Docket No. 2021-22

IN THE

Supreme Court of the United States

October Term 2021

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

Petitioner,

v.

LUCAS ESCOFFIER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

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BRIEF FOR THE PETITIONER

Attorneys for Petitioner
October 22, 2021

QUESTIONS PRESENTED

I. Pursuant to Fed. R. App. P. 4(c), even though Mr. Escoffier was represented by counsel may he benefit from the prison mailbox rule when he submitted his notice of appeal because his attorney was incapacitated with Miasmic Syndrome?

II. Does Garum Correctional Facility's policy that prohibits gender affirmation surgery and prevents inmates with gender dysphoria from receiving an individualized evaluation for surgery violate a transgender inmate's, Mr. Escoffier, Eighth Amendment right against cruel and unusual punishment?

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent, Mr. Escoffier, appealed the summary judgment granted to Mr. Posca in the district court under 42 U.S.C. § 1983 and alleged that the prison's policy banning gender affirmation surgery violated his Eighth Amendment right against cruel and unusual punishment. Concerning Mr. Escoffier's procedural issue of timely filing, Federal Rule of Appellate Procedure 4(c) requires that when an inmate files a notice of appeal that it be accompanied by a declaration in compliance with 28 U.S.C. § 1746, notarized statement, or evidence (like a date stamp) that shows that the notice was deposited, and that postage was prepaid. These provisions are set forth in the Appendices below.

STATEMENT OF THE CASE

Factual Background

Lucas Escoffier ("Mr. Escoffier"), a female-to-male transgender inmate at Garum Correctional Facility ("Garum"), was convicted for criminal tax fraud in the first degree ten days after he decided to have gender affirmation surgery from female to male. R. at 2. He pleaded guilty in exchange for a lesser sentence of five years. R. at 2. Mr. Escoffier has suffered from depression from young adulthood and was diagnosed with gender dysphoria in 2011. R. at 1. Mr. Escoffier had a marked improvement in his mental health when he socially transitioned and began receiving hormone therapy. R. at 1. However, Mr. Escoffier suffers from cyclical bouts of depression from his gender dysphoria despite having an elected reconstructive mastectomy to align his identity with his gender identity. R. at 1. Mr. Escoffier's personal doctor, Dr. Johanna Semlor, clinically referred him for gender affirmation surgery due to his relapsing depression. R. at 2.

While Mr. Escoffier's was incarcerated, the discovery of "Miasmic Syndrome" caused a pandemic. R. at 2. Due to its highly infectious nature, "Miasmic Syndrome" has caused hundreds of millions of infections, and several million deaths. R. at 2. Prisons were heavily affected by the pandemic due to the infectious nature of the disease and congregational nature of the facilities. R. at 3. Despite the new challenges the prison faced, inmates like Mr. Escoffier were still receiving medical attention. R. at 4. Mr. Escoffier received his hormone therapy treatment, counseling, was allowed social interventions, and was checked on repeatedly by staff throughout the pandemic. R. at 4.

The height of the pandemic required prisons to take measures that included: staying six feet apart, frequent hand washing, wearing masks in public, and quarantining as much as possible. R. at 2. As Mr. Escoffier's mental health began to decline during his incarceration amidst the pandemic, and he alerted Garum officials that his depression and suicidal ideation was back and requested gender affirmation surgery. R. at 4. Subsequently, Garum's established medical professionals notified Mr. Escoffier that surgical intervention for gender dysphoria inmates was prohibited as per the prison policy. R. at 4.

The committee that created the policy included Dr. Erica L. Laridum, a board certified physician and Chief physician at Hope State Hospital for ten years before taking the position of Health Director at Garum in 2019. R. at 4, 12. Dr. Arthur Chewtes is another committee member who is the supervising psychiatrist at Garum and has over twenty years of experience in psychiatry. R. at 13. Dr. Chewtes treated approximately 100 patients with gender dysphoria, six of whom he is treating currently at Garum. R. at 13. Other qualified members of the committee include Dr. Bergamot, a general surgeon with twenty years of experience, Dr. Cordata, an endocrinology specialist in practice since 1992, and Dr. Mitsuba, a plastic surgeon with expertise on reconstructive procedures. R. at 13.

In determining transgender policy at the prison, the committee consulted the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, put forth by the transgender advocacy group, the World Professional Association for Transgender Health ("WPATH"). In deliberations, Dr.

Cordata mentioned that surgical intervention was often never necessary because of the effective treatment options available such as hormone therapy combined with psychotherapy and gender affirming social practices. R. at 14. Only Dr. Chewtes mentioned that prohibiting surgical intervention was counter to one part of the WPATH standards, but the committee of experts unanimously approved the policy because it provided a wide range of effective treatment options. R. at 14. Treatments included hormone therapy, counseling, and even letting transgender inmates choose the male or female housing unit, provided the safety of the inmates or others were not at risk. R. at 14-15.

Mr. Escoffier contacted Forme Cury, a medium sized, local law firm to bring a civil rights suit against Garum. R. at 5. His case was taken on pro bono, and he was represented by Ms. Sam Pegge ("Ms. Pegge"). R. at 5. Ms. Pegge informally specializes in prison litigation because she took on almost all the firm's incarcerated clients. R. at 5. Shortly after the district court decision, even though phones were often busy at Garum due to the pandemic, Mr. Escoffier was able to speak with Ms. Pegge and she confirmed that Forme Cury would continue to represent him in his appeal. R. at 6. Ms. Pegge also stated that she would continue to be in touch, she and the firm would continue to build his case, and she would need his signature of "some documents" in "early March." R. at 6. After this conversation, Ms. Pegge contracted Miasmic Syndrome and while she did eventually make a full recovery, she was in the hospital for over two weeks. R. at 6. During her hospitalization, none of the twenty-five attorneys at Forme Cury reached out to Mr. Escoffier. R. at 3, 6.

Her matters were not formally transferred, but she left a note with her legal assistant to give "all of her inmate matters" to another associate at the firm. R. at 7. However, Mr. Escoffier's and a few of Ms. Pegge's other cases were not properly calendared. R. at 7.

During the time of Ms. Pegge's absence, Mr. Escoffier only tried to call Ms. Pegge's direct office line three times and only left one voice message during the entire month of February 2021. R. at 7. Mr. Escoffier sent one email to Forme Cury asking for help with his appeal on March 1, 2021. R. at 7. On March 2, 2021, Mr. Sharafi, an associate at Forme Cury, called Mr. Escoffier and told him of Ms. Pegge's hospitalization and that he would need to immediately file his own appeal in the prison mailbox. R. at 7. Mr. Escoffier put his Notice of Appeal in the prison mailbox on March 2, 2021, but due to the delays caused by the pandemic, Garum did not mail the appeal to the district court until March 7, 2021. R. at 7. The district court received the appeal on March 20, 2021. R. at 7.

Procedural History

Ms. Pegge filed suit under 42 U.S.C. § 1983 on behalf of Mr. Escoffier against Max Posca, as an administrator of Garum. R. at 5. Ms. Pegge alleged that Garum violated Mr. Escoffier's Eighth Amendment rights because Garum's policy prevented surgical intervention for gender dysphoria. R. at 5. On October 25, 2020, Garum moved to dismiss under the Federal Rule of Civil Procedure 12(b)(6), which The District Court of Silphium converted to a motion for summary judgment and granted dismissal for lack of a genuine dispute of material fact on February 1, 2021.

