No. 19-1280

In the Supreme Court of the United States

THE IDAHO DEPARTMENT OF CORRECTION; HENRY ATENCIO, in his official capacity as Director of the IDOC; JEFF ZMUDA, in his official capacity as Deputy Director of the IDOC; AL RAMIREZ, in his official capacity as Warden of the Idaho State Correctional Institution; and SCOTT ELIASON, M.D.,

Petitioners,

v.

ADREE EDMO, aka Mason Edmo,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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IF THIS APPEAL IS NOT MOOT, THE COURT SHOULD GRANT THE PETITION.

In the contemporaneously filed Suggestion of Mootness, Petitioners inform the Court that this appeal is now moot because the injunction at issue has been fully and irrevocably carried out. Consequently, and consistent with this Court's standard practice, the Court should dismiss the appeal as moot and vacate those portions of the lower courts' orders and judgment that issued and affirmed the injunction against Petitioners. Yet, in the event this appeal is not moot, the Court should grant certiorari.

In her Brief in Opposition ("Opp."), Respondent suggests incorrectly that the appeal is not moot and argues certiorari should be denied on other grounds. Respondent primarily argues that the Ninth Circuit's decision is "fact-bound" and does not establish any far-reaching legal principles that impact future cases. To the contrary, as Judge O'Scannlain correctly pointed out, "[f]ar from rendering an opinion 'individual to Edmo' that 'rests on the record,' . . . , the panel entrenches the district court's unfortunate *legal* errors . . . ." Appendix to the Petition ("App."), 36 (citations omitted) (emphasis added). The Ninth Circuit's decision implicates broad constitutional questions. Under the Ninth Circuit's decision, prison medical providers violate the Eighth Amendment when they recommend treatment for gender dysphoria that is contrary to the WPATH Standards, even though the WPATH Standards are controversial and not universally accepted in the medical community.

Moreover, the Ninth Circuit concluded that mere medical malpractice constitutes an Eighth Amendment violation when it held Dr. Scott Eliason was deliberately indifferent without consideration of whether he actually knew the recommended course of treatment would be inappropriate and, further, without consideration that Dr. Eliason balanced the competing risks in deciding upon the course of treatment. These new rules have broad constitutional implications and conflict with the decisions reached by other circuit courts and this Court.

I. PETITIONERS' FIRST QUESTION PRESENTED INVOLVES IMPORTANT CONSTITUTIONAL ISSUES THAT REACH FAR BEYOND THE SPECIFIC FACTS OF THIS CASE.

On a fundamental level, the primary issue in this case is whether a prison medical provider inflicts cruel and unusual punishment when the provider recommends a course of treatment for gender dysphoria that is contrary to the WPATH Standards. That question has arisen with increasing frequency in circuit courts across the country. In the last few years, the First, Fifth, Tenth, and Eleventh Circuits have all concluded the answer is no. That is, a prison medical provider who recommends a course of treatment contrary to the WPATH Standards does not commit cruel and unusual punishment. Petition for Writ of Certiorari ("Petition"), 18-22. In direct contrast, the district court and the Ninth Circuit held in this case that the WPATH Standards set the constitutional minima for the treatment of gender dysphoria in

prison. They did this by holding that Dr. Eliason inflicted cruel and unusual punishment when he recommended a course of treatment contrary to the WPATH Standards and rejecting the testimony of Defendants' experts because their opinions were not consistent with the WPATH Standards. App. at 111, 117 (holding the district court "appropriately used [the WPATH Standards] as a starting point to gauge the credibility of each expert's testimony" and holding Dr. Eliason inflicted cruel and unusual punishment when he "did not follow [the WPATH Standards] in rendering his decision").

Respondent unsuccessfully tries to distinguish the Ninth Circuit's decision from the decisions reached by other circuit courts. For example, Respondent attempts to distinguish the Fifth Circuit's decision in *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019) from this case because it involved a blanket policy ban on sex reassignment surgery ("SRS").[1] Opposition, 24. But, in that case, the Fifth Circuit held that a blanket ban on sex reassignment surgery was acceptable under the Eighth Amendment and reasoned that courts should not take sides in the ongoing medical debate regarding the treatment of gender dysphoria. *Gibson*, 920 F.3d at 220-21. That the Fifth Circuit took its analysis one step further and held that sex reassignment surgery is not required by the Eighth Amendment does not render the Fifth Circuit's refusal to adopt the WPATH Standards as constitutional minima any less meaningful. *Id*. at 215. Moreover, the conflict with the Fifth Circuit comes

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[1] Another term for "sex reassignment surgery" ("SRS") also used by the lower courts is "gender confirmation surgery" ("GCS").

to a head when it directly addressed the injunction issued in this case and stated, "the judgment of the district court in *Edmo* should not survive appeal." *Gibson*, 920 F.3d at 225. Thus, the Ninth Circuit's decision in this case created a clear circuit split.

