

CASE No. 15-15712

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHELLE-LAEL B. NORSWORTHY

Plaintiff–Appellee,

v.

JEFFREY BEARD ET AL.

Defendants–Appellants.

**BRIEF OF *AMICUS CURIAE* BAY AREA LAWYERS FOR INDIVIDUAL
FREEDOM IN SUPPORT OF PLAINTIFF-APPELLEE NORSWORTHY
AND IN SUPPORT OF AFFIRMANCE OF DISTRICT COURT’S
PRELIMINARY INJUNCTION**

Appeal From The United States District Court
Northern District of California, Case No. C 14-00695 JST (PR)
Hon. Jon S. Tigar

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PURSUANT TO FED. R. APP. P. 26.1**

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INTEREST OF *AMICUS CURIAE*

Bay Area Lawyers for Individual Freedom (BALIF) is a bar association of more than 600 lesbian, gay, bisexual, and transgender (LGBT) members of the San Francisco Bay Area legal community. As the nation's oldest and largest LGBT bar association, BALIF promotes the professional interests of its members and the legal interests of the LGBT community at large. To accomplish this mission, BALIF actively participates in public policy debates concerning the rights of LGBT individuals. BALIF frequently appears as *amicus curiae* in cases, like this one, in which it can provide valuable perspective and argument on matters of broad public importance.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

When any prisoner has a serious medical need requiring medically necessary treatment, the United States Constitution requires that such care be provided. *See Estelle v. Gamble*, 429 U.S. 97, 104-105 (1976); U.S. Const. amend. VIII. This requirement applies to a transgender prisoner no less than any other prisoner.

Where, as in this case, sex-reassignment surgery (SRS) has been identified as medically necessary for a transgender prisoner, Defendants-Appellants (referred to collectively as “California Department of Corrections and Rehabilitation” or

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented through counsel in writing to amicus' submission of this brief.

“CDCR”) must provide such care. CDCR’s argument that various anticipated safety and administrative challenges prevent it from providing the SRS procedure that Plaintiff-Appellee (“Ms. Norsworthy”) needs are not compelling because CDCR can safely and effectively address those challenges relating to the SRS and post-operation placement. Safety and administrative issues that may arise following constitutionally mandated treatment for a transgender prisoner like Ms. Norsworthy should be identified and addressed. But they do not justify denial of necessary medical care to avoid such issues.

The Prison Rape Elimination Act (PREA), 42 U.S.C. §§ 15601-15609 (2003), and federal guidelines support the district court’s order directing CDCR to provide Ms. Norsworthy with the SRS procedure. PREA explicitly requires that prison officials take steps to ensure both the health and the safety of transgender prisoners. Nothing in PREA or its implementing regulations suggests that it would be appropriate to deny medically necessary treatment for Ms. Norsworthy in order to avoid CDCR’s asserted anticipated safety or administrative challenges following such treatment.

Numerous state and local systems of detention have developed policies and procedures that ensure the health and safety of transgender prisoners (whether pre- or post-SRS) while effectively balancing institutional security issues, demonstrat-

ing that safety and administrative challenges do not stand in the way of providing the procedure.

CDCR is a large and sophisticated system with extensive options to address even the most challenging security issues. It has extensive policies and procedures to ensure appropriate administration and the safety of Ms. Norsworthy and others following the provision of SRS. CDCR policies and procedures are designed to ensure prisoners' safety and institutional security during and following medically necessary treatment of all kinds. Importantly, CDCR is already housing a male-to-female transgender prisoner who has undergone SRS. CDCR's asserted safety or administrative challenges are set forth in a four-page declaration prepared for litigation purposes. They are vague and unsupported by any specific facts, data, or empirical evidence. They constitute nothing more than a pretextual and indefensible excuse for CDCR to avoid its constitutional duty to provide medically necessary care to Ms. Norsworthy.

