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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

ADREE EDMO (a/k/a MASON 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.

Case No.: 1:17-cv-00151-BLW

PLAINTIFF'S STATUS REPORT

Complaint Filed:	April 6, 2017
Discovery Cut-Off:	August 31, 2018
Motion Cut-Off:	None Set
Trial Date:	None Set

Pursuant to the Court's March 5, 2019 Minute Entry (ECF 176), Plaintiff hereby submits the following status report:

INTRODUCTION

Plaintiff has urgent and substantial concerns about Defendants' failure to comply with this Court's December 13, 2018, Order and Defendants' counsel's ongoing mistakes or misrepresentations about their efforts to do so. Accordingly, and as explained more fully below, Plaintiff requests continued oversight by this Court to enforce its Order.

PROCEDURAL SUMMARY

During a telephonic status conference on March 5, 2019, the Court ordered the parties to meet and confer within one week regarding Defendants' efforts to arrange Ms. Edmo's surgery, including pre-operative and post-operative requirements. The Court directed Defendants to identify any and all potential problems and/or barriers to surgery, and to provide the information to Plaintiff's counsel so that Plaintiff could determine what further legal motions are necessary, if any, to enforce the preliminary injunction. As detailed below, Defendants did not comply with their meet and confer obligations and Plaintiff's counsel has serious concerns about Defendants' overall compliance with the Court's December 13, 2018 Order:

1) Plaintiff's counsel informed Defendants soon after this Court's December 13, 2018 order that the pre-operative requirements for Ms. Edmo's surgery could require significant leadtime. On January 9, 2019, Plaintiff's counsel provided Defendants with the names of several qualified surgeons so that Defendants could promptly contact the surgeons and arrange surgery, as well as pre- and post-operative care. Plaintiff also raised concerns about Defendants' timely compliance with the order during a December 21, 2018 status conference with the Court. As a result, the Court ordered Defendants to provide a status report on their efforts by January 15, 2019.

2) In that January 15, 2019 status report, Defendants represented that they had identified Dr. Stiller, an Idaho surgeon who was not on the list provided by Plaintiff, as their potential surgeon and were working, through their chosen contractor, Dr. Alviso, to determine possible dates for the surgery as well as logistics for pre- and post-surgical care.

3) On February 11, 2019, Plaintiffs' counsel learned that no one from either IDOC or Corizon had contacted Dr. Stiller's office or spoken with Dr. Stiller (or anyone else at his office) to schedule Ms. Edmo's surgery or to inquire about pre-surgical and post-surgical requirements. Dr. Alviso, Corizon's contractor, also had not contacted Dr. Stiller's office. On February 25, 2019, Plaintiff's counsel sent a letter to Defendants expressing concerns that Defendants were not on track to meet the Court's deadline, and identifying Defendants' misrepresentations to Plaintiff and the Court regarding their purported contact with Dr. Stiller's office. A copy of this letter is attached hereto as **Exhibit A**.

4) On March 1, 2019, Corizon Defendants responded to Plaintiff's counsel's letter, and confirmed that Dr. Alviso had not reached out to Dr. Stiller's office. Corizon Defendants stated that they had "recently contacted Dr. Stiller's practice directly and obtained a tentative GCS surgery date for Ms. Edmo in May 2019." Corizon then listed "Dr. Stiller's typical requirements prior to performing GCS" and said they were "working through this process but completing all of these typical requirements is problematic in Ms. Edmo's case." Corizon did not identify the "problems" with any of these requirements in their letter. A copy of this letter is attached hereto as **Exhibit B**.

5) On March 5, 2019, this Court held a further status conference. At that time, Defendants indicated they had obtained a date certain at the end of May for Ms. Edmo's surgery, but declined to disclose the precise date for security reasons. Defendants stated that they may have concerns about whether they could provide the required referral letters for gender confirmation surgery to Dr. Stiller's office. This Court ordered the parties to meet and confer within one week, directed Defendants to identify any problems or barriers to complying with the Court's order, and directed them to provide their position regarding each problem / barrier, including with respect to referral letters.

6) On March 8, 2019, Defendants filed a motion for stay pending appeal in the Ninth Circuit. A copy of Defendants' filing is attached hereto as **Exhibit C**. As part of this motion, Defendants filed a "certification" stating that a decision on the stay motion by the Ninth Circuit

“is necessary before April 8, 2019, in order to avoid irreparable harm to Defendants. Should Ms. Edmo’s surgery take place without a decision on defendants’ Motion to Stay, full appellate review of the district court’s order would be rendered moot. Defendants will also incur significant time, cost, and expense in arranging for Ms. Edmo’s surgery and preoperative visits to take place hours away from where she is incarcerated and those arrangements must be finalized as soon as possible to ensure Ms. Edmo receives surgery by the June 13, 2019 deadline imposed by the district court.” **Exh. C at v.** Defendants argued in their stay filing that this Court’s Order is overbroad because it “broadly instructs Defendants to provide ‘adequate medical treatment,’ rather than being limited to Ms. Edmo’s request for GCS. The injunction also requires Defendants to provide Ms. Edmo with GCS even though Defendants are not qualified surgeons with the ability to actually approve or perform the surgery and despite the potential contraindications or other issues that may arise, prohibiting the surgery from taking place.” **Exh. C at 12.**

7) On March 12, 2019, during the parties’ telephonic meet and confer, IDOC counsel communicated IDOC’s plans for housing Ms. Edmo pre- and post-surgery. However, Defendants’ counsel did not share their clients’ position on the two referral letters for surgery, including whether Defendants would accept such letters from outside mental health clinicians. Instead, Defense counsel suggested that they would not move forward with surgery in the absence of further direction from this Court and clarification about the Court’s Order. Plaintiff’s counsel pointed out that it has already been established that Defendants’ mental health providers are not qualified to assess Ms. Edmo for gender confirmation surgery. Plaintiff’s counsel also stated that this Court’s Order requires Defendants to provide Ms. Edmo adequate medical care, which includes qualified providers to assess her for gender confirmation surgery. Plaintiff’s counsel offered that they could themselves obtain these letters from qualified providers, including Dr. Ettner. Plaintiff also asked whether Defendants would be amenable to agreeing to outside, qualified providers to assess Ms. Edmo for the surgical referral letters. Defendants did not provide responses other than to state that the Court’s order was not specific enough to address these issues, and that they were considering filing a motion with the Court. Plaintiff’s counsel again asked Defendants whether they would

agree to have outside providers assess Ms. Edmo for surgery, including Dr. Ettner, who is highly qualified to do so. Defendants were not able to say whether they would agree to outside evaluators during the call, but said they would provide their position on this issue by Friday, March 15.

8) On Friday, March 15, IDOC counsel sent an email to counsel stating that he did not have sufficient time that week to speak with his clients regarding the matters discussed during the meet and confer conference, and therefore did not provide their positions. A copy of this email is included in the email string attached hereto as **Exhibit D**.

