Case No. 19-35552

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 OPENING BRIEF

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November 15, 2019

CORPORATE DISCLOSURE

Corizon, LLC (formerly Corizon, Inc.) is a wholly owned subsidiary of Corizon Health, Inc. No publicly held corporation owns ten percent or more of Corizon, LLC or Corizon Health, Inc.

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STATEMENT OF JURISDICTION

The U.S. District Court for the District of Idaho had subject matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343. The district court's interlocutory Order granting Plaintiff-Appellee Adree Edmo a renewed preliminary injunction was entered on May 31, 2019. 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) filed a timely joint notice of appeal on June 28, 2019. This Court has jurisdiction under 28 U.S.C. §§ 1292(a)(1) to hear the IDOC Defendants and Corizon Defendants (collectively, the "Defendants") joint appeal.

STATEMENT OF ISSUES

1. Should the renewed preliminary injunctive relief that issued in the District Court's May 31, 2019 Order be vacated on the basis that it has expired under the terms of the Prison Litigation Reform Act (PLRA)?

2. Should the renewed preliminary injunctive relief that issued in the District Court's May 31, 2019 Order be vacated on the basis that it merged with the permanent injunctive relief the District Court purports to have previously granted?

3. Should the renewed preliminary injunctive relief that issued in the District Court's May 31, 2019 Order be vacated on the basis that it is unsupported by factual findings on the record that would satisfy either the mandatory preliminary injunction standard or the PLRA?

STATEMENT OF ADDENDUM

The full text of the pertinent constitutional provisions, statutes, and rules are set forth in the addendum filed concurrently with this joint opening brief. *See 9th Cir. R. 28-2.7.*

STATEMENT OF THE CASE

On May 31, 2019, the Honorable District Judge B. Lynn Winmill entered an "Order" stating "[t]he preliminary mandatory relief set forth in the Court's decision at Docket No. 149 is RENEWED." (ER08) Defendants appeal from the May 31, 2019 Order and request this Court vacate the renewed mandatory preliminary injunction entered therein.

The decision referred to in the May 31, 2019 Order as "Docket No. 149" is the subject of a separate, consolidated appeal currently pending in this Court. *See Edmo v. Corizon, Inc.*, Case Nos. 19-35017 and 19-35019 (hereinafter referred to as "*Edmo I*"). "Docket No. 149" is the district court's December 13, 2018 *Findings of Fact, Conclusion of Law, and Order* in which the district court granted Ms.

Edmo's Motion for Preliminary Injunction (Dkt. No. 62), in part, and ordered as follows:

> Defendants are ordered to provide Plaintiff with adequate medical care, including gender confirmation surgery. Defendants shall take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery as promptly as possible and no later than six months from the date of this order.

(Dkt. No. 149)

In *Edmo I*, Defendants raised on appeal, among other issues, that the December 13, 2018 preliminary injunction automatically expired on March 13, 2019 because it had not been made final as required by the PLRA. (*Edmo I*, DktEntry: 31, DktEntry: 74, pp. 36-38, and DktEntry: 80) The PLRA mandates "[p]reliminary 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. § 3626(a)(2) (Emphasis added). Defendants requested that this Court vacate the preliminary injunction. (*Edmo I*, DktEntry: 31)

On May 16, 2018, *Edmo I* was argued and submitted before M. Margaret McKeown and Ronald M. Gould, Circuit Judges, and Robert S. Lasnik, District Judge sitting by designation (collectively, the Panel). On May 30, 2019, the Panel issued an Order on limited remand to the district court that, among other things,

stated "the district court has the authority under this limited remand to consider whether to reissue the injunction." (*Edmo I,* DktEntry: 90, p. 3) The Panel notified the district court in the Order of the Defendants' contention that the December 13, 2018 preliminary injunction had automatically expired. (*Id*. at p. 1)

On May 31, 2019, the district court entered its Order (ER 5-9) in response to the limited remand Order. The district court clarified that it had not yet renewed the December 13, 2018 preliminary injunction, but had granted a permanent injunction in the December 13, 2018 Order. (ER 7) However, the district court, in a single sentence, renewed the preliminary mandatory relief set forth in the December 13, 2018 Order. (ER 8 ("The preliminary mandatory relief set forth in the Court's decision at Docket No. 149 is RENEWED.”))

