No. 11-7482

In the United States Court of Appeals for the Fourth Circuit

OPHELIA AZRIEL DE'LONTA,

Appellant,

v.

GENE JOHNSON, Director of VDOC, et al.,

Appellees.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC. IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICI CURIAE*

The American Civil Liberties Union (ACLU) is the oldest organization dedicated to promoting and defending civil liberties in the United States. Two of the ACLU's areas of particular expertise are the rights of lesbian, gay, bisexual, and transgender individuals, and the rights of prisoners. The American Civil Liberties Union of Virginia (ACLU of Virginia) is an affiliate of the ACLU dedicated to promoting civil liberties in Virginia. Both the ACLU and the ACLU of Virginia have appeared frequently before this and other federal courts, as *amici* and as direct counsel.

This brief is filed pursuant to the Court's order dated December 9, 2011, granting *amici*'s motion for leave to file a brief and for extension of time to file. Pursuant to F.R.A.P. 29, no party's counsel authored the brief in whole or in part; and no party, party's counsel, or other person contributed money intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

There is no "sex reassignment surgery" exception to the Eighth Amendment. Although prisoners do not have a constitutional right to demand any particular medical procedure, they do have a constitutional right to receive treatment that is adequate to address their serious medical needs. There is an overwhelming medical consensus that for a small number of people with the most severe forms of

Gender Identity Disorder ("GID"), sex reassignment surgery is the only available treatment that can adequately address the severe pain and suffering associated with gender dysphoria or the compulsion to attempt self-castration. Accordingly, even if an inmate has been provided some other form of treatment for GID, prison officials still act with deliberate indifference when they refuse to provide the inmate with medically necessary sex reassignment surgery for reasons unrelated to his or her individual medical needs.

In 2003, this Court held that Ophelia De'lonta stated a valid Eighth Amendment claim when she alleged that prison officials acted with deliberate indifference to her serious medical needs by refusing to provide her with hormone therapy to treat her GID, even though De'lonta was already receiving some type of treatment in the form of antidepressants and counseling. *See De'lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003). In her new pro se complaint, De'lonta now alleges that, after more than six years of hormone therapy, her hormone treatments have been inadequate to address her severe gender dysphoria and her continued attempts at self-castration. She alleges that she has never been evaluated by a medical professional experienced with GID to determine whether sex reassignment surgery is necessary in her case. Instead, she alleges that she was categorically denied even an evaluation for sex reassignment surgery "not based on her unique circumstances or an individualized medical evaluation of De'lonta, but rather . . .

based on a choice made for political rather than medical reasons." (Compl. ¶ 43.) Without the benefit of any evidentiary record, the district court declared that De'lonta was merely disagreeing with medical personnel over what treatment was appropriate and dismissed her complaint sua sponte pursuant to the screening procedures of 28 U.S.C. § 1915A. *See De'lonta v. Johnson*, No. 7:11–cv–00257, 2011 WL 5157262 (W.D. Va. Oct. 28, 2011).

The district court's premature order of dismissal should be reversed. This Court does not have to decide at this juncture whether De'lonta is ultimately entitled to sex reassignment surgery or any other specific treatment. At the pleading stage, however, her allegations state a viable claim under the Eighth Amendment. *Cf. Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011), *petition for cert. filed* Nov. 1, 2011 (Nos. 10-2339, 10-2466) (invalidating statute that categorically banned prison doctors from treating GID with sex reassignment surgery); *Stevens v. Knowles*, No. CV 08–1674–AHM, 2011 WL 2075119, at *6 (C.D. Cal. May 25, 2011) (evidence showing that specialist in GID determined that sex reassignment surgery "is a necessary intervention in Plaintiff's case given the severity of her GID, her prior history of self-harm, and a long life sentence . . . could plausibly establish a deliberate indifference claim"); *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 195 (D. Mass. 2002) ("If psychotherapy, hormones, and possibly psychopharmacology are not sufficient to reduce the anguish caused by Kosilek's

gender identity disorder to the point that there is no longer a substantial risk of serious harm to him, sex reassignment surgery might be deemed medically necessary.").

Finally, because De'lonta's equal protection claim raises difficult and unsettled legal questions, judicial restraint counsels against reaching out to decide those questions in the context of a 1915A dismissal in which no factual record has been developed and the relevant issues have not been fully vetted through the traditional adversarial process. This Court should reverse the district court's sua sponte dismissal of De'lonta's complaint and allow De'lonta to conduct discovery and submit evidence in support of her claims.

ARGUMENT

I. Like Any Other Medical Treatment, Sex Reassignment Surgery May Not Be Denied With Deliberate Indifference To An Individual Inmate's Serious Medical Needs.

