Team 2108

No. 2021-22

IN THE

Supreme Court of the United States

MAX POSCA,
IN HIS OFFICIAL CAPACITY AS WARDEN AND
ADMINISTRATOR OF GARUM CORRECTIONAL FACILITY,

Petitioner,

v.

LUCAS ESCOFFIER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Attorneys for Respondent
October 22, 2021

QUESTIONS PRESENTED

1. 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?

2. 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 undergo an individualized examination to demonstrate necessity for such surgery, and then providing inmates with such surgery when found necessary?

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The Memorandum and Order of the United States District Court for the District of Silphium, Docket No. 21-916, is unreported but appears on pages 22-29 of the Record. The Opinion of the United States Court of Appeals for the Fourteenth Circuit, Docket. No. 21-916, is unreported but appears on pages 30-44 of the Record. The Dissent of this decision is located on pages 45-47 of the Record.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions appear in an appendix attached to this brief.

STANDARD OF REVIEW

"The question of whether [a] notice of appeal was timely is a question of law over which [this Court] exercises plenary review." *Lizardo v. United States*, 619 F.3d 273, 276 (3d Cir. 2010) (quoting *DL Res., Inc. v. First Energy Sols. Corp.*, 506 F.3d 209, 213 (3d Cir. 2007)). Similarly, the conclusion of whether prison officials have violated the Eighth Amendment is reviewed *de novo*. *Kosilek v. Spencer*, 774 F.3d 63, 84 (1st Cir. 2014).

STATEMENT OF THE CASE

Mr. Escoffier's Health Condition

Mr. Lucas Escoffier ("Escoffier"), assigned female at birth, is a transgender man residing in the state of Silphium. (R. at 1.) Tragically, Escoffier began to suffer from depression and suicide ideation in young adulthood. (R. at 1.) Escoffier's efforts to seek medical assistance culminated when his physician, Dr. Johanna Semlor ("Semlor"), diagnosed him with gender dysphoria ("GD") on March 9, 2011. (R. at 16.) Semlor began treating Escoffier in 2010 and was his primary physician until his incarceration at Garum. (R. at 16.)

In May 2012, Escoffier began to "socially" transition to male by informally changing his name to Lucas and adopting masculine pronouns. (R. at 1.) The following year, he started medical gender alignment therapies ("hormone therapy") as treatment for GD. (R. at 1.) Escoffier responded well to both social transition and hormone therapy, reporting that he had a markedly improved outlook on life. (R. at 1.) For unrelated health reasons, Escoffier elected to have a double mastectomy in February 2014 and chose a reconstructive approach to the surgery so that his chest would conform with his gender identity. (R. at 1.) Several years thereafter, Escoffier legally changed his name to Lucas Escoffier. (R. at 1.)

Despite his efforts, the symptoms of Escoffier's GD, chronic depression and mild suicidal ideation, resurfaced in April 2018. (R. at 1.) After consulting with his

medical team, Escoffier and Semlor concluded that gender affirmation surgery[1] ("GAS") was medically necessary to treat his GD. (R. at 1-2.) Semlor noted that Escoffier stated: "There's only two ways this ends. I live as a man, in a man's body, because I am a man. Or I kill myself. Because I can't keep doing this." (R. at 17, App. C.) Escoffier, however, denied having any immediate plans to commit suicide. (R. at 17, App. C.)

Ten days after deciding to undergo GAS, Escoffier was arrested, charged, and indicted with criminal tax fraud in the first degree, amongst other underlying charges. (R. at 2.) On March 1, 2020, Escoffier plead guilty to criminal tax fraud in the third degree in exchange for a reduced sentence of five years. (R. at 2.) Escoffier began his sentence at the Garum Correctional Facility ("Garum") on March 7, 2020. (R. at 2.)

Miasmic Syndrome's Effect on Garum

Not long after Escoffier's prison sentence began, humanity discovered a previously unknown disease—Miasmic Syndrome—which quickly became a global pandemic, infecting hundreds of millions of people worldwide and killing several million people by the time of Escoffier's appeal. (R. at 2.) In response, governments implemented strict regulations to promote the health and well-being of their citizens. (R. at 2.)

[1] Though many terms are used synonymously throughout case law, for purposes of clarity, only the term gender affirmation surgery (GAS) will be used in this brief, unless a direct quote is used from another case.

The pandemic hit prisons hard in large part due to the high prisoner turnover rate and the prisons' desire to maintain a high correction officer-to-prisoner ratio. (R. at 3.) Garum took extreme measures to prevent the spread of Miasmic Syndrome in its prison, canceling many of its programs for inmates and instead confining them to their cells. (R. at 3.)

Garum prohibited in-person visitations and limited all judicial proceedings and essential attorney-client visits to videoconference. (R. at 3.) Garum only had five computers for this purpose, however, and because it houses the entire criminal population of Silphium, videoconference appointments were in high demand and often booked weeks in advance. (R. at 3.) Garum limited access to communal phones and required that appointments only be made through correctional staff. Because Garum reduced correctional staff to avoid transmission of Miasmic Syndrome, staffing shortages resulted in missed calls and the inability of many prisoners to contact their attorneys. (R. at 4.)

Escoffier's Health Declines

Notwithstanding that Garum allowed Escoffier to continue receiving hormone therapy during the pandemic, his mental health declined significantly during his incarceration. (R. at 4.) Escoffier's depression and suicidal ideation substantially worsened, and he began to suffer from bouts of weight and hair loss, loss of appetite, severe anxiety, and paranoia. (R. at 4.) Escoffier, recognizing these as symptoms of his GD, informed Garum staff that his condition had become unbearable and that he required GAS as he had intended to undergo prior to his incarceration. (R. at 4.)

Thus, Escoffier filed requests to meet with Dr. Arthur Chewtes ("Chewtes"), Garum's psychiatrist, to discuss treatment options for his GD. (R. at 4.) Chewtes—an expert in treating GD—has more than 20 years of experience in psychiatry and has treated approximately 100 patients suffering from GD. (R. at 13, App. B.)

Garum Denies Escoffier's Medically Necessary Treatment

The record below includes the affidavit of Erica Laridum, Ph.D. ("Laridum"), the Division of Health Director at Garum. (R. at 12, App. B.) Laridum was tasked with assembling and chairing a committee charged with reviewing the inmate-care standards in Garum, which encompasses the policy regarding the treatment of inmates with GD. (R. at 12, App. B.) Laridum assembled the fifteen-person committee by contacting experienced physicians throughout Silphium—some of which had broad practices while others had more specialized, but fairly high-volume practices. (R. at 13, App. B.) Committee member Chewtes diagnosed Escoffier with GD and has treated him during his incarceration. (R. at 13, App. B; R. at 18-19, App. D.) Prudently, Chewtes directed the committee to consider the WPATH SOC[2] to develop the treatment plan for inmates with GD. (R. at 14, App. B.) Though the WPATH SOC recognize that surgical interventions for GD may be clinically appropriate in certain circumstances, committee member Dr. Cordata[3] ("Cordata") posited that such surgeries are never necessary given the existence of other treatment options, such as hormonal therapies. (R. at 14, App. B.) Chewtes confirmed Cordata's

[2] World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (7th ed. 2012), available at https://www.wpath.org/publications/soc.

[3] Cordata has practiced endocrinology since 1992.

belief that such hormonal therapies are a common, and well-tolerated treatment, (R. at 14, App. B.); Chewtes also noted that such therapies may be effective "when combined with other non-surgical interventions, such as psychotherapy and gender-affirming social interventions." (R. at 14, App. B.) Notably, although Escoffier's treatment has included the hormonal therapies and social interventions referenced by the committee members (*See* R. at 1; R. at 14, App. B.)—the fact remains, however, that had such treatments been effective for Escoffier, he would not continue to suffer from "serious depression, bouts of weight and hair loss, loss of appetite, severe anxiety and paranoia, and perpetual suicidal ideation." (R. at 4.) Indeed, had such treatments been as effective for Escoffier as the committee opined, Escoffier likely would not be seeking to treat his GD by surgical intervention, and this controversy would not be before the Court.

After a mere hour and a half of deliberation, the committee unanimously voted to preclude GAS from Garum's plan for treating inmates who suffer from GD. (R. at 14.) This decision was rendered despite Chewtes' informing the committee that such a decision was contrary to the WPATH SOC—the very standards they were directed to consider—and despite the existence of research "show[ing] [GAS] did provide patients with significant relief from their [GD]." (R. at 14, App. B.) Although Laridum believed the WPATH standards "to be the most widely used standards for transgender healthcare in the United States," (R. at 14, App. B.), she approved the policy on behalf of the committee, and Posca subsequently signed off. (R. at 10, App. A; R. at 14, App. B.)

