

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' REPLY BRIEF IN SUPPORT OF JOINT  
URGENT MOTION TO STAY INJUNCTION PENDING APPEAL**

Lawrence G. Wasden,  
Attorney General State of Idaho  
Brady J. Hall,  
Special Deputy Attorney General  
Marisa S. Crecelius  
Moore Elia Kraft & Hall, LLP  
P.O. Box 6756  
Boise, ID 83707  
(208) 336-6900  
[brady@melawfirm.net](mailto:brady@melawfirm.net)  
[marisa@melawfirm.net](mailto:marisa@melawfirm.net)  
*Attorneys for Defendants-Appellants  
Idaho Department of Corrections, Henry  
Atencio, Jeff Zmuda, Howard Keith Yordy,  
Richard Craig, and Rona Siegert*

Dylan Eaton  
J. Kevin West  
Parsons Behle & Latimer  
800 West Main Street  
Suite 1300  
Boise, ID 83702  
(208) 562-4900  
[Deaton@parsonsbehle.com](mailto:Deaton@parsonsbehle.com)  
[KWest@parsonsbehle.com](mailto:KWest@parsonsbehle.com)  
*Attorney for Defendants-  
Appellants Corizon, Inc., Scott  
Eliason, Murray Young, and  
Catherine Whinnery*

March 18, 2019

## **TABLE OF CONTENTS**

ARGUMENT .....	1
CONCLUSION .....	7

## TABLE OF AUTHORITIES

### Cases

<i>Agency v. John Doe Corp.</i> 488 U.S. 1306 (1989).....	5
<i>Estelle v. Gamble</i> 429 U.S. 97 (1976).....	3
<i>Graham v. Teledyne-Cont'l Motors, a Div. of Teledyne Indus., Inc.</i> 805 F.2d 1386 (1986) .....	4
<i>Hallett v. Morgan</i> 296 F.3d 732 (9th Cir. 2002) .....	4
<i>Leiva-Perez v. Holder</i> 640 F.3d 962 (9th Cir. 2011) .....	2, 5
<i>Melendres v. Arpaio</i> 695 F.3d 990 (9th Cir. 2012) .....	3
<i>Nken v. Holder</i> 556 U.S. 418 (2009).....	1, 2
<i>Norsworthy v. Beard</i> No. 15-15712, Dkt. 25 (9th Cir. May 21, 2015).....	5
<i>Sain v. Wood</i> 512 F.3d 886 (7th Cir. 2008) .....	4
<i>Toguchi v. Chung</i> 391 F.3d 1051 (9th Cir. 2004) .....	3
<i>United States v. Marine Shale Processors</i> 81 F.3d 1329 (5th Cir. 1996) .....	6

### Rules

9TH CIR. R. 28-1(b) .....	2
FED. R. APP. P. 8.....	1
FED. R. CIV. P. 26(a)(1).....	3

Pursuant to this Court’s Order (Dkt. 16), 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), hereby submit this optional reply in support of the *Defendants-Appellants’ Joint Urgent Motion to Stay Injunction Pending Appeal* (Dkt. 15).

### **ARGUMENT**

Contrary to the arguments set forth in *Plaintiff-Appellant’s Opposition to Defendants-Appellants’ Joint Urgent Motion to Stay Injunction Pending Appeal* (Dkt. 17), IDOC and Corizon have fully satisfied each of the four *Nken* factors<sup>1</sup>, and essential principals of due process, fairness, and justice require staying the District Court’s December 13, 2018 Order (ER 1-45) to afford IDOC and Corizon their rights to appellate review before serious legal issues are rendered irreparably moot.<sup>2</sup>

---

<sup>1</sup> *Nken v. Holder*, 556 U.S. 418, 434 (2009) (“(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.”).

<sup>2</sup> Ms. Edmo’s opposition memorandum quotes lengthy portions of the district court’s order denying a stay. (Dkt. 17 at 2). However, that order has not been appealed. *See* FED. R. APP. P. 8. Thus, any commentary or supposed findings by the district court in that order are irrelevant in determining whether the district court erred in issuing the preliminary injunction and whether this Court should issue a stay.

First, Defendants meet the first *Nken* prong because they have a substantial case on appeal and the appeal raises serious legal questions. The standard from *Leiva-Perez* does not require the petitioners to show that “it is more likely than not that they will win on the merits.” *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (per curiam). Notwithstanding, as previously set forth in the record and briefing, IDOC and Corizon have demonstrated a strong and substantial likelihood that they will prevail on the merits on the very serious issues presented in this appeal.<sup>3</sup> (Dkt. 15 at 16-20; Dkt. 13-1 at 36-75).

