[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 25-5099, 25-5101, 25-5108 (consol.)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANE DOE, et al.,
Plaintiffs-Appellees,

v.

PAMELA BONDI, in her official capacity as Attorney General of the United States, et al.,
Defendants-Appellants.

JANE JONES, et al.,
Plaintiffs-Appellees,

v.

PAMELA BONDI, in her official capacity as Attorney General of the United States, et al.,
Defendants-Appellants.

MARIA MOE,
Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

AMICUS BRIEF OF IDAHO, INDIANA, 23 OTHER STATES, AND THE ARIZONA LEGISLATURE, IN SUPPORT OF APPELLANTS

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CERTIFICATE AS TO PARTIES, FILINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel certifies the following:

Parties, Intervenors, and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in Appellants' opening brief, except for each of the amici submitting this brief.

Rulings Under Review

References to rulings at issue appear in the Appellants' opening brief.

Related Cases

This case has not previously been before this Court. Counsel is aware of one related case within the meaning of D.C. Circuit Rule 28(a)(1)(C): *Kingdom v. Trump*, No. 1:25-cv-691 (D.D.C.).

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The federal government is charged with preserving the safety of *all* prisoners in its care, and it has determined that placing transgender-identifying male prisoners in female housing intolerably jeopardizes female prisoners' well-being. Whether this determination is correct and whether it outweighs any resulting risks for trans-identifying prisoners are questions subject to fierce debate—but not questions answered by the Eighth Amendment. So far as the Eighth Amendment is concerned, the federal government is free to decide, as it has, that the best and safest solution is to house trans-identifying male prisoners with non-violent male offenders.

Even if the Court views the question as one regarding the proper treatment of plaintiffs' medical needs, deference is owed to the political branches. Political branches exercising police power to regulate health and medicine are given great deference, particularly where there is medical uncertainty. Here, the lack of any shred of medical evidence suggesting that plaintiffs' gender dysphoria will be worsened by transferring them to male housing is all the Court needs to know to uphold the transfer decision. And the medical uncertainty regarding the efficacy of cross-sex hormones should have been enough to uphold the federal government's decision to deny those to prisoners too.

As sovereigns who have long regulated prisons and medicine to protect health and safety, *amici* States have an interest in protecting their authority. They urge the Court to reverse the injunction preventing the government from moving plaintiffs (males identifying as transgender) to male housing.

ARGUMENT

I. Policymakers Are Entitled to Make Complex Administrative Prison Decisions Like Housing Assignments, and Courts Should Defer.

In the context of prison administration, policymakers require flexibility and judicial deference. "Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another," *Farmer v. Brennan*, 511 U.S. 825, 858 (1994) (Thomas, J., concurring), and prison officials are the ones "actually charged with and trained in the running of" those hazardous environments. *Bell v. Wolfish*, 441 U.S. 520, 562 (1979). Review of prison administrative decisions must therefore utilize "a standard that incorporates due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions." *Farmer*, 511 U.S. at 845 (cleaned up).

The executive order's directive to house transgender-identifying males in male housing is such a decision requiring "appropriate deference." *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 349 (1987). Housing transgender-identifying individuals in prison can be an "intractable problem." *Bell*, 441 U.S. at 562. On the one hand, some claim that housing males identifying as transgender with other males elevates their risk of assault (sexual or physical) or "exacerbate[s] the symptoms of their gender dysphoria." J.A. 165. There is no meaningful evidence of those claims in the record, as the government explains. *See* Opening Br. at 36–41. (Although the government has taken steps to

minimize possible risks anyway. *See id.* at 42–44 (explaining that BOP plans to house plaintiffs in low-security facilities with non-violent offenders).)

On the other hand, housing transgender-identifying males with female prisoners presents its own set of risks. Those risks inure to the harm of female inmates, who (1) have their rights to privacy and dignity compromised by having to sleep and shower with men, (2) are exposed to elevated possibilities of violence or sexual assault, and (3) will be pressured or coerced into using speech reflecting a belief that conflicts with biological reality. Those directing the prison must take *these* risks into account when crafting policy as well, which is why the executive order promises to fight efforts to "depriv[e] [women] of their dignity, safety, and well-being," and the section on prison housing policy is entitled "Privacy in Intimate Spaces." Exec. Order No. 14,168, §§ 1, 4(a), (c), 90 Fed. Reg. 8615 (Jan. 20, 2025).

