No. 15-15712

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHELLE-LAEL B. NORSWORTHY,

Plaintiff-Appellee,

v.

JEFFREY BEARD, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
in Case Number C 14-00695 JST (PR)

PLAINTIFF-APPELLEE NORSWORTHY'S OPPOSITION TO DEFENDANTS' URGENT MOTION TO STAY ORDER GRANTING PRELIMINARY INJUNCTION

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INTRODUCTION

On April 2, 2015, the district court granted the motion of Plaintiff-Appellee Michelle-Lael Norsworthy ("Plaintiff") seeking access to adequate medical care, including sex reassignment surgery ("SRS"), for her gender dysphoria. Specifically, the district court found that Plaintiff was likely to succeed on the merits because there was compelling evidence that Defendants "deliberately ignored [Plaintiff's] continuing symptoms of gender dysphoria and the recognized standards of care; that they were deliberately indifferent to the recommendations of her treating health care provider; that CDCR's [California Department of Corrections and Rehabilitation's] reasons for denying SRS are pretextual; and that CDCR has a blanket policy against providing SRS for transgender inmates." (ER 30.) Based upon significant evidence that Plaintiff is currently suffering irreparable harm as a result of the "excruciating" psychological and emotional pain she experiences from her gender dysphoria, the district court ordered Defendants-Appellants ("Defendants") to provide SRS "as promptly as possible." (ER 6, 38.)

Defendants now seek an urgent order from this Court staying the district court's order pending resolution of their appeal—relief the district court previously denied. Defendants fail to satisfy any of the requirements for obtaining such relief:

Defendants are not likely to succeed on the merits. Defendants' appeal (as well as the instant motion) is based entirely upon a challenge to the district court's factual findings and, in particular, the district court's determination that Defendants' expert witness lacked credibility. Defendants' attempt to frame these arguments in terms of the district court applying the wrong legal standard is unavailing. The Court expressly applied the legal precedents advocated by Defendants, but reached opposite conclusions based upon its factual findings. The district court's factual findings are entitled to substantial deference and may only be overturned by this Court if clearly erroneous. The record evidence provides ample support for the district court's factual findings.

Defendants will not suffer any irreparable injury absent a stay. The only purported injury that Defendants claim they will suffer is the possibility that they *may* be required to provide Plaintiff surgery prior to having their appeal resolved. The law, however, is well-settled that the risk that an appeal may become moot is not irreparable injury; nor does speculative harm constitute irreparable injury.

Plaintiff is suffering irreparable injury that will continue in the absence of the ordered surgery. The Court's finding that Plaintiff is suffering irreparable injury as a result of Defendants' refusal to provide SRS is supported by substantial evidence. Defendants' contention that Plaintiff must prove a worsening of her condition where she has been suffering for years is wholly unsupported by legal

precedent or common sense. Moreover, Plaintiff presented evidence that there is a substantial risk that her mental and physical health will significantly deteriorate if she is not provided the ordered surgery, including increased risk of suicide.

The public interest does not favor a stay. As this Court has acknowledged, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation omitted). The district court already found the purported "safety and administrative concerns" offered by Defendants unpersuasive. CDCR has extensive experience housing inmates requiring outpatient surgeries and already has experience housing a transgender inmate who received SRS prior to incarceration.

Defendants' urgent motion for a stay should be denied.

BACKGROUND

Plaintiff is a transsexual woman—an individual whose female gender identity is different from the male gender assigned to her at birth—seeking SRS to treat her serious gender dysphoria. Since adolescence, she has experienced significant distress and anxiety because of the discrepancy between her male body and her female gender identity. (ER 167; SER 018, 020.)

In the 1990s, while in custody of CDCR, Plaintiff began to understand and accept that she was a transsexual woman. (ER 167-68, SER 018.) As early as

1996, Plaintiff informed prison personnel that she was a transsexual woman and needed hormone therapy and SRS to treat her dysphoria. (ER 167, SER 018.)

