IN THE
SUPREME COURT OF THE UNITED STATES

No. 2021-22

MAX POSCA,
in His Official Capacity as Warden
and Administrator of Garum Correctional Facility,

Petitioner,

v.

LUCAS ESCOFFIER,

Respondent.

Appeal from the United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR THE RESPONDENT

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STATEMENT OF THE ISSUES

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

II. Whether a blanket ban against gender affirmation surgery, which violates WPATH Standards and does not permit an individualized assessment for surgery, violates an inmate's Eighth Amendment right against cruel and unusual punishment?

STATEMENT OF THE CASE

This case is about a simple, but fundamental truth: incarcerated individuals are humans too. Prisoners ought to have the ability to properly defend their case and have access to adequate treatment in prison for their serious medical needs. Though individuals may lose their freedom while incarcerated, the judiciary owes inmates a realistic opportunity to appeal a decision, and prison officials have an obligation to provide inmates with adequate medical care. Eighth Amendment jurisprudence, along with the Federal Rules of Appellate Procedure, sway in favor of Mr. Escoffier, indicating that the Fourteenth Circuit Court of Appeal's decision should be affirmed.

I. The Course of Proceedings and Dispositions in the Court Below

Mr. Escoffier seeks to affirm the Fourteenth Circuit Court of Appeal's ruling that the plaintiff's appeal was timely and that he stated a genuine issue of material fact as to an Eighth Amendment violation to quash the defendant's motion to dismiss.

Mr. Escoffier filed this action on October 5, 2020, alleging a single cause of action under 42 U.S.C. § 1983 on the basis that the defendant's policy denying gender affirmation surgery as treatment for gender dysphoria is unconstitutional under the Eighth Amendment. (R. 25.) The plaintiff sought declaratory and injunctive relief, ordering the prison to provide gender affirmation surgery or provide an individualized assessment as to whether surgery was necessary for his medical needs. (R. 25.) On October 25, 2020, Mr. Posca filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (R. 25.) Both parties agreed to convert the motion to one for summary judgment under Fed. R. Civ. P 12(d), and the U.S. District Court of Silphium held a hearing on the motion on January 12, 2021. (R. 25.) The District Court granted summary judgment, holding that the policy does not constitute deliberate indifference as a matter of law. (R. 29.) Following Mr. Escoffier's notice of appeal, the Fourteenth Circuit Court of Appeals reversed the District Court's ruling of summary judgment, holding that Mr. Escoffier's appeal was timely and that he stated a claim for an Eighth Amendment violation. (R. 39, 44.)

II. Statement of Facts

Mr. Lucas Escoffier is a transgender man who was assigned female at birth. (R. 1.) In 2011, he was diagnosed with gender dysphoria. (R. 1.) He began to socially transition in 2012 and started hormone therapy in 2013. (R. 1.) In 2018, despite receiving a double mastectomy and legally changing his name, Mr. Escoffier began to suffer from chronic depression and mild suicidal ideation related to his gender dysphoria. (R. 1.) While the double mastectomy initially allowed Mr. Escoffier to feel

more comfortable in his body (even if not originally undergone for that purpose), he expressed to his doctor that he could not tolerate being "forced to live in a woman's body." (R. 17.) Mr. Escoffier's doctor determined that gender affirmation surgery was medically necessary for his condition and he began to contact medical providers to receive this surgery. (R. 1–2, 17.)

Unfortunately, shortly afterwards on March 1, 2020, Mr. Escoffier was incarcerated after pleading guilty to criminal tax fraud charges. (R. 2.) He was sent to Garum Correctional Facility ("Garum") on March 7, 2020. (R. 2.) While at Garum, Mr. Escoffier continued hormone therapy, but his mental health began to drastically decline. (R. 4.) Recognizing that his serious depression and perpetual suicidal ideation were symptoms of his gender dysphoria, he informed the prison staff that his condition was becoming intolerable. (R. 4.) Mr. Escoffier filed requests for gender affirmation surgery with the prison's psychiatrist, Dr. Arthur Chewtes, but was informed that the prison's policy prohibited any gender affirmation surgery. (R. 4, 19.) Mr. Escoffier was denied evaluation for surgery in each of his grievances based on the policy's prohibition, and on September 15, 2020, Mr. Max Posca denied Mr. Escoffier's final request. (R. 5, 20.)

The prison's policy, § G-33.8, states that "[s]urgical interventions are not provided for [gender dysphoria]." (R. 11.) The plan allows for mental health counseling, hormone therapy, and adjustments to housing if security concerns permit. (R. 11, 14–15.) The policy regarding treatment for gender dysphoria was created by a committee chaired by Dr. Erica Laridum, which reported to the warden, Mr. Posca.

(R. 4–5.) The 15-person committee consisted of experienced physicians including Dr. Chewtes, the supervising psychiatrist at the prison. (R. 13.) To develop the treatment plan, Dr. Chewtes directed the committee to WPATH Standards and the committee considered different treatment options. (R. 14.) Despite knowledge of the WPATH Standards and over Dr. Chewtes' objection, the committee voted to preclude sex-reassignment surgery from the prison's plan for treating inmates with gender dysphoria. (R. 14.)

Upon exhausting his administrative appeals at Garum, Mr. Escoffier retained a local firm named Forme Curry. (R. 5.) The firm agreed to take Mr. Escoffier's case on a pro-bono basis and Ms. Sami Pegge was assigned as his attorney. (R. 5.) On October 5, 2020, Ms. Pegge filed suit under 42 U.S.C. § 1983 alleging Garum violated Mr. Escoffier's Eighth Amendment rights. (R. 5.) The defendant filed a Motion to Dismiss which the District Court Silphium converted into a Motion for Summary Judgment. (R. 6.) The District Court then ruled in favor of the defendant. (R. 6.)

After the District Court's adverse ruling on the Motion for Summary Judgment, Ms. Pegge assured Mr. Escoffier that she would continue to represent him in the appeal. (R. 6.) Ms. Pegge advised Mr. Escoffier that the firm would continue to build the case and would need to get his signature on some documents by early March. (R. 6.) Mr. Escoffier was then taken back to Garum Correctional Facility. (R. 6.) He never heard from Ms. Pegge again. (R. 7.)

As it turned out, Ms. Pegge had contracted the novel Miasmic Syndrome, which had recently become viral, and was hospitalized. (R. 6.) Ms. Pegge did not return to the firm until March 12, 2021, nine days after the March 3 filing deadline. (R. 7.) Although she had left a note to transition all of her matters to other members of the firm, Mr. Escoffier's case was never properly calendared. (R. 6–7.) As a result, no one from the firm reached out to Mr. Escoffier about his case. (R. 7.)

