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' MOTION FOR VACATUR AND REMAND

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INTRODUCTION

In this prisoner civil rights action, Defendant prison officials appealed from the district court's mandatory preliminary injunction, which ordered that they provide Plaintiff-Appellee Michelle-Lael Norsworthy with sex-reassignment surgery.

In response to the Court's July 20, 2015 and August 3, 2015 orders, Defendants inform the Court that the Board of Parole of Hearings (Board) granted Ms. Norsworthy parole on May 21, 2015. On August 7, 2015, the Governor took no action on the grant of parole and the Board ordered her immediate release from prison. Accordingly, Ms. Norsworthy's injunctive suit is moot, and this Court should vacate the district court's preliminary injunction below and vacate oral argument scheduled for August 13, 2015.

FACTUAL BACKGROUND

Ms. Norsworthy has been involved in a number of parole proceedings dating back several years. (*See* CD 68, ER 150; CD 66, ER 174.) In June 2014, three months before she filed this suit, the Board advanced Ms. Norsworthy's next parole suitability hearing under California Penal Code 3041.5(b)(4), based on her disciplinary-free behavior and "participat[ion] in rehabilitative programming." (Decl. J. Zelidon-Zepeda Supp. Mot. Vacatur & Remand, Ex. 2.)

Over the past year, Ms. Norsworthy has been scheduled for several parole hearings—in which none of the Defendants have been involved— to determine her suitability for parole. (CD 76, ER 99-102; CD 92, ER 51.9-51.10.) Her parole hearing was postponed three times—most recently on March 25, 2015, one week before the hearing on her preliminary-injunction motion. (CD 76, ER 99-102; CD 92, ER 51.9-51.10; Decl. J. Zelidon-Zepeda, Ex. 3.) (*Id.* at ER 102.)

Ms. Norsworthy attended her parole hearing on May 21, 2015. A panel from the Board found her suitable for parole, concluding that she does not "represent an unreasonable risk of danger to the public" if released. (Decl. J. Zelidon-Zepeda, Ex. 4 at 2.) The panel noted that Ms. Norsworthy had improved her behavior since her last hearing, had participated in various self-help groups, and learned to abide by prison rules and regulations. (*Id.*, Ex. 4 at 4.) The panel concluded that Ms. Norsworthy had "come a long way" toward understanding her crime's impact on the victim and the victim's family. (*Id.* at 6.)

Under California law, the panel's parole grant may be reviewed by the full Board, and thereafter by the Governor. *See* Cal. Const., art. V, § 8; Cal. Penal Code §§ 3041(b), 3041.2. On August 7, 2015, the Governor took no action to disturb Ms. Norsworthy's parole grant and the Board issued a Release Memo ordering Ms. Norsworthy's release from prison. (Decl. J. Zelidon-Zepeda, Ex. 5.) Accordingly, Ms. Norsworthy's release from prison is imminent.

ARGUMENT

I. MS. NORSWORTHY'S SUIT FOR INJUNCTIVE RELIEF IS MOOT BECAUSE SHE HAS BEEN GRANTED PAROLE.

Ms. Norsworthy's suit for injunctive relief regarding her medical treatment is now moot because of her imminent release from prison.[1]

"A case is moot 'when it has lost its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law.'" *Walker v. Beard*, 789 F.3d 1125, 1131-32 (9th Cir. 2015) (citation omitted). Since the Constitution requires a live case or controversy, this Court must dismiss a case that has become moot. *Id.* at 1132 (citation omitted). An inmate-plaintiff's injunctive claim regarding prison conditions generally becomes moot when she is transferred out of the prison in question, absent "a reasonable expectation" that she will be subjected again to the challenged policies. *Id.*; *see also Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995) ("An inmate's release from prison while his claims are pending generally will moot any claims for injunctive relief relating to the prison's policies unless the suit has been classified as a class action."). And an inmate-plaintiff's release from prison

[1] In California, medical services for transgender individuals, including sex-reassignment surgery, are covered by private insurers and the State's Medi-Cal program if they are medically necessary. *See* Answering Br. 6-7; *http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2013/APL13-011.pdf*. Ms. Norsworthy will therefore become eligible to apply for sex-reassignment surgery upon her release from prison.

"extinguishes [the inmate's] legal interest in an injunction because it would have no effect." *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1095 (9th Cir. 2004). Here, as a practical matter, Ms. Norsworthy has no legal interest in her request for a particular type of medical treatment in prison, given her imminent release from custody.

