IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

SOFIA CANO *Plaintiff*, v. SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *et al*., *Defendants*.	Civil Action No. 9:22-cv-4247-JDA-MHC

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Ms. Cano is an incarcerated transgender woman who has been diagnosed with gender dysphoria. Despite her serious need for treatment, including hormone therapy and social transition—and despite well-established case law to the contrary—the South Carolina Department of Corrections ("SCDC") continues to unlawfully deny Ms. Cano adequate medical care. The undisputed facts and applicable law entitle Ms. Cano to summary judgment.

STATEMENT OF UNDISPUTED FACTS

A. Gender Dysphoria

Gender dysphoria is a mental health diagnosis "characterized by a strong and lasting desire to be the opposite sex, and 'clinically significant' distress of sufficient severity to impair the individuals' ability to function in their daily life setting."[1] A gender dysphoria diagnosis is based on a patient's symptoms, not the underlying cause of those symptoms.[2] Gender dysphoria can have severe symptoms, including loss of appetite, a disinclination to socialize, heightened anxiety, panic attacks, depression, despondence, self-harm, self-castration, and even suicide.[3] For example, SCDC staff—including individuals involved directly in Ms. Cano's care—have had other patients suffering from gender dysphoria consider and actually attempt self-surgery.[4] Gender dysphoria

[1] Ex. 1 (Cantor Report) at ¶ 69; Ex. 2 (30(b)(6) Dep.) at 99:19–21; *see also* Ex. 3 (Anderson Dep.) at 124:6–8 (describing gender dysphoria as a "serious psychological issue"); Ex. 4 (DSM-5-TR excerpt).

[2] *See* Ex. 3 at 170:16–19; Ex. 5 (Kaliebe Dep.) at 188:18–20 (noting that "the DSM . . . doesn't really differentiate" based on the underlying cause of gender dysphoria); Ex. 6 (Cantor Dep.) at 153:11–154:10 ("In psychiatry and mental health, the symptoms just get labeled. Person comes in feeling sad, they get diagnosed with depressive disorder regardless of what is causing it."), 157:8–11 ("if I asked somebody to give me an example of a psychiatric disorder for which we can diagnose the cause, the answer is zero."). Nor does it depend on the age of onset. Ex. 6 at 271:11–17 ("We do not use the age of onset in order to make the diagnostic decision. It's information that . . . [is] not used in deciding who should and shouldn't transition.").

[3] *See* Ex. 3 at 46:8–14, 159:24–160:2, 164:11–165:5; Ex. 7 (Soto Dep.) at 52:15–22; *see also* Ex. 8 (Brown Report) at ¶¶ 17–18.

[4] *See* Ex. 9 (Inmate 175 "cut[her] right scrotum" because she was "wanting h[er] testicular gone because her hormone replacement has expired in July and a provider hasn't renewed it. She stated wanting to stop the testosterone."); Ex. 10 (Inmate 175 "reports that she has been doing better now that hormones have been restarted."); Ex. 11 (Inmate 91 "desire[s] to be rid of male

often coexists with other mental health diagnoses, but it is "certainly possible" to treat multiple diagnoses at the same time.[5] Importantly, though, treating a comorbid condition does not, in itself, address a patient's gender dysphoria.[6]

1. Treatment of Gender Dysphoria

"In the absence of proper treatment, people with gender dysphoria may experience significant distress, depression, self-mutilation, self-castration, and suicidality."[7] Depending on a patient's needs, gender dysphoria is treated using a combination of social transition, hormone therapy, and surgical intervention.[8] This "triadic treatment sequence" is outlined in the "Standards of Care, published by the World Professional Association for Transgender Health" (WPATH), and represents the leading and "generally accepted protocols for the treatment" of gender dysphoria.[9] Indeed, there is "widespread consensus" that "the WPATH standards of care represent best practices for the treatment of individuals with gender dysphoria[.]"[10] Dr. Stephanie Skewes, SCDC's Assistant Deputy Director for Behavioral Health, who has "experience with transgender care,"[11] agrees that "the WPATH standards of care . . . represent an accepted medical standard of

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genitalia" and "want[s] to slam [her] junk in the drawer."); Ex. 12 ("I/M stated that last night []he started feeling bad and wanted to cut off h[is] breasts. [H]e says []he's okay now. But 'it's getting worse.' [H]e wants hormone therapy.").

[5] Ex. 5 (Kaliebe Dep.) at 41:25–42:7; *see also* Ex. 5 at 40:10–12; Ex. 3 (Anderson Dep.) at 160:23–161:2, 183:18–21 (expressing that her questions about Ms. Cano's mental health could be addressed while Ms. Cano receives treatment for gender dysphoria).

[6] Ex. 5 at 191:4–12.

[7] Ex. 13 (Lowell Report) at ¶ 23.

[8] Ex. 8 (Brown Report) at ¶ 23; Ex. 3 (Anderson Dep.) at 125:2–5 (testifying that individualized treatment is necessary).

[9] *De'lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir. 2013) (*De'lonta II*); *see also Kadel v. Folwell*, 100 F.4th 122, 136 n.6 (4th Cir. 2024) (en banc); *Williams v. Kincaid*, 45 F.4th 759, 767 n.3 (4th Cir. 2022); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 595–96 (4th Cir. 2020).

[10] Ex. 3 (Anderson Dep.) at 218:22–219:1.WPATH's authority is disputed only in part by two of three defense experts, Dr. Kristopher Kaliebe, Ex. 14 at ¶¶ 26–27, and Dr. James Cantor, Ex. 1 at ¶¶ 64, as well as SCDC psychiatrist Dr. Pitt, after reading the experts' reports and "[d]oing research . . . [o]n the internet," but not conducting her own "independent, fulsome review," Ex. 15 (Pitt Dep.) at 79:7–25, 85:25–86:11. Along with the current motion, Plaintiff also moves the Court to exclude the expert testimony of Dr. Kaliebe, ECF No. 172, and limit the expert testimony of Dr. Cantor, ECF No. 173.

[11] Ex. 16 (Kunkle Dep.) at 42:8–43:2

care that an IAP should reference."[12] Other SCDC staff, including SCDC's Deputy Director of Behavioral Health, consider the WPATH guidelines worthy of consideration.[13] Internal SCDC training and documents also reference the WPATH Standards of Care as authoritative.[14]

i. Social Transition

"Social transition has been commonly described as the 'real life experience' of living publicly in the gender role consistent with gender identity," which includes "using the preferred name and pronouns," "wear[ing] gender congruent clothing and hairstyles," and "obtain[ing] and us[ing] gender-appropriate hygiene and grooming products."[15] Social transition involves "living in a gender role that is congruent with a patient's gender identity" and "is an important component of a treatment plan."[16] An inability to socially transition can be "highly distressing."[17]

ii. Hormone Therapy

Hormone therapy alleviates the symptoms of gender dysphoria[18] and has been used to treat gender dysphoria for decades.[19] For some individuals, providing hormone therapy is medically necessary,[20] and refusing to provide that care "when medically necessary" can result in "a high likelihood of . . . negative outcomes."[21] Moreover, "[r]eadily available literature has long

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[12] Ex. 17 (Skewes Dep.) at 110:11–16.

[13] *See* Ex. 16 (Kunkle Dep.) at 24:4–7, 45:2–12 (The WPATH SOC "would certainly be a guideline we would review."); Ex. 7 (Soto Dep.) at 88:2–10; Ex. 18 (Cooper Dep.) at 24:12–25:24; Ex. 19 (Green Dep.) at 51:25–52:2; c*f.* Ex. 20 (Taylor Dep.) at 78:16–79:16 (considering the APA authoritative), 254:2–20 (confirming that the APA views WPATH as appropriate guidance).

[14] *See* Ex. 21 (SCDC presentation) at C-7379; Ex. 22 (SCDC training lesson plan) at 2 (Ultimately, this specific training was not given for unrelated reasons.); Ex. 2 (30(b)(6) Dep.) at 261:21–262:14); Ex. 23 (Aug. 2020 MMTT minutes) at I-039 (referring members to WPATH "for more information").

[15] Ex. 8 (Brown Report) at ¶ 23; Ex. 13 (Lowell Report) at ¶ 36 (citing WPATH SOC8 at S107).

[16] Ex. 8 (Brown Report) at ¶ 23; *see also* Ex. 13 (Lowell Report) at ¶¶ 35, 57.

[17] Ex. 3 (Anderson Dep.) at 149:21–150:2.

[18] Ex. 3 at 161:16–20; Ex. 24 (Hedgepath Dep.) at 70:5–15.

[19] Ex. 5 (Kaliebe Dep.) at 197:16–17 ("has gone on for a long time"); *see also* Ex. 13 (Lowell Report) at ¶ 41.

[20] Ex. 2 (30(b)(6) Dep.) at 176:13–17

[21] Ex. 24 (Hedgepath Dep.) at 89:7–11; *see also* Ex. 3 (Anderson Dep.) at 155:13–20 (Delaying hormone therapy when necessary can increase distress).

concluded that [gender-affirming hormone therapy] is safe and effective for adults[.]"[22] Hormone therapy is medically necessary for a particular patient when:

> a. Gender incongruence is marked and sustained;
>
> b. The patient meets diagnostic criteria for gender [dysphoria] prior to gender-affirming hormone treatment in regions where a diagnosis is necessary to access health care;
>
> c. The patient demonstrates capacity to consent for the specific gender-affirming hormone treatment;
>
> d. Other possible causes of apparent gender incongruence have been identified and excluded;
>
> e. The patient's mental health and physical conditions that could negatively impact the outcome of treatment have been assessed, with risks and benefits discussed;
>
> f. The patient understands the effect of gender-affirming hormone treatment on reproduction and they have explored reproductive options.[23]

Defendants' experts agree that hormone therapy can be necessary treatment for gender dysphoria in adults after the patient has "very much engaged and tried other things" and has "a stable identity."[24] In short, evidence establishes that "the benefits" of medical transition for adults who "are otherwise basically mentally healthy and adjust well over the course of real life experience" "outweigh[] the risks," and proper treatment results in lower levels of depression.[25]

iii. Role of Psychotherapy

Although "[p]sychotherapy can be beneficial, particularly when used concurrently with medical and social transition, . . . it is not a comparable or substitute treatment. Psychotherapy

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[22] Ex. 25 (Brown Rebuttal) at ¶ 33.

[23] *See* Ex. 13 (Lowell Report) at ¶ 38 (quoting WPATH SOC8 at S256).

[24] Ex. 5 (Kaliebe Dep.) at 153:16–22, 192:18–193:7; *see also* Ex. 6 (Cantor Dep.) at 261:3–10 (supporting medical transition when a patient "met all of the clinic's criteria" and "were otherwise mentally healthy and they were demonstrating good adjustment to their new social role while undergoing real life experience"), 271:15–20 (A person's readiness to medically transition is determined by their "overall mental health status and their response to the real life experience"), 305:8–25 ("If having [unsuccessfully] attempted" psychotherapy and social transition, treatment is "down to the last of the options": "biological sex reassignment.").

[25] Ex. 6 at 257:2–15, 276:5–21; *see also* Ex. 13 (Lowell Report) at ¶ 33.

plays an adjunctive role to support patients *while* they are undergoing transition and post-transition, but not as a substitute treatment."[26] In fact, there is no evidence that psychotherapy alone is sufficient to treat moderate to severe gender dysphoria in adults.[27]

2. Gender Dysphoria Treatment in Prisons

"All of the recommendations of the [WPATH] Standards of Care apply equally to people living in" prisons.[28] Gender-affirming care, including hormone therapy, can be medically necessary to treat gender dysphoria, including for incarcerated individuals.[29] "As with all medically necessary health care, access to gender-affirming hormone therapies should be provided in a timely fashion when indicated."[30] Similarly, social transition may also be necessary and is possible in a prison setting.[31] To that end, the SOC recommend that prison staff "allow those individuals who request appropriate clothing and grooming items to obtain such items concordant with their gender expression," "address [transgender] individuals by their chosen names and pronouns at all times," "establish housing policies that ensure the safety of transgender and gender

[26] Ex. 25 (Brown Rebuttal) at ¶ 31.

[27] Ex. 5 (Kaliebe Dep.) at 311:9–12; Ex. 26 (Cantor Blog) ("No type of psychotherapy have been effective in relieving what can be lifelong anguish from gender dysphoria . . . Research conducted throughout the world, however, has repeatedly demonstrated the effectiveness of surgical sex reassignment in relieving that distress in medically indicated cases."); *see also* Ex. 25 (Brown Rebuttal) at ¶¶ 25–26 ("Based on my own experience and knowledge of the field, there have been no patients who had a need for medically necessary GAH for whom psychotherapy was an effective treatment alone and separate from GAH.").

[28] Ex. 27 (WPATH Standards of Care Version 8 (SOC8)) at S104; *see also* 13 (Lowell Report) at ¶ 31.

[29] Ex. 28 (30(b)(6) sworn answers); Ex. 2 (30(b)(6) Dep.) at 176:6–11; Ex. 24 (Hedgepath Dep.) at 53:20–54:7 (explaining that the "typical treatments for gender dysphoria" include "psychosocial interventions and the accommodations, including items related to the gender . . . canteen accommodations, housing accommodations, access to shaving, razors would be initial. And then, you know, outside the offices of . . . psychiatry, Estradiol").

[30] Ex. 27 (WPATH SOC8) at S106.

[31] Ex. 5 (Kaliebe Dep.) at 185:5–24, 288:12–24 (testifying that social transition may be medically necessary in a correctional environment in certain long-term cases that last between one and five years); Ex. 3 (Anderson Dep.) at 133:2–9 ("We have had hundreds of people socially transition within a gender prison situation in IDOC in Illinois[.]").

diverse residents without segregating or isolating these individuals," and "allow transgender and gender diverse residents the private use of shower and toilet facilities, upon request."[32]

B. Medical Care in SCDC

SCDC policy provides that individuals in SCDC custody will receive "medically necessary care . . . throughout their incarceration . . . in keeping with generally accepted medical standards of the community."[33] Medically necessary care is "treatment that's necessary to either prevent the deterioration of an inmate, an inmate's medical condition or mental health condition."[34] When developing medical policies, SCDC itself looks to the National Commission on Correctional Health Care (NCCHC) for guidance.[35]

During Plaintiff's incarceration, SCDC has received more than $2 million in federal funds to finance staff payroll and training regarding counseling for inmates who are victims of domestic violence and sexual assault; the discharge of inmates who are HIV-positive; and support for inmates with substance abuse conditions.[36] Additionally, according to the most recent available data, SCDC spent $1,800,588 in federal funds on medical and laboratory supplies in fiscal years 2021 and 2022.[37] Medicaid also covers a substantial portion of eligible inmates' inpatient hospitalization costs—approximately $2 to $2.5 million each year—which would otherwise fall to SCDC.[38]

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[32] Ex. 27 (WPATH SOC8) at S107–109.

