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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATEMENT OF ADDENDUM

Except for the following, all applicable statutes and authorities are contained in the brief or addendum of Defendants' Joint Opening Brief and/or Plaintiff's Answering Brief:

Federal Rule of Appellate Procedure 10

Circuit Rules 10-2, 29-1, 30-1.4, and 30-1.5

Circuit Advisory Committee Note to Circuit Rule 29-1.

STANDARD OF REVIEW

This Court is to apply the standard of review for permanent injunctions, because the preliminary injunction issued by the district court granted Ms. Edmo permanent and irreversible relief. This Court suggests that the applicable standard of review depends on the substance of the injunction rather than its form. *See Melendres v. Arpaio*, 695 F.3d 990, 996 (9th Cir. 2012) ("treat[ing] the Order as granting only preliminary injunctive relief" because "nothing in the Order purport[ed] to provide a permanent remedy"). Similarly, this Court recognized that denial of a temporary restraining order can be reviewed as the denial of a permanent injunction when the denial "effectively decide[s] the merits of the case . . . [and] appellant's claims will be rendered moot [absent relief]." *Graham v. Teledyne-Cont'l Motors, a Div. of Teledyne Indus., Inc.*, 805 F.2d 1386, 1388 (9th Cir. 1986).

A decision to grant a permanent injunction is reviewed for an abuse of discretion, while any determination underlying the grant of the injunction is reviewed "by the standard that applies to that determination." *Ting v. AT&T*, 319 F.3d 1126, 1134–35 (9th Cir. 2003). Regarding challenges to medical care in prisons, "the district court's factual findings regarding conditions at the Prison are reviewed for clear error. However, its conclusion that the facts . . . demonstrate an Eighth Amendment violation is a question of law [the Court] review[s] de novo." *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002).

Under *Hallett*, the district court's determination that the evidence clearly established an Eighth Amendment violation is a legal conclusion that the Court should review *de novo*. 296 F.3d at 744; *Gibson v. Collier*, No. 16-51148, 2019 WL 1417271, at *10 (5th Cir. Mar. 29, 2019) ("At bottom, our disagreement with the dissent concerns not the record evidence in *Kosilek* or *Edmo* or any other case, but the governing constitutional standard."). Moreover, as the Supreme Court recently recognized, that determination should be reviewed *de novo* because it establishes a general principle that can be applied in future cases. *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018) ("[W]hen applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision *de novo*.").

Ms. Edmo argues that *Hallett* was abrogated by *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc). Ms. Edmo is mistaken. *Hinkson* did not overrule *Hallett* in any way, nor are the decisions inconsistent. According to *Hinkson*, "[w]hen considering whether a district court erred in applying law to facts, we look to the substance of the issue on review to determine if the question is factual or legal." *Hinkson*, 585 F.3d at 1259. Thus, *Hallett* is entirely consistent with *Hinkson* and stands for the proposition that determining whether a given set of facts constitutes an Eighth Amendment violation should be reviewed *de novo* because it is primarily a legal inquiry. Indeed, the Ninth Circuit has continued to cite the *Hallett* standard with approval after *Hinkson*. *See Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) ("The district court's factual findings regarding conditions at the Maricopa County jails are reviewed for clear error. Whether those facts demonstrate an Eighth or Fourteenth Amendment violation is a question of law that we review de novo." (*citing Hallett*, 296 F.3d at 744)). To the extent any subsequent case decided by a three-judge panel conflicts with *Hallett* and *Graves*, *Hallett* and *Graves* still control as the earlier decisions. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (recognizing that "a three-judge panel may not overrule a prior decision of the court" unless it is "clearly irreconcilable" with a subsequent decision of a higher authority).

In sum, Defendants acknowledge that there were factual determinations, such as if Corizon and IDOC had a *de facto* policy of precluding GCS surgery or if Dr. Eliason applied the WPATH when assessing Plaintiff, that should be reversed for clear error. However, the application of whether the facts establish an Eighth Amendment violation is a legal conclusion that the Court reviews *de novo*. As contended below, neither the facts nor the law clearly establish Ms. Edmo's deliberate indifference claims.

ARGUMENT

A. This Court Should Refuse Ms. Edmo's Invitation to Apply a Significantly Watered-Down Version of Mandatory Injunction Standards.

Ms. Edmo concedes that the district court was required to apply the heightened mandatory injunction standard. (Dkt. 32-1 at 43). Mandatory injunctions are "particularly disfavored" and are not issued in "doubtful cases." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (citations omitted). Consequently, Ms. Edmo "must establish that the law and facts clearly favor her position, not simply that she is likely to succeed." *Id.* (emphasis added). In addition, Ms. Edmo must show more than the possibility of an irreparable injury; she must show that "extreme or very serious damage will result" before her

case can be heard on the merits.[1] *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979) (citation omitted).

Moreover, where the injunction acts "against state officers engaged in the administration of the States' criminal laws" the irreparable injury must be both "great and immediate." *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999) (en banc) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983)). Ms. Edmo asserts that she does not need to show that immediate extreme or very serious harm will occur. (Dkt. 32-1 at 62). That assertion is incorrect, based on Supreme Court and Ninth Circuit precedent. *See, e.g.*, *Lyons*, 461 U.S. at 112 (requiring "great and immediate injury"); *O'Shea v. Littleton*, 414 U.S. 488, 499, (1974) (same); *Gomez v. Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001) (requiring "substantial and immediate irreparable injury"). Consequently, Ms. Edmo must show that she will imminently suffer extreme or very serious damage absent an injunction.

[1] Ms. Edmo repeatedly attempts to water down this very high standard by asserting that she only needs to show a likelihood of extreme or very serious damage, contrary to the plain language of the standard. Ms. Edmo must show that "extreme or very serious damage will result," not that the damage will likely result. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009).

B. Despite Her Arguments to the Contrary, Neither the Facts nor the Law Clearly Favor Ms. Edmo's Deliberate Indifference Claim.

This case involves a textbook example of a mere disagreement between Ms. Edmo and her prison health providers regarding the course of treatment for her Gender Dysphoria ("GD"). Differences in judgment between an inmate and prison medical personnel regarding treatment are insufficient, as a matter of law, to establish deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.1989); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.1996). "[T]o prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the chosen course of treatment was medically unacceptable under the circumstances, and was chosen in conscious disregard of an excessive risk to [the prisoner's] health." *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004) (internal quotation marks omitted).

Ms. Edmo argues that the district court did not consider this case as a disagreement between alternative courses of treatment for Ms. Edmo's GD. (Dkt. 32-1, pp. 51-52). However, the district court's Order specifically cited *Sanchez* and *Toguchi*, *supra*, as the standard for establishing deliberate indifference when there is disagreement in treatment. (ER 035). Furthermore, in reaching its conclusory determination that the unidentified "Defendants" were deliberately indifferent, the district court quoted the holding in *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1192 (N.D. Cal. 2015), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir.

2015), which specifically cited to the "alternate course of treatment" standard set forth in *Toguchi*, *supra*. (ER 041).

