No. 24-6477

In the United States Court of Appeals
for the Fourth Circuit

KANAUTICA ZAYRE-BROWN,

Plaintiff-Appellee,

v.

NORTH CAROLINA DEPARTMENT OF ADULT CORRECTION, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of North Carolina

BRIEF OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

I certify, pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, that no appellant is in any part a publicly held corporation, a publicly held entity, or a trade association, and that no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation.

This the 29th day of July 2024.

/s/ Orlando L. Rodriguez
Orlando L. Rodriguez

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STATEMENT OF JURISDICTION

In this 42 U.S.C. § 1983 action, Plaintiff-Appellee raised Eighth Amendment claims against the North Carolina Department of Adult Correction, and multiple Department officials. JA0021-0068. The district court had jurisdiction under 28 U.S.C. § 1331. On April 16, 2024, after granting summary judgment to Plaintiff-Appellee, the district court entered a mandatory injunction against Defendants-Appellants. JA1392-1399. Defendants-Appellants timely filed a notice of appeal on May 15, 2024. JA1400. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1292(a).

ISSUES PRESENTED

1. Whether the district court erred in denying summary judgment for Defendants and granting summary judgment for Plaintiff on her deliberate indifference claim after the district court expressly determined that a reasonable jury could find for either party on whether the requested surgery was medically necessary.
2. Whether the injunction violates the Prison Litigation Reform Act (PLRA), because Plaintiff failed to exhaust her administrative remedies and the injunction otherwise fails to meet the PLRA's requirements.

INTRODUCTION

This case involves an incarcerated person's request for gender-affirming surgery from the State prison system. Plaintiff is a transgender woman who is currently incarcerated. She has taken steps to transition to female and seeks to continue her transition through gender-affirming surgery (here, a vulvoplasty that would create a vulva), while incarcerated.

Defendants are state prison employees who accept Plaintiff's diagnosis of gender dysphoria, a condition characterized by distress related to incongruence between one's experienced/expressed gender and their assigned gender. To address the condition, these officials have provided Plaintiff with gender-related canteen items, regular psychological counseling, hormone therapy, and housing accommodations with female inmates. However, after an extensive review of Plaintiff's medical and mental health records, Defendants denied Plaintiff's request for a vulvoplasty. Defendants determined that Plaintiff's mental health was stable and well controlled with existing interventions, such that surgery was not medically necessary for her.

Plaintiff sued, asserting a claim for denial of medical care under the Eighth Amendment and other claims. After discovery, the parties cross moved for summary judgment. Defendants argued that a professional disagreement did not warrant a finding of deliberate indifference – the standard for evaluating Eighth Amendment medical care claims. After conducting a brief evidentiary hearing, the district court granted summary judgment to Plaintiff on her Eighth Amendment claim and denied summary judgment to Defendants. Although the district court expressly declined to answer the question of whether Plaintiff's desired surgery was medically necessary, noting that a reasonable jury could find for either party, the district court nonetheless ruled in Plaintiff's favor.

The district court focused on a single decision-maker and concluded that decision-maker was "biased" because he had written a position paper that expressed a belief that gender affirming surgery was not medically necessary and raised concerns about the quality of the medical literature. On that basis, the district court ordered injunctive relief. Specifically, the district court ordered Defendants to either provide the requested surgery or create a new committee including medical experts on gender dysphoria to re-review and decide the request.

The district court's decision was error. Under this Court's well-established precedent, the district court's concession that a reasonable jury could rule for either party on medical necessity demonstrates a reasonable disagreement that precludes summary judgment for Plaintiff and demonstrates that summary judgment should have been entered for Defendants as a matter of law. In addition, the district court failed to apply the black letter standard for deliberate indifference. Instead, the district court applied a new standard that sounds in procedural due process – focusing on whether the decision was sufficiently individualized and unbiased. Furthermore, the district court apparently determined that Defendants violated the Eighth Amendment because the participation of the purportedly-biased decision-maker resulted in a de facto categorical ban on surgery. But the district court committed clear error by making this finding in the face of substantial evidence to the contrary.

Separately, Plaintiff's claim was barred by the Prison Litigation Reform Act (PLRA), because Plaintiff did not exhaust her administrative remedies. The district court's injunction also violates the PLRA's requirements. Accordingly, this Court should reverse.

STATEMENT OF THE CASE

A. Plaintiff is a transgender woman who has been diagnosed with gender dysphoria.

Plaintiff is a transgender woman. (JA0022-JA0023) The term transgender means a person whose gender identity is different from their assigned sex at birth. (JA0030) Plaintiff has been diagnosed with gender dysphoria ("GD") – a mental health diagnosis defined as the "marked incongruence between one's experienced/expressed gender and assigned gender[.]" (DE 61-2 ¶ 23) GD is associated with "clinically significant distress or impairment in social, occupational, or other important areas of functioning." (DE 61-1 at 2)

Transitioning is the "[p]rocess of changing one's gender presentation and/or sex characteristics to . . . align[] with one's internal sense of gender identity[.]" (DE 61-1 at 2) In 2012, Plaintiff began hormone therapy to decrease her testosterone and to get a more female look. (DE 61-3 at 24-27) Between 2012 and 2017, Plaintiff had multiple surgeries as part of her transition, including breast augmentation, facial feminization surgery (permanent fillers in her chin, cheek and forehead), earlobe replacement surgery, and a "Brazilian butt lift" (injection of fat into the buttocks). (DE 61-4 at 1; DE 61-3 at 31-32) Then in 2017, just

before her incarceration, Plaintiff had an orchiectomy – surgical removal of the testes. (DE 61-3 at 43-44) Plaintiff reports that these many procedures caused only a slight improvement of her GD. (DE 61-3 at 35-48)

B. The Department[1] has provided certain accommodation for and treatment of Plaintiff's GD.

Plaintiff was incarcerated in the state prison system on October 10, 2017. (JA0038-0039) Upon Plaintiff's incarceration, Department medical staff confirmed her GD diagnosis. (DE 61-15, DE 61-16 at 3) Throughout her incarceration, the Department has provided Plaintiff with gender affirming hormone therapy and mental health counseling.[2] (DE 61-3 at 69-70; DE 61-17; DE 61-33 at 30-31) The Department also transferred Plaintiff to a facility where she could be housed with other females and provided her with access to gender affirming canteen items, including undergarments. (DE 61-40 at 5; DE 61-18 at 2)

Plaintiff has requested a vulvoplasty, which is a surgery in which

[1] The Department of Adult Correction (previously, the Department of Public Safety) – herein, the Department – operates the state prison system in North Carolina.

[2] Plaintiff initiated her own removal from mental health services in November 2022. (DE 33 at 30-31) Additionally, Plaintiff voluntarily discontinued medication for anxiety and depression on April 25, 2022. (DE 61-19)

existing tissue is used to create a neo-vulva. (DE 61-22 at 5) After engaging in its multidisciplinary review process, the Department denied the request, which led to the claims asserted in this case.

C. The Department's policy provides for evaluating requests for surgery by transgender persons on an individual basis.

In 2019, the Department adopted its current policy for the Evaluation and Management of Transgender Offenders ("EMTO Policy"), which was further amended in 2021. (DE 61-1) The EMTO Policy provides for a Division Transgender Accommodation Review Committee ("DTARC"), which reviews requests for surgery by transgender persons. (DE 61-1 at 2-7) The DTARC operates at the division level for all 50+ state prison facilities. (DE 61-1 at 6-7) The Department's policy for evaluating these requests requires an individualized, case-by-case review. (JA0879-0880, JA0914, DE 61-1 at 7) The Department is aware of the World Professional Association of Transgender Health ("WPATH") guidance for gender affirming care and considers it a useful resource. (DE 61-7 at 5, 21; DE 61-8 at 43; DE 61-5 at 26-27) However, the WPATH guidelines are intended to be flexible and still require an individualized application. (*See* DE 104-3 at 18-19; DE 101 at 106-107,111)

The DTARC is made up of high level medical and mental health staff, including the Chief Medical Officer/Medical Director (Arthur L. Campbell, III, M.D.); the Chief of Psychiatry (Brian Sheitman, M.D.); and the Director of Behavioral Health (Lewis Jonathan Peiper, Ph.D.) (DE 61-9 at 6; DE 61-27 at 1) The DTARC also includes the Director of Nursing and other non-clinical staff, including custody experts. (DE 61-9 at 6-7, 78; DE 61-1 at 2) The DTARC is intentionally multidisciplinary, with each person providing relevant input based on their area of expertise. (DE 61-9 at 6, 70-79; DE 61-5 at 44-45)

DTARC members generally do individualized reviews prior to a DTARC meeting to prepare their input for a particular request. (DE 61-5 at 78-80; JA0915) This individualized approach is followed for all surgery requests. (JA0892) As of December 2022, the DTARC had considered a total of 25 requests for gender-affirming surgeries made by 15 people (not including Plaintiff). (JA0891-0892; JA0971-0972) While each of those requests was denied for a range of reasons including specific contraindications to surgery, each request received individualized review and consideration. (JA0892-0893; JA0971-0972)

