UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS
(a.k.a. CRISTIAN NOEL IGLESIAS),

Plaintiff,

v.

IAN CONNORS, *et al.*,

Defendants.

Case No. 19-cv-00415-NJR

DEFENDANTS' RESPONSE TO THE COURT'S FEBRUARY 10, 2022 ORDER TO SHOW CAUSE

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INTRODUCTION

The Department of Justice and Federal Bureau of Prisons ("BOP") take their obligations to comply with court orders seriously. Defendants and their counsel likewise take seriously their duties of candor and to refrain from taking any action or making any representations for improper purposes, such as delay. Defendants deeply regret that their actions have caused the Court to question the truthfulness and intentions of BOP and Government counsel. As explained below and in the attached declarations from Dr. Leukefeld, Dr. McLearen, and the six Government attorneys involved in this matter, the Government never intended to mislead the Court, misrepresent the facts, or take action of any kind for the purpose of delaying these proceedings or Plaintiff's receipt of needed medical care. Defendants have endeavored to comply with all of this Court's orders, including its preliminary injunction order, and respectfully submit that any perceived noncompliance resulted from Defendants' reasonable, good-faith interpretation of that order, not any intent to disregard an order of the Court.

The Court's December 27, 2021 preliminary injunction order first directed BOP's Transgender Executive Council ("TEC") to meet to evaluate Plaintiff for gender-confirmation surgery by Monday, January 24, 2022. Doc. 177. After that point, the injunction takes a bifurcated approach. If the TEC recommended Plaintiff for surgery, the Court directed Defendants to, among other things, refer Plaintiff immediately to BOP's medical director. But if the TEC did not recommend Plaintiff for surgery, the Court directed Defendants instead to file a notice explaining the reasons for the TEC's decision. The TEC met as required on January 24 and did not recommend Plaintiff for immediate surgery. Instead, it recommended that she be referred to a surgeon approximately one month after she is placed in a Residential Reentry Center—which is scheduled to happen less than one month from now, on March 10, 2022—presuming that Plaintiff can continue to be safely housed in a women's facility and barring new developments in her medical care. Doc. 183. Because the TEC did

not make an unconditional recommendation of surgery as described under the first branch of the Court's injunction, Defendants concluded that its recommendation must be treated as falling under the second set of instructions, requiring Defendants to file a notice and supporting declaration explaining all of the reasons for the TEC's decision not to recommend surgery immediately. Defendants did so, and respectfully submit that their actions complied with the Court's order. At a minimum, there is no basis for sanctions under any of the authorities the Court has invoked, even if Defendants have misconstrued the injunction, because Defendants have acted reasonably and in good faith.

The Court also suggested in its order to show cause that BOP has offered changing reasons for its conclusion that gender-confirmation surgery for Plaintiff was not yet appropriate, and inconsistent explanations of the process for evaluating Plaintiff's request for surgery. Doc. 187 ("Show Cause Order") at 1–4. But, as explained below, BOP has been consistent in its explanations throughout this litigation. Specifically, BOP has consistently maintained that there were two reasons why the TEC decided in its March 2020 meeting that gender-confirmation surgery was not yet appropriate for Plaintiff: (i) Plaintiff had not lived in a gender-confirming role for twelve months, and (ii) her hormone levels were not maximized at that time. In her testimony at the preliminary injunction hearing, Dr. Leukefeld also addressed the separate, but related, issue of why BOP had not recommended transferring Plaintiff to a women's facility before 2021, explaining that her medium security level was not previously consistent with assignment to a women's prison. But Plaintiff's security level was not a new or changing reason for declining to approve surgery; rather, it was an explanation as to why Plaintiff had been not transferred to a women's facility sooner.

Moreover, when Dr. Leukefeld explained at the preliminary injunction hearing that the process for approving requests for gender-confirmation surgery involves a referral to BOP's medical director, she was describing the process for individuals, like Plaintiff, housed in secure BOP facilities. The

process for referring an individual for gender-confirmation surgery is different in the halfway house context. Dr. McLearen explained in her January 31 declaration that the TEC in that context could refer Plaintiff to a surgeon directly, without having to go through the additional process of seeking the medical director's approval. Again, there was no attempt to mislead the Court.

Finally, the Court has also directed counsel to appear at the February 22, 2022 hearing to address representations made in eight specific filings. In contrast to BOP, the Court does not provide explicit notice of an intent to issue sanctions against Government counsel, or identify the provisions under which such sanctions might issue. Nevertheless, to address the Court's stated concerns regarding the accuracy of representations made by counsel in Defendants' filings, we explain below that the Government's representations in all of these filings were accurate. The Government advanced these arguments because it believed—and continues to believe—that they were well supported by the facts and the law, not to delay these proceedings or Plaintiff's receipt of medical care. Moreover, as detailed below, BOP continues to make progress toward expeditiously resolving Plaintiff's request for surgery. For example, to avoid any delay, BOP has notified its contractor of Iglesias's pending transfer, and has been informed that the contractor has located an appropriate surgeon. BOP will provide updates on any further progress made between now and the February 22 hearing.

For these reasons, as discussed more fully below, sanctions against BOP (or anyone else in this matter) are unwarranted.

BACKGROUND

On December 27, 2021, the Court granted in part Plaintiff's motion for a preliminary injunction. *See* Doc. Nos. 176, 177. Specifically, the Court ordered Defendants to have the TEC meet to evaluate Plaintiff's request for gender-confirmation surgery by Monday, January 24, 2022. Doc. No. 177 at 1. The Court further ordered that "if the TEC *recommends* Iglesias for GCS," then Defendants were to (i) file a notice to the Court within two days of the recommendation, (ii) refer

Plaintiff to the BOP's medical director immediately, and (iii) ensure that BOP's medical director assess Plaintiff for surgery as soon as possible, but no later than thirty days after receiving the TEC's recommendation. *Id.* at 2 (emphasis in original). If the TEC "*does not* recommend Iglesias for GCS," then Defendants were to (i) file a notice with the Court explaining all of the reasons for the TEC's decision within seven days and include the policies and procedures Plaintiff does not meet, when the policies were established, and all documents providing when the policies were established and (ii) provide the Court the full transcript of the TEC's meeting where it discussed Plaintiff for gender-confirmation surgery. *Id.* at 3 (emphasis in original). After Defendants moved for partial reconsideration of the requirement that the TEC transcribe its meeting, the Court modified the preliminary injunction to remove that requirement and instead directed Defendants to provide a sworn declaration from a member of the TEC explaining the reasons for its decision if the TEC did not immediately and unconditionally recommend Plaintiff for surgery. Doc. 181.

Pursuant to the Court's order, the TEC timely met to evaluate Plaintiff's request for gender-confirmation surgery on January 24, 2022. The TEC did not immediately recommend Plaintiff for GCS, so on January 31, 2022, Defendants filed their Notice in Compliance with December 27, 2021 Preliminary Injunction and a supporting declaration from Dr. Alix M. McLearen. Doc. Nos. 183, 183-1. The McLearen declaration explained that the TEC "recommended that Iglesias be referred to a surgeon for consultation for GCS approximately one month after she is placed in a Residential Reentry Center ('RRC,' commonly referred to as a 'halfway house')." Doc. No. 183-1 ¶ 6. Dr. McLearen explained that the TEC made this recommendation on the "assum[ption that Plaintiff] does not engage in behavior that would prevent her from continued placement in a female facility and assuming further that no other reasons develop that would make gender confirmation surgery inappropriate[.]" *Id.*

The McLearen declaration explained that there were several reasons for the TEC's decision. First, the TEC determined "given Iglesias's impending transfer to an RRC . . . in Florida, the principles of continuity of care weigh in favor of making the referral after Iglesias is transferred, rather than beginning the process while she is at FMC Carswell, only for it to be interrupted by her transfer to Florida." *Id.* ¶ 10. The TEC also concluded that in light of the different logistical processes for referring Plaintiff for GCS once she is at an RRC, referring her to a surgeon after approximately one month in an RRC "may allow for the process to be more logistically streamlined than it would be if the referral was made while Iglesias was housed in a secure facility." *Id.* ¶ 11. Additionally, the TEC believed that it was important to continue to monitor Plaintiff's placement at a female correctional facility while encouraging her to remain compliant with her mental health treatment. *Id.* ¶ 12.

Defendants' Notice in Compliance acknowledged that "[a]lthough the Court's PI anticipated that the TEC would either (a) recommend Plaintiff for surgery and immediately refer Plaintiff to BOP's Medical Director or (b) not recommend Plaintiff for surgery," the TEC's decision was "to recommend referral to a surgeon for consultation for GCS at a future date provided no reasons develop that would make surgery inappropriate." Doc. No. 183 at 2. Defendants did not understand the PI to direct the TEC to make either one decision or the other, if that were contrary to its medical and penological judgments. But because the TEC did not make an unequivocal recommendation for immediate surgery, Defendants concluded that the PI required them to treat the decision as falling under the second set of instructions in the Court's injunction, and thus to explain the reasons for the TEC's decision. Defendants' notice explained, accordingly, that although the PI required Defendants to file a declaration only if the TEC did not recommend surgery, they were providing an explanatory declaration "because the TEC's recommendation d[id] not involve an immediate referral for surgery." *Id.* at 2 n.2.

On February 10, 2022, the Court issued an order requiring BOP to show cause "why sanctions should not be imposed." Show Cause Order at 5. The Order suggests that BOP failed to comply with the Court's preliminary injunction by neither immediately recommending nor denying Plaintiff for gender-affirming surgery, and was seeking to "delay [the] process." *See id.* at 5. The Court directed BOP to address the Court's legal authority to impose sanctions "beyond its inherent authority, and discuss reasons why the Court should not impose sanctions under Rule 11, Rule 56, and 28 U.S.C. § 1927." *Id.*

The Court also set a show-cause hearing for February 22, 2022, *id.*, at which it directed Dr. Leukefeld, Dr. Alix McLearen, and four Department of Justice attorneys who at various times and to varying extents have represented BOP in this case, to appear and show cause "for their failure to adhere to the Court's" PI, *id.* at 6. The Court also directed counsel to be "prepared to discuss their representations in Docs. 100, 129, 130, 147, 157, 161, 178, and 183." *Id.* at 6–7 (footnotes omitted). The order does not, however, instruct these individuals to show cause why they should not be sanctioned, or identify the legal authorities under which sanctions against them might issue.

LEGAL STANDARDS

The Court's Show Cause Order instructs BOP to address four sources of a court's authority to impose sanctions: (1) a court's "inherent power" to impose "appropriate sanction[s] for conduct which abuses the judicial process," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991); (2) the discretion under Rule 11(c)(1) of the Federal Rules of Civil Procedure to "impose an appropriate sanction" on an attorney or party for submitting a pleading, motion, or other paper for an improper purpose, or without support in law or fact, in violation of Rule 11(b); (3) the authority under 28 U.S.C. § 1927 to assess attorneys' fees and costs against an attorney who "unreasonably and vexatiously" "multiplies the proceedings" in a case; and (4) the discretion under Rule 56(h) to assess fees and costs against a party that submits "an affidavit or declaration under [Rule 56] . . . in bad faith or solely for

delay." Show Cause Order at 5. Settled principles govern the exercise of a court's power under each of these authorities.

Inherent Powers: "A district court has inherent power to sanction a party who has willfully abused the judicial process or otherwise conducted litigation in bad faith." *Secrease v. W.&S. Life Ins. Co.*. 800 F.3d 397, 401 (7th Cir. 2015) (internal quotation marks omitted). "Because of their very potency," however, a court's inherent powers "must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44; *see also United States v. Johnson*, 327 F.3d 554, 562 (7th Cir. 2003); *Black v. Brown*, 2019 WL 3325840, at *1 (S.D. Ill. Mar. 25, 2019), *report and recommendation adopted sub nom. Black v. Moore*, 2019 WL 3322279 (S.D. Ill. July 24, 2019). Chief among these restraints is the requirement that the subject of the sanction acted with "willful disobedience or bad faith." *Maynard v. Nygren*, 332 F.3d 462, 470 (7th Cir. 2003) (holding that "[t]he district judge's finding of no willfulness . . . preclude[d] any sanction . . . under the inherent powers of the court"); *see also Schmude v. Sheahan*, 420 F.3d 645, 649–50 (7th Cir. 2005); *Johnson*, 327 F.3d at 562-63; *Morisch v. United States*, 2009 WL 6506656, at *1 (S.D. Ill. June 16, 2009) (inherent-power sanctions "should not be imposed unless there is willful disobedience, bad faith, or fraud"). A court has "no authority" under its inherent powers to issue sanctions for "mere negligence." *Maynard*, 332 F.3d at 471.

Rule 11: Rule 11(b) provides that by presenting a pleading, written motion, or other paper to the court, an attorney certifies to the best of their knowledge, information, and belief, based on reasonable inquiry, (i) that "it is not being presented for any improper purpose," including, *inter alia*, "unnecessary delay," and (ii) that "the claims, defenses, and other legal contentions" therein, as well as the "the factual contentions" and "denials of factual contentions" are warranted. Fed. R. Civ. P. 11(b)(1)-(4). "[A]fter notice and a reasonable opportunity to respond . . . the court may impose an appropriate sanction on any attorney . . . or party" for a violation of Rule 11(b). *Id.* § 11(c)(1); *see Bentz v. Maue*, 2020 WL 1938883, at *1 (S.D. Ill. Apr. 22, 2020) ("A court may impose [Rule 11] sanctions

on a party for making arguments or filing claims that are frivolous, legally unreasonable, without factual foundation, or asserted for an improper purpose." (quoting *Fries v. Helsper*, 146 F.3d 452, 458 (7th Cir. 1998)); *Yonaka v. UPS, Inc.*, No. 06-cv-0464-MJR, 2006 WL 8455949, at *1 (S.D. Ill. Dec. 20, 2006). "Rule 11 sanctions 'are to be imposed sparingly,'" however. *Peoples Nat. Bank, N.A. v. Am. Coal Co.*, 2012 WL 1606014, at *3 (S.D. Ill. May 8, 2012) (quoting *Hartmax Corp. v. Abbound*, 326 F.3d 862, 867 (7th Cir. 2003)). The "mere absence of legal precedent . . . or the failure to prevail on the merits of a particular legal contention . . . cannot justify a finding of frivolousness," which "connote[s] that the legal contention . . . is utterly implausible and lacks any arguable basis[.]" *Ogden v. Dyco*, 2010 WL 11685292, at *2 (S.D. Ill. Mar. 22, 2010); *see also Nemsky v. Int'l Union of Operating Engineers, Loc. 399*, 2008 WL 4853626, at *10 (S.D. Ill. Nov. 4, 2008). Likewise, "factual statements" that are "subject to interpretation that could render them accurate or [as] presenting a genuine issue of fact" do not warrant sanctions under Rule 11(c). *White v. Dep't of Justice*, 2018 WL 488719, at *7 (S.D. Ill. Jan. 19, 2018).

