THE EIGHTH AMENDMENT AND MEDICAL CONSENSUS ON GENDER AFFIRMING CARE: REEXAMINING THE DISSENTALS IN *EDMO V. CORIZON*

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ABSTRACT

Medical and scientific organizations widely adopt the World Professional Association of Transgender Health Standards of Care as the authority on gender affirming care. Despite this consensus, the legal, political, and policy environments often see only controversy. For example, the Ninth Circuit Court opinion in *Edmo v. Corizon* held that denying an incarcerated transgender person suffering from severe gender dysphoria—resulting in two attempts at self-castration, cutting to reduce genital distress, and suicidal ideations—violated the Eighth Amendment. The majority denied the State of Idaho's petition for a rehearing en banc, but ten judges joined in three separate dissents to the denial of rehearing en banc (dissentals) arguing that the opinion was a "revolution in our law!" This article confronts these dissentals head on, dismantling both their purpose and arguments, and analyzing their reasoning, factual assertions, and legal, scientific, and medical assessments. Ultimately, this Article reframes the medical and scientific consensus on gender affirming care within the context of the Eighth Amendment by exposing the errors, misstatements, and misrepresentations in the dissentals.

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INTRODUCTION

After eight years of hormone therapy, multiple disciplinary referrals—for wearing makeup, styling her hair in a feminine manner, and altering her undergarments into panties—two attempts at self-castration, self-harm to deal with her desire for self-castration, and years of litigation, all while living as a woman in a men's prison, Adree Edmo finally

received the gender affirming surgery she had long sought and needed.[1] She was finally able to live as herself.

Edmo was incarcerated in the Idaho Department of Corrections (IDOC) in April 2012, and was diagnosed with gender dysphoria by June 2012.[2] IDOC contracted with Corizon, a for profit corporation,[3] to provide healthcare services to incarcerated people.[4] When IDOC and Corizon refused to provide her with gender affirming surgery, Edmo filed for a preliminary injunction alleging a violation of her Eighth Amendment rights.[5] The District Court granted the motion in part, and issued a preliminary injunction ordering IDOC and Corizon to "provide [Edmo] with adequate medical care, including gender [affirming] surgery."[6] On appeal, the Ninth Circuit affirmed the District Court's ruling on the merits of the Eighth Amendment claim through a unanimous three-judge panel and remanded the case to the District Court.[7] The District Court ordered a correction granting a permanent injunction on the merits of Edmo's Eighth Amendment claim.[8] A Ninth Circuit judge then requested a vote to rehear the case en banc, which failed to get a majority and was denied.[9] Three Ninth Circuit judges, joined by others, wrote dissents to the denial of rehearing en

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1. Edmo v. Corizon, Inc., 935 F.3d 757, 772–74, 780–781 (9th Cir. 2019) [hereinafter *Edmo I*].

2. *See infra* Part II.

3. "In 2018, Corizon contracted with 534 facilities in 27 states to provide prisoner health care." Matt Clarke, *Investment Firm Buys Corizon*, PRISON LEGAL NEWS, Nov. 1, 2020, at 40. Corizon is now owned and operated by Flacks Group. *Id.* Sharon Dolovich, leading Eighth Amendment scholar and attorney, lays out some reasons why for-profit medical providers may create additional problems for prisoners trying to get their medical needs addressed and raising Eighth Amendment claims. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 484–88 (2005).

> Prison operators wishing to save money on medical care might, for example, create a deliberately unwieldy process for prisoners wishing medical attention, as has apparently been the strategy of Correctional Medical Services (CMS), a for-profit prison medical services company operating in prisons and jails in twenty-seven states. They might also hire medical staff of questionable competence, increasing the likelihood that conditions will go undiagnosed. Or they might institute treatment protocols of questionable efficacy that cost less than medically indicated methods. This last approach in particular might allow a defense that "reasonable" steps were taken even if they were ultimately ineffective.

Id. at 484–85 (internal citations omitted). Corizon Health, Inc., was formed by a 2011 merger of CMS and Prison Health Services, Inc. (PHS). *Corizon Launches From Correctional Healthcare Merger*, BUSINESS WIRE (June 3, 2011, 11:38 AM), https://www.businesswire.com/news/home/20110603005747/en/Corizon-Launches-from-Correctional-Healthcare-Merger. Another culprit may be "the near universal use of 'capitation systems' under which healthcare contractors are paid a fixed rate for each incarcerated individual, regardless of the care provided. These systems incentivize providers to withhold care and ignore the sickest patients to increase their profits." Mike Greene, *Adree Edmo, the Eighth Amendment, and Abolition: Evaluating the Fight for Gender-Affirming Care in Prisons*, 28 WM. & MARY J. RACE, GENDER, & SOC. JUST. 445, 451 (2022) (citing Molly Rothschild, *Cruel and Unusual Prison Healthcare: A Look at the Arizona Class Action Litigation of* Parsons v. Ryan *and Systemic Deficiencies of Private Health Services in Prison*, 61 ARIZ. L. REV. 945, 975–76 (2019)).

4. Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1115 (D. Idaho 2018), *order clarified*, No. 1:17-cv -00151-BLW, 2019 WL 2319527 (D. Idaho May 31, 2019), and *aff'd in part, vacated in part, remanded sub nom.* Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019).

5. *Id.* at 1109.

6. *Id.* at 1129.

7. Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019).

8. Edmo v. Idaho Dep't of Corr., No. 1:17-cv-00151-BLW, 2019 WL 2319527, at *1 (D. Idaho May 31, 2019).

9. Edmo v. Corizon, Inc., 949 F.3d 489, 490 (9th Cir. 2020) [hereinafter *Edmo II*].

banc (dissentals).[10] The Supreme Court denied a petition for writ of certiorari.[11]

Dissentals are a quirk of the American judiciary. A dissent is normally written as a response to the opinion of the court by a judge or judges present during the appeal who heard arguments and reviewed the record to decide a controversy between parties.[12] A dissental is a dissent to the decision not to have an en banc hearing.[13] Under these circumstances, a dissental voices opposition to the decision by the other judges not to rehear the case—it is not an assessment of the merits of a dispute between parties. The dissentals in *Edmo II* repeat arguments that are gaining strength in denying transgender rights: that there is no medical consensus on the subject of gender affirming care;[14] that gender affirming care is controversial;[15] that support for gender affirming care is political and supported by advocates, not scientists or doctors;[16] and that gender affirming care is an area of ongoing debate.[17] These very arguments are also at the heart of increasing legislation targeting transgender rights.[18]

This legislation includes efforts to restrict access to healthcare,[19] regulate the lives of transgender youth,[20] ban gender affirming care in young adulthood,[21] ban "drag performances"[22] that could include transgender people, prevent teachers from using names or pronouns matching students' gender identities without written parent permission, protect school

10. *Id.* at 505.

11. Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020).

12. Marshall Bowen & Xan Ingram Flowers, *Making Use of Dissenting Opinions*, JDSUPRA (Nov. 11, 2020), https://www.jdsupra.com/legalnews/making-use-of-dissenting-opinions-33186/.

13. Alex Kozinksi & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J. ONLINE 601, 604 (2012).

14. *Edmo II*, 949 F.3d at 493, 497–500.

15. *Id.* at 493, 497.

16. *Id.* at 497.

17. *Id.*

18. Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN (Apr. 15, 2021, 9:46 AM), https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html ("Thirty-three states have introduced more than 100 bills that aim to curb the rights of transgender people across the country, with advocacy groups calling 2021 a record-breaking year for such legislation.").

19. Hannah Schoenbaum, *Republican States Aim to Restrict Transgender Health Care in First Bills of 2023*, PBS NEW HOUR (Jan. 7, 2023, 2:36 PM), https://www.pbs.org/newshour/politics/republican-states-aim-to-restrict-transgender-health-care-in-first-bills-of-2023 ("More than two dozen bills seeking to restrict transgender health care access have been introduced across 11 states — Kansas, Kentucky, Missouri, Montana, New Hampshire, Oklahoma, South Carolina, Tennessee, Texas, Utah and Virginia — for the legislative sessions beginning in early 2023.").

20. Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-Transgender Bills*, N.Y. TIMES (June 20, 2023), https://www.nytimes.com/2023/01/25/us/politics/transgender-laws-republicans.html ("Over the past three years, Republican state lawmakers have put forward a barrage of bills to regulate the lives of transgender youths, restricting the sports teams they can play on, bathrooms they can use and medical care they can receive.").

21. *Id.* ("Legislation in Oklahoma and South Carolina would make it a felony to provide hormonal or surgical transition treatment to transgender people younger than 26 — an uncharted incursion into adults' health care. Other bills in both states, and in Kansas and Mississippi, would ban such care up to age 21. And bills in more than a dozen states would ban it for minors, which Arkansas was the first to do in 2021, against the consensus of major medical organizations.").

22. *Id.*

employees who do not want to use preferred pronouns for "religious or moral conviction,"[23] and require that schools "out" transgender students to parents and other students.[24] These legislative attacks against transgender people are particularly alarming considering the high incidence of suicidal ideation among transgender people,[25] especially transgender youth.[26]

For adults, a recent "large-scale, controlled study . . . demonstrate[s] that undergoing gender-affirming surgery is associated with decreased odds of past-month severe psychological distress, past-year smoking, and past-year suicidal ideation."[27] Transgender people who "underwent all desired surgeries had significantly lower odds of all adverse mental health outcomes, and these benefits were stronger than among transgender people who only received some desired surgeries."[28] Edmo's case and the dissentals' arguments are particularly relevant as these arguments reflect part of the mainstream discussion on transgender rights and, more specifically, the treatment of scientific and medical evidence and expertise.

The dissentals from the rehearing en banc in *Edmo v. Corizon*[29] (*Edmo II*) are a lens for examining the larger arguments regarding gender affirming care. This Article is not simply a critique of the dissentals, but a way to situate the larger medical, scientific, legal, and policy issues impacting transgender people's lives. The Ninth Circuit's decision in *Edmo v. Corizon*[30] (*Edmo I*) is the first time a U.S. Circuit Court has held that

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23. Gloria Rebecca Gomez, *New GOP-Proposed Bill Targets Preferred Pronoun Use in Schools*, ARIZ. MIRROR (Dec. 28, 2022, 8:44 AM), https://www.azmirror.com/2022/12/28/new-gop-proposed-bill-targets-preferred-pronoun-use-in-schools/.

24. Astor, *supra* note 20 ("[T]he 2023 legislative season stands out for the aggressiveness with which lawmakers are pushing into new territory. The bills they have proposed — more than 150 in at least 25 states — include bans on transition care into young adulthood; restrictions on drag shows using definitions that could broadly encompass performances by transgender people; measures that would prevent teachers in many cases from using names or pronouns matching students' gender identities; and requirements that schools out transgender students to their parents.").

25. Ashley Austin, Shelly L. Craig, Sandra D'Souza, & Lauren B. McInroy, *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, 37 J. INTERPERSONAL VIOLENCE NP2696 (2022) (citing SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET, & MA'AYAN ANAFI, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, (National Center for Transgender Equality 2016) (available at https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf) ("Data from the U.S. Transgender Survey indicate that 82% of transgender individuals have considered killing themselves and 40% have attempted suicide.").

26. Austin, Craig, D'Souza, & McInroy, *supra* note 25 ("Within the transgender population, suicidality is highest among young people.").

27. Anthony N. Almazan & Alex S. Keuroghlian, *Association Between Gender-Affirming Surgeries and Mental Health Outcomes*, 156 JAMA SURGERY 611, 615 (2021).

28. *Id.* The large-scale study confirmed prior research. *See, e.g.*, Cecilia C. Dhejne, Roy Van Vlerken, Gunter Heylens, & Jon Arcelus, *Mental Health and Gender Dysphoria: A Review of the Literature*, 28 INT'L REV. PSYCHIATRY 44, 44 (2016); Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin, & Victor M. Montori, *Hormonal Therapy and Sex Reassignment: A Systematic Review and Meta-Analysis of Quality of Life and Psychosocial Outcomes*, 72 J. CLINICAL ENDOCRINOLOGY 214, 214 (2010); Friedemann Pfäfflin & Astrid Junge, *Sex Reassignment. Thirty Years of International Follow-Up Studies After Sex Reassignment Surgery: A Comprehensive Review, 1961-1991*, INT'L J. TRANSGENDERISM (1998).

29. 949 F.3d 489 (9th Cir. 2020).

30. 935 F.3d 757 (9th Cir. 2019).

gender affirming surgery is medically necessary.[31] The dissentals in *Edmo II* represent the latest and most robust argument against providing gender affirming surgery.[32]

As explained in this Article, the unique features of dissentals make them particularly strong instruments of advocacy. As the latest legal argument against gender affirming surgery, the dissentals benefit from the (misguided) research, analysis, and reasoning of the cases that precede them. The use of the same arguments and reasoning used by politicians to limit the rights of transgender people demonstrates that these issues must be addressed and rebutted. By focusing on these dissentals, we obtain a better understanding of the current legal, political, and policy landscapes, and a proper framework for examining transgender access to gender affirming care.

This Article therefore analyzes and critiques the reasoning, factual assertions, and legal and scientific assessments in the *Edmo II* dissentals to expose their flaws. To do so, it is necessary to take the dissentals seriously both in their purpose and argument.

Judge O'Scannlain's harsh dissental in *Edmo II* claims the Ninth Circuit:

> Creates a circuit split, substitutes the medical conclusions of federal judges for the clinical judgments of prisoners' treating physicians, redefines the familiar "deliberate indifference" standard, and, in the end, constitutionally enshrines precise and partisan treatment criteria in what is a new, rapidly changing, and highly controversial area of medical practice.[33]

For O'Scannlain, the Ninth Circuit holding was an incomprehensible legal opinion made worse by the Ninth Circuit's failure to rehear the case en banc.[34] Thus, O'Scannlain says, "suddenly the request for sex-reassignment surgery—and the panel's closing appeal to what it calls the 'increased social awareness' of the needs and wants of transgender citizens—effects a revolution in our law!"[35]

The *Edmo II* dissentals seek to enshrine significant misstatements about the status of scientific and medical evidence and consensus for gender affirming care as fact supported by law. These errors are not just repeated by policy makers and politicians, but by courts. The Fifth Circuit, in *Gibson v. Collier*,[36] engages in the same mischaracterizations as the dissentals in *Edmo II*, but in the majority opinion.[37] Although *Gibson* and

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31. *Id.* at 490 (O'Scannlain, J. dissenting).
32. *Id.* at 494–500.
33. *Id.* at 490.
34. *Id.*
35. *Id*. at 504.
36. 920 F.3d 212 (5th Cir. 2019).
37. *See infra* Part IV.

Edmo I arrive at opposite holdings, both cases were denied certiorari by the Supreme Court.[38] Thus, the issue of scientific and medical consensus on gender affirming care remains legally unsettled. Clarifying the errors in the *Edmo II* dissentals is necessary to properly frame the scientific and medical consensus. Examining the *Edmo II* dissentals also provides clarity around the current circuit court split regarding Eighth Amendment claims by transgender people seeking gender affirming care and surgery.

This Article argues that where the medically necessary treatment for gender dysphoria is gender affirming surgery, the denial of the surgery with full awareness of the incarcerated person's suffering violates the Eighth Amendment's prohibition against cruel and unusual punishment.[39] Perhaps more importantly, this Article seeks to properly frame the scientific and medical consensus on gender affirming care and surgery. This Article analyzes and critically examines the *Edmo II* dissentals' arguments and misuse of medical and scientific research and evidence to illustrate that denying the right to gender affirming surgery can violate specific patients' Eighth Amendment rights. This scrutiny also facilitates a better understanding of the scientific and medical consensus on care for transgender people.

Part I outlines the Eighth Amendment's prohibition on imposing "cruel and unusual punishment" and its application to the serious medical needs of people experiencing incarceration. Part II outlines the relevant events in Edmo's life leading to her gender affirming surgery. Part III examines the meaning and importance of dissentals and illustrates the political and legal significance of the dissentals in *Edmo II*. It additionally situates the *Edmo II* dissentals as both politically and legally important in constructing justifications for denying access to gender affirming surgery. Part IV establishes that the *Edmo II* dissentals contain significant errors in scientific, medical, and legal analysis leading to a misguided assessment of the consensus among scientific and medical experts. Breaking down the errors, misstatements, and mischaracterizations of the *Edmo II* dissentals reframes the medical and scientific consensus on gender affirming care and surgery both within and beyond Eighth Amendment jurisprudence. Part V argues both that the dissentals mischaracterize the current circuit court split and that the errors in the dissentals' analysis undermine their legal conclusions regarding the Eighth Amendment's application to gender affirming care.

38. Gibson v. Collier, 140 S. Ct. 653 (2019); Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020).

39. U.S. CONST. amend. VIII.

I. THE EIGHTH AMENDMENT'S PROHIBITION ON DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishment."[40] The added restrictions inherent to incarceration help define cruel and unusual punishment; as one scholar has pointed out, "we tolerate certain features of incarceration, either as a consequence of a criminal sentence or as a putatively administrative measure pending the resolution of a legal proceeding, and anything outside those bounds of tolerance is 'cruel and usual' and, accordingly, unconstitutional."[41] The cruel and unusual punishment analysis is premised on the fact that people retain their basic rights while incarcerated.[42]

Two points are salient when discussing incarcerated people's rights: first, incarcerated people's constitutional rights are largely protected;[43] and second, the government owes additional duties to incarcerated people.[44] As the Supreme Court has stated, "[an] [incarcerated person] is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."[45]

The Court in *Estelle v. Gamble*,[46] the first case to address the medical needs of incarcerated people, established the requirement that "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."[47] As Chief Justice William Rehnquist explains further:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.[48]

This relationship can be characterized as the "carceral burden."[49] This means that "[w]hen the state opts to incarcerate [people with convictions] as punishment, it is committing itself to providing for [incarcerated

40. *Id.*
41. Danielle C. Jefferis, *American Punishment and Pandemic*, 21 NEV. L.J. 1207, 1217 (2021) (citing Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000)).
42. *Id.* at 1217.
43. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).
44. *See* DeShaney v. Winnebago Cnty Dep't of Soc. Servs., 489 U.S. 189, 198–201 (1989).
45. *Wolff*, 418 U.S. at 555–56.
46. 429 U.S. 97 (1976).
47. *Id.* at 103.
48. *DeShaney*, 489 U.S. at 200.
49. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 891 (2009).

people's] basic human needs in an ongoing way as long as they are in custody."[50]

In *Estelle*, the Supreme Court held that "deliberate indifference to serious medical needs of [incarcerated people] constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment,"[51] thus protecting incarcerated people's right to access medical treatment.[52] The Court has further found that "[p]unishments 'incompatible with the evolving standards of decency that mark the progress of a maturing society'" violate the Eighth Amendment.[53]

In *Farmer v. Brennan*,[54] the Supreme Court defined "deliberate indifference" as only occurring if prison officials are aware of and disregard a substantial risk of harm to an incarcerated person.[55] This holding was "based . . . on the language of the Eighth Amendment, specifically the requirement that the challenged treatment constitute[d] 'punishment[ ].'"[56] The Supreme Court found that "unless the official knows of and disregards an excessive risk to inmate health or safety," the harm an incarcerated person suffers is not punishment within the meaning of the Eighth Amendment.[57]

The *Farmer* Court's deliberate indifference test deploys a two-prong assessment to determine whether an "official knows of and disregards an excessive risk to inmate health or safety."[58] This test requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference."[59]

The first prong is an objective fact-specific determination of the incarcerated person's serious medical needs.[60] A serious medical need exists if the "failure to treat [an incarcerated person]'s condition could result in further significant injury or the unnecessary and wanton infliction of pain."[61] The determination is based on scientific and medical evidence:

> Indications that a plaintiff has a serious medical need include[s] "[t]he existence of an injury that a reasonable doctor or patient would find

50. *Id.* at 921–22.
51. *Estelle*, 429 U.S. at 104 (internal citations omitted).
52. *Id.* at 104–06.
53. Hudson v. McMillian, 503 U.S. 1, 10 (1992) (quoting *Estelle*, 429 U.S. at 102–03). There is a compelling argument for the "evolving standard of decency" securing Eighth Amendment access to gender affirming surgery. Carly Cruickshank, Note, *The Evolving Standards of Decency: Transgender Prisoners' Right to Adequate Medical Care in the Prison System*, 2022 MICH. STATE L. REV. 521, 526 (2022).
54. 511 U.S. 825 (1994).
55. *Id.* at 837.
56. Dolovich, *supra* note 49, at 895 (citing *Farmer*, 511 U.S. at 837).
57. *Farmer*, 511 U.S. at 837.
58. *Id.*
59. *Id.*
60. *Id.*
61. Russell v. Lumitap, 31 F.4th 729, 739 (9th Cir. 2022) (quoting Peralta v. Dillard, 744 F.3d 1076, 1086 (9th Cir. 2014)) (internal quotation marks omitted).

