
Nos. 19-35017 and 19-35019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

vs.

IDAHO DEPARTMENT OF CORRECTION, et al.,
Defendants-Appellees.

and

CORIZON, INC., et al.,
Defendants-Appellees.

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

PLAINTIFF-APPELLEE'S MOTION TO PARTIALLY LIFT STAY

Lori Rifkin, Esq. [CA # 244081]
Rifkin Law Office
2855 Telegraph Avenue, Suite 517
Berkeley, CA 94705
Telephone: (510) 414-4132
Email: lrifkin@rifkinlawoffice.com

Dan Stormer, Esq. [CA #101967]
Shaleen Shanbhag, Esq. [CA #301047]
Hadsell Stormer Renick & Dai LLP
128 North Fair Oaks Avenue
Pasadena, California 91103
Telephone: (626) 585-9600
Facsimile: (626) 577-7079
Emails: dstormer@hadsellstormer.com
sshahbhag@hadsellstormer.com

(Counsel continued on next page)
Attorneys for Plaintiff-Appellee, ADREE EDMO

Counsel continued from previous page:

Craig Durham, Esq. (ISB # 6428)
Deborah Ferguson, Esq. (ISB # 5333)
FERGUSON DURHAM, PLLC
223 N. 6th Street, Suite 325
Boise, ID 83702
Telephone: 208-345-5183
Facsimile: 208-908-8663
Emails: chd@fergusondurham.com
daf@fergusondurham.com

Amy Whelan, Esq. (CA # 215675)
Julie Wilensky, Esq. (CA # 271765)
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
Telephone: 415-365-1338
Facsimile: 415-392-8442
Email: awhelan@NCLRights.org
jwilensky@NCLRights.org

Attorneys for Plaintiff-Appellee, ADREE EDMO

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INTRODUCTION

Plaintiff-Appellee Adree Edmo (“Plaintiff”) moves this Court to partially lift its March 20, 2019, stay of the district court’s order requiring Defendants-Appellants (“Defendants”) to take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery. Ms. Edmo seeks this targeted relief in order to ensure that she begins receiving presurgical treatments identified by Defendants’ chosen surgeon as necessary prerequisites for surgery. These presurgical treatments—none of which constitute surgery itself—and any necessary corollary appointments or consultations, will take months to complete. Because Defendants have refused to initiate these presurgical treatments while a stay is in place, Ms. Edmo files this motion in order to avoid additional irreparable harm that will result from further delays of medical care.

Changed factual and legal circumstances since this Court issued the March 20, 2019, stay justify this motion. On August 23, 2019, this Court affirmed the district court’s order finding that Defendants have violated Ms. Edmo’s right to adequate and necessary medical treatment under the Eighth Amendment and ordering Defendants to provide her gender confirmation surgery to correct that violation. On September 6, 2019, Defendants filed a petition for rehearing en banc, delaying issuance of the mandate and lifting of the stay. Defendants’ chosen surgeon completed his presurgical consultation with Ms. Edmo on April 12, 2019, and

determined that she must receive certain presurgical treatments over a period of months in order to undergo surgery. Yet, while the stay pending appeal is in place, Defendants have refused to begin providing Ms. Edmo such treatments. As a result, if the entire stay remains in place until after rehearing en banc is decided and the mandate issues, Ms. Edmo will have to wait additional months for surgery. This Court has recognized that it has been more than one year since medical experts determined Ms. Edmo urgently needs this surgery, and that Defendants' refusal to provide it constitutes cruel and unusual punishment. Partial lifting of the stay is justified and necessary in order to reduce the ongoing and future serious and irreparable harm Ms. Edmo continues to suffer.

RELEVANT BACKGROUND

On December 13, 2018, the district court in the proceedings below enjoined Defendants to “take all actions reasonably necessary to provide Ms. Edmo gender confirmation surgery as promptly as possible and no later than six months from the date of this order.” ER 45. This established a June 13, 2019, deadline for the surgery. Defendants appealed the district court's order to this Court and on January 9, 2019, moved the district court for a stay of its order pending appeal. SER 22-35.