Escoffier Tries to Vindicate His Eighth Amendment Right

After Chewtes denied Escoffier's request for GAS, Escoffier submitted several grievances with both Garum's Medical Department and the facility itself. (R. at 5.) Each grievance underwent an investigation and administrative review but was ultimately denied based on the policy prohibiting GAS. (R. at 5.) Garum denied Escoffier's final request on September 15, 2020. (R. at 5.) In a last-ditch effort to get the help he needed, Escoffier solicited the aid of Forme Cury, a medium-sized civil litigation firm, which accepted Escoffier's case pro bono and assigned it to Ms. Sami Pegge ("Pegge"). (R. at 5.)

Soon thereafter, on October 5, 2020, Pegge filed suit against Posca, as Garum Administrator, under 42 U.S.C. § 1983. (R. at 5.) Pegge averred that Garum violated Escoffier's Eighth Amendment rights when it implemented an unconstitutional policy banning GAS and denied Escoffier the treatment even after Semlor found it was medically necessary to treat his GD. (R. at 5-6; *see* Apps. C, D.) Posca moved to dismiss the complaint on October 25, 2020, claiming that the blanket ban did not target Escoffier personally and posturing that similar policies had previously been held constitutional. (R. at 6.) The District Court of Silphium, finding that all necessary facts were available through the materials submitted by the parties' briefs, converted Posca's motion to dismiss into a motion for summary judgment; finding no genuine dispute of material fact, the court dismissed the Complaint on February 1, 2021. (Opinion of the District Court of Silphium, R. at 29.) Shortly thereafter, Pegge confirmed to Escoffier that Forme Cury would continue to represent him on appeal.

(R. at 6.) Pegge promised Escoffier that she would remain in contact with him as they continued to build his case and mentioned she would need him to sign "some documents" by "early March." (R. at 6.)

Unfortunately, Pegge contracted a severe form of Miasmic Syndrome, for which she was immediately hospitalized and required multiple days of vigorous ventilator treatment. (R. at 6.) The illness incapacitated Pegge for more than two weeks, during which she was unable to work. (R. at 6.) No one from Forme Cury reached out to Escoffier while Pegge was incapacitated, nor were any of Pegge's matters properly transferred to anyone else at the firm, despite the fact that she left a note for her legal assistant to transfer "all of her inmate matters" to another associate at the firm. (R. at 6-7.) As a result, Escoffier's case was not properly calendared. (R. at 7.) Pegge could not return to work until March 12, 2021. (R. at 7.)

Unaware of Pegge's medical situation, Escoffier tried and failed to contact her multiple times during February 2021. (R. at 7.) Because of the stringent limitations on inmates at Garum, Escoffier could only call Pegge's office a total of three times, leaving her one voice message. (R. at 7.) Because his access to the prison library was also restricted, Escoffier was only able to look up Forme Cury on the library computer on one occasion. (R. at 7.) In one last desperate attempt to reach Pegge, Escoffier sent an email to the general e-mail address found on Forme Cury's "Contact Us" page. (R. at 7.) His e-mail begged: "Please help me on my appeal, I cannot reach Ms. Pegge." (R. at 7.) Finally, on March 2, Mr. Hami Sharafi ("Sharafi") contacted Escoffier and informed him that Pegge was hospitalized, and that Sharafi was unfamiliar with

Escoffier's case. (R. at 7.) Sharafi advised Escoffier that, since he was unaided by an attorney, he would have to submit his Notice of Appeal to the prison mailbox on his own. (R. at 7.) That same day, Escoffier promptly placed his Notice of Appeal in the prison mailbox and attached a completed Garum Mailing Certificate. (R. at 7.) Due to delays partially attributable to Miasmic Syndrome, Garum mailed the Notice of Appeal to the District Court five days later—on March 7, 2021. (R. at 7.) The district court received Escoffier's Notice of Appeal on March 10, 2021. (R. at 7.)

The Procedural Posture

The Fourteenth Circuit Court of Appeals reversed the District Court of Silphium's Order and remanded the action to the court for further proceedings consistent with its Opinion and Order. (Opinion of the Fourteenth Circuit, R. at 44.) The Fourteenth Circuit deemed Escoffier's Notice of Appeal timely but took no position as to whether Garum must ultimately provide Escoffier with GAS, rather ordering that Garum must evaluate Escoffier for the treatment. (Opinion of the Fourteenth Circuit, R. at 44.) Judge Change ("Chang") dissented and opined that Escoffier failed to meet his burden in proving that the court had jurisdiction over the dispute pursuant to Federal Rule of Appellate Procedure 4(c). (Dissenting Opinion of the Fourteenth Circuit, R. at 45.) Posca petitioned for a Writ of Certiorari on August 15, 2021, which this Court granted on September 22, 2021. (R. at 9.)

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit Court of Appeals because the plain language of Fed. Rule App. Proc. 4(c) allows for all inmates, regardless of their representation, to take advantage of the Prison Mailbox Rule first articulated in *Houston v. Lack*. Even if this Court determined that the Rule only applies to pro se prisoners, Escoffier still timely filed his Notice of Appeal because his attorney effectively abandoned him leaving him to act pro se.

Finally, there is sufficient evidence that Escoffier timely filed the Notice of Appeal as indicated by the Garum Correctional Facility Mailing Certificate and other circumstantial evidence to be in compliance with any further requirements of Fed. Rule App. Proc. 4(c), and, if not, then this Court should use its discretion to hold that Escoffier could use the Rule to his advantage as the outcome of this case would be inequitable otherwise.

Therefore, Escoffier respectfully requests that this Court affirm the Fourteenth Circuit Court of Appeals' decision deeming Escoffier's Notice of Appeal timely and determine that it had jurisdiction to hear the merits of his case.

Additionally, Garum's policy categorically banning GAS without allowing for an individualized evaluation for same constitutes deliberate indifference to the serious medical needs of their patients with GD. Even if this Court found that the policy is not facially unconstitutional, the course of treatment provided to Escoffier was medically unacceptable because it proved ineffective in treating his GD.

Though some courts and experts have opined otherwise, the widespread endorsement of the WPATH SOC reflects the existence of a medical consensus that GAS is a medically necessary treatment for some patients. Were that not enough, it's medically unacceptable to deny a patient's request to be evaluated for treatment based on an administrative policy rather than a treating physician's medical judgment.

Not only did Garum's committee adopt the challenged policy with deliberate indifference to the medical needs of all inmates with GD, but the Garum officials' denial of Escoffier's grievances evinces their deliberate indifference to his specific serious medical need. The committee was aware of and considered the empirical research embodied in the WPATH SOC, and was informed that precluding GAS as a treatment option would be contrary to the WPATH SOC. Nevertheless, the committee apparently relied on the dissenting opinion of Cordata, an endocrinologist, that GAS is never medically necessary, despite the fact that the Endocrine Society endorsed the WPATH SOC. Moreover, Chewtes, Laridum, and Posca all knew that the course of treatment provided to Escoffier was ineffective in alleviating his GD symptoms, but refused to evaluate him for GAS. In sum, neither the adoption of the policy nor the refusal to evaluate Escoffier's need for GAS was based on a medical judgment, but rather on blind and steadfast adherence to Garum's policy.

Therefore, Escoffier respectfully requests that this Court affirm the Fourteenth Circuit Court of Appeals' decision that Garum's policy violates the Eighth

Amendment and order the Garum facility to individually evaluate whether GAS is medically necessary for inmates diagnosed with GD.

ARGUMENT

I. ESCOFFIER TIMELY & SATISFACTORILY FILED HIS NOTICE OF APPEAL AND THUS THE COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT HAD JURISDICTION TO HEAR THE CASE.

By way of background, Posca challenges the timeliness of Escoffier's pro se appeal to the United States Court of Appeals for the Fourteenth Circuit. (*See* R. at 48.) This Court should affirm the Fourteenth Circuit's decision rendering the Notice of Appeal timely and sufficiently evinced because Escoffier appropriately relied on the plain language of Fed. Rule App. Proc 4 in filing his Notice with prison officials and otherwise complied with the evidentiary requirements of the Rule. (*See* Opinion of the Fourteenth Circuit, R. at 39.)

A. The "Prison Mailbox Rule" Applies to Inmates Regardless of Their Representation, and Even if it Does not, Escoffier was Effectively Unrepresented.

