No. 19-35552

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, (a/k/a MASON EDMO),
Plaintiff-Appellee,

vs.

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
Case No. 1:17-cv-00151-BLW

PLAINTIFF-APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

This Court has already upheld the injunctive relief at issue in this appeal—the District Court's order that Defendants must provide gender confirmation surgery to Plaintiff Adree Edmo—under both the permanent and preliminary injunction standards. Case No. 19-35017 ("*Edmo I*"), Dkt. 96-1 at 45 n.13.[1] Pursuant to established law, the permanent injunction supersedes the preliminary injunction, resulting in the preliminary injunction merging into the final decree and no longer existing independently. *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 544 (9th Cir. 1996). Accordingly, there is no actual, ongoing controversy with respect to the District Court's May 31, 2019 renewal of its preliminary injunction, and there is no effective relief that could be granted by this Court that will affect the parties' rights. As Defendants themselves admit in their brief, their "appeal from the interlocutory preliminary order is properly dismissed." Dkt. 12 at 11 ("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.") (citing *Estate of Marcos,* 94 F.3d at 544). This Court should therefore dismiss the instant appeal forthwith for lack of jurisdiction.

Because Defendants' appeal is moot, consideration of the merits would

[1] All page numbers for docket cites refer to ECF page numbers.

constitute an advisory opinion outside the exercise of judicial power authorized by Article III of the Constitution. However, even if this Court were to reach the merits of Defendants' appeal, the law of the case set forth in this Court's order in *Edmo I* establishes that the District Court's renewal of its preliminary injunction order satisfied the legal standard for such relief. Further, the renewed preliminary injunction did not expire because it was finalized and merged with the permanent injunction. And—even if, counterfactually, the preliminary injunction had not merged with and been made final by the permanent injunction—Defendants' appeal of the District Court's order renewing the preliminary injunction would have tolled any applicable expiration period for making such injunction "final" under the Prison Litigation Reform Act.

Defendants' appeal—by their own admission—is moot, and their arguments are baseless, self-contradictory, and have already been rejected by this Court. Defendants' continuing demand that this Court "vacate" a preliminary injunction order they themselves argue no longer exists, Dkt. 12 at 15, unreasonably and vexatiously multiplies the proceedings in this case and frustrates the appellate process. Crucially, Defendants' decision to litigate the instant appeal despite the clear lack of justiciability is only the latest example of a continuing course of similar, obdurate conduct. While Plaintiff does not dispute Defendants' right to litigate their underlying appeal, Defendants have now compelled Ms. Edmo to

litigate, and this Court to adjudicate, two subsequent appeals for which this Court lacks jurisdiction. With respect to one of those improper appeals, Defendants invoked this Court's "emergency" briefing process, forcing Ms. Edmo and this Court to respond to that appeal within a matter of days. Case No. 19-35917, Dkt. 11 at 2-3, n.1. Accordingly, Ms. Edmo urges this Court to utilize its inherent and statutory authority to sanction Defendants in order to deter ongoing abuse of the appellate process. Sanctions are particularly important in a case such as this one, where Defendants' conduct threatens Ms. Edmo's ability to vindicate her constitutional right to necessary medical treatment, without which she continues to suffer "profound, persistent distress" and "is at risk of further attempts of self-castration and possibly suicide." Case No. 19-35017, Dkt. 96-1 at 75.

STATEMENT OF JURISDICTION

A. District Court Jurisdiction

Plaintiff agrees with Defendants' statement of the District Court's jurisdiction.

B. Appellate Jurisdiction

Plaintiff agrees that this Court has jurisdiction in principle over an interlocutory appeal of a preliminary injunction order under 28 U.S.C. § 1292(a)(1). However, as set forth in Plaintiff's Argument, *infra*, Defendants' appeal of the District Court's May 31, 2019 renewal of its preliminary injunction is

not justiciable by this Court as required under Article III, Section 2 of the Constitution. According to Defendants' own arguments, the preliminary injunction is no longer active, rendering this appeal moot. There is no actual, ongoing controversy and there is no effective relief this Court could order that would affect the rights of the parties. Therefore, Defendants' appeal is nonjusticiable and must be dismissed for lack of jurisdiction.

STATEMENT OF THE ISSUES

Defendants adequately set forth the three substantive issues they raise on appeal. Dkt. 12 at 6-7. However, Defendants' appeal raises the following threshold jurisdictional issues that must be decided prior to consideration of the substantive issues raised on appeal:

1. Should this Court dismiss Defendants' appeal of the renewed preliminary injunction for lack of justiciability under Article III, Section 2 of the Constitution?
2. Would this Court's consideration of the substantive issues constitute an impermissible advisory opinion because Defendants' appeal is not justiciable?

