TEAM 2116

No. 2021-22

IN THE

# Supreme Court of the United States

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

*Petitioner*,

v.

LUCAS ESCOFFIER.

*Respondent.*

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

## BRIEF FOR RESPONDENT

## QUESTIONS PRESENTED

I. Whether the prison mailbox rule applies broadly to all prisoners, regardless of representation status, and if not, whether it applies to prisoners who are abandoned by counsel and effectively *pro se*?

II. Whether a government official working as a prison administrator, who has substantial knowledge of an inmate's risk of harm, violates the Eighth Amendment by denying him evaluation for gender confirmation surgery due to prison policy banning the procedure, and if so, whether the administrator is excused from his duty because of the extenuating circumstances presented by a global pandemic?

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## OPINIONS BELOW

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

## CONSTITUTIONAL, FEDERAL RULE, AND STATUTORY PROVISIONS

Please see the Appendix, *infra*, a-c, for the specific text of the following constitutional provision, federal rule, and statute involved in this case:

- U.S. Const. Amend VIII
- Federal Rule of Appellate Procedure 4
- 42 U.S.C. § 1983 (2006)

## STANDARD OF REVIEW

The Supreme Court reviews the Fourteenth Circuit's reversal of summary judgment *de novo*. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992) ("[O]n summary judgment we may examine the record *de novo* without relying on the lower courts' understanding...."). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

## STATEMENT OF THE CASE

### The Parties in this Case

Respondent Mr. Lucas Escoffier is a transgender man residing in Silphium, who was assigned to the female sex at birth. R. at 1. Mr. Escoffier uses the male identifying pronouns of "he", "him", and "his". R. at 1. Mr. Escoffier was diagnosed with gender dysphoria in 2011 and began taking masculinizing hormones in 2013, initiating a medical transition. R. at 16. However, since March 7, 2020, he has been incarcerated at the Garum Correctional Facility ("Garum"). R. at 2. He has been seeking approval for gender affirmation surgery through Garum's Division of Health to treat his medical diagnosis of gender dysphoria, and to ease debilitating symptoms of depression. R. at 4.

Petitioner Mr. Max Posca ("Warden Posca") is the prison warden and administrator at Garum, which houses the entire incarcerated population of the state. R. at 3, 22. Warden Posca assumes final authority over the operations and safety at the facility and is responsible for supervising the actions of the Division of Custody and the Division of Health. R. at 10. The medical department Warden Posca oversees is responsible for denying Mr. Escoffier his necessary surgical treatment. R. at 4-5.

### Mr. Escoffier Begins Seeking Necessary Medical Treatment

Throughout Mr. Escoffier's young adulthood, he struggled with depression and suicidal thoughts and eventually sought professional assistance. R. at 1, 16. After the underlying source of his depression was diagnosed as gender dysphoria,

Mr. Escoffier began to "socially" transition to his preferred gender in May 2012. R. at 1, 16. Since starting to medically transition in 2013, his psychiatrist noted a marked decrease in Mr. Escoffier's depressive symptoms and suicidal ideation. R. at 16. During this time, it was also determined that Mr. Escoffier was a genetic carrier for a mutation known to be a significant risk factor for breast cancer, and he underwent a double mastectomy to reduce this risk. R. at 1, 16-17. After his double mastectomy, further surgery was sought to reconstruct Mr. Escoffier's chest to be in line with his gender identity. R. at 1, 16-17.

Although these steps resulted in noticeable improvement to Mr. Escoffier's mental health, in 2018, Mr. Escoffier began noticing a return of depressive symptoms, stating he could not tolerate being forced to live in a woman's body and explicitly expressed suicidal intent. R. at 17. Specifically, Mr. Escoffier told his doctor, "There's only two ways this ends. I live as a man, in a man's body, because I am a man. Or I kill myself. Because I can't keep doing this." R. at 17. His doctor determined gender confirmation surgery was medically necessary for Mr. Escoffier to treat both his gender dysphoria and the associated underlying depression and suicidal ideation. R. at 1, 17. Mr. Escoffier and his medical team began taking steps toward receiving the surgical intervention he critically needed. R. at 1. In fact, Mr. Escoffier took substantial action to initiate his surgery, including scheduling a surgical consultation with his medical team. Opinion of the District Court of Silphium, R. at 23.

## The Grave Effects of the Miasmic Syndrome on Life in Garum

Just a week before the consultation for his gender confirmation surgery, Mr. Escoffier was arrested, charged, and indicted with criminal tax fraud in the first degree. R. at 2, 23. Because of Mr. Escoffier's extensive cooperation with the prosecution, Mr. Escoffier pleaded guilty to a lesser charge and received a lesser sentence of five years on March 1, 2020. R. at 2. Mr. Escoffier subsequently began his period of incarceration at Garum on March 7, 2020. R. at 2.

After Mr. Escoffier's imprisonment began, a highly contagious and fatal viral disease dubbed "Miasmic Syndrome" was discovered. R. at 2. Miasmic Syndrome turned into a pandemic within a matter of mere months. R. at 2. By the time Mr. Escoffier filed his appeal, Miasmic Syndrome had infected hundreds of millions, and killed several million people worldwide. R. at 2. In response to the pandemic, federal, state, and local governments instituted strict regulations to support the health and safety of their communities. R. at 2.

Miasmic Syndrome had profound effects on Garum's operations and on the everyday life of inmates. R. at 3. The pandemic created unprecedented challenges as prisons dealt with the spread of Miasmic Syndrome. R. at 3. To mitigate the spread of Miasmic Syndrome, Garum implemented a wide variety of policies restricting inmate resources. R. at 3. Garum cancelled programming, job trainings, classes, and communal recreation, resulting in inmates being held in their cells for most of the day. R. at 3. Social interactions and basic personal hygiene were limited; inmates were even given less time to shower. R. at 3. Without warning, Garum staff would

move inmates between quarantine and the general population. R. at 3. This significantly increased the amount of time inmates spent alone, without the company of others. R. at 3.

Perhaps the most damaging effect of these changes were the impacts on prisoners' litigation. Because incarcerated individuals could no longer have in-person visitation, essential attorney-client visits were conducted only by videoconference software. R. at. 3. However, Garum only had five computers for the entire incarcerated population of Silphium, including both pretrial and post-conviction inmates. R. at 3. This vastly reduced the availability of videoconference appointments, and individuals oftentimes had to wait more than three weeks to book an appointment with their attorney. R. at 3. Communal phones were generally inaccessible; they were only available via appointment made through the corrections staff, which was significantly reduced because of the pandemic. R. at 4. These reductions in corrections staff resulted in many important missed phone call appointments. R. at 4. As a result, prisoners often went weeks without being able to contact family, friends, or the attorneys crucial to securing their freedom. R. at 4.

**Exhaustion of Administrative Remedies Available at Garum**

The isolation inflicted on inmates at Garum had detrimental effects on Mr. Escoffier's health and wellbeing. R. at 4. The continuation of his hormone replacement therapy alone was not enough to curtail the impacts of his gender dysphoria. R. at 4. During his incarceration, Mr. Escoffier's condition persistently worsened, showing undeniable physical symptoms of debilitating depression, hair

loss, loss of appetite, and atypical weight loss. R. at 4. Mr. Escoffier directly informed the medical staff at Garum of his deteriorating health, and filed requests with Dr. Arthur Chewtes, Garum's psychiatrist, to obtain the gender confirmation surgery previously recommended by his medical team. R. at 4.

In an attempt to receive this necessary medical treatment, Mr. Escoffier submitted multiple grievances to the Medical Department and Garum itself. R. at 5. Each of his grievances underwent an investigation and a subsequent administrative review. R. at 5. But, each time, Garum denied Mr. Escoffier's requests on the basis of its arbitrary ban on gender confirmation surgery. R. at 5. Mr. Escoffier persevered in appealing this denial within the prison medical system until his final request was denied by Warden Posca on September 15, 2020. R. at 5.

After exhausting the administrative remedies available at Garum, Mr. Escoffier reached out to a local law firm, Forme Cury, to initiate a civil rights lawsuit against the prison for denying his gender confirmation surgery as a violation of his Eighth Amendment rights. R. at 5. His case was taken on by the firm *pro bono* and was assigned to Ms. Sami Pegge. R. at 5. Ms. Pegge was a senior associate with experience in prison litigation, handling almost all the firm's incarcerated clients. R. at 5.

On behalf of Mr. Escoffier, Ms. Pegge filed suit against Warden Posca in his official capacity as prison warden and administrator, and the Garum Correctional Facility on October 5, 2020. R. at 5, 8. Mr. Escoffier sought immediate relief from Garum's blanket ban against gender confirmation surgery as it violates his

constitutional Eighth Amendment right to be free from cruel and unusual punishment. R. at 5. Garum and Warden Posca filed a motion to dismiss, which was converted into a motion for summary judgment by the District Court of Silphium ("District Court"). R. at 6. On February 1, 2021, the District Court found there were no genuine issues of material fact and ruled in favor of Warden Posca, dismissing the case. R. at 6, 22.