(R. at 8). Mr. Escoffier mailed his Notice of Appeal on March 2, 2021, where it was received and "filed" on March 10, 2021. R. at 8.

On August 1, 2021, the Fourteenth Circuit reversed the district court's decision and found that Mr. Escoffier's appeal was timely under the prison mailbox rule, and that Garum's policy that prohibits gender affirmation surgery was a violation of his Eighth Amendment rights. R. at 8. Mr. Posca petitioned the United States Supreme Court for a writ of certiorari on August 1, 2021, which was granted on September 22, 2021. R. at 9.

SUMMARY OF THE ARGUMENT

I.

This Court should reverse the Fourteenth Circuit's decision that Mr. Escoffier's notice of appeal was timely filed because he cannot benefit from the prison mailbox rule, Fed. R. App. P. 4(c), while represented by counsel. Historically, the prison mailbox rule was used to afford leniency for prisoners acting without the aid of counsel in filing documents because of the unique circumstances of being incarcerated. It should be interpreted that way here, first, due to the latent ambiguous nature of the language in Fed. R. App. P. 4(c) that does not specify "pro se" in front of the word "inmate." Without this specification courts have routinely applied the rule with its purpose in mind, to provide unrepresented prisoners with a fair shot of appeal without the hinderance of lack of counsel, not by its plain meaning to any "inmate."

Secondly, there are more facts to suggest that Mr. Escoffier was acting as represented rather than unrepresented even considering the pandemic, and the brief absence of his attorney, Ms. Pegge. Simply because Mr. Escoffier filed his own appeal it does not mean this eliminates his representation by counsel because like the recent case *Certacci*, This Court stated that just because an inmate files a document on their own behalf, it does not make them a pro se prisoner instantly that entitles them to the prison mailbox rule. Furthermore, Mr. Escoffier is not "passively" represented but rather "actively" represented because he received, followed, and relied on legal advice from Mr. Sharafi, another associate at the firm.

Moreover, although Ms. Pegge represented Mr. Escoffier in the district court and may have been his counsel of record; ultimately, Mr. Escoffier is a client of the law firm of Forme Cury, not Ms. Pegge exclusively. Even in Ms. Pegge's unfortunate absence in her bout with Miasmic syndrome, her firm's lack of care in handling her matters does not transform her clients, like Mr. Escoffier, to pro se. Forme Cury still represented Mr. Escoffier, most strongly shown by the fact that another attorney at the firm, Mr. Sharafi, gave Mr. Escoffier legal advice on when and how to file his notice of appeal in the legal mail system, advice that Mr. Escoffier followed under the advisement of counsel.

Finally, even if Mr. Escoffier was given the right to the mailbox rule, he failed to meet the specifications set out by Rule 4(c)(1)(A)(i) which requires that a notice of appeal be accompanied by a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement. The appeal here lacked these requirements given the

facts presented so, therefore eliminates jurisdictional authority of the circuit court. Therefore, as a represented inmate Mr. Escoffier cannot reap the benefits of the prison mailbox rule, and his appeal would be considered untimely. This untimely appeal is governed by the "mandatory and jurisdictional" Fed Rule App. 4(a) which does not allow an equitable tolling.

II.

Mr. Escoffier's Eighth Amendment claim should be reversed because Garum's policy provides medical services that are effective and adequate within modern medical standards so, neither the objective nor the subjective requirements to establish a cause of action in the Eighth Amendment are met. The objective part of the test set out by this Court in *Farmer v. Brennan* state that an objective risk of harm is one that subjects an inmate to serious medical risk, that is not present here because Garum provided other effective treatments for Mr. Escoffier's gender dysphoria. Only when prison officials demonstrate a deliberate indifference does it amount to a cruel and unusual punishment under the Eighth Amendment. This failure to meet the objective risk of harm is also strengthen by the fact that there is no medical consensus in the medical community that surgical intervention is an absolute medical necessity when treating gender dysphoria.

ARGUMENT

Lucas Escoffier's notice of appeal is untimely because at the time of filing he was represented by counsel and, therefore, is not entitled to the benefit of the prison

mailbox rule. Federal Rule of Appellate Procedure 4(c) provides "[i]f *an inmate* filed a notice of appeal, the notice is timely if it is deposited in the institution's internal mail system on or before the last day of filing…." (Emphasis supplied). Although the rule does not, on its face, present an ambiguity, the case law that was relied on to codify Rule 4(c) and subsequent case law presents alternative interpretations. The majority of federal circuits and the facts support the conclusion that Mr. Escoffier's notice of appeal was untimely because it did not meet the necessary requirements of Fed. R. App. P. 4 and, therefore, the Fourteenth Circuit lacked subject-matter jurisdiction.

I. Reversal of the appellate court is merited because Mr. Escoffier's notice of appeal was untimely pursuant to Fed. R. App. P. 4(c)

From its inception, the prison mailbox rule only extended to a distinct class of persons: pro se prisoners acting without the aid of counsel. *Houston v. Lack*, 487 U.S. 266, 270 (1988). In *Houston*, this Court held that when a notice of appeal is filed by a pro se prisoner, it is deemed filed when the prisoner delivered the notice to prison officials for mailing. *Id*. at 270 (citing *Fallen v. United States*, 378 U.S. 139 (1964)). The basis behind the adoption of this rule was largely premised on providing leniency for pro se prisoners who were incapable of controlling the process in filing a notice of appeal. *Id*. at 270-71. For instance, pro se prisoners are incapable of taking steps to monitor the processing of the notice, nor were they able to personally travel to ensure the notice was filed. *Id*. at 271. Notably, this Court emphasized the reality that "pro se prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can takes these precautions for

them." *Id*. In acknowledging these disadvantages, this Court extended the prison mailbox rule and it set out in *Fallen* to also encompass civil notices of appeal. *Id*.

A. Fed. R. App. P. 4(c) Should Not Be Interpreted By Its Plain Meaning Because it is Ambiguous

The inception of Federal Rule of Appellate Procedure 4(c) followed this Court's holding in *Houston* and was molded as a reflection of that decision. *United States v. Moore,* 24 F.3d 624, 626 (4th Cir. 1994). Rule 4(c) provides that "[i]f an inmate files a notice of appeal, the notice is timely if it is deposited in the prison mail system on or before the last day for filing…." Fed. R. App. P. 4(c).

It has long been established that the primary method of statutory interpretation is for the court to look at the rule's plain meaning. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940). If the plain meaning of the text is *clear and unambiguous* on its face, then the court should not look to any extrinsic sources to interpret the meaning of the rule. *Id*. at 543-44. (Emphasis supplied).

Alternatively, another common method of statutory interpretation involves the court looking past the rule's plain meaning and look to the purpose for which the rule serves. *Id*. The theory of the "purpose approach" is that since the purpose of enacting the rule was to eliminate a particular wrong, the court should interpret the statute to produce that result. *Id*. Here, the particular wrong involves the disadvantages that pro se prisoners face because they are unable to exercise any control over the filing of their pleadings.

