No. ______

In the Supreme Court of the United States

THE IDAHO DEPARTMENT OF CORRECTION; HENRY ATENCIO, in his official capacity as Director of the IDOC; JEFF ZMUDA, in his official capacity as Deputy Director of the IDOC; AL RAMIREZ, in his official capacity as Warden of the Idaho State Correctional Institution; and SCOTT ELIASON, M.D.,
Petitioners,

v.

ADREE EDMO, aka Mason Edmo,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 6, 2020

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QUESTIONS PRESENTED

The Ninth Circuit became the first circuit in the nation to conclude that the Eighth Amendment mandates the provision of sex reassignment surgery when it held that prison psychiatrist Dr. Scott Eliason inflicted cruel and unusual punishment on transgender inmate Adree Edmo by recommending in good faith that Edmo's gender dysphoria be treated conservatively with hormone therapy and counseling, and not sex reassignment surgery. The panel reached this result by adopting an advocacy group's treatment guidelines as constitutional requirements. The panel then held that Dr. Eliason was deliberately indifferent because he deviated from those guidelines; it failed to properly consider the subjective reasoning underlying his decision. The district court has ordered Idaho to provide Edmo's surgery, which, if it occurs, will be the second such surgery ever performed on an inmate in this country. Ten circuit judges disagreed with the panel's decision and would have granted the petition for rehearing *en banc*. The questions presented are as follows:

1. Whether the Ninth Circuit erred in concluding that the guidelines set by an advocacy organization constitute the constitutional minima for inmate medical care under the Eighth Amendment, when the First, Fifth, Tenth, and Eleventh Circuits have all concluded that they do not.

2. Whether the Ninth Circuit's holding that a prison health care provider's individualized medical decision was unreasonable and therefore constituted deliberate indifference, regardless of his subjective

reasoning, conflicts with *Estelle v. Gambl*e, 429 U.S. 97 (1976) (holding that mere negligence does not establish deliberate indifference), and *Farmer v. Brennan*, 511 U.S. 825 (1994) (holding the provider must have known of and disregarded a substantial risk of serious harm to find deliberate indifference).

PARTIES TO THE PROCEEDING BELOW

The Idaho Department of Correction ("IDOC"); Henry Atencio, in his official capacity as Director of the IDOC; Jeff Zmuda, in his official capacity as Deputy Director of the IDOC; Al Ramirez, in his official capacity as Warden of the Idaho State Correctional Institution; and Scott Eliason, M.D., were the appellants in the proceeding below and are the Petitioners here. Corizon, Inc., Murray Young, Catherine Whinnery, Howard Keith Yordy, Richard Craig, and Rona Siegert were also appellants in the proceeding below. Adree Edmo was the appellee in the court below and is the Respondent here.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):

Adree Edmo (a/k/a/ Mason Edmo) vs. Idaho Department of Correction, et al., and Corizon, Inc., et al., No. 19-35552 (Judgment has not been entered)

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING BELOW iii

DIRECTLY RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES. vii

OPINIONS BELOW. 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

INTRODUCTION. 1

STATEMENT OF THE CASE 3

A. Dr. Eliason treated Edmo for gender dysphoria in prison; in 2016, he made the medical decision not to recommend sex reassignment surgery for Edmo.. 3

B. Edmo filed a lawsuit alleging her treatment for gender dysphoria was constitutionally inadequate 8

C. The district court issued an injunction ordering Idaho to provide Edmo with sex reassignment surgery 11

D. The Ninth Circuit panel affirmed the injunction issued by the district court 12

E. The Ninth Circuit denied Defendants' request for rehearing *en banc*, despite the disagreement of ten circuit judges 15

REASONS FOR GRANTING THE PETITION . . . 17

I. Certiorari is warranted on the First Question Presented. 17

A. The Ninth Circuit's adoption of guidelines set by an advocacy organization creates a circuit split with the First, Fifth, Tenth, and Eleventh Circuits 17

B. The Ninth Circuit's adoption of guidelines set by an advocacy organization conflicts with this Court's precedents 22

II. Certiorari is warranted on the Second Question Presented. 24

A. The Ninth Circuit's deliberate indifference analysis conflicts with *Estelle v. Gamble* by imposing liability for what could, at most, be mere medical negligence 25

B. The Ninth Circuit's deliberate indifference analysis conflicts with *Farmer v. Brennan* by ignoring the subjective component of deliberate indifference. 30

C. The Questions Presented involve recurring issues of national importance . 33

CONCLUSION. 38

APPENDIX

Appendix A Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the Ninth Circuit (February 10, 2020) . . . . App. 1

Appendix B Per Curiam Opinion in the United States Court of Appeals for the Ninth Circuit (August 23, 2019) . . . . App. 53

Appendix C Order in the United States District Court for the District of Idaho (May 31, 2019). . . . . App. 147

Appendix D Findings of Fact, Conclusions of Law, and Order in the United States District Court for the District of Idaho (December 13, 2018) . . . . App. 152

TABLE OF AUTHORITIES

Cases

Armstrong v. Mid-Level Prac. John B. Connally Unit,
No. SA-18-CV-00677-XR, 2020 WL 230887
(W.D. Tex. Jan. 15, 2020) 36

Atkins v. Parker,
412 F. Supp. 3d 761 (M.D. Tenn. 2019) 35

Avilez v. Barr,
No. 19-cv-08296-CRB, 2020 WL 570987
(N.D. Cal. Feb. 5, 2020) 36

Bell v. Wolfish,
441 U.S. 520 (1979). 17, 22, 23, 24, 35

Campbell v. Kallas,
936 F.3d 536 (7th Cir. 2019). 19

Clark v. LeBlanc,
No. 3:19-00512-BAJ-RLB, 2019 WL 5085425
(M.D. La. Oct. 10, 2019) 36

Corr. Servs. Corp. v. Malesko,
534 U.S. 61 (2001). 26

Dana v. Tewalt,
No. 1:18-cv-00298-DCN, 2020 WL 1545786
(D. Idaho Apr. 1, 2020) 36

Druley v. Patton,
601 Fed. App'x 632 (10th Cir. 2015). 21, 33

Estelle v. Gamble,
429 U.S. 97 (1976). *passim*

Farmer v. Brennan,
511 U.S. 825 (1994). . . . . *passim*

Gibson v. Collier,
920 F.3d 212 (5th Cir. 2019),
cert. denied, 140 S. Ct. 653 (2019) . . 19, 23, 27, 37

Gonzales v. Cal. Dep't of Corrs. & Rehab.,
No. 1:19-cv-01467BAM (PC), 2020 WL 1847491
(E.D. Cal. Apr. 13, 2020). 36

Hope v. Pelzer,
536 U.S. 730 (2002). 25

Jackson v. Kallas,
No. 17-cv-350-bbc, 2020 WL 1139769
(W.D. Wis. Mar. 9, 2020) 36

Keohane v. Florida Department of Corrections Secretary,
952 F.3d 1257 (11th Cir. 2020). 21, 22, 29, 35

Keohane v. Jones,
328 F. Supp. 3d 1288 (N.D. Fla. 2018). 22

Kosilek v. Spencer,
774 F.3d 63 (1st Cir. 2014),
cert. denied, Kosilek v. O'Brien, 135 S. Ct. 2059
(2015). . . . . *passim*

Lamb v. Norwood,
262 F. Supp. 3d (D. Kan. 2017) 20, 21

Lamb v. Norwood,
899 F.3d 1159 (10th Cir. 2018),
cert. denied, 140 S. Ct. 252 (2019) 21, 29, 37

Minneci v. Pollard,
565 U.S. 118 (2012) 25

Monroe v. Baldwin,
No. 18-CV-00156-NJR-MAB, 2019 WL 6918474
(S.D. Ill. Dec. 19, 2019) 36

