Nos. 19-35017 and 19-35019

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO (a/k/a MASON EDMO),
Plaintiff-Appellee,

v.

IDAHO DEPARTMENT OF CORRECTION, *et al*.,
Defendants-Appellants,

and

CORIZON, INC., *et al*.,
Defendants-Appellants.

On Appeal from Orders of the United States District Court
For the District of Idaho
(No. 1:17-cv-00151-BLW)

MOTION TO FILE AMICUS BRIEF

Molly E. Whitman
AKIN GUMP STRAUSS HAUER & FELD LLP
2300 N. Field St., Ste. 1800
Dallas, TX 75216
(214) 969-2715
mwhitman@akingump.com

David M. Shapiro
Sheila A. Bedi
Vanessa del Valle
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
375 E. Chicago Ave.
Chicago, IL 60611
(312) 513-0711
david.shapiro@law.northwestern.edu

Counsel for Amici Curiae Andrea Armstrong, Sharon Dolovich, Betsy Ginsberg, Michael B. Mushlin, Alexander A. Reinert, Laura Rovner, and Margo Schlanger

CORPORATE DISCLOSURE STATEMENT

Amici Curiae Andrea Armstrong, Sharon Dolovich, Betsy Ginsberg, Michael B. Mushlin, Alexander A. Reinert, Laura Rovner, and Margo Schlanger ("*Amici*") are all individuals and thus no corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1 is required.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Amici move to file their proposed Brief in Support of Plaintiff-Appellee ("Brief"), which addresses the application of Eighth Amendment jurisprudence to Ms. Edmo's request for gender confirmation surgery while detained in the Idaho Department of Corrections. The District Court granted Ms. Edmo injunctive relief, mandating that she be provided the surgery within the next six months.

In accordance with Ninth Circuit Rule 29-3, *Amici* endeavored to obtain the consent of all parties to the filing of the Brief before moving the Court for permission to file the proposed Brief. Counsel for Appellee consented to the filing of the Brief. Counsel for Appellants did not provide their consent.

INTEREST OF *AMICI CURIAE*

Amici are legal scholars who study the treatment of incarcerated people under the Eighth Amendment to the United States Constitution. Writing and teaching about this topic is a central focus of their work. *Amici* have a shared interest in the lawful treatment of incarcerated men and women and fidelity to the principles established by the Supreme Court of the United States in *Estelle v. Gamble*, 429 U.S. 97 (1976). They believe that all people, regardless of their gender identity, are entitled to constitutionally adequate medical treatment consistent with the rule of *Estelle*.

Andrea Armstrong is a Professor of Law at the Loyola University New Orleans College of Law.[1] **Sharon Dolovich** is a Professor of Law and Faculty Director of the Prison Law & Policy Program at UCLA Law School. **Betsy Ginsberg** is a Clinical Associate Professor of Law and the Director of the Civil Rights Clinic at Benjamin H. Cardozo School of Law. **Michael B. Mushlin** is a Professor of Law at the Pace University Elizabeth Haub School of Law. **Alexander A. Reinert** is a Professor of Law and the Director of the Center for Rights and Justice at Benjamin H. Cardozo School of Law. **Laura Rovner** is a Professor of Law and Director of the Civil Rights Clinic at the University of Denver Sturm College of Law. **Margo Schlanger** is Wade H. and Dores M. McCree Collegiate Professor of Law at University of Michigan Law School.

ARGUMENT

The Court should allow the Brief to be filed because the matters asserted in the proposed Brief are relevant to the core constitutional principles that are at the heart of the District Court's decision to grant Appellee injunctive relief. Although Appellee is ably represented, *Amici* will offer an in-depth perspective based on their interest and expertise in the Eighth Amendment and related legal doctrines. *Amici* are scholars of the Eighth Amendment who are deeply interested in the

[1] Institutional affiliations are provided for the purpose of identification only.

consistent application of the Cruel and Unusual Punishment Clause to all matters of serious medical need, regardless of the political or societal biases that some may hold toward certain segments of our population—in this case, the transgender community and those suffering from gender dysphoria.

The legal concepts raised by Appellee's motion for injunction are not novel. In fact, *Amici* will demonstrate how the already well-established parameters governing Eighth Amendment issues in the medical context readily apply to Ms. Edmo's claim. However, Appellants wish to upend settled Eighth Amendment precedent and to make legal arguments signaling a departure from long-established applications of this Amendment to the medical needs of prisoners. *Amici*'s Brief is highly relevant to these issues and shows why the District Court's ruling on the injunction motion should not be disturbed.

CONCLUSION

In light of their unique interest in and perspective on this case, and the significant legal arguments *Amici* intend to present to this Court, *Amici* respectfully move for leave to file their Brief as *Amici Curiae*. *See* Fed. R. App. P. 29(b).