9) On Friday, March 15, Plaintiffs' counsel learned that Defendants' representatives had only spoken with Dr. Stiller's surgery coordinator and had not spoken with Dr. Stiller directly regarding Ms. Edmo's surgery, or the pre- and post-surgery requirements. Dr. Stiller informed Plaintiff's counsel that he follows the WPATH Standards of Care for referrals: typically he receives records of hormone treatment from the physician providing such treatment, as well as two referral letters for surgery from therapists. WPATH requires that the two referral letters be from qualified mental health professionals who have independently assessed the patient. Plaintiff's counsel also learned that Ms. Edmo's tentative surgery date was in June, not in May, and that Dr. Stiller could not determine the precise surgery or pre-operative requirements until he was able to have an initial consultation with Ms. Edmo. That consultation is not set to occur until mid-April, 2019

10) On Sunday, March 17, Corizon counsel sent an email stating that no Corizon medical or psychiatrist providers can provide the surgical referral letters "for a variety of reasons, including Ms. Edmo not having well controlled mental health conditions, not having lived as a female in a real-life social setting for 12-months or more, and due to a history of lack of compliance issues with treatment recommendations." Corizon's counsel objected to Dr. Ettner providing a referral letter and would not agree to a third-party assessment because it "was not specifically addressed in the court's order and there are many unanswered questions." This email also states that, since the March 12 meet and confer, Corizon has learned (apparently for the first time) about the different options for vaginoplasty surgeries, the pre-surgery requirements for electrolysis and

the timelines for these. Dr. Stiller determines which surgery is appropriate, and what pre-surgical electrolysis is needed after his medical examination of the patient. Corizon counsel's email concludes that Defendants "don't see how the parties can try to find a solution regarding these issues in this context until we get direction from the court" and are "considering options, which may include a motion for modification." A copy of this email is included in the email string attached hereto as **Exhibit D**.

11) On March 18, 2019, Plaintiffs' counsel sent an email to Defense counsel asking for more information, including whether the IDOC Defendants also object to providing surgical letters or stipulating to third party evaluators, whether Defendants have spoken with Dr. Stiller directly, and whether the surgery date is set for May or June. Plaintiff's counsel also stated: "We disagree that any of these issues are not encompassed by the Court's order. Rather, they appear to be issues regarding pre-op procedures that Defendants did not timely explore, in direct contradiction to Defendants' past representations to the Court, and in violation of the Court's order." A copy of this email is included in the email string attached hereto as **Exhibit D**.

12) On March 18, 2019, IDOC counsel responded that it has arranged for housing for Ms. Edmo for her pre-surgery appointment in April. IDOC Counsel also stated, however, that he shares Corizon's concerns regarding potential barriers to surgery and that "[m]y clients believe it is necessary to have the Court address whether and how the WPATH referral letters are to be provided to the surgeon." On March 19, 2019, Corizon counsel sent an email reiterating these issues, clarifying that they have not spoken with Dr. Stiller directly, and confirming that a surgery date has been reserved for May. Corizon's counsel stated, "[t]he parties have not been able to come to a resolution regarding these issues because, I believe, they are not addressed by the court's order and likely were not contemplated by the court when it issued its order." A copy of this email is included in the email string attached hereto as **Exhibit D**.

PLAINTIFF'S POSITION

Plaintiff's counsel is extremely concerned about Defendants' failure to comply with this Court's December 13, 2018 Order. This Court has repeatedly told Defendants, beginning with the

first telephonic status conference held on December 21, 2018, that unless or until a stay is entered, Defendants must take all necessary steps to promptly comply with the preliminary injunction. Despite this direction, the preliminary injunction order itself, and information from Plaintiff's counsel in December 2018 and early January 2019, Defendants did not engage Dr. Stiller's office until at least the end of February 2019, two-and-a-half months after the Court's order. To this day, they have never spoken with Dr. Stiller directly and neither has their purported surgery "consultant," Dr. Alviso. Defendants failed to request specific information about the pre-surgical timeline and steps that must be completed (such as pre-surgery electrolysis) until mid-March 2019—three months after this Court's order—and now take the position that completion of these steps may delay Ms. Edmo's surgery beyond the Court's deadline. Defendants' failures to act diligently have caused these delays.

With respect to the required provider letters, Defendants' position that they cannot or will not provide the letters because Ms. Edmo's Corizon/IDOC mental health providers do not believe she is qualified for surgery is unsupported and improper. Similarly, any suggestion that Defendants or their chosen contractor, Dr. Alviso, will not refer Ms. Edmo to Dr. Stiller for surgery because they do not believe she is qualified, is also unsupported and improper. The Court has already ruled that Defendants' determinations about Ms. Edmo's need for surgery were so deficient that they constitute deliberate indifference in violation of her rights under the Eighth Amendment. Their current position is thus an improper attempt to relitigate issues that have already been resolved by this Court.

Defendants' refusal to stipulate to outside evaluators is also wholly unsupported. There is no basis for objecting to a surgery referral letter from Dr. Ettner, a highly experienced and extremely qualified clinician who has treated hundreds of transgender patients. Defendants also have no basis to object to other qualified providers who can assess Ms. Edmo for surgery. Indeed, Defendants' current legal position makes clear that this is the only viable option because both IDOC and Corizon have stated that their clinicians will adhere to the positions they took during the underlying litigation about these issues.

Provision of gender confirmation surgery to Ms. Edmo is not substantively different from any other situation in which a prisoner requires medical treatment, including surgery, to be performed by an outside specialist—a scenario IDOC counsel has represented his client encounters regularly. If a prisoner plaintiff obtains a preliminary injunction order from a court under the Eighth Amendment for such treatment, the prison cannot simply maintain its position that such treatment is unnecessary and inappropriate, and refuse to provide access to medical providers qualified to evaluate for and provide such treatment.

This Court has already ruled that Ms. Edmo needs urgent access to surgery and has directed Defendants to take all necessary steps to provide that access. Because Defendants refuse to do so based on the same arguments that have been specifically rejected by this Court, and because the June 13, 2019 surgery deadline is now fewer than three months away, Plaintiff has obtained a referral letter for surgery from Dr. Ettner. Dr. Ettner has provided these letters many times, is highly qualified to do so, and has fully evaluated Ms. Edmo, including through the use of psychodiagnostic testing. Plaintiff has also arranged for a second, highly qualified mental health provider to meet with Ms. Edmo on April 4, 2019, in order to assess Ms. Edmo for gender confirmation surgery and provide a surgical referral if the clinician deems that appropriate. Plaintiff will submit any and all surgical referral letters to Dr. Stiller and provide copies to Defendants.

In light of Defendants' significant delays complying with this Court's Order, and their ongoing reliance on arguments that have been rejected by this Court, continued oversight is necessary to enforce the preliminary injunction order. Plaintiff requests that this Court require ongoing reporting by Defendants about their plans for complying with the June 13, 2019 surgery deadline, including fulfilling pre-operative requirements, and an in-person status conference, if necessary. Plaintiff also requests further reporting by Defendants about what information they intend to provide to Dr. Stiller's office, in order to ensure that the information is limited to documents that are typically provided to surgeons in these circumstances, and about how Defendants will provide medical privacy with respect to Ms. Edmo's consultation with Dr. Stiller

and his staff.

