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

BRIEF FOR PETITIONER

Oral Argument Requested

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Southeast Regional
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STATEMENT OF THE ISSUES

1. Whether the prison mailbox rule extends to a represented inmate even if his attorney was temporarily incapacitated when he has been represented and benefitted from the assistance of counsel throughout his entire lawsuit, and he failed to satisfactorily comply with Federal Rule of Appellate Procedure 4 in filing his notice?
2. Whether a policy prohibiting Gender Affirmation surgery violates the Eighth Amendment's proscription against cruel and unusual punishment when an experienced committee of medical professionals developed and approved the policy, alternate forms of treatment are offered, and a genuine debate exists within the medical community about the necessity or efficacy of the denied treatment.

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STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

Petitioner, warden of Garum Correctional Facility, Max Posca, appeals to the Supreme Court of the United States following the Fourteenth Circuit court's reversal of the district court's decision. Record 8. The district court dismissed the Respondent's complaint under Federal Rule of Civil Procedure 12(b)(6), converting the Mr. Posca's motion to dismiss into a motion for summary judgment, finding that there are no genuine issues of material fact. Record 8. The Respondent, represented by counsel, filed a Notice of Appeal to the Fourteenth Circuit through the legal prison mailbox on March 2, 2021. Record 7. The Fourteenth Circuit incorrectly found that the Respondent's Notice of Appeal was timely under the prison mailbox rule and that the Garum Correctional Facility's blanket ban prohibiting gender affirmation surgery was a violation of the Respondent's Eighth Amendment rights. Record 8. The Supreme Court granted Petitioner certiorari on September 22, 2021. Record 9.

B. Statement of Facts

Garum Correctional Facility ("Garum") is a State of Siphium correctional facility. Record 2. Max Posca is the warden and administrator of Garum. Record 10. In early 2019, Erica Laridum, a board-certified physician licensed and chief physician at Hope State Hospital, was asked to take on a temporary role in the Division of Health Director of Garum, where she would assemble and chair a

committee charged with reviewing inmate-care standards in Garum. Record 12. While Mr. Posca, as an administrator of Garum, attended committees, he had no influence, nor a vote, on questions of medical treatment. Record 13. His role was to provide information requested by the committee and to formally approve the handbook. *Id.*

To assemble the 15-person committee, Ms. Laridum contacted experienced physicians throughout Siphium. *Id.* She recruited some physicians with broad practices and others with more specialized practices. *Id.* None of the committee members then held, or had previously held, any elected office. *Id.* Questions of political opinions were not considered before inviting the physicians to serve on the committee. *Id.*

Dr. Arthur Chewtes was a committee member and supervising psychiatrist at Garum Correctional Facility. *Id.* Dr. Chewtes has more than 20 years of experience in psychiatry and has treated approximately 100 patients with gender dysphoria, six of whom he is currently treating from among the inmates at Garum. *Id.*

Other members of the committee include Dr. Cordata, who specializes in endocrinology; Dr. Bergamot, a general surgeon; and Dr. Mitsuba, a plastic surgeon who specializes in reconstructive procedures. *Id.* These three members have each been practicing for over thirty years. *Id.*

To develop the treatment plan for inmates with Gender Dysphoria, the committee looked to the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* ("WPATH Standards of Care"),

published by the World Professional Association for Transgender Health ("WPATH"). Record 14. The committee carefully considered the several treatment options included in the WPATH Standards of Care for consideration by providers for each patient. *Id.* Although the standards include consideration of surgical intervention, a member of the committee opined that "surgeries were never medically necessary for treatment of gender dysphoria, given the many options available to treat the condition." *Id.*

Dr. Chewtes and Dr. Cordata confirmed that the administration of hormonal therapies is a common and well tolerated treatment. *Id.* Dr. Chewtes also noted the effectiveness of hormonal therapies when combined with other non-surgical interventions, such as psychotherapy and gender-affirming social interactions. *Id.*

The committee discussed the matter for around an hour that day, as well as for half an hour the next morning. *Id.* The committee unanimously voted to exclude gender affirmation surgery ("GAS") from Garum's plan for treating inmates diagnosed with gender dysphoria. *Id.*

The committee of 15 experienced physicians drafted and unanimously approved the policy for treatment of gender dysphoria as providing for mental-health counseling, hormonal treatment (as dictated by appropriate medical standards), dress and grooming privileges, and, security concerns permitting, allowing transgender inmates their choice of male or female housing units. *Id.* The entire handbook was approved by the committee and Ms. Laridum, and subsequently signed off on by Mr. Posca. *Id.*

Mr. Lucas Escoffier is a transgender man residing in the state of Siphum. He was assigned female at birth and was diagnosed with gender dysphoria in 2011. *Id.* A little over a year later, he began to socially transition by changing his name and adopting the pronouns "he," "his," and "they." *Id.* Two years after his diagnosis, he began medical gender alignment therapies and treatment for gender dysphoria. *Id.* Mr. Escoffier responded well to social transition and hormone therapy, with marked improvement on his outlook in life. *Id.*

For reasons unrelated to gender dysphoria, Mr. Escoffier had a double mastectomy in 2014 and elected to take a reconstructive approach to his chest to be more in line with his gender identity. *Id.* In late 2019, Mr. Escoffier developed a plan with his personal doctor to undergo GAS. Record 1, 2. His doctor noted that Mr. Escoffier tolerated medication and noted a marked decrease in suicidal ideation and in depressive symptoms. Record 16. However, Ms. Escoffier's plans for GAS came to a halt when he was arrested, charged, and indicted with criminal tax fraud in the first degree. Record 2.

On March 1, 2020, Mr. Escoffier, respondent, pleaded guilty to criminal tax fraud in the third degree and received a sentence of five years. *Id.* He began his period of incarceration at Garum on March 7, 2020. *Id.* While at Garum, Mr. Escoffier began treatment for his gender dysphoria with Dr. Chewtes less than two months after the start of his incarceration. Record 18. Mr. Escoffier requested evaluation for GAS. Record 19. However, this request was denied because Garum's policy does not provide for GAS for inmates with gender dysphoria and evaluation

would not contribute to Mr. Escoffier's wellbeing. *Id.* Instead, Dr. Chewtes continued the hormonal therapy consistent with pre-detention usage and provided access to weekly mental health counseling for the duration of detention. Record 18.