This Court articulated the so-called "Prison Mailbox Rule" in *Houston v. Lack*, 487 U.S. 266 (1988). This rule is now reflected in Fed. Rule App. Proc. 4(c).

1. The Plain Language of Fed. Rule App. Proc. 4(c) Reflects the Advisory Committee's Intent to Afford the Prison Mailbox Rule to all Inmate Litigants--not Just Those Acting *Pro Se*.

In *Houston*, this Court held that "[a] notice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk." *Id.* at 276. There, because the pro se prisoner handed his notice of appeal to prison authorities three days before the filing deadline established by Fed. Rule App. Proc. 4(a)(1), this Court deemed it filed timely even though the Clerk of the District Court did not stamp the notice "filed" until the day after the filing period expired. *Id.* at 269, 271. Accordingly, as the prisoner's notice of appeal was timely per the Prison

Mailbox Rule, the court of appeals had jurisdiction over the prisoner's appeal. *Id.* at 276.

Importantly, while case law may "make[] a good deal of sense[,]" this Court should follow the rule that has been "promulgated through congressionally prescribed procedures." *Id.* at 277 (Scalia, J., dissenting.) So, while in *Houston* this Court interpreted an earlier version of Rule 4, *see id.* at 275, it subsequently rendered any debate about the extension of *Houston* irrelevant when it amended Rule 4 to include a rule specifically addressing inmates—without reference to representation. *See* FED. RULE APP. PROC. 4(C).

In 1993, this Court echoed the rule articulated in *Houston* in Fed. Rule App. 4 (c.) *See* FED. RULE APP. PROC. 4(C). The Rule—aptly named "Appeal by an ***Inmate*** Confined in an Institution"—specifically states, *inter alia*, that "[i]f 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." FED. RULE APP. PROC. 4(C) (emphasis added.) In promulgating the rule, the Advisory Committee considered *Houston* and noted: "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. The amendment reflects that decision." FED. RULE APP. PROC. 4(C) Advisory Committee's note to 1993 amendment.

Reflection, though, does not require exact replication. In fact, the Advisory Committee continued: "in a civil case [] ***an institutionalized person*** [may] file[] a notice of appeal by depositing it in the institution's mail system." FED. RULE APP.

PROC. 4(C) Advisory Committee's note to 1993 amendment. Notably, despite the Advisory Committee's reliance on *Houston*, it abandoned the "pro se" language both in comment and, more importantly, the promulgated rule.

The Fourteenth Circuit Court of Appeals rightly averred that "Federal Rule of Appellate Procedure 4 has been adopted without ***any*** limitation as to whether the prisoner is acting with our without counsel's representation." (Opinion of the Fourteenth Circuit, R. at 39) (emphasis in original). "It is a fundamental principle of statutory interpretation that 'absent provisions cannot be supplied by the courts.'" *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 94 (2012)). As explained in *United States v. Craig*, "[a] court ought not pencil 'unrepresented' or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd." 368 F.3d 738, 740 (7th Cir. 2004). Indeed, if Posca asks this Court to "introduce[e] a limitation not found in the [Rule], [he] asks [it] to alter, rather than to interpret." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020). This Court has expressly refused to do just that, and accordingly should extend the principle of plain meaning here.

The plain meaning of inmate is "a person confined to a prison, penitentiary, or the like." *Boatman v. Berreto*, 938 F.3d 1275, 1277 (11th Cir. 2019) (quoting Black's Law Dictionary 788 (6th ed. 1990)). Quite plainly, Escoffier was and remains *an inmate*. The Record is clear that Escoffier "began his period of incarceration at Garum Correctional Facility, a State of Silphium correctional facility, on March 7,

2020." (R. at 2.) And, at the time he filed his Notice of Appeal, Escoffier used the legal prison mailbox as an inmate. (R. at 7.) In short, Escoffier was and is a person confined at a prison.

To hold that Fed. Rule App. Proc. 4(c) only applies to pro se inmates would disregard the plain language of the Rule and run afoul of the well-developed principles of statutory construction. In sum, the Advisory Committee said what it meant and meant what it said. This Court should acknowledge and adhere to the Advisory Committee's intent to expand the holding in *Houston* to encompass all inmates—regardless of their representation.

2. Even if This Court Holds That the Rule Only Applies to Pro Se Prisoners, the Rule Applies to Escoffier Because He Did in Fact File his Notice of Appeal as a Pro Se Litigant.

When "an attorney no longer acts, or fails to act, as the client's representative[,]" the principal-agent relationship is severed. *Maples v. Thomas*, 565 U.S. 266, 281 (2012) (citing 1 Restatement (Third) of Law Governing Lawyers §31, Comment 1 (1998)). Further, "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." *Id.* (citing *Holland v. Florida*, 560 U.S. 631, 659 (2010)). If this Court finds that a litigant may only take advantage of the Prison Mailbox Rule when the inmate is acting pro se, Escoffier qualifies because his counsel effectively abandoned him.

In *Maples*, the petitioner sought post-conviction relief in state court after being sentenced to death for the murder of two individuals. *Maples*, 565 U.S. at 270-71

(2012). In his state court action, two attorneys associated with a New York-based law firm represented the petitioner pro bono. *Id.* During the course of the action, the "New York attorneys left the law firm . . . did not inform [the petitioner] of their departure and consequent inability to serve as his counsel[,] . . . [and] [n]either they nor anyone else moved for the substitution of counsel able to handle [the petitioner's] case." *Id.* at 270-71.

When the time to appeal his conviction lapsed, the Court opined that "[the petitioner] was blameless for the default." *Id.* at 271. He "was left unrepresented at a critical time . . . and he lacked a clue of any need to protect himself pro se." *Id.* As this Court pointed out, "the lawyers [the petitioner] believed to be vigilantly representing him had abandoned the case without leave of court, without informing [the petitioner] they could no longer represent him, and without securing any recorded substitution of counsel." *Id.*

Here too, Escoffier found himself abandoned at a critical time without a clue that he needed to protect himself until it was too late. Just as counsel in *Maples* failed to inform the litigant of their departure and inability to serve as counsel, *id.*, so too did Pegge fail to inform Escoffier. After confirming that she would represent Escoffier in the appeal, Pegge "abruptly contracted a severe form of the Miasmic Syndrome, requiring immediate hospitalization and several days of intense ventilator treatment." (R. at 6.) As his appeal deadline loomed, Escoffier called Pegge's office line three times, left her a voice mail, and used the prison computer to e-mail the general inbox listed on Forme Cury's website. (R. at 7.) The case here is

indistinguishable from *Maples* in that Escoffier thought that Pegge was representing him during the appeal—as evidenced by his diligence in trying to reach her—but found himself abandoned when it was too late. Neither Pegge nor her staff informed Escoffier that Pegge was unable to represent him as counsel until the day before the appeal was due to be filed. (R. at 7.)

Further, neither Forme Cury nor Pegge moved for substitution of counsel during this time. Just as the respondent in *Maples* asserted that other attorneys at the firm "continued to serve as [the petitioner's] counsel," Petitioner likely will argue that others at Forme Cury continued to represent Escoffier, and thus nobody needed to move to substitute counsel. *See Maples*, 565 U.S. at 271; *see also Atasi Corp. v. Seagate Tech.*, 847 F.2d 826, 829-30 (Fed. Cir. 1988) ("A [rebuttable] presumption exists that the other members of the firm shared in the confidential information.")

Petitioner will likely point to Escoffier's brief phone call with Sharafi as proof that at least one attorney at Forme Cury continued to represent Escoffier. (R. at 7.) While it may be true that Escoffier may not have known to submit his Notice of Appeal except for Sharafi's instruction, Sharafi's advice did not create an attorney-client relationship. (*See* R. at 7.) As this Court explained, when an attorney is not admitted to practice law within a jurisdiction, has not entered an appearance on behalf of the litigant, and has "done nothing to inform the . . . court that they wished to substitute for [the supposed attorney of record]," then that attorney does not "ha[ve] the legal authority to act on [the litigant's] behalf." *Id.* at 287. Even further,

Sharafi solidified Escoffier's abandonment at a crucial time when Sharafi told Escoffier that he "did not have any attorney to help him." (R. at 7.)

In sum, Pegge severed the agency relationship with Escoffier when she abandoned him and left him to act as a pro se litigant, and Sharafi and Forme Cury's actions solidified said abandonment.