Dated: March 19, 2019

Respectfully Submitted,

NATIONAL CENTER FOR LESBIAN RIGHTS
FERGUSON DURHAM
HADSELL STORMER & RENICK LLP

By: /s/ - Lori Rifkin
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Exhibit A

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February 25, 2019

VIA ELECTRONIC MAIL ONLY

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Re: Adree Edmo v. Idaho Department of Correction, et al.
Case No.: 1:17-cv-00151-BLW

Dear Counsel,

We write to meet and confer in advance of the next status conference on March 5, 2019. During the January 30, 2019 status conference, Judge Winmill directed the parties to exchange information regarding potential surgeons and other issues in light of the preliminary injunction ordering surgery on or before June 13, 2019. To date, we have not received any additional information from Defendants regarding the status of arrangements for Ms. Edmo's surgery beyond Defendants' January 15, 2019 status report. Based on the information in that report as

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February 25, 2019

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well as the concerns identified below, we do not believe Defendants are on track to meet the Court's deadline for providing Ms. Edmo gender confirmation surgery with a qualified surgeon meeting relevant medical standards of care. For this reason, we request that Defendants provide the information requested below prior to the next status conference with the Court.

On January 9, 2019, Plaintiff's counsel provided IDOC and Corizon information regarding four surgeons who are qualified to perform Ms. Edmo's surgery and who are amenable to adjusting their surgical schedules in order to comply with the Court's order. As noted in the information provided on January 9, however, some of the surgeons could only do that if Ms. Edmo is placed on their schedules immediately. We also understand that any surgeon who performs this surgery will have to meet with Ms. Edmo ahead of time to ensure that any pre-surgical requirements are met. This means that pre-surgical preparation with the selected surgeon must begin several weeks, if not months, before surgery. Therefore, time is of the essence in Defendants' identification and scheduling of a surgeon to perform Ms. Edmo's gender confirmation surgery on or before the Court's June 13, 2019 deadline.

In Defendant's January 15, 2019 "Joint Status Report," Defendants represented to the Court that they had contracted with Dr. Alviso "as the intermediary physician to assist with pre-operative tasks and requirements, such as labs, and help arrange Ms. Edmo's GCS." ECF 157. On February 19, we received an undated "Memorandum of Understanding" (PBL 1737) with Dr. Alviso that does not specify these responsibilities in Dr. Alviso's scope of work. Accordingly, please produce the operable contract with Dr. Alviso that outlines the scope of work detailed in the status report.

In the January 15, 2019 report, Defendants also identified Dr. Geoffrey Stiller as a potential surgeon for Ms. Edmo and stated that "Corizon and Dr. Alviso are in the process of determining possible dates for GCS surgery with Dr. Stiller, as well as discussing the logistical challenges of such." *Id.* Defendants also indicated that they are considering the surgeons for which Plaintiffs provided information.

Plaintiff's counsel spoke to Dr. Stiller on February 11, 2019 and he represented that, as of that date, no one from IDOC or Corizon, including Dr. Alviso, had reached out to him about Ms. Edmo's surgery. Dr. Stiller's office represented that he currently has a 6-8 month waiting list for surgery. It is also our understanding that Dr. Stiller currently performs surgeries at Gritman Medical Center, which is a six-hour drive from Boise, and at Pullman Hospital in Washington state, both of which will necessitate post-surgery housing arrangements for Ms. Edmo near those locations.

Given that surgical preparation issues must begin immediately in order for surgery to happen by June, and in light of Dr. Stiller's and the other surgeons' waiting lists, please let us know what steps Corizon and/or IDOC have taken to schedule Ms. Edmo's surgery either with Dr. Stiller or with someone else, including the pre-operative procedures and bloodwork required. Please also provide us with the status of Corizon and/or IDOC's planning for necessary housing arrangements for Ms. Edmo related to the surgical process, including preparatory and follow-up care.

We also remain concerned that Defendants continue to improperly manage Ms. Edmo's hormone medication, thereby jeopardizing her safety. Ms. Edmo had an appointment with Dr. Alviso on February 13, 2019, which was her first appointment with him since the evidentiary hearing in this case. While Dr. Alviso increased her spironolactone (a testosterone blocker) during that appointment, he also informed Ms. Edmo that he will reduce that dose if her ALT/AST levels are abnormal. As Dr. Gorton documented extensively in his expert report, it is

Hadsell Stormer & Renick LLP

February 25, 2019

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exceedingly unlikely that spironolactone has any effect on Ms. Edmo's AST/ALT levels. Rather, as Dr. Gorton predicted, Ms. Edmo has now been diagnosed with Hepatitis C, and that disease is far more likely to be affecting her liver function. Accordingly, there is no medical basis to reduce Ms. Edmo's testosterone blocker based on her AST/ALT levels. Ms. Edmo has repeatedly grieved this issue. If Defendants continue to link Ms. Edmo's hormone medication to her AST/ALT levels despite medical evidence, we may have to seek relief from the Court.

Dr. Alviso also did not otherwise discuss surgery with Ms. Edmo during the appointment on February 13, did not discuss any pre-surgical requirements, and informed Ms. Edmo that he would not see her again until June or July. Please explain how this squares with Defendants' representation to the Court in the January 15, 2019 status report that Dr. Alviso will be assisting with pre-operative requirements for a surgery occurring no later than June 13, 2019.

We look forward to your prompt response to this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Lori Rifkin", with a stylized flourish at the end.

Lori Rifkin

Exhibit B

**PARSONS
BEHLE &
LATIMER**

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March 1, 2019

VIA E-MAIL

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RE: *Adree Edmo v. Corizon, Inc., et al. (ISCI)*
CH File No. 2016-PL-10007
PBL File No. 20382.116

Lori,

This letter is in response to your February 25, 2019 letter primarily inquiring as to the status of steps being taken for Ms. Edmo's GCS surgery as ordered by the court.

I have confirmed with Brady Hall that the Idaho Department of Correction (IDCO) has a strong priority for the GCS surgery occurring in Idaho for security, operation, transport, cost, and logistical purposes.

As you know from our January 2019 report to the court, Defendants identified Geoffrey Stiller, M.D. FACS as a potential qualified GCS surgeon for Ms. Edmo. Apparently, Dr. Alviso has sent other patients to Dr. Stiller and, to date, this is the only GCS surgeon in Idaho that Corizon is aware of. I understand you contacted Dr. Stiller directly and obtained information from his practice and his resume. You did not indicate you have any objection to him being the surgeon in your letter. My client has told me that they have learned Dr. Stiller performs an average of about two vaginoplasties per week.

Dr. Alviso did have an appointment with Ms. Edmo in mid-February, which was the normal appointment to manage her hormones. A local Corizon administrator had previously talked with Dr. Alviso (who, as you know, is not employed by Corizon) in January and asked him to start the process of coordinating the next steps for the GCS surgery with Dr. Stiller. Unfortunately, Dr. Alviso did not do so. It is my understanding that a local Corizon senior administrator recently learned that Dr. Alviso is somewhat uncomfortable with the current situation, in part, because he is unclear as to whether some of the typical pre-operative requirements for GCS can be met in light of the judge's order.

Lori E. Rifkin
March 1, 2019
Page Two

In any event, given Dr. Alviso's hesitancy with the GCS process in Ms. Edmo's situation, a local Corizon senior administrator recently contacted Dr. Stiller's practice directly and obtained a tentative GCS surgery date for Ms. Edmo in late May 2019. I understand this surgery is currently on Dr. Stiller's calendar. The surgery would occur in Moscow, Idaho. Furthermore, a pre-operative consultation is in the process of being scheduled.

