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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

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<b>IN RE:</b>	<b>§</b>	<b>Chapter 11</b>
	<b>§</b>	
<b>TEHUM CARE SERVICES, INC.</b>	<b>§</b>	<b>Case No. 23-90086</b>
	<b>§</b>	
<b>Debtor</b>	<b>§</b>	
	<b>§</b>	

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**ADREE EDMO’S OBJECTION TO DEBTOR’S EMERGENCY MOTION TO EXTEND  
AND ENFORCE THE AUTOMATIC STAY**

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**I. Introduction**

1. Adree Edmo (“Ms. Edmo”), hereby files this Objection (“Objection”) to the Debtor’s Emergency Motion to Extend and Enforce the Automatic Stay (“Motion”) [Dkt. No. 7] filed by the above-captioned debtor (“Debtor”) in the above-referenced case.
2. Debtor asks this Court to enjoin creditors from pursuing claims against certain third parties who are not affiliates of Debtor’s—claiming this relief is justified under both 11 U.S.C. §§ 362 and 105. Section 362 does not apply to non-debtor non-affiliates—including the State of Idaho’s Department of Corrections (“IDOC”). Along with the Debtor, IDOC is a judgment debtor for \$2.6 million in attorneys’ fees owed to Ms. Edmo, a plaintiff who succeeded in a § 1983 civil rights action against IDOC and the predecessor in interest of the Debtor, Corizon, Inc. (“Corizon”). The Debtor has failed to meet its burden to justify an injunction extending to IDOC under section 105.
3. Procedurally, the Debtor’s attempts to extend the stay also fail. The Debtor is asking this court via motion for injunctive relief by imposing a stay. To do so, Debtor must

file a request for injunctive relief as an adversary proceeding and comply with the Adversary Rules—including proper service. The Debtor must also prove up its entitlement to an injunction by meeting the criteria under applicable law. It cannot skirt around these requirements by asking the Court to grant it a stay via a contested matter and by using the Court's equitable power under 105.

4. Moreover, under Idaho State law, IDOC is an arm of the state of Idaho. Neither the state of Idaho nor IDOC can file for bankruptcy protection under any chapter of the Bankruptcy Code. IDOC shouldn't be permitted to enjoy a stay it could never obtain on its own.

5. Ms. Edmo is in the last stages of her successful federal civil rights litigation. She holds a post-judgment order for attorneys' fees and costs in which the District Court of Idaho found IDOC and Corizon jointly and severally liable under federal civil rights statutes for \$2.6 million in fees. As a matter of public policy, this Court should not allow IDOC—a state entity—to hide behind the Debtor's bankruptcy filing to further stall and potentially avoid payment altogether to a successful civil rights plaintiff—especially given the fact that IDOC is completely solvent and capable of paying the obligation owed to Ms. Edmo.

6. Lastly, because it is so early in the case, a Committee of Unsecured Creditors has not yet been appointed. Extending the stay to non-debtor non-affiliates at this point—with provisions requiring a motion to lift said stay is prejudicial to the hundreds if not thousands of creditors who are in need of representation in the above-captioned case.

## II. Factual Background

7. On April 6, 2017, Ms. Edmo filed a § 1983 civil rights case (the “1983 Action”) against IDOC, several IDOC administrators in their official capacities, Corizon, and several individual Corizon employees and individual-capacity defendants (IDOC, Corizon, and along with the individual IDOC administrators, the individual Corizon employees, and the individual capacity defendants, collectively, are “Defendants”). The 1983 Action is Case No. 1:17-cv-00151-BLW in the United States District Court of Idaho.

8. On December 13, 2018, Ms. Edmo successfully obtained an order for permanent injunctive relief from the District Court of Idaho. *Edmo v. Idaho Dep’t of Corr., et al.*, 358 F.Supp.3d 1103 (D. Idaho 2018) (the “1983 Injunction”). The 1983 Injunction is attached hereto as Exhibit 1.

9. On August 23, 2019, a panel of the Ninth Circuit Court of Appeals affirmed the District Court’s injunction (the “1983 Judgment”), *Edmo v. Corizon, Inc., et al.*, 935 F.3d 757 (9th Cir. 2019). The 1983 Judgment is attached hereto as Exhibit 2.

10. On February 10, 2020, the Ninth Circuit declined to rehear the case *en banc*, 949 F.3d 489 (9th Cir. 2020). Subsequently, Defendants petitioned for *certiorari* to the United States Supreme Court. On October 13, 2020, the Supreme Court denied the Defendants’ petition. *Idaho Dep’t of Corr. v. Edmo*, 141 S.Ct. 610 (2020).

11. On September 30, 2022, the District Court granted Ms. Edmo’s motion for attorneys’ fees and costs under 42 U.S.C. § 1988, awarding Ms. Edmo \$2,631,593 (the “Fee Judgment”), which is jointly and severally enforceable against IDOC, official-capacity IDOC Defendants, Corizon, and an individual Corizon employee. *Edmo v. Idaho Dep’t of Corr., et al.*, ---F.Supp.3d---2022 WL 16860011, No. 1:17-cv-00151-BLW (D. Idaho Sept.

30, 2022). The Fee Judgment became enforceable and collectible against Defendants on October 31, 2022, after an automatic 30-day stay. See Fed. R. Civ. P. 62(a). The Fee Judgment accrues interest at a daily rate of \$294.16 pursuant to 28 U.S.C. § 1961, and Defendants are also jointly and severally liable for further fees-on-fees required to defend and enforce the Fee Judgment. The Fee Judgment is attached hereto as Exhibit 3. On November 28, 2022, the Amended Abstract of Judgment (“Abstract of Judgment”) was entered by the district court. The Abstract of Judgment is attached hereto as Exhibit 4. Defendants filed an appeal of the Fee Judgment in the Ninth Circuit which is currently in process. All Defendants declined to obtain an appeal bond.

### **III. Law and Analysis**

#### **A. The relief sought in the Motion cannot be brought as a contested matter. It must be brought as an adversary proceeding.**

12. The Stay Motion improperly seeks injunctive relief that can only be granted through commencement of an adversary proceeding under Rule 7001(7) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and not by way of motion and contested matter under Bankruptcy Rule 9014. Specifically, Rule 7001 expressly provides that “the following are adversary proceedings: ...(7) a proceeding to obtain an injunction or other equitable relief...”

13. Not only has the Debtor filed a procedurally deficient motion, it has also asked this Court to consider the Stay Motion on an expedited basis. This case was filed on February 13, 2023—only two weeks ago. Until the late evening of February 28, 2023—three days before the hearing on the Motion, the Debtor had not filed a creditor matrix. The Debtor has not filed schedules or statements of financial affairs. There is no complete list of

contracts in Schedule G with counter parties who could be potentially implicated in the Motion. Moreover, the Debtor may not have a grasp on how many parties are out there to which it owes indemnification obligations. Yet the Motion is broadly drafted to cover all numerous third parties to be protected without a complete story or description of from what or whom they should be protected.

14. The Motion also unfairly puts the onus on the creditor who finds himself in a situation where he is stayed by the Motion to litigate over lifting the stay. The advantage of this is clearly in favor of the non-debtor affiliates of the Debtor who seek to continue operating in the prison systems across the country while shedding their liabilities for pennies on the dollar—the Debtor doesn't want to cut off business opportunities for its solvent non-debtor affiliated companies. The strategy is obvious. The entities related to the Debtor that did not file for bankruptcy get to protect their business relationships. And the Debtor gets to promise that the liabilities associated with Old Corizon are capped at pennies on the dollar.

15. This Motion, if granted, forces all potential claimants into the bankruptcy case even if they have a perfectly legitimate, separately collectible claim against a solvent co-defendant that is not affiliated with Debtor. Under the order proposed by the Debtor, a party like Ms. Edmo—who has a valid claim for recovery of post-judgment attorneys' fees and costs against IDOC, the arm of a sovereign state—, must come to this Court to litigate. Given that IDOC is an entity that is ineligible for a bankruptcy stay, Ms. Edmo should be able to proceed against IDOC, and if IDOC then wishes to pursue a claim for indemnification in the bankruptcy case, that is IDOC's prerogative. The Debtor and IDOC have joint and several liability for the Fee Judgment—granting this motion would

effectively extend bankruptcy protections to an entity that is otherwise prohibited from those protections.

16. Debtor’s proposal to extend its bankruptcy stay even to non-debtor non-affiliates is not how bankruptcy works. This is not the purpose of Chapter 11. The bankruptcy process is intended to give “the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). The powers and benefits of Chapter 11 are only available “to further a valid reorganizational purpose.” *In re SGL Carbon Corp.*, 200 F.3d 154, 165 (3d Cir. 1999); see Report of the Committee on the Judiciary, House of Representatives to Accompany H.R. 8200, H.R. Rep. No. 595 (1977), reprinted in 1978 U.S.C.C.A.N. 6179 (“The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business’s finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.”). In its few pleadings, the Debtor has not indicated any reorganization plans. It has not filed First Day Motions.

17. Moreover, the one thing Debtor has made clear about its future is that since its genesis out of a Texas Two Step divisional merger in the spring of 2022, it has only sought various strategies to “wind down” its assets and liabilities. The Debtor’s future is liquidation—plain and simple: “Therefore, the best way to ensure that creditor recoveries are not diminished by piece-meal litigation in multiple venues across the country is for the Court to extend the automatic stay to protect co-defendants holding an indemnity right against the Debtor, **while the Debtor formulates and consummates a plan of liquidation.**” [Motion, page 3] (emphasis added).

18. The Fifth Circuit has said (and the Supreme Court has affirmed) that, “when there is no reasonable likelihood that the statutory objective of reorganization can be realized . . . then the automatic stay and other provisions designed to accomplish the reorganization objective become destructive of the legitimate rights and interests of creditors, the intended beneficiaries.” *United Savs. Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 808 F.2d 363, 373 (5th Cir. 1987) (*en banc*), *aff’d*, 484 U.S. 365 (1988); *see also SGL Carbon Corp.*, 200 F.3d at 167 (dismissing bankruptcy case as having been filed in bad faith where “the petition was not motivated by a desire to reorganize or rehabilitate SGL Carbon’s business.”). Here, there is no desire to save jobs or rehabilitate a business—even though, in support of the Motion, the only Fifth Circuit cases the Debtor cites deal with Chapter 11 debtors that seek to reorganize, not liquidate. Furthermore, all the non-debtor, non-affiliated, third parties and co-defendants do not need the Debtor’s protection—nor are they entitled to it under the Bankruptcy Code. Those non-debtors who are co-defendants or co-obligors can pay their debts. And then if those third parties have indemnification claims against the Debtor’s estate, they can file claims in the bankruptcy and be paid under the Chapter 11 Plan. As it currently stands, there is no applicable bankruptcy law that should keep Ms. Edmo from pursuing IDOC for payment. This Court should not create an exception in this case.

19. The Fifth Circuit has addressed consistently the limited scope of the automatic stay:

The purposes of the bankruptcy stay under 11 U.S.C. § 362 “are to protect the debtor’s assets, provide temporary relief from creditors, and further equity of distribution among the creditors by forestalling a race to the courthouse.” *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th

Cir.1985). “By its terms the automatic stay applies only to the debtor, not to co-debtors under Chapter 7 or Chapter 11 of the Bankruptcy Code nor to co-tortfeasors.” *Id.* This Court has also noted that “[s]ection 362 is rarely, however, a valid basis on which to stay actions against non-debtors.” *Arnold v. Garlock, Inc.*, 278 F.3d 426, 436 (5th Cir. 2001).

*Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir. 2003) (emphasis added).

We begin our inquiry by examining the plain language of the statute. That language clearly focuses on the insolvent party. There are repeated references to the debtor. The stay envisioned is “applicable to all entities,” § 362(a), but only in the sense that it stays all entities proceeding against the debtor. To read the “all entities” language as protecting co-debtors would be inconsistent with the specifically defined scope of the stay “against the debtor,” § 362(a)(1). Continuing, we note that the remaining clauses of § 362(a) carefully list the kinds of proceedings stayed, in each instance explicitly or implicitly referring to “the debtor.”

This literal interpretation of § 362(a) is bolstered by language which is notably absent from its provisions. By way of comparison, Chapter 13 specifically authorizes the stay of actions against codebtors. 11 U.S.C. § 1301(a) (“a creditor may not . . . commence or continue any civil action . . . [against] any individual that is liable on such debt with the debtor”). No such shield is provided Chapter 11 co-debtors by § 362(a).

Further, the legislative history of § 362 supports this distinction between debtors and co-debtors. The automatic stay was intended to protect the debtor’s assets and give it a “breathing spell.” See S.Rep. No. 989, 95th Cong., 2d Sess., 54–55, reprinted in [1978] U.S. Code Cong. & Admin. News 5787, 5840–41. The provision concomitantly protects creditors by preventing a race for the debtor’s assets. See H.R. Rep. No. 595, 95th Cong., 2d Sess., 340, reprinted in [1978] U.S. Code Cong. & Admin. News 5787, 6297. **Neither purpose is advanced by application of the stay rule to co-defendants.**

*Wedgeworth*, 706 F.2d at 544 (emphasis added).



Once a party files in bankruptcy, under Chapter 11, for example, 11 U.S.C. § 362, *et seq.*, stays further actions against the debtor. Virtually any act attempting to enforce a judgment against or obtain property from the estate of the debtor is stayed once the title 11 proceedings are commenced. See *id.* § 362(a)(1)-(8). In the instant cases, Garlock contends that § 362 should stay any further actions against the non-debtor co-defendants and should stay the various district courts from dismissing debtor Federal-Mogul companies or remanding the related cases to state court. Section 362 is rarely, however, a valid basis on which to stay actions against non-debtors. See *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544 (5th Cir.1983) (“[w]e join [the cited courts] in concluding that the protections of § 362 neither apply to co-defendants nor preclude severance”).

*Arnold v. Garlock, Inc.*, 278 F.3d 426, 435-36 (5th Cir. 2001) (second emphasis added).

20. The Debtor’s authorities for the relief it seeks are inapposite because those courts did not rule that co-defendants like Tehum Health Care and IDOC are one and the same for litigation purposes. The only Fifth Circuit case that describes the very narrow exception to the rule of limiting the automatic stay to the debtor is *Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816 (5th Cir. 2003).<sup>1</sup> The exception articulated by the *Reliant* court applied to a subsidiary of the debtor. The court also found that the contract that was in dispute (as to whether it imposed joint liability on the non-debtor subsidiary) was ambiguous. *Id.* at 822. The *Reliance* holding is wholly distinguishable from the relationship between the Debtor and IDOC. First, IDOC is not a subsidiary or related affiliate of the Debtor. It is an arm of a sovereign state. Second, there is no ambiguity in

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<sup>1</sup> In a case that is closer to Ms. Edmo’s situation, in *Edwards v. Armstrong World Industries*, the Fifth Circuit refused to extend the A.H. Robins exception to a surety, holding that a supersedeas bond may be executed against the surety of a judgment debtor. 6 F.3d 312, 316-17 (5th Cir. 1993), *reversed on other grounds*, 514 U.S. 300 (1995).

the orders issued by the Idaho district court. The court found IDOC to be jointly and severally liable for the \$2.6 million in fees and costs owed to Ms. Edmo.

21. The authorities cited by the Debtor in the Motion are either out of circuit or are inapplicable to extending the stay to co-defendants and co-obligors that are equally liable to creditors. Even *A.H. Robins Co.*, 788 F.2d 994 (4th Cir. 1986) (which has not been fully adopted by the Fifth Circuit), does not support the extension of a stay to IDOC in Ms. Edmo's situation. In *A.H. Robins Co.*, the non-debtor co-defendants were indemnified associates, employees, or insureds of the debtor's sole manufacturer of the Dalkon Shield intrauterine device. IDOC is one of many co-defendant departments of corrections who were (or are) clients of Corizon's. IDOC has already been held liable for its actions. And IDOC has already been ordered to pay Ms. Edmo's legal fees. "[A] section 362(a)(1) stay is available only for the debtor's benefit and does not prohibit actions against nonbankrupt third parties or codefendants." *In re S.I. Acquisition, Inc.* 817 F.2d 1142, 1147 (5th Cir. 1987), accord *United States ex rel. Bowman v. Computer Learning Ctrs.*, 73 F.App'x 735, 736 (5th Cir. 2003).

22. The Debtor tries to bolster its claims for extending the stay by suggesting that the parties it seeks to protect are innocuous in their own right by conflating these groups: non-debtor former clients and/or their employees (collectively, the "Indemnified Clients"), former officers and directors (collectively, the "Indemnified D&Os"), non-debtor affiliates, CHS and YesCare Corp. (collectively, the "Non-Debtor Affiliates") and together with the Indemnified D&Os and the Indemnified Clients, the "Non-Debtor Indemnified Parties"). And then, without distinguishing between a lawsuit that has just been filed and a lawsuit that is in post-judgment collection stages, the Debtor states: "[p]ermitting the Lawsuits to

continue against the Non-Debtor Indemnified Parties notwithstanding the automatic stay would undoubtedly interfere with this chapter 11 proceeding and allow non-debtors to exercise control over and dissipate property of the Debtor's estate. For these reasons, the plaintiffs' pursuit of claims against the Non-Debtor Indemnified Parties in the Lawsuits should be prohibited." At least with regard to Ms. Edmo and IDOC, the Debtor's conflation of the various parties and the various stages of the Lawsuits belies the truth. Ms. Edmo brought claims against both IDOC and Corizon, and the injunction she obtained was specifically directed to IDOC as the State entity. See 935 F.3d at 799 ("The State does not contest that Attencio, as Director of IDOC, and Zmuda, as Deputy Director of IDOC, would be responsible for implementing any injunctive relief ordered. Edmo properly named them as defendants to her Eighth Amendment claim for injunctive relief . . . . Because Edmo may properly pursue her Eighth Amendment claim for injunctive relief against Attencio, Zmuda, and Ramirez in their official capacities, they are properly included within the scope of the district court's injunction."). The Ninth Circuit excluded Corizon from the injunctive relief in order to avoid a question of undecided law, noting that "[d]oing so still provides Edmo the relief she seeks at this stage." *Id.* at 799-800. This is one example of the way in which Edmo's Judgment against the State is not simply inextricably derivative of Corizon's acts, and IDOC is not an alter ego of Corizon in Ms. Edmo's Judgment.

23. Moreover, if the stay is not extended to IDOC, then Ms. Edmo will be free to continue her pursuit against IDOC unimpeded by the bankruptcy court. Her claim against the estate will be reduced—hopefully even eliminated—by IDOC's fulfillment of its court-ordered obligation. IDOC may or may not choose to pursue a claim in the bankruptcy

court, but either way, the amount paid out to creditors with regard to Ms. Edmo's fee award will be the same. The only thing that will change is the name of the creditor asserting it against the estate.

24. The Debtor cannot extend its automatic stay—essentially a free injunction against all of its co-defendants in all of its cases around the country—through a contested matter. A debtor cannot simply file an expedited motion and seek relief without going through some basic steps to achieve due process.

B. The Debtor has not met its burden to extend the stay to third party non-debtor non-affiliates.

25. The second fatal error is that the Debtor hasn't made even a threshold showing that it is entitled to such broad relief. The Motion fails to make even a preliminary finding that the Debtor is entitled to the expansive injunctive relief it seeks. The Debtor is asking this Court to take the "extraordinary" step of enjoining hundreds of lawsuits across the country—regardless of the stage of the litigation. Notably, the proposed stay is so vast that it could encompass hundreds, maybe thousands, of parties who have not yet filed suit against various parties that the Debtor claims are "absolutely indemnified." There is no way of notifying those individuals of the requirement to come to the Bankruptcy Court and seek permission to lift the stay before proceeding against a non-debtor with no clear affiliation with the Debtor. The Debtor has not put forth any evidence that it is entitled to such a broad stay. Rather, the Motion puts forth nothing more than vague and conclusory statements. That is not enough to sustain its burden to show entitlement to such unusual relief. Furthermore, there has been no argument—let alone evidence—to show that allowing Ms. Edmo to proceed in her post-judgment collection efforts against IDOC will in any way jeopardize or even affect the Debtor's estate.

26. Assuming the Debtor could be granted injunctive relief through a contested matter, the Motion does not address any of the four prongs it must prove to be entitled to such relief. There is no mention of (1) likelihood of success; (2) irreparable harm; (3) balance of the equities; and (4) the public interest weighs in its favor. The Debtor is not reorganizing. The Debtor will not suffer irreparable harm if its friendly co-defendants may need to seek indemnification through the bankruptcy. The equities certainly balance in the favor of Ms. Edmo being able to recover against IDOC—a defendant who shares joint and several responsibility for payment of fees per a court order. And the public does not have any interest in a private company's liquidation. It's not as if the Debtor is converting from reorganization after years in bankruptcy. The Debtor—at the outset—in its first Motion before this Court says it is liquidating.

27. In addition, it is the Debtor's burden to show why non-debtor non-affiliated third parties should be granted an injunction without even participating in the bankruptcy cases. With regard to Ms. Edmo, she has been fighting for vindication of her constitutional rights, and now payment for her legal counsel, for seven years. She's way past the discovery phase, or even trial phase of her case. She's in the final stage of an appeal by Defendants of a post-judgment order granting her attorneys' fees and costs. IDOC is fully able to pay this obligation, and there is no reason whatsoever why it cannot fulfill this obligation—regardless of the financial state of its co-defendant. The state of Idaho and IDOC certainly do not need the protection of an undercapitalized Debtor that is planning to liquidate. IDOC can pay Ms. Edmo and then come file a claim against the Debtor and get paid whatever it is entitled to under the Chapter 11 plan.

- C. Even if the Debtor can somehow clear the procedural hurdles associated with injunctive relief, IDOC should not be able to use the bankruptcy stay of another debtor to put off further court-ordered fees for a violation of 42 U.S.C. § 1983.

28. The Motion improperly seeks injunctive relief that is improper under federal civil rights principles. Under 42 U.S.C. § 1983 and Idaho State law, Ms. Edmo's suit against IDOC and IDOC administrators in their official capacities amounts to a suit against the State of Idaho, and the State of Idaho is jointly and severally liable along with Corizon Defendants for the Fee Judgment. IDAHO CODE Title 20, Chapter 2, § 20-201 ("The Department of correction shall, for the purposes of section 20, article IV, of the constitution of the state of Idaho, be an executive department of state government."); see, e.g., *Edmo*, 935 F.3d at 766 ("[T]he district court...ordered the State to provide the surgery."); *id.* at 799 ("Edmo sued Attencio, Zmuda, and Yordy in their official capacities. . . . The State does not contest that Attencio, as Director of IDOC, and Zmuda, as Deputy Director of IDOC, would be responsible for implementing any injunctive relief ordered. Edmo properly named them as defendants to her Eighth Amendment claim for injunctive relief.").

***In addition to States not being able to directly file for bankruptcy, federal law principles also prohibit a State from using bankruptcy law or proceedings to shield itself from a federal civil rights judgment obtained pursuant to 42 U.S.C. § 1983.***

29. In enacting § 1983, Congress affirmed that individuals can recover damages against state government actors who violate citizens' federal constitutional rights. Congress intended § 1983 and its precursor, § 1 of the Civil Rights Act of 1871, to decisively guarantee that individuals can vindicate their civil rights in federal court. See *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972) ("[Section 1] was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era...the role of the Federal Government as a

guarantor of basic federal rights against state power was clearly established.). The causes of action Congress established in the Civil Rights Act arise directly out of rights and duties under the Constitution and federal statutes, and “exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable in the first instance.” *Burnett v. Grattan*, 468 U.S. 42, 50 (1984). The Civil Rights Act was crafted specifically to safeguard individual civil rights in the face of abuse by State actors: “The central aim of the Civil Rights Act was to provide protection to those persons wronged by the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”) *Owen v. City of Independence, Mo.*, 445 U.S. 622, 650 (1980); *see also Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 503 (1982) (The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients of the basic alteration of our federal system accomplished during the Reconstruction Era...[T]he Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power. . . . [I]n passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights.”).

30. Congress intended that federal court jurisdiction to protect constitutional rights under these statutes be given the broadest possible construction: “This act is...in aid of preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation.” *Monell v. Dep’t of Social Services of City of New York*, 436 U.S. 658, 684 (1978) (quoting the

Congressional Record, *Globe App.* 68); *see also id.* at 700 (“[T]here can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.”); *Burnett*, 468 U.S. at 50 (holding that these statutes “are characterized by broadly inclusive language”); *Owen*, 445 U.S. at 635-36 (“[T]he congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13—the forerunner of § 1983—confirm the expansive sweep of the statutory language.”). The Supreme Court emphasized the stated intent of the legislators to “throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired.” *Mitchum*, 407 U.S. at 240.

31. The ability of an individual to seek and recover money judgments in federal court from a state government entity that has violated her federal rights is an indispensable part of the federalism framework established by Congress. *See Owen*, 445 U.S. at 651 (“A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.”). Any decision having the effect of precluding individuals from collecting compensation for State violations of civil rights would vitiate the core objective of § 1983: “The central purpose of the Reconstruction Era laws is to provide compensatory relief to those deprived of their federal rights by state actors.” *Felder v. Casey*, 487 U.S. 131, 141 (1988); *see also Burnett*, 468 U.S. at 53 (“The goals of the federal statutes are compensation of persons whose civil rights have been violated, and prevention of the abuse of state power.”).



32. Furthermore, the Supreme Court has recognized that civil rights suits brought by individuals under § 1983 serve a crucial public interest: “When a plaintiff succeeds in remedying a civil rights violation . . . [she] serves ‘as a private attorney general,’ vindicating a policy that Congress considered of the highest priority.” *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)); *see also id.* at 2214 (“A civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress’s statutory purposes.”). The Supreme Court has observed “[h]ow uniquely amiss it would be, therefore, if the government itself—the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct—were permitted to disavow liability for the injury it has begotten.” *Monell*, 436 U.S. at 651 (internal quotations omitted).

D. Even if the Debtor can somehow convince this Court that third party non-debtor non-affiliates should be entitled to a stay, the Court should not grant such a stay before the UCC has been formed and has had time to hire counsel and analyze the situation for the creditors who will be affected by such a broad order.

33. The Debtor set the hearing on the Motion for March 3, 2023. In the evening of February 28—on less than 48 hours’ notice—and in support thereof filed a revised proposed order including a requirement that the stay be extended to non-debtors, third parties, and co-defendants unless and until a party in interest files a motion to lift the stay and this court has a hearing. For the first time since the filing of the bankruptcy case, the Debtor lists approximately forty lawsuits in which the Debtor is seeking an extension of a stay. Many of those lawsuits (per the proposed order), including Ms. Edmo’s, do not involve “non-debtor affiliates” or “indemnified D&Os / Employees.” It is wholly improper for the Motion to seek a stay against potentially hundreds of claims—some known and

some unknown—prior to the appointment of the Official Committee of Unsecured Creditors (“UCC”). At a minimum, this Court should put off this hearing and maintain the status quo by not extending the stay until the United States Trustee can form the UCC, and then the UCC can seek approval of advisors, including legal counsel to represent their interests. As it currently stands, there are potentially hundreds if not thousands of creditors who have no way of even knowing if they could be in breach of a stay order extended to third parties. Those individuals deserve representation and they deserve to have a voice in these proceedings.

#### **IV. Prayer**

WHEREFORE, PREMISES CONSIDERED, Edmo respectfully prays that the Court deny the relief sought in the Motion and grant all other just relief.

Submitted on March 2, 2023.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing OBJECTION was served on March 2, 2023, via the Court's electronic case filing (ECF) system on all parties receiving ECF notices in these cases and via first class U.S. mail to the parties listed below.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

ADREE EDMO,

Plaintiff,

v.

IDAHO DEPARTMENT OF  
CORRECTION, *et al.*,

Defendants.

Case No. 1:17-cv-00151-BLW

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ORDER**

**INTRODUCTION**

For more than forty years, the Supreme Court has consistently held that consciously ignoring a prisoner’s serious medical needs amounts to cruel and unusual punishment in violation of the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976). After all, inmates have no choice but to rely on prison authorities to treat their medical needs, and “if the authorities fail to do so, those needs will not be met.” *Id.* Prison authorities thus treat inmates with all manner of routine medical conditions – broken bones are set; diabetic inmates receive insulin; inmates with cancer receive chemotherapy; and so on. This constitutional duty also applies to far less routine, and even controversial, procedures – if necessary to address a serious medical need. And so it is here. Plaintiff Adree Edmo alleges that prison authorities violated her Eighth Amendment rights by refusing to provide her with gender confirmation surgery. For the

reasons explained below, the Court agrees and will order defendants to provide her with this procedure, a surgery which is considered medically necessary under generally accepted standards of care.

The Court will explain its reasoning below but will first pause to place this decision in a broader context. The Rule of Law, which is the bedrock of our legal system, promises that all individuals will be afforded the full protection of our legal system and the rights guaranteed by our Constitution. This is so whether the individual seeking that protection is black, white, male, female, gay, straight, or, as in this case, transgender. This decision requires the Court to confront the full breadth and meaning of that promise.

Adree Edmo is a male-to-female transgender prisoner in the custody of the Idaho Department of Correction (“IDOC”). She has been incarcerated since April 2012. In June 2012, soon after being incarcerated, an IDOC psychiatrist diagnosed Ms. Edmo with gender dysphoria. An IDOC psychologist confirmed that diagnosis a month later.

Gender dysphoria is a medical condition experienced by transgender individuals in which the incongruity between their assigned gender and their actual gender identity is so severe that it impairs the individual’s ability to function. The treatment for gender dysphoria depends upon the severity of the condition. Many transgender individuals are comfortable living with their gender identity, role, and expression without surgery. For others, however, gender confirmation surgery, also known as gender or sex reassignment surgery (“SRS”), is the only effective treatment.

To treat Ms. Edmo’s gender dysphoria, medical staff at the prison appropriately

began by providing Ms. Edmo with hormone therapy. This continued until she was hormonally confirmed – meaning she had the same circulating sex hormones and secondary sex characteristics as a typical adult female. Ms. Edmo thus achieved the maximum physical changes associated with hormone treatment. But, Ms. Edmo continued to experience such extreme gender dysphoria that she twice attempted self-castration. For her second attempt, Ms. Edmo prepared for weeks by studying the anatomy of the scrotum and took steps to diminish the chance of infection by boiling a razor blade and scrubbing her hands with soap. She was successful in opening the scrotum and exposing a testicle. But because there was too much blood, Ms. Edmo abandoned her second self-castration attempt and sought medical assistance. She was transported to a hospital where her testicle was repaired.

As already noted, an inmate has no choice but to rely on prison authorities to treat their medical needs. For this reason, the United States Supreme Court has held that deliberate indifference to a prisoner’s serious medical needs constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 103 (1976). To show such deliberate indifference, Ms. Edmo must establish two things. First, she must show a “serious medical need” by demonstrating that failure to treat a medical condition could result in significant further injury or the “unnecessary and wanton infliction of pain.” Second, she must show that the prison officials were aware of and failed to respond to her pain and medical needs, and that she suffered some harm because of that failure.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 3**

Ms. Edmo's case satisfies both elements of the deliberate indifference test. She has presented extensive evidence that, despite years of hormone therapy, she continues to experience gender dysphoria so significant that she cuts herself to relieve emotional pain. She also continues to experience thoughts of self-castration and is at serious risk of acting on that impulse. With full awareness of Ms. Edmo's circumstances, IDOC and its medical provider Corizon refuse to provide Ms. Edmo with gender confirmation surgery. In refusing to provide that surgery, IDOC and Corizon have ignored generally accepted medical standards for the treatment of gender dysphoria. This constitutes deliberate indifference to Ms. Edmo's serious medical needs and violates her rights under the Eighth Amendment to the United States Constitution. Accordingly, for the reasons explained in detail below, IDOC and Corizon will be ordered to provide Ms. Edmo with gender confirmation surgery. Thus, the Court will grant in part Plaintiff's Motion for Preliminary Injunction (Dkt. 62).