The DTARC's reasons for each decision are documented and the

decisions were briefly summarized on a chart that was produced in discovery. (JA0971-0972) The chart indicates that while some of the requests were determined to not be medically necessary, several were denied for other reasons, including "recent instability, medical noncompliance, and inconsistencies in gender transition"; "significant behavioral and mental health issues not well controlled"; "has not begun hormone therapy"; and "does not meet diagnostic criteria," among other reasons. (*Id.*)

Where surgery is being considered, the DTARC may authorize a surgical consultation to determine whether the surgeon considers the requester an appropriate candidate for surgery. (DE 61-9 at 31, 36-37) But the determination of whether to approve the surgery as medically necessary remains with the DTARC. (DE 61-5 at 100-104)

For each case, the DTARC discusses the request and makes a recommendation. (DE 61-9 at 29-31, 51, 93-94; DE 61-1 at 5-8) In conducting this review, DTARC members review medical and mental health assessments and make an overall determination of the patient's stability. (DE 61-5 at 70-72, 175-76; DE 61-8 at 28-30) The DTARC also considers whether the patient's symptoms of GD have been adequately

addressed by other treatments. (DE 61-5 at 70-72) Once the DTARC makes its recommendation, the request undergoes final review by the Director of Health and Wellness Services and the Assistant Commissioner of Prisons. (DE 61-1 at 7)

In questioning the individualized nature of the DTARC review process, the district court has consistently pointed to a document written by Dr. Campbell, the Department's Chief Medical Officer. That document, which is entitled "DTARC medical necessity position statement on gender reassignment surgery," summarizes Dr. Campbell's review of the research related to gender affirming surgery and sets forth his formulation of the phrase "medical necessity." (DE 61-14 at 3-11) The draft document states that, in Dr. Campbell's view based on his literature review and his professional judgment, gender affirming surgery is not medically necessary. (JA0923-0924) The draft position statement was only shared by Dr. Campbell with the other DTARC members after they had already met to decide Plaintiff's request. (JA0889-0891, JA0921, JA0926) Dr. Campbell's position paper has never been adopted by DTARC or the Department. (JA0926; DE 61-5 at 121-122, 126-127; DE 61-11 at 60-61; DE 61-12 at 112-113;) Rather, the Department follows the

EMTO policy. (DE 61-1; JA0928-0929, JA0953)

D. The DTARC considered and denied Plaintiff's request for surgery.

In 2019, the DTARC deferred action on Plaintiff's request for surgery. (DE 61-21) In February 2020, the DTARC revisited Plaintiff's request and sought information from the UNC Transgender Health Program ("UNC THP"), regarding the desired procedure. (DE 61-10 at 12) In May 2020, after receiving this information, the DTARC recommended a referral to the UNC THP to determine whether Plaintiff was an appropriate candidate for surgery. (DE 61-10 at 12) The DTARC's meeting minutes reflected an acknowledgement that gender affirming surgery could be considered medically necessary "if there has been documented history that without this type of surgery, there would be severe psychiatric or psychological injuries to the person." (DE 61-10 at 12)

On July 12, 2021, the UNC THP surgeon, Dr. Figler reported that, based on meeting WPATH's criteria, Plaintiff would be an appropriate candidate for surgery after meeting a weight goal. (DE 61-23 at 2)

On February 17, 2022, the DTARC met to consider Plaintiff's request. (DE 61-13) Prior to the meeting, Drs. Peiper, Sheitman, and

Campbell each separately reviewed Plaintiff's medical records, including her mental health records. (DE 61-5 at 78-82; DE 61-9 at 119; DE 61-12 at 9-11, 31; JA0880-0883, JA0914-0917, JA0945-0948, JA0973-1379) They were aware that the UNC THP considered Plaintiff an appropriate candidate for surgery and that a treating endocrinologist and a licensed social worker had indicated their support for surgery. (JA0897-898, JA0938, JA0955, JA0958) Notably, however, none of Plaintiff's treating providers had ever reported that Plaintiff was at serious or imminent risk of self-harm unless she received the requested surgery. (*See, e.g.*, JA0973-1379)

During the DTARC meeting, Drs. Peiper, Sheitman, and Campbell each provided input based on their individual assessments. (DE 61-5 at 85-87; DE 61-8 at 22-24; DE 61-9 at 116-121; DE 61-12 at 83-91) The DTARC discussed and reached a consensus not to approve the requested surgery, which it concluded was not medically necessary. (DE 61-5 at 85-90; DE 61-9 at 96; DE 61-12 at 101-102) Plaintiff was notified of this decision on April 26, 2022. (JA1364)

E. The DTARC's determination was primarily based on an assessment of Plaintiff's mental health.

The DTARC's conclusion rested on two bases. First, the DTARC

determined that Plaintiff was relatively well adjusted and was doing well with current treatments. (DE 61-8 at 22-24; DE 61-5 at 108; DE 61-12 at 88-89; DE 61-13 at 1-2) Second, the DTARC concluded that the medical literature regarding the efficacy of gender affirming surgery as a treatment for GD was mixed in terms of outcomes. (DE 61-9 at 129-131; DE 61-13 at 2-5) Regardless of the nature of the medical literature, however, the clinical DTARC members (including Dr. Campbell) have confirmed that they would have approved the surgery if it had appeared that Plaintiff was at serious risk of imminent harm. (JA0887-0888, JA0920-0921, JA0925-0926, JA0950-0951)

1. The clinical members of the DTARC each independently concluded that Plaintiff's mental health was stable and her GD was well controlled.

Regarding the first factor, Plaintiff's mental health, Drs. Peiper, Campbell, and Sheitman each independently concluded that surgery was not medically necessary for Plaintiff.

Dr. Peiper testified that he reviewed more than four hundred pages of records prior to the DTARC meeting. (*See* JA0881; JA0973-1379) He was looking for broad indications of mental health symptoms and any impact those mental health symptoms were having on Plaintiff's general

functioning. (JA0882) After reviewing these records, Dr. Peiper concluded that while "there were moments of crisis, moments of instability[,] [o]verall[,]" Plaintiff was generally stable, "[a]nd any of the mental health symptoms appeared reasonably well-controlled." (JA0882-0883) Thus, Dr. Peiper determined that Plaintiff did not have severe symptoms associated with GD that would not be responsive to other interventions. (JA0888) Dr. Peiper concluded that Plaintiff was "remarkably well adjusted," that "[s]uicidality wasn't a concern," and that "she was [not] at significant risk" without the procedure. (DE 61-9 at 119) Dr. Peiper did not defer to anyone in reaching this conclusion. (JA0883)

Dr. Campbell also reviewed Plaintiff's medical records in preparation for the DTARC's meeting. (JA0915-0916) Dr. Campbell noted that Plaintiff experienced "episodic periods" of "distress," which "seemed to be often situational and generally short-lived without any severe implications." (JA0916) Dr. Campbell's overall assessment was that Plaintiff "was psychiatrically and emotionally stable and actually had very good indications of adapting well." (JA0916)

Moreover, approximately three months before the meeting, Plaintiff's endocrinologist concluded that her "gender dysphoria was chronic, stable, and markedly improved[,]" and two weeks before the meeting, Plaintiff's primary care manager noted that her GD was "chronic, stable, and improved." (JA0917) Thus, Dr. Campbell concluded that "the current treatment plan seemed to be sufficiently addressing the underlying condition of dysphoria for Ms. Brown, and, therefore, there was no indication that additional treatment or accelerated treatments were indicated at that current time." (JA0917)

Dr. Sheitman also reviewed Plaintiff's medical records before the DTARC meeting. (JA0946) Dr. Sheitman determined that Plaintiff's condition was "reasonably controlled," such that she "didn't really stand out … as excessively dysphoric, depressed, anxious." (DE 61-12 at 9-11, 31, 87-90) Dr. Sheitman identified times when Plaintiff appeared to struggle, but he noted that these instances seemed to be reactions to external events rather than some "internal process." (JA0948) Overall, Dr. Sheitman concluded that Plaintiff was doing relatively well, and that she appeared to be energetic, forward-thinking, and not depressed – and that he did not see severe symptoms. (JA0947) Dr. Sheitman testified

that he did not defer to Dr. Campbell or anyone else in reaching this conclusion. (JA0949-0950)

The DTARC was aware of and considered a handful of incidents in which Plaintiff indicated that she was experiencing more significant distress, including incidents in March and August 2019 in which she was taken to the emergency room (JA1024-1064, JA1122-1167) and a situation in December 2020 in which she was sent to another facility for inpatient mental health treatment and monitoring after reporting thoughts of self-harm. (JA1223-1249) In the latter situation, Plaintiff was ultimately transferred back to her original facility without incident. (JA1249-1254) DTARC was also aware that Plaintiff had threatened to rip the skin off her phallus "in order to force the need for surgical intervention" and had reported placing a band around her phallus (before later voluntarily removing it) to "protest" the time it was taking to schedule a surgical consult. (JA0957; DE 61-8 at 2-3, 25, 35-38; JA1270-1271)

The DTARC did not consider any of these events to be suicide attempts or reflective of actual suicidal intent. (*E.g.,* DE 61-8 at 37-38, 61, 78; DE 61-9 at 146-150) DTARC evaluated these events in the context

of Plaintiff's detailed and well documented mental health history and, based on the whole record and overall trajectory, believed that her mental health was remarkably stable. (JA0882-0883, JA0888, JA0916, JA0926, JA0948-0950)

