15-15712

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHELLE-LAEL NORSWORTHY,

Plaintiff-Appellee,

v.

JEFFREY BEARD, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

No. C 14-00695 JST (PR)

The Honorable Jon S. Tigar, Judge

DEFENDANTS' URGENT MOTION UNDER CIRCUIT RULE 27-3 TO STAY MANDATORY PRELIMINARY INJUNCTION

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1. Contact Information for Counsel.

Plaintiff-Appellee Michelle-Lael Norsworthy (aka Jeffrey Norsworthy) is represented by Herman Hoying, Morgan Lewis & Bockius LLP, 415-442-1000, hhoying@morganlewis.com. His office address is One Market, Spear Street Tower, San Francisco, CA 94105.

Defendants-Appellants are represented by Jose A. Zelidon-Zepeda, California Attorney General's Office, 415-703-5781, Jose.ZelidonZepeda@doj.ca.gov. His office address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102.

2. Facts establishing the existence and nature of the urgency.

On April 2, 2015, the district court granted Ms. Norsworthy's motion for a mandatory preliminary injunction directing Defendant prison officials to provide Ms. Norsworthy with "sex reassignment surgery as promptly as possible." Defendants appealed from that preliminary injunction order. Although the district court's order does not set a specific deadline for compliance, Defendants have contacted the receiver appointed by the court in Plata v. Brown, N.D. Cal. No. C 01-cv-01351 TEH to begin the process of identifying appropriate medical contractors to perform the surgery and their availability. On April 27, 2015, Ms. Norsworthy's counsel advised Defendants that they contacted several physicians who are "willing and available to perform surgery for Ms. Norsworthy in the

coming weeks." Assuming it is possible to make arrangements for surgery within that timeframe, then unless the preliminary injunction order is immediately stayed, irreversible surgery will be performed, irreparably altering the status quo before Defendants' case may be heard on appeal, effectively denying them review of the district court's extraordinary ruling.

3. When and how counsel for the other parties were notified and whether they have been served with the motion.

Counsel for Defendants contacted Ms. Norsworthy's counsel on May 1, 2015 to inform him that Defendants would file a motion to stay on May 4, 2015. Defendants are also serving this urgent motion on Ms. Norsworthy's counsel via the Court's electronic filing system.

4. Relief sought in the district court first.

On April 10, 2015, before filing this motion, Defendants moved the district court to stay the operation of the mandatory preliminary injunction pending appeal and requested a ruling by April 17, 2015. The district court denied that request, and instead directed Ms. Norsworthy to respond to the stay motion by April 22, 2015. On April 27, 2015, the district court denied the motion, citing the following reasons: 1) Plaintiff will likely succeed on the merits of her deliberate indifference claim; 2) the injunction does not deprive Defendants "of the opportunity to present their arguments concerning constitutionally adequate care for patients with gender

dysphoria to the Ninth Circuit;" 3) Plaintiff "suffers continuing psychological and emotional pain as a result of her gender dysphoria" and "she is at risk of significant worsening of her condition in the event that hormone therapy must again be modified or discontinued;" and 4) the record is sufficient to support the preliminary injunction. Order Denying Mot. Stay Order Granting Prelim. Inj., ECF 116, at 4, 6-7. Because the district court's order will likely require surgery before the merits of the appeal are resolved, and a possibility exists that surgery may be scheduled within the next several weeks, Defendants have no choice but to seek this Court's intervention. All grounds advanced in support of this motion were submitted to the district court.

INTRODUCTION

Defendants respectfully request that this Court stay the district court's mandatory preliminary injunction requiring that prison officials provide sex-reassignment surgery to Michelle-Lael Norsworthy, aka Jeffrey Norsworthy, a male-to-female transgender state prisoner. Although the district court rested its ruling on a purported violation of the Eighth Amendment's proscription against cruel and unusual punishment, the record shows that Ms. Norsworthy has received extensive medical and mental-health treatment for her gender dysphoria for over 15 years, she is specially housed with other transgender inmates, and no treating physician has ever determined that reassignment surgery is medically necessary.

The district court's ruling is remarkable for several reasons. It comes less than a year after the case was filed, on a sparse record and in the compressed context of a preliminary-injunction motion, without live testimony from any witness or depositions of any of the medical experts in the case. And the evidence showed that there was no medical or psychological need for immediate sex-reassignment surgery. In short, the court departed from the well-established rule that Eighth Amendment deliberate-indifference claims cannot rest on differences of medical opinion about an inmate's medical treatment, and that a plaintiff in such a circumstance must demonstrate that the provided treatment was not only medically unacceptable, but chosen in conscious disregard of excessive risk to her health.

