Team 2112

No. 2021-22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

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 STATE COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES DISTRICT COURT CASES

RULES

QUESTIONS PRESENTED

I. Whether a formerly represented inmate who was without the aid of counsel and thus forced to mail his notice of appeal via a prison mail system is entitled to the use of the prison mailbox rule, and, if so, whether evidence of the notice's pre-paid postage and deposit date are enough to satisfy all other procedural requirements of the rule.

II. Whether an inmate's Eighth Amendment rights were violated when prison officials refused to evaluate his medical need for gender affirmation surgery solely due to the prison's blanket ban on surgical interventions for gender dysphoria.

STATEMENT OF THE CASE

1. Mr. Escoffier's Persistent Gender Dysphoria

Respondent, Mr. Lucas Escoffier, is a transgender man who suffers from gender dysphoria, a serious condition that has plagued him with chronic depression and suicidal ideation. R. at 1. For the last ten years, he has undergone various treatments to alleviate his gender dysphoria: he socially transitioned, began masulizing hormone therapy, and, after a prophylactic double mastectomy, elected for masculinized chest reconstruction. R. at 1.

These measures improved his mental health to some extent, but in 2018, his depression had returned, and he noticed a marked increase in suicidal ideation. R. at 17. Specifically, he could no longer tolerate being "forced to live in a woman's body," and revealed to his doctor that "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." R. at 17. Accordingly, in December 2019, his doctor determined that gender affirmation surgery was medically necessary to treat his persistent gender dysphoria. R. at 17.

2. Mr. Escoffier's Imprisonment and the Onset of the Miasmic Pandemic

Just ten days after Mr. Escoffier was referred for gender affirmation surgery, he was arrested, charged, and indicted with criminal tax fraud and other underlying charges. R. at 2. He pleaded guilty and was sentenced to five years in prison; his period of incarceration began on March 7, 2020, at Garum Correctional Facility (Garum), a State of Silphium facility. R. at 2. Shortly after his sentence began, the world was plagued with Miasmic Syndrome, a highly contagious, highly

fatal virus. *Id.* In response, Garum instituted strict policies to prevent the spread of Miasmic: in-person visitations were completely curtailed, and court appearances and attorney-client visits were conducted online. R. at 3. Garum had only five computers, making videoconferences extremely limited. Id. Further, phone calls were only available via appointment made through the corrections staff, and, due to short staffing, those phone calls often went unanswered, forcing inmates to go weeks without being able to contact family or attorneys. R. at 4.

3. Mr. Escoffier's Medical Treatment in Prison

Following incarceration, Mr. Escoffier was racked with debilitating depression, anxiety, paranoia, and perpetual suicidal ideation. R. at 4. He had even resorted to pulling out his own hair. R. at 18. Recognizing these as symptoms of his gender dysphoria, Mr. Escoffier requested a meeting with Garum's psychiatrist, Dr. Arthur Chewtes. R. at 4.

After a clinical assessment and a review of Mr. Escoffier's pre-detention medical file, Dr. Chewtes diagnosed Mr. Escoffier with gender dysphoria and major depressive disorder. R. at 18. Dr. Chewtes made several recommendations: Mr. Escoffier was to continue masculizing hormone therapy consistent with his pre-detention usage, he was to attend weekly psychotherapy, and, to ensure his safety, he was to be observed at least hourly. R. at 18.

Dr. Chewtes noted that, pre-detention, Mr. Escoffier had been recommended for gender affirmation surgery, and, in their meeting, Mr. Escoffier explicitly requested a surgical evaluation to follow through with that plan. R. at 18–19.

However, Dr. Chewtes refused to evaluate Mr. Escoffier's necessity for surgery because, per Garum's medical policy, surgical interventions for gender dysphoria were not available to inmates. R. at 19.

Mr. Escoffier appealed Dr. Chewtes's decision to deny him surgical evaluation through Garum's medical grievance protocol, but all three appeals were denied based on Garum's policy against gender affirmation surgery—first, by Dr. Chewtes; second, by Dr. Laridum, Director of Garum's Division of Health; and third, by Garum's Warden Max Posca. R. at 20. Warden Posca, who reviewed the third and final appeal, noted: "even if [surgery] might have been entertained in normal times, this facility's health system is already stressed enough trying to keep inmates and staff safe from Miasmic Syndrome. Now is not the time to start offering luxury services." *Id.*

4. Garum's Blanket Ban on Gender Affirmation Surgery

Garum's Medical Policy Handbook prohibits surgical interventions for gender dysphoria. R. at 11. Therefore, regardless of an inmate's medical needs, gender affirmation surgery is unavailable. *See id.* A committee of community physicians, chaired by Dr. Laridum, set the inmate-care standards contained in the Handbook. R. at 12. Dr. Chewtes was the only physician on the committee with any documented experience treating patients with gender dysphoria. R. at 13. In addition to the physicians, Warden Posca, as administrator of Garum, attended committee meetings *ex officio*. R. at 13.

To develop the Handbook's treatment plan for inmates with gender dysphoria, Dr. Chewtes directed the committee to consider the WPATH Standards,[1] the country's most widely used standards for transgender healthcare. R. at 14. The WPATH standards specifically provide that surgical intervention is a viable treatment for gender dysphoria. R. at 14. In fact, Dr. Chewtes informed the committee that ample research had proven that gender affirmation surgery offers patients significant relief from their gender dysphoria. R. at 14.

However, contrary to the WPATH standards and Dr. Chewtes's advisement, another physician on the committee opined that surgical intervention was never medically necessary to treat gender dysphoria. R. at 14. In response, Dr. Chewtes warned the committee that precluding gender affirmation surgery would be counter to the WPATH standards. R. at 14. After less than two hours of discussion on the matter, the committee voted to exclude gender affirmation surgery from the Handbook. R. at 14. Warden Posca and Dr. Laridum subsequently signed their approval of the new policies. *Id.*

5. Mr. Escoffier Files Suit Alleging Deliberate Indifference

Distraught that his medical needs were going untreated, Mr. Escoffier retained an attorney, Ms. Pegge, and filed suit against Petitioner, Warden Posca, for a deprivation of his Eighth Amendment rights under 42 U.S.C. § 1983. R. at 5.

---

[1] World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonforming People* (7th ed. 2012) [hereinafter WPATH Standards].

The District Court of Silphium returned summary judgment in favor of Warden Posca on February 1, 2021. R. at 6.

6. Mr. Escoffier Appeals Without the Aid of Counsel

Ms. Pegge planned to represent Mr. Escoffier in his appeal, but, unbeknownst to him, she was hospitalized with a severe form of Miasmic Syndrome shortly after February 1. R. at 6. She did not return to work until March 12, nine days after Mr. Escoffier's notice of appeal was due. R. at 7. Her firm, Forme Curry, neglected to transfer Mr. Escoffier's case to another attorney, leaving him without counsel. *Id.* Due to Miasmic policies, Mr. Escoffier's access to communication was severely limited: he was only able to call Ms. Pegge three times throughout February 2021—all of which were unsuccessful. R. at 7. Additionally, he had only one chance to use a computer to look up Ms. Pegge's firm; that day, March 1, 2021, he sent an email to Forme Curry's general inbox asking for help with his appeal since he could not get in contact with Ms. Pegge. R. at 7. Finally, on March 2, 2021, the day before Mr. Escoffier's notice of appeal was due, an attorney unfamiliar with Mr. Escoffier's case contacted him, informed him that Ms. Pegge was hospitalized, and advised him that he must submit his own notice of appeal to the prison mailbox because the firm had no attorney to assist him. R. at 7. Mr. Escoffier placed his notice of appeal in Garum's mailbox on March 2, 2021, with the completed prison mailing form. *Id.* Garum did not mail the appeal to the district court until March 7, 2021, and the court did not receive it until March 10, 2021. *Id.*

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Fourteenth Circuit was correct in holding that Mr. Escoffier's notice of appeal was timely filed. As an inmate without the aid of counsel at the relevant time of filing, Mr. Escoffier is entitled to use the prison mailbox rule. As written, the prison mailbox rule applies to any inmate confined in an institution. Fed. R. App. P. 4(c). Thus, the plain meaning rule demands that the prison mailbox rule apply to all inmates, including Mr. Escoffier.

