J. Kevin West (ISB No. 3337)
KWest@parsonsbehle.com
Dylan A. Eaton (ISB No. 7686)
DEaton@parsonsbehle.com
Bryce Jensen, ISB #10324
bjensen@parsonsbehle.com
Parsons, Behle & Latimer
800 W. Main Street, Suite 1300
Boise, Idaho 83702
Telephone: (208) 562-4900
Facsimile: (208) 562-4901
(Counsel for Defendants Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery)

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

Brady J. Hall (ISB No. 7873)
Special Deputy Attorney General
brady@melawfirm.net
Marisa S. Crecelius (ISB No. 8011)
marisa@melawfirm.net
Moore Elia Kraft & Hall, LLP
Post Office Box 6756
Boise, Idaho 83707
Telephone: (208) 336-6900
Facsimile: (208) 336-7031
(Counsel for Defendants Kevin Kempf, Richard Craig, Rona Siegert, and Howard Keith Yordy)

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

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

INTRODUCTION

Ms. Edmo's response to Defendants' Joint Motion to Stay Order Pending appeal, in large part, quotes much of the Court's decision back to itself in the hopes that is all that is necessary to overcome a request for a stay. However, Ms. Edmo misconstrues the standard applicable to the Motion to Stay, places more weight on certain factors than required, and ignores significant issues the court should now consider that were not the focus of the court in the preliminary injunction hearing stage. Factors that weigh in favor of the stay include but are not limited to:

- This Court has recognized that the 9th Circuit has not issued clear direction regarding the standard applicable to a permanent injunction regarding an irreversible surgery.
- The 9th Circuit seems to be moving the appeal along in an expedited manner.
- Defendants contend there are clear legal issues on appeal that need to be resolved, such as whether this is a case of difference of medical opinion and exercise of medical judgment that does not constitute deliberate indifference in a rare and unique case that has not been ruled on by the 9th Circuit.
- Ms. Edmo's own expert, Dr. Gorton, did not find Gender Confirmation Surgery (GCS) was emergent and only suggested Plaintiff be evaluated for surgery within 6 months.
- Moreover, the fact that GCS is ordered to occur almost a year after the original motion for preliminary injunction was filed and such relief was requested cuts against Ms. Edmo's argument that the surgery is emergent, and stay is improper.
- Defendants obligation to provide medical and mental health care to Ms. Edmo, the GCS surgery notwithstanding, continues regardless of the stay and appeal.

Therefore, the Court should stay the preliminary injunction issued in this case pending appeal. Ms. Edmo's arguments to the contrary mischaracterize Defendants' arguments and are unpersuasive.

LEGAL STANDARD

The parties agree on the basic legal framework. When considering a motion to stay pending appeal, the court should consider "(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, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). However, the parties have two main points of disagreement regarding how this standard should be applied.

Contrary to Ms. Edmo's arguments, the standard for granting a stay is less demanding and more lenient than the standard for granting a preliminary injunction. "There is substantial overlap between [the *Nken* factors] and the factors governing preliminary injunctions; *not because the two are one and the same*, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken*, 556 U.S. at 434 (emphasis added) (internal citation omitted). While the general factors to be considered are similar, Ms. Edmo ignores that the standard is different. "[A] request [for an injunction] 'demands a significantly higher justification' than a request for a stay . . . ." *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). Similarly, the Ninth Circuit has recognized that "stays are typically less coercive and less disruptive than are injunctions." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per curiam). Thus, "a flexible approach is even *more* appropriate in the stay context." *Id.*

Despite this precedent, Ms. Edmo argues that the standard for granting a stay is the same as the standard for granting a preliminary injunction. (ECF No. 168 at 3). To the contrary, the Supreme Court could not have been more clear: "a request [for an injunction] 'demands a significantly higher justification' than a request for a stay . . . ." *Respect Maine PAC*, 562 U.S. at 996 (quoting *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1313 (Scalia, J., in chambers)). Moreover, and significantly, if the standards are the same, it would create an

impossible situation for a party seeking a stay of a preliminary injunction. If that were the case, a court could never grant a stay of a preliminary injunction pending appeal, because the court would have already determined that the party seeking the preliminary injunction had carried its burden. It would be contradictory for the court to then determine that the opposing party had carried its burden as well. Fortunately, a stay pending appeal is not treated the same as a preliminary injunction. "Whether such a stay might technically be called an injunction is beside the point; that is not the label by which it is generally known. The sun may be a star, but 'starry sky' does not refer to a bright summer day." *Nken*, 556 U.S. at 430. The Supreme Court has drawn a clear distinction between the two and so should this Court.