Beyond the contested merits of Ms. Norsworthy's claim, the district court misapplied the rigorous standard for issuing a mandatory injunction under this Court's jurisprudence. The injunction issued by the district court would not maintain the status quo pending trial on the merits or an appeal. In fact, it would cause irreparable harm and provide Ms. Norsworthy with all the relief she seeks by requiring irreversible sex-reassignment surgery without a treating physician's determination that the procedure is medically necessary. This the first time any court has directed prison officials to provide this treatment on the thin record of a preliminary-injunction proceeding. And although another district court issued a similar order after extensive trial proceedings, live testimony, and 20 years of legal proceedings, that decision was reversed by the First Circuit Court of Appeals sitting en banc.

This case warrants a stay pending appeal, to allow appellate review of the district court's order before irreversible surgery is performed on Ms. Norsworthy.

FACTUAL BACKGROUND

I. PRISON AUTHORITIES HAVE TREATED MS. NORSWORTHY'S GENDER DYSPHORIA SINCE 1999.

Ms. Norsworthy has been in state prison since 1987. (CD 10, ER 247.) In 1999, prison officials referred her to a psychologist for assessment of issues relating to her gender identity. (*Id.* at ER 250.) Per the Diagnostic and Statistical Manual IV (DSM-IV), Ms. Norsworthy was diagnosed with gender identity disorder (the DSM-V now refers to this condition as gender dysphoria). (*Id.*)

Prison doctors recommended therapy and medication, which Ms. Norsworthy sought and received. (CD 76, ER 117.)

Ms. Norsworthy has received hormone therapy for her gender dysphoria since 2000, and continues to receive this and other forms of treatment, including counseling and constant medical and psychological monitoring. (CD 94, ER 5-6.) Her doctors have adjusted her hormone prescriptions so that they safely provide an appropriate therapeutic benefit. (ER 308 (under seal); CD 74, ER 136.2.) Prison officials have also afforded Ms. Norsworthy other accommodations, including access to brassieres and the option to grow her hair long. (CD 76, ER 120.) All of this has substantially improved Ms. Norsworthy's condition. (*Id.* at ER 118-19.) In her own words, the officials "have facilitated and they have made it possible for [her] to come to terms with who [she] really [is]." (*Id.* at ER 124.)

California law provides a process for inmate-patients to access medical care based on individual medical need. *See* Cal. Code Regs. tit. 15, § 3350-3359.7. Inmates begin the process of requesting non-prescribed medical care by submitting a "Request for Medical Services" form. Although she has followed this procedure when seeking other treatments before this litigation, Ms. Norsworthy did not formally request sex-reassignment surgery until after this litigation was filed. (CD 76; ER 130:17-131:5.)

In 2012, Ms. Norsworthy began treatment with Dr. Reese, a prison psychologist, regarding her ongoing mental-health issues, primarily Post Traumatic

Stress Disorder. On November 29, 2012, Dr. Reese opined that if Ms. Norsworthy were not released on parole at an upcoming parole hearing, she should be scheduled for sex-change surgery. (CD 68, ER 157.) Dr. Reese did not explain his reasoning for determining that Ms. Norsworthy was an appropriate candidate for surgery, or state that it was medically necessary as a treatment for her gender dysphoria. He simply asserted in his cursory progress notes that, in his opinion, "health, safety, fairness and justice mandate" sex-reassignment surgery for Ms. Norsworthy's "continued well-being." (*Id.* at ER 139.)

Over the past year, Ms. Norsworthy has been scheduled for several parole hearings to determine her suitability for release from prison. (CD 76, ER 99-102; CD 92, ER 51.9-51.10.) On March 25, 2015—one week before the hearing on her preliminary-injunction motion—Ms. Norsworthy's counsel postponed her parole hearing, claiming insufficient time to prepare for the hearing after being appointed five weeks earlier. (*Id.* at ER 102.) Her next parole hearing is scheduled for May 20, 2015. (CD 92, ER 51.9.)

II. AFTER A FULL EVALUATION, CDCR'S PSYCHOLOGIST CONCLUDES IN 2013 THAT MS. NORSWORTHY'S CURRENT TREATMENT WAS APPROPRIATE.