In her opposition brief, Ms. Edmo overlooks the fact that the district court ultimately applied the incorrect legal standard in entering the preliminary injunction, made no actual factual findings that any one Defendant was subjectively deliberately indifferent, entered an overly-broad injunction in violation of the Prison Litigation Reform Act, supplanted the Eighth Amendment standards with the flexible treatment guidelines published by the WPATH, and, moreover, failed to follow controlling precedent establishing that a difference in professional medical opinion as to how to best provide treatment does not amount to deliberate indifference. (Dkt. 15 at 9-13)

---

<sup>3</sup> In her opposition memorandum, Ms. Edmo claims Circuit Rule 28-1(b) prohibits Defendants from incorporating by reference the arguments made in their opening brief on appeal. (Dkt. 17 at 2). However, Rule 28-1(b) applies to incorporation by reference in “briefs,” not motions. Moreover, Rule 28-1(b) applies only to incorporation by reference of briefs filed “in a prior appeal,” not to briefs filed in the current appeal. *Id.*

*See also Estelle v. Gamble*, 429 U.S. 97, 107 (1976); *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

Ms. Edmo’s inference in her opposition brief that a delay in receiving medical records from the prison somehow justifies her two-year delay in moving for preliminary injunctive relief and also her experts’ incomplete review of the medical records is not only misleading<sup>4</sup>, but does nothing to change the fact that the multiple medical and mental health providers at the prison who are very familiar with Ms. Edmo’s mental health treatment repeatedly determined that Ms. Edmo did not (and currently does not) meet the criteria for Gender Confirming Surgery (GCS) under the WPATH’s flexible clinical guidelines. (ER 735-743, 779, 814-829, 1730, 2932-3051, 3093-3099, 3118-3134, 3135-3143, 3163-3168, 3476-3480).

Additionally, in her opposition memorandum, Ms. Edmo incorrectly asserts that the standard of review on appeal is “abuse of discretion.” The standard of review is actually higher, because the injunction grants permanent relief. *See Melendres v. Arpaio*, 695 F.3d 990, 996 (9th Cir. 2012) (“treat[ing] the Order as granting only

---

<sup>4</sup> Ms. Edmo incorrectly and unfairly charges that Defendants refused to provide medical records to her counsel. (Dkt.17 at 10). Ms. Edmo had access to her records under IDOC policy and the record is clear that IDOC and Corizon provided Ms. Edmo’s counsel all of her medical records when her counsel finally complied with prison policies meant to protect inmate medical privacy by providing an adequate written release. (ER 3458-3460, ¶ 7). Notably, the Defendants provided Ms. Edmo with a full set of her records well before any discovery request and before being required to provide initial disclosures under Rule 26(a)(1) of the Federal Rules of Civil Procedure.

preliminary injunctive relief” because “nothing in the Order purport[ed] to provide a permanent remedy”); *Graham v. Teledyne-Cont’l Motors, a Div. of Teledyne Indus., Inc.*, 805 F.2d 1386, 1388 (1986). Further, Ms. Edmo claims that whether Defendant Dr. Scott Eliason was deliberately indifferent “is a factual determination, not a legal one.” (Dkt. 17 at 15, 17). Ms. Edmo’s assertion is without citation to authority and ignores Ninth Circuit precedent holding that whether certain conduct violates the Eighth Amendment is a mixed question of law and fact that the court of appeals reviews *de novo*. *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *see also Sain v. Wood*, 512 F.3d 886, 891 (7th Cir. 2008) (“Whether Dr. Wood’s actions based on that knowledge amounted to deliberate indifference is a mixed question of fact and law properly resolved by this court.”). Ms. Edmo appropriately recognizes that this appeal is, in part, about “the District Court’s applications of fact to law” (Dkt. 17 at 20), but nonetheless fails to recognize that this Court on appeal reviews *de novo* the district court’s conclusion that the facts found amount to an Eighth Amendment violation. *Hallett*, 296 F.3d at 744.

Second, it remains undeniable that IDOC and Corizon will be substantially and irreparably harmed absent a stay because, if this appeal is not reviewed, heard, and decided before Ms. Edmo undergoes surgery, the appeal will be forever mooted and Defendants will be deprived of any appellate review of the preliminary injunction. If Ms. Edmo’s receives GCS, her damages claim may not become moot, but her claim for equitable relief would certainly become moot. 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, in a case with involving a similar procedural history. *Norsworthy v. Beard*, No. 15-15712, Dkt. 25 (9th Cir. May 21, 2015). Just as in *Norsworthy*, refusing to grant a stay here will forever moot IDOC and Corizon's right to appellate review of the injunction as well as this Court's ability to fulfill its important role to address the “serious legal questions raised” even if those issues may be more likely than not resolved against the party seeking a stay. *Leiva-Perez*, 640 F.3d at 968; *Norsworthy*, No. 15-15712, Dkt. 25 at 1. Granting the stay will “give the reviewing court the time to ‘act responsibly.’” *Norsworthy*, Dkt. 25 at 1 (citations omitted).

