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.

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-APPELLANTS' REPLY BRIEF

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## INTRODUCTION

The district court misapplied the governing Eighth Amendment standard in this prison-medical-care case by erroneously substituting its own interpretation of what treatment the WPATH's Standards of Care may require, rather than evaluating whether the treatment afforded to Ms. Norsworthy was not only medically unacceptable but chosen in conscious disregard to an excessive risk to her health. The court rejected Defendants' reasoned medical testimony that sex-reassignment surgery is not medically necessary for Ms. Norsworthy on the basis that their opinions were "inconsistent with" and purportedly "misrepresent" and "misapply" the WPATH Standards of Care. This was error.

The Standards of Care themselves admit significant flexibility in the treatment of gender dysphoria. *See Kosilek v. Spencer*, 774 F.3d 63, 87, 89 (1st Cir. 2014) (en banc). While certain individuals may benefit from sex-reassignment surgery, it is a separate question, left to medical professionals, whether such surgery is medically necessary in an individual case. The district court erroneously substituted its own interpretation of medical necessity, and failed to heed longstanding case law that differences of medical opinion do not establish deliberate indifference to medical needs, and that inmate-plaintiffs are not entitled to the treatment of their choice.

Even if questions remained about Ms. Norsworthy's alleged urgent need for surgery, the district court should not have entered a mandatory preliminary injunction granting all of the relief that Ms. Norsworthy seeks, based on a limited and disputed record that involved no live testimony or expert discovery. In doing just that, the district court essentially granted summary judgment on a record replete with material factual disputes, under the guise of a preliminary injunction.

Where key factual disputes predominate, a court should hold an evidentiary hearing before granting injunctive relief, and a mandatory preliminary injunction should not issue unless the movant shows a clear entitlement to that relief. Because the district court disregarded these important limitations, this Court should reverse the order granting permanent sex-reassignment surgery.

## ARGUMENT

### I. THE PRELIMINARY INJUNCTION IS IMPROPER AS A MATTER OF LAW BECAUSE THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARD.

#### A. The District Court Substituted the WPATH's Standards of Care for the Deliberate-Indifference Standard.

As Defendants demonstrated in the opening brief, the WPATH's Standards of Care, while they may be considered, are not the constitutional

litmus test for Eighth Amendment deliberate-indifference claims; instead, the proper constitutional inquiry is whether the treatment afforded to Ms. Norsworthy (including transgender evaluation, mental-health treatment, and hormone therapy) was deliberately indifferent to a substantial risk of harm under the Constitution. (Opening Br. 23-25.) 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). Ultimately, "[t]he Constitution is not a medical code that mandates specific medical treatment." *Jackson v. Kotter*, 541 F.3d 688, 697 (7th Cir. 2008) (citation omitted); *see also Jackson v. Fair*, 846 F.2d 811, 817 (1st Cir. 1988) ("Although the Constitution does require that prisoners be provided with a certain minimum level of medical treatment, it does not guarantee to a prisoner the treatment of his choice.").[1]

[1] The WPATH's amicus curiae brief on appeal contends that "[its] Standards of Care unequivocally apply to all institutionalized individuals," citing its own guidelines. (WPATH Br. 12.) But this does not answer the question of what treatment the *Constitution* requires prison officials to provide to inmates. *See Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (under the deliberate-indifference standard, an inmate-plaintiff must establish that prison officials deprived her of the "minimal civilized

(continued…)

Ms. Norsworthy counters that Defendants somehow waived this issue below, but the record reflects otherwise. (Answering Br. 36-37.) Defendants consistently urged the district court that the governing standard is the deliberate-indifference test, rather than adherence to some interpretation of the WPATH guidelines. (CD 73, ER 361-68.)[2] Defendants emphasized that "the issue at hand is whether Defendants were deliberately indifferent to Norsworthy's medical needs, *not what the WPATH Standards of Care dictate*." (CD 88, ER 323-24 (emphasis added).) In light of this, the district court's conclusion that Defendants did not challenge the WPATH's guidelines as the only accepted standards of care is dubious, at best. (CD 94, ER 26.) There was no waiver. *Cf. Grocery Outlet Inc. v. Albertson's Inc.*, 497 F.3d 949, 951 (9th Cir. 2007) (holding that appellant waived challenge to applicable legal standard "by adopting the clear and convincing standard in its briefing in the district court").

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measures of life's necessities'") (citation omitted). Moreover, "state prison authorities have wide discretion regarding the nature and extent of medical treatment." *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986), *overruled on other grounds by Peralta v. Dillard*, 774 F.3d 1076, 1083 (9th Cir. 2014) (en banc).

[2] For consistency, Defendants-Appellants' Further Excerpts of Records are numbered consecutively to the Excerpts of Record and maintain the ER prefix.

Ms. Norsworthy's contention that the district court did not substitute the WPATH Standards for the deliberate-indifference standard is belied by the record. In fact, Ms. Norsworthy argues that the district court was justified in finding Defendants deliberately indifferent in part because of their "failure to comply with the Standards of Care," and in dismissing the medical opinions of Drs. Coffin and Levine because they purportedly "deviated from the Standards of Care" and "misapplied" these professional guidelines. (Answering Br. 24, 37-38.) It is clear that the district court rejected the reasoned medical opinions of Drs. Coffin and Levine because their opinions purportedly conflicted with the Standards of Care. (CD 94, ER 31, 34.) It also rejected Defendants' argument that the balance of hardships tips in their favor, again based on its reading of the Standards of Care. (*Id.* ER 36.)