On September 16, 2012, Ms. Norsworthy submitted an inmate grievance regarding her gender dysphoria. (CD 76, ER 104-06.) She asserted that she had not received "adequate and sufficient medical care as it relates to Gender Identity Disorder." (*Id.*) The impetus for this grievance was Ms. Norsworthy's recent

knowledge that a federal district court had ordered gender-reassignment surgery for a Massachusetts inmate, Michelle Kosilek (*id.* at ER 127:10-129:9) —a ruling that would later be overturned by the First Circuit, *Kosilek v. Spencer*, 774 F.3d 63, 86-89 (1st Cir. 2014) (en banc), *cert. denied* 2015 WL 1206262 (May 4, 2015). Prison officials reviewed this grievance, as well as Ms. Norsworthy's medical treatment file, at multiple levels. (CD 76, ER 108-11; *see generally* CD 66, ER 164-84.)

As part of this inmate-grievance review, Ms. Norsworthy was referred to a licensed psychologist, Dr. Raymond Coffin, who performed a "Gender Identity Disorder Evaluation" on July 1, 2013. (CD 66, ER 164-84.) After reviewing Ms. Norsworthy's central file and complete medical record, as well as meeting with her, Dr. Coffin concluded that she had received appropriate mental-health services. (*Id*, ER 180-84.) Dr. Coffin also found that she did not meet the criteria for sex-reassignment surgery because she had not been fully evaluated, recommended, and approved for sex-reassignment surgery by the appropriate medical and psychological staff. (*Id.* at ER 180-83.) He also noted that Dr. Reese's earlier progress notes did not point to anything supporting his conclusion that Ms. Norsworthy "has not achieved 'normal mental health,' nor evidence supporting his recommendation that a sex change operation would be the appropriate effective intervention." (*Id.* at ER 181.) Dr. Coffin recommended that Ms. Norsworthy continue her current hormone therapy and medical treatment, and focus her

mental-health treatment on improving coping mechanisms and addressing concerns raised by the parole board in prior eligibility hearings. (*Id.* at ER 183-84)

No treating physician has concluded that sex-reassignment surgery is medically necessary for Ms. Norsworthy. (CD 76, ER 125:14-19.)

III. DEFENDANTS' EXPERT CONSULTANT CONCLUDED THAT SEX-REASSIGNMENT SURGERY IS NOT MEDICALLY NECESSARY.

Defendants' expert consultant, Dr. Stephen Levine, is a licensed psychiatrist who received his medical degree in 1967 from the Case Western Reserve University School of Medicine. (ER 288 (under seal).) He has been a member of the American Psychiatric Association (APA) since 1971, and was previously a member of the Harry Benjamin International Gender Dysphoria Association, the precursor to the World Professional Association for Transgender Health. (*Id.*) In this capacity, he was a chairman of the Standards of Care Committee in 1997-98. (*Id.*) Dr. Levine was retained as the district court's independent expert in the seminal case involving transgender inmate care, *Kosilek v. Spencer*, discussed below.

Dr. Levine reviewed Dr. Coffin's report, and concluded that Dr. Coffin is qualified to opine on the medical necessity of sex-reassignment surgery here. (ER 296 (under seal).) Dr. Levine agreed with the assessment that sex-reassignment surgery was not medically necessary for Ms. Norsworthy in 2012-13. (*Id.* at 298-99.) This decision "was a conservative and prudent one," since "sex reassignment surgery was not at the time a medical necessity," in part because there are "other

ways to diminish the inmate's gender dysphoria short of this irreversible surgery." (*Id.* at 299.) "Rather than viewing sex reassignment surgery as the ultimate treatment for the pain of gender dysphoria, it should be viewed as a weighty step with social, psychological, medical, and environmental consequences." (*Id.*) As Dr. Levine concluded, "Prison officials are wise to not simply accept one clinician's opinion without articulated compelling reasoning." (*Id.*)