Further, even if the prison mailbox rule applies only to unrepresented inmates, Mr. Escoffier nonetheless qualifies because he was without the aid of counsel when he was forced to file his own notice of appeal. In fact, Mr. Escoffier's situation reflects the very reason why the prison mailbox rule was created. In *Houston v. Lack*, the impetus behind the prison mailbox rule, this Court acknowledged that inmates who are forced to file their own notices of appeal, unlike other litigants, face substantial hurdles that necessarily prevent them from ensuring the timely delivery of their appeals. *Houston v. Lack*, 487 U.S. 266, 270 (1988). Inmates must use the prison mail system and thus are at the mercy of prison authorities whom they cannot control or supervise. *Id.* Moreover, an inmate cannot personally shepherd his notices of appeal to the courthouse, nor can he monitor the status of his notices of appeal, nor can he confirm that the court ultimately filed his appeal on time. *Id.* Thus, to retain the spirit of the rule as announced in *Houston*, any inmate faced with these barriers must be afforded the protections of the prison mailbox rule. Since Mr. Escoffier was faced with each of

these barriers—unmitigated by any help from counsel—he is entitled to the prison mailbox rule, which renders his appeal timely filed. Finally, since substantial evidence exists confirming that Mr. Escoffier's notice of appeal was accompanied by prepaid postage and deposited on or before the appeal's due date, Mr. Escoffier complied with all other procedural requirements of the prison mailbox rule.

Since Mr. Escoffier's appeal is timely, this Court should reach the merits of the case and affirm the Fourteenth Circuit's holding that Garum's blanket ban on gender affirmation surgery violated Mr. Escoffier's Eighth Amendment rights. Since 1976, this Court has prohibited prison officials from being deliberately indifferent to the serious medical needs of prisoners. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) . Garum's blanket ban on gender affirmation surgery is the very definition of the deliberate indifference proscribed by the Eighth Amendment: it preempted an individualized review of Mr. Escoffier's medical needs, and it forced officials to deny Mr. Escoffier treatment for non-medical reasons. Moreover, even if this Court finds no fault in the blanket ban itself, the treatment Garum officials provided to Mr. Escoffier must still pass constitutional muster. It does not. The medical treatment Mr. Escoffier received was inadequate and grossly incompetent. At best, the treatment failed to address Mr. Escoffier's medical needs. At worst, it was an easier and less efficacious treatment plan selected pursuant to improper motives.

ARGUMENT

I. MR. ESCOFFIER'S NOTICE OF APPEAL WAS TIMELY FILED BECAUSE HE IS ENTITLED TO THE USE OF THE PRISON MAILBOX RULE AND COMPLIED WITH ALL OF ITS PROCEDURAL REQUIREMENTS.

The Fourteenth Circuit properly found that Mr. Escoffier's notice of appeal was timely. A notice of appeal is deemed "filed" when it reaches the courthouse. *Houston,* 487 U.S. at 271. Normally, litigants retain full control over their notices and are able to ensure that they reach the courthouse on time. However, because inmates are restricted to the four walls of their institution, they so not enjoy this same control over their own notices. *Houston,* 487 U.S. at 271-72. This Court addressed this inequality in *Houston*, recognizing that it was imperative to treat prisoners fairly, who, unlike civil litigants, are at the mercy of prison authorities to mail their notices and "cannot personally travel to the courthouse" to see that their notices are timely filed. *Houston,* 487 U.S. at 271.

To remedy this issue, *Houston* proposed a new filing rule applicable to inmates confined in an institution. *Id.* at 276. This rule, termed the "prison mailbox rule," holds that an inmate's notice of appeal is deemed "filed" at the time he places it in the prison's mailbox. *Id.* Congress codified this in Rule 4(c) of the Federal Rules of Appellate Procedure. Fed. R. App. P. 4(c). The prison mailbox rule is characterized as "a rule of equal treatment." *Lewis v. Richmond City Police Dep't*, 947 F.2d 733, 735 (4th Cir. 1991). The rule seeks to ensure that imprisoned litigants are not disadvantaged by delays which other civilian litigants might readily overcome. *Houston*, 487 U.S. at 275. In keeping with the spirit of the rule as one of equal treatment, Congress imposed no requirements on inmates to qualify for the

rule; "inmates confined to an institution" are entitled to the prison mailbox rule. Fed. R. App. P. 4(c). Accordingly, the Fourth and Seventh Circuits have remained faithful to the plain meaning of the rule and offer any inmate the use of the rule. *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004); *United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994).

However, some circuits have artificially narrowed the rule, contrary to its plain meaning, and restrict the rule's application to only unrepresented inmates. *Cretacci v. Call*, 988 F.3d 860, 867 (6th Cir. 2021); *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003); *Burgs v. Johnson Cnty.*, 79 F.3d 701, 702 (8th Cir. 1996). This Court should follow the Fourth and Seventh Circuits' leads and hold that the prison mailbox rule applies to all inmates for two reasons. First, under the plain meaning rule, the prison mailbox rule necessarily applies to all inmates, regardless of their representation. Second, the rule was designed to ensure equal treatment and access to the courts; thus, a narrow reading that artificially restricts the rule's application is contrary to the very spirit of the rule.

Even if this Court narrows the rule's scope and entitles only pro se inmates to the use of the prison mailbox rule, Mr. Escoffier nonetheless qualifies because, with his appeal deadline looming and his attorney unreachable, he was forced to place his notice of appeal in Garum's mailbox and proceed without the aid of counsel.

Additionally, Mr. Escoffier complied with all other procedural requirements of Rule 4(c) to entitle him to the rule. Rule 4(c) requires that an inmate's notice of appeal be accompanied by either (1) a declaration or notarized statement in

compliance with 28 U.S.C. §1746 or (2) evidence, including a postmark or date stamp, showing that the notice was deposited with prepaid postage. Fed. R. App. P. 4(c). Several circuit courts, and the rule itself, allow any evidence of prepaid postage and deposit date to suffice. *Ray v. Clements*, 700 F.3d 993, 1008 (7th Cir. 2012); *Barrientos v. Lynch*, 829 F.3d 1064, 1067 (9th Cir. 2016). For these reasons, the judgement of the Fourteenth Circuit should be affirmed.

A. The Prison Mailbox Rule Applies to All Inmates.

1. The plain meaning rule demands that the prison mailbox rule apply to all inmates.

Where statutory language is plain, any inquiry into the meaning of the statute must begin and end with the text itself. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). This plain meaning rule is a foundation of this Court's jurisprudence. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). It requires that, absent indication to the contrary, words be given their ordinary, contemporary, and common meaning. *Walters v. Metro. Educ. Enters.,* 519 U.S. 202, 207 (1997); *Robinson*, 519 U.S. at 340. "Our inquiry into the statute's meaning must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson*, 519 U.S. at 340. Thus, where a statute's language is plain and its scheme coherent, a court's sole function is to enforce it according to its terms. *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti v. United States,* 242 U.S. 470, 485 (1917)).

The prison mailbox rule's language is plain, and its scheme is coherent. Thus, this Court need not inquire any further into the meaning of its language. Per its

terms, the rule applies to "inmates confined in an institution." Fed. R. App. P. 4(c). Because the phrase "inmates confined in an institution" is unambiguous, this Court must give that phrase its ordinary meaning and cease additional inquiry. *Robinson*, 519 U.S. at 340. Rather, this Court's sole function is to enforce the rule's terms.

The rule itself imposes only two requirements for a litigant to invoke it: (1) he must be an inmate, and (2) he must be confined to an institution. Fed. R. App. P. 4(c). Accordingly, both the Fourth and Seventh Circuits have remained faithful to the rule's plain meaning by imposing only these requirements. *Moore*, 24 F.3d at 625 (holding that an inmate represented by counsel is still entitled to the prison mailbox rule); *Craig*, 368 F.3d at 740 (holding that a represented inmate was still "an inmate confined to an institution" and thus was entitled to use the prison mailbox rule).

