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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 OPPOSITION TO DEFENDANTS' EXPEDITED MOTION TO STAY ORDER REQUIRING DEFENDANTS PROVIDE ALL PRESURGICAL TREATMENTS AND RELATED COROLLARY APPOINTMENTS OR CONSULTATIONS NECESSARY FOR GENDER CONFIRMATION SURGERY [DKT. 225] PENDING APPEAL

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

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INTRODUCTION

On October 10, 2019, the Ninth Circuit returned jurisdiction to this Court to enforce its injunction with respect to Defendants' provision of "all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery" to Ms. Edmo. This Court's order effectuating the Ninth Circuit's partial lifting of the stay is not appealable as either a final order or a modification of an injunction. Defendants' appeal of that order and the instant motion to stay ignore the law of the case established by the Ninth Circuit, as well as the evidentiary record, including the sworn testimony of their own chosen surgeon. This Court should deny Defendants' motion to stay because they cannot show any case for relief or serious legal questions on the merits of their appeal, nor any legally cognizable hardship from following this Court's October 24 Order. In contrast, any further delay of presurgical treatment to Ms. Edmo will subject her to continued irreparable harm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On December 13, 2018, this Court enjoined Defendants to "take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery as promptly as possible and no later than six months from the date of this order." ECF No. 149 at 45, ¶ 1. Defendants appealed the December 13 order, and moved to stay the injunction pending appeal. After this Court denied Defendants' stay motion, a Ninth Circuit motions panel granted a stay pending appeal, but expedited the appellate briefing schedule. ECF No. 19. Ms. Edmo filed an emergency motion for modification of the stay order to exempt the presurgical appointment Defendants had scheduled for Ms. Edmo with their chosen surgeon, Dr. Geoffrey Stiller. Appeal ECF No. 22. Defendants scheduled this appointment for April 12, 2019, four months after this Court's injunctive relief order, and only two months before the surgery deadline set by this Court. The motions panel granted Ms. Edmo's motion and the presurgical consultation took place as scheduled. Appeal ECF No. 30 at 2.

On August 23, 2019, the Ninth Circuit affirmed this Court's injunctive relief order, holding that Defendants violated Ms. Edmo's Eighth Amendment right to adequate and necessary medical

treatment and ordering Defendants to provide her gender confirmation surgery. Defendants filed a petition for rehearing en banc, which is currently pending, and, therefore, no mandate has issued.

On September 26, 2019, Plaintiff moved the Ninth Circuit to partially lift its stay of the December 13, 2018 order to ensure that Ms. Edmo would begin receiving presurgical treatments identified by Dr. Stiller as necessary prerequisites for surgery, including treatment for hair removal in the genital area. ECF No. 101. In support of her motion, Plaintiff submitted a letter from Dr. Stiller estimating that these presurgical treatments would take at least six months to complete. Plaintiff's motion was necessary due to Defendants' litigation strategy throughout this case, which has been delay, abdication of responsibility, and appeal. In the months following the Court's order for surgery and before any stay was in place, Defendants refused to effectuate even the most basic planning steps for surgery unless ordered to do so by this Court. Plaintiff documented these failures in a March 19, 2019 status report to the Court because of 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." ECF No. 180. The Ninth Circuit granted Plaintiff's motion on October 10, 2019, stating: "[T]his court's stay of the district court's December 13, 2018 order is partially lifted so that Plaintiff may receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery." ECF No. 104 at 2.

This Court subsequently held a status conference on October 17, 2019. ECF No. 222. Defendants' counsel stated that their clients were confused about the specific presurgical requirements and type of gender confirmation surgery required by the injunction, and requested that this Court issue an order "clarifying" these items. This Court noted that there had been extensive testimony during the trial in this case concerning the specific type of gender confirmation surgery at issue (vaginoplasty) and that there was no ambiguity about what was required. However, Defendants continued to insist that the Court issue a more specific order. Accordingly, this Court asked Plaintiff to submit Dr. Stiller's presurgical requirements on the record so the Court could issue an order specifying that Defendants provide such treatment to Ms. Edmo. The Court also provided that, following its order, Defendants could file a motion for clarification if they still

believed it necessary. Defendants did not object or otherwise raise any concerns regarding to the Court's indicated course of action to address their request for a clarifying order.