**Further Procedural Hurdles Presented by the Miasmic Syndrome**

Shortly after discussing the District Court's decision with Mr. Escoffier, Ms. Pegge abruptly contracted a severe form of the Miasmic Syndrome. R. at 6. Due to her sudden hospitalization, she could not provide timely assistance to Mr. Escoffier with his appeal, and she was unable to properly transition his case to another attorney at the firm. R. at 6. Nearly six weeks passed from the District Court's decision to the time Ms. Pegge was available to return to work. R. at 6.

Mr. Escoffier maximized his efforts to reach his legal counsel during this time but was limited by Garum's restrictive policy regarding phone and library access due to the spread of Miasmic Syndrome. R. at 7. Over the course of the entire month of February following the District Court decision, Mr. Escoffier was only permitted to call Ms. Pegge's direct office line three times without reaching anyone. R. at 7. Mr. Escoffier left Ms. Pegge one voice message. R. at 7. Because of the new prison policies curtailing the use of the prison's facilities, including the library, Mr. Escoffier was only allowed to use the computer one time to send an email to Forme

Cury's general inbox. R. at 7. He sent the email through the firm's "Contact Us" page stating, "Please help me on my appeal, I cannot reach Ms. Pegge." R. at 7, 8-9.

Mr. Escoffier was not informed that his legal counsel was incapacitated until March 2, 2021, when Mr. Hami Sharafi, an attorney unfamiliar with his case, called him in response to his email. R. at 7. Mr. Sharafi told Mr. Escoffier that Ms. Pegge was hospitalized, and he was unfamiliar with Mr. Escoffier's case. R. at 7. Mr. Sharafi further informed Mr. Escoffier that no attorney would be able to help him, so Mr. Escoffier would have to file his Notice of Appeal on his own immediately. R. at 7. Mr. Escoffier followed Mr. Sharafi's guidance that he would need to submit his Notice of Appeal without official legal assistance and took immediate action, filling out the requisite mailing forms and submitting the appeal in the prison mailbox the same day. R. at 7.

## Procedural History

After Mr. Escoffier's several requests to receive necessary surgical transition surgery were denied, Mr. Escoffier filed a civil action under 42 U.S.C. § 1983 against the warden of Garum Correctional Facility, Max Posca, on October 5, 2020, in the District Court of Silphium. R. at 8. The complaint alleged that Warden Posca, in his official capacity as a state official, violated Mr. Escoffier's Eighth Amendment rights by enforcing an unconstitutional ban against gender confirmation surgery and denying him a necessary medical transition surgery. R. at 8. Mr. Escoffier also requested the District Court enter an injunction requiring Garum to either provide Mr. Escoffier with gender confirmation surgery, or to provide an individualized

analysis regarding the necessity of his surgery. R. at 22, 31. On October 25, 2020, Warden Posca moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). R. at 6. The District Court converted the motion to dismiss into a motion for summary judgment and granted summary judgment in favor of Warden Posca on February 1, 2021, finding there were no genuine issues of material fact. R. at 6, 22.

Although Mr. Escoffier was represented by counsel throughout this litigation, his attorney, Ms. Pegge, contracted Miasmic syndrome and was hospitalized for over two weeks; she could not return to work for over a month. R. at 6. Mr. Escoffier did not hear from Ms. Pegge or the law firm, Forme Cury, at all until March 2, 2021. R. at 7. On March 2, 2021, a different associate from Forme Cury, Mr. Sharafi, instructed Mr. Escoffier to mail his Notice of Appeal form to the prison's mail facilities immediately. R. at 7. Mr. Escoffier complied, submitting his Notice of Appeal on his own to the prison mailbox on March 2, 2021, along with a completed prison form. R. at 7, 21. Mr. Escoffier filled out the Garum Correctional Facility Mailing Certificate, and Officer James Whitbread signed that it was received, and postage was paid by the inmate on March 2, 2021. R. at 21. Because of staffing shortages at Garum due to the pandemic, the prison did not mail Mr. Escoffier's Notice of Appeal until March 7, 2021. R. at 7.

The District Court filed Mr. Escoffier's Notice of Appeal on March 10, 2021. R. at 7. On appeal, the Fourteenth Circuit reversed the decision of the District Court and made two conclusions:

1. Plaintiff's Notice of Appeal is timely under the prison mailbox rule, which can apply to incarcerated individuals otherwise represented by counsel; and
2. The Garum Correctional Facility's blanket ban prohibiting gender affirmation surgery is a violation of Mr. Escoffier's Eighth Amendment rights.

Opinion of the Fourteenth Circuit, R. at 38-39, 44.

The United States Supreme Court granted Warden Posca's petition for a writ of certiorari on September 22, 2021. R. at 9.

## SUMMARY OF THE ARGUMENT

### I.

To address unique challenges faced by prisoners seeking to exercise their constitutional right to be heard, the prison mailbox rule was established by the Supreme Court in *Houston v. Lack*, 487 U.S. 266, 275-76 (1988), and codified in Rule 4(c) of the Federal Rules of Appellate Procedure. *Pro se* prisoners are entitled to the benefit of the mailbox rule, but Circuit Courts are split on whether it applies to prisoners aided by counsel. This Court should adopt a broad reading of the prison mailbox rule and apply it to all prisoners, regardless of representation status.

The policy concerns underlying the ruling of *Houston* are present in the instant case. Like the litigant in *Houston*, Mr. Escoffier is an incarcerated litigant unable to monitor the processing of the mails. He could not deliver a copy of his pleadings to the Court Clerk by hand, nor did he have access to express mail services. Rather, he was compelled to rely on others to timely process their mailings. *Houston*'s underlying policy—that of not penalizing *pro se* prisoners for delays over which they have no control once they have timely delivered notices of appeal to prison authorities—applies with equal, if not greater, force to § 1983 actions. If *Houston* stands for nothing else, it stands for the principle that it is unfair to hinge prisoners' freedom on either the diligence or the good faith of their custodians, whether the prisoner is represented or not.

A prisoner who, as here, had to file the document because his counsel could not, should not have the doors of justice closed to him on limitations grounds if he

timely submits his filing via the inmate mail system. The experience of *pro se* prisoners that *Houston* describes applies exactly to Mr. Escoffier's experience, and even more so because of the challenges posed by Miasmic Syndrome. Mr. Escoffier was "unskilled in law, unaided by counsel, and unable to leave the prison," and as such, he was effectively abandoned by counsel and thus *pro se*.

Finally, if the drafters of the Fed. R. App. P. 4(c)(1) intended for it to apply only to unrepresented inmates, they would have included language to indicate that. Fed. R. App. P. 4 has been adopted without any limitation as to the prisoner's representation status. There is no support in the statutory language for narrowing the scope of Fed. R. App. P. 4(c)(1) to *pro se* inmates. Such an interpretation would burden prisoners like Mr. Escoffier whose success should not be inextricably tied to his understanding and familiarity with the nuance of procedure.

## II.

Under 42 U.S.C. § 1983, prison officials can be held personally liable for violations of an incarcerated person's Eighth Amendment protections to be free from cruel and unusual punishment. To establish a valid claim for this violation, a plaintiff must show that the prison officials or medical staff exhibited "deliberate indifference" to his medical needs, and that this indifference led to infliction of pain. However, an identifiable injury is not required to make a showing of deliberate indifference. It is also sufficient to show that there was a substantial risk of potential harm known to the prison officials and that they failed to take reasonable steps to abate this risk. While Circuit Courts are historically split over the provision

of gender confirmation surgery within prison medical systems, rapid advancements in social and medical understanding require our courts to adapt when this new evidence arises.

After nearly a decade of treatment for gender dysphoria without significant improvement in his condition, Mr. Escoffier and his medical provider made the concerted and considered decision to pursue gender confirmation surgery. Despite Garum's psychiatrist reporting Mr. Escoffier's anxiety, depression, suicidal thoughts, and other symptoms, he was denied evaluation for gender confirmation surgery. At every step in the administrative appeals process, Garum officials cited the blanket ban against the surgery as the reason for the denial. The blanket ban prevents medical staff at Garum from conforming with the well-accepted standards of care for treatment of patients with gender dysphoria.

Despite having full knowledge of Mr. Escoffier's risk of self-harm, Garum officials refused to even provide him with an individualized assessment for gender confirmation surgery. This unreasonable conduct is the discrete cause of Mr. Escoffier's continued suffering and deprivation of a fundamental right, and it is not excused simply because of logistical or financial hurdles presented by the Miasmic Syndrome. Therefore, this Court should affirm the Fourteenth Circuit's decision below.

## ARGUMENT

### I. This Court should affirm the Fourteenth Circuit's decision to hear Mr. Escoffier's Appeal because the prison mailbox rule should be read broadly to apply to *all* prisoners, regardless of representation status, and because Mr. Escoffier was proceeding without the assistance of counsel.

At the cornerstone of our justice system is the right of access to the court. No person can be deprived of life, liberty, or property without the opportunity to be heard. An inmate's ability to exercise his constitutional right to be heard is severely constrained by his incarceration. To address unique challenges faced by prisoners seeking to exercise this constitutional right to be heard, the prison mailbox rule was established by the Supreme Court in *Houston v. Lack*, 487 U.S. 266, 275-76 (1988), and codified in Rule 4(c) of the Federal Rules of Appellate Procedure. Timely notice of appeal is a mandatory jurisdictional prerequisite to the right of appeal. *United States v. Robinson*, 361 U.S. 220, 224 (1960).