In 1999, Ms. Norsworthy self-referred to CDCR's Gender Clinic—a clinic founded by Dr. Lori Kohler that specialized in the treatment of transgender inmates—and underwent a series of tests upon which she was diagnosed with gender identity disorder ("GID").[1] (ER 168-69; SER 026-27.) Dr. Kohler thereafter prescribed Plaintiff hormone therapy to better conform her body to her gender identity. (ER 169.)

Despite counseling and hormone therapy, Plaintiff's symptoms of anxiety, dysphoria and distress have persisted. That Plaintiff is forced to live with male genitalia while she lives as a woman and the rest of her body has feminized is the source of severe emotional distress. (ER 117-120, SER 017..) Plaintiff feels that she is "not allowed to be a person" because she is "caught in this between state" of neither being a woman nor a man. (SER 020.) Plaintiff experiences "excruciating pain and frustration" that manifest in physical symptoms, including sleeplessness, cold sweats, hypervigilance, panic attacks and mood swings. (SER 017, 019.) As a result of the persistent dysphoria, anxiety and stress that Plaintiff continues to experience even after receiving hormone therapy, Plaintiff needs SRS. Plaintiff's

[1] Subsequent to Plaintiff's initial diagnosis, the American Psychiatric Association replaced the "gender identity disorder" diagnosis with "gender dysphoria" in the DSM-V.

medical records starting in the mid-1990s repeatedly reflect Plaintiff's efforts to obtain SRS. (*See, e.g.*, SER 024, 042, 059.)

Plaintiff spoke to nearly all of her therapists about SRS—relaying that she wanted and needed SRS. (SER 021-022.) In response, Plaintiff was told that CDCR did not provide SRS. For example, in a progress note dated April 28, 2009, Plaintiff's mental health provider noted that Plaintiff struggles emotionally as a result of her gender dysphoria on an "ongoing basis" and her suffering is "possibly more pronounced by not being able to complete the *required* surgeries." (SER 059 (emphasis added).) Plaintiff's primary mental health provider, Dr. Reese ("Reese"), with whom she met almost weekly from 2011-2013, repeatedly noted Plaintiff's need for SRS. (*See, e.g.*, SER 053-056.) In November 2012, Reese expressly stated: "It is clear that clinical medical necessity suggest and mandate a sex change medical operation before normal mental health can be achieved for this female patient." (ER 157.) Reese repeatedly renewed this opinion for the following five months (ER 138-57), at which time CDCR Headquarters issued a directive to remove Plaintiff from his care (SER 083). Around this same time, Plaintiff learned that a judge in Massachusetts had ruled in favor of an inmate seeking SRS and decided to file a formal appeal seeking SRS. (SER 022.)

On September 16, 2012, Plaintiff submitted her CDCR 602 Health Care appeal seeking "adequate and sufficient medical care" for her gender dysphoria,

including SRS. (ER 104-107.) Plaintiff highlighted that she received "the highest possible dose of estrogen." (ER 106.) There are significant risks associated with long term use of high dosage hormone replacement therapy, including heart attack, stroke, blood clots, and liver toxicity. (ER 193.) Plaintiff's hepatitis C makes her hormone replacement therapy more difficult and dangerous as hepatitis C is associated with ongoing liver damage, which can be exacerbated by the hormone replacement therapy. (ER 193-94.) Plaintiff experiences complications with hormone replacement therapy, which resulted in her endocrinologist completely removing her from hormone therapy for several months in late 2014. (ER 194-96.)

Plaintiff's appeal was denied at the first and second levels of review by administrators at the facility at which she was housed who had no experience treating transgender patients or assessing their need for care. (SER 086, 090, 112.) None of these individuals consulted with Plaintiff's treating health care providers or with a transgender specialist. (SER 085-088, 090, 112-113.) This failure was particularly telling given that Dr. Kohler—a transgender specialist who had been involved with Ms. Nosworthy's care—was working at the same facility where the appeal was considered. (SER 029-030.) At the first level of appeal, Plaintiff's request for SRS was denied "per state policy." (ER 110.) The denial at the second level stated that "neither your mental health nor your PCP [Primary Care Physician] has recommended SRS as a treatment for any of your medical conditions." (ER

109.) In fact, however, Plaintiff's primary mental health provider, Reese, repeatedly had recommended SRS. (*See, e.g.*, SER 049, 053-056.)