Per the district court's order on the parties' stipulation, Dr. Levine conducted an independent mental examination of Ms. Norsworthy. Dr. Levine met with Ms. Norsworthy for over two hours to discuss her gender dysphoria and reviewed reports prepared by psychologists for her in connection with her parole hearings in 2009, 2012, and 2014. (*Id.*) He also reviewed Dr. Reese's progress notes pertaining to his meetings with Ms. Norsworthy, and her medical records and endocrine reports for the past three years. (*Id.*) Dr. Levine concluded that Ms. Norsworthy's situation does not present a case where *immediate* sex-reassignment surgery is medically necessary. (ER 308 (under seal).) First, he concluded that it is not medically necessary to save Ms. Norsworthy's life—"her life is not in danger because of the condition of Gender Dysphoria." (*Id.*) Second, "sex reassignment surgery is not medically necessary to prevent a major psychological or medical decompensation." (*Id.*)[1] While not being granted immediate sex-

[1] Dr. Levine's assessment is corroborated by Ms. Norsworthy's expert declarant, Dr. Randi Ettner, who determined that Ms. Norsworthy presently experiences at most "mild symptoms of depression." (CD 63, ER 216 ¶ 70.)

(continued…)

reassignment surgery will likely disappoint Ms. Norsworthy, Dr. Levine concluded that any resulting depression can be addressed through the mental-health services available in prison. (*Id.*)

During this litigation, Ms. Norsworthy has cited her liver disease as a basis for needing surgery because high levels of hormones exacerbate her liver problems. Dr. Levine concluded that Ms. Norsworthy's "liver disease [is not] a reason to perform sex reassignment surgery" because any deterioration of her liver function can and has been reversed and managed by adjusting her hormone dosage. (*Id.*) This point is not disputed. Lastly, although surgery "would diminish her gender dysphoria," Ms. Norsworthy has lived with this distress for 15 years, and the distress "does not constitute a necessity for immediate sex reassignment surgery." (ER 309 (under seal).)

Dr. Levine noted that in medicine, a "medical necessity" for immediate surgery means that, absent surgical intervention, "a serious worsening of the patient's physiological state is inevitable." (*Id.* at 312.) By contrast, he explained, there generally is no immediacy to sex-reassignment surgery. (*Id.*) "It is not a response to an acute situation. Patients wait until they can gather the funds for the procedure, have [a] post operative support system in place and have mastered the

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(…continued)
While Dr. Ettner opines that gender dysphoria can lead to emotional decompensation and "externalizing behaviors such as suicide or surgical self-treatment," she does not describe any such concerns specific to Ms. Norsworthy herself. (*Id.* at ER 217 ¶ 75.)

expected pre-surgical second thoughts." (*Id.*) Although the district court's scheduling order provided Ms. Norsworthy a chance to submit a rebuttal report, she did not rebut Dr. Levine's conclusions. (CD 48, ER 46.)

LEGAL STANDARD

Stays pending appeal are governed by Federal Rule of Appellate Procedure 8. In ruling on stay motions, this Court considers four factors: (1) whether the movant is likely to succeed on the merits; (2) whether the movant will be irreparably injured absent a stay; (3) whether a stay will substantially injure the other parties in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). At a minimum, the party seeking a stay must show a "substantial case for relief on the merits," but is not required to show that "it is more likely than not that [the movant] will win on the merits." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012). Granting a stay is within the Court's discretion, to be exercised "dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672–73 (1926)).

ARGUMENT

I. DEFENDANTS HAVE A SUBSTANTIAL CASE ON THE MERITS BECAUSE THE DISTRICT COURT ORDERED UNNECESSARY SURGERY, BASED ON A MISAPPLIED CONSTITUTIONAL STANDARD.

The district court itself conceded that this "appeal raises a 'serious legal question' that satisfies the formulation of the likelihood of success prong of the

stay analysis." (Order Denying Mot. Stay Order Granting Prelim. Inj., ECF 116, at 3.) Indeed, there is a substantial issue on appeal regarding whether the district court misapplied the Eighth Amendment's deliberate-indifference standard, relying instead on its interpretation of the World Professional Association for Transgender Health's (WPATH) Standards of Care.[2] This legal error presents a substantial issue on appeal.

A. Defendants Are Providing a Level of Treatment to Ms. Norsworthy That Exceeds Constitutional Requirements.

Under the Eighth Amendment's deliberate-indifference standard, an inmate must show "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). "[O]nly those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quotation marks and citation omitted). And the alleged indifference "must be substantial." *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980). A difference of medical opinion between physicians does not establish deliberate indifference. *Toguchi v. Chung*,

[2] The WPATH Standards of Care are a set of recommended guidelines to medical professionals for the treatment of individuals with gender dysphoria. Importantly, the Standards of Care "themselves admit of significant flexibility in their interpretation and application." *Kosilek*, 774 F.3d at 87; *see id. at* 88-89 & n.10 (holding that the district court erred in finding that the failure to "follow" the Standards of Care amounted to constitutionally deficient treatment).