***

Respectfully submitted,

/s *Molly E. Whitman*

David Shapiro
Sheila A. Bedi
Vanessa del Valle
RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER

Molly E. Whitman
AKIN GUMP STRAUSS HAUER &
FELD LLP

Counsel for Amici Curiae *Andrea Armstrong, Sharon Dolovich, Betsy Ginsberg, Michael B. Mushlin, Alexander A. Reinert, Laura Rovner, and Margo Schlanger*

April 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2019, I electronically filed the foregoing Motion to File Amicus Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ *Molly E. Whitman*
Molly E. Whitman

Nos. 19-35017 and 19-35019

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO (a/k/a MASON EDMO),
Plaintiff-Appellee,

v.

IDAHO DEPARTMENT OF CORRECTION, *et al*.,
Defendants-Appellants,

and

CORIZON, INC., *et al*.,
Defendants-Appellants.

On Appeal from Orders of the United States District Court
For the District of Idaho
(No. 1:17-cv-00151-BLW)

BRIEF OF *AMICI CURIAE* ANDREA ARMSTRONG, SHARON DOLOVICH, BETSY GINSBERG, MICHAEL B. MUSHLIN, ALEXANDER A. REINERT, LAURA ROVNER, AND MARGO SCHLANGER IN SUPPORT OF PLAINTIFF-APPELLEE

Molly E. Whitman
AKIN GUMP STRAUSS HAUER & FELD LLP
2300 N. Field St., Ste. 1800
Dallas, TX 75216
(214) 969-2715
mwhitman@akingump.com

David M. Shapiro
Sheila A. Bedi
Vanessa del Valle
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
375 E. Chicago Ave.
Chicago, IL 60611
(312) 513-0711
david.shapiro@law.northwestern.edu

Counsel for Amici Curiae Andrea Armstrong, Sharon Dolovich, Betsy Ginsberg, Michael B. Mushlin, Alexander A. Reinert, Laura Rovner, and Margo Schlanger

CORPORATE DISCLOSURE STATEMENT

Amici Curiae Andrea Armstrong, Sharon Dolovich, Betsy Ginsberg, Michael B. Mushlin, Alexander A. Reinert, Laura Rovner, and Margo Schlanger ("*Amici*") are all individuals and thus no corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1 is required.

STATEMENT PURSUANT TO FED. R. APP. P. 29(A)(4)(E)

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the *Amici* state that: (i) no party's counsel has authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person, other than *Amici* and/or their counsel, contributed money that was intended to fund preparing or submitting this brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars who study the treatment of incarcerated people under the Eighth Amendment to the United States Constitution. Writing and teaching about this topic is a central focus of their work. *Amici* have a shared interest in the lawful treatment of incarcerated men and women and fidelity to the principles established by the Supreme Court of the United States in *Estelle v. Gamble*, 429 U.S. 97 (1976). They believe that all people, regardless of their gender identity, are entitled to constitutionally adequate medical treatment consistent with the rule of *Estelle*.

Andrea Armstrong is a Professor of Law at the Loyola University New Orleans College of Law.[2] **Sharon Dolovich** is a Professor of Law and Faculty Director of the Prison Law & Policy Program at UCLA Law School. **Betsy Ginsberg** is a Clinical Associate Professor of Law and the Director of the Civil Rights Clinic at Benjamin H. Cardozo School of Law. **Michael B. Mushlin** is a Professor of Law at the Pace University Elizabeth Haub School of Law. **Alexander A. Reinert** is a Professor of Law and the Director of the Center for Rights and Justice at Benjamin H. Cardozo School of Law. **Laura Rovner** is a Professor of Law and

---

[1] Pursuant to Circuit Rule 29-3, *Amici* endeavored to obtain the consent of all parties to the filing of this brief, but were unable to do so. Accordingly, *Amici* filed a motion for leave to file this brief pursuant to Fed. R. App. P. 29(a).

[2] Institutional affiliations are provided for the purpose of identification only.

Director of the Civil Rights Clinic at the University of Denver Sturm College of Law. **Margo Schlanger** is Wade H. and Dores M. McCree Collegiate Professor of Law at University of Michigan Law School.

SUMMARY OF ARGUMENT

It has long been established that corrections officials violate the Constitution when they deny medically necessary treatment to incarcerated people. *Estelle v. Gamble*, 429 U.S. 97 (1976). When correctional personnel deny gender confirmation surgery to a prisoner, despite obvious signs that the individual will suffer grave harm without the surgery, they have exhibited textbook deliberate indifference in violation of *Estelle*'s teachings. *Id.* at 103 ("[D]enial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.").

Though general awareness of gender identity has increased in recent years, medical professionals have long studied and treated the clinical mental anguish caused by gender dysphoria (previously labeled, gender identity disorder). The World Professional Association for Transgender Health has issued Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, which identify well-established treatments for gender dysphoria, including gender confirmation surgery. World Prof'l Assoc. for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (7th ed. 2012). For some people suffering from gender dysphoria, gender confirmation surgery may be the *only* treatment sufficient to alleviate their

symptoms. The fact that some people with gender dysphoria in need of surgery are incarcerated does not diminish this need.

