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 PETITIONER

Team 2126
Attorneys for Petitioner

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QUESTIONS PRESENTED

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

2. Is it a violation of an inmate's Eighth Amendment right against cruel and unusual punishment for a prison facility to impose a blanket ban against gender affirmation surgery without permitting those inmates suffering from gender dysphoria to undergo an individualized examination to demonstrate necessity for such surgery, and then providing inmates with such surgery when found necessary?

STATEMENT OF THE CASE

I. Facts

Respondent, Lucas Escoffier, is a transgender male living within the state of Silphium, who is transitioning from female to male. R. at 1. In early adulthood, Mr. Escoffier sought out medical treatment for depression and suicidal ideations. *Id.* In March of 2011, Mr. Escoffier was diagnosed with gender dysphoria, and the following year he began to socially transition by using masculine pronouns and adopting the name Lucas. *Id.* Years later, Mr. Escoffier legally changed his name to Lucas Escoffier to further confirm his gender identity. *Id.*

In 2013, Mr. Escoffier began gender alignment therapy and hormone therapy, each of which are medical treatments for gender dysphoria. *Id.* Mr. Escoffier underwent a double mastectomy in 2014 that was unrelated to his treatment for gender dysphoria; however, he elected to have reconstructive surgery on his chest to bring his physical appearance more in line with his gender identity for the purpose of abating the symptoms of gender dysphoria. *Id.*

The steps Mr. Escoffier took to socially, legally, and physically transition helped with his gender dysphoria symptoms for a time; however, in April of 2018, Mr. Escoffier's condition worsened, and he again began suffering from chronic depression and suicidal ideation. *Id.* Mr. Escoffier again consulted with his doctor, who determined that gender affirmation surgery was necessary to further treat his symptoms. *Id.* Over a year later, Mr. Escoffier's doctor, Dr. Johanna Semlor, referred

him to the University Medical Center to be evaluated for gender affirmation surgery. R. at 2, 17. The record does not indicate that Mr. Escoffier was ever scheduled for the surgery consultation or that a medical provider ever agreed to perform the surgery on Mr. Escoffier.

Ten days after Mr. Escoffier decided to seek gender affirmation surgery, and over a year after he and his doctor began inquiring about scheduling the surgery, Mr. Escoffier was arrested, charged, and indicted on charges for criminal tax fraud in the first degree, along with other incidental charges related to the fraud. R. at 2. After posting bail, Mr. Escoffier plead guilty on March 1, 2020, and began his five-year sentence at Garum Correctional Facility ("Garum"), the only such facility in the state, on March 7, 2020. *Id.*

A short time after Mr. Escoffier's incarceration began, Miasmic Syndrome rapidly spread across the globe causing a worldwide pandemic that left millions dead and many more infected. *Id.* Across the country, all levels of governments began implementing strict public health and safety measures. *Id.* Miasmic Syndrome particularly impacted prisons. R. at 3. Garum implemented strict policies, such as canceling classes, canceling training opportunities, and limiting recreational time for the inmates to quell the dangerous conditions a prison creates during a pandemic. *Id.* Further, Garum suspended all in person visitations, including in person attorney meetings. *Id.* Garum made video conferencing available to inmates, but due to high

demand, there was notable backlog in appointments that caused significant delays in inmate meetings. R. at 4.

During this time, Mr. Escoffier's condition quickly deteriorated as highlighted by depressive episodes, hair loss, anxiety, paranoia, and suicidal ideations. *Id.* Mr. Escoffier continued to see the medical team for his gender dysphoria and continued his hormone therapy and psychotherapy – despite the strain the pandemic created on the medical resources at Garum. *Id.* However, Mr. Escoffier viewed his deteriorating condition as signs of his worsening gender dysphoria and notified the Garum staff that he required gender affirmation surgery to fully treat his symptoms. *Id.*

The Garum Correctional Facility's Medical Policy Handbook ("Handbook") states that the facility will not provide surgical intervention for gender dysphoria. R. at 11. However, the Handbook provides for mental health counseling and hormonal treatment. *Id.* A committee of fifteen medical professionals, including: Dr. Chewtes, Garum's resident psychiatrist who has treated over 100 patients suffering from gender dysphoria; Dr. Bergamot, a general surgeon with over thirty years of experience; Dr. Cordata, an endocrinologist with over twenty-five years of experience; and Dr. Mitsuba, a plastic surgeon specializing in reconstruction with over thirty years of experience; sat on Garum's health policy committee ("Committee") that created the policies in the Handbook. R. at 13. As a starting point for developing the treatment plan for gender dysphoria, and in determining whether to provide surgical

intervention for gender dysphoria, the Committee consulted the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* ("WPATH"). R. at 14. The Committee unanimously decided to prohibit surgical intervention for inmates with gender dysphoria despite the WPATH standards that provide that surgical intervention can, in some instances, provide significant relief to gender dysphoria patients. *Id.*