[33] Ex. 29 (SCDC policy HS-18.15) at 1 (Policy Statement); *see also* Ex. 30 at 4, RFA #19 ("SCDC provides both medical services and mental health services for its inmate population.").

[34] Ex. 29 at ¶ 1.1; *see also* Ex. 2 (30(b)(6) Dep.) at 86:24–87:6, 158:23–159:1.

[35] Ex. 2 at 73:24–74:4, 77:21–78:2; *see also* Ex. 17 (Skewes Dep.) at 42:9–16.

[36] *See* Ex. 31 (detailing federal medical grants).

[37] Ex. 32 (Spending Transparency excerpts); *see also* Ex. 30 at 5, RFA #22 (admitting the authenticity of the data submitted to the Comptroller General).

[38] *See* Ex. 33 (Oct. 2019 letter from SCDC to the House Legislative Oversight Committee attachment); *see also* Ex. 34 (Jan. 2020 letter from SCDC to the House Legislative Oversight Committee) at 2 (suggesting SCDC be granted authorization to apply for Medicaid on behalf of eligible inmates without their consent).

Only about thirty transgender women are incarcerated in SCDC custody,[39] a tiny proportion—less than 0.2%—of SCDC's total population.[40] SCDC aims to "establish guidelines for identification, medically necessary treatment, and management of transgender inmates and inmates diagnosed with gender dysphoria during their incarceration period . . . and to ensure safety and security for all inmates and staff."[41] Under that policy, SCDC commits "to providing medically necessary care to inmates throughout their incarceration period . . . in keeping with generally accepted medical standards of the community[.]"[42] To that end, SCDC has a Multidisciplinary Management and Treatment Team (MMTT) that "bring[s] together disciplines to talk about the health and safety of transgender [inmates] . . . and inmates with gender dysphoria," "provide[s] guidance on housing, accommodations," and "discuss[es] treatment" to "ensur[e] the health and safety" of transgender inmates and inmates with gender dysphoria.[43] To provide "appropriate care and accommodations" for transgender inmates,[44] the MMTT "will, on a case-by-case basis, create individualized management accommodation plans that will provide for all medically necessary treatment, including personal adjustment and housing needs and search preferences, where deemed medically necessary."[45] The MMTT is the ultimate decision-maker about whether accommodations are granted.[46]

Accommodations are documented in an inmate's Individual Accommodation Plan (IAP), which "will address medical, mental health, and personal adjustment needs" "in accordance with the accepted medical standards of care[.]"[47] IAPs do not "allow for preferences," but rather establish "medically necessary interventions aimed [at] alleviating clinically significant distress"

[39] Ex. 35 (MMTT caseload).

[40] *See About SCDC*, SC.gov (last accessed Oct. 8, 2024), available at https://tinyurl.com/bdfpr67a (estimating SCDC's total population to be approximately 16,000 people).

[41] Ex. 36 (SCDC Policy GA-06.09) at 1 (Purpose).

[42] Ex. 36 at 1 (Policy Statement).

[43] Ex. 2 (30(b)(6) Dep.) at 184:25–185:8; Ex. 36 at ¶¶ 1.1–2.2.

[44] Ex. 37 (Adams Dep.) at 91:23–92:3.

[45] Ex. 36 (SCDC Policy GA-06.09) at ¶ 2.1.

[46] Ex. 2 (30(b)(6) Dep.) at 211:5–17; Ex. 37 (Adams Dep.) at 123:7–10.

[47] Ex. 36 (SCDC Policy GA-06.09) at ¶ 2.1, 2.5.

on a case-by-case basis.[48] Accommodations are only placed on an individual's IAP if the MMTT decides that the specific request is "medically necessary"; "[i]s appropriate"; "can be accommodated"; and is not "a safety hazard, anything that's considered contraband, [or] anything that might cause a disruption."[49] "An individual's IAP can be restricted if there's a security issue with a specific person."[50]

Although SCDC policy requires that "[i]ndividualized medical and mental health evaluations for gender dysphoria . . . be made by appropriately licensed and qualified medical professionals,"[51] SCDC considers anyone "licensed to practice and provide treatment to those with mental health conditions" to be "qualified" to treat gender dysphoria, whether or not they have received any specialized training.[52] For example, SCDC employs a Transgender Services Coordinator, who is "understood by the department to be the expert on assessing the needs of individuals with gender dysphoria" and "looked at as the lead in providing guidance on what's needed to assess the needs of [an] individual."[53] Netra Adams, the current Transgender Services Coordinator, first heard the term 'transgender' after Googling it and reading "[w]hatever popped up" when she first "applied for the position."[54] She learned about gender dysphoria from "DSM" and "Google," but received no other training when she first took the job.[55]

C. Ms. Cano's Gender Dysphoria

At age sixteen, while incarcerated in a juvenile detention facility, Ms. Cano realized she was transgender.[56] At that time, she "was still too scared to tell anyone," but after arriving at SCDC at age seventeen, Ms. Cano's "gender dysphoria became way more powerful and [she] could no

[48] *See* Ex. 21 (SCDC presentation) at C-7374; Ex. 36 at ¶ 2.1.

[49] Ex. 36 at ¶ 2.1 (IAPs "will provide for all medically necessary treatment, including personal adjustment and housing needs and search preferences, *where deemed medically necessary*."); Ex. 2 (30(b)(6) Dep.) at 212:16–20, 218:15–21, 242:24–243:3, 244:23–245:2.

[50] Ex. 2 at 221:5–10.

[51] Ex. 36 (SCDC Policy GA-06.09) at ¶ 1.1.

[52] Ex. 2 (30(b)(6) Dep.) at 161:23–162:7.

[53] Ex. 2 (30(b)(6) Dep.) at 190:19–24, 191:16–18; *see also* Ex. 38 (Job description).

[54] Ex. 37 (Adams Dep.) at 43:15–44:25.

[55] Ex. 37 (Adams Dep.) at 45:11–16, 46:1–5, 46:15–17.

[56] Ex. 39 (Plaintiff's handwritten notes) at C-0951.

longer fight it as [she] had for years."[57] At that time, in early 2020, Ms. Cano "told [her] psychiatrist about the depression but could not bear to talk about the dysphoria."[58] In June 2020, Ms. Cano "personally identif[ied] as a woman" to herself and ultimately "decided that [she] really would have to live the rest of [her] life as a woman or [she] would continue to want to die every single day[.]"[59]

1. Initial Diagnosis and Treatment

In July 2020, Ms. Cano first told an SCDC employee, Qualified Mental Health Professional (QMHP) Koren Cooper.[60] "Based on I/M Cano's report of [her] presenting symptoms, and after careful research and review of peer-reviewed literature and the DSM-5 criteria of Gender Dysphoria" Cooper documented her "belie[f that] I/M Cano has Gender Dysphoria."[61]

Later that month, Dr. Jennifer Block, an SCDC psychologist, assessed Ms. Cano for gender dysphoria.[62] During an interview with Dr. Block and another SCDC psychologist, Ms. Cano reported that she has "a desire to be female"; that "her penis 'doesn't feel like it should be a part of [her]'"; and that she "cover[ed] her mirror in previous cells because [she] couldn't even stand to look at [her] own reflection.'"[63] Additionally, Ms. Cano scored a 2.4 on "the Gender Identify/Gender Dysphoria Questionnaire for Adults and Adolescents (GIDYQ-AA) . . . which strongly suggested a presence of gender dysphoria."[64] Despite those indications, Dr. Block did not diagnose Ms. Cano with gender dysphoria at that time, in part because Dr. Block did not believe Ms. Cano's symptoms had been present for more than six months, as required by the DSM-5.[65] In doing so, Dr. Block disregarded Koren Cooper's assessment and confessed she "had no idea what

[57] Ex. 39 at C-0951.
[58] Ex. 39 at C-0951–52.
[59] Ex. 39 at C-0952.
[60] Although Cooper was later fired for unexcused absences, her supervisor testified she was a "great clinician" when at work. Ex. 40 (Johnson Dep.) at 139:21–140:6.
[61] Ex. 41 (Plaintiff's medical records) at C-0262; *see* Ex. 18 (Cooper Dep.) at 103:7–10.
[62] Ex. 42 (July 2020 assessment).
[63] Ex. 42 at C-1219–20.
[64] Ex. 42 at C-1220.
[65] Ex. 42 at C-1220–21; *see also* Ex. 23 (Aug. 2020 MMTT minutes) at I-039 ("Sometimes the issue resolves itself if you wait and reevaluate the inmate after six months.").

[she] was doing."[66] Because of Dr. Block's assessment, the MMTT did not grant Ms. Cano an IAP at that time.[67]

Throughout this time, Ms. Cano's symptoms continued. In November 2020, Ms. Cano communicated to QMHP Timothy Green that she had "persistent thoughts of death" and had "journaled thoughts of dying and expressions of not wanting to live."[68] She "expressed distress with not being able to transition genders" and "described in detail her plan to cut off her testicles and stated that she had tried a few months earlier but the 'can lid' was not sharp enough."[69] At that time, Ms. Cano's depression and suicidality were "significant,"[70] and her autocastration attempt was a "psychiatric emergency."[71]

In December 2020, Dr. Block reassessed Ms. Cano and diagnosed her with gender dysphoria.[72] After receiving the diagnosis, Ms. Cano was told she would receive an IAP, and she requested information about hormone therapy; a way to remove hair; to be celled alone; and for staff to use her female name and pronouns.[73] The MMTT granted Ms. Cano an IAP that allowed her to room alone, cut her hair in accordance with female grooming standards, receive female commissary clothing items, and purchase certain female canteen items.[74] During that time, Ms. Cano also requested access to hormone therapy and adequate hair removal, but SCDC provided neither.[75] Ms. Cano became increasingly distressed that SCDC refused to provide her with—or even assess her need for—hormone therapy.[76]

During her first four years in SCDC, Ms. Cano participated in significant, long-term mental

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[66] Ex. 43 (Block and Soto email) at C-1181.
[67] Ex. 44 (Skewes email) at C-1245.
[68] Ex. 41 (Plaintiff's medical records) at C-0190.
[69] Ex. 41 at C-0190.
[70] Ex. 41 at C-0192.
[71] *See* Ex. 25 (Brown Rebuttal) at ¶ 72.
[72] Ex. 45 (Dec. 2020 assessment addendum) at C-6197; *see also* Ex. 46 (Block Dep.) at 156:6–19; Ex. 47 at 6, RFA #4.
[73] Ex. 41 (Plaintiff's medical records) at C-0187–0189.
[74] Ex. 48 (Dec. 2020 IAP).
[75] *See infra*, Part D–E.
[76] *See, e.g.*, Ex. 49 (Dec. 21, 2020 grievance); Ex. 19 (Green Dep.) at 199:18–200:3.

health treatment, including at least one hundred sessions involving several different providers.[77] Throughout her incarceration, eleven clinicians have explicitly pointed out—at least forty times—that Ms. Cano was "cooperative" in treatment.[78] In addition to treatment within SCDC, Ms. Cano had approximately twenty-five hour-long sessions of "education and support" with Dr. Kate Kleinfelter, an external clinical psychologist.[79]

After twenty months of intensive treatment at Gilliam Psychiatric Hospital (GPH) and Intermediate Care Services (ICS), Ms. Cano was discharged from ICS in June 2021, indicating she was "capable of living independently and functioning normally on a daily basis among the general population" and "treatment and/or medication compliant."[80] At that time, her QMHP recommended that she "should continue to be assisted in her gender transition[.]"[81] In fact, that was part of the reason for her discharge.[82] Since February 2022, Ms. Cano has been classified as a Level 5 mental health patient,[83] which means her symptoms are "well[-]controlled" and she is "able to function with minimal assistance from mental health staff."[84]

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[77] Ex. 41 (Plaintiff's medical records) at Cano-C-0422, 0416, 0411, 0401, 0404, 0394, 0389, 0386, 0382, 0378, 0380, 0372, 0376, 0368, 0362, 0356, 0352, 0349, 0340, 0339, 0335, 0333, 0330, 0322, 0325, 0320, 0309, 0307, 0299, 0295, 0290, 0293, 0288, 0276, 0279, 0274, 0261, 0258, 0255, 0251, 0249, 0247, 0238, 0236, 0232, 0225, 0220, 0218, 0216, 0212, 0209, 0207, 0203, 0200, 0190, 0186, 0184, 0178, 0176, 0170, 0168, 0166, 0162, 0164, 0159, 0157, 0154, 0152, 0149, 0143, 0136, 0139, 0132, 0130, 0123, 0121, 0119, 0116, 0114, 0112, 0110, 0104, 0108, 0098, 0096, 0094, 0091, 0086, 0076, 0072, 0069, 0067, 0063, 0059, 0056, 0045, 0040, 0035, 0032; *see also* Ex. 50 at 6–7, Int. #13 ("Since Plaintiff came into SCDC custody in October 2019, Plaintiff has been treated by dozens of mental health providers.").

[78] Ex. 41 (Plaintiff's medical records) at Cano-C-0419, 0413, 0404, 0398, 0394, 0389, 0384, 0378, 0372, 0364, 0362, 0352, 0340, 0338, 0333, 0325, 0318, 0307, 0258, 0255, 0239, 0190, 0187, 0179, 0170, 0159, 0143, 0136, 0116, 0104, 0069, 0065, 0059, 0057, 0047, 0045, 0040, 0035, 0032; Ex. 51 (Evaluation notes) at 16.

[79] Ex. 52 (Kleinfelter letter) at C-2797. These sessions occurred with the permission of Sofia's treating QMHP, Timothy Green. Ex. 53 (Green and Kleinfelter email) at C-3606 ("As for my end, I think the plan you currently have works just fine.").

[80] *See* Ex. 54 (Discharge request) at C-2952; Ex. 55 (Wallace Dep.) at 42:21–43:1 (Transfers out of ICS only occur when the individual is "stable enough to go elsewhere.").

[81] Ex. 56 (Discharge summary) at C-3292.

[82] Ex. 54 (Discharge request) at C-2952; *see also* Ex. 41 (Plaintiff's medical records) at C-0093, 0102.

[83] Ex. 41 at C-0040–42.

[84] Ex. 57 (SCDC Policy HS-19.04) at ¶¶ 6.1, 6.1.5.