ARGUMENT

I. THE PRISON RAPE ELIMINATION ACT (PREA) REQUIRES A CASE-BY-CASE ASSESSMENT OF TRANSGENDER PRISONERS TO ENSURE THEIR HEALTH AND SAFETY, AND DOES NOT SUGGEST THAT MEDICAL TREATMENT CAN BE DENIED DUE TO ANTICIPATED SECURITY ISSUES.

The Prison Rape Elimination Act, passed by unanimous vote in both houses of Congress in 2003, requires that prison officials take steps to ensure the health

and safety of transgender prisoners like Ms. Norsworthy. CDCR's position that "serious safety and administrative challenges concerning Ms. Norsworthy's housing placement post-operation" can justify denial of medically necessary care (Defendants-Appellants' Opening Brief ("CDCR Br.") 39-40) is directly at odds with PREA's mandates. Nothing in PREA or its implementing regulations suggests that CDCR can appropriately deny medically necessary treatment for a transgender prisoner in order to avoid anticipated safety or administrative challenges following treatment.

Congress passed PREA to address the high incidence of rape and related violence in prison facilities. *See* 42 U.S.C. § 15601 (2003). PREA's implementing regulations (28 C.F.R. Pt. 115 (2012), entitled Prison Rape Elimination Act National Standards, "PREA National Standards") mandate that when determining housing placement for any prisoner, officials must conduct an individualized, case-by-case screening to determine a safe and appropriate placement for that prisoner. *See* 28 C.F.R. § 115.42(b). The case-by-case screening must address each prisoner's "risk of being sexually abused by other inmates or sexually abusive toward other inmates." *Id.* § 115.41(a). The screening must consider specific security criteria, including: mental, physical, or developmental disability; age; physical build; criminal history; sexual orientation; previous sexual victimization; and vulnerability. *See id.* § 115.41(d).

The PREA National Standards contain several specific measures that negate CDCR's asserted safety and administrative concerns in this case. The PREA National Standards include enhanced protections for transgender prisoners and require that prison officials ensure both the health and safety for such prisoners:

In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.

28 C.F.R. § 115.42(c).

It follows that prison officials are not permitted to disregard a transgender prisoner's health needs in the name of perceived security challenges. Decisions regarding a transgender prisoner must be made on a case-by-case basis to ensure both the health and safety of the individual.

The PREA National Standards require prison officials to "use information from the risk screening to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive." *Id.*

§ 115.42(a). The regulations further provide, *inter alia*, that "[p]lacement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate," *id.* § 115.42(d), and that a "transgender or intersex inmate's own

views with respect to his or her own safety shall be given serious consideration,” *id.* § 115.42(e).

Pursuant to the PREA National Standards, and consistent with the Eighth Amendment, CDCR must take steps to ensure Ms. Norsworthy’s health by providing medically necessary treatment and to ensure her safety thereafter so long as she is incarcerated. As the district court found, in Ms. Norsworthy’s case, the provision of SRS is the “only adequate medical treatment.” (ER 34.) Any anticipated “safety and administrative challenges” to Ms. Norsworthy and others relating to her treatment and housing placement post-operation can and must be addressed by CDCR. They do not justify denying her medically necessary care.

II. DETENTION SYSTEMS THROUGHOUT THE COUNTRY, INCLUDING CDCR, ALREADY EFFECTIVELY MANAGE THEIR TRANSGENDER POPULATIONS TO ENSURE THE HEALTH AND SAFETY OF TRANSGENDER AND OTHER PRISONERS.