Monroe v. Meeks,
No. 18-cv-00156-NJR, 2020 WL 1048770
(S.D. Ill. Mar. 4, 2020) 36

Murillo v. Godfrey,
No. 2:18-cv-02342-JGB-JC, 2020 WL 1139811
(C.D. Cal. Mar. 9, 2020) 36

Ortiz v. Jordan,
562 U.S. 180 (2011) 31

Porter v. Crow,
No. 18-CV-0472-JED-FHM, 2020 WL620284
(N.D. Okla. Feb. 10, 2020) 36

Rhodes v. Chapman,
452 U.S. 337 (1981) 35

Woodcock v. Correct Care Solutions, LLC,
No. 3:16-cv-00096-GFVT, 2020 WL 556391
(E.D. Ky. Feb. 4, 2020) 35

Constitutional Provisions

U.S. Const. amend. VIII . . . . *passim*

Statutes

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 8

Other Authorities

William Byne et al., *Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder*, 41 Archives of Sexual Behav. 759 (2012) 9, 24

California murder convict becomes first U.S. inmate to have state-funded sex reassignment surgery, L.A. TIMES (Jan. 6, 2017), https://www.latimes.com/local/lanow/la-me-ln-inmate-sex-reassignment-20170106-story.html 4, 5

CMS, DECISION MEMO FOR GENDER DYSPHORIA AND GENDER REASSIGNMENT SURGERY (Aug. 30, 2016), https://go.cms.gov/36yMrxX 9, 23, 37

Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 Cal. L. Rev. 839 (1969) 34

WPATH, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (7th ed. 2011) . . . . *passim*

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 935 F.3d 757 (9th Cir. 2019) and is reprinted in the Appendix to the Petition ("App.") at 53-146. The initial opinion of the district court is reported at 358 F. Supp. 3d 1103 (D. Idaho 2018) and reprinted at App. 152-202. The district court's clarifying order on limited remand from the Ninth Circuit is unreported but available at 2019 WL 2319527 and is reprinted at App. 147-51.

JURISDICTION

The Court of Appeals entered its judgment in this matter on August 23, 2019 and denied rehearing *en banc* on February 10, 2020. App. 1-5, 53-146. Ten circuit judges would have granted rehearing *en banc*. *Id.* 5-52. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves U.S. Constitution Amendment VIII, which states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

The Ninth Circuit held that prison psychiatrist Dr. Scott Eliason violated the Eighth Amendment's prohibition against cruel and unusual punishments when he recommended treating inmate Adree Edmo's gender dysphoria with hormone therapy and counseling but not sex reassignment surgery, a

controversial and uncommon procedure that, at the relevant time, had never before been performed in a prison setting and, to date, has only been performed once in a prison setting. The Ninth Circuit is the first circuit in the nation to reach this conclusion, which it did by adopting the guidelines of an advocacy group as the constitutional minima for the treatment of gender dysphoria, creating a conflict with the First, Fifth, Tenth, and Eleventh Circuits.

The Ninth Circuit's decision also directly conflicts with this Court's binding precedent. In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court clearly established that a provider's mere negligence in treatment decisions does not violate the Eighth Amendment. But the Ninth Circuit applied a mere negligence standard to determine whether there was a constitutional violation here. And in *Farmer v. Brennan*, 511 U.S. 825 (1994), this Court clarified that a provider only acts with deliberate indifference to serious medical needs, the standard required to violate the Eighth Amendment, if he subjectively knows of and disregards an excessive risk to inmate health or safety. Yet the Ninth Circuit only considered Dr. Eliason's reasoning in the context of finding his treatment decision unreasonable. The Ninth Circuit failed to evaluate whether Dr. Eliason knew his treatment decision was medically unacceptable, nor did it consider that Dr. Eliason was balancing the significant risk of sex reassignment surgery to Edmo with his informed treatment decision.

If left unchecked, the Ninth Circuit's decision threatens to have an immediate detrimental and

destabilizing effect on prisons nationwide. It diminishes this Court's deliberate indifference standard into a negligence determination that is controlled by the goals of advocacy groups and that places the federal judiciary in the role of a prison medical review committee, with grave consequences.

Ten Ninth Circuit judges would have granted Petitioners' request for rehearing *en banc* based on the issues discussed in this petition. The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

A. Dr. Eliason treated Edmo for gender dysphoria in prison; in 2016, he made the medical decision not to recommend sex reassignment surgery for Edmo.

Dr. Scott Eliason is a board-certified psychiatrist who is experienced and trained in treating prisoners, including those with gender dysphoria. ER[1] 797 (Tr. 401:4-25), ER 802 (Tr. 406:3-6, 16-21), ER 816 (Tr. 420:8-13). He is the Regional Psychiatric Director for Corizon, a company that provides certain medical services for inmates in Idaho Department of Correction ("IDOC") custody. App. 61 n.1; ER 797 (Tr. 401:3-4).

In 2012, Dr. Eliason was assigned a new patient, Adree Edmo (who was then known as Mason Edmo), who had recently pled guilty to sexually assaulting a sleeping 15 year-old boy. App. 73; ER 1513. Well before

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[1] All citations to "ER" are to the Excerpt of Record filed in the Ninth Circuit by the Defendants-Appellants.

her 2012 incarceration, Edmo suffered from abuse, trauma, and profound mental illness and was repeatedly non-compliant with treatment. App. 75; ER 880, 882, 884-86. Edmo attempted suicide at least twice in the years prior to her arrest. App. 75; ER 602 (Tr. 206:14-16).

Dr. Eliason diagnosed Edmo with gender identity disorder, now known as gender dysphoria, in June 2012. App. 73. Shortly after, prison doctors started Edmo on hormone therapy. *Id*. 74. She now has the same circulating hormones and secondary sexual characteristics as an adult female. *Id*. 74-75. The hormones have "alleviate[ed] her gender dysphoria to some extent." *Id*. 74.

Dr. Eliason and other prison providers also recommended that Edmo participate in mental health treatment and counseling to reduce her gender-related dysphoria and co-existing mental health conditions. *Id*. 75, 182. However, Edmo repeatedly refused to attend treatment and declined to fully participate in counseling, which the district court found "troubling." *Id*.

Dr. Eliason met with Edmo regularly following her diagnosis. ER 811 (Tr. 415:4-12). In April 2016, Dr. Eliason evaluated Edmo for sex reassignment surgery. App. 76. At that time, no prisoner in the United States had ever received such a surgery.[2]

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[2] As of the 2018 evidentiary hearing, only one other prisoner in the U.S. had received sex reassignment surgery. ER 208 (Tr. 514:9-11), ER 1088 (Tr. 110:9-12); *California murder convict becomes first*

Dr. Eliason noted that Edmo reported she was "doing alright." App. 76. Edmo reported that hormone therapy had improved her dysphoria, but she remained frustrated by her genitalia; she had attempted self-castration months earlier. *Id.* Dr. Eliason correctly indicated in his charting that "Medical Necessity for Sexual Reassignment Surgery is not very well defined and is constantly shifting." *Id.* 77; ER 1730. He noted that one indicator of medical necessity for sex reassignment surgery was "severe and devastating dysphoria that is primarily due to genitals[.]" App. 76. Dr. Eliason "did not see significant dysphoria" at his April 2016 evaluation of Edmo. *Id.* 76-77. "[I]nstead, she 'looked pleasant and had a good mood.'" *Id.* 77. Dr. Eliason also spoke to prison staff, who confirmed Edmo had "animated affect and no observed distress." *Id.* Dr. Eliason was concerned, in the absence of more severe distress, about the risks of pursuing the most aggressive—and permanent—gender dysphoria treatment: surgery. ER 1730; ER 189 (Tr. 495:10-12); ER 826-28 (Tr. 430:22-432:11); ER 229 (Tr. 535:1-13).