Concerned about the status of his case, Mr. Escoffier tried to reach his attorney for help. (R. 7.) However, being incarcerated made this difficult. (R. 7.) In addition, new polices to curb the spread of the Miasmic Syndrome also severely restricted Mr. Escoffier's ability to reach out to his attorney. (R. 7.) Incarcerated people could no longer have in-person visitation. (R. 3.) All court appearances and attorney-client visits were conducted through video conference software. (R. 3.) Videoconferences were held using the five computers the Garum Correctional Facility had for this purpose. (R. 3.) Because Garum Correctional Facility houses the entire incarcerated population of Silphium state, it was not uncommon for videoconferences to be booked out for more than three weeks at a time. (R. 3.) Phone access was not much better: access to communal phones was only available by appointment made through corrections staff. (R. 4.) Limited staff meant that many missed phone call appointments occurred, and prisoners often would go weeks without being about to contact family, friends, and attorneys. (R. 4.)

Despite these immense difficulties, Mr. Escoffier attempted multiple times and in multiple ways to reach his attorney. (R. 7.) He called Ms. Pegge's direct line three

times during February of 2021 and left a voicemail, unsuccessfully trying to reach her. (R. 7.) Mr. Escoffier also used his only opportunity to use the Garum Correctional Facility's computers to send an email to the firm's general inbox. (R. 7.)

Finally, on March 2, another attorney from Forme Curry, Mr. Hami Sharafi responded. (R. 7.) However, instead of taking on his case, Mr. Sharafi simply informed Mr. Escoffier that he was not familiar with the case and directed Mr. Escoffier to file his own notice of appeal given that he did not have an attorney to help him. (R. 7.) That same day, Mr. Escoffier immediately and diligently drafted his own notice of appeal and placed it in the legal prison mailbox along with a completed mailing form. (R. 7, 21.) He checked the box entitled "Check if Mailing is LEGAL MAIL." (R. 21.) The mailing form was signed and dated by the receiving custody officer on March 2 in the section entitled "To be completed by Receiving Custody Officer." The officer also checked the box entitled "Check if Postage Paid by Inmate." (R. 21.) A custody officer also dated and signed the mailing form on the date it was transmitted. (R. 21.) Unfortunately, the Garum Correctional Facility did not mail his appeal until March 7 and the District Court did not receive Mr. Escoffier's appeal until March 10th. (R. 7.) Because there are genuine issues of material fact with respect to whether Mr. Escoffier timely filed his notice of appeal and whether Garum violated his constitutional rights under the Eighth Amendment, this Court should affirm the holding of the Fourteenth Circuit.

III. Statement of the Standard of Review

The correct interpretation of this Court's decision in *Houston v. Lack,* 487 U.S. 266 (1988) is a legal determination subject to *de novo* review. *See Outler v. United States*, 485 F.3d 1273, 1278 (11th Cir. 2007). With respect to whether Rule 4(c) has been complied with, this Court reviews pure "questions of law *de novo*, but, to the extent factual issues are intermingled, consider[s] mixed questions of law and fact under the more deferential clear error standard." *United States v. Ponzo*, 853 F.3d 558, 589 (1st Cir. 2017).

The ultimate legal conclusion of whether prison administrators have violated the Eighth Amendment is also reviewed *de novo*. *Kosilek v. Spencer*, 774 F.3d 63, 84 (1st Cir. 2014) (hereinafter *Kosilek II*). While factual finding regarding conditions at a prison are reviewed for clear error, the conclusion as to whether the facts demonstrate an Eighth Amendment violation is a question of law that is reviewed *de novo*. *Id.* (citing *Hallet v. Morgan*, 296 F.3d 732, 744 (9th Cir. 1994)). Subsidiary legal questions such as those involving deliberate indifference are similarly reviewed *de novo*. *Id.*

The Court may grant judgment under Federal Rule of Civil Procedure 56(a) only when there exists "no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The motion will not be granted if the nonmovant produces sufficient evidence proving the contrary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Furthermore, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.*

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's ruling, reversing the Order granting Petitioner summary judgment because Mr. Escoffier's appeal was timely under the Prison Mailbox Rule and Garum Correctional Facility violated the Eighth Amendment by categorically banning gender affirmation surgery.

First, there is a genuine issue of material fact with respect to whether Mr. Escoffier's appeal was timely. As a passively represented prisoner, Mr. Escoffier was entitled to the Prison Mailbox Rule because the plain language of Rule 4(c) includes represented inmates, the purposes behind the case that created the rule support its application here, and courts have already often extended the rule to other contexts based on its underlying reasoning.

Second, Mr. Escoffier presented sufficient evidence to establish a genuine issue of material fact as to his Eighth Amendment claim. The prison's policy, which categorically prohibits gender affirmation surgery, violates both the objective and subjective prong of the Eighth Amendment's deliberate indifference test because it fails to follow WPATH Standards and proscribes an individualized assessment for gender affirmation surgery.

ARGUMENT

I. The Prison Mailbox Rule Should Apply to Passively Represented Inmates and Respondent Has Complied with the Requirements of Fed. R. App. P. 4.

Mr. Escoffier was represented in name only and compelled to file his notice of appeal himself through Garum's mail system. Therefore, he may take advantage of

the Prison Mailbox Rule. Furthermore, Mr. Escoffier complied with all requirements necessary to receive the benefit of the Rule.

A. The Prison Mailbox Rule Should Apply to Passively Represented Inmates

The "timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The burden of establishing jurisdiction initially rests on the plaintiff who is seeking to establish jurisdiction. *See May v. Mahone*, 876 F.3d 896, 898 (7th Cir. 2017). However, upon plaintiff's showing that he filed his appeal with prison authorities, the burden then shifts to the defendant to argue otherwise. *Jeffries v. United States*, 748 F.3d 1310, 1314 (11th Cir. 2014); *United States v. Camilo*, 686 F. App'x 645, 646 (11th Cir. 2017).

1. The Plain Language of Rule 4(c) Includes Represented Inmates

Five years after *Houston v. Lack* created the Prison Mailbox Rule, Federal Rule of Appellate Procedure 4(c) ("the Rule") was amended to incorporate it. *See Houston v. Lack*, 487 U.S. 266, 266 (1988); *Nichols v. Bowersox*, 172 F.3d 1068, 1077 (8th Cir. 1999). Thus, the question of whether Mr. Escoffier's notice of appeal is timely ultimately depends on the text of the current version of the Rule. *See United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004) ("Today the mailbox rule depends on Rule 4(c), not on how [pre-amendment cases] understood *Houston*.").