A. Many State and Local Detention Systems Successfully Implement Systems That Safely House Transgender Prisoners.

State and local jurisdictions throughout the country appropriately implement the PREA National Standards using policies that ensure the health *and* safety of transgender prisoners. They have been implemented in statewide prison systems like that in Washington State, in large jail systems like that in Cook County, Illinois, and in smaller jail systems like that in Cumberland County, Maine. The policies in these diverse jurisdictions differ, accounting for each system’s size,

prisoner population make-up, administrative structure, and available housing options. The common thread is each system's individualized, case-by-case determination designed to ensure the health and safety of individual transgender prisoners, as well as the security of other prisoners and the institutional setting. These systems are designed to safely house male-to-female transgender prisoners (including post-SRS) in female housing units when appropriate. Their policies and programs demonstrate the myriad options available to CDCR to provide a safe and appropriate housing placement for a transgender prisoner like Ms. Norsworthy following her SRS treatment. None of the policies suggests that it would be appropriate to deny necessary medical care for a transgender prisoner in order to avoid anticipated security or administrative challenges.

Washington State: The Washington Department of Corrections (WA DOC) policy on transgender prisoner housing determinations is embedded in the Department's broader procedures for assessing the risk of sexual victimization and/or predation of all prisoners, consistent with the PREA National Standards (28 C.F.R. Pt. 115). *See* WA DOC Policy No. 490.820, PREA Risk Assessments and Assignments (Apr. 13, 2005), *available at* <http://www.doc.wa.gov/policies/files/490820.pdf>. The WA DOC has a specific protocol for the housing of transgender prisoners, which requires consideration of placement in both men's and women's facilities. *See* WA DOC Protocol No. 02-384, Protocol for the Housing of

Transgender and Intersex Offenders (May 10, 2013), *available at* <http://www.doc.wa.gov/docs/02-384PREAprotocolhousingtransgender.pdf>. As recognized by another federal court, the WA DOC has “uneventfully” housed post-SRS male-to-female transgender prisoners in female units. *See Kosilek v. Spencer*, 889 F. Supp. 2d 190, 244 (D. Mass. 2012) (discussing placement of a post-SRS transgender woman in a Washington State women’s prison), *rev’d en banc*, 774 F.3d 63 (1st Cir. 2014). The WA DOC protocol outlines fifteen review factors, including the prisoner’s medical and mental health needs, length of incarceration, history of victimization or predation, ability to defend oneself without resorting to violence or aggression, physical resemblance to a particular gender, management or safety concerns, housing history, and the prisoner’s own input regarding his or her safety needs. *See* WA DOC Protocol No. 02-384, *supra*.

Washington D.C.: The Washington D.C. Department of Corrections (D.C. DOC) established the Transgender Housing Committee in 2009. The Committee is responsible for determining each transgender prisoner’s housing assignment on a case-by-case basis. *See* D.C. DOC Policy & Procedure 4020.3E, Gender Classification and Housing (May 1, 2014), *available at* <http://doc.dc.gov/publication/gender-classification-and-housing>. The prisoner can be housed consistent with his or her gender identity and/or genitalia, allowing for placement of a male-to-female prisoner in a female unit or a female-to-male prisoner in a

male unit, where appropriate. *Id.* at 2, 6. D.C. DOC's transgender prisoner housing policy mandates that individuals not be held in administrative segregation for more than seventy-two hours pending a housing determination; and such prisoners may be so placed in administrative segregation only if they present a heightened risk to themselves or others or they are determined to be vulnerable to victimization in any other housing setting. *Id.* at 6-7. Segregated housing placements are permitted only for as long as the heightened risk exists and must be reviewed on a regular basis. *Id.* at 7.

Cook County, Illinois: In 2011, the Cook County Department of Corrections established the Gender Identity Committee to make case-by-case housing recommendations for transgender prisoners. Male-to-female transgender prisoners are considered for placement in female housing units. *See* Cook Cnty., Ill. Interagency Directive No. 64.5.43.0, Mgmt. of Inmates with Gender Identity Disorder at 4-5 (Mar. 7, 2011), *available at* <https://www.prisonlegalnews.org/news/publications/transsexual-prisoner-management-directive-cook-county-il/>. The Committee considers the individual's housing preferences, his or her physical and psychological health records, any safety and security issues regarding either the individual prisoner or the general prisoner population, and considerations for maintaining the prisoner's dignity and respect. *Id.* A transgender prisoner may be housed in administrative segregation only when the prisoner presents a heightened

or immediate risk of harm to self or others. *Id.* at 7. Such a segregated placement is permitted only for the limited periods during which the heightened security risk exists. *Id.*