When interpretating a rule, courts should also look to the purpose and intent of the rule. *United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004). In *Craig*, a prisoner in open court advised the judge and his appointed attorney that he did not want to appeal the sentencing decision against him. *Id*. at 739. However, while still incarcerated, the prisoner "changed his mind" and filed a notice of appeal using the prison mail system[1]. *Id*. In applying Rule 4(c), the Seventh Circuit held that the prisoner was entitled to the prison mailbox rule because he fell within the plain meaning of an "inmate". *Id*. at 740. The court went on to reason that when interpreting Rule 4(c) by its plain meaning it should not pencil in the word "unrepresented" before the word "inmate". *Id*. at 741.

Undoubtedly, Mr. Escoffier will argue that Rule 4(c) is clear and unambiguous and, thus, the plain meaning of "inmate" should be used. Not so. This argument ignores the reality that if it were so clear then there would not be such a clear divide in the circuits, and the issue would not have made its way to this Court again. The split among the federal circuits only strengthens the argument that although the rule says "inmate", it only applies to pro se prisoners. While the word "inmate" alone may not present an immediate ambiguity, the ambiguity arises in Rule 4(c)'s application.

This latent ambiguity has caused a split within the circuits. There are only two circuits that have applied the prison mailbox rule to both pro se and represented prisoners. *See Moore*, 24 F.3d at 626 ("[T]here is little justification for limiting *Houston*'s applicability to situations where the prisoner is not represented

by counsel."); *Craig*, 368 F.3d at 740 ("Respect for the text of Rule 4(c) means that represented prisoners can use the opportunity it creates…"). *But see Rutledge v. United* States, 230 F.3d 1041, 1052 (7th Cir. 2000) (declining to extend the prison mailbox rule to a motion to amend filed by a represented prisoner). The remaining federal circuits have denied extending the prison mailbox rule to represented prisoners.[2]

Thus, because the plain meaning approach has caused a split amongst the circuits, this Court should interpret Rule 4(c) in light of its intended purpose. As mentioned, Rule 4(c) was developed as a reflection of this Court's holding and rationale in *Houston*.

The prison mailbox rule was created to prevent pro se prisoners from being penalized by any delays in filing caused by prison officials or the mails. *Cretacci v. Call*, 988 F.3d 860, 866 (6th Cir. 2021). Its purpose was to provide leniency to pro se prisoners because not only did they not have an attorney who can file documents for them, but because they have no surefire way to ensure their important documents will not get delayed by the mails or prison officials. *Houston*, 487 U.S. at 276. *See also Cousin v Lensing*, 310 F.3d 843, 847 (5th Cir. 2002) (finding that there is no justification to extend leniency to prisoners represented by counsel).

If the plain meaning of the rule was adopted, then the prison mailbox rule would extend to represented prisoners, a class of persons who are fundamentally in a different position than the class of persons the rule was intended to protect. Extending the prison mailbox rule to represented prisoners would cause

the rule to be overinclusive and would allow prisoners who have the luxury of an attorney to benefit from a grant that has historically exclusively been reserved for pro se prisoners. And, in light of *Houston*'s classification of pro se prisoners as prisoners who act without the aid of counsel, extending the prison mailbox rule to include represented prisoners would undercut this Court's entire rationale in *Houston*. *Id*. at 271.

Therefore, instead of looking to Rule 4(c)'s plain meaning, this Court should place greater weight on its holding in *Houston* and Congress' intent in codifying that holding for the purpose of granting the benefit of the prison mailbox rule to only pro se prisoners.

B. Mr. Escoffier Does Not Get the Benefit of the Prison Mailbox Rule Because He Was Being Actively Represented by Counsel

Syllogistically, pro se prisoners get the benefit of the prison mailbox rule because they cannot control the filing of their own notices of appeal. Represented prisoners have an outside agent (attorney) who has ultimate control over the filing of notices of appeal. Therefore, it follows that represented prisoners do not get the benefit of the prison mailbox rule. Represented prisoners do not act with the same disadvantages as pro se prisoners that *Houston* addressed because they can direct their counsel to file documents on their behalf, a task which can now be done instantaneously with the court. While pro se prisoners are subjected to the whims of prison officials and the mails, represented prisoners have no logical reason to. *See Walker v. Jastremski*, 430 F.3d 560, 563 (2d Cir. 2005) (concluding that the prison

mailbox rule does not apply to delays that implicate neither prison officials nor the mails).

If a prisoner files a document on behalf of their attorney, they are not proceeding without the aid of counsel. *Cretacci*, 988 F.3d at 866. In *Cretacci*, a prisoner was denied the benefit of the prison mailbox rule after his attorney delivered a civil complaint for him to file with prison officials. *Id*. at 867. The attorney prepared the complaint in anticipation of filing but discovered that he was not licensed to practice law in the district where the prison was situated. *Id*. at 864. The Sixth Circuit affirmed dismissal of the case for lack of jurisdiction because the district court did not receive the notice of appeal until three days after the statute of limitations had expired. *Id*. at 865. The court reasoned that the prisoner "was not proceedings without the aid of counsel" because he and his attorney had an explicit attorney-client relationship in which his attorney had agreed to represent him in his lawsuit. *Id*. at 866. Moreover, "the fact that [the prisoner] himself filed the complaint does not lead to a different result." *Id*. Notably, the court set out that "when an attorney agrees to represent a client and then prepares legal documents on his behalf, the client is not proceeding without assistance of counsel." *Id*. *See also Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003) (refusing to extend the prison mailbox rule to a prisoner being assisted by a lawyer).

When a prisoner is only being represented in a "passive sense", the prisoner may get the benefit of the prison mailbox rule if they are proceeding with the same

disadvantages of a pro se prisoner. *Moore,* 24 F.3d at 625. In *Moore*, a prisoner's claim was dismissed because his notice of appeal was received by the district court two days after the deadline. *Id*. The Fourth Circuit, acknowledging that the prison mailbox rule was set out in *Houston* for purposes of equity and lenity towards pro se prisoners, noted that "whenever a prisoner attempts to file a notice of appeal from prison he is acting 'without the aid of counsel,' even if he is 'represented' in a passive sense." *Id*. However, the court failed to define what "passive" representation entails or how it differs from "active" representation.

Here, Mr. Escoffier was represented by Ms. Pegge, a senior associate at the law firm of Forme Cury, who represented Mr. Escoffier in the district court pro bono. R. at 5. Additionally, Mr. Escoffier was advised by Ms. Pegge that her firm would continue to represent him in the Court of Appeals. R. at 6. However, during the appealability window, Ms. Pegge became ill. R. at 6. While attempting to contact Ms. Pegge, Mr. Escoffier communicated with another associate at Forme Curry, Mr. Sharafi. R. at 7. Mr. Sharafi advise Mr. Escoffier that he was unfamiliar with his case, but Mr. Sharafi proceeded to instruct Mr. Escoffier on filing a notice of appeal by using the prison mail system. R. at 7. Mr. Escoffier promptly submitted his notice of appeal pursuant to Mr. Sharafi's legal instructions. R. at 7.

This case is analogous to *Cretacci,* where an attorney agreed to represent the prisoner and the prisoner filed a document in furtherance of that representation. *Cretacci*, 988 F.3d at 865. Likewise, here, Ms. Pegge advised Mr. Escoffier that her firm, Forme Cury, would represent him in his appeal and Mr.

Escoffier subsequently filed his notice of appeal in furtherance of that representation. R. at 6-7. Thus, as in *Cretacci*, where the court found that the prisoner does not get the benefit of the prison mailbox rule because he was "not proceeding without assistance of counsel", *Id*. at 866, the prison mailbox rule does not apply to Mr. Escoffier because he was proceeding under advice of counsel.