Because plain meaning must control, this Court should follow the Fourth and Seventh Circuits' leads and enforce the statute in accordance with its own terms. Thus, the prison mailbox rule must apply to all inmates confined in an institution. Under this reading, Mr. Escoffier is entitled to the prison mailbox rule: there is no dispute that he is an inmate confined at Garum. R. at 2.

In clear defiance of the rule's language, the Fifth, Sixth, Eighth, and Ninth Circuits have limited the rule to apply only to pro se inmates. However, this artificial limitation is contrary to the statute's plain meaning. The rule does not include the adjective "pro se" before "inmate." Fed. R. App. P. 4(c). Courts are not free to interpret or qualify unambiguous statues. *Conn. Nat'l Bank v. Germain*, 503

U.S. 249, 254 (1992). To the contrary, when the words of a statute are unambiguous, "judicial inquiry is complete." *Id.* Further, the statute is coherent, so courts "should not freely pencil 'unrepresented' or '*pro se*' into the text of Rule 4(c). *Craig,* 368 F.3d at 740.

2. The prison mailbox rule's legislative history and spirit support its application to all inmates.

The legislative history of the prison mailbox rule further supports enforcing its plain terms. In 1998, the Advisory Committee for the Federal Rules of Appellate Procedure amended Rule 4(c) to require inmates to use a legal-mail system if the detention facility had one. Nevertheless, the Committee chose not to amend the phrase "an inmate confined in an institution" and declined to qualify "inmate" with the adjective "pro se." *Craig*, 368 F.3d at 740; Fed. R. App. P. 4(c). Because "courts must presume that a legislature says in a statute what it means and means in a statute what it says . . ." this Court should defer to the clear language of Congress and its continuing decision to maintain the rule's original language. *Germain*, 503 U.S. at 253–54.

Moreover, even if courts are permitted to look beyond the text for meaning, a narrow reading is contrary to the spirit of the rule, its legislative history, and its broad application embraced by the courts. A narrow reading skews the concerns articulated in *Houston*, which discussed the guiding policy behind the rule. Although *Houston* described the experience of pro se inmates, the circumstances that *Houston* was concerned with are not unique to pro se inmates—they are shared by all inmates. *See, e.g.*, *Moore,* 24 F.3d at 625. (holding that the same concerns are

present for both represented and pro se inmates). Regardless of representation, no inmate can monitor the processing of his notice of appeal like other litigants can, nor can he personally shepherd his notice to the courthouse to see that it is stamped 'filed," nor can he ever ensure that his notice will ultimately get stamped "filed" on time. *Houston*, 487 U.S. at 271-72. Thus, the guiding policy behind the rule does not support an artificially limited reading. In fact, the policy supports a reading that encompasses all inmates faced with these barriers.

Furthermore, a narrow reading is contrary to the common law built around the rule: to maintain the spirit of the rule as one of equal treatment, courts have broadly extended the rule to apply to more filings than just notices of appeal. *Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002) (applying rule to complaints); *Noble v. Kelly*, 246 F.3d 93, 98 (2nd Cir. 2001) (applying rule to habeas corpus petitions); *Faile v. Upjohn Co.*, 988 F.2d 985, 989 (9th Cir. 1993) (applying rule to discovery responses). Most importantly, the rule has been extended beyond applying only to criminal defendants. *Boatman v. Berreto*, 938 F.3d 1275, 1277 (11th Cir. 2019) (holding the prison mailbox rule should not be "artificially" narrowed and should apply to a civilly committed person).

B. At the Time of Filing, Mr. Escoffier Was Without the Aid of Counsel.

Even if this Court artificially limits the prison mailbox rule to apply only to pro se inmates, Mr. Escoffier nonetheless qualifies. Whether an inmate is pro se is evaluated at the time of filing—the moment an inmate places his notice of appeal in a prison mailbox. *Houston*, 487 U.S. at 266. In other words, an inmate's

representation status before he files his notice of appeal is not dispositive—only his status at the time of and immediately after filing is determinative. *Moore*, 24 F.3d at 625. This is because the barriers *Houston* identified as the reasons for the rule arise concurrently with and immediately after the time of filing. *Houston*, 487 U.S. at 270–72 (listing concerns that arise after a notice of appeal is put in the mail).

An inmate is pro se, and thus qualifies for the rule, if he is without the aid of counsel. *Houston*, 487 U.S. at 270. *Houston* was concerned with barriers inhibiting an inmate's timely appeal, not an inmate's formal status. *Houston*, 487 U.S. at 270–72. Thus, any inmate facing these barriers is entitled to the mailbox rule, regardless of whether he was once represented by counsel. *See id.* When an inmate's counsel becomes inaccessible, either due to prison authorities or by the attorney's own choice, or abandons the inmate, an inmate must proceed without the aid of counsel, entitling him to the prison mailbox rule. *United States v. Carter*, 474 Fed. App'x. 331, 333 (4th Cir. 2012) (holding an inmate was entitled to the prison mailbox rule when he was represented by counsel but filed his notice of appeal on his own via the prison's legal mail system); *Vaughan v. Ricketts*, 950 F.2d 1464, 1467 (9th Cir. 1991) (holding an inmate was pro se after his trial because the attorney told him he was "on his own").

Only an inmate who has the aid of counsel to mitigate these concerns is disqualified from the prison mailbox rule. *Cretacci*, 988 F.3d at 867. An inmate aided by counsel after a notice of appeal is mailed is not entitled to the prison mailbox rule because these concerns do not exist: his counsel can mail the appeal for

him without dependence on the prison mail system, his counsel can check in on the status of the appeal to ensure it is received, and his counsel is free and available to address any urgent issues that may arise. *Houston*, 487 U.S. at 271.

Mr. Escoffier was forced to proceed without the aid of counsel when an attorney unfamiliar with his case informed him that he would have to handle his notice of appeal on his own because his former counsel was hospitalized, and no other attorneys were available to help him. R. at 7. Without the aid of counsel, Mr. Escoffier was faced with all of the barriers identified in *Houston*: he was forced to use the prison mail system, which left him at the mercy of prison officials; he could not personally shepherd his notice of appeal to the district court; and he could not monitor the status of his notice of appeal or ultimately ensure its timely delivery. Because Mr. Escoffier was exposed to the very risks the prison mailbox rule seeks to mitigate, Mr. Escoffier is entitled to the use of the prison mailbox rule.

1. Mr. Escoffier was forced to use the prison mail system.

An inmate is entitled to the prison mailbox rule when he is forced to file his notice of appeal via the prison's mail system. *Houston*, 487 U.S. at 271. Inmates who have no other option but to use the prison mail system are entitled to the rule. *Houston*, 487 U.S. at 271. In *Vaughan*, an inmate was forced to us the prison mail system to file his own notice of appeal after his attorney told him he was "on his own." *Vaughan*, 950 F.2d at 1467. The court found that he was entitled to the prison mailbox rule because, despite once being represented by counsel, the fact that his only option was to use the prison's mail system meant he was proceeding without

the aid of counsel. *Id.* In *Stillman*, the court held that an inmate was not entitled to the prison mailbox rule when he had the aid of counsel who prepared his habeas petition for him and filed it on his behalf. *Stillman*, 319 F.3d at 120.

After desperately emailing the firm the day before his appeal was due, Mr. Escoffier was rejected and told no one at the firm could represent him, similar to the inmate in *Vaughan*, who was also told that he was "on his own." *Id*; R. at 7. Like the inmate in *Vaughan*, Mr. Escoffier's use of the prison mail system was his *only* option, which must entitle him to the prison mailbox rule. R. at 7, Opinion of the Fourteenth Circuit, R. at 45. Mr. Escoffier had no one to submit his notice of appeal for him unlike the inmate in *Stillman* who had counsel to prepare his filing and submit it on his behalf, eliminating his reliance on the prison mail system as his only means to file.

However, an inmate aided by counsel cannot conveniently use the prison mail system to evade an untimely filing. *Cretacci*, 988 F.3d at 867. In *Cretacci*, the inmate's counsel prepared the complaint but filed it in the wrong court; then, because the attorney knew he would not be able to drive to the correct courthouse before the court closed, he instead drove to the prison for the inmate to file it in the prison's mail system. *Id.* at 865. Although the inmate submitted the document through the prison's mail system on the night it was due, the court did not receive it until five days later. *Id.* at 865. The inmate attempted to invoke the prison mailbox rule to avoid an untimely filing, but the Sixth Circuit declined because the inmate was clearly assisted by counsel at the time he used the prison mailbox. *Id.* at 866.