Mr. Escoffier appealed the denial and filed a medical grievance. Record 20. Dr. Chewtes reviewed the denial as the supervising psychiatrist, determined the denial was proper, and denied grievance. *Id.* Mr. Escoffier appealed the denial again. *Id.* Dr. Laridum reviewed the appeal and denied grievance, determining the poicy was proper. Mr. Escoffier appealed the denial again. *Id.* Mr. Posca reviewed the third appeal and determined that Garum's Medical Policy Handbook clearly prohibits the requested procedure and found no reason to second-guess the clinical decision making of Dr. Chewtes and Dr. Laridum. *Id.* As such, the grievance was denied. *Id.*

The Respondent reached out to a local law firm, Forme Cury, to seek their assistance in bringing a civil rights lawsuit against the prison for denying him gender affirmation surgery. Forme Cury is a medium-size local firm focused on civil litigation, with approximately 25 attorneys and 40 working staff members. Record 5. From the beginning of his suit to his notice of appeal, Forme Cury represented the Respondent. Record 5. The Respondent's case was assigned to Ms. Sami Pegge. Record 5. Even after the district court dismissed the Respondent's case in favor of the Petitioner, Ms. Pegge continued to represent the Respondent through his appeal, noting that she would be in touch with him to "continue to build the case." Record 6. When Ms. Pegge was hospitalized with the Miasmic Syndrome, the

Respondent still able to ask for assistance from Forme Cury and sent an email to the firm pleading their help on his appeal because he could not reach Ms. Pegge. Record 7. Help did arrive, in the form of Mr. Hami Sharafi, who assisted and advised the Respondent to submit his Notice of Appeal to the prison mailbox. Record 7. Ms. Pegge was aware that the Respondent's signature would be needed on "some documents by early March." Record 6. While Ms. Pegge was hospitalized, Ms. Pegge tasked her legal assistant with properly transitioning her caseload to one of the other 24 attorneys in the firm. Record 5-6. The Respondent was able to email the Forme Cury firm when he needed help with his Notice of Appeal. Record 7. When he finally filed his Notice of Appeal, the Respondent failed to affirm the pre-paid first-class postage for his Notice of Appeal. Record 21. He never subsequently filed any additional declarations under penalty of perjury. Record 21. Warden Posca now appeals to the Supreme Court to reverse the Fourteenth Circuit's ruling. Record 9.

C. Statement of the Standard of Review

The proper standard of review for both certified questions before this Court is de novo because both questions are pure issues of law brought under 42 U.S.C. § 1983. *See Peel v. Atty. Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990).

SUMMARY OF THE ARGUMENT

The Petitioner appeals to the Supreme Court of the United States contending that the Fourteenth Circuit court erred in its decision to extend the prison mailbox rule to incarcerated individuals otherwise represented by counsel. Further, this Court should find that a prison policy excluding gender affirmation surgery as a treatment does not violate an inmate's Eighth Amendment right against cruel and unusual punishment.

The Supreme Court narrowly applied the prison mailbox rule to pro se prisoners because they lack the benefits of counsel, the skills of law, and the ability to leave the prison. *Houston v. Lack,* 487 U.S. 266, 275-76 (1988). The Advisory Committee Note of the 1993 Amendment to Federal Rule of Appellate Procedure 4 states the rule reflects the *Houston* decision. Therefore, this court should also find that the prison mailbox rule only applies to pro se prisoners.

A majority of circuit courts, namely, the Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits, hold that the mailbox rule does not apply to prisoners represented by counsel. Represented prisoners benefit from the skill and knowledge of counsel, unlike the pro se prisoners mentioned in *Houston*. The prison mailbox rule does not apply where a prisoner proceeds with the assistance of counsel.

The Respondent has proceeded with the assistance of counsel from the beginning of his lawsuit where a local firm, Forme Cury, represented him. At his disposal were 25 attorneys and 40 working staff members. When the attorney assigned to his case was incapacitated, she tasked her legal assistant to transition

her caseload. Out of a clerical error, the Respondent did not hear from the firm until March 2, 2021. This error is insufficient to allow the Respondent to benefit from the prison mailbox rule. The Respondent still had the benefit of counsel and was assisted throughout his lawsuit, even up to his Notice of Appeal that was unfairly filed under the prison mailbox rule.

Even if the Respondent is concerned with unfairness, the true unfairness would arise if this Court allowed the Respondent to benefit from both counsel and the prison mailbox rule where counselors—especially when incapacitated—are equipped and meant to file court documents on behalf of their client while inmates are imprisoned.

If the court is inclined to extend the prison mailbox rule to the Respondent, he still did not satisfactorily comply with Federal Rule of Appellate Procedure 4 because he did not accompany his notice with evidence that it was deposited and that the postage was pre-paid. Looking at the four corners of the Rule alone, the Respondent failed to affirm any declarations that he filed this notice, any notarized statements, or any pre-paid first-class postage. Not only does the prison mailbox rule not apply to the Respondent, even if it did, he did not comply with the requisite procedure in filing his notice.

The Eight Amendment of the United States Constitution forbids cruel and unusual punishments. In the context of medical treatment, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The act must be and

unnecessary and wanton infliction of pain or repugnant to the conscious of mankind. Thus, deliberate indifference is a stringent standard of fault requiring proof that a municipal actor disregarded a known or obvious consequence of his action.

First, Respondent cannot show that Garum was deliberately indifferent to his needs because Garum relied on the professional opinion of an experienced, independent medical committee to develop the policy that excludes Gender Affirmation Surgery as a treatment for gender dysphoria. Second, the Garum policy provided for alternative, constitutionally adequate treatment. Garum's policy provides inmates with hormonal therapy, mental health counseling, grooming and dress privileges, and security reasons permitting, the inmate's choice of male or female housing unit. Thus, Garum could not have been deliberately indifferent to the needs of inmates by implementing a comprehensive policy that excludes one single form of treatment.

