IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

KANAUTICA ZAYRE-BROWN, *Plaintiff*, v. THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, *et al.*, *Defendants*.	No. 3:22-cv-00191

BRIEF IN SUPPORT OF PLAINTIFF'S MOTTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff Kanautica Zayre-Brown is a transgender woman in the custody of the North Carolina Department of Public Safety ("DPS"). Since entering DPS custody in 2017, Mrs. Zayre-Brown has made repeated requests to DPS and its officials ("Defendants") for the gender-affirming surgery she urgently needs to treat her gender dysphoria, a serious medical condition. Healthcare providers, employed and engaged by Defendants, have confirmed this surgery to be medically necessary. But Defendants have refused to provide that care—offering no medical justification—and as a result, Mrs. Zayre-Brown continues to face a substantial risk of serious mental and physical harm.

Mrs. Zayre-Brown now moves for a preliminary injunction on her Eighth Amendment claim to remedy Defendants' deliberate indifference to her serious

medical need. Mrs. Zayre-Brown is likely to succeed on the merits, and preliminary relief is necessary to protect her from ongoing mental anguish and risk of self-harm. The balance of equities and public interest also weigh in favor of preliminary relief. Therefore, the Court should issue a preliminary injunction ordering Defendants to provide Mrs. Zayre-Brown the gender-affirming surgery that she urgently needs.

STATEMENT OF FACTS

I. Mrs. Zayre-Brown's History of Gender Dysphoria

Mrs. Zayre-Brown is a transgender woman—an individual whose female gender identity differs from the male sex assigned to her at birth. Ex. 1, Expert Declaration of Randi C. Ettner, Ph.D.[1] at ¶¶ 16, 76; Ex. 2, Declaration of Kanautica Zayre-Brown at ¶¶ 1, 2. 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. Ex. 1, ¶ 21. While gender dysphoria is a condition unique to transgender people, not all transgender people have gender dysphoria. *Id.* ¶ 17. Gender dysphoria is recognized by the American Psychiatric Association and listed in the DSM-V and the World Health Organization's International Classification of Diseases-10. *Id.* ¶¶ 19, 20. Like many medical conditions, gender dysphoria can be ameliorated or cured through treatment.

[1] Dr. Ettner is a clinical and forensic psychologist with expertise concerning the diagnosis and treatment of gender dysphoria. She has extensive experience treating transgender individuals with gender dysphoria in her clinical practice and has published numerous books and articles on the topic. She has also frequently served as an expert witness in federal court in cases concerning health care for incarcerated transgender persons. Ex. 1 ¶¶ 1, 9.

Id. ¶ 28.

Mrs. Zayre-Brown has been aware of her female identity and has understood herself to be female since she was a child. Ex. 2, ¶ 2. In 2010, she began socially transitioning and was formally diagnosed with gender dysphoria. *Id.* ¶ 9. Soon after, Mrs. Zayre-Brown began psychotherapy as part of her treatment. *Id.* In 2012, with the support of her psychologist, Mrs. Zayre-Brown began gender-affirming hormone therapy under the care of an endocrinologist. *Id.* ¶ 10. In the same year, she legally changed her name from the typically masculine name given to her at birth, to a more typically feminine name, "Kanautica Promises Zayre," to align with her female identity. *Id.* ¶ 11.

In 2013, as part of her treatment for gender dysphoria, Mrs. Zayre-Brown had gender-affirming mammoplasty and body contouring, resulting in a more typically feminine body shape. *Id.* ¶ 13. In 2017, Mrs. Zayre-Brown underwent gender-affirming orchiectomy (surgical removal of testicles). *Id.* ¶ 15. The procedure was performed in a manner to permit and in contemplation of later full gender-affirming genital surgery. *Id;* Ex. 1, App. E at 1, 4.

II. Standards of Care for the Treatment of Gender Dysphoria

The World Professional Association for Transgender Health ("WPATH")—the leading authority on transgender healthcare—publishes internationally accepted Standards of Care ("SOC") for treating gender dysphoria. Ex 1. ¶ 28. The current SOC, published in 2011, are the prevailing standards of care for medical professionals treating gender dysphoria. *Id.* The Fourth Circuit and other courts have recognized

the SOC in the context of medical care for transgender prisoners. *See De'lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir. 2013); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019); *Campbell v. Kallas*, No. 16-cv-261-jdp, 2020 WL 7230235, at *4 (W.D. Wis. Dec. 8, 2020); *Hicklin v. Precythe*, No. 4:16-cv-01357-NCC, 2018 WL 806764, at *3 (E.D. Mo. May 22, 2018); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1186 (N.D. Cal. 2015); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. 2012).