Congress gave this Court "the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals" through the Rules Enabling Act. 28 U.S.C. § 2072(a). In interpreting these procedural rules, the Court looks first to their plain meaning. *Pavelic & LeFlore v. Marvel Ent.*

Grp., 493 U.S. 120, 123 (1989) (interpreting the Federal Rules of Civil Procedure). With procedural rules, as with a statute, "[w]hen [the Court] find[s] the terms . . . unambiguous, judicial inquiry is complete." *Id.*

Here, the language of the Rule is unambiguous in its terms. *See Craig*, 368 F.3d at 740 ("the text of Rule 4(c) . . . as written is neither incoherent nor absurd"). The Rule is entitled "Appeal by an Inmate Confined in an Institution." Fed. R. App. P. 4(c). It specifies how any "inmate [who] files a notice of appeal in either a civil or a criminal case" may receive the benefit of a modified timing calculation if certain steps are followed. *See id.* As the Fourth Circuit has pointed out, the Rule does not distinguish between represented and *pro se* prisoners. *See United States v. Moore*, 24 F.3d 624, 626 n.3 (4th Cir. 1994); *Craig*, 368 F.3d at 740 ("[r]espect for the text of Rule 4(c) means that represented prisoners can use the opportunity it creates"). Thus, the Court should not "pencil" in "unrepresented" where the rule unambiguously applies to all inmates. *Id.*

If an individual qualifies under the description of the Rule, that individual should be allowed to take advantage of it. *See Craig*, 368 F.3d at 740; *United States v. Carter*, 474 F. App'x 331, 333 (4th Cir. 2012) (holding represented prisoner allowed to use mailbox rule because he filed his notice of appeal "while incarcerated"). In *Craig*, the court found a represented prisoner could benefit from Rule 4(c) because he was an inmate confined in an institution. *See id.*

Here, just as the Eighth Circuit held that the represented inmate in *Craig* could take advantage of the Prison Mailbox Rule because he "me[t] the description"

of the rule, this Court should hold that Mr. Escoffier also may take advantage of the Rule because—regardless of the status of his representation—he is an inmate confined in an institution and thus meets the description of the Rule. *Craig*, 368 F.3d at 740.

2. The Purposes Behind Houston and Rule 4(c) at Minimum Support its Application to Passively Represented Prisoners

In addition to the plain text of the rule, all the reasons *Houston* set forth for the inception of the Rule also support its extension to prisoners represented in name only by incapacitated attorneys. *See Moore*, 24 F.3d at 625; *Vaughan v. Ricketts*, 950 F.2d 1464, 1467 (9th Cir. 1991). As an initial matter, *Houston* did not expressly limit its holding to unrepresented individuals. *See Moore*, 24 F.3d at 626; *Cretacci v. Call*, 2020 WL 2561945, at *10 (E.D. Tenn. May 20, 2020), aff'd, 988 F.3d 860 (6th Cir. 2021) (observing that the *Houston* holding was not expressly restricted to prisoners proceeding *pro se*).

More importantly, *Houston* justified creation of the Prison Mailbox Rule on fairness grounds which would support individuals in Mr. Escoffier's position receiving the benefit of the Rule. *Moore*, 24 F.3d at 625 ("*Houston* itself was premised upon fairness; indeed, the theme runs throughout Justice Brennan's majority opinion."); *Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002) (observing that the rule in *Houston* is a "rule of equal treatment").

Houston identified three fairness-based reasons justifying the creation of the rule: (1) the prisoner's inability to control his or her notice of appeal after it has been delivered to prison guards, (2) a lack of legal counsel to assist in ensuring the appeal

is filed, and (3) the incentive for prison authorities to delay the prisoner's filing beyond an applicable time limit. *See Houston*, 487 U.S. at 271–72. All these concerns are equally present where a prisoner is technically represented, but his or her attorney is incapacitated.

i. A Represented Prisoner is Unable to Exercise Control Once an Appeal is Handed Over to Prison Authorities for Filing

With respect to the first reason justifying the Prison Mailbox Rule, for the same reasons that unrepresented prisoners filing their own appeal through a prison's mail system are unable to control it once it is in the hands of prison guards, represented prisoners filing their own appeal through the *prison's* mail system are similarly limited because the prison is in possession and control of delivery—not the prisoner or attorney. *See Houston*, 487 U.S. at 271 (observing that prisoners have no means of proving delay attributable to prison authorities). To the extent that representation by an attorney might be thought to somehow lessen this problem, the second and third reasons below demonstrate that it cannot in the context of an attorney who is incapacitated.

ii. A Prisoner Passively Represented by Counsel is Effectively Unrepresented

With respect to *Houston*'s second justification of the Rule, a prisoner that is represented on paper is unrepresented for all intents and purposes when that attorney is incapacitated. *See Vaughan*, 950 F.2d at 1467; *Mason v. Glebe*, 674 F. App'x 631, 631 (9th Cir. 2017) (holding that prison mailbox rule was applicable because represented prisoner was for all practical purposes acting *pro se*).

In *Vaughan*, a prisoner was represented by counsel at trial and never formally discharged his attorney, although his attorney had told him he was on his own. *Id.* at 1467. The prisoner filed his own motion of appeal at a date that would be considered untimely unless the mailbox rule applied. *Id.* The Ninth Circuit found that although he was still represented, he was in the same position as the *pro se* litigants in *Houston* because he could not hand deliver his appeal to the clerk nor could he trust a lawyer to file it in time. *Id.* The Ninth Circuit concluded that "it would be neither logical nor just to treat [the prisoner] as having an attorney if he has had none of the benefits representation is supposed to provide." *Id.*

Here, Mr. Escoffier's case similarly demonstrates that *Houston*'s concerns are present in the case of a passively represented prisoner. Similar to *Vaughan*, where the prisoner was still represented, but was not receiving the benefits of representation because the attorney had wanted to quit his case, Mr. Escoffier also was still represented, but was not receiving the benefits of representation because Ms. Pegge was hospitalized. *See id.* In fact, the last advice Mr. Escoffier had received—that Ms. Pegge would need Mr. Escoffier's signature on some documents by early March—could not be considered as representation that would set Mr. Escoffier in a position of advantage over *pro se* litigants. (R. 6.) Additionally, just as in *Vaughan*, despite representation Mr. Escoffier was unable to hand deliver his appeal to the clerk or trust Ms. Pegge to file it in time. *See id.*