> important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain."[62]

The second prong is a subjective determination[63] of actual knowledge of the serious medical needs of an incarcerated person and harm arising from an action or inaction to address those needs.[64] Actual knowledge may be shown "when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care."[65]

II. THE FACTS AND CIRCUMSTANCES OF ADREE EDMO'S CASE: AN ESSENTIAL ELEMENT IN ASSESSING WHETHER HER EIGHTH AMENDMENT RIGHTS WERE VIOLATED[66]

Adree Edmo is transgender.[67] She has viewed herself as female from the age of five or six.[68] She long struggled with her gender identity and attempted suicide twice.[69] Edmo was incarcerated in an IDOC facility starting in April 2012,[70] was diagnosed with gender dysphoria in June 2012,[71] and subsequently legally changed her name and sex on her birth

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62. Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014) (quoting McGuckin v. Smith, 974 F.2d 1050, 1059–60 (9th Cir. 1992), *overruled in part on other grounds by* WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc)).

63. A substantial criticism of the deliberate indifference standard is the difficulty of demonstrating continuing systemwide harm in addressing medical needs. *See, e.g.*, Jefferis, *supra* note 41, at 1217–21; Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 152–53, 167–68 (2020); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 358–59, 370 (2018); John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 456–58 (2017).

64. *Colwell*, 763 F.3d at 1066.

65. *Id.* (quoting Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. (1988)) (internal quotation marks omitted).

66. The facts in this section are almost exclusively from the District Court's Findings of Fact and should be given deference as outlined in Section IV below.

67. Gender is a social construct. *See generally* Judith Butler, UNDOING GENDER 62–64 (2004). Sex is a medical category. *Id.* at 62, 66. A person seeking gender affirming surgery (formerly a sex change operation or sex (re)alignment surgery) is looking to transition into the sex that aligns with their gender. *See* Almazan & Keuroghlian, *supra* note 27, at 612. The term transgender is considered more inclusive because it covers a broader spectrum of individuals including those who do not want surgery, those who want some surgery but not genital surgery, and those that seek full gender affirming surgery. *Id.* To maintain the general preference for more inclusive terminology, this article uses the term transgender. In addition, there is criticism of the potential to overmedicalize transgender people. *See* Bryce Couch, Comment, *The Constitutional Basis for Inmate Gender Confirmation Surgery*, 74 SMU L. REV. 783, 787 (2021) ("[A] subset of the transgender community may exhibit clinically significant gender dysphoria that serves as a pathway to necessary forms of gender-affirming care."). The choice to focus on medical evaluation in this Article is based on Edmo's decision to seek gender affirming surgery and not commentary on medicalization.

68. Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1116 (D. Idaho 2018), *order clarified*, No. 1:17-cv-00151-BLW, 2019 WL 2319527 (D. Idaho May 31, 2019), and *aff'd in part*, *vacated in part*, *remanded sub nom.* Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019).

69. *Id.*

70. *Id.* at 1109.

71. *Id.* ("Gender dysphoria is a medical condition experienced by transgender individuals in which the incongruity between their assigned gender and their actual gender identity is so severe that it impairs the individual's ability to function.").

certificate.[72] Since her incarceration, Edmo has always presented as a female, including at her two places of employment.[73] Edmo's persistent desire to present as a woman resulted in "multiple disciplinary offense reports related to wearing makeup, styling her hair in a feminine manner, and altering her male-issued undergarments into female panties."[74] Despite being eligible, Edmo was denied parole because of the multiple disciplinary offense reports "related to her use of makeup and feminine appearance."[75]

Starting immediately after her gender dysphoria diagnosis, Edmo was provided hormone therapy resulting in both "sex hormones and secondary sex characteristics [of] a typical adult female."[76] After years of hormone therapy, and achieving "the maximum physical changes associated with hormone" therapy,[77] Edmo's gender dysphoria remained.[78] Edmo "continued to experience such extreme gender dysphoria that she twice attempted self-castration."[79] Edmo "first attempted self-castration to remove her testicles in September 2015 using a disposable razor blade. She wrote a note to let the officers know she was not trying to commit suicide and was only trying to help herself."[80] As a warning, the next set of details is graphic, but its inclusion is necessary to demonstrate the severity of Edmo's gender dysphoria:

> For her second attempt, Ms. Edmo prepared for weeks by studying the anatomy of the scrotum and took steps to diminish the chance of infection by boiling a razor blade and scrubbing her hands with soap. She was successful in opening the scrotum and exposing a testicle. But because there was too much blood, Ms. Edmo abandoned her second self-castration attempt and sought medical assistance.[81]

Edmo's self-castration attempts were "not acts of mutilation or self-harm, but . . . attempts to remove her target organ that produces testosterone, which is the cure for gender dysphoria."[82] Her mental distress did not indicate a barrier to performing the surgery, but was an indication that surgery was needed. It was "Edmo's gender dysphoria, not her depression and anxiety" that was "the driving force behind her self-surgery attempts."[83]

The attempts to self-castrate were not sufficient to dissuade Edmo from continuing to consider self-castration and she resorted to cutting her

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72. *Id.* at 1117.
73. *Id.*
74. *Id.*
75. *Id.* at 1118.
76. *Id.* at 1109.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 1109.
82. *Id.* at 1120.
83. *Id.*

arm to relieve her desire to do so.[84] Edmo's cutting was an "attention-reduction behavior that she use[d] to prevent herself from cutting her genitals."[85] Taken together, Edmo's attempts at self-castration and cutting "[did] not indicate . . . mental health concerns," but were indicative of her need for treatment of gender dysphoria.[86] Despite these medical concerns, however, IDOC and Corizon refused to provide gender affirming surgery[87] on the grounds that "no Corizon or IDOC provider has ever recommended that gender affirming surgery is medically necessary for a patient in IDOC custody."[88]

Edmo's psychiatrist, Dr. Eliason, noted that Edmo "had ongoing frustrations stemming from her current anatomy," and determined that her self-castration attempts indicated that her "gender dysphoria had risen to another level."[89] Nonetheless, Dr. Eliason did not approve gender affirming surgery and "made no change to her treatment plan."[90] To support his assessment, Dr. Eliason indicated that gender affirming surgery is only necessary under three circumstances: (1) "Congenital malformations or ambiguous genitalia,"[91] (2) "Severe and devastating dysphoria that is primarily due to genitals,"[92] and (3) "Some type of medical problem in which endogenous sexual hormones were causing severe physiological damage."[93]

Citing the World Professional Association of Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (WPATH SOC), Dr. Eliason provided two reasons for determining that Edmo's gender affirming surgery was unnecessary.[94] First, according to Dr. Eliason, Edmo "had not satisfied the 12-month period of living in her identified gender role under WPATH standards."[95] Second, "it was not doing Edmo any service to rush through getting gender [affirming] surgery in th[e] current social situation."[96] This was the only time Edmo was assessed for gender affirming surgery.[97]

The experts who testified on behalf of Edmo, and the experts who testified on behalf of Corizon and IDOC, both cited the WPATH SOC in

84. *Id.* at 1110. Edmo "continue[d] to experience thoughts of self-castration and [was] at serious risk of acting on that impulse."
85. *Id.* at 1120.
86. *Id.*
87. *Id.* at 1110. Gender affirming surgery is also sometimes referred to sex reassignment surgery. The surgery confirms sex with gender by altering primary sexual characteristics.
88. *Id.* at 1127.
89. *Id.* at 1118–19. If Edmo's attempts at self-castration and cutting do not indicate severe and devastating gender dysphoria resulting from her genitals, it is hard to imagine what would meet this criterion.
90. *Id.* at 1119.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*

assessing the necessity for gender affirming surgery.[98] Although the experts on both sides agreed that the WPATH SOC is the correct standard, they did not agree "on whether Ms. Edmo [met] all the WPATH standards criteria for gender [affirming] surgery."[99]

Experts testifying on behalf of IDOC and Corizon argued that Edmo did not meet WPATH criteria requiring "that any significant mental health concerns be well controlled and that she live twelve months in a fully gender-congruent role."[100] They also argued that Edmo's self-castration attempts and cutting stemmed from depression, that Edmo's depression meant she would not "be able to properly participate in postsurgical care," and that it was highly unlikely that surgery would eliminate Edmo's severe gender dysphoria.[101]

In contrast, experts testifying on Edmo's behalf argued that her depression and anxiety were well-controlled, and that her attempts at self-castration and cutting were the direct result of her gender dysphoria.[102] Edmo's experts argued that her actions indicated a need to treat her gender dysphoria with gender affirming surgery, and that she "demonstrated the capacity to follow through with the postsurgical care she would require."[103] Dr. Ettner, one of Edmo's experts, testified that "gender affirming surgery is the cure for [her] gender dysphoria"[104] and that without gender affirming surgery, her severe gender dysphoria would continue.[105] Dr. Gorton, another of Edmo's experts, testified that without surgery her condition would worsen.[106] Dr. Gorton testified that, "The risks of not providing gender [affirming] surgery to Ms. Edmo include surgical self-treatment, emotional decompensation, and risk of suicide given her high degree of suicide ideation."[107] Dr. Gorton also stated that Edmo's increasing progress on her prior two attempts at self-castration meant it was likely she would try again and be successful.[108]

On December 13, 2018, the District Court partially granted Edmo's motion for a preliminary injunction[109] and ordered IDOC and Corizon "to

98. *Id.* at 1125.
99. *Id.* at 1120.
100. *Id.*
101. *Id.* at 1119–20.
102. *Id.* at 1120.
103. *Id.*
104. *Id.* at 1120–21.
105. *Id.* at 1121.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1129. The Ninth Circuit initially remanded the case for clarification. "The Court clarifies that as part of its ruling on the motion for preliminary injunction, it also granted permanent injunctive relief." Edmo v. Idaho Dep't of Corr., No. 1:17-cv-00151-BLW, 2019 WL 2319527, at *2 (D. Idaho May 31, 2019). In addition, the District Court clarified that, "Edmo succeeded in showing that the care she is receiving from Defendants is cruel and unusual punishment under the Eighth Amendment." *Id.*

provide [Edmo] with adequate medical care, including gender [affirming] surgery."[110]

On August 23, 2019, the Ninth Circuit affirmed the District Court's holding, acknowledging that "[T]he medical community's understanding of what treatments are safe and medically necessary to treat gender dysphoria has changed as more information becomes available, research is undertaken, and experience is gained."[111] Holding that where, "the record shows that the medically necessary treatment for [an incarcerated person]'s gender dysphoria is gender affirming surgery, and responsible prison officials deny such treatment with full awareness of the [incarcerated person]'s suffering, those officials violate the Eighth Amendment's prohibition on cruel and unusual punishment."[112]

On February 10, 2020, the Ninth Circuit issued a denial of petition for rehearing en banc.[113]

Edmo received gender affirming surgery in July 2020.[114] In August 2020 she was transferred to a women's prison.[115] Edmo was released from prison in July 2021.[116]

III. THE MEANING AND IMPORTANCE OF DISSENTALS GENERALLY, AND SPECIFICALLY IN *EDMO V. CORIZON*

The *Edmo II* dissentals must be situated within the broader context of dissentals in general to understand the unique advocacy they deploy. Dissentals represent "a fundamental oddity: they are published opinions that have no precedential weight and, often, are written by judges who were not on the panel that decided the underlying case."[117] Although dissentals do not have formal precedential value, judges "nevertheless [use them to]

110. *Edmo*, 358 F. Supp. 3d at 1129. The order was issued by Chief Judge B. Lynn Winmill a Clinton appointee. *Senior U.S. District Judge B. Lynn Winmill*, UNITED STATES DISTRICT COURT, DISTRICT OF IDAHO (Jan. 4, 2019), https://www.id.uscourts.gov/district/judges/winmill/General_Information.cfm?.

111. Edmo v. Corizon, Inc., 935 F.3d 757, 803 (9th Cir. 2019). The three-judge panel of McKeown (nominated by former President Clinton), Gould (nominated by former President Clinton), and Lasnik (nominated by former President Clinton) issued the per curium opinion. *See The Judges of this Court in Order of Seniority*, UNITED STATES COURTS FOR THE NINTH CIRCUIT (July 2023), https://www.ca9.uscourts.gov/judicial-council/judges-seniority-list/; Carmen Castro-Pagan, *Know Your Judge: Robert S. Lasnik*, BLOOMBERG LAW (Aug. 15, 2018, 5:30 AM), https://news.bloomberglaw.com/employee-benefits/know-your-judge-robert-s-lasnik.

112. *Edmo I*, 935 F.3d at 803.

113. Edmo v. Corizon, Inc., 949 F.3d 489 (9th Cir. 2020).

114. James Dawson, *Idaho Transgender Inmate Transferred to Women's Prison, Making Legal History*, BOISE STATE PUBLIC RADIO NEWS (Aug. 4, 2020, 4:24 PM), https://www.boisestatepublicradio.org/law-justice/2020-08-04/idaho-transgender-inmate-transferred-to-womens-prison-making-legal-history.

115. *Id.*

116. Madelyn Beck, *Idaho's Failed Legal Fight Against an Inmate's Gender Affirming Surgery Nets Plaintiffs' Attorneys $2.58 Million in Fees*, BOISE STATE PUBLIC RADIO NEWS (Oct. 5, 2022, 10:01 AM), https://www.boisestatepublicradio.org/law-justice/2022-10-05/idahos-failed-legal-fight-against-an-inmates-gender-affirming-surgery-nets-plaintiffs-attorneys-2-58-million-in-fees.

117. Jeremy D. Horowitz, *Not Taking "No" for an Answer: An Empirical Assessment of Dissents from Denial of Rehearing En banc*, 102 GEO. L.J. 59, 60–61 (2013).

freely set out their views of the case's substantive merits – often in considerable detail."[118] The importance of using dissentals to advocate for a certain position becomes clear by examining first, the use of dissentals generally, and the specific use of dissentals in *Edmo II*; and second, the use of the *Edmo II* dissentals in subsequent cases despite the lack of any precedential value.[119]

The *Edmo II* dissentals are a form of judicial advocacy. Instead of presenting arguments narrowly tailored to the denial of a rehearing en banc, the dissentals in *Edmo II* represent an inappropriate legal, scientific, medical, and political argument for denying gender affirming surgery beyond the bounds of the denial to rehear the case en banc.[120] This is clear when examining the appropriate role of dissentals and the specific aspects of the *Edmo II* dissentals that go beyond the accepted function of dissentals.

A. The History and Critiques of Dissentals as a Form of Judicial Advocacy

The Judicial Code of 1911 established the practice of using three-judge panels to adjudicate circuit court appeals.[121] In 1941, the Supreme Court held that these three-judge panel decisions could be reviewed en banc[122] to ensure consistency and finality, which is "especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases."[123] By 1968, Congress adopted Federal Rule of Appellate Procedure Rule 35, which provided that "circuit courts may hear cases en banc if doing so is 'necessary to secure or maintain uniformity of the court's decisions' or if a case 'involves a question of exceptional importance,' though the rule cautions that the practice 'is not favored.'"[124]

Any judge of a circuit court can "call" a case en banc, either by motion or *supa sponte*.[125] To rehear the case en banc "requires the vote of a majority of non-recused active judges."[126] In the Ninth Circuit, at least, the judges exchange memorandum on whether to hold a rehearing en banc—there is no public poll of the votes for or against a rehearing en banc.[127] If the majority denies a motion for rehearing en banc, judges may submit a dissent or concurrence to that denial.[128] There has been an increase in the

118. *Id.* at 61.
119. *See id.* at 60–62.
120. *See generally* Edmo v. Corizon, 949 F.3d 489, 495–508 (9th Cir. 2020).
121. Douglas H. Ginsburg & Donald Falk, *The Court En banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1009 (1991) (quoting Act of March 3, 1911, ch. 231, § 117, 36 Stat. 1131).
122. An en banc hearing can involve all the judges appointed to the circuit, but different circuits have different rules for who can participate in an en banc hearing. *Id.* at 1009, 1009–10 n.7.
123. Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326, 334–35 (1941).
124. Horowitz, *supra* note 117, at 66 (citing Fed. R. App. P. 35(a)).
125. Marsha S. Berzon, *Introduction*, 41 GOLDEN GATE U. L. REV. 287, 290 (2011).
126. *Id.* at 291.
127. *Id.*
128. *Id.* at 293.

use of dissentals throughout the circuit courts, but particularly within the Ninth Circuit.[129] For comparison, in 2018 the Ninth Circuit saw six such dissentals with twenty-eight judges signing on, and in 2020 there were twenty-one dissentals with 123 judges signing on.[130]

One major criticism of dissentals is that they move the judge from arbiter to advocate.[131] Former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit Patricia Wald noted that dissentals are accurately described as "thinly disguised invitations to certiorari."[132] Ninth Circuit Judge Marsha S. Berzon stated that dissentals "read, inappropriately, like petitions for writs of certiorari."[133] According to Judge Berzon, the problem "is that advocacy for further review is inappropriate for judges . . . who should be upholding our decision-making processes once they are completed rather than seeking intervention from the Supreme Court."[134] D.C. Circuit Court Judge A. Raymond Randolph was also critical of the practice, noting that dissentals involve "step[ping] out of the robe and into the role of an advocate, urging the Supreme Court to take the case on certiorari and correct the panel's judgment."[135]

Dissentals are more like advisory opinions[136] than dissents. Despite "the Constitution's prohibition of advisory opinions," dissentals "often essentially constitute just that: a judge's account of the way he would have

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129. *See* Horowitz, *supra* note 117, at 69–72. One reason the Ninth Circuit may see more dissentals is because the court is so large, but this does not explain the increase in dissentals within the Ninth Circuit.

130. Andrew Wallender & Madison Alder, *Ninth Circuit Conservatives Use Muscle to Signal Supreme Court*, BLOOMBERG L. (Dec. 8, 2021, 3:45 AM), https://news.bloomberglaw.com/us-law-week/ninth-circuit-conservatives-use-muscle-to-signal-supreme-court.