Under the prison mailbox rule, a prisoner's notice of appeal is deemed filed when the prisoner places it in the prison mail system, not when it reaches the court clerk. *Id. See also, Hurlow v. United States*, 726 F.3d 958, 962 (7th Cir. 2013). At the core of the prison mailbox rule, then, is "equal treatment," ensuring that "imprisoned litigants are not disadvantaged by delays which other litigants might readily overcome." *Lewis v. Richmond City Police Dep't*, 947 F.2d 733, 735 (4th Cir. 1991). *Pro se* prisoners are entitled to the benefit of the mailbox rule, but Circuit Courts are split on whether it applies to prisoners aided by counsel. *See Cretacci v. Call*, 988 F.3d 860 (6th Cir. 2021) (limiting the prison mailbox rule to *pro se* prisoners); *United States v. Camilo*, 686 Fed. Appx. 645, 646 (11th Cir. 2017)

(same); *but see United States v. Moore*, 24 F.3d 624, 625 (4th Cir. 1994) (holding the prison mailbox rule applies to all prisoners). This Court should adopt a broad reading of the prison mailbox rule and hold that it applies to all prisoners, regardless of representation status.

As noted by the Fourteenth Circuit below, there is no basis to limit the prison mailbox rule to solely *pro se* prisoners, and a plain reading of *Houston* supports that holding. Opinion of the Fourteenth Circuit, R. at 38. First, limiting application of the prison mailbox rule in cases like Mr. Escoffier's would cut off an inmate's right to have his claims fully heard by the courts. Second, even if this Court does not want to apply the prison mailbox rule broadly, Mr. Escoffier was effectively *pro se* and thus the prison mailbox rule should apply to him. Third, even if these two arguments are unpersuasive to this Court, the prison mailbox rule still applies to Mr. Escoffier under the text and plain meaning of Federal Rule of Appellate Procedure 4. Hence, the Fourteenth Circuit correctly concluded that the prison mailbox rule must be applied to Mr. Escoffier's case.

### A. The prison mailbox rule should be read broadly to apply to all prisoners, not solely *pro se* prisoners, to protect inmates' rights to have their claims fully heard by the court.

The prison mailbox rule ensures that justice will be properly served. *Jones v. Bertrand*, 171 F.3d 499 (7th Cir. 1999). Our judicial system recognizes the complexity of our procedural rules, and those rigid requirements are sometimes relaxed when a litigant appears in federal court unrepresented. *Ray v. Clements*, 700 F.3d 993, 1002 (7th Cir. 2012). The breadth with which the prison mailbox rule

has been applied illustrates the important policy considerations behind the rule: as detained petitioners cannot physically file an appeal with the clerk of the court, they have no choice but to trust prison officials to mail important court documents. Prisoners cannot control or monitor their papers once handed over to prison officials, who have little incentive to preserve prisoners' rights. *Houston*, 487 U.S. at 271; *Longenette v. Krusing*, 322 F.3d 758 (3d Cir. 2003). Additionally, should something "go awry," an incarcerated individual cannot simply walk the papers to the courthouse and file them at the last minute. *See Houston*, 487 U.S. at 271 (opining that other, free litigants can monitor mail and correct any delays by delivering papers directly to court); *Longenette*, 322 F.3d at 761.

In *Houston*, the Supreme Court dealt with a *pro se* prisoner's petition for habeas corpus relief that was deposited with the prison authorities for mailing to the District Court. *Houston*, 487 U.S. at 268. The notice was stamped "filed" by the Clerk of the District Court one day after the expiration of the 30-day filing period for taking an appeal, established by Federal Rule of Appellate Procedure 4(a)(1). *Id.* at 268-69. The Supreme Court concluded that the moment of filing for the purposes of Rule 4 is triggered at the time the prisoner delivers the appeal to prison authorities, not when the clerk receives the appeal. *Id.* at 270. The Supreme Court reasoned that the situation of *pro se* prisoners is unique; they cannot take steps other litigants can take to monitor the processing of their notices of appeal to ensure the court clerk receives and stamps the notice before the 30-day deadline. *Id.* at 270-71. "Worse, the *pro se* prisoner has no choice but to entrust the forwarding of his

notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay." *Id.* at 271. *Pro se* prisoners are "[u]nskilled in law, unaided by counsel, and unable to leave the prison," and their control over the processing of their notice ceases as soon as they hand it over to the prison officials. *Id.* at 271.

Courts have held the same is true even if the prisoner is represented by counsel. *Moore*, 24 F.3d at 625 (holding that *Houston* applies to all direct appeals of a federal criminal proceeding filed by prisoners, whether they are represented by counsel or not). This Court has long held that the tailoring of otherwise unduly burdensome procedural filing requirements is necessary to protect inmates' constitutional right of access to the courts. *See Houston*, 487 U.S. at 270; *Johnson v. Johnson*, 488 U.S. 806, 806 (1988); *Bowie v. California*, 487 U.S. 1230, 1230 (1988); *Franks v. Bauer*, 487 U.S. 1213, 1213 (1988). This Court should follow the lead of the Fourth and Seventh Circuits interpreting the prison mailbox rule broadly because the Supreme Court's reasoning in *Houston* applies to all prisoners, regardless of representation status.

**1. This Court should apply the Fourth and Seventh Circuits' broad interpretation of *Houston*'s prison mailbox rule because, like *pro se* prisoners, Mr. Escoffier was unable to take precautions that non-imprisoned litigants can take to monitor their appeals.**

The Fourth Circuit broadly applied the prison mailbox rule to apply to all prisoners regardless of representation status and regardless of whether the case is civil or criminal. *Moore*, 24 F.3d at 625. In *Moore*, the court applied the *Houston* rule broadly to all kinds of filings, noting that "[t]he mechanism" the prisoner uses

'makes no difference' to the applicability of *Houston*. *Id.* at 625. The prisoner in *Moore* was represented by the federal public defender's office but filed a notice of appeal from prison within the excusable neglect period. *Id.* Though the prisoner alleged that he handed the documents over to the prison authorities for mailing, the District Court denied the prisoner's motion, holding that *Houston* is inapplicable in a criminal proceeding where the prisoner is represented by counsel. *Id.*

The Fourth Circuit reversed the District Court's order, explaining that "the same concerns" about control over timely delivery "are present" whenever a prisoner submits a filing via the inmate mail system regardless of whether the prisoner has counsel. *Moore*, 24 F.3d at 625-26. The *Moore* court found "little justification for limiting *Houston*'s applicability to situations where the prisoner is not represented by counsel," explaining that if "it is possible that prison officials could choose to delay a prisoner's attempt to communicate with the courts, it is just as possible that they could choose to delay his access to counsel." *Id.* at 625. The Court also noted that whenever a prisoner attempts to file a notice of appeal, he is acting without the aid of counsel, even if he is represented in a passive sense. *Id.* Finally, the Fourth Circuit held that the Supreme Court did not expressly limit *Houston*'s application to cases involving *pro se* prisoners, and Circuits holding otherwise did not consider the fact that even represented prisoners are prevented from timely communicating with counsel. *Id.* at 626.

Following *Moore*, the Fourth Circuit has reaffirmed the application of *Houston* to represented prisoners like Mr. Escoffier. See *United States v. Carter*,

474 Fed. Appx. 331, 333 (4th Cir. 2012), citing *Moore*, 24 F.3d at 625-26). In *Carter*, the Fourth Circuit held that a filing submitted via the prison mail system should be subject to the mailbox rule regardless of if the prisoner has counsel. *Carter*, 474 Fed. Appx. at 333.

The Seventh Circuit most recently addressed the prison mailbox rule in 2004, in *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004). In *Craig*, a prisoner decided to appeal his case at the last moment, filing his notice of appeal *pro se* under the prison mailbox rule because he thought his lawyer would no longer represent him. *Id.* at 739. The government challenged the prisoner's change of heart, arguing it was time-barred and that the prison mailbox rule did not apply to represented prisoners. *Id.* Although the Seventh Circuit dismissed this specific case, the Court explicitly disagreed with the government's argument about the prison mailbox rule. *Id.* at 740. The Court reasoned that although *Houston* initially defined the rule, it had been codified through amendments to Federal Rule of Appellate Procedure 4, which applies to "an inmate confined in an institution." Fed. R. App. P. 4(c); *Craig*, 368 F.3d at 740. The Court held that they could not pencil "unrepresented" or any extra word into the text of Rule 4(c). *Id.*

Here, Mr. Escoffier had no control over delays encountered before submitting his Notice of Appeal to the prison authorities. R. at 6-7. Like the litigants in *Houston* and *Moore*, Mr. Escoffier was unable to take precautions that non-imprisoned litigants can take to monitor the timely processing of their appeal. As a prisoner, Mr. Escoffier could not travel to the courthouse to ensure his Notice of

Appeal was timely stamped "filed." R. at 7. Mr. Escoffier had no choice other than to submit his Notice of Appeal to prison authorities whom he can neither control nor supervise. R. at 7. *See Houston*, 487 U.S. at 271.

