No. 15-15712

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHELLE-LAEL NORSWORTHY,
Plaintiff-Appellee,

v.

JEFFREY BEARD, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California, No. 3:14-cv-00695 (Judge Jon S. Tigar)

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION ET AL. AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for amici curiae hereby certifies that no amicus has any parent corporation. Amici are civil rights and legal services organizations and have no shares or securities that are publicly traded.

STATEMENT OF AMICI'S IDENTITY AND INTEREST[1]

Amici curiae are civil rights and legal services organizations that regularly represent prisoners and their interests in litigation, including under the Eighth Amendment. Amici accordingly have an abiding interest in the proper interpretation of the Eighth Amendment as well as application of the settled rules governing the provision of medically necessary care to all prisoners.

The American Civil Liberties Union is a nationwide, non-profit, nonpartisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. Through its LGBT Project and National Prison Project, the ACLU works to protect the rights of lesbian, gay, bisexual, and transgender individuals and the rights of prisoners. The ACLU of Southern California, the ACLU of Northern California, and the ACLU of San Diego and Imperial Counties are California-based affiliates of the ACLU dedicated to promoting civil liberties in California.

Equality California is California's largest statewide lesbian, gay, bisexual, and transgender civil rights organization focused on creating a fair and just society. Equality California has hundreds of thousands of members and works to achieve

[1] All parties consent to the filing of this brief. Amici state that no party or party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amici, their members, or their counsel contributed money intended to fund preparing or submitting this brief.

and maintain full and lasting equality, acceptance, and social justice for all people in the diverse LGBT communities inside and outside of California. Equality California frequently participates in litigation in support of the rights of LGBT persons.

Gay & Lesbian Advocates & Defenders is a New England-wide legal rights organization dedicated to ending discrimination based on sexual orientation, gender identity and expression, and HIV status. GLAD's Transgender Rights Project litigates cases that promote legal respect for and recognition of the lives of transgender individuals and their families, including *Rosa v. Park West Bank*, 214 F.3d 213 (1st Cir. 2000), *Doe ex rel. Doe v. Yuntis*, 15 Mass. L. Rep. 278 (Mass. Super. Ct. 2001), *O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010), and *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2059 (2015).

Lambda Legal Defense and Education Fund, Inc. is the Nation's largest and oldest legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and those with HIV through impact litigation, education, and public policy work. As part of the work of Lambda Legal's Transgender Rights Project, Lambda Legal seeks to advance and protect the rights of transgender individuals, including prisoners, to be provided access to medically necessary health care. Lambda Legal has been and currently is

representing numerous individuals, both in and out of prison, who wrongly have been denied access to such care.

The Legal Aid Society of New York is a private, non-profit organization that has provided free legal assistance to indigent persons in New York City for over 125 years. It is the largest provider of criminal defense services in New York City, and large numbers of its criminal defense clients are held in the City jails. In addition, through its Prisoners' Rights Project, established in 1971, the Society seeks to ensure the protection of prisoners' constitutional and statutory rights through litigation and advocacy on behalf of prisoners in the New York State prisons and the New York City jails. In recent years PRP has engaged in considerable advocacy on behalf of transgender prisoners with regard both to medical issues and safety concerns, and in cooperation with Legal Aid's LGBT Law and Policy Unit, advocated for the creation of the new Transgender Housing Unit on Rikers Island, and continues to monitor its operation and advocate for the admission of transgender individuals to the unit.

The National Center for Lesbian Rights is a national non-profit law firm with headquarters in San Francisco and an office in Washington, D.C. NCLR seeks legal protection for lesbian, gay, bisexual, and transgender people through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other social justice organizations and activists. Each year,

NCLR serves more than 500 people in California, and more than 5,000 people in all fifty states.

The Prison Law Office is a non-profit organization dedicated to improving living conditions for and protecting the fundamental rights of people who are incarcerated. PLO has litigated numerous individual and class-action cases involving the right of people who are incarcerated to receive access to constitutionally required medical care. PLO has appeared before this Court in multiple cases involving the right of incarcerated people to receive access to required medical care, including in *Plata v. Schwarzenegger*, 603 F.3d 1088 (9th Cir. 2010).

Prisoners' Legal Services of New York is a non-profit organization that has provided civil legal services to indigent prisoners in New York State correctional facilities for over 39 years. PLS serves as legal counsel to incarcerated individuals on a variety of claims in the state and federal courts regarding conditions of confinement, including claims of excessive force, sexual abuse, cruel and inhuman treatment, deliberate indifference, and violations of due process. PLS has a significant interest in ensuring that incarcerated individuals are treated fairly and humanely, including being provided adequate medical and mental health care.

The Southern Center for Human Rights provides legal representation to people facing the death penalty, challenges human rights violations in prisons and

jails, seeks to improve legal representation for poor people accused of crimes through litigation and advocacy, and advocates for criminal justice system reforms.

