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' SUPPLEMENTAL RESPONSE TO THE COURT'S FEBRUARY 21, 2022 NOTICE AND ORDER

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INTRODUCTION

The United States appreciates the opportunity to submit this supplemental response, explaining further why we respectfully urge the Court to conclude that the actions of the individual Department of Justice ("DOJ") attorneys in this case do not warrant sanctions. As discussed at the February 22, 2022, hearing in this matter, both DOJ and the Federal Bureau of Prisons ("BOP") acknowledge that they made mistakes in this case. The United States recognizes the significant frustration that those mistakes have caused the Court, and the United States apologizes for and regrets those mistakes. As discussed at the February 22 hearing and in prior filings, however, none of those mistakes was intentional, and the United States respectfully submits that DOJ and BOP personnel have acted in good faith at all times in this litigation. Thus, the United States does not believe that sanctions are warranted here, particularly against individual DOJ attorneys, though the United States certainly takes the Court's concerns seriously and reaffirms its commitment to addressing those concerns.

To respond to the Court's concerns more completely, this supplemental filing addresses three subjects. First, the United States supplements its prior answers to the Court's list of questions in the February 21 Notice and Order, Doc. 198 at 18-21, including through the submission of sworn declarations from the four primary trial team members—Joshua Gardner, Gary Feldon, Joshua Kolsky, and John Robinson. As those declarations explain, each team member had varying levels of knowledge and understanding at different points in time regarding BOP's different approval processes for gender-confirmation surgery (*i.e.*, depending on whether someone is housed in a BOP secure facility or a halfway house). Some team members first learned of the different approval processes in October 2021, though not everyone remembers that information or fully understood the details of the different processes at that time. One team member first learned of the different approval processes in January 2022. Regardless of the precise timing and individual level of understanding,

however, what is common to all of the DOJ attorneys is that, before this Court's order to show cause, *see* Doc. 187, at no point did any of the individual DOJ attorneys realize that Dr. Leukefeld had provided inaccurate testimony at the preliminary-injunction hearing, nor did any of them appreciate the significance of BOP's different processes to the overall preliminary injunction proceedings. This failure to "connect the dots" and realize the importance of this information to the Court is certainly regrettable—but as the attached declarations explain in detail, it was not the result of any bad faith or intent to mislead the Court.

Second, this filing addresses certain concerns, raised in the Court's February 21 Notice and Order, that the individual DOJ attorneys may have pursued a conscious strategy of delay in this case, and about one of Defendants' counsel's representations in response to the Court's February 10, 2022, Show Cause Order. Defendants discussed these matters in their February 22 response to the Court's Notice and Order, and believe what they have already said on these topics should allay the Court's concerns. Nevertheless, the United States gratefully accepts the opportunity extended by the Court to present further information herein to dispel any remaining misgivings the Court may have about counsel's intentions or their conduct.

Third and finally, the United States hopes that the detailed explanations submitted in this filing are sufficient to address the Court's concerns regarding the conduct of individual DOJ attorneys in this matter. The United States as a whole remains committed to demonstrating its good faith in this matter, including by continuing to work with BOP to address Ms. Iglesias's medical needs. To the extent the Court has any remaining concerns regarding the conduct of individual DOJ attorneys, however, the United States would respectfully request an opportunity to address any remaining concerns before the imposition of any sanctions on individual DOJ attorneys.

DISCUSSION

I. The Individual DOJ Attorneys Did Not Intend to Mislead the Court, and Sought to Comply with the Court's Preliminary Injunction Based on Their Good Faith Understanding of Its Terms

This Court's February 21 Notice and Order contains a list of questions regarding what individual DOJ attorneys did (or did not) know and do at various points in time, *see* Doc. 198 at 18-21, which the United States previously answered to the best of its ability in the time permitted for its February 22 filing, *see* Doc. 199 at 13-17. In order to provide a more complete response, and in order to attempt to fully address the concerns reflected in the Court's questions, the United States now submits this supplemental filing—which is supported by sworn declarations from the four primary DOJ attorneys assigned to this case (Mr. Gardner, Mr. Feldon, Mr. Kolsky, and Mr. Robinson). *See* Exhs. A – D, attached.

As those declarations reflect, and as explained further below, the DOJ attorneys did not intend to mislead the Court regarding BOP's different surgery approval processes, nor did the DOJ attorneys seek to disregard the Court's preliminary injunction. Instead, they attempted to implement the Court's injunction according to their good faith understanding of its terms.

To be sure, everyone involved in this case (at both DOJ and BOP) acknowledges that they did not inform the Court about the existence of BOP's different approval processes at an earlier point in the proceedings—*i.e.*, before the January 31 Notice. And everyone involved recognizes the significant frustration that their failure to do so has caused the Court, for which they apologize. But the United States respectfully submits that, notwithstanding the Court's understandable frustration, the mistakes in this case were unintentional and inadvertent, not the type of conduct for which sanctions would be appropriate. That is confirmed by the sworn declarations submitted in this case, as well as the overall record in the case, as discussed further below.

A. Background on These Proceedings, the Individual DOJ Attorneys' Awareness of the Different BOP Processes, and Their Injunction Compliance

1. Early Proceedings in the Case

Plaintiff initiated this matter by filing a Complaint in April 2019. *See* Doc. 1. As relevant to these show cause proceedings, two of the DOJ attorneys (Mr. Gardner and Mr. Feldon) were assigned to this case in late 2020. *See* Gardner Decl., Doc. 191-4, ¶ 3; Feldon Suppl. Decl., Doc. 196-1, ¶ 2. On April 6, 2021, Plaintiff filed a motion for a preliminary injunction. *See* Doc. 93. The relief requested in that motion was "a preliminary injunction enjoining Defendants to (i) provide Plaintiff with the medically necessary healthcare she needs, including permanent hair removal and gender confirmation surgery; (ii) house Plaintiff at an institution consistent with her gender identity; and (iii) protect Plaintiff from the known and serious risks of harm she continues to face while housed in a men's prison." *Id.* at 20.

Defendants timely filed their opposition to that preliminary injunction motion on April 20, 2021, *see* Doc. 99, which included a declaration from Dr. Alison Leukefeld, a BOP official, explaining the medical care that BOP had (and had not) provided to Ms. Iglesias. *See* Doc. 99-2. Plaintiff filed her reply brief on May 3, 2021. *See* Doc. 107. While the preliminary injunction motion was pending, Defendants filed several Notices of Case Developments informing the Court of new factual information relevant to the pending motion. *See* Docs. 103, 111, 123, 148. Defendants also filed a motion to dismiss on July 8, 2021, which included another declaration from Dr. Leukefeld discussing recent developments in Plaintiff's medical care. *See* Doc. 129.

While the preliminary injunction motion was pending, the parties engaged in certain limited discovery. In particular, Plaintiff's counsel deposed Dr. Leukefeld on September 10, 2021. During her deposition, Dr. Leukefeld testified that the exact process BOP would follow after the TEC recommended an individual for gender-affirming surgery was not entirely clear, because the TEC had not made any such recommendations at that time:

> Q. And you mentioned that, after the TEC makes a decision on surgery, there might still be more process to determine if such surgery is safe. What does that later process consist of?
>
> A. I'm not a medical doctor, but it would be working through labs and health screens and making sure that someone is healthy enough to have major surgery and recover well.
>
> Q. And that would happen after the TEC has made a decision on gender-affirming surgery?
>
> A. I guess I can't say for sure. We haven't been there.
>
> Q. And when you say you haven't been there, what do you mean by that?
>
> A. At this point the TEC has not recommended surgery.
>
> Q. The TEC has never recommended gender-affirming surgery for any prisoner?
>
> A. Correct.

Leukefeld Depo. Tr. (Unprotected) at 120:4 – 120:22 (attached hereto as Exh. E); *see also* Leukefeld Depo. Tr. (Subject to Protective Order) at 67:5 – 67:13 (redacted version attached hereto as Exh. F). During her deposition, Dr. Leukefeld also testified regarding Residential Re-entry Centers ("RRCs"), more commonly known as halfway houses, and BOP's continued provision of medical care to individuals even after they are transferred to an RRC. *See* Leukefeld Depo. Tr., Exh. F, at 70:22 – 77:3.

Around this same timeframe (September/October 2021), another DOJ attorney, Mr. Kolsky, began actively participating in the case alongside Mr. Gardner and Mr. Feldon. *See* Kolsky Decl., Doc. 191-5, ¶ 4. To the best of their recollections, and based on reviews of their records, it appears that all three of these DOJ attorneys learned for the first time in October 2021 that at least some aspects of BOP's approval process for gender-confirmation surgery would differ for individuals residing in halfway houses, though each person's memory and understanding of that information varied. *See* Gardner Suppl. Decl. ¶ 3; Feldon Third Decl. ¶ 3(A); Kolsky Suppl. Decl. ¶ 5; *cf.* Feb. 21 Notice & Order, Doc. 198, at 18 (Question A). For example, Mr. Feldon does not recall learning that

information at all, and instead is aware that he was informed of this information in October 2021 only by virtue of reviewing his records. *See* Feldon Third Decl. ¶ 3(A). Mr. Gardner believes that he learned in October 2021 that BOP's processes for authorizing medical care may differ for inmates housed in secure facilities versus those located in halfway houses, but at that time he did not think the difference was significant to the case, for the reasons discussed below. *See* Gardner Suppl. Decl. ¶ 3. Additionally, Mr. Kolsky understood in October 2021 that Dr. Alix McLearen would be the final decisionmaker for gender-confirmation surgery for individuals in a halfway house, but he did not at that time know all of the details of the different approval processes—such as the fact that, in the halfway house context, the BOP Medical Director would have no involvement whatsoever in approving gender-confirmation surgery. *See* Kolsky Suppl. Decl. ¶ 5.

Regardless of their different understandings, at that time, none of the three attorneys appreciated the potential significance of BOP's different approval processes to Plaintiff's then-pending preliminary injunction motion. Specifically, because Plaintiff's preliminary injunction motion requested an order compelling BOP to provide surgery, the DOJ attorneys did not understand BOP's internal processes for approving gender-confirmation surgery to be material to the proceedings. *See, e.g.*, Gardner Suppl. Decl. ¶ 3; Feldon Third Decl. ¶ 3(A).

Moreover, the attorneys learned about the different approval processes in connection with a hypothetical future event. As of October 2021, the TEC's decision was that it would reconsider Ms. Iglesias for surgery in April 2022, at which point she would likely be in a halfway house. *See, e.g.*, Doc. 175 at 149:15 – 149:22. The DOJ attorneys learned about Dr. McLearen's final decisionmaking authority in that context; specifically, they learned that if the TEC ultimately recommended Ms. Iglesias for surgery in April 2022, and assuming Ms. Iglesias was indeed in a halfway house at that time, then Dr. McLearen's approval authority was relevant because it demonstrated that BOP itself was highly unlikely to disagree with the TEC's recommendation in favor of surgery (because Dr.

McLearen oversees and participates on the TEC, and thus she would be highly unlikely to disagree with her own recommendation). *See* Gardner Suppl. Decl. ¶ 3; Kolsky Suppl. Decl. ¶ 5. Ultimately, however, because this future event was entirely hypothetical, at least several months away, and did not appear to be related to the requested relief in Plaintiff's motion, the DOJ attorneys did not understand BOP's different approval processes to be material to the ongoing preliminary injunction proceedings, which focused on whether BOP was currently obligated to provide gender-confirmation surgery. *See* Gardner Suppl. Decl. ¶ 3; Kolsky Suppl. Decl. ¶ 5; Feldon Third Decl. ¶ 3(A).

2. The November 22, 2021 Preliminary Injunction Hearing

Shortly after being made aware of the two different processes in October 2021, two of the DOJ attorneys' involvement in the case became substantially more limited. Specifically, Mr. Gardner began a detail to the Office of Legislative Affairs in late October 2021, *see* Gardner Suppl. Decl. ¶ 3, and Mr. Feldon was on leave beginning in early November 2021 due to the birth of his son, *see* Feldon Third Decl. ¶ 3(A). Neither attorney attended the November 22, 2021 preliminary injunction hearing, nor did either attorney review (prior to the Court's Order to Show Cause issued in February 2022) the portion of the hearing transcript in which Dr. Leukefeld incorrectly stated that, if Ms. Iglesias was recommended for surgery by the TEC in April 2022, she would be referred to the BOP Medical Director. *See* Gardner Suppl. Decl. ¶ 3; Feldon Third Decl. ¶ 3(A).

The DOJ attorneys who did attend the November 22, 2021 preliminary injunction hearing were Mr. Kolsky, Mr. Robinson, and Ms. Talmor. *See generally* Doc. 175. As Ms. Talmor previously clarified, her only substantive involvement in this case was cross-examining Plaintiff's expert, Dr. Ettner, at the preliminary injunction hearing. *See* Talmor Decl., Doc. 191-8, ¶ 2; *see also* Doc. 195 (excusing Ms. Talmor's attendance from the show cause hearing). Mr. Robinson was assigned to this case in November 2021 shortly before the preliminary injunction hearing. *See* Robinson Decl., Doc. 191-6, ¶ 2. Thus, he was not aware of the differences in BOP's surgery approval processes at

the time of the preliminary injunction hearing. *See* Robinson Suppl. Decl. ¶ 4. As noted above, Mr. Kolsky had been made aware in October 2021 of the fact that Dr. McLearen would be the final decisionmaker on an individual's request for surgery if that individual resided in a halfway house. At the time of the preliminary injunction hearing, however, he did not understand the details of the two different processes—including the fact that the Medical Director would have no involvement whatsoever for individuals living in a halfway house. *See* Kolsky Suppl. Decl. ¶¶ 5, 7-8.

At the hearing, in response to a question from the Court, Dr. Leukefeld unintentionally but incorrectly stated that if the TEC recommended Ms. Iglesias for surgery in April 2022, she would then be referred to the BOP Medical Director. *See* Doc. 175 at 189-90; *see also* Leukefeld Decl, Doc. 191-1, ¶ 9 (correcting this testimony). Mr. Kolsky does not specifically recall listening to that particular question and answer, but he is confident that, before the Court's Show Cause Order issued in February 2022, he did not believe any of Dr. Leukefeld's testimony to be inaccurate in any way. *See* Kolsky Suppl. Decl. ¶¶ 6, 10; Kolsky Decl., Doc. 191-5, ¶ 8. For that reason, Mr. Kolsky did not review a transcript of the hearing (prior to the February 2022 Show Cause Order), because he had no reason to believe that any inaccurate testimony (or any other misrepresentations by the Government) occurred at the hearing. *See* Kolsky Suppl. Decl. ¶ 15.