But the district court looked at only half of the picture. It asked only whether the housing policy was deliberately indifferent to the risks posed to *plaintiffs* without considering countervailing risks posed to the *women* that plaintiffs seek to be housed with. J.A. 164–65. Both are facets of prison housing management—the government has an obligation to consider not just plaintiffs' interests, but "the needs of the institution" as a whole and all those who reside therein, including female prisoners. *Washington v. Harper*, 494 U.S. 210, 225 (1990). In fact, Washington's Department of Corrections was recently sued by a female prisoner claiming deliberate indifference to *her* well-being when the Department forced her to share a cell with a transgender-identifying male

who "repeatedly sexually harassed and assaulted" her. *Clark v. Wash. Dep't of Corr.*, No. 3-24-cv-6058, Dkt. 32 at 2 (W.D. Wash.).

The district court's one-sided view of the government's housing policy is not dictated by Supreme Court precedent, as the court believed. *See* J.A. 164. "Deliberate indifference" is generally the "appropriate inquiry" when addressing claims that prison officials "failed to attend to serious medical needs" because the government's "responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns." *Hudson v. McMillian*, 503 U.S. 1, 5–6 (1992). But that's not the case here—these housing determinations entail "balanc[ing]" that repairing a broken arm does not. *Id.* at 6.

The Court's inquiry must therefore "var[y] according to the nature of the alleged constitutional violation," which here involves, at the very least, competing administrative concerns. *Id.* at 5. The Court can ask whether the executive order's directive is "reasonably related to legitimate penological interests," *Turner v. Safley*, 482 U.S. 78, 89 (1987), a test that the Supreme Court has previously stated "applies to *all* circumstances in which the needs of prison administration implicate constitutional rights." *Washington*, 494 U.S. at 224 (emphasis added).[1] Or the Court can account for

[1] In a later Equal Protection case, the Supreme Court noted that it had "not used *Turner* to evaluate Eighth Amendment claims." *Johnson v. California*, 543 U.S. 499, 511 (2005). But the only one of its precedents it cited involved a punishment by handcuffing to a hitching post—not a circumstance involving any competing administrative concerns. *See Hope v. Pelzer*, 536 U.S. 730 (2002).

the prison officials' reasonableness in assessing deliberate indifference, as the Supreme Court has done in a previous case related to housing transgender-identifying prisoners where the parties agreed that the deliberate-indifference standard should govern. *Farmer*, 511 U.S. at 835, 844–45. Either way, "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause," *id.* at 845, and the BOP's actions here are eminently reasonable.[2]

Taking a holistic view of the prison officials' concerns and deferring to their reasonable resolution of problems will afford prison officials the breathing room they need to effectively carry out their responsibilities. Exacting judicial scrutiny in this context, though, risks "freezing" a particular policy approach "into a rigid constitutional mold." *City of Grants Pass v. Johnson*, 603 U.S. 520, 551 (2024) (cleaned up). As prisons continue to "experiment[]" with policies,[3] *id.*, new solutions to the delicate problem of housing prisoners identifying as transgender may emerge. Housing such individuals with non-dangerous prisoners, as BOP plans to do, may produce superior results to plaintiff's preferred approach—plaintiffs certainly do not present any research on prison policy suggesting otherwise.

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[2] To be clear, plaintiffs have not satisfied the standard for deliberate indifference even accounting only for the risk of harm they say they will be subjected to. *See* Opening Br. at 33–48.

[3] *See Resource Guide to Improve Safety in Carceral Housing for Transgender People*, The LGBTQ+ Bar, https://tinyurl.com/h32bj6ms (last visited May 15, 2025) (listing housing policies for trans-identifying prisoners by state).

Leeway for reasonable action is necessary in this space, and constitutionalizing the question will only ensure that the courts—which "are ill equipped to deal with the increasingly urgent problems of prison administration and reform"—will be the final decisionmaker each time. *Thornburgh v. Abbott*, 490 U.S. 401, 422 n.5 (1989) (Stevens, J., concurring in part and dissenting in part). Rather than send the judiciary down that path, the Court should leave the issue to the "expert judgment" of the executive branch and uphold actions as long as they are reasonable. *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

II. To the Extent the Question Is a Medical One, the Constitution Vests Responsibility in Politically Accountable Policymakers.