Had the district court applied the correct Eighth Amendment standard, Ms. Norsworthy's preliminary-injunction motion would have been denied. The record demonstrates that Ms. Norsworthy has been successfully treated for gender dysphoria for over fifteen years, helping Ms. Norsworthy successfully consolidate her gender identity and alleviate her mental distress. (CD 10, ER 251 ¶ 20; CD 76, ER 118:15-119:3, 124:4-5.) Her own medical expert, Dr. Randi Ettner, acknowledged that she currently experiences at

most mild symptoms of depression. (CD 63, ER 216 ¶¶ 69-70.) Yet, without an evidentiary hearing, the district court concluded that prison officials improperly relied on Dr. Coffin's opinion about Ms. Norsworthy's treatment needs, and instead found that the opinion of Dr. Reese, another CDCR psychologist, was entitled to dispositive weight. (CD 94, ER 26.)[3] But as Dr. Levine pointed out, Dr. Reese gave no substantive, detailed explanation supporting his recommendation for surgery. (CD 78, ER 300). In this context, "[p]rison officials are wise to not simply accept one clinician's opinion without articulated compelling reasons." (CD 78, ER 299 (under seal)). Even crediting Dr. Reese's cursory progress notes, a difference of medical opinion cannot support an Eighth Amendment claim. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004).

Further, contrary to Ms. Norsworthy's contention, (Answering Br. 30-31), no appellate decision holds that prison medical staff are deliberately indifferent when they decline to prescribe a specific treatment, provided that

[3] In her answering brief, Plaintiff implies that Dr. Reese was removed from her care because he recommended surgery. (Answering Br. 8.) But the record cited does not support Plaintiff's inference. (CD 69, SER 083, *cited by* Answering Br. 8.) Further, Dr. Reese—who has retired from CDCR—provided no declaration below, and the parties were unable to secure his participation in the proceedings. (CD 48, ER 46; CD 92, ER 51.5:18-51.6:22.)

other treatments are available to address the medical condition. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (noting that "society does not expect that prisoners will have unqualified access to health care"). On the contrary, the case law holds that the Constitution does not require a particular treatment. *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (emphasizing that an inmate who stated an Eighth Amendment claim "does not have a right to any particular type of treatment, such as estrogen therapy"); *Praylor v. Texas Dep't of Crim. Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (per curiam) (collecting cases and noting that other circuits "have concluded that declining to provide a transsexual with hormone treatment does not amount to acting with deliberate indifference to a serious medical need").

*Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) and *De'Lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013) do not undermine this principle. *Fields*, which struck down a state statute prohibiting the use of state funds to pay for hormone therapy or sex-reassignment surgery, merely holds that prisons may not ban certain treatments without evidence that other available treatments are effective. *Fields*, 653 F.3d at 555-56. And *De'Lonta* merely held that, liberally construed, a transgender inmate's complaint stated a plausible Eighth Amendment claim, while again emphasizing that "a

prisoner does not enjoy a constitutional right to the treatment of his or her choice." *Id*. at 526.

### B. Contrary to Amicus ACLU's Assertion, Defendants Do Not Urge Application of a Different Eighth Amendment Standard to the Claims of Transgender Inmates.

Amicus ACLU incorrectly contends that Defendants urge a "transgender exception to the Eighth Amendment." (ACLU Br. 22.) Notably, the ACLU does not cite any portion of Defendants' opening brief in this Court, or any of Defendants' pleadings below, to support this assertion. (*Id.*) Amicus nevertheless contends that "the State asked the district court to adopt 'a distinct standard for the treatment of gender dysphoria," relying on a truncated and edited statement from the district court's order denying Defendants' request to stay its preliminary injunction pending appeal. (*Id.*) In fact, the district court's statement on this point reads: "Defendants' argument that CDCR need not provide SRS to patients with gender dysphoria . . . *suggests* a distinct standard for the treatment of gender dysphoria, and has not yet been addressed by the Ninth Circuit." (CD 94, SER 3 [emphasis added].) Amicus's truncated citation misrepresents the district court's order to further its strained reading of the

record.[4] As the record demonstrates, Defendants repeatedly urged the district court that widely recognized Eighth Amendment principles in the prison context warranted denial of Ms. Norsworthy's request for surgery. (CD 73, ER 361-63 [setting out the deliberate indifference standard].) Defendants' opening brief likewise explains that the "district court misapplied the Eighth Amendment's deliberate-indifference standard." (AOB 23-32.)

Amicus ACLU further argues that the extensive treatment provided to Ms. Norsworthy does not foreclose her claim for surgery. (ACLU Br. 28.) This misses the point. The correct legal inquiry is whether sex-reassignment surgery is *constitutionally required* for her particular situation, given that she has received extensive treatment over the past fifteen years and this treatment has alleviated her gender dysphoria. In other words, at issue is whether prison officials can be found to be deliberately indifferent to a serious medical need when they provide extensive treatment—which here, Ms. Norsworthy agrees has effectively helped to relieve her gender

[4] Amicus further asserts that Dr. Levine "suggested" that "it would '*never* be medically prudent to provide SRS to an inmate.'" (ACLU Br. 27 n.7.) Amicus does not cite any portion of Dr. Levine's report so asserting. (*Id.*) And the district court's selective reading of Dr. Levine's report is belied by the report itself. At no point in his report does Dr. Levine posit that sex-reassignment surgery should *never* be provided to an inmate.

dysphoria—but decline to provide treatment that medical staff do not find medically necessary. (CD 76, ER 124:2-9.) They cannot.