Additionally, Plaintiff raises the following issue based on Defendants' repeated litigation of appeals for which there is no jurisdiction:

3. Should this Court sanction Defendants under its inherent and/or statutory

power for unreasonably, vexatiously, and improperly multiplying the proceedings in order to deter future abuse and protect the appellate process?

STATEMENT OF ADDENDUM

Except for the following, all applicable constitutional provisions, statutes, and rules are set forth in the addendum filed with Defendants' opening brief, Dkt. 12:

U.S. Constitution, Article III, Section 2

28 U.S.C § 1927

Federal Rule of Appellate Procedure 38

STATEMENT OF THE CASE

On December 13, 2018, the District Court held that Defendants' refusal to provide Plaintiff with gender confirmation surgery "ignored generally accepted medical standards for the treatment of gender dysphoria [and] constitutes deliberate indifference to Ms. Edmo's serious medical needs and violates her rights under the Eighth Amendment to the United States Constitution." D.Ct. Dkt. 149 at 4. The District Court entered injunctive relief ordering Defendants to "take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery as promptly as possible and no later than six months from the date of [the] order." *Id.* at 45.

Defendants appealed the District Court's December 13, 2018 injunctive

relief order (*Edmo I*). This Court stayed the order pending appeal but also expedited the briefing and hearing schedule. Case No. 19-35017, Dkt. 19. Subsequent to their opening brief, Defendants moved this Court to vacate the December 13, 2018 order, contending, "the district court's December 13, 2018 injunction automatically expired under [the PLRA] and, for that reason, the appeal is moot." Case No. 19-35017, Dkt. 90 at 2. This Court considered that motion with the underlying appeal. Case No. 19-35017, Dkt. 37.

This Court heard oral argument in the appeal on May 16, 2019. Case No. 19-35017, Dkt. 88. On May 30, 2019, the Court ordered a limited remand to the District Court "to address two issues relevant to mootness." Case No. 19-35017, Dkt. 90 at 2. First, this Court asked the District Court to clarify whether it had already renewed the injunction, and, if not, authorized the District Court "to consider whether to reissue the injunction" under the limited remand. *Id.* at 3. Second, this Court asked the District Court to "clarify whether, as part of its ruling on [Ms.] Edmo's motion for preliminary injunction, the district court also granted permanent injunctive relief [and] whether it concluded that [Ms.] Edmo actually succeeded on the merits of her Eighth Amendment claim for permanent injunctive relief." *Id.* at 3-4. This Court also specified that, following the District Court's order on limited remand, this Court would consider that order together with the December 13, 2018 order and the appellate record in the case "for review and final

disposition. This panel retains jurisdiction pending the limited remand. No party need file a new notice of appeal." *Id.* at 4 (internal quotation marks and citation omitted).

On May 31, 2019, the District Court issued an order in accordance with the limited remand. ER at 5-9 (D.Ct. Dkt. 196). In response to the first issue, the District Court clarified that it had not previously renewed the injunction, and then renewed the preliminary injunction, finding that "[b]y denying Ms. Edmo gender confirmation surgery, Defendants continue to subject her to cruel and unusual punishment that is contrary to the Eighth Amendment." ER at 6; *id.* at 8. The District Court reiterated its intent to "secure a quick end to Defendants' constitutionally deficient care," incorporated its findings from the December 13, 2018 order, and explicitly held that the reissued injunction satisfied the needs-narrowness-intrusiveness requirements of the PLRA. *Id.* at 6. In response to this Court's second question, the District Court clarified that it granted Ms. Edmo permanent injunctive relief as part of the December 13, 2018 order, and "reiterate[d] its prior finding: Ms. Edmo is entitled to gender confirmation surgery under the permanent injunction standard." *Id*. at 7-8. The District Court further stated that it had "concluded, and expressly incorporated into its final decision, that Plaintiff succeeded on the merits of her Eighth Amendment claim for permanent injunctive relief." *Id*. at 9.

Despite this Court's direction that "[n]o party need file a new notice of appeal" with respect to the District Court's order on limited remand, Defendants filed the instant notice of appeal on June 28, 2019 ("*Edmo II*"). ER at 1-3. Defendants framed the appeal as an appeal of a preliminary injunction, but requested a stay of the expedited appellate briefing schedule that applies to preliminary injunction appeals. ER at 2; Dkt. 7 at 3. Defendants further sought clarification from this Court that they did not have to comply with the expedited briefing schedule. Dkt. 7. In its August 2, 2019 order responding to Defendants' motion for clarification, this Court clarified that no briefing schedule had been established and explicitly provided that Defendants could file a motion regarding the briefing schedule in *Edmo II*. Dkt. 8 ("To the extent that the motion seeks any other relief related to briefing in this appeal, it is denied without prejudice to renewing the request in a separate motion."). Although Defendants could have moved to consolidate *Edmo II* with *Edmo I*, or to brief *Edmo II* on an expedited schedule, Defendants elected to do neither.

