Case Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO, AKA MASON EDMO,
Plaintiff-Appellee,
v.
IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellants
and
CORIZON, INC., et al.,
Defendants-Appellants

On Appeal from Orders of the United States District Court
For the District of Idaho
(No. 1:17-cv-00151-BLW)

DEFENDANT-APPELLANTS' JOINT OPENING BRIEF

Lawrence G. Wasden,
Attorney General State of Idaho
Brady J. Hall,
Special Deputy Attorney General
Marisa S. Crecelius
Moore Elia Kraft & Hall, LLP
P.O. Box 6756
Boise, ID 83707
(208) 336-6900
brady@melawfirm.net
marisa@melawfirm.net
Attorneys for Defendants-Appellants Idaho Department of Corrections, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert

Dylan Eaton
J. Kevin West
Parsons Behle & Latimer
800 West Main Street
Suite 1300
Boise, ID 83702
(208) 562-4900
Deaton@parsonsbehle.com
KWest@parsonsbehle.com
Attorney for Defendants-Appellants Corizon, Inc., Scott Eliason, Murray Young, and Catherine Whinnery

March 6, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 1

STATEMENT OF ADDENDUM 2

STATEMENT OF THE CASE 2

A. Ms. Edmo's Serious Co-Existing Mental Health History 2

B. Ms. Edmo's Diagnosis and Extensive Treatment for Gender Dysphoria 5

C. Ms. Edmo's Repeated Refusals to Address Her Serious Co-Existing Mental Health Concerns 8

D. Ms. Edmo's 2016 Evaluation for Gender Confirming Surgery 10

E. Litigation and Relevant Procedural Posture of the Case 17

F. Ms. Edmo's Delayed Second Motion for Preliminary Injunction 18

G. The Evidentiary Hearing 18

H. The District Court's Order Granting Ms. Edmo's Motion for Preliminary Injunction 22

I. Defendants' Notices of Appeal 23

SUMMARY OF ARGUMENT 24

ARGUMENT 26

A. The District Court Erred in Granting Ms. Edmo's Motion for Preliminary Injunction Where Ms. Edmo Failed to Establish a Clear Showing That Any One Defendant Was Deliberately Indifferent 26

1. Before granting Ms. Edmo permanent and mandatory injunctive relief, the district court was required to apply the heightened standard for a mandatory injunction 26

2. The Ninth Circuit is to review the record *de novo* to determine if the law and facts clearly favored Ms. Edmo's Eighth Amendment claim 29

3. The district court erred in granting Ms. Edmo injunctive relief because the law and facts on the record do not clearly favor her Eighth Amendment claim 31

a. The district court erred in holding that Eighth Amendment deliberate indifference can be established merely when a provider does not strictly follow the WPATH guidelines 35

b. Dr. Eliason's 2016 decision not to refer Ms. Edmo for a surgical consult was based on his professional judgment and there is no evidence on the record to support a conclusion that it was medically unacceptable 38

c. In disregarding Dr. Eliason's professional judgment, the district court supplanted its own medical conclusions for that of Ms. Edmo's treating providers and, in doing so, discounted and unwisely expanded sound legal precedent 45

d. The district court erred in granting the injunction against the named Defendants despite the record being devoid of any evidence or findings that any one named Defendant acted with the requisite subjective indifference 49

e. The district court erred in concluding that evidence "suggests" that the defendants had a de facto policy prohibiting GCS or that any improper bias motivated Dr. Eliason's decision not to refer Ms. Edmo for GCS 49

f. The record does not support a finding that Ms. Edmo will suffer immediate, extreme or very serious damage.....54

B. The District Court's Overbroad Order Granting Permanent and Mandatory Injunctive Relief Violates the Prison Litigation Reform Act (PLRA) 58

C. The District Court Erred to the Extent It Converted the Preliminary Injunction Hearing to a Final Trial on the Merits Without Affording the Parties Prior Notice and Without Protecting the Defendants' Right to a Jury Trial on the Merits 61

CONCLUSION 65

STATEMENT OF RELATED CASES 65

CERTIFICATE OF COMPLIANCE 65

TABLE OF AUTHORITIES

Page(s)

CASES

Abdul-Karim Ali v. Terhune
113 F. App'x 431 (3d Cir. 2004) 45

Amoco Prod. Co. v. Vill. of Gambell, AK
480 U.S. 531 n.12 (1987).....63

Anderson v. United States
612 F.2d 1112 (9th Cir. 1979).....28

Armstrong v. Schwarzenegger
622 F.3d 698 (9th Cir. 2010) 45, 60

Bell v. Wolfish
411 U.S. 520 (1979).....35

Bismark v. Fisher
213 F. App'x 892 (11th Cir. 2007) 45

Bowring v. Godwin
551 F.2d 44 (4th Cir. 1977).....45

California v. Azar
911 F.3d 1164 (9th Cir. 2018) 26, 28

Cates v. Ciccone
422 F.2d 926 (8th Cir. 1970) 45

Chalk v. U.S. Dist. Court
840 F.2d 701 (9th Cir. 1988) 26

Chance v. Armstrong
143 F.3d 698 (2d. Cir. 1998).....45

Colwell v. Bannister
763 F.3d 1060 (9th Cir. 2014) 31

Ctr. for Competitive Politics v. Harris
784 F.3d 1307 (9th Cir. 2015) 29

Dahl v. HEM Pharm. Corp.
7 F.3d 1399 (9th Cir. 1993) 27

Druley v. Patton
601 F. App'x 632 (10th Cir. 2015) 37

Estelle v. Gamble
429 U.S. 97 (1976) 24, 32, 41, 45, 46, 47

Farmer v. Brennan
511 U.S. 825 (1994) 31, 49, 63

Garcia v. Google, Inc.
786 F.3d 733 (9th Cir. 2015) (en banc) 27, 33

Gary H. v. Hegstrom
831 F.2d 1430 (9th Cir. 1987) 36

Graham v. Teledyne-Cont'l Motors, a Div. of Teledyne Indus., Inc.
805 F.2d 1386 (1986) 30

Graves v. Arpaio
623 F.3d 1043 (9th Cir. 2010) 58

Hallett v. Morgan
296 F.3d 732 (9th Cir. 2002) 30, 58

Hamby v. Hammond
821 F.3d 1085 (9th Cir. 2016) 31

Hodgers-Durgin v. de la Vina
199 F.3d 1037 (9th Cir. 1999) 33

Isaacson v. Horne
716 F.3d 1213 (9th Cir. 2013) 26, 61, 62

Jackson v. McIntosh
90 F.3d 330 (9th Cir. 1996) 32, 47, 48

Kosilek v. Spencer
774 F.3d 63 (1st Cir. 2014).....38, 45, 52

Lacy v. Cook Cty., Illinois
897 F.3d 847 (7th Cir. 2018) 64

Lamb v. Norwood
262 F. Supp. 3d 1151 (D. Kan. 2017 37

Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs.
237 F.3d 1101 (9th Cir. 2001).....50

Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.
571 F.3d 873 (9th Cir. 2009) 26, 27, 28

Melendres v. Arpaio
695 F.3d 990 (9th Cir. 2012) 30

Michenfelder v. Sumner
860 F.2d 328 (9th Cir. 1988) 61, 64

Norfleet v. Webster
439 F.3d 392 (7th Cir. 2006) 45

Norsworthy v. Beard
87 F. Supp. 3d 1164 (N.D. Cal. 2015).....53, 54

Oakland Tribune, Inc. v. Chronicle Pub. Co.
762 F.2d 1374 (9th Cir. 1985) 56

O.K. v. Bush
344 F. Supp. 2d 44 (D.D.C. 2004).....45

Peralta v. Dillard
744 F.3d 1076 (9th Cir. 2014).....47

Ramos v. Lamm
639 F.2d 559 (10th Cir. 1980) 45

Rhinehart v. Scutt
894 F.3d 721 (6th Cir. 2018) 45

Romer v. Green Point Sav. Bank
27 F.3d 12 (2d Cir. 1994).....29

Sanchez v. Vild
891 F.2d 242 (9th Cir. 1989) 46, 47

Senate of State of Cal. v. Mosbacher
968 F.2d 974 (9th Cir. 1992) 28

Snow v. McDaniel
681 F.3d 978 (9th Cir. 2012).....47, 48

Stewart v. Murphy
174 F.3d 530 (5th Cir. 1999).....45

Stormans, Inc. v. Selecky
586 F.3d 1109 (9th Cir. 2009).....55

Tanner Motor Livery, Ltd. v. Avis, Inc.
316 F.2d 804 (9th Cir. 1963) 28

Ting v. AT&T
319 F.3d 1126 (9th Cir. 2003) 30

Toguchi v. Chung
391 F.3d 1051(9th Cir. 2004) 24, 31, 32, 45

Univ. of Texas v. Camenisch
451 U.S. 390 (1981).....61

United States v. Hinkson
585 F.3d 1247 (9th Cir.2009) 29

Van Ort v. Estate of Stanewich
92 F.3d 831 (9th Cir. 1996).....50

Washington Metro. Area Transit Auth. v. L'Enfant Plaza Properties, Inc.
448 A.2d 864 (D.C. 1982) 64

Winter v. Nat. Res. Def. Council, Inc.
555 U.S. 7 (2008).....26, 27, 33, 42

OTHER AUTHORITIES

18 U.S.C.A. § 3626. Appropriate Remedies with Respect to Prison Conditions 25, 58, 59, 60, 61

28 U.S.C.A. § 1292(a)(1). Interlocutory Decisions 1

28 U.S.C.A. § 1331. Federal Question 1

28 U.S.C.A. § 1343. Civil Rights and Elective Franchise.....1

42 U.S.C.A. § 1983. Civil Action for Deprivation of Rights 17

U.S.C.A. Const. Amend. VII: Civil Trials.....64

U.S.C.A. Const. Amend. VIII: Excessive Bail, Fines, Punishments.....17, 30, 31, 49, 59

Federal Rule of Civil Procedure 65: Injunctions and Restraining Orders..... 61

STATEMENT OF JURISDICTION

The U.S. District Court for the District of Idaho had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The district court's Order granting Plaintiff-Appellee Adree Edmo's motion for preliminary injunction was entered December 13, 2018. Defendants-Appellants Idaho Department of Correction (IDOC), Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert (collectively, the IDOC Defendants) and Defendants-Appellants Corizon, Inc. (Corizon), Dr. Scott Eliason, Dr. Murray Young, and Dr. Catherine Whinnery (collectively, the Corizon Defendants) filed timely Notices of Appeal on January 9, 2019. This Court has jurisdiction under 28 U.S.C. §§ 1292(a)(1).

STATEMENT OF ISSUES

1. Did the district court err in issuing the injunction when it applied the incorrect standard and when the law and facts in the record did not clearly demonstrate that any one Defendant was deliberately indifferent to Ms. Edmo's medical needs?

2. Did the district court err by issuing an overbroad injunction in violation of the Prison Litigation Reform Act when ordering Defendants to broadly provide "adequate medical care" and a surgery not yet approved by a qualified surgeon?

3. Did the district court err in converting the abbreviated preliminary injunction hearing to a full and final trial on the merits without providing prior notice to the parties?

STATEMENT OF ADDENDUM

The full text of the pertinent constitutional provisions, statutes, and rules are set forth in the addendum filed concurrently with this joint opening brief. *See* 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

A. Ms. Edmo's Serious Co-Existing Mental Health History

Ms. Edmo was born a biological male in 1987 in Pocatello, Idaho. (ER 3610). She was raised male and, for the first 26 years of her life, went by Mason Dean Meeks and Mason Meeks Edmo. (ER 558, 874-875; PSI 15-17, 97-119). Prior to her most recent incarceration in 2012 at the age of 24, Ms. Edmo identified openly as a gay man. (ER 1513; PSI 7-8, 12, 53-56, 67, 71, 97-119).