Further, courts should be hesitant to weigh on "matters for medical judgment," particularly where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine. Both hormonal therapy treatment, used in conjunction with mental health counseling, grooming privileges, and social transitioning accommodations, and gender affirmation surgery are two alternative courses of medical treatment effective in the treatment of gender dysphoria. Therefore, Garum's policy cannot amount to cruel and unusual punishment because the dispute over the propriety of that policy

amounts to little more than a strong disagreement with the course of medical treatment.

Finally, prison officials cannot be deliberately indifferent by excluding gender affirmation surgery as a treatment when there is significant disagreement among the medical community as to the necessity of that treatment. The First Circuit, Fifth Circuit, and Eleventh Circuit have declined to accept the WPATH Standards of Care as the constitutional minima for patients with gender dysphoria because the WPATH Standards of Care reflect one side of a sharply contested debate over gender affirmation surgery. Additionally, other various governmental agencies and insurance providers decline to provide coverage for gender affirmation surgery. Thus, Garum could not have been deliberately indifferent to Respondent's medical needs by accepting and following the Garum committee's treatment guidelines for inmates with gender dysphoria and excluding one controversial method of treatment for inmates.

For the foregoing reasons, this Court should find in favor of the Petitioner.

ARGUMENT

I. A REPRESENTED INMATE IS NOT PERMITTED TO BENEFIT FROM THE PRISON MAILBOX RULE EVEN IF THE INMATE'S ATTORNEY IS INCAPACITATED BECAUSE THE PRISON MAILBOX RULE ONLY APPLIES TO PRO SE PRISONERS.

The Respondent's submission of his notice of appeal is impermissible under the prison mailbox rule because he was represented by an attorney at the time of his submission and thus, was not acting as a pro se defendant permitted to benefit from the prison mailbox rule. Federal Rule of Appellate Procedure 4(c) states:

> if an inmate files 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 and it is accompanied by a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit or evidence showing that the notice was so deposited, and that postage was prepaid.

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

The Advisory Committee Note after the 1993 Amendment states that the amendment to this rule reflects the decision of the Supreme Court in *Houston v. Lack*. In *Houston*, the Supreme Court narrowly applied the prison mailbox rule to pro se prisoners because they are "[u]nskilled in law, unaided by counsel, and unable to leave the prison" they may benefit from the prison mailbox rule. *Houston v. Lack*, 487 U.S. 266, 275-76 (1988). Because of these pro se prisoner's circumstances, the prison mailbox rule provides that a prisoner's notice of appeal is deemed filed at the moment the prisoner places it in the prison mail system, rather than when it reaches the court clerk. *Hurlow v. United States*, 726 F.3d 958, 962 (7th Cir. 2013).

The Court in this case should follow the majority of circuits that have held that the mailbox rule does not apply to prisoners represented by counsel because this very Court has held that the rule is narrowly designed to address the unique circumstances faced by pro se prisoners. Respondent contends that the prison mailbox rule applies to him although he was represented by counsel at the time, he filed his notice of appeal. Analyzing just the four corners of Federal Rule of

Appellate Procedure 4, the prison mailbox rule does not apply to the Respondent and thus, this Court should find in favor of the Petitioner.

A. The prison mailbox rule does not apply to the Respondent because the rule only affords leniency to pro se defendants acting without the aid of counsel.

This Court should find that the prison mailbox rule only applies to pro se defendants. In *Houston,* this Court stressed the necessity of the prison mailbox rule among pro se prisoners because unlike represented prisoners, pro se prisoners do not have lawyers who can take precautions for them in timely filing their notices. *Houston,* 487 U.S. at 271. Since this decision, only a minority of federal circuits, the Fourth and Seventh Circuits, hold that the prison mailbox rule applies to all prisoners, including those who are represented by counsel. The majority of the federal circuits, specifically, the Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, hold that the mailbox rule does not apply to prisoners represented by counsel.

Represented prisoners have at their disposal the aid of counsel and therefore, have no need of the prison mailbox rule. In *Burgs v. Johnson County*, the court held that the prisoner "is not entitled to the benefit of *Houston* because he was represented by counsel and thus in the same position as other litigants who rely on their attorneys to file." *Burgs v. Johnson County*, 79 F.3d 701, 702 (8th Cir. 1996).

The Ninth Circuit also does not extend the mailbox rule to represented prisoners. *Stillman v. LaMarque*, 319 F.3d 1199, 1202 (9th Cir. 2003). In *Stillman*, the lawyer advised the prisoner that she would be mailing the prison a habeas petition for the prisoner to sign and have the prisoner return the signed petition

immediately. *Id.* at 1200. Prison officials did not present the petition to the prisoner until after the time had expired to file the habeas petition. *Id.* The court held that the mailbox rule did not apply to the pro se prisoner's filing because he was assisted by a lawyer. *Id.* at 1201. The court held that, "to benefit from the mailbox rule, a prisoner must meet two requirements. First, the prisoner must be proceeding without assistance of counsel." *Id.; see also Williams v. Russo*, 636 Fed. Appx. 527, 531 (11th Cir. 2016) (holding that the mailbox rule did not apply since counsel represented the inmate and the inmate was not proceeding pro se).

The Sixth Circuit in *Cretacci v. Call*, held that an inmate was not entitled to the prison mailbox rule because he was not proceeding without the assistance of counsel. *Cretacci v. Call,* 988 F.3d 860, 866 (6th Cir. 2021). The court reasoned that the attorney, although unable to practice law in the inmate's jurisdiction and thus, incapacitated, was still the inmate's attorney and had an explicit attorney-client relationship. *Id.* The court held that when an attorney agrees to represent a client, prepare legal documents on his behalf, and give legal advice, the client is not proceeding without the assistance of counsel. *Id.*

In the present case, the Respondent was a represented prisoner, and thus, is not entitled to the benefit of the prison mailbox rule. *Burgs*, 79 F.3d at 702; *Stillman*, 319 F.3d at 1201. From the beginning of his suit to his notice of appeal, a local firm, Forme Cury, represented the Respondent. Record 5. Forme Cury is a medium-size local firm focused on civil litigation, with approximately 25 attorneys and 40 working staff members. Record 5. The Respondent's case was assigned to

Ms. Sami Pegge. Record 5. Even after the district court dismissed the Respondent's case in favor of the Petitioner, Ms. Pegge continued to represent the Respondent through his appeal, noting that she would be in touch with him to "continue to build the case." Record 6. Like the prisoner in *Stillman* and *Burgs*, the Respondent was assisted by a lawyer throughout his entire process. Even when Ms. Pegge was hospitalized with the Miasmic Syndrome, the Respondent still benefitted from the assistance of counsel while imprisoned. The Respondent was able to send an email to Forme Cury pleading their help on his appeal because he could not reach Ms. Pegge. Record 7. Help did arrive, in the form of Mr. Hami Sharafi, who assisted and advised the Respondent to submit his Notice of Appeal to the prison mailbox. Record 7. For purposes of the application of the prison mailbox rule, the Respondent was a represented prisoner, proceeding with the assistance of counsel and thus, unable to benefit from the prison mailbox rule.