The SOC establish individualized and patient-centric medical treatment options for gender dysphoria. Ex. 1 ¶¶ 29, 32. Medically necessary treatment options include social transition, psychotherapy, gender-affirming hormone therapy, and gender-affirming medical procedures and surgeries to align an individual's primary and/or secondary sexual characteristics with their gender identity. *Id.* ¶ 29. The SOC "explain that some individuals are unable to obtain relief from gender dysphoria without surgical intervention and describe [gender-affirming] surgery . . . as 'essential and medically necessary' for this group of patients." *Norsworthy*, 87 F. Supp. 3d at 1186 (quoting WPATH SOC at 36); Ex. 1 ¶ 45.

The SOC apply in equal force to both incarcerated and non-incarcerated people. *Id.* ¶ 30. The SOC indicate that gender-affirming surgery "may be necessary for individuals who continue to present with severe [gender dysphoria] after one year of hormone therapy and [social transition]." *De'lonta*, 708 F.3d at 525. "In these cases, the surgery is not considered experimental or cosmetic; it is an accepted, effective, medically indicated treatment for [gender dysphoria]." *Id.* at 523.

The number and sequence of gender-affirming medical and surgical procedures

may vary from patient to patient according to their individual clinical needs. Ex. 1 ¶ 32.

III. Defendants' "Evaluation & Management of Transgender Offenders" Policy

The current DPS Evaluation & Management of Transgender Offenders Policy ("Transgender Offenders Policy") has been in effect since August 2019. *See* N.C. Dept. of Pub. Safety Policy & Proc. Manual, Ch. E § .2700 (Aug. 22, 2019) *reissued with amendments at* Ch. F § .4300 (March 31, 2021), https://files.nc.gov/ncdps/F-4300-03_31_21.pdf. The policy governs "Routine Accommodations," which include items such as clothing and toiletries, and "Non-Routine Accommodations," which include hormone therapy and gender-affirming surgery. *Id.* at 6. Routine accommodations are handled by a Facility Transgender Accommodation Review Committee ("FTARC"), which exist at each prison. *Id.* Non-routine accommodation requests are reviewed by the Division Transgender Accommodation Review Committee ("DTARC"). *Id.*

The DTARC must include, "at a minimum, the Medical Director, Chief of Psychiatry, Behavioral Health Director, Director of Rehabilitative Services, and the [Prison Rape Elimination Act] Director." *Id.* at 2. Defendants Campbell, Catlett, Peiper, Sheitman, Langley, Agarwal, Cobb, Panter and Williams are members of the DTARC. Under the policy, the DTARC makes recommendations regarding surgeries to the Assistant Commissioner of Prisons—Defendant Harris—and Director of Health and Wellness Services—Defendant Junker—for final determinations. *Id.* at 7. Medical procedures must also be approved by the Utilization Review Board. *See*

Utilization Review Policies, N.C. Dept. of Pub. Safety Health Care Policy Manual, AD III-7, at 2 (Nov. 2, 2020), https://www.ncdps.gov/final-ad-iii-7-utilization-management-11-1-20/download. Defendant Amos is a member of the Utilization Review Board.

IV. Defendants' Repeated Denials of Ms. Zayre-Brown's Requests for Medically Necessary Gender-Affirming Surgery

Upon entering DPS custody in October 2017, Mrs. Zayre-Brown informed DPS that she is a transgender woman diagnosed with gender dysphoria. Ex. 2. ¶ 17. DPS psychologist Susan Garvey evaluated Mrs. Zayre-Brown for gender dysphoria three days after she entered DPS custody and confirmed her diagnosis. *Id.* ¶ 18; Ex. 1, App. D at 1-3. The psychologist's report details Mrs. Zayre-Brown's history of treatment for gender dysphoria, including social transition, gender-affirming hormone therapy, and her history of gender-affirming surgical care. Ex. 1, App. D at 1-3. Notably, the psychologist's report records that during this encounter, Mrs. Zayre-Brown expressed her need for further gender-affirming genital surgery to address the significant distress she experiences associated with her gender dysphoria. *Id.*

Mrs. Zayre-Brown's DPS medical records establish that as early as November 27, 2017, DPS staff knew that Mrs. Zayre-Brown was requesting gender-affirming surgery to treat her gender dysphoria. Ex. 1, App. D at 4-5. These same records indicate that DPS physician Dr. Joseph Umesi was to look into gender-affirming surgery and follow-up with Mrs. Zayre-Brown at a later date. *Id.*

In November 2018, after having not heard back from Dr. Umesi or anyone else from DPS about her request for gender-affirming surgery, Mrs. Zayre-Brown again

requested it during a medical encounter at Harnett Correctional Institution ("Harnett CI"). Ex. 2 ¶ 19. In December 2018, Mrs. Zayre-Brown submitted a request for gender-affirming surgery to Harnett CI's FTARC. *Id.* ¶ 23. In January 2019, Dr. Umesi evaluated Mrs. Zayre-Brown for gender-affirming surgery. *Id.* ¶ 24; Ex. 1, App. E at 1-4. Following that encounter, he submitted a Utilization Review request on Mrs. Zayre-Brown's behalf for full gender-affirming genital surgery. *Id*. In that request, Dr. Umesi noted that the requested surgery was the next step in her treatment plan before entering DPS custody, and that her previous gender-affirming orchiectomy was done in accordance with the WPATH SOC and in a manner to facilitate later full gender-affirming genital surgery. *Id*.