2. Court-Ordered Evaluation

In January 2024, the Court ordered SCDC to evaluate Ms. Cano's need for hormone therapy and, if necessary, to provide it.[85] Two named Defendants, Dr. Andrew Hedgepath and Dr. Chris Kunkle, selected Dr. Rose Pitt, an SCDC psychiatrist, to perform the evaluation.[86] Dr. Pitt had only ever treated between one and two dozen patients with gender dysphoria; had never initiated hormone therapy for any patient; had not reviewed the WPATH SOC guidance regarding incarcerated people; and held mistaken beliefs about the risks and benefits of hormone therapy.[87] Without producing any written determination, Dr. Pitt communicated through defense counsel that Ms. Cano did not need hormone therapy.[88] Only when Plaintiff deposed Dr. Pitt months later did Dr. Pitt reveal she concluded that Plaintiff does not have gender dysphoria because there is "no evidence of distress."[89]

Dr. Pitt's conclusion was flawed because she failed to consider crucial evidence and erroneously discounted Ms. Cano's self-report.[90] Crucially, despite demanding evidence that Ms. Cano "actively [sought] out treatment" (and purportedly finding none), Dr. Pitt failed to review Ms. Cano's extensive file of complaints and grievances, which document her years-long struggle with gender dysphoria and repeated attempts to access care.[91] After determining Ms. Cano had a "good" memory, "good" judgment, and "good" insight into her mental illness, Dr. Pitt inexplicably discounted Ms. Cano's repeated reports of distress, including that her "body doesn't feel ok," she "can't stand looking at [her]self sometimes," she sometimes "feel[s] like [she's] having a panic attack," she had "tried to remove [her] testes because they are producing testosterone," and she

[85] ECF No. 91 at 13–14.

[86] Ex. 58 at 5, Int. 18.c. Dr. Pitt also corresponded directly with defense counsel. Ex. 58 at 11 (Privilege Log).

[87] Ex. 58 at 5, Int. 18.f; Ex. 15 (Pitt Dep.) at 27:23–29:2, 87:4–9, 88:17–22; Ex. 25 (Brown Rebuttal) at ¶¶ 33–36.

[88] ECF No. 108; *see also* Ex. 15 (Pitt Dep.) at 33:19–34:1, 110:7–17.

[89] Ex. 15 at 54:17–20.

[90] *See* ECF No. 156 at 7–12.

[91] Ex. 15 (Pitt. Dep.) at 141:14–20, 142:8–15, 147:21–148:1.

"felt suicidal several times within 2023," prior to Dr. Pitt's January 2024 evaluation.[92] And although Dr. Pitt "underst[ood]" Ms. Cano has an autism diagnosis, causing "sometimes the reactions [to be] not always exactly as you might express [sic] from someone who is distressed," Dr. Pitt still discounted Ms. Cano's self-report in part because Ms. Cano was not sufficiently emotive.[93] Those flaws, compounded by Dr. Pitt's inexperience treating gender dysphoria,[94] seriously undermine Dr. Pitt's conclusion.

3. SCDC's Current Approach

Ms. Cano's diagnosis is not reasonably in dispute. Ms. Cano's gender dysphoria diagnosis is noted repeatedly throughout her medical records[95]—including most recently in September 2024, several months after Dr. Pitt's evaluation.[96] Moreover, all five experts—hired by both Plaintiff and Defendants—agree Ms. Cano has gender dysphoria.[97]

Following Dr. Pitt's deposition, Plaintiff's expert Dr. Isabel Lowell reexamined Ms. Cano to determine if her condition had changed.[98] Concerningly, "Ms. Cano's general condition has gotten worse since [Dr. Lowell's] previous evaluations. Her symptoms have escalated, disrupting her daily life, ability to function, and most importantly, [Dr. Lowell is] very concerned about her risk of self-harm or suicide."[99] Ms. Cano reports that she is experiencing serious symptoms, including:

- Daily thoughts about suicide, including a plan and potentially lethal method;

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[92] Ex. 51 (Evaluation notes) at 19–21, 32–33.

[93] Ex. 15 (Pitt Dep.) at 59:14–24, 66:15–17.

[94] Ex. 58 at 5, Int. 18.e

[95] Ex. 41 (Plaintiff's medical records) at Cano-C-0261, 0258, 0232, 0207, 0203, 0188, 0176, 0164, 0152, 0144, 0139, 0124, 0098, 0100, 0101, 0102, 0084, 0067, 0068, 0064, 0061, 0047, 0043, 0040, 0032.

[96] Ex. 59 (Plaintiff's medical records – Sept. and Oct. 2024 update) at S-0001.

[97] Ex. 5 (Kaliebe Dep.) at 208:15–17 ("Do you think plaintiff has a diagnosis of Gender Dysphoria?" / "Yes."); Ex. 3 (Anderson Dep.) at 183:6–7 ("I don't dispute the gender dysphoria diagnosis."); Ex. 6 (Cantor Dep.) at 350:9–22 (discussing the "onset of Plaintiff Cano's gender dysphoria"); Ex. 60 (Lowell Rebuttal) at ¶ 20; Ex. 25 (Brown Rebuttal) at ¶¶ 63–64.

[98] *See* Ex. 61 (Lowell August 14, 2024, visit notes).

[99] Ex. 61.

- Persistent and constant feelings of distress, disgust, and hatred of her body because of her male physical form;
- Sleep disruption, due to night-time erections, such that she needs to nap every day (which would stop if she received appropriate medically necessary testosterone blockers). Poor/insufficient sleep is a significant risk factor for chronic diseases such as heart disease, diabetes, depression, and many other conditions;
- Inability to concentrate during simple activities such as reading or watching TV;
- Wanting to not interact with people due to frequent misgendering, which upsets her deeply;
- Declining to participate in role-playing games at times because of how people perceive her and her body;
- Struggling to teach her classes despite a love for teaching because of her discomfort in her body and how people see her and misgender her.[100]

Defendants currently offer no treatment for Ms. Cano's symptoms, other than allowing her minimal social transition accommodations. Indeed, there was a months-long gap between Ms. Cano's most recent therapeutic sessions and the sessions prior.[101] Defendants' refusal to treat Ms. Cano's medical condition is cause for alarm.[102]

D. SCDC continues to wrongfully deny necessary hormone therapy.

Defendants originally denied Ms. Cano hormone therapy based on their interpretation of Budget Proviso 65.28, which they understood to prevent the use of state funds to initiate hormone therapy treatment.[103] In January 2024, the Court ordered SCDC to evaluate Ms. Cano's need for hormone therapy irrespective of the Proviso.[104] Following the Court's Order, Defendants refused

[100] Ex. 61 (Lowell August 14, 2024, visit notes).

[101] *Compare* Ex. 59 (Plaintiff's medical records – Sept. and Oct. 2024 update) *with* Ex. 62 (Plaintiff's medical records – Jan. 2024 update).

[102] *See, e.g.*, Ex. 61 (Lowell August 14, 2024, visit notes).

[103] *See* Ex. 63 at 4, Int. #1.

[104] ECF No. 91 at 4. Defendants have since appealed that ruling, ECF No. 109, and represented they are free to reinstate the freeze-frame policy, *see* ECF No. 142 at 3 n.3.

her hormone therapy for another reason: that she purportedly does not have gender dysphoria.[105] Since then, South Carolina has passed more expansive and explicit legislation prohibiting the use of public funds for "gender transition procedures," including hormone therapy.[106]

1. SCDC improperly denies hormone therapy based on a freeze-frame policy.

SCDC pays for medically necessary care, with an exception for only one diagnosis: gender dysphoria.[107] SCDC will not "purchase medications for the use of HRT or prescribe medications for the use or HRT unless the inmate was on them prior to incarceration."[108] Individuals who need Estradiol to manage osteoporosis or menopause can receive it.[109] Individuals who need Spironolactone for hypertension, edema, or congestive heart failure can receive it.[110] In fact, approximately 250 have.[111] But individuals who need Estradiol and Spironolactone for gender dysphoria cannot.[112]

The only way an individual with gender dysphoria can receive hormone therapy is to pay for it themselves through the extensive "Elective Outside Medical Care" process,[113] which requires her to locate and contact a community provider willing to provide care; obtain SCDC approval; and prove she has sufficient funds to pay "all charges involved," including two officers' hourly rate for any outside visit, transportation costs, and the costs to retrieve any prescriptions.[114] The annual cost for medication and lab testing alone ranges "from approximately $775.00 to $1020.00."[115] For hormone therapy (but not any other type of "elective" care), an individual must

[105] *See supra*, Part C.2.
[106] S.C. Code Ann. §§ 44-42-310, 340.
[107] *See* Ex. 16 (Kunkle Dep.) at 155:19–24.
[108] Ex. 2 (30(b)(6) Dep.) at 116:5–7; *see also* Ex. 2 at 107:7–13, 114:20.
[109] *See* Ex. 47 at 7–8, RFA #15; Ex. 2 (30(b)(6) Dep.) at 140:11–12, 17–20, 142:10–13.
[110] *See* Ex. 47 at 7, RFA #14; Ex. 64 at 7–8, Int. #5; Ex. 2 at 138:13–20.
[111] Ex. 65 (Spironolactone Pharmacy Report); *see also* Ex. 66 at 8, Int. #4.
[112] Ex. 47 at 8, RFA #13 ("Defendants are not aware of any other medical treatment being restricted to only those patients who received the treatment prior to incarceration.").
[113] *See* Ex. 29 (SCDC Policy HS-18.15) at ¶ 16–16.11; Ex. 2 (30(b)(6) Dep.) at 112:6–13, 120:5–9.
[114] Ex. 67 (Procedure 300.15); *see also* Ex. 68 (Form M-42); Ex. 55 (Wallace Dep.) at 121:4–15.
[115] Ex. 66 at 9, Int. #5.

also sign an extensive, all-encompassing waiver of rights.[116]

SCDC based its freeze-frame policy on Budget Proviso 65.28.[117] However, this Court held that "the Budget Proviso does not prohibit the use of state funds to start a prisoner on hormone therapy."[118] Nevertheless, it appears SCDC retains its blanket administrative ban: Defendants have represented to Plaintiff their understanding that the Court's order did not bar SCDC from reinstating its administrative freeze-frame policy because "the only mandate reached in the Order was that Inmate Cano should be evaluated by SCDC medical personnel to see if Hormone Replacement Therapy is medically necessary."[119] Moreover, South Carolina recently passed legislation explicitly outlawing the use of any state funds on "gender transition procedures," including hormone therapy.[120]

2. Defendants and experts agree that a freeze-frame policy is medically inappropriate.

Several SCDC clinicians and staff members testified that SCDC's long-standing freeze-frame policy is not medically appropriate.[121] Defendants' own expert, Dr. Erica Anderson, testified that if she had been "consulted," she "would advise against" a freeze-frame policy.[122] Likewise, the National Commission on Correctional Healthcare, which SCDC looks to as authoritative, recommends that "[t]he clinical decision making to initiate or advance hormone medication treatment or candidacy for surgical interventions while incarcerated or upon release needs to be

[116] Ex. 69 (Form M-244); Ex. 2 (30(b)(6) Dep.) at 124:6–7.

[117] Ex. 2 at 168:23–25, 172:9–14, 173:7–10; Ex. 47 at 8, RFA #12; *see also* Ex. 70 (Labrador Dep.) at 199:4–10 ("I don't think there's a medical basis for this policy.").

[118] ECF No. 46 at 5; ECF No. 91 at 4.

[119] ECF No. 142 at 3 n.3.

[120] S.C. Code Ann. §§ 44-42-310, 340.

[121] Ex. 71 (Ellis Dep.) at 243:5–7; Ex. 24 (Hedgepath Dep.) 86:5–10; Ex. 18 (Cooper Dep.) at 91:13–16, 92:1; Ex. 19 (Green Dep.) at 338:8–339:15; Ex. 72 (Sieverdes Dep.) at 138:8–16; Ex. 20 (Taylor Dep.) at 122:14–123:6.

[122] Ex. 3 (Anderson Dep.) at 208:20–24, 57:5–12 (There are "at least some circumstances in which it is medically appropriate for [an] individual that has been diagnosed with gender dysphoria who is also in prison to receive hormone therapy[.]"); *see also* Ex. 5 (Kaliebe Dep.) at 33:7–10 ("agree[ing] that patients should be prescribed medical treatment on an individualized basis").

based on *individual medical need*[.]"[123] WPATH similarly advises against freeze-frame policies.[124] Accordingly, departments of corrections around the country have done away with—or been forced to eliminate—freeze-frame policies similar to SCDC's.[125]

3. Hormone therapy is necessary to treat Ms. Cano's gender dysphoria.

Prior to filing the present lawsuit, Ms. Cano repeatedly discussed her need for hormone therapy with mental health and medical providers.[126] She also pleaded with SCDC to provide her hormone therapy in over twenty formal Requests to Staff Member (RTSMs) and grievances.[127]

Timothy Green, a QMHP who worked with Ms. Cano, wrote in January 2021 that Ms. Cano "was engaged and cooperative," "participated in the session," "describes distress related to having her transition delayed[,] and appears personally ready to begin hormone therapy."[128] Then, in March 2021, Dr. Kate Kleinfelter—a "licensed clinical psychologist" with "a variety of specialty areas including LGBT and some forms of Autism," who consistently spoke with Ms. Cano to provide "education and support"—sent a letter to SCDC documenting Ms. Cano's need for

[123] Ex. 73 (NCCHC Position Statement) at 3, ¶ 8 (emphasis added); *see also* Ex. 13 (Lowell Report) at ¶ 31; Ex. 8 (Brown Report) at ¶ 25.

[124] Ex. 27 (WPATH SOC8) at S106 (citations omitted).

[125] *See, e.g.*, *De'lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003) (*De'lonta I*) (Virginia); Ex. 74 (BOP Transgender Offender Manual) at 8 (Federal Bureau of Prisons); Ex. 3 (Anderson Dep.) at 123:1–10, 157:1–7 (Illinois); *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1266–67 (11th Cir. 2020) (Florida); *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (Wisconsin).

[126] *See* Ex. 41 (Plaintiff's medical records) at C-0203, 0188, 0184, 0171, 0164, 0160, 0160, 0154, 0152, 0149, 0143, 0136, 0130, 0117, 0100, 0092, 0078, 0059, 0056, 0053, 0045.