The policy concerns underlying the ruling of *Houston* and *Moore* are likewise present in the instant case. Each of the litigants, *Houston*, *Moore*, and Mr. Escoffier are incarcerated litigants who were unable to monitor the processing of the mails. *See Lewis*, 947 F.2d at 735 (holding imprisoned litigants are unable to monitor the process of mails nor rectify any problems arising from delays). They could not deliver a copy of their pleadings to the court clerk by hand, nor did they have access to express mail services. R. at 7. Rather, each was compelled to rely on others to timely process their mailings. If a pleading is delayed, an incarcerated *pro se* litigant has neither the means nor the ability to determine the cause of the delay or to obtain additional evidence to support a finding of excusable neglect. *Lewis*, 947 F.2d at 733; *see also Hostler v. Groves*, 912 F.2d 1158, 1160 (9th Cir. 1990); (applying the rule to non-habeas civil appeals) *cert. den.*, 111 S. Ct. 1074 (1991).

Additionally, Mr. Escoffier is filing a claim under § 1983 alleging a constitutional violation by the prison and prison officials. R. at 5. *Houston*'s underlying policy—that of not penalizing *pro se* prisoners for delays over which they have no control once they have timely delivered notices of appeal to prison authorities—applies with equal, if not greater, force to § 1983 actions. *Hostler*, 912 F.2d at 1160. Prison authorities have *greater* incentive to delay the processing of § 1983 suits, since such suits target prison officials. *Id.* (emphasis added); *see also*

*Hamm v. Moore*, 984 F.2d 890, 892 (8th Cir. 1992); *Vaughan v. Ricketts*, 950 F.2d 1464, 1467–68 (9th Cir. 1991).

This is precisely what *Houston* intended to prevent. If *Houston* stands for nothing else, it stands for the principle that it is unfair to hinge prisoners' freedom on either the diligence or the good faith of their custodians, whether the prisoner is represented or not. *Moore*, 24 F.3d at 625. This is especially true when the prison officials have a great incentive to delay a prisoner's filings. *Hostler*, 912 F.2d at 1160. Accordingly, this Court should apply the broad reading of the prison mailbox rule as advocated for by the Fourth and Seventh Circuits.

**2. Although the majority of circuits apply a narrow reading of the prison mailbox rule, this approach erroneously relies on formalisms that do not reflect a prisoner's actual ability to rely on counsel.**

The Sixth Circuit recently adopted a narrow, limiting approach where the court analyzed the limitations of Rule 4(c) in a similar context of representing prisoners filing civil complaints in federal court. *See Cretacci*, 988 F.3d at 860. In *Cretacci*, the prisoner was a pretrial detainee retaining counsel to file a complaint alleging numerous constitutional violations stemming from his time in the Coffee County Jail. *Id.* at 864. The day before the statute of limitations expired on the prisoner's claims, his attorney realized he was not admitted to practice law in the district encompassing the Coffee County Jail. *Id.* Despite his efforts to do so, the attorney was unable to file the complaint in person. *Id.* The attorney brought the complaint, stamped and addressed to the courthouse, to the prisoner at the Coffee County Jail. *Id.* He instructed the prisoner to deliver the complaint to correction

officers immediately, explaining that because he was an inmate, he could take advantage of the prison mailbox rule. *Id.* Confronted with the same issue as the one before us today, the Sixth Circuit held the plaintiff "was not proceeding without assistance of counsel" when an attorney agrees to represent a client and then prepares legal documents on his behalf. *Id.* at 866-67. The Sixth Circuit further held that "the prison mailbox rule applies only to prisoners who are not represented by counsel and are proceeding *pro se*." *Id.* at 867.

Other circuits have held similarly. *See Camilo*, 686 Fed. Appx. at 646 (holding that because prisoner was represented by counsel, he was not limited to communicating with the court through the prison staff); *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002) (declining to apply the prison mailbox rule to represented prisoners as they are not as restricted as *pro se* prisoner litigants); *United States v. Rodriguez-Aguirre*, 30 Fed. Appx. 803, 805 (10th Cir. 2002) (refusing to apply the prison mailbox rule to a prisoner who was represented by counsel).

This approach is a dangerous one as it severely limits prisoners' right to be heard before the Court. The Sixth Circuit specifically relied on the erroneous premise that if a prisoner does not need to use the prison mail system, and instead relies on counsel to file a pleading on their behalf, the prison is no longer responsible for any delays and the rationale of the prison mailbox rule does not apply. *Cretacci*, 988 F.3d at 867. That inquiry can trap the unwary prisoner and turn on formalisms that do not reflect the prisoner's actual ability to rely on this

counsel. Once a prisoner submits a filing via the inmate mail system, he has no control over the filing, regardless of whether he is represented by counsel.

As Mr. Escoffier's case before this Court and others cited above demonstrate, nominally represented prisoners sometimes need to use the prison mail system because they cannot rely on their counsel to undertake the filing. R. at 7. By definition, that inmate will not be able to place his filing "directly into the hands of the United States Postal Service" nor "personally travel to the courthouse" to deliver it. *Houston*, 487 U.S. at 271. A prisoner who, as here, had to file the document because his counsel could not, should not have the doors of justice closed to him on limitations grounds if he timely submits his filing via the inmate mail system. R. at 7. Rather, tailoring procedural formalisms is necessary to protect inmates' constitutional right of access to the courts. *See Houston*, 487 U.S. at 270; *Johnson*, 488 U.S. at 806; *Bowie*, 487 U.S. at 1230; *Franks*, 487 U.S. at 1213. This Court should not punish Mr. Escoffier for his lawyer's inability to submit a filing on his behalf. R. at 7.

### 3. Applying the prison mailbox rule broadly to all prisoners will not lead to abuse, but rather will provide prisoners leniency in exercising their right to be heard.

Applying the mailbox rule to all filings made via the prison system will not lead to abuse as a court always retains discretion to disallow a *pro se* filing, including when the inmate has representation. *See United States v. Flowers*, 428 Fed. Appx. 526, 530 (6th Cir. 2011) (citing *United States v. Martinez*, 588 F.3d 301, 328 (6th Cir. 2009)). If a court would otherwise allow the filing, it should not be

deemed untimely simply because the inmate chose to use the prison mail system to file it rather than go through an attorney.

If this Court chose to affirm the lower court's decision, it would in no way abridge the appellate rights of nonincarcerated appellants. Requiring the clerk of a district court to wait a few extra days before receiving a notice of appeal from an incarcerated appellant, whether represented or not, does not offend fairness. Rather, those appellants so situated would gladly trade those few extra days for the opportunity to timely deliver their notices in person. *Moore*, 24 F.3d at 625–26.

### B. Mr. Escoffier was effectively *pro se* because he was abandoned by counsel and thus the prison mailbox rule should be applied to him to provide the full protection of the law.

Even where a prisoner obtains or is provided counsel, representation does not in and of itself cure the limitations imposed by incarceration. Communications between a prisoner and his lawyer may be subject to interference—intentional or otherwise—that would not be possible but for the same conditions motivating the Supreme Court's decision in *Houston*. *See Moore*, 24 F.3d at 626 (holding the Supreme Court did not expressly limit *Houston*'s application to cases involving unrepresented prisoners and even represented prisoners might be prevented from timely communicating with counsel). The prisoner might be effectively abandoned by his counsel, placing him in the same position as the *pro se* prisoners described in *Houston*. *See, e.g.*, *Faile v. Upjohn Co.*, 988 F.2d 985, 988 (9th Cir. 1993) (citing *Vaughan*, 950 F.2d at 1466–68 (extending the prison mailbox rule to a represented prisoner, finding he was acting *pro se* for all practical purposes as his attorney was

uninvolved in his appeal)). For an incarcerated individual who retains counsel, the critical issue is whether that person has been prevented from asserting their rights.

Here, Mr. Escoffier was substantially prevented from asserting his rights because his counsel was incapacitated and could not provide legal assistance. R. at 6. For all practical purposes, Mr. Escoffier was acting *pro se*. He filed a Notice of Appeal without the involvement of any attorney. R. at 7. Although Mr. Sharafi of Forme Cury advised Mr. Escoffier to file the notice himself, he did not represent Mr. Escoffier or assist in drafting. R. at 7. Messaging Mr. Sharafi through Forme Cury's "Contact Us" page was the first time Mr. Escoffier had spoken to anyone from the firm in weeks. R. at 7. It would be neither logical nor just to treat Mr. Escoffier as having an attorney if he has had none of the benefits representation is supposed to provide for an integral time in his appeal. Mr. Escoffier should be treated as a *pro se* litigant to whom the *Houston* rule applies.

