IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHELSEA ELIZABETH MANNING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ASHTON CARTER, *et al.*,	)	Civil Action No. 1:14-cv-1609 (CKK)
	)	
	)	**REDACTED - ORIGINAL FILED UNDER SEAL**
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case is about more than hairstyles. It is about medical treatment for a long-misunderstood and stigmatized condition, and about a prisoner's core identity and her need to be seen and treated in accordance with that identity. It is about the experience of being "cruelly imprisoned within a body incompatible" with Plaintiff's true gender and being denied treatment to minimize the concomitant suffering that results. *Farmer v. Moritsugu*, 163 F.3d 610, 611 (D.C. Cir. 1998). Though the factual dispute has narrowed since Plaintiff first brought this lawsuit, the implications for Plaintiff are anything but trivial, touching a fundamental aspect of who she is and her physical and emotional well-being.

Plaintiff Chelsea Elizabeth Manning ("Plaintiff" or "Manning") suffers from gender dysphoria, a medical condition that requires treatment. She has spent her entire life struggling with her identity. By the time she was recognized as female and prescribed treatment, she was already incarcerated. But her incarceration makes her no less of a woman nor does it make her medical needs any less urgent. For a person with gender dysphoria, the ability to consolidate and express gender is not merely a choice but rather a critical part of treatment. To enforce male grooming standards against Plaintiff is to undermine her treatment and mark her as different solely because of her sex, gender identity, assigned sex at birth and transgender status.

Raising objections to the severity of Plaintiff's medical needs and introducing disputed facts about security concerns related to Plaintiff's transgender status and medical treatment, Defendants attempt to litigate factual disputes far beyond what is presented in Plaintiff's Amended Complaint. These complex factual questions cannot be resolved on the pleadings and Defendants' motion to dismiss should be denied because, as shown below, Plaintiff's claims are properly before this Court and Plaintiff has more-than-plausibly alleged that the Defendants have violated her constitutional rights.

BACKGROUND

A. Gender Dysphoria

Gender dysphoria (previously known as gender identity disorder (GID)) is the medical diagnosis given to individuals whose gender identity – a person's innate sense of being a particularly gender – differs from the sex assigned at birth, causing clinically significant distress. Am. Compl. ¶ 22. According to medical consensus, gender dysphoria intensifies over time and, when inadequately treated, can lead to clinically significant psychological distress, dysfunction, debilitating depression, self-surgery, and suicidality. Am. Compl. ¶ 24-25. The risk of these harms is heightened for incarcerated male-to-female transgender individuals like Plaintiff. Am. Compl. ¶ 26.

The medically recognized protocols for treating persons with gender dysphoria are outlined in the World Professional Association for Transgender Health ("WPATH") *Standards of Care*, which have been deemed authoritative by all the major medical associations and have been recognized as such by Defendants. Am. Compl. ¶¶ 27, 36. These standards identify "changes in gender expression and role," including through gender-consistent hair length and style, as part of necessary treatment. Am. Compl. ¶¶ 28, 31. The National Commission on Correctional Healthcare ("NCCHC") has affirmed the importance of correctional institutions following the WPATH standards and cautions against any policies that limit treatment based on blanket prohibitions. Am. Compl. ¶ 32. Consistent with those standards and the recommendations of the NCCHC, the Federal Bureau of Prisons and many state and local corrections agencies permit female prisoners housed in men's facilities to maintain long hair. Am. Compl. ¶ 34.

B. Plaintiff's Gender and Her Requests for Treatment

Plaintiff is a woman and like all women she retains her female identity while incarcerated. Am. Compl. ¶ 13, 131. Defendants have recognized that Plaintiff is a woman; she was viewed as such at the United States Disciplinary Barracks at Fort Leavenworth ("USDB"), where she has been incarcerated, even before Defendants initiated treatment for her gender dysphoria. Am. Compl. ¶ 49, 129. Though Plaintiff has experienced harm due to Defendants' failure to adequately treat her gender dysphoria, she has not been harmed by other prisoners nor have there been any security incidents related to Plaintiff's feminine gender expression since her arrival at the USDB. Am. Compl. ¶¶ 96, 125.

The United States Army has been aware of Plaintiff's medical condition since 2010. Am. Compl. ¶¶ 42-43. Since her first diagnosis with gender identity disorder in 2010 by military personnel, Plaintiff has been diagnosed at least three additional times. Am. Compl. ¶¶ 45, 53, 82. Over the past two years, while Plaintiff has been incarcerated at the USDB, she has requested treatment in writing for her condition no fewer than ten times. Am. Compl. ¶¶ 48-51, 57-60, 64, 67-68, 76. Plaintiff first filed a request for treatment by submitting a Department of Defense ("DD") Form 510 to Defendant Keller on August 28, 2013. Am. Compl. ¶ 51. She never received a response to that request. On January 21, 2014, Plaintiff filed a request to the Army Office of the Inspector General [redacted] thereby exhausting her administrative remedies. Am. Compl. ¶ 68; Def.'s Br. Ex. M.

Consistent with the WPATH standards, Plaintiff's recommended treatment has included the ability to consolidate her female gender through appropriate hair length and hair grooming standards. When evaluated in August 2014 by an expert in the treatment of gender dysphoria, that expert recommended that Plaintiff be immediately permitted to "express her female gender through growing her hair" as part of her necessary treatment. Am. Compl. ¶ 83. That same expert

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cautioned that failure to adequately treat Plaintiff's condition through the recommended treatment put her "at high risk for serious medical consequences, including self-castration and suicide." Am. Compl. ¶ 84. Nowhere did Plaintiff's evaluating expert specify that such risks were limited to the denial of hormone therapy. Am. Compl. ¶¶ 83–84. Plaintiff's treating clinician at the USDB, Dr. Galloway, PA/HIPAA PA/HIPAA PA/HIPAA Am. Compl. ¶¶ 87, 91. At the time of those recommendations, PA/HIPAA PA/HIPAA Am. Compl. ¶ 86; ECF No. 30, Ex. 2; ECF No. 34, Ex. 1.

Plaintiff's health and well-being have continued to deteriorate and she is suffering physical and emotional harm and the risk of future severe harms if Defendants continue to withhold her medically necessary treatment. Am. Compl. ¶ 84, 126. She is further harmed by Defendants' refusal to treat her as a woman, thereby subjecting her to discrimination on the basis of her sex in violation of her right to equal protection under the Fifth Amendment. Am. Compl. ¶¶ 128-136.

APPLICABLE LEGAL STANDARDS

To survive a motion to dismiss, a complaint need only contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When considering a motion to dismiss for failure to state a claim, "'the complaint must be liberally construed in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged.'" *Baumann v.*

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District of Columbia, 775 F. Supp. 2d 191, 193 (D.D.C. 2011) (Kollar-Kotelly, J.) (quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979)).

Within this framework, a motion to dismiss under Rule 12(b)(6) is designed to test the legal sufficiency of a complaint, "not resolve contests surrounding the facts." *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992); *see also United States ex rel. Shemesh v. CA, Inc.*, 89 F. Supp. 3d 67, 73 (D.D.C. 2015) (denying motion to dismiss where dispute was not "purely legal" and therefore and could not "be resolved at this stage solely based on the limited record of exhibits incorporated by reference").

ARGUMENT

In the five years since Plaintiff was first diagnosed with gender dysphoria by the military, she has repeatedly requested treatment from the government and warned of the harms she feared would befall her if her requests went unanswered. She made and exhausted these requests through every available administrative channel before she filed this lawsuit to enjoin the unconstitutional harms she is suffering. Because Plaintiff's claims are properly before this Court and she has adequately pled violations of her Eighth and Fifth Amendment rights, Defendants' motion to dismiss should be denied in its entirety.

I. PLAINTIFF'S CLAIMS ARE PROPERLY BEFORE THIS COURT.

Although military personnel first diagnosed Plaintiff with gender dysphoria more than five years ago, and although Plaintiff has repeatedly requested medical treatment for that condition from military and prison officials (requests considered even by the Secretary of Defense), Defendants now contend that their continued refusal to provide Plaintiff constitutionally required medical care may not be heard by this Court because (i) this Court should abstain in favor of the military tribunal that is reviewing her court martial conviction, and (ii) Plaintiff did not exhaust her requests for treatment at the administrative level, as required by

the Prison Litigation Reform Act ("PLRA"). These contentions have no merit. Abstention is not proper where, as here, the relief Plaintiff seeks is not available from the military tribunal, and Plaintiff has sufficiently exhausted her administrative remedies under the PLRA.

