IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

KANAUTICA ZAYRE-BROWN, Plaintiff, v. NORTH CAROLINA DEPARTMENT OF ADULT CORRECTION, *et al.,* Defendants.	No. 3:22-cv-191

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment is notable for what it lacks. Defendants offer no testimony from the expert witnesses they designated in discovery. None of the Defendants claim to have their own expertise in gender-affirming care. They do not dispute that Plaintiff continues to experience clinically significant symptoms of gender dysphoria. They do not attempt to justify their refusal to provide surgery under the widely accepted standard of care or any clinical guidelines. They do not even acknowledge the main Fourth Circuit case on the Eighth Amendment and gender dysphoria, *De'lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013), instead stating falsely that "the Fourth Circuit has not yet considered whether the denial of a request for gender affirming surgery can support an Eighth Amendment claim[.]" (Doc. 60, Mem. Supp. Def.'s Mot. Summ. J. at 25.)

These omissions underscore the "one-sided" nature of the record and the fatal flaws in Defendants' arguments. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (summary judgment is appropriate if the evidence is "so one-sided that one party must prevail as a matter of law"). For these reasons and as detailed below, Defendants' motion for summary judgment should be denied. Instead, Plaintiff's motion for partial summary judgment should be granted.

I. Plaintiff Has an Objectively Serious Medical Condition That Has Been Diagnosed by Multiple Doctors as Requiring Treatment.

Defendants argue that Plaintiff cannot satisfy the objective prong of her Eighth Amendment claim because "the evidence does not support an inference that without the requested surgery, Plaintiff has experienced or is at risk of experiencing an 'objectively, sufficiently serious' harm." (Doc. 60 at 18.) This argument is meritless.

First, Defendants do not state the precise, governing legal standard—maybe because doing so would acknowledge that Plaintiff has satisfied it. "A serious medical need is a condition diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *DePaola v. Clarke*, 884 F.3d 481, 486 (4th Cir. 2018) (cleaned up). Decisions from the Fourth Circuit and other courts—including ones that Defendants cite elsewhere in their brief—hold that gender dysphoria meets this standard. *See, e.g.*, *De'lonta*, 708 F.3d at 522, 525 (plaintiff's allegation that risks of harm from her gender dysphoria (then called "gender identity disorder") constituted an objectively serious medical need); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) (citing cases); *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014) (en banc) ("The parties do

not spar over the fact that Kosilek requires medical care aimed at alleviating the harms associated with GID—to the contrary, the DOC has provided such care since 2003.").

Defendants cite no cases holding that gender dysphoria is *not* an objectively serious medical condition. Defendants also concede that they "confirmed [Plaintiff's] GD diagnosis," prescribed her treatments for it, and "do not challenge Plaintiff's GD diagnosis" or her ongoing need for treatment. (Doc. 60 at 5, 6, 33.) Indeed, the very diagnosis of gender dysphoria *requires* "clinically significant distress or impairment in social occupational, or other important areas of functioning." (Doc. 61-2, Ettner Rep. ¶23.) Plaintiff's opening brief details the significant, ongoing pain she experiences from gender dysphoria, confirmed by healthcare providers engaged by Defendants, their own expert, and Plaintiff's expert. (Doc. 63, Pl.'s Br. Supp. Mot. Partial Summ. J. at 10-22.) Plaintiff's expert further explains that "Mrs. Zayre-Brown's gender dysphoria will continue to intensify, with no means of relief. Her immediate need for surgery is great and will only accelerate." (Doc. 61-2, Ettner Rep. ¶134.)

Instead, Defendants base their argument entirely on a few instances when Plaintiff reported lacking certain symptoms or described herself as a happy person with a lot of energy. (Doc. 60 at 20.) But none of that changes the analysis.

First, Plaintiff was describing herself as a happy, energetic person "outside of prison," which was more than six years ago. (Doc. 62-3, Zayre-Brown Dep. 137:14-

24.)[1] That comment reveals little about her current health. And while Plaintiff has at times felt better than others, she has repeatedly reported severe anxiety, depression, and thoughts of self-harm and suicide. (*See* Doc. 63 at 11-18, 20.)

Moreover, a gender dysphoria diagnosis and eligibility for surgery—neither of which Defendants contest—do not require constant misery or lethargy. Rather, "[t]he critical element of Gender Dysphoria is the presence of clinically significant distress associated with the condition," and when hormone therapy and other treatments are insufficient, "relief from [a patient's] dysphoria cannot be achieved without surgical intervention. . . ." (Doc. 61-2, Ettner Rep. ¶¶21, 48.)

No one disputes that Plaintiff continues to have clinically significant levels of distress that her current treatment has not alleviated. In her recent words:

> To this day, every time it reenters my mind that I still have a phallus—whether it is because I see it, I feel sensation in it, I am in a situation where others might see it, or I even think about it—I am filled with disgust and emotional pain and at times overwhelmed with extreme anxiety and depressive feelings. While I may be able to function and even put on a happy face, during those periods—which occur frequently—it is extremely difficult to focus and I have to struggle to not again take measures to rid myself of this part of my body that is so foreign to the woman I know myself to be.

(Doc. 62-24, 2nd Zayre-Brown Decl. ¶4; *see also* Doc. 62-3, Zayre-Brown Dep. 87:14-15; 143:24, 144:7 (describing dysphoria-caused distress as "acutely high," "off the charts," "really high," and "to the roof").)

[1] Where original exhibit page numbering and ECF page numbering are inconsistent, citations refer to the original exhibit page numbering unless otherwise indicated.

Therefore, a reasonable factfinder could easily conclude that Plaintiff's gender dysphoria is an objectively serious medical condition requiring treatment. Indeed, on this record, Plaintiff makes that showing as a matter of law.

II. Defendants Are Currently Aware of Plaintiff's Gender Dysphoria and Her Resulting Pain.

Defendants argue that Plaintiff cannot meet the subjective prong of her Eighth Amendment claim because "none of the Defendants actually perceived Plaintiff's physical or mental health to be at a significant risk of harm." (Doc. 60 at 21.) Once again, Defendants have not applied the correct legal standard.

On her Eighth Amendment claim, Plaintiff only seeks prospective declaratory and injunctive relief. So, the proper inquiry is what Defendants know *now*—not what they perceived at some point in the past. The Supreme Court has held that for injunctive-relief claims, "deliberate indifference[] should be determined in light of the prison authorities' current attitudes and conduct: their attitudes and conduct at the time suit is brought and persisting thereafter." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (cleaned up). If "the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness[.]" *Id.* at 846 n.9.

Accordingly, even if Defendants truly did not perceive any risk of harm to Plaintiff before this litigation began, they have now been educated about her ongoing pain and risk of future harm. *Cf. Makdessi v. Fields*, 789 F.3d 126, 129 (4th Cir. 2015) ("Prison officials may not simply bury their heads in the sand and thereby skirt liability.").

III. The Disagreement in This Case Is Between Defendants—Who Have No Expertise in Gender-Affirming Care—and Everyone in the Record Who Does.

Defendants frame this case as a mere disagreement over the proper course of treatment between themselves and Plaintiff; they claim that her "contention that [Defendants'] medical-necessity determination was incorrect, even if true, does not make it unconstitutional." (Doc. 60 at 25.) Yet again, Defendants get the legal standard wrong and ignore critical, undisputed facts.

Under the Eighth Amendment, "the essential test is one of medical necessity. . . ." *Bowring v. Godwin*, 551 F.2d 44, 48 (4th Cir. 1977). Prison officials must provide care that is "adequate to address the prisoner's serious medical need." *De'lonta*, 708 F.3d at 526. Treatment decisions must be informed by sound medical judgment. *E.g., Gordon v. Schilling,* 937 F.3d 348, 361 (4th Cir. 2019) (denying defendants summary judgment because of "the soundness of [their] reasons" for withholding treatment). Therefore, if Defendants' "medical-necessity determination was incorrect," as they put it, Defendants lose.

Here, it is not just Plaintiff who disagrees with Defendants' medical-necessity determination. Defendants sent Plaintiff to be evaluated by doctors at UNC who specialize in gender-affirming care. Those specialists agree that surgery is medically necessary to treat Plaintiff's gender dysphoria and alleviate her ongoing pain. (Doc. 62-17, Figler Decl. ¶¶9-11; Doc. 62-18, Caraccio Decl.¶¶14-23; Doc. 62-16, Croft Decl. ¶¶14-15, 17-26.) So do Plaintiff's mental health care providers employed by Defendants. (Doc. 62-19, Dula Decl. ¶¶13-14; 61-2, Ettner Rep., App. E. at 12; Doc.

62-15, Hahn Dep. 156:24-158:14.) So does Plaintiff's expert. (Doc. 61-2, Ettner Rep. at ¶¶133-36.) So does the psychologist who Defendants retained for this litigation. (Doc. 62-1, Boyd Dep. 166:21-25; 167:12-21.)

Accordingly, this case is not a simple disagreement between patient and provider. Rather, it is a disagreement between Defendants—who do not claim any expertise in gender-affirming care—and everyone else in the record who does have such expertise or personally evaluated Plaintiff. (*See* Doc. 63 at 9 (detailing Defendants' minimal experience with gender-affirming medicine).) The lopsided nature of this disagreement supports Plaintiff's motion for summary judgment, not Defendants'. *See Edmo*, 935 F.3d at 787 (affirming judgment for plaintiff supported by gender-affirming care experts, whereas the defendants "lack[ed] meaningful experience directly treating people with gender dysphoria").

Defendants rely on *Hixson v. Moran*, where the defendant and plaintiff's expert disputed whether the defendant had violated the standard of care for treating diabetes. 1 F.4th 297, 303 (4th Cir. 2021). He had not prescribed insulin because doing so could have risked an insulin overdose. *Id.* The Fourth Circuit affirmed summary judgment for the defendant, explaining that violating the standard of care could show negligence, but by itself "is not enough to show deliberate indifference." *Id.*

Here, however, Plaintiff does not base her claim solely on the WPATH Standards of Care. She has presented compelling evidence that gender-affirming surgery is medically necessary for her—without it, she will continue to experience serious pain and risk of future harm. And unlike in *Hixson*, Defendants have not

identified any risks specific to Plaintiff that counsel *against* surgery. Accordingly, a reasonable trier of fact could only conclude that gender-affirming surgery is indeed medically necessary for Plaintiff, and refusing to provide it is "unnecessarily prolong[ing] [her] pain." *Sharpe v. S.C. Dept. of Corr.*, 621 Fed. App'x 732, 734 (4th Cir. 2015) (quoting *McGowan v. Hulick,* 612 F.3d 636, 640 (7th Cir. 2010)).

IV. Defendants' Reasons for Refusing Gender-Affirming Surgery Are Medically Unsound Judgments.

Defendants assert two reasons for denying Plaintiff's repeated requests for gender-affirming surgery. First, DTARC concluded that Plaintiff was "doing well and was relatively well adjusted, and that her physical and mental health were not at significant risk." (Doc. 60 at 24.) Second, "DTARC concluded that the medical literature was mixed regarding the efficacy of gender affirming surgery as a treatment for GD." (*Id.* at 25.) The evidence before the Court would require a reasonable trier of fact to reject these purported reasons as a matter of law.