In 2016, Defendant Dr. Scott Eliason, Ms. Edmo's Psychiatrist, conducted an individualized examination of Ms. Edmo and determined that GCS was not medically necessary or appropriate for her at that time. (ER 022-025, 814-829, 1730). Dr. Eliason not only determined that Ms. Edmo did not meet the criteria for GCS, but that a surgery would be potentially harmful for Ms. Edmo given her uncontrolled mental health conditions. As an alternative to surgery, Dr. Eliason specifically recommended the following course of treatment: "For the time being it is my opinion that the combination of hormonal treatment and supportive counseling is sufficient for her gender dysphoria." (ER 022-25, ER 1730).

Ms. Edmo disagreed with Dr. Eliason's conclusion and filed a lawsuit and Motion for Preliminary Injunction[2] nearly one year after the individualized evaluation. (ER 3804-3864). Ms. Edmo retained experts, who, after brief meetings with Ms. Edmo that occurred approximately two years after Dr. Eliason's 2016 evaluation, disagreed with Dr. Eliason and opined that Ms. Edmo met the criteria for GCS. (ER 025-029, 3517, 3562). In June 2018, Ms. Edmo filed a second Motion for Preliminary Injunction seeking an order for GCS, asserting that

[2] Ms. Edmo later withdrew her Motion. (ER 3700-3710).

Defendants' decision to provide her with hormones and therapy, rather than surgery, violated her constitutional rights. (ER 3505-3619).

In deciding Ms. Edmo's Motion, the district court inappropriately viewed this case as a mere "battle of the experts." The district court determined that Ms. Edmo's experts' recommended course of treatment was the correct one. (ER 035-039). By doing so, the district court inappropriately viewed its role as choosing which of the two alternate treatments was more appropriate for Ms. Edmo, contrary to well-settled Eighth Amendment law.

The district court then went a step further and held that Defendants' disagreement with Ms. Edmo's experts "suggest[ed] a decided bias against providing" GCS. (ER 037). In other words, the district court incorrectly applied the *Toguchi* standard apparently holding that the very existence of a difference in medical opinion suggested bias. (ER 040). Relying on this "suggested" bias, the district court concluded that Defendants' chosen course of treatment was "medically unacceptable," despite hearing no evidence that no other psychiatrist in Dr. Eliason's shoes would have made the same decision (ER 041).

Furthermore, the district court concluded that Defendants "misapplied" the WPATH, "failed to accurately apply" the WPATH, and "insufficiently trained their staff." (ER 037, 039-040). However, those findings (which Defendants contend are clearly erroneous), at most, would demonstrate negligence, not that

Defendants "denied her the necessary treatment for reasons unrelated to her medical need." (ER 041). Nevertheless, it is clear that negligence does not constitute deliberate indifference and the court's conclusions otherwise are erroneous. (ER 035). *See Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980).

1. The case law regarding deliberate indifference does *not* clearly favor Ms. Edmo.

Ms. Edmo cites a number of cases in support of the district court's conclusion that unidentified "Defendants" were deliberately indifferent. Those cases are factually and legally distinguishable from the facts here. Furthermore, recent U.S. Court of Appeals decisions have held that treatment for GD is an evolving area of medicine regarding which prudent professionals disagree. These cases highlight how far afield the district court's legal conclusions are from well-established Eighth Amendment law.

It is undisputed that Ms. Edmo was denied GCS after Dr. Eliason, a qualified Psychiatrist, conducted an individualized evaluation and recommended an alternate course of treatment to address her GD. The district court found that Dr. Eliason decided not to recommend surgery only after consulting with other mental health professionals (including a member of WPATH), who agreed that Ms. Edmo did not meet criteria for GCS. (ER 022-025). Furthermore, the district court found that Ms. Edmo's treating clinicians, along with IDOC's Chief Psychologist Dr.

Walter Campbell and Defendant's experts, did not believe that surgery was medically necessary for Ms. Edmo, in part, due to her underlying mental health issues. (ER 024).

Despite Ms. Edmo's assertions to the contrary, the district court did not find that Dr. Eliason, IDOC's clinicians, or Dr. Campbell were unqualified to treat Ms. Edmo's GD or evaluate her for GCS.[3] Furthermore, the district court did not find that Dr. Eliason or any other Defendant exhibited malice toward Ms. Edmo. Nor did the district court find that Defendants believed Ms. Edmo's GD was not a serious medical condition in need of treatment.

Moreover, the district court here did not find that Ms. Edmo was denied all treatment for her GD or refused an evaluation for surgery. Nor did it find that Ms. Edmo was denied GCS based on a written policy or statute. Nor did the district court find that a recommendation for surgery by a qualified physician was later overruled or disregarded by corrections officials or policies.

Those circumstances, which are not present here, predominate the cases relied upon by Ms. Edmo (most of which are non-binding district court cases). For

[3] The district court's conclusion that Defendants had "insufficiently trained their staff" is based on a single training provided by Dr. Stephen Levine after Ms. Edmo's evaluation for surgery in 2016: "Defendants insufficiently trained their staff with materials that discourage referrals for surgery and represent the opinions of a single person who rejects the WPATH…" (ER 039). As set forth in Defendants' Joint Opening Brief (Dkt. 13-1, at 59-63), this finding was temporally illogical, ignored undisputed testimony from Dr. Eliason and IDOC clinician Jeremy Clark, and at most constituted a finding of negligence.

example, unlike here, inmates in cases cited by Ms. Edmo were denied even the opportunity to be evaluated by a qualified provider for surgery. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (inmate denied GCS solely on recommendation of a physician's assistant with no experience); *Miller v. Bannister*, No. 3:10-CV-00614-RCJ-RA, 2011 WL 666106, at *1 (D. Nev. Feb. 9, 2011), *report and recommendation adopted in part*, No. 3:I0-CV-00614, 2011 WL 666097 (D. Nev. Feb. 14, 2011) (defendants refused to even evaluate inmate for a liver transplant).

In the majority of the cases cited by Ms. Edmo, an express policy or statute prohibited the treatment sought. *See Fields v. Smith*, 653 F.3d 550, 553 (7th Cir. 2011) (state statute prohibited hormone therapy for inmates); *Norsworthy, supra,*, 87 F. Supp. 3d at 1174-76 (medical records and testimony demonstrated that GCS was denied due to actual written policies and procedures);[4] *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1305, 1310 (N.D. Fla. 2018), *appeal docketed*, No. 18-14096 (11th Cir. Sept. 26, 2018) (access to hormones and ability to feminize denied due to "freeze-frame" policy and "blanket deference" to security policies "over the

[4] The district court equates the facts of this case with those in *Norsworthy*, 87 F. Supp. 3d at 1192. There, when a prison psychologist recommended GCS for Ms. Norsworthy, correctional officials removed that treating psychologist from her care. *Norsworthy*, 87 F. Supp. 3d at 1174-76. In addition, actual written prison policies prohibited vaginoplasty for transgender inmates and corrections officials refused to provide GCS following a "reevaluation." *Id*. None of those facts are present here. *See also* Dkt. 13-1, at 62-63.

exercise of medical judgment"); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *11 (E.D. Mo. Feb. 9, 2018) ("*Hinklin I*") (refusal to provide hormone therapy due to "freeze-frame" policy rather than medical judgment); *Hamby v. Hammond*, No. C14-5065 RBL-KLS, 2014 WL 4162542, at *2, *8 (W.D. Wash. Aug. 21, 2014) (surgery denied due to DOC policy that activities of daily living must be affected to be eligible for surgery); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 241, 247 (D. Mass. 2012) (defendants never provided individualized evaluation for surgery due to prison policy prohibiting GCS); *Konitzer v. Frank*, 711 F. Supp. 2d 874, 906, 908 (E.D. Wis. 2010) (defendants refused to provide real-life experience due to security policy).