On March 4, 2019, the district court denied Defendants' stay motion, concluding that Defendants had not met their burden to show that a stay was appropriate under the four stay factors set forth by the Supreme Court in *Hilton v.*

Braunskill, 481 U.S. 770, 776 (1987). The district court emphasized the irreparable, severe, and ongoing harm to Ms. Edmo if Defendants continued to deny her surgery and highlighted its findings from the December 13, 2018 order:

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. 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. *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.*

SER 12-13 (internal citations omitted) (emphasis in original). Accordingly, the district court concluded:

[G]iven Edmo's past actions, time is of the essence. . . . The Court will offer just one more thought: Ms. Edmo's testimony and that of her experts conclusively established, in the Court's opinion, that there is a substantial risk that Ms. Edmo will make a third attempt to self-castrate if the Defendants continue to deny her gender confirmation surgery. In short, her medical needs are urgent. The Constitution requires Defendants to act accordingly.

SER 14.

Defendants next moved this Court to stay the district court's order pending appeal. Dkt. 15. On March 20, 2019, a motions panel stayed the district court's December 13, 2018 order pending appeal. Dkt. 19. Two days later, Ms. Edmo filed an emergency motion for modification of the stay order to exempt the pre-surgical

appointment previously scheduled by Defendants for Ms. Edmo with their chosen surgeon, Dr. Geoffrey Stiller. Dkt. 22. The motions panel granted Ms. Edmo's motion on March 29, 2019, stating: "This court's stay of the district court's December 13, 2018 order does not apply to or otherwise affect the already scheduled presurgical consultation." Dkt. 30 at 2. As discussed during this Court's hearing of the appeal, that presurgical consultation took place on April 12, 2019.

In the more than three months between the district court's December 13, 2018, order that Defendants were to take all necessary steps to provide Ms. Edmo surgery by June 13, 2019, and this Court's March 20, 2019 stay, Defendants took almost no actions to ensure that Ms. Edmo would receive surgery within the six months ordered by the district court. D.Ct. Dkt. 180 (March 19, 2019 Plaintiff's Status Report) at 2-6. Only in March 2019, two-and-a-half months after the district court's order, did Defendants contact the surgeon's office and arrange for an initial consultation with Ms. Edmo for April 2019. *Id.* at 5. During this time, Defendants also did not communicate with the surgeon about presurgical requirements, despite notice from Plaintiff's counsel and expert testimony at the October 2018 evidentiary hearing that the presurgical consultation and treatment process typically takes six months.¹ *Id.*

¹ Throughout this time period, Plaintiff repeatedly provided Defendants with information about gender confirmation surgery and related presurgical and post-operative requirements. D.Ct. Dkt. 180 at 2-5. The district court held several status conferences regarding Defendants' delays in complying with its order, but

at 5-6; Dkt. 96-1 at 74-75.

Since this Court granted Defendants' stay motion, the only action Defendants have taken with respect to Ms. Edmo's presurgical preparation was provision of the initial April 12, 2019 consultation with Dr. Stiller in compliance with this Court's stay modification order. Following that appointment, Defendants have not provided Ms. Edmo with any additional treatment related to preparation for gender confirmation surgery.

On September 13, 2019, Ms. Edmo's counsel received a letter from Dr. Stiller detailing the presurgical requirements that Ms. Edmo must meet prior to undergoing gender confirmation surgery. Declaration of Shaleen Shanbhag ("Shanbhag Decl."),

¶ 3. Dr. Stiller's letter states in relevant part:

[Ms. Edmo] is planning to have [gender confirmation] surgery with our office in the near future, where complete hair removal from the surgical site is required. Electrolysis is required prior to the procedure to prevent any future complication post operatively. Without complete hair removal of the area, complications can occur that may require revisional surgery in some rare cases. Please assist the patient in completing the required hair removal for their upcoming surgery.

Ex. 1.

Dr. Stiller's presurgical procedure is consistent with the October 2018

the court's further enforcement of its order was put on hold by this Court's issuance of a stay. *See id.* at 2-6.

testimony from Ms. Edmo's expert, Dr. Ryan Nicholas Gorton, relied on by this Court in affirming the district court's order: "As Dr. Gorton explained, all patients who receive [gender confirmation surgery] 'are seen, they are evaluated, there is a process you have to go through.' In his experience, that process typically concludes within six months." Dkt. 96-1 at 74-75. Dr. Gorton also explained that, during the presurgical process, other issues may be identified "that make the process longer," ER 698:12-13, such as other medical conditions that must first be treated, or the surgeon's availability, ER 661:8-12. Dr. Gorton further testified that, not only is the presurgical process a medically necessary prerequisite for provision of surgery, but it also can help improve the patient's gender dysphoria. ER 660:25-661:7. However, "if [the process] goes more than about six months, that sort of anticipatory benefit that you get with regards to [the patient's] gender dysphoria starts to fade away." ER 661:11-14.