There were two additional reasons underlying Dr. Eliason's decision.[3] App. 78, 179. First, Dr. Eliason concluded that Edmo's separate mental health conditions—including major depressive disorder and

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U.S. inmate to have state-funded sex reassignment surgery, L.A. TIMES (Jan. 6, 2017), https://www.latimes.com/local/lanow/la-me-ln-inmate-sex-reassignment-20170106-story.html.

[3] The Ninth Circuit suggested that these were post-hoc explanations, but the district court made no such finding and only determined that Dr. Eliason did not follow the advocacy group's treatment guidelines. App. 118, 180.

substance abuse—were not adequately controlled. *Id.* 78. Dr. Eliason was concerned about Edmo's ability to cope with the stressful process of the life-changing surgery and transition. ER 180-81 (Tr. 486:5-487:11); ER 237 (Tr. 543:1-11); ER 827-28 (Tr. 431:3-432:11).

Second, Dr. Eliason was concerned that Edmo had not yet had an opportunity to live as a woman in an out-of-prison social setting. App. 78. Dr. Eliason was aware of reports of high suicide rates for postoperative patients and concerned that Edmo might be at a greater risk of suicide given the potential lack of support from family, friends, and her social network during her transition. ER 827-28 (Tr. 431:3-432:11). He knew Edmo would be parole eligible in 2016 and would soon have the opportunity to live as a woman in her community before undergoing the irreversible procedure; Dr. Eliason was gravely concerned that "it was not doing Ms. Edmo any service to rush through getting gender reassignment surgery in that current social situation."[4] *Id.*; ER 180 (Tr. 486:6-13), ER 827 (Tr. 431:3-6); App. 179.

Prior to making a final decision, Dr. Eliason researched how entities like Medicare and Medicaid handled sex reassignment surgery and he sought input from providers and mental health colleagues with different backgrounds and viewpoints. ER 821 (Tr.

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[4] Edmo has not been granted parole due to her refusal to complete Sex Offender Treatment Programming and significant disciplinary history, which includes multiple offenses for assault, theft, and sexual contact. ER 3149-51; ER 1113 (Tr. 135:12-18); ER 3401. Edmo will complete her current sentence in July 2021 and will be released at that time. ER 626 (Tr. 230:2-10); ER 3401.

425:2-5), ER 823 (Tr. 427:20-24). Dr. Eliason staffed the evaluation with Dr. Jeremy Stoddart (for another psychiatric viewpoint) and Dr. Murray Young, Corizon's Regional Medical Director (for a medical perspective), as well as Jeremy Clark, an IDOC clinical supervisor and member of the World Professional Association for Transgender Health ("WPATH") (for a WPATH perspective). App. 77; ER 821 (Tr. 425:7-14); ER 717 (Tr. 321:17-22). He also presented the evaluation to the prison Management and Treatment Committee ("MTC"), a multi-disciplinary team of medical, mental health, and security professionals that regularly discusses how best to meet the unique needs of prisoners diagnosed with gender dysphoria. App. 78. There was universal agreement with Dr. Eliason's treatment plan. *Id*. 77-78.

Ultimately, Dr. Eliason decided not to refer Edmo for sex reassignment surgery and to maintain the treatment that had already been helpful for Edmo, including hormone therapy and counseling. *Id*. He left the door open to revisit the decision. *Id*. To deter any future self-castration attempts, Dr. Eliason explained to Edmo the importance of having intact genitals for any future sex reassignment surgery. ER 818 (Tr. 422:21-24).

By September 2016, Dr. Eliason had stopped treating Edmo because she had moved off the Behavioral Health Unit. ER 798-99 (Tr. 402:22-403:5), ER 811 (Tr. 415:6-12), ER 186 (Tr. 492:21-493:3); ER 1759. Edmo continued to be monitored by the MTC and treated by other providers and clinicians. ER 186-87 (Tr. 492:21-493:3). Dr. Eliason reviewed her case in the

context of the MTC meetings, but he was never asked to reevaluate her for sex reassignment surgery. ER 187 (Tr. 493:3-9).

Edmo attempted self-castration for a second time in December 2016. App. 79. Dr. Eliason felt Edmo's self-castration attempts were reflective of her poor coping response to stressors, such as discipline, rather than indicia of an immediate need for sex reassignment surgery. ER 180-81 (Tr. 486:22-487:11). His informed medical opinion continues to be that if sex reassignment surgery is ever indicated, doing so "on the outside [of prison] would best suit Ms. Edmo." ER 180 (Tr. 486:12-13).

B. Edmo filed a lawsuit alleging her treatment for gender dysphoria was constitutionally inadequate.

About a year after the 2016 evaluation, Edmo filed suit under 42 U.S.C. § 1983 against Dr. Eliason, the IDOC, Corizon, and several other prison medical providers and staff, alleging that the denial of sex reassignment surgery had, among other things, violated her Eighth Amendment right to be free from cruel and unusual punishment. App. 80. She filed a motion for a preliminary injunction to compel the provision of sex reassignment surgery. *Id.* 81.

In October 2018, following four months of discovery, the district court held an evidentiary hearing on the requested preliminary injunction. *Id.* Dr. Eliason, Clinician Clark, and Edmo testified at the hearing. *Id.* 82. Four expert witnesses also testified at the hearing. *Id.*

Edmo's experts were Dr. Randi Ettner, a psychologist, and Dr. Ryan Gorton, an emergency room physician. *Id*. 82, 85. Both doctors are heavily involved in WPATH. *Id*. 82, 86.

WPATH is an advocacy organization dedicated to "developing best practices and supportive policies worldwide that promote health, research, education, respect, dignity, and equality for transsexual, transgender, and gender nonconforming people in all cultural settings." ER 2938 (WPATH, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 1 (7th ed. 2011) ("Standards")). WPATH promulgates guidelines, which it calls "Standards of Care" (referred to herein as "Standards"), that provide treatment recommendations.[5] *See* App. 66, 158.

The term "Standards of Care" is a misnomer. The WPATH Standards do not reflect accepted standards of care in the medical community. The Centers for Medicare and Medicaid Services ("CMS") have refused to adopt them as controlling and at least one medical group has expressed concern regarding their scientific underpinnings. CMS, DECISION MEMO FOR GENDER DYSPHORIA AND GENDER REASSIGNMENT SURGERY (Aug. 30, 2016), https://go.cms.gov/36yMrxX; *see also* ER 544-81 (William Byne et al., *Report of the American Psychiatric Association Task Force on Treatment of*

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[5] While Petitioners use the shorthand "Standards" to refer to the WPATH Standards to be consistent with the terminology used by the courts of appeal, they do not concede that the WPATH Standards equate with a medically-accepted and endorsed standard of care.

Gender Identity Disorder, 41 Archives of Sexual Behav. 759, 783 (2012)). Even WPATH itself states that the Standards are intended to be "flexible clinical guidelines" from which providers may deviate. App. 68.

The WPATH Standards set forth six suggested criteria for male-to-female sex reassignment surgery:

(1) persistent, well documented gender dysphoria;
(2) capacity to make a fully informed decision and to consent for treatment;
(3) age of majority. . .;
(4) if significant medical or mental health concerns are present, they must be well controlled;
(5) 12 continuous months of hormone therapy as appropriate to the patient's gender goals; and
(6) 12 continuous months of living in a gender role that is congruent with their gender identity.

Id. 70-71 (quoting Standards at 60 (ER 2997)) (internal quotation marks omitted).

Dr. Ettner and Dr. Gorton testified that, in their opinions, Edmo needed sex reassignment surgery, in part, because she met the suggested criteria for sex reassignment surgery in the Standards and because she was unlikely to have further improvement in her gender dysphoria without surgery. *Id*. 83-87.

