
No. 19-35917

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 MOTION TO DISMISS APPEAL FOR LACK
OF JURISDICTION AND OPPOSITION TO DEFENDANTS-
APPELLANTS' EMERGENCY MOTION FOR STAY**

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INTRODUCTION

Plaintiff-Appellee Adree Edmo (Plaintiff) opposes Defendants-Appellants' (Defendants) emergency motion for a stay and moves this Court to dismiss Defendants' instant appeal for lack of jurisdiction.

On August 23, 2019, this Court affirmed the District Court's permanent injunction ordering Defendants to provide gender confirmation surgery to Ms. Edmo. Case No. 19-35017 Dkt. 96-1. This Court found that "the facts of this case call for expeditious effectuation of the [district court's] injunction," given that it has been over a year since medical experts concluded surgery is medically necessary for Ms. Edmo due to acute gender dysphoria, including two self-castration attempts. *Id.* at 85. Therefore, this Court "urge[d] the State to move forward" with providing surgery because of Ms. Edmo's daily suffering and ongoing risk of life-threatening harm in the absence of necessary treatment. *Id.*

On October 10, 2019, this Court partially lifted the stay of the injunction to ensure that Ms. Edmo would begin receiving presurgical treatment to prepare her for surgery.¹ This Court held that, with respect to provision of presurgical treatment to Plaintiff, "Defendants, as proponents of the stay, have not shown that 'irreparable harm is probable'...and that they have both 'a substantial case on the merits and that the balance of hardships tips sharply' in their favor." 19-35017 Dkt. 104 at 2 (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (per curiam)). After this Court partially lifted the stay, the District Court promptly held a status conference regarding provision of presurgical treatment pursuant to this Court's order. On October 24, 2019, the District Court issued an Order ("October 24 Order")²

¹ The stay that a motions panel of this Court granted pending Defendants' appeal remains in effect because no mandate has issued while the Court considers Defendants' petition for rehearing en banc.

² Plaintiff appends the District Court's October 24, 2019 Order hereto because Defendants failed to include a copy with their motion as required by Federal Rule of Appellate Procedure 27(a)(2)(B)(iii).

memorializing the presurgical requirements specified by Defendants' chosen surgeon and setting reasonable deadlines for completion of those requirements.

Now Defendants—in a continuing effort to avoid providing Ms. Edmo necessary and appropriate medical treatment—have filed a frivolous appeal of the October 24 Order. The October 24 Order does not modify the underlying injunction and is not subject to interlocutory review pursuant to 28 U.S.C. § 1292(a)(1). This Court partially lifted the stay so that the District Court could enforce its permanent injunction with respect to provision of “all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery.” 19-35017 Dkt. 104 at 2. That is precisely what the District Court did. Therefore, this Court should dismiss the instant appeal for lack of jurisdiction.

In the alternative, this Court should deny Defendants' emergency motion for a stay because, even if Defendants could establish interlocutory appellate jurisdiction, they cannot satisfy the legal standard for a stay. This Court already considered and rejected the arguments Defendants make in support of their motion when it partially lifted the stay of the injunction. *See* D.Ct. Dkt. 244 at 7 (District Court's denial of stay of October 24 Order where “Defendants now ask this Court to reconsider the factors and arguments fully considered by the Ninth Circuit.”). Per this Court's October 10, 2019 decision, it is the law of the case that Defendants are not likely to suffer irreparable harm through provision of presurgical treatment to Ms. Edmo, including hair removal, and that Defendants have not shown a substantial case on the merits or that the balance of hardships tips in their favor with respect to presurgical treatment. 19-35017 Dkt. 104 at 2.

Because the October 24, 2019 order is not appealable, and because this Court has already adjudicated the issues raised in Defendants' motion for a stay, this Court should dismiss Defendants' appeal and deny this motion as moot. Defendants' appeal and emergency motion for a stay are improper and abusive attempts to re-

litigate issues already adjudicated by this Court. *See* D.Ct. Dkt. 251 at 8.

RELEVANT PROCEDURAL BACKGROUND

On December 13, 2018, the District Court enjoined 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 this order.” D.Ct. Dkt. 149 at 45, ¶ 1. Defendants appealed the December 13 order, and moved to stay the injunction pending appeal. After the District Court denied Defendants’ motion, this Court granted a stay pending appeal on March 20, 2019, but expedited the appellate briefing schedule. 19-35017 Dkt. 19. Ms. Edmo filed an emergency motion for modification of the stay to exempt the presurgical appointment Defendants had scheduled for her with their chosen surgeon, Dr. Geoffrey Stiller. 19-35017 Dkt. 22. This Court granted Ms. Edmo’s motion and the presurgical consultation took place on April 12, 2019. 19-35017 Dkt. 30 at 2.

On August 23, 2019, a unanimous panel of this Court affirmed the December 13, 2018 injunctive relief order, holding that Defendants violated Ms. Edmo’s Eighth Amendment right to adequate and necessary medical treatment and ordering Defendants to provide her gender confirmation surgery. 19-35017 Dkt. 49-1. Defendants filed a petition for rehearing en banc, 19-35017 Dkt. 99, which is currently pending, and, therefore, no mandate has issued.³

On September 26, 2019, Plaintiff moved this Court to partially lift its stay of the December 13, 2018 injunction to ensure that Ms. Edmo would begin receiving presurgical treatments identified by Dr. Stiller as necessary prerequisites for surgery, including treatment for hair removal in the genital area. 19-35017 Dkt. 101. In

³ Defendants also appealed the District Court’s order issued in direct response to limited remand by this Court, despite this Court’s specific advisement in the remand order that “[n]o party need file a new notice of appeal.” 19-35017 Dkt. 90. This appeal is also currently pending. Case No 19-35552.

support of her motion, Plaintiff submitted a letter from Dr. Stiller estimating that these presurgical treatments would take at least six months to complete. 19-35017 Dkt. 101-2 at Exh. 1. This Court granted Plaintiff's motion on October 10, 2019, partially lifting the stay "so that Plaintiff may receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery." 19-35017 Dkt. 104 at 2.

"In light of the partial lifting, the [District] Court held a status conference with counsel for the parties" on October 17, 2019. D.Ct. Dkt. 244 at 4; Declaration of Lori Rifkin in Support of Plaintiff's Motion to Dismiss and Opposition to Emergency Motion to Stay ("Rifkin Decl."), filed herewith, at Exh. A (Transcript of October 17, 2019 status conference) (hereinafter, "10/17/19 Tr."). "During the conference, counsel for Defendant Corizon suggested, for the first time, that his client was confused or uncertain regarding the specific presurgical requirements and the type of gender confirmation surgery required by the 2018 Order and the Ninth Circuit's August 2019 decision." D.Ct. Dkt. 244 at 4-5. Defendants' counsel requested that the District Court issue an order "clarifying" these items. 10/17/19 Tr. at 17:23-19:16. Accordingly, the District Court "ordered Plaintiff to file a submission detailing the presurgical requirements as indicated by the [Defendants' chosen surgeon], Dr. Stiller," so the Court could issue an order specifying that Defendants provide such treatment to Ms. Edmo. D.Ct. Dkt. 244 at 5; 10/17/19 Tr. at 15:15-16:17; 21:9-22:1. The Court also provided that, following its order, Defendants could file a motion for clarification or modification if they still believed it necessary. 10/17/19 Tr. at 15:15-16:17; 16:25-17:7; 20:22-21:4. Defendants did not object or otherwise raise any concerns regarding the Court's indicated course of action. *See, e.g., id.* at 16:25-19:16; 20:8-23:9.

Plaintiff filed the requested submission regarding presurgical requirements on October 22, 2019. D.Ct. Dkt. 224. That filing included a sworn declaration from

Dr. Stiller setting forth the following required presurgical steps: (1) a referral letter from a treating physician, (2) two mental health care provider referrals, and (3) complete hair removal from the surgical site by either laser treatment or electrolysis. D.Ct. Dkt. 224-1 at Exh. 1, ¶ 5. Dr. Stiller identified hair removal and a referral from the treating physician as requirements that remained to be completed for Ms. Edmo. *Id.* at ¶¶ 5-8. Plaintiff also submitted a March 1, 2019 letter from Defendants' counsel documenting their understanding that the December 13, 2018 injunction required them to provide Ms. Edmo with a vaginoplasty, and enumerating Dr. Stiller's same presurgical requirements. *Id.* at Exh. 2.

On October 24, 2019, the District Court issued an order memorializing Dr. Stiller's presurgical requirements and setting deadlines for Defendants to comply with the outstanding requirements, including hair removal treatment. D.Ct. Dkt. 225. On October 30, 2019, the Court held another status conference. Defendants again did not object to the District Court's procedure leading up to the October 24 Order, did not request an opportunity to respond to Dr. Stiller's declaration, and did not request further clarification from the Court. Rifkin Decl. at Exh. B (October 24, 2019 Transcript). The next day, Defendants filed a notice of appeal of the October 24 Order, and moved the District Court to stay the Order pending appeal. Dkt. 1; D.Ct. Dkt. 227; D.Ct. Dkt. 228. The District Court denied the motion to stay on November 8, 2019. D.Ct. Dkt. 244. Defendants filed an emergency motion for a stay in this Court on November 13, 2019. Dkt. 6.

APPLICABLE LEGAL STANDARDS

I. Interlocutory Appellate Jurisdiction

The Court of Appeals has jurisdiction over appeals of final district court decisions or interlocutory appeals satisfying certain statutory prerequisites. 28 U.S.C. § 1291; *Plata v. Davis*, 329 F.3d 1101, 1108 (9th Cir. 2003). 28 U.S.C. § 1292(a)(1) creates "a limited exception to the final-judgment rule" for interlocutory

appeals of orders “granting, continuing, modifying, refusing or dissolving injunctions.” *Carson v. Am. Brands*, 450 U.S. 79, 84 (1981). This limited interlocutory jurisdiction is “construed . . . narrowly,” given “the general congressional policy against piecemeal review.” *Id.* For an order to be immediately appealable as a modification of an existing injunction under § 1292(a)(1), a litigant must show: (1) that the order has the practical effect of modifying an injunction (2) that the order might have a serious, perhaps irreparable consequence, and (3) that the order can be effectually challenged only by immediate appeal. *Gallatin Wildlife Ass'n v. U.S. Forest Serv.*, 743 F. App'x 753, 757 (9th Cir. 2018); *U.S. v. Sunset Ditch Co.*, 472 F. App'x 472, 474 (9th Cir. 2012); *see also Plata*, 329 F.3d at 1106.

To satisfy the requirement that an order have the practical effect of modifying an injunction, a litigant must demonstrate that the order does not “merely interpret” the injunction, but, rather, substantially alters the legal relations of the parties or substantially changes the terms of the injunction. *Nat'l Wildlife Federation v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 825 (9th Cir. 2018); *Cunningham v. David Special Commitment Ctr.*, 158 F.3d 1035, 1037 (9th Cir. 1998). A district court’s clarification of the scope or application of an injunction does not constitute a modification. *Aevoe Corp. v. AE Tech Co., Ltd.*, 727 F.3d 1375, 1381-83 (Fed. Cir. 2013) (applying Ninth Circuit law to determine that order interpreted rather than substantively modified an existing injunction); *see also Fisher v. Tucson Unified Sch. Dist.*, 588 F. App’x. 608, 610 (9th Cir. 2014) (finding district court’s orders did not constitute modification where orders clearly indicate that the court intended them to clarify provisions of prior order).

II. Stay Pending Appeal

A stay pending appeal is “an intrusion into the ordinary processes of administration and judicial review,” and “is not a matter of right, even if irreparable injury might otherwise result.” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations

omitted). “It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case.” *Id.* at 433 (internal quotations marks and citations omitted). Such judicial discretion is to be “guided by sound legal principles,” which the Supreme Court has set forth as four factors: (1) whether the stay applicant has made a strong showing of a likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Nken*, 556 U.S. at 434; *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). “The party requesting a stay bears the burden of showing that circumstances justify an exercise of that discretion.” *Nken*, 556 U.S. at 433-34.

The first two factors are “the most critical.” *Nken*, 556 U.S. at 434. The party seeking a stay “must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that a balance of hardships tips sharply in the petitioner’s favor.” *Leiva-Perez*, 640 F.3d at 970. “[T]hese standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified.” *Id.* (citation omitted). Defendants do not argue that it is more likely than not that they will succeed on the merits of their appeal. Dkt. 6 at 9. They argue instead that the appeal raises serious legal questions. *Id.* This triggers the second *Leiva-Perez* scenario, in which they must show that serious legal questions exist, irreparable harm is probable, *and* the balance of hardships tips sharply in their favor.

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ARGUMENT

I. This Court Does Not Have Jurisdiction Over Defendants' Interlocutory Appeal of the District Court's October 24 Order

This Court does not have jurisdiction to review the October 24 Order on interlocutory appeal because the Order is not, as Defendants contend, a modification of an existing preliminary injunction.⁴ For the October 24 Order to be appealable as a modification of an injunction, Defendants must show that the Order (1) has the practical effect of modifying the existing injunction; (2) might have a serious, perhaps irreparable consequence; and (3) can be effectually challenged only by immediate appeal. The October 24 Order does not satisfy any of these requirements, much less all three. While the October 24 Order clarified the presurgical aspect of the injunctive relief—in direct response to Defendants' request that the District Court do so—it did not substantially change the terms of the injunction or alter the legal relations of the parties. Further, in partially lifting the stay, this Court already found that Defendants will not be irreparably harmed by providing presurgical treatment, including hair removal, and this is the law of the case. Finally, Defendants could have challenged the October 24 Order through procedures in the District Court—indeed, the District Court explained how they could do so—and they chose not to do so in favor of this premature appeal.

