No. 18-1586

In the Supreme Court of the United States

SCOTT LYNN GIBSON A/K/A VANESSA LYNN,
PETITIONER
v.
BRYAN COLLIER AND DR. D. GREENE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

LANORA C. PETTIT
Assistant Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

QUESTION PRESENTED

Whether the Eighth Amendment mandates that States provide sex-reassignment surgery to prisoners, notwithstanding an ongoing debate about the propriety and effectiveness of such treatment, particularly in an institutional setting.

RULE 15.2 STATEMENT

Pursuant to Rule 15.2, Respondents identify the following directly related cases, which were not identified in the petition pursuant to Rule 14.1(b)(iii):

- *Gibson v. Livingston*, No. W-15-CA-190, U.S. District Court for the Western District of Texas. Judgment entered August 31, 2016.
- *Gibson v. Collier*, No. 16-51148, U.S. Court of Appeals for the Fifth Circuit. Judgment entered March 29, 2019.

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OPINIONS BELOW

The opinion of the court of appeals (App. A1-A61) is reported at *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019). The opinion of the district court (App. A62-A91) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT

Petitioner, a convicted murderer serving a lengthy prison sentence, claims that the Eighth Amendment requires Texas taxpayers to fund his sex-reassignment surgery (SRS).[1] But the Eighth Amendment "proscribes only medical care so unconscionable as to fall below society's minimum standards of decency." *Kosilek v. Spencer*, 774 F.3d 63, 76-78, 87-89, 96 (1st Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2059 (2015) (citing *Estelle v. Gamble*, 429 U.S. 97, 102-05 (1976)). Petitioner has conceded that SRS's efficacy is hotly debated in the medical community, *see* Pet. App. A2, so its deprivation cannot be unconscionable. And because only one State has ever provided the treatment he seeks, the denial of that treatment cannot be cruel *and unusual*. U.S. CONST. amend. VIII.

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[1] As did the decision below, Respondents use male pronouns to describe Petitioner, a pre-operational, transgender prisoner who is biologically male. Pet. App. A4. That convention also follows this Court's past practice. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (referring to "biologically male" transgender prisoner with male pronouns).

That is why, until a few weeks ago, every court to consider Petitioner's arguments had rejected them. In August, however, the Ninth Circuit made itself the first circuit court in the nation to order taxpayers to fund SRS for prisoners. *See Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019) (per curiam). But that outlier opinion does not make this issue certworthy. To begin with, the Ninth Circuit may yet grant the defendant's request to correct its error en banc. And even if it does not, any disagreement between the courts of appeals is shallow and lopsided. The Ninth Circuit's poor reasoning is not likely to be adopted elsewhere, and if this Court is concerned about inconsistent circuit authority, the solution is to summarily reverse the Ninth Circuit.

The court below was correct in holding that refusal to provide SRS is not "cruel and unusual punishment" where (1) only one State has ever provided a prisoner with the surgery, and (2) there is considerable debate about whether the surgery is safe and effective in a prison setting. This Court should deny the petition.

1. Scott Lynn Gibson is a 41-year old, preoperational-male-to-female transgender prisoner. ROA.398.[2] In 1997, while serving a prison sentence for aggravated assault, he murdered a fellow inmate, Virgil Phillips. *Gibson v. State*, No. 01-98-00736, 1999 WL 796770, at *1 (Oct. 7, 1999) (describing murder committed by "gang known as the 'white assassins'"). He has also committed additional aggravated assaults and possessed a deadly weapon. Tex. Dep't of Criminal Justice, *Offender*

[2] "ROA" refers to the record on appeal for *Gibson v. Collier*, No. 16-51148 (5th Cir.).

Information Details, TDCJ Number 00699888, https://offender.tdcj.texas.gov/OffenderSearch/offenderDetail.action?sid=05374437/ (last accessed Oct. 16, 2019). Gibson was convicted of these subsequent crimes and his sentence runs through May 2031. *Id.*

Petitioner resides in the Alfred Hughes Unit of the Texas Department of Criminal Justice ("TDJC") in Gatesville, Texas. *Id.*; ROA.398. Petitioner has been continuously incarcerated in gender-segregated facilities as a male since 1995. Pet. App. A4, A64.

When Petitioner was first placed into TDCJ custody in 1995, he verbally requested treatment for a then-undiagnosed gender disorder. ROA.399. This request was denied because TDCJ policy at the time prohibited treatment for transgender inmates who had not been diagnosed and treated with a gender disorder before entering prison. Pet. App. A64; ROA.399.[3] In the mid-1990s, it was fairly commonplace for prisons essentially to freeze a transgender prisoner's treatment at the time of his incarceration. *Farmer v. Moritsugu*, 163 F.3d 610, 611-12

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[3] In the mid-1990s, Petitioner's condition may have been described as "gender identity disorder" or "transsexualism." ROA.267 (explaining that "gender dysphoria" was to replace earlier "gender identity disorder"). There remains ongoing debate about appropriate terminology to use for the condition. *See, e.g.*, Sophie Lewis, *World Health Organization removes "gender identity disorder" from list of mental illnesses*, CBS News, May 29, 2019, https://www.cbsnews.com/news/world-health-organization-removes-gender-dysphoria-from-list-of-mental-illnesses/ (describing debate about whether to classify gender dysphoria as sexual health issue or mental illness). To avoid confusion, Respondents will use Petitioner's preferred term "gender dysphoria."

(D.C. Cir. 1998) (per curiam) (describing similar policy applied by federal Bureau of Prisons).

TDCJ updated its policy in 2013 to recognize and address a range of gender-related conditions. This updated policy defined gender dysphoria as "the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender." ROA.267. Because gender dysphoria can vary widely in severity, TDCJ's policy provided that a prisoner who claimed to have gender dysphoria would be "evaluated by appropriate medical and mental health professionals" and have their "treatment determined on a case-by-case basis." ROA.267.