391 F.3d 1051, 1057 (9th Cir. 2004); *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

Here, the record shows that Defendants have provided Ms. Norsworthy with appropriate and continuous treatment for gender dysphoria for the past 15 years, including referral to a psychologist for transsexual assessment, consultation with various endocrinologists, mental-health treatment and counseling, and hormone therapy. This treatment has helped Ms. Norsworthy successfully consolidate her gender identity. (CD 10, ER 251 ¶ 20; CD 76, ER 118:15-119:3, 124:4-5.) Moreover, her mental distress has been alleviated, and her own experts find that she presently experiences at most "mild" depression and anxiety. (CD 63, ER 216 ¶¶ 69-70.) This 15-year treatment history in no way evinces indifference—much less deliberate indifference—to Ms. Norsworthy's medical and psychological needs.

In fact, other courts have found similar care to be constitutional. For example, in the only other case where a district court ordered sex-reassignment surgery, the First Circuit Court of Appeals reversed the ruling that prison officials were deliberately indifferent to the inmate's gender dysphoria by failing to provide such surgery, given that they provided "such alleviative measures as psychotherapy, hormones, electrolysis, and the provision of female garb and accessories." *Kosilek v. Spencer*, 774 F.3d 63, 86-89 (1st Cir. 2014) (en banc), *cert. denied* 2015 WL 1206262 (May 4, 2015). While a complete denial of

treatment to a transgender inmate might violate the Eighth Amendment, "[i]t is important to emphasize . . . that [the plaintiff] does not have a right to any particular type of treatment." *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987).

The core of Ms. Norsworthy's complaint is that Defendants have not provided the particular treatment she wants—sex-reassignment surgery and unspecified "additional treatment." But the Constitution "does not guarantee to a prisoner the treatment of his choice." *Jackson v. Fair*, 846 F.2d 811, 817 (1st Cir. 1988). The Eighth Amendment requires that an inmate be afforded "reasonable measures to meet a substantial risk of serious harm to her," not that she be given the specific care she demands. *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997). The "essential test is one of *medical necessity* and not one simply of desirability." *Id.* (emphasis added; citation omitted); *see also Kosilek*, 774 F.3d at 82 (noting that the deliberate indifference standard "does not impose upon prison administrators a duty to provide care that is ideal, or of the prisoner's choosing"). This standard is easily met in this case. In the sex-reassignment-surgery context, the federal court that most recently confronted this issue found this principle determinative: "The law is clear that where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of our court to 'second guess medical judgments'. . . ." *Kosilek*, 774 F.3d at 90.

B. The District Court Erroneously Substituted the WPATH Standards of Care for the Eighth Amendment Standard.

The district court did not apply Eighth Amendment jurisprudence and instead relied on the WPATH Standards of Care. (CD 94, ER 26-28.) Although Defendants' expert psychiatrist, Dr. Levine, and CDCR psychologist Dr. Coffin, determined that surgery was not medically necessary for Ms. Norsworthy, the district court concluded that "these opinions are inconsistent with the Standards of Care . . . and convincingly refuted by Plaintiff's experts." (*Id.* at ER 34.) But the correct legal standard was whether in providing the treatment that Ms. Norsworthy received—including transgender evaluation, mental-health treatment and hormone therapy—Defendants were deliberately indifferent to a substantial risk of harm to the patient. As the First Circuit explained in *Kosilek*, "it's the particular risk of harm faced by a prisoner due to the challenged deprivation of care, rather than the severity of the prisoner's underlying medical condition, considered in the abstract, that is relevant for Eighth Amendment purposes." 774 F.3d at 89 (citation omitted). In other words, the key question is whether Ms. Norsworthy's prison doctors were deliberately indifferent to a serious risk of physical or psychological harm that would result from not receiving surgery.

Here, Ms. Norsworthy did not establish that a serious risk of harm would result absent surgery. As the record reflects, "sex reassignment surgery is not medically necessary to prevent a major psychological or medical decompensation" to Ms. Norsworthy. (ER 308 (under seal).) And there is no indication that Ms.