De'lonta has alleged that the denial of sex reassignment surgery in her particular circumstances violates the Eighth Amendment. "In order to establish that she has been subjected to cruel and unusual punishment, a prisoner must prove (1) that the deprivation of a basic human need was *objectively* sufficiently serious, and (2) that *subjectively* the officials acted with a sufficiently culpable state of mind." *De'lonta*, 330 F.3d at 634 (internal quotation marks, citations, and brackets omitted; emphasis in original).

With respect to the objective component of the test, the denied medical care must be necessary to adequately address an inmate's "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). "Because evolving precepts of humanity and personal dignity animate the Eighth Amendment, [the courts] are guided by contemporary standards of decency in determining whether an alleged harm is sufficiently deleterious to satisfy the objective component of an Eighth Amendment claim." *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995). In the context of psychological conditions, this Circuit has stated that medical treatment is generally required under the Eighth Amendment

> if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial.

Bowring v. Godwin, 551 F.2d 44, 47-48 (4th Cir. 1977). Because this test depends on the exercise of medical judgment, "[t]here is a constitutional violation when inmates with serious mental illnesses are effectively prevented from being diagnosed and treated by qualified professionals." *Chessher v. Hall*, 812 F.2d 1400 (Table), 1987 WL 36474, at *1 (4th Cir. Feb. 25, 1987) (unpublished).

With respect to the subjective component of the constitutional test, "an Eighth Amendment claim challenging the conditions of confinement is satisfied by a showing of deliberate indifference by prison officials." *De'lonta*, 330 F.3d at

634. "Deliberate indifference entails something more than mere negligence but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* (internal quotation marks omitted; alterations incorporated). Such "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment." *Estelle*, 429 U.S. at 104 (internal quotation marks and citations omitted).

As discussed below, sex reassignment surgery is not somehow exempt from these generally applicable constitutional requirements. As with any other medical procedure, an allegation that sex reassignment surgery has been withheld in deliberate indifference to an inmate's serious medical needs, including an allegation that she was denied adequate care based on a general policy rather than on individual medical judgment, states a valid claim under the Eighth Amendment.

A. In Some Circumstances, Sex Reassignment Surgery Is The Only Treatment That Can Adequately Address The Serious Medical Needs Of Inmates With GID.

Every Court of Appeals to decide the issue has held that the pain and suffering associated with inadequately treated GID constitutes a serious medical need that triggers the requirements of the Eighth Amendment. *See, e.g.*,

Meriwether v. Faulkner, 821 F.2d 408, 413 (7th Cir. 1987).[1] In addition, an inmate's compulsion to engage in self-castration or other physical harm as a result of inadequately treated GID constitutes an independent serious medical need requiring adequate treatment. *De'lonta*, 330 F.3d at 634; *see also Lee v. Downs*, 641 F.2d 1117, 1121 (4th Cir. 1981) ("[P]rison officials have a duty to protect prisoners from self-destruction or self-injury."); *see generally* George R. Brown, *Autocastration and Autopenectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder*, 12 Int'l J. of Transgenderism 31 (2010).

Whether sex reassignment surgery is necessary to address a particular inmate's serious medical needs adequately is a question of fact, which will likely be determined by expert testimony.[2] "[P]rison officials cannot avoid eighth

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[1] *Accord Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011); *Allard v. Gomez*, No. 00-16947, 9 Fed. App'x 793, 794 (9th Cir. June, 8, 2001) (unpublished); *Murray v. U.S. Bureau of Prisons*, 106 F.3d 401 (Table), 1997 WL 34677 at *3 (6th Cir. Jan. 28, 1997) (unpublished); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988). *See also Praylor v. Tex. Dep't of Crim. Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (assuming serious medical need without deciding the issue); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (same).

[2] *See Moore v. Duffy*, 255 F.3d 543, 545 (8th Cir. 2001) (holding that adequacy of medical treatment is a factual question often requiring expert opinion to resolve); *Greason v. Kemp*, 891 F.2d 829, 835 (11th Cir. 1990) ("[T]he conflict among the experts concerning the propriety of the psychiatrist's professional judgment calls had to be resolved by the jury."); *Montgomery v. Pinchak*, 294 F.3d 492, 504-05 (3d Cir. 2002) (inmate entitled to present expert testimony to support Eighth Amendment claim).

amendment liability for denying a prisoner treatment necessary to address a serious medical need simply by labeling the treatment 'elective.'" *Garrett v. Elko*, 120 F.3d 261 (table), 1997 WL 457667, at *3 (4th Cir. Aug. 12, 1997) (unpublished). "Otherwise, prison officials could evade effective judicial review of eighth amendment claims by using a label. Instead, proper eighth amendment inquiry should involve looking beyond labels and examining the substance of the claim presented." *Id.* (citations omitted).