Mr. Escoffier met with Garum's psychiatrist, Dr. Chewtes, to discuss potential treatments for his worsening gender dysphoria. R. at 4. Dr. Chewtes and other medical staff communicated to Mr. Escoffier that Garum does not provide surgery to inmates suffering from gender dysphoria. *Id.* Based on that, Mr. Escoffier filed multiple grievances contesting Garum's denial of an individual evaluation for gender affirmation surgery. R. at 5. Garum denied all of Mr. Escoffier's grievances based on Garum's policy that prohibits surgical intervention. *Id.*

Following the final denial, Mr. Escoffier obtained counsel through a local firm, Forme Cury, and attorney Ms. Sami Pegge. *Id.* They filed a complaint against Garum Prison Warden Max Posca alleging that Garum violated Mr. Escoffier's Eighth Amendment rights by imposing the blanket ban on surgical intervention for gender dysphoria patients. *Id.* The district court dismissed the complaint and found for Garum. R. at 6. Ms. Pegge informed Mr. Escoffier that Forme Cury would continue the case and appeal the decision. *Id.* However, before any such action occurred, Ms. Pegge contracted Miasmic Syndrome and as a result became incapacitated for over

two weeks. *Id.* Ms. Pegge left a note asking for her firm to forward all active cases to another associate; however, despite Forme Cury being a medium sized firm with twenty-five attorneys and forty support staff, the firm never forwarded the cases and Mr. Escoffier's case was not addressed. R. at 7.

On March 2, 2021, Mr. Escoffier reached out to the firm and an associate of the firm informed him of Ms. Pegge's condition and that Mr. Escoffier would have to submit his Notice of Appeal on his own via the prison mail system. *Id.* Mr. Escoffier did so, with a completed prison mailbox form, that same day. *Id.* Garum did not mail the appeal until five days later and the district court did not receive it until March 10, 2021. *Id.*

II. Procedural History

On October 5, 2020, Mr. Escoffier filed a civil action against the warden of Garum Correctional Facility, Max Posca, under 42 U.S.C. § 1983. R. at 8. Mr. Escoffier alleged that Garum's refusal to provide an individual evaluation and Garum's policy prohibiting gender affirmation surgery constituted a violation of his Eighth Amendment rights against cruel and unusual punishment. R. at 8. On October 25, 2020, Posca moved to have the case dismissed for failure to state a claim under FRCP 12(b)(6). *Id.* The District Court of Silphium converted the motion into a motion for summary judgment and granted that motion in favor of Posca on February 1, 2021. *Id.*

Mr. Escoffier personally mailed the Notice of Appeal to the district court via the prison mail system on March 2, 2021, and the court received and filed the appeal on March 10, 2021. *Id.* On August 15, 2021, a divided panel of the United States Court of Appeals for the Fourteenth Circuit reversed the district court, finding that: 1) The Notice of Appeal is timely under the prison mailbox rule, which can be applied to incarcerated individuals otherwise represented by counsel, and 2) Garum's refusal to provide an individual evaluation and Garum's policy prohibiting gender affirmation surgery constituted a violation of Mr. Escoffier's Eighth Amendment rights against cruel and unusual punishment. *Id.*

Posca appealed to the United States Supreme Court for a writ of certiorari on August 1, 2021. This Court granted certiorari on September 22, 2021. R. at 9.

STANDARD OF REVIEW

For a federal court to exercise jurisdiction in a civil case, a notice of appeal must be timely filed within the thirty-day time limit that Fed. R. App. P. 4(a) prescribes. *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Courts cannot apply equitable doctrines to unique circumstances when evaluating whether jurisdiction is proper. *Id.* A federal court lacks subject matter jurisdiction to hear the appeal if a party files a notice of appeal outside the window Fed. R. App. P. 4(a) provides. *Cohen v. Empire Blue Cross & Blue Shield*, 142 F.3d 116, 118 (2d Cir. 1998). Appellate courts review subject matter jurisdiction *de novo*, and the party asserting jurisdiction "constantly" bears the burden of showing that jurisdiction exists. *Raj v. Louisiana State Univ.*, 714 F.3d 322, 327 (5th Cir. 2013) (quoting *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)). Where a court lacks subject matter jurisdiction, the court must dismiss the claim. *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012).