Since her late teens, Ms. Edmo has suffered from serious and uncontrolled mental health issues, notably depression, anxiety, and alcohol dependence. (ER 601-606, 871-879, 881-906, 1103-1109, 3221; PSI 10-11, 15-17, 22-29, 32-52, 53-57, 67). Prior to her 2012 incarceration, Ms. Edmo routinely abused alcohol, methamphetamines, and other illegal substances such that she was rarely sober and of sound mind. (ER 605-606, 1107; PSI 10-11, 15-17, 32-52, 53-57, 67,

112-116). Her mental health was so severely compromised that she made two serious suicide attempts requiring emergency treatment. (ER 601-606; PSI 46-51, 53-57, 67, 71, 76-77). In 2010, an intoxicated Ms. Edmo deeply lacerated her right arm after her boyfriend ended their relationship. (ER 602-606, 898-906, 3217; PSI 46, 55-57, 71, 76). One year later, Ms. Edmo nearly died after overdosing on alcohol and prescription medication. (ER 602-606, 871-879, 881-897; PSI 46, 55-57, 71, 76). She was subsequently diagnosed with Major Depressive Disorder, Substance Abuse Mood Disorder, and Alcohol Dependence. (ER 877, 893, 903). Ms. Edmo was referred for mental health counseling and substance abuse treatment, but medical records show that she did not fully participate in the recommended treatments. (ER 877-886). She later reported that she had been depressed due to unemployment, feelings of guilt and worthlessness, and the "tumultuous relationship he has had with his boyfriend." (ER 606, 888).

Records reveal that, prior to 2012, Ms. Edmo exclusively presented herself as male and no mention was ever made of her expressing issues with her gender identity. (ER 558, 874-875, 898, 1513, 3144-3147; PSI 7-8, 12, 53-56, 67, 97-119). In 2009, when Ms. Edmo was 21, she wrote several bad checks to buy alcohol. (ER 606, 2792; PSI 1-3, 12, 18-22, 91-93). She was convicted of felony check fraud and was incarcerated in an IDOC prison. (ER 606, 2792; PSI 22, 38). A photograph taken upon her intake shows Ms. Edmo presenting as a male. (ER

2792-2793, 2795). Moreover, the records from that earlier period of incarceration are devoid of any documents in which Ms. Edmo ever identified as female or raised issues regarding her gender identity. (ER 1488-1490, PSI 1-31). Ms. Edmo's parole officer testified that, after her release in 2010, he never saw her dress as a woman or present feminine. (ER 3144-3147). Additionally, Ms. Edmo repeatedly stated following her release that her mental health issues were due to severe depression, substance abuse, unemployment, criminal proceedings, suicidality, and trauma stemming from abusive personal relationships, and childhood sexual abuse. (ER 602-606, 871-879, 881-906, 1104-1107; PSI 1-147).

In 2011, Ms. Edmo sexually assaulted a child. She was convicted of a felony and sentenced to a fixed term of three years and seven years indeterminate. (ER 3148-3162). Ms. Edmo participated in Pre-Sentence Investigations (PSI) that included detailed life histories, a psychosexual evaluation, interviews with family members, and a polygraph. (PSI 1-147). The PSI is sealed, but tellingly absent from the 147 pages are any statements that Ms. Edmo identified or appeared female, that she questioned her identity as a homosexual male, or that she had any distress with her male genitals. (PSI 1-147).

In April 2012, Ms. Edmo was transferred to the Idaho State Correctional Institution (ISCI), a male prison operated by IDOC. (ER 3303-3304). Upon intake, Ms. Edmo was again photographed with her appearance clearly masculine. (ER

2797). She was given a mental health assessment in which she reported "poor self-image" and that "relationship issues are the primary reasons for his depressed moods [and] suicide attempts." (ER 1501-1504). Her judgment was assessed as "poor," "impulsive," "immature," and "dependent." *Id*. Ms. Edmo noted that she "lives an openly gay life style," but made no statements about gender identity or distress with her genitalia. *Id*.[1] Ms. Edmo was provisionally diagnosed with alcohol addiction, Major Depressive Disorder with Anxiety, and "BPD [Borderline Personality Disorder] anti-social traits." (ER 1109, 1501-1504). Ms. Edmo was appropriately referred to a psychiatrist for further evaluation and medication. (ER 1501-1504).

B. Ms. Edmo's Diagnosis and Extensive Treatment for Gender Dysphoria

Approximately two months after Ms. Edmo was transferred to ISCI, she reported *for the first time* that she identified as "feminine." (ER 144; 805-806, 1513). During a June 25, 2012, appointment with Corizon's Director of Psychiatry, Dr. Scott Eliason, Ms. Edmo reported she used to identify as a homosexual male, but that "now I think it is that I am not a gay man, but actually a woman." *Id*. Dr.

[1] Ms. Edmo testified in this case that she identified as a female and began living "full-time as a woman around the age of 20 or 21," including wearing "makeup, women's outerwear, underwear and bras, and styl[ing her] long hair." (ER 607, 3611). Ms. Edmo's uncorroborated testimony is contradicted by the contemporaneous medical records and voluminous evidence in the record. (ER 871-906, 1501-1504, 3144-3147; PSI 1-147).

Eliason noted that Ms. Edmo expressed some dysphoria related to her male gender, but that she was "functioning well." (ER 1513).

Dr. Eliason is a psychiatrist who specializes in treating inmates. (ER 797-800; 973-977). He is Board-Certified in Forensic and General Psychiatry and is a Certified Correctional Healthcare Provider (CCHP) as a medical doctor and mental health provider. (ER 802; 973-977). Dr. Eliason is a qualified Gender Dysphoria evaluator and has extensive training and education treating gender dysphoric inmates (ER 813-816, 2912, 2927). He also has considerable experience treating patients with gender dysphoria both during and prior to working as the Chief Psychiatrist with IDOC. *Id*.

Dr. Eliason took seriously Ms. Edmo's subjective reports and, after an appropriate assessment, concluded that she met the criteria for what was known in 2012 as Gender Identity Disorder (GID), now Gender Dysphoria (GD). (ER 803-809, 1513). Dr. Eliason timely referred Ms. Edmo to a forensic psychologist, Claudia Lake, PsyD, for a full history and diagnostic evaluation, which occurred in July 2012. (ER 809, 1515-1519). In her five-page evaluation, Dr. Lake confirmed Ms. Edmo's diagnosis of GD after conducting a two-day interview of Ms. Edmo, administering diagnostic testing, and reviewing the PSI and mental health records. (ER 1515-1519).

Prior to Ms. Edmo's incarceration, IDOC adopted a detailed Standard Operating Procedure (SOP) "to ensure [GD offender] safety and access to appropriate and necessary medical and mental health treatment." (ER 743-744, 2910-2927). The SOP expressly provided that inmates with GD will have access to cross-sex hormone therapy and gender confirming surgery if it is determined medically necessary. (ER 743-744, 2912, 2923). The SOP also created the Management and Treatment Committee (MTC), which is a multi-disciplinary team composed of medical providers, mental health clinicians, IDOC's Chief Psychologist, and prison leadership, which meets periodically to evaluate and meet the unique medical, mental health, and housing needs of GD inmates. (ER 717-718, 809-810, 2911, 2916, 2922-2923, 2926, 3094, 3120, 3137-3141, 3165-3166).

Consistent with the SOP, the MTC reviewed Ms. Edmo's GD diagnosis on August 23, 2012. (ER 810-811, 2800-2803). Dr. Eliason participated in that MTC meeting where Ms. Edmo's PSI and mental health history was reviewed. *Id*. Dr. Eliason and the MTC recognized Ms. Edmo's diagnosis of GD and appropriately referred her for an additional evaluation to begin treatment, including hormone therapy. *Id*.

By August 29, 2012, four months after entering prison and approximately two months after first requesting a GD evaluation, Ms. Edmo began hormone therapy. (ER 1882-1884, 2800-2803). After beginning hormones, Ms. Edmo

developed breasts, her body fat redistributed, and her skin softened. (ER 592, 619). Defendants provided Ms. Edmo with bras to support her growing breasts and with a jock strap and padding to support her sensitive testicles. (ER 620-621, 1921, 1926). Ms. Edmo also received female underwear and is now allowed to purchase makeup and female grooming items from the commissary. (ER 612, 744, 2919-2927).

C. Ms. Edmo's Repeated Refusals to Address Her Serious Co-Existing Mental Health Concerns

From 2012 to 2016, Ms. Edmo continued to receive hormone therapy and access to psychiatric care with Dr. Eliason and other medical and mental health staff. (ER 619, 811-812, 732-735, 1193-2791, 3093-3099, 3118-3143). However, Ms. Edmo adamantly refused to address her other serious co-existing mental health issues that her treating mental health providers, including IDOC clinicians Laura Watson and Krina Stewart, recognized as barriers to decreasing her gender-related dysphoria and improving her overall mental stability. (ER 3093-3099, 3118-3134). With the support of the MTC, Ms. Edmo's clinicians strongly encouraged Ms. Edmo to participate in individualized counseling and attend focused therapeutic

groups, such as Mood Management, Social Skills, and the GD process group. (ER 614-621, 740, 1112-1114, 2833-2839, 3093-3099, 3118-3143).[2]

Unfortunately, Ms. Edmo deliberately failed to attend therapy aimed at helping her develop healthy methods to address her GD and to identify the sources of her co-existing mental health issues. (ER 614-621, 1112-1114, 2479-2480, 2497-2499, 2697, 2715, 2833-2839; 3093-3099, 3118-3143, 3163-3168). Consequently, Ms. Edmo's major depression and anxiety persisted and she continued to exhibit symptoms of Borderline Personality Disorder and to engage in unhealthy thoughts and destructive behaviors, including cutting her arms and genitals. (ER 189, 223, 232, 236-237, 594, 596, 741, 3093-3099, 3118-3143, 3163-3168). Ms. Edmo is now committed to preserving her male anatomy so that her genital tissue will be available to create female anatomy during a vaginoplasty and she has not attempted self-castration since 2016. (ER 614).

Nevertheless, these self-harm episodes illustrate that Ms. Edmo has not developed adequate coping skills to address her complicated and traumatic mental health history. (ER 223, 232, 237, 239-241, 301, 742, 1582, 1685, 1788, 2479, 2697, 3096-3097, 3428, 3432, 3438). Ms. Edmo admittedly has struggled with "wanting and needing male attention," which has resulted in inappropriate sexual

[2] Defendants recognize that Ms. Edmo attended GD group sporadically, but was removed after violently assaulting another GD inmate on two occasions in 2015 and 2016. (ER 2825-2826, 2833-2835, 2838-2839, 2894-2896, 3302, 3306-)

encounters with multiple inmates. (ER 738, 1681-1683, 1703, 3121, 3124, 3127, 3140, 3166). She continues to exhibit low self-esteem, co-dependency, self-harm, and violent tendencies. (ER 736, 738, 741, 1567, 1660, 1673, 1681-1682, 1685, 1689, 1703, 1706, 3093-3099, 3118-3143). She has received over thirty Disciplinary Offense Reports (DOR) for sexual activity, physical assault, destruction of property, and disobedience to direct orders. (ER 736, 3302, 3306-3307, 3347, 3358).

D. Ms. Edmo's 2016 Evaluation for Gender Confirming Surgery

In April 2016, Ms. Edmo requested and received an evaluation for gender confirmation surgery (GCS)[3]. (ER 814-815, 1730). The evaluation was performed by Dr. Eliason, who began his assessment by noting that medical necessity for GCS was not well defined and that criteria for GCS are constantly shifting. (ER 823-826). The World Professional Association for Transgender Health (WPATH) has published "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("the WPATH guidelines")". (ER 2932-3051). The WPATH guidelines have evolved over the years and the most recent iteration, Version 7, was published in 2011. (ER 1020-1021). The WPATH outlines criteria for recommending genital surgery (such as a vaginoplasty). (ER 1096-1097, 2995-

[3] Gender Confirmation Surgery (GCS) is also known as Sex Reassignment Surgery (SRS) and Gender Affirmation Surgery (GAS).

