UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VERONICA-MAY CLARK,	
Plaintiff,	**Case No. 3:19-cv-575-VLB**
v.	
ANGEL QUIROS, DR. GERALD VALLETTA, RICHARD BUSH, and BARBARA KIMBLE-GOODMAN,	**May 5, 2022**
Defendants.	

Plaintiff's Opposition to Defendants' Motion for Summary Judgment

ORAL ARGUMENT REQUESTED

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1. Preliminary Statement

Plaintiff Veronica-May Clark has endured extreme physical and mental pain and suffering for *six years* as a direct result of Defendants' deliberate indifference to her gender dysphoria. State prison officials, like Defendants, are obligated under the Eighth Amendment to provide adequate treatment for the serious medical needs of the people in their custody. Defendants' attempts to skirt their constitutional obligations in this case are predicated on a misstatement of the law, a mischaracterization of the facts, and a series of excuses that this Court should not countenance. Their motion for summary judgment must be denied.

In seeking summary judgment, Defendants would have this Court ignore nearly forty years of precedent that unequivocally establishes that gender dysphoria is a serious medical need that satisfies the "objective" prong of a deliberate indifference claim. Rather than acknowledge that precedent, Defendants cite inapposite cases involving allegations of a *delay* in treatment. But this is not a delay-of-treatment case. This case is about a six-year, systematic, and intentional failure by Defendants to adequately treat Ms. Clark's gender dysphoria, despite their knowledge that doing so would result in immense pain to Ms. Clark—a failure that continues to this day. Nor must Ms. Clark demonstrate that she experienced unceasing, excruciating pain during the entire six years to satisfy the objective prong, an absurd standard urged by Defendants that would make a mockery of deliberate indifference jurisprudence.

Defendants Richard Bush and Barbara Kimble-Goodman also attempt to evade liability for their constitutional wrongs by arguing that they were both not responsible for treating Ms. Clark's gender dysphoria *and* that any treatment they

did provide to her was adequate. Neither claim supports summary judgment in their favor. Bush and Kimble-Goodman, who were indisputably charged with providing mental healthcare to Ms. Clark for her gender dysphoria, cannot escape liability merely because they personally lacked the ability to provide Ms. Clark with other medical procedures or medication appropriate to treat her gender dysphoria. Nor can they avoid liability based on the acts that they did perform for Ms. Clark when such actions were wholly inadequate to address her serious medical need.

Dr. Gerald Valletta's attempts to excuse his failure to treat Ms. Clark are equally unavailing. Dr. Valletta's invocation of DOC's blanket policy to deny Ms. Clark *any* treatment for her gender dysphoria between April 2016 and September 2017, in the face of Ms. Clark's repeated descriptions of her ongoing suffering—and after her attempted self-castration—is direct proof of his deliberate indifference. Indeed, Dr. Valletta does not offer any medical reason for denying Ms. Clark treatment for gender dysphoria during that period. Moreover, even after DOC changed its policy, Dr. Valletta still failed to ensure that Ms. Clark received timely and appropriate treatment for her gender dysphoria.

Nor are Defendants entitled to qualified immunity. Ms. Clark has a clearly established Eighth Amendment right to be free from deliberate indifference to her serious medical need. To evade that clear constitutional mandate, Defendants attempt to recast the right at issue as a very narrow right to a particular kind of treatment or procedure for gender dysphoria. But the Second Circuit does not analyze qualified immunity for deliberate indifference claims on a disease-

specific, condition-specific, or body part-specific basis. Moreover, Ms. Clark is *not* requesting a particular treatment for her gender dysphoria; rather, she seeks adequate medical and mental health treatment for her gender dysphoria consistent with the prevailing standard of care in the medical community.

Defendants' continued attempts to evade their constitutional obligation to provide Ms. Clark with adequate treatment for her gender dysphoria demonstrate why injunctive relief is necessary and warranted. Defendants' motion and accompanying declarations prove that there is little hope that they will alter their conduct without judicial intervention in the form of injunctive relief. For example, Defendants' continued questioning of the necessity of gender affirmation surgery and Ms. Clark's suitability for such surgery—notwithstanding their own consultant's recommendations—underscores why court intervention is necessary.

Lastly, Defendants' motion for summary judgment on Ms. Clark's intentional infliction of emotional distress ("IIED") claim should also be denied. Ms. Clark has been seeking treatment for her gender dysphoria from DOC since at least May 2016. Yet, at every turn, Defendants refused to provide her with medically necessary treatment—and continue to do so. Such intentional failure to treat Ms. Clark's serious medical condition—particularly coming from medical professionals in positions of power—constitutes extreme and outrageous conduct. At a minimum, this is a question for a jury to decide.

Because Defendants fail to demonstrate that they are entitled to summary judgment on Ms. Clark's deliberate indifference or IIED claims, their motion must be denied.

2. Factual Background

A. Statement of Facts

Plaintiff Veronica-May Clark is a transgender woman incarcerated by the Connecticut Department of Correction ("DOC") on a long sentence. *See* Local Rule 56(a)(2) Statement of Facts in Opposition to Summary Judgment ("Opp'n Stmt.") ¶¶ 1, 2. After years of hiding her gender identity, Ms. Clark told DOC clinicians she thought she had gender dysphoria in April 2016, *id.* ¶ 109, and was diagnosed by DOC clinicians with gender dysphoria no later than May 2016, *id.* ¶ 110. Gender dysphoria is "a whole continuum" of clinically significant distress generated by the mismatch between what a person knows their gender to be and the gender label assigned to them at birth. *Id.* ¶ 111.

Untreated or insufficiently treated gender dysphoria is likely to result in serious negative medical and mental health outcomes, including depression and anxiety, auto-castration, and suicide. *Id.* ¶ 112. The goal of treatment for gender dysphoria is to reduce or permanently resolve the patient's clinically significant distress symptoms. *Id.* ¶ 113. The World Professional Association for Transgender Health ("WPATH") Standards of Care are the accepted standards by which gender dysphoria is treated. *Id.* ¶ 114. The WPATH standards set out an individualized, multipronged medical and psychological approach to treatment, including (i) gender-informed psychotherapy, (ii) hormone therapy, and (iii)

surgery to bring a person's sex organs and physical appearance into conformance with their true identity ("gender affirmation surgery"). *Id.* ¶ 115.

DOC does not allow incarcerated people to choose the medical or mental health providers assigned to provide them care. *Id.* ¶ 120. For the entirety of Ms. Clark's time at Garner Correctional Institution ("Garner"), Defendant Dr. Gerald Valletta was the principal physician there. *Id.* ¶ 5. Ms. Clark was thus directed to him for medical treatment. *Id.* ¶ 120. Defendants Richard Bush and Barbara Kimble-Goodman are mental health providers. *Id.* ¶ 7. When Ms. Clark wanted mental health care, she was directed to them. *Id.* ¶ 120. Neither Dr. Valletta, nor Bush, nor Kimble-Goodman has any special training in surgery, endocrinology, or hormone therapy for gender dysphoria, *id.* ¶¶ 7, 18, but when they came into contact with Ms. Clark, each knew what gender dysphoria was. *Id.* ¶ 121.

Prior to October 2021, DOC had never employed anyone with the skills, knowledge, or expertise to treat gender dysphoria. *Id.* ¶ 116. Neither Dr. Valletta, nor Bush, nor Kimble-Goodman knew whether surgical treatment for gender dysphoria was effective or whether it would have been appropriate for Ms. Clark. *Id.* ¶ 10. However, DOC may obtain specialist care for incarcerated people from outside the prison walls. *Id.* ¶ 85. To do so, an incarcerated person's clinician is responsible for identifying the need for specialist care and making the need known to DOC's chief mental health officer, Dr. Craig Burns. *Id.* ¶ 86. Dr. Burns then works to locate a specialist. *Id.* ¶ 86. Dr. Burns decides whether any given outside specialist would be appropriate for an incarcerated patient's needs. *Id.*

¶ 87. Despite the availability of outside help, neither Kimble-Goodman, *id.* ¶ 138, nor Bush, *id.* ¶ 139, ever asked for such assistance on behalf of Ms. Clark.

In July 2016, Ms. Clark attempted to castrate herself with a pair of nail clippers by cutting into her scrotum and pulling out a testicle before passing out from the pain. *Id.* ¶ 118. DOC acknowledged that Ms. Clark's self-castration attempt was caused by high levels of distress due to gender dysphoria. *Id.* ¶ 119. Dr. Valletta provided wound care, antibiotics, and pain medication to Ms. Clark immediately after her castration attempt in August 2016. *Id.* ¶ 11. During Ms. Clark's time at Garner, Dr. Valletta also provided her with a variety of medical treatments for conditions other than gender dysphoria. *Id.* ¶ 12.

After her castration attempt, in August 2016, Ms. Clark began begging Dr. Valletta for gender-transition medical care, including hormone therapy, laser hair removal, and gender affirmation surgery. *Id.* ¶¶ 13, 122. Dr. Valletta categorically refused Ms. Clark treatment multiple times, *id.* ¶ 123, because he believed that his employer banned hormone therapy for anyone who had not started such treatment prior to incarceration, *id.* ¶ 14. Dr. Valletta had no medical reason to deny hormone therapy to Ms. Clark. *Id.* ¶ 124. Ms. Clark was denied hormone therapy by Dr. Valletta for nearly a year. *Id.* ¶¶ 11, 19-20 (August 2016 through July 2017). Dr. Valletta finally referred Ms. Clark to endocrinologists at the University of Connecticut for hormone therapy in July 2017, *id.* ¶¶ 19-20, but only after a legal clinic threated to sue on Ms. Clark's behalf, *id.* ¶ 125. Dr. Valletta submitted requests for those referrals to the prison system's Utilization Review Committee,

which approved the requests, and Ms. Clark was scheduled for an evaluation with mental health and a consultation with UCONN endocrinology. *Id.* ¶ 21.

Ms. Clark was first seen by UCONN endocrinology on September 14, 2017, though DOC neglected to take any bloodwork for Ms. Clark before the visit. *Id.* ¶ 23. At that visit, an endocrine specialist prescribed Ms. Clark hormones, requested that DOC complete bloodwork for Ms. Clark, and indicated that Ms. Clark should be evaluated by endocrinology again in three months. *Id.* ¶ 23.

Ms. Clark returned for her three-month follow-up, but after that, it would be 20 months before her next appointment. *Id.* ¶ 25 (December 2017 until August 2019). In the interim, Ms. Clark remained on a starter dose of hormones and did not see any of the effects that hormone therapy is intended to produce. *Id.* ¶ 126. In total, Ms. Clark has seen providers at the UCONN endocrinology practice on five occasions. *Id.* ¶ 25. Dr. Valletta did not make recommendations for specific dosages or types of hormone medications; those were recommended by the endocrinologists and administered by prison nurses once Dr. Valletta wrote the necessary prescription. *Id.* ¶ 29. But Dr. Valletta was responsible for following the recommendations of the endocrinologists for specific dosages and types of hormone medications, ordering bloodwork or lab work when requested by the specialists, and submitting approvals for follow-up visits with the endocrinologists. *Id.* ¶ 26. While Dr. Valletta requested bloodwork and/or lab work on eleven occasions, *id.* ¶ 28, Ms. Clark still was brought to appointments with endocrinology without labs, *id.* ¶ 127, and her follow-up was delayed by months or years. *Id.* ¶ 25 (gap of 20 months between appointment).

