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-APPELLANT'S MOTION TO STAY MANDATE PENDING FILING OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Defendants-Appellants (hereinafter "Defendants") will file a petition for certiorari with the United States Supreme Court. Pursuant to 28 U.S.C. § 2101(f) and Federal Rule of Appellate Procedure (hereinafter "FRAP") 41(d), and for good cause existing, Defendants respectfully move this Court for an order staying the mandate pending the filing of a petition for certiorari. This Court should stay the mandate to preserve the status quo and prevent irreparable injury to Defendants' rights to appellate review on what are clearly substantial constitutional questions of national importance. The petition will not be frivolous and will not be filed for purposes of delay.

BACKGROUND

On December 13, 2018, the district court ordered Defendants to provide Plaintiff-Appellee Adree Edmo – a transgender prisoner in the custody of the Idaho Department of Corrections – with "gender confirmation surgery." (Case: 1:17-CV-00151-BLW, Dist. Ct. Dkt. 149, p. 45) The order came after an abbreviated evidentiary hearing on Ms. Edmo's request for a preliminary injunction at which time Judge Winmill held that Dr. Scott Eliason and other named defendants were deliberately indifferent in violation of Ms. Edmo's Eighth Amendment rights by providing her with alternative treatments to sex reassignment surgery.

Defendants timely appealed and moved this Court to stay the district court's December 13, 2018 Order, in part, because of the irreparable injury that would befall Defendants if Ms. Edmo received the surgery before Defendants could seek full appellate review. (DktEntry: 15 at 23-24 (citing *Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (Marshall, J. in chambers) (recognizing that an event mooting a litigants' appeal amounts to irreparable injury) and this Court's decision in *Norsworthy v. Beard,* Case No. 15-15712, DktEntry: 25, p. 1-2) (granting stay of similar order for transgender prisoner to receive surgery)). On March 20, 2019, this Court stayed the district court's December 13, 2018 order so that Defendants could obtain appellate review. (DktEntry: 19)

On August 23, 2019, the panel affirmed, in part, the district court's December 13, 2018 order, as against Defendants Dr. Eliason and three prison officials in their official capacities only. *Edmo v. Corizon*, 935 F.3d 757 (9th Cir. 2019). Seeming to recognize Defendants should still have an opportunity to fully exhaust appellate review, the panel did not lift or modify the stay. Rather, it confirmed that the "stay of the district court's December 13, 2018 order shall automatically terminate upon issuance of the mandate." *Id*. at 803.

On September 6, 2019, Defendants timely filed a Petition for Rehearing En Banc thereby automatically staying the issuance of the mandate. (DktEntry: 99) On October 10, 2019, the panel partially lifted the stay so that Ms. Edmo "may receive

all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery." (DktEntry: 104) Pursuant to the partial lifting of the stay, Judge Winmill entered an order requiring Defendants to provide Ms. Edmo with pre-surgical treatment including "laser treatment or electrolysis for hair removal around the surgical site." (Dist. Ct. Dkt. 225, p. 2)[1]

Dr. Geoffrey Stiller, a plastic surgeon who performed a pre-surgical consultation of Ms. Edmo, testified via declaration that Ms. Edmo will likely require multiple hair removal treatment sessions over a period of 6 to 9 months before undergoing surgery. (Dist. Ct. Dkt. 250-1, ¶ 7) Ms. Edmo received hair removal treatments on November 26, 2019 and January 7, 2020, and is scheduled for a third treatment in mid-February. Based on Dr. Stiller's prior testimony, Ms. Edmo may complete the pre-surgical hair removal treatment in early May 2020 or even sooner.

