

CASE NO. 18-14096-HH

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

REIYN KEOHANE,

Plaintiff-Appellee,

v.

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida
District Court No. 4:16-cv-00511- MW-CAS

**BRIEF OF *AMICI CURIAE*
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ON BEHALF OF
PLAINTIFF-APPELLEE REIYN KEOHANE**

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Keohane v. Florida Department of Corrections

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 26.1-3, the undersigned *Amici Curiae* (“*Amici*”) adopt the Certificate of Interested Persons (“CIP”) contained in Defendant-Appellant’s brief and supplement as follows:

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TRANScending Barriers

Appeal No. 18-14096-H

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Keohane v. Florida Department of Corrections

(Amicus Curiae in Support of Plaintiff-Appellee)

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Amici Curiae certify that none of the *Amici Curiae* have any parent corporation, none are publicly held corporations and no person or entity owns 10% or more of any *Amici Curiae's* stock. The undersigned will enter this information into the web-based CIP contemporaneous with the filing of this CIP and Corporate Disclosure Statement.

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici are non-profit civil rights and legal services organizations dedicated to eradicating discrimination against transgender people. *Amici* are committed to ensuring that correctional facilities fulfill their constitutional obligations to provide incarcerated transgender people and other inmates with adequate medical and mental health care, and accordingly have an interest in this case. *Amici* submit this brief pursuant to Federal Rules of Appellate Procedure 29 and 32 and Eleventh Circuit Rule 29.1, through their counsel, who authored this brief in its entirety without financial support from any other person or entity.

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal was founded in 1973 and has offices in California, New York, Illinois, Texas, Georgia, and Washington, D.C. Lambda Legal has appeared as counsel in the following cases on behalf of incarcerated transgender people: *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015) (reversing dismissal of a transgender prisoner’s complaint alleging that denial of gender-confirming surgery constituted

¹ None of the parties to this case nor their counsel authored this brief in whole or in part. No person or entity other than *Amici Curiae* contributed money to fund preparation or submission of this brief.

cruel and unusual punishment in violation of the 8th Amendment); *Fields v. Smith*, 712 F. Supp. 2d 830 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011) (challenging Wisconsin statute that barred treatment for gender dysphoria to transgender inmates); and *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764 (E.D. Mo. Feb. 9, 2018) (finding denial of hormone therapy based on a blanket rule, rather than an individualized medical determination, constitutes deliberate indifference in violation of the 8th Amendment). Lambda Legal is counsel for *Amici*.

The Center for Constitutional Rights (“CCR”) is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases on behalf of individuals impacted by arbitrary and discriminatory criminal justice policies, including policies that disproportionately impact LGBTQI communities of color and policies that violate the Eighth Amendment’s prohibition against cruel and unusual punishment and cause significant harm to people in prison. CCR successfully mounted a challenge regarding the use of solitary confinement in prisons and jails in its class action *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal 2009). CCR is also counsel for *Amici*.

Black and Pink (“B&P”) is a national volunteer organization made up of currently and formerly incarcerated LGBTQI and gender non-conforming people, as well as community members who support them. B&P has chapters in Boise, Boston, Chicago, New Orleans, New York City, Providence, San Francisco, Seattle, and Southwest Ohio.

Florida Institutional Legal Services Project of Florida Legal Services (the “FILS Project”) is a non-profit public interest organization that advocates to challenge unconstitutional conditions in Florida’s prisons, jails and juvenile detention facilities concerning the rights of LGBTQ persons, the use of solitary confinement, racial disparities, and access to medical and mental healthcare, disability rights, and sexual abuse. Our advocacy on behalf of transgender prisoners includes, for example, *Kothmann v. Rosario*, 558 F. App’x 907 (11th Cir. 2014) (holding that the law was clearly established that intentionally refusing to provide accepted, medically necessary hormone treatment for Gender Identity Disorder, the precursor diagnosis for gender dysphoria constitutes deliberate indifference to a serious medical need and violates the 8th Amendment).

Freedom Overground Corp. (“Freedom Overground”) is a grass-roots, non-profit organization that uplifts and supports the transgender and gender non-conforming (“TGNC”) incarcerated community. Freedom Overground’s programs are structured around improving the life expectancy and quality of life for TGNC

people by working to ensure their dignity and safety while they are incarcerated. The organization is led by trans and formerly incarcerated advocates who use their lived experiences to guide educational activities, engage the public on TGNC incarceration issues, and facilitate programs that support mental health to reduce the impact of Incarceration PTSD on returning citizens. Since 2016, Freedom Overground has supported dozens of incarcerated and returning TGNC citizens with health care, mental health, education, and gender-related services.