On August 23, 2019, this Court affirmed the District Court's entry of the December 13, 2018 injunction against Defendant IDOC, IDOC official capacity Defendants, and Defendant Eliason, holding that Defendants "have been deliberately indifferent to [Ms.] Edmo's gender dysphoria, in violation of the Eighth Amendment. The record before us, as construed by the district court,

establishes that [Ms.] Edmo has a serious medical need, that the appropriate medical treatment is GCS, and that prison authorities have not provided that treatment despite full knowledge of [Ms.] Edmo's ongoing and extreme suffering and medical needs." Case No. 19-35017, Dkt. 96-1 at 9-10. Recognizing "the nature and urgency of the relief at issue," this Court further concluded that "the facts of this case call for expeditious effectuation of the injunction" and urged Defendants "to move forward" with gender confirmation surgery for Ms. Edmo. *Id.* at 85. This Court directed that its stay of the injunction "shall automatically terminate upon issuance of the mandate." *Id.*

In upholding the injunction, this Court rejected Defendants' contentions "that the district court did not make the PLRA's requisite need-narrowness-intrusiveness findings," and that the injunction had expired under the PLRA. *Id.* at 42-45. This Court affirmed issuance of the injunction as proper under both the permanent and preliminary injunction standards. *Id.* at 45-46 n. 13. This Court also held that the injunction had not expired, both because the District Court entered a permanent injunction, and because the District Court validly renewed the preliminary injunction on May 31, 2019 pursuant to the limited remand. *Id.* at 44-45 & n.12.

On September 6, 2019, Defendants filed a petition for rehearing en banc. Case No. 19-35017, Dkt. 99. On September 26, 2019, Plaintiff filed a motion to

partially lift this Court's stay of the injunction in order to ensure that Ms. Edmo would begin receiving presurgical treatments that Defendants' chosen surgeon identified as necessary prerequisites for surgery. Case 19-35017, Dkt. 101-1 at 5. On October 10, 2019, this Court granted Plaintiff's motion to partially lift the stay "so that Plaintiff may receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery." Case 19-35017, Dkt. 104 at 2. This Court found that Defendants had not shown that irreparable harm to them was probable with respect to partial lifting of the stay, or that they had both a substantial case on the merits and the balance of hardships tipped sharply in their favor. *Id.* On October 24, 2019, pursuant to Defendants' demand that the District Court clarify exactly which presurgical requirements they had to provide under this Court's partial lifting of the stay, the District Court issued an order requiring Defendants to fulfill the presurgical requirements stated by their own chosen surgeon. Case No. 19-35917, Dkt. 11 at 2; D.Ct. Dkt. 225. Defendants then appealed the District Court's October 24, 2019 order ("*Edmo III*") and moved for a stay of the order under this Court's emergency stay motion procedures. Case No. 19-35917, Dkts. 1 & 6; Case No. 19-35917, Dkt. 11 at 1. Plaintiff opposed Defendants' motion for a stay and moved to dismiss Defendants' *Edmo III* appeal for lack of jurisdiction. Case No. 19-35917, Dkt. 9. On November 20, 2019, this Court dismissed Defendants' third appeal for lack of

jurisdiction as an improper interlocutory appeal. Case No. 19-35917, Dkt. 11 at 2. Defendants' petition for rehearing en banc of *Edmo I* is still pending, and the mandate has not yet issued, so the stay of the injunction to provide surgery remains in place.

On September 11, 2019, this Court ordered Defendants "to show cause as to why [the instant] appeal [*Edmo II*], should not be dismissed as moot" following the Court's affirmation of the injunction in *Edmo I*. Dkt. 9. In response, Defendants primarily argued that they sought appeal to challenge "whether the district court impermissibly exceeded the scope of the limited remand by, for example, making new findings that its prior order complied with the PLRA's need-narrowness-intrusiveness requirements and by simultaneously entering both a permanent and preliminary injunction." Dkt. 10 at 7-8. Defendants contended that their *Edmo II* appeal was not moot "because the Court can still give Defendants . . . effective relief in the event that it decides the issues in this appeal on the merits in their favor." *Id.* at 2. This Court discharged the order to show cause on October 18, 2019 and set a briefing schedule for Defendants' *Edmo II* appeal. Dkt. 11. In their opening brief filed November 15, 2019, Defendants abandoned most of the arguments they set forth in their response to the show cause order.[2] Instead, they

[2] Defendants presumably recognized that their arguments would fail in light of this Court's express statement in its order for limited remand that, "the district court

argued primarily that the District Court's May 31, 2019 renewal of the preliminary injunction is no longer active because it either expired or merged into the permanent injunction. Defendants also acknowledged in their opening brief that the appropriate procedure when a preliminary injunction has merged into a permanent injunction is dismissal of the appeal as moot. Dkt. 12 at 16. Nevertheless, Defendants failed to dismiss the appeal and instead request that this Court "vacate" the preliminary injunction renewal that they contend "no longer exi[s]ts." *Id.* at 15.