Ms. Edmo also asserts that even if Defendants can show that their appeal raises serious legal questions, Defendants must also show that the balance of hardships tips sharply in their favor. (ECF No. 168 at 3). This additional requirement applies when determining whether to grant a preliminary injunction. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). In addition, this requirement applies in the immigration context when a "petitioner seek[s] a stay of removal." *Leiva-Perez*, 640 F.3d at 970. However, Defendants are unaware of any case in which the Ninth Circuit applied that requirement outside those two contexts. For example, in *Lair v. Bullock*, 697 F.3d 1200 (9th Cir. 2012), the Ninth Circuit granted a stay of a lower court decision enjoining the enforcement of Montana's campaign finance regulations. *Id.* at 1201-02. In addressing the first *Nken* factor, the *Lair* Court noted that the phrases "'reasonable probability,' 'fair prospect,' 'substantial case on the merits,' and 'serious legal questions ... raised,' are largely interchangeable. All of these formulations indicate that, 'at a minimum,' a petitioner must show that there is a 'substantial case for relief on the merits.'" *Id.* (quoting *Leiva-Perez*, 640 F.3d at 967-68). The *Lair* Court went on to conclude that the State of Montana had made the minimum showing

of a "substantial case for relief on the merits." *Id.* However, the *Lair* Court never indicated that the State of Montana also show that the balance of the hardships tipped sharply in its favor. Thus, Defendants need show only that their appeal raises serious legal questions.

This conclusion is reinforced by the Ninth Circuit's order granting a stay of the preliminary injunction in *Norsworthy v. Beard*, 802 F.3d 1090 (9th Cir. 2015). *Order Granting Stay* (Dkt. 25), *Norsworthy v. Beard*, No. 15-15712 (9th Cir. May 21, 2015). In that order, the Ninth Circuit recognized that "[a] stay is appropriate when an appeal presents 'serious legal questions.'" *Id.* (quoting *Leiva-Perez*, 640 F.3d at 967-68). However, the *Norsworthy* Court never mentioned that the defendant would also have to show that the balance of hardships tipped sharply in its favor, nor did the *Norsworthy* Court ever find that the defendant had made that showing. *Id.* Nevertheless, the *Norsworthy* Court granted a stay of the preliminary injunction. *Id.* Similarly, Defendants need only show that this case presents serious legal questions.

However, even if Defendants must demonstrate a "fair prospect" of success on appeal, Defendants have met that standard. The court granted Ms. Edmo a mandatory injunction, and Ms. Edmo's burden is "doubly demanding" because mandatory injunctions are "particularly disfavored." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc). Consequently, Defendants burden on appeal is quite low; they need show only that Ms. Edmo failed to carry her heavy burden of proving that the law and the facts clearly favored her claim and that imminent, extreme or very serious damage would result absent an injunction. *Id*; *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009). There is a "fair prospect" that Defendants can make that showing on appeal, *see Lair*, 697 F.3d at 1204, defendants will be irreparably harmed absent a stay, a stay is unlikely to increase the risk of harm to Ms. Edmo, and the public interest is mixed. Thus, the court should grant a stay.

ARGUMENT

I. Defendants Have Shown a "Fair Prospect" of Success on Appeal.

The court determined that Defendants were deliberately indifferent to Ms. Edmo's GD based on its finding that "Defendants' sole evaluation of Ms. Edmo for surgery prior to this lawsuit failed to accurately apply the WPATH Standards of Care." (ECF No. 149 at 40). Ms. Edmo argues that the court's decision was purely factual and required only the application of the well-known Eighth Amendment standard. (ECF No. 168 at 4-7). Thus, Ms. Edmo suggests that the Ninth Circuit will not review the court's decision de novo. *Id.* at 5. Once again, the Ninth Circuit disagrees with Ms. Edmo. A district court's conclusion that the facts in any given case constitute an Eighth Amendment violation "is a question of law that [the Ninth Circuit] review[s] de novo."[1] *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002).