Appellate courts review motions for summary judgment *de novo* using the same standard as the district court. *Hicks v. Ferreyra*, 965 F.3d 302, 308 (4th Cir. 2020). The Federal Rules of Civil Procedure require summary judgment when there is no genuine dispute of material fact. Fed. R. Civ. P. 56(a). When the undisputed facts, taken in light most favorable to the nonmovant, present no question of law where the nonmovant will prevail, the Court must grant summary judgment for the moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). Once the

movant makes prima facie showing that there is no genuine dispute of material fact, the burden of proof shifts to the party opposing the motion; the opposing party must prove that specific evidence is both material and in dispute. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The opposing party cannot rely on "the mere existence of a scintilla of evidence" nor on metaphysical doubt. *Id.* at 252. The moving party shall prevail on a motion for summary judgment when the movant shows that there is insufficient evidence to support the nonmovant's claim. *Celotex,* 477 U.S. at 323.

ARGUMENT

Issue One – Prison Mailbox Rule

I. Mr. Escoffier Cannot Benefit from the Prison Mailbox Rule Because this Court Created that Rule to Apply to Pro Se Inmates and Mr. Escoffier Maintained Representation when Filing his Notice of Appeal, so his Appeal is Untimely Filed and this Court Lacks Jurisdiction.

This Court should reverse the decision of the Court of Appeals for the Fourteenth Circuit because Mr. Escoffier, as a represented individual, cannot benefit from the prison mailbox rule and the federal courts therefore lack subject matter jurisdiction to hear his appeal. The Federal Rules of Appellate Procedure require that an individual seeking to appeal a federal district court decision must file a notice of appeal with that district court within thirty-days of the entry of judgment. Fed. R. App. P. 4(a)(1). Recognizing the unique difficulties that incarcerated pro se defendants have in meeting that deadline, this Court created what is known as the "prison mailbox rule" in *Houston v. Lack*. 487 U.S. 266 (1988). This Court held that a prisoner's notice of appeal is timely filed where a pro se prisoner deposits his notice of appeal with the proper prison authorities, for forwarding to the district court, on or before the expiration of the thirty-day period that Fed. R. App. P. 4(a)(1) imposes. *Id.* at 276. Accordingly, the prison mailbox rule provides that a pro se prisoner's notice of appeal is considered filed at the moment the prisoner delivers the notice of appeal to prison authorities. *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003).

Federal Rule of Appellate Procedure 4(c) has since been amended to reflect the prison mailbox rule. Fed. R. App. P. 4(c). The Rule provides that an inmate incarcerated in an institution with a system for legal mail must utilize that system

in filing his notice of appeal and that filing is timely if deposited in the prison mail system on or before the last day for filing. Fed. R. App. P. 4(c)(1). Additionally, the filing must include: either a declaration in compliance with 28 U.S.C. § 1746[1] or a notarized statement listing the date of deposit and attesting that first-class postage is prepaid; or other evidence, such as a postmark or date stamp, that shows the prisoner deposited the notice of appeal on or before the deadline and that postage is prepaid. Fed. R. App. P. 4(c)(1)(a)(i)-(ii). The Advisory Committee Notes to Fed. R. App. P. 4(c) specify that the amendment to the Rule "reflects" the Supreme Court's decision in *Houston* "that a pro se prisoner's notice of appeal is 'filed' at the moment of delivery to prison authorities for forwarding to the district court." Fed. R. App. P. 4(c) advisory committee's notes to 1993 amendment.

A. The Prison Mailbox Rule is for the Benefit of Pro Se Defendants and Lacking Counsel is Therefore a Prerequisite to the Application of the Prison Mailbox Rule, and Mr. Escoffier did not Lack Counsel at the Time of His Appeal.

This Court created the prison mailbox rule based on the "unique circumstances of a pro se prisoner[.]" *Houston*, 487 U.S. at 272. This Court referenced at length the difficulties of appellant prisoners lacking counsel, including the inability to monitor the receipt of their notices of appeal, the reliance upon the workings of the prison mail system rather than the postal service or private carriers, and the inability to personally deliver the notice of appeal in the event of a mail error. *Id.* at 271. As a basis for the prison mailbox rule, this Court noted the difference between the ability

[1] 28 U.S.C. § 1746 provides that a declaration stating "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)" satisfies the declaration requirement. Federal Rules of Appellate Procedure Appendix of Forms 7, entitled "Declaration of Inmate Filing" and designed to facilitate inmate compliance with Fed R. App. P. 4(c)(1), calls for the following declaration: "I am an inmate confined in an institution. Today, _____ [insert date], I am depositing the _____ [insert title of document; for example, "notice of appeal"] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf. I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621)."

of represented prisoners to rely on their counsel to ensure timely filing and that of pro se prisoners who "by definition, do [not] have lawyers who can take these precautions for them." *Id.*