Defendants' experts were Dr. Keelin Garvey, M.D., the former Chief Psychiatrist of the Massachusetts

Department of Correction (MADOC) and Chair of its Gender Dysphoria Treatment Committee, and Dr. Joel Andrade, Ph.D., a clinical social worker who served as MADOC's Clinical Director and member of the same Gender Dysphoria Treatment Committee. *Id*. 88, 90.

Dr. Garvey and Dr. Andrade disagreed with Edmo's experts. Dr. Garvey testified that she did not regard the WPATH Standards as definitive treatment criteria, let alone reflective of medical consensus. ER 225-28 (Tr. 531:5-534:7). She testified the evidence underlying the Standards was not sufficiently developed, particularly as to the treatment of gender dysphoric prisoners. *Id.* Dr. Garvey opined Dr. Eliason had used "his clinical judgment to apply decision-making[.]" ER 221 (Tr. 527:5-7).

Both Dr. Garvey and Dr. Andrade agreed with Dr. Eliason that sex reassignment surgery was not appropriate for Edmo. App. 89-92. They raised concerns that she would have problems transitioning after surgery because her co-existing mental health concerns were not well controlled. *Id*. And they were concerned that she had not yet lived as a woman outside of prison, meaning that she did not yet know if she and her social network were ready for the post-surgery challenges. *Id*.

C. The district court issued an injunction ordering Idaho to provide Edmo with sex reassignment surgery.

The district court analyzed the evidence in the context of a motion for preliminary injunction. *See* App. 184-86.

In analyzing Edmo's likelihood of success on the merits, the district court first looked at whether sex reassignment surgery was medically necessary for Edmo. *Id.* 191-95. As a critical threshold issue, the district court found the WPATH Standards to be the standard of care for the treatment of gender dysphoria in incarcerated patients. *Id.* 191. Using the Standards as its touchstone, the district court found the State's experts "unconvincing" and gave their opinions "virtually no weight." *Id.* 191-95. The district court then found the "Defendants" as a whole had been deliberately indifferent to Edmo's medical needs (focusing on findings it felt suggested bias by IDOC and Corizon against providing sex reassignment surgery). *Id.* 195-97.

The district court never found or concluded that Dr. Eliason himself was deliberately indifferent, nor did it find that Dr. Eliason was not credible. *See id.* 156-200. The district court's only conclusion specific to deliberate indifference by Dr. Eliason was that, in the court's view, he "did not apply the WPATH criteria" or his evaluation "failed to accurately apply the WPATH" guidelines. *Id.* 195. The district court granted Edmo's motion for preliminary injunction and ordered Defendants to provide Edmo with sex reassignment surgery. *Id.* 201. In a footnote, the district court suggested it had "effectively converted" the evidentiary hearing into a final trial on the merits. *Id.* 185-86 n.1.

D. The Ninth Circuit panel affirmed the injunction issued by the district court.

The Defendants timely appealed the district court's decision to the Ninth Circuit. Before issuing its opinion,

the panel remanded the case to the district court on the limited question of whether the injunction was preliminary or permanent. *Id*. 147-48. In response, the district court issued an order stating it had granted permanent injunctive relief and that it had found Edmo succeeded on the merits of her Eighth Amendment claim. *Id*. 149-51.

Three months later, the Ninth Circuit panel issued its opinion affirming the district court's finding that Dr. Eliason violated Edmo's Eighth Amendment rights and the order instructing Idaho prison officials to provide Edmo with sex reassignment surgery. *Id*. 131-32, 145.[6]

The Ninth Circuit applied the following test to determine whether there was deliberate indifference: (1) whether "the course of treatment the [official] chose was medically unacceptable under the circumstances" and (2) whether "the [official] chose this course in conscious disregard of an excessive risk to the plaintiff's health." *Id*. 105-06.

To answer the first question, the Ninth Circuit affirmed the district court's expert credibility determinations, using compliance with the WPATH Standards as its touchstone. *Id*. 107-08, 111-16 ("the

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[6] The panel reversed and vacated the injunction as to all Defendants named in their individual capacities, other than Dr. Eliason, as there was insufficient evidence to conclude they were deliberately indifferent. App. 136. The panel affirmed the injunction against several IDOC officials named in their official capacities whom the panel held would be responsible for implementing the injunction. *Id*. 135-36.

district court did not err in crediting the opinions of Edmo's experts over those of the State because aspects of Dr. Garvey's and Dr. Andrade's opinions ran contrary to the established standards of care in the area of transgender health care—the WPATH Standards"). The panel approved the district court's decision to "credit[] the opinions of Edmo's experts" because it agreed their testimony was the most consistent with the WPATH Standards. *Id.* 111-16. And it refused to give any deference to the judgment of the prison doctors. *Id.* 106. With that baseline, the panel concluded the "credited expert testimony established that [sex reassignment surgery] is medically necessary to alleviate Edmo's gender dysphoria." *Id.* 116.

The panel then held that Dr. Eliason's decision not to recommend sex reassignment surgery was unreasonable because he "did not follow" or "reasonably deviate" from the WPATH Standards. *Id.* 117-21 ("Dr. Eliason did not follow accepted standards of care in the area of transgender health care . . . . [The criteria he applied bore] little resemblance to the widely accepted, evidence-based criteria set out in the WPATH's Standards . . . "; "Dr. Eliason's criteria . . . are so far afield from the WPATH standards that we cannot characterize his decision as a flexible application of or deviation from those standards."). The panel discounted the agreement of Dr. Stoddart, Dr. Young, and Clinician Clark and the MTC with Dr. Eliason's assessment because "general agreement in a medically unacceptable form of treatment does not somehow make it reasonable." *Id.* 121 n.18.

In applying the second part of its test—whether the treatment was chosen in conscious disregard to an excessive risk to Edmo's health—the panel held that Dr. Eliason was deliberately indifferent simply because he "knew . . . that Edmo had attempted to castrate herself" and "continued with Edmo's . . . treatment plan" and he knew of Edmo's second attempt at self-castration in December 2016 but did not "change his mind or the treatment plan regarding surgery." *Id.* 121-22. The panel did not discuss whether Dr. Eliason knew his treatment decision was medically unacceptable, nor did it consider that Dr. Eliason stopped being Edmo's treating physician prior to Edmo's second self-castration attempt. Further, the panel did not consider that Dr. Eliason took steps to avert the risk of self-castration, or that Dr. Eliason's treatment decision was the result of his effort to balance multiple risks to Edmo's well-being.

E. The Ninth Circuit denied Defendants' request for rehearing *en banc*, despite the disagreement of ten circuit judges.

The Defendants timely petitioned for rehearing *en banc*, but the Ninth Circuit denied the petition. *Id.* 5.

Judge O'Scannlain, joined by eight other judges, opined in a statement respecting the denial of rehearing *en banc* that the panel first erred in analyzing what it meant for medical treatment to be "unacceptable" under the Eighth Amendment by (1) defining "constitutionally acceptable medical care" by the "standards of one organization"; (2) adopting the guidelines of "a controversial self-described advocacy group that dresses ideological commitments as

evidence-based conclusions"; and (3) failing to recognize the case was one of "dueling experts." *Id.* 16. Even if this were not error, Judge O'Scannlain continued, the panel erred in its deliberate indifference inquiry by disregarding risks that Dr. Eliason addressed and by fixating on just one risk when Dr. Eliason made a considered treatment choice in a complex situation that he believed "would mitigate overall risk." *Id.* 30 (emphasis omitted). Judge O'Scannlain warned that the panel's approach had created a circuit split. *Id.* 32.

Judge Collins dissented from the denial of rehearing *en banc*, opining that the panel failed to apply this Court's binding precedent in *Estelle v. Gamble* by watering the analysis down to a "mere negligence" test. *Id.* 37-38.

