No. _____

In The
Supreme Court of the United States

SCOTT LYNN GIBSON,
ALSO KNOWN AS VANESSA LYNN,
Petitioner,

v.

BRYAN COLLIER
AND DR. D. GREENE,
Respondents.

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

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-51148

FILED: MARCH 29, 2019

SCOTT LYNN GIBSON, also known as Vanessa Lynn, Plaintiff - Appellant
v.
BRYAN COLLIER; DR. D. GREENE, Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas

Before SMITH, BARKSDALE, and HO, Circuit Judges.

JAMES C. HO, Circuit Judge:

A state does not inflict cruel and unusual punishment by declining to provide sex reassignment surgery to a transgender inmate. The only federal court of appeals to decide such a claim to date has so held as an *en banc* court. *See Kosilek v. Spencer*, 774 F.3d 63, 76–78, 87–89, 96 (1st Cir. 2014) (en banc). The district court in this case so held. And we so hold today.

Under established precedent, it can be cruel and unusual punishment to deny essential medical care to an inmate. But that does not mean prisons must provide whatever care an inmate wants. Rather, the Eighth Amendment "proscribes only medical care so unconscionable as to fall below society's minimum

standards of decency." *Id.* at 96 (citing *Estelle v. Gamble*, 429 U.S. 97, 102–5 (1976)).

Accordingly, "mere disagreement with one's medical treatment is insufficient" to state a claim under the Eighth Amendment. *Delaughter v. Woodall*, 909 F.3d 130, 136 (5th Cir. 2018). This bedrock principle dooms this case. For it is indisputable that the necessity and efficacy of sex reassignment surgery is a matter of significant disagreement within the medical community. As the First Circuit has noted—and counsel here does not dispute—respected medical experts fiercely question whether sex reassignment surgery, rather than counseling and hormone therapy, is the best treatment for gender dysphoria. *See Kosilek*, 774 F.3d at 76–78, 87 (surveying conflicting testimony concerning medical efficacy and necessity of sex reassignment surgery).

What's more, not only do respected medical experts disagree with sex reassignment surgery—so do prisons across the country. That undisputed fact reveals yet another fatal defect in this case. For it cannot be cruel *and unusual* to deny treatment that no other prison has ever provided—to the contrary, it would only be unusual if a prison decided *not* to deny such treatment.

The dissent correctly observes that no evaluation for sex reassignment surgery was ever provided in this case, because Texas prison policy does not authorize such treatment in the first place. The dissent suggests that a blanket ban is unconstitutional—and that an individualized assessment is required. But that defies common sense. To use an analogy: If the FDA prohibits a particular drug, surely the Eighth Amendment does

not require an individualized assessment for any inmate who requests that drug. The dissent's view also conflicts with *Kosilek*—as both the dissent in *Kosilek* and counsel here acknowledge, the majority in *Kosilek* effectively allowed a blanket ban on sex reassignment surgery.

In addition, the dissent would remand to correct certain alleged procedural errors made by the district court. But counsel has asked us to reach the merits, forfeiting any procedural objections that could have been brought. And the dissent's remaining procedural concerns are redundant of the substantive debate over the proper interpretation of the Eighth Amendment. We affirm.[1]

I.

Scott Lynn Gibson is a transgender Texas prison inmate in the custody of the Texas Department of Criminal Justice (TDCJ) in Gatesville. He was originally convicted and sent to prison on two counts of aggravated robbery. In prison, he committed the additional crimes of aggravated assault, possession of a deadly weapon, and murder. He was convicted of those subsequent offenses, and is now sentenced to serve through May 2031, and eligible for parole in April 2021.

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[1] In reaching this judgment, we express no opinion on the ongoing debate over the medical necessity or efficacy of sex reassignment surgery, other than to acknowledge the existence and vigor of that debate. Nor do we express any opinion as to what alternative medical treatments, if any, Texas prison officials might voluntarily offer to Gibson, as a matter of policy or compassion. We conclude only that the Constitution affords us no authority, as a court of law, to make such decisions on behalf of Texas.

Gibson was born male. But as his brief explains, he has been diagnosed as having a medical condition known today as "gender dysphoria" or "Gender Identity Disorder" (GID). He has lived as a female since the age of 15 and calls himself Vanessa Lynn Gibson.[2]

The American Psychiatric Association defines "gender dysphoria" in its most recent *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) as a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by" at least two of six factors, namely:

> 1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics. . . . 2. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender. . . . 3. A strong desire for the primary and/or secondary sex characteristics of the other

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[2] We use male pronouns, consistent with TDCJ policy—which Gibson does not appear to challenge. Tex. Dep't of Criminal Justice, OFFENDER INFORMATION DETAILS: SCOTT LYNN GIBSON, https://offender.tdcj.texas.gov/OffenderSearch/offenderDetail.action?sid=05374437 (last visited Mar. 29, 2019) (listing Gibson as male and assigning him to male-only prison facility). *See also Farmer v. Brennan*, 511 U.S. 825, 829, 832, 851 (1994) (using male pronouns for transgender prisoner born male); *id.* at 852–54 (Blackmun, J., concurring) (same); *Praylor v. Texas Dep't of Criminal Justice*, 430 F.3d 1208, 1208–9 (5th Cir. 2005) (per curiam) (same); *cf. Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J.) (plurality op.) ("[S]ex . . . is an immutable characteristic determined solely by . . . birth.").

> gender. 4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender). 5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender). 6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

As the Manual further notes, "[t]he condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."

Gibson has averred acute distress. He is depressed, has attempted to castrate or otherwise harm himself, and has attempted suicide three times (though he says that gender dysphoria was not the sole cause of his suicide attempts). His prison medical records reflect that he has consistently denied any suicidal urges. But in this litigation, Gibson has averred that, if he does not receive sex reassignment surgery, he will castrate himself or commit suicide.

After he threatened to castrate himself, Gibson was formally diagnosed with gender dysphoria and started mental health counseling and hormone therapy. Since his formal diagnosis, Gibson has repeatedly requested sex reassignment surgery, explaining that his current treatment regimen of counseling and hormone therapy helps, but does not fully ameliorate, his dysphoria.

TDCJ Policy G-51.11 provides that transgender inmates must be "evaluated by appropriate medical and mental health professionals and [have their]

treatment determined on a case by case basis," reflecting the "[c]urrent, accepted standards of care." Although there is some dispute whether the Policy forbids sex reassignment surgery or is merely silent about it, doctors have denied Gibson's requests because the Policy does not "designate [sex reassignment surgery] . . . as part of the treatment protocol for Gender Identity Disorder."[3]

II.

This appeal comes to us with an unusual procedural history. Proceeding *pro se*, Gibson sued, *inter alia*, the Director of the TDCJ (now, Bryan Collier), challenging TDCJ Policy G-51.11 as unconstitutional under the Eighth Amendment, both facially and as applied. He argued that Policy G-51.11 amounts to systematic deliberate indifference to his medical needs, because it prevents TDCJ from even considering whether sex reassignment surgery is medically necessary for him. He demanded injunctive relief requiring TDCJ to evaluate him for sex reassignment surgery.[4]

The Director moved for summary judgment on two grounds: qualified immunity and sovereign immunity. Notably, the Director did not move for summary judgment on the merits of Gibson's Eighth Amendment claim.

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[3] The dissent refers to a "clinic note" seeking to schedule Gibson for an individualized assessment for sex reassignment surgery, but acknowledges that Gibson's counsel does not argue that the clinic note is relevant to this appeal. Diss. Op. at 17–18.

[4] Gibson also sued "Dr. D. Greene" at the prison hospital, along with the Municipality of Gatesville. The district court dismissed both of those defendants, and those claims are not at issue in this appeal.

Gibson nevertheless responded to the motion for summary judgment on the merits. He argued that the Policy prohibits potentially necessary medical care. To support his claim of medical necessity, he attached the Standards of Care issued by the World Professional Association for Transgender Health (WPATH). Those standards provide that, "for many [transgender people,] [sex reassignment] surgery is essential and medically necessary to alleviate their gender dysphoria." WPATH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 54 (7th ed., 2011) (STANDARDS OF CARE).

The district court rejected the Director's two immunity defenses—denying qualified immunity because this is a suit for injunctive relief, not damages, and denying sovereign immunity under *Ex parte Young*. But the district court granted summary judgment for the Director on the merits of Gibson's Eighth Amendment claim.

Gibson appealed *pro se*. This court appointed experienced counsel to advocate on Gibson's behalf. With the assistance of able counsel, Gibson declined to protest any procedural defect in these proceedings. Instead, Gibson asks us to reverse solely on the basis of the merits of his Eighth Amendment claim, and to remand for further proceedings accordingly.

We accept Gibson's invitation to reach his deliberate indifference claim on the merits, rather than reverse based on any procedural defects in the district court proceedings. In doing so, we note that, had Gibson presented any such procedural concerns, we might very well have remanded this case for

further proceedings. But he did not do so—as the dissent admits. *See* Diss. Op. at 4 (admitting that "Gibson did not assert not being able to present essential facts"); *id.* at 6 (admitting that "Gibson on appeal does not contest the violation of this Rule"). And we presume he had good reason not to do so.

Reasonable counsel might conclude that it would be a waste of time and resources for everyone involved (and give false hope to Gibson) to remand for procedural reasons. After all, Gibson is destined to lose on remand if he is unable to identify any genuine dispute of material fact. That is the case here, as we shall demonstrate.

III.

We review grants of summary judgment *de novo*, and ask whether "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "'[T]he substantive law will identify which facts are material.' This means '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 378 (5th Cir. 2019) (second alteration in original) (citation omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[5]

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[5] The dissent contends that we have somehow misapplied the standards governing summary judgment. The contention is meritless. We all agree that summary judgment is proper where there is no genuine dispute as to any material fact—and that the underlying substantive law (here, the Eighth Amendment) dictates which facts are material. As we explain

The Eighth Amendment forbids cruel and unusual punishments. The Supreme Court has construed this prohibition to include "deliberate indifference to serious medical needs of prisoners." *Gamble*, 429 U.S. at 104.

To establish deliberate indifference, Gibson must first demonstrate a serious medical need. *Gobert v. Caldwell*, 463 F.3d 339, 345 n.12 (5th Cir. 2006) (citing *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994)). Second, he must show that the Department acted with deliberate indifference to that medical need. *Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001) (citing *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999)).

Here, the State of Texas does not appear to contest that Gibson has a serious medical need, in light of his record of psychological distress, suicidal ideation, and threats of self-harm. Instead, the State disputes that it acted with deliberate indifference to his medical needs.

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below, Eighth Amendment precedent establishes that medical disagreement is not actionable. Given the demonstrable medical disagreement over sex reassignment surgery, we conclude—consistent with established precedent—that there are no material facts in dispute here. In sum, the dissent's disagreement concerns substantive Eighth Amendment law, not the standards that govern summary judgment.
The dissent's related complaint—that we have somehow misplaced the burden of production on Gibson, rather than on TDCJ where it belongs—fails for similar reasons. To recognize the futility of Gibson's claim does not place the burden of production on him. It simply follows from the established rule that summary judgment is proper in the absence of a dispute over facts that might affect the outcome of the suit under the governing law.

"[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Gamble*, 429 U.S. at 104 (citation omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality op.)). This is a demanding standard.

Negligence or inadvertence is not enough. "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." *Id.* at 106. "[A]n inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'" *Id.* at 105–6.

Rather, the inmate must show that officials acted with malicious intent—that is, with knowledge that they were withholding medically necessary care. The plaintiff must show that officials "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985).

There is no intentional or wanton deprivation of care if a genuine debate exists within the medical community about the necessity or efficacy of that care. "Disagreement with medical treatment does not state a claim for Eighth Amendment indifference to medical needs." *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir. 1997) (collecting cases). There is no Eighth Amendment claim just because an inmate believes that "medical personnel should have attempted different diagnostic measures or

alternative methods of treatment." *Id. See also Mayweather v. Foti*, 958 F.2d 91, 91 (5th Cir. 1992) (prisoners are not entitled to "the best [treatment] that money c[an] buy").

Gibson seems to accept this standard. As his brief notes, to state an Eighth Amendment claim, he must demonstrate "universal acceptance by the medical community" that sex reassignment surgery treats gender dysphoria.

This is not to say, of course, that a single dissenting expert automatically defeats medical consensus about whether a particular treatment is necessary in the abstract. "Universal acceptance" does not necessarily require unanimity. But where, as here, 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. *See*, *e.g.*, *Kosilek*, 774 F.3d at 96 ("Nothing in the Constitution mechanically gives controlling weight to one set of professional judgments.") (quoting *Cameron v. Tomes*, 990 F.2d 14, 20 (1st Cir. 1993)).

Accordingly, there is no genuine dispute of material fact as to deliberate indifference under the Eighth Amendment where—as here—the claim concerns treatment over which there exists on-going controversy within the medical community. Indeed, Gibson himself admits as much.

IV.

The district court concluded that Gibson failed to present a genuine dispute of material fact concerning deliberate indifference. To quote: "Plaintiff would prefer a policy that provides [sex

reassignment surgery]. However, a Plaintiff's disagreement with the diagnostic decisions of medical professionals does not provide the basis for a civil rights lawsuit." Op. at 20. "Plaintiff provides . . . no witness testimony or evidence from professionals in the field demonstrating that the WPATH-suggested treatment option of [sex reassignment surgery] is so universally accepted, that to provide some but not all of the WPATH-recommended treatment amounts to deliberate indifference." *Id.* at 19. "Accordingly, Plaintiff fails to establish there is a genuine issue of material fact as to whether the policy is unconstitutional on its face or as applied to Plaintiff." *Id.* at 20.

We agree. What's more, the conclusion of the district court is further bolstered by a recent ruling by one of our sister circuits. As the First Circuit concluded in *Kosilek*, there is no consensus in the medical community about the necessity and efficacy of sex reassignment surgery as a treatment for gender dysphoria. At oral argument, Gibson's counsel did not dispute that the medical controversy identified in *Kosilek* continues to this day. This on-going medical debate dooms Gibson's claim.

A.

The sparse record before us includes only the WPATH Standards of Care, which declares sex reassignment surgery both effective and necessary to treat some cases of gender dysphoria. As the First Circuit has concluded, however, the WPATH Standards of Care reflect not consensus, but merely one side in a sharply contested medical debate over sex reassignment surgery.

The *en banc* First Circuit considered whether a prison acted with deliberate indifference when it failed to offer sex reassignment surgery to a Massachusetts inmate. *Kosilek*, 774 F.3d at 68–96. Although the prison denied the surgery, it offered "hormones, electrolysis, feminine clothing and accessories, and mental health services." *Id.* at 89.