A. The October 24 Order Did Not Modify the Injunction

The District Court issued its October 24 Order in response to Defendants' request, during the October 17, 2019 status conference, that the Court clarify the precise presurgical treatment they must provide Ms. Edmo under the Ninth Circuit's

⁴ Despite this Court's decision affirming the District Court's injunction as a permanent injunction and subsequent order partially lifting the stay of that injunction, Defendants have now improperly styled their appeal and emergency motion to stay as an appeal of a "preliminary injunction" order.

order partially lifting the stay. This clarification did not substantially change the terms of the original injunction or substantially alter the legal relations of the parties.

This Court’s affirmation of the injunction specifically recognized that it encompasses “‘adequate medical care’ that is ‘reasonably necessary’ to accomplish [gender confirmation surgery].” 19-35017 Dkt. 96-1 at 78. In partially lifting the stay “so that Plaintiff may receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery,”⁵ this Court further confirmed that such treatment falls within the underlying injunction. 19-35017 Dkt. 104 at 2. The District Court’s October 24 Order simply effectuated this Court’s partial lifting of the stay. It did not substantially change the terms of the injunction, but, rather, clarified the presurgical treatment reasonably necessary to provide Plaintiff with gender confirmation surgery, in response to Defendants’ request. *See Fisher*, 588 F. App’x. at 610; *Aevoe Corp.*, 727 F.3d at 1381-83; *see also* D.Ct. Dkt. 251 at 7 ([T]he Court questions whether the appeal of the October 24, 2019 Order can fairly be characterized by the Defendants or should be treated by the Ninth Circuit as a ‘joint preliminary injunction’ appeal. Rather, it appears to be a garden-variety interlocutory appeal of a non-final order.”).⁶

B. Defendants Will Not Suffer Legally Cognizable Harm from Providing Presurgical Treatment to Ms. Edmo

Defendants also cannot establish that the October 24 Order meets the second criterion to be immediately appealable as a modified injunction: “that the order has a serious, perhaps irreparable consequence.” *See Gallatin Wildlife Ass’n v. United*

⁵ As this Court also recognized, because the presurgical requirements are distinct from the surgery itself, partial lifting of the stay to allow for provision of such non-surgical treatment does not moot ongoing appellate review of Defendants’ original appeal. *See id.*

⁶ Defendants do not argue that the October 24 Order substantially alters the legal relations of the parties. Nor could they, given that the District Court fully adjudicated the merits of the claim for injunctive relief and their pending petition for rehearing en banc is not mooted.

States Forest Serv., 743 F. App'x. 753, 757 (9th Cir. 2018) (dismissing appeal where “[Appellant] has not demonstrated that ‘serious’ or ‘irreparable consequences’” would result); *United States v. Gila Valley Irrigation Dist.*, 345 F. App'x 281, 283 (9th Cir. 2009) (dismissing appeal for lack of jurisdiction under § 1292(a)(1) based solely on party’s failure to show “that it would experience serious and irreparable harm from the Order”).

This Court has already determined that requiring Defendants to provide presurgical treatment to Ms. Edmo, including hair removal, does not cause legally cognizable harm. 19-35017 Dkt. 104. In their instant emergency motion to stay, Defendants assert the same bases for purported irreparable consequences resulting from provision of presurgical treatment as they made when they opposed Ms. Edmo’s motion to partially lift the stay: that requiring presurgical treatment will violate Defendants’ “due process rights,” “irreparably destroy[]” their “constitutional right to appeal those treatments,” and “diminish” Defendants’ pending appeal of the injunction. *Compare* Dkt. 6 at 10-11 *and* 19-35017 Dkt. 103-1 at 7-8; *see also* D.Ct. Dkt. 244 at 7 (“Defendants’ motion involves, as its subject, the same core issue presented to the circuit—the performance of presurgical treatments pending conclusion of appellate review.”); *id.* at 9 (“The Ninth Circuit made this ruling [partially lifting the stay] after considering arguments substantially similar to the arguments Defendants make in the present motion.”). Defendants also repeat their same arguments that Plaintiff has not sufficiently established which vaginoplasty surgical technique is constitutionally required, has not established that genital hair removal is necessary, and has not shown that Ms. Edmo’s need for surgery and presurgical treatment is “urgent or emergent.” *Compare* Dkt. 6 at 11-13 *and* 19-35017 Dkt. 103-1 at 9-11. This Court already decisively rejected Defendants’ arguments, finding that “Defendants, as the proponents of the stay, have not shown that ‘irreparable harm is probable’ with respect to the limited nature of Plaintiff’s

request.” 19-35017 Dkt. 104 at 2. This determination is the law of the case and may not be revisited. *See 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 quotations and citations omitted)); D.Ct. Dkt. 244 at 15.

C. Defendants Had Other Means to Challenge the October 24 Order

Defendants cannot show that their only ability to challenge the October 24 Order was through immediate appeal. Defendants’ claim that the District Court afforded them no other options and “deprived Defendants of due process,” Dkt. 6 at 10-11, blatantly misrepresents the record. Defendants assert, for instance, that the District Court told the parties it would generate the October 24 Order based on “whatever Plaintiff requested” Dkt. 6 at 6, “did not allow Defendants to file any response or present any evidence,” *id.*, “improperly invited only Ms. Edmo to submit evidence regarding the required pre-operative procedures,” *id.* at 10, and “did not give Defendants an opportunity to respond or object.” *Id.* As the District Court stated in denying Defendants’ motion to stay, “[t]his characterization is completely inaccurate and unfounded.” D.Ct. Dkt. 244 at 10.

The District Court issued its October 24 Order in direct response to Defendants’ demand that the District Court clarify what presurgical steps Defendants must complete pursuant to this partial lifting of the stay given their alleged “confusion” about that issue. Dkt. 249 at 23; 10/17/19 Tr. at 10:2-11:16; 13:1-17. Despite Defendants’ failure to file any motion for clarification, the Court agreed to issue such an order and directed Plaintiff to provide a submission setting forth Dr. Stiller’s—Defendants’ hand-picked surgeon—presurgical requirements. D.Ct. Dkt. 244 at 5; 10/17/19 Tr. at 13:18-14:2. The Court specifically told

Defendants that if they were still “confused” after it issued an order implementing Dr. Stiller’s requirements, Defendants could move for clarification or modification. 10/17/19 Tr. at 15:15-16:17; 16:25-17:7; 20:22-21:4. Defendants did not at any time object to this procedure as set forth by the Court. *See, e.g., id.* at 16:25-19:16; 20:8-23:9. After the Court issued its October 24 Order, rather than filing a motion in the District Court for clarification or modification, Defendants filed the instant appeal.⁷ Defendants’ *choice* to forego further motion practice in the District Court does not establish that their only ability to challenge the October 24 Order was through immediate appeal.

Not only did Defendants have the opportunity to challenge the October 24 Order in the District Court, but well-established law *required* them to do so before appealing. Parties are not permitted to “lay in wait” regarding procedural or legal issues in the district court, raising them for the first time at the appellate level. Rather, a party must first challenge the procedure used by a district court or a district court’s interlocutory order before appealing—and if a party does not, they have waived their ability to appeal. *See, e.g., Tibble v. Edison, Int’l*, 843 F.3d 1187, 1193 (9th Cir. 2016) (“[A]n issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it.”) (quoting *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010)). This rule is “essential” so that parties have the opportunity to present evidence and legal arguments before the district court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004) (“This rule serves to ensure that legal arguments are considered with the benefit of a fully developed factual record, offers appellate courts the benefit of the district court’s

⁷ In so doing, Defendants also ignored this Court’s specific direction that “[t]o the extent there are issues arising from a surgical evaluation, the State can raise those issues with the district court.” 19-35017 Dkt. 96-1 at 79.

prior analysis, and prevents parties from sandbagging their opponents with new arguments on appeal.”). Further, this principle affords the district court the opportunity to fully consider the issues before it and correct any errors.⁸ *See, e.g., In re Mercury*, 618 F.3d at 992. The appellate court “will only excuse a failure to comply with th[e waiver] rule when necessary to avoid a manifest injustice.” *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006) (quoting *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999)).

Here, Defendants never objected to the District Court’s clearly articulated procedure for issuing its order clarifying presurgical requirements—an order requested by Defendants. Nor did Defendants file any motion for clarification, modification, or reconsideration of the District Court’s October 24, 2019 Order, as the District Court specifically invited them to do. Defendants’ failure to object to the District Court’s procedure for the October 24 Order at any time prior to appeal waived any such objections. *See* 19-35017 Dkt. 96-1 at 81 (citing with approval *Reilly v. United States*, 863 F.2d 149, 160 (1st Cir. 1988) (“When 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.”)).

⁸ Indeed, Defendants’ emergency motion complains that the District Court “is now seeking to address, post-hoc, some of Defendants’ issues raised in this appeal with an evidentiary hearing...The district court should not be allowed to substantially alter the record, which would moot some of Defendants’ arguments on appeal.” Dkt. 6 at 2-3; *id.* at 16. As the cases cited establish, Defendants have the law exactly backward: if Defendants contend the District Court erred in its interlocutory order, the District Court should have an opportunity to do exactly what Defendants claim it is doing—address their objections. Defendants jumped the gun on their appeal and it must be dismissed precisely to avoid the kind of piecemeal and premature review disallowed under federal law.

II. Defendants Cannot Satisfy the Requirements for a Stay of the October 24, 2019 Order

Far from being able to show a substantial case on the merits, Defendants have no case on the merits of their appeal. First, as set forth *supra*, this Court does not have jurisdiction to review the October 24 Order. Second, even if the October 24 Order were appealable, Defendants cannot demonstrate a stay is warranted. Defendants' appeal does not present any serious legal questions. *Leiva-Perez*, 640 F.3d at 970; *Lair*, 697 F.3d at 1204. Defendants argue that (1) the District Court lacked jurisdiction to issue the October 24 Order because it “materially altered a core question already on appeal;” (2) the Order violates Defendants’ “due process rights;” and (3) the Order is overbroad in violation of the Prison Litigation Reform Act (“PLRA”). As the District Court observed, this Court already “consider[ed] arguments substantially similar to the arguments Defendants make in the present motion” when it granted Plaintiff’s motion partially lifting the stay. D.Ct. Dkt. 244 at 9. This Court’s ruling is the law of the case and this Court should not permit Defendants to re-litigate issues it already adjudicated.

A. The District Court Had Jurisdiction To Enter the October 24 Order

This Court’s order partially lifting the stay conclusively established the District Court’s jurisdiction to enter its October 24 Order. The Ninth Circuit “partially lift[ed] the stay of the district court’s order requiring Defendants-Appellants to take all actions reasonably necessary to provide Plaintiff with gender confirmation surgery” and directed that Plaintiff must receive “all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery.” 19-35017 Dkt. 104 at 2. This Court thus made active the December 13, 2018 injunction with respect to all presurgical treatment, which, as the Court recognized, is distinct from surgery itself and therefore does not moot Defendants’ pending arguments on appeal. By partially lifting the stay of the District Court’s order, “the Court of Appeals necessarily concluded that the district court

retained jurisdiction to proceed despite the pendency of the interlocutory appeals, [and] that decision is the law of this case.” *United States v. Cohen*, 2009 WL 6313793, at *23 (D. Ariz. Oct. 6, 2009).

Beyond the law of the case doctrine, the District Court had inherent power to enter the October 24 Order pursuant to Federal Rule of Civil Procedure 62(d), which expressly permits a district court to modify an injunction pending appeal “as it considers proper for the security of the rights of the adverse party.” *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001); *Natural Res. Def. Council Inc. v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001); D.Ct. Dkt. 244 at 9-10; D.Ct. Dkt. 251 at 5. Rule 62(d) “authorizes a district court to continue supervising compliance with the injunction.” *A&M Records v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002). The District Court issued its October 24 Order following this Court’s partial lifting of the stay in response to Defendants’ request for clarification from the District Court about their presurgical treatment obligations. The October 24 Order did not change the status quo; rather, it enumerated Defendants’ specific obligations resulting from the December 13, 2018 order granting injunctive relief.

Further, the October 24 Order did not materially change any issues already on appeal in Defendants’ pending petition for rehearing en banc. Defendants argue that it narrowed the relief to a penile-inversion vaginoplasty, including electrolysis, which “undercuts one of Defendants’ primary arguments [on appeal]—that the injunction is overbroad under the PLRA.” Dkt. 6 at 10. This Court already rejected this argument, holding that Defendants waived it as grounds for appellate review. 19-35017 Dkt. 96-1 at 79, n.23. (“The State . . . contends for the first time in its reply in support of its motion to dismiss that the order is overbroad because it does not specify the type of GCS ordered. Because the State did not present these arguments in its opening brief, we do not consider them.”). Because the definition of gender confirmation surgery is not an issue on appeal, Defendants fail to show how the

October 24 Order even impacts, much less “materially alter[s],” any issue on appeal.⁹ See *Mayweathers*, 258 F.3d at 935. Moreover, this Court has already considered and rejected Defendants’ arguments against “mov[ing] the ball forward” on surgery, Dkt. 6 at 13, by requiring Defendants to provide presurgical medical procedures including hair removal. Case 19-35017 Dkt. 104 at 2.

