Case Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, AKA MASON EDMO,
Plaintiff-Appellee,
v.
IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellants
and
CORIZON, INC., et al.,
Defendants-Appellants

On Appeal from Orders of the United States District Court
for the District of Idaho
(No. 1:17-cv-00151-BLW)

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FORMER CORRECTIONS OFFICIALS IN SUPPORT OF PLAINTIFF-APPELLEE

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Counsel for Amici Curiae

MOTION

Pursuant to Federal Rules of Appellate Procedure Rule 29 and Ninth Circuit Court of Appeals Rule 29-3, former corrections officials Dan Pacholke, Richard Subia, Eldon Vail, and Jeanne Woodford, by and through their counsel, respectfully move for leave to file the accompanying brief as *amici curiae* in support of Appellee. *Amici* endeavored to obtain the consent of all parties prior to the filing of this brief, but Appellants declined to consent.

This appeal concerns the right of transgender prisoners to medically necessary gender-confirmation surgery. *Amici* are four former corrections officials from some of the largest state correctional systems within the Ninth Circuit. They collectively have over a century of combined experience in field of corrections. Over the courses of their careers, they have overseen the administration of necessary medical care to thousands of prisoners. *Amici*, therefore, have abundant experience with the provision of medical care to incarcerated persons.

As corrections professionals, *amici* have an interest in ensuring that issues affecting corrections systems are decided in a manner that is consistent with sound penological principles. *Amici* thus respectfully submit this brief to advise the court of certain principles and practices relevant to the issues presented in this case.

ACCORDINGLY, Mr. Pacholke, Mr. Subia, Mr. Vail, and Ms. Woodford respectfully move this Court for leave to appear as *amici curiae* in this matter and to file the brief accompanying this motion.

Dated: April 10, 2019

Respectfully submitted,

s/ Devon A. Little

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 10, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Devon A. Little
Devon A. Little

Counsel for Amici Curiae

Dated: April 10, 2019

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are four former corrections officials from some of the largest state correctional systems within the Ninth Circuit. With over a century of combined experience, each has worked at various levels of the prison system, from entry level correctional officers to senior positions within their respective state organizations. Over the courses of their careers, they have worked at and overseen dozens of correctional facilities, housing thousands of prisoners. *Amici* are:

- **Dan Pacholke**: the former Secretary of the Washington State Department of Corrections, the top position within the Department. He served in the Department for 33 years. He is a co-author of *Keeping Prisons Safe: Transforming the Corrections Workspace* (2014).

- **Richard Subia**: a former Director of the California Department of Corrections and Rehabilitation, a senior position within one of the largest correctional systems in the United States. Subia served in the Department for 26 years. He is now the President of Subia Consulting Services, Inc., through which he offers his expertise in correctional operations, oversight, and rehabilitative programming. He has served as an expert witness for a variety of correctional issues in numerous state and federal court cases.

- **Eldon Vail**: the former Secretary of the Washington State Department of Corrections. He has over 40 years of experience in the field of corrections and has served as an expert witness in numerous prison-related cases across the country.

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

- **Jeanne Woodford**: a former Undersecretary of the California Department of Corrections and Rehabilitation. She has more than 30 years of experience in corrections and law enforcement, including as a correctional officer and Warden of San Quentin State Prison. After her retirement from the Department, she taught at Berkeley and Hastings Law Schools and Stanford University's Continuing Studies Program.

Amici are not medical doctors and do not opine on the particular circumstances of Appellee's request for gender-confirmation surgery. However, as the administrators of state-wide correctional systems, *amici* oversaw the daily and routine administration of necessary medical care to thousands of prisoners over the course of their careers. *Amici*, therefore, have abundant experience with the provision of medical care to incarcerated persons.

As corrections professionals, *amici* have an interest in ensuring that issues affecting corrections systems are decided in a manner that is consistent with sound penological principles. *Amici* thus respectfully submit this brief to advise the court of certain principles and practices relevant to the issues presented in this case.

ARGUMENT

I. Corrections Officials Must Attend to the Serious Medical Needs of All Prisoners

"An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). As such, corrections officials have a constitutional obligation under the Eighth Amendment "to provide medical care for those whom [they are] punishing by incarceration." *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting *Estelle*, 429 U.S. at 103). Pursuant to this constitutional mandate, corrections officials have long understood that they are required to attend to the "serious medical needs" of all prisoners in their custody. *Id*.

