No. 19-1280

In the Supreme Court of the United States

THE IDAHO DEPARTMENT OF CORRECTION; HENRY ATENCIO, in his official capacity as Director of the IDOC; JEFF ZMUDA, in his official capacity as Deputy Director of the IDOC; AL RAMIREZ, in his official capacity as Warden of the Idaho State Correctional Institution; and SCOTT ELIASON, M.D.,

Petitioners,

v.

ADREE EDMO, aka Mason Edmo,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF SUGGESTION OF MOOTNESS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

Notwithstanding the novel arguments raised in Respondent Adree Edmo's Response to Petitioners' Suggestion of Mootness ("Resp."), the appeal is moot because Edmo has been afforded all of the relief she requested and which the district court ordered in its injunction. *See, e.g., Univ. of Texas v. Camenisch*, 451 U.S. 390, 398 (1981). Edmo's attempt to manufacture a live controversy over postsurgical treatment fails and is telling of her broader motivation to secure legal precedent now unreviewable due to mootness. The parties never litigated the necessity of postsurgical treatment and the district court did not order any such treatment. Regardless, Petitioners do not dispute Edmo's need for postsurgical treatment – now that she has received the surgery – and have been providing such treatment without court order.

Contrary to Edmo's representations, this Court's "established practice" is to vacate the underlying judgment and orders against Petitioners, especially when mootness occurred due to no fault of Petitioners. *U.S. v. Munsingwear*, 340 U.S. 36, 39 (1950). Vacatur is not only necessary, but is the most equitable solution to prevent the significant legal issues and procedural ambiguities in the record from "spawning any legal consequences" that prejudice the parties on remand or arise from the broad-reaching circuit court decision that directly conflicts with this Court's precedent and circuit law. *Munsingwear*, 340 U.S. at 41.

ARGUMENT

1. The appeal is not saved from mootness, as Edmo erroneously suggests, merely because Edmo is to receive postsurgical treatment.

Edmo incorrectly suggests that a live case or controversy exists regarding whether she is to receive postsurgical access to a dilator and other unidentified postsurgical treatment. Resp., 1, 8-11. There are three primary reasons why this Court should reject Edmo's argument:

First, the now moot controversy in this appeal has always been whether Edmo was to receive sex reassignment surgery consistent with the district court's injunction, not whether Edmo would receive postsurgical treatment in the event the surgery was ultimately provided. Edmo's attempt to cobble together the very few references in the record to postsurgical treatment reveals the truth: no controversy ever existed over the postsurgical treatment to be provided in the event Edmo received the surgery. Petitioners' concern was never with the necessity of postsurgical treatment, but whether Edmo could be compliant with the rigorous postsurgical regimen. Resp., 4 (citing to examples in the record).

Thus, the only factual finding the district court made regarding postsurgical care was that "Ms. Edmo has demonstrated the capacity to follow through with the postsurgical care she would require" despite having found it "troubling that Ms. Edmo has declined to fully participate in the mental health treatment and counseling sessions recommended by [Petitioner] Dr.

Eliason and [other mental health professionals]." Appendix to Petition ("App."), 182. Absent any dispute, whatsoever, regarding postsurgical care, the district court did not order Petitioners to provide treatment other than what was "reasonably necessary to provide Ms. Edmo gender confirmation surgery." App. 201. Edmo's overly-broad reading of the injunction was rejected by the Ninth Circuit, which interpreted the relief the district court ordered narrowly and not requiring Petitioners to provide any treatment after the surgery was accomplished:

> The order, read in context, requires defendants to provide GCS, as well as "adequate medical care" that is "reasonably necessary" *to accomplish that end*—not every conceivable form of adequate medical care.

App. 137 (emphasis added). Edmo's argument that the district court and Ninth Circuit intended to order Petitioners to also provide her with postsurgical care into perpetuity is neither supported by the record, nor relevant absent a live controversy.

