No. 19A1038

In the Supreme Court of the United States

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

Applicants,

v.

ADREE EDMO, AKA MASON EDMO,

Respondent.

On Application to Stay the Order of the U.S. District Court for the District of Idaho

Reply in Support of Application For Reinstatement of Stay Issued by the Ninth Circuit Pending Disposition of A Petition for Writ of Certiorari

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INTRODUCTION

Respondent's opposition is a facade of cherry-picked statements, mischaracterized facts and misread cases. Fundamentally, Respondent asserts that a court's examination of the facts renders its legal analysis unreviewable. But the rule of law requires that the legal standard be met regardless of the underlying factual determinations. The requested stay is necessary to prevent an irreversible sex reassignment surgery from going forward, one that would moot this appeal, preclude this Court from addressing significant circuit splits on the law, and allow the Ninth Circuit to run roughshod over this Court's precedent.

Contrary to Respondent's claim that this is merely a case of application of settled law to facts, Applicants have raised clear legal issues of national importance: (1) whether an advocacy group's clinical guidelines establish constitutional minima for inmate medical care under the Eighth Amendment and (2) whether the Ninth Circuit violated this Court's binding precedent in *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Farmer v. Brennan*, 511 U.S. 825 (1994). These issues warrant the review requested in the Petition for Writ of Certiorari filed on May 6, 2020 (hereinafter "Petition"). There is a reasonable probability that at least four Justices will consider these issues sufficiently meritorious to grant certiorari and at least a fair prospect that a majority of the Court will vote to reverse the judgment below. If this Court declines to reissue the requested stay, Applicants will be irreparably harmed given the appeal will likely be mooted. Respondent has failed to identify

any competing irreparable harm that weighs against reinstatement of the Ninth Circuit's stay. This Court should issue the stay.

ARGUMENT

Applicants' request is simple and straightforward. They ask that this Court utilize "its traditional equipment for the administration of justice" to ensure this Court's decision on their Petition does not come too late for meaningful appellate review. *Nken v. Holder*, 556 U.S. 418, 421 (2009) (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942)). The district court, affirmed by the Ninth Circuit, issued "the extraordinary remedy of injunction" "with the backing of its full coercive powers" when it ordered the State of Idaho to provide Respondent with a permanent sex reassignment surgery.[1] *Nken*, 556 U.S. at 428 (citations omitted). Applicants merely ask that this Court preserve the status quo and hold this coercive "ruling in abeyance to allow [this Court] the time necessary to review" their Petition. *Id.* at 421. Indeed, a stay is far less coercive than an injunction to provide an irreversible surgery.

A. This Court is likely to grant review.

1. The issues Applicants have presented to this Court are legal issues of national importance.

Respondent mischaracterizes the issues Applicants have identified as fact-bound. While the Ninth Circuit attempted to cloak the novel legal principles it

[1] The surgery is currently still scheduled for July 2020; however, due to complications arising from the COVID-19 pandemic with the completion of pre-surgical hair removal, it is possible that Respondent's surgery date may be moved.

applied under the guise of an affirmance of the district court's individualized fact-finding, a careful reading of the decision reveals the opposite to be true. As Judge O'Scannlain correctly pointed out, "[f]ar from rendering an opinion 'individual to Edmo' that 'rests on the record,' . . . , the panel entrenches the district court's unfortunate *legal* errors . . . ." Appl. For Reinstatement of Stay ("Appl.") Ex. F at 33 (emphasis added) (citations omitted).

a. The Ninth Circuit's adoption of the WPATH Standards as constitutional requirements is a clear legal issue.

By using the WPATH Standards as the touchstone to determine whether Dr. Eliason's decision not to recommend sex reassignment surgery was "medically unacceptable," the district court and the Ninth Circuit adopted the WPATH Standards as constitutional requirements. Respondent admits as much, arguing that the Ninth Circuit's decision was an "application of the WPATH Standards of Care." Resp't's Opp'n to Appl. For Stay ("Opp'n") at 17. By Respondent's admission, the Ninth Circuit used the WPATH Standards to determine what the Eighth Amendment requires.