Plaintiff filed the requested submission regarding presurgical requirements on October 22, 2019. ECF No. 224. This submission included a March 1, 2019 letter from Defendants' counsel to Plaintiff's counsel which documented their understanding that this Court's order required them to provide Ms. Edmo with a vaginoplasty, and specifically enumerated Dr. Stiller's six presurgical requirements for performing vaginoplasty: (1) a referral from a treating physician, (2) two mental health care provider referrals, (3) hormone treatment and counseling for at least 1 year, (4) laser treatment or electrolysis for lower region, (5) initial consult, and (6) approval for payment. ECF No. 224-1, Ex. 2. Plaintiff also submitted a declaration from Dr. Stiller in which he confirmed the same six presurgical requirements listed by Defendants' counsel in their letter and identified the three presurgical requirements that remained to be completed: 1) laser treatment or electrolysis for hair removal around the surgical site; 2) the provision of a referral for the surgery from a treating physician; and 3) documentation of approval for payment for the surgery. *Id.*, Ex. 1.

On October 24, 2019, this Court ordered Defendants to provide the presurgical requirements outlined by their chosen surgeon, Dr. Stiller. ECF No. 225. The Ninth Circuit specifically conferred jurisdiction on this Court to enter that Order, which addresses only presurgical issues and not the surgery itself. On October 30, 2019, the Court held another status conference with the parties, in which Defendants did not request further clarification from the Court or object to the procedure the Court had followed in issuing its October 24, 2019 order. The next day, Defendants appealed this Court's October 24 order, and moved this Court to stay the October 24, 2019 Order pending appeal.

LEGAL STANDARD

A stay pending appeal is "an intrusion into the ordinary processes of administration and judicial review," and "is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). "It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular

case." *Id*. at 433 (internal quotations marks and citations omitted); *see also Hilton v. Braunskill*, 481 U.S. 770, 777 (1987). Such judicial discretion is to be "guided by sound legal principles," which the Supreme Court has set forth as four factors: (1) [W]hether 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. *Hilton*, 481 U.S. at 776; *Nken*, 556 U.S. at 434; *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). "The party requesting a stay bears the burden of showing that circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 433-34.

The first two factors are "the most critical." *Nken*, 556 U.S. at 434. The party seeking a stay "must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that a balance of hardships tips sharply in the petitioner's favor." *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (per curiam). "[T]hese standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified." *Id.* (citation omitted). Defendants do not argue that they are likely to succeed on the merits of their appeal. They argue instead that the appeal raises serious legal questions. ECF No. 228-1 at 4. This triggers the second *Leiva-Perez* scenario, in which they must show that serious legal questions exist, irreparable harm is probable, and the balance of hardships tips sharply in their favor. Defendants do not and cannot satisfy any of these requirements, much less all three.

ARGUMENT

I. Defendants Have No Case for Relief on the Merits of their Appeal Because the October 24, 2019 Order is Not Appealable

Far from being able to show a substantial case on the merits, Defendants have *no case* on the merits of their appeal. The October 24, 2019 Order is not a "modified injunction" subject to

interlocutory appeal, as they contend.[1] 28 U.S.C. § 1292(a)(1) creates "a limited exception to the final-judgment rule" for interlocutory appeals of orders "granting, continuing, modifying, refusing or dissolving injunctions," and should be "construed . . . narrowly," given "the general congressional policy against piecemeal review."[2] *Carson v. Am. Brands*, 450 U.S. 79, 84 (1981). To show that an order is subject to interlocutory review as a modified injunction, a party must demonstrate that the order "(1) ha[s] the practical effect of [modifying] an injunction, (2) ha[s] serious, perhaps irreparable consequences, and (3) [is] such that an immediate appeal is the only effective way to challenge it." *Gallatin Wildlife Ass'n v. United States Forest Serv.*, 743 F. App'x. 753, 757 (9th Cir. 2018) (quoting *Calderon v. U.S. Dist. Court*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998)). Defendants have not established that any of these criteria apply to this Court's October 24 Order, much less all three, as required for interlocutory review.