Denver, Colorado: The Denver Sheriff Department (DSD) established its Transgender Review Board in 2012. Housing decisions consider gender identity and cannot be based solely on sex at birth or genitalia, such that male-to-female transgender prisoners are considered for placement in female housing units. *See* DSD Office of Dir. of Corr./Undersheriff, Dep't Order No. 4005.1, Transgender & Gender-Variant Inmates at 6 (Jun. 6, 2012), *available at* <http://nicic.gov/library/files/026337.pdf>. The Board assesses each transgender prisoner's medical, psychological and housing needs based on his or her gender identity, adjustment to incarceration, and psychological factors that may contribute to potential victimization. *Id.* at 5. Housing decisions must be made to maximize the health and safety of the individual prisoner. *Id.* at 6. The Board may consult with an outside member of the transgender, LGBT, or allied community to assist it in forming its recommendations and the prisoner has the option of having such a representative present at the housing hearing and/or interview. *Id.* at 5. The final housing decision is made by the jail's Classification Unit, after consideration of the Transgender Review Board's recommendations. *Id.* at 6.

Cumberland County, Maine: A Transgender Review Committee must determine the housing placement of transgender prisoners within seventy-two hours of arrival at the Cumberland County Jail. Housing decisions consider gender identity and preference, not genitalia, such that male-to-female transgender prisoners are considered for placement in female housing units. Placement of transgender prisoners is decided on a case-by-case basis after considering security and safety needs, housing availability, and gender identity. The Committee considers an individual's institutional history (including any history of predation or victimization), charges, length of stay, identity preferences, medical history, and mental or physical needs. *See* Cumberland Cnty. Sheriff's Office Policy No. N-243A, Transgender Inmates (Dec. 2009).

These jurisdictions, which allow for the housing of pre- and post-SRS transgender male-to-female prisoners in female units, demonstrate that a PREA-compliant custodial system can effectively ensure the health and safety of any transgender prisoner while balancing other relevant security and administrative challenges. They demonstrate that viable options are available to CDCR.

B. CDCR Has an Extensive Security Classification System, Pursuant to Which It Is Already Housing a Post-SRS Male-to-Female Prisoner.

CDCR itself has extensive security classification procedures to determine safe and appropriate housing placements for each of its more than 129,000

inmates, including transgender prisoners. See CDCR website, *Weekly Report of Population as of Midnight May 20, 2015*, http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad150520.pdf. CDCR's classification system applies to its large and diverse prisoner population, which includes at least 385 transgender prisoners. See Howard Mintz, *California Transgender Inmates Fight for Medical Care*, San Jose Mercury, May 18, 2015. CDCR procedures are fully capable of addressing the housing needs of post-SRS transgender prisoners. There is no evidence or reason to believe that CDCR's established procedures are incapable of handling the safety or administrative challenges related to housing these individuals, including Ms. Norsworthy post-SRS. Indeed, the CDCR is already housing a post-SRS male-to-female transgender prisoner in a female facility. See Declaration of Kelly Harrington ("Harrington Decl.") (ER 135 ¶ 6).

CDCR's large size and diverse range of facilities provide many housing placement options for its prisoner population. CDCR operates 35 adult institutions, including three women's facilities. CDCR website, *Prison Facilities*, http://www.cdcr.ca.gov/Facilities_Locator/index.html; *Female Offender Programs and Services*, http://www.cdcr.ca.gov/Adult_operations/FOPS/index.html. CDCR houses prisoners at four different security levels. Cal. Code Regs. tit. 15, §§ 3375, 3377. For each CDCR prisoner, the system assesses a series of security factors,

including commitment offense, enemies and history of victimization, history of violence, security threat group affiliation, reports of prior misconduct, and history of sexual assault victimization or predation. *See id.* § 3269(a). The screening authority assesses whether each prisoner requires special housing restrictions by considering potential security issues, requests for protective custody, medical or mental health issues, and related factors. *See id.* § 3269(b). Prisoners undergo additional screening to determine if they can safely house in dorms, double-celled housing, or single-celled housing. *See id.* §§ 3269(c)-(f).

