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 U.S. District Court for the Western District of North Carolina, Case No. 3:22-cv-00191
The Honorable Max O. Cogburn, Jr., Presiding

PLAINTIFF-APPELLEE'S BRIEF

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INTRODUCTION

Plaintiff-Appellee Kanautica Zayre-Brown is a transgender woman in the custody of Defendants-Appellants—the North Carolina Department of Adult Correction ("DAC") and its officials. She suffers from gender dysphoria, a medical condition marked by severe distress that can lead to self-mutilation and suicide. This Court has recognized that, for people like Plaintiff, gender-affirming surgery may be medically necessary when other treatments prove ineffective. *De'lonta v. Johnson*, 708 F.3d 520, 523 (4th Cir. 2013).

Plaintiff pleaded with Defendants for years to provide her with gender-affirming surgery. Defendants themselves lack expertise in that field, so they eventually had Plaintiff evaluated by specialists at the UNC Transgender Health Program. Those specialists concluded that surgery was medically necessary—as did Defendants' own employees and the expert psychologist Defendants hired for this litigation. JA190–191, JA317, JA640–641, JA693–694, JA708, JA0820–821 & n.3. But Defendants still refused. They did so despite never identifying any contraindications to surgery or explaining why Plaintiff would not benefit from surgery.

This litigation followed. After extensive discovery and an evidentiary hearing, the district court granted Plaintiff summary judgment on her Eighth Amendment claim. The court found that Defendants had imposed a de facto ban on gender-affirming surgery, thereby denying "Plaintiff the individualized medical evaluation the Eighth Amendment requires." JA1397.

Ample evidence supported that conclusion. Defendants had never authorized gender-affirming surgery to treat gender dysphoria. Dr. Arthur Camp**b**ell—Defendants' chief medical officer and primary decision-maker for gender-affirming surgery requests—had authored a "Position Statement" asserting that gender-affirming surgery is never medically necessary for anyone. Dr. Campbell campaigned to make this official state policy, and the district court found that the other Defendants deferred to Dr. Campbell's medical judgment. While Dr. Campbell testified that he *would* have authorized surgery in some circumstances, the district court did not find that testimony credible. JA1393, JA1396.

As a remedy, the district court ordered Defendants to either provide Plaintiff with surgery or retain doctors with relevant expertise to reevaluate her. JA1397. Defendants picked the second option. This Court

denied Defendants' stay motion and Plaintiff will be reevaluated in the coming weeks. *See* Dist. Ct. ECF No. 126.

This Court should affirm. The district court's legal analysis is fully consistent with this Court's decisions. The district court's findings of fact are well supported by an extensive record. And the injunction could not be any narrower while still affording Plaintiff meaningful relief. Defendants' arguments to the contrary, several of which were not preserved, are meritless.

STATEMENT OF THE CASE

I. Mrs. Zayre-Brown is a transgender woman with a long history of gender dysphoria.

Gender dysphoria is a serious medical condition characterized by (1) a marked incongruence between an individual's sex assigned at birth and the individual's gender identity, (2) strong cross-gender identification, and (3) clinically significant distress or impairment of functioning. *Grimm v. Gloucester Cty. Sch. Bd.* 972 F.3d 586, 594–95 (4th Cir. 2020); JA202–204. The condition is recognized by the American Psychiatric Association and listed in the DSM-V and the World Health Organization's

International Classification of Diseases-10. JA202–203. Gender dysphoria can be ameliorated or cured through treatment. JA207–208.

Plaintiff is a transgender woman; her female gender identity, which is the sex she knows herself to be, differs from the male sex assigned to her at birth. JA22–23, JA202. She was formally diagnosed with gender dysphoria and began socially transitioning in 2010, seven years before she entered Defendants' custody. JA817.

Plaintiff began psychotherapy to treat her gender dysphoria shortly after receiving her diagnosis. JA34. Two years later, with the support of her psychologist, Plaintiff began gender-affirming hormone therapy under the care of an endocrinologist. JA35. She also legally changed her name to "Kanautica Promises Zayre" to align with her female identity. *Id.*[1] In 2012, Plaintiff began to have gender-affirming surgical procedures, culminating in 2017 with an orchiectomy (surgical removal of testicles). *Id.,* JA818. The orchiectomy was performed as a first step

[1] Plaintiff began going by Kanautica Zayre-Brown in 2014, after marrying her long-time partner, Dionne Brown. JA35.

toward later gender-affirming vulvoplasty or vaginoplasty.[2] JA35, JA306–309.

In 2017, Plaintiff was incarcerated before she could complete her surgical treatment. JA35, JA818. Plaintiff continued to experience dysphoria related to her genitals and, once incarcerated, she began seeking gender-affirming genital surgery from Defendants. JA39, JA818.

Plaintiff's clinically significant distress from her gender dysphoria is ongoing. JA0739–740. In her words:

> To this day, every time it reenters my mind that I still have a phallus—whether it is because I see it, I feel sensation in it, I am in a situation where others might see it, or I even think about it—I am filled with disgust and emotional pain and at times overwhelmed with extreme anxiety and depressive feelings. While I may be able to function and even put on a happy face, during those periods—which occur frequently—it is extremely difficult to focus and I have to struggle to not again take measures to rid myself of this part of my body that is so foreign to the woman I know myself to be.

JA739.

[2] A vaginoplasty is a surgical procedure that creates the outer female genitals as well as a vaginal canal. A vulvoplasty is an easier procedure that creates only the outer female genitals. JA641.

II. WPATH provides the authoritative standards of care for treating gender dysphoria.

The World Professional Association for Transgender Health ("WPATH") publishes internationally accepted Standards of Care ("WPATH Standards") for treating gender dysphoria. JA207. This Court has observed that the WPATH Standards "represent the consensus approach of the medical and mental health community. . . and have been recognized by various courts, including this one, as the authoritative standards of care" in both carceral and non-carceral settings. *Grimm,* 972 F.3d at 595 (citing *De'lonta*, 708 F.3d at 522–23); JA207–208. "There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups." *Grimm*, 972 F.3d at 595–96 (quoting *Edmo v. Corizon, Inc.,* 935 F.3d 757, 769 (9th Cir. 2019)).

The WPATH Standards are widely endorsed by professional medical associations such as the American Medical Association, the American Psychological Association, and the World Health Organization. JA207–208. Many major health insurance companies, including Blue Cross Blue Shield of North Carolina, cover gender-affirming surgery and reference

the WPATH Standards, as does the North Carolina State Employees Health Plan. JA241–242; *see Kadel v. Folwell*, 620 F. Supp. 3d 339, 392 (M.D.N.C. 2022), *aff'd,* 100 F.4th 122 (4th Cir. 2024) (en banc).

The WPATH Standards establish treatment guidelines tailored to the needs of the individual patient. JA208–210. Treatments include social transition, psychotherapy, hormone therapy, and gender-affirming surgeries to align an individual's sexual characteristics with their gender identity. JA208–209.

The WPATH Standards acknowledge that for some patients, "relief from gender dysphoria cannot be achieved without modification of their . . . sex characteristics to establish greater congruence with their gender identity." JA215. For some, gender-affirming surgery is "the **only** effective treatment for the condition, and for some people genital surgery is essential and life-saving." JA215–216 n.2

III. Despite their written policy, Defendants have never approved gender-affirming surgery to treat gender dysphoria.

Defendants' policy instructs clinicians to provide "services that are consistent with standards of care or community practice," and provides that prisoners "should receive the exact same care they would get if they

were on the outside." JA355–356, JA371, JA461. Defendants generally consider professional medical associations and organizations to be reliable and instruct their clinicians to look to these groups' clinical practice guidelines for the appropriate standard of care. JA360–362, JA371–374.