The first factor requires that an order not merely interpret an injunction, *Cunningham v. David Special Commitment Ctr.*, 158 F.3d 1035, 1037 (9th Cir. 1998), or "substantially change[] the terms and force of an injunction." *Gon v. First State Ins. Co.*, 871 F.2d 863, 866 (9th Cir. 1989). The Ninth Circuit has specifically held that district court orders providing clarification do not *See, e.g.*, *Fisher v. Tucson Unified Sch. Dist.*, 588 F. App'x. 608, 610 (9th Cir. 2014) (district court's orders did not modify injunction under 1292(a)(1) because they were "intended to clarify the review provisions . . . not curtail the parties' pre-existing rights"). This Court issued its October

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[1] Defendants also assert in a footnote, without any analysis, that the October 24 Order could be construed as a new, separate injunction. This argument is meritless, given that the items enumerated in the October 24 Order are squarely encompassed within this Court's injunctive relief order that Defendants "take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery as promptly as possible and no later than six months from the date of this order." ECF No. 149 at 45, ¶ 1.The Ninth Circuit already recognized this in partially lifting the stay so that Defendants must provide "all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery" to Ms. Edmo. Appeal ECF No. 104 at 2.

[2] The October 24 Order is also not a final judgment from which Defendants may appeal as a matter of right pursuant to 28 U.S.C. § 1291. *See Dannenberg v. Software Toolworks*, 16 F.3d 1073, 1074 (9th Cir. 1994) ("A final judgment under § 1291 is 'a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978))).

24 Order specifically in response to Defendants' request during the October 17 status conference that the Court "clarify" the precise pre-surgical treatment they must provide Ms. Edmo under the Ninth Circuit's order partially lifting the stay. This clarification did not "substantially change" the terms and force of the original injunction, nor did it "substantially alter the legal relations of the parties." This Court's injunction ordered Defendants to provide Ms. Edmo gender confirmation surgery, including any necessary prerequisite medical treatment for the surgery. However, as the Ninth Circuit recognized, because the pre-surgical requirements are distinct from the surgery itself, partial lifting of the stay to allow for provision of such pre-surgical treatment does not moot ongoing appellate review. Appeal ECF No. 104 at 2

For the same reason, Defendants also cannot satisfy the second requirement for showing that the October 24 order is appealable as a modified injunction—that the order will have "serious, perhaps irreparable consequences." *See Gallatin Wildlife Ass'n v. United States Forest Serv.*, 743 F. App'x. 753, 757 (9th Cir. 2018) (dismissing appeal where "[Appellant] has not demonstrated that "serious" or "irreparable consequences" had or would result); *United States v. Gila Valley Irrigation Dist.*, 345 F. App'x 281, 283 (9th Cir. 2009) (dismissing appeal for lack of jurisdiction under § 1292(a)(1) based solely on party's failure to show "that it would experience serious and irreparable harm from the Order"). Defendants include a single argument regarding irreparable harm—that their appeal will become moot. In granting Plaintiff's motion to partially lift the stay, however, the Ninth Circuit rejected Defendants' mootness argument, ruling that "Defendants have not shown that 'irreparable harm is probable' with respect to the limited nature of Plaintiff's request." Appeal ECF No. No. 104 at 2. This determination is the "law of the case." *See United States v. Alexander*, 106 F.3d 874, 876-77 (9th Cir. 1997) ("Under the 'law of the case' doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." (internal quotations and citations omitted)).

Defendants fail to meet the third requirement for an appealable modified injunction because they cannot demonstrate that immediate appeal is their only effective way to challenge the October 24 Order. This Court specifically informed Defendants they could file a motion for

clarification or reconsideration upon issuance of the Order, but Defendants elected not to file any such motion in this Court.

Because the October 24 Order is not appealable, Defendants have no case on the merits of their appeal and their Motion must be denied on this basis alone.

II. Even if the October 24 Order Is Appealable, Defendants Do Not Have Any Case for Relief Nor Does Their Appeal Present Serious Legal Questions

Even if interlocutory review of this Court's October 24 Order is proper, Defendants' appeal does not present serious legal questions. *Leiva-Perez*, 640 F.3d at 970; *Lair*, 697 F.3d at 1204; *see also Guifu Li v. A Perfect Franchise, Inc.*, No. 5:10-cv-1189, 2011 WL 2293221, at *3 (N.D. Cal. June 8, 2011) ("[R]equesting a review of the district court's decision does not automatically mean [Defendants] have raised a 'serious legal question' on appeal.") (citing *Arthurs v. U.S. INS*, 959 F.2d 142, 143 (9th Cir. 1992)). Defendants argue that (1) this Court lacked jurisdiction under Fed. R. Civ. P. 62(c) to issue the October 24 Order because it "materially altered the status of Defendants' initial appeal," (2) the Order violates Defendants' due process rights, and (3) the Order is contrary to the Prison Litigation Reform Act ("PLRA"). None of these contentions is supported by fact or law, or creates "serious legal questions."