The process to provide a safe and appropriate housing placement for a post-SRS transgender prisoner is essentially no different than the process used for housing any other CDCR prisoner. CDCR's classification procedures are designed to account for each of the anticipated security challenges that CDCR asserts will be presented by Ms. Norsworthy's case. *See* CDCR Dep't Operations Manual §§ 62080.3, 62070.9.3 (procedures for prisoners undergoing and recovering from a surgical procedure); *id.* § 54046.4 (procedures for prisoners with a history of sexual assault or other form of violence); *id.* §§ 54040.5, 54046.4 (procedures for prisoners at risk of physical or sexual victimization and predation).

In fact, there are specific additional CDCR procedures for "difficult-to-house" transgender prisoners:

In cases where a[] [transgender] inmate-patient has multiple case factors which make it difficult to house them in one of the above

listed institutions, a case conference consisting of Health Care Placement Oversight Program, Classification Services Unit, California Correctional Health Care Services, and Population Management Unit staff, shall be conducted to determine the most appropriate level of care/institution suitable for housing consistent with the inmate-patient's case factors.

CDCR Dep't Operations Manual § 62080.14 ("Transgendered Inmates").

Plainly, CDCR is capable of handling the anticipated safety or administrative challenges related to housing Ms. Norsworthy post-SRS, and of ensuring both her health and safety so long as she is in CDCR's custody.

III. CDCR'S ASSERTED SECURITY ISSUES IGNORE IMPORTANT ASPECTS OF CALIFORNIA'S PRISON SYSTEM, AND ARE IN ANY EVENT ENTIRELY MANAGEABLE.

A. CDCR's Asserted Safety and Administrative Challenges Regarding Ms. Norsworthy's Post-SRS Placement Are Misleading, and in Any Event Manageable.

CDCR's position that safety and administrative challenges concerning Ms. Norsworthy's housing placement post-operation justify the denial of SRS are misleading and not credible. In any event, as explained above, the asserted security issues can be managed through CDCR's existing housing and security policies and procedures.

First, CDCR argues that if Ms. Norsworthy is provided SRS, housing her in a male facility would be unacceptable. It further argues that housing her in a female facility would "also present[] significant concerns" because she "could be targeted for assault or victimization by other inmates, or conversely,

Ms. Norsworthy might pose a threat to other inmates.” CDCR Br. 40 (citing Harrington Decl. (ER 135-136 ¶¶ 7 & 8)). Any relevant security factors following the provision of SRS can and should be addressed just as they would be for any non-transgender female prisoner in CDCR’s custody. But the security issues asserted by CDCR, contained in a vague four-page declaration, are not supported by any specific facts, data, or empirical evidence. They were not even raised until this case reached litigation. They do not justify denial of treatment for Ms. Norsworthy.

Second, CDCR ignores the substantial risks that male-to-female transgender prisoners like Ms. Norsworthy face in California’s male prisons. The reality is that in today’s prisons, including and likely especially in CDCR prisons, male-to-female transgender prisoners are at a significantly heightened risk of abuse, sexual violence, and other harms by virtue of their placement in male facilities.

Ms. Norsworthy has herself been the victim of multiple sexual assaults while housed in CDCR’s male facilities.

