

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO

Brady J. Hall (ISB No. 7873)  
Special Deputy Attorney General  
[brady@melawfirm.net](mailto:brady@melawfirm.net)  
Marisa S. Crecelius (ISB No. 8011)  
[marisa@melawfirm.net](mailto:marisa@melawfirm.net)  
*Moore Elia Kraft & Hall, LLP*  
Post Office Box 6756  
Boise, Idaho 83707  
Telephone: (208) 336-6900  
Facsimile: (208) 336-7031

*Attorneys for Defendants Idaho Department of Corrections, Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert*

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

ADREE EDMO,	)	Case No. 1:17-cv-151-BLW
	)	
Plaintiff,	)	
vs.	)	<b>IDOC DEFENDANTS' WRITTEN</b>
	)	<b>CLOSING STATEMENT</b>
IDAHO DEPARTMENT OF	)	
CORRECTION; HENRY ATENCIO, in	)	
his official capacity; JEFF ZMUDA, in	)	
his official capacity; HOWARD KEITH	)	
YORDY, in his official and individual	)	
capacities; CORIZON, INC.; SCOTT	)	
ELIASON; MURRAY YOUNG;	)	
RICHARD CRAIG; RONA SIEGERT;	)	
CATHERINE WHINNERY; AND	)	
DOES 1-15;	)	
	)	
Defendants.	)	
_____	)	

COME NOW Defendants Idaho Department of Correction (“IDOC”), Henry Atencio, Jeff Zmuda, Howard Keith Yordy, Richard Craig, and Rona Siegert (hereinafter collectively “IDOC Defendants”), by and through their counsel of record, Moore Elia Kraft & Hall, LLP, and pursuant to the Court’s request for written closing statements, do hereby submit the following in supplement to the oral closing statements provided by the IDOC Defendants and the Corizon Defendants (hereinafter collectively referred to as “Defendants”) on August 12, 2018 (Tr. 686-699). The following is also provided in addition to the arguments the IDOC Defendants submitted in their *Response to Plaintiffs’ Motion for Preliminary Injunction* (Dkt. 99).

**1. Ms. Edmo actually seeks a mandatory injunction (not a preliminary injunction), which is subject to a much higher and stringent standard.**

Ms. Edmo incorrectly postured her instant motion (Dkt. 62) as one seeking a preliminary injunction for gender confirmation surgery.<sup>1</sup> However, a preliminary injunction seeks only to preserve the “status quo” pending determination of the action on the merits. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808–09 (9th Cir. 1963). Ms. Edmo is not seeking to merely preserve the status quo; Ms. Edmo is instead seeking to alter the status quo by having this Court order the Defendants to provide her with final relief – the provision of a permanent and irreversible surgical procedure to remove her penis and scrotum. Accordingly, the relief Ms. Edmo requests can only be provided if she meets the much higher and stringent standard of a mandatory injunction.

The federal courts are directed to be extremely cautious about ordering mandatory relief absent a full trial on the merits. This Court and the Ninth Circuit prohibit the granting of mandatory injunctions unless the moving party establishes that the law and facts clearly favor

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<sup>1</sup> Ms. Edmo’s motion does not specify the particular surgical procedure she believes the Court should order in this case and there was no testimony at the hearing from a qualified surgeon who had determined whether Ms. Edmo was a candidate for any particular gender confirmation surgery, of which there are several.

their position and, moreover, that extreme or very serious damage will result. *See Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015); *Battelle Energy All., LLC v. Southfork Sec., Inc.*, 980 F. Supp. 2d 1211, 1216 (D. Idaho 2013), citing *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir.1984)). Mandatory injunctions are not issued in doubtful cases and will not be awarded if the plaintiff merely shows a likelihood of success on the merits and a likelihood of irreparable harm, as set forth in the standard for a preliminary injunction. *Id.*

**2. Regardless, Ms. Edmo has not met (and cannot meet) her burden for the issuance of either a preliminary or mandatory injunction.**

- a. There is no reasonable likelihood – let alone the requisite clear showing – that Ms. Edmo will prevail on the merits of her claims, most notably her Eighth Amendment deliberate indifference cause of action.