As the preliminary injunction hearing transcript reflects, none of the DOJ attorneys (or BOP personnel) at the hearing explained the differences between BOP's processes for approving gender-confirmation surgery for individuals in BOP secure facilities versus halfway houses. *Cf.* Feb. 21 Notice & Order, Doc. 198, at 18 (Question E). That is because Mr. Kolsky had only a limited understanding of the different processes and was unaware of any inaccuracy in the testimony, and because Mr. Robinson was entirely unaware at that time of the different processes. *See* Kolsky Suppl. Decl. ¶ 6; Robinson Suppl. Decl. ¶ 4. For the same reason, Mr. Robinson's closing argument also did not reference the different processes. *See* Robinson Suppl. Decl. ¶ 14; *cf.* February 21 Notice & Order,

Doc. 198, at 19 (Question I). Had Mr. Kolsky or Mr. Robinson been aware of any inaccuracies or misrepresentations at the preliminary injunction hearing, they would have ensured that any such errors were corrected. *See* Kolsky Suppl. Decl. ¶ 6; Robinson Suppl. Decl. ¶ 14.

3. Preliminary Injunction Compliance

Following the November 22 preliminary injunction hearing, and after the Court issued its preliminary injunction order, Doc. 177, all four of the primary DOJ attorneys on this case read the Court's order. *See* Gardner Suppl. Decl. ¶ 6; Feldon Third Decl. ¶ 3(F); Kolsky Suppl. Decl. ¶ 11; Robinson Suppl. Decl. ¶¶ 5, 13; *cf.* Feb. 21 Notice & Order, Doc. 198, at 18 (Question F). Following receipt of the order, the DOJ attorneys immediately took steps to ensure BOP could comply with the injunction's terms. *See, e.g.*, Robinson Suppl. Decl. ¶¶ 5, 13.

The Court's preliminary injunction order does not differentiate between BOP's processes for individuals housed at secure BOP facilities and individuals in halfway houses. *Cf.* Feb. 21 Notice & Order, Doc. 198, at 19 (Question G). Importantly, however, none of the individual DOJ attorneys understood the Court's order to limit the range of potential decisions the TEC could make in connection with Ms. Iglesias's individualized medical care (as opposed to prescribing a deadline for the TEC's decision and then imposing procedures to be followed after a decision was made). *See id.* (Question H); *see also, e.g.*, Gardner Decl., Doc. 191-4, ¶ 9; Gardner Suppl. Decl ¶ 6; Feldon Decl., Doc. 191-7, ¶ 10; Feldon Third Decl. ¶ 3(H); Kolsky Decl., Doc. 191-5, ¶¶ 6-7; Kolsky Suppl. Decl ¶ 13; Robinson Decl., Doc. 191-6, ¶ 4; Robinson Suppl. Decl ¶¶ 5, 13. The same is true for the BOP officials who were bound to implement the Court's injunction. *See, e.g.*, McLearen Decl., Doc. 191-2, ¶¶ 13-15.

On January 10, 2022, Mr. Robinson learned for the first time about the two different BOP processes for approving surgery. *See* Robinson Suppl. Decl. ¶¶ 3, 6. Around that same time, other DOJ team members also learned more details about the two different BOP processes. *See, e.g.*, Kolsky

Suppl. Decl. ¶ 6; Feldon Third Decl. ¶¶ 3(A), 3(C). At that time, BOP officials were considering different potential options in connection with the TEC's upcoming January 24 meeting, during which the TEC would reevaluate Ms. Iglesias's request for surgery. *Cf.* Doc. 177 at 1 (ordering "the TEC meet to evaluate Iglesias's request for GCS by Monday, January 24, 2022"). In that context, DOJ attorneys learned that one potential benefit of the TEC recommending Ms. Iglesias for surgery after her arrival at the halfway house (if the TEC ultimately decided on that course of action) would be that the approval process would be more streamlined—*i.e.*, because once Ms. Iglesias resided in a halfway house, she would not need to be referred to the BOP Medical Director. *See, e.g.*, Robinson Suppl. Decl. ¶ 6; Kolsky Suppl. Decl. ¶ 6; Feldon Third Decl. ¶ 3(C). At that time, the DOJ attorneys did not recall the prior inaccurate testimony at the preliminary injunction proceedings, nor did they appreciate the significance of this information to the Court's resolution of Plaintiff's preliminary injunction motion. *See, e.g.*, Kolsky Suppl. Decl. ¶ 6; Robinson Suppl. Decl. ¶¶ 7-8; Feldon Third Decl. ¶ 3(C); Gardner Suppl. Decl. ¶ 3.

On January 24, 2022, the TEC decided to recommend that Ms. Iglesias be referred to a surgeon for consultation for gender-confirming surgery approximately one month after she is placed in a halfway house, assuming no reasons develop that would make surgery inappropriate. *See* McLearen Decl., Doc. 183-1, ¶ 6. In reaching that decision, the TEC relied, in part, on the more streamlined referral process that would not require review of Ms. Iglesias by the BOP Medical Director. *See id.* ¶ 11.

Once the TEC made its decision on January 24, the DOJ attorneys evaluated how best to proceed in light of the injunction's requirements. The DOJ attorneys recognized that the TEC's January 24 decision—recommending surgery at a future date, assuming certain conditions are satisfied—did not fit neatly into either of the two types of decisions anticipated by the Court's preliminary injunction order, *i.e.*, either "if the TEC *recommends* Iglesias for GCS" or "[i]f the TEC *does*

not recommend Iglesias for GCS[.]" Doc. 177 at 2, 3 (emphases in original); *see also* Gardner Suppl. Decl. ¶ 6; Feldon Third Decl. ¶ 3(H); Kolsky Suppl. Decl. ¶ 13; Robinson Decl., Doc. 191-6, ¶ 5; Robinson Suppl. Decl. ¶¶ 8-9, 13.

After considering the matter, the DOJ attorneys determined that the best course was not to follow the injunction's first set of requirements, which appeared to apply only if the TEC made a recommendation for immediate surgery. *Cf.* Doc. 177 at 2 (requiring that, "if the TEC *recommends* Iglesias for GCS," then Defendants must "[r]efer Iglesias to the BOP's medical director **immediately**" (emphases in original)). The DOJ attorneys were concerned that complying with the first set of reporting requirements could itself be misleading—by suggesting that the TEC had made an unequivocal and/or immediate recommendation for surgery, even though the TEC's actual decision was to refer Ms. Iglesias for surgery several months later assuming certain conditions were satisfied. *See, e.g.*, Gardner Suppl. Decl. ¶ 6; Feldon Third Decl. ¶ 3(H); Kolsky Suppl. Decl. ¶ 13; Robinson Decl., Doc. 191-6, ¶ 5; Robinson Suppl. Decl. ¶ 9.

Moreover, the DOJ attorneys understood the overall intent of the Court's injunction to be that, if the TEC did not agree to provide Plaintiff with her requested relief—*i.e.*, an immediate recommendation for gender-confirming surgery—then BOP needed to explain the reasons for that decision, such that Plaintiff could challenge the new decision if she saw fit and the Court would have an adequate record to review in connection with that decision. *See, e.g.*, Gardner Suppl. Decl. ¶ 6; Feldon Third Decl. ¶ 3(H); Kolsky Suppl. Decl. ¶ 13; Robinson Decl., Doc. 191-6, ¶ 5; Robinson Suppl. Decl. ¶ 9. In contrast to the preliminary injunction's first set of reporting requirements (which did not appear to require an explanation of the TEC's decision), *see* Doc. 177 at 1-2, the injunction's second set of requirements mandated that BOP document and explain its reasons for not recommending Iglesias for surgery. *See* Doc. 177 at 3. Accordingly, the DOJ attorneys determined that, in order to provide Plaintiff and the Court with an adequate record explaining the TEC's

January 24 decision declining to recommend Plaintiff for surgery immediately, the best course was to follow the second set of reporting requirements. *See* Gardner Suppl. Decl. ¶ 6; Feldon Third Decl. ¶ 3(H); Kolsky Suppl. Decl. ¶ 13; Robinson Suppl. Decl. ¶¶ 9, 13. Nonetheless, the DOJ attorneys recognized the tension between the TEC's January 24 decision and the two categories of decisions that the preliminary injunction appeared to contemplate, and for that reason sought to expressly acknowledge this tension in their Notice. *See* Doc. 183 at 2 & n.1.

Pursuant to the Court's second set of reporting requirements, the Notice needed to "explain[] all the reasons for TEC's decision." Doc. 177 at 3. Given that the TEC's January 24 decision was based in part on the existence of BOP's two different approval processes, the DOJ attorneys recognized that their filing needed to discuss those two separate processes. Accordingly, on January 31, the DOJ attorneys submitted a Notice in Compliance with December 27, 2021 Preliminary Injunction, and also submitted a declaration from Dr. McLearen, both of which discussed the existence of the two separate approval processes. *See* Doc. 183 at 3; Doc. 183-1 ¶ 11. At that time, however, the DOJ attorneys did not recall the inaccurate testimony at the preliminary injunction hearing. *See* Feldon Third Decl. ¶ 3(C); Kolsky Suppl. Decl. ¶ 6; Robinson Suppl. Decl. ¶¶ 7, 11. Thus, although the attorneys' filings on January 31, 2022 discussed the two different approval processes, the attorneys did not appreciate the extent to which the Court would feel misled by this new disclosure of the separate approval process. *See* Feldon Third Decl. ¶ 3(C); Robinson Suppl. Decl. ¶¶ 9, 11.

Also pursuant to the injunction's reporting requirements, the Notice in Compliance informed the Court about BOP's recently revised Transgender Offender Manual. *See* Doc. 183 at 3-4; Doc. 183-1 ¶ 7 & n.2. Before this January 31 Notice, the DOJ attorneys had not raised the revised Transgender Offender Manual with the Court. *Cf.* Feb. 21 Notice & Order, Doc. 198 at 18 (Question D). That was because there were no motions to which the Transgender Offender Manual would be relevant

pending before the Court at or near the time the Manual was issued (*i.e.*, on January 13, 2022), and thus the DOJ attorneys thought the most appropriate course would be to provide the updated Manual in conjunction with the "policies and procedures" they were required to provide pursuant to the preliminary injunction order. Doc. 177 at 3; *see also* Feldon Third Decl. ¶ 3(D); Kolsky Suppl. Dec. ¶ 9; Robinson Suppl. Decl. ¶ 12.

Ultimately, the DOJ attorneys did not realize the scope of confusion in this case—or the serious concerns that the Court had with respect to the series of events recounted above—until the Court issued its Order to Show Cause on February 10, 2022. *See* Doc. 187. At that point, the DOJ attorneys realized that Dr. Leukefeld had previously provided inaccurate testimony at the preliminary injunction hearing regarding BOP's surgery approval processes; that the Court had relied on that inaccurate testimony in crafting the terms of its preliminary injunction; and that the Court had serious concerns about the United States' conduct in this case. *See* Gardner Suppl. Decl. ¶ 3; Feldon Third Decl. ¶ 3(C); Kolsky Suppl. Decl. ¶ 6; Robinson Suppl. Decl. ¶ 9. The Court's Order to Show Cause was the first time all of these events crystallized for the DOJ attorneys, and in responding to that Show Cause Order, they sought to express regret for their actions, while also explaining that these events were unintentional. *See, e.g.*, Gardner Decl., Doc. 191-4, ¶ 17; Kolsky Decl., Doc. 191-5, ¶ 12; Robinson Decl., Doc. 191-6, ¶ 9; Feldon Decl., Doc. 191-7, ¶ 11.

B. The Individual DOJ Attorneys Acted in Good Faith, as the Record Confirms, and Sanctions Would Therefore Be Inappropriate

The foregoing series of events is undoubtedly unfortunate. The United States, and in particular the four individual DOJ attorneys, wish to apologize for the frustration that these events have caused the Court. Certainly everyone involved in this case at both BOP and DOJ wishes that they had been clearer about the different approval processes upfront, or at least noticed the inaccurate testimony earlier so as to correct it and prevent the significant frustration and expenditure of resources that these events have caused.

Notwithstanding the Court's understandable frustration and dissatisfaction with the above series of events, and notwithstanding the collective desire for this case to have unfolded differently, it is an entirely separate question whether sanctions are warranted against any particular individual. Here, the United States respectfully submits that no such sanctions are warranted, particularly against any of these four individual DOJ attorneys. The existing factual record—both the sworn declarations, as well as several pieces of extrinsic evidence—unequivocally demonstrate that the DOJ attorneys were operating in good faith and that any errors were unintentional, and thus there is no basis for sanctions.

As discussed previously, *see* Doc. 191 at 7-10, sanctions under the Court's inherent power requires that the subject of the sanction acted with "willful disobedience or bad faith." *Maynard v. Nygren*, 332 F.3d 462, 470 (7th Cir. 2003). Under Rule 11, "a court may impose sanctions on a party for making arguments or filing claims that are frivolous, legally unreasonable, without factual foundation, or asserted for an improper purpose." *Fries v. Helsper*, 146 F.3d 452, 458 (7th Cir. 1998). And sanctions under 28 U.S.C. § 1927 require, at a minimum, "reckless indifference to the law," *Dal Pozzo v. Basic Mach. Co.*, 463 F.3d 609, 614 (7th Cir. 2006), and "[s]imple negligence . . . will not suffice." *Boyer v. BNSF Ry. Co.*, 824 F.3d 694, 708 (7th Cir. 2016).