In other cases relied upon by Ms. Edmo, corrections officials overruled or ignored a recommendation for care after an individual evaluation by a qualified provider. *See Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014) (prison optometrist's recommendation for cataract surgery overruled due to "one eye only policy"); *McNearney v. Washington Dep't of Corr*., No. C11-5930 RBL/KLS, 2012 WL 3545267, at *14 (W.D. Wash. June 15, 2012), *report and recommendation adopted*, No. 11-CV-5930-RBL/KLS, 2012 WL 3545218 (W.D. Wash. Aug. 16, 2012), *and modified*, No. C11-5930 RBL/KLS, 2013 WL 392489 (W.D. Wash. Jan. 31, 2013) (defendants refused to follow surgeon's recommendations after evaluation); *Hicklin v. Precynthe*, No. 4-16-CV-01357- NCC, Dkt. No. 176, at 8-9

(E.D. Mo. May 22, 2018) ("*Hicklin II*") (necessary hormone therapy denied after psychiatrists' recommendation due to "freeze-frame policy").

These cases demonstrate that the law does not clearly favor Ms. Edmo's claim for deliberate indifference even if this Court accepts the district court's clearly erroneous findings of fact. The majority of the cases Ms. Edmo relies upon concern prison policies and procedures specifically prohibiting the treatment sought.[5] To the contrary, Ms. Edmo was individually evaluated for surgery, pursuant to a written policy expressly providing for GCS when determined medically necessary (ER 029, 1730, 2910-2927). The decision to continue Ms. Edmo on hormones and therapy after a qualified assessment demonstrated that surgery was not medically necessary does not "offend evolving standards of decency in violation of the Eighth Amendment." *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The district court's holding otherwise interferes with the role of correctional medical providers, who must assess each inmate as a whole person, in consultation with treatment providers who are most familiar with the inmate's care.

[5] The district court made a conclusory finding that evidence "suggests that Ms. Edmo was not provided surgery due to a *de facto* policy or practice of refusing this treatment for [GD] to prisoners."(ER 040) (underline emphasis added). However, the district court did not make an actual finding of bias or a *de facto* policy and could not have done so because the evidence presented did not support such a finding. Thus, to the extent that the district court made an actual finding of bias or a *de facto* policy prohibiting GCS, it is clearly erroneous. (Dkt. 13-1, at 59-63).

Further, the district court's legal analysis drastically departs from several recent decisions by U.S. Circuit Courts of Appeal. Ms. Edmo attempts to distinguish those cases by referring to them as "out-of-circuit cases by *pro se* prisoner plaintiffs." (Dkt. 32-1, at 52-53). By doing so, Ms. Edmo discounts the Courts' deliberation and breadth of analysis. After careful consideration, those Courts concluded that a prison, its employees, and providers are not deliberately indifferent when they do not provide GCS to an inmate with GD.

In *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014)(en banc), the First Circuit reversed an injunction to provide GCS. There, after several individual evaluations for surgery (some of which recommended surgery, while others did not), the defendants chose to provide an alternate course of treatment, i.e. hormones, psychotherapy, and feminizing items. *Id*., at 86. Among its many holdings, the First Circuit determined that the defendants' decision not to strictly follow the WPATH "Standard of Care" was not "medically imprudent," in light of their flexible application as clinical guidelines. *Id*., at 87.[6] The Court declined to

[6] Notably, the district court appointed Dr. Levine as an independent expert to assist the court in "determining what constituted the medical standard for treatment for [GD]." *Kosilek*, 774 F.3d 63, 77. Both the district court (in determining defendants were deliberately indifferent) and the First Circuit (in concluding defendants were not) relied upon Dr. Levine's testimony and expertise. *Id*., at 88-89. A review of Dr. Levine's testimony in *Kosilek* demonstrates that he is far from "an outlier" in his field.

"second-guess medical judgments or to require that the DOC adopt the more compassionate of two adequate options." *Id*., at 90. Notably, the Court concluded:

> For another, this case presents unique circumstances; we are simply unconvinced that our decision on the record before us today will foreclose all litigants from successfully seeking SRS in the future. Certain facts in this particular record—including the medical providers' non-uniform opinions regarding the necessity of SRS, Kosilek's criminal history, and the feasibility of postoperative housing—were important factors impacting the decision.

Id., at 91.

Kosilek acknowledged important factors impacting a decision to provide GCS, other than those strictly set forth in the WPATH. It further recognized a reasonable dispute among professionals regarding the appropriateness of treatment for an inmate's GD, not only among the individual treatment providers who assessed the plaintiff, but also among the experts and professionals in "the medical community." *Id*., at 87-89, fn. 11. For example, the Court noted:

> We find no support for the district court's conclusion that no reasonable medical expert could opine that Kosilek lacked real-life experience, particularly in light of the contrary testimony from medical experts concerning the range of social, environmental, and professional considerations that are necessary to constitute a real-life experience under the Standards of Care. The district court thus erred by substituting its own beliefs for those of multiple medical experts.

Id., at 88–89.

The Fifth Circuit's recent decision in *Gibson v. Collier*, No. 16-51148, 2019 WL 1417271 and * 2 (5th Cir. Mar. 29, 2019), thoroughly discussed *Kosilek* and

recognized the "significant disagreement within the medical community" regarding GCS. The *Gibson* Court held that a prison's decision not to provide GCS cannot give rise to an Eighth Amendment claim, due to the "robust and substantial good faith disagreement dividing respected members of the expert medical community." *Id*., at *5. The *Gibson* Court further highlighted the language in the WPATH guidelines themselves, which state that this field of medicine is "evolving." *Id*., at *8. Citing Constitutional principles, the Court held:

> We see no basis in Eighth Amendment precedent—and certainly none in the text or original understanding of the Constitution—that would allow us to hold a state official deliberately (and unconstitutionally) indifferent, for doing nothing more than refusing to provide medical treatment whose necessity and efficacy is hotly disputed within the medical community.