Under TDCJ's current policy, any offender diagnosed with gender dysphoria "w[ould] receive thorough medical and mental health evaluations," and "[c]urrent, accepted standards of care and the offender's physical and mental health w[ould] determine if advancement of therapy is needed." ROA.268. The policy cites as reference various medical standards as well as federal guidelines on both the treatment of gender disorders and the prevention of prison rape. ROA.269-70. It explicitly provides treatment protocols for reversible treatment options such as mental-health counseling and hormone therapy, but it is silent regarding irreversible surgical intervention. ROA.269.

In February 2014, shortly after learning of the new policy, Petitioner submitted a request to be treated for gender dysphoria. Pet. App. A68. He "denied any thoughts of harming [him]self," but he "reported emotional and physical distress" on account of (1) "teas[ing]" by guards and other inmates, and (2) "frequent requests

of a sexual nature from other inmates." *Id.* at A68-A69. Petitioner was seen on several occasions between February and May 2014, during which he "reported hatred of h[is] testicles but denied thoughts of self-mutilation." *Id.*

Petitioner first appears to have threatened to castrate himself in July 2014 due to feelings that he was not being taken seriously. *Id.* He was sent for evaluation at Skyview psychiatric facility, where he was diagnosed with gender dysphoria for the first time on July 31, 2014. *Id.* As the district court observed, Petitioner's doctors noted that, at discharge, Petitioner "denied" any thoughts of self-harm and "explained that [his] previous threats were made primarily in an attempt to more clearly get [his] point across." *Id.* at A70.

Following his discharge from Skyview, TDCJ continued to provide Petitioner with counseling. *See generally Id.* at A69-A74. Petitioner was also referred to an endocrinologist for evaluation regarding hormone therapy. *Id.* at A70. Within weeks of his diagnosis with gender dysphoria, Petitioner was prescribed a testosterone suppressant. *Id.* Petitioner was provided estrogen as soon as it could be safely administered. *See id.* at A71 (describing initial delays due to threat of blood clots). He was denied his request to wear makeup and female clothing due to concerns of disruption in his all-male prison. *Id.*

2. Petitioner filed this lawsuit because he remained unsatisfied with his course of treatment. Specifically, he alleged that TDCJ personnel subjected him to cruel and unusual punishment when they denied him: (1) "the real-life experience" of living as a woman, and (2) an assessment for taxpayer-funded SRS. *See, e.g.*, *id.* at A67. He alleged that TDCJ has imposed a "blanket ban" on SRS,

which he argues is unconstitutional because it fails to mirror the full recommendations of the World Professional Association for Transgender Health ("WPATH"). *Id.* at A65.

TDCJ's then-director Brad Livingston filed a motion for summary judgment, asserting qualified immunity.[4] *Id.* at A68. With it, he filed Petitioner's medical records from January 2014 through August 2015 as well as TDCJ's policy regarding treatment of gender disorders. *Id.* Petitioner responded by filing his psychiatric records, grievances filed with TDCJ, and correspondence between himself and TDCJ health officials. *Id.* Petitioner also submitted for the court's consideration certain hearsay documents, including publicly available reports of the purported benefits of SRS. *Id.* These included excerpts from the current version of the WPATH standards copyrighted in 2012, ROA.328-42, and a 2013 report from Lambda Legal providing quotes from other medical organizations that were presumably handpicked to be cited in court filings, ROA.343-45.

3. After reviewing these materials, the district court granted summary judgment for Respondents. As permitted by *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), the district court considered first whether the standard of care applied by TDCJ violated Petitioner's Eighth-Amendment rights. The court concluded that it did not and never reached the question of whether the right was

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[4] Respondent Bryan Collier succeeded Mr. Livingston as Executive Director of TDCJ in August 2016 and was substituted as a party in this action under Federal Rule of Civil Procedure 25(d).

clearly established. The court reasoned that Petitioner had offered "no witness testimony or evidence from professionals in the field demonstrating that the WPATH-suggested treatment option of SRS is so universally accepted" that refusal to provide that treatment amounted to deliberate indifference to Petitioner's medical needs. *Id.* at A86. Moreover, the district court noted that "the record contains no evidence addressing the security issues associated with adopting in full the WPATH standards in an institutional setting." *Id.* at A86-A87. Because, "per TDCJ policy," Petitioner "has received extensive and ongoing mental health care as well as hormone therapy," his preference for SRS constitutes mere "disagreement with the . . . decisions of medical professionals" that "does not provide the basis for a civil rights lawsuit." *Id.* at A88.

4. On appeal, Petitioner asked the Fifth Circuit to bypass any procedural irregularities in the district court's decision and address the merits of whether SRS is required by the "consensus medical standard of care required for transgender individuals." Supplemental Brief of Appellant Scott Lynn Gibson, *Gibson v. Collier*, No. 16-51148, at 1; *see also* Pet. App. A7 (noting that Petitioner had waived any challenge to procedural irregularities in the district court opinion). Joining the only extant precedential authority that had considered whether the Eighth Amendment required SRS outside a motion to dismiss, the Fifth Circuit concluded that it did not. Pet. App. A1. The majority did not, as Petitioner maintains, hold that deliberate indifference to medical necessity can "be determined as a matter of law because there was not unanimity." Pet. 20. Instead, the Fifth Circuit concluded

that there was sufficient disagreement about SRS that the Eighth Amendment does not compel States to offer it as a treatment option to inmates with gender dysphoria. *Id.* This analysis proceeded in two parts.

