RECORD NO. 16-51148

IN THE

United States Court of Appeals
FOR THE FIFTH CIRCUIT

SCOTT LYNN GIBSON,
also known as Vanessa Lynn,

Plaintiff-Appellant,

v.

BRYAN COLLIER;
DR. D. GREENE,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS - AT WACO
Honorable Walter S. Smith, Jr., U.S. District Judge

SUPPLEMENTAL BRIEF OF APPELLANT SCOTT LYNN GIBSON

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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SCOTT LYNN GIBSON,

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v.

BRYAN COLLIER, *et al.*,

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SUPPLEMENTAL BRIEF OF APPELLANT
SCOTT LYNN GIBSON

This appeal raises two questions of first impression in this Circuit: is Gender Dysphoria ("GD") a serious medical condition, and is Sex Reassignment Surgery ("SRS") a potentially necessary treatment for some who suffer from GD? If the answer to both of these questions is yes, then Texas state inmates who suffer from GD should have SRS available as a potential treatment for their condition. Otherwise, by proscribing this potential treatment for this serious medical

condition, the Texas Department of Criminal Justice ("TDCJ") violates the Eighth Amendment's ban on Cruel and Unusual Punishments by being "deliberately indifferent" to these inmates' serious medical needs. Yet that is exactly what is happening here, to the great and unconstitutional suffering of inmate Scott Lynn Gibson ("Gibson") and others like her.

STATEMENT REGARDING ORAL ARGUMENT

Gibson respectfully requests oral argument of this appeal because the issues of first impression it raises involve fundamental and evolving rights of the required care and treatment for transgender inmates under the United States Constitution, the analysis of which might be substantially aided by the assistance of counsel at oral argument who are familiar with the medical standards set by The World Professional Association for Transgender Health ("WPATH"), etc. In addition, as appellees' counsel has informed the Court,[1] at least one other case in this Circuit (*Haverkamp v. Penn*, No. 2:17-CV-18 (S.D.Tex. Corpus Christi Division)) has been stayed pending the resolution of this appeal, which also counsels in favor of the issues on appeal being fully aired as well.

[1] See Notice Of Form For Appearance for John C. Sullivan.

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because Gibson's suit arose under 42 U.S.C. § 1983. This Court has jurisdiction over this appeal pursuant to 29 U.S.C. § 1291 because the District Court entered a final, summary judgment below. That judgment was entered on August 31, 2016, ROA.421, and Gibson timely filed a notice of appeal on September 12, 2016. ROA 422.23.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Gender Dysphoria is a serious medical condition, as recognized by the unanimous consensus of reputable medical organizations, for purposes of the Eighth Amendment?

2. Whether Sex Reassignment Surgery is a potential medically necessary treatment for some who suffer from Gender Dysphoria, as recognized by the consensus medical standard of care required for transgender individuals, for purposes of the Eighth Amendment?

3. Whether the District Court erred in granting summary judgment against Gibson's claim that Texas' prohibition of Sex Reassignment Surgery as a potential treatment for inmates suffering from Gender Dysphoria violates her Eighth Amendment rights by being "deliberately indifferent" to her serious medical needs?

STATEMENT OF THE CASE

The facts concerning Gibson's condition, and those surrounding the District Court's ruling, are quite narrow indeed. As a result, this case presents an uncluttered record on which this Court can directly address the important legal questions at issue herein.

Gibson's Transgender Condition

Gibson is a pre-operational male-to-female transgender inmate currently incarcerated at the A. Hughes Unit of the Texas Department of Criminal Justice in Gatesville, Texas. ROA.397. She has openly lived as a female for over twenty years, since the age of fifteen. ROA.388-89. Gibson is a "female trapped in a male's body." ROA.397.

When Gibson entered TDCJ in 1995, she immediately requested to be treated, but her request was denied because TDCJ had a policy at the time prohibiting treatment for transgender inmates who were not diagnosed before incarceration. ROA.398-99. As a result, throughout her incarceration, Gibson has suffered from "severe depression and the thoughts of suicide [have become] more prevalent and realistic." ROA.398-99.

Gibson's condition has led her to abuse her testicles by tying a string around them until they are swollen and dark purple, causing her severe pain. ROA.407.

She does this to "stop the testosterones [sic] from entering into [her] body" and "to destroy [her] testicles" because "the pain of having them is overwhelming and [she] cannot cope." ROA.392. She also abuses her penis by "pulling it, bending it" and she "pulled it one day so hard [she] heard a pop, and severe pain shot into [her] stumach [sic] and [she] threw up." ROA.392. She asserts she has "been having serious thoughts of removing [her] testicles because they make [her] sick, make [her] feel deformed, and [she] cannot live in peace" because she is in "[constant] mental and physical anguish!" ROA.392. As she experiences it, her "sex organs . . . don't belong to [her] and [she is] tired of being forced to live with them!" ROA.393.

She has also attempted suicide three times while incarcerated. ROA.407. She cut a vein in her arm, causing substantial blood loss, tried to hang herself with her light cord, and overdosed on medication. *Id*. She has also cut herself "over 100 times." ROA.407. While Gibson "doesn't claim she attempted suicide solely due to her gender related condition, . . . it did play a significant part in her suicide attempts because the constant stress she deals with is at times overwhelming." ROA.398-99. She "feel[s] Deformed, Nasty and it makes [her] Hate [her] body to the point [she] want[s] to Die." ROA.406.

Gibson's Diagnosis With Gender Dysphoria

In 2014, TDCJ rescinded the "non-treatment" policy described above and Gibson then renewed her request for treatment. ROA.266-70. TDCJ refused Gibson's request again, however, because "medical was still enforcing the old policy." ROA.398-99. "After expressing her desire to casterate [sic] herself," Gibson was sent to Sky View Unit, a psychiatric facility. ROA.398-99. *At Sky View, psychiatrist Robin L. Rigsby diagnosed Gibson with Gender Dysphoria.* ROA.386.