2999). It is undisputed that these guidelines are "flexible" recommendations that are not mandatory standards (ER 186, 224-225, 265, 334, 637-639, 682-685, 1096-1097, 2939). For instance, Ms. Edmo's expert, Dr. Randi Ettner, testified that the guidelines are flexible recommendations. (ER 1096-1097).

The WPATH guidelines declare that they "are intended to be flexible in order to meet the diverse health care needs of transsexual, transgender, and gender nonconforming people." (ER 2939). The guidelines permit that "individual health professionals and programs may modify them" due to a patient's "unique social, or psychological situation…" (ER 682-685, 1096-1097, 2939). Acknowledging their ever-changing nature, the guidelines also provide that any anticipated departures from the standards should be documented for accumulation of "new data, which can be retroactively examined to allow for health care – and the [guidelines] – to evolve." *Id*.

Prior to 1998, the WPATH guidelines made no attempt to address treatment of prisoners. (ER 3053-3054). WPATH now has a "committee" specifically tasked with drafting "standards of treatment" for inmates with GD. (ER 1021). However, none of the members of that committee have ever worked in a prison (ER 682). Indeed, the WPATH guidelines were not developed based on extensive clinical experience with incarcerated persons. (ER 3053-3054). Consequently, Version 7 includes only a one-page section applying the guidelines to the treatment of

prisoners. (ER 3004-3005). This brief section contains the WPATH's opinion that denial of GCS based solely on the basis of a person's residence in a prison is not a "reasonable accommodation" under the WPATH guidelines. *Id*. However, in anticipating prisoners like Ms. Edmo, the guidelines caution that "[p]eople with gender dysphoria in institutions may also have co-existing mental health conditions. These conditions should be evaluated and treated appropriately." (ER 3005).[4]

The WPATH guidelines have not been universally adopted because of concerns regarding whether they have a sufficient scientific basis. For example, the Centers for Medicare and Medicaid Services ("CMS") decided not to adopt the WPATH guidelines because it did not believe the scientific evidence was strong enough and wanted to allow providers to either apply the WPATH guidelines or their own standards based on their decision-making. (ER 226-227, 3421-3422). In addition, the American Psychiatric Association ("APA") concluded there were

[4] The WPATH guidelines emphasize the importance of assessing, diagnosing, and discussing the treatment options for the co-existing mental health concerns of gender dysphoric persons. (ER 2961). Such concerns include anxiety, depression, self-harm, a history of abuse and neglect, compulsivity, substance abuse, sexual concerns, and personality disorders. (ER 1099-1102, 2961-2962). Ms. Edmo has a history of each of these enumerated concerns, which, as the guidelines state, "are significant sources of distress [that], if left untreated, can complicate the process of gender identity exploration and resolution of gender dysphoria." (ER 2962). The WPATH guidelines advise that these concerns "need to be *optimally managed* prior to or concurrent with treatment of gender dysphoria." *Id*. (emphasis added).

issues with the quality of the data and evidence used to support the WPATH guidelines. (ER 227, 544-581, 3433). Likewise, WPATH members have raised concerns about the lack of scientific evidence to support the WPATH guidelines. (ER 1125-1126). Consequently, WPATH asked Johns Hopkins University to conduct an evidence-based review of those standards in 2017. *Id.*

In his assessment of Ms. Edmo, Dr. Eliason considered the WPATH guidelines, and, ultimately, using his experience and medical judgment, determined that GCS was not medically necessary or appropriate for Ms. Edmo at that time. (ER 814-829, 1730). There were several reasons for Dr. Eliason's decision, some of which he elaborated in more detail in his testimony than he had in his chart note. First, Dr. Eliason determined that Ms. Edmo's co-existing mental health concerns were not well-controlled, which is a requirement for surgery under the WPATH guidelines. (ER 826-827). Dr. Eliason documented in his assessment that Ms. Edmo had diagnoses of Major Depressive Disorder, GD, and Alcohol Use Disorder. (ER 1730). Dr. Eliason concluded that not all of Ms. Edmo's co-existing mental health issues stemmed from her GD, and that her major depression and alcohol use disorders were separate and preexisting mental health issues that needed to be more adequately controlled. (ER 145, 827-828). Like Ms. Edmo's mental health clinicians, Dr. Eliason opined that Ms. Edmo needed further "supportive counseling," which she continued to refuse. (ER 1730).

Second, Dr. Eliason concluded that Ms. Edmo had not yet satisfied the 12-month period of living in her identified gender role as the WPATH guidelines required. (ER 827-828). He was aware of a study indicating that patients, after GCS, were more likely than the general population to kill themselves, in part because their social networks were not supporting these patients through their post-surgical transition. (ER 827). In 2016, Ms. Edmo was parole-eligible and Dr. Eliason believed it would be in her best interest for her to first experience living as a woman in her real-world social network – family and friends – outside the artificial environment of a prison. (ER 827-828). Dr. Eliason concluded his assessment by stating his plan was to continue monitoring Ms. Edmo and "that the combination of hormonal treatment and supportive counseling –[wa]s sufficient" to treat her GD for the time being. (ER 828-829, 1730).

Importantly, Dr. Eliason also staffed Ms. Edmo's GCS evaluation with multiple other providers, including Dr. Jeremy Stoddart, another Corizon psychiatrist; Defendant Dr. Murray Young, Corizon's Regional Medical Director in Idaho; and IDOC Lead Clinician Jeremey Clark, LCPC, who Dr. Eliason knew was a WPATH member. (ER 821-823, 1730). Mr. Clark and each one of these qualified providers agreed with Dr. Eliason's assessment. *Id*.

Mr. Clark has been a WPATH member since 2013. (ER 721, 911, 3163-3164). He has attended several WPATH conferences and correctional health care

trainings, reviewed articles and publications regarding the treatment of transgender inmates with GD, and provided clinical supervision and training to IDOC clinical staff regarding the treatment and assessment of GD inmates. (ER 718-730, 794, 910-972, 3163-3165). Mr. Clark is qualified under the WPATH to provide treatment to GD inmates. (ER 721-730, 793-794, 910-972, 2959-2960, 3163-3168). As a member of the MTC, Mr. Clark was familiar with Ms. Edmo's mental health history, GD diagnosis, and disciplinary history. (ER 3163-3168).

Mr. Clark recalls his conversation with Dr. Eliason in April 2016 and remembers telling Dr. Eliason that he did not believe surgery was medically necessary or appropriate for Ms. Edmo. (ER 736-740, 779, 3163-3168). Mr. Clark concluded, based on his review and understanding of Ms. Edmo's complete health history and mental health records, along with his discussions with Ms. Edmo's providers and clinicians over the years, that surgery was not appropriate. *Id.* Mr. Clark was primarily concerned that Ms. Edmo did not meet the fourth WPATH criteria for surgery because her co-existing mental health issues were not well controlled. (ER 735-743, 779, 782-784, 793-794, 3163-3168) Mr. Clark was concerned that Ms. Edmo displayed unstable behaviors, such as physical violence, sexual acting-out, anger management issues, and problems with interpersonal relationships, all of which demonstrated to him that Ms. Edmo was emotionally and mentally unstable. (ER 717-743, 760-761, 774-776, 779, 793-794, 3163-3168).

He was also concerned that Ms. Edmo demonstrated multiple Borderline Personality Disorder traits, including sexual deviance, depression, relationship issues, self-harm, and substance abuse. *Id*.

Mr. Clark also noted that Ms. Edmo's emotional instability gave him concerns about her ability to handle the stressful process of surgery and transition to a female prison after GCS. (ER 735-740, 3163-3168). Ms. Edmo's noncompliance with prison rules and refusal to complete Sex Offender Treatment Programming raised concerns about Ms. Edmo's ability and willingness to comply with post-operative treatments. (ER 735-740, 3148-3168). Moreover, Mr. Clark concluded that, due to her repeated refusals, Ms. Edmo had not addressed her underlying Major Depressive Disorder, Anxiety, and other mental health issues. (ER 735-743, 779, 782-784, 793-794, 3163-3168). He noted that Ms. Edmo had repeatedly refused to attend recommended Social Skills and Mood Management groups and had not consistently participated in individualized counseling. (ER 740-741, 3163-3168).

Dr. Eliason also discussed his evaluation of Ms. Edmo with the entire MTC in 2016. (ER 737, 815). Members of the MTC agree with Dr. Eliason's assessment that GCS was not and is still not medically necessary or appropriate. Specifically, Ms. Edmo's treating clinicians and IDOC's Chief Psychologist all concluded that Ms. Edmo's co-existing mental health issues were not well-controlled and that

individualized and group therapy would assist Ms. Edmo in developing healthy coping skills and identifying the root causes underlying her major depressive disorder and anxiety. (ER 3093-3099, 3118-3143). Unfortunately, Ms. Edmo continues to refuse to participate in recommended therapy groups and has not completed her Sex Offender Treatment Programming. (ER 614-621, 740, 1112-1114, 2833-2839, 3093-3099, 3118-3143, 3148-3162).

E. Litigation and Relevant Procedural Posture of the Case

Though Ms. Edmo disagreed with Dr. Eliason's 2016 evaluation, she did not file suit until almost one year later. On April 6, 2017, Ms. Edmo filed a *pro se* Civil Rights Complaint and a "Motion for Temporary Restraining Order and Preliminary Injunction Order." (ER 3804-3864). Counsel for Ms. Edmo appeared on June 19, 2017, and withdrew Ms. Edmo's Motion for Preliminary Injunction three days later. (ER 3700-3710).

On September 1, 2017, Ms. Edmo's counsel filed an Amended Complaint asserting claims against Defendants pursuant to 42 U.S.C. § 1983, the Eighth Amendment, the Fourteenth Amendment, the Americans with Disabilities Act, the Affordable Care Act, and common law negligence. (ER 3634-3696). No request or motion for a preliminary injunction was filed with the Amended Complaint. *Id*.

Defendants timely filed Motions for Dispositive Relief on November 1, 2017, seeking to dismiss several of Ms. Edmo's claims. (ER 3623-3628). After

hearing oral argument on April 4, 2018, the Court took the matter under advisement and ultimately dismissed several of Ms. Edmo's claims. (ER 3620-3622).

F. Ms. Edmo's Delayed Second Motion for Preliminary Injunction

Prior to the Court ruling on Defendant's Motion for Dispositive Relief, nearly a year after withdrawing her first Motion for Preliminary Injunction, and two years after Dr. Eliason and the MTC denied her request for GCS, Ms. Edmo filed a second Motion for Preliminary Injunction on June 1, 2018. (ER 3505-3619). Ms. Edmo sought an order requiring Defendants, among other things, to provide her with referral to a qualified surgeon and access to GCS. (ER 698-699, 3506-3507). Referring to her previous attempts at self-castration in 2015 and 2016, Ms. Edmo claimed that serious damage would result absent a preliminary injunction ordering the Defendants to provide her with surgery. (ER 3506-3507).

G. The Evidentiary Hearing

The district court allowed the parties to conduct limited discovery relevant to Ms. Edmo's motion for preliminary injunction and set a three-day evidentiary hearing for October 10, 11, and 12, 2018. (ER 3445-3454). On the morning of the first day of the hearing, the district court noted the "awkward procedural posture" of Ms. Edmo's motion and expressed uncertainty about whether the preliminary injunction hearing should be treated differently, because the injunction would be

essentially "final." (ER 985). Nevertheless, the court asked for briefing from the parties on "whether a different standard applie[d], whether th[e hearing] should be treated as a hearing on a final injunction . . . ." *Id*.

During the three-day evidentiary hearing, Ms. Edmo presented testimony by retained experts, psychologist Dr. Randi Ettner and emergency medicine physician Dr. Ryan Gorton, who opined that Ms. Edmo met the criteria for surgery under the WPATH guidelines. (ER 648-650, 1052-1056). Neither Dr. Ettner nor Dr. Gorton are Certified Correctional Health Care providers and neither of them have ever been employed by a prison or published articles in any peer-reviewed journal on a topic related to providing care to transgender inmates. (ER 664-666, 682, 695-696, 1084-1086, 1131, 3537-3544, 3598-3607). Moreover, Dr. Ettner and Dr. Gorton have never provided direct treatment to a GD inmate, let alone any inmate. (ER 664-666, 1084-1085, 269). Nor have Dr. Ettner and Dr. Gorton ever had physician-patient relationship with an incarcerated person, including Ms. Edmo. (ER 664-666, 673, 1085, 3514, 3517, 3556).