Because this Court rooted the basis of the prison mailbox rule in the unique circumstances of pro se prisoners, "[t]he majority of circuits have declined to extend the prison mailbox rule to prisoners proceeding with counsel." *Cretacci v. Call*, 988 F.3d 860, 867 (6th Cir. 2021). In so holding, circuits courts have utilized the pro se defendant basis of the prison mailbox rule to preclude a represented prisoner from benefitting from the prison mailbox rule in a wide variety of filings, including civil complaints, habeas corpus petitions, and notices of appeals. *Id.* (citing *United States v. Camilo*, 686 F. App'x 645, 646 (11th Cir. 2017); *Cousin v. Lensing*, 310 F.3d 843, 847 (5th Cir. 2002); *United States v. Rodriguez-Aguirre*, 30 F. App'x 803, 805 (10th Cir. 2002); *Burgs v. Johnson County*, *Iowa,* 79 F.3d 701, 702 (8th Cir. 1996)).

In *Burgs v. Johnson County, Iowa*, the Seventh Circuit held that a represented prisoner could not benefit from the prison mailbox rule when filing his notice of appeal. *Burgs*, 79 F.3d at 702. In that case, an inmate brought a 42 U.S.C. § 1983 suit against jail officials and the court granted summary judgment in favor of the jail. *Id.* at 701. The record indicated that both the inmate and the inmate's counsel received the final order and judgment. *Id.* Three days after the deadline for filing an appeal had passed, the inmate filed a pro se notice of appeal and a request for appointment of counsel. *Id.* The court appointed the same counsel that represented the inmate at the district court level and requested that the parties brief whether the inmate's notice of appeal fell within the prison mailbox rule that this Court established in *Houston*. *Id.* at 702.

The Seventh Circuit held that the inmate could not benefit from the prison mailbox rule because the prison mailbox rule "was premised on the plight of an inmate who proceeded pro se in the district court, lost, and then sought to appeal without the benefit of counsel." *Id.* Because the inmate in *Burg* had counsel, he was "thus in the same position as other litigants who rely on their attorneys to file a timely notice of appeal" and could therefore not benefit from the pro se prison mailbox rule created in *Houston*. *Id.*

Similarly, in *Stillman v. LaMarque*, the Ninth Circuit held that a prisoner whose attorney agreed to prepare pro se habeas petitions on behalf of the prisoner could not benefit from the prison mailbox rule. *Stillman*, 319 F.3d at 1201. In that case, the attorney declined to represent the prisoner on a pro bono basis but offered to draft pro se habeas petitions for the prisoner. *Id.* at 1200. The attorney prepared those documents and coordinated with the prison to allow for the prisoner's signature of the documents, but prison officials did not present the documents to the prisoner until one day after the filing deadline. *Id.* at 1200-01.

The court held that the prisoner, despite a comparatively informal relationship with his attorney, could not benefit from the prison mailbox rule because he had counsel. *Id.* at 1201. The court, drawing from the definition of the practice of law, concluded that an individual who benefits from a lawyer's preparation of legal documents and whose lawyer arranges for those documents to be signed is not proceeding without the assistance of counsel. *Id.* Because being without counsel is a necessary prerequisite for the prison mailbox rule to apply, the court held the prisoner could not benefit from the rule. *Id.*

The instant case is similar to *Burg* and *LaMarque* and is factually similar to cases that circuit courts have used when limiting the prison mailbox rule to

unrepresented inmates. Like the inmate in *Burg*, Mr. Escoffier had representation at the district court level. Additionally, the record in this case also indicates that both Mr. Escoffier and Sami Pegge, Escoffier's attorney, received notice of the judgement and order against Mr. Escoffier from the district court. R. at 6. Moreover, the record here indicates that Mr. Escoffier and Pegge were not simply aware of the judgment but discussed it together and agreed that Forme Cury would continue to represent Mr. Escoffier during the course of the appeal. R. at 6.

The contact between Mr. Escoffier and Forme Cury extends far beyond the contact in *Burg*, where the inmate requested the appointment of counsel when filing his notice of appeal. Here, Mr. Escoffier was aware he had counsel immediately after his loss at the district court level and was aware that counsel's law firm would continue to represent him.

The initial conversation between Mr. Escoffier and Pegge following the district court decision provides additional support for the contention that Mr. Escoffier had counsel and therefore cannot meet the pro se prerequisite for the prison mailbox rule. At the time Mr. Escoffier and Pegge conversed following the order and judgment of the district court, Pegge indicated that her law firm, Forme Cury, would continue to represent Mr. Escoffier in the appeal. R. at 6. Pegge noted that Forme Cury would "continue to build the case" and would prepare documents that would later require Mr. Escoffier's signature. R. at 6. As the Seventh Circuit reasoned in *LaMarque*, preparation of documents and the facilitation of signing those documents is a fundamental component of the practice of law. Similarly, Mr. Escoffier cannot benefit from a rule requiring him to be without counsel when he had previously received assurances that his representation would continue, and the attorney's firm would be drafting documents on his behalf.