SUMMARY OF ARGUMENT

Defendants' appeal is not justiciable as an exercise of judicial power under Article III, Section 2 of the U.S. Constitution because it is moot. In light of the entry and affirmation of the permanent injunction, the renewal of the preliminary injunction presents no actual ongoing controversy, and this Court cannot grant any effective relief that would affect the parties' legal rights. As Defendants themselves recognize in their opening brief, the renewed preliminary injunction they appeal has merged with the permanent injunction, and appeal is proper only from the permanent injunction. Thus, the instant appeal must be dismissed.

Because the instant appeal is not justiciable, the prohibition on advisory

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has the authority under this limited remand to consider whether to reissue the injunction." Case No. 19-35017, Dkt. 90 at 3.

opinions bars this Court from considering the merits of the appeal. However, even were this Court to reach the merits, Defendants' arguments fail. The law of the case established by this Court in *Edmo I* affirms that the District Court's renewal of the preliminary injunction incorporating its previous findings was proper and satisfies the legal requirements for such relief, including the mandatory preliminary injunction standard and PLRA need-narrowness-intrusiveness requirements.

It would also be improper and unnecessary for this Court to "vacate" the renewed preliminary injunction as "expired," given that it has merged into the permanent injunction and accordingly become final relief. Indeed, even if no valid permanent injunction existed—which would contradict the express holding of this Court in *Edmo I*—Defendants' immediate appeal of the order renewing the preliminary injunction would have had the effect of tolling any applicable expiration period to "finalize" the relief under the PLRA by divesting the District Court of jurisdiction to do so.

Defendants' request that this Court "vacate" a preliminary injunction that—by their own admission—no longer independently exists is unnecessary, unsupported by law, and outside the valid exercise of Article III judicial power. Because Defendants' continued litigation of an appeal for which there is obviously no jurisdiction is part of an obstructive pattern of conduct that abuses the judicial process, unreasonably and vexatiously multiples the proceedings, and threatens

Plaintiff's ability to vindicate her rights, this Court should sanction Defendants under its inherent and statutory authority.

ARGUMENT

I. This Court Should Dismiss Defendants' Appeal for Lack of Justiciability

Defendants' appeal of the District Court's renewal of the preliminary injunction is not justiciable. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968) ("[N]o justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is not standing to maintain the action." (footnotes omitted)). The District Court's permanent injunction, which has already been upheld by this Court, superseded the renewed preliminary injunction and the preliminary injunction therefore merged into the permanent relief. *Estate of Marcos*, 94 F.3d at 544 (holding that where permanent injunction has been granted that supersedes the original preliminary injunction, the interlocutory injunction becomes merged in the final decree and appeal of the preliminary injunction order is properly dismissed); *Cont'l Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 880 (9th Cir. 1990) (same); *see also Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013) ("The district court's entry of a final judgment and a permanent injunction moots Arizona's appeal of the preliminary injunction."); *Burbank-Glendale-*

Pasadena Airport Auth. v. City of Los Angeles, 979 F.2d 1338, 1340 n.1 (9th Cir. 1992) ("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."). As Defendants themselves acknowledged in their opening brief, Dkt. 12 at 15, there is therefore no live controversy concerning the renewed preliminary injunction. *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 516 (9th Cir. 1993) (where the permanent injunction "covers . . . the same issues appealed in the preliminary injunction, the appeal of those issues in the context of the preliminary injunction has become moot"); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 548-49 (9th Cir. 1988) (per curiam) ("Article III . . . limits federal courts to adjudicating actual, ongoing controversies between litigants."). Defendants' appeal is moot, and this Court's vacating of the renewed preliminary injunction "would have no effect on the parties' legal rights *vis-à-vis* each other."[3] *Hellerstein v. Desert Lifestyles, LLC*, 686 Fed. App'x 530, 531 (9th Cir. 2017) (mem. op.); *see also Allard v. DeLorean*, 884 F.2d 464, 464 (9th Cir. 1989) ("If events subsequent to the filing of an appeal moot the issues presented in case, no justiciable controversy is presented. This court has no jurisdiction to hear a case

[3] This is true regardless of whether the Court decides to grant Defendants' petition for rehearing en banc. *See Hellerstein*, 685 Fed. App'x at 531 ("An interlocutory appeal may be moot even though the underlying case still presents a live controversy.").

that cannot affect the litigant's rights." (citation omitted)).

