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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ADREE EDMO, Plaintiff, v. IDAHO DEPARTMENT OF CORRECTION; HENRY ATENCIO, in his official capacity; JEFF ZMUDA, in his official capacity; HOWARD KEITH YORDY, in his official and individual capacities; CORIZON, INC.; SCOTT ELIASON; MURRAY YOUNG; RICHARD CRAIG; RONA SIEGERT; CATHERINE WHINNERY; AND DOES 1-15; Defendants.	CIVIL ACTION FILE NO. 1:17-cv-151-BLW **DEFENDANTS' JOINT MOTION TO STAY ORDER [DKT. 149] PENDING APPEAL**

Defendants, Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery, by and through their counsel of record, Parsons Behle & Latimer, and the Idaho Department of Correction, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert, by and through their counsel of record, Moore Elia Kraft & Hall, LLP, hereby move this Court, pursuant to Federal Rule of Civil Procedure 62(d), and the authority and argument cited in the supporting memorandum, to issue an order staying this Court's order, issued on December 13, 2018, in part, granting Plaintiff's Motion for Preliminary Injunction, including the Court's order that Defendants are to provide Plaintiff with adequate medical care, including gender confirmation surgery (Dkt. 149, p. 45, Order 1.) pending resolution of Defendants' appeal of said order.

This Motion is supported by a Memorandum in support filed contemporaneously herewith.

DATED this 9th day of January, 2019.

PARSONS BEHLE & LATIMER

By: */s/ Dylan A. Eaton*
Dylan A. Eaton
Counsel for Defendants Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery

DATED this 9th day of January, 2019.

MOORE ELIA KRAFT & HALL, LLP

By: */s/ Brady J. Hall*
Brady J. Hall
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of January, 2019, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ADREE EDMO,

Plaintiff,

v.

IDAHO DEPARTMENT OF CORRECTION; HENRY ATENCIO, in his official capacity; JEFF ZMUDA, in his official capacity; HOWARD KEITH YORDY, in his official and individual capacities; CORIZON, INC.; SCOTT ELIASON; MURRAY YOUNG; RICHARD CRAIG; RONA SIEGERT; CATHERINE WHINNERY; AND DOES 1-15;

Defendants.

CIVIL ACTION FILE

NO. 1:17-cv-151-BLW

MEMORANDUM IN SUPPORT OF DEFENDANTS' JOINT MOTION TO STAY ORDER [DKT. 149] PENDING APPEAL

COME NOW, Defendants, Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery, by and through their counsel of record, Parsons Behle & Latimer, and the Idaho Department of Correction, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert, by and through their counsel of record, Moore Elia Kraft & Hall, LLP (collectively referred to as "Defendants"), and file this Memorandum in Support of their Motion to Stay Order [Dkt. 149] Pending Appeal.

I. INTRODUCTION

The Court should grant a stay pending Defendants' appeal of the Court's order granting a preliminary injunction mandating gender confirmation surgery (GCS) for Plaintiff Adree Edmo ("Edmo") (Dkt. 149), pending Defendants' appeal. As the Court has already recognized, this case involves difficult issues of first impression in the Ninth Circuit. Further and importantly, if the Court does not grant a stay, there is a serious risk that Defendants' appeal will become moot. If Defendants' appeal becomes moot, it will cause Defendants irreparable injury and deprive the Court of Appeals of the opportunity to clarify the law regarding the important issues in this case. Recognizing the weight of these concerns, the Ninth Circuit granted a stay of a similar preliminary injunction that required the California Department of Corrections to provide GCS to an inmate suffering from gender dysphoria. *See Norsworthy v. Beard*, 802 F.3d 1090, 1091 (9th Cir. 2015). Thus, Defendants respectfully submit that this Court should do the same.

II. ARGUMENT

The Rules of Civil Procedure specifically authorize a district court to suspend a preliminary injunction pending appeal. Fed. R. Civ. P 62(d). When considering whether to issue a stay pending appeal, a court considers four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The Court must "balance the relative equities of the[se] factors." *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (per curiam). However, "[t]he first two factors of th[is] standard are the most critical." *Nken*, 556 U.S. at 426.