Defendants' written policy authorizes gender-affirming surgery and other treatments for gender dysphoria. However, unlike the process for most other medical decisions, this policy—the Evaluation & Management of Transgender Offenders Policy ("EMTO Policy")—requires that such treatments be approved by a multidisciplinary committee known as the Division Transgender Accommodation Review Committee ("DTARC"). Dist. Ct. ECF No. 10-1; JA375. The DTARC must include the Medical Director (Defendant Campbell), Chief of Psychiatry (Defendant Sheitman), Behavioral Health Director (Defendant Peiper), Director of Rehabilitative Services (Sarah Cobb), and the Prison Rape Elimination Act Director (Defendant Williams). Dist. Ct. ECF No. 10-1 at 2. The DTARC also had several other members during the relevant time period: Langley, Agarwal, Panter, and Catlett.

Defendants have minimal experience with gender dysphoria. JA818. Cobb, Panter, and Williams are not healthcare providers of any

kind. JA482–483. Dr. Campbell has never directly treated a patient seeking gender-affirming care for gender dysphoria and otherwise has limited training on that subject. JA491–497, JA499–500. Dr. Peiper had limited experience treating individuals diagnosed with gender dysphoria before joining DAC, and he does not provide any direct clinical services in his current role. JA573–575, JA577. Dr. Sheitman's only relevant experience is addressing psychiatric comorbidities, primarily in emergency room and outpatient settings, rather than addressing the need for surgery. JA604–607.

Under the EMTO policy, the DTARC makes recommendations regarding surgeries to the Assistant Commissioner of Prisons—Defendant Harris—and the Director of Health and Wellness Services—Defendant Junker—for final determination. Dist. Ct. ECF No. 10-1 at 7. There is no other medical procedure for which DAC requires such approval. JA579, JA608–609, JA819. Neither Harris nor Junker have any experience or training in directly treating gender dysphoria. JA819.

Defendants have provided surgeries that could be considered gender-affirming surgeries—such as mammoplasty, hysterectomy, and gonadectomy—whenever medically indicated for treatment of conditions

other than gender dysphoria. JA416, JA709. By contrast, DTARC has never approved, and DAC has never provided, gender-affirming surgery to treat gender dysphoria. JA409–410, JA578, JA623, JA819.

IV. After years of Defendants' denials and delays, specialists conclude that gender-affirming surgery is medically necessary for Plaintiff.

Defendants confirmed Plaintiff's gender dysphoria diagnosis when she was imprisoned in October 2017. JA38–39, JA290–292. Prison staff knew that Plaintiff made an informal request for gender-affirming surgery as early as November 2017, and she submitted a formal request the following year. JA45, JA293–294.

In January 2019, a DAC doctor evaluated Plaintiff for gender-affirming surgery and submitted an approval request. JA306–309. The prison forwarded the request to the DTARC but recommended against gender-affirming surgery. JA324. While the DTARC review was pending, Plaintiff began experiencing extreme distress related to her gender dysphoria and the DTARC's continued delays. JA819. On August 6, 2019, this distress intensified to the point that Plaintiff was taken to an emergency room and placed on suicide watch. JA47, JA1156–1161.

Later that month, the DTARC denied Plaintiff's request for gender-

affirming surgery. JA325. The decision falsely asserted that Plaintiff had "successfully completed gender reassignment surgically" and that "[v]aginoplasty is an elective procedure which is not medically necessary for reassignment." *Id.*

Plaintiff exhausted an administrative grievance on this deferral by January 2, 2020. JA47–49, JA152–153 (admitting Plaintiff submitted and fully appealed grievances). That grievance was denied, and Plaintiff submitted a request for reconsideration two weeks later. JA49. Five months later, the DTARC stated that no determination would be made until after "an in-person consultation with an OBGYN surgical specialist with experience in gender-affirmation surgery." JA326, JA819. [3]

In December 2020, still waiting on this surgical consult, Plaintiff was admitted to an inpatient mental health facility, at the recommendation of DAC provider Dr. Patricia Hahn, after Plaintiff expressed suicidal thoughts and an urge to mutilate her genitals. JA1225–1226. At that point, Plaintiff had been requesting gender-affirming surgery for more than three years.

[3] Plaintiff in fact required and ultimately received a surgical consult with a urologist, not an OBGYN. JA638–639.

In February 2021, Plaintiff filed an emergency grievance because her mental health was deteriorating due to her inadequately treated gender dysphoria. DAC admitted that it received, but never responded to, her emergency grievance. JA51, JA156–157.

Plaintiff became increasingly distressed and began to experience thoughts of self-harm more frequently. During this time, she was placed on an increased dose of Zoloft for dysphoria-related depression. JA1264–1265, JA1268–1269. In April 2021, Plaintiff arrived at an appointment with Dr. Hahn with a band tied around her genitals, which Dr. Hahn believed was a dysphoria-motivated attempt by Plaintiff to harm herself to obtain surgery faster. JA820, JA1270. The next month, DAC officials received an email from Plaintiff's husband relaying concerns that Plaintiff desired to mutilate and kill herself. JA820; *see also* Dist. Ct. ECF. No. 62-8 at 59.

In July 2021, Plaintiff had the long-awaited in-person consultation for gender-affirming surgery with Dr. Figler, a UNC surgeon selected by DAC who has expertise in performing vulvoplasty and vaginoplasty. JA638–639, JA644–652. Dr. Figler evaluated Plaintiff and concluded that she met the requirements in the WPATH Standards for gender-

affirming genital surgery. JA640, JA820.

Dr. Figler discussed surgical treatment options with Plaintiff and together they decided on a treatment plan for vulvoplasty after some weight loss. JA641–642. Dr. Figler concluded that, based on her persistent gender dysphoria, such gender-affirming surgery was "medically necessary" "to cure or provide significant improvement of the patient's medical problem, and end or significantly diminish the pain and suffering that problem is causing[.]" JA640–641. Dr. Figler believed "[t]his was particularly true for Plaintiff because she had already socially transitioned and received all other endocrinological and surgical treatments without elimination of her gender dysphoria." JA641.

Dr. Donald Caraccio, the UNC endocrinologist engaged by Defendants, also concluded that gender-affirming surgery was medically necessary for her. JA656–659, JA690, JA693–694. Jennifer Dula, the social worker employed by Defendants who provided Plaintiff with mental health care, likewise concluded that vulvoplasty was medically necessary for Plaintiff and informed the DTARC in October of 2021 that "the next appropriate step for Ms. Brown is to undergo trans-feminine bottom surgery . . . Ms. Brown has met the WPATH criteria and is an appropriate

candidate for surgery." JA317, JA708

In early September 2021, Plaintiff met the recommended weight loss goal, at which point her DAC healthcare providers submitted an administrative request to schedule gender-affirming surgery. JA328. That request was denied with a cursory notation: "ELECTIVE PROCEDURES NOT APPROVED." *Id.*

Plaintiff then filed a new grievance concerning Defendants' failure to provide her gender-affirming surgery. That grievance was fully exhausted on January 18, 2022. JA54–56, JA162–164. As Plaintiff waited to hear the result, she continued to voice urges to harm herself to DAC medical providers. JA1307, JA1319, JA1323.

V. Defendants defer to Dr. Campbell's judgment and again deny Plaintiff's request for surgery.

On February 17, 2022, the DTARC met to consider Plaintiff's request for gender-affirming surgery. Only Defendants Campbell, Peiper, and Sheitman reviewed Plaintiff's medical records beforehand. None of them had ever met or spoken with Plaintiff. JA559, JA613, JA896.