Without Mr. Sharafi's legal advice Mr. Escoffier would not have known that a notice of appeal was required for the appeals process to begin. Without reaching out to Forme Cury on how to proceed, and absent Mr. Sharafi's legal advice Mr. Escoffier would not have filed his appeal. Thus, Mr. Escoffier was relying on the legal instruction given to him by Mr. Sharafi and acted in accordance with that advice to preserve his right to appeal. This is the exact opposite of the cornerstone of "acting without aid of counsel" set out in *Houston* and followed by the majority of federal circuits. *Houston*, 487 U.S. at 272.

Additionally, because Forme Cury was representing Mr. Escoffier on a pro bono basis, it can be argued that Mr. Escoffier would not have filed a notice of appeal had he believed he was proceeding without representation. R. at 5. As in *Cretacci*, simply because Mr. Escoffier filed the notice of appeal himself does not convert him into a pro se prisoner, nor does it speak to his attorney-client relationship with Ms. Pegge. In fact, there is no direct evidence in the record to suggest that the attorney-client relationship between Mr. Escoffier and Forme Cury was ever affirmatively dissolved. Had there been evidence that Mr. Escoffier fired

Forme Cury after hearing of Ms. Pegge's incapacitation, then that would render a different result. However, those facts are not present here.

Ms. Pegge's absence does not transform Mr. Escoffier into a pro se prisoner. Everybody gets sick, including attorneys, and the analysis would be no different had Ms. Pegge gotten the common flu. To his advantage, Mr. Escoffier has the benefit of having an attorney who was part of a medium-sized law firm with a revolving door of attorneys who can pick up where another left off. R. at 5. Granted, that did not exactly happen here; however, this advantage is what fundamentally sets Mr. Escoffier apart from the pro se prisoner that this Court illustrated in *Houston*.

Although Ms. Pegge was Mr. Escoffier's counsel of record in the district court, he is not *her* client, he is a client of *the firm*. Thus, not only did Mr. Escoffier have Ms. Pegge as his attorney, but in reality, he had a team of 25 attorneys. Ms. Pegge's unavailability does not negate the fact that there were 24 other attorneys within the firm that could have filed a simple notice of appeal or a form motion for extension of time. Furthermore, there were other attorneys within Forme Cury who also dealt with inmate cases that could have taken the case over on a temporary basis. R. at 5, 36 fn. 2.

Nevertheless, it makes no difference that Ms. Pegge, or any other attorney for that matter, was unavailable because on March 2nd, the day before the appeals deadline, the law firm of Forme Cury was on notice that a notice of appeal had still not be filed in Mr. Escoffier's case. R. at 7. Mr. Sharafi, the associate who advised Mr. Escoffier to file the notice of appeal from prison, could have simply drafted the

notice of appeal himself, or a motion for extension of time pursuant to Fed. R. App. P. 4(a)(5), and had the capability of filing them instantaneously with the court. R. at 7. However, that is not what occurred. Instead, Mr. Sharafi gave Mr. Escoffier specific instructions on how to preserve his right of appeal by advising him to deposit the notice of appeal in the prison mail system. R. at 7. This is precisely the reason why Mr. Escoffier should not be entitled to benefit from the prison mailbox rule, because he was not acting "without the aid of counsel" after he received advice from an attorney at the firm who was representing him in his appeal and then acted on behalf of that advice before the deadline for appeal expired. R. at 6.

Mr. Escoffier's reliance on Mr. Sharafi's advice is the exact opposite of "acting without the aid of counsel". In *Moore*, the prison mailbox rule was extended to a represented prisoner because he filed the notice of appeal himself on his own prerogative. *Moore*, 24 F.3d at 625. In contrast, here, Mr. Escoffier received advice from a licensed attorney at the firm who represents him and acted pursuant to that advice. R. at 6. The moment that Mr. Escoffier acted in accordance with Mr. Sharafi's instructions, he was doing so on behalf of Forme Cury, acting merely as an extension of the firm. R. at 7. Thus, because Mr. Escoffier was operating under the advice of an attorney, it does not follow that an extension of the prison mailbox rule to him should result. Additionally, this case is distinguishable from *Moore* because, unlike the prisoner who filed a motion for an extension of time citing excusable neglect, *Id.*, Mr. Escoffier never filed a motion for an extension of time, nor was excusable neglect ever raised.

At best, Mr. Escoffier has a claim against the law firm of Forme Cury for professional malpractice, an issue that is outside of the scope of the case before this Court. The consideration in applying the prison mailbox rule does not hinge on professional malpractice, it hinges of whether an inmate is proceeding represented by counsel or without the aid of counsel. Here, Mr. Escoffier proceeded with the aid, advice, and at the direction of an attorney at the firm who he chose to represent him in his appeal. Therefore, he was not acting without the aid of counsel and is not subject to reap the benefit of the prison mailbox rule.

As a result of Mr. Escoffier not having the benefit of the prison mailbox rule, his notice of appeal is untimely and, therefore, the Fourteenth Circuit lacked the required subject-matter jurisdiction.

C. Mr. Escoffier did not satisfy the filing requirements of Fed. R. App. P. 4(c)(1)(A)

Even if this court were to allow Mr. Escoffier to avail himself of the benefits of the prison mailbox rule, it should nevertheless dismiss this case for lack of jurisdiction because Mr. Escoffier failed to meet the filing requirements under Fed. R. App. P. 4(c)(1)(A).

Rule 4(c)(1)(A)(i) requires that the notice of appeal be accompanied by a declaration in compliance with 28 U.S.C § 1746 or a notarized statement. Fed. R. App. P. 4(c)(1)(A)(i). A declaration satisfies § 1746 if it is in writing, signed, and dated by the subscribing person under penalty of perjury. 28 U.S.C § 1746. If those were not completed then alternatively, the prisoner must present evidence showing that the notice was so deposited and that postage was prepaid, such as producing the

postmark or a date stamp. Fed. R. App. P. 4(c)(1)(A)(ii). *See Blake v. Aramark*, 489 Fed. Appx. 267 (10th Cir. 2012) (holding a notice of appeal was untimely because the prisoner failed to submit a sworn statement declaring the date the notice was submitted in the prison mail system); and *DeLong v. Dickhaut*, 715 F.3d 382, 385-86 (1st Cir. 2013) (holding an affidavit signed by the prisoner under penalty of perjury stating that the notice of appeal was sent via fist-class mail and postage prepaid, was sufficient to establish the date it of filing).

Here, Mr. Escoffier did not submit any sort of declaration that complies with § 1746, nor did he submit a notarized statement. Therefore, the only remaining avenue to comply with Rule 4(c) would have been for him to supply evidence showing that the notice was so deposited. Here, the only evidence in the record is Appendix F. There is no envelope to check if it was timely postmarked or that there was sufficient postage. Most notably, the record is completely devoid of a copy of the notice of appeal to see if there were any marking to confirm that it passed through the prison mailing system. The fact of the matter is that, based on the record, it cannot be said for certain that the envelope Mr. Escoffier submitted to the prison mail system on March 2nd actually contained a notice of appeal. Without any evidence, there is no proof that Mr. Escoffier complied with Rule 4(c) in order to gain the benefit of the prison mailbox rule.