Importantly, this standard is more lenient than the preliminary injunction standard. The standard is less demanding because "stays are typically less coercive and less disruptive than are injunctions." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). "[I]nstead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself." *Nken*, 556 U.S. at 428. "A stay 'simply suspend[s] judicial alteration of the status quo,' while injunctive relief 'grants judicial intervention . . . .'" *Id.* at 429 (alteration in original) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers)). Thus, although the factors are similar, the Court should grant a stay even though the Court previously determined Edmo is entitled to a preliminary injunction. Each of these factors are addressed in turn.

A. Defendants Satisfy the First Nken Factor, Because Their Appeal Raises Serious Legal Questions.

Regarding the first Nken factor, "[t]he standard does not require [parties] to show that 'it is more likely than not that they will win on the merits.'" *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (quoting *Leiva-Perez*, 640 F.3d at 966). Rather, a party satisfies the first Nken factor if "serious legal questions are raised." *Leiva-Perez*, 640 F.3d at 968; *see also Lair*, 697 F.3d

at 1204. As the Ninth Circuit recognized in granting the stay in *Norsworthy*, "[a] stay is appropriate when an appeal presents 'serious legal questions,' even if it may be more likely than not that those legal questions will be resolved against the party seeking a stay." *Order Granting Stay* (Dkt. 25), *Norsworthy v. Beard*, No. 15-15712 (9th Cir. May 21, 2015) (quoting *Leiva-Perez*, 640 F.3d at 968). In this case, Defendants' appeal presents serious legal questions.

First, as the Court recognized the Ninth Circuit has not yet determined when an inmate is constitutionally entitled to GCS. The Court's Order seems to establish a legal principle that defendants are likely deliberately indifferent to an inmate's gender dysphoria if the inmate satisfies the six WPATH medical necessity criteria and the defendants do not provide the inmate with GCS. *Order Granting Preliminary Injunction* (Dkt. 144) at 35-41 (finding that Defendants were likely deliberately indifferent because they "misapplied the recognized standards of care . . ."). The Court relied on the WPATH criteria in concluding that Defendants were likely deliberately indifferent "by failing to provide [Edmo] with available treatment that is generally accepted in the field as safe and effective, despite her actual harm and ongoing risk of future harm including self-castration attempts, cutting, and suicidal ideation." *Id.* at 40.

In contrast, Defendants argued that a different legal standard should govern. Defendants asserted that because the WPATH standards are "flexible . . . guidelines," there is room for reasonable disagreement regarding their interpretation and application. *Corizon's Response to Motion for Preliminary Injunction* (Dkt. 100) at 12. And, "Eighth Amendment doctrine makes clear that a difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference." *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016) (citation and alteration omitted). The evidence presented at the evidentiary hearing showed that Defendants have been

treating Edmo's gender dysphoria for several years, including providing hormone therapy, counseling, and medical management. There has been no refusal of care and no "indifference" to Edmo's gender dysphoria. Rather, there is a disagreement as to the interpretation and application of the WPATH criteria and consequently, which of the available medical options are most appropriate to treat Edmo's gender dysphoria.

Other courts have determined the WPATH standards are subject to interpretation and that failing to follow the WPATH standards does not constitute deliberate indifference. In considering a claim of deliberate indifference, the Tenth Circuit rejected "the conclusory assertion that [the inmate] demonstrated her constitutional rights would be violated if she did not receive the hormone levels suggested by WPATH." *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015). "*Druely* reflects the reality that the treatment of gender dysphoria is a highly controversial issue for which there are differing opinions." *Lamb v. Norwood*, 262 F. Supp. 3d 1151, 1158 (D. Kan. 2017), aff'd, 895 F.3d 756 (10th Cir. 2018), *aff'd*, 899 F.3d 1159 (10th Cir. 2018). Thus, the district court in *Lamb* held that the defendants were entitled to summary judgment even though the plaintiff "assert[ed] that her treatment falls short of the standard set forth by various experts as well as the WPATH standard of care." *Id.* Sitting en banc, the First Circuit similarly determined that even if expert testimony established that GCS "was the only medically adequate treatment" for the prisoner's gender dysphoria, "[t]he choice of a medical option that, although disfavored by some in the field, is presented by competent professionals does not exhibit a level of inattention or callousness to a prisoner's needs rising to a constitutional violation." *Kosilek v. Spencer*, 774 F.3d 63, 91-92 (1st Cir. 2014) (en banc). The Ninth Circuit has not yet addressed whether failing to follow the WPATH guidelines constitutes deliberate indifference. Moreover, the Ninth Circuit has not addressed in detail the complicated issues presented in this case. Thus, this case presents a