"Under the Eighth Amendment, [an inmate] is not entitled to demand specific care" or even "entitled to the best care possible." *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997). As the Supreme Court noted, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844. In the context of gender dysphoria, the First Circuit rejected a claim that the Eighth Amendment mandated that prison officials provide surgery. *Kosilek*, 774 F.3 at 90 ("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' or to require that the [Department of Corrections] adopt the more compassionate of two adequate options.").[5]

[5] The First Circuit left open the possibility that a different result might obtain where a party "engage[s] in a frenzy of serial consultations aimed at finding the one doctor out of a hundred willing to testify that SRS was not medically necessary." 774 F.3d at 90 n.12. Here, there was no evidence of such an attempt to find such an opinion.

Finally, Amicus ACLU invites this Court to disregard this established case law and—like Ms. Norsworthy—seeks to impose the WPATH guidelines as the applicable legal standard. (ACLU Br. 23-27.) Opinions of professional organizations "may be helpful and relevant with respect to some questions, but 'they simply do not establish the constitutional minima; rather they establish goals recommended by the organization in question.'" *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981). Notably, amicus cites nary a case involving Eighth Amendment claims to support its argument in this regard, instead relying on case law regarding the death penalty or the Environmental Protection Act. (ACLU Br. 14-16.) The only remotely relevant case cited is *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563 (6th Cir. 2013), which involved the rights of pretrial detainees during labor and delivery. That case merely cited standards from two professional medical organizations as further support for the judiciary's "universal consensus" that there is a qualified right—subject to security concerns—to be free from shackling during labor. *Id.* at 572-74. It did not rely on the organizations' standards to establish the constitutional baseline. *Id.*

In sum, the district court went astray by substituting the WPATH standard for the constitutional test, and this error warrants reversal.

## II. THE DISTRICT COURT ERRED BY AFFORDING MS. NORSWORTHY COMPLETE RELIEF ON A DISPUTED RECORD RATHER THAN ALLOWING DISCOVERY AND A FULL EVIDENTIARY HEARING.

The district court granted Ms. Norsworthy all the relief she sought through its preliminary injunction. This was error. If the district court intended to grant Ms. Norsworthy the full extent of the relief she requested, there were various other options. For example, the court could have advanced the trial on the merits with the hearing on the preliminary injunction, under Federal Rule of Civil Procedure 65(a)(2). This would have informed the parties about the court's intention, and allowed them to conduct full discovery, including expert discovery and depositions. *Univ. of Tx. v. Camenisch*, 451 U.S. 390, 395 (1981) (noting that courts proceeding under Rule 65(a)(2) should give the parties "clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases") (citation omitted).

In *Airline Pilots Association International v. Alaska Airlines, Inc.*, 898 F.2d 1393 (9th Cir. 1990), the district court denied the plaintiffs' request for injunctive relief, and, finding no disputed issues of fact, entered summary judgment against them. This Court reversed, holding that the district court erred in converting the preliminary-injunction proceedings into summary

judgment without notice to the parties. *Id.* at 1397. This was error because "the case would almost certainly benefit from further discovery." *Id.* The district court below also erred by using preliminary-injunction proceedings to finally resolve the case, without any proper means to adjudicate disputed facts. *See U.S. v. Owens*, 54 F.3d 271, 277 (6th Cir. 1995) (reversing district court order converting preliminary injunction into permanent one without allowing opposing party "to conduct additional discovery and present his version of the facts at an evidentiary hearing").

### A. Where Factual Disputes Predominate, District Courts Must Conduct an Evidentiary Hearing Before Granting Injunctive Relief.

Because factual disputes abounded in the parties' briefing, the district court should have held an evidentiary hearing. Ms. Norsworthy claims that Defendants waived this argument by not requesting an evidentiary hearing. (Answering Br. 42.) That argument is baseless. Defendants' opposition expressly noted that "the record has not been sufficiently developed to address complex factual and medical questions as well as reasonable safety concerns by prison administrators" concerning the relief Ms. Norsworthy sought. (CD 73, ER 136.4.) Defendants further emphasized this deficiency at oral argument. (CD 92, ER 51.12:9-11.) And there is no question that the district court was aware of the objection. (CD 92, ER 51.4:4.) Thus, the

case law Ms. Norsworthy cites regarding waiver where a party did not request further factual development is inapposite. *See Jacobson & Co., Inc. v. Armstrong Cork Co.*, 548 F.2d 438, 442 (2d Cir. 1977) (holding that party waived argument that the district court should have held an evidentiary hearing by not so arguing below). The bottom line is that the district court clearly understood Defendants' objection.[6] In *Thomas v. County of Los Angeles*, this Court reversed a preliminary injunction where the parties submitted opposing declarations and counter-declarations, and the district court did not hold an evidentiary hearing to resolve the factual disputes. 978 F.2d 504, 509 (9th Cir. 1992). "When the district court imposes a preliminary injunction on a state agency, a strong factual record is necessary," this Court noted. *Id.* at 508.