Id., at *10.[7]

Like in *Kosilek* and *Gibson*, the district court in this case heard similar testimony regarding the disagreement in the medical community, the continued evolution of the WPATH guidelines, the difficulty in applying the WPATH guidelines in prison, and the need for further research in the field. (ER 006, 186, 224-227, 265, 334, 544-581, 637-639, 682-685, 1020-1021, 1096-1097, 1125-1126, 2939, 3053-3054, 3421-3422, 3433). The district court even recognized that

[7]The Tenth Circuit has also addressed this "highly controversial issue" in several decisions involving treatment of GD. (Dkt. 13-1, at 46-47). *Druley v. Patton,* 601 F. App'x 632, 635 (10th Cir. 2015) (unpublished); *Lamb v. Norwood,* 899 F.3d 1159, 1163 (10th Cir. 2018); *Supre v. Ricketts*, 792 F.2d 958, 963 (10th Cir.1986).

GCS is a "far less routine, and even *controversial*, procedure[]." (ER 1) (emphasis added). Incorrectly, the district court characterized those who acknowledge the complexities providing GCS to inmates as having a "bias" or a "*de facto* policy" prohibiting surgery. As discussed above, such a characterization turns the standard for establishing deliberate indifference into a "battle of the experts" and a credibility contest that no correctional health care provider may be able to win.

Finally, and most significantly, the Fifth Circuit specifically reviewed Ms. Edmo's injunction and determined it should be reversed, holding as follows:

> Finally, the dissent does not dispute that no circuit has disagreed with *Kosilek*. So the dissent relies primarily on a recent ruling by a federal district court ordering the state of Idaho to provide sex reassignment surgery to an inmate. *See Edmo v. Idaho Dep't of Corr.*, 2018 WL 6571203, *19 (D. Idaho Dec. 13, 2018) (appeal pending).
>
> But *Edmo* did not even mention *Kosilek*. To the contrary, it held that the Eighth Amendment requires "even controversial" procedures. *Id*. at *1. Our circuit precedent, by contrast, rejects Eighth Amendment claims in cases involving medical disagreement. *See*, *e.g.*, *Norton*, 122 F.3d at 292.
>
> Yet that is precisely what the district court in *Edmo* did. It took sides in an on-going medical debate—much like the district court did in *Kosilek*. And just as the district court in *Kosilek* was subsequently reversed by the First Circuit *en banc*, so too the judgment of the district court in *Edmo* should not survive appeal.
>
> After all, *Edmo* rejected the views of multiple medical experts who disputed the efficacy of sex reassignment surgery for inmates—including Dr. Campbell, the Idaho Department of Correction's chief psychologist (and a WPATH member). 2018 WL 6571203, at *6–7. The dissent points out that the record in *Edmo* includes expert medical testimony disagreeing with two of the doctors that the First Circuit

> credited in *Kosilek*. But that is not news—*Kosilek* itself included the testimony of other medical experts—some who agreed, and some who disagreed, with those doctors.

Gibson, No. 16-51148, 2019 WL 1417271, * 10.

2. The district court did not find that any one Defendant, including Dr. Eliason, acted with the requisite subjective deliberate indifference.

The district court failed to apply the subjective test of the deliberate indifference standard, which requires an individualized analysis of a Defendant's mental state.[8] In responding, Ms. Edmo misconstrues Defendants' argument as suggesting that it is error if an injunction is not rendered against each individual Defendant by name. Defendants emphasize that "[t]o establish an Eighth Amendment violation, a prisoner "must satisfy both the objective and subjective components of a two-part test." *Toguchi*, 391 F.3d at 1057, *citing Hallett*, 296 F.3d at 744. The second, subjective test requires analysis and findings regarding whether the prison official "acted with deliberate indifference." *Id*. This "subjective approach" focuses only "on what a defendant's mental attitude actually was." *Farmer v. Brennan*, 511 U.S. 825, 839 (1994). "Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights." *Hutchinson v. United States*, 838 F.2d 390,

[8] Ms. Edmo ignores this argument and therefore it should be deemed waived and admitted.

394 (9th Cir. 1988). (citation omitted). Hence, a district court can only analyze actual "mental attitude," if it renders findings about each Defendant's frame of mind at the time in question.

Conspicuously absent from the district court's Order is the application of the subjective test to any individual Defendant, let alone any agent or employee of the IDOC or Corizon. Moreover, the district court made no findings whatsoever regarding Defendants Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Murray Young, Richard Craig, Rona Siegert, or Catherine Whinnery. Ms. Edmo did not present any evidence that these individual Defendants participated in the decision not to recommend GCS for Ms. Edmo. Rather, the district court erroneously grouped all Defendants together and vaguely and generally found them to have acted with deliberate indifference without addressing the subjective test, which is central to the Eighth Amendment analysis.

Although the district court never applied the subjective deliberate indifference test, Ms. Edmo singles out Dr. Eliason without identifying any finding that Dr. Eliason acted with the requisite malice, intent to inflict pain, or knowledge that his recommended course of treatment was medically inappropriate. To the contrary, the evidence shows that Dr. Eliason was appropriately exercising his judgment as Ms. Edmo's treating Psychiatrist, which should not be taken lightly given his years of first-hand knowledge with Ms. Edmo's complex mental health

history and treatment. Notably, the district court never found that Dr. Eliason was not qualified to treat Ms. Edmo, including diagnosing her with GD in 2012, referring her for hormone therapy, and assessing her for GCS. Indeed, he was qualified under IDOC's Standard Operating Procedure, WPATH guidelines, and his own education, training, and experience. (ER 017-018, 797-800, 802, 813-816, 973-977, 2912, 2927).

Significantly, Ms. Edmo's experts did not opine about whether Dr. Eliason's assessment met the standard of care. (ER 665, 682, 695-696, 1084-1086). Nor did Ms. Edmo's experts testify that Dr. Eliason's assessment was medically unacceptable, other than to disagree with the result. Rather, Ms. Edmo's experts' opinions were limited to whether GCS was medically necessary for Ms. Edmo from the perspective of their disciplines. Unlike Dr. Eliason, neither of Ms. Edmo's experts had any experience treating incarcerated prisoners, nor are they Psychiatrists. What's more, the only expert who was a Psychiatrist (Defendant's expert Dr. Garvey) opined that Dr. Eliason's evaluation for surgery was reasonable, adequate, and met the standard of care. (ER 215-216; 220-221, 236, 311, 3415-3417; 3436-3438). Yet, Ms. Edmo admits that the district court took it upon itself to render its own judgment as to what constituted appropriate care (Dkt. 32-1, at 49), even though the only expert allowed to opine about Dr. Eliason found

that his treatment and GCS assessment met the applicable standard of care and was therefore not medically unacceptable.

Importantly, the evidence shows that Dr. Eliason was in an appropriate frame of mind when treating Ms. Edmo, i.e. not purposefully providing improper care or acting wantonly or maliciously. Dr. Eliason diagnosed Ms. Edmo with GD, monitored and managed her other mental health conditions for many years, and wrote a letter to help Ms. Edmo change her gender to female on her driver's license. (ER 019, 812-814).[9] He did not outright dismiss her request for a GCS evaluation, but rather prepared for, and provided her with, an assessment that was based on her individual history and needs. This is not evidence of a sinister Psychiatrist with improper motives.