The experience of *pro se* prisoners that *Houston* describes applies exactly to Mr. Escoffier's experience, and even more so because of the challenges posed by Miasmic Syndrome. At the time *Houston* was decided, the Miasmic Syndrome was not an issue. Not only did Mr. Escoffier have to hurdle challenges because of his incarceration, but he also had to hurdle further challenges faced by the Miasmic Syndrome. R. at 3. Specifically, new policies at Garum severely limited Mr. Escoffier's ability to contact his attorney. R. at 3. Even before Ms. Pegge was infected, Mr. Escoffier was only able to have essential conversation with Ms. Pegge via videoconference software on one of five computers used for the entire

incarcerated population of Silphium State. R. at 3. It was common for video conferences to be booked out for more than three weeks at a time. R. at 3. After Ms. Pegge was infected, these limits were exacerbated. Mr. Escoffier was only able to call Ms. Pegge's direct office line three times during the entire month of February, and he had only one opportunity to use the library computer to look up Forme Cury. R. at 7.

Like the *Houston* prisoners, Mr. Escoffier could not hand deliver the notice or call the court clerk; neither could he trust a lawyer to file his Notice of Appeal on time. *Vaughan*, 950 F.2d at 1467. Mr. Escoffier was "unskilled in law, unaided by counsel, and unable to leave the prison," and as such, he was effectively abandoned by counsel and thus *pro se*. *Houston*, 487 U.S. at 271. This Court should apply the *Houston* rule to Mr. Escoffier so he can act on his own behalf to protect his constitutional rights, as he was abandoned by counsel.

### C. Even if this Court found that the prison mailbox rule does not apply to represented prisoners and that Mr. Escoffier was not effectively *pro se*, the prison mailbox rule still applies under the text of Federal Rule of Appellate Procedure 4.

Where, as here, the words of a statute are unambiguous, the judicial inquiry is complete. *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020). Under Federal Rule of Appellate Procedure 4,

> If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing.

Fed. R. App. P. 4(c)(1).

Nowhere in the text of Fed. R. App. P. 4 are the words "unrepresented" or "*pro se*." This Court "ought not to pencil 'unrepresented' or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd." *Craig*, 368 F.3d at 740. "Respect for the text of Rule 4(c) means that represented prisoners can use the opportunity it creates." *See Ingram v. Jones*, 507 F.3d 640, 645 (7th Cir. 2007), as amended (Dec. 7, 2007) (quoting Craig, 368 F.3d at 740). Congress acts intentionally and purposely in the disparate inclusion or exclusion of words from statutes. *Russello v. United States*, 464 U.S. 16, 23 (1983).

If the drafters of the Fed. R. App. P. 4(c)(1) intended for it to apply only to unrepresented inmates, they would have included language to indicate that. Fed. R. App. P. 4 has been adopted without any limitation as to the prisoner's representation status. Opinion of the Fourteenth Circuit, R. at 39. There is no support in the statutory language for narrowing the scope of Fed. R. App. P. 4(c)(1) to *pro se* inmates. Such an interpretation would burden prisoners like Mr. Escoffier whose success should not be inextricably tied to his understanding and familiarity with the nuance of procedure. Rather, it should depend primarily on the substantive merits of the claim being asserted. *Ray*, 700 F.3d at 1002-03.

The dissent argues that Fed. R. App. P. 4(c) requires an inmate's notice of appeal be accompanied by "a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid" or "evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid." Dissent Opinion of

the Fourteenth Circuit, R. at 46-47. Recent amendments to the prison mailbox rule clarify that a declaration or notarized statement from Mr. Escoffier is not needed to establish compliance with that rule; evidence, such as a postmark or date stamp, showing that the notice was timely deposited into the institutional mail with appropriate postage is enough. Fed. R. App. P. 4(c)(1)(A). Even before these recent amendments, courts had read Rule 4(c)(1) in a commonsense manner. *See Taylor v. Brown*, 787 F.3d 851, 858-59 & n. 10 (7th Cir. 2015) (noting that prisoners obviously need not comply with Rule 4(c)(1)'s command to certify that postage has been prepaid if filing is done by prison staff electronically). The dissent further argues that Appellant's Mailing Certificate was neither accompanied by a declaration, nor did it show "notice was so deposited." Dissent Opinion of the Fourteenth Circuit, R. at 47.

The record shows that Mr. Escoffier complied with Rule 4(c)(1), even though he did not have a declaration with his Notice of Appeal. However, on Mr. Escoffier's Mailing Certificate, there is a checkmark next to "Check if Postage Paid by Inmate" and Officer James Whitbread signed next to that on March 2, 2021. R. at 21. This is sufficient "evidence" under Fed. R. App. P. 4(c)(1)(A). Absent contrary evidence, this Court should take the March 2, 2021, checkmark and signature of Officer James Whitbread as indicative of the date the document was given to prison authorities. See Fed. R. App. P. 4(c)(1)(A)(ii); *Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008). The interests of justice and judicial economy would be promoted by treatment of Mr. Escoffier's Mailing Certificate as compliant with Fed. R. App. P. 4(c)(1)(A). Such

interests are heightened when the matter involves a prisoner's freedom, as is present here. To read a document so strictly as to dismiss an appeal merely because a technical filing requirement would defy the dictates of law. It would further impress upon inmates that access to justice is denied to those behind prison doors. *United States v. Smotherman*, 838 F.3d 736, 739 (6th Cir. 2016). As such, this Court should hold that Mr. Escoffier's Notice of Appeal complies with Fed. R. App. P. 4.

## II. This Court should affirm the Fourteenth Circuit's decision to grant Mr. Escoffier's § 1983 claim because Garum's "blanket ban" against gender confirmation surgery violates his Eighth Amendment protections against cruel and unusual punishment.

42 U.S.C. § 1983 allows individuals, including those incarcerated, to bring civil suits against state officials who violate their constitutionally protected rights. *See Nelson v. Campbell*, 541 U.S. 637, 639 (2004). Mr. Escoffier's protection under the Eighth Amendment guarantees him the right to be free from infliction of "cruel and unusual punishments." Cruel and unusual punishment includes deliberate indifference to an inmate's medical needs or interference with the provision of a prescribed treatment. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). Additionally, the failure of a medical provider "to consider an individual inmate's condition in making treatment decisions" constitutes a "substantial departure from accepted professional judgment." *Roe v. Elyea,* 631 F.3d 843, 862-863 (7th Cir. 2011) (citing *Sain v. Wood*, 512 F.3d 886, 895 (7th Cir. 2008)).

Here, Garum's failure to provide Mr. Escoffier with an individualized assessment for gender confirmation surgery amounts to cruel and unusual

punishment and a violation of his Eighth Amendment protections. Warden Posca, and the Garum Division of Health which he oversees, fell below the recognized standards set by The World Professional Association for Transgender Health ("WPATH") and the expectations of societal decency. Garum's medical and administrative staff were fully aware of the severity of Mr. Escoffier's condition but denied him evaluation for gender confirmation surgery because of Garum's policy banning the procedure altogether.

Circuit Courts are split over the provision of gender confirmation surgery within our prisons, but as medical and social understanding of transgender lives continue to evolve, our legal protections should grow to meet this new consensus. *See Kosilek v. Spencer,* 774 F.3d 63 (1st Cir. 2014) (holding that denial of gender confirmation surgery to a transgender inmate did not violate the Eighth Amendment); *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019) (same); *Edmo v. Corizon Inc.*, 935 F.3d 757, 790 (9th. Cir. 2019) (holding that a prison's refusal to provide an inmate with gender confirmation surgery violated her Eighth Amendment protections). Should this Court affirm that the arbitrary ban on gender confirmation surgery amounts to a cruel and unusual punishment, it should also hold that the extenuating circumstances presented by the Miasmic Syndrome pandemic do not excuse Garum from its duty to preserve the constitutional rights of Silphium's inmates.

### A. Garum's Division of Health and Warden Posca had specific and extensive knowledge of Mr. Escoffier's physical ailments, mental condition, and risk of harm, but intentionally failed to act.

This Court has long established that failure to provide necessary medical treatment to inmates can give rise to cognizable claims under § 1983. *Estelle*, 429 U.S. at 104-05. "Deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Deliberate indifference can be exhibited either from prison doctors denying or delaying access to necessary care, or from prison guards intentionally interfering in patient treatment once an intervention is prescribed. *Id.* at 104-105. To establish a claim for deliberate indifference, the plaintiff must prove two elements: he has a critical medical concern that creates a risk of significant injury or wanton infliction of pain, and that this harm is a result of the defendant's intentional failure to act based on the knowledge he has of the plaintiff's condition. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle*, 429 U.S. at 104).

Additionally, there does not need to be a present or known injury that is ignored to rise to the level of deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 845 (1994). If the prison staff is aware that there is a "substantial risk of serious harm" to an inmate, officials must "take reasonable measures to abate" this risk or they may be liable for constitutional violations. *Id.* at 847. However, a showing that the prison officials inadvertently or negligently failed to provide adequate medical care is not sufficient alone to establish an Eighth Amendment

violation. *Estelle*, 429 U.S. at 105-06. A prison official will be held liable if he is "subjectively aware" of facts from which an inference of a substantial risk of harm could be drawn, draws the inference, but fails to act as a reasonable person would. *Farmer*, 511 U.S. at 837.