A. This Court Should Not Abstain.

Defendants' attempts to stretch the abstention doctrine to fit the circumstances of this case should be rejected. Defendants have not demonstrated that the relief Plaintiff seeks here is available in military court, nor have they explained why this Court should abdicate its duty to adjudicate constitutional claims for injunctive relief filed by military prisoners. Defendants have cited no authority – and Plaintiff is aware of none – providing that this Court should abstain from hearing Plaintiff's constitutional claims related to her post-conviction deprivation of medical care solely because military court proceedings concerning Plaintiff's underlying conviction and sentence have not yet concluded.

1. Abstention Is Not Proper Where Military Courts Cannot Grant Plaintiff The Relief She Seeks.

A federal court should abstain in favor of a military court "'only if the relief the petitioner seeks . . . would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the court-martial charge.'" *Hamdan v. Rumsfeld*, 548 U.S. 557, 586 n.17 (2006) (quoting *Parisi v. Davidson*, 405 U.S. 34, 41–43 (1972)). Because the relief Plaintiff seeks here is not available in military court, this Court should not abstain.

In *Parisi*, the Supreme Court found abstention inappropriate where a servicemember sought review of an administrative application independent of pending military criminal proceedings because the relief sought – an administrative discharge for his conscientious objector status – was not "available to him with reasonable promptness and certainty" through

the military courts. 405 U.S. at 41. Although the servicemember could have raised the wrongful determination of his discharge based on his objector status as a defense in military court proceedings, the "narrow" and "not wholly clear" availability of that path to relief counseled against abstention. *Id*. at 43.

Here, Defendants suggest that the military appellate court may consider Plaintiff's Eighth Amendment claim and reduce the length of her confinement if it finds a violation, Def.'s Br. at 18-19,[1] but they have "referred to no reported military court decision," *Parisi*, 405 U.S. at 43, that has issued the relief Plaintiff actually seeks: an injunction directing the government to provide her with clinically appropriate medical treatment while she remains in confinement. Am. Compl. Prayer for Relief (c). Even if the military courts would entertain Plaintiff's Eighth Amendment claim, they "may act only with respect to the findings and sentence as approved by the convening authority." 10 U.S.C. § 866. *See also United States v. Kinsch*, 54 M.J. 641, 549 (Army Ct. Crim. App. 2000) (remedy for Eighth Amendment violation involved assessment of "appropriateness of the sentence" to grant one month confinement relief), abrogated on other grounds, *United States v. Bright*, 63 M.J. 683 (Army Ct. Crim. App. 2006); *accord United States v. Pena*, 64 M.J. 259, 264 (C.A.A.F. 2007) ("Our review of post-trial confinement and release conditions on direct appeal is limited to the impact of such conditions on the findings and the sentence.").[2] Here, Plaintiff does not request sentence relief; she requests medical treatment. A

[1] Even if the Army Court of Criminal Appeals would consider Plaintiff's Eighth Amendment claim for the first time on appeal, its review would generally be limited to the court martial record. 10 U.S.C. § 866(c). While a military appellate court may order a hearing on collateral matters pursuant to *United States v. DuBay*, 37 C.M.R. 411 (1967), Plaintiff has no right under either constitutional or military law to such a hearing. *Cothran v. Dalton*, 83 F. Supp. 2d 58, 69 (D.D.C. 1999).

[2] Defendants also appear to suggest that some unspecified form of relief may be available through the All Writs Act, 28 U.S.C. § 1651(a). However, this is also uncertain. The USDB Risk Assessment Memo denying permission to Plaintiff to wear a feminine hairstyle as part of her

reduction in her 35-year sentence will not provide her with treatment. Because the relief Plaintiff seeks is not available in military court – and at the very least its availability is "not wholly clear" – this Court should hear Plaintiff's claim. *Parisi*, 405 U.S. at 43.

2. Abstention Would Result In Unreasonable Delay.

Additionally, abstention in favor of the military court system would result in egregious delay in the consideration of Plaintiff's constitutional claims. The military courts are years away from resolution of Plaintiff's appeal. Despite diligent prosecution by Plaintiff's counsel, she will not even be able to file the opening brief in her court martial appeal until sometime next year, more than 30 months after Plaintiff's August 2013 sentencing.[3] And proceedings after that promise to be similarly protracted.[4] Adding these new and unrelated issues to that already-complicated appeal will only add further delay.

Abstention would compound Plaintiff's unconstitutional deprivation of medically necessary treatment. Where military courts cannot provide expeditious relief, servicemembers may have their claims heard in federal court regardless of any otherwise applicable abstention doctrine. *See Apple v. Greer*, 554 F.2d 105, 110 (3d Cir. 1977).

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treatment plan "was an executive action, not a 'findin[g]' or 'sentence,' § 867(c), that was (or could have been) imposed in a court-martial proceeding," and therefore is beyond the scope of the military court's jurisdiction under even the All Writs Act. *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999).

[3] Plaintiff's court martial record is voluminous (consisting of more than 46,000 pages) and significant portions of it are classified, requiring her attorneys to draft the brief in a secure location during duty hours pursuant to Army Court of Criminal Appeals Rule 30.5. Declaration of Nancy Hollander ("Hollander Dec.") ¶¶ 7-8. Moreover, more than two years after sentencing, Plaintiff continues to await CIA approval before her counsel may even review some classified portions of the record for the first time. *Id.* ¶ 9.

[4] Plaintiff's appellate counsel in military court anticipates that her appeal will not be completed in the military courts before 2019. Hollander Dec. ¶ 11; *see also* Annual Report from the Code Committee on Military Justice, the U.S. Court of Appeals for the Armed Forces and the Judge Advocates General of the Armed Forces for the Period Oct. 1, 2013 to Sept. 30, 2014 at 30, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY14AnnualReport.pdf (reporting on lengthy duration of military court appellate proceedings).

3. Appellate Review Of Plaintiff's Court Martial Conviction Does Not Require This Court To Abstain From Hearing Plaintiff's Claim To Remedy Her Ongoing Deprivation of Medical Care.

Every case Defendants cite in support of abstention concerns a military prisoner's attempt to collaterally attack in civilian court a pending court martial proceeding, conviction or sentence prior to the resolution of military court proceedings. For example, the prisoner in *Schlesinger v. Councilman* had attempted to enjoin pending court martial criminal proceedings before the military trial had even begun. 420 U.S. 738, 741 (1975). Likewise, all other cases on which Defendants rely have involved a collateral attack on military court proceedings through a *habeas corpus* or mandamus claim, almost exclusively where a court martial trial had not yet adjudicated the accused's criminal charges or sentence. *See New v. Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1997) (*habeas* challenge to bad conduct discharge filed prior to initial determination by court martial); *Hennis v. Hemlick*, 666 F.3d 270 (4th Cir. 2012) (*habeas* challenge seeking to raise jurisdictional challenge to court martial criminal proceedings where post-trial motions had not yet been argued).[5] That the abstention cases primarily concern court martial proceedings, where military courts find facts and hear testimony, is not surprising. Indeed, the D.C. Circuit considers *Councilman*'s abstention requirement "particularly important" in connection with ongoing court martial proceedings. *New*, 129 F.3d at 643.

By contrast, Plaintiff's court martial proceedings concluded in 2013, and the subject of those proceedings – the merits of her underlying criminal conviction – are not at issue in this case. In like circumstances, federal courts routinely hear suits brought by military prisoners

[5] Defendants have cited a single case where a federal court required abstention to a military court where, as here, a court martial had concluded its initial determination on the accused's conviction and sentence. *See Williams v. Sec'y of Navy*, 787 F.2d 552, 561 (Fed. Cir. 1986). However, like the remainder of Defendants' abstention authority, *Williams* also involved a collateral attack on the conviction and resulting punishment.

regardless of the prisoners' use of military courts. *See, e.g.*, *Wilkins v. United States*, 279 F.3d 782, 789 (9th Cir. 2002) (holding military prisoner's constitutional claims for declaratory and injunctive relief not subject to exhaustion requirement); *Walden v. Bartlett*, 840 F.2d 771, 774 (10th Cir. 1988) (finding federal court jurisdiction over a § 1331 action for equitable relief for constitutional violations from military prisoner). The Supreme Court has "never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *United States v. Stanley*, 483 U.S. 669, 683 (1987) (*quoting Chappell v. Wallace*, 462 U.S. 296, 304 (1983)).[6] These principles govern here.

B. Plaintiff's Claims Were Properly Exhausted.

Despite acknowledging that Plaintiff raised grievances about her treatment for gender dysphoria at every available level, *see* Def.'s Br. at 21 (acknowledging that Plaintiff submitted both the Form 510s and IG request, and not asserting that any other procedures were available), Defendants fault those submissions for not explicitly describing each type of treatment necessary for her medical condition and not explicitly identifying each legal theory underlying her requests. Plaintiff's grievances, however, were entirely sufficient to meet the requirements of the PLRA.