Ms. Edmo claims that the district court found Dr. Eliason's testimony to be inconsistent with his April 2016 GCS evaluation note. That finding is not supported by the record. First, Dr. Eliason's note states, "Medical Necessity for

[9] Ms. Edmo incorrectly argues that Dr. Eliason did not consider the PSI, her mental health history, or other important information when assessing her for GCS. However, Dr. Eliason testified that he had access to a wide variety of information when he assessed Plaintiff for GCS. (ER 820). Indeed, the clinician's notes and the lengthy GID assessment by Dr. Claudia Lake (which discussed the PSI) were all in the prison chart and incorporated into his assessment. Dr. Eliason was also a member of the MTC, which discussed Ms. Edmo's PSI during her course of treatment. (ER 820, 1515-1519, 2800-2803). What is undisputed is that Ms. Edmo's retained experts never reviewed Ms. Edmo's PSI or pre-incarceration medical records before rending their opinions. (ER 672-682, 1089-1092, 1095-1096).

Sexual Reassignment Surgery is not very well defined and is constantly shifting …" (ER 1730). At least two other Court of Appeal Circuit Courts have now affirmed that Dr. Eliason was correct in this regard. *See Gibson,* 2019 WL 1417271, at *10 (*citing to Kosilek*, 774 F.3d 63). Therefore, without clearly defined criteria for medical necessity for GCS, Dr. Eliason exercised his professional judgment and consulted resources, including the WPATH guidelines. (ER 823-825). The WPATH guidelines encourage "flexibility" and the exercise of medical judgment. (ER 006, 2939). Dr. Eliason's assessment note explicitly states that he staffed Ms. Edmo's case with a variety of professionals, including WPATH member Jeremy Clark. (ER 023, 814-829, 1730).

Ms. Edmo claims that Dr. Eliason's note did not include an assessment of the fourth and sixth WPATH criteria and, therefore, his testimony that he considered those factors is inconsistent. Again, this is not supported by the text of Dr. Eliason's note.[10] Dr. Eliason's note described her co-existing mental health conditions and concluded, in part, that she needed further "supportive counseling," in which Ms. Edmo has repeatedly refused to participate. (ER 1730). Therefore, contrary to Ms. Edmo's assertion, the note consistently reflects Dr. Eliason's position that her mental health conditions were not well controlled and that she

[10] If there is an inconsistency, such does not establish that Plaintiff was acting with deliberate indifference, such as purposefully trying to inflict harm on Plaintiff. At most, it may establish poor record-keeping.

needed further counseling. (ER 827-828).Additionally, Dr. Eliason's note states that Ms. Edmo was eligible for parole, which is consistent with his testimony that he thought it was best for her to first experience a real social network living as a female outside of prison, especially since she was parole eligible. *Id*.

3. The district court clearly erred in finding that the Defendants were biased or acting pursuant to a de facto policy.

Under the *Monell* doctrine, a plaintiff "must show that (1) she was deprived of a constitutional right; (2) the [municipality] had a policy; (3) the policy amounted to a deliberate indifference to her constitutional right; and (4) the policy was the moving force behind the constitutional violation." *Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110–11 (9th Cir. 2001); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690-91(1978). Ms. Edmo disputes the application of this doctrine to the Corizon Defendants.

In addition to suits against municipalities, the *Monell* doctrine "applies to suits against private entities under § 1983" because there is "no basis in the reasoning underlying *Monell* to distinguish between municipalities and private entities acting under color of state law." *Id.* at 1138-39. *Tsao* applied this principle to a casino whose private security guards were acting under the authority of a local police agency, but nothing in *Tsao* limited the application of the *Monell* doctrine to private entities who are operating under the authority of municipalities rather than

directly under state law. Indeed, at least one unpublished decision of this Court recognizes that, under *Tsao*, the *Monell* doctrine applies to private prisons. *Jimenez v. Corr. Corp. of Am.*, 646 F. App'x 522, 523 (9th Cir. 2016). Thus, the *Monell* doctrine applies to Corizon.

"Absent a formal . . . policy, [Ms. Edmo] must show a longstanding practice or custom which constitutes the standard operating procedure of [Corizon]." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (citation and quotation marks omitted). The district court found that the record merely "suggests" Corizon (and IDOC) had a "de facto policy or practice of refusing [GCS] for gender dysphoria prisoners." (ER 40). Because there is no evidence in the record to support that finding, it is clearly erroneous. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (citation omitted).

The only conclusion supported by the record is that Corizon and IDOC do not have a written or unwritten (de facto) policy or blanket prohibition denying GCS. To the contrary, IDOC's standard operating procedure expressly requires that GCS be provided if it is found to be medically necessary by a qualified evaluator. (ER 017-018, 2910-2927). Moreover, Dr. Eliason testified that Corizon's policy did not prohibit GCS and that Corizon would provide GCS to a prisoner if it was medically appropriate. (ER 147-149, 744-745, 778-779, 3141). Likewise, Mr. Clark, an IDOC clinical supervisor and WPATH member, testified

that it would be appropriate for an inmate to receive GCS in prison, but that Ms. Edmo did not yet meet the criteria. (ER 778-779).

Ms. Edmo recognizes this lack of evidence, but attempts to improperly shift the burden of proof by asserting that Defendants "did not offer any evidence in the proceeding below regarding their treatment of other patients with gender dysphoria that contradicts the District Court's findings of a *de facto* ban on surgery." (Dkt. 32-1, at 59 n.9). The burden was not on Defendants to disprove the existence of a purported policy or practice; the burden was on Ms. Edmo. Regardless, because there is no evidence in the record to support a finding of a long-standing policy or custom of denying GCS when it is medically necessary, the district court clearly erred. *Stormans, Inc.*, 586 F.3d at 1119.

4. Speculation that Ms. Edmo may someday intentionally inflict self-harm is not sufficient to demonstrate that "immediate" and "extreme or very serious damage will result."

The district court did not make a finding that Ms. Edmo would suffer immediate, extreme, or very serious damage absent an injunction. Such a finding of immediate harm is a prerequisite to granting a mandatory injunction. *See Hodgers-Durgin*, 199 F.3d at 1041. As previously cited, a Plaintiff seeking a mandatory injunction "must establish that the law and facts clearly favor her position, not simply that she is likely to succeed." *Garcia*, 786 F.3d at 740 (emphasis added). Further, a plaintiff seeking a mandatory injunction must show

that "extreme or very serious damage will result." *Marlyn Nutraceuticals*, 571 F.3d at 879. Additionally, a mandatory injunction must be issued only if it is urgently needed. *See, e.g., Oakland Tribune, Inc. v. Chronicle Pub. Co.,* 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984) ("A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action.") (internal quotations omitted).

