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The Eighth for *Edmo*: Access to Gender-Affirming Care in Prisons

John Ferraro
Boston College Law School, john.ferraro@bc.edu

THE EIGHTH FOR *EDMO*: ACCESS TO GENDER-AFFIRMING CARE IN PRISONS

Abstract: In 2019, the U.S. Court of Appeals for the Ninth Circuit in *Edmo v. Corizon, Inc.* held that a prison's denial of gender confirmation surgery to a transgender prisoner constituted cruel and unusual punishment under the Eighth Amendment. In doing so, the Ninth Circuit contravened a U.S. Court of Appeals for the Fifth Circuit decision on similar facts. This Comment argues that the Ninth Circuit's approach was correct, as that court properly applied Eighth Amendment precedent to assess the quality of care provided to address a prisoner's serious medical need.

INTRODUCTION

The Eighth Amendment limits the government's ability to impose disproportionately harsh punishments on persons accused or convicted of a crime.[1] The Amendment's prohibition of cruel and unusual punishment usually evokes ideas of medieval torture.[2] But the Amendment is also applied to uphold the dignity of incarcerated persons.[3] This includes the provision of medical care.[4] Courts have routinely held that the denial of adequate medical care to incarcerated persons cruelly inflicts pain and serves no legitimate penological purpose.[5]

In 2002, a federal district court considered medical care under the Eighth Amendment in a novel context: the provision of gender-affirming care for incarcerated transgender persons.[6] In 2019, the U.S. Court of Appeals for the

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[1] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[2] *See* Robinson v. California, 370 U.S. 660, 675–76 (1962) (Douglas, J., concurring) (recounting historic non-capital punishments with similar disapproval); Wilkerson v. Utah, 99 U.S. 130, 135 (1878) (describing historic methods of execution considered "atrocities").

[3] *See* Brown v. Plata, 563 U.S. 493, 510 (2011) (discussing human dignity and respect as underlying rationales for the Eight Amendment ban on cruel and unusual punishment); Furman v. Georgia, 408 U.S. 238, 271, 273 (1972) (Brennan, J., concurring) (discussing the need for punishments to be commensurate with the crime committed, otherwise a prisoner's dignity is threatened).

[4] Estelle v. Gamble, 429 U.S. 97, 103 (1976) (holding prison authorities have an obligation to provide adequate medical care under the Eighth Amendment).

[5] *See, e.g.*, Harris v. Hegmann, 198 F.3d 153, 159 (5th Cir. 1999) (holding that a prison's failure to promptly and adequately treat an inmate's broken jaw violated the Eighth Amendment).

[6] *See* Kosilek v. Maloney (*Kosilek I*), 221 F. Supp. 2d 156, 159 (D. Mass. 2002) (challenging a state corrections agency's denial of gender-affirming care). *Kosilek v. Maloney*, a case that the U.S. District Court for the District of Massachusetts decided in 2002, as well as its progeny, center on Eighth Amendment violations resulting from denial of gender-affirming medical care in prisons. *See id.* (discussing application of the Eighth Amendment in the context of gender-affirming care in prisons); *see, e.g.*, Edmo v. Corizon, Inc., 935 F.3d 757, 786 (9th Cir. 2019) (per curiam) (reviewing the constitutionality of a prison's denial of gender confirmation surgery), *cert. denied*, 141 S. Ct. 610

Ninth Circuit held in *Edmo v. Corizon, Inc.* that it was cruel and unusual punishment for a state prison authority to deny access to gender confirmation surgery (GCS) to Adree Edmo, an incarcerated transgender woman.[7] As a result, Edmo became the first incarcerated person in the country to be provided access to GCS under a court order.[8] This decision stood diametrically opposed to a decision of the U.S. Court of Appeals for the Fifth Circuit on nearly identical facts.[9]

Part I of this Comment provides the legal and factual context in which *Edmo* arose.[10] Part II examines conflicting holdings across the First, Fifth, and Ninth Circuits on whether, and under what circumstances, prisons can legally deny GCS.[11] Finally, Part III argues that the Ninth Circuit properly applied

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(2020). Some existing scholarship and jurisprudence criticize the treatment of transgender issues in an exclusively medical framework. *See* Esiman Agbemenu, *Medical Transgressions in America's Prisons: Defending Transgender Prisoners' Access to Transition-Related Care,* 30 COLUM. J. GENDER & L. 1, 3 (2015) (questioning the validity of framing gender-affirming care for incarcerated transgender persons solely in the Eighth Amendment context). Especially in light of the Supreme Court's 2020 decision in *Bostock v. Clayton County*, there are likely other claims arising under the Fourteenth Amendment or statutory civil rights protections that would provide a legal basis for arguing that the denial of gender confirmation surgery (GCS) in prisons constitutes discrimination. *See* 140 S. Ct. 1731, 1740 (2020) (interpreting "sex discrimination" to include discrimination on the basis of gender identity or sexual orientation). These analyses would focus on discrimination on the basis of sex rather than the quality or nature of the care given. *See id.* (holding that a valid cause of action for discrimination on the basis of gender identity exists under civil rights law). Federal courts have had little opportunity to rule meaningfully on this line of analysis. *See* Christina Zhang, *Biopolitical and Necropolitical Constructions of the Incarcerated Trans Body*, 37 COLUM. J. GENDER & L. 257, 259 (2019) (discussing case law focusing on the Eighth Amendment). Thus, this Comment confines itself to an evaluation of existing Eighth Amendment jurisprudence. *See infra* notes 124–157 and accompanying text (discussing the outcomes of varying Eighth Amendment claims pertaining to the provision of GCS). This Comment should not be read, however, as an endorsement of the notion that severe gender dysphoria is a necessary prerequisite for GCS. *See infra* notes 13–123 and accompanying text (discussing relevant precedent for a claim of inadequate medical care under the Eighth Amendment).

[7] *Edmo*, 935 F.3d at 767.

[8] *See id.* (holding that the prison is constitutionally bound to provide GCS); James Dawson, *Supreme Court Rejects Transgender Inmate Case. What Does That Mean for Adree Edmo?,* BOISE STATE PUB. RADIO (Dec. 11, 2019), https://www.boisestatepublicradio.org/post/supreme-court-rejects-transgender-inmate-case-what-does-mean-adree-edmo#stream/0 [https://perma.cc/5DFV-4M73] (providing background information about Edmo's circumstances and her legal proceedings).

[9] *Compare Edmo*, 935 F.3d at 767 (discussing the denial of GCS to an incarcerated transgender woman diagnosed with gender dysphoria and holding the denial unconstitutional), *with* Gibson v. Collier, 920 F.3d 212, 215–16 (5th Cir.) (holding that the denial of GCS to an incarcerated transgender woman with gender dysphoria can never be unconstitutional), *cert. denied*, 140 S. Ct. 653 (2019). In both cases, a transgender woman plaintiff sued a state prison authority for denial of GCS. *Edmo*, 935 F.3d at 772; *Gibson*, 920 F.3d at 216. Both women had been diagnosed with gender dysphoria and had histories of self-harm resulting from gender dysphoria. *Edmo*, 935 F.3d at 772; *Gibson*, 920 F.3d at 216. Both the First and Fifth Circuits analyzed the claims under the same Eighth Amendment framework but reached disparate outcomes. *See Edmo*, 935 F.3d at 767 (holding that the denial of GCS was unconstitutional under the Eighth Amendment); *Gibson*, 920 F.3d at 216 (holding that the denial of GCS can never be unconstitutional under the Eighth Amendment).

[10] *See infra* notes 13–63 and accompanying text.

[11] *See infra* notes 64–123 and accompanying text.

legal precedent and medical consensus to a transgender plaintiff's specific circumstances when it held denial of GCS was unconstitutional.[12]

I. The Legal Landscape of Gender-Affirming Care in Prisons

In 2019, the U.S. Court of Appeals for the Ninth Circuit held in *Edmo v. Corizon, Inc.* that denying a transgender inmate GCS violated the Eighth Amendment.[13] Section A of this Part discusses the legal background that informed the Ninth Circuit's ultimate holding.[14] Section B provides the factual and procedural background of *Edmo*.[15]

A. The Eighth Amendment and Medical Care in Prisons

The Eighth Amendment's proscription of cruel and unusual punishment is central to the American legal system.[16] The U.S. Supreme Court has applied the Amendment to find characteristically barbaric punishments, such as hard labor while shackled in irons or the death penalty for minors or mentally handicapped persons, to be cruel and unusual.[17] As such, these punishments, and other punishments like them, are unequivocally unconstitutional.[18]

Underpinning the Amendment are ideas of dignity, humanity, and decency.[19] Its application is informed by ever-changing judicial standards that ensure incarcerated persons are not subjected to extreme anguish.[20] As such, the

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[12] *See infra* notes 124–157 and accompanying text.

[13] Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019) (per curiam), *cert. denied*, 141 S. Ct. 610 (2020).

[14] *See infra* notes 16–35 and accompanying text.

[15] *See infra* notes 36–63 and accompanying text.

[16] *See* U.S. Const. amend. VIII (barring cruel and unusual punishment). The Eighth Amendment directly constrains the federal government, but the Fourteenth Amendment extends its mandates to states as well. Robinson v. California, 370 U.S. 660, 666–67 (1962); *see* U.S. Const. amend. XIV (barring states from acting in a manner that infringes on constitutional rights).

[17] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the death penalty for minors is cruel and unusual); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the death penalty for mentally disabled persons is cruel and unusual); Weems v. United States, 217 U.S. 349, 382 (1910) (holding that the use of hard labor in chains as a punishment is cruel and unusual).

[18] *See* U.S. Const. amend. VIII (barring cruel and unusual punishment); *Roper*, 543 U.S. at 578 (holding that the death penalty for minors is unconstitutional); *Atkins*, 536 U.S. at 321 (holding that the death penalty for mentally disabled persons is unconstitutional); *see, e.g.*, Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909) (holding that excessive fines are unconstitutional under the Eighth Amendment).

[19] Brown v. Plata, 563 U.S. 493, 510 (2011) (emphasizing the importance of human dignity in assessing an Eighth Amendment claim). *See generally* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. Pa. L. Rev. 169 (2011) (discussing how concepts of dignity inform constitutional jurisprudence).