In January 2019, Harnett FTARC reviewed Mrs. Zayre-Brown's request. Ex. 2 ¶ 24. Harnett FTARC's report stated that gender-affirming surgery was not recommended, without explanation. *Id.*; Ex. 1, App. F at 1. Harnett FTARC then referred Mrs. Zayre-Brown's request along with their recommendation to DTARC. Ex. 2 ¶ 25.

In February 2019, DTARC began repeatedly "deferring" Mrs. Zayre-Brown's request for gender-affirming surgery for a decision at a later date without explanation. Doc. 1 (Verified Complaint) ¶ 95. Mrs. Zayre-Brown made repeated inquiries about the status of her request and expressed her worsening mental and emotional distress to DPS healthcare providers. Ex. 2. ¶¶ 25, 26.

In 2019, DPS began referring Mrs. Zayre-Brown to Dr. Karla Pou, an endocrinologist with UNC Health Care, for provision and maintenance of gender-

affirming hormone therapy. *Id.* ¶ 27. Following an April 15, 2019 appointment where Mrs. Zayre-Brown expressed her need for gender-affirming surgery, Dr. Pou referred Mrs. Zayre-Brown for a consultation with UNC Health Care urologist, Dr. Brad Figler. *Id.* Dr. Figler is the director of the UNC Transgender Health Program and specializes in gender-affirming genital surgery. *Id.* Following Dr. Pou's referral, Dr. Figler's office contacted Warren Correctional Institution ("Warren CI"), where Mrs. Zayre-Brown had been transferred, to arrange a consultation with Mrs. Zayre-Brown. *Id.* Warren CI staff declined to arrange a consultation for Mrs. Zayre-Brown, erroneously claiming they had no information about her desire for a consultation. *Id.*

On July 8, 2019, Mrs. Zayre-Brown had another appointment with Dr. Pou. *Id.* Dr. Pou made a second referral for Mrs. Zayre-Brown to have a consultation with Dr. Figler for evaluation for gender-affirming surgery. *Id.* Multiple DPS medical and mental health providers knew of Dr. Pou's referrals and request for DPS to arrange a consultation for Mrs. Zayre-Brown with Dr. Figler to be evaluated for gender-affirming surgery. *Id.* ¶ 28; Doc. 1 ¶ 101. Dr. Pou's request for Mrs. Zayre-Brown to be referred to Dr. Figler for evaluation for gender-affirming surgery was subsequently referred to DTARC. Ex. 2 ¶ 30.

Following the referral to DTARC for review, Mrs. Zayre-Brown began experiencing extreme distress related to her gender dysphoria and DTARC's continued delays and lack of communication about her request for gender-affirming surgery. *Id.* ¶ 29. On August 6, 2019, while in protective custody awaiting transfer to Anson Correctional Institution ("Anson CI"), Mrs. Zayre-Brown's mental and

emotional health deteriorated so badly that she was vomiting, crying, and barely able to speak. *Id.* She was taken to a local emergency room and subsequently placed on suicide watch. *Id.*

On August 15, 2019, Mrs. Zayre-Brown was transferred to Anson CI. *Id.* ¶ 22. On August 21, 2019, DTARC again deferred Mrs. Zayre-Brown's request for gender-affirming surgery. *Id.* ¶ 30; Ex. 1, App. F at 2. DTARC's decision incorrectly asserted that Mrs. Zayre-Brown had "successfully completed gender reassignment surgically," that "[v]aginoplasty is an elective procedure which is not medically necessary for reassignment," and that "[c]urrent staffing and resources does [sic] not allow for the proper post-operative care of this procedure." *Id.*

Shortly after being informed of the decision, Mrs. Zayre-Brown appealed DTARC's denial through the DPS administrative remedy process. Ex. 2 ¶ 30. Mrs. Zayre-Brown exhausted her administrative remedies on January 2, 2020, when the Inmate Grievance Resolution Board issued its final determination, upholding DTARC's decision. *Id.*

Two weeks later, Mrs. Zayre-Brown submitted a request for re-consideration for gender-affirming surgery to Anson CI's FTARC. Doc. 1 ¶ 110. On February 7, 2020, Anson CI's FTARC referred her request to DTARC. *Id.* ¶ 110. More than three months later, DTARC met to discuss the request. *Id.* ¶ 112. Following that meeting—and over a year after Dr. Pou first requested that DPS refer Mrs. Zayre-Brown to Dr. Brad Figler for a surgery consultation—DTARC's report stated that no determination would be made until after "an in-person consultation with an OBGYN surgical

specialist with experience in gender-affirming surgery." *Id.*; Ex. 1, App. F at 3.

