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

KANAUTICA ZAYRE-BROWN, Plaintiff, v. NORTH CAROLINA DEPARTMENT OF ADULT CORRECTION, *et al.,* Defendants.	No. 3:22-cv-191

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment is notable for what it lacks. Defendants offer no testimony from the expert witnesses they designated in discovery. None of the Defendants claim to have their own expertise in gender-affirming care. They do not dispute that Plaintiff continues to experience clinically significant symptoms of gender dysphoria. They do not attempt to justify their refusal to provide surgery under the widely accepted standard of care or any clinical guidelines. They do not even acknowledge the main Fourth Circuit case on the Eighth Amendment and gender dysphoria, *De'lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013), instead stating falsely that "the Fourth Circuit has not yet considered whether the denial of a request for gender affirming surgery can support an Eighth Amendment claim[.]" (Doc. 60, Mem. Supp. Def.'s Mot. Summ. J. at 25.)

These omissions underscore the "one-sided" nature of the record and the fatal flaws in Defendants' arguments. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (summary judgment is appropriate if the evidence is "so one-sided that one party must prevail as a matter of law"). For these reasons and as detailed below, Defendants' motion for summary judgment should be denied. Instead, Plaintiff's motion for partial summary judgment should be granted.

I. Plaintiff Has an Objectively Serious Medical Condition That Has Been Diagnosed by Multiple Doctors as Requiring Treatment.

Defendants argue that Plaintiff cannot satisfy the objective prong of her Eighth Amendment claim because "the evidence does not support an inference that without the requested surgery, Plaintiff has experienced or is at risk of experiencing an 'objectively, sufficiently serious' harm." (Doc. 60 at 18.) This argument is meritless.

First, Defendants do not state the precise, governing legal standard—maybe because doing so would acknowledge that Plaintiff has satisfied it. "A serious medical need is a condition 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." *DePaola v. Clarke*, 884 F.3d 481, 486 (4th Cir. 2018) (cleaned up). Decisions from the Fourth Circuit and other courts—including ones that Defendants cite elsewhere in their brief—hold that gender dysphoria meets this standard. *See, e.g.*, *De'lonta*, 708 F.3d at 522, 525 (plaintiff's allegation that risks of harm from her gender dysphoria (then called "gender identity disorder") constituted an objectively serious medical need); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) (citing cases); *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014) (en banc) ("The parties do

not spar over the fact that Kosilek requires medical care aimed at alleviating the harms associated with GID—to the contrary, the DOC has provided such care since 2003.").

Defendants cite no cases holding that gender dysphoria is *not* an objectively serious medical condition. Defendants also concede that they "confirmed [Plaintiff's] GD diagnosis," prescribed her treatments for it, and "do not challenge Plaintiff's GD diagnosis" or her ongoing need for treatment. (Doc. 60 at 5, 6, 33.) Indeed, the very diagnosis of gender dysphoria *requires* "clinically significant distress or impairment in social occupational, or other important areas of functioning." (Doc. 61-2, Ettner Rep. ¶23.) Plaintiff's opening brief details the significant, ongoing pain she experiences from gender dysphoria, confirmed by healthcare providers engaged by Defendants, their own expert, and Plaintiff's expert. (Doc. 63, Pl.'s Br. Supp. Mot. Partial Summ. J. at 10-22.) Plaintiff's expert further explains that "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." (Doc. 61-2, Ettner Rep. ¶134.)

Instead, Defendants base their argument entirely on a few instances when Plaintiff reported lacking certain symptoms or described herself as a happy person with a lot of energy. (Doc. 60 at 20.) But none of that changes the analysis.

First, Plaintiff was describing herself as a happy, energetic person "outside of prison," which was more than six years ago. (Doc. 62-3, Zayre-Brown Dep. 137:14-

24.)[1] That comment reveals little about her current health. And while Plaintiff has at times felt better than others, she has repeatedly reported severe anxiety, depression, and thoughts of self-harm and suicide. (*See* Doc. 63 at 11-18, 20.)

Moreover, a gender dysphoria diagnosis and eligibility for surgery—neither of which Defendants contest—do not require constant misery or lethargy. Rather, "[t]he critical element of Gender Dysphoria is the presence of clinically significant distress associated with the condition," and when hormone therapy and other treatments are insufficient, "relief from [a patient's] dysphoria cannot be achieved without surgical intervention. . . ." (Doc. 61-2, Ettner Rep. ¶¶21, 48.)

No one disputes that Plaintiff continues to have clinically significant levels of distress that her current treatment has not alleviated. In her recent 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.

(Doc. 62-24, 2nd Zayre-Brown Decl. ¶4; *see also* Doc. 62-3, Zayre-Brown Dep. 87:14-15; 143:24, 144:7 (describing dysphoria-caused distress as "acutely high," "off the charts," "really high," and "to the roof").)

[1] Where original exhibit page numbering and ECF page numbering are inconsistent, citations refer to the original exhibit page numbering unless otherwise indicated.

