

## Morgan Lewis

Morgan, Lewis & Bockius LLP  
One Market, Spear Street Tower  
San Francisco, CA 94105-1596  
Tel. +1.415.442.1000  
Fax: +1.415.442.1001  
www.morganlewis.com

**Herman J. Hoying**  
Associate  
+1.415.442.1359  
hhoying@morganlewis.com

August 10, 2015

### VIA ECF

The Hon. Molly C. Dwyer, Clerk of the Court  
United States Court of Appeals, Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

**Re: *Michelle-Lael Norsworthy v. Jeffrey Beard, et al.*,  
No. 15-15712**

Dear Ms. Dwyer:

Plaintiff-Appellee Michelle-Lael Norsworthy (“Plaintiff”) submits this Status Report pursuant to the Court’s August 3, 2015 Order requesting each party’s “views regarding oral argument and mootness within 24 hours (excluding Saturday and Sunday) of any decision by the governor” regarding Plaintiff’s parole. (Dkt. No. 58.) Counsel for Plaintiff understands that on Friday, August 7, 2015, the governor “took no action on the grant of parole” and thus it is anticipated that Plaintiff will soon be released from prison.

### **I. The Court Should Conduct Oral Argument on August 13, 2015 As Scheduled**

Although Defendants reported to the Court that “[o]n August 7, 2015, the Governor took no action on the grant of parole and the Board ordered her

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immediate release from prison,” Defendants failed to notify the Court what actions still must be taken to prepare for Plaintiff’s release and when Plaintiff actually will be released from Mule Creek State Prison. (Dkt. No. 59-1 at 1.) Counsel for Plaintiff has been informed that CDCR intends to release Plaintiff from custody on Friday, August 14, 2015, but no formal paperwork to that effect has been provided and counsel for Plaintiff is unaware what intervening events may lead to further delay of Plaintiff’s release.

Until Plaintiff is physically released from CDCR custody, CDCR remains responsible for her medical care and Plaintiff’s claims seeking access to adequate medical care for her gender dysphoria, including sex reassignment surgery (“SRS”), are not mooted. Defendants seem to concede this point, stating that “[a]n inmate-plaintiff’s injunctive claim regarding prison conditions generally becomes moot *when she is transferred out of the prison* in question ...” (Dkt. No. 59-1 at 3-4 (emphasis added).)

Plaintiff’s case thus will not be mooted at the time currently scheduled for the oral argument, Thursday, August 13, 2015, and the Court should proceed with oral argument – or at least hold the case in abeyance subject to rescheduling the argument – to allow for prompt resolution if Plaintiff is not released this week. The district court found compelling evidence that Plaintiff continues to suffer “severe symptoms of gender dysphoria” as a result of Defendants’ refusal to provide her with SRS as a treatment for her gender dysphoria. (ER 30.) The district court further found that, “for Norsworthy, the only adequate medical treatment for her gender dysphoria is SRS” and thus that

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SRS is a medically necessary and constitutionally required treatment for her gender dysphoria. (ER 34.) As a result, the district court concluded that Plaintiff “is currently suffering irreparable harm and that it will likely continue in the absence of preliminary injunction” requiring Defendants to provide SRS “as promptly as possible.” (*Id.*) Because Plaintiff continues to suffer this irreparable harm and the deprivation of her Constitutional rights, the Court should proceed with the oral argument as scheduled to ensure that, if Plaintiff is not promptly released, she finally receives access to medically necessary treatment for her gender dysphoria.

**II. If The Appeal Becomes Moot, The Case Should Be Remanded To The District Court**

If Plaintiff ultimately is released from custody and this Court determines that Defendants’ appeal has become moot, the Court should remand to the district court to determine whether the order granting injunctive relief should be vacated and to consider Plaintiff’s claim for attorneys’ fees. *See, e.g., Dilley v. Gunn*, 64 F.3d 1365, 1372-73 (9th Cir. 1995) (finding that appeal of order granting inmate injunctive relief to access law library at specific CDCR facility was mooted by inmate’s transfer to another facility but remanding to district court “to determine whether the order granting injunctive relief should be vacated”); *Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996)(internal quotation omitted) (remanding for determination of vacatur and attorneys fees, noting that “claims for attorneys’ fees ancillary to the case survive

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independently under the court's equitable jurisdiction, and may be heard even though the underlying case has become moot”).

