No. 19A1038

In the Supreme Court of the United States

Idaho Department of Correction, Henry Atencio, in his official capacity as Director; Jeff Zmuda, in his official capacity as Deputy Director; Al Ramirez in his official capacity as Warden; and Scott Eliason, M.D.,

Applicants,

v.

Adree Edmo AKA Mason Edmo,

Respondent.

RESPONDENT'S OPPOSITION TO APPLICATION FOR STAY PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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MAY 18, 2020

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INTRODUCTION

"Following four months of intensive discovery and a three-day evidentiary hearing," the district court in this case made "detailed factual findings" that gender-confirmation surgery "is medically necessary for [respondent Adree] Edmo" based on "findings individual to Edmo's medical condition." Stay App. Exh. D at 9. In a factbound decision that applied settled Eighth Amendment law, the Court of Appeals unanimously upheld the district court's decision. The Court of Appeals repeatedly "emphasize[d] that the analysis here is individual to Edmo and rests on the record in this case," which "establish[ed] that Edmo has a serious medical need, that the appropriate medical treatment is [gender confirmation surgery], and that prison authorities have not provided that treatment despite full knowledge of Edmo's ongoing and extreme suffering and medical needs." *Id.* at 9-10. Although the Court of Appeals "emphatically d[id] not speak to other cases," it held that the "facts of this case call for expeditious effectuation of the [district court's] injunction" requiring petitioners to provide Ms. Edmo with the medically necessary surgery, given "Edmo's severe, ongoing psychological distress and the high risk of self-castration and suicide she faces absent surgery." *Id.* at 73, 85.

Against that backdrop, Applicants cannot meet the heavy burden they face to justify the extraordinary relief they seek. As every court to consider this case has found, the balance of hardships swings heavily in one direction: each day Applicants withhold necessary medical treatment, Adree Edmo suffers irreparable harm. After two attempts at self-castration—including one in which Ms. Edmo "was able to open her testicle sac with a razor blade and remove one testicle" before "abandon[ing] her

attempt . . . when there was too much blood to continue," Stay App. Exh. D at 25, Ms. Edmo is finally scheduled to receive the surgery she needs in July 2020. A stay removing that surgery date from the calendar would consign Ms. Edmo to another year of "escalating risks of self-surgery, suicide, and emotional decompensation," *id.* at 73, which vastly outweigh any harm to Applicants. Indeed, the district court emphasized, "Ms. Edmo's testimony and that of her experts conclusively established, in the Court's opinion, that there is substantial risk that Ms. Edmo will make a *third* attempt to self-castrate if the Defendants continue to deny her gender confirmation surgery." Stay App. Exh. B at 3.

Nor can Applicants meet their burden to establish that this case satisfies any other requirement for the extraordinary relief of a stay. Applicants identify no issue on which it is reasonably probable that this Court would grant review—let alone an issue that raises a fair prospect of reversal. Applicants' assertion of a circuit conflict hinges on their mischaracterization of the appellate court's decision, which did not apply any bright-line rules or mandate any particular result with respect to other prisoners with gender dysphoria, but, instead, reflected fact-intensive analysis and findings based on Ms. Edmo's individual medical condition and needs, in line with other courts of appeals.

Applicants likewise cannot establish that the Court of Appeals departed from this Court's Eighth Amendment precedent. Contrary to Applicants' contention, the Ninth Circuit did not "constitutionalize" the World Professional Association of Transgender Health Standards of Care for the Health of Transsexual, Transgender,

and Gender Nonconforming People ("WPATH Standards of Care"). While Applicants now seek to disavow the WPATH Standards, they "acknowledged to the district court [that] the WPATH Standards of Care 'provide the best guidance,' and 'are the best standards out there.'" Stay App. Exh. D at 14. The Court of Appeals upheld the district court's decision to use "the WPATH Standards of Care" as "a useful starting point for analyzing the credibility and weight to be given to each expert's opinion," but the Court made clear that a "simple deviation from those standards does not alone establish an Eighth Amendment claim." *Id.* at 54-55 n.16, 56.

This case is a fact-intensive dispute about whether a particular treatment is medically necessary for one individual and whether the district court erred in concluding based on an extensive record that Applicants were—and continue to be—deliberately indifferent to her serious medical needs and ongoing risk of harm. This Court routinely denies review in this type of factbound Eighth Amendment deliberate indifference case.[1] *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (noting that deliberate indifference "is a question of fact subject to demonstration in the usual

[1] *See, e.g.*, *Gibson v. Collier*, 140 S. Ct. 653 (2019); *Swaney v. Lopez*, 140 S. Ct. 399 (2019); *Cowlitz Cty. v. Crowell*, 139 S. Ct. 802 (2019); *Cty. of Orange v. Gordon*, 139 S. Ct. 794 (2019); *Sanchez v. Young Cty.*, 139 S. Ct. 126 (2018); *Spencer v. Abbott*, 139 S. Ct. 62 (2018); *Walker v. Estate of Clark*, 138 S. Ct. 1285 (2018); *Arrington-Bey v. City of Bedford Heights*, 138 S. Ct. 738 (2018); *Dale v. Rife*, 138 S. Ct. 364 (2017); *Phillip v. Scinto*, 138 S. Ct. 447 (2017); *Corr. Med. Servs., Inc. v. Glisson*, 138 S. Ct. 109 (2017); *Bornstein v. Monmouth Cty. Sheriff's Office*, 138 S. Ct. 120 (2017); *Carter v. Petties*, 137 S. Ct. 1578 (2017); *Collett v. Berlanga*, 137 S. Ct. 510 (2016); *Saylor v. Kohl*, 137 S. Ct. 161 (2016); *Anderson v. Marshall Cty.*, 137 S. Ct. 67 (2016); *Zaunbrecher v. Gaudin*, 137 S. Ct. 58 (2016); *Herriman v. Kindl*, 136 S. Ct. 1657 (2016); *Kosilek v. O'Brien*, 135 S. Ct. 2059 (2015).

ways."). The district court adjudicated Ms. Edmo's Eighth Amendment claim after a four-month intensive discovery period, a three-day evidentiary hearing with live witnesses (including experts from each side), the submission of additional testimony via declarations, and review of thousands of pages of documentary evidence. Stay App. Exh. D at 9. The district court carefully weighed the evidence, including making credibility determinations with respect to experts and other witnesses, and issued a thorough 45-page decision detailing its findings of fact and conclusions of law. *Ibid*. The Court of Appeals—recognizing the urgency of the relief at issue in this case—expedited its consideration of Applicants' appeal, unanimously upheld the district court's decision and emphasized the need for Ms. Edmo to receive surgery expeditiously. Applicants make no showing that this highly fact-dependent case is appropriate for certiorari review, and their request for a stay threatens Ms. Edmo with continued irreparable harm. The stay request should be denied.

BACKGROUND

A. Adree Edmo's Need for Medical Treatment

Ms. Edmo is a transgender woman[2] who has been incarcerated in the Idaho Department of Corrections ("IDOC") since 2012. It is undisputed that Ms. Edmo has been accurately diagnosed with gender dysphoria by Applicants since 2012, and that

[2] A transgender person is one whose gender identity—"a deeply felt, inherent sense of their gender"—does not align with their sex assigned at birth. Stay App. Exh. D 11. At birth, infants are identified as male or female based on their external anatomy. This is a person's "sex assigned at birth," which, in the case of a transgender person, conflicts with the person's gender identity. *Ibid*.

gender dysphoria is a serious but highly treatable medical condition. Stay App. Exh. D at 8, 13, 48; Stay App. Exh. A at 19. Gender dysphoria results when the incongruity between a transgender person's assigned sex and gender identity is so severe and persistent that it results in clinically significant distress impairing the ability to function. Stay App. Exh. D at 13 (citing Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 452-58 (5th ed. 2013) ("DSM-5")).

The parties agree that treatment of gender dysphoria includes one or more of the following, depending on the severity of the condition: (1) changes in gender expression and role (which may involve living in another gender role, consistent with one's gender identity); (2) psychotherapy for purposes such as addressing the negative impact of gender dysphoria and stigma on mental health, alleviating internalized transphobia, enhancing social and peer support, or promoting resilience; (3) hormone therapy to feminize or masculinize the body; and (4) surgery to change primary and/or secondary sex characteristics. Stay App. Exh. D at 15-16. The parties also agree that while surgery is not medically necessary or appropriate for every person with gender dysphoria, "in certain circumstances, gender confirmation surgery ('GCS') can be a medically necessary treatment for gender dysphoria," and, in those circumstances, Applicants must provide surgery to treat a prisoner with gender dysphoria. *Id.* at 9, 16; Exh. A to Respondent's Opposition to Stay Application, *attached hereto* ("Stay Opp.") at 6.

Although Applicants have provided Ms. Edmo with limited access to some treatment since 2012, including hormone therapy, she continues to suffer clinically

significant distress and impairment, primarily related to her male genitalia. Stay App. Exh. D at 21; Stay App. Exh. A at 20. While in IDOC's custody, Ms. Edmo has twice attempted to self-castrate in order to remove her testicles and eliminate testosterone from her body, in September 2015 and December 2016. Stay App. Exh. D at 21-22, 25; Stay App. Exh. A at 2-3, 20-21. Ms. Edmo has repeatedly requested evaluation and referral for surgery. For a transgender woman, gender confirmation surgery consists of genital reconstruction (orchiectomy and vaginoplasty). Stay App. Exh. A at 9. Such surgery is well-established as safe and effective for treating gender dysphoria. Stay App. Exh. D at 16. Applicants have formally considered Ms. Edmo's medical necessity for gender confirmation surgery only once, in April 2016, before her second attempted self-castration, and have relied on that 2016 evaluation to continue to deny her access to surgery on an ongoing basis through today. *Id.* at 25, 64; Stay App. Exh. A at 22, 24-25.

In the April 2016 evaluation, Applicant-Defendant Eliason, a psychiatrist working for IDOC's prison health contractor Corizon, concluded that Ms. Edmo's gender dysphoria "had risen to another level," as demonstrated by her attempt to self-castrate seven months before the evaluation. Stay App. Exh. D at 23. Nonetheless, Dr. Eliason concluded gender confirmation surgery was not appropriate for Ms. Edmo based on his own formulation of three criteria for surgery that, by his own admission, were untethered to any standards of care or medical consensus on treatment for gender dysphoria. *Id.* at 59-63.

Dr. Eliason refused to refer Ms. Edmo for surgery without providing her any additional treatment or adjusting her existing treatment in any way. Stay App. Exh. D at 23-24. Predictably, Ms. Edmo again attempted to self-castrate eight months later, this time nearly succeeding in removing her own testicle with a razor blade in her prison cell. *Id.* at 25. Again, neither Dr. Eliason nor any other staff took any action with respect to her treatment, despite the obvious ineffectiveness of her existing course of treatment. *Id.* at 25, 64.[3] Neither Dr. Eliason nor any other IDOC or Corizon clinician documented any application of any recognized medical standard in making the decision to deny Ms. Edmo surgery. *Id.* at 24-25, 59-63. At the evidentiary hearing, Ms. Edmo "testified that she continues to actively think about self-castration. To avoid acting on those thoughts and impulses, [she] self-medicates by cutting her arms with a razor. She says that the physical pain helps to ease the emotional torment and mental anguish her gender dysphoria causes her." *Id.* at 25-26 (internal quotation marks and alteration omitted).