Jurisdictions refusing to extend *Houston* to represented prisoners often have come to that decision through a black and white concept of representation, not

considering the class of prisoners represented in name only. *See Moore*, 24 F.3d at 626 ("The Seventh Circuit apparently did not consider the possibility that even represented prisoners might be prevented from timely communicating with counsel"); *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002) (declining to extend the mailbox rule to represented prisoners and reasoning that they have an agent to control the conduct of their action and file pleadings); *Camilo*, 686 F. App'x at 646 (same). Ultimately, *Houston*'s second concern about lack of legal counsel is present for prisoners in Mr. Escoffier's position and thus he should be given the benefit of the Prison Mailbox Rule.

iii. The Incentive for a Prison to Delay the Appeals Process Also Exists in the Context of Represented Prisoners

Regarding *Houston*'s third justification for creation of the Rule, if a prison has an incentive to prevent the timely filing of a prisoner's appeal, that incentive will exist regardless of a prisoner's representation status. *See Moore*, 24 F.3d at 625. In *Moore*, the Fourth Circuit observed that a prison can just as easily delay—represented or not—a prisoner's access to counsel, as it can delay the communication to courts feared in *Houston*. *See id.*

Mr. Escoffier's case is a perfect example. At Garum Correctional Facility, Mr. Escoffier could not have in-person visitation. (R. 3.) All court appearances and attorney-client visits were conducted virtually through five computers that were often booked out for more than three weeks at a time. (R. 3.) Access to communal phones was limited and only available through appointment. (R. 4.) Missed phone calls were common due to limited corrections staff. (R. 4.) In fact, Mr. Escoffier could only

unsuccessfully contact Ms. Pegge's direct office line three times during the entirety of February 2021 and leave one voicemail. (R. 7.) His only successful contact was through the one opportunity he was allowed to use the computer. (R. 7.) Ms. Pegge did not return to the office until March 12 and made no contact with Mr. Escoffier during this time. (R. 7.) Intentional or not, Garum Correctional Facility limited Mr. Escoffier's access to representation substantially such that he was in an identical position as the *pro se* prisoner in *Houston*. *See id.*; *Vaughan*, 950 F.2d at 1467. In situations like *Moore* and Garum, the prisoner's access to the court system is no different than that of a prisoner that never retained an attorney in the first place. *See id.* Therefore, Rule 4(c) should equally apply to these passively represented prisoners.

3. Courts Have Already Extended Houston To Other Contexts Based On Its Underlying Reasoning

Finally, in addition to the plain text of the governing rule and the fact that *Houston*'s rationale applies to prisoners in Mr. Escoffier's position, this Court should not hesitate to extend Rule 4(c) to passively represented prisoners based on the *Houston* factors because the Federal Circuit Courts have already extended the rule in other contexts many times using this analytical framework. *See Ray*, 290 F.3d 810, 812–13 (6th Cir. 2002) (observing that all the reasons supporting the *Houston* decision also supported applying the mailbox rule to complaints); *Faile v. Upjohn Co.*, 988 F.2d 985, 988–89 (9th Cir. 1993) (observing that the Ninth Circuit has looked to the presence or absence of the policy concerns underlying *Houston* in determining whether to extend its application); *In re Flanagan*, 999 F.2d 753, 757–59 (3d Cir. 1993) (holding the mailbox rule applies to joint notices of appeal because the same

concerns in *Houston* are present). As Subsection I(A)(2) demonstrates, passively represented prisoners also implicate *Houston* concerns, and therefore this Court should not hesitate to extend it to them as well.[1]

B. Mr. Escoffier Has Complied with the Requirements of the Mailbox Rule

Section A has argued that Mr. Escoffier has a right to benefit from the Rule. Mr. Escoffier has also fully complied with the requirements of the Rule. Absent evidence to the contrary, courts assume that a prisoner delivered a filing to prison authorities on the date that he signed it, and the burden is then on the government to prove the filing was delivered to prison authorities on a date other than the date the prisoner signed it. *Camilo*, 686 F. App'x at 646. If there is insufficient evidence in the record on appeal to make a determination, the proper course of action is to remand the case back to the district court for further factual findings. *Vaughan*, 950 F.2d at 1467.

Rule 4(c) states in relevant part: "[i]f 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)." Fed. R. App. P. 4. It then goes on to state 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 and . . . is accompanied by" a declaration, notarized statement, or "evidence (such as

[1] *See* Courtenay Canedy, *The Prison Mailbox Rule and Passively Represented Prisoners*, 16 GEO. MASON L. REV. 773 (2009) (advancing the argument made in this section).

a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid." *Id.*

Mr. Escoffier complied with all the requirements of the Rule by using the legal mail system at Garum Correctional Facility. Alternatively, even if there were no legal mail system, Mr. Escoffier has complied with the requirements of Rule 4(c)(1)(A)(II).

1. *Mr. Escoffier Satisfied Rule 4(c) by Using Garum Correction Facility's Legal Mail System*

Several courts have interpreted Rule 4(c) as having one requirement: if a prison has a dedicated legal mail system a prisoner simply has to deposit his notice of appeal in that system. *Ingram v. Jones*, 507 F.3d 640, 643–44 (7th Cir. 2007); *Meraz-Camacho v. United States*, 417 F. App'x 558, 559 (7th Cir. 2011) (holding that prisoner who failed to state that he had prepaid first-class postage had nevertheless complied with Rule 4(c) by using the prison's legal mail system); *Hurlow v. United States*, 726 F.3d 958, 962 (7th Cir. 2013) (interpreting the rule as only requiring use of the legal mail system where one exists); *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1144 (10th Cir. 2004) (holding that the third sentence of Rule 4(c) "references Congress's intent to allow prisoners a filing option for those cases where a legal mail system is not available").

In *Ingram*, a prisoner filed a notice of appeal and failed to state whether or not postage was prepaid when the notice was placed in the prison mailbox. *Ingram*, 507 F.3d at 642. The Seventh Circuit held that the prisoner had nevertheless satisfied Rule 4(c) because he had used the prison's dedicated legal mail system which verified the time of deposit. *Id.* at 644. The court interpreted the legal mail provision as a

sufficient condition for satisfying the rule and the subsequent provisions in Rule 4(c) as alternative means of satisfying the rule in the case where a prison does not have a dedicated legal mail system. *Id.* at 643–44.