The WPATH Standards were not just the starting point of the district court and Ninth Circuit's flawed analysis, they were also the endpoint. *See* Opp'n at 12-13 (quoting Appl. Ex. D at 51 and 58-59). The Ninth Circuit held that Dr. Eliason's evaluation was "not an exercise of medically acceptable professional judgment" "[g]iven the credited expert testimony that [sex reassignment surgery] is necessary to treat Edmo's gender dysphoria. . . ." Appl. Ex. D at 62. Respondent's expert

testimony was credited because it most closely adhered to the WPATH Standards. *See id.* at 51-59. And the Ninth Circuit found Dr. Eliason deliberately indifferent because he never recommended the treatment that the court determined aligned with the WPATH Standards. *See id.* at 64.

Respondent cherry-picks a sentence from the decision stating that deviation alone from the WPATH Standards does not establish deliberate indifference. Opp'n at 16 (quoting Appl. Ex. D at 56). But this demonstrates how Respondent seeks to obfuscate the analysis the Ninth Circuit actually applied. The Ninth Circuit allowed only "reasonab[le] deviat[ion]" from the WPATH Standards. Appl. Ex. D at 62 ("Dr. Eliason . . . 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.").

Neither the application of the facts of Respondent's situation to the WPATH Standards nor the Ninth Circuit's affirmance of the district court's use of the WPATH Standards in making credibility determinations render the first Question Presented fact-bound. The linchpin of the Question Presented is the Ninth Circuit's decision to use the WPATH Standards as the legal touchstone to determine whether a violation of the Eighth Amendment occurred.

Finally, Respondent does not even address the fact that the Ninth Circuit's decision to adopt the WPATH Standards as constitutional requirements conflicts, as a matter of law, with this Court's precedent in *Bell v. Wolfish*, 441 U.S. 520 (1979). Respondent concedes by omission that the conflict between this Court's precedent

and the Ninth Circuit's decision to adopt the WPATH Standards cannot be characterized as fact-bound.

b. The Ninth Circuit's failure to apply this Court's binding precedent is a clear legal issue.

Respondent offers nothing more than a conclusory statement that the issues in Applicants' second Question Presented are fact-bound. *See* Opp'n at 22. However, Respondent's argument reveals the truth; she only argues the *legal* principles that the Ninth Circuit ostensibly applied. *Id.* As discussed in the Stay Application and below, Applicants seek review because the Ninth Circuit did not actually apply this Court's precedent. *See* Appl. at 26-33. Based on Respondent's own argument, this legal issue cannot be characterized as fact-bound.

2. A circuit split exists as to whether an advocacy group's guidelines set constitutional minima for the purposes of the Eighth Amendment.

Respondent's arguments against a circuit split rest on distinctions without a difference. There is no functional difference between a circuit court choosing to follow only the testimony of expert witnesses applying the WPATH Standards or simply adopting the WPATH Standards themselves.[2] *Compare Appl. Ex. D with Lamb v. Norwood*, 899 F.3d 1159, 1163 (10th Cir. 2018), *cert. denied,* 140 S. Ct. 252 (2019); *Druley v. Patton*, 601 F. App'x 632, 633 (10th Cir. 2015).

[2] Respondent also misrepresents that all the experts endorsed the WPATH Standards as the applicable standard of care. Applicants' expert, Dr. Garvey, identified the WPATH Standards' shortcomings and testified that this supported looking to other resources and the exercise of medical judgment. ER 225-28 (Tr. 531:5-534:7).

Respondent limits herself to a myopic view of the decisions of other circuit courts in order to avoid seeing the clear circuit split that exists. For example, it is necessary to also read the district court's decision in *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1312-16 (N.D. Fla. 2018), to understand that the Eleventh Circuit rejected the district court's refusal to credit medical testimony that did not follow the WPATH Standards and associated conclusion that there was deliberate indifference in part because the prison did not apply the WPATH Standards. *See Keohane v. Fla. Dep't of Corrs. Sec*'y, 952 F.3d 1257 (11th Cir. 2020). This does not make the circuit split any less extant.

Similarly, Respondent ignores the heart of the circuit split in arguing no split exists because the First and Eleventh Circuits employed fact-based analyses. *See* Opp'n at 18-19. The key to the legal issue here is that the Ninth Circuit erred in adopting the WPATH Standards as constitutional requirements by grading testimony and good-faith treatment decisions against those guidelines. The First and Eleventh Circuits declined to do this.