Dr. Valletta did not facilitate any of the monitoring necessary to ensure that hormone therapy is safe. *Id.* ¶ 128. And though Dr. Valletta was responsible for assessing and referring Ms. Clark for surgery, he never did so, nor did he send her to another doctor for such assessment or referral. *Id.* ¶¶ 129-30. Dr. Valletta was no longer Ms. Clark's medical provider after April 2020. *Id.* ¶ 32.

During the time when Ms. Clark was denied any treatment for gender dysphoria, she described her gender dysphoria as "extreme," "unbearable," "intolerable," and "constantly suffering," and she attempted self-castration and suicide. *Id.* ¶ 33. There were physical effects as well, including the continued masculinizing effects of testosterone on Ms. Clark's body—thinning hair, male pattern baldness, spontaneous erections, and continued facial and body hair growth requiring Ms. Clark to shave constantly. *Id.* ¶¶ 43, 160. After she was finally allowed to begin hormone therapy, medical providers wrote in Ms. Clark's records that she reported her mood was "really good, best ever." *Id.* ¶ 37. And years later, once her starter dose of hormones was finally increased in February 2020, *id.* ¶ 73, Ms. Clark reported improved self-esteem, reduced muscle mass, increased breast growth, the slowing of her male pattern baldness, and a dramatic reduction in erections and sex drive as a result of hormone therapy. *Id.* ¶ 38. But none of that is to say that Ms. Clark's problems were solved by an introductory dose of hormone therapy. To this day her gender dysphoria "is a daily, ever-present source of stress and misery." *Id.* ¶ 159. While denied adequate treatment in the last four years, Ms. Clark has attempted self-harm and suicide. *Id.* ¶ 161.

Ms. Clark is currently seen by UCONN endocrinologists. *Id.* ¶ 71. After years on a starter dose, she has now been prescribed 4 mg of estradiol, an estrogen medication, since February 2020, as well as 300 mg spironolactone per day since October 2019. *Id.* ¶73. As has been her experience for years, at Ms. Clark's most recent visit with endocrinologists on December 14, 2021, DOC once again presented Ms. Clark without necessary bloodwork. *Id.* ¶ 71. Ms. Clark's next recommended follow-up with endocrinology is for six months from December 14, 2021. *Id.*

From 2016 through 2018, Kimble-Goodman, a psychiatric advanced practice registered nurse ("APRN"), met with Ms. Clark seven times. *Id.* ¶ 45. On those occasions, Kimble-Goodman provided Ms. Clark supportive talk therapy for her general mental health needs, *id.* ¶ 46, but not for gender dysphoria, *id.* ¶¶ 134, 141. Kimble-Goodman never made any effort to refer Ms. Clark to another mental health or medical provider. *Id.* ¶ 138. Kimble-Goodman saw her role as limited to providing mental health evaluation and assessment, including prescription of mental health medications. *Id.* ¶ 45. In February and June 2017, Ms. Clark's depression over her denial of treatment reached the point where Kimble-Goodman recommended that Ms. Clark begin mental health medications to treat her dysphoric and depressed mood. *Id.* ¶ 47.[1] Kimble-Goodman used the words

[1] DOC's medical records show that Ms. Clark has also declined mental health visits on four occasions since July 2021, Opp'n Stmt. ¶ 78, although she has never declined an endocrinology visit or a visit to medical. *Id.* ¶¶ 152-53. The Court has good reason to be suspicious of Defendants' recordkeeping as establishing the declination of visits, however, as Ms. Clark's experience is that prison guards commonly report to medical staff that a person has "refused" a visit without checking with them. *Id.* ¶ 154.

"dysphoric" and "dysphoric mood" to mean "a down mood that does not meet the criteria for major depression," and not gender dysphoria. *Id.* ¶ 135. In July 2017, with Ms. Clark's depression continuing in the face of continued denial of treatment for gender dysphoria, Kimble-Goodman prescribed Prozac to Ms. Clark for depression until Ms. Clark stopped taking it. *Id.* ¶¶ 48-49. Ms. Clark is currently prescribed buspirone for anxiety. *Id.* ¶ 79. Kimble-Goodman did not interact with Ms. Clark after June 2018. *Id.* ¶ 53.

Defendant Richard Bush was a social worker at Garner, *id.* ¶ 136, who saw Ms. Clark twice in 2019. *Id.* ¶ 54. Like Kimble-Goodman, Bush viewed his role as limited to "assessing" Ms. Clark—notwithstanding that she had been diagnosed with gender dysphoria by DOC clinicians years earlier—and referring her for additional care if needed. *Id.* ¶ 55. Bush recorded in his notes that he provided general talk therapy to Ms. Clark, *id.* ¶ 56, but was adamant that he did not treat her, nor did he treat her gender dysphoria, *id.* ¶ 137. Bush's notes do not record that Ms. Clark had an acute mental health problem, and despite her mental health history and diagnosis, Bush did not refer Ms. Clark for further mental health treatment. *Id.* ¶ 57. Bush had no involvement with Ms. Clark after September 2019. *Id.* ¶ 59.

Both Ms. Clark's testifying expert, Dr. George Brown, and DOC's own consultant—hired in recent months—agree: Ms. Clark requires treatment. Dr. Brown concluded that DOC provided Ms. Clark with "substandard medical, psychiatric, and surgical care," and that Ms. Clark's inability to access "basic, medically necessary services for the treatment of G[ender] D[ysphoria] violates

any reasonable standard of care" for incarcerated transgender people. *Id.* ¶ 144. DOC's consultant, Dayne Bachmann, similarly concluded that gender affirmation surgery for Ms. Clark is "essential" and "vital" for alleviating Ms. Clark's gender dysphoria. *Id.* ¶ 145. Mr. Bachmann was hired just as discovery in this case was scheduled to close and as Defendants received a copy of Dr. Brown's report; Mr. Bachmann's job is to "limit or extinguish [] specific litigation through provision of care," *id.* ¶ 147, by serving as a specialist for inmates that suffer from gender dysphoria, *id.* ¶ 80. Mr. Bachmann evaluated Ms. Clark on December 22, 2021. *Id.* ¶ 81. Along with Mr. Bachmann's conclusion about Ms. Clark's suitability for gender affirmation surgery, he recommended that Ms. Clark see a gender therapist. *Id.* ¶ 146.

Defendants' testifying expert, Dr. Stephen Levine, did not dispute that conclusion, also urging that Ms. Clark be seen by both a gender therapist and a general therapist. *Id.* ¶ 149. He further concluded that Ms. Clark's treatment, on the whole, had been "insufficient." *Id.* ¶ 150. Finally, he stated Ms. Clark "may or may not be" an appropriate candidate for surgery and that he could give not give an expert opinion either way. *Id.* ¶ 151.[2] Indeed, throughout his deposition, Dr. Levine emphasized that he could not give *any* expert opinion today about gender dysphoria treatment for Ms. Clark within the bounds of professionalism. *Id.* ¶ 151.

Four months after Mr. Bachmann submitted his recommendations to DOC, Ms. Clark was finally permitted to see Mr. Bachmann for gender-informed therapy,

[2] As discussed in Part 2.B, *infra*, the Court should not accept Dr. Levine's effort to walk his deposition testimony back through a sham declaration.

and avers that it will permit her to keep doing so if she wishes. *Id.* ¶ 82.[3] Nonetheless, Mr. Bachmann's contract with DOC expires on November 1, 2022. *Id.* ¶ 148.

Six years after DOC diagnosed Ms. Clark with gender dysphoria, and three years after the filing of this lawsuit, DOC has only now taken the first steps to refer Ms. Clark to the Middlesex Center for Gender Medicine and Wellness ("Middlesex"). *Id.* ¶ 83. DOC believes that Middlesex will provide several services for DOC transgender patients, and DOC has asked for the assistance of Middlesex's transition coordinator. *Id.* ¶ 84. Notwithstanding DOC's optimism at this late stage, a scheduled telehealth visit for Ms. Clark on April 14, 2022 never occurred. *Id.* ¶¶ 83 (visit scheduled), 164 (visit did not occur).

Ms. Clark has repeatedly begged for treatment for her gender dysphoria. Just during her time at Garner, Ms. Clark filed at least twenty-four detailed grievances requesting treatment for gender dysphoria, many of which were directed to the individual Defendants. *Id.* ¶ 165. But instead of receiving treatment, Ms. Clark has received runarounds and excuses. She has been stuck with whomever and whatever the DOC gives her. Over the last six years, that has unfortunately been near-nothing.

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[3] Oddly, Defendants appear to blame Ms. Clark for not affirmatively requesting such therapy. *Id.* ¶ 82 ("Plaintiff has not requested to continue meeting with a gender therapist"). But Ms. Clark was not aware that, after years of DOC denying her requests for comprehensive treatment of her gender dysphoria, she had to request treatment once again. Ex. 32 ¶ 22.

B. The Court Should Ignore Defendants' Inadmissible Evidence, Including Sham Affidavits and Improper Expert Testimony

Defendants' motion is replete with improper factual assertions that violate the Federal Rules of Civil Procedure and Federal Rules of Evidence. Defendants rely heavily on the introduction of six new declarations submitted with their motion. Not only do these stand in stark contrast to the individual Defendants' clear deposition testimony that they could remember nothing about Ms. Clark and nothing about their interactions with her, but some of them also introduce evidence that directly contradicts their deposition testimony. Dr. Levine's affidavit does this and more: He adds a brand-new contention that appeared nowhere in his expert report. The Court should not countenance such blatant gamesmanship.

A party must support their motion for summary judgment with admissible evidence. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008); *Camera v. Freston*, No. 3:18-cv-1595, 2022 WL 903450, at *2 (D. Conn. Mar. 28, 2022).

Defendants' most egregious violation of the evidentiary rules is the submission of sham declarations that directly contradict Defendants' and their expert's deposition testimony. In this Circuit, "a party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." *Raskin v. Wyatt Co.*, 125 F.3d 55, 63 (2d Cir. 1997) (internal quotation omitted). The rule exists to prevent precisely what Defendants seek to do through the declarations of Dr. Valletta, Richard Bush, and Dr. Levine—"repudiating sworn

testimony once adversarial questioning has ceased"—and it "equally applies to sham affidavits offered to procure judgment for the offering party." *Fed. Deposit Ins. Corp. v. Murex LLC*, 500 F. Supp. 3d 76, 95 (S.D.N.Y. 2020). As witnesses who were "examined at length on deposition," Dr. Valletta, Bush, and Dr. Levine may not now seek judgment in Defendants' favor "simply by submitting an affidavit contradicting [their] own prior testimony." *Perma Research & Dev. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). The rule identically binds parties and their experts. *In re Fosamax Prod. Liab. Litig.*, 707 F.3d 189, 193–94 (2d Cir. 2013) (explaining that the rule extends to instances in which "a party attempts to use evidence from an expert witness to defeat summary judgment").

Dr. Levine's declaration—dated some five weeks after his deposition testimony—largely reprises portions of his expert report that have been produced to Ms. Clark. *See* Ex. E (ECF 128-7). (Ms. Clark's motion to compel production of Dr. Levine's complete report is pending and fully briefed. *See* ECF 118.) But the declaration contains flat contradictions of Dr. Levine's deposition testimony, which must be rejected by the Court.