Here, Mr. Escoffier's notice of appeal satisfies Rule 4(c) because it was deposited through the legal mail system. Mr. Escoffier clearly marked the "Legal Mail" box on the mailing certificate attached to his notice of appeal. (R. 21.) Just as the prisoner in *Ingram* satisfied the rule by using the legal mail system despite the fact that he had not stated whether postage was prepaid, Mr. Escoffier also has satisfied the rule by using Garum's dedicated legal mail system—regardless of whether he filed a declaration or notarized statement. *See id.*

2. In the Alternative, the "Evidence" Provision of Rule 4(c) is Also Satisfied

Even if the provisions of subsection Rule 4(c)(1)(A) governed—they do not—Mr. Escoffier's notice of appeal has still satisfied the Rule under the "evidence" provision. In 2016, Rule 4(c) was amended to include an alternative method of proving postage payment under the non-legal mail provisions of the Rule. *United States v. White*, 745 F. App'x 646, 647 (7th Cir. 2018). In addition to a declaration or notarized statement, now "evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid" is also sufficient. Fed. R. App. P. 4.

Courts have liberally construed the evidence provision, finding many alternative forms of proof to satisfy the rule. *See White*, 745 F. App'x at 646; *Murray v. Artl*, 189 F. App'x 501, 503 (7th Cir. 2006) (holding that prisoner who failed to attest that he prepaid first-class postage had satisfied the rule because he provided

an inmate transaction statement showing that postage had been charged from his account); *Douglas v. Noelle*, 567 F.3d 1103, 1109 (9th Cir. 2009) (holding that declaration or notarized statement was unnecessary because there was a photocopy of the envelope in which the legal document was sent with the postmark date).

In *White*, an inmate failed to submit a declaration or affidavit attesting that postage was prepaid. *See White*, 745 F. App'x at 647. However, he did submit a photocopy of the stamped envelope accompanying the appeal. *Id.* Because mail without postage is not ordinarily accepted, the Court held that it could infer postage was prepaid and the rule was satisfied. *Id.*

Here, even if the provisions of subsection Rule 4(c)(1)(A) governed, Mr. Escoffier's mail certificate has complied with the "evidence" provision of the Rule. The mailing certificate that Mr. Escoffier filed has a box labeled "Check if Postage Paid by Inmate." (R. 21.) This box is checked on the form and beneath is the signature of the receiving custody officer—a neutral third-party. (R. 21.) If that were not sufficient, a custody officer also signed and dated the certificate in the section entitled "To be Completed by the Custody Officer on Transmittal," which implies that it had adequate postage. (R. 21.) Just as the inmate in *White* could use a photocopy of the stamped envelope and the inmate in *Murray* could use an inmate transaction statement to satisfy the Rule, Mr. Escoffier could use the mailing certificate (which explicitly asserts that postage was paid) to satisfy the rule. *See White*, 745 F. App'x at 646; *Murray*, 189 F. App'x at 503.

This is especially so given that this proof is uncontested by contradicting evidence. *See Jeffries*, 748 F.3d at 1314 (holding that after the prisoner submits proof the burden is on the prison to argue otherwise). Therefore, Mr. Escoffier has fully complied with the requirements of the Rule, and thus this Court may consider his appeal concerning Garum's categorical ban on gender affirmation surgery.

II. A Prison Violates the Eighth Amendment When It Categorically Bans Gender Affirmation Surgery Without Allowing an Inmate Suffering from Gender Dysphoria to Undergo an Individualized Examination

One bedrock principle of U.S. Constitutional law is the Eighth Amendment's prohibition against "cruel and unusual punishment." U.S. Const. amend. VIII. The Supreme Court has long held that the Eighth Amendment forbids forms of punishment that are "incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing to *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Cruel punishments not only encompass acts that involve torture or lingering death, but also acts that "involve the unnecessary and wanton infliction of pain." *Id.* at 102–03 (citing to *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). In *Estelle*, the Supreme Court held that deliberate indifference to serious medical needs of prisoners constitutes "unnecessary and wanton infliction of pain," barred by the Eighth Amendment. *Id.* Though the Eighth Amendment does not apply to mere medical malpractice against prisoners, it does prohibit prison officials from intentionally denying medical care or intentionally interfering with treatment once prescribed. *Id.* at 104–06.

For a finding of deliberate indifference, a prisoner must satisfy a two-part test: (1) an objective prong that requires proof of a serious medical need for which the prisoner has received inadequate treatment, and (2) a subjective prong that mandates a showing of prison administrators' deliberate indifference to the serious medical need. *Kosilek II*, 774 F.3d at 82, 85.

Under the first prong, prison officials are not mandated to provide care that is ideal or of the prisoner's choosing, but rather this prong bars "care that is 'so inadequate as to shock the conscience.'" *Id.* at 82–83 (citing *Torraco v. Maloney*, 923 F.2d 231, 235 (1st Cir. 1991)). Next, the second prong requires the prisoner to show that "failure in treatment was purposeful." *Id.* at 83.

Here, there is no dispute that Mr. Escoffier's gender dysphoria is a serious medical condition. *See* (R. 29.) However, the two parties disagree as to the adequacy of Garum's policy for gender dysphoria treatment under the first prong and Mr. Posca's deliberate indifference under the second prong. Mr. Escoffier has presented sufficient evidence to establish both prongs of the Eighth Amendment test based on Garum Correctional Facility's failure to follow WPATH Standards and its enactment of a per se rule prohibiting gender affirmation surgery, also known as sex reassignment surgery, in all circumstances.

A. The Garum Correctional Facility Demonstrated Deliberate Indifference to the Medical Needs of Prisoners with Gender Dysphoria By Not Following WPATH Standards

The World Professional Association of Transgender Health authors the Standards of Care for the Health of Transsexual, Transgender, and Gender

Nonconforming People, also known as WPATH Standards (or "Standards"). The Standards emphasize that "[t]reatment is individualized: [w]hat helps one person alleviate gender dysphoria might be very different from what helps another person." WPATH at 5. They identify evidence-based treatment options for individuals with gender dysphoria including psychotherapy, hormone therapy, and "surgery to change primary and/or secondary sex characteristics." WPATH at 9–10. The Standards also state that for some, "surgery is essential and medically necessary to alleviate their gender dysphoria." WPATH at 54. WPATH lists six criteria for individuals with gender dysphoria to qualify for sex reassignment surgery: (1) Persistent, well documented gender dysphoria; (2) Capacity to make a fully informed decision and to give consent for treatment; (3) Age of majority in a given country; (4) If significant medical or mental health concerns are present, they must be well controlled; (5) 12 continuous months of hormone therapy as appropriate to the patient's gender goals (unless hormones are not clinically indicated for the individual); (6) 12 continuous months of living in a gender role that is congruent with their gender identity. WPATH at 106.