B. Procedural History

On April 6, 2017, shortly after attempting self-castration for the second time, Ms. Edmo filed this lawsuit *pro se*, seeking injunctive relief and damages for, *inter*

[3] Applicants assert in their stay motion that Dr. Eliason's only involvement with Ms. Edmo was the April 2016 evaluation. The evidence does not support this contention, which Applicants raise for the first time before this Court. Dr. Eliason's oversight of Ms. Edmo's care continued, as reflected in his contemporaneous treatment notes "that he would continue to monitor and assess Edmo," Stay App. Exh. D at 24-25, and his testimony at the evidentiary hearing. *Id.* at 63-64.

alia, Applicants' failure to provide medically necessary treatment for gender dysphoria. Stay App. Exh. D at 26. She also moved for appointment of counsel, and pro bono counsel filed an amended complaint on September 1, 2017. *Ibid.*

Ms. Edmo moved for preliminary injunctive relief on June 1, 2018, on the basis of assessments by two experienced medical experts who evaluated her and determined that the acuity of her condition requires surgical treatment. Stay App. Exh. D at 27. Ms. Edmo sought an order requiring immediate access to necessary medical treatment for gender dysphoria meeting the medical standard of care, including gender confirmation surgery. *Ibid.*

Applicants moved for extensions of time to conduct discovery and respond to Respondent's motion, and the district court granted the motion in part, permitting fact and expert discovery focused on the preliminary injunction issues for four months, and scheduling a three-day evidentiary hearing from October 10-12, 2018. Stay App. Exh. D at 27, 81. From June through September 2018, the parties engaged in extensive written discovery and conducted 13 depositions, including fact and expert witnesses. *Ibid.* The evidentiary hearing, which spanned three full days, included testimony from fact and expert witnesses and the submission of exhibits. *Id.* at 27-28, 81. In addition, the district court allowed Applicants to submit declarations from witnesses not called during the hearing, and considered evidence submitted in the pre-trial briefing. *Id.* at 27, 81. The court also directed the parties to submit proposed findings of fact and conclusions of law, and post-hearing briefs, which they did. *Id.* at 37, 80-81.

C. District Court Decision

On December 13, 2018, the district court granted Ms. Edmo's motion for injunctive relief in part, ordering Applicants to provide her surgery as soon as possible and no later than the six months estimated as necessary to complete her presurgical care. Stay App. Exh. D at 39; *see also id.* at 74-75 ("As Dr. Gorton explained, all patients who receive GCS 'are seen, they are evaluated, there is a process you have to go through.' In his experience, that process typically concludes within six months."). The court emphasized that "its decision [wa]s based upon, and limited to, the unique facts and circumstances presented by Ms. Edmo's case," and was "not intended, and should not be construed, as a general finding that all inmates suffering from gender dysphoria are entitled to gender confirmation surgery." Stay App. Exh. A at 4. Instead, in a 45-page order, the district court carefully weighed the evidence, made extensive findings of fact, and applied well-established law to conclude:

> Defendants have been deliberately indifferent to Ms. Edmo's medical needs by failing to provide her with available treatment that is generally accepted in the field as safe and effective, despite her actual harm and ongoing risk of future harm including self-castration attempts, cutting, and suicidal ideation.

Id. at 40; *see also* Stay App. Exh. D at 37-38 (describing district court as making "extensive factual findings" in its "carefully considered, 45-page opinion").

In reaching that conclusion, the district court "specifically found 'credible the testimony of Plaintiff's experts . . . who have extensive personal experience treating individuals with gender dysphoria both before and after receiving gender confirmation surgery,' and who opined that GCS was medically necessary." Stay App.

Exh. D at 38 (internal quotation marks omitted). The district court "rejected the contrary opinions of the State's experts because neither. . . has any direct experience with patients receiving gender confirmation surgery or assessing patients for the medical necessity of gender confirmation surgery,' and 'neither of the State's experts had meaningful experience treating patients with gender dysphoria other than assessing them for the existence of the condition.'" *Ibid.* (citation omitted). Based on its factual findings and credibility determinations, the district court specifically rejected Applicants' argument that Ms. Edmo's case constituted a reasonable disagreement between medical professionals. Stay App. Exh. A at 41.

On the evidentiary record proffered by the parties, the court concluded that Ms. Edmo requires surgery in accordance with the medical standard of care and based on her individualized medical needs. Stay App. Exh. A at 36-37. The court ruled that Applicants' failure to provide surgery was deliberately indifferent to Ms. Edmo's serious medical needs because they withheld an available, safe, and effective treatment despite knowing that their chosen course of treatment was insufficient and subjected Ms. Edmo to ongoing serious harm and risk of life-threatening harm. *Id.* at 4, 39-41.

D. Ninth Circuit Court of Appeals Proceedings

Applicants moved the district court to stay the injunction pending appeal to the Ninth Circuit. Stay App. Exh. D at 39. When the District Court denied that motion, Applicants sought a stay from the Court of Appeals. *Id.* The Court of Appeals granted the stay but exempted Ms. Edmo's presurgical consultation and expedited

the Court's consideration of Applicants' appeal. Stay Opp. Exh. B at 11; Stay App Exh. C at 2. The Court of Appeals heard oral argument just two months later on May 16, 2019, and issued its unanimous decision affirming the district court's injunction on August 23, 2019. Stay App. Exh. D.[4]

"[B]ased on the district court's factual findings," the Court of Appeals held "that Edmo established her Eighth Amendment claim and that she will suffer irreparable harm—in the form of ongoing mental anguish and possible physical harm—if GCS is not provided." Stay App. Exh. D at 47. Citing *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976), and *Farmer v. Brennan*, 511 U.S. 825, 935 (1994), the Court of Appeals recognized that deliberate indifference may not be established by demonstrating merely inadvertent or negligent failure to provide adequate medical care; rather, to show deliberate indifference, "the plaintiff must show that the course of treatment the official chose was medically unacceptable under the circumstances and that the official chose this course in conscious disregard of an excessive risk to the plaintiff's health." Stay App. Exh. D at 49 (quotation marks and alterations omitted).

[4] After the panel affirmed the district court's injunction and Applicants petitioned for rehearing en banc, the Court of Appeals partially lifted the stay to ensure that Ms. Edmo would begin receiving the presurgical treatments the surgeon deemed necessary so that her surgery would not be further delayed while Applicants' petition was pending. Stay App. Exh. E at 2. The Court of Appeals denied rehearing en banc in February 2020, and Ms. Edmo is scheduled to receive surgery in July 2020. Stay App. Exh. F at 5; Application at 4.

The Court of Appeals determined that standard was satisfied here on the basis of the extensive factual record. Among other things, the court observed that "[e]ach expert in this case relied on the WPATH Standards of Care in rendering an opinion" about whether GCS is medically necessary for Ms. Edmo. Stay App. Exh. D at 14.[5] Applicants "acknowledged to the district court [that] the WPATH Standards of Care 'provide the best guidance,' and 'are the best standards out there.'" *Ibid.* (citation omitted). In light of that agreement, the district court used "the WPATH Standards of Care" as "a useful starting point for analyzing the credibility and weight to be given to each expert's opinion and whether that opinion was consistent with established standards of care." *Id.* at 54-55 n.16.

Importantly, the Court of Appeals stressed that this is not "a case of dueling experts," reasonably differing as to two acceptable courses of treatment. Stay App. Exh. D at 51. Instead, based on the evidence presented:

> The district court permissibly credited the opinions of Edmo's experts that GCS is medically necessary to treat Edmo's gender dysphoria and that the State's failure to provide that treatment is medically unacceptable. . . . [T]he district court permissibly discredited the contrary opinions of the State's treating physician and medical experts. Those individuals lacked expertise and

[5] As the Court of Appeals observed, "many of the major medical and mental health groups in the United States"—including, *inter alia*, the American Medical Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, and the American College of Surgeons—"recognize the WPATH Standards of Care as representing the consensus of the medical and mental health communities regarding the appropriate treatment for transgender and gender dysphoric individuals." Stay App. Exh. D at 14. Indeed, the National Commission on Correctional Health Care, which Applicants' witnesses testified is the touchstone for establishing standards for medical treatment in prisons, expressly incorporates the WPATH Standards of Care for treating prisoners with gender dysphoria. *Id.* at 19, 60; Stay App. Exh. A at 16.

> incredibly applied (or did not apply, in the case of the State's treating physician) the WPATH Standards of Care. In other words, the district court did not clearly err in making its credibility determinations, so it is not our role to reevaluate them. The credited testimony establishes that GCS is medically necessary.

Ibid.; *id.* at 58-59 ("The district court carefully examined the voluminous record, extensive testimony, and conflicting expert opinions in this case and set forth clear reasons, supported by the record, for relying on the testimony of Edmo's experts."); *id.* at 56-57 (observing that "the WPATH Standards of Care are flexible and a simple deviation from those standards does not alone establish an Eighth Amendment claim," but "the district court did not clearly err in discounting the testimony of the State's experts" given that they "purported to be applying those standards and yet did so in a way that directly contradicted them").

The Court of Appeals also held that the district court reasonably concluded that "Dr. Eliason did not follow accepted standards of care in the area of transgender health care," and that the district court's rejection of Dr. Eliason's post hoc explanations for his actions at the evidentiary hearing "was not clear error." Stay App. Exh. D at 59-60. The Court upheld the district court's finding that Dr. Eliason failed to utilize any established medical standard of care in evaluating Ms. Edmo's need for gender confirmation surgery, *id.* at 59-62, and recognized that, even according to the criteria Dr. Eliason "invented," Ms. Edmo "should have been provided GCS." *Id.* at 62. Specifically, the Court of Appeals upheld the district court's determination that:

> Dr. Eliason's evaluation was not an exercise of medically acceptable professional judgment. Dr. Eliason's decision was based on inexplicable criteria far afield from the recognized standards of care and, even applying Dr.

> Eliason's criteria, Edmo qualifies for GCS. Given the credited expert testimony that GCS is necessary to treat Edmo's gender dysphoria, Dr. Eliason's contrary determination was 'medically unacceptable under the circumstances.'

Id. at 62-63 (citation omitted).

Because Dr. Eliason recognized that Ms. Edmo's gender dysphoria "had risen to another level" and knew that Ms. Edmo was experiencing clinically significant distress and had attempted to castrate herself, but he "nonetheless continued with Edmo's ineffective treatment plan," the Court of Appeals affirmed the district court's holding that Dr. Eliason acted in conscious disregard of an excessive risk to Ms. Edmo's health. Stay App. Exh. D at 63-64. The Court also noted Dr. Eliason's ongoing deliberate indifference before and after Ms. Edmo's second self-castration attempt. Dr. Eliason failed to "reevaluate or recommend a change to Edmo's treatment plan, despite indicating in his April 2016 evaluation that he would continue to monitor and assess Edmo's condition." *Ibid.* The Court of Appeals specifically noted that "[a]n inadvertent or negligent failure to provide adequate medical care is insufficient to establish a claim under the Eighth Amendment." *Id.* at 49. Based on the specific facts of this case, however, the court held that "the record shows that the medically necessary treatment for a prisoner's gender dysphoria is gender confirmation surgery" and the "responsible prison officials [had] den[ied] such treatment with full awareness of the prisoner's suffering" in violation of the Eighth Amendment. *Id.* at 84.

Following the Court of Appeals' decision, Applicants sought rehearing en banc, which the court denied on February 10, 2020. Stay App. Exh. F at 5.