The disproportionate risk of sexual victimization and related abuse that male-to-female transgender prisoners face in male facilities is well established. *See* Deborah Sontag, *Push to End Prison Rapes Loses Earlier Momentum*, N.Y. Times, May 12, 2015, at A1 (citing incidents of violence and abuse against male-to-female transgender prisoners in male facilities); Sharon Dolovich, *Strategic*

Segregation in the Modern Prison, 48 Am. Crim. L. Rev. 1, 18 (2011) (noting that “trans women, who self-identify and self-present as women, become obvious targets” for sexual violence in male detention facilities); District of Columbia Off. Insp. Gen. Mgmt. Alert Report, DOC Policy on Inmate Gender Identification May Violate District Regulations at 2 (Apr. 4, 2008) (finding that male-to-female transgender prisoners “may be at heightened risk of torture or ill-treatment if they are placed in male [facilities], as such placement may put an individual at risk of physical or sexual assault”); The Sylvia Rivera Law Project, *“It’s War In Here”*: A Report On The Treatment Of Transgender And Intersex People In New York State Men’s Prisons (2007), available at <http://srlp.org/files/warinhere.pdf> (“In men’s facilities, transgender women, gender non-conforming people, and intersex people are frequent and visible targets for discrimination and violence[.]”); Christine Peek, *Comment, Breaking out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 Santa Clara L. Rev. 1211, 1248 (2004) (noting that male-to-female transgender prisoners are, “[b]y virtue of their feminine appearance and the nature of the prison hierarchy, [male-to-female] transgender inmates housed in men’s prisons disproportionately targeted for rape and other violence”).

The widespread violence against male-to-female transgender prisoners housed in California’s male prisons is particularly well documented. And it is

staggering. One study found that transgender prisoners in California's prisons are 13 times more likely to be victims of sexual assault: 59% of transgender prisoners reported having been sexually assaulted, as compared to 4.4% of a random sample all prisoners in male facilities. *See* Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, Report to the California Department of Corrections and Rehabilitation, Sacramento, CA at 3, 27 (2007). A December 2010 report, funded by CDCR, found that transgender prisoners in California's men's prisons were "exceptionally vulnerable" to physical and sexual victimization. *See* Lori A. Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 27 Justice Q. 835, 839 (Dec. 2010).

The PREA directives stem from specific findings regarding the "extremely high risk for abuse" that male-to-female transgender prisoners (whether pre- or post-SRS) like Ms. Norsworthy face when housed in male facilities. Nat'l Inst. of Corrs., Nat'l Prison Rape Elimination Commission Report ("NPREC Report") at 74 (June 2009), available at <http://www.nicic.gov/preacommission>. The NPREC Report found that men's correctional facilities have "very rigid cultures that reward extreme masculinity and aggression," and noted that "[m]ale-to-female transgender individuals are at special risk" in such facilities. *Id.* at 73.

The PREA National Standards issued in the wake of the NPREC Report thus stands in opposition to the historically dominant practice of housing transgender inmates according to their genitalia and without regard to their gender identity and other factors that may affect their safety while incarcerated. *See* Giovanna Shay, *PREA's Elusive Promise: Can DOJ Regulations Protect LGBT Incarcerated People?*, 15 Loy. J. Pub. Int. L 343, 352 (2014).

Ms. Norsworthy's post-SRS circumstances will present a simpler case than what is envisioned by the PREA National Standards. The PREA National Standards require that prison officials consider placement of a transgender prisoner in both male and female facilities through an individualized assessment; the standards thus endorse appropriate placement according to a prisoner's gender identity, even when different from his or her genitalia. *See* 28 C.F.R. § 115.42(c). In contrast, once Ms. Norsworthy has SRS, CDCR will address security factors to determine a safe and appropriate placement for her as a *female*-identifying individual with *female* genitalia.