Mootness is a "threshold jurisdictional issue" that requires that this Court to dismiss Defendants' appeal without proceeding further to its substance. *Sea-Land Serv., Inc. (Pacific Div.) v. Int'l Longshoreman's and Warehousemen's Union*, 939 F.2d 866, 870 (9th Cir. 1991); *Aguirre v. S.S. Sohio Intrepid*, 801 F.2d 1185, 1187 & 1189 (9th Cir. 1986). Defendants' continued litigation of their appeal—despite their admission that it is moot given the permanent injunction—seeks an impermissible advisory opinion by this Court regarding preliminary injunctions under the PLRA. *See Flast*, 392 U.S. at 96 ("[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." (citation omitted)); *Holloway v. United States*, 789 F.2d 1372, 1374 (9th Cir. 1986) ("'[I]f this court were to reach the merits of this appeal, it would render an advisory opinion upon a moot question. This court will not declare rules of law that will have no effect upon the case at bar.'") (quoting *In re Royal Properties, Inc.*, 621 F.2d 984, 987 (9th Cir. 1980)). Accordingly, this Court should dismiss Defendants' appeal as nonjusticiable.

II. As Established by the Law of the Case, the Injunction is Proper under the Mandatory Preliminary Injunction Standard and Satisfies the PLRA

This Court should not reach the merits of Defendants' instant appeal because it is moot. Even were this Court to consider the merits of the appeal, however, it

has already adjudicated and rejected Defendants' arguments. Re-hashing the same contentions they made in their underlying appeal, Defendants assert that the renewed preliminary injunction was improper under the mandatory preliminary injunction standard and did not contain adequate written findings to satisfy the PLRA needs-narrowness-intrusiveness requirements. Dkt. 12 at 17-23. This Court has already held that the District Court's renewed injunction was proper under the mandatory preliminary injunction standard and that it satisfies the requirements of the PLRA.[4] Case No. 19-35017, Dkt. 96-1 at 46 n.13 ("As we have explained, the district court granted [Ms.] Edmo injunctive relief under both the preliminary and permanent injunction standards. . . . [W]e would also affirm under the mandatory preliminary injunction standard, because the district court correctly applied the proper standard for mandatory preliminary injunctive relief."); *id.* at 43 ("Here, the district court made the necessary need-narrowness-intrusiveness findings."). This is the law of the case and may not be successively relitigated by Defendants. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988) (holding

[4] This Court made clear that it intended to review any renewed preliminary injunction by the District Court on limited remand as part of its decision in *Edmo I*, specifying in its order that "[the] panel retains jurisdiction pending the limited remand. No party need file a new notice of appeal." Case No. 19-35017, Dkt. 90 at 4. Defendants' untimely complaint that they were not "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," Dkt. 12 at 10, is addressed in Section IV, *infra*.

that law of the case "promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues" (internal quotation marks and citation omitted)); *United States v. Alexander*, 106 F.3d 874, 876-77 (9th Cir. 1997) ("Under the 'law of the case' doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." (internal quotation marks and citation omitted)).

Further, Defendants' assertions that "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," and that the Court failed to make findings demonstrating a "continuing need for mandatory preliminary injunctive relief," Dkt. 12 at 20-21 (emphasis in original), are legally and factually wrong. The District Court reincorporated its factual findings underpinning the original injunction, found that "[b]y denying Ms. Edmo gender confirmation surgery, Defendants *continue* to subject her to cruel and unusual punishment that is contrary to the Eighth Amendment," and reiterated that the injunction remained necessary "to secure a quick end to Defendants' constitutionally deficient care." ER at 6 (emphasis added). The District Court also expressly articulated and applied the PLRA needs-narrowness-intrusiveness criteria, including finding that injunctive relief continued to be necessary to correct the violation of Ms. Edmo's constitutional right. ER at 6 n.2. This Court has

already rejected Defendants' argument, Dkt. 12 at 20-21, that it was improper for the District Court to renew its injunction based on incorporation of its previous findings. *See* Case No. 19-35017, Dkt. 96-1 at 45 n.12 (affirming the District Court's renewal of the injunction "incorporating its previous findings") (citing *Mayweathers v. Newland*, 258 F.3d 930, 935-36 (9th Cir. 2001)). Finally, this Court has also already rejected Defendants' argument, Dkt. 12 at 22, that the injunction is overbroad in violation of the PLRA.[5] Case No. 19-35017, Dkt. 96-1 at 78-79.