GLBTQ Legal Advocates & Defenders (“GLAD”) is a legal rights organization that seeks equal justice for all persons under the law, regardless of their sexual orientation, gender identity, or HIV/AIDS status. Since 1978, GLAD has worked in New England and nationally through strategic litigation, public policy advocacy, and education. GLAD is lead counsel in *Doe v. Massachusetts Department of Correction*, 1:17-cv-12255-RGS (D. Mass 2017), which held that failing to provide adequate treatment for gender dysphoria to transgender persons behind bars can constitute a violation of the Americans with Disabilities Act.

The National Center for Lesbian Rights (“NCLR”) is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their

families in cases across the country involving constitutional, civil, and criminal rights. NCLR is lead counsel in *Edmo v. Idaho Department of Correction*, 1:17-cv-00151-BLW, 2018 WL 6571203 (D. Idaho Dec. 13, 2018) which ordered corrections officials to provide gender-confirmation surgery and other forms of gender dysphoria treatment to a transgender woman in state custody.

The National Center for Transgender Equality (“NCTE”) is a non-profit legal organization devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. Since 2003, NCTE has been engaged in educating legislators, policymakers, and the public, and advocating for laws and policies that promote the health, safety, and equality of transgender people. NCTE also has been involved in efforts to implement the Prison Rape Elimination Act (“PREA”) and to address the vulnerability of transgender people in confinement settings.

Southern Poverty Law Center (“SPLC”) is a non-profit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. SPLC was counsel in *Diamond v. Owens*, 5:15-cv-50-MTT (M.D. Ga. 2015) (ending the Georgia Department of Corrections’ policy of denying hormone therapy to transgender inmates on a blanket basis).

TRANScending Barriers is a Georgia-based, trans-led, non-profit organization whose mission is to empower the transgender and gender non-conforming community through community organizing with leadership building, advocacy, and direct services so that lives can be changed and a community uplifted.

Transgender Law Center (“TLC”) is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming (“TGNC”) people alive, thriving, and fighting for liberation. TLC was counsel in *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Cal. 2015), which ordered the State of California to provide medically-necessary gender-confirmation surgery to an incarcerated transgender woman, and *Quine v. Beard*, No. 3:14-cv-02726-JST (N.D. Cal. 2014), which required corrections officials to furnish access to gender-affirming clothing, commissary items, and surgery.

STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that Defendant-Appellant the Florida Department of Corrections’ (“FDC”) treatment of Plaintiff-Appellee Keohane’s gender dysphoria violates the Eighth Amendment’s prohibition on cruel and unusual punishment.

2. Whether the district court erred in finding that FDC failed to satisfy its burden under the voluntary-cessation doctrine.
3. Whether the district court failed to give effect to some requirements of the Prison Litigation Reform Act.

SUMMARY OF THE ARGUMENT

This appeal presents an important constitutional and civil rights issue for the Eleventh Circuit: whether a state Department of Corrections' denial of medically necessary treatment for gender dysphoria, including access to hormone therapy and clothing and grooming standards consistent with one's gender identity, violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Amici* receive hundreds of requests for assistance from incarcerated transgender people who have been denied care, including numerous individuals who attempted suicide, self-harm, or surgical self-treatment after being barred from and at times punished for attempting to socially transition while in custody, or who have had their grievances ignored outright by departments of corrections—leaving the court system as their only means to vindicate their constitutional rights to care.

Amici elevate the voices and experiences of incarcerated transgender people to aid the Court in understanding how the denial of treatment for gender dysphoria, including social transition, directly harms transgender people and inflicts psychological and physical suffering in violation of the U.S. Constitution.

Amici urge this Court to affirm the District Court’s conclusion that Defendant-Appellant FDC showed deliberate indifference to Plaintiff-Appellee Reilyn Keohane’s serious medical need for treatment of gender dysphoria by denying her hormone therapy and care related to her social transition.

ARGUMENT

I. Incarcerated Transgender People Have a Constitutional Right to Medically Necessary Treatment for Gender Dysphoria

A. Background on Incarcerated Transgender People in the United States

Transgender people are individuals whose gender identity and internal sense of self differ from the sex they were assigned at birth.² Gender dysphoria—the medical condition which characterizes this “incongruence between one’s experienced/expressed gender and assigned gender” has been recognized as a serious condition by medical professionals and associations from across the globe.³ Gender

² World Prof’l Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, & Gender Nonconforming People* at 97 (7th ed. 2011) (“WPATH Standards”), <https://www.wpath.org/publications/soc>

³ *Id.* at 1.; *see also* World Health Org., *International Classification of Diseases and Related Health Problems* (11th ed. 2018), <https://icd.who.int/browse11/l-m/en> (using the term “gender incongruence”); Am. Med. Ass’n House of Delegates, *Resolution 122 (A-08)* (2008), <http://www.imatyfa.org/assets/ama122.pdf>; Am. Psychological Ass’n, *Policy Statement on Transgender, Gender Identity and Gender Expression Nondiscrimination* (2009), <https://www.apa.org/about/policy/transgender.aspx>; Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (“DSM-V”); National Commission on Correctional Healthcare, *Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings* (2015) (“NCCH Trans Healthcare

dysphoria, left untreated, causes clinically significant distress—including depression, anxiety, and suicide ideation—which has also led to its inclusion in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders.⁴