As part of its deliberate-indifference analysis, the First Circuit considered whether WPATH and its proponents reflect medical consensus. It concluded that, notwithstanding WPATH, sex reassignment surgery is medically controversial. Accordingly, Massachusetts prison officials were not deliberately indifferent when they "chose[] one of two alternatives—both of which are reasonably commensurate with the medical standards of prudent professionals, and both of which provide [the plaintiff] with a significant measure of relief." *Id.* at 90. The court held that this choice between treatments "is a decision that does not violate the Eighth Amendment." *Id.*

To support its decision, the First Circuit exhaustively detailed the underlying expert testimony in the case. That testimony is crucial because it provides objective evidence that the medical community is deeply divided about the necessity and efficacy of sex reassignment surgery. As the First Circuit explained, respected doctors profoundly disagree about whether sex reassignment surgery is medically necessary to treat gender dysphoria.

To begin with, *Kosilek* recounted the testimony of Dr. Chester Schmidt, "a licensed psychiatrist and Associate Director of the Johns Hopkins School of Medicine." *Id.* at 76. He testified that "'[t]here are

many people in the country who disagree with [WPATH] standards who are involved in the [gender dysphoria] field.'" *Id.* (first alteration in original). As a result, "Dr. Schmidt expressed hesitation to refer to the [WPATH] Standards of Care, or the recommendation for [sex reassignment surgery], as medically necessary. He emphasized the existence of alternative methods and treatment plans accepted within the medical community." *Id.* at 76–77.

Next, the court summarized Cynthia Osborne's testimony. *Id.* at 77. She is "a gender identity specialist employed at the Johns Hopkins School of Medicine who had experience working with other departments of correction regarding [gender dysphoria] treatment." *Id.* at 70. She testified that "she did not view [sex reassignment surgery] as medically necessary in light of 'the whole continuum from noninvasive to invasive' treatment options available to individuals with [gender dysphoria]." *Id.* at 77.[6]

Third, the First Circuit considered the opinions of an expert appointed by the district court, "Dr. Stephen Levine, a practitioner at the Center for

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[6] Schmidt and Osborne are not the only experts at the Johns Hopkins School of Medicine who question the necessity and effectiveness of sex reassignment surgery. *See*, *e.g.*, Paul McHugh, *Transgender Surgery Isn't the Solution*, WALL ST. J. (May 13, 2016), https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120; *see also* Amy Ellis Nutt, *Long Shadow Cast by Psychiatrist on Transgender Issues Finally Recedes at Johns Hopkins*, WASH. POST (Apr. 5, 2017), https://www.washingtonpost.com/national/health-science/long-shadow-cast-by-psychiatrist-on-transgender-issues-finally-recedes-at-johns-hopkins/2017/04/05/e851e56e-0d85-11e7-ab07-07d9f521f6b5_story.html?noredirect=on&utm_term=.062c67bae5fe.

Marital and Sexual Health in Ohio and a clinical professor of psychiatry at Case Western Reserve University School of Medicine." *Id.*

As the First Circuit pointed out, "Dr. Levine had helped to author the fifth version of the [WPATH] Standards of Care." *Id.* So it was notable that Dr. Levine expressed concerns that later versions of WPATH were driven by political considerations rather than medical judgment. His written report "explain[ed] the dual roles that WPATH . . . plays in its provision of care to individuals with GID." *Id.* As the report stated:

> WPATH is supportive to those who want sex reassignment surgery (SRS). . . . Skepticism and strong alternate views are not well tolerated. . . . The [Standards of Care are] the product of an enormous effort to be balanced, but *it is not a politically neutral document*. WPATH aspires to be both a scientific organization and an advocacy group for the transgendered. These aspirations sometimes conflict.

Id. at 78 (first alteration in original) (emphasis added).

Dr. Levine also expressed concerns that the support for sex reassignment surgery expressed in the Standards of Care lacked medical support. "The limitations of the [Standards of Care], however, are not primarily political. They are caused by the lack of rigorous research in the field." *Id.* "Dr. Levine further emphasized that 'large gaps' exist in the medical community's knowledge regarding the long-term effects of [sex reassignment surgery] and other

[gender dysphoria] treatments in relation to its positive or negative correlation to suicidal ideation." *Id.* Dr. Levine ultimately agreed with Dr. Schmidt's testimony:

> Dr. Schmidt's view, however unpopular and uncompassionate in the eyes of some experts in [gender dysphoria], is within prudent professional community standards. Treatment stopping short of [sex reassignment surgery] would be considered adequate by many psychiatrists.

Id. And when asked to confirm if "prudent professionals can reasonably differ as to what is at least minimally adequate treatment" for gender dysphoria, Dr. Levine agreed: "Yes, and do." *Id.* at 87.

Finally, the court noted that "Dr. Marshall Forstein, Associate Professor of Psychiatry at Harvard Medical School . . . issued a written report, in which he noted that 'the question of the most prudent form of treatment is complicated by the diagnosis of [gender dysphoria] being on the margins of typical medical practice.'" *Id.* at 79.

To be sure, not all of the testimony was negative toward sex reassignment surgery. *See id.* at 74–76, 77, 79. And not all of it was about sex reassignment surgery generally, as distinguished from the plaintiff's individual need for such surgery. But the unmistakable conclusion that emerges from the testimony is this: There is no medical consensus that

sex reassignment surgery is a necessary or even effective treatment for gender dysphoria.[7]

We see no reason to depart from the First Circuit. To the contrary, we agree with the First Circuit that the WPATH Standards of Care do not reflect medical consensus, and that in fact there is no medical consensus at this time. WPATH itself acknowledges that "this field of medicine is evolving." STANDARDS OF CARE 41. The record in *Kosilek* documents more than enough dissension within the medical community to conclude that it is not deliberately indifferent for Texas prison officials to decline to authorize sex reassignment surgery.

Indeed, even one of the dissenters in *Kosilek* felt compelled to acknowledge the "carefully nuanced and persuasive testimony that medical science has not reached a wide, scientifically driven consensus mandating [sex reassignment surgery] as the only acceptable treatment for an incarcerated individual with gender dysphoria." 774 F.3d at 114 (Kayatta, J., dissenting). That admission is fatal to this case as well.[8]

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[7] Nor is the *Kosilek* testimony alone in questioning the efficacy of sex reassignment surgery. In August 2016, for example, the Center for Medicare & Medicaid Services at the U.S. Department of Health and Human Services issued a "Decision Memo for Gender Dysphoria and Gender Reassignment Surgery." The memo surveyed the available medical literature and found that there was insufficient expert medical evidence to support sex reassignment surgery with respect to Medicare and Medicaid patients. *See generally* CMS, *Decision Memo for Gender Dysphoria and Gender Reassignment Surgery* (Aug. 30, 2016), https://www.cms.gov/medicare-coverage-database/details/ nca-decision-memo.aspx?NCAId=282.

[8] We are not aware of any circuit that has disagreed with *Kosilek*. The Fourth and Ninth Circuits allowed Eighth Amendment claims for sex reassignment surgery to survive

Gibson relies exclusively on the WPATH Standards of Care to support his claim that failure to evaluate for sex reassignment surgery constitutes deliberate indifference to his serious medical needs. Yet he too acknowledges that WPATH's conclusions are hotly contested.

When asked about *Kosilek* at oral argument, Gibson's counsel did not dispute that the Standards of Care are a matter of contention within the medical community. In fact, counsel conceded as much, acknowledging that the First Circuit in *Kosilek* "criticizes" WPATH and "doesn't recognize [WPATH] as having universal consensus." Oral Arg. 10:50–11:33.

Gibson nevertheless asks this court to remand so that he can present evidence of his individual need for sex reassignment surgery. Oral Arg. 11:35–12:10; 13:27–16:22. We do not see how evidence of

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motions to dismiss, without addressing the merits. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (per curiam); *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013).

Moreover, various circuits, including our own, have rejected Eighth Amendment claims for *hormone therapy*—never mind sex reassignment surgery—to treat gender dysphoria, at least in individual cases. *See Praylor*, 430 F.3d at 1209 ("[W]e hold that, on this record, the refusal to provide hormone therapy did not constitute the requisite deliberate indifference."); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) ("[Prisoners do] not have a right to any particular type of treatment, such as estrogen therapy."); *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir. 1986) ("It was never established, however, that failing to treat plaintiff with estrogen would constitute deliberate indifference to a serious medical need. While the medical community may disagree among themselves as to the best form of treatment for plaintiff's condition, the [prison] made an informed judgment as to the appropriate form of treatment and did not deliberately ignore plaintiff's medical needs.").

individual need would change the result in this case, however. Any evidence of Gibson's personal medical need would not alter the fact that sex reassignment surgery is fiercely debated within the medical community. Because Gibson does not dispute the expert testimony assembled by the First Circuit concerning the medical debate surrounding sex reassignment surgery, he cannot establish on remand that such surgery is universally accepted as an effective or necessary treatment for gender dysphoria. Nor can he contend that TDCJ has been deliberately indifferent to his serious medical needs—particularly where TDCJ continues to treat his gender dysphoria through other means. *See Brauner v. Coody*, 793 F.3d 493, 500 (5th Cir. 2015) ("Deliberate indifference is not established when 'medical records indicate that [the plaintiff] was afforded extensive medical care by prison officials.'") (alteration in original) (quoting *Norton*, 122 F.3d at 292).

In sum, Gibson has failed to present a genuine dispute of material fact. There is no material fact dispute as to whether TDCJ was deliberately indifferent to his medical needs. It is undisputed that TDCJ has provided him with counseling and hormone therapy. And he acknowledges the on-going good faith medical debate over the necessity and efficacy of sex reassignment surgery.

C.

The dissent contends that we are not permitted to look at the record in *Kosilek*. Although it might have been better practice for TDCJ to present its

own evidence, rather than borrow from *Kosilek*, we disagree that this warrants reversal.

No legal authority compels the state, every time a prison inmate demands sex reassignment surgery, to undertake the time and expense of assembling a record of medical experts, pointing out what we already know—that sex reassignment surgery remains one of the most hotly debated topics within the medical community today. There is no reason why—as a matter of either common sense or constitutional law—one state cannot rely on the universally shared experiences and policy determinations of other states.[9]

D.

The dissent also suggests that *Kosilek* allows a prison to deny sex reassignment surgery only if the prison first makes an individualized assessment of the inmate's particular medical needs. Under this view, it would be unconstitutional for a prison system to make a categorical policy judgment not to

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[9] *Cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (plurality op.) ("Erie could reasonably rely on the evidentiary foundation set forth in [*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)] and [*Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)] to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood."); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 n.6 (2000) ("'The First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.'") (alteration in original) (quoting *Playtime Theatres*, 475 U.S. at 51–52).

wade into the controversial world of sex reassignment surgery—as TDCJ did here.

There are a number of problems with this theory. To begin with, Gibson's own brief acknowledges that, if the logic of *Kosilek* is correct, it would allow a "blanket refusal to provide SRS." Counsel made the same acknowledgment during oral argument. The court stated: "But your brief acknowledges that the reasoning of the First Circuit is essentially allowing a blanket ban." Counsel responded: "And in fact, we do that by adopting the dissent—you're correct, your Honor—by adopting the dissent's position," referring to the dissent in *Kosilek*. Oral Arg. 10:02–10:20.

Our dissenting colleague suggests that counsel subsequently retracted this admission. But counsel's original admission—made first in writing, and then again at the podium—is consistent with the dissent in *Kosilek*, which likewise construed the logic of the *en banc* majority to permit a blanket ban. To quote the dissent: "[T]he majority in essence creates a de facto ban on sex reassignment surgery for inmates in this circuit. . . . [T]he precedent set by this court today will preclude inmates from ever being able to mount a successful Eighth Amendment claim for sex reassignment surgery in the courts." *Kosilek*, 774 F.3d at 106–7 (Thompson, J., dissenting).

Moreover, putting *Kosilek* to one side, there is a more fundamental problem with the dissent's contention that the Eighth Amendment requires individualized assessments, and thus forbids categorical judgments about the necessity and efficacy of certain medical treatments. To illustrate: An entire agency of the federal government—the Food and Drug Administration—is devoted to

making categorical judgments about what medical treatments may and may not be made available to the American people. So imagine an inmate seeks a form of medical treatment that happens to be favored by some doctors, but has not (at least not yet) been approved by the FDA. Could the inmate challenge this deprivation on the ground that it is a categorical prohibition on medical treatment, rather than an individualized assessment? Surely not. There is no basis in the text or original understanding of the Constitution—nor in Supreme Court or Fifth Circuit precedent—to conclude that a medical treatment may be categorically prohibited by the FDA, yet require individualized assessment under the Eighth Amendment. The dissent seems to acknowledge this, stating only that "*[o]ther circuits* have time and again held that . . . a blanket policy . . . *could* constitute deliberate indifference." Diss. Op. at 20–21 (emphases added) (discussing examples from Fourth and Ninth Circuits).

E.

Finally, the dissent does not dispute that no circuit has disagreed with *Kosilek*. So the dissent relies primarily on a recent ruling by a federal district court ordering the state of Idaho to provide sex reassignment surgery to an inmate. *See Edmo v. Idaho Dep't of Corr.*, 2018 WL 6571203, *19 (D. Idaho Dec. 13, 2018) (appeal pending).

But *Edmo* did not even mention *Kosilek*. To the contrary, it held that the Eighth Amendment requires "even controversial" procedures. *Id.* at *1. Our circuit precedent, by contrast, rejects Eighth Amendment claims in cases involving medical

disagreement. *See*, *e.g.*, *Norton*, 122 F.3d at 292. Yet that is precisely what the district court in *Edmo* did. It took sides in an on-going medical debate—much like the district court did in *Kosilek*. And just as the district court in *Kosilek* was subsequently reversed by the First Circuit *en banc*, so too the judgment of the district court in *Edmo* should not survive appeal.

After all, *Edmo* rejected the views of multiple medical experts who disputed the efficacy of sex reassignment surgery for inmates—including Dr. Campbell, the Idaho Department of Correction's chief psychologist (and a WPATH member). 2018 WL 6571203, at *6–7. The dissent points out that the record in *Edmo* includes expert medical testimony disagreeing with two of the doctors that the First Circuit credited in *Kosilek*. But that is not news—*Kosilek* itself included the testimony of other medical experts—some who agreed, and some who disagreed, with those doctors.

At bottom, our disagreement with the dissent concerns not the record evidence in *Kosilek* or *Edmo* or any other case, but the governing constitutional standard. We can all agree that sex reassignment surgery remains an issue of deep division among medical experts. Indeed, that is precisely our point. We see no basis in Eighth Amendment precedent—and certainly none in the text or original understanding of the Constitution—that would allow us to hold a state official deliberately (and unconstitutionally) indifferent, for doing nothing more than refusing to provide medical treatment whose necessity and efficacy is hotly disputed within the medical community.

V.

As a matter of established precedent, Gibson's claim plainly fails, due to the undisputed medical controversy over sex reassignment surgery. But there is an even more fundamental flaw with his claim, as a matter of constitutional text and original understanding.