Significant time constraints were placed on the parties for presentation of testimony at the hearing and Defendants were not able to present all of their witnesses via live testimony. (ER 137-141, 3088-3089). The Corizon Defendants and the IDOC Defendants were allowed only four hours of time each at the evidentiary hearing, including opening and closing statements and cross-

examination. (ER 3088-3089). On the one hand, the court indicated that it wanted a complete record, but, on the other, the court acknowledged that the preparation for the hearing was "not perfect" and was "put together hurriedly for the hearing." (ER 141).

Dr. Eliason testified that his assessment of Ms. Edmo for surgery was based on his evaluation and prior treatment, his interpretation of the WPATH guidelines, his professional judgment as a Board-Certified psychiatrist and Certified Correctional Healthcare Provider, and his consultation with a Corizon psychiatrist, a WPATH member, and the MTC. (ER 814-829, 1730). Ms. Edmo's correctional health care providers and Defendants' retained experts testified in support of Dr. Eliason's conclusion that surgery was not medically necessary or appropriate for Ms. Edmo. (ER 221-224, 236, 317-336, 736-740, 779, 3163-3168, 3415-3417, 3436-3438). Indeed, Dr. Keelin Garvey, MD CCHP, the only psychiatrist other than Dr. Eliason to testify at the hearing, concluded that Dr. Eliason's assessment was reasonable, adequate, and fell within the standard of care. (ER 220-225, 232, 236, 311, 3415-3417, 3436-3438).

Unlike Ms. Edmo's retained experts, Defendants' retained experts, Dr. Garvey and Joel Andrade, Ph.D, LICSW, CCHP-MH, are both Certified Correctional Health Care providers who have years of experience assessing and treating incarcerated persons with GD. (ER 196-208, 219-220, 311-313, 317-324,

515-543). On two prior occasions, Dr. Andrade recommended gender confirmation surgery for inmates. (ER 321-323). Dr. Garvey also has experience in treating inmates with GCS, including GCS assessments, in the correctional setting. (ER 196-208, 219-220). Drs. Garvey and Andrade, both of whom are recognized by the WPATH guidelines as qualified to treat GD patients, each conducted separate clinical interviews with Ms. Edmo and, unlike Ms. Edmo's retained experts, reviewed Ms. Edmo's pre and post-incarceration mental health records in conjunction with those interviews. (ER 209-211, 215, 229-231, 237, 324-329, 334, 3175-3187, 3395-3438).

Based on their unique training, education, and experience as correctional mental health care providers, along with their familiarity with the relevant studies, publications, and guidelines concerning gender confirmation surgery, including the WPATH, Defendants' experts testified at the hearing that Ms. Edmo's co-existing depression, anxiety, and borderline personality disorder traits were not reasonably well-controlled and that Ms. Edmo did not satisfy the WPATH's criteria for surgery. (ER 195-242, 311-315, 317-338, 354-362, 3176-3187, 3395-3438). Moreover, there was serious concern that Ms. Edmo had not developed the healthy and productive coping mechanisms needed after surgery. (ER 223, 232, 237, 239-241, 301, 3428, 3432, 3438). Defendants' experts further testified that GCS was not appropriate for Ms. Edmo because there was no support for her claims that she

lived full-time in the community as a woman before entering prison. (ER 195-242, 311-315, 317-338, 354-362, 3176-3187, 3395-3438). Accordingly, in their expert opinion, Ms. Edmo had not yet had the opportunity to live in the gender role consistent with her true identity, as required by the WPATH guidelines. *Id*.

At the conclusion of the hearing, the district court again expressed uncertainty about whether the hearing was for a preliminary injunction or a "final" injunction. (ER 365-366). The court, however, described Ms. Edmo's motion as one "that can only be resolved at a final hearing." (ER 365). The court then went on to state that it had "*kind of* treated this hearing as the final hearing on that issue." *Id*. (emphasis added). The court then asked the parties to provide additional briefing regarding the "standard" that should apply. *Id*. The Defendants provided the Court with post-hearing briefing as instructed, stating that only the heightened standard for approving a mandatory injunction must be applied. (ER 52-125).

H. The District Court's Order Granting Ms. Edmo's Motion for Preliminary Injunction

Two months after the evidentiary hearing, the district court issued its Findings of Fact, Conclusions of Law, and Order (Order), granting Ms. Edmo's motion for preliminary injunction in part. In adopting Ms. Edmo's request verbatim, the court ordered Defendants to broadly provide Ms. Edmo "adequate medical care" including gender confirming surgery "as promptly as possible and

no later than six months from the date of this order." (ER 45). In a footnote, the court again stated that it was unsure whether it should apply the preliminary injunction standard or the permanent injunction standard, but nonetheless entered a mandatory injunction. (ER 031).

The district court ultimately concluded that not providing Ms. Edmo with GCS amounted to deliberate indifference under the Eighth Amendment. (ER 40). However, the court did not make any individualized factual findings regarding the subjective indifference on the part of any individual Defendant named in Ms. Edmo's Second Amended Complaint. (ER 1-45). Rather, the court's findings generally referred to all Defendants. *Id*. The court stated vaguely that unidentified "Defendants" misapplied the WPATH guidelines and denied Ms. Edmo GCS due to "reasons unrelated to her gender dysphoria." (ER 39). The court further found, albeit with no factual basis, that evidence "suggests" that Defendants had a "de facto" policy or practice of refusing to provide GCS. (ER 37, 40).

I. Defendants' Notices of Appeal

On January 9, 2019, Defendants timely filed Notices of Appeal from the district court's Order granting Ms. Edmo's motion for preliminary injunction. (ER 46-51).

SUMMARY OF ARGUMENT

The district court committed several reversible errors in granting the injunction in this case. First, the district court erred by applying the ordinary preliminary injunction standard to the permanent and mandatory relief sought by Ms. Edmo. By so doing, the court failed to accurately apply the higher mandatory injunction standard to Ms. Edmo's Eighth Amendment claims.

In addition, even if the district court had applied the proper legal standard, it erred by concluding that the law and facts clearly favored Ms. Edmo's claim that "Defendants" were deliberately indifferent to her GD. Specifically, the district court ignored the years of treatment that Defendants provided Ms. Edmo to assess and treat her GD. The court further erred when it determined, contrary to the holdings in *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) and *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004), that the exercise of professional medical judgment by Ms. Edmo's treating psychiatrist, Dr. Eliason, constituted deliberate indifference because Ms. Edmo's retained experts disagreed with Dr. Eliason's determination that Ms. Edmo did not meet the WPATH criteria for surgery. Thus, the court erred by ignoring the sound professional medical decisions made by Dr. Eliason and other prison mental health providers. In doing so, the district court unwisely supplanted the medical opinions of Ms. Edmo's qualified treating

providers for those of Ms. Edmo's retained experts, who formed opinions based on a limited snapshot of her mental health history.

Moreover, the district court clearly erred when it granted the injunction without making a requisite finding that Ms. Edmo would suffer immediate extreme or very serious damage absent the issuance of the injunction. Nevertheless, such a finding would be implausible on the record, in the light of the long delay before Ms. Edmo sought a preliminary injunction seeking GCS, expert testimony that Ms. Edmo could wait for many months to receive a surgical consult, and the speculative nature of Ms. Edmo's threats of future self-harm. The court further failed to consider Ms. Edmo's own testimony that she remains committed to not re-attempting self-castration due, in part, to the genital tissues' critical role in constructing a vagina. (ER 614).

Second, the injunction is overbroad in violation of the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A). The injunction broadly applies to all medical treatment rather than being limited to Ms. Edmo's request for GCS. Further, the injunction requires Defendants to provide Ms. Edmo with GCS even though Defendants are not qualified surgeons with the ability to actually approve or perform GCS.

Third, the district court erred to the extent it converted the evidentiary hearing to a final trial on the merits. The district court failed to give the parties the

required clear and unambiguous notice of its intent to consolidate the hearing with a final trial on the merits. *Isaacson v. Horne*, 716 F.3d 1213, 1220 (9th Cir. 2013) (alteration, quotation marks, and citation omitted)). Moreover, even if the court had provided adequate notice, Defendants were entitled to a jury trial rather than a bench trial on the merits of Ms. Edmo's claims. Finally, the record does not support a finding that any one Defendant actually was objectively, and subjectively indifference to Ms. Edmo's alleged need for GCS.

ARGUMENT

A. The District Court Erred in Granting Ms. Edmo's Motion for Preliminary Injunction Where Ms. Edmo Failed to Establish a Clear Showing That Any One Defendant was Deliberately Indifferent.

1. Before granting Ms. Edmo permanent and mandatory injunctive relief, the district court was required to apply the heightened standard for a mandatory injunction.

"A preliminary injunction is . . . 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quoting *Winter v. NRDC*, 555 U.S. 7, 22 (2008)). "A preliminary injunction can take two forms. A prohibitory injunction prohibits a party from taking action and 'preserve[s] the status quo pending a determination of the action on the merits.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009) (quoting *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988)). In

contrast, a mandatory injunction requires "affirmative conduct." *Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993). Here, the district court issued a mandatory injunction, requiring Defendants to provide Ms. Edmo with GCS.

Under the ordinary preliminary injunction standard, a plaintiff "must establish that he is *likely* to succeed on the merits, that he is *likely* to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20 (emphasis added). However, this standard applies only to *prohibitory* injunctions. *Marlyn Nutraceuticals*, 571 F.3d at 878-79. When seeking a mandatory preliminary injunction, the plaintiff's burden is "doubly demanding" because mandatory injunctions are "particularly disfavored." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

Instead of showing merely a likelihood of success on the merits, a plaintiff seeking a mandatory injunction "must establish that the law and facts *clearly favor* her position, not simply that she is likely to succeed." *Id.* (underline emphasis added). "In plain terms, mandatory injunctions should not issue in doubtful cases." *Id.* (quotation marks omitted). "Because it is a threshold inquiry, when a plaintiff has failed to [meet this element], [the court] need not consider the remaining three *Winter* elements." *Id.* (quotation marks, alteration, and citation omitted).

Moreover, instead of showing a *likelihood* of irreparable harm, a plaintiff seeking a mandatory injunction must show that "extreme or very serious damage will result." *Marlyn Nutraceuticals*, 571 F.3d at 879 (quoting *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979)). This heightened standard differs from the ordinary standard in two significant ways. First, under the ordinary standard "[t]he analysis focuses on irreparability, irrespective of the magnitude of the injury." *Azar*, 911 F.3d at 581 (9th Cir. 2018) (quotation marks omitted). Second, the ordinary standard requires a finding that irreparable harm is "likely," but the mandatory injunction standard requires a more definitive finding that the irreparable harm "will result." *Marlyn Nutraceuticals*, 571 F.3d at 879.

A court should be even more reluctant to grant a mandatory injunction in a case like this, where the injunction grants permanent relief. As the Ninth Circuit has held:

> [I]t is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it.

Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 808–09 (9th Cir. 1963). "In general, that kind of judgment on the merits in the guise of preliminary relief is a highly inappropriate result." *Senate of State of Cal. v. Mosbacher*, 968 F.2d 974,

978 (9th Cir. 1992). Thus, the injunction in this case is even more disfavored than a typical mandatory injunction.

2. The Ninth Circuit is to review the record *de novo* to determine if the law and facts clearly favored Ms. Edmo's Eighth Amendment claim.

Ordinarily, the Ninth Circuit "review[s] a district court's ruling on a motion for preliminary injunctive relief for abuse of discretion." *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1311 (9th Cir. 2015).[5] A court abuses its discretion if it fails to identify "the correct legal rule to apply to the relief requested." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). A court also abuses its discretion if its "application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* (quotation marks omitted).