In Ms. Edmo's case, the District Court did not strike new ground, nor did it need to. Whether a plaintiff's constitutional rights have been infringed due to prison officials' deliberate indifference toward her serious medical need must be evaluated on an individual basis. But the Eighth Amendment does not distinguish between serious medical conditions and does not have an exception for gender dysphoria. Ms. Edmo is a transgender woman suffering from severe gender dysphoria who was denied the medical care necessary to treat her. Despite her evident suffering, clearly manifested through her attempts at self-castration and other signs of distress, Ms. Edmo received constitutionally deficient care from prison medical authorities who were not equipped to treat her gender dysphoria. The District Court properly recognized these failures on the part of the prison and its medical professionals for what they were: deliberate indifference to Ms. Edmo's dire need for gender confirmation surgery to treat her gender dysphoria.

Such deliberate indifference violates the Eighth Amendment and requires immediate redress via injunctive relief, lest Ms. Edmo continue to suffer additional harm. The District Court's award of this relief was properly grounded in settled constitutional law and should not be disturbed.

ARGUMENT

I. Deliberate Indifference to Any Serious Medical Need Violates the Eighth Amendment

Appellee Adree Edmo's undisputed gender dysphoria ("GD") requires relief through surgical intervention. The District Court's holding, ordering Defendants-Appellants ("Appellants") to provide Ms. Edmo with gender confirmation surgery ("GCS"), is supported by well-established case law dictating that deliberate indifference to a serious medical need violates the constitutional prohibition against cruel and unusual punishment.[3] *See* U.S. Const. amend. VIII.

The Eighth Amendment's Cruel and Unusual Punishments Clause is a bedrock of American criminal justice protections: "The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality op.); *see also Brown v. Plata*, 563 U.S. 493, 510 (2011) ("Prisoners retain the essence of human dignity inherent in all persons."); *see generally* Dan Schneider, *Decency Evolved: The Eighth Amendment Right to*

[3] In the District Court's *Findings of Fact, Conclusions of Law, and Order* (the "Opinion"), the District Court properly applied the standard for a mandatory injunction, noting that, despite the "extremely cautious" approach courts take in granting such relief, Ms. Edmo was nonetheless entitled to such relief under the facts stated. Op. at 30. The District Court did not err in so determining.

Transition in Prison, 683 Wis. L. Rev. 834, 849-50 (2016) (discussing historical underpinnings of the Eighth Amendment). The Eighth Amendment's protections embody "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," *Estelle*, 429 U.S. at 102; *see also Brown*, 563 U.S. at 505 n.3 (plaintiffs showed that the medical care in California prisons fell below "the evolving standards of decency that mark the progress of a maturing society").

Over 40 years ago, the Supreme Court expressly recognized that "deliberate indifference to serious medical needs" violates Eighth Amendment protections as an affront to such standards of decency. *Estelle*, 429 U.S. at 106. Put simply, Eighth Amendment jurisprudence makes clear that it is incumbent upon the State to treat the serious medical needs of those it incarcerates. *Cf. DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 198-200 (1989). To prevail on an Eighth Amendment claim alleging cruel and unusual punishment due to inadequate medical care, a plaintiff must show deliberate indifference to the plaintiff's health or safety, meaning the defendants knew of and disregarded the plaintiff's objectively serious medical need. *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013); *see also Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (prison officials violate the Eighth Amendment when they "know[ ] that inmates face a substantial risk of serious harm and disregard[ ] that risk by failing to take reasonable measures to abate it."). Ms. Edmo and Appellants agree that Ms. Edmo suffers from GD, an objectively

serious medical condition. Op. at 35. But Appellants dispute that GCS is medically necessary to treat Ms. Edmo's GD and that Appellants acted with deliberate indifference toward this serious medical need. *See* Op. at 36, 39-40.

As the Supreme Court held in 1994, a prison official is "deliberately indifferent" when that official fails to "take reasonable measures to abate" a substantial risk of serious harm. *Farmer*, 511 U.S. at 847; *id.* at 842 ("[An] Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm *actually* would befall an inmate; . . . knowledge of a substantial risk of serious harm [is sufficient].") (emphasis added). Such deliberate indifference can be demonstrated when prison officials deny, delay, or otherwise intentionally interfere with medical treatment, and also by "the way in which prison physicians provide medical care." *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988)).