1. PLRA Exhaustion Requires Only Notice of a Prisoner's Grievance.

Except where a prison's explicit procedures require something additional, "a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in a

[6] In addition, because Defendants have not argued that abstention is appropriate for Plaintiff's Fifth Amendment claim, it would be inefficient for this court to abstain from hearing Plaintiff's Eighth Amendment claim, which derives from the same set of facts. Such claims, after all, are routinely considered together. *Cf. Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (affirming prisoner's Eighth Amendment claim based on denial of hormone therapy to prisoners with gender identity disorder where district court had found Fifth Amendment violation in the alternative); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1116 (N.D. Cal. 2015) (holding that transgender prisoner stated both Eighth Amendment and equal protection claims based on denial of medical treatment related to gender dysphoria).

notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming." *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002); *see also, e.g.*, *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004).[7] A complaint satisfies the PLRA's specificity requirements so long as it is not "so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally." *Brownell v. Krom*, 446 F.3d 305, 310 (2d Cir. 2006). The overarching question is whether the grievance was sufficient to "alert[] the prison to the nature of the wrong for which redress is sought." *Akhtar v. Mesa*, 698 F.3d 1202, 1211 (9th Cir. 2012) (internal quotation marks omitted).

The USDB regulations cited by Defendants, Def.'s Br. at 20–21, do nothing to alter this baseline standard. Although the USDB regulations require prisoners to "clearly state the problem" and "[g]ive a clear, full explanation," those broad and generic instructions do not require prisoners to provide legal theories, ask for specific remedies, or provide every factual detail relevant to future claims. *See Jones v. Bock*, 549 U.S. 199, 218 (2007) (administrative rule requiring prisoners to "be as specific as possible" was insufficient to require prisoner to name specific defendants). Thus, so long as a USDB prisoner "object[s] intelligibly to some asserted shortcoming," and that objection is sufficient to provide notice to prison officials of the nature of the wrong, the PLRA exhaustion requirement is satisfied. *Strong*, 297 F.3d at 650.

2. Plaintiff's Clear Requests For Treatment For Gender Dysphoria Were Sufficient To Exhaust Her Eighth Amendment Claim.

The law is clear that where a prisoner complains of inadequate medical treatment for a particular condition and exhausts that complaint, she has sufficiently exhausted any claim for

[7] At least six Circuits have explicitly adopted the *Strong* standard. *See Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (adopting *Strong* standard and collecting cases).

failure to treat that condition. Indeed, the rule that a grievant need not "present fully developed legal and factual claims at the administrative level" has "particular application to the complex issues involved in medical care cases." *Sulton v. Wright*, 265 F. Supp. 2d 292, 298 (S.D.N.Y. 2003). Courts refuse to require "rigid 'issue exhaustion' . . . when the fundamental issue is one of medical care from the same injury." *Id.* at 298; *see also Lewis v. Naku*, No. Civ S-07-0090, 2007 WL 3046013, at *5 (E.D. Cal. Oct. 18, 2007) ("Prisoners are not required to file and exhaust a separate grievance each time they allegedly receive inadequate medical care for an ongoing condition.").

Plaintiff's grievances met the baseline requirement of notifying Defendants of her need for medical care for her gender dysphoria. Plaintiff used every available channel to inform the Defendants (1) exactly what her condition was, (2) that she did not believe she was receiving adequate medical care for the condition, and (3) that she was requesting additional treatment – specifically, treatment in accordance with WPATH standards, including the opportunity to "live[] and dress[]" as a woman. For an Eighth Amendment deliberate indifference to medical needs claim, the PLRA requires nothing more. *See Akhtar*, 698 F.3d at 1210–11 (PLRA's overarching inquiry is whether grievance was "sufficient" to "alert[] the prison to the nature of the wrong for which redress is sought").

Defendants' argument that Plaintiff's grievances should have listed the exact types of treatments she felt she required is both unfair and nonsensical. One would not require a cancer patient to request the specific medications or forms of chemotherapy necessary to cure her disease prior to bringing an Eighth Amendment claim for failure to provide treatment – simply complaining of lack of proper treatment for the condition would suffice. By the same token, Plaintiff's request that she receive treatment for gender dysphoria is sufficient to raise a demand

for the *proper* treatment of that condition. To require anything else would impose a nearly impossible burden on prisoners, requiring them to be medical experts regarding their conditions and treatments.

The law also recognizes that where a prisoner exhausts a grievance for lack of necessary medical treatment, that grievance also suffices to exhaust claims for the *later* failure to provide treatment for that *same* medical condition. *See Parzyck v. Prison Health Servs., Inc.*, 627 F.3d 1215, 1219 (11th Cir. 2010) (the PLRA does not require a prisoner to "file new grievances addressing every subsequent act by a prison official that contributes to the continuation of a problem already raised in an earlier grievance"); *Passer v. Steevers*, No. 2:08-cv-2792, 2010 WL 3210850, at *8 (E.D. Cal. Aug. 10, 2010) (prisoner's grievance for the denial of proper treatment for neck injury was sufficient to exhaust claims that treatment provided subsequent to grievance was inadequate to fully treat condition); *Torrence v. Pelkey*, 164 F. Supp. 2d 264, 278-79 (D. Conn. 2001) (declining to require exhaustion of new issues in medical care that arose from the "same series of events" concerning medical care that had already been exhausted).

That is precisely what has occurred here. Plaintiff complained that her gender dysphoria was not adequately treated. She exhausted those claims. The Defendants then made some effort to treat her condition. It soon became clear that those efforts were insufficient and – only after first attempting to resolve those deficiencies with the Defendants, despite having no obligation to do so for claims that had already been exhausted[8] – Plaintiff came to this Court seeking to force the Defendants to provide the necessary treatment. Plaintiff was not required to go back and *re-*

[8] Contrary to Defendants' implications, Manning's submission of three additional Form 510s PA/HIPAA has no bearing on the question of whether her initial requests for treatment were in fact exhausted. Manning exhausted her administrative grievances on January 21, 2014, when she filed the IG Action Request. Her attempts to continue a dialogue with the Defendants by raising those issues again are irrelevant to the question of whether those claims were exhausted earlier.

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exhaust her medical treatment grievances simply because the Defendants continued to fail to provide all necessary treatment for her condition. Her clear request for treatment PA/HIPAA PA/HIPAA was sufficient to exhaust *any* claim that the Defendants failed to provide her with necessary treatment for that condition – even if that failure continued into the future.

Even if the law or the USDB regulations required Plaintiff to actually request the *specific* treatment methods necessary PA/HIPAA her grievances were sufficiently detailed to do that. In her initial August 28, 2013 Form 510 request, PA/HIPAA

PA/HIPAA

PA/HIPAA

PA/HIPAA Def.'s Br., Ex. F at 1–3. She later incorporated that request into her second Form 510 request PA/HIPAA *id.* at 4, and into her IG Action Request, Def.'s Br., Ex. G. As explained in Plaintiff's amended complaint, the WPATH Standards of Care include "[c]hanges in gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity)," and the "real life experience" involves, among other things, "dressing, grooming, including through hair length and style, and otherwise outwardly expressing oneself consistently with one's gender." Am. Compl. ¶¶ 28, 31 (emphasis added). Plaintiff thus went beyond the PLRA's exhaustion requirements. Under any standard, that was sufficiently explicit to provide notice that her request for treatment included a request to be allowed female hair length.

The steps Plaintiff took were entirely consistent with the underlying policies of the PLRA's exhaustion requirement: to "afford[ ] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). These Defendants unquestionably had that opportunity. Plaintiff

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clearly requested treatment PA/HIPAA PA/HIPAA and raised those claims at every available level. After formally raising those issues, she continued to work with the Defendants to address her problems, submitting three additional Form 510s further requesting PA/HIPAA *see* Def.'s Br., Ex. F at 5, 10, 11, and raising her concerns through a variety of other administrative procedures, *see* Am. Compl. ¶¶ 64–67. Prior to filing this lawsuit, Plaintiff's counsel once again raised her requests for medical treatment with the Defendants, including seeking permission for her to follow female hair and grooming standards. Am. Compl. ¶ 76. And there is no question that Plaintiff's requests were received by the Defendants and that the Defendants had an opportunity to remedy her complaints: Secretary of Defense Chuck Hagel personally acknowledged awareness of her requests for treatment and spoke openly about how the government would address those requests. *See* Am. Compl. ¶¶ 73–74.

This is not a case in which prison officials were not provided with the opportunity to remedy a prisoner's grievance. To the contrary, Plaintiff informed prison officials of her need for treatment – and her need for this *specific* treatment – in nearly every conceivable way. The PLRA was not intended to bar claims in these circumstances.