Moreover, because the district court's injunction here is irreversible, it is tantamount to a permanent injunction. In that context, courts *must* conduct evidentiary hearings unless the adverse party has waived its right to a hearing or the facts are undisputed. "Generally the entry or continuation of an injunction requires a hearing. Only when the facts are not in dispute, or

[6] In fact, Defendants requested a *Daubert* hearing on all witnesses if the district court was inclined to consider Ms. Norsworthy's motion to strike the expert report of Dr. Levine, a request that the district court did not address. (CD 88, ER 328.)

when the adverse party has waived its right to a hearing, can that significant procedural step be eliminated." *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988) (citation omitted). The Sixth Circuit likewise holds that "[n]ormally, an evidentiary hearing is required before an injunction may be granted." *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983). In a similar context—the remedy phase of an antitrust trial—another circuit has noted that "[i]t is a cardinal principle of our system of justice that factual disputes must be heard in open court and resolved through trial-like evidentiary proceedings." *United States v. Microsoft Corp.*, 253 F.3d 34, 101-03 (D.C. Cir. 2001) (per curiam). In this regard, this Court "will not lightly imply a waiver of the right to be heard." *Charlton*, 841 F.2d at 989.

The cases cited by Ms. Norsworthy highlight the district court's error below. As this Court has previously held, where there are sharply disputed facts and "little time would be required for an evidentiary hearing, proceeding on affidavits alone might be inappropriate." *Int'l Molders' & Allied Workers' Local v. INS*, 799 F.2d 547, 555 (9th Cir. 1986). In that case, this Court determined that an evidentiary hearing was not warranted because the case turned on "the application of correct substantive law" to the facts, rather than a factual dispute. *Id.* By contrast, an evidentiary hearing should be held where, as here, there are disputed factual issues, resolution of

those factual disputes will impact the outcome, and the witnesses are readily available. *Aguirre v. Chula Vista Sanitary Serv. & Sani-Tainer, Inc.* 542 F.2d 779, 781 (9th Cir. 1976) (per curiam).

### B. Material Factual Disputes Abound in this Case.

There are numerous factual disputes in this case, all of which impact key legal issues, and thus, the district court should have held an evidentiary hearing to resolve them. These factual disputes include: 1) Ms. Norsworthy's contention that CDCR has a "blanket policy" against providing sex-reassignment surgery; 2) Dr. Levine's expertise and expert report; and 3) other issues, including Ms. Norsworthy's delay in requesting sex-reassignment surgery, and the qualifications of her expert witnesses. Ultimately, all of these issues impact the analysis of whether Defendants were deliberately indifferent to Ms. Norsworthy's serious medical needs.

#### 1. CDCR does not have a blanket policy prohibiting sex-reassignment surgery.

The district court determined, based on incompetent testimony and a prison manual lacking the force of law, that CDCR has a blanket policy

against providing sex-reassignment surgery. (CD 94, ER 32.) But the evidence of such a blanket policy was questionable, at best.[7]

California prison regulations allow all inmates access to an evaluation, diagnosis, and necessary treatment. (CD 77, ER 91-94.) Any medically necessary procedure "may be provided" if prescribed and authorized as clinically necessary. Cal. Code Regs. tit. 15, § 3350.1(d). Under California law, certain medical procedures, including vaginoplasty, are provided on the basis of medical need. *Id.* This regulation was enacted to ensure that all inmates receive consistent and standardized health-care services based on medical necessity. (CD 77, ER 91-93.) It was approved by the federal court in *Plata v. Schwarzenegger*, No. C01-1351-TEH (N.D. Cal.), which has oversight over CDCR's medical care. (CD 77, ER 91-93.)

In rejecting this authority, the district court relied on the CDCR's Department Operations Manual, section 91020.26. (CD 94, ER 33.) But that manual, unlike the California regulation, lacks the force of law. In fact, the Department Operations Manual, section 12010.6, expressly provides that

[7] Ms. Norsworthy's answering brief asserts, without citation, that Defendants do not challenge the district court's "blanket policy" conclusion. (Answering Br. 30.) Contrary to Ms. Norsworthy's argument, Defendants' Opening Brief sets forth the actual policy governing surgery, including title 15, section 3350.1 of the California Code of Regulations. (Opening Br. 7-8.)

title 15 of the California Code of Regulations governs all of CDCR's institutions and programs. Thus, section 3350.1 supersedes the CDCR manual.

The district court also relied on the testimony of Dr. Lori Kohler (CD 94, ER 32), who has not worked with CDCR's transgender program in years, and whose testimony does not support the district court's blanket-policy finding. Dr. Kohler testified that she "had no dealings with the Department as a whole" regarding transgender issues, but instead only with the transgender program at one institution, the California Medical Facility. (CD 67, SER 28 at 42:25-43:4.) Specifically, she testified that "there were no Department-wide policies that stated [that sex- reassignment surgery was unavailable] that I was aware of." (*Id.* SER 28 at 43:6-7.) And she has not "been involved in transgender care for the CDCR for a few years." (CD 76, ER 356:25 to 357:5.) When asked about CDCR's *current* policy regarding surgery, Dr. Kohler replied, "I haven't looked at the CDCR latest policy in a while. I'm not certain whether it excludes surgery specifically." (*Id.* ER 353:4-13.) More specifically, she is not aware of *any* written policy within CDCR stating that sex-reassignment surgery was not available. (*Id.* ER 353:14-24.)

At a minimum, this factual dispute warranted further factual development or an evidentiary hearing.