Courts have regularly held that the provision of *some* medical treatment does not preclude a § 1983 claim based on the Eighth Amendment. For example, in *De'lonta v. Johnson*, the plaintiff alleged that Virginia correctional personnel were deliberately indifferent to her need for GCS. 708 F.3d 520, 522 (4th Cir. 2013). The Fourth Circuit rejected the defendants' argument that the plaintiff was foreclosed from alleging her claim because the prison system had provided her with hormone treatment and psychiatric services and had allowed her to dress as a woman. *Id.* at

525-26 (holding that "just because Appellees have provided De'lonta with some treatment consistent with the [gender identity disorder] Standards of Care, it does not follow that they have necessarily provided her with *constitutionally adequate* treatment"). Along the same lines, prison officials may be deliberately indifferent even if they have provided "extensive medical care" over a period of years. *See Rosado v. Alameida*, 349 F. Supp. 2d 1340, 1346, 1349 (S.D. Cal. 2004) (ruling that plaintiff was entitled to preliminary injunction ordering prison to pursue liver transplant, even where the prison had provided "extensive" treatment and taken plaintiff to at least two transplant consultations); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1187, 1195 (N.D. Cal. 2015) (rejecting prison officials' argument that hormone therapy and mental health treatment were constitutionally sufficient to treat plaintiff's GD, and ordering that plaintiff receive GCS); *McQueen v. Brown*, No. 2:15-cv-2544, 2019 WL 949442, at *6-7 (E.D. Cal. Feb. 27, 2019) (denying motion to dismiss plaintiff's claim of deliberate indifference where plaintiff alleged GCS was only way to treat her GD, despite prison's provision of hormone therapy).

This Court also has recognized that policies or procedures put in place by prison officials can cause, or create a substantial risk of, serious harm in violation of the Eighth Amendment, including where such policies or procedures impede or discourage the provision of medically necessary treatments. *See Parsons v. Ryan*, 754 F.3d 657, 677 (9th Cir. 2014) (stating that this Court has "repeatedly recognized

that prison officials are constitutionally prohibited from being deliberately indifferent to policies and practices that expose inmates to a substantial risk of serious harm," and collecting cases); *Colwell*, 763 F.3d at 1068 (holding that denial of treatment for monocular blindness solely because of an administrative policy limiting surgical treatment if only one eye was affected to be "the very definition of deliberate indifference"); *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012*)*, *rev'd on other grounds*, *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014) (finding that corrections facility doctor's testimony that "he did not recall any hip replacement surgeries at all during his tenure" suggested a *de facto* policy against them). As discussed below, the District Court found that Appellants have such a *de facto* policy of refusing GCS to treat the GD of any incarcerated person under their care. *See* Op. at 40.

Similarly, a prison medical provider's departure from accepted medical standards, often due to a stated or *de facto* policy, is strong evidence of deliberate indifference. For example, a federal court has held unconstitutional the Florida Department of Corrections' refusal to permit a transgender prisoner suffering from GD to socially transition (*e.g.*, to wear her hair long, have access to female undergarments and make-up, and use feminine pronouns) pursuant to the department's dress code and security policies. *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1318-19 (N.D. Fla. 2018). In so holding, the court found probative the fact

that the department's medical professionals refused to implement the World Professional Association of Transgender Health ("WPATH") standards for treating GD, which are "recognized by the American Medical Association, American Psychiatric Association, American Psychological Association, and the American College of Obstetricians and Gynecologists."[4] *Id.* at 1294, 1316. Moreover, the department's stringent reliance on its outdated policies that did not conform to the accepted WPATH medical standards supported the court's suspicion that the policies were rooted in "bigotry and ignorance" rather than true understanding of the serious medical needs of people with GD. *See id.* at 1302.

II. Courts Do Not Hesitate to Order Medical Treatment, Including Through Injunctions, When Necessary to Secure Adequate Relief for a Serious Medical Need

Recognizing the inherent necessity to address serious medical needs in a timely manner despite ongoing litigation, courts, including in this Circuit, frequently use their injunctive power to order medical treatment to remedy Eighth Amendment violations. *See, e.g.*, *Mason v. Ryan*, No. CV 17-08098-PCT-DGC (MHB), 2018 WL 2119398 (D. Ariz. May 8, 2018) (injunction for specialist-recommended

[4] After the plaintiff filed her suit, the department enacted a policy allowing hormone therapy to be provided to prisoners with GD, and the plaintiff began receiving treatment during the pendency of her lawsuit. *Keohane*, 328 F. Supp. 3d at 1300. Nevertheless, the court also enjoined the department from ceasing to provide the plaintiff with hormone therapy in the future, noting, importantly, that the department "chose to right some wrongs only *after* it was faced with a lawsuit in federal court." *Id.* at 1300.

treatment and evaluation for medication for chronic neck pain); *McNearney v. Wash. Dep't of Corr.*, No. C11–5930 RBL/KLS, 2012 WL 3545267 (W.D. Wash. June 15, 2012) (ordering plaintiff's foot and ankle be examined by specialists and receive recommended treatment), *modified in part, report and recommendation adopted*, 2013 WL 392489 (W.D. Wash. Jan. 31, 2013); *Rhea v. Wash. Dep't of Corr.*, No. C10–254 BHS/KLS, 2010 WL 3720223 (W.D. Wash. July 2, 2010) (ordering plaintiff be examined by a specialist and receive recommended treatment for painful nerve growth where her leg was amputated); *Francis v. Hammond*, No. C12-6023 RBL-JRC, 2013 WL 12167887, at *6-7 (W.D. Wash. Mar. 4, 2013) (referring to court-ordered injunction requiring orthopedic evaluation of plaintiff's shoulder injury). Plaintiffs may also seek injunctions for a change in prison conditions that may cause harm in the future. The Supreme Court solidified this concept in *Helling v. McKinney*, rejecting the prison's theory that only deliberate indifference to current serious health problems is actionable under the Eighth Amendment and holding that an injunction cannot be denied "to inmates who plainly proved an unsafe, life-threatening condition . . . in their prison on the ground that nothing yet has happened to them." 509 U.S. 25, 33 (1993).