The Tenth Circuit addressed the mailbox rule in *U.S. v. Rodriguez-Aguirre*, 30 Fed. Appx. 803, 805 (10th Cir. 2002). In *Rodriguez-Aguirre*, the court stated that "[a]lthough the Supreme Court limited the rule to pro se prisoners, Aguirre asserts prisoners represented by counsel are similarly hampered in taking proper measures to ensure timely filing." *Id.* at 805. The court held that the mailbox rule still did not apply since Aguirre was represented by counsel. *Id.* The court reasoned that because the prisoner was represented by the current counsel on the date the Supreme Court denied certiorari and had a full year to prepare the proper

signatures, counsel should be aware of the potential for delay and is in a position to take precautions to ensure timely filing. *Id.*

Similarly, here, Respondent was represented by the same firm throughout his entire lawsuit. Ms. Pegge was aware that the Respondent's signature would be needed on "some documents by early March." Record 6. While Ms. Pegge was hospitalized, Ms. Pegge's legal assistant was tasked with properly transitioning her caseload to one of the other 24 attorneys in the firm. Record 5-6. Even if the Respondent was unable to reach Ms. Pegge for the approximate two weeks she was hospitalized, Mr. Sharafi, or another attorney at Forme Cury, like the counselors in *Rodriguez-Aguirre*, had a full 30 days to prepare the proper documents, should have been aware of the potential for delay, and should have taken the precautions to ensure a timely filing. *Rodriguez-Aguirre*, 30 Fed. Appx. at 805. With this, the Respondent was represented by counsel and the prison mailbox rule still does not apply to him, even if his untimely filing was the result of counselor error.

A minority of federal circuits, the Fourth and Seventh Circuits, have extended the mailbox rule to all prisoners including those represented by counsel. These two circuits extended the rule to all prisoners for two different reasons.

In *U.S. v. Moore*, the Fourth Circuit extended the application of the mailbox rule to represented prisoners. *U.S. v. Moore,* 24 F.3d 624, 626 (4th Cir. 1994). The court found it "unfair to permit a prisoner's freedom to ultimately hinge on either the diligence or the good faith of his custodians. *Id.* at 625. The court concluded that represented prisoners share the same unique circumstances as pro se prisoners if

jail authorities delay access to counsel. *Id.* However, the Fourth Circuit's concern regarding delayed access to counsel does not justify extending *Houston* to represented prisoners.

Here, the prisoner Respondent's freedom does not ultimately hinge on the "diligence or good faith of his custodians." *Moore*, 24 F.3d at 625. The Respondent, as a represented prisoner, is afforded the benefits of counsel and even reaped these benefits while imprisoned. The Respondent was able to email the Forme Cury firm when he needed help with his Notice of Appeal. Record 7. Unlike pro se prisoners, the Respondent's freedom did not hinge on the good faith of his custodians, rather, on the good faith of his attorneys, to which the attorneys that needed to be more diligent in managing their caseload. These attorneys could take legal action on behalf of his/her client and could address any attempts to delay access to his/her client. The prison mailbox rule cannot be extended to the Respondent for fear of unfairness. Rather, it would be unfair to extend this rule to the Respondent because he would be benefitting from both the services of counsel and the leniency of the prison mailbox rule where pro se prisoners only benefit from the rule.

In *U.S. v. Craig*, the Seventh Circuit extended application of the mailbox rule to represented prisoners. *U.S. v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004). In *Craig*, an inmate filed a pro se notice of appeal because he mistakenly believed that he was no longer represented by counsel. *Id.* The Court analyzed Rule 4(c)(1) of the Federal Rules of Appellate Procedure and held that its language, "an inmate confined in an institution," applies to all inmates, including those represented by counsel. *Id.*

However, the Seventh Circuit in *Craig* did not address the 1993 Advisory Committee Note to Rule 4(c)(1), which states that, "[t]he amendment [adding Rule 4(c)] reflects th[e] decision" of the Supreme Court in *Houston*. Since Rule 4(c)(1), was intended to reflect the holding in *Houston*—which narrowly applied the mailbox rule to pro se inmates acting without the assistance of counsel—the rule of procedure should be construed as being limited to pro se inmates.

Here, it is undisputed that the Respondent is a represented prisoner and thus, this Court should not weigh its ruling based on *Craig*, rather, it should simply analyze Rule 4(c) and hold that the prison mailbox rule is inapplicable in this case.

For the foregoing reasons, the Respondent, who is represented by counsel, is not permitted to benefit from the prison mailbox rule even where his attorney was incapacitated.

B. The Respondent did not satisfactorily comply with Federal Rule of Appellate Procedure 4 because he did not accompany his appeal with evidence that the notice was deposited, and that postage was prepaid.

Because the prison mailbox rule cannot be applied to represented prisoners, the Respondent is unable to benefit from its leniency for pro se prisoners. However, even assuming the rule did apply to represented prisoners, the Respondent failed to comply with Federal Rule of Appellate Procedure 4. Federal Rule of Appellate Procedure 4(c) requires that an inmate's notice of appeal is accompanied by:

> a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid or evidence (such as a postmark or date stamp) showing the notice was so deposited and that postage was prepaid.