First, the Fifth Circuit concluded that "where, as here, there is a robust and substantial good faith disagreement dividing respected members of the expert medical community" regarding the propriety of a medical treatment, a prisoner cannot meet the standard of proof as defined by this Court. *Id.* at A11. The court correctly recited that an Eighth Amendment claim has two elements: (1) a serious medical need on the part of the prisoner and (2) a sufficiently blameworthy state of mind on the part of the prison official. *Id.* at A9. Like many courts before it, the Fifth Circuit assumed without deciding that gender dysphoria is a serious medical need requiring treatment. *Id.* at A9.

The Fifth Circuit next considered whether Petitioner had raised a triable question of fact that he could meet the high standard of blameworthiness required by this Court's precedent. *Id.* at A11-A17; *see also Farmer*, 511 U.S. at 837-38. To show that prison officials *must* have known that he needed SRS, Petitioner had asked the district court to consider publicly available materials, most importantly the WPATH standards. *See* ROA.328-46. The Fifth Circuit reviewed those materials as well as others available in the public domain required to put them into context, including all relevant caselaw brought to the court's attention.[5]

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[5] For example, Petitioner provided only excerpts of the WPATH standards, and the Lambda Law brief upon which

The majority concluded that Petitioner had not met his burden of showing that the WPATH guidelines were so well-established that they would support an inference that prison officials acted with deliberate indifference to his gender dysphoria. The majority noted that WPATH itself "acknowledges that 'this field of medicine is evolving.'" Pet. App. A17; *see also* ROA.341. The court concluded that the standards regarding if and when SRS is a medically necessary procedure are "a matter of contention." Pet. App. A18. "Indeed, counsel conceded as much." *Id.* (quoting Oral Arg. 10:50-11:33). In light of the "ongoing medical debate," the Fifth Circuit concluded that Petitioner had not raised a triable issue of fact regarding a necessary element of his claim, namely that the TDCJ officials had subjectively ignored Petitioner's mental distress by "providing him with counseling and hormone therapy" rather than surgery. *Id.* at A19.

Second, the Fifth Circuit majority considered whether Petitioner could establish a claim for "cruel and unusual punishment" based on the original meaning of that clause. In this section of the opinion, the Fifth Circuit assumed that refusal to provide SRS could properly be considered a punishment. *Cf. id*. at A24-A28. The majority, however, concluded that Petitioner could not establish it was "unusual" because "only one state to date, California, has ever provided [SRS] to a prison inmate," and even then only in 2017 and in response to litigation. *Id.* at A27. Refusal to provide a procedure that is similarly refused by forty-nine States could not, the Fifth

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Petitioner relied included only snippets of the documents it purports to quote. See ROA.328-45.

Circuit concluded, be considered "unusual" within the original meaning of that term. *Id.* As Judge Ho succinctly summarized, "it would only be unusual if a prison decided *not* to deny such treatment." *Id. at* A2 (emphasis in original).

Judge Barksdale dissented because, in his view, the district court "awarded summary judgment on a basis not urged" by Respondents without providing Petitioner notice and an opportunity to respond. *Id.* at A28. In the process, Judge Barksdale discussed what he considered to be faults in the district court's opinion, which Petitioner misquotes as a criticism of the majority. *Compare* Pet. 16 *with* Pet. App. A44. Because Judge Barksdale was unsure that the decision reflected "the medical community's current opinion on the necessity of SRS," he would have remanded for further proceedings. Pet. App. A60. The majority acknowledged these concerns and stated that it might have agreed to remand had Gibson and his counsel not forfeited his procedural objections. *Id.* at A7-A8.

SUMMARY OF ARGUMENT

The opinion below is consistent with the holding of virtually every other court to have examined whether the Eighth Amendment requires States to provide a prisoner with SRS, with the original meaning of the terms "cruel and unusual" punishment, and with this Court's precedent.

The clear consensus among federal circuit courts is that the Eighth Amendment does not require States to provide SRS to prisoners. Petitioner asserts a 3-1 (or perhaps 3-2) circuit split in his favor. In reality, the vote

is closer to a 4-1 split against him. One of the Circuits he cites has never addressed the question outside a motion to dismiss, and a second has explicitly backed off the supposed rule he posits since the petition was filed.

This majority rule, adopted by the court below, is correct both under the Eighth Amendment's text and this Court's prior precedent. As the Fifth Circuit ably explained, the text of the Eighth Amendment prohibits punishments only if they are both cruel *and* unusual. Assuming that refusing to pay for a prisoner's SRS is a "punishment," there is nothing unusual about a policy that is applied by forty-nine States. Moreover, under this Court's precedent, a prison official cannot realistically be deemed to be "deliberately indifferent" to a medical need when the appropriate course of treatment is still being studied and debated.

ARGUMENT

I. The Majority of Circuits Addressing the Issue Hold That Prisoners Have No Eighth Amendment Right to Sex-Reassignment Surgery.

Petitioner posits (at 29-30) a 3-2 circuit split on whether the Eighth Amendment guarantees prisoners a right to taxpayer-funded SRS (or at least a right to be evaluated for SRS). At the time his petition was filed, no circuit court had ordered a State to provide the relief he seeks. Two of the courts he cites had never considered the question outside motions to dismiss, and the third did not say what Petitioner asserts (as that court has now made clear). While the Ninth Circuit has now become the first court in the nation to order a State to provide SRS to an inmate, a brand-new circuit split with the Ninth

Circuit reprising its role as outlier hardly counsels this Court's review.

Petitioner offers (at 29-30) three potential circuits that have supposedly found an Eighth Amendment right to be individually evaluated for SRS: the Fourth, Seventh, and Ninth.[6] A closer look reveals something entirely different. Precisely because the Fifth Circuit was correct that treatment protocols for gender dysphoria vary across the country, an exact count is hard to tally. At present, the better view is that there is a 4-1 split against.