On February 10, 2020, an order was entered denying Defendants' Petition for Rehearing En Banc. (DktEntry: 105-1, at 5) However, ten circuit judges opposed the denial of rehearing en banc and articulated – in a 48-page order – multiple legal and factual errors within the district court's and panel's respective opinions. (*Id*., at 5-48.) Judge O'Scannlain, joined by eight other judges, summarized how the panel's

[1] This order was entered over Defendants' objections (and a subsequent appeal) that the order was not narrowly tailored since "Gender Confirmation Surgery" is overly broad – the term refers to multiple different types of surgical procedures – and because there are at least three types of vaginoplasty procedures, only one of which requires hair removal. (Dist. Ct. Dkt. 227, 228, 228-1, 228-2, 250, 250-1)

unprecedented decision misapplied existing Eighth Amendment standards and left the Ninth Circuit at odds with its sister circuits:

> With its decision today, our court becomes the first federal court of appeals to mandate that a State pay for and provide sex-reassignment surgery to a prisoner under the Eighth Amendment. The three-judge panel's conclusion – that any alterative course of treatment would be "cruel and unusual punishment" – is as unjustified as it is unprecedented. To reach such a conclusion, the court creates a circuit split, substitutes the medical conclusions of federal judges for the clinical judgments of prisoners' treating physicians, redefines the familiar "deliberate indifference" standard, and, in the end, constitutionally enshrines precise and partisan treatment criteria in what is a new, rapidly changing, and highly controversial area of medical practice.

(*Id*. at 5-6.)

Likewise, Judge Collins, in dissenting from the denial of rehearing en banc, expressed his opinion that the panel "effectively waters down" the deliberate indifference standard announced by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976).

> That is, by narrowly defining the range of "medically acceptable" options that the court believes a prison doctor may properly consider in a case such as this one, and by then inferring deliberate indifference from Dr. Eliason's failure to agree with that narrow range, the district court and the panel have applied standards that look much more like negligence than deliberate indifference.

(*Id*. at 34-35.)

Finally, Judge Bumatay's dissent, in which he was joined by six judges, explained how Dr. Eliason's treatment decisions were "far from a constitutional violation" based on the text and original meaning of the Eighth Amendment's Cruel and Unusual Punishments clause. (*Id*. at 35-48.) Said differently, Dr. Eliason's decisions to provide Ms. Edmo with alternative treatments to surgery "simply do not amount to the 'barbarous' or 'inhuman' treatment so out of line with longstanding practices as to be forbidden by the Eighth Amendment." (*Id*. at 40)

LEGAL STANDARDS

Ordinarily, the mandate will issue seven days after entry of an order denying a timely petition for rehearing en banc. FRAP 41(b). However, if a party files a motion to stay the mandate, the mandate will not issue until seven days after that motion is denied. *Id.* Under FRAP 41(d)(1) and (2), the mandate may be stayed "pending the filing of a petition for a writ of certiorari in the Supreme Court" when the certiorari petition "present[s] a substantial question and . . . there is good cause for a stay."

A motion to stay the mandate pending a certiorari petition will often be granted. *United States v. Pete*, 525 F.3d 844, 850 and n. 9 (9th Cir. 2008) (stating that it is "often the case" that mandates are stayed while seeking certiorari from the Supreme Court). A party need not demonstrate exceptional circumstances to justify a stay of the mandate. *Id.* (quoting *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528-

29 (9th Cir. 1989) ("Ordinarily, . . . a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay.")). Rather, a stay is merited unless "the petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. 41-1.

ANALYSIS

1. Defendants' certiorari petition will present substantial questions and will neither be frivolous nor filed for the purpose of delay.

The dissenting and opposing opinions of Circuit Judges O'Scannlain, Collins, and Bumatay and the other seven judges who joined those opinions (DktEntry: 105-1) impressively and comprehensively articulated many of the substantial questions Defendants anticipate presenting in the certiorari petition (and many substantial questions Defendants have argued in this case all along).[2] Each issue to be presented separately provides a reasonable probability of the Supreme Court accepting the petition as well as a significant possibility of a reversal of the district court's holding

[2] In the interest of brevity, the Defendants incorporate by reference the Circuit Judges' analysis (DktEntry: 105-1) in support of this motion. Defendants also incorporate the briefing provided in support of the Petition for Rehearing En Banc (DktEntry: 99) and do not waive or abandon any such arguments contained therein that are not re-briefed herein. For example, Defendants maintain, and reserve for their certiorari petition, that the district court failed to provide clear and unambiguous notice that it intended to convert the preliminary injunction hearing into a final trial on the merits. (DktEntry: 99, at 7-12) Such an issue alone meets the substantial question requirement as the panel's decision is in direct conflict with *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

that Dr. Eliason was deliberately indifferent in providing Ms. Edmo with alternative treatments to surgery.