REASONS THE STAY SHOULD BE DENIED

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves v.* Barnes, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Applicants cannot satisfy their burden on *any* of these factors, let alone all of them. On the merits, there is no realistic probability that this Court will choose to review or reverse the lower courts' case-specific resolution of Ms. Edmo's Eighth Amendment claim, which involved an "analysis . . . individual to Edmo and rest[ed] on the record in this case," including extensive evidentiary and credibility determinations made by the district court in its role as factfinder. Stay App. Exh. D at 10. Nor can Applicants demonstrate that the balance of equities weighs in favor of a stay, given the irreparable harm Ms. Edmo suffers each day Applicants refuse to provide her necessary medical treatment. Applicants' request for a stay should be denied.

I. This Court Is Unlikely to Grant Review

The issues litigated by the parties in this case were whether gender confirmation surgery is medically necessary for Ms. Edmo, given her particular circumstances, and whether Applicants were deliberately indifferent to her serious medical needs in violation of the Eighth Amendment when they refused to provide

that surgery. Stay App. Exh. D at 9. The district court resolved those factual questions based on an extensive record and with the benefit of live testimony that facilitated the court's credibility determinations. The Court of Appeals affirmed the district court's decision, observing that "[t]he district court's detailed factual findings were amply supported by its careful review of the extensive evidence and testimony." *Ibid*. The Court of Appeals "emphasize[d] that the analysis here is individual to Edmo and rests on the record in this case," and it did "not endeavor to project whether individuals in other cases will meet the threshold to establish an Eighth Amendment violation." *Id.* at 10. Applicants cannot show that this Court is likely to grant review of the factbound Eighth Amendment claim in this case. *See United States v. Johnston,* 268 U.S. 220, 227 (1925) (this Court "do[es] not grant . . . certiorari to review evidence and discuss specific facts.").

In an effort to manufacture an issue warranting this Court's review, Applicants mischaracterize the Court of Appeals' decision and contend that the court adopted the WPATH Standards of Care as "constitutional requirements" in purported conflict with decisions from other courts of appeals. Application at 16. But the Court of Appeals did no such thing. The Court expressly stated that a "deviation from those standards does not alone establish an Eighth Amendment claim." Stay App. Exh. D at 56. The court observed that Applicants had "acknowledged at the evidentiary hearing" that "the 'WPATH standards of care . . . provide the best guidance' and 'are the best standards out there'" and that all experts in the case—including Applicants' experts—had "used the WPATH Standards of Care as a starting point" for evaluating

Ms. Edmo's need for gender confirmation surgery. *Id.* at 54 n.16 (citation omitted).[6] Given the focus of the experts on the WPATH standards and the Applicants' admission that those standards "provide the best guidance," the Court of Appeals observed that "the WPATH Standards of Care establish a useful starting point for analyzing the credibility and weight to be given to each expert's opinion and whether that opinion was consistent with established standards of care." *Ibid.* The Court of Appeals' fact-specific application of the WPATH Standards of Care, which Applicants themselves had endorsed, sets forth no bright-line legal rule warranting this Court's review.

Nor does the Ninth Circuit's evaluation of the WPATH Standards of Care conflict with the approach of any other court of appeals. Applicants contend that the Eleventh Circuit in *Keohane* "implicitly" "refused to find that the WPATH standards set the constitutional minima for medical care for transgender inmates." Application at 21. But the Eleventh Circuit's decision did not even address the WPATH

[6] Although Applicants now contend that the WPATH Standards of Care are "advocacy" rather than evidence-based medical standard of care, the uncontroverted evidence presented below supported the district court's observation that those standards are "internationally recognized guidelines for the treatment of individuals with gender dysphoria"—an observation so unobjectionable that "[Applicants] d[id] not contest [it]" in the Court of Appeals. Stay App. Exh. D at 55 n.16. As noted, the WPATH Standards of Care have been endorsed by every major health organization in the United States, including the National Commission on Correctional Health Care, which Applicants' experts lauded as a key organization that establishes correctional medical care standards. Stay App. Exh. D at 67-68; *see Campbell v. Kallas*, 936 F.3d 536, 538, 549 (7th Cir. 2019) (referring to the WPATH Standards of Care as the "accepted national standards," and noting that "[t]he parties cite the Standards extensively and treat them as authoritative.").

Standards of Care. Similarly, Applicants' claim that the Tenth Circuit "implicitly" refused to "enshrine the WPATH Standards as constitutional minima," (Application at 20), ignores the fact that the Tenth Circuit in *Lamb v. Norwood* revised its opinion specifically to omit earlier language stating that there is no governing medical consensus on the appropriateness of gender dysphoria treatment and that scientific advances in the understanding of gender dysphoria need not be considered. *Compare* 895 F.3d 756, 759-60 (10th Cir. 2018) *with* 899 F.3d 1159, 1162 (10th Cir. 2018), *cert. denied*, 140 S. Ct. 252 (2019). Moreover, the *pro se* prisoner plaintiffs in *Lamb* and *Druley v. Patton*, 601 F. App'x 632, 634-35 (10th Cir. 2015), presented no expert evidence about the meaning and application of the WPATH Standards of Care, and the district courts in those cases accordingly had no bases to consider that issue. In this case, in contrast, all experts (including Applicants' experts) "relied on the WPATH Standards of Care in rendering an opinion," fully justifying the Court of Appeals' conclusion that the district court had "appropriately used them as a starting point to gauge the credibility of each expert's testimony." Stay App. Exh. D at 14, 54 n.16.

Applicants' assertion that this case implicates a circuit split is accordingly incorrect. As the Court of Appeals recognized, "settled Eighth Amendment jurisprudence . . . requires a fact-specific analysis of the record (as construed by the district court) in each case" and "important factual differences between cases" can "yield different outcomes" under the applicable legal rules. Stay App. Exh. D at 65-67. Other courts of appeal to consider the issue have followed the same fact-based

approach in evaluating whether denial of a particular treatment for gender dysphoria for a given prisoner violates the Eighth Amendment. *See Id.* at 67 (recognizing that the Ninth Circuit's "approach mirrors the First Circuit's" in *Kosilek*, with the resolution of the Eighth Amendment claims turning on the particular facts and "medical evidence" in each case);[7] *see also Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1277 (11th Cir. 2020) (declining to find an Eighth Amendment violation "[i]n light of the disagreement among the testifying professionals about the medical necessity of" the treatment sought by plaintiff); *Kosilek v. Spencer,* 774 F.3d 63, 91 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 2059 (2015) ("[T]his case presents unique circumstances; we are simply unconvinced that our decision on the record before us today will foreclose all litigants from successfully seeking [gender confirmation surgery] in the future. Certain facts in this particular record—including the medical providers' non-uniform opinions regarding the necessity of [gender confirmation surgery], Kosilek's criminal history, and the feasibility of postoperative housing—were important factors impacting the decision."). This Court has consistently declined to grant certiorari review of these cases, in keeping with its general approach to Eighth Amendment deliberate indifference medical care cases.

[7] Notably, the individualized factors that the First Circuit cited as reasons that surgery was not appropriate for Ms. Kosilek have now been resolved, and she is being scheduled for gender confirmation surgery by the Massachusetts Department of Corrections and its medical contractor. *See* Stay Opp. Exh. C at 12 (but noting that "[c]urrently there is a waiting list for surgery of about twenty-two months").

Nor can Applicants establish that this Court's review is warranted because the Fifth Circuit assertedly "held it could never be deliberate indifference to deny sex reassignment surgery as treatment for gender dysphoria." Application at 18 (discussing *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019)). Applicants have not advanced any argument for such a bright-line rule in this case; instead, Applicants agreed that "in certain circumstances, gender confirmation surgery . . . can be a medically necessary treatment for gender dysphoria," and "[t]he parties' dispute center[ed] around whether GCS is medically necessary *for Edmo*" based on her particular circumstances. Stay App. Exh. D at 9 (emphasis added). In other words, Applicants in this case have never disputed that GCS is a medically necessary treatment for some patients with gender dysphoria and that, if such a patient were incarcerated in IDOC, they would be constitutionally obligated to provide that treatment and would do so. *See, e.g.,* Stay Opp. Exh. A at 6 ("I also wanted to mention that, you know, the Idaho Department of Corrections and Corizon don't have a blanket policy prohibiting SRS. And, in fact, witnesses from both sides testified that they allow all treatment options and even SRS if it's medically necessary. And so a lot of the cases that are being cited by plaintiff's counsel are cases where there was a blanket prohibition against one of these treatment options, hormones, or sex reassignment surgery. That's not this case."). This case therefore does not present the question of whether a prison policy categorically banning gender confirmation surgery violates the Eighth Amendment. *Cf. Kosilek*, 774 F.3d at 91 (noting that its decision upholding the adequacy of Massachusetts Department of Correction's

treatment of plaintiff without gender confirmation surgery did *not* "create a de facto ban against [sex reassignment surgery] as a medical treatment for any incarcerated individual.").

Because Applicants do not seek a categorical rule that gender confirmation surgery can never be an appropriate treatment for prisoners with gender dysphoria, this case provides no opportunity for this Court to consider such a claim. Any asserted conflict with *Gibson* is further undermined by the "sparse record" in that case, which was litigated by a *pro se* prisoner plaintiff and resolved by the district court in pre-discovery proceedings without any expert evidence about the medical standard of care for gender dysphoria or evidence about the plaintiff's individual medical condition or need for gender confirmation surgery, 920 F.3d at 220-21, 223-24, 230. In contrast, the Ninth Circuit reviewed the district court's extensive findings of fact regarding the medical standard of care and Ms. Edmo's individual need for treatment following a three-day evidentiary hearing and submission of other evidence for clear error, and found them to be well-supported by the record.

Applicants are also wrong to suggest that the lower court decisions in this case have resulted in a surge of cases filed by transgender prisoners demanding particular medical treatments. As with many other prison medical care issues, this issue has been consistently raised in courts across the country for many years. *See, e.g.,* Stay App. Exh. D at 84 ("Our court and others have been considering Eighth Amendment claims brought by transgender prisoners for decades."). Nor is it unusual for courts to evaluate updated information in Eighth Amendment medical care cases. *See id.*

("[T]he medical community's understanding of what treatments are safe and medically necessary to treat gender dysphoria has changed as more information becomes available, research is undertaken, and experience is gained. The Eighth Amendment inquiry takes account of that understanding.").

Finally, Applicants cannot establish that the Court of Appeals departed from this Court's settled Eighth Amendment precedent. While Applicants assert (Application at 26) that the Court of Appeals "water[ed] down *Estelle*'s deliberate indifference standard into a 'mere negligence' test," the Court of Appeals in fact specifically noted that "[a]n inadvertent or negligent failure to provide adequate medical care is insufficient to establish a claim under the Eighth Amendment," Stay App. Exh. D. at 49. Similarly, while Applicants contend (Application at 30) that the Court of Appeals ignored this Court's decision in *Farmer*, which requires a showing that "the official kn[ew] of and disregard[ed] an excessive risk to inmate health or safety," 511 U.S. at 837, the Court of Appeals in fact specifically cited this standard and found it satisfied, concluding based on the extensive evidentiary record "that Dr. Eliason knew of and disregarded the substantial risk of severe harm to Edmo." Stay App. Exh. D at 64 (citing *Farmer*, 511 U.S. at 837). Applicants' factbound disagreement with the Court of Appeals' application of settled Eighth Amendment precedent provides no basis for—and no likelihood of—this Court's review.

II. Applicants Have Failed to Show a Fair Prospect that a Majority of the Court Will Reverse the Judgment

Even if Applicants could establish a likelihood that this Court would grant certiorari, they have not demonstrated that this Court would likely reverse on the

merits of the case. *See Hollingsworth*, 558 U.S. at 190 ("[A]n applicant must show . . . a fair prospect that a majority of the Court will vote to reverse the judgment below."). The district court held, and a unanimous panel of the Ninth Circuit affirmed, that under the Eighth Amendment, Applicants are obligated to provide medically necessary surgery to Ms. Edmo to treat her acute gender dysphoria. Those decisions faithfully apply *Estelle, Farmer,* and their progeny, and are rooted in factual and credibility determinations to which this Court defers.

