UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Reiyn Keohane,

Plaintiff,

v. Case No. 4:16-cv-511-MW-CAS

Julie Jones,
in her official capacity as
Secretary of the Florida Department of Corrections,

Trung Van Le,
in his official capacity as
Chief Health Officer of the Desoto Annex,

Teresita Dieguez,
in her official capacity as
Medical Director of Everglades Correctional Institution,

Francisco Acosta,
in his official capacity as
Warden of Everglades Correctional Institution,

Defendants.

PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANTS LE AND DIEGUEZ'S MOTION TO DISMISS

Plaintiff Reiyn Keohane ("Plaintiff"), through the undersigned counsel, responds to Defendants Le and Dieguez's ("Doctor Defendants") Motion to Dismiss ("Motion"), Doc. 22, and states as follow:

INTRODUCTION

Plaintiff is a transgender woman currently in the custody of the Florida Department of Corrections who seeks medically necessary treatment for her Gender Dysphoria. Her complaint, which is brought under the Eighth Amendment, specifically challenges the failure of Department of Corrections officials and agents (including the contracted medical provider, Wexford Health Sources, including Defendants Le and Dieguez) (collectively, "the DOC") to provide her with hormone therapy and access to female clothing and grooming standards so that she can live in accordance with her female gender identity.

When reviewing a Rule 12(b)(6) motion to dismiss, "the pleadings are construed broadly," and "the allegations in the complaint are viewed in the light most favorable to the plaintiff." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (internal quotation marks omitted); *see also Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014) (per curiam) (holding under *Twombly* and *Iqbal* that "substantive plausibility" requires only that plaintiffs state "simply, concisely, and directly events that" entitle them to relief).

The Doctor Defendants contend that Plaintiff's Complaint should be dismissed for mootness and because Plaintiff failed to allege facts demonstrating deliberate indifference to a serious medical need by the Doctor Defendants. These arguments rely on an assortment of misunderstandings of both the facts pleaded and the pleading requirements for claims for injunctive relief for constitutional violations in prison.

I. Plaintiff's Eighth Amendment claim is not moot.

A. The provision of hormone therapy does not moot Plaintiff's Eighth Amendment claim against Dr. Dieguez.

The Doctor Defendants argue that Plaintiff's claim against Dr. Dieguez is moot because she is now receiving hormone therapy since an endocrinologist appointment on September 2, 2016. Motion at 8. In her Complaint, Plaintiff seeks medically necessary treatment for her Gender Dysphoria, specifically, hormone treatment, access to female clothing and grooming standards, and all other treatment for Gender Dysphoria deemed medically necessary by a medical professional qualified in the treatment of Gender Dysphoria. Complaint ¶ 98. After Plaintiff filed her Complaint, the DOC began providing Plaintiff with hormone therapy. Motion at 8. But it continues to deny Plaintiff access to female clothing and grooming standards. Providing a portion of Plaintiff's necessary treatment does not moot her claim. "[E]ven the availability of a partial remedy is sufficient to

prevent a case from being moot." *Byrd v. U.S. E.P.A.*, 174 F.3d 239, 244 (D.C. Cir. 1999) (alterations and quotations marks omitted); *see also Wiley v. National Collegiate Athletic Ass'n*, 612 F.2d 473, 476 (10th Cir. 1979).

Even if the only treatment at issue in this case were hormone therapy, the DOC's voluntary cessation of the unlawful denial of this treatment does not moot Plaintiff's claim. "[T]he doctrine of voluntary cessation provides an important exception to the general rule that a case is mooted by the end of the offending behavior[.]" *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1183 (11th Cir. 2007) (emphasis and quotation marks omitted). Without this exception, courts would be forced to release a defendant from potential liability while leaving the defendant free to resume its allegedly unlawful behavior. *See id.* A defendant bears a "heavy burden" to overcome the voluntary-cessation exception and show that the controversy is moot. *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1265 (11th Cir. 2010).

A government actor will be extended a rebuttable presumption that the complained-of behavior will not recur, but only if it can establish an *unambiguous* termination. *Doe v. Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014). The Court must determine whether the ceased behavior is unambiguously terminated by considering "(1) whether the termination of the offending conduct was ambiguous; (2) whether the change in government policy or conduct appears to be the result of

substantial deliberation, or is simply an attempt to manipulate jurisdiction; and (3) whether the government has consistently applied a new policy or adhered to a new course of conduct." *Id.* at 1323.