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

The Tenth Circuit sheds light on this requirement in *Prince v. Philpot*, 420 F.3d 1158, 1165 (10th Cir. 2005). In *Prince*, the court held that the inmate must attest that such a timely filing was made and has the burden of proof on this issue. *Id.* If the prisoner has a legal mail system, then the prisoner must use it as a means of proving compliance with the mailbox rule. *Id.* Additionally, if a legal mailing system is not available, then a prisoner may make timely use of the prison's regular mail system in combination with notarized statements or a declaration under penalty of perjury of the date on which documents were given to prison authorities and attesting that postage was prepaid. *Id.*

Furthermore, in *United States v. Ceballos-Martinez*, the inmate filed a notice of appeal using the prison mailbox rule. *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143 (10th Cir. 2004). The court analyzed Rule 4(c)(1) and notes the Rule provides the mandatory method by which a prisoner, who does not have access to a legal mail system, proves compliance with the mailbox rule. *Id.* at 1145. If a prison lacks a legal mail system, a prisoner must submit a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attest that first-class postage was pre-paid. *Id.* The inmate in *Ceballos-Martinez* failed to attach a declaration of compliance nor a notarized statement. *Id.* He further failed to affirm he pre-paid first-class postage for any of his filings. *Id.* Never did this inmate subsequently file any declaration or notarized statement in compliance with

Rule 4(c)(1). *Id.* Therefore, the court found that the inmate failed to employ the methods provided by Congress to establish compliance with the mailbox rule. *Id.*

Here, the Respondent failed to attach a declaration of compliance with 28 U.S.C. § 1746 or a notarized statement, pursuant to Rule 4. Like the inmate in *Ceballos-Martinez*, the Respondent failed to affirm he pre-paid first-class postage for his Notice of Appeal. Record 21; *Id.* He never subsequently filed any additional declarations. Record 21. The only evidence provided is the Garum Correctional Facility Mailing Certificate which is not notarized or declared under penalty of perjury. Record 21. The inmate himself does not even attest that the postage is first-class postage. Record 21. Because the Respondent's notice lacks the requisite compliance documents, there is no way of knowing exactly when the Respondent filed his notice in the prison mailbox and thus, there is no way of knowing whether this was done in a timely manner.

Out of sheer resistance to Federal Rule of Appellate Procedure 4, the Respondent did not satisfactorily comply with the Rule. For this reason, the appellate court lacked the jurisdiction to hear the Respondent's case. This Court should, therefore, find in favor of the Petitioner. Not only does the prison mailbox rule not apply to the Respondent, even if it did, he did not comply with the requisite procedure in filing his notice.

II. A PRISON POLICY EXCLUDING GENDER AFFIRMATION SURGERY AS A TREATMENT DOES NOT VIOLATE AN INMATE'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT

Garum's policy prohibiting Gender Affirmation Surgery ("GAS") does not violate the Eighth Amendment because the policy cannot meet the demanding standard of deliberate indifference required to bring a violation the Eighth Amendment.

The Eight Amendment of the United States Constitution forbids cruel and unusual punishments. U.S. Const. amend. VIII. In the context of medical treatment, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). It is only that indifference that can "offend evolving standards of decency" in violation of the Eight Amendment. *Id.* However, not every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eight Amendment. *Id.* at 105. The act or omission must be "an unnecessary and wanton infliction of pain" or must be "repugnant to the conscience of mankind." *Id.* at 105-06.

Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997). There are two showings the Respondent must make under the deliberate indifference standard. First, the Respondent must show a "serious medical need" by demonstrating that "failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *Id.* at 1059 (citing Estelle, 429 U.S. at

104). Second, the plaintiff must show that the Petitioner's response to the need was deliberately indifferent.

As explained below, Garum was not deliberately indifferent to Respondent's serious medical needs by implementing a treatment policy that excludes GAS as a form of treatment because Garum relied on the medical opinions of an independent and experienced panel of medical professionals, Garum provided Respondent with extensive and constitutionally adequate treatment for his condition, and there is significant medical disagreement on the use of GAS as a form of treatment for Gender Dysphoria. In the present case, both parties agree that gender dysphoria is a serious medical need that requires treatment. Record 27.

C. Garum's policy prohibiting Gender Affirmation Surgery was not deliberately indifferent because the policy was implemented by an independent and experienced committee and provides prisoners with comprehensive treatment for their gender dysphoria.

Deliberate indifference is a demanding standard requiring inmates to show a purposeful act or a failure to respond to a prisoner's pain or possible medical need and harm caused by the indifference. *Estelle v. Gamble*, 429 U.S. 97, 104. Negligence or an inadvertent denial of access to care is insufficient to meet the deliberate indifference standard. *Id.* at 105-06. Rather, the inmate must show that "officials acted with malicious intent." *Gibson v. Collier*, 920 F.3d 212, 220 (5th Cir. 2019). The officials must have had knowledge that they were withholding medically necessary care. *Id.* Therefore, Respondent must show that officials "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious

medical needs." *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985); *Gibson*, 920 F.3d at 220.

Deliberate indifference does not exist where a medical policy is developed, adopted, and implemented by the appropriate committees because reliance on competent and experienced professionals "does not exhibit a level of inattention or callousness to a person's needs." *See Kosliek v. Spencer*, 774 F.3d 63, 91-92 (1st Cir. 2014); *Moreland v. McCoy*, 2021 WL 2917109 at *13; *see also Campbell v. Kallas*, 936 F.3d 536, 549 (10th Cir. 2019) (holding that prison healthcare providers, by definition, do not act with deliberate indifference when they base treatment decisions on the advice of an expert).

In *Kosliak*, an inmate claimed that the Department of Corrections violated the Eighth Amendment by not providing her with GAS. 774 F.3d at 89. The Department of Corrections solicited the opinion of multiple medical professionals and based on their opinions, decided not to provide GAS to an inmate but still provided the inmate with various other treatments to alleviate her distress and symptoms. *Id.* at 91, 89. The inmate claimed, however, that the only medically acceptable treatment was GAS. *Id.* at 90. The court held that the Department of Correction's reliance on the opinion of experienced medical professionals for a particular course of treatment does not exhibit of level of inattention or callousness to a prisoner's needs rising to a constitutional violation. *Id.* at 91-92.