28 U.S.C. § 1927: Section 1927 "permits [a] district court to award attorneys' fees as a sanction against an attorney who unreasonably and vexatiously"—which is to say "gratuitously and injuriously"—"multiplies the proceedings in any case." *Bender v. Freed*, 436 F.3d 747, 751 (7th Cir. 2006) (internal quotation marks omitted); *IDS Life Ins. Co. v. Royal All. Assocs., Inc.*, 266 F.3d 645, 653 (7th Cir. 2001). "[A] court has discretion to impose § 1927 sanctions when an attorney has acted in an objectively unreasonable manner by engaging in serious and studied disregard for the orderly process of justice; pursue[d] a claim that is without a plausible legal or factual basis and lacking in justification; or pursued a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound[.]" *Jolly Grp., Ltd. v. Medline Indus., Inc.*, 435 F.3d 717, 720 (7th Cir. 2006) (internal quotation marks and citations omitted; alteration in original); *see also Green Tree Servicing, LLC v. Cook*, 2015 WL 148508, at *1 (S.D. Ill. Jan. 12, 2015); *Peoples Nat. Bank, N.A.*, 2012 WL 1606014, at *4. This

standard is not satisfied by "simple negligence," *Glob. Traffic Techs., LLC v. KM Enters., Inc.*, 2016 WL 3912836, at *4 (S.D. Ill. July 19, 2016); *see also Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 799 (7th Cir. 2013), or merely because counsel's arguments "may not have won the day." *Daniel v. Christian Care Ministry, Inc.*, 2021 WL 4263181, at *2 (S.D. Ill. Sept. 20, 2021); *see also Grochocinski*, 719 F.3d at 801; *Mustafa v. City of Chicago*, 442 F.3d 544, 549-50 (7th Cir. 2006); *White*, 2018 WL 488719, at *7. "[I]f the conduct under consideration had an objective colorable basis" then a finding of "subjective bad faith" is required. *Peoples Nat. Bank*, 2012 WL 1606014, at *4; *see Glob. Traffic*, 2016 WL 3912836, at *5. By its terms, section 1927 applies only against attorneys and "cannot be used to impose sanctions against a party," such as BOP. *United States v. Rogers Cartage Co.*, 794 F.3d 854, 862 (7th Cir. 2015).

Rule 56(h): "There is very little case law" on Rule 56(h) (or its predecessor, Rule 56(g)), but "when sanctions have been awarded" under this rule, "the conduct has been particularly egregious." *DR Distribs., LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 950 (N.D. Ill. 2021) (citing cases). The rule has been interpreted to require, *inter alia*, "direct evidence of a prior inconsistent statement," that the court "must have relied on the affidavit," and "that the affidavit be based on subjective bad faith, or [submitted] solely for delay." *Id.* at 950-51 (citing authorities); *see also Barnes v. City of Chicago*, 2000 WL 1745180, at *3 (N.D. Ill. Nov. 27, 2000). Most pertinent here, "Rule 56[(h)] by its terms specifically pertains to affidavits submitted in connection with summary judgment motions[.]" *Illinois Tool Works, Inc. v. Metro Mark Prods., Ltd.*, 43 F. Supp. 2d 951, 963 (N.D. Ill. 1999); *see also Pantry Queen Foods, Inc. v. Lifschultz Fast Freight, Inc.*, 809 F.2d 451, 454 (7th Cir. 1987) ("[A]ffidavits used in moving for summary judgment are covered by Rule 56[(h)]."); *James v. Hale*, 959 F.3d 307, 315 (7th Cir. 2020) (Rule 56(h) applies to "an affidavit offered in response to a summary-judgment motion[.]"). Because at this stage of the proceedings BOP has not offered any affidavit or declaration in support of or in response to a motion for summary judgment, Rule 56(h) does not apply here.

Notice: Regardless of the legal authority invoked, the Court must also comply with certain procedural requirements before imposing any sanctions. Specifically, "the imposition of sanctions requires that the party to be sanctioned receive notice of the possible sanction and an opportunity to be heard." *Larsen v. City of Beloit*, 130 F.3d 1278, 1286 (7th Cir. 1997). "A general notice that the court is contemplating sanctions is insufficient; rather, the offending party must be on notice of the specific conduct for which she is potentially subject to sanctions." *Johnson v. Cherry*, 422 F.3d 540, 551–52 (7th Cir. 2005). As explained below, no sanctions are warranted against BOP (or anyone else) under the legal principles that govern the exercise of the Court's authority under its inherent power, Rule 11, or section 1927.

ARGUMENT

I. Sanctions Are Not Warranted Against BOP Because It Complied with the Court's Preliminary Injunction

The Court's Show Cause Order suggests that BOP failed to comply with the Court's preliminary injunction by neither unequivocally and immediately recommending Plaintiff for gender-affirming surgery nor conclusively denying her request. Show Cause Order at 5. As explained below, however, Defendants acted in good faith to abide by the terms of the preliminary injunction and did not violate its plain terms. Even if the Court determines that Defendants failed to comply with the intent underlying certain terms of the Court's injunction, they did not act "with willful disobedience or bad faith," as required for inherent-power sanctions, *Maynard*, 332 F.3d at 470; with "serious and studied disregard for the orderly process of justice," as would be required under section 1927 (if section 1927 applied to parties), *Jolly Group*, 435 F.3d at 720; nor did they advance a position that is "utterly implausible and lack[ing] any arguable basis," as would be necessary for sanctions under Rule 11, *Ogden*, 2010 WL 11685292, at *2. Sanctions predicated on a failure to comply with the preliminary injunction would therefore be improper.

A. BOP's Compliance With the Preliminary Injunction Precludes the Issuance of Sanctions

The Court should not issue sanctions because BOP complied with this Court's preliminary injunction order. Under that order, BOP was required first to "have the TEC meet to evaluate Iglesias's request for GCS by Monday, January 24, 2022."[1] Doc. 177 at 1. It is undisputed that the TEC satisfied this aspect of the preliminary injunction, and met on January 24, 2022 to evaluate Plaintiff's request for surgery. *See* Doc. 183-1 ¶ 5. The preliminary injunction further provides that "if the TEC recommend[ed] Iglesias for GCS," then Defendants were to, among other procedural steps, "refer her to BOP's medical director immediately." Doc. 177 at 2. On the other hand, "[i]f the TEC [did] not recommend Iglesias for GCS, then the Court ORDER[ED] Defendants to . . . [f]ile a notice with the Court explaining all the reasons for [the] TEC's decision within seven days and include the policies and procedures Iglesias does not meet, when the policies were established, and all documents providing when the policies were established." *Id.* at 3 (emphasis omitted).

The TEC met on January 24, as ordered, and "recommended that Iglesias be referred to a surgeon for consultation for GCS approximately one month after she is placed in a Residential Reentry Center"—which, as discussed above, would eliminate the step of seeking approval for the surgery from the BOP medical director. Doc. 183-1 ¶ 6. In the declaration explaining the bases for that determination, the BOP official who oversees the TEC explained that Plaintiff's continuity of care would be better if she were to undergo treatment in one location (*i.e.*, the halfway house to which she is currently scheduled to be transferred on March 10, 2022). Doc. 183-1 at 2, 4. She further stated that the TEC anticipated approving Plaintiff's surgery one month thereafter, presuming Plaintiff is

[1] The Court also ordered that BOP "[s]chedule a certified court reporter to be present at the TEC meeting to provide the Court a transcript of the TEC's meeting," and, if the TEC did not recommend GCS, give the Court "the full transcript of the TEC's meeting where it discussed Iglesias for GCS." Doc. 177 at 1, 3. The Court later modified this aspect of the injunction and instead required only a sworn declaration, which BOP timely provided to the Court. Doc. 181.

able to adjust to her female facility (a condition based in both medical and safety and security concerns). *Id.* at 5. This timing would also allow for continued monitoring of "Iglesias's placement at a female correctional facility while encouraging her to remain compliant with her mental health treatment." *Id.*

Given that the TEC had not immediately and unconditionally "recommend[ed] Iglesias for GCS," its recommendation did not fall under the injunction's first set of instructions, and BOP therefore complied with the preliminary injunction by following the alternate set of instructions that applied "[i]f the TEC [did] not recommend Iglesias for GCS." Doc. 177 at 2-3. Specifically, BOP timely filed their Notice in Compliance and the accompanying "sworn declaration from a member of the TEC explaining the reasons for the TEC's decision," as required by the Court's January 19, 2022 minute order, Doc. 181. *See* Doc. 183, 183-1. To Defendants' understanding, this filing fully complied with the preliminary injunction. *See, e.g.*, McLearen Decl. ¶¶ 13–15; Feldon Decl. ¶ 10; Kolsky Decl. ¶ 7; Robinson Decl. ¶¶ 4–5. Because Defendants thus complied with the preliminary injunction, they cannot be subject to sanctions for violating that order. At the very least, as explained in the attached declarations, Defendants acted based on their reasonable, good-faith understanding of what the order required, thus precluding an imposition of sanctions under the standards governing the inherent power, section 1927, and Rule 11. *See Maynard*, 332 F.3d at 470; *Jolly Group*, 435 F.3d at 720; *Ogden*, 2010 WL 11685292, at *2.

B. The Preliminary Injunction Did Not Set Forth an Unambiguous Command Requiring BOP To Either Immediately Recommend or Conclusively Deny Surgery

Sanctions are also unwarranted because, at a minimum, the Court's preliminary injunction does not contain an unambiguous command requiring BOP to either immediately and unconditionally recommend surgery or conclusively deny surgery.

The Court's injunction instructed BOP to take certain actions and file certain notices "if the TEC recommend[ed] [Plaintiff] for GCS," Show Cause Order at 2-3, and to "[f]ile a notice with the Court explaining all the reasons for [the] TEC's decision," together with a supporting declaration, "if the TEC d[id] not recommend Plaintiff for surgery." *Id.* at 3; Doc. 181. Because of the medical and penological reasons explained in Defendants' Notice in Compliance, the TEC neither immediately approved nor conclusively denied Plaintiff's request for gender-confirmation surgery, but conditionally recommended that she be referred to a surgeon approximately 30 days after transfer to an RRC, assuming no other developments in the meantime that would make the surgery inappropriate. Doc. No. 183. If the Court instead intended the preliminary injunction to require BOP to either: (a) immediately recommend surgery; or (b) conclusively deny surgery, and to foreclose alternatives that the TEC might consider more appropriate in its best medical and penological judgment, Defendants respectfully submit that such an intent is not plain from the face of the order. At best the order is ambiguous, which precludes sanctions for any unintentional noncompliance. *Cf.* Fed. R. Civ. P. 65(d)(1) (requiring that every injunction "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required"); *Int'l Longshoremen's Ass'n, Loc. 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). In short, BOP acted on the basis of a reasonable, good-faith interpretation of the Court's preliminary injunction, *see* McLearen Decl. ¶¶ 13–15, and its best medical and penological judgments. The issuance of sanctions in these circumstances would therefore be inconsistent with the standards governing a court's authority under the inherent power, section 1927, and Rule 11.

C. Sanctions Are Not Warranted Against Any Individuals

The Court's Show Cause Order identifies two BOP officials and four DOJ attorneys and orders them to appear before the Court "to SHOW CAUSE for their failure to adhere to the Court's order dated December 27, 2021." Show Cause Order at 6. Defendants respectfully submit that, even

were the Court potentially considering sanctions against these individuals, there is no basis for any such sanctions. First, the individuals are not derivatively responsible for any perceived violation of the preliminary injunction by BOP because, as discussed above, BOP did not violate the Court's preliminary injunction. Thus, there was likewise no violation by any of the individuals.

Moreover, the individuals have not received "notice of the specific conduct for which [they are] potentially subject to sanctions," as required before the imposition of sanctions. *Johnson*, 422 F.3d at 551–52. Here, the Court has directed that "BOP is hereby ORDERED to SHOW CAUSE in writing on or before February 14, 2022, why sanctions should not be imposed." Doc. 187 at 5. Although the Show Cause Order requires the individuals to appear before the Court "to **SHOW CAUSE** for their failure to adhere to the Court's order dated December 27, 2021," and for DOJ counsel to be prepared to discuss their representations in various filings, the Show Cause Order does not state that the Court is considering issuing sanctions against the individuals and does not identify the specific conduct for which they could be sanctioned, or the particular provisions under which sanctions might be imposed. Accordingly, Defendants do not currently understand the listed individuals to be the target of potential sanctions. Regardless, Defendants take the Court's expressed concerns with the utmost seriousness—and for that reason, have submitted the attached declarations that, as discussed further below, demonstrate that the relevant individuals at both DOJ and BOP have acted in good faith at all times in this litigation, and thus sanctions against individuals would be unwarranted in any event.

II. BOP Has Consistently Explained Why It Believed Gender-Confirmation Surgery Was Not Yet Appropriate and the Process for Evaluating Plaintiff's Request

In its Show Cause Order, the Court expressed concerns about BOP's candor with the Court, suggesting that BOP has offered changing reasons for its conclusion that gender-confirmation surgery was not yet appropriate for Plaintiff, and changing explanations of its process for evaluating Plaintiff's

request. Show Cause Order at 1–4. The record as a whole confirms, however, that BOP has been candid in its explanations to the Court.

A. BOP's Reasons for Its Decision Not to Approve Surgery

The Court correctly notes that BOP offered two reasons why the TEC decided in its March 9, 2020 meeting that gender-confirmation surgery was not yet appropriate for Plaintiff. Doc. 100 at 16. First, Plaintiff had "not lived in a gender confirming role for twelve months." Doc. 99-1, Leukefeld Decl. ¶ 11. Second, Plaintiff's hormone levels "had fallen below their goal and were not . . . maximized" and so Defendants "recommended [Plaintiff] remain at her current facility and maximize gender affirming hormones." *Id.* ¶ 12. These two reasons accurately describe why the TEC had determined that gender-confirmation surgery was not appropriate for Plaintiff.