Throughout her incarceration, Plaintiff has continuously and consistently denied thoughts of self-harm or suicidal ideation. (DE 61-33; DE 61-34; DE 61-35) Plaintiff's medical records do not indicate a loss of interest, hopelessness, difficulty sleeping, or other indications of significant or worsening symptoms. Indeed, there are numerous indications of the opposite – that Plaintiff was doing relatively well. (DE 61-9 at 119; DE 61-8 at 48-49; DE 61-3 at 99-103, 110-114; JA0971-0972) Plaintiff has continued to participate in programs, pursue career and academic goals, and plan for the future. (DE 61-5 at 120; DE 61-3 at 17-18) Plaintiff indicated that she does not allow her distress to affect her day to day and that she has appropriate coping mechanisms, such as journaling and meditation. (DE 61-3 at 116) Plaintiff describes herself as "always a happy person," with "loads of energy." (DE 61-3 at 107)

Ultimately, the DTARC's case summary reflects its conclusion that "the patient's mood and anxiety symptoms appear well controlled by psychiatric interventions." (DE 61-13 at 2; DE 61-27 at 2)

2. The DTARC's assessment of the medical literature was a secondary factor.

During the DTARC meeting, Dr. Campbell also discussed his general conclusions based on his medical literature review.[3] (*See* JA0883-0884, JA0918-0919) First, Dr. Campbell noted that he had found no studies that clearly concluded that gender-affirming surgery would consistently alleviate the symptoms of gender dysphoria. (JA0919) Second, Dr. Campbell noted that many of the studies attempting to assess efficacy were low quality. (JA0919) Similarly, Dr. Sheitman did his own literature review, and determined that the literature was inconclusive on efficacy of surgery. (JA0951-0952)

Regardless, the DTARC's medical literature assessment was not the driving factor that resulted in denial. Drs. Peiper, Campbell, and Sheitman each testified that the DTARC would approve gender-affirming

[3] There is no evidence that Dr. Campbell's draft position statement was shared with any DTARC members prior to their discussion of Plaintiff's request and their recommendation to deny it. (*See, e.g.,* JA0889-0890, JA0952-0953) Moreover, Drs. Peiper, Campbell, and Sheitman each testified that the position statement did not affect the DTARC's practice of individualized review. (JA0891, JA0928, JA0953)

surgery as medically necessary if warranted by a patient's clinical presentation, regardless of any concerns about the medical literature. (JA0884, JA0887-088, JA0926, JA0950-0951)

F. Plaintiff brings claims against Defendants, including an Eighth Amendment claim.

In April 2022, Plaintiff filed this lawsuit against the Department and fourteen Department officials. Plaintiff asserts claims under the Eighth Amendment to the U.S. Constitution, Article I, Section 27 of the North Carolina Constitution, the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act ("RA"). In relevant part, Plaintiff contends that Defendants were deliberately indifferent to her medical needs by denying a medically necessary surgery. (DE 1 ¶¶ 144-154)

G. Despite holding that a reasonable jury could find for either party on medical necessity, the district court granted summary judgment for Plaintiff on her Eighth Amendment claim and ordered injunctive relief.

Defendants initially moved to dismiss based in part on Plaintiff's failure to exhaust her administrative remedies. (DE 10) The district court denied the motion. (DE 25) After discovery, the parties filed cross motions for summary judgment. (JA0179-0180, JA0181-0184) In her response to Defendants' motion, Plaintiff acknowledged that her Eighth Amendment

claim is not framed "in terms of the state having a 'blanket ban' on gender-affirming surgery" but rather is "based exclusively on her individual medical needs." (DE 66 at 21)

Thereafter, on February 2, 2024, the district court issued an order denying the parties' cross motions without prejudice. (JA0817-0831) The district court indicated that there were unresolved questions of material fact and that, instead of proceeding to trial, the district court would hold an evidentiary hearing to resolve two disputed issues: (1) whether the DTARC applied the appropriate standard of care; and (2) whether the DTARC's medical necessity analysis afforded Plaintiff individualized consideration. (JA0826) The district court set an evidentiary hearing for February 20, 2024, limited to those two issues. (JA0830) The district court indicated that it would permit the parties to renew their summary judgment motions after the hearing.

On February 20, 2024, the parties appeared and presented evidence at a three-hour hearing on the two issues identified by the district court. Defendants presented the testimony of Drs. Peiper, Sheitman, and Campbell, who each testified to the individualized nature of the DTARC's determination. (*E.g.,* JA0891, JA0928, JA0953)

After the hearing, the parties renewed their cross-motions for summary judgment. (JA0832-0834, JA1380-1381) On April 16, 2024, the district court denied Defendants' motion and granted Plaintiff's motion as to her Eighth Amendment claim, "find[ing] that Defendants' accommodation review process violated Plaintiff's Eighth Amendment rights." (JA1398)[4] The order contains a short background section but no findings of fact with citation to the record. The order also contains a single paragraph discussing the standard for injunctive relief and concludes that Plaintiff "satisfies all five factors." (JA1397)

Despite Plaintiff's express disclaimer of any theory based on a categorical ban and the lack of any due process claim, the district court framed the question presented as "whether North Carolina's *process* for assessing the medical necessity of gender-affirming surgery for inmates suffering from gender dysphoria violates the Eighth Amendment . . . ." (JA1392 emphasis added)) The district court then determined that the case boiled down to Dr. Campbell's credibility because of his position statement indicating that surgery was not medically necessary. Despite

[4] The district court denied for now Plaintiff's motion "with respect to [her] ADA and *Corum* claims," which are triable by jury.

acknowledging Dr. Campbell's "impressive qualifications" and "several decades" of admirable service to our country, the district court indicated that it could not credit Dr. Campbell's testimony that he gave individualized consideration to Plaintiff's request. (JA1396) The district court claimed it was not making any value judgment about Dr. Campbell's views:

> The Court's decision remains value neutral as to Dr. Campbell's apparent views. *This case is about process*, not substance. While this case involves a transgender prisoner, it is not a case about transgender issues. It is certainly not a case about whether states should or should not be required to pay for transgender healthcare. Instead, this case is about whether states can permit prison officials' personal views to determine the medical care available to prisoners.

(JA1396 (emphasis added)) The district court apparently considered Dr. Campbell's perspective to be his personal views as opposed to his professional judgment. (JA1397)

The district court found that non-clinical DTARC members had deferred to Dr. Campbell and further determined that "there is evidence that" even DTARC members with medical training had deferred to Dr. Campbell's assessment. (JA1393) The district court's order made no express subjective deliberate indifference finding. The district court did

not address Drs. Peiper and Shietman's testimony that they afforded Plaintiff's request individualized review and did not defer to anyone on their assessment of whether the surgery was necessary for her. Instead, the district court concluded that North Carolina's process was deficient because it failed to afford Plaintiff's request "unbiased and individualized" consideration. (JA1393, JA1397)

Despite having acknowledged in its prior order that "where—as here—a deliberate indifference claim arises from prison officials' decision not to provide a course of treatment, 'the essential test is one of medical necessity,'" the district court "ma[de] no finding as to medical necessity." (JA0825, JA1397) Rather, the district court "[found] only that the process by which Defendants assessed medical necessity was flawed." (JA1397) The district court acknowledged that, at this stage, "a reasonable jury could find for either party on the question of medical necessity." (JA1398)

Based on these conclusions, the district court entered a mandatory injunction that requires Defendants "to, within 30 days, either (1) Notify the Court of DPS' intention to accommodate Plaintiff's surgical request; or (2) Form a new committee containing two medical doctors with gender dysphoria expertise to re-assess Plaintiff's accommodation request and

submit a roster of the reconstituted committee to this Court for approval." (JA1398-1399)

The district court indicated that while its order could render the Eighth Amendment claim moot, the ADA and state constitutional claims could remain viable and "Defendants are entitled to trial by jury on these damages claims." (JA1398) Thus, "if Defendants accommodate Plaintiff's surgical request, and Plaintiff's ADA and Corum claims proceed to trial, *then* the question of medical necessity will be put to the jury." (JA1398 (emphasis added))

On May 15, 2024, Defendants filed a timely Notice of Appeal. (JA1400)

SUMMARY OF ARGUMENT

The deprivation of necessary medical care in prison, under certain circumstances, can form the basis of an Eighth Amendment violation. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). But a prison official violates the Eighth Amendment only when two requirements are met to establish deliberate indifference to inmate health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). First, the inmate must show an objectively, sufficiently serious deprivation, such as a serious medical need. Second,

the inmate must show that the prison official has a sufficiently culpable state of mind, such as awareness of a serious risk and conscious disregard of the same. *Id.* Obviously, this requires something much more than mere negligence or mistake. *Id.*

Here, the district court denied summary judgment to Defendants even though it expressly acknowledged that a reasonable jury *could find for either party* on whether the requested surgery was medically necessary. Yet, the district court granted summary judgment *to Plaintiff* on her deliberate indifference claim, an atypical result that was only possible because the proper standard was not applied.