In his declaration, Dr. Levine copies and pastes paragraphs of his expert report word-for-word. But in his deposition, he walked back many of those points. Most significantly, Dr. Levine's declaration says: "It is my opinion that Ms. Clark, based on my evaluation process with her in 2020, was neither a candidate for immediate transfer to a women's facility nor for scheduling genital reconstructive surgery." Ex. E ¶ 55. Defendants' slippery verbiage here is intended to give the impression that, in Dr. Levine's expert opinion, Ms. Clark "is not a candidate" for

genital surgery. But Dr. Levine's deposition testimony said the opposite: that Ms. Clark "may or may not be an appropriate candidate for surgery." Ex. 28 at 117:13-19. When pressed, Dr. Levine acknowledged several times that, in fact, he could not give an expert opinion either way. *See* Ex. 28 at 117:13-19, 174:5-14. Indeed, throughout his deposition, Dr. Levine emphasized that he could not give *any* expert opinion today about gender dysphoria treatment for Ms. Clark with any degree of medical certainty. *See* Ex. 28 at 209:12-22.

Paragraph 55 of Dr. Levine's declaration—as well as paragraph 56 to the extent it purports to offer an opinion as to Ms. Clark today—cannot be considered by the Court.

Dr. Valletta similarly contradicts his own deposition testimony in his declaration in support of Defendants' motion for summary judgment. In his declaration, Dr. Valletta claims that he "did not have the authority to refer Ms. Clark to a gender confirming surgeon," could not "assess whether surgical treatment would be medically indicated" for Ms. Clark, and "was not and am not involved in scheduling specialist visits." Ex. G (ECF 128-9) ¶¶ 14-15, 20. But at his deposition, Dr. Valletta stated that it was up to him alone to submit requests for Ms. Clark to see specialists, Ex. 9 (ECF 133-11) at 108:14-110:1, 111:21-113:16, and he was responsible for "assessing [Ms. Clark] for the suitability of surgery," Ex. 9 at 227:11-18.

The Court should disregard paragraphs 14, 15, and 20 of Dr. Valletta's declaration.

Finally, Bush for the first time in his declaration makes a cryptic reference to his "understanding" that Ms. Clark was seeing Andrea Reischerl for "gender related needs." Ex. I (ECF 128-11) ¶ 23; *see also* Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment (ECF 128-1) ("Defs.' Mot.") at 11. But that entirely misses the point. Ms. Clark has repeatedly begged Defendants for individualized treatment for gender dysphoria, not for some amorphous "gender related needs." Further, Bush's statement is based entirely on the following two sentences in his September 2019 clinical note about Ms. Clark: "Also complained about the lack of programs at [Garner] and potential interest in transferring to another facility. Inmate reported verbalizing this to Reischerl in her last meeting with her." Ex. B (ECF 128-4) at 899. But at his deposition, Bush claimed he had no independent insight into what his notes meant and no recollection of his meetings with Ms. Clark. Ex. 20 (ECF 133-22) at 55:21-23, 57:7-9. So the only thing Bush could now mean in his declaration by "gender related needs" is where Ms. Clark was to be housed. The Court should cabin Bush's comment accordingly.

In addition to sham affidavits, Defendants seek to insert improper expert testimony through their expert's declaration and through a physician who treated Ms. Clark twice.

First, Dr. Levine adds something to his declaration that appeared nowhere in his expert report: a suggestion that Ms. Clark is unable to offer informed consent to genital surgery. Ex. E ¶ 54. In addition to directly contradicting his testimony by appearing to rule out the appropriateness of surgery for Ms. Clark—

something he explicitly said under direct questioning at deposition that he could not do, *see* Ex. 28 at 117:13-19 (agreeing that Ms. Clark "may or may not be" an appropriate candidate for surgery); *see also* Ex. 28 at 251:8-19 (testifying that "I'm not disagreeing with Mr. Bachmann" regarding suitability for surgery)—that "attempt to supplement [his] expert report via affidavit constitutes a violation of Rule 26." *Looney v. Macy's Inc.*, No. 16-cv-04814DG, 2021 WL 5827432, at *17 (E.D.N.Y. Dec. 8, 2021); *see also Bhagwant v. Kent Sch. Corp*., 453 F. Supp. 2d 444, 449 (D. Conn. 2006). If Ms. Clark cannot offer informed consent—and notably, both Plaintiff's expert and Defendant's consultant found no issue there—then there may well be a genuine dispute of material fact. Because this is a brand-new theory that Dr. Levine injected into his declaration, the Court should disregard paragraph 54 under Rule 37. *See Richman v. Respironics, Inc.*, No. 08-cv-9407, 2012 WL 13102265, at *10 (S.D.N.Y. Mar. 13, 2012).

Defendants also rely on inappropriate expert testimony from Dr. Hassaan Aftab, a UCONN endocrinologist who met with Ms. Clark on two occasions. Those statements must be disregarded by this Court. Dr. Aftab, who did not submit an expert report under Fed. R. Civ. P. 26(a)(2)(B) and whom Defendants did not disclose under Fed. R. Civ. P. 26(a)(2)(C), was deposed in his capacity as an endocrinologist who treated Ms. Clark on two occasions. "[T]he key to what a treating physician can testify to without being declared an expert is based on his personal knowledge from consultation, examination and treatment of the Plaintiff, 'not from information acquired from outside sources." *Barack v. Am. Honda Motor Co*., 293 F.R.D. 106, 109 (D. Conn. 2013). Treating physicians are

"permitted to offer opinion testimony on diagnosis, treatment, prognosis and causation, but *solely* as to the information he/she has acquired through observation of the Plaintiff in his/her role as a treating physician limited to the facts in Plaintiff's course of treatment." *Spencer v. Int'l Shoppes, Inc.*, No. 06-cv-2637, 2011 WL 4383046, at *4 (E.D.N.Y. Sept. 20, 2011) (emphasis in the original). Thus, courts exclude any "testimony as to medical matters unrelated to the actual care and treatment of the particular patient, and any opinion not derived from the physician's personal knowledge of the patient's course of treatment." *Mercado v. Dep't of Corr.*, No. 3:16-cv-01622 (VLB), 2019 WL 625697, at *4 (D. Conn. Feb. 14, 2019).

Under that rubric, Dr. Aftab's testimony regarding "the general nature and use of the drugs" at issue and the "nature of [the] disorder" constitutes "inappropriate expert testimony" that is inadmissible and must be disregarded by the Court. *Parks v. Blanchette*, 144 F. Supp. 3d 282, 298 (D. Conn. 2015) (holding, on motion for summary judgment, that "the Court will not consider these paragraphs because they opine on the general nature and symptoms" of the condition "in an abstract way"). Defendants may not rely on Dr. Aftab's generic statements about unspecified "patient[s] with gender dysphoria" because such statements are plainly outside his "personal knowledge of the plaintiff's course of treatment." *Mercado*, 2019 WL 625697, at *4.

Accordingly, statements 39, 40, and 41 of Defendants' Local R. 56(a)(2) Statement, which rely on this testimony, should be disregarded by the Court.

3. Argument

A. Ignoring Well-Established Precedent, Defendants Urge the Wrong Legal Standard for the Objective Prong of Deliberate Indifference

Defendants argue that Ms. Clark's gender dysphoria is not a serious medical need and so does not satisfy the objective prong of deliberate indifference. *See* Defs.' Mot. at 43-49. That suggestion flies in the face of Second Circuit precedent.

Using previous terminology for gender dysphoria, "[the Second Circuit has] approved of the description of transsexualism as 'a profound psychiatric disorder,' and treated it in another context as a 'medical condition.' . . . [Plaintiff's] transsexualism constitutes a serious medical condition." *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (citations omitted). Courts in this district have followed suit. *See Johnson v. Cook*, No. 3:19-cv-1464, 2021 WL 2741723, at *14 (D. Conn. July 1, 2021) (plaintiff has plausibly alleged "she suffered from a serious medical or mental health condition—*i.e.*, gender dysphoria/identity disorder—and that the condition and the symptoms stemming from the condition require treatment. Accordingly, [Plaintiff] has met the objective component of the Eighth Amendment standard."); *see also Manning v. Goord*, No. 05-cv-850F, 2010 WL 883696, at *7 (W.D.N.Y. Mar. 8, 2010) ("Plaintiffs' [gender identity disorder] constitutes a serious medical condition sufficient to avoid dismissal of the Amended Complaint for failure to state a claim."); *Brooks v. Berg*, 289 F. Supp. 2d 286, 287 (N.D.N.Y. 2003) (explaining court's prior holding that "Gender Identity Disorder (GID) is a serious medical need" and warrants treatment).

In suggesting that gender dysphoria is not a serious medical need, Defendants attempt to evade nearly forty years of authority from around the country that has unequivocally established the exact opposite. *See Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) ("There is no reason to treat transsexualism differently than any other psychiatric disorder. . . . [P]laintiff's complaint does state a 'serious medical need.'"); *see also Pinson v. United States*, 826 F. App'x. 237 (3d Cir. 2020) (taking gender dysphoria as a serious medical need without discussion); *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1266 (11th Cir. 2020) ("no debate" about the objective component because FDC "admits" that Keohane's gender dysphoria constitutes a "serious medical need"); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) (explaining that state did not dispute objective prong, "[n]or could it," because "[g]ender dysphoria is a serious medical condition that causes clinically significant distress"); *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014) ("That [gender dysphoria] is a serious medical need, and one which mandates treatment, is not in dispute in this case."); *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011) ("Defendants do not challenge the district court's holding that [gender identity disorder] is a serious medical condition."); *Phillips v. Mich. Dep't of Corr.*, 731 F. Supp. 792, 800 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991) (holding that gender dysphoria "may present a serious medical need under the *Estelle* formulation"); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (concluding "that transsexualism is a serious medical need"). In recent years, court after court has continued to hold that gender dysphoria is a serious medical need without

skipping a beat. *See, e.g.*, *Guthrie v. Wetzel*, No. 1:20-cv-2351, 2022 WL 122372, at *3 (M.D. Pa. Jan. 12, 2022) ("[P]laintiff's gender dysphoria constitutes a serious medical need for purposes of an 8th Amendment claim."); *Doe v. Pa. Dep't of Corr.*, No. 1:20-cv-00023, 2021 WL 1583556, at *22 (W.D. Pa. Feb. 19, 2021); *Oakleaf v. Martinez*, 297 F. Supp. 3d 1221, 1230 (D.N.M. 2018).

Ignoring that avalanche of case law, Defendants do not cite a single case involving gender dysphoria to support their argument. *See* Defs.' Mot. at 24-31. In fact, Plaintiff has not located a case, anywhere, holding that gender dysphoria does not meet the objective prong—or even a case in the last three decades where a defendant made that argument.

Rather than confront the complete absence of law in their favor, Defendants kick up dirt with an irrelevant argument premised on supposed "delay" of treatment. Defs.' Mot at 27-31. Typically, when analyzing the objective prong, courts look to the seriousness of the underlying medical condition or injury.[4] *Smith v. Carpenter*, 316 F.3d 178, 185 (2d Cir. 2003) (explaining that HIV qualifies under this approach). Where there has been "a *temporary delay or interruption* in the provision of *otherwise adequate* medical treatment," however, courts take a "narrower" approach, *Bilal v. White*, 494 F. App'x 143, 145 (2d Cir.

[4] To identify a serious condition, "[f]actors that have been considered include 'the existence of an injury that a reasonable doctor or patient would find 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." *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) (internal citation omitted).

2012) (emphasis added), looking both to the underlying condition as well as the ramifications of delay in treatment, *see Smith*, 316 F.3d at 186.