That the Fifth Circuit took its analysis one step further and held that sex reassignment surgery is not required by the Eighth Amendment does not render the Fifth Circuit's starting-point refusal to adopt the WPATH Standards as constitutional minima any less meaningful. *Gibson v. Collier*, 920 F.3d 212, 221-24 (5th Cir. 2019), *cert denied*, 140 S. Ct. 653 (2019). Respondent overplays her hand; the Ninth Circuit has acknowledged this split. *See* Appl. Ex. D at 67.

Finally, while the Ninth Circuit's decision alone may not have caused a surge in gender dysphoria treatment claims in the lower courts, the volume of such cases does demonstrate that this is a recurring issue of national importance.[3] A clear circuit split exists regarding the Ninth Circuit's decision to adopt the WPATH Standards as constitutional requirements, warranting this Court's review.

3. There is a reasonable probability that at least four Justices will vote to grant certiorari on the second Question Presented.

Tellingly, Respondent offers virtually no argument in opposition to Applicants' position that at least four Justices will vote to grant certiorari on the second Question Presented. Respondent merely points out that the panel opinion includes a sentence and a citation paying lip service to *Estelle* and *Farmer*. Opp'n at 22. Applicants acknowledged this. *See* Appl. at 32 ("Despite the Ninth Circuit's fig-leaf citation to *Farmer*, the standard the Ninth Circuit actually applied was, at most, the very 'should have known' negligence standard that this Court explicitly rejected in *Farmer*.")

Respondent does not attempt to explain how Applicants and multiple Ninth Circuit judges are incorrect in their analysis that the Ninth Circuit actually applied a legal standard in conflict with this Court's precedent. The Ninth Circuit's analysis reveals itself upon a careful reading, despite its lip-service to *Estelle*. The Ninth Circuit held that Dr. Eliason was deliberately indifferent because he

[3] Applicants never contended that the lower court decisions in this case were the sole cause of a "surge" of cases. *Compare* Opp'n at 21 *with* Appl. at 24. Respondent mischaracterizes Applicants' words.

unreasonably deviated from the WPATH Standards. The panel failed to properly consider that Dr. Eliason researched, consulted and arrived at an individualized medical decision that analyzed the risks inherent in the treatments available to Respondent,[4] decided that a conservative approach was appropriate, and took action to mitigate the risk of self-harm. In so holding, the Ninth Circuit applied a mere negligence standard in violation of this Court's decision in *Estelle*. Further, by finding Dr. Eliason deliberately indifferent without examining whether he subjectively knew or deliberately avoided the knowledge that his decision was "medically unacceptable" and without considering that Dr. Eliason made a treatment choice designed to best address overall risk to Respondent, the Ninth Circuit failed to adhere to *Farmer*.[5]

B. There is at least a fair likelihood that the Court will reverse the Ninth Circuit's decision.

The Ninth Circuit's legal decision to enshrine the WPATH Standards as constitutional minima and its failure to apply this Court's precedent demonstrates a

[4] Respondent incorrectly states that the "district court[ ] reject[ed] . . . Dr. Eliason's *post hoc* explanations for his actions at the evidentiary hearing[.]" Opp'n at 13. At no point did the district court characterize Dr. Eliason's testimony as *post hoc* explanations. *See* Appl. at 6 n.3 (citing Appl. Ex. D at 60, and then citing *id.* Ex. A at 25-26). The district court never found Dr. Eliason was not credible. The district court merely concluded that "Dr. Eliason did not rely upon any finding that Ms. Edmo did not meet the WPATH criteria" in recommending against sex reassignment surgery. *See id.* Ex. A at 26.

[5] Respondent mischaracterizes the Stay Application to argue that Applicants assert that Dr. Eliason's "only involvement with Ms. Edmo was the April 2016 evaluation." Opp'n at 7 n.3. This is not accurate. *See* Appl. at 5-8 (stating that Dr. Eliason treated Respondent regularly after her 2012 diagnosis, that he stopped treating her when she moved off the Behavioral Health Unit, and he continued to review her case in the context of prison Management and Treatment Committee meetings).

fair prospect a majority of the Court will reverse the judgment. The Ninth Circuit's decision is deeply flawed on the merits and the key flaws are legal, not factual.