Although just 0.6% of the adult U.S. population—about 1.4 million individuals—identify as transgender, transgender individuals are significantly overrepresented in prisons and jails because of systemic discrimination against them.⁵ Studies have shown that one out of six (or 16%) of transgender people have been incarcerated at some during their lives—a rate that skyrockets to 47% among black transgender people.⁶ A 2015 study polling 28,000 transgender Americans also revealed that one in ten (9%) black transgender women and nearly 2% of all transgender people polled had been incarcerated in the previous year—five to ten

Policy”), <https://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care>.

⁴ DSM-V, *supra*, at 451.

⁵ Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, Williams Institute 3 (2016.); Nat’l Ctr. for Transgender Equality, *LGBTQ People Behind Bars* 5 (2018) (noting transgender individuals report being incarcerated at twice the rate of the general population).

⁶ Mara Keisling et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality & National Gay and Lesbian Task Force 163 (2011).

times the incarceration rate of the general population.⁷

Research conducted over the past two decades has shown that bias and discrimination in housing, employment, education, and policing cumulatively lead transgender individuals to enter the criminal justice system at disproportionate rates.⁸ Once incarcerated, the provision of medical care for gender dysphoria often falls woefully short of Constitutional requirements, as courts in the Eleventh Circuit have repeatedly determined.⁹

Accessing the full spectrum of medically necessary care—including the ability to express one’s gender through grooming and dress—can be life saving for

⁷ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat’l Ctr. for Transgender Equality at 190 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

⁸ See, e.g., Ctr. for Am. Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People of Color* (2016), <http://www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf>; Christy Mallory et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, Williams Institute (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf>; Amnesty Int’l, *Stonewalled: Police Abuse and Misconduct Against LGBT People in the U.S.* (2005), <https://www.amnesty.org/en/documents/AMR51/122/2005/en/>.

⁹ See Section I, *infra* (collecting cases). See also Black & Pink, *Coming Out of Concrete Closets: A Report on Black & Pink’s National LGBTQ Survey* (2015), www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015.pdf; Lambda Legal, *Protected and Served?* (2012), <https://www.lambdalegal.org/protected-and-served>.

incarcerated transgender people.¹⁰ In contrast, transgender people who are not provided adequate care for gender dysphoria can experience immense physical and mental suffering, commit or contemplate suicide, and engage in compulsive acts of self-harm and attempted self-surgery such as self-castration among transgender women, and forcible removal of the breasts in the case of transgender men.¹¹

B. There is No Gender Dysphoria Exception to the Eighth Amendment’s Prohibition on Cruel and Unusual Punishment

The Eighth Amendment guarantees incarcerated persons the right to receive medical care, and establishes that deliberately ignoring that right constitutes cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Brown v. Plata*, 563 U.S. 493, 511 (2011) (“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.”); *McElligott v. Foley*, 182 F.3d 1248 (11th Cir. 1999) (describing this doctrine as well-settled); *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (“It is thus clear that prisoners are guaranteed the right under the eighth amendment to be free from deliberate indifference by correctional institutions to their serious physical or psychological needs.”).

This guarantee includes an incarcerated transgender person’s right to treatment for gender dysphoria, which constitutes a serious medical need under the

¹⁰ *See* Section II, *infra* (detailing inmate experiences in depth).

¹¹ *Id.*

Eighth Amendment. Statement of Interest of the United States at 17, ECF No. 29, *Diamond v. Owens*, 5:15-cv-50-MTT (M.D. Ga. 2015) (“Diamond SOI”); *accord Diamond v. Owens*, 131 F. Supp. 3d 1346, 1371–75 (M.D. Ga. 2015) (sustaining transgender woman’s Eighth Amendment healthcare claim against Georgia); *Kothmann*, 558 F. App’x at 912 (describing the constitutional right to gender dysphoria care behind bars as well-settled); *De’lonta v. Johnson*, 708 F.3d 520, 525–26 (4th Cir. 2013) (providing “some treatment” for gender dysphoria instead of complete treatment can constitute an Eighth Amendment violation); *Fields v. Smith*, 653 F.3d 550, 554–59 (7th Cir. 2011) (barring state from restricting the provision of gender-dysphoria care behind bars); *Phillips v. Mich. Dep’t of Corr.*, 932 F.2d 969 (6th Cir. 1991) (same); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1195 (N.D. Cal. 2015) (ordering state to provide transgender inmate gender dysphoria care including gender-confirmation surgery); *Edmo v. Idaho Dep’t of Corr.*, 1:17-CV-00151-BLW, 2018 WL 6571203, **16–19 (D. Idaho Dec. 13, 2018) (same).