Ms. Edmo's argument to the contrary is conclusory and unsupported; it cites no cases and does not distinguish any of Defendants' cases. (Dkt. 32-1, at 64-66.) In response to Defendants' argument that Ms. Edmo's risk of harm was not urgent due to the amount of time that has elapsed since Ms. Edmo was evaluated for GCS, Ms. Edmo ignores much of the relevant procedural history and focuses on events after she filed her second Motion for Preliminary Injunction on June 1, 2018. The relevant timeframe for this analysis does not begin in 2018. Rather, it begins after she was assessed for GCS in April 2016, after which Ms. Edmo did not seek a preliminary injunction requesting the surgery until over a year later on June 8, 2017. (ER 3711-3755, 3813-3822). She later withdrew that Motion, after her counsel appeared, and waited to refile it for nearly one more year. (ER 3505-3508,

3700-3710). Ms. Edmo's long delay before seeking a preliminary injunction clearly demonstrates a lack of urgency and irreparable harm that would necessitate a mandatory injunction for the surgery.

Ms. Edmo contends the district court found that she suffered irreparable and serious harm without surgery and that she "is at serious risk of life-threatening self-harm." (Dkt. 32-1, at 66). Not only is the district court's conclusion based on speculation, it also does not indicate a need to be addressed urgently by way of a mandatory injunction. Ms. Edmo's expert physician opined in June 2018 that she should be referred to a GCS surgeon within six months, not immediately. (ER 696-699, 3595). Further, Dr. Gorton agreed that it would be "absurd" to consider GCS an emergent procedure. (ER 697). Also, the court's Order granting Ms. Edmo's Motion for Preliminary Injunction did not require an immediate surgery, rather it adopted Ms. Edmo's proposed request verbatim that surgery be provided within six months from the date of the Order. (ER 130). Additionally, Ms. Edmo has not attempted self-castration since 2016, in part because she now recognizes that she must preserve her genital tissues for a future GCS procedure. (ER 593-596, 614).

C. Ms. Edmo Concedes that the District Court Did Not Convert the Preliminary Injunction into a Final Trial on the Merits.

Ms. Edmo concedes that the district court did not convert the evidentiary hearing into a "final trial on the merits." (Dkt. 32-1, at 71). Moreover, Ms. Edmo

concedes that she never requested a "final injunction" and that the district court only granted her preliminary, albeit mandatory, injunctive relief. (*Id*. at p. 72 (citing ER 368:23-369:5)). Accordingly, this Court need not address whether the district court provided the requisite "clear and unambiguous notice [of the intended consolidation] either before the hearing commences or at a time which will afford the parties a full opportunity to present their respective cases." *Isaccson v. Horne*, 716 F.3d 1213, 1220 (9th Cir. 2013) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)) (alteration in original) (internal quotation marks omitted). *See also* Fed.R.Civ.P. 65(a)(2). Additionally, this Court need not address Ms. Edmo's waiver argument.[11]

[11] To the extent this Court feels compelled to address Ms. Edmo's waiver argument, Defendants maintain that such argument fails because the district court never provided the prerequisite "clear and unambiguous notice." (Dkt. 13-1, at 71-75). Defendants interpreted the district court's informal and ambiguous comments on the first (ER 985) and last (ER 365) days of the hearing that the court was unsure about which standard applied to Ms. Edmo's motion for preliminary injunction (i.e., the lesser likelihood standard or the heightened standard applied to mandatory and/or permanent injunctions."). Ms. Edmo's oral closing statements indicate that she too understood the Court was only questioning whether the preliminary or mandatory injunction standard applied. (ER 365-368). At no time did the court reference Fed.R.Civ.P. 65(a)(2) or suggest that it was intending to "advance the trial on the merits and consolidate it with the hearing."

D. Given that the District Court Never Made the Requisite PLRA Findings nor Finalized the Preliminary Injunction, this Court Cannot Affirm the District Court's Expired and Erroneous Order.

Ms. Edmo correctly recognizes that the district court never made any actual findings that the Order satisfied the "need-narrowness-intrusiveness criteria" of the PLRA, 18 U.S.C.A. § 3626(a)(1)(A). (Dkt. 32-1, at 67-71, and fn. 10). Nor did the district court make any findings that it gave any weight, let alone "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." § 3626(a)(1). However, Ms. Edmo suggests incorrectly, and without citing to any authority, that the district court's Order does not violate the PLRA even though it is devoid of such findings.

The language of the PLRA is clear that the district court shall expressly make such "findings" and that any order granting relief "in the absence of a finding" is subject to immediate termination. § 3626(a)(1)(A), (a)(2), and (b)(2). Where an order lacks "specific findings that any of the preliminary injunction's requirements satisfied the need-narrowness-intrusiveness criteria in § 3626(a)(2), much less an explanation of how they did," the order violates the PLRA. *U.S. v. Secretary, Florida Dept. of Corrections*, 778 F.3d 1223, 1229 (11th Cir. 2015) (hereinafter "*FDOC*"); *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010) (requiring that the district court make, at the very least, "a determination that it has found the requisite need, narrowness and lack of intrusiveness" criteria)

(citing *Armstrong v. Davis*, 275 F.3d 849, 872 (9th Cir. 2001) (noting that the district court there "specifically made the findings required by the PLRA")); *Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9th Cir. 1998)[12] ("We interpret the statute [18 U.S.C. § 3626(a)(1)] to mean just what it says – before granting prospective relief, the trial court must make the findings mandated by the PLRA.")).

Here, the district court's Order failed to make even a conclusory statement that the relief satisfied the PLRA's need-narrowness-intrusiveness criteria or that the district court had given "substantial weight" to the criminal justice system as required. (ER 1-45). Absent pure speculation, there is no way to determine from the record whether the district court even engaged in the requisite inquiries, let alone ever considered whether ordering defendants to provide an irreversible GCS was narrowly drawn, extended no further than necessary, and was the least intrusive relief.

Because the district court did not make the requisite findings, and has not made its Order "final," the Order automatically expired ninety days after December 13, 2018:

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[12] Ms. Edmo cited dicta from *Oluwa* in her brief (Dkt. 32-1, p. 70) for the proposition that Fed.R.Civ.P. 61 permits this Court to find that the district court's failure to make the requisite PLRA findings was "harmless error." Not only did the Court in *Oluwa* refrain from applying Rule 61, but subsequent case law cited herein clearly establishes that the failure to timely make the PLRA need-narrowness-intrusiveness findings subjects that order to automatic expiration, a result that is anything but "harmless."

> Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

18 U.S.C.A. § 3626(a)(2) (emphasis added). *See also FDOC*, 778 F.3d at 1229 (11th Cir. 2015) (holding that the injunction "expired by operation of law" and "passed onto injunction heaven" where the district court failed to make the specific need-narrowness-intrusiveness findings and did not issue a subsequent order that finalized the initial injunction). In reaching its decision, the Eleventh Circuit relied upon the Ninth Circuit's decision in *Mayweathers v. Newland*, 258 F.3d 930, 936 (9th Cir. 2001) ("Because the district court in the present case did not make either of the preliminary injunctions at issue final within 90 days, both injunctions expired pursuant to [§3636(a)(2)].") (Alterations in the original)).