It is well settled that, to prevail on her Eighth Amendment claim, Ms. Edmo must establish that the Defendants were “deliberately indifferent” to an actual serious need for the surgical procedure. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285 (1976) (internal citation omitted). In other words, Ms. Edmo must show that the Defendants unnecessarily and wantonly inflicted pain on her by intentionally denying or delaying a surgery that the Defendants actually knew was necessary and recognized that not providing the surgery created a serious risk of harm to Ms. Edmo. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.2006) (citing *Estelle*, 429 U.S. at 104, 97 S.Ct. 285) (internal quotation marks omitted).

“In the context of mental health care [as here], courts have recognized that it is particularly difficult to establish deliberate indifference to a serious need for numerous reasons.” *Mintun v. Corizon Med. Servs.*, No. 1:16-CV-00367-DCN, 2018 WL 1040088, at \*5 (D. Idaho Feb. 22, 2018)(internal citations omitted). One of those reasons, which is at the center of the dispute in this case, is that “psychiatrists themselves differ on the underlying theories and thus on the methods of treatment.” *Id.* “[T]he Constitution only requires that the courts make certain that

professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.” *Id.*

Allegations of professional negligence fall far short of deliberate indifference. Additionally, prison officials are generally provided wide-ranging deference in their treatment of inmates and the courts are not given free rein “to substitute their judgment for that of officials who have made a considered choice.” *Whitley v. Albers*, 475 U.S. 312, 321–22, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251 (1986). A court’s inquiry under the Eighth Amendment should therefore be limited to reviewing treatment decisions made by mental health professionals when made arbitrarily or in bad faith.

Here, despite Plaintiff’s baseless assertions and unfair insults to the contrary (Tr. 676:12-15, 684:17-18), the Defendants did not determine that surgery was inappropriate and unnecessary for Ms. Edmo due to any reason other than the thoughtful consideration of Ms. Edmo’s individual mental health concerns and needs. The actual facts and testimony on the record in this case demonstrate that the Defendants did not consider cost, religious or political objections, prejudice against transgender inmates, or Ms. Edmo’s status as a felon in determining whether surgery was medically necessary for her. Nor is there any basis in this case to suggest that the Defendants acted arbitrarily, in bad faith, or pursuant to any actual or *de facto* policy containing a blanket denial of surgery to an inmate with Gender Dysphoria (“GD”).

To the contrary, substantial evidence in the record illustrates that the Defendants have long recognized, embraced, and provided the various treatment options for GD patients that are available in the community and set forth in the flexible guidelines provided by the WPATH Standards of Care (“SOC”). Since 2011, IDOC’s written policy has expressly held that treatment options, including surgery, will be provided when medically necessary. Furthermore, IDOC

policy explicitly provides that GD inmates will be provided access to the full range of services and programs available within IDOC to the same extent as other offenders.

The treatment provided to Ms. Edmo further evidences the Defendants' commitment to providing adequate mental health treatment to GD inmates. It is undisputed that, very shortly after she requested an evaluation in 2012, Ms. Edmo was appropriately diagnosed with GD and started on hormones. Ms. Edmo has since been provided hormone therapy and monitoring by qualified medical doctors and, since 2016, has been followed by a Boise-based specialist from the community. Further, Ms. Edmo has been permitted to appropriately feminize within IDOC policy in a manner that prison security believed balanced the competing security interests and did not subject her to an increased risk of sexual assault. Any assertion that Ms. Edmo has not been allowed to feminize in a meaningful way while in prison would be simply disingenuous, especially in light of the stark contrast of Ms. Edmo's documented change in physical appearance from 2010, 2012, 2014, and to the present day, which clearly demonstrates that Ms. Edmo's transition from an outwardly-appearing man to an effeminate woman has been very successful with the support of her custodians, clinicians, and doctors.

Additionally, since 2012, the Defendants have provided Ms. Edmo with individual mental health clinical contacts. In addition to having been followed regularly by a multidisciplinary Management and Treatment Committee ("MTC"), Ms. Edmo's mental health clinicians have repeatedly offered and recommended that Ms. Edmo undergo a number of therapy classes and groups including, but not limited to, Mood Management, Social Skills, Healthy Relationships, and GD group, which her clinicians believe will be helpful in addressing and reducing not only her GD symptoms, but her co-existing symptoms and trauma related to severe and longstanding depression, anxiety, sexual abuse, self-harm, substance abuse, unhealthy

and co-dependent relationships, high-risk sexual behavior, and borderline personality disorder traits and characteristics that have plagued Ms. Edmo, long before she ever identified as a transgender woman or experienced documented dysphoria related to her male genitalia.