Two of the opinions to which Petitioner points were decided at the motion-to-dismiss phase. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (per curiam); *De'lonta v. Johnson*, 709 F.3d 520, 522 (4th Cir. 2013). The courts "express[ed] no opinion on whether SRS [wa]s medically necessary" for anyone or "whether prison officials have other legitimate reasons for denying . . . that treatment." *Rosati*, 791 F.3d at 1040. Nor did they "suggest what remedy [a prisoner] would be entitled to should she prevail." *De'Lonta*, 709 F.3d at 526; *accord Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (noting minimal requirements for pro se inmates to plead Eighth Amendment claim because at pleading stage "the proper application of controlling legal

[6] Petitioner spills a lot of ink to explain why the First Circuit's en banc ruling in *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), is also consistent with his proposed rule. Pet. 25-28. But as Judge Thompson's dissent in *Kosilek* makes clear, it does not. *Id.* at 106-05 (criticizing majority for "in essence creat[ing] a de facto ban on sex reassignment surgery for inmates in this Circuit").

principles to the facts is yet to be determined"). The district court here, too, allowed Petitioner a chance to proceed past the pleadings. It merely held at summary judgment that Petitioner failed to establish a triable issue of fact regarding the blameworthiness of Respondents' actions, and the Fifth Circuit affirmed.[7]

The third case on which Petitioner relies is similarly inapposite. In *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), the Seventh Circuit considered the constitutionality of a Wisconsin statute that flatly prohibited state officers from paying for "'hormonal therapy or sexual reassignment surgery.'" *Id.* at 553 (quoting Wis. Stat. § 302.386(5m)). The Seventh Circuit affirmed the district court's decision that "defendants acted with deliberate indifference" when they "refused to provide *hormone therapy* because of" the statute. *Id.* at 555 (emphasis added). To the extent there was any doubt, since the petition was filed, the Seventh Circuit has clarified that *Fields* did *not* address the constitutionality of a State's decision to provide hormone therapy but not SRS. *Campbell v. Kallas*, 936 F.3d 536, 546 (7th Cir. 2019).

To the contrary, like the Fifth Circuit, the Seventh Circuit recognizes that treatment protocols for SRS are "varied," which precludes finding that refusal to provide a particular treatment violates the Eighth Amendment.

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[7] If the Court is going to consider these decisions to align with the Ninth Circuit (which it should not), it should also count *Farmer*, 163 F.3d 610, and *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996), as aligning with the Fifth. Each rejected an Eighth Amendment claim based on failure to provide a prisoner's preferred treatment for gender dysphoria.

Id. at 548. Providing some treatment that falls within the scope of professional judgment is sufficient. *Id.* ("[P]risons aren't obligated to provide every requested treatment once medical care begins."); *see also* Pet. App. A12. This decision is consistent with First Circuit's ruling in *Kosilek* and the Tenth Circuit's ruling in *Norwood v. Lamb*, 899 F.3d 1159, 1163 (10th Cir. 2018) ("[P]rison officials could not have been deliberately indifferent by implementing the course of treatment recommended by a licensed medical doctor.").

The one outlier is the Ninth Circuit's decision, published after the petition was filed, in *Edmo v. Corizon*. Unlike the earlier *Rosati* opinion, the *Edmo* panel *did* reach the merits of whether the Eighth Amendment compels States to provide SRS to prisoners. 935 F.3d at 796 & n.20 (acknowledging *Rosati* was at motion to dismiss). Unlike here, Idaho did not actually dispute whether there was a difference of opinion regarding the standards of care to be applied to gender dysphoria. *Id.* at 766. First the district court and then the Ninth Circuit simply disagreed with the State's treatment personnel regarding whether the standards were properly applied to the particular inmate. *Id.* at 780-81, 788-92. The Ninth Circuit acknowledged its disagreement with the Fifth Circuit and criticized the Fifth Circuit's decision as based on a "dismaying disregard for procedure." *Id.* at 795.

But it was the Ninth Circuit that demonstrated "dismaying disregard" for the proper role of a federal court in our government system. Relying largely on its own prior precedent, it held that courts "need not defer to the judgment of prison doctors or administrators" in setting

overall health policy within their prison. *Id.* at 786 (quotation marks omitted). Instead, the court stated, judges should determine on a case-by-case basis whether "the treatment decision of responsible prison authorities was medically acceptable." *Id.* The Ninth Circuit cited *Fields* and *De'lonta* as support for that remarkable conclusion and for a rule that requires state officials to provide SRS in appropriate cases. *Id.* at 799. As discussed above, the Fourth and Seventh Circuits have applied no such rule.

Summed up, Petitioner's core claim would not succeed in the First, Fifth, Seventh, or Tenth Circuits. It would succeed only in the Ninth Circuit, and only because of that court's distorted view of the Eighth Amendment. The Ninth Circuit may yet correct its own error, as the defendants in that case have sought rehearing en banc, and their petition remains pending.

II. The Eighth Amendment Does Not Require States to Provide Sex-Reassignment Surgery to Prisoners.

The paucity of authority in Petitioner's favor is because the Fifth Circuit was correct. As the panel's opinion explained, this is not a case about "what alternative medical treatments" state officials "might voluntarily offer to [Petitioner]" and similarly situated prisoners "as a matter of policy or compassion." Pet. App. A3 n.1. This case is about what the Constitution permits federal courts to *require* States to provide. *Id.* Neither the text of the Eighth Amendment nor this Court's prior case law required Texas to provide SRS to prisoners.