Defendants focused primarily on these two reasons at the preliminary injunction hearing because they were the reasons on which the TEC had relied. PI Hr'g Tr. 202 ("The Bureau has offered two reasons why it has not approved surgery up to this point."). In her testimony, Dr. Leukefeld also addressed a separate, but related issue—why BOP had not recommended transferring Plaintiff to a women's facility before 2021. Dr. Leukefeld explained that Plaintiff's "[medium] security level was not consistent with [assignment to] a female prison prior to this [year]." *Id.* at 143. Dr. Leukefeld provided this explanation in response to an argument Plaintiff had advanced in her preliminary injunction reply brief that Plaintiff had achieved target hormone levels "as early as August 2016" and thus, in Plaintiff's view, should have been transferred to a women's facility sooner. Doc. 107 at 8.

The Court appears to have inferred from Dr. Leukefeld's explanation that BOP was offering "a third obstacle for Iglesias receiving the surgery" at the preliminary injunction hearing. Show Cause Order at 2. Respectfully, that was not the intended purpose of Dr. Leukefeld's testimony, and Defendants regret any confusion. BOP has consistently maintained that there were two reasons why the TEC did not approve Plaintiff's request for surgery when it met to evaluate the request in March

2020. Dr. Leukefeld's explanation concerning Plaintiff's security level related to the separate, but related question of why Plaintiff had not been transferred to a women's facility sooner, in response to Plaintiff's point that her hormones had achieved target levels in prior years. In its March 2020 decision, however, the TEC did not rely on Plaintiff's security level as an obstacle to surgery because, by that point, Plaintiff had already been transferred to a low-security prison. *See* Second McLearen Decl. ¶¶ 7–12. Thus, Plaintiff's security level was not a new or "everchanging reason[]" for declining to approve surgery in 2020, *id.* at 1, but rather an explanation as to why Plaintiff was not transferred to a women's facility in prior years when her hormones had achieved target levels. Defendants respectfully submit the testimony and their legal filings were accurate, but regret any confusion this point.

B. Dr. Leukefeld's Description of the TEC's Process

The Show Cause Order also quotes from Dr. Leukefeld's testimony at the preliminary injunction hearing about BOP's process for approving requests for gender-confirmation surgery by persons within BOP custody. Show Cause Order at 3–4. In her testimony, Dr. Leukefeld explained that the process would involve a referral by the TEC to the BOP Medical Director. With one exception discussed below involving an inadvertent misstatement, Dr. Leukefeld's testimony was accurate.

The process for referring an individual for gender-confirmation surgery is different if the individual is housed at a secure BOP facility than if the individual is housed in a halfway house. For individuals housed in a secure BOP facility (the large majority of individuals within the custody of BOP), medical care is overseen by the Health Services Division. For such individuals, the process involves the TEC making a referral to BOP's Medical Director, who would then determine whether to refer the individual to a surgeon. On January 13, 2022, this established process was included in the BOP's updated Transgender Offender Manual, which states:

> The TEC is the sole body who may determine that all milestones and individual goals for surgical consideration have been met. When this occurs, the case is referred to the agency's Medical Director for medical consideration. He or she may review existing records and/or interview the inmate, institution staff, and members of the TEC. After this individualized assessment, the Medical Director will determine if the surgery is medically appropriate for referral to a gender affirming surgeon.

Transgender Offender Manual at 9 (Doc. 183-1).

BOP follows a different process for individuals living in a halfway house. Medical care for such individuals is overseen, not by the Health Services Division, but by the Reentry Services Division. *See* Defs' Notice in Compliance With Dec. 27, 2021 Prelim. Inj., Doc. 183, at 3. Therefore, for individuals living in a halfway house, the Reentry Services Division would arrange, through a contractor, for GCS consultation with a surgeon. *Id.*; *see also* Decl. of Alix M. McLearen, Doc. 183-1, ¶ 11. It would not be necessary to refer such individuals to the Medical Director.

Accordingly, when the Court asked Dr. Leukefeld whether the TEC would refer an individual "seeking gender-confirming surgery at a female facility" for a medical evaluation, Dr. Leukefeld correctly testified "yes" and discussed the example of the individual who the TEC had recently referred for GCS. Show Cause Order at 3. That individual is housed in a secure BOP facility (FMC Carswell) and was referred by the TEC to the Medical Director. Doc. 175 at 151, 190.

Similarly, Dr. Leukefeld correctly testified that "[t]he TEC makes that recommendation, and then [the Medical Director] and her staff would work to find a surgeon and make sure that there's – that there are no contraindications that would preclude surgery." Show Cause Order at 3. Here, Dr. Leukefeld accurately described the general process applicable to individuals in BOP secure facilities.

Also, when the Court asked about the individual whom Dr. Leukefeld "just mentioned in October who was referred," Dr. Leukefeld correctly testified that the TEC had referred that individual to BOP's Medical Director. Show Cause Order at 4.

The Court also asked Dr. Leukefeld, regarding Plaintiff, if the TEC was "going to recommend surgery in April or refer her at that time for an evaluation?" Show Cause Order at 3. Dr. Leukefeld

responded: "The committee will make a determination about whether to recommend in April, and if it does, she would immediately be referred to the medical director to find – [.]" *Id.* at 3-4. Due to an inadvertent oversight, Dr. Leukefeld's response did not address the fact that a referral to the Medical Director would not be necessary in April if Plaintiff were then living in a halfway house. *See* Decl. of Alison Leukefeld ¶ 9 (filed herewith).[2] At the time of her testimony, the TEC had only recommended one individual for surgery, and that individual was in a secure facility, so the process for referring that inmate to the Medical Director was uppermost in Dr. Leukefeld's mind. Decl. of Alison Leukefeld ¶ 9. And, as noted, Plaintiff was housed in a secure facility at the time. *Id.* Since the large majority of individuals in BOP custody are housed in secure facilities rather than RRCs, Dr. Leukefeld considers the process for referring individuals in RRCs to be the exception to the general rule of referral to the Medical Director. *Id.* ¶ 7. Dr. Leukefeld did not intend to mislead and did her best to provide accurate information during her examination. *Id.* ¶¶ 9-10.

In short, when BOP's explanations of its decisions and its decision-making processes are considered in their full context, it is apparent that BOP has not made intentionally false, misleading, or factually unfounded representations to the Court, as would be necessary to impose sanctions under any of the authorities identified by the Court. Nonetheless, Defendants apologize for and regret the inadvertent misstatement with respect to Dr. Leukefeld's testimony.

III. Counsel's Representations to the Court Have Been Accurate

In its Show Cause Order, the Court instructed counsel for Defendants to be prepared to speak to certain factual and legal contentions made in various past filings, with footnotes indicating which contentions in some of those filings were of particular interest to the Court. The signatory to a filing complies with Rule 11(b) when, following a reasonable inquiry, the signatory has a good faith belief

[2] At the time Dr. Leukefeld testified, Plaintiff was (and still is) housed at a secure facility, but Plaintiff was scheduled to be transferred to a halfway house in March. Doc. 175, at 148:25-149:7.

that all "legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law" and all factual contentions have "evidentiary support or, if specifically so identified, will have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(2), (b)(3).

Because the trial counsel in this matter wish to assure the Court of their candor in as complete and expeditious a manner as possible, Defendants explain below, and in counsel's accompanying declarations, that Defendants' counsel fully complied with their ethical obligations to the Court, and their Rule 11 obligations, in preparing and submitting each of the documents identified by the Court.

A. Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction (Doc. 100)

The Court first suggested that there is a conflict between Defendants' factual contention in their PI opposition that the TEC "conducted an individualized assessment of Plaintiff and concluded that she was not an appropriate candidate for gender affirming surgery at th[e relevant] juncture because her hormone level had not yet stabilized, and she had not lived a real-life experience as a female for twelve months in a female prison," and the statement in Dr. Leukefeld's declaration that the "TEC has not denied Iglesias gender affirming surgery." Show Cause Order at 7 n.2. But when viewed in full context, both statements were factually accurate when made, and consistent with each other.

As Dr. Leukefeld stated in her declaration, "[g]ender affirming surgery was not appropriate at the time Iglesias was last reviewed by the TEC, nor is it currently appropriate." Doc. 100-2 at ¶ 11. Dr. Leukefeld noted that Plaintiff had not yet lived in a gender congruent role for twelve months and explained the penological reasons why such an experience was important before considering surgery. *Id.* at ¶¶ 11–12. She also observed that at the time the TEC reviewed Plaintiff for surgery on March 9, 2020, Ms. Iglesias' "hormone levels had fallen below their goal and were not been maximized." *Id.* ¶ 10. Thus, the statements in Defendants' PI opposition that Plaintiffs' GCS had not yet been

approved because of her hormone levels, and lack of residential time in a female prison, are all directly supported by Dr. Leukefeld's declaration.

Dr. Leukefeld also stated, as the Court observes, that "the TEC has not denied Iglesias gender affirming surgery," and went on to explain that "Rather, it has not approved placement in a female facility, which is a necessary and appropriate step toward surgery." *Id.* at ¶ 13 (emphasis added). Taken together these two statements do not contradict the representations in Defendants' PI opposition (or the earlier statements in Dr. Leukefeld's own declaration). They merely explained one of the reasons given by Defendants as to why Plaintiff could not yet be approved as an appropriate candidate for gender-confirming surgery when the TEC considered her request in March 2020. Moreover, the fact that an inmate may not be an appropriate candidate for GCS at a particular moment in time because they fail to meet certain preconditions does not equate to a "denial" of providing that surgery, because the surgery may later be approved as circumstances change.

Thus the representations in Defendants' PI opposition were well-founded in the record, and were not made for an improper purpose such as delay. Gardner Decl. ¶ 11. As such, they would not support the imposition of sanctions.

B. Defendants' Motion to Dismiss (Doc. 129)

Next, the Court's order questions the argument in Defendants' motion to dismiss that venue is improper because no legally significant events occurred in this judicial district when Plaintiff filed her Second Amended Complaint, the operative pleading in this case.[3] Show Cause Order. at 7 n.3.

[3] In the same footnote to the Show Cause Order, the Court also noted its "concerns with the quality of DOJ's arguments on Standing Mootness, and the Eighth Amendment Claim [for] Denial of Medical Care" in Defendants' motion to dismiss. Although the Court found these arguments unpersuasive, its Show Cause Order does not identify any reason those arguments might violate Rule 11. *See Ogden*, 2010 WL 11685292, at *2 (mere "failure to prevail on the merits of a particular legal contention . . . cannot justify a finding of frivolousness"). The Court's order on the motion to dismiss similarly did not state that those arguments were frivolous, or misrepresented the applicable law.

Defendants' legal contention is not sanctionable because it is "warranted by existing law," or at a minimum by "a nonfrivolous argument . . . establishing new law" in the Seventh Circuit. Fed. R. Civ. P. 11(b)(2).

Based on extensive research, Defendants concluded that neither the Supreme Court nor the Seventh Circuit has squarely addressed the question of how the venue inquiry is affected when a party's earlier pleading alleges a basis for venue that no longer applies at the time the party files an amended pleading. Defendants therefore relied on district court decisions in the Seventh Circuit for the principles supporting their legal contention that venue is considered based solely on the amended pleading. Defendants made this contention based on a good faith understanding of the law, and neither Plaintiff's opposition to Defendants' motion to dismiss nor the Court's order on that motion identified any contrary authority from the Seventh Circuit or Supreme Court. Insofar as the issue remains unsettled, Defendants' arguments were "warranted," Fed. R. Civ. P. 11(b)(2), on the basis of persuasive authority—albeit not binding precedent—in this Circuit, and were made in good faith. Feldon Decl. ¶¶ 6–8.

Following the Court's Show Cause Order, Defendants again looked for any relevant authority on this issue. In doing so, they did not locate any binding authority foreclosing the argument, and instead identified two decisions from other U.S. Courts of Appeal that accord with Defendants' legal contention. As the Federal Circuit recently explained, once parties "filed their amended complaints, the original complaints were 'dead letter[s]' and no longer performed any function in the case[s]' . . . including for purposes of venue." *In re Samsung Elecs. Co.*, 2 F.4th 1371, 1376 (Fed. Cir. 2021) (citation omitted) (first two alterations in original). And the Tenth Circuit reached the same conclusion in a case factually analogous to the one at bar. In *Fullerton v. Maynard*, a prisoner was transferred to a different judicial district between the filing of his original complaint and his amended pleading. 943 F.2d 57, 57 (10th Cir. 1991) (unpublished table decision). Under those circumstances, the Tenth

Circuit concluded that, "[b]ecause the amended complaint supersedes the original complaint, proper venue . . . must be established from facts alleged in the amended complaint." Both the district court decisions cited by Defendants in their motion and these two newly discovered circuit court cases are persuasive even if not binding authority that constitute "existing law" warranting Defendants' legal contention.

Defendants acknowledge that, as the Court noted in the Show Cause Order, "district court opinions have no precedential value." Show Cause Order at 7 n.3. But in the absence of controlling authority, a party may ordinarily rely on persuasive authority without running afoul of any ethical obligations. *See Lorrison v. Berryhill*, No. 18-10289, 2019 WL 1324247, at *6 n.4 (E.D. Mich. Mar. 25, 2019) ("Absent binding precedent, courts and parties are free to turn to persuasive authority."). Accordingly, Defendants appropriately relied on persuasive authority here to make good faith arguments in their motion to dismiss, and Defendants respectfully submit that such reliance is not a basis on which to issue sanctions.

C. Defendants' Motion to Exclude Untimely and Undisclosed Expert Testimony and Request for Expedited Consideration (Doc. 130)

Although the Court references Defendants' motion to exclude the newly proffered opinions of Plaintiff's expert, Dr. Ettner, the Show Cause Order does not reference any specific issue or representation in that filing that could be a basis for sanctions. Show Cause Order at 7 (citing Doc. 130). Defendants moved in good faith on the ground that submission of Dr. Ettner's previously undisclosed opinions less than two weeks before the preliminary injunction hearing would unfairly prejudice Defendants, particularly given that Plaintiff could have had Dr. Ettner evaluate Plaintiff and formulate those opinions at any earlier time in the litigation. To Defendants' knowledge, all the contentions they made in support of that motion were legally and factually accurate. Plaintiff did not contest the legal or factual accuracy of Defendants' contentions in opposing that motion, arguing instead that Defendants were responsible for the delay in Dr. Ettner forming her opinions. Doc. 131.