In this case, the district court held a three-day evidentiary hearing, heard from live witnesses, evaluated their credibility, reviewed thousands of pages of documents, and issued lengthy findings of fact and conclusions of law in support of its decision. The Court of Appeals found the district court's decision to be well-grounded in facts, and deferred to the district court's reasoned credibility determinations. The Court of Appeals further held that the district court squarely applied decades of Eighth Amendment precedent to evaluate the deliberate indifference claim based on the facts and evidence unique to Ms. Edmo's circumstance. *See* Stay App. Exh. D at 65 ("Our decision cleaves to settled Eighth Amendment jurisprudence, which request a fact-specific analysis of the record (as construed by the district court) in each case.").

Applicants provide no basis for this Court to second-guess the factual findings below, which were based on an assessment of each witness's qualifications and credibility and the weight of the evidence in the case. *Cf. Graves*, 405 U.S. at 1203-04 ("A lower court judgment, entered by a tribunal that was closer to the facts . . . is entitled to a presumption of validity. . . . The case received careful attention by the

three-judge court, the members of which were 'on the scene' and more familiar with the situation than the Justices of this Court; and the opinions attest to a conscientious application of principles enunciated by this Court."). And, while Applicants now attempt to repudiate the WPATH Standards of Care as a reference point for determining the reasonableness of Applicants' treatment decisions, Applicants took the opposite position before the district court. *See, e.g.,* Stay Opp. Exh. A at 8-9 ("This is not a case where the defendants have denied or refused to recognize the WPATH, which we have referred to as standards. . . . And no one with the defendants has said that they should not be applied in a correctional institution."). Applicants agreed below that the WPATH Standards of Care provided the relevant starting point for evaluating Ms. Edmo's claim; they explicitly acknowledged that no other accepted standard of medical care for gender dysphoria exists, and their experts and medical providers—including Dr. Eliason—testified that they rely on the WPATH Standards of Care when treating incarcerated individuals. Stay App. Exh. D at 14, 24-25, 34-37, 54-55, 60-61.

In adjudicating the Eighth Amendment claim in this case, the district court found that there is a well-established and effective treatment to alleviate or even cure Ms. Edmo's serious medical condition and that Applicants refused that treatment in favor of medical care they know is insufficient and results in her ongoing suffering. The evidentiary record established that gender confirmation surgery is a safe and effective treatment for individuals with severe gender dysphoria and that this treatment was medically necessary for Ms. Edmo, who experiences such profound

distress that she has attempted to castrate herself twice and now cuts her arms in an attempt to distract herself from her acute gender dysphoria. Whether one person or one hundred people have previously been provided gender confirmation surgery in prison is not relevant to determining whether that surgery is medically necessary for Ms. Edmo. Applicants do not dispute their obligation to provide gender confirmation surgery to a prisoner for whom it is medically necessary, and both federal courts below found that the record in this case establishes that such surgery is medically necessary for Ms. Edmo, and that Applicants have been deliberately indifferent in refusing to provide it. Because this Court has repeatedly emphasized that it does not sit to re-scrutinize such fact-based, evidentiary decisions by district courts, there is little probability that a majority of this Court will reverse the district court's judgment.

III. The Balance of Equities Weighs Heavily Against a Stay

In addition to failing to show that this Court is likely to grant review or reverse the Court of Appeals' judgment, Applicants have not established that they will suffer irreparable harm in the absence of a stay or that the balance of equities tips in their favor. *See Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers) ("In addressing the irreparable-injury issue, the task of a judge or Justice is to examine the competing equities, a task that involves balancing the injury to one side against the losses that might be suffered by the other." (internal alterations, quotations, and citations omitted)); *see also Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers) ("The conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*. . . .

It is ultimately necessary, in other words, to balance the equities." (internal quotations omitted)).

When balancing the equities here, the irreparable harm Ms. Edmo will suffer if she continues to be deprived of medically necessary care in violation of her Eighth Amendment rights far outweighs the theoretical harms Applicants claim. *See* 501 U.S. at 1305 (finding that if an applicant's irreparable harm is "vastly less severe" than the harm the respondent would suffer, a stay should not be granted). The district court made factual determinations, affirmed by the Court of Appeals, that Ms. Edmo suffers gravely each day without surgery and is at ongoing risk of life-threatening harm. *See* Stay App. Exh. A at 42; Stay App. Exh. B at 1, 3.

Applicants attempt to minimize Ms. Edmo's harm by ignoring her daily suffering and asserting, without any expert or evidentiary support, that she is unlikely to attempt a third self-castration. As the Court of Appeals found, "[t]hat argument overlooks the profound, persistent distress Edmo's gender dysphoria causes, as well as the credited expert testimony that absent GCS, Edmo is at risk of further attempts at self-castration, and possibly suicide." Stay App. Exh. D at 75; *see also* Stay App. Exh. B at 3 ("Ms. Edmo's testimony and that of her experts conclusively established, in the Court's opinion, that there is substantial risk that Ms. Edmo will make a *third* attempt to self-castrate if the Defendants continue to deny her gender confirmation surgery. In short, her medical needs are urgent."). In its August 2019 decision, the Court of Appeals emphasized the "nature and urgency of the relief at issue," and observed, "[a]lthough we addressed this appeal on an

expedited basis, it has been more than a year since doctors concluded that GCS is medically necessary for Edmo. We urge the State to move forward. We emphatically do not speak to other cases, but the facts of this case call for expeditious effectuation of the injunction." Stay App. Exh. D at 85.

The Court of Appeals also expressly rejected Applicants' contention, which Applicants repeat in this Court, that Ms. Edmo cannot establish irreparable injury because "GCS is not an emergency surgery" and the district court permitted "six months to provide such surgery." Stay App. Exh. D at 74; *see* Application at 38-39. The Court of Appeals noted, "[t]he State . . . ignores the rationale for the six-month time period. As Dr. Gorton explained, all patients who receive GCS 'are seen, they are evaluated, there is a process you have to go through.' In his experience, that process typically concludes within six months. That Edmo requested relief on a reasonable timeline, based on the medical evidence, does not undermine the strong evidence of irreparable injury." Stay App. Exh. D at 74-75.[8]

[8] Because the six months of presurgical treatment began in November 2019, Ms. Edmo will be ready for surgery in June 2020. She is scheduled for surgery in July 2020. A stay taking Ms. Edmo's surgery off the calendar pending the disposition of Applicants' certiorari petition could deny her that medically necessary treatment—which two courts have found is violating her Eighth Amendment rights—for an additional year or more. Applicants' chosen surgeon's surgery schedule generally fills more than six months in advance, and weeks of surgical aftercare are also required. Stay Opp. Exh. D at 16. The COVID-19 pandemic adds an additional complicating factor in terms of future scheduling and access to surgeries. *Cf.* Stay Opp. Exh. C at 12 ("It is unclear at this time what effect, if any, the COVID-19 pandemic will have regarding upcoming surgeries. Currently there is a waiting list for surgery of about twenty-two months.").

Against all this, Applicants assert that their appeal could become moot in the absence of a stay. But that circumstance does not automatically warrant issuance of a stay, as reflected by this Court's denial of stays of execution where the applicant seeks a stay pending this Court's or another appellate court's review. *See, e.g., Irick v. Tennessee*, 139 S. Ct. 1 (2018) (declining to stay execution to allow for appellate review of applicant's claims); *Warner v. Gross*, 135 S. Ct. 824 (2015) (denying stay of execution for four applicants, despite consequence that at least one would be executed while petition for certiorari was pending).

The cases Applicants cite do not establish that their claim of potential mootness entitles them to a stay from this Court. In *Republican State Cent. Comm. of Ariz. v. Ripon Soc. Inc.*, 409 U.S. 1222, 1224-27 (1972) (Rehnquist, J., in chambers), Justice Rehnquist recognized that the fact that a stay preserves an issue for review is just one factor that must still be balanced against the fact that such relief was denied by the lower courts.[9] In *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309-10 (1989) (Marshall, J., in chambers), while Justice Marshall recognized that potential mooting of an issue for review creates an irreparable injury, he granted a stay only after concluding that the respondent did not suffer any threat of irreparable harm, such that there was no countervailing consideration cutting against issuance of a stay. And in *N.Y. Nat. Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1311-12

[9] The other cases Applicants cite, *Nken v. Holder*, 556 U.S. 418 (2009) and *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942), are about the power of an appellate court to stay an order in order to preserve a party's appeal as of right.

(1976) (Marshall, J., in chambers), a stay was denied even though the case would become moot because the case involved deference to lower courts on a fact-intensive issue and did not warrant the "extraordinary" relief of a stay. The potential for mootness does not trump the irreparable harm to Ms. Edmo's health and safety that will occur if a stay is granted after the lower courts found that Applicants have been deliberately indifferent to her suffering and serious medical needs. *See* Stay App. Exh. B at 3 ("The Court is not persuaded that the Defendants will be irreparably injured absent a stay. Indeed, it is difficult to see how providing medical treatment to an inmate could ever constitute an irreparable injury.").

Applicants fail to establish any other cognizable irreparable harm. First, financial expenditure by a State does not constitute irreparable injury. *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (observing that injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough).[10] Applicants suggest that "requiring the government to pay money that it likely cannot recoup" constitutes irreparable injury (Application at 37), but in the cases they cite, both parties asserted financial injuries and the Court used the difference in ability to recoup as a balancing factor to distinguish between them. *See Ledbetter v. Baldwin*, 479 U.S. 1309, 1310-11 (1986) (Powell, J., in

[10] Even if a financial expenditure could constitute an irreparable injury, there is no evidence in the record—and Applicants cite none—to support Applicants' claim that provision of gender confirmation surgery to Ms. Edmo will cost Idaho taxpayers any extra money. In fact, the cost of Ms. Edmo's gender confirmation surgery is already covered by the State's existing contract with Corizon. *See* Stay Opp. Exh. E at 32.

chambers); *Heckler v. Turner*, 468 U.S. 1305, 1307-09 (1984) (Rehnquist, J., in chambers). In contrast, where, as here, the balance of hardships involves economic harm on one side, and danger to human life and health on the other side, the balance of equities weighs in favor of those at risk of serious medical injury or death. *Blum v. Caldwell*, 446 U.S. 1311, 1316 (1980) (Marshall, J., in chambers).

Applicants likewise cannot show that "Dr. Eliason will suffer severe harm" absent a stay because the Court of Appeals found he was deliberately indifferent to Ms. Edmo's serious medical needs. Application at 37. Applicants fail to cite any authority that an individual defendant's future, speculative chance of possibly disproving his liability in a case constitutes irreparable harm for purposes of a stay. Particularly when weighed against the factual finding that "Edmo is at risk of further attempts at self-castration, and possibly suicide" absent the medically necessary surgery, Stay App. Exh. D at 75, concerns about Dr. Eliason's reputation do not tip the balance of the equities in favor of a stay. Finally, Applicants' claim that Idaho "will suffer irreparable harm to its prison system if the Ninth Circuit's decision is allowed to stand" is similarly unsupported and does not constitute irreparable injury. The district court's decision was tailored to Ms. Edmo and her individual circumstances and neither the district court's injunction nor the Court of Appeals decision affirming it mandates any particular result with respect to other prisoners who have serious medical conditions.