Gibson Continues To Suffer From Her Condition

Gibson regularly informed prison officials of her distress and repeatedly requested her penis and testicles be removed because "having them make[s] [her] sick." ROA.302-04. She has to "wear socks over [her] hand to use the restroom and to take a shower." ROA.407. Gibson has told "every nurse, doctor" that she will cut her penis and testicles off if she does not get treatment. ROA.407. She has "written Medical over 30 times about this and they [told her] she will never get a Sex change or be treated." ROA.407. Gibson has repeatedly informed doctors of the extreme mental and physical anguish she suffers on a regular basis. ROA.302-04.

Limited Treatment Is Prescribed For Gibson

In early 2015, Gibson's primary care doctor at the University of Texas Medical Branch (Dr. McKinney) prescribed certain treatments for Gibson's GD. ROA. 238. Specifically, the doctor prescribed hormone therapy with estrogen-premarin, spirolactone, and finestreride, as well as the "real-life" experience, such as access to a bra. ROA.390. However, Dr. Greene at the prison refused to allow Gibson the opportunity for the real-life experience portion of her treatment, stating "I have never authorized a 'Man' a pass to live as a female and *I will never do it*!" ROA.390 (emphasis added).

Gibson Is Denied Evaluation For SRS Treatment

As a result of her GD and as a consequence of her continued suffering, Gibson has repeatedly requested that she be considered for SRS. ROA.305. In response to those requests, Gibson has been told that "*TDCJ/UTMB does not provide inmates sex changes for any reason*." ROA.394 (emphasis added).

In addition, because of the TDCJ's blanket prohibition on SRS, Gibson has not even "been evaluated to see if SRS would adequately treat [her] condition, nor has any doctor made a sound medical judgment [about that potential treatment option] based on [her] medical needs." ROA.394. When she wrote a letter to the Director of TDCJ (Brad Livingston) explaining her condition, her depression, and

her thoughts of suicide and self-mutilation, she received a letter in return *advising her to put in a sick call*. ROA.394 (emphasis added).

Gibson believes that "if [she doesn't] get a Sex change [she] will end up committing suicide because the older [she becomes] the strong[er] [her] pain gets, as well as the need to abuse [her] body parts." ROA.407.

Gibson Files A Lawsuit Over Her Lack Of Treatment

Feeling left with no alternative by the repeated denials of her requests for treatment, on June 9, 2015, Gibson filed a *pro se* complaint in the Western District of Texas, Waco Division, against TDCJ Director Brad Livingston ("the Director"),[2] an unknown University of Texas Medical Branch ("UTMB") Policy Maker, and the Municipality of Gatesville, Texas, alleging violations of her rights under 42 U.S.C. §1983. ROA.376. The heart of Gibson's claim was the TDCJ's "enforce[ment] of a systematic ban on sex reassignment surgery, which creates a policy of deliberate indifference to her gender dysphoria because they refuse to allow her to be evaluated to determine if sex reassignment surgery would be a viable medical treatment option based on her medical needs. Consequently, Plaintiff has to suffer severe mental anguish that causes her to have realistic thoughts of committing suicide and of self-castration." ROA.380. As relief on this

[2] Bryan Collier subsequently took over the role of TDCJ's Executive Director from Livingston, as reflected in the current case caption on appeal.

claim, Gibson sought a "declaration that this ban is unconstitutional" and a "permanent injunction" against its ongoing enforcement. ROA.380.

On October 7, 2015, the Director answered Gibson's complaint. His answer denied all of Gibson's allegations and asserted that Gibson "has failed to state a claim for which relief can be granted under 42 U.S.C. § 1983." ROA.136. The Director also asserted various affirmative defenses and immunities against Gibson's claims. ROA.137-38.

On October 20, 2015, the Municipality of Gatesville, Texas moved to dismiss the claims against it, arguing that it had no role in setting TDCJ policy concerning inmate medical treatment. ROA.157. The district court granted this motion on November 17, 2015. ROA.402.

On December 21, 2015, Gibson sought leave to amend her complaint to include Dr. Greene as a defendant. ROA.402. Greene was the physician who refused to allow Gibson to be treated for her GD as prescribed by her UTMB primary care doctor. ROA.235-247. As Gibson put it: "Dr. Greene is not a Gender Dysphoria specialist and has never actually treated this medical condition. Therefore he is not qualified to deny Plaintiff this treatment nor is he legally qualified to treat Gender Dysphoria." ROA.240. The District Court *sua sponte* dismissed Gibson's claims against Greene as a matter of law because "Plaintiff

cannot state a claim for deliberate indifference based on Dr. Greene's refusal to provide Plaintiff with SRS in accordance with TDCJ policy." ROA 418-21.

On February 19, 2016, the Director filed a motion for summary judgment arguing there was no issue of material fact in dispute as he was (1) entitled to qualified or Eleventh Amendment immunity and (2) not deliberately indifferent to Gibson's serious medical needs. ROA.398. The Director's grounds for summary judgment on the merits of Gibson's Eighth Amendment claim were presented in three brief pages of text. ROA.259-61. The crux of this argument was its recharacterization of Gibson's claims as follows:

> Plaintiff complains that sex reassignment surgery is a cure to his gender dysphoria and that Defendant is medically indifferent to his serious medical needs because she hasn't been provided sex reassignment surgery. Plaintiff does not get to choose her medical treatment. Plaintiff's medical records indicate that she is and has received extensive treatment regarding gender dysphoria. Plaintiff is receiving hormone treatment therapy in accordance with the Correctional Managed Health Care Policy Manual, as well as mental health services. Plaintiff's disagreement with the course of treatment pursued by prison medical staff does not constitute a viable claim for deliberate indifference to serious medical needs under the Eighth Amendment.

ROA.260.