Respondent incorrectly suggests that Applicants conceded before the lower courts that the WPATH Standards provided the applicable standard of care. Applicants never contended nor admitted that prison medical doctors were required to base their treatment decisions on the WPATH Standards. Rather, Applicants repeatedly disputed in argument and evidence that the WPATH Standards represent a controlling, or even reliable, standard of care. *See* Appl. at 18 n.7; *see also* ER 1003 (Tr. 25:19-21) ("Now, we need to understand when surgery is appropriate. There are no universal standards out there. The area here is rapidly evolving."); ER 084 ("Given the flexibility of the WPATH guidelines and their deficiencies, medical and mental health providers can look to other resources of guidance on providing treatment and care."); ER 3388 ("[Dr. Eliason] dispute[s] that the WPATH establishes the applicable standard of care in treating [gender dysphoric] patients and, more specifically, in treating Plaintiff."); ER 381-82 (Tr. 687:25-688:1) ("There is a lack of clarity as to the applicability of standards and how to apply them in the correctional setting."); Def.-Appellants' Jt. Opening Br., No. 19-35019 (9th Cir. Mar. 6, 2019), Dkt. 13, at 45-46. Applicants also presented evidence of the WPATH Standards' shortcomings. *See* Appl. at 18 n.7.

Further, even if Applicants had conceded that the WPATH Standards were the applicable standard of care (which they do not), it does not follow that the district court or the Ninth Circuit therefore adhered to this Court's precedent in

Estelle and *Farmer*. Contrary to Respondent's argument, this Court's precedent establishes that deliberate indifference does not necessarily follow from the conclusion that a treatment is medically necessary. Reversal is warranted and likely.

C. Unlike Applicants, Respondent has failed to show she will suffer irreparable harm if the stay is reinstated pending further judicial review.

1. The risk of mooting the appeal establishes Applicants will suffer irreparable harm absent a stay.

Respondent's argument that "Applicants have not established that they will suffer irreparable harm in the absence of a stay" is without basis and belied by the very cases Respondent cites to this Court. *See* Opp'n at 25, 28-29. For example, in *Republican State Cent. Comm. of Ariz. v. Ripon Soc. Inc.*, Justice Rehnquist determined that impending mootness was not merely "one factor," as Respondent represents, but rather the primary factor justifying the stay. 409 U.S. 1222, 1224-27 (1972) (Rehnquist, J., in chambers) (applying the irreparable harm factor before others and holding that to "preserve[] these issues for review in a manner conducive to careful study and consideration is itself a reason to stay the injunction…"). Similarly, Justice Marshall in *John Doe Agency v. John Doe Corp.*, analyzed the impact of mootness at the outset and determined that to not grant the stay would moot a portion of the appeal and thus "create an irreparable injury." 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers). Respondent has also mischaracterized the holding in *N.Y. Nat. Res. Def. Council, Inc., v. Kleppe*, 429 U.S. 1307, 1312-13 (1976) (Marshall, J., in chambers), in which Justice Marshall noted the absence of

an irreparable injury where, unlike in the present case, the act sought to be stayed was neither "irreversible" nor certain to occur.

Fundamentally, Respondent does not dispute that the appeal will be mooted if she undergoes the permanent and irreversible sex reassignment surgery. Despite Respondent's representations to the contrary, the cases discussed above establish that a party suffers irreparable harm if its appeal becomes moot before it exhausts its right to appellate review. In fact, Justices Marshall and Rehnquist recognized the need to preserve the ability for judicial review as a primary factor warranting the stays in *Ripon Soc. Inc.* and *John Doe Agency*. Accordingly, it is undeniable Applicants will suffer irreparable harm if the surgery is not stayed. The irreversible nature of the surgery warrants reinstating the stay.

2. Applicants have demonstrated irreparable harm resulting from financial expenditures.

Contrary to the holdings in *Ledbetter v. Baldwin*, 479 U.S. 1309, 1310-11 (1986) (Powell, J., in chambers) and *Heckler v. Turner*, 468 U.S. 1305, 1307-08 (1984) (Rehnquist, J., in chambers), in which the Justices recognized that a government's inability to recoup costs and payments if a stay is not granted constitutes irreparable harm, Respondent cites *Sampson v. Murray*, 415 U.S. 61, 90 (1974), for the proposition that "financial expenditure by a State does not constitute irreparable harm." Opp'n at 29. However, Respondent has overlooked crucial language from that decision that supports Applicants' position. The Court in

Sampson recognized that the "temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Id.* at 90.

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. *The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.*

Id. (emphasis added) (internal quotations omitted).