131. An argument can be made that all dissents are advocacy. "Chief Justice Hughes famously said: 'A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.'" Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4 (2010) (citing Hon. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990) (quoting CHARLES HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936))). The important distinction is that a dissental is a plea to the Supreme Court to take up a case when a majority of a circuit court already determined that the three-judge panel's decision should not be subject to en banc review. Marsha S. Berzon, *Dissent, "Dissentals," and Decision-Making*, 100 CALIF. L. REV. 1479, 1487, 1491 (2012). From a procedural standpoint, a dissental is also different from a dissent because it is a direct response to a circuit court decision not to hear a case en banc. *See* Berzon, *supra* note 125, at 293. It serves to both dissent to the decision on the merit of reviewing the case en banc and the panel decision itself. *See* Horowitz, *supra* note 117, at 61. For support of dissentals, look to Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J. ONLINE 60 (2012). Kozinski and Burnham argue that dissentals are widely accepted and used by those not on the original panel as a chance to dissent. *Id.* at 607–09. This position further illustrates that dissentals are worth examining. "There is every indication that dissentals serve an important function and are taken seriously by courts, the public, the academy, and the legal profession." *Id.* at 607.

132. Patricia M. Wald, *THE D.C. CIRCUIT REVIEW: The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 719 (1987).

133. Berzon, *supra* note 125, at 294.

134. *Id.*

135. Horowitz, *supra* note 117, at 80 (alteration in original) (citing Indep. Ins. Agents of Am., Inc. v. Clarke, 965 F.2d 1077, 1080 (D.C. Cir. 1992) (statement of Randolph, J.).

136. Advisory opinions are prohibited under the "case or controversies" limitation under U.S. CONST. art. III, § 2, cl. 1.

ruled, if only he had been called on to hear a particular case."[137] For an example, look to the:

> [L]ament from Judge Richard Chambers: "I think the far-reaching implications of the majority's holding and the subsequent sequence richly merit consideration of the original decision by ou[r] court en banc, but I am helpless because the simple arithmetic of one plus one is greater than the sum of one plus none."[138]

Moreover, dissentals may be overtly political. All judicial activity may contain an element of the political; as Judge Randolph notes, "[J]udges sometimes must decide cases in which the facts do not dictate a single outcome and may therefore turn to their ideological preferences to resolve the legal indeterminacy."[139] But dissentals by their nature take on a great political role. The use of dissentals can be characterized as "imply[ing] an ideological preference so strong that it compels a judge to interpose herself in a dispute in which she has not been called to participate."[140] It may even "impl[y] that the judge has already tried and failed to initiate an *en banc* call to involve herself in the dispute directly, and thus must resort to collateral means to ensure her views are heard."[141] Dissentals can "express a judge's indignation – at the panel for deciding the case wrongly and at the circuit as a whole for failing to appreciate the gravity of the panel's error – as well as frustration at [their] institutional inability to do anything to correct the court's mistake."[142]

The political nature of these dissentals corresponds with an increasing ideological rift in the Supreme Court. Under Chief Justice John Roberts, through the 2012 term, circuit court cases that had dissentals from judges nominated by Republicans were nearly three times as likely to attract certiorari review than those from judges nominated by Democrats.[143] Over the same period, the Supreme Court reversed circuit court opinions with dissentals authored by Republican-appointed judges 93% of the time.[144]

B. Inappropriate Judicial Advocacy in the Edmo II *Dissentals and their Impact in Subsequent Cases*

The dissentals in *Edmo II* fall squarely within these criticisms. There are three dissentals in *Edmo II*. All ten Ninth Circuit judges who authored or joined a dissental were nominated by Republican presidents—six of ten

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137. Horowitz, *supra* note 117, at 61.
138. *Id.* (alteration in original) (quoting Strand v. Schmittroth, 235 F.2d 756, 758 (9th Cir. 1956) (Chambers, J., dissenting from denial of rehearing en banc)).
139. *Id.* at 85.
140. *Id.* at 86.
141. *Id.*
142. *Id.* at 61.
143. *Id.* at 83–85.
144. *Id.* at 86. Circuit court opinions with dissentals authored by Democrat appointed judges were reversed 71% of the time. *Id.*

Trump appointees and two of three active G.W. Bush appointees.[145] Judge O'Scannlain authored the primary dissental, which Judges Callahan, Bea, Ikuta, R. Nelson, Bade, Bress, Bumatay, and VanDyke joined.[146] Judge Bumatay delivered a separate dissental which Judges Callahan, Ikuta, R. Nelson, Bade, and VanDyke joined; Judge Collins, joined Part II, dissenting from the denial of rehearing en banc.[147] Judge Collins also delivered a separate dissental.[148] This composition alone implies an ideological divide. Not all Republican appointees signed on to the dissentals and an insufficient number of judges supported granting a rehearing en banc.[149]

The O'Scannlain dissental characterizes the three-judge panel's decision in *Edmo II* as unprecedented: "With its decision today, our court becomes the first federal court of appeals to mandate that a State pay for and provide sex-reassignment surgery to [an incarcerated person] under the Eighth Amendment. . . . To reach such a conclusion, the court creates a circuit split."[150] O'Scannlain further argues that the three-judge panel's holding "is as unjustified as it is unprecedented"[151] and "entrenches the district court's unfortunate legal errors as the law of this circuit."[152] In doing so, "the request for sex-reassignment surgery—and the panel's closing appeal to what it calls the 'increased social awareness' of the needs and wants of transgender citizens—effects a revolution in our law!"[153]

The dissentals are a full-throated condemnation of the panel and the other judges on the Ninth Circuit who did not vote for a rehearing en banc—a "thinly disguised invitation[] to certiorari."[154] The dissentals had their desired effect and are cited extensively in both the State of Idaho's Application for Reinstatement of the Stay Issued by the Ninth Circuit Pending Disposition of a Petition for Writ of Certiorari[155] (Application)

145. O'Scannlain (senior status) (nominated by former President Reagan), Bea (senior status) (nominated by former President G.W. Bush), Callahan (nominated by former President G.W. Bush), Ikuta (nominated by former President G.W. Bush), R. Nelson (nominated by former President Trump), Bade (nominated by former President Trump), Bress (nominated by former President Trump), Bumatay (nominated by former President Trump), VanDyke (nominated by former President Trump), and Collins (nominated by former President Trump). UNITED STATES COURTS FOR THE NINTH CIRCUIT, *supra* note 111 (listing current Ninth Circuit judges, their seniority status, and which President nominated them). The three-judge panel was composed entirely of Clinton appointees. Edmo v. Corizon, 935 F.3d 757, 765 (9th Cir. 2019); UNITED STATES COURTS FOR THE NINTH CIRCUIT, *supra* note 111; BLOOMBERG LAW, *supra* note 111. But the draw of three-judge panels is random, the en banc system is meant to correct any randomness that leads to outlier opinions. James J. Wheaton, *Playing with Numbers: Determining the Majority of Judges Required to Grant En banc Sittings in the United States Courts of Appeals*, 70 VA. L. REV. 1505, 1508–09 (1984). Here, a majority of Ninth Circuit Judges, including appointees from both parties, did not vote to rehear the case en banc. *Edmo*, 949 F.3d at 490.

146. Edmo v. Corizon, 949 F.3d 489, 490 (9th Cir. 2020).

147. *Id.* at 505 (Bumatay, J., dissenting).

148. *Id.* (Collins, J., dissenting).

149. *Edmo II*, 949 F.3d at 490; UNITED STATES COURTS FOR THE NINTH CIRCUIT, *supra* note 111.

150. *Edmo II*, 949 F.3d at 490.

151. *Id.*

152. *Id.* at 504.

153. *Id.*

154. Wald, *supra* note 132, at 719.

155. Reply in Support of Application for Reinstatement of Stay, Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (No. 19A1038) 2020 WL 2866593, at *2–3 (May 21, 2020).

and in the State's Petition for Writ of Certiorari (Petition).[156] Beyond the arguments themselves, the Application and the Petition cite the composition of the Ninth Circuit judges who did, or did not, join a dissental as reasons to reinstate the stay and grant certiorari.[157] While the Application for a stay was denied by the Supreme Court, Justice Thomas and Justice Alito stated that they would grant the application.[158] The Petition was also denied.[159]

The dissentals written by Judges O'Scannlain and Bumatay are cited in over twenty-five cases by magistrate,[160] district,[161] and circuit court judges.[162] Nearly all the decisions citing these dissentals were authored by Republican appointees.[163] Many of the cases deal with Eighth Amendment

156. Petition for Writ of Certiorari, Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020) (No. 19-1280) 2020 WL 2425669, at *15–18, *25, *32–33. (May 6, 2020).

157. *See id.* at *I, 15–16 ("Ten circuit judges disagreed with the panel's decision and would have granted the petition en banc") ("The Ninth Circuit denied Defendants' request for rehearing en banc, despite the disagreement of ten circuit judge[s]").

158. Idaho Dep't of Corr. v. Edmo, 140 S. Ct. 2800 (2020).

159. Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610 (2020) (citing United States v. Munsingwear, Inc., 340 U.S. 36 (1950)). The citation to *Munsingwear* is relevant because Justices Alito and Thomas do not want to give any precedential value to the Ninth Circuit decision. U.S. v. Munsingwear, 340 U.S. 36, *39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."). *Id*. at*41 ("[I]t is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences.").

160. *See, e.g.*, Report and Recommendation, Jackson v. White, 2022 WL 2296926, at *7 (C.D. Cal. May 16, 2022) (No. CV 20-04938 JVS (AS)); Order, Jackson v. White, 2022 WL 2291718, at *1 (C.D. Cal. June 24, 2022) (No. CV 20-04938-JVS (AS)) (Eighth Amendment claim based on the Plaintiff having expressed suicidal ideation to doctors by saying he had a noose, which was taken away, but attempting suicide by burning his cell); Report and Recommendation, Fader v. Berrada, 2021 WL 5967949, at *3 (W.D. Wash. Nov. 24, 2021) (No. C21-5264 TSZ-TLF); Order, Fader v. Berrada, 2021 WL 5937687 (W.D. Wash. Dec. 16, 2021) (No. C21-5264 TSZ) (Eighth Amendment claim based on an incarcerated individual's untreated leg infection leading to lingering impacts on the leg); Report and Recommendation, Davis v. Saidro, 2021 WL 254179, at *5 (S.D. Cal. Jan. 26, 2021) (No. 18-CV-2838-LAB(WVG)); Order, Davis v. Saidro, 2021 WL 764138 (S.D. Cal. Feb. 26, 2021) (No. 3:18-cv-02838-LAB-WVG) (Eighth Amendment claim regarding an inmate with a DVT placed on warfarin and removed from warfarin because he refused blood tests).

161. *See, e.g.*, Buentello v. Boebert, 545 F. Supp. 3d 912, 919 n.5 (D. Colo. 2021) (citing Bumatay's dissent in a First Amendment case regarding a Congresswoman blocking her on twitter); Cavanaugh v. County of San Diego, No. 3:18-cv-02557-BEN-LL, 2020 WL 6703592, at *12 (S.D. Cal. Nov. 12, 2020), *judgment entered*, No. 18-cv-02557-BEN-LL, 2020 WL 6702029 (S.D. Cal. Nov. 13, 2020), *aff'd*, No. 20-56311, 2021 WL 6103115 (9th Cir. Dec. 22, 2021) (Eighth Amendment claim based on a muted emergency call and deficient soft check of a pretrial detainee's cell suffering drug withdrawal leading to suicide).

162. *See, e.g.*, Texas v. Rettig, 993 F.3d 408, 418 (5th Cir. 2021); Brawner v. Scott County, 18 F.4th 551, 556 (6th Cir. 2021).

163. *Rhesa Barksdale*, BALLOTPEDIA, (https://ballotpedia.org/Rhesa_Barksdale) (last visited Oct. 18, 2023); *Roger Benitez*, BALLOTPEDIA, (https://ballotpedia.org/Roger_Benitez) (last visited Oct. 18, 2023); *Daniel Domenic*, BALLOTPEDIA, (https://ballotpedia.org/Daniel_Domenico) (last visited Oct. 18, 2023). There is only one Democratic appointee citing any of the dissents in this search, U.S. District Court Judge Michael H. Simon (appointed by former President Obama). *Michael H. Simon*, BALLOTPEDIA, (https://ballotpedia.org/Michael_H._Simon) (last visited Oct. 18, 2023). Judge Simon cites the O'Scannlain dissental only to clarify the distinction between gender identity disorder and gender dysphoria. *See* Gibson v. Cmty. Dev. Partners, No. 3:22-cv-454-SI, 2022 WL 10481324, at *7 (D. Or. Oct. 18, 2022) (Judge Simon explains, "Gender dysphoria is a diagnosis introduced in the latest edition of the American Psychiatric Association's classification of mental disorders. Am.

medical claims. In *Brawner v. Scott County, Tennessee*,[164] the Sixth Circuit held that a pretrial detainee who suffered a significant number of seizures and was diagnosed with epilepsy was denied necessary medical care in violation of her Eighth Amendment rights when corrections officers and nurses ignored her while she was having seizures, misdiagnosed her with withdrawal symptoms, and tased her while she was having a seizure.[165] Judge Readler, a Trump appointee[166] who was on the three-judge panel, wrote an opinion concurring in part and dissenting in part, citing all three dissentals in *Edmo II*.[167] Judge Readler argued that the Sixth Circuit was moving toward a lower negligence standard in Eighth Amendment jurisprudence[168] and impermissibly defining the range of medically acceptable procedures.[169]

Judge Ho, a Trump appointee,[170] cites Judge Bumatay's dissental[171] in three different Fifth Circuit cases, one of the most conservative circuit courts.[172] Importantly, in *Texas v. Rettig*,[173] a case involving the Affordable Care Act, Judge Ho cited Judge Bumatay's dissental arguing for strict originalism: "While we must faithfully follow [Supreme Court]

Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, Text Revision (DSM-V-TR) F64.0 (5th ed. 2022). It replaces the 'now-obsolete' term 'gender identity disorder' used in the previous edition. Edmo v. Corizon, Inc., 949 F.3d 489, 491 n.2 (9th Cir. 2020).''). A similar claim could be made about a dissental authored by Democrats that is almost exclusively cited by Democrat appointees, but that is not the circumstance in this case.

164. 14 F.4th 585 (6th Cir. 2021) [hereinafter *Brawner I*].

165. *Id.* at 600.

166. *United States Court of Appeals for the Sixth Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Sixth_Circuit (last visited Oct. 18, 2023). Joined by Thapar (nominated by former President Trump), Bush (nominated by former President Trump), Nalbandian (nominated by former President Trump), and Murphy (nominated by former President Trump). *Id.*

167. Brawner v. Scott Cnty., 18 F.4th 551, 556 (6th Cir. 2021) [hereinafter *Brawner II*] (Readler, J., dissenting from denial of hearing en banc).

168. The Supreme Court was clear in *Kingsley v. Hendrickson*, that the Eighth Amendment's Cruel and Unusual Punishment Clause applies to convicted prisoners, and the Fourteenth Amendment's Due Process Clause applies to pretrial detainees. 576 U.S. 389, 390, 397 (2015) (citing Whitley v. Albers, 475 U.S. 312 (1986); Hudson v. McMillian, 503 U.S. 1 (1992)). "The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'" Kinglsey, 576 U.S. at 400. Judge Readler does not believe that this distinction is applicable. *Brawner I*, 14 F.4th at 601 ("I do not believe that *Kingsley v. Hendrickson*'s excessive force holding abrogates the subjective standard for deliberate indifference claims brought by pretrial detainees.").

169. *Brawner II*, 18 F.4th at 556.

170. *James Ho*, BALLOTPEDIA, https://ballotpedia.org/James_Ho (last visited Oct. 18, 2023); Williams v. Homeland Ins. Co. of New York, 18 F.4th 806, 818 n.1 (5th Cir. 2021) (Ho, J., dissenting) (arguing that "When faced with a conflict between text and precedent, we should maximize the former—and minimize the latter."); Williams v. Seidenbach, 958 F.3d 341, 349–50 n.2 (5th Cir. 2020) (Ho, J., concurring) (Judge Ho concurring to his own majority opinion to point out that the dissenting Republican appointees, although fellow "textualist" are mistaken in asserting stare decisis in part because "[w]e should resolve questions about the scope of those precedents in light of and in the direction of the constitutional text and constitutional history.").

171. Bumatay's dissent is also cited in the Third Circuit by former President Trump appointee Judge Paul Matey. FDRLST Media, LLC v. Nat'l Lab. Rels. Bd., 35 F.4th 108, 132 (3d Cir. 2022) (Matey, J., concurring).

172. Emma Plantoff, *Trump Appointed Judges are Shifting the Country's Most Politically Conservative Circuit Court Further to the Right*, THE GUARDIAN, (Aug. 30, 2018, 12:00 AM), https://www.theguardian.com/law/2021/nov/15/fifth-circuit-court-appeals-most-extreme-us.

173. Texas v. Rettig, 993 F.3d 408, 418 (5th Cir. 2021).

precedent . . ., '[w]e should resolve questions about the scope of those precedents in light of and in the direction of the constitutional text and constitutional history.'"[174] The only person who cites Judge Bumatay's dissental more than Judge Ho is Judge Bumatay himself.[175]

IV. ERRORS IN THE *EDMO II* DISSENTALS' SCIENTIFIC, MEDICAL, AND LEGAL ANALYSIS

The foundation for the dissentals' argument against gender affirming care is that it represents "a new, rapidly changing, and highly controversial area of medical practice" lacking medical consensus.[176] If there is no medical consensus, gender affirming care and surgery cannot be seen as medically necessary under the first prong of the *Farmer* Court's indifference test.[177] Furthermore, if the medical practice is controversial, then the trial court's decision is about "social awareness" and "partisan treatment."[178] To establish that gender affirming care is medically necessary for transgender people, including incarcerated transgender people, it is important to understand the broader medical and scientific consensus on the matter.

In concluding that there is no medical consensus regarding gender affirming care, the *Edmo II* dissentals present and analyze scientific and medical research.[179] But in examining this analysis, it becomes evident that the dissentals misconstrue the legal, medical, and scientific evidence they present. In reality, there is not medical controversy, but rather medical consensus, and providing gender affirming care is not merely a form of social awareness and partisan treatment, but is medically necessary.[180]

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174. *Id.* Judge Ho was joined by E. Jones (nominated by former President Reagan), J. Smith (nominated by former President Reagan), Elrod (nominated by former President G.W. Bush), and Duncan (nominated by former President Trump). The three-judge panel was also exclusively Republican appointees—Haynes (nominated by former President G.W. Bush), Barksdale (nominated by former President G.H.W. Bush), and Willett (nominated by former President Trump). *United States Courts of Appeals for the Fifth Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Fifth_Circuit, (last visited Oct. 18, 2023).

175. Verdun v. City of San Diego, 51 F.4th 1033, 1058 (9th Cir. 2022) (Bumatay, J., dissenting); United States v. Hansen, 40 F.4th 1049, 1072 (9th Cir. 2022) (Bumatay, J., dissenting) (joined by Callahan, Ikuta, R. Nelson, VanDyke, Bress, and Lee (all nominated by former President Trump)); United States v. Olsen, 21 F.4th 1036, 1063 (9th Cir. 2022), *cert. denied*, 142 S. Ct. 2716 (2022) (Bumatay, J., concurring in the denial of rehearing en banc) (Bumatay concurred separately from the concurring opinion of Murguia joined by Christen); Mai v. United States, 974 F.3d 1082, 1091 (9th Cir. 2020) (Bumatay, J., dissenting to a denial of a rehearing en banc) (joined by VanDyke, and joined in part by Ikuta, Hunsaker (nominated by former President Trump), Bennet (nominated by former President Trump), Collins, and Bress).

176. Edmo v. Corizon, Inc., 949 F.3d 489, 490 (9th Cir. 2020) (O'Scannlain, J., dissenting to denial of rehearing en banc).

177. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

178. *Edmo II*, 949 F.3d at 490, 504.

179. *Id.* at 508–09.

