No. 19-1280

IN THE
Supreme Court of the United States

THE IDAHO DEPARTMENT OF CORRECTION, ET AL.,
Petitioners,

v.

ADREE EDMO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE TO PETITIONERS' SUGGESTION OF MOOTNESS

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INTRODUCTION

Nearly seven weeks after Respondent Adree Edmo received gender confirmation surgery ("GCS") on July 10, 2020—and after waiting for Ms. Edmo to file her brief in opposition—Petitioners now belatedly claim their Petition is moot and seek to have the lower courts' decisions vacated. Petitioners' new approach of asking this Court to erase their losses below—perhaps in recognition that this case is not cert-worthy—equally lacks merit.

The case is not moot because the parties continue to have a concrete interest in the permanent injunction, which requires Petitioners to provide Ms. Edmo with "adequate medical care, including [GCS]" to treat her gender dysphoria. Pet. App. 201. Following surgery, Ms. Edmo requires necessary post-operative medical care associated with GCS that is encompassed within the permanent injunction. Although Petitioners now incorrectly claim the injunction required only the surgery itself, they acknowledged below that GCS involves post-operative treatment—a fact they repeatedly invoked in an effort to deny Ms. Edmo surgery in the first place. Given Petitioners' long-standing and well-documented opposition to providing Ms. Edmo with GCS and related treatment, the permanent injunction continues to provide her with critical protection.

Nor have Petitioners established that vacatur would be appropriate even if the appeal were moot. Given the limited scope of the relief at issue—medically necessary treatment for a single individual's specific medical condition—there is simply no justification supporting the "extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994).

Petitioners instead transparently seek an opportunity to re-litigate the separate issue of their liability under the Eighth Amendment. They seek that result because among the several issues remaining for the lower courts to resolve is Ms. Edmo's claim for damages arising from Petitioners' Eighth Amendment violation. But Petitioners already had the chance to fully and fairly contest their liability in the lower courts. They lost. And "orderly operation of the federal judicial system," *id.* at 27, dictates that they should not be allowed a do-over. Rather, this Court may conduct any further review necessary following final judgment, together with any other appellate issues arising from adjudication of Ms. Edmo's remaining claims.

STATEMENT

1. Following "four months of discovery," a "three-day evidentiary hearing," and review of thousands of pages of documents, Pet. App. 141, the district court found that Petitioners were deliberately indifferent to Ms. Edmo's serious medical needs in violation of the Eighth Amendment and entered a permanent injunction requiring them to provide Ms. Edmo with "adequate medical care, including gender confirmation surgery," *id.* at 201.

In assessing Ms. Edmo's Eighth Amendment claim and determining the scope of injunctive relief, the district court considered extensive evidence about the medical treatment Ms. Edmo sought—GCS—which in her case involved a specific surgical procedure known as a "vaginoplasty." *Idaho Dep't of Corr. v. Edmo*, No. 1:17-cv-151 (D. Idaho) ("Dist. Ct."),

Dkt. 249 at 3–5 (collecting record references to vaginoplasty). Of particular relevance here, that evidence established the importance of providing pre- and post-operative care in connection with GCS.

For example, one of Ms. Edmo's experts testified about medical complications that can arise if a patient does not receive proper post-operative care:

> [Vaginoplasty is] a major genitourinary surgery. So you can have infections; you can have complications with urine flow; you can have dehiscence, where the wound doesn't perfectly heal. You—if patients don't, subsequent to surgery, dilate their vaginas as they are supposed to, you can actually have the vaginal depth decrease and the width decrease. Those are things that you can treat if they come up.

ER 663 (Tr. 267:2–12).[1] In addition, the record evidence included the World Professional Association of Transgender Health Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("WPATH Standards"), which describe the necessity of pre- and post-operative care for vaginoplasty. ER 3001–02. All four experts relied on the WPATH Standards when forming their opinions about the necessary medical care for Ms. Edmo. Pet. App. 67–68, 78.

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[1] All citations to "ER" are to the Excerpt of Record filed by Petitioners in the court of appeals.