Through the record review, Defendants learned of Plaintiff's previous instances of suicidal thoughts and self-injury. JA419–421. They also

knew of the recommendations from Dr. Figler, Dr. Caraccio, and Ms. Dula. JA429–437. At the meeting, only Drs. Campbell, Peiper, and Sheitman provided input regarding health considerations. JA0417–419, JA482–484, JA609–612, JA728–729.

The DTARC recommended denial of Plaintiff's request as not medically necessary. JA329–331, JA450, JA581–593, JA850–854. The non-medical members of DTARC deferred to Drs. Campbell, Peiper, and Sheitman regarding the decision. JA730–732, JA821. In turn, Drs. Peiper and Sheitman deferred to Dr. Campbell. JA626, JA734.

The DTARC set out its analysis in a "Case Summary" prepared after the February 17 meeting. Drs. Peiper and Sheitman contributed to the mental health and behavioral health case reviews. JA609–612, JA722–723. The Case Summary indicated that the UNC Transgender Health Program deemed Plaintiff an appropriate candidate for surgery. JA850. The summary further noted, "The patient's mood and anxiety symptoms appear well-controlled by psychiatric interventions, however, recent progress notes . . . indicate the patient has been heavily focused on the status of the final decision regarding her requested/desired surgery and experiencing related anxiety/frustrated mood." JA851. There

was no further analysis of Plaintiff's individual circumstances.

Dr. Campbell was the sole author of the Case Summary's medical analysis and conducted the attendant literature review. JA448–450. While the DTARC was considering Plaintiff's surgical request, Dr. Campbell was authoring a "Position Statement" setting out his views on gender-affirming surgery. JA546–548, JA550-JA552, JA865–876. He hoped that it would be adopted by the DTARC as a whole "to standardize the evaluation of medical necessity for gender-affirming surgery." JA549–550. If approved, Dr. Campbell envisioned that "no further consideration would be given to [gender-affirming surgery] within our system." JA855.

In the Position Statement states that after "extensive and objective review and analysis of hundreds of studies and other publications, it has been determined that gender reassignment surgery (GRS), as a treatment for gender dysphoria, is not medically necessary." JA866; *see also* JA862 ("it is quite clear that gender reassignment surgery is indeed not a medical necessity"). Dr. Campbell further argued that "to support these procedures given all these concerns would be in conflict with the most critical imperative in medicine, '*Primum non nocere*' (First, do no harm')." JA875. The Position Statement did not provide for exceptions, *see* JA865–

76, and criticized WPATH as "'activist-led' rather than 'evidence-led,'" JA874.

Even though Defendants did not formally adopt the Position Statement, the DTARC unanimously supported it and deferred to Dr. Campbell as the medical authority on the DTARC. JA453, JA926, JA965–966. Further, the Position Statement reflected Dr. Campbell's thinking when he was considering Plaintiff's request. JA552. Dr. Campbell acknowledged that his medical analysis in Plaintiff's Case Summary was based largely on the Position Statement. JA458, JA504. In fact, the Case Summary contained many passages identical to drafts of the Position Statement,[4] asserting that gender-affirming surgery is never medically necessary to treat gender dysphoria. JA458, JA504, JA542–543, JA546–552.

The Case Summary provided minimal analysis as to Plaintiff herself, instead making generalizations about gender-affirming surgery that

[4] *Compare*, *e.g.*, JA852 *with* JA862 (identical passage beginning with "In order to ensure" and ending with "The evidence regarding [GCS] does not provide sufficient confidence that the procedures should be undertaken without concern for having violated that oath."); JA852 *with* JA862 (two identical paragraphs beginning with "When as clinicians we encounter concerns" and ending with "When further research is conducted, as we have done in this case, it becomes even more apparent why there is indeed not consensus among the medical community in the treatment of gender dysphoria, and particularly GCS").

were substantively identical to those in the Position Statement. JA851–854, JA865–876. Like the Position Statement, Dr. Campbell's Case Summary concluded that the WPATH Standards are not evidence-based. JA852. Although both documents stated that de-transition was a "critically important" consideration, Dr. Campbell had no reason to believe Plaintiff would detransition or regret her vulvoplasty. JA555, JA853, JA857. Dr. Campbell opined that some evidence suggests the suicide rate, as well as mortality and psychiatric hospitalization rates, increase after gender-affirming surgery. JA853. However, nothing caused him concern that Plaintiff herself would experience increased suicidality or other harm if she underwent surgery. JA552–554.

Despite all this, Dr. Campbell concluded that "the surgical procedure requested by this offender is not medically necessary." JA854. Junker and Harris deferred to Dr. Campbell's judgment and denied Plaintiff's request. JA822.

Plaintiff filed this lawsuit in April 2022 shortly after learning that Defendants had denied surgery.[5] JA329–331. Defendants filed a motion

[5] Plaintiff verified the allegations in her complaint on April 25, 2022, before receiving formal notice of Defendants' decision to deny her surgery. JA56 & n.1, JA68.

to dismiss Plaintiffs claims for failure to exhaust administrative remedies and failure to state a claim. Dist. Ct. ECF No. 25 at 2. Plaintiff sought a preliminary injunction. *Id.* at 3. The district court denied both motions, *id.* at 11, and discovery ensued.

VI. Without gender-affirming surgery, Plaintiff's gender dysphoria will likely worsen.

It has been nearly six years since Plaintiff first requested gender-affirming surgery from Defendants. Every clinician with subject-matter expertise who has personally examined Plaintiff has concluded that she required gender-affirming surgery to treat her condition.

Plaintiff's expert witness Dr. Randi Ettner is a clinical and forensic psychologist with decades of experience in the evaluation, diagnosis, and treatment of gender dysphoria. She was a co-author of the WPATH Standards and chaired the chapter on Institutionalized Persons addressing treatment of incarcerated individuals with gender dysphoria. JA197–199, JA261–271. After reviewing Plaintiff's health records, Dr. Ettner conducted an in-person evaluation of Plaintiff in May 2022, and a follow-up phone consultation in January 2023. JA228, JA233.

Dr. Ettner found that Plaintiff has "severe and persistent" gender

dysphoria and continues to struggle with thoughts of self-harm as a result. JA256–257. Dr. Ettner found that DAC's treatment of Plaintiff's gender dysphoria "falls far outside of what is recommended by the" WPATH Standards because Plaintiff's previous treatments "have been ineffective in significantly alleviating or resolving" her condition. JA234, JA257. Dr. Ettner also found that Plaintiff's resilience is "rapidly eroding," and that without surgery, her "gender dysphoria will continue to intensify, with no means of relief." JA257. For these reasons, Dr. Ettner concluded that gender-affirming surgery is medically necessary for Plaintiff. JA256–258.

Her health care providers and Defendants' experts agree that her focus on her unfulfilled request for surgery has impaired her ability to meaningfully engage with other aspects of her mental health. JA192–193, JA707–708. JA820–821 n.3.

Dr. Hahn testified that during her three years treating Plaintiff, gender-affirming surgery was necessary treatment for her from a mental health perspective. JA0820–821 n. 3. Dr. Marvella Bowman, a psychologist that treated Plaintiff after Dr. Hahn, testified that she could not imagine that Plaintiff will stop experiencing gender dysphoria without

surgery. *Id.*

Defendants' expert psychologist Dr. Boyd, who conducted an in-person evaluation of Plaintiff, agreed. At deposition, Dr. Boyd testified that gender-affirming surgery is "necessary" to cure Plaintiff's gender dysphoria, and that Plaintiff "cannot be cured of her gender dysphoria" while she has male genitalia. JA190–191.