Therefore, Mr. Escoffier has not satisfied all of the requirements under Rule 4(c) because he did not submit an adequate declaration, nor a notarized

statement, nor did he provide any evidence that shows his notice of appeal was so deposited in the prison mail system.

D. The Fourteenth Circuit lacked subject-matter jurisdiction because Mr. Escoffier's notice of appeal was untimely.

The filing of a timely notice of appeal is "mandatory and jurisdictional", triggering a court of appeals to have subject-matter jurisdiction over the matter. *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982)). Century-old precedent has dictated that when an appeal is not filed within the time limit set out by Congress, the appeal must be dismissed for lack of jurisdiction. *United States v. Curry*, 47 U.S. 106, 113 (1848). Depending on the source, some filing deadlines are strict and mandatory with no exceptions (jurisdictional rules), while others a subject to lenity and equity (claim-processing rules). Jurisdictional time limits are derived by statute and are inflexible, while claim-processing rules are court rules that are subject to equitable considerations and may be waived or forfeited. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). "[I]f a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and sua sponte consideration in the court of appeals mandatory." *Bowles*, 551 U.S. at 216-217.

A time limit proscribed under a procedural rule is jurisdictional if it is supported by a statutory basis. *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 21 (2017). In *Hamer*, the district court granted a two-month extension of time to file a notice of appeal, conflicting with Fed. R. App. P. 4(a)(5) which confines an

extension of time to thirty days. *Id*. at 18. After the notice of appeal was filed, the Court of Appeals dismissed the case by ruling that Rule 4(a)(5)'s time prescription was jurisdictional and, therefore, the notice of appeal was untimely. *Id*. Determining that the Court of Appeals erred in its dismissal, this Court clarified that "a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time." *Id*. at 17. Because Rule 4(a)(5) was not set by statute, it was a claim-processing rule, not a jurisdictional rule. *Id*. at 21-22.

Unlike *Hamer*, which analyzed the time limit set for a motion for an extension of time under Fed. R. App. P. 4(a)(5), *Id*. at 17, here, the time limit in question is the thirty days prescribed to file a notice of appeal pursuant to Fed. R. App. P. 4(a)(1). Notably, the time limit set out in Rule 4(a) is reflected in 28 U.S.C. § 2107, which provides that no appeal shall bring any judgment of a civil nature before a court of appeals for review unless the notice of appeal is filed within thirty days after entry of such judgment. 28 U.S.C. § 2107. Therefore, because Rule 4's time limit is supported by a statute set outby Congress, it does not follow that holding the time limit to file a notice of appeal under Rule 4 is non-jurisdictional. As a result, any deviation from the deadline results in an automatic dismissal.

Mr. Escoffier's only option to defeat the rigid jurisdictional stature of Rule 4(a) would have been for him to raise the defenses of excusable neglect or good cause. However, pursuant to Rule 4(a)(5) the only way to invoke those defenses

would have been to file a timely motion for an extension of time. Mr. Escoffier never filed a Rule 4(a)(5) motion, nor was excusable neglect or good cause ever raised in his pleadings.

Additionally, because Rule 4(a) is mandatory and jurisdictional, it is not subject to this Court's remedy of equitable tolling. Regardless, equitable tolling would not apply to this case because this Court had already determined that attorney negligence does not trigger the benefit of equitable tolling. *Holland v. Florida*, 560 U.S. 631, 651 (2010). *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline.") Ultimately, attorney negligence is what stood in the way of Mr. Escoffier's filing of a timely notice of appeal.

Therefore, because Mr. Escoffier did not file his notice of appeal within the thirty days prescribed by Congress in § 2107 and Rule 4(a), the Fourteenth Circuit lacked subject-matter jurisdiction to reach the merits.

II. This Court should overturn the Fourteenth Circuit ruling in favor of Escoffier's 42 USC § 1983 claim, as Garam's policy precluding sex affirmation surgery does not violate the Eighth Amendment, and, alternatively, Mr. Escoffier's suit is an official-capacity action barred by sovereign immunity.

42 USC § 1983 establishes a cause of action against individuals acting on behalf of the state for deprivation of federally guaranteed rights. *Filarsky v. Delia*, 566 U.S. 377, 380 (2012). The Eighth Amendment's bar against infliction of "cruel and unusual punishment," U.S. Const. amend. VIII.

Sovereign immunity under the Eleventh Amendment bars lawsuits brought by citizens in federal court against nonconsenting states, including suits naming state officials in which the state is the real party in interest. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984).

Garum's policy regarding treatment of inmates with gender dysphoria, including its preclusion of gender affirmation surgery, does not amount to cruel and unusual punishment and therefore does not violate Mr. Escoffier's Eighth Amendment rights. The policy provides medical services adequate within modern medical standards which meet neither the objective nor the subjective requirements to establish a cause of action in the Eighth Amendment. Furthermore, even if this Court were to determine that the policy violates Mr. Escoffier's Eighth Amendment rights, the real party in interest is Garum, and therefore, Mr. Posca may assert sovereign immunity.

A. Enforcement of Garum's treatment policy regarding gender dysphoria does not meet this Court's objective and subjective requirements to constitute cruel and unusual punishment under the Eighth Amendment.

The Cruel and Unusual Clause of the Eighth Amendment generally forbids punishment which constitutes "unnecessary and wanton infliction of pain." *see, e.g.*, *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Furthermore, "the provision [can] be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). However, claims related "to conditions of confinement that are not formally imposed as a sentence for a crime …." *Helling v. McKinney*, 509 U.S. 25, 30 (1993), and thus

"do[] not purport to be punishment at all must involve more than an ordinary lack of due care for the prisoner's interests or safety." *Whitley* at 319. In regard to "denial of medical care … result[ing] in pain and suffering which no one suggests would serve any penological purpose," *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), it is insufficient to show mere "inadvertent failure to provide adequate medical care," *Id.* at 105, as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Id.* at 106. Rather, in order to create a cause of action under § 1983, there must be evidence of "deliberate indifference to the serious medical needs of prisoners." *Id.* at 105; *see also Hudson v. McMillan*, 503 U.S. 1, 8 (1992) ("[C]ourts considering a prisoner's claim must ask both if 'the officials acted with a sufficiently culpable state of mind' and if the alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation (quoting *Wilson* at 298-304)).

Finding deliberate indifference as "lying somewhere between the poles of negligence at one end and purpose or knowledge at the other," *Farmer v. Brennan*, 511 U.S. 825, 836 (1994), this Court identified this state of mind requirement to be akin to "subjective recklessness as used in criminal law," *Id.* at 839; *see also Helling* at 36 ("the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct at the time the suit is brough and persisting thereafter."). As such, in a claim such as that made by Mr. Escoffier which is "based on a failure to prevent harm, the inmate

must [first] show that he is incarcerated under conditions posing a substantial risk of serious harm," *Farmer* at 834, and second:

"[T]o survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so …."

Id. at 846. Therefore, while Mr. Escoffier's Eighth Amendment claim under § 1983 failed to show both that he is incarcerated under conditions posing an objectively substantial risk of serious harm, and that prison officials knowingly disregarded it, a defendant in such a case need only satisfy the burden of showing "that there be no *genuine* issue of *material* fact," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986), as to either one of the factors under *Farmer* in order for a ruling of summary judgment to be proper.

1. Garum's policy does not violate the Eighth Amendment because it is does not create conditions posing an objectively substantial risk of serious harm.