There is currently a circuit split as to whether WPATH Standards should be the guidepost for gender dysphoria treatment, specifically regarding the Standard's recommendation for sex reassignment surgery and individualized assessments. However, one decision by the Ninth Circuit most accurately depicts the medical consensus of WPATH Standards. *See Edmo v. Corazon*, 935 F.3d 757 (9th Cir. 2019). In *Edmo*, the court affirmed the holding that sex reassignment surgery was medically

necessary for the plaintiff and that prison authorities had been deliberately indifferent to her gender dysphoria. *Id.* at 797. The Ninth Circuit held that the lower court did not err in discounting the state's experts for determining the medical necessity of surgery because these experts did not follow WPATH Standards. *See e.g.*, *id.* at 789 (noting that two of the state's experts testified that they would deny surgery to a class of people because of their "institutionalization," which is explicitly disavowed by WPATH Standards); *see also id.* (noting that the two state experts relied on the inmate's failure to attend psychotherapy sessions as an indication that her mental health concerns were not controlled, which is not a precondition for surgery under WPATH Standards). The Ninth Circuit also asserted that the case was not merely a difference in medical opinions regarding the adequacy of treatment because the treating prison physician denied the plaintiff surgery based on the doctor's three-part criteria which "bear little resemblance to the widely accepted, evidence-based criteria set out in the WPATH's Standards of Care." *Id.* at 791. The court referred to WPATH as the "gold standard" for gender dysphoria treatment. *Id.* at 788 n.16.

Similarly, the Fourth Circuit and the Southern District of Illinois have followed WPATH Standards in determining the standard of care that prison official owe to inmates with gender dysphoria. In *De'lonta v. Johnson*, the court held that the plaintiff's claim, that her continued denial of sex reassignment surgery constituted deliberate indifference, survived a motion to dismiss. 708 F.3d 520, 522 (4th Cir. 2013). The court noted that the WPATH Standards are "the generally accepted

protocols for the treatment of GID" and that prison officials failed to meet these standards when they refused to evaluate De'lonta's suitability for surgery when alternative treatment was not effective. *Id.* at 522–23, 525. Additionally, in *Monroe v. Baldwin*, the Southern District of Illinois ordered a prison to develop policies and procedures that meet WPATH Standards. 424 F. Supp. 3d 526, 546 (S.D. Ill. 2019). In finding that the prison's actions could amount to deliberate indifference, the court stated that it "joins many other courts who agree the [WPATH] Standards of Care are the appropriate benchmark for treating gender dysphoria," also pointing to the defendant's own witness who testified that he was "not familiar with any other association that rivals WPATH's level of universal acceptance in the transgender health field." *Id.* at 543.

Alternatively, the Fifth Circuit has held that the failure to meet WPATH Standards is not indicative of an Eighth Amendment violation because these standards do not reflect the medical consensus regarding sex reassignment surgery. *See Gibson v. Collier*, 920 F.3d 212, 223 (5th Cir. 2019). In *Gibson*, the Texas prison facility had a policy that provided that transgender inmates were to be treated on a case-by-case basis, reflecting current, accepted standards of care. *Id.* at 217–18. Though there was dispute as to whether the policy forbade surgery or was merely silent on the issue, Gibson argued that the doctors denied her requests for surgery simply because the treatment was not part of the policy and thus the defendant was deliberately indifferent to her serious medical need. *Id.* at 218. In finding that Gibson failed to present a genuine dispute of material fact as to deliberate indifference, the

Fifth Circuit reasoned that the sex reassignment surgery was an on-going controversy in the medical community. *Id.* at 220. The court relied largely on the expert testimony from the record in *Kosilek II*, specifically the opinions of four doctors which included a gender identity specialist who did not view surgery as medically necessary and a psychiatrist who stated that many people disagree with WPATH Standards. *Id.* at 221–223 (citing to *Kosilek II,* 774 F.3d at 76–89). Though the *Gibson* court recognized that its own record included only WPATH Standards, it sided with the First Circuit declaring that WPATH Standards are merely one side in a contested medical debate. *Id.* at 221.

This Court should side with the Ninth and Fourth Circuit in finding that WPATH Standards guide the determination of adequate treatment for individuals with gender dysphoria and accordingly, departure from these standards amounts to deliberate indifference. *See Edmo*, 935 F.3d at 797; *De'lonta*, 708 F.3d at 522. WPATH Standards have been recognized as representing the medical consensus for transgender treatment by multiple courts and various health organizations. *See Monroe*, 424 F. Supp. 3d at 546; *see also Edmo*, 935 F.3d at 769 (stating that several major medical and mental health groups in the U.S., such as the American Medical Association, the American Psychiatric Association, and the American College of Surgeons recognize the WPATH Standards as "representing the consensus of the medical and mental health communities regarding the appropriate treatment for transgender and gender dysphoric individuals"). Additionally, the WPATH standards are based on the "best available science and expert professional consensus." *Id.* Given

that the leading standard for transgender treatment calls for sex reassignment surgery as a treatment option for some individuals, defying these standards creates a genuine issue of material fact as to whether a prison was deliberately indifferent to a prisoner's serious medical needs. Though the WPATH Standards allow for flexibility in the treatment for the individual receiving services, creating an absolute bar against a treatment option makes it impossible for the prison to ever offer a WPATH-recommended treatment. *See* WPATH at 35.

Further, this Court should not find the *Gibson* decision controlling because it represents the views of only one circuit, while also being inherently flawed. As noted by the Fourteenth Circuit in this case, the *Gibson* court ruled in a "conclusory fashion" by ignoring its own record and relying on the medical opinions from *Kosilek II*. (R. 41); *Gibson*, 920 F.3d at 221–23. Moreover, the expert testimonies from *Kosilek II* do not support the categorical holding of *Gibson*. *See Edmo*, 935 F.3d at 795–96 (stating that two *Kosilek II* experts testified that surgery was not necessary for the specific circumstances of the case and another expert who testified that surgery was never medically necessary has changed this opinion since *Kosilek II*). Furthermore, like the defendants in *Monroe*, the *Gibson* court failed to offer a standard that meets the level of general acceptance as WPATH. *See Monroe*, 424 F. Supp. 3d at 543.