More importantly, unlike the situation in *Vaughan*, the inmate in *Cretacci* was not forced to use the prison's mail system because he was proceeding without the aid of counsel—it was only after his counsel's attempts to file proved unsuccessful did the attorney charge the inmate with using the prison mailbox rule to bypass an error the attorney could have avoided.

But where an inmate is intermittently represented by counsel such that he fears he would not be able to communicate with counsel in time to timely file his notice of appeal, the prisoner is entitled to the use of the prison mailbox rule. *Craig*, 368 F.3d at 739-40 (holding an inmate was entitled to the prison mailbox rule because he was worried he would not be able to reach counsel before the time for appeal expired and thus filed his notice of appeal on his own); *see also Telfair v. Tandy*, 797 F. Supp. 2d 508, 511 (D.N.J. 2011) (holding the inmate was entitled to the prison mailbox rule because the inmate was represented by three different defense attorneys throughout his case, which confused him as to who actually represented him and thus he filed fifty-one pro se applications including motions, petitions, and various letters).

Although Ms. Pegge assured Mr. Escoffier that she would continue to represent him in his appeal, her hospitalization rendered her inactive. R. at 7. Accordingly, neither Ms. Pegge nor her firm prepared or attempted to file Mr. Escoffier's notice of appeal. *Id.* This is the opposite of the situation in *Cretacci* where the inmate's counsel prepared everything and even previously attempted to file the inmate's notice of appeal. *Cretacci*, 988 F.3d at 866–67. It was only after the

Cretacci counsel realized that he had filed in the wrong court did urge the inmate to use the prison mail system in an attempt to abuse the prison mailbox rule as a work-around to amend his careless error. *Id. Cretacci's* dishonest use of the prison mail system strikes at the heart of the rule's intention to provide inmates with equal treatment, which is why the court found the prison mailbox rule was inapplicable in that case. On the other hand, Mr. Escoffier's use of the prison mailbox rule—his only option as an inmate without the aid of counsel—is precisely within the spirit of the rule.

Moreover, after not receiving an answer from Ms. Pegge or her firm for over a month as the appeal deadline loomed and a pandemic and Mr. Escoffier's own depression and suicidal ideation raged, it is understandable that Mr. Escoffier would be confused as to his status of representation, similar to the inmate in *Telfair* who, although formally represented, did not know if he was represented at the time of filing and feared he may miss his chance for freedom.

2. Mr. Escoffier was unable to personally shepherd his notice of appeal to the courthouse, monitor its status, or ensure its timely delivery.

Unlike other litigants, inmates do not have the privilege of "shepherding [their] documents through a complex legal system"; thus, this lack of control is a "deprivation for which the prison mailbox rule compensates." *United States v. McNeill*, 523 Fed. App'x 979, 982 (4th Cir. 2013). Accordingly, an inmate is entitled to the prison mailbox rule when he cannot personally shepherd his notice of appeal to the courthouse. *Houston*, 487 U.S. at 271 (holding that, since inmates cannot

follow their notices of appeal to the courthouse like other civil litigants, inmates are entitled to the prison mailbox rule). When an inmate is forced to use a prison's mail system to file his notice of appeal, he must surrender control over his notice and, by virtue of his lack of supervision or authority over prison officials, he is powerless to monitor the status of his notice. *Moore*, 24 F.3d at 625; *Lewis,* 947 F.2d at 735 (holding the inmate was entitled to the use of the prison mailbox rule because the prisoner was unable to monitor the process of getting his filing to the court).

As the Fourth Circuit noted, it would be fundamentally "unfair to permit a prisoner's freedom to ultimately hinge on either the diligence or the good faith of his custodians." *Moore*, 24 F.3d at 625. Thus, an inmate whose notice of appeal is at the sole mercy of prison officials must be entitled to the prison mailbox rule. *Id.*; Houston, 487 U.S. at 271 (recognizing that inmates whose notices of appeal are at the mercy of prison officials must be entitled to the rule because prison officials "may have every incentive to delay" sending inmates' notices and such inmates are powerless to supervise or ensure that prison authorities ever timely deliver their notices). In *Moore*, an inmate was entitled to the prison mailbox rule because, even though he was represented by a federal public defender, he personally filed his notice of appeal through prison mail, rendering him at the mercy of prison officials. *Id.*

Not only does Mr. Escoffier lack authority over his prison superiors, he is confined in a prison and cannot personally travel to the courthouse or freely use a phone, leaving him with the inability to call the court to check on the progress of his

notice of appeal, similar to the inmate in *Lewis* who was also powerless to monitor his appeal. R. at 6-7. In fact, because the Miasmic pandemic curtailed Mr. Escoffier's access to communication even more so than average, Mr. Escoffier had even less opportunity to monitor his notice of appeal than did the inmate in *Lewis.*

After Mr. Escoffier's placed his notice of appeal in Garum's mailbox, he surrendered all control over whether it would arrive on time. Like the inmates in *Moore* and *Houston*, this put Mr. Escoffier at the mercy of prison officials. This lack of control necessarily caused uncertainty that his notice of appeal would reach the courthouse before the appeal deadline. For the same reasons that the inmates in *Moore* and *Houston* were entitled to the prison mailbox rule—that their filings were at the mercy of prison officials whom they could not supervise—Mr. Escoffier must too be entitled to the rule.

Moreover, the inmate in *Moore* was entitled to the prison mailbox rule even though he was represented by a public defender. Although the inmate in *Moore* used the prison mail system, he had an active counsel to mitigate concerns that he would not be able to monitor his filing, yet he was still entitled to the prison mailbox rule. It follows that Mr. Escoffier, who was unaided by counsel and had no one to mitigate his concerns is an even better candidate for the prison mailbox rule than the one found adequate in *Moore*.

C. Mr. Escoffier Complied with the Prison Mailbox Rule.

Rule 4(c) requires that an inmate use the prison's mail system to file their legal documents by the pertinent due date with either (1) a declaration or notarized

statement in compliance with 28 U.S.C. § 1746, *or* (2) evidence, including a postmark or date stamp, showing the notice was deposited with prepaid postage. Fed. R. App. P. 4(c). Although previous versions of the Rule provided that an inmate had only the choice between a declaration or notarized statement, Congress expressly declined to limit an inmate's filing options, and provided the second alternative option. Per the Advisory Committee's Note from the 2016 Amendment, "a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid." Fed. R. App. P. 4(c) advisory committee's note to 2016 amendment.

Thus, courts have held that Rule 4(c) does not require an inmate to file an accompanying affidavit or declaration to their legal document. *Grady v. United States*, 269 F.3d 913, 918 (8th Cir. 2001) (holding the inmate complied with the procedural requirements when he did not include an affidavit with his motion but did use a pre-printed form, signed the motion, typed the date of filing, and the envelope was postmarked). Accordingly, when the purported filing is not received by the court on time, the petitioner must supply "some other corroborating evidence," such as copies of the filing, a postmarked envelope, or other correspondence. *Ray*, 700 F.3d at 1008. After the petitioner makes this evidentiary showing, the burden shifts to the government to prove that the filing was untimely. *Ray*, 700 F.3d at 1008 (holding the petitioner made the evidentiary showing and the government found no evidence contract the inmate); *Barrientos*, 829 F.3d at 1067 (holding that

although the inmate did not file an affidavit or notarized statement with his pro se filing, he was entitled to the prison mailbox rule and his petition was timely filed because he was able to submit a copy of the outgoing mail log from the detention center, showing the mailroom had received the petition before the deadline)

Additionally, this Court has previously emphasized "that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) (holding that the petitioner failed to comply with Rule 3(c) because he was not named in the appeal and did not satisfy the timeliness of Rule 4 by adding himself to the appeal, such that the court did not have jurisdiction over the petitioner); *Adeline v. Stinson*, 206 F.3d 249, 251 n.1 (2nd Cir. 2000).