Lest we lose the forest for the trees, a prison violates the Eighth Amendment only if it inflicts punishment that is *both* "cruel *and unusual*." U.S. CONST. amend. VIII (emphasis added). As the text makes clear, these are separate elements. *See*, *e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012) ("[I]n the well-known constitutional phrase *cruel and unusual punishments*, the *and* signals that cruelty or unusualness alone does not run afoul of the clause: The punishment must meet both standards to fall within the constitutional prohibition."); Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1778 (2011) ("[W]hether hypothetical punishment X is 'cruel' as well as unusual is of course a separate question.").

Under the plain meaning of the term, a prison policy cannot be "unusual" if it is widely practiced in prisons across the country. One of the nation's leading originalist scholars put the point simply: "'[U]nusual' should mean what it says. . . . [S]o long as Congress routinely authorized a particular punishment, it would be hard to say that the

punishment, even if concededly cruel, was 'cruel *and unusual*.'" Amar, 120 YALE L.J. at 1778–79.[10]

This understanding of the term "unusual"—that widely accepted practices, such as the denial of sex reassignment surgery, do not violate the Eighth Amendment—is not just commanded by constitutional text. It is also consistent with opinions issued by various members of the Supreme Court. This is particularly notable considering that few constitutional provisions have divided members of the Court more vigorously than the Eighth Amendment.

In *Harmelin v. Michigan*, 501 U.S. 957 (1991), for example, Justice Scalia wrote that, "by forbidding 'cruel *and unusual* punishments,' the Clause disables the Legislature from authorizing . . . cruel methods of punishment that are *not regularly or customarily employed*." *Id.* at 976 (op. of Scalia, J.) (second emphasis added) (citations omitted). "[T]he word 'unusual'" means "'such as [does not] occu[r] in ordinary practice,' '[s]uch as is [not] in common use.'" *Id.* (alterations in original) (quoting WEBSTER'S AMERICAN DICTIONARY (1828); WEBSTER'S

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[10] *See also* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008) ("As used in the Eighth Amendment, the word 'unusual' was a term of art that referred to government practices that are contrary to 'long usage' or 'immemorial usage.' Under the common law ideology that came to the founding generation through Coke, Blackstone, and various others, the best way to discern whether a government practice comported with principles of justice was to determine whether it was continuously employed throughout the jurisdiction for a very long time, and thus enjoyed 'long usage.' The opposite of a practice that enjoyed 'long usage' was an 'unusual' practice, or in other words, an innovation.") (footnotes omitted).

SECOND INTERNATIONAL DICTIONARY 2807 (1954)).

Similarly, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), Justice Scalia explained that "[t]he punishment is either 'cruel *and* unusual' (*i. e.*, society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our job is to *identify* the 'evolving standards of decency'; to determine, not what they *should* be, but what they *are*." *Id.* at 378 (op. of Scalia, J.).

The specific holding of *Stanford*—that it is not cruel and unusual punishment to impose capital punishment on 16 and 17-year-olds—was later abrogated by *Roper v. Simmons*, 543 U.S. 551 (2005). But *Simmons* did not abrogate Justice Scalia's interpretation of "unusual." To the contrary, the majority in *Simmons* relied heavily on "[t]he evidence of national consensus against the death penalty for juveniles" to support its holding. *Id.* at 564. "30 States prohibit the juvenile death penalty." *Id.* And "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. Since *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia." *Id.* at 564–65. *See also id.* at 565 ("In December 2003 the Governor of Kentucky decided to spare the life of Kevin Stanford, and commuted his sentence to one of life imprisonment without parole, with the declaration that '[w]e ought not be executing people who, legally, were children.' By this act the Governor ensured Kentucky would

not add itself to the list of States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford v. Kentucky*.") (alteration in original) (citation omitted).

Similarly, Justice Breyer has observed that "[t]he Eighth Amendment forbids punishments that are cruel and *unusual*. Last year, in 2014, only seven States carried out an execution. Perhaps more importantly, in the last two decades, the imposition and implementation of the death penalty have increasingly become unusual." *Glossip v. Gross*, 135 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting).

Gibson's claim fails this fundamental principle. As his counsel has acknowledged, only one state to date, California, has ever provided sex reassignment surgery to a prison inmate. Oral Arg. 28:20–53. It did so in January 2017, pursuant to the settlement of a federal lawsuit. Before that litigation, no prison in the United States had ever provided sex reassignment surgery to an inmate.[11]

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[11] *See*, *e.g.*, *Quine v. Beard*, 2017 WL 1540758, *1 (N.D. Cal. Apr. 28, 2017) ("Under the Agreement, [the California Department of Corrections and Rehabilitation] agreed to provide sex reassignment surgery to Plaintiff."); Kristine Phillips, *A Convicted Killer Became the First U.S. Inmate to get State-Funded Gender-Reassignment Surgery*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/01/10/a-transgender-inmate-became-first-to-get-state-funded-surgery-advocates-say-fight-is-far-from-over/?utm_term=.e236ac6bbd90 ("After a lengthy legal battle, a California transgender woman became the first inmate in the United States to receive a government-funded gender-reassignment surgery."); *see also Rosati*, 791 F.3d at 1040 ("[T]he state acknowledged at oral argument that no California prisoner has ever received SRS.").

Accordingly, Gibson cannot state a claim for cruel *and unusual* punishment under the plain text and original meaning of the Eighth Amendment, regardless of any facts he might have presented in the event of remand.

* * *

Gibson acknowledges that sex reassignment surgery for prison inmates was unheard of when proceedings in this case began—and that it was only done for the first time, anywhere, a year later in California, in response to litigation. Gibson nevertheless contends that what was unprecedented until just recently—and done only once in our nation's history—suddenly rises to a constitutional mandate today. That is not what the Constitution requires. It cannot be deliberately indifferent to deny in Texas what is controversial in every other state. The judgment is affirmed.

RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting:

The Director of the Texas Department of Criminal Justice (TDCJ) was awarded summary judgment on a basis not urged by him; and, to make matters far worse, in awarding judgment on the merits *sua sponte*, the district court did not provide Gibson the required notice that it would consider such a basis and allow Gibson to respond. Accordingly, as the majority notes correctly, this appeal springs from this very unusual and improper procedure and resulting sparse summary-judgment

record, which is insufficient for summary-judgment purposes. Therefore, this case should be remanded for further proceedings. Accordingly, I must respectfully dissent from the majority's reaching the merits of this action, which concerns the Eighth Amendment's well-established requirements for medical treatment to be provided prisoners.

I.

Gibson's *pro se* complaint claimed: sex-reassignment surgery (SRS) is a medically-necessary treatment for gender dysphoria; and the Director, in violation of the Eighth Amendment, was deliberately indifferent to Gibson's serious medical need (gender dysphoria) by refusing to allow Gibson to even be evaluated for SRS, due to a blanket ban on SRS instituted by TDCJ Policy No. G-51.11. The Director moved for summary judgment on the basis of qualified and Eleventh Amendment immunity. The district court denied immunity, but then, *sua sponte*, improperly granted summary judgment on the merits, without providing notice to Gibson—as required by Federal Rule of Civil Procedure 56(f)—that it was considering a basis for granting summary judgment not advanced by the Director in his motion and, concomitantly, giving Gibson the opportunity to respond.

II.

Procedurally, summary judgment was improperly granted for several reasons, in violation of bedrock bases for ensuring fundamental due process to the nonmovant in a summary-judgment

proceeding. Substantively, numerous reasons compel summary judgment's not being granted, most especially the requested medical relief's not being considered based on Gibson's individual needs.

A.

Gibson proceeded *pro se* in district court. The procedure employed by the district court in granting summary judgment against Gibson flies in the face of fundamental fairness, which Rule 56 (summary judgment), and caselaw concerning it, seek to ensure. Regrettably, the majority compounds the error.

1.

The Director moved for summary judgment based only on immunity: qualified and Eleventh Amendment. When relief is sought against an official in his individual capacity, in our considering entitlement *vel non* to qualified immunity, the well-known, two-prong analysis is employed: first, "whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the [official's] conduct violated a constitutional right", *Price v. Roark*, 256 F.3d 364, 369 (5th Cir. 2001) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Glenn v. City of Tyler*, 242 F.3d 307, 312 (5th Cir. 2001)); and, second, if the allegations show a constitutional violation, "whether the right was clearly established—that is whether 'it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted'", *id.* (quoting *Saucier*, 533 U.S. at 202). The district court

did not address these two prongs, instead denying qualified immunity because Gibson was only seeking injunctive relief against the Director in his official capacity.

But, in urging qualified immunity, the Director's brief—which was incorporated in his summary-judgment motion—addressed, *inter alia*, the Eighth Amendment claim by discussing the first prong of the qualified-immunity analysis. The Director asserted Gibson "failed to state an actionable claim for medical deliberate indifference". In support of this contention, the Director claimed, *inter alia*, "[Gibson's] disagreement with the course of treatment pursued by prison medical staff does not constitute a viable claim for deliberate indifference to serious medical needs under the Eight[h] Amendment".

Proceeding *pro se*, Gibson's response to the Director's immunity claims, *inter alia*, necessarily addressed Gibson's Eighth Amendment deliberate-indifference claim in the context of the first prong of the qualified immunity urged by the Director. Gibson contended SRS is not demanded, or even requested; rather, Gibson requested an evaluation by a gender-dysphoria specialist so that Gibson's condition could be fully assessed, and a determination made by a medical professional, based on Gibson's individualized needs, whether SRS would adequately treat Gibson's gender dysphoria. Gibson averred there was a genuine dispute of material fact as to: whether Gibson had a serious medical condition; whether Gibson was entitled to medical care that meets prudent professional standards, as opposed to being denied medical care based on a blanket policy; and whether the Director

was deliberately indifferent to Gibson's serious medical need.

The discussion for qualified-immunity purposes in the summary-judgment motion and Gibson's *pro se* response may be why the district court improperly went beyond the summary-judgment motion, based only on immunity, and addressed the merits of the Eighth Amendment claim. But, at this very early stage of the proceeding, no discovery had been taken, and material facts were unavailable to Gibson. Gibson's affidavit in opposition to summary judgment stated TDCJ was enforcing a blanket ban and refusing to allow doctors to fully evaluate medical needs. As a result, Gibson was unable to prove SRS is medically necessary in this case, because TDCJ prevented Gibson from even being evaluated for SRS.

Along that line, Rule 56(d) provides: "If a nonmovant [for a summary-judgment motion] shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition [to summary judgment], the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order". Fed. R. Civ. P. 56(d). While Gibson did not assert not being able to present essential facts, including because of not being aware the court was considering a basis for judgment not advanced by the Director, this Rule reflects the necessity of allowing a party opposing summary judgment to garner such facts.

In addition, in *Celotex Corp. v. Catrett*, the Supreme Court explained that summary judgment can be entered against a party which fails to show it will be able to prove an essential element of its case

"after adequate time for discovery". 477 U.S. 317, 322 (1986). Gibson was not allowed discovery. Gibson filed requests for admissions, which the Director never answered, instead filing a motion for a protective order based on his qualified-immunity defense.

The court never ruled on the Director's protective order, but ruled, in granting summary judgment, that, although the Director did not have immunity, Gibson had not shown a genuine dispute of material fact. For instance, the court found, *inter alia*, "the record contain[ed] no evidence addressing the security issues associated with adopting in full the WPATH standards in an institutional setting". *Gibson v. Livingston*, No. 6:15-cv-190, at 19 (W.D. Tex. 31 Aug. 2016). Notwithstanding the fact that the court improperly placed the burden of showing security concerns on Gibson, the record contained no evidence of security concerns because there had been no discovery. Ruling on the merits without compelling the Director to respond to Gibson's discovery requests, after denying the Director's qualified-immunity defense, flies in the face of clear Supreme Court precedent.

More to the point concerning the district court's addressing the merits *sua sponte*, Rule 56(f) provides, *inter alia*: "*After giving notice and a reasonable time to respond*, the court may . . . grant the [summary-judgment] motion on *grounds not raised by a party* . . . ." Fed. R. Civ. P. 56(f)(2) (emphasis added). Contrary to this Rule, the district court ruled on the merits without giving Gibson any notice or opportunity to respond.

Regarding *sua sponte* grants of summary judgment, "we have vacated summary judgments

and remanded for further proceedings where the district court provided no notice prior to granting summary judgment *sua sponte*, *even where* '*summary judgment may have been appropriate on the merits*'". *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1398 (5th Cir. 1994) (emphasis added) (affirming district court's *sua sponte* grant of summary judgment because plaintiffs could not identify how discovery would yield a genuine dispute of material fact) (citing *Judwin Properties, Inc. v. U.S. Fire Ins.*, 973 F.2d 432, 437 (5th Cir. 1992)). "Since a summary judgment forecloses any future litigation of a case the district court must give proper notice to [e]nsure that the nonmoving party had the opportunity to make every possible factual and legal argument." *Id.* (quoting *Powell v. United States*, 849 F.2d 1576, 1579 (5th Cir. 1988)). "When there is no notice to the nonmovant, summary judgment will be considered harmless *if the nonmovant has no additional evidence* or if all the nonmovant's additional evidence is reviewed by the appellate court and none of the evidence presents a genuine [dispute] of material fact." *Id.* (emphasis in original) (quoting *Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp.*, 992 F.2d 1398, 1403 n.7 (5th Cir. 1993)).

Gibson was not given every opportunity to present evidence and contentions in opposing summary judgment on the basis for which it was granted. Gibson, as an inmate, must rely on TDCJ or the court to allow an evaluation to determine if SRS is necessary for Gibson. Accordingly, we have not been able to evaluate all the evidence to determine if there are no genuine disputes of material fact, as that evaluation has not been allowed. Although

Gibson on appeal does not contest the violation of this Rule, which exists to ensure fundamental due process, it is one factor that should be considered in evaluating this insufficient record.

The majority at 3 states Gibson has "forfeit[ed]" any procedural objections because Gibson has now asked for a ruling on the merits. (In that regard, the majority is inconsistent: it notes that Gibson has asked our court to rule on the merits, but also states at 15 that Gibson has asked our court to remand, so that evidence of Gibson's individual need for SRS can be presented.) But, just as a party cannot decide our standard of review, a party also cannot decide an insufficient record is sufficient.

2.

The majority, as did the district court, consistently places the burden of production on Gibson. But, at hand is a summary judgment. It may be granted only when there is no genuine dispute of material fact and movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Because the Director, not Gibson, moved for summary judgment, it was the Director's burden to "demonstrate the absence of a genuine [dispute] of material fact". *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citing *Celotex*, 477 U.S. at 323; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885–86 (1990)). "If the [movant] fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Id.* Only if the Director met his burden would the burden shift to Gibson to "go beyond the pleadings and designate specific facts

showing that there is a genuine [dispute] for trial". *Id.* (citing *Celotex*, 477 U.S. at 325).

Again, if a genuine dispute of material fact exists, we cannot hold movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); s*ee Johnson v. Treen*, 759 F.2d 1236, 1237 (5th Cir. 1985) ("Accordingly, on appeal we view all materials in the light most favorable to [nonmovant] . . . to determine if there is any [dispute] of material fact. *If no such [dispute] exists*, we must *then* determine if [movant is] entitled to judgment as a matter of law." (emphasis added) (citation omitted)).