We respectfully submit that those high standards are not met in this case. Indeed, the factual record here is unequivocal and uniform: nobody at either DOJ or BOP intended to mislead the Court, disregard the Court's orders, or otherwise make any arguments for an improper purpose such as delay. *See, e.g.*, Gardner Decl., Doc. 191-4, ¶¶ 7-9; Gardner Suppl. Decl ¶ 17; Feldon Decl., Doc. 191-7, ¶¶ 3, 5; Feldon Third Decl. ¶¶ 3(A), 3(C), 3(H), 7; Kolsky Decl., Doc. 191-5, ¶¶ 6-7, 10; Kolsky Suppl. Decl ¶¶ 7, 13, 15; Robinson Decl., Doc. 191-6, ¶ 3; Robinson Suppl. Decl ¶ 16. As discussed in detail above, the individual DOJ attorneys did not intend to conceal from the Court the relevant facts regarding BOP's different approval processes, nor did they operate in bad faith with respect to the Court's injunction. There is certainly room to second-guess the Government's actions in this case,

particularly when viewed through the lens of hindsight. But the numerous declarations submitted here all confirm that any errors were unintentional and inadvertent, and thus should not lead to the issuance of sanctions. *Cf. Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F.3d 441, 449 (7th Cir. 1993) ("Although MCS' factual error was admittedly a serious one, and one with which the district court was understandably perturbed, the error was inadvertent and therefore not sanctionable.").

The United States respectfully submits that the attorneys' sworn declarations, by themselves, are sufficient to conclude that no misconduct occurred here. But the Court need not rely solely on the individual attorneys' statements; there is also extrinsic evidence in the record further supporting the attorneys' explanations that any errors here were inadvertent and unintentional.

First, while Plaintiff's preliminary injunction motion was pending, the DOJ attorneys filed at least four different Notices informing the Court of new factual developments that might bear on Plaintiff's claims. *See* Docs. 103, 111, 123, 148. These Notices represent the actions of conscientious attorneys who are seeking to ensure the Court has all the necessary information for deciding the relevant motions pending before it, not attorneys who would intentionally seek to conceal information from the Court or otherwise mislead the Court.

Second, the overall record here demonstrates that BOP's processes for approving surgery were occurring in a dynamic, fluid environment. At the time of Dr. Leukefeld's deposition (in mid-September 2021), BOP's processes still were not entirely clear because at that point the TEC had never recommended an individual for gender-confirmation surgery (let alone conditionally recommended someone for surgery at a future date, who may at that point be residing in an RRC). *See* Leukefeld Depo. Tr. (Unprotected) at 120:4 – 120:22; Leukefeld Depo. Tr. (Subject to Protective Order) at 67:5 – 67:13. Thus, it is understandable that confusion could arise relating to BOP's surgery approval processes, given that BOP was establishing these processes for the first time as this litigation was unfolding.

Indeed, the notion that anyone was trying to withhold information about medical care for individuals in RRCs is refuted by Dr. Leukefeld's deposition testimony, where she testifies at length, without interruption or objection by DOJ counsel, regarding medical care provided to individuals in RRCs. *See* Leukefeld Depo. Tr., Exh. F, at 70:22 – 77:3. Although Dr. Leukefeld's deposition testimony does not address the precise source of confusion here (the different approval processes for gender-confirmation surgery for individuals in RRCs), her lengthy testimony about RRCs dispels any notion that anyone at DOJ (or BOP) was improperly seeking to withhold information from Plaintiff or the Court on this topic. Furthermore, there is simply no advantage to be gained (for either the individual DOJ attorneys or for BOP) by attempting to conceal this different approval process—particularly given that, as Dr. Leukefeld testified in September, BOP remains responsible for individuals' medical care even when they are at an RRC. *See* Leukefeld Depo. Tr., Exh. F, at 72:2 – 72:6 ("Individuals who are in RRC are still in the custody of the Bureau of Prisons. They are going into the community, but still BOP's responsibility, and BOP does pay for their health care while they are in the RRC.").

Third and finally, each of the individual DOJ attorneys here is a member of the career civil service, responsible for defending the Executive Branch's policies and decisions regardless of presidential administration. These career civil servants have no vested interests in the policy decisions challenged in this case (or any other case), nor do they have any vested interest in the outcome of this litigation. In other words, these individual DOJ attorneys have absolutely no incentive to mislead the Court, disregard the Court's orders, or do anything else that could jeopardize their professional reputations or livelihood. Additionally, as Mr. Haas, a Director of the Federal Programs Branch and also a career civil servant, previously made clear in his sworn declaration, it is simply inconceivable that four different Federal Programs Branch attorneys would independently learn information, seek to conceal it from the Court, and/or seek to intentionally disregard a court order, without at least one

of those attorneys bringing the matter to his attention and raising concerns about that potential course of conduct. *See* Haas Decl., Doc. 191-3, ¶¶ 9-10.

In sum, the record here is uniform and uncontradicted. The United States acknowledges it has made mistakes in this case. But as the numerous sworn declarations all unwaveringly attest, those mistakes were unintentional and inadvertent. And those declarations are further supported by other extrinsic evidence in the record, collectively demonstrating that these individual DOJ attorneys would not, and did not, attempt to mislead the Court, disregard the Court's order, or engage in any other form of misconduct. Everyone involved at both BOP and DOJ regrets the mistakes that were made. But those mistakes were inadvertent and do not provide a basis for sanctions. *Cf. Milwaukee Concrete Studios*, 8 F.3d at 451 ("Inadvertent factual errors will occur—we hope not frequently, but litigants and attorneys will make mistakes. MCS and its counsel made a glaring one here . . . but Rule 11 is not directed to isolated factual errors that do not undermine a party's legal theory. Instead, Rule 11 is meant to deter baseless filings in district court.").

II. The Individual DOJ Attorneys Did Not Seek to Delay These Proceedings or Otherwise Attempt to Mislead the Court

Although previously addressed in their February 22 response, Defendants next turn to several additional concerns raised in the Court's Notice and Order regarding (i) a perceived strategy of delay pursued by the individual DOJ attorneys, and (ii) the candor of certain representations made by one of Defendants' counsel in connection with Defendants' February 14 response (Doc. 191) to the Court's Show Cause Order.

A. The Individual DOJ Attorneys Did Not Pursue a Strategy of Delay.

The Court's Notice and Order identifies three filings by Defendants (and related arguments) and raises the prospect that counsel may have intended to delay these proceedings each time the Court attempted to set a date for the preliminary injunction hearing. Feb. 21 Notice & Order, Doc. 198, at 22-25. Respectfully, as the individual DOJ attorneys have attested previously, and confirm again in

their declarations submitted herewith, they have not filed any motion or made any argument in this case for improper purposes of delay, including the three filings cited in the Court's Notice and Order. As detailed below, each of these submissions was grounded in the facts and circumstances presented, and was made in good faith.

1. Defendants' Motion to Exclude Untimely and Undisclosed Expert Testimony

The Court's Notice and Order first observes that on July 16, 2021, two weeks before the then-scheduled preliminary injunction hearing, Defendants filed their Motion to Exclude Untimely and Undisclosed Expert Testimony (Doc. 130), in consideration of which the Court postponed the hearing (Doc. 133). Feb. 21 Notice & Order, Doc. 198, at 23. Respectfully, however, Defendants' motion to exclude did not request a postponement of the preliminary injunction hearing; rather, the sole relief sought therein was to limit the scope of Dr. Ettner's testimony to the opinions expressed in her previously submitted declarations, and to exclude undisclosed opinions based on her post-briefing examination of Plaintiff. Doc. 130 at 5; *see* Gardner Suppl. Decl. ¶ 10. In lieu of excluding those opinions, the Court decided to reschedule the hearing. Doc. 133; *see also* Gardner Suppl. Decl. ¶ 10. In short, as Defendants' DOJ counsel attests, "Defendants' motion was not intended to delay, but rather was made"—and reasonably so—"to prevent [Defendants] from being prejudiced by new, undisclosed opinion's from Plaintiff's expert." *Id.*

2. Defendants' Motion for Relief from Full Compliance With the Court's October 15 Order, and Arguments Concerning the Timing of Dr. Ettner's Testimony.

The February 21 Notice and Order observes that on October 18, 2021, just before the re-scheduled preliminary injunction hearing was set to convene, Defendants filed their Motion for Relief from Full Compliance With the Court's October 15, 2021 Order (Doc. 157), seeking an extension of time to complete the production of documents the Court had directed one business day earlier. Feb. 21 Notice & Order, Doc. 198, at 23-24. The Notice and Order also notes that during a

teleconference with the Court that same day, Defendants objected to convening the hearing on October 19 if Dr. Ettner (due to her sudden illness) was unavailable to testify before Defendants presented their case. *Id.* at 24-25. Consequently, the Court postponed the hearing, to November 22, 2021. *See id.* at 25. However, counsel did not file Defendants' Motion for Relief, nor object to proceeding on October 19 without Dr. Ettner's testimony, in order to delay action on Plaintiff's motion for preliminary relief.

The Court granted Plaintiff's Motion to Compel Expedited Discovery (Doc. 146), as to four categories of documents, on the morning of Friday, October 15, 2021, four days (two business days) before the scheduled October 19 hearing. Doc. 156; Gardner Suppl. Decl. ¶ 11. Working diligently over the weekend, Defendants and their DOJ counsel succeeded in producing the first three categories of documents (totaling 886 pages) by Sunday, October 17. *Id.* ¶ 12. After several days spent on the necessary tasks of identifying relevant custodians, assembling potentially responsive documents, and loading them onto an online platform for review, Defendants determined that it would not be possible by October 19 to complete production of the fourth category (concerning communications about Plaintiff) due to the volume and nature of the documents that would have to be reviewed for responsiveness, and privilege. *Id.*; *see also infra* § II.A.3 (citing Feldon Third Decl. ¶ 4).

Under the circumstances, counsel filed Defendants' Motion for Relief as soon as they practically could do so, on the morning of Monday, October 18, 2021. Gardner Suppl. Decl. ¶ 12. Importantly, Defendants' motion did not seek a postponement of the October 19 hearing. Instead, as was the case when Defendants filed their Motion to Exclude, *supra*, they proposed an alternative, that the hearing record be kept open for a period of two weeks after Defendants completed their production, to permit Plaintiff to submit any relevant information received. Doc. 157 at 2-3; *see* Gardner Suppl. Decl. ¶ 13. In short, the Motion for Relief was motivated by a concern about the ability to comply with the Court's October 15 Order within the contemplated timeframe, was filed

promptly once the impossibility of compliance became apparent, and did not seek to exploit the situation as an excuse to delay the preliminary injunction proceedings. *See id.* ¶ 11.[1]

Nor did Defendants' DOJ counsel seek to delay proceedings when informed on October 18 of Dr. Ettner's inability to testify the following day. It is true, as the Court observes, *see* Feb. 21 Notice & Order, Doc. 198, at 24-25, that Defendants argued during the teleconference that it would be inefficient and unfair to force Defendants to present the testimony of Dr. Leukefeld on October 19 while allowing Plaintiff's expert to testify at a later date. Gardner Suppl. Decl. ¶ 14. But Defendants also observed that it would not materially advance the resolution of Plaintiff's motion to receive testimony on October 19 only from some witnesses, while leaving the record open until Dr. Ettner were well enough to testify. *Id.* In other words, Defendants' counsel objected to convening, adjourning, and then re-convening the hearing for reasons unrelated to delay; rather, they sought only to protect Defendants' interests in a fair hearing amidst unforeseen circumstances (Dr. Ettner's illness) that were beyond their control. *Id.*

3. Defendants' October 22, 2021, Status Report

Finally, the Notice and Order describes Defendants' October 22, 2021, Status Report (Doc. 161)—in particular, its estimate of the time required to complete production of the fourth category of documents designated by the Court's October 15 Order—as "one final attempt to delay the preliminary injunction hearing[.]" Feb. 21 Notice & Order, Doc. 198, at 25. Defendants have explained why they believe the estimate in their Status Report was reasonable, and made in good faith, despite the imprecision of some of the language. Defs.' Feb. 22 Resp. at 11-12. We take this

[1] Somewhat relatedly, the Notice and Order also faults Defendants' Opposition to Plaintiff's Motion to Compel Expedited Discovery (Doc. 147) because counsel did not include earlier postponements of the preliminary injunction hearing in their recitation of prior proceedings. Feb. 21 Notice & Order, Doc. 198, at 13-14. As counsel explains, Defendants' Opposition focused on events occurring on or after August 30, 2021, because that was the date of the first event relevant to Defendants' arguments, Gardner Suppl. Decl. ¶ 16, not to obscure relevant facts or advance an agenda of delay.

opportunity, however, to provide further explanation as to why Defendants' estimate of the time needed to complete their production of documents cannot be regarded as an effort to improperly delay these proceedings.

In particular, the Notice and Order expressed skepticism of Defendants' estimate that it would take 26 days to review and produce the 5,200 documents potentially falling within category four ("all communications about Ms. Iglesias" sent to or from various BOP entities and officials since May 2021), when it had taken them only two days to produce 886 pages of documents falling into categories one through three. Feb. 21 Notice & Order, Doc. 198, at 17-18 n.2. There are at least three reasons, however, explaining why the review and production of documents in category four could not proceed at the same pace as of documents in the first three categories:

i. Identifying documents in the first three categories did not require collection of documents from individual custodians, whereas identifying documents in category four required keyword searches of emails from numerous custodians and then individual review of each document containing one or more keywords.

ii. The fourth category more frequently contained privileged or otherwise protected information, requiring additional time for redaction and other processing, including consultation with agency counsel on privilege issues.

iii. Whereas responsiveness generally could be discerned on the face of documents in the first three categories, the greater variety of content among documents in category four required closer scrutiny of entire documents (including e-mail attachments) to distinguish responsive documents from false hits.

Third Feldon Decl. ¶ 4. These factors reinforce the reasonableness of Defendants' estimate, and the conclusion that Defendants filed their Status Report in good faith.

Defendants' DOJ counsel again apologize for the fact that the October 22 Status Report did not convey the basis for their estimate of the time needed to complete the production in greater detail, and with more clarity. *See* Defs.' Feb. 22 Resp. at 12. They recognize that it is their responsibility to express themselves clearly when communicating with the Court. *See* Third Feldon Decl. ¶ 5. But we respectfully submit that neither the October 22 Status Report, nor the additional filings singled out in

the Court's Notice and Order, can be condemned as instruments of delay, or otherwise support the imposition of sanctions.