In their effort to deny her GCS, Petitioners likewise presented evidence of the necessity of post-operative care for Ms. Edmo. Asserting that she did not satisfy the criteria for GCS, Petitioners (wrongly) contended that she would not be able to comply with post-surgical requirements. For example, Dr. Eliason emphasized that, after "getting the procedure, there [are] a lot of medical follow-ups, a lot of bad outcomes that can happen. And you need to have that cooperation to work through those." ER 150 (Tr. 456:15–17); *see also* ER 193–94 (Tr. 499:15–500:2) (again referring to post-operative follow-ups). And one of Petitioners' experts opined that she was "concerned about [Ms. Edmo's] ability to work with her treatment providers because that's going to be an essential component if she does have the surgery, that she is going to need the support and need to discuss what she is experiencing as she is making that transition." ER 236 (Tr. 542:3–10).

The district court issued "a carefully considered, 45-page opinion" that contained "extensive factual findings," ruled that Petitioners had been deliberately indifferent to Ms. Edmo's serious medical needs, and ordered them "to provide [Ms. Edmo] with adequate medical care, including [GCS]." Pet. App. 93, 107, 201.

2. The scope of that injunctive relief was further clarified on appeal, where Petitioners unsuccessfully argued that the injunction was overbroad. *Id.* at 137. The court of appeals explained that "[t]he order, read in context, requires [Petitioners] 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." *Id.*

(emphasis added). The court stated that this related care included, for example, pre-operative steps such as "finding a surgeon and scheduling a surgical evaluation." *Id.* at 138. The evidence also established that post-operative care for GCS is reasonably necessary to carry out that treatment. *See* pp. 2–4, *supra* (summarizing evidence).

The court of appeals also addressed the associated medical care necessary to effectuate Ms. Edmo's GCS. The court twice partially lifted its stay of the injunction "so that [Ms. Edmo] may receive all presurgical treatments and related corollary appointments or consultations necessary for gender confirmation surgery." *Idaho Dep't of Corr. v. Edmo*, No. 19-35017 (9th Cir.), Dkt. 104; *see also id.* Dkt. 30 (modifying stay to permit "presurgical consultation").

3. During the course of this litigation, Petitioners have repeatedly forced Ms. Edmo to seek court assistance in enforcing the injunction's terms over Petitioners' resistance. For example, despite the order to provide surgery as soon as possible and no later than six months from the issuance of the injunction in December 2018, Petitioners failed to contact a potential surgeon for more than two months and then "failed to request specific information about the pre-surgical timeline and steps that must be completed (such as pre-surgery electrolysis) until mid-March 2019—three months after [the injunction order]." Dist. Ct. Dkt. 180 at 2–8.

Consequently, the district court held a series of status conferences to enforce Petitioners' compliance with the injunction, including with respect to the

necessary pre- and post-operative steps. On March 5, 2019, Ms. Edmo's counsel addressed the pre- and post-operative care at issue. Dist. Ct. Dkt. 201 (Tr. 5:20–6:3; 10:12–16). On March 26, 2019, Petitioners acknowledged that "all pre- and post-surgical requirements" are "very important" and sought to delay the surgery based on alleged concerns about whether Ms. Edmo could follow the necessary associated treatment. Dist. Ct. Dkt. 183 (Tr. 6:16–17). Given Petitioners' unwillingness to abide by the injunction, the court observed:

> [T]here is a desperate need for me to be deeply involved in this presurgical process to ensure that we're . . . doing what the identified doctor has required, and assess and ensure that that, in fact, is done. . . . I thought this would have been done months ago; probably within 30 days after I issued my decision, that these kinds of issues would have been flushed out. Here we are 90 days out and—I think more than 90 days out, and it's—it hasn't happened. And I think it probably won't happen in the absence of direct court intervention.

Dist. Ct. Dkt. 183 (Tr. 10:25–11:11). The court later stated that the pre-surgical step of electrolysis was a necessary part of the relief ordered—further confirming that the permanent injunction required not only GCS but also adequate medical care associated with that surgery. Dist. Ct. Dkt. 247 (Tr. 11:21–12:21, 15:15–16:4, 20:8–21).

After the court of appeals denied Petitioners' petition for rehearing *en banc* and this Court denied a stay of the injunction, Petitioners again compelled Ms. Edmo to involve the district court to obtain the ordered medical treatment. Ultimately, to enforce the injunction, Petitioners forced the district court to specifically order that they test Ms. Edmo for COVID-19 and transport her for GCS, as required by the surgeon. Dist. Ct. Dkt. 290. Only following that enforcement order did Ms. Edmo finally receive GCS on July 10, 2020.