Even if Defendants misapplied the WPATH guidelines, Defendants respectfully believe the court erred in drawing the conclusion that they were deliberately indifferent. "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) (emphasis added) (quotation marks and alteration omitted). Applying this principle, other courts have determined that the WPATH guidelines are "flexible" and are subject to modification and individualized interpretation by medical providers. *See Kosilek v. Spencer*, 774 F.3d 63, 91-92, 87

[1] While a district court's decision to grant a preliminary injunction can be reviewed for an abuse of discretion in some circumstances, the Ninth Circuit has indicated that the standard of review on appeal depends on the substance of the injunction rather than its title. *Melendres v. Arpaio*, 695 F.3d 990, 996 (9th Cir. 2012) ("treat[ing] the Order as granting only preliminary injunctive relief" because "there [wa]s nothing in the Order purporting to provide a permanent remedy"). Because the injunction in this case grants what is essentially permanent relief, the Ninth Circuit will likely review under a less deferential standard.

(1st Cir. 2014) (en banc); *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). In addition, failing to follow the WPATH guidelines does not violate the Eighth Amendment. *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) (rejecting "the conclusory assertion that [the inmate] demonstrated her constitutional rights would be violated if she did not receive the hormone levels suggested by WPATH"). Thus, Defendants have a fair prospect on appeal of showing that the law and the facts do not clearly favor Ms. Edmo's claim. *See Garcia*, 786 F.3d at 740.

Moreover, Defendants have shown a fair prospect of succeeding on appeal, because the court issued a "preliminary" injunction that grants Ms. Edmo permanent relief. The Ninth Circuit has not specifically addressed the circumstances in which a court may grant permanent relief via a preliminary injunction. However, the Ninth Circuit has commented that "[i]n general, that kind of judgment on the merits in the guise of preliminary relief is a highly inappropriate result." *Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 978 (9th Cir. 1992). The issue the Ninth Circuit will need to resolve is not whether the court erred in its application of the permanent injunction standard; the issue is whether the court should have granted permanent relief via a preliminary injunction and what legal standard Ms. Edmo must meet to be entitled to permanent relief before trial. Thus, it is doubtful that the court's alternative finding that Ms. Edmo was entitled to relief under the permanent injunction standard cures the possible defects in the court's decision, and Defendants have shown a "fair prospect" of success on appeal.

II. A Stay Pending Appeal Will Not Substantially Injure Ms. Edmo.[2]

As Defendants noted in their initial memorandum, Defendants recognize that the court has already determined Ms. Edmo is likely to suffer irreparable harm absent a preliminary injunction. "There is substantial overlap between [the *Nken* factors] and the factors governing preliminary injunctions; *not because the two are one and the same*, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id.* at 434 (emphasis added) (internal citation omitted). Thus, Defendants are not trying to "relitigate" that prior determination. Rather, Defendants seek to highlight the factors that weigh in favor of a stay in this case.

As in their initial memorandum, Defendants submit three points for the court's consideration. First, as previously discussed, "a request [for an injunction] 'demands a significantly higher justification' than a request for a stay . . . ." *Respect Maine PAC*, 562 U.S. at 996 (quoting *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1313 (Scalia, J., in chambers)). Thus, it is not contradictory for the court to determine Ms. Edmo is entitled to a preliminary injunction and that Defendants are also entitled to a stay of that injunction pending appeal. Second, whether Ms. Edmo will suffer substantial injury is not as "critical" to determining whether a stay should be granted as the first two *Nken* factors. *Nken*, 556 U.S. at 434. Ms. Edmo finds this statement of the law "alarming." (ECF No. 168 at 9). Defendants did not intend to alarm Ms. Edmo, but that is what the Supreme Court has said. *Nken*, 556 U.S. at 434. Third, Ms. Edmo's expert and the court itself recognized that Ms. Edmo could wait up to six months for surgery. (ECF No. 156-1 at 8). Defendants obligations regarding medical and mental health treatment and care at