Even some Defendants have conceded the same. Despite his deference to Dr. Campbell's medical necessity analysis, Dr. Sheitman has since testified that Plaintiff's treatment had been helpful but not sufficient, and that surgery could be helpful to manage her gender dysphoria. JA621–622, JA624–625. Similarly, Dr. Peiper testified that at the time of the DTARC meeting "[i]t continued to be confirmed" that Plaintiff suffered clinically significant distress, depression, or anxiety associated with her gender dysphoria." JA727; *see also* JA719, JA726.

VII. The district court concluded that Defendants had implemented a de facto ban on gender-affirming surgery.

The parties filed cross-motions for summary judgment. Supported by factual findings spanning two orders, the district court held that

Plaintiff had established both the objective and subjective elements of her Eighth Amendment claim.

In its February 2024 summary judgment order, the district court concluded that Plaintiff had established the objective prong of her Eighth Amendment claim: she "suffered serious or significant physical or mental injury as a result of Defendants' denial of the request for gender affirming surgery." JA824. (quotation marks omitted). "That Defendant's denial caused Plaintiff to suffer significant injury is beyond genuine dispute." *Id.* Defendants do not contest that conclusion here.

The court also held that Plaintiff had satisfied the subjective prong. It found that "DAC is familiar with the WPATH Standards," which establish that sometimes gender dysphoria will not resolve without gender-affirming surgery, and that "Dr. Campbell's position is plainly at odds with the WPATH Standards." JA825, JA827. Moreover, because "Plaintiff's medical records document her history of distress, anxiety, hopelessness, self-harm and suicidal ideation," "[n]o reasonable jury could find that Defendants lacked subjective awareness that denying [her] request carried some risk of harm." JA825–826 (quotation marks omitted).

Even though Plaintiff had established both elements of her Eighth Amendment claim as a matter of law, the district court believed that two factual questions precluded summary judgment: (1) "Whether gender-affirming surgery is medically necessary for Ms. Zayre-Brown according to the WPATH Standards of Care," and (2) "Whether [DAC] policy, specifically the DTARC and Dr. Campbell's role therein, amounts to a de facto ban on gender-affirming surgery for [gender dysphoria] patients." JA830.

The district court held an evidentiary hearing to resolve those questions. The court heard testimony from the three clinician Defendants on DTARC—Drs. Campbell, Peiper, and Sheitman—and from Plaintiff's expert witness Dr. Randi Ettner. Dr. Ettner was qualified as an expert and testified that Plaintiff required gender-affirming genital surgery according to the WPATH Standards. Doc. 19-4 at 106:9–14; 111:14–113:2.

By contrast, Defendants confirmed that they lack experience in this field, and they did not attempt to have their expert witnesses testify. JA894, JA933, JA954–955. Dr. Campbell and Dr. Peiper testified, contrary to the WPATH Standards, that they would only approve gender-affirming surgery if a patient's symptoms were "severe," "extreme," and "debilitating." JA887–889, JA894, JA924–925.

Defendants did not define these terms, nor did they ground their views in the WPATH Standards or any other clinical guideline. *See, e.g.*, JA887-889, JA894, JA924-925, JA969. Further, although Dr. Campbell testified that DAC does not have a de facto ban, he also testified that the concerns in his Position Statement—which criticized WPATH and asserted that providing gender-affirming surgery risks violating the Hippocratic Oath—remain "valid." JA929, JA933-934.

Following the hearing, the parties renewed their motions for summary judgment. On April 16, the district court denied Defendants' motion and granted Plaintiff's motion as to her Eighth Amendment claim. JA1398. The court found "evidence that even DTARC members with medical training deferred to Dr. Campbell's assessment of whether gender-affirming surgery was medically necessary in Plaintiff's case." JA1393. "[C]onsidering Dr. Campbell's authorship of the position statement, other DTARC members' deference to his medical judgment, and the DTARC's track record of denying dysphoric prisoners' requests for gender-affirming surgery, the Court cannot credit Dr. Campbell's testimony." JA1396.

The district court thus concluded that "Defendants' review of Plaintiff's accommodation request violated Plaintiff's Eighth Amendment

rights insofar as Defendants denied Plaintiff the individualized medical evaluation the Eighth Amendment requires." JA1397. The court entered a permanent injunction that provided Defendants with two options: "either (1) give Plaintiff the surgery that Plaintiff's experts contend remains medically necessary; or (2) within 30 days from entry of this order form a new committee, subject to this Court's approval, to re-assess Plaintiff's accommodation request, that committee to contain at least two medical doctors with gender dysphoria expertise." *Id.*

Defendants subsequently filed their notice of appeal and sought to stay the district court's injunction pending appeal. Dist. Ct. ECF No. 117, 118. The district court denied Defendants' stay motion, as did this Court. ECF No. 20. Further proceedings in the district court are underway.

STANDARDS OF REVIEW

On appeal from a bench trial or evidentiary hearing, "[t]he district court's legal conclusions are reviewed de novo, but the court's findings of fact are only reviewed for clear error." *Heyer v. United States Bureau of Prisons*, 984 F.3d 347, 355 (4th Cir. 2021). When a finding of fact is "based upon assessments of witness credibility, such finding is deserving of the

highest degree of appellate deference." *Evergreen Int'l, S.A. v. Norfolk Dredging Co.,* 531 F.3d 302, 308 (4th Cir. 2008) (quotation marks omitted). On appeal from an order on summary judgment or a motion to dismiss, this Court's review is de novo. *See Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014)*; Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993).

SUMMARY OF THE ARGUMENT

The district court correctly held that Defendants imposed a de facto ban on gender-affirming surgery to treat gender dysphoria, thereby denying "Plaintiff's surgical request the individualized medical evaluation our Constitution requires." JA1396 (quotation marks omitted). To remedy this Eighth Amendment violation, the district court properly issued an injunction that could not be any narrower while still providing meaningful relief: Defendants simply had to have experienced doctors reevaluate Plaintiff's need for surgery.

Defendants argue that the district court erred by finding an Eighth Amendment violation without addressing medical necessity. Def. Br. 34. But imposing a blanket ban on treatment violates the Eighth

Amendment by making meaningful *evaluations* of medical necessity impossible. *See Gordon v. Schilling*, 937 F.3d 348, 360-362 & n.17 (4th Cir. 2019); *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013). The district court's order is entirely consistent with that precedent. Defendants' effort to distinguish those cases—arguing that only a "formal" ban may be unconstitutional, Def. Br. 45—defies common sense and has no basis in the law.

Defendants also contend that the district court erred by failing to address their subjective mental states. This argument ignores the district court's express findings on that issue. JA825–826. And for Eighth Amendment injunctive relief, a court must examine the defendant's *current* mental state. "[I]f . . . the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury"—which the district court found and Defendants do not contest—prison officials "could not plausibly persist in claiming lack of awareness[.]" *Farmer v. Brennan,* 511 U.S. 825, 846 n.9 (1994).

Next, Defendants argue that the district court erred by denying them summary judgment because Plaintiff did not exhaust her administrative remedies before suing. Defendants never moved for summary

judgment on that issue, however, so it is waived. And even if the Court entertains the argument, it is meritless. "[T]o exhaust their remedies, prisoners need not file multiple, successive grievances raising the same issue . . . if the objectionable condition is continuing." *Wilcox v. Brown*, 877 F.3d 161, 167 n.4 (4th Cir. 2017) (quoting *Turley v. Rednour*, 729 F.3d 645, 650 (7th Cir. 2013)). Here, Plaintiff repeatedly exhausted grievances concerning Defendants' ongoing refusal to provide surgery. She did not have to raise the issue yet again simply because Defendants denied surgery yet again.