The Southern Poverty Law Center is a non-profit organization founded in 1971 that has worked to make this Nation's constitutional ideals a reality for everyone since its inception. SPLC's LGBT Rights Project is dedicated to fighting all forms of discrimination against the LGBT community in all its forms, and defending the constitutional rights of LGBT prisoners.

The Washington Lawyers' Committee for Civil Rights Under Law and Urban Affairs is a non-profit civil rights organization dedicated to eradicating discrimination and entrenched poverty. Since 1989, its Prisoners' Project has engaged in broad-based litigation seeking to improve overall conditions at correctional facilities wherever Washington, D.C. prisoners are held.

INTRODUCTION

The Eighth Amendment principles that govern this case are well established and make no exception for transgender prisoners or the treatment that is medically necessary to address gender dysphoria.[2] As both the Supreme Court and this Court have made clear, the Eighth Amendment requires the State to provide medically necessary treatment to prisoners with serious medical needs in a manner consistent with prudent professional standards and appropriate to the individual prisoner's current medical condition.

Consistent with these principles, the district court determined that the State had defaulted on its constitutional obligations and was required to provide Michelle-Lael Norsworthy with sex reassignment surgery (SRS)—the only treatment that would adequately address her serious medical needs. The State asks this Court to relieve it of those obligations, contending principally that it has discharged its duties by providing Norsworthy *some* medical treatment, in the form of hormone therapy, counseling, and access to certain clothing items available to female prisoners, even though that treatment proved ineffective. That argument would plainly fail in any other context: For instance, no public official would contend—and no court would conclude—that the State need not provide a

[2] Gender dysphoria is the term preferred by experts in the field for the condition previously known as gender identity disorder (GID). Norsworthy was diagnosed with GID more than fifteen years ago. Compl. ¶ 18.

medically necessary hysterectomy to a prisoner with uterine cancer because it had previously provided radiation therapy that proved ineffective. It carries just as little weight here. The Eighth Amendment does not apply differently to transgender prisoners; if sex reassignment surgery is medically necessary to treat a prisoner's severe gender dysphoria, the State may not evade its constitutional obligation to provide that treatment by arguing that it is willing to provide *other* treatment that ineffectively addresses that prisoner's condition.

Nor may the State seek shelter in dissenting medical views that depart from an established consensus of prudent professionals to sanction its treatment decisions. The Supreme Court and the courts of appeals consistently look to the views of the relevant medical or professional community to inform judgments on the propriety of treatment decisions and other Eighth Amendment considerations. In accord with these principles, the district court properly consulted the Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People issued by the World Professional Association for Transgender Health (WPATH)—the recognized articulation of professional consensus on the treatment of gender dysphoria—to inform its analysis. In doing so, the district court did not substitute the Standards of Care for the requirements of the Eighth Amendment—just as the Supreme Court did not substitute the views of the American Psychological Association for its own judgment when it concluded that the

Constitution prohibits the execution of a person with severe intellectual disabilities. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). Consistent with well-established Eighth Amendment law, the district court determined that the State's treatment position—that sex reassignment surgery is elective and therefore need not be provided—reflects an unwarranted departure from the Standards of Care and the professional consensus they articulate.

The district court correctly determined that faithful application of established constitutional principles requires the State to provide Norsworthy with sex reassignment surgery to treat her severe gender dysphoria. The district court likewise aptly recognized the flaws in the State's contrary position. As the court put it, the State's "argument that CDCR need not provide SRS to patients with gender dysphoria, even where other treatment options fail to alleviate an inmate's suffering, suggests a distinct standard for the treatment of gender dysphoria." *Norsworthy v. Beard*, No. 14-cv-695, 2015 WL 1907518, at *2 (N.D. Cal. Apr. 27, 2015). No such distinct standard exists, and this Court should reject the State's invitation to recognize one.

ARGUMENT

I. THE EIGHTH AMENDMENT REQUIRES INDIVIDUALIZED, MEDICALLY NECESSARY TREATMENT AS DICTATED BY PRUDENT PROFESSIONAL STANDARDS

The baseline constitutional principles are not in dispute. The Eighth Amendment proscribes "cruel and unusual punishment[]," including the failure to provide medical care to prisoners in government custody. U.S. Const. amend. VIII; *Estelle v. Gamble*, 429 U.S. 97, 102-103 (1976). Because "society takes from prisoners the means to provide for their own needs," *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011), the government has an "obligation to provide medical care for those whom it is punishing by incarceration," *Estelle*, 429 U.S. at 103. The failure to do so could cause a prisoner to "suffer or die," a possibility that is plainly "incompatible with the concept of human dignity and has no place in civilized society." *Plata*, 131 S. Ct. at 1928 (articulating the "basic concept" that animates the Eighth Amendment (internal quotation marks omitted)).