"serious legal question." *See Order Granting Stay* (Dkt. 25), *Norsworthy v. Beard*, No. 15-15712 (9th Cir. May 21, 2015).

Moreover, the Ninth Circuit has not yet addressed what standard a court should apply when a preliminary injunction will grant the final relief requested by the plaintiff. A vaginoplasty, the surgery apparently sought by Edmo, is permanent and irreversible.[1] Thus, the "preliminary" injunction is, in effect, a permanent injunction, and Defendants urged the Court to "be extremely careful and hesitant to order [a vaginoplasty]." *Corizon's Response to Motion for Preliminary Injunction* (Dkt. 100) at 13. The Court recognized this procedural difficulty but found that Edmo was entitled to an injunction under either the preliminary injunction standard or the permanent injunction standard. *Order Granting Preliminary Injunction* (Dkt. 144) at 31 n.1. Defendants are unaware of any Ninth Circuit case specifically addressing what standard the court should apply when the preliminary injunction will irreversibly grant a part of the final relief requested. The uncertainty regarding the appropriate legal standard further demonstrates that Defendants' appeal presents serious legal questions.

To state the obvious, if Edmo has GCS, there is no "do over" available here. While the undersigned respect the Court's decision-making abilities, this Court itself has recognized the difficulty of the issues in play, and with that, the possibility that the Court's decision could be in error. Accordingly, judicial prudence suggests that irreversible action, if such can be avoided, should be avoided at this preliminary stage.

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[1] In their briefing, the Defendants noted that "it is not entirely clear what [GCS Edmo] wants." *Corizon's Response to Motion for Preliminary Injunction* (Dkt. 100) at 13. This confusion arises, because GCS is a generic term referring to a variety of surgical procedures. *Id.*

B. Defendants will be Irreparably Injured Absent a Stay.

A party is irreparably injured if the party's appeal becomes moot. *See Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). Indeed, in *Norsworthy*, the Ninth Circuit found that the risk the litigation "would become moot before receiving full appellate consideration" justified issuing a stay of the preliminary injunction. *Order Granting Stay* (Dkt. 25), *Norsworthy v. Beard*, No. 15-15712 (9th Cir. May 21, 2015). That precise reasoning applies here, because the preliminary injunction grants Edmo part of the final relief requested, and that relief is permanent. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 398 (1981) ("[T]he question whether a preliminary injunction should have been issued here is moot, because the terms of the injunction, as modified by the Court of Appeals, have been fully and irrevocably carried out.").

C. A Stay Will Not Substantially Increase the Risk of Irreparable Injury to Edmo.

The Court has already determined that Edmo is likely to suffer irreparable harm if Defendants do not provide GCS within six months of the Court's Order. *Order Granting Preliminary Injunction* (Dkt. 144) at 45. While Defendants appreciate that the Court is unlikely to change its mind at this time, three issues warrant the Court's attention.

First, the standard for granting a stay pending appeal is less demanding than the standard for granting a preliminary injunction, because "stays are typically less coercive and less disruptive than are injunctions." *Leiva-Perez*, 640 F.3d at 966. "A stay 'simply suspend[s] judicial alteration of the status quo,' while injunctive relief 'grants judicial intervention . . . .'" *Nken*, 556 U.S. at 429 (alteration in original) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers)). That difference is particularly acute in this case where the preliminary injunction is mandatory.