And the Court appeared to credit many of Defendants' contentions by noting several in a minute order before ordering the hearing rescheduled. Doc. 133. In filing this motion, Defendants acted in good faith, accurately recited both the facts and the law, and did not make this motion for the purpose of unnecessarily delaying proceedings. *See* Gardner Decl. ¶ 12.

D. Defendants' Opposition to Plaintiff's Motion to Compel Expedited Discovery (Doc. 147)

The Show Cause Order reiterates the Court's statement from a footnote in its order on Plaintiff's motion for expedited discovery that Defendants' opposition "mischaracterized the record" when it stated that "Plaintiff has had the opportunity twice to seek expedited discovery and made the strategic decision to seek only the deposition of Dr. Leukefeld." Show Cause Order at 7 n.4; Doc. 156 at 5 & n. 2. Respectfully, however, Defendants' statement accurately reflects the record. Plaintiff's counsel's emails of August 30, 2021 (Exhibit 2 to Defendants' opposition) and September 10, 2021 (Exhibit 5 to Defendants' opposition) both stated Plaintiff's intent to limit her pre-hearing discovery to deposing Dr. Leukefeld. Docs. 147-2, 147-5. It is true, of course, as the Show Cause Order notes, that Plaintiff was not required to inform the Court of her position on discovery on September 10, 2021. Show Cause Order at 7 n.4. Nevertheless, the e-mails of Plaintiff's counsel show that in fact she did advise the Court of her position, before reversing course. Thus Defendants' statement noting this change of Plaintiff's position was firmly founded in the record.

The Show Cause Order goes on to repeat the remainder of the Court's earlier footnote, which focuses on Defendants' positions regarding discovery. *Id.* (quoting Doc. 156 n. 2). Respectfully, however, the change in Defendants' position on discovery does not alter the fact that Defendants accurately described the change in Plaintiff's position. Moreover, Defendants' own change of position on pre-hearing discovery is not suggestive of bad faith. As Defendants stated at the August 30, 2021 hearing, they did not at that time believe that it was necessary to depose Dr. Ettner and were unlikely to call witnesses. *Id.* However, the day after the August 30 hearing, Plaintiff provided Defendants

with the results of Dr. Ettner's July 20, 2021 psychological evaluation of Plaintiff, which led Defendants to reconsider and revise their conclusion about the need to depose Dr. Ettner. Defendants informed the Court of their revised position on September 10, as the Court ordered. *Id.* Defendants' change in position was reasonably based on new information, not any intent to deceive or delay. *See* Gardner Decl. ¶ 13.

E. Defendants' Motion for Relief From Full Compliance With the Court's October 15 Order (Doc. 157)

The Show Cause Order states that Defendants should be prepared to discuss their representations in their motion for relief from the Court's October 15 order authorizing Plaintiff to conduct discovery, but does not identify particular representations that the Court questions. Order at 7 (citing Doc. 157). In that motion, Defendants sought partial relief from the Court's October 15 order insofar as it required complete compliance with the production of documents by the date of the then-scheduled October 19, 2021 preliminary injunction hearing. Doc. 157 at 1-2.

Defendants informed the Court that that they "had made every effort to comply with the Court's order as quickly as possible, and [were] working to collect the documents encompassed by the Court's Order and prepare them for production." *Id.* at 1. Defendants noted that they had already produced the first three of the four categories reflected in the Court's discovery order and had produced 886 pages of documents in the previous 48 hours. *Id.* at 2. Defendants explained, however, that it would be impossible to complete production of the final category of documents by the October 19 hearing because it required "electronic custodial searches of a number of BOP employees, and the initial collection efforts resulted in hundreds of thousands of pages of emails." *Id.* Defendants' preliminary review indicated that a substantial proportion—and likely a large majority—of the documents collected were either privileged or non-responsive, and they needed additional time to process, review, and produce the documents. *Id.* For those reasons, Defendants explained, the review could not be completed in time for the preliminary injunction hearing scheduled for the

following day. *Id.* These statements were factually accurate, and made in good faith. *See* Gardner Decl. ¶ 14.

F. Defendants' October 22, 2021 Status Report (Doc. 161)

The Court expresses concern with the statement in Defendants' status report concerning the amount of time they estimated it would take to review and produce documents as required by the October 15 order. Defendants provided this estimate in response to the Court's October 19, 2021 minute order that asked, among other things, for "defendants[']proposed deadline to []comply with the Court['s] order on expedited discovery[.]" In that status report, Defendants noted that, after de-duplication and agreements with the Plaintiff to narrow the scope of the search, approximately 5,200 documents still required review. *See* Doc. 161 at 2. Defendants noted that they anticipated providing to Plaintiff responsive, non-privileged documents on a rolling basis and that they hoped to complete their productions by November 22, 2021 (*i.e.*, in less than one month). *Id.* Defendants further noted that assuming an averaging process rate of twenty-five documents per hour and eight-hour review days, "it will take twenty-six full days to review the approximately 5,200 collected documents, absent further narrowing." *Id.* at 2, n.1. For this reason, Defendants noted that they were "uncertain whether they can complete their production of documents subject to the Court's order by November 22, 2021." *Id.* at 2.

The Court states in its Show Cause Order that "DOJ attorneys represented that it could not comply with the Court's discovery order on expedited discovery" based on the number of personnel hours estimated to complete the review, and further noted that the estimate assumed a single attorney doing the work when "five attorneys entered in on this case." Order at 7 n.5. But, as stated above, Defendants did not represent to the Court that they "could not comply with the Court's discovery order." Rather, as explained in Defendants' status report, Defendants expressed uncertainty as to whether they could produce all responsive, non-privileged documents by November 22, 2021, given

the large volume of documents and the short time for review. Moreover, Defendants did not intend to suggest that only a single attorney would be reviewing documents. Rather, the intention was to provide the court with the aggregate number of personnel hours necessary to complete the review. Defendants sought in good faith to provide the Court with a conservative estimate so that the Court could decide whether it made sense to briefly delay the evidentiary hearing. To the extent Defendants' explanation was unclear, the lack of clarity was unintended, not meant to mislead the Court, and Defendants regret any confusion. And the representations in this filing were not made for the purpose of improperly delaying Gardner Decl. ¶ 15.

G. Defendants' Motion for Reconsideration (Doc. 178)

The Court references Defendants' motion for reconsideration of the portion of the preliminary injunction requiring transcription of the TEC's January 24, 2022 meeting, but does not identify particular representations of concern in that filing. Show Cause Order at 7 (citing Doc. 178). Defendants' motion was based on arguments that requiring BOP to transcribe the TEC meeting would represent an unnecessary infringement of BOP's deliberative process privilege and represent inappropriate judicial supervision of an executive agency, particularly given the Prison Litigation Reform Act's limit on injunctive relief in this context. Doc. 178. Those arguments were supported by applicable legal authority, and the factual representations on which they were based were accurate. Further, Defendants filed their motion to protect BOP's legitimate interests identified in that filing, and not for any improper purpose. Gardner Decl. ¶ 16; Kolsky Decl. ¶ 9; Robinson Decl. ¶ 7. Thus, reliance on the motion for reconsideration as a basis for sanctions would be unwarranted.

H. Notice by All Defendants in Compliance with the Preliminary Injunction (Doc. 183)

The Show Cause Order suggests that BOP should have informed the Court that the Medical Director is not directly involved in approving medical procedures for inmates in halfway houses prior to filing their January 24 Notice in Compliance, given that Defendants earlier anticipated providing

Plaintiff surgery once she has transitioned to a halfway house. Show Cause Order at 7 n. 6 (citing Doc. 183). Except in the single instance noted above involving an inadvertent error, *see* p. 18, *supra*, the information provided to the Court concerning the process for awarding gender-confirming surgery—both in written filings and through live testimony—was consistent and accurate. Defendants and their counsel simply did not anticipate the need to explain that the Medical Director does not play a role in authorizing and arranging medical care for inmates placed in halfway houses until the TEC's recommendation (for a surgical referral after Plaintiff's transfer to a halfway house) made that information relevant. Defendants apologize that this omission affected the Court's understanding of BOP's procedures for approval of gender-confirming surgery. However, the omission was born of oversight, without intent to deceive the Court on this point.

Because all of the filings identified in the Court's Show Cause Order were made in good faith, for appropriate purposes, without intent to mislead or delay, and are well-founded in law and fact, they would not furnish grounds for imposing sanctions against counsel under the Court's inherent power, section 1927, or Rule 11, even if the Show Cause Order indicated that the Court were contemplating that course of action. *See* McLearen Decl. ¶¶ 13–15; *see generally* Haas Decl. ¶¶ 5–11; Gardner Decl. ¶¶ 5–17; Feldon Decl. ¶¶ 3–12 ; Kolsky Decl.; ¶¶ 3-12 Robinson Decl. ¶¶ 2–9; Talmor Decl. ¶¶ 7–9.

IV. BOP Continues to Work Expeditiously to Address Plaintiff's Request

As explained above and in the attached declaration of Dr. Alix McLearen, BOP has worked diligently to address Plaintiff's request for gender-confirmation surgery. *See* McLearen Decl. ¶¶ 4–5, 13-20. The TEC has not sought to delay its decision but rather is striving to take the medical and safety considerations into account in providing the best possible care in a dynamic situation. *Id.* Dr. McLearen and others at BOP are continuing to work diligently to address Plaintiff's request for surgery. *Id.* ¶¶ 19–20. For example, BOP is not waiting until Plaintiff's transfer to the RRC to develop

a plan to provide Plaintiff with surgery. *Id.* Instead, to avoid any delay, BOP has notified its contractor of Plaintiff's pending transfer and has been informed that the contractor has located an appropriate surgeon. *Id.* ¶ 20. The surgeon has been contacted and given preliminary patient information, and Dr. McLearen will provide a further update to the Court on any progress made at or before the February 22 hearing. *Id.*

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that sanctions are not warranted, and this Court should formally discharge its Order to Show Cause, Doc. 187.

Dated: February 14, 2022

Respectfully submitted,

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Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS (a.k.a., CRISTIAN NOEL IGLESIAS),	)	
Plaintiff,	)	
vs.	)	Case No. 19-cv-00415-NJR
IAN CONNORS, ET AL.,	)	
Defendants.	)	

DECLARATION OF ALISON LEUKEFELD

I, Alison Leukefeld, make the following declaration, in accordance with the provisions of 28 U.S.C. § 1746:

1. I am currently employed by the Federal Bureau of Prisons ("BOP") as the Psychology Services Branch Administrator. I have held my current position since April of 2020. I have been employed by the BOP since May, 2004. Additionally, I serve as a member of the BOP's Transgender Executive Council (TEC). I began to participate in the TEC when it was established in 2016.

2. I previously testified in this case at the hearing held on November 22, 2021, on Plaintiff's Motion for Preliminary Injunction. (See Doc. 175)

3. I am aware that the Court ordered BOP to show cause why sanctions should not be imposed in this case. (Doc. 187). In its order, the Court cites several excerpts from my November 22, 2021, testimony, and states that I did not explain that the TEC could refer Igelsias to a surgeon for consultation for GCS directly. (Doc. 187 at 5). The Court contrasts my testimony, to Defendants' Notice in Compliance with December 27, 2021 Preliminary Injunction (Doc. 183) which states in relevant part that review [for GCS] by the BOP Medical Director

would not be necessary once Iglesias is housed in a Residential Reentry Center (RRC), as medical care for an inmate at an RRC is provided by contract medical providers in that community.

4. Specifically, the Court cited the following exchange:

> **THE COURT:** The psychiatrist, but the -- so would you make a referral, then, for a medical examination -- if the TEC was considering, say, that an inmate at a – seeking gender-confirming surgery at a female facility, hormone levels are stabilized, would you then refer her for a medical evaluation?
>
> **DR. LEUKEFELD:** Yes. For example, in the case where the TEC recently made a recommendation for surgery, we of course are working with the local health care professionals, and when we made that recommendation, we referred it to BOP's medical director, who will ensure that the individual is appropriate for surgery, that there are no contraindications, and look for a surgeon.

(Doc. 175, p. 151).

5. In the above exchange, I was referring to a specific inmate who at the time was housed in a secure BOP facility. Therefore, that answer accurately reflected the TEC's practice of referring an inmate housed in a secure facility (as opposed to an RRC) to the BOP's medical director to ensure that individual is appropriate for surgery.

6. Additionally, the Court's order to show cause cited the following:

> **MR. KNIGHT:** So -- But Dr. Stahl does not determine whether someone gets surgery; is that right?
>
> **DR. LEUKEFELD:** Correct. The TEC makes that recommendation, and then she and her staff would work to find a surgeon and make sure that there's -- that there are no contraindications that would preclude surgery.

(Doc. 175, p. 163).

7. In the above exchange, I was again referring to TEC's practice of referring an inmate housed in a secure facility (as opposed to an RRC) to the BOP's medical director to

ensure that individual is appropriate for surgery. This question and answer came during a long line of questions about the TEC generally. And in fact, the question was about Dr. Stahl, which elicits an answer regarding the process for inmates housed in secure facilities. I acknowledge that I did not answer the question as to the process that would be followed for an inmate in an RRC. At that point, TEC had not recommended an RRC inmate for surgery, and so that process was not most salient in my mind. At the time I gave that answer, TEC had only recommended one inmate for surgery. That inmate was housed in a secure facility and referred to the BOP's Medical Director. Since the large majority of BOP inmates are housed in secure facilities rather than RRCs, I believe the process for referring inmates in RRCs would be the exception to the general rule (referral to the Medical Director).

8. Finally, the Court's order cites the following exchange:

> **THE COURT:** Okay. And just so I'm clear, and you said that -- I think we've -- both things have been said here today. Is the committee going to recommend surgery in April or refer her at that time for an evaluation?
>
> **DR. LEUKEFELD:** The committee will make a determination about whether to recommend in April, and if it does, she would immediately be referred to the medical director to find –
>
> **THE COURT: Okay.** So first you have to recommend it and then she would be referred, and for the one that you just mentioned in October who was referred -- were they referred or recommended?
>
> **DR. LEUKEFELD:** The TEC recommended surgery and referred her to the medical director. Medical director would not -- will do surgery unless there's some kind of contraindication.
>
> **THE COURT:** And that's the BOP medical director?
>
> **DR. LEUKEFELD:** Correct.
>
> **THE COURT:** Okay. But you don't know how long that's going to take.
>
> **DR. LEUKEFELD:** I don't know how long it will ultimately take, but I -- but it is underway.
>
> (Doc. 175 at pp. 189-190).

9. In this exchange, only the Court's first question related to Iglesias. I acknowledge that in response to this question, I misspoke and incorrectly referenced Iglesias being referred to the BOP's Medical Director. At the time I gave that testimony, Iglesias was approximately four months away from RRC placement. Again, at that time, only one inmate had been recommended for surgery, and as that inmate was in a secure facility, the process for referring that inmate to the BOP Medical Director was most salient in my mind. While the answer I gave may be the correct answer in regard to the large majority of BOP inmates, I recognize that I neglected to answer the question specifically in regard to Iglesias. This was an inadvertent oversight, and not in any way meant to mislead. At the time I gave that testimony, the first referral to the Medical Director had just recently been made, and it was not clear to me that the difference in the process for referring RRC inmates would make a great difference logistically. Aside from the Court's first question in the exchange above, the remaining questions and answers in this exchange again refer back to a specific inmate. For the same reasons stated in paragraphs 5 and 7, above, the responses to those questions are accurate.

10. In all of my testimony, I did my absolute best to provide accurate information covering a very broad and nuanced subject matter.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of February 2022.

_____

Alison Leukefeld

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS (a.k.a., CRISTIAN NOEL IGLESIAS),	)	
Plaintiff,	)	
vs.	)	Case No. 19-cv-00415-NJR
IAN CONNORS, ET AL.,	)	
Defendants.	)	

DECLARATION OF DR. ALIX M. MCLEAREN

I, Dr. Alix M. McLearen, make the following declaration, in accordance with the provisions of 28 U.S.C. §1746:

1. I am currently employed by the Federal Bureau of Prisons ("BOP") as Acting Assistant Director of the BOP's Reentry Services Division. I have held my current position since December of 2021, and have been the Senior Deputy Assistant Director since May of 2020. I have been employed by the BOP for approximately 18 years.

2. As Acting Assistant Director of the BOP's Reentry Services Division, I am responsible for the oversight of Psychology Services, Residential Reentry Management, Community Reentry Affairs, Women and Special Populations, Education, and Chaplaincy.

3. Additionally, I oversee and serve as a member of the BOP's Transgender Executive Council (TEC). I began to participate in the TEC when it was established in 2016. I am familiar with the TEC's recommendations regarding the Plaintiff, inmate Iglesias, Reg. No. 17248-018.

Background

4. The TEC recognizes that Iglesias's gender dysphoria is a serious condition and takes seriously its obligation to address her needs. The TEC has regularly reviewed Iglesias's housing

situation and needs. *See, e.g.* Decl. of Alison Leukefeld ¶¶ 8–10, Doc. 99-2 (explaining steps TEC has taken to address Plaintiff's requests). The TEC has consistently applied BOP policies and practices to Iglesias's request for gender confirmation surgery ("GCS"). *See id.* ¶¶ 11–14. The TEC has provided different recommendations over time depending on the facts that existed at the time of the recommendation. Those recommendations have been appropriately updated as Iglesias's treatment and condition has progressed.

5. The TEC has not sought to delay any decision on Iglesias's request for GCS. Rather, it is striving to take her mental health treatment and overall care in a correctional setting into account in providing appropriate care in a dynamic situation. Neither the TEC nor BOP has taken, nor asked its counsel to take, any steps in this litigation for the purpose of delay or to avoid providing Iglesias any necessary treatment.

The Court's Show Cause Order (Doc. 187)

6. I am aware that the Court ordered BOP to show cause why sanctions should not be imposed in this case. (Doc. 187). In its order, the Court first notes a concern that BOP has offered changing reasons for its conclusion that gender-confirmation surgery for Plaintiff was not yet appropriate. I respectfully disagree that BOP has offered changing reasons for its decision and believe that BOP has been consistent in the explanations it has given.

7. In support of its suggestion that BOP has offered changing reasons, the Court cites Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, which states that the TEC had not approved Iglesias for surgery for two reasons. "First, Plaintiff had not lived in a gender-conforming role for twelve months since being incarcerated under the custody of BOP." (Doc. 100 at 16) "Second, Defendants concluded that Plaintiff's placement in a female facility was not warranted until now because her hormone levels had fallen below their goal and had not been maximized." (*Id.* at 17).

8. Those statements were supported by the Declaration of Alison Leukefeld. The reference to Iglesias's hormone levels not being maximized was a reference to a TEC decision at a specific point in time, i.e. on or about March 9, 2020. (Doc. 99-2 ¶¶ 10-12).

9. At the preliminary injunction hearing, Dr. Leukefeld testified that, previously, Iglesias's medium security level had posed an obstacle to transfer to a female institution. (Doc. 175, pp. 143–45). However, that issue was also addressed in Dr. Leukefeld's declaration. Specifically, the declaration acknowledged that, in 2019, the TEC had recommended that Iglesias be placed at a low security male facility as a step toward placement in a female institution, and stated that this was "an important step toward [placement in] a female facility, for medium and high-security female transgender inmates, since all female institutions are low-or minimum security, and inmates do not typically skip security levels as they move down." (Doc. 99-2 ¶ 15). It also referenced Iglesias's transfer from USP Marion (a medium security facility) to FMC Lexington (a low security facility) in 2019. *Id.*

10. Therefore, the statements that the Court referenced in its Show Cause Order are consistent with the testimony at the preliminary injunction hearing "that BOP could not have placed Iglesias in a female facility even when her goal hormone levels had been maximized because she still had a medium security threat level." (Doc. 175, p. 143). The testimony at the preliminary injunction hearing regarding security levels was intended to describe BOP's decisions at the time "[w]hen [Iglesias's] hormone levels were within goal range" – i.e., prior to her transfer to FMC Lexington (a low security facility) in 2019. That is why, when describing the TEC's March 2020 decision, security level was not an obstacle, because by that point Iglesias had been moved to a low security male institution.

11. The TEC has based its decisions regarding Iglesias on the facts as they existed at the time of each evaluation of her status. For example, Iglesias began hormone therapy in 2015. Her hormone levels were largely at goal from 2016 to 2019. (Doc. 99-4). In 2019, TEC recommended

she be transferred to a low security facility as a step toward placement in a female facility. However, shortly after transfer to a low security facility, the Federal Medical Center at Lexington, Kentucky, her hormone levels were not at goal. Doc. 99-4. Those hormone levels then stabilized and later returned to goal levels in April 2021. (Doc. 99-4). At that point, for the first time, Iglesias was both simultaneously housed in a low security facility and with target hormone levels. Consequently, shortly thereafter, Iglesias was transferred to a female facility in May 2021.

12. As the Court is aware, the TEC recently recommended Iglesias be referred to a surgeon for consultation for GCS approximately one month after she is placed in a Residential Reentry Center ("RRC," commonly referred to as a "halfway house"), assuming she does not engage in behavior that would prevent her from continued placement in a female facility and assuming further that no other reasons develop that would make gender confirmation surgery inappropriate for Iglesias.

Compliance with the Court's preliminary injunction

13. The TEC takes its compliance with the Court's orders seriously. After the Court issued its December 27 preliminary injunction, BOP carefully reviewed the order to ensure that we acted in accordance with it. As explained in my prior declaration (Doc. 183-1), the TEC met on January 24, 2022, to evaluate Iglesias's request for GCS by January 24 in response to the Preliminary Injunction (Doc. 177).

14. The TEC did not understand the court's order (Doc. 177) to be intended to limit it to only two options—either (1) immediate referral to medical director or (2) denial of request for surgery.

15. The TEC made what it viewed was the best recommendation for the wellbeing of the patient given all factors. The TEC did not make this recommendation for purposes of delaying or denying Iglesias surgery. As I have explained, the TEC did not believe that immediate referral to the medical director was appropriate given the pending transfer to the Residential Reentry Center,

because surgery will take place while the inmate is in the community placement.

16. As explained in my declaration (Doc. 183-1), the TEC decided to recommend that Iglesias be referred to a surgeon by mid-April, assuming that no other reasons develop that would make gender confirmation surgery inappropriate, because of continuity-of-care concerns and the importance of continuing to monitor Iglesias in a female facility.

17. The recommendation for referral to a contract surgeon does not represent a change in reasoning to delay GCS for Iglesias. Rather, as explained in my declaration (Doc. 183-1), the process for referring an RRC inmate does not require the Medical Director's involvement, as it would for an inmate in a secure facility. In that regard, the decision to recommend referral directly to a surgeon by mid-April, without referral to BOP's Medical Director, should streamline the process for Iglesias and be less time consuming than if referral to the Medical Director was required.

18. The continuity-of-care and monitoring concerns are legitimate practical and treatment reasons that are based on ensuring that Iglesias receives appropriate care.

19. The TEC is continuing to work to provide the best care to this individual. Iglesias is in an operationally unique situation as she is currently at a secure facility, but soon to be transferred to an RRC. Accordingly, referring her to the BOP Medical Director is not prudent, as Iglesias is scheduled to soon be transferred to an RRC, at which point any treatment she receives will be provided by providers in the community who provide treatment to inmates in RRCs pursuant to a contract. Normally, medical appointments for inmates in RRCs are not scheduled prior to the inmate's arrival at the RRC.

20. Moreover, BOP is not waiting until Plaintiff's transfer to the RRC to develop a plan to provide Plaintiff with GCS. Indeed, to avoid delay in this case, BOP, has notified the contractor of Iglesias's pending transfer and has been informed they have located an appropriate surgeon. The surgeon has been contacted and given preliminary patient information, and we will provide updates to the Court on any further progress made between now and the February 22 hearing.

I declare under penalty of perjury that the foregoing is true and correct to the best of my belief. Executed on this 14th day of February 2022.

_____

Dr. Alix M. McLearen

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICOLE IGLESIAS (a.k.a. CRISTIAN NOEL IGLESIAS), Plaintiff, v. IAN CONNORS, ET AL., Defendants.	19-CV-00415-NJR

DECLARATION OF ALEXANDER K. HAAS

I, Alexander K. Haas, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am a Director in the Federal Programs Branch, Civil Division, of the United States Department of Justice, a position in the Career Senior Executive Service of the United States Government. I joined the Department of Justice through the Attorney General's Honors Programs as a Federal Programs Branch Trial Attorney in 2003 and stayed until 2009. From 2009 to 2011, I served as Counsel for National Security Law & Policy in the Department's National Security Division. I left the Department of Justice in 2011 to work in private practice at the Washington, D.C. office of the law firm King & Spalding. I worked at King & Spalding until 2017, at which time I became an Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Columbia. From 2017 to 2019, I was on detail to the Civil Division as Chief of Staff and Special Counsel to the Assistant Attorney General. I became Director in the Federal Programs Branch in August 2019. Before originally joining the Department, I clerked for the Hon. Andrew J. Kleinfeld

on the United States Court of Appeals for the Ninth Circuit and graduated from the University of California, Berkeley Law School in 2002. I make this declaration based on personal knowledge, and am submitting it on behalf of the Federal Government in the above-captioned matter.

2. The role of the Federal Programs Branch is principally to defend civil actions filed against the Government in federal district courts throughout the United States. The Branch is made up entirely of career professionals. The Branch handles significant cases nationwide in which parties challenge the lawfulness of Federal Government programs, policies, and decisions, including the constitutionality of Federal statutes; the cases handled by the Branch encompass a wide range of subject matters and address many different areas of the law. The Branch handles significant defensive civil litigation concerning the Department of Justice, and therefore the Federal Bureau of Prisons (BOP). The Branch makes the determination of whether to handle cases within its sphere of responsibility, regardless of where in the United States those cases are filed, and assigns other cases to the respective United States Attorney's Offices for handling in whatever jurisdictions they are filed.

3. My engagement and level of involvement in the details of any particular litigation matter handled by the Federal Programs Branch depend on a variety of factors and may change throughout the disposition of a case. Due to the number of cases handled by the Branch and my competing managerial and administrative duties as Director, I am not able to participate closely in the day-to-day activities of every case that falls within my area of responsibility. For many cases, I rely on the responsible Deputy Director, Assistant Director, or Special Litigation Counsel to oversee the day-to-day litigation activities, and (together with the assigned trial attorneys) to bring

any significant issues in such cases to my attention as needed.

4. I began supervising this matter when I became Director in 2019 and have worked principally with Mr. Gardner since that time actively monitoring the litigation and conferring with Mr. Gardner and other members of the Federal Programs Branch team. This work has included reviewing draft filings and discussing case strategy with him and the team, including the conduct of the proceedings related to Defendants' motion to dismiss, Plaintiff's motion for preliminary injunction, the preliminary injunction hearing, and then discussing the compliance with the Court's preliminary injunction. And when Mr. Gardner began a detail to the Department's Office of Legislative Affairs, I began directly supervising the remaining team members on the matter to more closely review case filings and to confer with those team members regarding case strategy and factual questions involving BOP; I have continued to confer with Mr. Gardner as necessary. In addition to being one layer of review of case filings and significant strategic decisions, I am also aware that virtually all significant filings in this case were reviewed at multiple levels by others within the Department and at BOP.

5. I am aware that on February 10, 2022, the Court issued an Order to Show Cause in the above-captioned case and expressed concerns about the Government's compliance with the Court's preliminary injunction and with the representations of the Government in this case and the conduct of the Government's litigation.

6. I have no knowledge or information indicating that any Department of Justice attorney involved in the Government's defense of this case sought at any time to mislead the Court or Plaintiff or to intentionally withhold or conceal from the Court or Plaintiff information regarding

the BOP's process for evaluating Plaintiff's request for Gender Confirmation Surgery (GCS). Likewise, I have no knowledge or information to indicate that any Department of Justice attorney ever directed, suggested, or intended that any litigation position be taken or document filed with the Court for the purpose of unnecessary delay, to multiply proceedings, or otherwise frustrate the Court's ability to evaluate BOP's medical judgments and decisions regarding Plaintiff's request for GCS.

7. I also have no knowledge or information to indicate that BOP, or any of its personnel, sought at any time to mislead the Court or Plaintiff or to intentionally withhold or conceal information from the Court or Plaintiff in connection with BOP's evaluation of Plaintiff's request for GCS. I have no knowledge or information to indicate that BOP, or its personnel, took any action to unnecessarily delay BOP's evaluation of Plaintiff's request for GCS. And I have no knowledge or information to indicate that BOP, or its personnel, have taken positions, taken actions, or made representations in this case (or requested the Department of Justice do so) for the purpose of unnecessary delay, to multiply proceedings, or otherwise frustrate the Court's ability to evaluate BOP's medical judgments and decisions regarding Plaintiff's request for GCS.

8. At no time did any of the attorneys working on this case raise a concern with me, nor did I have other reason to believe, that anyone else working on the case, or that anyone at BOP, was acting with an intention to mislead the Court or Plaintiff, or to withhold or conceal information that the Government ought to disclose. At no time did any of the Branch attorneys assigned to this case raise a concern with me, nor did I have other reason to believe, that BOP had taken, or intended to take, any actions to unnecessarily delay BOP's evaluation of Plaintiff's request for

GCS. Likewise, at no time did any of the attorneys working on this case raise a concern with me, nor did I have other reason to believe, that any litigation actions were taken in this case for any reason other than zealous advocacy of our client's legitimate interests, or that actions were being taken for the purpose of unnecessary delay, to multiply proceedings, or otherwise frustrate the Court's ability to evaluate BOP's medical judgments and decisions regarding Plaintiff's request for GCS.

9. Given my experience as Director overseeing litigation handled by the Federal Programs Branch, and consistent with my expectations of the supervisors and trial attorneys in the Branch, it is inconceivable that there could have been such actions without it being brought to my attention by any of the career professionals working on this matter. Similarly, and for the same reasons, I do not believe that representations in the Government's filings could have been crafted in such a way as to intentionally mislead the Court or Plaintiff, or to improperly withhold or conceal information, or to take actions in this case for the purpose of unnecessary delay without it being brought to my attention by these career professionals. As a Federal Programs Branch Director, it is my experience that Branch attorneys, consistent with their responsibilities as career civil servants, seek to accurately present to the courts the position of the United States in litigation, the facts in a case, and the applicable law with respect to matters handled by the Branch.

10. If at any time any of the attorneys involved in this case had indicated to me that someone in our office intended, or that someone had asked our office (or any individual in our office), to mislead the Court, to withhold or conceal information from the Court or Plaintiff, or to take actions for the purpose of unnecessarily delaying these proceedings in this case inconsistent

with ethical obligations and the standards of this office, I would not have countenanced it or permitted it. If I had been made aware by any individual of any direction, suggestion, or intention to mislead the Court or the Plaintiff or any effort to intentionally withhold or conceal information that the Government should have disclosed or an effort to unnecessarily delay these proceedings, I would have personally intervened to ensure that the Branch would take no part in it. And if I had been made aware that such information had been withheld, I would have taken steps to ensure that appropriate corrective measures were taken.

11. It is my privilege as a Director in the Federal Programs Branch to represent the United States of America. And it is my privilege in this position to work with outstanding attorneys who execute their duties as counsel for the United States with skill and utmost professionalism. That is true with respect to the Branch attorneys assigned to this case, whom I personally assigned to work on this matter and whom I have known through personal observation and interaction over time to have conducted themselves consistent with the highest standards of ethics and professionalism with respect to their litigation matters, including the above-captioned civil action.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 14, 2022, in the City of Kensington in the State of Maryland.

Alexander K. Haas
Director, Federal Programs Branch
United States Department of Justice

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICOLE IGLESIAS (a.k.a. CRISTIAN NOEL IGLESIAS), Plaintiff, v. IAN CONNORS, ET AL., Defendants.	19-CV-00415-NJR

DECLARATION OF JOSHUA E. GARDNER

I, Joshua E. Gardner, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am currently employed by the Department of Justice (DOJ), Office of Legislative Affairs, as a Special Counsel, a position I have been detailed to since October 27, 2021. My permanent position is with the Federal Programs Branch, Civil Division, DOJ, as a Special Counsel, a Senior Level career civil-service position. I have worked at DOJ since February 2004, and have worked in the Federal Programs Branch since 2008. Previously I worked at the law firm of Shearman & Sterling, and before that I served as a law clerk for a Justice on the Florida Supreme Court. During my time at DOJ, I have been responsible for personally litigating and managing numerous cases, often involving complex issues of federal constitutional and administrative law. My direct supervisors are three Federal Programs Branch Directors, each of whom is also a career civil servant. As part of my job responsibilities, since 2016 I have worked on behalf of DOJ on the Advisory Committee for Civil Rules. In this role, I work with numerous federal district court and appellate court judges, law

professors, and practitioners, to consider potential amendments to the Federal Rules of Civil Procedure. In addition to my work at DOJ, I have been an adjunct professor at The George Washington University Law School since 2005, where I have taught at various times Legal Research & Writing, Government Lawyering and Pretrial Advocacy. A substantial portion of my teaching involves instruction on legal ethics and professional responsibility. I graduated from The George Washington University Law School in 2000 with high honors. I have received numerous awards for my work at DOJ, including awards recognizing my integrity as a litigator.

2. I make this declaration based on personal knowledge and in response to the Court's February 10 Show Cause Order. Dkt. No. 187.

3. I filed my notice of appearance in the above-captioned litigation on November 13, 2020. Dkt. No. 75.

4. Since that time I have been substantially involved in every brief filed by the United States in this matter until my detail to the Office of Legislative Affairs began on October 27, 2021. Since that point, my day-to-day involvement in this matter has declined substantially. Nevertheless, since my detail I have continued to be apprised of significant case developments, as appropriate.

5. In virtually every document filed in this matter by the United States, multiple levels of review within DOJ took place. This review occurs both within the Federal Programs Branch, as well as often within certain of DOJ's leadership or other offices and the Federal Bureau of Prisons.

6. I have never filed a document or been instructed to take a position in Court for purposes of delay or the multiplication of proceedings. To my knowledge, no other DOJ attorney assigned to this matter has filed a document, or been instructed to file a document, for the purpose of delaying or multiplying proceedings.

7. In every filing made with the Court I have endeavored to represent the facts and law accurately and fairly, while zealously advocating on behalf of the United States. I have never sought to mislead the Court or sought to withhold non-privileged, material information from the Court. Based on my extensive interactions with them over the course of this case and others, I believe the same to be true of my Department of Justice colleagues working on this matter.

8. I have no reason to believe that any representative of the Federal Bureau of Prisons has made any representations to the Court, or withheld information from the Court, for purposes of misleading the Court or the Plaintiff. No one from the Federal Bureau of Prisons has asked me to make misleading statements or representations to the Court, or to withhold non-privileged, material information from the Court. I have no reason to believe that the Federal Bureau of Prisons has asked other DOJ attorneys assigned to this matter to make misleading statements or representations to the Court, or to withhold non-privileged material information from the Court. Nor am I aware of any efforts on behalf of the Federal Bureau of Prisons to delay providing medical care to the Plaintiff, including the provision of gender-affirming surgery.

9. I am not aware of anyone at the Department of Justice or the Federal Bureau of Prisons who intentionally sought to violate the Court's preliminary injunction order or endorsed any effort to do so. In the course of providing legal advice to the Federal Bureau of Prisons, I did not (and would not) provide any advice that I believed would constitute a violation of the Court's preliminary injunction order. My understanding of the Court's preliminary injunction order was that it required the "TEC [to] meet to evaluate Iglesias' request for GCS by Monday, January 24, 2022." Dkt. No. 177 at 1. I did not understand the Court's preliminary injunction to require the TEC to reach any

particular conclusion in its evaluation or to limit the range of possible conclusions the TEC could reach.

10. I have re-reviewed each of the eight filings identified in the Court's February 10 Order, including Docket Numbers 100, 129, 130, 147, 157, 161, 178, and 183. In each of those filings I believe I and my colleagues accurately represented both the facts and the law. Neither myself, nor to the best of my knowledge did anyone at DOJ, make any of the eight filings identified by the Court in the February 10 Order for the purpose of delay or the multiplication of proceedings. Rather, each of the filings identified in the Court's February 10 Order was made in good faith and based on the best understanding of the facts and the law. None of the filings identified in the Court's February 10 Order was intended to mislead the Court or misrepresent the facts or the law.

11. For example, the Court's February 10 Show Cause Order notes that I argued in Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction that the TEC "conducted an individualized assessment of Plaintiff and concluded that she was not an appropriate candidate for gender affirming surgery at this juncture because her hormone levels had not yet stabilized, and she had not lived a real-life experience as a female for twelve months in a female prison." Dkt. No. 187 at 7 n. 2 (quoting Dkt. No. 100 at 14). The Court further observes that Dr. Leukefeld's declaration in support of Defendants' Opposition stated that "the TEC has not denied Iglesias gender affirming surgery." *Id.* (quoting Dkt. No. 100-2 at 6). I do not believe these statements are inconsistent, and both statements were accurate at the time they were made. As Dr. Leukefeld explained in her declaration, "[g]ender affirming surgery was not appropriate at the time Iglesias was last reviewed by the TEC, nor is it currently appropriate." Dkt. No. 100-2 at ¶ 11. Dr. Leukefeld stated that Iglesias had not yet lived in a gender congruent role for twelve months, and explained the penological reasons

such an experience was important before considering surgery. *Id.* at ¶¶ 11-12. She also noted that at the time the TEC reviewed Ms. Iglesias for surgery on March 9, 2020, Ms. Iglesias' "hormone levels had fallen below their goal and were not been maximized." *Id.* ¶ 10. For these reasons, Dr. Leukefeld explained that "the TEC has not denied Iglesias gender affirming surgery. Rather, it has not approved placement in a female facility, which is a necessary and appropriate step toward surgery." *Id.* at ¶ 13 (emphasis added). I did not believe at the time, and do not believe now, that there is anything contradictory or factually inaccurate in Dr. Leukefeld's declaration, or in Defendants' brief which cites to that declaration. The statements in Dr. Leukefeld's declaration and the brief are consistent with one another because the TEC had not denied Plaintiff's request for surgery; rather, the TEC concluded that surgery was not yet appropriate, with the expectation that the TEC would continue to evaluate Plaintiff for surgery as her circumstance may change. The statements made in the brief and supporting declaration were made in good faith, are consistent with the facts as they then existed, and were not made for purposes of delay.

12. The Court also identifies Defendants' Motion to Exclude Untimely and Undisclosed Expert Testimony and Request for Expedited Consideration, Dkt. No. 130, as a motion that should be addressed at the upcoming hearing. Defendants moved to exclude new opinions that Dr. Ettner sought to offer after Plaintiff's motion for a preliminary injunction had been fully briefed and less than two weeks before the then-scheduled preliminary injunction hearing. Dkt. No. 130. Defendants explained in that motion (with citation to support in the record) that Plaintiff had months to develop Dr. Ettner's opinions in this case, and that Plaintiff waited until *after* the Court had scheduled the preliminary injunction hearing—which was six weeks after the preliminary injunction briefing had concluded—before seeking to have Dr. Ettner conduct a psychological examination of the Plaintiff.

Id. at 3. Defendants also explained that in the absence of knowing precisely what Dr. Ettner's new opinions and bases for those opinions were, they could not reasonably prepare for the upcoming evidentiary hearing. *Id.* Defendants then cited to a number of cases standing for the proposition that the exclusion of untimely expert testimony may be appropriate. *Id.* I believed at the time, and continue to believe, that this is an accurate statement of the law, that Defendants had a good faith, legitimate basis for seeking the exclusion of Dr. Ettner's untimely opinions, and that this motion was not made for purposes of delay.

13. The Court's Show Cause Order also suggests that I mischaracterized the record in Defendants' Opposition to Plaintiff's Motion to Compel Expedited Discovery. Dkt. No. 187 at 6 n. 4. In support of that Opposition, Defendants explained that Plaintiff had repeatedly told the Defendants and the Court that she did not want expedited discovery beyond the deposition of Dr. Leukefeld, and that Plaintiff changed her position less than three weeks before the preliminary injunction hearing. Dkt. No. 147. Defendants factual representations in that Opposition were accurate, made in good faith, and were not made for the purposes of delay. Defendants' Opposition identified the multiple times Plaintiff's counsel had represented to the Defendants and the Court that Plaintiff did not seek to pursue expedited discovery beyond the deposition of Dr. Leukefeld. This included an August 30, 2021, email in which Plaintiff's counsel advised the government that "[a]fter thinking more about the question of moving forward with expedited discovery, we are inclined to limit the expedited discovery we request to a deposition of Dr. Leukefeld." *Id.* at 1 Ex. 2. Plaintiff's counsel then told the Court at the August 30, 2021 status conference that Plaintiff did not seek any discovery beyond Dr. Leukefeld's deposition. *Id.* at 1. Then, on September 10, 2021, after Dr. Leukefeld's deposition, Plaintiff's counsel again told the Court that she "do[es] not anticipate the need for any

additional depositions or discovery before the hearing." *Id.* at 2 Ex. 5. Despite these multiple representations to Defendants and the Court, the Plaintiff changed course on September 20 and sought additional, expedited document discovery. *Id.* at 2. Each of these assertions of fact is supported by the record, was made in good faith, and was not made for purposes of delay. The Court states in the Show Cause Order that Defendants have mischaracterized the record because at the hearing on August 30, 2021, it was Defendants who explained that they did not need to depose Dr. Ettner and were unlikely to call witnesses, but later changed positions when Defendants stated on September 10 that they intended to depose Dr. Ettner and to call Dr. Leukefeld as a witness. Dkt. No. 187 at 7 n.4. While that, too, is true, it is also true that Plaintiff made repeated representations to the Court that she did not intend to seek discovery beyond Dr. Leukefeld's deposition, and Defendants' opposition to the motion for expedited discovery accurately states as much. And Defendants' need to depose Dr. Ettner only became apparent after Plaintiff finally provided the results of Dr. Ettner's July 20, 2021 psychological assessment of Plaintiff – which Plaintiffs produced on August 31—after the August 30 hearing. Although the Court is correct that Plaintiff was not *ordered* to inform the Court by September 10 as to whether she sought additional discovery beyond Dr. Leukefeld's deposition, Dkt. No. 187 at 7 n.4, Plaintiff did repeatedly represent to the Court and Defendants that she did not, both on September 10 and earlier.

14. The Court's Show Cause Order also identifies Defendants' Motion for Relief From Full Compliance With the Court's October 15 Order, Dkt. No. 157, as a document Defendants should be prepared to discuss at the upcoming hearing. Dkt. No. 187 at 7. Defendants filed a motion for relief from the aspect of the Court's October 15 Order concerning expedited discovery to the extent it required complete compliance with the production of documents by the date of then-scheduled

October 19, 2021 preliminary injunction hearing. Dkt. No. 157 at 1-2. Defendants explained that they "had made every effort to comply with the Court's order as quickly as possible, and they are working to collect the documents encompassed by the Court's Order and prepare them for production." *Id.* at 1. Defendants noted that they had already produced the first three of the four categories reflected in the Court's discovery order, and had produced 886 pages of documents in the last 48 hours. *Id.* at 2. Defendants explained, however, that it would be impossible to complete production of the fourth category of documents by that Tuesday's evidentiary hearing because it required "electronic custodial searches of a number of BOP employees, and the initial collection efforts resulted in hundreds of thousands of pages of emails." *Id.* Defendants explained that although a preliminary review indicated that a substantial proportion—and likely a large majority—of these documents are either privileged or non-responsive, addition time would be necessary to de-duplicate the collection, review the documents for responsiveness and privilege, and redact any security sensitive information or information related only to other inmates. *Id.* For those reasons, Defendants explained, the review could not be completed in time for the preliminary injunction hearing scheduled for the following day. *Id.* These representations were and remain accurate to the best of my knowledge, information, and belief, and the motion for relief was made in good faith and not for purposes of delay.

15. The Court's Show Cause Order also expresses concern with the statement in Defendants' October 22, 2021 Status Report, Dkt. No. 161, concerning the amount of time they estimated it would take to review documents. Dkt. No. 187 at 7 n.5. The Defendants provided this estimate in response to the Court's October 19, 2021 minute order that asked, among other things, for "defendants[']proposed deadline to []comply with the Court[']order on expedited discovery[.]" In that status report,

Defendants noted that, after de-duplication and discussions with the Plaintiff to narrow the scope of the search, the number of documents to be searched totaled approximately 5,200 documents. Dkt. No. 161 at 2. Defendants further noted that the documents would be available to be searched early in the week of October 25, 2021, that Defendants anticipated providing to Plaintiff responsive, non-privileged documents on a rolling basis, and that Defendants anticipated making their best efforts to complete their productions by November 22, 2021 – within less than one month. *Id.* Defendants further noted that assuming an averaging process rate of twenty-five documents per hour and eight-hour review days, "it will take twenty-six full days to review the approximately 5,200 collected documents, absent further narrowing." *Id.* at 2, n.1. For this reason, Defendants noted that they were "uncertain whether they can complete their production of documents subject to the Court's order by November 22, 2021." *Id.* at 2. The Court states in its Show Cause Order that "DOJ attorneys represented that it could not comply with the Court's discovery order on expedited discovery" based on the number of man-hours estimated to complete the review, and further noted that the estimate assumed a single attorney doing the work when "five attorneys entered in on this case." Dkt. No. 187 at 7, n.3. But Defendants did not represent to the Court that they "could not comply with the Court's discovery order." Rather, as explained in Defendants' status report, Defendants expressed uncertainty as to whether they could produce all responsive, non-privileged documents by November 22, 2021 given the large volume of documents and the short time for review. More importantly, Defendants did not intend to suggest that only a single attorney would be reviewing documents. Rather the intention was to provide the court with the aggregate number of personnel hours necessary to

complete the expedited review.[1] There certainly was no intention to mislead the Court; rather, Defendants sought to provide the Court with a conservative estimate so that the Court could decide whether it made sense to delay briefly the evidentiary hearing to permit the orderly production of documents. This filing was made in good faith and was not intended to mischaracterize the record or improperly delay proceedings.

16. The Court also expressed concerns in the Show Cause Order with Defendants' Motion for Reconsideration, Dkt. No. 178, as well as the Notice by All Defendants in Compliance with Preliminary Injunction, Dkt. No. 183. *See* Dkt. No. 187 at 7. These two documents were filed while I was on detail to the Office of Legislative Affairs. Nevertheless, I have no reason to believe that either the DOJ attorneys assigned to this matter or the Federal Bureau of Prisons sought to file these documents to mislead the Court or otherwise improperly delay proceedings or Plaintiff's medical care.

17. As a member of the Bar and an employee of the Department of Justice, I take with utmost seriousness my duties and obligations to comply with all Court orders, the Federal Rules of Civil Procedure, and the Rules of Professional Responsibility to the full extent required by law. In my twenty-two years of practice I have never been sanctioned by a Court for alleged misconduct. As in every matter I handle on behalf of the United States, I have endeavored to adhere to the highest ethical standards in litigating this case. At no time during my involvement in this case did I seek to misrepresent the facts or the law or improperly delay proceedings in this matter. Prior to the Court's

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[1] As reflected on the signature block of this filing, there were three—not five—Federal Programs Branch trial attorneys assigned to work on this matter at that time, along with a reviewer and representatives from the U.S. Attorney's Office, who are not substantively involved in the litigation of this case but rather serve as local counsel. Each of those three Federal Programs Branch attorneys, including myself, had other matters in addition to this litigation to attend to during this time. In addition, Laura Smith is an attorney from DOJ's Torts Branch who represented the Defendants sued in their individual capacity. At the time Defendants filed this motion, the parties had jointly stipulated to the dismissal of the individual capacity claims, Dkt. No. 114, and Ms. Smith has had no further involvement in this case since that time.

Show Cause Order, I was unaware that the Court had any concerns about my or other DOJ employees' professionalism or candor in this case. I regret if any of my actions, or the actions of my colleagues, have caused the Court to question the truthfulness or intentions of counsel for the United States or the Federal Bureau of Prisons, and that the Court's concerns have resulted in an unfortunate expenditure of the Court's time and resources.

I declare under penalty of perjury that the foregoing is true and correct.

Alexandria, Virginia
February 14, 2022

*_/s/Joshua E. Gardner*_____
Joshua E. Gardner
Special Counsel
United States Department of Justice

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS
(a.k.a. CRISTIAN NOEL IGLESIAS),

Plaintiff,

v.

IAN CONNORS, *et al.*,

Defendants.

Case No. 19-cv-00415-RJN

DECLARATION OF JOSHUA M. KOLSKY

I, Joshua M. Kolsky, make the following declaration, in accordance with the provisions of 28 U.S.C. § 1746:

1. I am a Trial Attorney employed as a career civil servant by the Department of Justice, Civil Division, Federal Programs Branch. I am one of the attorneys representing the defendants in this litigation. I make this declaration based on my personal knowledge of the facts stated herein.

2. I have worked as an attorney or law clerk since graduating from law school in 2006. I have spent the majority of my legal career in public service, including serving as a law clerk to judges on the U.S. District Court for the Central District of California and on the U.S. Court of Appeals for the Ninth Circuit, working as an Assistant United States Attorney, and in my current position at DOJ, where I represent federal agencies and officials in a variety of civil litigation, in both defensive and affirmative postures. I have also worked as an associate at Gibson Dunn & Crutcher LLP and Cohen Milstein Sellers & Toll PLLC. I have a degree in Engineering Science from the University of Virginia and a law degree from Columbia University.

3. I have never been sanctioned by any court. Prior to the Court's February 10, 2022 Show Cause Order, Doc. 187, I had never been identified in an order to show cause regarding sanctions. I take seriously my duties to the Court, including my duty of candor and my duty to refrain from taking action or making representations in a case for improper purposes such as delay. As in all other litigation in which I am involved, I have endeavored to adhere to the highest ethical standards in litigating this case. I believe that government attorneys such as myself, as public servants entrusted with significant responsibility, should be especially careful to strictly abide by all ethical and professional obligations. I believe this because, in my view, the public has a right to expect that their government is truthful, plays by the rules, and follows the law. As a government lawyer, I understand that my actions may impact how the public views DOJ and the federal government generally, so I strive to perform my job duties at the highest levels of professionalism.

4. I was assigned to this matter in July 2021, but I had very limited involvement until approximately September/October 2021 when I began to participate more actively on the case. I participated in drafting Defendants' Opposition to Plaintiffs' Motion to Compel Expedited Discovery (ECF No. 147); Defendants' Motion to Strike Plaintiffs' Reply in Support of Motion to Compel Or, in the Alternative, For Leave to File a Supplemental Declaration (ECF No. 154); Defendants' Motion for Relief From Full Compliance with the Court's October 15 Order (ECF No. 157); Defendants' Status Report (ECF No. 161); Defendants' Motion for Extension of Time, Nunc Pro Tunc, to File Answer (ECF No. 171); Defendants' Answer (ECF No. 174); Defendants' Expedited Motion for Partial Reconsideration of the Court's Preliminary Injunction Order (ECF No. 178) and supporting declaration; Notice in Compliance with December 27, 2021 Preliminary Injunction (ECF No. 183) and supporting declaration. I also participated in responding to

Plaintiffs' document requests, helped to prepare Dr. Alison Leukefeld for testimony at the preliminary injunction hearing, and examined Dr. Leukefeld at the preliminary injunction hearing.

5. The Court's Show Cause Order orders me, three other DOJ attorneys, and two BOP officials, to appear at a hearing to show cause "for their failure to adhere to the Court's order dated December 27, 2021. (Docs. 176, 177)." The cited documents are the Court's Preliminary Injunction and the related Memorandum and Order (collectively, the "PI") in this case.

6. I have read the Show Cause Order several times, but it is unclear to me in what way I am alleged to have failed to adhere to the Court's PI. The PI, by its terms, imposes certain requirements on "Defendants." For example, the PI orders "Defendants to have the TEC meet to evaluate Iglesias's request for GCS by Monday, January 24, 2022." I am aware based on my reading of the Show Cause Order that the Court's concerns relate to the decision rendered by the TEC at its January 24, 2022 meeting, but the TEC – not DOJ – ultimately determined what decision to make. Accordingly, I am not aware of anything I have done that failed to adhere to the PI. When providing legal advice to client agencies, including BOP in this matter, I would never knowingly endorse or advise a client to disobey or fail to comply with a court order, and I did not do so in this case.

7. In addition, I do not read the PI to restrict the decisions that the TEC could make and to require a binary choice of either (1) recommending gender confirmation surgery for Plaintiff immediately or (2) denying it in full. Instead, the PI ordered the TEC to meet to "evaluate Iglesias's request for GCS by Monday, January 24, 2022." My understanding is that the TEC did meet and did evaluate Plaintiff's request for gender confirmation surgery on January 24, 2022, and thus complied with that requirement of the PI. The PI also orders Defendants to undertake various reporting requirements if certain conditions are met, but I have never understood those reporting

requirements to limit the decisions that the TEC could make. For these reasons, I believe BOP complied with the PI. Moreover, I am not aware of any reason to believe that the TEC made misrepresentations regarding its decision, withheld information, or that it reached the decision it did for purposes of misleading the Court or Plaintiff, or of delay.

8. The Show Cause Order also takes issue with testimony provided by Dr. Alison Leukefeld at the PI hearing. My understanding is that Dr. Leukefeld's testimony was accurate with the exception of one piece of testimony which failed to distinguish between the process that BOP would follow for considering gender confirmation surgery requests from inmates housed in a secure prison facility and the process that BOP would follow for inmates housed in a halfway house. I was not aware of any inaccuracy in the testimony until the Court's Show Cause Order. I am aware of no facts suggesting that Dr. Leukefeld intentionally provided inaccurate testimony, and I believe firmly that she did not.

9. The Show Cause Order states that I and my DOJ colleagues, "shall be prepared to discuss their representations in Docs. 100, 129, 130, 147, 157, 161, 178, and 183" at the February 22, 2022, hearing. Order at 6-7 (footnotes omitted). I am not aware of any inaccurate representations or frivolous legal arguments in any of the cited documents. Three of those documents (Docs. 100, 129, 130) pre-date my participation in this case and, therefore, do not contain my representations.

10. I have not made any representations or withheld any information in the case for the purpose of misleading the Court or Plaintiff, or taken action of any kind for the purpose of delaying or multiplying these proceedings. I have no reason to believe that any other DOJ attorney working on this case has made any representations or withheld information in the case for the purpose of misleading the Court or Plaintiff, or taken action of any kind for the purpose of delaying or

multiplying these proceedings. Similarly, I have no reason to believe that any BOP employee has made any representations or withheld information in the case for the purpose of misleading the Court or Plaintiff, or taken action of any kind for the purpose of delaying or multiplying these proceedings.

11. Although the Show Cause Order states that "BOP waited until the last possible day to file its 'Notice of Compliance with December 27, 2021 Preliminary Injunction,'" I did not delay filing that notice (Doc. 183). The TEC met on January 24, 2022 and I filed the notice one week later on the deadline set by the Court's PI. The intervening week was necessary in order to prepare the filing and have it reviewed by supervisors within Federal Programs Branch, by senior officials in DOJ leadership, and within BOP. The documents to be filed were finalized on the afternoon of January 31, and I filed them that day.

12. As noted above, I endeavor to conduct myself in accord with the highest ethical standards in every case, including this case. That includes complying with all court orders, offering evidence that is accurate and complete, and presenting only well-founded factual assertions and legal argument. I regret that the circumstances of this case have caused the Court to doubt the government's intentions in this matter, but I respectfully believe that everyone involved in this case has acted in good faith and endeavored to represent our client's legitimate interests within the bounds of our ethical and professional responsibility obligations.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of February 2022 in Washington, DC.

Joshua M. Kolsky

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS
(a.k.a. CRISTIAN NOEL IGLESIAS),

Plaintiff,

v.

IAN CONNORS, *et al.*,

Defendants.

Case No. 19-cv-00415-NJR

DECLARATION OF JOHN ROBINSON

I, John Robinson, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a trial attorney in the Federal Programs Branch, an office within the Civil Division of the United States Department of Justice. I joined the Department of Justice in 2020. From 2016 to 2020, I was a Senior Associate at the Washington, D.C. office of Arnold & Porter. Earlier in my career, I clerked for the Hon. Joan B. Gottschall of the United States District Court for the Northern District of Illinois and the Hon. Rosemary S. Pooler of the United States Court of Appeals for the Second Circuit. I graduated from the University of Michigan Law School in 2012 and Yale University in 2009.

2. I joined the trial team defending the Federal Government in this matter in November 2021 as the team was preparing for the November 22, 2021 preliminary injunction hearing. My role at the hearing was to present oral argument on behalf of the United States. Since the hearing, I have assisted the team in preparing various of the Government's filings, including the Government's motion for partial reconsideration of the Court's December 27, 2021 preliminary injunction (Doc. 178) and the Government's notice in compliance with the preliminary injunction (Doc. 183). I have

also participated in discussions with the Bureau of Prisons regarding compliance with the Court's preliminary injunction.

3. The Court's order to show cause suggests that the Bureau of Prisons failed to comply with the preliminary injunction and questions representations made by Government counsel in certain filings. I take compliance with court orders very seriously. I would never knowingly disobey an order of the Court or encourage a client to disobey an order of the Court. I likewise take my duty of candor and Rule 11 obligations seriously and would never present a pleading to the Court for an improper purpose or without believing that the factual and legal contentions made in the pleading were well supported. I have no reason to believe that anyone at the Department of Justice or Bureau of Prisons has made any representations in this case to mislead the Court or Plaintiff or taken any action to inappropriately delay these proceedings or Plaintiff's receipt of needed medical care.

4. When I learned that the Bureau of Prison's Transgender Executive Counsel ("TEC") had recommended that Plaintiff be referred to a surgeon for consultation for gender confirmation surgery approximately one month after she is placed in a Residential Reentry Center, I believed—and continue to believe—that the Bureau acted in compliance with the Court's injunction. If I had believed that the Court's order foreclosed that recommendation, I would have advised the Bureau that it was not an available option. My understanding is that the other members of the trial team likewise understood the Court's preliminary injunction to allow the recommendation that the TEC made.

5. In preparing Defendants' notice in compliance with the Court's preliminary injunction, the team was careful to be transparent with the Court about the course that the TEC had selected. We made clear that the TEC had not unequivocally recommended surgery immediately, but also had not denied Plaintiff's request for surgery. Because the Court had ordered that Defendants file a notice explaining the reasons for the TEC's decision if the TEC did not recommend Plaintiff for surgery, we provided a notice and declaration explaining all the reasons for the TEC's decision.

6. As noted, I was part of the trial team when the Government filed two of the documents identified in the Court's order to show cause: the Government's motion for partial reconsideration of the Court's December 27, 2021 preliminary injunction (Doc. 178), and the Government's notice in compliance with the preliminary injunction (Doc. 183).

7. With respect to the motion for partial reconsideration, the Court does not identify any particular representations of concern in that filing. The motion sought reconsideration of the Court's order that the TEC transcribe and potentially produce its internal deliberations to the Court. Plaintiff did not oppose the motion, and the Court granted it. The Court notes that the Government did not seek relief from any other aspect of the Court's preliminary injunction in its motion for partial reconsideration, but, as explained, the Government believed that the TEC's decision was consistent with the preliminary injunction, so we did not believe that there was any need to seek reconsideration.

8. With respect to the notice in compliance with the preliminary injunction, the Court suggests that the TEC made a recommendation that was foreclosed by the Court's preliminary injunction. As explained, however, we believed that the TEC's decision was consistent with the preliminary injunction.

9. I take my ethical duties extremely seriously and deeply regret that the Court has expressed concern with the Government's actions in this case. Before the Court's order to show cause, I had no reason to believe that the Court had any concerns with counsel's professionalism or candor in this case. In my more than nine years of practicing law, I have never been sanctioned or accused of sanctionable misconduct by a Court. I hope that the response and supporting declarations that we are providing today help to assure the Court that we have taken our obligations to the Court seriously and will continue to do so.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 14, 2022.

JOHN ROBINSON

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS (a.k.a., CRISTIAN NOEL IGLESIAS),	)	
Plaintiff,	)	
vs.	)	Case No. 19-cv-00415-NJR
IAN CONNORS, ET AL.,	)	
Defendants.	)	

DECLARATION OF GARY FELDON

I, Gary Feldon, make the following declaration, in accordance with the provisions of 28 U.S.C. § 1746:

1. I am currently employed as a Trial Attorney by the Federal Programs Branch of the Civil Division of the Department of Justice, a position I have held since November 2015, with the exception of six months spent detailed to the Department's Antitrust Division. While employed with the Department, I have received three Special Commendations for Outstanding Service. Prior to my current position, I served as an Assistant Attorney General in the Office of the Attorney General for the District of Columbia from October 2012 until August 2015, an associate at Covington & Burling LLP from September 2008 to September 2012, and a law clerk on the U.S. Court of Appeals for the Eleventh Circuit from August 2007 to August 2008. I received my undergraduate degree from Columbia University in 2004 and my law degree (with High Honors) from Emory University School of Law in 2007.

2. I was assigned to the above-captioned litigation in September 2021 and since then have been involved in all aspects of the litigation, with the exception of events occurring from November 2 through December 28, 2021, when I was on leave. I had particular involvement in

preparing the opening and reply briefs for Defendants' motion to dismiss, ECF Nos. 129 & 137, the opposition to Plaintiff's motion for a preliminary injunction, ECF No. 99, the opening and reply briefs for Defendants' motion to exclude the untimely opinions of Dr. Ettner, ECF Nos. 130 & 132, the motion seeking partial relief from the Court's order on expedited discovery, ECF No. 157, the status report concerning Defendants' ability to provide expedited discovery of custodial documents, ECF No. 161, and Defendants' collection, processing, review, and production of documents. I was also involved in preparing the motion for partial reconsideration of the Court's Preliminary Injunction, ECF No. 178, and the Notice of Compliance with December 27, 2021 Preliminary Injunction, ECF No. 183, although I was not a primary drafter of those filings.

3. In representing Defendants in this case, I have not knowingly made any misrepresentation or omitted any information in an attempt to mislead the Court or Plaintiff, nor am I aware of any other counsel for Defendants who has done so. I have also not taken any action to delay the resolution of this litigation or Plaintiff's receipt of any medical care to which she may be entitled, nor am I aware of any other counsel for Defendants who has done so.

5. During my representation of Defendants in this case, I am unaware of any Bureau of Prisons official or employee requesting that counsel make any misrepresentations or omit any information in an attempt to mislead the Court or Plaintiff, or any such misrepresentation or omission by a Bureau of Prisons official or employee. I am also unaware of any Bureau of Prisons official or employee requesting that counsel take any action to delay the resolution of this litigation or Plaintiff's receipt of any medical care to which she may be entitled, or any such action by a Bureau of Prisons official or employee.

6. The Court's February 10, 2022, Show Cause Order raises questions about the merits of the venue argument in Defendants' motion to dismiss. ECF No. 187 at 7 n.2. I was the attorney primarily responsible for drafting that argument. Following extensive legal research, I formed the good faith belief that, contrary to Plaintiff's position, venue is determined solely based on the

operative complaint in a case. I am aware that district court opinions lack precedential value, but I believed the decisions were nonetheless appropriate to cite as persuasive authority. I cited them in the motion only as persuasive authority and did not intend to suggest they were binding authority on this Court.

7. Following receipt of the Court's Order to Show Cause, I performed additional research on the venue question to determine whether I inadvertently overlooked any binding precedent foreclosing Defendants' venue argument. My additional research did not uncover any controlling authority to the contrary and has revealed at least two circuit courts agreeing with Defendants' position on venue. *See In re Samsung Elecs. Co., Ltd.*, 2 F.4th 1371, 1376 (Fed. Cir. 2021); *Fullerton v. Maynard*, 943 F.2d 57, 57 (10th Cir. 1991) (unpublished table decision) (holding that venue should be based on a prisoner's amended complaint when he was transferred after filing the original complaint). I am unaware of any other point that Defendants made in connection with the venue argument (or any other argument) that is unsupported by applicable law.

8. Based on the above, I do not believe Defendants' venue argument was inconsistent with Rule 11 or any of my other professional responsibility or ethical obligations. Had I believed that the argument violated Rule 11 (or any similar principle of attorney conduct), I would not have made the argument. And, had I discovered that the argument violated Rule 11 (or any similar principle of attorney conduct), I would have filed a notice with the Court expressly withdrawing the argument.

9. The Court's February 22, 2022 Show Cause Order also questions the Defendants' representations in their motion seeking partial relief from the Court's October 15 expedited discovery order and the status report concerning Defendants' ability to complete the custodial discovery ordered. ECF No. 177 at 7 (citing ECF Nos. 157, 161). Defendants went to extraordinary lengths to comply with the Court's order on expedited discovery, including agency counsel, litigation counsel, and support staff working nights and weekends. I estimated that

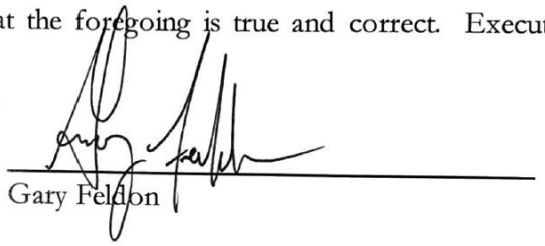
Defendants would require somewhat less than a month to complete review and production of the custodial files encompassed by the Court's October 15 order based on (1) initial information on the number of documents requiring individual review; (2) an estimate of the average rate of review (including redaction and privilege logging, as needed), and (3) an estimate of the average number of hours available for review between the three attorneys with access to the online platform on which the documents were reviewed. In describing the process for reaching that estimate, I did not intend to mislead the Court to believe that only one attorney would be performing the document review. Further, I had a good faith belief in the truth of that statement when I made it, and no one involved in the case suggested to me that it was not a realistic estimate. Indeed, the actual review and production required almost the period granted by the Court.

10. Having closely read the Court's Preliminary Injunction, it was and is my good faith belief that Defendants complied with that order by following the Court's instructions in the event the Transgender Executive Committee did not approve Plaintiff for immediate referral for gender confirming surgery. In discussing and assisting in the preparation of Defendants' Notice of Compliance with December 27, 2021 Preliminary Injunction, ECF No. 183, at no time did I believe Defendants were violating the Preliminary Injunction, and no one else raised such a concern to my knowledge.

11. I believe strongly in the importance of the ethical conduct by attorneys generally and by attorneys representing the government even more so. I take these ethical duties very seriously and would not intentionally mislead a court or make filings for improper purpose, such as delay. I did not do so in this case nor am I aware of anyone else doing so. Prior to reading the Order to Show Cause, I was not aware that the Court had ethical concerns about any aspect of Defendants' conduct in this case. In fifteen years of practice—eleven of them in public service—no court has sanctioned me, and I have never been subject to disciplinary action by a bar association or employer.

12. To the extent any actions of mine harmed the credibility or perception of the Department of Justice in the eyes of the Court, I deeply regret those actions even though they were unintentional. I likewise regret any actions of mine that unintentionally hindered the speedy, efficient, and just resolution of this case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of February 2022.



Gary Feldon

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS (a.k.a., CRISTIAN NOEL IGLESIAS),	)	
Plaintiff,	)	
vs.	)	Case No. 19-cv-00415-NJR
IAN CONNORS, ET AL.,	)	
Defendants.	)	

DECLARATION OF KATE TALMOR

I, Mary Kathryn (Kate) Talmor, make the following declaration, in accordance with the provisions of 28 U.S.C. § 1746:

1. I am currently employed as a Trial Attorney by the Federal Programs Branch of the Civil Division of the Department of Justice, a position I have held since I joined the Department through the Attorney General's Honors Program in September 2017, with the exception of nine months during which I served in the same role in the Department's Civil Rights Division. Prior to accepting this position, I served for two years as a Staff Law Clerk for the United States Court of Appeals for the Seventh Circuit. I obtained my law degree, with Honors, from the George Washington University Law School in 2015.

2. My involvement with the above-captioned litigation has been minimal and brief. Specifically, I was asked to help with the November 22, 2021 hearing on Plaintiff's Motion for Preliminary Injunction due to the unavailability of counsel, Josh Gardner, who originally had planned to handle the hearing. My role in the hearing was limited to the cross-examination of Plaintiff's expert witness, Dr. Ettner.

3. In preparation for the hearing, I reviewed Defendants' Motion to Dismiss, this

Court's order denying that motion, the transcript from Dr. Ettner's deposition, Dr. Ettner's declarations, briefing on Plaintiff's Motion for Preliminary Injunction, and a handful of other materials related to Dr. Ettner's anticipated testimony. I was not otherwise involved in preparation for the hearing.

4. I had no discussions or interactions with the Bureau of Prisons before the hearing, and have only spoken with BOP attorneys or officials on the day of the hearing.

5. As a matter of internal staffing, I have not been formally assigned to the team handling this litigation outside my assistance with the hearing. I had no further involvement with the case after the Court's preliminary-injunction hearing. I continue to receive ECF notifications and read this Court's Order Granting a Preliminary Injunction as a matter of personal interest, but I have had no responsibility for assisting BOP with implementing the injunction, nor have I had any awareness as to further events post-dating the injunction or BOP's steps to comply with it.

6. I have neither signed any pleading or other filing in this matter (with the exception of the Notice of Appearance I entered on November 17, 2021, for the purpose of assisting with the hearing), nor have I had any role in litigation strategy, research, or writing. Specifically, my name has not appeared on the signature block of any substantive filing in this matter and I had no role in preparing or filing any of the docket entries identified in the Court's Order to Show Cause, Docs. 100, 129, 130, 147, 157, 161, 178, and 183. I likewise had no involvement with formulating the legal arguments presented in Defendants' Opposition to Preliminary Injunction, nor any role in preparing Defendants' Notice in Compliance with December 27, 2021 Preliminary Injunction, Doc. 183.

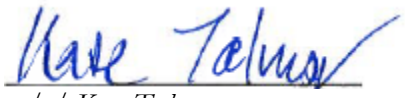
7. I have not taken any actions, including either representations or withholding of information, for any improper purpose, including misleading any party or the Court, delaying the proceedings, or denying Plaintiff the medical care she seeks. And although my role has been, as explained above, quite limited, I have no information to suggest nor reason to believe that any of my colleagues have made representations or withheld information in this matter for the purpose of

misleading the Court or parties, or delaying or multiplying the proceedings. To the best of my knowledge and belief, my colleagues take seriously their role as public servants, officers of the Court, and representatives of the United States, and would not take action in this matter for an improper purpose.

8. Although I have not had interactions with BOP aside from in-person conversations on the day of this Court's preliminary-injunction hearing, I have no reason to believe that anyone at BOP has misrepresented or withheld information for an improper purpose, including to delay or deny the surgery Plaintiff seeks.

9. Each of my roles in the legal profession, including four internships during law school, has been in a public-service capacity. I consider it a great honor to represent the United States as a trial attorney, and I take with the utmost seriousness the importance of my duty of candor and my duty to undertake vigorous defense of the government in an ethical manner. I have never been sanctioned by a Court and always have endeavored to adhere to the highest ethical standards in litigation.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of February 2022.



/s/ Kate Talmor