Despite the repeated recommendations of her mental health clinicians, Ms. Edmo has repeatedly and consciously refused to participate in the available therapy classes and only infrequently appeared at and engaged in GD group and her regularly-scheduled clinical contact appointments. Similarly, Ms. Edmo has refused to complete her Sex Offender Treatment Programming and has exhibited a pattern of ongoing disobedience to direct orders and prison rules, which is illustrated by her extensive disciplinary record and further demonstrates the severity and relevance of her uncontrolled mental health concerns. Her disciplinary troubles and her decisions not to participate in recommended treatment and programming also raise serious questions regarding her ability and/or willingness to follow any post-surgical treatment protocols and orders, particularly if those protocols and recommendations come from prison officials.

Although Ms. Edmo has, both prior to her incarceration in 2012 and since, exhibited moments of clarity where she recognized her underlying trauma and co-existing mental health conditions and their contribution to her overall mental health, she has not followed through on her treatment recommendations and at times outright ignores the problems that plague her. Since her incarceration, Ms. Edmo has remained focused only on treating her GD and obtaining surgery, which she perceives will be the panacea for her severe and lifelong mental health problems. The guidelines in the WPATH SOC recognize the serious complications that uncontrolled and coexisting mental health concerns pose to social transition and treatment of GD patients, and the Defendants and their mental health professionals have taken seriously their obligation to ensure that Ms. Edmo works to achieve mental stability and develops healthy

coping skills to manage the multiple and significant stressors that returning to the community as a woman and undergoing an irreversible genital surgery will certainly pose.

Accordingly, the evidence in this case shows clearly that this is not a situation where the Defendants refused or delayed to provide adequate and necessary treatment to Ms. Edmo related to her GD and other mental health concerns. Nor is this a case where the Defendants refused to consider all treatment options, including surgery, to treat Ms. Edmo's GD. Rather, it is undisputed that, in 2016, the Defendants did evaluate Ms. Edmo for surgery, and that after engaging in a thoughtful analysis of this complex mental health issue, which involved numerous mental health and medical professionals and a subsequent review by the multi-disciplinary MTC, it was universally agreed upon that Ms. Edmo did not meet the WPATH SOC criteria, or any other criteria for surgery. Rather, after careful thought and consideration Defendants determined, within their professional judgment, that providing Ms. Edmo surgery was neither medically necessary, appropriate, nor in Ms. Edmo's best interests.

During closing arguments, Ms. Edmo's counsel referred the Court to *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1189 (N.D. Cal.), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015). In that case, Michelle Norsworthy, an inmate in the California correctional system, who had been diagnosed with GD, requested and was denied surgery, even after her treating psychologist found that surgery was medically necessary. *Id.*, at 1174. Furthermore, the Court in that case found that the California Department of Corrections and Rehabilitation ("CDCR") had written regulations that stated that vaginoplasty was not medically necessary and "shall not be provided." *Id.* at 1176. CDCR's operation manual also provided that vaginoplasty "shall be deferred beyond the period of incarceration." *Id.*, at 1177. Furthermore, correctional health care providers in that case understood that hormone therapy and mental health treatment

were the only treatment options for prisoners. *Id.* (emphasis added). The District Court for the Northern District of California found that, as a result, CDCR were deliberately indifferent to the recommendations of her treating psychologist and had a blanket policy against providing surgery for GD inmates. *Id.*, at 1189-1191. Notably, the Court in *Norsworthy* made the specific finding that CDCR did not make a professional medical judgment in choosing between two possibilities, nor was there a difference of opinion between a prisoner and her provider or between providers.” *Id.*, at 1191-92. Rather, the Court held that CDCR overruled the recommendations of Norsworthy’s mental health providers. *Id.*

The instant case is distinguishable from the facts in *Norsworthy* on many levels. First, there are absolutely no written or “de facto” policies at IDOC that prohibit surgery for GD inmates. The IDOC’s policies state that surgery will be provided when it is deemed medically necessary. Contrary to the testimony by treatment providers at the hearing in *Norsworthy*, the testimony in this case from the treating psychiatrist and supervising clinician establishes that IDOC will provide surgery if it is deemed medically necessary. In fact, clinical supervisor and WPATH member Jeremy Clark testified that he believes there will come a day when a GD inmate will meet criteria for surgery. In addition, unlike in *Norsworthy*, Ms. Edmo’s treating psychiatrist, Dr. Scott Eliason, decided surgery was neither necessary nor appropriate after an exercise of his professional judgment and after consulting with Mr. Clark and others. Further, Dr. Eliason’s decision was (and still is) supported by Ms. Edmo’s current treatment providers, the MTC, at least two members of WPATH, and experts with years of experience treating and supervising inmates with GD.