In *Moreland*, an inmate alleged that prison officials were deliberately indifferent to his medical needs by failing to treat his chronic Hepatitis C and

cirrhosis conditions in a timely and effective manner. 2021 WL 2917109 at *12. However, to treat the inmate, the correctional facility used a Hepatitis C policy in place that was created and promulgated by an independent committee comprised of various healthcare professionals. *Id.* at *7. The committee used national guidelines to develop the treatment plan and prioritization of cases for Hepatitis C. *Id.* at 14. The court determined that the inmate failed to offer evidence to establish that the "Hepatitis C policy developed, adopted, and implemented by the appropriate committees and medical officials" was constitutionally deficient or that a universal consensus of medical opinion otherwise existed to reject the monitoring and prioritization practices. *Id.*

However, in *Monroe*, a correctional facility had a Transgender Committee create guidelines to treat transgender patients and review inmates' treatment and care. *Monroe v. Baldwin*, 424 F.Supp.3d 526, 544 (S.D. Ill. 2019). The Transgender Committee considered whether to give an inmate hormonal therapy, increase dosages, and continue to administer the hormonal therapy. *Id.* at 532, 534. The court noted that the Transgender Committee was unqualified to treat patients with gender dysphoria because the doctors on the committee lacked experience in treating gender dysphoria and administering hormones. *Id.* at 534, 545. The Transgender Committee failed to monitor inmates' hormonal levels, delayed and denied hormonal therapy for non-medical bases, and administered hormonal therapy below the therapeutic range. *Id.* at 534. The court determined that the facility consciously disregarded a known and substantial risk of harm because the

facility committee's uninformed decisions placed the transgender inmates at risk. *Id.*; *see also Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1116-18 (N.D. CA 2015) (determining that a prison's reliance on the opinions of inexperienced health care providers can establish a claim for deliberate indifference).

Garum's policy of providing various effective treatments for gender dysphoria and excluding one, GAS, does not exhibit a level of inattention or callousness to a person's needs because Garum implemented a medical policy that was unanimously developed, adopted, and implemented by an independent committee comprised of experienced medical officials. Like the correctional facilities in *Kosliak* and *Moreland*, Garum relied on the expert opinion of experienced medical professionals to determine a course of treatment. Record 13, 15, 27. Like in *Moreland*, where the medical policy for treating Hepatitis C that was created and promulgated by an independent committee comprised of various healthcare professionals, here, the medical policy for treating gender dysphoria that was created and promulgated by an independent committee comprised of various healthcare professionals. Record 12, 13, 15.

Unlike in *Monroe*, where the Transgender Committee was unqualified to treat gender dysphoria and administer hormones, here, two doctors on the committee had significant experience with both. Record 13. Dr. Chewtes has treated approximately 100 patients with gender dysphoria and Dr. Cordata has specialized in and practiced endocrinology, the study of the endocrine system and hormones, for nearly thirty years. *Id.* Further, the medical professionals in *Monroe* denied

treatment for non-medical bases, but the medical professionals in both *Kosliak* and *Moreland* were experienced and advised the correctional facility based on their professional experience and knowledge. Likewise, Garum's committee made a careful and informed decision to exclude GAS based on their knowledge, guidelines, and professional experience treating patients gender dysphoria. Record 13, 14. Garum did not want to "second-guess the clinical decision making" of the committee. Record 20. Therefore, this Court should determine that Respondent cannot establish that Garum's policy rises to the level of deliberate indifference because experienced medical professionals developed and implemented policy and Garum's reliance on their professional opinion "does not exhibit of level of inattention or callousness to a prisoner's needs rising to a constitutional violation." *See Kosliak*, 774 F.3d at 91-92.

Courts have routinely held that an inmate is not entitled to the best care possible provided that the prisoner received an alternative, and constitutionally adequate, treatment for his condition. *See Poretti v. Dzurenda,* 2021 WL 3853052 at *16 (determining that an Eight Amendment claim fails where there is a disagreement of medical opinion between experts when both opinions are medically acceptable under the circumstances)*; see also Lamb v. Norwood*, 899 F.3d 1159 (10th Cir. 2018) (holding that prison officials do not act with deliberate indifference when they provide medical treatment, even if it is subpar); *Miller v. Stevenson*, 2018 WL 3722164 at *5 (holding that where the claimant received treatment for his

condition, as here, he must show that his treatment was so woefully inadequate as to amount to no treatment at all).

In *Gibson*, an inmate argued a prison was deliberately indifferent to his needs because the prison had a blanket policy prohibiting GAS and that failure to evaluate her for GAS constitutes deliberate indifference to her serious medical needs. 920 F.3d at 224. However, the prison provided the inmate with hormone therapy and mental health counseling. *Id.* at 217. The court held that the prison had been treating her gender dysphoria through other means and therefore, the inmate cannot establish deliberate indifference when she was afforded extensive medical care by prison officials. *Id.* at 224.

Further, in *Barnhill*, an inmate challenged a correctional facility's prohibition against gender affirmation surgery. *Barnhill v. Inch*, 2020 WL 6049559 at *6. The inmate claims that the prison failed to follow the WPATH medical standards, did not provide her with the same grooming standards as female inmates, and that this has created intense anxiety and suicidal ideation. *Id.* at *7. However, the inmate had been given access to hormone therapy, mental health treatment, and social transitioning accommodations. *Id.* at *15. The only treatment that the inmate wanted and had not received is gender affirmation surgery. *Id.* at *24. The court held that the inmate cannot demonstrate that the "denial of [gender affirmation] surgery **alone** amounts to cruel and unusual punishment." *Id.* The court reasoned that "for better or for worse, prisoners aren't constitutionally entitled to their

preferred treatment plan." *Id.* at *22 (citing Keohane v. Fla. Dep't of Corr., Sec'y, 952 F. 3d 1257, 1277 (11th Cir. 2020)).

Also, in *Armstrong*, an inmate alleged that prison doctors violated her rights by denying her GAS and delaying or interrupting her hormone replacement therapy. *Armstrong v. Mid-Level Practitioner John B. Connally Unit*, 2020 WL 230887 at *4. The inmate's medical records showed that months of hormone therapy immediately followed a diagnosis of gender dysphoria. *Id.* at *5. The inmate was also treated with prescription drugs for her depression. *Id.* Thus, the court held that doctors did not act with deliberate indifference because they treated the inmate with hormone therapy, an accepted treatment for gender dysphoria, and that the inmate had a positive response to the treatment. *Id.* The court reasoned that the inmate could not contend that the doctors were deliberately indifferent to her serious medical needs when she "has received and continues to receive treatment for her gender dysphoria." *Id.* at *6.