The timing of the termination of the offending conduct is important to this analysis. A termination of behavior that occurs well before litigation has commenced will be viewed with favor by the Court, whereas a termination that occurs "late in the game" will cause the Court to view the change with suspicion. *Harrell*, 608 F.3d at 1266; *accord Doe*, 747 F.3d at 1325 ("[T[he BOP suddenly changed its position days before Mr. Doe's trial . . . . This timing suggests a change was made simply to deprive the District Court of jurisdiction."); *Rich v. Sec'y, Florida Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013) (citing *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 833-34 (11th Cir.1989) (finding that a claim was not mooted by the school district's voluntary cessation of the challenged activity in part because the change was only made when there was an "imminent threat of [a] lawsuit")); *see also Doe*, 747 F.3d at 1325 (finding no evidence of substantial deliberation because defendant did not explain why the change happened during litigation, but not earlier). In addition, a one-off change or a change that appears targeted to just the plaintiff will not support a finding that the change is applied consistently. *See Rich*, 716 F.3d at 532 ("Notably, Florida implemented the plan at the prison where Mr. Rich is incarcerated, and only at that

prison . . . ."). Where the termination is not consistently applied and appears to manipulate the Court's jurisdiction, the claims will not be considered moot. *See id.*

Here, the DOC's post-litigation provision of hormone therapy falls squarely within the voluntary-cessation exception to mootness. Plaintiff has been seeking treatment of Gender Dysphoria for over two years, *see* Complaint ¶ 37, and the DOC only allowed Plaintiff to meet with an endocrinologist and begin a hormone regimen after this lawsuit was filed, *see* Motion at 8. While Plaintiff is currently receiving hormone treatment, there is no indication in the Motion that such treatment will continue throughout her incarceration if her claims are dismissed. The first case cited by the Doctor Defendants involved a one-time medical treatment that was provided,[1] not ongoing treatment like Plaintiff needs, and the second case involved treatment that the main defendant himself had helped the plaintiff to secure prior to the initiation of litigation,[2] and thus there would have been no reason to believe that the offending conduct there would reoccur. Here, the DOC (including the Doctor Defendants) have provided no proof that the change in Plaintiff's medical treatment is due to a change in policy. With no explanation

[1] *See Smith v. Sec'y, Dep't of Corr.*, 602 F. App'x 466, 471 (11th Cir. 2015) (claim that inmate needed crown on molar was moot once tooth was fixed).

[2] *See Wilson v. Franceschi*, 735 F. Supp. 395, 399 (M.D. Fla. 1990) (lawsuit filed June 1989; defendant chief health officer had recommended AZT as treatment for AIDS-related complex in January 1989 and assisted plaintiff in transferring to new facility for treatment).

from the DOC for its sudden change of heart, it appears that its recent decision to provide hormone therapy to Plaintiff was the result of the litigation at hand, not a policy change. And unlike the DOC Defendants, who admit that Plaintiff "needs" hormone therapy, Doc. 21 at 11, the Doctor Defendants do not say anything about that one way or the other. Their careful silence on that point suggests a reservation of the right to reverse course later. As a result, even putting aside Plaintiff's current need for access to female clothing and grooming standards and focusing just on hormone therapy, Plaintiff's claim is not moot and remains a live controversy.

B. The fact that Plaintiff is no longer at the DeSoto Annex does not moot Plaintiffs' claim against Dr. Le.

The Doctor Defendants contend that Plaintiff's claim against Dr. Le is moot because she is no longer housed at the DeSoto Annex. Motion at 7. But in addition to seeking injunctive relief, Plaintiff is seeking nominal damages, and thus the controversy with Dr. Le is live.

The Doctor Defendants incorrectly contend that any claim against them for nominal damages is barred by the Eleventh Amendment. Motion at 4. While the Eleventh Amendment generally precludes actions in federal court against States and State agencies, an exception is provided for suits "challenging the constitutionality of a state official's action in enforcing state law," which are not deemed to be against the State. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. 123, 159-160 (1908)). The Eleventh Amendment

"insulates a defendant from all claims for legal damages, but it does not shield a defendant from claims for equitable relief." *Hopkins v. Saunders*, 199 F.3d 968, 976-77 (8th Cir. 1999). However, "[t]he fact that a remedy may require one party to pay money to another is not a sufficient reason to characterize the remedy as 'legal relief.'" *Id.* at 977 (citing *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990)).