Not all medical needs trigger the government's Eighth Amendment obligations, and not every failure to treat runs afoul of the Constitution. Prison officials need only treat a prisoner's objectively "serious medical needs." *Estelle*, 429 U.S. at 104, 106; *see also Farmer v. Brennan*, 511 U.S. 825, 834 (1994) ("[T]he deprivation alleged must be, objectively, 'sufficiently serious.'"). A medical need is "serious" if "failure to treat [it] could result in further significant

injury or the unnecessary and wanton infliction of pain." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal quotation marks omitted). Put differently, a medical need is "serious" if "'a reasonable doctor or patient would find [the need] important and worthy of comment or treatment.'" *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014); *accord Blackmore v. Kalamazoo County*, 390 F.3d 890, 897 (6th Cir. 2004) ("[A] medical need is objectively serious if it is 'one that has been diagnosed by a physician as mandating treatment.'").

It is well settled that psychiatric and psychological needs can be sufficiently serious to trigger a constitutional obligation to provide medically necessary care. *See, e.g.*, *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) (observing that the "duty to provide medical care encompasses detainees' psychiatric needs"); *accord Clark-Murphy v. Foreback*, 439 F.3d 280, 292 (6th Cir. 2006); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987); *Partridge v. Two Unknown Police Officers of Houston*, 791 F.2d 1182, 1187 (5th Cir. 1986). It is likewise well settled that a medical need may be "serious" even if some delay in providing treatment will not result in immediate death or injury. *See*, *e.g.*, *Singleton v. Lopez*, 577 F. App'x 733, 735-736 (9th Cir. 2014) (reversing grant of summary judgment for prison officials on prisoner's claim that one-year delay in treating eye pain violated Eighth Amendment); *Hartsfield v. Colburn*, 371 F.3d 454, 456-457 (8th Cir. 2004) (reversing grant of summary judgment for jail

officials on pretrial detainee's claim that nearly two-month delay in care violated Eighth Amendment); *Farrow v. West*, 320 F.3d 1235, 1243-1248, 1249 (11th Cir. 2003) (reversing grant of summary judgment for prison officials on prisoner's claim that fifteen-month delay in provision of dentures constituted deliberate indifference to serious medical need); *Harrison v. Barkley*, 219 F.3d 132, 137 (2d Cir. 2000) ("[B]ecause a tooth cavity will degenerate with increasingly serious implications if neglected over sufficient time, it presents a 'serious medical need' within the meaning of our case law.").

Once a prisoner demonstrates an objectively serious medical need, prison officials are obligated by the Eighth Amendment to provide treatment. *Estelle*, 429 U.S. at 103 (explicating "the government's obligation to provide medical care for those whom it is punishing by incarceration"). But not just any treatment will do; prison officials must provide treatment "at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards." *United States v. DeCologero*, 821 F.2d 39, 43 (1st Cir. 1987); *see also Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (noting that treatment decisions are constitutionally inadequate when they are "'far afield of accepted professional standards'").

Put another way, prison officials have an obligation to provide a prisoner with medically necessary treatment based on an individualized assessment of the

prisoner's serious needs. *See, e.g.*, *Estelle*, 429 U.S. at 107 (focusing on the prisoner's particular medical condition and whether the state's treatment protocol—bed rest, muscle relaxants, and pain relievers—sufficiently addressed his symptoms); *Roe v. Elyea*, 631 F.3d 843, 859 (7th Cir. 2011) ("[I]nmate medical care decisions must be fact-based with respect to the particular inmate, the severity and stage of [her] condition, the likelihood and imminence of further harm and the efficacy of available treatments."); *Rouse v. Plantier*, 182 F.3d 192, 199 (3d Cir. 1999) (alleged violations of the Eighth Amendment "obviously var[y] depending on the medical needs of the particular prisoner"); *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 & n.32 (3d Cir. 1987) (by virtue of a blanket policy, "the County denies to a class of inmates the type of individualized treatment normally associated with the provision of adequate medical care").

This much appears to be common ground for the parties to this appeal. They part ways, however, on two issues: (1) whether it is appropriate for a court to consult professional consensus in establishing the prudence of a particular treatment decision, and (2) whether an Eighth Amendment violation can be found where the state provides a prisoner with some, but not all, medically necessary treatment. The State's position is wrong on both questions, as settled by well-established Eighth Amendment precedent.