In assessing whether an inmate's Eighth Amendment claim amounts to deliberate indifference, this Court first considers whether "the deprivation alleged is, objectively, 'sufficiently serious,'" *Farmer* at 834 (quoting *Wilson* at 298); *see also Wilson at* 298 *(*quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) ("[O]nly those deprivations denying 'the minimal civilized measures of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation."). When such alleged deprivation relates to medical treatment, this Court has recognized that

"society does not expect that prisoners will have unqualified access to healthcare," *Hudson* at 9, and that there is deliberate indifference in violation of the Eighth Amendment "only when those needs are 'serious.'" *Id.* (citing *Estelle* at 103-104).

Here, as noted by the First Circuit, the question is not whether gender dysphoria "is a serious medical need, and one which mandates treatment … [but] whether [gender affirmation surgery] is a medically necessary component of [the inmate's] care, such that any course of treatment not including surgery is constitutionally inadequate." *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014). More specifically, it is whether gender affirmation surgery is a medically necessary component of a prison's treatment plan for inmates suffering from gender dysphoria when that plan is developed by a qualified committee of physicians in careful consideration of the treatment options included in the World Association for Transgender Health (WPATH) *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*. These standards include mental-health counseling, hormonal treatment, and gender-affirming social interventions; and is executed under the care of a psychiatrist with experience in treating individuals with gender dysphoria R. at 14.

As prison administrators are only "'constitutionally obligated to provide medical services to inmates … on a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards,'" *Kosilek* at 82 (citing *United States v. Derbes*, 369 F.3d 579, 583 (1st Cir.

2004), whether gender affirmation surgery would be a beneficial treatment to Mr. Escoffier is not at issue. Rather, the pertinent consideration is "when an inmate has received on-going treatment for his condition and claims that this treatment was inadequate," *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018), whether preclusion of such surgery from a comprehensive treatment policy is "'so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness.'" *Id.* (quoting *Miller v. Calhoun Cty.*, 408 F.3d 803, 819 (6th Cir. 2005)).

In the present case, this larger concept of serious medical need has been distilled into a nebulous determination of medical necessity, as while the Fourteenth Circuit's finding turned on the contention that the Garum policy "den[ies] a treatment accepted to be medically necessary in some instances …." R. at 44, its reasoning for this determination was based solely on expert testimony in *Monroe v. Baldwin*, 424 F. Supp. 3d 526, 544 (S.D. Ill. 2019), and the Ninth Circuit's holding that treatment of gender dysphoria must "satisfy those broadly-accepted [WPATH] standards," *Edmo v. Corizon, Inc.*, 935 F.3d 757, 780-81 (9th Cir. 2019), at the exclusion of any legitimate medical opinion to the contrary.

While reaching opposing conclusions, the Fifth and the Ninth Circuit rulings regarding the necessity of considering gender affirmation surgery as a treatment option as it pertains to the deliberate indifference issue under the Eighth Amendment each turn on the concept of "medical consensus." *see Gibson v. Collier*, 920 F.3d 212, 220 (5th Cir. 2019) ("There is no intentional or wanton

deprivation of care if a genuine debate exists within the medical community about the necessity or efficacy of that care."); *see also Edmo* at 796 ("The consensus is that [gender affirmation surgery] is effective and medically necessary in appropriate circumstances.").

WPATH does in fact contend that "for many [individuals], [gender affirmation surgery] is essential and medically necessary," WPATH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE, 54 (7th ed. 2012); however, *Edmo*'s basis for its finding of medical consensus on the assertion that WPATH is the "gold standard on this issue," *Edmo* at 788 N.16, is tenuous at best. The court supported this contention by providing a list of various medical associations – citing WPATH as its source – by whom "[t]he WPATH Standards of Care … are endorsed …." *Edmo* at 795. However, WPATH notes that those associations listed are "[p]rofessional associations that have issued statements in support of the WPATH Standards of Care," WPATH, *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* (Dec. 21, 2016), https://www.wpath.org/newsroom/medical-necessity-statement. While *Edmo* and *Gibson* turned exclusively on the issue of medical necessity of gender affirmation surgery, it is one specific issue in a guidebook covering the overarching spectrum of issues related to care for gender nonconformity and gender dysphoria. To assert that letters of support for the WPATH Standards of Care in general amounts to a medical consensus regarding whether gender affirmation surgery is not only

beneficial, but *necessary*, in certain cases, is a practice in conjecture at best. This reasoning would by implication suggest that each association which wrote a letter of general support for the WPATH Standards agrees with everything contained within it, leaving no room for valid medical opinion regarding any aspect of gender-nonconformity and gender dysphoria outside of those standards.

While it appears that the vast majority of courts have referred to the WPATH Standards of Care in related cases, a legal consensus does not constitute a medical consensus, and individual courts have consistently cautioned the judiciary at large from substituting its reasoning in place of that of physicians. *See Shorter v. United States*, 2018 U.S. Dist. LEXIS 182571, 36 (S.D. Fla. 2018) ("[In] a case where the inmate has received medical attention, and the dispute is over the adequacy of that attention … the courts should be reluctant to question the accuracy of the medical judgments that were made."); see also, *Westlake v. Lucas*, 537 F.2d 857 ("[C]ourts are [not] to engage in the process of second-guessing in every case the adequacy of medical care that the state provides.").

WPATH is not an unbiased medical authority such as one would expect an organization that is representative of a medical consensus to be, nor does it purport itself to be as such. Rather, WPATH describes itself as "an international, multidisciplinary, professional association," WPATH, *supra*, at 1, which, in addition to providing clinical guidance, is an advocacy and public policy organization. *Id.* Nor does WPATH purport their Standards of Care to be policies set in stone: WPATH refers to the Standards as flexible clinical guidelines which individual professions

may modify, lists a series of reasons for such clinical departures from the Standards, and admits that there are a wide variety of relevant considerations which the Standards do not reflect which require adaptation to "local realities" by health professionals. *Id.* at 2-3. To treat these standards as binding medical consensus as *Edmo* suggests opens the door to questioning any variation from them, which is antithetical to WPATH's intent in their construction.

Furthermore, as in any profession, reasonable minds will differ. As noted in *Kosilek*, which was litigated after the current iteration of the WPATH Standards, "'[a]llegations [that] simply reflect a disagreement on the appropriate course of treatment … fall[] short of alleging a constitutional violation,'" *Kosilek* at 82 (quoting *Torraco v. Maloney*, 923 F2d 231, 235 (1st Cir. 1991). The court-appointed expert in *Kosilek* stated, in part, that the WPATH Standards of Care "is not a politically neutral document," *Kosilek* at 78; that "[l]arge gaps' exist in the medical community's knowledge regarding the long-term effects of gender affirmation surgery in relation to its positive or negative correlation to suicidal ideation," Id.; and that "[t]reatment stopping short of [gender affirmation surgery] would be considered adequate by many psychiatrists …." Id. at 79. Similarly, while Edmo characterized the holding in Gibson that "[T]here is no medical consensus that [gender affirmation surgery] is a necessary or even effective treatment for gender dysphoria," *Gibson* at 223, as "an incorrect, or at best outdated, premise," Edmo at 795, the plaintiff in *Gibson*, "who relie[d] exclusively on the WPATH Standards of Care to support his claim that failure to evaluate for [gender affirmation surgery]

constitutes deliberate indifference to his serious medical needs … did not dispute that the Standards are a matter of contention within the medical community," *Gibson* at 223.