Corizon advises that Dr. Stiller's typical requirements prior to performing GRS include:

- A referral from treating physician
- 2 mental health care provider referrals
- Hormone treatment and counseling for at least 1 year
- Laser treatment or electrolysis for lower region
- Initial consult
- Approval for payment

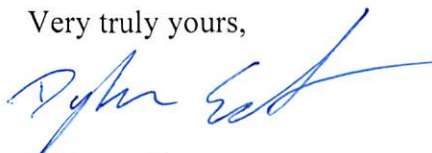
We are working through this process but completing all of these typical requirements is problematic in Ms. Edmo's case.

With respect to Hepatitis-C, it is my understanding that Ms. Edmo has a Chronic Care Clinic appointment later in March to discuss the additional lab results obtained in February 2019.

I know that you have mentioned concerns with Ms. Edmo's hormone treatment in this case, but I am unclear how this issue relates to the judge's order on Plaintiff's Motion for Preliminary Injunction, especially since Plaintiff indicated they were not pursuing this issue for purposes of said motion. In any event, it sounds like you believe it is a good development that Ms. Edmo's spironolactone was recently increased. I note, as you know, that Dr. Alviso is an offsite medical specialist whom Corizon has asked to provide hormone treatment to some inmates in Idaho's prisons, including Ms. Edmo. Corizon is relying on Dr. Alviso's judgment regarding appropriate hormone therapy and management for Ms. Edmo.

I hope this letter addresses the issues raised in your letter. We will be prepared to further discuss these items with Judge Winmill at the Tuesday status conference in this case.

Very truly yours,



Dylan A. Eaton

DAE/lae
cc: Brady Hall

Exhibit C

URGENT MOTION UNDER CIRCUIT RULE 27-3(b)

Case Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, AKA MASON EDMO,
Plaintiff-Appellee,

v.

IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellants

and

CORIZON, INC., et al.,
Defendants-Appellants

On Appeal from Orders of the United States District Court
For the District of Idaho
(No. 1:17-cv-00151-BLW)

**DEFENDANTS-APPELLANTS' JOINT URGENT MOTION
TO STAY INJUNCTION PENDING APPEAL
ACTION IS NECESSARY BEFORE APRIL 8, 2019**

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March 8, 2019

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RULE 27-3(b) CERTIFICATION

On December 13, 2018, the U.S. District Court for the District of Idaho issued an Order granting Plaintiff-Appellee Adree Edmo’s Motion for Preliminary Injunction (Order). (ER 1-45). The district court ordered Defendants-Appellants Idaho Department of Correction (IDOC), Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert (collectively, the IDOC Defendants) and Defendants-Appellants Corizon, Inc. (Corizon), Dr. Scott Eliason, Dr. Murray Young, and Dr. Catherine Whinnery (collectively, the Corizon Defendants) to “take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery [GCS] as promptly as possible and no later than six months from the date of this order.” (ER 45). Consequently, Defendants must provide Ms. Edmo with surgery by June 13, 2019 and Defendants are already working to address pre-operative requirements and issues.¹

Defendants have filed timely notices of appeal from the district court’s Order. This case has proceeded as an expedited appeal from a preliminary injunction, pursuant to Cir. Rule 3-3. Defendants have filed their joint opening

¹ Indeed, one of the many issues with the district court’s decision is that it requires Defendants, who are not surgeons, to provide a surgery. The surgeon has pre-operative requirements and will need to exercise his or her own medical judgement regarding whether GCS is indicated. Surgeons also require referrals from treatment providers and mental health care professionals and it is unclear how this will be addressed in this situation, where prison medical and mental health providers believe the GCS is not indicated for Ms. Edmo.

brief and Ms. Edmo's answering brief is due April 3, 2019. (Nos. 19-35017 and 19-35019, Dkt. 10). Defendants' optional reply briefs are due within 21 days after service of Ms. Edmo's answering brief. *Id.*

Despite this expedited schedule, it is unlikely that this Court will fully hear Defendants' appeal before Ms. Edmo's surgery must take place by June 13, 2019, and certainly not before Defendants finalize arrangements for security, housing, and other provisions related to Ms. Edmo's pre-operative visits and the surgery itself. Accordingly, Defendants certify that action on this Urgent Motion for Stay is necessary before April 8, 2019, in order to avoid irreparable harm to Defendants. Should Ms. Edmo's surgery take place without a decision on Defendants' Motion for Stay, full appellate review of the district court's Order would be rendered moot. Defendants will also incur significant time, cost, and expense in arranging for Ms. Edmo's surgery and preoperative visits to take place hours away from where she is incarcerated and those arrangements must be finalized as soon as possible to ensure Ms. Edmo receives surgery by the June 13, 2019, deadline imposed by the district court.

Defendants also certify that defense counsel notified Ms. Edmo's counsel by email on March 7, 2019, that Defendants intended to file the instant Motion on March 8, 2019. Defendants also filed a Joint Motion to Stay before the district

court, which the court denied on March 4, 2019. (Memo. Decision and Order, Dkt. 175, p. 4).

INTRODUCTION

Defendants respectfully request that this Court stay the district court's injunction requiring Defendants to provide GCS to Ms. Edmo by June 13, 2019. If a stay is not granted, Defendants will be irreparably harmed because the appeal will become moot and Defendants will be deprived of their right to appellate review. Unlike Defendants, Ms. Edmo will not suffer significant or irreversible harm if a stay is granted, especially in light of her sworn testimony that she will not attempt self-castration because she is committed to preserving her male anatomy for a future surgery. This Court stayed a similar injunction requiring California to provide GCS to an inmate with gender dysphoria. *Norsworthy v. Beard*, No. 15-15712, Dkt. 25 (9th Cir. May 21, 2015); *see also Norsworthy v. Beard*, 802 F.3d 1090, 1091 (9th Cir. 2015).

FACTUAL AND PROCEDURE BACKGROUND

Ms. Edmo is an IDOC inmate who was born a biological male and, prior to her incarceration in 2012, identified openly as a gay man. (ER 1513, 3610; PSI 7-8, 12, 53-56, 67, 71, 97-119 (under seal)). Prior to entering prison, Ms. Edmo suffered from serious and uncontrolled mental health issues, notably depression, anxiety, and alcohol dependence. (ER 601-606, 871-879, 881-906, 1103-1109, 3221; PSI 10-11, 15-17, 22-29, 32-52, 53-57, 67 (under seal)). Her mental health was so severely compromised that she made two serious suicide attempts, once in

2010 and again in 2011. (ER 601-606; PSI 46-51, 53-57, 67, 71, 76-77 (under seal)).

Approximately two months after Ms. Edmo entered IDOC custody in 2012, Ms. Edmo received an assessment for Gender Dysphoria (GD) by psychiatrist Dr. Scott Eliason. (ER 144; 805-806, 1513). Dr. Eliason specializes in treating inmates, is Board-Certified in Forensic and General Psychiatry, and is a Certified Correctional Healthcare Provider (CCHP). (ER 797-802; 973-977). Dr. Eliason is a qualified GD evaluator and has extensive training, education, and experience treating GD inmates (ER 813-816, 2912, 2927).