[20] *See* Trop v. Dulles, 356 U.S. 86, 101–02 (1958) (plurality opinion) (discussing with disapproval punishments that inflict extreme physical or emotional pain and dehumanize individuals). The Supreme Court has held that the Eighth Amendment's scope is "not static." *Id.* at 100–01. Lower courts have echoed these sentiments. *See, e.g.*, Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (empha-

Amendment is not limited to prohibiting torture or punishments inflicting physical pain.[21] Rather, the Supreme Court has broadly applied it to forbid punishments that are more psychological in nature as well.[22]

In 1976, in *Estelle v. Gamble*, the Supreme Court first considered the denial of medical care vis-à-vis the Eighth Amendment and held that the government must provide medical care to address the serious medical needs of incarcerated persons.[23] Failure to do so, the Court reasoned, could result in needless pain and suffering in violation of the Eighth Amendment.[24] Specifically, *Estelle* gave rise to a "deliberate indifference" framework for incarcerated plaintiffs contesting the denial of medical care.[25] The deliberate indifference framework is a two-prong test.[26] Plaintiffs must allege (1) a serious medical need, and (2) that prison officials who were both aware of that need and capable of addressing it did not do so.[27] Plaintiffs demonstrate the first prong, serious medical need, by showing that unnecessary pain will result from either no medical treatment or substandard medical treatment.[28] After satisfying the

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sizing dignity and flexible standards of decency). *See generally* Dennis J. Baker, *Constitutionalizing the Harm Principle*, 27 CRIM. JUST. ETHICS 3, 10 (2008) (drawing parallels between evolving Eighth Amendment standards and the evolving scope of rights protected under other amendments).

[21] *See* Harmelin v. Michigan, 501 U.S. 957, 995–96 (1991) (holding that disproportionately long prison sentences are unconstitutional); *Trop*, 356 U.S. at 101 (holding that denaturalization is an unconstitutional punishment, regardless of its nonphysical nature).

[22] *See Trop*, 356 U.S. at 102 (discussing the profound negative psychological impact of denaturalization). In 1958, in *Trop v. Dulles*, for example, the U.S. Supreme Court specifically struck down revocation of citizenship as a form of punishment. *Id.* Similarly, the Supreme Court has also found that sentences disproportionate to the crimes committed can be unconstitutional in some instances. *Harmelin*, 501 U.S. at 995–96 (holding that a life sentence for a drug possession charge was unconstitutionally harsh); Solem v. Helm, 463 U.S. 277, 303 (1983) (same). Beyond intentionally inflicted punishment, the Supreme Court has also used the Eighth Amendment to assess prison conditions. *Brown*, 563 U.S. at 544–45. The Supreme Court held that an overcrowded prison was just as serious of an Eighth Amendment violation as the denial of medical care. *Id.* at 525. In both instances, prison officials' actions caused needless suffering to prisoners. *Id.*

[23] Estelle v. Gamble, 429 U.S. 97, 103 (1976) (noting that incarcerated persons are unable to provide for some of their own needs and must rely on prison authorities to do so).

[24] *Id.* at 104, 106.

[25] *Id.* at 106.

[26] *Id.* The Supreme Court has used the "deliberate indifference" nomenclature in a variety of other contexts, from prison conditions to institutional liability for sexual harassment. *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999) (using the deliberate indifference framework to assess a school's response to a student's allegations of sexual harassment).

[27] *See Estelle*, 429 U.S. at 106 (setting forth both prongs of the deliberate indifference test); Leavitt v. Corr. Med. Servs., 645 F.3d 484, 497 (1st Cir. 2011) (reaffirming and applying the two prongs of the *Estelle* test).

[28] *See, e.g.*, Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (holding that a prison was liable to an inmate who was not seen by physicians for a thumb fracture for several months following an injury). There is no strict definition of what constitutes "substandard" medical treatment; rather, this is a fact-dependent analysis for which courts will rely on expert testimony and medical records, among other things. *See Leavitt*, 645 F.3d at 495–97 (recounting expert testimony that discussed the plain-

first prong, the plaintiff must then show that prison officials did not adequately respond to that serious medical need.[29] This requires reckless disregard for a prisoner's health.[30] In other words, plaintiffs must show prison officials either did not provide necessary treatment, intentionally pursued a medically unacceptable course of treatment, or consciously disregarded the risk of inadequate treatment.[31]

Because courts are loath to opine on medical matters, they generally turn to accepted standards of care in the medical community for guidance on minimum adequate treatment.[32] For example, courts deciding Eighth Amendment medical care claims regularly cite the standards of care promulgated by the National Commission on Correctional Health Care (NCCHC), although these standards

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tiff's medical condition and the prescribed treatment protocols); *Jett*, 439 F.3d at 1096 (using the plaintiff's medical records to determine the quality of care necessary for the plaintiff's condition).

[29] *See Estelle*, 429 U.S. at 106 (establishing the deliberate indifference test for adjudicating claims regarding the adequacy of medical care in prisons); *Leavitt*, 645 F.3d at 497 (explaining the state of mind that constitutes deliberate indifference).

[30] Farmer v. Brennan, 511 U.S. 825, 835 (1994). The Supreme Court explicitly stated that an Eighth Amendment deliberate indifference claim utilizes a standard far higher than "a lack of ordinary due care." *Id.* (quoting Whitney v. Albers, 475 U.S. 312, 319 (1986)). Recklessness is generally defined as the creation of a significant risk of harm to others and a disregard of that risk. *Reckless*, BLACK'S LAW DICTIONARY (11th ed. 2019). Similarly, disregard occurs where an entity ignores something or does not treat it with proper respect or consideration. *Disregard*, BLACK'S LAW DICTIONARY, *supra*.

[31] *Farmer*, 511 U.S. at 835–36. The Supreme Court's 1994 opinion in *Farmer v. Brennan* surveyed cases across federal courts that roughly equated deliberate indifference with recklessness. *Id.* at 836; *see, e.g.*, LaMarca v. Turner, 995 F.2d 1526, 1535 (11th Cir. 1993) ("To be deliberately indifferent, a prison official must knowingly or recklessly disregard an inmate's basic needs . . . ."). As part of the second element, the plaintiff must also suffer some harm as a result of the prison officials' disregard of a serious medical need. *Estelle*, 429 U.S. at 104 (holding that the denial of medical care must result in "unnecessary and wanton infliction of pain" (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976))). A risk of future harm also qualifies under this framework. Roe v. Elyea, 831 F.3d 843, 858 (7th Cir. 2011) (citing Board v. Farnham, 394 F.3d 469, 479 (7th Cir. 2005)). This is especially true if there is an unreasonably great risk to future health. *Id.*; Taylor v. Barkes, 135 S. Ct. 2042, 2043, 2044 (2015); Edmo v. Corizon, Inc., 935 F.3d 757, 788 (9th Cir. 2019) (per curiam), *cert. denied*, 141 S. Ct. 610 (2020). Examples of risk to future health include the possibility of a condition worsening or a risk of self-harm resulting from pain and suffering. *Edmo*, 935 F.3d at 788; *Roe*, 831 F.3d at 858. The *Estelle* deliberate indifference test is applied in a varied number of contexts, even including the provision of personal hygiene or menstrual health products. *See* Mitchell O. Carney, Note, *Cycles of Punishment: The Constitutionality of Restricting Access to Menstrual Health Products in Prisons*, 61 B.C. L. REV. 2541, 2560–68, 2588–93 (2020) (discussing Eighth Amendment denial of medical care jurisprudence and its applicability to personal hygiene and the provision of menstrual health products).

[32] *See, e.g.*, *Taylor*, 135 S. Ct. at 2043, 2044 (assessing an Eighth Amendment claim against widely accepted correctional psychiatric care standards); Bragg v. Dunn, 257 F. Supp. 3d 1171, 1226–27 (M.D. Ala. 2017) (assessing prison psychiatric care against National Commission on Correctional Health Care (NCCHC) standards); Feliciano v. Gonzalez, 13 F. Supp. 2d 151, 158 n.3 (D.P.R. 1998) (discussing NCCHC standards and accreditations when assessing prison medical and mental health care systems); Casey v. Lewis, 834 F. Supp. 1477, 1483–84 (D. Ariz. 1993) (discussing NCCHC standards with regard to psychiatric, medical, and dental care, as well as other professional standards from other organizations).

are not necessarily determinative.[33] Additionally, federal courts considering the provision of GCS under the *Estelle* framework almost invariably refer to the World Professional Association for Transgender Health's Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (WPATH-SOC).[34] The WPATH-SOC is a set of clinical recommendations for persons transitioning genders that the NCCHC has supported and adopted.[35]

B. Factual and Procedural Background of Edmo

Adree Edmo is a prisoner in the custody of the Idaho Department of Corrections (IDOC) since 2012.[36] She has identified as female from a young age.[37] At all times in IDOC custody, Edmo has lived openly as female.[38] Shortly after her incarceration began, a prison psychiatrist diagnosed Edmo with "gender

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[33] *See, e.g.*, Balla v. Idaho State Bd. of Corr., No. 181-CV-1165-BLW, 2020 U.S. Dist. LEXIS 95915, at *28 (D. Idaho May 30, 2020) (discussing NCCHC standards of psychiatric care). The NCCHC is an independent, non-profit organization that seeks to improve the quality of healthcare in correctional facilities. *About Us*, NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/about [https://perma.cc/6269-DWE3]. Although NCCHC standards are instructive and help courts determine the adequacy of the care provided, they do not by themselves establish the minimum level of adequate care. Bell v. Wolfish, 441 U.S. 520, 543 n.27 (1979). Conversely, it is also possible that even though a certain medical treatment is NCCHC-approved, it could still be unconstitutionally inadequate under the Eighth Amendment. *See id.* (asserting that NCCHC standards have no bearing on the adequacy of treatment in an Eighth Amendment analysis).

[34] *See, e.g.*, Kosilek v. Spencer (*Kosilek III*), 774 F.3d 63, 70 n.3 (1st Cir. 2014) (en banc) (relying on the WPATH-SOC to assess the adequacy of medical care given to an incarcerated transgender woman).