Plaintiff then appealed to the Office of Third Level Appeals. By this time, Reese had expressly recommended that SRS be provided as a "medical necessity." (ER 157.) The appeal was referred to the mental health consultant utilized by the Office of Third Level Appeals, who found that Plaintiff's records "indicate that [she] is psychologically ready for the SRS." (SER 091.) She noted, however, "I do not know if CDCR is performing SRS." (*Id.*) Contrary to its usual practice, the Office of Third Level Appeals did not follow these opinions and instead requested that an evaluation be conducted by Defendant Dr. Coffin ("Coffin"), a psychologist who had no experience evaluating a patient for SRS and had not been involved in the treatment of transgender patients in over ten years. (SER 094-098.) Coffin's only qualification for evaluating Plaintiff was his attendance at a one-day training session related to transgender care led by Dr. Stephen Levine ("Levine"), who subsequently was retained as Defendants' expert in this litigation. (SER 098.) That training, however, provided no instruction on the evaluation of a patient for SRS and instead made clear that SRS was not a treatment available to incarcerated patients. (SER 104 (stating that patients must understand that hormone treatment "will not lead to SRS in prison"), SER 106 ("Surgical candidates may use experience to decide to have surgery when they are released").) After conducting

an evaluation, Coffin concluded that "[w]hile it appears likely that [Plaintiff's] medical consultants would approve [her] as a candidate for SRS as an *elective* procedure, in the opinion of this evaluator the available documentation does not establish SRS as medically necessary at this time." (ER 182.) Plaintiff's appeal was subsequently denied at the third level based on the false contention that Plaintiff's "current providers have documented the determination that the subject surgery is not medically necessary for you." (SER 032.) In fact, Reese is the only *provider* that has ever documented a determination with regard to the need for SRS, and he expressly found it to be a medical necessity.[2] (ER 157.)

Having exhausted her appeals, Plaintiff filed this lawsuit seeking, *inter alia*, access to adequate medical care, including SRS, based upon violations of the Eighth and Fourteenth Amendments. At the initial case management conference, counsel for Plaintiff notified Defendants and the Court of her intention to seek a preliminary injunction as a result of the severe mental distress she experiences as a result of her gender dysphoria and the physical health issues caused by the high dosages of hormone therapy required without surgery. The parties stipulated to a

[2] In their Motion, Defendants repeatedly suggest that SRS is not appropriate for Plaintiff because "no treating physician has ever determined that [SRS] is medically necessary." (Motion 1, 2, 6.) Defendants' contention is a red herring. As Defendants' own expert has acknowledged, mental health care professionals – not physicians—are charged with determining whether or not SRS is a medically necessary treatment for gender dysphoria. (ER 296-297.) Indeed, Defendants' expert concluded that Plaintiff's treating mental health provider, Reese, was a "qualified mental health professional" to make the recommendation for SRS. (*Id.*)

schedule for the preliminary injunction motion, which included significant time for fact and expert discovery. (SER 009-10.) Subsequently, the parties stipulated to an extension of the discovery period. (ER 45-48.) The parties conducted substantial discovery, consisting of the production of thousands of pages of documents, substantial written discovery, seven depositions and four expert reports. (SER 116.) Defendants did not seek any further extension of the discovery period and opposed any effort by Plaintiff to obtain additional discovery. (*Id.*) Defendants also refused Plaintiff's proposal that the parties take depositions of the experts. (*Id.*) Defendants did not request an evidentiary hearing even though the trial court expressly invited the parties to do so. (SER 10 n.1, ER 47 n.1.) Defendants vigorously opposed the introduction of live testimony at the hearing. (SER 013.)

In accord with the schedule stipulated by the Parties, the district court heard oral argument on the motion for preliminary injunction on April 1, 2015.[3] On the following day, the Court granted the motion for preliminary injunction and ordered Defendants to take all necessary steps to provide SRS "as promptly as possible."