180. *See Gender Confirming Surgery*, PENN MEDICINE, (last visited Oct. 19, 2023), https://www.pennmedicine.org/for-patients-and-visitors/find-a-program-or-service/plastic-surgery/reconstructive-surgery/gender-confirmation-plastic-surgery.

A. (Mis)framing the Medical and Scientific Understanding of Gender Affirming Care

Demonstrating that an area of medical practice is controversial, and thus lacks medical consensus, requires proving the existence of competing and divergent medical treatments and scientific evidence. To do so, opposing parties will find experts to support their position and, therefore, "disputes in the field are magnified, and the consensus of experts, if any, is obscured."[181]

However, the mere existence of competing expert testimony is not sufficient to demonstrate a lack of medical consensus.[182] Instead, the law provides a system for evaluating expert testimony.[183] The use of dissentals is problematic because they significantly diverge from this system.[184] The *Edmo II* dissentals, fail to properly evaluate the expert testimony in order to frame gender affirming care as controversial and lacking consensus.[185] When the expert testimony is properly evaluated, the medical consensus on gender affirming care is clear.

As a rule, a district court is given deference in assessing the facts of a case.[186] A district court's findings of fact are reviewed under the clearly erroneous standard of review[187] because "[f]indings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations," and therefore are entitled to deference.[188] This is especially true with a district court's credibility findings.[189]

Review under the clearly erroneous standard requires a "definite and firm conviction that a mistake has been committed."[190] An appellate court cannot reverse factual findings if, based on the entire record, a district court's account of the evidence is plausible, even if the appellate court would have weighed the evidence differently.[191] In fact, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[192] The *Edmo II* dissentals offer no such deference to the findings of the district court.

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181. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1175 (1991).
182. *See* FED. R. EVID. 702 advisory committee notes.
183. *See* FED. R. EVID. 702.
184. *Edmo II*, 949 F.3d at 493 (O'Scannlain, J., dissenting to denial of rehearing en banc).
185. *See id.* at 490, 504.
186. "[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." Harman v. Apfel, 211 F.3d 1172, 1175 (9th Cir. 2000) (quoting Pierce v. Underwood, 487 U.S. 552, 558 (1988)).
187. FED. R. CIV. P. 52(a)(6).
188. Rand v. Rowland, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc).
189. *See* Anderson v. City of Bessemer, 470 U.S. 564, 573–74 (1985); McClure v. Thompson, 323 F.3d 1233, 1240–41 (9th Cir. 2003).
190. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 242 (2001); Fisher v. Tucson Unified Sch. Dist., 652 F.3d 1131, 1136 (9th Cir. 2011).
191. *See, e.g.*, United States v. McCarty, 648 F.3d 820, 824 (9th Cir. 2011); Husain v. Olympic Airways, 316 F.3d 829, 835 (9th Cir. 2002).
192. United States v. Elliott, 322 F.3d 710, 715 (9th Cir. 2003).

It is long established that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[193] The reason for this "gatekeeping" function is that expert testimony is given significant latitude under "the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline."[194] The *Daubert* rule "'establishes a standard of evidentiary reliability.' It 'requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility.'"[195] Thus, "the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'"[196]

A district court's findings regarding expert witness testimony are given even greater deference than its factual assessments; rather than a clearly-erroneous standard, a reviewing court "must apply an abuse-of-discretion standard when it reviews a trial court's decision to admit or exclude expert testimony."[197] The standard applies equally to a district court's "decisions about how to determine reliability as to its ultimate conclusion."[198] The district court is given "broad latitude" in assessing expert witness testimony.[199]

Judge O'Scannlain's dissental in *Edmo II* characterizes the experts' testimony differently than the District Court's opinion without justification.[200] The District Court assessed the disagreement between the experts as follows:

> Plaintiff's and Defendants' experts disagree on whether Ms. Edmo meets all the WPATH standards criteria for gender [affirming] surgery. Specifically, Defendants' experts believe that Edmo does not meet the fourth and sixth criteria–that any significant mental health concerns be well controlled and that she live twelve months in a fully gender-congruent role.[201]

O'Scannlain's dissental adds an additional disagreement that does not appear in the District Court's finding of facts, namely that the IDOC and Corizon experts "did not regard the WPATH Standards as definitive treatment criteria, let alone medical consensus."[202] The dissental uses this

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193. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993)).

194. *Id.* at 148 (quoting *Daubert*, 509 U.S. at 592).

195. *Id.* at 149 (quoting *Daubert*, 509 U.S. at 590 and 592).

196. *Id.* (alteration in original).

197. *Id.* at 138–39 (citing General Electric Co. v. Joiner, 522 U.S. 136, 138–39 (1997)).

198. *Id.* at 139.

199. *Id.* at 142 (citing *General Electric*, 522 U.S. at 143).

200. *See* Edmo v. Corizon, Inc., 949 F.3d 489, 490 (9th Cir. 2020) (O'Scannlain, J., dissenting to denial of rehearing en banc).

201. Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1120 (D. Idaho 2018), *order clarified*, No. 1:17-cv-00151-BLW, 2019 WL 2319527 (D. Idaho May 31, 2019), and *aff'd in part*, *vacated in part*, *remanded sub nom*. Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019).

202. *Edmo II*, 949 F.3d at 493.

additional fact to attack the District Court and the three-judge panel and undermine the medical and scientific assessment; however, as the District Court found, the experts proffered by IDOC and Corizon did not have adequate experience to come to this conclusion.[203]

Unlike the experts who testified on Edmo's behalf, who both had extensive experience with gender dysphoria and gender affirming surgery, neither of the experts that testified on IDOC and Corizon's behalf had adequate experience in those areas. Dr. Ettner, who testified on Edmo's behalf, has been a member of WPATH since 1993, authored WPATH SOC version seven, and currently chairs the WPATH Committee for Institutionalized Persons.[204] She has "treated approximately 3,000 individuals with gender dysphoria, including evaluating whether gender [affirming] surgery is necessary for certain patients."[205] Of the 3,000 individuals she has worked with, she has referred approximately 300 for gender affirming surgery and has diagnosed approximately thirty incarcerated people with gender dysphoria.[206]

Likewise, Edmo's second expert, Dr. Gorton, "is an emergency medicine physician . . . [who] also works with Project Health, which has provided training for numerous clinics regarding the provision of transgender health care in California."[207] Dr. Gorton is a WPATH member and on both the Transgender Medicine and Research Committee and the Institutionalized Persons Committee.[208] "Dr. Gorton has been the primary care physician for approximately 400 patients with gender dysphoria" and provides follow-up care for gender affirming surgery for about thirty patients.[209]

Unlike Dr. Ettner and Dr. Gorton's substantial experience, prior to Edmo's evaluation, Dr. Garvey, one of the experts for IDOC and Corizon, "had never conducted an in-person evaluation to determine whether a patient needed gender [affirming] surgery."[210] He also had "never recommended that a patient with gender dysphoria receive gender [affirming] surgery or done long-term follow-up care with a patient who has had gender [affirming] surgery."[211]

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203. *See id.* at 490.
204. *Edmo*, 358 F. Supp at 1113.
205. *Id.*
206. *Id.* Although she has assessed prisoners' gender dysphoria, "Dr. Ettner is not a Certified Correctional Healthcare Professional, and she has not *treated* inmates with gender dysphoria." *Id.* (emphasis added). In addition to extensive experience treating patients, Dr. Ettner is "an author or editor of numerous peer-reviewed publications on treatment of gender dysphoria and transgender healthcare Dr. Ettner is an editor for the textbook, 'Principles of Transgender Medicine and Surgery,' which . . . [is] used in medical schools." Through WPATH's global education initiative, Dr. Ettner provides training to medical and mental health professionals on "treating people with gender dysphoria, including assessing whether gender [affirming] surgery is appropriate." *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 1114. "Dr. Gorton is not a Certified Correctional Healthcare Professional" and does not treat "inmates with gender dysphoria." *Id.*
210. *Id.* at 1114.
211. *Id.*

Another expert, Dr. Andrade, could not evaluate gender dysphoria because, "as a licensed independent clinical social worker, Dr. Andrade [did] not qualify under IDOC's former gender dysphoria policy as a 'gender identity disorder evaluator' who could assess someone for surgery."[212] Although Dr. Andrade had "provided treatment to gender dysphoria inmates in his role on the treatment committee and [had] evaluated and confirmed diagnoses of gender dysphoria for over 100 inmates," he did not qualify as an expert in the area because he had "never provided direct treatment for patients with gender dysphoria [or] been a treating clinician for a patient who has had gender [affirming] surgery."[213]

Likewise, there was no evidence that IDOC's Chief Psychologist, Dr. Campbell, had "ever recommended gender [affirming] surgery for an inmate."[214] Although Dr. Campbell was a member of WPATH and "directly conducted six gender dysphoria assessments," including overseeing "the treatment and assessment of approximately fifty inmates who have requested gender dysphoria evaluations,"[215] he lacked the experience necessary to evaluate gender affirming surgical decisions.[216]

IDOC and Corizon's three experts, therefore, had no experience with a patient undergoing or having undergone gender affirming surgery. Only Dr. Andrade had ever been part of a committee that recommended gender affirming surgery and in both instances the recommendation was conditioned on a move to a women's prison for twelve months before surgery, an impossibility because "[t]he Massachusetts Department of Corrections houses [incarcerated persons] according to their genitals."[217]

IDOC and Corizon's experts' lack of expertise in gender affirming surgery is the reason "the Court [gave] virtually no weight to the opinions of Defendants' experts that Edmo does not meet the fourth and sixth WPATH criteria for gender [affirming] surgery."[218] The lack of qualifying experience was the determining factor in the District Court's factual determination:

> [N]either Dr. Garvey nor Dr. Andrade has any direct experience with patients receiving gender [affirming] surgery or assessing patients for the medical necessity of gender [affirming] surgery. Defendants' experts also have very little experience treating patients with gender dysphoria other than assessing them for the existence of the condition.[219]

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212. *Id.* The District Court notes "former" because IDOC had a prior policy in place at the time of the events in the case, not to imply he would qualify under the current standard.
213. *Id.*
214. *Id.* at 1115.
215. *Id.*
216. *Id.*
217. *Id.* at 1114–15.
218. *Id.* at 1126.
219. *Id*. at 1125.

The O' Scannlain dissental attempts to minimize these findings by stating that "[e]ach set of experts had gaps in their relevant experience. Edmo's experts had never treated *inmates* with gender dysphoria, while the State's experts had never conducted long-term follow-up care with a patient who had undergone sex-reassignment surgery."[220] O'Scannlain characterization of the deficiencies in IDOC and Corizon's experts' experience does not correspond with the actual differences between the experts or give deference to the District Court's findings.

Notably, the O'Scannlain dissental does not provide any analysis indicating that the District Court abused its discretion; instead, it violates the District Court's broad discretion to evaluate both the reliability and conclusions of the expert witnesses. The dissental's disregard for *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[221] *Kumho Tire Co. v. Carmichael*,[222] and their progeny is, at minimum, problematic, but the bigger issue is that it leads to O'Scannlain's conclusion that the expert opinions should be given equal weight.[223] This incorrect conclusion, in turn, lends support to the dissentals' broader conclusion that gender affirming care is controversial.[224]

Based on this problematic assessment of expert witness testimony, O'Scannlain asserts three arguments that form the basis of his conclusion that the Eighth Amendment is not violated by denying access to gender affirming surgery because there is no medical or scientific consensus on gender affirming care or surgery. First, the dissental claims that "constitutionally acceptable medical care is not defined by the standard of one organization."[225] Second, the dissental asserts that WPATH is a "controversial self-described advocacy group that dresses ideological commitments as evidence-based conclusions."[226] Third, the dissental argues that this is a "case of dueling experts," meaning the failure to treat Edmo was "indeed acceptable."[227] The following Sections examine these positions thoroughly and conclude that each is flawed.

B. The WPATH SOC Represents a Medical and Scientific Consensus and is Supported by a Multitude of Organizations in Health, Mental Health, Corrections, and Law

The WPATH SOC represents the medical consensus on gender affirming care and should be used to inform the constitutional standard for medical necessity.[228] The O'Scannlain dissental's challenge to the

220. Edmo v. Corizon, Inc., 949 F.3d 489, 493 (9th Cir. 2020) (O'Scannlain, J., dissenting to denial of rehearing en banc).
221. 509 U.S. 579 (1993).
222. 526 U.S. 137 (1999).
223. *Edmo II*, 949 F.3d at 499.
224. *Id.* at 508.
225. *Id.* at 495.
226. *Id.*
227. *Id.*
228. *See id.* at 493.

WPATH SOC is undermined by the very cases it cites. By examining these cases, the WPATH SOC and gender affirming care are better understood within the Eighth Amendment's medical necessity requirement.

The WPATH SOC has been recognized and adopted by a wide variety of organizations. For instance, the District Court in *Edmo II* noted that the National Commission on Correctional Healthcare (NCCHC) "endorses the WPATH Standards of Care as the accepted standards for the treatment of transgender prisoners."[229] The NCCHC was formed after an American Medical Association (AMA) study of jails "found inadequate, disorganized health services and a lack of national standards."[230] The AMA then formed a program with collaborating organizations to address these issues.[231] In 1983, the program became the NCCHC, an independent 501(c)(3) that is often cited by courts deciding Eighth Amendment claims, although its standards are not determinative.[232] The NCCHC is composed of more than thirty supporting organizations in the fields of health, mental health, law, and corrections.[233]

In addition to the NCCHC, the Ninth Circuit also notes:

> [M]any of the major medical and mental health groups in the United States—including the American Medical Association, the American Medical Student Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, the National Association of

229. Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1115 (D. Idaho 2018), *order clarified*, No. 1:17-cv-00151-BLW, 2019 WL 2319527 (D. Idaho May 31, 2019), and *aff'd in part*, *vacated in part*, *remanded sub nom*. Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019).

230. *About Us*, NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/about-us/ (last visited Oct. 19, 2023).

231. *See* Press Release, AMA, AMA Reinforces Opposition to Restrictions on Transgender Medical Care (June 15, 2021), https://www.ama-assn.org/press-center/press-releases/ama-reinforces-opposition-restrictions-transgender-medical-care.

232. John Ferraro, Comment, *The Eighth for* Edmo*: Access to Gender-Affirming Care in Prisons*, 62 B.C. L. REV. E-SUPP. II.-344, II.-348–49 (2021); *see, e.g.*, Braggs v. Dunn, 257 F. Supp. 3d 1171, 1226–27 (M.D. Ala. 2017) (assessing prison psychiatric care against NCCHC standards); Feliciano v. Gonzalez, 13 F. Supp. 2d 151, 158 n.3 (D.P.R. 1998) (discussing NCCHC standards and accreditations when assessing prison medical and mental health care systems); Casey v. Lewis, 834 F. Supp. 1477, 1483–84 (D. Ariz. 1993) (discussing NCCHC standards with regard to psychiatric, medical, and dental care, as well as other professional standards from other organizations).

233. *NCCHC Committee Members*, https://www.ncchc.org/supporting-organizations-board-members/ (last visited Oct. 19, 2023). Current supporting organizations include: Academy of Correctional Health Professionals, American Academy of Child and Adolescent Psychiatry, American Academy of Family Physicians, American Academy of PAs, American Academy of Pediatrics, American Academy of Psychiatry and the Law, American Association of Nurse Practitioners, American Bar Association, American College of Correctional Physicians, American College of Emergency Physicians, American College of Healthcare Executives, American College of Obstetricians and Gynecologists, American College of Physicians, American College of Preventive Medicine, American Counseling Association, American Dental Association, American Health Information Management Association, American Jail Association, American Medical Association, American Nurses Association, American Osteopathic Association, American Pharmacists Association, American Psychiatric Association, American Psychological Association, American Public Health Association, American Society of Addiction Medicine, National Association of Counties, National Association of Social Workers, National Medical Association, National Sheriffs' Association, and Society for Adolescent Health and Medicine. *Id.*

> Social Workers, the American Academy of Plastic Surgeons, the American College of Surgeons, Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus, and Mental Health America—recognize the WPATH Standards of Care as representing the consensus of the medical and mental health communities regarding the appropriate treatment for transgender and gender dysphoric individuals.[234]

The WPATH SOC is not the standard of just one organization, but the accepted standard across a multitude of health organizations. In fact, IDOC and Corizon acknowledged that "the WPATH Standards of Care 'provide the best guidance,' and 'are the best standards out there,'" and that "[t]here are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups."[235] The WPATH standards are also recognized by most courts as the proper guidelines for treatment.[236]

The O'Scannlain dissental relies on a series of cases that are either easily distinguishable or support the use of the WPATH SOC when examined more closely.[237] The O'Scannlain dissental relies on these cases to assert that "A mere professional association simply cannot define what qualifies as constitutionally acceptable treatment of prisoners with gender dysphoria."[238] As already demonstrated above, however, the WPATH SOC is not the standard of a "mere professional association" but instead is a professional standard of care supported by many professional organizations, with "no other competing evidence-based standards."[239] The WPATH SOC does not set the constitutional limit, but it informs the constitutional limit on what doctors, scientists, and society deem "cruel and unusual" when addressing prisoners' serious medical needs.[240] In fact, looking at the cited cases in O'Scannlain's dissental further supports the use of medical and scientific professional standards like the WPATH SOC.

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234. Edmo v. Corizon, Inc., 935 F.3d 757, 769 (9th Cir. 2019).

235. *Id.* (quoting Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1125 (D. Idaho 2018), *order clarified*, No. 1:17-cv-00151-BLW, 2019 WL 2319527 (D. Idaho May 31, 2019), and *aff'd in part*, *vacated in part*, *remanded sub nom*. Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019)).

236. *Id.* (citing De'lonta v. Johnson, 708 F.3d 520, 522–23 (4th Cir. 2013)); *see also* Doe v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 344 (4th Cir. 2021), *cert. denied sub nom*. Shenandoah Valley Juv. Ctr. Comm'n v. Doe, 142 S. Ct. 583 (2021) (quoting *De'lonta*, 708 F.3d at 522–23) ("When determining whether the inmate plausibly alleged that VDOC acted with deliberate indifference, this Court relied upon the 'Benjamin Standards of Care,' the standards 'published by the World Professional Association for Transgender Health' laying out the 'generally accepted protocols for the treatment of GID.'"); Rosati v. Igbinoso, 791 F.3d 1037, 1039–40 (9th Cir. 2015); Keohane v. Jones, 328 F. Supp. 3d 1288, 1294 (N.D. Fla. 2018), *rev'd in part, dismissed in part sub nom.*, Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257 (11th Cir. 2020); Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1170 (N.D. Cal. 2015), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015); Soneeya v. Spencer, 851 F. Supp. 2d 228, 231–32 (D. Mass. 2012).

237. Edmo v. Corizon, Inc., 949 F.3d 489, 495–97 (9th Cir. 2020) (O'Scannlain, J., dissenting to denial of rehearing en banc).

238. *Id.*at 495.

239. *Edmo I*, 935 F.3d at 769.

240. *Id.* at 794–95.

