

No. 17-3171

---

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

---

MICHELLE RENEE LAMB, a/k/a  
Thomas Lamb,

*Plaintiff-Appellant,*

v.

JOE NORWOOD; JOHNNIE  
GODDARD; PAUL CORBIER;  
KANSAS DEPARTMENT OF  
CORRECTIONS; CORIZON  
HEALTH SERVICES,

*Defendants - Appellees.*

---

On Appeal from the United States District Court  
for the District of Kansas Civil Case No. 16-cv-03077-EFM-DJW, Hon. Eric F. Melgren

---

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF  
KANSAS, LAMBDA LEGAL, NATIONAL CENTER FOR TRANSGENDER  
EQUALITY AND TRANSCEND LEGAL IN SUPPORT OF NEITHER PARTY IN  
PETITION FOR REHEARING *EN BANC***

---

LAUREN BONDS  
ACLU Foundation of Kansas  
6701 W. 64th Street, Ste. 210  
Overland Park, KS 66202  
(913) 490-4100

CHASE STRANGIO  
GABRIEL ARKLES  
JOSH BLOCK  
American Civil Liberties Union Foundation  
125 Broad Street  
New York, NY 10004  
(212) 549-2569

**Corporate Disclosure Statement**

Proposed *amici* are non-profit entities that do not have parent corporations. No publicly held corporation owns ten percent or more of any stake or stock in *amici*.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST.....	1
ARGUMENT.....	2
I. The Panel’s Analysis Of The State Of Medical Science With Respect to Gender Dysphoria Is Dicta Offered Without the Benefit of Any Record.....	4
II. The Court’s Discussion of the Vitality and Scope of <i>Supre v. Ricketts</i> Is Unnecessary And Creates At Least Two Circuit Splits.....	6
CONCLUSION.....	10

**TABLE OF AUTHORITIES**

**CASES**

*Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2013)..... 3

*Crawford v. Cuomo*, 796 F.3d 252 (2d Cir. 2015)..... 8

*De’lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003)..... 8

*De’lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013)..... 9

*Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011).....8

*Gonzalez v. Feinerman*, 663 F.3d 311 (7th Cir. 2011).....9

*Helling v. McKinney*, 509 U.S. 25 (1993)..... 8

*Hicklin v. Precynthe*, Case No. 4:16-cv-01357-NCC, 2018 WL 806764 (E.D. Mo. Feb. 9, 2018).....9

*Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111 (10th Cir. 2004).....6

*Jimenez v. Sessions*, 893 F.3d 704 (10th Cir. 2018)..... 5

*Jones v. Muskegon Cty.*, 625 F.3d 935 (6th Cir. 2010)..... 9

*Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014)..... 8

*Lamb v. Norwood*, No. 17-3171, 2018 WL 3341031 (10th Cir. July 9, 2018)..... 3, 4, 7, 10

*Lamb v. Norwood*, 262 F. Supp. 3d 1151 (D. Kan. 2017)..... 6

*Langford v. Norris*, 614 F.3d 445 (8th Cir. 2010).....9

*Rex v. Chase Home Fin. LLC*, 905 F. Supp. 2d 1111, (C.D. Cal. 2012).....6

*Rosati v. Igbinoso*, 791 F.3d 1037 (9<sup>th</sup> Cir. 2015)..... 9, 10

*Savage v. Fallin*, 663 F. App’x 588 (10<sup>th</sup> Cir. 2016)..... 9

*Supre v. Ricketts*, 792 F.2d 958 (10<sup>th</sup> Cir. 1986)..... 3, 6-10

**Other Authorities**

American Psychiatric Association Caucus of Lesbian, Gay and Bisexual Psychiatrists et al., APA Official Actions: Position Statement on Access to Care for Transgender and Gender Variant Individuals (2012), <https://transcendlegal.org/american-psychiatric-association> (last visited July 23, 2018)..... 5

American Psychological Association, Transgender, Gender Identity, & Gender Expression Non-Discrimination, adopted by the American Psychological Association Council of Representatives (August 2008), <http://www.apa.org/about/policy/transgender.aspx> (last visited July 23, 2018)..... 5

Removing Financial Barriers to Care for Transgender Patients, Res. 122 (A-08), American Medical Association House of Delegates (2008), [http://www.tgender.net/taw/ama\\_resolutions.pdf](http://www.tgender.net/taw/ama_resolutions.pdf) (last visited July 23, 2018)..... 5

*Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings*, National Commission on Correctional Health Care (last revised 2015), <https://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care> (last visited July 23, 2018)..... 5

## STATEMENT OF INTEREST

The ACLU is a nationwide nonpartisan organization of over one million members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions and our nation's civil rights laws. Through the ACLU's Lesbian, Gay, Bisexual and Transgender Project and its National Prison Project, the organization focuses on defending the rights of transgender individuals, and defending the rights of individuals in all custodial settings. The ACLU of Kansas is the ACLU's state affiliate in the State of Kansas equally dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal was founded in 1973 and has offices in California, New York, Illinois, Texas, Georgia, and Washington, D.C.