[35] *Id.* Prior to 2011, the World Professional Association for Transgender Health (WPATH) was known as the Harry Benjamin International Gender Dysphoria Association, and the Standards of Care document was instead tilted "Standards of Care for Gender Identity Disorders." *Id.* This Comment, when discussing the WPATH Standards of Care, refers to the seventh version of the document, published in 2011. *See generally* THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE (2011) [hereinafter "WPATH-SOC"] (outlining clinical care recommendations for transgender and gender nonconforming people, including recommendations for the treatment of gender dysphoria). The WPATH-SOC is a set of "flexible clinical guidelines." *Id.* at 2. These guidelines are meant to provide clinicians with a comprehensive overview of the unique healthcare needs of transgender persons, including gender transition recommendations and specialized reproductive and mental health guidelines. *Id.* at 1. The WPATH-SOC also cautions against viewing transgender people or people with gender dysphoria solely in a medical context. *Id.* at 4–5; *see* Agbemenu, *supra* note 6 (cautioning against viewing transgender issues in a solely medical framework). The NCCHC has adopted and accepted the WPATH-SOC treatment recommendations. NAT'L COMM'N ON CORR. HEALTH CARE, STANDARDS OF HEALTH SERVICES IN PRISONS (2018); *see supra* note 33 and accompany text (providing an overview of the NCCHC).

[36] Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1116 (D. Idaho 2018).

[37] *Id.* Edmo, aged thirty at the time of writing, testified during the district court proceedings that she has identified as female since at least age five or six. Edmo v. Corizon, Inc., 935 F.3d 757, 772 (9th Cir. 2019) (per curiam), *cert. denied*, 141 S. Ct. 610 (2020). She began openly living as a woman at approximately age twenty, shortly before her incarceration. *Edmo*, 358 F. Supp. 3d at 1116.

[38] *Edmo*, 935 F.3d at 772. Edmo has presented as female in her manner of dress and hairstyle since at least 2012. *Id.*

identity disorder," now known as gender dysphoria.[39] Afterwards, Edmo began socially transitioning genders, changing her name and sex on her birth certificate.[40] Prison officials later prescribed her hormone therapy, which somewhat ameliorated her gender dysphoria.[41] Edmo, however, continued to suffer distress due to her embarrassment at having male genitalia.[42]

Edmo twice attempted self-castration, emphasizing "emotional torment" as a driving factor behind the attempts.[43] Dr. Scott Eliason, a prison psychiatrist who made Edmo's initial diagnosis, evaluated Edmo for GCS prior to the second self-castration attempt.[44] Despite Edmo's severe gender dysphoria, Dr. Eliason did not recommend GCS.[45] Instead, he concluded that hormone treatment and counseling would be sufficient.[46] Dr. Eliason testified that he consulted the WPATH-SOC in making his recommendations.[47]

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[39] *Id.* Gender dysphoria is defined as feelings of anxiety stemming from incongruence between the gender a person is assigned at birth and the gender with which that person identifies, subjectively experiences, and objectively expresses. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452–53, 458 (5th ed. 2013). The American Psychiatric Association (APA) had used the term "gender identity disorder" in prior versions of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM). *Id.* at 451. The APA elected to change the term to "gender dysphoria," however, to reduce stigma around accessing gender-affirming care. *Id.* Doctors vary in their specific methods of treating gender dysphoria but focus generally on facilitating social and medical transition. *Id.* at 454–56. The DSM distinguishes between gender nonconformity (behavior or expression that does not match with historical gender roles) and gender dysphoria. *Id.* at 451.

[40] *Edmo*, 358 F. Supp. 3d at 1117. Social acclimation includes adopting mannerisms, styles of dress, etc., associated with the gender with which a person identifies, as well as legal name changes. AM. PSYCHIATRIC ASS'N, *supra* note 39, at 455. Medical transitioning, on the other hand, includes undergoing hormone treatment or GCS. *Id.*

[41] *Edmo*, 358 F. Supp. 3d at 1117. Hormone therapy involves taking hormones to induce physical changes in one's body to match one's gender identity. *Feminizing Hormone Therapy*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/feminizing-hormone-therapy/about/pac-20385096 [https://perma.cc/2236-AJKU]. At the time of her lawsuit, Edmo was "hormonally confirmed," meaning that her hormones and some sex characteristics matched those of a person assigned female at birth. *Edmo*, 935 F.3d at 772. Without further care, however, she would not experience further physical change. *Id.*

[42] *Edmo*, 935 F.3d at 773. In discussions with prison clinicians and mental health providers, Edmo repeatedly reported ideation of self-castration. *Id.* at 773 n.8.

[43] *Id.* at 773–74. Edmo had written notes just prior to both attempts in which she discussed her desperation to "help [her]self." *Id.* at 774. Edmo did not complete the castration on either attempt, but she continued to report ideation of another attempt in subsequent counseling sessions. *Id.*

[44] *Id.* at 773–74.

[45] *Id.* at 774.

[46] *Id.* at 773–74. At least three other prison clinicians agreed with Dr. Eliason, but the record lacked evidence to indicate whether these three clinicians had ever treated a person with gender dysphoria. *Id.* IDOC's Management and Treatment Committee, a group of medical providers, mental health care providers, and prison officials who address the needs of incarcerated persons with gender dysphoria, also agreed with Dr. Eliason's assessment. *Id.* at 774.

[47] *Id.* Dr. Eliason also testified to his opinion that Edmo would not be a suitable candidate for GCS until Edmo had better addressed her depression and substance abuse issues. *Id.* The court noted Eliason's clinical notes apparently contradicted his testimony but did not discuss exactly how. Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1119 (D. Idaho 2018).

In April 2017, Edmo filed a pro se complaint in the U.S. District Court for the District of Idaho, seeking an injunction.[48] In her complaint, Edmo asserted an Eighth Amendment violation.[49] In considering Edmo's claim, the district court collected testimony from seven witnesses and thousands of pages of medical records, depositions, and declarations.[50] The court also looked for medical guidelines against which to assess Edmo's circumstances and found that the WPATH-SOC was the leading authority on medical care for

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[48] *Edmo*, 935 F.3d at 775. Edmo's lawsuit named the IDOC and several of its employees as defendants. *Id.* Corizon was added as a defendant because Corizon contracts with the IDOC to provide healthcare. *Id.* Corizon is a privately held prison healthcare contractor that works with approximately 220 jails and prisons in 17 states. *About*, CORIZON HEALTH, http://www.corizonhealth.com/About-Corizon/Locations [https://perma.cc/6NQV-J6HQ]. A pro se litigant is one who represents oneself without the assistance of a lawyer. *Pro se,* BLACK'S LAW DICTIONARY, *supra* note 30. Injunctions, or "prohibitory injunctions," are court orders that prevent a party from doing something. *Injunction,* BLACK'S LAW DICTIONARY, *supra* note 30. Affirmative injunctions, or "mandatory injunctions," are orders that compel a party to do something. *Id.* The word "injunction" refers to either type. *Id.* Edmo sought an affirmative injunction to compel IDOC to provide her GCS. *Edmo*, 935 F.3d at 775. Federal courts grant injunctions when a plaintiff demonstrates (1) the possibility of succeeding on the merits of a legal claim, (2) an irreparable injury, (3) that legal remedies or monetary compensation are inadequate, (4) the injunction would not be overly burdensome on the defendant, and (5) the injunction is compatible with the public interest. eBay Inc. v. MercExch. L.L.C., 547 U.S. 388, 391 (2006); *Edmo*, 935 F.3d at 784.

[49] *Edmo*, 935 F.3d at 775. In addition, Edmo asserted claims under the Fourteenth Amendment, the Americans with Disabilities Act, and the Affordable Care Act (ACA). *Id.* At bottom, these claims alleged that the IDOC's denial of GCS constituted discrimination and, therefore, violated constitutional and statutory civil rights protections. *See* U.S. CONST. amend. VIII (providing for equal protection under the law); 42 U.S.C. § 18116 (prohibiting discrimination on the basis of sex in the provision of healthcare); 45 C.F.R. § 92.1 (2020) (prohibiting discrimination the basis of disability in the provision of healthcare).

[50] *Edmo*, 935 F.3d at 775. Two of Edmo's treating IDOC clinicians testified to Edmo's medical circumstances. *Id.* Edmo also testified on her own behalf. *Id.* Additionally, Edmo and the State of Idaho each retained two expert witnesses. *Id.* Edmo's first expert witness was Dr. Randi Ettner, Ph.D., one of the authors of the WPATH-SOC. *Id.* at 775–76. The Ninth Circuit recounted Dr. Ettner's substantial credentials in the area of transgender healthcare and the treatment of gender dysphoria. *Id.*; *see Edmo,* 358 F. Supp. 3d at 1113 (discussing Dr. Ettner's experience working with over 3,000 persons with gender dysphoria and her research on transgender healthcare). Edmo's second expert witness was Dr. Ryan Gorton, M.D., an emergency medicine physician who had worked with hundreds of persons with gender dysphoria and was also involved with WPATH. *Edmo*, 935 F.3d at 777. Both Doctors Ettner and Gorton testified that Edmo was eligible for and required GCS because without it, her gender dysphoria would worsen and could lead to adverse effects like continued attempts at self-harm. *Id.* at 775–77. The State of Idaho retained Dr. Keelin Garvey, M.D., C.C.H.P., former Chief Psychiatrist for the Massachusetts Department of Corrections and chair of the Gender Dysphoria Treatment Committee. *Id.* at 777. Dr. Garvey had limited experience addressing gender dysphoria. *Id*. The State also retained Dr. Joel Andrade, PhD, C.C.H.P., who had worked with Dr. Garvey on the Gender Dysphoria Treatment Committee and had over ten years of experience in correctional mental health, but not gender dysphoria. *Id.* at 779. Doctors Garvey and Andrade did not believe Edmo required GCS. *Id.* at 777–79. They both believed Edmo's gender dysphoria was not serious enough to warrant GCS and that Edmo's hormone therapy was sufficient to mitigate her gender dysphoria. *Id.*

transgender persons.[51] According to the court, the WPATH-SOC reliably indicated the constitutional minimum for adequate medical care.[52]

First, the court found Edmo's gender dysphoria constituted a serious medical need under the first prong of the *Estelle* test.[53] The key issue, however, was the second prong—whether IDOC, in denying GCS to Edmo, had strayed too far from the WPATH-SOC's guidelines.[54] Edmo had several witnesses, all of whom had significant experience working with gender dysphoria, testify in support of the notion that IDOC's refusal to provide GCS was inappropriate in Edmo's circumstances.[55] Given those witnesses' experience, the district court gave great weight to their testimony.[56] Accordingly, the district court ruled in Edmo's favor on the grounds that IDOC's denial of GCS constituted inadequate care.[57] IDOC thus exhibited deliberate indifference to Edmo's serious medical need, failing the second *Estelle* prong.[58]

The State of Idaho appealed.[59] The Ninth Circuit upheld the district court's grant of an injunction on the grounds that Edmo had proven her Eighth Amendment claim.[60] The court reasoned that Edmo would suffer irreparable injury without an injunction and that IDOC's evidence did not credibly rebut that notion.[61] The Ninth Circuit denied a request for an en banc rehearing.[62] The State of Idaho appealed again, but the Supreme Court denied certiorari.[63]

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[51] *Edmo,* 358 F. Supp. 3d at 1112, 1126–27 (calling the WPATH-SOC "recognized standards of care").