In this case, however, because the injunction grants Ms. Edmo permanent relief, this Court should apply the standard of review for a permanent injunction.[6] *See Romer v. Green Point Sav. Bank*, 27 F.3d 12, 16 (2d Cir. 1994). The Ninth Circuit has previously suggested that the standard of review on appeal is based on

[5] Even if this Court applies the ordinary preliminary injunction standard of review, the district court's conclusion that there was no doubt Ms. Edmo would succeed on her claim was clearly erroneous given the contrary determinations reached in similar cases by other courts across the country and the evidence in the record.

[6] The district court itself appeared to recognize the difficulty of treating the injunction as "preliminary" because the injunction grants relief that is permanent and irreversible. (ER 365-366, 985).

the substance of the injunction rather than its form. *See Melendres v. Arpaio*, 695 F.3d 990, 996 (9th Cir. 2012) ("treat[ing] the Order as granting only preliminary injunctive relief" because "nothing in the Order purport[ed] to provide a permanent remedy"); *Graham v. Teledyne-Cont'l Motors, a Div. of Teledyne Indus., Inc.*, 805 F.2d 1386, 1388 (1986). When reviewing a permanent injunction, the Court reviews the decision to grant the injunction for an abuse of discretion, but reviews "any determination underlying the grant of an injunction by the standard that applies to that determination." *Ting v. AT&T*, 319 F.3d 1126, 1134–35 (9th Cir. 2003).

The underlying determination in this case is whether Dr. Eliason's professional opinion that surgery was not medically necessary violated Ms. Edmo's Eighth Amendment rights, which is a mixed question of law and fact. *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002). "The district court's factual findings regarding conditions at [a p]rison are reviewed for clear error. However, its conclusion that the facts . . . demonstrate an Eighth Amendment violation is a question of law that [this Court] review[s] de novo." *Id.*, 296 F.3d at 744. Thus, this Court should review *de novo* the district court's conclusion that the law and the facts clearly favored Ms. Edmo's Eighth Amendment claim. *See id.* In addition, the Court should review for clear error any finding that Ms. Edmo would suffer very serious or extreme damage absent an injunction. *See id.*

3. The district court erred in granting Ms. Edmo injunctive relief because the law and facts on the record do not clearly favor her Eighth Amendment claim.

In order to establish a valid Eighth Amendment claim, a plaintiff must first demonstrate that a prison official was "deliberately indifferent" to a prisoner's serious medical need. *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014). "Deliberate indifference is a high legal standard." *Toguchi*, 391 F.3d at 1060. A prison official is deliberately indifferent *only* if the official "knows of and disregards an excessive risk to inmate health and safety." *Colwell*, 763 F.3d at 1066 (emphasis added) (quoting *Toguchi*, 391 F.3d at 1057). "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

"Eighth Amendment doctrine makes clear that a difference of opinion between a physician and the prisoner—*or between medical professionals*—concerning what medical care is appropriate does not amount to deliberate indifference." *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016) (emphasis added) (quotation marks and alteration omitted). Rather, the Ninth Circuit has been clear that,

> [T]o prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the chosen course of treatment 'was medically unacceptable under the circumstances,' and was

> chosen 'in conscious disregard of an excessive risk to [the prisoner's] health.'

Toguchi, 391 F.3d at 1058 (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)).

In this case, the evidence in the record does not demonstrate that Dr. Eliason (or any of the Defendants) was acting in conscious disregard of an excessive risk to Ms. Edmo's health or that Dr. Eliason's decision to not recommend GCS was medically unacceptable. To find deliberate indifference in the medical context, there must be facts in the record to show that no other reasonable medical doctor would have chosen that course of treatment.[7] *See Estelle*, 429 U.S. at 104–06; *Toguchi*, 391 F.3d at 1058; *Jackson*, 90 F.3d at 332. Further, there is no evidence in the record showing that the decision not to provide GCS was intended to punish Ms. Edmo or due to any animosity or bias toward her or inmates with GD. Rather, at most, the evidence in the record demonstrates a difference in medical, professional judgment on a number of issues, as outlined in the following sections. Accordingly, the district court abused its discretion by finding that the facts and the law clearly favored Ms. Edmo.

[7] Ms. Edmo's treating providers, members of the MTC, and both of Defendants' experts universally agree that GCS was not warranted, and that Ms. Edmo's treatment was appropriate. Clearly, many other reasonable medical providers chose a course of treatment different from that which Ms. Edmo seeks.

The district court initially recognized that Ms. Edmo was required to show that the law and the facts clearly favored her claim. (ER 30). However, when the court analyzed Ms. Edmo's claim, it did not actually apply this heightened standard. Instead, the court inquired into Ms. Edmo's "Likelihood of Success on the Merits" and concluded that Ms. Edmo was merely "likely to succeed on the merits of her Eighth Amendment claim." (ER 31, 41). The court went on to analyze the other three *Winter* elements and stated in a conclusory manner "both the facts and the law clearly favor Ms. Edmo." (ER 44). But, the district court was required to first determine whether the law and the facts *clearly favored* Ms. Edmo's claim before examining the other *Winter* elements. *Garcia*, 786 F.3d at 740 (determining that the first *Winter* element is a "threshold inquiry"). Thus, the district court erred.

As further explained below, the district court also erred because it granted the injunction without ever finding that the supposed irreparable harm would be "immediate." "The Supreme Court has repeatedly cautioned that, absent a threat of *immediate* and irreparable harm, the federal courts should not enjoin a state to conduct its business in a particular way." *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) (emphasis added). The district court never addressed Defendants' argument that Ms. Edmo did not need GCS immediately. Instead, the court was merely "persuaded by [Ms. Edmo's] experts that, without surgery, Ms.

Edmo is at serious risk of life-threatening harm." (ER 42). That finding was not only speculative; it was insufficient, because the Court failed to conclude that Ms. Edmo needed surgery immediately.

Even Ms. Edmo's own expert, Dr. Gorton, testified that it would be "kind of absurd" to consider Ms. Edmo's GD as an emergent medical issue. (ER 696-699). Rather, Dr. Gorton declared that Ms. Edmo should be "immediately *referred* to an appropriate surgeon . . . *within the next 6 months*."[8] (emphasis added) (ER 3595). It is clear that even Dr. Gorton does not believe that Ms. Edmo requires surgery immediately. Moreover, Ms. Edmo's proposed order allowed Defendants to take up to six months to provide her with GCS, and the district court adopted Ms. Edmo's proposal verbatim. (ER 130).[9] Thus, the district court never found, nor

[8] A surgery for which a patient can wait up to six months for a consult with a surgeon cannot constitute an "immediate" or "urgent" procedure. The words "urgent" and "immediate," by definition, do not apply to Ms. Edmo's situation—even under her own experts' standards. Defendants also note that the many dire predictions of self-harm by Ms. Edmo have (thankfully) not been borne out over the past 2-3 years since Dr. Eliason and the MTC denied Ms. Edmo's request for GCS. Again, such evidence weighs strongly against Ms. Edmo's assertions of urgency and immediacy.

[9] The district court's Order requiring GCS was issued about seven months after Ms. Edmo filed her second Motion for Preliminary Injunction along with Dr. Gorton's Declaration recommending that Ms. Edmo be referred to a surgeon "at a minimum" within six months. (ER 1-45, 3505, 3595).

could it have found, that Ms. Edmo would suffer *immediate* extreme, or very serious harm.

a. The district court erred in holding that Eighth Amendment deliberate indifference can be established merely when a provider does not strictly follow the WPATH guidelines.

The district court indicated that not referring Ms. Edmo for GCS was medically unacceptable, because, in the court's view, Ms. Edmo was entitled to receive GCS under the WPATH guidelines. (ER 25, 36-37, 39-41, 43). The district court's conclusion is based on a faulty premise: the court failed to acknowledge that use of the WPATH guidelines and how to interpret those guidelines is a matter of professional judgment. Thus, even if Dr. Eliason did not strictly adhere to the WPATH guidelines, Dr. Eliason's decision was not *ipso facto* medically unacceptable.

The complexities involved in applying the WPATH guidelines are a matter of professional judgment. The WPATH guidelines themselves purport to be "flexible" and state that "individual health professionals and programs may modify them." (ER 2939). Moreover, the WPATH guidelines state that a provider may depart from them due to a patient's "unique social, or psychological situation." *Id*. Thus, by their own terms, the WPATH guidelines do not require or welcome strict adherence and do not constitute the only constitutionally acceptable course of treatment for GD. *See Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) ("[W]hile the

recommendations of [professional organizations] may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question."); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1433 (9th Cir. 1987) ("[W]holesale adoption of various professional associations' concepts for model institutions as if they were constitutionally mandated [i]s unwarranted.")).

In addition, providers are not required to strictly follow the WPATH guidelines, because the scientific validity of the WPATH guidelines is less than certain. The Centers for Medicare and Medicaid Services has declined to adopt the WPATH guidelines, citing a lack of scientific support. (ER 226-227). Similarly, The American Psychiatric Association has expressed concern regarding the quality of the scientific evidence used to support the WPATH guidelines. (ER 227-228). In fact, WPATH members have raised concerns that the WPATH guidelines do not have an adequate scientific foundation. (ER 1125-1126). As a result, in 2017, WPATH asked Johns Hopkins University to conduct an independent, evidence-based review of its guidelines. *Id*. That review is still ongoing. *Id*. Due to the uncertainty regarding the scientific validity of the WPATH guidelines, the WPATH guidelines are a valuable resource, but they are not definitive standards limited to one interpretation or application for all persons in all circumstances. (ER

226-227). Further, the guidelines are not intended to trump, clinical judgment. (ER 185-186, 640-641, 684-686, 1096-1097, 1102).

Other courts that have considered this issue agree that the WPATH guidelines are flexible and making an informed decision not to follow these guidelines to the letter does not constitute deliberate indifference. In considering a claim of deliberate indifference, the Tenth Circuit rejected "the conclusory assertion that [the inmate] demonstrated her constitutional rights would be violated if she did not receive the hormone levels suggested by WPATH." *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) (unpublished). *Druley* "reflects the reality that the treatment of gender dysphoria is a highly controversial issue for which there are differing opinions." *Lamb v. Norwood*, 262 F. Supp. 3d 1151, 1158 (D. Kan. 2017), *aff'd*, 895 F.3d 756 (10th Cir. 2018), *superseded on rehearing by*, 899 F.3d 1159 (10th Cir. 2018). Thus, the district court in *Lamb* held that the defendants were entitled to summary judgment even though the plaintiff "assert[ed] that her treatment falls short of the standard set forth by various experts as well as the WPATH standard of care." *Id.* Sitting en banc, the First Circuit similarly determined that even if expert testimony established that GCS "was the only medically adequate treatment" for the prisoner's gender dysphoria,

> [t]he choice of a medical option that, although disfavored by some in the field, is presented by competent professionals does not exhibit a

> level of inattention or callousness to a prisoner's needs rising to a constitutional violation.

Kosilek v. Spencer, 774 F.3d 63, 91–92 (1st Cir. 2014) (en banc).

The district court apparently ignored this case law, as well as the terms of the WPATH guidelines. Instead, the court concluded that Dr. Eliason was deliberately indifferent because his "assessment that Ms. Edmo did not meet medical necessity for surgery did not apply the WPATH criteria." (ER 40). Thus, the district court erred, because Ms. Edmo must show more than that Dr. Eliason did not adhere to the WPATH guidelines. Case law and the WPATH guidelines themselves instruct that it is medically acceptable to deviate from the WPATH guidelines.

b. Dr. Eliason's 2016 decision not to refer Ms. Edmo for a surgical consult was based on his professional judgment and there is no evidence on the record to support a conclusion that it was medically unacceptable.