In moving for summary judgment only on the basis of immunity, the Director provided the following evidence in support: Gibson's grievance records; Gibson's medical records from January 2014-August 7, 2015; and TDCJ Policy No. G-51.11. The Director submitted no evidence regarding the medical necessity *vel non* of SRS in treating gender dysphoria.

In response, Gibson offered as evidence: Gibson's affidavit, grievance records, and psychiatric records from a psychiatric facility; literature on health care and transgender individuals, including excerpts from a report detailing the WPATH Standard of Care, which state "for many . . . surgery is essential and medically necessary to alleviate their gender dysphoria"; a copy of TDCJ's policy on surgical castration for sex offenders; and copies of correspondence to Gibson from TDCJ Correctional Managed Health Care.

Therefore, because the Director did not provide evidence showing an absence of a dispute as to the medical necessity of SRS in treating gender

dysphoria, he did not meet his burden; summary judgment was improper.

The majority does not address the Director's failure to show an absence of a dispute for a material fact, which was the Director's burden, as movant, under Rule 56(a). Instead, the majority, throughout its opinion, claims *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014) (en banc), shows there is no genuine dispute of material fact in regard to the medical controversy surrounding SRS; but, in district court, the Director did not even cite *Kosilek*, much less contend the evidence presented in *Kosilek* was dispositive. Again, the majority can only state that Gibson "has failed to present a genuine dispute of material fact", *Maj. Opn.* at 16, without citation to *any* facts presented to the district court by the Director, without any citation for why it was Gibson's burden at this stage, and without citation for whether there is any proof regarding whether this medical controversy—which it submits at 2 "dooms" Gibson's claim—still exists, over four years after *Kosilek* was decided. Nevertheless, the majority at 7 note 5 states there is no merit to my contention that it is misplacing the burden of production on Gibson.

Again, though, the majority is improperly taking evidence from another case (*Kosilek*, decided by the first circuit over four years ago, and tried well before then)—facts not presented in this case to the district court—and is refusing to evaluate those facts in the requisite light most favorable to Gibson, the nonmovant. *See Johnson*, 759 F.2d at 1237 ("The burden is on the moving party to establish that there is no genuine issue of fact and the party opposing the motion should be given the benefit of every

reasonable inference in his favor." (citation omitted)).

Instead, the majority contends at 7 note 5 that it is "recogniz[ing] the futility of Gibson's claim"; however, a review of relevant caselaw yielded no precedent providing for the denial of remand based on futility when there is a genuine dispute of material fact at the summary-judgment stage. The majority is, in essence, skipping straight to the "judgment as a matter of law" prong for summary judgment. That is improper, because, as noted *supra*, this court must first determine *there is no genuine dispute of material fact*. Obviously, as explained more fully *infra*, under the Eighth Amendment deliberate-indifference standard, individualized medical assessment is required in each case to determine the necessity of a particular treatment for a prisoner. Because Gibson has not received the requested and physician-ordered evaluation for SRS, there is a genuine dispute of material fact—whether SRS is medically necessary *in Gibson's case*.

The majority instead, in essence, is treating this Rule 56 summary-judgment motion as a motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6). *See Maj. Opn.* at 2, 8, 9, & 23 ("Accordingly, Gibson *cannot state a claim* for cruel *and unusual* punishment under the plain text and original meaning of the Eighth Amendment, regardless of any facts he might have presented in the event of remand." (first emphasis added)). Here, we are not determining whether Gibson failed to state a claim (Gibson did state a claim for deliberate indifference), but are instead determining whether, *inter alia*, there are genuine disputes of material fact. Again, I emphasize, the only facts presented to the district

court regarding the medical necessity of SRS were the WPATH Standards of Care. As much as it claims not to have, in its zeal to interpret the original text of the Eighth Amendment (which, as explained *infra* has already been done by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976)), the majority has "missed the trees for the forest" by disregarding what stage of the proceeding we are evaluating and the concomitant standards for it.

B.

The procedural errors that compel vacating the summary judgment almost pale in comparison to the majority's going far outside the totally lacking summary-judgment record at hand in holding judgment was properly granted. This is reflected in the majority's refusing to consider Gibson's individual medical needs, which are in large part unknown because Gibson has never received the requested evaluation for SRS, despite the evaluation's being ordered by a TDCJ doctor.

1.

Instead of looking to the summary-judgment record for evidence of the claimed uncertainty in the medical community, the majority at 10–14 attempts to create its own record, as noted, from the opinion in *Kosilek* (en banc) (which, again, was not cited by the Director in the brief incorporated in his summary-judgment motion), and from other outside sources, *Maj. Opn.* at 12 & 14 nn.6–7. While we can, of course, look to other cases for legal analysis, we

cannot reconstruct the summary-judgment record in this case from the record in another.

Moreover, this case is a far cry from *Kosilek*, which spanned over 20 years, had a very "expansive" record, and was not decided by summary judgment. *Kosilek*, 774 F.3d at 68. Throughout Kosilek's *trial*, testimony was provided by numerous medical professionals—including gender-dysphoria specialists who had evaluated Kosilek—regarding the medical necessity of SRS *in that case*, and from multiple prison officials regarding safety concerns if Kosilek were allowed SRS, neither of which is in issue for the summary judgment at hand.

Additionally, *Kosilek*, as noted, was decided more than four years ago, which is not as "recent" as the majority claims at 10. In the last four years, have there been any developments in the medical community regarding treating gender dysphoria and determining the necessity for SRS? We do not know because, in the instant summary-judgment record, we have no expert testimony or any evidence as to the medical necessity outside of the WPATH Standards of Care. (Somewhat along the line of relevant medical-community developments, the majority at 3 note 2, in discussing why it uses male pronouns for Gibson, cites *Frontiero v. Richardson* for the proposition that "sex . . . is an immutable characteristic determined solely by . . . birth". 411 U.S. 677, 686 (1973) (Brennan, J.) (plurality opinion). *Frontiero*, an equal-protection challenge, confronted the disparate treatment of women; its being cited by the majority is puzzling, to say the least. In any event, 46 years have passed since 1973, when *Frontiero* was decided.)

A recent example of the disagreement over the requirement under the Eighth Amendment to provide SRS in certain instances is the 13 December 2018 opinion in *Edmo v. Idaho Department of Corrections*. No. 1:17-cv-00151-BLW, 2018 WL 6571203 (D. Idaho 13 Dec. 2018), concerning the court's granting Edmo's motion for preliminary injunction and ordering the Idaho Department of Corrections (IDOC) to provide Edmo with SRS. There, the district court held Edmo had "satisfie[d] both elements of the deliberate-indifference" standard: Edmo proved there was a serious medical need; and IDOC and its medical provider, with full awareness of Edmo's circumstances, had refused to provide Edmo with SRS. *Id.* at *2. The district court went on to state: "In refusing to provide that surgery, IDOC and [its medical provider] have ignored generally accepted medical standards for the treatment of gender dysphoria". *Id.* The court also noted, as did the court in *Kosilek*, that its opinion was based on "the unique facts and circumstances" of Edmo's case, and "is not intended, and should not be construed, as a general finding that all inmates suffering from gender dysphoria are entitled to" SRS. *Id.*

In so holding, the court found the "WPATH Standards of Care are the accepted standards of care for treatment of transgender patients", and "have been endorsed by the [National Commission on Correctional Health Care (NCCHC)] as applying to incarcerated persons". *Id.* at *15. The court found credible Edmo's two experts, doctors "who have extensive personal experience treating individuals with gender dysphoria both before and after receiving [SRS]". *Id.* at *15. One doctor testified

"that [SRS] is the cure for gender dysphoria" and would "eliminate" Edmo's gender dysphoria, *id.* at *12; the other, that "it is highly unlikely that [Edmo's] severe gender dysphoria will improve without" SRS, *id.*

The court also gave "virtually no weight" to IDOC's experts, who had no "experience with patients receiving [SRS] or assessing patients for the medical necessity of [SRS]". *Id.* at *15. IDOC and its medical provider were trained by a doctor, *id.*, whose testimony in *Kosilek* is relied on heavily by the majority at 12–13. The court found that doctor and another, who also testified in *Kosilek* and is quoted by the majority at 12, were "outliers in the field of gender dysphoria treatment"; "do not ascribe to the WPATH Standards of Care"; and impose additional requirements on incarcerated individuals to receive SRS that have no scientific support, have not been endorsed by any professional organizations, and have not been adopted by the NCCHC. *Id.* at *16; *see also Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1188 (N.D. Cal. 2015) (finding the above-referenced doctor who trained IDOC and its medical provider was not credible because he testified as to "illogical inferences", misrepresented the WPATH Standards of Care, "overwhelmingly relie[d] on generalizations about gender dysphoric prisoners, rather than an individualized assessment", and "admittedly include[d] references to a fabricated anecdote").

The record in *Edmo* contains more than, as the majority suggests at 19, a disagreement with the doctors in *Kosilek*. The courts in *Edmo* and *Norsworthy* found those doctors not credible in the light of their misrepresentations and refusal to subscribe to the medically-accepted standards of

care—WPATH. *See*, *e.g.*, *Edmo*, 2018 WL 6571203, at *16; *Norsworthy*, 87 F. Supp. 3d at 1188.

2.

The majority at 9 and 15 also errs in stating Gibson's "concessions". Gibson's statement that *the first circuit* (which decided *Kosilek en banc*) "doesn't recognize [WPATH] as having universal consensus" is not equivalent to a concession that WPATH is not universally accepted. And, contrary to the majority's statement at 15, Gibson *does* contest the expert testimony in *Kosilek* refuting such "universal acceptance". Although Gibson acknowledges that, while proceeding *pro se* in district court, Gibson did not present evidence of WPATH's universal acceptance, Gibson asserts such acceptance could be inferred as "[i]t is undisputed . . . that all reputable U.S. medical organizations have recognized WPATH as the proper standard of care".

In that regard, the majority rests on lack of "universal acceptance" of the medical necessity of SRS, stating that, to constitute deliberate indifference, the medical procedure must be "universally accepted". *E.g., Maj. Opn.* at 9, 10, & 15. Tellingly, the majority provides no citation to *any* caselaw regarding this universal-acceptance standard. In fact, the only citation for this point is to Gibson's brief. *Maj. Opn.* at 9. Gibson's brief seemingly quoted the following statement from the district court's order:

> However, plaintiff provides as summary judgment evidence only portions of the WPATH report, and no witness testimony or

> evidence from professionals in the field demonstrating that the WPATH-suggested treatment option of SRS is so *universally accepted*, that to provide some but not all of the WPATH-recommended treatment amounts to deliberate indifference.

Gibson, No. 6:15-cv-190, at 19 (emphasis added). But, the district court did not cite any caselaw for this universal-acceptance standard either. And, a review of relevant caselaw yields no precedent for this standard. It is, therefore, improper to add this unfounded qualification to the well-known deliberate-indifference standard.

In any event, again, it was not Gibson's burden to show universal acceptance, because the Director failed to present *any* evidence demonstrating WPATH is *not* universally accepted. (The *Kosilek* court quoted *Cameron v. Tomes*, 990 F.2d 14, 20 (1st Cir. 1993), for the proposition that security concerns, as identified by prison administrators in *Kosilek*, are entitled to great deference—not, as the majority states at 9, as support for the controversial nature of SRS and the requirement of "universal consensus". *Kosilek*, 774 F.3d at 96.)

3.

The majority, at 12 and 14 notes 6–7, also cites three outside sources for evidence of the claimed controversy surrounding SRS. In note 6, the majority cites two news articles showing two doctors "are not the only experts at the Johns Hopkins School of Medicine who question the necessity and effectiveness of [SRS]". Johns Hopkins, however, has

opened a transgender health service and resumed providing SRS to transgender individuals, a program cancelled by a former chief of psychiatry who felt SRS was not a viable treatment. Amy Ellis Nutt, *Long Shadow Cast by Psychiatrist on Transgender Issues Finally Recedes at Johns Hopkins*, Wash. Post (5 Apr. 2017), https://www.washingtonpost.com/national/health-science/long-shadow-cast-by-psychiatrist-on-transgender-issues-finally-recedes-at-johns-hopkins/2017/04/05/e851e56e-0d85-11e7-ab07-07d9f521f6b5_story.html?noredirect=on&utm_term=.062c67bae5fe.

The Decision Memo by the Centers for Medicare & Medicaid Services (CMS), cited by the majority at 14 note 7, is also unpersuasive, and, in fact, if anything, supports Gibson's claim. The memo notes that CMS is not issuing a national coverage determination (NCD) for SRS "for Medicare beneficiaries with gender dysphoria because the clinical evidence is inconclusive *for the Medicare population*", but coverage determinations for SRS continue to be made locally "*on a case-by-case basis*". CMS, *Decision Memo for Gender Dysphoria and Gender Reassignment Surgery*, at 2 (30 Aug. 2016), https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282 (emphasis added).

The memo goes on to acknowledge that, while SRS "may be a reasonable and necessary service for certain beneficiaries with gender dysphoria", "[t]he current scientific information is not complete for CMS to make a NCD that identifies the precise patient population for whom the service would be reasonable and necessary", and "[p]hysician recommendation is one of many potential factors

that the local [Medicare Administrative Contractors] may consider when determining whether the documentation is sufficient to pay a claim". *Id.* at 40–41. A determination made on a case-by-case basis and supported by physician recommendation is precisely what Gibson has been denied.

4.

It must also be noted that the *Kosilek* opinion is not nearly as determinative on the issue of the necessity *vel non* for SRS as the majority suggests. The majority in *Kosilek* stated: based on the *evaluation* of Kosilek by numerous medical professionals, the court was convinced that both the Massachusetts Department of Correction's (DOC) course of treatment and SRS could alleviate Kosilek's symptoms. *Kosilek*, 774 F.3d at 90.

But, it was "not the place of [the] court to 'second guess medical judgments' or to require that the DOC adopt the more compassionate of two adequate options". *Id.* (citations omitted). The first circuit warned that the opinion was not meant to "create a de facto ban against SRS as a medical treatment for any incarcerated individual", as any such "blanket policy regarding SRS" "would conflict with the requirement that medical care be *individualized* based on a particular prisoner's serious medical needs". *Id.* at 90–91 (emphasis added) (citing *Roe v. Elyea*, 631 F.3d 843, 862–63 (7th Cir. 2011) (holding failure to conduct individualized assessment of prisoner's needs may violate Eighth Amendment)).

I agree the evidence in *Kosilek* encompassed both Kosilek's individual medical needs and the broader dispute about the efficacy of SRS; however, the

holding in *Kosilek* is based on Kosilek's specific circumstances. *Id.* at 89–92.

Addressing the subjective prong of deliberate indifference, the *Kosilek* court noted, "it is not the district court's own belief about medical necessity that controls, but what was known and understood by prison officials in crafting their policy". *Id.* at 91 (citation omitted). The court went on to acknowledge that the DOC had "solicited the opinion of multiple medical professionals and was ultimately presented with two alternative treatment plans, *which were each developed by different medical experts to mitigate the severity of Kosilek's mental distress*". *Id.* (emphasis added). Inherent in that analysis is the fact that Kosilek was evaluated by medical professionals, and the DOC chose a course of treatment for Kosilek recommended by them.