As discussed above, the Eighth Amendment requires individualized medical determinations and sound application of treatment guidelines to ensure accurate medical care. *De'Lonta*, 708 F.3d at 526; *Gordon*, 937 F.3d at 361 (collecting cases). Here, first consider Defendants' complete lack of experience in evaluating a patient for gender-affirming care. Most Defendants are not health care providers at all. Three who are—Campbell, Peiper, and Sheitman—do not claim to have *ever* evaluated a patient for gender-affirming surgery and have minimal experience with gender-affirming care more generally. (Doc. 63 at 9.) Thus, any opinion Defendants offer on gender-affirming care is immediately suspect.

Now turn to Defendants' conclusion that Plaintiff was "doing well." This completely ignores medical records consistently demonstrating her severe distress caused by gender dysphoria. Indeed, the discussion in Defendants' own decision to deny Plaintiff surgery notes "the patient has been heavily focused on the status of the final decision regarding her requested/desired surgery and experiencing related anxiety/frustrated mood." (Doc. 61-2, Ettner Rep., App. G at 2.) Other records paint a clear picture of consistent distress.[2]

Defendants also found surgery unnecessary because of Plaintiff's "emotional and psychological stability." (Doc. 61-2, Ettner Rep., App. F at 7.) But that stability is *necessary* for a patient to qualify for surgery. As Dr. Figler from UNC explains, if any "mental health concerns are present, they must be well-controlled." (Doc. 62-17, Figler Decl. ¶9.) Dr. Caraccio testifies that Plaintiff "was as psychologically stable as

[2] (*See* Doc. 61-31 at ECF p. 1 (noting "very frequent thoughts of self-mutilation" and statement "I don't want to die but I feel like it is the best thing for me" given "increase in symptoms of Gender Dysphoria"); *id.* at ECF p. 2 (noting Plaintiff's "symptoms of depression have significantly increased and she has had thoughts of ripping the skin" off her genitals); Doc. 61-32 (noting that Plaintiff had tied a band around her genitals for a week and a half in order to require surgery and noting "increased dysphoric mood" that only improved when provided with information about upcoming appointment with UNC Transgender Health Program); Doc. 61-34 at 1-2 (noting hopefulness at prospect of receiving surgery but reporting feelings dysphoria at "a level of 11" "measured by rating dysphoric feelings on a scale from 0-10"); Doc. 61-35 (request for mental health visit every two weeks due to current level of dysphoria being "off the charts."); Doc. 61-36 at 1 (noting distress over lack of gender-affirming surgery or mental health provider competent in treatment of gender dysphoria and desire to perform self-surgery if gender-affirming surgery was not approved); Doc. 61-37 at 1 (same); *see also* Doc. 62-20 (noting Plaintiff's desire to put a band around her genitals "as a means of forcing surgical intervention" and explanation to Plaintiff that she "would only undermine her chances for gender-affirming surgery if she was considered to be emotionally unstable for treatment").)

she could be with ongoing gender dysphoria." (Doc. 62-18, Caraccio Decl. ¶22.) Defendant Junker also acknowledged that Plaintiff being "stable from a mental health standpoint was a factor in favor of her being a good candidate for surgery." (Doc. 62-10, Junker Dep. 113:5-9.) Thus, Defendants have put Plaintiff in a catch-22: either her health is too stable for surgery to be necessary, or her health is not stable enough to qualify for surgery under the WPATH SOC. Such a self-contradictory position is inherently unreasonable and cannot justify the denial of necessary surgery to individuals suffering from gender dysphoria.

Even putting all this aside, consider Defendant Campbell's own formulation of medical necessity. A procedure is necessary "for a particular individual to protect their life, to prevent significant disability or illness, or to prevent significant pain and suffering. The relevant factors for the determination under this definition are (1) an individualized risk benefit analysis; (2) any standard of care; and (3) evidence-based medicine." (Doc. 60 at 13-14. (citation omitted).) The record shows that Plaintiff meets these criteria.

On the risk/benefit analysis, Defendants' own expert psychologist testified that Plaintiff's gender dysphoria likely cannot be cured without surgery. (Doc. 62-1, Boyd Dep. 166:21-25, 167:12-21.) And Defendants could not identify any reasons that Plaintiff specifically would face a high risk of harm from surgery or would later regret it. (Doc. 62-11, Campbell Dep. 82:4-25, 83:1-84:14; Doc.62-10, Junker Dep. 221:3-224:12.) Further, Defendants have not and cannot provide any explanation as to why the distress documented in Plaintiffs' records, and now testified to under penalty of

perjury, do not show "significant pain and suffering" that would make surgery necessary under Defendant Campbell's criteria. (*See* Doc. 13-2, First Zayre-Brown Decl. ¶¶24-26, 29, 34; Doc. 62-24, 2nd Zayre-Brown Decl. ¶¶4, 8; Doc. 62-3, Zayre-Brown Dep. 153:7-20, 166:18-170:16, 171:1-174:13.)

Moreover, Defendants downplay the associated risk by pointing to instances of positivity in Plaintiff's records. But courts have rejected such cherry-picked assessments of a gender dysphoric patient's mental health history. *See Edmo,* 935 F.3d at 798 (defendants' argument that the plaintiff had not self-harmed for many years was meritless because it "overlook[ed] the profound, persistent distress [her] gender dysphoria cause[d]"); *Clark v. Quiros*, No. 3:19-cv-00575-VLB, 2023 WL 6050160, at *64 (D. Conn. Sept. 15, 2023) (rejecting argument against gender-affirming surgery where context revealed that hopefulness for additional treatment "had a placebo-like effect" on plaintiff's mental health and "occasional reports of feeling better [were] engulfed by the many reports showing . . . suffering and demanding adequate treatment").

As to "any standards of care," that factor favors Plaintiff as well. Beyond the WPATH Standards of Care ("SOC"), "'[t]here are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups.'" *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595-96 (4th Cir. 2020) (quoting *Edmo*, 935 F.3d at 769). Defendants have not identified any other competing standards of care that led them to their conclusion. Nor could they. *See id.*

Finally, the issue of "evidence-based medicine" brings up Defendants' second

justification: "that the medical literature was mixed regarding the efficacy of gender affirming surgery." But Defendants' policy—and Defendants themselves—acknowledge that gender-affirming surgery may be medically necessary for some patients. (Doc. 60 at 5; Doc. 10-1, EMTO Policy at 7.) So even if the literature were "mixed," Defendants still accept that some patients require gender-affirming surgery, and they cannot point to anything particular about Plaintiff's circumstances that would make such surgery dangerous or ineffective for her. Therefore, this argument is irrelevant, and a reasonable trier of fact could not accept it as a reason why Plaintiff specifically does not need gender-affirming surgery.

This argument also finds no support in the mainstream medical community or the Fourth Circuit. As explained in Plaintiff's brief in support of her motion for partial summary judgment, the Fourth Circuit has already concluded that "sex reassignment surgery may be necessary for some individuals for whom serious symptoms persist [after hormone therapy and other treatment]. In these cases, the surgery is not considered experimental or cosmetic; it is an accepted, effective, medically indicated treatment. . . ." *De'lonta,* 708 F.3d at 523. And again, *Grimm* endorsed the WPATH SOC as the only authoritative, evidence-based standard of medical care for treating gender dysphoria, consistent with numerous medical associations that Defendants purport to respect and look to for clinical guidance. (Doc. 63. at 4-5; Doc. 62-5, Campbell 30(b)(6) Dep. 28:4-29:1, 35:1-10, 51:5-54:10.)

Defendants rely on the literature review of Dr. Campbell, who has no real background in gender-affirming care. (Doc. 62-11, Campbell Dep. 5:17-6:23, 7:22-

11:23, 13:4-14:2). He found purportedly "mixed" evidence of the surgery's efficacy. (Doc. 60 at 25; Doc. 62-5, Campbell 30(b)(6) Dep. 190:4-191:5, 193:9-16.) Dr. Campbell's literature review, however, was woefully inadequate, and his conclusions drawn therefrom are simply not true.

As Dr. Ettner explains, Dr. Campbell's assertions regarding the efficacy of gender-affirming surgery are "contradicted by the literature addressing such surgery and particularly recent studies substantiating the health outcomes and benefits of gender affirming surgery." (Doc. 61-2, Ettner Rep. ¶116.) Dr. Campbell relies on "highly questionable sources of information" to reject the well-established SOC. (*Id.* ¶¶118-21.) And even as to the credible studies that Dr. Campbell cites, he distorts and mischaracterizes their results to support his denial of gender-affirming surgery. (*Id.* ¶117.) Other courts have rejected similar assertions that the WPATH SOC or the efficacy of gender-affirming surgery are matters of scientific or medical dispute. *See Flack v. Wisconsin Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1014 (W.D. Wis. 2019) (rejecting "low-quality evidence" argument in holding that gender-affirming surgery is a generally accepted form of medical treatment for gender dysphoria); *Dekker v. Weida*, No. 3:19-cv-00575-VLB, 2023 WL 4102243, at *15 (N.D. Fla. June 21, 2023) (rejecting argument that "low quality" evidence cannot support necessary treatments for gender dysphoria); *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 WL 40373727, at *17 (E.D. Ark. June 20, 2023) (same).

Accordingly, a reasonable trier of fact could easily conclude—and on this record, could *only* conclude—that Defendants' reasons for denying surgery are

medically unsound, and gender-affirming surgery is medically necessary to treat Plaintiff's gender dysphoria.

V. Defendants Ignore the Fourth Circuit's Binding *De'lonta* Decision.

Defendants argue that "if a correctional system is providing other recognized accommodations and treatment for GD, the decision not to approve a requested surgery cannot support a claim of deliberate indifference." (Doc. 60 at 26-27.) This argument only works by pretending *De'lonta* does not exist—which is exactly what Defendants do. They wrongly assert that "the Fourth Circuit has not yet considered whether the denial of a request for gender affirming surgery can support an Eighth Amendment claim[.]" (Doc. 60 at 25.)

In *De'lonta*, the plaintiff alleged that "despite her repeated complaints to Appellees alerting them to the persistence of her symptoms and the inefficacy of her existing treatment, she has never been evaluated concerning her suitability for surgery. . . . These factual allegations, taken as true, state a plausible claim that Appellees actually knew of and disregarded *De'lonta*'s serious medical need in contravention of the Eighth Amendment." 708 F.3d at 525 (cleaned up). The court further explained that just because defendants provided "*some* treatment consistent with the [SOC], it does not follow that they have necessarily provided her with *constitutionally adequate* treatment." *Id.* at 526.