The National Center for Transgender Equality (NCTE) is devoted to advancing justice, opportunity and well-being for transgender people through education and advocacy on national issues. Since 2003, NCTE has been engaged in educating legislators, policymakers and the public, and advocating for laws and

policies that promote the health, safety and equality of transgender people. NCTE provides informational referrals and other resources to thousands of transgender people every year, including many individuals in prisons, jails and civil detention settings, and has been extensively involved in efforts to address the vulnerability of transgender people in confinement settings.

Transcend Legal is a non-profit legal organization that cultivates equitable social, medical and legal recognition of transgender people by offering culturally competent, transgender-led legal representation, public policy advocacy, community empowerment, and public education. Transcend Legal focuses on ensuring that all transgender people have access to transgender-related health care, including transgender people who are currently incarcerated.

None of the *amici curiae* are nongovernmental entities with a parent corporation or a publicly held corporation that owns 10% or more of its stock; 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 memorandum of law. This memorandum of law has been submitted together with a motion seeking this Court's leave to file.

## **ARGUMENT**

*Amici* do not quarrel with this Court's determination that there is insufficient evidence in the record to establish that surgical care for gender dysphoria was

medically necessary in Ms. Lamb's individual case. The Court's holding here that the summary judgment record does not present evidence of deliberate indifference to Ms. Lamb's medical needs sufficiently resolves the questions before the Court in this case. *Lamb v. Norwood*, No. 17-3171, 2018 WL 3341031, at \*3–4 (10th Cir. July 9, 2018).

But *amici* are concerned that portions of the Court's opinion go far beyond what is necessary to affirm the district court's grant of summary judgment to Defendants. In doing so, the panel opinion makes sweeping assertions about the current medical consensus without the benefit of a developed evidentiary record, and the panel opinion unnecessarily creates a circuit split based on the briefs filed by an unrepresented plaintiff. The further analysis offered by the panel as dicta without the benefit of any record evidence is unnecessary and runs the risk of foreclosing effective development of important legal and factual issues presented in cases brought by prisoners with gender dysphoria.

*Amici* respectfully request that the panel amend its opinion and wait for a case with a properly developed record and where the question bears on the outcome to evaluate the scope of *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986), and the efficacy of different treatment for gender dysphoria. *Cf. Bernstein v. Bankert*, 733 F.3d 190, 196 (7th Cir. 2013) (amending opinion to address concerns raised by amicus in support of petition for rehearing regarding "certain passages of



our original opinion [that] suggested” the complete unavailability of a legal option).

Specifically, *amici* respectfully ask the Court to remove Sections 3 and 4 of the panel decision, *Lamb*, 2018 WL 334103, at \*2-4, and the following sentence: “Though prison officials have not authorized surgery or the hormone dosages that Michelle wants, the existing treatment precludes a reasonable fact-finder from inferring deliberate indifference.” *Id.* at \*3. These portions of the panel opinion contain overbroad statements regarding the current medical consensus for treating gender dysphoria without the benefit of a fully developed record.

**I. The Panel’s Analysis Of The State Of Medical Science With Respect to Gender Dysphoria Is Dicta Offered Without the Benefit of Any Record.**

This Court’s holding that the record does not present a genuine issue of material fact sufficiently resolves this case. On the limited record presented by Ms. Lamb to the district court without the assistance of counsel, the district court determined that the record did not present a genuine dispute of material fact. The panel agreed but expounded on factual questions outside the scope of the record before it. Instead of focusing on the slim evidentiary record in the case, the panel cited to a lone law review article in support of the proposition that “there is no governing medical consensus on the appropriateness of the treatment options that Michelle is requesting.” *Lamb*, 2018 WL 3341031, at \*3.

*Amici* strongly disagree with the factual assertions made in that law review article regarding the existing medical consensus. Indeed, every major medical association has rejected the conclusions of the article and has endorsed the World Professional Association for Transgender Health’s Standards of Care, which recommend surgical treatment for transgender individuals where medically necessary.<sup>1</sup>

The erroneous claims of a law review article should not be incorporated into circuit precedent through unnecessary dicta. This Court has warned that unnecessary dicta should generally be avoided because “being peripheral, [it] may not have received the full and careful consideration of the court that uttered it.”