Indeed, an attorney-client relationship may exist when the attorney takes affirmative steps in furtherance of the litigant's interests. In *Cretacci v. Cox*, a prisoner brought deliberate indifference and excessive force claims against the jail in which he was incarcerated. 988 F.3d 860, 865 (6th Cir. 2004). After drafting the complaint, the prisoner's attorney realized that "he was not admitted to practice law in the district that encompassed [the jail]." *Id.* at 864. Frantically, the attorney "looked into being admitted" in said district and "drove to the . . . courthouse . . . to attempt to file the complaint in person." *Id.* at 865. After his failed attempts to file the complaint, the attorney put the complaint in "an envelope stamped and addressed to the Chattanooga courthouse" and handed it to the prisoner. *Id.* He instructed the prisoner to "deliver it to the correctional officers immediately, [and] explain[ed] that because he was an inmate, he could take advantage of the prison mailbox rule" for a timely filing. *Id.*

Ultimately, the Sixth Circuit held that the prisoner was represented by counsel, in part because: (1) the defendant and an attorney "had an explicit attorney-client relationship in which [the attorney] agreed to represent [the defendant]; (2) the attorney "identified the proper legal causes of action to bring, and wrote the

complaint;" (3) the attorney "attempted to file the complaint several times;" and (4) the "attorney-client relationship did not end after [the attorney] drafted the complaint." *Id. See also Stillman v. Lamarque,* 319 F.3d 1199, 1200 (9th Cir. 2003) ("When a lawyer pre-pares [sic] legal documents on behalf of a prisoner and arranges for those documents to be signed and filed, the prisoner is not proceeding without assistance of counsel.").

Recognizing similar principles, the Fifth Circuit in *Cousin v. Lensing* refused to apply the Prison Mailbox Rule to represented litigants, opining that they "ha[ve] an agent through whom [they] can control the conduct of [their] action[s], including the filing of pleading." 310 F.3d 843, 847 (5th Cir. 2002). Yet, here, it is likely that even the Fifth Circuit would agree that Escoffier could not control the conduct of Pegge's actions as he could not even reach her before the deadline to timely file the Notice of Appeal. Escoffier was, for all intents and purposes, abandoned without notice and without a clue of the need to protect himself pro se.

Similarly, when the "attorney of record" is not admitted to practice before the court, the court "treat[s] . . . the actions as filed pro se." *In re Flanagan*, 999 F.2d 753, 754 (3d Cir. 1993). Here, although Pegge "confirmed that Forme Cury would be continuing to represent Mr. Escoffier in the appeal[,]" there is no evidence in the Record that Pegge was admitted to practice before the Fourteenth Circuit Court of Appeals. Nor is there any evidence that Forme Cury associate Sharafi was either. Accordingly, *In Re Flanagan* also supports Escoffier's contention that he was unrepresented.

Consequently, upon Pegge's abandonment, Escoffier found himself in the same conditions that this Court recognized in *Houston* as warranting the Prison Mailbox Rule**.** Importantly, "there is little justification for limiting Houston's applicability to situations where the prisoner is not represented by counsel." *United States v. Moore*, 24 F.3d 624, 624 (4th Cir. 1994). At its core, "the rule in *Houston* is a rule of equal treatment; it seeks to ensure that imprisoned litigants are not disadvantaged by delays which other litigants might readily overcome." *Richard v. Ray*, 290 F.3d 810, 812 (6th Cir. 2002) (quoting *Lewis*, 947 F.2d at 735).

Even if Escoffier enjoyed an attorney-client relationship with Pegge, or any other attorney for that matter, he still suffered "the unique circumstances of an incarcerated pro se petitioner." *Richard*, 290 F.3d at 812 (citing *Houston*, 487 U.S. at 270-72). *Richard* summarizes these concerns:

> 1) the petitioner's inability to control the notice of appeal after it has been delivered to prison officials, 2) the petitioner's lack of legal counsel to institute and monitor the process, and 3) any incentive on the part of prison authorities to delay a pro se prisoner's filing beyond an applicable time limit.

Id. at 812-13.

First, Escoffier could not control the Notice of Appeal after he delivered it to prison officials. As this Court explained in *Houston*, "prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and ensure that the court clerk receives and stamps their notices." *Houston*, 487 U.S. at 270. Further, "if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service . . . and follow its progress

by calling the court to determine whether the notice has been received." *Id.* at 271. Otherwise, "they can personally deliver the notice at the last moment or [know] that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it." *Id.*

Escoffier could not take these precautions. He did what he could and submitted "the Notice of Appeal in the legal prison mailbox on March 2, 2021, along with a completed prison mailing form." (R. at 7.) Escoffier could not place the Notice in the hands of the United States Postal Service. And, not surprisingly, Escoffier could not walk out of the prison and personally deliver the notice to the clerk. To reiterate, any opportunities to contact the outside world were severely curtailed. (See R. at 3-4.) In-person visits were banned. (R. at 3.) Inmates competed for use of the limited supply of computers. (R. at 3.) "Prisoners would often go weeks without being able to contact family, friends, or attorneys." (R. at 4.)

Second, Escoffier did not have legal counsel to institute and monitor the process of filing the appeal. Rather, he did it himself. Notably, "[w]hen a lawyer prepares legal documents on behalf of a prisoner and arranges for those documents to be signed and filed, the prisoner is not proceeding without assistance of counsel." *Stillman*, 319 F.3d at 1201. Escoffier prepared his own Notice of Appeal. He alone arranged for it to be signed and filed. (R. at 7.)

Finally, although Escoffier was "unlikely to have any means [to] prov[e] it," the delay may have been attributable to the prison authorities. *See Houston*, 487 U.S. at 271. Let this Court not forget that Escoffier lodges his grievances in this

action against Posca—the very prison authority responsible for Garum—who has "every incentive to delay." *Id.;* (*See* R. at 8.)

Escoffier clearly faces the concerns articulated by this Court—regardless of his alleged representation. Escoffier is for all intents and purposes "[u]nskilled in law, unaided by counsel, and unable to leave the prison." *Houston*, 487 U.S. at 271. The Fourteenth Circuit Court of Appeals correctly averred that the circumstances noted in *Houston* "were the exact circumstances that Mr. Escoffier found himself in." (Opinion of the Fourteenth Circuit, R. at 38.)

In conclusion, this Court should recognize that the Prison Mailbox Rule articulated in *Houston* extends to all prisoners to align with the "procedural accommodations to prisoners [that] are a familiar aspect of our jurisprudence." *Stutson v. United States*, 516 U.S. 193, 197 (1996). To hold otherwise would reiterate that "access to justice is denied to those behind prison doors." *United States v. Smotherman*, 838 F.3d 736, 739 (6th Cir. 2016). Thus, upon this Court's "recogni[tion] [of] the prudence, when faced with an equitable, often fact-intensive inquiry, of allowing the lower courts to undertake it in the first instance[,]" *Holland,* 560 U.S. at 654, Escoffier respectfully requests that this Court affirm the Fourteenth Circuit Court of Appeals' holding that Escoffier timely filed his Notice of Appeal because Pegge severed the attorney-client relationship and did not take any affirmative steps in furtherance of Escoffier's appeal.

B. Escoffier's Mailing Certificate Sufficiently Evinces That the Notice of Appeal was Timely, and so the Additional Requirements of Fed. Rule App. Proc. 4(c)(1)(A) are Satisfied.

Fed. Rule App. Proc. 4. requires that an inmate's notice of appeal be:

> accompanied by 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*** evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid.

FED. RULE APP. PROC. 4(C)(1)(A) (emphasis added). Sufficient evidence must "prove the date of deposit and pre-payment of postage." *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1145 (10th Cir. 2004).

To take advantage of the Prison Mailbox Rule, the inmate must use "the system designed for legal mail" if the institution has one. FED RULE. APP. PROC. 4(C)(1). Naturally, "[t]he burden of proving the date of the mailing rests on the plaintiff who is seeking to establish jurisdiction." *May v. Mahone*, 876 F.3d 896, 898 (7th Cir. 2017).

To begin, Escoffier did not need to attach a declaration of compliance or notarized statement to his Notice of Appeal because he used Garum's legal mail system. The Record demonstrates that "Mr. Escoffier put the Notice of Appeal in the ***legal*** prison mailbox on March 2, 2021." (R. at 7.) (emphasis added.) This is further corroborated by the fact that the "LEGAL MAIL" box is checked on the Mailing Certificate. (R. at 21, App. F.)