[3] Defendants' inexplicably infer that Plaintiff postponed her parole hearing in order to avoid mooting her claims. (Motion 4, 16.) Defendants' contention is absurd and wholly unsupported by the record. Defendants' counsel made clear to the district court that Plaintiff's "…***parole attorney***, on procedural grounds, refused to go forward with the hearing…" scheduled for March 25, 2015 (ER 51.9-51.10) (emphasis added); *see also* ER 103 ("the first hearing could not start until 10:30 and set the schedule too late to start this hearing").

(ER 38.) On April 10, 2015, Defendants moved the district court to stay the preliminary injunction pending resolution of their appeal. On April 27, the district court denied their motion. (SER 001.)

LEGAL STANDARD

Defendants "bear[] the burden of showing that the circumstances justify" an exercise of the Court's discretion to grant a stay. *Niken v. Holder*, 556 U.S. 418, 433-34 (2009). In deciding whether to exercise this discretion, courts consider and balance four factors: (1) whether the movant has made a strong showing that it is likely to succeed on the merits; (2) whether the movant will be irreparably harmed absent a stay; (3) whether a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id.* at 434.

ARGUMENT

I. DEFENDANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Although Defendants attempt to frame their appeal as a challenge to the legal standard applied by the district court, the district court applied the same legal precedents advocated by Defendants. In reality, all of Defendants' arguments on appeal are based upon their disagreement with the district court's factual findings and, in particular, the finding that the medical opinions offered by Defendants "are inconsistent with the Standards of Care, based on the unsupported assumption that SRS should never be available to incarcerated patients, and convincingly refuted

by Plaintiff's experts."[4] (ER 34.) These factual determinations are entitled to great deference from this Court and may only be overturned if clearly erroneous.[5] That the trial court did not conduct an evidentiary hearing has no impact on the standard of review. *See Hale v. Dep't of Energy*, 806 F.2d 910, 914 (9th Cir. 1986).

A. The District Court Correctly Found That Plaintiff Is Not Receiving Constitutionally Adequate Medical Care

Defendants first argue that Defendants could not have been deliberately indifferent to Plaintiff's gender dysphoria because they have been providing her with treatment—in the form of counseling and hormone therapy—for the past fifteen years. (Motion 2-3.) Defendants essentially ask this Court to adopt a rule that SRS is never constitutionally required where the prison is providing the inmate with some treatment to address gender dysphoria.[6] Defendants contend that "other

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[4] "Standards of Care" refer to the Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People published by the World Professional Association for Transgender Health ("WPATH"), which is the leading international body of experts on transgender care. (SER 125.) The Standards of Care are recognized as authoritative standards of care by multiple mental health organizations, including the American Psychiatric Association. (ER 205-206.) The current version of the Standards of Care—Version 7—was released in September 2011 following a five-year process in which eighteen gender dysphoria specialists submitted peer-reviewed papers to help identify the most effective treatments for gender dysphoria. (ER 253.)

[5] *See, e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013) (finding that mandatory preliminary injunction should be upheld unless "the district court based its decision on an erroneous legal standard or on clearly erroneous findings of fact").

[6] Defendants' argument is consistent with CDCR's policy. As the district court found, "[t]he evidence suggests that Norsworthy's request for SRS was denied

courts have found similar care to be constitutional," but cite only to the First Circuit's decision in *Kosilek v. Spencer*, 774 F.3d 63, 90 (1st Cir. 2014) (*en banc*). (Motion 11.) In *Kosilek*, however, the First Circuit expressly cautioned that its decision did not create a *de facto* ban against SRS as a medically necessary treatment and noted that a "blanket policy" barring SRS would run afoul of the requirement that medical care be individualized based on a particular prisoner's serious medical needs.[7] *Id.* at 90 n.12, 91. The other Circuits that have considered this issue expressly have found that a plaintiff states a a constitutional claim where

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because CDCR has a blanket policy barring SRS as a treatment for transgender inmates." (ER 32-33.) There is significant evidence to support this conclusion, including an express policy in the CDCR Operations Manual (SER 073), testimony from Dr. Kohler that there was an "understanding" that SRS was not a treatment option (SER 028), training materials making clear SRS was not available (SER 104, 106); and transgender health care policies that included specific guidelines for counseling and hormone therapy but no mention of SRS (SER 075-081).