The district court made no new factual findings in the May 31, 2019 Order. Nor did the district court set forth how the renewed preliminary injunction satisfied the PLRA's need-narrowness-intrusiveness criteria set forth in 18 U.S.C. § 3626(a)(1). Further, the district court did not identify how it provided "substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief" it granted in accordance with 18 U.S.C. § 3626(a)(1)(A). Instead, the district court simply "reincorporated" unspecified findings that it had purportedly made in the December 13, 2018 Order. (ER 6, fn. 2)

The district court's May 31, 2019 Order was subsequently made part of the record on appeal in *Edmo I.* (DktEntry: 91, Exh. A, pp. 5-9) Neither Defendants nor Ms. Edmo were given an opportunity to provide supplemental briefing on the validity, if any, of the district court's May 31, 2019 Order renewing the preliminary injunction.

On June 28, 2019, Defendants timely submitted the *Notice of Defendants' Joint Preliminary Injunction Appeal*, which appealed the district court's May 31, 2019 Order renewing the preliminary mandatory injunction. (ER 1-4) This appeal was docketed on July 1, 2019, but no briefing schedule was entered at that time. (DktEntry: 1-1)

On August 23, 2019, the Panel in *Edmo I* issued a per curium Opinion in which it addressed Defendants' argument that the December 13, 2018 preliminary injunction had expired rendering the appeal moot. (DktEntry: 96-1, pp. 44-45, fn. 12) To the extent the December 13, 2018 Order entered a preliminary injunction that had automatically expired 90 days thereafter, the Panel held that the appeal was not moot because the district court renewed the preliminary injunction in its May 31, 2019 Order. (*Id*. at p. 45, fn. 12) The Panel then considered the merits of the renewed preliminary injunction, but it is not clear if the Panel actually affirmed the renewed preliminary injunction or not. (DktEntry: 96-1, pp. 45-46, fn. 12 and fn. 13) Ultimately, the Panel affirmed, in part, the district court's entry of an

injunction, but did not specify if it was affirming the preliminary injunction as well as the permanent injunction. (*Id*. at p. 85)

Notwithstanding the above, at no time since the May 31, 2019 Order has the district court issued any order further renewing or otherwise finalizing the renewed preliminary injunction issued on May 31, 2019. Nor has the district court made any additional written findings of fact that a preliminary injunction is, or was, still warranted *or* that the preliminary injunctive relief met the need-narrowness-intrusiveness criteria of the PLRA. The 90-day period to finalize the renewed preliminary injunction expired on August 29, 2019.

On September 11, 2019, this Court ordered Defendants to show cause as to why this appeal should not be dismissed as moot based on the Panel's decision in *Edmo I*. (DktEntry: 9) Defendants complied with the show cause order on September 25, 2019 by filing a brief in response. (DktEntry: 10) Defendants raised in that response that this Court can still grant Defendants relief by vacating the district court's May 31, 2019 renewal of the preliminary injunction that has since automatically expired. (DktEntry: 10, p. 9 and fn. 3 and fn. 4)

On October 18, 2019, this Court entered an Order (DktEntry: 11) discharging the prior September 11, 2019 Order to show cause. This Court also ordered Defendants' opening brief on appeal to be filed by November 15, 2019. (*Id*., p. 1)

SUMMARY OF THE ARGUMENT

This Court should vacate the renewed preliminary injunction issued by the district court on May 31, 2019 for three primary reasons. First, more than 90 days have passed since the renewed preliminary injunction issued, and the PLRA mandates automatic dismissal because the district court failed to take any action finalizing the preliminary injunction. Second, the preliminary injunction is merged with a previously entered and materially indistinguishable permanent injunction. Third, the district court's May 31, 2019 Order contains no specific findings of fact satisfying the PLRA's "need-narrowness-intrusiveness" criteria. Regardless, the renewed preliminary injunction is overbroad and in violation of the PLRA.

ARGUMENT

A. The Renewed Preliminary Injunction Issued On May 31, 2019 Has Expired Under the Plain Language of the Prison Litigation Reform Act.

A preliminary injunction issued under the PLRA expires automatically 90 days after it is entered unless a court has taken certain actions to make the order final. Specifically, the PLRA states that:

> 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. § 3626(a)(2) (Emphasis added). Subsection (a)(1), in turn, requires the court to make specific findings that a preliminary injunction is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary." *Id.* Also, "[t]he court shall give substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief." *Id*. Thus, a district court must make the above-described specific factual findings and make the injunctive relief final within 90 days or the preliminary injunction automatically expires. *U.S. v. Secretary, Florida Dept. of Corrections*, 778 F.3d 1223, 1229 (11th Cir. 2015) (hereinafter "*FDOC")* (citing and quoting *Mayweathers v. Newland*, 258 F.3d 930, 936 (9th Cir. 2001)).