Applicants also place great weight on their argument that the Court of Appeals "implicitly" found that the balancing of the equities weighs in their favor when it

initially granted a stay in March 2019 to consider (on an expedited basis) Applicants' appeal as of right. Application at 38. That argument ignores that after the Court of Appeals considered the case on the merits and had an opportunity to evaluate the facts and the record, it unanimously *rejected* Applicants' motion for a stay pending their petition for a writ of certiorari in this Court. Stay App. Exh. G at 2. At this juncture, with full knowledge of the record of the case, the Court of Appeals has concluded that the balance of equities favors Ms. Edmo and not Applicants. That decision is presumed valid and is entitled to substantial deference from this Court, especially where the Court of Appeals lifted its original stay and denied the motion for a new stay. *Blum*, 446 U.S. at 1315; *see also Graddick v. Newman*, 453 U.S. 928, 934-35 (1981) ("[A] Circuit Justice should show great reluctance, in considering in-chambers stay applications, to substitute his view for that of other courts that are closer to the relevant factual consideration that so often are critical to the proper resolution of these questions." (internal quotations and alternation omitted)); *cf. Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 434 U.S. 1316, 1319 (1977) (Marshall, J., in chambers) ("Since the Court of Appeals was quite familiar with this case, having rendered a thorough decision on the merits, its determination that stays were warranted is deserving of great weight, and should be overturned only if the court can be said to have abused its discretion.").

Balancing the equities tips sharply in favor of denying a stay and permitting the district court to effectuate its order requiring Applicants to provide Ms. Edmo the treatment she desperately needs. Even if the Court were to find this to be a close

question, however, it should resolve any doubt in favor of Ms. Edmo: "Whether or not the plaintiffs prevail in this Court, the fact is that they did in the District Court. . . . Balancing the equities is always a difficult task, and few cases are ever free from doubt. Where there is doubt, it should inure to the benefit of those who oppose grant of the extraordinary relief which a stay represents." *Williams*, 442 U.S. at 1315-16.

CONCLUSION

For all of these reasons, the application for stay should be denied.

Respectfully submitted,

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MAY 18, 2020

RESPONDENT'S EXHIBITS TO OPPOSITION TO APPLICATION FOR STAY PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

INDEX

EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

ADREE EDMO (a/k/a MASON EDMO), Plaintiff, vs. IDAHO DEPARTMENT OF CORRECTION; HENRY ATENCIO, in his official capacity; JEFF ZMUDA, in his official capacity; HOWARD KEITH YORDY, in his official and individual capacities; CORIZON, INC.; SCOTT ELIASON; MURRAY YOUNG; RICHARD CRAIG; RONA SIEGERT; CATHERINE WHINNERY; and DOES 1-15, Defendants.	CASE NO. 1:17-cv-00151-BLW **EVIDENTIARY HEARING DAY 3**

TRANSCRIPT OF PROCEEDINGS - VOLUME 3
BEFORE THE HONORABLE B. LYNN WINMILL
FRIDAY, OCTOBER 12, 2018, 8:37 A.M.
BOISE, IDAHO

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I N D E X

OCTOBER 12, 2018 - VOLUME 3

D E F E N D A N T S' W I T N E S S E S

J O I N T E X H I B I T S

PLAINTIFF EXHIBITS

DEFENDANTS' EXHIBITS

that -- who is going to measure that? Does it mean something more than just simply controlled enough that we can make sure that she, in fact, cooperates with the surgery and the follow-up and whatnot?

Now, you may dispute that given the problems that she has had while incarcerated.

MR. EATON: Well, I think, in part, that's why there needs to be a lot of deference to the clinical judgment of the clinicians and the therapists and the medical providers in trying to help work through those things before SRS may be indicated at some other time.

Additionally, I think you do bring up a good point, which is when you talk about the WPATH, there is the criteria for an informed consent, and then there is a separate criteria for -- that the mental health conditions need to be well controlled.

And I think Your Honor picked up on it, but their experts and plaintiffs want to lump those together. And I think that's telling. They don't want to distinguish that you have to have well-controlled mental health issues. They want to say: Well, that's solely just so they can have informed consent, and they just want to make it about psychosis only.

And that's not what the WPATH says. It wants to have things in order so that there can be good coping mechanisms before and after surgery, and that there has been time spent in an appropriate community in the outside community before that

sex reassignment surgery is performed, so that after, they know what that experience is going to be like. As you heard the experts talk about, that's a clinical point.

I also wanted to mention that, you know, the Idaho Department of Corrections and Corizon don't have a blanket policy prohibiting SRS. And, in fact, witnesses from both sides testified that they allow all treatment options and even SRS if it's medically necessary.

And so a lot of the cases that are being cited by plaintiff's counsel are cases where there was a blanket prohibition against one of these treatment options, hormones or sex reassignment surgery. That's not this case.

As to the other issue that Your Honor picked up on, this is a mandatory injunction, and it's not to be taken lightly. And the Ninth Circuit, in *Garcia v. Google, Inc.*, summarized some of the case law in this regard.

> "This relief is treated as a mandatory injunction because it orders the responsible party to take action. As we have cautioned, a mandatory injunction goes well beyond simply maintaining the status quo and is particularly disfavored. The district court should deny such relief unless the facts and law clearly favor the moving party. In plain terms, mandatory injunction should not be issued in doubtful cases."

This is not a clear case by plaintiffs in any regard. And

self-harming behavior preincarceration, and that there was no mention of gender dysphoria or those type of comments in those preincarceration records. And now she is cutting herself again, and at least our experts indicated that that could be related to borderline personality disorder or other, you know, mental health issues as well.

So unless Your Honor has any other comments --

THE COURT: No, that's fine.

MR. EATON: -- we'll reserve the rest of our -- rest of our argument for briefing.

I would just close by saying that we do believe that the motion for preliminary injunction should be denied in all respects, and that there is no proof of likelihood of success on deliberate indifference. And there are concerns about harm after SRS, and Your Honor needs to take that into consideration when you hopefully deny it.

Thank you.

THE COURT: Thank you.

Mr. Hall.

MR. HALL: Is there any time remaining?

LAW CLERK: Nine and a half minutes.

THE COURT: I'll give you 10.

MR. HALL: Very generous, Your Honor.

I think I heard the words "ignorant" and "prejudiced." That's a first because usually only my wife calls me ignorant.

I think that I would like to end where I began, Your Honor, and just highlight that this case is about a difference in medical opinion made by professionals, and that is not deliberate indifference alone.

This is not a case where the defendants have denied or refused to recognize the WPATH, which we have referred to as standards. But the WPATH, admittedly, agrees that they are guidelines, that they are flexible guidelines to be provided and to provide recommendations to professionals who have to apply them on these highly complex mental health issues.

To say that or use the cancer analogy is not accurate here because, as we know, not everyone who has cancer is eligible, or is it appropriate for them to have chemotherapy.

The defendants, their experts, and plaintiff's experts disagree about the appropriateness of the guidelines, about the appropriateness of surgery at this time. And that is not deliberate indifference to have engaged in a thoughtful analysis.

And are they the experts on this evolving area of the world? That's -- that's debatable, plaintiff's as well. Plaintiff's experts come from one portion of this debate.

They have zero experience in correctional -- in the correctional world; yet, both Dr. Gorton and Dr. Ettner sit on a committee that appears to be prepared to dictate how they should be applied in a correctional institution.

And no one with the defendants has said that they should not be applied in a correctional institution. They are just saying: We need to apply that flexibility so that we can do the right thing and do no harm. And they disagree that Ms. Edmo actually meets all the criteria.

Your Honor, I fail to see how that is deliberate indifference to any medical need -- to recognize the treatment options, to provide treatment, but to decide that one potential treatment option, one appropriate treatment option is not appropriate at this time.

This case is, in essence, asking this court to step in, exercise its own judgment, and determine whether or not it's appropriate, whether she meets the criteria despite this dispute over whether or not it is appropriate at this time.

Plaintiffs want to advance an argument that there is only two experts in this world, two individuals in this world who could have done the right thing for Ms. Edmo, that they have the most experience; so, therefore, what they say is right.

Now, they never treated Ms. Edmo. They never had that patient-provider relationship. Defendants' employees, defendants' doctors, defendants' mental health clinicians, they did, and they have taken that seriously.

I think it would be a dangerous precedent to have the court step in whenever there is a debate as to whether or not a patient in a correctional institution meets the criteria for

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 29 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ADREE EDMO, AKA Mason Edmo, Plaintiff-Appellee, v. CORIZON, INC.; et al., Defendants-Appellants, and IDAHO DEPARTMENT OF CORRECTIONS; et al., Defendants, UNITED STATES OF AMERICA, Real-party-in-interest.	No. 19-35017 D.C. No. 1:17-cv-00151-BLW District of Idaho, Boise ORDER

ADREE EDMO, AKA Mason Edmo, Plaintiff-Appellee, v. IDAHO DEPARTMENT OF CORRECTIONS; et al., Defendants-Appellants, and	No. 19-35019 D.C. No. 1:17-cv-00151-BLW

KAM/MOATT

CORIZON, INC.; et al.,

Defendants,

UNITED STATES OF AMERICA,

Real-party-in-interest.

Before: TALLMAN and MURGUIA, Circuit Judges.

Appellee's motion for modification of the court's March 20, 2019 order (Docket Entry No. 22 in No. 19-35017) is granted. This court's stay of the district court's December 13, 2018 order does not apply to or otherwise affect the already scheduled presurgical consultation.

The consolidated opening brief has been filed. The consolidated answering brief remains due April 3, 2019. The optional consolidated reply brief is due within 14 days of service of the consolidated answering brief.

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 18-cv-11838-ADB

MICHELLE LYNNE KOSILEK
Plaintiff

v.

THOMAS A. TURCO, III
Defendant

DEFENDANT'S UPDATED STATUS REPORT

Defendant, through counsel, respectfully submits the following updated status report pursuant to the Court's Order dated April 29, 2020.

Since the defendant's last status report on March 6, 2020, the Gender Dysphoria Treatment Committee voted to move forward with gender confirmation surgery for Ms. Kosilek. DOC Health Services has been informed that it is the intent of Wellpath, the Department's independent medical provider, to refer Ms. Kosilek to Boston Medical Center (BMC) Transgender Health. Providers at BMH Transgender Health will make any further determinations based upon their clinical plan and the informed consent of Ms. Kosilek. It is unclear at this time what effect, if any, the COVID-19 pandemic will have regarding upcoming surgeries. Currently there is a waiting list for surgery of about twenty-two months. The Department has not yet received a formal report from the GD Treatment Committee. As of this date, Ms. Kosilek continues to be housed at MCI-Framingham and continues to do well at that facility.

With respect to Ms. Kosilek's allegations contained in her Motion for Clarification, the defendant is not aware of what, if any, conversations that Ms. Kosilek may have had with mental health providers who are employed by the Department's independent

medical provider Wellpath. However, Ms. Peterson adamantly denies that she ever instructed anyone not to provide Ms. Kosilek with relevant documents relating to her health and/or treatment recommendations.

In light of the above, no discovery has taken place to date. Defendant anticipates filing a Motion to Dismiss or a Motion for Summary Judgment in this matter in the near future.

Dated: April 30, 2020

Respectfully submitted,
NANCY ANKERS WHITE
Special Asst. Attorney General

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CERTIFICATE OF SERVICE

I, Mary Eiro-Bartevyan, counsel for defendant, hereby certify that on April 30, 2020, I served a copy of the forgoing document on the plaintiff, by first class mail, postage prepaid, to her address below, and on all other parties through the Court's electronic filing system (ECF).