The World Professional Association for Transgender Health’s Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (the “WPATH Standards”) provide the authoritative treatment protocol for gender dysphoria including in the prison context.¹² *See, e.g., Diamond*, 131 F. Supp.

¹² WPATH Standards, *supra* n.2, at 67 (confirming applicability in incarcerated settings); NCCH Trans Healthcare Policy, *supra* n.2 (recognizing that medical and surgical care for transgender prisoners should follow the WPATH Standards).

3d at 1372–73; Diamond SOI at 5–6, n.6; *De'lonta*, 708 F.3d at 522–23; *Fields*, 653 F.3d at 553; *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. 2012). See also *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1289 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011) (affirming that “statements of WPATH are accepted in the medical community”).

C. Social Transition is Medically Necessary Treatment for Gender Dysphoria in Prisons

According to the WPATH Standards, the accepted course of treatment for gender dysphoria typically involves hormone therapy to feminize or masculinize the body; changes in gender expression, grooming, and dress to affirm one’s gender identity (referred to herein as “social transition”); and surgery to change primary and/or secondary sex characteristics where medically indicated.¹³ Left untreated, gender dysphoria causes clinically significant physical and mental impairments, including depression, suicidality, and the impulse to engage in self-castration and other forms of self-treatment.¹⁴

Courts have repeatedly affirmed that transgender persons have a right to

¹³ WPATH Standards, *supra* n.2, at 9-10; Diamond SOI at 8 (describing as the “accepted course” of medical treatment for gender dysphoria). Psychotherapy can also play a beneficial role, but is not considered sufficient treatment alone. See Third Expert Decl. of Dr. Randi C. Ettner ¶ 17, *Diamond v. Owens*, 5:15-cv-50-MTT, ECF No. 66-2 (M.D. Ga. Aug. 26, 2015) (“3d Ettner Decl.”).

¹⁴ See Section I-A, *supra*; see also First Expert Decl. of Dr. Randi C. Ettner ¶¶ 13-33, *Diamond v. Owens*, 5:15-cv-50-MTT, ECF No. 2-1 (M.D. Ga. Feb. 20, 2015) (collecting additional sources).

gender-dysphoria treatment—including social transition—in incarcerated settings. For instance, in *Konitzer v. Frank*, Donna Dawn Konitzer, a transgender woman, sought access to female clothing and undergarments, the use of a female name and pronouns, the use of hair removal products, and feminine makeup products, as part of treatment for gender dysphoria. 711 F. Supp. 2d 874, 908 (E.D. Wis. 2010). In denying Defendant’s motion for summary judgment, the district court found that modest makeup, women’s’ undergarments, facial hair remover, and hair growth stimulators were arguably medically necessary aspects of social transition related to gender dysphoria care. *Id.* at 908–13.

Additionally, in *Hicklin v. Precynthe*, Jessica Hicklin, a transgender woman incarcerated in Missouri, sued after she was denied constitutionally adequate medical treatment for her gender dysphoria, including permanent hair removal and access to gender-affirming canteen items. No. 4:16-CV-01357-NCC, 2018 WL 806764, at *1 (E.D. Mo. Feb. 9, 2018). In granting her motion for preliminary injunction, the court found Hicklin was “likely to succeed on the merits as to her Eighth Amendment claim that Defendants were deliberately indifferent by failing to provide her with hormone therapy, ‘gender-affirming’ canteen items, and permanent hair removal.” *Id.* at *13. The district court also held that “gender-affirming” canteen items and permanent hair removal are not merely cosmetic treatments but, instead, medically necessary treatments to address the serious medical condition of gender

dysphoria. *Id.* at *12.

Because social transition including access to commissary items and grooming standards is medically necessary treatment for gender dysphoria, the failure to provide such treatment “constitutes cruel and unusual punishment under the Eighth Amendment.” Diamond SOI at 17; *accord*, *Soneeya*, 851 F. Supp. 2d at 246–50 (striking ban on laser hair removal and gender-confirmation surgery pursuant to the Eighth Amendment, even though other forms of treatment including hormone therapy were available); *Alexander v. Weiner*, 841 F. Supp. 2d 486, 493–95 (D. Mass. 2012) (denying hair removal treatment to a transgender woman stated a constitutional violation); *Konitzer*, 711 F. Supp. 2d at 909 (denying incarcerated transgender people access to gender-affirming undergarments, commissary items (including makeup), and grooming products can violate the Eighth Amendment); *Hicklin*, 2018 WL 806764 at *11–13 (same).