B. The October 24 Order Does Not Violate Defendants’ Purported “Due Process Rights”

Defendants argue that the October 24 Order deprived them of their “due process rights,” that require “a person deprived of property to be given an opportunity to be heard at a meaningful time and in a meaningful manner.” Dkt. 6 a 10. This argument is entirely specious. Defendants have not identified any such “property right” at issue in this case. The lone case they cite, *Buckingham v. Sec’y of the USDA*, 603 F.3d 1073 (9th Cir. 2010), involves a dispute between the government and a private landowner over a grazing permit, and bears no factual or legal similarity to this case. The October 24 Order does not deprive Defendants of any property rights, nor did the District Court deny Defendants “due process” in issuing the clarification order Defendants specifically requested. As described *supra*,

⁹ Even if Defendants had timely objected that the exact surgical technique and presurgical treatment of hair removal were not established during the trial or by the District Court’s injunction, such argument would have failed. Plaintiff presented evidence in support of her motion for an injunction regarding the dominant and customary use of the penile inversion surgery technique for vaginoplasty, which Defendants did not dispute. See, e.g., 19-35017 Dkt. 12-5 at ER 643-644 & Dkt. 12-16 at ER 3595. Further, until Ms. Edmo was actually referred to a qualified surgeon and had a presurgical consult—which Defendants refused to do prior to the District Court’s entry of the injunction—the determination could not be made as to which surgical technique for vaginoplasty is most medically appropriate for her. See *Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (“Although Rosati lacks a medical opinion recommending SRS, she plausibly alleges that this is because the state has failed to provide her access to a physician competent to evaluate her.”); *De’lonta v. Johnson*, 708 F.3d 520, 527 n.4 (4th Cir. 2013) (“Appellees and the district court take pains to point out that, absent a doctor’s recommendation, De’lonta cannot show a demonstrable need for sex reassignment surgery. However, we struggle to discern how De’lonta could have possibly satisfied that condition when, as she alleges, Appellees have never allowed her to be evaluated by a GID specialist in the first place.”).

Defendants did not state any objection to the procedures the District Court used, nor did they request an opportunity to respond to Plaintiff's filing, which included the very same presurgical requirements Defendants themselves documented in a letter to counsel. D.Ct. Dkt. 224-1 at Exh. 2.

C. The October 24 Order Is Not Overbroad

This Court has also already repeatedly rejected Defendants' argument that the October 24 Order is overbroad under the PLRA and contrary to Eighth Amendment precedent. As stated previously, this Court already held that Defendants waived any argument "that the order is overbroad because it does not specify the type of GCS ordered." 19-35017 Dkt. 96-1 at 79, n.23. Similarly, this Court already considered Defendants' argument—made in their opposition to Plaintiff's motion to partially lift the stay—that Plaintiff has not sufficiently established which surgical technique for vaginoplasty and which presurgical treatment is required under the Eighth Amendment. 19-35017 Dkt. 103-1 at 9-10. This Court considered that argument and rejected it, granting Plaintiff's motion to partially lift the stay. This is the law of the case.

Further, the April 12, 2019 consultation between Ms. Edmo and Dr. Stiller that this Court exempted from the stay, was in part to determine which surgical technique and presurgical treatments were necessary and appropriate for Ms. Edmo. *See* 19-35017 Dkt. 22 at 6. Following that appointment, Dr. Stiller sent a letter setting forth genital hair removal as a presurgical requirement for Ms. Edmo, and this Court partially lifted the stay so such presurgical treatment would go forward. The District Court relied on a declaration from Dr. Stiller—Defendants' chosen surgeon—setting forth his presurgical requirements in issuing the October 24 Order. All of these procedures comport with the District Court's underlying injunction and this Court's affirmation of that injunction requiring Defendants to provide Ms. Edmo all medical treatment reasonably necessary for gender confirmation surgery.

Finally, as the District Court found in denying Defendants' motion for a stay, their contention that the October 24 Order violates the PLRA by requiring them to "doctor shop" is "circular and nonsensical." D.Ct. Dkt. 244 at 14. "If the medical providers at the prison will not, or cannot provide a referral necessary for an inmate to obtain medically necessary treatment, and the denial of such treatment deprives the inmate of rights secured by the Eighth Amendment, prison officials have an affirmative duty to refer the inmate to medical professionals who will, and can provide the necessary referral letters." *Id.* at 14-15; *see also Rosati*, 791 F.3d at 1040; *De'lonta*, 708 F.3d at 527 n.4. And, again, this Court has already held that Defendants waived the argument that Plaintiff did not secure the necessary referral letters for gender confirmation surgery prior to issuance of the injunction. 19-35017 Dkt. 96-1 at 79, n.23.

D. Defendants Cannot Establish that The Balance of Hardships Tips Sharply in Their Favor

Given that Defendants have not established any likelihood of success on the merits or serious legal questions raised by their appeal, this Court need not reach the other stay factors. However, the Court has further basis to deny the stay because Defendants cannot show that the balance of hardships "tips sharply" in their favor, as they must, given that they seek to satisfy the first stay prong by claiming that the case raises "serious legal issues." *Leiva-Perez*, 640 F.3d at 964. As explained previously, this precise issue was already decided by this Court in granting Plaintiff's motion to partially lift the stay and is thus the law of the case: "Defendants, as the proponents of the stay, have not shown that 'irreparable harm is probable' with respect to the limited nature of Plaintiff's request and that they have both 'a substantial case on the merits and that the balance of hardships tips sharply' in their favor." 19-35017 Dkt. 104 at 2 (quoting *Leiva-Perez*, 640 F.3d at 970).

Further, this Court has also already found that Ms. Edmo experiences ongoing and severe irreparable harm as a result of Defendants' denial of adequate medical care. 19-35017 Dkt. 96-1 at 73; *see also* D.Ct. Dkt. 244 at 16. On the other hand, Defendants' only purported harm is that, if forced to provide Ms. Edmo presurgical treatment, their instant appeal of the Court's non-appealable October 24 Order will be mooted. If this were sufficient to satisfy the balance of hardships prong for a stay of injunctive relief, then by definition, every injunctive order would qualify for a stay. As this Court has already determined, Defendants are not harmed by providing Ms. Edmo presurgical treatment for her serious medical condition.

E. The Public Interest Disfavors a Stay

Defendants argue that "the public interest favors a stay because the [October 24 Order] is being applied against a state government," and that federal courts should "defer to a state's political branches in identifying and protecting the public interest." Dkt. 6 at 19. Defendants are sorely mistaken in their assertion that it is in the public interest for Idaho's executive branch to avoid compliance with federal court orders aimed at ending constitutional violations by state actors. Rather, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Further, as the District Court held in its December 13, 2018 Order, and again when it denied Defendants' motion to stay its October 24 Order, "the public has a strong interest in the provision of constitutionally adequate health care to prisoners." D.Ct. Dkt. 244 at 17 (quoting *McNearney v. Wash. Dep't of Corr.*, 2012 WL 3545267, at *16 (W.D. Wash. June 15, 2012)).

Defendants' suggestion that state political actors are above federal court orders flies in the face of the federalism principles underlying this country's entire system of government. As established by the Supreme Court, during any period when an injunction is not stayed, a party must comply promptly with the order, even

pending appeal. *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *see also GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 386 (1980) (“[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.”). “The rule in *Maness* that parties must comply whether or not they believe a court’s order is incorrect and must do so during any period that they may be contesting its validity is applicable to public and private parties alike. Specifically the rule is applicable to [the] Governor [], as well as the lowliest citizen.” *Coleman v. Brown*, 922 F. Supp. 2d 1004, 1054 (E.D. Cal. 2013) (three-judge panel of the district court). As the District Court found in denying Defendants’ motion to stay the October 24 Order, “the public has an interest in orders of the courts of the United States being carried out.” D.Ct. Dkt. 244 at 17.

CONCLUSION

For the reasons stated above, this Court should dismiss Defendants’ appeal for lack of jurisdiction and deny their emergency motion for a stay as moot.

DATED: November 18, 2019

Respectfully submitted,

FERGUSON DURHAM, PLLC
HADSELL STORMER RENICK & DAI LLP
NATIONAL CENTER FOR LESBIAN RIGHTS
RIFKIN LAW OFFICE

By: /s/ Lori Rifkin
Lori Rifkin

Attorneys for Plaintiff-Appellee

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ADREE EDMO,

Plaintiff,

v.

IDAHO DEPARTMENT OF
CORRECTION; HENRY ATENCIO;
JEFF ZMUDA; HOWARD KEITH
YORDY; CORIZON, INC.; SCOTT
ELIASON; MURRAY YOUNG;
RICHARD CRAIG; RONA
SIEGERT; CATHERINE
WHINNERY; AND DOES 1-15,

Defendants.

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

**ORDER DENYING
DEFENDANTS' EXPEDITED
MOTION TO STAY**

INTRODUCTION

Pending before the Court is Defendants' expedited motion to stay this Court's order of October 24, 2019, pending appeal to the United States Court of

Appeals for the Ninth Circuit. (Expedited Motion to Stay, Dkt. 228; Notice of Appeal, Dkt. 227.) The Court’s order requires Defendants to provide all pre-surgical treatments and related corollary appointments or consultations necessary for the Plaintiff to undergo gender confirmation surgery. (*See* Dkt. 225 (“Presurgical Order”).)

After careful consideration of the motion, the parties’ arguments, the procedural and factual record, and relevant law, the Court will deny the expedited motion to stay. However, the Court will defer setting a deadline for Plaintiff to receive her first hair removal treatment to allow the Court to hold a limited hearing for purposes outlined below.

BACKGROUND

On December 13, 2018, the Court issued a decision concluding that by refusing to provide Plaintiff gender confirmation surgery to treat her severe gender dysphoria, Defendants violated the Eighth Amendment to the Constitution of the United States of America. The Court granted Plaintiff’s motion for injunctive relief, and ordered 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. (Dkt. 149 at 45 (“2018 Order”). Defendants appealed the decision, and moved the Court to stay the injunction pending resolution of the appeal. (Dkt. 154; Dkt

156.) Although the Court denied the motion to stay, a Ninth Circuit motions panel granted a stay pending appeal. (Dkt. 182.) Later, Plaintiff filed a motion to modify the appellate stay to exempt a previously scheduled presurgical appointment with the surgeon chosen by Defendants to perform the gender confirmation surgery, Dr. Geoffrey Stiller. The panel granted the motion, and the presurgical appointment took place on April 12, 2019. (Dkt. 187.)

Dr. Stiller’s medical assessment record from the presurgical appointment included notes that are pertinent to Defendants’ motion. (Exhibit A to Defendants’ Memorandum in Support of the Expedited Motion to Stay, Dkt. 228-2 at 12.) Dr. Stiller noted that he discussed the pros and cons of two gender confirmation surgery techniques—penile inversion vaginoplasty and colovaginoplasty. *Id.* The notes include that Dr. Stiller discussed with Plaintiff the fact that hair removal was “needed” for the penile inversion technique. *Id.* Dr. Stiller noted also that, should Plaintiff proceed with the colovaginoplasty technique, “the first stage can be completed with hair removal” followed by the surgery six (6) months later. *Id.*

On August 23, 2019, the Ninth Circuit affirmed the 2018 Order, holding Defendants violated Plaintiff’s Eighth Amendment right to adequate and necessary medical treatment of her severe gender dysphoria by denying gender confirmation surgery. (Dkt. 209.) Defendants filed a petition for rehearing *en*

banc, which as of the date of this order is pending.

Subsequently, Plaintiff filed a motion requesting the Ninth Circuit partially lift its stay of the 2018 Order to enable her to receive all necessary presurgical treatments. In support of the motion, Plaintiff submitted a letter from Dr. Stiller wherein he provided an estimation that completion of all presurgical treatments and prerequisites would take at least six months. The Ninth Circuit granted Plaintiff's motion for partial lifting of the stay. (Dkt. 220.) The court found that, as the proponents of the stay, Defendants failed to show irreparable harm was probable "with respect to the limited nature of Plaintiff's request." *Id.* at 2. The court found also that Defendants failed to meet their burden to show a substantial case on the merits or that the balance of the hardships tipped sharply in their favor. *Id.* at 2. Accordingly, the Ninth Circuit partially lifted the appellate stay of the 2018 injunction "so that Plaintiff may receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery." *Id.*

In light of the partial lifting, the Court held a status conference with counsel for the parties. (Dkt. 222.) During the conference, counsel for Defendant Corizon suggested, for the first time, that his client was confused or uncertain regarding the specific presurgical requirements and the type of gender confirmation surgery required by the 2018 Order and the Ninth Circuit's August

2019 decision. Given Defendants' contentions, the Court ordered Plaintiff to file a submission detailing the presurgical requirements indicated by the performing surgeon, Dr. Stiller.

Plaintiff filed the submission on October 22, 2019. (Dkt. 224.)