As this Court specifically noted in affirming the district court's order granting Ms. Edmo injunctive relief, it has now "been more than a year since doctors concluded that [gender confirmation surgery] is medically necessary for Edmo." Dkt. 96-1 at 85. This Court "urge[d] the State to move forward" with "expeditious effectuation of the injunction." *Id.* However, Defendants filed a Petition for Rehearing En Banc on September 6, 2019. Dkt. 99. Plaintiff's response is due September 30, 2019. Dkt. 100. As a result of the pending petition for rehearing en

banc, no mandate has issued and the stay of the district court's order remains in effect. *See* Fed. R. App. P. 41(b).

Pursuant to Ninth Circuit Advisory Committee Note 5 to Circuit Rule 27-1, counsel for Plaintiff contacted counsel for Idaho Department of Correction Defendants (“IDOC Defendants”) and counsel for Corizon, Inc. Defendants (“Corizon Defendants”) prior to filing this Motion and inquired as to whether Defendants would oppose the instant Motion. Shanbhag Decl., ¶ 2. IDOC Defendants represented they currently have no position on this Motion. Corizon Defendants indicated they will likely oppose this Motion. *Id.*

LEGAL STANDARD

A stay pending appeal is “an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case.” *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotations marks and citations omitted). Consideration of a stay involves four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton*, 481 U.S. at 776; *see also Nken*, 556 U.S. at 434. The first two factors are “the most critical.” *Nken*, 556 U.S. at 434. The party seeking a stay “must show that irreparable harm is probable and either: (a) a strong

likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that a balance of hardships tips sharply in the petitioner's favor." *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (per curiam). "[T]hese standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified." *Id.* (per curiam) (citation omitted).

A court may exercise its discretion to lift a stay if the factual or legal circumstances have changed since the stay was entered. *See Taylor v. Hawley Troxell Ennis & Hawley, LLP*, 628 F. App'x 490, 491 (9th Cir. 2015) (error for district court to deny motion to lift stay despite evidence of changed circumstances); *Alaska Survival v. Surface Transp. Bd.*, 704 F.3d 615, 616 (9th Cir. 2012) (granting motion to lift stay where "Petitioners no longer satisfy the standard for issuance of a stay"); *Log Cabin Republicans v. United States*, 2011 U.S. App. LEXIS 16310, at *4 (9th Cir. 2011) (granting in part motion to lift Ninth Circuit stay of district court judgment pending appeal because "[t]he circumstances have changed since [the date the stay was issued]").

ARGUMENT

Partial lifting of the March 20, 2019, stay is necessary to minimize ongoing and future serious and irreparable harm to Ms. Edmo. Such relief will ensure that

Ms. Edmo receives presurgical treatments that Defendants' selected surgeon has determined are medically necessary prerequisites for gender confirmation surgery. Such action by this Court is appropriate because in the six months since this Court issued the stay, critical factual and legal changes have occurred that heavily affect the *Hilton* four-factor stay analysis. Specifically: (1) this Court affirmed the district court's injunction ordering surgery, (2) Defendants petitioned for rehearing en banc, delaying issuance of the mandate, (3) Defendants' selected surgeon determined that Ms. Edmo must receive certain presurgical treatments in order to undergo surgery that will take months to complete, and (4) Defendants have not begun providing these necessary prerequisite treatments to Ms. Edmo. Under these circumstances, Defendants cannot satisfy their burden to show that the existing stay continues to be appropriate in its entirety. *See Nken*, 556 U.S. at 433-34 ("The party requesting a stay bears the burden of showing that circumstances justify an exercise of [judicial] discretion" to issue a stay and must make a minimum showing for each of the four factors).

I. Defendants Did Not Succeed on the Merits of Their Appeal

The first *Hilton* factor asks "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." 481 U.S. at 776. This Court's per curiam August 23, 2019 order affirming the district court's injunction demonstrates that Defendants cannot satisfy this stay criterion. In its Order, this

Court “credit[ed] . . . the district court’s logical, well-supported factual findings” and held “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.” Dkt. 96-1 at 9-10. In so holding, this Court decisively “rejected the State’s portrait of a reasoned disagreement between qualified medical professionals.” *Id.* at 10. Because Defendants can show neither “a strong likelihood of success on the merits,” nor “a substantial case on the merits,” continuing to stay any implementation of the district court’s order cannot be justified. *Leiva-Perez v. Holder*, 640 F.3d at 970.