[7] Plaintiff respectfully submits that *Kosilek* was wrongly decided and should not be followed by this Court. As one of the dissenters in *Kosilek* eloquently stated:

> I am confident that I would not need to pen this dissent, over twenty years after Kosilek's quest for constitutionally adequate medical care began, were she not seeking a treatment that many see as strange or immoral. Prejudice and fear of the unfamiliar have undoubtedly played a role in this matter's protraction. Whether today's decision brings this case to a close, I cannot say. But I am confident that this decision will not stand the test of time, ultimately being shelved with the likes of *Plessy v. Ferguson*, 163 U.S. 537 [ ] (1896), deeming constitutional state laws requiring racial segregation, and *Korematsu v. United States*, 323 U.S. 214[ ] (1944), finding constitutional the internment of Japanese–Americans in camps during World War II. I only hope that day is not far in the future, for the precedent the majority creates is damaging.

Kosilek, 774 F.3d at 113 (Thompson, J., dissenting).

a prison system refuses to offer SRS as a treatment option, even where it provides other types of treatment to inmates, such as counseling and hormone therapy. *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011) (finding policy barring access to hormone therapy or SRS unconstitutional, even though patients were receiving counseling and other forms of treatment); *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (reversing dismissal where prison refused to refer plaintiff for assessment for SRS because plaintiff was receiving counseling and hormone therapy).

Citing *Kosilek*, 774 F.3d at 90, Defendants contend: "[t]he 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' . . ." (Motion 12.) The district court agreed, applying this statement of the law, but finding that "the evidence does not suggest that, in this case, Defendants made a professional judgment in choosing between two possibilities or that there was a difference of opinion between a prisoner and her provider or between providers." (ER 33.) Indeed, there is no evidence in this case of "two alternative courses of medical treatment" that both are effective at "alleviating the negative effects" of Plaintiff's gender dysphoria. SRS was not ordered as an *alternative* treatment, but rather as an *additional* form of treatment for Plaintiff's gender dysphoria. For certain patients,

such as Plaintiff, counseling and hormone therapy alone are not effective in alleviating the negative effects of gender dysphoria. (ER 209-210; SER 159.) As the district court put it, "[t]he weight of the evidence demonstrates that for Norsworthy, the ***only*** adequate medical treatment for her gender dysphoria is SRS . . . ." (ER 34 (emphasis added).)

Defendants are not likely to succeed on their appeal, because the district court's finding that the current treatment received by Plaintiff is constitutionally insufficient is based upon the correct legal standard and factual findings that are logical and well-supported by the record. Defendants' continued reliance on the opinions of Levine and Coffin is wholly misplaced as the district court provided compelling reasons for not giving weight to their opinions.[8]

B. The Court Did Not Substitute the WPATH Standards Of Care For Eighth Amendment Standard

Defendants next argue that "[t]he district court did not apply Eighth Amendment jurisprudence and instead relied on the WPATH Standards of Care." (Motion 13.) Defendants base this argument on a single line—albeit misquoted

[8] *See, e.g.*, ER 31 (noting that "it is clear from Coffin's deposition that he has a profound misunderstanding of and lack of scientific information . . ."") (internal quotation omitted); ER 37 (noting that each only "met [with] Norsworthy on one occasion" and thus "can hardly be described as the health care professionals 'most familiar with [Norsworthy's] care'"); ER 28 (giving "very little weight" to the opinions of Levine, "whose report misrepresents the Standards of Care, overwhelmingly relies on generalizations about gender dysphoric prisoners, rather than an individualized assessment of Norsworthy; contains illogical inferences; and admittedly includes references to a fabricated anecdote").

and taken out of context—from the district court's order, in which the district court found Levine and Coffin unreliable, in part, because their opinions "are inconsistent with the Standards of Care." (ER 34; *see supra* note 8.) Defendants contend that, under the Eighth Amendment, "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 the surgery." (Motion 13.) This is exactly the standard applied by the district court. (*See, e.g.*, ER 25 ("In the Ninth Circuit, a plaintiff alleging deliberate indifference must first show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or unnecessary and wanton infliction of pain.") (internal quotation omitted).)