The O'Scannlain dissental cites *Bell v. Wolfish*[241] to assert that a professional association cannot inform constitutionally acceptable medical care for prisoners with gender dysphoria.[242] In *Bell*, the Supreme Court addressed the constitutional rights of pretrial detainees in a federally operated short-term custodial facility.[243] The pretrial detainees claimed that "overcrowded conditions, undue length of confinement, improper searches, inadequate recreational, educational, and employment opportunities, insufficient staff, and objectionable restrictions on the purchase and receipt of personal items and books" violated their constitutional rights.[244] Despite evidence from "the American Public Health Association's Standards for Health Services in Correctional Institutions, the American Correctional Association's Manual of Standards for Adult Correctional Institutions, or the National Sheriffs' Association's Handbook on Jail Architecture," the Supreme Court held that such conditions were not unconstitutional.[245] The Supreme Court did not reject this evidence because it failed to establish the constitutional standard, however, but rather because these organizations' handbooks and the other cases cited by the pretrial detainees "involved traditional jails and cells in which inmates were locked during most of the day."[246] Thus, in *Bell,* the Supreme Court bluntly concluded, "We simply do not believe that requiring a detainee to share toilet facilities in this admittedly rather small sleeping place with another person for generally a maximum period of 60 days violates the Constitution."[247]

The circumstances of *Bell*, therefore, are not analogous to the facts and circumstances of Edmo's case. First, the *Bell* Court did not reject the listed professional association documents because they did not inform a constitutional standard, but because they dealt with a different type of facility.[248] Second, *Bell* did not involve a medical necessity argument; rather, it was a case about the conditions of pretrial detention facilities.[249]

The O'Scannlain dissental also cites *Jackson v. McIntosh*[250] to assert that a physician's disagreement with a criterion is a "'difference of medical opinion' . . . [that is] insufficient, as a matter of law, to establish deliberate indifference."[251] *Jackson* is also an inappropriate comparison and does not support rejecting the WPATH SOC informing the constitutional limit in *Edmo II*. The *Jackson* court's decision cannot establish the appropriate factors to use in determining what is "nothing more than 'a

241. 441 U.S. 520 (1979).
242. *See Edmo II*, 949 F.3d at 495–97.
243. *Bell*, 441 U.S. at 523.
244. *Id.* at 527.
245. *Edmo II*, 949 F.3d at 495 (citing *Bell*, 441 U.S. at 543 n.27).
246. *Bell*, 441 U.S. at 543 n.27.
247. *Id.* at 543.
248. *Id.* at 548.
249. *Bell*, 441 U.S. at 520.
250. 90 F.3d 330 (9th Cir. 1996).
251. *Edmo II*, 949 F.3d at 495–96 (alteration in original) (quoting *Jackson* 90 F.3d at 332).

difference of medical opinion'" because it was an interlocutory appeal of a § 1983 qualified immunity claim based on the doctors' motion for summary judgment.[252] The *Jackson* court's decision not to grant summary judgment was based on Jackson's argument that animosity, *not a difference of opinion*, was the reason he was denied a kidney transplant.[253] The court held that "[i]f Jackson prove[d] that claim at trial, and [showed] that the delay in performing the kidney transplant was medically unacceptable, he [would] have shown that the doctors were deliberately indifferent to his serious medical needs."[254] The interlocutory appeal was dismissed for lack of jurisdiction.[255]

The O'Scannlain dissental then cites *Long v. Nix*[256] to argue that "nothing in the Eighth Amendment prevents prison doctors from exercising their independent medical judgment."[257] Long's principal claim was that he was not treated for gender dysphoria, but both the district court and the Eighth Circuit held that Long never showed "a continued interest in psychiatric evaluation or treatment either for depression or his gender-identity disorder."[258] Long refused to be cooperative even when afforded annual medical evaluation as part of a parole evaluation.[259]

In *Long*, the disagreement concerned the prescription of tranquilizers as part of a larger scope of mental health treatment.[260] Long's expert recommended psychotherapy combined with tranquilizers to treat depression and anxiety.[261] The State's expert did not recommend providing tranquilizers "not[ing] Long has not requested treatment for his anxiety or depression nor has he fully cooperated with prison psychologists so that the staff could properly respond to his anxiety or depression."[262] Essentially, the State's expert argued there was no basis for determining whether to prescribe tranquillizers because Long never participated in treatment for his anxiety or depression.[263] The independent medical judgment exercised in *Long* was based purely on Long's refusal to be involved in the agreed upon portion of the treatment in the first place.[264]

Conversely, in *Edmo I*, both sets of experts agree that Edmo has gender dysphoria.[265] The experts disagreement is not whether Edmo has gender dysphoria, but instead whether Edmo meets the WPATH SOC criteria

252. *Jackson*, 90 F.3d at 331–32.
253. *Id.* at 332.
254. *Id.*
255. *Id.*
256. 86 F.3d 761 (8th Cir. 1996).
257. Edmo v. Corizon, Inc., 949 F.3d 489, 496 (9th Cir. 2020) (quoting *Long*, 86 F.3d at 765).
258. *Long*, 86 F.3d at 763.
259. *Id.*
260. *Id.* at 764.
261. *Id.*
262. *Id.*
263. *See id.*
264. *See id.*
265. *See* Edmo v. Corizon, Inc., 949 F.3d 489, 493 (9th Cir. 2020).

for gender affirming surgery.[266] One set of experts has no experience in gender affirming surgery and the other has extensive experience.[267] Unlike in *Long* where the court did not have any guidance to determine whether tranquilizers should be administered,[268] the WPATH SOC provides guidance supported by a myriad of professionals in *Edmo I*.[269]

The O'Scannlain dissental goes on to minimize the three-judge panel's reliance on a Seventh and Eighth Circuit case finding that "professional organizations' standards of care are 'highly *relevant* in determining what care is medically acceptable and unacceptable.'"[270] O'Scannlain then cites two cases to demonstrate that "the range of medically acceptable care is defined by *qualities* of that care (or of its opposite) and not by professional associations."[271] The very same cases the O'Scannlain dissental cites, however, support the three-judge panel's proposition and contradict the dissental's assertion. Both cases state "that professional organizations' standards of care are 'highly *relevant* in determining what care is medically acceptable and unacceptable.'"[272]

The dissental contends that *Allard v. Baldwin*[273] establishes that "[m]edically unacceptable care is '*grossly incompetent* or inadequate care.'"[274] *Allard*[275] does not stand for this proposition.[276] *Allard* actually states that "A plaintiff can show deliberate indifference in the level of care provided in *different ways*."[277] *Allard* does state that one way to demonstrate deliberate indifference is "showing grossly incompetent or inadequate care."[278] But *Allard* also provides different ways to show deliberate indifference, such as: "[S]howing a defendant's decision to take an easier and less efficacious course of treatment or showing a defendant intentionally delayed or denied access to medical care."[279] Alternatively, deliberate indifference could be shown where treatment "so *deviated from professional standards* that it amounted to deliberate indifference.'"[280] *Allard*

266. *See id.*
267. *Id.*
268. *See generally Long*, 86 F.3d at 765–66 (offering no insight into standard of determining when to administer tranquilizers).
269. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 769 (9th Cir. 2020).
270. *Edmo*, 949 F.3d at 496 (quoting *Edmo I*, 935 F.3d at 785–87) (emphasis added in the dissental).
271. *Id.*
272. *Id.* (quoting *Edmo I*, 935 F.3d at 786) (emphasis added in the dissental).
273. 779 F.3d 768 (8th Cir. 2015) (en banc).
274. *Edmo II*, 949 F.3d at 496.
275. In *Allard*, "[a]ll claims arise out of a bowel obstruction and perforation Allard suffered and the allegedly deficient medical care provided." 779 F.3d at 769. The question was whether the failure to properly diagnose a bowel obstruction constituted deliberate indifference. *Id.* "Allard agrees he was diagnosed with constipation and given extensive treatment for that diagnosis." *Id.* at 771. The case hinged on misdiagnosis and the Eighth Circuit held: "Negligent misdiagnosis does not create a cognizable claim under § 1983." *Id.* (quoting McRaven v. Sanders, 577 F.3d 974, 982 (8th Cir. 2009)).
276. *See id.* at 771.
277. *Id.* at 772 (emphasis added).
278. *Id.* (citing Smith v. Jenkins, 919 F.2d 90, 93 (8th Cir. 1990)).
279. *Id.* (citing Smith, 919 F.2d at 93; Meloy v. Bachmeier, 302 F.3d 845, 849 (8th Cir. 2002)) (emphasis added).
280. *Id.* (quoting *Smith*, 919 F.2d at 93) (emphasis added).

also supports the proposition from *Edmo I* that "[a]ccepted standards of care and practice within the medical community are highly relevant in determining what care is medically acceptable and unacceptable,"[281] supporting the *Edmo I* three-judge panel and contradicting the dissental.[282] In *Edmo I*, the District Court and panel establish that both the plaintiff's and defendant's experts agree the WPATH SOC is the appropriate standard of care and then holds that IDOC and Corizon deviated from that professional standard, establishing deliberate indifference.[283]

The dissental then misquotes *Henderson v. Ghosh*[284] by leaving out several critical words to argue that "the range of medically acceptable care is defined by *qualities* of that care (or of its opposite) and not by professional associations."[285] *Henderson* concerned a motion for recruitment of counsel to assist in raising an Eighth Amendment serious medical need claim.[286] The court held "that Henderson needed counsel and needed counsel's assistance at every phase of litigation."[287] The court discussed the evidence required to demonstrate deliberate indifference to establish that a pro se litigant like Henderson would not be able to provide the necessary evidence.[288] Notably, the court in *Henderson* addressed only the question of whether a pro se litigant needed representation to bring an Eighth Amendment claim—the court never reached a decision regarding Henderson's substantive claims.

Yet, the O'Scannlain dissental quotes a portion of *Henderson* to support the proposition that "[m]edically unacceptable care is . . . care that constitutes . . . 'such a substantial departure from accepted professional judgment to demonstrate that the person responsible did not base the decision on . . . [accepted professional] judgment.'"[289] The full quote from *Henderson*, however, is "such a substantial departure from accepted professional judgment, *practice, or standards*, as to demonstrate that the person responsible actually did not base the decision on . . . [accepted professional] judgment."[290] The removal of the words "practice" and "standards" in the O'Scannlain dissental makes a major difference because the dissental's argument is that professional organizations' *standards* cannot be used to measure deliberate indifference. It cites *Henderson* for this assertion, but *Henderson* actually supports "the proposition that professional organizations' standards of care are 'highly *relevant* in determining what

281. Edmo v. Corizon, Inc., 935 F.3d 757, 786 (9th Cir. 2019) (emphasis added).
282. *See* Edmo v. Corizon, Inc., 949 F.3d 489, 496 (9th Cir. 2020).
283. *Edmo I*, 935 F.3d at 792–96.
284. 755 F.3d 559 (7th Cir. 2014).
285. *Edmo II*, 949 F.3d at 496.
286. *See generally Henderson*, 755 F.3d at 561–66.
287. *Id.* at 568.
288. *Id.* at 566.
289. *Edmo II*, 949 F.3d at 496 (second alteration in original) (quoting *Henderson*, 755 F.3d at 566).
290. *Henderson*, 755 F.3d at 566 (alteration in original) (emphasis added) (quoting McGee v. Adams, 721 F.3d 474, 481 (7th Cir. 2013).

care is medically acceptable and unacceptable.'"[291] When the full quotation from *Henderson* is considered, the holding actually undermines O'Scannlain's argument and supports using the WPATH SOC.

The WPATH SOC represents a medical consensus on gender affirming care.[292] In assessing medical necessity under the Eighth Amendment, it is appropriate to use the WPATH SOC to inform the constitutional standard.[293] This Article reasons that the O'Scannlain dissental cites the abovementioned cases to undermine the use of the WPATH SOC, but examining the cases and the dissental's misstatements about them strengthens the point that the WPATH SOC represents the medical consensus on gender affirming care.

C. The O'Scannlain Dissental Provides Little Evidence to Support Rejecting the WPATH SOC

Criticism of the use of the WPATH SOC for gender affirming care is minimal and poorly supported. The O'Scannlain dissental's own contentions illustrate that criticisms of the WPATH SOC do not support rejecting its use in cases concerning gender affirming care.[294]

First, the O'Scannlain dissental miscategorized the district court's assessment of experts in relation to the WPATH SOC, stating that the district court's determination of expert credibility turned on how closely the expert followed the WPATH SOC.[295] In fact, all of the experts provided analysis using the WPATH SOC.[296] Where the experts differed was in their application of the WPATH SOC; IDOC and Corizon's experts used the WPATH SOC to argue that Edmo did not meet two of the criteria necessary to provide gender affirming surgery while Edmo's experts used the WPATH SOC to argue that gender affirming care was appropriate.[297] In assessing the credibility of the expert witnesses, the district court examined their experience with gender affirming surgery and determined that IDOC and Corizon's experts lacked such experience.[298] The lack of experience, rather than how closely they hewed to the WPATH SOC, was the determining factor.[299]

The O'Scannlain dissental then questioned the validity of the WPATH SOC's authority, arguing that it is "merely criteria promulgated

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291. *Edmo II*, 949 F.3d at 496 (quoting Edmo v. Corizon, Inc., 935 F.3d 757, 786 (9th Cir. 2019)) (emphasis added in the dissental); *see also Henderson*, 755 F.3d at 561–64 (discussing generally the relevance of professional organization standards).

292. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 795 (9th Cir. 2019).

293. *See id.* at 789 (explaining the validity of the WPATH SOC standard and holding that the Eighth Amendment claim can be properly brought forward).

294. *See Edmo II*, 949 F.3d at 498–99.

295. *Id.* at 494.

296. *Edmo I*, 935 F.3d at 795.

297. *Edmo II*, 949 F.3d at 493.

298. *See id.* at 494.

299. *See id.; see also Edmo I*, 935 F.3d at 795 (discussing how experts from Edmo and the State both agree with the WPATH standard).

by a controversial private organization with a declared point of view."[300] O'Scannlain supports this claim by citing to "Dr. Stephen Levine, author of the WPATH Standards' fifth version, former Chairman of WPATH's Standards of Care Committee, and the court-appointed expert in *Kosilek*."[301] Dr. Levine left WPATH before the sixth version of the WPATH SOC because he disagreed with the *influence* and *advocacy* of transgender patients.[302] He stated that "[a]dvocacy [by transgender patients] meant that science was secondary to these poor, suffering people needing to have exactly what they want."[303] Dr. Levine "was making his mark as the go-to expert for prison systems [while], his peers began to publicly affirm that the medical consensus on trans care had changed."[304] Dr. Levine, in response to questions "about his status as an outsider in his professional community" argues that, "The mainstream medical establishment, not he, had moved to the fringe. Groups that have endorsed the standards, such as the American Psychiatric Association, did so 'on the basis of civil rights' rather than scientific evidence."[305]

Dr. Levine's views are by his own admission outside the mainstream medical establishment, but his contention is that the medical establishment is at fault.[306] He testified in *Kosilek v. Spencer*[307] (*Kosilek II*) that WPATH is "both a scientific organization and an advocacy group for the transgendered" and that "[t]hese aspirations sometimes conflict."[308] According to Dr. Levine, "WPATH is supportive to those who want sex reassignment surgery . . . Skepticism and strong alternate views are not well tolerated."[309] Dr. Levine's assertions are the view of one person who is often used as an expert by correctional facilities to deny gender affirming care,[310] and holds a view contrary to the medical community at large.[311] Dr. Levine's status corresponds with a larger trend: "[T]hose experts in the minority on any issue are more likely to be in great demand because there are fewer of them and their position is the controversial one."[312] His ubiquity, therefore, does not lend to his credibility. His testimony is also the only evidence the O'Scannlain dissental cites to support the assertion that the WPATH is a "controversial private organization with a declared

300. *Edmo II*, 949 F.3d at 497.
301. *Id.*
302. Aviva Stahl, *Prisoners, Doctors, and the Battle over Trans Medical Care*, WIRED (July 8, 2021, 8:00 AM), https://www.wired.com/story/inmates-doctors-battle-over-transgender-medical-care/.
303. *Id.*
304. *Id.*
305. *Id.*
306. *See id.*
307. 774 F.3d 63 (1st Cir. 2014) (en banc) [hereinafter *Kosilek II*].
308. Edmo v. Corizon, 949 F.3d 489, 497 (9th Cir. 2020) (quoting *Kosilek*, 774 F.3d at 78).
309. *Id.* (quoting *Kosilek II*, 774 F.3d at 78).
310. Stahl, *supra* note 302.
311. *Id.*
312. L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1434 (1995) (citing Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1175 (1991)).

point of view."[313] The dissental's failure to cite any other authority supporting this view demonstrates the weakness of its argument.

The O'Scannlain dissental also attempts to trivialize the WPATH review process, but in so doing, actually highlights the extent and thoroughness of the WPATH SOC review process. When preparing the seventh version of the WPATH SOC, each section of the sixth version was assigned to individual WPATH members.[314] Each member then published a literature review updating their assigned section to reflect the latest research.[315] A thirty-four-person committee reviewed all the suggestions and debated the proposed changes.[316] After the Revision Committee completed their process, a separate subcommittee drafted the new document.[317] The process also incorporated a three-year period during which "'invited papers were written, subjected to peer review, and published for public comment in the *International Journal of Transgenderism*.'"[318] After three years' of "review and revision, the Writing Group presented the final draft of Version 7 to the WPATH Board of Directors, which approved the WPATH Standards on September 14, 2011."[319]

The O'Scannlain dissental points to the composition of the Revision Committee seemingly to denigrate those on the committee, stating that "Only about half of the Revision Committee possesses a medical degree," and that "The rest are sexologists, psychotherapists, or career activists, with a sociologist and a law professor rounding out the group."[320] The assertion made in O'Scannlain's dissental is based solely on Dr. Levine's personal viewpoint and testimony in *Kosilek II* rather than on an independent assessment of the participants in the WPATH SOC by the court.[321] By the standard articulated in the dissental, the social worker proffered by IDOC and Corizon to provide expert testimony should also be rejected, because he is not a medical professional with a medical degree.[322] Furthermore, the dissental's assertion raises an important question: if the Revision Committee has an insufficient number of medical doctors to make a medical recommendation, should a minority of judges on the Ninth Circuit,

313. *Edmo II*, 949 F.3d at 497.
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. Jennifer Levi & Kevin M. Barry, *Transgender Rights & the Eighth Amendment*, 95 S. CALIF. L. REV. 109, 125 (2021) (quoting Brief as Amicus Curiae Supporting Petitioner, at 7, Kosilek v. O'Brien, 774 F.3d 63 (1st Cir. 2014) (No. 14-1120)).
319. *Id.* at 126.
320. *Edmo II*, 949 F.3d at 497. *See generally*, *SOC8 Contributors*, WORLD HEALTH PRO. ASS'N. FOR TRANSGENDER HEALTH (July 26, 2021) https://www.wpath.org/media/cms/Documents/SOC%20v8/SOC8%20Full%20Contributor%20List%20-%20FINAL%20UPDATED%2009232021.pdf (Exhibiting a list of WPATH SOC contributors; only one person on the list appears to be only an activist. Kirill Sabir, co-founder of "FtM Phoenix" Group, a Russian–American transgender initiative focused on advocating for transgender health in Eurasia. Sabir has been a respondent or reviewer for studies by the World Health Organization, USAID, and the Council of Europe).
321. *Edmo II*, 949 F.3d at 497.
322. *Id.* at 496–97.

none of whom have medical degrees, be able to assess a medical standard? After all, the dissentals' emphasis on the lone law professor member of the Revision Committee is not a great endorsement for the judges' own role in this process. But the O'Scannlain dissental's greater error is its misguided reliance on Dr. Levine's testimony and its subsequent rejection of the WPATH SOC.

D. The O'Scannlain Dissental Cites Medical and Scientific Research that Actually Supports Using the WPATH SOC

Scientific and medical research also supports use of the WPATH SOC. The O'Scannlain dissental cherrypicks quotes from scientific and medical articles to support its criticisms of the WPATH SOC and undermine its value in deciding issues regarding gender affirming care.[323] Yet, a close reading of the articles O'Scannlain cites, in their entirety, proves the opposite point. O'Scannlain's reliance on truncated quotations to contest the WPATH SOC, at minimum, suggests a lack of evidence supporting the position that gender affirming care is controversial and lacks medical consensus. Dismantling the evidence offered by these articles, therefore, serves to dismantle the larger arguments offered by the dissental.