A. The Fifth Circuit correctly held that Texas policy, which provides many of WPATH's recommended

treatments, does not run afoul of the text of the Eighth Amendment. Petitioner disparages the Fifth Circuit majority for going "out of its way" to consider a question not raised by the parties and that is unnecessary in light of the Court's prior precedent. Pet. 31. But there is no dispute that Respondents asserted that the Eighth Amendment does not require States to provide SRS. In any event, "[p]arties cannot waive the correct interpretation of the law simply by failing to invoke it." *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2101 n.2 (2015) (Thomas, J., concurring) (citing *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (per curiam)). Furthermore, the first place a court should look in interpreting legal text is the language used and the context in which it was written. *E.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-16 (2019); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality op.); Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304-05 (2017).

As an initial matter, this case is not a good vehicle for addressing whether this aspect of the Fifth Circuit's ruling was in error because it is not clear how a choice between treatment alternatives meets the definition of "punishment." The term "punishment" is generally understood to mean "[a] sanction . . . assessed against a person who has violated the law." BLACK'S LAW DICTIONARY 1353 (9th ed. 2009). Common examples include "a fine, penalty, confinement, or loss of property, right, or privilege." *Id.* That definition has been consistent "from the time of the Founding to the present day." *Farmer*, 511 U.S. at 859 (Thomas, J., concurring) (citing *inter alia* 2 THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE

ENGLISH LANGUAGE (1780)). There is no allegation that TDCJ refused to provide Petitioner with SRS because he committed a crime either before or after he was incarcerated. To the contrary, outside a prison context, SRS is considered elective surgery that is generally available only to the affluent.[8]

Even assuming, as the Fifth Circuit did, that Texas's policy regarding SRS can be considered "punishment," it would violate the Eighth Amendment only if it were "*both* 'cruel *and unusual*'." Pet. App. A24 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012); Akil Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1778 (2011)). There is nothing remotely "unusual" about a policy that provides hormonal therapy for gender dysphoria but does not provide SRS.

Indeed, Petitioner does not challenge that, as a factual matter, SRS is unusual in a prison context. Nor could he. As Petitioner's "counsel has acknowledged, only one state to date, California, has permitted sex reassignment surgery to a prison inmate." Pet. App. A27 (citing Oral Arg. 28:20-53); Pet. 32 & n.26. That did not occur until January 2017, following a district court ruling that California elected not to appeal. Pet. App. at A27

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[8] *See, e.g.*, *Maggert v. Hanks*, 131 F.3d 670, 672 (7th Cir. 1997) ("[M]any state Medicaid statutes contain a blanket exclusion" for SRS.); *Transgender health care*, healthcare.gov/transgender-health-care/ (last accessed Oct. 21, 2019) ("Many health plans are still using exclusions such as 'services related to sex change' or 'sex reassignment surgery' to deny coverage to transgender people for certain health care services. Coverage varies by state.").

n.11. A therapy that every State refused until three years ago and is now permitted in only one is, by definition, "unusual." *See, e.g.*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 2514 (3d ed. 2002) (defining "unusual" as "being out of the ordinary" or "unique").

Instead of directly confronting the Fifth Circuit's reasoning, Petitioner tries to take the question up a level of generality to argue that it would be "unusual" for prison officials to ignore this Court's command "to provid[e] adequate medical care." Pet. 32-33. For the reasons discussed below, the Fifth Circuit's conclusion is consistent with this Court's jurisprudence. And, at a more fundamental level, this rhetorical sidestep is analytically unhelpful because the term "adequate" is neither derived from the Eighth Amendment nor self-defining.

B. In light of the ongoing debates and gaps in medical knowledge about SRS within the medical community, refusal to provide the treatment cannot constitute "deliberate indifference" to a serious medical need as defined by this Court. The "primary concerns of the drafters" of the Eighth Amendment "was to proscribe 'torture(s)' and other 'barbar(ous)' methods of punishment." *Estelle*, 429 U.S. at 102. This Court has expanded that proscription to incidents of imprisonment that are akin to torture because they "involve the unnecessary and wanton infliction of pain." *Id.* at 102-03 (cleaned up) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) and *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). The Court has recognized that this bar may reach (a) serious deprivations of medical care that "actually produce physical torture or a lingering death," or (b) "less serious cases" that "result in pain or

suffering which no one suggest would serve any penological purpose." *Id.* at 103 (quotation marks and citations omitted).

This Court, however, has never held that the Eighth Amendment protects more than "basic health needs." *Brown v. Plata*, 563 U.S. 493, 501 (2011). To the contrary, this Court has stated that not "every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment." *Estelle*, 429 U.S. at 105. Questions about "diagnostic techniques or forms of treatment" are "classic example[s]" of decisions that do *not* "represent cruel and unusual punishment." *Id.* or 107.

Applying this standard, courts have routinely held that an inmate is not entitled to the "best care possible," so long as the prisoner received an "alternative treatment for his" condition. *Rhinehart v. Scutt*, 894 F.3d 721, 750 (6th Cir. 2018) (rejecting claim based on State's failure to provide patient with late-stage liver disease with procedure considered "the 'gold standard' of treatment").[9] Nor may a prisoner dictate his or her preferred treatment. *E.g.*, *Harrison v. Barkley*, 219 F.3d 132, 144 (2d Cir. 2000) (noting that private individuals have a "right to reject a proposed plan of treatment and may

[9] *See also, e.g.*, *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997) (rejecting claim based on failure to prevent tuberculosis infection because "Forbes is not entitled to demand specific care. She is not entitled to the best care possible. She is entitled to reasonable measures to meet a substantial risk of serious harm to her. The defendants have taken those measures."); *Manuel v. Atkins*, 545 F. App'x 91, 94 n.4 (3d Cir. 2013) (per curiam) (applying *Forbes* rule in trauma situation).

demand that elective procedures be performed;" prisoners do not); *Parker v. Gosmanova*, 335 F. App'x 791, 795 (10th Cir. 2009) (rejecting argument that "'prevailing professional norms' dictated a different course of treatment").