In applying WPATH Standards, sex reassignment surgery is a treatment option for inmates diagnosed with gender dysphoria. WPATH at 10. These individuals should receive an individualized analysis and have the opportunity to seek surgery if they meet the WPATH criteria. *See* WPATH at 5, 60. Because Garum's

policy does not allow any inmate to receive sex reassignment surgery or even an assessment for this treatment, it violates WPATH Standards and does not comport with the Eighth Amendment. *See Edmo*, 935 F.3d at 796 n. 19 (stating "when the medical consensus is that a treatment is effective and medically necessary under the circumstances, prison officials render unacceptable care by following the views of outliers without offering a credible medical basis for deviating from the accepted view"). Although the Committee considered WPATH Standards at the beginning of their deliberations over the prison's policy, they were required to ensure that the treatment provided to its inmates comported with these standards. (R. 14); *see id.*

For Mr. Escoffier specifically, he met the WPATH criteria for sex reassignment surgery because he had persistent gender dysphoria since at least 2011, had the capacity to make a fully informed decision, had his health concerns under control given that his symptoms stemmed solely from his gender dysphoria, received at least 12 continuous months of hormone therapy, and lived in his gender role for at least 12 months. *See* (R. 16–19); WPATH at 60. Therefore, Mr. Escoffier is eligible for an individualized assessment for sex reassignment surgery under WPATH Standards. The defendant's denial of this assessment forced Mr. Escoffier to receive inadequate treatment for his gender dysphoria and constitutes deliberate indifference to his serious medical need.

B. The Blanket Ban on Gender Reassignment Surgery Violates the Objective and Subjective Prong of the Eighth Amendment Test

Even if the WPATH Standards are not deemed to be the guiding force in the treatment of gender dysphoria, an absolute ban on sex reassignment surgery in all

situations can force the facility to provide inadequate treatment for an inmate's serious medical needs and constitute deliberate indifference.

1. Under the Eighth Amendment Objective Prong, a Blanket Ban Can Create Inadequate Treatment for a Serious Medical Need

Given the general acceptance of sex reassignment surgery as a treatment option for gender dysphoria, a categorical ban on the treatment may deprive an individual of adequate treatment. *See Kosilek v. Mahoney*, 221 F.Supp.2d 156 (D. Mass. 2002) (hereinafter *Kosilek I*). In *Kosilek I*, a transgender inmate sought an injunction to require that her prison provide medical treatment for gender identity disorder. *Id.* at 159–160 (the prison's policy categorically prohibited sex reassignment surgery and only permitted hormone therapy for inmates who received the treatment prior to incarceration). The court held that hormones and sex reassignment surgery are treatments "commensurate with modern medical science that prudent professionals in the United States prescribe as medically necessary for some," thus the policy prohibited forms of treatment that may have been necessary to provide Kosilek real treatment. *Id.* at 186. Though the court ultimately held that Kosilek had not proved that the defendant was deliberately indifferent to violate the Eighth Amendment under the subjective-second prong, the court held that the defendant failed to provide adequate treatment under the objective-first prong because the treatment decision must be based on an individualized medical evaluation. *Id.* at 193, 195.

The court's decision in *Kosilek I*, demonstrates how the Garum Correctional Facility's blanket ban against surgery is unconstitutional on its face. "Prudent

professionals" find sex reassignment surgery to be "medically necessary for some," therefore the possibility that prison physicians deem surgery medically necessary for inmates with gender dysphoria is evident. *Id.* at 186. If other alternative treatments, such as hormone therapy and psychotherapy, are not effective for these individuals, their final option for relief may be surgery. In this case, the categorical ban on sex reassignment surgery would deny the Garum prisoners of adequate treatment, in violation of the Eighth Amendment.

Unlike *Kosilek I*, the court in *Kosilek II* ruled in favor of the defendant on the objective prong of the deliberate indifference test. *See id.* at 186; *Kosilek II*, 774 F.3d at 90. Kosilek sued prison officials for the second time for their failure to provide her with sex reassignment surgery, although her gender identity specialist recommended the treatment. *Kosilek II*, 774 F.3d at 70. The prison consulted with the Fenway Community Health Center, who issued a report recommending surgery, which was then peer reviewed by Dr. Osborne, who disagreed that surgery was medically necessary for Kosilek. *Id.* at 70–73. The court held that Kosilek did not prove that she received inadequate treatment because her treatment plan was just one of two acceptable courses of treatment that would provide a significant measure of relief. *Id.* at 90. However, the court explicitly noted that a blanket policy against surgery "would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs." *Id.* at 91 (explaining that the court's decision rested on the particular facts on the record including the doctor's non-

uniform opinions regarding the necessity of surgery, Kosilek's criminal history, and the feasibility of post-operative housing).

The *Kosilek II* decision demonstrates how Garum's blanket ban on surgery is not only unconstitutional on its face, but also as applied to Mr. Escoffier. As with *Kosilek I*, *Kosilek II* stands for the proposition that blanket prohibitions run afoul to the Eighth Amendment requirement of individualized assessments. *See id.* However, the particular facts that led the *Kosilek II* court to rule in favor of the defendant vary significantly from the facts surrounding Mr. Escoffier. Unlike Kosilek's personalized assessment that underwent multiple rounds of review, Mr. Escoffier was denied any individualized assessment that offered surgery as an option. *Id.* at 70–73; (R. 20.) Prior to incarceration, Mr. Escoffier's physician recommended sex reassignment surgery and Mr. Escoffier's alternative treatment options, such as hormone therapy, were not effective in treating his gender dysphoria. (R. 17, 18.) This differs from the court's determination in *Kosilek II* that Kosilek's treatment was one of two viable options. *Kosilek II*, 774 F.3d at 90. The only remaining option to cure Mr. Escoffier's symptoms of depression and anxiety stemming from his gender dysphoria, is sex reassignment surgery. By categorically denying him of this surgery, Mr. Escoffier has been left with inadequate treatment for his serious medical need.