II. Incarcerated Transgender People in the Eleventh Circuit Have an Acute Need for Constitutionally Adequate Treatment for Gender Dysphoria

The acute suffering imposed by denials of medically necessary transition-related care is evident from the *Amici*’s own legal help lines. Since 2016 when this case was initiated, *Amici* have received hundreds of requests for assistance from incarcerated transgender people nationwide nationwide—including from Georgia, Alabama, and Florida—demonstrating the dire need. For instance, *Amici* TLC received 280 healthcare-related requests from transgender prisoners, while *Amici*

Lambda Legal and SPLC collectively received 205 such requests during this three-year period.¹⁵ *Amici* the FILS Project also received 26 requests for assistance from Florida alone, demonstrating that transgender people other than Plaintiff-Appellee Reilyn Keohane have faced challenges accessing gender dysphoria care within FDC.

Though policies on gender dysphoria treatment exist in Eleventh Circuit states other than Florida, inconsistent implementation has led to severe health consequences for much of the incarcerated transgender population. For instance, while Alabama ostensibly allows special commissary orders for prisoners with gender dysphoria, some transgender women have been unable to obtain makeup other than foundation, and have had their hair forcibly cut to look like a man's, as detailed below.¹⁶ Incarcerated transgender people in Georgia have endured forced haircuts and have been disciplined for wearing makeup, despite the Department's policy that "[c]urrent, accepted standards of care" will be referenced in treating transgender inmates.¹⁷

Amici provide the following stories of real-life experience of current and

¹⁵ Intake statistics on file with Counsel for *Amici*.

¹⁶ See ADC Admin. Reg. No. 637, Gender Dysphoria, at 6, <http://www.doc.state.al.us/docs/AdminRegs/AR637.pdf>.

¹⁷ See GDC Standard Operating Proc. No. 507.04.68 at 1 (effective Apr. 7, 2015). A copy of this policy is on file with Counsel for *Amici*, though it is unclear whether the policy remains in effect today. See <https://www.powerdms.com/public/GADOC> (linking several policies but not 507.04.68).

formerly incarcerated transgender people from within the Eleventh Circuit to aid the Court in understanding the dire and urgent need:

A. Florida¹⁸

Susan, a 66-year old transgender woman incarcerated within FDC, has faced numerous obstacles accessing healthcare related to social transition. As she explains, “I haven’t been able to fully express myself as a woman, which has caused much anxiety, stress, and depression as my appearance conflicts with who I am.”¹⁹ To abate her anguish, Susan fashions panties for herself and vigorously removes all body hair from her underarms and legs in an “attempt to maintain (with difficulty and in conflict with current FDC policy) as feminine an appearance as possible.”²⁰ Natalia, another transgender woman in FDC custody, reports “constantly being targeted by officers because I view myself as female,” enduring humiliating searches by officers “to see if I’m wearing panties.”²¹

Despite the persistent threat of discipline, Vicky, a transgender woman, “routinely violate[s] Department rules to maintain gender presentation consistent with [her] gender identity”—including by making panties and meticulously plucking

¹⁸ Individuals referenced in this section have been given pseudonyms for purposes of confidentiality and to prevent reprisal.

¹⁹ Materials on file with Counsel for *Amici*.

²⁰ *Id.*

²¹ *Id.*

her body hair.²² She is resigned to the discipline she receives because, in her words, being denied treatment for gender dysphoria has left her suicidal, hopeless, and pushes her “closer every day to the abyss,” adding:

The agony the dysphoria engenders on a daily basis is too excruciating. For me the quality of life triumphs any quantity of days, and if I cannot live consistent with my identity as a woman then I chose not to live, as the essence of my being will have been eviscerated.²³

Vicky is not alone in that feeling: a transgender woman housed in FDC’s Everglades Correctional Institution reportedly took her own life after being denied full treatment for her gender dysphoria.²⁴ Other transgender Floridians who have been denied comprehensive gender dysphoria treatment behind bars have castrated themselves as a form of surgical self-treatment. For instance, a transgender woman named Aisha removed both of her testicles in 2015 after being “extremely traumatiz[ed]” by the restrictions FDC placed on her gender expression, including her clothing and hair.²⁵

B. Georgia

Despite having a good policy on gender dysphoria on the books, transgender people incarcerated in the Georgia Department of Corrections (“GDC”) have also

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

languished when it comes to social transition care, leading to a rash of suicides, self-harm, and self-surgery attempts, including cases where inmates have attempted to castrate themselves (in the case of transgender women) and forcibly remove their breasts (in the case of transgender men).²⁶ Ashley Diamond, a transgender rights activist who made national headlines in 2015 when her lawsuit against GDC made hormone therapy widely available across the state,, can speak to these deprivations firsthand.²⁷ GDC refused to provide Ashley comprehensive treatment for her gender dysphoria while her lawsuit was pending, causing Ashley extreme mental anguish until her release.²⁸ As Ashley stated poignantly:

Even though I have received some hormone therapy since initiating my lawsuit against GDC, my gender dysphoria continues to worsen because I am being denied a necessary component of my medical care—the ability to express my gender. . . . Receiving hormone therapy while being denied the ability to express my female gender is the cruelest form of torture I can imagine. *It intensifies my gender dysphoria and creates mental anguish and physical distress by communicating to me that my entire existence is wrong.* . . . This treatment is counter to the Standards of Care and medically accepted norms, and intensifies my gender dysphoria symptoms by *making me feel*

²⁶ Materials on file with Counsel for *Amici*.