3. Plaintiff Exhausted Her Sex Discrimination Claims.

Nor did Plaintiff's decision not to explicitly use the words "sex discrimination" or "equal protection" in her administrative grievances cause her Fifth Amendment claim to be unexhausted. The PLRA's exhaustion requirement does not require a prisoner to raise specific legal theories or claims. *See, e.g.*, *Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003) (grievance need not "allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory"). So long as the grievances were sufficient "to provide notice of the *harm*

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being grieved," it need not include legal theories, as "[t]he primary purpose of a grievance is to alert the prison to a problem and facilitate its resolution, not to lay groundwork for litigation." *Griffin*, 557 F.3d at 1120.

As described above, Plaintiff's grievances did just that. Her Fifth Amendment claim in this case seeks to hold Defendants accountable for failing to allow her "to present as female." Am. Compl. ¶ 132. Plaintiff's Fifth Amendment claim therefore seeks a remedy for the same deprivation of rights about which she grieved. The fact that, now with counsel, she presents that deprivation in the framework of a specific legal claim does not render her administrative grievances any less effective. *See, e.g.*, *Gregge v. Kate*, 584 F. App'x 421, 421 (9th Cir. 2014) (district court erred in finding failure to exhaust based upon prisoner's failure to put "defendants on notice of the alleged basis of liability"); *Tennille v. Quintana*, 443 F. App'x 670, 672–73 (3d Cir. 2011) (where prisoner fully exhausted remedies to claim that he had been denied eyeglasses but did not include in grievances "the specific constitutional grounds on which his complaint is based," he had nevertheless exhausted due process and equal protection claims).

Several courts have explicitly recognized that where the basic facts underlying an equal protection claim have been raised, the prisoner need not explicitly cite the Fifth (or Fourteenth) Amendment or refer to "discrimination" in order for the claim to be exhausted. In *Parker v. Mulvaney*, a district court found a prisoner's race discrimination claims exhausted based upon grievances he filed relating to his placement in the "Security Threat Group," notwithstanding the fact that the grievances did not indicate that he believed that placement was a result of race discrimination. No. 07-cv-124, 2008 WL 4425579, at *5 (W.D. Mich. Sept. 26, 2008).[9] And in

[9] The *Parker* court's decision was based in part on the fact that the prison's administrative rules only required the prisoner to provide information about the "*facts* involving the issue being grieved." 2008 WL 4425579, at *5 (emphasis in original). Although the USDB regulations do

Holley v. Cal. Dep't of Corr., although the prisoner failed to raise both his First Amendment freedom of religion and Fourteenth Amendment equal protection claims at every level of the administrative grievance process, his factual description of the problem – that "he felt he had a legal right to grow his hair in spite of the grooming regulations" – was sufficient to exhaust both constitutional claims. No. Civ S-04-2006, 2007 WL 586907, at *7–8 (E.D. Cal. Feb. 23, 2007). As in these cases, Plaintiff clearly provided the Defendants with notice of the facts underlying her claim of discriminatory conduct, and raised her concerns about those facts through all available administrative avenues. She did not need to label her complaints as "sex discrimination" in order to bring her Fifth Amendment claim.

Defendants cite *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004), for the proposition that discrimination claims must be explicitly raised in a grievance in order to be exhausted. *Johnson*, however, compels a finding of exhaustion here. In *Johnson*, the court examined whether two different discrimination claims were exhausted by the prisoner's grievances complaining of sexual assault: a claim for racial discrimination, and a claim for discrimination based on sexual orientation. *See id*. at 517. As Defendants note, the Fifth Circuit found that the racial discrimination claims were not exhausted because the prisoner's "grievances do not mention his race at all," and failed to provide any "notice that there was a race-related problem." *Id*. at 518. By contrast, the court found that the sexual orientation discrimination claims *were* exhausted because the prisoner's grievances "mention his sexual orientation many times," and were "intertwined with [the prisoner's] complaints about the officials' failure to protect him from assaults." *Id*. It did not matter that the prisoner failed to allege that the defendants' failures to

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not explicitly limit the required information to just "facts," they do not purport to require anything more than an "explanation," *see*, *e.g.*, Def.'s Br., Ex. E at 1, and do not alter the baseline PLRA rule that legal theories need not be raised in a grievance.

protect him from assault were "*because of* his homosexuality"; rather, the references in the grievances to both his sexual orientation and the assaults were sufficient to "at least reasonably indicate[] a problem." *Id*. Like the sexual orientation discrimination claims in *Johnson*, Plaintiff repeatedly referenced her gender identity or transgender status, and made clear that the problems for which she was seeking a remedy were "intertwined" with – and, in fact, completely based upon – her gender identity and transgender status. Given Plaintiff's repeated requests for action related to her gender, the Defendants here cannot plausibly allege that they lacked notice that there was a gender-related problem.[10]

II. PLAINTIFF STATES A VALID CLAIM FOR VIOLATION OF HER RIGHTS UNDER THE EIGHTH AMENDMENT.

The Eighth Amendment's proscription of cruel and unusual punishment "includes the failure to treat the medical needs of prisoners in government custody." *Estelle v. Gamble*, 429 U.S. 97, 102–103 (1976). The Supreme Court has made clear that the government is obligated to provide medically necessary treatment to prisoners with serious medical needs in a manner consistent with prudent professional standards and appropriate to the individual prisoner's current medical condition. *Id*. That some prisoners or types of medical care may be misunderstood or controversial does not change the constitutional inquiry.

[10] Cases from other courts finding non-exhaustion of discrimination claims for failure to explicitly allege discrimination during the administrative grievance process are in the same vein as the racial discrimination claim in *Johnson*: circumstances where the facts raised in the grievances had no facial connection to the status upon which discrimination allegedly occurred. *See*, *e.g.*, *Waddy v. Sandstrom*, No. 11CV00320, 2012 WL 2023519, at *4 (W.D. Va. June 5, 2012) (race discrimination claim not exhausted by grievances complaining about assault that made no mention of racial comments); *Spencer v. City of Philadelphia*, No. 09-123, 2012 WL 1111141, at *6 (W.D. Pa. Apr. 2, 2012) (equal protection claims not exhausted where grievances only related to confiscation of his personal property, and did not "allude to any facts which could even liberally be construed as raising such claims"); *Andrews v. Evert*, No. 09-5858, 2011 WL 4479480, at *2 (N.D. Cal. Sept. 23, 2011) (race discrimination claim not exhausted by grievances related to use of restraints where grievances never raised the issue of race).

Corrections officials inflict cruel and unusual punishment on a prisoner, in violation of the Eighth Amendment, when they are deliberately indifferent to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97 (1976). To state a claim for an Eighth Amendment violation, a prisoner must allege (1) that her medical need was *objectively* sufficiently serious, and (2) that *subjectively* officials acted with a sufficiently culpable state of mind in failing to treat that need. *Id*. Plaintiff has plausibly alleged that she suffers from an objectively serious medical condition and that Defendants acted with deliberate indifference in failing to provide adequate treatment.

A. Plaintiff Has Plausibly Alleged An Objectively Serious Medical Need.

The first prong of the deliberate indifference inquiry is met when a plaintiff alleges that she is suffering from an objectively "serious medical need[]." *Estelle*, 429 U.S. at 104, 106. "[A] medical need is objectively serious" for purposes of the Eighth Amendment if it is ''one that has been diagnosed by a physician as mandating treatment.'" *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 897 (6th Cir. 2004) (internal citations omitted). Plaintiff has pled that she is suffering from gender dysphoria, which has been recognized by medical providers as requiring treatment. Am. Compl. ¶¶ 81, 83. She has further pled that her treating providers recommend that she be permitted to grow and style her hair consistent with female grooming standards as part of her treatment for gender dysphoria. Am. Compl. ¶¶ 28, 31, 82–84.

It is well established, and Defendants do not contest, Def.'s Br. at 4, that gender dysphoria is an objectively serious medical need for purposes of the Eighth Amendment. *See, e.g.*, *Meriwether v. Faulkner*, 821 F.2d 408, 411 (7th Cir. 1987) (recognizing transsexualism as a serious medical need that should not be treated differently than any other psychiatric disorder); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011) (upholding district court decision recognizing gender identity disorder as a serious medical need for purposes of the Eighth Amendment); *see*

also Statement of Interest of the United States, *Diamond v. Owens*, No. 15-cv-50 (M.D. Ga. April 3, 2015) (collecting cases).[11]

Recognizing the clear consensus in the law that gender dysphoria is a serious medical need, Defendants advance two arguments as to why Plaintiff fails to meet the objective prong of the Eighth Amendment test: (1) that treatment related to hair and grooming can *never* be an objectively serious deprivation as a matter of law, and (2) that even if it could, Plaintiff has not alleged such a serious deprivation here. Neither argument has merit and both fail to appreciate the fact-specific nature of assessing the medical needs of a particular individual.

1. The Question Whether Plaintiff Has A Medical Need To Follow Female Hair Length And Hair Grooming Standards Cannot Be Resolved As A Matter of Law.