On March 11, 2016, Gibson filed a *pro se* response in opposition to the Director's motion for summary judgment arguing there was a genuine issue of material fact as to whether (1) Gibson had a serious medical condition in GD, (2)

TDCJ's policy for treating GD did not follow that of prudent medical professionals (as illustrated by WPATH) because those policies effectively eliminated SRS as a treatment option, and (3) the Director was deliberately indifferent to Gibson's medical needs by enforcing TDCJ's policy against Gibson. ROA.299-320.[3] The gravamen of Gibson's opposition was to focus on the right to have her "individualized medical needs" determined rather than be subject to the TDCJ's "blanket policy that denies Transgender inmates SRS and allows TDJC's Doctors to ignore their condition by not fully assessing their individualized medical needs to determine if SRS would adequately treat her condition." ROA.305. Gibson further explained:

> The Defendants claim that Plaintiff cannot choose the care she wants. Plaintiff is not demanding SRS. If the Court goes by her Complaint, it's clear that she is not requesting SRS, rather she is requesting to be evaluated by a GID specialist so the doctor can fully assess her condition and determine whether or not based on her individualized medical needs SRS would adequately treat her condition. If her Doctor cannot assess her medical needs, her condition will not be treated nor will there be a sound medical judgment made.

ROA.305.

On August 31, 2016, the district judge granted the Director's motion for summary judgment. ROA.419. The district court held that no reasonable trier of fact could determine that Livingston's conduct in TDCJ's failure to offer SRS to

[3] Gibson also opposed the Director's arguments for Qualified and Eleventh Amendment immunity. The District Court subsequently ruled in favor of Gibson on these arguments because she was not seeking any monetary relief on his claims, only injunctive relief. ROA.412-13.

Gibson amounted to deliberate indifference. ROA.416-17. In doing so, the District Court was influenced by the fact that there was no controlling precedent in this Circuit suggesting that inmates are constitutionally entitled to SRS as a treatment for GD. ROA.416-17. And it was uninfluenced by the WPATH Standards of Care which Gibson cited as support for his contention that SRS was a potentially medically necessary treatment for her GD that should be evaluated. ROA.416.

This appeal followed.[4]

Initial Briefing Before This Court

On initial briefing in this Court before undersigned counsel was appointed to file this supplemental brief, the parties submitted the following elucidation of the issues.

Gibson argued, inter alia, that "Gender Dysphoria is a serious medical condition that triggers the protection of the Eighth Amendment" and that "Plaintiff's factual allegations that the Defendants denied her Sex Reassignment Surgery (SRS) based on a blanket policy that denies her and other Transgender inmates SRS and other treatment and care that the Standard of care for Transgender Health Care recommends raised a material issue under the Eighth

[4] This Court subsequently entered an order appointing undersigned counsel to represent Gibson through the filing of this Supplemental Brief on appeal. See Letter From Deputy Clerk Shawn Henderson to Stephen L. Braga dated October 10, 2017.

Amendment." Gibson Initial Brief ("Gibson IB") at 1-2. In support of these claims, Gibson cited "The World Professional Association For Transgender Health ('WPATH'), a professional Association dedicated to establishing the Standards for treating Gender Dysphoria," and noted that "[t]hese Standards are accepted by the medical community and Federal courts." Gibson IB at 12.[5] According to Gibson, the WPATH "treatment protocols include socially transitioning (dressing, grooming, and presenting oneself to others in accordance with one's gender identity), hormone therapy, and surgeries. The particular course of medical treatment varies on the individualized needs of the person." Gibson IB at 14.[6] By contrast, "TDCJ has designed a health care policy designed to fit all Transgender inmates without actually basing the care on their individualized medical needs, and [under] Policy G.51.11 Plaintiff and other transgender inmates treatment is frozen at the first phase of the treatment." Gibson IB at 18.

In his initial brief, the Director argued that "Gibson failed to produce evidence suggesting that the care provided for in G-51.11 is so inadequate as to shock the conscience." Brief Of Defendant-Appellee Bryan Collier ("Director IB") at 6. According to the Director, "[t]o support his assertion that mental health

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[5] Gibson also noted that "The National Commission on Correctional Healthcare" cited "the WPATH standards of care" in connection with "the medical management of prisoners with gender dysphoria." Gibson IB at 13.

[6] With respect to each patient's "individualized needs," Gibson also pointed to WPATH's recognition "that while many individuals need both hormone therapy and surgery to alleviate their gender dysphoria, others need only one of these treatment options and some need neither." Gibson IB at 18.

counseling and hormone therapy are inadequate, Gibson relied on the WPATH guidelines. But while those guidelines do recommend SRS as a form of treatment, they provide no help in determining whether diverging from those guidelines shocks the conscience." Director IB at 7. The Director also argued that "Gibson failed to produce evidence suggesting that G-51.11amounts to deliberate indifference." Director IB at 7. As the Director saw it, "[e]ven if Gibson did produce evidence suggesting that SRS is medically necessary to adequately treat GD, his claim would still fail because he failed to produce any evidence suggesting that anyone 'knew or should have known this fact, but nonetheless failed to respond in an appropriate manner.'" Director IB at 7-8.

SUMMARY OF THE ARGUMENT

In granting summary judgment, the district court erred by not accepting and deferring to the established consensus of reputable U.S. medical organizations as required by Supreme Court Eighth Amendment jurisprudence. There is virtually unanimous medical consensus around the World Professional Association for Transgender Health's ("WPATH") Standards of Care prescribing the level of care required for the adequate care of transgender patients suffering from gender dysphoria. (Indeed, even the TDCJ itself has adopted "parts" of those WPATH standards.) Not surprisingly, therefore, the Courts have almost uniformly deferred to those standards as well.

Yet TDCJ's policy explicitly deviates from the Standards by not allowing consideration of SRS as a potentially medically necessary treatment for GD, which prevents evaluation of - and potential accommodation for - each individual's unique medical circumstances. WPATH's Standards of Care do not provide such flexibility for the provider of care to deviate from the Standard when treating gender dysphoria. By deciding on its own to remove this one aspect of the GD standard of care, the TDCJ has effectively gutted the potential care plan required for those at the most extreme end of the treatment spectrum.