This decision was wrong. First, there is a well-established standard for medical deliberate indifference claims brought by convicted prisoners under the Eighth Amendment. It is black letter law in this circuit that a difference of opinion on medical care does not constitute deliberate indifference. The district court's finding that either party could prevail at a jury trial on the central issue of medical necessity demonstrates that Defendants were entitled to summary judgment, because it underscores that there is a reasonable disagreement regarding medical necessity. For

that reason, summary judgment should have been awarded *to Defendants*.

Second, the district court did not apply the subjective deliberate indifference prong to the individual Defendants and made no findings concerning that prong.

Third, in analyzing the claim, the district court framed the question as whether the State's overall decision-making process was adequate and concluded that Defendants' review of Plaintiff's requested surgery was not "individualized and unbiased," and therefore violated the Eighth Amendment. (JA1393) In doing so, the district court effectively and improperly converted Plaintiff's medical deliberate indifference claim into a procedural due process claim. But the district court's "unbiased" decision-maker requirement deviates from the deliberate indifference standard and invites new claims based on the quality of the decision-making process.

In reaching its conclusion, the district court focused on perceived process concerns stemming from a position paper written by Dr. Campbell, one of the decision-makers, that set forth concerns about the state of the medical literature and stated that gender affirming surgery

was not medically necessary. The district court considered this "bias," ignoring record evidence that indicated that this purported bias was merely an expression of Dr. Campbell's professional judgment – which, under this Court's jurisprudence, is not actionable under the Eighth Amendment, even if flawed.

Taken individually and together, these points demonstrate that the district court erred by denying summary judgment to Defendants and granting summary judgment to Plaintiff on her deliberate indifference claim.

Furthermore, the district court erred in finding a de facto categorical ban (a theory Plaintiff conceded she was not pursuing) on this record and without a full trial. The district court's order fails to set forth any supporting factual findings, meaningful analysis, or citations to the record on this point. The district court's order discredits Dr. Campbell's testimony but fails to either credit or discredit testimony of two additional key decision-makers whose testimony squarely refuted the existence of such a ban. These decision-makers unequivocally explained that they personally reviewed Plaintiff's extensive medical and mental health records and independently determined, based on that review, that

surgery was not necessary in her individual case. The record here deviates sharply from cases in which categorical bans have been found.

Upholding the district court's decision would erode this Court's well-established deliberate indifference standard. This Court has consistently applied a high bar for Eighth Amendment claims brought by incarcerated persons challenging their medical care, and for good reason. Substantially lowering the bar for these claims would open the floodgates to unjustified claims and place courts into the role of supervising and second-guessing the administration of health care in prison systems – an unwarranted intrusion where there has not been a strong showing that any rights were violated.

Separately, the court's decision was also error because it violates the PLRA. As a threshold matter, because Plaintiff concedes that she did not file and exhaust a specific grievance related to the DTARC's February 2022 decision prior to filing this lawsuit, she failed to exhaust her administrative remedies and her claim is barred. Additionally, the district court's injunction violates the PLRA's requirements for injunctions, because the order lacks required need-narrowness-intrusiveness findings and requires Defendants to violate state law.

For all of these reasons, this Court should reverse. On this record, the Court should direct that the district court enter summary judgment for Defendants on Plaintiff's deliberate indifference claim based on the district court's own finding that a reasonable jury could find either way on the issue of medical necessity. In the alternative, the Court should remand for the district court to send disputed factual issues to a jury.

STANDARD OF REVIEW

This Court reviews a "district court's grant of summary judgment de novo[.]" *Butler v. Drive Auto. Indus. of Am.*,793 F.3d 404, 407 (4th Cir. 2015). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Additionally, where a district court conducts an evidentiary hearing and makes factual findings based on that evidence, the appellate courts may review its factual findings for clear error. *United States v. Nunez-Garcia*, 31 F.4th 861, 865 (4th Cir. 2022). "Clear error occurs if [the Court's] review of the entire record leaves [it] with the definite and firm conviction that a mistake has been committed." *Id.* (citation omitted).

ARGUMENT

I. The District Court Erred in Denying Summary Judgment to Defendants and Granting the Same to Plaintiff on Plaintiff's Deliberate Indifference Claim.

The district court erred in denying summary judgment to Defendants and granting it to Plaintiff where it expressly determined that a reasonable jury could find for either party on the key issue of medical necessity. First, this demonstrates that there was a professional disagreement on medical necessity, which precludes a finding of medical deliberate indifference. Second, the district court did not apply the subjective prong of the deliberate indifference standard. Third, the district court erroneously focused on perceived process concerns and effectively added an "individualized and unbiased" requirement. Finally, the district court committed clear error[5] in finding a de facto ban.

[5] To the extent that this Court determines that the district court made specific factual findings on this issue based on its three-hour evidentiary hearing, it appears those would be reviewable for clear error. To the extent the district court made findings from reviewing the summary judgment record more broadly, the standard *de novo* review applies. While Defendants do not concede that clear error is the appropriate standard, Defendants nonetheless maintain any finding of a de facto ban was clear error.

A. The well-established deliberate indifference standard applies to prisoners' claims based on the provision of medical care.

The deprivation of necessary medical care in prison, under certain circumstances, can form the basis of an Eighth Amendment violation. *Gamble*, 429 U.S. at 104. "[A] prison official violates the Eighth Amendment only when two requirements are met[,] [f]irst, the deprivation alleged must be, objectively, sufficiently serious[,]" and second, the "prison official must have a sufficiently culpable state of mind[,]" what the Court referred to as "deliberate indifference to inmate health or safety[.]" *Farmer*, 511 U.S. at 834 (citations omitted). Thus, the deliberate indifference "inquiry proceeds in two parts[.]" *Thorpe v. Clarke*, 37 F.4th 926, 933 (4th Cir. 2022).

The objective component asks "whether confinement conditions inflict harm that is 'objectively, sufficiently serious' to deprive prisoners of 'the minimal civilized measure of life's necessities[.]'" *Id.* (citing *Farmer*, 511 U.S. at 834).

The subjective component asks, "whether officers subjectively acted with 'deliberate indifference to inmate health or safety' because they knew of but disregarded the [claimed] inhumane treatment." *Id.* (citing

Farmer, 511 U.S. at 834). The Supreme Court "adopt[ed] [the subjective recklessness standard as used in the criminal law] as the test for 'deliberate indifference' under the Eighth Amendment." *Farmer*, 511 U.S. at 840. An official cannot be liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* 511 U.S. at 837. Thus, "it is not enough that an official should have known of a risk[,] [rather] he or she must have had actual subjective knowledge of both the inmate's serious medical condition and the excessive risk posed by the official's action or inaction." *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014) (emphasis in original). Accordingly, the deliberate indifference standard "is a higher standard for culpability than mere negligence or even civil recklessness, and as a consequence, many acts or omissions that would constitute medical malpractice will not rise to the level of deliberate indifference." *Id.* 775 F.3d at 178.

The Fourth Circuit has made clear that "a disagreement among reasonable medical professionals is not sufficient to sustain a deliberate

indifference claim." *Hixson v. Moran*, 1 F.4th 297, 303 (4th Cir. 2021). Also, this Court has held that deliberate indifference requires treatment that is "so grossly incompetent, inadequate or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Stevens v. Holler*, 68 F.4th 921, 933 (4th Cir. 2023) (quotations omitted). In short, the medical deliberate indifference standard is extremely high.

B. The district court failed to apply the established deliberate indifference standard.

The district court's recognition that the medical necessity issue could go in either party's favor is fatal to any conclusion that Defendants violated Plaintiff's Eighth Amendment rights by denying her a medically-necessary surgery. The district court also erred because it did not apply the established subjective deliberate indifference prong, and the record cannot support a conclusion that any Defendant was subjectively aware of a serious risk of harm to Plaintiff, which they nonetheless ignored. The district court further erred by framing the issue in a manner more akin to a procedural due process claim, which was not brought in this case and would not be viable, and by creating a new requirement for an "unbiased" decision.

1. The district court expressly declined to make a medical necessity determination.

Fundamentally, a medical deliberate indifference claim requires a deprivation of medically necessary care. This is because, while it has long been established that convicted prisoners have a right to treatment, that right "is, of course limited . . . and the essential test is one of medical necessity and not simply that which may be considered merely desirable." *Bowring v. Godwin*, 551 F.2d 44, 47-48 (4th Cir. 1977). That limitation "stems from the Eighth Amendment[.]" *Id.*

Given that the core question on a medical deliberate indifference claim involves medical necessity, this Court has stated that as "with all other aspects of health care, [the propriety or adequacy of a particular course of treatment] remains a question of sound professional judgment[,] [and] . . . courts will not intervene upon allegations of mere negligence, mistake *or difference of opinion*." *Id.* (emphasis added). Thus, "a disagreement among reasonable medical professionals is not sufficient to sustain a deliberate indifference claim." *Hixson*, 1 F.4th at 303. Accordingly, it is not enough that a medical professional may have been wrong in their assessment of medical necessity, as that is not the test. *Id.* Moreover, in general, disagreements over the appropriate course of care

are not enough. *Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985). *See also, Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016) (same); *United States v. Clawson*, 650 F.3d 530, 538 (4th Cir.2011) (same); *Jackson*, 775 F.3d at 178 (cleaned up) (noting this Circuit has "consistently" found that "disagreements between an inmate and a physician over the inmate's proper medical care . . . fall short of showing deliberate indifference").[6]

In light of this case law, the district court's acknowledgement that "a reasonable jury could find for either party on the question of medical necessity" (JA1398), demonstrates that the district court granted summary judgment to the wrong party. This Court should remand for entry of summary judgment in favor of Defendants or, at a minimum, for a jury trial on all factual issues – chief among them, whether the surgery is medically necessary.