Indeed, while *De'lonta* did not address the merits, it forecast this very case: Plaintiff is "hormonally confirmed"—she will see no further improvement to her gender dysphoria from hormone therapy, and in fact requires hormone therapy for

her basic functioning because of her orchiectomy. (Doc. 61-2, Ettner Rep. ¶¶47, 90). Her providers agree that the source of her gender dysphoria is her genitals, and it will not abate while she has genitals inconsistent with her gender identity.[3] Despite the treatment provided, Plaintiff's painful symptoms of gender dysphoria and associated risks persist, making surgery necessary.

VI. This Case Is Very Similar to *Edmo v. Corizon*.

Defendants seek to distinguish *Edmo v. Corizon,* encouraging this Court to look instead to different out-of-circuit precedent. (Doc. 60 at 27-28.) But *Edmo* is directly on point, and this Court has already rejected Defendants' primary effort to distinguish it.

In *Edmo*, the Ninth Circuit, like the Fourth Circuit, observed that "[t]he weight of opinion in the medical and mental health communities agrees that GSC"—gender confirmation surgery—"is safe, effective, and medically necessary in appropriate circumstances." 935 F.3d at 770. And like the Fourth Circuit, the Ninth Circuit recognized the WPATH SOC as the relevant clinical guidelines for evaluating and providing treatment for transgender prisoners suffering from gender dysphoria. *Id.* at 770-71. As here, "both sides and their medical experts agree[d]" that the plaintiff suffered from gender dysphoria, but the defendants disputed that gender-affirming surgery was medically necessary. *Id.* at 767.

[3] (Doc. 62-17, Figler Decl. ¶¶9-14; Doc. 62-18, Caraccio Decl. ¶¶10, 14-23; Doc. 62-19, Dula Decl. ¶¶13-14; Doc. 62-15, Hahn Dep. 90:2-91:6, 94:19-95:1, 165:23-166:14, 167:12-17, 160:16-161:5, 193:17-194:24, 210:9-11; Doc. 62-23, Bowman Dep. 31:14-19, 51:7-18, 118:25-119:13.)

Edmo had received hormone therapy and counseling for her gender dysphoria while incarcerated, but continued to feel "depressed, embarrassed, [and] disgusted] by her male genitalia" on a daily basis. *Id.* at 772. Dr. Eliason, the clinician who made the medical necessity determination, believed that despite Edmo's distress and self-castration attempts, she was "doing alright." *Id.* at 773. Based on reports from prison staff and his own observations, he concluded that he "did not see significant dysphoria," but that Edmo "looked pleasant and had a good mood." *Id.* Though Edmo's clinician purported to consider the WPATH SOC, like Dr. Campbell, *supra* § IV, he ultimately stated his own criteria for medical necessity of gender-affirming surgery and concluded that Edmo did not meet them. *Id.* at 774, 791. As here, his decision was affirmed by other clinicians and a multidisciplinary committee of medical providers and prison leadership, none of whom evaluated Edmo themselves. *Id.*

The court noted that to resolve Edmo's Eighth Amendment claim, it "must determine, considering the record, the judgments of prison medical officials, and the views of prudent professionals in the field, whether the treatment decisions of responsible prison authorities was medically acceptable." *Id.* at 786. Even though Dr. Eliason personally observed Edmo (unlike the decisionmakers for Plaintiff) and claimed to evaluate her individual circumstances, the court concluded that it could not defer to his judgment. *Id.* at 791. Relying in part on the expertise of Plaintiff's expert Dr. Ettner, the Ninth Circuit agreed with the district court that "Dr. Eliason's decision was medically unacceptable under the circumstances." *Id.* Not only did he "lack meaningful experience directly treating people with gender dysphoria," he "did

not follow the accepted standards of care in the area of transgender health care,"—the WPATH SOC—"nor did he reasonably deviate from or flexibly apply them." *Id.* at 787, 792. Moreover, as here, even under the doctor's own criteria for gender affirming surgery, Edmo still qualified for surgery. *Id.* at 792. The court concluded that, by refusing gender-affirming surgery despite awareness of an ineffective treatment plan, those defendants acted with deliberate indifference. *Id.* at 798, 803.

Here, Defendants try to distinguish *Edmo* by focusing on evidence there "that the plaintiff had, on multiple occasions, actually harmed herself, including three efforts to self-castrate and the alleviation of thoughts of self-castration by cutting her arms." (Doc. 60 at 27.) Defendants' counsel made the same argument at a hearing in this case, pointing to "the presence of self-mutilation and self-harm [in *Edmo*] that has not been demonstrated in this case." (Ex. 2, Transcript of Aug. 23, 2022 Hearing at 28.)

In response, the Court rightly expressed incredulity:

> I mean, if we're going to wait till people start self-mutilating themselves -- I mean, you know, what are we doing here? I mean, we got to figure out -- there are people who are different in this world, and we've got to -- we've got to figure out how to treat them as citizens and people of this world. We've got to get away -- we can't -- I mean, just because somebody is different doesn't mean that we just throw them away.

(*Id.*) This view aligns with the basic Eighth Amendment rule that prison officials may not "withhold treatment from an inmate who suffers from a serious, chronic disease until the inmate's condition significantly deteriorates." *Gordon*, 937 F.3d at 359; *see also Smith v. Carpenter,* 316 F.3d 178, 188 (2nd Cir. 2003) ("[P]rison officials may not

ignore medical conditions that are 'very likely to cause serious illness and needless suffering' in the future even if the prisoner has 'no serious current symptoms'" (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993))).

Moreover, the record here shows that Plaintiff has attempted to harm herself and often has strong urges to do so. (*See supra* note 2; Doc. 62-24, 2nd Zayre-Brown Decl. ¶¶4, 8.) Plaintiff's providers believed these reports to be true, and Defendants testified that they did as well. (*See* Doc. 63 at 17-18.) Dr. Ettner's report explains why Plaintiff's gender dysphoria will only worsen without surgery. (Doc. 61-2, Ettner Rep. ¶¶75-79, 89-90, 133-37.)

For these reasons, *Edmo* provides highly persuasive authority in Plaintiff's favor.

VII. The Out-of-Circuit Cases Defendants Cite Are Distinguishable.

Defendants urge the Court to rely on out-of-circuit cases that ruled against plaintiffs seeking gender-affirming surgery. All are distinguishable.

Defendants first point to *Kosilek v. Spencer,* 774 F.3d 63 (1st Cir. 2014) (en banc). But *Kosilek* justified the denial of surgery in part based on prison safety concerns, *id.* at 92, which Defendants have explicitly disavowed here. (Doc. 62-9, Defs. Interrog. Resp. at 6.) The defendants there also relied on "medical experts" to craft a treatment plan, *Kosilek,* 774 F.3d at 91, whereas Defendants here *rejected* the expert recommendations of the specialists they sent Plaintiff to at UNC. (*See supra* note 3.)

Moreover, nearly a decade has passed since *Kosilek*, and the expert witness who testified against the plaintiff in that case has since come to recognize that

gender-affirming surgery is a "safe, effective and widely accepted treatment for [gender dysphoria]; disputing the medical necessity . . . based on assertions to the contrary is unsupportable." *See Edmo*, 935 F.3d at 795-96.

Defendants next cite *Lamb v. Norwood,* 899 F.3d 1159 (10th Cir. 2018), which affirmed summary judgment against a pro se prisoner. But Defendants acknowledge that the court's decision there was based in part on the "sparseness of the summary judgment record." (Doc. 60 at 26.) Unlike in *Lamb*, Plaintiff—with the aid of counsel—has compiled a vast record demonstrating that the care she has received is inadequate.

Defendants additionally rely on *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019), where a divided panel held that because "there is robust and substantial good faith disagreement dividing respected members of the expert medical community, there can be no claim under the Eighth Amendment." *Id.* at 220.

Curiously, the majority in that case relied entirely on the factual record from *Kosilek*—which was compiled in 2006—and so could not account for "any developments in the medical community regarding treating gender dysphoria and determining the necessity for" gender-affirming surgery." *Id.* at 233 (Barksdale, J., dissenting). The Ninth Circuit has recognized this flaw: "*Gibson* relies on an incorrect, or at best outdated, premise: that there is no medical consensus that [gender-affirming surgery] is a necessary or even effective treatment for gender dysphoria." *Edmo*, 935 F.3d at 795 (cleaned up); *see also Flack v. Wis. Dep't of Health Servs.,* 395 F. Supp. 3d 1001, 1017 (W.D. Wis. 2019) ("The oddest part of the *Gibson*

decision is that the *only* 'evidence' on this issue came not from the record in that case, but rather from adoption of the same *2006* expert testimony relied upon by the First Circuit in *Kosilek*.").

So, even assuming that *Gibson* was right about disagreement in the medical community, the evidence of that disagreement is now 17 years old. The fresh record before the Court tells a very different story.[4] Defendants concede that gender-affirming surgery can be medically necessary for some patients. (Doc. 60 at 5.) Every health care provider in the record who has subject-matter expertise agrees that Plaintiff is one of those patients. And under the Eighth Amendment, prison medical standards are not fixed in time, but must account for "evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble,* 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

Defendants also cite *Campbell v. Kallas,* 936 F.3d 536, 537 (7th Cir. 2019), which awarded the defendants qualified immunity on a damages claim. Critically, the court did *not* award qualified immunity because it considered the defendants' conduct constitutional—indeed, it declined to address that question at all. *Id.* at 545 (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). The court explained, "Denying a specific therapy in a particular case might amount to a constitutional violation, but qualified immunity applies absent reasonably specific notice to prison officials." *Id.*

[4] Additionally, as explained in Plaintiff's reply brief in support of her preliminary injunction motion, *Gibson*'s position regarding gender-affirming surgery is at odds with the Fourth Circuit's precedents in *De'lonta and Grimm*. (*See* Doc. 22, Pl.'s Reply Supp. Mot. Prelim. Inj., at 8-11 & n.6.)

at 549 (italics omitted). The court ruled as it did because there was not sufficiently similar precedent on point. *Id*.

Here, Plaintiff has not sought damages for her Eighth Amendment claim, making a qualified immunity analysis irrelevant. Defendants also fail to note that Campbell's suit was allowed to proceed to trial on her claim for injunctive relief, and the district court concluded the defendants were deliberately indifferent in failing to provide Campbell surgery even though she had received hormone therapy and counselling. No. 16-cv-261-jdp, 2020 WL 7230235, *8 (W.D. Wis. Dec. 8, 2020). This case thus supports the necessity of Plaintiff's surgical request.

Finally, Defendants cite four unpublished district court decisions ruling against plaintiffs seeking gender-affirming surgery. (Doc. 60 at 27 n.4.) Three of those cases involved pro se plaintiffs who offered no expert testimony. Therefore, those cases offer minimal persuasive value. *See Sabbats v. Clarke,* No. 7:21CV00198, 2022 WL 4134771, at *1 (W.D. Va. Sep. 12, 2022); *Wright v. Parker,* No. 4:21-cv00069-KGB-JJV, 2022 WL 18586696, at *1 (E.D. Ark. Apr. 11, 2022); *Armstrong v. Mid-Level Prac. John B. Connally Unit*, No. SA-18-CV-00677-XR, 2020 WL 230887, at *2 (W.D. Tex. Jan. 15, 2020).