The district court's reference to the Standards of Care is unremarkable. Courts routinely consider evidence regarding the prevailing standards of care for the specific medical condition at issue when making factual determinations regarding the sufficiency of care under the Eighth Amendment.[9] Defendants'

[9] *See, e.g.*, *Hutchinson v. U.S.*, 838 F.2d 390, 392 (9th Cir. 1988) (Standards of care are "ordinarily possessed and exercised by members of their profession" and thus "can be proven only by expert testimony"); S*oneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. 2012) ("the course of treatment for Gender Identity Disorder generally followed in the community is governed by the 'Standards of Care'"); *De'Lonta*, 708 F.3d at 522-23 (reasoning that the Standards of Care are "the generally accepted protocols" for transgender care); *Toguchi v. Chung*, 391 F.3d 1051, 1055-56 (9th Cir. 2004) (considering expert testimony to determine whether defendant was "deliberately indifferent" to prisoner's "serious medical needs").

contention that the Court erred by relying upon the Standards of Care is particularly puzzling given that Defendants' own expert also purports to rely upon the Standards of Care.[10]

Regardless, the district court did not substitute the Standards of Care for the Eighth Amendment's requirements or rely exclusively upon the Standards of Care to find that Defendants were deliberately indifferent to Plaintiff's serious medical need. Independent from the Standards of Care, the district court found Defendants' refusal to provide surgery deliberately indifferent based upon Defendants' decision (i) to ignore and interfere with the treatment recommended by Plaintiff's treating mental health provider, and (ii) to apply a blanket policy against the provision of SRS rather than undertake an individualized determination of Plaintiff's medical need. (ER 31-32; *see also supra* note 6.)

[10] Dr. Levine testified that Plaintiff had "met" most of the criteria set out in the Standards of Care for eligibility and readiness for SRS, including "[t]welve continuous months of living in female gender role in prison." (ER 310-311.) In fact, Plaintiff has met all of the criteria. (ER 36, 218.) Dr. Levine contends that Norsworthy has not "strictly met" purported criterion requiring "12 months[] of continuous living in the female gender role *in society*" (ER 311 (emphasis added)), but, in fact, the Standards of Care require only "12 continuous months of living in a gender role that is congruent with the patient's identity." (SER 162.) The Standards of Care do not require that this experience be obtained "in society," but rather make clear that individuals "living in an institutional environment" may satisfy the criteria for obtaining SRS. (SER 166-67.)

II. DEFENDANTS WILL NOT SUFFER IRREPARABLE HARM ABSENT A STAY

Regardless of the strength of the other factors, a court may not issue a stay unless the movant proves that it will suffer irreparable harm absent a stay. *See Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (there is a "bedrock requirement that stays must be denied to all petitioners who did not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors"). The sole basis upon which Defendants allege irreparable harm is their assertion that, absent a stay, their appeal "could potentially" be rendered moot if the surgery is scheduled before this Court resolves the appeal. (Motion 18.)

As courts in this Circuit have noted, "it is well settled that the risk an appeal may become moot is not an irreparable injury." *In re Howrey LLP*, No. 15-cv-03062-JD, 2014 U.S. Dist. LEXIS 95580 (N.D. Cal. July 14, 2014) (collecting cases); *In re Red Mountain Mach. Co.*, 451 B.R. 897, 908-09 (Bankr. D. Ariz. 2011) ("The law is clear in the Ninth Circuit that irreparable injury cannot be shown solely from the possibility that an appeal may be moot."). Additionally, Defendants' qualified statement regarding the harm it "could potentially" suffer is insufficient to establish irreparable harm. *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) ("Speculative injury cannot be the basis for a finding of irreparable harm.").

Moreover, as the district court observed, "denial of the requested stay as to Norsworthy will not deprive Defendants of the opportunity to present their arguments to the Ninth Circuit, because Norsworthy is not the only CDCR inmate seeking SRS." (SER 006.)