1. WPATH Recommendations are not Merely Policy Preferences

To support the conclusion that the WPATH recommendations are merely policy preferences, the O'Scannlain dissental cites Dr. George R. Brown's[324] *Recommended Revisions to the World Professional Association for Transgender Health's Standards of Care Section on Medical Care for Incarcerated Persons with Gender Identity Disorder*[325]:

> The article from which the [WPATH] recommendations [for incarcerated people] are adapted stipulates upfront that, because WPATH's "mission" is "to advocate for nondiscriminatory" care, it presumes that treatment choices should be the same for all "demographic variables, unless there is a clinical indication to provide services in a different fashion."[326]

Based on Dr. Brown's argument, the O'Scannlain dissental concludes that "Unable to make an evidentiary finding from a sample size of one, the [WPATH] concludes that its presumption should set the standard of care and then proceeds to recommend revisions with the express purpose of influencing how courts review gender dysphoria treatments under the Eighth Amendment."[327]

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323. *Id.* at 498–500.

324. Dr. Brown, MD, DFAPA has published over 110 papers and abstracts and 15 book chapters. George Richard Brown, *Recommended Revisions to the World Professional Association for Transgender Health's Standards of Care Section on Medical Care for Incarcerated Persons with Gender Identity Disorder*, 11 INT'L J. OF TRANSGENDERISM 133 (2009).

325. *Edmo II*, 949 F.3d at 498.

326. *Id.*

327. *Id*.

Yet, Dr. Brown, a professor at East Tennessee University in the Department of Psychiatry and Behavioral Sciences and a board-certified General Psychiatrist, argues that the WPATH SOC is misinterpreted as tacitly approving discrimination against transgender inmates.

> Silence on the issues of discrimination against institutionalized persons with [gender dysphoria] in the current SOC have been misinterpreted by health-care providers, including some current and past members of WPATH, and administrators of institutions or health care plans to mean that there is a tacit approval of some forms of discrimination since these issues are not specifically addressed.[328]

Dr. Brown specifically cites the First Circuit case *Kosilek II* as an example of this type of misinterpretation:[329] "As a result of th[e] 2002 ruling in [*Kosilek II*] an inmate with [gender dysphoria] diagnosed by nearly a dozen professionals with expertise in evaluating and treating [gender dysphoria] received access to de novo cross-sex hormones, female undergarments, laser electrolysis, [and] cosmetics."[330] Dr. Brown cites eleven articles to support his conclusion that the "[l]ack of access to transgender health care in institutions has caused, or contributed to, serious negative health outcomes including depression, exacerbation of other mental illnesses, suicidal thinking and behavior, and autocastration and/or autopenectomy."[331] Rather than asserting a policy preference, Dr. Brown is marshalling research to demonstrate that those with gender dysphoria are harmed in the institutional setting. His suggested revisions are based on his belief that subsequent research articles misinterpret prior versions of the WPATH SOC due to the wording, not that the WPATH as a whole should be disregarded.[332] Dr. Brown himself notes that the *Edmo II* dissental completely misrepresents his work.[333] Additionally, the revision process was not left to one doctor.[334]

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328. Brown, *supra* note 324, at 134.
329. *Edmo II*, 949 F.3d at 496.
330. Brown, *supra* note 324, at 136.
331. *Id.*
332. *Id.* at 134.
333. *See* E-mail from Dr. George R. Brown, MD, DFAPA, Professor, East Tenn. Univ., to John Parsi, Visiting Assistant Professor of L., Neb. Coll. of L. (Feb. 7, 2023) (on file with author) ("I had not previously seen that judges in that case were completely misinterpreting my work. As author of the SOC 5, 7, and 8 section on institutionalized persons and the care they should receive for [gender dysphoria], I am appalled that my work was twisted into somehow supporting denial of medically necessary care for those diagnosed with [gender dysphoria] in carceral settings. Clearly, that is not my position and I have testified to the contrary for over 25 years.").
334. *Edmo II*, 949 F.3d at 497.

2. The WPATH SOC is not Merely an Ethical Principle

The O'Scannlain dissental also cites a truncated portion of Cynthia S. Osborne[335] & Anne A. Lawrence's[336] *Male Prison Inmates With Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?*,[337] to argue that the WPATH SOC follows an ethical principle and not extensive clinical experience.[338] But further reading of the article shows that Osborne and Lawrence's position does not stop with this assessment. Instead, Osborne and Lawrence go on to say, "We concur with the [WPATH] SOC's contention that [gender affirming surgery] can be medically necessary for some, though not all, persons with [gender dysphoria], including some prison inmates."[339] Osborne and Lawrence articulate three points in support of this position: (1) "[A] determination of medical necessity reflects the exercise of professional judgment, but professionals sometimes disagree about the medical necessity of certain treatments—particularly [gender affirming surgery] as a treatment for [gender dysphoria]";[340] (2) Gender affirming surgery "is a safe, effective, and widely accepted treatment for [gender dysphoria]; disputing the medical necessity of [gender affirming surgery] based on assertions to the contrary is unsupportable";[341] and (3) Gender affirming surgery "can be judged medically necessary for some persons with [gender dysphoria], especially males, when their [gender dysphoria] reflects intense distress about the incongruence between their external genitalia and their gender identity; this incongruence can only be corrected through genital surgery."[342] Osborne and Lawrence explain that:

> Much of the resistance to offering [gender affirming surgery] to inmates with genital anatomic [gender dysphoria] appears to reflect doubts about the legitimacy of the [gender dysphoria] diagnosis itself or whether the distress that these inmates report is genuine. Such skepticism is not surprising: The phenomenon of genital anatomic [gender dysphoria] is so inconsistent with ordinary experience that it is almost

335. Cynthia S. Osborne LCSW-C is a Social Worker in Baltimore, MD. Kosilek v. Spencer, 774 F.3d 63, 70 (1st Cir. 2014). Osborne has a history of blanket denials of gender affirming surgery to prisoners. *Id.* at 73. She uses the WPATH SOC but has "opined that an inmate could not have the real-life experience required by the Standards of Care." Kosilek v. Spencer, 889 F. Supp. 2d 190, 221 (D. Mass. 2012), *aff'd*, 740 F.3d 733 (1st Cir. 2014), *reh'g en banc granted*, *opinion withdrawn* (Feb. 12, 2014), *on reh'g en banc*, 774 F.3d 63 (1st Cir. 2014), and *rev'd*, 774 F.3d 63 (1st Cir. 2014). Her denials have had disastrous results. *Id*. (internal citations omitted) ("After the Virginia Department of Corrections retained Osborne and terminated hormone therapy for a transsexual inmate named Ophelia De'lonta, De'lonta mutilated [her] genitals and Osborne was replaced by Dr. Brown. After Osborne advised the Wisconsin Department of Corrections that sex reassignment surgery was not necessary for an inmate named Donna Dawn Konitzer, Konitzer castrated [herself]."). Dr. Brown is Dr. George R. Brown, the same Dr. Brown whose work was misinterpreted by the dissental to justify denying gender affirming surgery. *Edmo*, 949 F.3d at 498.

336. Anne A. Lawrence is psychologist, sexologist, and former anesthesiologist. Cynthia S. Osborne & Anne A. Lawrence, *Male Prison Inmates With Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?*, 45 ARCHIVES OF SEXUAL BEHAV. 1649, 1649 (2016).

337. *Id.* at 1651.

338. *Edmo*, 949 F.3d at 498.

339. Osborne & Lawrence, *supra* note 336, at 1651.

340. *Id.*

341. *Id.*

342. *Id.*

> impossible to adequately comprehend. Consequently, there is a tendency to minimize the distress that inmates with genital anatomic [gender dysphoria] report or to attribute their complaints to hysteria, psychosis, malingering, or exaggeration, especially given that these phenomena are prevalent in correctional environments.[343]

Essentially, it can be difficult for those who do not have expertise or experience with gender dysphoria and gender affirming surgery, like IDOC and Corizon, to assess the necessity of the medical treatment fully and appropriately. Therefore, for "inmates seeking [gender affirming surgery], evaluation of [gender dysphoria] symptoms and comorbid conditions is ordinarily conducted by outside consultants, because prison-based mental health providers rarely have the necessary expertise and experience."[344] Often there is a basic "lack of correctional staff education and training surrounding transgender needs."[345]

The O'Scannlain dissental cites to Osborne and Lawrence to argue that the WPATH is following an "'ethical principle,' not 'extensive clinical experience.'"[346] But, under the standard articulated in a complete reading of Osborne and Lawrence's article, Dr. Eliason[347] and IDOC and Corizon's three expert witnesses do not have the requisite expertise or experience and would not qualify as experts.[348]

Osborne and Lawrence also argue that there are specific features of a prison that justify gender affirming surgery:

> Other features that can contribute to diagnostic confidence include a documented history of intense and unremitting [gender dysphoria] symptoms in prison, an absence of significant comorbid psychopathology that could complicate differential diagnosis (e.g., schizophrenia or bipolar disorder), and evidence of a positive response to cross-sex hormone therapy and whatever elements of identity-congruent living (e.g., clothing, makeup, hairstyle) have been permitted.[349]

Again, the dissental cited this study favorably, but a full reading of Osborne and Lawrence's article, sets forth criteria under which Edmo would qualify for gender affirming surgery: for example, Edmo's gender dysphoria includes intense and unremitting symptoms including two attempts at self-castration and a continuing desire to self-castrate mitigated by cutting.[350] Edmo's comorbidities are not psychopathologies like

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343. *Id.* at 1653.
344. *Id.* at 1654.
345. Patricia O'Neill, *Dysphoria of Adequate Care: Health Care of Incarcerated Transgender Individuals in American Prisons and Courts*, 31 TUL. J. L. & SEXUALITY 121, 129 (2022) (citing Ashley Hurst, Brenda Castaneda, & Erica Ramsdale, *Deliberate Indifference: Inadequate Health Care in U.S. Prisons*, 170 ANNALS INTERNAL MED. 563, 563 (2019).
346. Edmo v. Corizon Inc., 949 F.3d 489, 498 (9th Cir. 2020).
347. The doctor who evaluated Edmo. *Id.* at 491.
348. *Id.* at 499.
349. Osborne & Lawrence, *supra* note 336, at 1654.
350. *Edmo*, 949 F.3d at 492–93.

schizophrenia or bipolar disorder.[351] Edmo responded positively to hormone therapy and feminization.[352] Edmo met the criteria in the very study the dissental cites.

The dissental's argument that the WPATH is following an "ethical principle," and not "extensive clinical experience"[353] does not align with the way Osborne and Lawrence assess and utilize the WPATH SOC. A full reading of the standard proposed by Osborne and Lawrence does not contradict the WPATH SOC and in fact incorporates the WPATH SOC.[354]

Osborne and Lawrence offer two additions to the WPATH SOC at the end of their paper but there is no evidence that anyone has adopted this more extensive standard.[355] Yet, the dissental cites only the proposed additions: "a long period of expected incarceration after [gender affirming surgery]" and "a satisfactory disciplinary record."[356] If Edmo had her gender affirming surgery at the time of the district court order, she would have been incarcerated for an additional four years after her surgery.[357] Edmo did have a disciplinary record, but her entire record of misbehavior was based on the IDOC not permitting her to live as a transgender woman.[358]

The O'Scannlain dissental goes on to note that, "Even apart from the concerns over WPATH's ideological commitments, its evidentiary basis is not sufficient to justify the court's reliance on its strict terms."[359] Yet, the very articles and research that the dissental relies on illustrate the strength of evidentiary support for the WPATH SOC.

3. The WPATH SOC is not Based on a "Low" Level of Evidence

The dissental cites Dr. William Byne[360] et al.'s, *Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder*,[361] "[C]oncluding that 'the level of evidence' supporting WPATH's Standards' criteria for sex-reassignment surgery 'was generally low.'"[362] The article's Literature Review assessed the "eligibility and readiness criteria (e.g., pre-treatment psychotherapy, real-life experience, sequence of transition steps), as predictors . . . favorable [to] post-surgical

351. *Id.* at 491.
352. *Id.*
353. *Id.* at 498.
354. *Id.* at 1660.
355. Osborne & Lawrence, *supra* note 336, at 1660–61.
356. Edmo v. Corizon Inc., 949 F.3d 489, 499–500 (9th Cir. 2020).
357. *Id.* at 490–91.
358. *Id.* at 493.
359. *Id.* at 498.
360. William Byne, MD, PhD is a Professor of Clinical Psychiatry at Columbia and psychiatrist with the New York State Office of Mental Health. William Byne, Susan J. Bradley, Eli Coleman, A. Evan Eyler, Richard Green, Edgardo J. Menvielle, Heino F. L. Meyer-Bahlburg, Richard R. Pleak, & D. Andrew Tompkins, *Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder*, 41 ARCHIVES OF SEXUAL BEHAV. 759, 759 (2012).
361. *Id.*
362. *Edmo II*, 949 F.3d at 498 (quoting Byne, Bradley, Coleman, Eyler, Green, Menvielle, Meyer-Bahlburg, Pleak, & Tompkins, *supra* note 360, at 782).

outcomes."[363] It found that "[o]verall evidence supported these components; however the level of evidence was generally low, mostly corresponding to [American Psychiatric Association (APA)] level D and lower."[364] The APA level is based on a grading system from A to G, where an A represents: "*Randomized, double-blind clinical trial*. A study of an intervention in which subjects are prospectively followed over time; there are treatment and control groups; subjects are randomly assigned to the two groups; and both the subjects and the investigators are 'blind' to the assignments."[365]

An APA level D represents: "*Control study.* A study in which a group of patients and a group of control subjects are identified in the present and information about them is pursued retrospectively or backward in time."[366] An APA level G represents: "*Other*. Opinion-like essays, case reports, and other reports not categorized above."[367] The low level assigned to the WPATH is in relation to the APA grading system, which is based on the APA's preference for certain types of research over other types.[368] A low level is not a conclusion about the quality of the research, but instead about the type of research and its alignment with APA research preferences.[369] Overall, Dr. Byne concluded that the WPATH evidence supported the components.[370]

The article goes on to note "[s]ome studies, however, that tracked patients longitudinally after intervention could be categorized as APA level B."[371] An APA level B represents: "*Clinical trial.* A prospective study in which an intervention is made and the results of that intervention are tracked longitudinally. Does not meet standards for a randomized clinical trial."[372] It is hard to imagine a way to conduct a randomized clinical trial of gender affirming surgery.[373] The research examining transgender people post-gender affirming surgical outcomes, and ultimately supporting the use of gender affirming surgery, was graded as high as possible under the APA levels of evidence.[374]

More important than the evidentiary grading is the conclusion of the article. The article positively cites to the WPATH SOC and concludes that

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363. Byne, Bradley, Coleman, Eyler, Green, Menvielle, Meyer-Bahlburg, Pleak, & Tompkins, *supra* note 360, at 783.
364. *Id.*
365. *Id.* at 761.
366. *Id.*
367. *Id.*
368. *Id.* at 759–60.
369. *See id.* at 761.
370. *Id.*
371. *Id.* at 783.
372. *Id.* at 761.
373. How would you be able to keep trial participants from knowing if they had or did not have surgery? Even if such a study could be pulled off, would that study meet ethical research guidelines?
374. Byne, Bradley, Coleman, Eyler, Green, Menvielle, Meyer-Bahlburg, Pleak, & Tompkins, *supra* note, 360 at 765–66.

the APA should "consider drafting a resolution, similar to Resolution 122 of the American Medical Association" that:

> [C]oncludes that medical research demonstrates the effectiveness and necessity of mental health care, hormone therapy and [gender affirming surgery] for many individuals diagnosed with [gender dysphoria] and resolves that the AMA supports public and private health insurance coverage for medically necessary treatments and opposes categorical exclusions of coverage for treatment of [gender dysphoria] when prescribed by a physician.[375]

In 2018, Dr. Byne, as chair of the American Psychiatric Association Workgroup on Treatment of Gender Dysphoria, wrote *Assessment and Treatment of Gender Dysphoria and Gender Variant Patients: A Primer for Psychiatrists*,[376] which includes adopting the WPATH SOC.[377]

The O'Scannlain dissental states that the WPATH Standards "lack the evidence-based grading system that characterizes archetypal treatment guidelines, such as the Endocrine Society's hormone therapy guidelines."[378] This criticism is supported by citation to Dr. Byne's alleged conclusion "that 'the level of evidence' supporting WPATH's Standards' criteria for sex-reassignment surgery 'was generally low'"; but, as outlined above, this is not an accurate statement.[379] From this faulty premise, the dissental concludes that "[l]acking evidence-based grading, the WPATH Standards leave practitioners in the dark about the strength of a given recommendation."[380] The dissental does not provide a citation to the Endocrine Society's hormone therapy guidelines, but is likely referring to the *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*.[381] It is important to note that the Endocrine Society lists WPATH as a co-sponsoring association.[382] The Clinical Practice Guideline also states that mental health professionals "usually follow the WPATH SOC."[383] The Endocrine Society describes the WPATH SOC by noting that, "These carefully prepared documents have provided mental health and medical professionals with general guidelines for the evaluation and treatment of transsexual persons."[384] The dissental's endorsement of the approach of the Endocrine Society and the Endocrine Society's support

375. *Id.* at 768–69.
376. William Byne, Eli Coeman, A. Evan Eyler, Heino Meyer-Bahlburg, Dan Karasic, Jeremy D. Kidd, Richard Pleak, & Jack Pula, *Assessment and Treatment of Gender Dysphoria and Gender Variant Patients: A Primer for Psychiatrists*, 175 AM. J. PSYCHIATRY 10, ds1 (2018).
377. *Id.* at ds7–8.
378. Edmo v. Corizon Inc., 949 F.3d 489, 498 (9th Cir. 2020).
379. *Id.*
380. *Id.*
381. Wylie C. Hembree, Peggy Cohen-Kettenis, Henriette A. Delemarre-van de Waal, Louis J. Gooren, Walter J. Meyer III, Norman P. Spack, Vin Tangpricha, & Victor M. Montori, *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94 J. CLINICAL ENDOCRINOLOGY & METABOLISM (SPECIAL FEATURE) 3132, 3132 (2009).
382. *Id.* at 3150.
383. *Id.* at 3136.
384. *Id.* at 3134.

of the WPATH SOC is notable. The section on Method of Development of Evidence-based Clinical Practice Guidelines states: "The Task Force followed the approach recommended by the Grading of Recommendations, Assessment, Development, and Evaluation (GRADE) group, an international group with expertise in development and implementation of evidence-based guidelines."[385] The WPATH SOC 8 "assigned evidence grades using the GRADE methodology."[386] The dissental's criticism is misplaced both because the Endocrine Society, the dissental's preferred example of evidentiary grading, supports the use of the WPATH SOC and because the latest version of the WPATH SOC explicitly uses the same system as the Endocrine Society (the GRADE system).[387]

4. No Criteria Other than the WPATH for Treatment are Offered

The dissental's reliance on the Center for Medicare & Medicaid Services to support the assertion that criteria other than WPATH SOC can be used for treatment is also misplaced. The dissental makes this assertion immediately after the discussion regarding evidence-based grading leaving practitioners in the dark, noting that, "For these reasons, the Centers for Medicare & Medicaid Services, an agency of the United States Department of Health and Human Services, decided, '[b]ased on a thorough review of the clinical evidence,' that providers may consult treatment criteria other than WPATH, including providers' own criteria."[388] The final *Decision Memo for Gender Dysphoria and Gender Reassignment Surgery* does not mention consulting treatment criteria other than WPATH.[389] The Centers for Medicare & Medicaid Services stated that they were "not issuing a National Coverage Determination (NCD) at this time on gender reassignment surgery for Medicare beneficiaries with gender dysphoria because the clinical evidence is inconclusive for the Medicare population."[390] The only population impacted are Medicare beneficiaries over 65 because research specific to that age group was inconclusive.[391] Additionally, the decision permits coverage determinations for gender affirming

385. *Id.* at 3135.