[6] Other courts have applied this principle in the specific context of disputes regarding prisoners' requests for gender-affirming interventions. *See Kosilek v. Spencer*, 774 F.3d 63, 90 (1st Cir. 2014) (en banc); *Gibson v. Collier*, 920 F.3d 212, 223, 228 (5th Cir. 2019).

2. The district court did not – and could not – hold that Plaintiff satisfied the subjective prong of her deliberate indifference claim.

To show the necessary culpability under the subjective prong, Plaintiff needed to show that Defendants were subjectively aware of an excessive risk of harm to Plaintiff that they consciously disregarded. The district court failed to correctly apply this prong in at least two ways. First, the absence of a finding on medical necessity precludes any finding that Defendants knowingly disregarded an excessive risk of harm to Plaintiff. Second, the district court made no findings that any Defendant possessed the requisite subjective knowledge of an excessive risk of harm.

a. Because the district court declined to find that the requested surgery was medically necessary, it could not find that Defendants knowingly disregarded an excessive risk by denying Plaintiff the surgery.

The well-established deliberate indifference standard requires that a defendant be subjectively aware of a substantial risk of harm and consciously disregard that known risk. *See Farmer*, 511 U.S. at 837. Thus, to show the necessary culpability on the part of Defendants, Plaintiff needed to show that Defendants were aware of an excessive risk of harm related to their decision on her request for surgery. But because the district court did not find that the surgery was medically necessary,

it did not find, and could not find, that denial of that surgery posed a substantial risk of harm to Plaintiff, much less that Defendants knew that it did but denied the surgery anyway. Accordingly, by declining to find medical necessity, the district court also foreclosed any conclusion that Defendants possessed the culpable state of mind to sustain Plaintiff's medical deliberate indifference claim.

b. The district court did not find subjective deliberate indifference on the part of any Defendant.

Despite the well-established prevailing standard, the district court made no findings in its summary judgment order about the subjective awareness of any of the fourteen Defendants.

The hallmark of deliberate indifference is subjective "know[ledge] of and disregard[] [for] an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Thus, a successful deliberate indifference claim must be rooted in evidence of subjective awareness of and a conscious disregard for excessive risk of harm. Indeed, "[h]olding officials accountable for risk factors that they did not actually recognize . . . is not permissible when deliberate indifference is the standard." *Parrish v. Cleveland*, 372 F.3d 294, 303-04 (4th Cir. 2004). Moreover, because Plaintiff is proceeding under Section 1983, she "must [] affirmatively

show[] that [Defendants] acted personally in the deprivation of [her] rights.'" *Wright*, 766 F.2d at 850 (internal quotes omitted). Thus, summary judgment in favor of Plaintiff on her deliberate indifference claim requires specific evidence that Defendants knowingly disregarded an excessive risk of harm to Plaintiff.

The record is completely devoid of any evidence that any Defendant was subjectively aware of an excessive risk of harm to Plaintiff. More importantly, the district court made no findings in its order concerning any of Defendants' subjective knowledge of or disregard for an excessive risk of harm to Plaintiff.

Nor could the district court make such a finding. The summary judgment record and the testimony at the evidentiary hearing established that the Department, through the DTARC, carefully considered Plaintiff's medical and mental health history and reached the conclusion that Plaintiff did not face any significant risk of harm if the surgery request was denied – the opposite of subjective deliberate indifference. (JA0882-0883, JA0888-0889, JA0916, JA0925-0926, JA0948-0950) Drs. Peiper, Sheitman, and Campbell all testified to this (JA0882-0883, JA0888-0889, JA0916, JA0925-0926, JA0948-0950); yet

the district court did not address this evidence at all. The district court did not discredit either Dr. Sheitman or Dr. Peiper's testimony, and, as such, lacked any basis for disregarding it. The district court's order simply made no finding that any of the fourteen individual Defendants were aware that surgery was medically necessary for Plaintiff but nevertheless declined to provide it.

Instead, the district court focused solely on the participation of Dr. Campbell in the process. Notably, although the district court declined to credit Dr. Campbell's testimony, the district court made no findings that Dr. Campbell knew of and disregarded an excessive risk to Plaintiff by denying surgery. To the contrary, the district court decided that Dr. Campbell was "biased" due to his purported belief that surgery was not medically necessary. But if Dr. Campbell sincerely believed that Plaintiff's desired surgery was not medically necessary, that sincere belief – which was grounded in his professional medical judgment – is fundamentally incompatible with a finding of subjective deliberate indifference. (JA1395-1396)

Instead of determining subjective deliberate indifference on Dr. Campbell's part, the district court concluded that, in light of his written

statement, it could not credit Dr. Campbell's testimony about the individualized consideration given to Plaintiff's request. (JA1396) This conclusion is flawed.

As an initial matter, Dr. Campbell's assessment of the medical literature in his position statement was certainly not reckless and was actually supported by other record evidence. Dr. Sheitman testified that, based on his own independent review of the medical literature, the evidence of the efficacy of gender-affirming surgery was inconclusive. (JA0951-0952; DE 61-12 at 32, 35-36, 93-95) Moreover, after conducting a detailed review of more than 80 studies relied upon by WPATH and Plaintiff's expert, one of Defendants' experts, Fan Li, PhD, a nationally-recognized expert in comparative effectiveness research, concluded that there is a lack of high-quality research indicating the long-term efficacy of gender-affirming surgery. (DE 65-15 at 3-5, 25; DE 65-16 at 4-8, 14-15, 19-22, 48-53, 66-73, 87-102) Dr. Penn, another defense expert with expertise in treating gender dysphoria, concurs with Dr. Li on this point. (DE 65-13 at 32-35) Numerous courts have also recognized that there is reasonable medical disagreement about the efficacy of gender-affirming surgery, with another district court in this Circuit this year explaining

that "the medical field is rapidly changing regarding the proper treatment for transgender individuals . . ." *Boone v. Carvajal*, No. 6:21-3053, 2024 U.S. Dist. LEXIS 81935, at *39-40 (D.S.C. Feb. 5, 2024), *adopted by* 2024 U.S. Dist. LEXIS 81180 (D.S.C. May 3, 2024) (declining to find deliberate indifference to the Plaintiff's GD or need for protection from self-harm where defendants did not fully comply with the entirety of the WPATH standard of care, which were designed to be flexible guidelines).[7]

Notably, the district court did not evaluate this evidence or make any finding rejecting Dr. Campbell's perspective: the district "[c]ourt's decision remains value neutral as to Dr. Campbell's apparent views." (JA1396)

Regardless, the medical deliberate indifference standard does not require that a prison official's assessments of such matters be correct. This is because professional disagreements concerning medical issues are

[7] *See also Gibson*, 920 F.3d at 221-26 (noting that "there is no consensus in the medical community about the necessity and efficacy of sex reassignment surgery as a medical treatment for gender dysphoria . . . We can all agree that sex reassignment surgery remains an issue of deep division among medical experts"); *Lamb v. Norwood*, 899 F.3d 1159 (10th Cir. 2018) (finding no deliberate indifference on the part of prison officials who declined to approve gender-affirming surgery); *Kosilek*, 774 F.3d at 82-96 (1st Cir. 2014) (same).

insufficient to sustain an Eighth Amendment deliberate indifference action. *See Wright*, 766 F.2d at 849; *Hixson*, 1 F.4th at 302-03. There is no dispute that Dr. Campbell subjectively believed that he was making the correct decision with regard to Plaintiff's requested surgery, and the district court made no finding otherwise.[8] There is also no dispute that Defendants have provided treatment and other accommodations to Plaintiff for her GD.

In short, Plaintiff has not established – and the district court did not find – that *any* of the Defendants knowingly disregarded a serious medical risk. At most, Plaintiff has highlighted an issue about which reasonable medical professionals can and do disagree – namely, whether gender-affirming surgery is medically necessary and effective in treating gender dysphoria. That kind of reasonable medical debate cannot undergird a deliberate-indifference claim.

[8] This critical point meaningfully separates this case from this Court's recent *en banc* decision in *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024). The Eighth Amendment has very different standards than the Equal Protection clause and the Medicaid and Affordable Care Act claims addressed in *Kadel*. *Id.* Even if Defendants got the issue of medical necessity wrong, that does not render Defendants' determination subjectively deliberately indifferent.

3. The district court effectively converted Plaintiff's Eighth Amendment claim into a procedural due process claim by applying a new requirement for an "individualized and unbiased" decision.

