

FILED

OCT 29 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE N. ALLEN,

Plaintiff-Appellant,

v.

AUDREY KING; DAVID LANDRUM,
Acting Chief of Police Services,

Defendants-Appellees.

No. 16-16518

D.C. No. 1:06-cv-01801-BLW-LMB

MEMORANDUM*

WAYNE P. DEBERRY,

Plaintiff-Appellant,

v.

AUDREY KING; DAVID LANDRUM,
Acting Chief of Police Services,

Defendants-Appellees.

No. 16-16521

D.C. No. 1:06-cv-01801-BLW-LMB

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

JACKIE ROBINSON,

Plaintiff-Appellant,

v.

AUDREY KING; DAVID LANDRUM,
Acting Chief of Police Services,

Defendants-Appellees.

No. 16-16560

D.C. No. 1:06-cv-01801-BLW-LMB

Appeal from the United States District Court
for the Eastern District of California
B. Lynn Winmill, Chief Judge, Presiding

Argued and Submitted October 10, 2018
San Francisco, California

Before: D.W. NELSON, W. FLETCHER, and BYBEE, Circuit Judges.

In October 2009, the California Department of Mental Health, a predecessor of the Department of State Hospitals (“DSH”), promulgated Title 9, Section 4350 of the California Code of Regulations (“Section 4350”).¹ Section 4350 prohibits Sexually Violent Predators (“SVPs”) who have been civilly committed to a DSH-operated hospital from possessing electronic devices, including personal laptops, capable of connecting to a wired or wireless communications network. Appellants

¹ In January 2018, DSH implemented emergency amendments to Section 4350. The amendments do not render Appellants’ claims moot because the personal wireless-capable electronic devices prohibited under the original Section 4350 are still prohibited under the amended regulation. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 413-14 (1935).

George Allen, Wayne DeBerry, and Jackie Robinson are civilly detained SVPs at Department of State Hospitals-Coalinga (“DSH-C”), pursuant to the Sexually Violent Predator Act, Cal. Welf. & Inst. Code § 6600 *et seq.* Each brought a conditions of confinement challenge to Section 4350, claiming that its ban on patient possession of wireless-capable devices is punitive in violation of the Fourteenth Amendment. The district court granted summary judgment to Appellees.

Civilly detained individuals have a substantive due process right to be free from restrictions that amount to punishment. *United States v. Salerno*, 481 U.S. 739, 746-47 (1987); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Restrictions that have a legitimate, non-punitive government purpose, and that do not appear excessive in relation to that purpose, are permissible. *Salerno*, 481 U.S. at 747; *Bell*, 441 U.S. at 535. The issue before us is whether there is a genuine dispute of material fact as to whether Section 4350 is reasonably related to a legitimate, non-punitive government interest. *Bell*, 441 U.S. at 539.

The undisputed factual record establishes that some DSH-C SVPs have used personal wireless-capable devices to access or share child pornography or engage in other illicit activities such as contraband trafficking. DSH-C has a legitimate interest in preventing such illicit activity. There is a genuine dispute in the record as to the number of DSH-C SVPs involved in such illicit activity. But given the

undisputed low-end number of SVPs involved, this dispute is not material in the sense that it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”). “A reasonable relationship between the governmental interest and the challenged restriction does not require an ‘exact fit.’” *See Valdez v. Rosenbaum*, 302 F.3d 1039, 1046 (9th Cir. 2002) (quoting *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999) (en banc)). Section 4350’s ban on patients’ personal possession of wireless-capable electronic devices is reasonably related to Appellees’ legitimate interest in preventing patients from using such devices for illicit purposes. We thus affirm the district court’s grant of summary judgment to Appellees on Appellants’ substantive due process challenges to Section 4350.

In *Allen v. Mayberg*, 577 F. App’x 728 (9th Cir. 2014), our earlier decision in this case, we reversed the district court’s dismissal of Appellants’ substantive due process challenges to Section 4350. *Id.* at 732. We declined to address a First Amendment argument that Appellants had raised for the first time on appeal. *Id.* at 733. On remand, Appellant Robinson sought to amend his complaint to add a First Amendment challenge to Section 4350. The district court denied Robinson’s motion to amend solely on the ground that “with regard to his First Amendment claim, the Ninth Circuit affirmed this Court’s dismissal of that claim and remanded

only the substantive due process claim.” We conclude that our earlier disposition did not foreclose an amendment on remand to add a First Amendment claim. We therefore vacate the district court’s denial of Robinson’s motion to amend, and remand so that it may reconsider the motion.

Finally, we affirm the district court’s grant of summary judgment as to Allen’s undergarment claim. Allen challenges DSH-C’s practice of not allowing patients to purchase their own personal undergarments. This practice differs from that of the California Department of Corrections. A presumption of punitive conditions applies when a patient is confined “in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held.” *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004). But this presumption is rebutted where the restriction is reasonably related to a legitimate government interest. *Id.* at 932-33. Here, the restriction is reasonably related to the legitimate interest of hospital hygiene.

We **AFFIRM** the district court’s grants of summary judgment. We **VACATE** the denial of Robinson’s motion to amend and **REMAND** so that the district court may reconsider the motion.²

² We grant Appellees’ Motion to Take Judicial Notice, filed April 24, 2018 (Dkt. # 47), Appellants’ Motions to Take Judicial Notice, filed October 20, 2017 (Dkt. #23) and March 5, 2018 (Dkt. #39), as well as Appellants’ Motion to Supplement the Judicial Record, filed February 9, 2018 (Dkt. #30).