Moreover, the policy bases behind the prison mailbox rule do not apply in Mr. Escoffier's case. While the Miasmic Syndrome pandemic resulted in communication difficulties between Mr. Escoffier and Pegge at times, the record indicates that the two spoke "shortly after" the district court issued its decision on February 1, 2021. R. at 6. At that point, Forme Cury knew that an appeal would need to be filed in Mr. Escoffier's case. *Id.* Forme Cury then should have properly calendared the thirty-day filing deadline; Pegge herself realized that there was an impending filing deadline and asked that all of her inmate matters be transferred to another associate within the firm. R. at 6-7. While this case would pose a more difficult question if Pegge's incapacitation resulted in a complete lack of contact between Mr. Escoffier and Forme Cury, the record indicates an almost immediate communication between the two, and assurances that representation would continue in the form of legal preparation for ultimately filing an appeal.

Additionally, Mr. Escoffier communicated with Forme Cury shortly before the filing deadline. R. at 7. During that conversation, another associate with Forme Cury informed Mr. Escoffier that he should place a notice of appeal in the prison mail system. R. at 7. The record does not indicate that there was any impediment at the time of that conversation that prevented the Forme Cury associate (or anyone at Forme Cury), aware that the firm was responsible for Mr. Escoffier's case, from filing the notice of appeal with the district court within the deadline. Such a responsibility is precisely the precaution that this Court noted represented prisoners rely on attorneys to take for them. *Houston*, 487 U.S. at 271 ("*Pro se* prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these

precautions for them.") Here, Mr. Escoffier had a law firm who could take those precautions for him.[2]

Mr. Escoffier will likely argue that Pegge's incapacitation effectively rendered him a pro se litigant. However, this Court should reject that argument given the record that indicates that Mr. Escoffier communicated with Forme Cury, the law firm that represented him in district court and pledged to continue representing him in his appeal, both immediately after the appeal window opened and immediately before the appeal window closed. This Court should adopt the reasoning of the *LaMarque* court and find that a prisoner who receives assurances that a law firm would be working on his behalf and preparing documentation in his case cannot, by definition, be a pro se litigant. Pegge's incapacitation did not render Mr. Escoffier without effective representation at Forme Cury.

This Court should find that Mr. Escoffier retained counsel during the entirety of his case and, because of that, he cannot benefit from the prison mailbox rule that is designed to benefit pro se inmates given their unique circumstances.

II. Even if Mr. Escoffier Can Benefit from the Prison Mailbox Rule, His Filing Did Not Meet the Requirements of Fed. R. App. P. 4(c).

Even if this Court finds that the pro se prison mailbox rule applies to prisoners who have a law firm working on their behalf, this Court should find that Mr. Escoffier's notice of appeal and prison mail form fail to meet the requirements necessary to benefit from Fed. R. App. P. 4(c). The Rule requires that the notice of appeal must contain either a declaration in compliance with 28 U.S.C. § 1746, a

[2] As Judge Chang's dissent noted, the resources of law firms are vast and attorneys within law firms are "'presume[d]' to 'shar[e] in the confidential information' pertaining to their clients." *Atasi Corp. v. Seagate Tech.*, 847 F.2d 826, 829 (Fed. Cir. 1988). The record here indicates that Forme Cury possesses 25 attorneys and 40 support staff. R. at 5.

notarized statement, or "evidence (such as a postmark or date stamp)" showing that the notice was deposited on or before the deadline and that postage is prepaid. Fed. R. App. P. 4(c)(1)(a)(i)-(ii). Because Mr. Escoffier's filing does not contain either a declaration, notarized statement, or sufficient evidence to document that the notice of appeal was in fact the document deposited, Mr. Escoffier cannot benefit from Fed. R. App. P. 4(c).

As a threshold issue, the record clearly indicates that Mr. Escoffier's "Garum Correctional Facility Mailing Certificate" does not contain the language that 28 U.S.C. § 1746 requires to meet the declaration requirement, nor does it contain a notary's stamp or signature. R. at 21. Accordingly, Mr. Escoffier's filing can only meet the requirements of Fed. R. App. P. 4(c) if it contains evidence that indicates that "*the notice* was [] deposited" within the requisite time frame and that postage was prepaid. Fed. R. App. P. 4(c)(1)(a)(i) (emphasis added).