Instead of deciding the claim as asserted by Plaintiff, the district court determined that Defendants violated Plaintiff's Eighth Amendment rights because the process was purportedly flawed. In doing so, the district court effectively morphed Plaintiff's deliberate indifference claim into a procedural due process claim – a claim that Plaintiff did not and could not bring. The court also injected a new and flawed requirement that decisions be "individualized and unbiased."

a. Plaintiff did not assert, and could not have asserted, a due process claim.

It is well settled that claims alleging a deprivation of medical care for convicted prisoners are governed by the deliberate indifference standard, not a due process standard. *See e.g., Gamble*, 429 U.S. at 97. Thus, Plaintiff's complaint demonstrates that she sought to proceed on a traditional deliberate indifference theory – that Defendants were deliberately indifferent in denying her a medically necessary surgery. (DE 1 ¶ 1, 5, 151-153, 157)

b. The district court added a new and unwarranted requirement for "unbiased" evaluation of a request for medical care that this Court has never endorsed for Eighth Amendment claims.

Instead of assessing the individual Defendants' states of mind to determine subjective deliberate indifference, the district court focused on, "whether North Carolina's *process* for assessing the medical necessity of gender-affirming surgery for inmates suffering from gender dysphoria violates the Eighth Amendment of the United States Constitution." (JA1392 emphasis added)) This was error.

This Court has never said that defendants act with deliberate indifference unless their review is sufficiently "individualized and unbiased." Such purported process flaws cannot be shoehorned into an Eighth Amendment claim without eviscerating the actual, subjective indifference standard and inviting countless new "bias" claims. This Court has not recognized, and should not recognize, Eighth Amendment claims that require a court to conduct an evaluation of the quality of the process. This Court has never held that the involvement of a "biased" decision-maker alone violates the Eighth Amendment. And such a holding is not warranted because it does not fit within the established standard.

Furthermore, the "categorical ban" cases cited by the district court are distinguishable and do not support such a standard. The only categorical ban case from this Court cited by the district court for this point is *Gordon v. Schilling*, 937 F.3d 348, 360–62 (4th Cir. 2019), which concerned a prison's policy that foreclosed hepatitis C treatment to an entire group of prisoners. But *Gordon* involved the application of a formal policy that did not permit the evaluation of the plaintiff and a whole group of other inmates for hepatitis C treatment. Several of the out-of-circuit cases cited by the district court also involved formal bans. *See, e.g., Fields v. Smith*, 653 F.3d 550, 557 (7th Cir. 2011); *Keohane v. Fla. Dep't of Corr. Sec'y*,. 952 F.3d 1257, 1266-67 (11th Cir. 2020); *Nosworthy v. Beard*, 87 F. Supp. 3d 1164, 1191 (N.D. Cal. 2015). In the instant case, there is no formal policy preventing evaluation. To the contrary, the applicable policy requires individualized evaluation (*see* DE 61-1 at 7), and there is substantial evidence that Plaintiff was indeed evaluated. Thus, *Gordon* and these other cases are inapposite. In short, the categorical ban cases merely establish that prison systems may violate the Eighth Amendment if they fail to afford any consideration to a request.

In short, the Court's criticism of the process – that it was not sufficiently "individualized and unbiased" due to a single decision-maker who had concerns about a course of treatment – goes too far afield from these categorical ban cases. There is simply no case in this Circuit that finds a categorical ban under similar circumstances. Thus, this Court should hew closely to its narrow categorical ban exception and decline to import into the Eighth Amendment new requirements.

C. Any finding that the Department has a de facto categorical ban was clear error.

Even if the extent to which Plaintiff received individualized consideration were relevant for purposes of the Eighth Amendment, that factor cannot help Plaintiff. As an initial matter, the district court's decision does not contain clear factual findings that establish that the Department had a blanket ban that denied inmates individualized consideration. The order's comments regarding Dr. Campbell are not sufficient to support such a determination. Furthermore, even if the district court made appropriate findings that are reviewable for clear error, it was clear error to find a de facto blanket ban on this record. Substantial unrefuted evidence demonstrates that the Department evaluated and denied Plaintiff's request based on her individual

circumstances and were open to approving her request. Accordingly, Defendants were entitled to summary judgment. At a minimum, whether the Department had and applied a categorical ban is a disputed issue of fact precluding summary judgment. Thus, this Court should remand for a jury trial to include that issue.

1. The district court's bases for determining that there was a de facto categorical ban were flawed.

The district court's eight-page order is devoid of detailed factual findings. The district court's conclusion that the Department did not provide Plaintiff with individualized consideration appears to be based on three factors: Dr. Campbell's authorship of the position paper, other decision-makers' alleged deference to him, and the fact that more than 30 surgery requests had been denied in the past. (JA1395-1396) The record, however, undermines each of these points and further demonstrates that they do not add up to a reasonable finding of a de facto ban in this case.

With respect to the first point, there is no evidence that the position statement dictated the result in Plaintiff's particular case. Dr. Campbell, as well as Drs. Peiper and Sheitman, all testified that was not the case. (JA0891, JA0913, JA0920-0920, JA0951-0953) Each was clear that the

decision was not based on an assessment of the medical literature, but rather was based on assessments of Plaintiff's mental health and her stability with existing interventions. (JA0891, JA0913, JA0920-0920, JA0951-0953)

The district court points out that Dr. Campbell sought to have his position paper, which was contrary to the Department's policy, adopted by the DTARC, but fails to mention that this occurred only after the DTARC had already made its decision denying Plaintiff's request. (JA1393) There was unrefuted evidence that the position paper was never adopted by the DTARC and that it never changed the nature of individualized reviews, which were conducted as required under the EMTO policy. (JA0891, JA0929; JA0921, JA0953) Dr. Campbell testified that he understood and followed this directive. (JA0914)

The district court's implicit suggestion is that no one on the DTARC was open to or willing to fairly consider surgery for Plaintiff because of Dr. Campbell's assessment that the medical literature did not support the medical necessity of surgery.[9] But there is substantial evidence in the

[9] At a motion to dismiss and preliminary injunction hearing in August 2022 (long before summary judgment evidence was received), the Court expressed a view on Defendants' openness to Plaintiff's request: "And I think it's pretty clear to the Court – it's going to be denied until a Court says it's not denied." (JA0105)

record of the DTARC's openness to the request, including unchallenged testimony by Drs. Peiper and Sheitman.

Dr. Campbell testified that, despite his concerns, he would have approved surgery in an appropriate case. Specifically, he confirmed that he would have supported surgery if symptoms were debilitating enough to impair a person's basic functioning (sleep, activities, work, energy level, and so forth) without further intervention, which was not the case with either Plaintiff or other cases that were presented to the DTARC. (JA0923-0926)

Even if the district court gave no credit to that testimony, Drs. Peiper and Sheitman each explained why the position paper did not influence their decisions in Plaintiff's individual case because they did not review the paper before making their own individualized assessment and recommendation. (JA0889-891, JA0921, JA0926)

Relatedly, the district court's conclusion that "there is evidence that" Drs. Sheitman and Peiper simply deferred to Dr. Campbell is not fairly supported by the record. (JA1393)[10] As discussed further below, the

[10] The district court finds that nonmedical members of the DTARC deferred to Dr. Campbell. But, as to Dr. Sheitman and Dr. Peiper, he only finds that "there is evidence that" they deferred. (JA1393) This contrasting wording appears to be an

hearing testimony and the summary judgment evidence clearly demonstrate that, based on their own independent review of the record, Drs. Peiper and Sheitman reached fully independent conclusions based on Plaintiff's mental stability and the lack of any risk of imminent harm. (JA0880-0882, JA0946-0950; DE 61-8 at 22-24; DE 61-9 at 96, 116-121; DE 61-12 at 9-11, 31, 83-91, 101-102) And both Drs. Sheitman and Peiper unequivocally testified that they did not defer to anyone, including Dr. Campbell, in reaching that conclusion. *See* JA0882-0883 (Peiper testifying that he reached his own assessment about Plaintiff's mental health and did not defer to anyone); JA0947-0950 (Sheitman testifying that he made his own assessment and "absolutely [did] not" defer to Dr. Campbell in reaching his overall conclusion regarding Plaintiff's mental health).

The district court does not address this evidence in its order, let alone make findings that any of Drs. Sheitman and Peiper's testimony was not credible. Wholly ignoring the testimony of Drs. Sheitman and

implicit acknowledgement of evidence in the record that Drs. Peiper and Sheitman did not defer to Dr. Campbell – evidence that the district court fails to even discuss.

Peiper on this point and concluding that they deferred to Dr. Campbell on a critical inquiry in this case, was clear error.

Finally, the district court's reliance on other denied surgeries was also flawed. The district court overlooked the testimony at the hearing that each of these surgical requests was evaluated on an individual basis and that each was denied for specific reasons, including contraindications to surgery (such as significant psychiatric instability). (JA0891-0893; *see also* JA0971-0972) The district court made no finding that surgery was medically necessary in any of these cases; nor could it reasonably have assumed without any evidence that was the case. The district court made no analysis of these other cases or any similarities to this one. Moreover, Plaintiff presented no evidence that these other surgical requests were denied because of a categorical ban. Thus, the district court's assumption that multiple denials must mean surgery would never be approved, contrary to the sworn testimony, is clear error. Additionally, the district court was factually wrong in stating that 30 other surgeries have been denied where the record evidence shows only 25 requests from 15 people. (JA0891-0893; JA0971-0972)

2. Overall, substantial, unrefuted evidence in the record showed that the Department afforded Plaintiff individualized consideration of her request and would have approved surgery if it had determined it was necessary for her.