A. Professional Consensus Informs Eighth Amendment Analysis And Departures From That Consensus Cannot Justify The State's Refusal To Provide Medically Necessary Treatment

The State's refrain in this case is that the district court "substitut[ed] a professional association's treating guidelines for the constitutional standard." Appellants Br. 1; *see also id.* 23 (district court erred by "relying … on its interpretation of WPATH's Standards of Care"). That is wrong as a factual matter, for the reasons set forth in Norsworthy's brief (at 34-38): The State confuses *consideration* of accepted standards of care and practice within the medical profession with the mechanical *adoption* of those standards. And to the extent the State argues that the recognized consensus of medical professionals in the relevant field may not bear on a court's Eighth Amendment analysis, it is mistaken as a matter of law.

The courts of appeals consistently recognize that "the contemporary standards and opinions of the medical profession … are highly relevant in determining what constitutes deliberate indifference to medical care." *Howell v. Evans*, 922 F.2d 712, 719 (11th Cir. 1991), *vacated pursuant to settlement*, 931 F.2d 711 (11th Cir. 1991), *opinion reinstated*, 12 F.3d 190, 191 n.* (11th Cir. 1994); *see also Allard v. Baldwin*, 779 F.3d 768, 772 (8th Cir. 2015) ("[I]n cases where some medical care is provided, a plaintiff 'is entitled to prove his case by establishing [the] course of treatment, or lack thereof, so deviated from

professional standards that it amounted to deliberate indifference.'"); *Henderson v. Ghosh*, 755 F.3d 559, 566 (7th Cir. 2014) (deliberate indifference can be shown by "'a substantial departure from accepted professional judgment, practice, or standards'"). That follows from the cardinal principle of Eighth Amendment law that adequate medical care is tested against "prudent professional standards." *DeCologero*, 821 F.2d at 43.

Eighth Amendment jurisprudence thus abounds with reference to, and reliance on, the views of the relevant medical communities. To take one salient example: In a recent line of cases, the Supreme Court has regularly referred to the professional consensus of mental health experts in determining when the execution of certain persons with intellectual disabilities violates the constitutional guarantee against cruel punishment. *See Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014) (explaining, in striking down Florida's IQ threshold for death penalty eligibility, that it is "proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores" and "to consult the medical community's opinions" in determining how intellectual disability should be measured); *id.* at 1995 ("Florida's rule disregards established medical practice[.]"); *Atkins*, 536 U.S. at 318 (citing "clinical definitions of mental retardation" and noting that particular limitations of persons with intellectual disabilities "diminish their personal culpability"); *see also Roper v. Simmons*, 543 U.S. 551, 570-571,

573 (2005) (striking down death penalty for juveniles and relying on established scientific and sociological studies about minors' underdeveloped sense of responsibility, propensity to engage in reckless behavior, and susceptibility to peer pressure); *cf. Indiana v. Edwards*, 554 U.S. 164, 176-178 (2008) (relying on American Psychiatric Association's settled position to hold that a defendant may have the capacity to stand trial but not to represent himself); *Baze v. Rees*, 553 U.S. 35, 67-69 (2008) (Alito, J., concurring) ("[A]n inmate challenging a method of execution should point to a well-established scientific consensus."). The courts of appeals have likewise referred to and relied on evidence of professional consensus in determining whether public officials' conduct violates the Eighth Amendment. *See, e.g.*, *Villegas v. Metropolitan Gov't of Nashville*, 709 F.3d 563, 572-573 (6th Cir. 2013) (citing views of, *inter alia*, the American Medical Association and the American College of Obstetricians and Gynecologists in considering detainee's Eighth Amendment challenge to shackling during labor).

As the above precedent makes clear, the State's position that the legal question of medical necessity is somehow unmoored from—or should be answered without consideration of—the relevant professional medical consensus is untenable. As the Supreme Court has explained, because courts are routinely called upon to make findings based on "reasonable medical judgments given the state of medical knowledge," *School Bd. of Nassau County v. Arline*, 480 U.S. 273,

287-289 (1987), recourse to professional standards of care is critically important when a court is presented with conflicting positions about the appropriate medical response. And where a professional consensus exists, state actors must demonstrate compelling bases to disregard that consensus. *See Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (court should take due account of the views of health experts; dissenting view may be credited only when the expert provides "a credible scientific basis for deviating from the accepted norm"); *cf. Massachusetts v. EPA*, 549 U.S. 497, 507-510, 534 (2007) (agency could not make "reasoned judgment" against regulating greenhouse gases based merely on "residual uncertainty" about the effects of climate change); *Consolidation Coal Co. v. Director, OWCP*, 521 F.3d 723, 726 (7th Cir. 2008) (affirming administrative law judge's "sensible" decision to discredit company expert's opinion because it conflicted with scientific community's "consensus" on clinical significance of medical condition).