Most notably, the panel's application of the Eighth Amendment created a clear split with the First, Fifth, and Tenth Circuits. The panel recognized "our decision is in tension" with the Fifth Circuit's decision in *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019), *cert. denied,* 140 S.Ct. 653. Indeed, it is in direct conflict with *Gibson*, which categorically held that "[a] state does not inflict cruel and unusual punishment by declining to provide sex reassignment surgery to a transgender inmate." Here, the panel held the near categorical opposite – i.e., that it is cruel and unusual punishment not to provide sex reassignment surgery, even where medically-acceptable alternative treatments are provided. This panel's holding is equally in conflict with *Kosilek v. Spencer*, 774 F.3d 63, 86-87 (1st Cir. 2014) and *Lamb v. Norwood*, 899 F.3d 1159, 1162-63 (10th Cir. 2018), each of which recognized that providing hormonal treatment and/or psychotherapy rather than surgery is not deliberate indifference. *See also*, *Campbell v. Kallas*, 936 F.3d 536, 549 (7th Cir. 2019) (holding that it is not clearly established that denying treatment beyond hormone therapy is unconstitutional). These circuit splits cause confusion and uncertainty in the law of this nation and are likely to elicit further review by the Supreme Court.

Additionally, the panel's decision is in direct conflict with the Supreme Court's important holding in *Bell v. Wolfish*, in which the Court rejected the argument that a professional association's recommendations establish the constitutional standard. 441 U.S. 520, 543 n.27 (1979) ("And while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather they establish goals recommended by the organization in question.")

Despite the holding in *Bell*, the panel adopted the WPATH "Standards of Care" as the "gold standard" and affirmed the finding of deliberate indifference against Dr. Eliason on the grounds that he purportedly failed to follow a rigid interpretation of those professional recommendations, which WPATH expressly cautioned are to be applied "flexibly." *Edmo*, 935 F.3d at 792, n. 16. Not only is the panel "alone in its insistence that a professional association's standards add up to the constitutional minima," (DktEntry: 105-1, at 17), but the panels' decision is again in direct conflict with the Fifth Circuit, which very recently held the "WPATH Standards of Care reflect not consensus, but merely one side in a sharply contested medical debate over sex reassignment surgery." *Gibson*, 920 F.3d at 221.

Further, the panel's interpretation of deliberate indifference conflicts with the seminal Supreme Court holding in *Estelle v. Gamble*, which proscribes only medical care so unconscionable as to fall below society's minimum standards of decency.

429 U.S. 97, 102-05 (1976); *see also*, *Kosilek*, 774 F.3d at 96. Here, the panel found not that Dr. Eliason's treatment decision fell below *society's* minimum standards of decency, but rather that his professional decision not to refer Ms. Edmo for sex reassignment surgery was inconsistent with the recommendations of WPATH, an advocacy group whose guidelines are flexible, ever-evolving, lacking scientific support, and without clear guidance on how they should be applied in a prison. *See, e.g.*, *Kosilek*, 774 F.3d at 78-79.

Moreover, the panel's interpretation of the deliberate indifference standard conflicts with the Supreme Court's holding in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), requiring Ms. Edmo to establish that Dr. Eliason "knowingly and unreasonably disregard[ed] an objectively intolerable risk of harm to the plaintiff." Despite the heightened subjective standard required by *Farmer*, the panel incorrectly applied a reasonableness standard – much more akin to the lesser negligence standard – to Dr. Eliason's treatment decisions. *Edmo*, 935 F.3d at 792 (concluding that Dr. Eliason neither followed the WPATH standards "nor did he reasonably deviate from or flexibly apply them.").

2. Good cause warrants granting the stay, which will preserve the status quo and prevent irreparable injury to Defendants.