Therefore, a reasonable factfinder could easily conclude that Plaintiff's gender dysphoria is an objectively serious medical condition requiring treatment. Indeed, on this record, Plaintiff makes that showing as a matter of law.

II. Defendants Are Currently Aware of Plaintiff's Gender Dysphoria and Her Resulting Pain.

Defendants argue that Plaintiff cannot meet the subjective prong of her Eighth Amendment claim because "none of the Defendants actually perceived Plaintiff's physical or mental health to be at a significant risk of harm." (Doc. 60 at 21.) Once again, Defendants have not applied the correct legal standard.

On her Eighth Amendment claim, Plaintiff only seeks prospective declaratory and injunctive relief. So, the proper inquiry is what Defendants know *now*—not what they perceived at some point in the past. The Supreme Court has held that for injunctive-relief claims, "deliberate indifference[] should be determined in light of the prison authorities' current attitudes and conduct: their attitudes and conduct at the time suit is brought and persisting thereafter." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (cleaned up). If "the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness[.]" *Id.* at 846 n.9.

Accordingly, even if Defendants truly did not perceive any risk of harm to Plaintiff before this litigation began, they have now been educated about her ongoing pain and risk of future harm. *Cf. Makdessi v. Fields*, 789 F.3d 126, 129 (4th Cir. 2015) ("Prison officials may not simply bury their heads in the sand and thereby skirt liability.").

III. The Disagreement in This Case Is Between Defendants—Who Have No Expertise in Gender-Affirming Care—and Everyone in the Record Who Does.

Defendants frame this case as a mere disagreement over the proper course of treatment between themselves and Plaintiff; they claim that her "contention that [Defendants'] medical-necessity determination was incorrect, even if true, does not make it unconstitutional." (Doc. 60 at 25.) Yet again, Defendants get the legal standard wrong and ignore critical, undisputed facts.

Under the Eighth Amendment, "the essential test is one of medical necessity. . . ." *Bowring v. Godwin*, 551 F.2d 44, 48 (4th Cir. 1977). Prison officials must provide care that is "adequate to address the prisoner's serious medical need." *De'lonta*, 708 F.3d at 526. Treatment decisions must be informed by sound medical judgment. *E.g., Gordon v. Schilling,* 937 F.3d 348, 361 (4th Cir. 2019) (denying defendants summary judgment because of "the soundness of [their] reasons" for withholding treatment). Therefore, if Defendants' "medical-necessity determination was incorrect," as they put it, Defendants lose.

Here, it is not just Plaintiff who disagrees with Defendants' medical-necessity determination. Defendants sent Plaintiff to be evaluated by doctors at UNC who specialize in gender-affirming care. Those specialists agree that surgery is medically necessary to treat Plaintiff's gender dysphoria and alleviate her ongoing pain. (Doc. 62-17, Figler Decl. ¶¶9-11; Doc. 62-18, Caraccio Decl.¶¶14-23; Doc. 62-16, Croft Decl. ¶¶14-15, 17-26.) So do Plaintiff's mental health care providers employed by Defendants. (Doc. 62-19, Dula Decl. ¶¶13-14; 61-2, Ettner Rep., App. E. at 12; Doc.

62-15, Hahn Dep. 156:24-158:14.) So does Plaintiff's expert. (Doc. 61-2, Ettner Rep. at ¶¶133-36.) So does the psychologist who Defendants retained for this litigation. (Doc. 62-1, Boyd Dep. 166:21-25; 167:12-21.)

Accordingly, this case is not a simple disagreement between patient and provider. Rather, it is a disagreement between Defendants—who do not claim any expertise in gender-affirming care—and everyone else in the record who does have such expertise or personally evaluated Plaintiff. (*See* Doc. 63 at 9 (detailing Defendants' minimal experience with gender-affirming medicine).) The lopsided nature of this disagreement supports Plaintiff's motion for summary judgment, not Defendants'. *See Edmo*, 935 F.3d at 787 (affirming judgment for plaintiff supported by gender-affirming care experts, whereas the defendants "lack[ed] meaningful experience directly treating people with gender dysphoria").

Defendants rely on *Hixson v. Moran*, where the defendant and plaintiff's expert disputed whether the defendant had violated the standard of care for treating diabetes. 1 F.4th 297, 303 (4th Cir. 2021). He had not prescribed insulin because doing so could have risked an insulin overdose. *Id.* The Fourth Circuit affirmed summary judgment for the defendant, explaining that violating the standard of care could show negligence, but by itself "is not enough to show deliberate indifference." *Id.*

Here, however, Plaintiff does not base her claim solely on the WPATH Standards of Care. She has presented compelling evidence that gender-affirming surgery is medically necessary for her—without it, she will continue to experience serious pain and risk of future harm. And unlike in *Hixson*, Defendants have not

identified any risks specific to Plaintiff that counsel *against* surgery. Accordingly, a reasonable trier of fact could only conclude that gender-affirming surgery is indeed medically necessary for Plaintiff, and refusing to provide it is "unnecessarily prolong[ing] [her] pain." *Sharpe v. S.C. Dept. of Corr.*, 621 Fed. App'x 732, 734 (4th Cir. 2015) (quoting *McGowan v. Hulick,* 612 F.3d 636, 640 (7th Cir. 2010)).