Even if there was a medical consensus as suggested by *Edmo*, this Court has found that establishment of such a consensus is not definitive, but rather a rebuttable presumption. *See Bragdon v. Abbott*, 524 U.S. 624, 650 (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 32, p. 187 (5th ed. 1984)) (While "courts should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments … A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm).

Here, the analysis is much less complicated, because as previously noted, Mr. Escoffier bears the burden of proof regarding the objective element of an Eighth Amendment claim. As he did not establish the existence of a medical consensus necessary to satisfy his burden of proving the existence of a serious medical need, there is no presumption to rebut nor serious risk of harm, but merely a disparity between the treatment Mr. Escoffier would like to have and the treatment available to him as a resident of Garum, and "[p]rison administrators are 'by no means required to tailor a perfect plan for every inmate," *Kosilek* (quoting *Derbes* at 583). Applying rulings from the First, Sixth, Seventh, and Ninth Circuits, *Kosilek* held that "[t]he law is clear that where two alternative courses of

medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of our court to 'second guess medical judgments' or to require that the [prison] adopt the more compassionate of the two adequate options. *Kosilek* at 90. (quoting *Layne v. Vinzant*, 657 F.2d 468, 474 (1st Cir. 1981).

Therefore, because Garum's policy is reasonably commensurate with modern medical science, and Mr. Escoffier failed to establish otherwise, it cannot be said as a matter of law to pose a substantial risk of serious harm constituting a violation of the Eighth Amendment.

2. Garum's policy is not deliberately indifferent to Mr. Escoffier's rights under the Eighth Amendment because the prison did not knowingly and unreasonably disregard an objectively intolerable risk of harm.

Even if this Court were to determine that Garum's policy poses a substantial risk of serious harm, this would in itself be insufficient to find the policy to be in violation of Mr. Escoffier's Eighth Amendment rights, because in order to satisfy the standard for deliberate indifference under Farmer, an inmate must prove "that each defendant 'subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk' by failing to take reasonable measures to abate it," *Rhinehart* at 738. (quoting *Comstock v. McCray*, 273 F.3d 693, 703 (6th Cir. 2001)).

In *Garretson*, the Sixth Circuit emphasized that This subjective component must be addressed for each [defendant] individually." *Garretson v. City of Madison Heights*, 407 F.3d 789 (6th Cir. 2005). Here, the only defendant in is Mr. Posca, and it must be assumed for the sake of Mr. Escoffier's Eighth Amendment claim that his

cause of action is against Mr. Posca's enforcement of Garum's policy rather than the prison's policy itself, as § 1983 "does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties," *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989), and "a suit against a state official in his or her official capacity … is no different from a suit against the State itself," *Id.* at 71.

Here, the facts surrounding the development of Garum's policy, which Mr. Posca approved and is charged with enforcing, show that Mr. Posca did not know or have reason to know that the policy might result in a substantial risk of serious harm, and he was therefore at most negligent in his approval and enforcement of the policy. Furthermore, evidence in the record shows that prison security was a consideration in development of the policy, and this Court "accord[s] wide-ranging deference to [prison administrators] in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

As previously stated, "an inadvertent failure to provide adequate medical care to an inmate amounting to negligence … is not enough to state a valid claim of medical mistreatment under the Eighth Amendment." *Estelle* at 106.

Here, Mr. Posca attended the meetings in which the committee drafted the policy *ex officio*, having neither influence or vote on the issues of medical treatment discussed. His role was limited to providing requested information and formally

approving the policy after it was the finalized and approved by the committee. R. at 13.

As indicated in the record, the committee was comprised of 15 physicians across the spectrum of fields related to gender dysphoria treatment who developed the policy. *Id.* at 13. The available facts regarding the development of the policy tend to show a good faith belief in its efficacy which suggest that the committee members did not know that their decisions might result in a substantial risk of serious harm and were themselves negligent at most in crafting the policy.

The committee used the WPATH Standards as a baseline and "carefully considered the several treatment options included in [them]." *Id.* at 14. An endocrinologist on the committee "opined that such surgeries were never medically necessary for treatment of gender dysphoria, given the many options available to treat the condition," *Id.*, to which the supervising psychiatrist for Garum replied by informing the rest of the committee that gender affirmation surgery is known to be a significantly effective treatment, but he did not disagree with the assertion that it was never necessary, though he did affirm "that administration of hormonal therapies is a common, well-tolerated treatment … effective[e] when combined with other non-surgical interventions," *Id.*, and the committee unanimously approved the policy, which included multiple forms of treatment noted by WPATH as effective for treating gender dysphoria. *Id.* at 14-15.

If this policy does in fact run afoul of the Eighth Amendment, whether Mr. Escoffier could satisfy the burden of showing that the committee itself was

deliberately indifferent to any risk of harm it might impose is at the very most uncertain, as the only evidence in the record which may suggest as much is the preclusion of a single form of treatment recommended by WPATH, and even then, that would only amount to deliberate indifference if it could be shown that they recognized the WPATH Standards as being representative of a medical consensus.

As such, it is unreasonable to suggest that Mr. Posca, who is a prison administrator rather than a physician, could have a state of mind akin to criminal recklessness in approving and enforcing the policy. However, as a prison administrator, Mr. Posca's considerations regarding the health, welfare and safety of inmates extends far beyond medical considerations

Included in the policies and practices for which this Court affords prison administrators a wide-ranging deference are "prophylactic or preventative measures intended to reduce the incidence of … breaches of prison discipline." *Whitley* at 321-22. See also *Battista v. Clark*, 645 F.3d 449, 454 (1st Cir. 2011) ("Medical 'need' in real life is an elastic term: security considerations also matter at prisons … and administrators have to balance conflicting demands."). While this deference "does not insulate from review actions taken in bad faith and for no legitimate purpose … it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Whitley* at 322.

As already established, there is no evidence that Posca approved and enforced the policy at issue in bad faith. Furthermore, while it may be a reasonable assumption that prison administrators take into consideration the implications on

inmate welfare and prison discipline into any substantive change in policy, there is evidence in the record to suggest that such issues were specifically contemplated in the development of the policy.

Among the treatments proscribed by the policy are gender-affirming treatments, including, "security concerns permitting, allowing transgender inmates their choice of a male or female housing unit, as well as other dress/grooming privileges." R. at 15. While this does not define in a quantifiable way the extent to which security concerns were considered in adoption of the policy, the burden of proof in this matter does not lie with Mr. Posca, as "[u]nless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain … the case should not go to the jury." *Whitley* at 322.

This is consistent with this Court's prior description of "infliction of … unnecessary suffering … [as] pain and suffering which no one suggests would serve any penological purpose." Estelle at 103. As such, "even a denial of care may not amount to an Eighth Amendment violation if that decision is based in legitimate concerns regarding prisoner safety and institutional security." *Kosilek* at 83 (citing *Cameron v. Tomes*, 990 F.2d 14, 20 (1st Cir. 1993). Furthermore, the wide-ranging deference afforded prison administrators is not an exception to the deliberate indifference rule; rather, it is a construct which follows the same standards as Farmer and allows prison administrators the ability to balance otherwise conflicting concerns regarding inmate safety and prison security:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock. The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.
>
> *Whitley* at 319.