Here, Garum's medical team is the sole provider of treatment for Mr. Escoffier and every inmate in Silphium. R. at 3. The medical team was fully apprised of Mr. Escoffier's history of gender dysphoria and mental condition before entering Garum, including his persistent suicidal ideation. R. at 18. They had access to details of Mr. Escoffier's episodes of extreme distress, including his statement pre-incarceration: "There's only two ways this ends. I live as a man, in a man's body, because I am a man. Or I kill myself. Because I can't keep doing this." R. at 17; *see App'x E.*

Even though the Division of Health was aware of Mr. Escoffier's severe depression when he entered Garum, he was not seen by the supervising psychiatrist, Dr. Arthur Chewtes, until nearly two months later. R. at 19. When Mr. Escoffier was finally evaluated, Dr. Chewtes confirmed his previous diagnosis of gender dysphoria and noted his major depression. R. at 19. During the evaluation, Mr. Escoffier detailed his anxiety, paranoia, and recurring suicidal ideation, and specifically requested gender confirmation surgery. R. at 19. Despite his knowledge of Mr. Escoffier's serious risk of self-harm due to his gender dysphoria, Dr. Chewtes denied him an individualized assessment for gender confirmation surgery, citing Garum's blanket ban against it. R. at 19; *see App'x D*.

Mr. Escoffier filed a grievance regarding his experience with Dr. Chewtes soon after his initial assessment. R. at 21. Dr. Chewtes reviewed the grievance and, unlikely to reverse his own clinical judgement, denied Mr. Escoffier any relief. R. at 21. Mr. Escoffier filed an appeal from the denied grievance which was reviewed by Dr. Erica Laridum. R. at 21. Without personally assessing Mr. Escoffier's condition, Dr. Laridum also denied his appeal based on Garum's blanket ban. R. at 21. In his final opportunity to obtain administrative relief within Garum, Warden Posca rejected Mr. Escoffier's plea, stating that there was "no reason to second-guess the clinical decision making" of Dr. Chewtes and Dr. Laridum. R. at 21.

However, neither Dr. Chewtes nor Dr. Laridum ever assessed Mr. Escoffier for gender confirmation surgery and never asserted any clinical judgement on whether he would benefit from the treatment. R. at 20-21. They simply barred him any individualized evaluation of the possible effects of gender confirmation surgery, stating that because of Garum's blanket ban, such an evaluation would provide no medical benefit. R. at 20-21; *see App'x D*. In rejecting Mr. Escoffier's final appeal, Warden Posca made the decision without any professional input or analysis of Mr. Escoffier's need for surgical treatment. This final rejection of Mr. Escoffier's request was not inadvertent or negligent, but instead purposeful, deliberate, and ill-informed.

The foregoing facts show that both Garum's medical providers and Warden Posca had direct knowledge of Mr. Escoffier's dire medical needs. Dr. Chewtes and Dr. Laridum did not conduct individualized assessments for surgery, ceding their

medical judgement to Garum's arbitrary ban. Arguably, if they were to provide Mr. Escoffier with an individualized assessment, they may have come to the medical decision that gender confirmation surgery was necessary to alleviate Mr. Escoffier's pain. Plainly, Warden Posca and Garum's medical team failed to "take reasonable measures to abate" any known "substantial risk of serious harm" to Mr. Escoffier, running afoul of his Eighth Amendment protections. *Farmer*, 511 U.S. 825, 847 (1994).

### B. Garum's medical team provided care far short of the accepted and established WPATH standards of care for patients of gender dysphoria.

Because of the complexity of care approaches and general misconceptions about gender dysphoria, responsible medical providers both outside and inside the prison system look to published standards of care to better treat transgender patients. Gender Dysphoria is a clinically recognized illness, included in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5"). It is possible to treat and even cure gender dysphoria with proper intervention. *Edmo*, 935 F.3d at 790.

To assess patients with gender dysphoria, many providers turn to the World Professional Association for Transgender Health ("WPATH") for guidance on standards of care for patients with gender dysphoria.[1] The Fifth Circuit in *Gibson* rejects the validity of the WPATH standards. *Gibson*, 920 F.3d at 221. However, the wide acceptance in the medical field of the WPATH standards is indisputable. The

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

American Medical Association, the American Psychiatric Association, the American Psychological Association, and many others recognize the WPATH standards as authoritative in the treatment of gender dysphoria. *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1170 (N.D. Cal. 2015) (appeal dismissed and remanded, *Norsworthy v. Beard*, 802 F.3d 1090 (9th Cir. 2015)). The WPATH standards explicitly state that some patients with gender dysphoria require both hormone therapy and surgery to alleviate their suffering. *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, WPATH, 7th Version (2012).

**1. The ruling in *Gibson* is inoperable and inapposite here because the medical merits of gender confirmation surgery are not genuinely disputed and because it heavily relies on the medically outdated testimony from *Kosilek*.**

The Fifth Circuit in *Gibson* stated that officials could not be deliberately indifferent to medical needs of prisoners when there exists a "good faith disagreement dividing respected members of the expert medical community" about the efficacy of gender confirmation surgery. *Gibson*, 920 F.3d at 220. There, the court denied a transgender inmate gender confirmation surgery because the merits of gender confirmation surgery were supposedly in question. *Id.* In making this decision, the court relied heavily on the only other prior circuit decision regarding this issue, *Kosilek*. *Kosilek*, 774 F.3d at 63. There, the court found that denial of gender confirmation surgery was constitutional where the prison provided a wide range of alternative therapies. *Kosilek*, 774 F.3d at 87.

However, in *Kosilek*, the only instance in which gender confirmation surgery was asserted to be medically unnecessary comes from one singular expert, Dr. Cynthia Osbourne. *Edmo,* 935 F.3d at 795-796. She testified that she did not view gender confirmation surgery as "medically necessary in light of the 'whole continuum from noninvasive to invasive' treatment options available to individuals with" gender dysphoria. *Kosilek*, 774 F.3d at 77. However, she was the only expert to assert this at any point during the trial. *Edmo,* 935 F.3d at 795-796.

The *Gibson* court did rely on its own expert testimony, in addition to its reliance on *Kosilek* and Dr. Osborne. However, while the experts in the *Gibson* court assert opinions about the politicization of WPATH as a transgender advocacy organization, none of them object that gender confirmation surgery can be medically necessary for some patients. *Edmo,* 935 F.3d at 795-796; *see generally Gibson*, 920 F.3d at 222. The Court explicitly admits that "a single dissenting expert" does not defeat "medical consensus about whether a particular treatment is necessary in the abstract." *Gibson,* 920 F.3d at 220. However, the Court gives substantial deference to Dr. Osborne's prior opinion, arbitrarily disposing of the opinions of other experts in *Kosilek* who stated that gender confirmation surgery can be medically necessary. *Edmo,* 935 F.3d at 795. Notably, since her testimony in *Kosilek*, Dr. Osborne has changed her medical opinion to conform with the WPATH standards, stating now that gender confirmation surgery "can be medically necessary for some" patients with gender dysphoria. Cynthia S. Osborne & Anne A. Lawrence, *Male Prison*

*Inmates With Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?*, 45 Archives of Sexual Behav. 1649, 1651-53 (2016).

Additionally, when making the decision in *Gibson*, the Fifth Circuit did not rely on some other alternative standards of care that are widely accepted for treatment or any guidance that conflict with the WPATH standards. "There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups." *Edmo v. Corizon Inc.*, 935 F.3d 757, 769 (9th. Cir. 2019) (citing *Edmo v. Idaho Dep't of Corr.*, 358 F. Supp. 3d 1103, 1125 (D. Idaho 2018)). The ruling in *Gibson* also notes that no court has ever found that inmates can be entitled to gender confirmation surgery, implying that at least part of the court's hesitation for finding so is that it would break with tradition, providing a resolution that had never been handed down by another court. *See Gibson*, 920 F.3d at 216 ("For it cannot be cruel *and unusual* to deny treatment that no other prison has ever provided…").

However, mere months after *Gibson*, the Ninth Circuit found that denying gender confirmation surgery to an inmate with substantial risk of injury amounted to a constitutional violation. *Edmo*, 935 F.3d at 803. The holding in *Gibson* was directly challenged by the Ninth Circuit in *Edmo*, which points out that the Fifth Circuit relied on medically outdated information. *Edmo*, 935 F.3d at 795. As the Fourteenth Circuit below notes, "*Edmo* stands for the principle that each inmate's medical needs must be individually addressed; a one-size-fits-all policy denying a treatment accepted to be medically necessary in some instances is facially,

deliberately indifferent to the serious medical needs of individuals subjected to the policy." Opinion of the Fourteenth Circuit, R. at 42-43. Garum's policy that uniformly and arbitrarily denies evaluation for gender confirmation surgery to all inmates goes firmly against the standards of care detailed by WPATH, and against the ideals of basic fairness central to the justice system.

**2. The decision in *Gibson* stands alone, inappropriately disregarding other Eighth Amendment jurisprudence that states that denying individualized health assessments can violate constitutional protections.**

Despite its reliance on the decision in *Kosilek*, the *Gibson* Court avoids glaring differences between the treatment approaches and policy concerns between the two cases. In *Kosilek*, the First Circuit weighed the needs of another inmate who requested gender confirmation surgery. There, the prison in question provided hormone therapy, mental health treatment, facial and body hair removal, and access to feminine attire and accessories. *Kosilek*, 774 F.3d at 69-70. The First Circuit notes, and the patient admits, that her symptoms including suicidal ideation and depression had largely subsided, and the improvements in her health without gender confirmation surgery were real and significant. *Kosilek*, 774 F.3d at 89.