A. This Court Had Jurisdiction To Enter the October 24 Order

The Ninth Circuit's order partially lifting the stay conclusively established this Court's jurisdiction to enter its October 24, 2019 Order under the law of the case doctrine. "The law of the case doctrine requires that when a court decides on a rule, it should ordinarily follow that rule during the pendency of the matter." *Mayweathers v. Terhune*, 136 F. Supp. 2d 1152, 1153-1154 (E.D. Cal. 2001) (holding that district court could summarily enter successive injunctive relief based on the law of the case doctrine); *see United States v. Alexander,* 106 F.3d 874, 876-77 (9th Cir. 1997). The Ninth Circuit "partially lift[ed] the stay of the district court's order requiring Defendants-Appellants to take all actions reasonably necessary to provide Plaintiff with gender confirmation surgery" and directed that Plaintiff must receive "all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery."

Appeal ECF No. 104 at 2. By lifting the stay of the district court's order in part, "the Court of Appeals necessarily concluded that the district court retained jurisdiction to proceed despite the pendency of the interlocutory appeals, [and] that decision is the law of this case." *United States v. Cohen*, No. CV-08-1888-PHX-JAT, 2009 U.S. Dist. LEXIS 126232, at *62 (D. Ariz. Oct. 6, 2009); *see also Thompson v. Thomas*, No. CV-08-00218 SOM-KSC, 2012 U.S. Dist. LEXIS 122823, *12 (D. Haw. Aug. 29, 2012) (concluding that the law of the case doctrine barred party's arguments regarding exhaustion because "[t]he exhaustion issues in this case were explicitly decided in this court's stay order").

Beyond the law of the case doctrine, this Court had inherent power to enter the October 24 Order pursuant to Fed. R. Civ. P. 62(c), which expressly permits a district court to modify an injunction pending appeal "on terms . . . that secure the opposing party's rights." *Natural Res. Def. Council Inc. v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). The Ninth Circuit has repeatedly made clear that Rule 62(c) "authorizes a district court to continue supervising compliance with the injunction," and such action is particularly justified where, as here, a defendant has repeatedly failed to comply with the court's prior directives. *A&M Records v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002) (district court "properly exercised its power under Rule 62(c) to continue supervision of [defendant's] compliance with the injunction" in light of defendant's continued non-compliance and the failure of the injunction as it stood to adequately protect the plaintiffs' rights).

The Ninth Circuit's lifting of the stay effectuated this Court's December 2018 injunction with respect to all presurgical treatment, which, as the Ninth Circuit recognized, is distinct from surgery itself. This Court's October 24 Order was necessary due to Defendants' prior failure to comply with the injunction from December 2018 through March 2019, before the stay was entered, and Defendants' specific requests for clarification from this Court about their presurgical treatment obligations. *See* discussion *supra* at II, section D. The October 24 Order did not change the status quo; rather, it enumerated Defendants' specific obligations resulting from the December 13, 2019 order granting injunctive relief. *See id.*; *cf. Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000)

(rejecting defendant's argument that injunction "properly intrude[d] upon matters that should be left to the discretion of qualified mental health professionals" because "[a] history of noncompliance with prior orders can justify greater court involvement than is ordinarily permitted").

B. The Order Does Not Materially Change Any Issues on Appeal

Defendants argue that this Court's October 24 Order "changes a critical issue on appeal" by (1) "undercutting" Defendants' PLRA argument on appeal because it "seeks to substantively modify the phrase Gender Confirmation Surgery, apparently to mean penile-inversion vaginoplasty," and (2) impacting the Ninth Circuit's determination of whether the injunction was premature, overbroad, and intrusive under the PLRA given "the lack of any evidence that Ms. Edmo had the requisite letters of referral, including from two mental health providers," ECF No. 228-1 at 5. The Ninth Circuit has already rejected both of these arguments, holding that Defendants waived them as grounds for appellate review by failing to raise them in their opening brief, and, instead, raising them for the first time in their Reply Brief. Appeal ECF No. 96-1 at 79 n.23.[3] Because neither the definition of gender confirmation surgery nor the letters of referral are issues on appeal, Defendants fail to show how the October 24 Order even impacts, much less "materially alter[s]," any issue on appeal. *See Mayweathers*, 258 F.3d at 935. Rather, as explained *supra* as part of Plaintiff's discussion of the factors determining whether an order modifies an injunction, the October 24 Order left "unchanged the core questions before the appellate panel." *Sw. Marine*, 242 F.3d at 1167.