Finally, Judge Bumatay, joined by five other judges in full and six in part, also dissented from rehearing *en banc*, and opined that Dr. Eliason's conduct was not a violation of the Eighth Amendment based on the text and original understanding of the Constitution because of the yet unproven, contested, and evolving nature of the WPATH Standards, the lack of medical consensus, and the particular circumstances of the case. *Id.* 38-47. Judge Bumatay further maintained that the panel's decision had departed from this Court's precedent by diluting the deliberate indifference standard to mere negligence and erasing the subjective component of the deliberate indifference standard through circular reasoning. *Id.* 47-52.

REASONS FOR GRANTING THE PETITION

I. Certiorari is warranted on the First Question Presented.

The Ninth Circuit elevated the WPATH Standards to constitutional canon and found Dr. Eliason deliberately indifferent merely because he did not adhere to the advocacy organization's guidelines. As Judge O'Scannlain, joined by eight other judges, identified, the Ninth Circuit's "novel approach . . . conflicts with every other circuit to consider the issue." App. 32. The Ninth Circuit's decision also conflicts with this Court's precedent, which established that the views of professional organizations and special interest groups do not set constitutional requirements for prison conditions. *See Bell v. Wolfish*, 441 U.S. 520 (1979). This Court should grant certiorari to resolve the circuit split and to issue a definitive answer to this important question.

A. The Ninth Circuit's adoption of guidelines set by an advocacy organization creates a circuit split with the First, Fifth, Tenth, and Eleventh Circuits.

Five courts of appeals have directly addressed the question of what constitutes cruel and unusual punishment in the context of gender dysphoria treatment in prison. Four of those courts, the First, Fifth, Tenth, and Eleventh Circuits, have rejected efforts to chain the determination of whether prison officials and providers acted with deliberate indifference to an inmate's serious medical needs to their adherence to the treatment guidelines set by the

advocacy organization WPATH and its predecessors. The Ninth Circuit stands alone.

1. As Judge O'Scannlain explained, the Ninth Circuit "enshrine[d] the WPATH Standards as an enforceable 'medical consensus,' effectively putting an ideologically driven private organization in control of every relationship between a doctor and a gender dysphoric prisoner within [the Ninth] circuit." App. 36. The Ninth Circuit held that prison psychiatrist Dr. Eliason was deliberately indifferent because, it concluded, Dr. Eliason's medical decision not to recommend sex reassignment surgery did not follow or "reasonably deviate" from the WPATH Standards. *Id.* 117-22. The Ninth Circuit reached its conclusion by affirming the district court's decision to discount any testimony that did not adhere to the WPATH Standards. *Id.* 108-17. To quote Judge O'Scannlain, "[b]y rejecting any expert not (in the court's view) appropriately deferential to WPATH, the district court and . . . the panel . . . effectively decided ab initio that only the WPATH Standards could constitute [constitutionally] . . . acceptable treatment."[7] App. 19-20.

[7] The panel incorrectly stated that the parties agreed that the appropriate benchmark for treatment of gender dysphoria was the WPATH Standards. *See* App. 61. Defendants never contended or admitted that prison medical providers were required to base their treatment decisions on the WPATH Standards. *See id.* 20 n.6 ("[B]efore the district court and before our court, the State clearly rejected the notion that any particular treatment criteria defines what is medically acceptable[.]"). In fact, Defendants presented evidence of significant deficiencies in the WPATH Standards. *See* ER 225-28 (Tr. 531:3-534:7), ER 544-81.

2. The Ninth Circuit's decision is in direct conflict with the decisions of the First, Fifth, Tenth, and Eleventh Circuits, which have declined to adopt the advocacy organization's guidelines as the constitutional minima for medical treatment under the Eighth Amendment.

Just months before the Ninth Circuit issued its decision, the Fifth Circuit held it could *never* be deliberate indifference to deny sex reassignment surgery as treatment for gender dysphoria. In *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 653 (2019), the Fifth Circuit rejected a transgender inmate's argument, which relied exclusively on the WPATH Standards, that prison doctors were deliberately indifferent when they denied the inmate's request for sex reassignment surgery. *Id.* at 218, 221-23. Unlike the Ninth Circuit, the Fifth Circuit refused to conclude the advocacy organization's guidelines were constitutional mandates, stating "the WPATH Standards . . . reflect not consensus, but merely one side in a sharply contested medical debate over sex reassignment surgery." *Id.* at 221. "The [Fifth Circuit] panel majority . . . wasn't prepared to accept the [WPATH] Standards as authoritative." *Campbell v. Kallas*, 936 F.3d 536, 547 n.3 (7th Cir. 2019) (citing *Gibson*, 920 F.3d at 221-24). The Ninth Circuit has acknowledged that "its decision is in tension" with the Fifth Circuit's decision. App. 125.

Similarly, in *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), *cert. denied*, *Kosilek v. O'Brien*, 135 S. Ct. 2059 (2015), the First Circuit rejected the argument that the "only constitutionally sufficient treatment

regimen [was] to adhere to the Standards of Care's [treatment] sequence in full, including the provision of [sex reassignment surgery]."[8] *Id.* at 86. There, a transgender inmate with gender dysphoria (then called gender identity disorder) was treated with conservative therapies, including mental health therapy and hormones, but she was denied sex reassignment surgery. *Id.* at 68-74. Like the district court here, the district court in *Kosilek* discounted the evidence of the providers who did not adhere to its interpretation of the WPATH Standards. *Id.* at 76-77, 81, 87-88. For example, the trial court refused to credit the prison's expert psychiatrist's testimony in large part because he did not "follow" the guidelines that preceded the WPATH Standards. *Id.* at 76-77, 81, 87-88. Unlike the Ninth Circuit, the First Circuit deemed this error, concluding that the district court put too much "weight" on the WPATH Standards and substituted its own beliefs for multiple medical experts. *Id.* at 87-88. The First Circuit ultimately "held that medically acceptable treatment of gender dysphoric prisoners is not synonymous with the demands of WPATH." App. 33.

The Tenth Circuit has also twice refused to adopt the WPATH Standards as constitutionally mandated. In *Lamb v. Norwood*, 262 F. Supp. 3d 1151, 1156-57 (D. Kan. 2017), an inmate claimed that prison medical

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[8] In *Kosilek*, the court was asked to apply an earlier version of the Standards issued by WPATH's predecessor, the Harry Benjamin International General Dysphoria Association. *See Kosilek*, 774 F.3d at 70 n.3. The treatment options in the earlier version of the Standards are essentially the same as the version of the WPATH Standards at issue here. *Id.* at 70 n.4; App. 68-69.

providers and officials violated "her Eighth Amendment rights by treating her in a manner that [fell] short of WPATH standards" and that she was entitled to a number of gender dysphoria treatments, including sex reassignment surgery. Contrary to this case, the district court concluded that the prison medical provider's medical judgment that weighed the costs and benefits of sex reassignment surgery against more conservative therapies precluded a finding of deliberate indifference, in spite of the provider's deviation from the WPATH Standards. *Id.* at 1157-59. The Tenth Circuit affirmed, implicitly adopting the district court's refusal to enshrine the WPATH Standards as constitutional minima. *See Lamb v. Norwood*, 899 F.3d 1159, 1163 (10th Cir. 2018), *cert. denied*, 140 S. Ct. 252 (2019). Moreover, three years prior, the Tenth Circuit, in an unpublished opinion, affirmed the district court's denial of a preliminary injunction sought by an inmate ordering the prison defendants to raise her hormone levels to the levels recommended by the WPATH Standards. *See Druley v. Patton*, 601 Fed. App'x 632, 633 (10th Cir. 2015). The Tenth Circuit concluded that simple deviation from the WPATH Standards, without more, was insufficient to even demonstrate a substantial likelihood of success on the merits of the deliberate indifference claim. *Id.* at 635.