Dr. Eliason concluded that Ms. Edmo met the criteria for GD (ER 803-809, 1513). Within two months, Ms. Edmo began hormone therapy, received bras and underwear, and is allowed to purchase makeup and female items from the commissary. (ER 612, 744, 620-621, 1515-1519, 1882-1884, 1921-1926, 2800-2803, 2919-2827). Ms. Edmo was also offered psychiatric care with Dr. Eliason and other medical and mental health staff, both for her GD and her underlying depression and anxiety. (ER 619, 811-812, 732-735, 1193-2791, 3093-3099, 3118-3143). Unfortunately, Ms. Edmo deliberately failed to attend therapy aimed at helping her develop healthy methods to address her GD and to identify the sources of her co-existing mental health issues. (ER 614-621, 1112-1114, 2833-2839; 3093-3099, 3118-3143, 3163-3168). Ms. Edmo also refused to complete her sex

offender treatment programming (SOTP), exhibited violent behavior, and received dozens of disciplinary offense reports. (ER 736, 3148-3168, 3302, 3306-3307, 3347, 3358). Ms. Edmo's major depression and anxiety persisted, and she continued to exhibit symptoms of Borderline Personality Disorder and to engage in destructive behaviors, including cutting her arms and twice attempting self-castration. (ER 189, 223, 232, 236-237, 594, 596, 741, 3093-3099, 3118-3143, 3163-3168).

In April 2016, Ms. Edmo received an evaluation for GCS with Dr. Eliason. (ER 814-815, 1730). Dr. Eliason concluded, along with exercising his own medical and psychiatric judgment based on his prior treatment of Ms. Edmo, that she did not meet the fourth and sixth criteria for GCS under the World Professional Association for Transgender Health (WPATH) "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("the WPATH guidelines")." (ER 814-829, 1730, 2932-3051). Dr. Eliason determined that Ms. Edmo's co-existing mental health concerns were not well-controlled, and that Ms. Edmo had not satisfied the 12-month period of living in her identified gender role. (ER 826-828).

Dr. Eliason also staffed Ms. Edmo's GCS evaluation with multiple other professionals, including IDOC Lead Clinician Jeremy Clark, LCPC, who has been a WPATH member since 2013. (ER 721, 821-823, 911, 1730, 3163-3164). Mr.

Clark has attended WPATH and other correctional health care conferences, is familiar with relevant literature regarding GD, and participates in the supervision and treatment of GD inmates at IDOC. (ER 718-730, 794, 910-972, 3163-3165). Mr. Clark agreed with Dr. Eliason's assessment that GCS was not appropriate for Ms. Edmo. (ER 735-743, 779, 782-784, 793-794, 3163-3168). Mr. Clark noted that Ms. Edmo's noncompliance with prison rules and refusal to complete SOTP raised concerns about her ability to comply with post-operative treatments. (ER 735-740, 3148-3168).

Almost one year after Dr. Eliason's assessment, Ms. Edmo filed a *pro se* Civil Rights Complaint and Motion for Preliminary Injunction Order. (ER 3804-3864). Counsel for Ms. Edmo appeared on June 19, 2017, and withdrew the Motion for Preliminary Injunction three days later. (ER 3700-3710). On June 1, 2018, nearly a year after withdrawing her first motion, and two years after Dr. Eliason denied her request for GCS, Ms. Edmo filed a second Motion for Preliminary Injunction seeking GCS. (ER 698-699, 3505-3619).

The district court set a three-day evidentiary hearing to take place four months later. (ER 3445-3454). On the first day of the hearing, the district court noted for the first time that the hearing should be treated differently, because the preliminary injunction would be essentially "final." (ER 985). Significant time constraints were placed on the parties at the hearing and IDOC and the Corizon

Defendants were allowed only four hours of time each to present their defenses, opening and closing statements, and cross-examination. (ER 137-141, 3088-3089). Dr. Eliason and Defendants' retained experts testified in support of Dr. Eliason's conclusion that surgery was not medically necessary or appropriate for Ms. Edmo. (ER 221-224, 236, 317-336, 736-740, 779, 3163-3168, 3415-3417, 3436-3438).

Ms. Edmo presented testimony by retained experts, psychologist Dr. Randi Ettner and emergency medicine physician Dr. Ryan Gorton, who disagreed with Dr. Eliason's assessment and opined that Ms. Edmo met the WPATH criteria for GCS under. (ER 648-650, 1052-1056). Ms. Edmo testified she was committed to preserving her genitals for a future GCS and has not attempted self-castration since 2016. (ER 595-596, 614). Ms. Edmo further testified that she has not attempted suicide since 2011. (ER 601-606).

At the conclusion of the hearing, the district court again expressed uncertainty about whether the hearing was for a preliminary injunction or a "final" injunction, describing Ms. Edmo's motion as one "that can only be resolved at a final hearing," and stating that it had "*kind of* treated this hearing as the final hearing on that issue." (ER 365-366) (emphasis added). Two months later, the district court issued its Order granting Ms. Edmo's motion for preliminary injunction and ordering Defendants to provide Ms. Edmo "adequate medical care" including GCS "as promptly as possible and no later than" June 13, 2019. (ER 45).

Despite failing to provide the parties with adequate notice prior to the hearing, the Court stated in a footnote that it had “effectively converted” the three-day evidentiary hearing into a “final trial on the merits.” (ER 31).

On January 9, 2019, Defendants timely filed Notices of Appeal from the district court’s Order. (ER 46-51). Defendants filed a Joint Motion to Stay the injunction before the district court. (Defendants’ Joint Mot. to Stay, Dkt. 156, 174). The district court denied the Motion stating that Defendants did not make a “strong showing” that they are likely to succeed on appeal. (Memo. Decision and Order, Dkt. 175, p. 3). The court further held that it was “not persuaded that Defendants will be irreparably injured absent a stay” and was “convinced that issuing the stay will substantially injure Ms. Edmo” because she was likely to attempt self-castration and successfully remove her testicles if she did not receive GCS. *Id.*

LEGAL STANDARD

An appellate Court may stay the enforcement of an order pending the outcome of an appeal to allow the Court to take the necessary time it needs to review the underlying order and to act responsibly. *Nken v. Holder*, 556 U.S. 418, 421, 427 (2009). A stay is an exercise of judicial discretion, dependent upon the circumstances of the particular case. *Id.* at 432-33 (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672(1926)). When deciding whether to grant a stay, the 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, 556 U.S. at 434 (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 because “stays are typically less coercive and less disruptive than are injunctions.” *Leiva-Perez*, 640 F.3d at 966. “[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, 1313 (1986) (Scalia, J., in chambers)).

ARGUMENT

Defendants are entitled to a stay of the district court’s Order for several reasons. First, Defendants meet the first *Nken* prong because they have a substantial case on appeal and the appeal raises serious legal questions, some of which are issues of first impression for the Ninth Circuit Court of Appeals. Second,

Defendants will be irreparably harmed absent a stay because, if Defendants’ appeal is not reviewed, heard, and decided before Ms. Edmo undergoes surgery, the appeal will be mooted and Defendants will be deprived of any appellate review. Third, Ms. Edmo will not be substantially injured if the Order is stayed, due to her commitment not to re-attempt self-castration, the lack of any “immediate” need for GCS, and in light of the significant amount of time that has passed since Ms. Edmo initially requested an injunction for GCS in 2017. Furthermore, Defendants will continue to provide Ms. Edmo with access to mental health services in order to help prevent any future attempts of self-harm, and can further ensure her safety by way of close observation, if necessary. Finally, a stay will serve the public interest because public policy favors due process and resolving cases on the merits with complete appellate review.