According to the submission, three presurgical requirements remain outstanding: (1) a physician referral letter, (2) laser treatment or electrolysis of the surgical area, and (3) documentation of approval for payment. *Id.* With the presurgical requirements clarified, the Court issued the Presurgical Order, which requires Defendants to take steps to ensure the three remaining presurgical requirements are completed in a timely manner. To this end, the Court required Defendants to schedule and ensure that Plaintiff's first hair removal treatment take place on or before November 8, 2019.

The Court held a second status conference with Counsel for the parties on October 30, 2019. (Dkt. 230.) The purpose of the status conference was to obtain an update from Defendants on their progress in complying with the Presurgical Order. Counsel for Defendants noted Plaintiff's first hair removal treatment had been scheduled for November 7, 2019. Defendants filed the present motion and notice of appeal on October 31, 2019. (Dkt. 227, 228.) Plaintiff filed a response to the motion November 5, 2019. (Dkt. 235.) The following day, the Court vacated the November 8, 2019 hair removal treatment

deadline to allow careful and full consideration of Defendants' expedited motion to stay. (Dkt. 239.) The Court will now discuss the merits of the motion.

STANDARD OF LAW

Federal Rule of Civil Procedure 62(d) provides that, when “an appeal is pending from an interlocutory order or final judgment that grants ... an injunction,” a “court may suspend, modify, or restore an injunction on terms that secure the opposing party’s rights.” Pertinent to the present motion, a court may stay, i.e. “hold an order in abeyance pending [its] review.” *Nken v. Holder*, 556 U.S. 418, 427 (2009).

The traditional standard used to determine whether a stay of an order should issue pending appeal of the order requires a court to consider four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* (internal citations omitted). The party requesting the stay bears the burden of showing it is warranted under the circumstances. *Id.* at 433-34. The first two factors are considered “the most critical” to a court’s determination. *Id.* at 434. Ultimately, however, a stay is “an exercise of judicial discretion” where the propriety “of its issue is dependent upon the circumstances of the particular

case.” *Id.*

ANALYSIS

The recent procedural history of this case bears on the Court’s analysis of the propriety of a stay of the Presurgical Order. Defendants’ motion comes on the heels of a decision from the Ninth Circuit to partially lift the appellate court stay of the 2018 Order. In issuing the order, the Ninth Circuit found “Defendants, as the proponents of the stay,” did not show “that irreparable harm is probable with respect to the limited nature of Plaintiff’s request” and also did not show “that they have both a substantial case on the merits and the balance of hardships tips sharply in their favor.” (Dkt. 220 at 2 (citing *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (per curiam) (internal citations omitted)).

Defendants now ask this Court to reconsider the factors and arguments fully considered by the Ninth Circuit. Furthermore, Defendants’ motion involves, as its subject, the same core issue presented to the circuit—the performance of presurgical treatments pending conclusion of appellate review. Defendants’ motion viewed in the best light invites the Court to engage in a circular exercise; in the worst light it suggests an attempt to relitigate decided issues and to delay provision of the presurgical treatments ordered by the Ninth Circuit.

While gravely concerned that the Defendants' filings are for the purpose of delay and do not reflect any real misunderstanding of the Court's prior decision, the Court will not preclude the Defendants from presenting, on an expedited basis, their belated argument that other gender confirmation surgery techniques would cure the constitutional violation at issue in this case. The Court will discuss that issue in the context of the factors it must consider when deciding whether to issue a stay pending appeal.

1. Defendants have not shown a strong likelihood of success on appeal.

Defendants argue they have a strong likelihood of success on appeal of Presurgical Order for three reasons: (1) the Court lacked jurisdiction to issue the order; (2) the Court "materially modified" the 2018 injunction without affording Defendants an opportunity to be heard; and (3) the order is overbroad under the PLRA and contrary to the Eighth Amendment.

In response, Plaintiff asserts the Presurgical Order is not appealable because it is not a modification of the 2018 injunction. In the alternative, Plaintiff argues that even if the order did modify the injunction, Defendants do not have a case for relief because the appeal does not present any serious legal questions for the Ninth Circuit's interlocutory determination.

A. The Court had jurisdiction to issue the Presurgical Order.

Defendants first contend this Court did not have jurisdiction to issue the

Presurgical Order because the order itself materially modified the December 2018 injunction. In support of this contention, Defendants assert the Presurgical Order affects two core questions within their original appeal. The first, whether the injunction was overbroad under the PLRA because the Court failed to define the terms “gender confirmation surgery” and “adequate medical care.” (Dkt. 228-1 at 4.) The second, whether the injunction was overbroad, premature, or intrusive “given the lack of evidence” that Plaintiff had the requisite letter of referral from mental health practitioners to be a candidate for gender confirmation surgery.

The Court finds Defendants’ argument that it lacked jurisdiction to issue the Presurgical Order completely unpersuasive. First, the Ninth Circuit partially lifted the stay of the Court’s 2018 Order and injunction. The express reason for partial lifting of the stay was to allow Plaintiff to receive all necessary presurgical treatments, consultations, and corollary appointments. The Ninth Circuit made this ruling after considering arguments substantially similar to the arguments Defendants make in the present motion. Importantly, Federal Rule of Civil Procedure 62(d) permits the Court discretion to “modify, restore, or grant an injunction” on “terms that secure” the rights of the party opposing appeal of an interlocutory order or final judgment regarding an injunction. Fed. R. Civ. P. 62(d). Therefore, the Court both had jurisdiction and the authority to issue the

Presurgical Order.

B. Defendants had ample opportunity to be heard.

Defendants argue that the Presurgical Order violated their due process rights because the Court invited only Plaintiff to submit evidence regarding prerequisites to surgery. This characterization is completely inaccurate and unfounded.

Defendants have been on notice since at least March of 2019 regarding the presurgical requirements for a gender confirmation surgery. (March 1, 2019 Letter, Dkt. 224-1 at 16-17, Ex. 2.) Defense counsel detailed the following in a March 1, 2019 letter to Plaintiff's counsel:

Corizon advises that Dr. Stiller's typical requirements prior to performing GRS include:

- A referral from treating physician
- 2 mental health care provider referrals
- Hormone treatment and counseling for at least 1 year
- Laser treatment or electrolysis for lower region
- Initial consult
- Approval for payment

Id. at 17.

Yet, Defendants assert in their motion that colovaginoplasty does not require hair removal. Defendants provide scant evidence¹ in support of this

¹ The only evidence supplied to support Defendants' contention that hair removal is not medically necessary as a part of the colovagioplasty gender confirmation surgery technique, is subject to a hearsay-based motion to strike statements contained in the Declaration of April Dawson, regional Medical Director for Corizon. (*See* Dkt. 228-2 at 4-5.)

assertion. However, in addition to the letter cited immediately above, there is other evidence in the record that raises questions about Defendants' contention. For example, Defendants include as Exhibit A to their memorandum in support of the motion for expedited stay, an assessment report completed by Dr. Stiller after the April 2019 presurgical consultation with Plaintiff. (Dkt. 228-2 at 12.) Dr. Stiller's notes state that the first step to the colovaginoplasty technique would be hair removal treatments starting six months prior to surgery. *Id.*

Additionally, the presurgical requirements for gender confirmation surgery were presented to the Ninth Circuit when Plaintiff filed her motion for partial lifting of the stay. (*See* Plaintiff-Appellant's Motion for Partial Lifting of Stay, USCA Case No. 19-35019.) Defendants submitted a response brief to the motion that called into question the provision of the hair removal treatments. After consideration of Defendants' arguments against partially lifting the stay, the Ninth Circuit nevertheless granted Plaintiff's motion. The Ninth Circuit determined that Defendants had failed to carry their burden to show that irreparable harm is probable if the presurgical treatments are completed – including hair removal. That is the law of the case. *See 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 quotations and citations omitted)).

Despite this background, as detailed above, during the telephonic conference with the parties on October 17, 2019, Defense counsel indicated their clients do not have proper guidance either from this Court or the Ninth Circuit as to what presurgical requirements are required for gender confirmation surgery. Provided Defendants' contention, the Court directed Plaintiff's counsel to file a submission detailing the presurgical requirements that remain to be completed according to the performing surgeon, Dr. Stiller. Notably, these were essentially the same presurgical requirements Defense counsel detailed in the letter of March 1, 2019.

Finally, during the telephonic status conference, the Court stated that it intended to give full effect to the Ninth Circuit's order partially lifting the stay, but also acknowledged Defendants' right to file a motion raising argument to challenge the presurgical requirements—which is exactly what Defendants have done. The Court is presently considering Defendants' arguments in context. Thus, given Defendants' prior opportunities to raise the issue regarding the necessity of hair removal prior to the available gender confirmation surgery techniques, and the Court's consideration of the contention within this order, the assertion that they have not had the opportunity to be heard on this issue is completely unsupported.

C. Notable PLRA and Eighth Amendment considerations.

Finally, Defendants assert they are likely to prevail on the merits of their appeal of the Presurgical Order because it is overbroad under the PLRA and contrary to the Eighth Amendment. To this end, Defendants argue the Eighth Amendment does not provide a right to a specific treatment or to the best possible care. Relatedly, Defendants note the PLRA mandates that Defendants correct a constitutional violation and that any correction must be made by the least intrusive means necessary. *See* 18 U.S.C. § 3626(a)(1)(A).

It is true that differences in judgment between inmate and prison medical personnel regarding appropriate medical treatment are not enough to establish a deliberate indifference claim under the Eighth Amendment. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.1989). However, when there are choices between alternative treatments, a prisoner can successfully challenge a chosen treatment if there is evidence it is “medically unacceptable under the circumstances” and is chosen “in conscious disregard of an excessive risk” to the inmate’s health. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004) (alternation and quotations omitted). However, those principles must be applied in the context of the Court’s determination that the Defendants were deliberately indifferent to Ms. Edmo’s Eighth Amendment rights by failing to provide her with gender confirmation surgery which would treat her gender dysphoria. Simply put, the

surgery provided must address Ms. Edmo's medical condition. Nothing less will satisfy the requirements of the Eighth Amendment.

Defendants claim there are three gender confirmation treatments that may cure the constitutional violation in this case: (1) penile inversion vaginoplasty, (2) colovaginoplasty, or (3) a zero-depth genital removal procedure. Defendants argue that “[t]hese are very different and distinct surgeries, and there is ... no evidence in the record to establish which is medically necessary or required to reverse a constitutional violation.” (Dkt. 228-1 at 7.)

The Court is frustrated that this issue was not raised during the evidentiary hearing in this matter conducted a year ago, and has not been presented to the Court until, almost literally, the eleventh hour. Nevertheless, the Court will provide the Defendants with the opportunity to raise the issue, but on a very expedited basis.

Additionally, Defendants assert that the Presurgical Order modified the injunction in violation of the PLRA by requiring Defendants to “doctor shop” for physicians to provide the referrals necessary for Ms. Edmo to obtain gender confirmation surgery. They assert that the order exceeds also the bounds of an inmate's constitutional protections under the Eighth Amendment because an inmate, Ms. Edmo in this case, is not entitled to choose her medical provider.

This argument is circular and nonsensical. If the medical providers at the

prison will not, or cannot provide a referral necessary for an inmate to obtain medically necessary treatment, and the denial of such treatment deprives the inmate of rights secured by the Eighth Amendment, prison officials have an affirmative duty to refer the inmate to medical professionals who will, and can provide the necessary referral letters. In this case, the Court has determined, and the Ninth Circuit has affirmed that, denial of gender confirmation surgery violates Plaintiff's Eighth Amendment right to receive medically necessary treatment. It necessarily follows that to cure the violation, Defendants must refer Ms. Edmo to physicians who will provide the requisite referral letters. Notably, Defendants have had full opportunity to raise and argue this issue to the Ninth Circuit.

2. Defendants have not met their burden to show irreparably injury absent a stay.

In granting Plaintiff's motion to partially lift the stay, the Ninth Circuit considered arguments from Defendants substantially similar, if not identical, to the arguments made in the present motion to stay. The Ninth Circuit's finding that Defendants' had not carried their burden to show "irreparable harm is probable" given "the limited nature of Plaintiff's request" is the law of the case. *See United States v. Alexander*, 106 F.3d 874, 876-77 (9th Cir. 1997).

3. The potential for harm to Plaintiff is ongoing, therefore a stay is disfavored.

Defendants contend Plaintiff does not need to receive hair removal treatment before undergoing a colovaginoplasty. (Dkt. 228-1 at 14.) However, as stated above, Defendants provide no persuasive medical authority for this assertion. Defendants also assert Plaintiff “has failed to present any evidence that hair removal surgery is necessary before undergoing the zero depth procedure.” This line of argument highlights the reason a limited evidentiary hearing on these issues is necessary. However, it is not only necessary to determine whether hair removal is medically necessary to the various surgical techniques, but which surgical technique or techniques will be gender confirming for Plaintiff.

Finally, Defendants assert “[t]here is little to no risk of self-castration” during a stay “because Ms. Edmo is committed to preserving her male anatomy for use in a future surgery.” (Dkt. 228-1 at 10, citing Evidentiary Hearing Transcript, October 11, 2018, Vol., 2, pp. 199-200, 218, ll. 2-14.) This argument is belied by the Court’s findings of fact and conclusions of law made in the 2018 Order after considering this same testimony within the context of all of the facts then before the Court. In that order the Court found that, “Ms. Edmo’s gender dysphoria results in clinically significant distress or impairment of functioning.” (Dkt. 149 at 42.) As of the date of this order, Ms. Edmo has not received adequate treatment for her gender dysphoria.