Most recently, the Eleventh Circuit similarly refused to find that the WPATH Standards set the constitutional minima for medical care for transgender inmates. In *Keohane v. Florida Department of Corrections Secretary*, 952 F.3d 1257 (11th Cir. 2020), a transgender inmate diagnosed with gender dysphoria

sought social transitioning—"in particular, to wear long hair, makeup, and female undergarments." *Id.* at 1262. Just like the district court here, the district court in *Keohane* erroneously refused to credit medical testimony that did not follow the WPATH Standards. *See Keohane v. Jones*, 328 F. Supp. 3d 1288, 1312 (N.D. Fla. 2018). It found deliberate indifference, in part, because the prison did not apply the WPATH Standards. *Id.* at 1316. The Eleventh Circuit rejected the district court's reasoning, implicitly concluding that the failure to adhere to the WPATH Standards did not render the denial of sex reassignment surgery cruel and unusual punishment. *Keohane*, 952 F.3d at 1277, 1278 n.15. The dissent pointed out the split with the Ninth Circuit, citing the Ninth Circuit's decision for the proposition that other courts "have found" the WPATH Standards "authoritative for treating gender dysphoria in prison" and using the Ninth Circuit's decision to "highlight[] the ways the majority ha[d] gone wrong." *Id.* at 1296, 1300 (Wilson, J., dissenting) (citations omitted).

The above decisions demonstrate that a clear circuit split exists as to whether an advocacy organization's guidelines constitute constitutional mandates.

B. The Ninth Circuit's adoption of guidelines set by an advocacy organization conflicts with this Court's precedents.

The Ninth Circuit's decision to adopt the guidelines of an advocacy organization as the constitutional minima for prison medical care also conflicts with this Court's precedent. In *Bell v. Wolfish*, this Court refused to adopt the correctional standards issued by various

advocacy and special interest groups as constitutional requirements for the purposes of an Eighth Amendment challenge to the space provided to pretrial detainees. 441 U.S. at 543 n.27. "[R]ather, they establish goals recommended by the organization in question." *Id.*

This Court's reasoning compels the conclusion that the WPATH Standards similarly do not establish the constitutional requirements for the treatment of inmates with gender dysphoria. WPATH is "an advocacy group for the transgendered" and the Standards are "not a politically neutral document." *Kosilek*, 774 F.3d at 78. As the Fifth and First Circuits have recognized, "the WPATH Standards . . . reflect not consensus, but merely one side in a sharply contested medical debate over sex reassignment surgery." *Gibson*, 920 F.3d at 221 (discussing the First Circuit's conclusions in *Kosilek*). Reflective of this, CMS declined to adopt the WPATH Standards due to inadequate scientific backing. CMS, DECISION MEMO FOR GENDER DYSPHORIA AND GENDER REASSIGNMENT SURGERY (Aug. 30, 2016), https://go.cms.gov/36yMrxX.

Judge O'Scannlain correctly identified that "[t]he pressure to be advocates appears to have won the day in the WPATH Standards' recommendations regarding institutionalized persons," as demonstrated by the fact that WPATH recommends sex reassignment surgery for inmates who have no experience living as their chosen gender outside of prison despite the "totally undeveloped" "medical knowledge about how such surgery might differ [for incarcerated persons]." App. 22. The evidentiary basis for the WPATH Standards is

insufficient to justify constitutionally mandated compliance. For example, the Standards "lack the evidence-based grading system that characterizes archetypal treatment guidelines[.]" *Id*. 23-24 (citing William Byne et al., *Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder*, 41 Archives of Sexual Behav. 759, 783 (2012) (concluding that "the level of evidence" supporting WPATH Standards' criteria for sex reassignment surgery "was generally low")).

This Court should grant certiorari to resolve the circuit split as to whether an advocacy group's aspirations for medical treatment set constitutional requirements for medical treatment in prison and to clarify that the principle established in *Bell* holds in the context of medical treatment for prisoners.

II. Certiorari is warranted on the Second Question Presented.

This Court should also grant certiorari because the Ninth Circuit's decision stands in direct defiance of *Estelle v. Gamble* and *Farmer v. Brennan*. *Estelle* definitively established that mere medical negligence cannot amount to deliberate indifference, and *Farmer* definitively established that deliberate indifference has a subjective component. The Ninth Circuit's decision contravenes both principles and therefore warrants review by this Court.

A. The Ninth Circuit's deliberate indifference analysis conflicts with *Estelle v. Gamble* by imposing liability for what could, at most, be mere medical negligence.

As Judge Bumatay, joined by six other judges, and Judge Collins identified in their dissents to the denial of rehearing *en banc*, the Ninth Circuit disregarded this Court's precedent in *Estelle* by watering down *Estelle*'s deliberate indifference standard into a "mere negligence" test. App. 37, 51. The Ninth Circuit's decision is squarely in conflict with *Estelle*.

1. In *Estelle*, the Court held that deliberate indifference by prison doctors in responding to the serious medical needs of prisoners was proscribed by the Eighth Amendment. *Estelle*, 429 U.S. at 104 (citation omitted). However, the Court held, "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." *Id.* at 106. The "inadvertent failure to provide adequate medical care" is not "an unnecessary and wanton infliction of pain" or "repugnant to the conscience of mankind." *Id.* at 105-06.

In the years since *Estelle* and later *Farmer v. Brennan* (discussed further below), this Court has repeatedly reaffirmed that mere negligence, inadvertence or good-faith error cannot establish deliberate indifference. *See Hope v. Pelzer*, 536 U.S. 730, 738 (2002); *Minneci v. Pollard*, 565 U.S. 118, 130 (2012) ("[T]o show an Eighth Amendment violation a prisoner must typically show that a defendant acted,

not just negligently, but with 'deliberate indifference.'" (Citation omitted.)); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 73 (2001) (discussing how the heightened deliberate indifference standard set by *Estelle* and *Farmer* "would make it considerably more difficult for respondent to prevail than on a theory of ordinary negligence").

The facts of the *Estelle* decision demonstrate how deliberate indifference differs from ordinary negligence. There, the inmate was treated for a back injury by multiple doctors and with multiple modalities. *Estelle*, 429 U.S. at 107. Yet, he contended additional treatment should have been provided and that his condition had worsened absent that treatment. *Id.* at 107; *id.* at 109 (Stevens, J., dissenting). The court of appeals agreed, concluding that additional testing could have led to an appropriate diagnosis and treatment. *Id.* at 107. But this Court disagreed, holding that "[a] medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most, it is medical malpractice[.]" *Id.* Whether additional "forms of treatment is indicated is a classic example of a matter of medical judgment." *Id.* Treatment decisions derived from an exercise of medical judgment do not amount to cruel and unusual punishment. *Id.*

2. Contrary to *Estelle*, the Ninth Circuit found deliberate indifference based solely on Dr. Eliason's decision not to recommend the course of treatment that the district court and the panel found preferable. App. 106-24. Dr. Eliason recommended treating Edmo with hormone therapy and counseling, but, based on his

medical judgment, Dr. Eliason did not recommend sex reassignment surgery. *Id.* 76-78, 176-79. At worst, Dr. Eliason made a mistaken judgment; *Estelle* teaches that this is not cruel and unusual punishment.