Finally, in *Monroe*, inmates sought an injunction against a Corrections Facility because the Corrections Facility delayed the diagnosis and treatment of gender dysphoria, failed to monitor inmates on hormonal therapy, and administered hormones below the therapeutic range. 424 F.Supp.3d at 544. The facility knew of the serious side effects of hormonal therapy because an inmate suffered from a stroke and partial paralysis from improper administration. *Id.* The court held that the Corrections Facility was deliberately indifferent because the Corrections Facility delayed diagnosis and treatment of gender dysphoria without a medical

basis and did not monitor the inmates' hormonal therapy. *Id.* at 544, 545. The court reasoned that the Correction Facility's awareness of the known risks and its continued denials and delays of the treatment of gender dysphoria constitutes deliberate indifference. *Id.*

Because Respondent is receiving an alternative and constitutionality adequate treatment for his condition, Respondent's disagreement with his current treatment plan and Garum's policy is insufficient to establish a violation of the Eighth Amendment. Like the prisons in *Gibson*, *Armstrong* and *Barnhill*, the committee and Garum prison officials did not act with deliberate indifference because they provided Respondent with hormone therapy, a widely accepted treatment for gender dysphoria, to which Respondent had a positive response to. Record 17, 18. Unlike the correctional facility in *Monroe* that unreasonably delayed and denied hormonal therapy for their inmates, Dr. Chewtes evaluated Respondent less than two months after the start of his incarceration and immediately began treatment for his gender dysphoria consistent with the treatment he received prior to his incarceration. Record 2, 18. Garum ensured that Respondent continued his hormonal therapy despite the limited access to medical facilities due to the Miasmic Syndrome pandemic. Record 4.

Like the inmates in *Gibson* and *Barnhill*, the Respondent was also given access to weekly mental health counseling. Record 18. Further, per Garum's policy, Respondent could have been given social transition accommodations, such as dress/grooming privileges and their choice of male or female housing unit. Record

11, 15. Like the inmates in *Gibson* and *Barnhill*, the only treatment Respondent has not received is GAS. Record 20. However, the "denial of [gender affirmation] surgery **alone**" cannot amount to cruel and unusual punishment." *Barnhill*, 2020 WL 6049559 at *24. This Court should determine that Garum was not deliberately indifferent despite the policy of excluding GAS because Garum promptly treated Respondent for his gender dysphoria by continuing his hormonal therapy and provided him with mental health counseling, and "for better or for worse, prisoners aren't constitutionally entitled to their preferred treatment plan." Record 17, 18; *Barnhill, 2020 WL 6049559*. at *22.

A patient's course of treatment is "a classic example for medical judgment" and the adequacy of that treatment should not be second-guessed by the courts in a civil rights action. *See Kosliak v. Spencer*, 774 F.3d 63, 89 (1st Cir. 2014); see also *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) (holding that "whether… additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment"); *Layne v. Vinzant*, 657 F.2d 468, 474 (1st Cir. 1981) (opining that the only permissible basis for liability is deliberate indifference and where a prisoner has received some medical attention, courts are reluctant to second guess medical judgments); *Bowring v. Goodwin*, 552 F.2d 44, 48 (4th Cir. 1977) (disavowing any attempt to second-guess the propriety or adequacy of a particular course of treatment and will not intervene where there is a difference of opinion).

In *Kosliak*, an inmate claimed that the Department of Corrections violated the Eighth Amendment by not providing her with GAS. *Kosliak v. Spencer*, 774 F.3d 63, 89 (2014). However, the Department of Corrections provided the inmate with hormones, electrolysis, feminine clothing and accessories, and mental health services to help alleviate her distress and symptoms. *Id.* The inmate responded positively to the treatment. *Id.* at 90. The court held that the Department of Corrections did not wantonly disregard the inmate's needs, rather, they accounted for her needs by providing alternative treatments reasonably commensurate with the medical standards of prudent professionals and provided her with a significant measure of relief. *Id.* The court explained that:

> The 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 judgements or to require that the [Department of Corrections] adopt the more compassionate of two adequate options.

Id. at 90 (citations omitted).

Further, in *Barnhill*, an inmate challenged a correctional facility's prohibition against gender affirmation surgery. *Barnhill v. Inch*, 2020 WL 6049559 at *6. The inmate claims that the prison failed to follow the WPATH medical standards by denying her surgery and that this has led to anxiety and suicidal ideation. *Id.* at *7. However, the inmate had been given hormonal therapy, mental health treatment, and social transitioning accommodations. *Id.* at *15. The court determined that where a patient has received medical attention and the dispute is over the propriety

of that course of treatment, courts should be reluctant to question the accuracy or appropriateness of the medical judgments made. *Id.* at *23.

Garum's policy guidelines for treatment of Gender Dysphoria is a classic example "for medical judgment" and the adequacy of that treatment should not be second-guessed by courts in a civil rights action. Both courts in *Barnhill* and *Kosliak* explained that the prisons did not wantonly disregard the inmate's needs because they accounted for the inmate's needs by providing alternative treatments reasonably commensurate with the medical standards of prudent professionals. Like the inmates in *Barnhill* and *Kosliak*, Respondent was receiving various treatments to alleviate his gender dysphoria, including hormonal therapy and mental health counseling, per Garum's guidelines for treating gender dysphoria. Record 18. Thus, Garum did not wantonly disregard Respondent's needs because Garum accounted for Respondent's needs by providing alternative treatments reasonably commensurate with the medical standards of prudent professionals.

Because "the law is clear that where two alternative courses of medical treatment exist and both alleviate negative effects within the boundaries of modern medicine," this Court should not second guess the medical judgment of the medical committee who developed the treatment plan, nor should this Court require Garum to adopt the more compassionate of two adequate options. *See Kosliak*, 774 F.3d at 90; Record 12-13. Therefore, like the courts in *Barnhill* and *Kosliak*, this Court should hold that Garum's policy of providing hormonal therapy and other social transitioning services, while prohibiting GAS, cannot amount to cruel and unusual

punishment because the dispute over the propriety of that policy amounts to little more than a strong disagreement with the course of medical treatment and courts should be hesitant to second-guess medical judgments.