Because the preliminary injunction had automatically expired in FDOC, the Eleventh Circuit vacated the district court's order and mooted the appeal. 778 F.3d 1223, 1228-1229 (citing *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 367 (1960) (recognizing that no actual controversy existed after the challenged injunction had expired)). Likewise, the equitable tradition of vacatur requires the district court's Order in this case to be vacated. *See Board of Trustees of Glazing Health and Welfare Trust v. Chambers*, 903 F.3d 829, 839 and fn. 5 (9th Cir. 2018) (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership.*, 513 U.S. 18, 25 (1994) ("A party who seeks review of an adverse

ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.")

Here, the district court initially granted a preliminary injunction on December 13, 2018. (DktEntry: 149, p. 45). The district court's May 31, 2019 Order confirmed that the initial preliminary injunction was not renewed, and, as such, it expired on March 13, 2019. On May 31, 2019, the district court, on limited remand, "renewed" the preliminary injunction, but that preliminary injunction also expired 90 days after issuance because the district court never finalized or renewed the same and failed to make the appropriate findings required under the PLRA.

B. The Renewed Preliminary Injunction is Merged With the Permanent Injunction Previously Issued by the District Court.

To the extent the renewed preliminary injunction has not automatically expired as Defendants contend above, it should nonetheless be vacated because it has merged with the permanent injunction that the district court purports to have entered on December 13, 2018. The district court erred in renewing the preliminary injunction while having simultaneously clarified that it entered identical permanent injunctive relief. Indeed, it was not only improper, but procedurally flawed and confusing for the district court to claim the same injunction was both permanent and preliminary at the same time. Different standards apply to preliminary and permanent injunctions and such were not addressed or clarified in the district court's subject order. An appeal from the grant of a preliminary injunction

becomes moot when the trial court enters a permanent injunction because the former merges into the latter. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999). Therefore, the preliminary injunction renewed on May 31, 2019 no longer exits. The only remaining "live" injunction is the permanent injunction that the district court contends it entered on December 13, 2018, which is the subject of the appeal in *Edmo I*.

The doctrine of merger has long been recognized and applied by federal courts. *Sec. & Exch. Comm'n v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361 (9th Cir. 1982). When permanent and preliminary injunctions "cover the same issues," the preliminary injunction is merged with the permanent injunction. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993). Federal courts recognize that one of the considerations in entry of a preliminary injunction is the probability of the plaintiff's success on the merits. *Sec. & Exch. Comm'n*, 664 F.2d at 1361. Yet after a final decision, such as an order granting permanent injunctive relief, the district court has *actually* decided the merits. *Id*.[1] To attempt

[1] Defendants do not waive their arguments in *Edmo I*, including, but not limited to, that the district court's December 13, 2018 order was a preliminary injunction only; that there was no final trial on the merits at the October 2018 hearing on Plaintiff's motion for preliminary injunction; that the district court erred in converting the preliminary injunction hearing to a final trial on the merits; and that the court's December 13, 2018 order erroneously issued a permanent injunction. However, to the extent the December 13 order is construed as a permanent injunction, any related preliminary injunction related to the same subject matter is moot as it merged into the permanent injunction.

to review a district court's advance assessment of a plaintiff's hypothetical probability of success after the district court has, in fact, found in favor of plaintiffs on the merits, is a "futile exercise". *Id*.

Thus, when a permanent injunction has been granted, it supersedes a preliminary injunction, which becomes merged in the final decree; hence the appeal from the interlocutory preliminary order is properly dismissed. *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 544 (9th Cir. 1996) (quoting *Continental Training Services, Inc. v. Cavazos*, 893 F.2d 877, 880 (7th Cir.1990)). Once an order of permanent injunction is entered, the preliminary injunction merges with it and appeal may be had only from the order of permanent injunction. *Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles*, 979 F.2d 1338, 1340, fn. 1 (9th Cir. 1992)

In the instant case, the district court's May 31, 2019 Order renewed the preliminary injunctive relief, but also stated that "Plaintiff succeeded on the merits of her Eighth Amendment claim for permanent injunctive relief." (ER 9) "Ms. Edmo is entitled to gender confirmation surgery under the permanent injunction standard." (ER 7) Therefore, any preliminary injunctive relief purporting to grant Ms. Edmo gender confirmation surgery has merged into the permanent injunction. This Court should therefore vacate the preliminary injunction.