**2. Dr. Levine provided credible, substantial, and unrebutted testimony, and the district court should not have made an adverse credibility finding without holding an evidentiary hearing or allowing further discovery.**

The district court also improperly rejected the reasoned and unrebutted medical opinion of Defendants' expert, Dr. Stephen Levine. Ruling on the papers and without affording Dr. Levine any opportunity to respond to the district judge's particular concerns about his expert opinion, the district court found his testimony not credible. (CD 94, ER 28.) As explained below, this was error.

Dr. Levine is a highly qualified, licensed psychiatrist, who has been a member of the American Psychiatric Association since 1971, and has written extensively on psychiatric issues and sexual functioning. (CD 78, ER 288; CD 51, ER 378-90.) Dr. Levine was a member of the Harry Benjamin International Gender Dysphoria Association (the precursor to the World Professional Association for Transgender Health (WPATH)), and was chairman of its Standards of Care Committee in 1997-98, when he helped to author the previous version of the WPATH's Standards of Care that the district court considered here. *Kosilek v. Spencer*, 774 F.3d 63, 77 (1st Cir.

2014) *cert. denied sub nom. Kosilek v. O'Brien*, 135 S. Ct. 2059 (2015); *Kosilek v. Spencer*, 889 F. Supp. 2d 190, 227 (D. Mass. 2012), *rev'd*, 774 F.3d 63 (1st Cir. 2014) (noting that Dr. Levine has evaluated well over 300 individuals with gender-identity disorders and recommended sex-reassignment surgery for approximately 24 patients). He was retained as the district court's independent expert in the seminal case involving transgender inmate care, *Kosilek*.

After Dr. Levine reviewed Dr. Coffin's report, Ms. Norsworthy's medical and mental-health records, and conducted an independent mental examination of her, he concluded that sex-reassignment surgery was not medically necessary for Ms. Norsworthy in 2012-13. (ER 298-99.) 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*.) Based on this review, Dr. Levine concluded that Ms. Norsworthy's situation does not present a case where immediate sex-reassignment surgery is medically necessary. (CD 78, ER 308-10.) Notably, Ms. Norsworthy did not submit a rebuttal to Dr. Levine's report, although the discovery order permitted her to do so. (CD 48, ER 46.)

Despite Dr. Levine's thorough preparation, expertise, and his detailed report, the district court concluded that his opinions were not credible for

three primary reasons: 1) he allegedly misrepresented the Standards of Care; 2) his report purportedly relied "on generalizations about gender dysphoric prisoners rather than an individualized assessment of Norsworthy;" and 3) his report allegedly contained "illogical inferences" and references to a "fabricated anecdote." (CD 94, ER 28.) Ostensibly recognizing the complex evidentiary issues in Dr. Levine's expert opinion, the district court allowed Ms. Norsworthy to file, in contravention of the local rules, a fifteen-page motion to strike his testimony.[8] (CD 83, ER 43-44; CD 80, ER 331-49.)

Relying on its own interpretation of the Standards of Care, the district court concluded that Dr. Levine misinterpreted the Standards to require an individual to have twelve months of real-life experience in *society* living in his or her preferred gender, rather than twelve months in prison (which Dr.

[8] Defendants did not have the same opportunity to file full evidentiary objections to Ms. Norsworthy's experts, and instead, per the Northern District's Civil Local Rules, incorporated these into their opposition papers. N. D. Civ. L. 7-3(c). Courts in the Northern District regularly strike separate evidentiary objections that violate this rule. *See, e.g., Hennighan v. Insphere Ins. Solutions, Inc.*, 38 F. Supp. 3d 1083, 1094-95 (N.D. Cal. 2014); *R.H. v. Los Gatos Union Sch. Dist.*, 33 F. Supp. 3d 1138, 1152 & n.8 (N.D. Cal. April 2, 2014) ("To permit these separately-filed objections here would allow Defendants to make an end run around the page limits set forth in the local rules."). But the district court denied Defendants' motion to strike. (CD 83, ER 43-44.)

Levine agreed Ms. Norsworthy completed). (CD 94, ER 28.) This issue is a matter of professional medical interpretation. The Standards specifically require twelve months "living in a gender role that is congruent with the patient's identity." (CD 10-1, SER 162.) The purpose of this requirement is to "provide[] ample opportunity for patients to experience and socially adjust in their desired gender role, before undergoing irreversible surgery." (*Id.*) The Standards further note that "[c]hanging gender role can have profound personal and social consequences, and the decision to do so should include an awareness of what the familial, interpersonal, educational, vocational, economic, and legal challenges are likely to be." (*Id.*) As Dr. Levine pointed out, prisoners "live in a unique cultural setting," and "they have no comparable opportunity to live in free society, interact with family, friends, and co-workers and to manage independent living." (CD 78, ER 293.) This deficiency was particularly glaring given Ms. Norsworthy's then-imminent parole.[9]

[9] A panel of the Board of Parole Hearings has since provisionally granted Ms. Norsworthy parole. *See* http://www.cdcr.ca.gov/BOPH/docs/PSHR/PSHR_Month_of_May_2015.pdf (last visited June 11, 2015). This provisional grant is subject to review by the full Board of Parole Hearings and the Governor. Cal. Penal Code §§ 3041(b), 3041.2.