[52] *Id.*

[53] *Id.* at 1118–19.

[54] *Id.* at 1124.

[55] *Id.* at 1125.

[56] *Id.*

[57] *Id.* at 1129. Because the State of Idaho's witnesses were less, or not at all, experienced in the area of healthcare for transgender persons, the district court gave less weight to their testimony. *Id.* at 1125–26. Edmo's complaint sought a preliminary injunction, but the district court expressed concern that Edmo's request for GCS created a situation where it was only possible to grant a final, permanent injunction. *Id.* at 1122 n.1. Given no objection from either party, the district court granted a final, permanent injunction. *Id.* at 1122 n.1, 1129.

[58] *Id.* at 1128–29.

[59] Edmo v. Corizon, Inc., 935 F.3d 757, 781 (9th Cir. 2019) (per curiam), *cert. denied*, 141 S. Ct. 610 (2020). In its appeal, the State also raised a number of other concerns. *Id.* at 782–84, 800. The State contended that the district court's injunction was overly broad both in terms of the relief it sought and the parties it bound, but the Ninth Circuit disagreed. *Id.* at 782. Additionally, the State believed that the district court violated its right to a fair jury trial. *Id.* at 800–03. The Ninth Circuit rejected this concern as well, noting that the State had explicitly agreed to an evidentiary hearing decided only by a judge, rather than a full jury trial. *Id.* Thus, as the main issue on appeal, Edmo's Eighth Amendment claim received the bulk of the Ninth Circuit's attention. *Id.* at 785–86.

[60] *Id.* at 803. Neither the district court nor the Ninth Circuit ruled on Edmo's Fourteenth Amendment or ACA claims because she prevailed on her Eighth Amendment claim. *See id.* (failing to discuss either the Fourteenth Amendment or the ACA claims); *Edmo*, 358 F. Supp. 3d at 1128–29 (declining to rule on the Fourteenth Amendment or ACA claims).

[61] *Edmo*, 935 F.3d at 803. Ninth Circuit precedent mandates affording district courts "considerable deference in [their] determination[s] that witnesses were qualified to draw [their] conclusions." *Id.*

II. THE J.D.S AND THE M.D.S SPAR OVER STANDARDS OF CARE FOR INCARCERATED TRANSGENDER PERSONS

The issue of a prison's denial of GCS to an incarcerated transgender person first appeared in federal courts in 2002.[64] Since then, three federal circuit courts have considered the issue.[65] Section A of this Part explains the U.S. Court of Appeals for the First Circuit's 2014 holding in *Kosilek v. Spencer* that

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at 788 (citing Caro v. Woodford, 280 F.3d 1247, 1253 (9th Cir. 2002)). An irreparable injury is one that cannot be measured or compensated with money damages. *Injury,* BLACK'S LAW DICTIONARY, *supra* note 30.

[62] Edmo v. Corizon, Inc., 949 F.3d 489, 490 (9th Cir. 2020). Judges Daniel Collins and Patrick Bumatay dissented from the denial. *Id.* at 505 (Collins, J., dissenting); *id.* at 508 (Bumatay, J., dissenting). Judge Collins believed the court had erroneously applied the lower legal standard of negligence when it should have applied the approximate reckless disregard standard for deliberate indifference. *Id.* at 505 (Collins, J., dissenting). Judge Bumatay, on the other hand, argued in favor of a literal reading of the word "unusual" which would imply that, without a longstanding practice of providing GCS in prisons, it could not be cruel and unusual to deny it. *Id.* at 508 (Bumatay, J., dissenting). Judge Diarmuid O'Scannlain filed an opinion criticizing the Ninth Circuit's denial of a rehearing. *Id.* at 490 (noting that Judge O'Scannlain is a senior judge and thus cannot formally join dissenting opinions). Judge O'Scannlain's opinion echoed the U.S. Court of Appeals for the Fifth Circuit's 2019 decision in *Gibson v. Collier*, contending that the WPATH-SOC was not an authoritative standard of care. *Id.* at 497; *see* 920 F.3d 212, 220 (5th Cir.) (questioning the validity of the WPATH-SOC), *cert. denied*, 140 S. Ct. 653 (2019).

[63] Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610, 610 (2020). The Supreme Court had also denied the State of Idaho's request to stay the Ninth Circuit ruling. Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800, 2800 (2020). A stay suspends a judgment or judicial proceeding, and a stay in Edmo's case would have halted her access to GCS until the Supreme Court decided the issue. *See stay,* BLACK'S LAW DICTIONARY, *supra* note 30 (explaining the effect of a stay on a judgment).

[64] Kosilek v. Maloney (*Kosilek I*), 221 F. Supp. 2d 156, 159 (D. Mass. 2002) (holding that severe gender dysphoria entitled the plaintiff to access gender-affirming care while incarcerated).

[65] *See* Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019) (per curiam) (discussing the issue of providing GCS to an incarcerated person), *cert. denied*, 141 S. Ct. 610 (2020); Gibson v. Collier, 920 F.3d 212, 220 (5th Cir.) (same), *cert. denied*, 140 S. Ct. 653 (2019); Kosilek v. Spencer (*Kosilek III*), 774 F.3d 63, 68 (1st Cir. 2014) (en banc) (same). These cases are sometimes categorized as "*Farmer* challenges," referring to the Supreme Court's 1994 decision in *Farmer v. Brennan*. *See* 511 U.S. 825, 849 (1994) (setting forth the deliberate indifference test with regard to incarcerated transgender persons); *see, e.g.*, Judson Adams et al., *Transgender Rights and Issues*, 21 GEO. J. GENDER & L. 479, 518 (2020) (discussing *Farmer* challenges in prison systems). *Farmer* dealt with an Eighth Amendment claim by Dee Farmer, a transgender woman in a federal prison. 511 U.S. at 829. The claim centered on whether prison officials were deliberately indifferent to Farmer's safety when housing her in the male general population facility, where other prisoners beat and sexually assaulted her. *Id.* The Court held that the prison exhibited deliberate indifference to Farmer's safety by housing her in male general population. *Id.* at 849. The *Farmer* holding helped articulate the second prong of the *Estelle v. Gamble* deliberate indifference test. *See id.* at 835–36; Estelle v. Gamble, 429 U.S. 97, 106 (1976) (setting forth the two-prong deliberate indifference test). *Farmer* does not, however, speak directly to issues of the provision of gender-affirming care. *See* 511 U.S. at 849 (failing to discuss gender-affirming care). Oftentimes, Eighth Amendment claims by incarcerated LGBTQ+ persons, whether or not medical care is involved in the claim, draw on *Farmer* and its related precedent. *See, e.g.*, Sonja Marrett, Note, *Beyond Rehabilitation: Constitutional Violations Associated with the Isolation and Discrimination of Transgender Youth in the Juvenile Justice System*, 58 B.C. L. REV. 351, 358–59 (2017) (discussing *Farmer* in the context of juvenile detention issues for LGBTQ+ youth).

denying GCS was constitutional under the Eighth Amendment in this particular plaintiff's instance.[66] Section B describes a subsequent U.S. Court of Appeals for the Fifth Circuit ruling in *Gibson v. Collier* that denying GCS in prisons can never be unconstitutional.[67] Finally, Section C explains the U.S. Court of Appeals for the Ninth Circuit's decision in *Edmo v. Corizon, Inc.*, in which the court held that the weight of medical evidence supported the assertion that denial of GCS was unconstitutional in Edmo's case.[68]

A. First Impression in the First Circuit: Kosilek v. Spencer

In 2014, the First Circuit was the first federal court of appeals to apply the U.S. Supreme Court's 1976 *Estelle v. Gamble* framework in the context of GCS.[69] *Kosilek*, however, was by no means the start of the legal journey of Michelle Kosilek, a prisoner in the custody of the Massachusetts Department of Corrections (MDOC).[70] In *Kosilek v. Maloney*, her first lawsuit against MDOC in 2002, Kosilek alleged an Eighth Amendment violation on the grounds that she had received no treatment for her gender dysphoria.[71] MDOC clinicians diagnosed Kosilek with gender dysphoria while in custody after she had attempted self-castration.[72] The U.S. District Court for the District of Massachusetts held that, although Kosilek had a serious medical need, the MDOC did not act with deliberate indifference because key decision-makers lacked the information necessary to comprehend either the extent of Kosilek's needs stemming from her gender dysphoria or that gender-affirming care would ad-

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[66] *See infra* notes 69–87 and accompanying text.

[67] *See infra* notes 88–108 and accompanying text.

[68] *See infra* notes 109–123 and accompanying text.