Both the Fifth and Tenth circuits have come to the same conclusion as the Eleventh and Ninth circuits. *See Yates v. Collier*, 677 Fed.Appx. 915, 918 (5th Cir. 2017) (mooting the appeal and vacating the injunction because the prisoner plaintiffs had "allowed their preliminary injunction to expire" by not asking the district court to extend or finalize it) and *Alloway v. Hodge*, 72 Fed.Appx. 812, 816-817 (10th Cir. 2003) (recognizing that it was Congress's intent that a district court make the need-narrowness-intrusiveness findings "explicit" to demonstrate that the court considered the appropriate factors in a timely manner).

Even if the district court's now-expired Order had made the findings required by the PLRA, such findings would have been in clear error. As defendants previously illustrated, the Order requiring defendants "to provide Plaintiff with adequate medical care, including [GCS]" was vague, overbroad, premature, and unnecessarily intrusive. (Dkt. 13-1, at 68-71). Most notably, the district court ordered defendants to provide Ms. Edmo with an irreversible surgical procedure despite the record being devoid of evidence establishing the necessary predicate: that a qualified surgeon has determined, consistent with the surgeon's ethical and professional obligations, that Ms. Edmo is mentally and physical eligible to undergo the procedure.

Moreover, the record lacks any WPATH-compliant referral letters that a surgeon could rely upon in evaluating whether Ms. Edmo meets the criteria for surgery. (ER 2964-2965) ("Two referrals – from qualified mental health professions who have independently assessed the patient – are needed for genital surgery."). Ms. Edmo's retained experts did not provide such referral letters, and the WPATH is clear that the "[m]ental health professionals who recommend surgery share the ethical and legal responsibility for that decision with the surgeon." *Id*. As set forth on the record, none of the defendants' medical and mental health providers familiar with Ms. Edmo were able to provide referral

letters because of their professional opinions that Ms. Edmo does not meet the criteria for surgery.

Finally, Ms. Edmo has not come forward with any controlling case law or persuasive argument that the district court's Order to provide surgery before a surgical consult complied with the PLRA's need-narrowness-intrusiveness criteria. To the contrary, case law Ms. Edmo cited in her brief (Dkt. 32-1, at 50) suggests that, at the very most, the district court could only have ordered the Defendants to provide Ms. Edmo with a surgical consult, not a surgery. *See, e.g., McNearney*, 2012 WL 3545267, at *16 (ordering an examination by a specialist, not surgery or specific treatment); *Miller v. Bannister*, No. 3:10-cv-00614, 2011 WL 666106, at *5 (D. Nev. Feb. 14, 2011) (ordering the plaintiff be given an evaluation for liver transplant eligibility, not the actual transplant procedure); *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (no ordering prison to provide hormone therapy, but only enjoining a state statute prohibiting state funds to be used for hormone therapy).

DEFENDANTS' RESPONSE TO AMICI BRIEFING

On April 10, 2019, five motions to file amici briefs in support of Plaintiff Adree Edmo's Answering Brief (Dkt. 32-1) were filed on behalf of various legal scholars, former correctional officers, medical groups, civil rights groups, and a university professor. (Dkt. 40, 41, 43, 48, and 49). Those briefs largely repeat arguments and factual statements made by Ms. Edmo in her Answering Brief,

contrary to the Circuit Advisory Committee Note to Circuit Rule 29-1 ("The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. …. the Court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties."). Defendants responded to Ms. Edmo's arguments in the body of this Reply Brief, *supra*, and do not intend to repeat those arguments here.

However, Defendants feel compelled to respond to the amicus brief submitted by Jody L. Herman (Dkt. 19-1), wherein she improperly relies upon "out-of-court statements, contract documents, and statements made in the context of prior proceedings …" for the proposition that the cost of GCS "appears to be an outsized factor" in declining to provide Ms. Edmo with GCS at this time. (Dkt. 19-1, at 3-4). Ms. Herman's brief is an improper attempt to augment the record in this case, by providing this Court with the above-cited out-of-court documents and statements that were admittedly never presented or admitted as evidence before the district court. *See* Fed. R. App. P. 10; Cir. Rule 10-2; Cir. Rule 30-1.4, Cir. Rule 30-1.5; *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) ("Papers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal"); *United*

States v. Walker, 601 F.2d 1051, 1055 (9th Cir. 1979) ("We are here concerned only with the record before the trial judge when his decision was made.").

Not only were the out-of-court statements and documents never presented to or considered by the district court, the record is void of any argument by Ms. Edmo or Defendants that cost was a factor in determining that surgery was not medically necessary for Ms. Edmo. Indeed, the record does not contain any evidence suggesting that cost was considered as part of Dr. Eliason's individual assessment of Ms. Edmo for GCS. Accordingly, Defendants respectfully request that this Court strike Ms. Herman's briefing and disregard it in its entirety.

To the extent that any other response to the repetitive amici briefing is required, Defendants do not believe, nor was it ever argued before the district court, that transgender prisoners should not be afforded medically necessary treatment for their serious medical needs, nor that "lesser rules apply to transgender persons and the treatment of gender dysphoria in incarcerated settings." (Dkt. 48-2, at 33). Several of the amici briefs rely upon the district court's erroneous findings of a "bias" or *de facto* policy and the same distinguishable cases cited by Ms. Edmo to support the mere suggestion that Defendants have a policy prohibiting inmates from receiving medically-necessary surgery. As the evidence demonstrated, the opposite is true. Ms. Edmo met no opposition to diagnosis or medically-necessary treatment when she initially

requested a GD evaluation and was then promptly placed on hormone therapy. Likewise, her request for a GCS evaluation was provided.

The amici briefs call for an "individualized assessment" of every inmate to determine if surgery is medically necessary.[13] (Dkt. 43-2, at 10; Dkt. 48-2, at 34). That is exactly what occurred in this case. Dr. Eliason provided an individualized assessment of Ms. Edmo and concluded that surgery was neither medically necessary nor appropriate for her based on serious concerns that GCS may cause Ms. Edmo more harm than good, especially in light of her co-existing, uncontrolled mental health conditions and lack of any experience living as a woman in the community. (ER 022-025, 814-829, 1730).

While espousing a concern for "individualized assessments," the amici parties nevertheless call for deference to Ms. Edmo's experts' strict interpretation of the WPATH guidelines.[14] (Dkt. 43-2, at 25; 48-2, at 36). By so doing, they

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[13] Interestingly, the legal scholars' brief describes the district court's decision here as a "rigorous, individualized assessment of the need for surgery."(Dkt. 40-1, at 30). As argued above, the district court's role is not to perform its own assessment of Ms. Edmo's need for surgery. Rather, the district court's threshold inquiry was limited to evaluating whether the course of treatment Dr. Eliason subscribed was so medically unacceptable that no other reasonable Psychiatrist could have arrived at the same conclusion and was subjectively chosen in conscious disregard of an excessive risk to Ms. Edmo's health. *See Toguchi*, 391 F.3d at 1058.