Finally, Defendants argue that the district court did not make adequate findings under the Prison Litigation Reform Act that the injunction was narrowly drawn. Defendants waived this argument as well by never raising it before the district court. But even if not waived, the relief ordered here—a single evaluation of a single patient for treatment already authorized by state policy—could not be any narrower while still providing meaningful relief. To the extent the district court erred, that error was harmless.

ARGUMENT

I. The district court correctly held that Defendants' blanket ban on gender-affirming surgery violated the Eighth Amendment.

By imposing a de facto ban on gender-affirming surgery to treat gender dysphoria, Defendants failed to provide Plaintiff the meaningful, individualized medical consideration required by the Eighth Amendment.

A. Defendants' blanket ban made a meaningful, individualized medical necessity determination impossible.

The Eighth Amendment requires the government to "provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society." *Brown v. Plata*, 563 U.S. 493, 511 (2011).

An Eighth Amendment claim of inadequate medical care has two components: "the plaintiff must demonstrate that the defendant prison official acted with deliberate indifference (the subjective component) to

the plaintiff's serious medical needs (the objective component)." *Gordon*, 937 F.3d at 356 (quotation marks omitted). Here the district court found that Plaintiff satisfied the objective component, JA824, and Defendants do not contest that finding on appeal.

A plaintiff can prove the subjective component in multiple ways. *Estelle*, 429 U.S. at 104–105. But ultimately, prison officials must provide care that is "adequate to address the prisoner's serious medical need." *De'lonta*, 708 F.3d at 526. A necessary part of such care is an individualized, meaningful evaluation of medical necessity. *See id.* n.4; *Gordon*, 937 F.3d at 361; *Bowring v. Godwin*, 551 F.2d 44, 48–49 (4th Cir. 1977).

Therefore, as numerous courts have acknowledged, an official or de facto ban on gender-affirming surgery "would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs." *Kosilek v. Spencer*, 774 F.3d 63, 91 (1st Cir. 2014) (en banc); *Fisher v. Fed. Bureau of Prisons*, 484 F. Supp. 3d 521, 543 (N.D. Ohio 2020) (collecting cases). A "blanket, categorical denial of medically indicated surgery . . . is the paradigm of deliberate indifference." *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014).

In *Gordon*, for example, the plaintiff alleged a medically unjustified blanket prohibition on hepatitis C treatment. 937 F.3d at 360. This Court held that such a practice, if proven, would violate the Eighth Amendment. Prison officials must make "an individualized determination," in accordance with the standard of care, that "results in adequate medical care for the inmate[.]" *Id.* at 361 (quoting *Roe v. Elyea*, 631 F.3d 843, 860 (7th Cir. 2011) (cleaned up)).

In a case about gender dysphoria, this Court held that when treatments other than surgery fall short, prison officials must evaluate a patient for gender-affirming surgery "consistent with the [WPATH] Standards of Care." *De'lonta*, 708 F.3d at 526.[6] Those standards require careful attention to a patient's individual needs. *See Grimm*, 972 F.3d at 596; JA827. Prison officials cannot simply go through the motions of a medical evaluation while intent on never authorizing treatment. *See Kosilek,* 774 F.3d at 91.

Here, the district court found that while state policy authorizes gender-affirming surgery, Defendants violated the Eighth Amendment by

[6] The WPATH Standards were previously known as the "Benjamin Standards of Care." *De'lonta*, 708 F.3d at 522.

imposing a functional ban on that treatment—"a sham process where the answer is always no." JA830. This conclusion is consistent with this Court's decisions and those of nearly every other court to address the issue.[7]

Defendants argue that the district court erred by finding an Eighth Amendment violation without determining that surgery was medically necessary for Plaintiff. Def. Br. 37. They also contend that "Plaintiff was indeed evaluated," and "the extent to which Plaintiff received individualized consideration" is irrelevant. *Id.* 45, 46.

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[7] The Fifth Circuit is the lone outlier. In *Gibson v. Collier*, a divided panel held that given "robust and substantial good faith disagreement dividing respected members of the expert medical community, there can be no claim under the Eighth Amendment" for denial of gender-affirming surgery. 920 F.3d 212, 220 (5th Cir. 2019). But the majority relied entirely on evidence from *Kosilek*—compiled thirteen years earlier—and so couldn't account for "any developments in the medical community regarding treating gender dysphoria and determining the necessity for" gender-affirming surgery." *Id.* at 233 (Barksdale, J., dissenting). As explained by the Ninth Circuit, "*Gibson* relies on an incorrect, or at best outdated, premise: that there is no medical consensus that [gender-affirming surgery] is a necessary or even effective treatment for gender dysphoria." *Edmo*, 935 F.3d at 795 (cleaned up); *see also Flack v. Wis. Dep't of Health Servs.,* 395 F. Supp. 3d 1001, 1017 (W.D. Wis. 2019) (noting same).

Therefore, even if the Fifth Circuit was right about disagreement in the medical community, the evidence of that disagreement is now eighteen years old. And in the end, *Gibson* conflicts with this Court's holding in *De'lonta* that denying gender-affirming surgery may indeed violate the Eighth Amendment. 708 F.3d at 526.

These arguments fail. An evaluation process that will never authorize medically indicated surgery, regardless of what a patient's treating clinicians find, shows indifference to a serious risk of harm that is forbidden by the Eighth Amendment. *See Kosilek*, 774 F.3d at 91 (citing *Farmer*, 511 U.S. 825 at 844–45). And the district court did not require Defendants to provide surgery—which would have required a medical necessity finding—but instead allowed Defendants to have Plaintiff reevaluated for surgery by doctors with relevant expertise.

Defendants also argue that the district court improperly converted Plaintiff's claim into a procedural due process claim, and urge this Court not to "recognize[] Eighth Amendment claims that require a court to conduct an evaluation of the quality of the process" underlying medical decisions. Def. Br. 44. But procedures that function to deny medically necessary care (or evaluations for such care) implicate the Eighth Amendment. *E.g.*, *Gordon*, 937 F.3d at 361. And the district court was not nitpicking the minutiae of prison operations; it mainly took issue with the predestined *result* of Defendants' process, led by an inexperienced doctor who believed, contrary to *De'lonta* and the WPATH Standards, that surgery

is "never medically necessary to treat" gender dysphoria. JA819 (emphasis omitted).[8]

Defendants scarcely mention *De'lonta*. They acknowledge *Gordon* and other cases concerning treatment bans but emphasize that some of those bans were "formal," while "there is no formal policy [here] preventing evaluation." Def. Br. 45. This implies that a formal policy may be unconstitutional, while a sham *practice*—which will never authorize treatment regardless of what a patient's treating clinicians say—is perfectly fine.

It isn't. Whether official or de facto, a ban makes it impossible for a patient to receive a meaningful, individualized evaluation of medical necessity. The risk of harm from going without potentially necessary treatment remains the same in either scenario. *See Kosilek,* 774 F.3d at 91; *Fisher*, 484 F. Supp. 3d at 543.

[8] In the first round of summary judgment briefing, Plaintiff focused on a medical necessity theory of Eighth Amendment liability. A district court, however, "is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

B. The district court made specific findings on Defendants' subjective mental states.

Defendants argue that "the absence of a finding on medical necessity precludes any finding that Defendants knowingly disregarded an excessive risk of harm to Plaintiff," and "the district court made no findings that any Defendant possessed the requisite subjective knowledge of an excessive risk of harm." Def. Br. 36. Both arguments fail.