This Court should determine that Garum's policy excluding one method of treatment, GAS, was not deliberately indifferent to Respondent's serious medical needs because Garum relied on the opinion of an independent, experienced committee to determine the course of treatment for patients with gender dysphoria, Garum provided Respondent with various effective treatments for his condition, and the dispute over the propriety of the policy amounts to little more than a disagreement with the course of medical treatment.

D. Prison officials cannot be deliberately indifferent by excluding gender affirmation surgery as a treatment when there is significant disagreement among the medical community as to the necessity of that treatment.

It bears repeating that this Court has long held that deliberate indifference only rises to the level of cruel and unusual punishment when it "offend[s] evolving standards of decency" in violation of the Eight Amendment. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Deliberate indifference is a demanding standard requiring either "an unnecessary and wanton infliction of pain" or an act or omission "repugnant to the conscience of mankind. *Id.* at 105-06.

If a genuine debate exists within the medical community about the necessity or efficacy of that care, then there can be no intentional or wanton deprivation of medical care, which is required to show deliberate indifference to a serious medical need. *Gibson*, 920 F.3d at 221. The Fifth Circuit and First Circuit have acknowledged that the WPATH Standards of Care reflect one side "in a sharply

contested medical debate over [GAS]." Gibson, 920 F.3d at 221; *see Kosliek*, 774 F.3d at 78. Additionally, the Eleventh Circuit rejected the WPATH Standards of Care as the constitutional minimum for the care of transgender inmates. *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1277-78 n.15 (11th Cir. 2020).

In *Gibson*, an inmate claimed that a policy that prohibited GAS amounted to deliberate indifference. 920. F.3d at 217, 218. The Fifth Circuit determined an inmate's claim of deliberate indifference is doomed because of an on-going medical debate. *Id.* at 221. The inmate could not establish that the WPATH suggested treatment of GAS is "so universally accepted that to provide some but not all of the WPATH recommended treatment amounts to deliberate indifference. *Id.* at 220. Further, the court opined that there is "no consensus in the medical community" on whether GAS is a necessary treatment for gender dysphoria and the WPATH Standards of care reflects "one side in a sharply contested medical debate over [GAS]." *Id.* at 221. The court reasoned that where there is "robust and substantial good faith disagreement" that divides experts in the medical community, an inmate cannot claim deliberate indifference because nothing in the constitutional gives controlling weight to one set of professional judgment. *Id.* at 220.

In *Kosliak*, another inmate also claimed that the Department of Corrections violated the Eighth Amendment by not providing her with GAS. 774 F.3d at 89. However, expert testimony provided throughout the case clearly showed that there was no medical consensus as the medical necessity of GAS. *Id.* at 76. Further, the

court noted that WPATH is "an advocacy group for the transgendered" and that the Standards of Care are "not a politically neutral document." *Id.* at 78.

Further, the term "Standards of Care" is inaccurate and misleading because the WPATH Standards do not reflect accept the standards of care for gender dysphoria in the medical community. There is significant disagreement within the medical community as to the proper course of treatment for gender dysphoria. For example, the Centers for Medicare and Medicaid Services ("CMS") declined to adopt the WPATH Standards of Care because of inadequate scientific backing, the differing opinions among the medical community, and the guidelines themselves state that they should be flexible. CTRS. FOR MEDICARE AND MEDICAID SERV., CMS CAG-00446N, Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria (Aug. 30, 2016). Like CMS, the U.S. Department of Veterans Affairs ("VA") chose not to follow the WPATH Standards of Care. In a recent directive, the VA stated that they "[do] not provide gender confirming/affirming surgeries in VA facilities or through non-VA care." DEPT. OF VETERANS AFF., DHA Directive 1341(2), Providing Healthcare for Transgender and Intersex Veterans (May 23, 2018, amended June 26, 2020).

Additionally, during the pandemic, the American College of Surgeons ("ACS") considered gender affirmation surgeries as elective when advising surgeons to reschedule elective surgeries to deal with the influx of COVID-19 patients. Rachel Savage & Annie Banerji, *Anxieties mount for trans people as coronavirus delays surgeries*, REUTERS (April 9, 2020), https://www.reuters.com/article/uk-health-

coronavirus-lgbt-trfn/anxieties-mount-for-trans-people-as-coronavirus-delays-surgeries-idUSKCN21R3NJ. Further, the health insurance exchange website operated by the United States federal government acknowledges that not all healthcare providers provide coverage for GAS. *Transgender Healthcare*, HEALTHCARE.GOV, (last visited Oct. 15, 2021), https://www.healthcare.gov/transgender-health-care/.

If hospitals, insurance companies, and various governmental agencies categorically deny and refuses to provide GAS to members of the public because there is no medical consensus on its necessity, concluding that Garum's policy violates the Eighth Amendment would run contrary to the intent of the Eight Amendment's proscription against cruel and unusual punishment. A policy excluding GAS as a possible treatment for gender dysphoria cannot be "repugnant to the conscious of mankind" if the treatment is not widely available to the public. *See Estelle*, 429 U.S. at 105-06. Further, WPATH standards are not "politically neutral" and are established by an advocacy group and therefore, should not be used to establish the constitutional minima for the treatment of inmates. Here, Garum's committee chose to provide access to a number of treatments known to be effective in treating gender dysphoria, while excluding one that is accompanied by expert disagreement despite the committee's awareness and consideration of the WPATH standards. Record 14, 15.

Therefore, because there is no medical consensus on the treatment of Gender Dysphoria and the necessity of GAS, Garum could not have been deliberately

indifferent to Respondent's medical needs by accepting and following the Garum committee's treatment guidelines for inmates with gender dysphoria and excluding one controversial method of treatment for inmates.

CONCLUSION

For the foregoing reasons, Petitioner, Max Posca, respectfully requests that this Court reverse the Judgement of the United States Fourteenth Circuit Court of Appeals.

Respectfully Submitted,

/s/ Team 2122

Attorneys for Petitioner