Moreover, courts have consistently held that the medical decisions of prison officials do not warrant reflexive deference, but rather must be evaluated by reference to the relevant professional consensus to ensure that the decision under consideration is "prudent." This Court, for example, has expressly held that "[i]n deciding whether there has been deliberate indifference to an inmate's serious medical needs, [a court] need not defer to the judgment of prison doctors or administrators." *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989). Courts

must instead review the record based on all relevant facts—including both the judgments of prison medical officials and the views of prudent professionals in the field—to ensure the medical decision under consideration comports with Eighth Amendment standards. A contrary approach that eschews professional standards would empower the State's "non-specialist and non-treating medical officials" to make decisions based on administrative convenience, cost-saving, or politics, rather than prisoners' serious medical needs. *See Colwell*, 763 F.3d at 1069.

In particular, the State may not evade liability by relying on a single, dissenting expert to manufacture a purported difference of medical opinion over whether a specific treatment is medically necessary. A state's decision to undertake one of multiple viable treatment options, in view of a legitimate difference of medical opinion, may not amount to deliberate indifference. But the opinion supporting the denial of care (or use of lesser alternatives) must be medically acceptable given all of the circumstances. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (Eighth Amendment is violated where "the course of treatment the doctors chose was medically unacceptable under the circumstances"). Relying on a dissenting medical view that departs substantially from "'accepted professional judgment, practice, or standards'" may, in fact, constitute deliberate indifference. *Roe*, 631 F.3d at 862-863 (quoting *Sain v. Wood*, 512 F.3d 886, 895 (7th Cir. 2008)); *see also Arnett*, 658 F.3d at 751 (noting that treatment decisions

may be constitutionally inadequate when they are "'far afield of accepted professional standards'"); *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992) ("By choosing to rely upon a medical opinion which a reasonable person would likely determine to be inferior, the prison officials took action which may have amounted to the denial of medical treatment, and the 'unnecessary and wanton infliction of pain.'"), *overruled in part on other grounds as recognized in Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1045 (9th Cir. 2002); *cf. Pickup v. Brown*, 740 F.3d 1208, 1223-1224, 1232 (9th Cir. 2013) (legislature had rational basis to ban gay conversion therapy for minors based on "well-documented, prevailing opinion of the medical and psychological community"; deferring to "overwhelming consensus" of "mainstream mental health professional associations" notwithstanding dissenting views from other professionals), *cert. denied*, 134 S. Ct. 2871 (2014).

Courts of appeals have rightly recognized that any rule to the contrary would significantly undermine the protections of the Eighth Amendment. To that end, even a court that rejected an Eighth Amendment claim concerning a prison's refusal to provide sex reassignment surgery to a transgender prisoner warned that its "holding in no way suggests that correctional administrators wishing to avoid treatment need simply to find a single practitioner willing to attest that some well-

accepted treatment is not necessary." *Kosilek v. Spencer*, 774 F.3d 63, 90 n.12 (1st Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2059 (2015).

B. The Provision Of Some Medical Care Does Not Discharge The State's Eighth Amendment Obligations When Additional Treatment Is Medically Necessary

The State insists that by providing Norsworthy with counseling and hormone therapy it fulfilled its constitutional obligations, notwithstanding that those interventions did not effectively treat Norsworthy's gender dysphoria and that (as the district court found) additional treatment is medically necessary to treat her condition. The State's position again is contrary to established Eighth Amendment law.

As this Court has explained, "[a] prisoner need not prove that he was completely denied medical care" to make out an Eighth Amendment claim. *Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc); *see also Langford v. Norris*, 614 F.3d 445, 460 (8th Cir. 2010) ("a total deprivation of care is not a necessary condition for finding a constitutional violation"; "a doctor's decision to take an easier and less efficacious course of treatment" constitutes deliberate indifference); *Jones v. Muskegon County*, 625 F.3d 935, 944 (6th Cir. 2010) ("'[P]rison officials may not entirely insulate themselves from liability under § 1983 simply by providing some measure of treatment.'"); *Simkus v. Granger*, 940 F.2d 653, 1991 WL 138483, at *2 (4th Cir. July 30, 1991) ("The fact that an

inmate has received some care for his condition does not preclude recovery under the eighth amendment."). For example, treatments that simply address a prisoner's pain without attending to the underlying condition, or that are appropriate to a less aggravated form of that condition, are constitutionally inadequate. *Arnett*, 658 F.3d at 752 (pain medication insufficient to address prisoner's serious medical needs because prisoner was entitled to "medication to treat, not simply mask, his condition"); *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999) ("[D]eliberate indifference may be established by a … decision to take an easier but less efficacious course of treatment.").