That narrower analysis does not apply here, where Defendants have *denied* treatment to Ms. Clark for gender dysphoria for *six years*. That becomes abundantly clear when one looks at the cases Defendants cite in support of their argument. *See* Defs.' Mot. at 24-26. In each case, the plaintiff experienced only a very short pause in treatment that he was already receiving, or a relatively brief delay of treatment that he ultimately did receive in full. *See Benjamin v. Pillai*, 794 F. App'x 8, 12 (2d Cir. 2019) (seven- to eight-week delay in obtaining Naproxen and an X-ray for back pain); *Bilal*, 494 F. App'x at 145 (interruption of epilepsy medicine "lasting only a few hours"); *Washington v. Artus*, 708 F. App'x 705, 709 (2d Cir. 2017) (noting that "four hours . . . elapsed between his injury and his arrival at the emergency room"); *Valdiviezo v. Boyer*, 752 F. App'x 29, 32 (2d Cir. 2018) (hour-long delay of medical help after slip and fall); *Bellotto v. Cty. of Orange*, 248 F. App'x 232, 237 (2d Cir. 2007) (noting that plaintiff "missed medication dosages" for depression); *Smith*, 316 F.3d at 185 (prescription HIV medication missed over two different week-long episodes); *Cuffee v. City of New York*, No. 15-cv-8916, 2017 WL 1232737, at *9 (S.D.N.Y. Mar. 3, 2017) (noting almost four-hour delay in medical care after prison bus accident); *McCoy v. Goord*, 255 F. Supp. 2d 233, 243 (S.D.N.Y. 2003) (plaintiff complaining of chest pains kept waiting for 25 minutes); *Guerrero v. White-Evans*, No. 06-cv-5368, 2009 WL 6315307, at *3 (S.D.N.Y. Sept. 17, 2009) (14-hour delay of treatment for superficial facial injuries).

Those cases are inapposite. None involved gender dysphoria—a chronic, lifelong diagnosis. And they each involved either (i) concededly adequate treatment that had begun and was temporarily suspended for no more than a week, or (ii) a delay in inception of treatment ranging from 25 minutes to several weeks. This case is not about a few hours waiting to go to the ER, or a few weeks waiting for an X-ray. Defendants have *never* provided "adequate medical treatment" for Ms. Clark's gender dysphoria, and Defendants' "delay" in supplying adequate care now exceeds *six years*. To describe that continuous denial as a mere delay would contort the delay doctrine beyond recognition.

Adequate care for gender dysphoria, as established by the WPATH Standards of Care, includes (i) gender-informed mental health treatment, (ii) hormone therapy, and (iii) surgery to bring a person's sex organs and physical appearance into conformance with their true gender identity. *See* Ex. 1 (ECF 133-3) ¶ 43; Ex. 30. Ms. Clark has never received adequate care for her gender dysphoria. Defendants' actions (or lack thereof) to this day, even when coupled with their alleged "anticipated care,"[5] is not a temporary delay or interruption of

[5] Defendants can point only to preliminary, investigatory actions taken in recent months that in no way suggest that treatment is imminent. For example, "Dr. Burns has . . . reached out to Middlesex and made progress in retaining them to provide services for Plaintiff." Defs' Mot. at 17. Defendants concede, however, that "this Clinic does not provide the vaginoplasty surgery Ms. Clark seeks." *Id*. "Dr. Burns has also *begun the process* of identifying a specialist who *may* be retained for a surgical consult." *Id*. (emphasis added). "Dr. Burns has *initiated communication* with electrolysis specialists who *may* be willing to take a DOC patient." *Id*. at 19 (emphasis added). Such preliminary steps are in no way proof that Defendants will imminently begin providing adequate treatment for Ms. Clark's gender dysphoria.

care that would be adequate to treat Ms. Clark's serious medical need. Rather, it is a complete denial of such care and is, therefore, not subject to the narrower delay analysis that Defendants urge.

Because Defendants' entire framing of this case is distorted, their arguments about whether delay in treatment worsened Ms. Clark's condition are irrelevant. They also fail on their own merits. First, Defendants suggest that, because Ms. Clark's "condition was objectively the worst it had ever been in 2016," there can be no "evidence that the delay worsened her condition." Defs.' Mot. at 28. But the mere fact that Ms. Clark did not vocally express her unending misery to every person at every interaction does not mean she was suddenly "better." Defendants' argument also misses the point: The question is not whether Ms. Clark is "better" than she was in 2016; it is whether she is as good as she would have been *had she received adequate care*. She is not. *See* Ex. 1 ¶¶ 59-60, 82. Defendants are not off the hook because Ms. Clark expressed a lessening of the debilitating mental and physical consequences of her dysphoria once she came out, began living in a manner consistent with her gender identity, and received the minimal first steps of what she hoped might ultimately be adequate care. *See Brock v. Wright*, 315 F.3d 158, 163 (2d Cir. 2003) ("We do not . . . require an inmate to demonstrate that he or she experiences pain that is at the limit of human ability to bear, nor do we require a showing that his or her condition will degenerate into a life-threatening one.").

Second, in a further attempt to persuade the Court to disregard decades of precedent, Defendants argue that the inability to "point to any physical injury or

physical pain caused by the supposed delay" excludes Ms. Clark's gender dysphoria from the category of a serious medical need. *See* Defs.' Mot. at 29-30. Again, because the delay framework is the wrong one, that argument is beside the point. It is also entirely wrong: There is no requirement that Ms. Clark experience *physical* pain or injury even under the delay analysis, and Defendants cite no cases to support their contention. Neither *Valdiviezo* nor *Smith* says anything to that effect. *Cf. Valdiviezo*, 752 F. App'x at 32 (citing *Smith v. Carpenter*, 316 F.3d 178 (2d Cir. 2003), for the proposition that "in considering whether a delay caused a risk of harm, a court may consider '[t]he absence of adverse medical effects or demonstrable physical injury.'").

To the contrary, mental health concerns meet the objective prong's seriousness standard. "[F]rom the legal standpoint psychiatric or mental health care is an integral part of medical care. It thus falls within the requirement of *Estelle v. Gamble* . . . that it must be provided to prisoners." *Langley v. Coughlin*, 888 F.2d 252, 254 (2d Cir. 1989); *see also Guglielmoni v. Alexander*, 583 F. Supp. 821, 826 (D. Conn. 1984) ("As there is 'no sound underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart,' the 'deliberate indifference' standard . . . is equally applicable to the constitutional adequacy of psychological or psychiatric care provided at a prison."). The Second Circuit has never held that physical pain or injury are necessary elements of a deliberate indifference claim. Defendants' argument to the contrary—absent a single case in support—is meritless.

Finally, even assuming, *arguendo*, that this is solely a case of delay rather than of denial of adequate care, delay is sufficiently serious if it lasts long enough. *See Hathaway v. Coughlin*, 841 F.2d 48, 50 (2d Cir. 1988) (finding a delay of over two years in arranging surgery amounted to deliberate indifference to serious medical needs); *see also Idowu v. Middleton,* No. 12-cv-1238, 2013 WL 4780042, at *7 (S.D.N.Y. Aug. 5, 2013) (two-month delay in urgent treatment); *Benitez v. Parmer*, No. 12-cv-448, 2013 WL 5310245, at *12 (N.D.N.Y. July 8, 2013) (year-long delay for liver biopsy). Ms. Clark has waited six years for adequate care to address her gender dysphoria. She has not yet received it.

Gender dysphoria is indisputably "a medical condition that significantly affects an individual's daily activities." *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998). It therefore satisfies the objective prong of the deliberate indifference analysis, as the Second Circuit and others have held for decades.

B. Richard Bush and Barbara Kimble-Goodman Neither Provided Gender Dysphoria Treatment to Ms. Clark Nor Took Any Steps to Help Her Obtain Treatment

Defendants Richard Bush and Barbara Kimble-Goodman argue that they were either not sufficiently involved in Ms. Clark's treatment, or, that whatever treatment they provided was not rendered in a manner that violated the Eighth Amendment. They each claim they lacked "the ability to remedy the supposed 'wrong'" of Ms. Clark's non-existent treatment: they were unable to write or modify prescriptions for hormone therapy, and could not have performed gender affirmation surgery for Ms. Clark. Defs.' Mot. at 33, 35. They further contend that they lacked personal involvement because they had an "extremely limited role" in or were "[n]ot responsible" for Ms. Clark's gender dysphoria care. *Id.*

First, as a factual matter, Defendants are wrong. Whether Bush acknowledges it or not, Ms. Clark was his patient. *See* Ex. 22 (ECF 133-24) at 1-2 (confirming Ms. Clark was on his "caseload" and that he was her "clinician"). When Ms. Clark wanted to see a mental health provider, she was directed to Bush and Kimble-Goodman, *see, e.g.*, Ex. 21 (ECF 133-23) ("Requesting more therapy. I will be giving the request to Bush"); Ex. H (ECF 128-10) ¶ 18 (explaining that Kimble-Goodman was assigned to people of Ms. Clark's description), just as when she wanted to see a medical doctor, she was sent to Dr. Valletta, *see, e.g.*, Ex. 29 a 1 (Reischerl directing Ms. Clark's concerns to Dr. Valletta because "Dr. Valletta would be the medical MD addressing" these issues).

Defendants' excuses are part of a larger theme. In their motion, Defendants engage in a circular and protracted game of finger-pointing to try to avoid responsibility for treating Ms. Clark. Dr. Valletta was Ms. Clark's medical provider. Kimble-Goodman and Bush were her mental health providers. But asked who was charged with treating Ms. Clark's gender dysphoria, each Defendant's answer is, "It wasn't me." Dr. Valletta says it was the responsibility of "mental health." Ex. 9 at 138:8-13. But Bush and Kimble-Goodman say that it was not their responsibility at all. *See* Ex. I ¶ 23 (Bush); Ex. H ¶ 18 (Kimble-Goodman). Kimble-Goodman added that it was the responsibility of Reischerl, but acknowledges that Reischerl did not treat patients, Ex. 18 (ECF 133-20) at 97:24-98:2—a fact confirmed by Reischerl herself. *See* Ex. 19 (ECF 133-21) ("A treatment plan would be developed with MH- I usually am not involved in those as that is for her

treatment providers to develop."). Kimble-Goodman further admitted she had no idea what Reischerl did or did not do. Ex. 18 at 96:15-98:2.

As Ms. Clark put it in her deposition, everyone was "passing the buck." Ex. 5 (ECF 133-7) at 105:22-25. When Ms. Clark's current providers at Cheshire tried the same tactic, Dr. Craig Burns, DOC's chief mental health officer—who also does not treat patients directly, and did not treat Ms. Clark—was blunt, writing in an email to her clinician: "Is she your patient?" Ex. 29 at 3-5. No, according to Defendants' logic: Ms. Clark was nobody's patient and thus nobody can be liable.

Defendants also play word games. Nobody was responsible for "treating" Ms. Clark, because her clinicians were only responsible for "assessing" her or "evaluating" her. *E.g.*, Ex. I ¶¶ 6,7 (Bush); Ex. H ¶ 23 (Kimble-Goodman). There is no legal significance to that distinction, and Defendants suggest none. Regardless, Ms. Clark had already been assessed for gender dysphoria and diagnosed in May 2016. Defendants did not need to "assess" Ms. Clark again, *cf.* Ex. G ¶¶ 7, 15 (arguing he could not have diagnosed Ms. Clark with gender dysphoria); they needed to treat her.