Even if Dr. Eliason did not strictly follow the WPATH guidelines, the evidence shows that Dr. Eliason's decision was nevertheless based on sound professional judgment. Dr. Eliason is a well-qualified psychiatrist and a GD evaluator under both the IDOC SOP and the WPATH guidelines. (ER 797-800, 802, 813-816, 973-977, 2912, 2927). Dr. Eliason was the psychiatrist who originally diagnosed Ms. Edmo with GD and had been monitoring her care as her treating psychiatrist since her diagnosis in 2012. (ER 186-187, 621-622, 803-809).

As her treating psychiatrist for nearly four years and as a member of the MTC, Dr. Eliason was familiar with Ms. Edmo's mental health history, including her pre-incarceration suicide attempts, cutting behaviors, and lack of participation in recommended therapy. (ER 804-830).

Dr. Eliason conducted a thorough examination in 2016, listening to Ms. Edmo's subjective complaints and reviewing her mental and medical health history. (ER 144-145, 178-184, 190-191 814-829, 1730). Dr. Eliason also made objective observations of Ms. Edmo, and staffed his evaluation of Ms. Edmo for surgery with multiple other providers, including WPATH member Jeremy Clark, LCPC. (ER 736-740, 779, 814-829, 1730, 3163-3168). During their consultation, Mr. Clark informed Dr. Eliason of his conclusion that Ms. Edmo's coexisting mental health issues were not well controlled and that Ms. Edmo's emotional instability gave him concerns about her ability to handle the stressful process of surgery and relocating to a female prison after the procedure was complete. (ER 735-743, 779, 782-784, 793-794, 3163-3168).

Based on his knowledge, experience, and years of prior treatment of Ms. Edmo, along with his consultation with Mr. Clark and other mental health professionals, as well as a real-time and in-person assessment of Ms. Edmo based on his medical judgment, Dr. Eliason concluded that Ms. Edmo should not be referred to a surgeon for GCS. (ER 814-829, 1730). Specifically, Dr. Eliason

concluded that Ms. Edmo's major depression and alcohol use disorders were not adequately controlled. (ER 145, 814-829, 1730). Indeed, Dr. Eliason's assessment note indicated, among other things, that she needed to engage in further "supportive counseling." (ER 1730).

Dr. Eliason also concluded that GCS was not medically necessary because Ms. Edmo has not yet lived in her preferred gender role for 12 months. (ER 159-160, 827-829). Dr. Eliason had concerns that, because Ms. Edmo had not lived as a woman outside of prison, she would not be served by rushing to surgery without living as a woman with the support of her real social network – family and friends – outside prison. *Id.* Thus, the evidence in the record demonstrates that Dr. Eliason considered the WPATH guidelines and applied them flexibly; staffed his assessment for surgery with qualified providers, including a WPATH member; and considered other factors outside the WPATH guidelines, which, based on his knowledge, experience, and professional judgment, were important to his determination. (ER 144-145, 178-184, 190-191 814-829, 1730).

None of the testimony on the record before the district court demonstrated that Dr. Eliason's judgment was medically unacceptable. The district court did not find, for example, that Dr. Eliason was unqualified to assess Ms. Edmo for gender dysphoria or to evaluate her for GCS. Nor did the district court determine that Dr. Eliason was not credible when he testified that it was his reasoned professional

opinion that surgery was not medically necessary for Ms. Edmo. Indeed, the only other psychiatrist who testified in this case, Dr. Garvey, concluded that Dr. Eliason's evaluation for surgery was reasonable, adequate, and met the standard of care. (ER 215,-216, 220-221, 236, 311, 3415-3417, 3436-3438). And, even if there was testimony at the hearing that Dr. Eliason's evaluation for surgery was negligently performed, it is well established that negligence does not constitute deliberate indifference. *See Estelle*, 429 U.S. at 106.[10]

Moreover, neither of Ms. Edmo's experts are psychiatrists and neither of them were permitted by the district court to offer opinions regarding the adequacy of Dr. Eliason's assessment of Ms. Edmo for surgery. (ER 665, 682, 695-696, 1084-1086). Rather, Ms. Edmo's experts' opinions regarding medical necessity were based on their own clinical interviews with Ms. Edmo, which took place on two occasions in 2018. (ER 647-648, 672-682, 1045, 3517, 3562). Notably, Ms. Edmo's experts had not reviewed Ms. Edmo's pre-incarceration mental health treatment records or her prior PSIs before forming their opinions that GCS was appropriate. (ER 672-682, 1089-1092, 1095-1096). They based their opinions, in part, on Ms. Edmo's unsupported and highly questionable statements that she had lived "full-time" as a woman prior to prison. (ER 672-682, 1089-1092, 1095-1096,

[10] There is no evidence in the record, nor did the district court find, that Dr. Eliason was negligent.

3518, 3567). Thus, the opinions of Ms. Edmo's experts do not demonstrate that the law and the facts clearly favor Ms. Edmo's claim.

Furthermore, the testimony of Ms. Edmo's treating mental health clinicians and Dr. Walter Campbell, IDOC's Chief Psychologist and WPATH member, support Dr. Eliason's conclusion that Ms. Edmo's mental health issues were not reasonably well-controlled pursuant to the WPATH guidelines. (ER 3093-3099, 3118-3143). These mental health professionals have experience treating GD inmates and have treated Ms. Edmo directly or have become familiar with her as members of the MTC over many *years*. *Id*. Their concerns about Ms. Edmo's mental health issues pre-date Dr. Eliason's assessment and are well-documented in Ms. Edmo's mental health notes and MTC records. (ER 2479-2480, 2497-2499, 2697, 2715, 2833-2839, 3093-3099, 3118-3143). The district court did not address their testimony and it was an abuse of discretion to ignore the same. (ER 1-45). *See, e.g.*, *Winter*, 555 U.S. at 29 (the Court of Appeals abused its discretion when it ignored or failed to give significant weight to declarations submitted by the Navy concerning the impact of a preliminary injunction on the Navy's training operations).

Defendants retained experts, Dr. Keelin Garvey, M.D., and Dr. Joel Andrade, Ph.D, similarly testified that they agreed with Dr. Eliason's assessment that surgery is not appropriate for Ms. Edmo. (ER 195-242, 311-315, 317-338,

354-362, 3175-3187, 3395-3438). Like Dr. Eliason (and unlike Ms. Edmo's retained experts), Drs. Garvey and Andrade are Certified Correctional Health Care Providers who have years of experience treating inmates with GD. (ER 196-208, 219-220, 311-313, 317-324, 522-542). Drs. Garvey and Andrade each conducted their own independent clinical interview with Ms. Edmo and reviewed her complete pre and post-incarceration mental health history and medical records. (ER 209-211, 215, 229-231, 237, 324-329, 334, 3175-3187, 3395-3438). Defendants' retained experts acknowledged and relied upon the WPATH guidelines in forming their opinions, and also recognized the need to apply them flexibly. (ER 224-225, 265, 323-324, 333, 343). They also relied upon their unique experience treating inmates with GD, along with their familiarity with publications, articles, and training regarding this complicated mental health issue. (ER 196-208, 219-220, 311-313, 317-324, 522-542, 3175-3187, 3395-3438). Based on their professional judgment, Defendants' retained experts concluded that Ms. Edmo did not meet the WPATH criteria for surgery and, therefore, surgery was not medically necessary or appropriate for Ms. Edmo. (ER 195-242, 311-315, 317-338, 354-362, 3175-3187, 3395-3438).

Dr. Andrade has recommended GCS for two incarcerated persons, and Dr. Garvey has directly treated inmates with GD. (ER 200-204, 321-323). Nevertheless, despite their testimony, the district court erroneously held that

neither Defense expert had *any* "direct experience" with assessing inmates for GCS. (ER 36). Erroneously, the district court "gave virtually no weight" to Defendants' experts on the grounds that they came to a different conclusion regarding Ms. Edmo's medical necessity for surgery than did Ms. Edmo's retained experts, and because Defendants' experts applied their own professional judgment when interpreting the WPATH's flexible guidelines. (ER 39). The court also clearly erred when accusing Drs. Garvey and Andrade, without any factual basis, of possessing a "decided bias against approving gender confirmation surgery." (ER 37).

The district court clearly erred by ignoring Defendants' experts' undisputed testimony regarding their unique experience in correctional mental health care, which included the treatment and supervision of inmates with GD. Taking the court's reasoning to its logical conclusion, no correctional health care provider in the United States would be constitutionally qualified to treat inmates with GD because their knowledge and experience would not rise to the level of Ms. Edmo's retained experts.

c. In disregarding Dr. Eliason's professional judgment, the district court supplanted its own medical conclusions for that of Ms. Edmo's treating providers and, in doing so, discounted and unwisely expanded sound legal precedent.

The United States Supreme Court has long recognized that a difference of medical opinion between providers – or between an inmate and his or her provider – is not sufficient as matter of law to demonstrate deliberate indifference. *See Estelle*, 429 U.S. at 107. All of the appellate circuits in the country honor the holding in *Estelle* with many of the circuits having articulated that the rule precludes courts from second-guessing the adequacy of particular courses of treatment decided upon by prison medical providers. See, e.g., *Kosilek*, 774 F.3d at 82–83 (1st Cir. 2014); *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998); *Abdul-Karim Ali v. Terhune*, 113 F. App'x 431, 435 (3d Cir. 2004); *Bowring v. Godwin*, 551 F.2d 44, 48 (4th Cir. 1977); *Stewart v. Murphy*, 174 F.3d 530, 535 (5th Cir. 1999); *Rhinehart v. Scutt*, 894 F.3d 721, 740 (6th Cir. 2018); *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006); *Cates v. Ciccone*, 422 F.2d 926, 928 (8th Cir. 1970); *Toguchi*, 391 F.3d at 1059–61; *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980); *Bismark v. Fisher*, 213 F. App'x 892, 896–97 (11th Cir. 2007); and *O.K. v. Bush*, 344 F. Supp. 2d 44, 61 (D.D.C. 2004).

The undisputed facts of this case are similar to those in *Estelle*, 429 U.S. at 106, where an inmate disagreed with the type of treatment he was provided after he

injured his back. There, the inmate was seen 17 times for his injury over a three-month period and received treatment, but argued that his providers should have done more to diagnose and treat his injured back. *Id.* at 107. The Supreme Court disagreed, holding that the additional treatment the inmate sought was a "classic example of a matter for medical judgment." *Id.* Such a decision not to order an x-ray or "like measures" did not represent cruel and unusual punishment. *Id.*

Here, like in *Estelle*, it is undisputed that Defendants provided Ms. Edmo with a significant amount of care and treatment from the time that she entered IDOC custody, including a diagnosis of GD, feminizing hormones, access to individual and group therapy, and the ability to feminize appropriately within a male prison. *Supra*, p. 4-8. Also like in *Estelle*, the appropriate form of treatment for Ms. Edmo's GD was within the medical judgment of Dr. Eliason. His decision that GCS was not appropriate for Ms. Edmo, in light of her co-existing mental health conditions and her inability to complete her transition in the community, was a treatment option reserved for his professional judgment.

The circumstances of this case are also aligned with the facts and reasoning in *Sanchez v. Vild*, 891 F.2d 242 (9th Cir. 1989). In that case, an inmate sued prison doctors for not providing him with surgery for a chronic perirectal abscess, and treating him with medication and other treatment. *Id.* at 241. There, the Court affirmed the district court's dismissal of the inmate's claims on summary

judgment, holding that, "at most, Sanchez has raised a difference of medical opinion regarding his treatment," which did not arise to deliberate indifference. *Id.* at 242.

The facts on the record in this case are distinguished from those in *Jackson*, 90 F.3d at 332, where the Ninth Circuit affirmed the district court's decision to deny summary judgment to a prison after correctional doctors denied an inmate a kidney transplant, not due to their medical judgment, but "on account of personal animosity" for the inmate. The Court in *Jackson* recognized the holdings of *Estelle* and *Sanchez*, but also recognized an exception to that rule when the "medical opinion" was actually based on malice or animosity. *Id.*

Similarly, in *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014) (en banc), the Ninth Circuit also held that evidence of an improper motive can support a conclusion that a defendant acted with deliberate indifference. In that case, prison officials refused to authorize joint replacement surgery for an inmate, despite recommendations from the inmate's treating physicians. *Id.* at 986. When denying the surgery, prison officials "gave no reason at all, or flatly told [the prisoner] that they would not approve any requests for joint replacement surgery." *Id.* Accordingly, the panel in *Snow* held that the evidence in the record suggested that the prison officials ignored the recommendations of the inmate's treating

physicians "for reasons unrelated" to the inmate's medical needs, allowing a reasonable jury to find that the officials acted with deliberate indifference. *Id*. at 987.