Petitioner seeks to expand that proscription by defining "adequate" healthcare to include a right to evaluation of any "potential treatment" when "other treatments provided to [a prisoner] have not worked to cure" a particular mental or physical malady. Pet. 3.

If applied generally, the effect of Petitioner's test would be staggering. As this Court is well aware, States have, at times, struggled to provide health care to the wide variety of inmates in their prisons. *See generally Brown*, 563 U.S. 493. Prison populations are also aging and showing increasing number of complex comorbidities.[10] Cure may not be attainable for many inmates, particularly those with chronic illness or psychological problems. Yet Petitioner asserts that States must provide inmates with every experimental treatment available until such cure is found. Pet. 33-34 (describing this as the "obvious" result under the Court's jurisprudence). Leaving aside the moral implications of a rule that would force States—as a matter of constitutional law—to test new therapies on prisoners, nothing in this Court's prior precedent guarantees an inmate "participation in cutting edge clinical trials," even if they are "the only lifeline left for the critically ill." Pet. 34. *Cf. Hudson v. McMillan*,

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[10] *See generally* Rachel Bedard, et al., *Ageing prisoners: An introduction to geriatric health-care challenges in correctional facilities*, 98 INT'L REV. RED CROSS 917 (2016).

503 U.S. 1, 9 (1992) (recognizing that "society does not expect that prisoners will have unqualified access to health care"); *see also, e.g.*, *Rhinehart*, 894 F.3d at 750.

Petitioner's only argument that a special rule should apply to SRS is that a "reasonable medical consensus supports WPATH" and its announced standards. Pet. 22. Once again, "reasonable medical consensus" is neither derived from the text of the Eighth Amendment nor self-defining. For example, does a "reasonable consensus" mean 90%? 60%? 50%+1? Does the denominator include all doctors or (as appears to be the case here) only those who have chosen to specialize in a particular field? This case involves a complicated set of standards of care.[11] To count toward the numerator, does any particular doctor have to agree with those standards in their entirety, or is substantial agreement enough? Petitioner does not attempt to answer any of these questions.

But even if courts could give meaning to Petitioner's contentless standard, there are three more fundamental reasons why this standard must fail.

First, the presence of a "reasonable consensus" does not guarantee that prison officials who choose to take a contrary view had the requisite state of mind to violate the Eighth Amendment. This Court detailed the mental state required to establish an Eighth Amendment claim in *Farmer v. Brennan*, 511 U.S. 825 (1994). There, the

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[11] *See generally* WPATH, Standards of Care (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf (last accessed Oct. 21, 2019).

Court adopted a standard akin to criminal recklessness, which "generally permits a finding of [liability] only when a person disregards a risk of harm of which he is aware." *Id.* at 837 (citing *inter alia* MODEL PENAL CODE § 2.02(2)(c) & cmt. 3 (AM. LAW. INST. 1985)). Specifically, to be liable, the Court held, a prison official "must *both*": (1) "be aware of facts from which the inference could be drawn of a substantial risk of serious harm exists," and (2) "he must also *draw the inference*." *Id.* (emphasis added). This rule contrasts sharply with civil recklessness, where a person may be found liable for "fail[ing] to act in the face of an unjustifiably high risk of harm that is known or so obvious that it should be known." *Id.* at 836.

Petitioner does not explain how a prisoner can meet that high burden of proof merely by showing that there was a "reasonable consensus" of medical opinion regarding how to treat his medical condition.[12] Assume, for instance, that a "reasonable consensus" of medical opinion means a three-fourths majority similar to the number of States required to amend the Constitution. U.S. CONST. art. V. If 75% of all doctors accept WPATH's standards of care wholesale, that may support an inference that it should have been "obvious" to a prison official that harm might arise if the prison does not adopt WPATH in its entirety. *See Farmer*, 511 U.S. at 837 (discussing standard for civil reckless). But it would say nothing about

[12] That is not to say that a "reasonable consensus" of medical opinion is irrelevant. Petitioner's flaw is that he provides no other evidence in support of his claim of deliberate indifference.

whether the official "dr[e]w the inference," *id.*, when 25% of the doctors in this country would have supported his conclusion. Such an official thus "cannot under [this Court's] cases be condemned as inflicti[ng] punishment." *Id.* at 838. The inferences become even more attenuated if the alleged "reasonable consensus" is limited to the small group of doctors who chose to specialize in treating gender dysphoria and thus may see their role as not just physicians but also advocates. *Cf.* Pet. 35 (acknowledging "political implications to a case like this"); Pet. App. A15 (noting "concerns that later versions of WPATH were driven by political considerations rather than medical judgment").

The Fifth Circuit recognized this when it imposed a rule that forecloses a finding of "intentional or wanton deprivation of care if a genuine debate exists within the medical community about the efficacy of that care," so long as that debate is "substantial" and in "good faith." Pet. App. A10-A11. Applied correctly, Petitioner's example (at 18-19) about vaccines would fail that test. Petitioner argues that the existence of an "anti-vaccination movement" means "there is certainly a 'hot' or 'fierce' debate" within the medical community about the efficacy of vaccines. Pet. 18. That is inaccurate. To the extent that "movement" was ever premised on medical evidence, it came from a single article in *Lancet* that purported to link the MMR vaccine to increased risk of autism.[13] That article would not foreclose an Eighth Amendment claim

[13] A.J. Wakefield, et al., *Illeal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive development disorders in children*, 351 LANCET 637 (1998).

under the Fifth Circuit's test, which acknowledges that "a single dissenting expert" may not "automatically defeat[] medical consensus." Pet. App. A11. The article has also been exposed for deliberate fraud and withdrawn by the very journal that published it.[14] There are undoubtedly circumstances in which a prison may permissibly decline to provide certain vaccinations or related treatments. *See, e.g.*, *Freeman v. Quinn*, No. 09-cv-1055, 2010 WL 2402917, at *2 (S.D. Ill. June 15, 2010); *Maury v. Gomez*, No. C-94-0918, 1994 WL 443707, at *1 (N.D. Cal. Aug. 4, 1994). But a single, discredited dissenting opinion in the face of an overwhelming medical consensus to the contrary generally does not provide a basis to do so.