While focusing exclusively on the risks that could befall plaintiffs and not the potential risks to female prisoners, the district court credited plaintiffs' allegation that housing them with other male prisoners would "exacerbate[]" their gender dysphoria. J.A. 165, 191. There is no meaningful evidence in the record behind that assertion. But to the extent plaintiffs hope to frame their claim as whether the government's housing policy reflects deliberate indifference to their *medical* needs, their argument runs headlong into a wall of case law establishing that politically accountable policymakers are given extraordinary deference from the courts when it comes to regulating medical treatments, particularly in the Eighth Amendment context.

As decision after decision from the Supreme Court establishes, regulating matters "concerned with health" is "a vital part of a state's police power." *Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442, 449 (1954). That power certainly allows for regulation

of the "right to practice medicine," *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926), including by barring unlicensed persons from practicing medicine, *Dent v. West Virginia*, 129 U.S. 114, 122–23 (1889), requiring practitioners to possess the requisite "[c]haracter" and "knowledge of diseases" to apply remedies "safely," *Hawker v. People of N.Y.*, 170 U.S. 189, 193–94 (1898), and imposing measures designed to "protect[] the integrity and ethics of the medical profession." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). But the police power also captures the ability to prescribe particular treatments for specific conditions. *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 703–04 (D.C. Cir. 2007) (en banc) (lawmakers have regulated drugs based on "the risks associated with both drug safety and efficacy" since colonial times); *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) ("It is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions.").

And since the Civil War era, Congress has layered federal regulations of drugs and procedures on top of state regulations. *See Abigail All.*, 495 F.3d at 704–05 ("States [were not] the only regulators of access to drugs"). To cite but a few examples, Congress has required that "drug manufacturers provide proof that their products were safe before they could be marketed" and that the Food and Drug Administration (FDA) "only approve drugs deemed effective for public use." *Id.* at 705. Congress has also prohibited physicians from using certain surgical procedures for abortions. *See Gonzales v. Carhart*, 550 U.S. 124, 140–43 (2007).

That some, or even many, medical professionals may disagree with policymakers' choices does not "tie [policymakers'] hands." *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997). The Supreme Court "has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Carhart*, 550 U.S. at 163. In fact, "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude." *Hendricks*, 521 U.S. at 360 n.3. As this Court has explained en banc, "[o]ur Nation's history and traditions have consistently demonstrated that the democratic branches are better suited [than the courts] to decide the proper balance between uncertain risks and benefits of medical technology, and are entitled to deference in doing so." *Abigail All.*, 495 F.3d at 713; *see also Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 274 (2022) (cleaned up) (the "normal rule" is that federal courts must "defer" to the judgments of politically accountable policymakers "in areas fraught with medical and scientific uncertainties").

All of this is particularly true in the context of Eighth Amendment claims brought by prisoners. Although the Supreme Court has announced that the Eighth Amendment prevents prison officials from showing "deliberate indifference to serious medical needs of prisoners," the Court has made equally clear that this does not mean "that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 102–05 (1976). The "Constitution is not a medical code that mandates specific medical treatment." *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996). Nor does the Eighth Amendment give prisoners "unqualified

access to health care," *Hudson*, 503 U.S. at 9, or empower them to "demand specific care." *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006).

Instead, to demonstrate deliberate indifference, a prisoner must show that the deprivation is objectively serious and that prison officials "act[ed] with a sufficiently culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). "Prison officials are not . . . deliberately indifferent to an inmate's serious medical need when a physician prescribes a different method of treatment than that requested by the inmate." *Bernier v. Obama*, 201 F. Supp. 3d 87, 93 (D.D.C. 2016) (cleaned up). Instead, a "constitutional violation exists only if *no* minimally competent professional would have so responded under those circumstances." *Johnson v. Dominguez*, 5 F.4th 818, 825 (7th Cir. 2021) (cleaned up) (emphasis added). Or as another court of appeals has put it, "[t]here is no intentional or wanton deprivation of care if a genuine debate exists within the medical community about the necessity or efficacy of that care." *Gibson*, 920 F.3d at 220; *see also Hoffer v. Sec'y, Fla. Dep't of Corr.*, 973 F.3d 1263, 1272–73 (11th Cir. 2020) (similar). A "difference of opinion over matters of expert medical judgment" simply "fails to rise to the level of a constitutional violation." *Barr v. Pearson*, 909 F.3d 919, 921–22 (8th Cir. 2018) (cleaned up).