4. Public interest disfavors a stay.

As stated in the Court’s 2018 Order, “the public has a strong interest in the provision of constitutionally adequate health care to prisoners.” *McNearney v. Wash. Dep’t of Corr.*, 2012 WL 3545267, at *16 (W.D. Wash. 2012).

Furthermore, the public’s interest is served by ensuring that court orders and judgments are carried out. As has been stated throughout, the Ninth Circuit partially lifted the stay of this Court’s 2018 Order and injunction “so that Plaintiff may receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery.” (Dkt. 220 at 2.) The Court therefore finds the public has an interest in orders of the courts of the United States being carried out, even if some may disagree with the outcome.

CONCLUSION

Provided the foregoing, the Court will deny Defendants’ expedited motion to stay the Presurgical Order pending appeal. However, the Court has already extended the time to begin the pre-surgical procedures to provide the Defendants with an opportunity to present to the Court its argument that it should be allowed to provide Ms. Edmo with colovaginoplasty or zero-depth genital removal as a means of discharging their obligations under the Eighth Amendment. The Court will hold a limited hearing on the following discrete

issues:

1. Whether colovaginoplasty would treat Ms. Edmo's serious medical need for gender confirmation surgery.
2. Whether hair removal treatment, or any other pre-surgical treatment is necessary for a medically successful outcome of a colovaginoplasty surgery.
3. Whether a zero-depth genital removal procedure would treat Ms. Edmo's serious medical need for gender confirmation surgery.
4. Whether hair removal treatment is necessary for a medically successful outcome of the zero-depth procedure.

The Court will issue a ruling on the hearsay objections subject to Plaintiff's Motion to Strike (Dkt. 236) in advance of the hearing.

ORDER

IT IS ORDERED that

1. Defendants' Expedited Motion to Stay (Dkt. 228) is **DENIED**.
2. The deadline for scheduling and completion of the first hair removal appointment will remain vacated pending the Court's decision following the hearing described above.
3. Defendants may file a motion requesting that the Court consider alternative means of remedying their established violation of the Plaintiff's Eighth Amendment rights. Such a motion must be filed, along with any briefs, affidavits, or other evidentiary materials they wish to submit, by **November 15, 2019**. Plaintiffs shall respond with any briefs,

affidavits, or other evidentiary materials they wish to submit by
November 20, 2019. A hearing on Defendants' motion will be
conducted on **November 21, 2019, at 9:00 a.m.**



DATED: November 8, 2019

B. Lynn Winmill

B. Lynn Winmill
U.S. District Court Judge

No. 19-35917

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

**DECLARATION OF LORI RIFKIN IN SUPPORT OF
PLAINTIFF-APPELLEE'S MOTION TO DISMISS APPEAL FOR LACK
OF JURISDICTION AND OPPOSITION TO DEFENDNANTS-
APPELLANTS' EMERGENCY MOTION FOR STAY**

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EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ADREE EDMO, also known as)
Mason Edmo,)
) Case No. 1:17-cv-00151-BLW
Plaintiff,)
) Pocatello, Idaho
vs.) October 17, 2019
) 9:31 a.m.

IDAHO DEPARTMENT OF)
CORRECTION; HENRY ATENCIO,)
in his official capacity;)
JEFF ZMUDA, in his official)
capacity; HOWARD KEITH)
YORDY, in his official and)
individual capacities;)
CORIZON, INC.; SCOTT)
ELIASON; MURRY YOUNG;)
RICHARD CRAIG; RONA SEIGERT;))
CATHERINE WHINNERY; and DOES))
1-15,)
) Telephonic Status Conference
Defendants.)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE B. LYNN WINMILL
UNITED STATES DISTRICT COURT JUDGE

Recorded by: Jamie Bracke

Transcribed by: Katherine Eismann, CRR, RDR
katherine_eismann@id.uscourts.gov

Recorded by electronic sound recording, transcript produced by
mechanical stenography and computer.

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25

1 (Thursday, October 17, 2019, 9:31 a.m.)

2 --oOo--

3 P R O C E E D I N G S

4 THE COURT: Counsel, this is Judge Winmill. Maybe
5 just check, see who we have on the phone for the plaintiffs?

6 MS. RIFKIN: Lori Rifkin, Your Honor.

7 MR. DURHAM: Craig Durham, Your Honor.

8 MS. WHELAN: Amy Whelan, Your Honor.

9 MS. SHANBHAG: Shaleen Shanbhag, Your Honor.

10 THE COURT: All right. And then for IDOC?

11 MR. HALL: Brady Hall, Your Honor.

12 THE COURT: And for Corizon?

13 MR. HALL: Dylan Eaton, Your Honor.

14 THE COURT: And then Miss Henderson, you are on as
15 well?

16 THE LAW CLERK: Good morning. This is Ann Henderson.

17 THE COURT: Okay. I think that's everyone.

18 Is there anyone who I've -- who's failed to identify
19 themselves yet? If so, please do so now.

20 All right. And counsel, we're going to be on the
21 record for this, but we don't have a court reporter, so it's
22 doubly important that you identify yourself before you speak.

23 So, the reason I asked for this status conference is
24 because of the Court of Appeals' order on October 10th, 2019,
25 lifting the stay as to any presurgery steps or processes that

1 can be undertaken. So -- and this discussion here today is --
2 is apart from and separate from my consideration of the
3 defendant's motion to stay the underlying damage claims, which
4 we will take up in due course as the briefing is completed.
5 This deals only with the injunctive relief and the surgery, and
6 that's all I wanted to talk about.

7 What -- what -- consistent with the Court of Appeals'
8 order, it seems to me that the defendants need to proceed with
9 all deliberate speed towards -- with an eye towards the
10 surgery, which means all background steps that need to be taken
11 should be done as quickly as possible.

12 I've -- and Miss Henderson, actually, has put this
13 together, but it appears to me that by sometime in the first
14 week of November, it's at least possible that the issue of
15 rehearing en banc will have been resolved. I understand those
16 can always change, but that's at least our understanding.

17 There may, of course, be a petition for cert from the
18 Supreme Court. And if so, a separate stay could be obtained
19 for, I think, up to 90 days while the Supreme Court considers
20 the petition. But I can't control either -- you know, and it's
21 possible, of course, that it will be reheard en banc.

22 I can't control that. I can't control whether the
23 defendants file a petition for cert, and I can't control what
24 the Supreme Court might do with that petition. But I'm going
25 to assume, just for purposes of our discussion here, that there

1 will be no rehearing en banc. And so I want, on that
2 assumption, to have the surgery scheduled just as soon as
3 possible. So, I guess what I had in mind -- well, let me --
4 let me hear from the parties.

5 Ms. Rifkin, before I hear from the defendants,
6 anything you want to add or concern you want to express?

7 MS. RIFKIN: Yes, Your Honor. Thank you. Our -- so,
8 prior to Ms. Edmo receiving the surgery, the surgeon defendants
9 had previously identified, Dr. Stiller -- she had her
10 presurgical appointment in April of this year. And we recently
11 received a communication from Dr. Stiller, which we filed
12 attached to the declaration in the Ninth Circuit, that
13 confirmed the medical necessity of hair removal, either
14 electrolysis or laser hair removal for Ms. Edmo. And his
15 estimate is that that will take approximately six months. That
16 that needs to be completed prior to the surgery.

17 We have -- we have notified defendants about this
18 requirement for some time. Dr. Gorton testified about it in
19 October of last year. I have made multiple communications to
20 defendants over the summer asking them -- because Dr. Stiller
21 has now moved out of state, out of Idaho. He's in Washington,
22 but he had confirmed that he will -- that he is available for
23 the surgery, and that the hospital where he is is willing to
24 have the surgery performed by him.

25 In communicating with him about this and about the

1 hair removal options, we haven't received responses while the
2 stay has been in place. And so from our perspective, what we
3 know Dr. Stiller had identified is that Ms. Edmo needs to begin
4 hair removal. There are hair removing options in Boise, close
5 to where she is located, and our position is that this needs to
6 start immediately.

7 THE COURT: Okay. Is -- is there any -- all right.
8 So, hair removal, and did you indicate that it would take up to
9 six months to complete that?

10 MS. RIFKIN: That's right. That is Dr. Stiller's
11 estimate. I guess it can depend, you know, as it goes,
12 depending on the individual and how they respond. But that's
13 the estimate.

14 THE COURT: Okay. So, that's why there's urgency to
15 that. Is there anything else? I mean, that's a fairly lengthy
16 process, and so I'm assuming there's nothing else that would
17 need to be undertaken within the next month or two. The
18 critical thing is just get the hair removal process started?

19 MS. RIFKIN: Well, I think that's correct, Your
20 Honor. There are the additional concerns that -- that we have
21 discussed, I think, prior, in our March conference, that in
22 order for the surgery to be performed, there are the WPATH
23 requirements that are two recommendations from mental health
24 providers and a letter from the current treating physician or
25 prescribing physician.

1 As we previously said, we have two letters
2 recommending surgery from mental health providers, and we are
3 prepared to provide those to Dr. Stiller. He's indicated he
4 will accept those.

5 Defendants have previously projected that
6 Dr. Alviso -- who is Ms. Edmo's treating physician as far as
7 the hormones and treatment for gender dysphoria. They have not
8 clearly indicated a position about whether he will provide the
9 referral to Dr. Stiller. And so if he will not, Dr. Gorton,
10 who is qualified to do so, if he receives updated records,
11 medical records for Ms. Edmo, can provide that referral. But
12 we just -- we need to make sure the documentation is given to
13 Dr. Stiller.

14 THE COURT: Okay. So, if I understand you, you are
15 indicating that you need the treating physician to provide a
16 referral. If the treating physician at the facility is not
17 willing to provide that, then Dr. -- is it Gorton?

18 MS. RIFKIN: That's right.

19 THE COURT: Dr. Gorton is willing to do so, but only
20 if -- if they are provided with all of the current medical
21 records. And so that's what needs to be done; is that correct?

22 MS. RIFKIN: That's -- that's correct, Your Honor.

23 THE COURT: All right. Anything else?

24 MS. RIFKIN: That's it as far as we are aware.

25 Dr. Stiller has said, as -- as I think Dr. Gorton

1 also testified during the hearing, you know, that it's possible
2 concerns may come up for an individual patient as they approach
3 surgery, depends on any certain, I think, other procedure. And
4 so it's possible -- and this is why we requested broader leave,
5 which -- from the Ninth Circuit, which had adopted, you know,
6 that any other issues or procedures deemed necessary for
7 surg- -- prior to surgery being undertaken. So, that's all
8 that we are aware of at this time, Your Honor.

9 THE COURT: All right. All right. So, then I don't
10 know whether -- Mr. Hall or Mr. Eaton, it seems to me there are
11 two things that we need to do as soon as possible.

12 First, start the hair removal process. And then
13 secondly, confirm whether the treating physician at the fac- --
14 that Ms. Edmo is now seeing is willing to provide the referral.
15 And if not, provide Dr. Gorton with the necessary medical
16 records. So, that's apparently the only things that need to be
17 done, say, within the next 30, 45 days.

18 So, your response, is there any problem with either
19 of those?

20 MR. HALL: Your Honor --

21 MR. EATON: Your Honor, this is Bill Eaton. I -- I
22 can start. If you don't mind, Your Honor, did you say this was
23 being recorded?

24 THE COURT: It is.

25 MR. EATON: Okay. So, I guess if -- if I may, I'd

1 like to start off by saying that or -- my clients are
2 considering options of appealing the modifications of stay.
3 So, I just wanted to be upfront with Your Honor --

4 THE COURT: Well --

5 MR. EATON: -- about that. I don't know that there
6 have been any decisions made --

7 THE COURT: Where are they --

8 MR. EATON: But --

9 THE COURT: -- appealing it, for an en banc or what?
10 It was a three -- well --

11 MR. EATON: I don't think any decisions have been
12 made, and I'm not sure it's appropriate for me --

13 THE COURT: Okay.

14 MR. EATON: -- to relay my communications with my
15 client.

16 THE COURT: All right.

17 MR. EATON: But I just wanted to be as upfront --

18 THE COURT: Well --

19 MR. EATON: -- as I could with Your Honor, that
20 that's being considered.

21 THE COURT: All right. Mr. Eaton, that's fine, but
22 it's pretty much wholly irrelevant to what I'm concerned with.
23 If you get a stay of that order or if you appeal and have that
24 order set aside, then that changes the dynamic. But until that
25 occurs, I'm going to operate within the four corners of

1 October 10th order. So --

2 MR. EATON: And -- and with that -- and with that, I
3 do have some -- some responses. I do believe my client, it's
4 my understanding, has looked into some options for
5 electrolysis, so I know that they have started to -- to look
6 into that and have some options, essentially, here in Boise.

7 However, my concern is that my clients don't have
8 proper direction and guidance from this Court or the Court of
9 Appeals related to what's being ordered. And I think this
10 relates directly to factual and legal issues in this case and
11 some of which are on appeal. And if I may, I'd just like to
12 explain.