The only represented plaintiff also failed to provide expert testimony, and unlike Plaintiff here, framed her Eighth Amendment claim in terms of the state having a "blanket ban" on gender-affirming surgery. *Fisher v. Fed. Bureau of Prisons*, No. 4:19-cv-1169, 2022 WL 2648950, at *3 (N.D. Ohio 2022). Plaintiff's claim here instead is based exclusively on her individual medical needs.

VIII. Plaintiff May Bring Her State Constitutional Claim Because She Has No Other Adequate State Law Remedy.

Plaintiff has also brought a claim for damages under Article I, Section 27 of the North Carolina Constitution, which prohibits "cruel or unusual punishments." Defendants argue that Plaintiff cannot do so because she has an "adequate state remedy" in the form of a negligence claim in the North Carolina Industrial Commission. (Doc. 60 at 30.)

Plaintiff's brief in support of her motion for partial summary judgment explains why she could not bring a negligence claim in the Industrial Commission. In short, the facts here show intentional and reckless misconduct. But the Industrial Commission can only adjudicate claims of ordinary negligence. A claim alleging these same facts would be jurisdictionally barred, and thus could not be an adequate state remedy that forecloses the need for a direct state constitutional claim. (Doc. 63 at 30-32.) Defendants cite no authority to the contrary.

In a footnote, Defendants ask the Court to grant summary judgment for Defendants Agarwal and Amos because neither "(1) was involved in any way in the events that are the subject of this litigation; or (2) is otherwise necessary for injunctive relief." (Doc. 60 at 30 n.5.) Even if the first point is true, Agarwal is a DTARC member, and both are DAC healthcare providers who would be bound by any injunction ordered by the Court. *See* Fed. R. Civ. P. 65(d)(2)(B) (injunctions bind "the parties' officers, agents, servants, [and] employees"). Moreover, dismissing Agarwal and Amos would be pointless since they are sued only in their official capacities, and so, like all other Defendants, are functionally "the State." Therefore, the Court should

deny Defendants' motion for summary judgment across the board.

IX. Defendants' Failure to Provide Adequate Hormone Treatment Further Exacerbated Plaintiff's Gender Dysphoria.

Defendants argue that "Plaintiff cannot satisfy the objective prong of a deliberate indifference claim related to housing or hormone therapy." (Doc. 60 at 28.) But Plaintiff has never premised her claims on her housing. And her claims do not depend solely on Defendants' delays and inconsistency in providing her hormone therapy. (*See* Doc. 62-18, Caraccio Decl. ¶¶10-11.) These facts simply reinforce Defendants' history of failing to provide Plaintiff gender-affirming care prescribed by specialists.

X. The Evidence Establishes an ADA Violation and Creates a Reasonable Inference of an RA Violation.

Plaintiff is also entitled to summary judgment on her Americans with Disabilities Act ("ADA") claim, based on either a failure to accommodate or a disparate treatment theory, and therefore Defendants' motion for summary judgment on that claim must fail.

Defendants argue that "there is no evidence that Plaintiff ever informed Defendants that she sought surgery as a reasonable accommodation for her GD." (Doc. 60 at 31.) That is flatly incorrect. As an initial matter, the body that considers requests for gender-affirming surgery is called the "Division Transgender **Accommodation** Review Committee," and requests to that body are called "accommodation requests." (Doc. 10-1, EMTO Policy at 2.) The record shows that Plaintiff made these "accommodation requests" for the treatment of her persistent

gender dysphoria. (Doc. 61-2, Ettner Rep., App. F, G.) Moreover, Plaintiff need not use any "magic words" for her requests to qualify as requests for accommodations under the ADA. *See, e.g., Parkinson v. Anne Arundel Med. Ctr.,* 79 Fed. App'x 602, 604-05 (4th Cir. 2003) (ADA accommodation request need not "formally invoke the magic words 'reasonable accommodation'" (quoting *Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 313 (3d Cir. 1999))). In any event, after exhausting all other avenues to seek accommodations for her gender dysphoria under DAC Policy, Plaintiff did in fact seek gender affirming surgery as a disability accommodation, and that request was considered through DAC's Accommodation Request policy. (*See* Ex. 3, ADA Recommendation, DAC 167.)

Regarding the reasonableness of the accommodation sought, Defendants do not argue that providing surgery would result in any "undue hardship" to them, *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016). Instead, Defendants argue that Plaintiff has not presented evidence that the accommodations she has already received were not reasonable accommodations or have failed to allow her to "fully participate in prison life or services." (Doc. 60 at 34.)

That is wrong. Plaintiff's expert has testified to the unreasonableness of Defendants' course of conduct in accommodating Plaintiff's gender dysphoria thus far (Doc. 61-2, Ettner Rep. ¶¶92, 133-35), and Plaintiff, her DAC provider, and Defendants' experts have all testified to Plaintiff's fixation on surgery, which has inhibited her rehabilitation. (Doc. 62-3, Zayre-Brown Dep. 153:7-20, Doc. 62-1, Boyd

Dep. 181:18-182:20; Doc. 62-25, Penn Dep. 210:18-211:4; Doc. 62-23, Bowman Dep. 89:20-91:5; 118:5-21.)

Further, as Plaintiff has already explained (Doc. 63 at 34-35), the record shows that her request for surgery was denied in a discriminatory manner—that is, because her disability is gender dysphoria. Denial of prescribed medical care for treatment of a disability, where like care is provided to others, constitutes discrimination in violation of the ADA. *See United States v. Georgia*, 546 U.S. 151, 157 (2006); *Lonergan v. Fla. Dept. of Corr.,* 623 Fed. App'x 990, 994 (11th Cir. 2015). As Plaintiff has detailed, gender-affirming surgery is medically necessary to treat her gender dysphoria. Defendants provide medically necessary care for other disabilities and admit that DAC provides surgeries that could qualify as gender-affirming surgery whenever indicated for conditions other than gender dysphoria, including genital reconstruction surgery. (Doc. 62-5, Campbell 30(b)(6) Dep. 144:2-19.). Defendants also use an entirely different approval system for gender dysphoria treatment than they do for other disabilities. (Doc. 63 at 6-10.) Dr. Campbell—DAC's chief medical officer—believes that as a general matter, surgery is never medically necessary to treat gender-dysphoria, and he has admitted to incorporating this position into his consideration of Plaintiff's request. (Doc. 61-2, Ettner Rep. App. H; Doc. 62-5, Campbell 30(b)(6) Dep. 215:2-15; Doc. 62-11 Campbell Dep. 21:17-25, 69:5-70:18, 74:13-76:10, 77:15-80:11.) Defendants have never approved gender-affirming surgery to treat gender dysphoria. (Doc. 62-11 Campbell Dep. 135:18-136:10.)

This evidence demonstrates that Plaintiff's disability—her gender dysphoria—is a but-for cause of Defendants' ongoing denial of gender-affirming surgery, and at the very least allows for a reasonable inference that her disability was the sole cause of the denial for purposes of the Rehab Act. Accordingly, this Court should deny Defendants' motion for summary judgment on Plaintiff's ADA and Rehabilitation Act claims, and grant summary judgment for Plaintiff on her ADA claim.[5]

CONCLUSION

The vast evidentiary record before the Court overwhelmingly favors Plaintiff and would preclude a reasonable finder of fact from ruling in favor of Defendants. Therefore, Defendants' motion for summary judgment should be denied. Instead, Plaintiff's motion for partial summary judgment should be granted.

Respectfully submitted this 19th day of October 2023.

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[5] Though the requirements the two statutes impose are largely identical, Courts have held that the "solely by reason of" language in the Rehab Act imposes a higher burden of causation than the ADA. The ADA requires only that the disability be one of the multiple causes of the discrimination. *See Baird ex rel. Baird v. Rose,* 192 F.3d 462, 468-69 (4th Cir. 1999).

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2023, I electronically filed the foregoing document using the ECF system which will send notification of such filing to all counsel of record.

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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

KANAUTICA ZAYRE-BROWN, Plaintiff, vs. THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant.	)	DOCKET NO. 3:22-cv-191

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MAX O. COGBURN, JR.
UNITED STATES DISTRICT COURT JUDGE
AUGUST 23, 2022

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

THE COURT: All right. Thank you. Good morning. Sorry. I-85 was a problem.

All right. Who wants to go first? How about the State?

MS. BRENNAN: Good morning, your Honor. I'm Stephanie Brennan on behalf of the State. I'm from the Attorney General's office, and I'm here along with my colleague, Orlando Rodriguez. I will be addressing the motion to dismiss, and he will be addressing the preliminary injunction. With your Honor's permission, I'll start by addressing the motion to dismiss.

THE COURT: All right.

MS. BRENNAN: Your Honor, our position is that you need not reach the preliminary injunction because the complaint is appropriately dismissed as a matter of law. I will first briefly address the plaintiff's allegations and then address our two primary arguments.

First is the --

THE COURT: Talk about where the Fourth Circuit is on this now --

MS. BRENNAN: Okay.

THE COURT: -- as the -- with its recent ruling two to

one, and where those cases are with regard to -- is that case going on en banc? Is it going to be appealed to the United States Supreme Court? I mean, where are we going to go -- this stuff is all going to get hashed out somewhere down the line.

MS. BRENNAN: Your Honor, that particular case that you're referring to, which we had filed last week, the Williams case, just recently came out. And so I don't know that any of us know at this point where it's going to go in terms of any en banc --

THE COURT: Right now -- right now -- it's until then. That's the case right now, that they --

MS. BRENNAN: Correct.

THE COURT: It could go en banc --

MS. BRENNAN: Correct.

THE COURT: It could go to -- there will certainly be some judges that will ask to have it done. And then, ultimately, it may go up to the Supreme Court, and they'll -- they'll rule on all this stuff. So it's moving -- it's moving along outside of this case.

MS. BRENNAN: Certainly, your Honor.

To address that case and how it impacts this one, it certainly addresses the -- the question of whether gender dysphoria qualifies as a disability, which affects both the Rehabilitation Act and the ADA claims and whether or not those are viable claims.

You know, at the current moment, the Fourth Circuit has ruled that gender dysphoria does qualify as a disability. As your Honor has noted, that could change through further appellate review and --

THE COURT: It could change because that's a -- is that opposite of what -- the ADA, the American Disabilities, I mean, where does that come in?

MS. BRENNAN: So we have not taken a position as to that element of that at this point. We actually made arguments as to -- we knew that that was an unsettled issue, so, therefore, we didn't ask the Court to dismiss on that ground.

We were focused, instead, on the other two elements, which we think separately warrant dismissal. And I don't think that the Williams case addresses those or affects our arguments on the motion to dismiss.

THE COURT: Okay. Go ahead.

MS. BRENNAN: So the second and third elements of that particular claim -- and, of course, we're talking about the ADA and Rehabilitation Act claims only.