The evidence before the lower courts established that, as with other patients receiving major surgeries, Ms. Edmo requires post-surgical treatment and monitoring. Within the first week following surgery, she required immediate medical attention and Petitioners transported her to an outside Emergency Room. Within the first month following surgery, Petitioners failed to provide her with access to dilation for several days, even though it is necessary post-operative care that the surgeon prescribed she receive on a daily basis. Given the history of Petitioners' refusals to provide care in this case, the district court may once again be required to intervene to enforce the permanent injunction's requirement of adequate post-operative care.

4. While the permanent injunction has been on interlocutory appeal, additional issues remain pending before the district court. These include Ms. Edmo's damages claim arising from Petitioners' Eighth Amendment violation as well as legal claims that were not the basis for Ms. Edmo's motion for expedited injunctive relief. *See* Pet. App. 80.

ARGUMENT

Petitioners erroneously assert that their Petition "became moot on July 10 when [Ms.] Edmo received the surgery that the district court ordered." Suggestion of Mootness ("S.M.") 3.[2] That argument is based on a misreading of the injunction and contradicts Petitioners' arguments below that GCS necessarily entails related post-operative care. Because the permanent injunction requires Petitioners to provide not only GCS, but also the necessary post-operative care associated with that surgery, the parties retain a concrete interest in this dispute. And in no event have Petitioners established entitlement to vacatur. This Court should deny the Petition and permit the district court to adjudicate Ms. Edmo's remaining claims to final judgment in the ordinary course.

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[2] Petitioners provide no explanation for why they waited nearly seven weeks to inform the Court that they believed their Petition was moot. *Board of License Com'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (noting parties have "continuing duty to inform the Court of any development which may conceivably affect the outcome" (internal quotation marks omitted)). Had Petitioners "promptly . . . advise[d]" the Court that they believed the case was moot, Stephen M. Shapiro, et al., *Supreme Court Practice* § 6.31.E (11th ed. 2019), Ms. Edmo could have addressed this issue in her brief in opposition, filed one month *after* her surgery. As Ms. Edmo's brief in opposition observed, "Petitioners must continue to provide her with 'adequate medical care' pursuant to the terms of the district court's injunction, Pet. App. 201"—and the case therefore is not moot. Br. in Opp. 34–35. However, "the fact of [her] surgery reduces any salience of the question presented." *Id.* at 35.

I. The Petition Is Not Moot Because The Permanent Injunction Is A Continuing Order.

"As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012) (internal quotation marks omitted). That standard is satisfied here because the permanent injunction imposes continuing obligations on Petitioners to provide Ms. Edmo with necessary post-operative care following GCS. While Petitioners now contend that the surgery is "all of the relief the district court ordered," S.M. 5, the injunction by its terms encompasses "adequate medical care, *including* [GCS]." Pet. App. 201 (emphasis added). As the court of appeals explained, "[t]he order, read in context, requires [Petitioners] to provide GCS, *as well as 'adequate medical care' that is 'reasonably necessary' to accomplish that end*." *Id.* at 137 (emphasis added).

Petitioners' claim before this Court that the injunction does not require them "to provide [Ms.] Edmo with any treatment after [GCS] was provided," S.M. 5 n.2, conflicts with the record, their own representations below, and common sense. As reflected in the record evidence summarized above, GCS requires pre- and post-operative care. *See, e.g.*, ER 663 (Tr. 267:2–12); ER 3001–02. And Petitioners opposed Ms. Edmo's qualification for surgery in part based on allegations about her ability to comply with the attendant pre- and post-operative care. *See, e.g.*, ER 150 (Tr. 456:15–17); ER 193–94 (Tr. 499:15–500:2); ER 236 (Tr. 542:3–10); Dist. Ct. Dkt. 183 (Tr. 6:16–17); Dist. Ct. Dkt. 145 at 6 (referring to

Ms. Edmo's need to "follow any post-surgical treatment protocols and orders"); Dist. Ct. Dkt. 146 at 20 (alleging "concerns about Ms. Edmo's ability to comply with the care required after surgery").

Because the permanent injunction imposes continuing obligations on Petitioners to provide related post-operative care, the case is not moot even though the surgery is irreversible. "[A]n order that has continuing consequences into the future is not moot merely because ongoing compliance has had consequences that will not be undone." 13B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris § 3533.2.2 (3d ed.). Thus, Petitioners retain a concrete interest in the subject of their Petition. *See Calderon v. Moore*, 518 U.S. 149, 150 (1996) (holding case becomes moot only when court is unable to "grant any effectual relief whatever in favor of the appellant" (internal quotation marks omitted)); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1353–54 (D.C. Cir. 1998) (holding appeal not moot when party "has not completed all that is required by" order).