Ms. Edmo’s counsel made one other attempt to inappropriately relate the facts of *Norsworthy* to this case. In repeated inferences during questioning and direct references during

closing argument, Ms. Edmo's counsel attempted to taint the independent clinical judgment of IDOC's and Corizon's providers and experts by associating them with Dr. Stephen Levine. Dr. Levine was a witness in this *Norsworthy* case. He is not a witness here and Ms. Edmo's treating providers attended only a single training with Dr. Levine. And, when providing supervision and treatment to Ms. Edmo (along with the hundreds, if not thousands, of inmates incarcerated at IDOC who also have coexisting mental health conditions), the IDOC and Corizon providers have relied upon their own education, training, and correctional experience, along with their experience treating Ms. Edmo's individual needs, participating in the MTC, attending WPATH trainings, attending NCCHC trainings, reading literature, and using their best clinical judgment.

Whether Plaintiff's expert witnesses (who admittedly have no experience providing treatment to GD patients in a prison context and have never had a patient-provider relationship with Ms. Edmo) may have come to a different conclusion in 2016 than Dr. Eliason is wholly irrelevant to the question before the Court at this time. This is not a negligence analysis. And, despite Plaintiff's experts' baseless and conclusory attempts to paint all of the Defendants' providers as incompetent, unqualified, and ignorant, it is undisputed that Dr. Eliason performed a thoughtful evaluation in 2016 and that he exercised his professional judgment, after considering Ms. Edmo's uncontrolled mental health concerns and the fact she had not lived as a woman in the community prior to her incarceration. Ultimately, Dr. Eliason rendered his professional opinion that surgery was neither appropriate nor medically necessary based upon consideration of Ms. Edmo's individual medical and mental health situation. Dr. Eliason's conclusion was not based on a consideration of the cost of the procedure or any written or *de facto* policy prohibiting such a surgery.

Accordingly, Ms. Edmo cannot demonstrate with any likelihood that one or more of the Defendants were deliberately indifferent to her alleged need for surgery to treat her GD. Where the decision not to provide a specific type of treatment was based on an exercise of professional judgment, a showing of deliberate indifference cannot be made and it is not the role of the Courts to intervene and order that the surgery must nevertheless be provided because Plaintiff's two retained experts hold a different opinion.

Furthermore, while Ms. Edmo has not since 2016 asked for a reevaluation for surgery, the testimony on the record is that serious doubt remains as to whether Ms. Edmo currently meets all of the criteria for surgery as set forth by the WPATH SOC. Specifically, Ms. Edmo still demonstrates severe levels of anxiety, depression, and borderline personality traits. Notably, during her clinical interview and testing with Plaintiff's expert, Dr. Randi Ettner, Ms. Edmo demonstrated extremely high levels of depression and anxiety, which are strikingly similar to the same levels of anxiety and depression that Ms. Edmo reported when entering prison, prior to ever receiving hormone therapy or demonstrating any symptoms of anatomical GD.

Ms. Edmo has also continued to refuse to address her coexisting mental health concerns in individual and group counseling, and she continues to exhibit cutting behaviors on her arms as a way of dealing with emotional dysregulation. Ms. Edmo's dysphoria fluctuates depending on her life stressors, including her job, housing, and relationships, not just when she has purported episodes of disgust related to her genitals. When Ms. Edmo experiences a stressful life event, such as a break-up with a boyfriend, Ms. Edmo's dysphoria increases and she is unable to separate out when her feelings of depression are related to her Major Depressive Disorder or GD related to relationship problems.

Ms. Edmo still needs to complete the work through psychotherapy to address her dysphoria, which the clinical evidence demonstrates has a very complex origin, related to trauma, relationship difficulties, and other unresolved life events.