An exception to this rule might apply when the appealing party "voluntarily forfeit[s] [the] right to appeal and receive a decision on the merits" through settlement or other like circumstances. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994). The key question is whether "the live case was resolved by strategic decision of the appealing party rather than mere happenstance." *ACLU of Nev. v. Masto*, 670 F.3d 1046, 1066 (9th Cir. 2012). Here, Ms. Norsworthy's suit was rendered moot by her grant of parole under California law, a decision independently reached by the Board of Parole Hearings based on its determination that she no longer poses an unreasonable risk to society, and left undisturbed by the Governor. *Cf. Dilley*, 64 F.3d at 1372 (noting that mootness of an inmate's injunctive relief claim resulting from the plaintiff's transfer from one prison to another "would be attributable to happenstance" even if the defendants "as employees of the state's prison system, did play some administrative role in the transfer"). Moreover, Defendants here have vigorously litigated Ms. Norsworthy's case on the merits, and thus there is no indication that

they forfeited vacatur. *Log Cabin Republicans v. U.S.*, 658 F.3d 1162, 1168 (9th Cir. 2011) (per curiam) (holding that appealing party did not voluntarily forfeit vacatur where it promptly appealed, moved to stay the district court's injunction, and filed multiple appellate briefs challenging the relief ordered).

II. BECAUSE THIS CASE IS MOOT, THIS COURT SHOULD VACATE THE DISTRICT COURT'S PRELIMINARY INJUNCTION, AND REMAND FOR DISMISSAL.

The appropriate remedy in light of the mootness issue is to vacate the district court's decision. *ACLU of Nev. v. Masto*, 670 F.3d 1046, 1065 (9th Cir. 2012) ("The 'normal rule' when a case is mooted is that vacatur of the lower court decision is appropriate.") (citing *Camreta v. Greene*, 131 S. Ct. 2020, 2035 (2011)). This practice "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* (citation omitted).

In *Camreta*, the Supreme Court faced a similar situation. This Court had held that state officials violated a minor's rights by interviewing her without a warrant, but that they were qualifiedly immune because the right at issue was not clearly established when the defendants acted. 131 S. Ct. at 2026. The state officials appealed the conclusion that they violated the minor's rights, but the plaintiff reached adulthood and moved across the country, mooting the appeal. *Id.* at 2026. The Supreme Court held that the proper remedy was to vacate this Court's conclusion that the defendants violated the minor's constitutional rights. *Id.* at

2026-27. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance . . . ought not in fairness be forced to acquiesce in that ruling." *Id.* at 2035 (internal citation omitted).

Happenstance—namely, an independent parole suitability review process—has rendered this case moot, and Defendants have no further opportunity to challenge the preliminary injunction. In such situations, Defendants should not have to bear the consequences of an adverse ruling that was decided on a flimsy and procedurally flawed record. "The point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by . . . a 'preliminary' adjudication." *Id.* at 2035. The Supreme Court's conclusion in *Camreta* applies with equal force in this preliminary injunction appeal. Accordingly, this Court should vacate the lower court's preliminary injunction, remand with instructions to dismiss the action, and vacate the Court's August 13, 2015 oral argument. *Id.* at 2034-35.[2]

[2] Ms. Norsworthy argues in her July 28, 2015 letter that this Court should remand to the district court for a ruling on her request for attorney's fees. But the Prison Litigation Reform Act precludes an inmate-plaintiff from obtaining such fees unless they are incurred in proving an "actual violation of the plaintiff's rights." 42 U.S.C. § 1997e(d)(1)(A). This Court has held that an inmate-plaintiff cannot obtain attorney's fees solely for obtaining a temporary restraining order or a preliminary injunction. *Siripongs v. Davis*, 282 F.3d 755, 758 (9th Cir. 2002); *Kimbrough v. California*, 609 F.3d 1027, 1031-32 (9th Cir. 2010) (reversing grant of attorney's fees in preliminary injunction context).

CONCLUSION

For these reasons, this Court should vacate the district court's preliminary injunction, and remand with instructions to dismiss the case.

Dated: August 7, 2015

Respectfully Submitted,

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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 August 7, 2015, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS-APPELLANTS' MOTION FOR VACATUR AND REMAND; and

DECLARATION OF COUNSEL SUPPORTING MOTION FOR VACATUR AND REMAND with EXHIBITS 1 TO 5.

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 7, 2015, at San Francisco, California.

C. Look	/s/ C. Look
Declarant	Signature

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