Treatment for gender dysphoria, like treatment for many other medical conditions, is not "one size fits all." Defendants note that some courts have denied hormone therapy to prisoners with gender dysphoria and argue that "[i]f hormone therapy is not always required under the Eighth Amendment, neither would the provision of any particular grooming standard . . . ." Def.'s Br. at 26. This is akin to saying that since some courts have found that chemotherapy is not required to treat breast cancer in some cases, any claim that chemotherapy is required to treat a particular person's breast cancer must fail as a matter of law, regardless of a patient's individual needs. Plaintiff is not alleging that any particular grooming-related treatment is always required, but simply that female hair length and grooming rules are medically necessary *for her*. Am. Compl. ¶¶ 82-84, 87, 91. The fact that in some cases, and usually on summary judgment or after trial, courts have held that hormone therapy is not required to treat gender dysphoria, has no bearing on the necessity of a particular (and different) treatment for Plaintiff here.

[11] http://www.justice.gov/sites/default/files/crt/legacy/2015/06/12/diamond_soi_4-3-15.pdf.

The fact that a prisoner may not be entitled to the treatment of her choice, *see* Def.'s Br. at 26, does not change a prison's obligations to meet the medical needs of prisoners, including those of gender dysphoric patients. *See De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (*De'lonta II*) (although "a prisoner does not enjoy a constitutional right to the treatment of his or her choice, the treatment a prison facility does provide must nevertheless be adequate to address the prisoner's serious medical need."). In *De'lonta II*, the court declined the defendants' invitation to hold that the denial of a particular form of treatment for gender dysphoria is "a matter of discretion that carries no constitutional implications." *Id*. at 524. The Court should decline Defendants' similar invitation here.

Ruling as a matter of law that Plaintiff's medical need to follow the female hair length and hair grooming standards is not objectively serious would effectively permit a blanket ban on such treatment for all prisoners. It is well established that such bans on medical care without regard to individual medical need are unconstitutional. *See, e.g*., *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014) (holding that the "blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy that one eye is good enough for prison inmates is the paradigm of deliberate indifference" (internal quotation marks omitted)); *Roe v. Elyea*, 631 F.3d 843, 859 (7th Cir. 2011) ("[I]nmate medical care decisions must be fact-based with respect to the particular inmate, the severity and stage of [her] condition, the likelihood and imminence of further harm and the efficacy of available treatments."); *Rouse v. Plantier*, 182 F.3d 192, 199 (3d Cir. 1999) (alleged violations of the Eighth Amendment "obviously var[y] depending on the medical needs of the particular prisoner"); *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 & n.32 (3d Cir. 1987) (by virtue of a blanket

policy, "the County denies to a class of inmates the type of individualized treatment normally associated with the provision of adequate medical care").

The Eighth Amendment's requirement for an individualized medical assessment of a particular prisoner's needs applies to medical care for gender dysphoria as well. *See, e.g*, *Allard v. Gomez*, 9 F. App'x 793, 795 (9th Cir. 2001) ("[T]here are at least triable issues as to whether hormone therapy was denied Allard on the basis of an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to Allard's medical needs."). In *Fields v. Smith*, 712 F. Supp. 2d 830, 866–67 (E.D. Wisc. 2010), for example, a Wisconsin district court struck down a statute that prohibited the Wisconsin Department of Corrections from providing hormone therapy or sexual reassignment surgery to prisoners because "[t]he statute applie[d] irrespective of an inmate's serious medical need or the DOC's clinical judgment." *Id*. at 559, *aff'd*, *Fields v. Smith*, 653 F.3d 550, 557 (7th Cir. 2011).

The fact that courts have denied non-medical challenges to grooming rules unrelated to gender dysphoria is irrelevant here. Plaintiff is not challenging the existence of grooming rules as a general matter. Nor is she asking to be exempt from grooming requirements. She is seeking medical treatment in accordance with medical recommendations and has alleged as much. Am. Compl. ¶¶ 28, 31, 82-84. Even in the cases cited by Defendants where grooming standards have been upheld when tested on First Amendment and due process grounds, those standards often make exemptions for medical needs. For example, in *DeBlasio v. Johnson*, 128 F. Supp. 2d 315, 320 (E.D. Va. 2000), the grooming standards upheld by the court in a non-medical challenge by a non-transgender prisoner exempted from the standards prisoners with a medical basis for such exemption. *Id*. ("If an inmate has a medical condition that could be aggravated by shaving or complete removal of facial hair, the inmate must receive a 'no shave' medical order from the

institutional medical authority."). The Army's own grooming standards also have exemptions for medical needs. *See* Def.'s Br., Ex. D at 5 (permitting medical exceptions to rule that males must keep their face clean-shaven); Def.'s Br., Ex. E at 55 (permitting prisoners with medical needs exception to rule that prisoners be required to shave daily).

Defendants' argument that Plaintiff is subject to male hair restrictions by virtue of her enlistment rather than her incarceration, *see* Def.'s Br. at 27, and therefore that denial of care cannot be considered a punishment, is both factually and legally wrong. It is true that Plaintiff would be subject to grooming rules as an enlisted service member, although it is not at all clear that she would be subject to the *male* grooming rules if she were permitted to remain in the military as an openly transgender woman.[12] But in any event, because of her incarceration she is held against her will and denied treatment that she would otherwise be able to access – either through leaving the military or by being treated as a female service member. Her enlistment does not alter Defendants' obligation to treat her medical needs while she is incarcerated. It is precisely because "society takes from prisoners the means to provide for their own needs," *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011), that the government has an "obligation to provide medical care for those whom it is punishing by incarceration," *Estelle*, 429 U.S. at 103. What may not be a punishment in the free world becomes one upon incarceration where a prisoner is entirely dependent upon the government to meet her medical needs. *Cf. Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 341 (3d Cir. 1987) ("[W]hile the government

[12] *See* Army Regulation, Standards of Medical Fitness, § 3-35(a), (b) (deeming administratively unfit for service individuals with "[c]urrent or history of psychosexual conditions (302), including, but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias"). If the ban on open transgender service is ultimately ended, which Plaintiff expects will happen, that would just mean that if she were serving in the Army outside of prison she would be doing so as a woman subject to standards for female service members. If it is not ended, then she simply would not be serving at all.

must provide prisoners in its custody with adequate food and housing, . . . no such affirmative duty is deemed to exist as to this nation's poor and homeless.").

2. Plaintiff Has Plausibly Alleged That Defendants' Refusal To Treat Her Medical Need Will Cause Her Sufficiently Serious Harm.

The Defendants apply the wrong standard in seeking to discount the severity of Plaintiff's harm. Citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), Defendants claim that the question for the objective prong of the deliberate indifference standard is "whether, in light of all the[] treatments, the failure to permit longer hair nonetheless constitutes a denial of the minimal civilized measures of life necessities." Def.'s Br. at 25. But that language from *Farmer* does not offer the proper framework for medical care cases; *Estelle* does. The question is whether Plaintiff has alleged facts showing the denial of medically necessary treatment will cause her serious harm. *Estelle*, 429 U.S. at 104, 106. She has.

Plaintiff has alleged that, as an objective matter, the medically necessary treatment for her serious medical condition includes the ability to follow female hair length and grooming standards. A "medical need is sufficiently serious if it is one that has been diagnosed by a physician as mandating treatment." *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005). Plaintiff has alleged that she was evaluated by a psychological expert in the treatment of gender dysphoria and a military medical provider, both of whom recommended that the ability to grow and groom her hair in a feminine manner is a necessary part of her treatment. Am. Compl. ¶¶ 83, 84, 91. To the extent Defendants disagree with the severity of Plaintiff's medical need for such treatment, that is a question of fact that cannot be resolved at this stage in the case. *See Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998) (holding that with respect to the severity of medical need for treatment, "[a]t the 12(b)(6) stage, [the Court] must accept the plaintiff's allegations as

true and may not dismiss the case unless is clear that it would be impossible for the plaintiff to make out a legally cognizable claim").

Plaintiff's amended complaint more than plausibly alleges that she is suffering from an objectively serious medical need. She alleged that she is at a "high risk for serious medical consequences, including self-castration and suicide" if her medical needs are not promptly addressed. Am. Compl. ¶¶ 84, 106-111. By "undermining" her entire treatment regime and causing her "extreme pain," Am. Compl. ¶¶ 111, 126, Plaintiff has in particular alleged that the enforcement of male hair length and grooming standards place her at "substantial risk of serious harm." *Farmer*, 511 U.S. at 834. Further, Plaintiff has alleged that Defendants are aware of her past suicide plans, plans to commit self-surgery and her "deteriorating" condition at various points during her incarceration related to the denial of gender dysphoria treatment. Am. Compl. ¶¶ 44, 54, 86, 87, 96. Though Defendant questions whether the seriousness of Plaintiff's anguish is connected to the denial of this aspect of her treatment or whether the assessment by Dr. Ettner is still valid, such factual disagreement cannot be properly resolved at this stage in the case.