Courts in other jurisdictions likewise regularly order injunctive relief to address serious medical needs. *See, e.g., Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004) (affirming injunction requiring monitoring and assessment of medication levels of

inmates receiving psychotropic medications); *Abu-Jamal v. Wetzel*, No. 3:16-CV-2000, 2017 WL 34700 (M.D. Pa. Jan. 3, 2017) (granting preliminary injunction requiring treatment of plaintiff's Hepatitis C with antiviral medication); *Reaves v. Dep't of Corr.*, 195 F. Supp. 3d 383 (D. Mass. 2016) (requiring custodians of quadriplegic prisoner to provide medically appropriate access to outdoor and indoor recreation and socialization, prison programming, showers, and medical confidentiality); *Ganaway v. Adamson*, No. 15-CV-784-SMY-PMF, 2016 WL 1364405 (S.D. Ill. Apr. 6, 2016), *adopting report and recommendation*, 2015 WL 10607608 (S.D. Ill. Oct. 21, 2015) (directing that plaintiff's skin condition be assessed by a medical professional); *Farnam v. Walker*, 593 F. Supp. 2d 1000 (C.D. Ill. 2009) (requiring specialist care for cystic fibrosis); *Yarbaugh v. Roach*, 736 F. Supp. 318 (D.D.C. 1990) (granting injunction for plaintiff suffering from multiple sclerosis to obtain adequate medical treatment, including physical therapy).

When an Eighth Amendment claimant demonstrates prison officials' deliberate indifference to her serious medical need, she properly meets her burden, regardless of whether that serious medical need is for surgery or some other form of medical treatment. *See Lemire*, 726 F.3d at 1082 (explaining objective and subjective prongs of Eighth Amendment standard). Indeed, courts have ordered that incarcerated plaintiffs receive surgical consultations and/or surgery to address their serious medical needs, including by injunctive order. *See, e.g.*, *Norsworthy*, 87 F.

Supp. 3d at 1195 (granting injunction to "provide Plaintiff with access to adequate medical care, including sex reassignment surgery"); *Rosado*, 349 F. Supp. 2d at 1340 (requiring state prison to arrange plaintiff's evaluation for a liver transplant and provide other necessary care for his liver condition); *Miller v. Bannister*, No. 3:10–cv–00614–RCJ (RAM), 2011 WL 666106 (D. Nev. Feb. 9, 2011), *report and recommendation adopted in part*, 2011 WL 666097 (D. Nev. Feb. 14, 2011) (same).

Likewise, courts have followed the same approach to order treatment via injunction specifically for individuals with GD. *See, e.g., Gammet v. Idaho State Bd. of Corr.*, No. CV05–257–S–MHW, 2007 WL 2186896 (D. Idaho July 27, 2007) (injunctive order requiring board of corrections to provide transgender person access to appropriate hormone therapy and psychotherapy); *Hicklin v. Precynthe*, No. 4:16–cv–01357–NCC, 2018 WL 806764 (E.D. Mo. Feb. 9, 2018) (providing transgender plaintiff with injunctive relief of medically necessary treatment for GD, including hormone therapy, access to permanent body hair removal, and access to gender-affirming canteen items); *Fields v. Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010) (holding Wisconsin statute prohibiting provision of hormone therapy to incarcerated persons with GD unconstitutional and granting permanent injunction restraining defendants from enforcing it against any person under their care), *aff'd*, 712 F. Supp. 2d 830 (7th Cir. 2011); *Phillips v. Mich. Dep't of Corr.*, 731 F. Supp. 792 (W.D.

Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991) (transgender plaintiff entitled to a preliminary injunction ordering provision of hormone therapy).

III. A Particular Treatment Need Not Be Many Decades Old to Be Required by the Eighth Amendment

It has been over 40 years since the Supreme Court determined that the Eighth Amendment's prohibition against cruel and unusual punishment requires correctional facilities to provide necessary medical treatment. *Estelle*, 429 U.S. at 103 (evaluating "contemporary standards of decency as manifested in modern legislation" in deciding that the Eighth Amendment obligates the government to provide necessary medical care to incarcerated persons); *Trop*, 356 U.S. at 101. In the decades that followed, courts have repeatedly considered how to evaluate new and different medical treatments under the framework established in *Estelle*.

A. The fact that medical standards of care evolve over time has *never* been a legitimate explanation for denying medically necessary care.