[69] *See Kosilek III*, 774 F.3d at 68 (discussing the plaintiff's access to GCS in prison under the Eighth Amendment framework). *See generally* Hana Church, Comment, *Prisoner Denied Sex Reassignment Surgery: The First Circuit Ignores Medical Consensus in* Kosilek v. Spencer, 57 B.C. L. REV. E. SUPP. 17 (2016), https://lawdigitalcommons.bc.edu/bclr/vol57/iss6/2 [https://perma.cc/8X5W-TK4B] (providing an in-depth analysis of the *Kosilek* decision).

[70] *See* Kosilek v. Spencer (*Kosilek II*), 889 F. Supp. 2d 190, 196 (D. Mass. 2012), *rev'd en banc*, 774 F.3d 63 (1st Cir. 2014) (discussing the plaintiff's lawsuit against prison authority for the denial of GCS); Kosilek v. Maloney (*Kosilek I*), 221 F. Supp. 2d 156, 158 (D. Mass. 2002) (discussing the plaintiff's lawsuit against prison authority for the denial of other gender-affirming care).

[71] *Kosilek I*, 221 F. Supp. 2d at 159. Kosilek was incarcerated in 1990, and she filed her first lawsuit two years later. *Id.* Kosilek had attempted suicide and self-castration while in custody. *Id.* at 164. Kosilek socially transitioned to a limited extent both before and during her incarceration. *Id.* at 164–65. MDOC denied Kosilek's request for medical transition resources. *Id.* In subsequent counseling sessions, Kosilek expressed ideation around self-harm, which she testified to at trial. *Id.* at 165. Prior to the initiation of Kosilek's lawsuit, MDOC had requested psychiatric and medical assessments from in-house clinicians, as well as external physicians specializing in transgender healthcare. *Id.* at 166, 168–70.

[72] *Kosilek III*, 774 F.3d at 69–71.

dress her gender dysphoria.[73] The court noted, however, that its opinion effectively put the MDOC on notice.[74] Afterwards, MDOC afforded Kosilek some gender-affirming care but not GCS.[75]

Kosilek's access to GCS became the focus of another Eighth Amendment lawsuit when, in 2006, she sued the MDOC again.[76] The district court again found in her favor, holding that the MDOC's denial of GCS was unconstitutional.[77] The MDOC appealed, and, in 2014, the First Circuit upheld the judgment.[78]

The First Circuit later reheard the case en banc.[79] The en banc court held that Kosilek's gender dysphoria was a serious medical need, thereby meeting the first *Estelle* prong.[80] Kosilek failed, however, to meet the second *Estelle* prong.[81] The First Circuit concluded that the WPATH-SOC was widely accepted as providing authoritative standards of care for gender dysphoria.[82] The court determined, however, that the treatment afforded to Kosilek did not unacceptably deviate from the WPATH-SOC.[83] Therefore, even though the treatment provided was not the treatment Kosilek requested, it did not fall below acceptable standards.[84] Stated another way, the provision of gender-affirming

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[73] *Kosilek I*, 221 F. Supp. 2d at 162. The court held that Michael Maloney, then Commissioner of MDOC, was not qualified to make medical decisions for Kosilek. *Id.* at 161–62. MDOC had never had a person with gender dysphoria in its custody. *Id.* Maloney had stepped in to manage Kosilek's case given the sensitivity of the matter and the lack of experience of MDOC staff. *Id.* Maloney adopted a "rigid freeze-frame policy" that did not provide gender-affirming treatment beyond what inmates had been provided prior to incarceration. *Id.* The court found Maloney's impetus for doing so was not rooted in a desire to inflict pain or deny care. *Id.* at 162.

[74] *Id.* at 162. Being "on notice" means having certain knowledge with binding legal implications. *Charged with notice,* BLACK'S LAW DICTIONARY, *supra* note 30.

[75] *Kosilek III*, 774 F.3d at 69–71. MDOC provided Kosilek with hormone treatment, as well as feminine clothing and personal effects, to begin her transition. *Id.* at 69–70. Pursuit of GCS would not come until later in her transition process. *Id.*

[76] Kosilek v. Maloney (*Kosilek II*), 889 F. Supp. 2d 190, 197 (D. Mass. 2012), *rev'd en banc*, 774 F.3d 63 (1st Cir. 2014).

[77] *Kosilek II*, 889 F. Supp. 2d at 197. Similar to the courts' rationale in Kosilek's earlier lawsuits, the court found that, without access to further gender-affirming care, specifically GCS, Kosilek would face irreparable injury in the form of continued mental torment and anguish from her gender dysphoria. *Id.*

[78] Kosilek v. Spencer, 740 F.3d 733, 736 (1st Cir. 2014).

[79] *Kosilek III*, 774 F.3d at 68. MDOC filed a motion to have the case reheard en banc. *Id.*

[80] *Id.* at 86; *see* Estelle v. Gamble, 429 U.S. 97, 103 (1976) (holding that a plaintiff suing under an Eighth Amendment inadequate medical care claim must show a serious medical need).

[81] *Kosilek III*, 774 F.3d at 91–92 (holding that prison officials were not equipped with sufficient knowledge to infer that Kosilek's medical care was constitutionally inadequate).

[82] *Id.* The First Circuit did not go as far as calling the WPATH-SOC medical consensus but nevertheless concluded that the WPATH-SOC was informative and authoritative. *Id.*

[83] *Id.*; *see supra* note 35 and accompanying text (providing an explanation of the WPATH-SOC).

[84] *Kosilek III*, 774 F.3d at 91–92. The court also held Kosilek failed to meet the second *Estelle* prong because the MDOC believed providing Kosilek with GCS would create safety and security concerns, especially around housing, like those outlined in *Farmer v. Brennan*. *Id.* at 95–96; *see* 511 U.S. 825, 830 (1994) (discussing safety concerns around housing an incarcerated transgender woman in male general population). For example, the MDOC believed Kosilek would be at risk of being

care excluding GCS was, according to professional medical guidelines, sufficient to mitigate Kosilek's gender dysphoria.[85] The First Circuit explicitly noted its decision did not condone blanket bans on GCS in prisons.[86] A blanket ban would not be acceptable under the *Estelle* framework, the court held, because blanket bans necessarily discount individual medical needs.[87]

B. The Fifth Circuit Also Denied GCS in Gibson v. Collier

In 2019, the Fifth Circuit faced a similar set of facts in *Gibson v. Collier*.[88] There, prison physicians diagnosed Vanessa Lynn Gibson[89] with gender dysphoria while she was in the custody of the Texas Department of Criminal Justice (TDCJ).[90] Prison healthcare providers began a regimen of counseling and hormone treatment.[91] Gibson submitted a request for GCS, but TDCJ de-

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assaulted if housed in male general population after receiving GCS. *Kosilek III*, 774 F.3d at 79. In addition, the superintendent of a women's prison stated that Kosilek's history of domestic abuse and murder would create security risks in female general population. *Id.* at 80. Thus, the court held that the MDOC had reasons other than the deliberate intention to inflict pain in denying GCS. *Id.* at 96. The Supreme Court denied Kosilek's appeal. Kosilek v. O'Brien, 135 S. Ct. 2059, 2059 (2015).

[85] *Kosilek III*, 774 F.3d at 96. The *Kosilek* decision ostensibly turned on the testimony of one expert witness who disagreed with the WPATH-SOC's recommendations. *Id.*; Church, *supra* note 69, at 30.

[86] *Kosilek III*, 774 F.3d at 90–91.

[87] *Id.* (citing Roe v. Elyea, 631 F.3d 843, 862–63 (7th Cir. 2011)); *see* Estelle v. Gamble, 429 U.S. 97, 103 (1976) (setting forth the deliberate indifference test with regard to an individual plaintiff's serious medical needs). Judge O. Rogeiree Thompson dissented, criticizing the majority's decision both for the standard of review it applied, the manner in which it applied law to fact, and the ultimate conclusion. *Kosilek III*, 774 F.3d at 98, 101 (Thompson, J., dissenting). Judge William Kayatta dissented as well, criticizing the majority for usurping the district court's fact-finding mission. *Id.* at 113–15 (Kayatta, J., dissenting).

[88] Gibson v. Collier, 920 F.3d 212, 216 (5th Cir.) (holding that the denial of GCS was not unconstitutional), *cert. denied*, 140 S. Ct. 653 (2019).

[89] The opinion refers to Gibson using masculine pronouns and a masculine name. *Id.* at 217 n.2. Although this was purportedly done to be consistent with prison policy, other courts refer to transgender plaintiffs with their chosen pronouns. *See, e.g.*, Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019) (per curiam) (using feminine pronouns for a transgender woman plaintiff), *cert. denied*, 141 S. Ct. 610 (2020). The practice of using the name and pronouns assigned to a transgender person at birth is known as "deadnaming" and is considered to be an aggressive and improper rejection of someone's gender identity. Julia Sinclair-Palm, *"It's Non-Existent": Haunting in Trans Youth Narratives About Naming*, 37 OCCASIONAL PAPER SERIES 96, 100 (2017). Additionally, deadnaming is known to exacerbate gender dysphoria. *See* M. Paz Galupo & Lex Pulice-Farrow, *"Every Time I Get Gendered Male, I Feel a Pain in My Chest": Understanding the Social Context for Gender Dysphoria*, 5 STIGMA & HEALTH 199, 202 (2020) (describing the adverse psychological effects of deadnaming). Judge Walter Smith, Jr., who presided over Gibson's district court proceedings, used feminine pronouns. *See* Gibson v. Livingston, No. W-15-CA-190, 2016 U.S. Dist. LEXIS 195724, at *2–4 (W.D. Tex. Aug. 31, 2016).

[90] *Gibson*, 920 F.3d at 217. Gibson underwent a psychiatric assessment after claiming ideation of self-harm. *Id.* Like Kosilek and Edmo, Gibson had attempted self-castration. *See id.* (describing the plaintiff's self-castration attempt); *see also Edmo*, 935 F.3d at 767 (describing Edmo's two attempts); *Kosilek III*, 774 F.3d at 69 (describing Kosilek's multiple attempts).