Mr. Escoffier's facility mailing certificate contains no evidence that sufficiently ties it to the notice of appeal. The Rule clearly states that any evidence that is used to support the contention that the notice of appeal was deposited within the requisite timeframe must show the notice itself was the document being deposited. Mr. Escoffier's mailing certificate makes no mention of the notice of appeal.

Mr. Escoffier may argue that the record's timeline of events supports the position that Mr. Escoffier deposited the notice of appeal and prison mail certificate with prison officials on March 2, 2021. Petitioner concedes that point. However, that point alone is insufficient to meet the requirements of Fed. R. App. P. 4(c) that requires any evidence submitted to support that the inmate filed the notice of appeal itself within the deadline. Put simply – without any reference to the notice of appeal, it is impossible to conclude that Mr. Escoffier's mailing certificate shows that he

deposited the notice of appeal with the mailing certificate. The Rule requires more than a simple coincidence of timing; it requires evidence that shows the date of the notice of appeal's filing, and the mailing certificate here does not contain that evidence – or any mention of the notice of appeal.

This Court should conclude that Mr. Escoffier's mailing certificate, which does not mention the notice of appeal, is insufficient to provide the requisite evidence under Fed. R. App. P. 4(c) to tie the mailing certificate to the notice of appeal, and Mr. Escoffier therefore cannot benefit from the Rule.

Issue Two – Eighth Amendment Violation

III. Mr. Escoffier Failed to Show that Garum and its Warden Denied Him Adequate Care for his Serious Medical Need and that they Acted with Deliberate Indifference Sufficient to Constitute an Eighth Amendment Violation.

This Court should reverse the ruling of the Fourteenth Circuit and find that Mr. Escoffier's Eighth Amendment rights were not violated because Mr. Escoffier was never denied adequate medical care for his serious medical need and because Garum and its warden, Posca, never acted with deliberate indifference towards Mr. Escoffier's treatment. The Eighth Amendment protects prisoners from "cruel and unusual punishment." U.S. Const. amend. VIII. Though originally meant to protect prisoners from torture, contemporary interpretations of the Eighth Amendment are more expansive and meant to "bar punishments incompatible with the 'evolving standards of decency that mark the progress of a maturing society.'" *Campbell v. Florian*, 972 F.3d 385, 393 (4th Cir. 2020) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). Additionally, the Eighth Amendment prohibits not only cruel and

unusual actions against prisoners, but the present standard also precludes inaction that constitutes a "deliberate indifference to serious medical needs of prisoners" and therefore "deliberate indifference to a prisoner's serious illness or injury states a cause of action under [42 U.S.C. § 1983]." *Estelle*, 429 U.S. at 104-105. This Court has held that prison officials have a duty to "ensure that inmates receive *adequate* food, clothing, shelter, and medical care[.]" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (emphasis added).

To succeed, claims under the Eighth Amendment are subject to a two-part test. *Farmer*, 511 U.S. at 833-34; *Estelle*, 429 U.S. at 106; *Edmo v. Corizon, Inc.,* 935 F.3d 757, 766 (9th Cir. 2019); *Gibson v. Collier*, 920 F.3d 212, 219 (5th Cir. 2019). First, inmates must show that deprivation of one of the aforementioned adequacies is objectively, sufficiently serious such that the prison official's act or failure to act denies a prisoner a minimal necessity. *Farmer*, 511 U.S. at 834. Second, the inmate must show that prison officials "have a sufficiently culpable state of mind" that constitutes a "deliberate indifference to inmate health or safety." *Id.* (internal quotations omitted). Therefore, to succeed on his claim, Mr. Escoffier must show that the prison's decision to preclude gender affirmation surgery evaluations from covered medical procedures fell so far below the standard of care that he was no longer receiving adequate medical care for his sexual transition. Mr. Escoffier then must additionally show that Posca acted with deliberate indifference that hindered or prevented Mr. Escoffier's access to adequate medical care such that there was a

wanton and unnecessary infliction of pain. Neither are true under the current standard.

A. Garum and Posca Treated Mr. Escoffier's Gender Dysphoria with an Objectively Adequate Standard of Care that was Medically Sufficient to Treat His Gender Dysphoria.

Sexual identity is one of the most intimate of human characteristics and there is no challenge here as to the seriousness of Mr. Escoffier's condition. At issue in this case is whether the denial of gender affirmation surgery evaluation is objectively, sufficiently serious to transgender inmates that, even if they are receiving hormone replacement therapy and psychotherapy, the prison is denying them adequate medical care. In determining what level of care should be deemed sufficient, an Eighth Amendment claim cannot survive based solely on disagreement with prison medical professionals. *See Gibson*, 920 F.2d at 216.