Mrs. Zayre-Brown was required to have a telephonic interview with a staff member of the UNC Transgender Health Program before an in-person surgical consultation with a surgeon could be scheduled. Ex. 2 ¶ 32. Mrs. Zayre-Brown did not have this first telephonic interview until August 8, 2020, more than six months after DTARC first approved the consultation. *Id.* Following the first interview and without explanation, months passed during which DPS did not schedule the in-person surgical consultation or communicate anything to Mrs. Zayre-Brown regarding the in-person surgical consultation. *Id.* ¶ 33.

Meanwhile, Mrs. Zayre-Brown continued to suffer from the effects of gender dysphoria, and her mental and emotional health again began rapidly deteriorating. *Id*. In December 2020, she was admitted to an inpatient mental health facility after expressing an urge to self-mutilate her genitals and experiencing suicidal thoughts. *Id*. At that point, Mrs. Zayre-Brown had been requesting gender-affirming surgery for more than three years.

In January 2021, Mrs. Zayre-Brown returned to Anson CI and immediately renewed her inquiries about the in-person consultation for gender-affirming surgery with Dr. Figler. Doc. 1 ¶ 117. She also began requesting a gender-affirming hormone therapy maintenance appointment with UNC Health. *Id*. The next month, Mrs. Zayre-Brown filed an emergency grievance because she had not had a hormone therapy maintenance appointment since July 2020—over 6.5 months earlier—and her mental and emotional health were again deteriorating because of her

inadequately treated gender dysphoria. Ex. 2 ¶ 34. Mrs. Zayre-Brown never received a response to her emergency grievance. *Id.*

On February 25, 2021, DTARC met again to discuss Mrs. Zayre-Brown's request for gender-affirming surgery. Doc. 1 ¶ 120. DTARC's report from this meeting states that DTARC was notified that Mrs. Zayre-Brown would need another interview before an in-person consultation with Dr. Figler could be scheduled. Ex. 1, App. F at 4. Mrs. Zayre-Brown's original telephone interview had occurred more than seven months prior. From March 2021 through early May 2021, Mrs. Zayre-Brown received no communications from DTARC regarding her request or the status of scheduling the preliminary interview with the UNC Transgender Health Program. Doc. 1 ¶ 121. Mrs. Zayre-Brown became increasingly distressed and began to experience thoughts of self-harm more frequently. *Id.*

On May 25, 2021, Mrs. Zayre-Brown finally had the second interview with the UNC Transgender Health Program through telehealth. Ex. 2 ¶ 35. DPS again did not schedule the in-person consultation with Dr. Figler following this appointment. Doc. 1 ¶ 122. Three days later, counsel for Mrs. Zayre-Brown issued a letter to DPS demanding that it arrange the in-person surgical consultation with Dr. Figler and provide all medically necessary health care to treat Mrs. Zayre-Brown's gender dysphoria. *Id.* ¶ 123.

On July 12, 2021—more than two years after Dr. Pou first referred Mrs. Zayre-Brown to Dr. Figler, and over a year after DTARC first recommended that she be referred to a specialist in gender-affirming surgery—Mrs. Zayre-Brown finally had

an in-person consultation for gender-affirming surgery with Dr. Figler. Ex. 2 ¶ 37; Ex. 1, App. E at 5-10. Dr. Figler evaluated Mrs. Zayre-Brown and concluded that she met the requirements set out in the SOC for gender-affirming genital surgery. *Id*. Dr. Figler discussed surgical treatment options with Mrs. Zayre-Brown. *Id.* Together they decided on a treatment plan for gender-affirming vulvoplasty to address Mrs. Zayre-Brown's gender dysphoria. *Id.* Before scheduling surgery, Dr. Figler recommended that Mrs. Zayre-Brown lose a certain amount of weight. *Id.*

Around the first week of September 2021, Mrs. Zayre-Brown met the recommended weight loss goal. Doc. 1 ¶ 128. Mrs. Zayre-Brown's DPS healthcare providers submitted a utilization review request to schedule gender-affirming surgery. Ex. 2 ¶ 37; Ex. 1, App. F at 5. On September 8, 2021, DPS provider Dr. Elton Amos deferred the request with a cursory notation that, "ELECTIVE PROCEDURES NOT APPROVED." Ex. 2 ¶ 38; Ex. 1, App. F at 5.