B. Mr. Gardner's Response to the Court's February 10 Show Cause Order Was True and Accurate

Finally, the Notice and Order posed several questions about Mr. Gardner's representation, in his February 14, 2021, declaration, that he has never been sanctioned by a court for alleged misconduct. Feb. 21 Notice & Order, Doc. 198, at 19-21; *see* Gardner Decl. ¶ 17. Specifically, noting that the court in *State of New York v. U.S. Department of Commerce*, 461 F. Supp. 3d 80 (S.D.N.Y. 2019), imposed sanctions for the defendants' failure to produce certain documents, and that Mr. Gardner had sought unsuccessfully to withdraw from representation in that case, this Court inquired (i) "whether Mr. Gardner or his clients have ever been sanctioned by a court," and (ii) whether "Mr. Gardner [was] sanctioned," in particular, in the *New York* litigation. Feb. 21 Notice & Order, Doc. 198, at 20. In addition, quoting from the *New York* court's earlier denial of the defendants' renewed motion for a stay of that case, this Court asked (iii) whether "Mr. Gardner [has] ever been admonished by any court for his litigation tactics[.]" *Id.* at 20-21.

As Defendants explained in their February 22 Response, and as Mr. Gardner acknowledges in his supplemental declaration, the *New York* court imposed sanctions on the defendants in that case—the Department of Commerce, the Bureau of the Census, and several agency officials sued in their official capacities. The court, however, did not impose personal sanctions against any of the seven career DOJ attorneys who represented the defendants in that litigation, including Mr. Gardner. *New York*, 461 F. Supp. 3d at 94-96; *see* Defs.' Feb. 22 Resp. at 16-17; Gardner Suppl. Decl. ¶ 7. Moreover, the *New York* court directed the defendants to pay fees and costs to the plaintiffs because of a "lapse" in their production of documents, without any finding of intentional misconduct or bad faith. 461 F. Supp. 2d at 89-95. Thus, Mr. Gardner was not sanctioned in the *New York* case—and has never been

sanctioned by a court—as he attested in his February 14 declaration and reaffirms in his supplemental declaration filed herewith. Gardner Decl. ¶ 17; Gardner Suppl. Decl. ¶ 7.

In addition, Mr. Gardner makes clear in his supplemental declaration that his request to withdraw as counsel in the *New York* case "was unrelated to the circumstances that led to the award of sanctions" there. Gardner Suppl. Decl. ¶ 8. As previously explained, *see* Defs.' Feb. 22 Resp. at 17, following the Supreme Court's decision in that litigation Government counsel confirmed to counsel for the plaintiffs, in writing, that the 2020 Decennial Census questionnaire had been sent for printing without a citizenship question; yet shortly thereafter, the previous administration asked that the Departments of Justice and Commerce "reevaluate all available options following the Supreme Court's decision . . . [for] includ[ing] the citizenship question." *See* Gardner Suppl. Decl. ¶ 8 (quoting *New York*, No. 1:18-cv-2921-JMF, ECF No. 613). Following that request, "in a single filing, [Mr. Gardner] and the other seven attorneys who had appeared on the docket and were actively representing defendants in that litigation—seven career attorneys (including [Mr. Gardner]), along with one political appointee—asked to withdraw from the litigation." *Id.* ¶ 8 (citing *New York*, No. 1:18-cv-2921-JMF, ECF No. 618). Mr. Gardner's request to withdraw was not prompted by events that led to the award of sanctions against the Government in *New York*.

Regarding the Court's question about "admonish[ment]," Feb. 21 Notice & Order, Doc. 198, at 21, Mr. Gardner acknowledges that the *New York* court, in denying the Government's motion for a stay of further proceedings, "expressed frustration with [the Government's] request." Gardner Suppl. Decl. ¶ 9. The *New York* court, however, did not sanction the defendants, or any of their counsel, including Mr. Gardner, for filing that motion. *See id.* Thus, if the Court's question concerns formal admonishment issued as a kind of sanction, then the answer is that the statements by the *New*

York court did not constitute a formal admonishment of the defendants, or Mr. Gardner personally.[2] Thus, Mr. Gardner's attestations that he has never been sanctioned by a court for his conduct as counsel were accurate when made, and remain so.

In short, Mr. Gardner has endeavored in every filing he has made in this case to represent the facts and the law accurately and fairly, and never sought to mislead the Court. Gardner Suppl. Decl. ¶ 7; *see also id.* ¶ 17. That is true, as well, of his February 14 declaration.

III. The United States Would Appreciate the Opportunity to Address Any Remaining Concerns from the Court

As noted at the outset, the United States is grateful for the opportunity to supplement its prior response, *see* Doc. 199, and to further explain why sanctions are not warranted or necessary here. The United States respectfully submits that, based on the existing record, this Court should conclude its sanctions inquiry at least as to these four individual DOJ attorneys.

To the extent the Court continues to have concerns about the conduct of this case, however, the United States respectfully requests an opportunity to further address those concerns. As noted in the prior response, the United States is currently uncertain as to the precise legal authority the Court believes may be applicable to the actions of the individual attorneys, as well as the precise form of potential sanctions under consideration. *See* Doc. 199 at 20-24. Additionally, although the United States has attempted to comprehensively address the Court's concerns, given the breadth of conduct discussed in the Court's orders, the United States would request a further opportunity to address any remaining concerns if the Court believes they have been inadequately addressed. Finally, as the record here reflects, this case was litigated as a collective effort by numerous individuals at both DOJ and BOP. *See, e.g.*, Haas Decl., Doc. 191-3, ¶ 4; Gardner Decl., Doc. 191-4, ¶ 5; Kolsky Decl., Doc. 191-

[2] Mr. Gardner adds that the Government's renewed motion to stay, on its face, does not reflect the full set of facts and circumstances surrounding that filing which demonstrate his commitment to ethical standards—facts he does not feel at liberty to divulge because doing so could reveal privileged client confidences and internal Government deliberations. Gardner Suppl. Decl. ¶ 9.

5, ¶ 11. Accordingly, the United States would have serious concerns about the issuance of sanctions against any of these four individual DOJ attorneys, penalizing them for conduct that is more accurately attributable to the collective action of numerous individuals and/or entities. Before the Court enters any sanctions against individual DOJ attorneys, therefore, the United States would respectfully request the opportunity to address any remaining concerns the Court may have.

Again, the United States appreciates the opportunity to submit this supplemental response, and hopes that the detailed explanations provided herewith demonstrate that, although there were mistakes in this case, those mistakes were unintentional and not deserving of any sanctions. The United States very much appreciates the Court's time and attention devoted to this important matter.

CONCLUSION

For the foregoing reasons, the United States respectfully submits that sanctions are not warranted against any of the four individual DOJ attorneys involved in this case.

Dated: March 4, 2022

Respectfully submitted,

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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

Exhibit A:

Gardner Suppl. Decl.

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

SUPPLEMENTAL 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 further response to the Court's February 10 Show Cause Order, Dkt. No. 187, and February 21, 2022 Notice and Order, Dkt. No. 198. Specifically, I respond to the questions posed by the Court on pages 18-19 of its Notice and Order, insofar as they are directed to me, and I also address concerns raised by the Court in its Notice and Order concerning certain filings and representations for which I was responsible.

Questions A Through H

3. Question A: The Court's February 21, 2022 Notice and Order asked when I first learned "about the difference between TEC's process for individuals housed at secure BOP facilities and TEC's process [for] individuals housed in halfway houses." Dkt. No. 198 at 18. To the best of my recollection and based on a review of my records, I learned that BOP's processes for authorizing medical care may differ for inmates housed in secure facilities versus those located in halfway houses in October 2021. Ultimately, I did not think at that time that the difference was significant to the case. I believe the significance did not strike me because I understood the issue raised by Plaintiff's motion for a preliminary injunction seeking permanent hair removal and gender confirmation surgery, *see* Dkt. No. 93 at 20, to be *whether* BOP was legally obligated to provide such procedures, not the

administrative steps required to approve such procedures. As I understood it at the time, the different processes were relevant only if a future hypothetical event were to occur – i.e., only if the TEC recommended Plaintiff for surgery after her placement in a halfway house, at which point Dr. McLearen (who oversees the TEC) would be the final decisionmaker on the surgery request. Because that future event was hypothetical, still several months away, and was not related to the relief requested in Plaintiff's motion for a preliminary injunction, I did not understand the different processes to be significant to the case at that time, nor did I anticipate that the Court would want to know about the details of these different processes in connection with Plaintiff's motion for a preliminary injunction. In addition, I started my detail to the Office of Legislative Affairs on October 27, 2021. This detail involves working with various congressional committees concerning their requests to the Department of Justice for information concerning the events of January 6, 2021, and related issues, and I have devoted the vast majority of my time while on detail to working on these issues. Accordingly, since my detail began, my involvement in this case and the time I have spent thinking about it have been substantially limited. I did not participate in the November 22, 2021 preliminary injunction hearing or review the transcript of that hearing (although I did receive a copy). I was not aware that the topic of BOP's surgery approval process was discussed at the hearing, nor was I aware of the specific testimony that Dr. Leukefeld provided on that topic at the hearing; I was not aware of Dr. Leukefeld's specific testimony on the topic until February 10, 2022, when I read the Court's Order to Show Cause, Doc. No. 187. I received a copy of the Court's preliminary injunction decision and order shortly after it was issued, and reviewed them briefly. Because of the demands placed on my time and attention by my detail, I did not closely review the preliminary injunction decision and order, or recognize, at the time I read them, that the differences in processes for the approval of surgery was significant. Had

I believed that this information would be of significance to the Court then I certainly would have ensured that it was brought to the Court's attention. I had no intention of concealing this information from the Court.

4. Questions B, C: I did not explain the difference between the TEC's process for individuals housed at secure BOP facilities and TEC's process for individuals housed in halfway houses between October 4, 2021, to November 22, 2021, for the reasons stated above in paragraph 3.

5. Question D: The Court's February 21, 2022 Notice and Order also asks whether I alerted the Court before the filing of Defendants' January 31, 2022 Notice in Compliance with December 27, 2021 Preliminary Injunction (Dkt. No. 183) that BOP issued a revised version of the Transgender Offender Manual several weeks earlier on January 13, 2022. Dkt. No. 198 at 18. I did not notify the Court of the January 13, 2022 issuance of the revised Manual. As stated above, I was on detail to the Office of Legislative Affairs at the time BOP issued the January 2022 revisions to the Manual.

6. Questions F, G, H: As discussed above in paragraph 3, I did read the Court's December 27, 2021 preliminary injunction decision and order, which did not differentiate between BOP's processes for individuals housed at secure BOP facilities and individuals in halfway houses. 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. As explained in my prior declaration, 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. Although I was on detail at the time, I participated somewhat in the process of drafting Defendants' Notice of Compliance, Dkt. No. 183, though not to the same degree as if I was working on this case full-time. I believed that the TEC's decision, and our Notice of Compliance, complied

with the terms of the Court's preliminary injunction. I did not believe that the TEC had made an immediate recommendation for surgery, and therefore did not think it was necessary to refer Iglesias to the BOP Medical Director, or necessary or appropriate to follow the set of reporting requirements the Court had attached to an immediate recommendation for surgery. Instead, after giving the matter thought I ultimately believed that the best approach would be to follow the alternate set of reporting requirements, which would make clear that the TEC had not made an immediate recommendation for surgery, and would still provide the Court and Plaintiff with a record explaining the basis for the TEC's decision. I acknowledge that the TEC's decision does not fit neatly into the Court's two sets of reporting requirements, and I believed it was important to be upfront with the Court about that fact, which is why the Notice acknowledges that point on page 2. Notwithstanding that the TEC's decision does not fit neatly into either category of decision anticipated by the preliminary injunction, I (and to the best of my knowledge, everyone else involved at BOP and DOJ) had a good-faith belief that the TEC's decision and BOP's Notice in Compliance complied with the preliminary injunction, including its reporting requirements. We attempted to comply with the Court's preliminary injunction based on our best understanding of the injunction at that time.

7. Question J: The Court's Notice and Order asks whether I or my clients have ever been sanctioned by a court, and further asks whether I was sanctioned in *State of New York v. Dep't of Commerce*, 461 F. Supp. 3d 80 (S.D.N.Y. 2019). Dkt. No. 198 at 20. As I stated in my February 14, 2022 declaration, I have never been sanctioned by a Court for alleged misconduct. ECF No. 191-4, ¶ 17. I was not sanctioned in *Department of Commerce*. Rather, as discussed in detail in Defendants' Response to the Court's February 21, 2022, Notice and Order, the *Department of Commerce* Court imposed sanctions under Federal Rule of Civil Procedure 37(b)(2)(C) on the Defendants in that case,

not the career attorneys. Dkt. No. 199 at 16.

8. The Court's Notice and Order further raises questions concerning the fact that I sought to withdraw from *Department of Commerce*. Dkt, No. 198 at 20. My request to withdraw was unrelated to the circumstances that led to the award of sanctions against the Defendants in that case. Rather, in *Department of Commerce*, the government repeatedly had represented, and a career scientist with the Census Bureau had testified, that the Census Bureau had to finalize the census questionnaire by June 2019 in order for the constitutionally mandated census to stay on track. On July 2, 2019, after the Supreme Court ruled against the government and set aside the Secretary of Commerce's decision to add a citizenship question, counsel for defendants emailed counsel for plaintiffs providing confirmation "that the questionnaire for the 2020 Decennial Census had been sent to the printer, without a question inquiring about respondents' citizenship status." *State of New York v. Dep't of Commerce*, No. 1:18-cv-2921-JMF, ECF No. 613. Shortly thereafter, however, the previous administration asked the "Department of Justice and Commerce . . . to reevaluate all available options following the Supreme Court's decision and whether the Supreme Court's decision would allow for a new decision to include the citizenship question." *Id.* Following that request, in a single filing, I and the other seven attorneys who had appeared on the docket and were actively representing defendants in that litigation—seven career attorneys (including myself), along with one political appointee—asked to withdraw from the litigation. *State of New York v. Dep't of Commerce*, No. 1:18-cv-2921-JMF, ECF No. 618. Counsel explained that the government "will be represented in this matter by different counsel from the Department of Justice," because "new attorneys from the Civil Division will be entering appearances." *Id.* As this Court noted, Judge Furman denied counsels' motion to withdraw. However, this does not change the fact that sanctions were never entered against either myself or my

co-counsel in that case. Respectfully, I believe my actions in *Department of Commerce* demonstrate my commitment to acting ethically and consistent with my professional responsibility obligations in all of my cases.