*Jimenez v. Sessions*, 893 F.3d 704, 714 (10th Cir. 2018) (quotation omitted) (citations omitted) (citing *OXY USA, Inc. v. Babbitt*, 230 F.3d 1178, 1184 (10th Cir. 2000)). This is especially true here where there is no factual record developed below for this Court to consider the issues opined upon regarding the medical

---

<sup>1</sup> See, e.g., American Medical Association House of Delegates, Removing Financial Barriers to Care for Transgender Patients, Res. 122 (A-08), (2008), [http://www.tgender.net/taw/ama\\_resolutions.pdf](http://www.tgender.net/taw/ama_resolutions.pdf) (last visited July 23, 2018); American Psychiatric Association Caucus of Lesbian, Gay and Bisexual Psychiatrists et al., APA Official Actions: Position Statement on Access to Care for Transgender and Gender Variant Individuals (2012), <https://transcendlegal.org/american-psychiatric-association> (last visited July 23, 2018); National Commission on Correctional Health Care, *Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings*, (last revised 2015), <https://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care> (last visited July 23, 2018); American Psychological Association, Transgender, Gender Identity, & Gender Expression Non-Discrimination, adopted by the American Psychological Association Council of Representatives (August 2008), <http://www.apa.org/about/policy/transgender.aspx> (last visited July 23, 2018).

efficacy of treatment for gender dysphoria. *Cf. Hill v. SmithKline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir. 2004) (recognizing that appointment of counsel is often necessary in indigent prisoner cases where expert testimony is required); *Rex v. Chase Home Fin. LLC*, 905 F. Supp. 2d 1111, 1133 (C.D. Cal. 2012) (rejecting decision as persuasive authority where plaintiff's pro se status resulted in incomplete analysis flowing from plaintiff's failure to raise arguments rather than strength of reasoning). Indeed, the district court recognized that Ms. "Lamb attempts to controvert many of [her treating physician's] assertions, but she mostly does so improperly." *Lamb v. Norwood*, 262 F. Supp. 3d 1151, 1157 (D. Kan. 2017).

*Amici* respectfully request that the Court amend its opinion and wait for a fully developed record before drawing factual conclusions about the current medical consensus regarding the treatment of gender dysphoria.

## **II. The Court's Discussion of the Vitality and Scope of *Supre v. Ricketts* Is Unnecessary And Creates At Least Two Circuit Splits.**

In addition to concluding that the plaintiff had failed to provide evidence in support of her need for surgical care, the panel also opined at length about this Court's precedent in *Supre*, 792 F.2d at 958, which was decided over thirty years ago. In *Supre*, the split panel determined, based on the available record evidence in 1986, that hormone therapy was controversial and therefore not required to treat

prisoners with gender dysphoria in the context of assessing prevailing party status for the purpose of a fee award determination. *Supre*, 792 F.2d at 963.

In light of the absence of evidence creating a genuine dispute of fact in this case, the Court’s discussion of *Supre* was unnecessary to the outcome of the case. As the panel recognized, “even if we were to reconsider *Supre*’s assumptions, its analytical framework would govern here.” *Lamb*, 2018 WL 3341031, at \*3. The panel opinion’s discussion of *Supre* contains several legal conclusions that, at a minimum, warrant careful scrutiny with the benefit of adversarial briefing with the assistance of counsel.

First, the panel suggested in dicta that it lacked authority to analyze the factual assumptions underlying *Supre* based on subsequent medical advances. But the Court did not cite any Eighth Amendment cases in support of that conclusion. It cited inapposite cases from the abortion context. As this Court previously recognized, “No static test can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Savage v. Fallin*, 663 F. App’x 588, 592 (10th Cir. 2016) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). Whether particular conduct constitutes deliberate indifference to a serious medical need will necessarily depend on the contemporary medical consensus—not the prevailing

medical views that existed over 30 years ago. *Cf. Helling v. McKinney*, 509 U.S. 25, 36 (1993) (holding the Eighth Amendment’s “contemporary standards of decency” requirement means that “the prisoner must show that the risk of which he complains is not one that *today’s society* chooses to tolerate”) (emphasis added); *Crawford v. Cuomo*, 796 F.3d 252, 259 (2d Cir. 2015) (“[P]articular conduct that might not have risen to the level of an Eighth Amendment violation 18 years ago may no longer accord with community standards, and for that reason may state a claim today.”).