A. Defendants are Likely to Succeed on Appeal Because Defendants Have a Substantial Case for Relief on the Merits and the Appeal Raises Serious Legal Questions.

In order to meet the first criteria for establishing the need for a stay, the moving party must show that there is a “substantial case for relief on the merits.” *Leiva-Perez*, 640 F.3d at 968. The standard does not require the petitioners to show that “it is more likely than not that they will win on the merits.” *Id.* Indeed, a more stringent requirement would put every case in which a stay is requested on an expedited schedule, requiring “the parties to brief the merits of the case in depth

for stay purposes, or would have the court attempting to predict with accuracy the resolution of often-thorny legal issues without adequate briefing and argument.” *Id.*, at 967. In addition, as this Court 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.” *Norsworthy*, No. 15-15712, Dkt. 25, p. 1 (quoting *Leiva-Perez*, 640 F.3d at 968))(emphasis added).

1. Defendants have a substantial case for relief on the merits because the district court committed several reversible errors.

Defendants do not intend to reiterate the numerous reasons why the district court erred in granting the permanent injunction,² nor does established case law require Defendants to show they are “more likely than not” to succeed on appeal to receive a stay. *Leiva-Perez*, 640 F.3d at 968. Nevertheless, the district court’s errors are numerous and significant, demonstrating that Defendants have a substantial case for relief on appeal.

For example, the district court erroneously applied the ordinary preliminary injunction standard to the permanent, mandatory, and irreversible relief sought by Ms. Edmo. (ER 31, 41). Under the ordinary preliminary injunction standard, a plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of

² See Defendants’ Joint Opening Brief, Dkt. 13.

equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008). However, this standard applies only to injunctions that maintain the status quo. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009). When seeking a mandatory preliminary injunction (one that changes the status quo), the plaintiff’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). The district court determined that Ms. Edmo was “likely to succeed” on several elements of her claims, contrary to well-established law that a mandatory preliminary injunction, such as the relief sought by Ms. Edmo, may only be issued if the moving party establishes that the law and facts clearly favor their claims. (ER 31, 41).

The court further erred when it determined, contrary to the holdings in *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) and *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004), that Dr. Eliason’s GCS assessment constituted deliberate indifference to Ms. Edmo’s GD simply because her retained experts disagreed with Dr. Eliason’s determination that she did not meet the WPATH criteria for GCS. The court ignored the sound professional medical decisions made by Dr. Eliason, thereby supplanting the medical opinions of Ms. Edmo’s qualified treating providers for those of Ms. Edmo’s retained experts, whose opinions were based only on a limited snapshot of Ms. Edmo’s mental health history.

Furthermore, the record does not support a finding, nor did the district court make a finding, that any particular Defendant was objectively and subjectively indifferent to Ms. Edmo's alleged need for GCS. Eighth Amendment suits against prison officials must satisfy a *subjective* requirement, demonstrating that prison officials "knowingly and unreasonably disregard[ed] an objectively intolerable risk of harm to the plaintiff." *Farmer v. Brennan*, 511 U.S. 825, 837, 846 (1994)). Here, the district court ignored the years of treatment Defendants provided to Ms. Edmo for GD and made generalized findings that all "Defendants" were deliberately indifferent, without identifying the requisite subjective, knowing indifference on the part of any individual Defendant. (ER 1-45).

Moreover, the district court granted the injunction without making the requisite finding that Ms. Edmo would suffer immediate harm absent the issuance of the injunction. "The Supreme Court has repeatedly cautioned that, absent a threat of immediate and irreparable harm, the federal courts should not enjoin a state to conduct its business in a particular way." *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999). Such a finding would be implausible on the record here, in the light of the long delay before Ms. Edmo sought a preliminary injunction seeking GCS, expert testimony that Ms. Edmo could wait for many months to receive a surgical consult, and the speculative nature of Ms. Edmo's threats of future self-harm. Ms. Edmo's expert also testified at the evidentiary

hearing that it is “absurd” to view GCS as an emergent procedure. (ER 697). The court further failed to consider Ms. Edmo’s own testimony that she remains committed to not re-attempting self-castration. (ER 595-596, 614).

The injunction is also not narrowly tailored, as required by the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A). Rather, the injunction broadly instructs Defendants to provide “adequate medical treatment,” rather than being limited to Ms. Edmo’s request for GCS. The injunction also requires Defendants to provide Ms. Edmo with GCS even though Defendants are not qualified surgeons with the ability to actually approve or perform the surgery and despite the potential contraindications or other issues that may arise, prohibiting the surgery from taking place.³

Finally, the district court erroneously converted the evidentiary hearing on Ms. Edmo’s preliminary injunction to a final trial on the merits without giving the parties the required clear and unambiguous notice required under Federal Rule of Civil Procedure 65(a)(2). *See also Isaacson v. Horne*, 716 F.3d 1213, 1220 (9th Cir. 2013). The district court gave no indication that it intended to convert the hearing to a full trial on the merits until the hearing was underway, at which time

³ The WPATH requires two referral letters from mental health professionals before GCS can be performed (ER 2694-2965, 2997). Here all of Ms. Edmo’s treating mental health providers testified that GCS is not appropriate for Ms. Edmo. Her providers further testified that they had concerns for her safety and well-being should she receive the surgery. (ER 183, 193, 739-740, 743, 3135-3143).

the court's statements were ambiguous at best. By doing so, the Court deprived Defendants of due process and a jury trial on the merits.

2. *A stay is also appropriate because Defendants' appeal raises several serious legal questions.*

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. Defendants' appeal raises several serious legal questions. First, the Ninth Circuit has not yet determined when an inmate is constitutionally entitled to GCS under the Eighth Amendment. The district court's Order indicates that not referring Ms. Edmo was medically unacceptable, and therefore, deliberately indifferent because Dr. Eliason did not strictly adhere to the WPATH guidelines. (ER 35-41). The evidence on the record shows that Dr. Eliason used his medical judgment and applied the WPATH guidelines when considering whether GCS was appropriate for Ms. Edmo.

Contrary to the district court's holding in this case, other courts have held that the WPATH guidelines are flexible and making an informed decision does not constitute deliberate indifference. For example, the Tenth Circuit rejected "the conclusory assertion that [an 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) (unpublished). *Druley* "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), *superseded on rehearing by*, 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 district court’s determination that any variation from the WPATH constitutes deliberate indifference is an unwise departure from other courts who have decided this issue and raises a serious legal question regarding how the WPATH guidelines should be considered in an Eighth Amendment claim.

Furthermore, the district court discounted sound legal precedent when it held that a difference of medical opinion between Dr. Eliason and Ms. Edmo’s retained experts constituted deliberate indifference. *See Estelle*, 429 U.S. at 107; *Toguchi*, 391 F.3d at 1059–61. The evidence in the record demonstrates that Dr. Eliason carefully considered Ms. Edmo for GCS, staffing his assessment with other mental health professionals, including a member of the WPATH. It is undisputed that Dr.