Michelle Lynne Kosilek, Pro Se
99 Loring Drive
Framingham, MA 01702

Dated: 4/30/2020

/s/ *Mary Eiro-Bartevyan*
Mary Eiro-Bartevyan

EXHIBIT D

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADREE EDMO (a/k/a MASON EDMO),
Plaintiff-Appellant,

vs.

IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellees.
and
CORIZON, INC., et al.,
Defendants-Appellees.

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

PLAINTIFF-APPELLEE'S EMERGENCY MOTION TO MODIFY THE STAY ORDER PENDING APPEAL
ACTION IS NECESSARY BEFORE APRIL 8, 2019

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RULE 27-3(a) CERTIFICATION

On December 13, 2018, the District Court issued a preliminary injunction ordering 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." *Id.* The Court's Order thus set the deadline for surgery as June 13, 2019. However, Defendants represented to the District Court prior to this Court's entry of a stay pending appeal that they were unable to obtain an initial pre-surgical consultation for Ms. Edmo with their selected surgeon sooner than mid-April 2019, four months after the Court's Order. This appointment is a necessary pre-requisite for surgery and Defendants have indicated that the surgeon requires it to take place weeks or months prior to the surgery. The surgeon has an average waiting list of six to eight months for surgeries and is typically fully booked for all other appointments, including the type of appointment currently scheduled for Ms. Edmo. If the mid-April appointment is not kept, Ms. Edmo will be at risk of significant delays in necessary treatment should this Court affirm the District Court's order requiring provision of gender confirmation surgery to Ms. Edmo. Therefore, maintaining this appointment is essential to preserving Ms. Edmo's right to timely and necessary medical treatment while Defendants' appeal is pending.

Plaintiff also certifies that on March 22, 2019, Plaintiff's counsel notified counsel for Defendants by phone and email that Plaintiff intended to file the instant

Motion and served counsel with the Motion.

The telephone numbers, addresses, and email addresses of attorneys for the parties are as follows:

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Attorney for Plaintiff-Appellee Adree Edmo

EMERGENCY MOTION

Pursuant to Circuit Rules 27-10 and 27-2, Plaintiff Adree Edmo files this emergency motion to request that this Court narrowly modify the Stay Order issued on March 20, 2019, Dkt. 19, to exempt the initial, pre-surgical appointment Defendants scheduled between their preferred surgeon and Ms. Edmo for mid-April 2019. The pre-surgical appointment consists only of the surgeon's examination and interview of Ms. Edmo so that he can gather information necessary to determine the surgical approach appropriate for Ms. Edmo, what procedures or treatments she will require before surgery, and how long those procedures and treatments are expected to take. Maintaining this appointment is essential to preserving Ms. Edmo's right to timely and necessary medical treatment while Defendants' appeal is pending and to ensure there is not a dangerous delay in provision of such medical care if the District Court's preliminary injunction is affirmed by this Court. Further, this narrow modification to the Stay Order will not render any issues contained in Defendants' appeal on the merits moot, nor otherwise irreparably harm Defendants in any way.

On December 13, 2018, the District Court issued a preliminary injunction ordering 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." *Id.* The Court's Order thus set the deadline for surgery as June 13, 2019. However, Defendants represented to the District Court prior to

entry of this Court's Stay that they were unable to obtain an initial, pre-surgical consultation for Ms. Edmo with their selected surgeon sooner than mid-April 2019, four months after the District Court's Order. This appointment is a necessary pre-requisite for surgery and Defendants have indicated that the surgeon requires it to take place weeks or months prior to the surgery. The surgeon has an average waiting list of six to eight months for surgeries and is typically fully booked for all other appointments, including the type of appointment currently scheduled for Ms. Edmo. Thus, even under the expedited hearing schedule the Court of Appeals has granted in consideration of the gravity of Ms. Edmo's medical concerns, if the mid-April appointment is not kept, Ms. Edmo will be at risk of significant delays in necessary treatment should this Court affirm the District Court's order requiring provision of gender confirmation surgery to Ms. Edmo.

To preserve Ms. Edmo's right to critically necessary care the District Court has ruled is urgently needed, and to protect Ms. Edmo from dangerous delays in the provision of such care should the appeal be resolved in her favor,

/ / /

/ / /

/ / /

Plaintiff respectfully requests this narrow modification of the Stay Order to clarify that Ms. Edmo's currently scheduled mid-April appointment with the surgeon shall proceed pursuant to the District Court's order.

DATED: March 22, 2019

Respectfully submitted,
NATIONAL CENTER FOR
LESBIAN RIGHTS
FERGUSON DURHAM
HADSELL STORMER & RENICK LLP

By: s/ Lori Rifkin
Dan Stormer
Lori Rifkin
Shaleen Shanbhag
Attorneys for Plaintiff-Appellant

EXHIBIT E

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)

BRIEF OF *AMICUS CURIAE* JODY L. HERMAN IN SUPPORT OF APPELLEE ADREE EDMO AND URGING AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Jody L. Herman is a Scholar of Public Policy at the Williams Institute at UCLA School of Law. Her scholarship examines the fiscal impacts of discrimination against transgender people, employer-provided health benefits coverage for gender transition, the development of questions to identify gender minorities on population-based surveys, and minority stress, health, and suicidality among transgender people. She leads the Williams Institute's research on gender identity. The Williams Institute is an academic center dedicated to conducting rigorous and independent research on sexual orientation and gender identity issues.

Herman coauthored the groundbreaking report *Injustice at Every Turn*, based on the National Transgender Discrimination Survey ("NTDS"). She also served as Co-Principal Investigator for the follow-up to the NTDS: the 2015 U.S. Transgender Survey, which had almost 28,000 respondents and is the largest survey to date of transgender adults in the United States. She co-authored *The Report of the 2015 U.S. Transgender Survey*, which describes findings from this survey. She is also the author of *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans*, a study that describes the experiences of 34 private employers who provide transition-related coverage in their health benefits plans. Many national and international media outlets routinely feature her work.

As a scholar who specializes in interpreting healthcare data for transgender people, Herman has a substantial interest in this matter. She believes that her academic experience and the research and data presented herein will contextualize the present dispute within the larger policy debate about the cost of healthcare for transgender prisoners in Idaho.[1]

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the *amicus curiae* or her counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5).

I. BACKGROUND

As described in detail in the district court's order, Appellee was diagnosed with gender dysphoria while serving a prison term in Idaho.[2] Despite meeting the diagnostic criteria for receiving gender confirmation surgery ("GCS"),[3] Appellee was denied this care by Defendants-Appellants.[4] *Id.* at 22-25.

Just as in the healthcare debate over transgender troops serving in the U.S. military,[5] cost appears to be an outsized factor motivating Appellants' refusal to

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[2] Findings of Fact, Conclusions of Law, and Order, *Edmo v. Idaho Dept., of Correction, et al.*, Case No. 1:17-cv-00151-BLW (D. Idaho 2018), ECF No. 149 ("Order") at 18-22.

[3] Throughout this brief, *amicus* uses the term "GCS" to refer to genital gender confirmation surgeries – the focus of the district court's order on appeal. *See* Order at 45; Evidentiary Hearing Transcript, *Edmo v. Idaho Dept., of Correction, et al.*, Case No. 1:17-cv-00151-BLW (D. Idaho), ECF Nos. 137-39 ("Tr.") at 200:16-20 (Appellee testified that she expected the results of gender confirmation surgery to be "hav[ing] the complete production of testosterone stopped and ultimately [her] genitals turned into a vagina."); *see also id.* at 73:9-13; *id.* at 319:22-320:1.

[4] Idaho Department of Corrections ("IDOC"), Henry Atencio; Jeff Zmuda; Howard Keith Yordy; Richard Craig; Rona Siegert; Corizon, Inc. ("Corizon"); Scott Eliason; Murray Young; and Catherine Whinnery (collectively, hereinafter "Appellants").

[5] *See, e.g.*, Paul Sonne and Ann E. Marimow, *Military to Begin Enforcing Trump's Restrictions on Transgender Troops*, The Washington Post, Mar. 13, 2019, https://www.washingtonpost.com/world/national-security/military-to-begin-enforcing-restrictions-on-trumps-transgender-troops/2019/03/13/cf2a0530-4587-11e9-9726-50f151ab44b9_story.html?utm_term=.b82bbc5d35b2 (quoting a July 2017 tweet from President Trump, announcing a ban on transgender individuals serving in the military because "[o]ur military . . . cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail"); Samantha Freeman and Anika Jagasia, *Cost Analysis of Transgender*

treat Appellee's gender dysphoria with surgery. Appellants' out-of-court statements, contract documents, and statements made in the context of prior proceedings demonstrate that healthcare cost considerations informed Appellants' decision to deny Appellee medical treatment, and have driven such decisions in the past. For example, in a press release announcing Appellants' decision to appeal the district court's ruling, Idaho Governor Brad Little stated that "[t]he hard working taxpayers of Idaho should not be forced to pay for a prisoner's gender reassignment surgery . . . . We cannot divert critical public dollars away from our focus on keeping the public safe and rehabilitating offenders."[6] In its 2013 Request for Proposal seeking a healthcare provider for its prison population, one of the primary objectives listed by IDOC was that the contractor "[o]perate a comprehensive healthcare delivery system that enables IDOC to control and predict the cost of Offender healthcare."[7] And, in the context of enforcing an

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Healthcare in the Military, Wharton Public Policy Initiative, May 23, 2018, https://publicpolicy.wharton.upenn.edu/live/news/2479-cost-analysis-of-transgender-healthcare-in-the.

[6] Press Release, Office of the Governor of Idaho, *Idaho Appeals Ruling in Transgender Inmate Surgery Case*, Jan. 9, 2019, https://gov.idaho.gov/pressrelease/idaho-appeals-ruling-in-transgender-inmate-surgery-case/.

[7] State of Idaho Department of Administration for the Department of Correction, *Request for Proposal (RFP): Healthcare Services for Adult Idaho Offenders*, July 30, 2013, at 8, https://www.muckrock.com/foi/idaho-228/corizon-health-contracts-idaho-department-of-corrections-19401/#file-48410.

injunction in a long running federal class action lawsuit brought by Idaho inmates, the District Court of Idaho found in 2007 that the clinical supervisor for the Idaho State Corrections Institute instructed clinicians "to not diagnose inmates with gender identity disorder . . . so that [the prison] would not have to pay for gender identity disorder treatment."[8]

As discussed in detail below, Appellants' concern about the cost of providing gender confirmation surgery cannot justify denying Appellee GCS. Budgetary concerns do not justify continuing violations of the Eighth Amendment. Moreover, Appellants' concerns about cost are unjustified. As set forth below, *amicus*'s cost projections demonstrate that any cost for offering GCS to covered inmates would be negligible.

II. SUMMARY OF ARGUMENT

The cost of providing treatment for gender dysphoria to Appellee and to similarly situated transgender prisoners in Idaho is already covered under the existing health care plan with Corizon.[9] Predicted costs of providing GCS as a

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[8] *Balla v. Idaho State Bd. of Corr.*, 119 F. Supp. 3d 1271, 1278-79 (D. Idaho 2015).