When medical conditions persist or worsen, prison officials must respond accordingly. Their constitutional obligations require them, in the "exercise of professional judgment," *Estelle*, 429 U.S. at 104 n.10, to determine what treatment is medically necessary *at the time* for a *particular prisoner*. That determination must give proper weight to a prisoner's *current* symptoms and needs. *See, e.g.*, *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 2011) (even though the initial course of treatment for hernia was constitutionally adequate for the first five years, prison doctors acted with deliberate indifference when they "never altered their response to his hernia as the condition and associated pain worsened over time"); *Hathaway v. Coughlin*, 37 F.3d 63, 68 (2d Cir. 1994) (even though defendant initially referred prisoner to a specialist, prison official acted with deliberate

indifference by not referring plaintiff for a reevaluation when subsequent complaints showed that the initial "course of treatment was largely ineffective"); *Cooper v. Dyke*, 814 F.2d 941, 945 (4th Cir. 1987) ("Continued complaints by Cooper, or the manifest symptoms described by Dr. Theodore, would have put defendants on notice that additional care was required.").

Providing *some* treatment, when that treatment is not a medically suitable response to the prisoner's current condition, is constitutionally insufficient, even if that treatment might have been appropriate for the prisoner at an earlier stage. The Fourth Circuit aptly analyzed the State's argument when made by the Commonwealth of Virginia:

> [I]magine that prison officials prescribe a painkiller to an inmate who has suffered a serious injury from a fall, but that the inmate's symptoms, despite the medication, persist to the point that he now, by all objective measure, requires evaluation for surgery. Would prison officials then be free to deny him consideration for surgery, immunized from constitutional suit by the fact they were giving him a painkiller? We think not.

De'lonta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013).

Here, the State was aware that the treatments it had previously provided Norsworthy—principally hormone therapy and counseling—were insufficient to treat her severe gender dysphoria. The State was likewise aware that clinicians recommended sex reassignment surgery as the sole treatment that could alleviate her significant pain and suffering. In the district court's view, the State's rationale

for refusing to provide surgery was pretextual and based on an indefensible, categorical ban on sex reassignment surgery. *See Norsworthy v. Beard*, No. 14-cv-695, 2015 WL 1500971, at *17 (N.D. Cal. Apr. 2, 2015). In any other context, these facts would inarguably establish an Eighth Amendment violation. The State contends that they do not here, because some special rules apply to transgender prisoners and the treatment of gender dysphoria. That is incorrect.

II. THERE IS NO EXCEPTION TO THE EIGHTH AMENDMENT FOR TRANSGENDER PRISONERS OR THE TREATMENT OF GENDER DYSPHORIA

Having evidently recognized that its treatment of Norsworthy's gender dysphoria and decision to deny her sex reassignment surgery is indefensible under established Eighth Amendment law, the State asked the district court to adopt "a distinct standard for the treatment of gender dysphoria." *Norsworthy*, 2015 WL 1907518, at *2. The district court declined the invitation. The State makes the same request on appeal, and it should again be rejected. There is no transgender exception to the Eighth Amendment. Application of this Circuit's settled law requires affirmance of the district court's injunction.

Again, Norsworthy and the State share some common ground. The parties agree that Norsworthy's gender dysphoria presents a serious medical need, and the State does not dispute that it is required to provide her with medically necessary treatment. The parties likewise agree that the State's provision of counseling and hormone therapy has been a necessary component of Norsworthy's treatment for

gender dysphoria. The parties disagree, however, as to whether the State—notwithstanding the treatment it previously provided—must now provide Norsworthy with sex reassignment surgery. Treating clinicians and the district court agreed that the surgery was medically necessary. The State takes a different view and suggests that the district court's conclusion could only be reached by substituting the Standards of Care for the Eighth Amendment. But as discussed above in general terms, and as discussed below with specific reference to gender dysphoria, the State is mistaken.

A. WPATH's Standards Of Care Provide A Relevant Benchmark For Judging The Prudence Of Treatment Decisions For Gender Dysphoria

As discussed above, it is a pillar of Eighth Amendment jurisprudence that "the contemporary standards and opinions of the medical profession … are highly relevant in determining what constitutes deliberate indifference to medical care." *Howell*, 922 F.2d at 719. In the context of transgender health, the Standards of Care adopted by WPATH reflect those standards and opinions, and are the indispensable starting point for judging the prudence of treatment decisions for transgender prisoners.

The State erroneously derides WPATH as a "small medical organization" and disparages its status in the medical community. Appellants Br. 26-28. The State points to no court that shares its view. An "international multidisciplinary

professional Association" founded in 1979, WPATH seeks to "promote evidence based care, education, research, advocacy, public policy and respect in transgender health."[3] Since 1979, WPATH (then known as the Harry Benjamin International Gender Dysphoria Association) has also published and periodically updated its Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People. Now in its seventh version, the Standards of Care have reflected the established consensus of medical and mental-health professionals for over thirty years.[4] They are the result of a rigorous and thorough process that distills existing literature and research into documents reflecting professional consensus on the treatment of gender dysphoria. This exhaustive process allows practitioners, caregivers, and prison officials to provide persons with gender dysphoria "evidence-based care" that is "based on the best available science and expert professional consensus." Standards of Care 1. Further, major professional medical organizations recognize WPATH as the leading professional organization for medical experts who specialize in the diagnosis and treatment of persons with gender dysphoria and recognize the primacy of the SOC in the field.[5]

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[3] WPATH, *Missions and Values—Mission Statement*.