[91] *Gibson*, 920 F.3d at 217.

nied it, saying the provision of GCS was inconsistent with policy.[92] Gibson sued in the U.S. District Court for the Western District of Texas.[93] Gibson challenged the prison policy on Eighth Amendment grounds, alleging the policy was, in effect, a blanket ban on GCS.[94] Gibson lost and then appealed.[95]

The Fifth Circuit ultimately ruled in the TDCJ's favor.[96] It agreed that gender dysphoria was a serious medical need under the first *Estelle* prong but did not find deliberate indifference under the second.[97] The court held that because disagreement on the efficacy of GCS exists, the WPATH-SOC is not instructive on the minimum acceptable level of care.[98] Thus, Gibson could not rely on the WPATH-SOC to show the denial of GCS constituted inadequate medical care.[99] The court then expressed disagreement with the efficacy of GCS by citing evidence from *Kosilek* and a memorandum by the Centers for Medicare & Medicaid Services on the provision of GCS.[100] In the Fifth Circuit's view, only "universally accepted" standards of care could provide a minimum.[101] In sum, the court concluded it was impossible to be deliberately indif-

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[92] *Id.* at 217–18. TDCJ's policies and medical protocols did not recognize GCS as a treatment option for gender dysphoria. *Id.* Notably, the majority and dissenting opinions in *Gibson v. Collier* use the term "sex reassignment surgery" rather than GCS. *Id.* at 215; *id.* at 228 (Barksdale, J., dissenting).

[93] *Gibson*, 2016 U.S. Dist. LEXIS 195724, at *2. In this initial litigation, Gibson named Brad Livingston, the CEO of the TDCJ at the time, as a defendant. *Id.* at *1. Bryan Collier took over TDCJ as Executive Director by the time Gibson appealed. *Gibson*, 920 F.3d at 218 (majority opinion).

[94] *Gibson*, 920 F.3d at 217–18.

[95] *Id.* at 218. A number of procedural issues were discussed at length in both the majority opinion and the dissent pertaining to whether the district court properly applied a summary judgment standard and the attendant burdens on both parties. *Id.* at 219; *id.* at 229 (Barksdale, J., dissenting). The court did not rule on these procedural issues, however, as Gibson only appealed the Eighth Amendment decision on the merits. *Id.* at 218 (majority opinion).

[96] *Id.* at 218–19.

[97] *Id.* at 218; *see* Estelle v. Gamble, 429 U.S. 97, 103 (1976) (holding that an Eighth Amendment claim for inadequate medical care must allege deliberate indifference to a serious medical need).

[98] *Gibson*, 920 F.3d at 227.

[99] *Id.*

[100] *Id.* at 222, 223 n.7. The cited memo, however, appeared to call for an individualized assessment of the necessity of GCS for Medicare/Medicaid recipients. *See* Tamara Syrek Jensen et al., *Decision Memo for Gender Dysphoria and Gender Reassignment Surgery*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Aug. 30, 2016), https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282 [https://perma.cc/5K9D-9JP4] (requiring an individualized assessment of a Medicare and/or Medicaid recipient's need for GCS).

[101] *Gibson*, 920 F.3d at 220, 223–24. Beyond mentioning that the phrase "universally accepted" is written in Gibson's briefs, the opinion does not cite any legal authority using this language. *See id.* at 220 (failing to cite to a legal authority on this point). The word "universal" appears only once in *Kosilek v. Spencer*, in a quotation recounting witness testimony. Kosilek v. Spencer (*Kosilek III*), 774 F.3d 63, 68 (1st Cir. 2014) (en banc). The word does not appear in this context in any other jurisprudence on Eighth Amendment claims of inadequate medical care. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103 (discussing the minimum standards of care in a general sense); Taylor v. Barkes, 135 S. Ct. 2042, 2043–44 (2015) (accepting NCCHC-approved standards without questioning medical consensus).

ferent under the second prong of the *Estelle* framework unless there was universal consensus that GCS effectively addressed gender dysphoria.[102]

In coming to this conclusion, the Fifth Circuit relied on its own precedent, as well as that of the First Circuit, which held that prisoners' disagreement with healthcare providers is insufficient to sustain an Eighth Amendment claim.[103] In addition, the majority opinion, moving outside the *Estelle* realm altogether, performed a textualist analysis of the Eighth Amendment.[104] The opinion delved into the meaning of the word "unusual."[105] The court essentially ruled that, absent a longstanding tradition of providing GCS to prisoners, it can never be "unusual" to deny GCS to prisoners.[106] Through its literal reading of the word "unusual," the majority created an effective blanket ban on GCS in prisons.[107] Nowhere in the majority's analysis was there room for the consideration of an individual prisoner's circumstances or medical history.[108]

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[102] *Gibson*, 920 F.3d at 220, 223–24.

[103] *Id.*; *see* Norton v. Dimazana, 122 F.3d 286, 292 (5th Cir. 1992) (stating that incarcerated persons' medical care need not be "perfectly tailored"); *see also* United States v. Derbes, 369 F.3d 579, 583 (1st Cir. 2004) ("[Medical] services need only be on a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards."). The *Gibson* opinion gave little attention to evidence refuting the majority's position. *See Gibson*, 920 F.3d at 222 (failing to discuss positive support for the WPATH-SOC). Judge Rhesa Hawkins Barksdale dissented. *Id.* at 229 (Barksdale, J., dissenting). Judge Barksdale's dissent noted that the court cannot rule on any procedural shortcomings from the district court proceedings, given that these issues were not raised on appeal. *Id.* at 229, 233. In the portion of his dissent most germane to the Eighth Amendment issue, he criticized the majority's interpretation of *Kosilek*. *Id.* at 233. Judge Barksdale contended that the majority should have focused on the *Estelle* test, which mandates an individualized consideration of a plaintiff's medical needs. *Id.* at 236. In Judge Barksdale's view, the majority's focus on evidence from the *Kosilek* record is inappropriate because such evidence does not pertain directly to Gibson's medical circumstances. *Id.* at 235–36. Judge Barksdale also noted that the majority cited no legal precedent for its "universal acceptance" standard vis-à-vis medical standards of care. *Id.* at 235.

[104] *Gibson*, 920 F.3d at 226–28 (majority opinion).

[105] *Id.* This portion of the opinion sought to return to the literal meaning of "cruel and unusual" in the Eighth Amendment. *Id.*; *see* U.S. CONST. amend. VIII.

[106] *Gibson*, 920 F.3d at 227–28 ("No prison in the United States has ever provided sex reassignment surgery to an inmate. Accordingly, Gibson cannot state a claim for cruel *and unusual* punishment under the plain text and original meaning of the Eighth Amendment.").

[107] *Id.* at 224–25, 228. In his dissent, Judge Barksdale was harshly critical of this ultimate holding. *Id.* at 229 (Barksdale, J., dissenting). In his view, the majority's holding ultimately enacted an overly broad blanket ban on GCS that the First Circuit explicitly stated it wished to avoid in *Kosilek III*. *Id.* at 238; *see Kosilek III*, 774 F.3d at 91 (warning against blanket bans on any medical procedure).

[108] *See Gibson*, 920 F.3d at 224 (majority opinion) ("We do not see how evidence of individual need would change the result in this case.").

C. Enter Edmo*: The Ninth Circuit Tempered the Fifth Circuit*

Less than five months after the Fifth Circuit decided *Gibson*, the Ninth Circuit handed down its *Edmo* opinion.[109] The Ninth Circuit first reiterated issues not in dispute: (1) Edmo's gender dysphoria was a serious medical need, (2) the WPATH-SOC was the benchmark for treatment of gender dysphoria, (3) GCS effectively addressed gender dysphoria.[110] The central issue, therefore, was the second *Estelle* prong: whether denying GCS to Edmo consciously disregarded the risks to her overall health.[111] In other words, the court had to decide whether IDOC's provision of gender-affirming care, which did not include GCS, was constitutionally adequate.[112]

The Ninth Circuit recounted the district court's extensive findings of fact on Edmo's medical circumstances and the WPATH-SOC.[113] Like the district court, the Ninth Circuit noted that Edmo's witnesses had significant experience with gender dysphoria patients.[114] These credentialed witnesses had proven that the severity of Edmo's gender dysphoria warranted her undergoing GCS.[115] IDOC, on the other hand, had reached the medically unacceptable conclusion that GCS was not appropriate or necessary for Edmo.[116] This amounted to a conscious disregard under the second *Estelle* prong because the failure to provide GCS to Edmo would result in her facing continued emotion-

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[109] *See Gibson*, 920 F.3d at 226 (holding that the denial of GCS can never be unconstitutional); Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019) (per curiam) (criticizing the *Gibson* decision), *cert. denied*, 141 S. Ct. 610 (2020).

[110] *Edmo*, 935 F.3d at 769–71, 785. The opinion recounted thirteen medical associations, including the American Medical Association and APA, that recognize the WPATH-SOC as consensus in care for patients with gender dysphoria. *Id.* at 769.

[111] *Id.* at 786; Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1109–10 (D. Idaho 2018). The parties agreed Edmo's gender dysphoria was a serious medical need, meeting the first *Estelle* prong. *Edmo*, 935 F.3d at 785; *see* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (stating that plaintiffs bringing an Eighth Amendment inadequate medical care claim must allege a serious medical need).

[112] *Edmo*, 935 F.3d at 786.

[113] *Id.*; *see Edmo*, 358 F. Supp. 3d at 1110–21 (reviewing WPATH-SOC, the expert testimony of both parties, and Edmo's health).

[114] *Edmo*, 935 F.3d at 787–90; *see Edmo*, 358 F. Supp. 3d at 1125; *see also supra* note 50 and accompanying text (providing a description of the key witnesses in *Edmo*). The court also noted that one of the State of Idaho's expert witnesses, whose opinions were not compatible with the WPATH-SOC, was an "outlier in the field of gender dysphoria." *Edmo*, 358 F. Supp. 3d at 1125. In a previous case focusing on GCS in prisons, this witness had made misleading statements about the WPATH-SOC and had fabricated testimony. *Id.* at 1226 (citing Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1188 (N.D. Cal. 2015)). The Ninth Circuit also emphasized that the district court was empowered to discount testimony from IDOC's less-qualified experts. *Edmo*, 935 F.3d at 788 (citing Caro v. Woodford, 280 F.3d 1247, 1253 (9th Cir. 2002)). In 2002, in *Caro v. Woodford*, for example, the Ninth Circuit held that neurologists' opinions regarding the plaintiff's brain injury should be given the greatest weight. 280 F.3d at 1253.