[127] Ex. 75 (August 10, 2020, RTSM); Ex. 76 (August 29, 2020, grievance); Ex. 77 (Dec. 16, 2020, RTSM) ("Hormones are by far my most urgent need, and I am in great distress from not having them. I have not taken hormones before, but that is because I have been continuously incarcerated since the age of thirteen."); Ex. 49 (Dec. 21, 2020, grievance) ("I am in great distress from not being able to start hormone therapy, which has led to depression and suicidal ideation."); Ex. 78 (Dec. 22, 2020, RTSM) ("I absolutely need [hormones] and if you could just approve them it would be much better for me. Please!"); Ex. 79 (Jan. 5, 2021, RTSM to Inmate Records); Ex. 80 (Jan. 5, 2021, RTSM to Legal); Ex. 81 (Jan. 8, 2021, RTSM); Ex. 82 (Jan. 19, 2021, RTSM); Ex. 83 (Jan. 26, 2021, grievance); Ex. 84 (Feb. 1, 2021, RTSM); Ex. 85 (March 10, 2021, RTSM); Ex. 86 (March 26, 2021, RTSM); Ex. 87 (April 4, 2021, RTSM); Ex. 88 (April 13, 2021, RTSM); Ex. 89 (June 22, 2021, grievance and June 28, 2021, appeal); Ex. 90 (May 18, 2022, RTSM); Ex. 83 (Sept. 5, 2022, grievance appeal); Ex. 91 (Sept. 29, 2022, RTSM); Ex. 92 (Nov. 3, 2022, RTSM); *see also* Ex. 47 at 6, RFA #5.

[128] Ex. 41 (Plaintiff's medical records) at C-0160.

hormone therapy.[129] Dr. Kleinfelter administered the Utretch Gender Dysphoria Scale and documented Ms. Cano's score of 59/60—a "very high" score "consistent with what she ha[d previously] disclosed[.]"[130] Dr. Kleinfelter wrote, "there is nothing about her mood" or "her form of autism" that "would preclude hormone treatment."[131]

Although SCDC received both internal and external assessments recommending hormone therapy for Ms. Cano, SCDC applied its freeze-frame policy.[132] After the Court ordered Defendants to evaluate Ms. Cano's need for hormone therapy, Dr. Pitt, an SCDC psychiatrist, concluded that Ms. Cano does not need hormones because she does not actually have gender dysphoria.[133] That conclusion belies available evidence. Defendants' own expert, Dr. Erica Anderson, testified that "for many people with gender dysphoria . . . they not only find social transition, but medical transition helpful and . . . helps them to reduce their distress and make progress in their lives to live authentically in their affirmed gender. *And that would be the pathway I would expect to be followed with – with Cano.*"[134] To the extent Defendants think further psychotherapy is warranted, Ms. Cano "could do both. She could explore all these issues and get hormone[s]."[135]

E. SCDC stands in the way of Ms. Cano's full social transition.

Social transition is also an important facet of gender dysphoria treatment, but SCDC has not allowed Ms. Cano full access to that treatment.

1. Uninterrupted Access to Adequate Hair Removal

i. SCDC restricts razors in certain housing settings.

Razors are allowed in general population but are restricted "due to safety concerns" in

[129] Ex. 52 (Kleinfelter letter); *see also* Ex. 93 (Brooklyn Law School letter).
[130] Ex. 52 at C-2798.
[131] Ex. 52 at C-2799.
[132] Ex. 94 (March 2021 MMTT minutes) at I-065; Ex. 89 (Feb. 15, 2022, grievance decision) at 5.
[133] *See supra*, Part C.2.
[134] Ex. 3 (Anderson Dep.) at 216:19–25 (emphases added).
[135] Ex. 3 at 215:1–2.

certain sites within SCDC, such as Gilliam Psychiatric Hospital (GPH), Intermediate Care Services (ICS), and Restricted Housing Units (RHU), including when an individual is on quarantine or has made a request for protective custody.[136]

ii. Ms. Cano has been denied effective hair removal, severely exacerbating her gender dysphoria, and is at substantial risk for future denials.

When Ms. Cano was housed in ICS at Kirkland Correctional Institution from October 2019 through June 2021, and then in quarantine after first arriving at Allendale Correctional Institution, she could not possess a razor. Although Ms. Cano was able to obtain depilatory cream, every available product "burn[ed her] skin and cause[d] intense pain,"[137] and although she was able to purchase an electric shaver, it "only work[ed] properly on [her] face."[138] Her inability to remove her hair caused "extreme distress" and exacerbated her gender dysphoria.[139] Ms. Cano repeatedly addressed her need for adequate hair removal with medical and mental health providers[140] and submitted eleven formal RTSMs and grievances explaining that her inability to remove hair was exacerbating her gender dysphoria and pleading for help.[141]

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[136] Ex. 2 (30(b)(6) Dep.) at 272:23–273:3; Ex. 95 (James Dep.) at 113:15–18, 115:1–4; Ex. 96 (Washington Dep.) at 61:5–62:7, 89:23–24, 90:20–23; Ex. 97 (Wilkins-Smith Dep.) at 108:22–109:3, 118:1–9.

[137] Ex. 77 (Dec. 16, 2020, RTSM); Ex. 98 (Cano Dep.) at 125:3–10.

[138] Ex. 99 (Mar. 1, 2021, RTSM).

[139] Ex. 100 (June 17, 2021, RTSM); Ex. 8 (Brown Report) at ¶ 28; Ex. 13 (Lowell Report) at ¶ 58.

[140] Ex. 41 (Plaintiff's medical records) at C-0261,0255, 0203, 0188, 0184, 0130, 0117, 0105, 0100, 0092, 0073, 0038, 0015; *see* also Ex. 19 (Green Dep.) at 252:15–253:4 ("It was something that she reported frequently."); Ex. 71 (Ellis Dep.) at 177:2–13.

[141] Ex. 75 (Aug. 10, 2020, RTSM) ("please be aware that every day t[h]at i have to wait i am in distress, especially with respect to shaving [i have no access to razors][.]"); Ex. 76 (Aug. 29, 2020, grievance) ("I am in severe distress currently due to not being able to shave[.]") (requesting an IAP); Ex. 101 (Sept. 22, 2020, RTSM) ("Plese [sic], please, please tell me that the grievance that I sent in on August [29] is being answered. I am under very much distress. Please. Thank you."); Ex. 77 (Dec. 16, 2020, RTSM); Ex. 49 (Dec. 21, 2020, grievance); Ex. 83 (Jan. 26, 2021, grievance); Ex. 84 (Feb. 1, 2021, RTSM); Ex. 99 (Mar. 1, 2021, RTSM to PREA); Ex. 102 (Mar. 1, 2021, RTSM to Legal); Ex. 100 (June 17, 2021, RTSM); Ex. 83 (Sept. 5, 2022, grievance appeal); *see also* Ex. 47 at 6, RFA #5.

SCDC staff knew that depriving Ms. Cano of a way to remove hair would "hav[e] the ability to 100% cause some level of mental and emotional distress or discomfort"[142] and would cause her to be "depressed, anxious, maybe even traumatized."[143] Nevertheless, they rejected the accommodation in part because "if we made concessions for one individual, we would have to make concessions for everyone that made that request."[144] Ultimately, Defendants provided no accommodation during that time to allow Ms. Cano to adequately remove her hair.[145] Defendants refused Ms. Cano supervised access to razors, even though there is already a procedure for medical staff to supervise a particular treatment[146] with "adequate security inside" "the medical annex" "at all times,"[147] and even though supervised access was previously allowed for another individual with gender dysphoria.[148] Neither did Defendants consider obtaining an alternative depilatory product, although such an accommodation "could be" possible.[149]

Ms. Cano is currently housed in general population, and therefore has access to razors for hair removal, but she is in constant fear that she will be moved to a housing unit where she could no longer access razors for any number of reasons, including protective custody, quarantine, or concerns about suicidal ideation.

2. Gender-Appropriate Name and Pronouns

i. SCDC does not mandate use of a transgender individual's legal name and corresponding pronouns.

SCDC is aware that using the wrong name and pronouns when referring to an individual

[142] Ex. 18 (Cooper Dep.) at 145:14–146:1.

[143] Ex. 97 (Wilkins-Smith Dep.) at 117:3–6; *see also* Ex. 71 (Ellis Dep.) at 172:22–173:6 (Ms. Cano's distress about not being able to remove her hair was "significant," "salient," and "pronounced").

[144] Ex. 97 (Wilkins-Smith Dep.) at 109:9–15.

[145] Ex. 94 (March 2021 MMTT minutes) at I-065; Ex. 103 (May 2021 MMTT minutes) at I-073; Ex. 95 (James Dep.) at 115:16–18, 116:5–6; Ex. 55 (Wallace Dep.) at 130:2–10, 150:15–151:19, 165:10–14.

[146] Ex. 104 (SCDC Policy HS-18.16) at 10 (Definitions), ¶ 7.1.1.

[147] Ex. 55 (Wallace Dep.) at 64:16–19.

[148] Ex. 105 (Logbook entries).

[149] Ex. 2 (30(b)(6) Dep.) at 275:20–276:5.

with gender dysphoria is harmful.[150] SCDC staff and defense experts agree.[151] Nevertheless, current policy does not require that a transgender individual's chosen name—even if that is their *legal* name—or corresponding pronouns be used in communication from staff.

When an individual in SCDC custody "legally changes their name through the family court, [the] inmate records office processes it. From then forward the inmate's commitment name still shows as it did previously, but then on their ID card and documents underneath that is the legal name."[152] On an individual's ID card, the "legal name" is smaller than the "commitment name," though SCDC's representative could not articulate a justification for the size difference.[153] SCDC insists on retaining an individual's commitment name on their ID badge alongside their legal name because "law enforcement entities have to be able to find the actual inmate they're looking for when they're doing name searches" and because an inmate's documents are "filed under" their "commitment name," so if the commitment name is "not on" an individual's ID badge, law enforcement or SCDC staff "won't even know who they're looking for when they're going to look

[150] Ex. 106 (Aug. 2020 MMTT SOP) at ¶ 3(g) ("Using an inmate's old (legal/given) first name and/or pronouns that do not match that person's gender identity can be perceived as disrespectful and can cause distress and conflict."); Ex. 107 (June 2021 MMTT SOP Suggestions); *see also* Ex. 22 (SCDC training lesson plan) at C-7688; Ex. 108 (SCDC presentation notes screenshot) (Ultimately, that training was not given for unrelated reasons. Ex. 2 (30(b)(6) Dep.) at 261:21–262:24)).

[151] Ex. 24 (Hedgepath Dep.) at 92:16–20 (agreeing "it's important to help alleviate a patient's gender dysphoria to address them by their chosen name and pronouns that matches their gender identity"); Ex. 19 (Green Dep.) at 342:14–343:7 (testifying he "always encouraged other staff members" to use Ms. Cano's legal name and corresponding pronouns "and provided consultation to them on how to refer to Sofia *to reduce distress*") (emphasis added); Ex. 70 (Labrador Dep.) at 247:13–19 (acknowledging that "having Ms. Cano's name tag changed to reflect her legal female name and having staff address Ms. Cano using this name and female pronouns would help treat her gender dysphoria"); Ex. 71 (Ellis Dep.) at 240:10–22; Ex. 15 (Pitt Dep.) at 167:16–20; Ex. 37 (Adams Dep.) at 184:1–7; Ex. 20 (Taylor Dep.) at 191:13–192:9, 234:16–18; Ex. 3 (Anderson Dep.) at 140:13–20 (identifying use of a person's preferred name and correct pronouns as "important aspects of social transition"); *cf.* Ex. 5 (Kaliebe Dep.) at 210:8–10 (Dr. Kaliebe "use[s] the preferred pronouns" when "meet[ing] a patient" and "speak[ing] with them directly[.]").

[152] Ex. 2 (30(b)(6) Dep.) at 47:23–48:5; *see also* Ex. 109 (SCDC Policy OP-21.09) at ¶¶ 3.1, 3.3.3; Ex. 110 (SCDC Policy OP-21.06) at ¶ 2.1.

[153] Ex. 2 at 49:21–50:6, 52:20–53:2.

up documents."[154] However, SCDC concedes that an inmate's documents can be located by the "number assigned" to each inmate, which is also included on their badge.[155]

An individual's ID card is particularly important because staff often look to an ID card to determine how to address inmates.[156] However, SCDC employees are not required, instructed, or advised to use the individual's legal name.[157] Even though policy states that "SCDC employees will use the new name in all written correspondence,"[158] that is not SCDC's practice: for example, an OTR, or "Order to Report," which is "a pass that an officer will write" to request "an inmate to report to" a specific location, uses an individual's committed name.[159]

An individual's committed name also remains in Global Tel Link (GTL), the system used on inmate tablets to communicate with friends and family and access electronic resources. SCDC's representative testified that name changes are not reflected in GTL due to an "IT issue" and "administrative burden,"[160] even though there is a specific contact within GTL for each institution who is responsible for updating any information[161] and GTL representatives previously reported that only SCDC itself could change the name.[162]

Similarly, SCDC staff are "not instructed that they have to" use proper pronouns "in the first place," and "if an employee of SCDC fails to use an inmate's preferred pronoun," it is not "SCDC's policy for that employee's superior to instruct the employee to use the preferred pronoun."[163] Essentially, "[i]t's recommended" to use proper pronouns, "but not . . . mandatory."[164] Although instructing staff to use preferred pronouns "would [not] be too burdensome," Kenneth

[154] Ex. 2 at 51:5–12, 51:19–52:3.
[155] Ex. 2 at 52:11–13; *see also* ECF No. 1 (Complaint) at ¶ 133 (Ms. Cano's ID card featuring her SCDC number).
[156] *See* Ex. 96 (Washington Dep.) at 39:18–23; Ex. 55 (Wallace Dep.) at 183:7–16.
[157] Ex. 2 (30(b)(6) Dep.) at 48:21–49:9.
[158] Ex. 109 (SCDC Policy OP-21.09) at ¶ 3.3.4.
[159] Ex. 96 (Washington Dep.) at 117:21–118:20, 119:10–21.
[160] Ex. 2 (30(b)(6) Dep.) at 58:15–17.
[161] Ex. 96 (Washington Dep.) at 110:2–17.
[162] Ex. 111 (Aug. 22, 2021, RTSM response); Ex. 112 (Nov. 17, 2021, RTSM response).
[163] Ex. 2 (30(b)(6) Dep.) at 249:8–14, 251:6–13.
[164] Ex. 2 at 246:15–18.

James, SCDC's PREA Coordinator and the Chairperson of the MMTT, "personally [doesn't] feel it should be mandated" because it would not be "the right thing to do."[165] Nor are "[p]ronoun accommodations" "reflected on an inmate's badge or any type of identifier[.]"[166] Notably, these practices represent a departure from other correctional systems,[167] and multiple SCDC staff—including three wardens—acknowledged that there is no reason to use an individual's former, male name or male pronouns.[168]

ii. Ms. Cano continuously endures harmful misgendering.