B. Plaintiff Has Plausibly Alleged That Defendants Are Acting With Deliberate Indifference To Her Serious Medical Needs.

The second prong of the deliberate indifference inquiry is met when a plaintiff alleges that officials failed to provide adequate medical care with a sufficiently culpable state of mind. This "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," *Farmer v. Brennan*, 511 U.S. 825, 835 (1994), and can be "manifested by . . . intentionally interfering with the treatment once prescribed." *Estelle*, 429 U.S. at 104-05. "Government officials who ignore indications that a prisoner's or pretrial detainee's initial medical treatment was inadequate can be liable for deliberate indifference to medical needs." *Cooper v. Dyke*, 814

F.2d 941, 945 (4th Cir. 1987). Plaintiff has plausibly alleged that Defendants knew of her prescribed need for medical treatment and withheld such treatment knowing that doing so would cause harm.

1. That Defendants Have Provided Some Treatment Does Not Immunize Their Refusal to Provide Additional Medically Necessary Treatment.

Defendants argue that "[i]t is well-established that mere disagreement over the proper treatment does not create a constitutional claim." Def.'s Br. at 30 (citing *Chance*, 143 F.3d at 703). But there is no disagreement over the medically appropriate treatment for her gender dysphoria. To the contrary, both Plaintiff's evaluating expert and Defendants' own medical providers agree that growing and grooming her hair consistent with female standards is medically necessary for her. Am. Compl. ¶¶ 83, 87, 90-91. Defendants, through Dr. Galloway, have recommended PA/HIPAA PA/HIPAA Am. Compl. ¶ 91. Despite being aware of this need since at least October 2014, Defendants have continued to deny Plaintiff this treatment without ever articulating a medical basis for such denial.

Defendants cannot discharge their constitutional obligations by providing some treatment for gender dysphoria and calling it a day: "A prisoner need not prove that he was completely denied medical care" to make out an Eighth Amendment claim. *Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc); *accord Langford v. Norris*, 614 F.3d 445, 460 (8th Cir. 2010); *Jones v. Muskegon Cnty.*, 625 F.3d 935, 944 (6th Cir. 2010); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1116 (N.D. Cal. 2015). "[J]ust because [Defendants] have provided [Plaintiff] with some treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with constitutionally adequate treatment." *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013).

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The relevant question under the Eighth Amendment is whether a prisoner has plausibly alleged that officials acting with deliberate indifference deprived her *adequate* medical care. *See Allard v. Baldwin*, 779 F.3d 768, 772 (8th Cir. 2015) ("[I]n cases where some medical care is provided, a plaintiff 'is entitled to prove his case by establishing [the] course of treatment, or lack thereof, so deviated from professional standards that it amounted to deliberate indifference.'"); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 285 (D.N.H. 2003) ("'Adequate medical care requires treatment . . . tailored to an inmate's particular medical needs, and that [is] based on medical considerations."). Plaintiff has alleged that she has a medical need, confirmed by her doctors, and by the Defendants' own medical personnel, to follow female hair length and grooming standards, Am. Compl. ¶¶ 83–84, 86–87, 91, and that Defendants are refusing to treat such need for non-medical reasons, Am. Compl. ¶¶ 47, 54–55, 97, 100. That is sufficient under the Eighth Amendment whether or not some care for her condition has been provided.

2. Plaintiff Has Sufficiently Alleged Personal Involvement of the Defendants.

To state a claim for injunctive relief for an Eighth Amendment violation, Plaintiff need not allege the personal deliberate indifference of each Defendant. *See Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011) (where "the individual defendants are sued only in their official capacity for injunctive relief," there is no need for "the separate roles of individual defendants [to] be sorted out"). The cases cited by Defendants to argue that Plaintiff's amended complaint should be "dismissed because it fails to adequately allege deliberate indifference as to any of the particular Defendants," Def.'s Br. at 33, involve both official and individual capacity claims against defendants in which each defendant's personal role must be assessed. *See, e.g.*, *Arnold v. Moore*, 980 F. Supp. 28, 35 (D.D.C. 1997) (raising official and individual capacity claims); *Mowatt v. U.S. Parole Comm'n*, 815 F. Supp. 2d 199, 208 (D.D.C. 2011) (personal capacity

claim only); *Jackson v. Corr. Corp. of Am.*, 564 F. Supp. 2d 22, 28 (D.D.C. 2008) (Kollar-Kotelly, J.) (*Monell* damages claim).

In this case, Plaintiff has plausibly alleged that actual knowledge of her medical needs and decisions about her treatment implicate all levels of the Department of Defense, including Defendants Keller, Nelson, and Carter, due to the novelty of her requests and the notoriety of her case. Am. Compl. ¶ 51. For example, Plaintiff requested treatment directly from Defendant Keller, Am. Compl. ¶ 51, PA/HIPAA PA/HIPAA Am. Compl. ¶ 54. Similarly, Defendant Nelson has reviewed each treatment plan PA/HIPAA PA/HIPAA Am. Compl. ¶¶ 78, 86–100; ECF No. 30, Ex. 2; ECF No. 34, Ex. 1. "[W]here 'knowledge of the need for medical care [is accompanied by the] . . . intentional refusal to provide that care' the deliberate indifference standard has been met." *Monmouth Cnty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987) (citing *Ancata v. Prison Health Servs.*, 769 F.2d 700, 704 (11th Cir. 1985)). Unlike in *Farmer v Moritsugu*, 163 F.3d at 615, where the court granted summary judgment to defendants on a claim for damages, concluding "[i]t is unimaginable . . . that [BOP Medical Director] Moritsugu should be available to intervene in established processes on behalf of every BOP inmate who happens to be dissatisfied with his or her medical treatment," here plaintiff has specifically alleged that Defendants up the chain of command, including the Secretary of Defense, are personally responsible for her treatment decisions. *See, e.g.*, Am. Compl. ¶¶ 78, 86–100; ECF No. 30, Ex. 1; ECF No. 30, Ex. 2; ECF No. 34, Ex. 2 PA/HIPAA PA/HIPAA Am. Compl. ¶ 54 PA/HIPAA Am. Compl.

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¶¶ 72, 73, 74 (same for Office of the Secretary of Defense).[13] Given the allegations in the complaint as to Plaintiff's many and public requests for treatment as well as the multiple treatment inquiries made by Defendants' own medical staff, it is at least plausible that the individual Defendants were aware of Plaintiff's particular medical needs and the resulting harm from denying them.

3. Defendants' Purported Security Concerns Cannot Justify Dismissal of the Amended Complaint.

Defendants' argument that security concerns justify their refusal to treat Plaintiff with the medical care that has been recommended for her rests on factual assertions that cannot properly be resolved on their motion to dismiss under Rule 12(b)(6). The very cases cited by Defendants in support of their security arguments make clear that additional factual development is needed to resolve Plaintiff's claims. Defendants argue that "[w]hen evaluating medical care and deliberate indifference, security considerations inherent in the functioning of a penological institution must be given significant weight." Def.'s Br. at 37 (citing *Kosilek v. Spencer*, 774 F.3d 63, 83 (1st Cir. 2014) (en banc)). But Defendants are not asking that these considerations be given significant weight, they are asking that they be given exclusive weight, foreclosing any opportunity to contest their validity or to balance the alleged concerns against the severity of Plaintiff's medical needs. In *Kosilek*, both Ms. Kosilek's medical needs and the DOC's security justifications were tested after a lengthy trial and the court's decision was premised on its conclusion "[t]hat the DOC has chosen one of two alternatives [courses of treatment] – both of which are reasonably commensurate with the medical standards of prudent professionals, and

[13] As to the Department of Defense, these allegations as to the named defendants' knowledge and actions may be attributed to the agency "[b]ecause the real party in interest in an official-capacity suit is the governmental entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law." *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (internal quotation marks and citations omitted).

both of which provide Kosilek with a significant measure of relief." *Id.* at 90. By contrast here, there has been no factual development and there is no allegation that there exist two reasonable treatment plans between which Defendants are choosing. Defendants are instead arguing that the medically prudent treatment that has been recommended for Plaintiff must be withheld because of alleged security concerns. Defendants' security arguments cannot override Plaintiff's medical needs without evidentiary proof that their asserted concerns are valid and that any alternate treatment plan adequately meets her serious medical needs.