Like in *Ledbetter* and *Heckler*, but unlike in *Sampson*, Applicants and Idaho's tax payers[6] will have no recourse to recoup the cost of surgery if the injunction is reversed. Respondent does not dispute she is indigent and unable to compensate tax payers for the cost of the surgery. Thus, the harm to Applicants is not temporary, but permanent, as there is no likelihood Applicants can be adequately compensated at a later time.

3. Respondent has failed to establish irreparable harm or that the balance of equities tip in her favor.

This Court engages in a balancing of the equities only in those close cases where "the likelihood that granting [a stay] will cause irreparable harm to others." *Barnes v. E-Systems, Inc. Grp. Hosp. Med & Surgical Ins. Plan*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers). *See also, e.g.*, *Rostker v. Goldberg*, 448 U.S.

[6] Respondent cites to a single assertion contained in an amicus brief filed below to suggest that Idaho's contract medical provider, Corizon, Inc., and not the State of Idaho, will bear the financial loss associated with the surgery. Opp'n at 29 n.10; *id.* Ex. E at 32. This was not addressed in the evidentiary hearing. Respondent's reliance on the amicus' argument is misguided and ignores the reality that Idaho's taxpayers fund the services Corizon, Inc. is contracted to provide.

1306, 1308 (1980) (Brennan, J., in chambers); *Williams v. Zbaraz*, 442 U.S. 1309, 1314-15 (1979) (Stevens, J., in chambers); and *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308-09 (1973) (Marshall, J., in chambers).

Respondent cites to the possibility of self-harm, as well as daily distress until receiving surgery. But, it remains undisputed that staying the surgery will not foreclose Respondent from undergoing the surgery in the near future if this Court affirms the injunction or, alternatively, upon her release from prison next year. A delay in implementation of the injunction does not constitute irreparable harm. *See, e.g.*, *Whalen v. Roe*, 423 U.S. 1313, 1317 (1975) (Marshall, J. in chambers). Further, Respondent does not contend that money damages cannot adequately compensate her for her distress. Respondent has commenced a lawsuit to recover money damages for these alleged injuries. ER 3634-58.

Applicants take the risk of self-harm seriously. Applicants are well-equipped to, have, and continue to take every precaution to protect Respondent. Four years have passed since Respondent last attempted self-castration and she has never attempted suicide while in prison. Respondent has also committed under oath to preserving her male anatomy for a future surgery. ER 614 (Tr. 218: 2-14).

Finally, Respondent's continued efforts to characterize the surgery as an urgent procedure that overrides Applicants' appellate rights are contradicted by Respondent's own expert. Respondent's expert, Dr. Nicholas Gorton, M.D., testified that the surgery he recommended for Respondent should in no way be construed as an emergency procedure: "So, I mean, I would never say this person needs

emergency sex reassignment surgery. . . . That's kind of absurd." ER 697 (Tr. 301: 21-23).

4. *The Ninth Circuit has already rejected Respondent's arguments*.

The Ninth Circuit rejected Respondent's very same arguments when that court stayed the surgery. The Ninth Circuit considered the argument that Respondent "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." Pl.-Appellee's Opp'n to Defs.-Appellants' Jt. Urgent Mot. To Stay Inj. Pending Appeal, No. 19-35017, Dkt. 17 at 23 (citation omitted) (internal quotation marks omitted). Respondent conceded below that Applicants' ability to challenge the injunction on appeal would be lost if the surgery was not stayed but urged the Ninth Circuit to find the equities tipped in Respondent's favor. *Id.* at 22-23. Respondent's arguments did not prevail then, and they should not prevail now.

The Ninth Circuit's summary decision declining to stay the mandate after denying Applicants' request for rehearing *en banc* should not be afforded any deference. *See* Opp'n at 31. The Ninth Circuit maintained the stay of the surgery for nearly one year while the appeal was pending in its court. Respondent does not contend it was error for the Ninth Circuit to have granted and maintained the stay during the course of the appeal. Nor did Respondent ever move to fully lift the stay. When its jurisdiction terminated, the Ninth Circuit left it to this Court to decide whether to reinstate the stay. The Ninth Circuit properly stayed the injunction to

afford it the opportunity to exercise its appellate review. It is likewise warranted and consistent for this Court to reinstate the stay to allow it the same opportunity to review this appeal of national significance.

CONCLUSION

Applicants respectfully request that this Court reinstate the stay.

Respectfully submitted,

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