In an October 20, 2021 report, DPS mental healthcare provider Jennifer Dula noted, "[I]t appears the next appropriate step for Mrs. Brown is to undergo trans-feminine bottom surgery . . . Mrs. Brown has met the WPATH criteria and is an appropriate candidate for surgery." Ex. 1, App. E at 12. In reference to a consultation on October 21, Dr. Donald Caraccio—an endocrinologist at UNC to whom Defendants referred Mrs. Zayre-Brown's—wrote, "Regarding desire for vulvaplasty [sic], this is medically necessary part of treatment for this patient. She has been treated with hormones since 2012 and orchiectomy in 2017, with persistent symptoms of gender dysphoria." Ex. 1, App. E at 15.

On November 4, 2021, after an October 4, 2021 grievance for gender-affirming surgery was ultimately rejected for technical reasons, Mrs. Zayre-Brown filed another grievance requesting gender-affirming surgery. Ex. 2 ¶ 40. On December 16, 2022, through the grievance appeals process, Mrs. Zayre-Brown was told that while Dr. Amos noted the requested surgery was elective and not approved, her request for gender-affirming surgery would be reviewed at a January 2022 DTARC meeting. *Id.* ¶ 41. Mrs. Zayre-Brown continued to appeal through the DPS administrative remedy process and exhausted her latest grievance on January 18, 2022. *Id.* ¶ 40.

In late April 2022, Mrs. Zayre-Brown received DTARC's latest denial of her request for gender-affirming surgery for the treatment of gender dysphoria, and Defendants Junker and Harris's acceptance of that decision. Ex. 2 ¶ 44, Ex. 1, App. F at 6. The denial, contained in a report dated February 17, 2022, states that gender-affirming vulvoplasty is not medically necessary, but provides no detail or analysis. Ex. 1, App. F at 6. A medical note written by Defendant Peiper on April 26, 2022 claims that "there is insufficient medical evidence to indicate such a complex and irreversible surgical intervention is medically necessary for her at this time." Ex. 1, App. F at 8.

Mrs. Zayre-Brown has engaged Dr. Randi Ettner as an expert witness in this case. Dr. Ettner is a clinical and forensic psychologist, with decades of experience in the treatment of gender dysphoria. Ex. 1. at ¶ 4 & App. A. After reviewing hundreds of pages of Mrs. Zayre-Brown's DPS medical and mental health records, Dr. Ettner conducted an in-person evaluation of Mrs. Zayre-Brown on May 25, 2022 and

evaluated her need for gender-affirming genital surgery. *Id.* ¶ 76.

Among other findings, Dr. Ettner's evaluation of Mrs. Zayre-Brown found that recommendations from DPS "healthcare providers with expertise in treating gender dysphoria were overridden by DTARC members for non-medical reasons," and that "any provider with experience in treating gender dysphoric individuals would recommend gender-affirming genital surgery for Mrs. Zayre-Brown." *Id.* ¶ 91. Dr. Ettner found that Mrs. Zayre-Brown "has met, and exceeded, all the requirements of the WPATH SOC for surgical intervention, which is medically necessary to treat her severe gender dysphoria." *Id.* Dr. Ettner additionally found that without surgery, "Mrs. Zayre-Brown's gender dysphoria will continue to intensify, with no means of relief." *Id.* ¶ 90. Based on these findings, Dr. Ettner concluded that "Mrs. Zayre-Brown urgently requires gender-affirming genital surgery for the treatment of her severe gender dysphoria." *Id.* ¶¶ 90, 92.

ARGUMENT

Mrs. Zayre-Brown seeks preliminary relief ordering Defendants to provide her with gender-affirming genital surgery she has long needed to treat her gender dysphoria. A preliminary injunction is warranted where a plaintiff (1) is likely to succeed on the merits of her claim, (2) will likely suffer irreparable harm without preliminary relief, (3) the balance of hardships weighs in her favor, and (4) the injunction is in the public interest. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014).

Mrs. Zayre-Brown satisfies all four considerations. She will likely succeed on

the merits of her Eighth Amendment claim because gender dysphoria is an objectively serious medical need that Defendants have long known about, but denied medically necessary treatment for. This ongoing constitutional violation inflicts irreparable harm while exposing Mrs. Zayre-Brown to substantial risk of serious future mental and physical injury. The balance of equities weighs in favor of preliminary relief, as Defendants would only have to provide medical care to one patient, and that care may well save the patient's life. An injunction preserving Mrs. Zayre-Brown's constitutional rights also serves the public interest.

I. Mrs. Zayre-Brown is likely to succeed on the merits of her Eighth Amendment claim.

To obtain a preliminary injunction, a plaintiff "need not establish a certainty of success but must make a clear showing that [they are] likely to succeed at trial." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (quotation marks omitted). District courts have "no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence" a constitutional violation. *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960).