IV. Defendants' Reasons for Refusing Gender-Affirming Surgery Are Medically Unsound Judgments.

Defendants assert two reasons for denying Plaintiff's repeated requests for gender-affirming surgery. First, DTARC concluded that Plaintiff was "doing well and was relatively well adjusted, and that her physical and mental health were not at significant risk." (Doc. 60 at 24.) Second, "DTARC concluded that the medical literature was mixed regarding the efficacy of gender affirming surgery as a treatment for GD." (*Id.* at 25.) The evidence before the Court would require a reasonable trier of fact to reject these purported reasons as a matter of law.

As discussed above, the Eighth Amendment requires individualized medical determinations and sound application of treatment guidelines to ensure accurate medical care. *De'Lonta*, 708 F.3d at 526; *Gordon*, 937 F.3d at 361 (collecting cases). Here, first consider Defendants' complete lack of experience in evaluating a patient for gender-affirming care. Most Defendants are not health care providers at all. Three who are—Campbell, Peiper, and Sheitman—do not claim to have *ever* evaluated a patient for gender-affirming surgery and have minimal experience with gender-affirming care more generally. (Doc. 63 at 9.) Thus, any opinion Defendants offer on gender-affirming care is immediately suspect.

Now turn to Defendants' conclusion that Plaintiff was "doing well." This completely ignores medical records consistently demonstrating her severe distress caused by gender dysphoria. Indeed, the discussion in Defendants' own decision to deny Plaintiff surgery notes "the patient has been heavily focused on the status of the final decision regarding her requested/desired surgery and experiencing related anxiety/frustrated mood." (Doc. 61-2, Ettner Rep., App. G at 2.) Other records paint a clear picture of consistent distress.[2]

Defendants also found surgery unnecessary because of Plaintiff's "emotional and psychological stability." (Doc. 61-2, Ettner Rep., App. F at 7.) But that stability is *necessary* for a patient to qualify for surgery. As Dr. Figler from UNC explains, if any "mental health concerns are present, they must be well-controlled." (Doc. 62-17, Figler Decl. ¶9.) Dr. Caraccio testifies that Plaintiff "was as psychologically stable as

[2] (*See* Doc. 61-31 at ECF p. 1 (noting "very frequent thoughts of self-mutilation" and statement "I don't want to die but I feel like it is the best thing for me" given "increase in symptoms of Gender Dysphoria"); *id.* at ECF p. 2 (noting Plaintiff's "symptoms of depression have significantly increased and she has had thoughts of ripping the skin" off her genitals); Doc. 61-32 (noting that Plaintiff had tied a band around her genitals for a week and a half in order to require surgery and noting "increased dysphoric mood" that only improved when provided with information about upcoming appointment with UNC Transgender Health Program); Doc. 61-34 at 1-2 (noting hopefulness at prospect of receiving surgery but reporting feelings dysphoria at "a level of 11" "measured by rating dysphoric feelings on a scale from 0-10"); Doc. 61-35 (request for mental health visit every two weeks due to current level of dysphoria being "off the charts."); Doc. 61-36 at 1 (noting distress over lack of gender-affirming surgery or mental health provider competent in treatment of gender dysphoria and desire to perform self-surgery if gender-affirming surgery was not approved); Doc. 61-37 at 1 (same); *see also* Doc. 62-20 (noting Plaintiff's desire to put a band around her genitals "as a means of forcing surgical intervention" and explanation to Plaintiff that she "would only undermine her chances for gender-affirming surgery if she was considered to be emotionally unstable for treatment").)

she could be with ongoing gender dysphoria." (Doc. 62-18, Caraccio Decl. ¶22.) Defendant Junker also acknowledged that Plaintiff being "stable from a mental health standpoint was a factor in favor of her being a good candidate for surgery." (Doc. 62-10, Junker Dep. 113:5-9.) Thus, Defendants have put Plaintiff in a catch-22: either her health is too stable for surgery to be necessary, or her health is not stable enough to qualify for surgery under the WPATH SOC. Such a self-contradictory position is inherently unreasonable and cannot justify the denial of necessary surgery to individuals suffering from gender dysphoria.

Even putting all this aside, consider Defendant Campbell's own formulation of medical necessity. A procedure is necessary "for a particular individual to protect their life, to prevent significant disability or illness, or to prevent significant pain and suffering. The relevant factors for the determination under this definition are (1) an individualized risk benefit analysis; (2) any standard of care; and (3) evidence-based medicine." (Doc. 60 at 13-14. (citation omitted).) The record shows that Plaintiff meets these criteria.