Eliason is a qualified, competent psychiatrist, who determined that Ms. Edmo did not meet the WPATH criteria for GCS because her co-existing mental health concerns were not reasonably well-controlled and because she had not yet lived full-time in her identified gender role outside of prison for 12 months. (ER 814-829, 1730, 2932-3051). Ms. Edmo's retained experts disagreed with Dr. Eliason's assessment and the district court held that this disagreement constituted deliberate indifference, despite the absence of any evidence of personal animosity or improper motives on the part of Dr. Eliason or any of the named Defendants toward Ms. Edmo. *See Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996), *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014) (en banc). By holding that such a disagreement constituted deliberate indifference, the district court erred and dangerously expanded the standard for demonstrating a violation of an inmate's Eighth Amendment rights, contrary to well-established case law. See, e.g., *Estelle*, 429 U.S. at 107; *Kosilek*, 774 F.3d at 91–92; *Toguchi*, 391 F.3d at 1059–61.

Moreover, this Court has not yet addressed what standard applies when the issuance of an injunction grants the final, permanent relief requested. This Court 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). One issue this Court must resolve is

what legal standard Ms. Edmo must meet to be entitled to permanent relief before trial. Defendants are unaware of any Ninth Circuit precedent specifically identifying which standard should apply when a preliminary injunction will irreversibly grant a part of the final relief requested. The uncertainty regarding the application of a preliminary legal standard to a permanent irreversible surgical procedure further demonstrates a serious legal question.

Finally, as discussed above, the district court erroneously converted the three-day evidentiary hearing to a final trial on the merits without providing notice to the parties as required under Rule 65(a)(2). At all times, Ms. Edmo has only sought a preliminary injunction and the parties conducted limited discovery and proceeded to the hearing without any expectation that it would be converted to a final trial on the merits. Defendants' appeal presents a serious legal question regarding the use of an expedited procedure to award final, permanent relief to a plaintiff without affording the opposing party the notice and opportunity to present a full defense on the merits.

B. Defendants Will be Irreparably Injured Absent a Stay Because Once Ms. Edmo Undergoes Surgery, Defendants' Appeal will be Mooted and Defendants Will be Deprived of Their Rights to Appeal.

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*, this Court found that the risk the litigation

“would become moot before receiving full appellate consideration” justified issuing a stay of the preliminary injunction. (No. 15-15712, Dkt. 25, p. 1-2). That precise reasoning applies here, because the Order grants Ms. 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.”).

Defendants’ rights to a jury trial were violated when the district court erroneously converted the preliminary injunction hearing to a final trial on the merits without providing notice to the parties. The district court’s denial of the stay creates a novel and dangerous precedent whereby an appellant may be forever denied its important constitutional right to appellate review simply when an interested litigant makes subjective and speculative statements suggesting a possibility of a future intent to inflict self-harm. As recognized by this Court in *Norsworthy*, such deprivation constitutes irreparable injury and thus, a stay must be granted to protect Defendants’ appellate rights and further the very purpose of this Court.

C. Ms. Edmo Will Not be Substantially Injured if the Order is Stayed, Due to her Commitment not to Re-attempt Self-castration and the Amount of Time that has Passed since Ms. Edmo First Requested an Injunction.

In denying Defendants’ *Joint Motion to Stay*, the district court relied on admittedly speculative testimony from Ms. Edmo’s retained expert, Dr. Gorton, that that “there is a substantial chance” that Ms. Edmo would re-attempt self-castration if she did not receive GCS. (Memo. Decision and Order, Dkt. 175 p. 1-2, 3; 659-660). The district court also ignored Ms. Edmo’s sworn testimony that “I need to keep as much tissue down there for surgery to be successful” as well as her testimony that she remains committed to not re-attempting self-castration. (ER 596, 614).

Further, while the district court cited Ms. Edmo’s speculative risk of suicide as another reason for denying the stay, Ms. Edmo’s only prior suicide attempts took place in 2010 and 2011, for reasons unrelated to her GD. (ER 601-606, 871-879, 881-906, 3217; PSI 46-51, 53-57, 67, 71, 76-77 (under seal)). Finally, Ms. Edmo waited nearly two years after Dr. Eliason’s 2016 evaluation before filing the instant preliminary injunction seeking GCS. It has now been ten months since Ms. Edmo filed her second motion for preliminary injunction and nearly three months since the district court granted her motion. Indeed, Ms. Edmo, her experts, and the court conceded that Ms. Edmo did not require GCS immediately. (ER 45, 130, 696-699, 3595). Dr. Gorton testified at the hearing that it is “absurd” to view GCS

as an emergent procedure and he only recommended that Ms. Edmo receive a surgical consult in six months' time. (ER 697, 3595).

D. The Public Interest Supports a Stay to Preserve Due Process and Allow this Court to Responsibly Fulfill its Appellate Role.

In cases involving governmental action, “the public interest is a factor to be strongly considered.” *Lopez v. Heckler*, 713 F.2d 1432, 1435-36 (9th Cir. 1983). Courts defer to a state’s political branches in identifying and protecting the public interest. *United States v. Marine Shale Processors*, 81 F.3d 1329, 1359 (5th Cir. 1996). Here, the district court supplanted its judgment for that of Ms. Edmo’s qualified medical and mental health prison providers. The public has a strong interest in allowing treatment providers the autonomy to manage inmate healthcare without judicial interference. The public further has an interest in ensuring that medical decisions are overridden only after a full trial on the merits or comprehensive appellate review.

The purpose of a stay is to give the reviewing court the time to act responsibly, rather than doling out justice on the fly. *Leiva-Perez*, 640 F.3d at 967 (quoting *Nken*, 556 U.S. at 427). “The ability to grant interim relief is accordingly not simply an historic procedure for preserving rights during the pendency of an appeal, but also a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process.” *Nken*, 556 U.S. at 427 (internal citations and quotations omitted). Accordingly, the public has an interest in resolving cases on

the merits, rather than on an incomplete record as occurred here. The public's interest strongly favors caution when issuing permanent injunctions requiring an irreversible surgery, particularly when qualified providers disagree about its necessity.

CONCLUSION

Defendants request that this Court stay the district court's December 13, 2018 Order (ER 1-45) pending review by this Court.

This 8th day of March, 2019.

s/ Dylan A. Eaton

Dylan A. Eaton, ISB #7686

s/ Brady J. Hall

Brady J. Hall, ISB #7873

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Joint Brief of Defendants-Appellants Corizon Inc., Scott Eliason, Murray Young, Catherine Whinnery, Idaho Department of Corrections, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert by electronic filing on the date stated below to:

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

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DATED: March 8, 2019.

s/ Dylan A. Eaton

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Exhibit D

From: [Dylan A. Eaton](#)
To: [Lori Rifkin](#)
Cc: [Amy Whelan \(awhelan@nclrights.org\)](#); [Lauri A. Ehredt](#); [Brady Hall](#); [Jessica Valdenegro](#); [DAF@fergusondurham.com](#); [chd@fergusondurham.com](#); [Shaleen Shanbhag](#); [Marisa Crecellus](#); [Bryce Jensen](#); [J. Kevin West](#)
Subject: Re: Edmo
Date: Tuesday, March 19, 2019 2:00:40 AM
Attachments: [emailsignaturelogonotext_c4fe8a58-60ec-4e55-8f78-be04efb3833d.png](#)

Lori,

I provide the following in response to your questions:

1. IDOC Defendants have now responded and have indicated they have the same or similar concerns as Corizon Defendants.
2. I understand my client has primarily received information from Dr. Stiller's GCS coordinator, who Dr. Stiller has directed to provide Defendants with the necessary information for the GCS. I'm told the GCS coordinator works directly with the GCS patients and Dr. Stiller, and is involved in the pre-op process, including meetings with the patients during the initial consult to discuss the GCS process, etc.
3. My client has indicated that Dr. Stiller's office has scheduled the initial consult in mid-April and a surgery date has been reserved for late May. This has not changed. However, this does not change the fact that there are prerequisite that the surgeon has for GCS, including the referral letters and other items I address in my email below and in prior correspondence with you. So, as I describe below, there appear to be issues with meeting these prerequisites for the late May surgery.