This case involves the provision of medical care to a transgender individual. However, the obligation of prison officials to provide necessary medical care to incarcerated persons is not a "transgender issue." Absent truly extraordinary circumstances, such as where an unavoidable, genuine, and material safety threat is presented—which, we understand, no party contends is present here—there is no valid penological principle or justification to deny necessary medical treatment to any prisoner, whether it is gender-confirmation surgery or cataract-removal. *Cf., e.g.*, *Oliver v. Carey*, 315 F. App'x 649, 650 (9th Cir. 2009) ("Deliberate indifference may be found where prison officials fail to provide an inmate with medical care for reasons unrelated to the medical needs of the prisoner, such as

administrative concerns."). This is as true for routine treatments as it is for ones that, whether due to personal beliefs or otherwise, some may view as controversial.[2] The proper role of corrections officials is to facilitate the provision of medical treatment deemed necessary by qualified medical authorities. Put differently, the denial of medically necessary treatment to transgender prisoners is a ***deviation from*** ordinary correctional norms. The ordinary prison medical protocol requires corrections officials to facilitate the provision of any treatments prescribed as necessary by qualified medical authorities. Based on our experience, there is no reason to deviate from this standard with respect to treatments for gender dysphoria.

[2] We acknowledge that, to some, gender-confirmation surgery may be a more contentious treatment than surgery to remove a cataract. To this we note that correctional systems have a long history of contact with historically marginalized populations, such as members of the LGBTQ community, and have previously also encountered controversy when providing those prisoners with the medical care that they required. However, because societal biases have never been a reason to deny any prisoner necessary medical care, many of the once "controversial" treatments have become destigmatized and are now routinely provided, in the normal course, to prisoners in facilities across the country. *See, e.g.*, *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1267-78, 1317-18 (M.D. Ala. 2012) (describing state correctional systems' early reaction to HIV positive prisoners, and their later turn away from those policies, which were based on "outdated and unsupported assumptions about HIV and the prison system's ability to deal with HIV-positive prisoners"); *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003) (reversing district court's dismissal of a transgender prisoner's claim related to the discontinuance of her hormone therapy); *Phillips v. Mich. Dep't of Corr.*, 731 F. Supp. 792 (D. Mich. 1990) (granting a preliminary injunction to provide hormone treatments to a transgender prisoner).

There is no dispute in this case that gender dysphoria presents a serious medical need that corrections officials are constitutionally required to treat. *See* Appellants' Br. 6-7; *see also, e.g.*, *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *10 (E.D. Mo. Feb. 9, 2018) ("A diagnosis of gender dysphoria disorder alone may constitute a serious medical need.").[3] In our experience, there is general consensus in the correctional community—as there should be—that prisoners who experience gender dysphoria must be provided medically appropriate care. The question, presented in this case, is whether gender-confirmation surgery is a form of treatment that may, in some circumstances, be constitutionally mandated. From our perspective as correctional professionals, there is no reason to treat gender-confirmation surgery any differently than any other treatment for a serious medical need.

The accepted medical standards of care state that gender-confirmation surgery is "essential and medically necessary" for some transgender individuals. *See* World Prof'l Assoc. for Transgender Health (WPATH), Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, at 54-55 (2012),

[3] Even the few courts that have recently ruled against prisoner claims for gender-confirmation surgery have agreed that gender dysphoria presents a serious medical need. *See Gibson v. Collier*, No. 16-51148, 2019 WL 1417271, at *4 (5th Cir. Mar. 29, 2019); *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014) (en banc).

available at https://www.wpath.org/publications/soc.[4] Further, correctional experience has evidenced that, at least for some transgender prisoners, hormone therapy cannot substitute for gender-confirmation surgery, and the consequences of denying surgery in such cases may be severe. *See, e.g.*, *De'Lonta v. Johnson*, 708 F.3d 520, 522 (4th Cir. 2013) (transgender prisoner receiving hormone therapy still experienced "constant mental anguish" and on several occasions attempted autocastration); Jae Sevelius & Valerie Jenness, *Challenges and Opportunities for Gender-Affirming Healthcare for Transgender Women in Prison*, 13 INT'L J. PRISONER HEALTH 32, 35 (2017) ("Negative outcomes such as genital self-harm, including autocastration and/or autopenectomy, can arise when gender-affirming surgeries are delayed or denied."); George R. Brown & Everett McDuffie, *Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States*, 15 J. CORR. HEALTH CARE 280, 287-88 (2009) (describing "firsthand