In *Gibson v. Collier*, the Fifth Circuit held that a prison's blanket ban on gender affirmation surgery was constitutional. *Id.* at 228. In that case, the court reasoned that there was a sharp divide among the medical community in determining whether gender affirmation surgery was required for proper care of transgender persons. *Id.* at 216. Furthermore, the court found that it was not *unusual* to blanketly deny gender affirmation surgery because no prison was offering gender affirmation surgery to treat gender dysphoria. *Id.*

Neither the Eighth Amendment nor applicable case law mandate "comfortable prisons." *Farmer*, 511 U.S. at 833 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349

(1981)). What the Eighth Amendment does require is that prisoners are free from inhumane treatment. *Id.* Simply because a prison does not provide an inmate's preferred treatment does not automatically warrant an Eighth Amendment challenge. *Gibson*, 920 F.3d at 216. According to Mr. Escoffier, the WPATH standards for gender dysphoria are considered the "gold standard." R. at 27. But the Eighth Amendment does not mandate gold standard care for inmates; rather, it requires adequacy in medical care. *See Farmer*, 511 U.S. at 833.

Furthermore, as the *Gibson* court found, "[A] single dissenting expert does not automatically defeat[] medical consensus about whether a particular treatment is necessary in the abstract." *Id.* at 220. Where there is robust disagreement among the medical community, the Court must restrain its analysis to only determine whether the care provided to an inmate is adequate and refrain from making medical determinations. *See Kosilek v. Spencer*, 774 F.3d 63, 90 (1st Cir. 2014) ("The law is clear that where there are two alternative courses of medical treatment that exist, and both alleviate negative medical 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 [Department of Corrections] adopt the more compassionate of the two adequate options."); *see also Gibson*, 920 F.3d at 220 ("But where, as here, there is robust and substantial disagreement dividing respected members of the expert medical community, there can be no claim under the Eighth Amendment.").

Mr. Escoffier has received care for his gender dysphoria every day that he has been in prison — his medication never ceased, and he never lacked access to competent medical professionals.[3] Quite frankly, Mr. Escoffier is receiving more comprehensive care in prison than many Americans have access to on a regular basis.[4]

The medical community is divided on whether gender affirmation surgery is objectively necessary. Further instructive for this Court, the federal government, through the Centers for Medicare & Medicaid Services, has refrained from issuing a National Coverage Determination on the necessity of gender affirmation surgery for those suffering from gender dysphoria. *See* Ctr. for Medicare & Medicaid Servs., U.S. Dep't. Health & Human Servs., *Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria*, CAG #00446N, Aug. 30, 2016, https://www.cms.gov/medicare-coverage-database/view/ncacal-decision-memo.aspx?proposed=N&NCAId=282.

Through the Committee, with over eighty-five combined years of medical and psychotherapy experience, Garum not only evaluated the available treatments for

[3] As the Fourteenth Circuit noted, Garum provides access to competent medical professionals for the treatment of gender dysphoria.

[4] To date, roughly 1.4 million adults in the U.S. identify as transgender. Roughly 152,000 of those identifying as transgender are enrolled in Medicaid — fewer than 69,000 of those on Medicaid have access to gender affirming care. Only seventeen states cover gender affirming care, including gender affirmation surgery, under Medicaid plans. *See* Christy Mallory & William Tentindo, *Medicaid Coverage for Gender-Affirming Care*, UCLA School of Law Williams Institute, 1-2, October 2019; *see also Transgender Health Care*, Healthcare.gov, https://www.healthcare.gov/transgender-health-care/. (Notifying those identifying as transgender that their health plan is not federally mandated to cover gender affirmation therapy).

gender dysphoria, but unanimously determined that gender affirmation surgery was not a required treatment for gender dysphoria. R. at 14. Like the Fourteenth Circuit noted in its opinion, Garum inmates have continual access to hormone therapy and competent medical professionals for the treatment of gender dysphoria. Simply because an inmate disagrees with the medical decisions of a prison medical board does not mean that the prison has denied the inmate an objectively adequate standard of care, which the Eighth Amendment requires.

Mr. Escoffier claims that during the pandemic he began to experience serious depression, bouts of weight loss, hair loss, loss of appetite, severe anxiety and paranoia, and perpetual suicidal ideation. R. at 4. He claims that he — not a medical professional — recognized that those were worsening symptoms of gender dysphoria, that his current regime of hormone replacement therapy and psychotherapy were insufficient, and that his symptoms were becoming intolerable. *Id.* However, the record does not include any evidence that the medical team determined that his ailments reached a point that was so severe that it was objectively clear that his current hormone regimen was insufficient to treat his symptoms.

Because Mr. Escoffier has failed under the first prong of the Eighth Amendment analysis to prove that his standard of care fell so far below what is objectively necessary to treat his gender dysphoria, this Court should vacate the decision of the Fourteenth Circuit and reinstate the district court's grant of summary judgment.