And, contrary to the majority's assertion at 17–18, the dissent in *Kosilek* does not suggest anything else. The dissent does state: "the majority in essence creates a de facto ban on sex reassignment surgery for inmates in [the first] circuit". *Kosilek*, 774 F.3d at 106–07 (Thompson, J. dissenting). This was due, however, to the majority's crediting "the divergence of opinion *as to Kosilek's need for surgery*", which "only resulted from the DOC disregarding the advice of Kosilek's treating doctors and bringing in a predictable opponent to [SRS]". *Id.* at 107 (emphasis added). The dissent concluded: "So the question remains, if Kosilek—who was time and again diagnosed as suffering from severe gender identity disorder, and who was uniformly thought by qualified medical professionals to require surgery—is not an appropriate candidate for surgery, what inmate is"? *Id.*

The majority at 17 notes Gibson's brief "acknowledges that, if the logic of *Kosilek* is correct, it would allow a 'blanket refusal to provide SRS'". Gibson stated at oral argument, however: to the extent the brief acknowledged the blanket refusal, it was error; and Gibson does not take that position. Oral Argument 09:54–10:47 ("When you read *Kosilek*, that is not what it says."). Gibson further stated "the Eighth Amendment claim, as this court's precedents say repeatedly, turns on . . . individualized medical assessments". Oral Argument 11:40–12:11.

In that regard, unlike Gibson, Kosilek was evaluated for SRS and denied it based on security concerns, uncertainty in the medical community, and conflicting medical opinions regarding Kosilek's individual needs. Gibson has not even received a requested evaluation, even though the summary-judgment record contains a "clinic note", electronically signed by Dr. Greene, stating: "Please schedule [Gibson] with unit MD *for evaluation for referral for sex change operation* and evaluation for medical pass for gender identity disorder." (Emphasis added.) Moreover, the district court referenced this ordered referral for SRS evaluation in its summary of the relevant summary-judgment evidence. (At oral argument, neither party was aware of this evidence.)

Again, the evaluation ordered by Dr. Greene has never occurred. As noted by the majority at 5, according to TDCJ, Gibson's requests for evaluation have been denied "because [TDCJ] Policy [No. G-51.11] does not 'designate [SRS] . . . as part of the treatment protocol for Gender Identity Disorder'". Gibson does not contend that TDCJ has refused a

doctor's orders based on the ban *per se*, but Gibson does contend that requests for evaluations are denied based on the ban, and not on medical advice or valid penological interests. In any event, as our review is *de novo*, we are allowed to consider the entire record, which shows that a doctor ordered an evaluation, which has not occurred solely due to the ban. (The majority at 5 note 3 states: "Gibson's counsel does not argue that the clinic note is relevant to this appeal". But, as noted above, at oral argument neither party was aware it existed. Obviously, Gibson can urge, and has urged, the requirement for an individualized medical assessment of Gibson's medical needs—as required by the Eighth Amendment—without pointing out this clinic note. As also noted above, the district court referenced the clinic note in its order.)

Gibson also moved in district court to add to the summary-judgment record a news article in which the spokesman for TDCJ stated "it should be noted that offenders cannot have gender reassignment surgery which would be considered elective and is not covered under the TDCJ offender health care plan", as further proof that TDCJ's denial of SRS is based on a policy and not on Gibson's medical need. Gibson's motion was denied summarily in the order granting summary judgment.

In Gibson's case, a TDCJ medical professional ordered evaluation for SRS; but TDCJ, not due to a conflicting medical opinion, but instead based on a blanket policy, refused to have Gibson evaluated. This is contrary to the Eighth Amendment's requirement that any denial of treatment be based on medical judgment in the specific-fact scenario. *See Delaughter v. Woodall*, 909 F.3d 130, 138–39 & n.7

(5th Cir. 2018) ("We have previously suggested that a non-medical reason for delay in treatment constitutes deliberate indifference." (citing *Thibodeaux v. Thomas*, 548 F. App'x 174, 175 (5th Cir. 2013))); *Smith v. Carpenter*, 316 F.3d 178, 187 (2d Cir. 2003) ("[G]iven the fact-specific nature of Eighth Amendment denial of medical care claims, it is difficult to formulate a precise standard of 'seriousness' . . . ". (quoting *Gutierrez v. Peters*, 111 F.3d 1364, 1372 (7th Cir. 1997))); *Id.* ("Just as the relevant 'medical need' can only be identified in relation to the specific factual context of each case, the severity of the alleged denial of medical care should be analyzed with regard to all relevant facts and circumstances." (citation omitted)).

A second dissent in *Kosilek* disagreed with the standard of review the majority applied to what the dissent deemed were pure questions of fact. *Id.* at 113–15 (Kayatta, J., dissenting). The dissenting judge stated that even though he disagreed with the trial judge's findings on the medical necessity of SRS in Kosilek's case, the judge did not clearly err in finding the medical professionals who concluded SRS was necessary in Kosilek's case were more credible. *Id.* In stating why he would have found SRS was not medically necessary, the judge noted he believed one expert "provided carefully nuanced

and persuasive testimony that medical science has not reached a wide, scientifically driven consensus mandating SRS as the only acceptable treatment for an incarcerated individual with gender dysphoria". *Id.* at 114. The majority at 14 concludes that this "admission is fatal to this case". That the majority believes a statement by a dissenting judge as to how

he personally would have weighed the testimony in another case could somehow doom Gibson's case is wide of the mark. The majority apparently believes Gibson was never entitled to due process for this claim because *Kosilek*, an out-of-circuit opinion, has foreclosed any advancement in the law and medical research in this area.

In addition, the majority's analogies to drugs banned by the FDA at 2 and 18 are inapposite. First, SRS is not subject to FDA approval. CMS, *Decision Memo for Gender Dysphoria and Gender Reassignment Surgery*, at 5–6 (30 Aug. 2016), https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282. Second, our focus in deliberate-indifference cases is on the actions of prison officials in response to treatment prescribed by medical professionals for serious medical needs of prisoners.

5.

This blanket ban on even an evaluation for SRS is clearly contrary to *Kosilek*'s holding. It even goes against TDCJ's G-51.11 policy, which provides that inmates with gender dysphoria are "evaluated by appropriate medical and mental health professionals and treatment determined on a case by case basis as clinically indicated", according to the "[c]urrent, accepted standards of care". TDCJ has denied Gibson evaluation for SRS and having treatment determined based on individualized needs, which is mandated under the "current, accepted standards of care"—WPATH—relied on by TDCJ in crafting its policy. Other circuits have time and again held that refusal to treat, or evaluate for treatment, based on

a blanket policy and not medical judgment, could constitute deliberate indifference. *See*, *e.g.*, *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015) (per curiam); *Colwell v. Bannister*, 763 F.3d 1060 (9th Cir. 2014); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).

More importantly, our precedent suggests a refusal to evaluate Gibson for SRS or a decision to deny SRS not based on medical judgment could constitute deliberate indifference. *See*, *e.g.*, *Delaughter*, 909 F.3d at 138–39 & n.7 ("We have previously suggested that a non-medical reason for delay in treatment constitutes deliberate indifference." (collecting cases)); *see also Estelle*, 429 U.S. at 104–05 ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." (internal citation and footnotes omitted)). If "intentionally interfering with the treatment once prescribed" could constitute a violation of the Eighth Amendment, surely a blanket refusal to be evaluated for treatment could also constitute a claim.

6.

The majority at 14–15 note 8 states no circuit has disagreed with *Kosilek*; however, that does not tell the full story. I am not aware of any circuit that has considered another case regarding SRS which

has gone through a full trial, instead of being dismissed at the Rule 12(b)(6) or summary-judgment stages. *See*, *e.g.*, *Rosati*, 791 F.3d 1037; *De'lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013).

As the majority notes, the fourth and ninth circuits have allowed Eighth Amendment claims to survive motions to dismiss for failure to state a claim. *See Maj. Opn.* at 14 note 8 (citing *Rosati*, 791 F.3d at 1040; *De'lonta*, 708 F.3d at 526); *see also De'lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003) (regarding a request for hormone therapy). In doing so, the fourth and ninth circuits have suggested the failure to provide medical care based on an administrative policy, and not on medical judgment, could constitute deliberate indifference. *See Rosati*, 791 F.3d at 1039–40 (citing *Colwell*, 763 F.3d at 1063 ("holding that the 'blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy that one eye is good enough for prison inmates is the paradigm of deliberate indifference'")); *De'lonta*, 330 F.3d at 635 ("In fact, [the doctor's] response . . . which states that there was no gender specialist at [the consulting medical facility] and that [the prison's] policy is not to provide hormone therapy to prisoners, supports the inference that [the] refusal to provide hormone treatment to De'lonta *was based solely on the Policy rather than on a medical judgment concerning De'lonta's specific circumstances*." (emphasis added)).

Nor are the majority's cited cases regarding hormone therapy persuasive, because, as the majority states at 15 note 8, the holdings were limited to *the individual cases*. In *Praylor v. Texas Department of Criminal Justice*, our court held that, "*on [that] record*, the refusal to provide hormone

therapy did not constitute the requisite deliberate indifference". 430 F.3d 1208, 1209 (5th Cir. 2005) (emphasis added). In *Supre v. Ricketts*, decided in 1986, the tenth circuit also held the failure to treat the plaintiff with hormone therapy did not rise to deliberate indifference. In so holding, the court explained:

> It is apparent *from the record* that there were a variety of options available for the treatment of plaintiff's psychological and physical medical conditions. It was never established, however, that failing to treat plaintiff with estrogen would constitute deliberate indifference to a serious medical need. *While the medical community may disagree among themselves as to the best form of treatment for plaintiff's condition*, the [prison] *made an informed judgment* as to the appropriate form of treatment and did not deliberately ignore plaintiff's needs.

792 F.2d 958, 963 (10th Cir. 1986) (emphasis added).

Supre was examined by two endocrinologists and a psychiatrist, each of whom considered estrogen therapy as a course of treatment. *Id.* at 960. Two of the doctors advised against hormone therapy because of its dangers and controversial nature at that time. *Id.* But, one of the endocrinologists recommended hormone therapy. *Id.* The prison made "an informed judgment" based on the recommendations of Supre's doctors, not based on a policy. *Id.* at 963.

Finally, the majority at 15 note 8 cites *Meriwether v. Faulkner*, decided by the seventh

circuit in 1987. The *Meriwether* court, in allowing the Eighth Amendment claim to survive a motion to dismiss, stated: "[Plaintiff] does not have a right to any particular type of treatment, such as estrogen therapy . . . ." 821 F.2d 408, 413 (7th Cir. 1987). In 2011, however, the seventh circuit explained in *Fields v. Smith* that the *Meriwether* language was *dicta*, and held "the evidence at trial indicated that plaintiffs could not be effectively treated without hormones". 653 F.3d at 555–56. Therefore, the court affirmed the district court's ruling that the Wisconsin statute in question, "which prohibit[ed] the Wisconsin Department of Corrections . . . from providing transgender inmates with certain medical treatments", id. at 552, was invalid, both on its face and as applied to plaintiffs, as a violation of the Eighth Amendment, id. at 559.

7.

The majority has missed the mark. The question is not whether there is a broad medical controversy, but whether there is a disagreement about the efficacy of the treatment for this particular prisoner, based on this prisoner's individual needs. Obviously, what is not medically necessary for one person, may be medically necessary for another. See, e.g., Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir. 1998) ("Whether a course of treatment was the product of sound medical judgment, negligence, or deliberate indifference depends on the facts of the case.").

This fact-specific inquiry required by the Eighth Amendment is exactly why we cannot rely solely on the record in Kosilek in determining the medical necessity in Gibson's case, unlike the procedure used

in the below-described First Amendment precedent relied on by the majority at 16–17 note 9.

Never mind that the Director did not "borrow from Kosilek" as the majority suggests at 16; again, the Director did not even cite Kosilek in his summary-judgment motion. Again, in this record, the only evidence of medical necessity is the WPATH Standards of Care. Contrary to the majority's above-noted position at 16 and note 9, the need for individualized medical determinations is obviously different from the general evidence required to show a State's compelling interest in protecting its citizens from corruption of the political system by large campaign contributions or from the secondary effects caused by a strip club or adult theater. *See*, *e.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

Even if the Director had cited *Kosilek* in district court, we are required, at this summary-judgment stage, to view the evidence and draw all reasonable inferences in the light most favorable to the nonmovant—Gibson. *See Renwick v. PNK Lake Charles, L.L.C.*, 901 F.3d 605, 611 (5th Cir. 2018) (citations omitted). The testimony in *Kosilek*, coupled with the WPATH Standards of Care, when viewed in the light most favorable to Gibson, demonstrate a genuine dispute of material fact on the medical necessity of SRS in general. And, on this record, we cannot know if SRS is medically necessary for Gibson, because Gibson has been denied the right to an evaluation and the due-process right to make a record on this point of contention.

The majority consistently misconstrues the correct standard. At 2, the majority quotes *Delaughter*, 909 F.3d at 136, stating: "'[M]ere disagreement with one's medical treatment is insufficient' to state a claim under the Eighth Amendment." *See also Maj. Opn.* at 9 (quoting *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir. 1997)). This is correct; "mere disagreement with one's medical treatment is insufficient to show deliberate indifference". *Delaughter*, 909 F.3d at 136 (citation omitted).

But, the majority at 2 goes on to claim that "[t]his bedrock principle dooms this case" because of the broad medical controversy surrounding SRS. This is incorrect. A prisoner's mere disagreement with his medical treatment is insufficient to show deliberate indifference when: the prisoner has, in fact, been evaluated by a medical professional; the medical professional has prescribed a course of treatment; and the prisoner then disagrees with that course of treatment. *See*, *e.g.*, *Estelle*, 429 U.S. at 107 (prisoner disagreed with diagnosis and treatment plan by medical professionals); *Norton*, 122 F.3d at 291–92 & n.1 (prisoner disagreed with medical treatment and asserted prison should have tried alternative methods of treatment or different diagnostic measures, but medical records showed prison officials followed medical treatment prescribed by doctors and afforded prisoner extensive medical care); *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (prisoner disagreed with revocation of his "diet card" after medical personnel determined the newly-built ramps in the dining hall made the diet card unnecessary).

Gibson, on the other hand, has been treated for SRS in the form of hormone therapy. Gibson does not deny that. Gibson, however, avers the hormone therapy is not adequate and SRS may be medically necessary to treat Gibson's gender dysphoria, and requests an evaluation for SRS. Ordinarily, the majority would be correct in stating this would not be enough to show deliberate indifference. But, the difference in this case is that a medical professional ordered Gibson be evaluated for SRS. This evaluation has never happened because of the prison's ban on SRS, not because of any treatment plan by a medical professional. *See Maj. Opn.* at 5.