In so ruling, the Court notes that its decision is based upon, and limited to, the unique facts and circumstances presented by Ms. Edmo's case. This decision is not intended, and should not be construed, as a general finding that all inmates suffering from gender dysphoria are entitled to gender confirmation surgery.

## **FINDINGS OF FACT**

### **I. Transgender and Gender Dysphoria**

1. Transgender is an umbrella term for a person whose gender identity is not congruent with their assigned gender. Tr. 50:5-11. A transgender person suffers



from gender dysphoria when that incongruity is so severe that it impairs the individual's ability to function. Tr. 50:12-14.

2. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") sets forth specific criteria which must exist before a diagnosis of gender dysphoria is appropriate. Specifically, two conditions are required:
  - a. First, there must be marked incongruence between one's experienced/expressed gender and assigned gender, of at least six month's duration, as manifested by at least two of the following:
    - i. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics.
    - ii. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender.
    - iii. A strong desire for the primary and/or secondary sex characteristics of the other gender.
    - iv. A strong desire to be of the other gender.
    - v. A strong desire to be treated as the other gender.
    - vi. A strong conviction that one has the typical feelings and reactions of the other gender.
  - b. Second, the individual's condition must be associated with clinically

significant distress or impairment in social, occupational, or other important areas of functioning. Exh. 1001 at 3-4.

3. “Clinically significant distress” means that the distress impairs or severely limits the person’s ability to function in a meaningful way and has reached a threshold that requires either medical or surgical interventions, or both. Tr. 51:3-8.
4. Not every person who identifies as transgender has gender dysphoria. Tr. 50:5-11.

## **II. WPATH**

5. The World Professional Association of Transgender Health (“WPATH”) Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People were first promulgated in 1979 and are the internationally recognized guidelines for the treatment of individuals with gender dysphoria. Tr. 42:6-20; Exh. 15. WPATH Standards of Care are “flexible clinical guidelines.” Tr. 118:16-24, 119:1-7, 8-25, 288:7-23, and “are intended to be flexible in order to meet the diverse health care needs of transsexual, transgender, and gender nonconforming people.” Exh. 15 at 8.
6. The WPATH Standards of Care have provided treatment guidelines for incarcerated individuals since 1998. Tr. 54:11-21; Exh. 15 at 73. The current WPATH Standards of Care apply equally to all individuals “irrespective of their housing situation” and explicitly state that health care for transgender people “living in an institutional environment should mirror that which would be available to them if they were living in a non-institutional setting within the same

community.” Tr. 54:11-21; Exh. 15 at 73. The next update to the WPATH Standards of Care will also apply to an individual regardless of where that person is housed, including in a prison setting. Tr. 54:25-55:12.

7. The WPATH Standards of Care indicate that options for psychological and medical treatment of gender dysphoria include:
  - a. changes in gender expression and role,
  - b. hormone therapy to feminize or masculinize the body,
  - c. surgical changes of primary or secondary sex characteristics, and
  - d. psychotherapy. Exh. 15 at 15-16.
8. The WPATH Standards of Care suggest options for social support and changes in gender expression, including:
  - a. offline and online peer support resources, groups, or community organizations that provide avenues for social support and advocacy;
  - b. offline and online support resources for families and friends;
  - c. voice and communication therapy to help individuals develop verbal and non-verbal communication skills that facilitate comfort with their gender identity;
  - d. hair removal through electrolysis, laser treatment, or waxing;
  - e. breast binding or padding, genital tucking or penile prostheses, padding of hips or buttocks; and
  - f. changes in name and gender marker on identity documents. Exh. 15 at 16.

9. The WPATH Standards of Care provide that the purposes of psychotherapy include “exploring gender identity, role, and expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia; enhancing social and peer support; improving body image; or promoting resilience.” Exh. 15 at 16.
10. Cross-sex hormone therapy results in development of secondary sex characteristics of the other sex and provides an increase in the overall level of well-being of a person with gender dysphoria. Tr. 60:8-22. For a transgender woman, hormone treatment has physical effects such as breast growth, thinning of facial hair, redistribution of fat and muscle, and shrinkage of the testicles. Tr. 246:7-20. The maximum physical effects of hormone therapy will typically be achieved within two to three years. Exh. 15 at 42; Tr. 60:23-61:5, 246:7-247:1.
11. Surgery – particularly genital surgery – is often the last and the most considered step in the treatment process for gender dysphoria. Exh. 15 at 60.
12. Many transgender individuals find comfort with their gender identity, role, and expression without surgery. Exh. 15 at 60. For many others, however, surgery is essential and medically necessary to alleviate their gender dysphoria. Exh. 15 at 60. For the latter group, relief from gender dysphoria cannot be achieved without modification of their primary or secondary sex characteristics to establish greater congruence with their gender identity. Exh. 15 at 60.

13. For individuals with severe gender dysphoria, where hormone therapy is insufficient, gender confirmation surgery is the only effective treatment and is medically necessary. Tr. 168:23-169:15; *see also* Ettner Decl. ¶ 51.
14. The WPATH criteria for genital reconstruction surgery in male-to-female patients include the following:
  - a. Persistent, well documented gender dysphoria;
  - b. Capacity to make a fully informed decision and to consent for treatment;
  - c. Age of majority in a given country;
  - d. If significant medical or mental health concerns are present, they must be well controlled;
  - e. 12 continuous months of hormone therapy as appropriate to the patient's gender goals; and
  - f. 12 continuous months of living in a gender role that is congruent with their gender identity. Exh. 15 at 66.
15. Regarding the first criterion, "persistent, well documented gender dysphoria" is deemed to exist when the person has a well-established diagnosis of gender dysphoria that has persisted beyond six months. Tr. 55:21-56:3.
16. Regarding the fourth criterion, the WPATH Standards of Care make clear that the presence of co-existing mental health concerns does not necessarily preclude possible changes in gender role or access to feminizing/masculinizing hormones or surgery. Exh. 15 at 31. But these concerns need to be optimally managed prior to,

or concurrent with, treatment of gender dysphoria. Exh. 15 at 31.

- a. It is often difficult to determine whether coexisting mental health concerns are a result of gender dysphoria or are unrelated to that medical condition. Tr. 171:1-14, 24-25, 172:1-5; 387:20-25, 388:1, 398:2-18, 601: 11- 602: 2; Campbell Decl., Dkt. 101-4, ¶¶ 30-33. Co-existing mental health issues directly tied to an individual's gender dysphoria should not be considered in assessing whether an individual meets the fourth WPATH criterion that significant medical or mental health concerns must be well controlled. Tr. 387:6 to 388:6.

17. Regarding the sixth criterion – a twelve-month experience of living in an identity-congruent role – the WPATH Standards of Care provide that this is intended to ensure that the individual has had the opportunity to experience the full range of different life experiences and events that may occur throughout the year (e.g., family events, holidays, vacations, season-specific work or school experiences). During this time, patients should present consistently, on a day-to-day basis and across all settings of life, in their desired gender role. This includes coming out to partners, family, friends, and community members (e.g., at school, work, and in other settings). Exh. 15 at 67.
18. An individual in prison can satisfy the criterion of living in a gender role congruent with their gender identity. Tr. 62:16-63:4, 584:16-25.

### III. Expert Testimony

#### A. Plaintiff's Experts

19. Dr. Ettner is one of the authors of the WPATH Standards of Care, version 7. Tr. 42:21-24. Dr. Ettner has been a WPATH member since 1993 and chairs its Committee for Institutionalized Persons. Tr. 43:2-16; Exh. 1003.
  - a. Dr. Ettner has treated approximately 3,000 individuals with gender dysphoria, including evaluating whether gender confirmation surgery is necessary for certain patients. She has referred approximately 300 patients for gender confirmation surgery and assessed approximately 30 incarcerated individuals with gender dysphoria. Tr. 43:17-44:1, 44:9-13.
  - b. Dr. Ettner has extensive experience treating patients who have undergone gender confirmation surgery. Tr. 44:2-8.
  - c. Dr. Ettner is an author or editor of numerous peer-reviewed publications on treatment of gender dysphoria and transgender healthcare. Dr. Ettner is an editor for the textbook, "Principles of Transgender Medicine and Surgery," which was revised in 2017 and is the textbook used in medical schools. Tr. 44:14-45:1; Exh. 1003.
  - d. Dr. Ettner also trains medical and mental health providers on treating people with gender dysphoria, including assessing whether gender confirmation surgery is appropriate, through the global education initiative of WPATH and other presentations. Tr. 41:8-16, 45:17-46:18.

- e. Dr. Ettner has been appointed by a federal court as an independent expert related to evaluation of an incarcerated patient for gender confirmation surgery. Tr. 46:19-22.
  - f. However, Dr. Ettner is not a Certified Correctional Healthcare Professional, and she has not treated inmates with gender dysphoria. Tr. 106:21-24, 107:11-18.
20. Dr. Gorton is an emergency medicine physician who practices at a federally qualified healthcare center that primarily services uninsured patients or those with Medicare or Medicaid. Exh. 1004; Tr. 234:24-235:2. Dr. Gorton also works with Project Health, which has provided training for numerous clinics regarding the provision of transgender health care in California. Tr. 233:5-21. Dr. Gorton is a member of WPATH and is on WPATH's Transgender Medicine and Research Committee and its Institutionalized Persons Committee. Tr. 238:4-6; Exh. 1004.
  - a. Dr. Gorton has been the primary care physician for approximately 400 patients with gender dysphoria and is currently the primary care physician for approximately 100 patients with gender dysphoria. Exh. 1004; Tr. 237:4-12. Dr. Gorton currently provides follow-up care for about thirty patients who have had vaginoplasty. Exh. 1004; Tr. 249:20-250:3.
  - b. Dr. Gorton has published peer-reviewed articles regarding treatment of gender dysphoria. Tr. 239:16-18, Exh. 1004.



- c. Dr. Gorton has been qualified as an expert in multiple cases involving transgender healthcare. Tr. 239:19-240:19; Exh. 1004.
- d. However, Dr. Gorton has no experience treating inmates with gender dysphoria. Tr. 269:17-23. Dr. Gorton is not a Certified Correctional Healthcare Professional. Tr. 270:9-16.

## **B. Defendants' Experts**

- 21. Dr. Garvey is a psychiatrist and Certified Correctional Healthcare Professional under the National Commission on Correctional Health Care. Tr. 525:15-23. As the Chief Psychiatrist in the Massachusetts Department of Corrections, Dr. Garvey served as the chair of the Gender Dysphoria Treatment Committee. Tr. 508:10-11. Dr. Garvey directly treated patients in the Massachusetts Department of Correction who had gender dysphoria. Tr. 508:13-509:1.
  - a. Prior to evaluating Ms. Edmo, Dr. Garvey had never conducted an in-person evaluation to determine whether a patient needed gender confirmation surgery. Tr. 558:10-14.
  - b. Dr. Garvey has never recommended that a patient with gender dysphoria receive gender confirmation surgery or done long-term follow-up care with a patient who has had gender confirmation surgery. Tr. 556:20-557:9.
- 22. Dr. Andrade is a licensed independent clinical social worker and is a Certified Correctional Healthcare Professional with an emphasis in mental health. Tr. 626:1-21. Dr. Andrade has over a decade of experience providing and supervising the

provision of correctional mental health care, including directing and overseeing the treatment of all inmates diagnosed with gender dysphoria in the custody of the Massachusetts Department of Corrections in his role as clinical director, chair of the Gender Dysphoria Supervision Group, and member of the Gender Dysphoria Treatment Committee. Tr. 627:22-23.

- a. Over the last decade, Dr. Andrade has provided treatment to gender dysphoria inmates in his role on the treatment committee and has evaluated and confirmed diagnoses of gender dysphoria for over 100 inmates. Tr. 627:2-14. But Dr. Andrade has never provided direct treatment for patients with gender dysphoria and has never been a treating clinician for a patient who has had gender confirmation surgery. Tr. 647:8-14, 651:10-12.
- b. As part of a committee, Dr. Andrade has recommended gender confirming surgery for incarcerated inmates on two occasions. Tr. 627-629:1-10. But the recommendation was contingent upon the requirement that the inmates first live in a women's prison for approximately twelve months. Tr. 647:19-648:25. The Massachusetts Department of Corrections houses prisoners according to their genitals, so the inmates were not allowed to move to a women's prison. Tr. 649:1-650:11. To Dr. Andrade's knowledge, the inmates had not been moved to a women's prison at least seven months after his recommendation. Tr. 649:1-650:11. Thus, the twelve-month period of living in a women's prison could not have started. Tr. 650:6-11.

- c. As a licensed independent clinical social worker, Dr. Andrade does not qualify under IDOC’s former gender dysphoria policy as a “gender identity disorder evaluator” who could assess someone for surgery. Tr. 660:11-17; Exh. 8 at 3.
23. Dr. Campbell is IDOC’s Chief Psychologist. He has provided mental health services to incarcerated inmates since 2012. Campbell Decl., Dkt. 101-4, ¶¶ 2-7. Dr. Campbell is a member of WPATH and is familiar with the WPATH Standards of Care regarding gender dysphoria offenders and transgender inmates as provided by the National Commission on Correctional Healthcare (“NCCHC”), the National Institute of Corrections, and the Federal Bureau of Prisons. Campbell Decl., Dkt. 101-4, ¶¶ 8-10.
  - a. Dr. Campbell serves as chair of the Management and Treatment Committee (“MTC”), a multidisciplinary committee that meets monthly to discuss and evaluate the needs of inmates who have been diagnosed with gender dysphoria. Campbell Decl., Dkt. 101-4, ¶¶ 13-14.
  - b. Dr. Campbell has directly conducted six gender dysphoria assessments and has overseen the treatment and assessment of approximately fifty inmates who have requested gender dysphoria evaluations, through his role as chair of the Management and Treatment Committee and as the Chief Psychologist. Campbell Decl., Dkt. 101-4, ¶¶ 13-14.

- c. There is no evidence that Dr. Campbell has ever recommended gender confirmation surgery for an inmate.

#### **IV. NCCHC**

24. The NCCHC endorses the WPATH Standards of Care as the accepted standards for the treatment of transgender prisoners. Exh. 1041 at 2, 4, n.1; Tr. 477:14-478:22.

#### **V. Defendants' Policies and Practices Regarding Gender Dysphoria**

##### **A. Corizon's Policies and Practices**

25. Corizon is a private corporation that contracts to provide health care to prisons and jails throughout the country. Corizon providers have never recommended gender confirmation surgery to a patient at any of the prisons where it provides medical services. Tr. 489:20-23.
26. Corizon's only written policy regarding gender dysphoria treatment does not include gender confirmation surgery as a form of treatment. Tr. 482:25-483:9; Exh. 14.

##### **B. IDOC's Policies and Practices**

27. The IDOC MTC is a multiple-disciplinary team that addresses treatment, planning, and security issues associated with IDOC inmates who have gender dysphoria. Tr. 322:12-20. The Management and Treatment Committee reviews the treatment of all inmates with gender dysphoria but does not make medical decisions. Tr. 323:4-13, 324:9-14.

28. There are currently 30 prisoners with gender dysphoria in IDOC custody. Tr. 322:21-323:3. No individual in IDOC custody has ever been recommended for, or received, gender confirmation surgery. Tr. 376:23-377:4.
29. IDOC's operative gender dysphoria policy when Ms. Edmo was assessed for surgery defined a "qualified gender identity disorder (GID) evaluator as '[a] Doctor of philosophy (PhD) level practitioner licensed by an appropriate state licensing authority as a psychologist, or a physician licensed by a state Board of Medicine, who has demonstrated an indicia of basic competence related to the diagnosis and treatment of GID and related mental or emotional disorders through their licensure, training, continuing education, and clinical experience.'" Exh. 8 at 3; Tr. 388:16-389:1.
30. This policy stated that gender confirmation surgery "will not be considered for individuals within the Idaho Department of Correction (IDOC), unless determined medically necessary by the treating physician." Exh. 8 at 8.
31. On October 5, 2018, shortly before the hearing in this matter, IDOC implemented a new gender dysphoria policy that would allow prisoners at Idaho State Correctional Institute ("ISCI") diagnosed with gender dysphoria to order and possess female commissary items and present in a manner consistent with their gender identity. Tr. 347:18-348:23; Exh. 9.

- a. The new policy also states that “to avoid a sexually charged atmosphere in IDOC facilities . . . [n]o provocative or sexually charged clothing or behavior will be permitted.” Exh. 9 at 6.
- b. IDOC’s new gender dysphoria policy continues to state that gender confirmation surgery “will not be considered for individuals within the Idaho Department of Correction (IDOC), unless determined medically necessary by the treating physician.” Exh. 9 at 8-9.
- c. The policy further states that prisoners will be housed “based upon the inmate’s primary physical sexual characteristics.” Exh. 9 at 4.

#### **V. Adree Edmo’s Gender Dysphoria**

32. Adree Edmo is a male-to-female transgender prisoner in the custody of IDOC. Ms. Edmo has been incarcerated at ISCI since April 2012. Tr. 192:19-20; *see also* Edmo Decl. ¶ 12. She is 30 years of age. Tr. 192:17-18.
33. From the age of 5 or 6, Ms. Edmo has viewed herself as female. In her words, “my brain typically operates female, even though my body hasn’t corresponded with my brain.” Tr. 193:7-8.
34. While others viewed her as being gay, that is not how she perceived herself. Tr. 193:18-23. While, she struggled with her gender identity as a child and teenager, she began living as a woman at age 20 or 21. Tr. 211:1-11. She views herself as a woman with a heterosexual attraction to men. Tr. 193:15-17.

35. Prior to being incarcerated, and learning about gender identity and transgender, Ms. Edmo struggled with her own identity and sexual orientation. On two occasions in 2010 and 2011, she attempted suicide. Tr. 206:12-15.
36. In June 2012, soon after being incarcerated, Ms. Edmo was diagnosed with gender identity disorder by Corizon psychiatrist Dr. Eliason. Exh. 1 at 321. In July 2012, Corizon psychologist Claudia Lake confirmed Ms. Edmo's diagnosis of gender identity disorder. Exh. 1 at 323-27. There is no dispute that Ms. Edmo suffers from gender dysphoria. Tr. 69:20-70:3, 251:23-252:3, 518:16-18, 635:1-7.
37. Ms. Edmo legally changed her name to Adree Edmo in September 2013. Tr. 192:6-9. Ms. Edmo has also changed her sex to "female" on her birth certificate to further affirm her gender identity. Tr. 203:13-22; Exh. 1002.
38. Ms. Edmo has consistently presented as feminine throughout her incarceration by wearing her hair in traditionally feminine hairstyles when able to do so, wearing makeup when able to do so, and acting in a feminine demeanor. Tr. 194:24-195:5, 411:1-7, 463:11-464:21. Ms. Edmo's feminine presentation has been documented by Defendants' medical providers since 2012. *See, e.g.*, Exh. 1 at 321, 347, 425, 452, 538. Ms. Edmo has also held two jobs while in prison and has presented as feminine at her places of employment. Tr. 201:24-202:10.
39. Ms. Edmo has continually sought to present herself as feminine despite receiving multiple disciplinary offense reports related to wearing makeup, styling her hair in a feminine manner, and altering her male-issued undergarments into female

- panties. Tr. 195:11-20; Exh. 5 at 8, 9, 21-22, 25, 27-28, 33-34, 41-43, 48-57, 62-65; Yordy Dep. 47:4-49:15, 85:22-87:11; Edmo Decl. ¶ 19.
40. Ms. Edmo testified that hormone therapy helped treat her gender dysphoria to some extent. Tr. 223:9-14. The hormones “cleared her mind,” and resulted in breast growth, body fat redistribution, and changes in her skin consistency. Tr. 196:15-25. As a result of hormone therapy, Ms. Edmo is hormonally confirmed, which means she has the same circulating sex hormones and secondary sex characteristics as a typical adult female. Tr. 72:14-21; Ettner Decl. ¶ 59.
41. Ms. Edmo has achieved the maximum physical changes associated with hormone treatment. Tr. 602:1-603:4. However, Ms. Edmo continues to experience distress related to gender incongruence, which is mostly focused on her male genitalia. She testified she feels “depressed, embarrassed, and disgusted” by her male genitalia and that this is an “everyday reoccurring thought.” Tr. 197:7-24.
42. Ms. Edmo first attempted self-castration to remove her testicles in September 2015 using a disposable razor blade. She wrote a note to let the officers know she was not trying to commit suicide and was only trying to help herself. She attempted to cut her testicle sac open but was unsuccessful. Edmo Decl. ¶ 31; Tr. 197:25-198:8.
43. In January 2016, Ms. Edmo reported to Dr. Eliason that she was having difficulty sleeping due to thoughts of self-castration. In response, Dr. Eliason prescribed Ms. Edmo sleeping medication. Tr. 458:5-10, 461:18-24.



44. Ms. Edmo also reported her frequent thoughts of self-castration to her assigned clinician, Krina Stewart, in November 2016. Ms. Stewart testified that none of the interventions she identified for Ms. Edmo at that visit would alleviate her gender dysphoria or desire to self-castrate. Stewart Dep. 58:15-59:16; Exh. 1 at 584-85.
45. Ms. Edmo attempted self-castration a second time in December 2016. She prepared for weeks by studying the anatomy of the scrotum and took steps to diminish the chance of infection by boiling the razor blade and scrubbing her hands with soap. Ms. Edmo made more surgical headway on this attempt and was able to cut open the testicle sac and remove the testicle. Gorton Decl. ¶ 74. Because there was too much blood, Ms. Edmo abandoned her attempt and sought medical assistance. Tr. 198:9-16. She was transported to a hospital where her testicle was repaired. Tr. 198:25-199:13.
46. Ms. Edmo was receiving hormone therapy both times she attempted to self-castrate. Tr. 228:20-25.
47. After the procedure, Ms. Edmo felt disappointed in herself because she felt she had come so close to removing her testicle but had not succeeded. Tr. 199:17-23. Ms. Edmo continues to actively experience thoughts of self-castration. Tr. 197: 21-24. In an effort to avoid acting on them, when she has experienced extreme episodes of gender dysphoria in the past year, Ms. Edmo “self-medicate[s]” by using a razor to cut her arm. The physical pain she feels from

cutting helps her release the emotional torment and mental anguish she feels at the time. Tr. 199:24-200:15.

48. Ms. Edmo will likely be released from prison sometime in 2021. Tr. 201:14-15, 230:3-10.

## **VI. Defendants' Treatment of Ms. Edmo for Gender Dysphoria**

49. On April 20, 2016, Dr. Eliason evaluated Ms. Edmo for sex reassignment surgery. Jt. Exh. 1 at 538. Dr. Eliason noted that Ms. Edmo reported she was “doing alright,” that she was eligible for parole, but it had not been granted because of multiple Disciplinary Offense Reports (“DORs”). Jt. Exh. 1 at 538. The DORS were related to her use of makeup and feminine appearance. Jt. Exh. 1 at 538.
50. Dr. Eliason noted that Ms. Edmo had been on hormone replacement for the last year and a half, but that she felt she needed more. Jt. Exh. 1 at 538. Dr. Eliason specifically noted that Ms. Edmo stated an improvement in gender dysphoria on hormone replacement but had ongoing frustrations stemming from her current anatomy. Jt. Exh. 1 at 538. He also recognized Ms. Edmo’s multiple attempts to “mutilate her genitalia” because of the severity of her distress. Jt. Exh. 1 at 538. He also noted that he spoke to prison staff about Ms. Edmo’s behavior, “which is notable for animated affect and no observed distress.” Jt. Exh. 1 at 538. Dr. Eliason then stated that he also personally observed Ms. Edmo in these settings and did not observe significant dysphoria. Jt. Exh. 1 at 538.

51. Nevertheless, Dr. Eliason noted that Ms. Edmo appeared feminine in demeanor and interaction style. Jt. Exh. 1 at 538. He concluded that Ms. Edmo had Gender Dysphoria, Alcohol Use disorder, and Depression, Jt. Exh. 1 at 538, but his ultimate conclusion was that Ms. Edmo “[d]oes not meet criteria for medical necessity for sex reassignment surgery.” Jt. Exh. 1 at 538.
52. In assessing Ms. Edmo’s need for gender confirmation surgery, Dr. Eliason indicated that he staffed her case with Dr. Jeremy Stoddart, Dr. Murray Young, and Jeremy Clark LCPC (clinical supervisor and WPATH member). Each of these individuals agreed with his assessment. Jt. Exh. 1 at 538.
53. Dr. Eliason indicated he would continue to monitor and assess Ms. Edmo for the medical necessity of gender confirmation surgery. Jt. Exh. 1 at 538. He further determined that the combination of hormonal treatment and supportive counseling is sufficient for Ms. Edmo’s gender dysphoria for the time being.
54. To justify his conclusion, Dr. Eliason noted that while medical necessity for gender confirmation surgery is not very well defined and is constantly shifting, the following situations could constitute medical necessity for the surgery:
  - a. Congenital malformations or ambiguous genitalia;
  - b. Severe and devastating dysphoria that is primarily due to genitals; and
  - c. Some type of medical problem in which endogenous sexual hormones were causing severe physiological damage. Jt. Exh. 1 at 538.

55. He also explained that there may also be other situations where gender confirmation surgery is medically necessary as more information becomes available. Jt. Exh. 1 at 538.
56. Although not noted in his April 20, 2016 progress notes, Dr. Eliason testified that Ms. Edmo's mental health concerns were not "fully in adequate control." Tr. 430:22-431:2. He testified that not all of Ms. Edmo's mental health issues, such as her major depression and alcohol use disorders, stemmed from her gender dysphoria. His testimony, however, is contradicted by his April 20, 2016 clinician notes. Tr. 451:1-12.
57. Ms. Edmo has received mental health treatment from a psychiatrist and mental health nurse practitioner since she began her incarceration in 2012. Tr. 225:8-227:2. However, she has not consistently attended therapy to help her work through serious underlying mental health issues and a pre-incarceration history of trauma, abuse, and suicide attempts. Tr. 134:8-25, 135:1-23, 218:21-25, 219:1-14, 220:17-20; 221:16-19; Campbell Decl. Dkt., 101-4, ¶¶24, 29; Stewart Decl., Dkt. 101-1, ¶12; Watson Decl., Dkt. 101-3, ¶18; Clark Decl., Dkt. 101-7, ¶14).
58. Dr. Eliason testified that there were two primary reasons why sex reassignment surgery was not medically necessary at the time:
  - a. Ms. Edmo had not satisfied the 12-month period of living in her identified gender role under WPATH standards. Tr. 430: 25-431:2; and

- b. “[I]t was not doing Ms. Edmo any service to rush through getting gender reassignment surgery in that current social situation.” Tr. 431:3-6.
59. Dr. Eliason’s evaluation was the only time IDOC and Corizon evaluated Ms. Edmo for gender confirmation surgery prior to this lawsuit. Exh. 1 at 538; Tr. 419:1-10.
60. In concluding that surgery was not medically necessary for Ms. Edmo, Dr. Eliason did not review her prior criminal record, disciplinary history, or her presentence investigation reports. Tr. 468:4-18. The only information Dr. Eliason relied upon was Ms. Edmo’s medical record, staff observations, and her therapist’s notes. Tr. 469:16-25. Dr. Eliason testified that when he assessed her for surgery, he was aware of Ms. Edmo’s prior self-surgery attempt. He believed Ms. Edmo’s gender dysphoria had risen to another level, but he made no change to her treatment plan. Tr. 471:7-22.

## **VII. Ms. Edmo’s Medical Necessity for Gender Confirmation Surgery**

61. Plaintiff’s and Defendants’ experts disagree on whether Ms. Edmo meets all the WPATH standards criteria for gender confirmation surgery. Specifically, Defendants’ experts believe that Ms. Edmo does not meet the fourth and sixth criteria – that any significant mental health concerns be well controlled and that she live twelve months in a fully gender-congruent role. Tr. 75:9-78:3; 252:13-254:11; 607:2-10, 639:14-640:25.

62. Notably, however, Dr. Eliason did not rely upon any finding that Ms. Edmo did not meet the WPATH criteria in concluding in his April 2016 assessment that she did not meet the criteria for gender confirmation surgery. Tr. 462:3-463:10.
63. With regard to the fourth criterion, Ms. Edmo has been diagnosed with Major Depressive Disorder, Alcohol Use Disorder, and Gender Dysphoria. *See, e.g.*, Exh. 1 at 538. These diagnoses were generally confirmed by each of the experts, with observation that any substance use disorder has been in remission while Ms. Edmo has been incarcerated. Tr. 67:16-18, 253:3-9, 518:16-219:6, 603:22-604:5.
  - a. Plaintiff's experts testified that Ms. Edmo's depression and anxiety are as controlled as they can be and do not impair her ability to undergo surgery. Tr. 76:13-25, 123:14-124:11, 253:3-9; Exh. 15 at 30. In their view, the clinical significance of Ms. Edmo's self-surgery attempts and recent cutting of her arm is that she has severe genital-focused gender dysphoria and is not getting medically necessary treatment to alleviate it. Tr. 254:15-19, 98:11-22. Ms. Edmo's self-surgery attempts are not acts of mutilation or self-harm, but are instead attempts to remove her target organ that produces testosterone, which is the cure for gender dysphoria. Tr. 80:3-13. Ms. Edmo's gender dysphoria, not her depression and anxiety, is the driving force behind her self-surgery attempts. Tr. 254:20-255:8.
  - b. Thus, Ms. Edmo's self-surgery attempts and cutting do not indicate she has mental health concerns that are not well controlled. Tr. 98:11-22. Rather,

Ms. Edmo's recent cutting is attention-reduction behavior that she uses to prevent herself from cutting her genitals. Tr. 98:16-22. Her self-surgery attempts indicate a need for treatment for gender dysphoria. Tr. 98:11-15.

- c. In the more than six years she has spent in IDOC custody, no Corizon or IDOC provider has ever diagnosed Ms. Edmo with borderline personality disorder. Tr. 361:18-362:3, 470:4-6. Defense expert Dr. Andrade is the first person to ever diagnose Ms. Edmo with borderline personality disorder, and he was unable to identify his criteria for this diagnosis of Ms. Edmo during his testimony. Tr. 652:21-24, 638:16-22. None of the other experts, including Defense expert Dr. Garvey, diagnosed Ms. Edmo with borderline personality disorder. Tr. 131:24-132:3, 139:19-24.
- d. One of the primary concerns underlying the fourth criterion is that the individual be able to properly participate in postsurgical care. Ms. Edmo has demonstrated the capacity to follow through with the postsurgical care she would require. Tr. 99:3-8, 169:23-170:25.
- e. Although it is troubling that Ms. Edmo has declined to fully participate in the mental health treatment and counseling sessions recommended by Dr. Eliason and others, Dr. Ettner made clear that, "Psychotherapy is neither a precondition for treatment or a condition -- a precondition for surgery." Tr. 98:23-99:2.