III. The Renewed Preliminary Injunction Has Not Expired Under the PLRA

Defendants also ask this Court to "vacate" the renewed preliminary injunction on the basis that it "has expired under the plain language of the Prison Litigation Reform Act." Dkt. 12 at 12. First, as set forth above, because Defendants' appeal is moot, this Court should not reach questions of law about preliminary injunctions under the PLRA, or whether an appeal tolls the PLRA's expiration provision related to preliminary injunctions. *See, e.g., Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 853-54 (9th Cir. 1985) ("A case, or

[5] This Court further found that Defendants waived the argument that "the order is overbroad because it does not specify the type of GCS ordered" by failing to raise it in their opening brief. Case No. 19-35017, Dkt. 96-1 at 79 n.23. Defendants may not avoid waiver via improper successive appeals of the same order. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

an issue in a case, is considered moot if it has lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law.") (citation omitted) (internal quotation marks omitted).

Second, Defendants' acknowledgement in their brief that the preliminary injunction merged into the permanent injunction directly contradicts their argument that "the district court never finalized" the injunction. *Compare* Dkt. 12 at 14 *with id.* at 15 (recognizing the District Court's entry of a permanent injunction as "a final decision' in which the court "has *actually* decided the merits."). Defendants' statement that "the preliminary injunction renewed on May 31, 2019 no longer exi[s]ts" and "[t]he only remaining 'live' injunction is the permanent injunction," also exposes the incoherence of their demand that this Court now review and vacate an order Defendants themselves contend is a nullity. *Cf. Sec. & Exch. Comm'n v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361 (9th Cir. 1982) (noting review of preliminary injunction on appeal would be a "futile exercise" after a permanent injunction making findings on the merits had issued). Defendants' argument is also unavailing in another way: if the renewed preliminary injunction *had* expired, as they contend, then, again, by definition, there would be no need for this Court to vacate it.

Finally, even were this Court to assume—contrary to fact—both that the

preliminary injunction did not merge into the permanent injunction and that the District Court did not finalize the preliminary injunction by entering a permanent injunction, Defendants' contention that the preliminary injunction has expired still fails. As Plaintiff pointed out in response to this same argument in the underlying appeal, Defendants provide no explanation of what more was purportedly necessary to "finalize" the District Court's order. *See* Case No. 19-35017, Dkt. 68 at 12-13. Moreover, as Plaintiff also previously explained, *id.* at 14-15, Defendants' appeal of the renewed preliminary injunction divested the District Court of jurisdiction to further adjudicate the merits related to the relief on appeal (if the Court had not already issued a permanent injunction, which, in fact, it had), and therefore tolled any applicable expiration period. *See A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002) (holding that while a preliminary injunction is pending on appeal, the district court "lacks jurisdiction to modify the injunction in such manner as to 'finally adjudicate substantial rights directly involved in the appeal'") (quoting *Newton v. Consol. Gas Co.*, 258 U.S. 165, 177 (1922)); *see also In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000) (voiding lower court order that "amounted to a final adjudication of the substantial rights directly involved in the appeal" because court lacked jurisdiction during pendency of appeal); *accord Petuskey v. Rampton*, 431 F.2d 378, 381 (10th Cir. 1970) (setting aside and dissolving permanent injunction entered by district court

after notice of appeal filed "because of the absence of jurisdiction"). By appealing the District Court's renewal of the preliminary injunction, Defendants stopped the 90-day clock for further adjudication of its merits. Defendants may not use their appeal as both sword and shield to prevent the District Court from taking further action, and "then demand to be free of the injunction by virtue thereof." *Mayweathers v. Terhune*, 136 F. Supp. 2d 1152, 1154 (E.D. Cal. 2001).

IV. This Court Should Sanction Defendants for Unreasonably and Vexatiously Multiplying the Proceedings by Repeatedly Litigating Frivolous Appeals

"Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice." *Haeger v. Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 941 (D. Ariz. 2012), *rev'd in part on other grounds*, *Goodyear Tire & Rubber Co. v. Haeger*, __ U.S. __, 137 S. Ct. 1178 (2017). In the instant case, this Court has found that Defendants are violating Ms. Edmo's constitutional rights, subject her to unnecessary suffering, and placing her in grave danger by withholding necessary medical treatment for her severe gender dysphoria. Case No. 19-35017, Dkt. 96-1 at 10, 63-65, 84-85. Both this Court and the District Court have emphasized the urgent nature of Ms. Edmo's situation and her ongoing suffering in the absence of care. *See, e.g., id.* at 85. Despite these rulings, Defendants have repeatedly employed improper litigation tactics in order to further delay providing this care and to make vindication of Ms. Edmo's rights as onerous

as possible.