The severity of Mr. Escoffier's condition is more apparent and presents a substantially higher risk of injury than the inmate in *Kosilek* experienced, as he is still presenting with debilitating anxiety, depression, and suicidal ideation. R. at 19. Additionally, the Court in *Kosilek* had to consider the prison's valid security concerns and followed precedent that gave wide discretion to prison officials over safety policy. *Kosilek*, 774 F.3d at 92 (citing *Bell v. Wolfish*, 441 U.S. 520, 547

(1979)). In both *Gibson* and the instant case, no such safety or security concerns regarding the provision of gender confirmation surgery are raised by the prison. *Gibson*, 920 F.3d at 233.

Distinct from Garum's policy prohibiting gender confirmation surgery, the Department of Corrections in *Kosilek* still provided an individualized assessment for the inmate, conducted by outside specialists with extensive knowledge of the clinical area. *Kosilek*, 774 F.3d at 70. The Court in *Kosilek* even explicitly rejected the use of blanket bans on gender confirmation surgery, stating that such a policy "would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs." *Kosilek*, 774 F.3d at 90-91 (citing *Roe*, 631 F.3d at 862-863 (holding that the failure to conduct an individualized assessment of a prisoner's needs may violate the Eighth Amendment)). Under this logic, the Court in *Kosilek* would have likely rejected Garum's use of a blanket ban against individualized assessments for gender confirmation surgery.

In *Gibson*, the court focuses myopically on the critiques of WPATH as an organization and outdated medical expertise, casting aside the only evidence-based, peer-reviewed guidance in this clinical area. One legal scholar notes that in its assessment that granting gender confirmation surgery to an inmate would be "unusual," the Fifth Circuit engages in the ironically unusual action of questioning standards of care promulgated by the medical community. John Ferraro, *The Eighth For Edmo: Access To Gender-Affirming Care In Prisons*, 62 B.C. L. Rev. E. Supp. 344, 361-362 (2021). In fact, this author reveals that the Fifth Circuit in

*Gibson* is likely the only federal court to do so and does this without consulting an alternative standard to assess the care that was given to the plaintiff. *Id.* Consequently, *Gibson* stands alone from other governing Eighth Amendment jurisprudence. *Id.* The Fifth Circuit departed from the rulings in *Kosilek* and *Roe* that both advocate for individualized assessments, and instead chose to irresponsibly interject its quasi-political view into a medical question where it consulted no relevant or established expertise.

### 3. Failure to follow the WPATH standards falls below both society's minimum standard of medical decency and the standard set by Garum's own commissioning body.

The WPATH Standards have been formally and unequivocally recognized as the guiding principles of care by Garum's commissioning body, the National Commission on Correctional Health Care ("NCCHC"). The NCCHC, "which sets standards and provides accreditation for prisons throughout the nation, recognizes that the WPATH Standards of Care should be followed by correctional institutions in providing healthcare to transgender people." *Doe v. Pa. Dep't of Corr.*, No. 1:20-cv-00023-SPB-RAL, 2021 WL 1583556, at *7, *8 (W.D. Pa. Feb. 19, 2021). Unlike many other areas of medicine, this therapeutic area is dynamically changing as medical and social understanding continues to expand. Care to transgender inmates should be made on an individual case-by-case basis, and the NCCHC recommends that prisons seek additional specialty consultation to address an inmate's candidacy for gender confirmation surgery. *See Transgender and Gender Diverse Health Care*

*in Correctional Settings*, NCCHC (Nov. 1, 2020), https://www.ncchc.org/transgender-and-gender-diverse-health-care.

Here, Garum unquestionably deviates from the recommendations of its own commissioning body. The NCCHC's embracement of the WPATH standards shows that the organization recognizes that gender confirmation surgery may be medically necessary for some inmates. The blanket ban blocks Garum's medical providers from making an individualized assessment of Mr. Escoffier or seeking outside consultation, even though the WPATH standards state that each case of gender dysphoria is different, and that a method of treatment sufficient for one patient may not be sufficient for another. In the standards of care, WPATH sets out a list of several criteria that medical providers should assess before a patient can safely consider gender confirmation surgery. This guidance was available to Garum staff and should have been used to conduct an individualized assessment in compliance with both the NCCHC's policy and the WPATH standards.

It is clear the WPATH standards of care for patients of gender dysphoria are currently the universally accepted guidelines for treating patients with gender dysphoria and that gender confirmation surgery is necessary in at least some cases. The policy at Garum banning gender confirmation surgery regardless of individual circumstances restricts medical staff from providing treatment that meets the basic standard of care set out by WPATH and by the medical profession. Dr. Chewtes and Dr. Laridum could not even assess whether Mr. Escoffier would benefit from gender

confirmation surgery because there was no avenue for them to provide the necessary care that could alleviate Mr. Escoffier's pain or risk of harm.

The blanket ban against gender confirmation surgery at Garum prevents medical staff from exercising the full scope of their medical judgement and decision-making. This type of care falls below "society's minimum standards of decency," and is vulnerable to liability for constitutional violations. *Estelle*, 429 U.S. at 102-105. It codifies the right to inflict harm, and states that patients, once incarcerated, are deprived of the right to autonomy over their own health. The intentional actions of Garum staff to deny Mr. Escoffier an evaluation for surgery fell below accepted medical care standards, were made with knowledge of his critical health issues, directly caused the continuation of his suicidal ideation, and put him at a substantial risk of injury.

### C. The hardships created by the Miasmic Syndrome pandemic do not alleviate or excuse Garum's responsibility to meet the constitutional rights of its inmates without undue delay.

The Miasmic Syndrome has undoubtedly caused significant barriers to normal societal functioning and numerous protections have been implemented to preserve public health. However, this pandemic does not relieve Garum staff from their duty as state officials to protect and preserve the constitutional rights of incarcerated citizens. Inmates are entitled to receive necessary, prescribed medical care without experiencing undue delays or interference that further their pain and suffering. *Formica v. Aylor*, 739 Fed. Appx. 745, 755 (4th Cir. 2018). "If necessary medical treatment has been delayed for non-medical reasons, a case of deliberate

indifference has been made out." *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 704 (11th Cir. 1985). Examples of non-medical reasons include the financial resources of the prison, contractual issues, and an inmate's inability to pay. *Id.; see also Scott v. Clarke*, 64 F. Supp. 3d 813, 815 (W.D. Va. 2014); *Weeks v. Hodges*, 871 F. Supp. 2d 811, 822-823 (N.D. Ind. 2012).

Here, operations at Garum have been reduced to curb the impact of the Miasmic Syndrome on its incarcerated population. Recreational activity was cut, and inmates were not able to engage in job trainings or educational classes. R. at 5. Beyond cancelling these developmental opportunities, Garum officials restricted in-person visitation with family and friends, and the shift to videoconferencing limited communication between inmates and their attorneys. R. at 5. However, no matter how serious or unprecedented the circumstances are, Garum officials have an unavoidable responsibility to meet the constitutional rights of their inmates.

In his final denial of Mr. Escoffier's request for an evaluation for gender confirmation surgery, Warden Posca states:

> "[E]ven if this 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."

R. at 20.

This statement from Warden Posca indicates that he believes gender confirmation surgery is a luxury, elective service, instead of a valid and critical medical treatment. *See App'x G.* It shows that he, as the administrator in charge of the Division of Health, believes that the other financial or personnel resources of

the prison can justifiably be put before the medical needs of an inmate when the prison encounters logistical hurdles. Because of the extenuating circumstances presented by the Miasmic Syndrome, the prison's resources are surely less abundant than they were before the pandemic took hold. However, we see from existing case law that these non-medical excuses do not relieve Garum from its legally binding duty. Mr. Escoffier's dire physical and psychological health needs are not something that Garum's staff can choose to "entertain" or ignore; they are the most highly valued assets to our wellbeing and are fiercely protected in our law and civil society. We posit that the Fourteenth Circuit was correct to intervene and protect Mr. Escoffier from the dehumanization of his body and the deprivation of his needs.

## CONCLUSION

For these reasons, this Court should affirm in its entirety the Fourteenth Circuit's decision below to reverse the District Court's grant of summary judgment in favor of Respondent Mr. Lucas Escoffier.

DATED this 22nd day of October 2021.

Respectfully submitted,

By: /s/ *Team 2116*
*Attorneys for Respondent*,
Mr. Lucas Escoffier

# APPENDIX A

*Constitutional Provision Involved*

The Eighth Amendment:

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

# APPENDIX B

*Federal Rule of Appellate Procedure Involved*

Federal Rule of Appellate Procedure 4(c):

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

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

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

# APPENDIX C

*Federal Statutory Provision Involved*

Title 42 – The Public Health and Welfare

Chapter 21 – Civil Rights

§ 1983 - Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
>
> 42 U.S.C. § 1983.