Petitioners' reliance on *University of Texas v. Camenisch*, 451 U.S. 390 (1981), is misplaced. There, "the terms of [a] [preliminary] injunction" requiring a university to provide a student with an interpreter had been "fully and irrevocably carried out" because the university had complied and the student had graduated by the time the case reached this Court. *Id.* at 398. Here, in contrast, Ms. Edmo is still incarcerated and Petitioners must provide ongoing post-operative care associated with GCS under the permanent injunction. Consequently, "[t]his dispute

is still very much alive." *Chafin v. Chafin*, 568 U.S. 165, 173 (2013).

Moreover, Petitioners' conduct to date suggests that Ms. Edmo may again need to seek enforcement of the injunction to ensure she receives necessary post-operative care. Petitioners repeatedly sought to delay and deny the treatment the district court ordered. *See* pp. 5–7, *supra* (summarizing history). Following Ms. Edmo's surgery, there have again been concerns with Petitioners' provision of necessary care related to Ms. Edmo's GCS. *See* p. 7, *supra*.

While Petitioners previously admitted that post-operative care is an integral part of successful surgery, their new position in this Court that the injunction does not encompass that related care at all and was fully carried out at the moment of Ms. Edmo's surgery, S.M. 5 n.2, reinforces that Ms. Edmo's "personal stake in the outcome of th[is] lawsuit" and the continued protection of the injunction is not simply theoretical but quite real. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478 (1990) (internal quotation marks omitted). Here, "it is not 'absolutely clear,' absent the injunction, 'that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Vitek v. Jones*, 445 U.S. 480, 487 (1980) (holding injunction preventing incarcerated individual from being transferred from penal complex to mental hospital without certain procedural protections was not moot even though he was paroled and reincarcerated in the penal complex). Ms. Edmo still requires "protection from the challenged practice" to ensure she receives necessary post-operative care. *Camreta v. Greene*, 563 U.S. 692, 710–11 (2011). The injunction is thus not moot.

II. Petitioners Cannot Establish Entitlement To "The Extraordinary Remedy Of Vacatur."

Even if Petitioners could establish—contrary to the record and common sense—that the permanent injunction ordering "adequate medical care, including [GCS]" covered *only* GCS and not necessary post-operative care, Petitioners cannot show vacatur would be warranted. Vacatur by this Court is not an inexorable outcome when a case becomes moot on appeal. *See Nelson v. Quick Bear Quiver*, 546 U.S. 1085 (2006) (dismissing appeal from injunction decree as moot but declining to vacate); *Faulkner v. Jones*, 516 U.S. 910 (1995) (same). Rather, the Court handles moot cases "in the manner most consonant to justice." *Bonner Mall*, 513 U.S. at 24 (internal quotation marks and alterations omitted). "It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26. Petitioners cannot carry that burden here.

Petitioners erroneously contend that vacatur is proper because they "requested the injunction be stayed to prevent the appeal from becoming moot." S.M. 7. If anything, this Court's denial of a stay makes vacatur *less*, not more, appropriate because the Court necessarily found either there was not "a reasonable probability that four Justices w[ould] consider the issue sufficiently meritorious to grant certiorari," or "a fair prospect that a majority of the Court w[ould] vote to reverse the judgment below," or "a likelihood that irreparable harm w[ould] result from the denial of a stay"—or some combination of all three factors. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

Petitioners next assert that vacatur would provide "recourse" to Dr. Eliason, who they allege would otherwise have no opportunity to challenge the finding that he was deliberately indifferent to Ms. Edmo's serious medical needs. S.M. 7. But the denial of a petition in an interlocutory posture "does not, of course, preclude [a petitioner] from raising the same issues in a later petition, after final judgment has been rendered." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari). The damages claims against Dr. Eliason remain pending below, and he retains the ability to seek review of his liability in this Court following final judgment. Therefore, contrary to Petitioners' argument, denial of the petition would not deprive Dr. Eliason of the opportunity to obtain this Court's review of the finding that he violated Ms. Edmo's Eighth Amendment rights. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (observing this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent" judgment); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258–59 (1916) (denial of petition in interlocutory posture does not prevent Court from "rectify[ing] any error that may have occurred in the interlocutory proceeding" following "the final decree").