None of this is to say that CDCR can or should ignore relevant security factors that may arise in placing Ms. Norsworthy post-SRS in a female housing unit. CDCR will identify and address relevant security factors, as it does with all prisoners in its custody. But to consider only the anticipated—and at this point, speculative—security challenges in placing Ms. Norsworthy in a female facility

after she receives SRS is to ignore the full context of her situation. Male-to-female transgender prisoners like Ms. Norsworthy are at heightened risk of abuse, sexual violence, and other harms in male facilities. Ms. Norsworthy herself has been the victims of multiple rapes and sexual assaults while housed in CDCR male prisons. (ER 134 ¶ 5; ER 307.) As the district court found, Ms. Norsworthy is also at serious risk of physical and psychological harm if denied the sex-reassignment surgery that has been determined to be medically necessary. (ER 34-36.)

CDCR's interest in ensuring the health and safety of those in its custody is not impaired, but significantly enhanced, by ensuring medically necessary treatment and by making a careful, individualized housing determination that takes into account Ms. Norsworthy's and any other institutional security needs.

B. CDCR's Asserted Security Issues Regarding the Mechanics for Arranging the SRS Procedure Are Consistent With Those That CDCR Already Manages and Do Not Support Denial of Treatment.

CDCR asserts that it cannot safely provide Ms. Norsworthy with SRS due to its "safety and security concerns presented by arranging for an inmate's transportation and hospitalization for any surgery, accommodating the inmate's immediate post-operative recovery period, and meeting the inmate's needs following significant medical interventions." Harrington Decl. (ER 135 ¶ 6). This naked assertion lacks any explanation as to how Ms. Norsworthy's transportation, hospitalization, and surgery poses a security risk that is any different than

comparable medical care provided to CDCR prisoners outside of the prison walls. *See* CDCR Dep't Operations Manual § 62080.3 (“Treatment Categories-Medical”), § 62070.9.3 (“Procedures/Responsibilities (Medical Removals)”).

CDCR's unsubstantiated assertion in this case is as flimsy as other recent attempts by CDCR to dodge its duties to provide hospital-level care to CDCR prisoners based on security challenges regarding arranging for transportation and hospitalization. In *Coleman v. Brown* (E.D. Cal., Case. No. 2:90-cv-00520), CDCR defended its practice of denying inpatient psychiatric care to San Quentin Death Row prisoners based on various security and custodial challenges, including the need for enhanced security when such prisoners are transported and provided treatment outside of San Quentin. *See Coleman v. Brown*, Docket No. 4592 at 17-18 (May 9, 2013). The *Coleman* court definitively rejected CDCR's security-related justifications for denying hospital-level care, and ordered CDCR to provide inpatient care to Death Row prisoners for whom such care was medically necessary. *See Coleman v. Brown*, No. CIV. S-90-520 LKK/DAD (PC), 2013 WL 6491529, at *9 (E.D. Cal. Dec. 10, 2013).

The court-appointed Receiver for the California prison medical care system (“Receiver”) has reported to the *Norsworthy* district court that a surgical services provider has been identified to perform the SRS procedure for Ms. Norsworthy, and entered into an agreement to complete the operation. The Receiver reported

that he has “no reason to believe that [the provider’s] surgical consultation with [Norsworthy] and any related preoperative procedures cannot occur,” and that the Receiver’s office has arranged to “assist in facilitating the information flow between [the surgery provider] and [CDCR], [Norsworthy’s] transport and the like.” *See* Receiver J. Clark Kelso’s Report to the Court Re: Pl.’s Anticipated Surgery, *Norsworthy* Docket No. 122, May 15, 2015 at 3-4.

In sum, any security concerns presented by arranging for Ms. Norsworthy’s surgery and post-operative recovery can and should be addressed like any other medical treatment provided to a CDCR prisoner.

C. Extended Use of Solitary Confinement to “Protect The Safety” of Transgender Prisoners Is Destructive and Dangerous, and It Is Well Established That CDCR Is Able to Provide Safe and Effective Alternatives to House Ms. Norsworthy Post-SRS.