Experience shows that the government's self-serving evaluation of security needs is not always sound. For example, after a trial in one case, the district court held that the proffered security justifications in defense of a ban on hormone therapy and surgical treatment for prisoners with gender identity disorder were "not reasonable"; the defendant's own expert had admitted that they were "an incredible stretch." *Fields v. Smith*, 712 F. Supp. 2d 830, 868 (E.D. Wisc. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2010). If alleged security reasons to deny medically necessary care could justify dismissal of an Eighth Amendment claim like that alleged here, the defendants in any case could assert security reasons for denying treatment, and that would end the case. A wide variety of necessary medical care implicates security – wheelchairs, care requiring transport to outside facilities, in-patient surgical stays – but that does not mean prison officials can immunize the denial of such care from all judicial review by reciting security concerns at the motion-to-dismiss stage. *Cf. Holt v. Hobbs*, 135 S. Ct. 853 (2015) (prison's security argument found not credible after evidentiary hearing).

Defendants suggest that the veracity and weight of their security assessments must be accepted as true at this stage because, they say, Plaintiff quoted the government's risk assessments in the Amended Complaint and those documents were therefore incorporated by

reference. Def.'s Br. at 45, 49. Plaintiff did not quote or incorporate those documents by reference.[14] In any event, if Defendants' position was correct, in any prison case where a prisoner referenced the basis for denial of treatment by prison officials in a grievance, every argument presented by the government in a grievance response supporting its denial would have to be accepted as true without the opportunity to test the veracity of the statements or existence of contradictory information through discovery. That makes no sense. *See Davis v. Prison Health Servs*., 679 F.3d 433, 439 (6th Cir. 2012) ("At this stage of the proceedings, the district court was required to treat Davis's allegations – not the contested statements contained in the grievance response – as true."). Whether and to what extent Plaintiff's medical treatment would pose security concerns is a question of highly disputed fact that simply cannot be resolved now. *See* Section IV.B (further discussing alleged security concerns).

Ultimately, the question whether Defendants have acted with deliberate indifference turns both on the validity of the security concerns raised and the ability to provide adequate treatment in light of any valid security needs. *Kosilek*, 774 F.3d at 90. Based on the pleadings, Plaintiff has

[14] The Complaint alleges that Defendants informed Plaintiff that permitting her "to wear a feminine hairstyle is not supported by the risk assessment and potential risk mitigation measures at this time." Am. Compl. ¶ 100. Neither the September 2015 nor the October 2014 risk assessment tools were ever presented to Plaintiff in advance of the filing of Defendants' brief and it is therefore impossible that she could have quoted from or relied on either document. Nor did she rely on the particulars of such assessments; rather, she relied only on the representation by Defendants that her medical treatment was denied based on security and not any alleged medical justifications. *Chambers v. Time Warner, Inc*., 282 F.3d 147, 153 (2d Cir. 2002) (noting that "a plaintiff's reliance on the *terms* and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough" (emphasis added)). Either way, the Court need not accept as true the facts stated in the risk assessments, only the fact of their existence. *See, e.g*., *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006) ("Even if a document is 'integral' to the complaint . . . it must be clear that there exist no material disputed issues of fact regarding the relevance of the document.").

plausibly alleged that her treatment is not adequate and that Defendants are acting with deliberate indifference despite reciting security concerns as the basis for denying her care.

III. PLAINTIFF STATES A VALID CLAIM FOR DISCRIMINATION ON THE BASIS OF SEX IN VIOLATION OF EQUAL PROTECTION.

The equal protection guarantee of the Fifth Amendment prohibits discrimination on the basis of sex by the federal government. *See Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality). When the government makes distinctions based on sex, such distinctions are suspect and must be tested under heightened scrutiny. Plaintiff has alleged that Defendants singled her out on the basis of her sex and are treating her differently from both women in military prisons and men in military prisons by denying her access to grooming standards that are consistent with her gender identity. This differential treatment must be tested under heightened scrutiny and Plaintiff has plausibly alleged that it fails to substantially advance – or advance at all – an important governmental interest.

A. Plaintiff Has Alleged Facts Sufficient To Show That Her Sex Discrimination Claim Must Be Tested Under Heightened Scrutiny.

1. Plaintiff Has Plausibly Alleged That Defendants Are Discriminating Against Her On The Basis of Her Sex By Denying Her Permission To Follow Appropriate Hair Length And Grooming Standards Because She Is Transgender.

The enforcement of male hair length and hair grooming rules against Plaintiff is a facial, sex-based classification. Prisoners in the custody of the United States military are subject to hair length and hair grooming rules based on their sex. Am. Compl. ¶ 19. Plaintiff has alleged that Defendants are requiring her to follow the male grooming rules solely on the basis of her gender

identity,[15] transgender status, assigned sex at birth, and perceived gender non-conformity. Am. Compl. ¶¶ 13, 16, 18–21.

"[D]iscrimination on the basis of gender identity is, 'literally,' discrimination on the basis of sex, even though the words 'gender identity' or 'transgender' are not explicitly mentioned in . . . the Equal Protection Clause." Statement of Interest of the United States, *Tooley v. Van Buren Public Schools*, at 12 (E.D. Mich. Feb. 24, 2015) (*citing Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008))[16]; *see also Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) (same). Just as it is impossible to discriminate against a person for being a religious convert without discriminating on the basis of religion, it is likewise impossible to treat people differently based on their transgender status – or the fact that they have changed sex – without treating them differently based on sex. *See Schroer*, 577 F. Supp. 2d at 306–07. Furthermore, there is inherently "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms" which is also a form of prohibited sex discrimination. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

2. Discrimination Based On Sex And Gender Identity Warrant Heightened Scrutiny Including In The Prison Context.

"[A]ll gender-based classifications today warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (internal quotation marks omitted). Heightened scrutiny applies even when discrimination is based on physical or anatomical differences. *Tuan Anh*

[15] Gender identity is a person's innate sense of being a particular gender, usually male or female. Am. Compl. ¶ 22. From a scientific perspective, an individual's gender identity is one of the components that determine an individual's sex or gender. *In re Lovo-Lara*, 23 I. & N. Dec. 746, 752 (BIA 2005) (discussing eight components that determine an individual's sex). Discrimination based on gender identity is also therefore impermissible discrimination based on sex.

[16] http://www.justice.gov/sites/default/files/crt/legacy/2015/02/27/tooleysoi.pdf.

Nguyen v. I.N.S., 533 U.S. 53, 60 (2001). And it applies whether the asserted justification for discrimination is benign or invidious. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). To survive constitutional review, "[c]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Women Prisoners of District of Columbia Dep't. of Corr.v. District of Columbia*, 899 F. Supp. 659 (D.D.C. 1995).

Even if the Court conceives of the discrimination against Plaintiff as gender-identity based discrimination separate from sex, such discrimination still triggers heightened equal protection scrutiny. *See Adkins v. City of New York*, --- F.Supp.3d ---, No. 14-cv-7519, 2015 WL 7076956, at *3-*5 (S.D.N.Y. Nov. 15, 2015) (holding that transgender individuals meet all the factors a court considers for identifying suspect characteristics for purposes of equal protection including that the group has a history of discrimination, is defined by an immutable or distinguishing characteristic, has the ability to contribute to society, and lacks political power); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015) (applying heightened scrutiny to claim by transgender prisoner based on sex and transgender status); *Marlett v. Harrington*, No. 15-cv-01382, 2015 WL 6123613, at *4 (E.D. Cal. Oct. 16, 2015) (same).

Heightened scrutiny applies to sex classifications and sex-based discrimination in the prison context. The right to be free from discrimination on the basis of sex and gender identity, like the right to be free from race-based discrimination, "is not a right that need necessarily be compromised for the sake of proper prison administration." *Johnson v. California*, 543 U.S. 499, 510 (2005); *see also Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989); *Women Prisoners of District of Columbia Dep't. of Corr. v. District of Columbia*, 899 F. Supp. 659 (D.D.C. 1995). Even in cases involving important government interests like military discipline and security,

heightened scrutiny is the proper standard when suspect classifications are involved. *See, e.g.*, *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015) (observing that even in highly sensitive circumstances like those involving national security, "we must apply the same rigorous standards" that heightened scrutiny requires when suspect class is affected).

3. Plaintiff's Discriminatory Placement In A Male Facility Does Not Require Dismissal Of Her Equal Protection Claim.

To the extent Defendants are arguing that Plaintiff is not being treated differently based on her gender but rather based on her placement in a men's facility, there are two responses. First, Defendants cannot evade constitutional scrutiny by using as a defense their own sex-based decision to place Plaintiff in a men's prison based on her transgender status, assigned sex at birth, and perceived gender non-conformity. Second, even if her placement at the male facility is taken as a given, she is still being treated differently from the male prisoners at the USDB who are afforded medical exemptions to grooming standards when such needs arise and who are subject to grooming standards that accord with their gender. No matter how the claim is framed, Defendants' actions are subject to heightened scrutiny and do not pass constitutional muster.