²⁷ See Deborah Sontag, *Georgia Says It Will Allow Hormones for Transgender Inmates*, N.Y. Times, Apr. 9, 2015, <https://www.nytimes.com/2015/04/10/us/georgia-says-it-will-allow-hormones-for-transgender-inmate.html>.

²⁸ Ashley Diamond Decl., *Diamond v. Owens*, 5:15-cv-50-MTT (M.D. Ga. 2015), ECF No. 66-1 (Aug. 26, 2015); see also 3d Ettner Decl., *supra* (explaining the role of social transition).

*ashamed, degraded, and less than human.*²⁹

Ashley Diamond's claim that GDC showed deliberate indifference to her Eighth Amendment healthcare rights was sustained in a published judicial decision. *See Diamond*, 131 F. Supp. 3d at 1372–73. Yet, because Ashley Diamond's request for injunctive relief was mooted by her release, transgender people across GDC continue to suffer deprivations when it comes to accessing gender dysphoria care.³⁰ In particular, incarcerated transgender people complain of being denied the ability to express their gender, verbally abused and addressed using incorrect pronouns by staff, subjected to forced shaving (in the case of transgender men) and haircuts (in the case of transgender women), and routinely denied access to gender-affirming undergarments and commissary items such as makeup or chest binders.³¹

One such individual is Robbin Amanda Bayse,³² a transgender woman who was diagnosed with gender dysphoria during the pendency of Ms. Diamond's lawsuit.³³ Even though Robbin is currently receiving hormone therapy, Georgia prison officials have repeatedly attempted to suppress her gender expression—actions which exacerbate her dysphoria and have led to a host of damaging side-

²⁹ Diamond Decl., *supra*, ¶¶ 4, 15–16.

³⁰ Materials on file with Counsel for *Amici*.

³¹ *Id.*

³² Robbin Amanda is a chosen name, not the name under which Ms. Bayse was incarcerated.

³³ Materials on file with Counsel for *Amici*.

effects, including mental decompensation, self-harm, and self-surgery attempts.³⁴

For example, after GDC officials seized her makeup as contraband, Robbin attempted to castrate herself twice within a three-month period, including on New Years' Eve of 2016.³⁵ Desperate to present herself in a more feminine manner, Robbin began to fashion makeup out of colored pencils and chalk.³⁶ After an officer ordered her to "take that shit off [her] face," Robbin stopped eating and became suicidal.³⁷ "The pain I have been through at the hands of GDC staff, and the pain of being trapped in the wrong body," she explained, were too much for her to bear.³⁸

Today, despite living under constant threat of reprisal and discipline, Robbin continues to express her femininity in any way possible, including by growing out her hair and wearing makeshift makeup, because it is the only thing that relieves her gnawing sense of dysphoria.³⁹ She goes to extreme ends to do so. After recently being told to remove her makeup, Robbin used a sharp object to carve thin, arched

³⁴ *Id.*

³⁵ Materials on file with Counsel for *Amici*. Lipstick, lip gloss, eye makeup, and pressed powder are authorized items for prisoners in Georgia's facilities for non-transgender women, but are considered contraband in "male" prisons that house women like Robbin. See GDOC SOP 206.01 Attach. 1 & 3, <https://www.powerdms.com/public/GADOC/documents/106000>, <https://www.powerdms.com/public/GADOC/documents/105998>.

³⁶ Materials on file with Counsel for *Amici*.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

eyebrows directly into her forehead.⁴⁰ As her gender dysphoria compounded, Robbin also stopped eating, losing upwards of 40 pounds.⁴¹ Robbin recently attempted self-castration again on Christmas Day 2018.⁴²

Reflecting on her anguish, Robbin explains: “They think that just giving me hormones I’m ok . . . I’m not. I’m tired of living a lie . . . I want the world to see me as who I am.”⁴³ Being able to express one’s authentic gender is the crux of what it means to have gender dysphoria, and for Robbin, it is as necessary as breathing. Being punished for her expressions of femininity which are, in effect, the symptoms of her gender dysphoria, tests Robbin’s ability to survive. “I’m going to die in here,” Robbin says, “I know that. I understand that. But let me be complete.”⁴⁴

In public court filings, Angelica Corporan, another transgender woman in GDC custody, reports that she has faced similarly agonizing experiences attempting to express her gender. In May 2017, Angelica alleges that she was handcuffed while corrections officers forcibly cut her hair, leaving her scalp and face bleeding.⁴⁵ Angelica’s lawsuit contends that growing her hair in a feminine style is medically