In this case, the dearth of evidence on how housing assignment affects transgender-identifying male prisoners' gender dysphoria unmistakably distinguishes the issue as one of "medical and scientific uncertainty," placing it within the political branches' broad power to regulate. *Carhart*, 550 U.S. at 163. The most any of the sets of

plaintiffs can muster is a declaration by a single doctor opining in one short paragraph—without citing any medical evidence—that housing transgender-identifying prisoners with those of the same sex will "predictably worsen gender dysphoria and cause severe psychological distress," even for persons who "ha[ve] not had medications or surgery." J.A. 182–83. That absolutist position—that all who are diagnosed with gender dysphoria will experience distress unless they socially transition by living with the opposite sex—is not even adopted by the staunchest advocates of transgender ideology. *See* WPATH Standards of Care 8, Statement 5.4 (laying out different approaches to social transition). If true, it would mean that every prison in the country is subjecting transgender-identifying prisoners to "severe psychological distress," since none has a policy of housing all transgender-identifying prisoners with the opposite sex.[4]

The truth is that there is no significant scientific research on this issue. "[F]ederal courts do not mediate medical debates," *K.C. v. Individual Members of the Med. Licensing Bd. of Ind.*, 121 F.4th 604, 634 (7th Cir. 2024), and they certainly shouldn't stamp out a medical debate before it even begins. *Grants Pass*, 603 U.S. at 556 (constitutionalizing questions and imposing standards by "fiat" short-circuits "productive dialogue" and "experimentation") (cleaned up). To the extent the housing issue is to be viewed as one concerning adequate medical treatment, the proper course is for the court to defer to the politically accountable policymakers.

[4] *See supra* note 3 (listing housing policies for trans-identifying prisoners by state).

III. Cross-Sex Hormones Are Also Subject to Regulation by Politically Accountable Policymakers.

Although the government has not chosen to appeal the preliminary injunction's order to provide plaintiffs with cross-sex hormones, *amici* States would submit that the same principles should have applied to the government's regulation of those treatments. Politically accountable policy makers are better positioned and constitutionally empowered to decide if, when, and how those treatments should be administered, and the need for deference to the politically accountable branches is particularly high in light of the medical uncertainty regarding the treatments' efficacy. *Abigail All.*, 495 F.3d at 703–04, 713.

The evidence supporting the effectiveness of hormone therapy to treat gender dysphoria is weak. A 2020 systematic review of available studies "found insufficient evidence to determine the efficacy or safety of hormonal treatment approaches for transgender women in transition"—it concluded that "[t]he evidence is very incomplete, demonstrating a gap between current clinical practice and clinical research." Claudia Haupt et al., *Antiandrogen or estradiol treatment or both during hormone therapy in transitioning transgender women*, 11 Cochrane Database of Systematic Reviews, Art. No. CD013138, at 2, 11 (2020) ("well-designed, sufficiently robust randomised controlled trials (RCTs) and controlled-cohort studies do not exist"). Another systematic review of studies concluded that it was "impossible to draw conclusions about the effects of hormone therapy on death by suicide" and the "strength of evidence" for other positive effects of hormone

therapy reported by the literature was "low." Kellan E. Baker, et al., *Hormone Therapy, Mental Health, and Quality of Life Among Transgender People: A Systematic Review*, 5 J. Endocrine Soc. 1, 12–13 (2021). A third review included studies "that showed an *increase* in suicidality for those who received gender-affirming treatment," including cross-sex hormones, and concluded that all existing studies on the effect of hormone therapy on suicidality suffered from methodological errors. Daniel Jackson, *Suicide-Related Outcomes Following Gender-Affirming Treatment: A Review*, 15 Cureus 9–13 (2023) (emphasis added).

This lack of proven benefits is accompanied by significant risks associated with hormones therapy. Evidence shows that males who are treated with estrogen have twenty-two times the likelihood to develop breast cancer,[5] an increased risk of prostate[6] and other cancers,[7] an increased risk of retinal vein occlusion,[8] a higher risk of strokes,[9] and a potential risk of autoimmune disorders.[10] Females treated with testosterone may

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[5] *See* Rakesh R. Gurrala et al., *The Impact of Exogenous Testosterone on Breast Cancer Risk in Transmasculine Individuals*, 90 Annals of Plastic Surgery 96 (2023).

[6] *See* Khobe Chandran et al., *A Transgender Patient with Prostate Cancer: Lessons Learnt*, 83 European Urology 379 (2023).