Turning to the date of deposit evidentiary requirement, "[a]bsent evidence to the contrary, we assume that a prisoner delivered a filing to prison authorities on the

date that he signed it. We have identified 'prison logs or other records' as evidence that could contradict the signing date." *Jeffries v. United States*, 784 F.3d 1310, 1314 (11th Cir. 2014). Although the Record nowhere avers that Escoffier actually *signed* the filing, the Record affirmatively provides that Escoffier completed the Garum Correctional Facility Mailing Certificate. (R. at 7; R. at 21, App. B.) And, his name is handwritten, presumably by him, in the section "[t]o be completed by Inmate." (R. at 21, App. B.) More importantly, though, is the fact that not one, but two, Garum Correctional Officers signed the Mailing Certificate—one of which signed on the last day to timely file. (R. at 21, App. B.)

Further, the prepayment of postage is also sufficiently evinced. Again, the checkbox to "Check if Postage Paid by Inmate" is in fact checked. (R. at 21, App. B.) Presumably, Correctional Officer James Whitbread checked the checkbox as it is included in the "Receiving Custody Officer" section which he certified. (R. at 21, App. B.) Indeed, "[t]he postage requirement is important: mail bearing a stamp gets going, but an unstamped document may linger." *Leavy v. Hutchison*, 952 F.3d 830, 832 (6th Cir. 2020) (quoting *Craig*, 368 F.3d at 740). There is no question that Escoffier's Notice of Appeal got going—it arrived at the district court only eight days after Escoffier claimed he dropped it in the prison legal mailbox. (R. at 7.)

While Petitioner may attempt to argue that the Mailing Certificate does not name the document that Escoffier mailed, the argument fails because this Court can infer that the Notice of Appeal was the only document Escoffier mailed to the Federal District Court of Silphium. In *May*, the court could not determine a notice of appeal

was timely when the inmate (1) "provided two 'copies' of his notice of appeal with dates two days apart and an undated copy of his Legal Mail Card[;]" (2) [the] mail card [did] not provide a description of the document sent to the district court[;] and (3) "the clerk of the district court docketed an unrelated submission from [the inmate] in another case." *May*, 876 F.3d at 898 (7th Cir. 2017).

Escoffier's case is distinguishable because, although he did not include the description of the document on the Mailing Certificate, the Record is devoid of any averment that Escoffier mailed more than one document via the legal prison mailbox. (*See* R. at 7; R. at 21, App. F.) Further, despite the fact that the Mailing Certificate does not "name" the Notice of Appeal, the Record is clear that the district court in fact received a Notice of Appeal from Escoffier on March 10, 2021—merely three days after the Notice of Appeal left the Garum Correctional Facility. (*See* R. at 7; App. F). *See Lamb v. Hargett*, 69 F.3d 548 (10th Cir. 1995) (allowing merely a prison mailing certificate to evince the date of deposit).

The evidence supporting the timeliness of Escoffier's Notice of Appeal does not "advance an inconsistent view of the facts." *Craig*, 368 F.3d at 740. Rather, the Mailing Certificate that Escoffier attached to his Notice of Appeal sufficiently satisfies the requirements of Fed. Rule App. Proc. 4(c)(A)(1).

Finally, this Court should "interpret procedural rules in favor of 'deciding cases on the merits as opposed to dismissing them because of minor technical defects.'" *Ceballos-Martinez*, 387 F.3d at 1145 (citing *Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co.*, 119 F.3d 847, 848 (10th Cir. 1999)). This Court has "followed a

tradition in which courts of equity have sought to 'relieve hardships, from time to time, aris[ing] from a hard and fast adherence' to more absolute legal rules, which if strictly applied, threaten the evils of archaic rigidity.'" *Holland*, 560 U.S. at 650 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)).[4] As Justice Ginsburg opined, "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment to which appellate court." *Becker v. Montgomery*, 532 U.S. 757, 767 (2001). In sum, Escoffier properly evinced the timeliness of his Notice of Appeal by notating the date and pre-paid postage on the Mailing Certificate provided by the prison. And, even if he did not sufficiently comply with the evidentiary requirements of Rule 4, this Court should still hear Escoffier's case on the merits.

Accordingly, this Court should affirm the Fourteenth Circuit Court of Appeals because the plain language of Fed. Rule App. Proc. 4(c) clearly applies to all inmate litigants. And, even if it only applied to pro se litigants, Escoffier found himself abandoned by his attorney and otherwise in the circumstances this Court warned about in *Houston*. Furthermore, the timeliness of Escoffier's Notice of Appeal was sufficiently evinced and thus in compliance with the additional requirements of Fed. Rule App. Proc. 4(c).

[4] Importantly, Escoffier does not request that this Court apply equitable tolling to the "mandatory and jurisdictional nature" of Fed. Rule App. Proc. 4(a)(1). *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (citing *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61 (1982)). Rather, Escoffier simply asks the Court to consider Fed. Rule App. Proc. 4(c)(1) a claims-processing rule subject to waiver. *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17-18 (2017). Notably, the only question on appeal regarding this issue is whether Escoffier could take advantage of the Prison Mailbox Rule. (R. at 8.) Thus, Petitioner likely waived any issue arising under Fed. Rule App. Proc. 4(c)(1)(A).

II. A BLANKET BAN ON MEDICALLY NECESSARY TREATMENT IS FACIALLY UNCONSTITUTIONAL, BUT EVEN IF THIS COURT FOUND OTHERWISE, GARUM OFFICIALS ACTED WITH DELIBERATE INDIFFERENCE TO ESCOFFIER'S SERIOUS MEDICAL NEED BY CONTINUING WITH AN INEFFECTIVE COURSE OF TREATMENT.

The Eighth Amendment, prohibiting "cruel and unusual punishments[,]" U.S. Const. amend. VIII, "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . . ." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal quotation omitted). And, given "[o]ur societ[al] recognition that prisoners 'retain the essence of human dignity inherent in all persons[,]'" *Edmo v. Corizon, Inc.*, 935 F.3d 757, 766 (9th Cir. 2019) (quoting *Brown v. Plata*, 563 U.S. 493, 510 (2011)), this Court has held for more than four decades "that 'deliberate indifference to serious medical needs' of prisoners constitutes [the] cruel and unusual punishment[]" proscribed by the Eighth Amendment. *Id.* (quoting *Estelle*, 429 U.S. at 106). Indeed, "[i]t is undisputed that the treatment a prisoner receives in prison . . . [is] subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31 (1993).

To establish a claim of inadequate medical care under the Eighth Amendment, a plaintiff must first "show a 'serious medical need' by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *Edmo*, 935 F.3d at 784 (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)). Where, as here, a plaintiff establishes a serious medical need, he must then "make a subjective showing that the deprivation occurred with deliberate indifference to [his] health or safety." *Lemire v. California Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013) (quoting *Foster v.*

Runnels, 554 F.3d 807, 812 (9th Cir. 2009)). Notably, Respondent need not prove that prison officials subjectively intended for him to suffer any harm. *Id.* Rather, he need only demonstrate "that the course of treatment the official[s] chose was medically unacceptable under the circumstances and that the official[s] chose this course in conscious disregard of an excessive risk to [his] health." *Edmo*, 935 F.3d at 786.

Many courts have acknowledged that the failure to properly treat GD may put individuals in danger of significant injury. *See Edmo*, 935 F.3d at 785 (plaintiff attempted self-castration several times, once resulting in her being transported to the hospital for blood loss); *Monroe v. Baldwin*, 424 F.Supp. 3d 526, 544 (S.D. Ill. 2019) (one prisoner attempted suicide and one attempted self-castration while prison officials reviewed their cases); *Soneeya v. Spencer*, 851 F.Supp. 2d 228, 245 (D. Mass. 2012) (noting that when a plaintiff has a history of suicidal ideation, leaving their GD untreated exposes them to a risk of serious harm). It is likely because of such recognition that the Petitioner did not dispute and, in fact, stipulated that treatment for Escoffier's GD constitutes a serious medical need. (R. at 27.) A wise decision, the Respondent submits, considering that many courts have reached the same conclusion.[5] Consequentially, the first element of Respondent's claim of inadequate medical care is established.[6] Accordingly, Respondent turns to the issue of deliberate indifference.

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[5] *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039-40 (9th Cir. 2015); *Kosilek*, 774 F.3d at 86; *De'Lonta v. Johnson,* 708 F.3d 520, 525 (4th Cir. 2013); *Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011); *Allard v. Gomez*, 9 F.App'x 793, 794 (9th Cir. 2001); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Meriwether v. Faulkner*, 821 F.2d 408, 412 (7th Cir. 1987).

[6] The district court noted that there was no need for it to address whether treatment for Escoffier's GD constituted a serious medical need. (Opinion of the District Court of Silphium; R. at 27, n. 4.)

A. Prison Officials Offer a Medically Unacceptable Course of Treatment for GD by Categorically Banning GAS or Refusing to Individually Evaluate an Inmate's Need for Same.