- f. Dr. Ettner concludes that Ms. Edmo meets the fourth criterion, since she has no unresolved mental health issues that would prevent her from receiving gender confirmation surgery. Tr. 98:3-10.
64. With respect to the sixth criterion, both Plaintiff's experts testified that Ms. Edmo meets and exceeds the condition of social role transition by living as a woman to the best of her ability in a male prison.
  - a. For the six-plus years she has lived in prison, Ms. Edmo has consistently sought to present as feminine, despite living in an environment hostile to her efforts, and despite the disciplinary consequences she faces. Tr. 77:9-78:3, 254:4-11.
65. Dr. Ettner testified that gender confirmation surgery would eliminate Ms. Edmo's gender dysphoria and significantly attenuate much of the attendant depression and symptoms she is experiencing. Tr. 104:24-105:9. She testified that gender confirmation surgery is the cure for gender dysphoria and will therefore result in therapeutic and beneficial effects for Ms. Edmo. Tr. 81:13-19.
66. Dr. Gorton testified that it is highly unlikely that Ms. Edmo's severe gender dysphoria will improve without gender confirmation surgery. Tr. 267:19-22.
67. The risks of not providing gender confirmation surgery to Ms. Edmo include surgical self-treatment, emotional decompensation, and risk of suicide given her high degree of suicide ideation. Tr. 80:24:81:8, 264:13-22. If she is not provided with surgery, Ms. Edmo has indicated that she will try self-surgery again to deal



with her extreme episodes of gender dysphoria. Tr. 199:24-200:5. Given that Ms. Edmo made increasing progress on her first two self-surgery attempts, it is likely that Ms. Edmo will be successful if she attempts self-surgery again. Tr. 264:13-22.

68. Scientific studies indicate that the regret rate for individuals who have had gender confirmation surgery is very low and generally in the range of one percent of patients. Tr. 103:25-12, 165:16-166:4. Ms. Edmo does not have any of the risk factors that make her likely to regret undergoing gender confirmation surgery. Tr. 266:1-267:1.

## CONCLUSIONS OF LAW

### I. Injunction Standard

1. Ms. Edmo asks for a preliminary injunction. A preliminary injunction is only awarded upon a clear showing that the plaintiff is entitled to the requested relief. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008).
2. To make this showing, the plaintiff must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Id.*
3. The requirements are stated in the conjunctive so that all four elements must be established to justify injunctive relief. The court may apply a sliding scale test, under which “the elements of the preliminary injunction test are balanced, so that a

stronger showing of one element may offset a weaker showing of another.”

*Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

4. A more stringent standard is applied where mandatory, as opposed to prohibitory, injunctive relief is sought. Prohibitory injunctions restrain a party from taking action and effectively “freeze[ ] the positions of the parties until the court can hear the case on the merits.” *Heckler v. Lopez*, 463 U.S. 1328, 1333 (1983). Mandatory injunctions go well beyond preserving the status quo, as they order a party to take some action. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009).
5. Although the same general principles inform the court’s analysis in deciding whether to issue mandatory or prohibitory relief, courts should be “extremely cautious” about ordering mandatory relief. *Martin v. Intl Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984). Mandatory preliminary relief should not issue unless both the facts and the law clearly favor the moving party and extreme or very serious damage will result. *See Marlyn Nutraceuticals*, 571 F.3d at 879. Mandatory injunctions are not issued in doubtful cases, or where the party seeking an injunction could be made whole by an award of damages. *Id.*

6. The Court agrees with defendants that Edmo seeks mandatory relief. Thus, the Court will apply the more stringent standard.<sup>1</sup>
7. The Prison Litigation Reform Act (“PLRA”) requires any preliminary injunction to be “narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct the harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system.” 18 U.S.C. § 3626(a)(2).

## **II. Eighth Amendment Claim**

### **A. Likelihood of Success on the Merits**

8. The Eighth Amendment to the United States Constitution protects prisoners against cruel and unusual punishment. To state a claim under the Eighth

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<sup>1</sup> In discussions with counsel before the evidentiary hearing, the Court expressed the concern that the nature of the relief requested in this case, coupled with the extensive evidence presented by the parties over a 3-day evidentiary hearing, effectively converted these proceedings into a final trial on the merits of the plaintiff’s request for permanent injunctive relief. Neither party addressed the Court’s concern, and both parties appear to have treated the evidentiary hearing as a final trial of Ms. Edmo’s claims.

In an abundance of caution, the Court has considered the standard for the issuance of a permanent injunction, which would have required the plaintiff to show (1) she has suffered an irreparable injury, (2) monetary damages would not compensate her for that injury, (3) after balancing the hardships between the parties, a remedy of equity is warranted, and (4) the public interest would not be disserved by a permanent injunction. *See, eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). That standard appears to be no more rigorous than that applicable to a claim for preliminary mandatory relief. The Court concludes that under either standard Ms. Edmo is entitled to relief.

Amendment, Ms. Edmo must show that she is “incarcerated under conditions posing a substantial risk of serious harm,” or that she has been deprived of “the minimal civilized measure of life’s necessities” as a result of Defendants’ actions. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted).

9. An Eighth Amendment claim requires a plaintiff to satisfy “both an objective standard – that the deprivation was serious enough to constitute cruel and unusual punishment – and a subjective standard – deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012).
10. The Eighth Amendment includes the right to adequate medical care in prison, and prison officials or prison medical providers can be held liable if their “acts or omissions [were] sufficiently harmful to evidence deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).
11. Regarding the objective standard for prisoners’ medical care claims, the Supreme Court of the United States has explained that “[b]ecause society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (quoting *Estelle v. Gamble*, 429 U.S., 97, 103 (1976)).
12. The Ninth Circuit has defined a “serious medical need” in the following ways: failure to treat a prisoner’s condition [that] could result in further significant injury or the unnecessary and wanton infliction of pain [;] ... [t]he existence of an injury

that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain . . . .”

*McGuckin v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992) (internal citations omitted), overruled on other grounds, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc).

13. As to the subjective standard, a prison official or prison medical provider acts with “deliberate indifference . . . only if the [prison official] knows of and disregards an excessive risk to inmate health and safety.” *Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1187 (9th Cir. 2002) (citation and internal quotation marks omitted). “Under this standard, the prison official must not only ‘be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,’ but that person ‘must also draw the inference.’” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting *Farmer*, 511 U.S. at 837).
14. “If a [prison official] should have been aware of the risk, but was not, then the [official] has not violated the Eighth Amendment, no matter how severe the risk.” *Gibson*, 290 F.3d at 1188 (citation omitted). However, “whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Farmer*, 511 U.S. at

842; *see also Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003)

(deliberate indifference to medical needs may be shown by circumstantial evidence when the facts are sufficient to demonstrate that defendant actually knew of a risk of harm).

15. In the medical context, a conclusion that a defendant acted with deliberate indifference requires that the plaintiff show both “a purposeful act or failure to respond to a prisoner’s pain or possible medical need and . . . harm caused by the indifference.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).
16. Deliberate indifference can be “manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.” *Estelle*, 429 U.S. at 104–05 (footnotes omitted).
17. Non-medical prison personnel are generally entitled to rely on the opinions of medical professionals with respect to the medical treatment of an inmate. However, if “a reasonable person would likely determine [the medical treatment] to be inferior,” the fact that an official is not medically trained will not shield that official from liability for deliberate indifference. *Snow*, 681 F.3d at 986; *see also McGee v. Adams*, 721 F.3d 474, 483 (7th Cir. 2013) (stating that non-medical personnel may rely on medical opinions of health care professionals unless “they have a reason to believe (or actual knowledge) that prison doctors or their

assistants are mistreating (or not treating) a prisoner”) (internal quotation marks omitted).

18. Differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnosis and treatment are not enough to establish a deliberate indifference claim. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.1989). “[T]o prevail on a claim involving choices between alternative courses of treatment, a prisoner must show that the chosen course of treatment ‘was medically unacceptable under the circumstances,’ and was chosen ‘in conscious disregard of an excessive risk’ to the prisoner's health.” *Toguchi*, 391 F.3d at 1058, (alteration omitted) (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)).
19. Mere indifference, medical malpractice, or negligence will not support a cause of action under the Eighth Amendment. *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir.1980) (per curiam). Likewise, a delay in treatment does not constitute a violation of the Eighth Amendment unless the delay causes further harm. *McGuckin*, 974 F.2d at 1060.

#### **1. Serious Medical Need**

20. There is no dispute that Ms. Edmo suffers from gender dysphoria. And there is no dispute that gender dysphoria is a serious medical condition recognized by the DSM-5.

21. WPATH Standards of Care are the accepted standards of care for treatment of transgender patients. These standards have been endorsed by the NCCHC as applying to incarcerated persons.
22. There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups.
23. The Court finds credible the testimony of Plaintiff's experts Drs. Ettner and Gorton, who have extensive personal experience treating individuals with gender dysphoria both before and after receiving gender confirmation surgery. Plaintiff's experts found that Ms. Edmo satisfied all six WPATH medical necessity criteria for surgery.
24. Defendants' experts, by contrast, have opined that surgery is not medically necessary for Ms. Edmo. However, neither Dr. Garvey nor Dr. Andrade has any direct experience with patients receiving gender confirmation surgery or assessing patients for the medical necessity of gender confirmation surgery. Defendants' experts also have very little experience treating patients with gender dysphoria other than assessing them for the existence of the condition.
25. Defendants' experts appear to misrepresent the WPATH Standards of Care by concluding that Ms. Edmo, despite presenting as female since her incarceration in 2012, cannot satisfy the WPATH criteria because she has not presented as female outside of the prison setting. But there is no requirement in the WPATH Standards of Care that a "patient live for twelve months in his or her gender role outside of



prison before becoming eligible for SRS.” *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Cal. 2015),

26. Indeed, Plaintiff’s experts opine that Ms. Edmo exceeds this criterion because she has not only presented as female for far longer than twelve months, but has done so in an environment arguably more hostile to these efforts than the non-custodial community, and despite the disciplinary consequences of doing so. The WPATH Standards of Care explicitly provide that they apply “in their entirety . . . to all transsexual, transgender, and gender-nonconforming people, irrespective of their housing situation,” and “including institutional environments such as prisons.” Exh. 15 at 73. The Standards of Care make clear that “[d]enial of needed changes in gender role or access to treatments, including sex reassignment surgery, on the basis of residence in an institution are not reasonable accommodations.” Exh. 15 at 74.
27. Defendants’ evidence to the contrary is unconvincing and suggests a decided bias against approving gender confirmation surgery.
28. In 2016, Dr. Eliason contacted Dr. Steven Levine to lead a training for IDOC and Corizon providers on medical necessity for gender confirmation surgery. Tr. 433:23-434:24. Dr. Levine’s training presentation was titled “Medical Necessity of Transgender Inmates: In Search of Clarity When Paradox, Complexity, and Uncertainty Abound.” Exh. 17 at 1. Dr. Levine trained Corizon and IDOC staff that gender confirmation surgery is “not conceived as lifesaving as is repairing a

potentially leaking aortic aneurysm but as life enhancing as is providing augmentation for women distressed about their small breasts.” Exh. 17 at 43; Exh. 16.

29. Dr. Levine is considered an outlier in the field of gender dysphoria and does not ascribe to the WPATH Standards of Care. Tr. 176:14-21. His training materials do not reflect opinions that are generally accepted in the field of gender dysphoria. Tr. 176:22-179:1.
30. Dr. Levine’s training includes additional criteria proposed by Cynthia Osborne and Anne Lawrence that incarcerated individuals must meet in order to receive gender confirmation surgery. Exh. 17 at 39-41, 51; Exh. 19. These requirements are not part of the WPATH criteria and are in opposition to the WPATH Standards of Care. Tr. 101:15-22, 103:14-20. There are no scientific studies that support these additional requirements, and no professional associations or organizations have endorsed Osborne and Lawrence’s proposed requirements for prisoners. Tr. 103:4-13. The NCCHC has not adopted Osborne and Lawrence’s additional requirements. Tr. 480:12-16. Like Dr. Levine, Osborne and Lawrence are considered outliers in the field of gender dysphoria treatment, are not WPATH members, and do not ascribe to the WPATH Standards of Care. Tr. 101:2-14.
31. A decision of the U.S. District Court in the Northern District of California, *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Cal. 2015), is noteworthy here. Dr. Levine was retained as a defense expert by the California Department of

Corrections and Rehabilitation in a suit filed by a transgender plaintiff in that case. In ordering the prison to provide the plaintiff gender confirmation surgery, the *Norsworthy* court afforded Dr. Levine’s opinions “very little weight,” stating: “To the extent that Levine’s apparent opinion that no inmate should ever receive SRS predetermined his conclusion with respect to Norsworthy, his conclusions are unhelpful in assessing whether she has established a serious medical need for SRS.” *Norsworthy*, 87 F. Supp. 3d at 1188. The court also determined that Dr. Levine’s opinion was not credible because of illogical inferences, inconsistencies, and inaccuracies,” including misrepresentations of the WPATH Standards of Care, overwhelming “generalizations about gender dysphoric prisoners” and Dr. Levine’s fabrication of a prisoner anecdote. *Id.*

32. Under these circumstances, the Court gives virtually no weight to the opinions of Defendants’ experts that Ms. Edmo does not meet the fourth and sixth WPATH criteria for gender confirmation surgery.

## **2. Deliberate Indifference**

33. Defendants misapplied the recognized standards of care for treating Ms. Edmo’s gender dysphoria.
34. Defendants insufficiently trained their staff with materials that discourage referrals for surgery and represent the opinions of a single person who rejects the WPATH Standards of Care.

35. Defendants' sole evaluation of Ms. Edmo for surgery prior to this lawsuit failed to accurately apply the WPATH Standards of Care. Specifically, Dr. Eliason's assessment that Ms. Edmo did not meet medical necessity for surgery did not apply the WPATH criteria.
36. 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.
37. Evidence also suggests that Ms. Edmo has not been provided gender confirmation surgery because Corizon and IDOC have a *de facto* policy or practice of refusing this treatment for gender dysphoria to prisoners.
38. In *Norsworthy*, the court found that the prison had a blanket policy barring surgery in light of evidence that the prison's "guidelines for treating transgender inmates, which do not mention SRS as a treatment option, and the 2012 training provided to CDCR staff by Levine, which indicated that SRS should never be provided to incarcerated patients." *Norsworthy*, 87 F. Supp. 3d at 1191.
39. Here, the only guidelines Corizon issued to assist its providers in treating gender dysphoria likewise do not include surgery as a treatment option. Moreover, Dr. Levine's training provided to Corizon and IDOC staff, and incorporated into further Corizon and IDOC training, discourages providing surgery to incarcerated persons with gender dysphoria.

40. Significantly, no Corizon or IDOC provider has ever recommended that gender confirmation surgery is medically necessary for a patient in IDOC custody. In fact, Corizon has never provided this surgery at any of its facilities in the United States.
41. As was the case in *Norsworthy*, “[t]he weight of the evidence demonstrates that for [Ms. Edmo], the only adequate medical treatment for her gender dysphoria is [gender confirmation surgery], that the decision not to address her persistent symptoms was medically unacceptable under the circumstances, and that [Defendants] denied her the necessary treatment for reasons unrelated to her medical need.” *Norsworthy*, 87 F. Supp. 3d at 1192.
42. Accordingly, Ms. Edmo is likely to succeed on the merits of her Eighth Amendment claim.

#### **B. Likelihood of Irreparable Harm**

43. The Ninth Circuit has repeatedly held that serious psychological harm, in addition to physical harm and suffering, constitutes irreparable injury. *See, e.g., Chalk v. U.S. Dist. Ct. Cent. Dist. of California*, 840 F. 2d 701, 709 (9th Cir. 1988) (plaintiff’s “emotional stress, depression and reduced sense of well-being” constituted irreparable harm); *Thomas v. Cnty. of Los Angeles*, 978 F. 2d 504, 512 (9th Cir. 1992) (“Plaintiffs have also established irreparable harm, based on this Court’s finding that the deputies’ actions have resulted in irreparable physical and emotional injuries to plaintiffs and the violation of plaintiffs’ civil rights.”).

44. Ms. Edmo's gender dysphoria results in clinically significant distress or impairment of functioning.
45. Both Plaintiff's and Defendants' experts agree that Ms. Edmo is properly diagnosed with gender dysphoria and continues to experience serious distress from this condition.
46. Ms. Edmo has received hormone treatment and achieved the maximum feminizing effects years ago.
47. Other district courts have recognized that the significant emotional pain, suffering, anxiety, and depression caused by prison officials' failure to provide adequate treatment for gender dysphoria constitute irreparable harm warranting a preliminary injunction. *See, e.g., Hicklin v. Precynthe*, 2018 WL 806764, at \*9 (E.D. Missouri 2018); *Norsworthy*, 87 F. Supp. 3d at 1192.
48. Ms. Edmo has twice attempted self-castration resulting in significant pain and suffering.
49. The Court is persuaded by Plaintiff's experts that, without surgery, Ms. Edmo is at serious risk of life-threatening self-harm.
50. Thus, Ms. Edmo has satisfied the irreparable harm prong by showing that she will suffer serious psychological harm and will be at high risk of self-castration and suicide in the absence of gender confirmation surgery.

### C. Balance of Equities

51. “Courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” *Winter*, 555 U.S. at 24 (quoting *Amoco Production Co.*, 480 U.S. 531, 542 (1987)).
52. The balance of equities tips in a plaintiff’s favor where the plaintiff has established irreparable harm in the form of unnecessary physical and emotional suffering and denial of her constitutional rights. *See, e. g., Hicklin*, 2018 WL 806764, at \*13; *Norsworthy*, 87 F. Supp. 3d at 1193.
53. Ms. Edmo has established that Defendants’ refusal to provide her with gender confirmation surgery causes her ongoing irreparable harm.
54. Defendants have made no showing that an order requiring them to provide treatment that accords with the recognized WPATH Standard of Care causes them injury.

### D. The Public Interest

55. The Court finds that a mandatory preliminary injunction is in the public interest. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *See Melendres v. Arpaio*, 695 F. 3d 990, 1002 (9th Cir. 2012).
56. “In addition, ‘the public has a strong interest in the provision of constitutionally adequate health care to prisoners.’” *McNearney v. Wash. Dep’t of Corr.*, 2012 WL 3545267, at \*16 (W.D. Wash. 2012).

57. Accordingly, a mandatory preliminary injunction should issue because both the facts and the law clearly favor Ms. Edmo and extreme or very serious damage will result if it is not issued. *See Marlyn Nutraceuticals*, 571 F.3d at 879.

### **III. FOURTEENTH AMENDMENT AND ACA CLAIMS**

58. Plaintiff has not met her burden for a preliminary injunction on her Fourteenth Amendment and Affordable Care Act claims at this time.
59. As explained above, to make this showing for preliminary injunction, the plaintiff must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 22.
60. While Ms. Edmo may ultimately prevail on her Fourteenth Amendment and Affordable Care Act claims, she is unable to show that she is entitled to injunctive relief at this time. Given the Court's ruling on her Eighth Amendment claim, there is no likelihood of irreparable harm to Ms. Edmo in the absence of injunctive relief on these two claims.
61. Moreover, the balance of equities tips in favor of Defendants because a more developed record on Defendants' treatment of transgender inmates is necessary before making a broader ruling based upon the Fourteenth Amendment or the Affordable Care Act.



62. Likewise, a more developed record is necessary to assess the public's interest in granting such injunctive relief. *Id.*

## ORDER

### IT IS ORDERED:

1. Plaintiff's Motion for Preliminary Injunction (Dkt. 62) is **GRANTED IN PART**. Defendants are ordered to provide Plaintiff with adequate medical care, including gender confirmation surgery. Defendants shall 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. However, given IDOC's implementation of an updated gender dysphoria policy on October 5, 2018 that appears to provide Plaintiff's requested injunctive relief related to accessing gender-appropriate underwear, clothing, and commissary items, the Court will not address that relief at this time. This is without prejudice to the plaintiff's right to raise the issue in the future, should IDOC revoke the new policy or if the implementation of the policy results in ongoing violations.

2. The Court's Deputy, Jamie Bracke, is directed to set a telephonic status conference in this case no later than two weeks after this decision issues.



DATED: December 13, 2018

A handwritten signature in black ink, reading "B. Lynn Winmill".

B. Lynn Winmill  
Chief U.S. District Court Judge

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

ADREE EDMO, AKA Mason Edmo,  
*Plaintiff-Appellee,*

V.

CORIZON, INC.; SCOTT ELIASON;  
MURRAY YOUNG; CATHERINE  
WHINNERY,  
*Defendants-Appellants,*

and

IDAHO DEPARTMENT OF  
CORRECTIONS; AL RAMIREZ, in his  
official capacity as warden of Idaho  
State Correctional Institution;\*  
HENRY ATENCIO; JEFF ZMUDA;  
HOWARD KEITH YORDY; RICHARD  
CRAIG; RONA SIEGERT,  
*Defendants.*

No. 19-35017

D.C. No.  
1:17-cv-00151-  
BLW

ADREE EDMO, AKA Mason Edmo,  
*Plaintiff-Appellee,*

No. 19-35019

\* Al Ramirez is substituted in his official capacity for his predecessor, Howard Keith Yordy, pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

v.

IDAHO DEPARTMENT OF  
CORRECTIONS; AL RAMIREZ, in his  
official capacity as warden of Idaho  
State Correctional Institution; HENRY  
ATENCIO; JEFF ZMUDA; HOWARD  
KEITH YORDY; RICHARD CRAIG;  
RONA SIEGERT,

*Defendants-Appellants,*

and

CORIZON, INC.; SCOTT ELIASON;  
MURRAY YOUNG; CATHERINE  
WHINNERY,

*Defendants.*

D.C. No.  
1:17-cv-00151-  
BLW

OPINION

Appeal from the United States District Court  
for the District of Idaho  
B. Lynn Winmill, Chief District Judge, Presiding

Argued and Submitted May 16, 2019  
San Francisco, California

Filed August 23, 2019

Before: M. Margaret McKeown and Ronald M. Gould,  
Circuit Judges, and Robert S. Lasnik, \*\* District Judge.

Per Curiam Opinion

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\*\* The Honorable Robert S. Lasnik, United States District Judge for  
the Western District of Washington, sitting by designation.

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**SUMMARY\*\*\***

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**Eighth Amendment / Prisoner Rights**

The panel affirmed the district court's entry of a permanent injunction in favor of Idaho state prisoner Adree Edmo, but vacated the injunction to the extent it applied to defendants Corizon, Howard Yordy, Rona Siegert, Dr. Young, Dr. Craig, and Dr. Whinnery, in their individual capacities, in Edmo's action seeking medical treatment for gender dysphoria.

The district court concluded that Edmo had established her Eighth Amendment claim. The district court further concluded that gender confirmation surgery ("GCS") was medically necessary for Edmo, and ordered the State to provide the surgery.

The panel credited the district court's factual findings as logical and well-supported, and held that the responsible prison authorities were deliberately indifferent to Edmo's gender dysphoria, in violation of the Eighth Amendment. The panel held that the record, as construed by the district court, established that Edmo had a serious medical need, that the appropriate medical treatment was GCS, and that prison authorities had not provided that treatment despite full knowledge of Edmo's ongoing and extreme suffering and medical needs. The panel rejected the State's position that there was a reasoned disagreement between qualified medical professionals. The panel emphasized that its

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\*\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

analysis was individual to Edmo, and rested on the record of this case.

Addressing further aspects of the appeal, the panel rejected the State’s contention that the district court did not make the Prison Litigation Reform Act’s requisite “need-narrowness-intrusiveness” findings, causing the injunction to automatically expire and moot the appeal. The panel held that the district court’s order, considered as a whole, made all the findings required by 18 U.S.C. § 3626(a)(1)(A), and Ninth Circuit precedent. The panel also held that the permanent injunction that the district court entered had not expired, and remained in place, albeit stayed. The panel accordingly denied the State’s motion to dismiss.

The panel held that the district court did not err in granting a permanent injunction. Specifically, the panel held, based on the district court’s factual findings, 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. The State did not dispute that Edmo’s gender dysphoria was a sufficiently serious medical need to trigger the State’s obligations under the Eighth Amendment. The panel held that the district court did not err in crediting the testimony of Edmo’s experts that GCS was medically necessary to treat Edmo’s gender dysphoria and that the State’s failure to provide that treatment was medically unacceptable. The panel further held that the district court did not err in discrediting the State’s experts because aspects of their opinions were illogical and unpersuasive. Also, the panel held that the record demonstrated that Dr. Eliason acted with deliberate indifference to Edmo’s serious medical needs. The panel noted that its decision was in tension with the Fifth Circuit’s decision in *Gibson v. Collier*, 920 F.3d 212 (5th

Cir. 2019), and the panel rejected that decision's categorical holding that denying GCS cannot, as a matter of law, violate the Eighth Amendment.

The panel held that the district court did not err in finding that Edmo would be irreparably harmed absent an injunction. The panel rejected the State's contentions as to why the district court erred in this finding.

The panel next considered the State's challenges to the scope of the injunction. The panel held that the injunction was properly entered against Dr. Eliason because he personally participated in the deprivation of Edmo's constitutional rights. The panel also held that because Edmo may properly pursue her Eighth Amendment claim for injunctive relief against Attencio, Zmuda and Ramirez in their official capacities, they were properly included within the scope of the district court's injunction. On remand, the district court shall amend the injunction to substitute the current warden as a party for Yordy. The panel vacated the district court's injunction to the extent it applied to Yordy, Siegert, Dr. Young, Dr. Craig, and Dr. Whinnery in their individual capacities because the evidence in the record was insufficient to conclude that they were deliberately indifferent to Edmo's serious medical needs. The panel vacated the injunction as to Corizon, and remanded with instructions to the district court to modify the injunction to exclude Corizon. Finally, the panel held that the injunctive relief ordered was not overbroad.

The panel considered the State's challenges to the procedure used by the district court. The panel rejected the State's contention that the district court erroneously converted the evidentiary hearing into a final trial on the merits without giving proper notice. The panel held that the State did receive notice, and in any event, the State had not

shown any prejudice. The panel also rejected the State's contention that the district court violated defendants' Seventh Amendment right to a jury trial by converting the evidentiary hearing into a trial on the merits. The panel held that the State's conduct waived its right to a jury trial with respect to issues common to Edmo's request for an injunction ordering GCS and her legal claims.

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### **COUNSEL**

Brady J. Hall (argued), Special Deputy Attorney General; Lawrence G. Wasden, Attorney General; Office of the Attorney General, Boise, Idaho; Marisa S. Crecelius, Moore Elia Kraft & Hall LLP, Boise, Idaho; for Defendants-Appellants Idaho Department of Corrections, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert.

Dylan A. Eaton (argued), J. Kevin West, and Bryce Jensen, Parsons Behle & Latimer, Boise, Idaho, for Defendants-Appellants Corizon, Inc.; Scott Eliason; Murray Young; and Catherine Whinnery.

Lori Rifkin (argued), Hadsell Stormer & Renick LLP, Emeryville, California; Dan Stormer and Shaleen Shanbhag, Hadsell Stormer & Renick LLP, Pasadena, California; Craig Durham and Deborah Ferguson, Ferguson Durham PLLC, Boise, Idaho; Amy Whelan and Julie Wilensky, National Center for Lesbian Rights, San Francisco, California; for Plaintiff-Appellee.

David M. Shapiro, Sheila A. Bedi, and Vanessa del Valle, Roderick & Solange MacArthur Justice Center, Chicago, Illinois; Molly E. Whitman, Akin Gump Strauss Hauer &

Feld LLP, Dallas, Texas; for Amici Curiae Andrea Armstrong, Sharon Dolovich, Betsy Ginsberg, Michael B. Mushlin, Alexander A. Reinert, Laura Rovner, and Margo Schlanger.

Molly Kafka and Richard Alan Eppink, ACLU of Idaho Foundation, Boise, Idaho; Devon A. Little and Derek Borchardt, Walden Macht & Haran LLP, New York, New York; Amy Fettig and Jennifer Wedekind, ACLU National Prison Project, Washington, D.C.; Gabriel Arkles and Rose Saxe, ACLU LGBT & HIV Project/ACLU Foundation, New York, New York; for Amici Curiae Former Corrections Officials.

Devi M. Rao and Jason T. Perkins, Jenner & Block LLP, Washington, D.C., for Amici Curiae Medical and Mental Health Professional Organizations.

Sharif E. Jacob, Ryan K. M. Wong, Kristin E. Hucek, and Patrick E. Murray, Keker Van Nest & Peters LLP, San Francisco, California, for Amicus Curiae Jody L. Herman.

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**OPINION****PER CURIAM:**

The Eighth Amendment prohibits “cruel and unusual punishments.” U.S. Const. amend. VIII. “The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quotation omitted). Our society recognizes that prisoners “retain the essence of human dignity inherent in all persons.” *Brown v. Plata*, 563 U.S. 493, 510 (2011).

Consistent with the values embodied by the Eighth Amendment, for more than 40 years the Supreme Court has held that “deliberate indifference to serious medical needs” of prisoners constitutes cruel and unusual punishment. *Estelle*, 429 U.S. at 106. When prison authorities do not abide by their Eighth Amendment duty, “the courts have a responsibility to remedy the resulting . . . violation.” *Brown*, 563 U.S. at 511. We do so here.

Adree Edmo (formerly Mason Dean Edmo) is a male-to-female transgender prisoner in the custody of the Idaho Department of Correction (“IDOC”). Edmo’s sex assigned at birth (male) differs from her gender identity (female). The incongruity causes Edmo to experience persistent distress so severe it limits her ability to function. She has twice attempted self-castration to remove her male genitalia, which cause her profound anguish.

Both sides and their medical experts agree: Edmo suffers from gender dysphoria, a serious medical condition. They also agree that the appropriate benchmark regarding treatment for gender dysphoria is the World Professional Association of Transgender Health Standards of Care for the

Health of Transsexual, Transgender, and Gender Nonconforming People (“WPATH Standards of Care”). And the State<sup>1</sup> does not seriously dispute that in certain circumstances, gender confirmation surgery (“GCS”) can be a medically necessary treatment for gender dysphoria. The parties’ dispute centers around whether GCS is medically necessary for Edmo—a question we analyze with deference to the district court’s factual findings.

Following four months of intensive discovery and a three-day evidentiary hearing, the district court concluded that GCS is medically necessary for Edmo and ordered the State to provide the surgery. Its ruling hinged on findings individual to Edmo’s medical condition. The ruling also rested on the finding that Edmo’s medical experts testified persuasively that GCS was medically necessary, whereas testimony from the State’s medical experts deserved little weight. In contrast to Edmo’s experts, the State’s witnesses lacked relevant experience, could not explain their deviations from generally accepted guidelines, and testified illogically and inconsistently in important ways.

The district court’s detailed factual findings were amply supported by its careful review of the extensive evidence and testimony. Indeed, they are essentially unchallenged. The appeal boils down to a disagreement about the implications of the factual findings.

Crediting, as we must, the district court’s logical, well-supported factual findings, we hold that the responsible

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<sup>1</sup> In addition to IDOC, Edmo sued Corizon, Inc. (a private for-profit corporation that provides health care to inmates in IDOC custody) and various employees of IDOC and Corizon. The defendants briefed the case jointly, and for ease of reference we refer to them collectively as “the State.”

prison authorities have been deliberately indifferent to Edmo’s gender dysphoria, in violation of the Eighth Amendment. The record before us, as construed by the district court, establishes that Edmo has a serious medical need, that the appropriate medical treatment is GCS, and that prison authorities have not provided that treatment despite full knowledge of Edmo’s ongoing and extreme suffering and medical needs. In so holding, we reject the State’s portrait of a reasoned disagreement between qualified medical professionals. We also emphasize that the analysis here is individual to Edmo and rests on the record in this case. We do not endeavor to project whether individuals in other cases will meet the threshold to establish an Eighth Amendment violation. The district court’s order entering injunctive relief for Edmo is affirmed, with minor modifications noted below.