Respondent's attempt to distinguish this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979) is similarly unavailing. In *Bell*, this Court held that while standards promulgated by professional groups and organizations, such as WPATH, "may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." 441 U.S. at 543 n. 27 (rejecting the argument that prison personnel must follow the standards set forth in the American Public Health Association's Standards for Health Services in Correctional Institutions). Respondent argues that the Ninth Circuit merely held the WPATH Standards were "instructive." Opp. 27. Respondent misconstrues the Ninth Circuit's decision. The Ninth Circuit explicitly held that the WPATH Standards were the "starting point." The Ninth Circuit's analysis has rendered any treatment recommendation that contradicts the WPATH Standards a violation of the Eighth Amendment. App. at 111 and 117. Thus, the Ninth Circuit's decision violates *Bell*.

Respondent wrongly claims the lower courts did not hold the WPATH Standards constitute the constitutional minima for the treatment of gender dysphoric inmates. In fact, Dr. Eliason's supposed failure to follow the WPATH Standards was the exact

reason given by the district court for concluding Dr. Eliason was deliberately indifferent:

> Defendants' sole evaluation of Ms. Edmo for surgery prior to this lawsuit failed to accurately apply the WPATH Standards of Care. Specifically, Dr. Eliason's assessment that Ms. Edmo did not meet medical necessity for surgery did not apply the WPATH criteria.

App. at 195. On appeal, the Ninth Circuit likewise held that a prison medical provider violates the Eighth Amendment if the provider's treatment recommendation "contradicts" or "d[oes] not follow" the WPATH Standards. App. 113, 117 ("Dr. Eliason . . . did not follow the accepted standards of care in the area of transgender health care, nor did he reasonably deviate from or flexibly apply them."). Thus, under the Ninth Circuit's flawed decision, the WPATH Standards are the constitutional minima.

Respondent also wrongly suggests that Petitioners conceded before the lower courts that the WPATH Standards constitute the applicable standard of care. Opp. at 14. Petitioners neither contended nor admitted that prison medical doctors were required to base their treatment decisions on the WPATH Standards. Rather, Petitioners presented evidence and repeatedly argued at the district court and on appeal that the WPATH Standards did not represent a controlling, or even reliable, standard of care.[2] *See* Petition, at 18 n. 7; *see*

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[2] Respondent also misrepresents that all the expert witnesses endorsed the WPATH Standards as the applicable standard of care. Petitioners' expert, Dr. Garvey, identified the WPATH

also ER 1003 (Tr. 25:19-21) ("Now, we need to understand when surgery is appropriate. There are no universal standards out there. The area here is rapidly evolving."); ER 084 ("Given the flexibility of the WPATH guidelines and their deficiencies, medical and mental health providers can look to other resources of guidance on providing treatment and care."); ER 3388 ("Corizon Defendants [including Dr. Eliason] dispute that the WPATH establishes the applicable standard of care in treating [gender dysphoric] patients and, more specifically, in treating Plaintiff."); ER 381-82 (Tr. 687:25-688:1) ("There is a lack of clarity as to the applicability of standards and how to apply them in the correctional setting."); Def.-Appellants' Jt. Opening Br., No. 19-35019 (9th Cir. Mar. 6, 2019), Dkt. 13, at 45-46). Therefore, contrary to Respondent's assertions, Petitioners have maintained throughout this case that the WPATH Standards are not the accepted standard of care, let alone the constitutional minima for the treatment of gender dysphoria.

Finally, Respondent incorrectly argues the Ninth Circuit's opinion "turned not on the WPATH Standards, but on deference to 'the district court's extensive factual findings.'" Opp. at 2. Not so. "[T]he district court's conclusion that the facts . . . demonstrate an Eighth Amendment violation is a question of law that [the Ninth Circuit] review[s] de novo." *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir.

Standards' shortcomings and testified that this supported looking to other resources and the exercise of medical judgment. ER 225-28 (Tr. 531:5-534:7). WPATH is far from being universally adopted as Respondent would like this Court to believe.

2002). Thus, the district court's conclusion that failing to follow the WPATH Standards constituted cruel and unusual punishment was subject to no deference. The fatal error in the Ninth Circuit's analysis was the game-changing legal standard that it adopted and applied to the district court's factual findings. The Ninth Circuit's holding that prison medical care that conflicts with the WPATH Standards violates the Eighth Amendment is not limited to the specific facts of this case. By using the WPATH Standards to set the constitutional minima for treatment of gender dysphoria in constitutional claims, the Ninth Circuit created a circuit split and adopted law that is contrary to this Court's precedents. The Ninth Circuit's new legal standard will be applied throughout the Circuit in case after case, regardless of the individual facts of each case. This Court should grant certiorari.

II. THE COURT SHOULD GRANT CERTIORARI ON THE SECOND QUESTION PRESENTED BECAUSE THE NINTH CIRCUIT'S DECISION IGNORES THIS COURT'S PRECEDENT.