By repeatedly litigating frivolous appeals for which this Court obviously lacks jurisdiction, Defendants have unreasonably and vexatiously multiplied the proceedings, frustrated the appellate process, and wasted the resources of this Court, the District Court, and Plaintiff. This Court can utilize its inherent power to sanction conduct where "the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons" and its statutory authority, pursuant to 28 U.S.C. § 1927, to sanction "conduct that unreasonably and vexatiously multiplies the proceedings." *Fink v. Gomez*, 239 F.3d 989, 991 (2001) (internal quotation marks and citation omitted); *see also id.* at 992 ("In *Chambers*, the [Supreme] Court left no question that a court may levy fee-based sanctions when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, delaying or disrupting litigation, or has taken actions in the litigation for an improper purpose.") (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 & n.10 (1991)). Federal Rule of Appellate Procedure 38 also provides authority for the Court of Appeal to sanction an appellant for frivolous appeal(s).

In the instant appeal, Defendants have repeatedly abused this Court's process. They appealed an order already subsumed within the original appeal, and then largely abandoned the reasons they set forth in their response to the order to show cause. Worse, Defendants continue to pursue this appeal despite their

avowed recognition in their opening brief that the required outcome when a preliminary injunction is merged into a permanent injunction is that "the appeal from the interlocutory preliminary order is properly dismissed." Dkt. 12 at 16. Instead of withdrawing or dismissing their appeal, Defendants frivolously continue to litigate it, demanding that this Court "vacate" a preliminary injunction they themselves admit no longer exists. *See Holloway*, 789 F.2d at 1374 (awarding sanctions for litigation of frivolous appeal where appeal was clearly moot). Defendants cite no case law that would explain why vacating an inactive order is necessary or would have any legal effect.

Further, Defendants' complaint that "[n]either 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," Dkt. 12 at 10, is belied by their own conduct during the appellate process. In the three months between the May 31, 2019 order and this Court's August 23, 2019 decision in *Edmo I*, Defendants never requested supplemental briefing to this Court. Rather, despite this Court's explicit statement that the panel retained jurisdiction over any order pursuant to the limited remand and no party need file a new notice of appeal, Defendants chose to file a new appeal and then expressly requested that expedited briefing on the new appeal be *stayed*. Dkt. 7 at 3; D.Ct. Dkt. 203 at 2. Now, following this Court's decision in *Edmo I* upholding the

injunction, Defendants object for the first time that they were not permitted to file a brief regarding the order on limited remand, and seek to relitigate issues already adjudicated by this Court.

Importantly, this is not the first time Defendants have employed an improper wait-and-see litigation tactic to unreasonably multiply the litigation, relitigate issues already adjudicated, and waste the resources of this Court, the District Court, and Plaintiff. This Court rejected similar tactics in *Edmo I* when Defendants appealed the District Court's consolidation of the preliminary injunction hearing with a trial on the merits even though Defendants had failed to respond to the District Court's request to address the issue and never objected to the process. Case No. 19-35017, Dkt. 96-1 at 80-81 (citing with approval *Reilly v. United States*, 863 F.2d 149, 160 (1st Cir. 1988) ("[W]hen a trial judge announces a proposed course of action which litigants believe to be erroneous, the parties detrimentally affected must act expeditiously to call the error to the judge's attention, or to cure the defect, not lurk in the bushes waiting to ask for another trial when their litigatory milk curdles.")).

Defendants also abused this Court's process when they appealed the District Court's October 24, 2019 presurgical treatment order. Following this Court's partial lifting of the stay to ensure that Ms. Edmo would receive presurgical treatment, Defendants demanded that the District Court issue an order clarifying

the elements of such treatment even though their own chosen surgeon had enumerated them. Defendants never objected to the procedure set forth by the District Court for issuing the order they requested, but then immediately appealed the order to this Court, complaining that they had been denied "due process." *See* Case No. 19-35917, Dkt. 11 at 2; Case No. 19-35917, Dkt. 8-1 at 17-19. Defendants further used their appeal as the basis for filing an expedited motion for a stay pending appeal in the District Court and an emergency motion for stay in this Court, both of which were rejected by the respective Courts.[6] D.Ct. Dkt. 244; Case No. 19-35917, Dkt. 11. This Court held that Defendants had improperly appealed an interlocutory order and dismissed the appeal for lack of jurisdiction. *Id.*

[6] Defendants' emergency motion for a stay in *Edmo III* was the third time they filed a purported "emergent" or "urgent" motion under Circuit Rule 27-3, a rule "meant for parties facing significant harm, e.g., imminent removal, not for parties seeking procedural relief." Circuit Advisory Committee Note to Rule 27-3; *see, e.g., West v. Brewer*, 652 F.3d 1060 (9th Cir. 2011) (mem. op.) (allowing use of Circuit Rule 27-3 for a motion for stay of execution); *Parretti v. U.S.*, 143 F.3d 508, 510 (9th Cir. 1998) (issuing emergency ruling under Circuit Rule 27-3 to plaintiff who alleged he was unconstitutionally arrested and imprisoned). In addition to this Court's recent dismissal of *Edmo III*, Case No. 19-35917, Dkt. 11, this Court previously rejected Defendants' characterization of another of its motions as "urgent" in *Edmo I*. Case No. 19-35017, Dkt. 37 at 2. Notably, this Court has repeatedly found that Defendants have not demonstrated that they will suffer irreparable harm when seeking stays, *see* Case No. 19-35017, Dkt. 37 at 2; Case 19-35017, Dkt. 104 at 2, but that Ms. Edmo continues to suffer irreparable harm in the face of Defendants' ongoing refusal to provide treatment. Case No. 19-35017, Dkt. 96-1 at 73-75.