At the time of his 2016 evaluation, Dr. Eliason concluded in his chart note that the medical necessity for sex reassignment surgery was "not very well defined and [was] constantly shifting[.]"[9] *Id.* 77. He noted that hormone therapy had resulted in an improvement in Edmo's gender dysphoria and that she did not exhibit significant distress. *Id.* 76-77. He, joined by other clinicians and mental health staff, felt Edmo had other mental health conditions that were not well controlled and which were not sufficiently stabilized to handle the life-changing surgery. *Id.* 75, 78, 178. Given that Edmo would soon be parole eligible, Dr. Eliason strongly believed that it was in Edmo's best interests to wait until she had experience living as a woman outside of prison before deciding to undergo surgery. *Id.* 179; ER 827-28 (Tr. 431:3-432:11), ER 180 (Tr. 486:6-13). Dr. Eliason researched how other organizations handled the issue and consulted with multiple professionals with multiple backgrounds, who universally agreed with his assessment. ER 821 (Tr. 425:2-5), ER 823 (Tr. 427:20-24); App. 77-78, 177. Dr. Eliason's medical judgment was also supported by

[9] Sex reassignment surgery is so controversial and the medical necessity and efficacy of the procedure so disputed that the Fifth Circuit has held that the Eighth Amendment does not require the performance of the procedure in any circumstance. *Gibson*, 920 F.3d at 223; *see also Kosilek*, 774 F.3d at 79 (noting "the treatment of [gender dysphoria] [is] an evolving field, in which practitioners could reasonably differ in their preferred treatment methods").

expert testimony and studies. *See, e.g.*, ER 221 (Tr. 527:5-7).

In short, Dr. Eliason arrived at an individualized medical judgment that analyzed the risks inherent in the potential treatments available and decided that the conservative approach was most appropriate for Edmo's particular circumstances. He also took action to investigate the risk of self-harm by Edmo and took action to mitigate it. ER 818 (Tr. 422:21-24). Yet, because the courts found Dr. Eliason deviated from the controversial WPATH Standards, the Ninth Circuit affirmed the finding that Dr. Eliason was deliberately indifferent.

In so doing, the Ninth Circuit replicated the mistake from the *Estelle* decision. As Judge Collins recognized, the Ninth Circuit did just what *Estelle* proscribed: "by narrowly defining the range of 'medically acceptable' options that the court believe[d] a prison doctor may properly consider in a case such as this one, and by then inferring deliberate indifference from Dr. Eliason's failure to agree with that narrow range, the district court and the panel . . . applied standards that look much more like negligence than deliberate indifference." App. 37-38 (citation omitted). At bottom, the Ninth Circuit analyzed the reasonableness of Dr. Eliason's decision. This amounts to a negligence standard and is foreclosed by this Court's decision in *Estelle*.

That the Ninth Circuit actually applied a negligence standard is confirmed by the court's repeated express references to reasonableness. *See, e.g.*, App. 120 (Dr. Eliason did not "reasonably deviate from" the WPATH

Standards), 121 n.18 (the Ninth Circuit discounted the agreement of Dr. Stoddart, Dr. Young, Clinician Clark and the MTC with Dr. Eliason's assessment with the statement that "general agreement in a medically unacceptable form of treatment does not somehow make it *reasonable*" (emphasis added)), 129 n.19 ("By choosing to rely upon a medical opinion which a *reasonable person* would likely determine to be inferior, the prison officials took actions which may have amounted to . . . the unnecessary and wanton infliction of pain." (Emphasis added) (internal quotation marks omitted)).

The decisions of the First, Tenth, and Eleventh Circuits discussed above illustrate how grievously the Ninth Circuit deviated from this Court's precedent. These decisions adhered to *Estelle* by requiring more than just negligence to find deliberate indifference. As the First Circuit explained, "[t]he law is clear that where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of our court to 'second guess medical judgments' or to require that the [Department of Correction] adopt the more compassionate of two adequate options." *Kosilek*, 774 F.3d at 90 (citations omitted); *see also Keohane*, 952 F.3d at 1277-78 (holding that arguably subpar medical care provided to an inmate by prison providers who did not have particularized experience or training in treatment for gender dysphoria did not violate the Eighth Amendment); *Lamb*, 899 F.3d at 1162 (finding no deliberate indifference when the prison provider exercised his medical judgment to determine a course of treatment).

The Ninth Circuit's disregard of this Court's binding precedent in *Estelle* warrants the requested grant of certiorari.

B. The Ninth Circuit's deliberate indifference analysis conflicts with *Farmer v. Brennan* by ignoring the subjective component of deliberate indifference.

The Ninth Circuit's decision also squarely conflicts with the Court's seminal decision in *Farmer*, as multiple judges identified in the statement and dissents from the denial of rehearing *en banc*. App. 28-29, 48-50.

1. In *Farmer*, the Court clarified the subjective component of deliberate indifference: a prison official only acts with deliberate indifference when "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference.*" *Farmer*, 511 U.S. at 837 (emphasis added). The course of treatment must have been criminally reckless or worse. *Id.* at 839-40. Anything less, such as "an official's failure to alleviate a significant risk that he should have perceived but did not, . . . cannot under our cases be condemned as the infliction of punishment." *Id.* at 838.

For this reason, deliberate indifference cannot solely be "premised on obviousness or constructive notice." *Id.* at 841 (citation omitted). To support a finding of deliberate indifference based on an obvious risk, there must have been strong evidence suggestive of risk

available to the provider and the provider must have deliberately refused to confirm it. *Id.* at 842-43 n.8. "It is not enough merely to find that a reasonable person would have known, or that the defendant should have known[.]" *Id.*

This Court has affirmed that *Farmer*'s deliberate indifference standard is still good law. *See Ortiz v. Jordan*, 562 U.S. 180, 190 (2011) (restating *Farmer*'s articulation of the deliberate indifference standard and noting that *Farmer*'s deliberate indifference standard was not in controversy).

2. The deliberate indifference analysis that the Ninth Circuit employed plainly contradicts this binding precedent. As Judge Bumatay, joined by six other judges, identified, "the panel's analysis effectively erases the subjective deliberate indifference requirement with its circular reasoning." App. 50.

Neither the district court nor the panel examined whether Dr. Eliason subjectively knew he was making a medically unacceptable choice.[10] The district court's sole conclusion related to Dr. Eliason's subjective deliberate indifference was that Dr. Eliason failed to apply the WPATH criteria. *Id.* 195. Implicitly acknowledging the insufficiency of this analysis, the Ninth Circuit applied a different (also insufficient) analysis that analyzed Dr. Eliason's reasoning only in the context of concluding that Dr. Eliason made a subpar medical choice. *See id.* 117-22. The Ninth Circuit did not conclude that Dr. Eliason was

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[10] There is not a single explicit finding in the district court's opinion as to Dr. Eliason's state of mind. App. 195-97.

deliberately indifferent because he *knew* that the only appropriate treatment for Edmo was sex reassignment surgery, nor did it conclude that Dr. Eliason *deliberately avoided* that knowledge. *Id.* 121-22. "Such an approach is particularly troublesome because" it infers deliberate indifference "solely from a finding of a 'medically unacceptable' treatment." *Id.* 51.

Second, the Ninth Circuit concluded its analysis by finding that Dr. Eliason knew there was a risk of self-castration and dysphoria inherent in the course of treatment he had chosen. *Id.* 121-22. But as Judge O'Scannlain correctly pointed out, the Ninth Circuit fixated on just one risk when Dr. Eliason made a considered treatment choice in a complex situation that he believed "would mitigate overall risk." *Id.* 30. As discussed above, Dr. Eliason made an informed medical decision to opt for a more conservative approach to treating Edmo's gender dysphoria in light of Edmo's particular circumstances. As to the risk of self-castration, he considered this risk, he took steps to avert further self-castration attempts, and he continues to believe Edmo, as a whole person, would be best served by undergoing surgery after her release.

Despite the Ninth Circuit's fig-leaf citation to *Farmer*, the standard the Ninth Circuit actually applied was, at most, the very "should have known" negligence standard that this Court explicitly rejected in *Farmer*. *Farmer*, 511 U.S. at 843 n.8. As Judge Bumatay warned, "the ultimate effect of the panel's analysis is to dilute the heightened, subjective culpability required for deliberate indifference, into

mere negligence[.]" App. 51-52 (first citing *Farmer*, 511 U.S. at 839-40; then citing *Estelle*, 429 U.S. at 105-06).