386. Eli Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S1, S250 (2022).

387. Kelly Horvath, *Making the GRADE: Endocrine Society Clinical Practice Guidelines Get a Refresh*, ENDOCRINE SOC'Y ENDOCRINE NEWS (July 2022), https://endocrinenews.endocrine.org/making-the-grade-endocrine-society-clinical-practice-guidelines-get-a-refresh/; Coleman et al., *supra* note 386, at S250.

388. Edmo v. Corizon, 949 F.3d 489, 498–99 (9th Cir. 2020) (alteration in original) (citation omitted).

389. *See* Tamara Syrek Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis, & Katherine Szarama, *Proposed Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria*, CTRS FOR MEDICARE & MEDICAID SERVS. 1, 15–16, 24, 30, 38, 47 (June 2, 2016), https://www.cms.gov/medicare-coverage-database/view/ncacal-decision-memo.aspx?proposed=Y&NCAId=282; Tamara Syrek Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis, & Katherine Szarama, *Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria*, CTRS FOR MEDICARE & MEDICAID SERVS. 1, 10–11, 13, 25, 33, 36, 47 (Aug. 30, 2016), https://www.cms.gov/medicare-coverage-database/view/ncacal-decision-memo.aspx?proposed=N&NCAId=282 [hereinafter Jensen II].

390. Jensen II, *supra* note 389, at 2.

391. *See id.* at 2, 4.

surgery "made by the local [Medicare Administrative Contractors] on a case-by-case basis. To clarify further, the result of this decision is not national non-coverage rather it is that no national policy will be put in place for the Medicare program,"[392] affecting those 65 and older.[393] The decision does not deal with the WPATH SOC.

The dissental offers no other scientific or medical evidence to support its conclusion that the WPATH SOC "are merely criteria promulgated by a controversial private organization with a declared point of view;"[394] that "its evidentiary basis is not sufficient to justify the court's reliance on its strict terms;"[395] and that its involvement is "as mere participants in an ongoing medical debate."[396] The lack of additional evidence supporting this position coupled with the evidence that what *is* cited does not support, or directly contradicts, the O'Scannlain dissental's conclusions renders the remainder of the dissental's analysis suspect at best. The danger of not contesting the scientific and medical evidence the dissental presents is that it will be repeated in subsequent court opinions, perpetuating an inaccurate view of the scientific and medical landscape.[397]

The WPATH SOC represents the medical and scientific consensus. This Article argues that the dissental's attempt to use scientific and medical articles to undermine the WPATH SOC does the opposite when read in context. The "proper perspective"[398] that the dissental purports to convey is entirely unsubstantiated. The dissental argues, "Had the district court understood that Edmo's experts' role in WPATH marks them not with special insight into the legally acceptable care, but rather as mere participants in an ongoing medical debate, they would have acknowledged this case for what it is: a 'case of dueling experts.'"[399] The supposed "proper perspective"[400] requires ignoring the deference given to the district court under the abuse of discretion standard and undermines *Daubert*, *Kuhmo Tires*, and their progeny in evaluating expert testimony. The WPATH SOC is not the standard of one isolated organization, as the O'Scannlain dissental asserts, but is in fact supported by a myriad of the largest and most professional organizations.

Based on misinformation, the dissental inaccurately describes the disagreement in *Edmo II* as follows: "Each set of experts had gaps in their relevant experience. Edmo's experts had never treated *inmates* with gender dysphoria, while the State's experts had never conducted long-term follow-up care with a patient who had undergone sex-reassignment

392. *Id.* at 2.
393. *See id.* at 2, 4.
394. Edmo v. Corizon, 949 F.3d 489, 497 (9th Cir. 2020).
395. *Id.* at 498.
396. *Id.* at 499.
397. *See id.* at 505–06, 509–11.
398. *Id.* at 495.
399. *Id.* at 499 (quoting Edmo v. Corizon, 935 F.3d 757, 787 (9th Cir. 2019)).
400. *Id.* at 495.

surgery."[401] Edmo's experts all have extensive experience working directly with people with gender dysphoria, recommending gender affirming surgery, and working with individuals who have had gender affirming surgery. IDOC and Corizon's experts have none, or at best little, of these experiences. Taking all these facts into consideration the conclusion that the WPATH SOC represents the medical and scientific consensus on gender affirming care and surgery is widely supported.

V. PROPERLY SITUATING MEDICAL AND SCIENTIFIC EVIDENCE REGARDING GENDER AFFIRMING CARE AND SURGERY INDICATES THE EXISTENCE OF A CONSENSUS

Examining U.S. Circuit Court cases addressing the Eighth Amendment and transgender prisoners supports the use of the WPATH SOC. The O'Scannlain dissental claims that the decision in *Edmo I* "conflicts with every other circuit."[402] But close examination of the cases that the O'Scannlain dissental discusses either demonstrates that there is no conflict, or if there is a conflict, that the deciding court perpetuated the same errors made in the O'Scannlain dissentals. The dissental cites three cases:[403] the First Circuit opinion in *Kosilek II*, the Fifth Circuit opinion in *Gibson*, and the Tenth Circuit opinion in *Lamb v. Norwood*.[404] Thoroughly analyzing each case situates the WPATH SOC as the proper authority in assessing access to gender affirming surgery for incarcerated individuals.

A. The Opinion in Kosilek v. Spencer *Supports a Scientific and Medical Consensus*

The *Edmo II* dissental first points to *Kosilek II* to argue that the three-judge panel failed to distinguish the First Circuit case from this one.[405] The court in *Kosilek II* accepts the WPATH SOC as representing a scientific and medical consensus but concludes that Kosilek did not meet the WPATH's standard for gender affirming surgery.[406]

The litigation in the *Kosilek* cases "spanned more than twenty years."[407] Kosilek's mother left her at an orphanage when she was three years old,[408] where she "was frequently punished for dressing as a female."[409] Kosilek was reunited with her mother when she was ten.[410] Based on her desire to live as a girl, she was repeatedly raped by her grandfather and stabbed by her stepfather.[411] Kosilek ran away from home as a

401. *Id.* at 493.
402. *Id.* at 502.
403. *Id.*
404. 899 F.3d 1159 (10th Cir. 2018).
405. *Edmo*, 949 F.3d at 502.
406. *See* Kosilek v. Spencer, 774 F.3d 63, 70, 77, 86–87, 89 (1st Cir. 2014).
407. *Id.* at 68.
408. Kosilek v. Maloney, 221 F. Supp. 2d 156, 163 (D. Mass. 2002) [hearinafter *Kosilek I*].
409. *Id.*
410. *Id.*
411. *Id.*

teenager.[412] Then, "From 1967 to 1968, Kosilek received female hormones prescribed by a physician in exchange for sex. [She] also took hormones for several months in 1971 and 1972. While on hormones, Kosilek 'felt normal' for the first time in [her] life."[413] She was taking hormones while imprisoned in Chicago in 1971 and 1972 and was gang raped.[414] After being released from prison, she "was [ ] assaulted outside a gay bar by two men who said they resented [her] effort to become a girl. Kosilek was beaten so badly that [she] stopped taking hormones."[415] Kosilek met Cheryl McCaul at a drug rehabilitation facility.[416] Cheryl told Kosilek that her gender dysphoria "would be cured by 'a good woman.'"[417] Kosilek took up Cheryl's offer and the two married.[418] Cheryl's claimed cure did not work, as "Kosilek's distress did not abate. In 1990, Kosilek murdered McCaul."[419]

Kosilek was previously diagnosed with gender dysphoria.[420] She attempted suicide twice while awaiting trial and tried self-castration.[421] Kosilk was able to consult with Dr. Nancy Strapko at her own expense in preparation for trial;[422] "Dr. Strapko was not, however, permitted to provide any treatment."[423] Dr. Strapko evaluated Kosilek and provided recommendations on her care, but "[t]he Sheriff . . . did not follow Dr. Strapko's recommendation that Kosilek begin psychotherapy with a qualified specialist to address" her gender dysphoria.[424]

After her conviction, Kosilek legally changed her name from Robert to Michelle and "[v]irtually all of the inmates and guards" called her Michelle.[425] She grew her nails and hair long, used a more feminine voice, tailored her clothing to "appear more feminine, and used various products as makeup."[426] While incarcerated, Kosilk requested treatment for gender dysphoria but did not receive any.[427] Kosilek repeatedly expressed her intent to commit suicide if she did not obtain treatment.[428]

During her first case, in which she claimed an Eighth Amendment violation for the correctional facility's failure to provide her with gender affirming care, the district court concluded, "The evidence demonstrates that, at a minimum, Kosilek should receive genuine psychotherapy from,

412. *Id.*
413. *Id.*
414. *Id.*
415. *Id.*
416. *Id.* at 164.
417. *Id.*
418. *Id.*
419. *Id.*
420. Kosilek v. Spencer, 774 F.3d 63, 68–69 (1st Cir. 2014).
421. *Id.* at 68.
422. *Kosilek I*, 221 F. Supp. at 164.
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.*
427. *Id.*
428. *Id.*

or under the direction of, someone qualified by training and experience to address a severe [form of gender dysphoria]."[429] Using the WPATH SOC, the district court further noted, "[S]uch therapy, or such therapy and pharmacology, may be sufficient to reduce the anguish caused by Kosilek's gender [dysphoria] so that it no longer constitutes a serious medical need."[430] The court also explained the potential need for additional gender affirming care, stating that, "If psychotherapy, and possibly psychopharmacology, do not eliminate the significant risk of serious harm that now exists, consideration should be given to whether hormones should be prescribed to treat Kosilek."[431]

The court then outlined circumstances that may require gender affirming surgery, noting that, "If psychotherapy, hormones, and possibly psychopharmacology are not sufficient to reduce the anguish caused by Kosilek's gender [dysphoria] to the point that there is no longer a substantial risk of serious harm to [her], sex reassignment surgery might be deemed medically necessary."[432] The court held that Kosilek's Eighth Amendment claims failed on the deliberate indifference prong because the prison did not have sufficient notice of her serious medical needs to ignore them, but the District Court held that the prison was now placed on notice of those serious needs moving forward.[433]

The O'Scannlain dissental claims, "[T]he First Circuit held that medically acceptable treatment of gender dysphoric prisoners is not synonymous with the demands of WPATH."[434] Two issues are important to note in this first litigation which undermine the dissental's arguments. First, the district court used the WPATH SOC in outlining recommendations for Kosilek's future care.[435] This contradicts the dissental's assertion that Kosilek's case was not decided in line with the WPATH SOC. Second, the court explicitly states that if Kosilek cannot find relief through other gender affirming care, gender affirming surgery may be medically necessary.[436] The dissental ignores the First Circuit's acknowledgement of this possibility.

Kosilek brought a second case before the district court[437] based on the circumstances outlined by the court for obtaining gender affirming surgery.[438] Notably, "At the time of both *Kosilek I* and [*Kosilek II*], the

429. *Id.* at 193.
430. *Id.* at 194.
431. *Id.*
432. *Id.* at 195.
433. *Id.*
434. Edmo v. Corizon, 949 F.3d 489, 503 (9th Cir. 2020).
435. *Kosilek I*, 221 F. Supp. 2d at 193–94.
436. *Id.* at 195. It is important to note that these recommendations are dicta and not the holding of the case or precedential, but as will be seen later in this Article they do form the foundation for the reasoning applied by the First Circuit in *Kosilek II*.
437. Kosilek v. Spencer, 889 F. Supp. 2d 190, 196 (D. Mass. 2012), *aff'd*, 740 F.3d 733 (1st Cir. 2014), *reh'g en banc granted*, *opinion withdrawn* (Feb. 12, 2014), *on reh'g en banc*, 774 F.3d 63 (1st Cir. 2014), and *rev'd*, 774 F.3d 63 (1st Cir. 2014).
438. *Id.* at 196–97.

[Massachusetts Department of Corrections (DOC)] contracted with the University of Massachusetts Correctional Health Program ('UMass') to provide medical services, including mental health services, to inmates."[439]

After *Kosilek I*, the DOC implemented "a presumptive policy that would provide inmates hormones if they had been previously prescribed, but allowed increased or decreased treatment if it was determined by UMass to be medically necessary, and approved by both the Director of the Department's Health Services Division and the Commissioner."[440] UMass hired a specialist, Dr. David Seil, who "recommended that Kosilek be provided estrogen therapy; electrolysis to remove facial hair, which 'is a major signifier of male gender'; and access to female clothing and makeup."[441] In discussing Kosilek's need for gender affirming surgery, Dr. Seil noted, "A future assessment needs to be made by an experienced gender specialist with Kosilek after treatment with hormones for a year as to whether this step definitely need be taken."[442] When the DOC received this "advice [it] did not like," it "decided not to employ Dr. Seil any longer."[443] Nonetheless, in 2003 Kosilek was given hormone treatment after additional review.[444]

Subsequently, in 2005, UMass hired outside consultants with experience in gender affirming care and surgery.[445] These experts concluded that Kosilek continued to show distress about her anatomy after hormone therapy and "[g]iven her previous suicide attempts" they recommended "[Kosilek] be able to have sex reassignment surgery."[446] The DOC ignored these recommendations, claiming they were unclear,[447] and hired Cynthia S. Osborne to review the findings.[448] Osborne had a reputation for using the WPATH SOC but issuing blanket denials of gender affirming surgery with disastrous results, including two court cases involving self-castration.[449]

Ultimately, the district court in *Kosilek II* concluded that:

> Kosilek has not been denied sex reassignment surgery because of a good faith belief that [her] security, or anyone else's, could not be reasonably assured if [she] is provided sex reassignment surgery. Rather, the defendant has refused to provide the only adequate treatment for

439. *Id.* at 214.
440. *Id.* at 218.
441. *Id.* (internal citation omitted).
442. *Id.*
443. *Id.* at 219.
444. *Id.*
445. *Id.* at 220.
446. *Id.* at 221 (alteration in original).
447. *Id.* at 222.
448. *Id.* at 221. This is the same Cynthia S. Osborne whose article is cited in the *Edmo* dissental. Edmo v. Corizon, 949 F.3d 489, 498 (9th Cir. 2020). For information on Osborne's professional history, see discussion and sources cited *supra* note 335.
449. *See* discussion and sources cited *supra* note 335.

> Kosilek's serious medical need in order to avoid public and political criticism. This is not a legitimate penological purpose.[450]

The district court further found that the DOC "denied Kosilek the prescribed sex reassignment surgery to avoid controversy, criticism, and, indeed, ridicule, and scorn. This represents an abdication of the defendant's responsibility to obey the requirements of the Eighth Amendment."[451]

The DOC appealed the district court's decision to the U.S. Court of Appeals for the First Circuit.[452] A three-judge panel affirmed the lower court decision on a two to one split.[453] The three-judge panel held:

> Here the trial judge had the opportunity to preside over two lawsuits involving the same players and similar allegations, to hear evidence in this case over the course of a twenty-eight day trial, to question witnesses, to assess credibility, to review a large volume of exhibits, and, in general, to live with this case for twelve years (twenty years if you count *Kosilek I*). The judge was well-placed to make the factual findings he made, and there is certainly evidentiary support for those findings. Those findings—that Kosilek has a serious medical need for the surgery, and that the DOC refuses to meet that need for pretextual reasons unsupported by legitimate penological considerations—mean that the DOC has violated Kosilek's Eighth Amendment rights. The court did not err in granting Kosilek the injunctive relief she sought.[454]

The DOC requested a rehearing en banc, which the First Circuit granted.

The First Circuit en banc reversed and remanded the case.[455] Judge Torruella, who wrote a dissent to the original decision by the three-judge panel, wrote the en banc opinion and was joined by Judge Lynch[456] and Judge Howard.[457] Judges Thompson and Kayatta, who wrote the majority

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450. *Kosilek*, 889 F. Supp. 2d at 240.

451. *Id.* at 247.

452. Kosilek v. Spencer, 740 F.3d 733, 736 (1st Cir. 2014), *reh'g en banc granted, opinion withdrawn* (Feb. 12, 2014), *on reh'g en banc*, 774 F.3d 63 (1st Cir. 2014).

453. *Id.* at 736, 773 (Thompson, J., writing for the court, joined by Kayatta, J., with a dissenting opinion by Torruella, J.). Judge O. Rogeriee Thompson and Judge William J. Kayatta Jr. were both nominated by former President Obama. *Federal Judicial Appointments by President*, BALLOTPEDIA, https://ballotpedia.org/Federal_judicial_appointments_by_president (last visited Oct. 25, 2023). Dissenting judge Juan R. Torruella was nominated by President Reagan. *Torruella, Juan R.*, FED. JUD. CTR, https://www.fjc.gov/history/judges/torruella-juan-r (last visited Oct. 25, 2023).

454. *Kosilek*, 740 F.3d at 772–73.

455. Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014).

456. Judge Lynch was nominated by former President Clinton. *Lynch, Sandra Lea*, FED. JUD. CTR., https://www.fjc.gov/history/judges/lynch-sandra-lea (last visited Oct. 25, 2023).

457. Judge Howard was nominated by former President George W. Bush. *Howard, Jeffrey R.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/howard-jeffrey-r (last visited Oct. 25, 2023).

opinion of the original three-judge panel, each wrote separate dissents to the en banc decision.[458]

Despite reversing and remanding, the First Circuit explicitly states that it does not reach the question of whether the denial of gender affirming surgery will never violate the Eighth Amendment.[459] Rather, the court notes that the Eighth Amendment requires analysis that is "individualized based on a particular prisoner's serious medical needs."[460] In addition, the First Circuit en banc states:

> [T]his case presents unique circumstances; we are simply unconvinced that our decision on the record before us today will foreclose all litigants from successfully seeking [gender affirming surgery] in the future. Certain facts in this particular record—including the medical providers' non-uniform opinions regarding the necessity of [gender affirming surgery], Kosilek's criminal history, and the feasibility of postoperative housing—were important factors impacting the decision.[461]

In other words, the First Circuit opinion is limited to Kosilek's particular circumstances and the DOC's conditions at that time. In particular, the majority opinion focused on the positive impact of Kosilek's current treatment:

> Kosilek admits that the DOC's current treatment regimen has led to a significant stabilization in her mental state. Kosilek's doctors testified to the same, highlighting her 'joy around being feminized.' This claim is also borne out by the passage of significant time since she exhibited symptoms of suicidal ideation or attempted to self-castrate. In addition to alleviating her depressive state, this treatment has also resulted in significant physical changes and an increasingly feminine appearance.[462]

The difference between Kosilek's position post-other gender affirming care and Edmo's position is stark. Edmo "was receiving hormone therapy both times she attempted to self-castrate."[463] Edmo then started using cutting as an "attention-reduction behavior that she use[d] to prevent herself from cutting her genitals."[464] Edmo faced significant risks if denied gender affirming surgery, including: "surgical self-treatment, emotional

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458. *See Kosilek II*, 774 F.3d at 96 (Thompson, J., dissenting); *id.* at 113 (Kayatta, J., dissenting) (explaining that "Kosilek warns, however, that upholding the adequacy of the DOC's course of treatment in this case—despite her medical history and record of good behavior—will create a de facto ban against [gender affirming surgery] as a medical treatment for incarcerated individuals. We do not agree.").

459. *See id.* at 90–91.

460. *Id.* at 91.

461. *Id.*

462. *Id.* at 90.

463. Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1118 (D. Idaho 2018), *order clarified*, No. 1:17-cv-00151-BLW, 2019 WL 2319527 (D. Idaho May 31, 2019), and *aff'd in part, vacated in part, remanded sub nom.* Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019).

464. *Id.* at 1120.

decompensation, and risk of suicide given her high degree of suicide ideation."[465]

The O'Scannlain dissental in *Edmo II* ignores the First Circuit's position that it does not serve as a blanket ban. The dissental also dismisses the significant differences between Kosilek and Edmo, claiming that there are "minor differences between the factual circumstances in each case."[466] But the difference in facts as outlined by the *Kosilek II* court are significant. Kosilek's self-castration and suicide attempts occurred before she received gender affirming treatment, and they subsequently abated with the treatment she received.[467] Edmo's self-castration attempts and cutting occurred *despite* gender affirming care, including hormones, and her suicidal ideation and severe distress about her genitals persisted.[468]

The O'Scannlain dissental also mischaracterizes *Kosilek II*'s position on the WPATH SOC. The dissental argues as follows:

> [T]he First Circuit held that medically acceptable treatment of gender dysphoric prisoners is not synonymous with the demands of WPATH. *Kosilek* first reversed the district court's finding that one of the State's experts was "illegitimate" because the district court "made a significantly flawed inferential leap: it relied on its own—non-medical—judgment" and put too much "weight" on the WPATH Standards.[469]

This characterization is not an accurate representation of the holding in *Kosilek II* or even what was stated in the opinion.

First, O'Scannlain's dissental misinterprets the use of the word "weight" in the *Kosilek II* opinion. The word weight is used as follows: "[T]he district court put great weight on the fact that the Standards of Care require that patients receive two letters of recommendation prior to [gender affirming surgery]."[470] The *Kosilek II* opinion does not find that the district court gave too much weight to the WPATH SOC, or even comment on how much weight the district court gave the WPATH SOC in its

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465. *Id.* at 1121.

466. Edmo v. Corizon, Inc., 949 F.3d 489, 502–03 (9th Cir. 2020). The three-judge panel opinion also highlights another significant difference: Kosilek's case dealt with security concerns and Edmo's case did not. "Notably, the security concerns in *Kosilek*, which the First Circuit afforded 'wide-ranging deference,' are completely absent here. The State does not so much as allude to them." Edmo v. Corizon, Inc., 935 F.3d 757, 794 (9th Cir. 2019) (citing *Kosilek II*, 774 F.3d at 92). Many prisons are not sufficiently concerned with the security of transgender prisoners without gender affirming surgery. *See* Marissa Luchs, Note, *Transgender Inmates' Right to Gender Confirmation Surgery*, 89 FORDHAM L. REV. 2809, 2810–11 (2021). Transgender prisoners are subject to more abuse than other prisoners and are "five times more likely . . . to be sexually abused by prison staff." *Id.* at 2811 (citing SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET, & MA'AYAN ANAF, NAT' CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 US TRANSGENDER SURVEY 192 (2017), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf; *see also* Darren Rosenblum, "*Trapped*" *in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 525 (2000).

467. *Kosilek II*, 774 F.3d at 90.

468. *Edmo*, 358 F. Supp. 3d at 1109–10, 1118, 1121.

469. *Edmo II*, 949 F.3d at 503.

470. *See Kosilek II*, 774 F.3d at 87–88.

entirety, as the dissental claims but rather highlights that the district court put great weight specifically on the WPATH SOC's "two letters of recommendation prior to [gender affirming surgery]" requirement.[471] The context of this statement illuminates the dissental's mischaracterization.

The *Kosilek II* opinion goes on to explain that, in reaching a decision, the district court focused on the difference between the terms "recommendation" and "confirming letter"—Dr. Schmidt, the testifying doctor, stated that "he does not advocate or recommend surgery" but if a patient seeks surgery "he releases all of their medical files to a surgeon and writes that surgeon a letter confirming that the patient is eligible for surgery."[472] The *Kosilek II* opinion minimizes the district court's distinction between the terms "recommendation" and "confirming letter."

In fact, the First Circuit argues in *Koilek II* that the distinction between a "letter of recommendation" and a "letter confirming readiness" is minor, and that as a result, Dr. Schmidt in fact adheres to the WPATH SOC. The court states: "whatever the semantic force of the district court's distinction, we see no material difference between the letters written by Dr. Schmidt confirming a patient's readiness for surgery and what the Standards of Care refers to as a letter of recommendation."[473] The First Circuit's analysis of "weight" does not stand for the assertion that the district court put too much weight on the WPATH SOC, rather, that the district court unnecessarily put great weight on the distinction between a "letter of recommendation" and a "letter of confirmation," when in fact both qualify under the WPATH SOC.[474]

Second, the O'Scannlain dissental mischaracterizes the phrase "made a significantly flawed inferential leap: it relied on its own—non-medical—judgment"[475] in *Kosilek II* as applying to the WPATH SOC. But, again, this is not the case. The phrase in fact references the definition of "real-life experience" as used in the WPATH SOC. The *Kosilek II* opinion states:

> [T]he district court found Dr. Schmidt imprudent because he did not believe that a real-life experience could occur in prison, given that it was an isolated, single-sex environment. The district court disagreed, stating that it had concluded a real-life experience could occur in prison, as Kosilek would remain incarcerated for her entire life. In reaching this determination, the court made a significantly flawed inferential leap: it relied on its own—non-medical—judgment about what constitutes a real-life experience to conclude that Dr. Schmidt's differing viewpoint was illegitimate or imprudent.[476]

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471. *Id.*
472. *Id.* at 87–88.
473. *Id.* at 88.
474. *Id.*
475. Edmo v. Corizon, Inc., 949 F.3d 489, 503 (9th Cir. 2020) (quoting *Kosilek II*, 774 F.3d at 88).
476. *Kosilek II*, 774 F.3d at 88.

Once again, the *Kosilek II* opinion is not dismissing the validity of the WPATH SOC, but instead acknowledging that Dr. Schmidt's testimony aligns with the WPATH SOC. In doing so, the court is giving great deference to the WPATH SOC.

Third, the word "illegitimate" is only used once in the entire *Kosilek II* opinion—in the context cited above. The district court viewed the definition of "real-life" as used by Dr. Schmidt to be illegitimate,[477] but the First Circuit found that Dr. Schmidt's use of "real-life" as excluding prison, can be a legitimate difference of opinion.[478] Thus, the critical aspect is that the assessment the dissental offers is inaccurate. Furthermore, as outlined in the preceding paragraph, the First Circuit's analysis supports the assertion that Dr. Schmidt followed the WPATH SOC, it does not dismiss the legitimacy of the WPATH SOC as the O'Scannlain dissental claims. It certainly is not the case that "the First Circuit held that medically acceptable treatment of gender dysphoric prisoners is not synonymous with the demands of WPATH."[479] Instead, the First Circuit argues that within the WPATH SOC the decision to stop short of gender affirming surgery for Kosilek was not cruel and unusual punishment under the Eighth Amendment,[480] noting that "Kosilek's [gender dysphoria] may be appropriately managed with treatment short of [gender affirming surgery]."[481] As the opinion notes:

> In fact, since *Kosilek I* the DOC has acknowledged the need to directly treat Kosilek's [gender dysphoria]. Beginning in 2003, it has provided hormones, electrolysis, feminine clothing and accessories, and mental health services aimed at alleviating her distress. The parties agree that this care has led to a real and marked improvement in Kosilek's mental state.[482]

Kosilek obtained real and marked improvement through gender affirming care short of gender affirming surgery in line with the WPATH SOC, and Edmo did not. But both cases acknowledge that there is medical and scientific consensus on gender affirming care and surgery represented by the WPATH SOC guidelines.

The *Kosilek II* opinion supports using the WPATH SOC as the medical consensus on gender affirming care. The Ninth Circuit three-judge panel's decision is in full alignment with the *Kosilek II* opinion using the WPATH SOC. The difference is the First Circuit held that following the WPATH SOC rendered gender affirming surgery for Kosilek unnecessary, while the Ninth Circuit held that following the WPATH SOC did not

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477. *See* Kosilek v. Spencer, 889 F. Supp. 2d 190, 235 (D. Mass. 2012), *aff'd*, 740 F.3d 733 (1st Cir. 2014), *reh'g en banc granted, opinion withdrawn* (Feb. 12, 2014), *on reh'g en banc*, 774 F.3d 63 (1st Cir. 2014), and *rev'd*, 774 F.3d 63 (1st Cir. 2014); *Kosilek II*, 774 F.3d at 88.

478. *Kosilek II*, 774 F.3d at 88–89.

479. *Edmo II*, 949 F.3d at 503.

480. *See Kosilek II*, 774 F.3d at 68, 87–88.

481. *Id.* at 86.

482. *Id.* at 89.

render gender affirming surgery for Edmo unnecessary. The Ninth Circuit is doing exactly what the First Circuit implored courts to do: not treat its decision as a "de facto ban against [gender affirming surgery] as a medical treatment for any incarcerated individual."[483] The O'Scannlain dissental encourages a split from the First Circuit by doing the very thing the opinion says not to do.

B. Gibson v. Collier *is a Split from* Kosilek v. Spencer *and Provides No Support for Rejecting a Medical and Scientific Consensus*

In *Gibson v. Collier*,[484] the Fifth Circuit engages in the same fatal analysis replicated by the O'Scannlain dissental in *Edmo II*.[485] In *Gibson*, the Fifth Circuit stipulates that, "As the First Circuit concluded in *Kosilek*, there is no consensus in the medical community about the necessity and efficacy of sex reassignment surgery as a treatment for gender dysphoria."[486] As outlined, this interpretation of *Kosilek II* is not accurate.

The court in *Gibson* did not base its holding on any medical evaluation, expert testimony, evaluation of medical or scientific research, or any alternatives to the WPATH SOC. It involved a pro se litigant and the only evidence presented was the WPATH SOC.[487]The Fifth Circuit acknowledged that, "The sparse record before [it] include[d] only the WPATH Standards of Care, which declare sex reassignment surgery both effective and necessary to treat some cases of gender dysphoria."[488]

Instead, the Fifth Circuit relies entirely on *Kosilek II* to conclude, "We see no reason to depart from the First Circuit. To the contrary, we agree with the First Circuit that the WPATH Standards of Care do not reflect medical consensus, and that in fact there is no medical consensus at this time."[489] But this conclusion is a misreading of *Kosilek II*. The First Circuit, as discussed, did not hold that the WPATH SOC does not reflect medical consensus.[490] Instead, it held that the DOC and its experts aligned with the WPATH SOC but that Kosilek's medical needs were met by treatment options other than gender affirming surgery under the WPATH SOC.[491] The Fifth Circuit's conclusion also ignores the First Circuit's

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483. *Id.* at 91.

484. 920 F.3d 212 (5th Cir. 2019).

485. The *Edmo* dissental states that, "The panel acknowledges such a circuit split with the Fifth Circuit's opinion in *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019)." Edmo v. Corizon, Inc., 949 F.3d 489, 502 (9th Cir. 2020). Even if the dissental and the panel are correct that there is a split with the Fifth Circuit, that split is based primarily on the Fifth Circuit's misstatement of the First Circuit's opinion in *Kosilek II*.

486. *Gibson*, 920 F.3d at 221.

487. The Ninth Circuit three-judge panel opinion notes that the *Gibson* opinion was based "on a 'sparse record'—which included only the WPATH Standards of Care and was notably devoid of 'witness testimony or evidence from professionals in the field'—compiled by a *pro se* plaintiff." Edmo v. Corizon, Inc., 935 F.3d 757, 794 (9th Cir. 2019) (citing *Gibson*, 920 F.3d at 220).

488. *Gibson*, 920 F.3d at 221.

489. *Id.* at 223.

490. *See* discussion *supra* Section V.A.

491. *See* Kosilek v. Spencer, 774 F.3d 63, 87, 89 (1st Cir. 2014).

demand to not treat its decision as a "de facto ban against [gender affirming surgery] as a medical treatment for any incarcerated individual."[492]

Gibson provides no support for rejecting the WPATH SOC as medical consensus other than its misreading of *Kosilek II*. In doing so, *Gibson,* and not *Edmo I,* created a circuit split. The Fifth Circuit was presented with no expert testimony, no medical evaluation, no scientific or medical evidence, no evidence contradicting the WPATH SOC, and nothing other than the WPATH SOC itself. The paucity of support lends little credibility to its challenge of the WPATH SOC as the medical consensus on gender affirming care.

C. Lamb v. Norwood *is Not a Comparable Case and Provides No Support for Rejecting a Medical and Scientific Consensus*

The O'Scannlain dissental chides the three-judge panel because, "The panel does not even address a third decision: the Tenth Circuit's opinion in *Lamb v. Norwood*."[493] The dissental notes that the "Tenth Circuit has upheld the entry of summary judgment against a prisoner's Eighth Amendment claim for sex-reassignment surgery."[494] The dissental connects and compares the Tenth Circuit opinion with *Edmo I*, arguing that, "As in this case, the doctor who evaluated the prisoner in *Lamb* determined that 'surgery is impractical and unnecessary in light of the availability and effectiveness of more conservative therapies.'"[495]

The Ninth Circuit three-judge panel does not discuss *Lamb* because the case does not concern factual or legal claims that are analogous to the relevant cases. *Lamb* was decided on summary judgment because Lamb was pro se and presented no expert testimony or alternative medical recommendations.[496] The court concluded that, "The Defendants have an

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492. *Kosilek II*, 774 F.3d at 91. The Fifth Circuit places a great deal of weight on the dissenting opinions in the First Circuit to argue that the First Circuit opinion is creating a de facto rule even though the opinion clearly and repeatedly states it is not doing so. *See Gibson*, 920 F.3d at 216, 225. The dissent in *Kosilek*:

> [C]onstrued the logic of the *en banc* majority to permit a blanket ban. To quote the dissent: "[T]he majority in essence creates a de facto ban on sex reassignment surgery for inmates in this circuit.... [T]he precedent set by this court today will preclude inmates from ever being able to mount a successful Eighth Amendment claim for sex reassignment surgery in the courts."

Id. at 225 (second and third alterations in original). It seems odd that the Fifth Circuit would ignore the explicit command of the First Circuit and side with the dissent's criticism of the impact of the opinion, while at the same time arguing that the opinion is so correct it does not have to provide any additional analysis of the scientific or medical literature even when no party in the district court in *Gibson* presents any standard other than the WPATH SOC.

493. Edmo v. Corizon, Inc., 949 F.3d 489, 502 (9th Cir. 2020).

494. *Id.* at 503 (citing Lamb v. Norwood, 899 F.3d 1159, 1163 (10th Cir. 2018).

495. *Id.* (quoting *Lamb*, 899 F.3d at 1163).

496. *See generally Lamb*, 899 F.3d 1159. *Lamb* is a case study in the difficulty in bringing Eighth Amendment claims by prisoners. Because Lamb was pro se, she did not have an attorney who could help her access and pay for a second medical opinion or any medical or scientific experts. *See id.* at 1163–64. Her position was entirely reliant on her affidavit and her own analysis. *See* Lamb v. Norwood, 262 F. Supp. 3d 1151, 1157–59 (D. Kan. 2017), *aff'd*, 895 F.3d 756 (10th Cir. 2018), *withdrawn from bound volume, superseded on reh'g en banc*, 899 F.3d 1159 (10th Cir. 2018), and *aff'd*, 899 F.3d

obligation to treat Lamb's gender dysphoria, but they are not obligated to treat it in the specific manner that Lamb prefers."[497] Lamb's inability to present an alternative treatment plan or any experts meant that her case was reliant entirely on her affidavit and request for additional forms of gender affirming care, and as a result, the Tenth Circuit concluded, "In light of the prison's treatment for [Lamb's] gender dysphoria, no reasonable fact-finder could infer deliberate indifference on the part of prison officials."[498]

In the end, the circuit split when properly scrutinized does not support the dissental's conclusion that "suddenly the request for sex-reassignment surgery—and the panel's closing appeal to what it calls the 'increased social awareness' of the needs and wants of transgender citizens—effects a revolution in our law!"[499]

The three-judge panel's opinion aligns with the First Circuit's opinion in *Kosilek II*. The First Circuit adhered to the WPATH SOC and held that Kosilek obtained relief from her gender dysphoria after a series of treatments including hormone therapy. The Ninth Circuit held that Edmo did not find relief after a series of treatments including hormone therapy and needed surgery. Lamb's desire to self-castrate and suicidal ideation subsided with the treatment; Edmo's attempts at self-castration occurred after hormone therapy and other gender affirming care and her suicidal ideation persisted.

The Fifth Circuit opinion in *Gibson* misreads *Kosilek II* as holding that the WPATH SOC should not inform serious medical need and deliberate indifference when the First Circuit went through significant steps to demonstrate its holding adhered to the WPATH SOC.

Taking these three circuit court opinions together, the opinion in *Edmo I* is not the revolution in law the O'Scannlain dissental claims it is. None of the cases prove or provide evidence that there is no medical or scientific consensus on gender affirming care or surgery. Reading these cases together supports the use of the WPATH SOC as a representation of the medical consensus on gender affirming care and to inform the constitutional limits on the Eighth Amendment.

1159 (10th Cir. 2018). The district court and the Tenth Circuit gave little credit to either and quickly dismissed her case. *See Lamb*, 899 F.3d at 1161, 1164. Pro se prisoner litigants are at a significant disadvantage compared to prisoners who have attorneys. *See, e.g.*, Erica M. Eisinger, Daniel E. Manville, & Kelly Rimmer, *Prisoners' Rights*, 52 WAYNE L. REV. 857, 912 n.322 (2006) (discussing pro se litigants in parole denial appeals, which are unlikely to be successful, versus appeals of grants of parole by the prosecutors, which are likely to be successful. "It is similar to college football teams playing high school football teams and everyone blaming the high school coaches for not winning these games. There can be no comparison in either situation.").

497. *Lamb*, 262 F. Supp. 3d at 1160.

498. *Lamb*, 899 F.3d at 1164.

499. *Edmo II*, 949 F.3d at 504.

CONCLUSION

The WPATH SOC represents a medical and scientific consensus on gender affirming care and informs the standard for determining the medical necessity of gender affirming surgery under the Eighth Amendment.[500]

The Ninth Circuit dissentals in *Edmo II* are representative of the inappropriate advocacy and political nature of dissentals. The strong rebuke of the denial of rehearing en banc solicited sufficient interest for the *Edmo II* dissentals to be cited extensively in both the Application and the Petition, and subsequent cases regarding gender affirming care under the Eighth Amendment. The dissentals were sufficiently compelling that Justices Alito and Thomas wanted to reinstate the stay and grant certiorari, ultimately suggesting that the case should have been declared moot to eliminate any possibility of precedential value. The problem is that the dissentals rest on faulty reasoning regarding the facts, legal precedent, and medical and scientific research.

This Article's deep critical assessment of the *Edmo II* dissentals illustrates that Adree Edmo rightfully obtained gender affirming surgery and that individual assessments based in the medical and scientific literature do illustrate an Eighth Amendment violation in denying gender affirming surgery. Close examination of the dissental also illuminates the true nature of the circuit split. *Gibson*, not *Edmo I*, is the real origin of the circuit court split. *Kosilek II* and *Edmo I* both apply the WPATH SOC as the appropriate guideline representing medical and scientific consensus on gender affirming care. The *Gibson* court, without any evidence and relying only on a misreading of *Kosilek II,* claims there is no medical consensus without offering any alternatives or medical opposition. Finally, and most importantly, examining the O'Scannlain dissental in *Edmo II* illustrates that there is medical and scientific consensus on gender affirming care and surgery.

500. *See supra* Part IV.