[4] The National Commission on Correctional Health Care has endorsed these standards of care. *See* footnote 1 of Nat'l Comm'n Corr. Health Care, *Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings* (Apr. 2015), *available at* https://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care. *See also De'Lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013) (describing the Standards of Care as "the generally accepted protocols" for the treatment of gender dysphoria); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. 2012) ("the course of treatment for Gender Identity Disorder generally followed in the community is governed by the 'Standards of Care'"); *O'Donnabhain v. Comm'r of Internal Revenue*, 134 T.C. 34, 65 (2010) (the Standards of Care are "widely accepted in the psychiatric profession").

knowledge of completed autocastration and/or autopenectomy in six facilities in four states"). In this respect, gender-confirmation surgery is not principally different from any other type of surgery that is necessary to treat a particular disorder.

In sum, consistent with usual correctional medical standards that apply in all other contexts, transgender prisoners should be provided gender-confirmation surgery when medically appropriate. Absent truly extraordinary circumstances that do not appear to be present here, corrections officials do not—and should not—preclude prisoners from receiving medically necessary care. This basic penological principle applies no differently where it is a transgender prisoner receiving the care or where the care is gender-confirmation surgery for the treatment of gender dysphoria.

II. A Prisoner's Disciplinary History Does Not Provide a Basis to Deny Medical Treatment

Appellants' brief calls attention to Appellee's prison disciplinary history in several instances—specifically, to the fact of her "over thirty" disciplinary infractions. Appellants' Br. 10, 15. Appellants never explain why they highlight Appellee's disciplinary history, but their decision to do so suggests an unspoken and insidious view that Appellee's disciplinary history somehow supports the denial of

her request for gender-confirmation surgery.[5] We disagree with the notion that a prisoner's disciplinary history ever provides any basis to deny medical treatment.

Initially, it is important to understand that correctional systems maintain disciplinary codes that typically regulate a very broad array of activities in order to promote a disciplined correctional environment. Prison disciplinary codes not only prohibit criminal or violent behaviors but also regulate a number of seemingly insignificant behaviors, such as grooming, to name one example. As such, it is our experience that many prisoners will incur multiple disciplinary infractions during their period of incarceration, which may range from relatively minor to more severe infractions. Without knowing more about the incidents behind the infractions, a simple reference to the mere number of a prisoner's infractions is not particularly edifying. *See* Donald F. Tibbs, *Peeking Behind the Iron Curtain: How Law "Works" Behind Prison Walls*, 16 S. CAL. INTERDISC. L.J. 137, 139, 145 (2006) (discussing the breadth of prison disciplinary codes and observing that "it is highly probable that even the most careful inmate will commit a violation at some point during his incarceration"); David H. Cloud, et al., *Public Health and Solitary Confinement in the United States*, 105 AM. J. PUB. HEALTH 18, 20 (2015) (describing "minor rule

[5] Appellants explicitly took this position before the district court, arguing, based on an article authored by two non-correctional professionals, that a "satisfactory disciplinary record" should be considered an "eligibility requirement" for transgender prisoners to receive gender-confirmation surgery. R. 84-85.

infractions" that may result in solitary confinement in some jurisdictions: "talking back (insolence), smoking, failing to report to work or school, refusing to return a food tray, or possessing an excess quantity of postage stamps.").

However, even if a prisoner's disciplinary history reflects abhorrent behavior, the denial of medical care is not an appropriate or lawful consequence of such behavior. We are unaware of any correctional system in the United States that, as a matter of policy, conditions medical care on good prisoner behavior. In our experience, sound correctional practices mandate that the medical needs of all prisoners, regardless of behavior, must be addressed. Even if that were not so as a matter of fact, as a principle of law, the denial of needed medical care as punishment for a disciplinary infraction would surely violate the constitutional prohibition on cruel and unusual punishment. *See, e.g.*, *Watson v. Caton*, 984 F.2d 537, 540 (1st Cir. 1993) (stating that the "denial of needed medical treatment in order to punish [an] inmate" would be an "obvious" violation of the Eighth Amendment).