Defendants are also wrong as a matter of law. The personal involvement of a government employee in a federal constitutional violation occurs when the employee "participated directly in" it. *Brandon v. Kinter*, 938 F.3d 21, 36 (2d Cir. 2019) (internal quotation marks omitted). Bush saw Ms. Clark face-to-face in March and September 2019, Ex. 7 (ECF 133-9) at 68-70, 71-73, in response to her report of feeling "stressed out and depressed over [her] transition," Ex. 21 at 1. He knew from consulting her medical chart at that first visit that Ms. Clark had

gender dysphoria. Ex. 20 at 32:2-17. Kimble-Goodman saw Ms. Clark at least eight times in response to Ms. Clark's requests for help because she had "continually been denied access . . . to transition related healthcare." Ex. 7 at 57; *see also id.* at 60-67; Ex. 17 (ECF 133-19) at 9 (grievance answered by Kimble-Goodman). During her first visit with Kimble-Goodman, Ms. Clark reported that her male genitalia were "poisoning" her. Ex. 7 at 60. Ms. Clark alleges that both Bush and Kimble-Goodman are liable for denying her care for gender dysphoria. *See* First Amended Complaint ("FAC") (ECF 84) ¶¶ 52-53.

Under governing law, those facts end the analysis on personal involvement. Yet without citation to authority, Bush and Kimble-Goodman advance a radical reconfiguration of personal involvement in which a government employee who lacks the ability or authority to provide the appropriate procedure or medication for a serious medical need cannot be "involved" for purposes of constitutional liability.

Their contention is belied by the Eighth Amendment's medical care mandate, which is violated "whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). No case limits that duty only to those having the "authority or qualifications," Defs.' Mot. at 35, to provide the ultimate intervention necessary to resolve a serious medical need.

Thus, for example, a nurse who cannot prescribe medicine or perform any of the other specialty care that a physician could provide to treat Hepatitis C nonetheless violates the Eighth Amendment's mandate by refusing to assist the patient in obtaining blood work necessary for his care, or by ignoring his sick call requests. *See Myers v. Dolac*, No. 09-cv-6642P, 2013 WL 5175588, at *2, 12 (W.D.N.Y. Sept. 12, 2013) (denying defense motion for summary judgment on medical indifference claim); *see also Aikens v. Rao*, No. 13-cv-1088S, 2015 WL 5919950, at *6 (W.D.N.Y. Oct. 9, 2015).

The same goes for government employees who have no medical knowledge or expertise at all. A prison guard who most assuredly may not practice medicine commits medical indifference by instructing other guards to ignore the patient's sick call requests or not to take a patient to sick call. *See Lainfiesta v. Livermore*, No. 11-cv-1099, 2013 WL 2404021, at *3, 9 (N.D.N.Y. May 31, 2013) (adopting report and recommendation denying summary judgment to defendants). So do guards and wardens who refuse to transfer a person to specialized medical housing or provide recommended medical treatments, *see Shomo v. City of New York*, 579 F.3d 176, 182 (2d Cir. 2009), and prison administrators who know of a patient's serious risk of permanent disability due to "the improper administration of his medications, yet fail[] to address the situation," *Thomas v. Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006) (reversing personal involvement dismissal of prison employees).

The same goes for police officers, who equally bear the duty to attend to the serious medical needs of someone in their custody even though their lack of

medical knowledge would—in Defendants' conception—render them without "the ability to remedy" a medical need singlehandedly. Defs.' Mot. at 33; *see Weyant v. Okst*, 101 F.3d 845, 857 (2d Cir. 1996) (reversing summary judgment for defendant state troopers who ignored diabetic shock); *Adamson v. Miller*, 808 F. App'x 14, 18 (2d Cir. 2020) (same for municipal police who did nothing for arrestee reporting bleeding from the mouth and difficulty breathing).[6]

The constitutional obligation to provide medical care runs against these and all other non-physicians like Bush and Kimble-Goodman because they hold complete sway over the person in their custody. Handcuffed in the back of a police car on a very cold night, an arrestee cannot summon a doctor for his frostbite. *See Ellington v. Monroe County*, No. 15-cv-6310, 2019 WL 1207515, at *3 (W.D.N.Y. Mar. 14, 2019). In the consultation room on Ms. Clark's cell block, Richard Bush and Barbara Kimble-Goodman (and Dr. Valletta, as will be discussed *infra*) were all Ms. Clark had, within a system that barred her from changing treatment providers. She was stuck with them and they were unwilling to lift a finger to ensure she received adequate treatment for gender dysphoria.

Lastly, there is no liability avoidance to be found for Kimble-Goodman or Bush in the acts they *did* perform for Ms. Clark, because they did not address her serious medical need of gender dysphoria. Neither one took any steps to get Ms. Clark treatment for her serious medical need, even by locating someone who

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[6] Although pretrial detainees' right to medical care flows from the Due Process Clause rather than the Eighth Amendment, the inquiry is the same in relevant part: whether the custodian "denied treatment needed to remedy a serious medical condition and did so because of his deliberate indifference to that need." *Weyant*, 101 F.3d at 856.

could treat her. Ex. 18 at 101:8-14; _compare_ Ex. 7 at 71-73 (recording no referrals by Bush), _with_ Ex. 20 at 51:8-23 (confirming it was Bush's practice to record referrals in the medical chart). Instead, Bush merely assessed whether Ms. Clark needed talk therapy for her denial of care and "allow[ed] her to vent her frustrations." Defs.' Mot. at 33. That is, Bush tried to talk Ms. Clark into being happier with her custodians' continued refusal to provide medical assistance. Kimble-Goodman tells a similar tale: that she offered Ms. Clark Prozac and the chance to talk. _See_ Defs.' Mot. at 35.

"[T]reating the symptoms is not a substitute for treating [the] underlying condition." _Soneeya v. Spencer_, 851 F. Supp. 2d 228, 248 (D. Mass. 2012) (holding that treating depression for denial of surgery does not void deliberate indifference claim). "Although DOC can provide psychotherapy as well as . . . antidepressants, defendants fail[] to present evidence rebutting the testimony that these treatments do nothing to treat the underlying disorder [gender dysphoria]."). _Iglesias v. Fed. Bureau of Prisons_, No. 19-cv-415, 2021 WL 6112790, at *22 (S.D. Ill. Dec. 27, 2021) (granting preliminary injunction). Notably, both sides' experts and DOC's consultant all differentiate between therapy and _gender-informed_ therapy. Ex. 28 at 113:24-115:21 (Levine recommending both a therapist and a gender therapist); Ex. 27 (ECF 133-29) at 2 (Mr. Bachmann specifying a gender therapist); Ex. 1 ¶ 84 (Brown noting the lack of "gender-informed" therapy and explaining that "the focus of the little mental health counseling [Ms. Clark] has received from DOC appears to be assisting her to 'adjust' to prison, rather than any specialized psychological treatment for GD."). Against this backdrop,

Kimble-Goodman's contentions of "supportive talk therapy" fall flat. *See Mitchell v. Kallas*, 895 F.3d 492, 500 (7th Cir. 2018) ("[E]ven if the therapy sessions addressed [plaintiff's] gender dysphoria to a degree, she may still recover if they did nothing actually to treat her condition.").

Regardless, Kimble-Goodman's admission that she has never had any training in the treatment of gender dysphoria dooms her attempt to now cast her inaction as an exercise of "her medical judgment." Defs.' Mot. at 35. She cannot have based her decision to ignore Ms. Clark on any "accepted professional judgment, practice or standards," *Nails v. Laplante*, 596 F. Supp. 2d 475, 480 (D. Conn. 2009) (internal quotation marks omitted), of gender dysphoria treatment that she admits to never knowing. Bush and Kimble-Goodman were involved in the constitutional violations, and are liable for them.

C. Dr. Gerald Valletta's Refusal to Treat Ms. Clark Based on a Blanket Policy is a Textbook Eighth Amendment Violation, and His Role in the Continued Failure to Treat Ms. Clark Went Far Beyond Mere Deference to Outside Specialists

Defendants next argue that Dr. Gerald Valletta was not deliberately indifferent because his "mere reliance on a policy does not evince a criminally reckless state of mind," and further, because he "simply deferred to the expertise of the endocrinologists." Defs.' Mot. at 37. But Defendants are wrong on both the law and the undisputed facts.

As Plaintiff demonstrated in her affirmative Motion for Summary Judgment, the "blanket, categorical denial of medically indicated [treatment] solely on the basis of an administrative policy . . . is the paradigm of deliberate indifference." *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014). For example, in *Johnson*

***v. Wright*, the Second Circuit considered a prison doctor's decision to deny the plaintiff a particular treatment for Hepatitis C based on a prison policy against administering that treatment to incarcerated people with a recent history of substance abuse. 412 F.3d 398, 404 (2d Cir. 2004). With "no evidence suggesting that the defendants took any steps whatsoever to assure themselves that applying the Guideline in plaintiff's case was, in fact, a medically justifiable course of action," the court held that "a jury could reasonably find that the defendants here acted with a sufficiently culpable state of mind . . . by reflexively following the Guideline's substance abuse policy." *Id.* at 406.**

In case after case, courts have held that a prison official's application of a blanket policy against treating incarcerated people for gender dysphoria, without consideration of an individual's particular medical condition, constitutes deliberate indifference. In *De'Ionta v. Angelone*, the Fourth Circuit allowed deliberate indifference claims to proceed against prison doctors and administrators that had discontinued the plaintiff's hormone treatment pursuant to a blanket policy. 330 F.3d 630, 634-36 (4th Cir. 2003). The Ninth Circuit issued a similar ruling in *Allard v. Gomez*, where "correctional officials based their [treatment] denials on a general policy of approving hormonal treatment only on the basis of medical need, ruling that Allard's gender disorder could not qualify as a medical need." 9 F. App'x 793, 794 (9th Cir. 2001). Numerous district courts have arrived at the same conclusion. *See, e.g., Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003), *vacated in part on other grounds*, 289 F. Supp. 2d 286 (2003); *Hicklin v. Precynthe*, No. 4:16-cv-01357-NCC, 2018 WL 806764, at *11 (E.D.

Mo. Feb. 9, 2018) (finding plaintiff "likely to succeed in establishing that Defendants," including prison doctors and nurses who treated the plaintiff, "were deliberately indifferent to her serious medical need" because defendants "refus[ed] to provide [plaintiff] with hormone therapy after her diagnosis . . . based on the Policy rather than on a medical judgment").

Defendants cite a single decision, *Manning v. Goord*, No. 05-cv-850F, 2010 WL 883696, (W.D.N.Y. Mar. 8, 2010), to support their assertion that "mere reliance on a policy does not evince a criminally reckless state of mind." Defs.' Mot. at 37. But that is not what the court held in *Manning*. There, on the *plaintiff's* motion for summary judgment, the court found that the plaintiff "present[ed] no evidence to rebut [the defendants'] statements describing their *medically-based* reasons for denying Plaintiff's hormone therapy requests." 2010 WL 883696, at *12 (emphasis added). Of particular import to the court was deposition testimony in which the defendants expressed concern that providing hormone therapy for the plaintiff's gender identity disorder would negatively affect her other medical conditions. *Id.* at *11-12. In so holding, the court relied on and directly quoted Second Circuit precedent holding that "a jury could infer the absence of a sufficiently culpable state of mind if the jury believed that the defendant denied the plaintiff medical treatment because the defendant sincerely and honestly believed that applying a prison policy mandating the denial of treatment was, *in plaintiff's case, medically justifiable*." *Id.* at *11 (quoting *Salahuddin v. Goord*, 467 F.3d 263, 281 (2d Cir. 2006)) (emphasis added; cleaned up). A prison official cannot claim "mere reliance on a policy" to deny needed medical care to an incarcerated person;

rather, treatment or non-treatment must be a medical, not policy, decision based on an individual's particular circumstances.