Although sex reassignment surgery at one time may have been characterized as experimental or cosmetic, a robust medical consensus now exists that recognizes sex reassignment surgery as the standard and medically necessary treatment for *some* patients suffering from the most severe forms of GID. In a recent decision surveying the current state of the scientific literature, the U.S. Tax Court noted that "every psychiatric reference text that has been established as authoritative in this case endorses sex reassignment surgery as a treatment for GID in appropriate circumstances." *O'Donnabhain v. C.I.R.*, 134 T.C. 34, 65 (U.S. Tax Ct. 2010). Indeed, "[n]o psychiatric reference text has been brought to the Court's attention that fails to list, or rejects, the triadic therapy sequence or sex reassignment surgery as the accepted treatment regimen for GID." *Id.* at 65-66.

As noted in De'lonta's complaint, the World Professional Association for Transgender Health ("WPATH") (formerly known as the Harry Benjamin

International Gender Dysphoria Association), is the leading authority on the medically appropriate treatment for people with GID.[3] The WPATH standards of care instruct that:

> 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 nonconforming individuals find comfort with their gender identity, role, and expression without surgery, for many others surgery is essential and medically necessary to alleviate their gender dysphoria. For the latter group, relief from gender dysphoria cannot be achieved without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity.[4]

The WPATH standards of care, including the provisions concerning sex reassignment surgery, have also been endorsed by the National Commission on Correctional Health Care ("NCCHC"), which instructs that "[w]hen determined to be medically necessary for a particular inmate, hormone therapy should be initiated and sex reassignment surgery considered on a case-by-case basis."[5]

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[3] *See O'Donnabhain*, 134 T.C. at 66-67 (collecting cases) ("Several courts have accepted the Benjamin standards as representing the consensus of the medical profession regarding the appropriate treatment for GID or transsexualism.").

[4] World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th ed. (2001), at 54-55, available online at http://www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf. (hereafter "WPATH Standards of Care").

[5] National Commission on Correctional Health Care, *Position Statement: Transgender Health Care in Correctional Settings* (Oct. 18, 2009), available online at http://ncchc.org/resources/statements/transgender.html

Whether or not De'lonta is ultimately entitled to sex reassignment surgery based on her particular circumstances, her allegations that sex reassignment surgery is necessary to treat her serious medical needs are plausible on their face. She is therefore entitled to conduct discovery and submit evidence in support of her claims.

B. The Refusal To Provide Sex Reassignment Surgery May Constitute Deliberate Indifference Even If The Inmate Receives Other Forms Of Treatment For GID.

The district court dismissed De'lonta's pro se complaint based primarily on the assumption that because De'lonta is receiving *some* form of treatment for GID, she cannot claim that denial of sex reassignment surgery constitutes deliberate indifference. According to the district court, De'lonta cannot establish deliberate indifference because "[t]he only treatment described by the Standards of Care that she has not yet received is the sex reassignment surgery" and she therefore "does not present a situation where there is a total failure to give medical attention or a policy prohibiting her treatment for GID." *De'lonta*, 2011 WL 5157262, at *5, *6.

The district court's analysis is strikingly similar to the analysis it used ten years earlier when it dismissed De'lonta's earlier lawsuit. As this Court recounted in its 2003 decision: "In dismissing De'lonta's suit, the district court incorrectly determined, based on the limited record before it, that the suit was nothing more than a challenge to the medical judgment of VDOC doctors." *De'lonta*, 330 F.3d

at 634. In that previous litigation, the district court reasoned that "the record was clear that De'lonta was receiving some treatment" in the form of antidepressants and therefore "the gravamen of De'lonta's claim was simply a disagreement with the medical judgment concerning what treatment was appropriate." *Id.* at 635.

The district court's reasoning was wrong ten years ago, and it is still wrong today. As this Court previously held, the relevant question is not whether the prison officials provided *some form* of treatment, but instead whether she was provided with "constitutionally adequate treatment." *Id.* at 636; *accord Simkus v. Granger*, 940 F.2d 653 (Table), 1991 WL 138483, at *2 (4th Cir. July 30, 1991) (unpublished) ("The fact that an inmate has received some care for his condition does not preclude recovery under the eighth amendment.").

Courts have routinely held, in a variety of contexts, that even though prisoners have no abstract constitutional right to any particular form of treatment, the treatment that is provided must be adequate to address the serious medical needs of the inmate. Prisoner officials thus act with deliberate indifference if they adopt an "easier and less efficacious treatment" that does not adequately address a prisoner's serious medical needs. *Estelle*, 429 U.S. at 104 n.10 (quoting *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974).[6] The responsibility to provide adequate

[6] *See also Arnett v. Webster*, 658 F.3d 742, 752 (7th Cir. 2011) (pain medication insufficient to address inmate's serious medical needs because inmate was entitled to "medication to treat, not simply mask, his condition"); *Langford v. Norris*, 614

treatment means that a prison may not deny access to certain types of treatments based on a blanket policy that does not allow for medical judgment based on an individual patient's particular circumstances.[7] The responsibility to provide adequate treatment also means that prison officials may not deny necessary treatment based on inappropriate considerations such as cost, politics, or administrative convenience.[8] Moreover, even if prison officials act reasonably in