In fact, the Standards themselves note that they "are intended to be flexible in order to meet the diverse health care needs of transsexual, transgender, and gender-nonconforming people." (CD 10-1, SER 126.) Indeed, courts recognize that the WPATH guidelines are flexible, and are not the *sine qua non* for treating transgender inmates. *Druley v. Patton*, 601 Fed. Appx. 632, 635 (10th Cir. 2015) (noting that the WPATH Standards of Care are intended to be "flexible"); *Arnold v. Wilson*, No. 13cv900, 2014 WL 7345755, at *6 (E.D. Va. Dec. 23, 2014) ("Given that the WPATH Standards acknowledge that treatment should be individualized and tailored to a specific individual's situation, [defendant's] flexible interpretation of the treatment standards does not constitute deliberate indifference,").

As the Standards explain, "[T]he criteria put forth in this document for hormone therapy and surgical treatments for gender dysphoria are clinical guidelines; *individual health professionals and programs may modify them*." (CD 1, SER 126 (emphasis added).) Given Dr. Levine's extensive expertise with transgender individuals—and his role as Chairman for the 1997-98 Committee drafting a previous version of the Standards of Care— the district court exceeded its role in substituting its own non-medical interpretation of the Standards for that of Dr. Levine's.

This is the same mistake that the district court made in *Kosilek*. There, the district court rejected expert testimony that real-life experience in the desired gender role could not occur in prison, finding this view "medically imprudent." *Kosilek*, 774 F.3d at 87. The First Circuit rejected this finding, holding that, "the court made a significantly flawed inferential leap: it relied on its own—non-medical—judgment about what constitutes a real-life experience to conclude that [an expert's] differing viewpoint was illegitimate or imprudent." *Id.* at 88. Ultimately, as that court noted, "Prudent medical professionals . . . do reasonably differ in their opinions regarding the requirements of a real-life experience—and this reasonable difference in medical opinions is sufficient to defeat [the inmate-plaintiff's] argument." *Id.* If the district court in *Kosilek* could not properly reject a reasoned medical opinion on this issue after years of litigation and a bench trial, then the district court here could not do so on the papers, without the benefit of Dr. Levine's deposition or an evidentiary hearing on his expert opinion.[10]

[10] Contrary to Ms. Norsworthy's argument, she did not propose that the *parties* conduct expert depositions. (Answering Br. 41.) Instead, she sought the deposition of Defendants' expert, and at no point offered to allow depositions of her own proposed experts. Ms. Norsworthy's cite to SER 116 provides no support for her contention, since it pertains to a request for Dr.

(continued…)

The district court also deemed Dr. Levine not credible based on his collateral reference to an inmate "who has had SRS while in custody," deeming this a "fabricated anecdote." (CD 94, ER 28-29.) Dr. Levine's report referred to "one inmate in the US who has had SRS while in custody." (ER 293.) The court's order stated that Dr. Levine backtracked from this statement, (CD 94, ER 30), but the record does not support this—instead, Dr. Levine clarified that no inmate had received sex-reassignment surgery *at CDCR*. (SER 116.) As the record reflects, an inmate *currently* in CDCR custody received sex-reassignment surgery "before her arrival to CDCR." (CD 75, ER 135 ¶ 6.)

In any event, the district court did not explain how this one statement undermined Dr. Levine's assessment of Ms. Norsworthy's mental health and purported medical need for surgery. The district court's reliance on this statement to find Dr. Levine not credible is flimsy, at best. These factual

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(…continued)
Levine's draft report notes. Regardless, the scheduling order did not provide for expert depositions, a trial, or an evidentiary hearing, but simply the exchange of expert reports. (CD 48, ER 46-47.) Defendants understood that if the district court needed to resolve factual disputes or make credibility determinations to decide the motion for a preliminary injunction, then it would also need to provide an opportunity for live testimony and full expert discovery. (Opening Br. 36-38 (citing Fed. R. Civ. P. 65(a)).) Neither occurred.

disputes underscore the need for further factual development, and the district court's concomitant obligation to conduct an evidentiary hearing. *See Kosilek*, 774 F.3d at 89 n.11 (reversing district court order granting transgender inmate's request for surgery, and noting that district judge should not have substituted its own interpretation of the WPATH Standards for those of its independent expert, Dr. Levine).

**3. Other key factual issues were disputed, including Ms. Norsworthy's delay in seeking injunctive relief, and the qualifications of her proffered experts.**

As Ms. Norsworthy's deposition testimony confirmed, she did not submit a request for sex-reassignment surgery until this litigation commenced, (CD 76, ER 130:17-131:5), despite the fact that she has received treatment for her gender dysphoria since 2000. (CD 94, ER 5-6.) Although she submitted an earlier grievance in 2012 regarding her treatment, the impetus for this grievance was her then-recent knowledge that the *Kosilek* district court had ordered sex-reassignment surgery for the Massachusetts inmate-plaintiff there, rather than any change in her medical condition. (CD 76, ER 106; CD 76, ER 128:20-129:22.) This weighed strongly against granting her immediate injunctive relief. *Oakland Tribune, Inc. v. Chronicle Publ. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985)

("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.").

The district court also relied extensively on the opinions of Ms. Norsworthy's experts, without allowing for their depositions or other factual discovery—in fact, the scheduling order only allowed for exchange of expert reports. (CD 48, ER 45-47.) And the court disregarded Defendants' request for further discovery, including a *Daubert* hearing, on Ms. Norsworthy's experts. (CD 73, ER 136.6 n.7; CD 88, ER 328.)