Our opinion proceeds as follows. In Part I, we provide background on gender dysphoria, the standard of care, and the evidence considered and factual findings made by the district court. Part II explains why this appeal complies with the Prison Litigation Reform Act (“PLRA”) and is not moot. In Part III, we turn to the gravamen of the appeal: Edmo’s Eighth Amendment claim and showing of irreparable injury. Part IV addresses the State’s challenges to the injunction’s scope and narrows the injunction as to certain defendants. Part V rejects the State’s objections to the procedure employed by the district court. We conclude in Part VI.

## I. Background<sup>2</sup>

### A. Gender Dysphoria and its Treatment

Transgender individuals have a “[g]ender identity”—a “deeply felt, inherent sense” of their gender—that does not align with their sex assigned at birth.<sup>3</sup> Am. Psychol. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 834 (2015). Recent estimates suggest that approximately 1.4 million transgender adults live in the United States, or 0.6 percent of the adult population. Andrew R. Flores et al., The Williams Inst., *How Many Adults Identify as Transgender in the United States?*, at 2 (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

Gender dysphoria<sup>4</sup> is “[d]istress that is caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics).” World Prof’l Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-*

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<sup>2</sup> The following sections are derived from the district court’s factual findings and the record on appeal.

<sup>3</sup> At birth, infants are classified as male or female based on visual observation of their external genitalia. This is a person’s “sex assigned at birth,” but it may not be the person’s gender identity.

<sup>4</sup> Until recently, the medical community commonly referred to gender dysphoria as “gender identity disorder.” See *Kosilek v. Spencer*, 774 F.3d 63, 68 n.1 (1st Cir. 2014).

*Nonconforming People 2* (7th ed. 2011) (hereinafter “WPATH SOC”). The Fifth Edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (“DSM-5”) sets forth two conditions that must be met for a person to be diagnosed with gender dysphoria.<sup>5</sup>

First, there must be “[a] marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months’ duration, as manifested by at least two of the following”:

- (1) “a marked incongruence between one’s experienced/expressed gender and primary and/or secondary sex characteristics”;
- (2) “a strong desire to be rid of one’s primary and/or secondary sex characteristics because of a marked incongruence with one’s experienced/expressed gender”;
- (3) “a strong desire for the primary and/or secondary sex characteristics of the other gender”;
- (4) “a strong desire to be of the other gender”;
- (5) “a strong desire to be treated as the other gender”; or

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<sup>5</sup> Each expert in the case used these criteria to determine whether Edmo has gender dysphoria.

(6) “a strong conviction that one has the typical feelings and reactions of the other gender.”

Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 452 (5th ed. 2013) (hereinafter “DSM-5”). Second, the person’s condition must be associated with “clinically significant distress”—*i.e.*, distress that impairs or severely limits the person’s ability to function in a meaningful way and has reached a threshold that requires medical or surgical intervention, or both. *Id.* at 453, 458. Not every transgender person has gender dysphoria, and not every gender dysphoric person has the same medical needs.

Gender dysphoria is a serious but treatable medical condition. Left untreated, however, it can lead to debilitating distress, depression, impairment of function, substance use, self-surgery to alter one’s genitals or secondary sex characteristics, self-injurious behaviors, and even suicide.

The district court found that the World Professional Association of Transgender Health Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (“WPATH Standards of Care”)<sup>6</sup> “are the internationally recognized guidelines for the treatment of individuals with gender dysphoria.” *Edmo v. Idaho Dep’t of Corr.*, 358 F. Supp. 3d 1103, 1111 (D. Idaho 2018). Most courts agree. *See, e.g., De’lonta v. Johnson*, 708 F.3d 520, 522–23 (4th Cir. 2013); *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1294 (N.D. Fla. 2018), *appeal filed*,

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<sup>6</sup> The WPATH Standards of Care were formerly referred to as the “Harry Benjamin Standards of Care” and were promulgated by WPATH under its former name, the “Harry Benjamin International Gender Dysphoria Association.” *Kosilek*, 774 F.3d at 70 & n.3.

No. 18-14096 (11th Cir. 2018); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1170 (N.D. Cal.), *appeal dismissed & remanded*, 802 F.3d 1090 (9th Cir. 2015); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231–32 (D. Mass. 2012). *But see Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019) (“[T]he WPATH Standards of Care reflect not consensus, but merely one side in a sharply contested medical debate over [GCS].”); *cf. Kosilek*, 774 F.3d at 76–79 (recounting testimony questioning the WPATH Standards of Care). And many of the major medical and mental health groups in the United States—including the American Medical Association, the American Medical Student Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, the National Association of Social Workers, the American Academy of Plastic Surgeons, the American College of Surgeons, Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus, and Mental Health America—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.

Each expert in this case relied on the WPATH Standards of Care in rendering an opinion. As the State acknowledged to the district court, the WPATH Standards of Care “provide the best guidance,” and “are the best standards out there.” “There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups.” *Edmo*, 358 F. Supp. 3d at 1125.

“[B]ased on the best available science and expert professional consensus,” the WPATH Standards of Care provide “flexible clinical guidelines” “to meet the diverse health care needs of transsexual, transgender, and gender nonconforming people.” WPATH SOC at 1–2. Treatment under the WPATH Standards of Care must be individualized: “[w]hat helps one person alleviate gender dysphoria might be very different from what helps another person.” *Id.* at 5. “Clinical departures from the [WPATH Standards of Care] may come about because of a patient’s unique anatomic, social, or psychological situation; an experienced health professional’s evolving method of handling a common situation; a research protocol; lack of resources in various parts of the world; or the need for specific harm reduction strategies.” *Id.* at 2.

The WPATH Standards of Care identify the following evidence-based treatment options for individuals with gender dysphoria:

- (1) “changes in gender expression and role (which may involve living part time or full time in another gender role, consistent with one’s gender identity)”;
- (2) “psychotherapy (individual, couple, family, or group) for purposes such as exploring gender identity, role, and expression[,] addressing the negative impact of gender dysphoria and stigma on mental health[,] alleviating internalized transphobia[,] enhancing social and peer support[,] improving body image[,] or promoting resilience”;



(3) “hormone therapy to feminize or masculinize the body”; and

(4) “surgery to change primary and/or secondary sex characteristics (e.g., breasts/chest, external and/or internal genitalia, facial features, body contouring).”

*Id.* at 10. The WPATH Standards of Care state that many individuals “find comfort with their gender identity, role, and expression without surgery.” *Id.* at 54. For others, however, “surgery is essential and medically necessary to alleviate their gender dysphoria.” *Id.* That group cannot achieve “relief from gender dysphoria . . . without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity.” *Id.* at 55; *see also* Jae Sevelius & Valerie Jenness, *Challenges and Opportunities for Gender-Affirming Healthcare for Transgender Women in Prison*, 13 Int’l J. Prisoner Health 32, 36 (2017) (“Negative outcomes such as genital self-harm, including autocastration and/or autopenectomy, can arise when gender-affirming surgeries are delayed or denied.”); George R. Brown & Everett McDuffie, *Health Care Policies Addressing Transgender Inmates in Prison Systems in the United States*, 15 J. Corr. Health Care 280, 287–88 (2009) (describing the authors’ “firsthand knowledge of completed autocastration and/or autopenectomy in six facilities in four states”).

The weight of opinion in the medical and mental health communities agrees that GCS is safe, effective, and medically necessary in appropriate circumstances. *See, e.g.*, U.S. Dep’t of Health & Human Servs., No. A-13-87, Decision No. 2576, (Dep’t Appeals Bd. May 30, 2014); Randi Ettner, et al., *Principles of Transgender Medicine and*

*Surgery* 109–11 (2d ed. 2016); Jordan D. Frey, et al., *A Historical Review of Gender-Affirming Medicine: Focus on Genital Reconstruction Surgery*, 14 J. Sexual Med. 991, 991 (2017); Cynthia S. Osborne & Anne A. Lawrence, *Male Prison Inmates With Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?*, 45 Archives of Sexual Behav. 1649, 1651–53 (2016); *see also De'lonta*, 708 F.3d at 523 (“Pursuant to the Standards of Care, after at least one year of hormone therapy and living in the patient’s identified gender role, sex reassignment surgery may be necessary for some individuals for whom serious symptoms persist. In these cases, the surgery is not considered experimental or cosmetic; it is an accepted, effective, medically indicated treatment for [gender dysphoria].”).

The WPATH criteria for genital reconstruction surgery in male-to-female patients include the following:

- (1) “persistent, well documented gender dysphoria”;
- (2) “capacity to make a fully informed decision and to consent for treatment”;
- (3) “age of majority in a given country”;
- (4) “if significant medical or mental health concerns are present, they must be well controlled”;
- (5) “12 continuous months of hormone therapy as appropriate to the patient’s gender goals”; and

(6) “12 continuous months of living in a gender role that is congruent with their gender identity.”

WPATH SOC at 60. The parties’ dispute focuses on whether Edmo satisfied the fourth and sixth criteria.

With respect to the fourth criterion, the WPATH Standards of Care provide that coexisting medical or mental health concerns unrelated to the person’s gender dysphoria do not necessarily preclude surgery. *Id.* at 25. But those concerns need to be managed prior to, or concurrent with, treatment of a person’s gender dysphoria. *Id.* Coexisting medical or mental health issues resulting from a person’s gender dysphoria are not an impediment under the fourth criterion. It may be difficult to determine, however, whether mental or medical health concerns result from the gender dysphoria or are unrelated.

The WPATH Standards of Care explain that the sixth criterion—living for 12 months in an identity-congruent role—is intended to ensure that the person experiences the full range of “different life experiences and events that may occur throughout the year.” *Id.* at 61. During that time, the patient should present consistently in her desired gender role. *Id.*

Scientific studies show that the regret rate for individuals who undergo GCS is low, in the range of one to two percent. *See, e.g.,* Osborne & Lawrence, *Male Prison Inmates With Gender Dysphoria*, 45 Archives of Sexual Behav. at 1660; William Byne, et al., *Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder*, 41 Archives of Sexual Behav. 759, 780–81 (2012). The district court found, and the State does not dispute on appeal, that Edmo does not have any of the risk

factors that would make her likely to regret GCS. *See Edmo*, 358 F. Supp. 3d at 1121.

The WPATH Standards of Care apply equally to all individuals “irrespective of their housing situation” and explicitly state that health care for transgender individuals “living in an institutional environment should mirror that which would be available to them if they were living in a non-institutional setting within the same community.” WPATH SOC at 67. The next update to the WPATH Standards of Care will likewise apply equally to incarcerated persons. The National Commission on Correctional Health Care (“NCCHC”), a leading professional organization in health care delivery in the correctional context, endorses the WPATH Standards of Care as the accepted standards for the treatment of transgender prisoners.

In summary, the broad medical consensus in the area of transgender health care requires providers to individually diagnose, assess, and treat individuals’ gender dysphoria, including for those individuals in institutionalized environments. Treatment can and should include GCS when medically necessary. Failure to follow an appropriate treatment plan can expose transgender individuals to a serious risk of psychological and physical harm. The State does not dispute these points; it contends that GCS is not medically necessary for Edmo.

### **B. Edmo’s Treatment**

Edmo is a transgender woman in IDOC custody. Her sex assigned at birth was male, but she identifies as female. In her words, “my brain typically operates female, even though my body hasn’t corresponded with my brain.”

Edmo has been incarcerated since pleading guilty in 2012 to sexual abuse of a 15-year-old male at a house party. Edmo was 21 years old at the time of the criminal offense. Edmo is currently incarcerated at the Idaho State Correctional Institution (“ISCI”). At the time of the evidentiary hearing, she was 30 years old and due to be released from prison in 2021.

Edmo has viewed herself as female since age 5 or 6. She struggled with her gender identity as a child and teenager, presenting herself intermittently as female, but around age 20 or 21 she began living fulltime as a woman.

Although she identified as female from an early age, Edmo first learned the term “gender dysphoria” and the contours of that diagnosis around the time of her incarceration. Shortly thereafter, Corizon psychiatrist Dr. Scott Eliason diagnosed her with “gender identity disorder,” now referred to as gender dysphoria. Corizon psychologist Dr. Claudia Lake confirmed that diagnosis.

While incarcerated, Edmo has changed her legal name to Adree Edmo and the sex on her birth certificate to “female” to affirm her gender identity. Throughout her incarceration, Edmo has consistently presented as female, despite receiving many disciplinary offense reports for doing so. For example, when able to do so, Edmo has worn her hair in feminine hairstyles and worn makeup, for which she has received multiple disciplinary offense reports.<sup>7</sup> Medical providers have documented Edmo’s feminine presentation since 2012.

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<sup>7</sup> Before the evidentiary hearing, Edmo tried to receive access to female commissary items, such as women’s underwear. Most of her requests were denied. On the eve of the evidentiary hearing, IDOC

Neither the parties nor their experts dispute that Edmo suffers from gender dysphoria. That dysphoria causes Edmo to feel “depressed,” “disgusting,” “tormented,” and “hopeless.”

To alleviate Edmo’s gender dysphoria, prison officials have, since 2012, provided hormone therapy. Edmo has followed and complied with her hormone therapy regimen, which helps alleviate her gender dysphoria to some extent. The hormones “clear[] [her] mind” and have resulted in breast growth, body fat redistribution, and changes in her skin. Today, Edmo is hormonally confirmed, which means that she has the hormones and secondary sex characteristics (characteristics, such as women’s breasts, that appear during puberty but are not part of the reproductive system) of an adult female. Edmo has gained the maximum physical changes associated with hormone treatment.

Hormone therapy has not completely alleviated Edmo’s gender dysphoria. Edmo continues to experience significant distress related to gender incongruence. Much of that distress is caused by her male genitalia. Edmo testified that she feels “depressed, embarrassed, [and] disgusted” by her male genitalia and that this is an “everyday reoccurring thought.” Her medical records confirm her disgust, noting repeated efforts by Edmo to purchase underwear to keep, in Edmo’s words, her “disgusting penis” out of sight.

In addition to her gender dysphoria, Edmo suffers from major depressive disorder with anxiety and drug and alcohol addiction, although her addiction has been in remission

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amended its policy concerning the treatment of gender dysphoric prisoners to increase transgender women’s access to female commissary items.

while incarcerated. Edmo has taken her prescribed medications for depression and anxiety. Prison officials have also provided Edmo mental health treatment to help her work through her serious underlying mental health issues and a pre-incarceration history of trauma, abuse, and suicide attempts. Edmo sees her psychiatrist when scheduled. But Edmo does not see her treating clinician, Krina Stewart, because Edmo does not believe Stewart is qualified to treat her gender dysphoria. Edmo has attended group therapy sessions inconsistently.

In September 2015, Edmo attempted to castrate herself for the first time using a disposable razor blade.<sup>8</sup> Before doing so, she left a note to alert officials that she was not “trying to commit suicide,” and was instead “only trying to help [her]self.” Edmo did not complete the castration, though she continued to report thoughts of self-castration in the following months.

On April 20, 2016, Dr. Eliason evaluated Edmo for GCS. At the time, IDOC’s policy concerning the treatment of gender dysphoric prisoners provided that GCS “will not be considered for individuals within [IDOC], unless determined medically necessary by” the treating physician.<sup>9</sup> Corizon’s policy does not mention GCS.

In his evaluation, Dr. Eliason noted that Edmo reported she was “doing alright.” He also noted that Edmo had been on hormone replacement therapy for the last year and a half, but that she felt she needed more. He reported that Edmo

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<sup>8</sup> She had previously reported thoughts of self-castration to clinicians.

<sup>9</sup> IDOC revised its policy shortly before the evidentiary hearing, but its revised policy contains functionally identical language.

had stated that hormone replacement therapy helped alleviate her gender dysphoria, but she remained frustrated with her male anatomy.

Dr. Eliason indicated that Edmo appeared feminine in demeanor and interaction style. He also indicated that Edmo had previously attempted to “mutilate her genitalia” because of the severity of her distress. Dr. Eliason later testified that, at the time of his evaluation, he felt that Edmo’s gender dysphoria “had risen to another level,” as evidenced by her self-castration attempt.

But Dr. Eliason also flagged that he had spoken to prison staff about Edmo’s behavior and they explained it was “notable for animated affect and no observed distress.” He similarly noted that he had personally observed Edmo and did not see significant dysphoria; instead, she “looked pleasant and had a good mood.”

As to GCS, Dr. Eliason explained in his notes that while medical necessity for GCS is “not very well defined and is constantly shifting,” in his view, GCS would be medically necessary in at least three situations: (1) “congenital malformations or ambiguous genitalia,” (2) “severe and devastating dysphoria that is primarily due to genitals,” or (3) “some type of medical problem in which endogenous sexual hormones were causing severe physiological damage.” Dr. Eliason concluded that Edmo “does not meet any of those . . . criteria” and, for that reason, GCS is not medically necessary for her.

Dr. Eliason instead concluded that hormone therapy and supportive counseling suffice to treat Edmo’s gender dysphoria for the time being, despite recognizing that Edmo had attempted self-castration on that regimen. Dr. Eliason



indicated that he would continue to monitor and assess Edmo.

Dr. Eliason staffed Edmo's evaluation with Dr. Jeremy Stoddart, Dr. Murray Young, and Jeremy Clark, who all agreed with his assessment. They did not observe Edmo; rather, they agreed with Dr. Eliason's recommended treatment as he presented it to them. The record is sparse on the qualifications of Dr. Stoddart and Dr. Young, but Clark has never personally treated anyone with gender dysphoria and was not qualified under IDOC policy to assess whether GCS would be appropriate for Edmo.

Dr. Eliason also discussed his evaluation with IDOC's Management and Treatment Committee ("MTC"), a multi-disciplinary team composed of medical providers, mental health clinicians, IDOC's Chief Psychologist, and prison leadership. The MTC meets periodically to evaluate and address the unique medical, mental health, and housing needs of prisoners with gender dysphoria. The committee "does not make any individual treatment decisions regarding" treatment for inmates with gender dysphoria. "Those determinations are made by the individual clinicians or the medical staff employed by Corizon." The MTC agreed with Dr. Eliason's assessment.

Although not mentioned in his April 20, 2016 notes, Dr. Eliason testified at the evidentiary hearing that he considered the WPATH Standards of Care when determining Edmo's treatment. Citing those standards, Dr. Eliason testified that he did not believe GCS was appropriate for two reasons: (1) because mental health issues separate from Edmo's gender dysphoria were not "fully in adequate control" and (2) because Edmo had not lived in her identified gender role for 12 months outside of prison. He explained that Edmo needed to experience

“living as a woman” around “her real social network – her family and friends on the outside” so that she could “determine whether or not she felt like that was her real identity.”

Edmo was never evaluated for GCS again, but the MTC considered her gender dysphoria and treatment plan during later meetings. The MTC continues to believe that GCS is not medically necessary or appropriate for Edmo.

In December 2016, Edmo tried to castrate herself for the second time. A medical note from the incident reports that Edmo said she no longer wanted her testicles. Edmo reported to medical providers that she was “feeling angry/frustrated that [she] was not receiving the help desired related to [her] gender dysphoria. Inmate Edmo’s actions were reported as a method to stop/cease testosterone production in Edmo’s body. Edmo denied suicidal ideation . . . .”

Edmo’s second attempt was more successful than the first. She was able to open her testicle sac with a razor blade and remove one testicle. She abandoned her attempt, however, when there was too much blood to continue. She then sought medical assistance and was transported to a hospital, where her testicle was repaired. Edmo was receiving hormone therapy both times she attempted self-castration.

Edmo testified that she was disappointed in herself for coming so close but failing to complete her self-castration attempts. She also testified that she continues to actively think about self-castration. To avoid acting on those thoughts and impulses, Edmo “self-medicate[s]” 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.

Edmo further testified that she expects GCS to help alleviate some of her gender dysphoria. In particular, she testified that she expects GCS to help her avoid having “as much depression about myself and my physical body. I don’t think I will be so anxious that people are always knowing I’m different . . . .” Edmo recognizes, however, that GCS “is not a fix-all”: “[i]t’s not a magic operation. . . . I’m still going to have to face the same stressors that we all face in everyday life . . . .”

### C. Initiation of this Action

Edmo filed a *pro se* complaint on April 6, 2017. She also moved for a temporary restraining order, a preliminary injunction, and the appointment of counsel.

Edmo’s motion for appointment of counsel was granted in part, and counsel for Edmo appeared in June and August 2017. Counsel withdrew Edmo’s *pro se* motion for preliminary injunction shortly thereafter.

On September 1, 2017, Edmo filed an amended complaint asserting claims under 42 U.S.C. § 1983, the Eighth Amendment, the Fourteenth Amendment, the Americans with Disabilities Act, the Affordable Care Act, and for common law negligence. She named as defendants IDOC, Henry Atencio (Director of IDOC), Jeff Zmuda (Deputy Director of IDOC), Howard Keith Yordy (former Warden of ISCI), Dr. Richard Craig (Chief Psychologist at ISCI), Rona Siegert (Health Services Director at ISCI), Corizon, Dr. Eliason, Dr. Young, and Dr. Catherine Whinnery (Corizon employee).

Through counsel, Edmo filed a renewed motion for a preliminary injunction on June 1, 2018. Among other relief, Edmo sought an order requiring the State to provide her with a referral to a qualified surgeon and access to GCS.

The State moved to extend the time to respond to Edmo's motion. After a status conference, the district court set an evidentiary hearing for October 10, 11, and 12, 2018. The court permitted the parties to undertake four months of extensive fact and expert discovery in preparation for the hearing.

#### **D. The Evidentiary Hearing**

At the evidentiary hearing, each side had eight hours to present its case. The district court heard live testimony from seven witnesses over three days. It also considered thousands of pages of exhibits, including Edmo's medical records. With the parties' agreement, the court also permitted the State to submit declarations in lieu of live testimony and permitted Edmo to impeach the declarations with deposition testimony.

At the outset of the hearing, the district court noted that "[w]e're here on a hearing for a temporary injunction," but it explained that "it's hard for me to envision this hearing being anything but a hearing on a final injunction[,] at least as to" the injunctive relief ordering GCS. The court stated that it was unsure whether that made a difference, and it asked the parties to address at some point whether the hearing was for a preliminary injunction or a permanent injunction. Notably, the State did not do so.

The district court heard testimony from three percipient witnesses: Edmo, Dr. Eliason (the Corizon physician), and Jeremy Clark (an IDOC clinician who did not meet IDOC's

criteria to assess Edmo for GCS). Their relevant testimony is largely recounted above.

It also heard testimony from four expert witnesses, two each for Edmo and the State. Dr. Randi Ettner, Ph.D. in psychology, testified first for Edmo. Dr. Ettner is one of the authors of the current (seventh) version of the WPATH Standards of Care. She has been a WPATH member since 1993 and chairs its Institutionalized Persons Committee. Dr. Ettner has authored or edited many peer-reviewed publications on the treatment of gender dysphoria and transgender health care more broadly, including the leading textbook used in medical schools on the subject. She also trains medical and mental health providers on treating people with gender dysphoria. Dr. Ettner has been retained as an expert witness on gender dysphoria and its treatment in many court cases, and she has been appointed as an independent expert by one federal court to evaluate an incarcerated person for GCS.

Dr. Ettner has evaluated, diagnosed, and treated between 2,500 and 3,000 individuals with gender dysphoria. She has referred about 300 people for GCS. She has also refused to recommend surgery for some patients who have requested it. She believes that not everyone who has gender dysphoria needs GCS. Dr. Ettner also has “[e]xtensive experience” treating and providing post-operative care for patients who have undergone GCS.

Dr. Ettner has assessed approximately 30 incarcerated individuals with gender dysphoria for GCS and other medical care, but she has not treated incarcerated patients. She has not worked in a prison and she is not a Certified Correctional Healthcare Professional.

Based on her evaluation of Edmo and a review of Edmo's medical records, Dr. Ettner diagnosed Edmo with gender dysphoria, depressive disorder, anxiety, and suicidal ideation. In Dr. Ettner's opinion, GCS is medically necessary for Edmo and should be immediately performed. She explained that most patients with gender dysphoria do not require GCS, but Edmo requires it because hormone therapy has been inadequate for her and Edmo has attempted to remove her own testicles. Dr. Ettner further explained that GCS would give Edmo congruent genitalia, eliminating the severe distress Edmo experiences due to her male anatomy.

Dr. Ettner further opined that Edmo meets the WPATH criteria for GCS. She explained that Edmo has "persistent and well-documented long-standing gender dysphoria"; Edmo "has no thought disorders and no impaired reality testing"; Edmo is the age of majority in this country; although Edmo has depression and anxiety, those conditions do not "impair her ability to undergo surgery" because they are "as controlled as [they] can be"; Edmo has had six years of hormone therapy; and Edmo has lived for more than one year "as a woman to the best of her ability in a male prison."

More specifically, as to the fourth criterion, Dr. Ettner opined that Edmo does not have mental health concerns that would preclude GCS. She explained that Edmo's depression and anxiety are as "controlled as can be" because Edmo "is taking the maximum amount of medication that controls depression." Dr. Ettner noted that Edmo has complied with taking her prescribed medications and that psychotherapy is not "a precondition for surgery" under the WPATH Standards of Care. She also flagged that Edmo has the capacity to comply with her postsurgical treatment, as evidenced by her compliance with her hormone therapy to date.

As to the clinical significance of Edmo's self-castration attempts and cutting behaviors, Dr. Ettner explained that neither behavior indicates that Edmo has inadequately controlled mental health concerns. Rather, those behaviors indicate "the need for treatment for gender dysphoria." Dr. Ettner explained that

when an individual who is not psychotic or delusional attempts what we call surgical self-treatment – because we don't regard removal of the testicles or attempted removal of the testicles as either mutilation or self-harm – we regard it as an intentional attempt to remove the target organ that produces testosterone, which, in fact, is the cure for gender dysphoria.

In Dr. Ettner's opinion, Edmo's depression and anxiety "will be attenuated post surgery."

Dr. Ettner opined that Edmo satisfies the sixth criterion because she has lived "as a woman to the best of her ability in a male prison." Dr. Ettner based her opinion on Edmo's "appearance . . . , her disciplinary records, which indicated that she had attempted to wear her hair in a feminine hairstyle and to wear makeup even though that was against the rules and she was – received some sort of disciplinary action for that, and her – the way that she was receiving female undergarments and had developed the stigma of femininity, the secondary sex characteristics, breast development, et cetera."

Dr. Ettner opined that if Edmo does not receive GCS, "[t]he risks would be, as typical in inadequately treated or untreated gender dysphoria, either surgical self-treatment, emotional decompensation, or suicide." Dr. Ettner

explained that Edmo “is at particular risk of suicide given that she has a high degree of suicide ideation.” If, on the other hand, Edmo receives surgery, Dr. Ettner opined that

[i]t would eliminate the gender dysphoria. It would provide a level of wellbeing that she hasn’t had previously. It would eliminate 80 percent of the testosterone in her body, necessitating a lower dose of hormones going forward, which would be particularly helpful given that she has elevated liver enzymes. And it would, I believe, eliminate much of the depression and the attendant symptoms that she is experiencing.

Dr. Ryan Gorton, M.D., also testified for Edmo. Dr. Gorton is an emergency medicine physician. He also works pro bono at a clinic serving uninsured patients or those with Medicare or Medicaid. Many of those patients have mental health conditions or have been in prison. He has published peer-reviewed articles on the treatment of gender dysphoria, and he has been qualified as an expert witness in cases involving transgender health care. Dr. Gorton also provides training on transgender health care issues to many groups, is a member of WPATH, and serves on WPATH’s Transgender Medicine and Research Committee and its Institutionalized Persons Committee.

Dr. Gorton has been the primary care physician for about 400 patients with gender dysphoria. At the time of the evidentiary hearing, Dr. Gorton was treating approximately 100 patients with gender dysphoria. Dr. Gorton has assessed patients for gender dysphoria, initiated and monitored hormone treatment, referred patients for mental health treatment, and determined the appropriateness of GCS. At



the time of the evidentiary hearing, Dr. Gorton was providing follow-up care for about 30 patients who had vaginoplasty. Dr. Gorton has no experience treating transgender inmates and is not a Certified Correctional Healthcare Professional.

Based on his review of Edmo's medical records and his in-person evaluation of Edmo, Dr. Gorton opined that GCS is medically necessary for Edmo and that she meets the WPATH criteria for GCS. He explained that Edmo has "persistent well-documented gender dysphoria," as shown in her prison medical records; she has the capacity "to make a fully informed decision and to consent for treatment" because "she didn't seem at all impaired in her decision-making capacity"; she is the age of majority; she has depression and anxiety, "but they are not to a level that would preclude her getting [GCS]"; she had 12 consecutive months of hormone therapy; and she has been living in her "target gender role . . . despite an environment that's very hostile to that and some negative consequences that she has experienced because of that."

Dr. Gorton further opined that if Edmo "is not provided surgery, there is a very substantial chance she will try to attempt self-surgery again. And that's especially worrisome given her attempts have been progressive. . . . So I think she might be successful" on her next attempt. He predicted that there is little chance that Edmo's gender dysphoria will improve without surgery. Conversely, Dr. Gorton anticipated that Edmo is unlikely to regret surgery because "her gender dysphoria is very genital-focused" and regret rates among GCS patients are very low.

Dr. Gorton also opined that Edmo's self-castration attempts demonstrate "that she has severe genital-focused gender dysphoria and that she is not getting the medically

necessary treatment to alleviate that.” He elaborated that Edmo’s depression and anxiety are not driving Edmo’s self-castration attempts: “there [are] a lot of people with depression and anxiety who don’t remove their testicles.”

Finally, Dr. Gorton criticized Dr. Eliason’s evaluation of Edmo. He explained that he disagreed with Dr. Eliason’s conclusion that Edmo does not need GCS and he also disagreed with the three “criteria” Dr. Eliason gave for when GCS would be necessary. Dr. Gorton criticized Dr. Eliason’s first criterion—that GCS could be needed where there is “congenital malformation or ambiguous genitalia”—because that situation “isn’t even germane to transgender people”; rather, it relates to “people with intersex conditions.” As to the second criterion—that GCS could be needed when a patient is suffering from “severe and devastating gender dysphoria that is primarily due to genitals”—Dr. Gorton pointed out that the WPATH Standards of Care for surgery require only “clear and significant dysphoria.” And even applying Dr. Eliason’s higher bar, Dr. Gorton explained that Edmo would still qualify for GCS because she has twice attempted self-castration, demonstrating “severe genital-focused dysphoria.” Finally, Dr. Gorton characterized Dr. Eliason’s third criterion—that GCS could be needed in situations when “endogenous sexual hormones were causing severe physiological damage”—as “bizarre.” Dr. Gorton could not conjure “a clinical circumstance where that would be the case that your hormones that your body produces are attacking you . . . I just don’t understand what [Dr. Eliason] is talking about there.”

Dr. Keelin Garvey, M.D., testified for the State. Dr. Garvey is a psychiatrist and Certified Correctional Healthcare Professional. As the former Chief Psychiatrist of

the Massachusetts Department of Corrections, Dr. Garvey chaired the Gender Dysphoria Treatment Committee. She directly treated a “couple of patients” with gender dysphoria earlier in her career as Deputy Medical Director, but she has not done so in recent years. Prior to evaluating Edmo, Dr. Garvey had never evaluated a patient in person to determine whether that person needed GCS. Dr. Garvey has never recommended a patient for GCS, and she has not done follow-up care with a person who has received GCS.