Under *Terry*, a monetary award may be equitable in nature if it is (1) "restitutionary, such as in actions for disgorgement of improper profits," or (2) "incidental to or intertwined with injunctive relief." *Terry*, 494 U.S. at 570-71 (alterations and quotation marks omitted). In *Hopkins*, the Eighth Circuit found that nominal damages were inappropriate because they did not meet either of the *Terry* exceptions. *Hopkins*, 199 F.3d at 977. The court specifically focused on the fact that the district court had not awarded any injunctive relief. *Id.* In contrast, if Plaintiff prevails here in obtaining any of the requested injunctive relief, the court may award Plaintiff an equitable award of nominal damages under the *Terry* framework since the monetary award is intertwined with injunctive relief.

The Doctor Defendants contend that Eleventh Amendment immunity applies even in the context of nominal damages. Motion at 4 (citing *Simmons v. Conger*. 86 F.3d 1080, 1084 (11th Cir. 1996)). In *Simmons*, the Eleventh Circuit, in dicta, held that damage awards against state officials are barred by sovereign immunity,

reversing an award of nominal damages of $100. *Id.* at 1085. This statement was dicta because it was unnecessary to the ultimate decision: the court held that the permanent injunction should be vacated because the plaintiffs failed to state a claim upon which relief could be granted. *Id.* at 1085-86. Because the plaintiffs had failed to state a claim, they would obviously have been unable to obtain an award of damages, irrespective of any official's immunity, thus rendering unnecessary the court's discussion of damages. Because no injunctive relief was awarded, the court had no need to examine the narrow exceptions to the general rule barring damages in suits in federal court against state officials under the *Terry* framework as discussed in the Eighth Circuit's opinion in *Hopkins*. As in *Hopkins*, no injunctive relief remained for the *Simmons* plaintiffs following the Eleventh Circuit's opinion. Because of this, the *Terry* principle of nominal damages as equitable rather than legal in nature if they are "intertwined with injunctive relief" was not in issue. 494 U.S. at 571. Here, by contrast, injunctive relief has been requested and, if awarded, makes proper an additional award of nominal damages of $1. *Cf. Brooks v. Warden*, 800 F.3d 1295, 1308 (11th Cir. 2015) ("the availability of nominal damages serves a symbolic function").

In any case, Plaintiff does not object to Dr. Le's dismissal so long as Defendants do not contend that full injunctive relief may not be provided—if the court deems injunctive relief otherwise appropriate under the Eighth

Amendment—by the remaining defendants. All of the defendants have been sued in their official capacity, not their individual capacity.

II. Plaintiff has stated an Eighth Amendment medical-necessity claim.

"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). Corrections officials inflict cruel and unusual treatment on a prisoner, in violation of the Eighth Amendment, when they are deliberately indifferent to a prisoner's serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The Eighth Amendment standard requires that the alleged deprivation be "objectively, sufficiently serious," and requires, subjectively, that the official acted with "deliberate indifference to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quotation marks omitted).

A. Plaintiff has plausibly alleged the denial of medically necessary treatment for an objectively serious medical need.

In her Complaint, Doc. 1, Plaintiff alleges that she "is a transgender woman with Gender Dysphoria, a serious medical condition," Complaint ¶ 88, that she "was receiving hormone therapy and expressing her female gender in all aspects of her life under the care of a doctor prior to her incarceration," *id.* ¶ 89, and that "it is medically necessary for Plaintiff to live as female, to once again receive hormone therapy, and to receive all other treatment for Gender Dysphoria deemed medically

necessary by a qualified provider," *id.* ¶ 90 (emphasis added). Eleventh Circuit precedent demonstrates why this alone is sufficient to establish the objective prong of the Eighth Amendment standard. *See Kothmann v. Rosario*, 558 F. App'x 907, 911 (11th Cir. 2014) ("At this Rule 12(b)(6) stage, we do not decide whether hormone treatment in fact was medically necessary to treat Kothmann's GID [(Gender Identity Disorder)] or whether Rosario knew in fact that hormone treatment was medically necessary for Kothmann. Nor do we address what other kinds of treatment could adequately address Kothmann's GID or whether Rosario actually provided other adequate treatment to Kothmann. Our review is limited to the four corners of the complaint, and the complaint alleges sufficient facts to survive Rosario's motion to dismiss.").

Even ignoring *Kothmann*, other case law makes clear that Plaintiff has adequately alleged that she has an objectively serious medical need.