I am not taking a position on whether Gibson's claim constitutes deliberate indifference. But, the Director's refusal to have Gibson evaluated for SRS, contrary to a medical professional's order and based on a blanket ban, *could* constitute deliberate indifference; and, Gibson should, as a matter of due process, be allowed to conduct discovery and build a record on this claim, including being evaluated by a medical professional to determine the medical necessity of SRS in Gibson's case.

8.

The majority goes to great lengths at 19–23 discussing the text and original understanding of the Eighth Amendment's "cruel and unusual punishment" standard. Its analysis is unnecessary; the standard has been long established. In *Estelle*, the Supreme Court held "that deliberate indifference to serious medial needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment". 429 U.S. at

104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)); *see*, *e.g.*, *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006) ("A prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment when his conduct demonstrates deliberate indifference to a prisoner's serious medical needs, constituting an 'unnecessary and wanton infliction of pain.'" (citation omitted)); *Barksdale v. King*, 699 F.2d 744, 748 (5th Cir. 1983) ("'[A]cts or omissions sufficiently harmful to evidence *deliberate indifference to serious medical needs*' of inmates constitute *cruel and unusual punishment*." (alteration in original; second emphasis added) (quoting *Ruiz v. Estelle*, 679 F.2d 1115, 1149 (5th Cir.), *vacated in part by* 688 F.2d 266 (5th Cir. 1982) (this portion of opinion vacated because parties entered into settlement before original opinion issued without disclosing to court)); *Dickson v. Colman*, 569 F.2d 1310, 1311 (5th Cir. 1978) ("The Court [in *Estelle*] held that inadequate medical care did not constitute cruel and unusual punishment cognizable under section 1983 unless the mistreatment rose to the level of 'deliberate indifference to serious medical needs.'" (quoting *Estelle*, 429 U.S. at 106)).

We, therefore, are not at liberty to undertake the text-and-original-understanding analysis. Instead, we must decide only: whether the prisoner has a serious medical need (the Director has conceded Gibson does); and, if there is a serious medical need, whether the prison has been deliberately indifferent to that need. End of analysis.

III.

The inadequate summary-judgment record does not provide any evidence regarding the medical community's current opinion on the necessity of SRS in treating gender dysphoria in general, much less in regard to Gibson; and we cannot base the medical community's standards on evidence submitted in a four-year-old case. Nor can we depart even further from the record and caselaw to make our own record, ignoring the genuine disputes of material fact at hand. This case does not call into question the "text [or] original understanding" of the Eighth Amendment, *see Maj. Opn.* at 20; the controlling medical-deliberate-indifference standard for prisoners is well-established. Instead, at issue is fundamental fairness—the right to due process. Summary judgment was improper; and, therefore, I must respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-51148
D.C. Docket No. 6:15-CV-190

SCOTT LYNN GIBSON, also known as Vanessa Lynn, Plaintiff - Appellant
v.
BRYAN COLLIER; DR. D. GREENE, Defendants - Appellees.

Appeal from the United States District Court for the Western District of Texas

Before SMITH, BARKSDALE, and HO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

WACO DIVISION

CIVIL ACTION NO. W-15-CA-190

SCOTT LYNN GIBSON,
aka VANESSA LYNN,
TDCJ # 699888,
Plaintiff,

v.

BRAD LIVINGSTON, et al.,
Defendants.

ORDER

Before the Court are the following Motions: 1) Defendant Livingston's Motion for Summary Judgment (Doc. 50); 2) Plaintiffs Motion Requesting the Court Consider the Court's Holding in *Praylor v. TDCJ* (Doc. 60); 3) Plaintiffs Motion for a Temporary Restraining Order and Preliminary Injunction (Doc. 62); 4) Plaintiff's Motion to Compel Dr. Greene to Respond to Plaintiff's § 1983 Complaint (Doc. 66); and 5) Plaintiff's Motion to Allow Plaintiff to Use TDCJ Spokesman Jason Clark's Statement as Proof to Support her Lawsuit (Doc. 67).

Plaintiff Vanessa Lynn Gibson[1] ("Plaintiff") is an inmate in the custody of the Texas Department of

[1] The Court will refer to Plaintiff in this Order as her preferred gender of female, using feminine pronouns. Such use, however, is not to be taken as a factual or legal finding.

Criminal Justice, Correctional Institutions Division ("TDCJ"). She is presently confined at the Alfred Hughes Unit in Gatesville, Texas. Plaintiff is proceeding *prose* and *in forma pauperis* in this action pursuant to 42 U.S.C. § 1983.

I. Factual Background As Alleged By Plaintiff

According to her original Complaint filed on June 8, 2015, Plaintiff is 37-year-old male-to-female preoperative transsexual. (Doc. 1, Memo. at 2). She has lived as a female since the age of 15. *Id.* She was diagnosed with Gender Dysphoria (GD)[2] by TDCJ

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[2] Plaintiff has been diagnosed with "Gender Identity Disorder" and "Gender Dysphoria." The TDCJ G-51.11 Policy, the policy at issue in this case, does not appear to distinguish between the two diagnoses for the purposes of treatment. For the sake of ease and clarity, the Court will refer to Plaintiff's disorder as "GID/GD," except in instances where the Plaintiff or a medical provider indicates an individual diagnosis of GID.or GD.

The TDCJ policy uses the definitions set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. (Def.'s Mot., Ex. Cat 1).

Gender Identity Disorder (GID) - A strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is of the other sex. This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex. There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex (Criteria B). The diagnosis is not made if the individual has a concurrent physical intersex condition (e.g., androgen insensitivity syndrome or congenital adrenal hyperplasia) (Criteria C). To make the diagnosis, there must be evidence of clinically significant distress or impairment in social occupational, or other important areas of functioning (Criteria D). [Diagnostic and Statistical Manual of Mental Disorders, fourth edition text revision (DSM-IV-TR), p. 576].

doctors at the Skyview psychiatric facility. *Id.* Plaintiff believes she is a female trapped in a male's body, which causes her to have realistic thoughts of committing suicide and of self-castration. *Id.* Plaintiff alleges she has, in fact, attempted suicide on three occasions and has made attempts to destroy her testicles. *Id.* When Plaintiff first entered TDCJ in 1995, she verbally requested treatment for her gender disorder but TDCJ denied her request. *Id.* at 3. Her depression and suicidal thoughts became more prevalent over the years, and in 2014, Plaintiff learned that TDCJ amended its policy, which had previously prohibited transgender inmates who were not diagnosed with Gender Identity Disorder (GID) prior to incarceration from receiving treatment. *Id.* After expressing the desire to castrate herself, Plaintiff was sent to the TDCJ's Skyview psychiatric facility where a psychiatrist diagnosed Plaintiff with GD and recommended hormone therapy. *Id.*

Dr. Kevin McKinney subsequently placed Plaintiff on estrogen and spironolactone. *Id.* Plaintiff explained to Dr. McKinney that she could not live in a male's body because it caused her to hate herself and gave her thoughts of committing suicide. *Id.* Dr. McKinney told Plaintiff he could only treat her with female hormones because TDCJ policy

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Gender Dysphoria (GD) - refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender. This term replaces GID and has the following criteria: Marked incongruence between one's experienced/expressed gender and assigned gender for a specified time and associated clinically significant distress or impairment. The diagnosis can be made with a concurrent disorder of sex development. [Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM-5) p. 451-453].

bans sex reassignment surgery ("SRS"). *Id.* Plaintiff also requested Dr. McKinney issue her a pass that would allow her to "live as a female." *Id.* at 4. Plaintiff has also made requests to TDCJ to have her genitals removed, but the Defendants have ignored her or told her no. *Id.* Finally, Plaintiff asked Defendants if, in light of the "ban" on SRS, she could have a pass to live and dress as a female and keep her hair at least seven inches long, but her request was denied. *Id.*

Plaintiff alleges the TDCJ' s "blanket ban" on SRS is unconstitutional both facially and as-applied because it deprives inmates with GID/GD of their right to medical care under the Eighth Amendment. *Id.* at 5. Plaintiff argues the Eighth Amendment requires Defendants to provide adequate medical care of quality acceptable when measured by prudent professional standards of the community, tailored to an inmate's specific medical needs. *Id.* at 6, citing *Barrett v. Coplan,*[3] 292 F. Supp. 2d 281 (D.N.H. 2003). According to Plaintiff, the TDCJ policy is at odds with the World Professional Association for Transgender Health's (WPATH) standard for the treatment of transgender individuals, which states that SRS is necessary to treat "some people adequately." *Id.* at 6.

Plaintiff alleges the TDCJ' s policy is unconstitutional on its face because it prohibits transgender inmates with severe GID/GD from being referred to a specialist to determine whether SRS is necessary to adequately treat their disorder on an individual basis, and further, it indiscriminately and arbitrarily denies transgender inmates SRS, even

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[3] Plaintiff cites to *"Burrett v. Loplen"* however the case-style associated with 292 F. Supp 2d 281 is *"Barrett v. Coplan."*

when medically necessary. *Id.* at 5. As applied to Plaintiff, the current policy only offers treatment that "reduce[s] the pain [her disorder] causes," but it denies her SRS, which would also treat her serious medical condition. *Id.* at 5. In Plaintiff's case, the policy allows Defendants to "ignore her serious medical needs" and results in a substantial risk of serious harm because Plaintiffs illness causes her to have realistic thoughts of suicide and self-castration. *Id.* Plaintiff alleges Defendants are aware of this risk because she has put Defendants on notice that she has thoughts of suicide and self-castration and that the TDCJ' s policy is unconstitutional. *Id.* at 7.

Plaintiff seeks (1) a declaration that the ban is unconstitutional (2) a permanent injunction ordering Defendants to rescind the ban on SRS and add SRS to the TDCJ' s health care policy, (3) judicial notice of the WPATH's statements that SRS is medically necessary treatment, and (4) costs and attorneys' fees. (Doc. 1 at 4).

In her original Complaint, Plaintiff names three Defendants: TDCJ Executive Director Brad Livingston, an unknown policymaker at the University of Texas Medical Branch (UTMB) "who created and enforc[es] the ban," and the municipality of Gatesville, Texas. (Doc. 1 at 3). On November 17, 2015, the Court granted Defendant Gatesville's Motion to Dismiss, and the municipality of Gatesville was terminated from this lawsuit. (Doc. 41).

On December 21, 2015, Plaintiff sought leave to amend her Complaint. (Doc. 48). In her Amended Complaint, which the Court construes as a supplemental complaint, Plaintiff asserts claims against "Dr. Greene" for denying her the treatment

her doctor at UTMB prescribed her to treat her GID/GD. (Doc. 55). Plaintiff alleges that on July 28, 2015, Dr. McKinney from UTMB prescribed estrogen-premarin, spirolactone [sic], and finastreride [sic] to treat Plaintiffs GID/GD. *(Id.* at 1). Plaintiff asserts Dr. McKinney also prescribed "the real-life experience" and ordered that Plaintiff be provided the items necessary to freely live as a female. *Id.* Plaintiff admits Dr. McKinney's order did not specify what items Plaintiff should be allowed to have. *Id.* However, Plaintiff alleges that the WPATH standard of care recommends the "triadic therapy," which includes hormone therapy, "real-life experiences," and sex reassignment surgery for treating GID/GD. *Id.* at 2.

Plaintiff alleges Dr. Greene, a medical doctor who is not a GD specialist, refused Dr. McKinney's orders, citing the TDCJ policy, which does not provide transgender inmates the real-life experience, nor does the TDCJ allow transgender inmates to live as females or express their gender. *Id.* Plaintiff alleges Dr. Greene is violating her Eighth Amendment rights by denying the treatment prescribed by Dr. McKinney. *Id.* at 1. Plaintiff seeks a declaration that Dr. Greene's acts violate Plaintiff's constitutional rights and an injunction granting Plaintiff the treatment prescribed by Dr. McKinney. *Id.* at 4. The Court ordered service on Dr. Greene on March 1, 2016. (Doc. 54). A return receipt shows Dr. Greene was served by certified mail return receipt on March 21, 2016. (Doc. 65). However, as of the date of entry of this Order, Dr. Greene has not filed an Answer or otherwise responded to Plaintiff's Supplemental Complaint.

II. Livingston's Motion for Summary Judgment

Defendant Livingston filed a Motion for Summary Judgment along with Plaintiff's grievance records, Plaintiff's medical records from January 2014-August 17, 2015, and TDCJ Policy No. G-51.11. *(See* Docs. 50 & 52). Livingston argues he is entitled to qualified immunity for claims against him in his individual capacity, and Plaintiff's claims against him in his official capacity are barred by the Eleventh Amendment. (Doc. 50). Plaintiff filed a Response (Doc. 58), along with an affidavit, her psychiatric records from Skyview (Ex. A2), literature on the subject of health care and transgender individuals, including excerpts from a report detailing the WPATH Standard of Care (Exs. 3 & 4), a copy of the TDCJ' s policy on surgical castration for sex offenders (Ex. 5), copies of correspondence sent to Plaintiff from TDCJ Correctional Managed Health Care (Ex. 6), and relevant TDCJ grievance records (Exs. 7-9).

III. Relevant Summary Judgment Evidence

A. Medical and Grievance Records

Medical records show medical staff first saw Plaintiff regarding her GID/GD on February 20, 2014 after she submitted a sick call request asking for treatment for GID. (Def.'s Mot., Doc. 52, Ex. B at 10). She reported emotional and physical distress because she feels she is a girl and the officers and inmates teased her. *Id.* She reported a long history of mental health and behavioral issues, including one overdose attempt in 2005 or 2006 and

a hanging attempt that was never reported. *Id.* She claimed she was threatened "with cases" because she likes to wear makeup and style her hair. *Id.* She reported she is often depressed because of frequent requests of a sexual nature from other inmates. *Id.* She claimed she has been living as a girl for over 20 years. *Id.* She denied any thoughts of harming herself or others. *Id.*

In March and April of 2014, Plaintiff submitted sick calls stating she is a transsexual and a woman in a man's body, but when mental health services responded, she told mental health services her sick call was meant to go to medical. *Id.* In May of 2014, mental health services saw her again after she requested counseling for GID. *Id.* On May 14, 2014, Plaintiff was diagnosed with GID. *Id.* at 10. She reported depression related to her gender and indicated that she wanted hormone treatment and surgical treatment. *Id.* She reported hatred of her testicles but denied thoughts of self-mutilation. *Id.* Mental health services saw Plaintiff on June 6, 2014, and she reported she had thoughts of cutting off her testicles and that she had, in the past, tied a string around her testicles with the hope of cutting off circulation to them. *Id.* At that time she denied current thoughts of self-harm. *Id.* Medical staff saw Plaintiff again on July 14, 2014, and Plaintiff stated she felt she was a woman in a man's body and expressed distress about not being able to shave her legs and having to touch her penis to go to the bathroom. *Id.* Plaintiff was transferred to the Skyview psychiatric facility on July 22, 2014. *Id.* at 11. Plaintiff denied she was suicidal and reported "psych" (presumably at her unit) was not taking her seriously. *Id.* She stated she would not do anything

to hurt herself. *Id.* When seen again by "D&E" staff at Skyview, she continued to report thoughts of castrating herself and reported some depression." *Id.* The following day, Plaintiff was diagnosed with "Intermittent Explosive Disorder and Personality Disorder NOS." *Id.* at 15.