As discussed above, denying care that a court finds medically necessary is not the only way to violate the Eighth Amendment. The constitutional injury here is a lack of a meaningful medical finding *by Defendants,* who were running a sham process guaranteed to deny surgery. Plaintiff is entitled to a real evaluation that complies with the WPATH Standards and would approve medically indicated surgery.

Second, the district court addressed Defendants' mental states directly in its initial summary judgment order. Given Defendants' familiarity with Plaintiff's medical records and the WPATH Standards, the court found that Defendants "knew the risks of denying Plaintiff's request for gender-affirming care. . . . No reasonable jury could" find

otherwise. JA825–826. That conclusion became the law of the case and informed the district court's subsequent order granting injunctive relief.

Moreover, when a prisoner seeks prospective relief, deliberate indifference is "determined in light of the prison authorities' *current* attitudes and conduct[.]" *Farmer,* 511 U.S. at 845 (quoting *Helling v. McKinney*, 509 U.S. 25, 36 (1994)). If "the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury"—which the district court found and Defendants do not contest—prison officials "could not plausibly persist in claiming lack of awareness[.]" *Id.* at 846 n.9. So, even if Defendants did not understand the risks when they denied surgery in February 2022, they certainly knew better once discovery was complete. "Prison officials may not simply bury their heads in the sand and thereby skirt liability." *Makdessi v. Fields*, 789 F.3d 126, 129 (4th Cir. 2015).

Relatedly, Defendants assert that "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." Def. Br. 39. Under this view, a prison doctor could injure or

even kill a patient through wildly incompetent care but avoid liability if he thought he was doing a good job.

That is not how the Eighth Amendment works. Treatment that is "grossly incompetent" or "inadequate" may show deliberate indifference. *Miltier v. Beorn,* 896 F.2d 848, 851 (4th Cir.1990); *see also Jehovah v. Clarke*, 798 F.3d 169, 181–82 (4th Cir. 2015). And here, Defendants knew about Plaintiff's medical history, knew about the WPATH Standards, and knew the conclusions of their handpicked clinicians that surgery was medically necessary. JA821, JA825. Defendants' inexpert disagreement—even if sincere—cannot defeat Plaintiff's Eighth Amendment claim.

Finally, Defendants argue that their conduct was not reckless because one of their expert witnesses, Dr. Joseph Penn, wrote in his report that Plaintiff did not require surgery,[9] and Dr. Fan Li, a statistician,

[9] Plaintiff filed motions under Federal Rule of Evidence 702 to exclude Defendants' experts. Dist. Ct. ECF No. 70, 73, 75. The district court has not ruled on those motions. Of note, however, another district court recently found Dr. Penn's testimony on prison medical issues "flawed," "meaningless," "nonsensical," "absurd," "contradict[ory,]" "unreliable and incredible," and not able to "withstand the slightest scrutiny." *Jensen v. Shinn*, 609 F. Supp. 3d 789, 862-63 (D. Ariz. 2022).

wrote a report critiquing the statistical methodology of studies on the effectiveness of gender-affirming surgery.[10] Def. Br. 40. These witnesses were not called to testify at the evidentiary hearing, and Defendants did not even file their reports in support of their motion for summary judgment. The district court had no obligation to credit these witnesses' views. And this testimony, even if admissible, could not change Dr. Campbell's indefensible conclusion that gender-affirming surgery is never medically necessary for anyone.[11]

C. The district court correctly denied Defendants' summary judgment based on the evidence of Plaintiff's medical need for gender-affirming surgery.

Defendants further contend that "the district court's acknowledgement that 'a reasonable jury could find for either party on the question of

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[10] Dr. Li is not a healthcare provider of any kind and offered no opinion on Plaintiff's medical needs.

[11] Defendants cite cases to show that "reasonable disagreement" in the medical community weighs in their favor. Def. Br. 41 & n.7. None of those cases help them. *Kosilek* explained that a "de facto ban" on surgery would violate the Eighth Amendment. 774 F.3d at 91. *Lamb v. Norwood* involved a pro se plaintiff who offered no expert evidence. 899 F.3d 1159, 1163 (10th Cir. 2018). So did *Boone v. Carvajal*, No. 6:21-CV-3053-JD-KFM, 2023 WL 4926150, at *3 (D.S.C. Aug. 2, 2023). And as explained above, the Fifth Circuit's decision in *Gibson* is wrong and conflicts with this Court's holding in *De'lonta*. *Supra* n.5.

medical necessity' (JA1398), demonstrates that the district court granted summary judgment to the wrong party." Def. Br. 35. This argument fails for two reasons.

First, Defendants conflate the medical necessity standard with the summary judgment standard. If a reasonable trier of fact could rule for either side on medical necessity, that cannot mean automatic judgment for the defendant. The trier of fact could still find for the plaintiff because the defendant's treatment was not "adequate to address the prisoner's serious medical need." *De'lonta*, 708 F.3d at 526; *see also Cooper v. Dyke,* 814 F.2d 941, 945 (4th Cir.1987) (stating that "government officials who ignore indications that a prisoner's . . . initial medical treatment was inadequate can be liable for deliberate indifference to medical needs"). When this Court has encountered disputed issues of material fact on an Eighth Amendment claim, it has not ordered judgment for the defendant but remanded for further proceedings. *E.g.*, *Gordon*, 937 F.3d at 363; *Scinto v. Stansberry*, 841 F.3d 219, 229 (4th Cir. 2016).

Second, the record has plenty of evidence that could persuade a fact-finder that surgery is medically necessary for Plaintiff. Most obviously, Defendants' handpicked specialists reached that conclusion, as did

Defendants' own employees, Defendants' expert Dr. Boyd, and Plaintiff's expert Dr. Ettner. *Supra* pp. 13–14, 19–21. Meanwhile, Defendants have no expertise in this field. They never met Plaintiff before denying her care, did not submit expert testimony to support their motion for summary judgment, and did not have their experts testify at the evidentiary hearing. *See* JA559, JA613, JA896.

Defendants also fault the district court for "engag[ing] in a truncated process" to resolve her Eighth Amendment claim and ask in the alternative for a jury trial. Def. Br. 56. But the district court held a limited hearing simply because most of the factual issues were undisputed. *See* JA830. And the district court correctly acknowledged that it was the trier of fact on Plaintiff's claim for injunctive relief. *See* JA831; *Porter v. Clarke,* 290 F. Supp. 3d 518, 531 n.10 (E.D. Va. 2018), *aff'd,* 923 F.3d 348 (4th Cir. 2019). Defendants participated in the evidentiary hearing without objection, so even if they had a right to a jury trial on this claim, they waived it. *See Edmo*, 935 F.3d at 802–03 (holding that prison officials waived any right to jury trial on Eighth Amendment claim).

II. The district court did not commit clear error by refusing to credit Defendants' implausible testimony.

Defendants contend that the district court committed clear error by finding that they had established a de facto ban. Def. Br. 46. Clear error is an exceptionally high bar, especially when the district court makes credibility determinations based on live testimony. *See Evergreen Int'l, S.A. v. Norfolk Dredging Co.,* 531 F.3d 302, 308 (4th Cir. 2008). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–74 (1985). Defendants cannot make that showing here.

First, Defendants say that "[t]he district court's eight-page order is devoid of detailed factual findings." Def. Br. 47. That is incorrect. The district court made findings concerning Dr. Campbell's views, the DTARC's deference to those views, and Defendants' history of never providing this procedure. JA1396. The district court made additional

findings of fact on these issues in its initial summary judgment order. JA817–822.