[115] *Edmo*, 935 F.3d at 787–90.

[116] *See id.* at 797 (holding the denial of GCS constituted inadequate medical care because it was inconsistent with suggested medical protocol).

al distress and torment.[117] Thus, the Ninth Circuit, in a per curiam opinion, held that IDOC officials' failure to adapt Edmo's treatment plan to include GCS amounted to deliberate indifference.[118]

The Ninth Circuit criticized the Fifth Circuit's opposing conclusion.[119] Specifically, the Ninth Circuit took umbrage with the Fifth Circuit "co-opt[ing]" the evidentiary record in *Kosilek* to determine that GCS can never be cruel and unusual.[120] In addition, the Ninth Circuit took issue with the Fifth Circuit's "incorrect, or at best, outdated" assertion that GCS did not effectively address gender dysphoria.[121] Finally, the Ninth Circuit criticized the Fifth Circuit for setting aside Eighth Amendment precedent that mandates evaluating courses of treatment in light of an individual prisoner's circumstances.[122] In other words, according to the Ninth Circuit, all blanket bans are incompatible with the Eighth Amendment because they ignore individual medical needs.[123]

III. The Ninth Circuit Correctly Applied *Estelle* in *Edmo*

The U.S. Court of Appeals for the Ninth Circuit rightly criticized the U.S. Court of Appeals for the Fifth Circuit's approach to healthcare for incarcerated

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[117] *Id.* In other words, IDOC's assertions that Edmo's gender dysphoria was not serious enough to warrant GCS indicated that IDOC had failed to adequately perceive the severity of her condition. *Id.*

[118] *Id.* at 793. The Ninth Circuit cited a Fourth Circuit case that held that prisons were not immunized against Eighth Amendment claims because they had provided some degree of gender-affirming care if the level of care provided was still inadequate to address a serious need. *Id.* (citing De'Lonta v. Johnson, 708 F.3d 520, 526 (4th Cir. 2013)). The Fourth Circuit analogized that a painkiller is not sufficient treatment for someone who suffers a serious injury from a fall. *De'Lonta*, 708 F.3d at 526. A per curiam opinion is attributed to the entire panel of judges that heard the case, rather than having one judge attributed as the opinion's author. *Per curiam*, Black's Law Dictionary, *supra* note 30. Edmo has since undergone GCS. Dawson, *supra* note 8.

[119] *Compare Edmo*, 935 F.3d at 794–95 (holding that the denial of GCS was unconstitutional), *with* Gibson v. Collier, 920 F.3d 212, 215–16 (5th Cir.) (holding that the denial of GCS is never unconstitutional), *cert. denied*, 140 S. Ct. 653 (2019). The Ninth Circuit noted that the Fifth Circuit's "categorical holding," in addition to improperly relying on testimony from *Kosilek*, relied on the premise that there was no medical consensus that GCS effectively addressed gender dysphoria, a now-outdated premise. *Id.*; *see* WPATH-SOC *supra* note 35, at 2 (reviewing various methods of addressing gender dysphoria).

[120] *Edmo*, 935 F.3d at 795–97; *see Gibson*, 920 F.3d at 215–16 (holding that, absent a longstanding tradition of providing GCS in prisons, the denial of GCS is never unconstitutional).

[121] *Edmo*, 935 F.3d at 795.

[122] *Id.* at 796. To support this point, the Ninth Circuit pointed to cases in the Fourth and Seventh Circuits that held that denying GCS could give rise to an actionable Eighth Amendment claim. *Id.* (first citing Rosati v. Igbinoso, 791 F.3d 1037, 1040 (4th Cir. 2015) (holding an internal prison policy mandating a blanket GCS ban gave a plaintiff with severe gender dysphoria an actionable claim); and then citing Fields v. Smith, 653 F.3d 550, 558–59 (7th Cir. 2011) (holding that state laws that ban GCS in prisons also gave plaintiffs an actionable claim)).

[123] *Edmo*, 935 F.3d at 796 (reviewing the plaintiff's specific medical circumstances in her Eighth Amendment claim); *see* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (outlining the test used in *Edmo*). The Ninth Circuit declined to rule on Edmo's Fourteenth Amendment and ACA claims. *Edmo*, 935 F.3d at 793.

transgender persons.[124] The Fifth Circuit's holding is not compatible with the precedent upon which it relied.[125] In the future, courts should adopt an individualized approach to determine the medical necessity of GCS for transgender prisoners.[126] Specifically, courts should mimic the approach of the U.S. District Court for the District of Idaho and the Ninth Circuit by relying on established and accepted medical authority.[127] Section A of this Part discusses how the Fifth Circuit departed from Eighth Amendment precedent in *Gibson v. Collier*.[128] Section B argues that the Ninth Circuit correctly applied Eighth Amendment precedent.[129]

A. Dictionaries Are Not Medical Authority: The Fifth Circuit Missed the Mark on Multiple Fronts

Circuit courts have refined the Supreme Court's *Estelle v. Gamble* test to better identify when medical care falls below the constitutional minimum.[130] Specifically, courts defer to accepted standards of medical care.[131] The Fifth Circuit's *Gibson* opinion purports to be an example of judicial restraint from making medical judgments.[132] Ironically, however, the opinion criticized the

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[124] *See* Gibson v. Collier, 920 F.3d 212, 227–28 (5th Cir.) (holding that the denial of GCS in prisons is not unconstitutional), *cert. denied*, 140 S. Ct. 653 (2019); Edmo v. Corizon, 935 F.3d 757, 793–94 (9th Cir. 2019) (per curiam) (holding that the denial of GCS is unconstitutional and criticizing *Gibson*), *cert. denied*, 141 S. Ct. 610 (2020).

[125] *Gibson*, 920 F.3d at 215–16 (stating that a denial of GCS is never unconstitutional); *see* Kosilek v. Spencer (*Kosilek III*)*,* 774 F.3d 63, 91 (1st Cir. 2014) (en banc) (holding that a blanket ban of a medical procedure is never constitutional).

[126] *See* Estelle v. Gamble*,* 429 U.S. 97, 104 (1976) (setting forth the deliberate indifference test for inadequate medical care); *Edmo*, 935 F.3d at 797 (applying *Estelle* test to assess whether a prison's denial of GCS was unconstitutional).

[127] *See Estelle*, 429 U.S. at 104 (holding that medical care in prisons must adequately address serious medical needs); Taylor v. Barkes, 135 S. Ct. 2042, 2043–44 (2015) (using clinical care standards to assess the quality of medical care in a prison setting); *Edmo*, 935 F.3d at 797 (relying on clinical care recommendations for transgender persons in determining the necessity of GCS).

[128] *See infra* notes 130–145 and accompanying text.

[129] *See infra* notes 146–157 and accompanying text.

[130] *See Estelle*, 429 U.S. at 104 (providing the general test for the adequacy of medical care in prisons); United States v. Derbes, 369 F.3d 579, 583 (1st Cir. 2004) (affirming *Estelle* but stating that prisons are not required to create perfect healthcare plans or provide the best quality care available); Norton v. Dimazana, 122 F.3d 286, 292 (5th Cir. 1992) (stating that medical care for incarcerated persons need not be "perfectly tailored").

[131] *Edmo*, 935 F.3d at 786 (first citing Allard v. Baldwin, 779 F.3d 768, 772 (8th Cir. 2015); and then citing Henderson v. Ghosh, 755 F.3d 559, 566 (7th Cir. 2014) (per curiam)). The *Edmo* court cited two cases that emphasized medical standards as a key piece of an Eighth Amendment analysis. *Id.*; *see Allard*, 779 F.3d at 772 (discussing the opinions of medical experts regarding the medical care provided to an incarcerated plaintiff); *Henderson*, 755 F.3d at 566 (discussing the need for the district court to consider expert medical opinion in an Eighth Amendment inadequate medical care case).

[132] Gibson v. Collier, 920 F.3d 212, 225 (5th Cir.), *cert. denied*, 140 S. Ct. 653 (2019). The Fifth Circuit stated its belief that the U.S. District Court for the District of Idaho "took sides in an on-going medical debate." *Id.* The Fifth Circuit expressed reluctance to take part in what it saw as an "ongoing

WPATH-SOC and medical professionals who utilize it.[133] Indeed, *Gibson* appears to be the only instance in which a federal court questioned standards of care promulgated by medical experts.[134] Further review of Eighth Amendment jurisprudence reveals no similar treatment of standards of care in any other medical sector.[135] Thus, for all its talk of restraint, the *Gibson* opinion is inconsistent in practice.[136] By discounting the WPATH-SOC, the Fifth Circuit had no guidepost to assess of the adequacy of the care afforded to Gibson.[137]

In addition, the Fifth Circuit improperly departed from the *Estelle* test when it explicitly stated that individual circumstances have no bearing on Eighth Amendment claims for GCS.[138] The Fifth Circuit attempted to orient its holding on an irrelevant etymological analysis of the word "unusual" in the Eighth Amendment.[139] In doing so, the court ignored the established *Estelle* test in favor of an exercise in literal interpretation of constitutional text.[140] The Supreme Court did not articulate a test that asked what the "usual" procedure is in response to a given medical need.[141] Instead, it asked whether a serious

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medical debate over the medical necessity or efficacy of sex reassignment surgery, other than to acknowledge the existence and vigor of that debate." *Id.* at 216 n.1.

[133] *See id.* at 221–22 ("[L]ater versions of the WPATH were driven by political considerations.").

[134] *See id.* at 221, 223 (questioning the validity of the WPATH-SOC); Kosilek v. Spencer (*Kosilek III*), 774 F.3d 63, 77–78 (1st Cir. 2014) (en banc) (accepting the WPATH-SOC despite some misgivings); *see also* Bragg v. Dunn, 257 F. Supp. 3d 1171, 1226–27 (M.D. Ala. 2017) (relying on NCCHC standards to assess a prison's psychiatric care programs); Feliciano v. Gonzalez, 13 F. Supp. 2d 151, 158 n.3 (D.P.R. 1998) (assessing prison medical and psychiatric care against NCCHC standards); Casey v. Lewis, 834 F. Supp. 1477, 1483–84 (D. Ariz. 1993) (using standards from NCCHC and other medical organizations to evaluate a prison's medical, psychiatric, and dental care programs).