Despite the lack of cross-examination of their opinions, the district court predicated much of its injunction on Ms. Norsworthy's experts.[11] For example, the court relied on Dr. Ettner's declaration to find that Ms. Norsworthy met the WPATH's requirement that she have two "independent clinical evaluations recommending SRS." (CD 94, ER 36.) The court further rejected the conclusion of the CDCR's in-house psychologist and its court expert regarding the medical necessity of sex-reassignment surgery,

[11] Paradoxically, the district court's extensive reliance on Ms. Norsworthy's experts came despite the fact that only one of them (Dr. Ettner) actually met with Ms. Norsworthy. (Opening Br. 15-17.) On the other hand, the court derided the conclusions of Dr. Coffin and Dr. Levine because they "met [Ms.] Norsworthy on one occasion and can hardly be described as the health care professionals 'most familiar with her care.'" (CD 94, ER 37.)

finding it "convincingly refuted by Plaintiff's experts" (CD 94, ER 34), even though none of these experts responded to Dr. Levine's report, Dr. Nick Gorton (an emergency-room physician) is not trained to make psychological evaluations (CD 64, ER 191 ¶ 2, 191-92 ¶¶ 2-14), and Dr. Marci Bowers gave no testimony about Ms. Norsworthy's specific circumstances and did not opine that sex-reassignment surgery is medically necessary for her (CD 65, ER 185-89).

## III. MS. NORSWORTHY DID NOT DEMONSTRATE THAT SHE FACED IMMEDIATE THREATENED INJURY WITHOUT MANDATORY PRELIMINARY INJUNCTIVE RELIEF.

As the opening brief showed, the district court erred in granting mandatory injunctive relief despite the fact that Ms. Norsworthy did not show that she faced immediate threatened injury. The case law is 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). "Speculative injury" does not meet this stringent requirement. *Id.* And because Ms. Norsworthy sought a mandatory injunction, her burden was higher. "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) (internal citation omitted).

On appeal, Ms. Norsworthy does not address this case law at all. (Answering Br. 39-40.) Instead, she relies on *McNearney v. Washington Department of Corrections*, No. C11-5930 RBL, 2012 WL 3545267, at *14 (W.D. Wash. June 15, 2012), an inapposite unpublished decision granting injunctive relief in the form of a referral to an outside ankle specialist for an evaluation. (Answering Br. 40.) Whatever the merits of the district court's injunction in *McNearney*, referral to a specialist for evaluation of an ankle injury is far removed from the injunction issued here, requiring that prison officials provide sex-reassignment surgery to an inmate despite contrary evidence regarding its medical necessity.

Lastly, although Ms. Norsworthy contends that she faced irreparable harm, she does not point to any evidence that she will suffer immediate threatened injury unless she receives surgery *on an expedited basis*. Instead, she reiterates her arguments about her mental distress, which her own expert describes as "mild symptoms of depression" and "generalized anxiety." (CD 63, ER 216 ¶¶ 69-70.) And these symptoms are being addressed by the prison's medical and mental-health staff. Any argument that Ms. Norsworthy urgently needs surgery is undermined by the fact that she has

received treatment for her gender dysphoria for fifteen years, and points to no sudden reason why this treatment is now inadequate. Notably, she did not request sex-reassignment surgery through the prison's internal grievance process until after this litigation was filed, even though she has previously used this procedure to seek various other treatments. (CD 76, ER 130:17-131:5.)

## IV. THE DISTRICT COURT'S ORDER FAILS TO ACCOUNT FOR SERIOUS SECURITY CONCERNS.

### A. The District Court Erred by Disregarding Unrebutted Testimony Regarding the Impact on Safety that Its Injunction Would Cause.

The district court also exceeded its authority in entering a mandatory injunction without giving due deference to prison officials' assessment of the security concerns that its injunction presented.

Under the Prison Litigation Reform Act (PLRA), federal courts must "give substantial weight to any adverse impact on public safety or the operation of the criminal justice system" that an injunctive relief order causes. 18 U.S.C. § 3626(a)(1). The case law teaches that, "when balancing the obligation to provide for inmate and staff safety against the duty to accord inmates the rights and privileges to which they are entitled, prison officials are afforded 'wide-ranging deference.'" *Norwood v. Vance*, 591

F.3d 1062, 1069 (9th Cir. 2010) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).

The unrebutted evidence demonstrated that providing sex-reassignment surgery will pose serious safety and administrative challenges for Ms. Norsworthy's housing placement post-operation. On the one hand, if Ms. Norsworthy obtains reassignment surgery, housing her in an all-male prison would increase the risk that she will be targeted for violence, including assault and rape. (CD 75, ER 135 ¶ 7.) Conversely, housing her in an all-female prison might present safety risks to both Ms. Norsworthy and other inmates, particularly given her prior history of assaultive behavior against her former girlfriend. (*Id.* ER 135-36 ¶ 8.) California prison officials have experienced these challenges with another male-to-female transgender inmate who received sex-reassignment surgery before that inmate was incarcerated in this state. (*Id.* 135 ¶ 6.) That other inmate has been involved in several threats and assaults with other female inmates, and has been frequently transferred between women's prisons and administrative segregation. (*Id.*) From a clinical perspective, Dr. Levine also pointed out the difficulties that post-operative transgender inmates face in prison. (CD 78, ER 310.)