Policy G51.11 constitutes a blanket ban on SRS as a potential treatment for gender dysphoria. It prevents TDCJ from making individualized determinations of inmates' medical needs. TDCJ's repeated refusals to consider SRS as a treatment for inmates like Gibson who continue to experience symptoms of gender dysphoria after other treatments have been prescribed constitutes deliberate indifference to serious medical needs. TDCJ prison officials are well aware of Gibson's history of self-harm and repeated attempts at self-castration and suicide. The refusal to allow consideration of such a recognized additional treatment options disregards an excessive risk that Gibson will harm herself in the future.

STANDARD OF REVIEW

"This Court reviews a district court's grant of summary judgment *de novo*, applying the same standard as the district court" *Kariuki v. Tarango*, 709 F.3d 495,

501 (5th Cir. 2013). In reviewing such a judgment, the facts "must be viewed 'in the light most favorable to the nonmoving party' and 'all reasonable inferences' must be drawn in favor of that party." *Griffin v. Hess Corp.*, No. 17-30165, 2017 U.S. App. LEXIS 22011, at *4 (5th Cir. Nov. 3, 2017) (internal citation and quote marks omitted). And summary judgment is proper only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. CONST., amend. VIII. The Supreme Court has specifically identified the deliberate indifference to a serious medical need as a violation of the Eighth Amendment because such actions can "produce physical 'torture or a lingering death.'" *Estelle v. Gamble*, 429 U.S. 97, 103-104 (1976). "It is . . . obduracy and wantonness" that defines such an Eighth Amendment violation, whether it "occurs in connection with establishing conditions of confinement, supplying medical needs, or returning order to a tumultuous cellblock." *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

To state a claim under the Eighth Amendment for deliberate indifference to a serious medical need, the plaintiff must satisfy two prongs. First, the plaintiff must show the prison officials were "aware of facts from which an inference of

excessive risk to the prisoner's health or safety could be drawn." *Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001).[7] Second, the plaintiff must demonstrate that the prison officials acted with "deliberate indifference" to such "potential harm," as evidenced by denials of requests for treatment, disregard for ongoing symptoms and the like. *Holiday*, 238 F.3d at 664.

I. GENDER DYSPHORIA IS A SERIOUS MEDICAL CONDITION

In *Praylor v. TDCJ*, 430 F.3d 1208, 1209 (5th Cir. 2005), this Court "[a]ssum[ed], without deciding, that transexualism does present a serious medical need." In the District Court, the Director went one step further and asserted that "based upon the existence of policy G-51.11, TDCJ appears to recognize gender disorder as a serious medical need." Defendant's Motion For Summary Judgment at 7.[8] The Director's concession in this regard is well-taken in light of the continually evolving standards surrounding GD.

Thus, other courts have consistently recognized gender dysphoria as a serious medical condition. See *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014) ("That GID is a serious medical need, and one which mandates treatment, is not in dispute in this case."); *De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013) ("De'lonta has alleged an objectively serious medical need for protection against

[7] *See also Farmer v. Brennan*, 511 U.S. 825, 838 (1996).

[8] As the District Court put it in reliance on these moving papers, the Director "does not argue that GID/GD is not a serious medical condition for Fifth Amendment purposes." Order of August 31, 2016 ("Dist. Ct. Order") at 15.

continued self-mutilation."); *Allard v. Gomez,* 9 Fed. App'x 793, 794 (9th Cir. 2001) (mem.) ("It is now undisputed that the appellant suffered from [gender identity disorder], that appellant repeatedly sought hormone treatment for it . . . and that the disorder constituted a serious medical need."); *Murray v. United States Bureau of Prisons*, No. 95-5204, 1997 U.S. App. LEXIS 1716, *11 (6th Cir. Jan. 28, 1997) (per curiam) ("[T]ranssexualism is a recognized medical disorder, and transsexuals often have a serious medical need for some sort of treatment"); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) ("Courts have repeatedly held that treatment of a psychiatric or psychological condition may present a "serious medical need" under the *Estelle* formulation . . . [t]here is no reason to treat transsexualism differently than any other psychiatric disorder. Thus . . . plaintiff's complaint does state a "serious medical need."").

Based on this unanimity of opinion, this Court should not hesitate to make it clear in this Circuit from this point forward that GD is a serious medical condition for purposes of the Eighth Amendment. It is time to resolve this question of first impression left open in the twelve years since *Praylor*.[9] Plainly, that question must be resolved in Gibson's favor.

It is important in this analysis, however, not only to recognize that GD is a serious medical condition, but also to recognize just how serious it is. *See Helling*

[9] Thus, the court below should be the last to have to consider the fact that "[t]he Fifth Circuit has yet to recognize unequivocally that transsexualism presents a serious medical need."

v. McKinney, 509 U.S. 25, 33 (1993)(evaluating the significance of the risk of future harm). As the facts of record concerning Gibson's situation amply reveal, inadequate treatment for inmates suffering from gender dysphoria presents a significant risk of future self-harm and psychological suffering. Without appropriate treatment, those inmates - like Gibson - can continue to struggle with thoughts of self-mutilation and suicide as a result of their condition.[10] Death can, thus, be the unfortunate result of mistreated GD. Nothing is more "serious" than that.

II. SEX REASSIGNMENT SURGERY IS A POTENTIALLY MEDICALLY NECESSARY TREATMENT FOR GENDER DYSPHORIA

Once GD is properly recognized as a serious medical condition, the Eighth Amendment analysis then turns to the potential treatments for that condition. The District Court stumbled in this regard on this Court's holding in *Praylor II* that "the refusal to provide hormone therapy" did not constitute "deliberate indifference" to Praylor's medical needs. Dist. Ct. Order at 18. As the district judge explained, "[w]ith this precedent, the Court cannot make the leap to hold that a policy that does not provide surgery to treat GID/GC necessarily constitutes deliberate indifference." *Id.* at 18-19.