[135] *See, e.g.*, Allah v. Thomas, 679 F. App'x 216, 220 (3d Cir. 2017) (holding that prison medical staff violated the Eighth Amendment when it did not consider the efficacy and adequacy of treatment and instead considered only the cost and the convenience of a treatment plan); Roe v. Elyea, 631 F.3d 843, 860 (7th Cir. 2011) (emphasizing the importance of following accepted medical protocol in ensuring adequate care); Berry v. Peterman, 604, F.3d 435, 441 (7th Cir. 2010) (holding that prison officials cannot default to a certain course of treatment for no reason); Collingon v. Milwaukee Cnty., 163 F.3d 982, 989 (7th Cir. 1998) (noting that the *Estelle* tests looks for a departure from competent professional judgment).

[136] *See Gibson*, 920 F.3d at 220 (questioning the validity of the WPATH-SOC).

[137] *See id.* at 220–22 (stating no acceptable medical standards exist vis-à-vis addressing gender dysphoria).

[138] *Id.* at 224 (holding that a plaintiff's individual needs have no bearing on the outcome of an Eighth Amendment lawsuit).

[139] *See id.* at 226 (analyzing whether a course of medical treatment was literally "unusual"); *see also* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (prescribing the specific framework for evaluating claims of inadequate medical care under the Eighth Amendment without regard to whether a course of treatment is "unusual").

[140] *See Estelle*, 429 U.S. at 106 (failing to discuss whether the denial of a medical procedure must be "unusual" to be unconstitutional); *Gibson*, 920 F.3d at 226 (holding that the denial of GCS can never be unconstitutional because it is not "unusual").

[141] *See Estelle*, 429 U.S. at 106 (creating the deliberate indifference test for inadequate medical care claims without referencing whether courses of treatment are "unusual").

medical need existed and then assessed prison officials' response to that need.[142] In totality, the Fifth Circuit's dismissal of the WPATH-SOC and literal interpretation of the Eighth Amendment erroneously dispose of the *Estelle* test entirely.[143] Rather than assessing Gibson's individualized medical needs, the Fifth Circuit created a blanket ban on a specific medical procedure, which necessarily undermines the second *Estelle* prong.[144] Additionally, such a sweeping judgment arguably undercuts the Eighth Amendment more broadly by questioning medical professionals and focusing on typicality, rather than rooting the analysis in human dignity and the condition of the plaintiff in an Eighth Amendment claim.[145]

B. Leave It to the White Coats, Not the Black Robes: The Ninth Circuit's Approach Emphasized Individual Medical Needs

Both the U.S. District Court for the District of Idaho and the Ninth Circuit followed precedent to the letter.[146] The Fifth Circuit criticized the District of Idaho for "not even mention[ing] *Kosilek* [*v. Spencer*]."[147] This criticism in fact highlights the virtue of the *Edmo* decision.[148] Testimony relevant to Michelle Kosilek has no bearing on Adree Edmo.[149] The Supreme Court illustrated the *Estelle* test by reference to a generic, *singular* individual.[150] The key question, then, is whether GCS is medically prudent with regard to an individual plaintiff's gender dysphoria, as outlined in authoritative standards of care:

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[142] *Id.* (holding that an Eighth Amendment claim for inadequate medical care requires an allegation of deliberate indifference to a serious medical need).

[143] *See id.* (prescribing a deliberate indifference framework for evaluating an inadequate medical care claim under the Eighth Amendment); *Gibson*, 920 F.3d at 221–22, 226 (stating that the denial of GCS is never unconstitutional for reasons outside of the *Estelle* analysis).

[144] *Gibson*, 920 F.3d at 226 (holding that the denial of GCS can never be unconstitutional, regardless of an individual plaintiff's circumstances); *see* Edmo v. Corizon, 935 F.3d 757, 795 (9th Cir. 2019) (per curiam) (explaining how the *Gibson* decision ignored proper legal analysis of medical care for incarcerated transgender persons), *cert. denied*, 141 S. Ct. 610 (2020).

[145] *See Estelle*, 429 U.S. at 106 (holding that a prison's failure to provide adequate medical care inflicts needless pain and suffering that is detrimental to human dignity); *Gibson*, 920 F.3d at 226 (holding that the denial of GCS is never unconstitutional, regardless of a plaintiff's individual needs); Baker, *supra* note 20, at 10 (highlighting unwritten rights inherent in the Eighth Amendment).

[146] *See Estelle*, 429 U.S. at 106 (setting forth the deliberate indifference test for considering the adequacy of medical care in prisons); *Edmo*, 935 F.3d at 803 (applying the *Estelle* test to the context of providing GCS in prisons); Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1116 (D. Idaho 2018) (finding the IDOC's denial of GCS was unconstitutional under the *Estelle* test).

[147] *Gibson*, 920 F.3d at 225–26.

[148] *See Estelle*, 429 U.S. at 106 (implying the necessity of an individual analysis of medical needs); *Edmo*, 935 F.3d at 795 (assessing Edmo's individual needs).

[149] *See Edmo*, 935 F.3d at 795 (discussing only Edmo's medical circumstances); *see Estelle*, 429 U.S. at 106 (requiring a case-by-case analysis of medical needs).

[150] *See Estelle*, 429 U.S. at 106 (holding that valid Eighth Amendment claims regarding inadequate medical care must allege acts amounting to deliberate indifference to a serious medical need).

the WPATH-SOC.[151] The Ninth Circuit properly focused its analysis in this manner.[152] The District of Idaho and the Ninth Circuit used the WPATH-SOC as a guidepost for evaluating the care provided to Edmo against a set of accepted medical standards.[153] Departure from those standards gave rise to a claim of medical care below a constitutionally acceptable minimum.[154]

Courts faced with plaintiffs like Edmo or Gibson in the future should thus follow the Ninth Circuit's approach.[155] To ensure this, the Supreme Court ought to adopt the Ninth Circuit's approach if and when it is called upon to decide the issue.[156] This approach priorities the judgment of the medical community at large, including medical professionals who understand an individual prisoner's specific medical needs and circumstances.[157]

CONCLUSION

The approach of federal courts across the country to the question of whether the denial of GCS for transgender inmates violates the Eighth Amendment has been markedly inconsistent. Although the U.S. Court of Appeals for the First Circuit held in *Kosilek v. Spencer* that the denial of GCS for

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[151] *See Edmo*, 935 F.3d at 794 (assessing the plaintiff's individual circumstances against WPATH-SOC recommendations); Kosilek v. Spencer (*Kosilek III*), 774 F.3d 63, 90 (1st Cir. 2014) (en banc) (considering the plaintiff's individual circumstances against the WPATH-SOC's recommendations); WPATH-SOC *supra* note 35, at 2 (providing clinical treatment recommendations for gender dysphoria).

[152] *See Edmo*, 935 F.3d at 794 (reviewing only the WPATH-SOC and Edmo's medical circumstances in reaching its ultimate holding); *see also Estelle*, 429 U.S. at 106 (suggesting an individualized assessment of the plaintiff's medical circumstances in Eighth Amendment claims).

[153] *See Edmo*, 935 F.3d at 794 (relying heavily on the NCCHC-approved WPATH-SOC to inform its holding); Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1126 (D. Idaho 2018) (finding the WPATH-SOC on point for evaluating the plaintiff's medical circumstances); *see also Estelle*, 429 U.S. at 106 (providing the general framework to assess when prison medical care falls below the constitutional minimum); Taylor v. Barkes, 135 S. Ct. 2042, 2043–44 (2015) (relying on accepted standards in the medical community to determine the constitutional minimum).

[154] *See* U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment); *Estelle*, 429 U.S. at 106 (holding that the inadequate provision of medical care in prisons constitutes cruel and unusual punishment); *Edmo*, 935 F.3d at 794 (holding that the WPATH-SOC is an authoritative standard of care for incarcerated persons experiencing gender dysphoria).

[155] *See Estelle*, 429 U.S. at 106 (holding that prison officials cannot exhibit deliberate indifference to an incarcerated person's serious medical need); *Edmo*, 935 F.3d at 794 (relying on *Estelle* to reach the conclusion that the denial of GCS constituted deliberate indifference to a serious medical need).

[156] *See Estelle*, 429 U.S. at 106 (holding that prison officials cannot exhibit deliberate indifference to an incarcerated person's serious medical need); *Edmo*, 935 F.3d at 794 (relying on *Estelle* to assess whether the denial of GCS constituted deliberate indifference to a serious medical need in the plaintiff's individual circumstance). Because the Supreme Court denied certiorari of Edmo's case, it remains to be seen if and when the Supreme Court will rule on this issue. *See* Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020) (mem.), *denying cert. to Edmo*, 935 F.3d at 794.

[157] *See Estelle*, 429 U.S. at 106 (providing a framework for assessing whether medical care in prisons falls below the constitutional minimum); *Edmo*, 935 F.3d at 794 (emphasizing the importance of medical evidence in determining the constitutionally adequate standards of care).

an incarcerated transgender person was not an Eighth Amendment violation in that specific instance, the U.S. Court of Appeals for the Fifth Circuit used the First Circuit's rationale to improperly make a broad, sweeping holding. The Fifth Circuit thus created what is in effect an unconstitutional blanket ban on GCS in prisons, regardless of whether GCS is a prudent and adequate treatment for an individual prisoner. The U.S. Court of Appeals for the Ninth Circuit, which held an individual plaintiff's circumstances warranted the provision of GCS, rightly criticized the Fifth Circuit's inconsistency with Eighth Amendment precedent. The Ninth Circuit properly emphasized that such cases are appropriately decided on narrow grounds, giving deference to a prisoner's individual medical needs and the highly-qualified experts who identify those needs. Courts should adopt the Ninth Circuit's approach in the future.

JOHN FERRARO

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