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F.3d 445, 460 (8th Cir. 2010) (explaining that "a total deprivation of care is not a necessary condition for finding a constitutional violation" and that "a doctor's decision to take an easier and less efficacious course of treatment" constitutes deliberate indifference); *Jones v. Muskegon County*, 625 F.3d 935, 944 (6th Cir. 2010) ("[P]rison officials may not entirely insulate themselves from liability under § 1983 simply by providing some measure of treatment." (internal quotation marks and citations omitted)).

[7] *See, e.g.*, *Monmouth County. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 & n. 32 (3d Cir. 1987) (blanket policy of denying elective abortions and failing to consider factors relevant to each particular inmate unconstitutionally "denie[d] to a class of inmates the type of individualized treatment normally associated with the provision of adequate medical care"); *see also Roe v. Elyea*, 631 F.3d 843, 860-61 (7th Cir. 2011) (blanket policy requiring that all inmates with hepatitis C must have at least two years remaining in their sentence to qualify for antiviral therapy); *Johnson v. Wright*, 412 F.3d 398, 404-06 (2d Cir. 2005) (blanket policy preventing the use of Rebetron therapy to treat Hepatitis C); *Chance v. Spears*, No. 2:08-1156, 2009 WL 3768736, at *5 (S.D. W. Va. Nov. 10, 2009) (blanket policy prohibiting MRI testing).

[8] *See Hunt v. Sandhir, M.D.*, 295 Fed. App'x 584, 586, 2008 WL 4442159, at *1 (4th Cir. Sept. 29, 2008) (unpublished) (deliberate indifference alleged where treatment "was delayed based on non-medical reasons"); *cf. Bowring*, 551 F.2d at 47-48 (explaining that although costs may sometimes be considered "the essential test is one of medical necessity"); *infra*, note 13, and accompanying text; *see also Roe*, 631 F.3d at 860 (medical protocol violated the Eighth Amendment when rule "was motivated by administrative convenience rather than patient welfare");

adopting a particular course of treatment at the outset, they must reevaluate the course of treatment if the inmate's condition worsens or the treatment proves inadequate.[9]

These generally applicable principles apply just as strongly in the context of treatments for GID. As with any other serious medical condition, prison officials may not deny adequate treatment for GID based on a blanket policy. Indeed, this Court already made clear in De'lonta's earlier challenge based on denial of hormone therapy that De'lonta stated a valid Eighth Amendment claim by alleging that the "refusal to provide hormone treatment to De'lonta was based solely on the Policy rather than on a medical judgment concerning De'lonta's specific

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Chance v. Armstrong, 143 F.3d 698, 704 (2d Cir. 1998) (plaintiff stated claim by alleging that dentists "recommended extraction not on the basis of their medical views, but because of monetary incentives").

[9] *See Cooper v. Dyke*, 814 F.2d 941, 945 (4th Cir. 1987) ("Continued complaints by Cooper, or the manifest symptoms described by Dr. Theodore, would have put defendants on notice that additional care was required."); *accord Gonzalez v. Feinerman*, -- F.3d --, 2011 WL 6076193, at *3 (7th Cir. Dec. 2, 2011) (even though the initial course of treatment for hernia was constitutionally adequate for the first five years, prison doctors acted with deliberate indifference when they "never altered their response to his hernia as the condition and associated pain worsened over time"); *Hathaway v. Coughlin*, 37 F.3d 63, 68 (2d Cir. 1994) (even though defendant initially referred inmate to a specialist, prison official acted with deliberate indifference by not referring plaintiff for a reevaluation when subsequent complaints showed that the initial "course of treatment was largely ineffective").

circumstances." *See De'lonta*, 330 F.3d at 635.[10] And, as with any other medical condition, prisoners with GID cannot be denied treatment because of political considerations or other factors not related to their medical needs.[11]

The fact that De'lonta's current challenge relates to the denial of sex reassignment surgery instead of hormone therapy does not change the underlying analysis. De'lonta is entitled to treatment based on her specific circumstances and individual medical needs. Although it may have been reasonable for prison officials initially to limit De'lonta's treatment to hormone therapy, De'lonta has alleged that -- after six years of treatment -- hormone therapy has proven insufficient to address her serious medical needs and prevent her compulsion to mutilate herself through self-castration. *Cf. Cooper*, 814 F.2d at 945; *Gonzalez*, -- F.3d at --, 2011 WL 6076193, at *3. De'lonta further alleges that a GID specialist would conclude that she requires sex reassignment surgery, but prison officials

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[10] That decision accords with the rulings of other federal courts across the country. *See, e.g.*, *Allard*, 9 Fed. App'x at 795, 2001 WL 638413, at *1; *Houston v. Trella*, No. 04-1393, 2006 WL 2772748, at *8 (D.N.J. Sept. 25, 2006); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003); *Kosilek*, 221 F. Supp. 2d. at 193.