[9] Idaho taxpayers do not pay for prisoners' needs *a la carte*. Corizon agreed to provide treatment for gender dysphoria, a diagnosis formerly referred to as "Gender Identity Disorder," as part of its contract with IDOC. *See* Corizon, *Idaho Department of Correction Healthcare Services for Adult Idaho Offenders: Technical Proposal Request for Proposal Number 02540* (Sept. 30, 2013), at 93-95, https://www.muckrock.com/foi/idaho-228/corizon-health-contracts-idaho-department-of-corrections-19401/#file-48397. The current contract, which was

proportion of existing appropriations for the health care plan are *de minimis* and are therefore unlikely to affect future health care plan costs. *Amicus* analyzed the costs associated with providing GCS to transgender prisoners under IDOC's contract with private medical care provider Corizon. To conduct this analysis, *amicus* took the most recently available data regarding the Idaho prisoner population and the number of individuals diagnosed with gender dysphoria and data on the average cost of the GCS procedures. Using the prisoner and cost data, *amicus* developed several models based on other examples where transgender benefits are extended by the City of San Francisco, private companies, and the U.S. military. Given the estimates generated by each of the models, *amicus* concludes that the cost of offering the care sought by Appellee to her and other covered inmates would be negligible, both in absolute terms and when compared to the total costs of providing healthcare to prisoners in Idaho. In addition, providing GCS to transgender prisoners could result in cost savings to Appellants when compared to the ongoing costs related to untreated gender dysphoria.

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most recently extended for two years, expires in 2020. *See* Betsy Z. Russell, *Prison Health Contract Extended for Two Year, but Re-Bid Planned*, Idaho Press, Dec. 13, 2018, https://www.idahopress.com/news/local/prison-health-contract-extended-for-two-years-but-re-bid/article_51793122-f5a5-58c8-8cce-f4d5a648526d.html. Thus, barring any renegotiation, until the expiration of the contract, the cost to the state of Idaho and IDOC (and thus taxpayers) will remain fixed, including any previously-negotiated rate adjustments, no matter what policy Corizon adopts.

III. ARGUMENT

The Eighth Amendment imposes an obligation on the government to provide medical care for those whom it is punishing through incarceration. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Deliberate indifference to serious medical needs of prisoners which could result in the "unnecessary and wanton infliction of pain" is proscribed by the Eighth Amendment. *Id.* at 103-04. Budgetary concerns do not justify the denial of prospective relief from an Eighth Amendment violation.[10] Here, Appellants' generic cost concerns are an impermissible basis to deny medical care under the Eight Amendment.

Furthermore, Appellants' cost concerns are not a valid basis to oppose entry of a preliminary injunction. The Ninth Circuit has repeatedly held that in the context of a preliminary injunction, when "[f]aced with a conflict between financial concerns and preventable human suffering, . . . the balance of hardships

[10] *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) ("Lack of resources is not a defense to a claim for prospective relief because prison officials may be compelled to expand the pool of existing resources in order to remedy continuing Eighth Amendment violations."). *See also Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012), *overruled on other grounds by Peralta*, 744 F.3d at 1083 ("Evidence of an improper motive can support a conclusion that a defendant acted with deliberate indifference."); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986), *overruled on other grounds by Peralta*, 744 F.3d at 1083 ("Budgetary constraints . . . do not justify cruel and unusual punishment."); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) ("The cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment.").

tips decidedly in plaintiffs' favor."[11]

Moreover, as set forth below, Appellants' public suggestion that the medical care Appellee needs is costly is unjustified.

A. The Cost of Providing Gender Confirming Surgery ("GCS") to Covered Inmate Population Would Be Negligible.

Under the current Corizon healthcare plan, treatment for gender dysphoria is a covered treatment, and therefore, no additional costs should be incurred by Appellants for this type of health care under the current contract.[12] Notwithstanding the foregoing, using publicly available data, it is possible to estimate the proportion of total health care costs related to GCS in one year if GCS was made available to prisoners covered under the Corizon healthcare plan. Below, *amicus* provides several such cost estimates using different approaches and assumptions. Even when erring on the side of using conservative assumptions, *amicus* concludes that offering the type of care sought by Appellee to the broader covered inmate population would result in negligible costs, which would be unlikely to affect future health care plan costs.

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[11] *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983). *See also Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (quoting *Lopez*); *Golden Gate Rest. Ass'n v. City and Cnty. of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) (same); *Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004) (same); *Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004) (same).

[12] *See* note 9 *supra*.

B. The Size and Demographics of the Inmate Population Covered by Corizon's Healthcare Plan

The best publicly available data on the Idaho prisoner population under the jurisdiction of Appellants is dated June 2018.[13] As of that date, there were approximately 7,763 individuals under the Corizon healthcare plan. For purposes of the below calculations, *amicus* will use 7,800 as the total number of individuals covered by the Corizon healthcare plan.[14]

C. The District Court Found There are Currently 30 Prisoners with Gender Dysphoria Covered by Corizon's Healthcare Plan.

Appellee meets the diagnostic criteria for gender dysphoria. Gender dysphoria is the distress caused by incongruity between an individual's assigned

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[13] Idaho Department of Correction, Budget and Policy Division, Evaluation and Compliance Section, *Population Overview FY 2018*, https://www.idoc.idaho.gov/content/document/fy_2018_population_overvew (last visited Mar. 19, 2019).

[14] The approximate number of prisoners under the jurisdiction of Appellants' healthcare plan excludes parolees, individuals who are on probation, and individuals housed in county jails and "contract beds" from the total Idaho prisoner population. *See id.;* State of Idaho Department of Administration for the Department of Correction, *Request for Proposal (RFP)*, note 7 *supra*. Since the 2018 data maintained on the IDOC's website represents the most recent data broken down by facility, amicus used this data for her analysis. Data published by the Bureau of Justice Statistics shows that the total number of prisoners under the jurisdiction of state or federal correctional authorities in Idaho was higher (8,052 in 2015 and 8,252 in 2016). E. Ann Carson, *Prisoners in 2016*, U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Jan. 2018 at 4, Table 2. This difference is likely due to the BJS data including prisoners not covered by the Corizon healthcare plan. *See also*, *id.* at 6, Table 4 (estimating the population of prisoners sentenced to more than one year of incarceration in Idaho to be 7,255 and 7,376 for 2015 and 2016, respectively).

sex at birth and gender identity, which may be so strong and persistent that it impairs that individual's ability to function.[15]

Jeremy Junior Clark, a clinical supervisor for IDOC, testified for Appellants that as of the preliminary injunction hearing, there were 30 individuals diagnosed with gender dysphoria in IDOC custody. Tr. 322:21-323:3. This number was adopted by the district court's December 13, 2018 findings of fact. Order at 17, ¶ 28 ("There are currently 30 prisoners with gender dysphoria in IDOC custody."). Mr. Clark's estimate is consistent with the available data on the size of the adult transgender population in Idaho[16] as well as the size of the incarcerated transgender population found in the National Inmate Survey.[17]

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[15] *See* Eli Coleman et al., The World Professional Association for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7, at 5 (2011) ("WPATH Standards"), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf (last visited Apr. 6, 2019); Jaclyn M. White Hughto & Sari L. Reisner, *A Systematic Review of the Effects of Hormone Therapy on Psychological Functioning and Quality of Life in Transgender Individuals*, 1.1 Transgender Health 21, 21 (2016), https://www.liebertpub.com/doi/pdf/10.1089/trgh.2015.0008 (last visited Apr. 6, 2019).

[16] *See* Andrew R. Flores et al., *How many Adults Identify as Transgender in the United States*, Williams Institute (June 2016), at 3, Table 1 (approximately 0.41% of the adult Idaho population identify as transgender).

[17] *See* Jody L. Herman, et al., Presentation at American Public Health Association's APHA 2016 Annual Meeting & Expo, Prevalence, characteristics, and sexual victimization of incarcerated transgender people in the United States: Results from the National Inmate Survey (NIS-3), (Oct. 31, 2016) (national survey of inmates indicates 0.24% of the inmate population identifies as transgender).

Accordingly, for purposes of *amicus*' estimates below that rely upon either an estimate of the covered transgender population or the number of those with gender dysphoria, *amicus* uses the district court's finding of 30 individuals with gender dysphoria within the covered population.

D. Estimating the Typical Cost of GCS

Treatment of gender dysphoria varies based on the symptoms and needs of each individual and can include a range of interventions, including psychotherapy, social role transition, cross-sex hormones, and gender confirmation surgery. [18] While some individuals will require hormone therapy or GCS to alleviate their gender dysphoria, other individuals may not need either of these treatment options.[19]

The cost of GCS varies depending on the procedures needed for the individual patient. The available cost data collected online indicates that these surgeries for male-to-female transgender individuals usually falls within a range of $10,000 to $30,000, and the cost for female-to-male transgender individuals is similar – approximately $12,000 to $25,000.[20]

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[18] WPATH Standards, at 5.

[19] WPATH Standards, at 8-9.

[20] The Philadelphia Center for Transgender Surgery, *Male to Female Price List*, http://www.thetransgendercenter.com/index.php/maletofemale1/mtf-price-list.html (last visited Mar. 25, 2019) (estimating a total cost of $25,600 for Male to Female genital reassignment surgery); The Philadelphia Center for Transgender Surgery,

E. Modeling the Yearly Cost of Offering GCS Benefits to the Covered Inmate Population

There are several different methods for estimating the yearly cost of offering coverage for GCS and placing this cost in context of the overall healthcare appropriations for the state of Idaho. In existing case studies of employers that offer coverage for GCS to their employees – whether it be the City of San Francisco, private employers, or the U.S. military – the observed rates of utilization of these benefits have been quite low. Under each model used by *amicus* below, the cost of offering GCS would be negligible in the context of the overall healthcare appropriations and the size of the covered inmate population.

1. One Claim for GCS in One Year

Before looking to other case studies, it is useful to get a sense of how much one claim of GCS would cost in the context of the FY2019 yearly healthcare appropriations and the size of the Idaho prisoner population. In fiscal year 2019, the Idaho Legislature appropriated $46,496,500 for payments under IDOC's

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Female to Male Price List, http://www.thetransgendercenter.com/index.php/price-list.html (last visited Mar. 25, 2019) (cost of female to male genital surgery estimated to be $24,900); Costhelper.com, *Sex Reassignment Surgery Cost: How Much Does Sex Reassignment Surgery Cost?*, https://health.costhelper.com/sex-reassignment-surgery.html (last visited Mar. 20, 2019) ("For patients not covered by health insurance, the typical cost of a sex reassignment surgery can range from about $15,000 for just reconstruction of the genitals to about $25,000 for operations on the genitals and chest . . . .").

contract with Corizon.[21] The latest contract specifies that Corizon is to be paid $6,022.50 per inmate per year or $16.50 per inmate per day.[22]

As explained above, the covered population for June 2018 is approximately 7,800 inmates. If one inmate receives a GCS procedure that costs between $10,000 and $30,000, this cost would be equal to approximately 0.022%[23] to 0.065%[24] of the total healthcare appropriation. Stated otherwise, the most conservative estimate under this model would show a cost of slightly less than seven ten-thousandths, or less than seven hundredths of a percent, of the total annual healthcare appropriation for Corizon's contract.

2. San Francisco Claims Data

In 2001, the City of San Francisco became the first major city in the U.S. to remove barriers to transgender healthcare coverage in its health insurance plans for employees, retirees, and their dependents. In the first five-year period, San Francisco observed an average of 1.2 claimants per year and at most 4.8 claimants per year.[25] Assuming a range of 70,260 to 100,000 enrollees, this meant that San

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[21] Russell, note 9.