Similarly unpersuasive is Petitioner's reliance (at 20-21) on *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005). Each of those cases overturned this Court's prior precedent because large numbers of States had changed their practices about imposing capital punishment on individuals with mental disabilities. *See Atkins*, 536 U.S. at 307, 314-15 (overturning *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Roper*, 543 U.S. at 555, 565-66 (reconsidering *Stanford v. Kentucky*, 492 U.S. 361 (1989)). Neither of these opinions forced forty-nine States to change their policies because a politicized subset of the medical community came together and agreed on a particular form of treatment for

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[14] *See, e.g.*, Fiona Godlee, *The Fraud Behind the MMR Scare*, BRITISH MED. J., Mar. 15, 2011, www.bmj.com/342/bmj.c7452; Gardiner Harris, *Journal Retracts 1998 Paper Linking Au-tism to Vaccines*, N.Y. TIMES, Feb. 2, 2010, https://www.ny-times.com/2010/02/03/health/research/03lancet.html.

a mental condition about which even the terminology is in flux and subject to dispute. ROA.329; *see also* Lewis, *supra* n. 3.[15]

Second, unlike the *Lancet* retraction, there has been no defining moment when the entire medical community reached consensus about when SRS may be appropriate in a prison setting (if ever). WPATH is undoubtedly a popular resource for the self-selecting group of physicians who have specialized in gender dysphoria. But Dr. Stephen Levine, a practitioner at the Center for Marital and Sexual Health in Ohio and a neutral expert selected by the district court in *Kosilek*, has explained that WPATH is neither the only acceptable view in the medical community, nor "a politically neutral document" because "WPATH aspires to be both a scientific organization and an advocacy group." *Kosilek*, 774 F.3d at 78; *see also* WPATH, *Mission and Vision*, wpath.org/about/mission-and-vision/. The standards are limited as well due to "lack of rigorous research in the field." *Kosilek*, 774 F.3d at 78.

Judge Barksdale's dissent raised concerns about relying on Dr. Levine's analysis as well as other publicly available material because certain of the material may be out of date. Pet. App. A39-A43. Leaving aside that Petitioner's primary evidence dates from two years before

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[15] Chief Justice Roberts' dissent in *Moore v. Texas*, cited by Petitioner at 20-21, would similarly have deferred to the judgment of a state actor. 137 S. Ct. 1039, 1054 (2017) (warning not to confuse that "clinicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment").

Kosilek was decided, Respondents do not dispute that the record in this case is not as fulsome as it might have been. That is often the case in *pro se* civil-rights suits, and it does not render the Fifth Circuit's decision improper. Courts routinely take judicial notice of public documents for the fact that the documents exist, albeit not for the truth of the matters asserted in the documents. *See, e.g.*, *Hawaii v. Trump*, 859 F.3d 741, 773 n. 14 (9th Cir.) (per curiam) (taking judicial notice of President Trump's statement made via Twitter), *vacated on other grounds*, 138 S. Ct. 377 (2017); *Flight Eng'rs Int'l Ass'n, AFL-CIO, TWA Chapter v. Trans World Airlines, Inc.*, 305 F.2d 675, 679 (8th Cir. 1962) ("tak[ing] judicial notice of the fact that a dispute presently exists"). The Fifth Circuit majority did precisely that here: Unlike the Ninth Circuit, the majority did not purport to decide which side of the ongoing debate about the treatment of gender dysphoria was right as a medical matter. *Compare Edmo*, 935 F.3d 786-87, *with* Pet. App. A3 n.1. Instead, the Fifth Circuit merely concluded that the existence of that debate precludes a finding of liability under the Eighth Amendment. Pet. App. A10.

And publicly available documents confirm that the concerns raised by Dr. Levine in 2014 have not disappeared in the last five years. In particular, Dr. Levine's primary criticism focused on the "'large gaps' [that] exist in the medical community's knowledge regarding the long-term effects of [SRS] and other [GID] treatments." *Id.* A15-16. WPATH excerpts submitted by Petitioner to the district court acknowledge those gaps. Indeed, WPATH cited problems with the scientific community's data to dismiss "troubling report[s]" about "lower scores

on quality of life" for patients like Petitioner "than for the general population," and a Swedish study that "found that individuals who had received sex reassignment surgery . . . had significantly higher rates of mortality, suicide, suicidal behavior, and psychiatric morbidity." ROA.342. While this document was published in 2012, documents on WPATH's website confirm that these gaps have not closed in the intervening time.[16]

The gaps in the medical community's knowledge are particularly large and concerning when it comes to whether SRS should be permitted in a prison setting. As Petitioner acknowledges (at 3 & n.2), WPATH recommends a "triadic sequence" of treatments. SRS, which is irreversible, is the last step in that sequence. The first is for a patient to live as the desired gender for twelve months to internalize the "profound personal and social consequences" of changing gender, including "familial, interpersonal, educational, vocational, economic, and legal challenges." WPATH, *supra* n. 11, at 61.