At the outset, courts should consider the "[a]ccepted standards of care and practice within the medical community," and "the record, the judgments of prison medical officials, and the views of prudent professionals in the field, [when determining] whether the treatment decision of responsible prison authorities was medically acceptable." *Edmo*, 935 F.3d at 786. While there is a circuit split as to whether GAS is necessary for the rendition of medically acceptable care, the courts that refuse to recognize that GAS may be medically necessary to treat GD endorse an unconstitutional and outdated standard of medical care.

1. In Fact, There is a Medical Consensus that GAS is a Medically Necessary Form of Treatment for Some GD Patients.

The courts that rely on WPATH research recognizing GAS as a medically necessary treatment for some patients comport with the requirements of the Eighth Amendment. For example, in *Doe*, the court noted that the WPATH SOC are recognized by the National Commission on Correctional Health Care ("NCCHC")[7] as the standard that "should be followed by correctional institutions in providing healthcare to transgender people." *Doe v. Pennsylvania Dep't of Corr.*, No. 1:20-cv-00023-SPB-RAL, 2021 U.S. Dist. LEXIS 31970 (W.D. Pa. Feb. 19, 2021). Furthermore, the WPATH SOC have been endorsed as the standards for medical care

[7] The National Commission on Correctional Health Care is an organization that sets the standards for health services in correctional facilities and provides accreditation for institutions meeting those standards. National Commission on Correctional Health Care, https://www.ncchc.org/about (last visited Oct. 22, 2021).

of transgender people by " [the] World Health Organization, the American Medical Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, and [NCCHC]." *Monroe v. Baldwin*, 424 F.Supp. 3d 526, 543 (S.D. Ill. 2019). Importantly, the Ninth Circuit has noted that "[t]here are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups" besides the WPATH SOC. *Edmo*, 935 F.3d at 769 (quoting *Edmo v. Idaho Dep't of Corr.*, 358 F.Supp. 3d 1103, 1125 (D. Idaho 2018)). Thus, there is an overwhelming consensus in the medical community that the WPATH SOC, which recognize the medical necessity of GAS, are the standards this Court should use in evaluating the acceptability of transgender health care.

Further, the dwindling minority of medical professionals who are skeptical about the medical necessity of GAS fail to advocate for an alternative standard. For instance, in *Kosilek*, the court relied on the testimony of Dr. Stephen Levine ("Levine"), who helped author the fifth version of the WPATH SOC,[8] and served as Chairman of the Harry Benjamin International Gender Dysphoria Association's[9] Standards of Care Committee. *Kosilek*, 774 F.3d at 77. In a written report, Levine opined that WPATH is unreceptive to views inconsistent with their mission, stating, "[s]kepticism and strong alternative views are not well tolerated." *Id*. at 78. Furthermore, Levine stated that the WPATH SOC are "the product of an enormous effort to be balanced, but it is not a politically neutral document." *Id*. Levine alleged

[8] The edition of the WPATH SOC cited throughout this brief is the 7th edition, published in 2012.
[9] Harry Benjamin International Gender Dysphoria Association is the former name of WPATH.

that the limitations of the WPATH SOC are not the result of its supposed political leanings, but rather "the lack of rigorous research in the field," and further opined that there are "large gaps" in the understanding of the long-term effects of GAS and other GD treatments. *Id*.

Despite his hesitancy in admitting that GAS may be medically necessary, Levine believed "that prudent professionals would generally not deny surgery to a fully eligible individual." *Id*. at 79. The holding in *Kosilek* is not supported by the medical opinions it purported to rely on; "Dr. Schmidt and Dr. Levine testified that [GAS] was not necessary in the factual circumstances of that case, that is, based on the unique medical needs of the prisoner at issue." *Edmo*, 935 F.3d at 795. Of significant import is the fact that Levine's testimony was rendered in 2006; WPATH has since issued the seventh edition of its SOC, which was "based upon significant cultural shifts, advances in clinical knowledge, and appreciation of the many health care issues that can arise for . . . transgender . . . people beyond hormone therapy and surgery." WPATH SOC at 1, n. II.

In a different vein, the necessity for GAS as a treatment option has been questioned by some courts because of a supposed lack of consensus on the efficacy of the treatment for GD. *Gibson v. Collier*, 920 F.3d 212, 228 (5th Cir. 2019). In *Gibson*, a transgender inmate filed an Eighth Amendment claim for inadequate medical care after being denied GAS. *Id*. at 218. In evaluating the claim, the court refused to rely on the WPATH SOC, which it claimed "reflect[ed] not consensus, but merely one side in a sharply contested medical debate over [GAS]." *Id*. at 221. Additionally, the court

was concerned that the WPATH SOC were not primarily based on medical research, but rather were driven by political considerations. *Id*. The court continually opined that the WPATH SOC do not reflect the medical consensus concerning the treatment of GD patients and that no such consensus exists. *Id*. at 223. The inmate's Eighth Amendment claim failed, according to the court, because GAS cannot be regarded as medically necessary if there is no agreement in the medical community about its necessity or effectiveness. *Id*. at 223.

As illustrated by the contradictory conclusion of Levine in *Kosilek*—that it would be prudent to both provide and deny the patient with GAS, *Kosilek*, 774 F.3d at 79—failing to accept that GAS may be medically necessary for some patients negates any assurance that transgender individuals will receive the care that they may need to abate their suffering. The individual conclusions of a small number of medical professionals should not eclipse the overall consensus of the medical community; for example, here, it would be inappropriate for the Respondent to aver that the committee justifiably relied on the opinion of Cordata, an endocrinologist, that GAS is never medically necessary, (R. at 14, App. B.), considering that the Endocrine Society endorses the WPATH SOC. *See Monroe*, 424 F.Supp 3d at 543; *see also Edmo*, 935 F.3d at 786 (noting that it "does [not suffice for 'correctional administrators wishing to avoid treatment . . . simply to find a single practitioner willing to attest that some well-accepted treatment is not necessary.'") (quoting *Kosilek*, 774 F.3d at 90 n.12). That's exactly what Garum did.

Moreover, while Chewtes and Cordata agreed that a combination of other treatments may effectively treat GD, Chewtes informed the committee that failing to include GAS as a treatment option would be contrary to the WPATH SOC. (R. at 14, App. B.) Thus, Cordata's logic would defy the combined research efforts of "the best available science and expert professional consensus." WPATH SOC at 1. To continue to deny the research efforts and conclusions of the necessity of GAS would undermine the medical community as a whole, which is a disservice to both medical professionals and those that they serve.

Despite the research by WPATH and the endorsement of their work, courts have opined, as in *Gibson*, that the robust debate about the proper standards of care for transgender people should bar the inclusion of GAS as a medically necessary treatment option. This conclusion, however, is outdated at best. As noted in *Monroe*, *Doe*, and *Edmo*, there is a widespread endorsement of GAS as a medically necessary treatment by national and international health organizations. As noted previously, the NCCHC declared that the WPATH SOC should guide the provision of healthcare to transgender inmates. The Garum policy, therefore, directly contradicts the conclusions of the preeminent correctional health care organization.

It is evident that the contentions of those who reject the existence of a medical consensus regarding the proper standards of care for transgender healthcare are misguided. Though there may be disagreement over whether a course of treatment is proper for a particular patient, the WPATH SOC acknowledge that care must be determined on a case-by-case basis, and state that WPATH's purpose "is to provide

clinical guidance for health professionals." WPATH SOC at 2. While health professionals will maintain discretion in formulating a course of treatment, they cannot exclude GAS from their consideration, as research demonstrates that it may be necessary to alleviate the symptoms of GD. WPATH SOC at 54. Therefore, this Court should recognize that GAS is a medically necessary treatment for some transgender patients.

2. A Blanket Ban on a Medically Necessary Treatment is Medically Unacceptable and Facially Unconstitutional.

Courts have found that a refusal to evaluate or treat a medical condition, based solely on a blanket policy and not medical judgment, could constitute deliberate indifference. *See, e.g., Rosati*, 791 F.3d 1037; *Colwell v. Bannister*, 763 F.3d 1060 (9th Cir. 2014); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *Gibson*, 920 F.3d at 239 (Barksdale, J., dissenting). Under the WPATH SOC, GAS is characterized as "essential and medically necessary" to alleviate the symptoms of GD for many transgender individuals. WPATH SOC at 54. Unsurprisingly, courts are keen to declare prison administrative policies prohibiting GAS unconstitutional under the Eighth Amendment.