Second, there is simply no dispute among the parties that postsurgical treatment, including Edmo's access to a dilator, is medically necessary now that Edmo has received the surgery. Nor is there a live question whether Petitioners are to provide Edmo with medically-necessary postsurgical treatment. Indeed, Petitioners have already made a number of special arrangements to provide Edmo appropriate postsurgical treatment since she received the surgery on July 10, 2020. Edmo has been held in special housing so she can be monitored by medical staff and

receive access to necessary supplies. Prison officials have transported Edmo to every postoperative appointment scheduled by her surgeon to date and will transport Edmo to the final postoperative visit in October. Edmo's conclusory allegation that "Petitioners failed to provide her with access to dilation for several days" since her surgery is incorrect.[1] Resp., 7. Regardless, the unverified accusation is not cause to question Petitioners' commitment to meet Edmo's postsurgical medical needs absent judicial intervention.[2]

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[1] Edmo has been provided access to the dilator three times per day in the medical unit at the women's prison in which she is currently housed. For the short period of time she was housed in general population at the women's prison, Edmo missed three days of dilation in early August despite medical staff directing her to come to medical to dilate. Subsequently, staff at the facility transferred her from a cell in general population to a cell in the medical unit where the dilator is securely stored, further ensuring Edmo's ability to dilate.

[2] Petitioners strongly dispute Edmo's mischaracterization of a "history of Petitioners' refusals to provide care in this case" requiring judicial intervention. Resp. 7. Edmo has not, and cannot, point to any instance in the record where Petitioners have refused or failed to carry out an order of the district court. Petitioners' success in obtaining a stay of the injunction pending appeal cannot be construed as a "refusal" to provide care; nor can Petitioners' diligent efforts to appeal or seek clarification of the district court's orders. Additionally, Edmo's assertion that the district court held a series of status conferences to "enforce Petitioners' compliance with injunction" is not accurate. Resp. 5-6. The status conferences were held largely to advise the district court of the status of the appeal and address complications with scheduling pre-surgical treatment and contacting a surgeon. The district court repeatedly encouraged the parties to meet and confer on pre-surgical matters outside the presence of the court, contradicting Edmo's claims of the district court's need to force Petitioners' compliance.

Third, Edmo's assertion that the appeal is not moot, even though she has now received the irreversible surgery, is belied by the case law Edmo cites as support in her brief. Resp. 9-11. Unlike in *Knox v. Service Employees Intern. Union, Local 1000*, Petitioners here took no voluntary action designed to moot their appeal. 567 U.S. 298, 307 (2012) ("Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.") To the contrary, Petitioners made every attempt to prevent their appeal from becoming moot. Suggestion of Mootness ("S.M."), 1-3.[3] Further, a remaining dispute in *Knox* over the adequacy of the refund notice saved that appeal from mootness. *Id.* at 307-08. Here, there is no dispute over the adequacy of the surgery Edmo received.

In *U.S. v. Chrysler Corporation*, the appellate court held the appeal was not moot because there was still "substantial relief that can be afforded by this court." 158 F.3d 1350, 1353-54 (D.C. Cir. 1998) ("If Chrysler prevails on the merits, it will avoid [] obligations imposed by the District Court, as well as any monetary penalties that might be sought for the alleged violations of the Act.") Similarly, in *Calderon v. Moore*,

[3] Edmo's inference that Petitioners were untimely in raising mootness is without merit, unnecessary, and an attempt to distract from Edmo's decision not to address the obvious mootness issue in her August 10, 2020 Brief in Response. Petitioners' application for stay, filed contemporaneously with the Petition on May 6, 2020, advised this Court the appeal will be mooted if Edmo receives the surgery. In opposing the stay, Edmo did not dispute that the appeal would be mooted if she received the surgery. When Edmo did not address mootness in her August 10 brief, Petitioners filed the Suggestion of Mootness fourteen days later.

the appeal was not moot because a decision on the merits in the State's favor "would release it from the burden of the new trial itself." 518 U.S. 149, 150 (1996). In contrast to both *Chrysler* and *Calderon*, there is no longer any actual relief this Court can provide any party after a ruling on the merits. The surgery is permanent and irreversible, and Edmo has no other claims for equitable relief before this Court. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 199 (1989) (holding appeal was moot when the plaintiff no longer had any remaining claims for equitable relief).

Edmo's citation to *Chafin v. Chafin* also does not support her argument and "confuses mootness with the merits." 568 U.S. 165, 174 (2013). In *Chafin*, an appeal regarding the district court's authority to order the re-return of a child to the United States was not moot because of a "live dispute between the parties over where their child will be raised…." *Id.* at 180. Here, no unsettled dispute exists because Edmo's surgery is irreversible.