First, you have to say that you have a disability. Second, you have to establish that you're otherwise qualified to receive the benefits of a public service, program, or activity, and, third, that the plaintiff was denied the benefits of such service, program, activity, or otherwise discriminated against on the basis of disability.

Now, the facts in Williams are very different. In that case, there were allegations that there were -- was harassment verbally, abusive -- an abusive physical search, and the failure to house the plaintiff in -- with the appropriate gender.

None of that is at issue in this particular case. The allegations here don't establish those other elements of the claim because the plaintiff has not been excluded from any service on the basis of disability.

So plaintiff contends that the denial of a particular medical intervention is exclusion from some kind of service, but that claim doesn't really make any sense, and there's no case that has so held. The plaintiffs don't cite any case in which a court has accepted that theory in the context of gender dysphoria.

Here, the -- there's been nothing denied to the plaintiff that is generally available to other incarcerated persons, but not to her. In other words, there's no public service, program, or activity that's available that's being denied.

And she has other equal access, as all other incarcerated persons, to medical care and treatment generally, and there's no allegation otherwise. In fact, the complaint concedes that there have been some treatments, some medical treatments, given to the plaintiff for gender dysphoria. It's just a simple disagreement about which treatment and whether a particular

treatment is going to be authorized, but that is not disability discrimination.

And by plaintiff's logic, the denial of any request for a particular intervention, if the plaintiff is disabled, must be disability discrimination because the plaintiff was excluded from the particular treatment. And that doesn't really make any sense.

So we've -- our position is that those last two elements have not been established because there was no exclusion that would qualify as a violation of either the ADA or the Rehabilitation Act under Article 2.

Before you even get to that, your Honor, we think there's a significant issue of the failure to exhaust administrative remedies that has to be addressed.

THE COURT: Well, let me hear about that.

MS. BRENNAN: Okay. If you'll give me just a moment.

The PLRA is mandatory, and it requires administration exhaustion. Specifically, 42 U.S.C. 1997(e)(a) provides that no action shall be brought with respect to prison conditions under Section 1983 or any other federal law until such administrative remedies as were available were exhausted.

So exhaustion is a prerequisite to filing suit, and it applies to all inmates suing about prison life. And there's a series of cases from the US Supreme Court and the Fourth Circuit that make it clear that this is strict and mandatory.

The Jones versus Bock decision out of the Supreme Court said there's no question that exhaustion is mandatory under the PLRA and unexhausted claims cannot be brought in court.

And again, in Ross versus Blake, the Supreme Court said the mandatory language of the PLRA means the Court may not excuse failure to exhaust. And it's been clear, through this series of cases, that there can be no judge-made exceptions, and there's no futility exception to the PLRA.

Plaintiff has three responses. First, the plaintiff contends that she's already grieved this issue, and she makes a vague and conclusory allegation that she has exhausted her remedies for all the claims that are asserted in paragraph 13 of the complaint. However, the facts that are actually alleged in the complaint made clear that that is not the case.

The plaintiff alleges that she started filing grievances about the lack of surgery while the decision was still being made. However, nowhere in the complaint does it allege that there was a grievance that was filed after the decision was completed and that that grievance was -- was finalized.

And, of course, that cannot be the case because the decision was given to the plaintiff here in April of 2022 -- specifically, April 26th of 2022 -- and that was only two days prior to this lawsuit being filed. But the decision at issue is the consideration for a surgery under the current policy, which resulted in that April 26th, 2022, decision. That's what

she's trying to challenge in this particular lawsuit.

So there's no allegation that she's completed the grievance process for the decision that she's trying to challenge in this particular case. And, of course, you can't pre-grieve an anticipated decision because the grievance process is supposed to address how the decision was made and the bases for the decision and so forth.

So the law is very clear that plaintiff cannot challenge the particular decision she's seeking to challenge in court without actually going through the grievance process.

Second, plaintiff contends that there's a continuing issue, and so she shouldn't have to repeatedly grieve it. And the plaintiff cites the Wilcox case out of the Fourth Circuit for that, but that case is also very distinguishable from this one.

In Wilcox, that involved a failure to restart some religious services after a decision had been made to stop those services. When the decision was made to stop the services, the plaintiff grieved that, and the Court said that the plaintiff didn't have to continuously re-grieve the decision to fail to restart because they had already grieved the specific issue.

This is very different because this is one particular and specific determination under a particular policy that was not complete until April of 2022. It was not simply a continuation of a decision that had previously been made. So in this case,

there's no potential exception to the grievance requirement.

And then, third, the plaintiff contends that this is an affirmative defense and suggests that it shouldn't be decided at this point. However, the Supreme Court and the Fourth Circuit has been very clear that, if the failure to exhaust is apparent on the face of the plaintiff's complaint, then dismissal is very appropriate.

In Jones versus Bock, the Supreme Court decision I referenced earlier, the Court said that the district court can dismiss the complaint sua sponte when it's apparent, from the face of the complaint, that the claim is barred by the affirmative defense of the nature to exhaust under the PLRA. And the Wilcox case that the plaintiffs rely on says that, as well, along with the Anderson case from the Fourth Circuit.

So under that circumstance, the courts have recognized North Carolina has a three-step grievance process, which, of course, takes more than two days to complete. And under those circumstances, it is clear, from the facts alleged on the face of the complaint, that the grievance process cannot have been and wasn't completed as of the time that the complaint was filed.

And, in fact, we found one case out of the Western District where the Court very similarly held, because it was apparent on the face of the complaint, that the complaint had been filed very shortly after an incident and without enough

time to complete the grievance process. And in that case, this Court found that that was appropriate to dismiss.

So this is a bar that we think means that, at this point, this issue has not been properly brought before the Court. And that doesn't mean that the plaintiff can't go through those processes and do what's -- what's necessary to make it properly before the Court, but the -- a lot of resources are being invoked at this point to make a determination that may very well have no impact if this is not properly before the Court because those remedies have not been exhausted.

THE COURT: But if -- yeah. And I see that, and I -- and I hear your arguments, and there's -- there's a lot of merit to it. But are we not going to just face this again? We dismiss the case, and they go back through the grievance process, and, whoopee, nothing happens, they decide not to do the surgery. The grievance process is done, and then they bring the case.

MS. BRENNAN: That's certainly possible, but I don't think we can assume what the result of the grievance process will be.

THE COURT: Really?

MS. BRENNAN: Well, the Department is entitled to go through that process. And until there's a decision, there's not a decision. And by law the requirement is that they have to do it. There's no exception. And when the Fourth Circuit

has tried to create exceptions, there's been reversal.

So I think -- I think this is just one of those areas where there's a very strict requirement in the reason that the law was intended to stem the tide of lawsuits from prisoners, and it's very strict. So I think that that's where we're at legally --

THE COURT: Okay.

MS. BRENNAN: -- on that issue.

THE COURT: All right. Let me hear from you all on this motion, and then I'll hear your side on the injunction issue.

MS. MAFFETORE: Yes, your Honor. And first, I'd like to address the issues that you were just discussing with my colleague across the aisle related to exhaustion.

So it is true that, if a complaint fails to -- or demonstrates a failure to exhaust on its face, that it can be dismissed. But what the complaint here demonstrates on its face is that Miss Zayre-Brown has exhausted this issue, repeatedly, to full exhaustion, multiple times.

THE COURT: How many times has she asked for the surgery before and had the process gone through and had it denied? How many times has she done that?

MS. MAFFETORE: She has fully grieved a request for gender-affirming surgery twice. The first time she fully grieved was in 2019, following a denial from the DTARC on a

request for gender-affirming surgery. She re-initiated the process in early 2020, was able to finally get a consultation in mid-2021, was told that gender-affirming surgery was necessary by the specialist that she was sent to by DPS. Despite that, she still had not received the surgery several months later.

And defendants concede, on page 3 of their reply brief, that she fully exhausted a request for a vulvoplasty, stating that it was a medically necessary surgery for her, on January 18th of this year.

So the purpose of the PLRA, according to Woodford versus Ngo and other Supreme Court cases, is to provide notice and an opportunity to correct to the Department. The Department here has been provided notice and an opportunity to correct on multiple occasions. They've been provided years worth of notice, and that is apparent from the face of the complaint. The Department had Miss Zayre-Brown's fully exhausted grievance before them before deciding, on April 26th, that they were going to, nonetheless, deny her of her surgery.

Courts across the country, including the Fourth Circuit and the Fifth Circuit, have held that failure to re-exhaust is not actually failure to exhaust where the underlying constitutional violation is ongoing. It would defeat the purpose of the PLRA to require another round of exhaustion in that circumstance, and it would be a fruitless waste of time,

in essence.

And I think your Honor indicated that that's exactly what would happen here, and I think the facts demonstrate that that is the case. That would simply drag out what we're here to do today, which is discuss medically necessary care.

THE COURT: And before this case gets anywhere down the road on -- there's going to be other cases. I mean, there's going to be -- I think the Supreme Court is going to rule on this before this case ever reaches final conclusion.

MS. MAFFETORE: Well, your Honor, this -- this particular case is appropriately before this Court because Miss Zayre-Brown has exhausted her administrative remedies here.

My colleague tried to distinguish the Wilcox case, but, in that case, defendants made a very similar argument, basically that, because there was a new chaplain before the complainant that had come on after he made his initial exhaustion of administrative remedies, and made a new request to that chaplain, which that chaplain then denied, that that plaintiff was required to re-exhaust. And the Court rejected that and said that that plaintiff was seeking the same underlying remedy and, therefore, did not need to re-exhaust.

That's exactly what we have here. Miss Zayre-Brown is requesting the exact same remedy that she requested in her exhausted grievance on January 18th, 2022.

THE COURT: All right. Let me hear on the injunction issue.

MS. BROWN: Good morning, your Honor. Taylor Brown with the ACLU on behalf of plaintiff, and I'll be addressing the motion for preliminary injunction.

Before I begin, your Honor, I want to first draw the Court's attention to four overarching deficiencies that ultimately prove fatal to all the defendant's arguments for why the preliminary relief requested in her motion for preliminary injunction should not be granted. I'm going summarize them first and then take them in turn a little bit into detail.

Today, and even in their briefing, defendants have attempted to characterize this as a reasonable disagreement in medical judgment, and that's just not what the underlying records, in their briefing for their motion to dismiss or the motion for PI and their response, indicates. There just is no merit to that, and they haven't provided any evidence to support that contention.

Second, defendants have not attempted to explain how four other healthcare providers, two directly employed by them and two engaged by them, all found the surgery medically necessary for them. In none of their briefings did they address that.

They only took issue with Dr. Ettner's evaluation. And the issues that they took, again, lacked no merit because they provided no analysis for if those actually were valid

penological interests or what have you, how that would affect why it's not medically necessary in her circumstance, and, again, how those four other providers -- two of them specialists in this kind of care -- said that this care was medically necessary, evaluated her.

And again, the medical consensus is that gender-affirming surgery is an appropriate and effective treatment for gender dysphoria. The Fourth Circuit said the same thing and reaffirmed that in the Kincaid case, as well as all of the -- all of the providers, including the four who have actually evaluated Miss Zayre-Brown and Dr. Randi Ettner, our expert in this case, all found this surgery medically necessary for her.