On the risk/benefit analysis, Defendants' own expert psychologist testified that Plaintiff's gender dysphoria likely cannot be cured without surgery. (Doc. 62-1, Boyd Dep. 166:21-25, 167:12-21.) And Defendants could not identify any reasons that Plaintiff specifically would face a high risk of harm from surgery or would later regret it. (Doc. 62-11, Campbell Dep. 82:4-25, 83:1-84:14; Doc.62-10, Junker Dep. 221:3-224:12.) Further, Defendants have not and cannot provide any explanation as to why the distress documented in Plaintiffs' records, and now testified to under penalty of

perjury, do not show "significant pain and suffering" that would make surgery necessary under Defendant Campbell's criteria. (*See* Doc. 13-2, First Zayre-Brown Decl. ¶¶24-26, 29, 34; Doc. 62-24, 2nd Zayre-Brown Decl. ¶¶4, 8; Doc. 62-3, Zayre-Brown Dep. 153:7-20, 166:18-170:16, 171:1-174:13.)

Moreover, Defendants downplay the associated risk by pointing to instances of positivity in Plaintiff's records. But courts have rejected such cherry-picked assessments of a gender dysphoric patient's mental health history. *See Edmo,* 935 F.3d at 798 (defendants' argument that the plaintiff had not self-harmed for many years was meritless because it "overlook[ed] the profound, persistent distress [her] gender dysphoria cause[d]"); *Clark v. Quiros*, No. 3:19-cv-00575-VLB, 2023 WL 6050160, at *64 (D. Conn. Sept. 15, 2023) (rejecting argument against gender-affirming surgery where context revealed that hopefulness for additional treatment "had a placebo-like effect" on plaintiff's mental health and "occasional reports of feeling better [were] engulfed by the many reports showing . . . suffering and demanding adequate treatment").

As to "any standards of care," that factor favors Plaintiff as well. Beyond the WPATH Standards of Care ("SOC"), "'[t]here are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups.'" *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595-96 (4th Cir. 2020) (quoting *Edmo*, 935 F.3d at 769). Defendants have not identified any other competing standards of care that led them to their conclusion. Nor could they. *See id.*

Finally, the issue of "evidence-based medicine" brings up Defendants' second

justification: "that the medical literature was mixed regarding the efficacy of gender affirming surgery." But Defendants' policy—and Defendants themselves—acknowledge that gender-affirming surgery may be medically necessary for some patients. (Doc. 60 at 5; Doc. 10-1, EMTO Policy at 7.) So even if the literature were "mixed," Defendants still accept that some patients require gender-affirming surgery, and they cannot point to anything particular about Plaintiff's circumstances that would make such surgery dangerous or ineffective for her. Therefore, this argument is irrelevant, and a reasonable trier of fact could not accept it as a reason why Plaintiff specifically does not need gender-affirming surgery.

This argument also finds no support in the mainstream medical community or the Fourth Circuit. As explained in Plaintiff's brief in support of her motion for partial summary judgment, the Fourth Circuit has already concluded that "sex reassignment surgery may be necessary for some individuals for whom serious symptoms persist [after hormone therapy and other treatment]. In these cases, the surgery is not considered experimental or cosmetic; it is an accepted, effective, medically indicated treatment. . . ." *De'lonta,* 708 F.3d at 523. And again, *Grimm* endorsed the WPATH SOC as the only authoritative, evidence-based standard of medical care for treating gender dysphoria, consistent with numerous medical associations that Defendants purport to respect and look to for clinical guidance. (Doc. 63. at 4-5; Doc. 62-5, Campbell 30(b)(6) Dep. 28:4-29:1, 35:1-10, 51:5-54:10.)

Defendants rely on the literature review of Dr. Campbell, who has no real background in gender-affirming care. (Doc. 62-11, Campbell Dep. 5:17-6:23, 7:22-

11:23, 13:4-14:2). He found purportedly "mixed" evidence of the surgery's efficacy. (Doc. 60 at 25; Doc. 62-5, Campbell 30(b)(6) Dep. 190:4-191:5, 193:9-16.) Dr. Campbell's literature review, however, was woefully inadequate, and his conclusions drawn therefrom are simply not true.

As Dr. Ettner explains, Dr. Campbell's assertions regarding the efficacy of gender-affirming surgery are "contradicted by the literature addressing such surgery and particularly recent studies substantiating the health outcomes and benefits of gender affirming surgery." (Doc. 61-2, Ettner Rep. ¶116.) Dr. Campbell relies on "highly questionable sources of information" to reject the well-established SOC. (*Id.* ¶¶118-21.) And even as to the credible studies that Dr. Campbell cites, he distorts and mischaracterizes their results to support his denial of gender-affirming surgery. (*Id.* ¶117.) Other courts have rejected similar assertions that the WPATH SOC or the efficacy of gender-affirming surgery are matters of scientific or medical dispute. *See Flack v. Wisconsin Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1014 (W.D. Wis. 2019) (rejecting "low-quality evidence" argument in holding that gender-affirming surgery is a generally accepted form of medical treatment for gender dysphoria); *Dekker v. Weida*, No. 3:19-cv-00575-VLB, 2023 WL 4102243, at *15 (N.D. Fla. June 21, 2023) (rejecting argument that "low quality" evidence cannot support necessary treatments for gender dysphoria); *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 WL 40373727, at *17 (E.D. Ark. June 20, 2023) (same).