Again, the decisions by other circuits that have adhered to this Court's precedent demonstrate how badly the Ninth Circuit erred. As the First Circuit has aptly stated, "a later court decision—ruling that the prison [officials] were wrong in their estimation of the treatment's reasonableness—does not somehow convert that choice into one exhibiting the sort of obstinacy and disregard required to find deliberate indifference." *Kosilek*, 774 F.3d at 92 (citation omitted); *see also Druley*, 601 Fed. App'x. at 635 (rejecting a gender dysphoric inmate's argument that her constitutional rights would be violated if she was not treated with the hormone levels suggested by WPATH because the inmate presented no evidence that the defendants "failed to consider the WPATH's flexible guidelines, failed to make an informed judgment as to the hormone levels appropriate for her, or otherwise deliberately ignored her serious medical needs").

The Ninth Circuit's disregard of this Court's binding precedent in *Farmer* separately warrants review.

C. The Questions Presented involve recurring issues of national importance.

This petition raises questions of vital importance to prison systems, medical and mental health providers, administrators, governments, and inmates nationwide.

Under the Ninth Circuit's interpretation, the views of advocacy organizations and judicial post-hoc determinations of optimal treatment are enough to establish an Eighth Amendment violation. This

amounts to a deeply troubling expansion of the Eighth Amendment's Cruel and Unusual Punishments clause. "[T]he primary concern of the drafters [of the Eighth Amendment] was to proscribe 'torture(s)' and other 'barbar(ous)' methods of punishment." *Estelle*, 429 U.S. at 102 (quoting Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 Cal. L. Rev. 839, 842 (1969)). While this Court has recognized that the Amendment proscribes more than just barbarous treatment, the Eighth Amendment still does not prohibit mere negligence and medical malpractice.

Yet, if the Ninth Circuit's decision is allowed to stand, inmates will be free to pursue state-law negligence claims disguised as constitutional claims. This will not just contravene the fundamental holdings in *Estelle* and *Farmer*, but it will allow inmates an end-run around the state-law tort claim requirements that govern every other litigant. Qualified medical professionals will be deterred from working in prisons by the constant threat of litigation.

Further, the Ninth Circuit's analysis impermissibly inserts the federal courts into the day-to-day treatment decisions of prison medical and mental health providers, who are already tasked with the very challenging job of treating prisoners experiencing complex and co-existing health conditions within the prison environment. Despite this Court having stressed that judicial inquiries into cruel and unusual punishment claims "spring from constitutional requirements and . . . judicial answers to them must reflect that fact rather than a court's idea of how best

to operate a detention facility," the federal judiciary now holds the role of prison medical committee in the Ninth Circuit. *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (quoting *Bell*, 441 U.S. at 539).

The Ninth Circuit's flawed analysis will affect prison medical care claims in all contexts. For example, similar arguments are playing out across the nation in the context of treatment for Hepatitis C in prisons, where inmates are arguing that the guidelines set by the American Association for the Study of Liver Disease and Infectious Disease Society of America set the constitutional requirements for the treatment of their condition. *See, e.g., Atkins v. Parker*, 412 F. Supp. 3d 761, 782 (M.D. Tenn. 2019); *Woodcock v. Correct Care Solutions, LLC*, No. 3:16-cv-00096-GFVT, 2020 WL 556391, at *5-6 (E.D. Ky. Feb. 4, 2020).

The Ninth Circuit's decision threatens to have a detrimental and destabilizing effect on the administration of prisons in other ways. This Court, as well as the First and Eleventh Circuits, have acknowledged that the medical treatment provided to inmates, particularly transgender inmates, impacts the administration of prisons. *See Farmer*, 511 U.S. at 848-49 (summarizing evidence that a prison's refusal to provide segregated housing to a pre-operative male-to-female transsexual could pose significant safety concerns); *Kosilek*, 774 F.3d at 93 ("[r]ecognizing that reasonable concerns would arise regarding a post-operative, male-to-female transsexual being housed with male prisoners takes no great stretch of the imagination"); *Keohane*, 952 F.3d at 1275 ("an inmate dressed and groomed as a female would inevitably

become a target for abuse in an all-male prison"). By constitutionalizing a right to controversial medical treatments with complex practical ramifications, the Ninth Circuit has tied the hands of prison providers and administrators.

Even if the import of this case were limited to the treatment of gender dysphoria in prison (and it is not), the issue of constitutionally appropriate treatment for gender dysphoric inmates is arising with increasing frequency across the country. The First Circuit addressed this question in 2014 and, in just the last two years, four more courts of appeals have faced this question. The issue continues to reoccur. Subsequent to the Ninth Circuit's decision alone, the district courts have seen a flurry of cases alleging deliberate indifference related to gender dysphoria treatment, including a putative class action.[11]

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[11] *See, e.g.*, *Clark v. LeBlanc*, No. 3:19-00512-BAJ-RLB, 2019 WL 5085425, at *2 (M.D. La. Oct. 10, 2019); *Monroe v. Baldwin*, No. 18-CV-00156-NJR-MAB, 2019 WL 6918474, at *17 (S.D. Ill. Dec. 19, 2019), *on recon. in part sub nom. Monroe v. Meeks*, No. 18-cv-00156-NJR, 2020 WL 1048770 (S.D. Ill. Mar. 4, 2020); *Armstrong v. Mid-Level Prac. John B. Connally Unit*, No. SA-18-CV-00677-XR, 2020 WL 230887, at *5 (W.D. Tex. Jan. 15, 2020); *Avilez v. Barr*, No. 19-cv-08296-CRB, 2020 WL 570987, at *4 (N.D. Cal. Feb. 5, 2020); *Porter v. Crow*, No. 18-CV-0472-JED-FHM, 2020 WL 620284, at *9 (N.D. Okla. Feb. 10, 2020); *Murillo v. Godfrey*, No. 2:18-cv-02342-JGB-JC, 2020 WL 1139811, at *14 (C.D. Cal. Mar. 9, 2020); *Jackson v. Kallas*, No. 17-cv-350-bbc, 2020 WL 1139769, at *2 (W.D. Wis. Mar. 9, 2020); *Dana v. Tewalt*, No. 1:18-cv-00298-DCN, 2020 WL 1545786, at *9 (D. Idaho Apr. 1, 2020); *Gonzales v. Cal. Dep't of Corrs. & Rehab.*, No. 1:19-cv-01467BAM (PC), 2020 WL 1847491, at *6 (E.D. Cal. Apr. 13, 2020).

A clear split in the circuits now exists, meaning that the constitutional rights of a gender dysphoric inmate include tax-payer funded sex reassignment surgery when he is housed in Idaho, for example, but not when that same inmate is housed in a state such as Texas. Just as absurd, the constitutional rights of an inmate housed within the Ninth Circuit's domain encompass treatment consistent with the WPATH Standards, including sex reassignment surgery, but U.S. citizens on Medicare are not guaranteed treatment consistent with the WPATH Standards. *See* CMS, DECISION MEMO FOR GENDER DYSPHORIA AND GENDER REASSIGNMENT SURGERY (Aug. 30, 2016), https://go.cms.gov/36yMrxX.

This case is an ideal vehicle for resolving the circuit split and the issues discussed above. Unlike in many prison litigation cases, the Plaintiff in this case has been represented by counsel from nearly the start. The district court allowed the parties to conduct several months of discovery and held a multi-day hearing before issuing its decision. Thus, the factual record is more developed in this case than in many others, and it is ripe for review. *Compare* App. 53-146, *with Lamb*, 899 F.3d at 1163 (noting the "sparseness of the summary judgment record") *and Gibson*, 920 F.3d at 221-23 (relying on the record created in the First Circuit's decision in *Kosilek*).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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