Here, there is no evidence of personal animosity or improper motives on the part of Dr. Eliason or any of the named Defendants toward Ms. Edmo. From the very beginning, Dr. Eliason compassionately recognized Ms. Edmo's diagnosis of GD and has ensured that she has received medically-necessary treatment. Similarly, Dr. Eliason provided thoughtful reasons for his decision not to recommend surgery for Ms. Edmo and his conclusions were supported by Ms. Edmo's treating mental health clinicians and Defendants' retained experts. Thus, unlike in *Jackson* and in *Snow*, the evidence here does not demonstrate that Dr. Eliason was acting intentionally, maliciously, or in conscious disregard of an excessive risk to Ms. Edmo's health, nor does the evidence on the record establish that Dr. Eliason's assessment was medically unacceptable under the circumstances.

At most, the facts on the record demonstrate only a difference in medical, professional judgment, which must be expected and welcomed in matters involving complex and rapidly-evolving areas of mental and medical health. By holding that such a disagreement constituted deliberate indifference, the district court erred and dangerously expanded the standard for demonstrating a violation of an inmate's Eighth Amendment rights, contrary to well-established case law.

d. The district court erred in granting the injunction against the named Defendants despite the record being devoid of any evidence or findings that any one named Defendant acted with the requisite subjective indifference.

The facts in the record do not demonstrate any subjective deliberate indifference on the part of *any named individual defendant*. Eighth Amendment suits against prison officials must satisfy a "subjective" requirement, demonstrating that prison officials "*knowingly and unreasonably* disregard[ed] an objectively intolerable risk of harm to the plaintiff." *Farmer*, 511 U.S. at 846 (emphasis added). Here, during the three-day evidentiary hearing, Ms. Edmo did not present any evidence that individual Defendants Henry Atencio, Jeff Zmuda, Howard Yordy, Dr. Murray Young, Rona Siegert, Dr. Richard Craig, or Dr. Katherine Whinnery actually participated in the decision not to recommend GCS for Ms. Edmo. Indeed, the district court's Order failed to identify any evidence of subjective reckless disregard or deliberate indifference to Ms. Edmo's need for surgery on the part of *any* individual Defendant.

e. The district court erred in concluding that evidence "suggests" that the Defendants had a de facto policy prohibiting GCS or that any improper bias motivated Dr. Eliason's decision not to refer Ms. Edmo for GCS.

To establish liability against Corizon, Ms. Edmo must show that "(1) she was deprived of a constitutional right; (2) [Corizon] had a policy; (3) the policy amounted to a deliberate indifference to her constitutional right; and (4) the policy

was the 'moving force behind the constitutional violation.'" *Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110–11 (9th Cir. 2001) (quoting *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996)). The district court never cited or mentioned these elements in its Order. However, for some reason, the court concluded that the record merely "suggests" that Corizon and IDOC had a "de facto policy or practice of refusing [GCS] for gender dysphoria prisoners." (ER 40). The district court's conclusory finding was clearly erroneous.

First, the plain language of IDOC's written SOP explicitly provides that GCS will be made available if it is found to be medically necessary by a qualified evaluator. (ER 2910-2927). Further, Dr. Eliason and Mr. Clark both testified that if an inmate met the criteria for GCS, Corizon would provide it and IDOC would not prohibit it from taking place. (ER 147-149, 744-745, 778-779, 3141). In support of its finding of a suggestion of bias, the district court cited only to the Defendants' disagreement with Ms. Edmo's experts' interpretation of the WPATH guidelines. (ER 37).

Second, the district court's finding of a *de facto* policy appears to be based solely on the fact that IDOC and Corizon have not yet provided GCS for an inmate in IDOC custody. (ER 37). Despite the court's statement that each inmate's medical necessity for surgery must be individually considered on a case-by-case

basis (ER 4), the court heard no testimony regarding the number of inmates in IDOC custody who have requested surgery and were denied. Nor did the court hear any testimony regarding other inmates' individual circumstances, or the reasons why they may or may not meet the criteria for surgery. Rather, the court made a sweeping assumption that at least some of the inmates with GD who are or have been in IDOC custody a) met the criteria for surgery, and b) were not provided with surgery due to some unwritten policy not allowing it.

The district court's Order incorrectly and unfairly assumes, without any testimony or other evidence in the record, that mental health clinicians, psychiatrists, and psychologists who are tasked with evaluating, monitoring, and caring for inmates in Idaho are neglecting or outright disregarding their ethical obligations to the inmates they treat, in advancement of some bias, unwritten policy, or conspiratorial agreement to prohibit GCS. The district court did not hear any testimony from any of Defendants' employees regarding such a bias or policy, nor did the court hear from other inmates who have been denied surgery. Notably, the district court determined only that evidence "suggested" the presence of bias and a *de facto* policy. The district court did not make a clear finding of such bias or that a *de facto* policy actually existed.

The district court also implied that Defendants possessed a bias against providing surgery based on a single, subsequent training presented to Defendants'

staff by Dr. Stephen Levine. (ER 37-41). Dr. Levine is an expert in the field of providing treatment to gender dysphoric inmates and was appointed as an independent expert by a district court in the First Circuit. *See Kosilek*, 774 F.3d at 77. In the summer of 2016, months *after* Dr. Eliason assessed Ms. Edmo for GCS, Dr. Levine was invited to give a presentation on the issue to Defendants' employees. (ER 146, 187-189, 729-731, 776-778, 829-833).

Nevertheless, Dr. Levine was not a witness in this case. He did not advise Dr. Eliason regarding Ms. Edmo's request for surgery, nor did Dr. Eliason rely on Dr. Levine's subsequent training when he assessed Ms. Edmo for surgery. In fact, Dr. Levine presented his training to Defendants' staff *after* Dr. Eliason's assessment of Ms. Edmo for surgery, rendering his "involvement" in this case irrelevant. (ER 729). While some of Dr. Levine's presentation was later incorporated into training provided to IDOC clinicians regarding assessments for gender dysphoria, Dr. Levine's single presentation does not represent the entire knowledge, training, and experience of Defendants' mental health treatment providers. For example, Corizon provided additional training by a local transgender healthcare provider and Mr. Clark, who consulted with Dr. Eliason, is a WPATH member who has attended several trainings on these very issues at national WPATH conferences. (ER 145-146, 833, 727-728). Furthermore, Dr. Levine's training was not adopted as Corizon policy. (ER 187).

The district court erroneously identified the training provided by Dr. Levine as evidence that Dr. Eliason and the Defendants were insufficiently trained not to provide surgery to inmates. This finding also ignores actual testimony by Mr. Clark and Dr. Eliason that they considered Dr. Levine's training to be only a useful tool to spark discussion among treatment providers and to consider different viewpoints regarding surgery. (ER 187-189, 729-731, 776-778). The Court also overlooked uncontroverted testimony by both Mr. Clark and Dr. Eliason that IDOC would provide GCS to an inmate if her actual treatment providers determined it to be medically necessary. (ER 147-149, 744-745, 778-779).

Finally, throughout its Order, the district court relied upon a 2015 U.S. District Court decision from the Northern District of California, *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1192 (N.D. Cal.) (2015), (appeal dismissed and remanded, 802 F.3d 1090 (9th Cir. 2015)). For example, the district court quoted directly from *Norsworthy* in reaching its erroneous conclusion that Defendants denied Ms. Edmo "necessary treatment for reasons unrelated to her medical need." (ER 41). That case is not controlling, and for several reasons, is unpersuasive and factually distinguishable from this case.

First, the inmate seeking GCS in that case "actively sought out therapy" to address her co-existing mental health concerns. *Id*., at 1172. Second, Ms. Norsworthy's prison psychologist determined that GCS was appropriate for her

and reaffirmed that view for several months. *Id*., at 1175. Despite that recommendation from her treating psychologist, surgery was later denied by the California Department of Corrections and Rehabilitation (CDCR), who was "unable to identify any support for the statement that Norsworthy's providers had concluded that [GCS] was not medically necessary." *Id*., at 1175-76. Third, CDCR's operations manual specifically prohibited vaginoplasty in prison. *Id*., at 1176-77. Indeed, a former CDCR employee testified that the *only* available treatment for incarcerated inmates with GD was hormones and mental health treatment. *Id*., at 1177.

None of those facts are present in this case. None of Ms. Edmo's treating providers have determined that GCS is medically necessary for Ms. Edmo. No IDOC or Corizon employee has overruled a medical determination that surgery is appropriate for Ms. Edmo. Finally, there is simply no policy prohibiting surgery. To the contrary, IDOC's written SOP recognizes GCS as an available treatment option to GD inmates and both Mr. Clark and Dr. Eliason testified that Defendants will provide GCS to an inmate when medically necessary. *Supra*, p. 50, 53. Thus, the district court erred by relying on *Norsworthy* and further erred when it found, without any basis, that bias or a *de facto* policy was the reason that Ms. Edmo was not provided with GCS.

f. The record does not support a finding that Ms. Edmo will suffer immediate, extreme or very serious damage.

The district court failed to find that Ms. Edmo would suffer any "immediate" extreme or very serious damage absent an injunction. But, even if the district court had made that finding, it would have been clearly erroneous. "[A] finding of fact [is] clearly erroneous if it is implausible in light of the record, viewed in its entirety, or if the record contains no evidence to support it." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (citation omitted). Here, any finding that Ms. Edmo would suffer immediate, extreme or very serious damage would be implausible in the light of the record.

First, Ms. Edmo did not pursue the instant preliminary injunction until nearly a year after filing her initial Amended Complaint. Acting *pro se*, Ms. Edmo filed an Amended Complaint on June 8, 2017, and initially requested a preliminary injunction requesting surgery. (ER 3711-3755, 3813-3822). However, on June 19, 2017, counsel for Ms. Edmo filed an appearance and withdrew the Motion for Preliminary Injunction three days later. (ER 3700-3710). Ms. Edmo then waited nearly a year before renewing her motion. (ER 3505-3508).[11] "Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and

[11] Notably, six months after Dr. Eliason's assessment of Ms. Edmo for surgery, she indicated that she intended to obtain the surgery upon her release from prison in 2021. (ER 1786).

irreparable harm." *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). That implication is even stronger in a case like this where Ms. Edmo must show that extreme or very serious damage *will immediately* result absent an injunction.

Second, Dr. Gorton, Ms. Edmo's own expert, believed Ms. Edmo could wait up to six months for a surgical consult. (ER 696-699, 3595). Indeed, Dr. Gorton recommended that Ms. Edmo should merely be *referred* to a GCS surgeon within *a minimum of* six months. *Id*. Dr. Gorton agreed it would be "absurd" to consider GCS an emergent procedure. (ER 697). Thus, Dr. Gorton's testimony indicates that Ms. Edmo will not suffer extreme or very serious damage if she waits until after a decision on the merits to undergo GCS.

Third, Ms. Edmo herself has conceded that she can wait many months to undergo surgery. In her proposed findings of fact and conclusions of law, Ms. Edmo requested that the court order Defendants to "take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery as promptly as possible, and no later than six months from the date of this order." (ER 130). The district court adopted this request verbatim in its Order. (ER 45). Thus, Ms. Edmo's proposed order evidences further that she does not need surgery immediately.