C. The Renewed Preliminary Injunction is not Supported by Factual Findings and Violates the PLRA.

Even if the renewed preliminary injunction has not expired and has not merged with the permanent injunction, this Court should still vacate the renewed preliminary injunction. The district court erred by issuing a preliminary injunction on May 31, 2019 without including written findings based on the record that satisfied either the standard for issuance of a mandatory preliminary injunction or the PRLA's "need-narrowness-intrusiveness" criteria. "The district court's factual findings regarding conditions at [a p]rison are reviewed for clear error. However, its conclusion that the facts…demonstrate an Eighth Amendment violation is a question of law that [this Court] review[s] de novo." *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002). Further, "[t]he district court abuses its discretion by fashioning relief that violates the PLRA." *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010).

"A preliminary injunction is . . . 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quoting *Winter v. NRDC*, 555 U.S. 7, 22 (2008)). Under the "ordinary" preliminary injunction standard, a plaintiff must establish: (1) that she is *likely* to succeed on the merits, (2) that she is *likely* to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in her favor, and (4) that an injunction is in the public

interest. *Winter*, 555 U.S. 7, 20 (2008) (emphasis added). However, this standard applies only to *prohibitory* injunctions. *Marlyn Nutraceuticals Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d at 878 (9th Cir. 2009).

Where, as here, a mandatory preliminary injunction is sought, 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)." A plaintiff seeking a mandatory injunction first "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 in the original). "In plain terms, mandatory injunctions should not issue in doubtful cases." *Id.* (quotation marks omitted). "Because it is a threshold inquiry, when a plaintiff has failed to [meet this element], [the court] need not consider the remaining three *Winter* elements." *Id.* (quotation marks, alteration, and citation omitted).

Moreover, instead of showing a *likelihood* of irreparable harm, the plaintiff must show that "extreme or very serious damage will result." *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879. This heightened standard differs from the ordinary standard in two significant ways. First, under the ordinary standard "[t]he analysis focuses on irreparability, 'irrespective of the magnitude of the injury.'" *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). Second, the ordinary standard requires only a "probability" of irreparable harm, but the mandatory

injunction standard requires a more definitive finding that the irreparable harm "will result." *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879.

Additionally, under the PLRA, a court shall not grant or approve a preliminary injunction unless the court finds that such relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626. The Ninth Circuit interprets 18 U.S.C. § 3626 "to mean just what it says-before granting prospective injunctive relief, the trial court must make the findings mandated by the PLRA". *Oluwa v. Gomez*, 133 F.3d 1237, 1239 (9th Cir. 1998).

Importantly, after expiration of a preliminary injunction, the PLRA "imposes a burden on plaintiffs to continue to prove that preliminary relief is warranted." *Mayweathers*, 258 F.3d 936. This means that, once an injunction expires after ninety days, a Court wishing to grant further injunctive relief may not do so unless:

> the court makes **written findings based on the record** that prospective relief **remains necessary** to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation

Id, 258 F.3d 930, 936 (9th Cir. 2001) (emphasis added). Thus, a court must make additional specific factual findings that the above-described standards are met at

the time it issues a renewed preliminary injunction under the PLRA. The imposition of this burden conforms to how the PLRA governs the termination of final prospective relief under 18 U.S.C. § 3626(b). *Id* (citing 18 U.S.C. § 3626(b).

Here, the district court erred in issuing the renewed preliminary injunction on May 31, 2019 because the district court's Order contained no written findings of fact based on the record that satisfied the PLRA's requirements or the heightened standard for issuance of a mandatory preliminary injunction. Instead, the district court's order curtly stated that "[t]he preliminary mandatory relief set forth in the Court's decision at Docket No. 149 is RENEWED." (ER 8) As indicated, once the initial preliminary injunction expired, the PLRA imposed a burden on Ms. Edmo to continue to prove that preliminary relief was warranted. See *Mayweathers*, 258 F.3d at 936. The plain language of the PLRA requires such findings before issuance of a preliminary injunction. Thus, the district court was required to make factual findings that plaintiff had met her burden to demonstrate that a preliminary injunction was still warranted at the time it issued the renewed preliminary injunction on May 31, 2019. The District Court made no such findings.

While the district court attempted to simply "reincorporate" its prior findings, it should be clear that "prior findings" are just that – findings that are not current and could not satisfy the burden to show a "continuing need" for mandatory preliminary injunctive relief. The district court failed to make any

specific findings that, as of May 31, 2019, Plaintiff had met her burden to satisfy the heightened factors by demonstrating a continuing need for mandatory preliminary injunctive relief. It is worth noting that, as a matter of law, it would have been impossible for Ms. Edmo to demonstrate any need for a preliminary injunction on May 31, 2019 because the district court had purportedly already issued a permanent injunction granting Ms. Edmo the final relief she sought. Plaintiff thus had no continuing need for preliminary injunctive relief and was not entitled to a renewed preliminary injunction on May 31, 2019.