In connection with their response to the Court’s August 3, 2015 order requesting a status update, Defendants filed a Motion for Vacatur and Remand in which Defendants contend that this Court should “vacate the district court’s preliminary injunction, and remand with instructions to dismiss the case.” (Dkt. No. 59-1 at 7.) As Plaintiff will explain in more detail in her response to the Motion, the relief sought by Defendants finds no support in the record or the law.

Because the appeal was mooted as a result of Defendants’ exercise of their discretion to grant Plaintiff parole, the case must be remanded to the district court for a determination of vacatur. As this Court has made clear: “when an appellant renders his appeal moot by his own act, our established procedure is not to vacate the district court's decision automatically, but to remand so the district court can decide whether to vacate its judgment in light of ‘the consequences and attendant hardships of dismissal or refusal to dismiss’ and ‘the competing values of finality of judgment and right to relitigation of unreviewed disputes.’” *Dilley*, 64 F.3d at 1370-71 (quoting *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982)). Defendants’ self-interested contention that Plaintiff’s parole was the result of “an independent parole suitability process” and thus justifies automatic vacatur by this Court is legally insufficient and unsupported by the record evidence. (Dkt. No. 59-1 at 6.) The CDCR defendants in *Dilley* made a similar

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argument before this Court, contending that the lower court's order should be vacated because "Dilley was transferred pursuant to prison regulations which permit an inmate to transfer to a lower security institution once he has served a specific amount of time as a Class IV inmate without substantial disciplinary problems." *Dilley*, 64 F.3d at 1372. Despite this representation, the Court remanded to the district court to consider the issue of vacatur because "[t]he facts surrounding Dilley's transfer from Calipatria are not sufficiently developed in the record." *Id.* at 1371. Similarly, here, there has been no development of the facts surrounding Plaintiff's parole. Notably, the district court's order should not automatically be vacated, "even if the appellant engaged in the conduct which caused the mootness for a purpose other than to prevent the appellate court's review of the district court order." *Cammermeyer*, 97 F.3d at 1239 (internal quotation omitted).

Nor should the action be remanded "with instructions to dismiss the action" as Defendants contend. (Dkt. No. 59-1 at 6.) The district court's order currently on appeal addressed only Plaintiff's claims for medically adequate care, including SRS. Plaintiff's First Amended Complaint, however, also alleges that Defendants violated the Fourteenth Amendment by refusing to allow Plaintiff to petition for a legal name change. (CD 10.) The parties have not yet litigated this claim before the district court.<sup>1</sup> Nor has the district court

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<sup>1</sup> The claim will not be mooted by Plaintiff's release from prison. *See* Cal. Code Civ. Pro. § 1279.5(c) (requiring approval from CDCR for parolee to obtain legal name change).

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yet resolved the issue of attorneys' fees. Although Defendants now contend in a footnote that Plaintiff is not entitled to attorneys' fees (Dkt. No. 59-1 at 6 n.2), Defendants did not oppose Plaintiff's motion before the district court requesting an extension of time to file its motion for attorneys' fees until "14 days after the later of (i) the resolution of Defendants' appeal of the [district court's] order granting Plaintiff's motion for preliminary injunction; or (ii) the resolution of Plaintiff's remaining claim for a legal name change under the Fourteenth Amendment." (CD 112 (Order Granting Administrative Motion to Enlarge Time to File Motion for Costs and Attorney's Fees).) Moreover, the cases cited by Defendants are inapposite. None involves the grant of a mandatory preliminary injunction. The Court thus should not remand the case "with instructions to dismiss the case" as requested by Defendants.

Respectfully submitted,

/s/ Herman J. Hoying

Herman J. Hoying

On Behalf of Plaintiff-Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that on August 10, 2015, I electronically filed the foregoing **Status Report** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

          /s/ Herman J. Hoying            
Herman J. Hoying