C. The Order Does Not Violate Defendants' Due Process Rights To Property

Defendants confusingly argue that the October 24 Order deprived them of their "due

[3] "The State contends for the first time in its reply brief that the injunctive relief ordered was inappropriate because the WPATH Standards of Care require two referrals from qualified mental health professionals who have independently assessed the patient before GCS may be provided. It similarly contends for the first time in its reply in support of its motion to dismiss that the order is overbroad because it does not specify the type of GCS ordered. Because the State did not present these arguments in its opening brief, we do not consider them. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)." *Id.*

process rights" to property without an opportunity to be heard, without ever identifying what specific "property" rights they claim are at issue. ECF No. 228-1 at 6. This Court's Order does not deprive Defendants of any property rights, nor did this Court deny Defendants "due process" in issuing the clarification order Defendants specifically requested during the October 17, 2019 status conference. Following Defendants' request for a clarifying order, this Court suggested that Plaintiff's counsel file a submission containing Dr. Stiller's presurgical requirements, and that, based on this submission, the Court would issue the type of order Defendants sought. Defendants did not object to the Court's proposal, nor did they request an opportunity to respond to Plaintiff's filing, which included the very same pre-surgical requirements Defendants themselves documented in a letter to counsel. ECF No. 224-1, Ex. 2. Moreover, this Court repeatedly asked Defendants' counsel if the Court's proposal sufficiently addressed their concerns, and they consistently responded in the affirmative. By failing to object to the Court's proposal despite being afforded multiple opportunities to do so, Defendants have waived any due process argument.[4]

D. The Order Is Not Overbroad

Defendants' argument that the October 24 Order is contrary to Eighth Amendment precedent and overbroad under the PLRA must also be rejected.

First, Defendants claim that "there is simply no evidence in the record to establish which surgery is medically necessary or required to reverse a constitutional violation" and that neither "the original injunction nor the Modified Injunction addresses which type of GCS is medical necessary for Ms. Edmo and necessary to remedy a constitutional violation."[5] ECF No. 228-1. at 7. It is beyond dispute that Ms. Edmo seeks a vaginoplasty to address Defendants' constitutionally deficient care through this litigation and that this is the surgery ordered by the Court. This Court's

[4] The lone case cited by Defendants, *Buckingham v. Sec'y of the USDA*, 603 F.3d 1073 (9th Cir. 2010), involves a dispute between the government and a private landowner over a grazing permit, and bears no factual or legal similarity to this case.

[5] Because Plaintiff was ordered to submit an expedited response to Defendants' motion in less than three business days, she reserves her right to move for sanctions against Defendants for this blatant misrepresentation, pursuant to Federal Rule of Civil Procedure 11 and this Court's inherent power.

injunction set forth in detail the WPATH criteria for "genital reconstruction surgery in male-to-female patients," referred to "gender confirmation surgery" more than fifty times throughout the decision, and ordered Defendants to provide "gender confirmation surgery as promptly as possible." ECF No. 149. Dr. Eliason, a Corizon psychiatrist, testified at the evidentiary hearing that his surgical assessment of Ms. Edmo was for a "vaginoplasty," which he described as "a surgery to remove the penis and put in a vagina." Appeal ECF No. 12-5 at 817. Dr. Garvey, Defendants' expert, reported that she asked Ms. Edmo "to explain her understanding of the surgical procedures, acknowledging awareness that the penis is most commonly used to create a neovagina." ECF No. 100-2 at 15 of 45. Dr. Garvey then opined on Ms. Edmo's readiness for vaginoplasty surgery. *Id.* at 27-28 of 45. Plaintiff's experts also testified specifically about vaginoplasty. *See, e.g.,* Appeal ECF No. 12-5 at 1033-34 (testifying about vaginoplasties and Ms. Edmo's need for that surgery); Appeal ECF No. 12-7 at 1133 (testifying that the "simple inversion technique" of vaginoplasty "carries less rate of complications" and testifying generally that complication rates of these surgeries are low); Appeal ECF No. 12-5 at 643-44 (Dr. Gorton testifying that "[t]he most typical surgery is the vaginoplasty, which is the construction of a vagina," that the "lion's share of [vaginoplasties] is what's called the penile inversion technique" and describing that technique in detail).