[10] As Exhibit 3 submitted in support of Gibson's opposition to the motion for summary judgment against him below indicates: "An October 2010 study done by the National Center for Transgender Equality found that 41% of transgender people in the U.S. have attempted suicide, compared to a rate of 1.6% for the general population."

Like all decisions, of course, the *Praylor* precedent is limited to its own facts, which are dramatically different than the facts before this Court. For example, in Praylor's situation, hormone therapy *was* available as a treatment option in the prison and Praylor was evaluated for such therapy on two occasions. *See* 430 F.3d at 1209. In this case, Gibson's complaint is predicated on the fact - undisputed by the Director - that SRS is *not* available as a treatment option in the prison. Similarly, in Praylor's case, there is no indication that Praylor had been diagnosed with GD. *See id.* In this case, by contrast, Gibson has been labeled with that serious diagnosis. Finally, in Praylor's case, the prison's evaluation of him concluded that there was no "medical necessity for the hormone." *Id.* In Gibson's case, her principal complaint is that prison policy G-51.11 robs her of the opportunity to have any such individualized determination of the potential medical necessity of SRS made for her GD.

But perhaps the most important distinction between *Praylor* and this case is the fact that the *Praylor* decision does not contain any discussion whatsoever of the authoritative medical consensus concerning the WPATH Standards of Care for Transgender Health, which have evolved significantly since *Praylor*. Yet in this

Court, those standards are front and center for review, as part of another question of first impression for this Court to review.[11]

A. WPATH's Standards of Care are Universally Accepted by the Medical Community as the Appropriate Standards of Care for Transgender Individuals, Including Incarcerated Individuals.

The World Professional Association for Transgender Health ("WPATH")[12] develops and publishes the Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People (Standards of Care), which are recognized in the medical community as the authoritative standards for the provision of transgender health care. Gibson submitted the WPATH Standards of Care to the District Court Exhibit 4 to his opposition to the Director's summary judgment motion. As relevant to this case, Standard of Care XI for "Surgery" and titled "Sex Reassignment Surgery Is Effective and Medically Necessary," provides:

> Surgery - particularly genital surgery - is often the last and the most considered step in the treatment process for gender dysphoria. While many transsexual, transgender and gender non-conforming individuals find comfort with their gender identity, role and expression without surgery, for many others surgery is essential and medically necessary to alleviate their

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[11] Cf. Dist. Ct. Order at 17 (recognizing Gibson's case as presenting "an issue of first impression in this Circuit" because "there is no Fifth Circuit precedent holding that denying an inmate SRS to treat GID/GD amounts to an Eighth Amendment violation").

[12] WPATH is an international professional association with membership consisting of more than 600 physicians, psychologists, social scientists, and legal professionals dedicated to the treatment of gender identity disorders.

> gender dysphoria. For the latter group, relief from gender dysphoria cannot be achieved without surgery.

Exhibit 4 at 9-10.[13] This is in direct contrast with the Texas Department of Criminal Justice's ("TDCJ") policy on the "Treatment of Offenders with Intersex Conditions," which remains silent as to the availability of SRS and instead practically limits the available care to hormonal therapy, which is insufficient. ROA.69.10-ROA.69.11.

The district court below did not fully consider TDCJ's inadequacy under the WPATH Standards of Care because Gibson provided "no witness testimony or evidence from professionals in the field demonstrating that the WPATH-suggested treatment option of SRS is so universally accepted, that to provide some but not all of the WPATH-recommended treatment amounts to deliberate indifference."[14] ROA.69.19.

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[13] However, as this option is "often the last and the most considered step in treatment" per WPATH's Standards of Care, SRS would be medically permissible only after the patient receives two referrals from medical professionals. In such a referral, medical professionals must verify that the patient has a "persistent, well documented gender dysphoria" and state the "clinical rationale for support in the patient's request for surgery." WPATH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 27-8, 59 (2011) ("Standards of Care"). The rationale requirement is usually met by stating the inadequacy of less intrusive treatment options such as lifestyle treatment (such as wearing gender conforming clothes) and hormone therapy.

[14] The district court also appeared to charge the appellant with the burden of negating all of the institutional safety and other concerns associated with implementation of the treatment alternative. *Id*. Affirmative proof of such factual concerns should more properly fall on the institution in the first instance. See *Fields v. Smith*, 653 F.3D 550, 557 (7th Cir. 2011) (Defendant sought proof of their institutional concerns through their expert witness, of which, was rejected due to substantial risk of transgender violence even without treatment); see also,

Although Gibson, a *pro se* plaintiff below, did not directly present evidence of the WPATH Standard of Care's "universal[] acceptance," such universal acceptance by the medical community can readily be factually inferred and/or judicially noticed under FED. R. EVID. 201, especially at the summary judgment phase.[15] It is undisputed, in fact, that all reputable U.S. medical organizations have recognized WPATH as the proper standard of care. No professional organization of mental health care, including the APA, has prescribed its own standards of care for transgender individuals suffering from gender dysphoria; all instead all defer to WPATH, AM. PSYCHIATRIC ASS'N, REPORT OF THE APA TASK FORCE ON THE TREATMENT OF GENDER IDENTITY DISORDER 6 (2011). WPATH, thus, stands alone in this regard, as even the TDCJ has implicitly recognized by deciding to follow "some . . . of the WPATH-recommended treatment." Dist. Ct. Order at 19.

In addition, the American Medical Association articulated unequivocally that WPATH "is the leading international, inter-disciplinary professional organization devoted to the under-standing and treatment of gender identity disorders, and has established internationally accepted Standards of Care for providing medical

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Long v. Nix, 877 F. Supp. 1358, 1361 (S.D. Iowa 1995) (Defendant had acting warden testify in effort to prove the institutional concerns).