# APPENDIX D

*Garum Correctional Facility Medical Policy Handbook*

**Approved:**

1. Erica L. Laridum, MD, PhD, Division of Health Director
2. Max Posca, Warden and Administrator

**Date:** 8/16/19

## Section B-1 – RESPONSIBILITIES AND AUTHORITIES

I. The Administrator has overall authority for the operations and safety of the Facility. The divisions of Custody and Health both report to the Administrator.

II. Division of Custody is directly responsible for the safety, housing, order, and discipline of all inmates housed at the Facility.

III. Division of Health is directly responsible for the medical and mental health care of all inmates housed at the Facility.

## Section G-33.8 - TREATMENT OF INMATES WITH GENDER DYSPHORIA

### I. EVALUATION OF GD.

A. An inmate with documented or claimed GD will promptly receive a comprehensive physical and mental health evaluation.

   1. Mental Health evaluation will be conducted by a qualified mental health professional (QMHP). If conducted by a non-psychiatrist, the evaluation and any supporting information must be reviewed by a psychiatrist. Only a licensed psychiatrist may make the diagnosis of GD.

   2. Medical evaluation will include a thorough history and complete physical examination.

B. A concerted effort will be made to expeditiously obtain the inmate's pre-detention medical and mental health records.

C. Notwithstanding any pre-detention diagnosis of GD the inmate may have received, only those patients diagnosed with GD by a Health psychiatrist will be deemed as GD patients under this policy.

### II. TREATMENT OF GD.

A. Mental health counseling will be offered.

B. Hormone therapy shall be made available to the inmate if indicated by current, accepted standards of care. If hormone therapy is indicated, such therapy will be prescribed and monitored by a medical provider competent in such therapy. Division of Health will have final authority over the inmate's clinical plan of care.

C. If the inmate's provider recommends adjustments to the inmate's housing and/or privileges as part of the inmate's plan of care for GD, Custody will consider those adjustments on a case-by-case basis. Custody will have final authority over the Inmate's housing and privileges.

D. Surgical interventions are not provided for GD.

**Section M-10: Medical Grievances.**

A. An inmate may file a grievance to the Division of Health, appealing the denial of clinical services.

B. Grievances will initially be reviewed by the supervising clinician in the licensure relevant to the inmate's grievance.

C. If a grievance is rejected by the supervising clinician, the inmate may appeal the grievance to the Director of the Division of Health.

D. If the appealed grievance is rejected by the Director, the inmate may appeal the grievance to the Administrator.

E. If a grievance is granted, the inmate may be granted the service requested, provided that:

1. No licensed clinician may be ordered to conducted licensed services, by a person who does not hold appropriate clinical licensure to make such orders, and

2. Nothing in this grievance process shall be read to entitle any inmate to services not ordinarily available, or to require any grievance reviewer to grant any grievance

# APPENDIX E

## *Mr. Escoffier's Pre-Prison Medical Record*

**Silphium University Medical System – Specialty Psychological Clinic**
**Progress Note**
**Patient**: Lucas Escoffier (MRN 909-491-267)
**Author:** Dr. Johanna Semlor, M.D.
**Department:** Gender
**Date:** 12/10/19

**Diagnoses:** Gender Dysphoria, Major Depressive Disorder

**Background:**
I have been treating client since 2010. Client initially presented with symptoms of Major Depressive Disorder, including lethargy, difficulty sleeping, flat affect, and recurrent suicidal ideation (including, on one occasion, development of a concrete plan). Client initially presented as and identified as female.

In 2011, client began to note that client's depressive symptoms were related to underlying and long-standing feelings of "having been born in the wrong body". Client determined that he identified as a male, and struggled with being forced to exist in society identified as a female. On 3/9/2011, in consideration of insights provided by the client, I diagnosed client with Gender Dysphoria. We discussed possible courses of treatment, and client indicated a desire to proceed conservatively, as client was unfamiliar with this diagnosis and did not want to take irreversible steps.

In May 2012, client began the process of socially transitioning from his given name to his current name of "Lucas" ("social transition"). In the following months, client noted a sense of relief, and some reduction in depressive symptoms.

In 2013, client expressed a desire to continue with the process of transition, and to begin taking masculinizing hormones ("medical transition"). After due counseling on the effect of hormone treatment and client's consideration of those effects, client elected to begin hormone treatment. I prescribed masculinizing hormone therapy on 7/1/2013.

Medication has been generally well-tolerated by client. Since the beginning of medical transition, client has noted a continuing decrease in depressive symptoms. Notably, client noted marked decrease in suicidal ideation as medical transition progressed.

Client underwent a preventive double-mastectomy procedure on 2/25/14, after receiving a positive genetic test for a mutation of the BRCA1 gene, which greatly increases the chance of a later breast cancer diagnosis. The surgery was undergone for medical and not psychological purposes, but the client noted feelings of being much more comfortable in his body after it was performed.

Client legally changed his name to “Lucas Escoffier” on June 29, 2017.

Starting in April 2018, client began to notice a return of certain depressive symptoms. Client began to indicate that despite improvements in life since beginning medical transition, he cannot tolerate still being “forced to live in a woman’s body.” While he hoped social and medical transitions would be sufficient, he was beginning to fear that only full surgical transition would be sufficient. During this time, client began to note a marked increase in suicidal ideation.

**Current Assessment and Recommendation:**
I met the client today to discuss client’s status. Client indicates that he cannot continue to live in a woman’s body. Specifically, client stated “There’s only two ways this ends. I live as a man, in a man’s body, because I am a man. Or I kill myself. Because I can’t keep doing this.” Client disclaimed any immediate suicidal intent or plan.

Considering the above history, contemporary evaluation of the client, and clinical guidelines, it is my determination that female-to-male gender affirmation surgery is clinically indicated for this client. Because of the client’s pre-existing double mastectomy, “top” surgery will not be required for this client. The client will require a full hysterectomy, and female-to-male genital reconstruction.

I have issued client a referral to the University Medical Center surgical department for further consultations on this matter.

## APPENDIX F

*Mr. Escoffier's Prison Medical Record*

**GCF Detention Health Services - Psychiatry**
**Progress Note**
**Client:** Lucas Escoffier (I# 20200415-0011)
**Author:** Dr. Arthur Chewtes, M.D.
**Date:** 5/1/20

**Diagnoses:** Gender Dysphoria, Major Depressive Disorder

**Background:**
Client is inmate at GCF. Presents with Gender Dysphoria, confirmed by pre-detention diagnosis (on file).

Since detention intake, client has presented with symptoms of severe depression. Client has remained in cell at all times except to eat and shower. Client is noted to regularly skip both of these normal activities. Client notes anxiety, paranoia, recurring suicidal ideation. Client health records show notable loss of weight since intake, although no serious physical health risks have yet been noted. Notable loss of hair appears to be self-inflicted by pulling.

Client is long time user of masculinizing hormone therapy for treatment of Gender Dysphoria. Prior notes indicate client had been recommended for sex reassignment surgery (termed "gender affirmation" in pre-detention clinical notes). Surgery was not yet scheduled at time of intake. Client demands such surgery now proceed.

**Current Assessment and Recommendation:**
After meeting with and evaluating the client, this writer confirms presence of Gender Dysphoria and Major Depression in the client. This writer has entered those diagnoses on the client's record.

Client will be continued on masculinizing hormone therapy, consistent with pre-detention usage.

Client will retain access to weekly mental health counseling for duration of detention, or until complete remission of MD and GD symptoms.

Custody should ensure Client is observed at least hourly.

Client requested evaluation for sex reassignment surgery. Such surgery is not available to GCF inmates, per MPH § G-33.8. Evaluation will therefore not be conducted, as results would not contribute to the well-being of the client.

## APPENDIX G

*Warden Posca's Final Denial of Mr. Escoffier's Request*

**Summary:**
Inmate Lucas Escoffier (I# 20200415-0011) requested evaluation for sex reassignment surgery, and provision of such surgery if deemed clinically necessary. Such surgery is prohibited to GCF inmates by duly enacted Medical Policy Handbook § G-33.8(2)(D).

**History**
Inmate submitted grievance 5/18/20, in reference to service by Dr. Arthur Chewtes.

Grievance initially reviewed by Dr. Chewtes, as supervising psychiatrist. Dr. Chewtes determined initial note was proper and denied grievance 5/29/20.

Inmate appealed denial of grievance on 6/8/20. Appeal was reviewed by Dr. Erica L. Laridum, MD, PhD, Division of Health Director. Dr. Laridum determined that policy was proper and denied grievance on 7/24/21.

Inmate appealed second denial of grievance on 8/4/21.

**Decision:**
The grievance is denied. Medical Policy Handbook § G- 33.8(2)(D) clearly prohibits the requested procedure, and in "individualized evaluation" could only have one result. The inmate is already being properly treated with hormones and psychotherapy, as provided under Medical Policy Handbook § G-33.8(2)(A) and (B). There is no reason to second-guess the clinical decision making of doctors Chewtes and Laridum. Existing procedures were already designed to keep inmates safe (and prevent any suicide attempts). Furthermore, even if this 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.

*This decision is final as of 9/15/20. No more appeals may be taken.*

/s/ Max Posca

Max Posca
Warden and Administrator, Garum Correctional Facility