[11] *Barrett*, 292 F. Supp. 2d at 286 ("[T]he Eighth Amendment does not permit necessary medical care to be denied to a prisoner because the care is expensive or because it might be controversial or unpopular."); *Kosilek*, 221 F. Supp. 2d. at 182 ("Nor would it be reasonable for a prison official to fail to provide adequate medical care to a prisoner because it might be unpopular or controversial to do so.").

have refused to allow her to be evaluated for surgery by a qualified specialist. *Cf. Chessher*, 1987 WL 36474, at *1 ("There is a constitutional violation when inmates with serious mental illnesses are effectively prevented from being diagnosed and treated by qualified professionals."). The WPATH standards of care specifically indicate that some people with severe GID cannot be adequately treated with hormone therapy alone and will require sex reassignment surgery, *see* WPATH Standards of Care at 54-55, but De'lonta alleges that defendants have categorically refused to have her evaluated by a specialist for such surgery "based on a choice made for political rather than medical reasons." (Compl. ¶ 43.) These allegations state a valid claim under the Eighth Amendment. *Cf. Fields*, 653 F.3d at 556; *Stevens*, 2011 WL 2075119, at *6; *Kosilek*, 221 F. Supp. 2d at 195.

C. The Seventh Circuit Has Clarified That The Portions Of Its Decision In *Maggert* On Which The District Court Relied Were Dicta And Empirically Unsupported Speculation.

Instead of relying on these generally applicable principles or on this Court's 2003 decision in *De'lonta*, the district court dismissed De'lonta's pro se complaint by relying primarily on portions of the Seventh Circuit's decision in *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997), that the Seventh's Circuit's recent decision in *Fields* has disavowed. In dicta not tied to any factual record, the *Maggert* panel speculated that the Eighth Amendment does not require prisons to provide sex reassignment surgery because the procedure is an esoteric and costly treatment.

Nearly 15 years later, the *Fields* court explained that the "discussion of hormone therapy and sex reassignment surgery . . . [in *Maggert*] was based on certain empirical assumptions -- that the cost of these treatments is high and that adequate alternatives exist." *Fields*, 653 F.3d at 555. Those empirical assumptions were put "to the test" in *Fields* during a lengthy bench trial, which revealed that hormone therapy and sex reassignment surgery are in fact not expensive and that other adequate alternative remedies do not in fact exist for some patients. *Id.*

The evidence produced at trial in *Fields* showed that, contrary to the *Maggert* court's speculation that sex reassignment surgery would cost approximately $100,000, sex reassignment surgery is in fact less expensive that many surgical procedures that are routinely provided to inmates for other medical conditions:

> While sex reassignment surgery is more expensive than hormone therapy, DOC provides surgeries of equal or greater cost, such as organ transplant and open heart surgical procedures, when medically necessary. Genital sex reassignment surgery costs approximately $20,000. . . . In 2005, the defendants paid $37,244.09 for one coronary bypass surgery and $32,897.00 for one kidney transplant surgery.

Fields v. Smith, 712 F. Supp. 2d 830, 837 (E.D. Wis. 2010); *see also Kosilek*, 221 F. Supp. 2d at 192 ("There is no showing that providing sex reassignment surgery

for Kosilek would be more expensive than the treatments provided to some inmates with cancer, kidney failure, or any other serious medical condition.”).[12]

Moreover, even if sex reassignment surgery were more expensive than other procedures, prison officials cannot deny treatment simply because it is expensive. To be sure, this Court noted in *Bowring* that “[t]he right to treatment is, of course, limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable.” *Bowring*, 551 F.2d at 47-48. But in context, this Court was explaining that prisoners cannot demand a more expensive treatment if a cheaper one exists that adequately addresses the inmate’s serious medical needs. *See United States v. Clawson*, 650 F.3d 530, 538 (4th Cir. 2011) (citing *Bowring* for the proposition that “[a]lthough an inmate certainly has a right to necessary medical treatment, he does not have a right to demand that the opinion of his pre-imprisonment doctor be permitted to override the reasonable professional judgment

[12] To the extent that the *Maggert* court was concerned about opening the floodgates to requests for sex reassignment surgery, it is also important to emphasize that GID is a rare medical condition and that the extremely severe cases requiring sex reassignment surgery are rarer still. According to the available studies, the prevalence of people with GID is estimated to be between 1:11,900 and 1:45,000 for biological males with female gender identities. *See* WPATH Standards of Care at 7. Only a small portion of these people experience gender dysphoria so extreme that it can be alleviated only by sex reassignment surgery. And surgery can be authorized only after a careful screening process that can take years to complete. *See id.* at 54-64, 104-06.

of the prison's medical team"); *see also Chance*, 2009 WL 3768736, at *5 (applying *Bowring*). Cost considerations can thus be used when selecting between different adequate treatments, but they cannot be used to deny access to the only treatment that is capable of adequately addressing the medical needs of a particular inmate.[13]

In short, if the facts show that sex reassignment surgery is the only treatment that can adequately address a particular prisoner's serious medical needs, then -- as with any other medically necessary surgery -- prison officials have a constitutional obligation to provide that inmate with the medically necessary care he or she requires.

II. De'lonta's Pro Se Complaint States A Claim That She Was Categorically Denied Sex Reassignment Surgery For Non-Medical Reasons And In Deliberate Indifference To Her Serious Medical Needs.

As explained in Part I, denial of medical treatment may amount to deliberate indifference in violation of the Eighth Amendment when prison officials refuse to consider a particular treatment based on a blanket policy or other nonmedical factors, or when they persist in a course of treatment that they know to be ineffective. De'lonta's complaint alleges that the defendants violated her

[13] *See, e.g.*, *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) ("Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates"); *Finney v. Ark. Bd. of Corr.*, 505 F.2d 194, 202 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974).

constitutional rights in both respects. The district court's finding to the contrary resulted from its failure to construe all allegations in the light most favorable to the plaintiff and to construe a pro se complaint liberally.

When considering dismissal for failure to state a claim, a court must "construe the factual allegations in the light most favorable to the plaintiff." *Schatz v. Rosenberg,* 943 F.2d 485, 489 (4th Cir. 1991) (internal quotation marks and citation omitted). Moreover, pro se complaints, "'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers....'" *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). "Here, '[l]iberal construction of the pleading is particularly appropriate' because it 'is a pro se complaint raising civil rights issues.'" *Brown v. N.C. Dep't of Corr.*, 612 F.3d 720, 722 (4th Cir. 2010) (quoting *Loe v. Armistead,* 582 F.2d 1291, 1295 (4th Cir. 1978)). Moreover, the obligations to interpret a complaint favorably to the defendant and to construe pro se complaints liberally persist even after the articulation of more stringent pleading standards in *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). *See Brown*, 612 F.3d at 722. *See also Hebbe v. Pliler*, 627 F.3d 338, 342 n.7 (9th Cir. 2010) (collecting similar cases from other circuits).

Brown exemplifies how courts should read pro se complaints in the deliberate indifference context. There, the plaintiff alleged that prison officials

sent him to the "Housing Block" to retrieve supplies even though they knew that an inmate in the Housing Block had a grudge against him. The plaintiff was then severely beaten by that inmate. *Id.* The state contended that the plaintiff had not stated a claim as to one of the defendants, Officer Simms, because "no reasonable person could infer from the complaint that Officer Simms knew of the assault in time to intervene, yet deliberately and indifferently failed to do so." *Id.* at 723. This Court disagreed, holding that based on the plaintiff's allegation that Officer Sims was in "the Block" at the time of the assault, "[a] reasonable person could infer . . . that Officer Simms was aware of the attack, and that his failure to intervene represented deliberate indifference to a serious risk of harm." *Id.* Similarly, the Court held that the plaintiff's allegation that "staff members" were aware of the other inmate's grudge against him, along with the fact that only three officers were named as defendants, was sufficient to allow the Court to "assume that Brown was naming Officer Simms when he described the staff members who were deliberately indifferent to the serious harm posed by his fellow inmate." *Id.* at 723-24. Thus construed, the complaint stated a claim against Officer Sims. *Id.*

In this case, although the district court paid lip service to its obligation to construe the complaint liberally, *De'lonta*, 2011 WL 5157262 at *4, it failed to do so in practice. First, and most glaringly, the district court insisted on reading the complaint to allege solely that the defendants failed to provide the treatment that

De'lonta wanted, as though this case presents something on the order of a complaint from a patient who prefers Tylenol to Advil. Second, the district court ignored De'lonta's allegations that the decision to deny her an evaluation for sex reassignment surgery was made by prison officials with no training or expertise in treating GID, not by the outside specialist that should have been responsible for De'lonta's treatment plan.

Far from alleging a simple preference for one adequate treatment over another, De'lonta's complaint alleges, in the language of a pro se prisoner, that the defendants have refused to treat her GID in a manner that adequately addresses her serous medical needs, including her continued risk of serious bodily harm through compulsions to engage in self-castration. Specifically, De'lonta makes the following allegations:

- Her GID has caused her "to suffer constant mental anguish" and "on several occasions, to attempt to castrate herself." (Compl. ¶¶ 23-24.)