"[T]he primary purpose of sanctions . . . is to deter subsequent abuses." *In re Matter of Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986). "A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses." *Id.* Defendants have repeatedly abused the appellate process in a manner that imposes an unjustified burden on Plaintiff, obstructs the judicial process, and is intended to frustrate Plaintiff's vindication of her rights in the courts.[7] *See id.* at 1182. Defendants' litigation tactics threaten the integrity of the federal judicial process and its time-honored mission of doing justice, including on behalf of the least powerful and most marginalized members of our society. *See Fink*, 239 F.3d at 992 ("[T]he Supreme Court made clear that courts possess inherent power to impose sanctions for 'willful abuse of judicial processes.'") (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980)). Defendants' actions are abusive of the public fisc and the public trust, have resulted in a significant waste of the Court's and Plaintiff's time and resources, and threaten to frustrate the appellate process. Given that the parties still have substantial proceedings in this case, including effectuation of the injunction to

[7] Although Defendants here have made misrepresentations to the Courts and asserted frivolous legal arguments, *see generally, supra*; *see also* Case No. 19-35917, Dkt. 8-1 at 16-17; D.Ct. Dkt. 244 at 10; D.Ct. Dkt. 249 at 10-11, that level of misconduct is not even necessary to impose sanctions. *Fink*, 239 F.3d at 992 ("[S]anctions are justified when a party acts *for an improper purpose*—even if the act consists of making a truthful statement or a non-frivolous argument or objection.").

provide gender confirmation surgery once the mandate issues and litigation of Plaintiff's remaining claims in the case, and given—as this Court has recognized—the urgency of Ms. Edmo's medical needs, Plaintiff requests that this Court use its inherent and statutory authority to sanction Defendants for their obdurate conduct. *See Yagman*, 796 F.2d at 1183.

It is also particularly important that the Court address such abuse in prisoners' rights cases such as this one—which was filed and litigated *pro se* by Ms. Edmo until the District Court granted her motion for appointment of counsel. D.Ct. Dkt. 3; D.Ct. Dkt. 5; D.Ct. Dkt. 12 at 23. As this Court is no doubt aware, there are many cases by prisoners and few attorneys to represent them—a challenge the Ninth Circuit has recognized through its creation of a *pro bono* program for prisoner representation. The kinds of litigation tactics employed by Defendants—sophisticated and repeat parties in this type of litigation—make prisoner cases even more unwieldy for district and appellate courts, including making them too onerous for attorneys to take either on a contingency or *pro bono* basis. If this Court allows the type of conduct at issue here to continue unchecked, it threatens to have a very real and chilling effect on individuals whose constitutional rights are being violated. These plaintiffs have insufficient resources to viably litigate their cases in the face of such obstructive tactics and will face an even steeper uphill battle finding attorneys to represent them.

CONCLUSION

This Court should dismiss Defendants' appeal as not justiciable. This Court should further sanction Defendants for unreasonably and vexatiously multiplying the proceedings in this case through repeated litigation of frivolous appeals.

DATED: December 12, 2019

Respectfully submitted,

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Attorneys for Plaintiff-Appellee

STATEMENT OF RELATED CASES

Defendants identified three related cases pending in this Court: Cases No. 19-35017 and 19-35019, which are consolidated, and Case No. 19-35917. Case No. 19-35917 was dismissed by this Court for lack of jurisdiction on November 20, 2019.

DATED: December 12, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s) 19-35552

I am the attorney or self-represented party.

This brief contains 6,746 **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)*:

[X] complies with the word limit of Cir. R. 32-1.

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Signature s/*Lori Rifkin* **Date** 12/12/19
*(use "*s/[typed name]*" to sign electronically-filed documents)*

No. 19-35552

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, (a/k/a MASON EDMO),
Plaintiff-Appellee,

vs.

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
Case No. 1:17-cv-00151-BLW

ADDENDUM TO PLAINTIFF-APPELLEE'S ANSWERING BRIEF

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U.S. Constitution, Article III, Section 2

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

28 U.S.C §1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Federal Rule of Appellate Procedure 38

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.