Norsworthy will suffer significant mental or physical injury without immediate surgery. (*Id.*) Any psychological effects resulting from her disappointment can be addressed through the prison's mental-health system, which has provided her support throughout her incarceration. *See Kosilek*, 774 F.3d at 90 (rejecting Eighth Amendment claim for sex-reassignment surgery in part because the prison officials "stand[] ready to protect [the inmate-plaintiff] from the potential for self-harm by employing its standard and accepted methods of treating any prisoner exhibiting suicidal ideation").

The issue before the district court was not whether Defendants complied with a particular course of treatment suggested by the WPATH Standards of Care, but whether Ms. Norsworthy's consistent and ongoing treatment constituted deliberate indifference under the Eighth Amendment.[3]

II. THE DISTRICT COURT ERRONEOUSLY ORDERED IMMEDIATE SURGERY WITHOUT PROOF THAT MS. NORSWORTHY URGENTLY REQUIRES IT.

As this Court has made clear, "a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Serv. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Ms. Norsworthy did not demonstrate through the evidence submitted with her preliminary injunction motion that she faces immediate threatened injury

[3] Although the district court concluded that Defendants' actions conflicted with the WPATH Standards of Care, the record actually establishes that while some of the criteria for sex reassignment surgery under the WPATH guidelines were met, others were not. (ER 310 (under seal).)

warranting urgent preliminary relief. "Injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "When a mandatory preliminary injunction is requested, the district court should deny such relief 'unless the facts and the law clearly favor the moving party." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

Notably, Ms. Norsworthy did not even argue in her papers that she will suffer immediate irreparable injury absent urgent relief, instead arguing that "sudden urgency" was not required for interim relief. (CD 79, ER 51.16-51.17.) Nonetheless, the district court concluded that Ms. Norsworthy's allegations that she suffers without SRS sufficed to warrant urgent injunctive relief. (CD 94, ER 36.) In fact, there was no evidence that Ms. Norsworthy's psychological distress differs in kind or degree from what she has experienced since she was diagnosed with gender dysphoria over fifteen years ago. And there is no evidence that her condition has worsened or will worsen in any appreciable way if this case is allowed to proceed to a full trial on the merits while these weighty legal and factual issues are decided.

The district court dismissed these concerns, concluding that "irreparable injury does not need to be new to be relevant." (CD 94, ER 36.) This statement misses the point. Ms. Norsworthy had to show a clear need for immediate relief because she has sought immediate relief. Indeed, the only factor that seemed to show any type of urgency for Ms. Norsworthy's request was her scheduled parole hearing, which she postponed and might have led to her release, rendering her constitutional claims moot. (CD 76, ER 102.)

In *Caribbean Marine Services*, this Court reversed an injunction prohibiting state agencies from placing female observers onboard certain commercial tuna boats, finding that "the district court did not require a showing that the harms alleged by the owners and crew were imminent or likely." 844 F.2d at 675. Instead, the movant's purported injury was speculative at best. *Id.* "Preliminary injunctions should be granted only in cases which 'clearly demand' such interim relief." *Direx Israel, Ltd. v. Breakthrough Med. Grp.*, 952 F.2d 802, 811 (4th Cir. 1991).

Although Ms. Norsworthy presented conclusory expert testimony that she needed "immediate" surgery, this testimony lacked a factual basis. First, Dr. Ettner, a psychologist who cannot authorize surgery, failed to explain why surgery was urgently required for a condition for which Ms. Norsworthy has received and is receiving treatment. (CD 63, ER 218 ¶ 79.) Ms. Norsworthy's other expert, Dr. Gorton, concluded that urgent surgery was necessary, based on his disputed

opinion that Ms. Norsworthy's current hormone therapy is not sufficiently therapeutic, an opinion that he rendered without examining Ms. Norsworthy. (CD 64, SER 195, 198-99 at ¶¶ 27, 35, & 38.) By contrast, the Board-certified endocrinologist who has been treating Ms. Norsworthy testified that her medications provide an appropriate therapeutic benefit. (CD 74, ER 136.1-136.2.)