[14] The amici briefing submitted by the medical professionals notably refers to the WPATH guidelines as protocols, not as the standard of care for treatment of GD. (Dkt. 43-1, at 10). The brief also notes that many, not all, of "the major medical and mental health groups in the United States recognize the WPATH Standards of

attempt to ignore the very text of the WPATH guidelines and oversimplify the criteria for GCS to a single inquiry – whether an inmate has GD and is vocalizing a future risk of intentional self-harm or mutilation. That oversimplification 1) discounts an inmate's co-existing mental health concerns contributing to their distress, 2) ignores the fourth criteria of the WPATH guidelines, 3) provides no deference to those mental and medical health providers who have treated the patient for years, and 4) disregards the "flexible" application of those guidelines as required by the WPATH. An evaluation for GCS in any setting, particularly in a prison, is far more complicated. The amici parties disregard the independent judgment and concerns of qualified medical providers (or worse, cite to those as evidence of negligence or bias) and call for an inconsistent application of the WPATH, at times arguing for strict adherence to the WPATH "guidelines" while also mandating that an individualized assessment is paramount. This view creates a troubling standard for prison health care providers, who must treat every inmate as a whole, taking into consideration how any proposed procedure will impact the inmate's overall well-being.

Care as representing the consensus of the medical and mental health community regarding the appropriate treatment for transgender and gender dysphoric people." (Dkt. 43-1, at 19). And, given that the amici do not speak universally for every medical or mental health group in the United States, their opinion further emphasizes that GCS remains a contested, unsettled, if not "controversial" procedure in the community (ER 1).

Finally, contrary to argument by the former correctional officials, Defendants do not argue or hold the "insidious view" that a prisoner must have an exemplary disciplinary history in order to be eligible for GCS or medically-necessary treatment. *See* (Dkt. 41-2, at 11). Defendants never argued such a position. Rather, Ms. Edmo's significant disciplinary history (including sexual misconduct, disobedience to direct orders, and violent assaults) as well as her failure to complete sex offender treatment programming are highly relevant to the evaluation of her mental health stability and her ability to comply with post-surgical treatment, both of which are appropriate considerations when assessing whether an individual meets the criteria for surgery. (ER 735-740, 2961-2962, 2997, 3148-3168).[15]

CONCLUSION

The Defendants respectfully request that this Court reverse the district court's issuance of the injunction, vacate the Order, and remand for a full jury trial on the merits.

[15] Given the expedited nature of this appeal and that Defendants only received the amici briefs (consisting of 25,462 words total) a few days ago, Defendants reserve the right to further address the amici briefs at oral argument.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Joint Reply 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 and counsel for all registered CM/ECF will be served by the appellate CM/ECF system.

DATED: April 17, 2019.

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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)

STATUTORY ADDENDUM TO DEFENDANTS-APPELLANTS' JOINT REPLY BRIEF

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April 17, 2019

TABLE OF CONTENTS

Federal Rule of Appellate Procedure 10

(a) Composition of the Record on Appeal. The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(b) The Transcript of Proceedings.

(1) Appellant's Duty to Order. Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

(2) Unsupported Finding or Conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) Partial Transcript. Unless the entire transcript is ordered:

(A) the appellant must--within the 14 days provided in Rule 10(b)(1)--file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) Payment. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it--together with any additions that the district court may consider

necessary to a full presentation of the issues on appeal--must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

Ninth Circuit Court Rule 10-2

Pursuant to FRAP 10(a), the complete record on appeal consists of:

> **(a)** the official transcript of oral proceedings before the district court ("transcript"), if there is one; and
>
> **(b)** the district court clerk's record of original pleadings, exhibits and other papers filed with the district court ("clerk's record").

Ninth Circuit Court Rule 29-1

No reply brief of an amicus curiae will be permitted.

Ninth Circuit Court Rule 30-1.4

30-1.4. Required Contents of the Excerpts of Record.

(a) In all appeals, the excerpts of record shall include:

(i) the notice of appeal;

(ii) the trial court docket sheet;

(iii) the judgment or interlocutory order appealed from;

(iv) any opinion, findings of fact or conclusions of law relating to the judgment or order appealed from;

(v) any other orders or rulings, including minute orders, sought to be reviewed;

(vi) any jury instruction given or refused which presents an issue on appeal;

(vii) except as provided in Circuit Rule 30-1.4(b)(ii), where an issue on appeal is based upon a challenge to the admission or exclusion of evidence, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the evidence, offer of proof, ruling or order, and objections at issue;

(viii) except as provided in Circuit Rule 30-1.4(b)(ii), where an issue on appeal is based upon a challenge to any other ruling, order, finding of fact, or conclusion of law, and that ruling, order, finding or conclusion was delivered orally, that specific portion of the reporter's transcript recording any discussion by court or counsel in which the assignment of error is alleged to rest;

(ix) where an issue on appeal is based upon a challenge to the allowance or rejection of jury instructions, that specific portion of the reporter's transcript recording any discussion by court or counsel involving the instructions at issue, including the ruling or order, and objections;

(x) where an issue on appeal is based on written exhibits (including affidavits), those specific portions of the exhibits necessary to resolve the issue; and

(xi) any other specific portions of any documents in the record that are cited in appellant's briefs and necessary to the resolution of an issue on appeal.

(b) In addition to the items required by Circuit Rule 30-1.4(a), in all criminal appeals and motions for relief under 28 U.S.C. § 2255, the excerpts of record shall also include:

(i) the final indictment; and

(ii) where an issue on appeal concerns matters raised at a suppression hearing, change of plea hearing or sentencing hearing, the relevant portions of reporter's transcript of that hearing.

(c) In addition to the items required by Circuit Rule 30-1.4(a), in civil appeals the excerpts of record shall also include:

(i) the final pretrial order, or, if the final pretrial order does not set out the issues to be tried, the final complaint and answer, petition and response, or other pleadings setting out those issues, and;

(ii) where the appeal is from the grant or denial of a motion, those specific portions of any affidavits, declarations, exhibits or similar attachments submitted in support of or in opposition to the motion that are essential to the resolution of an issue on appeal; and

(iii) where the appeal is from a district court order reviewing an agency's benefits determination, the entire reporter's transcript of proceedings before the administrative law judge if such transcript was filed with the district court.

Ninth Circuit Court Rule 30-1.5

30-1.5. Items Not to Be Included in the Excerpts of Record. The excerpts of record shall not include briefs or other memoranda of law filed in the district court unless necessary to the resolution of an issue on appeal, and shall include only those pages necessary therefor. The presentence report, documents attached to the report, and any sentencing memoranda filed under seal in the district court shall not be included in the excerpts of record. *See* Cir. R. 27-13(d).

Ninth Circuit Court Advisory Committee Note to Rule 29-1

The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. Prospective amici are encouraged to file a joint brief. Movants are reminded that the Court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties.

Amici who wish to join in the arguments or factual statements of a party or other amici are encouraged to file and serve on all parties a short letter so stating in lieu of a brief. If the letter is not required to be filed electronically, the letter shall be provided in an original.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-35017, 19-35019

I am the attorney or self-represented party.

This brief contains **9,274** **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated [ ].
- ☑ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Brady J. Hall **Date** 4/17/2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

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