Third, the evidence on the record confirms that, absent pure speculation, Ms. Edmo will not be substantially injured if the Order is stayed for a limited time to complete this appeal, 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. (Dkt. 15 at 25-26) (ER 596, 614). Ms. Edmo has not made any suicide attempts since 2011 (for which those attempts were unrelated to her Gender Dysphoria), nor has Ms. Edmo made any self-castration attempts since 2016. (ER 601-606, 871-879, 881-906, 3217; PSI 46-51, 53-57, 67, 71, 76-77 (under seal)).

Moreover, Ms. Edmo, her experts, and the court apparently concede that Ms. Edmo does not require GCS *immediately*. (ER 45, 696-699, 3595). For example, in June 2018, Dr. Gorton concluded that Ms. Edmo required a referral to a surgeon within six months. (ER 3595). He further testified at the evidentiary hearing that it is “absurd” to view GCS as an emergent procedure. (ER 697). Likewise, Ms. Edmo has never requested that GCS occur immediately, and substantial pre-operative procedures must first be complied with, most notably, that a surgeon receives the requisite letters of reference from Ms. Edmo’s mental health professionals. (ER 2964-2965). Further, the district court did not make a finding that Ms. Edmo’s purported need for GCS was emergent or must happen immediately. To the contrary, the district court recognized that GCS could be delayed for many months. (ER 45).

Finally, the public interest will be served by issuing a stay of the injunction because public policy favors due process and having this case resolved on the merits. Likewise, the public has a strong interest in allowing treatment providers the autonomy to manage inmate healthcare in Idaho without judicial interference, especially when the prison has been providing substantial treatment for Ms. Edmo’s GD over the last six years. (ER 1193-2791). 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). Defendants will continue to provide Ms. Edmo with access to mental health services to prevent any future attempts of self-harm, and can further ensure her health by way of protective

custody, if necessary. Defendants continue to request and encourage Ms. Edmo to participate in the recommended mental health treatment and therapy groups that she has repeatedly refused to attend. (ER 614-621, 1112-1114, 2479-2480, 2497-2499, 2697, 2715, 2833-2839; 3093-3099, 3118-3143, 3163-3168). Vague and highly speculative statements that Ms. Edmo may one day engage in an act of intentional self-harm, while simultaneously ignoring the treatment recommendations of her providers, should not be allowed to override litigants' rights and this Court's responsibility to exercise appellate review.

### **CONCLUSION**

For the foregoing reasons, IDOC and Corizon respectfully request that this Court stay the district court's December 13, 2018 Order (ER 1-45) pending review by this Court.

This 18<sup>th</sup> 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 DEFENDANT-APPELLANTS’  
REPLY BRIEF IN SUPPORT OF JOINT URGENT MOTION TO STAY  
INJUNCTION PENDING APPEAL 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

Lori E. Rifkin  
HADSELL STORMER & RENICK, LLP  
4300 Horton Street, #15  
Emeryville, CA 94608

Dan Stormer  
Shaleen Shanbhag  
HADSELL STORMER & RENICK, LLP  
128 N. Fair Oaks Avenue  
Pasadena, CA 91103

Amy Whelan  
Julie Wilensky  
Alexander Chen  
National Center for Lesbian Rights  
870 Market Street, Suite 370  
San Francisco, CA 94102

Craig H. Durham  
Deborah A. Ferguson  
FERGUSON DURHAM, PLLC  
223 N. 6th Street, Suite 235  
Boise, ID 83702

DATED: March 18, 2019.

*s/ Dylan A. Eaton*

---

J. Kevin West, ISB #3337  
Dylan A. Eaton, ISB #7686  
PARSONS BEHLE & LATIMER  
800 W. Main Street, Suite 1300  
Boise, ID 83702  
Telephone: 208-562-4900  
Facsimile: 208-562-4901  
Email: deaton@parsonsbehle.com  
*Attorneys for Defendants-Appellants  
Corizon Inc., Scott Eliason,  
Murray Young, and Catherine Whinnery*

*s/ Brady J. Hall*

---

Lawrence G. Wasden,  
Attorney General State of Idaho  
Brady J. Hall, ISB #7873,  
Special Deputy Attorney General  
Marisa S. Crecelius, ISB #8011  
Moore Elia Kraft & Hall, LLP  
P.O. Box 6756  
Boise, ID 83707  
Telephone: (208) 336-6900  
Email: brady@melawfirm.net  
Email: marisa@melawfirm.net  
*Attorneys for Defendants-Appellants  
Idaho Department of Corrections, Henry Atencio,  
Jeff Zmuda, Howard Keith Yordy, Richard Craig,  
and Rona Siegert*