A state has a constitutional duty "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). To succeed on an Eighth Amendment claim of inadequate medical care, a plaintiff must (1) establish that she has "an objectively serious condition," and (2) show "deliberate indifference" by prison officials, meaning

they have subjective knowledge of the condition but refused to provide adequate treatment. *De'lonta*, 708 F.3d at 525-26.

A. Mrs. Zayre-Brown's gender dysphoria is an objectively serious medical need.

A serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Iko v. Shreve*, 535 F.3d 225, 241 (4th Cir. 2008) (quotation marks omitted). The Fourth Circuit and other courts across the country have had little difficulty in concluding that gender dysphoria is an objectively serious medical need. Indeed, prison officials seldom contest this issue. *See De'lonta,* 708 F.3d at 525-26; *Edmo*, 935 F.3d at 785; *Hardeman v. Smith*, 764 Fed App'x 658, 664 (10th Cir. 2019); *Kothman v. Rosario*, 558 Fed App'x 907, 912 (11th Cir. 2014); *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011); *Iglesias v. Federal Bureau of Prisons*, 2021 WL 6112790, at *23 (S.D. Ill. Dec. 27, 2021); *Hicklin v. Precynthe*, No. 4:16-cv-01357-NCC, 2018 WL 806764, at *15 (E.D. Mo. Feb. 9, 2018); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1195 (N.D. Cal. 2015).

Here, the record shows that gender dysphoria is a medical condition codified in the DSM-V and the ICD-10. Ex. 1 ¶ 20. The consensus among mainstream medical associations in the United States is that gender dysphoria is a serious medical condition requiring treatment. *Id.* ¶ 28. On October 13, 2017, three days after entering DPS custody, DPS psychologist Susan Garvey evaluated Mrs. Zayre-Brown and confirmed Mrs. Zayre-Brown's gender dysphoria diagnosis, her previous history of treatment for gender dysphoria, and her continued need for treatment for gender

dysphoria. *Id.* ¶ 87. On November 11, 2017, DPS medical staff developed a "gender dysphoria treatment plan" for Mrs. Zayre-Brown. *Id.* Finally, DPS's own policies authorize treatment for gender dysphoria, including gender-affirming surgery. *See* Transgender Offenders Policy at 6-7.

Accordingly, Plaintiff is likely to establish the objective prong of her Eighth Amendment claim.

B. Defendants have been deliberately indifferent by refusing to provide Mrs. Zayre-Brown with gender-affirming surgery for the treatment of her gender dysphoria.

Deliberate indifference "lies somewhere between negligence and purpose or knowledge: namely, recklessness of the subjective type used in criminal law." *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016) (quotation marks omitted). In medical cases, prison officials "must have had actual subjective knowledge of both the inmate's serious medical condition and the excessive risk posed by the official's action or inaction." *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014).

A plaintiff may prove deliberate indifference in several ways. They may demonstrate that prison officials have been "intentionally denying or delaying access to medical care." *Estelle*, 429 U.S. at 104-05; *accord Smith v. Smith*, 589 F.3d 736, 739 (4th Cir. 2009) (explaining that "delay or interference with treatment once prescribed" may qualify). "A delay in treatment may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain." *Sharpe v. S.C. Dep't of Corr.*, 621 F. App'x 732, 734 (4th Cir. 2015) (quoting *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010)). A plaintiff can also

show that their medical treatment was "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Miltier v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990), *overruled in part on other grounds by Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "Accepted standards of care and practice within the medical community are highly relevant" to this inquiry. *Edmo*, 935 F.3d at 786.

Alternatively, a plaintiff can show that a substantial risk of serious harm "was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official . . . had been exposed to information concerning the risk and thus must have known about it[.]" *Scinto*, 841 F.3d at 226 (quotation marks omitted) (alterations in original).

Importantly, prison officials may not defeat an Eighth Amendment claim by showing they have provided a patient with *some* treatment. In the context of a transgender plaintiff seeking gender-affirming care, the Fourth Circuit has explained that "just because [prison officials] have provided [the plaintiff] with *some* treatment consistent with the . . . [WPATH] Standards of Care, it does not follow that they have necessarily provided her with *constitutionally adequate* treatment." *De'lonta*, 708 F.3d at 526.

Multiple courts have granted preliminary injunctions under the Eighth Amendment for incarcerated transgender people seeking gender-affirming care, including surgery. *See, e.g.*, *Edmo*, 935 F.3d at 793 (prison doctor who denied gender-affirming surgery was deliberately indifferent when he continued with "ineffective

treatment plan" despite plaintiff's "'clinically significant' distress that impairs her ability to function" and led to self-castration attempt); *Iglesias*, 2021 WL 6112790, at *23 (granting relief where plaintiff's gender dysphoria persisted despite hormone treatment and "Defendants are aware of [her] suffering, but have delayed her treatment" and "specialists in gender dysphoria would all agree that [plaintiff] needs [gender-affirming surgery]"); *Norsworthy*, 87 F. Supp. 3d at 1195 (granting preliminary injunction ordering gender-affirming surgery); *Hicklin*, 2018 WL 806764, at *15 (denial of gender-affirming care for non-medical reasons was likely deliberate indifference).