Furthermore, to use a prisoner's disciplinary history as a basis to restrict medical care would be particularly unwarranted and punitive with respect to transgender prisoners, who, in our experience, are disproportionately likely to incur disciplinary infractions as a result of their transgender status. This is so for several reasons.

First, it is well known among corrections officials, and amply documented in the literature, that transgender prisoners experience "exceptionally high rates of victimization relative to other prisoners." Sevelius & Jenness, *supra* at 33 (collecting data). This victimization, which may come from other prisoners or, even worse, from correctional officers, may lead to disciplinary infractions in a variety of scenarios—such as, for example, if a transgender prisoner fails to report to a particular location at the required time to avoid contact with a victimizer.

Second, it is not uncommon for prison disciplinary codes to prohibit behaviors that are the manifestation of a transgender prisoner's gender expression. For example, a prison's grooming rules may bar an incarcerated transgender woman from having long hair or wearing makeup. *See, e.g.*, Brown & McDuffie, *supra* at 280 (citing "rules infractions regarding clothing, hair, and makeup" as a "special challenge" posed by transgender prisoners). In these cases, the disciplinary sanction is not for any behavior deserving of moral opprobrium, but for the prisoner's expression of his or her gender identity. It would be utterly irrational to use gender expression—the basis for these infractions—as a reason to deny medical treatment that is intended to ***affirm*** the prisoner's gender identity.

For these reasons, we submit that sound correctional principles do not support the use of a prisoner's disciplinary history to affect whether or how the prisoner receives medical treatment, and this should be equally true—if not especially true—

for gender dysphoria. Simply put, it is neither rational nor lawful, in our view, to condition medical treatment on a prisoner's perfect adherence to a prison's disciplinary code.

III. Correctional Facilities Benefit From Treatments That May Help Alleviate Corollary Issues

As a matter of course, and as described in more detail above, prison administrators must facilitate the provision of all necessary medical care to those individuals incarcerated within their facilities. This is true even in the face of competing administrative concerns, such as budgetary implications. *Cf. Oliver*, 315 F. App'x at 650. This premise occasionally results in a public outcry regarding the allotment of state resources. However, providing prisoners with the proper, medically necessary treatments often benefits the relevant correctional facility and/or correctional department as a whole. *Cf., e.g.*, Bryan Robinson, *Death-Row Inmate Seeks Organ Transplant*, ABC NEWS (May 28, 2012), *available at* http://abcnews.go.com/US/story?id=90611 (a kidney transplant would be a one-time cost to the state of between $80,000 and $100,000, but would eliminate the need for the prisoner to receive dialysis, which would cost the state $121,000 per year for the rest of the prisoner's life).

With regard to transgender prisoners specifically, studies have shown that gender dysphoria, if not adequately treated, can lead to mental health problems, such as depression and self-harm, including autocastration and suicide. *See supra* at 6-7.

These issues in turn can lead to significant costs for correctional facilities, including medical costs related to emergency or surgical care, and, potentially, legal costs stemming from Eighth Amendment challenges (such as this one) or Section 1983 and state tort law suits brought as a result of prisoner injury or death. *Cf.* Brown & McDuffie, *supra* at 287-88 (noting that, by contrast, cases of autocastration appear to be rare in both the general community at large and among prisoners in states whose corrections policies allow for appropriate treatment of gender dysphoria). Providing gender-confirmation surgery where medically necessary is, thus, not only the constitutionally mandated course of action for prisoners with gender dysphoria, but would likely also provide corollary benefits to the overall operations of the relevant correctional facilities and correctional systems in which such prisoners are housed.

CONCLUSION

The Court should decide this appeal in accordance with the correctional principles set out above, which hold that prisoners who experience gender dysphoria should be provided medically necessary care—including gender-confirmation surgery. In the judgment of *amici*, informed by their decades of experience in correctional operations, there is no valid penological justification, disciplinary or otherwise, to preclude transgender prisoners from gender-confirmation surgery in medically appropriate circumstances.

Dated: April 10, 2019

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this **BRIEF OF *AMICI CURIAE* FORMER CORRECTIONS OFFICIALS IN SUPPORT OF PLAINTIFF-APPELLEE** complies with the length limits permitted by Fed. R. App. P. 29(a)(5) and 32-1(a). This brief is 2,791 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Devon A. Little
Devon A. Little

Counsel for Amici Curiae

Dated: April 10, 2019

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Signature *s/ Devon A. Little* **Date** April 10, 2019
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