Third, I want to point out, again, plaintiff maintains her -- and two -- defendants proffered experts in this case, Dr. Penn and Dr. Boyd. We've provided a robust response regarding their qualifications to even serve as experts in this issue in particular.

And we also filed our notice of supplemental authority pointing you to the Shinn versus Jensen case, which there Dr. Boyd was -- or sorry -- Dr. Penn was attempting to qualify as a mental-health expert, and the Court -- I mean, just in all honesty, shredded him just based on his lack of qualifications, what the underlying records showed. And I think here, it's even more devastating for him.

I understand that, you know, we're at the preliminary

injunction phase. The -- you know, the Rules of Evidence --

THE COURT: If I rule on the preliminary injunction, doesn't that pretty much end the case? If she gets the surgery, there's no case.

MS. BROWN: That's true, your Honor. I don't dispute that.

THE COURT: And I'm deciding the case --

MS. BROWN: Yeah. And I was just saying that I understand that, in the Fourth Circuit -- or I think in all circuits, that FRE doesn't necessarily apply to this stage since we're not like seeking a Daubert motion at this stage to exclude him.

But we indicated, through our filings, just the lack of qualifications that both of them have to render the opinions that they do. And again, the opinions came on the issue of whether the surgery was medically necessary for Miss Zayre-Brown. They did not evaluate her at all. They did not attach any of her underlying records that they evaluated.

Dr. Penn provided no literature review, which he says, you know, creates this reasonable dispute. He cites directly to two studies, whereas Dr. Ettner has attached like a three- to five-page bibliography of all the research that's out there.

And so the medical consensus is there, the Fourth Circuit is there, as well as, again, the DPS doctors, who are providers who have evaluated her for this care.

And then lastly, I just want to say my final point is that -- again, finally, for the grievance that the defendants are trying to narrow this Court's attention to on April 20 -- from April 22nd -- or their decision on that, again, it's just not supported by anything.

And I think it's so important for the Court to actually read that, where it says -- all they basically say is, upon a literature review of Miss Zayre-Brown's DPS medical records -- and basically, that's it -- we find this -- we find this not medically necessary. And that has been their theme throughout their denials and deferrals of this same request, over and over again. They provide no explanation of how they got to that.

And what's more, I'll note that, regarding Dr. Figler, the founder of the UNC Transgender Health Program, who's a specialist in this kind of care and who they referred her to for evaluation, and who found it medially necessary for her in 2021 -- for Dr. Figler, again -- defendants have not explained how Dr. Figler got it wrong and moreover how, between August 2021, when he renders his decision that they felt necessary to refer her for an expert evaluation, until April '22, when they issue this new denial, how suddenly they develop the expertise to actually make the evaluation themselves and didn't need an outside referral and chose to ignore the three other providers within their system who have found this care medically necessary for her.

And so maybe I won't go -- I think that pretty much sums it up. I'm happy to address any of those points in more detail.

But turning to the actual merits argument of the preliminary injunction here, under -- or to secure a preliminary injunction of this kind for an Eighth Amendment violation, Miss Zayre-Brown has to prove that she's likely to succeed on the merits of her Eighth Amendment claim, she'll suffer irreparable harm, the balance of hardships sway in her favor --

(Reporter seeks clarification.)

MS. BROWN: I'm sorry. I'll start over.

To prove -- or to secure preliminary injunction for an Eighth Amendment violation as to healthcare, Miss Zayre-Brown must show that she is likely to succeed on the merits of her Eighth Amendment claim, she will suffer irreparable harm absent preliminary relief, the balance of hardships weigh in her favor, and the injunction is in the public interest.

And Miss Zayre-Brown has satisfied -- arguably, exceeded -- that section of the requisite showing of all four factors that are laid out in detail in our briefing, but I'll quickly summarize and just note a few things.

Again, there's no dispute -- and I don't believe defendants dispute -- that she has a seriously objective medical condition within the meaning of an Eighth Amendment

claim in this context. And so -- and that's been clear since Da'Lonta, two, from the Fourth Circuit in 2013 and, arguably, Da'Lonta, one, back in 2003.

Again, she has established deliberate indifference. There are various tests that the Supreme Court and the Fourth Circuit have given us to guide plaintiffs in establishing deliberate indifference.

In Estelle, the Supreme Court told us that deliberate indifference can be established where prison officials intentionally deny or delay access to care. Again, this has happened over and over.

If you look at the underlying record here, again -- because she made the -- she was incarcerated in October 2017, they revaluated her and affirmed her gender-dysphoria diagnosis, and she let them know that she was seeking further gender-affirming surgery to treat her gender dysphoria.

And they also went about securing records from her external providers, prior to the time that she became incarcerated, who had performed her surgeries. They have medical records in their possession, and they're in her DPS file.

And again, she starts -- she starts, you know, informally requesting in 2017. And finally in 2018, towards the beginning of 2019, she starts filings grievances and starts exhausting her requests for gender-affirming surgery.

And again -- so when we're talking about delays and denials within the meaning of Estelle -- because here you have the DTARC has approved an in-person specialty visit with an expert in February 2020. She doesn't end up having that until August 2021. And again, they have provided no explanation for why this was a -- yeah -- no explanation as to why.

I mean, we can assume, perhaps, this was a time of COVID, and so in-person visits may have been, you know, restricted on some level. But they've never went into any detail about that or why there couldn't have been a virtual visit, like many doctors are now performing about this.

And again, this is a serious medical condition. It's causing her severe distress every single day that she has to go without the treatment that she requires. And they have just continually kicked the can down the road, deferred, delayed, and just led her to believe that she may actually get this care, only to turn around, time and time again, to deny the care she requires without any medical justification. And even to this day, they still haven't provided any medical justification that I found as recognized in any case law.

Also, the Fourth Circuit decision in Smith tells us that it can be established where prison officials delay or interfere with treatment once prescribed. Again, even outside of those four that we -- the four providers, there was another provider that they referred her to, Dr. Pou, who said she needed to be

referred to a surgeon for evaluation for gender-affirming surgery. They ignored that request. She comes back to Dr. Pou maybe three months later for a maintenance appointment for her hormone therapy. And again, Dr. Pou reiterates she needs to be referred to Dr. Figler for an evaluation.

So I think that counts as a delay. I think the delay, from 2020 to 2021, to actually have her evaluated counts as a delay in this context. And again, the underlying records show that she has tried do this without litigation. She has tried to go through their internal processes in order to get this care, and it has been unsuccessful.

And that's the theme in many of the cases involving transgender prisoners seeking gender-affirming surgery, much like the case of Iglesias out of the Southern District of Illinois against the Federal Bureau of Prisons. The Court entered a preliminary injunction there ordering surgery, and it was because of these same games that FBOP was playing with the plaintiff in regards to getting her this care.

THE COURT: But essentially what that is is summary judgement. I mean, really, it's end of the case. That's the whole -- that's the whole thing we're -- the whole thing we're moving toward in this case, is the case continues to get to withstand dismissal, is toward a decision being made about the right or wrong of what the prison is doing here.

And you're saying that it's -- you're essentially saying

that I'd be granting summary judgement in ordering this. I mean, really, there's nothing left -- there's nothing left to do if I did that.

MS. BROWN: Your Honor, I'm saying that, in the Fourth Circuit, it's recognized that, where a defendant has shown a constitutional violation, a preliminary injunction -- district courts have discretion, technically, to deny preliminary injunction.

And I'm saying that, if you look at the record, which is much of what we have provided in summary judgement in this situation, they've provided expert testimony, we've provided expert testimony. We provided so much of our underlying mental health records, they provided none. They've had opportunities to. And so I don't believe that anything would change at summary judgement. We'd be making the exact same arguments.

And again, it's just -- unfortunately, while they tried to characterize this as a dispute in medical judgment, it's just not. It's just frankly not. And again, medical judgment is best left to the experts.

And as I've stated, the Fourth Circuit -- all of the providers who have actually evaluated her, which I think would be necessary to make a determination about medical necessity, the medical consensus -- the broad medical consensus aside from outlier, extremist organizations who aren't recognized in the

mainstream -- and many of them have anti-LGBTQ motives -- are the only ones raising disputes about the medical necessity of this kind of care.

And as to the other cases we were talking about, the Supreme Court deciding this case -- we have the Edmo case out of the Ninth Circuit. The Supreme Court denies her in that case. We can't take anything from that. But that was a case with very similar facts about a trans prisoner seeking surgery. The Ninth District ordered surgery -- or the district court ordered it, and the Ninth Circuit affirmed.

The same situation in this circuit with Kadle v. Folwell, which challenged the state of North Carolina's state employee and teacher health insurance plan. There the claims were different, but when we were talking -- they were making similar argument in that case at the motion to dismiss stage, which I was counsel in that case, and so I was handling the opposition to that motion.

They're making the same arguments about WPATH, they're making the same arguments about this not being necessary care, and they've lost. You know, the Fourth Circuit denied cert in that case, and so did the Supreme Court.

And so all indications, if you look at the majority of the case law in this country in the federal courts, is that, you know, there's just really no genuine disagreement on this issue. And again, if they did want to provide a genuine

disagreement, then they would have to provide much more than they've provided in any of their filings here.

THE COURT: Okay. Thank you.

MS. BROWN: You're welcome.

THE COURT: All right. Let me hear on the injunction argument, and then I want to get back into this exhaustion issue, about whether or not she has asked for this surgery twice before, before having it denied this last time in April, with regard to the administrative exhaustion.

But first I want to hear about the preliminary injunction.

MR. RODRIGUEZ: Yes, your Honor. Thank you. Orlando Rodriguez for the defendants on the preliminary injunction matter.

I want to just start by reiterating that the Department and its officials are sympathetic to this situation. However, we are guided by the law as it presently exists. And the law as it presently exists does not support a likelihood of success on the merits in this case for the very reasons that your Honor has already alluded to a couple times -- that is, resolution in favor the plaintiffs on a preliminary basis here would effectively end the case without an opportunity to adjudicate the case on the merits, which is actually what happened in the Edmo case.

In the Edmo case, there was a long back and forth between the district court judge and the attorneys in that case,

particularly the State's attorneys, with regard to whether the PI motion that was presently before the Court had effectively been converted to a full hearing on the merits on a permanent injunction basis.

And ultimately the decision was -- the consensus was, because the State didn't argue the matter, that it had converted. And in that case, the parties had several months of discovery, wherein depositions of the opposing experts were taken, written discovery was exchanged, not a flinging of declarations within a couple of weeks time. That's all we've had an opportunity here to do.

And for that simple reason, a mandatory, preliminary injunction of this nature would be a very extraordinary remedy. And to do that, to reach that burden, is quite a high -- a tall task.

And so if the Court would allow me just a little bit of liberty to go through some of the reasons why we believe that burden has not been satisfied here, and, in doing so, I'll address some of the particular points that opposing counsel has raised.