Extensive evidence from the evidentiary hearing and in the summary judgment record shows that the DTARC gave Plaintiff's case serious, detailed individualized consideration. As noted above, at the evidentiary hearing, all three clinicians on the DTARC testified that after reviewing Plaintiff's health record, they denied Plaintiff's request based on their clinical judgments regarding Plaintiff's mental health. Thus, even setting aside Dr. Campbell's testimony, Drs. Sheitman and Peiper's testimony fully refutes the proposition that there was a de facto blanket ban. The district court does not address, let alone discredit, their testimony.

At the February 20, 2024, hearing, Dr. Peiper testified that the DTARC followed the individualized review process provided for in the Department's policy when it evaluated Plaintiff's request. (JA0880) Dr. Peiper further testified that before the DTARC's February 17, 2022 meeting, he reviewed Plaintiff's health records, and that he had access to and would have reviewed the more than four hundred pages of records

contained in Defendants' Hearing Exhibit 8. (*See* JA0880-0881) Dr. Peiper testified that while reviewing those records, he was looking for broad indications of mental health symptoms and any impact those mental health symptoms were having on Plaintiff's general functioning, which could manifest themselves "in some of the activities the person's engaged in, sleeping, eating patterns[,] anhedonia[,]" or a "[loss of] interest in things that they otherwise would have interest in." (JA0882)

Ultimately, after reviewing these records, Dr. Peiper testified that he concluded that while "there were moments of crisis, moments of instability[,] [o]verall[,]" Plaintiff was generally stable, "[a]nd any of the mental health symptoms appeared reasonably well-controlled." (JA0882-0883) Thus, Dr. Peiper determined that Plaintiff did not have severe symptoms associated with gender dysphoria that would not be responsive to other interventions. (JA0888)

Also at the February 20, 2024, hearing Dr. Sheitman testified that he reviewed Plaintiff's medical records before the February 17, 2022, DTARC meeting. (JA0946) He further testified that in this review of Plaintiff's records, Dr. Sheitman identified times when Plaintiff appeared to struggle, but he noted that these instances seemed be reactions to

"external events" or factors rather than some "internal process." (JA0948-0949) However, Dr. Sheitman concluded that overall, Plaintiff was doing relatively well, and that she appeared to be energetic, forward-thinking, and not depressed—and that he did not see severe symptoms. (JA0947-0949)

The testimony at the February 20 hearing served to further corroborate the extensive summary judgment evidence that demonstrated that the Department conducted a thorough and individualized review of Plaintiff's request. (DE 61-5 at 70-72, 81-82, 85-90, 101-102; DE 61-8 at 22-24, 64-66; DE 61-9 at 96, 116-121; DE 61-12 at 83-91, 101-102) The totality of this evidence indicates that the Department did not summarily reject Plaintiff's request.

Plaintiff did not present any evidence through summary judgment or at the hearing that controverted any of the above evidence concerning the individualized review of Plaintiff's request. Nor did the district court address this evidence in its order. All of this evidence firmly separates this case from any in which the court has found a categorical ban and demonstrates that any finding to that effect was clear error. Defendants respectfully submit that because the record does not reasonably support

any finding of a categorical ban, Defendants were entitled to summary judgment on that issue.

At a minimum, this evidence demonstrates that there are genuine disputes between the parties on whether there was a categorical ban. Thus, the district court erred in granting summary judgment in favor of Plaintiff.

The district court cites one case, *Allard v. Gomez*, in which there was a factual dispute about whether there was a blanket ban on the provision of gender-affirming hormone therapy. No. 00-16947, 9 F. App'x 793, 795 (9th Cir. 2001) (unpublished). The Ninth Circuit found "triable issues" remaining as to whether hormone therapy was denied on the basis of an individualized medical evaluation or as a result of a blanket rule.[11]

By contrast, here, the district court only held a limited three-hour hearing rather than determining that there was a triable issue for the

[11] Two other cases cited by the district court, *Fisher v. Federal Bureau of Prisons*, 484 F. Supp. 3d 521, 543 (N.D. Ohio 2020), and *Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) were both decided at the motion to dismiss stage and merely provide that allegations of a blanket ban survive a motion to dismiss. Such rulings are consistent with this Circuit's precedent that allegations of a policy which prohibits the evaluation of a request for surgery are sufficient to survive frivolity review. *See De'Lonta v. Johnson*, 708 F.3d 520, 525 (2013).

jury. Because the district court engaged in a truncated process to allow it to consider and award equitable relief without a full trial on the merits, at a minimum, this Court should remand for a jury trial on this disputed factual issue.

II. The Prison Litigation Reform Act Bars Plaintiff's Claim and Further Requires that the Injunction be Vacated.

The Prison Litigation Reform Act (PLRA), was enacted to address a crushing flood of federal lawsuits brought by incarcerated persons and applies to all lawsuits brought by prisoners to address prison conditions, including this case. *E.g., Porter v. Nussle,* 534 U.S. 516, 532 (2002). Here, Plaintiff failed to exhaust her administrative remedies prior to bringing this case by filing and exhausting a grievance regarding the DTARC's 2022 decision to deny her request for surgery; thus, the PLRA precludes her from asserting a claim related to that denial in federal court. In addition, the district court's injunction should be vacated, because it violates the PLRA's requirements for injunctive relief. First, it lacks required findings related to such relief and is overbroad. Second, it requires Defendants to violate state law.

A. The PLRA bars Plaintiff's claim, because she failed to exhaust the claim prior to bringing this action.

The Court also erred in granting summary judgment to Plaintiff and awarding relief, because Plaintiff failed to exhaust administrative remedies prior to filing this action, as required by the PLRA. The PLRA provides that "no action shall be brought with respect to prison conditions under [section] 1983 of [this title], or any other federal law […] until such administrative remedies as were available were exhausted." 42 U.S.C. § 1997e(a). The "exhaustion requirement applies to all inmate suits about prison life[.]." *Porter*, 534 U.S. at 532.

"There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007). Thus, the exhaustion requirement is a precondition to filing suit even if the relief sought in the suit cannot be granted by the administrative process. *Booth v. Churner*, 532 U.S. 731, 741 (2001). Proper exhaustion requires an incarcerated plaintiff to comply with the Department's Administrative Remedy Procedure ("ARP"), which is a three-step procedure that governs submission and review of inmate grievances. *See Woodford v. Ngo*, 548 U.S. 81, 88-91 (2006); *Moore v. Bennette*, 517 F.3d 717, 721 (4th Cir. 2008). As an

incarcerated individual, Plaintiff was required to exhaust her administrative remedies with the Department in accordance with the ARP. *Id.*, 517 F.3d at 721.

Here, Plaintiff's claims center on the Department's decision in 2022 not to approve her request for surgery. Although Plaintiff had filed prior grievances while she was waiting for a decision on surgery, she did not file a grievance after the denial that she seeks to challenge in this case. Accordingly, Defendants raised Plaintiff's failure to exhaust at the motion to dismiss stage and as an affirmative defense. (DE 11 & 26) In response, Plaintiff conceded that she did not file and exhaust a specific grievance regarding the DTARC's February 2022 decision before filing this lawsuit. (DE 17 at 12; JA0079-0091) Nor could she have done so, as she was notified of the DTARC's decision only two days prior to filing this lawsuit. (JA1364; JA0021) Instead, Plaintiff took the position that she did not need to exhaust a grievance regarding this decision because she had previously filed and exhausted grievances related to her request for surgery and faced an ongoing risk of harm. (DE 17 at 12; JA0079-0091)

The district court acknowledged that "Defendants are surely correct that exhaustion of administrative remedies is a mandatory requirement

of PLRA," (DE 25 at 7) The district court further recognized that "technically, [Plaintiff has] failed" and "probably everyone should have just pulled back and . . done the grievance and then finished based on that. That would have been cleaner." (JA0104-0105, JA0111-0112; *see also* DE 25 at 5) The district court also warned Plaintiff that this failure would likely be an issue throughout the case, including on appeal, even if the district court initially found in her favor. (JA0111-0112) However, the district court declined to dismiss, holding that Plaintiff had adequately exhausted because she had already filed prior grievances, faced ongoing risks, and had put the agency on notice of the surgery request. (DE 25 at 5-6) The district court further reasoned that requiring Plaintiff to go through the process again would not change the outcome. (*Id.*)

The district court was wrong to allow the case to continue (and then to award relief) absent exhaustion of a grievance related to the specific decision at issue – the DTARC's 2022 denial of Plaintiff's request for surgery. The district court was also wrong to allow the case to continue although Plaintiff has never exhausted the specific claim now at issue in

the lawsuit – the alleged lack of an "individualized and unbiased" process.