Relatedly, Petitioners err in suggesting that vacatur is warranted to "allow for future litigation before a *jury* on Dr. Eliason's liability on [Ms.] Edmo's damages claims." S.M. 8 (emphasis added). The court of appeals found that Petitioners "waived [their] right

to a jury trial with respect to issues common to [Ms.] Edmo's request for an injunction ordering GCS and her legal claims," Pet. App. 144—and Petitioners did not seek review of that issue in this Court. Thus, Petitioners cannot now dispute that they already had a "full opportunity to present their case[]" regarding their liability for violating Ms. Edmo's Eighth Amendment rights. *Camenisch*, 451 U.S. at 396. Allowing Petitioners to re-litigate their liability before a jury when Petitioners waived that right and lost in a bench trial would unfairly saddle Ms. Edmo with the burden of proving again what she has already proven. *Humphreys v. Drug Enf't Admin.*, 105 F.3d 112, 116 (3d Cir. 1996) (refusing vacatur because government "had a full and fair opportunity to present its case").

Petitioners' attempt to obtain a second bite at the apple in the lower courts on the question of their Eighth Amendment liability would "disturb the orderly operation of the federal judicial system." *Bonner Mall*, 513 U.S. at 27. Here, the district court's determination of Petitioners' liability, which was reviewed and affirmed by the court of appeals, should stand while the case remains ongoing in the lower courts to "promote[] the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (internal quotation marks omitted); *see also Jersey Cent. Power & Light Co. v. New Jersey*, 772 F.2d 35, 41 (3d Cir. 1985) (dismissing appeal as moot but ruling that "lower court's decision continu[es] to have legal force and allows the district court to consider on remand the outstanding claims of damages and attorney's fees").

Petitioners' invocation of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), does not support their request for vacatur. *Munsingwear* discussed a judgment that was "unreviewable because of mootness," *id.* at 41—but, here, Petitioners may seek review of the liability determination following final judgment. Because Ms. Edmo retains an interest in the finding of liability and Petitioners retain a path for seeking review of that issue following the conclusion of the case, "the rights of all parties are preserved" by allowing the liability determination to stand. *Id.* at 40–41; *see also, e.g.*, *Bonner Mall*, 513 U.S. at 27 (refusing to vacate "on the basis of assumptions about the merits").

Nor is vacatur warranted to prevent purported "interfere[nce] with the deference [Petitioners] must necessarily provide to the individualized treatment decisions of competent prison medical providers." S.M. 7–8. The case-specific decision below is limited to "the unique facts and circumstances presented" by Ms. Edmo's medical situation and does not apply to other prisoners with gender dysphoria. Pet. App. 99, 156. And if the injunction were moot as Petitioners assert, then it by definition would have no continuing force and would not affect Petitioners' deference to treatment decisions with respect to Ms. Edmo or anyone else.

Given all of these considerations, the only disposition of the Petition that is "consonant to justice," *Bonner Mall*, 513 U.S. at 24, is to deny the Petition and permit the district court to adjudicate the remaining claims in the case. *See* 13C Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris.

§ 3533.10.3 (3d ed.) (observing that when "the case remains alive in the district court, it is sufficient to" deny a petition if the Court determines the case is moot "without directing that the injunction order be vacated"); *see also Housing Works, Inc. v. City of New York*, 203 F.3d 176, 178 (2d Cir. 2000) (refusing vacatur "where other claims and issues in the case remain to be decided by the district court"). Further, even if vacatur were warranted, it would properly be limited only to those portions of the lower courts' decisions ordering injunctive relief—that is, the parts that are allegedly moot—while leaving in place the remainder of the lower courts' decisions, including the portions that concern the merits of Ms. Edmo's Eighth Amendment claim. *See Camreta*, 563 U.S. at 714 (vacating only relevant part of appellate court's decision); *see also O'Connor v. Donaldson*, 422 U.S. 563, 577 n.2 (1975) (ordering lower courts on remand to address only damages because finding that petitioner violated respondent's constitutional rights "needs no further consideration").

CONCLUSION

For the reasons above and in Ms. Edmo's brief in opposition, the Court should deny the Petition.

Respectfully submitted,

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