Here, however the test is stated, Defendants are deliberately indifferent to Mrs. Zayre-Brown's gender dysphoria by refusing to provide medically necessary surgery.

First, Defendants have been delaying and denying treatment recommended by their own healthcare providers. Ex. 1 ¶¶ 87-88. Dr. Umesi recommended gender-affirming surgery in January 2019. *Id.* ¶ 88 & App. E at 1-4. Three months later, Dr. Pou referred Mrs. Zayre-Brown to Dr. Figler, a specialist in gender-affirming surgery. Ex. 2 ¶ 37. Dr. Figler evaluated Mrs. Zayre-Brown in July 2021 and concluded that a vulvoplasty was necessary. Ex. 1, App. E at 5-10. MSW Jennifer Dula, a DPS mental healthcare provider, confirmed three months later that gender-affirming surgery was necessary. *Id.* at 12. So did endocrinologist Dr. Carracio. *Id.* at 15.

Dr. Ettner has also reviewed Mrs. Zayre-Brown's medical records and personally evaluated her. In Dr. Ettner's professional opinion, in light of Mrs. Zayre-

Brown's medical needs and the WPATH SOC, gender-affirming surgery is the next necessary step in treatment: "She has met, and exceeded, all the requirements of the WPATH SOC for surgical intervention, which is medically necessary to treat her severe gender dysphoria." Ex. 1 ¶ 91. Defendants' delays and denials of necessary treatment cannot be reconciled with the prevailing standards of care. *Id.* ¶ 87 (noting "serious concerns about the adequacy of treatment provided by DPS and its employees . . . which falls far outside of what is recommended by the SOC"). That is deliberate indifference. *See Smith*, 589 F.3d at 739; *Edmo*, 935 F.3d at 792-93.

Defendants have also known that Mrs. Zayre-Brown's gender dysphoria places her at an ongoing substantial risk of serious harm, and that her current course of treatment has proven inadequate. Through numerous requests, grievances, and medical appointments, Mrs. Zayre-Brown has informed Defendants of the extreme distress her gender dysphoria causes and her need for gender-affirming surgery. Defendants know that Mrs. Zayre-Brown had been hospitalized and placed on suicide watch several times due to urges to self-mutilate her genitals and suicidal thoughts brought on by gender dysphoria. *See, e.g.*, Ex. 2 ¶¶ 29, 33-34. Defendants' delays and denials will only prolong Mrs. Zayre-Brown's suffering, and place her at unnecessary risk of harm. *See, e.g.*, Ex. 2 ¶¶ 52-55; Ex. 1 ¶ 90 ("Mrs. Zayre-Brown's gender dysphoria will continue to intensify, with no means of relief. Her immediate need for surgery is great and will only accelerate."). That is deliberate indifference. *See Scinto*, 841 F.3d at 226; *Sharpe*, 621 F. App'x at 734.

What's more, Defendants have never offered a medical justification for refusing

this care. Defendants trivialized gender-affirming surgery as "elective," but never explained why. Ex. 1, App. F at 2, 5. As the Fourth Circuit has observed, gender-affirming surgery is not "experimental or cosmetic," but "an accepted, effective, medically indicated treatment for" gender dysphoria. *De'lonta*, 708 F.3d at 525.

Defendants also incorrectly assumed that because Mrs. Zayre-Brown had undergone *some* gender-affirming surgery, additional surgery was unnecessary. Ex. 1, App. F at 2, 7-8. This rationale cannot square with the Fourth Circuit's ruling that "*some* treatment" for gender dysphoria is not the same as "*constitutionally adequate* treatment." *De'lonta*, 708 F.3d at 526.

Most recently, Defendants claimed "insufficient medical evidence to indicate that such a complex and irreversible surgery is medically necessary." Ex. 1, App. F at 8. But, beyond years of documentation and the consensus of healthcare providers with subject-matter expertise, what more evidence do they need? And why should the irreversibility and complexity of the treatment matter? Any number of medical procedures may be irreversible and complex, but that does not make them any less urgent or necessary.

In sum, there can be no serious dispute that Mrs. Zayre-Brown truly needs gender-affirming surgery, that she will face a serious ongoing risk of harm without it, and that Defendants know all of this. These facts align with other cases where courts granted relief to transgender prisoners seeking gender-affirming surgery. *See, e.g.*, *Edmo*, 935 F.3d at 794 (relying on the Fourth Circuit's decision in *De'lonta* to conclude that refusing gender-affirming surgery "stopped short of what was medically

necessary"); *Iglesias*, 2021 WL 6112790, at *22 (given plaintiff's history of suicidal ideation and threatened self-harm, the ineffectiveness of current treatment, and Dr. Ettner's testimony, refusal to provide surgery was likely deliberate indifference).