Edmo's reliance on *Camreta v. Greene*, 563 U.S. 692 (2011) is equally misplaced and actually supports Petitioners' request for vacatur. There, the appeal challenging the Ninth Circuit Court of Appeal's decision limiting a social worker's ability to interview a minor child was moot when the child moved out of the appellate court's jurisdiction, had no plans to return, and was only months away from her 18th birthday. The Court held that the minor child "faces not the slightest possibility of being seized in a school in the Ninth Circuit's jurisdiction as part of a child abuse investigation." *Id.* at 711. Similarly, because

Edmo has received the irreversible procedure the district court ordered, there is no possibility the same allegedly wrongful behavior of denying her the vaginoplasty can recur.[4]

2. Vacating the lower courts' orders and injunction against Petitioners is the most appropriate and equitable solution under the unique circumstances of this case.

Edmo misapplies and misinterprets the cases she cites in support of her position that vacatur is not warranted. Edmo relies on *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership* to suggest that vacatur is an "extraordinary remedy" and uncommon. Resp. 12. But, the issue in *Bonner Mall* was whether "courts should vacate where mootness results from a settlement [by the parties on appeal]." 513 U.S. 18, 23 (1994). If so, "the losing party has voluntarily forfeited his legal remedy by the ordinary process of appeal or certiorari, thereby surrendering his claims to the equitable remedy of vacatur." *Id.* at 25.[5]

Importantly, *Bonner Mall* did not disavow the seminal precedent in *Munsingwear* that vacatur is the

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[4] For the same reasons, Edmo's citation to *Vitek v. Jones*, 445 U.S. 480 (1980) is unpersuasive. While there remained a possibility that the inmate in *Vitek* could again be transferred to a mental hospital in violation of his constitutional rights, Edmo cannot again be denied a vaginoplasty.

[5] Edmo points to two other opinions for the proposition that this Court "dismiss[ed] appeal[s] from injunction decree as moot but declining to vacate." Resp. at 12 (citing *Nelson v. Quick Bear Quiver*, 546 U.S. 1085 (2006); *Faulkner v. Jones*, 516 U.S. 910 (1995)). However, vacatur was never analyzed, let alone addressed.

"established practice of this Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits…." 340 U.S. 36, 39-40.[6] In fact, *Bonner Mall* reaffirmed that "mootness by happenstance provides sufficient reasons to vacate." 513 U.S. 18, n. 3. It was undisputed in *Bonner Mall* that "vacatur must be decreed for those judgments whose review is … 'prevented through happenstance' – that is to say where a controversy presented for review has 'become moot due to circumstances unattributable to any of the parties." *Id*. at 23 (internal citations omitted). This appeal, of course, became moot not because of a voluntary settlement or any action of Petitioners. Petitioners timely and repeatedly requested the injunction be stayed to prevent the appeal from becoming moot. S.M. 1-3.

Bonner Mall does stand as a reminder that vacatur is an equitable doctrine that must be in a manner that is "most consonant with justice" and take account of the public interest. 513 U.S. at 24, 26. However, Edmo is

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[6] While Petitioners assert the merits of this appeal are cert-worthy, this Court routinely grants certiorari for the limited purpose of vacating the lower court's judgment without ever finding that certiorari would have been granted had the case not become moot. *See, e.g.*, *Blue Water Navy Vietnam Veterans Ass'n, Inc. v. Wilkie*, 139 S. Ct. 2740 (2019); *Village of Lincolnshire v. Int'l Union of Operating Eng'rs Local 399*, 139 S.Ct. 2692 (2019); *Eisai Co. v. Teva Pharm. USA, Inc.*, 564 U.S. 1001 (2011); *Hollingsworth v. U.S. Dist. Court for N. Dist. of California*, 562 U.S. 801 (2010); *Radian Guar., Inc. v. Whitfield*, 553 U.S. 1091 (2008); *Lehman v. MacFarlane*, 529 U.S. 1106 (2000); *Teel v. Khurana*, 525 U.S. 979 (1998); *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93-94 (1979) (per curiam).

wrong to suggest that vacatur is not equitable, just, and appropriate under the circumstances of this case. The important substantive issues, as well as the awkward procedural posture of this case, counsel that vacatur is not only appropriate, but necessary to ensure a just and equitable end to the underlying decisions that Petitioners are now unable to challenge due to no conduct of their own.