[4] *See* WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (2012).

[5] *See, e.g.*, American Medical Ass'n, *Removing Financial Barriers to Care for Transgender Patients*, *in* AMA Resolution 122 (A-08) (2008) (calling the SOC

As a result, courts consistently rely on the Standards of Care in Eighth Amendment cases involving medical care for or treatment of transgender prisoners. *See, e.g.*, *De'lonta*, 708 F.3d at 522-523 ("The Standards of Care … are the generally accepted protocols for the treatment of GID."); *Lynch v. Lewis*, No. 14-cv-24, 2015 WL 1296235, at *10 (M.D. Ga. Mar. 23, 2015) (noting, approvingly, that "[o]ther courts have held that the standards for GID treatment set out by [WPATH] are the accepted standards for GID treatment in the medical community"); *see also Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231-232 (D. Mass. 2012) ("The course of treatment for [GID] followed in the community is governed by the 'Standards of Care' promulgated by [WPATH]."); *Fields v. Smith*, 712 F. Supp. 2d 830, 844 (E.D. Wis. 2010) ("The Standards of Care 'are a document that articulates professional consensus about the treatment of [GID], and it's produced by the WPATH organization and distributed throughout the world to organizations such as the World He[alth] Organization and other providers of health care worldwide.'"), *aff'd*, 653 F.3d 550 (7th Cir. 2011); *cf. Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1289 n.4 (N.D. Ga. 2010) (rejecting defendant's claim that Standards of Care do not reflect consensus of medical professionals and

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"internationally accepted" and "recognized within the medical community to be the standard of care for treating people with GID"); Endocrine Society, *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline* 6 (2009) (discussing how the SOC have provided the field with general guidelines for treatment).

finding "'sufficient evidence that statements of [WPATH] are accepted in the medical community'").[6]

The State's contention that the district court "substituted" the Standards of Care for the Eighth Amendment is wide of the mark. As with other medical and mental health conditions, the proper treatment for gender dysphoria depends on the individual patient's medical needs. The State appears to contend that because the district court concluded, consistent with Norsworthy's treating clinicians, that sex reassignment surgery was medically necessary for her, it impermissibly "ignored significant contrary evidence regarding the breadth and variety of acceptable treatment for GID within the medical community." Appellants Br. 28 (quoting *Kosilek*, 774 F.3d at 89). That is incorrect. The district court explained that the Standards of Care "address a variety of therapeutic options," including, in some cases, "surgery." *Norsworthy*, 2015 WL 1500971, at *2, *16. The court further observed that treatment under the Standards of Care is "individualized," and that "[w]hat helps one person alleviate gender dysphoria might be very different from what helps another person." *Id.* at *2. The court thus did not reflexively apply the

[6] The best "criticism" of the Standards of Care the State can marshal is a concurrence to the Tax Court's decision concluding that expenses for sex reassignment surgery are tax-deductible. *See* Appellants Br. 26-28 (discussing *O'Donnabhain v. Commissioner*, 134 T.C. 34, 89 (2010) (Holmes, J., concurring)). A concurrence responding to what the concurring judge argues was dicta in the majority opinion hardly disturbs the broad support for the Standards of Care reflected in the cases just cited.

Standards of Care to conclude that sex reassignment surgery was medically necessary for Norsworthy, but rather used them as a framework to evaluate the parties' contentions as to the adequacy of Norsworthy's treatment regimen.

The State also seeks to bolster its "substitution" argument by contending that the district court "g[ave] very little weight to the opinions of [its expert] Levine." *Norsworthy*, 2015 WL 1500971, at *16. But the district court gave myriad reasons, based on the record evidence before it, for discounting Levine's testimony. In particular, the court was unpersuaded by Levine's testimony because his "report misrepresents the Standards of Care; overwhelmingly relies on generalizations about gender dysphoric prisoners, rather than an individualized assessment of Norsworthy; contains illogical inferences; and admittedly includes references to a fabricated anecdote." *Id.* Nothing in that analysis evidences any impermissible "substitution" of the Standards of Care for the ordinary operation of the Eighth Amendment (or the Federal Rules of Evidence).[7]