Accordingly, a reasonable trier of fact could easily conclude—and on this record, could *only* conclude—that Defendants' reasons for denying surgery are

medically unsound, and gender-affirming surgery is medically necessary to treat Plaintiff's gender dysphoria.

V. Defendants Ignore the Fourth Circuit's Binding *De'lonta* Decision.

Defendants argue that "if a correctional system is providing other recognized accommodations and treatment for GD, the decision not to approve a requested surgery cannot support a claim of deliberate indifference." (Doc. 60 at 26-27.) This argument only works by pretending *De'lonta* does not exist—which is exactly what Defendants do. They wrongly assert that "the Fourth Circuit has not yet considered whether the denial of a request for gender affirming surgery can support an Eighth Amendment claim[.]" (Doc. 60 at 25.)

In *De'lonta*, the plaintiff alleged that "despite her repeated complaints to Appellees alerting them to the persistence of her symptoms and the inefficacy of her existing treatment, she has never been evaluated concerning her suitability for surgery. . . . These factual allegations, taken as true, state a plausible claim that Appellees actually knew of and disregarded *De'lonta*'s serious medical need in contravention of the Eighth Amendment." 708 F.3d at 525 (cleaned up). The court further explained that just because defendants provided "*some* treatment consistent with the [SOC], it does not follow that they have necessarily provided her with *constitutionally adequate* treatment." *Id.* at 526.

Indeed, while *De'lonta* did not address the merits, it forecast this very case: Plaintiff is "hormonally confirmed"—she will see no further improvement to her gender dysphoria from hormone therapy, and in fact requires hormone therapy for

her basic functioning because of her orchiectomy. (Doc. 61-2, Ettner Rep. ¶¶47, 90). Her providers agree that the source of her gender dysphoria is her genitals, and it will not abate while she has genitals inconsistent with her gender identity.[3] Despite the treatment provided, Plaintiff's painful symptoms of gender dysphoria and associated risks persist, making surgery necessary.

VI. This Case Is Very Similar to *Edmo v. Corizon*.

Defendants seek to distinguish *Edmo v. Corizon,* encouraging this Court to look instead to different out-of-circuit precedent. (Doc. 60 at 27-28.) But *Edmo* is directly on point, and this Court has already rejected Defendants' primary effort to distinguish it.

In *Edmo*, the Ninth Circuit, like the Fourth Circuit, observed that "[t]he weight of opinion in the medical and mental health communities agrees that GSC"—gender confirmation surgery—"is safe, effective, and medically necessary in appropriate circumstances." 935 F.3d at 770. And like the Fourth Circuit, the Ninth Circuit recognized the WPATH SOC as the relevant clinical guidelines for evaluating and providing treatment for transgender prisoners suffering from gender dysphoria. *Id.* at 770-71. As here, "both sides and their medical experts agree[d]" that the plaintiff suffered from gender dysphoria, but the defendants disputed that gender-affirming surgery was medically necessary. *Id.* at 767.

[3] (Doc. 62-17, Figler Decl. ¶¶9-14; Doc. 62-18, Caraccio Decl. ¶¶10, 14-23; Doc. 62-19, Dula Decl. ¶¶13-14; Doc. 62-15, Hahn Dep. 90:2-91:6, 94:19-95:1, 165:23-166:14, 167:12-17, 160:16-161:5, 193:17-194:24, 210:9-11; Doc. 62-23, Bowman Dep. 31:14-19, 51:7-18, 118:25-119:13.)

Edmo had received hormone therapy and counseling for her gender dysphoria while incarcerated, but continued to feel "depressed, embarrassed, [and] disgusted] by her male genitalia" on a daily basis. *Id.* at 772. Dr. Eliason, the clinician who made the medical necessity determination, believed that despite Edmo's distress and self-castration attempts, she was "doing alright." *Id.* at 773. Based on reports from prison staff and his own observations, he concluded that he "did not see significant dysphoria," but that Edmo "looked pleasant and had a good mood." *Id.* Though Edmo's clinician purported to consider the WPATH SOC, like Dr. Campbell, *supra* § IV, he ultimately stated his own criteria for medical necessity of gender-affirming surgery and concluded that Edmo did not meet them. *Id.* at 774, 791. As here, his decision was affirmed by other clinicians and a multidisciplinary committee of medical providers and prison leadership, none of whom evaluated Edmo themselves. *Id.*

The court noted that to resolve Edmo's Eighth Amendment claim, it "must determine, considering the record, the judgments of prison medical officials, and the views of prudent professionals in the field, whether the treatment decisions of responsible prison authorities was medically acceptable." *Id.* at 786. Even though Dr. Eliason personally observed Edmo (unlike the decisionmakers for Plaintiff) and claimed to evaluate her individual circumstances, the court concluded that it could not defer to his judgment. *Id.* at 791. Relying in part on the expertise of Plaintiff's expert Dr. Ettner, the Ninth Circuit agreed with the district court that "Dr. Eliason's decision was medically unacceptable under the circumstances." *Id.* Not only did he "lack meaningful experience directly treating people with gender dysphoria," he "did

not follow the accepted standards of care in the area of transgender health care,"—the WPATH SOC—"nor did he reasonably deviate from or flexibly apply them." *Id.* at 787, 792. Moreover, as here, even under the doctor's own criteria for gender affirming surgery, Edmo still qualified for surgery. *Id.* at 792. The court concluded that, by refusing gender-affirming surgery despite awareness of an ineffective treatment plan, those defendants acted with deliberate indifference. *Id.* at 798, 803.