The requirement under *Estelle* is for the provision of necessary medical care. As medical knowledge improves, and new or different care becomes available, the *Estelle* standard may lead to similarly new or different care. For example, consider the evolution of medical knowledge regarding HIV/AIDS. In 1999, one year after the CDC released the first national treatment guidelines for the use of antiretroviral therapy to treat HIV, the Tenth Circuit upheld the dismissal of a plaintiff's claim that Kansas prison officials were deliberately indifferent to his serious medical needs

because they refused to prescribe him a protease inhibitor to supplement his other HIV medications.[5] *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999). The Court denied the plaintiff's claim despite his explanation that he could develop immunity to his other antiretroviral medications without the required protease inhibitor. *Id.* (denying claim on the basis that "Plaintiff simply disagree[d] with medical staff about the course of his treatment"). At the time, protease inhibitors were relatively new, having first been approved to treat HIV in 1996. *See Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1277 (M.D. Ala. 2012) (tracing history of HIV epidemic and treatment).

Just one year later, this Court reversed a district court's grant of summary judgment against a prisoner suffering from AIDS who alleged jail officials were deliberately indifferent to his need for his AIDS "cocktail" medication, which included a protease inhibitor. *See Sullivan v. Cty. of Pierce*, No. CV-97-05214-RJB, 2000 WL 432368, at *2 (9th Cir. Apr. 21, 2000). In contrast to the Tenth Circuit's position just one year earlier, this Court showed a marked understanding of the importance of the same cocktail in fighting HIV/AIDS, reflecting that "it was

[5] *See* Mark B. Feinberg & Jonathan E. Kaplan, U.S. Dep't of Health & Human Servs., *Report of the NIH Panel to Define Principles of Therapy of HIV Infection and Guidelines for the Use of Antiretroviral Agents in HIV-Infected Adults and Adolescents*, 47 Morbidity & Mortality Weekly Report at 43 (Apr. 24, 1998), https://aidsinfo.nih.gov/contentfiles/ adultandadolescentgl04241998014.pdf (noting that a combination of antiretroviral therapy, including use of a protease inhibitor, is most optimal for suppression of the virus).

common medical knowledge" that HIV/AIDS patients needed to remain in strict compliance with their regimen of medications, including protease inhibitors, to avoid becoming resistant to the treatment. *Id.* (citing *McNally v. Prison Health Servs.*, 46 F. Supp. 2d 29 (D. Me. 1999) (concluding that deprivation of HIV medication for three days could support jury finding of deliberate indifference)).

Just four years after protease inhibitors were made available as a treatment for HIV/AIDS, this Court recognized that the relative newness of a treatment for which a plaintiff has demonstrated a serious medical need is no bar to success upon the merits of their Eighth Amendment claims. *Id. Cf. Henderson*, 913 F. Supp. 2d at 1278 ("The progression of how HIV has been handled in American prisons somewhat mirrors its progression in the free world: initial (and understandable) terror about its spread gave rise to drastic prevention measures, which subsided as both treatment and understanding of HIV improved.").

Courts have similarly considered claims related to even "newer" treatments or procedures under the Eighth Amendment, such as the relatively recent development of direct-acting antiviral ("DAA") drugs to treat Hepatitis C. For example, in 2015, the District of Maryland granted summary judgment in favor of prison officials and Corizon on the basis that their refusal to provide DAA medication to a Hepatitis C-positive prisoner constituted a mere difference of opinion in medical treatment. *See Smith v. Corizon, Inc.*, No. JFM-15-743, 2015 WL

9274915, at *6 (D. Md. Dec. 17, 2015). Several courts in various jurisdictions followed suit in 2015 and 2016, denying or dismissing prisoners' claims that the deprivation of DAA drugs constituted cruel and unusual punishment under similar reasoning regarding differences in medical opinion. *See, e.g.*, *Bernier v. Obama*, 201 F. Supp. 3d 87 (D.D.C. 2016), *aff'd*, 738 F. App'x 1 (D.C. Cir. 2018); *Buchanon v. Mohr*, No. 2:16-cv-279, 2016 WL 4702573 (S.D. Ohio Sept. 18, 2016), *report and recommendation adopted*, 2016 WL 5661697 (S.D. Ohio Sept. 20, 2016); *Johnson v. Frakes*, No. 8:16CV155, 2016 WL 4148231 (D. Neb. Aug. 4, 2016); *Melendez v. Fla. Dep't of Corr.*, No. 3:15CV450-RV-CJK, 2016 WL 5539781 (N.D. Fla. Aug. 30, 2016), *report and recommendation adopted,* 2016 WL 5661012 (N.D. Fla. Sept. 28, 2016); *Dulak v. Corizon, Inc.*, 2015 U.S. Dist. LEXIS 131291 (E.D. Mich. July 10, 2015), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 129702 (E.D. Mich. Sept. 28, 2015).