In March 2019, this Court stayed the district court's December 13, 2018 order pending appeal. (DktEntry: 19) In granting that stay, this Court found Defendants met their burden in establishing factors significantly more stringent than those before

the Court on a motion to stay a mandate: (1) a strong showing the applicant is likely to succeed on the merits; (2) irreparable injury will befall the applicant if a stay is not granted; (3) granting the stay will not substantially injury other parties; and (4) the public interest favors granting the stay. *See Hilton v. Braunskill*, 487 U.S. 770, 776 (1987) (cited by this Court in DktEntry: 19); s*ee also, Defendants-Appellants' Joint Urgent Motion to Stay Injunction* (DktEntry: 15)

The irreparable injury to Defendants without a stay of the mandate is just as likely today as it was in March 2019 when this Court stayed the district court's order. If the order to provide surgery must be carried out before the Supreme Court is afforded the opportunity to consider the Defendants' forthcoming certiorari petition, then Defendants' rights to full appellate review will be irreparably injured. A stay is particularly appropriate when it is necessary to prevent mootness and preserve a party's ability to seek appellate review. *Agency*, 488 U.S. at 1309 (1989); s*ee also, Norsworthy,* Case No. 15-15712, Dkt. 25, p. 1-2 (granting stay of surgery because risk that litigation "would become moot before receiving full appellate consideration.")

Meanwhile, Ms. Edmo will not be injured by staying the mandate, which will preserve the status quo aimed to balance the litigants' competing interests. Because this Court already partially lifted the stay, Ms. Edmo will continue to receive pre-surgical hair removal treatments in the months to come. Ms. Edmo has not attempted

self-castration since 2016, and there is no evidence to suggest Ms. Edmo's gender-related dysphoria has worsened since the district court entered its order on December 13, 2018. This Court should not discount Ms. Edmo's prior testimony that she is committed to not reattempting self-castration given the need to preserve the tissue for a successful surgery. (ER 596, 614.)

Finally, staying the mandate will save the parties significant costs, avoid unnecessary litigation, and further judicial economy. As an initial matter, Defendants will not be forced to separately move this Court and/or the Supreme Court for a stay of the injunction pursuant to Supreme Court Rule 23. Further, the parties will likely not be forced to unnecessarily litigate remaining claims and related disputes in the district court while Defendants seek appellate review from the Supreme Court. Since there is a reasonable probability the Supreme Court will grant certiorari, it is not reasonable and just to allow costly litigation to proceed in the district court when a ruling from the high court will likely dramatically affect the claims, discovery needs, and ultimate outcome of the case.

On February 11, 2020, the district court notified the parties of its intent to enter a scheduling order governing litigation of Ms. Edmo's remaining claims. (Dist. Ct. Dkt. 264.) However, Defendants contend that all of Ms. Edmo's remaining claims are "inextricably bound up" with the issues on appeal and thus the district court lacks jurisdiction. *See Memorandum in Support of Defendants' Joint Motion*

to Stay, Dist. Ct. Dkt. 214-1 at 4-7. While Ms. Edmo believes the district court has jurisdiction over the remaining claims, she recently joined, in part, in Defendants' request to say litigation in the district court pending resolution of the appeal in this Court. *Plaintiff's Response to Defendants' Joint Motion to Stay*, Doc. 223.[3] Staying the mandate pending Defendants' filing of its certiorari petition will aid the parties and the district court in avoiding unnecessary litigation.

CONCLUSION

For the foregoing reasons, and upon the record before this Court, Defendants respectfully request that this Court, pursuant to FRAP 41, stay the mandate pending the Defendants' filing of a petition for writ of certiorari in the Supreme Court and to allow the Supreme Court the opportunity to issue opinions in this case. The petition will present substantial questions and there is good cause for a stay.

This 13th day of February, 2020.

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

s/ Brady J. Hall
Brady J. Hall, ISB #7873

[3] Ms. Edmo wrote that "Plaintiff does not dispute that there are some overlapping factual issues between the claims on appeal and the remaining claims such that resolution of the appeal is likely to simplify questions of fact and law, reduce discovery disputes, and allow for a single jury trial on all remaining claims." (Dist. Ct. Dkt. 223 at 10)

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Defendant-Appellants' Motion to Stay Mandate Pending Filing of Petition for Writ of Certiorari by electronic filing on the date stated below to:

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