[2] 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). Ms. Edmo does not challenge the fact that Defendants will be irreparably harmed absent an appeal.

the prison continue regardless of the stay and appeal. Yet, when there are legitimate questions of law on appeal regarding a permanent, irreversible surgery that has been ordered, a stay should be appropriate. This Court has expressed that it did not believe there was clear direction from the 9th Circuit on some of the unique issues in this case. Therefore, Defendants would think that this court would want that direction before the permanent surgery is performed. Additionally, while the parties do not yet have an oral argument date, the 9th Circuit does appear to have this case on its radar and on track for an expedited decision on appeal.[3] Thus, a stay is appropriate in this case.

III. The Public Interest is Mixed at Best.

"[O]rdering . . . Defendants to direct their medical and/or mental health providers to take a specific course of treatment, even where that treatment would run counter to the treatment prescribed after the providers have exercised individualized judgment, weighs against the public interest." *Oakleaf v. Martinez*, 297 F. Supp. 3d 1221, 1233 (D.N.M. 2018). Moreover, there is a "public policy favoring disposition of cases on their merits" this policy is "particularly important in civil rights cases."[4] *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)). In response, Ms. Edmo notes that it is in the public's interest to prevent the deprivation of a constitutional right, citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). However, it is worth noting that it does not appear the Court made a specific and final finding on the merits that there was a constitutional violation since the

[3] The 9th Circuit issued an expedited briefing schedule and, did not, as is typically, allow an automatic extension of the briefing deadline for 30 days. Rather, the court indicated that it would only extend the briefing schedule for good cause. Defendants did seek an extension due to health issues with IDOC's lead counsel, but they are working a quickly as possible and plan to file an opening appeal brief soon.

[4] Contrary to Ms. Edmo's assertion, the court never reached the merits of her claim. Rather, the court issued a mandatory preliminary injunction based on its conclusion that the law and the facts clearly favored Ms. Edmo's claim and that extreme or very serious damage would result absent an injunction. (ECF No. 149 at 44).

decision was related to a preliminary injunction hearing with preliminary findings about the likelihood of success on the merits. Thus, the public policy interest of Defendants appears to outweigh Plaintiffs. However, even if the public interest does not weigh in favor of a stay, the factor is not as "critical" as the first two *Nken* factors. 556 U.S. at 434. Thus, the court should nonetheless issue a stay, because Defendants have shown that they have a fair prospect of succeeding on appeal and they will be irreparably harmed absent a stay.

CONCLUSION

The court should grant a stay because Defendants have shown a fair prospect of success on appeal, Defendants will be irreparably harmed absent a stay, a stay is unlikely to increase the risk of harm to Ms. Edmo, and the public interest is mixed. Ms. Edmo's counter-arguments are unavailing.

DATED this 13th day of February, 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 13th day of February, 2019.

MOORE ELIA KRAFT & HALL, LLP

By: */s/ Marisa S. Crecelius*
Marisa S. Crecelius
Counsel for Defendants Kevin Kempf, Richard Craig, Rona Siegert, and Howard Keith Yordy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of February, 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:

Craig H. Durham
Deborah A. Ferguson
FERGUSON DURHAM, PLLC
chd@fergusondurham.com
daf@fergusondurham.com
(Counsel for Plaintiff)

Amy Whelan
Julie Wilensky
Alexander Chen
National Center for Lesbian Rights
awhelan@nclrights.org
jwilensky@nclrights.org
(Counsel for Plaintiff)

Brady J. Hall
Marisa S. Crecelius
MOORE ELIA KRAFT & HALL, LLP
brady@melawfirm.net
marisa@melawfirm.net
(Counsel for Defendants Kevin Kempf, Richard Craig, Rona Siegert, and Howard Keith Yordy)

Lori E. Rifkin
Dan Stormer
Shaleen Shanbhag
HADSELL STORMER & RENICK, LLP
lrifkin@hadsellstormer.com
dstormer@hadsellstormer.com
sshanbhag@hadsellstormer.com
(Counsel for Plaintiff)

By: */s/ Dylan A. Eaton*
Dylan A. Eaton