Dr. Levine, Defendants' expert witness and a Board-certified medical doctor, licensed psychiatrist, and national expert in transgender issues, explained that sex-reassignment surgery was not medically necessary, much less *immediately* medically necessary. Based on an independent mental examination, he concluded that prison officials' actions were prudent, and that "sex reassignment surgery" was not medically necessary in this case. He also explained that sex-reassignment surgery must be considered in view of its weighty "social, psychological, medical, and environmental consequences." (ER 299 (under seal).) Specifically addressing concerns about Ms. Norsworthy's liver, Dr. Levine concluded that this issue did not warrant surgery. And Ms. Norsworthy did not rebut Dr. Levine's testimony.

In the light most favorable to Ms. Norsworthy, the record regarding medical necessity is mixed; the record on *immediate* necessity is not, however, and "the district court should deny such relief 'unless the facts and the law clearly favor the moving party." *Stanley*, 13 F.3d at 1320. Given this heavy burden, and the irreversible nature of the surgery, this Court should stay the mandatory preliminary injunction to allow appellate review of these sensitive and important issues.

III. IRREPARABLE INJURY WILL RESULT WITHOUT A STAY BECAUSE THE SURGERY ORDERED BY THE DISTRICT COURT IS IRREVERSIBLE.

As set forth above, there is no evidence that irreversible treatment is immediately necessary before this appeal can be heard and the factual record can be fully developed in a proceeding on remand. On the other hand, the record demonstrates that the Defendants will be irreparably injured if the district court's order stands and surgery goes forward because the case will effectively become moot, precluding appellate review.

Unless this Court stays the order, Defendants will have to provide "sex reassignment surgery as promptly as possible." (CD 94, ER 38.) Although the district court did not specify a date for surgery, it set a case-management conference in mid-May, when the parties will presumably report the status of compliance. (*Id.*) Given that this appeal will not be fully briefed on the merits until June 19, Defendants must take necessary steps to comply with the lower court's order, and if surgery becomes available before then, provide it. Doing so could potentially render appellate proceedings—as well as trial proceedings in the district court—moot.

When the terms of a preliminary injunction are "irrevocably carried out," the appellate court cannot undo what has been done, and the question whether the preliminary injunction was proper becomes moot. *Camenisch*, 451 U.S. at 398. Here, if Defendants provide irreversible surgery to Ms. Norsworthy in compliance

with the order, the issues on appeal will likely be rendered moot. These pressing factual and legal issues should not escape review.

By contrast, a stay will not appreciably injure Ms. Norsworthy. As explained above, she has been receiving and will continue to receive extensive medical and mental-health treatment, which has markedly altered her physical appearance and improved her condition.

IV. THE DISTRICT COURT DISREGARDED IMPORTANT SECURITY CONSIDERATIONS.

"[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (citation omitted). Here, providing sex-reassignment surgery will create novel issues that impact inmate safety. No correctional system has been judicially ordered to provide sex-reassignment surgery, necessary security during hospitalization, and appropriate housing placement afterward. (CD 75, ER 135 ¶ 6.) Although Defendants have experience housing an inmate who received sex-reassignment surgery in an out-of-state correctional facility before the inmate was incarcerated in California, those circumstances continue to present serious safety and administrative concerns—including threats and assaults involving the transgender inmate and other female inmates, as well as frequent transfers, "including to administrative segregation, and transfer between the female institutions." (*Id.*)

The district court downplayed these safety concerns (CD 94, ER 36-37), thereby disregarding the Prison Litigation Reform Act's mandate that courts "shall give substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the preliminary relief." 18 U.S.C. § 3626(a)(2). As the First Circuit held in *Kosilek*, a federal court should not substitute its judgment for prison officials' good-faith balancing of security and health concerns. *Kosilek*, 774 F.3d at 92. Here, the district court did not adequately consider the unrebutted declaration of the Director of Adult Institutions, describing these serious concerns (CD 75, ER 133-36) and did not offer an opportunity for live testimony on these issues. This, too, was error.

CONCLUSION

Sex-reassignment surgery is a serious step with significant consequences, which are even more complicated in a correctional setting. The district court should not have ordered surgery on a preliminary injunction when it lacked a complete factual record and there was no need for expedited consideration. This Court should grant a stay pending consideration of these important issues of first impression.

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Dated: May 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: **Michelle-Lael Norsworthy v. J. Beard, et al.** No. **15-15712**

I hereby certify that on May 4, 2015, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS' URGENT MOTION UNDER CIRCUIT RULE 27-3 TO STAY MANDATORY PRELIMINARY INJUNCTION.

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 4, 2015, at Sacramento, California.

C. Look	/s/ C. Look
Declarant	Signature

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