Defendants argue that because Plaintiff is "housed in a military prison for men with grooming restrictions requiring short hair," she cannot be similarly situated to female prisoners in a women's prison. Def.'s Br. at 41. But it was the Defendants' own decision to place Plaintiff, a transgender woman receiving medical care for that condition, in a men's prison. That cannot become a justification for denying her an aspect of medical care that would be entirely non-controversial if they had placed her in a women's facility. Moreover, the argument relies on contested fact claims about the effect on the prison population of allowing Plaintiff to grow her hair consistent with female grooming standards; claims that can only be confirmed or rebutted after discovery.

In any event, Plaintiff has alleged facts sufficient to show that she is being subjected to sex-based discrimination even compared to other prisoners housed at the USDB – the group with whom she is similarly situated, according to Defendants. Def.'s Br. at 41. Despite having a female gender identity, Plaintiff is forced to follow male hair length and grooming standards – standards that do not accord with her gender. Am. Compl. ¶ 20. The other prisoners at the USDB who are male are permitted to follow the hair length and hair grooming standards that accord with their gender – namely, the male standards. Am. Compl. ¶ 19. Only Plaintiff is singled out and subjected to grooming requirements inconsistent with her gender, and it is incontestable that she is singled out because of her sex, gender identity, and assigned sex at birth. This differential treatment on the basis of gender – however justified Defendants believe it to be – still must be tested under heightened scrutiny. *Virginia*, 518 U.S. at 555.

B. Plaintiff Has Plausibly Alleged That Defendants' Actions Do Not Substantially Serve Important Governmental Interests.

The burden of proof under heightened scrutiny rests with the government. *See*, *e.g.*, *Virginia*, 518 U.S. at 533 (under intermediate scrutiny, "[t]he burden of justification is demanding and it rests entirely on the State"). Because under heightened scrutiny, there is a "presumption of unconstitutionality," once a facial classification triggering heightened scrutiny has been alleged, the burden is on the government to prove that it is utilizing the proper means to advance its important state interests. *Id.*

Defendants misapply the heightened scrutiny analysis by suggesting that they win just because they have offered security concerns as a justification. Merely reciting that a decision is related to security does not satisfy the high burden imposed on the government under heightened scrutiny. Def.'s Br. at 45. Defendants' actions cannot merely relate to the governmental interest but must *advance and relate to the achievement of* that interest. *See Virginia*, 518 U.S. at 533. At

this stage Defendants have not met their burden of proving those interests are advanced by treating Plaintiff as male with respect to hair length and grooming. Notably, none of the cases cited by Defendants concerning grooming standards and security were resolved at the pleading stage. *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (following evidentiary hearing); *Knight v. Thompson*, 797 F.3d 934 (11th Cir. 2015) (summary judgment); *Jackson v. Dist. of Columbia*, 89 F. Supp. 2d 48 (D.D.C. 2000) (after trial).

Defendants also have not established – and cannot, at this stage – why treating Plaintiff consistent with her gender with respect to hair length would make her any *more* "unique" than she already is at the USDB and, thus, impact security. Plaintiff's amended complaint alleges that the USDB has designated her **PA/HIPAA; LES** **PA/HIPAA; LES** Am. Compl. ¶ 49. She has since, in accordance with treatment recommendations, been allowed to wear make-up and undergo a regimen of hormone therapy. Am. Compl. ¶¶ 93, 98. The government may try, at some later stage, to show why longer hair would make her more visible or put her at an increased risk to warrant treating her as male, but such evidentiary submissions are out of order on a motion to dismiss, and under heightened scrutiny government justifications must be demonstrated, they cannot be "hypothesized." *Virginia*, 518 U.S. at 533.

The government also cannot meet its burden at the pleading stage of proving why a medical exception for Plaintiff would be different than other medical exceptions granted to grooming rules in terms of its impact on security or military discipline. "The Army makes exceptions to its hair-related grooming rules for medical reasons, see A.R. 670–1 at 5, and for 'operational necessity.'" *Singh v. McHugh*, --- F. Supp. 3d ---, No. 14-1906, 2015 WL 3648682,

at *3 (D.D.C. June 12, 2015); *see also* Def.'s Br., Ex. D at 5 (permitting medical exceptions to rule that males must keep their face clean-shaven); Def.'s Br., Ex. E at 55 (same).

Furthermore, the hypothesis [redacted] is precisely the type of speculative argument rejected by other courts, including the Supreme Court. *See, e.g.*, *Lanzaro*, 834 F.2d at 343 (rejecting argument that expending money on "elective, nontherapeutic" abortions for prisoners will cause "perceive[d] favoritism" or "significant 'ripple effect' on fellow inmates or on prison staff" thereby causing security concerns); *cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.").

With respect to the alleged interest in military discipline, since Plaintiff is not challenging the existence of grooming standards but merely the application to her of male as opposed to female standards, it is not clear how her case implicates military discipline at all. Defendants' arguments are premised on the idea that treating her as female and applying the military rules applied to female prisoners and servicemembers would disrupt military discipline. But they have not explained how treating a transgender female prisoner as the woman she is would do that. Certainly the military prisoners at the USDB are familiar with female servicemembers following the grooming standards applicable to women. Defendants' argument therefore assumes that she is viewed as male by other prisoners, itself a form of sex-based bias to which the government "cannot, directly or indirectly, give . . . effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). And it also contradicts Defendants' other arguments that she is perceived as female and therefore vulnerable to abuse in a facility for men. Def.'s Br. at 44. Again, these contradictory and

hypothetical arguments cannot fairly be tested before discovery, and the evidence put in by Defendants cannot properly be considered on a motion to dismiss.

At most, Defendants have established that there exist important governmental interests in military discipline and security. Plaintiff does not contest that. But that does not end the inquiry. *Cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) ("The gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose"). Defendants must prove, not simply assert, that the means chosen to advance that interest – here treating Plaintiff as male for purposes of the hair length and grooming standards and refusing to make a medical exception – substantially advances that interest.

CONCLUSION

Because Plaintiff's claims are properly before the Court and properly exhausted, and because her amended complaint sets forth plausible and legally sufficient Eighth Amendment and equal protection claims, Defendants' motion to dismiss should be denied.

Dated: December 2, 2015

Respectfully submitted,

/s/ *Chase Strangio*
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHELSEA ELIZABETH MANNING,	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:14-cv-1609 (CKK)
	)	
ASHTON CARTER, *et al.*,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF NANCY HOLLANDER

I, Nancy Hollander, hereby declare and state as follows:

1. I am an attorney at Freedman, Boyd, Hollander, Goldberg, Urias & Ward, P.A. based in Albuquerque, New Mexico.

2. I am lead counsel in Chelsea Manning's appeal of her court martial conviction.

3. Plaintiff (Chelsea Manning) was sentenced for her court martial conviction on August 21, 2013.

4. The convening authority affirmed her conviction and sentence on April 10, 2014.

5. The record from her court martial conviction was docketed in the Army Court of Criminal Appeals on April 25, 2014.

6. To date, Plaintiff has not yet filed the opening brief in her appeal to the Army Court of Criminal Appeals because of the length and nature of the record and through no fault of her own.

7. Plaintiff's court martial record consists of more than 46,000 pages.

8. Significant portions of the record are classified. To review those portions of the record and draft the appellate brief while reviewing those documents, I and my appellate team must travel to Fort Leavenworth in Kansas and Fort Belvoir in Virginia. We are only permitted

to view those portions of the record in a secure location during duty hours pursuant to Army Court of Criminal Appeals Rule 30.5. Initially obtaining access to the documents, and now reviewing the voluminous documents within the foregoing constraints, has caused significant delays in the briefing process.

9. Further, we continue to await CIA approval before we may review some classified portions of the record for the first time.

10. The appeal concerns Chelsea Manning's court martial conviction and sentence.

11. Based on the experience of our team, it is our opinion that Chelsea Manning's appeal will not be completed in the military courts – including a decision from the Army Court of Criminal Appeals and discretionary review from the Court of Appeals for the Armed Forces – before 2019.

12. Pursuant to 28 U.S.C. § 1746, I hereby declare and state under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

November 21, 2015

NANCY HOLLANDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHELSEA ELIZABETH MANNING,

Plaintiff,

v.

ASHTON CARTER, *et al.*,

Defendants.

Civil Action No. 1:14-cv-1609-CKK

[PROPOSED] ORDER

Upon consideration of Defendants' Motion to Dismiss, Plaintiff's Opposition, and any reply thereto, it is hereby

ORDERED that the motion is **DENIED.**

DATE:

Colleen Kollar-Kotelly
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHELSEA ELIZABETH MANNING, Plaintiff, v. ASHTON CARTER, *et al.*, Defendants.	)	Civil Action No. 1:14-cv-1609 (CKK)

CERTIFICATE OF SERVICE

I, Chase B. Strangio, do hereby certify that on this 2nd day of December, 2015 I caused **Plaintiff's Opposition to Defendants' Motion to Dismiss** to be filed via this Court's Electronic Case Filing System and to be served via electronic mail delivery upon the following individuals:

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