Second, whether Edmo will suffer irreparable injury during the stay is not a critical factor. *Nken*, 556 U.S. at 426. Instead, the most important factors are whether Defendants have demonstrated a likelihood of success on the merits and whether Defendants will be irreparably harmed absent a stay. *Lair*, 697 F.3d at 1203-04. Having satisfied these "most critical factors," the scale tips in favor of granting a stay even if there is a risk of irreparable harm to Edmo.

Third, the question in this case is whether Edmo's treatment is constitutionally adequate, not whether Edmo is entitled to treatment. Defendants agree that Edmo is suffering from a serious psychological condition, gender dysphoria. Consequently, Defendants are treating Edmo's gender dysphoria, but they and their expert witnesses do not believe GCS is an appropriate treatment option at this time. Edmo's expert witness disagrees with Defendants' experts. Nevertheless, even Edmo's own experts did not claim that GCS needs to be performed immediately. *See Decl. of Lori Rifkin* (Dkt. 62-1) at 87. Instead, one of Edmo's experts, Dr. Gorton, indicated that Edmo should be "*referred* to an appropriate surgeon . . . within the next six months."[2] *Id.* (emphasis added). The Court seemingly adopted that argument and ordered Defendants to provide Edmo with GCS "as promptly as possible and no later than six months from the date of [its] order." *Order Granting Preliminary Injunction* (Dkt. 144) at 45. Defendants merely request that the Court extend that timeframe so that they can provide less invasive treatment to Edmo while the appeal in this case is pending.

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[2] It has now been more well over six months since Dr. Gorton signed his declaration, averring that Edmo would be at a substantial risk of "self-surgery or suicide" if immediate relief were not granted. *Decl. of Lori Rifkin* (Dkt. 62-1) at 87. Such predictions were proven wrong; there is no evidence that Edmo has attempted self-surgery or suicide during the intervening time-period, possibly because her current treatment has been effective. Consequently, allowing a stay will not result in greater harm, if any.

D. The Public Interest Weighs in Favor of a Stay.

As the Supreme Court has recognized "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84–85 (1987). Because prison administration "has been committed to the responsibility of those branches," courts should exercise "a policy of judicial restraint" when addressing constitutional claims challenging a prisoner's conditions of confinement. *Id.* at 85. Thus, where, as here, "[a] preliminary injunction to direct [Defendants'] medical and/or mental health providers to take a specific course of treatment . . . weighs against the public interest . . . ." *Oakleaf v. Martinez*, 297 F. Supp. 3d 1221, 1233 (D.N.M. 2018).

In addition, "the public policy favoring disposition of cases on their merits . . . 'is particularly important in civil rights cases.'" *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998) (quoting *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987)). As discussed above, the preliminary injunction grants part of the final relief requested without an adjudication on the merits of Edmo's claim. Thus, public policy favors a stay of the preliminary injunction ordering Defendants to provide GCS to Edmo.

III. CONCLUSION

The Court should grant a stay of the preliminary injunction ordering Defendants to provide GCS to Edmo, pending Defendants' appeal to the Ninth Circuit. This case presents important issues of first impression in the Ninth Circuit. And, absent a stay, the appeal will likely become moot. Although the Court previously found Edmo may suffer irreparable harm, that factor is less important when considering whether to issue a stay. Moreover, the risk of irreparable harm is at least somewhat mitigated by the fact Defendants are providing treatment for Edmo's gender

dysphoria and Edmo has not attempted self-surgery during the pendency of this litigation. Finally, the public interest favors a stay or is at best neutral. Even though the public interest may weigh against the continuation of a possible constitutional violation, the Supreme Court has cautioned the judicial branch against interfering with debatable decisions made by prison administrators. In addition, public policy favors the adjudication of Edmo's claims on the merits. Thus, the risk this litigation may become moot if a stay is not granted weighs in favor of the Court issuing a stay. As a result, the Court should grant a stay pending Defendants' appeal to the Ninth Circuit.

DATED this 9th day of January, 2019.

PARSONS BEHLE & LATIMER

By: */s/ Dylan A. Eaton*
Dylan A. Eaton
Counsel for Defendants Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery

DATED this 9th day of January, 2019.

MOORE ELIA KRAFT & HALL, LLP

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