[22] *Id.*

[23] $10,000 / $46,496,500 = 0.022% = $\frac{22}{100{,}000}$

[24] $30,000 / $46,496,500 = 0.065% = $\frac{65}{100{,}000}$

[25] Human Rights Campaign, *San Francisco Transgender Benefit: Actual Cost & Utilization*, 2001-2006, at 2, https://www.hrc.org/resources/san-francisco-

Francisco experienced a utilization rate of at least 0.012 and at most 0.0683 claimants per thousand enrollees.[26] From 2001 to 2004, between 4 and 7 claimants utilized the benefit, with average claim costs between $22,286 and $39,000 each.[27] From 2004 to 2006, between 7 and 18 claimants claimed between $12,618 and $32,445 each.[28]

If similar utilization occurs for a population size of 7,800 inmates, Appellants would be likely to receive only one claim for transgender benefits every 1.9[29] to 10.7 years.[30] Using San Francisco as a model, Appellants would experience ***no related costs over most years***.

Assuming *arguendo* that Appellants observed the highest utilization rate and the same average costs per claimant as in San Francisco, Appellants could expect a

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transgender-benefit-actual-cost-utilization-2001-2006 (last visited Mar. 21, 2019).

[26] *Id*.

[27] *Id*.

[28] The average cost range observed in San Francisco included all covered treatments, including surgeries. Because it is similar to, but higher than the range described above ($10,000 – $30,000), *amicus* has employed this range to be conservative in the San Francisco model and for the Private Employer model below.

[29] 7,800 covered inmates / 1000 enrollees *.0683 claims /year = 0.5327 claim per year = 1 claim / 1.877 years

[30] 7,800 covered inmates / 1000 enrollees * .012 claims /year = .0936 claim per year = 1 claim / 10.7 years

cost of approximately $6,641.05[31] to $20,526.32[32] per year. This would represent approximately 0.014%[33] to 0.044%[34] of the total annual healthcare appropriations under Corizon's contract.[35] In other words, the most conservative assumptions under this model result in a cost less than nine twenty-thousandths, or just over four hundredths of a percent, of the Corizon healthcare appropriations.

3. Private Employer Claims Data

Private employers who have added transition-related coverage to their health benefits plans have reported very low utilization rates. In *amicus*'s landmark analysis of the utilization of such healthcare benefits, the highest yearly rate of utilization of transgender healthcare benefits observed among employers with 1,000 to 9,999 employees was 0.214 claims per thousand employees and the lowest utilization was 0.027 claims per thousand employees.[36]

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[31] $12,618 / 1.9 = $6,641.05

[32] $39,000 / 1.9 = $20,526.32

[33] $6,641.05 / $46,496,500 in healthcare approps. for FY2019 = 0.014% = $\frac{14}{100,000}$

[34] $20,526.32/ $46,496,500 in healthcare approps. for FY2019 = 0.044% = $\frac{44}{100,000}$

[35] This calculation assumes a static level of healthcare appropriations.

[36] Jody L. Herman, The Williams Institute, *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans*, (Sept. 2013) at 13, Table 8, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Cost-Benefit-of-Trans-Health-Benefits-Sept-2013.pdf (last visited Apr. 7, 2019).

If the same utilization is observed here, Appellants could expect to see one claim every seven months[37] to 4.7 years.[38] Adopting the highest rate of utilization would mean that there would either be one or two claims in a year. If we apply the range of average costs observed in San Francisco and the highest rate of utilization, Appellants can expect costs ranging from $12,618[39] to $78,000[40] per year. This cost would represent a range of 0.03%[41] - 0.17%[42] of the Corizon healthcare contract appropriations. In other words: 17 ten-thousandths, or 17 hundredths of a percent, of the total Corizon contract.

4. U.S. Military

From July 1, 2016 to February 1, 2019, 1,524 U.S. military personnel were diagnosed with gender dysphoria within a group of 2,100,000 covered individuals.[43] Since that time, treatment for troops with gender dysphoria has

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[37] 7,800 covered inmates / 1000 enrollees * .214 claims /year = 1.6692 claims per year = 1 claim / 7 months

[38] 7,800 covered inmates / 1000 enrollees * .027 claims /year = 0.2106 claims per year = 1 claim / 4.7 years

[39] $12,618 (lowest average cost per claim per year in SF) * 1 claim = $12,618

[40] $39,000 (highest average cost per claim per year in SF) * 2 claims = $78,000

[41] $12,618 / $46,496,500 = 0.03% = $\frac{3}{10,000}$

[42] $78,000 / $46,496,500 = 0.17% = $\frac{17}{10,000}$

[43] Tom Vanden Brook, *Exclusive: Pentagon Spent Nearly $8 Million to Treat 1,500 Transgender Troops Since 2016*, USA Today, Feb. 27, 2019, https://www.usatoday.com/story/news/politics/2019/02/27/exclusive-report-shows-8-million-spent-more-than-1-500-transgender-troops-pentagon-

included 22,992 psychotherapy visits, 9,321 prescriptions for hormones, and 161 surgical procedures.[44] Of the 161 surgical procedures, only 54 included genital surgeries.[45]

The 161 surgical procedures cost the U.S. military approximately $2,100,000 in total,[46] for an average of cost of $13,043.47 per surgery.[47] This represented approximately 0.002% of the $129.2 billion the U.S. military spent on healthcare in the same time period.[48] Assuming that each surgical procedure represented a new claimant, this data suggests that 10.6% of the adults with gender dysphoria received surgical care between July 1, 2016 and February 1, 2019.[49]

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dysphoria/2991706002/.

[44] *Id.*

[45] *See id.*

[46] *Id.*

[47] This average number is lower than our estimate, since it also includes non-genital surgeries, which may be significantly cheaper than the procedures at issue in this appeal. *Amicus* expects that this underestimate will be balanced out by the overestimate of the total number of individuals seeking procedures. *See* note 49 *infra*.

[48] Vanden Brook, note 43 *supra* ("[T]he Pentagon spends about $50 billion per year on health care.").

[49] This number is likely to be an overestimate. Since the *USA Today* data counts the total number of surgical procedures, it is not clear how many individuals received surgery. The total number of patients who received surgery is likely to be lower than the total number of reported surgeries. For example, it is likely that at least some of those receiving male to female genital procedures would have also received breast augmentation and some of those receiving hysterectomies may have also received breast reductions or mastectomies.

If the same utilization rate occurs among inmates with gender dysphoria in Idaho, Appellants can expect 10.6% of those who have received a diagnosis of gender dysphoria to seek surgery every 2 years and 7 months, or approximately 4.1% per year. Using the District Court's finding that there are currently 30 individuals with gender dysphoria within the covered inmate population, we would expect the average number of claims for surgery to be approximately 1.23 claims for surgery per year.[50] If each claim costs the same as the average cost of surgeries observed in the U.S. military, Appellants can expect a cost of approximately $16,042.89[51] in one year. This cost would represent just over three ten-thousandths, or just over three hundredths of one percent, of the total appropriations under the Corizon contract.[52]

5. Summary

As the foregoing estimates demonstrate, the relative rarity of transgender individuals in the covered inmate population combined with the observed low rates of utilization of GCS indicate that any cost of providing GCS would be negligible. Specifically, *amicus* estimates that the cost for covering GCS would represent

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[50] 30 gender dysphoria diagnoses * 4.1% patients with gender dysphoria seeking surgery in a year = 1.23 claims for surgery per year

[51] $13,043.47 average cost of surgical claims * 1.23 claims per year = $16,042.89 per year

[52] $16,042.89 / $46,496,500 = 0.0345% = $\frac{345}{1{,}000{,}000}$

between zero (lowest estimate) and seventeen hundredths of one percent (highest estimate) of the total healthcare appropriation to Corizon in one year.

F. Providing Medically Necessary Gender Confirmation Surgery for Idaho Prisoners Could Result in Medical Cost Savings.

Just looking at the monetary cost of providing GCS to prisoners in the Idaho prison system does not tell the whole story. The full effect of allowing gender confirmation surgery can only be understood by looking at the costs that would have been incurred to treat the prisoner's gender dysphoria in the absence of surgery as a treatment option.

In the 2015 U.S. Transgender Survey, nearly 40% of transgender people reported experiencing serious psychological distress in the month before the survey, compared to 5% of the general U.S. population.[53] Of greater concern, 7% of transgender people attempted suicide in the year before the survey, compared to 0.06% of the general U.S. population.[54]

These symptoms can be alleviated with access to appropriate mental and physical health care, including GCS for those who need it. Long-term studies tracking the experiences of transgender people before and after receiving gender

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[53] Erin McCauley, et al., *Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail*, Transgender Health (2018), at 35.

[54] *Id.*

affirming medical care results in an overall improvement of mental health.[55] And, more specifically, the rates of suicidality among trans men has been shown to have decreased after receiving gender affirming care, dropping from 20% to 1%.[56] As described in a forthcoming publication, research conducted by *amicus* and co-authors found that, out of those who need GCS, those who received it experienced a significant reduction in suicidal thoughts and attempts compared to those who have not received it.[57] There is thus a consensus that medical treatment for gender transition improves the overall well-being of transgender individuals and contributes to a better quality of life.[58]

These improvements in overall health and well-being can result in cost-savings. In its economic assessment of prohibiting discrimination against

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[55] Cecilia Dhejne, et al., *Mental health and gender dysphoria: A review of the literature*, Int'l Rev. of Psych. (2016), at 53.

[56] William V. Padula, et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, J. of Gen. Intern. Med. (Oct. 19, 2015), at 2.

[57] Jody L. Herman, et al., Presentation at the Annual Meeting of the American Public Health Association, Atlanta, GA, Effect of gender transition-related health care utilization on suicidal thoughts and behaviors: Findings from the 2015 U.S. Transgender Survey (Nov. 9, 2017).

[58] Cornell University, The Public Policy Research Portal, *What Does the Scholarly Research Say About the Effect of Gender Transition on Transgender Well-Being?*, https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people/ (last visited Apr. 6, 2019).

transgender people in health insurance, the State of California Department of Insurance found that "there may be potential cost savings resulting from the adoption of the proposed regulation in the medium to long term, such as lower costs associated with the high cost of suicide and attempts at suicide, overall improvements in mental health and lower rates of substance abuse, as discussed in the following section."[59] For instance, the Department stated that suicide deaths or attempts can cost as much as $7,200 for each incident;[60] costs that could be saved by reducing suicide attempts and deaths among transgender Californians.

Appellants have already incurred substantial, avoidable costs by denying Appellee the GCS she needs. Appellee's two self-castration attempts and subsequent hospitalization are directly tied to the distress she has experienced because of being denied access to gender confirmation surgery. For example, after her second attempt at self-castration, Appellant was taken to the hospital by ambulance for treatment to repair her testicle. *See* Tr. 198:9-199:16. At the hospital, Appellee was treated by a urologist and was put under anesthesia for the repair procedure. *See* Tr. 199:7-13. Furthermore, Appellant continues to actively

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[59] State of California, Dept. of Insurance, *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance*, (April 13, 2012) at 9, https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf (last visited April 6, 2019).

[60] *Id.*

experience thoughts of self-castration, which she relieves by using a razor to cut her arm – further increasing the chance of future, expensive medical interventions. *See* Tr. 199:24-200:15. By complying with the law and offering this care, Appellants can avoid these types of costs (and others) that arise when Appellees and others are denied treatment for their gender dysphoria.

IV. CONCLUSION

Neither the legal reasons cited by Appellants in their opening brief nor the public statements made by Appellants and their supporters justify withholding medically necessary and constitutionally mandated care from Appellee. The surgical treatment that Appellee requires to alleviate the symptoms of her gender dysphoria is not costly in absolute terms nor when compared to IDOC's yearly budget for all medical expenses for prisoners under its supervision. Offering this medically necessary care may also result in other types of healthcare savings for Appellants. Therefore, this Court should affirm the district court's order granting Appellee injunctive relief.

Respectfully submitted,

Dated: April 10, 2019

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 5,041 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 further certify that this brief 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).

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