1. Gender Dysphoria is a serious medical need.

Courts have routinely held that Gender Dysphoria (also referred to as transsexualism and Gender Identity Disorder) is a serious medical need for purposes of the Eighth Amendment. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011); *Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011) *see also Diamond v. Owens*, No. 5:15-cv-50 (M.D. Ga.), Statement of Interest of the United States (ECF No. 29) at 8 (collecting cases),

https://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/diamond_soi_4-3-15.pdf.

Here, the Doctor Defendants do not appear to dispute that Gender Dysphoria is a serious medical need for the purposes of the Eighth Amendment.

2. The question whether Plaintiff has a serious medical need to access female clothing and grooming standards cannot be resolved on a motion to dismiss as a matter of law.

The Doctor Defendants contend that, as a matter of law, access to female clothing and grooming standards is not a serious medical need. *See* Motion at 10-11, 12-13. This is incorrect.

The established medical protocols for treating Gender Dysphoria, the World Professional Association of Transgender Health's ("WPATH") Standards of Care, make clear that for individuals with this condition, social transition, which involves "dressing, grooming, and presenting oneself to others in accordance with one's gender identity," can be medically necessary care. Complaint ¶ 24. Plaintiff has alleged that such care is medically necessary *for her*. Complaint ¶ 90 ("It is medically necessary for Plaintiff to live as female . . . .").

The Doctor Defendants rely on court decisions that have denied inmates' claims concerning denial of access to certain clothing and grooming items or standards. Motion at 8-11. In only one of the cases cited by the Doctor Defendants in their analysis of Plaintiff's medical needs did the court evaluate whether

denying access to female clothing or grooming standards to prisoners with Gender Dysphoria was a denial of medically necessary treatment in violation of the Eighth Amendment. Indeed, many of the cases did not even involve transgender prisoners,[3] and all but one of the others either addressed clothing and grooming claims outside of the Eighth Amendment—for example, First Amendment or Equal Protection claims[4]—or Eighth Amendment claims where clothing and grooming standards were not part of the court's evaluation of medical necessity. And the one case cited by Defendants that discusses access to female commissary items in the context of an Eighth Amendment medical-necessity claim did so on a motion for summary judgment, not a motion to dismiss. *See Brown v. Wilson*, No. 3:13CV599, 2015 WL 3885984, at *6 (E.D. Va. June 23, 2015) (plaintiff "fail[ed] to direct the Court to any evidence that demonstrates she faces a substantial risk of serious harm in the absence of these items").

In any case, the fact that such a claim might fail in one case does not mean that access to female clothing and grooming standards can *never* constitute a

[3] *Taylor v. Gandy*, No. 11-cv-27, 2012 WL 6062058, at *4 (S.D. Ala. Nov. 15, 2012); *Casey v. Hall*, No. 2:11-cv-588-FTM-29SPC, 2011 WL 5583941, at *2 (M.D. Fla. Nov. 16, 2011); *Star v. Gramley*, 815 F. Supp. 276, 278 & n.2, 279 (C.D. Ill. 1993); *Jones v. Warden of Stateville Corr. Ctr.*, 918 F. Supp. 1142, 1145-46 (N.D. Ill. 1995).

[4] *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401, 1997 WL 34677, at *2-3 (6th Cir. 1997) (Table); *Hood v. Dep't of Children & Families*, No. 2:12-CV-637-FTM-29, 2014 WL 757914, at *8 (M.D. Fla. Feb. 26, 2014).

serious medical need. The Doctor Defendants' suggestion to the contrary is akin to saying that if some courts have found that chemotherapy was not required to treat cancer for some individual prisoners, any claim that chemotherapy is a serious medical need must fail as a matter of law, regardless of a patient's individual needs. Plaintiff is not alleging that any particular clothing- or grooming-related treatment is always required for every prisoner with Gender Dysphoria, but simply that access to female clothing and grooming standards are medically necessary *for her*. *See, e.g.*, Complaint ¶¶ 27, 36, 57, 66, 90, 93.

That a prisoner may not be entitled to the treatment of her choice does not change a prison's obligations to adequately address the medical needs of prisoners, including those of gender dysphoric patients. *See De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (*De'lonta II*) (although "a prisoner does not enjoy a constitutional right to the treatment of his or her choice, the treatment a prison facility does provide must nevertheless be adequate to address the prisoner's serious medical need."). In *De'lonta II*, the court rejected the defendants' argument that the denial of a particular form of treatment for Gender Dysphoria is "a matter of discretion that carries no constitutional implications." *Id*. at 524. This Court should decline the Doctor Defendants' similar invitation here.

Plaintiff has alleged that she has a serious medical need not only for hormone therapy but also access to female clothing and grooming standards in

order to be able to live in accordance with her gender identity. *See* Complaint ¶ 90. Accepting the DOC Defendants' invitation to rule as a matter of law that Plaintiff's medical need to access female clothing and grooming standards cannot be objectively serious would effectively permit a blanket ban on such treatment for all prisoners. Because the Eighth Amendment requires that prisoners be provided with adequate medical care "based on an individualized assessment of an inmate's medical needs in light of relevant medical considerations," *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 242 (D. Mass. 2012), blanket bans on certain forms of medical treatment regardless of medical need violate the Eighth Amendment. *See Colwell v. Bannister*, 763 F.3d 1060, 1063, 1068 (9th Cir. 2014) (holding that the "blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy that one eye is good enough for prison inmates is the paradigm of deliberate indifference") (quotation marks omitted); *Roe v. Elyea*, 631 F.3d 843, 859 (7th Cir. 2011) ("[I]nmate medical care decisions must be fact-based with respect to the particular inmate, the severity and stage of [her] condition, the likelihood and imminence of further harm and the efficacy of available treatments."); *Johnson v. Wright*, 412 F.3d 398, 406 (2d Cir. 2005) (denial of hepatitis C treatment to a prisoner based on a policy that a particular drug could not be administered to inmates with recent history of substance abuse could constitute deliberate indifference if relied upon without consideration of individual medical

need); *Rouse v. Plantier*, 182 F.3d 192, 199 (3d Cir. 1999) (alleged violations of the Eighth Amendment "obviously var[y] depending on the medical needs of the particular prisoner"); *Mahan v. Plymouth Cty. House of Corr.*, 64 F.3d 14, 18 & n.6 (1st Cir. 1995) (suggesting that "inflexible" application of prescription policy may violate Eighth Amendment); *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 & n.32 (3d Cir. 1987) (by virtue of a blanket policy, "the County denies to a class of inmates the type of individualized treatment normally associated with the provision of adequate medical care"); *Jorden v. Farrier*, 788 F.2d 1347, 1348-49 (8th Cir. 1986) (citing with approval case holding that application of prison medication policies must be instituted in manner that allows individualized assessments of need).

This principle encompasses treatment for Gender Dysphoria: automatic exclusions of certain forms of treatment for Gender Dysphoria violate the Eighth Amendment. *See Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (state law that barred hormone therapy and gender-confirming surgery as possible treatments for prisoners with gender identity disorder facially violated the Eighth Amendment); *De'lonta v. Angelone*, 330 F.3d 630, 634-35 (4th Cir. 2003) (*De'lonta I*) (prisoner with gender identity disorder stated a claim for deliberate indifference where the Department of Corrections withheld hormone therapy pursuant to a categorical policy against providing such treatment rather than based on individualized

medical judgment); *see also Allard v. Gomez*, 9 F. App'x 793, 795 (9th Cir. 2001) ("[T]here are at least triable issues as to whether hormone therapy was denied Allard on the basis of an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to Allard's medical needs."); *Soneeya*, 851 F. Supp. 2d at 249, 253 (holding that a prison policy that "removes the decision of whether sex reassignment surgery is medically indicated for any individual inmate from the considered judgment of that inmate's medical providers" violated Eighth Amendment); *Houston v. Trella*, No. 04-1393, 2006 WL 2772748, at *8 (D.N.J. Sept. 22, 2006) (claim that prison doctor's decision not to provide hormone therapy to prisoner with gender identity disorder based not on medical reason but policy restricting provision of hormones stated viable Eighth Amendment claim); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003) ("A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs [for treatment related to gender identity disorder] and prescribing and providing adequate care to treat those needs violates the Eighth Amendment.").

On motions to dismiss, Plaintiff's allegations must be accepted as true, and Plaintiff has plausibly alleged the objective prong of her Eighth Amendment medical-necessity claim. *See Kothmann*, 558 F. App'x at 911.

B. Plaintiff has plausibly alleged deliberate indifference to her serious medical needs.

The subjective prong of the Eighth Amendment standard concerns deliberate indifference, which "entails something more than mere negligence . . . [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835. If the DOC knew that the risk existed and either intentionally or recklessly ignored it and will continue to do so in the future, then the subjective test has been met. *See id*. at 837-40, 845-46. This indifference is impermissible "whether . . . manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle*, 429 U.S. at 105-06.

1. Plaintiff has adequately alleged facts showing deliberate indifference.

The Doctor Defendants contend that there are insufficient factual allegations to show that the Doctor Defendants were aware of a substantial risk of serious of harm to Plaintiff or that they were deliberately indifferent to any such risk. Motion at 5-7, 9-10, 12. Plaintiff has plausibly pled sufficient allegations to state a claim for deliberate indifference to her serious medical need.

In *LaMarca v. Turner*, 995 F.2d 1526, 1530 (11th Cir. 1993), the Eleventh Circuit considered a Florida prisoner's claim *for damages* against a *former* warden

in his *individual* capacity, along with a claim *for injunctive relief* against the *current* warden in his *official* capacity. There, the district court awarded damages against the former warden and injunctive relief against the current warden. *See id.* The current warden "argue[d] that the [district] court erred in ordering injunctive relief. In essence, he assert[ed] that the court should have focused on *his* deliberate indifference, instead of the *institution's historical* indifference." *Id.* at 1542 (alterations and emphasis added). The Eleventh Circuit rejected that approach. *See id.* (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity.") (citation omitted; emphasis in original); *see also Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011) ("Though Gonzalez does not allege any specific involvement by Gaetz in the treatment of his hernia, the warden of Menard is a proper defendant since Gonzalez seeks injunctive relief. . . . If Gonzalez was seeking only damages, the warden's lack of personal involvement would be conclusive, but since Gonzalez also seeks injunctive relief it is irrelevant whether the warden participated in the alleged violations[.]") (alteration added; citations omitted); *Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011) ("Because the individual defendants are sued only in their official capacity for injunctive

relief and no damages are sought, qualified immunity is not an issue nor need the separate roles of individual defendants be sorted out."); *Luckey v. Harris*, 860 F.2d 1012, 1015-16 (11th Cir. 1988) ("Personal action by defendants individually is not a necessary condition of injunctive relief against state officers in their official capacity."); *accord Parkell v. Danberg*, --- F.3d ----, ----, No. 14-1667, 2016 WL 4375620, at *10 (3d Cir. Aug. 17, 2016); *Colwell*, 763 F.3d at 1070.

Because it is the DOC's (including its medical contractor, Wexford Health Sources, and including the Doctor Defendants) *historical* indifference to Plaintiff's serious medical needs that is at issue, Plaintiff adequately asserts a claim merely by naming individuals who will respond to any injunctive relief. There is no indication from the Doctor Defendants that Dr. Dieguez or other Wexford Health Sources employees will no longer be providing Plaintiff any medical care, and as long as that is the case, the Doctor Defendants are thus properly named as such.[5]

Here, the historical indifference to Plaintiff's serious medical needs is plausibly alleged. "DOC officials . . . are aware that Plaintiff is seeking hormone

[5] The Doctor Defendants contend that Plaintiff's complaint improperly lumps allegations against all Defendants and non-parties together, citing a case involving an employer-employee contract dispute among private parties not standing in the shoes of the State. Motion at 4-5 (citing *Pro Image Installers, Inc. v. Dillon*, No. 3:08CV273/MCR/MD, 2009 WL 112953 (N.D. Fla. Jan. 15, 2009)). They cite no case seeking injunctive relief against state actors in their official capacity, where—as explained above—the institution's historical indifference is the issue. Moreover, numerous allegations specifically detail the actions or inactions taken by Drs. Le and Dieguez. *See* Complaint ¶¶ 8, 9, 50, 59, 72, 77.

therapy and access to female clothing and grooming standards to treat her Gender Dysphoria; that proper, necessary medical care for Plaintiff's Gender Dysphoria includes allowing her to live as female and providing her with hormone therapy; and that the denial of this needed medical care is causing serious harm to Plaintiff." Complaint ¶ 93. This allegation is eminently plausible and supported by other allegations throughout the Complaint. *See id., e.g.*, ¶ 35 (partial list of "DOC psychiatrists, psychologists, mental-health specialists, and other medical and mental-health officials" who recognize Plaintiff's Gender Dysphoria); ¶ 36 ("Plaintiff repeatedly requested treatment for her Gender Dysphoria. From the first conversations Plaintiff had with DOC officials concerning her need for treatment, Plaintiff made clear both her need for hormone therapy and her need to be able to live as female in all aspects of life—including dressing and grooming (including growing her hair)—as she did prior to her incarceration. Through to the present day, in nearly all conversations Plaintiff has had with mental-health and medical officials at the DOC in which her transgender status and need for treatment for Gender Dysphoria were discussed, Plaintiff raised both her need for hormone therapy and her need to access female dressing and grooming standards. Plaintiff made repeated requests to mental-health and medical officials that she be provided comprehensive, medically necessary treatment for Gender Dysphoria, including hormone therapy and the ability to dress and groom in accordance with female

grooming standards."); ¶ 37 (grievance describing need for hormone therapy; "Without it I consider self-harm and suicide every single day."); ¶ 47 (grievance describing "needless suffering I face every day"); ¶ 49 (Plaintiff attempted to hang herself because of the DOC's refusal to provide her with transition-related care); ¶ 53 (grievance: "No amount of counseling can ever make who I am on this most fundamental level change . . . . .This treatment is literally necessary for me to have a future – there is no possible chance that I could endure the absolute agony of waking up every day to my own body forcing me to hate myself, to the point where I struggle not to hurt or kill myself every day."); ¶ 56 (grievance describing her prior hormone therapy and her continued need for it); ¶ 57 (grievance: "I would like to schedule an appointment to discuss the psychological necessity of myself dressing as a female, and the availability of a pass for this way of dressing. I have, for the past 6 years consecutively, always dressed in a way that presents me as female in appearance through the use of padded bras, etc. For me, this is a necessary facet of my life, and deeply ingrained in my personality. In the treatment of a trangendered person, this behavio[r] is not only encouraged, but required as a prerequisite for the prescription of hormone replacement therapy [and] sexual reassignment surgery – I have lived my entire life past the age of 13 as female, and it is extremely detrimental to my mental health to forbid this practi[c]e; it is also well documented as a legitimate and proper treatment for a person who is

transgender. As I am transgender, I should rec[ei]ve a pass to allow me to continue this behavior for my wellbeing. This is part of who I am – it is not the place of the DoC to try to change the fact that I am transgender. That is not able to be changed."); ¶ 59 (Plaintiff attempted self-castration and told officials, including Defendant Dr. Le, that she did so "because of their failure to provide her with treatment for her Gender Dysphoria"); ¶ 65 (grievance describing needed treatment for Gender Dysphoria—"1) the patient must be able to live and dress as the gender with which they identify[,] 2) hormone therapy, 3) gender confirmation surgeries [and] procedures"—requesting "full" treatment, and stating "my symptoms include severe depression, anxiety, fatigue, and eating disorders. Additionally, other symptoms that can occur are self-injury, rage, addiction, and suicide, in the most severe instances."); ¶ 66 (grievance requesting return of confiscated personal sports bras and female underwear); ¶ 72 (Plaintiff offered to provide medical records documenting her Gender Dysphoria to Defendant Dieguez, who refused to look at them); ¶ 76 (grievance listing symptoms as "severe depression, fatigue, anxiety, body-image disorders, fear, eating disorders, persecution, a constant state of unease, and self-harming behaviors, including a history of genital mutilation," and stating that she needs "1) the ability to live as the gender I identity as (female) in all aspects of life[;] 2) Hormone therapy (aforementioned)[;] 3) Gender-confirmation Surgery"); ¶ 79 (grievance appeal describing diagnosis and symptoms

and stating she needs "1. The ability to live as the gender I identify as (female)[;] 2. Hormone therapy[;] 3. Gender-confirmation Surgery").

Although it is not required to state a claim for the reasons described above, numerous allegations in the complaint plausibly allege that the Doctor Defendants themselves were aware of Plaintiff's need for treatment and the risks of not receiving it. *See, e.g.*, Complaint ¶ 8 ("Le denied Plaintiff's request for treatment for her Gender Dysphoria even though he knew that such treatment was medically necessary and that Plaintiff was at substantial risk of serious harm if she did not receive it."); ¶ 9 ("Dieguez denied Plaintiff's request for treatment for her Gender Dysphoria even though Dieguez knew that such treatment was medically necessary and that Plaintiff was at substantial risk of serious harm if she did not receive it."); ¶¶ 49-50 (Dr. Le signed discharge summary with diagnosis of Gender Identity Disorder after Plaintiff attempted to hang herself while in administrative confinement); ¶ 59 (medical note signed by Dr. Le indicating recommendation that Plaintiff be seen by psychiatrist following her attempted self-castration); ¶ 72 (Plaintiff offered to provide medical records documenting her Gender Dysphoria to Dr. Dieguez, who refused to look at them); ¶¶ 76-77 (Dr. Dieguez denied Plaintiff's grievance that listed symptoms as "severe depression, fatigue, anxiety, body-image disorders, fear, eating disorders, persecution, a constant state of unease, and self-harming behaviors, including a history of genital mutilation," and