III. Plaintiff Is Suffering Irreparable Harm

Defendants argue that Plaintiff has failed to demonstrate that "she faces immediate threatened injury warranting urgent preliminary relief." (Motion 14-15.) Defendants' contention is unsupported by the district court's findings of fact and the record evidence, and it is premised on a misstatement of the applicable legal standard.

Based upon its consideration of all the evidence, the district court determined that Norsworthy suffers continuing "[e]motional distress, anxiety, depression, and other psychological problems" and "is at risk of significant worsening of her gender dysphoria in the event that her hormone therapy must again be modified or discontinued because of liver complications." (ER 35.) These factual determinations are supported by Plaintiff's deposition testimony (ER 118-120; SER 017-022), contemporaneous medical records (SER 042-059; ER 138-57), and the testimony of Plaintiff's expert witnesses (ER 137-57, 194-96).

Defendants' contention that Plaintiff failed to prove "that her condition has worsened or will worsen in any appreciable way" if the surgery is not provided is

based upon a misunderstanding of the law and misstates the record. (Motion 15.) As the district court correctly explained:

> "[Plaintiff] is not required to demonstrate that she is at risk of death or imminent self-harm, or that her risk of injury or pain is new. Norsworthy is likely to succeed in demonstrating that she has experienced decades of severe psychological pain because SRS is the only way to treat her persistent symptoms of gender dysphoria. The fact that she has not yet received SRS does not lessen her need for it now."

(ER 28.)[11] Regardless, Plaintiff introduced evidence that there is a substantial risk that Plaintiff's condition will worsen if she is not provided access to surgery, including an increased risk for renewed suicide attempts. (*See, e.g.*, ER 199, 217.)

VI. THE PUBLIC INTEREST DOES NOT SUPPORT A STAY

As this Court has recognized, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002. The district court thus found the injunction to be in the public interest, noting that "[t]here is no public interest in Norsworthy's continued suffering during the pendency of this litigation." (ER 37.)

[11] *See, e.g.*, *McNearney v. Washington Dep't of Corr.*, No. C11-5930 RBL/KLS, 2012 WL 3545267, at *14 (W.D. Wash. June 15, 2012) *adopted*, No. 11-CV-5930-RBL/KLS, 2012 WL 3545218 (W.D. Wash. Aug. 16, 2012) *and modified*, No. C11-5930 RBL/KLS, 2013 WL 392489 (W.D. Wash. Jan. 31, 2013) (finding irreparable injury where plaintiff "continues to suffer unnecessary pain despite [current treatment]" even though condition was not new, went untreated for years prior to incarceration, and had not worsened).

Defendants ignore this entirely and instead contend only that "providing sex-reassignment surgery will create novel issues that impact inmate safety." (Motion 19.) Notably, Defendants' denial of Plaintiff's request for SRS never mentioned any concerns with regard to security. The only evidence supporting Defendants' contention is a four page declaration prepared specifically for this litigation. (ER 133-36.) The declaration consists solely of generalized statements without citation to any data or research. (*See id.*) Credibility concerns aside, the declaration expressly concedes that CDCR already houses a transgender female inmate that obtained SRS prior to incarceration. (ER 135.) As the district court explained:

> "CDCR may not have experience housing an inmate undergoing SRS, but it does have experience housing inmates who require surgery and housing one post-operative male-to-female transsexual individual. Any suggestion that housing a female inmate with a history of violence against women would be a novel security challenge is hard to square with the fact that CDCR already houses many women with a history of violence, including violence against their female partners."

(ER 36-37.)

Defendants' evidence is wholly unpersuasive, particularly when balanced against the irreparable harm Plaintiff is suffering.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for a stay.

Dated: May 12, 2015

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CERTIFICATE OF SERVICE

Case Name: Michelle-Lael B. Norsworthy v. J. Beard, et al.

Case No. 15-15712

I hereby certify that on May 12, 2015, I caused the following documents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system:

PLAINTIFF-APPELLEE'S OPPOSITION TO DEFENDANTS' URGENT MOTION TO STAY ORDER GRANTING PRELIMINARY INJUNCTION

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the United States Court of Appeals 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 12, 2015, at San Francisco, California.

May 12, 2015

Respectfully submitted,

MORGAN LEWIS & BOCKIUS LLP

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