[15] Specifically, FED. R. EVID. 201(b)(2) states that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Furthermore, "The court may take judicial notice at any stage of the proceeding." FED. R. EVID. 201(d). *See also Lovelace v. Software Spectrum*, 78 F.3d 1015, 1018-19, n.1 (5th Cir. 1996) (A court may under FED. R. EVID. 201(b)(2) consider the contents of Securities Exchange Commission public disclosure documents not incorporated into the complaint).

treatment for people with [gender dysphoria] including…sex reassignment surgery, which are… recognized within the medical community to be the standard of care for treating people with [gender dysphoria].” AM. MED. ASS’N HOUSE OF DELEGATES, RESOLUTION 122 (A-08) REMOVING FINANCIAL BARRIERS TO CARE FOR TRANSGENDER PATIENTS 1 (2008), http://www.tgender.net/taw/ama_resolutions.pdf.

Similar support for the WPATH Standard of Care has been articulated by the Endocrine Society, the American Psychological Association, the American Academy of Family Physicians, the American Public Health Association, the National Association of Social Workers, the American College of Obstetrics and Gynecology, the American Society of Plastic Surgeons, and the World Health Organization. WPATH, *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A*. (Dec. 21, 2016), http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1352&pk_association_webpage=3947.

Finally, and most importantly, the National Commission on Corrective Health Care (“NCCHC”) cites the WPATH Standards of Care as “[t]he…accepted standards developed by professionals with expertise in transgender health,” that prison doctors must follow in treating prisoners suffering from gender dysphoria.

NCCHC, *Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings* (Apr. 2015), https://www.ncchc.org/ transgender-transsexual-and-gender-nonconforming-health-care.

Thus, not only was TDCJ's policy for transgender prisoners below the medical community's consensus to follow the WPATH's standards for the transgender community in general—given the NCCHC's adherence to WPATH standards, TDCJ's policy also fell short of the standards directed by the national medical commission to ensure the proper standard of care for prisoners.

This overwhelming consensus from the medical community has led naturally to the WPATH Standards of Care similarly being recognized by various U.S. courts, including the Fourth Circuit, as the preeminent authority for the care required for correctional inmates. *De'Lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013) (describing WPATH as "the generally accepted protocols" for treatment of gender dysphoria); *Norsworthy v. Beard*, 74 F. Supp. 3d 1100, 1104 (N.D. Cal. 2015) (describing WPATH as the "leading medical research and standards of care" and granting prisoner suffering from gender dysphoria a preliminary injunction for SRS based on the expert medical consensus from WPATH); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. 2012) (recognizing "the 'Standards of Care' promulgated by the [WPATH]" as "the course of treatment for Gender Identity Disorder generally followed in the community"); *Fields v. Smith*, 712 F. Supp. at

838 n.2 (E.D. Wis. 2010) (acknowledging WPATH's Standard of Care as "the worldwide acceptable protocol for treating GID"), aff'd 653 F.3d 550 (7th Cir. 2011).

B. By Not Deferring to the Clearly Established Medical Expert Consensus of WPATH's Standards of Care, the District Court Departed from Clear U.S. Supreme Court Precedent and Eighth Amendment Jurisprudence.

The district court erred in refusing to defer to the general consensus of the medical community that the WPATH standards of care govern the treatment of gender dysphoria prisoners. This refusal violates U.S. Supreme Court precedent and Eighth Amendment jurisprudence, especially for purposes of ruling on a motion for summary judgment when all reasonable factual inferences must be found in favor of the non-moving party.

In considering Eighth Amendment cases involving complex medical science, the Supreme Court has repeatedly deferred to the existing general consensus in the medical community. In *Akins v. Virginia* for instance, the Supreme Court determined that the state justification of retribution and deterrence for the execution of mentally retarded prisoners violated the Eighth Amendment. 536 U.S. 304, 319-20 (2002). The Court arrived at this conclusion after deferring to the general consensus of medical experts from the American Association on Mental Retardation and the American Psychiatric Association as to the clinical definition of mental retardation. *Id.*, at 318.

Again, when considering a matter of Eighth Amendment jurisprudence in *Roper v. Simmons*, the Supreme Court deferred to the consensus of the expert medical community. 543 U.S. 551, 569 (2005). In finding an Eighth Amendment violation for juvenile capital punishment, the Supreme Court relied on a consensus of "scientific and sociological studies" in holding that juveniles cannot reliably be considered to hold the same moral reprehensibility as adult worst offenders. *Id.* The District Court should have followed the same approach here.

III. TDCJ'S DENIAL OF SRS AS A POTENTIAL TREATMENT FOR INMATES SUFFERING FROM GD VIOLATES GIBSON'S EIGHTH AMENDMENT RIGHT TO MEDICAL CARE

Even if this court does not find error in the lower court's refusal to defer to the medical community's acceptance of the WPATH standards of care, this court should still reverse the District Court's decision on Eighth Amendment grounds. In the light most favorable to the plaintiff, the facts of this case demonstrate, at the very least, a deliberate indifference to Gibson's serious medical condition and risk of serious harm in the future.

The repeated denial of Gibson's requests for consideration for SRS constitutes deliberate indifference to her serious medical needs in light of her continuing symptoms. She has presented factual allegations which, when taken as true, as required in this appeal, demonstrate that her medical condition is serious and that the defendants are aware of the serious risk resulting from her symptoms.

The defendants have nonetheless continued to deny her requests for consideration for SRS based on Policy G 51.11's blanket ban rather than an individualized medical assessment. Gibson's allegations state a valid claim under the Eighth Amendment's protections against cruel and unusual punishment and should be resolved at trial.

It is a truism that under the Eighth Amendment, inmates are not entitled to ideal care or care of their choosing. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). Rather, the plaintiff must show that the prison officials were "aware of facts from which an inference of excessive risk to the prisoner's health or safety could be drawn" and that the prison officials "actually drew an inference that such potential for harm existed." *Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001). Under this standard, the plaintiff must show officials "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Id.* (citing *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985)).