Here, Defendants try to distinguish *Edmo* by focusing on evidence there "that the plaintiff had, on multiple occasions, actually harmed herself, including three efforts to self-castrate and the alleviation of thoughts of self-castration by cutting her arms." (Doc. 60 at 27.) Defendants' counsel made the same argument at a hearing in this case, pointing to "the presence of self-mutilation and self-harm [in *Edmo*] that has not been demonstrated in this case." (Ex. 2, Transcript of Aug. 23, 2022 Hearing at 28.)

In response, the Court rightly expressed incredulity:

> I mean, if we're going to wait till people start self-mutilating themselves -- I mean, you know, what are we doing here? I mean, we got to figure out -- there are people who are different in this world, and we've got to -- we've got to figure out how to treat them as citizens and people of this world. We've got to get away -- we can't -- I mean, just because somebody is different doesn't mean that we just throw them away.

(*Id.*) This view aligns with the basic Eighth Amendment rule that prison officials may not "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; *see also Smith v. Carpenter,* 316 F.3d 178, 188 (2nd Cir. 2003) ("[P]rison officials may not

ignore medical conditions that are 'very likely to cause serious illness and needless suffering' in the future even if the prisoner has 'no serious current symptoms'" (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993))).

Moreover, the record here shows that Plaintiff has attempted to harm herself and often has strong urges to do so. (*See supra* note 2; Doc. 62-24, 2nd Zayre-Brown Decl. ¶¶4, 8.) Plaintiff's providers believed these reports to be true, and Defendants testified that they did as well. (*See* Doc. 63 at 17-18.) Dr. Ettner's report explains why Plaintiff's gender dysphoria will only worsen without surgery. (Doc. 61-2, Ettner Rep. ¶¶75-79, 89-90, 133-37.)

For these reasons, *Edmo* provides highly persuasive authority in Plaintiff's favor.

VII. The Out-of-Circuit Cases Defendants Cite Are Distinguishable.

Defendants urge the Court to rely on out-of-circuit cases that ruled against plaintiffs seeking gender-affirming surgery. All are distinguishable.

Defendants first point to *Kosilek v. Spencer,* 774 F.3d 63 (1st Cir. 2014) (en banc). But *Kosilek* justified the denial of surgery in part based on prison safety concerns, *id.* at 92, which Defendants have explicitly disavowed here. (Doc. 62-9, Defs. Interrog. Resp. at 6.) The defendants there also relied on "medical experts" to craft a treatment plan, *Kosilek,* 774 F.3d at 91, whereas Defendants here *rejected* the expert recommendations of the specialists they sent Plaintiff to at UNC. (*See supra* note 3.)

Moreover, nearly a decade has passed since *Kosilek*, and the expert witness who testified against the plaintiff in that case has since come to recognize that

gender-affirming surgery is a "safe, effective and widely accepted treatment for [gender dysphoria]; disputing the medical necessity . . . based on assertions to the contrary is unsupportable." *See Edmo*, 935 F.3d at 795-96.

Defendants next cite *Lamb v. Norwood,* 899 F.3d 1159 (10th Cir. 2018), which affirmed summary judgment against a pro se prisoner. But Defendants acknowledge that the court's decision there was based in part on the "sparseness of the summary judgment record." (Doc. 60 at 26.) Unlike in *Lamb*, Plaintiff—with the aid of counsel—has compiled a vast record demonstrating that the care she has received is inadequate.

Defendants additionally rely on *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019), where a divided panel held that because "there is robust and substantial good faith disagreement dividing respected members of the expert medical community, there can be no claim under the Eighth Amendment." *Id.* at 220.

Curiously, the majority in that case relied entirely on the factual record from *Kosilek*—which was compiled in 2006—and so could not 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). The Ninth Circuit has recognized this flaw: "*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) ("The oddest part of the *Gibson*

decision is that the *only* 'evidence' on this issue came not from the record in that case, but rather from adoption of the same *2006* expert testimony relied upon by the First Circuit in *Kosilek*.").