[7] The district court was similarly unpersuaded by Levine's suggestion that it would "*never* be medically prudent to provide SRS to an inmate," *Norsworthy*, 2015 WL 1500971, at *17 (emphasis added)—concluding that his view was at odds with the consensus reflected in the Standards of Care, *id.* at *18. That conclusion was amply supported by this Court's precedent. *See id.* (citing *Hamilton*, 981 F.2d at 1067 ("By choosing to rely upon a medical opinion which a reasonable person would likely determine to be inferior, the prison officials took actions which may have amounted to the denial of medical treatment, and the 'unnecessary and wanton infliction of pain.'"), *overruled in part on other grounds as recognized in Ramirez-Palmer*, 301 F.3d at 1045). What is more, Levine's view that a recognized form of medical treatment could be made categorically

B. The State's Provision Of Hormone Therapy And Counseling Does Not Foreclose Norsworthy's Claim For Sex Reassignment Surgery

Notwithstanding the legion of cases holding that the provision of *some* medical care does not foreclose a claim for additional or different medically necessary care, *see supra* pp. 19-21, the State contends that its provision of hormone therapy and counseling precludes a finding of deliberate indifference. The Fourth Circuit dismantled this argument in *De'lonta v. Johnson* and it should be similarly rejected here.

In *De'lonta*, Virginia argued that a prisoner could not state an Eighth Amendment claim based on the denial of sex reassignment surgery because prison officials had provided her with therapy and hormone treatment. "In other words, [Virginia contended] that because [it had] provided *some* treatment recognized as effective under the Standards of Care, [its] conduct cannot be said to rise to the level of deliberate indifference." *De'lonta*, 708 F.3d at 524. The Fourth Circuit recognized the flaws in that position; this Court should do the same here.

The State's provision of hormone therapy and counseling may have addressed certain of Norsworthy's medical needs at a certain point in time. But the

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unavailable to prisoners is deeply at odds with Eighth Amendment law. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550, 555, 559 (7th Cir. 2011) (striking down policy categorically barring certain forms of treatment for prisoners with gender dysphoria); *Roe*, 631 F.3d at 859-860 (striking down policy barring antiviral therapy for classes of prisoners with Hepatitis C); *see also Colwell*, 763 F.3d at 1063 (holding as a "paradigm of deliberate indifference" a "one eye policy" prohibiting cataract surgery for prisoners with at least one functioning eye).

record shows that her gender dysphoria now requires more, and the State is obligated to treat it. *See, e.g.*, *Edwards v. Snyder*, 478 F.3d 827, 831 (7th Cir. 2007) ("[A] plaintiff's receipt of *some* medical care does not automatically defeat a claim of deliberate indifference."); *cf. Gant v. County of Los Angeles*, 772 F.3d 608, 618 (9th Cir. 2014) ("[D]eliberate indifference to a person's constitutional rights occurs when *the need for more or different action 'is so obvious, and the inadequacy of the current procedure so likely to result in the violation of constitutional rights*, that the policymakers … can reasonably be said to have been deliberately indifferent to the need.'" (emphasis added; brackets and colon omitted)).

Conditions progress and require different treatment over time. Gender dysphoria is no different, and the fact that sex reassignment surgery is the required regimen at a particular point in time for certain prisoners with gender dysphoria does not change the Eighth Amendment standard. *See, e.g.*, *Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003) (holding that prison officials show deliberate indifference by denying medically care because it "is expensive or because it might be controversial or unpopular"). A "one and done" approach to treatment in the face of a continuing or evolving serious medical condition does not meet the standards of the Eighth Amendment. Nor does a plan to manage symptoms without ever treating the prisoner's underlying condition. *See Arnett*, 658 F.3d at

752; *see also Kosilek*, 774 F.3d at 106 (Thompson, J., dissenting) (Massachusetts' "assertion that [] future risk [can] be curbed with medication and psychotherapy cannot carry the day…. [T]reating the underlying disorder and its symptoms are two very different things.").

The State contends that Norsworthy's Eighth Amendment claim is in fact for "the treatment of [her] choice," which the Constitution does not mandate. Appellants Br. 25 (quoting *Jackson v. Fair*, 846 F.2d 811, 817 (1st Cir. 1988)). Instead, the State repeats, the standard is one of "medical necessity." *Id.* But the fact that Norsworthy's wishes and her doctors' prescriptions coincide does not diminish her claim. *See Jett*, 439 F.3d at 1097-1098 (allowing prisoner's deliberate indifference claim to proceed where prison officials denied a specific treatment recommended by initial treating physician and repeatedly requested by prisoner). The district court found, based on an extensive medical and factual record, that sex reassignment surgery was medically necessary to treat Norsworthy's gender dysphoria. That is the end of the Eighth Amendment analysis, and the State cannot avoid the inexorable consequence of the district court's finding by pointing out that Norsworthy (understandably) desires the same result.

CONCLUSION

For all of these reasons, this Court should affirm the district court's grant of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 6,869 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Alan E. Schoenfeld
ALAN E. SCHOENFELD

June 12, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Alan E. Schoenfeld
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