Ms. Norsworthy minimizes unrebutted evidence that her sex-reassignment surgery will raise numerous serious safety and administrative concerns, but she cites no evidence in response, and presented none below. (Answering Br. 44-46.) Her argument that Defendants presented no "data or research" regarding these concerns misses the mark altogether. (*Id.* 44.) Ms. Norsworthy offered no evidence in response to Mr. Harrington's purported "generalized statements" about these security concerns. And neither the case law nor the PLRA require prison officials to provide "data or research" regarding the safety risks that underlie their decisions. Such a requirement would be at odds with the "wide-ranging deference" that the Supreme Court has instructed federal courts to accord to prison officials' decisions. *Bell*, 441 U.S. at 547.

Indeed, the case law buttresses the commonsense conclusion that transgender inmates face unique security concerns in prison. As early as 1994, the Supreme Court acknowledged the safety risks in housing transgender inmates. *Farmer v. Brennan*, 511 U.S. 825, 848-49 (1994). And last year, the First Circuit noted the "reasonable concerns" that would arise when a correctional system considers housing for a post-operative, male-to-female transsexual inmate. *Kosilek*, 774 F.3d at 93.

The district court simply "was not persuaded" by this unrebutted evidence from a high-level correctional official. (CD 94, ER 36.) Regardless, the court's task was not to substitute its judgment for that of a state official with over 25 years of correctional experience, but instead to assess whether prison officials reasonably held these concerns. *Kosilek*, 774 F.3d at 92. Notably, in *Kosilek*, the en banc First Circuit rejected the district court's similar conclusion disregarding prison officials' safety concerns *after an evidentiary hearing*. 774 F.3d at 93. If a district court errs in substituting its own judgment for that of prison officials after hearing testimony, surely it does the same after reviewing unrebutted affidavits or declarations. Here, as in *Kosilek*, "rather than deferring to the expertise of prison administrators, the district court ignored [prison officials'] stated security concerns." *Id.*

Ms. Norsworthy also raises numerous purported inconsistencies or contradictions in Mr. Harrington's declaration. (Answering Br. 44-45.) Whatever their merits, these issues should have been addressed by the district court through an evidentiary hearing, and this highlights the factual disputes weighing in favor of further factual development.

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### B. Amicus BALIF's Brief Underscores the District Court's Error in Not Holding an Evidentiary Hearing to Assess Security Concerns Before Issuing its Preliminary Injunction.

Amicus BALIF takes issue with Defendants' legitimate safety and correctional concerns.[12] (BALIF Br. 14-24.) Like Ms. Norsworthy, amicus argues that Mr. Harrington's declaration is "not supported by any specific facts, data, or empirical evidence." (*Id.* at 15.) As noted above, the PLRA's mandate to give substantial weight to security concerns does not require that prison officials submit peer-reviewed studies to obtain the requisite deference. 18 U.S.C. § 3626(a)(1). Quite the contrary, the case law notes that prison officials are not expected to wait until a security problem arises; rather, the law encourages prophylactic measures to keep inmates, staff, and the public safe. *See Whitley v. Albers*, 475 U.S. 312, 322 (1986); *Hewitt v. Helms*, 459 U.S. 460, 474 (1983) ("In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and

[12] Amicus BALIF's arguments substantially rely on factual allegations that Ms. Norsworthy failed to provide evidence of, either in the district court or on appeal. This Court declines to address arguments raised only by an amicus curiae. *Chaker v. Crogan*, 428 F.3d 1215, 1220 (9th Cir. 2005).

longstanding relations between prisoners and guards, prisoners *inter se*, and the like."), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472, 483-84 (1995).

Amicus BALIF also invites this Court to disregard the PLRA's mandate by pointing to the Prison Rape Elimination Act (PREA). (BALIF Br. 3-6.) As other courts have pointed out, the PREA does not impose any enforceable requirements on state corrections systems. *Bell v. County of L.A.*, No. CV-07-8187-GW, 2008 WL 4375768, at *6 (C.D. Cal. 2008); *Pirtle v. Hickman*, No. CV-05-146-S-MHW, 2005 WL 3359731, at *1 (D. Idaho Dec. 9, 2005). Amicus cites no authority for the proposition that the PREA somehow trumps the PLRA's requirements. And amicus's citation to the classification systems in other correctional systems (BALIF Br. 6-11), does nothing to call into question the experience of correctional personnel tasked with ensuring the safety of inmates and staff in California prisons. "Protecting the safety of prisoners and staff involves difficult choices and evades easy solutions." *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986). Given these considerations, courts defer to prison officials in this arena.

## CONCLUSION

For these reasons, Defendants request that this Court vacate the district court's preliminary injunction, and remand for further proceedings.

Dated: June 19, 2015

Respectfully submitted,

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15-15712

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**MICHELLE-LAEL B. NORSWORTHY,**

Plaintiff-Appellant,

**v.**

**JEFFREY BEARD, et al.,**

Defendants-Appellees.

## STATEMENT OF RELATED CASES

The following related case is pending: *Rosati v. Igbinoso*, No. 13-15984 (9th Cir.).

Dated: June 19, 2015

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**15-15712**

**CERTIFICATE OF COMPLIANCE**

**PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1**

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **DEFENDANTS-APPELLANTS' REPLY BRIEF** is

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June 19, 2015
Dated

*/s/ Jose A. Zelidon-Zepeda*
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# CERTIFICATE OF SERVICE

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

I hereby certify that on June 19, 2015, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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**DEFENDANTS-APPELLANTS' FURTHER EXCERPT OF RECORD.**

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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 June 19, 2015, at San Francisco, California.

| C. Look | /s/ C. Look |
|---|---|
| Declarant | Signature |

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