I understood the court to ask us to meet and confer about the status of Defendants' arrangements for GCS, any issues with complying with the court's GCS order, and discuss if there are any solutions to those issues by the parties. We have done this. The parties have not been able to come to a resolution regarding these issues because, I believe, they are not addressed by the court's order and likely were not contemplated by the court when it issued its order.

Corizon Defendants plan to inform the court of the status of GCS scheduling for Ms. Edmo and issues that have come up in the process.

Dylan

Sent from my iPhone

On Mar 18, 2019, at 9:13 AM, Lori Rifkin <lrifkin@hadsellstormer.com> wrote:

Dylan,

We ask that you provide some additional information in advance of tomorrow's status report deadline:

1. Please clarify whether your response is a response on behalf of IDOC Defendants as well. The agreement on our meet and confer call was that IDOC and Corizon Defendants would each provide us information about any perceived problems/barriers to surgery and their positions on these. Brady did not provide such information on behalf of his clients, so we need to understand whether your email speaks for both set of Defendants.
2. Please clarify whether you or your client has actually spoken to Dr. Stiller (as opposed to his coordinator) about his requirements.
3. You previously represented that a date certain had been set for late Mayu for Ms. Edmo's surgery based on prior consults with Dr. Stiller's office about the necessary timeline and requirements. Based on your email below, it appears that this is no longer the case. Please

confirm which dates have been set and confirmed for Ms. Edmo regarding the surgery process.

We disagree that any of these issues are not encompassed by the Court's order. Rather, they appear to be issues regarding pre-op procedures that Defendants did not timely explore, in direct contradiction to Defendants' past representations to the Court, and in violation of the Court's order and/or reflect Defendants' continued refusal to provide Ms. Edmo with access to qualified medical providers competent to treat gender dysphoria.

As we discussed during our meet and confer last week, consistent with the Court's direction during the last status conference, please provide a clear statement of how Defendants intend to move forward regarding this issues (as opposed to that "Defendants are considering options").

Lori Rifkin

Hadsell Stormer & Renick LLP

626-585-9600

lrifkin@hadsellstormer.com

From: "Dylan A. Eaton" <DEaton@parsonsbehle.com>

Date: Sunday, March 17, 2019 at 4:57 PM

To: Lori Rifkin <lrifkin@hadsellstormer.com>, "Amy Whelan (awhelan@nclrights.org)" <awhelan@nclrights.org>

Cc: "Lauri A. Ehredt" <LEhredt@parsonsbehle.com>, Brady Hall <Brady@melawfirm.net>

Subject: RE: Edmo

Lori and Amy,

I was tied up traveling in Friday and still trying to get some additional information to provide to you regarding Ms. Edmo's GCS process in follow-up to our meet and confer last week. I now provide additional information below.

Dr. Stiller's GCS coordinator confirmed that the 2 mental health referral requirements for surgery are per WPATH guidelines. You are obviously aware of these guidelines, so I won't cite them here. Dr. Stiller's GCS coordinator summarized that one mental health letter needs to be from someone who has had appointments with the patient, but the other could potentially come from a consult.

Additionally, the GCS coordinator confirmed Dr. Stiller needs a treating doctor to refer and recommend Ms. Edmo for surgery. As I understand it, this referral, among other things, needs to address if there are any comorbidities that could delay or preclude GCS and whether Ms. Edmo has a history of being compliant or noncompliant with treatment recommendations.

I am not aware of any Corizon medical or psychiatric providers who can make the above referrals for a variety of reasons, including Ms. Edmo not having well controlled mental health conditions, not having lived as a female in a real-life social setting for 12-months or more, and due to a history of lack of compliance issues with treatment recommendations and orders.

While you now propose an independent assessment by offsite provider(s), this was not specifically addressed in the court's order and there are many unanswered questions. (We do object to Dr. Ettner providing referral letters for GCS because she was a retained expert, not a treating provider or an independent provider.) Some of the unanswered questions include: Is the court requiring defendants to find offsite independent mental health providers and physicians to assess Ms. Edmo and recommend GCS? If these offsite providers don't recommend GCS, is the court requiring defendants to continue to look for other offsite providers until they find someone who will recommend GCS? How are the independent providers selected and what qualifications does the court want for those providers? What

information and other logistics is the court requiring in this regard.

Additionally, I learned, since we talked last week, that Dr. Stiller will determine at the initial consultation if Ms. Edmo needs hair removal, which likely would be performed by electrolysis. Apparently, most patients needed the hair removal for surgery, but not all. If she does need it, Dr. Stiller's GCS coordinator estimates that it generally takes about 5 to 6 months (on the low end) and up to 1 year (on the high end) to complete the electrolysis process.

Finally, I learned, since we talked last week, that Dr. Stiller has 3 options for vaginoplasty surgeries. The first is a "zero depth" option. The second is the "penal inversion." The third is a "Colo Vaginoplasty", which involves 2 separate surgeries and utilization of the colon. As I understand it, the second "colo" surgery would occur several months (about 6 months) after the first "colo" surgery. Dr. Stiller, in part, determines which option is appropriate after his medical examination of the patient. However, the patient's preference also determines which surgical option is selected.

Corizon Defendants intend to inform the court of these complications by [next Tuesday](#), when the court asked for a status report. These are issues that are not addressed by the court's order and likely not even contemplated by the court when it issued its order. I just don't see how the parties can try to find a solution regarding these issues in this context until we get direction from the court. Defendants are considering options, which may include a motion for modification.

Dylan

[<image001.png>](#)

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From: Brady Hall <Brady@melawfirm.net>

Sent: Friday, March 15, 2019 4:39 PM

To: Lori Rifkin (Lrifkin@hadsellstormer.com) <Lrifkin@hadsellstormer.com>; Amy Whelan (awwhelan@nclrights.org) <awwhelan@nclrights.org>

Cc: Dylan A. Eaton <DEaton@parsonsbehle.com>; Krista Zimmerman <krista@melawfirm.net>; Lauri A. Ehredt <LEhredt@parsonsbehle.com>

Subject: Edmo

Counsel:

I did not have sufficient time this week to speak with all of my client representatives regarding the matters discussed during the meet and confer conference. I would like to follow-up early next week to continue our meet and confer obligations and to provide my clients' position and plan for proceeding forward. Thank you and have a great weekend.

Brady J. Hall

[<image002.png>](#)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of March, 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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/s/ - Lori Rifkin
Lori Rifkin