However, by 2017, after the CDC released guidelines supporting the use of the new DAA drugs, federal courts rapidly reversed course. For instance, in *Cunningham v. Sessions*, the district court recognized that there had been no cure for Hepatitis C until recent years, and prior iterations of DAA drugs had produced inconsistent results and severe side effects. No. 9:16-CV-1292-RMG, 2017 WL 2377838, at *1 (D.S.C. May 31, 2017). Nevertheless, "mindful of the rapidly evolving medical and legal issues generated by the FDA's approval of a new

generation of highly effective and curative DAA drugs . . . and the endorsement of these new recommendations by the CDC," the court found that the plaintiff had plausibly set forth a claim of deliberate indifference under the Eighth Amendment and allowed his claim for injunctive relief to proceed. *Id.* at *5. Likewise, several other federal courts have now awarded a preliminary injunction or declined to dismiss prisoners' § 1983 claims of deliberate indifference to their need for the recently developed DAA medications. *See, e.g.*, *Allah v. Thomas*, 679 F. App'x 216 (3d Cir. 2017) (reversing dismissal of state inmate's Eighth Amendment claim for refusal to provide treatment with DAA drugs); *Abu-Jamal*, 2017 WL 34700 (granting mandatory preliminary injunction for DAA drugs based, in part, on Department of Corrections' expert's own testimony that he would prescribe DAA treatment for prisoners not currently receiving it); *Postawko v. Mo. Dep't of Corr.*, No. 2:16-4219-NKL, 2017 WL 1968317 (W.D. Mo. May 11, 2017); *Bernier v. Trump*, No. 16-828 (APM), 2017 WL 1048053 (D.D.C. Mar. 17, 2017) (denying motion to dismiss Eighth Amendment claim for denial of DAA drugs), *vacated in part on other grounds*, 299 F. Supp. 3d 150 (D.D.C. 2018); *Henderson v. Tanner*, No. 15-804-SDD-EWD, 2017 WL 1015321 (M.D. La. Mar. 15, 2017), *adopting report and recommendation*, 2017 WL 1017927 (M.D. La. Feb. 16, 2017).

B. Appellants ignored medically accepted standards in denying Ms. Edmo the gender confirmation surgery necessary to treat her severe gender dysphoria.

The parties do not dispute that Ms. Edmo suffers from severe GD. Op. at 36. But Appellants insist that their denial of GCS was justified, largely based on Dr. Eliason's 2016 evaluation of Ms. Edmo. Relying on vague rhetoric reminiscent of the HIV/AIDS and Hepatitis C cases discussed above, Dr. Eliason "began his assessment by noting that medical necessity for GCS was not well defined and that criteria for GCS are constantly shifting." Def.-Appellants' Joint Opening Br. at 10. Accordingly, Dr. Eliason concluded that a plan to monitor Ms. Edmo, as opposed to recommending GCS, was good enough. *Id.* at 14. As the District Court opined, Dr. Eliason's position and other unpersuasive arguments presented by Appellants in the face of established medical standards and case law in a multitude of jurisdictions "suggests a decided bias against approving gender confirmation surgery," rather than any actual consideration of the substantial body of medical support for GCS as a legitimate and necessary treatment for GD. Op. at 37.

Contrary to Dr. Eliason's misguided suggestions, the medical community has squarely determined that GCS "is safe and effective and not experimental." Dep't of Health & Human Servs., No. A-13-87, National Coverage Determination 140.3, Transsexual Surgery (Dep't Appeals Bd. May 30, 2014) ("NCD 140.3"). In fact, American surgeons began performing GCS (previously referred to as sex

reassignment surgery ("SRS")) in the mid-1960s, and the successful results of these surgeries "confirmed the value of SRS as a treatment for those suffering from severe" GD. Randi Ettner, et al., *Principles of Transgender Medicine and Surgery* 109 (2007). Although GCS was previously classified as an experimental treatment by the Department of Health and Human Services, that classification was formally removed in 2014, two years *before* Dr. Eliason evaluated Ms. Edmo. *See* NCD 140.3 (relying on over 32 years of medical studies, including the WPATH standards and briefing by WPATH as *amici curiae*, to overturn prior National Coverage Determination denying Medicare coverage for all GCS to treat GD). In Ms. Edmo's case, the District Court recognized that in failing to provide GCS to Ms. Edmo, Appellants "have ignored [these] generally accepted medical standards for the treatment of gender dysphoria." Op. at 4. Nevertheless, even if Dr. Eliason's unfounded assertion regarding the "constantly shifting" criteria for GCS were true, the fact that a medical treatment is developing (as most nearly always are) does not excuse a correctional facility from providing a prisoner that treatment if it is necessary to treat a serious medical need.

IV. The District Court Faithfully Applied Settled Law to Gender Confirmation Surgery

Ms. Edmo's claim does not seek to expand Eighth Amendment jurisprudence, and it is far from a matter of first impression. At bottom, Appellants couch their appeal in a number of legal and factual arguments that boil down to just one

inquiry—whether Appellants were deliberately indifferent to Ms. Edmo's serious medical need for GCS. The District Court issued a well-reasoned opinion that Ms. Edmo is likely to prevail on the merits of this claim, and that she is entitled to the surgical remedy she so desperately needs. Most critically, the District Court's findings *required* an injunctive order mandating surgery under settled law to alleviate the harm that Ms. Edmo is clearly currently suffering and will continue to suffer without this treatment.