While at Kirkland, Ms. Cano "was upset . . . about being male . . . on the ID card."[169] Others noticed her distress because "[s]he voiced her feelings about it" and "cried sometimes."[170] Starting in 2020, Ms. Cano made multiple requests for staff to address her using her new name and female pronouns and honorifics or gender-neutral language.[171] After receiving a gender dysphoria diagnosis from Dr. Block, Ms. Cano requested that staff use she/her pronouns and the name Sofia.[172] Then, on June 11, 2021, Ms. Cano legally changed her name to Sofia Erin Cano, and SCDC received notice of the change on August 11, 2021.[173] Since her diagnosis, Ms. Cano has

[165] Ex. 95 (James Dep.) at 220:25–221:1, 224:1–8.

[166] Ex. 2 (30(b)(6) Dep.) at 248:3–5.

[167] *See* Ex. 3 (Anderson Dep.) at 117:23–118:1 (affirming that she "advised IDOC to use an inmate's proper pronouns in accordance with their gender identity"); 249:14–18 ("I didn't have to" "advise[]" Delaware "on any policies or practices relating to the use of proper pronouns or gender-neutral language" because "[t]hey were already doing that."); Ex. 74 (BOP Transgender Offender Manual) at 10, ¶ 12.

[168] Ex. 113 (Langdon Dep.) at 113:16–22 (testifying he is "[n]ot . . . aware of" "any reason not to use . . . the name that aligns with their gender identity"), 216:5–9 (testifying he is "[n]ot . . . aware" of "any reason for staff to not use Ms. Cano's preferred pronoun"); Ex. 114 (Newton Dep.) at 132:17–22 (testifying that "for [his] purposes," he needed the "[l]egal name," not the commitment name, on "the I.D. card"); Ex. 55 (Wallace Dep.) at 183:17–24 (For someone who is aware of Ms. Cano's legal name, "[t]here's no reason, no valid reason" not to refer to Ms. Cano by her legal name.), 183:25, 184:16–18; Ex. 96 (Washington Dep.) at 40:6, 106:2–7; Ex. 97 (Wilkins-Smith Dep.) at 165:18–166:16; Ex. 18 (Cooper Dep.) at 144:25–145:11; *cf.* Ex. 37 (Adams Dep.) at 186:8–10; Ex. 71 (Ellis Dep.) at 213:1–3.

[169] Ex. 115 (Santiago Dep.) at 17:7–10.

[170] Ex. 115 at 17:7–10.

[171] *See* Ex. 116 (Nov. 4, 2020, RTSM).

[172] Ex. 41 (Plaintiff's medical records) at C-0188.

[173] *See* Ex. 117 (Receipt of name change); Ex. 118 (Paavola email) at C-3407–08.

repeatedly asked, through formal RTSMs and grievances, that her legal name and female pronouns or gender-neutral language be used.[174] Yet, SCDC staff continue to regularly misgender Ms. Cano.[175] Additionally, Ms. Cano's ID card, which she must wear "at all times,"[176] features her legal name in large print. It appears there *is* an available process to change an individual's name in GTL, and that the process was initiated for Ms. Cano,[177] but Ms. Cano's former name remains on her tablet's interface. "The constant usage of [Ms. Cano's] old name exacerbates [her] gender dysphoria, causing great pain, distress, and humiliation."[178]

3. Female Canteen Items

i. Transgender women at other (higher-security) SCDC prisons may purchase certain female canteen items, but many of those are forbidden at Allendale.

There is consensus among high-ranking SCDC clinicians and staff that access to female commissary and canteen items can help alleviate gender dysphoria, including for Ms. Cano.[179] The MMTT may grant an individual on its caseload access to female commissary and canteen items by including that accommodation in the individual's IAP. If an individual has that accommodation, they can access items on a canteen list specifically for transgender women at SCDC, which is

[174] Ex. 119 (Feb. 11, 2021, RTSM); Ex. 120 (Aug. 11, 2021, RTSM); Ex. 121 (Aug. 18, 2021, RTSM); Ex. 111 (Aug. 22, 2021, RTSM); Ex. 122 (Sept. 21, 2021, RTSM); Ex. 123 (Nov. 8, 2021, grievance) ("I continue to receive paperwork addressed to a name that is not me and my inmate ID card does not contain the proper name. Officers and staff have not been told what my name actually is. Most upsettingly, the tablet constantly shows me a name that I hate and is not legally mine. Nowhere within SCDC does it show that my name is Sofia Erin Cano."); Ex. 112 (Nov. 17, 2021, RTSM); Ex. 124 (Nov. 17, 2021, grievance); Ex. 125 (Nov. 24, 2021, RTSM); Ex. 124 (Dec. 2, 2021, grievance appeal); Ex. 126 (Jan. 31, 2022, RTSM); Ex. 127 (Sept. 4, 2022, RTSM); *see also* Ex. 47 at 7, RFA #9.

[175] *See, e.g.*, Ex. 113 (Langdon Dep.) at 218:9–17; Ex. 96 (Washington Dep.) at 44:16–24.

[176] Ex. 110 (SCDC Policy OP-21.06) at ¶ 3.1.

[177] Ex. 126 (Feb. 2, 2022, RTSM response) ("Your tablet will not display your name change until the process is completed.").

[178] Ex. 128 (2022 Cano Decl.) at ¶ 56.

[179] Ex. 70 (Labrador Dep.) at 247:20–24 (agreeing that "allowing Ms. Cano access to female canteen items such as makeup would help treat her gender dysphoria"); Ex. 16 (Kunkle Dep.) at 150:10–14 (agreeing that "allowing Ms. Cano access to female canteen items such as makeup would help treat her gender dysphoria" "[b]ased on the standards of care and the medical records"); Ex. 7 (Soto Dep.) at 106:25–107:9; Ex. 20 (Taylor Dep.) at 235:8–10.

different than the canteen list available at female institutions.[180] However, individual wardens have the authority to "overrule accommodation plans . . . for safety and security reasons[.]"[181]

Some wardens, including Terrie Wallace, feel there are no "circumstances when it's appropriate to not follow [the MMTT's] recommendation[.]"[182] Others, such as William Langdon, who became warden at Allendale in May 2022, determined that "no makeup will be sold from the point that he made that specific policy forward," even if deemed medically necessary, "[s]o if there was an individual who had makeup, they could keep it; but no more makeup would be sold."[183] Nail polish also "got lumped into" the restriction because the Warden did not want "to get into piecemealing on cosmetics[.]"[184]

Warden Langdon banned the prospective purchase of makeup and nail polish at Allendale because he was concerned that "makeup can be used to dress up a dummy in an attempt to escape"[185]—specifically, that "[t]he makeup will change the appearance of a pillow that at 2:00 in the morning can fool a staff member into thinking that they have a living, breathing inmate lying in front of them and add them to their count."[186] Notably, however, Warden Langdon allowed individuals to keep makeup they had already purchased and chose not to restrict other items that could be used to make a dummy, such as bedsheets, pillows, toothpaste, and books.[187] Paint is also currently available for purchase at the facility. Testimony revealed that no specific event at Allendale precipitated Warden Langdon's concern, and makeup had never been used to fool an officer with a dummy under Warden Langdon's supervision or at any SCDC institution.[188]

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[180] Ex. 96 (Washington Dep.) at 71:8–22.
[181] Ex. 95 (James Dep.) at 156:10–24; *see also* Ex. 113 (Langdon Dep.) at 85:9–18.
[182] Ex. 55 (Wallace Dep.) at 99:5–7.
[183] Ex. 2 (30(b)(6) Dep.) at 223:9–224:7; Ex. 113 (Langdon Dep.) at 11:7–9, 119:7–24.
[184] Ex. 113 at 121:15–24.
[185] Ex. 2 (30(b)(6) Dep.) at 224:15–225:5.
[186] Ex. 113 (Langdon Dep.) at 129:3–8.
[187] Ex. 113 at 123:19–124:18, 149:22–25; *see also* Ex. 66 at 5–6, Int. #2.
[188] Ex. 113 at 120:13–18, 127:16–18, 136:1–11, 148:10–14, 150:18–20; *see also* Ex. 2 (30(b)(6) Dep.) at 226:24–227:4; Ex. 28 (30(b)(6) sworn answers) at 3.

Allendale's makeup and nail polish ban persists even though other SCDC institutions—including higher-security prisons—permit transgender women access to female canteen items including nail polish, nail polish remover pads, skin moisturizer, balm cream, makeup, makeup brushes, makeup wedges, cuticle nippers, fashion wraps, perm kits, and hot oil hair treatment.[189] Other departments across the country also permit access.[190]

ii. Accessing female canteen items is an important part of Ms. Cano's social transition.

Since Ms. Cano's first IAP in December 2020, the MMTT has authorized Ms. Cano to purchase female canteen items[191] to treat her gender dysphoria.[192] SCDC knew that Ms. Cano sought gender-affirming commissary and canteen items,[193] and at least some SCDC staff thought that "allowing Ms. Cano access to female canteen items such as makeup would help treat her gender dysphoria."[194] In fact, when Ms. Cano was granted access to female canteen items, "that seemed to alleviate some of her distress."[195] Although SCDC staff, including Warden Langdon, were aware of Ms. Cano's need,[196] they refused to allow Ms. Cano access to items that are available at other institutions.

[189] Ex. 129 (Canteen lists); *see also* Ex. 55 (Wallace Dep.) at 174:4–176:5, 177:23–178:2.

[190] *See, e.g.*, Ex. 3 (Anderson Dep.) at 116:1–20 (describing how the Illinois Department of Corrections allows "anyone in custody [to] have anything in commissary," regardless of their gender identity); *Alexander v. Mass. Dep't of Corr.*, No. 20-10020-PBS, 2022 WL 1407946, at *4 (D. Mass. May 4, 2022).

[191] Ex. 48 (Dec. 2020 IAP); Ex. 130 (July 2021 IAP); Ex. 131 (Sept. 2021 IAP); Ex. 132 (Aug. 2022 IAP); Ex. 133 (March 2023 IAP); Ex. 134 (Sept. 2023 IAP).

[192] Ex. 20 (Taylor Dep.) at 171:20–172:7, 174:23–175:5; *see also* Ex. 78 (Dec. 22, 2020, RTSM).

[193] Ex. 47 at 7, RFA #10.

[194] Ex. 16 (Kunkle Dep.) at 150:10–14; *see also* Ex. 20 (Taylor Dep.) at 164:21–165:7 (explaining the limited access Ms. Cano had was "intended to alleviate [her] gender dysphoria").

[195] Ex. 19 (Green Dep.) at 343:9–22.

[196] Ex. 113 (Langdon Dep.) at 70:18–71:4.

4. Safe Housing

i. SCDC's General Policy

"[T]he process by which a cellmate is assigned . . . would be the same for any inmate," and "there's no separate policy regarding transgender housing assignments."[197] To determine housing assignments, SCDC tries "to put [individuals] with someone who's comparable in terms of, let's say, crime or sentence length, or they also look at weight and height and stuff like that and make an assignment" on a "case by case" basis.[198] SCDC "never allow[s] an inmate to pick . . . his [roommate],"[199] and if an inmate refuses a room assignment, they are sent to RHU.[200] In that case, the individual is "held [in RHU] until it's identified the circumstances by which they are refusing, or we can identify a different location, or they can agree to move into that location, or if they get a disciplinary for refusing a directive."[201] There is a process to address "compatibility issues that constitute an emergency move,"[202] but Allendale's current warden believes that individuals "exploit," "undermin[e]," and "abuse" the process.[203]

SCDC has a committee that can grant a single cell accommodation, where an individual is housed without a roommate, for mental health, medical, security, or PREA reasons.[204] Likewise, some individuals have special requirements, such as "a medical requirement for a ground floor bottom bunk . . . [s]o we have to match the inmates but also make sure we're medically placing them in the appropriate room."[205] Accommodating special requirements is possible unless there are "administrative problems," such as if the facility "run[s] out of beds" that would provide the

[197] Ex. 2 (30(b)(6) Dep.) at 23:7–8, 28:16–19.
[198] Ex. 55 (Wallace Dep.) at 101:2–8; Ex. 2 (30(b)(6) Dep.) at 24:25.
[199] Ex. 2 (30(b)(6) Dep.) at 38:20–21.
[200] *See* Ex. 2 at 31:17–25; *see also* Ex. 135 (Allen email).
[201] Ex. 113 (Langdon Dep.) at 167:6–10.
[202] Ex. 135 (Allen email); *see also* Ex. 2 (30(b)(6) Dep.) at 33:14–34:7 (saying that a refusal would not result in RHU placement if "there's truly safety concerns" such as "verbalized or implied" threats).
[203] Ex. 113 (Langdon Dep.) at 171:1–5.
[204] Ex. 136 (Celled alone procedure); Ex. 2 (30(b)(6) Dep.) at 38:1–3, 40:17–19.
[205] Ex. 2 at 24:3–12.

appropriate accommodations.[206]

ii. SCDC's Policy Regarding Transgender Inmates

SCDC acknowledges that transgender individuals "are nearly 10-12x more likely to be sexually assaulted than the general prison population."[207] The MMTT's role regarding housing is to "mak[e] sure that [individuals] are in a situation where it is safe[.]"[208] Under policy, IAPs "will provide for all medically necessary treatment, including . . . housing needs . . . where deemed medically necessary."[209] In making housing assignments, the MMTT "will consult with" operations and classification staff "to create a plan with a reasonable outcome for the inmate and institution as a whole," "tak[ing] into account" any "[s]afety concerns."[210] Specifically, the MMTT "must . . . give[] serious consideration" to "[t]he inmate's views with respect to safety; [t]he inmate's expressed gender identity; [t]he inmate's current gender expression; [t]he inmate's vulnerability to victimization; [t]he likelihood that the inmate will perpetrate abuse; [f]acility considerations such as staffing patterns, physical layout, and inmate population; [and] [l]ength of sentence."[211] Although all transgender inmates are not automatically allowed to cell alone,[212] the MMTT can recommend—and, in fact, has recommended—a single cell accommodation.[213]

At Kirkland, where Ms. Cano was housed prior to Allendale, staff "try to do [their] best to accommodate" single-cell requests by transgender inmates because they "know that in some cases

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[206] Ex. 2 at 27:5–12.

[207] Ex. 21 (SCDC presentation at C-7359; *see also* Ex. 55 (Wallace Dep.) at 95:23–25 ("Housing is the main thing with the transgender inmates, making sure that they're in a safe place."); Ex. 113 (Langdon Dep.) at 204:21–25 (classifying "transgender inmates" as "victim-prone," with "a propensity of being victimized").