Based on her evaluation of Edmo and a review of Edmo’s medical records, Dr. Garvey diagnosed Edmo with gender dysphoria, major depressive disorder, alcohol use disorder, stimulant use disorder, and opioid use disorder. She explained that the latter three are in remission.

Relying on the WPATH Standards of Care, Dr. Garvey opined that GCS is not medically necessary for Edmo.<sup>10</sup> Dr. Garvey first explained that Edmo does not meet the first WPATH Standards of Care criterion—“persistent, well documented gender dysphoria”—because of a lack of evidence in pre-incarceration medical records that Edmo presented as female before her time in prison. Dr. Garvey acknowledged, however, that Edmo has been presenting as female since 2012 and that she has been diagnosed with gender dysphoria since that time.

Dr. Garvey then explained that Edmo does not meet the fourth criterion—“medical/mental health concerns must be well controlled”—because Edmo “is actively self-injuring.” Dr. Garvey elaborated that “self-injury in any form is never

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<sup>10</sup> Dr. Garvey testified that she relies on the WPATH Standards of Care and the NCCHC guidelines adopting those standards when treating inmates with gender dysphoria.

considered a healthy or productive coping mechanism” and that she would like to see Edmo “develop further coping skills that she would be able to use following surgery so that she is not engaging in self-injury after surgery.” Dr. Garvey’s concern is that GCS is a “stressful undertaking” and Edmo lacks “effective coping strategies” to deal with the stress.

Finally, Dr. Garvey testified that Edmo does not meet the sixth criterion—“12 continuous months of living in a gender role that is congruent with gender identity”—because Edmo has not presented as female outside of prison and “there [are] challenges to using her time in a men’s prison as this real-life experience because it doesn’t offer her the opportunity to actually experience all those things she is going to go through on the outside.”

Dr. Joel Andrade, Ph.D. in social work, also testified for the State. He is a licensed clinical social worker and is a Certified Correctional Healthcare Professional with an emphasis in mental health. Dr. Andrade has over a decade of experience providing and supervising the provision of correctional mental health care, including directing and overseeing the treatment of inmates diagnosed with gender dysphoria in the custody of the Massachusetts Department of Corrections in his roles as clinical director, chair of the Gender Dysphoria Supervision Group, and member of the Gender Dysphoria Treatment Committee.

As a member of the Gender Dysphoria Treatment Committee, Dr. Andrade recommended GCS for two inmates. But the recommendations were contingent on the inmates living in a women’s prison for approximately 12 months before the surgery. The Massachusetts Department of Corrections, like IDOC, houses prisoners

according to their genitals, so the inmates had not been moved (nor had their surgery occurred).

Dr. Andrade has never directly treated patients with gender dysphoria, nor has he been a treating clinician for a patient who has had GCS. His “experience with gender dysphoria comes almost exclusively from [his] participation on the Massachusetts Department of Corrections[’] Gender Dysphoria Treatment Committee and Supervision Group.” Dr. Andrade did not qualify, under the IDOC gender dysphoria policy in effect at the time of his assessment of Edmo, to assess a person for GCS because he is neither a psychologist nor a physician.

Based on his evaluation of Edmo and a review of her medical records, Dr. Andrade diagnosed Edmo with “major depressive disorder, recurrent, in partial remission,” “generalized anxiety disorder,” “alcohol use disorder, severe,” and gender dysphoria. Dr. Andrade also diagnosed Edmo with borderline personality disorder. The district court did not credit this diagnosis, however, because no other person (including the State’s other expert, Dr. Garvey) has ever diagnosed Edmo with borderline personality disorder and Dr. Andrade was unable to identify his criteria for this diagnosis. *Edmo*, 358 F. Supp. 3d at 1120. The record amply supports the district court’s finding in this respect.

Dr. Andrade opined that Edmo does not meet the WPATH criteria for GCS. He explained that, based on his review of Edmo’s pre-incarceration records, Edmo did not present as female or discuss her gender dysphoria before incarceration. Dr. Andrade testified that he would like to see Edmo live as female outside of a correctional setting before receiving GCS, or, at the least, live in a women’s prison first. IDOC, however, houses prisoners according to their genitals. Dr. Andrade also explained that Edmo needs to

work through some of her trauma, particularly sexual abuse that she suffered, and other mental health concerns before receiving surgery. Dr. Andrade opined that Edmo's mental health issues will not be cured by GCS.

At the close of the hearing, the district court reiterated that it was unsure "how we can hear [Edmo's request for GCS] on a preliminary injunction. . . . [I]f I order it, then it's done." The court further suggested that the request for GCS could "only be resolved in a final hearing" and noted that it had, in effect, "treated this hearing as [a] final hearing on the issue."

The court, as it had done at the outset of the hearing, asked the parties to address whether the hearing was for a preliminary or permanent injunction. In response, Edmo contended that the court could order GCS in a preliminary injunction. The State did not address the court's question. It instead contended that the standard for a mandatory injunction—which can be preliminary or permanent—should apply.

#### **E. The District Court's Decision**

The district court rendered its decision on December 13, 2018. After recounting the evidence and making extensive factual findings, the district court began its analysis by noting that it was unsure whether the standard for a preliminary injunction or the standard for a permanent injunction applied. The court noted that "the nature of the relief requested in this case, coupled with the extensive evidence presented by the parties over a 3-day evidentiary hearing, [may have] effectively converted these proceedings into a final trial on the merits of the plaintiff's request for permanent injunctive relief." *Edmo*, 358 F. Supp. 3d at 1122 n.1. It also indicated that "both parties appear to have treated

the evidentiary hearing” as a final trial on the merits. *Id.* The district court explained that the difference was immaterial, however, because Edmo was entitled to relief under either standard. *Id.*

On the merits, the district court concluded that Edmo had established her Eighth Amendment claim. The district court first held that Edmo suffers from gender dysphoria, which is undisputedly “a serious medical condition.” *Id.* at 1124.

It then concluded that GCS is medically necessary to treat Edmo’s gender dysphoria. *See id.* at 1124–26. In a carefully considered, 45-page opinion, the district court specifically found “credible the testimony of Plaintiff’s experts Drs. Ettner and Gorton, 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. *Id.* at 1125. The court rejected the contrary opinions of the State’s experts because “neither Dr. Garvey nor Dr. Andrade 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.” *Id.* The district court also noted that the State’s “experts appear to misrepresent the WPATH Standards of Care by concluding that Ms. Edmo, despite presenting as female since her incarceration in 2012, cannot satisfy the WPATH criteria because she has not presented as female outside of the prison setting.” *Id.* As the district court noted, “there is no requirement in the WPATH Standards of Care that a patient live for twelve months in his or her gender role outside of prison before becoming eligible for” GCS. *Id.* (quotation omitted).



Finally, the district court explained that the State was deliberately indifferent to Edmo's gender dysphoria because it "fail[ed] 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 1126–27. The district court also stated that the evidence "suggest[ed] that Ms. Edmo has not been provided gender confirmation surgery because Corizon and IDOC have a *de facto* policy or practice of refusing this treatment for gender dysphoria to prisoners," which amounts to deliberate indifference. *Id.* at 1127.

After analyzing the merits, the district court concluded that Edmo satisfied the other prerequisites to injunctive relief. *Id.* at 1127–28. The district court found that, given Edmo's continuing emotional distress and self-castration attempts, "Edmo is at serious risk of life-threatening self-harm" if she does not receive GCS. *Id.* at 1128. The State, on the other hand, had not shown that it would be harmed if ordered to provide GCS, so the equities favored Edmo. *Id.*

Having concluded that Edmo was entitled to an injunction, the court ordered the State "to provide Plaintiff with adequate medical care, including gender confirmation surgery." *Id.* at 1129. It ordered the State 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.*

#### **F. Appellate Proceedings**

The State filed timely notices of appeal on January 9, 2019. It also asked the district court to stay its order pending appeal. The district court denied the State's motion on March 4.



The State then filed in this court a motion to stay pending appeal. A motions panel granted that motion. Edmo subsequently moved to amend the stay to allow her to undergo a previously scheduled pre-surgery consultation. The motions panel granted that motion and amended the stay.

On April 3, the State filed an “urgent motion” to dismiss this appeal as moot. We indicated on April 5 that our court would consider that motion with the merits, not on an urgent basis.

After hearing oral argument on May 16, we ordered a limited remand to the district court to clarify three points. Relevant here, we asked the district court to clarify whether it granted Edmo a permanent injunction in its December 13, 2018 order. The district court clarified that it “granted permanent injunctive relief.” *Edmo v. Idaho Dep’t of Corr.*, No. 1:17-CV-00151-BLW, 2019 WL 2319527, at \*2 (D. Idaho May 31, 2019). We also asked the district court to clarify whether it had concluded that Edmo had succeeded on the merits of her Eighth Amendment claim. The district court responded that it had. *Id.*

Having received the district court’s response to our limited remand order, we proceed to the issues on appeal. The State challenges the district court’s grant of injunctive relief to Edmo on multiple grounds. It contends that this appeal is moot because the injunction did not comply with the PLRA and has, for that reason, automatically expired. It contends that the decision not to provide GCS to Edmo reflects a difference of prudent medical opinion and cannot support an Eighth Amendment claim. It contends that Edmo will not be irreparably harmed absent an injunction. It contends that the injunction is overbroad. Finally, it contends that, to the extent the district court converted the

evidentiary hearing into a final trial on the merits of Edmo's request for GCS, it was provided inadequate notice and the court violated its right to a jury trial.

## II. Mootness

"We first address, as we must, the question of mootness . . . ." *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 628 (9th Cir. 2016). An appeal is moot "[w]hen events change such that the appellate court can no longer grant 'any effectual relief whatever to the prevailing party.'" *Id.* (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). In those circumstances, we "lack[] jurisdiction and must dismiss the appeal." *Id.*

The State contends that the injunction does not comply with provisions of the PLRA and, for that reason, has automatically expired under the terms of the statute. Relevant here, the PLRA provides that a

court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A). Courts often refer to this provision as the "need-narrowness-intrusiveness" inquiry. *Graves v. Arpaio*, 623 F.3d 1043, 1048 n.1 (9th Cir. 2010) (per curiam) (quoting *Pierce v. County of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008)). The PLRA further provides that

any “[p]reliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) [quoted above] for the entry of prospective relief and makes the order final before the expiration of the 90-day period.” 18 U.S.C. § 3626(a)(2).

The State contends that the district court did not make the PLRA’s requisite need-narrowness-intrusiveness findings or make its order final within 90 days, causing the injunction to expire under 18 U.S.C. § 3626(a)(2). Generally, the expiration of an injunction challenged on appeal moots the appeal. *See Kitlutsisti v. ARCO Alaska, Inc.*, 782 F.2d 800, 801 (9th Cir. 1986); *see also United States v. Sec’y, Fla. Dep’t of Corr.*, 778 F.3d 1223, 1228–29 (11th Cir. 2015). The State asserts separate, albeit overlapping, contentions in their motion to dismiss this appeal and in their briefing. We reject those arguments.

#### **A. Need-Narrowness-Intrusiveness Findings**

The State first contends that the district court did not make the PLRA’s need-narrowness-intrusiveness findings, causing the injunction to automatically expire and mooting this appeal.<sup>11</sup> As we have explained in prior decisions, the PLRA “has not substantially changed the threshold findings and standards required to justify an injunction.” *Gomez v. Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001). When “determining the appropriateness of the relief ordered,” appellate “courts must do what they have always done”:

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<sup>11</sup> We question whether the State’s need-narrowness-intrusiveness challenge, properly understood, implicates mootness. But because the result is the same, we accept the State’s framing for purposes of our analysis.

“consider the order as a whole.” *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1070 (9th Cir. 2010). District courts must make need-narrowness-intrusiveness “findings sufficient to allow a ‘clear understanding’ of the ruling,” but they need not “make such findings on a paragraph by paragraph, or even sentence by sentence, basis.” *Id.* (quotation omitted). “What is important, and what the PLRA requires, is a finding that the set of reforms being ordered—the ‘relief’—corrects the violations of prisoners’ rights with the minimal impact possible on defendants’ discretion over their policies and procedures.” *Id.*

Here, the district court made the necessary need-narrowness-intrusiveness findings. At the start of its December 13, 2018 order, the district court explained that any injunction must meet the PLRA’s need-narrowness-intrusiveness requirement. *See Edmo*, 358 F. Supp. 3d at 1122. The district court then explained how the relief being ordered, GCS, “corrects the violations of” Edmo’s rights. *See Armstrong*, 622 F.3d at 1071. Specifically, the district court explained that GCS is medically necessary to alleviate Edmo’s gender dysphoria and that the State’s denial of GCS amounts to deliberate indifference in violation of the Eighth Amendment. *See Edmo*, 358 F. Supp. 3d at 1116–21, 1123–27, 1129. The district court limited the relief ordered to have “the minimal impact possible on [the State’s] discretion over their policies and procedures.” *See Armstrong*, 622 F.3d at 1071. Specifically, the district court limited the relief to “actions reasonably necessary” to provide GCS, cautioned that its conclusion is based on “the unique facts and circumstances presented” by Edmo, and noted that its “decision is not intended, and should not be construed, as a general finding that all inmates suffering from gender dysphoria are entitled to [GCS].” *Edmo*, 358 F. Supp. 3d at

1110, 1129. Finally, the district court rejected the notion that injunctive relief would have “any adverse impact on public safety or the operation of a criminal justice system.” 18 U.S.C. § 3626(a)(1)(A). It explained that the State had “made no showing that an order requiring them to provide” GCS to Edmo “causes them injury.” *Edmo*, 358 F. Supp. 3d at 1128. The district court’s order, considered as a whole, made all the findings required by 18 U.S.C. § 3626(a)(1)(A) and our precedent. *See Armstrong*, 622 F.3d at 1070.

### **B. Finality**

The State next argues that the injunction has automatically expired under the PLRA because the district court did not make its order “final” within 90 days of entering injunctive relief. *See* 18 U.S.C. § 3626(a)(2); *see also Sec’y, Fla. Dep’t of Corr.*, 778 F.3d at 1228–29 (holding that an appeal of a preliminary injunction was moot because the district court “did not issue an order finalizing its [preliminary-injunction] order,” and “[a]s a result, the preliminary injunction expired by operation of law” 90 days later). The PLRA provision cited by the State applies to preliminary injunctive relief, not permanent injunctive relief. *See* 18 U.S.C. § 3626(a)(2). The permanent injunction that the district court entered has not expired. *See Edmo*, 358 F. Supp. 3d at 1122 n.1 (concluding that Edmo is “entitled to relief” under the permanent injunction standard); *see also Edmo*, 2019 WL 2319527, at \*2 (clarifying on limited remand that the district court granted Edmo a permanent injunction). It remains in place, albeit stayed.

There is a live controversy on appeal.<sup>12</sup> We accordingly **DENY** the State’s motion to dismiss and proceed to the merits of the appeal.

### **III. Challenges to the District Court’s Grant of Injunctive Relief**

An injunction is an “extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “To be entitled to a permanent injunction, a plaintiff must demonstrate: (1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction.”<sup>13</sup> *Indep. Training & Apprenticeship Program*

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<sup>12</sup> Even construed as a preliminary injunction, the district court’s December 13, 2018 order is not moot. On May 31, 2019, the district court, incorporating its previous findings, renewed the injunction. *See Edmo*, 2019 WL 2319527, at \*2. Because the district court renewed the injunction, we can consider its merits. *See Mayweathers v. Newland*, 258 F.3d 930, 935–36 (9th Cir. 2001) (holding that district courts may renew preliminary injunctions under the PLRA while an appeal is pending, and considering the merits of the renewed injunction). And we have jurisdiction under 28 U.S.C. § 1292(a)(1) regardless of whether the district court’s order is considered a preliminary or permanent injunction. *See Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1131 (9th Cir. 2005) (preliminary injunction); *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 680–81 (9th Cir. 1990) (permanent injunction where the “district court retained jurisdiction to determine damages” and to adjudicate a separate claim).

<sup>13</sup> We agree with the State that the injunction is mandatory, as opposed to prohibitory, because it requires the State to act. Based on that distinction, the State argues that Edmo must satisfy a higher burden of

*v. Cal. Dep't of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013) (citing *eBay Inc. v. MercExch., L.L.C.*, 547 U.S. 388, 391 (2006)).

We review for abuse of discretion the district court's decision to grant a permanent injunction. *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 965 (9th Cir. 2017). We

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proof to be entitled to injunctive relief, and that the district court failed to hold Edmo to that burden. On that point, we disagree.

The State errs by relying on cases that concern mandatory preliminary injunctions. Because mandatory preliminary injunctions go “well beyond simply maintaining the status quo [p]endente lite,” they are “particularly disfavored” and “are not issued in doubtful cases.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (alteration in original) (quoting *Anderson v. United States*, 612 F.2d 1112, 1114–15 (9th Cir. 1980)). The calculus is different in the context of permanent injunctions. A plaintiff must show actual success on the merits, *see Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987), so there is no concern that a mandatory permanent injunction will upset the status quo only for a later trial on the merits to show that the plaintiff was not entitled to equitable relief. As a result, a plaintiff need not show that “extreme or very serious damage will result,” as is required for mandatory preliminary injunctions.

As we have explained, the district court granted Edmo injunctive relief under both the preliminary and permanent injunction standards. *See Edmo*, 358 F. Supp. 3d at 1122 n.1; *see also Edmo*, 2019 WL 2319527, at \*2. Because the standard for granting permanent injunctive relief is higher (in that it requires actual success on the merits) and the State contends in its opening brief that we should review the injunction as a permanent injunction, we consider whether the district court erred in granting Edmo permanent injunctive relief. But we would also affirm under the mandatory preliminary injunction standard, because the district court correctly applied the proper standard for mandatory preliminary injunctive relief, and not the lower standard for prohibitory preliminary injunctions. *See Edmo*, 358 F. Supp. 3d at 1122, 1128.

review “any determination underlying the grant of an injunction by the standard that applies to that determination.” *Ting v. AT&T*, 319 F.3d 1126, 1134–35 (9th Cir. 2003). Accordingly, the district court’s factual findings on Edmo’s Eighth Amendment claim are reviewed for clear error. *See Graves*, 623 F.3d at 1048. Clear error exists if the finding is “illogical, implausible, or without support in inferences that may be drawn from the facts in the record.” *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014) (quoting *Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013)). We review de novo the district court’s “conclusion that the facts . . . demonstrate an Eighth Amendment violation.” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002).

The State contends that the district court erred in granting an injunction because (1) Edmo’s Eighth Amendment claim fails and (2) Edmo has not shown that she will suffer irreparable injury in the absence of an injunction.<sup>14</sup> We disagree. We hold, based on the district court’s factual findings, 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.

#### **A. The Merits of Edmo’s Eighth Amendment Claim**

“[D]eliberate indifference to serious medical needs of prisoners” violates the Eighth Amendment. *Estelle*, 429 U.S. at 104. Because “society takes from prisoners the means to provide for their own needs,” *Brown*, 563 U.S.

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<sup>14</sup> Because the State does not contest the other injunction factors, we do not address them.



at 510, the government has an “obligation to provide medical care for those whom it is punishing by incarceration,” *Estelle*, 429 U.S. at 103.

To establish a claim of inadequate medical care, a prisoner must first “show a ‘serious medical need’ by demonstrating that ‘failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc)). Serious medical needs can relate to “physical, dental and mental health.” *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

The State does not dispute that Edmo’s gender dysphoria is a sufficiently serious medical need to trigger the State’s obligations under the Eighth Amendment. Nor could it. Gender dysphoria is a “serious . . . medical condition” that causes “clinically significant distress”—distress that impairs or severely limits an individual’s ability to function in a meaningful way. DSM-5 at 453, 458. As Edmo testified, her gender dysphoria causes her to feel “depressed,” “disgusting,” “tormented,” and “hopeless,” and it has caused past efforts and active thoughts of self-castration. As this and many other courts have recognized, Edmo’s gender dysphoria is a sufficiently serious medical need to implicate the Eighth Amendment. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039–40 (9th Cir. 2015); *Kosilek*, 774 F.3d at 86; *De’lonta*, 708 F.3d at 525; *Battista v. Clarke*, 645 F.3d 449, 452 (1st Cir. 2011); *Allard v. Gomez*, 9 F. App’x 793, 794 (9th Cir. 2001); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Meriwether v. Faulkner*, 821 F.2d 408, 412 (7th Cir.

1987) (and cases cited therein); *Norsworthy*, 87 F. Supp. 3d at 1187; *Konitzer v. Frank*, 711 F. Supp. 2d 874, 905 (E.D. Wis. 2010).

If, as here, a prisoner establishes a sufficiently serious medical need, that prisoner must then “show the [official’s] response to the need was deliberately indifferent.” *Jett*, 439 F.3d at 1096. An inadvertent or negligent failure to provide adequate medical care is insufficient to establish a claim under the Eighth Amendment. *Estelle*, 429 U.S. at 105–06; *see also Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (“ordinary lack of due care” is insufficient to establish an Eighth Amendment claim). In other words, “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner.” *Estelle*, 429 U.S. at 106. 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.” *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016) (quoting *Snow v. McDaniel*, 681 F.3d 978, 988 (9th Cir. 2012), *overruled in part on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014) (en banc)).

### 1. The Medical Necessity of GCS for Edmo

The crux of the State’s appeal is that it provided adequate and medically acceptable care to Edmo.

Accepted standards of care and practice within the medical community are highly relevant in determining what care is medically acceptable and unacceptable. *See Allard v. Baldwin*, 779 F.3d 768, 772 (8th Cir. 2015); *Henderson v. Ghosh*, 755 F.3d 559, 566 (7th Cir. 2014) (per curiam). Typically, “[a] difference of opinion between a physician

and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.” *Snow*, 681 F.3d at 987; *see also Gibson*, 920 F.3d at 220. But that is true only if the dueling opinions are medically acceptable under the circumstances. *See Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004) (a mere “difference of medical opinion . . . [is] insufficient, as a matter of law, to establish deliberate indifference,” but not if the “chosen course of treatment ‘was medically unacceptable under the circumstances’” (alterations in original) (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996))).

“In deciding whether there has been deliberate indifference to an inmate’s serious medical needs, we need not defer to the judgment of prison doctors or administrators.” *Hunt v. Dental Dep’t*, 865 F.2d 198, 200 (9th Cir. 1989). Nor does it suffice for “correctional administrators wishing to avoid treatment . . . simply to find a single practitioner willing to attest that some well-accepted treatment is not necessary.” *Kosilek*, 774 F.3d at 90 n.12. In the final analysis under the Eighth Amendment, we must determine, considering the record, the judgments of prison medical officials, and the views of prudent professionals in the field, whether the treatment decision of responsible prison authorities was medically acceptable.

Reviewing the record and the district court’s extensive factual findings, we conclude that Edmo has established that the “course of treatment” chosen to alleviate her gender dysphoria “was medically unacceptable under the circumstances.” *Hamby*, 821 F.3d at 1092 (quoting *Snow*, 681 F.3d at 988). This conclusion derives from the district court’s factual findings, which are not “illogical, implausible, or without support in inferences that may be

drawn from the facts in the record.” *La Quinta Worldwide LLC*, 762 F.3d at 879 (quotation omitted).

In particular, and as we will explain, this is not a case of dueling experts, as the State paints it. 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. Edmo’s experts are well-qualified to render such opinions, and they logically and persuasively explained the necessity of GCS and applied the WPATH Standards of Care—the undisputed starting point in determining the appropriate treatment for gender dysphoric individuals. On the other side of the coin, the district court permissibly discredited the contrary opinions of the State’s treating physician and medical experts. Those individuals lacked expertise and 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.

#### **a. Expert Testimony**

Turning first to the expert testimony offered, the district court credited the testimony 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. *See Edmo*, 358 F. Supp. 3d at 1120–21, 1125. Dr. Ettner and Dr. Gorton opined that GCS is medically necessary because Edmo’s current treatment has been inadequate, as evidenced by her self-castration attempts. They also opined that if Edmo does not receive GCS, there is little chance that her gender dysphoria will improve and she is at risk of committing self-surgery again, suicide, and

further emotional decompensation. On the other hand, providing GCS to Edmo would, in the opinions of Dr. Ettner and Dr. Gorton, align Edmo's genitalia with her gender identity, thereby eliminating the severe distress Edmo experiences from her male genitalia.

In sharp contrast, the district court gave “virtually no weight” to the opinions of the State's experts. *Edmo*, 358 F. Supp. 3d at 1126. Dr. Garvey and Dr. Andrade, who purported to rely on the WPATH Standards of Care, opined that GCS is not medically necessary for Edmo.

The district court did not err in crediting the testimony of Edmo's experts and discounting the testimony of the State's experts. Dr. Ettner and Dr. Gorton are well-qualified to opine on the medical necessity of GCS. Both have substantial experience treating individuals with gender dysphoria. Dr. Ettner has evaluated, diagnosed, and treated between 2,500 and 3,000 individuals with gender dysphoria, while Dr. Gorton has been the primary care physician for approximately 400 patients with gender dysphoria. Both have substantial experience evaluating whether GCS is medically necessary for patients. Dr. Ettner has evaluated hundreds of people for GCS, referring approximately 300 while refusing others, and Dr. Gorton routinely determines the appropriateness of GCS for patients. They also have experience providing follow-up care for patients who have undergone GCS. And both have published peer-reviewed articles concerning the treatment of gender dysphoria.

The State's experts, by contrast, have substantial experience providing health care in institutional settings, but lack meaningful experience directly treating people with gender dysphoria. Dr. Garvey directly treated a “couple of patients” with gender dysphoria early in her career, while Dr. Andrade has never provided direct treatment for patients

with gender dysphoria. Moreover, prior to evaluating Edmo, neither had ever evaluated someone in person to determine the medical necessity of GCS. Relatedly, Dr. Garvey and Dr. Andrade have never provided follow-up care for a person who has received GCS. Indeed, Dr. Andrade did not even qualify under IDOC policy to assess a person for GCS. And neither Dr. Garvey nor Dr. Andrade has published a peer-reviewed article concerning the treatment of gender dysphoria.

Neither Dr. Ettner nor Dr. Gorton have treated prisoners with gender dysphoria, nor are they Certified Correctional Healthcare Professionals. But both serve on WPATH's Institutionalized Persons Committee, which "looks at the care and the assessment of individuals who are incarcerated and develops standards for treatment" of such individuals. They are thus familiar with medical treatment in prison settings. Moreover, Dr. Ettner has assessed approximately 30 incarcerated persons with gender dysphoria for GCS and other medical care.

More to the point, the more relevant experience for determining the medical necessity of GCS is having treated individuals with gender dysphoria, having evaluated individuals for GCS, and having treated them post-operatively. Such experience lends itself to fundamental knowledge of whether GCS is necessary and the potential risks of providing or foregoing the surgery. Edmo's experts have the requisite experience; the State's experts do not. For that reason alone, the district court did not clearly err in crediting the opinions of Edmo's experts over those of the State.<sup>15</sup> See *Caro v. Woodford*, 280 F.3d 1247, 1253 (9th

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<sup>15</sup> The State contends that neither Dr. Ettner nor Dr. Gorton was qualified to offer expert opinions as to the appropriate medical care for

Cir. 2002) (explaining that we “must afford the District Court considerable deference in its determination that the witnesses were qualified to draw [their] conclusions”).

Independent of the experts’ qualifications, the district court did not err in crediting the opinions of Edmo’s experts over those of the State because aspects of Dr. Garvey’s and Dr. Andrade’s opinions ran contrary to the established standards of care in the area of transgender health care—the WPATH Standards of Care—which they purported to apply.<sup>16</sup> *See Edmo*, 358 F. Supp. 3d at 1125.

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Edmo because neither is a psychiatrist. So far as we can discern, the argument is that because a psychiatrist (Dr. Eliason) evaluated Edmo for GCS, only other psychiatrists are qualified to opine as to the medical necessity of GCS and to contradict his assessment. *See Oral Arg.* at 10:00–10:30. We reject that contention. Edmo’s experts, as explained, have significant experience evaluating patients for GCS—precisely what Dr. Eliason did. On the basis of their medical experience treating persons with gender dysphoria, they are well-qualified to render an opinion on the medical necessity of GCS and whether failure to provide the surgery is medically acceptable. *See Fed. R. Evid.* 702.

<sup>16</sup> The State contends that the district court erred in requiring strict adherence to the flexible WPATH Standards of Care and in concluding that any deviation from those standards is medically unacceptable. But the district court correctly recognized that the WPATH Standards of Care are flexible, *see Edmo*, 358 F. Supp. 3d at 1111, and it appropriately used them as a starting point to gauge the credibility of each expert’s testimony, *see id.* at 1125–26. Tellingly, each expert for Edmo and the State likewise used the WPATH Standards of Care as a starting point. As the district court recognized: “There are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups.” *Id.* at 1125. And as the State acknowledged at the evidentiary hearing, the “WPATH standards of care in the seventh edition do provide the best guidance” and “are the best standards out there.” For these reasons, the WPATH Standards of Care establish a useful starting point for analyzing the



For example, both Dr. Garvey and Dr. Andrade expressed the view that Edmo does not meet the sixth WPATH criterion, “12 continuous months of living in a gender role that is congruent with gender identity.” WPATH SOC at 60. They pointed out that Edmo has not presented as female outside of prison and urged that she needs real-life experiences in the community before undergoing GCS.

These opinions run head-on into the WPATH Standards of Care. The WPATH standards, which the NCCHC endorses as the accepted standards for the treatment of transgender inmates, apply

in their entirety . . . to all transsexual, transgender, and gender nonconforming people, irrespective of their housing situation. People should not be discriminated against in their access to appropriate health care based on where they live, including institutional environments such as prisons . . . . Health care for transsexual, transgender, and gender nonconforming people living in an institutional environment should mirror that which would be available to them if they were living in a non-institutional setting within the same community.

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credibility and weight to be given to each expert’s opinion and whether that opinion was consistent with established standards of care. The State does not contest the district court’s finding that the WPATH Standards of Care are the “internationally recognized guidelines for the treatment of individuals with gender dysphoria.” *Id.* at 1111. They are the gold standard on this issue.



All elements of assessment and treatment as described in the [Standards of Care] can be provided to people living in institutions. Access to these medically necessary treatments should not be denied on the basis of institutionalization or housing arrangements.

WPATH SOC at 67. Dr. Garvey and Dr. Andrade’s view—that GCS cannot be medically indicated for transgender inmates who did not present in a gender-congruent manner before incarceration—contradicts these accepted standards. Dr. Garvey and Dr. Andrade would deny GCS to a class of people because of their “institutionalization,” which the WPATH Standards of Care explicitly disavow. They provide no persuasive explanation for their deviation.<sup>17</sup> And nothing in the WPATH Standards of Care or the law supports excluding an entire class of gender dysphoric individuals from eligibility for GCS.

Both Dr. Garvey and Dr. Andrade also relied on Edmo’s failure to attend psychotherapy sessions as an indication that her mental health concerns are not well controlled. But psychotherapy is not a precondition for surgery under the WPATH Standards of Care. WPATH SOC at 28–29.

We acknowledge 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

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<sup>17</sup> In concluding that Edmo does not meet the sixth WPATH criterion, Dr. Garvey expressed concern that there is a lack of evidence regarding GCS in prison settings. That rationale acts as self-fulfilling prophecy. If prisons and prison officials deny GCS to prisoners because of a lack of data, the data will never be generated, and the cycle will continue.