One of the main objectives of vacatur is to preclude a court of appeals' decision on constitutional questions from governing future cases where a party was precluded from obtaining review of these issues at no fault of their own. *See e.g., Camreta*, 563 U.S. 692, 713 (2011) (holding the point of vacatur is to prevent unreviewable constitutional decisions 'from spawning any legal consequence" so that no party is harmed by what this Court called a "preliminary" adjudication) (internal citations omitted); *Radian Guaranty, Inc. v. Whitfield,* 553 U.S. 1091 (2008) (vacating judgment and remanding to district court to dismiss where party seeking vacatur argued, in part, the court of appeal's decision was irreconcilable with this Court's precedent). The posture of Edmo's case is such that the district court wrongly issued an injunction that was then affirmed by a published and precedential court of appeal's opinion rendering broad legal holdings that conflict with Eighth Amendment constitutional standards of other circuit courts and this Court. Therefore, it is just and in the public interest to vacate the lower court's decisions and judgment as to Petitioners.

Finally, the unprecedented and confusing procedural posture of this case confirms that vacatur is equitable and just. Edmo suggests that Petitioner Dr. Scott Eliason does not deserve a jury trial on the Eighth Amendment claim and contends Petitioners can later appeal the liability decision after the damages case. Resp. at 13-14. Edmo misconstrues the record and her own prior representations of the procedure below. Edmo filed a Motion for *Preliminary* Injunction that was heard during an extremely truncated evidentiary hearing after only limited discovery. *Edmo v. Idaho Dep't. of Corr.*, No. 1:17-cv-151 (D. Idaho) ("Dist. Ct."), Dkt. 62. Edmo never moved to consolidate the preliminary injunction hearing with a final trial on the merits, but the district court held – after the hearing – that the hearing was "effectively converted" into a full and final trial on the merits. App. 185-86, n. 1. Petitioners charged that the district court did not provide clear and unambiguous notice of its intention to convert the hearing into a full trial on the merits as required by *Camenisch*, 451 U.S. 390, 395 (1981). *Edmo v. Idaho Dep.'t of Corr. v. Edmo*, No. 19-35017 (9th Cir.), Dkt. 11, pp. 72-75.

In her own opening brief before the Ninth Circuit, Edmo too argued that the **"District Court did not convert the preliminary injunction hearing to a final trial on the merits.**" 9th Cir. Dkt. 32, pp. 28, 60-61, 64 and n. 11 (emphasis added). It was also unclear to the Ninth Circuit whether the hearing was a final trial on the merits because, during the appeal, it issued a limited remand asking the district court to clarify if it was also granting permanent injunctive relief and, if so, whether Edmo actually succeeded on a final trial of

the merits of her Eighth Amendment claim. *Id*. at Dkt. 90. Only then did the district court clarify it had ordered a permanent injunction whereby Edmo purportedly succeeded on the merits. *Id*. at Dkt. 91.[7] Subsequently, the Ninth Circuit held that the hearing was a final trial on the merits and any jury trial was waived by Petitioners. *Edmo v. Corizon*, 935 F.3d 757, 800-803 (9th Cir. 2019).

Given the significant ambiguities and inconsistencies with the procedural posture below, and Edmo's own position that no full and final trial on the merits has yet been had, the only equitable solution is to vacate the injunction against Petitioners to prevent the judgment from "spawning any legal consequences." *Munsingwear*, 340 U.S. at 41.

CONCLUSION

Petitioners respectfully request the Court enter an order dismissing the appeal as moot and partially vacating the lower court's orders and judgment consistent with Petitioners' prior request. S.M. 8.

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[7] The district court continues to be inconsistent as to the procedural posture of this case because it indicated in a status conference earlier this year that, although the court has ruled on the Eighth Amendment claim in terms of injunctive relief, **"I think the parties are entitled to a jury determination on liability"** on that claim. Dist. Ct., Dkt. 269 (Tr. 8:16-19) (emphasis added). Thus, the district court's understanding is inconsistent with Edmo's assertion that liability under the Eighth Amendment for purposes of damages has already been established against Dr. Eliason. Resp. 13-14.

Respectfully submitted,

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