9. The Court's February 21, 2022 Notice and Order also cites to the *Department of Commerce* court's November 20, 2018 Order denying the Defendants' letter motion to stay further proceedings (Dkt. No. 544), and asks whether I have "ever been admonished by any court for [my] litigation tactics." Dkt. No. 198 at 20. I acknowledge that the Court in *Department of Commerce* denied Defendants' letter motion to stay further proceedings, and further acknowledge that the Court in that order expressed frustration with Defendants' request. However, the Court did not sanction either the Defendants or myself (or the other trial attorneys) in the context of that motion. Thus, if this Court's question refers to formal "admonishment" equivalent to a sanction, then I do not believe the Court's statements in *Department of Commerce* constituted such an "admonishment," of me personally, and I believe the statements in my prior declaration remain accurate. I would also note that the Defendants' letter motion in *Department of Commerce*, on its face, does not reflect the full set of facts demonstrating my commitment to ethical standards in the context of that filing. At present, however, I do not feel as if I can divulge the full set of facts surrounding the filing of that motion, because doing so would reveal privileged information, including client confidences and internal DOJ deliberations, and protecting those confidences is an independent requirement of professional responsibility.

Additional Issues in the Court's Notice and Order

10. The Court's February 21, 2022 Notice and Order also states that "every time this Court attempted to set a hearing over Iglesias's Preliminary Injunction—Defendants' counsel found a way to delay proceedings." Dkt. No. 198 at 23. Respectfully, I wish again to assure the Court, as stated in

my February 14, 2022 declaration, that I never sought to improperly delay these proceedings through any filing, representation, or argument I have made in this case. For example, neither I nor Defendants asked the Court to delay proceedings in their Motion to Exclude Untimely and Undisclosed Expert Testimony and Request for Expedited Consideration. Dkt. No. 130. Rather, the sole relief Defendants requested in that motion was that "the Court limit Dr. Ettner's opinions to those she provided in her two declarations in support of Plaintiff's preliminary injunction motion." Dkt. No. 130 at 5. Defendants filed that motion because Plaintiff's expert, Dr. Ettner, did not conduct a psychological examination of Plaintiff until after her preliminary injunction motion was fully briefed, and Defendants were concerned they would be prejudiced at the preliminary injunction hearing without advance notice of the opinions Dr. Ettner would offer based on that examination. *Id.* Rather than exclude these new opinions, as Defendants had requested, the Court ordered that the preliminary injunction hearing be postponed. Dkt. No. 133. In short, Defendants' motion was not intended to delay proceedings, but rather was made to prevent them from being prejudiced by new, undisclosed opinions from Plaintiff's expert.

11. The Court's February 21, 2021 Notice and Order further notes that Defendants filed a Motion for Relief From Full Compliance With the Court's October 15 Order one day before the Court's scheduled preliminary injunction hearing. Dkt. No. 198 at 23. This motion also was not intended, by me or Defendants, to delay proceedings and was filed as quickly as possible under the circumstances. The Court granted Plaintiff's motion for expedited discovery on the morning of Friday, October 15, 2021, and ordered Defendants to produce four categories of documents. Among those categories was "all communications about Ms. Iglesias sent to or from the TEC, TCCT, and/or Dr. Elizabeth Stahl since May 2021." Dkt. No. 156 at 13. At the time of the Court's October 15

order, the preliminary injunction hearing was scheduled for four days later, on Tuesday, October 19, 2021.

12. Counsel for Defendants immediately began to comply with that Order, while also preparing for the upcoming preliminary injunction hearing and attending to their other cases. Defendants immediately began to identify relevant custodians, search terms, and worked with the Bureau of Prisons to locate potentially responsive documents and ingest the data into an electronic review platform for review. Unfortunately, certain potential custodians were out of the office on October 15, and additional time was necessary to ensure that all relevant custodians had been identified. In addition, as reflected in Defendants' Motion for Relief, counsel for Defendants worked diligently to produce each category of documents as quickly as possible. On Saturday, October 16, 2021, Defendants produced the first and third categories of documents to Plaintiff. Dkt. No. 157 at 1-2. On Sunday, October 17, 2021, Defendants produced the second category of documents to Plaintiff. *Id.* at 2. Accordingly, due to Defendants' diligence (and their counsel's), Defendants expeditiously produced 886 pages of documents within two days of the Court's Order. *Id.* Due to their non-custodial character, these documents were easier to identify, review, and produce on an expedited timetable than the fourth category of documents. After several days of working on the fourth category of documents, counsel for the Defendants recognized that because this category required term searches for potentially responsive documents in the files of individual custodians, and because of the volume of the documents to be reviewed, it would not be possible to complete the production in four days. For that reason, Defendants filed the Motion for Relief as quickly as they could on the morning of Monday, October 18, 2021, just three days (one business day) after the Court issued its Order.

13. Defendants expressly did not seek to delay the October 19, 2021 preliminary injunction hearing in their Motion for Relief. Dkt. No. 157. Rather, Defendants requested that "the Court permit the production of responsive, non-privileged documents after the October 19, 2021 evidentiary hearing." *Id.* at 2. And to ensure that Plaintiff would not be prejudiced by the post-hearing production of documents, Defendants proposed "to keep the preliminary injunction hearing record open for a period of two weeks after Defendants complete their production to permit Plaintiff to submit any additional information received as a result of Defendants' production." *Id.* at 2-3. Ultimately, the Court granted the Motion for Relief in part and denied it in part. The Court extended the October 19 deadline to complete the production of documents, but denied Defendants' request to keep the preliminary injunction hearing open for a period of two weeks after Defendants had completed their production. Dkt. No. 159. Instead, the Court decided to reset the preliminary injunction hearing to November 22, 2021. *Id.* Defendants did not ask the Court to delay the preliminary injunction hearing in its Motion for Relief, and this motion was not made for any improper purpose.

14. The Court's February 21, 2021 Notice and Order also discusses the October 18, 2021 conference with the Court in which Plaintiff's counsel stated that Dr. Ettner was having an emergency procedure and could not be available for the preliminary injunction hearing the following day. Dkt. No. 198 at 24. As the Court correctly notes, I stated that it would be inefficient and unfair to proceed with only the testimony of Plaintiff and/or Dr. Alison Leukefeld, while leaving the proceedings open to have Dr. Ettner testify at a later date. I contended during that call that because Plaintiff bore the burden of proof on her motion for a preliminary injunction, it would be unfair to make Defendants present testimony by Dr. Leukefeld before Plaintiff and her expert had testified. I also argued that presenting only some witnesses on October 19 would not materially advance resolution of the

preliminary injunction motion if the hearing would remain open until such undetermined time as Dr. Ettner recovered. I took this position because I believed then, and continue to believe now, that it was in the best interest of my clients to ensure that Plaintiff present her full case before Defendants were required to respond to that case. I did not take this position to delay proceedings, only to protect my clients' interests in a situation that had arisen due to unexpected circumstances (Dr. Ettner's illness) that were beyond my (or my clients') control.

15. The Court's February 21, 2022 Notice and Order states that, with respect to Defendants' Opposition to Plaintiff's Motion to Compel Expedited Discovery, Dkt. No. 147, Defendants' response to the Court's Show Cause Order "brush[es]-off the crucial fact that Iglesias's counsel was not required to inform the Court of her position on discovery on September 10, 2021." Dkt. No. 198 at 13. I fully acknowledge that the statement in Defendants' Opposition that characterized the Court's order as requiring both parties to report their positions on discovery was an error, which I regret and for which I apologize. However, that mischaracterization was inadvertent, and did not influence my decision to file Defendants' Opposition or the arguments I made therein. That is because the material points in Defendants' Opposition were not predicated on my unintentional misstatement. Rather, Defendants' Opposition was principally based on the facts that (a) Plaintiff had previously told both Defendants and the Court that she was not seeking expedited discovery beyond Dr. Leukefeld's deposition; (b) Defendants had relied upon that representation; and (c) Plaintiff's change in position shortly before the preliminary injunction hearing prejudiced Defendants. Although I cannot say for certain, it is possible that the speed at which Defendants filed their opposition contributed to overlooking the inadvertent misstatement in their opposition. Plaintiff filed her Motion to Compel on Friday, October 1, 2021 at 7:10 pm EST (after working hours). Defendants filed their opposition

on Monday, October 4, 2021 at 5:28 am EST (before working hours), less than one business day later.

16. The Court's February 21, 2022 Notice and Order also expresses concern that Defendants' Opposition "selectively started" its recitation of the pertinent proceedings with August 30, 2021, without noting prior postponements of the preliminary injunction hearing. Doc. No. 198 at 13-14. Respectfully, Defendants' Opposition began with the events on August 30 because that was the first time Plaintiff represented her intention not to seek discovery beyond Dr. Leukefeld's deposition, and therefore I believed it was the first date relevant to the motion, *i.e.*, as demonstrating Defendants' point that Plaintiff's later request for additional discovery was inconsistent with her counsel's earlier representations.

17. I take seriously the concerns expressed in the Court's Orders and deeply regret that the Court believes that I or other members of the trial team may have done anything to improperly delay proceedings in this case. As stated in my February 14 declaration, I have never sought to improperly delay proceedings through any filing or position taken in this matter. Rather, I have always sought to advance the best interests of my client consistent with my ethical responsibilities as an officer of the Court both to the Court itself and to opposing parties. I have also always sought to comply with this Court's orders and to provide the Court with the necessary information, as I believe has everyone else at DOJ and BOP involved in this matter.

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

Alexandria, Virginia
March 4, 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-NJR

Exhibit B:

Feldon Third Decl.

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.	)	

THIRD 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 a Trial Attorney with the Federal Programs Branch of the Department of Justice, a career civil service role. I represent Defendants in the above-captioned litigation. I make this declaration based on my personal knowledge of the facts stated herein.

2. This is my third declaration in the above-captioned matter, following a declaration and supplemental declaration dated February 14 and 18, 2022, respectively. I make this declaration pursuant to the Court's Minutes of Court (ECF No. 200), which permits Defendants to supplement their February 22 filing (ECF No. 198).

3. With regard to the questions posed to Defendants' counsel in Section V of the Court's Notice and Order (ECF No. 198), my responses are as follows:

A. Defendants' February 22 response (ECF No. 199) reported that I was unaware of any differences in BOP's processes until the issue arose in connection with reporting the TEC's decision after the Court's preliminary injunction. That was consistent with my best recollection at that time. However, co-counsel informed me after the February 22, 2022 hearing on the Court's Show Cause Order (ECF No. 187) that, although I have no independent recollection of this fact, I was told in October 2021 that there was a difference between the processes for providing healthcare for individuals housed at secure BOP facilities and for individuals housed in halfway houses. I have now gone back, reviewed my files from that period and confirmed that I was told in October 2021 that there was at least one difference between the process for providing medical care to individuals housed in secured facilities and those in halfway houses. I was not provided with the full details of those differences at the time. I surmise that I did not retain this information because the parties were then litigating *whether* the Court would require Defendants to provide Plaintiff with gender confirming surgery, not *how* surgery would be provided. In addition, October 2021 was especially busy for me on other litigation, particularly because I needed to complete numerous litigation tasks before going on sick leave in early November for the birth of my son. Because I did not retain this information about BOP's different processes, I was therefore not conscious of this difference until it arose in the context of Defendants' Notice of Compliance with Compliance with December 27, 2021 Preliminary Injunction (ECF No. 183). Regardless, I would not have been aware of any inaccuracy in Dr. Alison Leukefeld's testimony on that issue during the November 22, 2021 preliminary injunction hearing because I was not present at the hearing and did not review the portion of the hearing transcript containing her testimony. As noted in my prior declaration, I was on leave from November 2 through December 28, 2021, and thus was not meaningfully involved in the case during that time period. Nonetheless, had I been aware of any inaccurate testimony, I would have taken remedial action to correct the record.

B. I did not explain to the Court the differences in the processes for providing healthcare for individuals housed at secure BOP facilities and for individuals housed in halfway houses between October 4, 2021 and November 22, 2021. As stated above, I did not recall any such differences in that timeframe, I and would likely not have appreciated the significance of those differences in connection with the Court's resolution of the preliminary injunction motion at that time (*i.e.*, prior to understanding the Court's perspective as reflected in its Show Cause Order (ECF No. 187)). In addition, I was on leave for roughly the last three weeks prior to the preliminary injunction hearing on November 22.

C. I did not submit any filings or otherwise enter into the record, prior to the filing of Defendants' Notice of Compliance with December 27, 2021 Preliminary Injunction (ECF No. 183), any explanation of the differences in the processes for providing healthcare for individuals housed at secure and for individuals in halfway houses. As stated above, I was not conscious of any such differences until the process of drafting Defendants' Notice of Compliance. Further, prior to the Court's Show Cause Order (ECF No. 187), I do not know that I would have appreciated the significance of such differences to the Court in connection with its injunction or its resolution of Plaintiff's preliminary injunction motion. As stated above, I understood the litigation surrounding the preliminary injunction to be focused on *whether* Defendants were obligated to provide Plaintiff gender confirming surgery, not *how* surgery would be provided. Thus, I do not know that I would have believed it necessary to file an explanation of the differences in the processes, had I been aware of such differences in the relevant timeframe. In drafting and filing the Notice of Compliance, I believed we were appropriately informing the Court about these separate processes, although I did not understand the differences in the processes to be a fact significant to the Court. Had I known that there was confusion on this issue, however, I would have sought to file an explanation of the different processes with the Court.