To the extent that *Supre* could be interpreted as a permanent, categorical bar on Eighth Amendment claims based on the denial of hormones or surgery to treat gender dysphoria, that interpretation would directly conflict with decisions from the First, Fourth, Seventh, and Ninth Circuits. *See, e.g., Kosilek v. Spencer*, 774 F.3d 63, 91 (1st Cir. 2014) (en banc) (noting that any blanket ban on surgical treatment for gender dysphoria “would conflict with the requirement that medical care be individualized based on a particular prisoner’s serious medical needs”); *De’lonta v. Angelone*, 330 F.3d 630, 634-35 (4th Cir. 2003) (prisoner stated a claim for deliberate indifference based on blanket restriction on initiation of hormone therapy); *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (state law that barred hormone therapy and gender-confirming surgery as possible treatments for prisoners with gender dysphoria facially violated the Eighth Amendment);

*Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (prisoner who alleged blanket ban on surgical treatment for gender dysphoria stated valid Eighth Amendment claim); *see also Hicklin v. Precynthe*, No. 4:16-cv-01357-NCC, 2018 WL 806764, at \*11 (E.D. Mo. Feb. 9, 2018) (“The denial of hormone therapy based on a blanket rule, rather than an individualized medical determination, constitutes deliberate indifference in violation of the Eighth Amendment”).

In addition, to the extent that the panel interpreted *Supre* to create a bright-line rule that the provision of some treatment categorically precludes a finding of deliberate indifference, the panel’s decision created a split with at least the Fourth, Sixth, Seventh, Eighth, and Ninth Circuits. *See De’lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (providing “some treatment” does not necessarily mean providing “constitutionally adequate treatment”); *Jones v. Muskegon Cty.*, 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.”) (citations omitted); *Gonzalez v. Feinerman*, 663 F.3d 311, 314 (7th Cir. 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”); *Langford v. Norris*, 614 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) (citations omitted); *Rosati*, 791 F.3d at 1040 (“Rosati plausibly alleges her symptoms (including repeated efforts at self-castration) are so severe that prison officials recklessly disregarded an excessive risk to her health by denying SRS” even where hormone therapy was being provided).

*Amici* do not ask the panel to overrule or distinguish *Supre* in this case. But given the growing consensus in the law contrary to *Supre* and three decades of intervening medical science—none of which has been introduced in the record—the Court should hesitate to unnecessarily expand *Supre*’s reasoning, particularly where there is no evidentiary record and the plaintiff is proceeding without the benefit of counsel and expert testimony.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court limit its holding to the reasoning of the district court that on the existing record there was no genuine dispute of material fact that Ms. Lamb’s gender dysphoria was appropriately managed by the existing treatment protocols. Specifically, the Court should amend its opinion to remove Sections 3 and 4 and the sentence

“Though prison officials have not authorized surgery or the hormone dosages that Michelle wants, the existing treatment precludes a reasonable fact-finder from inferring deliberate indifference.” *Lamb*, 2018 WL 3341031, at \*3.

Respectfully submitted,

CHASE STRANGIO  
GABRIEL ARKLES  
JOSH BLOCK  
American Civil Liberties Union Foundation  
125 Broad Street  
New York, NY 10004  
(212) 549-2569

/s/ Lauren Bonds  
Lauren Bonds, KS No. 27807  
ACLU Foundation of Kansas  
6701 W. 64th Street, Ste. 210  
Overland Park, KS 66202  
Phone: (913) 490-4100  
[lbonds@aclukansas.org](mailto:lbonds@aclukansas.org)

July 23, 2018



## CERTIFICATE OF COMPLIANCE

In accordance with of the Federal Rules of Appellate Procedure 32(g), undersigned counsel certifies that this brief complies with the word limit of Fed. R. App. P. 29 (b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,340 words as measured using the Word Count function for Word documents.

July 23, 2018

*/s/ Lauren Bonds* \_\_\_\_\_  
Lauren Bonds, KS No. 27807  
ACLU Foundation of Kansas  
6701 W. 64th Street, Ste. 210  
Overland Park, KS 66202  
Phone: (913) 490-4100  
lbonds@aclukansas.org

*Counsel for Amici*

**CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that the foregoing document complies with the required privacy redactions. I further certify that any hard copies submitted of this filing will be exactly the same as the electronic copy. Finally, I certify that this document was scanned for viruses with Symantec Endpoint Protection version 12.1.6., last updated January 20, 2018. According to the virus scan, this file is free of viruses.

/s/ Lauren Bonds  
Lauren Bonds

*Counsel for Amici*

July 23, 2018

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that this 23rd day of July, 2018, the Brief in support of the Motion for Leave to File an Amicus Brief of the American Civil Liberties Union and the American Civil Liberties Union of Kansas was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. A copy will also be mailed to the appellant.

/s/ Lauren Bonds  
Lauren Bonds

*Counsel for Amici*