that stated that Plaintiff needed "1) the ability to live as the gender I identity as (female) in all aspects of life[;] 2) Hormone therapy (aforementioned)[;] 3) Gender-confirmation Surgery"); *accord* Complaint ¶ 36 ("Through to the present day, in nearly all conversations Plaintiff has had with mental-health and medical officials at the DOC in which her transgender status and need for treatment for Gender Dysphoria were discussed, Plaintiff raised both her need for hormone therapy and her need to access female dressing and grooming standards.").[6] But, regardless, Plaintiff has more than plausibly alleged the institutional historical indifference sufficient to plead an Eighth Amendment medical-necessity claim for injunctive relief against the named defendants, including the Doctor Defendants.[7]

2. The Doctor Defendants' contention that DOC policy governs clothing and grooming standards does not immunize them from liability.

[6] The Doctor Defendants contend that Plaintiff failed to correct Dr. Le's misunderstanding about the canceled appointment, Motion at 6, but Plaintiff corrected the DOC's misunderstanding by filing an appeal explaining the error, *see* Complaint ¶ 56.

[7] Although the Doctor Defendants contend that no specific or plausible relief has been sought against them, Motion at 3-4 (injunctive relief sought "solely against the DOC"), it is not only obvious but explicitly stated that "the DOC" includes the Doctor Defendants. *See* Complaint ¶ 1 ("Plaintiff brings this action to compel Defendants (collectively, 'the DOC') to treat her serious medical need consistent with its constitutional obligations under the Eighth Amendment to the United States Constitution."); *accord id.* ¶¶ 89, 91-93 (referencing "DOC officials, including Le and Dieguez"). Moreover, the prayer for relief includes requests for medical care, *id.* ¶ 98, which the Doctor Defendants are contracted to provide.

The Doctor Defendants contend that they are not responsible for enforcing clothing and grooming standards. Motion at 9, 11-12. But that is not relevant to the question whether Plaintiff is receiving medically necessary care. Wexford Health Sources employees, including the Doctor Defendants, are Plaintiff's primary medical providers, and it is their duty—whether or not non-Wexford DOC officials adhere to their recommendations—to address Plaintiff's serious medical needs. If DOC policy banned treatment for cancer, surely the Doctor Defendants' position would not be that they had no responsibility to recommend that an inmate receive care for their cancer. Whether administrators followed their recommendations would be a separate matter, but DOC medical providers are required to provide medical care, and the Doctor Defendants cannot escape from their legal and ethical obligations merely by citing a DOC policy that bans certain medical care. No liability would lie against the Doctor Defendants where they recommended a course of treatment that DOC administrators refused to follow, but here, the Doctor Defendants appear to disclaim any responsibility at all to recommend care pursuant to Plaintiff's actual medical needs. But DOC policy does not immunize them from the duty to provide constitutionally adequate care.[8]

[8] Remarkably, the Doctor Defendants demand attorneys' fees in this case. Motion at 13. The brazenness of this demand is particularly highlighted by the fact that Plaintiff has been requesting hormone therapy for more than two years, that she

CONCLUSION

For these reasons, the Doctor Defendants' motion to dismiss, Doc. 22, should be denied.

Rule 7.1(F) Certificate on Word Count: This document contains 6,718 words, including the headings, footnotes, and quotations, and excluding the case style, signature block, and any certificate of service.

Date: September 26, 2016

Respectfully submitted,

/s/ Daniel B. Tilley
Daniel B. Tilley
Florida Bar No. 102882
Nancy G. Abudu
Florida Bar No. 111881
ACLU Foundation of Florida
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
(786) 363-2714
dtilley@aclufl.org
nabudu@aclufl.org

Leslie Cooper*
ACLU Foundation
125 Broad Street, 18th Floor
New York, New York 10004

Matthew D. Grosack
Florida Bar No. 073811
DLA Piper LLP (US)
200 S. Biscayne Boulevard, Suite 2500
Miami, Florida 33131
(305) 423-8554
matthew.grosack@dlapiper.com

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received it only after the initiation of litigation, and that the Doctor Defendants have given no indication that the treatment will not be withheld at some point in the future.

(212) 549-2627
LCooper@aclu.org
*Admitted to the N.D. Fla.

ATTORNEYS FOR PLAINTIFFS