[208] Ex. 37 (Adams Dep.) at 187:18–22.

[209] Ex. 36 (SCDC Policy GA-06.09) at ¶ 2.1; *see also* Ex. 24 (Hedgepath Dep.) at 93:23–94:3 (acknowledging it "would be important" to treat an inmate's gender dysphoria by housing them "in either a single cell or . . . with someone that that person knows and trusts").

[210] Ex. 36 (SCDC Policy GA-06.09) at ¶ 3.1.

[211] Ex. 36 at ¶ 3.2.

[212] *See* Ex. 137 (Brooklyn Law School (BLS) housing email).

[213] Ex. 95 (James Dep.) at 194:22–24, 196:21–25; Ex. 2 (30(b)(6) Dep.) at 231:19–24; Ex. 35 (MMTT decisions document) at N-006.

transgender inmates can be victimized, you know, they can be harassed."[214] To that end, transgender inmates "have the option, if they want a roommate or they want to be by themselves, and [they] try to accommodate that" unless "there's not space in that particular dorm[.]"[215] According to Warden Wallace, an SCDC employee for over twenty-five years and a warden for over seven, that is "the most reasonable course of action to protect those individuals," and "there's really no reason not to do that."[216]

iii. Ms. Cano's Housing Assignment

While at Kirkland in ICS, Ms. Cano was housed in a cell by herself.[217] When Ms. Cano first arrived in general population at Allendale in June 2021, she was again housed in a cell by herself.[218] At that time, Ms. Cano understood that her IAP, which "[a]uthorized for single room" and required "maintain[ance of her] current housing assignment,"[219] allowed her to be housed individually.[220] For over a year, Ms. Cano was housed without a roommate.[221]

When her IAP was set to be renewed in late summer 2021, Ms. Cano learned it "had been modified without [her] conscent [sic] to exclude the single-room provision listed on [her] previous IAP . . . without hearing [her] own argument,"[222] in violation of SCDC policy and PREA's requirement that her input receive "serious consideration."[223] In September 2022, although Ms. Cano was at "high risk for victimization,"[224] she received a male roommate.[225] As a result, Ms. Cano was terrified for her safety, experienced worsening gender dysphoria symptoms, and was

[214] Ex. 55 (Wallace Dep.) at 103:9–17.
[215] Ex. 55 at 102:10–25.
[216] Ex. 55 at 11:20–13:19. 103:18–104:2.
[217] Ex. 40 (Johnson Dep.) at 132:16–18.
[218] *See* Ex. 113 (Langdon Dep.) at 176:12–14.
[219] Ex. 48 (Dec. 2020 IAP).
[220] Ex. 128 (2022 Cano Decl.) at ¶ 32; *see also* Ex. 137 (BLS housing email).
[221] Ex. 138 (Cano housing history A); Ex. 113 (Langdon Dep.) at 206:13–14; *see also* Ex. 139 (Cano housing history B); Ex. 137.
[222] Ex. 140 (Sept. 4, 2021, RTSM).
[223] *See* Ex. 36 (SCDC Policy GA-06.09) at ¶ 3.2.
[224] Ex. 141 (McNair email).
[225] Ex. 138 (Cano housing history A); Ex. 137 (BLS housing email).

unable to use the restroom while confined with her roommate. Ms. Cano filed several RTSMs and grievances,[226] and her counsel and other advocates reached out to SCDC on her behalf, pleading that she be reassigned to a single cell.[227]

When questioned about the September 2022 assignment, Warden Langdon claimed that "there [had been] many vacancies, but bed space is now needed."[228] In reality, there were at least fifty-four open beds (and, therefore, up to fifty-four people without a cellmate) in character dorms at that time, which are "interchangeable," such that individuals could "move from one to another and that wouldn't cause a disruption."[229] Even so, Warden Langdon did not consider housing Ms. Cano alone after learning Ms. Cano feared for her safety,[230] asserting, "[t]ransgenders don't require single cell."[231]

Currently, Ms. Cano is housed with another transgender woman. She feels safe but constantly fears that she will be reassigned to a cell with a male roommate, which would make her vulnerable to assault, exacerbate her gender dysphoria, and restrict her ability to use the restroom when locked in a cell with a male roommate.[232]

LEGAL STANDARD

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Harley v. Wilkinson*, 988 F.3d 766, 768 (4th Cir. 2021) (quoting Fed. R. Civ. P. 56(a)). The movant bears the initial burden of demonstrating

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[226] Ex. 142 (Sept. 15, 2022, RTSM) ("I would like to room with resident [Jane Doe]. I am confident I will be much safer rooming with her rather than my current roommate. The likelihood of a security issue will be much lower as long as I live with her."); Ex. 143 (Sept. 19, 2022, RTSM to Programs); Ex. 144 (Sept. 19, 2022, RTSM to Classification); Ex. 145 (Sept. 28, 2022, grievance); Ex. 146 (Sept. 29, 2022, RTSM); Ex. 147 (Oct. 5, 2022, RTSM); Ex. 148 (Oct. 6, 2022, RTSM to PREA); Ex. 149 (Oct. 6, 2022, RTSM to Bed Assignments).

[227] Ex. 137 (BLS housing email); Ex. 150 (DRSC housing email).

[228] Ex. 150.

[229] Ex. 113 (Langdon Dep.) at 35:8–36:19, 39:4–10, 206:11–17; Ex. 151 (Allendale Population Level Report).

[230] Ex. 113 (Langdon Dep.) at 179:17–180:6, 205:25–206:2.

[231] Ex. 113 at 180:9–10 ("Transgenders don't require single cell.").

[232] *See, e.g.*, Ex. 144 (Sept. 19, 2022, RTSM to Classification).

there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If this showing is made, the non-moving party must demonstrate specific, material facts that give rise to a genuine issue. *Id.* at 324. "[T]he nonmoving party 'cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another[.]'" *Snyder v. Auto-Owners Ins. Co.*, 634 F. Supp. 3d 252, 257 (D.S.C. 2022) (quoting *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985)). "The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient[.]" *Md. Shall Issue, Inc. v. Anne Arundel Cnty.*, 662 F. Supp. 3d 557, 566 (D. Md. 2023) (citation omitted).

ARGUMENT

I. SCDC violated the Eighth Amendment by denying Ms. Cano treatment for her gender dysphoria.[233]

Ms. Cano is entitled to summary judgment on her Eighth Amendment claim because the undisputed facts establish that (1) she suffers from an "objectively 'sufficiently serious'" medical condition; (2) Defendants had actual knowledge of that medical condition; and (3) Defendants denied Ms. Cano medical care—including hormone therapy and accommodations for her social transition—for categorical, nonmedical reasons. *De'lonta I*, 330 F.3d at 634 (citation omitted).

A. Ms. Cano's gender dysphoria is an objectively serious medical need.

Gender dysphoria is a serious medical need. *See, e.g.*, *id*. Since at least December 2020—nearly four years ago—Ms. Cano's gender dysphoria diagnosis has been repeatedly documented in her medical records, including most recently on September 17, 2024. *See supra*, SOF Part C.

The only provider or expert in this case to disagree with Ms. Cano's diagnosis is Dr. Pitt, who evaluated Ms. Cano under the instruction of two named Defendants and communicated her conclusion, without explanation, through defense counsel. *See supra*, SOF Part C.2. Months later, Dr. Pitt's deposition revealed that she (1) erroneously discounted Ms. Cano's self-reported symptoms, despite finding Ms. Cano a credible witness; (2) claimed Ms. Cano had not "actively

[233] Under the Eighth Amendment, Ms. Cano is entitled to injunctive relief allowing her to access hormone therapy and social transition treatment. *See infra*, Part V.

[sought] out treatment," while neglecting to review Ms. Cano's copious RTSMs and grievances begging for treatment; and (3) relied on Ms. Cano's lack of emotional expression, despite acknowledging that patients with autism, such as Ms. Cano, can have atypical reactions. *See supra*, SOF Part C.2.

In August 2024, Dr. Lowell conducted a follow-up evaluation of Ms. Cano and, concerningly, discovered that her "general condition has gotten worse" and "[h]er symptoms have escalated, disrupting her daily life [and] ability to function," and causing additional "concern[] about her risk of self-harm or suicide."[234] Indeed, this Court previously found that "Plaintiff has been exhibiting relevant symptoms of distress . . . related to her gender dysphoria[,]" "including: persistent depression, increasing anxiety, suicidal ideation, suicide attempts, and attempted self-castration" and expressed concern "that she will continue to suffer from severe emotional distress and is at substantial risk for self-harm, which will worsen if she continues to be denied medically necessary care." ECF No. 91 at 9. The Court's prediction has been borne out: Ms. Cano remains in severe emotional distress and at substantial risk for self-harm.

B. Defendants have long known about the substantial risk of harm posed by Ms. Cano's gender dysphoria.

Since July 2020, when QMHP Koren Cooper documented Ms. Cano's gender dysphoria diagnosis, SCDC has known that Ms. Cano has a serious medical need. Later that year, in November 2020, Ms. Cano revealed to Timothy Green that she had "persistent thoughts of death" and had attempted to cut off her testicles. In December 2020, Cooper's diagnosis was reaffirmed by SCDC psychologist Dr. Block. Since that time, Ms. Cano has continuously requested care and filed dozens of RTSMs and grievances begging for help.

C. Defendants disregarded a serious risk of harm to Ms. Cano by refusing to provide hormone therapy for a categorical, nonmedical reason.

It is well-established that "a categorical denial of a particular course of medically necessary treatment violates the Eighth Amendment." *See, e.g.*, *Zayre-Brown*, 2024 WL 1641795, at *2

[234] Ex. 61 (Lowell August 14, 2024, visit notes).

(citing *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014)); *Gordon v. Schilling*, 937 F.3d 348, 360–62 (4th Cir. 2019)). Thus, "[w]here a gender dysphoric prisoner requests gender-affirming [care], the State must afford their request *unbiased* and *individualized* consideration." *Zayre-Brown*, 2024 WL 1641795, at *1 (emphases added).

Defendants do not dispute that SCDC enforces an administrative freeze-frame policy that—for nonmedical reasons—categorically prohibits Ms. Cano from receiving hormone therapy. Therefore, "[e]ven taking the evidence in the light most favorable to the Defendants, no reasonable factfinder could conclude that Defendants afforded Plaintiff's . . . request [for hormone therapy] the individualized medical evaluation our Constitution requires." *Id.* at *3 (citations and quotation marks omitted).

Denying treatment based on a blanket policy "rather than on medical judgment concerning [the patient's] specific circumstances" amounts to the kind of "extreme deprivation" that constitutes an Eighth Amendment violation. *De'lonta I,* 330 F.3d at 634–35; *see also, e.g.*, *Gordon*, 937 F.3d at 360–62; *Fields*, 653 F.3d at 556–57 (holding that denial of hormone therapy and gender reassignment surgery under Wisconsin state statute constituted deliberate indifference). Whether SCDC's denial is based on its own erroneous interpretation of the Budget Proviso, the Budget Proviso itself, or any other state legislative ban, it is impermissible under the Eighth Amendment.

D. Defendants disregarded a serious risk of harm to Ms. Cano by needlessly interrupting Ms. Cano's social transition.

Social transitioning is part of the medically necessary treatment for gender dysphoria. *See* Ex. 8 (Brown Report) at ¶ 23; Ex. 13 (Lowell Report) at ¶¶ 34–36; *Monroe v. Meeks*, 584 F. Supp. 3d 643, 678 (S.D. Ill. 2022) ("Social transition (including . . . access to gender-affirming clothing and other items) is a medically necessary component of treatment for some prisoners with gender dysphoria[.]"); *Hicklin v. Precynthe*, No. 4:16–cv–01357–NCC, 2018 WL 806764, at *12 (E.D. Mo. Feb. 9, 2018) ("[T]he case law is clear—'gender-affirming' canteen items and permanent hair removal are not merely cosmetic treatments but, instead, medically necessary treatments to address

a serious medical disease."); *see also Alexander v. Weiner*, 841 F. Supp. 2d 486, 493–94 (D. Mass. 2012); *Konitzer v. Frank*, 711 F. Supp. 2d 874, 909 (E.D. Wis. 2010).

Despite knowing that social transition is medically necessary, Defendants have repeatedly undermined Ms. Cano's social transition by interrupting her access to adequate hair removal products, continuing to use her old name and male pronouns, and denying her access to certain female canteen items (including makeup, nail polish, and other grooming items) that are available to other transgender women.[235] It is undisputed that each of these treatments is possible in a prison setting[236] and that SCDC has refused to provide them, causing significant and increasing distress.[237]

By refusing to accommodate Ms. Cano's social transition in ways that are readily available in the prison setting, Defendants are violating her rights under the Eighth Amendment. *See, e.g.*, *Monroe*, 584 F. Supp. 3d at 688 (ordering, after bench trial, that each Plaintiff class member "shall be evaluated for transfer" to a "facility matching his or her expressed gender," "shall [be] . . . allowed access to a private shower," and "shall immediately be provided with access to gender-affirming items in the commissary"); *but see Keohane*, 952 F.3d at 1276–77 (denying some requests for social transitioning due to "significant security concerns" where prisoner was provided other medical treatment, including "hormone therapy, the use of female pronouns, safer housing accommodations, and private shower facilities").

II. SCDC's refusal to treat Ms. Cano's gender dysphoria violates the ADA and the Rehabilitation Act.[238]

Title II of the Americans with Disabilities Act (ADA) "unambiguously extends to state

[235] *See, e.g.*, *supra*, SOF Part E; Ex. 24 (Hedgepath Dep.) at 91:9–17; Ex. 18 (Cooper Dep.) at 145:14–146:1; Ex. 71 (Ellis Dep.) at 172:22–173:6; Ex. 19 (Green Dep.) at 342:14–343:7; Ex. 70 (Labrador Dep.) at 247:13–24; Ex. 15 (Pitt Dep.) at 167:16–20; Ex. 20 (Taylor Dep.) at 191:13–192:9; Ex. 16 (Kunkle Dep.) at 150:10–14.

[236] Ex. 3 (Anderson Dep.) at 116:1–20, 117:23–118:1, 133:2–9, 249:14–18; Ex. 74 (BOP Transgender Offender Manual) at 8, 10; Ex. 105 (Logbook entries).

[237] Ex. 61 (Lowell Aug. 14, 2024, visit notes).