Accordingly, Mrs. Zayre-Brown is likely to prove the subjective prong of her Eighth Amendment claim.

II. Mrs. Zayre-Brown will suffer irreparable harm without preliminary relief.

"[T]he denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction." *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987). When a plaintiff seeks preliminary injunctive relief for a constitutional violation, the "claimed irreparable harm is inseparably linked to the likelihood of success on the merits[.]" *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (cleaned up); *accord Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc).

An ongoing denial of a transgender prisoner's right to medically necessary care for gender dysphoria is irreparable harm. *E.g.*, *Edmo*, 935 F.3d at 798; *Iglesias*, 2021 WL 6112790, at *26; *Hicklin*, 2018 WL 806764 at *10; *Norsworthy*, 87 F. Supp. 3d at 1193. Plaintiff has established that she is suffering severe mental and emotional distress due to Defendants' deliberate indifference to her serious medical needs in violation of the Eighth Amendment. She has therefore satisfied the irreparable harm factor.

III. The balance of harms and the public interest require injunctive relief for Mrs. Zayre-Brown.

In evaluating the balance of equities, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted).

Here, the balance of harms weighs strongly in favor of injunctive relief for Mrs. Zayre-Brown. Because Defendants continue to deny her medically necessary care for the treatment of her gender dysphoria, Mrs. Zayre-Brown remains at a significant ongoing risk of harm to her mental and physical health. By contrast, granting injunctive relief would impose minimal costs on Defendants—treatment of a single patient.

The public interest is also served by granting Mrs. Zayre-Brown injunctive relief. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("[U]pholding constitutional rights surely serves the public interest."); *Flynn v. Doyle*, 630 F. Supp. 2d 987, 993 (E.D. Wis. 2009) ("The public has a strong interest in the provision of constitutionally-adequate health care to prisoners and this public interest argues in favor of granting the motion for preliminary injunction.").

IV. The relief sought complies with the Prison Litigation Reform Act.

In prison cases, "preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. §

3626(a)(2). Courts must also "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief." *Id*.

Here, Plaintiff seeks an injunction requiring Defendants to provide a single course of medical treatment already authorized by Defendants' own policies and recognized by Defendants' own healthcare providers as medically necessary. This relief is minimally intrusive and could not plausibly result in any harm to public safety. Therefore, the relief sought complies with the PLRA.

V. The Court should waive the requirement to provide security.

While Rule 65(c) of the Federal Rules of Civil Procedure provides that "a court may issue a preliminary injunction . . . only if the movant gives security," the Fourth Circuit has held that "the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013).

In cases in which prisoners seek preliminary injunctive relief to obtain medically necessary care or to address medically harmful prison conditions, it is common that courts exercise their discretion to waive any security requirement. *See*, *e.g.*, *Beck v. Hurwitz*, 380 F. Supp. 3d 479, 485 (M.D.N.C. 2019); *Chatman v. Otani*, 2021 WL 2941990, at *24 (D. Haw. July 13, 2021). In particular, such a waiver has been held warranted when a transgender prisoner has obtained preliminary injunctive relief to obtain necessary treatment for gender dysphoria. *Hicklin*, 2018 WL 806764, at *14.

A waiver of any security is warranted in this case. The Fourth Circuit has explained, "[i]n fixing the amount of an injunction bond, the district court should be guided by Rule 65(c), which is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order." *Hoechst Diafoil Co. v. Nan Ya Plastics, Inc.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999). Here, the individual defendants who have been sued in their official capacities are unlikely to incur any costs or damages as a result of the preliminary injunction. *See B.P.J. v. W. Va. Bd. of Ed.*, 550 F. Supp. 3d 347 (S.D. W. Va. 2021) (waiving bond because of lack of risk of harm to the enjoined party); *U.S. Airline Pilots Ass'n v. Velez*, 2015 WL 5258725, at *7 (W.D.N.C. Aug. 27, 2015) (waiving security because, among other reasons the court had found in its analysis of the balance of equities that there was "little to no risk that Defendants would be harmed as a result of an improvidently issued injunction"). In addition, when a plaintiff of limited financial means seeks to vindicate their constitutional rights and there is a significant public interest underlying the action, waiver of a bond is warranted. *Taylor-Failor v. County of Hawaii*, 90 F. Supp. 3d 1095, 1103 (D. Haw. 2015).

CONCLUSION

The Court should enter a preliminary injunction enjoining Defendants to immediately provide Mrs. Zayre-Brown with medically necessary gender-affirming vulvoplasty.

Dated: June 28, 2022 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 28, 2022, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will effect service on all counsel of record.

Dated: June 28, 2022

Respectfully submitted,

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