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Corporan v. Williams*, No. 7:17-cv-124 (M.D. Ga.), ECF 7 at 5 (Nov. 9, 2017).

necessary treatment for her gender dysphoria under the WPATH Standards.⁴⁶ She filed a grievance alleging that prison officials were not following the WPATH Standards in treating her dysphoria.⁴⁷ The grievance was denied and, in addition to the forced shaving, Angelica was issued a disciplinary report and sent to “the hole” (solitary confinement).⁴⁸ “The cruelty of it all [w]recked me,” she wrote.⁴⁹

Reflecting on the incident, Angelica noted that “the mental and emotional pain it caused [were] enough to push me into suicidal thoughts.”⁵⁰ “Keeping myself from self-harm was a challenge that I lost at times,” she states, admitting that she engaged in self-harming behaviors to cope.⁵¹ Nearly a year later, her experience of being forcibly shaved still brought Angelica to tears.⁵² “Every lock of hair that fell was my very best friend,” she explained.⁵³

Zahara Green, a transgender rights activist who was incarcerated in GDC for two years, also suffered greatly after being denied the ability to socially transition. As Zahara explains:

GDC took away my gender affirming care and cut my hair, characteristics I deemed essential to my gender identity. I was stripped

⁴⁶ *Corporan*, ECF 1 at 5 (July 6, 2017), ECF 22-1 at 3 (Feb. 22, 2018).

⁴⁷ *Corporan*, ECF 39-6 at 2 (Sept. 4, 2018).

⁴⁸ *Corporan*, ECF 22-1 at 4 (Feb. 22, 2018).

⁴⁹ *Corporan*, ECF 22 at 4 (Feb. 22, 2018).

⁵⁰ *Id.* at 3.

⁵¹ *Id.*

⁵² *Id.* at 4.

⁵³ *Id.*

to the fiber of my being. Every time I saw my reflection, the wind was knocked out of me. The irreparable harm this caused is forever scarred into my memory, and it drove me into darkness, where I was pushed to take antidepressants daily in hopes of coping with the crippling depression.

GDC forced me to conform to their idea of gender norms while flaunting their blatant disrespect and disregard for my identity and appearance, in which other inmates observed this display of disrespect and disregard leading to multiple forms of abuse from other inmates during my incarceration.⁵⁴

Access to gender-affirming commissary items and grooming standards is also crucially important care for the dozens of incarcerated transgender men in Georgia. For example, Ky Peterson has languished within GDC, despite gaining access to hormone therapy following Ashley Diamond's court victory.⁵⁵ GDC has severely restricted Ky's ability to express his male gender, including by preventing him from growing a beard or wearing his hair in a short more masculine style.⁵⁶ When Ky begged his facility to give him access to comprehensive health care, he was simply laughed at and called an abomination and a freak by corrections officials including the Warden.⁵⁷ In an act of desperation, Ky applied chemicals to his scalp to burn off all his hair, and entreated inmates who worked in the prison's salon to cut his hair

⁵⁴ Statement on file with Counsel for *Amici*.

⁵⁵ Materials on file with Counsel for *Amici*.

⁵⁶ *Id.*

⁵⁷ *Id.*

using scissors.⁵⁸ GDC responded by charging the inmate who gave Ky his haircut with felony assault, and throwing Ky into solitary confinement and telling Ky to “go kill yourself.”⁵⁹ Ky attempted suicide shortly thereafter.⁶⁰

C. Alabama⁶¹

Transgender inmates within the Alabama Department of Corrections (“ADC”) can also attest to the importance of comprehensive gender dysphoria care. For instance, although Melissa Morgan Toole⁶² is presently receiving hormone therapy and has been issued a bra and panties, prison officials continue to restrict her gender expression.⁶³ She is currently in segregation, where she has been “forced to grow a beard” because she is unable to regularly shave.⁶⁴ Officers recently taunted her saying, “you ain’t no female, you’re a *man*.”⁶⁵ These interactions make Melissa Morgan feel “hated, and like I have some kind of disease,” and like she “will never be complete or understood.”⁶⁶ “I can testify to the depression and the desire to either

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Individuals referenced in this section have been given pseudonyms for purposes of confidentiality and to prevent reprisal

⁶² Melissa Morgan is a chosen name, not the name under which Ms. Toole was incarcerated.