At a follow-up appointment at Skyview on July 31, 2014, a provider determined Plaintiff meets the requirements for a diagnosis of "Gender Dysphoria in Adolescents and Adults" under "DSM-5" criteria. (Pl.'s Resp., Doc. 58, Ex. A2). Plaintiff was discharged from Skyview on August 5, 2014. (Def.'s Mot., Doc 52, Ex. Bat 72). In the discharge notes, the provider noted Plaintiff denied plans to harm herself and explained that her previous threats were made primarily in an attempt to more clearly get her point across and to express the seriousness of the situation. *Id.* at 71. Plaintiff reported she was treated unfairly by TDCJ medical staff. *Id.* She denied suicidal ideations. *Id.*

On August 25, 2014, Dr. Greene referred Plaintiff to endocrinology for an evaluation regarding hormone therapy. *Id.* at 17. Dr. Greene informed Plaintiff she must continue psychiatric therapy. *Id.* On September 24, 2014, Plaintiff was prescribed spironolactone by Dr. Michael Atemo for "antiandrogen" effects. *Id.* at 18.

On October 28, 2014, Plaintiff submitted a sick call to mental health services requesting a pass from medical to purchase make-up and earrings from commissary. *Id.* at 23-25. Mental health services reviewed the relevant Correctional Managed Health Care and TDCJ policies and found nothing in the policy indicating Plaintiff is allowed to live as a female and make those purchases. *Id.* at 25. On

December 17, 2014, medical staff saw Plaintiff again regarding treatment for her GID/GD. *Id.* at 26. Medical staff determined Plaintiff could not begin estrogen treatments until her testosterone levels were suppressed. *Id.*

On January 2, 2015, medical staff saw Plaintiff again cell-side. *Id.* at 29. Plaintiff asked mental health services to provide an approval to the warden to allow Plaintiff to wear full makeup, but medical staff informed Plaintiff security would not provide a pass to allow Plaintiff to carry herself in any manner that would be disruptive to her environment. *Id.* On February 3, 2015, Plaintiff made a sick call requesting a bra and a pass to wear it. *Id.* at 32-33. On February 13, 2015, Plaintiff made another sick call stating she was mistreated by the medical department. *Id.* at 35. She stated she was denied a sports bra, and that medical staff made fun of her and did not treat her seriously. *Id.* Mental health services told Plaintiff the responses from medical would be reviewed and she was encouraged to contact the mental health department in the future. *Id.* at 36. Plaintiff denied suicidal ideations or thoughts of hurting others. *Id.*

On March 19, 2015, mental health services saw Plaintiff again. *Id.* at 41. She informed mental health she was going to UTMB hospital for hormone treatment the following week. *Id.* She denied suicidal or homicidal ideations. *Id.* On April1, 2015, Dr. McKinney at UTMB saw Plaintiff. *Id.* at 82. Dr. McKinney noted he was unable to start Plaintiff on estrogen therapy until her testosterone is suppressed due to threat of blood clot. (Def.'s Mot., Ex. A at 21). Mental health services saw Plaintiff again on April 8, 2015 for individual therapy. (Def.'s

Mot., Ex. B at 46). She reported she felt stressed and angry due to not being able to live like a woman. *Id.* Plaintiff stated her hormone treatment was increased during her last visit at UTMB, but she was not able to receive a pass to live as a woman. *Id.* Plaintiff denied suicidal or homicidal ideations. *Id.*

Dr. Greene saw Plaintiff on June 18, 2015. *Id.* Plaintiff requested to live as a female and requested the necessary passes to do so. *Id.* at 49. Dr. Greene ordered Plaintiff to be scheduled with the unit medical department for evaluation for referral for a sex change operation and evaluation for a medical pass for her GID. *Id.* at 50. On July 1, 2015, Plaintiff asked mental health personnel to approve Plaintiff to have her testicles removed and to write her a pass to live as a woman. *Id.* at 52. Plaintiff did not report suicidal or homicidal ideations. *Id.* However, mental health explained that under the policy it could only help Plaintiff with adjustment, anxiety, or depressive symptoms and could not provide such a pass. *Id.* at 52. Plaintiff was seen a second time on July 1, requesting to speak to a supervisor regarding counseling for her GID/GD. *Id.* at 56. Plaintiff did not express thoughts of harming herself or others. *Id.* Plaintiff was referred to a supervisor. *Id.* Mental health services saw Plaintiff again the following day. *Id.* at 59. On July 11, 2015, Plaintiff requested to see a provider concerning her request for a sex change. *Id.* at 61. A mental health therapist saw Plaintiff again regarding her GID/GD on July 15, 2015. *Id.* at 64. Plaintiff requested a jock strap and laser hair removal. *Id.* The therapist told Plaintiff she would refer Plaintiff to the psychiatrist. *Id.* Plaintiff denied thoughts of harm to herself or others. *Id.*

On July 17, 2015, a mental health therapist saw Plaintiff again for a mental status check. *Id.* at 67. After reviewing Plaintiffs chart, the therapist determined Plaintiff already had a diagnosis of GID and did not need to be referred to a psychiatrist. *Id.* The therapist told Plaintiff that she and other mental health staff follow the rules under the TDCJ. *Id.* Plaintiff denied thoughts of harm to self or others. *Id.* Plaintiff was seen again on August 7, 2015 after asking for estrogen. *Id.* at 90. Medical staff noted an endocrinology specialist saw Plaintiff on July 28, 2015 and ordered no change in medication. *Id.* The record reflects Plaintiff was later placed on estrogen. In her Response to Defendant's Motion for Summary Judgment, Plaintiff states her new doctor, Dr. Wayers, placed her on a high level of estrogen to "basically cause chemical castration." (Pl.'s Resp., Doc. 58 at 10). In an affidavit filed along with her Response, Plaintiff states if she cannot get a sex change or have her penis and testicles removed, she is either going to cut them off or commit suicide. *Id. (See* Pl.'s Affidavit at 1).

The record further reflects Plaintiff filed numerous grievances with TDCJ asking for treatment for her GID/GD. The grievance record shows Plaintiff's requests to see a "GID specialist," receive a sex change, and to be issued a pass to live as a female were denied by TDCJ Health Services. (Def.'s Mot, Doc. 52, Ex. A (Grievance Nos. 2015059692, 2015122077, and 2015125706); Pl.'s Resp., Doc. 58, Ex. 6-7 (Grievances Nos. 2015096265 & 2015088363)). Plaintiff was told she was being treated in accordance with Policy G-51.11, which does not designate SRS as part of the treatment protocol for GID/GD. *See id.* The record reflects

Plaintiff sent a letter to the TDCJ Health Services Division requesting a bra and a pass to live as a female and express her gender freely. (Pl.'s Resp., Doc. 58, Ex. 6 at 2). Plaintiff's letter was returned, and the TDCJ Health Services Division directed her to pursue the unit's informal complaint process. *Id.* at 3.

B. TDCJ Policy

Livingston submitted as summary judgment evidence Correctional Managed Health Care Policy G-51.11, the TDCJ' s policy on the "Treatment of Offenders with Intersex Conditions, Gender Disorder or Gender Dysphoria." It provides in relevant part:

> II. An offender with documented or claimed Gender Identity Disorder (GID) or Gender Dysphoria (GD) will receive thorough medical and mental health evaluations.
>
> A. The offender will be continued on the same hormone regimen, if any, upon arrival to TDCJ.
>
> B. A concerted effort will be made to expeditiously obtain the offender's prior medical and psychological records.
>
> C. Medical evaluation will include a thorough history and complete physical examination.
>
> D. Mental Health evaluation will be conducted by a qualified mental health professional (QMHP). If conducted by a non-psychiatrist, the evaluation and any

supporting information must be reviewed by a psychiatrist. Only a licensed psychiatrist may make the diagnosis of GID or GD within TDCJ.

III. When a diagnosis of Gender Identity Disorder or Gender Dysphoria is made -

A. Mental health counseling will be offered.

B. Current, accepted standards of care and the offender's physical and mental health will determine if advancement of therapy is indicated.

1. If hormone therapy is indicated, the offender will be referred to a medical provider competent to prescribe hormone therapy.

2. Hormone therapy will be requested through the non-formulary process.

3. Documentation of patient education and written consent are required prior to submission of the non-formulary request (see Attachments A-1 and A-2).

4. If hormone therapy is prescribed, the offender will also be followed in chronic care clinic with regular assessments for potential complications of hormone therapy (e.g. hypertension, liver disease, heart disease, breast cancer, etc.).

(Def. 's Mot., Doc. 52, Ex. C).

C. WPATH Standard of Care

Plaintiff's Response includes portions of the 2012 "Standards of Care for the Health of Transsexual, Transgender and Gender Noncomforming People"

published by the WPATH. (Pl.'s Resp., Doc. 58, Ex. 4). The excerpts provide in relevant part:

> **Gender Nonconformity is Not the Same as Gender Dysphoria**
> What helps one person alleviate gender dysphoria might be very different from what helps another person. This process may or may not involve a change in gender expression or body modifications. Medical treatment options include, for example, feminization or masculinization of the body through hormone therapy and/or surgery, which are effective in alleviating gender dysphoria and are medically necessary for many people. Gender identities and expressions are diverse, and hormones and surgery are just two of many options available to assist people with achieving comfort with self and identity. Report Pg. 5.
>
> **Sex Reassignment Surgery is Effective and Medically Necessary**
> Surgery--particularly genital surgery-is often the last and the most considered step in the treatment process for gender dysphoria. While many transsexual, transgender, and gender-nonconforming individuals find comfort with their gender identity, role, and expression without surgery, for many others surgery is essential and medically necessary to alleviate their gender dysphoria (Hage & Karim. 2000). Report Pg. 54.

(Pl.'s Resp., Doc. 58, Ex. 4). The report also suggests access to "these medically necessary treatments

should not be denied on the basis of institutionalization or housing arrangements." *Id.* at Report Pg. 67.[4]

IV. Summary Judgment Standard

This Court may grant summary judgment on a claim if the record shows that there is no genuine dispute of any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A party who moves for summary judgment has the burden of identifying the parts of the pleadings and discovery on file that, together with any affidavits, show the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). If the movant carries this burden, then the burden shifts to the nonmovant to show that the Court should not grant summary judgment. *Id.* at 324-325. The nonmovant must set forth specific facts that show a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). The nonmovant cannot rely on conclusory allegations, improbable inferences, and unsupported speculation. *Krim v. BancTexas Group, Inc.,* 989 F.2d 1435, 1449 (5th Cir. 1993). The Court must review the facts and draw all inferences most favorable to the nonmovant. *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577,578 (5th Cir. 1986).

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[4] Plaintiff also submitted a brief report from Lambda Legal aggregating the position statements of various health organizations with respect to transgender care. *See* Ex. 4.

V. 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of law, causes another to be deprived of a federally protected constitutional right. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress ...

42 U.S.C. § 1983. Section 1983 was promulgated to prevent " ... [a government official's] [m]isuse of power, possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law." *Johnston v. Lucas,* 786 F.2d 1254, 1257 (5th Cir. 1986); *Whitley v. Albers,* 475 U.S. 312 (1986); *Davidson v. Cannon,* 474 U.S. 344 (1986), *Daniels v. Williams,* 474 U.S. 327 (1986). Section 1983 does not create substantive rights; rather, it merely provides a remedy for deprivations of rights established elsewhere. *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 816 (1985). To bring an action within the purview of Section 1983, a claimant must first identify a protected life, liberty, or property interest, and then prove that government action resulted in a deprivation of that

interest. *Baker* v. *McCollan,* 443 U.S. 137, 140 (1979); *Mahone* v. *Addicks Utility Dist.,* 836 F.2d 921 (5th Cir. 1988); *Villanueva v. Mcinnis,* 723 F.2d 414,418 (5th Cir. 1984).

Only two allegations are required in order to state a cause of action under § 1983. "First, the Plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo,* 446 U.S. 635, 640 (1980); *Manax* v. *McNamara,* 842 F.2d 808, 812 (5th Cir. 1988). Allegations of a prisoner's complaint, "'however inartfully pleaded,' are held 'to less stringent standards than formal pleadings drafted by lawyers.'" *Hughes v. Rowe,* 449 U.S. 5, 9 (1980); *Haines* v. *Kerner,* 404 U.S. 519, 520 (1972). It is also clear that civil rights complaints must be pleaded with specific facts, not merely conclusory allegations. *Thompson v. City of Starkville, Mississippi,* 901 F.2d 456, 469 n. 13 (5th Cir. 1990); *Elliot v. Perez,* 751 F.2d 1472, 1479 (5th Cir. 1985).

VI. Deliberate Indifference Claim

The Cruel and Unusual Punishment Clause allows an inmate to obtain relief after being denied medical care if he proves that there was a "deliberate indifference to [his] serious medical needs." *Banuelos v. McFarland,* 41 F.3d 232, 235 (5th Cir. 1995) (quoting *Estelle v. Gamble,* 429 U.S. 97, 104 (1976)). Deliberate indifference requires a showing that the Defendant (1) was "aware of facts from which an inference of excessive risk to the prisoner's health or safety could be drawn," and (2) that he "actually

drew an inference that such potential for harm existed." *Herman v. Holiday,* 238 F.3d 660, 664 (5th Cir. 2001). In *Domino v. Texas Dep't of Criminal Justice,* the Fifth Circuit discussed the high standard involved in showing deliberate indifference as follows:

> Deliberate indifference is an extremely high standard to meet. It is indisputable that an incorrect diagnosis by medical personnel does not suffice to state a claim for deliberate indifference. Rather, the plaintiff must show that the officials "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Id.* Furthermore the decision whether to provide additional treatment "is a classic example of a matter for medical judgment." And, the "failure to alleviate a significant risk that [the official] should have perceived, but did not" is insufficient to show deliberate indifference.

239 F.3d 752, 756 (5th Cir. 2001) (citations omitted). A disagreement with the treatment provided by a doctor does not rise to the level of a constitutional violation. *See Varnado v. Lynaugh,* 920 F.2d 320, 321 (5th Cir. 1991).

VII. Livingston's Motion for Summary Judgment

Livingston alleges he is entitled to qualified immunity to the extent Plaintiff asserts claims against him in his individual capacity. Government officials sued in their individual capacities for *money damages* are entitled to qualified immunity from liability insofar as their conduct does not violate a clearly-established constitutional right of which a reasonable person would have been aware. *See Mangaroo v. Nelson,* 864 F.2d 1202, 1206 (5th Cir. 1989) (emphasis supplied). The Plaintiff in this case, however, seeks injunctive relief, not money damages. Thus, Livingston's qualified immunity defense is not relevant. The relief sought by Plaintiff can only be provided by the individual defendant in his official capacity. Accordingly, what remains is Plaintiff's claim against Livingston in his official capacity as Executive Director.