Congress did not impose stringent filing requirements on inmates because, due to the already substantial constraints on them, Congress thought inmates should not be further burdened with strict filing requirements. Instead, Congress adopted filing requirements that only require prisoners to show that they completed the due diligence within their control, such as showing pre-paid postage or a date stamp. Mr. Escoffier did his due diligence: he submitted his notice of appeal through the prison mail system, and, as evidenced by the mailing form in Exhibit F, his notice was accompanied with pre-paid postage, the date he placed the document in the mailroom is present, the date the mailroom received the document is present, and the name and signature of the prison official who received the document is

present. R. at 21. This is similar to the *Grady* inmate who submitted an affidavit stating he had used the mail system with prepaid postage on a certain date.

Mr. Escoffier's requisite mailing form satisfies the ruling in *Barrientos*, where the court held that, although the inmate did not submit an affidavit or declaration, the inmate nonetheless complied with the rule because he submitted other evidence showing his appeal was timely. Mr. Escoffier's mailing form shows that he submitted his appeal by the deadline on March 2, 2021, one day before the filing was due, unlike the inmate in *Torres* who failed to timely add himself to the appeal. R. at 7, 21. Because Mr. Escoffier submitted his notice of appeal to prison officials on time—as evidence by the deposit date—and accompanied by prepaid postage, this Court should affirm the Fourteenth Circuit's ruling that Mr. Escoffier's notice of appeal was timely and procedurally sufficient.

II. GARUM OFFICIALS VIOLATED MR. ESCOFFIER'S EIGHTH AMENDMENT RIGHTS BECAUSE THEY WERE DELIBERATELY INDIFFERENT TO HIS SEVERE AND PERSISTENT GENDER DYSPHORIA.

The Fourteenth Circuit properly found that Garum officials were deliberately indifferent to Mr. Escoffier's medical needs in violation of his Eighth Amendment rights. Inmates, deprived of their own liberty, are forced to rely on prison authorities to treat their medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). When prison authorities fail to treat those needs, inmates are subjected to needless pain and suffering, or, in the more severe cases, even torture or death. *Id.* Thus, since 1976, this Court has recognized that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of

pain' proscribed by the Eighth Amendment." *Estelle*, 429 U.S. at 104 (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); U.S. Const. amend. VIII.

To establish deliberate indifference, Mr. Escoffier must prove two elements. *See Estelle*, 429 U.S. at 104. First, he must demonstrate a serious medical need. *Id.* Second, he must show that Garum officials were deliberately indifferent to that medical need. *Id.* Petitioner agrees that Mr. Escoffier's gender dysphoria constitutes a serious medical need; therefore, he need only prove that Garum officials[2] were deliberately indifferent in treating his gender dysphoria. Deliberate indifference occurs when "[an] official knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 835–36 (1994).

Garum officials were deliberately indifferent to Mr. Escoffier's severe, persistent gender dysphoria for a host of reasons. First, Garum's blanket ban on gender affirmation surgery, created and enforced by Garum's medical team and Warden Posca, is the paradigm of deliberate indifference: it preempted an individualized review of Mr. Escoffier's medical needs, and it forced officials to deny Mr. Escoffier treatment for non-medical reasons. Second, even if this Court finds no fault in the blanket ban itself, the treatment Garum officials provided to Mr. Escoffier must still

---

[2] Because Posca is sued only in his official capacity for injunctive relief and no damages are sought, qualified immunity is not an issue, nor must his personal role in Mr. Escoffier's medical treatment be sorted out. *Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011). Moreover, a prison's warden is a proper defendant for a plaintiff seeking injunctive relief for an Eighth Amendment deliberate indifference claim since the warden is responsible for ensuring that any injunctive relief be carried out. *Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011). Thus, to succeed on his claim, it is enough for Mr. Escoffier to show that *any* Garum official responsible for treating his medical needs was deliberately indifferent. *See id.*

pass constitutional muster. It does not. The medical treatment Mr. Escoffier received was inadequate and grossly incompetent. At best, the treatment failed to address Mr. Escoffier's medical needs and was selected absent an exercise of medical judgement. At worst, it was an easier and less efficacious treatment plan selected pursuant to improper motives. For these reasons, the judgement of the Fourteenth Circuit should be affirmed.

A. Garum's Blanket Ban on Gender Affirmation Surgery Is the Very Definition of Deliberate Indifference.

Governments are required to provide medical care for those whom they punish by incarceration. *Estelle*, 429 U.S. at 103. However, governments cannot provide just any kind of medical care to their prisoners—they must provide constitutionally adequate care. *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013). To be adequate, medical care must be attentive to the particularized circumstances of individual inmates. *Roe v. Eleya*, 631 F.3d 843, 859 (7th Cir. 2011). This requirement reflects a bedrock principle inherent in all medical care—when you visit a doctor, you expect that they will treat you in accordance with your unique symptoms.

Blanket bans are categorical prohibitions on particular medical treatment. Garum's medical policy specifies that "surgical interventions are not provided for [gender dysphoria]," which amounts to a blanket ban on gender affirmation surgery. R. at 11. Blanket bans do not allow for the consideration of an inmate's particular medical needs. *Kosilek v. Spencer*, 774 F.3d 63, 91 (1st Cir. 2014) ("[A]ny [blanket]

policy would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs."). More importantly, blanket bans force officials to disregard the medical needs of inmates whose medical conditions may require the prohibited treatment—a clear violation of *Estelle's* charge that officials may not deliberately disregard an inmate's needs. *Estelle*, 429 U.S. at 104. Further, blanket bans force officials to deny inmates treatment for non-medical reasons, prioritizing administrative convenience or other non-medical concerns ahead of an inmate's health.

Accordingly, of the nine[3] circuit courts that have considered the constitutionality of blanket bans, eight agree: a prison's blanket ban on medical treatment is per se unconstitutional because inattentiveness to an inmate's individual needs is the very definition of deliberate indifference proscribed by the Eighth Amendment. This Court should adopt this majority rule and hold that Garum's blanket ban is unconstitutional for the same reasons: it prevented Garum officials from assessing and treating Mr. Escoffier's unique medical needs in clear violation of his Eighth Amendment rights.

1. Blanket bans are per se unconstitutional because they preempt an individualized assessment of an inmate's medical needs.

To be adequate, medical care must be individualized based on an inmate's particular needs: "medical decisions must be fact-based with respect to the

---

[3] Count includes the decision of the Court of Appeals for the Fourteenth Circuit.

particular inmate, the severity and stage of his condition, the likelihood and imminence of further harm, and the efficacy of available treatments." *Roe,* 631 F.3d at 859. Blanket bans fly in the face of this individualized care requirement because they prohibit a course of treatment regardless of an inmate's medical needs. *Kosilek,* 774 F.3d at 91(recognizing that blanket bans inherently conflict with the individualized care requirement).

It is a blanket ban's structure—its preemption of an individualized medical decision—not its substance that makes it constitutionally infirm. Accordingly, eight circuit courts have found them to be per se unconstitutional, irrespective of the kind of treatment prohibited. *Kosilek,* 774 F.3d at 91 (in dicta determined that blanket ban on gender affirmation surgery would be unconstitutional); *see also Colwell v. Bannister*, 763 F.3d 1060, 1068 (9th Cir. 2014) (blanket ban on one-eye cataract correction was unconstitutional); *see also Roe*, 631 F.3d at 862 (blanket ban on Hepatitis C treatment was unconstitutional). Because the constitutional infirmity is structural, even blanket bans created to protect the health of inmates are unconstitutional. *Roe*, 631 F.3d at 862 (holding that a blanket ban on Hepatitis C treatment for inmates with less than eighteen months left in their sentence was unconstitutional even though the ban was enacted to ensure that inmates could receive the full course of antiviral therapy because interrupted treatment put inmates at risk for a number of undesirable outcomes).

Moreover, both express and de facto blanket bans are subject to the same scrutiny and have been invalidated equally. *Compare Fields v. Smith*, 653 F.3d 550,

552 (7th Cir. 2011) (state statute prohibiting hormones and gender affirmation surgery was unconstitutional) *with Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (unwritten, de facto policy against hip replacement surgery was unconstitutional).