Defendants further assert that their denial of surgery "was not based on an assessment of the medical literature . . . ." Def. Br. 48. But the Case Summary's written explanation for denying Plaintiff surgery—approved by the entire DTARC—is almost *entirely* a literature review, largely identical to the one in Dr. Campbell's position statement. JA458, JA504, JA850–854.

Next, Defendants argue that the testimony of Drs. Peiper and Sheitman disclaiming any de facto ban went "unchallenged." Def. Br. 49. That is false. Dr. Peiper testified that he "personally accepted Dr. Campbell's interpretation of the literature" on gender-affirming surgery, which Dr. Campbell used to support his conclusion that surgery is never necessary for anyone. JA910 Dr. Sheitman testified that there was unanimous support on DTARC for Dr. Campbell's position statement even though it was not formally adopted. JA966. And both Drs. Peiper and Sheitman agreed with the Case Summary's rationale for denying surgery, which, again, was mostly copied from Dr. Campbell's position statement JA821–822.

Accordingly, the district court rightly acknowledged "evidence that even DTARC members with medical training deferred to Dr. Campbell's assessment of whether gender-affirming surgery was medically necessary in Plaintiff's case." JA1393. The district court had no obligation to credit Defendants' contrary testimony.

For these reasons, the district court's account of the evidence was plausible at the very least, which defeats any assertion of clear error. *See Anderson*, 470 U.S. at 573–74.

III. Plaintiff exhausted her administrative remedies by repeatedly filing and exhausting grievances requesting gender-affirming surgery.

Defendants also argue that Plaintiff did not exhaust her administrative remedies before suing as required by the Prison Litigation Reform Act (PLRA). Defendants failed to preserve these arguments. And even if preserved, they are meritless.

A. Defendants' exhaustion arguments are unpreserved.

"[I]ssues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000). "Further, a party must do more than raise

a non-specific objection or claim to preserve a more specific argument on appeal. Rather, to preserve an argument for appeal, the party must press and not merely intimate the argument during the proceedings before the district court." *Wards Corner Beauty Acad. V. Nat'l Accrediting Comm'n of Career Arts & Scis.*, 922 F.3d 568, 578 (4th Cir. 2019) (quotation marks omitted).

Defendants argue that the district court "erred in granting summary judgment to Plaintiff" because she failed to exhaust her administrative grievances before suing as required by the PLRA. Def. Br. 57. But Defendants never raised this argument in either round of summary judgment briefing. *See* Dist. Ct. ECF Nos. 60, 111. They did make a failure-to-exhaust argument on a motion to dismiss, Def. Br. 19, but did not include the district court's denial of that motion in the joint appendix as required by Fed. R. App. P. 30(a)(1), or list it as an issue presented to this Court as required by Fed. R. App. P. 30(b)(1). Nor do Defendants discuss the standard of review for a motion to dismiss. Therefore, Defendants have not properly presented the issue on appeal.

B. Plaintiff was not required to exhaust multiple grievances raising the same issue.

The PLRA states: "No action shall be brought with respect to prison conditions" under federal law "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e. A failure-to-exhaust argument under the PLRA is an affirmative defense—a defendant must prove that an administrative remedy was available and a plaintiff failed to exhaust it. *Jones v. Bock*, 549 U.S. 199, 212 (2007). Otherwise, dismissal is only appropriate "when the alleged facts in the complaint, taken as true, prove that the inmate failed to exhaust his administrative remedies." *Custis v. Davis*, 851 F.3d 358, 361 (4th Cir. 2017).

When prisoners face an ongoing risk of harm, or multiple instances of the same kind of harm, they do not have to exhaust multiple grievances. In *Wilcox v. Brown*, the plaintiff alleged an ongoing failure by prison officials to accommodate Rastafarian worship services. 877 F.3d 161, 165 (4th Cir. 2017). He fully exhausted the prison grievance procedure. *Id.* Afterwards, the prison system hired a new chaplain who decided to not continue Rastafarian services. *Id.* Prison officials argued—as

Defendants argue here—that the plaintiff had to grieve that later decision before suing. *Id.*

This Court disagreed: "[T]o exhaust their remedies, prisoners need not file multiple, successive grievances raising the same issue . . . if the objectionable condition is continuing. Thus, once a prison has received notice of, and an opportunity to correct, a problem, the prisoner has satisfied the purpose of the exhaustion requirement." *Id.* at 167 n.4. (quoting *Turley v. Rednour*, 729 F.3d 645, 650 (7th Cir. 2013)); *see also Johnson v. Johnson*, 385 F.3d 503, 521 (5th Cir. 2004) (prisoner alleging repeated assaults did not have to exhaust a new grievance for each assault).

Here, the district court correctly held that Plaintiff had fully exhausted the grievance system several times raising the same ongoing problem: lack of gender-affirming surgery. Dist. Ct. ECF No. 25 at 5–7. Defendants argue that, unlike *Wilcox*, this case centers on "a discrete review and determination." Def. Br. 60–61. But the February 2022 review was not the first surgery denial—Plaintiff alleged an ongoing denial of surgery that began in 2018. JA44–56. No matter how "detailed" the latest denial was, it presented the exact same problem that Plaintiff had fully grieved multiple times before.

Defendants also argue that "Plaintiff's prior grievances asserting that [they] needed to provide surgery generally could not have raised the specific concerns" of a de facto ban. Def. Br. 60. Again, Defendants never raised this argument before the district court despite having multiple opportunities.

Regardless, "[t]he level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is *the prison's requirements*, and not the PLRA, that define the boundaries of proper exhaustion." *Jones*, 549 U.S. at 218 (emphasis added). Defendants say nothing about their administrative remedy procedure, which simply defines a grievance as "a written complaint . . . by an offender on the offender's own behalf concerning an action, incident, policy, or condition within a prison facility."[12] There is no rule on how much detail a grievance must contain. Nor is there a requirement that a prisoner explain who or what is *causing* the problem—information that often can only be learned through discovery.

[12]Administrative Remedy Procedure, Ch. G, §.0301(b), https://public.powerdms.com/NCDAC/tree/documents/2145373.

Therefore, the district court rightly held that Plaintiff's multiple, fully exhausted grievances requesting gender-affirming surgery were adequate.

IV. The district court's injunction satisfied the narrowness requirement of the PLRA.

Defendants argue that the district court did not satisfy the PLRA's requirement that prospective relief be narrowly drawn. Defendants did not make that argument before the district court and so have waived that argument on appeal. And even if not waived, Defendants' argument fails.

A. Defendants waived this argument by never raising it with the district court.

Parties waive arguments that were not first presented to the district court. *Wards Corner Beauty Acad.*, 922 F.3d at 578. That rule applies to the PLRA's narrowness provision. *E.g.*, *Gates v. Cook*, 376 F.3d 323, 336 n.8 (5th Cir. 2004) (narrowness argument not made to district court could not be made for first time on appeal).

Here, Defendants argued against entry of a permanent injunction, but did not raise the PLRA or otherwise challenge the scope of potential relief. JA1390. Defendants passed up another opportunity to raise the

issue when seeking a stay from the district court. JA1401–1409. They cannot raise these arguments for the first time on appeal.[13]

B. The permanent injunction was narrowly drawn.

Defendants fault the district court for issuing an injunction without citing the PLRA's requirement that prospective relief be narrowly drawn. In essence, they propose a magic words test requiring a district court to "specifically reference[] the requirement for findings." Def. Br. 63 n.12. But the PLRA's requirement here is substantive, not formalistic, and the district court's orders satisfy that standard.

The PLRA provides:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. 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 of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public

[13]Defendants first made this argument in their motion for a stay pending appeal to this Court. The Court did not appear to find it persuasive. Even the dissenting Judge, who voted to grant the stay, did not reference the PLRA. *See* ECF No. 20.

> safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A).

This provision "merely codifies existing law and does not change the standards for determining whether to grant an injunction." *Gomez v. Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001) (quoting *Smith v. Ark. Dep't of Corr.*, 103 F.3d 637, 647 (8th Cir.1996)); *see also Williams v. Edwards*, 87 F.3d 126, 133 (5th Cir. 1996). It requires that relief "correct[] the violations of prisoners' rights with the minimal impact possible on defendants' discretion over their policies and procedures." *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010). When reviewing a district court's order for compliance with the PLRA, appellate courts must "consider the order as a whole." *Id.* at 1070.

A district court can satisfy the PLRA's narrowness requirement without citing the statute. *E.g.*, *Smith*, 103 F.3d at 647 (affirming injunction that did not cite the PLRA but "applied the appropriate standards," which are simply the "standards for determining whether to grant an injunction"); *Thomas v. Bryant*, 614 F.3d 1288, 1323 (11th Cir. 2010) (context showed district court "was keenly aware of [PLRA's] requirements and seemingly has fashioned a narrow injunction targeting the violation

of [the plaintiff's] constitutional rights in a most non-intrusive manner"). Moreover, unlike other parts of the PLRA, § 3626(a)(1)(A) does not expressly require written findings concerning the narrowness of prospective relief. *See Gates*, 376 F.3d at 336 n.8 (holding that the PLRA expressly requires written findings to *extend* injunctive relief, but not to initially provide it).[14]

Edmo provides an example of substantive narrowness review in the context of a district court ordering gender-affirming surgery. There the Ninth Circuit held that the district court's findings satisfied the PLRA because it "limited the relief to actions reasonably necessary to provide [surgery], cautioned that its conclusion is based on the unique facts and circumstances presented by Edmo, and noted that its decision is not intended, and should not be construed, as a general finding that all inmates suffering from gender dysphoria are entitled to [surgery]." 935 F.3d at 783 (cleaned up).

[14] This Court has held that written findings are required when considering *termination* of a consent decree but has not addressed what is required for the initial entry of injunctive relief. *Cagle v. Hutto*, 177 F.3d 253, 257 (4th Cir. 1999).

Here, the district court made detailed findings concerning Plaintiff's unique medical history and Defendants' involvement in her care. JA1392–1393, JA1396. The district court described exactly how Defendants' treatment of Plaintiff violated the Eighth Amendment. JA1395–1396. It stated that its decision did not address larger issues such as whether states must "pay for transgender healthcare." JA1396.

Then the court took pains to respect Defendants' discretion by giving them a choice of remedy: either provide surgery or engage qualified doctors—to be selected by Defendants—to evaluate Plaintiff. JA1397. The court was also satisfied that the injunction would not harm the public interest or unduly interfere with prison operations. *Id.*; Dist. Ct. ECF No. 126 at 8–11. These findings satisfy the PLRA's substantive requirements for issuing prospective relief.

Defendants cite an Eleventh Circuit case holding that a "boilerplate" PLRA analysis was deficient. *Hoffer v. Fla. Dep't of Corr.*, 973 F.3d 1263 (11th Cir. 2020). That court explained that "if a district court's injunction grants 15 separate forms of relief, the court must make—and explain—15 separate PLRA-related findings." *Id.* at 1279. But even this stringent application of the PLRA focused on the *substance* of a district

court's order, not whether it mentioned the right statutory provision.[15] Here the district court ordered just one form of relief, and its substantive findings explain why that relief was narrowly drawn.

On that point, Defendants further argue that the district court "could have simply rejected [their] determination and allowed Defendants the opportunity to re-review the request without Dr. Campbell's involvement – in the manner Defendants determined was most appropriate." Def. Br. 64.

Removing Dr. Campbell could remedy *his* bias. But that alone would not address the other Defendants' minimal experience with treating gender dysphoria or their acceptance of Dr. Campbell's opinions. *Supra* pp. 8. While the Eighth Amendment does not always require treatment by experts, it does require a surgical evaluation "consistent with the [WPATH] Standards of Care." *De'lonta*, 708 F.3d at 526. Dr. Peiper demonstrated a fundamental misunderstanding of those standards by testifying that surgery is only necessary when a patient has "debilitating" and "extreme" symptoms. JA888–889, JA894. The WPATH Standards

[15] Other courts have disagreed with this approach. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550, 558 (7th Cir. 2011); *Armstrong*, 622 F.3d at 1070.

say no such thing. Indeed, mental stability is *required* to qualify for surgery, JA640, and "it is inconsistent with the Eighth Amendment . . . to withhold treatment from an inmate who suffers from a serious, chronic disease until the inmate's condition significantly deteriorates." *Gordon*, 937 F.3d at 359.

As for Dr. Sheitman, he testified that only "persistent dysphoria" is required. JA969. That is generally correct. But Dr. Sheitman still voted to deny surgery despite agreeing that Plaintiff has experienced, and continues to experience, persistent dysphoria.

All told, this is not a case where "the district court has 'enmeshed [itself] in the minutiae of prison operations,' beyond what is necessary to vindicate plaintiffs' federal rights." *Armstrong*, 622 F.3d at 1071 (quoting *Lewis v. Casey,* 518 U.S. 343, 363 (1996) (brackets original)). Plaintiff could not obtain an evaluation consistent with the WPATH Standards if her evaluators did not understand or accept those standards. Therefore, involving experienced doctors was necessary to correct the constitutional violation. *See Brown v. Plata,* 563 U.S. 493, 511 (2011) (explaining that special masters may be necessary to remedy Eighth Amendment violations). To the extent the district court erred, that error was harmless and

does not require reversal—this Court "may affirm when the evidence permits only one conclusion." *Wright v. Lassiter*, 921 F.3d 413, 418–19 (4th Cir. 2019).

C. State law requirements cannot prevent a federal court from remedying a violation of federal law.

Defendants finally argue that the injunction violates the PLRA because a North Carolina statute, N.C.G.S. § 143C-6-5.6, prohibits the use of state funds "for the performance of or in furtherance of surgical gender transition procedures . . . .". Def. Br. 67. Not so.

Under the Supremacy Clause, U.S. Const. art. VI, § 2, state law cannot interfere with a remedy for the violation of a federal right. *See Reynoldsville Casket Co. v. Hyde,* 514 U.S. 749, 751 (1995). Defendants cite no authority suggesting otherwise. And they have no problem being ordered "to conduct a new review with no additional expenditure of funds by the State." Def. Br. 68. The State, however, would still be paying Defendants to engage in a process potentially "in furtherance of surgical gender transition procedures." N.C. Gen. Stat. § 143C-6-5.6(b). The *amount* spent to determine medical necessity is irrelevant.

Finally, N.C.G.S. § 143C-6-5.6 appears to impose a "formal" prohibition on gender-affirming surgery—exactly what Defendants concede would violate the Eighth Amendment. Def. Br. 45. And Defendants' concern over this statute suggests they would again find a way to deny surgery, regardless of Plaintiff's medical needs.

Therefore, the injunction fully complies with the PLRA.

CONCLUSION

The district court's grant of summary judgment to Plaintiff on her Eighth Amendment claim and entry of a permanent injunction should be affirmed.

Respectfully submitted, this the 26th day of August, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2024, I filed the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

/s/ Jaclyn A. Maffetore
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limits of Fed. R. App. P. 32(a)(7)(B) and the typeface requirements of Fed. R. App. P. 32(a)(5) & (6) because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), this brief contains 10,392 words and has been prepared in a 14-point, proportionally spaced typeface.

This the 26th day of August.

/s/ Jaclyn A. Maffetore
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