In addition, Defendants have long demonstrated their understanding that the surgery at issue in the injunctive relief is vaginoplasty. Defendants' Joint Proposed Findings of Fact and Conclusions of Law included a five-page section dedicated to "Medical Standards of Guidelines for Treatment and Care of Patients with GD, including Criteria for Sex Reassignment Surgery/Vaginoplasty." Defendants urged the Court to adopt a proposed finding of fact that Ms. Edmo understands the need to preserve "tissue from her scrotum and penis for future use in a vaginoplasty procedure." ECF No. 146 at 13-17, 39-40. Defendants' first joint motion for a stay pending appeal specifically addressed vaginoplasty as "the surgery apparently sought by [Ms.] Edmo," anchored its legal argument to this surgery as "permanent and irreversible," and reiterated Corizon's urging of this Court to "be extremely careful and hesitant to order 'a vaginoplasty.'"

ECF No. 156-1. IDOC Defendants' counsel questioned Ms. Edmo about vaginoplasty surgery during the evidentiary hearing. Appeal ECF No.12-5 at 614. In a letter dated March 1, 2019, Corizon's counsel reported that Defendants had selected Dr. Stiller as their chosen surgeon to perform GCS, and stated that Dr. Stiller "performs an average of about two vaginoplasties per week." Corizon counsel's letter set forth Dr. Stiller's presurgical requirements for vaginoplasties, "including laser hair removal or electrolysis for lower region." ECF No. 224-1, Ex. 2. In short, it has been crystal clear throughout every stage of litigation that Ms. Edmo requires vaginoplasty surgery to remedy the cruel and unusual punishment to which Defendants have subjected her.

Second, Defendants argue that the Order is overbroad because it allows Ms. Edmo to "select the type of vaginoplasty she will receive based on mere personal preference" and requires Defendants to provide her hair removal treatment even though "a colo-vaginoplasty does not require hair removal." ECF No. 228-1 at 8. As an initial matter, Defendants attempt to confuse the record regarding vaginoplasty options and the surgery that will be provided to Ms. Edmo. There are two types of vaginoplasty: a penile inversion vaginoplasty or a colo-vaginoplasty. Defendants' purported third example—"a zero depth procedure where male genitalia are removed, but *a vagina is not created*," ECF No. 228-1 at 7, is, by definition, not a vaginoplasty given that it fails to create a vagina. Notably, Defendants have remained utterly silent as to which surgery they think Ms. Edmo should have, or even whether they have an opinion regarding this issue (including in this very motion). Meanwhile, the overwhelming evidence in the record establishes that the penile inversion technique is far more common and has the lowest rate of complications. *See, e.g.*, Appeal ECF No. 12-5 at 643-44. Defendants' chosen surgeon, Dr. Stiller, submitted a declaration to this Court stating that the penile inversion technique is "[t]he most commonly performed vaginoplasty surgery, and the one performed on the vast majority of patients both in this country and worldwide." ECF No. 224-1, Ex. 1 at 2 ¶ 4. Indeed, the physician declaration Defendants filed with this very motion acknowledges that the colo-vaginoplasty technique, as compared to the penile inversion technique, "is a more complex surgery and can involve two separate surgeries."

ECF No. 228-2 at 4, ¶ 12.[6] While Defendants now profess ignorance as to which surgery will or should be provided to Plaintiff, their prior representation to this Court that they scheduled a single surgery date for Ms. Edmo's vaginoplasty and setting forth the requirement of hair removal—consistent with the penile inversion surgery—belies this claim. *Id.*, Ex. 2.

Defendants' argument that it is not established that hair removal is a required presurgical procedure for Ms. Edmo also ignores the fact that the surgeon *they have selected* to perform Ms. Edmo's surgery filed a sworn declaration outlining the necessary presurgical procedures for Ms. Edmo, including hair removal.[7] ECF No. 224-1, Ex. 1; *id.*, Ex. 2. Defendants also ignore their own counsel's prior representations of the same presurgical requirements for Ms. Edmo. These are party admissions which are not refuted by Defendants' unsupported legal arguments, nor by the new declaration from a Corizon physician who purports to testify as to statements made by Dr. Stiller. In addition to the inadmissible nature of her hearsay submission, this physician has not demonstrated any indicia of reliability of her testimony. *See* Plaintiff's Motion to Strike Portions of Declaration of April Dawson.