⁶³ Materials on file with Counsel for *Amici*.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

self-mutilate (castrate) or self-terminate that comes from . . . not being able to present myself as who I am,” she reports.⁶⁷

Shana,⁶⁸ another transgender woman receiving hormone therapy in ADC custody, has also experienced ongoing gender dysphoria and anguish due to restrictions placed on her gender expression.⁶⁹ Shana reports that correctional officers at one time referred to her using female pronouns in a mocking tone as a form of disrespect.⁷⁰ The officers now make a point to use *male* pronouns, apparently for the same reason.⁷¹ When she complained about the treatment, her PREA Compliance Manager—the person in charge of inmates’ complaints alleging sexual abuse and harassment—told Shana that she would quit her job before she referred to Shana in female terms.⁷² Shana also filed grievances requesting permanent body hair removal, modified grooming standards, and accommodations to get “more in line with my gender identity” in order to reduce her dysphoria.⁷³ In response, Shana was sent to the Warden’s office, where she was subjected to a verbal browbeating and

⁶⁷ *Id.*

⁶⁸ Shana is a pseudonym provided for confidentiality and to prevent reprisal within prison.

⁶⁹ Materials on file with Counsel for *Amici*.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

told she was fighting a losing battle.⁷⁴ Unfortunately, Shana’s story is not unique: many incarcerated transgender people who seek relief through the grievance process are ignored or face outright resistance to their requests.⁷⁵

III. The United States and Many State Departments of Corrections Recognize Social Transition as Medically Necessary Treatment for Gender Dysphoria

The Federal Bureau of Prisons has already recognized that social transition is medically necessary care for gender dysphoria. The current Federal Bureau of Prisons Clinical Guidance for Medical Management of Transgender Inmates states, “Present-day treatment approaches involve supporting individuals in modifying their lifestyle—and if indicated, physically modifying their body—to better match the gender with which they psychologically identify.”⁷⁶

In addition, providing this medically necessary care is a routine part of operations in prisons across the country. A survey of policies in effect at state Departments of Corrections nationwide found at least twenty jurisdictions have specific protocols for transgender inmates.⁷⁷ Some, like Georgia and Alabama, inconsistently apply those policies, leaving transgender inmates with gender

⁷⁴ *Id.*

⁷⁵ Summarizing requests for assistance on file with Counsel for *Amici*.

⁷⁶ Federal Bureau of Prisons Clinical Guidance for Medical Management of Transgender Inmates (2016), https://www.bop.gov/resources/pdfs/trans_guide_dec_2016.pdf.

⁷⁷ Materials on file with Counsel for *Amici*.

dysphoria at heightened risk of receiving inadequate care.⁷⁸ Yet the widespread adoption of policies emphasizing social transition indicate increasing understanding that treatment for gender dysphoria can be provided in prisons without compromising other facility interests like security and efficiency. For instance, Pennsylvania has special commissary lists for transgender men and woman that furnish them access to makeup and gender-affirming undergarments.⁷⁹ Maryland permits inmates with gender dysphoria to purchase commissary items from both male- and female- commissary lists.⁸⁰ The Federal Bureau of Prisons also specifically provides for gender-affirming undergarments.⁸¹ The National Institute of Corrections has likewise emphasized that inmates may be permitted to “express their gender identity in matters of grooming.”⁸² Such policies confirm that social

⁷⁸ See Section II, *supra*.

⁷⁹ Penn. Dep’t of Corr. Commissary Lists, <https://www.cor.pa.gov/Inmates/Pages/Commissary-Catalogs.aspx> (last visited Jan. 8, 2019)

⁸⁰ Md. Executive Directive OPS.131.0001 “Identification, Treatment and Correctional Management of an Inmate Diagnosed with Gender Dysphoria” at 12, <http://itcd.dpscs.state.md.us/PIA/ShowFile.aspx?fileID=1467>; *see also* Mich. Policy Directive 04.06.184 “Gender Dysphoria” at 2, https://www.michigan.gov/documents/corrections/04_06_184_576651_7.pdf (making gender-affirming commissary items available under treatment plans).

⁸¹ Bureau of Prisons Program Statement 5200.04 “Transgender Offender Manual” at 12, <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf>; *see also* Cal. Code Regs. tit. 15 § 3030(c) (2018); Del. Policy No. 11-E-14 at 8, https://doc.delaware.gov/assets/documents/policies/policy_11-E-14.pdf.

⁸² Brenda V. Smith et al., *Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings*, U.S. Dep’t of Justice Nat’l Institute of Corrections, Chapter 3 (2d ed. 2014), <http://info.nicic.gov/lgbti/?q=node/7>.

transition is medically necessary treatment for gender dysphoria, and that departments of corrections like FDC are able to provide such care.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court affirm the District Court judgment finding that Defendant-Appellant violated the Eighth Amendment by denying Plaintiff-Appellee medically necessary treatment for gender dysphoria including treatment related to social transition.

Dated: January 9, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(b)(4)-(5) and 32(g)(1), Counsel for *Amici Curiae* certify that this brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and 29(b)(4)-(5) because it contains 6497 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I, Richard Saenz, hereby certify that this brief *Amici Curiae* was filed and served on January 9, 2019 on all counsel of record electronically via CM/ECF. Hard copies of this brief will also be mailed to the Clerk of the Court pursuant to Federal Rule of Appellate Procedure 32 and Eleventh Circuit Rule 32-4.

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