II. The Balance of Hardships Weighs Heavily Against the Full Stay

Considering the second and third *Hilton* factors, it cannot be seriously disputed that the relative hardships to the parties resulting from the stay overwhelmingly harm Ms. Edmo. *See Leiva-Perez*, 640 F.3d at 970. As this Court has recognized, without necessary treatment for gender dysphoria, Ms. Edmo suffers “severe, ongoing psychological distress” and “the high risk of self-castration and suicide.” Dkt. 96-1 at 73. The district court found that Ms. Edmo suffers “serious psychological harm” each day that surgery is withheld and is at “serious risk of life-threatening self-harm” including “self-castration and suicide in the absence of gender confirmation surgery.” ER 42, ¶¶ 49-50. Ms. Edmo also suffers ongoing physical injury, including cutting herself to avoid self-castration. ER 40, ¶ 36. Yet,

it has now been more than three months since the deadline for surgery ordered by the district court, and, as this Court noted, over one year since medical experts determined Ms. Edmo has an urgent need for this lifesaving treatment. Dkt. 96-1 at 85. This Court joined the district court in warning that “expeditious effectuation of the injunction” is necessary given the “nature and urgency of the relief at issue.” *Id.*

Because Defendants have now filed for rehearing en banc, issuance of the mandate is delayed and the stay remains in effect. With the full stay in place, Defendants continue to refuse Ms. Edmo treatment that both this Court and the district court found to be medically necessary and Constitutionally required. Given the dire circumstances Ms. Edmo continues to suffer without surgery, Defendants should not be permitted to further delay the presurgical process while they elect to seek further review of the district court’s order. Defendants have been well aware, based on Dr. Gorton’s testimony at the October 2018 evidentiary hearing, and Dr. Stiller’s April 2019 assessment, that the preparation process for gender confirmation surgery typically takes six months. Dkt. 96-1 at 74-75; Ex. 1. This process can be further delayed by other factors in the event Ms. Edmo requires additional treatment, or if there are complications discovered that must be treated prior to her surgery. ER 661:8-12, 698:12-13. Thus, it is imperative that these presurgical procedures begin now, so that Ms. Edmo will be prepared to undergo surgery at the earliest time possible after the mandate issues. At a minimum, the stay should be partially lifted

to require Defendants to provide Ms. Edmo electrolysis and related treatments ordered by Dr. Stiller.

In contrast to the life-threatening harm to Ms. Edmo each day Defendants refuse her necessary treatment, the only purported injury claimed by Defendants in support of their stay motion was the possible mootness of their appeal.² Dkt. 15 at 23-24. Presurgical appointments and procedures, none of which constitute the surgery itself, will not moot any of Defendants' arguments on appeal. Accordingly, a partial lifting of the stay is necessary to alleviate ongoing, grave, and irreparable harm to Ms. Edmo.

III. The Public Interest Requires Provision of Medically Necessary Treatment to Ms. Edmo

The final *Hilton* factor also weighs against continued imposition of the full stay. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 685 F.3d 990, 1002 (9th Cir. 2012). Moreover, as the district court found, “the public has a strong interest in the

² Even were Defendants to argue that they would experience financial or administrative hardship by having to provide Ms. Edmo presurgical treatment, this would not change the fact that the balance of hardships from partial lifting of the stay tips sharply against Defendants and in favor of Ms. Edmo. *See Golden Gate Rest. Ass’n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) (“Faced with a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in favor of the latter.” (internal quotation marks and citation omitted)).

provision of constitutionally adequate health care to prisoners.” ER 43, ¶ 56 (quoting *McNearney v. Wash. Dep’t of Corr.*, 2012 WL 3545267, at *16 (W.D. Wash. 2012)). In light of this Court’s recent holding that Defendants’ denial of gender confirmation surgery to Ms. Edmo violates the Eighth Amendment, the public interest requires partially lifting the stay to require Defendants to provide Ms. Edmo necessary presurgical treatments.

CONCLUSION

The changed factual and legal circumstances since this Court issued the stay six months ago clearly establish that Defendants cannot satisfy the *Hilton* stay factors, and this Court’s stay should no longer be enforced in its entirety. *See Hilton*, 481 U.S. at 776; *Taylor, LLP*, 628 F. App’x at 491; *Alaska Survival*, 704 F.3d at 616.

This Court and the district court have agreed that gender confirmation surgery is Constitutionally-required, medically necessary, and lifesaving treatment for Ms. Edmo—and, crucially, that in the absence of this necessary treatment, she continues to suffer grievous harm and risk of life-threatening injury. In order to protect Ms. Edmo from the harms and violation of her rights resulting from further delays in the provision of this medical care, Plaintiff respectfully requests that this Court partially lift the March 20, 2019 stay. In particular, Ms. Edmo requests the Court enter the following order: “This Court’s stay of the district court’s December 13, 2018 order is lifted for Ms. Edmo regarding all presurgical treatments and any related corollary

appointments or consultations necessary for gender confirmation surgery.”

