apply a standard of heightened scrutiny, but instead

inquired whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *Id* at 87. Additionally, as the Supreme Court has long recognized, "[p]rison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547(1979).

When analyzing a prison or prison official's culpable state of mind, "there is no mechanical formula for finding pretext and it is thus a fact-intensive inquiry to uncover the DOC defendants' true motives." *Snell* at 490. In its analysis of the Plaintiff's § 1983 action, the *Snell* Court gave the Defendant Department of Corrections employees the benefit of assuming "the DOC defendants countered with a legitimate, non-discriminatory explanation for keeping Snell away from the first-floor Terminal." *Id.* at 489.

Finally, prisons are not required to provide incarcerated individuals with a "preferred healthcare regimen" or to "render ideal care" but instead must provide care "at a level reasonably acceptable within prudent professional standards." *Id.* at 495. The *Snell* Court took an exacting look at the doctor in that case and found the fact that the doctor "provided Snell with a range of other therapies to alleviate his pains" supportive of her lack of deliberate indifference. *Id* at 496. However, when there are multiple alternative courses of treatment "and both alleviate negative effects within

the boundaries of modern medicine," the court will not "second guess" medical judgments. *Id.* at 495.

Here, the prison and prison officials acted with reasonableness, and not deliberate indifference in enacting the policy at issue. As the *Snell* standard requires, this inquiry must include circumstantial, situational, and detailed case-specific information. Just as the court in *Snell* allowed room for reasonable benefits of the doubt towards the DOC defendants, so here should there be room for Administrator Posca to provide a reasonable, security, or other related prison interest which supports the enacting of this policy.

Administrator Posca and Garum were faced with numerous constraints including but not limited to a deadly pandemic, hospital overcrowding, and stoppage of all elective surgeries each of which must be considered when evaluating the subjective standard as prescribed by the *Wilson* Court in its holding that the success of the subjective component of an Eighth Amendment claim depends on the entire picture of circumstances.

As is mandated by the *Turner* Court, no heightened level of scrutiny applies to Garum's actions. Rather, Garum's actions of enacting the policy banning gender reassignment surgery fall squarely within the *Turner* standard as this policy is reasonably related to maintaining prison health, safety, and security, particularly in the height of a deadly pandemic. Moreover, Garum's enactment of the policy does not demonstrate the negative exaggerated response standard in *Turner*, but instead

represent a reasonable response to the treatment of this illness given the fact medical professionals disagree over the treatment's efficacy and necessity.

Garum's actions fall squarely within the realm of standards "acceptable within prudent professional standards" articulated in *Snell*. In *Snell*, the Court emphatically refused to provide inmates with their preferred treatment or preferred healthcare regimen and even went so far as to indemnify prisons from rendering "ideal care."

While Respondent did not receive what he deemed his preferred treatment plan, he continued to receive regular hormone replacement therapy throughout his entire time at Garum. R. at 4. Further, the treatment provided to Respondent is acceptable when viewed in light of the approved actions of the doctor in *Snell* who the Court noted provided alternative treatment options for her patient. Finally, the officials at Garum reasonably relied on the advice and input of medical professionals in drafting and enacting this policy R. at 4-5. Here, as in *Snell*, there are two viable, productive, and medically accepted paths of treatment in this case. Garum acted reasonably in their reliance on doctors' medical advice in regard to medical treatments and decisions. This concerted effort by Garum to include medical experts provides a common sense showing that Garum did not display deliberate indifference.

2. The actions of Administrator Posca in creating, enacting, and maintaining the policy are reasonable under the Turner standard.

The blanket policy at issue is not facially deliberately indifferent and the actions of Administrator Posca do not show deliberate indifference. Both the Policy and actions of Administrator Posca are reasonable when viewed in light of this Court's decision in *Turner*.

The *Turner* Court laid out "several factors … relevant in determining the reasonableness of the regulation at issue." *Turner* at 89. The first requires "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89-90. "A second factor … is whether there are alternative means of exercising the right that remain open to prison inmates. Where 'other avenues' remain available for the exercise of the asserted right … courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials … in gauging the validity of the regulation.'" *Turner* at 90 (internal citations omitted). Next, "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and the allocation of prison resources generally." *Id.* The fourth and last factor states "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.*

The policy banning gender affirmation surgery at Garum is reasonable under the *Turner* test and thus is not facially invalid and does not violate Respondent's Eighth Amendment Rights. Administrator Posca and Garum's enactment of the Policy was both validly and rationally related to the legitimate governmental interests of public health and prison safety and thus is reasonable under the first *Turner* factor. The Miasmic Syndrome pandemic has already infected millions of people, causing hospital overflow, social distancing requirements, and general social

unrest. R. at 2-3. In light of the surrounding circumstances, the prohibition of an elective surgery which has not been shown effective in all cases to a degree medical certainty is both validly and rationally related to the health and safety of those within Garum and the public at large.

The Policy is reasonable under the second and fourth *Turner* factor as Garum has provided Respondent with alternative forms of medically viable treatment for his GD. It is uncontested that Respondent was able to continue hormone replacement therapy throughout his entire time at Garum. R. at 4. This evidence of a "ready alternative" provides the evidence required under *Turner's* fourth reasonableness factor. Finally, the Policy is reasonable under the third *Turner* consideration when viewing the impact of the Policy on the Garum guards, local hospitals, and the safety of other Garum inmates. The risks associated with allowing Respondent to undergo gender affirmation surgery reach far beyond Respondent himself. In transporting Respondent to the hospital, allowing his surgery, permitting his recovery, and then transporting him back to Garum places all guards, doctors, nurses, and inmates involved at great risk of contracting Miasmic Syndrome. Additionally, it is also undisputed prisons were "hit particularly hard by Miasmic Syndrome" due to their "congregate nature and the high turnover rate of their population" coupled with "the desire to maintain a high correction-officer-to-incarcerated-person ratio." R. at 3. In light of these particularly difficult challenges, allocating prison resources towards an elective surgery for one inmate would have grave negative impacts on all involved.

CONCLUSION

Respondent's notice of appeal was untimely and thus his notice of appeal was not properly before the court. Additionally, the Policy did not evidence deliberate indifference on the part of the Administrator or any of his Medical Advisors.

For the foregoing reasons, Petitioner respectfully requests this Court to reverse the Fourteenth Circuit's decision and reinstate the trial court's order denying the motion to dismiss in favor of Caesar.