For example, during Ms. Edmo's clinical interview with defense expert Dr. Joel Andrade, Ms. Edmo demonstrated that she had not fully addressed the relationship between her significant early childhood trauma and abuse. To be sure, there is no evidence that Ms. Edmo has ever attempted to work through the significant affects that her past substance abuse, sexual abuse, and domestic abuse have had on her feelings of self-worth, separate and apart from her feelings about her male anatomy. Such serious and severe mental health concerns should not be ignored, overlooked, or downplayed when assessing the causes of her dysphoria. Indeed, Ms. Edmo's experts did not testify, nor is there any support for the contention, that all of Ms. Edmo's depression and anxiety is related to her GD. Nor did they testify that surgery or Ms. Edmo's current anti-depressant medication will assist Ms. Edmo in sorting out and working through her significant history of trauma and abuse.

Although not specified in her *Motion* or during argument at the evidentiary hearing, Defendants now understand that Ms. Edmo is also requesting a mandatory injunction from this Court ordering the "cessation of discipline related to Ms. Edmo's GD." Here, the IDOC Defendants have not been deliberately indifferent to Ms. Edmo's needs by disciplining her for refusing direct orders to remove makeup or take down her hair, for destroying property to make thong underwear, engaging in sexual activity, or for assaulting another GD inmate on two separate occasions. Ms. Edmo's DORs were issued for violations of IDOC policy and rules put into place to maintain a safe and secure environment for all inmates and staff. In prohibiting inmates, including Ms. Edmo, from appearing or acting sexual in prison, destroying property,

having sex, and injuring other inmates, IDOC officials acted reasonably and in good faith to protect the safety and security of all inmates, including Ms. Edmo, and were thus not deliberately indifferent to her medical needs. The IDOC defendants, then, must be afforded deference in implementing those policies and in meting out reasonable discipline for such serious offenses. *See Whitley v. Albers*, 475 U.S. 312, 321–22, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251 (1986).

In addition, IDOC’s recently updated GD policy specifically allows inmates with GD to wear appropriate makeup, style their hair in traditionally female hairstyles, and present as female. Furthermore, the updated policy allows inmates who have been diagnosed with GD to access commissary items, such as bras, underwear, female makeup, and grooming items. As a result, there is no basis for IDOC to issue discipline to Ms. Edmo for wearing makeup or her hair in a feminine manner or possess female items from commissary. However, the updated policy does not relieve IDOC of its obligation to maintain a safe and secure environment. IDOC must still be afforded the ability and subjective judgment to issue discipline related to behaviors that are specifically prohibited by the new policy, including “provocative or sexually charged clothing or behavior.” Certainly, Ms. Edmo’s sexual and assaultive behavior cannot be excused by her GD, and there is no evidence or expert witness testimony in the record to suggest that it should.

- b. That any “irreparable harm” or “extreme or very serious damage” will result if Ms. Edmo is not provided the surgery immediately is entirely speculative and, in fact, unlikely.

The expert testimony in this case highlights the competing opinions that Ms. Edmo’s overall mental health concerns and dysphoria may worsen, improve, or remain unchanged regardless if she is provided the surgery or not. In fact, without the requisite coping skills to handle the stressors of such a serious and irreversible surgery, and without yet having the

opportunity to live as a woman in the community, a likelihood exists that Ms. Edmo will be at an increased risk of depression and suicide if she is provided the surgery at this time. As discussed above, Ms. Edmo's significant unresolved history of trauma and abuse will not be resolved or alleviated through surgery and Ms. Edmo has not developed or attempted to develop healthy coping skills to address those stressors and the stressors that will certainly come with surgery.

It is undisputed that there are no reliable anecdotes or evidence-based studies to suggest that Ms. Edmo's depression, anxiety, dysphoria, or possibility of self-harm will decrease if she is provided surgery, especially in light of Ms. Edmo's incarceration and significant co-existing and uncontrolled mental health concerns. Accordingly, making any predictions as to whether, absent surgery now, Ms. Edmo will experience irreparable injury or extreme or serious harm is entirely speculative.

However, the evidence and testimony on the record supports the conclusion that Ms. Edmo will not suffer any irreparable – let alone extreme or serious harm – if she is not provided the surgery pending resolution of this dispute at a trial on the merits. Ms. Edmo has not made any attempts at self-castration since 2016, and she testified that she now understands the importance of, and is committed to, preserving the tissue from her scrotum and penis for future use in a vaginoplasty procedure. Further, while Ms. Edmo's depression and anxiety appear to be at the same high levels as they were prior to her incarceration, she has not made any attempts to commit suicide since 2011. Moreover, Dr. Gorton, Plaintiff's own medical expert, testified that the surgery Ms. Edmo is requesting is not an emergency procedure:

I mean, it's not like your appendix is going to rupture and you have to get surgery tonight. So all patients who are treated for this, they are seen, they are evaluated, there is a process you have to go through. It's not something that happens overnight. So that's not -- I mean, that's not what you do clinically.