[238] Pursuant to her ADA claim, Ms. Cano requests access to hormone therapy, social transition treatment, and housing accommodations. *See infra*, Part V.

prison inmates[.]" *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998).[239] "To make out a violation of Title II, plaintiffs must show: (1) they have a disability; (2) they are otherwise qualified to receive the benefits of a public service, program, or activity; and (3) they were denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of their disability." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 502–03 (4th Cir. 2016) (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005)). The third prong may be established by showing "(1) intentional discrimination or disparate treatment; (2) disparate impact; [or] (3) failure to make reasonable accommodations." *Lamone*, 813 F.3d at 503 n.5 (citing *A Helping Hand, LLC v. Baltimore Cnty., Md.*, 515 F.3d 356, 362 (4th Cir. 2008)).

A. Ms. Cano has a disability.

SCDC's own healthcare providers and other licensed practitioners have diagnosed Ms. Cano with gender dysphoria. *See supra*, SOF Part C. As this Court has correctly held, Ms. Cano's gender dysphoria is a qualifying disability under the ADA because it "substantially limits one or more major life activities." 42 U.S.C. § 12102(2)(A) (1990); ECF No. 41 at 34; ECF No. 91 at 6; *see also Williams*, 45 F.4th at 766 (holding that gender dysphoria, unlike "gender identity disorders," is a qualifying disability under the ADA). Ms. Cano's gender dysphoria continues to substantially limit major life activities by causing sleep disruption, inability to concentrate, difficulty interacting with others, distress at her male features, and suicidality.[240]

B. SCDC's hormone therapy freeze-frame policy intentionally discriminates against Ms. Cano on the basis of her disability.

Denial of a specific treatment to "a class of disabled individuals" because of their specific disability violates the ADA's "plain language." *See In re Baby K*, 832 F. Supp. 1022, 1029 (E.D. Va. 1993) ("Such discrimination against a vulnerable population class is exactly what the American

[239] The Fourth Circuit "interprets the ADA and the RA in lockstep." *Basta v. Novant Health Inc.*, 56 F.4th 307, 316 (4th Cir. 2022) (citing *Koon v. North Carolina*, 50 F.4th 398, 403 n.2 (4th Cir. 2022)).

[240] Ex. 152 (2024 Lowell Declaration) at ¶¶ 15–16.

with Disabilities Act was enacted to prohibit."). So does imposing additional eligibility criteria, such as an obligation to pay for the treatment and waive certain rights. 28 C.F.R. § 35.130(b)(8) (2016); *see Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 442 (E.D. Va. 1995). SCDC's freeze-frame policy, on its face, does both: individuals with gender dysphoria cannot access certain medications (that are available to others at no cost) unless they pay for it. The ADA simply does not permit that type of exclusion.

C. The ADA requires that SCDC provide reasonable accommodations to allow Ms. Cano to access social transition treatment.

To show a state entity failed to make reasonable accommodations in violation of the ADA, a plaintiff must show: "(1) that he has a disability or has been regarded as having a disability; (2) that he is otherwise qualified to receive the benefits provided by a public entity; and (3) that he was denied those benefits or was otherwise discriminated against on the basis of his disability." *Fauconier v. Clarke*, 966 F.3d 265, 276 (4th Cir. 2020) (citing *Wicomico Nursing Home v. Padilla*, 910 F.3d 739, 750 (4th Cir. 2018)). A requested accommodation is reasonable "if it is reasonable on its face or used ordinarily or in the run of cases and will not cause undue hardship." *Lamone*, 813 F.3d at 507 (citations and quotation marks omitted). The "burden" of establishing the reasonableness of an accommodation "is not a heavy one," and "[i]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits.'" *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995); *see also Lamone*, 813 F.3d at 507–08.

1. Ms. Cano is otherwise entitled to necessary medical treatment.

A "qualified individual with a disability" includes someone who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (1990). As this Court has already found, Ms. Cano, as an individual housed in SCDC's custody, is plainly entitled under SCDC policy—not to mention the U.S. Constitution—to adequate healthcare. Ex. 29 (SCDC Policy HS-18.15); ECF No. 41 at 34–35; ECF No. 91 at 6–7; *see also Brown v. Dep't of Pub. Safety & Corr. Servs.*, 383 F.

Supp. 3d 519, 556 (D. Md. 2019). In Ms. Cano's case, social transition is necessary medical care. *See supra*, SOF Parts A.1.i, E; *see also Monroe*, 584 F. Supp. 3d at 678.

2. Reasonable accommodations to SCDC policies and practices will enable Ms. Cano to access social transition, which is medically necessary care.

The ADA by its own terms envisions reasonable modification to even established state laws, policies, and procedures to accommodate an individual's disabilities. *See, e.g.*, *Mary Jo C. v. N.Y. State & Loc. Ret. Sys.*, 707 F.3d 144, 163 (2d Cir. 2013). Here, SCDC is required to modify its typical policies and procedures to allow Ms. Cano meaningful access to medical care (in this case, social transition).

i. Uninterrupted Access to Hair Removal

A crucial aspect of Ms. Cano's gender dysphoria treatment is allowing her to remove her facial and body hair. *See supra*, SOF Part E.2. However, in some housing settings within SCDC (such as quarantine or specific mental health treatment programs), individuals are not permitted to retain razors in their possession. Ensuring Ms. Cano has access to adequate hair removal in those settings is a reasonable accommodation. It is undisputed that SCDC already has a procedure in place for medical staff to supervise individuals receiving treatments that require direct observation.[241] It is also undisputed that SCDC has indicated that exploring available alternative hair-removal products would be a possible accommodation[242] and, on at least one occasion in the past, has accommodated supervised razor access for another patient with gender dysphoria who was in restricted housing.[243] Making a similar accommodation for Ms. Cano would allow her to access the adequate healthcare she needs.

ii. Use of Legal Name and Corresponding Pronouns or Gender-Neutral Language

Substituting Ms. Cano's former first name for her current first name on her nametag and using only her legal name in any correspondence or interaction is a reasonable accommodation,

[241] Ex. 104 (SCDC Policy HS-18.16); at 10 (Definitions), ¶ 7.1.1.
[242] *See* Ex. 2 (30(b)(6) Dep.) at 275:20–276:5.
[243] Ex. 105 (Logbook entries).

particularly given that Ms. Cano's current and former last name are the same. Essentially, Ms. Cano only asks that staff discontinue any use of her former first name in any written or verbal interaction with her. Additionally, Ms. Cano's unique SCDC ID number will remain on her nametag and on any written correspondence, preventing any confusion. As multiple current and former SCDC wardens have testified, there is no legitimate reason to refuse that request.[244]

Likewise, including Ms. Cano's pronouns on her ID card and instructing staff to use female pronouns or gender-neutral language in reference to Ms. Cano is a reasonable accommodation. Testimony establishes that it is already "recommended" that employees use proper pronouns,[245] and it would not be "difficult"[246] or "too burdensome"[247] for employees to do so (or to use gender-neutral language). SCDC already regulates communication between staff and inmates, requiring respectful communication,[248] and already offers annual training to staff regarding transgender inmates[249] that could include the instruction. SCDC cannot articulate a reason that requiring staff to use female pronouns or gender-neutral language regarding Ms. Cano would be unreasonable.

iii. Female Canteen Items

Allowing Ms. Cano access to the female canteen items that have been made available at other male facilities is a reasonable accommodation. Testimony establishes that Warden Langdon's reason for banning cosmetics is based purely in speculation (no similar incident has ever occurred under his supervision or at SCDC) and is also overinclusive (because other items that could be used to create or decorate a dummy are available).[250] Moreover, the availability of these items (including nail polish, nail polish remover pads, skin moisturizer, balm cream, makeup, makeup

[244] Ex. 113 (Langdon Dep.) at 113:16–22; Ex. 114 (Newton Dep.) at 132:17–22 (testifying that "for [his] purposes," he needed the "[l]egal name," not the commitment name, on "the I.D. card"); Ex. 55 (Wallace Dep.) at 183:17–24 (For someone who is aware of Ms. Cano's legal name, "[t]here's no reason, no valid reason" not to refer to Ms. Cano by her legal name).

[245] Ex. 2 (30(b)(6) Dep.) at 246:15–18.

[246] Ex. 37 (Adams Dep.) at 186:8–10.

[247] Ex. 95 (James Dep.) at 224:1–8.

[248] *See* Ex. 2 (30(b)(6) Dep.) at 249:20–23.

[249] Ex. 55 (Wallace Dep.) at 70:16–17.

[250] Ex. 113 (Langdon Dep.) at 120:13–18, 127:16–18, 136:1–11, 148:10–14, 150:18–20; *see also* Ex. 2 at 226:24–227:4; Ex. 28 at 3.

brushes, makeup wedges, cuticle nippers, fashion wraps, perm kits, and hot oil hair treatment) at other prisons, even higher-security institutions,[251] indicates that making these products accessible to transgender women for their medically necessary social transition is doable. Ms. Cano merely asks for that accommodation in her case as well.

D. SCDC must provide reasonable accommodations to permit Ms. Cano access to appropriate housing.

Under SCDC policy, Ms. Cano is entitled to "a safe and sanitary place to live and work[.]"[252] Additionally, "Title II and Section 504 require Defendants to provide safe housing to disabled and non-disabled inmates alike." *Brown*, 383 F. Supp. 3d at 559 (citations omitted); *see also Bane v. Va. Dep't of Corr.*, 267 F. Supp. 2d 514, 521 (W.D. Va. 2003). SCDC's general approach does not allow an individual a determinative say in their housing assignment. *See supra*, SOF E.4.i. To ensure she is safe from attack and can use the restroom when locked in her cell, which ameliorate her gender dysphoria, Ms. Cano requests that SCDC modify that practice by housing her in a cell either by herself or with another transgender woman. Currently, and for most of her time in Defendants' custody, SCDC has provided one of those two accommodations. *See supra*, SOF Part E.4. The availability of that accommodation throughout Ms. Cano's incarceration demonstrates that it is reasonable.

III. SCDC discriminates against Ms. Cano in violation of the Equal Protection Clause.[253]

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Thus, laws, policies, and practices may not differentiate between groups "explicitly . . . or in the reasons given for [their] administration or enforcement" without sufficient justification. *Sylvia Dev. Corp. v. Calvert Cnty., Md.*, 48 F.3d 810,

[251] *See* Ex. 129 (Canteen lists).
[252] Ex. 153 (SCDC Policy OP-22.15) at ¶ 4.
[253] Pursuant to her Equal Protection Clause claim, Ms. Cano requests hormone therapy and social transition treatment. *See infra*, Part V.

819 (4th Cir. 1995). Here, Defendants permit cisgender individuals to access all medically necessary care, while transgender individuals are restricted from accessing hormone therapy and social transition treatment.

A. The Court should apply intermediate scrutiny.

Under binding Fourth Circuit precedent, SCDC's sex-based classification triggers heightened scrutiny under the Equal Protection Clause. *See, e.g.*, *Kadel*, 100 F.4th at 146 (holding that state law refusing to fund gender-affirming medical care "is textbook sex discrimination"); *Grimm*, 972 F.3d at 608–09 (holding that school bathroom policy discriminating against transgender students "constitutes sex-based discrimination"); *see also Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 660–74 (2020) (holding that discrimination against transgender employees violates Title VII). Defendants' conduct also triggers intermediate scrutiny by discriminating against a quasi-suspect class. *See Grimm*, 972 F.3d at 611–13 (holding that transgender people are a quasi-suspect class because they have historically been subjected to discrimination, transgender status "bears [no] relation to ability to perform or contribute to society," transgender people are a discrete group with immutable characteristics, and transgender people are a minority lacking political power).

Sex-based classifications trigger intermediate scrutiny, even in a prison. *See, e.g.*, *Harrison v. Kernan*, 971 F.3d 1069, 1076–78 (9th Cir. 2020) ("We now hold that prison regulations . . . which facially discriminate on the basis of gender, must receive intermediate scrutiny[.]"); *Williamson v. Maciol*, 839 F. App'x 633, 638–39 (2d Cir. 2021) (applying intermediate scrutiny to disparate treatment of male and female jail detainees). Although most prison-based constitutional challenges are analyzed under *Turner v. Safley*, 482 U.S. 78 (1987), *see, e.g.*, *Heyer v. U.S. Bureau of Prisons*, 984 F.3d 347, 355–56 (4th Cir. 2021), "it is evident that the *Turner* framework does not apply to all asserted violations of all constitutional rights," *Munday v. Beaufort Cnty.*, No. 9:20-CV-02144-DCN, 2023 WL 9188398, at *6 (D.S.C. Mar. 31, 2023); *see also Johnson v. California*, 543 U.S. 499, 502 (2005) (holding that strict scrutiny applies to race-based prison classification).

Specifically, *Turner* applies "*only* to rights that are 'inconsistent with proper incarceration.'" *Johnson*, 543 U.S. at 500, 510 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)). Here, because neither the right to be free from "archaic and stereotypic notions" about sex, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982), nor the right to be free from the second-class citizenship long inflicted upon transgender people, *Grimm*, 972 F.3d at 610–11, are contrary to a properly functioning carceral environment, they do not trigger the "deferential" test announced in *Turner*. *See, e.g.*, *Harrison*, 971 F.3d at 1076–78; *Williamson*, 839 F. App'x at 638–39; *but see Munday*, 2023 WL 9188398, at *6.

To survive intermediate scrutiny, Defendants "must provide an 'exceedingly persuasive justification' for the classification." *Kadel*, 100 F.4th at 156 (citations omitted). "At minimum," Defendants "must show that 'the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Id.* (citations omitted). Because the disparate treatment occurred in a prison, "[t]he deference owed to judgments made by prison officials must always be factored carefully into the analysis[.]" *Harrison*, 971 F.3d at 1076. Here, Defendants lack legitimate reasons—much less "exceedingly persuasive justifications"—for treating Ms. Cano differently simply because she is transgender.

B. Whether the Court applies intermediate scrutiny or the deferential *Turner* standard, Defendants' disparate treatment of transgender prisoners fails.