First, the specific claim on which Plaintiff proceeds in court must be exhausted. *See, e.g., Jones,* 549 U.S. at 211 (no unexhausted claims may be considered). Plaintiff has not grieved, and could not have grieved in advance, the particular medical necessity review and decision that she seeks to challenge in this case. Furthermore, Plaintiff's prior grievances asserting that the Department needed to provide surgery generally could not have raised the specific concerns for which a claim is apparently now being asserted – that there were procedural flaws with the 2022 decision, in particular, because of the involvement of Dr. Campbell and others' deference to him. Plaintiff's prior grievances related to surgery could not have raised this issue, because it is undisputed that Dr. Campbell did not begin his role until late 2020 and thus was not involved in any of the DTARC's prior actions on Plaintiff's requests for surgery, including a 2019 decision to defer a decision on surgery and a 2020 decision to recommend a surgical consultation. (JA0912-0913; DE 61-10, 61-21)

Second, there is no exception to the exhaustion requirement for ongoing issues that would apply here. Because this case involves a

discrete review and determination, this case is unlike a case relied upon by Plaintiff and the district court, *Wilcox v. Brown,* 877 F.3d 161, 167 n. 4 (4th Cir. 2017). That case involved the failure to hold religious services, and this Court explained that prisoners need not file multiple, successive grievances raising the exact same issue if the objectionable issue is continuing and has been fully grieved, because prison officials had been placed on notice of a concern and had an opportunity to address it. *Id.* Here, even if Plaintiff had previously raised the fact that she had not received surgery, her prior grievances could not have challenged the highly specific and detailed DTARC decision made in 2022. Nor could her grievances have challenged the DTARC's review as insufficiently "individualized and unbiased." The determination had not yet occurred. For the same reasons, Plaintiff's prior grievances would not have put the prison system on notice of these specific procedural concerns or any other alleged deficiencies with the 2022 decision.

Furthermore, it is well-settled that futility is not an exception to the PLRA requirement. *Booth*, 532 U.S. at 741 n.6 ("we will not read futility or other exceptions into [the PLRA's] statutory exhaustion requirements."); *see also Reynolds v. Doe*, 431 App'x 221, 222 (4th Cir.

2011) (same). Thus, the district court was wrong to allow Plaintiff to sidestep the exhaustion requirement based on a belief that the outcome would not change.

Accordingly, the district court erred in considering Plaintiff's claim and awarding relief in violation of the PLRA.

B. The district court's injunction violates the requirements of the PLRA.

The PLRA also contains specific requirements applicable to injunctions entered by courts for PLRA claims. Here, the district court's order violates those requirements, because it failed to make necessary findings regarding the injunction's scope. In addition, the injunction violates the PLRA by requiring Defendants to violate state law.

1. The injunction violates the PLRA, because the district court failed to make, and could not have made, the required need-narrowness-intrusiveness findings.

The Prison Litigation Reform Act sets forth "Appropriate remedies with respect to prison conditions." 18 U.S.C. § 3626(a). Under subsection (a)(1)(A), "Requirements for relief," the PLRA provides as follows:

> Prospective relief . . . shall extend no further than necessary to correct the violation of the Federal right . . . The court shall not grant or approve any prospective relief *unless the court finds* that such relief is narrowly drawn, extends no further than necessary

> to correct the violation . . . and is the least intrusive means necessary to correct the violation of the Federal right.

18 USC § 3626(a)(1)(A) (emphasis added). The district court made none of these findings (explicitly or implicitly) in its eight-page order prior to issuing the injunction. *See* JA1392-1399. Nor could it have made such findings.

In *Hoffer v. Fla. Dep't of Corr.*, 973 F.3d 1263 (11th Cir. 2020), the Eleventh Circuit determined that a one-sentence, boilerplate paragraph regarding an injunction's PLRA requirement was "seriously deficient" and did not meet this statutory requirement for findings. *Id.* at 1278.[12] Here, the district court failed even to include a conclusory statement; rather, the order is wholly devoid of any reference to the injunction's compliance with the PLRA. For that reason alone, this Court should vacate the injunction and remand.

Furthermore, had the district court considered the required factors, it could not have issued the injunction. The injunctive relief ordered is not in fact "narrowly drawn, extend[ing] no further than necessary to

[12] By contrast, in *Edmo v. Corizon, Inc.*, relied upon by Plaintiff and the Court, the Court of Appeals determined that the district court's injunction made the "necessary" need-narrowness-intrusiveness findings "required by the PLRA" where, among other things, the order specifically referenced the requirement for findings. 935 F.3d 757, 783 (9th Cir. 2019).

correct the violation . . . and . . . the least intrusive means necessary to correct the violation of the Federal right." 18 USC § 3626(a)(1)(A). The district court's injunction requires Defendants to either (1) provide Plaintiff with surgery before any factfinder ever determines whether it is medically necessary; or (2) form a new committee that must have at least two medical doctors who are experts in gender dysphoria, have the committee approved by the district court, and have the new committee's work be subject to additional scrutiny by the district court at Plaintiff's request.

This is not narrowly drawn, necessary, or the least intrusive means to remedy the purported violation. The district court could have simply rejected Defendants' determination and allowed Defendants the opportunity to re-review the request without Dr. Campbell's involvement – in the manner Defendants determined was most appropriate. Such relief would be more narrowly drawn and less intrusive than the injunction entered.

Instead, the district court's order has unnecessary requirements. First, the district court requires re-review and decision by at least two experts in gender dysphoria, as opposed to those with general medical

expertise. This goes beyond what the Eighth Amendment reasonably requires, as prisons have never been required to have highly trained specialists making their medical necessity determinations. *Cf. Keohane,* 952 F.3d at 1278 n. 15 (rejecting argument that a prison's treatment team was not adequate where treatment team lacked specialties or particularized experience in treating patients with gender dysphoria where that team was "minimally competent"); *Fisher*, 484 F. Supp. 3d at 533 (rejecting argument that Eighth Amendment was violated where treatment of GD was by medical generalists, not GD experts). Nor would that even be feasible for the wide variety of medical conditions facing a prison population.

In addition, by requiring decision-makers with gender dysphoria expertise who are acceptable to the district court, the order also appears to force Defendants to select from a small group of highly specialized outside experts who would require significant compensation from the State. This intrudes substantially into the Department's decision-making processes and sets unreasonable standards for future medical reviews. *Cf. Howe v. Hughes,* 74 F.4th 849, 856 (7th Cir. 2023) (determining that a PLRA-governed injunction was overbroad and intrusive where it was

prescriptive and did not allow prison officials options regarding how to address the concern). Such intrusion by courts into the Department's processes is not warranted. *See, e.g., Farmer*, 511 U.S. at 846-47 (noting that courts should use "caution" in issuing injunctions in the prison context and should not "enmesh[ ] themselves in the minutiae of prison operations.").

Furthermore, it would be far less intrusive to provide a full review of Defendants' decision, which the Court concedes could result in a determination that the requested surgery is not medically necessary for Plaintiff, prior to rejecting the decision and ordering injunctive relief.

Because the Court's order does not provide narrow, necessary, and least-intrusive relief, it should be reversed as inconsistent with the PLRA.

2. The injunction violates the PLRA because it requires Defendants to violate state law.

The PLRA further provides that courts shall not order any prospective relief that requires a government official to violate state law, unless federal law requires the relief to be ordered in violation of state law, the relief is necessary to correct the violation of federal law, and no

other relief will correct the violation of the federal law. 18 U.S.C. § 3626(a)(1)(B).

A North Carolina budget law enacted in 2023 (before the district court issued its injunction), contains a section entitled, "Limitation on use of State funds for gender transition procedures." This law prohibits the direct or indirect use of state funds "for the performance of or in furtherance of surgical gender transition procedures . . . ." N.C.G.S. § 143C-6-5.6. Because this is a relatively new statute that has not yet been interpreted by the courts, the Court's injunction raises a serious question regarding whether the injunction forces Defendants to violate the statute by expending funds in furtherance of surgical gender transition procedures.

The PLRA's exceptions do not apply. As discussed above, the injunction is neither "required" under federal law nor necessary to correct the purported violation of federal law. Even if the district court were correct that there was an Eighth Amendment violation, the district court's specific remedy – requiring the spending of substantial state funds in furtherance of surgical gender transition procedures – is not necessary. The district court could have remedied the purported violation

simply by requiring the Department to conduct a new review with no additional expenditure of funds by the State. At a minimum, therefore, this Court should vacate the injunction and remand for further proceedings.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court reverse the district court's order and direct entry of summary judgment for Defendants. In the alternative, Defendants request that the Court vacate the injunction and remand for a jury trial on disputed factual issues.

Respectfully submitted, this the 29th day of July, 2024.

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STATEMENT REGARDING ORAL ARGUMENT

Defendants respectfully request oral argument pursuant to Fed. R. App. P. 34(a) and Fourth Circuit Local Rule 34(a). This case presents important issues concerning the application of the deliberate indifference standard and the scope of the district court's injunction. Oral argument would assist the Court in addressing these issues. This case also involves many facts and contains a large record, so oral presentation would also aid this Court's resolution of the issues raised in this case.

/s/ Orlando L. Rodriguez
Orlando L. Rodriguez

CERTIFICATE OF SERVICE

I certify that on this 29th day of July, 2024, I filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record

/s/ Orlando L. Rodriguez
Orlando L. Rodriguez

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface: 14-point Century Schoolbook font.

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