So, even assuming that *Gibson* was right about disagreement in the medical community, the evidence of that disagreement is now 17 years old. The fresh record before the Court tells a very different story.[4] Defendants concede that gender-affirming surgery can be medically necessary for some patients. (Doc. 60 at 5.) Every health care provider in the record who has subject-matter expertise agrees that Plaintiff is one of those patients. And under the Eighth Amendment, prison medical standards are not fixed in time, but must account for "evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble,* 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

Defendants also cite *Campbell v. Kallas,* 936 F.3d 536, 537 (7th Cir. 2019), which awarded the defendants qualified immunity on a damages claim. Critically, the court did *not* award qualified immunity because it considered the defendants' conduct constitutional—indeed, it declined to address that question at all. *Id.* at 545 (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). The court explained, "Denying a specific therapy in a particular case might amount to a constitutional violation, but qualified immunity applies absent reasonably specific notice to prison officials." *Id.*

[4] Additionally, as explained in Plaintiff's reply brief in support of her preliminary injunction motion, *Gibson*'s position regarding gender-affirming surgery is at odds with the Fourth Circuit's precedents in *De'lonta and Grimm*. (*See* Doc. 22, Pl.'s Reply Supp. Mot. Prelim. Inj., at 8-11 & n.6.)

at 549 (italics omitted). The court ruled as it did because there was not sufficiently similar precedent on point. *Id*.

Here, Plaintiff has not sought damages for her Eighth Amendment claim, making a qualified immunity analysis irrelevant. Defendants also fail to note that Campbell's suit was allowed to proceed to trial on her claim for injunctive relief, and the district court concluded the defendants were deliberately indifferent in failing to provide Campbell surgery even though she had received hormone therapy and counselling. No. 16-cv-261-jdp, 2020 WL 7230235, *8 (W.D. Wis. Dec. 8, 2020). This case thus supports the necessity of Plaintiff's surgical request.

Finally, Defendants cite four unpublished district court decisions ruling against plaintiffs seeking gender-affirming surgery. (Doc. 60 at 27 n.4.) Three of those cases involved pro se plaintiffs who offered no expert testimony. Therefore, those cases offer minimal persuasive value. *See Sabbats v. Clarke,* No. 7:21CV00198, 2022 WL 4134771, at *1 (W.D. Va. Sep. 12, 2022); *Wright v. Parker,* No. 4:21-cv00069-KGB-JJV, 2022 WL 18586696, at *1 (E.D. Ark. Apr. 11, 2022); *Armstrong v. Mid-Level Prac. John B. Connally Unit*, No. SA-18-CV-00677-XR, 2020 WL 230887, at *2 (W.D. Tex. Jan. 15, 2020).

The only represented plaintiff also failed to provide expert testimony, and unlike Plaintiff here, framed her Eighth Amendment claim in terms of the state having a "blanket ban" on gender-affirming surgery. *Fisher v. Fed. Bureau of Prisons*, No. 4:19-cv-1169, 2022 WL 2648950, at *3 (N.D. Ohio 2022). Plaintiff's claim here instead is based exclusively on her individual medical needs.

VIII. Plaintiff May Bring Her State Constitutional Claim Because She Has No Other Adequate State Law Remedy.

Plaintiff has also brought a claim for damages under Article I, Section 27 of the North Carolina Constitution, which prohibits "cruel or unusual punishments." Defendants argue that Plaintiff cannot do so because she has an "adequate state remedy" in the form of a negligence claim in the North Carolina Industrial Commission. (Doc. 60 at 30.)

Plaintiff's brief in support of her motion for partial summary judgment explains why she could not bring a negligence claim in the Industrial Commission. In short, the facts here show intentional and reckless misconduct. But the Industrial Commission can only adjudicate claims of ordinary negligence. A claim alleging these same facts would be jurisdictionally barred, and thus could not be an adequate state remedy that forecloses the need for a direct state constitutional claim. (Doc. 63 at 30-32.) Defendants cite no authority to the contrary.

In a footnote, Defendants ask the Court to grant summary judgment for Defendants Agarwal and Amos because neither "(1) was involved in any way in the events that are the subject of this litigation; or (2) is otherwise necessary for injunctive relief." (Doc. 60 at 30 n.5.) Even if the first point is true, Agarwal is a DTARC member, and both are DAC healthcare providers who would be bound by any injunction ordered by the Court. *See* Fed. R. Civ. P. 65(d)(2)(B) (injunctions bind "the parties' officers, agents, servants, [and] employees"). Moreover, dismissing Agarwal and Amos would be pointless since they are sued only in their official capacities, and so, like all other Defendants, are functionally "the State." Therefore, the Court should

deny Defendants' motion for summary judgment across the board.

IX. Defendants' Failure to Provide Adequate Hormone Treatment Further Exacerbated Plaintiff's Gender Dysphoria.

Defendants argue that "Plaintiff cannot satisfy the objective prong of a deliberate indifference claim related to housing or hormone therapy." (Doc. 60 at 28.) But Plaintiff has never premised her claims on her housing. And her claims do not depend solely on Defendants' delays and inconsistency in providing her hormone therapy. (*See* Doc. 62-18, Caraccio Decl. ¶¶10-11.) These facts simply reinforce Defendants' history of failing to provide Plaintiff gender-affirming care prescribed by specialists.

X. The Evidence Establishes an ADA Violation and Creates a Reasonable Inference of an RA Violation.

Plaintiff is also entitled to summary judgment on her Americans with Disabilities Act ("ADA") claim, based on either a failure to accommodate or a disparate treatment theory, and therefore Defendants' motion for summary judgment on that claim must fail.