13 So, the Court has ordered -- as I understand it, this
14 Court, Your Honor has ordered the gender confirmation surgery,
15 and has -- the WPATH, which is in the record, explains that's a
16 very broad term. It can be breast augmentation. It can be a
17 voice box removal, is my understanding. It could be removal of
18 the testicles. It could be removal of the penis and the
19 testicles, or it could be creation of a vagina, which I
20 understand can be done, I believe, in two different procedures.

21 Plaintiff did not establish in their motion or in the
22 hearing which specific procedure is medically necessary and
23 required under the Eighth Amendment. In the consult note from
24 the surgeon earlier this year, it indicates -- which is not in
25 evidence before the Court, I should indicate, but the parties

1 have a copy -- say there's multiple surgical options, and the
2 plaintiff gets to choose which one, if I understand the note
3 correctly.

4 I don't -- defendant's position this violates the
5 Eighth Amendment deliberate indifference law, because the
6 plaintiff doesn't get to choose their medical care or determine
7 what is allowed under the Constitution. And also, to the
8 extent electrolysis is being requested or required, which the
9 Ninth Circuit doesn't address specifically in its modification,
10 this is another permanent procedure, as I understand, of which
11 there's no sufficient evidence, and there isn't an order by the
12 Court that this is medically necessary, required under the
13 Eighth Amendment.

14 Also, I don't think there's evidence as to whether
15 electrolysis is being required for or is required for which
16 specific surgery.

17 THE COURT: Well, counsel --

18 MR. EATON: I know --

19 THE COURT: Counsel.

20 MR. EATON: -- Miss Rifkin --

21 THE COURT: Mr. Eaton, Mr. Eaton, let me just cut you
22 off for a moment, because I -- I'm not sure this discussion --
23 I don't think there is any uncertainty as to what the Court
24 ordered. It was gender confirmation surgery, which would
25 include full gender confirmation surgery. I didn't envision

1 it's anything less than that.

2 And if you want, I suppose we can have a hearing and
3 perhaps you can ask the Court to clarify. But as I sit here, I
4 don't see that as an issue. I think that Dr. Stiller
5 understood what the surgery was going to be. I think certainly
6 the plaintiffs understood, and I understood.

7 Now, whether -- you know, if you want to question
8 that, ask for a clarification, you can. But in the meantime, I
9 am proceeding on the assumption that the surgery will be as I
10 ordered it, which will be full gender confirmation surgery.
11 And we've been advised by the doctor that electrolysis is a
12 necessary part of that, or at least I'm relying upon
13 Ms. Rifkin's representation to that effect.

14 And so I don't think -- this is just muddying the
15 waters on things that I don't think really are at issue. So,
16 if you feel that there's uncertainty, you can file a motion
17 with the Ninth Circuit or with me to clarify, but I'm
18 proceeding on the assumption that it will be full gender
19 confirmation surgery as Dr. Stiller has been consulted to
20 perform. And that that would include, apparently, hair
21 electrolysis which needs to be done before the surgery.

22 So, I don't think there's a lot of purpose in
23 discussing that, because that's not really before the Court
24 unless you file a motion for clarification or modification.

25 Okay? Anything else?

1 MR. EATON: Your Honor, I -- I -- I have concern that
2 my client not understanding which specific surgery is being
3 required, and I think we are relying on plaintiff's counsel's
4 representation in a note that I don't believe was signed by the
5 doctor was -- there was a signature, a written notation from
6 the staff as to electrolysis being needed. It wasn't dated and
7 didn't really have any foundation. And like I indicated, I
8 don't believe anything as to this is on the record. And so I'm
9 concerned my clients don't have guidance on --

10 THE COURT: All right. Well --

11 MR. EATON: -- specifics. And I appreciate Your
12 Honor's ordering the -- has ordered gender confirmation
13 surgery, and I'm just trying to explain that that's a broad
14 term, and it can involve multiple different surgeries. And
15 there may be different requirements for the different
16 surgeries, and none of that's on the record, and I don't
17 believe my client has -- has guidance in that regard.

18 THE COURT: Well, I think we can provide the
19 guidance.

20 Ms. Rifkin, I assume you can file something with the
21 Court that would embody Dr. Stiller's recommendation as to what
22 steps are going to be taken and clarifying as to exactly what
23 the medical procedure is that he is intending to undertake
24 pursuant to the Court's order.

25 And that -- and I will then issue an order, pursuant

1 to the Ninth Circuit's decision of October 10th, directing that
2 the state immediately begin that process.

3 Ms. Rifkin, is that -- can you take care of that?

4 MS. RIFKIN: Yes, Your Honor. We can.

5 And I'd like to address a couple things. I want to
6 note that we are 10 months after this Court's December order.
7 And for approximately three and a half months that this Court's
8 order was in effect, it was not stayed.

9 And defendants trying to say they are confused now,
10 they haven't -- they don't know which procedure it is, they --
11 they could just note that. In three and a half months, they
12 are acting as if this is not their selected surgeon, and they
13 can't access this information.

14 So, this idea that anything should be delayed, while
15 any clarification is sought, I -- I think is inappropriate,
16 since defendants -- we've been communicating with defendants
17 all year about these pre- -- prerequisites, and they have
18 chosen to get no information and apparently not to have further
19 conversation with Dr. Stiller. I don't think they have ever
20 actually spoken to him.

21 And we are happy to file something with the Court,
22 and I think, as Your Honor noted in the March 21st status
23 conference, clearly, Your Honor's direct involvement in this is
24 needed to to make sure that defendants follow through.

25 However, when injunctive relief is ordered for some

1 kind of surgery or cancer treatment, the idea that each
2 particular step -- shaving someone's head, if they need brain
3 surgery, whatever it is -- has to be litigated and filed with
4 the Court as an evidentiary hearing or evidence submitted to
5 the Court, in order for defendants to believe and understand
6 that they are obligated to go through with that. I think that
7 that is a -- is not the legal standard.

8 And so we are happy to file a document that we
9 received from Dr. Stiller. Defendants have the same
10 documentation. The idea that every time Dr. Stiller has a
11 medical opinion or thinks something needs to be done, that we
12 have to go litigate that in court, that is just --

13 THE COURT: Well, Ms. Rifkin --

14 MS. RIFKIN: -- not -- not what the law is.

15 THE COURT: Ms. Rifkin, that's not going to happen.
16 What I'm asking you to do is simply submit to the Court
17 something that -- that -- from Dr. Stiller that specifies
18 exactly what steps need to be taken, and I will, by essentially
19 return mail, order that. Include that as part of the Court's
20 order. I'm -- so, there will be no delay.

21 I just need to have something that clarifies, so
22 there is absolutely no question as to what step needs to be
23 taken. I understand what you're saying, but I -- I do want to
24 provide IDOC and Corizon with clarity.

25 I'm not sure they need it. I think my order was very

1 clear. I don't think it was anything less than full gender --
2 or gender confirmation surgery. And that is the order of the
3 Court, as I understand it, and that's what I intend to stand
4 by.

5 If Mr. Eaton wishes to ask me to reconsider, ask me
6 for clarification, he can, but that's not going to slow down or
7 change the process we are going to go through, unless and until
8 I -- he can persuade me that I meant something different than
9 what I said. So, hopefully, that's sufficiently clear.

10 So, if -- if you want to provide that. Now, there is
11 another option, and that is Dr. Stiller can -- I can simply
12 order the defendant to do whatever Dr. Stiller says is
13 necessary as a prequel or a prior step to completing the
14 surgery. And that may be what I'll do as an alternative, but I
15 think it would be helpful to at least have something so it's
16 clear to everyone that Dr. Stiller has, in fact, requested this
17 and said it's necessary. All right?

18 MS. RIFKIN: Yes, Your Honor. This is --

19 MR. EATON: Your Honor.

20 THE COURT: Now, Mr. --

21 MS. RIFKIN: This is Lori --

22 THE COURT: Ms. Rifkin, something else?

23 MS. RIFKIN: I was just going to say that we can file
24 that, Your Honor.

25 THE COURT: All right. Thank you.

1 Mr. Eaton, anything else? Mr. Eaton, just so it's
2 clear, I don't intend to let this be delayed. So, you know, if
3 you want clarification, you can get it. But I don't see any
4 reason why there needs to be any delay while you're requesting
5 that. So, just -- I'm just kind of warning both -- well, all
6 the parties to, you know, hang onto your hat, because I expect
7 this to be done as quickly as it can be done.

8 I can't control what the Ninth Circuit will do on a
9 petition for rehearing en banc or the Supreme Court may do, but
10 barring some development on that stage, I expect the surgery to
11 be done just as quickly as it possibly can be done, given only
12 the physical limitations that we're facing, not any legal
13 negotiation, posturing, or motions.

14 So, given that, Mr. Eaton, anything else or do we
15 have sufficient clarity that we can move on?

16 MR. EATON: I appreciate Your Honor taking my
17 thoughts into consideration. I guess the only other thing I
18 would indicate, if I didn't already, is I think the
19 electrolysis is a permanent and irreversible procedure, so
20 that's something that's already at issue on appeal. But I do
21 hear Your Honor, and we will look for plaintiff's filing.

22 THE COURT: Okay. Mr. Hall.

23 MR. HALL: Thank you, Your Honor. I appreciate the
24 opportunity to be heard on this matter.

25 IDOC has some of the same concerns as Corizon does,

1 and I don't want to belabor this or reiterate it, but I think
2 it makes sense. And I'd like to build my record to just
3 clarify a couple points.

4 The Ninth Circuit has ordered that presurgical
5 treatments and corollary appointments or consultations be
6 provided if they are necessary for gender confirmation surgery.
7 And I think, Your Honor, that my client's position is we're
8 going to need to develop that record a little bit more. And I
9 heard the Court, but please allow me an opportunity to make my
10 record here.

11 The Court ordered gender confirmation surgery, which,
12 again, is a very broad term. There is no discussion or factual
13 findings as to what type of gender confirmation surgery is
14 medically necessary or required to fix the constitutional
15 violation here.

16 Gender confirmation surgery can be anything from
17 facial feminization surgery, which there was absolutely no
18 testimony in the record as to any medical need. Voice surgery,
19 cartilage reduction in the thyroid, to breast augmentation, and
20 then what is often referred to as genital surgery involves a
21 penectomy, orchiectomy, vaginoplasty, clitoroplasty,
22 valvoplasty, total vaginoplasty.

23 And it begs the question, Your Honor, what is
24 medically necessary? What is -- what did the Court order by
25 way of gender confirmation surgery, because I think there's

1 only one reference in the Court's order as to any type of
2 procedure. But we're going to need some additional factual
3 findings as to what this Court believes or has ruled is the
4 gender confirmation surgery that is actually medically
5 necessary and required to resolve the constitutional violation.

6 And right now, absent any sort of findings as to what
7 gender confirmation surgery is required, it is very hard to
8 identify what presurgical treatments are necessary. For some,
9 my understanding is electrolysis may be necessary. For others,
10 it may not be necessary. And even to date, I'm not aware of
11 Ms. Edmo having selected which type of procedure she would
12 like, to the extent she even has that opportunity.

13 So, I've heard the Court, and I've heard the Court is
14 not going to consider this any further absent a motion or some
15 clarification. So, I'll confer with my client, and we will act
16 accordingly, Your Honor. Thank you.

17 THE COURT: All right. Ms. Rifkin, any response?

18 MS. RIFKIN: Yes, Your Honor. I think your -- your
19 prior response to Mr. Eaton generally covers it. I do want to
20 make a record that the trial that you oversaw did in fact talk
21 about the procedure. We specifically referenced many times to
22 the criteria under the WPATH for a vaginoplasty. That is
23 clearly what was testified to by all of the experts. They
24 considered the criteria clearly laid out in the WPATH for a
25 vaginoplasty, and that is what the Court heard evidence on,

1 made a decision on, and the Ninth Circuit has affirmed.

2 Defendants' idea that it is possibly unclear what we
3 are talking about, I think, it's dubious. And Dr. Stiller's
4 direction, which we will file with the Court, states it is a
5 medical necessity for genital electrolysis in order to have the
6 surgery that the Court contemplated. So, I don't think it's
7 invalid, and we'll file documentation with the Court.

8 THE COURT: All right. Well, I actually --
9 Ms. Rifkin commented on what I was going to say. I sat through
10 the trial. I heard the testimony. And I think no one -- there
11 was really no confusion among any of the experts or any of the
12 parties, at that time, as to what surgery was being sought. I
13 didn't foresee that as being an issue, and it's never been
14 raised as an issue until today.

15 I -- I have indicated, when I used the word "full
16 gender confirmation surgery," it was my clear intent, I thought
17 it was clear from the decision, that it included the removal of
18 male genitalia and the creating of female genitalia. I don't
19 know the medical terminology, but that's clearly what the
20 testimony was about. And I don't see that there was really any
21 question about it.

22 But as I have indicated, Mr. Hall and Mr. Eaton are
23 absolutely free to either file a motion for clarification or --
24 or upon my receipt of the information from Dr. Stiller, after I
25 enter an order, you can file a motion challenging that, if you

1 will, if you feel that the Eighth Amendment doesn't require
2 that and that I didn't make the necessary findings, and then we
3 will have to resolve that issue when and if you file that
4 motion.

5 But in the meantime, as I indicated, I don't intend
6 to let that -- the resolution of that legal issue delay the
7 process that's been undertaken given the delay that's already
8 occurred.