To illustrate, the Ninth Circuit ruled that a prison administrative policy that banned a medically necessary procedure constituted deliberate indifference to a serious medical need in violation of the Eighth Amendment. *Colwell,* 763 F.3d at 1063. In *Colwell*, the prison had what was aptly named the "one eye only" policy, which categorically banned cataract surgery for inmates that were adjudged to have at least one well-functioning eye, even if the other had a cataract. *Id*. at 1065. The

prison denied the plaintiff surgery for a cataract that caused cataract-induced blindness because his unaffected eye was corrected to 20/20 vision which, under the challenged policy, rendered the surgery non-essential despite the prison optometrist's recommendation that the surgery was necessary. *Id*. at 1065. The court explained that the plaintiff was denied surgery contrary to the advice of medical professionals and in reliance on the advice of "non-specialist and non-treating medical officials who made decisions based on an administrative policy." *Id*. at 1069. Thus, the surgery was not denied based on a medical judgment—*i.e.*, on the basis that non-treatment or an alternative course of treatment was medically acceptable under the circumstances—rather solely because of the administration's "one eye only" policy. *Id*. at 1070. In the eyes of the court, a blanket ban on a medically necessary procedure "solely on the basis of an administrative policy that 'one eye is good enough for prison inmates' is the paradigm of deliberate indifference." *Id*. at 1063.

Similarly, the implementation of a state statute that categorically bans transgender inmates from receiving hormone therapy or GAS has been held unconstitutional. *Fields*, 653 F.3d at 559. In *Fields*, several transgender inmates sued their prison and alleged that its enforcement of a state statute barring transgender inmates from receiving certain medical treatments violated the Eighth Amendment. *Id*. at 553. The plaintiffs required hormone therapy, and the court noted that the prison could not proffer any evidence that any alternative treatment could be adequate. *Id*. at 556. Relying on *Estelle,* the court highlighted the well-established principle that a state's refusal to provide effective treatment for the

serious medical needs of prisoners violates the Eighth Amendment. *Id. See Estelle*, 429 U.S. at 102-03. Thus, the court concluded that when no alternative treatment would suffice, a prison violates the Eighth Amendment by enforcing a blanket ban on a medically necessary treatment. *Id*. at 559.

A policy ruling that certain accepted treatments for GD are never medically necessary, and therefby prohibiting prisoners from receiving an evaluation for same, is facially unconstitutional. *Soneeya*, 851 F. Supp. 2d at 252. In *Soneeya*, as is the case here, the court was confronted with a policy that banned inmates from receiving GAS as a treatment for GD. *Id*. at 240. Both the plaintiff and her treating physician feared that the plaintiff would commit suicide if she did not receive GAS. *Id*. The court noted that prisons that use blanket ban policies to deny inmates from receiving GAS have received negative treatment. *Id*. at 243-44.[10] Though the prison offered alternative treatment options to the plaintiff, the court noted that the flaw in the policy was that it "create[d] blanket prohibitions on some types of treatment that professional and community standards indicate may sometimes be necessary for the adequate treatment of [GD]." *Id*. at 247. The court concluded that the "failure to offer such an individualized assessment in the face of [the plaintiff's] serious medical needs constitutes [*sic*] is sufficient to allow the court to conclude that there is deliberate indifference in this case." *Id*. at 250.

[10] *See Allard* 9 F. App'x 793 (blanket policy prohibiting GAS, rather than allowing for individualized evaluations, may constitute deliberate indifference); *Fields*, 653 F.3d at 559; *Brooks v. Berg*, 270 F.Supp. 2d 302 (N.D. N.Y. 2003) (stating that a "blanket denial of medical treatment is contrary to a decided body of case law" and "[p]risons must provide inmates with serious medical needs some treatment based on sound medical judgment").

Turning to the case at hand, when viewed in light of the decisions rendered in *Colwell*, *Fields*, and *Soneeya*, Garum's blanket ban cannot pass constitutional muster. Courts have consistently held that a denial of GAS, to be medically acceptable, must be based on an "individualized medical evaluation" rather than as "a result of a blanket rule[.]" *Kosilek v. Maloney*, 221 F.Supp. 2d 156, 193 (D. Mass. 2002) (quoting *Allard*, 9 F.App'x at 793). Garum's policy prohibits not only GAS itself, but also the possibility of an evaluation to determine whether it could be clinically warranted for a specific inmate—this is true even when, as in Escoffier's case, the then-prescribed course of treatment proved ineffective in relieving the inmate's suffering. Instead, as in *Colwell*, Escoffier was denied a medically necessary treatment based on an administrative policy, rather than a medical judgment. And, as the court concluded in *Soneeya*, Garum's failure to individually assess Escoffier's need for GAS demonstrates the medical unacceptability of his course of treatment.

B. Garum Officials Consciously Disregarded the Excessive Risk to Escoffier's Health by Failing to Evaluate Him for GAS After His Course of Treatment Proved Ineffective.

"[I]n the medical context, an 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.'" *Estelle*, 429 U.S. at 105-06. "To state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Id.* at 106.

Continuing with an ineffective treatment plan may serve as evidence that a prison official was deliberately indifferent to a serious medical need of a prisoner in violation of the Eighth Amendment. *Edmo*, 935 F.3d at 793-94. In *Edmo,* a prison medical official was aware that a prisoner had attempted to harm herself at the time that he evaluated her to determine whether GAS was medically necessary. *Id.* at 793. Furthermore, despite knowing that the prisoner suffered from GD, that she "experience[d] 'clinically significant' distress that impaired her ability to function[,]" and even "acknowledg[ing] that her self-[harm] attempt was evidence that [her GD] . . . 'had risen to another level[,]'" the official continued with the ineffective treatment plan. *Id.* Sometime later, the prisoner attempted to harm herself a second time. *Id.*

Despite knowing of this second incident and indicating in his previous evaluation that "he would continue to monitor and assess her condition[,]" the prison official again failed to "reevaluate or recommend a change to the inmate's treatment plan[]." *Id.* After taking this into consideration, the court held that, "[u]nder these circumstances, we conclude that [the prison official] knew of and disregarded the substantial risk of severe harm to [the prisoner]." *Id.* (quoting *Farmer*, 511 U.S. at 837). While the defendants argued that neither the prison medical official nor any other defendant acted with deliberate indifference because none acted with "malice, intent to inflict pain, or knowledge that [the] recommended course of treatment was medically inappropriate[,]" the court pointed out that "'it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.'" *Id.* (quoting *Lemire*, 726 F.3d at 1074). Granting that this Court had never required

prisoners to meet the lofty standard proffered by the defendants, the court reasoned that "[i]t [was] enough that [the prison medical official] knew of and disregarded an excessive risk to [the prisoner's] health by rejecting her request for [GAS] and then never re-evaluating his decision despite ongoing harm to [the prisoner]." *Id.* In a final effort, the defendants argued that their provision of some care precluded a finding of deliberate indifference. *Id.* After noting that "[t]he provision of . . . even extensive treatment over a period of years, does not immunize officials from the Eighth Amendment's requirements[,]" the court again justified its decision on the basis that the course of treatment rendered "stopped short of what was medically necessary." *Id.*

Here, this Court is confronted with a case bearing a striking resemblance to *Edmo*. Escoffier's prison medical record demonstrates Chewtes' awareness that Escoffier had exhibited symptoms of severe depression and that his physical and mental health had suffered since his detention intake. (R. at 18, App. D.) Chewtes noted that Escoffier regularly skipped showers and meals, thereby contributing to his notable weight loss, and that his notable hair loss appeared to be self-inflicted by pulling. (R. at 18, App. D.) After meeting with and evaluating Escoffier, Chewtes confirmed the presence of and diagnosed Escoffier with Major Depression and GD. *Id.* (R. at 18, App. D.) More importantly, however, Chewtes was both aware that Selmor thought GAS was medically necessary for Escoffier and that Escoffier threatened killing himself if he did not receive the procedure. (R. at 18, App. D.; R. at 17, App. C.) Nonetheless, Chewtes, dutifully adhering to Garum's policy, merely

recommended that Escoffier continue to receive hormone therapy consistent with his pre-detention usage in addition to weekly mental health counseling. (R. at 18, App. D.) And, despite Escoffier's request that he be evaluated for GAS, Chewtes refused to provide such evaluation not based on his medical judgment that it wasn't necessary for Escoffier, but instead on the basis that Garum's policy banned surgical interventions as treatment for GD. (R. at 19, App. D.) Disheartened, but undeterred, Escoffier filed a grievance appealing the denial of his request for an evaluation for GAS not once, but three times over a nearly four-month period. (R. at 20, App. E.) Each cry for care was summarily denied by referencing Garum's blanket ban.[11] (R. at 20, App. E.)