Denying treatment on the basis of a blanket ban, rather than on an individualized medical determination, constitutes deliberate indifference. *Colwell*, 763 F.3d at 1063; *see also Roe*, 631 F.3d at 862–63 ("Failure to consider an individual inmate's condition in making treatment decisions is . . . precisely the kind of conduct that constitutes [deliberate indifference]."). In *Colwell*, an inmate had monocular blindness caused by a cataract. *Colwell*, 763 F.3d at 1068. Several medical providers recommended and requested that the inmate have cataract surgery, but prison officials denied the surgery because the prison had a de facto "one good eye" policy, which prohibited cataract correction if an inmate could still see out of his other eye. *Id.* Because the inmate was denied treatment solely on the basis of an administrative policy rather than on an assessment attentive to his individual medical needs, the court found this was "the very definition of deliberate indifference." *Id.*

Like the *Colwell* inmate, Mr. Escoffier too was denied treatment on the basis of an administrative policy. Like *Colwell*, he had an existing referral for gender affirmation surgery, but his request for surgery was nonetheless denied three times based on Garum's blanket ban prohibiting the surgery. R. at 20. In fact, Garum

officials provided no other reason for denying Mr. Escoffier's request than the ban itself. *Id.* Further, the *Colwell* inmate was at least allowed a prison evaluation for cataract surgery; here, Garum officials have declined to even offer Mr. Escoffier an evaluation for gender affirmation surgery. R. at 19.

Officials are deliberately indifferent when they refuse to evaluate an inmate's medical necessity for treatment. *Keohane v. Florida Dep't Corrections Sec.*, 952 F.3d 1257, 1266–67 (11th Cir. 2020) (". . . refusal even to consider whether a particular course of treatment is appropriate is the very definition of 'deliberate indifference'—anti-medicine, if you will."); *Fields*, 653 F.3d at 559. In *Fields*, a state statute prohibiting hormone therapy and surgical interventions for gender dysphoria necessarily had the effect of preventing prison officials from evaluating inmates for treatment because such evaluations would be moot in light of the statute's ban on the treatment they may determine to be medically necessary for the health of the inmates. *Fields*, 653 F.3d at 559. The court held that the statute was plainly unconstitutional because it forced officials to ignore the medical needs of inmates who required hormone therapy or gender affirmation surgery. *Id.*

Just like the statute in *Fields*, Garum's policy necessarily prevented Mr. Escoffier from ever being evaluated for gender affirmation surgery. Dr. Chewtes expressly noted that he would not conduct an evaluation because its results would be moot in the face of Garum's ban on the surgery. R. at 19. Refusing to even evaluate an inmate's medical needs is at the zenith of deliberate indifference; it is a blatant disregard for an inmate's medical needs, which is, as *Keohane* noted, anti-

medicine. It follows then that any policy necessitating such deliberate indifference must fail under the Eighth Amendment.

2. Blanket bans preempt a course of treatment for non-medical reasons.

Prison officials are deliberately indifferent when they deny medical treatment for reasons unrelated to an inmate's medical needs. *Snow*, 681 F.3d at 987. In other words, any denial of treatment must be based on sound medical judgement. *See id.* Rejecting treatment on the basis of a blanket ban is never an exercise of medical judgement. *Campbell v. Kallas*, 936 F.3d 536, 547 (7th Cir. 2019) (nothing that mechanically applying categorical rules is not the exercise of medical judgement). To the contrary, rejection pursuant to a blanket ban is plainly non-medical: a decision to deny treatment based on an administrative policy rather than on an evaluation of an inmate's medical needs requires no medical judgement at all. *Id.* For example, in *Snow*, despite multiple recommendations that an inmate be provided double hip replacement, officials refused to authorize the surgery due to an official policy against treating chronic pain. *Snow*, 681 F.3d at 987. The court found this rejection amounted to deliberate indifference because it was premised on a de fact policy, which was a non-medical reason. *Id.*; s*ee also Brock v. Wright*, 315 F.3d 158, 167 (2nd Cir. 2003) (finding that an inmate was denied steroid injections, not because of medical judgement, but because the prison's policy forbade preventative measures in cases such as the inmate's).

Like the in *Snow*, and *Brock* cases, Mr. Escoffier's request for gender affirmation surgery was denied pursuant to a policy prohibiting the procedure. Mr. Escoffier was denied surgery, not because it was not medically necessary (his medical necessity for gender affirmation surgery was never evaluated), not because his gender dysphoria did not warrant surgery (he had a pre-prison referral to obtain such surgery), not because the surgery would not have helped him (Dr. Chewtes admitted that gender affirmation surgery provides patients significant relief from their gender dysphoria), but because Garum's policy forbade surgical interventions. This mechanical application of a blanket policy is, as both the *Snow* and *Brock* courts recognized, not an exercise of medical judgement; instead, it is the opposite—deliberate indifference.

3. *Gibson's* narrow holding that some blanket bans may be constitutional is unpersuasive, inapplicable to the case at bar, and contrary to precedent.

Only one circuit—and only one case in that circuit—disagrees that blanket bans are per se unconstitutional. *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019). *Gibson* held that a treatment may be banned if there is no medical consensus on that treatment's necessity or efficacy. *Id.* at 221. However, *Gibson* is unpersuasive for several reasons. First, *Gibson* misunderstands the constitutional infirmity in blanket bans. It is not the ban's substance—the actual treatment prohibited— that is unconstitutional; it is the ban's structure, which necessarily preempts an individualized review of an inmate's medical needs. *Roe*, 631 F.3d at 862. The opposite of a blanket ban—a policy mandating certain treatment without

regard for an inmate's particular symptoms—would suffer from the same constitutional infirmity because it too would disregard individual needs. *See id.* Thus, even if a treatment has no medical consensus, categorically prohibiting it inherently conflicts with Eighth Amendment's individualized care requirement. *Roe*, 631 F.3d at 859.

Second, Gibson's holding is narrow and applies only to blanket bans on treatment for which there is no medical consensus. *Gibson*, 920 F.3d at 221. Even if this Court adopts *Gibson's* reasoning, it is inapplicable to this case: gender affirmation surgery does not qualify under *Gibson's* standard, so Garum's policy still must fail. Today, the necessity and efficacy of gender affirmation surgery is well-established. *See* WPATH Standards at 8. *Gibson* requires that treatment be universally accepted before a prison's denial of it may rise to deliberate indifference, *Gibson*, 920 F.3d at 220, but as Judge Thompson's dissent in *Kosilek* aptly noted, one need not look far to find doctors with differing mindsets. *Kosilek,* 774 F.3d at 108 (Thompson, J., dissenting). Gibson unilaterally creates a demanding "universal acceptance" standard, citing no other case law to substantiate it. *Gibson*, 920 F.3d at 220. Traditionally, courts have looked to professional standards to determine whether a treatment is widely accepted enough to be deemed necessary. *See, e.g., Kosilek,* 774 F.3d at 108 (employing the WPATH standards and asserting that the adequacy of medical care is measured against prudent professional standards.)

The WPATH standards are "based on the best available science and expert professional consensus" about transgender health care. WPATH Standards at 1.

The WPATH standards acknowledge that gender affirmation surgery is medically necessary for many people suffering from gender dysphoria. WPATH Standards at 8. Moreover, Garum's own psychiatrist acknowledged that, in addition to the WPATH standard's demanding surgery as a treatment option for gender dysphoria, research had shown gender affirmation surgery to be highly effective. R. at 14. Taken together, the WPATH Standards and the knowledge of Garum's own psychiatrist show that there is indeed medical consensus on the necessity and efficacy of gender affirmation surgery.

Third, Gibson holds that it cannot be cruel and unusual to deny a treatment that is not yet commonplace in other prisons and thus any deliberate indifference claims premised on a prison's failure to provide that treatment must fail. *Gibson*, 920 F.3d at 216. This is plainly illogical and contrary to this Court's precedent. In *Trop*, this Court held that the meaning of "cruel and unusual" in the Eighth Amendment expands alongside the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 365 U.S. 86, 100–101 (1958). This concept is especially applicable to medical care, which, even more so than penological theories, is marked by continually evolving standards and emerging technology. Medical essentiality is not a static standard; it evolves alongside the shifting needs and advancements of the medical field. What was once essential—polio vaccines—has since become obsolete. And what was once unnecessary—COVID-19 vaccines—has since become essential.