State's experts purported to be applying those standards and yet did so in a way that directly contradicted them. These unsupported and unexplained deviations offer a further reason why the district court did not clearly err in discounting the testimony of the State's experts. *See Caro*, 280 F.3d at 1253.

Finally, the district court did not err in discrediting the State's experts because aspects of their opinions were illogical and unpersuasive. For example, Dr. Garvey and Dr. Andrade expressed the view that Edmo does not meet the first WPATH criterion—"persistent, well documented gender dysphoria," WPATH SOC at 60—because of a lack of evidence from pre-incarceration records of Edmo presenting as female. But both experts acknowledged that Edmo has been diagnosed with and treated for gender dysphoria since 2012—*i.e.*, for six years as of the evidentiary hearing. Neither Dr. Garvey nor Dr. Andrade questioned Edmo's diagnosis, and both agree that she currently suffers gender dysphoria. There can be no doubt that Edmo has "persistent, well documented gender dysphoria," so their opinion is inexplicable.

Dr. Garvey's and Dr. Andrade's opinions on this point also ignore that individuals with gender dysphoria do not always experience symptoms early in life or throughout their life, or do not identify them as such. As Dr. Ettner testified, "gender dysphoria intensifies with age." And as with treatment for any other medical condition, treatment for gender dysphoria must be based on a patient's current situation.

The opinions of Edmo's experts are notably devoid of these flaws. Dr. Ettner and Dr. Gorton cogently and persuasively explained why GCS is medically necessary for Edmo and why Edmo meets the WPATH criteria for GCS.

For example, consistent with the WPATH Standards of Care, Dr. Ettner explained that Edmo has lived for “12 continuous months . . . in a gender role that is congruent with gender identity” (the sixth WPATH criterion) because she has lived “as a woman to the best of her ability in a male prison.” In support of her opinion, Dr. Ettner cited Edmo’s “appearance . . . , her disciplinary records, which indicated that she had attempted to wear her hair in a feminine hairstyle and to wear makeup even though that was against the rules and she was – received some sort of disciplinary action for that, and her – the way that she was receiving female undergarments and had developed the stigma of femininity, the secondary sex characteristics, breast development, et cetera.” Dr. Gorton similarly explained that Edmo satisfies the sixth WPATH criterion because she has lived for years in her “target gender role . . . despite an environment that’s very hostile to that and some negative consequences that she has experienced because of that.”

Moreover, both Dr. Ettner and Dr. Gorton offered reasoned explanations tying Edmo’s self-castration attempts to her severe gender dysphoria. Dr. Ettner explained that doctors regard “surgical self-treatment . . . as an intentional attempt to remove the target organ that produces testosterone, which, in fact, is the cure for gender dysphoria.” As Dr. Gorton elaborated, Edmo’s self-castration attempts demonstrate deficient treatment for “severe genital-focused gender dysphoria.” He rejected the notion that Edmo’s depression and anxiety drove her self-castration attempts: “there [are] a lot of people with depression and anxiety who don’t remove their testicles.”

In light of the experts’ backgrounds and experience, and the reasonableness, consistency, and persuasiveness of their opinions, the district court did not err in crediting the

opinions of Edmo's experts and giving little weight to those of the State's experts. 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. *See La Quinta Worldwide*, 762 F.3d at 879 (a factual finding is clear error if it is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record"); *Caro*, 280 F.3d at 1253; *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 838 (9th Cir. 1995) (*per curiam*). The credited expert testimony established that GCS is medically necessary to alleviate Edmo's gender dysphoria.

#### **b. Dr. Eliason's Assessment**

Turning from the expert testimony offered, the State contends that Edmo's experts, at most, created a dispute of professional judgment with Edmo's treating psychiatrist, Dr. Eliason, who it urges reasonably concluded that GCS is inappropriate for Edmo. If that is the case, the argument goes, then Edmo's Eighth Amendment claim fails because the dispute is merely a "difference of opinion . . . between medical professionals" about "what medical care is appropriate." *Snow*, 681 F.3d at 987. The problem for the State is that Dr. Eliason's decision "was medically unacceptable under the circumstances." *Toguchi*, 391 F.3d at 1058 (quoting *Jackson*, 90 F.3d at 332).

In particular, as the district court found, Dr. Eliason did not follow accepted standards of care in the area of transgender health care. *See Edmo*, 358 F. Supp. 3d at 1126. Dr. Eliason explained in his notes that, in his view, GCS is medically necessary in three situations: "congenital malformation or ambiguous genitalia," "severe and devastating dysphoria that is primarily due to genitals," or "some type of medical problem in which endogenous sexual

hormones were causing severe physiological damage.” The conclusion of his notes—“[t]his inmate does not meet any of those [three] criteria”—suggests that he views those as the *only* three scenarios in which GCS would be medically necessary, an impression he did not dispel during his testimony. Those “criteria” (Dr. Eliason’s term), however, bear little resemblance to the widely accepted, evidence-based criteria set out in the WPATH’s Standards of Care. As Dr. Eliason acknowledged, the NCCHC endorses the WPATH Standards of Care as the accepted standards for the treatment of transgender prisoners. And as the district court found and the State does not contest, “[t]here are no other competing, evidence-based standards that are accepted by any nationally or internationally recognized medical professional groups.” *Id.* at 1125. Dr. Eliason did not follow these standards in rendering his decision.

The State challenges the district court’s finding that Dr. Eliason “did not apply the WPATH Criteria,” *id.* at 1126, on two grounds. First, citing Dr. Eliason’s testimony at the evidentiary hearing, it urges that Dr. Eliason concluded that GCS was not medically necessary for Edmo because Edmo’s mental health issues were not well controlled (the fourth WPATH criterion) and she had not consistently presented as female outside of prison (the sixth).

The district court’s rejection of this post hoc explanation was not clear error. Neither of the explanations offered by Dr. Eliason during the evidentiary hearing appears in Dr. Eliason’s notes. Nor did he give these reasons during his deposition. Their absence is conspicuous, given that Dr. Eliason took the time to indicate instances where, in his opinion, GCS is appropriate and to explain that Edmo did not satisfy his “criteria.”

Second, the State highlights that Dr. Eliason's notes recommend further "supportive counseling" for Edmo and indicate that Edmo was up for parole. The State construes these notes as shorthand for the fourth and sixth WPATH criteria, respectively. The State's proposed reading of Dr. Eliason's notes is unreasonable. His notes are clear that GCS is not needed because Edmo did not meet his three "criteria," and the district court was well within its factfinding discretion in rejecting the State's strained reading. We therefore conclude that the district court reasonably found that Dr. Eliason "did not rely upon any finding that Ms. Edmo did not meet the WPATH criteria in concluding in his April 2016 assessment that she did not meet the criteria for gender confirmation surgery." *Id.* at 1120.

Notably, neither Dr. Eliason nor the State has offered any explanation or support for Dr. Eliason's "criteria." Dr. Eliason testified that he could not recall where he came up with them.

Nor has Dr. Eliason or the State contended that Dr. Eliason's criteria were a reasonable deviation or modification of the WPATH Standards of Care. In any event, we could not accept that argument. Dr. Eliason's criteria—apparently invented out of whole cloth—are so far afield from the WPATH standards that we cannot characterize his decision as a flexible application of or deviation from those standards. Indeed, as Dr. Gorton explained, two of Dr. Eliason's criteria are inapplicable to the care of transgender individuals. Dr. Eliason's criterion of "congenital malformation or ambiguous genitalia" "isn't . . . germane to transgender people." His statement that GCS could be needed when "endogenous sexual hormones were causing severe physiological damage," is, in Dr. Gorton's

words, “bizarre. I can’t think of a clinical circumstance where . . . your hormones that your body produces are attacking you . . . . I just don’t understand what [Dr. Eliason] is talking about there.”

Dr. Eliason, in short, did not follow the accepted standards of care in the area of transgender health care, nor did he reasonably deviate from or flexibly apply them. Dr. Eliason did not apply the established standards, even as a starting point, in his evaluation.

Putting to the side Dr. Eliason’s failure to follow or reasonably deviate from the accepted standards of care, his decision was internally contradictory in an important way. His notes reflect that GCS would be medically necessary if a person is suffering “severe and devastating gender dysphoria that is primarily due to genitals.” At his deposition, Dr. Eliason conceded that self-castration could show gender dysphoria sufficiently severe to satisfy that criterion. And at the evidentiary hearing, he acknowledged that Edmo “does primarily meet that criteri[on].” Thus, even under Dr. Eliason’s own criteria, Edmo should have been provided GCS. Neither Dr. Eliason nor the State has reconciled this important contradiction between Dr. Eliason’s criteria and his determination.

In sum, 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.”<sup>18</sup> *Snow*, 681 F.3d at 988.

## 2. Deliberate Indifference

The State next contends that even if the treatment provided Edmo was medically unacceptable, no defendant acted “in conscious disregard of an excessive risk to [Edmo’s] health.” *Hamby*, 821 F.3d at 1092 (quoting *Snow*, 681 F.3d at 988). We disagree.

The record demonstrates that Dr. Eliason acted with deliberate indifference to Edmo’s serious medical needs. Dr. Eliason knew, as of the time of his evaluation, that Edmo had attempted to castrate herself. He also knew that Edmo suffers from gender dysphoria; he knew she experiences “clinically significant” distress that impairs her ability to function. He acknowledged that Edmo’s self-castration attempt was evidence that Edmo’s gender dysphoria, in his words, “had risen to another level.” Dr. Eliason nonetheless continued with Edmo’s ineffective treatment plan.

Edmo then tried to castrate herself a second time, in December 2016. Dr. Eliason knew of that nearly

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<sup>18</sup> Dr. Eliason was not alone in his decision. Dr. Stoddart, Dr. Young, and Jeremy Clark agreed with his assessment, as did the MTC. The State contends that such general agreement demonstrates that Dr. Eliason’s decision was reasonable. But general agreement in a medically unacceptable form of treatment does not somehow make it reasonable. This is especially so in light of the limited review those individuals performed: Dr. Stoddard, Dr. Young, and Jeremy Clark agreed with Dr. Eliason’s recommended treatment as *he* presented it to them and without personally evaluating Edmo, and the MTC “does not make any individual treatment decisions regarding [gender dysphoric] inmates. Those determinations are made by the individual clinicians or the medical staff employed by Corizon,” like Dr. Eliason.



catastrophic event, but he did not 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. Dr. Eliason continued to see Edmo after that time, and he considered Edmo's treatment as a member of the MTC. At no point did Dr. Eliason change his mind or the treatment plan regarding surgery. Under these circumstances, we conclude that Dr. Eliason knew of and disregarded the substantial risk of severe harm to Edmo. *Farmer*, 511 U.S. at 837.

The State urges that neither Dr. Eliason nor any other defendant acted with deliberate indifference because none acted with "malice, intent to inflict pain, or knowledge that [the] recommended course of treatment was medically inappropriate." The State misstates the standard. A prisoner "must show that prison officials 'kn[ew] [ ] of and disregard[ed]' the substantial risk of harm," but the officials need not have intended any harm to befall the inmate; "it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013) (alterations in original) (quoting *Farmer*, 511 U.S. at 837, 842). Neither the Supreme Court nor this court has ever required a plaintiff to show a "sinister [prison official] with improper motives," as the State would require. It is enough that Dr. Eliason knew of and disregarded an excessive risk to Edmo's health by rejecting her request for GCS and then never re-evaluating his decision despite ongoing harm to Edmo.

The State also contends that because the defendants provided some care to Edmo, no defendant could have been deliberately indifferent. The provision of some medical treatment, even extensive treatment over a period of years,

does not immunize officials from the Eighth Amendment’s requirements. *See Lopez v. Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc) (explaining that “[a] prisoner need not prove that he was completely denied medical care” to make out an Eighth Amendment claim); *see also De’lonta*, 708 F.3d at 526 (“[J]ust because [officials] have provided De’lonta with some treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with constitutionally adequate treatment.”). As the Fourth Circuit has aptly analogized,

imagine that prison officials prescribe a painkiller to an inmate who has suffered a serious injury from a fall, but that the inmate’s symptoms, despite the medication, persist to the point that he now, by all objective measure, requires evaluation for surgery. Would prison officials then be free to deny him consideration for surgery, immunized from constitutional suit by the fact they were giving him a painkiller? We think not.

*De’lonta*, 708 F.3d at 526. Here, although the treatment provided Edmo was important, it stopped short of what was medically necessary.

### 3. Out-of-Circuit Precedent

Our decision cleaves to settled Eighth Amendment jurisprudence, which requires a fact-specific analysis of the record (as construed by the district court) in each case. *See Patel v. Kent Sch. Dist.*, 648 F.3d 965, 975 (9th Cir. 2011) (“Deliberate-indifference cases are by their nature highly fact-specific . . .”); *see also Rachel v. Troutt*, 820 F.3d 390, 394 (10th Cir. 2016) (“Each step of this [deliberate

indifference] inquiry is fact-intensive.” (quoting *Hartsfield v. Colburn*, 491 F.3d 394, 397 (8th Cir. 2007)); *Roe v. Elyea*, 631 F.3d 843, 859 (7th Cir. 2011) (“[I]nmate medical care decisions must be fact-based with respect to the particular inmate, the severity and stage of his condition, the likelihood and imminence of further harm and the efficacy of available treatments.”); *Youmans v. Gagnon*, 626 F.3d 557, 564 (11th Cir. 2010) (“Judicial decisions addressing deliberate indifference to a serious medical need, like decisions in the Fourth Amendment search-and-seizure realm, are very fact specific.”); *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998) (“Whether a course of treatment was the product of sound medical judgment, negligence, or deliberate indifference depends on the facts of the case.”).

Several years ago, the First Circuit, sitting en banc, employed that fact-based approach to evaluate a gender dysphoric prisoner’s Eighth Amendment claim seeking GCS. The First Circuit confronted the following record: credited expert testimony disagreed as to whether GCS was medically necessary; the prisoner’s active treatment plan, which did not include GCS, had “led to a significant stabilization in her mental state”; and a report and testimony from correctional officials detailed significant security concerns that would arise if the prisoner underwent GCS. *Kosilek*, 774 F.3d at 86–96. “After carefully considering the community standard of medical care, the adequacy of the provided treatment, and the valid security concerns articulated by the DOC,” a 3–2 majority of the en banc court concluded that the plaintiff had not demonstrated GCS was medically necessary treatment for her gender dysphoria. *Id.* at 68.

Our approach mirrors the First Circuit's, but the important factual differences between cases yield different outcomes. Notably, the security concerns in *Kosilek*, which the First Circuit afforded "wide-ranging deference," are completely absent here. *Id.* at 92. The State does not so much as allude to them. The medical evidence also differs. In *Kosilek*, qualified and credited experts disagreed about whether GCS was necessary. *Id.* at 90. As explained above, the district court's careful factual findings admit of no such disagreement here. Rather, they unequivocally establish that GCS is the safe, effective, and medically necessary treatment for Edmo's severe gender dysphoria.

We recognize, however, that our decision is in tension with *Gibson v. Collier*. In that case, the Fifth Circuit held, in a split decision, that "[a] state does not inflict cruel and unusual punishment by declining to provide [GCS] to a transgender inmate." 920 F.3d at 215. It did so on a "sparse record"—which included only the WPATH Standards of Care and was notably devoid of "witness testimony or evidence from professionals in the field"—compiled by a *pro se* plaintiff. *Id.* at 220. Despite the sparse record, a 2–1 majority of the *Gibson* panel concluded that "there is no consensus in the medical community about the necessity and efficacy of [GCS] as a treatment for gender dysphoria. . . . This on-going medical debate dooms Gibson's claim." *Id.* at 221.

We respectfully disagree with the categorical nature of our sister circuit's holding. Most fundamentally, *Gibson* relies on an incorrect, or at best outdated, premise: that "[t]here is no medical consensus that [GCS] is a necessary or even effective treatment for gender dysphoria." *Id.* at 223.

As the record here demonstrates and the State does not seriously dispute, the medical consensus is that GCS is

effective and medically necessary in appropriate circumstances. The WPATH Standards of Care—which are endorsed by the American Medical Association, the American Medical Student Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, the National Association of Social Workers, the American Academy of Plastic Surgeons, the American College of Surgeons, Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus, and Mental Health America—recognize this fact. WPATH SOC at 54–55. Each expert in this case agrees. As do others in the medical community. *See, e.g.*, U.S. Dep’t of Health & Human Servs., No. A-13-87, Decision No. 2576; Bao Ngoc N. Tran, et al., *Gender Affirmation Surgery: A Synopsis Using American College of Surgeons National Surgery Quality Improvement Program and National Inpatient Sample Databases*, 80 *Annals Plastic Surgery* S229, S234 (2018); Frey, *A Historical Review of Gender-Affirming Medicine*, 14 *J. Sexual Med.* at 991; *see also* What We Know Project, Ctr. for the Study of Inequality, Cornell Univ., *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 July 10, 2019) (reviewing the available literature and finding “a robust international consensus in the peer-reviewed literature that gender transition, including medical treatments such as hormone therapy and surgeries, improves the overall well-being of transgender individuals”). The Fifth Circuit is the outlier.

*Gibson*'s broad holding stemmed from a dismaying disregard for procedure. As noted, the “sparse” summary judgment record that the *pro se* plaintiff developed included “only the WPATH Standards of Care.” *Gibson*, 920 F.3d at 221. Perhaps that factual deficiency doomed *Gibson*'s Eighth Amendment claim. *See id.* at 223–24. But to reach its broader holding that denying GCS cannot, as a matter of law, violate the Eighth Amendment—in other words, to reject every conceivable Eighth Amendment claim based on the denial of GCS—the Fifth Circuit coopted the record from *Kosilek*, a First Circuit decision that predates *Gibson* by four years. *Id.* at 221–23. We doubt the analytical value of such an anomalous procedural approach.

Worse yet, the medical opinions from *Kosilek* do not support the Fifth Circuit's categorical holding. Dr. Chester Schmidt's and Dr. Stephen Levine's testimony in *Kosilek*, which the Fifth Circuit relied on, do not support the proposition that GCS is never medically necessary. Dr. Schmidt and Dr. Levine testified that GCS was not necessary in the factual circumstances of that case, that is, based on the unique medical needs of the prisoner at issue. *See Kosilek*, 774 F.3d at 76–79.

The only suggestion in *Kosilek* that GCS is never medically necessary is in the First Circuit's recitation of the testimony of Dr. Cynthia Osborne. *See Gibson*, 920 F.3d at 221. The First Circuit recounted that Dr. Osborne testified that she “did not view [GCS] as medically necessary in light of the ‘whole continuum from noninvasive to invasive’ treatment options available to individuals with” gender dysphoria. *Kosilek*, 774 F.3d at 77. To the extent this vague portrait of Dr. Osborne's testimony conveys her belief that GCS is never medically necessary, she has apparently changed her view in the more than ten years since she

testified in *Kosilek*. Like both sides and all four medical experts who testified here, Dr. Osborne now agrees that GCS “can be medically necessary for some, though not all, persons with [gender dysphoria], including some prison inmates.” Osborne & Lawrence, *Male Prison Inmates With Gender Dysphoria*, 45 Archives of Sexual Behav. at 1651. In her and her co-author’s words, “[GCS] is a safe, effective, and widely accepted treatment for [gender dysphoria]; disputing the medical necessity of [GCS] based on assertions to the contrary is unsupportable.” *Id.* The predicate medical opinions that *Gibson* is premised upon, then, do not support the Fifth Circuit’s view that GCS is never medically necessary. The consensus is that GCS is effective and medically necessary in appropriate circumstances.<sup>19</sup>

*Gibson* is unpersuasive for several additional reasons. It directly conflicts with decisions of this circuit, the Fourth

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<sup>19</sup> We do not suggest that every member of the medical and mental health communities agrees that GCS may be medically necessary. There are outliers. But when the medical consensus is that a treatment is effective and medically necessary under the circumstances, prison officials render unacceptable care by following the views of outliers without offering a credible medical basis for deviating from the accepted view. See *Kosilek*, 774 F.3d at 90 n.12 (explaining that it is not enough for “correctional administrators wishing to avoid treatment . . . simply to find a single practitioner willing to attest that some well-accepted treatment is not necessary”); *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992) (“By choosing to rely upon a medical opinion which a reasonable person would likely determine to be inferior, the prison officials took actions which may have amounted to the denial of medical treatment, and the unnecessary and wanton infliction of pain.” (quotation omitted)), *overruled in part on other grounds as recognized in Snow*, 681 F.3d at 986; *cf. also Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (“A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm.”).



Circuit, and the Seventh Circuit, all of which have held that denying surgical treatment for gender dysphoria can pose a cognizable Eighth Amendment claim. *Rosati*, 791 F.3d at 1040 (alleged blanket ban on GCS and denial of GCS to plaintiff with severe symptoms, including repeated self-castration attempts, states an Eighth Amendment claim); *Fields v. Smith*, 653 F.3d 550, 552–53, 558–59 (7th Cir. 2011) (law banning hormone treatment and GCS, even if medically necessary, violates the Eighth Amendment); *De'lonta*, 708 F.3d at 525 (alleged denial of an evaluation for GCS states an Eighth Amendment claim).<sup>20</sup> Relatedly, *Gibson* eschews Eighth Amendment precedent requiring a case-by-case determination of the medical necessity of a particular treatment. See, e.g., *Colwell v. Bannister*, 763 F.3d 1060, 1068 (9th Cir. 2014) (holding that the “blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy . . . is the paradigm of deliberate indifference” (quotation omitted)); *Roe*, 631 F.3d at 859.

In this latter respect, *Gibson* also contradicts and misconstrues the precedent it purports to follow: *Kosilek*. According to the *Gibson* majority, “the majority in *Kosilek* effectively allowed a blanket ban on sex reassignment surgery.” 920 F.3d at 216. Not so. The First Circuit did precisely what we do here: assess whether the record before it demonstrated deliberate indifference to the plaintiff’s

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<sup>20</sup> The Fifth Circuit unpersuasively attempted to reconcile its decision with *Rosati* and *De'lonta*, pointing out that those decisions “allowed Eighth Amendment claims for [GCS] to survive motions to dismiss, without addressing the merits.” *Gibson*, 920 F.3d at 223 n.8. But if *Gibson* is correct that failing to provide GCS cannot amount to deliberate indifference, then a plaintiff cannot state an Eighth Amendment claim based on the denial of GCS. *Rosati* and *De'lonta* would necessarily have been decided differently under *Gibson*’s holding.



gender dysphoria. On the record before it, the First Circuit determined that either of two courses of treatment (one included GCS and one did not) were medically acceptable. *Kosilek*, 774 F.3d at 90. In light of those medically acceptable alternatives, the First Circuit explained that it was not its place to “second guess medical judgments or to require that the DOC adopt the more compassionate of two adequate options.” *Id.* (quotation omitted). It expressly cautioned that the opinion should not be read to “create a de facto ban against [GCS] as a medical treatment for any incarcerated individual,” as “any such policy would conflict with the requirement that medical care be individualized based on a particular prisoner’s serious medical needs.” *Id.* at 91 (citing *Roe*, 631 F.3d at 862–63). The Fifth Circuit disregarded these words of warning.<sup>21</sup>

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In summary, Edmo has established that she suffers from a “serious medical need,” *Jett*, 439 F.3d at 1096, and that the treatment provided was “medically unacceptable under the circumstances” and chosen “in conscious disregard of an excessive risk” to her health, *Hamby*, 821 F.3d at 1092. She established her Eighth Amendment claim of deliberate indifference as to Defendant-Appellant Dr. Eliason.

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<sup>21</sup> *Gibson*’s final, originalist rationale—that it cannot be cruel and *unusual* to deny a surgery that has only once been provided to an inmate, 920 F.3d at 226–28—warrants little discussion. *Gibson*’s originalist understanding of the Eighth Amendment does not control; *Estelle* does, and under *Estelle* a plaintiff establishes an Eighth Amendment claim by demonstrating that prison officials were deliberately indifferent to a serious medical need. 429 U.S. at 106. This standard protects the evolving standards of decency enshrined in the Eighth Amendment.

### B. Irreparable Harm

The State next contends that the district court erred in finding that Edmo would be irreparably harmed absent an injunction.

In reaching its conclusion, the district court found that Edmo experiences ongoing “clinically significant distress,” meaning “the distress impairs or severely limits [her] ability to function in a meaningful way.” *Edmo*, 358 F. Supp. 3d at 1110–11. This finding is supported by Edmo’s testimony that her gender dysphoria causes her to feel “depressed,” “disgusting,” “tormented,” and “hopeless”; that she actively experiences thoughts of self-castration; and that she “self-medicate[s]” by cutting her arms with a razor to avoid acting on those thoughts and impulses. The district court also found that in the absence of surgery, Edmo “will suffer serious psychological harm and will be at high risk of self-castration and suicide.” *Id.* at 1128. This finding is supported by the credited expert testimony of Dr. Ettner and Dr. Gorton, who detailed the escalating risks of self-surgery, suicide, and emotional decompensation should Edmo be denied surgery.

It is no leap to conclude that Edmo’s severe, ongoing psychological distress and the high risk of self-castration and suicide she faces absent surgery constitute irreparable harm. *See Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1324 n.5 (9th Cir. 1994); *Thomas v. County of Los Angeles*, 978 F.2d 504, 511 (9th Cir. 1992); *Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 709 (9th Cir. 1988). Moreover, the deprivation of Edmo’s constitutional right to adequate medical care is sufficient to establish irreparable harm. *See Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008) (“Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore

generally constitute irreparable harm.”), *rev’d and remanded on other grounds*, 562 U.S. 134 (2011).

The State offers three contentions as to why the district court erred in finding that Edmo would be irreparably injured in the absence of an injunction. None is persuasive.

First, the State argues that the “long delay” of “nearly a year” between Edmo filing her Amended Complaint and her preliminary injunction motion “implies a lack of urgency and irreparable harm.” We disagree. The procedural history demonstrates that Edmo did not sit on her rights. Proceeding *pro se*, Edmo moved for preliminary injunctive relief when she filed her original complaint. The court then appointed counsel for Edmo, and shortly after appearing, appointed counsel withdrew Edmo’s motion and filed an amended complaint. To assess the urgency of surgery, Edmo’s counsel promptly sought access to Edmo’s medical records, which the State did not produce until more than six months later. Edmo moved for injunctive relief shortly thereafter. During that time, Edmo and her counsel diligently investigated and compiled the necessary record to move for injunctive relief. That it took them months to do their diligence does not suggest that Edmo will not be harmed absent an injunction.

Second, the State contends that Edmo has not established irreparable injury because both she and her expert, Dr. Gorton, agree that GCS is not an emergency surgery and that the State should have six months to provide such surgery. The State’s argument would preclude courts from ordering non-emergent medical care, even if the Eighth Amendment demands it. That is untenable. The State also 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.

Third, the State contends that Edmo has not established irreparable harm because she “has not attempted suicide or self-castration for years.” That 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. The district court did not err in finding that Edmo would be irreparably harmed in the absence of an injunction.

#### **IV. Challenges to the Scope of the Injunction**

We turn to the State’s contentions that the district court’s injunction was overbroad.

##### **A. Individual Defendants**

The State contends that the injunction should not apply to Atencio, Zmuda, Yordy, Siegert, Dr. Young, Dr. Craig, Dr. Eliason, or Dr. Whinnery because the district court did not find that they, individually, were deliberately indifferent to Edmo’s medical needs.

As explained in Section III.A, Edmo has established that Dr. Eliason was deliberately indifferent to her serious medical needs. The injunction was properly entered against him because he personally participated in the deprivation of Edmo’s constitutional rights. *See Colwell*, 763 F.3d at 1070.

Edmo sued Attencio, Zmuda, and Yordy in their official capacities. An official-capacity suit for injunctive relief is

properly brought against any persons who “would be responsible for implementing any injunctive relief.” *Pouncil v. Tilton*, 704 F.3d 568, 576 (9th Cir. 2012). The State does not contest that Attencio, as Director of IDOC, and Zmuda, as Deputy Director of IDOC, would be responsible for implementing any injunctive relief ordered. Edmo properly named them as defendants to her Eighth Amendment claim for injunctive relief, regardless of their personal involvement. *See Colwell*, 763 F.3d at 1070–71 (director of a state correctional system is a proper defendant in an official-capacity suit seeking injunctive relief for Eighth Amendment violations). Yordy is no longer the Warden of ISCI, but, by operation of the Federal Rules, his successor, Al Ramirez, is “automatically substituted as party” in his official capacity. Fed. R. Civ. P. 25(d). Ramirez is properly a defendant to Edmo’s Eighth Amendment claim for injunctive relief, regardless of his personal involvement. *See Colwell*, 763 F.3d at 1070–71 (warden is a proper defendant in an official-capacity suit seeking injunctive relief for Eighth Amendment violations). Because Edmo may properly pursue her Eighth Amendment claim for injunctive relief against Attencio, Zmuda, and Ramirez in their official capacities, they are properly included within the scope of the district court’s injunction. On remand, the district court shall amend the injunction to substitute Al Ramirez (or the then-current Warden of ISCI) as a party for Yordy.

Edmo also named Yordy as a defendant in his individual capacity. She likewise named Siegert, Dr. Young, Dr. Craig, and Dr. Whinnery as defendants in their individual capacities (though she does not argue on appeal that the injunction properly included them). We hold that the evidence in the current record is insufficient to conclude that they were deliberately indifferent to Edmo’s serious medical needs. In particular, the record does not show what they

knew about Edmo's condition and what role they played in her treatment or lack thereof. Edmo has not established their liability, and the district court improperly included them within the scope of the injunction. We vacate the district court's injunction to the extent it applies to Yordy, Siegert, Dr. Young, Dr. Craig, and Dr. Whinnery in their individual capacities. *See California v. Azar*, 911 F.3d 558, 585 (9th Cir. 2018) (vacating in part an overbroad injunction and remanding to the district court). On remand, the district court shall modify the injunction to exclude those defendants from its scope.

### B. Corizon

The State also contends that the injunction should not apply to Corizon. It urges that Corizon does not have a policy barring GCS and argues that such a policy is a prerequisite to liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). We have not yet determined whether *Monell* applies "to private entities acting on behalf of state governments," such as Corizon. *Oyenik v. Corizon Health Inc.*, 696 F. App'x 792, 794 n.1 (9th Cir. 2017). We leave that issue for another day. Instead, we vacate the injunction as to Corizon and remand with instructions to the district court to modify the injunction to exclude Corizon. *See Azar*, 911 F.3d at 585. Doing so still provides Edmo the relief she seeks at this stage.<sup>22</sup>

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<sup>22</sup> For similar reasons, we need not reach Edmo's contention and the district court's finding that "Corizon and IDOC have a *de facto* policy or practice of refusing" GCS to prisoners. *Edmo*, 358 F. Supp. 3d at 1127.

### C. Relief Ordered

The State next contends that the injunctive relief ordered is overbroad because it requires the State to provide Edmo all “adequate medical care.” The State misconstrues the district court’s order. The order, read in context, requires defendants to provide GCS, as well as “adequate medical care” that is “reasonably necessary” to accomplish that end—not every conceivable form of adequate medical care. *Edmo*, 358 F. Supp. 3d at 1129; *see also id.* at 1109 (“Plaintiff Adree Edmo alleges that prison authorities violated her Eighth Amendment rights by refusing to provide her with gender confirmation surgery. For the reasons explained below, the Court agrees and will order defendants to provide her with this procedure, a surgery which is considered medically necessary under generally accepted standards of care.”); *id.* at 1110 (“[F]or the reasons explained in detail below, IDOC and Corizon will be ordered to provide Ms. Edmo with gender confirmation surgery.”).