Other circuits have found that the denial of consideration for SRS can constitute an Eighth Amendment violation, particularly where the denial is based on a policy creating a blanket ban on surgery without consideration of the inmate's specific circumstances. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039-40 (9th Cir. 2015) (finding a viable Eighth Amendment claim where California prison denied

her sex reassignment surgery based on a blanket ban or the recommendation of a physician's assistant without experience in transgender medicine); *De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013) (finding plaintiff's complaint sufficient to state a claim where she suffered from constant mental anguish and overwhelming urges to castrate herself); *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011) (finding a state policy prohibiting the use of state funds for hormone therapy and sex reassignment surgery was unconstitutional because it prohibited effective treatment for a serious medical condition).

In *De'lonta v. Johnson*, the Fourth Circuit reversed the lower court's dismissal where the plaintiff suffered from constant mental anguish and overwhelming urges to castrate herself despite having received hormone therapy, mental health consultations, and real-life experiences. *De'lonta,* 708 F.3d at 525. De'lonta had been repeatedly hospitalized following self-castration attempts and had repeatedly requested SRS under the WPATH Standards of Care for gender dysphoria. *De'lonta*, 708 F.3d at 522. The court held that, while the prison had provided some treatment for De'lonta's gender dysphoria, "it does not follow that they have provided the constitutionally mandated level of treatment" and that the plaintiff did not need to show "a total deprivation of care" for the court to find "a constitutional violation." *Id.* The court recognized that while hormone therapy and

real-life experiences can treat some cases of gender dysphoria, others require SRS when the symptoms persist. *Id.* at 523.

The state's argument that SRS was merely a preferred treatment failed to acknowledge the ongoing symptoms of De'lonta's underlying condition. *Id.* Although the requisite level of treatment cannot be determined solely by the inmate's choice, it must address the serious medical need causing the inmate's suffering. *Id.* The Fourth Circuit made a helpful comparison to painkillers prescribed for persistent pain, explaining that the prison could not deny an inmate consideration for surgery just because she had received one form of treatment if it had not alleviated her symptoms. *Id.* at 526.

Similarly, in *Rosati v. Igbinoso*, the Ninth Circuit found the plaintiff's complaint was sufficient to state a claim where she alleged the prison had denied her request for SRS in a California prison based either on a blanket ban or on the recommendation of a physician's assistant without any experience treating transgender patients. 791 F.3d at 1039-40. While the state argued there was no blanket ban, it also admitted that, "no California prisoner has ever received SRS," suggesting no request for the procedure would be approved. *Id.* at 1040. The court held that "even absent such a blanket ban, Rosati plausibly alleges her symptoms (including repeated efforts at self-castration) are so severe that prison officials recklessly disregarded an excessive risk to her health by denying SRS solely on the

recommendation of a physician's assistant with no experience in transgender medicine." *Id.* at 1040.

In *Fields v. Smith*, the Seventh Circuit affirmed the lower court's determination that a Wisconsin statute prohibiting the prescription of hormone therapy and SRS was unconstitutional on its face and as applied to the plaintiffs because it violated the Eighth Amendment. 653 F.3d 550. The Seventh Circuit affirmed the district court's holding that "plaintiffs suffered from a serious medical need, namely GID, and that defendants acted with deliberate indifference in that defendants knew of the serious medical need but refused to provide hormone therapy because of [the statute]." *Id.* at 555. The court cited testimony from doctors stating they could think of "no other state law or policy, besides [the Act in question], that prohibits prison doctors from providing inmates with medically necessary treatment" as evidence that hormone therapy and SRS are necessary medical treatments for inmates suffering from gender identity disorder. *Id.* at 554.

Similar to the Fourth Circuit, the Seventh Circuit stated that "[s]urely, had the Wisconsin legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional." *Id.* at 556. The court viewed both cancer and transsexualism as serious medical conditions requiring treatment and stated that the refusal to provide effective treatment "serves no valid penological

purpose and amounts to torture." *Id.* at 556. While the statute in question prohibited both hormone therapy and SRS, the court refused to separate the two treatments because the statute removed any consideration of either treatment for inmates suffering from gender identity disorder regardless of medical need. *Id.* at 559.

Not surprisingly in light of the ample authority delineated above, District Courts throughout the country have similarly found blanket bans on consideration for SRS as a treatment for gender dysphoria to be unconstitutional under the Eighth Amendment. *See Denegal v. Farrell*, No. 1:15-cv-01251, U.S. Dist. LEXIS 83373 (E.D. Cal. May 31, 2017) (refusing to order summary judgment where a transgender woman alleged vaginoplasty was medically necessary to treat her GID and was only available for cis women); *Shadle v. Frakes*, No. 8:16CV546, 2017 U.S. Dist. LEXIS 53731 (D. Neb. Apr. 7, 2017) (stating the alleged denial of hormone therapy and SRS was sufficient to overcome summary judgment); *Tate v. Wexford Health Source, Inc.*, No. 3:16-cv-00092 U.S. Dist. LEXIS 20391, at *7, *10 (S.D. Ill. Feb. 18, 2016) (holding summary judgment is inappropriate where the prison's policy prevents evaluation for SRS and fails to train personnel to treat transgender inmates); *Barrett v. Coplan*, 292 F. Supp. 281 (D.N.H. 2003) (finding the plaintiff's complaint was sufficient where a policy prohibited hormone therapy and SRS despite repeated self-castration and suicide attempts).

The federal government has now come in line solidly behind these Courts as well. Just two weeks ago, United States District Court Judge Marvin Garbis issued a preliminary injunction against implementation of the Department of Defense's new policies with respect to transgender members of the military, which included a directive aimed at future funding for Sex Reassignment Surgery. *See Stone v. Trump*, Civil Action No. MJG-17-2459 (D. Md. Nov. 21, 2017). In the course of addressing the claims before him, Judge Garbis noted that the federal "[d]efendants do not dispute that the military has a statutory obligation to provide medically-necessary treatment, nor that surgical procedures are sometimes necessary to treat transgender individuals who have been diagnosed with gender dysphoria." Memorandum And Order Re: Motions at 51.