[7] *See* Jose O. Sanetellan-Hernandez et al., *Multifocal Glioblastoma and Hormone Replacement Therapy in a Transgender Female*, 14 Surgical Neurology Int'l 106 (2023).

[8] *See* Vianney Andzembe et al., *Branch Retinal Vein Occlusion Secondary to Hormone Replacement Therapy in a Transgender Woman*, 46 J. Fr. Ophtalmologie 148 (2023).

[9] *See* Talal Alzahrani et al., *Cardiovascular Disease Risk Factors and Myocardial Infarction in the Transgender Population*, 12 Circulation: Cardiovascular Quality & Outcomes (2019).

[10] *See* Alice A. White et al., *Potential Immunological Effects of Gender-Affirming Hormone Therapy in Transgender People—an Unexplored Area of Research*, 13 Therapeutic Advances in Endocrinology & Metabolism 1 (2022).

experience infertility,[11] pseudotumor cerebri,[12] an earlier onset of breast cancer,[13] and an increased risk of heart attacks.[14]

Of course, there are some interest groups like WPATH—the group on whose recommendations plaintiffs and their experts rely, *see* J.A. 17—that promote cross-sex hormones to treat gender dysphoria. "But recent revelations indicate that WPATH's lodestar is ideology, not science." *Eknes-Tucker v. Governor of Ala.*, 114 F.4th 1241, 1261 (11th Cir. 2024) (Lagoa, J., concurring in denial of rehearing en banc). A "contributor to WPATH's most recent Standards of Care frankly stated, '[o]ur concerns, echoed by the social justice lawyers we spoke with, is that evidence-based review reveals little or no evidence and puts us in an untenable position in terms of affecting policy or winning lawsuits.'" *Id.*; *see* Amicus Brief of the State of Alabama, *United States v. Skrmetti*, No. 23-477 (Oct. 15, 2024) (cataloguing internal documents showing that WPATH routinely ignored the evidence, silenced scholars who questioned its guidelines, and censured members who go public with their concerns). Simply put, WPATH's guidelines

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[11] *See* Kenny Rodriguez-Wallberg et al., *Reproductive Health in Transgender and Gender Diverse Individuals: A Narrative Review to Guide Clinical Care and International Guidelines*, 24 Int'l J. Transgender Health 7 (2023).

[12] *See* Naomi E. Gutkind et al., *Idiopathic Intracranial Hypertension in Female-to-Male Transgender Patients on Exogenous Testosterone Therapy*, 39 Ophthalmic Plastic & Reconstructive Surgery 449 (2023).

[13] *See* Giovanni Corso et al., *Risk and Incidence of Breast Cancer Risk in Transgender Individuals: A Systematic Review and Meta-Analysis*, 32 European J. Cancer Prevention 207 (2023).

[14] *See* Darios Getahun et al., *Cross-Sex Hormones and Acute Cardiovascular Events in Transgender Persons: A Cohort Study*, 169 Annals of Internal Medicine 205 (2018).

"overstate[] the strength of the evidence." H. Cass, *Independent Review of Gender Identity Services for Children and Young People: Final Report* 133 (2024), https://tinyurl.com/346ufbw6.

So hormone-based interventions for gender dysphoria are fraught with serious risks and uncertain to deliver any benefits. Meanwhile, there are non-surgical, non-hormone related interventions that have been shown to address gender dysphoria effectively—specifically, "[s]ocial support and psychotherapy are widely recognized approaches." *K.C. v. Individual Members of the Med. Licensing Bd. of Ind.*, 121 F.4th 604, 610–11 (7th Cir. 2024) (citing Danyon Anderson et al., *Gender Dysphoria and Its Non-Surgical and Surgical Treatments*, 10 Health Psych. Rsch., at 4 (2022)). This is precisely the sort of situation where policymakers should have the greatest latitude to regulate in the interest of public health and safety, especially where medical organizations have continued to misrepresent the true risk profile of these treatments.

CONCLUSION

The district court's grant of a preliminary injunction should be reversed.

Dated: May 16, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,566 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Word for Microsoft 365 in 14-point Garamond, a proportionally spaced typeface.

/s/ Michael A. Zarian
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CERTIFICATE OF SERVICE

I certify that on May 16, 2025, I caused this document to be electronically filed with the Clerk of Court using this Court's CM/ECF system, which will send a notice of docketing activity to all parties who are registered through CM/ECF.

/s/ Michael A. Zarian
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