B. Mr. Escoffier Failed to Establish that Garum or Posca Acted with Deliberate Indifference to Establish a Claim Under the Eighth Amendment.

This Court has determined that "deliberate indifference to the serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain" sufficient to satisfy an Eighth Amendment claim. *Estelle*, 429 U.S. at 104 (internal citations omitted). Furthermore, this Court has held that "medical malpractice does not become a constitutional violation merely because the victim is a prisoner" and that "[i]n order to state a cognizable harm, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* Additionally, this Court has held that deliberate indifference is "something more than mere negligence… satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 144 U.S. at 835.

Like the Fourteenth Circuit noted in its decision, some inmates suffering from gender dysphoria in prison have caused themselves serious harm. *See, e.g.*, *Edmo*, 935 F.3d 757, 767 (9th Cir. 2019) (inmate engaged in self-cutting and twice attempted self-castration); *see, e.g.*, *Gibson*, 920 F.2d at 217 (inmate attempted suicide multiple times and attempted self-castration); *see, e.g.*, *Kosilek*, 774 F.3d at 69 (prisoner, who identified and presented as female, was placed in an all-male facility, attempted self-castration, and doctors determined she was at grave risk for suicide). However, to succeed on an Eighth Amendment claim, an inmate must demonstrate that a prison official, inclusive of doctors and guards, "knows of and disregards an excessive risk to

inmate health or safety; the official must both be aware of the facts from which a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 144 U.S. at 837.

In this case, the Fourteenth Circuit improperly analogizes Mr. Escoffier's medical care with the inmate's medical care in *Edmo v. Corizon* whose suicidal ideations took active form in multiple suicide attempts and attempts at self-castration. 935 F.3d 757, 767. In *Edmo*, even the prison doctors, who had no experience evaluating transgender persons, were aware of the risk of self-harm presented in that inmate and that the inmate's gender dysphoria "had risen to another level." 935 F.3d at 793. Still, in that case, the prison refused to consider gender affirmation surgery. *Id.* The *Edmo* court reasoned that although the state's expert witnesses claimed to rely on the WPATH standards in evaluating Ms. Edmo, the doctors acted with indifference in applying the standards when treating the inmate's gender dysphoria. *Id.* at 789. That is not the case with Mr. Escoffier.

Garum and Posca do not question the seriousness of Mr. Escoffier's gender dysphoria. In fact, Garum and Posca have amassed a panel of medical professionals who are proficient in the treatment of gender dysphoria and who took care to review the WPATH standards and their applicability to transgender inmates at Garum. Over two days of discussion, the panel determined that the inclusion of gender affirmation surgery was unwarranted, at that time, for the general treatment of gender dysphoria. R. at 14. This is easily distinguishable from the doctors consulted

in *Edmo*, who had little to no experience treating transgender persons or those suffering from gender dysphoria. In sharp contrast to the prison's indifference in *Edmo*, Garum's medical professionals continue to see Mr. Escoffier and treat him for his gender dysphoria. Through these assessments, Mr. Escoffier's prison doctors determined that his gender dysphoria was treatable with hormone therapy and psychotherapy, and they did not believe that his symptoms were worsening to the point of requiring them to re-evaluate the preclusion of gender affirmation surgery.

Posca is not a medical professional — he is a prison warden. His understanding of gender dysphoria and engagement with the medical needs of transgender inmates relies solely on the evaluations of the prison's medical professionals. Here, Posca has overseen the intake and custody of every level of offender, both male and female, and never denied his transgender inmates access to individualized hormone therapy, psychotherapy, or competent medical care. In fact, in this instance, Posca is overseeing the health needs of all Garum's inmates in the face of a global pandemic, while he adequately addressed the administrative appeals of Mr. Escoffier's medical denial.

Because the Garum medical team properly considered the WPATH standards when writing the Handbook and Mr. Escoffier continues to receive the constitutionally required medical treatment for his gender dysphoria, there is no evidence that Garum or Posca acted with deliberate indifference towards Mr. Escoffier's serious medical need.

CONCLUSION

This Court should find for the Petitioner for two reasons. First, this Court lacks jurisdiction to hear this appeal because Mr. Escoffier maintained representation throughout his appeal and is not a pro se inmate who can benefit from the prison mailbox rule, and his appeal is therefore untimely filed. Second, because Mr. Escoffier fails to show that Garum and Posca responded to his serious medical need with deliberate indifference, he cannot satisfy the two-part test necessary to establish an Eighth Amendment violation. For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision of the Court of Appeals for the Fourteenth Circuit and reinstate the district court's grant of summary judgment.

Respectfully submitted,
Team Number 2126