Fourth, Ms. Edmo has not attempted suicide or self-castration for years and any testimony that Ms. Edmo will attempt suicide or self-castration in the near-future is speculative and suspect. Ms. Edmo's two prior suicide attempts, in 2010 and 2011, predate her incarceration and her GD diagnosis. (ER 601-606, 871-879, 881-906, 3217; PSI 46-51, 53-57, 67, 71, 76-77). In fact, Ms. Edmo reported that her previous suicide attempts were unrelated to her GD, but instead resulted from relationship problems, economic distress, other feelings of worthlessness, and her legal troubles. *Id*. Because Ms. Edmo suffers from other serious and currently uncontrolled mental illnesses, including Major Depressive Disorder and Anxiety, the testimony on the record raised legitimate concerns that GCS will be harmful for Ms. Edmo and will increase her risk of suicide. (ER 183, 193, 239-240, 337, 704-706, 3135-3143). In addition, Ms. Edmo has not attempted self-castration since 2016, in part because she now recognizes that she must preserve her genital tissues for a future GCS procedure. (ER 593-596, 614).

Given this evidence and the court's own conclusion that Ms. Edmo's surgery could wait up to six months, it is unclear why the district court did not permit a final trial on the merits to occur within that timeframe. Ms. Edmo waited nearly a year to pursue a preliminary injunction, the hearing on the motion took place four months later, the court did not rule on the motion until two months after that, and then the court ordered that Ms. Edmo undergo GCS within six months. This

prolonged litigation timeline and repeated lack of urgency greatly contradicts any finding that Ms. Edmo will suffer the requisite immediate, extreme or very serious damage absent a preliminary injunction.

B. The District Court's Overbroad Order Granting Permanent and Mandatory Injunctive Relief Violates the Prison Litigation Reform Act (PLRA).

"The PLRA limits the power of federal courts to grant or approve certain remedies in actions challenging prison conditions." *Hallett*, 296 F.3d at 742. Under the PLRA, "[t]he court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. *Id.* (quoting 18 U.S.C. § 3626(a)(1)(A)). "The district court abuses its discretion by fashioning relief that violates the PLRA." *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010).

Here, the injunction violates the PLRA because it is vague and overbroad. The district court ordered Defendants "to provide Plaintiff with adequate medical care, including gender confirmation surgery." (ER 45). The requirement to provide "adequate medical care" is overbroad under the PLRA because Ms. Edmo's deliberate indifference claim did not relate to every conceivable type of medical treatment she may need. Ms. Edmo sought only GCS, but the district court's Order would seemingly encompass treatment of any medical issues that she has, even

those that were diagnosed after the issuance of the injunction. Moreover, the court did not define what it meant by providing "adequate" medical care and erred to the extent "adequate" medical care means something beyond or in addition to the medical care required by the Eighth Amendment. *See* 18 U.S.C. § 3626(a)(1)(A).

In addition, the injunction extends "further than necessary to correct the violation of the Federal right" because it requires Defendants to provide Ms. Edmo with GCS even though no surgeon has evaluated Ms. Edmo. *See* 18 U.S.C. § 3626(a)(1)(A). Ms. Edmo's retained expert witnesses are not GCS surgeons and are not qualified to authorize or perform surgery. As a result, Ms. Edmo's expert's opinions were limited to recommending that Ms. Edmo be referred to and evaluated by a qualified surgeon. (ER 696-699, 3595). The Court went beyond that recommendation and issued an injunction requiring Defendants to actually provide Ms. Edmo with GCS within six months, without taking into account the potential contraindications for surgery that a surgeon may find during a consultation. Regardless of whether the district court can make the medical determination that Ms. Edmo is physically and mentally capable of undergoing GCS, Defendants are not GCS surgeons either. Thus, Defendants are at the mercy of the medical judgment and ethical obligations of a third-party GCS surgeon.

Under the PLRA, the district court could have, at most, ordered Defendants to refer Ms. Edmo for an evaluation with a GCS surgeon.[12]

Moreover, the district court never found that the injunction complied with the PLRA. Under the PLRA, "[a] court shall not grant or approve any prospective relief *unless the court finds* that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A) (emphasis added). "What is important, and what the PLRA requires, is *a finding* that the set of reforms being ordered—the 'relief'—corrects the violations of prisoners' rights with the minimal impact possible on defendants' discretion over their policies and procedures." *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010) (emphasis added). Conspicuously absent from the Order is *any* finding that the injunction complies

[12] During the pendency of this appeal, Defendants have attempted to secure the services of a GCS surgeon to evaluate Ms. Edmo. However, the district court's order provides no guidance for Defendants should the surgeon determine that Ms. Edmo is not medically eligible for surgery. For example, if the surgeon determines that GCS is not appropriate for Ms. Edmo, it is unclear whether Defendants will nevertheless be required to surgeon shop until they find a surgeon who will provide the surgery, regardless of the potential contraindications, complications, or ethical concerns raised. This issue illustrates the problems that arise when a court orders a medical procedure regarding which there is a reasonable disagreement among medical professionals.

with the PLRA.[13] Thus, the injunction fails to comply with the PLRA and this Court should reverse.

C. The District Court Erred to the Extent It Converted the Preliminary Injunction Hearing to a Final Trial on the Merits Without Affording the Parties Prior Notice and Without Protecting the Defendants' Rights to a Jury Trial on the Merits.

"[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). "Should an expedited decision on the merits be appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a means of securing one." *Id.* However, before issuing a consolidation order, the court must "provide[] the parties with clear and unambiguous notice of the intended consolidation either before the hearing commences or at a time which will afford the parties a full opportunity to present their respective cases." *Isaacson*, 716 F.3d at 1220. If the district court fails to give adequate notice and a party was consequently not allowed to present material evidence, the district court's decision to consolidate must be overturned. *Michenfelder v. Sumner*, 860 F.2d 328, 337 (9th Cir. 1988).

Here, the district court did not give clear and unambiguous notice that it intended to consolidate the preliminary injunction hearing with a final trial on the

[13] 18 U.S.C. § 3626(b)(2) requires the district court's injunction to be immediately terminated given the lack of these requisite and enumerated findings.

merits. Defendants had argued in their briefing that the court should apply the higher mandatory injunction standard based on the relief Ms. Edmo was seeking. (ER 3383-3390, 3439-3444). The district court seemed to recognize this argument and stated at the beginning of the hearing, "it's hard for me to envision this hearing being anything but a hearing on a final injunction at least as to that part of the relief requested." (ER 985). The court then stated "I think it's something I will want to at least hear from counsel at some point between now and Friday as to whether a different standard applies, whether this should be treated as a hearing on a final injunction . . . ." *Id*. The district court never raised the issue again until after the hearing.[14] Thus, the district court never gave "clear and unambiguous notice" that it intended to consolidate the preliminary injunction hearing with the trial on the merits of Ms. Edmo's claims. *Isaacson*, 716 F.3d at 1220.

Nevertheless, the district court's Order reflects that the court treated the hearing as a trial on the merits. The court stated in a footnote:

> [T]he nature of the relief requested in this case, coupled with the extensive evidence presented by the parties over a 3-day evidentiary hearing, effectively converted these proceedings into a final trial on the merits of the plaintiff's request for permanent injunctive relief.

[14] Defendants' counsel interpreted the district court's comments to mean that it was unsure whether a heightened legal standard applied due to the mandatory and/or permanent nature of the relief requested. Nevertheless, the first time that the court provided any notice that it may consider the hearing a final one on the merits was during its informal opening comments on the morning of the hearing.

(ER 31). The court then concluded that Ms. Edmo was entitled to an injunction under both the permanent injunction and mandatory preliminary injunction standards. (ER 31, 41, 44). The district court did not explicitly address whether Ms. Edmo actually prevailed on the merits of her claim, but prevailing on the merits is a mandatory prerequisite to granting a permanent injunction. *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." (emphasis added)).

Defendants were prejudiced by the district court's failure to provide adequate notice. If Defendants had known in advance that the court intended to treat the hearing as a final bench trial on the merits, Defendants would have objected and/or requested additional time to present live testimony. In fact, all but one of the individual Defendants, Dr. Eliason, was permitted to testify at the hearing, primarily due to the significant time constraints imposed by the district court. The testimony of the individual Defendants is material, because deliberate indifference requires a subjective finding that each individual Defendant knew of and disregarded an excessive risk to Ms. Edmo's health and safety. *Farmer*, 511 U.S. at 837. Thus, to the extent the district court consolidated the hearing with a

trial on the merits, the district court committed reversible error. *Michenfelder*, 860 F.2d at 337.

In addition, the district court erred to the extent it transformed the preliminary injunction hearing to a final trial on the merits, because it violated Defendants' right to a jury trial under the Seventh Amendment. "It is well established that when a legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact." *Lacy v. Cook Cty., Illinois*, 897 F.3d 847, 858 (7th Cir. 2018) (quotation marks and citation omitted).

> Thus, where monetary damages, as well as the equitable remedies of preliminary and permanent injunction are sought, a party who preserves the right to jury trial is entitled to a trifurcated proceeding. The court must first hold a hearing on the preliminary injunction, then try the legal issues before a jury, and finally hold a bench hearing on the permanent injunction.

Washington Metro. Area Transit Auth. v. L'Enfant Plaza Properties, Inc., 448 A.2d 864, 869 (D.C. Cir. 1982). "Otherwise, the court might limit the parties' opportunity to try to a jury every issue underlying the legal claims by affording preclusive effect to its own findings of fact on questions that are common to both the legal and equitable claims." *Lacy*, 897 F.3d at 858. Here, Ms. Edmo is seeking monetary damages in addition to her claims for a preliminary and permanent injunction, and Defendants have never waived their rights to a jury trial. (ER 3634-

3696). Thus, the district court erred to the extent it held a bench trial on the merits of Ms. Edmo's claims and the district court's decision should have no preclusive effect moving forward in this case.

CONCLUSION

The Defendants respectfully request that this Court reverse the district court's issuance of an injunction and remand for a full jury trial on the merits.

STATEMENT OF RELATED CASES

The undersigned, on behalf of all Defendants-Appellants, certify that there are no known related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), we certify that this *Joint Brief of Defendants-Appellants Corizon Inc., Scott Eliason, Murray Young, Catherine Whinnery, Idaho Department of Corrections, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert* contains 14,986 words. As a joint opening brief, this brief complies with this longer length limit permitted by Cir. R. 32-2(b). *See Form 8*, attached hereto. We relied on the Microsoft Word processing program to obtain the word count. We certify that the above-information is true and correct to the best of our knowledge and belief formed after a reasonable inquiry.

This 6th day of March, 2019.

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

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

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Joint Brief of Defendants-Appellants Corizon Inc., Scott Eliason, Murray Young, Catherine Whinnery, Idaho Department of Corrections, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert by electronic filing on the date stated below to:

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Lori E. Rifkin
HADSELL STORMER & RENICK, LLP
4300 Horton Street, #15
Emeryville, CA 94608

Dan Stormer
Shaleen Shanbhag
HADSELL STORMER & RENICK, LLP
128 N. Fair Oaks Avenue
Pasadena, CA 91103

Amy Whelan
Julie Wilensky
Alexander Chen
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102

Craig H. Durham
Deborah A. Ferguson
FERGUSON DURHAM, PLLC
223 N. 6th Street, Suite 235
Boise, ID 83702

DATED: March 6, 2019.

s/ Dylan A. Eaton

J. Kevin West, ISB #3337
Dylan A. Eaton, ISB #7686
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, ID 83702
Telephone: 208-562-4900
Facsimile: 208-562-4901
Email: deaton@parsonsbehle.com
Attorneys for Defendants-Appellants Corizon Inc., Scott Eliason, Murray Young, and Catherine Whinnery

s/ Brady J. Hall

Lawrence G. Wasden,
Attorney General State of Idaho
Brady J. Hall, ISB #7873,
Special Deputy Attorney General
Marisa S. Crecelius, ISB #8011
Moore Elia Kraft & Hall, LLP
P.O. Box 6756
Boise, ID 83707
Telephone: (208) 336-6900
Email: brady@melawfirm.net
Email: marisa@melawfirm.net
Attorneys for Defendants-Appellants Idaho Department of Corrections, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-35017, 19-35019

I am the attorney or self-represented party.

This brief contains 14,986 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ◉ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ◉ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Brady J. Hall **Date** 03/06/2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov