Case Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, AKA MASON EDMO,
Plaintiff-Appellee,

v.

IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellants
and
CORIZON, INC., et al.
Defendants-Appellants,

On Appeal from Orders of the United States District Court
For the District of Idaho
(No. 1:17-cv-00151-BLW)

BRIEF OF *AMICUS CURIAE* JODY L. HERMAN IN SUPPORT OF APPELLEE ADREE EDMO AND URGING AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Jody L. Herman is a Scholar of Public Policy at the Williams Institute at UCLA School of Law. Her scholarship examines the fiscal impacts of discrimination against transgender people, employer-provided health benefits coverage for gender transition, the development of questions to identify gender minorities on population-based surveys, and minority stress, health, and suicidality among transgender people. She leads the Williams Institute's research on gender identity. The Williams Institute is an academic center dedicated to conducting rigorous and independent research on sexual orientation and gender identity issues.

Herman coauthored the groundbreaking report *Injustice at Every Turn*, based on the National Transgender Discrimination Survey ("NTDS"). She also served as Co-Principal Investigator for the follow-up to the NTDS: the 2015 U.S. Transgender Survey, which had almost 28,000 respondents and is the largest survey to date of transgender adults in the United States. She co-authored *The Report of the 2015 U.S. Transgender Survey*, which describes findings from this survey. She is also the author of *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans*, a study that describes the experiences of 34 private employers who provide transition-related coverage in their health benefits plans. Many national and international media outlets routinely feature her work.

As a scholar who specializes in interpreting healthcare data for transgender people, Herman has a substantial interest in this matter. She believes that her academic experience and the research and data presented herein will contextualize the present dispute within the larger policy debate about the cost of healthcare for transgender prisoners in Idaho.[1]

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the *amicus curiae* or her counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5).

I. BACKGROUND

As described in detail in the district court's order, Appellee was diagnosed with gender dysphoria while serving a prison term in Idaho.[2] Despite meeting the diagnostic criteria for receiving gender confirmation surgery ("GCS"),[3] Appellee was denied this care by Defendants-Appellants.[4] *Id.* at 22-25.

Just as in the healthcare debate over transgender troops serving in the U.S. military,[5] cost appears to be an outsized factor motivating Appellants' refusal to

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[2] Findings of Fact, Conclusions of Law, and Order, *Edmo v. Idaho Dept., of Correction, et al.*, Case No. 1:17-cv-00151-BLW (D. Idaho 2018), ECF No. 149 ("Order") at 18-22.

[3] Throughout this brief, *amicus* uses the term "GCS" to refer to genital gender confirmation surgeries – the focus of the district court's order on appeal. *See* Order at 45; Evidentiary Hearing Transcript, *Edmo v. Idaho Dept., of Correction, et al.*, Case No. 1:17-cv-00151-BLW (D. Idaho), ECF Nos. 137-39 ("Tr.") at 200:16-20 (Appellee testified that she expected the results of gender confirmation surgery to be "hav[ing] the complete production of testosterone stopped and ultimately [her] genitals turned into a vagina."); *see also id.* at 73:9-13; *id.* at 319:22-320:1.

[4] Idaho Department of Corrections ("IDOC"), Henry Atencio; Jeff Zmuda; Howard Keith Yordy; Richard Craig; Rona Siegert; Corizon, Inc. ("Corizon"); Scott Eliason; Murray Young; and Catherine Whinnery (collectively, hereinafter "Appellants").

[5] *See, e.g.*, Paul Sonne and Ann E. Marimow, *Military to Begin Enforcing Trump's Restrictions on Transgender Troops*, The Washington Post, Mar. 13, 2019, https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html?utm_term=.b82bbc5d35b2 (quoting a July 2017 tweet from President Trump, announcing a ban on transgender individuals serving in the military because "[o]ur military . . . cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail"); Samantha Freeman and Anika Jagasia, *Cost Analysis of Transgender*

treat Appellee's gender dysphoria with surgery. Appellants' out-of-court statements, contract documents, and statements made in the context of prior proceedings demonstrate that healthcare cost considerations informed Appellants' decision to deny Appellee medical treatment, and have driven such decisions in the past. For example, in a press release announcing Appellants' decision to appeal the district court's ruling, Idaho Governor Brad Little stated that "[t]he hard working taxpayers of Idaho should not be forced to pay for a prisoner's gender reassignment surgery . . . . We cannot divert critical public dollars away from our focus on keeping the public safe and rehabilitating offenders."[6] In its 2013 Request for Proposal seeking a healthcare provider for its prison population, one of the primary objectives listed by IDOC was that the contractor "[o]perate a comprehensive healthcare delivery system that enables IDOC to control and predict the cost of Offender healthcare."[7] And, in the context of enforcing an

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Healthcare in the Military, Wharton Public Policy Initiative, May 23, 2018, https://publicpolicy.wharton.upenn.edu/live/news/2479-cost-analysis-of-transgender-healthcare-in-the.

[6] Press Release, Office of the Governor of Idaho, *Idaho Appeals Ruling in Transgender Inmate Surgery Case*, Jan. 9, 2019, https://gov.idaho.gov/pressrelease/idaho-appeals-ruling-in-transgender-inmate-surgery-case/.

[7] State of Idaho Department of Administration for the Department of Correction, *Request for Proposal (RFP): Healthcare Services for Adult Idaho Offenders*, July 30, 2013, at 8, https://www.muckrock.com/foi/idaho-228/corizon-health-contracts-idaho-department-of-corrections-19401/#file-48410.

injunction in a long running federal class action lawsuit brought by Idaho inmates, the District Court of Idaho found in 2007 that the clinical supervisor for the Idaho State Corrections Institute instructed clinicians "to not diagnose inmates with gender identity disorder . . . so that [the prison] would not have to pay for gender identity disorder treatment."[8]

As discussed in detail below, Appellants' concern about the cost of providing gender confirmation surgery cannot justify denying Appellee GCS. Budgetary concerns do not justify continuing violations of the Eighth Amendment. Moreover, Appellants' concerns about cost are unjustified. As set forth below, *amicus*'s cost projections demonstrate that any cost for offering GCS to covered inmates would be negligible.

II. SUMMARY OF ARGUMENT

The cost of providing treatment for gender dysphoria to Appellee and to similarly situated transgender prisoners in Idaho is already covered under the existing health care plan with Corizon.[9] Predicted costs of providing GCS as a

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[8] *Balla v. Idaho State Bd. of Corr.*, 119 F. Supp. 3d 1271, 1278-79 (D. Idaho 2015).

[9] Idaho taxpayers do not pay for prisoners' needs *a la carte*. Corizon agreed to provide treatment for gender dysphoria, a diagnosis formerly referred to as "Gender Identity Disorder," as part of its contract with IDOC. *See* Corizon, *Idaho Department of Correction Healthcare Services for Adult Idaho Offenders: Technical Proposal Request for Proposal Number 02540* (Sept. 30, 2013), at 93-95, https://www.muckrock.com/foi/idaho-228/corizon-health-contracts-idaho-department-of-corrections-19401/#file-48397. The current contract, which was

proportion of existing appropriations for the health care plan are *de minimis* and are therefore unlikely to affect future health care plan costs. *Amicus* analyzed the costs associated with providing GCS to transgender prisoners under IDOC's contract with private medical care provider Corizon. To conduct this analysis, *amicus* took the most recently available data regarding the Idaho prisoner population and the number of individuals diagnosed with gender dysphoria and data on the average cost of the GCS procedures. Using the prisoner and cost data, *amicus* developed several models based on other examples where transgender benefits are extended by the City of San Francisco, private companies, and the U.S. military. Given the estimates generated by each of the models, *amicus* concludes that the cost of offering the care sought by Appellee to her and other covered inmates would be negligible, both in absolute terms and when compared to the total costs of providing healthcare to prisoners in Idaho. In addition, providing GCS to transgender prisoners could result in cost savings to Appellants when compared to the ongoing costs related to untreated gender dysphoria.

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most recently extended for two years, expires in 2020. *See* Betsy Z. Russell, *Prison Health Contract Extended for Two Year, but Re-Bid Planned*, Idaho Press, Dec. 13, 2018, https://www.idahopress.com/news/local/prison-health-contract-extended-for-two-years-but-re-bid/article_51793122-f5a5-58c8-8cce-f4d5a648526d.html. Thus, barring any renegotiation, until the expiration of the contract, the cost to the state of Idaho and IDOC (and thus taxpayers) will remain fixed, including any previously-negotiated rate adjustments, no matter what policy Corizon adopts.

III. ARGUMENT

The Eighth Amendment imposes an obligation on the government to provide medical care for those whom it is punishing through incarceration. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Deliberate indifference to serious medical needs of prisoners which could result in the "unnecessary and wanton infliction of pain" is proscribed by the Eighth Amendment. *Id.* at 103-04. Budgetary concerns do not justify the denial of prospective relief from an Eighth Amendment violation.[10] Here, Appellants' generic cost concerns are an impermissible basis to deny medical care under the Eight Amendment.

Furthermore, Appellants' cost concerns are not a valid basis to oppose entry of a preliminary injunction. The Ninth Circuit has repeatedly held that in the context of a preliminary injunction, when "[f]aced with a conflict between financial concerns and preventable human suffering, . . . the balance of hardships

[10] *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) ("Lack of resources is not a defense to a claim for prospective relief because prison officials may be compelled to expand the pool of existing resources in order to remedy continuing Eighth Amendment violations."). *See also Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012), *overruled on other grounds by Peralta*, 744 F.3d at 1083 ("Evidence of an improper motive can support a conclusion that a defendant acted with deliberate indifference."); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986), *overruled on other grounds by Peralta*, 744 F.3d at 1083 ("Budgetary constraints . . . do not justify cruel and unusual punishment."); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) ("The cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment.").

tips decidedly in plaintiffs' favor."[11]

Moreover, as set forth below, Appellants' public suggestion that the medical care Appellee needs is costly is unjustified.

A. The Cost of Providing Gender Confirming Surgery ("GCS") to Covered Inmate Population Would Be Negligible.

Under the current Corizon healthcare plan, treatment for gender dysphoria is a covered treatment, and therefore, no additional costs should be incurred by Appellants for this type of health care under the current contract.[12] Notwithstanding the foregoing, using publicly available data, it is possible to estimate the proportion of total health care costs related to GCS in one year if GCS was made available to prisoners covered under the Corizon healthcare plan. Below, *amicus* provides several such cost estimates using different approaches and assumptions. Even when erring on the side of using conservative assumptions, *amicus* concludes that offering the type of care sought by Appellee to the broader covered inmate population would result in negligible costs, which would be unlikely to affect future health care plan costs.

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[11] *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983). *See also Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (quoting *Lopez*); *Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) (same); *Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004) (same); *Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004) (same).

[12] *See* note 9 *supra*.

B. The Size and Demographics of the Inmate Population Covered by Corizon's Healthcare Plan

The best publicly available data on the Idaho prisoner population under the jurisdiction of Appellants is dated June 2018.[13] As of that date, there were approximately 7,763 individuals under the Corizon healthcare plan. For purposes of the below calculations, *amicus* will use 7,800 as the total number of individuals covered by the Corizon healthcare plan.[14]

C. The District Court Found There are Currently 30 Prisoners with Gender Dysphoria Covered by Corizon's Healthcare Plan.

Appellee meets the diagnostic criteria for gender dysphoria. Gender dysphoria is the distress caused by incongruity between an individual's assigned

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[13] Idaho Department of Correction, Budget and Policy Division, Evaluation and Compliance Section, *Population Overview FY 2018*, https://www.idoc.idaho.gov/content/document/fy_2018_population_overvew (last visited Mar. 19, 2019).

[14] The approximate number of prisoners under the jurisdiction of Appellants' healthcare plan excludes parolees, individuals who are on probation, and individuals housed in county jails and "contract beds" from the total Idaho prisoner population. *See id.;* State of Idaho Department of Administration for the Department of Correction, *Request for Proposal (RFP)*, note 7 *supra*. Since the 2018 data maintained on the IDOC's website represents the most recent data broken down by facility, amicus used this data for her analysis. Data published by the Bureau of Justice Statistics shows that the total number of prisoners under the jurisdiction of state or federal correctional authorities in Idaho was higher (8,052 in 2015 and 8,252 in 2016). E. Ann Carson, *Prisoners in 2016*, U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Jan. 2018 at 4, Table 2. This difference is likely due to the BJS data including prisoners not covered by the Corizon healthcare plan. *See also*, *id.* at 6, Table 4 (estimating the population of prisoners sentenced to more than one year of incarceration in Idaho to be 7,255 and 7,376 for 2015 and 2016, respectively).

sex at birth and gender identity, which may be so strong and persistent that it impairs that individual's ability to function.[15]

Jeremy Junior Clark, a clinical supervisor for IDOC, testified for Appellants that as of the preliminary injunction hearing, there were 30 individuals diagnosed with gender dysphoria in IDOC custody. Tr. 322:21-323:3. This number was adopted by the district court's December 13, 2018 findings of fact. Order at 17, ¶ 28 ("There are currently 30 prisoners with gender dysphoria in IDOC custody."). Mr. Clark's estimate is consistent with the available data on the size of the adult transgender population in Idaho[16] as well as the size of the incarcerated transgender population found in the National Inmate Survey.[17]

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[15] *See* Eli Coleman et al., The World Professional Association for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7, at 5 (2011) ("WPATH Standards"), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf (last visited Apr. 6, 2019); Jaclyn M. White Hughto & Sari L. Reisner, *A Systematic Review of the Effects of Hormone Therapy on Psychological Functioning and Quality of Life in Transgender Individuals*, 1.1 Transgender Health 21, 21 (2016), https://www.liebertpub.com/doi/pdf/10.1089/trgh.2015.0008 (last visited Apr. 6, 2019).

[16] *See* Andrew R. Flores et al., *How many Adults Identify as Transgender in the United States*, Williams Institute (June 2016), at 3, Table 1 (approximately 0.41% of the adult Idaho population identify as transgender).

[17] *See* Jody L. Herman, et al., Presentation at American Public Health Association's APHA 2016 Annual Meeting & Expo, Prevalence, characteristics, and sexual victimization of incarcerated transgender people in the United States: Results from the National Inmate Survey (NIS-3), (Oct. 31, 2016) (national survey of inmates indicates 0.24% of the inmate population identifies as transgender).

Accordingly, for purposes of *amicus*' estimates below that rely upon either an estimate of the covered transgender population or the number of those with gender dysphoria, *amicus* uses the district court's finding of 30 individuals with gender dysphoria within the covered population.

D. Estimating the Typical Cost of GCS

Treatment of gender dysphoria varies based on the symptoms and needs of each individual and can include a range of interventions, including psychotherapy, social role transition, cross-sex hormones, and gender confirmation surgery. [18] While some individuals will require hormone therapy or GCS to alleviate their gender dysphoria, other individuals may not need either of these treatment options.[19]

The cost of GCS varies depending on the procedures needed for the individual patient. The available cost data collected online indicates that these surgeries for male-to-female transgender individuals usually falls within a range of $10,000 to $30,000, and the cost for female-to-male transgender individuals is similar – approximately $12,000 to $25,000.[20]

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[18] WPATH Standards, at 5.

[19] WPATH Standards, at 8-9.

[20] The Philadelphia Center for Transgender Surgery, *Male to Female Price List*, http://www.thetransgendercenter.com/index.php/maletofemale1/mtf-price-list.html (last visited Mar. 25, 2019) (estimating a total cost of $25,600 for Male to Female genital reassignment surgery); The Philadelphia Center for Transgender Surgery,

E. Modeling the Yearly Cost of Offering GCS Benefits to the Covered Inmate Population

There are several different methods for estimating the yearly cost of offering coverage for GCS and placing this cost in context of the overall healthcare appropriations for the state of Idaho. In existing case studies of employers that offer coverage for GCS to their employees – whether it be the City of San Francisco, private employers, or the U.S. military – the observed rates of utilization of these benefits have been quite low. Under each model used by *amicus* below, the cost of offering GCS would be negligible in the context of the overall healthcare appropriations and the size of the covered inmate population.

1. One Claim for GCS in One Year

Before looking to other case studies, it is useful to get a sense of how much one claim of GCS would cost in the context of the FY2019 yearly healthcare appropriations and the size of the Idaho prisoner population. In fiscal year 2019, the Idaho Legislature appropriated $46,496,500 for payments under IDOC's

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Female to Male Price List, http://www.thetransgendercenter.com/index.php/price-list.html (last visited Mar. 25, 2019) (cost of female to male genital surgery estimated to be $24,900); Costhelper.com, *Sex Reassignment Surgery Cost: How Much Does Sex Reassignment Surgery Cost?*, https://health.costhelper.com/sex-reassignment-surgery.html (last visited Mar. 20, 2019) ("For patients not covered by health insurance, the typical cost of a sex reassignment surgery can range from about $15,000 for just reconstruction of the genitals to about $25,000 for operations on the genitals and chest . . . .").

contract with Corizon.[21] The latest contract specifies that Corizon is to be paid $6,022.50 per inmate per year or $16.50 per inmate per day.[22]

As explained above, the covered population for June 2018 is approximately 7,800 inmates. If one inmate receives a GCS procedure that costs between $10,000 and $30,000, this cost would be equal to approximately 0.022%[23] to 0.065%[24] of the total healthcare appropriation. Stated otherwise, the most conservative estimate under this model would show a cost of slightly less than seven ten-thousandths, or less than seven hundredths of a percent, of the total annual healthcare appropriation for Corizon's contract.

2. San Francisco Claims Data

In 2001, the City of San Francisco became the first major city in the U.S. to remove barriers to transgender healthcare coverage in its health insurance plans for employees, retirees, and their dependents. In the first five-year period, San Francisco observed an average of 1.2 claimants per year and at most 4.8 claimants per year.[25] Assuming a range of 70,260 to 100,000 enrollees, this meant that San

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[21] Russell, note 9.

[22] *Id.*

[23] $10,000 / $46,496,500 = 0.022% = $\frac{22}{100{,}000}$

[24] $30,000 / $46,496,500 = 0.065% = $\frac{65}{100{,}000}$

[25] Human Rights Campaign, *San Francisco Transgender Benefit: Actual Cost & Utilization*, 2001-2006, at 2, https://www.hrc.org/resources/san-francisco-

Francisco experienced a utilization rate of at least 0.012 and at most 0.0683 claimants per thousand enrollees.[26] From 2001 to 2004, between 4 and 7 claimants utilized the benefit, with average claim costs between $22,286 and $39,000 each.[27] From 2004 to 2006, between 7 and 18 claimants claimed between $12,618 and $32,445 each.[28]

If similar utilization occurs for a population size of 7,800 inmates, Appellants would be likely to receive only one claim for transgender benefits every 1.9[29] to 10.7 years.[30] Using San Francisco as a model, Appellants would experience ***no related costs over most years***.

Assuming *arguendo* that Appellants observed the highest utilization rate and the same average costs per claimant as in San Francisco, Appellants could expect a

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transgender-benefit-actual-cost-utilization-2001-2006 (last visited Mar. 21, 2019).

[26] *Id.*

[27] *Id.*

[28] The average cost range observed in San Francisco included all covered treatments, including surgeries. Because it is similar to, but higher than the range described above ($10,000 – $30,000), *amicus* has employed this range to be conservative in the San Francisco model and for the Private Employer model below.

[29] 7,800 covered inmates / 1000 enrollees *.0683 claims /year = 0.5327 claim per year = 1 claim / 1.877 years

[30] 7,800 covered inmates / 1000 enrollees * .012 claims /year = .0936 claim per year = 1 claim / 10.7 years

cost of approximately $6,641.05[31] to $20,526.32[32] per year. This would represent approximately 0.014%[33] to 0.044%[34] of the total annual healthcare appropriations under Corizon's contract.[35] In other words, the most conservative assumptions under this model result in a cost less than nine twenty-thousandths, or just over four hundredths of a percent, of the Corizon healthcare appropriations.

3. Private Employer Claims Data

Private employers who have added transition-related coverage to their health benefits plans have reported very low utilization rates. In *amicus*'s landmark analysis of the utilization of such healthcare benefits, the highest yearly rate of utilization of transgender healthcare benefits observed among employers with 1,000 to 9,999 employees was 0.214 claims per thousand employees and the lowest utilization was 0.027 claims per thousand employees.[36]

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[31] $12,618 / 1.9 = $6,641.05

[32] $39,000 / 1.9 = $20,526.32

[33] $6,641.05 / $46,496,500 in healthcare approps. for FY2019 = 0.014% = $\frac{14}{100,000}$

[34] $20,526.32/ $46,496,500 in healthcare approps. for FY2019 = 0.044% = $\frac{44}{100,000}$

[35] This calculation assumes a static level of healthcare appropriations.

[36] Jody L. Herman, The Williams Institute, *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans*, (Sept. 2013) at 13, Table 8, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Cost-Benefit-of-Trans-Health-Benefits-Sept-2013.pdf (last visited Apr. 7, 2019).

If the same utilization is observed here, Appellants could expect to see one claim every seven months[37] to 4.7 years.[38] Adopting the highest rate of utilization would mean that there would either be one or two claims in a year. If we apply the range of average costs observed in San Francisco and the highest rate of utilization, Appellants can expect costs ranging from $12,618[39] to $78,000[40] per year. This cost would represent a range of 0.03%[41] - 0.17%[42] of the Corizon healthcare contract appropriations. In other words: 17 ten-thousandths, or 17 hundredths of a percent, of the total Corizon contract.

4. U.S. Military

From July 1, 2016 to February 1, 2019, 1,524 U.S. military personnel were diagnosed with gender dysphoria within a group of 2,100,000 covered individuals.[43] Since that time, treatment for troops with gender dysphoria has

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[37] 7,800 covered inmates / 1000 enrollees * .214 claims /year = 1.6692 claims per year = 1 claim / 7 months

[38] 7,800 covered inmates / 1000 enrollees * .027 claims /year = 0.2106 claims per year = 1 claim / 4.7 years

[39] $12,618 (lowest average cost per claim per year in SF) * 1 claim = $12,618

[40] $39,000 (highest average cost per claim per year in SF) * 2 claims = $78,000

[41] $12,618 / $46,496,500 = 0.03% = $\frac{3}{10,000}$

[42] $78,000 / $46,496,500 = 0.17% = $\frac{17}{10,000}$

[43] Tom Vanden Brook, *Exclusive: Pentagon Spent Nearly $8 Million to Treat 1,500 Transgender Troops Since 2016*, USA Today, Feb. 27, 2019, https://www.usatoday.com/story/news/politics/2019/02/27/exclusive-report-shows-8-million-spent-more-than-1-500-transgender-troops-pentagon-

included 22,992 psychotherapy visits, 9,321 prescriptions for hormones, and 161 surgical procedures.[44] Of the 161 surgical procedures, only 54 included genital surgeries.[45]

The 161 surgical procedures cost the U.S. military approximately $2,100,000 in total,[46] for an average of cost of $13,043.47 per surgery.[47] This represented approximately 0.002% of the $129.2 billion the U.S. military spent on healthcare in the same time period.[48] Assuming that each surgical procedure represented a new claimant, this data suggests that 10.6% of the adults with gender dysphoria received surgical care between July 1, 2016 and February 1, 2019.[49]

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dysphoria/2991706002/.

[44] *Id.*

[45] *See id.*

[46] *Id.*

[47] This average number is lower than our estimate, since it also includes non-genital surgeries, which may be significantly cheaper than the procedures at issue in this appeal. *Amicus* expects that this underestimate will be balanced out by the overestimate of the total number of individuals seeking procedures. *See* note 49 *infra*.

[48] Vanden Brook, note 43 *supra* ("[T]he Pentagon spends about $50 billion per year on health care.").

[49] This number is likely to be an overestimate. Since the *USA Today* data counts the total number of surgical procedures, it is not clear how many individuals received surgery. The total number of patients who received surgery is likely to be lower than the total number of reported surgeries. For example, it is likely that at least some of those receiving male to female genital procedures would have also received breast augmentation and some of those receiving hysterectomies may have also received breast reductions or mastectomies.

If the same utilization rate occurs among inmates with gender dysphoria in Idaho, Appellants can expect 10.6% of those who have received a diagnosis of gender dysphoria to seek surgery every 2 years and 7 months, or approximately 4.1% per year. Using the District Court's finding that there are currently 30 individuals with gender dysphoria within the covered inmate population, we would expect the average number of claims for surgery to be approximately 1.23 claims for surgery per year.[50] If each claim costs the same as the average cost of surgeries observed in the U.S. military, Appellants can expect a cost of approximately $16,042.89[51] in one year. This cost would represent just over three ten-thousandths, or just over three hundredths of one percent, of the total appropriations under the Corizon contract.[52]

5. Summary

As the foregoing estimates demonstrate, the relative rarity of transgender individuals in the covered inmate population combined with the observed low rates of utilization of GCS indicate that any cost of providing GCS would be negligible. Specifically, *amicus* estimates that the cost for covering GCS would represent

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[50] 30 gender dysphoria diagnoses * 4.1% patients with gender dysphoria seeking surgery in a year = 1.23 claims for surgery per year

[51] $13,043.47 average cost of surgical claims * 1.23 claims per year = $16,042.89 per year

[52] $16,042.89 / $46,496,500 = 0.0345% = $\frac{345}{1{,}000{,}000}$

between zero (lowest estimate) and seventeen hundredths of one percent (highest estimate) of the total healthcare appropriation to Corizon in one year.

F. Providing Medically Necessary Gender Confirmation Surgery for Idaho Prisoners Could Result in Medical Cost Savings.

Just looking at the monetary cost of providing GCS to prisoners in the Idaho prison system does not tell the whole story. The full effect of allowing gender confirmation surgery can only be understood by looking at the costs that would have been incurred to treat the prisoner's gender dysphoria in the absence of surgery as a treatment option.

In the 2015 U.S. Transgender Survey, nearly 40% of transgender people reported experiencing serious psychological distress in the month before the survey, compared to 5% of the general U.S. population.[53] Of greater concern, 7% of transgender people attempted suicide in the year before the survey, compared to 0.06% of the general U.S. population.[54]

These symptoms can be alleviated with access to appropriate mental and physical health care, including GCS for those who need it. Long-term studies tracking the experiences of transgender people before and after receiving gender

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[53] Erin McCauley, et al., *Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail*, Transgender Health (2018), at 35.

[54] *Id.*

affirming medical care results in an overall improvement of mental health.[55] And, more specifically, the rates of suicidality among trans men has been shown to have decreased after receiving gender affirming care, dropping from 20% to 1%.[56] As described in a forthcoming publication, research conducted by *amicus* and co-authors found that, out of those who need GCS, those who received it experienced a significant reduction in suicidal thoughts and attempts compared to those who have not received it.[57] There is thus a consensus that medical treatment for gender transition improves the overall well-being of transgender individuals and contributes to a better quality of life.[58]

These improvements in overall health and well-being can result in cost-savings. In its economic assessment of prohibiting discrimination against

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[55] Cecilia Dhejne, et al., *Mental health and gender dysphoria: A review of the literature*, Int'l Rev. of Psych. (2016), at 53.

[56] William V. Padula, et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, J. of Gen. Intern. Med. (Oct. 19, 2015), at 2.

[57] Jody L. Herman, et al., Presentation at the Annual Meeting of the American Public Health Association, Atlanta, GA, Effect of gender transition-related health care utilization on suicidal thoughts and behaviors: Findings from the 2015 U.S. Transgender Survey (Nov. 9, 2017).

[58] Cornell University, The Public Policy Research Portal, *What Does the Scholarly Research Say About the Effect of Gender Transition on Transgender Well-Being?*, https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people/ (last visited Apr. 6, 2019).

transgender people in health insurance, the State of California Department of Insurance found that "there may be potential cost savings resulting from the adoption of the proposed regulation in the medium to long term, such as lower costs associated with the high cost of suicide and attempts at suicide, overall improvements in mental health and lower rates of substance abuse, as discussed in the following section."[59] For instance, the Department stated that suicide deaths or attempts can cost as much as $7,200 for each incident;[60] costs that could be saved by reducing suicide attempts and deaths among transgender Californians.

Appellants have already incurred substantial, avoidable costs by denying Appellee the GCS she needs. Appellee's two self-castration attempts and subsequent hospitalization are directly tied to the distress she has experienced because of being denied access to gender confirmation surgery. For example, after her second attempt at self-castration, Appellant was taken to the hospital by ambulance for treatment to repair her testicle. *See* Tr. 198:9-199:16. At the hospital, Appellee was treated by a urologist and was put under anesthesia for the repair procedure. *See* Tr. 199:7-13. Furthermore, Appellant continues to actively

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[59] State of California, Dept. of Insurance, *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance*, (April 13, 2012) at 9, https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf (last visited April 6, 2019).

[60] *Id.*

experience thoughts of self-castration, which she relieves by using a razor to cut her arm – further increasing the chance of future, expensive medical interventions. *See* Tr. 199:24-200:15. By complying with the law and offering this care, Appellants can avoid these types of costs (and others) that arise when Appellees and others are denied treatment for their gender dysphoria.

IV. CONCLUSION

Neither the legal reasons cited by Appellants in their opening brief nor the public statements made by Appellants and their supporters justify withholding medically necessary and constitutionally mandated care from Appellee. The surgical treatment that Appellee requires to alleviate the symptoms of her gender dysphoria is not costly in absolute terms nor when compared to IDOC's yearly budget for all medical expenses for prisoners under its supervision. Offering this medically necessary care may also result in other types of healthcare savings for Appellants. Therefore, this Court should affirm the district court's order granting Appellee injunctive relief.

Respectfully submitted,

Dated: April 10, 2019

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 5,041 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I further certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

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