D. I did not alert the Court prior to the January 31, 2022 filing of Defendants' Notice of Compliance with December 27, 2021 Preliminary Injunction (ECF No. 183) that BOP had issued a revision to the Transgender Offender Manual on January 13, 2022. Because there was no pending motion at that time that might be affected by the revision, it did not occur to me that Defendants should do so in the roughly two weeks prior to the filing of Defendants' Notice. Further, the Court's injunction to "include the policies and procedures [for gender confirming surgery] Iglesias does not meet" by January 31 appeared to set the appropriate time to apprise the Court of the revised Manual. ECF No. 177. I never intended to deprive the Court of timely information, nor am I aware of any other counsel for Defendants who intended to do so.

E. As stated above, I was not present at the November 22, 2021 preliminary injunction hearing, so I could not have clarified or corrected any inconsistent testimony by Dr. Alison Leukefeld at the hearing itself.

F. I carefully read the Court's December 27, 2021 Preliminary Injunction (ECF No. 177) numerous times.

G. The Court's Preliminary Injunction (ECF No. 177) did not differentiate between the processes for providing healthcare for individuals housed at secure BOP facilities and for individuals housed in halfway houses.

H. As explained in my prior declaration, I did not understand the Court's Preliminary Injunction (ECF No. 177) to require that the TEC only either immediately approve Plaintiff's request for gender confirming surgery or conclusively deny Plaintiff's request for surgery. Rather, assuming it did not immediately approve surgery, I understood the Preliminary Injunction (as modified by the Court's January 19 minute order, ECF No. 181) to permit the TEC to exercise its best judgment concerning Plaintiff's medical care so long as Defendants "[f]ile[d] a notice with the Court explaining all the reasons for TEC's decision within seven days and include the" specified additional information and documents. I understood this requirement to be the Court's requirement that Defendants provide an adequate record for the reasons underlying the TEC's recommendation such that the Court could evaluate whether that decision constituted deliberate indifference. Thus, based on my understanding at the time, I believed that Defendants' Notice of Compliance with December 27, 2021 Preliminary Injunction (ECF No. 183) complied with the Preliminary Injunction.

I. As stated above, I was not present at the November 22 preliminary injunction hearing. I also did not review the portion of the transcript of that hearing containing John Robinson's closing argument. Following the Court's February 21, 2022 Notice and Order (ECF No. 198), I did review that portion of the transcript. Based on that review, I am unaware of anywhere in Mr. Robinson's argument that he discussed the differences between the processes for providing healthcare for individuals housed at secure BOP facilities and for individuals housed in halfway houses. Based on Mr. Robinson's statements to me and to the Court, it is my understanding that he was unaware of such differences at the time of his argument.

4. With regard to the Court's footnote starting on page 17 of the February 21, 2022 Notice and Order (ECF No. 198) stating that, "even if the Court accepts the pace of 886 documents in 48 hours[,] . . . Defendants should have been able to get through the remaining 5,200 documents in less than six days," I can explain why the average time to review and produce the remaining documents was longer than those in the initial productions.

The Court's October 15, 2021 Memorandum and Order (ECF No. 156) granted Plaintiff's

> request for: (1) the agendas, minutes, and records from all Transgender Executive Council ("TEC") and Transgender Critical Care Team ("TCCT") meetings where Ms. Iglesias was discussed that have not already been produced; (2) all documents about Ms. Iglesias considered by members of the TEC and TCCT; (3) all medical and mental-health records for Ms. Iglesias that have not already been produced for the period of 2019 to present, including unit-staff-only filings; and (4) all communications about Ms. Iglesias sent to or from the TEC, TCCT, and/or Dr. Elizabeth Stahl since May 2021.

Id. at 13. The 886 documents to which the Court referred are those falling within the first three categories, and the remaining 5,200 documents are those falling within the fourth category.

The following are some of the main reasons that review and production of the fourth category of documents could not proceed at the same rate as the rate for the first three categories:

A. Identifying documents in the first three categories did not require collection of documents from individual custodians, and some of those documents had already been assembled for litigation purposes. By contrast, identifying documents in the fourth category of discovery ordered required performing keyword searches on emails from numerous custodians and then individually reviewing each document that contained a keyword (except to the extent the parties were able to agree on certain categorical exclusions, as noted in Defendants' Status Report, ECF No. 161).

B. Compared to the first three categories, the fourth category of documents more frequently contained protected information (*e.g.*, information pertaining exclusively to other inmates and privileged information) and the protected information was less easily segregable, requiring additional time to redact or otherwise process the documents. Privilege issues also required consultation with agency counsel, which took additional time.

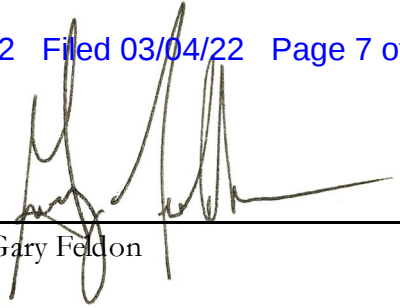
C. The greater variability in the nature of contents of the fourth category of documents required closer scrutiny to determine responsiveness. For instance, with respect to the third category of documents, it was generally obvious from the face of a document whether it was a health record concerning Plaintiff. In contrast, it required substantially more time to review documents in the fourth category because determining whether an email and any attachments actually pertained to Plaintiff (rather than being a false hit) required reviewing the email and attachments in full.

5. As stated in my February 14, 2022 declaration, I intended and understood footnote 1 of Defendants' Status Report (ECF No. 161) to refer to the aggregate estimated time needed for counsel for Defendants to review the fourth category of documents ordered to be produced in the Court's October 15, 2021 Memorandum and Order (ECF No. 156). ECF No. 191-7, ¶ 9. I recognize that it is my responsibility to express my intended meaning clearly, and I sincerely regret if that was unclear or if the language used wrongly suggested that the entire review would be conducted by a single attorney.

6. In arguing that venue is improper in this judicial district, I cited *Smith v. Bond County Jail*, No. 17-CV-006-JPG, 2017 WL 446967, at *5 (S.D. Ill. Feb. 2, 2017), for the proposition that "[a]n amended complaint supersedes and replaces the original complaint, rendering the original complaint void." *Id.* at *5. In retrospect, I should have brought to the Court's attention that *Smith* relied on the Seventh Circuit's decision in *Flannery v. Recording Industry Association of America*, 354 F.3d 632 (7th Cir. 2004), which stated that "[i]t is axiomatic that an amended complaint supersedes an original complaint and renders the original complaint void." *Id.* at 638 n.1. I regret if my failure to cite this case suggested that there was no binding authority supporting that proposition or otherwise caused confusion regarding the merits of the venue argument.

7. Again, I sincerely apologize if my conduct in this matter hindered the Court's speedy, efficient, or just resolution of this litigation. That was never my intention. I am also deeply sorry if my conduct harmed the Court's or the public's perception of the Department of Justice.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 4th day of March 2022.



Gary Feldon

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

Exhibit C:

Kolsky Suppl. Decl.

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

SUPPLEMENTAL 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 am submitting this declaration to address various questions and concerns raised in the Court's Notice and Order issued on February 21, 2022. Doc. 198. I make this declaration based on my personal knowledge of the facts stated herein.

2. The Court's Notice and Order notes that Defendants' Opposition to Plaintiffs' Motion to Compel Expedited Discovery (Doc. 147) stated that "the Court issued a minute order instructing counsel for the parties to inform the Court" of certain information when, in fact, the minute order actually required "Defendants" to provide such information. Notice and Order at 12-14. My involvement in the preparation of Defendants' Opposition to Plaintiffs' Motion to Compel Expedited Discovery (Doc. 147) consisted of reviewing a draft of the filing, to which I added one paragraph and proposed a few edits to other portions of the brief. I did not draft the sentence referred to in the Court's Notice and Order and I did not know it was inaccurate at the time. The

minute order to which the sentence refers was issued at a time when I had minimal participation in this case. I regret that I was not aware of this inaccuracy at the time, because I believe that if I had mentioned it as an inaccuracy, the other attorneys involved would have corrected the mistake.

3. The Notice and Order also raises concerns about Defendants' October 22, 2021 Status Report, which stated in part: "Assuming an average processing rate (i.e., review and redaction) 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." I reviewed a draft of the Status Report before it was filed and I added the words "approximately" and "absent further narrowing" to the sentence in question. My understanding of that sentence was and still is that it was attempting to quantify the cumulative amount of work that would be required to review the collected documents. The amount of work could have been expressed in various ways. For instance, the Status Report could have simply referred to the need to review "approximately 5,200 documents" without any further quantification, but that would not have been very helpful in conveying the burdens associated with the document review. The Status Report also could have said it would take "approximately 208 hours" to review the documents but that number would not have been very helpful because, in my experience, it is uncommon to refer to the number of hours to perform a task when the task requires hundreds of hours. By using the number of 8-hour days that the review would occupy, the Status Report attempted to quantify the amount of work using a more meaningful metric. I did not understand the sentence in question to suggest that only one attorney would be reviewing documents. Rather, the point was that the review would require a significant amount of time and resources. Notably, each of the DOJ attorneys assigned to this case at the time was also assigned to other litigation matters and could not devote 100% of their working hours to the document review. I regret that the Status Report did not express its intended meaning more clearly, but there was no intent to mislead the Court.

4. The Notice and Order poses questions about the differences in BOP's process for approving gender confirmation surgery for individuals living in a secure facility and individuals living in a halfway house. I respond to those questions below.

5. First, the Notice and Order asks, "When did Mr. Robinson, Mr. Kolsky, Mr. Gardner, and Mr. Feldon first learn about the difference between TEC's process for individuals housed at secure BOP facilities and TEC's process for individuals housed in halfway houses?" Notice and Order at 18. Based primarily on my review of my files (but also on my own vague recollection), I understand that I was informed in approximately early to mid-October 2021 that once Ms. Iglesias was living in a halfway house, Dr. Alix McLearen would be the BOP official with the final decisionmaking authority on Ms. Iglesias's request for surgery. My recollection is that the significance of that fact at that time was that, because Dr. McLearen was the head of the TEC, a *recommendation* by the TEC to approve Plaintiff's request for surgery once Plaintiff was in a halfway house would suggest that BOP would also *approve* the surgery (because Dr. McLearen also oversees and participates on the TEC). Aside from knowing that Dr. McLearen would have final decisionmaking authority once Plaintiff was in a halfway house, I do not believe I knew, at any time before or during the preliminary injunction hearing in November 2021, the details of the two processes for approving surgery at BOP, such as that the Medical Director would have no involvement whatsoever for individuals living in a halfway house. At the time of the preliminary injunction hearing, the TEC had not identified the differences in the processes as a basis for any of its decisions, and those differences were not discussed in the filings related to the preliminary injunction motion, on which I relied to prepare for the hearing. In my direct examination of Dr. Leukefeld at the hearing, I did not ask her about the process for what would happen after the TEC recommended surgery.

6. I am aware by reading the transcript of the preliminary injunction hearing that Dr.

Leukefeld testified, in response to a question by the Court, that "[t]he 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 –." I do not have a specific recollection of listening to that particular testimony at the preliminary injunction hearing, but I do know that I did not understand any of Dr. Leukefeld's testimony at the hearing to be inaccurate until the Court's Show Cause Order was issued. If I had realized that Dr. Leukefeld's testimony was inaccurate in any way, I would have promptly taken remedial action to notify the Court and to ensure the record was correct. In the weeks following issuance of the Court's preliminary injunction (*i.e.*, in January 2022), the fact that there were two processes became much more significant and my understanding of the two processes increased. In particular, the TEC determined at its January 24, 2022 meeting that the differences between the two processes was one of the reasons not to immediately recommend surgery for Ms. Iglesias. To my knowledge, the TEC had not identified those differences as a reason for any prior decision regarding Ms. Iglesias, including the decisions that were challenged at the preliminary injunction hearing. Thus, I believe I became aware in January 2022 that the Medical Director would not be involved in approving Ms. Iglesias's surgery once she was placed in a halfway house. However, at that time I did not recall Dr. Leukefeld's prior testimony about what would happen in April 2022 and her response referencing the Medical Director. Had I recalled her testimony at that time, and realized it was inaccurate, I would have ensured that we quickly corrected the prior inaccurate testimony.

7. The Notice and Order asks, "Did the BOP or its attorneys explain the difference between TEC's process for individuals housed at secure BOP facilities and TEC's process for individuals housed in halfway houses between October 4, 2021, to November 22, 2021? Please point where in the record this was explained." Notice and Order at 18. I did not explain the difference in the processes during the referenced timeframe, and I am not aware of BOP or other

DOJ attorneys doing so. As noted above, I do not believe I was aware of the details of the two processes at the time of the hearing and I did not know that any of Dr. Leukefeld's testimony was inaccurate. As stated in my prior declaration, I do not believe any BOP or DOJ personnel intentionally withheld this information from the Court or sought to mislead the Court.

8. The Notice and Order asks, "Where in the record (before Defendants Notice by All Defendants in Compliance with the Preliminary Injunction (Doc. 183)) did the BOP or DOJ explain the difference between TEC's process for individuals housed at secure BOP facilities and TEC's process for individuals housed in halfway houses?" Notice and Order at 18. I did not explain the difference in the processes during the referenced timeframe, and I am not aware of BOP or other DOJ attorneys doing so. As noted above, I do not believe I was aware of the details of the two processes at the time of the hearing and I did not know that any of Dr. Leukefeld's testimony was inaccurate.

9. The Notice and Order asks, "Did Mr. Robinson, Mr. Kolsky, Mr. Gardner, and Mr. Feldon alert the Court before the filing of Defendants Notice by All Defendants in Compliance with the Preliminary Injunction (Doc. 183) that BOP's Transgender Offender Manual was revised on January 13, 2022? If so, please point to the document(s) in the record." Notice and Order at 18. DOJ did not alert the Court that the revised Transgender Offender Manual was issued before filing the Notice by All Defendants in Compliance with the Preliminary Injunction on January 31, 2022. At the time the revised Transgender Offender Manual was issued, the Court had already ruled on the preliminary injunction motion so there was no pending motion to which the changes might have been relevant. I submitted the revised manual to the Court on January 31, 2022 with Defendants' Notice in Compliance with December 27, 2021 Preliminary Injunction because the Court's preliminary injunction required Defendants' Notice to "include the policies and procedures Iglesias does not meet." Doc. 177 at 3.

10. The Notice and Order asks, "Did Mr. Robinson, Mr. Kolsky, or Ms. Talmor clarify Dr. Leukefeld's testimony or correct the alleged inadvertent error at the Preliminary Injunction hearing? Please point the Court to the pages in the transcript where this is discussed." Notice and Order at 18. I did not clarify or correct Dr. Leukefeld's testimony at the preliminary injunction hearing. As discussed above, I was not aware of any inaccuracy in the testimony until the Court's Show Cause Order.

11. The Notice and Order asks, "Did Mr. Robinson, Mr. Kolsky, Mr. Gardner, and Mr. Feldon read the Court's order over the preliminary injunction from December 27, 2021?" Notice and Order at 18. I have read the Court's preliminary injunction order issued on December 27, 2021. I was on leave when the order was issued but I read portions of it within hours of it being issued. I then read it more closely when I returned from leave days later, and have read it again since then.

12. The Notice and Order asks, "In the Court's order over the preliminary injunction, did the Court differentiate between TEC's process for individuals housed at secure BOP facilities and TEC's process for individuals in halfway houses?" Notice and Order at 19. The Court did not differentiate between the TEC's process for individuals housed at secure BOP facilities and the TEC's process for individuals in halfway houses.

13. The Notice and Order asks, "If the Court did not differentiate between secure BOP facilities and halfway houses, then explain where in the order BOP could deviate from the process discussed by Dr. Leukefeld?" Notice and Order 19. I do not read the Court's preliminary injunction 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 preliminary injunction 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 preliminary injunction. The preliminary injunction also orders Defendants to take various actions and undertake various reporting requirements if certain conditions are met. Specifically, the preliminary injunction required certain actions and imposed certain reporting requirements "if the TEC *recommends* Iglesias for GCS," and certain other reporting requirements "[i]f the TEC does not recommend Iglesias for GCS[.]" Preliminary Injunction, Doc. 177, at 2-3 (emphasis in original). The TEC's decision here was somewhere in between those two possibilities – it was not an immediate recommendation but it was not an outright denial. I did not understand the preliminary injunction's requirements to limit the decisions that the TEC could make. Because the TEC's decision was not an immediate recommendation for surgery—but rather was one that would become operative months later assuming certain conditions were satisfied—it did not appear to be the type of recommendation referred to in the Court's preliminary injunction under the first set of requirements. Therefore, after conferring with my DOJ colleagues, I believed it was appropriate for BOP to follow the preliminary injunction's reporting requirements applicable "[i]f the TEC does not recommend Iglesias for GCS[.]" In following this path, we would avoid conveying any misimpression to the Court that the TEC had made an immediate recommendation in favor of surgery, and also would provide a record of the reasons for the TEC's decision, such that Plaintiff could challenge that decision and/or the Court could review that decision, as necessary and appropriate. As stated in my prior declaration, I believe that everyone involved—at both BOP and DOJ—pursued this course of action in good faith, believing it complied with the Court's preliminary injunction, and without any intent to disregard the Court's preliminary injunction or to otherwise obstruct or delay these proceedings.

14. The Notice and Order asks, "In Mr. Robinson's closing argument, did he explain the difference between TEC's process between individuals housed at secure BOP facilities and

individuals housed in halfway houses?" Notice and Order at 19. Mr. Robinson's closing argument did not explain the difference in BOP's surgery approval processes between individuals housed at secure BOP facilities and individuals housed in halfway houses. My understanding is that Mr. Robinson was not aware of those differences at the time.

15. The Notice and Order asks, "Did Mr. Kolsky not review the transcript from the Preliminary Injunction Hearing?" Notice and Order at 21 n.3. I did not review the transcript of the preliminary injunction hearing before the Court issued its February 10, 2022 Show Cause Order. I did not believe or have reason to believe that Dr. Leukefeld had provided any inaccurate testimony, or that any other misrepresentations had been made at the hearing. Had I any concerns about the accuracy of the testimony or our representations, I would have reviewed the transcript and reported any errors to the Court. I deeply regret that the inaccurate testimony was not caught and corrected, and I understand that the Court relied on the testimony in fashioning the preliminary injunction.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 4th day of March 2022 in Washington, DC.

JOSHUA KOLSKY

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Date: 2022.03.04 16:55:34 -05'00'

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

Exhibit D:

Robinson Suppl. Decl.

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 previously provided a declaration in this matter on February 14, 2022. *See* Doc. 191-6. I am providing this declaration in response to the Court's February 21, 2022 notice and order (the "February 21 order"), Doc. 198, and in support of Defendants' response to that order, *see* Doc. 199. Specifically, I address the questions posed by the Court on pages 18–19 of the February 21 order.

3. Question A: The Court's February 21 order first asks (in Question A) when I and the other members of the trial team "first learn[ed] about the difference between TEC's process for

individuals housed at secure BOP facilities and [the] TEC's process [for] individuals housed in halfway houses." Doc. 198 at 18. As noted in Defendants' response, I did not know about the different processes until the week of January 10, 2022. After reviewing my records, I can confirm that I became generally aware of the different processes on January 10, as discussed further below.

4. As explained in my prior declaration, I did not join the trial team in this matter until shortly before the November 2021 preliminary injunction hearing, and I spent my first weeks on the team reviewing the parties' prior filings, reading cases cited in the parties' briefs, and otherwise preparing for the November 22, 2021 preliminary injunction hearing. I was not aware at the time of the hearing that BOP had different processes for individuals housed at secure BOP facilities and individuals housed in halfway houses. I understand that other individuals at DOJ may have learned some of that information earlier (*e.g.*, in October 2021), but I was not involved in the case at that time, and I was not involved in any discussions on the topic until January 10, 2022, as noted above.

5. On the day the Court issued its preliminary injunction decision—December 27, 2021—I read the Court's opinion and order closely as soon as they were issued. Mr. Feldon and I had a call with agency counsel later that same day to discuss the injunction and to ensure that BOP could comply with its terms. At that time, I remained unaware of the different processes for individuals housed in halfway houses and individuals in BOP secure facilities. Also, as explained in my prior declaration, I do not believe anyone (at BOP or DOJ) understood the Court's injunction to limit the range of potential decisions the TEC could make, and for that reason I do not believe anyone understood the different approval processes to be relevant to injunction compliance—which, at that time, was focused on ensuring that the TEC met and considered Ms. Iglesias's request for gender-confirmation surgery by January 24, 2022, consistent with that portion of the Court's order.

6. I was on leave from December 30, 2021 to January 9, 2022. When I returned to the office on January 10, I learned that Dr. Alix McLearen, who oversees the TEC, was considering as a

potential option recommending to the TEC that Plaintiff be referred to a surgeon for consultation one month after she is placed in a halfway house. I also learned that because Plaintiff would be in a halfway house at the time of the potential referral, Dr. McLearen and the TEC, rather than the BOP Medical Director, would be the final decisionmaker and oversee Plaintiff's referral to a surgeon. I understood that Dr. McLearen viewed this as potentially advantageous because it would mean that the process would likely be more expedient because she could personally ensure that the referral to a surgeon occurred. However, I did not fully understand all of the details of the differences between the two processes at this time.

7. When I learned that Dr. McLearen and the TEC would oversee Plaintiff's referral once she entered a halfway house, it did not occur to me that this particular process had not been discussed at the preliminary injunction hearing during Dr. Alison Leukefeld's testimony or that the record may need to be clarified. Dr. Leukefeld's testimony was not fresh in my mind, and I did not recall that she had testified that if the TEC recommended Plaintiff for surgery in April 2022, the TEC would refer Plaintiff to BOP's Medical Director. Moreover, although I understood that Dr. McLearen was considering recommending that Plaintiff be referred to a surgeon after her transfer to a halfway house, I understood this to be only one option that she was considering and that no final decision had been made by her or the TEC, which was scheduled to meet to discuss the issue on January 24, 2022.

8. On January 25, 2022, I learned that the TEC had recommended that Plaintiff be referred to a surgeon approximately one month after her placement in a halfway house. Again, it did not occur to me that this particular process had not been discussed at the preliminary injunction hearing or that the record may need to be clarified. In hindsight, I now appreciate that the Court crafted its preliminary injunction based on the testimony of Dr. Leukefeld and with the understanding that if the TEC recommended Plaintiff for surgery at any point, including in April 2022, the next step would be to refer Plaintiff to the BOP Medical Director. Now that I appreciate the significance that

the Court placed on this aspect of Dr. Leukefeld's testimony, I understand why the Court had concerns with BOP's compliance with the preliminary injunction order. But I can assure the Court that there was no intentional effort to evade the Court's order, or to delay Plaintiff's receipt of medical care. To the contrary, as noted, I always understood that the TEC was considering and ultimately selected this option because (among other reasons) it believed that the process would be more expeditious than if the TEC referred Plaintiff to BOP's Medical Director.

9. In drafting the Notice of Injunction Compliance and deciding how to report the TEC's decision to the Court per the terms of the Court's injunction, I believe everyone at DOJ and BOP sought to comply with the Court's order in good faith. As mentioned in my prior declaration, we did not want to inaccurately portray that the TEC had made an immediate recommendation for surgery, and we were concerned that filing a Notice within two days (per paragraph 2 of the Court's injunction) would leave the Court and/or Plaintiff with that misimpression. After giving the matter thought we ultimately decided that, because the TEC did not make an immediate recommendation for surgery, the better course was to follow the Notice requirements set forth in paragraph 9 of the Court's injunction. That would provide the Court with a clear record of the TEC's recommendation, and also explain the full reasons for the TEC's decision. We also recognized, however, that the TEC's decision did not fit neatly into the Court's bifurcated reporting requirements (for an immediate recommendation or an unequivocal denial), and we sought to be upfront about that fact by acknowledging it in our Notice. *See* Doc. 183 at 2 & n.1. At that time, I did not appreciate the extent to which the Court had crafted its injunction based on Dr. Leukefeld's prior testimony, or the extent to which our Notice would cause the Court to question the Government's compliance. In hindsight, I now appreciate those facts, regret that I did not appreciate them sooner, and apologize to the Court for this oversight. Nonetheless, at all times I believe DOJ and BOP personnel were acting in good

faith, trying to implement the Court's injunction consistent with their understanding of the order at the time.

10. As I noted in my prior declaration, I take my ethical obligations seriously. I left private practice for a career in public service in part because I believe that in important cases such as this one, it is critical that Government attorneys hold themselves to the highest standards of ethics and professionalism.

11. Questions B, C, & E: In its February 21 order, the Court also asks (in Question B) whether BOP or government counsel "explain[ed] the difference between [the] TEC's process for individuals housed at secure BOP facilities and [the] TEC's process for individuals housed in halfway houses between October 4, 2021, to November 22, 2021." February 21 order at 18. In Question C, the Court asks "where in the record (before Defendants' Notice . . . in Compliance with the Preliminary Injunction (Doc. 183)) did the BOP or DOJ explain" this difference. *Id.* And in Question E, the Court asks whether Government counsel "clarif[ied] Dr. Leukefeld's testimony or correct[ed] the alleged inadvertent error at the Preliminary Injunction hearing." *Id.* As noted in Defendants' response to the February 21 order, we did not explain this difference before Defendants' notice in compliance with the preliminary injunction. As explained above, I did not learn about the different processes until January 10, 2022, and it did not occur to me at that time that this issue had not been adequately addressed at the preliminary injunction hearing during Dr. Leukefeld's testimony or that the record may need to be clarified.

12. Question D: The Court asks whether Government counsel alerted the Court that BOP's revised Transgender Offender Manual had been issued on January 13, 2022 before the Government's January 31, 2022 notice in compliance with the preliminary injunction. As discussed in Defendants' response to the February 21 order, we did not alert the Court of the issuance of the revised manual until the Government's January 31, 2022 notice. I can assure the Court that there was

no attempt to conceal the issuance of the revised manual, which was posted to BOP's website shortly after it was issued and was attached to Defendants' January 31, 2022 notice.

13. Questions F, G, & H: The Court asks (Question F) whether Government counsel read the Court's December 27, 2021 preliminary injunction order. I carefully read both the Court's opinion and order immediately after they were issued and several times thereafter. As noted above, Mr. Feldon and I had a call to discuss the order with agency counsel on the day it was issued to ensure that the agency believed that it could comply. The Court also asks (Questions G and H) whether the Court's order "differentiate[s] between [the] TEC's process for individuals housed at secure BOP facilities and [its] process for individuals in halfway houses" and, if not, "where in the order BOP could deviate from the process discussed by Dr. Leukefeld." February 28 order at 19. The Court's order does not differentiate between the two processes. As explained in Defendants' prior filings and above, we did not understand the Court's preliminary injunction to constrain the TEC's discretion, and because the TEC did not "recommend" Plaintiff for surgery within the meaning of the Court's preliminary injunction (at least as we understood the injunction), we followed the injunction's second set of instructions that applied if the TEC did not recommend Plaintiff for surgery. *See* Doc. 191 at 12, Doc. 199 at 15. Now that I appreciate the significance that the Court placed on Dr. Leukefeld's testimony, I understand why the Court had concerns with BOP's compliance, and I apologize that I did not appreciate sooner the questions that Dr. Leukefeld's testimony could raise about the TEC's decision..

14. Question I: Finally, the Court asks whether I mentioned during my closing argument at the preliminary injunction hearing that if the TEC recommended Plaintiff for surgery in April of 2022, it would refer her to a surgeon (as opposed to the BOP's Medical Director). *See* February 21 Order at 19. As explained in Defendants' response to the February 21 Order, I did not mention that the TEC could refer Plaintiff to a surgeon without Medical Director approval because I did not know

that this was an option at the time of the preliminary injunction hearing and did not become aware of this possibility until January 2022. During my closing argument, I accurately conveyed to the Court that the TEC at that point planned "in April of 2022 to consider Ms. Iglesias for surgery." *See id.* (quoting Doc. 175 at 201). I did not intend in my closing argument to make any representations about BOP's approval processes, *i.e.*, about what might happen after the TEC made its recommendation, in April 2022 or otherwise. I have reviewed the transcript of my closing argument and do not believe that I made any such representations. Had I made any representations that I later learned were inaccurate, on this topic or any other topic, I would have promptly sought to correct the record.

15. The Court's order also states that "[t]he 12-month requirement is to receive GCS. Correct?" and that "[t]he 12-month requirement is **not** in order to then be referred to a surgeon for consultation of GCS. Correct?" *Id.* (emphasis in original). Respectfully, this is not an entirely accurate description of the 12-month requirement. As Dr. Leukefeld explained at the preliminary injunction hearing, the 12-month requirement means that the TEC will generally *consider* an individual for GCS only after the individual has lived in a gender-affirming facility for at least one year; it does not mean that an individual will necessarily *receive* GCS after one year. *See, e.g.*, Doc. 175 at 149 (explaining that the TEC "would assess [Plaintiff] for surgery in April"); *id.* at 187 ("The TEC's position is that we will evaluate her for surgery in April."); *id.* at 189 ("The committee will make a determination about whether to recommend in April."). This process is also set forth in BOP's recently updated Transgender Offender Manual, which explains that "surgery may be the final stage in the transition process and is generally *considered* only after one year of clear conduct and compliance with mental health, medical, and programming services at the gender affirming facility." Doc. 183-1 at 15 (emphasis added).

16. I wish to convey again my profound regret that the Court has expressed concern with the Government's actions in this case. I consider it an honor to represent the United States and would

never knowingly disobey an order of the Court, mislead the Court, or take any action to inappropriately delay these proceedings. I hope that the responses that we have provided the Court and our presentations at the show-cause hearing have helped 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 March 4, 2022.

JOHN ROBINSON

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Date: 2022.03.04 16:48:31 -05'00'

JOHN ROBINSON

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

Exhibit E:

Excerpt of Leukefeld Depo. Tr.

(Not subject to Protective Order)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS (aka CRISTIAN NOEL IGLESIAS),	:	Case No: 19-cv-00415-NJR
Plaintiff	:	Pages 1 - 184
-vs-	:	
IAN CONNORS, et al.,	:	
Defendant	:	

Videotaped Videoconference Deposition of Dr. Alison Leukefeld

Zoom Remote

Friday, September 10, 2021

Reported by: Kathleen M. Vaglica, RPR, RMR

Job No: 747918

MAGNA LEGAL SERVICES
(866) 624-6221

A. I am aware that initially Dr. Lynn Stall was on the TCCT, and I am not aware of any other members that were before or after that or other than her.
Q. To your knowledge, there's no one who serves on both the TEC and the TCCT?
A. No.
Q. Do you know what the TCCT is empowered to do?
A. It's a Health Services committee that is empowered to provide guidance, clinical guidance to health service providers.
Q. Do you know how often the TCCT meets?
A. I don't.
Q. Do you know if the TCCT at any point has kept records of their meetings, their agendas, or minutes?
A. I do not know.
Q. Do you know the process by which prisoners or issues related to prisoners come before the TCCT?
A. I believe they are referred by Health Services because this is a Health Services

committee.
Q. Do you know who leads the TCCT?
A. No.
Q. Does the TCCT make any final decisions with respect to transgender prisoners' health care?
A. No, they don't. It's a peer guidance-type model where clinicians in the field who have knowledge and skill provide guidance to their peers.
Q. Good. And now a few more questions about the TEC.
MR. GARDNER: Josh, I'll tell you what. We've been going for another hour, 15. Is now a good time for a break?
MR. BLECHER-COHEN: I have a few things to clean up and then we can do another break around the three-hour mark, if that sounds good.
THE WITNESS: That's fine.
BY MR. BLECHER-COHEN:
Q. Great. I appreciate your patience. So you mentioned a bit about the process for deciding if someone gets gender-affirming surgery. What is the process through which the TEC considers a

request for gender-affirming surgery?
A. It's the same process as other requests at this point.
Q. And you mentioned that, after the TEC makes a decision on surgery, there might still be more process to determine if such surgery is safe. What does that later process consist of?
A. I'm not a medical doctor, but it would be working through labs and health screens and making sure that someone is healthy enough to have major surgery and recover well.
Q. And that would happen after the TEC has made a decision on gender-affirming surgery?
A. I guess I can't say for sure. We haven't been there.
Q. And when you say you haven't been there, what do you mean by that?
A. At this point the TEC has not recommended surgery.
Q. The TEC has never recommended gender-affirming surgery for any prisoner?
A. Correct.

Q. And to be super clear, by gender-affirming surgery, we're including vaginoplasty, orchiectomy, mastectomy, phalloplasty, metoidioplasty, breast augmentation, hysterectomy. The TEC has never approved any BOP prisoner for any gender-affirming surgery including any of those procedures?
A. Correct. We have not approved anyone for those.
Q. Why not?
A. At this point there's, there have not been inmates that have come before the TEC who are prepared for that. It is a transition process and that involves both, all of the things that transgender individuals in the community need to transition through, and it also involves the correctional aspects of supervision and safety that are important in a correctional environment.
And so the TEC has not rejected anyone for surgery, but it also has not approved anyone. Continually, we make recommendations that individuals continue with their transition.
Q. What actions has the TEC taken with

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

Exhibit F:

Excerpt of Leukefeld Depo. Tr.

(Redacted due to Protective Order)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS (aka CRISTIAN NOEL IGLESIAS),	:	Case No: 19-cv-00415-NJR
Plaintiff	:	Pages 1 - 82
-vs-	:	
IAN CONNORS, et al.,	:	
Defendant	:	

UNDER PROTECTIVE ORDER

Videotaped Videoconference Deposition of Dr. Alison Leukefeld

Zoom Remote

Friday, September 10, 2021

Reported by: Kathleen M. Vaglica, RPR, RMR

Job No: 747918

MAGNA LEGAL SERVICES
(866) 624-6221

at Carswell?
A. I would estimate that it has been several years, but I don't have an exact date.
Q. And is REDACTED seeking gender-affirming surgery?
A. I believe she is.
Q. But she has not yet received gender-affirming surgery; right?
A. She has not.
Q. But she's been in a woman's facility for more than 12 months?
A. Yes.
Q. Why hasn't REDACTED received gender-affirming surgery?
A. I am unaware if she has been assessed for or meets all of the criteria, some of which may be outside of the TEC. So I can't tell you why she hasn't received it right now.
Q. What are examples of those other criteria?
A. Well, some of the things we talked about before, which would include a medical assessment and other things that are necessary outside. Her case

has not come back before the TEC just recently.
Q. Do you remember the last time it did come before the TEC?
A. I do not.
Q. Earlier, I think you had indicated that some medical clearances would happen after TEC approval of making sure that someone is safe and ready for surgery. Is that the process or it sounded like now that might be criteria to even be considered and approved?
A. We're talking about a process that hasn't happened so it's hard for me to say exactly what it would look like.
Q. I see. Any other criteria that could prevent someone from being considered for gender-affirming surgery that you can think of?
MR. GARDNER: Objection. Vague.
THE WITNESS: I think we've covered that pretty clearly, and I don't have anything to add.
BY MR. BLECHER-COHEN:
Q. In addition to REDACTED, can you recall any other transgender prisoners currently at

gender-aligned facilities besides Ms. Iglesias as well?
A. No, and I'm sorry. I simply don't track them in my role so there may be ones that, if I was asked about them, I would say yes, but, like I said, they may release after they go or they may have gone and, you know, I don't have a tracking system because that really is managed by the Women and Special Population Branch.
Q. Who would know the most up-to-date list of transgender prisoners in gender-aligned facilities?
A. Jenna Epplin.
Q. And are there any documents or other materials that would also cover that information?
A. I don't believe so.
Q. What did you base your assertions about the number of transgender prisoners in gender-aligned facility facilities on in your April 2021 declaration?
A. Which assertion?
Q. You made assertions about the number of transgender people in gender-aligned facilities.

A. I consulted with Jenna Epplin.
Q. Now, in April 2021 the TEC recommended that Ms. Iglesias be moved to a woman's facility from where she was at Fort Dix. Did you participate in that decision?
A. Yes, I did.
Q. And what materials were considered in making that new recommendation that she be moved to a woman's facility?
A. I don't know that there were materials, per se, but definitely her hormone levels being a goal as reported by Dr. Lewis was a major consideration, as well as her tenure at low security facilities.
Q. Was there anything else that had changed in Ms. Iglesias's circumstances that warranted her transfer to a woman's prison at that moment?
A. No, I don't think so. It's something that we have been looking toward for a number of years through lower security transfers and maximization of hormones. I shouldn't say we. That she has been working towards for a number of years and that we

have been supportive of as the TEC.
Q. And was April 2021 the earliest possible point where the TEC believed that it was appropriate to move Ms. Iglesias to a woman's facility or could it, could she have been ready earlier?
MR. GARDNER: Objection. Calls for a hypothetical. Speculation.
THE WITNESS: It was time for her to transfer to another facility, and that is when TEC typically reviews. And so at that time she was ready.
BY MR. BLECHER-COHEN:
Q. But had she not been in need of transfer due to exigent circumstances, then she wouldn't have had a pathway to come or she wouldn't have come before the TEC automatically; right?
A. Not automatically, but that doesn't mean that she wouldn't have had access to come before the TEC. Certainly, any contact from the staff that was requesting that would have triggered her consideration.
Q. And now I want to ask about, briefly about

Residential Re-Entry Centers. When someone is housed in a Bureau of Prison's facility, BOP is responsible for their health care; right?
A. Correct.
Q. What is a Residential Re-Entry Center?
A. The colloquial term for Residential Re-Entry Center is a halfway house.
Q. And what is a Residential Re-Entry Center or a halfway house?
A. It's a place where, typically, individuals who are releasing from prison go to reintegrate into their community or community close to their community to reunite with family, to reinitiate ties to the community, and to, for example, employment.
Those ties would also include greater contact with family and a chance to acclimate to community if they've been out of the community for some time, community norms and expectations and also to have a both sheltered and supervised initial re-entry into the community.
Q. And when an individual moves from BOP facility to an RRC, who is responsible for that

individual's health care?
A. Individuals who are in RRC are still in the custody of the Bureau of Prisons. They are going into the community, but still BOP's responsibility, and BOP does pay for their health care while they are in the RRC.
Q. Are there any BOP policies that discuss health care in RRCs?
A. Oh, I'm confident there are, but they are not my policies, and I can't tell you what they are.
Q. Whose policies are they?
A. My guess is that they belong to the Residential Re-Entry Management Branch, which is a branch in the Re-Entry Services Division. And they possibly may be blended with Health Services Division policies.
Q. Okay. Are there particular people at BOP who would know about responsibility for health care for individuals in RRCs?
A. Jon Gustin is the branch administrator for the Residential Re-Entry Branch, and he is an expert in these issues.

Q. And do you have any involvement in the determination to move someone from a BOP facility to an RRC?
A. Typically, I do not.
Q. When would you?
A. Potentially, I would have some, some influence or opportunity to comment if the individual was seriously mentally ill, if there was an intersection with their treatment program, and potentially also as a member of the TEC if the individuals is transgender.
Q. Has the TEC had discussions about individual's potential or actual movement to an RRC before?
A. I don't recall that we have.
Q. So the TEC has never discussed Ms. Iglesias with respect to a Residential Re-Entry Center?
A. No.
Q. And do you have any involvement in ensuring continuity of psychological care for individuals moving from BOP facilities to RRCs?

A. Yes. The psychologist and the institution are charged with completing a mental health transfer summary for individuals who have serious mental illness or classified as Care 1 or Care 2, and that report goes to the individual to contract for mental health services for individuals living in the RRC.

Importantly, I am not over Health Services. That is a different branch because the services are all contracted.

Q. Who within the BOP system is involved in the determination to move someone from a BOP facility to an RRC?

A. That is almost entirely managed at the local institution level in conjunction -- well, let me say it this way. At the local institution level that generates a referral and that referral goes to the warden who passes it back to the DSCC who I believe makes final determinations.

Q. Do you have any involvement in overseeing psychological care of any individuals in RRCs?

A. No. I on rare occasion consult with the branch that is charged with that, but, like I said,

the care that's provided in the RRCs is provided by contractors and another branch that oversees this contract.

Q. And do you know anything about Ms. Iglesias and a possible move to an RRC by her?

A. Do I know anything -- no, I don't.

Q. Have you discussed Ms. Iglesias's possible move to an RRC with anyone?

A. No.

Q. In your July 2021 declaration you discuss the Bureau of Prison's policy on halfway houses and Cristina's possible movement to a halfway house. What was that discussion in your declaration based on?

A. I think I said it would be possible for her to move, which is true, but I -- other than that and the fact that it is possible, can you point me to the place so that I can look at exactly what you're talking about?

Q. Of course. That's paragraph nine.

A. Yeah. She, I mean, this is accurate that we designate inmates to RRCs, and she would

potentially be eligible here, you know, on this date, and that's the extent of my knowledge of the issue.

Q. Were you the one who drafted that paragraph?

A. I don't believe I drafted it because I would rely on the expertise of someone else to look up that date.

Q. So who did draft it?

A. I believe it was Mr. Nelson.

Q. And who oversees the contracts with the providers who provide health care at RRCs?

A. That is the community -- well, the contracts are overseen by two different bodies depending on whether it's medical care or mental health care. And if it's medical care, I believe Jon Gustin oversees that contract.

If it is mental health care, substance abuse treatment, or sex offender treatment, those contracts are overseen by Cheryl Lightsey and she's the administrator for the Community Re-Entry Affairs Branch in RRC.

Q. Is there anyone else who is involved?

A. Those are certainly the primary individuals.

Q. I am going to ask if we can take a brief break. It's 3:09. Maybe we'll resume at 3:15, if that works.

MR. GARDNER: Sure.

MR. BLECHER-COHEN: Great.

THE VIDEOGRAPHER: The time is 3:09 p.m. We are off the video record.

(Whereupon, a short recess was taken.)

THE VIDEOGRAPHER: The time is 3:17 p.m., and we are back on the video record.

BY MR. BLECHER-COHEN:

Q. At one point earlier, Dr. Leukefeld, you mentioned a prisoner who had been moved to one facility and moved back to a men's facility by the name REDACTED. Do you know the first name of that prisoner?

A. I don't recall her first name.

Q. Do you recall any other identifying facts such as the facility from which she was transferred