Additionally, if every prison were allowed to argue that "unusual" treatments do not give rise to Eighth Amendment claims, then no prison would ever be required to update its standards alongside medical advancements. For example, at one time, gender dysphoria was not a recognized diagnosis, so inmates suffering from it went untreated. But then—alongside evolving medical standards—it was recognized as a serious medical need for which inmates must be treated. If every prison could deny treatment by clinging to the premise that no prison before it had treated gender dysphoria, then prisons would be relieved from following updated medical guidelines.

Finally, *Gibson* is contrary to this Court's and the Fifth Circuit's own precedents. Prior to *Gibson*, the Fifth Circuit, like other circuits, held that denying treatment on the basis of non-medical reasons constitutes deliberate indifference. *Delaughter v. Woodall*, 909 F.3d 130, 138–39 (5th Cir. 2018). However, Gibson abandoned this rule by allowing prisons to deny medical treatment on the basis of a blanket ban. More importantly, in *Estelle*, this Court held that deliberate indifference arises when prison officials intentionally deny or delay access to medical care. *Estelle*, 429 U.S. at 104–05. If denying care could constitute an Eighth Amendment violated, surely denying to even evaluate an inmate's medical needs constitutes deliberate indifference under this standard. Because *Gibson* suffers from all of these fatal flaws, this Court should decline to follow it and instead embrace the majority rule that blanket bans are per se unconstitutional.

B. Garum Officials Were Deliberately Indifferent by Providing Mr. Escoffier with Inadequate Medical Care.

Even if this Court finds no fault in Garum's blanket ban itself, the medical care Mr. Escoffier received must still pass constitutional muster. In other words, regardless of Garum's medical policy, the question remains whether the decision to provide Mr. Escoffier with hormones and psychotherapy constituted deliberate indifference. Governments must provide their prisoners with constitutionally adequate medical care. *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013); *Langford v. Norris*, 614 F.3d 445, 460 (8th Cir. 2010). Following policy does not immunize officials from deliberate indifference claims. *Johnson v. Wright*, 412 F.3d 398, 404 (2nd Cir. 2005) (noting that, regardless of a policy's permissibility, the court must still consider whether *following* the policy resulted in deliberate indifference to the plaintiff's medical needs). Deliberate indifference occurs whenever officials know of but disregard a substantial risk to an inmate's health. *Farmer*, 511 U.S. at 835–36. Providing some care to an inmate is not enough—the care provided must be adequate and appropriate to abate an inmate's risk of harm. Inadequate care is constitutionally deficient. *De'lonta*, 708 F.3d at 526.

Mr. Escoffier's medical care was inadequate because it failed to address his serious medical needs, and it was not the product of sound medical judgement. Additionally, his care was inadequate because it was an easier but less efficacious treatment plan selected pursuant to improper motives. constituting deliberate indifference. Accordingly, regardless of the constitutionality of Garum's blanket ban itself, this Court should affirm the Fourteenth Circuit's finding that Garum officials

were deliberately indifferent to Mr. Escoffier's serious medical needs in violation of his Eighth Amendment rights.

1. The treatment provided failed to address Mr. Escoffier's medical needs.

"Grossly incompetent care or inadequate care can constitute deliberate indifference." *De'lonta*, 708 F.3d at 526 (citing *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990). Although inmates do not have a right to their preferred treatment, the treatment provided must actually address the inmate's medical needs. *De'lonta*, 708 F.3d at 526; *see also Edmo v. Corizon*, 935 F.3d 757, 793 (9th Cir. 2019) (upholding district court's finding of deliberate indifference where prison officials rejected an inmate's request for gender affirmation surgery even though hormone therapy was ineffective in controlling the inmate's suicidal ideation and urges to self-harm).

In *De'lonta*, prison officials provided a gender dysphoric inmate with hormones, psychotherapy, and social accommodations like female clothing. *De'lonta*, 708 F.3d at 522. However, despite that treatment, the inmate continued to suffer from urges to self-harm, so she requested gender affirmation surgery. *Id.* Prison officials refused to evaluate the inmate's suitability for gender affirmation surgery, claiming that their refusal was a matter of discretion, and, more importantly, that the treatment they provided complied with the WPATH Standards, necessarily relieving them of a deliberate indifference claim. *Id.* at 524. The court concluded that, regardless of the prison's compliance with *some* of the WPATH Standards, the treatment provided (hormones, psychotherapy, and social accommodations) was

inadequate under the circumstances and amounted to deliberate indifference because it failed to actually address the inmate's urges and attempts to self-harm. *Id.* at 526.

The facts from *De'lonta* and *Edmo* are virtually indistinguishable from our case. Although Garum officials provided Mr. Escoffier with hormones and psychotherapy—generally effective treatments under the WPATH Standards—they were ineffective in treating his severe depression, suicidal ideation, and self-harm, just as they were for the inmates in *De'lonta* and *Edmo*. Therefore, just at the *De'lonta* and *Edmo* courts found, the treatment provided failed to actually address Mr. Escoffier's unique medical needs, rendering it constitutionally inadequate. Moreover, Dr. Chewtes knew, through reviewing Mr. Escoffier's pre-prison report and through his own clinical assessment, that hormones and psychotherapy failed to abate Mr. Escoffier's depression, suicidal ideation, and self-harm, yet he nonetheless continued with an ineffective treatment plan. R. at 18–19. In other words, Dr. Chewtes knew that hormones and psychotherapy did not address Mr. Escoffier's serious medical needs; thus, Dr. Chewtes's decision to prescribe ineffective treatment—despite full awareness of the risks posed by that ineffective treatment—amounts to deliberate indifference. It is clear that Dr. Chewtes knew of and disregarded a substantial risk of harm to Mr. Escoffier's health. *Farmer*, 511 U.S. at 837.

Whether treatment is adequate is a highly fact-specific inquiry, dependent entirely on the symptoms each inmate presents. *Roe*, 631 F.3d at 859 (mandating

that medical care be attentive to the particularized circumstances of individual inmates). In contrast to *De'lonta* and *Edmo*, the facts in *Kosilek* supported a finding that hormones and psychotherapy were constitutionally adequate to treat an inmate's gender dysphoria. *Kosilek*, 774 F.3d at 96. However, the *Kosilek* inmate admitted that she was not at risk for self-harm, and, more importantly, her hormone therapy had stabilized her mental health and had even caused her joy. *Id.* at 69, 90. The court also noted that prison officials employed methods—hormones and psychotherapy— proven to alleviate Kosilek's mental distress. *Id.* at 90. Those circumstances, which the court considered persuasive in finding the care adequate, were not present in either the *De'lonta* or *Edmo* cases—nor are they present here. To the contrary, hormones and psychotherapy have proven patently ineffective for Mr. Escoffier, and Dr. Chewtes prescribed them knowing that they were ineffective. R. at 16–19. Significantly, hormones and psychotherapy have not eased Mr. Escoffier's suffering to a point where he no longer faces a life-threatening risk of harm. R. at 18–19. Despite treatment, he still suffers from severe depression and suicidal ideation, and he actively self-harms by pulling out his own hair. R. at 18–19. In fact, his suicide risk was so high that Dr. Chewtes required him to be monitored hourly. *Id.* Accordingly, the reasonings in *De'lonta* and *Edmo*, not *Kosilek,* should control in this case.

2. The treatment provided was not the result of medical judgement.

It is true that a difference of opinion regarding medical treatment does not state a claim under the Eighth Amendment. *Gibson*, 920 F.3d at 216. However, no

true medical judgement was made in this case, rendering the medical opinion defense inapplicable here. The two actions that Garum officials took in this case—mechanically applying a blanket policy and denying an inmate an evaluation for gender affirmation surgery pursuant to that policy—required no exercise of medical judgement. "Reflexively relying on policy and failing to assess whether applying that policy was in fact appropriate is not an exercise of medical judgement and is deliberate indifference." *Mitchell v. Kallas*, 895 F.3d 492, 501 (7th Cir. 2018); *see also Johnson v. Wright*, 412 F.3d 398, 404 (2nd Cir. 2005) (holding that when medical policies are applied, the operative question is whether applying the policy could have amounted to deliberate indifference to plaintiff's medical needs). Mr. Escoffier's medical needs were not considered when Garum officials reflexively applied the blanket ban without any regard for whether applying it was appropriate in this case. Thus, without an exercise of medical judgement—or a medical opinion defense to combat it—Garum officials were deliberately indifferent, just like the officials in *Mitchell*.