There's three reasons, three top-level reasons, to deny preliminary injunction here. First and foremost is there has not been a demonstration of a likelihood of success on the merits of the specific claim here.

The specific claim here needs to be drilled down on. That

is, the decision by the Department to not approve a medical intervention, a surgical intervention, as requested by the plaintiff, when requested by the plaintiff, which was -- that decision was made in April of 2022.

THE COURT: Do you think the law supports that those surgeries should not be given and that prisons should not give those?

MR. RODRIGUEZ: Well, I do believe --

THE COURT: I'm talking about across the country, not just this case. What do you say on that? Are you saying, as a general matter, they should not be given?

MR. RODRIGUEZ: Well, I do -- what I can say, as a general matter with regard to cases that have reached the circuit level, there are four of those, one being the Edmo case out of California in the Ninth Circuit and the other three coming from the Tenth, First, and Fifth Circuits, ranging back from 2013 till relatively recently, the 2019, 2020 time frame.

THE COURT: So the Fifth Circuit said no --

MR. RODRIGUEZ: Fifth Circuit said no.

THE COURT: -- I can already call that one out.

MS. BRENNAN: Fourth Circuit, Fifth Circuit, Tenth Circuit said that denial of a request for gender-affirming surgery, in the circumstances present in that case, which were decided upon relatively robust records -- that the denial of surgery in those cases did not constitute a deliberate

indifference claim. The Ninth Circuit in Edmo was the only circuit to find otherwise.

What's important about Edmo -- and it was raised by opposing counsel as similar, I think was the phrase she used, or had similar facts -- we would actually -- we do contend that that's not entirely correct.

In fact, there were very distinct differences -- there are very distinct differences in the factual record presently before this Court and in Edmo that I believe drove the decision-making process in Edmo, and that is the presence of self-mutilation and self-harm that has not been demonstrated in this case.

Now, that is not to say it is some sort of prerequisite to making --

THE COURT: I mean, if we're going to wait till people start self-mutilating themselves -- I mean, you know, what are we doing here?

I mean, we got to figure out -- there are people who are different in this world, and we've got to -- we've got to figure out how to treat them as citizens and people of this world. We've got to get away -- we can't -- I mean, just because somebody is different doesn't mean that we just throw them away.

MR. RODRIGUEZ: Absolutely, your Honor. Absolutely, which is why the Department of Public Safety does not have any

policy with blanket bans, which is why the policy permits the type of request being made in the first instance and provides for this process to evaluate that request, which is what happened here.

The reason why I bring up the differences in Edmo is, without acknowledging the facts in that case and a subsequent Ninth Circuit case that came up very recently, Doe v. Snyder, which is cited in our brief, which -- the Ninth Circuit in Doe v. Snyder reiterated that its holding in Edmo was dependent on the specific facts present in that case.

And in that -- in that Doe v. Snyder case, just like in the Grimm case out of the Fourth Circuit relatively recently, as well, both of those circuit opinions acknowledge that, while we obviously must respect everybody's individual differences with dignity, that there -- it does remain a reasonable disagreement in the field -- particularly, the correctional medical field -- as to these -- these sorts of issues.

And that is one of the key points here, is that our position is not that the surgery is never necessary or that the surgery is -- is, you know, anathema to anything. None of that is in our cards here. All we are simply saying is, in this particular case, based on the record -- at present what we're saying is, based on the record that's been presented, the plaintiff has not established a likelihood of success on the merits.

And I want to circle back to the point your Honor asked me about with regard to the cases across the country. So these are the circuit cases we've discussed.

The Fourth Circuit -- there are no Fourth Circuit cases on-point. Kadle is not an Eighth Amendment claim, neither is Kincaid. Well, Kincaid is an Eighth Amendment claim to the extent that it involved that specific -- those specific facts, but it wasn't a denial of surgery request on a deliberate indifference basis.

So the Fourth Circuit doesn't have any binding case law on-point with regard to the surgical intervention. The case law that it does have -- that is, in the correctional context, to be specific -- the case law that it does have, that is relevant and worthy of attention, is the De'Lonta case, which has been discussed here. And that case was a motion to dismiss, not a preliminary injunction case, and it did not involve a request for surgery. It involved a request for evaluation.

Central to our point on De'Lonta is that De'Lonta specifically side-stepped the issue of the surgery because it wasn't before a court. So you cannot point to De'Lonta and say, hey, look, this Fourth Circuit case, the case law says surgery here -- the denial of surgery is de facto deliberately indifferent. That's not what De'Lonta stands for.

Grimm is also not an Eighth Amendment corrections case.

It's an equal protection claim. I believe it's an equal protection, due process claim. Different legal standards, not Eighth Amendment.

What's important about Grimm -- I alluded to earlier, in reference to the Doe case, Footnote 2 of Grimm specifically acknowledges that -- says, "To be sure, some courts" -- or "courts have recognized the disagreement in the field with regard to this surgery and the W" -- "the extent of the consensus that the WPATH standards represent with regard to this matter in corrections."

And that's a key point because the context of the care that's being provided has to be considered. And the plaintiff's case thus far has completely eliminated any and all reference to the context of care.

They literally argued that the care -- the context in which -- the setting in which the care is provided has no bearing on the standard of care. As your Honor knows, that is not the law. The law in North Carolina is -- it's baked into the statute.

The definition of standard of care has in it, baked into it, considerations for same healthcare profession, same healthcare -- similar -- same or similar circumstances. All of those things add up to the fact that the context does, indeed, matter when considering whether -- what the standard of care is and certainly whether it's breached.

Now, that's just in the malpractice setting, which, as your Honor also knows, malpractice is a lower legal bar than the deliberate indifference bar. So if the standard of care for a lower legal bar -- malpractice -- necessarily includes consideration of the factors attendant to the setting in which the care is provided, it must be true that, at minimum, that same standard, when applied to the same definition of the standard, would apply to the deliberate indifference test.

And the reason why that's important is Dr. Ettner, while she is a renowned expert with regard to gender dysphoria, she doesn't have any experience in corrections. Now, rather than attack her -- her -- the weight of her testimony for that, we simply present, on a preliminary basis with only a couple of weeks time, an expert who does have decades of experience in correctional medicine to provide the contextual opinions that are missing from the plaintiff's side of things.

When you cobble together the three experts' testimony, what we're left with is a dispute between experts. We have a dispute between experts as to not just what's required for the standard of care, but how to even define what medical necessity means and what it means in the correctional context.

With those kinds of disputes swirling around, a preliminary injunction is -- is -- demonstrating a likelihood of success on the merits is simply just not met with that kind of dispute.

THE COURT: I mean, it would seem, though, that that's -- I mean, I'm sitting here thinking, in terms of whether -- you know, what's it like in a correction area, what's it like in a big hospital? If it's open-heart surgery, and the guy needs to get it or he's going to -- he needs open-heart surgery or he's going to die, you can't then turn around and say, well, but if he's in a prison and needs it or is going to die, different standard of care, he dies. You can't do that. You can't do that.

MR. RODRIGUEZ: Correct. Absolutely, correct, your Honor. And that is a common -- that is a common response to the line that I just provided regarding the standard matter.

You're absolutely correct. There are a litany of medical interventions that require the same response, no matter the setting, no matter the provider, whether you're talking about nurse-practitioner, a doctor, a PA -- a doctor, an osteopath, or an M.D. There's a litany of types of medical issues that would require that type of response regardless.

The point with regard to this issue is that there are organizations, like the North Carolina -- or the National Commission of Correctional Healthcare, NCCHC, that do provide specific, practical, protocol guidelines -- or protocols and guidelines, practice guidelines, for practitioners in the correctional setting. And organizations like that do not have those types of guidelines with regard to this issue because of

the lack of a consensus on the matter, specifically in regards to corrections.

And so it is not the case that a prison doc can say, oh, we're in a prison, so I can't attend to that. That's not what I'm contending. What I am contending, however, is that there's a comprehensive view of the delivery of care in general, the considerations for making sorts of decisions about certain types of interventions, that is different, particularly on a systemic level in a correctional setting, than it is on an individual basis in the community. That's the point of the contention there.

And simply that we're having this discussion, your Honor, I believe, is an indication that preliminary injunction would not be appropriate here because these are matters that should be more fully fleshed out through discovery, through depositions, so that the plaintiffs can have an opportunity to explore our experts' qualifications and to explore the weight of their testimony and what weight should be provided and what shouldn't.

THE COURT: Okay. Let me hear a response on the other, since she believes that you -- that we need to go through the whole process again and then come back and deal with this issue in the next case in December or January or whenever is what she's -- what she's essentially saying.

Tell me, did the -- did the -- did the plaintiff in this

case ask to have this surgery in the past?

MS. BRENNAN: Your Honor, there are allegations in the complaint that there have been requests for the surgery, as well as two grievances for the surgery in the past. The first was in 2019 and --

THE COURT: That's what they say.

MS. BRENNAN: -- the grievance was exhausted at that time. However, that was a decision -- and it was not a final decision. It was a deferral of this decision because the policy was changing, and it was under a prior policy.

So it was not, as was referred to, a denial, although I think plaintiffs, in the complaint, do try to characterize it as a de facto denial, but it was at the time --

THE COURT: Well, it's the same thing if you defer. I mean, we're going to defer it, and we're never going to reach it, and we -- I mean, eventually it falls into the denial pot, doesn't it? If nothing happens --

MS. BRENNAN: Well, your Honor --

THE COURT: -- it's the same -- it's the same result as the denial.

MS. BRENNAN: I see your Honor's point, but I would note that, if they were trying to only challenge the deferral that was made in 2019, you could perhaps say that had been grieved and exhausted, but that's not what they're trying to do here.

They're trying to challenge -- and their complaint makes very clear that what they want to challenge is the current decision, under the concurrent policy, that was not made until April 26th of 2022, and that they have not grieved. And under the law, they can't challenge that in court.

THE COURT: Well, but the law is talking about these -- if the courts were to find that these previous grievances all were essentially the same thing and that the -- that we're just wasting time to do that, I don't think the Court has to just go to technically reach that.

I think I can -- depending on which panel you got at the Fourth Circuit -- but you could have some of them that would say what the hey, and you'd have some others that would say, oh, we got to take care of this matter right now.

So it's really -- it's an interesting question that you all are bringing up to me. And the question is, should we throw it out now and start over again or do we just go ahead and deal with what we got in front of us?

I've got to think about that. I've got to think about this preliminary injunction issue. But I think -- I don't like the preliminary injunction from the standpoint of I believe there's a lot -- there's a lot of things that need to be heard before anything like that is granted. I think this case needs to be fully fleshed out. There's a lot here for this Court and for the Appellate Courts to make decisions on going forward.

I understand what you're saying. And technically, they have failed. They probably should have just waited -- once they -- once that decision came down, probably everybody should have just pulled back and filed -- and filed based on that, finished the grievance -- done the grievance and then finished based on that. That would have been cleaner. But the question is, do we need to do that? And I've got to decide that.

Thank you.

MS. BRENNAN: Thank you, your Honor.