In response to Escoffier's third appeal, Posca claimed an individualized evaluation could have only one result, presumably that GAS is unavailable, (R. at 20, App. E.); however, the evaluation could have revealed that, despite Garum's policy, GAS was medically necessary for Escoffier. Furthermore, Posca opined that, because Escoffier was "being properly treated with hormones and psychotherapy, . . . there [was] no reason to second-guess the clinical decision making of doctors Chewtes and Laridum." (R. at 20, App. E.) Ignoring that, as a non-medical professional, Posca is not qualified to decide whether an inmate is being properly treated, there were at least two valid reasons to second-guess doctors Chewtes and Laridum—Posca, as administrator and warden, not only has overall authority for the operations and

[11] Escoffier's first grievance was denied by Chewtes; his second, by Laridum; his third, by Garum Warden and Administrator, Posca. All denials of Escoffier's grievance refer to Garum's policy as set forth in Appendix A. (R. at 10-11, App. A.)

safety of the Garum facility and its residents, (R. at 10, App. A.), but Escoffier's prison medical records and continued appeals suggest, at a minimum, that the course of treatment prescribed by Chewtes was ineffective at treating Escoffier's GD. Though Posca suggested that evaluating a prisoner for medically necessary care might not even be entertained in "normal times," he briefly cited the stress placed on Garum's health system as a result of the Miasmic Syndrome to justify the prison officials' refusal to evaluate Escoffier's clinical need for what Posca considers to be "luxury services." (R. at 20, App. B.) Thus, the Respondent submits that, when considering his continued appeals and suffering that arose out of the medically unacceptable and ineffective course of treatment provided him by Garum, and the officials' unjustifiable decision to deny his request for an evaluation based on an administrative policy rather than a medical judgment, the Fourteenth Circuit correctly decided that the Garum officials exhibited deliberate indifference to his serious medical need in violation of the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the Respondent, Lucas Escoffier, respectfully requests that this Court affirm the holding of the Fourteenth Circuit.

DATED this 22nd day of October 2021.

Respectfully submitted,

Lucas Escoffier, Respondent

By: /s/ Team 2108
Attorneys for Respondent

APPENDIX A

CONSTITUTIONAL PROVISIONS.

The Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> U.S. Const. amend. VIII.

APPENDIX B

STATUTORY PROVISIONS.

Title 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX C

FEDERAL RULES OF APPELLATE PROCEDURE.

Fed. Rule App. Proc. 4(a)(1):

(a) Appeal in a Civil Case.

(1) ***Time for Filing a Notice of Appeal.***

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a.)

Fed. Rule App. Proc 4(c):

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1.) 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:

(A) it is accompanied by:

(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; or

(B) 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.)

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

APPENDIX D

WPATH STANDARDS OF CARE, VERSION 7, CHAPTER XI PGS. 54-56.

developing an individualized therapy plan (Carew, Dacakis, & Oates, 2007; Dacakis, 2000; Davies & Goldberg, 2006; Gelfer, 1999; McNeill, Wilson, Clark, & Deakin, 2008; Mount & Salmon, 1988).

Feminizing or masculinizing the voice involves non-habitual use of the voice production mechanism. Prevention measures are necessary to avoid the possibility of vocal misuse and long-term vocal damage. All voice and communication therapy services should therefore include a vocal health component (Adler et al., 2006).

Vocal Health Considerations After Voice Feminization Surgery

As noted in section XI, some transsexual, transgender, and gender-nonconforming people will undergo voice feminization surgery. (Voice deepening can be achieved through masculinizing hormone therapy, but feminizing hormones do not have an impact on the adult MtF voice.) There are varying degrees of satisfaction, safety, and long-term improvement in patients who have had such surgery. It is recommended that individuals undergoing voice feminization surgery also consult a voice and communication specialist to maximize the surgical outcome, help protect vocal health, and learn nonpitch related aspects of communication. Voice surgery procedures should include follow-up sessions with a voice and communication specialist who is licensed and/or credentialed by the board responsible for speech therapists/speech-language pathologists in that country (Kanagalingam et al., 2005; Neumann & Welzel, 2004).

Surgery

Sex Reassignment Surgery Is Effective and Medically Necessary

Surgery – particularly genital surgery – is often the last and the most considered step in the treatment process for gender dysphoria. While many transsexual, transgender, and gender-nonconforming individuals find comfort with their gender identity, role, and expression without surgery, for many others surgery is essential and medically necessary to alleviate their gender dysphoria (Hage & Karim, 2000). For the latter group, relief from gender dysphoria cannot be achieved

without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity. Moreover, surgery can help patients feel more at ease in the presence of sex partners or in venues such as physicians' offices, swimming pools, or health clubs. In some settings, surgery might reduce risk of harm in the event of arrest or search by police or other authorities.

Follow-up studies have shown an undeniable beneficial effect of sex reassignment surgery on postoperative outcomes such as subjective well-being, cosmesis, and sexual function (De Cuypere et al., 2005; Gijs & Brewaeys, 2007; Klein & Gorzalka, 2009; Pfäfflin & Junge, 1998). Additional information on the outcomes of surgical treatments are summarized in Appendix D.

Ethical Questions Regarding Sex Reassignment Surgery

In ordinary surgical practice, pathological tissues are removed to restore disturbed functions, or alterations are made to body features to improve a patient's self image. Some people, including some health professionals, object on ethical grounds to surgery as a treatment for gender dysphoria, because these conditions are thought not to apply.

It is important that health professionals caring for patients with gender dysphoria feel comfortable about altering anatomically normal structures. In order to understand how surgery can alleviate the psychological discomfort and distress of individuals with gender dysphoria, professionals need to listen to these patients discuss their symptoms, dilemmas, and life histories. The resistance against performing surgery on the ethical basis of "above all do no harm" should be respected, discussed, and met with the opportunity to learn from patients themselves about the psychological distress of having gender dysphoria and the potential for harm caused by denying access to appropriate treatments.

Genital and breast/chest surgical treatments for gender dysphoria are not merely another set of elective procedures. Typical elective procedures involve only a private mutually consenting contract between a patient and a surgeon. Genital and breast/chest surgeries as medically necessary treatments for gender dysphoria are to be undertaken only after assessment of the patient by qualified mental health professionals, as outlined in section VII of the *SOC*. These surgeries may be performed once there is written documentation that this assessment has occurred and that the person has met the criteria for a specific surgical treatment. By following this procedure, mental health professionals, surgeons, and patients share responsibility for the decision to make irreversible changes to the body.

It is unethical to deny availability or eligibility for sex reassignment surgeries solely on the basis of blood seropositivity for blood-borne infections such as HIV or hepatitis C or B.

Relationship of Surgeons with Mental Health Professionals, Hormone-Prescribing Physicians (if Applicable), and Patients (Informed Consent)

The role of a surgeon in the treatment of gender dysphoria is not that of a mere technician. Rather, conscientious surgeons will have insight into each patient's history and the rationale that led to the referral for surgery. To that end, surgeons must talk at length with their patients and have close working relationships with other health professionals who have been actively involved in their clinical care.

Consultation is readily accomplished when a surgeon practices as part of an interdisciplinary health care team. In the absence of this, a surgeon must be confident that the referring mental health professional(s), and if applicable the physician who prescribes hormones, is/are competent in the assessment and treatment of gender dysphoria, because the surgeon is relying heavily on his/her/their expertise.

Once a surgeon is satisfied that the criteria for specific surgeries have been met (as outlined below), surgical treatment should be considered and a preoperative surgical consultation should take place. During this consultation, the procedure and postoperative course should be extensively discussed with the patient. Surgeons are responsible for discussing all of the following with patients seeking surgical treatments for gender dysphoria:

- The different surgical techniques available (with referral to colleagues who provide alternative options);
- The advantages and disadvantages of each technique;
- The limitations of a procedure to achieve "ideal" results; surgeons should provide a full range of before-and-after photographs of their own patients, including both successful and unsuccessful outcomes;
- The inherent risks and possible complications of the various techniques; surgeons should inform patients of their own complication rates with each procedure.

These discussions are the core of the informed consent process, which is both an ethical and legal requirement for any surgical procedure. Ensuring that patients have a realistic expectation of outcomes is important in achieving a result that will alleviate their gender dysphoria.

All of this information should be provided to patients in writing, in a language in which they are fluent, and in graphic illustrations. Patients should receive the information in advance (possibly