To that end, Defendant asserts Plaintiffs claim against him in his official capacity is barred by the Eleventh Amendment. However, as mentioned previously, Plaintiff seeks prospective injunctive relief, not money damages and "the Eleventh Amendment does not bar claims for prospective relief against state officials acting in their official capacity." *See Edelman v. Jordan,* 415 U.S. 651, 664 (1974); *Ex Parte Young,* 209 U.S. 123 (1908); *Nelson v. Univ. of Tex. at Dallas,* 535 F.3d 318, 321-22 (5th Cir. 2008). Thus, Plaintiffs claim is not barred by the Eleventh Amendment. Plaintiff cannot prevail against Livingston, however, because Plaintiff cannot demonstrate a violation of her Eighth Amendment rights.

Livingston does not argue that GID/GD is not a serious medical condition for Eighth Amendment purposes. *See* Def.'s Mot. at 7 ("based upon the existence of policy G-51.11, TDCJ appears to recognize gender disorder as a serious medical need"). The Fifth Circuit has not addressed the issue of whether an inmate is entitled to SRS as a treatment for GID/GD. The magistrate judge in this division previously addressed the issue of whether a TDCJ inmate is entitled to hormone therapy as a treatment for GID/GD in *Praylor v. TDCJ,* Civil No. W-04-CA-058. In *Praylor,* the Magistrate concluded that hormone therapy was not constitutionally required for the Plaintiff, based in part upon testimony developed at a *Spears* hearing that the Plaintiff had not initiated the process for an operative sex change and did not qualify under the then-existing policy for treatment. Further, the magistrate found that Plaintiff[']s disagreement with the nonhormonal treatment pursued by prison medical staff did not constitute a viable claim for deliberate indifference to serious medical needs under the Eighth Amendment.

The plaintiff in *Praylor* appealed the magistrate's decision to the Fifth Circuit who issued a decision at 423 F.3d 524 (5th Cir. 2005) *("Praylor I")* which was later withdrawn and substituted for the decision in *Praylor v. TDCJ,* 430 F.3d 1208 (5th Cir. 2005) *("Praylor II").* Initially, the Fifth Circuit decided to follow those circuits that determined transsexualism to be a serious medical need raising Eighth Amendment considerations, but held that such inmates do not have a constitutional right to hormone therapy. *Praylor,* 423 F.3d at 525-26. In affirming the magistrate's decision, the Fifth Circuit

concluded that "the prison facility must afford the transsexual inmate some form of treatment based upon the specific circumstances of each case." *Id.* at 526. Shortly after their initial decision, the Fifth Circuit withdrew its decision in *Praylor I* and held "[a]ssuming, without deciding, that transsexualism does present a serious medical need, we hold that, on this record, the refusal to provide hormone therapy did not constitute the requisite deliberate indifference." *Praylor,* 430 F.3d at 1209.

The magistrate addressed the issue again in *Young v. Adams,* 693 F. Supp. 2d 635 (W.D. Tex. 2010). In that case, the magistrate determined the Plaintiffs claims were barred by the statute of limitations, however the magistrate went on to hold that in any event the Plaintiff failed to show evidence of a violation of his federal civil rights because he was not entitled to receive hormone therapy under the facts as alleged and developed at the *Spears* hearing. *Id.* at 639. The Magistrate again recognized that, under *Praylor II,* there currently is no controlling precedent in the Fifth Circuit as to whether refusing hormone therapy to a person diagnosed with gender dysphoria violates the Eighth Amendment prohibition against cruel and unusual punishment. However, the Magistrate recognized the Fifth Circuit's implication that under certain facts the refusal to provide hormone therapy will not constitute deliberate indifference. *Id.*

The version of G-51.11 in force at the time *Young* was decided provided hormone therapy in circumstances in which the inmate is close to release and committed to proceeding with a sex change operation immediately upon discharge. *Id.* at 641. The magistrate determined Young did not meet the

requirements to receive hormone treatment. *Id.* The Magistrate found that the policy was "reasonable and supports legitimate penological interests such as maintaining order and discipline within the prison unit." *Id.* The magistrate concluded that the existence of policy G-51.11, coupled with adherence to the same in the case of the Plaintiff, is also evidence in and of itself that the defendants were not deliberately indifferent to Plaintiffs serious medical needs under the Eighth Amendment. *Id.*

This case presents a different issue and an issue of first impression in this Circuit. Plaintiff here concedes she has received hormone therapy and instead argues the TDCJ policy is unconstitutional because it does not provide for inmates diagnosed with GID/GD to be evaluated by a specialist to determine if SRS is necessary, nor does it provide for SRS if deemed necessary. Plaintiff recognizes there is no Fifth Circuit precedent holding that denying an inmate SRS to treat GID/GD amounts to an Eighth Amendment violation, however Plaintiff argues there is a consensus of persuasive authority from other circuits demonstrating it is unconstitutional to deny Plaintiff medical care based on a blanket policy, especially when a Plaintiffs medical condition has not be fully assessed. (Doc. 58 at 13, citing, e.g., *Fields v. Smith,* 653 F.3d 550 (7th Cir. 2011) (affirming district court's invalidation on Eighth Amendment grounds of a Wisconsin state statute prohibiting the Wisconsin Department of Corrections ("DOC") from providing transgender inmates with hormonal therapy and sexual reassignment surgery); *Kosilek v. Spencer,* 740 F.3d 733 (1st Cir. 2014) (affirming district court's injunction requiring the

Massachusetts Department of Corrections to provide SRS to inmate suffering from severe gender dysphoria), rev'd en bane, 774 F.3d 63 (1st Cir. 2014) (holding care provided to inmate by the Massachusetts Department of Corrections does not violate the Eighth Amendment); *De'Lonta v. Johnson,* 708 F.3d 520 (4th Cir. 2013) (reversing and remanding district court's dismissal of Eighth Amendment Claim based on denial of consideration for sex reassignment surgery)).

It is worth noting that the TDCJ's policy does not include an outright ban on SRS. However, at present, the policy does not go beyond providing mental health services and hormone therapy for inmates with GID/GD. Based on the current state of the law in this Circuit regarding the medical treatment of prisoners with GID/GD and the record in this case, this Court declines to hold that the TDCJ' s policy is unconstitutional either on its face or as applied to Plaintiff. After *Praylor II,* there is still no controlling precedent in the Fifth Circuit as to whether refusing hormone therapy to a person diagnosed with GID/GD violates the Eighth Amendment prohibition against cruel and unusual punishment, although the Fifth Circuit does appear to imply that under certain facts the refusal to provide hormone therapy will not constitute deliberate indifference. The Fifth Circuit has yet to recognize unequivocally that transsexualism presents a serious medical need. The Fifth Circuit substituted its initial decision in *Praylor I* where it stated that "[a]lthough this circuit has not addressed the issue of providing hormone treatment to transsexual inmates, we will follow those circuits that have determined transsexualism to be a serious

medical need raising Eighth Amendment considerations" with its decision in *Praylor II,* where it stated "assuming, without deciding, that transsexualism does present a serious medical need, we hold that, on this record, the refusal to provide hormone therapy did not constitute the requisite deliberate indifference." *See Praylor I,* 423 F.3d at 526; *Praylor II,* 430 F.3d at 1209. With this precedent, the Court cannot make the leap to hold that a policy that does not provide surgery to treat GID/GD necessarily constitutes deliberate indifference.[5]

Further, Plaintiff's argument rests in part on the premise that the TDCJ's policy is unconstitutional because it does not comply with the treatment standard set forth by the WPATH. The Court does not dismiss Plaintiffs argument that the WPATH's standard of care has gained wide acceptance. However, Plaintiff provides as summary judgment evidence only portions of the WPATH report, and no witness testimony or evidence from professionals in the field demonstrating that the WPATH-suggested treatment option of SRS is so universally accepted, that to provide some but not all of the WPATH-recommended treatment amounts to deliberate indifference. More importantly, the record contains

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[5] Plaintiff also names as a Defendant an unknown policymaker at UTMB "who created and enforc[es] the ban." Plaintiff's claim against this policymaker in his or her official capacity is a claim against the state. For the reasons discussed, Plaintiff cannot demonstrate the TDCJ's policy is unconstitutional under Fifth Circuit law. Plaintiff cannot, therefore, prevail against this Defendant. Additionally, as of the date of entry of this Order, Plaintiff has failed to name, serve, or request service upon this Defendant. Accordingly, dismissal of this Defendant is proper.

no evidence addressing the security issues associated with adopting in full the WPATH standards in an institutional setting. As such, Plaintiff fails to meet her burden in demonstrating sufficient evidence exists from which a reasonable trier of fact could conclude the TDCJ's failure to offer SRS amounts to deliberate indifference.

Assuming arguendo the standard of care for GID/GD does mandate SRS as a treatment option for inmates, Plaintiff fails to show Livingston's official conduct amounts to deliberate indifference. In order to show deliberate indifference, a public official must have been personally aware of facts indicating a substantial risk of serious harm, and the official must have actually recognized the existence of such a risk. *Farmer* v. *Brennan,* 511 U.S. 825, 838 (1994). Thus Plaintiff must demonstrate Livingston, as TDCJ policymaker, was and is aware that the appropriate standard of care for inmates with GID/GD requires an assessment for SRS, and, if warranted, SRS, and further, that the treatment set forth in the TDCJ's policy does not provide a suitable alternative. Plaintiff must further demonstrate Livingston had and has knowledge of the substantial risk of serious harm posed to GID/GD inmates by not providing for surgical treatment, and deliberately set forth and persists in enforcing a policy to deny such treatment, despite the known or obvious consequence that constitutional violations will result. Plaintiff does not demonstrate sufficient evidence from which a reasonable factfinder could conclude that Livingston was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that Livingston actually drew that inference.

Finally, after reviewing Plaintiffs submissions, she does not present a policy or scenario that fails to provide constitutionally adequate treatment. In contrast, the summary judgment evidence demonstrates the TDCJ policy provides mental health counseling and hormone therapy when appropriate to inmates with GID/GD. Plaintiff, per TDCJ policy, has received extensive and ongoing mental health care as well as hormone therapy to treat her GID/GD since 2014. Of course, Plaintiff would prefer a policy that provides SRS. However, a Plaintiffs disagreement with the diagnostic decisions of medical professionals does not provide the basis for a civil rights lawsuit. Accordingly, Plaintiff fails to establish there is a genuine issue of material fact as to whether the policy is unconstitutional on its face or as applied to Plaintiff.

VIII. Plaintiff's Claim Against Dr. Greene

In her Supplemental Complaint, Plaintiff states Dr. McKinney from UTMB prescribed her Estrogen-permarin, spirolactone [sic], and finastreride [sic] to treat her GID/GD. (Pl.'s Suppl. Compl., Doc. 55 at 1). She alleges that on July 28, 2015, Dr. McKinney prescribed Plaintiff "the real-life experience" and ordered that Plaintiff be provided the items necessary to freely live as a female. *Id.* Plaintiff admits Dr. McKinney's order did not specify what items Plaintiff should be allowed to have. *Id.* However, Plaintiff alleges that the WPATH standard of care recommends the "triadic therapy," which includes hormone therapy, "real-life experiences," and sex reassignment surgery for treating GID/GD. *Id.* at 2. Plaintiff alleges she explained to Dr. Greene

that the "real-life experience" is a serious part of her treatment, but Dr. Greene, a TDCJ medical doctor who is not a GD specialist, refused Dr. McKinney's orders, citing the TDCJ policy. *Id.* Plaintiff alleges she explained to Dr. Greene that he was violating clearly established law and professional standards of care, but Dr. Greene said he would not comply until TDCJ' s policy clearly provides such treatment. *Id.* at 2-3. Plaintiff alleges Dr. Greene is violating her Eighth Amendment rights by denying the treatment prescribed by Dr. McKinney. *Id.* at 1. Plaintiff seeks a declaration that Dr. Greene's acts violate Plaintiff's constitutional rights and an injunction granting Plaintiff the treatment prescribed by Dr. McKinney. *Id.* at 4.

Because Plaintiff is proceeding *in forma pauperis* in this action, her Supplemental Complaint is subject to *sua sponte* dismissal under 28 U.S.C. § 1915(e)(2), which mandates dismissal "at any time" if the court determines that the action "fails to state a claim on which relief may be granted" or "is frivolous or malicious." *See also Neitzke* v. *Williams,* 490 U.S. 319, 328 (1989) (A complaint filed *in forma pauperis* that lacks an arguable basis in law should be dismissed under 28 U.S.C. § 1915).

Plaintiff's allegations against Dr. Greene fail to amount to a constitutional violation. As an initial matter, Plaintiff admits Dr. McKinney did not specify what items Plaintiff should be permitted to have to enjoy the "real life experience." It is Plaintiff's conclusion that Dr. McKinney intended to prescribe SRS. However, even assuming Dr. McKinney intended to prescribe Plaintiff SRS, Plaintiff cannot state a claim for deliberate indifference based on Dr. Greene's refusal to provide

Plaintiff with SRS in accordance with TDCJ policy. The Court holds in this Order that the TDCJ' s policy does not violate the Eighth Amendment. Moreover, Plaintiff never alleges Dr. Greene "refused to treat [her], ignored [her] complaints, intentionally treated [her] incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Domino,* 239 F.3d at 756. Plaintiff states in her Complaint that she is receiving mental health services and hormone therapy. Plaintiff's disagreement with Dr. Greene's treatment does not amount to an Eighth Amendment violation. Thus, Plaintiff fails to state a claim upon which relief may be granted, and her claim against Dr. Greene is dismissed as a matter of law.

IX. Conclusion

It is ORDERED that Defendant Livingston's Motion for Summary Judgment is GRANTED as to all claims. It is further

ORDERED that Plaintiffs claim against Dr. Greene is DISMISSED for failure to state a claim upon which relief can be granted and Plaintiffs Motion to Compel Dr. Greene to respond to Plaintiffs 1983 Complaint is DENIED (Doc. 66). The dismissal of this case for failure to state a claim will count as a "strike" for the purpose of 28 U.S.C. § 1915(g). *See Adepegba v. Hammons,* 103 F.3d 383, 385-87 (5th Cir. 1996). Plaintiff is admonished that if she accumulates three "strikes" pursuant to § 1915(g), she may not proceed in forma pauperis in any civil action or appeal filed while she is incarcerated or detained in any facility unless she is under

imminent danger of serious physical injury. *See* 28 U.S.C. § 1915(g). It is further

ORDERED that any and all motions not previously ruled upon by the Court are hereby DENIED. It is further

ORDERED that the Clerk of the Court is directed to e-mail copies of this Order and the Judgment to the TDCJ-Office of the General Counsel and the Pro Se Clerk for the United States District Court for the Eastern District of Texas.

SIGNED this 31st day of August, 2016.

/s/ Walter S. Smith
United States District Judge