The Ninth Circuit and Respondent ignore the bedrock tenets of this Court's Eighth Amendment jurisprudence. "The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'" *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Consequently, "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. Medical malpractice does not become a constitutional violation merely because the victim is a

prisoner." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Instead, medical treatment violates the Eighth Amendment only if the medical provider displays *deliberate* indifference to a prisoner's serious illness or injury. *Id.*

A medical provider displays deliberate indifference only if the provider "knows of and disregards an excessive risk to inmate health or safety; the [provider] must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the provider] must also draw the inference." *Farmer*, 511 U.S. at 837. In other words, the plaintiff must show that the provider acted with "subjective recklessness." *Id.* at 839-40. A good faith belief that medical care is appropriate immunizes a medical provider from liability under the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

A complete failure to treat a prisoner's serious medical need may demonstrate subjective recklessness. *Estelle*, 429 U.S. at 103. However, choosing between alternative treatment options, even if that decision is objectively wrong, "does not represent cruel and unusual punishment." *Id.* at 107 ("[T]he question whether . . . additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment."). As a result, negligently refusing to provide treatment, even when that treatment would alleviate "the daily pain and suffering [the prisoner] was experiencing" does not violate the Eighth Amendment. *Id.* "At most it is medical

malpractice, and as such the proper forum is the state court . . . ." *Id.*

Contrary to this Court's precedent, the Ninth Circuit held Dr. Eliason was deliberately indifferent merely because his treatment recommendation conflicted with the WPATH Standards. Petition at 25–33. Critically, the district court and the Ninth Circuit never determined Dr. Eliason was subjectively aware that sex reassignment surgery was the only medically-appropriate treatment option for Ms. Edmo. Indeed, the Ninth Circuit held that Defendants "misstate[d] the standard" when Defendants argued Dr. Eliason did not act with deliberate indifference because he did not know the "recommended course of treatment was medically inappropriate." App. at 122. Under the Ninth Circuit's flawed reasoning, a prison medical provider who recognizes a serious medical need but then negligently provides treatment[3] violates the Eighth Amendment. The Ninth Circuit's holding is directly contradicted by this Court's precedent: "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Whitley*, 475 U.S. at 319.

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[3] Petitioners do not admit Dr. Eliason's care was negligent and, in fact, contend it was medically appropriate.

In support of the Ninth Circuit's misguided legal standard, Respondent cites *Farmer* for the proposition that a prison official need not know that harm actually will befall the inmate as long as the prison official knows of a significant risk of harm. Opp. at 29–30. Respondent's argument completely misses the point. In *Farmer*, this Court distinguished between knowledge of certain harm and knowledge of a significant risk of harm. *Farmer*, 511 U.S. at 842. This Court held that knowledge of certain harm is not required to show an Eighth Amendment violation—"it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* Consequently, in the medical context, the inquiry is whether the medical provider knew the recommended course of treatment created "a substantial risk of harm" to the inmate compared to an alternative treatment. But the prison medical provider must actually *know* that the recommended course of treatment creates such a risk compared to an alternative course of treatment; negligence is not enough. *See id.* (holding "the [provider] must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and [the provider] must also draw the inference*") (emphasis added)); *Whitley*, 475 U.S. at 319. As this Court has clearly stated, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle*, 429 U.S. at 106. The Ninth Circuit's decision contradicted this precedent.

Recognizing the weakness of her argument, Respondent makes an extraordinary misrepresentation of the record by claiming "the district court found that

Dr. Eliason knew of the substantial 'risks of not providing GCS [gender confirmation surgery] to Ms. Edmo,' including 'surgical self-treatment, emotional decompensation, and risk of suicide given her high degree of suicide ideation.'" Opp. at 30. Respondent is flatly wrong; that finding is nowhere in the district court's order despite Respondent's attempt to create it out of whole cloth. The district *never* found Dr. Eliason knew of those risks; the district court merely found that those risks were present in the abstract. App. at 183. In other words, the district court never found that Dr. Eliason knew his treatment recommendation of hormone therapy and counseling created a significant risk of harm compared to the alternative of sex reassignment surgery. The Ninth Circuit attempted to rectify the district court's error and, in doing so, created a significantly watered-down Eighth Amendment standard that directly conflicts with this Court's precedent. Thus, the Court should grant certiorari.

CONCLUSION

This appeal is now moot because the injunction at issue has been fully and irrevocably carried out. Thus, pursuant to this Court's standard practice, the Court should vacate the lower courts' orders and judgment against the Petitioners as requested in the Suggestion of Mootness. In the alternative, in the event the appeal is not moot, this Court should grant Certiorari. The Ninth Circuit's decision creates new constitutional standards that will apply in many future cases—standards that conflict with decisions reached

by other circuit courts and with this Court's prior precedent.

Respectfully submitted,

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