A "real-life" experience of the type contemplated by WPATH is not feasible in a correctional facility where inmates are, by long-standing practice, segregated by biological sex and kept away from the ordinary social sphere. *Farmer*, 511 U.S. at 829-30 (discussing such practices at federal prisons). As Cynthia Osborne, a

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[16] *See* WPATH, Response to Open Letter from WPATHopenletter@gmail.com, May 30, 2018, https://www.wpath.org/media/cms/Documents/Public%20Policies/2018/5_May/WPATH%20Response%20to%20Open%20Letter.pdf (acknowledging ongoing difficulties in obtaining cooperation in conducting research).

consultant who works with prisons on gender-dysphoria issues, has explained, "'[m]any gender dysphoria experts believe that the challenges of completing a valid real-life experience . . . present a formidable obstacle'" to fully implementing the WPATH criteria. *Campbell*, 936 F.3d at 541 (alterations in original). This is not because a policy forbids SRS, but because an inmate cannot complete the medically recommended precursors. *Id.* Petitioner has offered no evidence that a consensus of medical authority would support allowing a prisoner to the take the irreversible step of undergoing SRS without spending at least some time living in the community as the desired gender.

Petitioner himself has not completed this part of WPATH's "triadic sequence." Petitioner claims that he has been living "openly as a female for over twenty years." Pet. 4. It is unclear, however, what he means. One of his complaints has always been that he was denied access to the items he deems necessary for a "real-life experience" as a woman. *Id.* at 6-7. But he cannot mean "present[ing] consistently, on a day-to-day basis across all settings of life, in [his] desired gender role." WPATH, *supra* n. 11, at 61 (citing as examples "family events, holidays, vacations, season-specific work or school experiences"). As an initial matter, he is in prison, which hardly represents "all settings of life." *Id.* Moreover, he has not even "present[ed] consistently" as a woman on a "day-to-day basis" in *his* setting of life, *id.*, because prison staff cannot allow Petitioner "to carry [him]self in any manner that would be disruptive" to the prison's all-male environment. Pet. App. A71.

Third, Petitioner has not established that TDCJ's policy serves no legitimate "penological purpose" as required by *Estelle*, 429 U.S. at 103. When TDCJ officials make decisions about medical care for inmates—both at the policy and individual levels—they *must* take into account that the facilities they manage are populated with "persons with demonstrated proclivities for antisocial criminal, and often violent, conduct." *Farmer*, 511 U.S. at 831, 833 (cleaned up) (discussing rape of transgender inmate "who 'projects feminine characteristics'").

Refusal to grant SRS to a particular individual may seem to some to be lacking in compassion. But TDCJ is charged with not only providing Petitioner constitutionally sufficient medical care, but also with taking action to protect him from "being violently assaulted," which "is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Id.* at 834 (quoting *Rhodes v. Chapman*, 542 U.S. 337, 347 (1981)). "'[T]here is no empirical evidence on which" prisons "can rely in [their] efforts to predict outcomes, prevent harm[,] and maintain safety' in developing a real-life experience" or caring for a transgender inmate post-surgery. *Campbell*, 936 F.3d at 541 (quoting Osborne). As it is, Petitioner complains that he is "often depressed because of frequent requests of a sexual nature from other inmates." Pet. App. A69. It is hardly unreasonable to think that such requests would become more frequent and even escalate to violence if TDCJ were to allow Petitioner to present as a woman without restriction in a men's facility. *Cf. Farmer*, 511 U.S. at 830-31.

Moreover, it is not as simple as moving Petitioner to a different prison because Petitioner is not the only

prisoner whose behavior and interests are implicated. For example, in *Kosilek*, Massachusetts faced the question of where to house a pre-surgical transgender inmate serving a life sentence for brutally murdering his wife. 774 F.3d at 69. Because a segregated unit for transgender inmates was not practical due to census issues, *id.* at 74, Massachusetts had two main options post-surgery (1) house him in the general population of a female prison, or (2) place him in long-term solitary confinement, *id.* The State reasonably concluded that the former presented an unacceptable security risk in light of the large number of inmates at the women's prison who were victims of domestic violence. *Id.* at 82. The latter ran the risk of exacerbating that particular prisoner's mental-health problems. *Id.* at 74. The First Circuit correctly upheld the denial of that inmate's request for SRS as a valid exercise of discretion, notwithstanding allegations (like those faced by the Fifth Circuit) that doing so would create a blanket ban on the procedure. *Id.* at 92-93.

Petitioner bemoans that this outcome would leave prisoners' medical care largely in "the hands of the [S]tates." *See* Pet. 17. This is a feature of the Fifth Circuit's approach, not a bug, and is entirely consistent with this Court's caselaw. This Court's Eighth Amendment jurisprudence permits federal intervention only in the most egregious cases. For example, Petitioner praises California as having developed "state-of-the-art protocols" for treatment of gender dysphoria. Pet. 32 n.26. This Court has, however, previously found systemic Eighth Amendment violations in California prisons where medical facilities were running at 300% capacity,

and psychiatric patients had been made to stand in their urine. *Brown*, 563 U.S. at 504, 521. Nonetheless, the Court cautioned, outside that type of extreme circumstance, courts "need [to] defer[] to experienced and expert prison administrators faced with the difficult and dangerous task of housing large number of convicted criminals." *Id.* at 511. *Contra Edmo*, 935 F.3d at 786 ("'[W]e need not defer to the judgment of prison doctors or administrators.'") (quoting *Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989)).

Texas's decision to treat inmates complaining of distress associated with gender dysphoria with a combination of psychological and hormone therapy rather than the full "triadic sequence" recommended by WPATH is not one of extreme circumstances that justify federal intervention under the text of the Eighth Amendment or this Court's jurisprudence.

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CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

LANORA C. PETTIT
Assistant Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

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