Nor did the district court's May 31, 2019 Order comply with the "need-narrowness-intrusiveness" criteria of the PLRA. While the May 13, 2019 Order contains the relevant statutory language in a footnote, it merely recites the statute and then concludes that the injunction satisfies those standards. This conclusory restatement of the statute alone does not satisfy the PLRA's requirement that a court must make factual findings based on the record, as made clear in 18 U.S.C. § 3626 itself, which requires courts to make "written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right." 18 U.S.C. § 3626(b)(3). "What is important, and what the PLRA requires, is *a finding* that the set of reforms being ordered—the 'relief'—corrects the violations of prisoners' rights with the minimal impact possible on

defendants' discretion over their policies and procedures." *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010) (emphasis added).

Moreover, the district court's renewed preliminary injunction purportedly ordering Defendants to "provide Plaintiff with adequate medical care, including gender confirmation surgery" is overbroad in violation of the PLRA. Most notably, the district court did not define "gender confirmation surgery" let alone identify what type of gender confirmation surgery Defendants were being ordered to provide. For example, had the district court intended for Ms. Edmo to receive a vaginoplasty, what type of vaginoplasty did the district court order? Given the absence of any factual findings in the renewed preliminary injunction, there is no way of telling from the district court's overbroad injunction whether the equitable relief ordered was narrowly drawn or the least intrusive means necessary to correct the alleged constitutional violation. Certainly, ordering Defendants to provide any and all types of gender confirmation surgeries to Ms. Edmo violates the need-narrowness-intrusiveness requirements of the PLRA.

The district court erred in renewing the preliminary injunction on May 31, 2019 without making sufficient findings of fact on the record that the renewed injunction was warranted at that time, and also in failing to satisfy the PLRA's "need-narrowness-intrusiveness" criteria. Defendants request that this Court enter

an order vacating the district court's May 31, 2019 Order to the extent that it purports to grant or renew a preliminary injunction.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter an order vacating the preliminary injunction that issued on May 31, 2019 and dismissing this appeal.

STATEMENT OF RELATED CASES

Defendants are aware of two related case pending in this Court. *See Edmo v. Corizon, Inc.*, consolidated appeals 19-35017 and 19-35019. That appeal arises out of the same district court proceeding in the District of Idaho, No. 1:17-cv-00151-BLW, but is an appeal of a separate order of the district court granting injunctive relief. (Dkt. 149). A third appeal from an order of the district court, 19-35917, is pending before this Court, in which Defendants contend the district court erred in ordering Defendants to provide pre-surgical treatment without jurisdiction, without affording Defendants an opportunity to be heard, and without factual findings that the pre-surgical treatment was medically necessary. Defendants also contend that order (Dkt. 225) violates the PLRA's need-narrowness-intrusiveness criteria. Any other issues and arguments in this third appeal will be identified in Defendants-Appellants' Opening Brief, which has not yet been filed.

This 15th day of November, 2019.

s/ Dylan A. Eaton
Dylan A. Eaton, ISB #7686

s/ Brady J. Hall
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Joint Opening 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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UNITED STATES COURT OF APPEALS
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9th Cir. Case Number(s) 19-35552

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November 15, 2019

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18 U.S.C.A. § 3626: Appropriate remedies with respect to prison conditions

a) Requirements for relief.--

(1) Prospective relief.--(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief.--In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. 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.

(3) Prisoner release order.--(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

> **(i)** a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and
>
> **(ii)** the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

> **(i)** crowding is the primary cause of the violation of a Federal right; and
>
> **(ii)** no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the

prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.--

(1) Termination of prospective relief.--(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener--

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate termination of prospective relief.--In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation.--Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief.--Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief

is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.--

(1) Consent decrees.--In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) Private settlement agreements.—(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies.--The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.--

(1) Generally.--The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) Automatic stay.--Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

(3) Postponement of automatic stay.--The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) Order blocking the automatic stay.--Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) Special masters.--

(1) In general.--(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) Appointment.--(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) Interlocutory appeal.--Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

(4) Compensation.--The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

(5) Regular review of appointment.--In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

(6) Limitations on powers and duties.--A special master appointed under this subsection--

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(g) Definitions.--As used in this section--

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or

admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

28 U.S.C.A. § 1331: Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.