DATED: September 26, 2019

Respectfully submitted,

FERGUSON DURHAM, PLLC
HADSELL STORMER RENICK & DAI LLP
NATIONAL CENTER FOR LESBIAN RIGHTS
RIFKIN LAW OFFICE

By: /s/ - Shaleen Shanbhag

Lori Rifkin

Dan Stormer

Shaleen Shanbhag

Attorneys for Plaintiff-Appellee

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**DECLARATION OF SHALEEN SHANBHAG IN SUPPORT OF
PLAINTIFF-APPELLEE'S MOTION TO PARTIALLY LIFT STAY**

Lori Rifkin, Esq. [CA # 244081]
Rifkin Law Office
2855 Telegraph Avenue, Suite 517
Berkeley, CA 94705
Telephone: (510) 414-4132
Email: lrifkin@rifkinlawoffice.com

Dan Stormer, Esq. [S.B. #101967]
Shaleen Shanbhag, Esq. [S.B. #301047]
Hadsell Stormer Renick & Dai LLP
128 North Fair Oaks Avenue
Pasadena, California 91103
Telephone: (626) 585-9600
Facsimile: (626) 577-7079
Emails: dstormer@hadsellstormer.com
sshahbhag@hadsellstormer.com

(Counsel continued on next page)
Attorneys for Plaintiff-Appellee, ADREE EDMO

Counsel continued from previous page:

Craig Durham, Esq. (ISB # 6428)
Deborah Ferguson, Esq. (ISB # 5333)
FERGUSON DURHAM, PLLC
223 N. 6th Street, Suite 325
Boise, ID 83702
Telephone: 208-345-5183
Facsimile: 208-908-8663
Emails: chd@fergusondurham.com
daf@fergusondurham.com

Amy Whelan, Esq. (CA # 215675)
Julie Wilensky, Esq. (CA # 271765)
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
Telephone: 415-365-1338
Facsimile: 415-392-8442
Emails: awhelan@NCLRights.org
jwilensky@NCLRights.org

Attorneys for Plaintiff-Appellee, ADREE EDMO

DECLARATION OF SHALEEN SHANBHAG

I, Shaleen Shanbhag, hereby declare and state:

1. I am a partner at the law firm of Hadsell Stormer Renick & Dai LLP. I am an attorney licensed to practice law in the state of California and before this Court, and am counsel of record for plaintiffs in this action. The information contained herein is based on my personal knowledge, or upon review of files and documents generated or received and regularly maintained by my office in connection with this case. If called upon, I could testify in a court of law to the accuracy of the matters set forth herein.

2. Pursuant to Ninth Circuit Advisory Committee Note 5 to Circuit Rule 27-1, counsel for Plaintiff-Appellee (“Plaintiff”) contacted counsel for Idaho Department of Correction Defendants-Appellants (“IDOC Defendants”) and counsel for Corizon, Inc. Defendants-Appellants (“Corizon Defendants”) prior to filing this Motion and inquired as to whether Defendants would oppose the instant Motion. Counsel for Corizon Defendants represented that they will likely oppose Plaintiff’s Motion. Counsel for IDOC Defendants informed Plaintiff’s counsel that IDOC Defendants currently have no position on Plaintiff’s Motion.

3. Attached hereto as Exhibit 1 is a true and correct copy of a letter from the office of Defendants’ chosen surgeon, Geoffrey Stiller, M.D., which was received by Plaintiff’s counsel on September 13, 2019. The letter details the

presurgical requirements that Ms. Edmo must meet prior to undergoing gender confirmation surgery.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed September 26, 2019 in Pasadena, California.

/s/ Shaleen Shanbhag
Shaleen Shanbhag

Ex. 1



To whom it may concern,

This letter is in regard to Adree Edmo to provide medical necessity for genital electrolysis. This patient is planning to have surgery with our office in the near future, where complete hair removal from the surgical site is required. Electrolysis is required prior to the procedure to prevent any future complication post operatively. Without complete hair removal of the area, complications can occur that may require revisional surgery in some rare cases. Please assist this patient in completing the required hair removal for their upcoming surgery.

If you have any questions please do not hesitate to call our office at 509-747-5773.

Alison B., MA, CMSS on behalf of

Geoffrey Stiller, MD