THE COURT: Anything you want to say, anything further?

MS. MAFFETORE: I would love to respond to that issue, if that's all right, your Honor.

THE COURT: You can. I'm kind of leaning your way on that one and leaning their way on the injunction.

MS. MAFFETORE: And I'm happy to also defer to my colleague if she'd like to address --

THE COURT: She certainly can do it, but I'm not going to -- I don't believe I'm going to order surgery at this point. I've got to fully understand it.

This is an issue that is -- obviously has not reached a lot of courts at this point. It's one that's not been fully decided by all the circuits yet. It's one that the Supreme Court -- we haven't had Justice Alito write an opinion on it yet.

So we -- at some point, we'll have all those things down the road, but the -- the -- I think we need to have plenty of information ahead of this. If you want to go ahead --

MS. BROWN: Briefly.

THE COURT: -- say something briefly to put yourself on the record.

MS. BROWN: Yes.

THE COURT: I'm not leaning your way. I'm really essentially deciding the case if I do the injunction because, once the operation is done, the operation is done. And it needs to be -- we need -- all this stuff needs to be heard. I need to -- the Court needs to hear -- we need to decide what's going to happen there.

The real question for the Court is, am I -- do we have a real, clear failure to exhaust administrative remedies? We do have a -- we do have a technical failure to do that in this last instance. I mean, it would have been better. But the question is, are we just wasting time? And does the law cover what has occurred before and allow us to go on based on what's happening?

And I think it's pretty clear to the Court -- it's going to be denied until a Court says it's not denied. Until a Court allows it, that kind of thing is going to be denied by -- and that's their -- and that is their position.

And they're going to have medical back-up on that.

They're not just going to -- it's not just some guy sitting in a room and going, well, I've never heard of anything like that. None of them -- that's not what's happening. They're going to back up what they're saying. It doesn't mean they're right, but they get a chance -- they get a chance, I think, to --

MS. BROWN: My question is they've had that chance over and over, your Honor, at least through those two grievance processes, to explain why, and they never have.

And even in this latest grievance, where they said they did this full evaluation -- and we've provided an exhibit to that effect that shows the summary of how the DTARC got to their conclusion. They do one paragraph just saying, based on a literature review, a general literature review, which they provide no bibliography for, that this surgery is not medically necessary, and that's it.

And that just can't be the standard, especially three times now, where we have a person who is in prison, who -- who they owe a constitutional obligation to provide care for, who is suffering every single day. The Fourth Circuit recognizes the seriousness of gender dysphoria, and that's long recognized.

THE COURT: They do and -- but that's what this process is for, is to make a --

MS. BROWN: Yeah. Well, I just want to --

THE COURT: -- for a proper determination that a

record can be made. And ultimately, whoever wins or whoever loses appeals it. And the decision is going to be made at the circuit, and maybe at the Supreme Court, and we'll get all that done.

But they can only -- they can only act if all the information is in front of them. And that's what needs to -- at some point that needs to happen. Whether it needs to happen in the re-bringing of it -- which is what they're essentially arguing because it's not going away. I can tell you -- I can tell from you all -- it's not going away. We're going to be right back here hearing the same stuff if the Court dismisses based on the failure to exhaust administrative remedies or we're going to go forward now, and we're going to -- we're going to hear it.

But I'm -- I think what you're asking me -- and I understand what you're saying. I understand, and I understand your arguments, but I'm deciding the case then. I mean, there's no case after -- once the injunction has been done -- any other decision after that is -- it's done, it's over. And I think it needs to be heard.

MS. BROWN: I mean, they're entitled to appeal.

THE COURT: Oh, they are. They are. And, you know, again, depending on the panel -- heck, one panel might go with me and one panel might go against me. And I think I'd like to -- I think I need to make a record.

MS. BROWN: Yeah. And I'd just like to give you three things to consider -- or four things to consider, just from what opposing counsel said, and then I'm completely done. I'll be very brief.

THE COURT: Okay.

MS. BROWN: First, opposing counsel said that self-harm and injury has not been established here as related to her gender dysphoria, and that's just, you know, patently untrue.

THE COURT: You're talking about the emotional and the mental strain?

MS. BROWN: Yeah. If you -- we included records from -- DPS records in our appendix to Dr. Ettner's second declaration that clearly show where she had tied a band around her penis, where she had been put on a suicide-risk assessment because of the gender dysphoria. They tried to attribute it to bullying, but, if you look at those health records, the bullying is because she has a penis and she's a woman, and there -- and she's being housed in a male prison at that time.

And so that's what -- it's all sorts of gender dysphoria. So to say that there is no underlying medical evidence, there is. They just didn't find it or they didn't address it.

Second, again, opposing counsel keeps talking about these correctional considerations. And, your Honor, you're so right in saying that, again, when someone needs open-heart surgery,

it doesn't change because someone is in prison.

But what's more, opposing counsel does list some of these considerations, as does his expert, but they never go into any detail about how any of these -- like cost. Cost is actually not a consideration that can be used, and it's recognized by multiple circuit courts for justification to deny adequate medical care for a prisoner. It's just not. And, I mean, that's black-letter law, I think, at this point.

And, again, when you're thinking about some of these things -- like transport is one of the things they say. That's squarely within the purview of the prison. Like, so, because she hasn't arranged transportation, she can't get surgery?

So if you actually look at the considerations they're raising, like patient satisfaction or why can't she just wait two years or all of these things -- they have no merit. And they actually apply no analysis to her actual facts, which are what are at issue in this case.

And then, lastly, I mean, Kincaid says expressly in Footnote 3 that the WPATH standards of care have been recognized as authoritative in the Fourth Circuit and that -- so, I mean, again, there's more that we can go into that.

And again -- but I'll say the -- all of the -- all of the DPS providers have evaluated her, have found the surgery medically necessary, and this was before the litigation ever began. And they've provided no reason why they got it wrong.

And then, lastly, opposing counsel raised the NCHCC. And we also addressed that, I believe -- or the National Commission on Correctional Health, so NCCHC.

The National Commission on care, in relation to their treatment guidelines for gender dysphoria, expressly site the WPATH standards of care, along with the American Academy of Pediatric and the American Psychological Association, which all adhere to the WPATH standards of care.

So I just wanted your Honor to know that there just really is just no dispute, and, if there is, they've provided no evidence, and I just don't think that they can. And so that's all.

THE COURT: Okay. Thank you. Thank you.

Anything you want to add at all?

MS. MAFFETORE: I just want --

THE COURT: And you're ahead right now. Don't knock yourself out.

MS. MAFFETORE: I just want to lay any concerns you had that there was some kind of technical failure to exhaust -- the only technical failure to exhaust that can be read into the complaint is based on a misreading or a mischaracterization of the complaint here.

What Miss Zayre-Brown brought -- her claim here is a failure to provide adequate medical care. She has already grieved that failure to provide adequate medical care. She

satisfied the prison's policy, and that is all that is required under Moore v. Bennett. There is no technical failure to exhaust.

THE COURT: But you had -- you had two days after they filed this last -- when -- when they made their decision, that you could have waited and said, okay, we got a complaint ready to go. I mean, people do this all the time. The federal government prosecutors do it. They pull indictments and wait till the next grand jury.

There are a lot of different things that happen. You could have pulled that out, let her grieve it out. They're probably going to reach the same decision. The same department is going to be -- you know, it's kind of like -- it's kind of like my brother, on his desk, has a little plaque that says, "If you want a second opinion, ask me again."

MS. MAFFETORE: So, your Honor --

THE COURT: And I think that's what -- I think they would have gone -- I think it would have been the same thing, so -- but it's -- but, by doing it this way, you've -- you know, you've handed me this -- you've handed an issue on the administrative exhaustion, which is going to be in the case all the way up, even if I find it in your favor today. So I'm just saying that.

At this point -- it's cleaner sometimes to take a little bit of extra time -- and I know, in a situation when somebody

is needing medical care, that's a tough thing to ask. But from a legal standpoint, it would be a better situation. But I think I'm prepared to deal with however I need to deal with this.

MS. MAFFETORE: That is correct, your Honor. There is certainly an urgency here, and it would undermine the purpose of the PLRA and be against public interest for her to be required to re-exhaust under these circumstances.

THE COURT: Okay. Thank you very much.

Anything anybody want to add? Anything from this side?

MR. RODRIGUEZ: I don't think so, your Honor.

MS. BRENNAN: No, your Honor.

THE COURT: All right. Thank you very much. This matter is concluded.

(End of proceedings.)

C E R T I F I C A T E

I, DEBORAH COHEN-ROJAS, Federal Official Court Reporter for the United States District Court for the Western District of North Carolina, a Registered Diplomate Reporter, Certified Realtime Reporter, and Federal Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the foregoing proceedings contained herein on the aforementioned subject on the date herein set forth, and that the foregoing pages constitute a full, true and correct transcript.

Dated this 27th day of January, 2023.

Deborah Cohen-Rojas

DEBORAH COHEN-ROJAS
RDR, CRR, FCRR
Federal Official Court Reporter

North Carolina Department of Public Safety EXHIBIT 2
ADA Recommendation

Offender Name:	[redacted], [redacted]			Off #:	0618705
Date of Birth:	[redacted]	Sex:	F	Facility:	ANSO
Date:	08/22/2022 14:45	Provider:	Kirby, Phillip A B.A. Social		

Comments

DC746 received by Disability Case Manager 08/22/2022. DC-927 completed 08/22/2022. Mental Health Social Worker and DCM met for final accommodation recommendation 08/22/2022.

Offender Brown ([redacted]) wrote that she has: I am an adult woman with sever gender dysphoria in adults and adolescence according to the DSM V-TR.

Brown wrote that she is unable: Access medical and mental healthcare with unjustified interruptions. I.E. Hormone therapy, gender affirming surgery and doctoral level therapy with a particularized specialty in Gender Dysphoria and post operative studies.

Accommodation requested: Treatment to NCCIW where I will have access to the above without interruptions and I will be within distance to specialized providers.

Offender Brown ([redacted]) has request specific mental health and medical treatment as well as a transfer to another correctional facility. She will be instructed to utilize the sick call process in order to request such treatment. In addiction she will be instructed to contact her case manager and the programs department to request at transfer. Her accommodation request is not recommended. This recommendation will be forwarded to the FADAC at Anson Correctional.

Co-Pay Required: No **Cosign Required:** No

Telephone/Verbal Order: No

Standing Order: No

Completed by Kirby, Phillip A B.A. Social Worker II on 08/23/2022 17:21

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

KANAUTICA ZAYRE-BROWN,

Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF ADULT CORRECTION, *et al.*,

Defendants.

No. 3:22-cv-191

EXHIBIT INDEX

Exhibit	Description
Exhibit 1	Transcript of Preliminary Injunction and Motion to Dismiss Hearing, *Zayre-Brown v. NC DAC* (W.D.N.C. Aug. 23, 2022).
Exhibit 2	Aug. 22, 2022 North Carolina Department of Public Safety ADA Recommendation, DAC 167.