Dr. Valletta has never offered a medical reason for denying Ms. Clark treatment for gender dysphoria between August 2016 and September 2017. In his declaration accompanying Defendants' Motion for Summary Judgment, Dr. Valletta admits that rather than apply his medical judgment to determine the appropriate course of treatment for Ms. Clark's gender dysphoria, he unthinkingly abided by his "understanding" of a DOC "practice" not to "initiate hormone therapy for inmates who had not been receiving that care in the community." Ex. G ¶ 12. That policy was unwritten, yet Dr. Valletta never questioned the policy and never discussed it with anyone. *See* Ex. 9 at 121:19-122:16 ("Q. Do you recall ever discussing that policy with anyone? A. Nothing in particular, no."). He did not even try to refer Ms. Clark to an endocrinologist because it was his "understanding" that the request would be denied, even though he cannot remember anyone ever telling him that. Ex. 9 at 232:14-233:17. And once a lawsuit was threatened and "the practice within DOC regarding hormone therapy changed," Dr. Valletta referred Ms. Clark for hormone therapy, *see* Ex. G ¶¶ 17-18, belying any claim by Defendants that previous denials of that treatment were based on anything besides the purported policy. And even then, Dr. Valletta only referred Ms. Clark to an endocrinology specialist after being instructed to do so by his superiors. *See* Ex. 7 at 74 ("Complaint/Diagnosis: I was asked to submit request."); Ex. 9 at 182:3-21.

Dr. Valletta's application of a blanket policy to deny Ms. Clark treatment for gender dysphoria is the epitome of deliberate indifference.

Defendants also argue that, once Ms. Clark began receiving treatment for gender dysphoria, Dr. Valletta "simply deferred to the expertise of the endocrinologists" and did not "have the authority to refer Plaintiff to a surgeon." Defs.' Mot. at 37-38; *but see* Ex. 9 at 227:11-18 (admitting that he would in fact be the person to refer Ms. Clark to surgery). Those arguments also fail. As a threshold issue, Defendants are wrong as a matter of law that Dr. Valletta was off the hook once Ms. Clark was referred to an endocrinologist. Dr. Valletta remained Ms. Clark's doctor for years and saw her frequently. *See Hathaway v. Coughlin*, 37 F.3d 63, 68 (2d Cir. 1994) ("We decline to adopt a rule that in effect would exempt general practitioners from being found deliberately indifferent to a patient's serious medical needs as long as that general practitioner at some point refers the patient to a specialist, regardless of the extent of contact that general practitioner has with the patient.").

As a factual matter, Defendants elide the many things Dr. Valletta could have done, but did not do, to treat Ms. Clark's gender dysphoria. Dr. Valletta was Ms. Clark's "primary physician" while she was in custody at Garner. Ex. G ¶¶ 4, 9. In that role, he had the power to order labs for Ms. Clark to ensure that the endocrinologists had the necessary information to assess Ms. Clark's progress in her hormone therapy. *See* Ex. 9 at 191:2-23. It was Dr. Valletta's responsibility to submit requests for Ms. Clark to see specialists. Ex. 9 at 108:14-110:1, 111:21-

113:16. Notably, he was also responsible for "assessing [Ms. Clark] for the suitability of surgery." Ex. 9 at 227:11-18.

Yet Dr. Valletta repeatedly failed to ensure Ms. Clark received timely and appropriate treatment for her gender dysphoria. He did not ensure Ms. Clark received follow-up appointments with endocrinologists at the intervals requested. *E.g.*, Ex. 7 at 81 (20 months until August 2019 appointment). He did not make sure her labs were timely taken prior to her endocrinology appointments. *See, e.g.*, Ex. 7 at 75-79 (no labs taken prior to first endocrinology visit); *id.* at 81 (no labs at visit). He failed to provide or arrange any monitoring for Ms. Clark to check that her hormone therapy was effective. *See* Ex. 3 (ECF 133-5) at 175:5-176:25. He repeatedly failed to renew Ms. Clark's prescriptions, resulting in lapses in her receipt of hormone treatment. *See* Ex. 7 at 121-22, 127. And he *never* assessed Ms. Clark for any medical interventions to treat gender dysphoria, such as gender affirmation surgery. Ex. 9 at 206:17, 239:20-240:3. Dr. Valletta's continuous failure to facilitate further treatment for Ms. Clark evinces his deliberate indifference to her serious medical need. *See, e.g.*, *Giraud v. Feder*, No. 20-cv-1124, 2021 WL 1535751, at *4 (D. Conn. Apr. 19, 2021); *Williamson v. Naqvi*, No. 19-cv-4, 2019 WL 2718476, at *6 (D. Conn. June 27, 2019).

D. The Governing Qualified Immunity Standard Asks Whether Ms. Clark Was Denied Individualized Care for Her Serious Medical Need, Generally, and Not Whether Prior Case Law Enshrined a Particular Disease as Meriting a Particular Kind of Treatment

Defendants argue that Dr. Valletta, Bush, and Kimble-Goodman are entitled to qualified immunity. Qualified immunity attaches "when one of two conditions is satisfied: (a) the defendant's action did not violate clearly established law, or

(b) it was objectively reasonable for the defendant to believe that his action did not violate such law." *Rodriguez v. Manenti*, 606 F. App'x 25, 26 (2d Cir. 2015) (internal quotation marks omitted). It is an affirmative defense on which the defendant has the burden of proof. *Outlaw v. City of Hartford*, 884 F.3d 351, 367-68 (2d Cir. 2018) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)).

The relevant inquiry in determining whether a right is clearly established is "whether the contours of the right were sufficiently clear that a reasonable official would understand that what he did violates that right." *Rodriguez*, 606 F. App'x at 26. "This is not to say, however, that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Outlaw*, 884 F.3d at 367 (internal quotation marks omitted).

Whether Defendants' conduct was objectively reasonable is a mixed question of law and fact. *Outlaw,* 884 F.3d at 367. The "facts would need to be resolved by the trier of fact before the court can decide whether, as a matter of law, Defendants are entitled to qualified immunity on the claim." *Ruggiero v. Canfield*, No. 14-cv-307, 2020 WL 7631890, at *12 (W.D.N.Y. Nov. 9, 2020); *see also Higazy v. Templeton*, 505 F.3d 161, 170 (2d Cir. 2007).

Defendants have not demonstrated that they are entitled to qualified immunity. First, Ms. Clark has a clearly established right to be free from Defendants' deliberate indifference to her serious medical need. In the Second Circuit, "[t]he right to be free from deliberate indifference to a serious medical need has been clearly-established at least since the Supreme Court's 1976 decision in *Estelle v. Gamble*." *Wilson v. McKenna*, No. 3:12-cv-1581 (VLB), 2015

WL 1471908, at *14 (D. Conn. Mar. 31, 2015); *see also Ramos v. Town of E. Hartford*, No. 3:16-cv-166 (VLB), 2019 WL 2785594, at *18 (D. Conn. July 2, 2019).

Defendants argue that the right at issue is Ms. Clark's right to a "certain kind of treatment" for her gender dysphoria. Defs'. Mot. at 49. But such a narrow view of the right is inappropriate. "An overly narrow definition of the right can effectively insulate the government's actions by making it easy to assert that the narrowly defined right was not clearly established." *LaBounty v. Coughlin*, 137 F.3d 68, 73 (2d Cir. 1998) (internal citation, quotation marks omitted). Defendants' argument "runs afoul of [the Second Circuit's] recognition that a court need not have passed on the identical course of conduct in order for its illegality to be clearly established." *Rodriguez*, 606 F. App'x at 26 (internal citation, quotation marks omitted). The Second Circuit does not analyze qualified immunity for deliberate indifference to a serious medical need on a disease-specific, condition-specific, or body part-specific basis. *See Rodriguez*, 606 F. App'x at 26 ("[T]his Court does not analyze Eighth Amendment claims for the deprivation of medical care according to body parts."); *see also Knight v. N.Y.S. Dep't of Corr.*, No. 18-cv-7172, 2022 WL 1004186, at *18 (S.D.N.Y. Mar. 30, 2022).

In *Knight*, in order to take advantage of qualified immunity, the defendants tried to "define the constitutional right at issue as the right to be free from having 'to wash and reuse catheters for no more than a single day.'" *Id.* The court rejected that narrow definition, agreeing instead with the plaintiffs that the right in question was the prohibition on "prison officials from being deliberately indifferent to an inmate's serious medical needs." *Id.*; *accord Rahman v. Schriro*,

22 F. Supp. 3d 305, 316 (S.D.N.Y. 2014) (rejecting defendants' argument that there was "no clearly established law prohibiting X-ray scans of inmates" because "Plaintiff's claim arises . . . from a broader right to be free from deliberate indifference to serious medical needs that was clearly established as far back as 1976 by *Estelle v. Gamble*") (internal citation, quotation marks omitted).

What Defendants seek to do here is what the Seventh Circuit rejected in *Mitchell v. Kallas*: urge that they are "entitled to qualified immunity because no binding decision guarantees inmates the right to a speedier gender dysphoria evaluation or . . . hormone therapy prior to release." 895 F.3d at 499. "That formulation, however, frames the right too narrowly. . . . Prison officials have been on notice for years that leaving serious medical conditions, including gender dysphoria, untreated can amount to unconstitutional deliberate indifference." *Id.* As another court put it, "binding precedent establishing that transgender inmates have a right to receive the specific treatment at issue . . . is not required to overcome the Defendants' qualified immunity defense." *Diamond v. Owens*, 131 F. Supp. 3d 1346, 1375 (M.D. Ga. 2015). To the contrary, "the law was sufficiently clear to give the Defendants fair warning that their refusal to provide [Ms. Clark] with treatment they knew was medically necessary or to refer her for treatment violated [her] Eighth Amendment right to adequate medical care." *Id.; see also Stevens v. Goord*, 535 F. Supp. 2d 373, 390 (S.D.N.Y. 2008) ("[c]lear Second Circuit precedent . . . dictates that significant gaps in treatment of a plaintiff with a serious, degenerative condition . . . who suffers recurrent pain can suffice to state a constitutional claim" and expose "treating

personnel" to liability). In those cases, as here, "[a] convicted prisoner's right not to be recklessly denied treatment for a serious medical condition was clearly established at the time these events transpired." *Hilton v. Wright*, 928 F. Supp. 2d 530, 552 (N.D.N.Y. 2013).

Importantly, Ms. Clark is *not* requesting a particularized, specific treatment. As she stated in her First Amended Complaint, Ms. Clark is seeking "adequate and necessary medical care for treatment of her gender dysphoria," to which even Defendants' expert admits she is entitled. FAC at 14.