SCDC's differential treatment of transgender prisoners cannot survive scrutiny because it is not "reasonably related to legitimate penological interests," *Morrison v. Garraghty*, 239 F.3d 648, 654–55 (4th Cir. 2001) (quoting *Turner*, 482 U.S. at 89), much less supported by an "exceedingly persuasive justification," *Kadel*, 100 F.4th at 156. Although review under the *Turner* analysis is deferential, it is not toothless. *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). The only legitimate penological interests identified in *Turner* are "security," "rehabilitation," and "institutional order." *See Turner*, 482 U.S. at 89, 91, 93. "[D]efendants cannot merely brandish the words 'security' and 'safety' and expect that their actions will automatically be deemed

constitutionally permissible conduct." *Campos v. Coughlin*, 854 F. Supp. 194, 207 (S.D.N.Y 1994). Nor may defendants "pil[e] conjecture upon conjecture[,]" *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988), or "avoid court scrutiny [under *Turner*] by reflexive, rote assertions," *Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001), *abrogation on other grounds recognized by Mattioda v. Nelson*, 98 F.4th 1164 (9th Cir. 2024). Additionally, *Turner* requires a reasonable fit between the outcome and its justification: in other words, a policy is not rationally related if it is wildly overinclusive or underinclusive relative to the asserted interest. *See Hum. Rts. Def. Ctr. v. Sw. Va. Reg'l Jail Auth.*, 396 F. Supp. 3d 607, 620 (W.D. Va. 2019).

i. Hormone Therapy

Defendants have *never* asserted a penological interest in denying Ms. Cano access to hormone therapy. The only explanation Defendants assert is that SCDC is precluded from paying for such care under Budget Proviso 65.28. But even if that were true (and this Court has held that it is not, *see* ECF No. 46 at 4–5), it is well-established that the State "may not protect the public fisc by drawing an invidious distinction between classes of its citizens." *Kadel*, 100 F.4th at 156–57 (quoting *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974)) (rejecting North Carolina and West Virginia's explanations for refusing to fund gender-affirming medical care). No other justification is plausible, particularly when SCDC allows individuals to obtain the care themselves. *See Hum. Rts. Def. Ctr.*, 396 F. Supp. 3d at 620 (considering whether a policy is underinclusive in the reasonableness inquiry). Thus, Defendants' sex-based classification regarding access to hormone therapy violates Equal Protection.

ii. Social Transition Treatment

Others in SCDC custody who need non-pharmacological medical treatment—such as "artificial limbs, braces, hearing aids, glasses, wheelchairs, dentures, [or] special shoes"—can access it.[254] Individuals with gender dysphoria, however, are not guaranteed consistent access to

[254] *See* Ex. 154 (SCDC Policy OP-22.03) at ¶¶ 1.2.4, 12; Ex. 29 (SCDC Policy HS-18.15) at ¶ 18.

non-pharmacological treatments necessary for social transition, such as adequate hair removal, use of proper name and pronouns, and female canteen items.

As explained above, *see supra*, Part II.C.2, providing these treatments is a reasonable accommodation. For the same reasons, refusing these treatments does not further any legitimate penological interests. First, to allow—*at most*—thirty individuals across the entire department supervised access to razors or other adequate hair removal products would not disrupt SCDC's operations sufficient to constitute a legitimate penological interest. Second, testimony—including that of three wardens—establishes that there is no legitimate penological reason to use an individual's former, male name or male pronouns when addressing transgender women.[255] Third, justifying a restriction on canteen items out of a concern that inmates will use makeup to decorate a dummy and dupe correctional officers does not pass the smell test, particularly when (a) individuals were allowed to retain the makeup they already purchased, despite the purportedly significant risk; (b) there is *no* evidence that this hypothetical scenario has ever happened at SCDC; and (c) those female canteen items are permitted at other, higher-security SCDC facilities, as well as other states' prison systems. *See supra*, Part E.3.

IV. SCDC discriminated against Ms. Cano on the basis of her disability and sex in violation of the Affordable Care Act.[256]

The Affordable Care Act (ACA) contains an "anti-discrimination mandate." *Kadel*, 100 F.4th at 163–64. The mandate, Section 1557, "references and incorporates . . . Title IX, which prohibits discrimination on the basis of sex . . . and section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability." *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 845 (D.S.C. 2015) (citation omitted). Specifically, Section 1557 of the ACA provides that "an individual shall not . . . be excluded from participation in, be denied benefits of, or be subjected to

[255] Ex. 113 (Langdon Dep.) at 113:16–22, 216:5–9; Ex. 114 (Newton Dep.) at 132:17–22; Ex. 55 (Wallace Dep.) at 183:17–25, 184:16–18; Ex. 96 (Washington Dep.) at 40:6, 106:2–7; Ex. 97 (Wilkins-Smith Dep.) at 165:18–166:16; Ex. 18 (Cooper Dep.) at 144:25–145:11; *cf.* Ex. 37 (Adams Dep.) at 186:8–10; Ex. 71 (Ellis Dep.) at 213:1–3.

[256] Under this claim, Ms. Cano seeks an injunction ordering Defendants to provide her with hormone therapy. *See infra*, Part V.

discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance." 42 U.S.C. §18116(a) (2010).

A. SCDC is a covered entity under the ACA.

SCDC operates a "health program" because it provides extensive "health-related services." *See Callum*, 137 F. Supp. 3d at 850–53 (holding a CVS "retail pharmacy outlet" constituted a "health program or activity"). SCDC itself admits that it is the sole healthcare provider for thousands of individuals, and undisputed evidence shows that SCDC's health services have received millions in federal funds to pay for medical supplies, staff counselor payroll, and other behavioral health support during Plaintiff's incarceration. *See supra*, Part B.

B. SCDC discriminated against Ms. Cano on the basis of her disability.

To prevail on a § 1557 disability discrimination claim, in addition to proving that SCDC is a covered entity, Ms. Cano "must show that . . . she is: (1) a 'disabled individual' as defined in the [Rehabilitation Act (RA)]; (2) 'otherwise qualified' to participate in the offered activity or to enjoy its benefits; [and] (3) excluded from such participation or enjoyment solely by reason of his or her handicap[.]"[257] *Basta*, 56 F.4th at 314–15. The Fourth Circuit "interprets the ADA and the RA in lockstep." *Id.* at 316 (citing *Koon*, 50 F.4th at 403 n.2); *see also Williams*, 45 F.4th at 765 n.1. Therefore, because Plaintiff is entitled to relief on her ADA and Rehabilitation Act claims, *see supra*, Part II.B, she is also entitled to relief under the ACA.

C. SCDC discriminated against Ms. Cano on the basis of her sex.

Section 1557 incorporates Title IX—which establishes that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681(a)—into the healthcare context. To succeed on a Title IX claim (and therefore a sex-based Section 1557 claim), a plaintiff must show "[1] worse treatment based on sex and [2]

[257] The fourth requirement, that "the program administering the activity receives federal financial assistance" is subsumed in the "covered entity" question posed by § 1557.

resulting harm." *B.P.J. v. W. Va. State Bd. of Educ.*, 98 F.4th 542, 563 (4th Cir. 2024); *see also Grimm*, 972 F.3d at 618. "[O]nce a Title IX plaintiff shows she has been discriminated against in the relevant sense and suffered harm, no showing of a substantial relationship to an important government interest can save an institution's discriminatory policy." *B.P.J.*, 98 F.4th at 563. Discrimination based on a gender dysphoria diagnosis constitutes discrimination on the basis of transgender identity because "gender dysphoria is so intimately related to transgender status as to be virtually indistinguishable from it," and discrimination on the basis of transgender identity is discrimination on the basis of sex. *Kadel*, 100 F.4th at 146, 164. Therefore, discrimination based on a gender dysphoria diagnosis constitutes discrimination based on sex.

Here, SCDC's freeze-frame policy explicitly denies a particular medical treatment based on the fact that a patient has a diagnosis of gender dysphoria, instead of some other condition that requires the same treatment. That policy, on its face, discriminates based on a gender dysphoria diagnosis and, in this case, caused Ms. Cano to be denied essential medical care.

V. Permanent injunctive relief is necessary to correct these violations.

Under the Prison Litigation Reform Act, prospective injunctive relief must be "narrowly drawn," must "extend[] no further than necessary to correct the violation of a federal right," and must be "the least intrusive means necessary to correct the violation." *Brown v. Plata*, 563 U.S. 493, 530 (2011) (citing 18 U.S.C. § 3626(a)). An injunction is warranted here.

A. The Court should order Defendants to provide Plaintiff with hormone therapy and permanently enjoin all categorical, nonmedical barriers to receiving hormone therapy.

The undisputed facts show that Ms. Cano prevails on her Eighth Amendment, ADA, RA, Equal Protection, and ACA claims for hormone therapy. Injunctive relief is necessary to remedy those violations.

1. The Court should enjoin Defendants' freeze-frame policy and any iteration thereof.

Even after this Court's preliminary injunction, Defendants have relentlessly argued that Budget Proviso 65.28 prohibits SCDC from expending state funds for Ms. Cano to receive hormone therapy. *See* Br. of Defendants-Appellants at 15–20, *Cano v. SCDC*, No. 24-6200, ECF No. 13 (4th Cir. Apr. 29, 2024). Added to that, South Carolina now explicitly outlaws the use of public funds to pay for hormone therapy or any "gender transition procedure." S.C. Code Ann. §§ 44-42-310, 340. As a result, the unconstitutional categorical prohibition on initiating hormone therapy for any individual in SCDC custody—including Ms. Cano—will continue.

The continuation of a freeze-frame policy prohibiting treatment is untenable, whether or not the treatment is imminently necessary: "as with treatment for any other medical condition, treatment for gender dysphoria must be based on a patient's current situation[,]" which will evolve over time. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 790 (9th Cir. 2019); *see also Soneeya v. Spencer*, 851 F. Supp. 2d 228, 251 (D. Mass. 2012) ("[A]lthough none of the experts currently recommend laser hair removal . . . it may become necessary at some point in the future in light of other developments in her care. It should thus be available for consideration in [her] case as it is for patients in the community."); *Monroe v. Baldwin*, 424 F. Supp. 3d 526, 545 (S.D. Ill. 2019) ("The Eighth Amendment protects a [prisoner] not only from deliberate indifference to his or her *current* serious health problems, but also from deliberate indifference to conditions posing an unreasonable risk of serious damage to *future* health.") (quoting *Board v. Farnham*, 394 F.3d 469, 479 (7th Cir. 2005)). To ensure Ms. Cano receives adequate care, the Court must enjoin any freeze-frame mandate.

2. To cure the harm to Ms. Cano, Defendants must be ordered to provide her with hormone therapy.

Even after receiving an order to evaluate Plaintiff's need for hormone therapy irrespective of the Budget Proviso, Defendants' deliberate indifference continued. Deliberate indifference can manifest in the provision of inadequate care, the denial or delay of proper medical care, or "medical

care which is so cursory as to amount to no treatment at all." *King v. United States*, 536 F. App'x 358, 362 (4th Cir. 2013) (quoting *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)); *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976). Essentially, "just because [DOC officials] have provided [an inmate with gender dysphoria] with *some* treatment consistent with the . . . Standards of Care, it does not follow that they have necessarily provided her with *constitutionally adequate* treatment." *De'lonta II*, 708 F.3d at 526 (citing *De'lonta I*, 330 F.3d at 635–36); *see also Langford v. Norris*, 614 F.3d 445, 460 (8th Cir. 2010); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 188 (D. Mass. 2002) (If a patient "had cancer, and was depressed and suicidal because of that disease, the DOC would discharge its duty to [her] under the Eighth Amendment by treating *both* [her] cancer and [her] depression.") (emphasis added) (citation omitted); *Soneeya*, 851 F. Supp. 2d at 248.

Ms. Cano needs hormone therapy. She has done exactly what Defendants' experts recommend prior to receiving the treatment: she has undergone *years* of "substantial therapy work" and has lived with a "stable identity" as a woman for over four years.[258] Any remaining psychological care that Defendants assert is necessary—which, puzzlingly, is not being consistently provided—can happen concurrently with any hormone therapy.[259] This is not a mere difference in opinion regarding the proper course of treatment, *see United States v. Clawson*, 650 F.3d 530, 538 (4th Cir. 2011), particularly when Ms. Cano is currently receiving *no treatment* other than a few social transition accommodations, *see Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) ("When the need for treatment is obvious, medical care which is so cursory as to amount to no treatment at all may amount to deliberate indifference.") (quoting *McElligott,* 182 F.3d at 1255) (alteration omitted). Defendants' failure to remedy this constitutional violation after the Court's preliminary injunctive relief reveals that similar relief here will not fix the problem. Rather, to ensure Ms. Cano gets the treatment she needs, the Court should order Defendants to provide Ms. Cano with hormone therapy after conducting the appropriate preliminary bloodwork.

[258] Ex. 5 (Kaliebe Dep.) at 192:18–193:7, 214:9–15; Ex. 6 (Cantor Dep.) at 261:3–10, 276:5–21, 305:8–25.

[259] Ex. 3 (Anderson Dep.) at 160:23–161:2, 183:18–21; Ex. 25 (Brown Rebuttal) at ¶ 31.

B. The Court should order Defendants to permit Ms. Cano's social transition.

Federal law requires Defendants to ensure that Ms. Cano can access social transition treatment for her gender dysphoria. *Supra* Parts I–III. In similar cases, courts have ordered Defendants to facilitate access to social transition treatment for gender dysphoria. *See Monroe*, 584 F. Supp. 3d at 680–87 (ordering relief regarding hormone therapy, gender-affirming items, hair removal, and misgendering); *Hicklin*, 2018 WL 806764, at *15 (directing defendants to provide the plaintiff "with care that her doctors deem to be medically necessary treatment for her gender dysphoria, including hormone therapy, access to permanent body hair removal, and access to 'gender-affirming' canteen items").

Here, the Court should order Defendants to:

- provide Ms. Cano with access to adequate hair removal by allowing her daily supervised access to razors when she is housed without access to razors;
- refer to Ms. Cano using her current, legal name (and refrain from using her former name) when interacting with her in any way;
- instruct staff to refer to Ms. Cano using her current, legal name (and refrain from using her former name) when interacting with her in any way;
- give Ms. Cano an identification card with her legal name that does not also include her former name;
- include Ms. Cano's pronouns (she/her) on her identification card;
- use female pronouns or gender-neutral language when interacting with Ms. Cano in any manner;
- instruct staff to use female pronouns or gender-neutral language when interacting with Ms. Cano in any manner;
- provide GTL with Ms. Cano's legal name to implement in its tablet system;
- allow Ms. Cano access to female canteen items that have been provided to other transgender women in SCDC, *see* Ex. 129 (Canteen lists); and
- house Ms. Cano in a cell by herself or with another transgender woman.

Defendants have shown an unwillingness to ensure Ms. Cano can access this crucial component of her gender dysphoria treatment. Therefore, in the absence of injunctive relief from this Court,

Defendants' violations will continue.

CONCLUSION

The undisputed facts establish that SCDC's refusal to treat Ms. Cano's gender dysphoria violates federal law and that an injunction ordering SCDC to provide adequate healthcare is the only way to remedy those violations.

October 30, 2024

Respectfully submitted,

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