Defendants argue that "there is no evidence that Plaintiff ever informed Defendants that she sought surgery as a reasonable accommodation for her GD." (Doc. 60 at 31.) That is flatly incorrect. As an initial matter, the body that considers requests for gender-affirming surgery is called the "Division Transgender **Accommodation** Review Committee," and requests to that body are called "accommodation requests." (Doc. 10-1, EMTO Policy at 2.) The record shows that Plaintiff made these "accommodation requests" for the treatment of her persistent

gender dysphoria. (Doc. 61-2, Ettner Rep., App. F, G.) Moreover, Plaintiff need not use any "magic words" for her requests to qualify as requests for accommodations under the ADA. *See, e.g., Parkinson v. Anne Arundel Med. Ctr.,* 79 Fed. App'x 602, 604-05 (4th Cir. 2003) (ADA accommodation request need not "formally invoke the magic words 'reasonable accommodation'" (quoting *Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 313 (3d Cir. 1999))). In any event, after exhausting all other avenues to seek accommodations for her gender dysphoria under DAC Policy, Plaintiff did in fact seek gender affirming surgery as a disability accommodation, and that request was considered through DAC's Accommodation Request policy. (*See* Ex. 3, ADA Recommendation, DAC 167.)

Regarding the reasonableness of the accommodation sought, Defendants do not argue that providing surgery would result in any "undue hardship" to them, *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016). Instead, Defendants argue that Plaintiff has not presented evidence that the accommodations she has already received were not reasonable accommodations or have failed to allow her to "fully participate in prison life or services." (Doc. 60 at 34.)

That is wrong. Plaintiff's expert has testified to the unreasonableness of Defendants' course of conduct in accommodating Plaintiff's gender dysphoria thus far (Doc. 61-2, Ettner Rep. ¶¶92, 133-35), and Plaintiff, her DAC provider, and Defendants' experts have all testified to Plaintiff's fixation on surgery, which has inhibited her rehabilitation. (Doc. 62-3, Zayre-Brown Dep. 153:7-20, Doc. 62-1, Boyd

Dep. 181:18-182:20; Doc. 62-25, Penn Dep. 210:18-211:4; Doc. 62-23, Bowman Dep. 89:20-91:5; 118:5-21.)

Further, as Plaintiff has already explained (Doc. 63 at 34-35), the record shows that her request for surgery was denied in a discriminatory manner—that is, because her disability is gender dysphoria. Denial of prescribed medical care for treatment of a disability, where like care is provided to others, constitutes discrimination in violation of the ADA. *See United States v. Georgia*, 546 U.S. 151, 157 (2006); *Lonergan v. Fla. Dept. of Corr.,* 623 Fed. App'x 990, 994 (11th Cir. 2015). As Plaintiff has detailed, gender-affirming surgery is medically necessary to treat her gender dysphoria. Defendants provide medically necessary care for other disabilities and admit that DAC provides surgeries that could qualify as gender-affirming surgery whenever indicated for conditions other than gender dysphoria, including genital reconstruction surgery. (Doc. 62-5, Campbell 30(b)(6) Dep. 144:2-19.). Defendants also use an entirely different approval system for gender dysphoria treatment than they do for other disabilities. (Doc. 63 at 6-10.) Dr. Campbell—DAC's chief medical officer—believes that as a general matter, surgery is never medically necessary to treat gender-dysphoria, and he has admitted to incorporating this position into his consideration of Plaintiff's request. (Doc. 61-2, Ettner Rep. App. H; Doc. 62-5, Campbell 30(b)(6) Dep. 215:2-15; Doc. 62-11 Campbell Dep. 21:17-25, 69:5-70:18, 74:13-76:10, 77:15-80:11.) Defendants have never approved gender-affirming surgery to treat gender dysphoria. (Doc. 62-11 Campbell Dep. 135:18-136:10.)

This evidence demonstrates that Plaintiff's disability—her gender dysphoria—is a but-for cause of Defendants' ongoing denial of gender-affirming surgery, and at the very least allows for a reasonable inference that her disability was the sole cause of the denial for purposes of the Rehab Act. Accordingly, this Court should deny Defendants' motion for summary judgment on Plaintiff's ADA and Rehabilitation Act claims, and grant summary judgment for Plaintiff on her ADA claim.[5]

CONCLUSION

The vast evidentiary record before the Court overwhelmingly favors Plaintiff and would preclude a reasonable finder of fact from ruling in favor of Defendants. Therefore, Defendants' motion for summary judgment should be denied. Instead, Plaintiff's motion for partial summary judgment should be granted.

Respectfully submitted this 19th day of October 2023.

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[5] Though the requirements the two statutes impose are largely identical, Courts have held that the "solely by reason of" language in the Rehab Act imposes a higher burden of causation than the ADA. The ADA requires only that the disability be one of the multiple causes of the discrimination. *See Baird ex rel. Baird v. Rose,* 192 F.3d 462, 468-69 (4th Cir. 1999).

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2023, I electronically filed the foregoing document using the ECF system which will send notification of such filing to all counsel of record.

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