The State similarly contends that the injunctive relief ordered is overbroad because it requires the State to provide Edmo surgery even though the defendants are not surgeons and no surgeon has evaluated Edmo. We reject this obtuse reading of the district court’s order. The district court ordered the State to “take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery.” *Edmo*, 358 F. Supp. 3d at 1129. That means that the State must take steps within its power to provide GCS to Edmo, such as finding a surgeon and scheduling a surgical evaluation. Indeed, we modified our stay of the district court’s order to permit a surgical consultation, which went forward in April 2019. Oral Arg. at 12:00–12:10. The State cannot reasonably understand the district court’s December 13, 2018 order to require that the defendants themselves provide

surgery. To the extent there are issues arising from a surgical evaluation, the State can raise those issues with the district court.<sup>23</sup>

## **V. Challenges to the Procedure Used by the District Court**

Finally, the State contends that the district court improperly converted an evidentiary hearing on a preliminary injunction into a final trial on the merits of Edmo's Eighth Amendment claim for GCS without giving them adequate notice and in violation of their Seventh Amendment right to a jury trial. We address and reject each contention.

### **A. Notice**

We first address the State's contention that the district court erroneously converted the evidentiary hearing into a final trial on the merits without giving the State "clear and unambiguous notice." Under Federal Rule of Civil Procedure 65(a)(2), "[a] district court may consolidate a preliminary injunction hearing with a trial on the merits, but only when it provides the parties with clear and unambiguous notice [of the intended consolidation] either before the hearing commences or at a time which will afford

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<sup>23</sup> The State contends for the first time in its reply brief that the injunctive relief ordered was inappropriate because the WPATH Standards of Care require two referrals from qualified mental health professionals who have independently assessed the patient before GCS may be provided. It similarly contends for the first time in its reply in support of its motion to dismiss that the order is overbroad because it does not specify the type of GCS ordered. Because the State did not present these arguments in its opening brief, we do not consider them. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).



the parties a full opportunity to present their respective cases.” *Isaacson v. Horne*, 716 F.3d 1213, 1220 (9th Cir. 2013) (second alteration in original) (quotation omitted). “What constitutes adequate notice depends upon the facts of the case.” *Michenfelder v. Sumner*, 860 F.2d 328, 337 (9th Cir. 1988).

A party challenging consolidation must show not only inadequate notice, but also “substantial prejudice in the sense that [it] was not allowed to present material evidence.” *Michenfelder*, 860 F.2d at 337; *see also* 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2950 (3d ed. Apr. 2019 update). “We have on occasion upheld a district court’s failure to give any notice whatsoever before finally determining the merits after only a preliminary injunction hearing, where the complaining party has failed to show how additional evidence could have altered the outcome.” *Michenfelder*, 860 F.2d at 337.

At the outset, we note that the State was provided notice, twice, that the district court considered the evidentiary hearing a final trial on the merits of Edmo’s request for GCS. At the beginning of the hearing, the district court explained “it’s hard for me to envision this hearing being anything but a hearing on a final injunction at least as to that part of the relief requested [GCS],” and it asked the parties to address by the end of the hearing whether it was for a permanent injunction. At the close of the hearing, the district court again questioned whether it could order GCS in a preliminary injunction. It explained that it had, in effect, “kind of treated this hearing as the final hearing” on Edmo’s request for GCS, and it again asked the parties to address in their oral closings or written briefs whether the hearing was one for a permanent injunction. The State never answered the court’s question or objected to consolidation, despite the

district court specifically noting it had treated the hearing as final. *Cf. Reilly v. United States*, 863 F.2d 149, 160 (1st Cir. 1988) (“[W]hen a trial judge announces a proposed course of action which litigants believe to be erroneous, the parties detrimentally affected must act expeditiously to call the error to the judge’s attention or to cure the defect, not lurk in the bushes waiting to ask for another trial when their litigatory milk curdles.”). This is not a case where the district court gave no notice whatsoever.

Regardless, the State has not shown any prejudice. With full awareness of the stakes, the district court permitted the parties four months of discovery and held a three-day evidentiary hearing. The parties called seven witnesses, submitted declarations in lieu of live testimony for other witnesses, and submitted thousands of pages of exhibits and extensive pre- and post-trial briefing. Most importantly, both parties put on extensive evidence concerning the treatment provided to and withheld from Edmo and why it was or was not appropriate—the key issue at the hearing.

When it comes to identifying prejudice, the State is tellingly short on specifics. It indicates that it “would have objected” to consolidation, but it failed to do so despite repeated invitations—indeed, directives—to address the issue. The State also urges that it would have requested that the named defendants be able to testify live, but it stipulated—knowing full well the stakes of the hearing—to submit certain testimony via declaration “[i]n lieu of and/or in addition to live testimony.” Moreover, the State fails to identify what testimony those witnesses would have offered or explain how presenting that testimony live, instead of via declaration, “could have altered the outcome.” *Michenfelder*, 860 F.2d at 337. The district court did not

commit reversible error in consolidating the evidentiary hearing with a trial on the merits of Edmo's request for GCS.

### **B. Seventh Amendment**

We turn to the State's related contention that the district court violated the defendants' Seventh Amendment right to a jury trial by converting the evidentiary hearing into a trial on the merits. We review that contention de novo. *Palmer v. Valdez*, 560 F.3d 965, 968 (9th Cir. 2009).

The Seventh Amendment guarantees the right to a trial by jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. In a case such as this, where legal claims are joined with equitable claims, a party "has a right to jury consideration of all legal claims, as well as all issues common to both claims." *Plummer v. W. Int'l Hotels Co.*, 656 F.2d 502, 504 n.6 (9th Cir. 1981) (citing *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974)). "Otherwise, the court might limit the parties' opportunity to try to a jury every issue underlying the legal claims by affording preclusive effect to its own findings of fact on questions that are common to both the legal and equitable claims." *Lacy v. Cook County*, 897 F.3d 847, 858 (7th Cir. 2018).

Like other constitutional rights, the right to a jury trial in civil suits can be waived. *See United States v. Moore*, 340 U.S. 616, 621 (1951). It is well established that "[a] failure to object to a proceeding in which the court sits as the finder of fact waives a valid jury demand as to any claims decided in that proceeding, at least where it was clear that the court intended to make fact determinations." *Fillmore v. Page*, 358 F.3d 496, 503 (7th Cir. 2004) (quotation omitted); *see also* 9 Wright & Miller, *Federal Practice and Procedure* § 2321 ("The right to jury trial also may be waived as it has

in many, many cases, by conduct, such as failing to object to or actually participating in a bench trial . . .”).

For example, in *White v. McGinnis*, we held that “[a] party’s vigorous participation in a bench trial, without so much as a mention of a jury, . . . can only be ascribed to knowledgeable relinquishment of the prior jury demand.” 903 F.2d 699, 703 (9th Cir. 1990) (en banc). We explained that where a party chooses “to argue his case fully before the district judge[,] it is not unjust to hold him to that commitment.” *Id.* By contrast, we have held that “[w]hen a party participates in [a] bench trial ordered by the trial court while continuing to demand a jury trial, his ‘continuing objection’ is ‘sufficient to preserve his right to appeal the denial of his request for a jury.’” *Solis v. County of Los Angeles*, 514 F.3d 946, 957 (9th Cir. 2008) (quoting *United States v. Nordbrock*, 941 F.2d 947, 950 (9th Cir. 1991)). “This is because the party in such a case is not seeking ‘two bites at the procedural apple’ . . . . Rather, when a trial court denies a party a jury trial despite the party’s continuing demand, the party has little choice but to accede to the trial court’s ruling and participate in the bench trial.” *Id.* (citation omitted); see also *Lovelace v. Dall*, 820 F.2d 223, 228 (7th Cir. 1987) (“Another policy justifying the jury demand waiver rule is the view that it is unfair to permit a party to have a trial, discover that it has lost, and then raise the jury issue because it is unsatisfied with the result of the trial.”).

The State seeks a second bite at the apple. It vigorously participated in the evidentiary hearing without ever raising the right to a jury trial. The State remained silent in the face of statements from the district court that it was considering treating, and then that it had treated, the hearing as a final trial on the merits, which made it clear that the court “intended to make fact determinations.” *Fillmore*, 358 F.3d

at 503. It also remained silent despite the district court asking twice whether the hearing was one for a permanent injunction—as clear a time as any to raise any concerns about a jury trial.

The State raised the issue of a jury trial for the first time on appeal, after the district court ruled against it. Even after the district court’s ruling, the State made no objection or claim to a jury trial. This conduct waived the State’s right to a jury trial with respect to issues common to Edmo’s request for an injunction ordering GCS and her legal claims.

## **VI. Conclusion**

We apply the dictates of the Eighth Amendment today in an area of increased social awareness: transgender health care. We are not the first to speak on the subject, nor will we be the last. Our court and others have been considering Eighth Amendment claims brought by transgender prisoners for decades. During that time, the 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 developing understanding. *See Estelle*, 429 U.S. at 102–03.

We hold that where, as here, the record shows that the medically necessary treatment for a prisoner’s gender dysphoria is gender confirmation surgery, and responsible prison officials deny such treatment with full awareness of the prisoner’s suffering, those officials violate the Eighth Amendment’s prohibition on cruel and unusual punishment.

\* \* \*

We affirm the district court's entry of an injunction for Edmo. However, we vacate the injunction to the extent it applies to Corizon, Yordy, Siegert, Dr. Young, Dr. Craig, and Dr. Whinnery, in their individual capacities, and remand to the district court to modify the injunction accordingly. The district court shall also modify the injunction to substitute Al Ramirez in his official capacity as Warden of ISCI for Yordy.

Although 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.

In light of the nature and urgency of the relief at issue, we will disfavor any motion, absent extraordinary circumstances or consent from all parties, to extend the period to petition for rehearing or rehearing en banc. Our stay of the district court's December 13, 2018 order shall automatically terminate upon issuance of the mandate.

Costs on appeal are awarded to Edmo.

**AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

ADREE EDMO,

Plaintiff,

v.

IDAHO DEPARTMENT OF  
CORRECTION, *et al.*,

Defendants.

Case No. 1:17-cv-00151-BLW

**MEMORANDUM DECISION  
AND ORDER**

**INTRODUCTION**

Before the Court is Ms. Edmo's Motion for Attorneys' Fees and Expenses. Dkt. 315. Having reviewed the parties' briefs and the record in this matter, the Court concludes that oral argument is not necessary. Accordingly, for the reasons explained below the Court will grant in part and deny in part Ms. Edmo's motion and award her attorneys' fees in the amount of \$2,586,048.80 and non-taxable costs in the amount of \$45,544.20.

**LITIGATION BACKGROUND**

Plaintiff Adree Edmo, a male-to-female transgender person, brought this action against Defendants alleging various constitutional and statutory violations. At the time she filed suit in 2017, Ms. Edmo was a prisoner in the custody of the

Idaho Department of Corrections. Diagnosed with severe gender dysphoria, Ms. Edmo claimed that Defendants were failing to provide her with necessary medical treatment in the form of gender confirmation surgery.

After Ms. Edmo initially brought her case pro se, the Court appointed counsel to represent her. Ms. Edmo's attorneys promptly filed an amended complaint asserting seven claims against Defendants and seeking injunctive relief, declaratory relief, and damages. Dkt. 36. Two months later, Defendants filed a Motion for Dispositive Relief asking the Court to dismiss several of Ms. Edmo's claims. Dkt. 39. The Court granted that motion in part and denied it in part but left the core of Ms. Edmo's case intact. Dkt. 66.

Ms. Edmo's counsel then moved to the second and most time-consuming phase of this litigation. Based on three legal theories—primarily the Eighth Amendment prohibition against cruel and unusual punishment—Ms. Edmo sought an injunction requiring Defendants to provide her with a name change, transfer to a women's facility, access to gender-appropriate clothing and commissary items, and gender confirmation surgery. Dkt. 62. After a three-day evidentiary hearing, the Court granted Ms. Edmo an injunction on Eighth Amendment grounds and ordered Defendants to provide her with “adequate medical care,” including gender confirmation surgery. Dkt. 146, at 45. But the litigation was far from over.



Soon after the Court granted the injunction, Defendants filed a notice of appeal and motion to stay the injunction in the Ninth Circuit. Dkts. 154 & 155. The Ninth Circuit granted the stay and set the appeal on an expedited briefing schedule. After oral argument on the appeal, the Ninth Circuit remanded for this Court to consider two limited issues. When this Court resolved those issues, Defendants filed yet another notice of appeal, challenging this Court's order on remand.

The Ninth Circuit then affirmed this Court's injunction except as it applied to five defendants in their individual capacities. Dkt. 209, at 85. Defendants sought rehearing en banc and, while that request was pending, refused to provide Ms. Edmo with pre-surgical care. As a result, Ms. Edmo successfully moved the Ninth Circuit to partially lift the stay of this Court's injunction and require Defendants to proceed with pre-surgical appointments. Dkt. 220. Eventually, the Ninth Circuit denied Defendants' request for rehearing en banc and dismissed yet another, third appeal. Dkts. 257 & 263.

In July 2020, nineteen months after this Court's injunction, Ms. Edmo received the ordered treatment. Yet the legal battle continued before the U.S. Supreme Court, where Defendants had filed an application for stay, petition for *certiorari*, and suggestion of mootness. Dkts. 278, 279 & 294.

Eventually, when the Supreme Court denied *certiorari*, this Court lifted the stay on Ms. Edmo's remaining claims and the parties engaged in judicially-

supervised settlement negotiations. As a result of those mediated negotiations, Ms. Edmo voluntarily dismiss her remaining claims against Defendants. Dkts. 307 & 313.

What remains is Ms. Edmo's request for attorneys' fees and expenses. Dkt. 315.

## **LEGAL STANDARD**

### **1. Attorneys' Fees Under § 1988**

Under the American Rule, each party to a lawsuit generally bears its own attorneys' fees unless Congress has statutorily provided otherwise. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Title 42 U.S.C. § 1988 authorizes an award of reasonable attorneys' fees to prevailing parties in civil rights actions brought under 42 U.S.C. § 1983. The purpose of awarding attorneys' fees in civil rights actions is to ensure that plaintiffs have "effective access to the judicial process." *Hensley*, 461 U.S. at 429. If successful plaintiffs always had to bear their own legal fees, "few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Jankey v. Poop Deck*, 537 F.3d 1122, 1131 (9th Cir. 2008). Therefore, in most cases the prevailing party should recover attorneys' fees. *Hensley*, 461 U.S. at 429.

### **2. The Lodestar Method**

Courts in the Ninth Circuit use the two-step “lodestar method” to calculate reasonable attorneys’ fee awards. *Haegar v. Goodyear Tire and Rubber Co.*, 813 F.3d 1233, 1249 (9th Cir. 2016).

The first step is to determine whether the hourly rate and the hours expended by the attorneys were reasonable. *Hensley*, 461 U.S. at 433. The burden is on the party seeking the fees to document and “submit evidence in support of those hours worked.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992). But the court generally defers to the prevailing lawyer’s professional judgment as to how much time the case required—“after all, he won, and might not have, had he been more of a slacker.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). The hourly rate and the hours expended are then multiplied for an initial estimate of the attorneys’ fees. *Hensley*, 461 U.S. at 433. The result—called the “lodestar figure”—is a presumptively reasonable fee. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013).

Second, the court considers whether to adjust the lodestar figure based on the factors set forth in *Kerr v. Screen Extras Guild, Inc.* “that are not already

subsumed in the initial lodestar calculation.” *Morales v. City of San Rafael*, 96

F.3d 359, 363-64 (9th Cir. 1996).<sup>1</sup> These include:

(5) the customary fee, ... (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the “undesirability” of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

*Id.* at 364 n.9. If the lodestar figure does not fully account for these factors, the court has discretion to adjust the award to a reasonable amount. *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045–47 (9th Cir. 2000).

### **3. Limits Under the PLRA**

The Prison Litigation Reform Act (“PLRA”) applies to all civil rights actions by prisoners and imposes two important limitations on the availability of attorneys’ fees. 42 U.S.C. § 1997e(d).

First, courts may award attorneys’ fees to prisoners only to the extent that (1) the fees were “directly and reasonably incurred in proving an actual violation of

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<sup>1</sup> There are twelve *Kerr* factors in total: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the ‘undesirability’ of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

the plaintiff's rights,” § 1997e(d)(1)(A), and (2) the fees are either “proportionately related to the court ordered relief for the violation” or “directly and reasonably incurred in enforcing the relief ordered for the violation,” § 1997e(d)(1)(B). *See Jimenez v. Franklin*, 680 F.3d 1096, 1099 (9th Cir. 2012).

Second, the PLRA dictates that that fee awards shall not be based on an hourly rate “greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.” 42 U.S.C. § 1997e(d)(3). For these purposes, the relevant rate for court-appointed counsel is the one “the Judicial Conference authorized and requested from Congress,” as reflected in the Congressional Budget Summary. *Parsons v. Ryan*, 949 F.3d 443, 464-65 (9th Cir. 2020).

## ANALYSIS

The threshold question when considering a fee petition is whether the party requesting fees was the “prevailing party” in the action. *See* 42 U.S.C. § 1988. Ms. Edmo was clearly the prevailing party in this case. She sought an injunction ordering gender confirmation surgery, and that is exactly what she got. Defendants do not appear to dispute that Ms. Edmo was the prevailing party, but instead object to the reasonableness of the fees incurred.

### 1. Reasonableness of the Requested Fees

#### A. Hourly Rate

The hourly rate used to calculate counsel's fees is dictated by the PLRA. During this case's five-year lifespan, the rates authorized by the Judicial Conference for court-appointed counsel have changed several times. As an adjustment for the delay in payment, the Court will use the FY 2021 rate applicable at the time of Ms. Edmo's fee request. *See Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). The rate authorized by the Judicial Conference for the payment of court-appointed counsel in FY 2021 was \$155 per hour.<sup>2</sup> Calculating 150% of that rate yields the hourly rate applicable in this case—\$232.50 per hour.

## **B. Hours Expended**

Having determined the applicable hourly rate, the next step is to evaluate whether the hours expended by Ms. Edmo's attorneys are reasonable. *Hensley*, 461 U.S. at 433.

Ms. Edmo's attorneys have provided the Court with declarations and timesheets detailing the services they provided, as well as attorney biographies and their regular hourly rates. Dkts. 315-2 through 315-7. In total, the timesheets record 5,968.30 hours billed for work on Ms. Edmo's case. *Id.*; *Pl. 's Reply*, Ex. A,

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<sup>2</sup> Admin. Office of the U.S. Courts, The Judiciary Fiscal Year 2021 Congressional Budget Summary 39 (Feb. 2020), [https://www.uscourts.gov/sites/default/files/fy\\_2021\\_congressional\\_budget\\_summary\\_0.pdf](https://www.uscourts.gov/sites/default/files/fy_2021_congressional_budget_summary_0.pdf) (last visited July 20, 2021).

Dkt. 321. Ms. Edmo has also submitted a declaration from Howard Belodoff, an experienced Idaho civil rights litigator, attesting to the reasonableness of her fee request. *Belodoff Aff.*, Dkt. 315-8. After reviewing each declaration and timesheet, the Court finds that, except as detailed below, Ms. Edmo has met her burden to submit evidence supporting her attorneys' hours. *Gates*, 987 F.2d at 1397-98.

Defendants object on numerous grounds to the hours expended by Ms. Edmo's attorneys. First, Defendants asks the Court to reduce the number of hours by 86 percent because only one of her seven original claims ultimately succeeded. *Def.'s Resp.* at 13, Dkt. 319. Essentially, they argue that any time spent on claims other than the successful Eighth Amendment claim was not directly related to Ms. Edmo's success and therefore is not recoverable. Next, Defendants assert numerous specific objections that can be categorized as follows: (i) overstaffing; (ii) excessive billing; (iii) duplicative billing; (iv) block billing and vague descriptions; (v) travel time; and (vi) clerical tasks.

### **C. Time Spent on Unsuccessful Claims**

Ms. Edmo did not succeed on all of her original claims or against all original defendants. Only one of her original claims ultimately formed the basis for her injunction against Defendants. Two of her other claims were rejected at the injunction stage. Dkt. 149. And the four remaining claims were ultimately dismissed. Dkts. 66, 301 & 311. According to Defendants, Ms. Edmo's fee award

should therefore be reduced in proportion to the number of unsuccessful claims—by their calculations, a reduction of six-sevenths, or 86%. *Def.’s Resp.* at 13, Dkt. 319.

At the outset, the Court rejects Defendants’ strictly mathematical approach. Four of the seven claims that Ms. Edmo asserted in her Second Amended Complaint were not pursued during the injunction phase. Further, the Court “cannot imagine why a lawyer would allocate equal hours to each claim,” so an automatic pro rata reduction would “make[] no practical sense.” *McGinnis v. Ky. Fried Chicken*, 51 F.3d 805, 808 (9th Cir. 1994). Indeed, the Ninth Circuit squarely rejected Defendants’ mathematical approach in *McGinnis*. *Id.* at 809; *see also Hensley*, 461 U.S. at 435 n.11. Instead of resorting to crude proportionality calculations, the Court must carefully consider whether the attorneys’ fees were “directly reasonably incurred” in proving that Ms. Edmo’s rights were violated. 42 U.S.C. § 1997e(d)(1).

In *Hensley*, the Supreme Court set forth the two-part framework for determining whether a plaintiff’s success on only some claims requires an attorneys’ fee reduction. *Hensley*, 461 U.S. at 434-37. The first step is to determine whether the plaintiff failed on any claims wholly unrelated to her successful claims. *Id.* at 435. If so, she should not recover the fees incurred for work on those unrelated claims. *Id.* at 434-35. The second step is to determine whether the



plaintiff failed on any claims that *were* related to her successful claims. *Id.* at 436. If so, she should nevertheless recover a full fee award so long as she ultimately “obtained excellent results.” *Id.* at 435. In other words, where a highly successful plaintiff “presents different claims for relief that involve a common core of facts or are based on related legal theories, the district court should not attempt to divide the request for attorney's fees on a claim-by-claim basis.” *McCown v. City of Fontana*, 565 F.3d 1097, 1103 (9th Cir. 2009) (cleaned up).

Beginning with step one, the Court finds that Ms. Edmo’s case did not involve wholly unrelated claims. All seven claims in Ms. Edmo’s Second Amended Complaint made essentially the same point: Defendants were denying her necessary medical treatment by refusing to provide gender confirmation surgery.<sup>3</sup> *Sec. Am. Compl.* ¶¶ 62, 71, 84, 92, 99, 103, & 111, Dkt. 36. Although each claim advanced a different legal justification for relief, each involved the same “common core of facts” surrounding Ms. Edmo’s need for, and Defendants’ refusal of, medical treatment for gender dysphoria. The Court therefore finds that Ms. Edmo’s claims were essentially alternative legal theories seeking the same result, not distinct claims for relief. Dkt. 62. Ms. Edmo clears the first hurdle.

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<sup>3</sup> The Court recognizes that Ms. Edmo also sought additional forms of relief, including equal access to gender-appropriate clothing and items, transfer to a female facility, and unspecified compensatory and punitive damages. *Sec. Am. Compl.*, Dkt. 36.

Moving to step two, Defendants correctly note that Ms. Edmo did not succeed on all of her related claims. Indeed, only one—based on the Eighth Amendment—ultimately formed the basis for the injunction. But this case cannot simply be reduced to the number of claims asserted and succeeded on. Doing so obscures the reality that Ms. Edmo’s claims substantially overlapped, and her attorneys obtained the result she was seeking—an injunction requiring Defendants to provide her with gender confirmation surgery. That was not “partial success,” despite how Defendants’ numerical analysis makes it seem. *Hensley*, 461 U.S. at 435. That was exactly—and almost exclusively—what she was seeking. The Court will not attempt to divide Ms. Edmo’s fee award on a “claim-by-claim basis.” *McCown*, 565 F.3d at 1103; *see also Padgett v. Loventhal*, 706 F.3d 1205, 1209 (9th Cir. 2013). As the Supreme Court put it in *Hensley*: “The result is what matters.” *Hensley*, 461 U.S. at 435.

The PLRA’s fee limitation does not change the Court’s conclusion on this issue. Considering that Ms. Edmo’s claims were all closely intertwined and sought the same basic result (which was obtained), the Court finds that the fees attributable to all of her claims were “directly and reasonably incurred” in proving that Ms. Edmo’s rights were violated. 42 U.S.C. § 1997e(d)(1). The Ninth Circuit has made clear that fees attributable to counsel’s unsuccessful efforts—so called “fees for losing” —may be recovered in PLRA cases so long as they are

reasonably incurred. *Balla v. Idaho*, 677 F.3d 910, 918 (9th Cir. 2012). In other words, a plaintiff can lose the battle with an unsuccessful argument or motion but win the war by obtaining the relief she seeks. *Id.* at 920.

Ms. Edmo won the war by obtaining and defending an injunction ordering Defendants to provide her with the medical treatment she sought. Her attorneys' efforts advancing alternative legal theories in the Second Amended Complaint and motion for injunction were directly and reasonably related to Ms. Edmo's ultimate victory—even if she did not “prevail on every contention raised in the lawsuit.” *Hensley*, 461 U.S. at 435.

The Court therefore will not proportionately reduce the attorneys' fees incurred for preparing and defend the Second Amended Complaint and Motion for Preliminary Injunction.

#### **(1) Fees Incurred Litigating, Mediating, and Settling the Remaining Claims**

The Court will, however, exclude the fees incurred for litigating, mediating, and settling Ms. Edmo's four remaining claims after the injunction was obtained and defended. Those hours, billed between November 2020 and March 2021, were not “directly and reasonably incurred in proving an actual violation of the plaintiff's rights.” § 1997e(d)(1). The actual violation had already been proven and remedied. Nor were they incurred “in enforcing the relief ordered for the

violation.” § 1997e(d)(1). Again, Ms. Edmo had already received her court-ordered surgery.

After reviewing the timesheets, the Court finds that Ms. Edmo’s attorneys billed approximately 154 hours to litigate, mediate, and settle her remaining claims between November 2020 and March 2021. Accordingly, the Court will deduct 154 hours from the lodestar calculation.

#### **D. Specific Objections**

##### **(1) Overstaffing**

Defendants ask the Court for a fee reduction because Ms. Edmo’s case was overstaffed. They argue that having six law firms and nineteen attorneys involved was “facially unreasonable.” *Def.’s Resp.* at 16-17, 19, Dkt. 319.

But the Court will not reduce attorneys’ fees based on an abstract notion that the number of attorneys involved seems high. *See De Jesus Ortega Melendres v. Arpaio*, Nos. 13-16285 & 13-17238, 2017 WL 10808812, at \*7 (9th Cir. March 2, 2017) (rejecting generalized objections to the sheer number of timekeepers). As Ms. Edmo points out, most of the hours—4,314 of the total 5,968.3—were billed by just three attorneys over the course of several years and involved dozens of motions, memoranda, depositions, and numerous appeals. Accordingly, the Court will not reduce the fee award based on this objection.

##### **(2) Excessive Billing**

Defendants repeatedly argue that counsel billed excessive hours. Most of the specific objections merely restate the number of hours billed for certain tasks without explaining why those hours are unreasonable. This case involved extensive motion practice before three courts and depended heavily on expert testimony related to unique medical issues. Over the course of several years, multiple appeals were taken, stays sought, and briefing deadlines expedited. Based on these circumstances and the Court's familiarity with the record and the nature of this litigation, the Court finds that, except as discussed below, counsel did not bill excessive hours.

Defendants first challenge the number of hours spent researching issues they view as uncomplicated or irrelevant, including “how to request medical records in Idaho,” *Def. ’s Resp.* at 19, Dkt. 319, and an “unrelated Hep-C case,” *Id.* at 21. Both objections are off the mark. As to the first, careful review of the docket and entry description shows that this matter was highly relevant to Ms. Edmo’s Motion to Strike and for a Protective Order, Dkt. 83, where the disclosure of Ms. Edmo’s medical records was directly at issue. *Stormer Aff.* at 52, Dkt. 315-4. As to the second, the Court finds that .5 hours researching the “Hep-C case” was reasonable as a precaution against waiving Ms. Edmo’s rights in this case. *See Pl. ’s Reply* at 4, Dkt. 321.

Next, Defendants challenge “close to 40 hours” billed by Shaleen Shanbhag “to prepare for the 6.5-hour deposition of Dr. Eliason.” *Def.’s Resp.* at 19, Dkt. 319. In fact, of the 45.7 hours Ms. Shanbhag billed related to that deposition, 12.5 hours involve travel to and from Idaho for the deposition and another 6.5 hours account for the deposition itself. *Stormer Aff.* at 54, Dkt. 315-4. That leaves 26.7 hours of preparation for the 6.5-hour deposition, which the Court finds is reasonable.

Defendants’ also object to 73 hours spent “preparing and reviewing statements made to the media,” most of which have already been excluded through billing judgment reductions. *Def.’s Resp.* at 21, Dkt. 319; *see e.g., Whelan Aff.* at 95 & 100, Dkt. 315-3; *Rifkin Aff.* at 39, 40, 41 & 43, Dkt. 315-2. But Ms. Edmo still requests 12.9 hours billed by local counsel for media-related tasks, including radio interviews and responding to media requests. Public relations work is compensable only if it is “directly and intimately related to the successful representation of a client.” *Davis v. City and Cnty. of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), *vacated in part on other grounds on denial of reh’g*, 984 F.2d 345 (9th Cir.1993). According to Ms. Ferguson, media work in this case “focused on fostering the litigation goals of our client, and addressing the animosity, misinformation and ‘fake news’ about the claims of our client.” *Ferguson Aff.* ¶ 22, Dkt. 315-5. Laudable as those goals might be, the Court finds

that these efforts were not intimately related to Ms. Edmo's success and will therefore exclude 12.9 hours from the lodestar calculation.

Next, Defendants twice object to the number of hours Lori Rifkin billed in a single day or series of days. *Rifkin Aff.* at 30, Dkt. 315-2 (20.5 hours in a single day during the injunction hearing); *Id.* at 31 (60 hours over four days for post-trial briefing and proposed findings of fact). The Court does not agree, however, that these long hours were unreasonably excessive. As lead counsel at the injunction hearing, Ms. Rifkin presented the opening and closing statements and examined six witnesses. Dkts. 137, 138 & 139. The time she spent on post-trial briefing is also unsurprising considering the product was a 40-page Proposed Findings of Fact and Conclusions of Law, Dkt. 144, and an 11-page post-hearing brief, Dkt. 143. Defendants have given no reason why these hours, however demanding, were unreasonably excessive—and the Court finds none.

Another of Defendants' objections is more convincing. Ms. Shanbhag billed 1.5 hours to research page and word limits for the Ninth Circuit brief. *Stormer Aff.* at 60, Dkt. 315-4. The Court agrees that 1.5 hours was excessive for this task and will reduce the time to .5 hours.

Finally, Defendants argue that billing for three moot courts was excessive: one before the injunction hearing and two before the Ninth Circuit oral argument. The Court is not convinced that holding one moot court before the injunction

hearing was unreasonable. That hearing covered a great deal of ground and involved testimony from seven witnesses and the admission of ninety-four exhibits. Defendants' argument is stronger when it comes to the two moot courts before the Ninth Circuit argument. Counsel billed a combined 17.8 hours for moot courts in preparation for Ms. Rifkin's 1.5-hour oral argument. The Court finds that this was excessive and will reduce those hours by one-half, or 8.9 hours.