CDCR also asserts that because Ms. Norsworthy is identified as requiring mental health treatment, she is precluded from being placed in administrative segregation for extended periods of time for non-disciplinary reasons (*i.e.*, “for her own safety”) pursuant to a court order in the *Coleman v. Brown* class action litigation. *See* Harrington Decl. (ER 135 ¶ 9). This fact has no bearing on the provision of medically necessary SRS to Ms. Norsworthy, nor should it be relevant to determination of her housing placement post-operation.

Although prison systems historically have used administrative segregation, or solitary confinement, as a means to protect the safety of transgender prisoners,

solitary confinement has increasingly been noted to have a “broad range of harmful psychological effects.” *See* Comm. on Causes and Consequences of High Rates of Incarceration, Nat’l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* at 187 (Jeremy Travis et al. eds., 2014); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124-256 (2003).

The *Coleman* court recently identified an alarming statistic that, between 2007 and 2012, roughly half of the suicides in California prisons’ administrative segregation units were completed by prisoners housed there for non-disciplinary reasons—that is, prisoners placed in segregation for their own “safety.” *See Coleman v. Brown*, 28 F. Supp. 3d 1068, 1097 (E.D. Cal. 2014). There is empirical evidence that segregation in CDCR prisons has especially pronounced negative effects, including suicides, for transgender prisoners. *See* Lori A. Sexton et al., *supra*, *Where the Margins Meet*, 27 *Justice Q.* at 851 (Summer 2010) (“Among the incarcerated transgender population in California, over 70% reported having had a mental health problem at some point in their lives, most of whom (66.3%) reported experiencing mental health problems since being incarcerated.”); Tammi S. Etheridge, *Safety v. Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates*, 15 *Geo. J. Gender & L.* 585, 598 (2014) (noting that “the use of protective custody to house a transgender inmate for lack of other

options is unnecessarily antagonistic” and that “the policy of placing transgender inmates in protective custody has a high risk-to-reward ratio”).

The *Coleman* court order limiting solitary confinement of prisoners like Ms. Norsworthy for “safety” reasons is not a barrier to the safe and appropriate handling of Ms. Norsworthy’s case post-operation. Quite the contrary. The *Coleman* court’s finding is an affirmation that CDCR has myriad options to ensure safe and appropriate housing for someone like Ms. Norsworthy post-operation, without resorting to the use of long-term solitary confinement. The *Coleman* court found that the placement of prisoners with mental illness in the “harsh, restrictive and non-therapeutic conditions of California’s administrative segregation units for non-disciplinary reasons for more than a minimal period necessary ... violates the Eighth Amendment.” *Coleman*, 28 F. Supp. 3d at 1099. And the court went on to find that “[t]he record suggests *several options to remedy this constitutional violation*[.]” *Id.* (emphasis added).

As detailed above, many detention systems explicitly proscribe long-term segregation of transgender prisoners. *See* Part II.A, *supra* at 6-11. The use of safe and effective alternatives to involuntary segregation of transgender prisoners is endorsed by the PREA National Standards, *see* 28 C.F.R. § 115.43, and related federal guidance. *See* U.S. Dep’t of Justice, Nat’l Inst. of Corrs., *Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex*

Persons in Custodial Settings at 8 (2013) (“Administrative segregation, and the ensuing isolation from the general population for purposes of ‘safety,’ often exacerbates mental health conditions such as depression or gender dysphoria.”).

Well-functioning, PREA-compliant correctional systems strictly limit the duration of administrative segregation for transgender prisoners who present heightened and imminent safety risks. *See* examples in Part II.A, *supra* at 6-11. Such systems rightfully focus instead on working through individual case factors to identify and effectuate safe and appropriate placements for their transgender population, ensuring both health and safety. CDCR can and must be held to the same standard.

CONCLUSION

For the foregoing reasons, the *amicus* urges this Court to affirm the judgment of the district court.

DATED: June 12, 2015

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 5,105 words as counted by the Microsoft Word 2010 word processing program used to generate the brief.

DATED: June 12, 2015

/s/ Aaron J. Fischer

Aaron J. Fischer

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