III. The Balance of Hardships Is Overwhelmingly in Ms. Edmo's Favor.

Given that Defendants have not established any likelihood of success on the merits or serious legal questions raised by their appeal, the Court need not consider the other three stay factors. However, the Court has further basis to deny the stay because Defendants cannot show that the balance of hardships "tips sharply" in their favor, as they must, given that they seek to satisfy the first stay prong by claiming that the case raises "serious legal issues." *Leiva-Perez*, 640 F.3d at 964 (citing *Abassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). Indeed, this precise issue was already decided by the Ninth Circuit in granting Plaintiff's motion to partially lift the stay and

[6] Concurrent with this motion, Plaintiff moves to strike portions of the Declaration of April Dawson, M.D., ECF No. 228-2, as impermissible hearsay and because Dr. Dawson lacks the requisite knowledge to testify about these matters.

[7] Defendants also argue in passing that the Court cannot "allow Ms. Edmo the opportunity to meet her burden and cure the defects raised on appeal" regarding the two mental health referrals. Contrary to Defendants' assertion and as discussed *supra*, this argument is not before the Ninth Circuit on appeal.

is thus the law of the case:

> Defendants, as the proponents of the stay, have not shown that "irreparable harm is probable" with respect to the limited nature of Plaintiff's request and that they have both "a substantial case on the merits and that the balance of hardships tips sharply" in their favor. *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (per curiam).

Because this legal issue has already been resolved by the Ninth Circuit in Plaintiff's favor, this Court's inquiry must end here.

Even if this Court were to again evaluate the balance of hardships, Defendants cannot show that it tips at all, much less sharply, in their favor. The sole injury Defendants continue to claim without a stay, which this Court and the Ninth Circuit have continued to reject, is possible mootness of their appeal. The Ninth Circuit previously determined in granting Plaintiff's motion to partially lift the stay that provision of presurgical treatment to Ms. Edmo does not moot Defendants' appeal of the injunction ordering gender confirmation surgery. Appeal ECF No. 104 at 2].[8] In contrast to Defendants' assertion that Ms. Edmo "will not suffer any harm" from a stay of the October 24 Order, the Ninth Circuit also already found that Ms. Edmo faces additional irreparable harm from further delays in medical care specifically due to Defendants' ongoing refusal to initiate presurgical treatments—which Defendants' own chosen surgeon has made clear includes hair removal treatment.[9] The Ninth Circuit specifically recognized that it has been more than one year since medical experts determined Ms. Edmo urgently needs surgery, and Defendants' continued refusal to provide necessary treatment for gender dysphoria constitutes cruel and unusual punishment.

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[8] Defendants' contention that "the court of appeals will be unable to grant any form of relief" if Defendants must provide hair removal treatments, a GCS referral letter, and payment authorizations is completely baseless. ECF No. 228-1 at 10. The Ninth Circuit has already determined, in granting Plaintiff's motion to modify the stay, that presurgical treatments are wholly distinct from the vaginoplasty surgery at issue on appeal.

[9] Defendants also confusingly assert that there is no harm from a delay in obtaining payment authorization for Ms. Edmo's surgery because it "should not take a significant amount of time," ECF No. 228-1 at 12, while simultaneously representing that "[o]btaining a payment authorization is somewhat difficult at present," *id.* at 7 n.5

IV. The Public Interest Does Not Support a Stay

As this Court determined in denying Defendants' first motion to stay, "there is a strong public interest in ensuring that our prisons are not deliberately indifferent to the serious medical needs of its inmates." ECF No. 175 at 3; *see Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). Defendants ignore the law entirely, arguing that the public has an interest in denying Ms. Edmo hair removal treatment because "there is no evidence that hair removal is actually a medically necessary prerequisite to a necessary gender confirmation surgery or is necessary to remedy a constitutional violation," and "[it] is not established that Ms. Edmo must undergo weeks or months of hair removal treatment before receiving a vaginoplasty" ECF No. 228-1 at 12. Defendants' statements starkly contradict the established evidence, including their own admissions, in this case.

CONCLUSION

For the reasons stated above, this Court should deny Defendants' motion to stay its October 24 Order.

Dated: November 5, 2019

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of November, 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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