So, I mean, I would never say this person needs emergency sex reassignment surgery. Let's send them in an ambulance to the hospital. That's kind of absurd.

(Tr. 301: 15-23)

Under the circumstances, common sense and sound professional judgment support selecting a course of action at this time that will afford Ms. Edmo the opportunity to experience living in the community as a woman prior to receiving such an invasive and irreversible procedure. While Ms. Edmo's credibility as a witness has been damaged by her prior testimony falsely claiming she lived full-time as a woman prior to her incarceration, it is undisputed that Ms. Edmo will have that opportunity very shortly. Ms. Edmo is not serving a life sentence. Her sentence will be completed on July 3, 2021, and she will be released at that time.

Upon her release, Ms. Edmo will have the opportunity to live full-time as a woman in the community, which will allow her to further evaluate in a real world setting whether or not she wants to continue to live as a woman and, more importantly, whether she still desires to undergo such an irreversible surgery to remove her penis and scrotum. After all, it is undisputed that prison is a unique and artificial environment that does not, in any way, mirror or resemble life in the community. With the exception of transgender individuals, inmates are typically separated from members of the opposite gender. Life is very structured in prison and human interaction and expression is severely limited. Female and male inmates wear very similar uniforms, and no one is allowed to express their sexuality or gender identity fully – whether through appearance, dress, or behavior – as those living in the community do.

- c. Under the circumstances, the balance of equities does not tip in Ms. Edmo's favor and supplanting the sound professional judgment of Ms. Edmo's treatment providers for that of the Court is not in the public's interests.

Ms. Edmo has no constitutional right to dictate that she receive one specific treatment option over others. This statement is even more true when Ms. Edmo's providers have exercised their professional judgment and determined that the treatment option she requests is neither medically necessary, appropriate, nor in her best interests. The Defendants in this case have an obligation to provide for the safety and well-being of all inmates in custody, including Ms. Edmo, which includes ensuring that no harm comes to Ms. Edmo by providing unnecessary or inappropriate medical and mental health treatment. For this Court to now order mental health treatment that Ms. Edmo's providers have determined to be inappropriate after applying the WPATH SOC would not only interfere impermissibly with those powers the public entrusted to the executive branch, but would also interfere with mental and medical health providers' efforts to provide medically necessary care and follow their ethical obligations to "do no harm" to their patients.

Dated this 26<sup>th</sup> day of October, 2018.

MOORE ELIA KRAFT & HALL, LLP

By: /s/Brady J. Hall

Brady J. Hall

Counsel for IDOC Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26<sup>th</sup> day of October, 2018, I caused to be served the foregoing document to the following parties or counsel by email.

Dan Stormer  
[dstormer@hadsellstormer.com](mailto:dstormer@hadsellstormer.com)  
Lori Rifkin  
[lrifkin@hadsellstormer.com](mailto:lrifkin@hadsellstormer.com)  
Shaleen Shanbhag  
[sshanbhag@hadsellstormer.com](mailto:sshanbhag@hadsellstormer.com)  
HADSELL STORMER & RENICK, LLP  
(*Counsel for Plaintiff*)

Amy Whelan  
[awhelan@nclrights.org](mailto:awhelan@nclrights.org)  
Julie Wilensky  
[jwilensky@nclrights.org](mailto:jwilensky@nclrights.org)  
Alexander Chen  
[AChen@nclrights.org](mailto:AChen@nclrights.org)  
NATIONAL CENTER FOR LESBIAN  
RIGHTS  
(*Counsel for Plaintiffs*)

Craig Durham  
[chd@fergusondurham.com](mailto:chd@fergusondurham.com)  
Deborah Ferguson  
[daf@fergusondurham.com](mailto:daf@fergusondurham.com)  
FERGUSON DURHAM, PLLC  
(*Counsel for Plaintiff*)

Dylan Eaton  
[deaton@parsonsbehle.com](mailto:deaton@parsonsbehle.com)  
J. Kevin West  
[kwest@parsonsbehle.com](mailto:kwest@parsonsbehle.com)  
PARSONS, BEHLE & LATIMER  
(*Counsel for Corizon Defendants*)

/s/ Brady J. Hall  
Brady Hall