And just a week before Judge Garbis' decision, the Pentagon approved SRS for an active-duty transgender member of the military. See "Pentagon Approves Gender-Reassignment Surgery for Service Member," *The New York Times* (Nov. 14, 2017). As Dana W. White, the chief Pentagon spokeswoman, explained: "the individual who underwent the surgery had already started a sex-reassignment course of treatment and that *the individual's doctor said the surgery was medically necessary*." *Id*.

Motions for summary judgment should be denied where the decision to deny access to SRS or other treatment was made with knowledge of the plaintiff's

ongoing attempts to harm herself. *See Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1117-18 (N.D. Cal. 2015) (denying summary judgment where the plaintiff alleged prison was "fully aware she faced a serious medical need for SRS and failed to address her ongoing anguish."); *Gulley-Fernandez v. Wisc. Dept. of Corr.*, No. 15-cv-995, 2015 U.S. Dist. LEXIS 161623 (E.D. Wis. Dec. 1, 2015) (denying summary judgment where inmate was prohibited from receiving hormone therapy, real life experiences, and SRS); *Konitzer v. Frank*, 711 F. Supp. 874, 908 (E.D. Wis. 2010) ("[A] reasonable jury could find that the defendants were deliberately indifferent to Konitzer's serious medical need where they failed to provide him with the second step of treatment . . . in the face of his repeated mutilations and suicide attempts. Clearly, what the defendants were doing to treat Konitzer was not working"). That should plainly be the result here as well. On this record, a reasonable factfinder certainly *could* find that TDCJ's policy rewriting the WPATH standards of care to eliminate the potentially medically necessary SRS treatment for those suffering the most from GD does indeed "shock the conscience."

Policy G 51.11 constitutes a blanket ban on SRS because it does not provide for evaluation for SRS when other treatment options do not address the patient's ongoing symptoms. Just as the Fourth and Seventh Circuits asserted, denying further treatment options is akin to providing ineffective treatment options for

other serious conditions, like cancer or physical ailments requiring surgery. *See De'Lonta*, 708 F.3d at 526; *Fields*, 653 F.3d at 556. Where other treatments fail to address the underlying issue and the inmate continues to suffer with symptoms of gender dysphoria, a failure to consider other treatment options constitutes deliberate indifference to the inmate's serious medical condition.

CONCLUSION

Sometimes cases are more difficult than they seem at first blush. Other times they are easier. Under proper analysis, Gibson's case falls into the latter category. "Surely, had the . . . legislature passed a law that DOC inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional." *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011). The substance of Gibson's situation is no different. TDJC Policy G 51.11 effectively provides that its transgender inmates must be treated only with part of the recognized standard of care for patients suffering from Gender Dysphoria. Under the Eighth Amendment, however, prison officials are not allowed to substitute their judgment for the medical profession on the scope of such treatment.

This is not a case of a prison authority deciding only to offer one of a variety of equally effective alternative medical cares. Quite to the contrary. As the WPATH Standards of Care and the many courts (and others) who have relied upon

those standards make clear, the consensus medical care for GD is a gradually increasing spectrum of care ending with SRS as the most severe potential medically necessary treatment for those patients for whom the prior nonsurgical treatments have proved unsuccessful. Thus, TDCJ's policy removes from the treatment equation the final alternative treatment potential for those GD patients who are suffering the most. SRS is the last treatment standing for these patients.

As demonstrated above, GD is a serious medical condition. A deadly serious one. This is not a routine prison medical case of poison ivy. It is rather a case of poison itself. And Policy G-51.11 does not reflect a prison policy of offering calomine lotion instead of cortisone cream for such routine medical care. Rather, it reflects a policy of withholding the only potential antidote for the poison of GD in those individuals whose suffering continues unabated by lesser treatments.

If a prisoner in Texas gets bitten by a poisonous rattlesnake, could the prison refuse to consider providing that prisoner with the anti-venom that might save the prisoner's life. Of course not. That would be precisely the type of "torture" that the Eighth Amendment prohibits. That is also precisely the type of potentially medically necessary care that is being withheld from consideration here. And as the facts of Gibson's suffering detailed in the record amply reveal, she is just as surely going through "torture" as well.

The Eighth Amendment demands better from prison officials, for Gibson and for all those who might follow in her footsteps. Our society's evolving standards of decency must require this Court to reverse the decision below. Gibson respectfully prays that it do so promptly.

Respectfully Submitted,

/s/ Stephen L. Braga

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CERTIFICATE OF SERVICE

The undersigned hereby certifies the Supplemental Brief of Appellant SCOTT LYNN GIBSON was electronically filed with the Fifth Circuit Court of Appeals on December 8, 2017. The Supplemental Brief of Appellant was served by ECF on December 8, 2017, on Counsel for Appellee. The addresses for the Appellee Counsel:

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United States Court of Appeals

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December 06, 2017

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No. 16-51148 Scott Gibson v. Bryan Collier, et al
USDC No. 6:15-CV-190

Dear Mr. Braga,

The following pertains to your brief electronically filed on 12/5/17.

We filed your brief. However, you must make the following corrections within the next 14 days.

Opposing counsel's briefing time continues to run.

You need to correct or add:

Record References: Although your brief contains citations to the record, they are not in proper form. Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record, whether in paper or electronic form, where the matter is found, using the record citation form as directed by the Clerk of Court. **The use of "id" is not permitted when citing to the record on appeal. (See 5TH CIR. R. 28.2.2)**

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USDC No. 6:15-CV-190

Dear Mr. Braga,

We have reviewed your electronically filed Appellants Supplemental Brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

The paper copies of your brief/record excerpts must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief/record excerpts filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief/record excerpts directly from your original file without any header.

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LYLE W. CAYCE, Clerk

By: _________________________
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cc:
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