As for Defendants' remaining excessiveness objections, the Court has reviewed each challenged entry and finds that none are unreasonable excessive.

### **(3) Duplicative Billing**

Defendants next object that Ms. Edmo's counsel duplicated efforts. Although it is "no easy task" to determine what work is unnecessarily duplicative, *Moreno*, 534 F.3d at 1110, the Ninth Circuit has made clear that "the participation of more than one attorney does not necessarily constitute an unnecessary duplication of effort." *McGrath v. Cnty. of Nevada*, 67 F.3d 248, 255 (9th Cir. 1995) (citation omitted). Rather, "[a]n award for time spent by two or more attorneys is proper as long as it reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation." *Johnson v. Univ. College*, 706 F.2d 1205, 1208 (11th Cir. 1983).

#### *(a) Hearing Attendance by Multiple Attorneys*



On several occasions, multiple attorneys attended the same hearing: (1) two local attorneys billed to attend the dispositive relief hearing where neither argued; (2) seven attorneys attended the three-day preliminary injunction hearing where three argued; and (3) four attorneys attended the oral argument before the Ninth Circuit where only one argued.

It is not always unreasonable for multiple attorneys to attend the same deposition or hearing. *See Kelly*, 7 F.Supp.3d 1069, 1079 (D. Idaho 2014), *aff'd by* 822 F.3d 1085 (9th Cir. 2016). If an attorney may assist during the hearing or will be working on the case in the future, for example, her attendance is usually reasonable. *Democratic Party of Washington State v. Reed*, 388 F.3d 1281, 1287 (9th Cir. 2004).

Here, the Court finds that it was reasonable for one local attorney, but not both, to attend the dispositive motion hearing on April 4, 2018. The timesheets show that Ms. Ferguson and Mr. Durham met with the lead attorney, Ms. Rifkin, for discussions before and after the hearing. *Ferguson Aff.* at 17-19, 30-31, Dkt. 315-5. Both attorneys were also involved in the case in the months immediately following the hearing. *Id.* The Court finds, however, that it was not reasonable for both attorneys to bill to attend and will deduct 1.4 hours.

Next, the Court finds that it was reasonable for five attorneys to bill for attending the three-day preliminary injunction hearing.<sup>4</sup> That hearing was the main act of this case. Three of Ms. Edmo's attorneys appeared on the record to present arguments and examine witnesses. *Hearing Tr.* at 9, Dkt. 137; *Hearing Tr.* at 231, Dkt. 138; *Hearing Tr.* at 457, Dkt. 139. The other two billing attorneys were local counsel who had been the primary point of contact for Ms. Edmo leading up to the hearing. *Ferguson Aff.* at 19-20, 30-31, Dkt. 315-5. Moreover, both were heavily involved in preparing Ms. Edmo and the expert witnesses for the hearing. *Id.* Each day after the hearing session, all five attorneys met to debrief and prepare for the following day. *Stormer Aff.* at 58, Dkt. 315-4; *Whelan Aff.* at 53-54, Dkt. 315-3; *Rifkin Aff.* at 30, Dkt. 315-2; *Ferguson Aff.* at 20 & 31, Dkt. 315-5. Considering these facts and the great deal of ground covered in the hearing, the Court finds that it was reasonable for all five attorneys to attend the hearing.

The Court does, however, agree with Defendants that it was unreasonable for four attorneys to bill for attending oral argument at the Ninth Circuit on May 16, 2019. Only Ms. Rifkin argued at the hearing. Aside from participating in moot courts before the hearing, Julie Wilensky was apparently uninvolved in the pre-

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<sup>4</sup> Defendants state that seven attorneys billed to attend the hearing, but the timesheets show only six attorneys attending, and Mr. Chen's hours were already removed as a billing judgment reduction. *Whelan Aff.* at 128, Dkt. 315-3.

hearing research and preparation. *Whelan Aff.* at 123, Dkt. 315-3. In contrast, Ms. Whelan and Ms. Shanbhag were heavily involved leading up to oral argument, and therefore could reasonably have been needed for assistance during the argument. *Id.* at 70; *Stormer Aff.* at 62-63, Dkt. 315-4. The Court will therefore deduct 1.5 hours for Ms. Wilensky's attendance at the hearing.

*(b) Collaboration by Multiple Attorneys*

The Court is not persuaded that counsel needlessly duplicated efforts when researching and preparing pleadings. Defendants note that five attorneys worked on the opposition to Defendants' motion for dispositive relief, and six attorneys collaborated on Ms. Edmo's Motion for Preliminary Injunction. *Def.'s Resp.* at 19, Dkt. 319. But those generalized groupings are unhelpful—in both cases, the vast majority of hours were billed by just one attorney. *Rifkin Aff.* at 23-24, 25-26, Dkt. 315-2.

Although Defendants don't object, counsel's timesheets also include many entries for intra-office meetings and communications. Billing for such meetings can be unnecessarily duplicative. *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 929 (9th Cir. 2008). In this case, however, the Court finds that those hours were reasonable considering the need for regular coordination between legal teams located in different states. Where numerous attorneys work closely to represent a

client, some overlap is unavoidable. Additionally, many of those entries are deducted anyway, as discussed below, due to vagueness.

#### **(4) Block Billing and Vague Descriptions**

Defendants state, without identifying any specific examples, that “numerous” entries are block billed. *Def.’s Resp.* at 22, Dkt. 319. After carefully reviewing the timesheets, the Court has identified only one instance of block-billing: 40.1 hours billed in one entry by Sairah Budwhani for “Review review IDOC production.” *Stormer Aff.* at 55, Dkt. 315-4. That entry clumps numerous days of work into one block, making it difficult to evaluate the reasonableness of the hours. The Court will therefore reduce that entry by fifty percent.

The Court also agrees that numerous billing entries are vague. Timesheets must be detailed enough for the court to determine how the time is directly attributable to the claims in the case, although counsel need not “record in great detail how each minute of his time was expended.” *Hensley*, 461 U.S. at 437 n.12. When entries are vague, the Court has discretion to reduce the fee to a reasonable amount. *Welch*, 480 F.3d at 948.

The entry descriptions for 12.4 hours of Mr. Stormer’s work use extremely broad terms, such as “calls,” “strategy,” and “review issues,” insufficient to enable the Court to evaluate the reasonableness of the time spent. Those lean entries provide no real sense of what Mr. Stormer was doing, who he was conferring with,

or what those conversations were about. Nor do the surrounding entries or the docket provide clarity. The same is true of 7.8 hours billed by Ms. Shanbhag, 5.1 hours billed by Ms. Valdenegro, and 8.7 hours billed by Ms. Rifkin, all of which use comparably vague terms.

The Court will therefore exclude a total of 34 hours from the lodestar calculation due to vagueness.

### **(5) Travel Time**

Defendants object to 200.5 hours billed for “driving and other travel time,” almost all of which involved out-of-state counsel traveling to Idaho.<sup>5</sup> *Def.’s Resp.* at 18, Dkt. 319. The Ninth Circuit has established that travel time is “reasonably compensated at normal hourly rates if such is the custom in the relevant legal market.” *Davis*, 976 F.2d at 1543.

Idaho courts only award fees for attorney travel time as a sanction. *Portfolio Recovery Assoc., LLC v. Ruiz*, No. 42982, 2015 WL 6441722, at \*4 (Idaho Ct. App. Oct. 23, 2015). But Idaho is not the “relevant legal market” in this case, so that custom is not controlling. Ms. Edmo’s case presented unique issues of prisoner conditions and transgender healthcare. It was therefore reasonable for Ms. Edmo to

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<sup>5</sup> As Ms. Edmo noted in her Reply, this number includes time already deducted by counsel for Mr. Chen’s travel to and from the injunction hearing. *Reply*, Dkt. 321, at 4.

retain outside counsel that specialized in those areas. *Ferguson Aff.* ¶¶ 19 & 31, Dkt. 315-5. Even Ms. Edmo’s local counsel who have substantial prisoner litigation experience would not have accepted her case without the assistance of outside counsel. *Id.* at ¶ 19. Nor does it appear that any other Idaho law firm could or would have done so. *Id.* at ¶ 18; *Belodoff Aff.* ¶ 18, Dkt. 315-8; see *Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke’s Health Sys., Ltd.*, No. 1:13-CV-00116-BLW, 2016 WL 1232656 (D. Idaho March 28, 2016) (awarding \$247,237.50 in attorneys’ fees for travel time by specialized out-of-state counsel). Consequently, extensive travel by outside counsel was necessary. *Marbled Murrelet v. Pacific Lumber Co.*, 163 F.R.D. 308, 327 (N.D. Cal. 1995) (refusing to disallow travel time where it would “deter out-of-town attorneys from undertaking this type of representation in the future.”).

The Court will, however, exclude time for travels not necessitated by outside counsel’s absence from Idaho. This includes incidental travels—such as driving to and from home, hotels, meetings, and depositions—that are a routine feature of every lawyer’s day. *Stormer Aff.* at 54, Dkt. 315-4. After reviewing the timesheets, the Court will deduct 6.2 hours of incidental attorney travels.

#### **(6) Clerical Tasks**

Defendants object to fees incurred for performing what they view as clerical work. *Def.’s Resp.* at 22, Dkt. 319. Work that is secretarial in nature should be

absorbed into overhead costs, not billed separately. *Nadarajah v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009). Some examples of clerical work are document filing and organization, scheduling, copying or scanning, and transcription. *See Scott v. Jayco Inc.*, Case No. 1:19-cv-0315 JLT, 2021 WL 6006411 (E.D. Cal. Dec. 20, 2021).

After reviewing the timesheets, the Court finds that several hours billed by numerous attorneys and paralegals, reflected in the table below, were for non-substantive work that should not be billed separately. Accordingly, 37.3 hours will be excluded from the lodestar calculation.

Professional	Description <sup>6</sup>	Hours
Jessica Valdenegro	File Preparation & Organization	3.8
Jessica Valdenegro	Scheduling/Coordinating	2.1
Norma Molina	File Preparation & Organization	3.4
Norma Molina	Scanning/Copying	0.6
Norma Molina	Scheduling/Coordinating	1.9
Maxie Bee	File Preparation & Organization	3.3
Shaleen Shanbhag	File Preparation & Organization	3.0
Shaleen Shanbhag	Scheduling/Coordinating	0.7
Jordyn Bishop	Transcription	18.5
<b>Total</b>		<b>37.3</b>

#### **E. Conclusion Regarding Expended Hours**

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<sup>6</sup> These are not the descriptions provided in the actual time entries submitted by Ms. Edmo. The Court has grouped the relevant entries into categories based on a broad description of the task performed for ease of reference.

In sum, the Court finds that Ms. Edmo's attorneys' fees are reasonable, except as discussed above. The result is a total of 5,691.5 expended hours to insert into the lodestar calculation.

## 2. Presumptive Lodestar Calculation

Taking into account the reductions discussed above, the presumptive lodestar amount is \$1,317,821.75, as illustrated below.

Professional	Rate	Adjusted Hours	Lodestar
Lori Rifkin	\$232.50	2,286.8	\$531,681.00
Dan Stormer	\$232.50	30.2	\$7,021.50
Shaleen Shanbhag	\$232.50	1,112.5	\$258,656.25
Caitlan McLoon	\$232.50	73.1	\$16,995.75
Jordyn Bishop	\$232.50	33.6	\$7,812.00
Sairah Budwhani	\$220	43.7	\$9,614.00
Norma Molina	\$210	62.4	\$13,104.00
Jessica Valdenegro	\$175	9.2	\$1,610.00
Elizabeth Prelogar	\$232.50	69.5	\$16,158.75
Barrett J. Anderson	\$232.50	247.6	\$57,567.00
Jamie D. Robertson	\$232.50	11.7	\$2,720.25
Kathleen R. Hartnett	\$232.50	40.9	\$9,509.25
Deborah Ferguson	\$232.50	170.8	\$39,711.00
Craig Durham	\$232.50	108.2	\$25,156.50
Devi Rao	\$232.50	16.2	\$3,766.50
Cheryl L. Olson	\$232.50	6.7	\$1,557.75
Eliza McDuffie	\$232.50	24	\$5,580.00
Amy Whelan	\$232.50	820	\$190,650.00
Shannon Minter	\$232.50	7.1	\$1,650.75
Julie Wilensky	\$232.50	120.6	\$28,039.50
Alex Chen	\$232.50	314.4	\$73,098.00
Ary Smith	\$220	39.1	\$8,602.00
Maxie Bee	\$175	43.2	\$7,560.00
<b>Totals</b>		<b>5,691.5</b>	<b>\$1,317,821.75</b>



### 3. Lodestar Enhancement

Ms. Edmo asks the Court to enhance the presumptive lodestar by applying a 2.0 multiplier. *Mtn.* at 12, Dkt. 315. Defendants respond that Ms. Edmo has not carried the heavy burden of overcoming the presumption that the lodestar represents a reasonable fee. After carefully reviewing the relevant *Kerr* factors and briefing, the Court finds that Ms. Edmo has demonstrated an extraordinary reason to enhance the lodestar.

The burden is on the party seeking an enhancement to produce specific evidence showing that the lodestar amount is unreasonably low. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2010). There is a strong presumption that the lodestar figure represents a reasonable fee and modifications are proper only in “rare and exceptional circumstances and must be supported by specific evidence in the record and detailed findings by the court.” *Id.* at 546–62. Ultimately, though, the decision whether to enhance the lodestar is within the district court's discretion. *Stranger v. China Elec. Motor, Inc.*, 812 F.3d 734, 740 (9th Cir. 2016).

At the outset, the Court disagrees with Defendants that multipliers are never appropriate in PLRA cases. *Def.’s Resp.* at 23, Dkt. 319. The Ninth Circuit has explicitly rejected that argument on more than one occasion. *See Parsons*, 949 F.3d at 466 n.14; *Kelly v. Wengler*, 822 F.3d 1085, 1100 (9th Cir. 2016). This Court will not ignore that binding precedent.

Turning to whether a multiplier is appropriate here, the Court finds that several of the *Kerr* factors not subsumed in the lodestar calculation support an enhancement.

#### **A. Customary Fees and Excellent Results**

Ms. Edmo argues that the PLRA rate cap of \$232.50 per hour undervalues her counsel considering customary fees (fifth *Kerr* factor) charged by other attorneys and the excellent results obtained (eighth *Kerr* factor) in this case. The Court agrees.

The quality of an attorney’s performance and the results obtained are typically not grounds for an enhancement because they “normally are reflected in the reasonable hourly rate.” *Perdue*, 559 U.S. at 553 (citation omitted). But in “rare circumstances,” a court may enhance the lodestar based on counsel’s exceptional success. *Perdue*, 559 U.S. at 554-55. As the Supreme Court explained in *Perdue v. Kenny*, one such circumstance exists where “the method used in determining the hourly rate employed in the lodestar calculation does not adequately measure the attorney’s true market value, as demonstrated in part during the litigation.” *Id.* Under those circumstances, an enhancement is appropriate “so that an attorney is compensated at the rate that the attorney would receive in cases not governed by the federal fee-shifting statutes.” *Id.* at 555. The court should therefore “adjust the

attorney’s hourly rate in accordance with specific proof linking the attorney’s ability to a prevailing market rate.” *Id.*

Ms. Edmo’s case is precisely the kind of rare circumstance described in *Perdue*. See *Kelly v. Wengler*, 7 F.Supp.3d 1069, 1082 (D. Idaho 2014), *aff’d by* 822 F.3d 1085 (9th Cir. 2016) (awarding multiplier where PLRA did not “fully reflect” counsel’s success); see also *Ginest v. Board of Cnty. Com’rs of Carbon Cnty., WY*, 423 F.Supp.2d 1237, 1241 (D. Wyo. 2006) (“[T]he PLRA fees are exceptionally low and an enhancement is permissible to make the fee more fair.”). There is a substantial disparity between the PLRA rate and customary fees for comparable attorneys, and Ms. Edmo’s counsel obtained excellent results through superior performance in this litigation.

### **(1) Customary Fees**

First, the Court agrees that the PLRA rate is exceptionally low when compared with the customary fees charged by civil litigators with comparable experience in this region. Ms. Edmo’s local counsel—Ms. Ferguson and Mr. Durham—charge regular hourly rates of \$475 and \$400 per hour, respectively. *Ferguson Aff.* ¶ 36, Dkt. 315-5. According to Howard Belodoff, an experienced Idaho civil rights lawyer, those rates are “in line with or below the market rates charged by other attorneys in the Boise area.” *Belodoff Aff.* ¶ 16, Dkt. 315-8. Mr. Belodoff, who himself litigates prisoner civil rights cases, further attests that (1)

his own hourly rate is \$475 per hour, (2) two Holland & Hart attorneys with less experience than local counsel charge \$400 and \$485 per hour, and (3) Ms. Ferguson’s and Mr. Durham’s “excellent reputation[s], background, and experience” support their regular hourly rates. *Id.* at ¶ 12. The Court credits these declarations and finds that customary rates for comparable civil litigators in the Boise area range between \$400 and \$485 per hour.

That means the PLRA rate of \$232.50 per hour undervalues local counsel’s time by between forty and fifty percent. *Ferguson Aff.* ¶ 36, Dkt. 315-5; *Belodoff Aff.* ¶¶ 10, 16, 315-8. The rate disparity is even more pronounced for out-of-state counsel, with the PLRA rate constituting as low as twenty percent of those attorneys’ regular rates. *See Rifkin Aff.* ¶ 46, Dkt. 315-2 (69% below regular rate); *Whelan Aff.* ¶ 30, Dkt. 315-3 (51% and 42% below regular rates); *Hartnett Aff.* ¶ 19, Dkt. 315-7 (81%, 78%, 65%, 78%, and 76% below regular rates); *Rao Aff.* ¶ 14, Dkt. 315-6 (74% below regular rate); *Stormer Aff.* ¶ 21, Dkt. 315-4 (81%, 60%, and 56% below regular rates). However, other than her own attorneys’ declarations, Ms. Edmo has not submitted any evidence of the customary rates charged by out-of-state counsel with comparable skill and experience. Without “specific proof linking the attorney’s ability to a prevailing market rate” for outside counsel, the Court cannot determine whether outside counsel’s regular rates are the customary rates in their localities. *Perdue*, 559 U.S. at 543. The Court will

therefore use the local market rate as the comparator for both local counsel and outside counsel in this case.

Defendants’ credibility challenges to Ms. Ferguson’s and Mr. Belodoff’s declarations are unpersuasive. First, there is nothing suspect about Ms. Ferguson stating that her own regular hourly rate of \$475 per hour is in line with the customary rates in the area. Such statements are often credited when accompanying fee requests. *See, e.g., United Steelworkers of America v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). Second, the Court will not discredit Mr. Belodoff, an experienced civil rights lawyer, based on a three-and-a-half-year-old fee reduction in a different case. That has absolutely no bearing Mr. Belodoff’s familiarity with customary rates charged by civil litigators in the Boise area.

## **(2) Excellent Results**

Second, Ms. Edmo’s counsel obtained excellent results through superior performance in this case. Through this Court’s injunction—which her attorneys successfully defended on appeal to the Ninth Circuit and on petition for *certiorari* from the Supreme Court—Ms. Edmo became the first prisoner in the nation to receive court-ordered gender confirmation surgery. *Mtn.* at 15, Dkt. 315. Her counsel skillfully navigated novel legal issues involving transgender healthcare in the Eighth Amendment context, conducted extensive expert discovery, and

reviewed over ten-thousand pages of documents produced by Defendants. *Rifkin Aff.* ¶ 22, Dkt. 315-2. Moreover, their written and oral advocacy before this court, the Ninth Circuit, and the Supreme Court was exemplary.

In sum, the Court finds that the PLRA rate does not adequately measure counsel's true market value, as demonstrated during this litigation, and will apply a lodestar enhancement.

## **B. Time Limitations and Awards in Similar Cases**

Two additional factors support an enhancement: unique time pressures (seventh *Kerr* factor) and awards in similar cases (twelfth *Kerr* factor).

In this case, Ms. Edmo sought medical treatment necessary to mitigate a “serious risk of life-threatening self-harm.” *Findings of Fact, Conclusions of Law, and Order* at 45, Dkt. 149. Because the need for treatment was urgent, the litigation was expedited on numerous occasions.<sup>7</sup> A careful review of the district and appellate dockets reveal that Ms. Edmo's counsel faced serious time

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<sup>7</sup> Expedited portions of this litigation include: (1) briefing and oral argument on Defendants' first appeal, 9th Circuit No. 19-35017, Dkt. 19; (2) briefing before this Court on Defendants' emergency motion to stay the order requiring pre-surgical treatments, 9th Circuit No. 1:17-cv-151, Dkt. 231; (3) briefing before the Ninth Circuit on Defendants' emergency motion to stay the same order, 9th Circuit No. 19-35917, Dkt. 7; (4) Ms. Edmo's emergency motion to modify the Ninth Circuit's stay by exempting pre-surgical appointments, 9th Circuit No. 19-35017, Dkt. 22; and Ms. Edmo's response to Defendants' application for stay in the Supreme Court, U.S. Supreme Court No. 19-1280.

constraints, especially from March to November of 2019, and in May of 2020. This factor favors an enhancement.

Looking to fee awards in similar cases, Ms. Edmo points to numerous prisoner civil rights cases in which multipliers have been used. *Bown v. Reinke*, No. 1:12-cv-00262-BLW, 2016 WL 2930904 (D. Idaho May 19, 2016) (awarding multipliers of 1.8 and 1.4 to bring PLRA rates in line with market rates); *Kelly*, 7 F.Supp.3d at 1083 (awarding multipliers of 2.0 and 1.3 to bring PLRA rates in line with market rates); *Balla v. Idaho State Bd. Of Corr.*, No. 81-cv-01165-BLW, 2016 WL 6762651, at \*12 (D. Idaho Feb. 1, 2016) (awarding multipliers of 1.97, 1.39 and 1.26 to bring PLRA rates in line with market rates).

Over Defendants' objection, the Court is satisfied that the cases Ms. Edmo cites are sufficiently similar to be instructive here. Each case involved the use of a lodestar enhancement to avoid substantially undervaluing highly effective counsel who were subject to the PLRA rate cap. The Court agrees that this factor also favors an enhancement.

#### **4. Conclusion on Lodestar Enhancement**

A lodestar enhancement is appropriate where a "successful plaintiff has demonstrated that [the] lodestar amount does not represent a fully compensatory fee." *Planned Parenthood of Cent. & N. Ariz. v. State of Ariz.*, 789 F.2d 1348, 1354 (9th Cir. 1986). Ms. Edmo has made that showing here. The Court will

therefore apply a multiplier of 1.7 for Mr. Durham and 2.0 for all other attorneys in order to more closely align the fee award with the market value of counsel's services.<sup>8</sup>

## 5. Litigation Expenses

Under § 1988, a prevailing party may recover reasonable out-of-pocket litigation expenses that “would normally be charged to a fee paying client.” *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1216 n.7 (9th Cir. 1986), *amended by* 808 F.2d 1373 (9th Cir. 1987). These include, for example, costs for travel, lodging, computer-assisted research, long-distance phone calls, postage, and photocopying.

Ms. Edmo requests \$91,878.73 in litigation expenses. *Mtn.*, Dkt. 315-1. Defendants object that those expenses are excessive and not supported by sufficient documentation. *Def.'s Resp.* at 39-40, Dkt. 319.

### A. Lack of Documentation

Defendants object to the lack of “supporting documents, such as receipts or invoices,” for Ms. Edmo's claimed expenses. *Id.* at 40. Without documentation,

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<sup>8</sup> As discussed, the Court will use the local customary fee as a comparator for outside counsel's hours because Ms. Edmo has not demonstrated the customary fees for outside counsel. Based on the affidavits and the Court's experience assessing fee requests, however, the Court does find that outside counsel's rates should be enhanced to the upper end of the customary fee range in the Boise area.



they argue, the Court cannot evaluate “the reasonableness and appropriateness of the claimed expenses.” *Id.* Defendants’ point is well taken, but it is worth noting that there is no hard-and-fast requirement to submit documentation and receipts. Such evidence is only necessary if the Court would otherwise be unable to determine the reasonableness of a given expense.

The Court agrees with Defendants that Ms. Edmo’s travel expenses are lumped together and lack sufficient detail. For example, the Court has no way of evaluating the reasonableness of \$9,188.13 spent on “case related travel expenses incurred by Lori Rifkin from June 9-October 13, 2018.” *Stormer Aff.*, Ex. D, Dkt. 315-4. Nor can the Court evaluate \$2,053.60 in “lodging charges” without more information—most obviously the length of stay. *Id.*

The Court will therefore exclude \$20,492.29 in travel expenses from the fee award.

## **B. Routine Expenses**

“Routine expenses which are incorporated into attorneys' rates as routine office overhead are not recoverable.” *Cleveland Area Bd. of Realtors v. City of Euclid*, 965 F.Supp. 1017, 1023 (N.D. Ohio 1997). Whether expenses are routine depends on “the prevailing practice in [the] community.” *Tr. of Const. Industry and Laborers Health and Welfare Trust v. Redlands Ins. Co.*, 460 F.3d 1253, 1258 (9th Cir. 2006) (citation omitted).

Among Ms. Edmo claimed expenses is \$5,414.50 for “monthly word processing” costs and \$826.80 for “office supplies.” *Stormer Aff.*, Ex. D, Dkt. 315-4. The Court finds that these are routine costs that are ordinarily not billed separately and will therefore exclude them from the fee award.

Ms. Edmo also seeks reimbursement for \$385 in meals and drinks purchased by her attorneys before and after hearings. *Whelan Aff.*, Ex. C, Dkt. 315-3; *Rifkin Aff.*, Ex. C, Dkt. 315-2. The Court will exclude those costs because they are not the kind which would normally be charged to a fee-paying client.

## **6. Bill of Costs**

Ms. Edmo filed a bill of costs in the amount of \$18,793.34. *Pl. ’s Bill of Costs*, Dkt. 312. Defendants raise four objections: (1) counsel did not meet and confer as required by Local Rule 54.1(a)(1) before filing the bill of costs; (2) counsel did not file a certificate of counsel as required by Local Rule 54.1(a)(1)(B); (3) Ms. Edmo was not the “prevailing party” on all claims or against all defendants; and (4) some of the claimed costs are not allowable. *Def. ’s Resp.* at 41-42, Dkt. 319.

The first objection begins and ends the Court’s analysis. Local Rule 54.1(a)(1) plainly states that no bill of costs “may be filed before the parties have met and conferred regarding costs.” Counsel concedes that they did not meet and confer prior to filing the bill of costs. *Pl. ’s Reply* at 13, Dkt. 321.

“It has long been a tradition in this district to hold counsel strictly to the Local Rules, especially regarding bills of costs.” *Blaine Larsen Processing, Inc. v. Hapco Farms, Inc.*, No. 97–0212–E–BLW, 2000 WL 35539979, at \*14 (D. Idaho Aug. 9, 2000). The Court will continue that tradition here, recognizing that awarding costs despite clear noncompliance with the local rules would reduce those rules to mere suggestions. The Court will therefore deny Ms. Edmo’s request for costs.

## 7. Final Calculation

Based on the foregoing, the Court awards attorneys’ fees and costs as follows:

### A. Attorneys’ Fees

Professional	Rate	Adjusted Hours	Multiplier	Total
Lori Rifkin	\$232.50	2,286.8	2	\$1,063,362.00
Dan Stormer	\$232.50	30.2	2	\$14,043.00
Shaleen Shanbhag	\$232.50	1,112.5	2	\$517,312.50
Caitlan McLoon	\$232.50	73.1	2	\$33,991.50
Jordyn Bishop	\$232.50	33.6	2	\$15,624.00
Sairah Budwhani	\$220	43.7	-	\$9,614.00
Norma Molina	\$210	62.4	-	\$13,104.00
Jessica Valdenegro	\$175	9.2	-	\$1,610.00
Elizabeth Prelogar	\$232.50	69.5	2	\$32,317.50
Barrett J. Anderson	\$232.50	247.6	2	\$115,134.00
Jamie D. Robertson	\$232.50	11.7	2	\$5,440.50
Kathleen R. Hartnett	\$232.50	40.9	2	\$19,018.50
Deborah Ferguson	\$232.50	170.8	2	\$79,422.00
Craig Durham	\$232.50	108.2	1.7	\$42,766.05

Devi Rao	\$232.50	16.2	2	\$7,533.00
Cheryl L. Olson	\$232.50	6.7	-	\$1,557.75
Eliza McDuffie	\$232.50	24	2	\$11,160.00
Amy Whelan	\$232.50	820	2	\$381,300.00
Shannon Minter	\$232.50	7.1	2	\$3,301.50
Julie Wilensky	\$232.50	120.6	2	\$56,079.00
Alex Chen	\$232.50	314.4	2	\$146,196.00
Ary Smith	\$220	39.1	-	\$8,602.00
Maxie Bee	\$175	43.2	-	\$7,560.00
<b>Totals</b>		<b>5,691.5</b>		<b>\$2,586,048.80</b>

## B. Litigation Expenses

<b>Firm</b>	<b>Adjusted Expenses</b>
National Center for Lesbian Rights	\$13,571.63
Cooley LLP	\$1,327.40
Ferguson Durham, PLLC	\$272.42
Hadsell Stormer & Renick, LLP	\$29,268.19
Rifkin Law Office	\$1,104.56
<b>Total</b>	<b>\$45,544.20</b>

## 8. Disposition

After considering the totality of the record and the arguments of counsel, the Court awards Ms. Edmo's \$2,586,048.80 in fees and \$45,544.20 in litigation expenses. The Court finds this award is reasonable and appropriate based on its analysis.

## ORDER

**IT IS ORDERED that:**

1. Plaintiff's Motion for Attorney Fees and Expenses (Dkt. 315) is  
**GRANTED in part and DENIED in part.**



DATED: September 30, 2022

*B. Lynn Winmill*

B. Lynn Winmill  
U.S. District Court Judge

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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

ADREE EDMO (a/k/a MASON EDMO),

Plaintiff,

v.

IDAHO DEPARTMENT OF CORRECTION;  
JOSH TEWALT, in his official capacity;  
BREE DERRICK, in her official capacity; AL  
RAMIREZ, in his official capacity;  
CORIZON, LLC; and SCOTT ELIASON;  
Defendants.

Case No.: 1:17-cv-00151-BLW

**AMENDED ABSTRACT  
OF JUDGMENT**

**UNITED STATES OF AMERICA CLERK'S OFFICE, BOISE, IDAHO  
U.S. DISTRICT COURT FOR THE DISTRICT OF IDAHO**

**ABSTRACT OF JUDGMENT**

On September 30, 2022, in Case No. 1:17-cv-00151-BLW, the District Court entered Judgment for Plaintiff Adree Edmo for \$2,586,048.80 in attorneys' fees and \$45,544.20 in litigation expenses against Defendants IDAHO DEPARTMENT OF CORRECTION; JOSH TEWALT, in his official capacity; BREE DERRICK, in her official capacity; AL RAMIREZ, in his official capacity; CORIZON, LLC; and SCOTT ELIASON. Said Judgment of \$2,631,593 is duly subject to the provisions of 28 U.S. Code Section 1961.

I certify that the foregoing is a correct Abstract of Judgment rendered in said action, in said Court, as it appears by my docket now in my possession.

Dated at Boise, Idaho, this 28th day of November, 2022.



United States Courts  
District of Idaho  
**ISSUED**  
Kelly Montgomery  
on Nov 28, 2022 12:05 pm

STEPHEN W. KENYON, CLERK

By /s/ Kelly Montgomery  
Deputy Clerk