There is no question that Ms. Clark has a right to individualized treatment for her gender dysphoria. *See Guthrie*, 2022 WL 122372, at *5-6 (no qualified immunity—despite the fact that "no authority within this District or this Circuit establishes a constitutional right to gender affirmation surgery, or the evaluation of an outside physician who could recommend such surgery"—because plaintiff's claims were broader than that: "a pattern of refusal on the part of all the defendants to provide individualized medical treatment for [her] gender dysphoria"); *see also Doe*, 2021 WL 1583556, at *24 . "Assuming that [Defendants were] deliberately indifferent to [Ms. Clark]'s serious medical needs, [they are] not entitled to qualified immunity because it would not be objectively reasonable for [them] to believe [their] conduct did not violate [her] rights." *Hathaway*, 37 F.3d at 69 (denying qualified immunity on motion to dismiss).[7]

[7] The Second Circuit has also denied qualified immunity where defendants, like Dr. Valletta, reflexively denied treatment based on a prison policy. *Griffin v. Amatucci*, 611 F. App'x 732, 735 (2d Cir. 2015) (holding that application of policy was not objectively reasonable); *accord McKenna v. Wright*, 386 F.3d 432, 437 (2d

Defendants have not cited a single case that holds a plaintiff does *not* have a clearly established right to be free from deliberate indifference to a serious medical need, or where it was objectively reasonable for a plaintiff's own clinicians to deny her individualized medical treatment for a diagnosed, serious medical need. Instead, Defendants cite cases for the narrow claim that a plaintiff does not have a right to pick and choose their treatment for gender dysphoria, and they misleadingly suggest that those cases granted qualified immunity in analogous contexts.

For example, Defendants imply that in *Cuoco*, the Second Circuit analyzed whether the plaintiff had a clearly established right to hormone therapy, or whether the failure to provide an incarcerated person treatment for gender dysphoria is objectively reasonable as a matter of law. Not so. Rather, the *Cuoco* Court held that the various defendants in that case should be granted immunity because a) there was no conduct at all attributed to one defendant, b) others were statutorily immune, c) others were custodial staff who had no role in the plaintiff's treatment, d) one was not the plaintiff's doctor, and e) the last defendant, although a prison psychologist, "had been told that plaintiff was not a transsexual"—*i.e.*, that defendant could reasonably believe the plaintiff did not need treatment for gender dysphoria.[8] Nothing the *Cuoco* Court did bolsters

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Cir. 2004) (denying qualified immunity on motion to dismiss where defendants relied on a prison policy rather than individualized treatment).

[8] It bears noting that *Cuoco* was decided 22 years ago, and thus reflects outdated conventions around gender dysphoria. There have been substantial advances in both terminology and treatment since then; among other things, the term "gender dysphoria" has replaced "transsexual," Ex. 4 (ECF 133-6) at 23:19-25, and the

Defendants' argument that Ms. Clark's *own* clinicians' refusal to treat her *diagnosed* gender dysphoria would be protected by qualified immunity. *Cf. Mitchell*, 895 F.3d at 501-02 (denying qualified immunity on summary judgment because "[p]rison officials have been on notice for years that leaving serious medical conditions, including gender dysphoria, untreated can amount to unconstitutional deliberate indifference"); *Kothmann v. Rosario*, 558 F. App'x 907, 912 (11th Cir. 2014).

Defendants' reliance on the remaining citations is equally unavailing. In *Lopez*, the court found the plaintiff's claim could not proceed, not because the defendants were entitled to qualified immunity, but because the plaintiff failed to present evidence that she was denied medical treatment. *Lopez v. City of New York,* No. 05-cv-10321, 2009 WL 229956, at *1 (S.D.N.Y. Jan. 30, 2009). The plaintiff had been denied hormone therapy, at most, for two weeks, but she had not pointed to medical records clearly indicating this, and she had no medical expert testimony supporting her position. *Id.*

WPATH Standards of Care have been accepted by all major medical organizations. Ex. 1 (ECF 133-3) ¶ 67; Ex. 4 at 62:14-63:16; Ex. 30. When assessing the adequacy of medical treatment that prison officials provide to those in their custody, courts are guided by current standards and medical mores. *See Estelle ,* 429 U.S. at 102 ; *see also Hilton*, 928 F. Supp. 2d at 553 (denying summary judgment to defendants based, in part, on "conflicting expert testimony as to whether [the conduct] comported with accepted medical standards at the relevant time"). "If the medical community uniformly decides that a recent advance is the only proper course of treatment, a defendant cannot rely on a case from before that advance occurred to say that her outdated treatment choice was reasonable." *Campbell v. Kallas*, 936 F.3d 536, 552-53 (7th Cir. 2019) (Wood, *J.*, dissenting).

The facts of *Lopez* stand in stark contrast to the facts here: Ms. Clark was denied hormone treatment outright for at least a year, then denied necessary monitoring and adjustments to her hormones for nearly two years, and has been denied all other forms of treatment for nearly six years. And not only has Ms. Clark presented the testimony of her own expert confirming that her treatment violated any reasonable standard of care, Ex. 1 at ¶ 51-52, but also Defendants' own expert agrees that Ms. Clark's treatment has been inadequate, Ex. 4 (ECF 133-6) at 110:18-23, and Defendants' own consultant called surgery "vital" and "essential" for Ms. Clark, Ex. 27 at 1. In any event, even the *Lopez* Court agreed that "a total denial of hormone therapy to a prisoner for an extended period of time might rise to the level of deliberate indifference." *Lopez,* 2009 WL 229956, at *11.

Similarly, in *Pack v. Bukowski*, No. 07-cv-6344L, 2010 WL 1403995, at *4 (W.D.N.Y. Mar. 31, 2010), the court found the plaintiff's claim could not proceed because there was no constitutional violation where the plaintiff had not been diagnosed with gender dysphoria and refused to submit to an evaluation for that purpose. The court held: "Given that refusal, it was hardly unreasonable for Dr. Bukowski not to simply accept the word of plaintiff, a layperson, that [the plaintiff] needed hormone therapy." 2010 WL 1403995, at *4. Again, the court did not consider whether or not the plaintiff had a clearly established right because it had already found that there was no constitutional violation. Defendants' reliance on *Pack* is thus misplaced. Even so, the steps taken by the defendant doctor in *Pack*—including "consult[ing] with his superiors about plaintiff's alleged

condition, and direct[ing] that plaintiff undergo an evaluation by a psychiatrist," 2010 WL 1403995, at *3—present a stark contrast to those here.

Finally, Defendants cannot rely on Dr. Burns' claims about the challenges of arranging appropriate treatment for Ms. Clark to support their claims of qualified immunity. *See* Ex. F (ECF 128-8) ¶¶ 19-52, 63-90. The dispositive inquiry is not the number of logistical hurdles that Defendants must surmount, but whether or not they have done so. Non-medical reasons for refusing treatment are no excuse for violating the Constitution. *See, e.g.*, *McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004) (no qualified immunity where plaintiff alleged that medical indifference was based on defendants' hope that "he might be released within twelve months of starting the treatment"); *Baker v. Blanchette*, 186 F. Supp. 2d 100, 105 (D. Conn. 2001).

E. DOC's Arguments Against Injunctive Relief Are Misleading, Internally Inconsistent, and Only Serve to Highlight the Need for Judicial Direction

Defendants would like to reframe Ms. Clark's request for injunctive relief to the narrow question of whether she is entitled to her "preferred treatment in the exact manner she desires, by the exact personnel she desires, on the exact timeline she desires." Defs.' Mot. at 55. But that argument ignores the actual relief Ms. Clark seeks from the Court. Defendants' arguments are also self-contradicting, simultaneously touting their purported efforts to arrange treatment for Ms. Clark while denying the efficacy of that treatment or its appropriateness for Ms. Clark. The Court should not countenance such tactics on a motion for summary judgment.

In a deliberate indifference case, a plaintiff's claim for injunctive relief will survive a motion for summary judgment where there is "evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so." *Farmer v. Brennan*, 511 U.S. 825, 846 (1994). While courts "approach issuance of injunctive orders with the usual caution," *id.* at 846-47, there are several examples of courts enjoining prison systems to provide appropriate care to transgender people, *see, e.g.*, *Edmo*, 935 F.3d at 769; *Monroe v. Meeks*, No. 3:18-cv-00156, 2022 WL 355100, at *1 (S.D. Ill. Feb. 7, 2022); *Iglesias*, 2021 WL 6112790, at *22; *Hicklin*, 2018 WL 806764, at *14; *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1195 (N.D. Cal. 2015). As Plaintiff has shown above, Defendants have been and continue to be deliberately indifferent to Ms. Clark's serious medical need. And Defendants' own Motion and accompanying declarations demonstrate that there is little hope that Defendants will change their conduct without judicial intervention through injunctive relief.

First, Defendants focus their entire injunctive-relief argument on the narrow question of whether the Court should order DOC to provide Ms. Clark with "gender reassignment surgery." *See* Defs.' Mot. at 54-56. But Ms. Clark is not demanding surgical intervention "in the exact manner she desires, by the exact personnel she desires, on the exact timeline she desires." Defs.' Mot. at 55. Rather, in her First Amended Complaint, Ms. Clark requested "injunctive relief enjoining Defendants to provide Ms. Clark with *adequate and necessary medical*

***care for treatment of her gender dysphoria*, including appropriate transition-related surgeries, other procedures, and feminine supplies." FAC at 14 (emphasis added). That request for individualized, holistic, and comprehensive treatment of her gender dysphoria is consistent with Defendants' expert, who testified that appropriate treatment for gender dysphoria can include gender-specific mental health counseling, hormone therapy, gender-conforming housing, and gender affirming surgeries, such as facial reconstruction, breast augmentation, and genital affirmation, among other things. Ex. 28 at 32:21-35:1, 113:24-115:16. Defendants cannot escape injunctive relief because they contest the efficacy of one of several potential treatment options.**

Second, Defendants' resistance to providing gender affirmation surgery to Ms. Clark is completely at odds with their own expert and consultant. Defendants' expert specifically recommended, as far back as February 11, 2021, that DOC provide Ms. Clark with a gender therapist, a general therapist, and re-housing in Connecticut's female prison on a "pathway" to potential genital surgery. Ex. 28 at 113:24-115:21. DOC did none of this. Again in December 2021, DOC's Gender Non-Conforming Consultant, Dayne Bachmann, strongly recommended that Ms. Clark receive transition-related therapy sessions and gender affirmation surgery, which he described as "a fundamental need and vital to alleviating her gender dysphoria." Ex. 27 at 1. Yet in the same breath that Defendants tout their retention of Mr. Bachmann and referral of Ms. Clark to a "transgender clinic," they argue that Ms. Clark "is not an appropriate candidate for surgical intervention" and question "whether gender reassignment surgery is even effective." Defs.' Mot. at

53-54. The fundamental irony of this position is striking: Defendants attempt to simultaneously take credit for pursuing further treatment for Ms. Clark while arguing that such treatment is unnecessary and inappropriate. That they continue to vigorously question the utility of gender affirmation surgery, and Ms. Clark's suitability for such surgery, underscores why court intervention is necessary to ensure Ms. Clark receives treatment that Defendants' own expert and consultant have recommended.

Third, Defendants have demonstrated time and time again that they will not progress Ms. Clark's treatment for gender dysphoria without the threat of judicial intervention. Defendants only agreed to refer Ms. Clark to an endocrinologist after a Columbia Law School clinic threatened to sue. Ex. 23 (ECF 133-25), 24 (ECF 133-26). And even after Dr. Valletta's superiors directed him to submit a request for that referral, Dr. Valletta waited two months before doing so. Ex. 7 at 74. Once Ms. Clark saw an endocrinologist and the threat of litigation passed, Defendants reverted to their old ways, delaying *20 months* (and after Ms. Clark filed this case) before ensuring Ms. Clark saw the endocrinologist again. Ex. 7 at 81. Even after Defendants' own expert recommended, in February 2021, that Ms. Clark receive a gender therapist, a general therapist, and re-housing in Connecticut's female prison on a "pathway" to potential gender affirmation surgery, Ex. 28 at 113:24-115:21, Defendants did not offer Ms. Clark regular visits with a gender therapist until April 2022—while the parties were briefing their motions for summary judgment in this case, Ex. F ¶ 61.

Defendants also make much of their retention of Mr. Bachmann as a "transgender consultant," Defs.' Mot. at 52, eliding their own admission that they did so in a mad dash to "provide immediate assistance with active Departmental litigation in a way that may limit or extinguish th[is] specific litigation through provision of care," Ex. 14 (ECF 133-16) at 1. Even after Mr. Bachmann met with Ms. Clark and recommended, in December 2021, that DOC provide Ms. Clark with a gender therapist and a referral for gender affirmation surgery, DOC waited until April 2022 to initiate that therapy. Ex. F ¶ 61; Ex. 27. And Mr. Bachmann's contract with DOC expires on November 1, 2022, which plainly calls into question DOC's intention to offer ongoing treatment for Ms. Clark once this litigation concludes. Ex. 14 at 2.

Finally, it is notable that Defendants are *already* laying the groundwork for their continued failure to treat Ms. Clark going forward. Dr. Burns spent over half of his declaration accompanying Defendants' Motion for Summary Judgment explaining why DOC will continue to deny Ms. Clark appropriate treatment for gender dysphoria. *See, e.g.*, Ex. F ¶¶ 25-57, 63-68, 78-90. This pre-excusing of DOC's continued and deliberate indifference to Ms. Clark's gender dysphoria is a clear indication "that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so." *Farmer* , 511 U.S. at 846.

DOC's denial of steady and reliable transition-related care to Ms. Clark except when faced with judicial intervention proves the need for injunctive relief.

F. Defendants Are Not Entitled to Summary Judgment on Ms. Clark's Intentional Infliction of Emotional Distress Claims

To state an IIED claim, a plaintiff must allege: "1) that the actor intended to inflict emotional distress; or knew or should have known that emotional distress was the likely result of its conduct, 2) that the conduct was extreme and outrageous, 3) that the defendant's conduct was the cause of the plaintiff's distress, and 4) that the emotional distress sustained by the plaintiff was severe." *Nance v. M.D. Health Plan, Inc*., 47 F. Supp. 2d 276, 278 (D. Conn. 1999). It is first a question for the court whether a defendant's conduct is sufficiently extreme and outrageous, but the question must go to the jury when reasonable minds may disagree. *Miles v. City of Hartford*, 719 F. Supp. 2d 207, 217 (D. Conn. 2010).

Behavior that may otherwise fail to constitute extreme and outrageous conduct may rise to that level when it arises from a position of power "which gives [the defendant] actual or apparent authority over the other or power to affect his interests." *Sangan v. Yale Univ*., No. 3:06-cv-587, 2006 WL 2682240, at *6 (D. Conn. Sept. 15, 2006). Indeed, the Restatement (Second) of Torts—which the Connecticut Supreme Court has accepted as the controlling standard for IIED claims—"specifically identifies extreme abuse of power or authority as actionable conduct." *Craig v. Yale Univ. Sch. of Med*., 838 F. Supp. 2d 4, 11 (D. Conn. 2011); *Sangan*, 2006 WL 2682240, at *4.

Here, Defendants' actions more than satisfy the requirement of extreme and outrageous conduct sufficient for an IIED claim. Dr. Valletta, Kimble-Goodman, and Bush all directly denied Ms. Clark with treatment for her gender dysphoria. Even after Ms. Clark was diagnosed with gender dysphoria, Dr.

Valletta refused to provide Ms. Clark with any treatment whatsoever notwithstanding her begging for transitional health care. *E.g.*, Ex. 17 at 1, 2; Ex. 7 at 58-59 (categorical refusals because of "policy"). When she similarly begged Kimble-Goodman, rather than taking any steps to provide Ms. Clark with treatment, Kimble-Goodman simply wrote "discussed" on the form and left it at that. Ex. 17 at 9. Kimble-Goodman also knew Ms. Clark was suffering when she requested medication for depression, and noted that she was "anxious to start hormone therapy." Ex. 31. Yet again, Kimble-Goodman refused to take any steps to ensure Ms. Clark would receive the treatment she needed. Bush similarly refused to treat Ms. Clark's serious medical needs. On March 8, 2019, Ms. Clark saw Bush for the stress she was suffering due to the lack of responses and support she requested from the medical staff for her gender dysphoria. Ms. Clark discussed suffering from gender dysphoria during that visit, and noted that in her journal entries at the time. Ex. 20 at 96. Yet Bush made no mention of that in his clinical records, and took no steps to see that she would receive medical treatment. Ex. 7 at 68. In addition to continuously denying Ms. Clark medical treatment, Bush took his conduct even further and verbally harassed Ms. Clark by telling her she deserved the (lack of) treatment she was receiving, and stated "what do you expect when you murder people?" Ex. 20 at 96. Bush also displayed a clear disregard for Ms. Clark's diagnosis and preferred pronouns, including by continuing to refer to Ms. Clark as "he" in her medical records. Ex. 7 at 68-69.

This conduct, particularly coming from medical professionals in positions of power, rises to the level of extreme and outrageous conduct. In *Johnson v.*

***Martin*, No. CV 960557415, 1996 WL 383351, at *2 (Conn. Super. Ct. June 11, 1996), the court found that a "humiliating" Christmas card sent by police officers to the plaintiff could rise to the level of extreme and outrageous conduct. The court held that, because the card was sent from officers, "whose sworn duty it is to protect and respect the rights of all citizens," the card carried the implicit suggestion that protection may not be available to the plaintiff in his time of need. *Id.* In addition, because the plaintiff had previously been arrested, the court found that the plaintiff "was already in an exceedingly vulnerable position. . . . If anyone then needed the law's protection, . . . it was the plaintiff." *Id.* at 3 Here, too, Ms. Clark has been harmed by Defendants, medical professionals who have the sole responsibility to safeguard Ms. Clark's health during her incarceration, and whose actions denied her adequate medical care in her time of need. *See Bloom v. Luis*, 198 F. Supp. 2d 141, 151 (D. Conn. 2002) (denying summary judgment on IIED claim where defendants taunted plaintiff); *Craig* , 838 F. Supp. 2d at 11.**

In addition, there is a dispute of material fact as to whether Bush verbally harassed Ms. Clark. Despite Ms. Clark's contemporaneous evidence of Bush's verbal harassment, Bush denies ever making such statements to Ms. Clark. Ex. 20 at 33:21-34:1. Where there is an issue of material fact in dispute, summary judgment must be denied. *Ochoa v. City of W. Haven*, No. 3:08-cv-24, 2011 WL 3267705, at *11 (D. Conn. July 29, 2011).

Finally, Ms. Clark has suffered actual physical injury as a result of Defendants' actions, as required by the Prisoner Litigation Reform Act ("PLRA"). Although the PLRA does not define "physical injury," courts in the Second

Circuit have held that the injury must be more than *de minimis*, but need not be significant. *Corley v. City of New York*, No. 1:14-cv-3202, 2015 WL 5729985, at *16 (S.D.N.Y. Sept. 30, 2015). In *Corley*, the court found a physical injury where a person suffered from low blood sugar levels after going on a hunger strike. *Id.* Ms. Clark's own hunger strikes, caused by Defendants' intentional refusal to provide medical treatment, would qualify as a physical injury. Ex. 31 ¶ 28.[9]

For a transgender woman with gender dysphoria like Ms. Clark, denial of treatment has physical manifestations. Ex. 5 at 79:10-14. This includes "continuing hair growth on the face and body to the point where she has to shave two or more times per day," Ex. 3 at 182:6-10, 182:21-23 ("Q: It would be experienced as a physical injury to grow hair on your face?" A. "Every time they have to shave"); "spontaneous erections," Ex. 3 at 188:24-189:5 ("[I]f a person is continuing to spontaneous erections, by definition they're – they're undertreated"); and "continued hair loss and recession of the hairline." Ex. 3 at 181:12-20.[10]

While the physical manifestations of masculinizing hormones, as well as the physical presence of male genitalia, may not be an injury to a cisgender person without gender dysphoria, they are an injury for Ms. Clark. Ex. 5 at 79:10-

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[9] If the "purpose of the PLRA's physical injury requirement is to weed out frivolous claims where only emotional injuries are alleged," *Corley,* 2015 WL 5729985, at *15 (internal citation omitted), then Ms. Clark submits that her attempt to cut off her own testicles as a result of an ongoing denial of treatment should demonstrate the requisite "prior showing of physical injury." 42 U.S.C. § 1997e.

[10] As described in Part 2.B, *supra*, Defendants may not rely on Dr. Aftab's inappropriate expert testimony to support their physical injury argument.

14. As Dr. Brown testified, "gender dysphoria, although it's listed as one of our psychiatric disorders is -- is far more than just a set of psychiatric symptoms." ex. 3 at 188:24-189:1. Accordingly, the purpose of treatment for gender dysphoria is "physical transition." Ex. 3 at 176:23-25, *see also id.* at 177:13-17 (noting breast growth, lack of spontaneous erections, and softer skin, among other physical changes).

***LaTouche* and *Guthrie* do not suggest otherwise, and neither involved the PLRA physical injury requirement. *Guthrie* involved a negligence claim for a cisgender man under New Jersey common law who alleged he was refused his hair loss medication. The court held that BOP did not violate its duty of care under principles of New Jersey tort law. *Guthrie v. U.S. Fed. Bureau of Prisons*, No. 09-cv-990, 2010 WL 2836155, at *5 (S.D.N.Y. July 7, 2010). *LaTouche* did not involve the PLRA physical injury requirement, either; it held instead that a cisgender man's hair loss and eczema did not satisfy the objective prong of deliberate indifference. *LaTouche v. Rockland Cty.*, No. 22-cv-1437, 2022 WL 953111, at *8 (S.D.N.Y. Mar. 29, 2022).**

Ultimately, even if Defendants were correct, that would not mandate dismissal of Ms. Clark's IIED claim. The PLRA's physical injury requirement "does not limit the availability of nominal damages for the violation of a constitutional right or of punitive damages." *Thompson v. Carter,* 284 F.3d 411, 418 (2d Cir. 2002); *accord Ruffino v. Murphy,* No. 3:09-cv-1287 (VLB), 2010 WL 2026446, at *2 (D. Conn. May 20, 2010). Even if Ms. Clark had not shown a physical injury, at most, it would result in dismissal of her request for

compensatory damages, not of the entire IIED (or other) claim. *Sheppard v. Roberts*, No. 3:20-cv-00875, 2021 WL 3023090, at *4 (D. Conn. July 16, 2021) ("The request for punitive damages also will survive."); *accord Gill v. Hoadley*, 2007 WL 1341468, at *4 (N.D.N.Y. May 4, 2007). It is, in fact, error not to award nominal damages in § 1983 actions for a constitutional violation. *Robinson v. Cattaraugus*, 147 F.3d 153, 162 (2d Cir. 1998). And "punitive damages may be awarded in the absence of a compensatory award" or even an award of nominal damages. *King v. Macri*, 993 F.2d 294, 297-98 (2d Cir. 1993).

4. Conclusion

For the foregoing reasons, the Court should deny Defendants' Motion for Summary Judgment.

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