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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

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.

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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:

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