The District Court based its findings on established protocols and a rigorous, individualized assessment of the need for surgery. Importantly, the District Court noted that since her incarceration began in 2012, Ms. Edmo has only had one evaluation for surgery prior to filing her lawsuit, during which Dr. Eliason determined that she was not eligible for GCS, but made no reference in his records to the WPATH criteria for the surgery and instead relied on his own formulation of criteria that he then claimed Ms. Edmo did not meet. Op. at 40. In its findings, the District Court examined each of the qualifying criteria for GCS established by the accepted WPATH standards, such standards having been relied on by numerous courts in assessing plaintiffs' claims of inadequate medical care regarding their GD, and explained in great detail why Ms. Edmo met those criteria. Op. at 26-29.

Specifically, the District Court found that Appellants' medical professionals, including Dr. Eliason, failed to properly apply the WPATH criteria and instead

substituted their own, non-scientific criteria to determine if Ms. Edmo qualified for GCS—some of which were impossible for Ms. Edmo to meet. *See* Defs.-Appellants' Joint Opening Br. at 40, 50; Op. at 39-40. Dr. Eliason's erroneous assertion that an inmate must live in his or her "preferred" gender role for at least twelve months outside of prison to qualify for GCS would categorically foreclose *any* person with GD who began transitioning during incarceration from ever becoming eligible for the procedure while incarcerated, no matter how severe that persons's GD.[6] Def.-Appellants' Joint Opening Br. at 40. Further, the Idaho Department of Corrections ("IDOC") unquestionably exacerbated Ms. Edmo's GD for years, not only by refusing her access to provisions necessary for presenting as female, but also by repeatedly disciplining her for attempting to do so anyway.[7] Op. at 26. Although IDOC began allowing Ms. Edmo access to female commissary items just recently (and perhaps not so coincidentally, on the first day of the evidentiary hearing in this

[6] Appellants' references to Ms. Edmo's gender as a "preferred" role, that she should not be "rushing to surgery," and to other incarcerated persons who "requested surgery" suggests Appellants' erroneous belief, contrary to the medical community's consensus, that gender identity itself is merely a matter of preference. *See* Def.-Appellants' Joint Opening Br. at 40, 51; *cf. Keohane*, 328 F. Supp. 3d at 1302.

[7] The District Court found that Ms. Edmo is likely to suffer additional risk of self-castration, suicide, or other serious psychological harm without GCS. Op. at 42. While Appellants attempt to point to these risks as evidence that Ms. Edmo is not eligible for GCS, it is clear that Appellants' refusal to provide this treatment has caused or worsened these psychological symptoms, and that GCS would alleviate them. *See* Op. at 28, 42.

case), IDOC's action does not rectify Appellants' unconstitutional deprivation of the surgery needed to treat Ms. Edmo's GD. Op. at 17; *cf.*, *Keohane,* 328 F. Supp. 3d at 1300 (correctional department's change in policy after plaintiff sued for deliberate indifference to GD did not remedy harm caused). The District Court also found that Appellants had a *de facto* policy or practice of refusing GCS, based on the facts that they had *never* provided the surgery to any transgender inmate suffering from GD, they provided their medical staff with training from an outlier expert who discourages ever providing GCS to inmates, and the only guidelines issued for treating IDOC prisoners with GD did not include surgery as a treatment option at all. Op. at 40.

Ms. Edmo's is a case of more than mere disagreement over the proper course of treatment for a particular condition. Much like the developing treatments for HIV/AIDS and Hepatitis C, the fact that GCS may not be well-known or completely understood by the general public does not render it any less necessary to treat serious GD. Reliable authorities, including WPATH and the Department of Health and Human Services, have determined that GCS is a safe and effective procedure to treat GD, and medical professionals have administered this treatment to patients suffering from GD for decades. *See* NCD 140.3. Ms. Edmo has consistently pursued the medical treatment she needs but has been met with numerous roadblocks that denote

Appellants' deliberate indifference to those needs. The District Court has finally removed those roadblocks for Ms. Edmo, and its decision should not be disturbed.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Andrea Armstrong, Sharon Dolovich, Betsy Ginsberg, Michael B. Mushlin, Alexander A. Reinert, Laura Rovner, and Margo Schlanger, submit that the applicable law under the Eighth Amendment supports affirmance of the injunction in this case.

Respectfully submitted,

April 10, 2019

/s *Molly E. Whitman*

Molly E. Whitman
AKIN GUMP STRAUSS HAUER & FELD LLP

David M. Shapiro
Sheila A. Bedi
Vanessa del Valle
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER

Counsel for Amici Curiae *Andrea Armstrong, Sharon Dolovich, Betsy Ginsberg, Michael B. Mushlin, Alexander A. Reinert, Laura Rovner, and Margo Schlanger*

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points or more and contains 5,146 words.

s/ Molly E. Whitman
Molly E. Whitman

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2019 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ *Molly E. Whitman*
Molly E. Whitman