9 So, Ms. Rifkin, as quickly as you can, file with the
10 Court a statement from Dr. Stiller as to -- describing
11 precisely the surgery that's being undertaken. And, of course,
12 you can then tie that back to the Court's order so that there's
13 clarity that it is responsive to the Court's order. And then
14 also what all of the presurgery medical steps that need to be
15 taken, so that I can then consider those and order them to be
16 undertaken by the defendants.

17 So, that's, I think, how we are going to press
18 forward. I'll probably have a status conference in this case
19 about every 30 days just to make sure that we're on task. And,
20 of course, everything I've said is conditioned upon there not
21 being a rehearing en banc ordered or any other stays. If there
22 are other stays that are imposed, then I'll have to -- unless
23 they except out the process being done here, as the circuit
24 panel did on the October 10th order, I'll have to consider it.
25 But in the absence of that, I intend to proceed in the way that

1 I've indicated.

2 All right. Counsel, I think --

3 MS. RIFKIN: Your Honor.

4 THE COURT: Yes. Ms. Rifkin.

5 MS. RIFKIN: Yes. Thank you, Your Honor. I just --
6 I appreciate everything the Court just said, and I also
7 appreciate Your Honor has a very busy schedule.

8 My concern with the next status conference being in
9 30 days is that defendants, at this point, should have already
10 identified the electrolysis provider, and I think that
11 Ms. Edmo's first appointment for electrolysis should occur
12 within the next 30 days.

13 THE COURT: All right.

14 MS. RIFKIN: So I just wanted to clarify --

15 THE COURT: All right. Why don't we schedule it in
16 two weeks, and then just so we're not delaying anything.

17 MS. RIFKIN: Thank you, Your Honor.

18 THE COURT: It will be telephonically, and by then I
19 should have received the information from Dr. Stiller and
20 issued -- or, yes, Dr. Stiller and also issued a decision. And
21 then we'll get a report, hopefully from the defendants, as to a
22 full -- I don't know if chronology or schedule for completion
23 of all of the presurgical steps that need to be taken.

24 All right?

25 MS. RIFKIN: Thank you, Your Honor.

1 THE COURT: Okay. All right. Anything else from the
2 plaintiffs? Ms. Rifkin?

3 MS. RIFKIN: No, Your Honor.

4 THE COURT: Mr. Hall?

5 MR. HALL: No, Your Honor. Thank you.

6 THE COURT: Mr. Eaton?

7 MR. EATON: Nothing at this time, Your Honor.

8 THE COURT: All right.

9 MR. EATON: Thank you.

10 THE COURT: Counsel, then I'll -- Miss Henderson will
11 send out a notice as to when that next telephonic hearing will
12 be. It will be in roughly two weeks. That, of course,
13 presupposes, Ms. Rifkin, that you will have what we need from
14 Dr. Stiller within a week, so that I can have that order
15 issued, and we'll have a clearer path forward by the time we
16 have another status conference.

17 All right? All right. Thank you, counsel.

18 MS. RIFKIN: Thank you, Your Honor.

19 (Recess, 10:03 a.m.)
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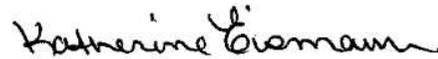
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TRANSCRIBER'S CERTIFICATE

I, KATHERINE EISMANN, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Date: November 9, 2019.



Katherine Eismann, CRR, RDR

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ADREE EDMO, also known as)
Mason Edmo,)
) Case No. 1:17-cv-00151-BLW
Plaintiff,)
) Pocatello, Idaho
vs.) October 30, 2019
) 3:32 p.m.

IDAHO DEPARTMENT OF)
CORRECTION; HENRY ATENCIO,)
in his official capacity;)
JEFF ZMUDA, in his official)
capacity; HOWARD KEITH)
YORDY, in his official and)
individual capacities;)
CORIZON, INC.; SCOTT)
ELIASON; MURRY YOUNG;)
RICHARD CRAIG; RONA SEIGERT;))
CATHERINE WHINNERY; and DOES))
1-15,)
) Telephonic Status Conference
Defendants.)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE B. LYNN WINMILL
UNITED STATES DISTRICT COURT JUDGE

Recorded by: Jamie Bracke

Transcribed by: Katherine Eismann, CRR, RDR
katherine_eismann@id.uscourts.gov

Recorded by electronic sound recording, transcript produced by
mechanical stenography and computer.

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1 (Wednesday, October 30, 2019, 3:32 p.m.)

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3 P R O C E E D I N G S

4 THE COURT: Okay. Counsel, this is Judge Winmill.
5 From the number of beeps I heard, I'm hoping everyone's already
6 on the phone.

7 Could we have all counsel for the plaintiff identify
8 themselves and -- and going forward, don't say anything without
9 identifying who you are, because we are just recording this.
10 We don't have a court reporter here. So, starting with
11 plaintiff's counsel.

12 MS. RIFKIN: Lori Rifkin, Your Honor.

13 MR. DURHAM: Craig Durham, Your Honor.

14 MS. FERGUSON: Deborah Ferguson, Your Honor.

15 MS. WHELAN: Amy Whelan, Your Honor.

16 MS. SHANBHAG: Shaleen Shanbhag, Your Honor.

17 THE COURT: Okay. For IDOC.

18 MR. HALL: Brady Hall, Your Honor.

19 THE COURT: And Corizon?

20 MR. EATON: Dylan Eaton, Your Honor.

21 THE COURT: Okay. All right. Counsel, we scheduled
22 this just to essentially get a status report to see if
23 counsel -- if there was any issues concerning compliance with
24 the Court's order that we issued, I think, a week ago or late
25 last week pursuant to the Court of Appeals granting of the

1 motion, partially lifting the stay of my order of
2 December 13th, 2018, for the purpose of Ms. Edmo receiving all
3 presurgical treatments and related corollary appointments or
4 consultations necessary for gender confirmation surgery.

5 My understanding -- from that order, I think we also
6 directed that the first treatment was to have been scheduled, I
7 think, for November 8th. That is her first hair removal
8 treatment. And I just wanted to see if -- if we were on -- if
9 that had occurred or if there's some issue we need to address.

10 Maybe I'll start with the defendants. Mr. Hall,
11 starting with IDOC, any issue concerning that?

12 MR. HALL: Well, Your Honor, no -- no issues with
13 defendant's ability to comply with the Court order. We have --
14 we reserve all options, at this point, to further seek a stay.
15 I know that Corizon is -- is taking the lead on planning any
16 sort of treatment, and efforts have been taken to do so.

17 Dylan can talk about that further, but we intend
18 to -- pursuant to the Court's order, provide a status update on
19 November 1, in writing, addressing what steps have been taken.

20 THE COURT: All right. That -- that's true, and I --
21 I should have noted that as well, that there is to be -- that
22 would be this Friday, I guess.

23 Mr. -- and again, I want to point out, I am not --
24 you know, an issue was raised during our last status conference
25 about whether there was any uncertainty as to what the Court

1 meant by "gender confirmation surgery." I didn't feel there
2 was, and I'm still of that view. It's exactly what was
3 discussed during the hearing. I don't think there's any
4 ambiguity in that. But, of course, the defendants are free to
5 seek a -- some other resolution or even appeal that. But I
6 don't think the Ninth Circuit had any question about what I
7 ordered, and I certainly didn't.

8 So, but I don't want to readdress that here, but I'm
9 certainly not suggesting that IDOC or Corizon have waived any
10 objection on that issue. But I'm also quite clear as to what
11 my understanding is of what my order meant and intended, and I
12 don't think there was any ambiguity about what was ordered.

13 So, Mr. Eaton, do you agree with Mr. Hall's
14 assessment?

15 MR. EATON: Your Honor, yes. With what you just
16 said, I will just reserve all objections. And, you know, we do
17 have concerns that we've raised already, but I understand Your
18 Honor doesn't want to address those today.

19 So, what I can represent to the Court is there is a
20 laser hair removal scheduled for Ms. Edmo. I guess I can just
21 say between now and the 8th, on the end of the day on the 8th.

22 Mr. Hall reminded me that, for public record, we
23 should not be disclosing the specific date or time for security
24 reasons.

25 THE COURT: No, and I -- I'm fine with that, and any

1 status report you file can be filed under seal to that end,
2 because it does include both -- both because it includes
3 sensitive personal information concerning Ms. Edmo and because
4 it may raise a security issue with the Idaho Department of
5 Correction.

6 So, I'm -- I'm fine with that, ordering that any
7 status report that counsel is uncomfortable -- uncomfortable
8 making available to the public, on this issue, will be -- I
9 will allow that to be filed under seal. All right?

10 MR. EATON: Thank you, Your Honor.

11 THE COURT: All right. Ms. Rifkin, are you content
12 with where we are on this or is there anything else that you
13 are concerned with that we need to take up here?

14 MS. RIFKIN: Generally, we are concerned with the
15 Court's order, Your Honor, on two, I guess, points of
16 clarification.

17 First is that we would -- given what Your Honor just
18 said about the status report being filed under seal, we would
19 request that defendants either in that report or separately
20 provide us the -- the name of the treatment provider who will
21 be providing the laser hair removal.

22 THE COURT: Okay.

23 MS. RIFKIN: We understand that defendants won't
24 provide us the exact date and time, but we want to know --

25 THE COURT: Well, Ms. Rifkin, I -- well, let's

1 address that here. I -- I had assumed that under seal meant
2 that the plaintiff's counsel could see it, defense counsel
3 could see it, the Court could see it but no one else. And, of
4 course, the plaintiffs would be under an obligation not to
5 reveal it to anyone else.

6 That would be -- well, or defense counsel. To me,
7 that's -- kind of goes without saying, when I order something
8 filed under seal, that it's not to be disclosed by the
9 attorneys to anyone who otherwise would not have access to
10 those sealed documents.

11 Mr. Hall and Mr. Eaton, are you satisfied with that?

12 MR. HALL: Well, Your Honor, I'll leave that to the
13 Court's discretion. We're certainly happy to provide such
14 information to plaintiff's counsel as -- as Officers of the
15 Court.

16 The concern is that the information regarding the
17 date, time of transport would be relayed to plaintiff, herself,
18 and any other inmates. If we can -- we can keep that from
19 Ms. Edmo, I don't think there's any concern. But that requires
20 the commitment on plaintiff's counsel not to share that with
21 their client.

22 The -- there's really no need for Ms. Edmo to know.
23 She will be advised and -- in advance that she's going to be
24 transported the day of. And there's really no planning or
25 anything that she needs to know in advance other than it will

1 happen, and they'll give her notice.

2 THE COURT: Okay. Well, that was -- for the record,
3 I think that was Mr. Hall. And I think I asked you to address
4 that.

5 MR. HALL: Correct, Your Honor. That was Brady Hall.

6 THE COURT: Okay. Let me -- counsel, I would suggest
7 that you kind of work this out in some fashion, taking into
8 account the twin concerns of Ms. Edmo's privacy rights; and,
9 secondly, the Department of Correction's concern about
10 security.

11 That either you agree on a protocol for filing
12 information like this under seal, who will have access to it,
13 and -- and include in that understanding that it will not be
14 shared with anyone except the plaintiff's counsel and the
15 plaintiff herself. It's not to be shared with anyone else,
16 and -- and not even shared by Ms. Edmo.

17 It may -- it seems to me you can work this out, that
18 simply letting Ms. Edmo know it's going to happen. I don't
19 know that she needs to know exactly when. I don't know that
20 she needs to have access to even the sealed report, but perhaps
21 plaintiff's counsel does just so they can adequately represent
22 her.

23 But I think there does need to be an understanding
24 that that information would not be communicated to her
25 directly, at least as to a specific date and time or location,

1 but just simply, you know, that it's underway, and it will
2 occur. I do think she's entitled to know that. But I -- I
3 don't think a status conference with seven or eight people on
4 is a good time to try to work out details.

5 So, I would just encourage you, the three parties, to
6 come up with a protocol. You can submit a -- a proposed order
7 for me to sign. If there's some sticking point you want me to
8 resolve, I certainly will step in and do so. But it does seem
9 to me, going forward with this, that there's going to be --
10 there would be some value in that sort of a protocol.

11 Ms. Rifkin, are you comfortable with working that --
12 working with Mr. Hall and Mr. Eaton to try to do that?

13 MS. RIFKIN: Yes, Your Honor.

14 THE COURT: Okay. Mr. Hall, I assume you are
15 likewise agreeable?

16 MR. HALL: Yes, Your Honor.

17 THE COURT: And Mr. Eaton?

18 MR. EATON: Yes, Your Honor.

19 THE COURT: Okay. All right. Ms. Rifkin, does
20 that -- is there anything else you wanted to take up?

21 MS. RIFKIN: Yes, Your Honor. This -- and this is
22 Lori Rifkin. One of the items ordered is the letter from
23 either Ms. Edmo's treating prison physician or another outside
24 physician. And defendants have raised several times, including
25 earlier on the confer call today, whether they'll be able to

1 provide that and whether -- and plaintiff's position, that is
2 Dr. Gorton, who was plaintiff's expert during the trial, if
3 provided the recent medical records, that he would be able to
4 provide that.

5 And so I just wanted to get clarification from the
6 Court. If the defendants were to request that Dr. Gorton
7 provide that or defendants are unwilling to obtain any other
8 physicians, whether that -- that would be an acceptable course
9 of action.