Additionally, a medical opinion defense must fail where no medical opinion has been offered. In other words, there can be no medical judgement where an inmate has not received an individualized medical evaluation. *Kosilek,* 774 F.3d at 91. There is no difference of opinion on Mr. Escoffier's necessity for gender affirmation surgery because his necessity for gender affirmation surgery was never evaluated. R. at 18–20. Garum's policy removes the decision of whether gender

affirmation surgery is medically necessary for any individual inmate from the considered judgment of that inmate's medical providers. *Id.*

3. The treatment provided was an easier and less efficacious plan selected pursuant to improper motives.

The choice of an easier and less efficacious treatment can constitute deliberate indifference. *Williams v. Vincent*, 508 F.2d 541, 544 (2nd Cir. 1974); *see also Rodgers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986) ("[Deliberate] indifference can be manifested by prison doctors in taking the easier and less efficacious route in treating an inmate.").

Where multiple treatment options are available, courts defer less to an official's medical judgement; instead, courts will scrutinize whether the chosen treatment was appropriate under the circumstances. *See Williams*, 508 F.2d at 544; *see also Darrah v. Krisher*, 865 F.3d 361, 372–73 (6th Cir. 2017). Courts have routinely found deliberate indifference where an official pursued a treatment plan that was easier and less efficacious. *Id.*

In *Williams*, a fellow inmate cut off a large portion of Williams's ear. *Williams*, 508 F.2d at 543. Williams asked prison hospital personnel to try to suture the severed portion back on, but they told him that reattachment was not medically necessary, opting instead to simply stitch up the wound. *See id.* Prison officials argued that the decision to close the wound rather than attempt reattachment was merely a difference of opinion over a matter of medical judgement. *Id.* at 544. However, the court rejected this argument: doctors' failure to attempt reattachment despite evidence that reattachment would have saved Williams's ear led the court to

conclude that the officials simply chose an easier and less efficacious treatment. *See id.* Therefore, the court concluded that it was likely deliberate indifference, not the exercise of reasonable professional judgement, that informed the doctor's decision to simply stitch up the wound. *See id.*

Mr. Escoffier's case is akin to *Williams*. Williams requested doctors to at least attempt to reattach his severed ear, but they refused. Refusal was based on the doctors' professional judgement that reattachment was not medically necessary, despite strong evidence to the contrary—namely, that reattaching the severed portion would have saved Williams's ear. Garum officials rejected Mr. Escoffier's request for gender affirmation surgery for the same reason and in the face of similarly conflicting evidence: the policy preempting gender affirmation surgery was enacted because officials thought surgery was never medically necessary, despite a wealth of evidence to the contrary. R. at 14. Particularly, the contradictory evidence included the WPATH standards, research studies proving the efficacy of gender affirmation surgery, Mr. Escoffier's pre-prison surgical recommendation, and Dr. Chewtes's own admission that surgery was a viable and effective option. *Id.* Moreover, Mr. Escoffier has an even stronger case than that found adequate in *Williams*. Williams lacked the benefit of a second opinion on the medical necessity of his ear, but a doctor already indicated that gender affirmation surgery was medically necessary for Mr. Escoffier. Further, as indicated earlier, Dr. Chewtes knew hormones and psychotherapy were ineffective to treat Mr. Escoffier. Together,

this is strong evidence that the treatment provided to Mr. Escoffier was easier and less efficacious.

Finally, the health risks at stake in Mr. Escoffier's case far eclipse the risks present for Williams. At most, declining to reattach Williams's ear deprived him of some auditory function. In contrast, Mr. Escoffier's life is at stake. Surely, if failing to reattach part of an ear constitutes deliberate indifference then failure to abate an excessive risk of self-harm and suicide must too.

Officials are likewise deliberately indifferent when they based medical decisions on the feasibility or cost of treatment. *Darrah*, 865 F.3d at 372 (holding that an official's refusal to provide alternative medication to an inmate whose symptoms were unabated by his original medication constituted deliberate indifference because the prison official refused to offer alternative medication on the basis that it was more expensive and had not been pre-approved by the prison's drug formulary); *see also Durmer v. O'Carroll*, 991 F.2d 64, 68–69 (3rd Cir. 1993) (evidence suggesting an inmate was denied physical therapy because it would have placed a considerable burden and expense on the prison to provide it supported a finding of deliberate indifference).

Mr. Escoffier's case also mirrors *Darrah*. Darrah was provided medication for his condition, but the medication was ineffective at relieving his symptoms. Prison officials refused to provide alternative medication because it was easier to provide the original medication; the alternative medication was more expensive and had not been previously approved by the prison's drug formulary. Like Darrah, Mr. Escoffier

was provided some treatment for his condition, but the treatment provided was ineffective in relieving his severe depression, self-harm, and suicidal ideation. Like in *Darrah*, Garum officials rejected Mr. Escoffier's request for alternative treatment—gender affirmation surgery—because it was too burdensome and expensive. In denying Mr. Escoffier's final medical appeal, Warden Posca admitted that, regardless of the policy against surgery, surgery would not be entertained at the time because resources were strained by the Miasmic pandemic. R. at 20. Specifically, he said that "now is not the time to start offering luxury services," implying that both cost and resource availability informed his decision to deny the appeal. R. at 20. Because feasibility and cost of treatment should not dictate medical decisions, Posca was deliberately indifferent in basing his denial on these factors.

Finally, officials are deliberately indifference when they allow improper motives like bias or animus to dictate treatment decisions. *Snow,* 681 F.3d at 987. In *Snow,* the prison's warden told medical staff: "If one of these [death row] inmates gets deathly ill, don't knock yourself out to save their life. There's plenty more to take their place." This clear animus against death row inmates led to de facto policy of treating them with inadequate care. Accordingly, the death row inmate in *Snow* was denied double hip replacement surgery despite multiple recommendations for the procedure.

While Warden Posca was not as explicit about his bias as the warden in *Snow*, Posca's comment calling gender affirmation surgery a "luxury service"

nonetheless reveals his animus toward transgender inmates. R. at 20. Mocking a procedure that is medically necessary for many transgender inmates is dangerous and disregards the very real medical needs of inmates entrusted to his care. As he noted, Posca had the ultimate authority to grant Mr. Escoffier's appeal and allow him to be evaluated for gender affirmation surgery, but he declined, reasoning in part that it was a "luxury service" unworthy of consideration. R. at 20. The denial of medical treatment on the basis of this sort of bias must fail under the Eighth Amendment because it plainly and callously disregards the medical needs of inmates.

CONCLUSION

Mr. Escoffier's appeal was timely. First, as an inmate forced to proceed without the aid of counsel, he is entitled to the use of the prison mailbox rule. In fact, this Court specifically created the prison mailbox rule to mitigate the barriers that inmates like Mr. Escoffier must face. Second, ample evidence shows that he complied with all of the prison mailbox rule's procedural requirements.

Further, Garum officials were deliberately indifferent to Mr. Escoffier's serious medical needs in violation of his Eighth Amendment rights. First, Garum's blanket ban on gender affirmation surgery is plainly unconstitutional because it preempts an individualized assessment of Mr. Escoffier's medical needs and forced Garum officials to deny him treatment for a non-medical reason. Second, even if a blanket ban itself is not per se unconstitutional, Garum officials nonetheless were deliberately indifferent by providing Mr. Escoffier with inadequate medical care.

The treatment provided failed to address Mr. Escoffier's severe and persistent gender dysphoria and was selected absent an exercise of medical judgement. And, even worse, it was an easier and less efficacious treatment plan selected pursuant to improper motives.

Accordingly, we respectfully request this Court to affirm the Fourteenth Circuit's rightful decision.