The case law demonstrates that security considerations must be given significant weight when determining adequate medical care and deliberate indifference. *Id.* at 83 (citing to *Battista v. Clarke*, 645 F.3d 449, 454 (1st Cir. 2011)). In *Kosilek II*, the court deferred to the Department of Correction's report, which

reflected major concerns arising from housing a formerly male inmate, with a criminal history of extreme violence against a female domestic partner, within a female prison population containing high numbers of domestic violence survivors. *Id.* at 93. Though a similar individualized assessment was not conducted for Mr. Escoffier, such considerations would find that substantial security concerns do not exist in providing Mr. Escoffier with sex reassignment surgery. Unlike Kosilek, Mr. Escoffier does not have a history of violence, nor was he incarcerated for a violent crime. *Compare* (R. 2.) (where Mr. Escoffier was arrested for tax fraud), *with Kosilek II*, 774 F.3d at 68 (where Kosilek was convicted of first-degree murder). Additionally, there is no evidence that housing Mr. Escoffier in a male, rather than a female, prison would present safety concerns. Nonetheless, the Garum policy permits inmates with gender dysphoria to choose which gender housing units they live in if security concerns permit. (R. 14–15.) Thus, an individualized analysis would likely find that sex reassignment surgery is a safe and viable option for Mr. Escoffier.

2. Under the Eighth Amendment Subjective Prong, a Blanket Ban Can Constitute Deliberate Indifference to an Inmate's Medical Needs

"The majority of courts hold that such a blanket policy (or de facto ban), which does not allow for the consideration of an inmate's particular medical needs, could violate the Eighth Amendment." *Fisher v. Federal Bureau of Prisons*, 484 F.Supp.3d 521, 543 (N.D. Ohio 2020) (citing to *Kosilek II*, 774 F.3d at 91). In *Fisher*, the district court held that though the case appeared to be one of dueling medical opinions, the plaintiff stated a deliberate indifference claim because her requests for sex reassignment surgery were denied based on an unofficial blanket policy against

surgery rather than on the basis of actual medical opinions. *Id.* at 542. Another district court similarly held that a blanket ban on sex reassignment surgery could constitute deliberate indifference to serious medical needs. *Soneeya v. Spencer*, 851 F.Supp.2d 228 (D. Mass. 2012). In *Soneeya*, an inmate with gender dysphoria sued the prison facility for not providing her with an individualized evaluation for treatment where surgery was an option based on a blanket prohibition. *Id.* at 241. The court held that the prison's policy "is unconstitutional in so far as it creates a blanket prohibition on certain methods of treatment for GID" and directed the prison to "modify the policy so that there is no blanket ban, or so that exceptions to the policy may be made based on individual needs." *Id.* at 253.

The Ninth Circuit has also consistently held that blanket bans against treatment can amount to deliberate indifference. *See Allard v. Gomez*, 9 Fed. Appx. 793, 795 (9th Cir. 2001); *see also Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (holding that the plaintiff-inmate stated a cause of action for deliberate indifference when sex reassignment surgery was a medically necessary treatment, but the prison had a blanket prohibition against the surgery). In *Allard*, the plaintiff brought an action against the prison for applying a department-wide policy in a way that denied therapy for gender identity disorder, regardless of the medical recommendations given to an individual inmate. 9 Fed. Appx. at 794. The court remanded the case on the basis that there were triable issues as to whether hormone therapy was denied to the plaintiff due to an individualized medical evaluation or as a result of a blanket rule, to constitute deliberate indifference. *Id.* at 795.

Similarly, the Eleventh Circuit has acknowledged that a blanket ban against a treatment for gender dysphoria represents deliberate indifference. In *Keohane v. Florida Department of Corrections Secretary*, a transgender inmate brought a § 1983 action for deliberate indifference due to the prison's failure to provide hormone therapy based on the department's former freeze-frame policy, which determined gender dysphoria treatment based on the treatment received at the time of incarceration. 952 F.3d 1257 (11th Cir. 2020). Though the court held that the issue was moot because the policy was rescinded, it agreed that the policy would constitute deliberate indifference to a serious medical need. *Id.* at 1266–67 (stating "[i]t seems to us that responding to an inmate's acknowledged medical need with what amounts to a shoulder-shrugging refusal even to consider whether a particular course of treatment is appropriate is the very definition of 'deliberate indifference'—anti-medicine, if you will.")

The Fifth Circuit's holding in *Gibson* is the exception to the general rule, by asserting that the Eighth Amendment does not require an individualized assessment of medical treatment. 920 F.3d at 225. The majority relies on a hypothetical example where a prison would not be required to perform an individualized assessment if an inmate requested a drug that was categorically prohibited by the FDA. *Id.* However, the dissent properly contends that this comparison is inapposite because the "focus in deliberate-indifference cases is on the actions by prison officials in response to treatment prescribed by medical professionals for serious medical needs of prisoners." *Id.* at 238 (Barksdale, J., dissenting). The dissent also notes that other circuits have

continuously held that refusing to treat or evaluate treatment of an inmate based on a blanket policy rather than an individualized medical judgment could constitute deliberate indifference. *Id.* at 239 (Barksdale, J., dissenting).

This Court should side with the majority of circuit courts to find that the Eighth Amendment demands an individualized assessment of treatment for serious medical needs, and that failure to do so is indicative of deliberate indifference. Even if a treating physician decides to not prescribe sex reassignment surgery to an inmate with gender dysphoria, the patient should still receive an assessment with all widely accepted treatments as available options. Categorically denying sex reassignment surgery to all prisoners with a "shoulder-shrugging refusal" is "anti-medicine" and fails to account for changing medical discoveries. *Keohane*, 952 F.3d at 1266–67.

Given that the Eighth Amendment is based on "evolving standards of decency," a prison must leave a widely-used treatment option available as the medical community becomes more accepting of this procedure. *Estelle*, 429 U.S. at 102 (citing to *Trop*, 356 U.S. at 101). Though the categorical bans in *Keohane* and *Allard* restricted hormone therapy, the rationale equally applies here. *Keohane*, 952 F.3d at 1266–67; *Allard*, 9 Fed. Appx. at 795. Both hormone therapy and sex reassignment surgery face controversy by the general public but are generally accepted in the medical community as treatment options for individuals with gender dysphoria. *See Kosilek I*, 221 F.Supp.2d at 186 (holding that hormones and sex reassignment surgery are treatments "commensurate with modern medical science that prudent professionals in the United States prescribe as medically necessary for some"). Even

if this Court does not follow WPATH Standards or finds that there is no medical consensus regarding sex reassignment surgery, this treatment is undoubtedly a widely used and accepted form of treatment. *Id.* Accordingly, an absolute ban against surgery demonstrates a conscious, deliberate effort to deny treatment that may provide the only relief for an individual.

CONCLUSION

For the foregoing reasons, Lucas Escoffier respectfully requests this Court to affirm the ruling of the Fourteenth Circuit and remand the case back to the District Court for trial.