10 THE COURT: Well, let me make sure I understand what
11 you're saying, Ms. Rifkin. You're just asking me to confirm
12 that Dr. Gorton can, in fact, serve as a treating physician
13 and -- and probably would need to receive all medical records
14 from Corizon for Ms. Edmo?

15 MS. RIFKIN: Yes. If that were the -- if that were
16 the route defendants would choose to take.

17 THE COURT: Okay. I certainly -- as long as the
18 operating physician is content with that, and from the report
19 that he filed, I think that would be suitable.

20 Mr. Hall -- well, let's try Mr. Eaton this time.

21 Mr. Eaton, is there any concern with that? You know,
22 I'm just not sure why you or Mr. Hall would prefer to use
23 anyone else. If Dr. Gorton's willing to do it, why not just
24 proceed with that. But if you've got some other plan as to
25 obtaining a treating physician or approval of the surgery,

1 then, certainly, that's something that we can talk about.

2 MR. EATON: Your Honor, this is Dylan Eaton. With
3 all due respect to Ms. Rifkin, I think it's a little bit
4 premature. I did have a preliminary conversation with her this
5 morning. But, you know, I -- we have a little bit of time from
6 your order, I believe, until December 31st, to submit or try to
7 get submitted the requisite letter.

8 There have been discussions, me with Ms. Rifkin and
9 among my clients, to try to figure out how to satisfy that
10 requirement. I don't have a definitive answer yet. I was just
11 exploring, because Ms. Rifkin's filing submission, prior to
12 this order, indicated that Dr. Gorton could be one -- provide
13 that letter, and so I was exploring those options.

14 As I understand it, Dr. Stiller may take that from
15 Dr. Gorton and/or would want to get it from Dr. Alviso, who
16 provides the off-site management and consulting for the hormone
17 therapy. So, we are in communication and trying to figure out
18 whether that's doable with -- that Dr. Alviso, who is not a
19 Corizon employee, or potentially the option was through
20 Ms. Rifkin and Dr. Gorton, so --

21 THE COURT: All right. Well --

22 MR. EATON: -- that's where I'm at at this point.

23 THE COURT: Well, I'm not concerned with who does it.
24 I'm only concerned that the letter of referral is -- well, so
25 that everything is done so that whoever is going to provide the

1 letter of referral can do so by December 31st.

2 And since Dr. Gorton, or whoever, may require some
3 time to review the medical records to provide that letter of
4 referral, I don't think it's something that can wait until even
5 the middle of December. I think it needs to be done much more
6 quickly than that.

7 Now, what you do to achieve that or who you select as
8 the outside physician, I -- I really do not care, so long as an
9 outside physician has been designated, who is willing to
10 provide that letter, and he or she has been provided with
11 whatever medical records or other information they may need so
12 that he or she can be in a position to provide Dr. Stiller with
13 that letter by December 31st as the Court has already ordered.

14 So, Ms. Rifkin, I -- I don't know what more I can say
15 than that. I don't think that Corizon can be compelled to use
16 Dr. Gorton as long -- since -- since it may be anticipated that
17 the outside physician may be expected to provide ongoing
18 post-surgical treatment. But as long as they obtain a doctor
19 who is willing to serve in that role, it seems to me they
20 should have the option of doing that.

21 But if we get into a problem in the next two to three
22 weeks, when I think we need to be working towards this, then we
23 can address that perhaps a little bit, maybe, in a status
24 conference in that time frame.

25 Ms. Rifkin, are you satisfied with that?

1 MS. RIFKIN: Yes, that is very helpful. Thank you.

2 THE COURT: All right. And Mr. Eaton, you are
3 content with that as well, I assume?

4 MR. EATON: Yes, I understand what you're saying,
5 Your Honor.

6 THE COURT: All right. And likewise, Mr. Hall?

7 MR. HALL: No issues with that, Your Honor. Thank
8 you.

9 THE COURT: Okay. All right. Now, Ms. Rifkin,
10 anything else?

11 MS. RIFKIN: I don't believe anything else from the
12 plaintiff's side, Your Honor.

13 THE COURT: All right. Mr. Hall, anything else?

14 MR. HALL: No, Your Honor. Thank you.

15 THE COURT: And Mr. Eaton.

16 MR. EATON: Yes, Your Honor. The third requirement
17 by the Court, as I see it in the October 24th order, is
18 defendant's must also ensure that the requisite team and its
19 approval for the gender confirmation surgery is provided to
20 Dr. Stiller as soon as possible.

21 I can indicate, per a Court order, that the hair
22 removal is and payment process is being taken care of, is my
23 understanding. But I was a little confused as to -- since the
24 surgery is still stayed, and I know you didn't want to get into
25 this, but without -- I have to raise this a little bit.

1 Without knowing the specific surgery that's being
2 required and those kinds of things, I'm having trouble
3 understanding how to comply or address that --

4 THE COURT: Well, I --

5 MR. EATON: -- that point, Your Honor.

6 THE COURT: All right. It seems to me that payment
7 approval can be conditional upon the Court's order surviving
8 appeal. And obviously -- and I have no -- in fact, I might ask
9 if anyone has any knowledge of where we are.

10 I think we should be approaching a date or time by
11 which we should know whether there's going to be a rehearing en
12 banc or not. But if there is a rehearing en banc, if there is
13 a successful petition for certiorari, all of that will change.

14 And so I think any payment authorization will have to
15 be conditioned that it will only take effect, essentially, upon
16 order of the Court, myself. And obviously, I'm not going to do
17 it until we -- the issue of rehearing en banc and certiorari
18 have been resolved. That would be my suggestion, is that you
19 simply make the payment authorization conditioned upon the
20 resolution of those issues.

21 Perhaps, again, Ms. Rifkin, you can work with counsel
22 to make sure that -- that that's reflected appropriately, but I
23 don't see how I can say anything much different from what I
24 just described. Because, certainly, nothing's going to happen
25 while there is still a stay in place, and the stay will remain

1 in place until the en banc process has been concluded, and the
2 certiorari process has been concluded, or there's an appeal to
3 the Supreme Court and they've issued a decision.

4 Mr. Eaton, does that give you enough guidance?

5 MR. EATON: It helps, Your Honor.

6 THE COURT: All right. And I -- I did indicate, you
7 know, that the order says that it would -- that they are to
8 provide that as soon as possible.

9 Now, I don't think that means just some verification
10 that upon a resolution of all appeals, that there's been
11 authorization for the surgery -- a payment for the surgery. I
12 think that's really, perhaps, all the doctor's looking for.

13 All right. I don't know what else I can do.
14 Ms. Rifkin, anything else or concern you have in that regard?

15 MS. RIFKIN: Your Honor, just a clarification that
16 our understanding is any stay would lift as soon as the
17 mandamus is issued, which would follow what happens with the
18 rehearing en banc, and the petition for certiorari is separate.
19 And that if a separate stay were obtained, then that would go
20 to into effect. But otherwise, once the stay was lifted in the
21 Ninth Circuit, your order is operable, and that's when we
22 would --

23 THE COURT: Well --

24 MS. RIFKIN: -- expect to be proceeding --

25 THE COURT: -- it is --

1 MS. RIFKIN: -- barring any other stay being issued.

2 THE COURT: Yeah. It is, but it's my understanding
3 that the stay is continued for a certain number of days until
4 the -- to see if a petition for certiorari is filed. I don't
5 want to get into those technical issues. It should be clear to
6 all concerned that I don't intend to do anything until the stay
7 is lifted.

8 And likewise, Dr. Stiller would not be in a position
9 to do anything until the stay is lifted, and the stay will not
10 lift until the en banc process is completed. And my
11 understanding is that if a petition for certiorari is filed,
12 then the stay will extend for a certain number of weeks until
13 the Supreme Court acts on the petition for certiorari. But
14 I -- I could be mistaken. I'm just saying my -- telling you
15 what my understanding is.

16 So, Mr. Eaton, I can't give you much more guidance
17 than that. I -- you are to do it as soon as possible, and I
18 think you should stand ready, almost immediately, to provide
19 Dr. Stiller with that authorization. But until the stay is
20 lifted, there is nothing to be authorized. Other than the --
21 what the Ninth Circuit described, in lifting the stay -- let me
22 see if I can get the language -- "all presurgical treatments."

23 And so I consider the electrol- -- the hair removal
24 as being a presurgical treatment. And that's why I have
25 ordered that it be begun, even while the stay is in place,

1 because of the Ninth Circuit's decision on October 10th to lift
2 the stay in this limited fashion.

3 But as far as the actual surgery itself for gender
4 confirmation, the stay is in place, and nothing will be
5 ordered, and the state does not have to authorize payment until
6 that stay is lifted. But steps should be taken to ensure that
7 there won't be any delay in authorization once the stay is
8 lifted.

9 MR. EATON: This is Dylan Eaton. Thank you. That's
10 helpful.

11 THE COURT: All right. Very good.

12 All right. Mr. Eaton, anything else?

13 MR. EATON: I don't believe so at this time, Your
14 Honor.

15 THE COURT: All right. I think, Mr. Hall, you
16 indicated you had nothing else; correct?

17 MR. HALL: That's correct, Your Honor.

18 THE COURT: All right. Counsel, we don't have
19 another date, I don't think, for another status conference.

20 Ms. Rifkin, do you see the need for scheduling one
21 now or do you -- or would you be content just to request a
22 further status conference if the need arises?

23 MS. RIFKIN: I think we can request one if the need
24 arises, Your Honor, based on defendant's November 1st.

25 THE COURT: All right.

1 MS. RIFKIN: Well --

2 THE COURT: Well, let me just --

3 MS. RIFKIN: -- we would like -- sorry.

4 THE COURT: No, go ahead.

5 MS. RIFKIN: I think we would appreciate, if not
6 another status conference being scheduled, a status report
7 following the November 8th deadline for beginning -- for
8 beginning hair removal treatment.

9 THE COURT: By which -- so, when do you -- by the
10 middle of November?

11 MS. RIFKIN: Yes.

12 THE COURT: Any objection to that? And I don't
13 expect anything elaborate, so I don't want to generate a lot of
14 work for counsel.

15 But Mr. Hall or actually probably more likely
16 Mr. Eaton, are you opposed to giving us another written status
17 report maybe by maybe the Friday before Thanksgiving, whatever
18 that is.

19 MR. EATON: As long as it's not on Thanksgiving, Your
20 Honor.

21 THE COURT: I'm sorry?

22 MR. EATON: Yes, Your Honor. That would be fine.

23 THE COURT: Okay. Then let's do that. We will just
24 direct that another status report be filed with the Court and
25 delivered to counsel by the -- Miss Gearhart, what is that

1 date? Do you know? I probably could look it up.

2 COURTROOM DEPUTY: November 22nd.

3 THE COURT: All right. November 22nd.

4 All right. And then if there's a need for a further
5 status conference or any motions, counsel, you are free to
6 contact Miss Henderson, the law clerk assigned to this case, or
7 Miss Gearhart.

8 The only thing I would say, I'm -- from
9 December 19th through January 7th, I'm going to be out of the
10 country. So, you should plan accordingly. If there's any
11 issue you want brought to my attention, it should be done in
12 advance of that or it will have to wait until I return. And I
13 don't think I will be -- I don't think where I can -- I do not
14 think I can be reached during that time frame.

15 So, all right. Okay. Unless there's something else,
16 then I think we will terminate the status conference, and we
17 will just look forward to getting that report from counsel.
18 And we will have another status conference at the request of
19 any party between now and such time as we finally hear back
20 from the Ninth Circuit.

21 Actually, before we close, Ms. Rifkin, and Mr. Hall,
22 or Mr. Eaton, do you have any sense of where we are in the
23 process as far as the en banc decision? For some reason, I had
24 November 4th as a likely date by which that would have been
25 concluded. That will be -- that would be -- what? Middle of

1 next week.

2 MR. HALL: Your Honor, this is Brady Hall. I don't
3 know. The last time I was in this process, it did take six
4 months --

5 THE COURT: Okay.

6 MR. HALL: -- to get a decision back from the -- from
7 the Ninth Circuit on an en banc petition. I think it largely
8 depends on, if it's denied, whether or not there will be a
9 dissenting opinion issued by a certain number of judges.

10 THE COURT: Ms. Rifkin, do you have any --

11 MS. RIFKIN: No, Your Honor. That's my understanding
12 as well. I think we were looking at this week and next week
13 and as the time frame to hear an answer, but for if there is a
14 dissenting opinion like Mr. Hall said.

15 THE COURT: So, they will not issue the decision
16 until the dissenting opinions have been prepared, if any?

17 MR. HALL: Your Honor, that was my experience the
18 last time I went through this.

19 THE COURT: All right. Well, I suppose there's some
20 likelihood of that happening, but I guess we will see.

21 All right. I will just leave it at that. All right.
22 Thank you, counsel. And we will probably be visiting with you
23 sometime in the next month or so. Thank you.

24 MS. RIFKIN: Thank you, Your Honor.

25 (Recess, 4:00 p.m.)

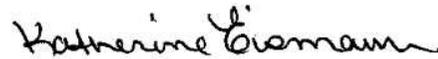
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TRANSCRIBER'S CERTIFICATE

I, KATHERINE EISMANN, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Date: November 9, 2019.



Katherine Eismann, CRR, RDR