- De'lonta is "not receiving effective GID treatment [,which] causes [her] to mutilate [her] own genitalia, essentially performing [her] own makeshift sex reassignment surgery." "Instead of receiving appropriate medical treatment for [her] GID, [she] received a [disciplinary] charge, which do[es] not do anything for [her] uncontrollable compulsions to self-surgery." (Compl. Ex. E.)

- "The failure to provide medical treatment to her will lead to serious bodily harm, untreated mental illness, depression, self-mutilation, and suicide." (Compl. ¶ 32)

- According to the established Standards of Care for GID, for some patients with severe forms of GID, sex reassignment surgery "is medically indicated and medically necessary." (Compl. ¶ 35.)

- "Under [the] Standards of Care, De'lonta should have been evaluated for sex reassignment surgery after a one year real-life test. At the conclusion of one year on hormones, nothing occurred." (Compl. ¶ 38.)

- "De'lonta has written each defendant personally, expressing her fear of self-castration and noting that she will remain at serious risk of harm if treatment is not forthcoming." (Compl. ¶ 44.)

De'lonta also alleges that even though defendants had agreed to consult an outside specialist in GID to form a treatment plan for De'lonta, defendants have refused to allow that specialist to evaluate De'lonta to determine whether sex reassignment surgery is medically necessary for her. According to her allegations, the decision to refuse evaluation for sex reassignment surgery was made by Dr. Cary and Dr. Hulbert, in-house medical providers who lack expertise in treating GID, and not by Dr. Codispoti, who is the outside specialist for GID treatment. Specifically, De'lonta alleges:

- "Mental health services are provided by VADOC as well [as] under contract with Dr. Codispoti, Gender Identity Specialist." (Compl. ¶ 36.)

- "Under [the] Standards of Care, De'lonta should have been evaluated for sex reassignment surgery after a one year real-life test. At the conclusion of one year on hormones, nothing occurred. De'lonta's mental health professional, Chief Psychiatrist Meredith R. Cary, and also Mental Health Director Dr. Robin L. Hulbert, were unwilling to give any information regarding her treatment plan, despite De'lonta's persistent requests." (Compl. ¶ 38.)

- "Despite repeated requests from De'lonta and intervention by her counsel, De'lonta has not received an evaluation [by Dr. Codispoti] concerning readiness for sex reassignment surgery." (Compl. ¶ 39.)

- In refusing to allow her to be evaluated for sex reassignment surgery, defendants have denied De'lonta "the very care recommended by the VADOC retained experts." (Compl. ¶ 40.)

- When De'lonta asked her treating psychologist, Lisa Lang, why she had not been evaluated for sex reassignment surgery, Lang responded: "Please submit your request to Dr. Carey [sic]. Approval or disapproval of your request is beyond the scope of this institution's authority." (Compl. Ex A at 3.)

- In response to De'lonta's letters to Dr. Cary and Dr. Hubert requesting an evaluation for sex reassignment surgery, Dr. Cary did not explain the basis for not evaluating De'lonta for surgery, but merely wrote, "in regards to gender reassignment surgery, I would request that you continue to work with Ms. Lang in individual therapy at this time." (Compl. Ex. C.)

- "The defendants' treatment decisions regarding De'lonta were not based on her unique circumstances or an individualized medical evaluation of De'lonta, but rather were based on a choice made for political rather than medical reasons. " (Compl. ¶ 43.)

Construed liberally and in the light most favorable to the plaintiff, these allegations establish that (1) the defendants are aware that their current course of treatment is not adequate to treat De'lonta's GID, and, in particular, her compulsion to self-mutilate, yet refuse even to consider an additional treatment that has been proven effective; and (2) the defendants' refusal to consider sex reassignment surgery is not based on medical reasons from a professional qualified to treat GID.

In reaching a contrary conclusion, the district court ignored pertinent allegations and failed to apply the established principles regarding pro se complaints described above. For example, the district court stated that De'lonta's allegation that defendants are "persistently denying her treatment," is contradicted by her admissions that she currently receives mental health consultations and hormone treatment, and "is permitted to dress and live as a woman to the extent possible in a correctional facility." *De'lonta*, 2011 WL 5157262 at *5. But the district court fails to acknowledge that what De'lonta alleges is a refusal of *effective* treatment. The allegations demonstrate that despite the current treatment, De'lonta continues to suffer severe mental anguish and the compulsion to self-mutilate.