As evidenced by testimony in *Kosilek* by a corrections facility superintendent and a department of corrections commissioner, gender-affirming treatments in a prison setting carry with them safety and security concerns which prison administrators must consider in conjunction with the potential threat of mental harm or physical self-harm to an individual which may accompany denial of treatments such as gender affirmation surgery, including the potential of that individual to become a target for assault and victimization, or in the alternative, the safety concerns surrounding the negative effects of long-term incarceration in a segregated unit. *Kosilek* at 74. Such problems are particularly foreseeable in a prison such as Garum, which is one of the largest in the country, R. at 3, while currently housing only six inmates diagnosed with gender dysphoria. R. at 13.

Furthermore, equally as notable as what is in the record regarding safety considerations in the provisions of the policy at issue is what is not in the record. At no point in the 14th Circuit analysis of this issue does the court address the potential existence of legitimate penological purposes for the substantive provisions of the policy as approved by Mr. Posca. As such, rather than affording Mr. Posca the wide-ranging deference afforded him by this Court as a prison administrator in the

adoption and execution of policies aimed at maintaining institutional security, it instead offered no consideration to the matter, and therefore no deference whatsoever to Mr. Posca.

As there is no evidence of material fact to assist Mr. Escoffier in satisfying his burden of proving that Mr. Posca "knowingly and unreasonably disregarded an objectively intolerable risk of harm, *Farmer* at 846, or that any Mr. Posca's actions in approving and enforcing the policy were made in anything other than a good-faith consideration of the welfare of the inmates under his care, Mr. Escoffier included, the District Court was correct in granting summary judgment to Mr. Posca, and the Fourteenth Circuit was not justified in freely substituting its judgment for his considered choices.

B. Should this Court find that there was deliberate indifference to a substantial risk of serious harm, Mr. Posca may assert sovereign immunity, as the state is the real party in interest, and Mr. Escoffier's claim fails to meet the requirements under § 3626.

"A suit against a state official in his or her official capacity is not a suit against the official but rather a suit against the official's office," *Will*, 491 U.S. at 71. (citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985). "As such it is no different from a suit against the State itself." Id. This Court has consistently held that "the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in federal court … unless the State expressly waives its immunity and consents to suit in federal court." *Welch v. Texas Dep't of Highways & Public Transp.,* 483 U.S. 468, 472-86 (1987). While Congress can abrogate the Eleventh

Amendment when acting pursuant to the Commerce Clause, "it must express its intent to do so in unmistakable language in the statute itself." *Id.* at 470.

The statute under which the current action is brought states in relevant part:

> Every person who, under color of any … State … 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

42 U.S.C. § 1983.

Because "congressional intent to affect the federal-state balance must be 'clear and manifest' … [and because] the word 'persons' is ordinarily construed to exclude the sovereign," *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 72, the statute "does not provide a federal forum for litigants who seek remedy against a state for alleged deprivations of civil liberties," *Id.* at 66. As such, "lawsuits brought against employees in their official capacity 'represent only another way of pleading an action against an entity of which the officer is an agent,' and they may also be barred by sovereign immunity." *Lewis v. Clarke*, 137 S. Ct. 1285, 1291-92 (2017) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1995).

While sovereign immunity "does not erect a barrier against suits to impose individual and personal liability," *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991), "[t]he identity of the real party in interest dictates what immunities may be available.

Defendants in an official-capacity action may assert sovereign immunity." *Lewis* at 1292.

In order Mr. Escoffier's to proceed nonetheless, it must satisfy the requirements of the Prison Litigation Reform Act, which allows for such actions to be brought under § 1983 under the following conditions:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.
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> 18 U.S.C.S. § 3626.

If the Court were to find that Mr. Escoffier's claim satisfies the requirements to satisfy an 8th Amendment claim under Farmer, granting his request for injunction precludes alternative relief which meets the purpose for which Mr. Escoffier is seeking the injunction, and the policy considerations for which this Court affords wide-ranging deference to prison administrators while also mitigating the potentially wide-ranging consequences such a ruling may have on the criminal justice system and the public at large.

The requirements under § 3626 are constructed upon similar principles of equity as the test that this Court has held that a plaintiff seeking injunction must satisfy:

> A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as

> monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). At issue in this case are the requirements under § 3626 that granting of relief is the intrusive means necessary to correct the violation, and the that the court shall give substantial weight to adverse effects on the public and criminal justice system, which are analogous to factors (3) and (4) of this Court's test for granting permanent injunction.

A blanket declaration that all prisons must consider granting gender affirmation surgery where it is found to be necessary may address the substantial risk of serious harm which preclusion of such surgery, but would simultaneously pose the exact concerns this Court sought to mitigate in granting prison administrators wide-ranging deference, and therefore could not be said to be the least intrusive means necessary to correct the violation. Similarly, rather than balancing the hardships between the parties under factor (3) of this Court's test for granting injunction, it would simply shift the burden to one side.
Furthermore, granting Mr. Escoffier's injunction would have untold consequences to the public and criminal justice system. While there would certainly be a cost to the public associated with constitutionally mandating gender affirmation surgeries, the cost relating to prison restructuring in order to address the issues related to inmate safety noted in *Kosilek* is potentially unquantifiable, and it would likely still fail to address the issues related to isolated confinement.

If this Court is to determine that the requirements under the WPATH Standards of Care are representative of a medical consensus, creating a pathway for mandatory evaluation of gender reassignment surgery for prisoners must, for the sake of equity and public policy, be done in the least intrusive means practicable to the public interest and criminal justice system, as well as in a manner which does not simultaneously create other detrimental risks to the physical and mental welfare of those individuals. For these reasons, Mr. Escoffier's action fails to meet the requirements of the Prison Litigation Reform Act, and consequentially § 1983. Therefore, his request for relief is not sufficiently narrowly drawn, and Mr. Posca retains the benefit of sovereign immunity.

CONCLUSION

For these reasons this Court should reverse the Fourteenth Circuit's decision and find Mr. Escoffier's appeal untimely, and that Garum's policy is constitutional.

DATED this 22nd day of October 2021.

Respectfully submitted,
Max Posca, Petitioner,

By:/s/ Team 2118
Attorneys for the Petitioner

APPENDIX A

CONSTITUTIONAL PROVISIONS

The Eighth Amendment:

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

APPENDIX B

STATUTORY PROVISIONS

42 U.S.C. § 1983:

> ***§ 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.

> ***Eighth Amendment:***

Continuing violation doctrine can apply to Eighth Amendment claims of medical indifference brought under 42 USCS § 1983 when plaintiff shows ongoing policy of deliberate indifference to his or her serious medical needs and some acts in furtherance of policy within relevant statute of limitations period.

42 U.S.C.S. § 1983

28 U.S.C. § 1746

§ 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1)

If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".

(2)

If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

3. Prisoner's petitions

Appeals are dismissed for lack of subject matter jurisdiction where notice of appeal lacked declaration in compliance with 28 USCS § 1746 or notarized statement setting forth notice's date of deposit with prison officials, and for a lack of statement that first-class postage was pre-paid, without subsequent filing such form in compliance with Fed. R. App. P. 4(c)(1).

28 U.S.C.S. § 1746

18 U.S.C.S. § 3626:

§ 3626. Appropriate remedies with respect to prison conditions