The district court further appears take Dr. Cary's letter to De'lonta, quoted above, as proof that the medical staff has fully considered, and legitimately rejected, De'lonta's request for sex reassignment surgery. *Id.* at *2. But Dr. Cary's spare "request" that De'lonta "continue to work with Ms. Lang in individual therapy" does not warrant such an inference, and certainly not when read in the light most favorable to the plaintiff. Indeed, such an inference ignores the allegations that an evaluation for surgery was "recommended by the VADOC retained experts," but that the defendants refuse have De'lonta evaluated or to provide her with any medically based reasons for their refusal. Indeed, Dr. Cary

does not indicate that Dr. Codispoti or any other GID specialist had any role in making the decision to refuse to allow her to be evaluated for sex reassignment surgery. Far from undermining De'lonta's claims, Dr. Cary's refusal to provide any medical explanation for the refusal to have De'lonta evaluated gives rise to a reasonable inference that no medical explanation exists.

In sum, the district court did not consider all of the allegations of the complaint, did not read the complaint in the light most favorable to the plaintiff, and did not adopt a liberal reading of the complaint. Under a proper reading of the complaint, it states a claim under the Eighth Amendment.

III. This Court Should Refrain From Prematurely Reaching De'lonta's Equal Protection Claim.

This Court should refrain from reaching the merits of De'lonta's equal protection claim in the context of a 1915A dismissal. De'lonta argues that "[p]re-operative male to female transsexuals should be treated as women and housed accordingly" in women's prison facilities. (Compl. ¶ 57.) In addition to the legal and factual issues raised by the DC Trans Coalition as *amicus* -- De'lonta's equal protection claim raises difficult questions about whether this Court's decision in *Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002), remains good law after the Supreme Court's decision in *Johnson v. California*, 543 U.S. 499 (2005). These legal questions should be resolved with the benefit of a developed factual record and adversarial briefing from both parties.

In *Veney*, this Court held that an equal protection challenge to a prison's use of sex-based classifications should be judged under the deferential standard announced in *Turner v. Safley*, 482 U.S. 78 (1987), which requires only a reasonable relationship between the prison policy and a valid penological interest. *See Veney*, 293 F.3d at 734. But in *Johnson*, the Supreme Court subsequently clarified that a prison's use of explicit racial classifications must be subjected to strict scrutiny instead of the deferential *Turner* standard. *Johnson*, 543 U.S. at 511.

Although *Johnson* dealt with racial classifications, there are strong arguments that its reasoning extends to sex-based classifications as well. Indeed, at least two circuits have already held that sex-based classifications in prison must be judged under intermediate scrutiny instead of *Turner*. *See Pitts v. Thornburgh*, 866 F.2d 1450, 1453-55 (D.C. Cir. 1989); *Roubideaux v. N.D. Dep't of Corr. & Rehabilitation*, 570 F.3d 966, 974-75 (8th Cir. 2009). These courts ultimately upheld the challenged classifications, but they did so after applying the intermediate scrutiny test and at the summary judgment stage after a factual record had been developed. *See Pitts*, 866 F.2d at 1463; *Roubideaux*, 570 F.3d at 974-75. As these cases demonstrate, if De'lonta's claim is subject to intermediate scrutiny, then it cannot be decided until discovery is complete and all the evidence is submitted.

In any event, this Court does not have to decide the standard of scrutiny at this juncture because additional factual development would be appropriate even if the *Turner* standard did apply. *Cf. Wolf v. Ashcroft*, 297 F.3d 305, 308-09 (3d Cir. 2002) (explaining that even under *Turner* the reasonableness of some prison regulations cannot be determined without factual development). For example, without the benefit of any factual record, the district court speculated that moving De'lonta to a female facility would open the floodgates for "legal claims from nearly all other male inmates requesting housing in a female prison" and would lead to an "incredibly costly and astonishingly ineffective correctional system." *De'lonta*, 2011 WL 5157262, at *7. This speculation is not supported by any record evidence or by common sense. De'lonta's equal protection claim implicates only a small subclass of prisoners who have been diagnosed with GID and are undergoing hormonal treatment to address that serious medical condition. Such prisoners can obviously be distinguished from "all other male inmates," and there is no basis to think that transferring this handful of inmates would be costly or administratively difficult. The district court's dubious speculation demonstrates the need for resolving De'lonta's claim against the backdrop of a factual record and developed briefing from both parties.

For all these reasons, judicial restraint counsels against unnecessarily deciding these open questions in the context of a 1915A dismissal. In these

circumstances, the more prudent approach would be to vacate the district court's decision and allow both claims to proceed to discovery. If it ultimately becomes necessary for this Court to resolve her equal protection claim, the Court would then be able to decide the relevant questions with the benefit of a fuller evidentiary record and developed legal arguments.

CONCLUSION

For all these reasons, this Court should reverse the district court's sua sponte dismissal of De'lonta's claims.

Respectfully submitted,

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This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because this brief contains 6,923 words, excluding the parts of the brief exempted by Fed. R. App. P. 2(a)(7)(B)(iii).

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I hereby certify that on this 6th day of January, 2012, the foregoing document was served on all parties or their counsel of record using the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy by U.S. Mail to:

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