DISTRICT JUDGE BENJAMIN H. SETTLE
MAGISTRATE JUDGE J. RICHARD CREATURA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NATHAN ROBERT GONINAN,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS, et al.,

Defendants.

No. 3:17-cv-05714-BHS-JRC

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. REPLY

In their Opposition to Plaintiff's Motion for Partial Summary Judgment ("Opposition"), Defendants Nathaniel Burt, Ph.D, Karie Rainer, Ph.D, Eleanor Vernell, Wendi Wachsmuth, Daniel White and Washington Department of Corrections (collectively "DOC" or "Department") neither defend the constitutionality of DOC's Gender Dysphoria Protocol, nor provide sufficient evidence that they have in fact lifted the blanket ban on gender affirming surgery for transgender individuals. Instead, DOC directs this Court to its recently modified Offender Health Plan ("OHP"), which now identifies Gender Dysphoria as a Level II condition that qualifies an inmate for treatment when treatment is deemed medically necessary. What DOC omits, however, is that the revised OHP still incorporates by

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reference DOC's Gender Dysphoria Protocol—and that protocol maintains the blanket ban on gender affirming surgery. DOC has not changed its blanket ban on gender affirming surgery.

And even if DOC did alter its blanket ban on gender affirming surgery, it still has not met its formidable burden of demonstrating that its unconstitutional behavior could not reasonably be expected to recur. DOC cannot evade judicial review of its unconstitutional policy by voluntary cessation.

Plaintiff Nonnie Marcella Lotusflower (formerly known as Nathan Robert Goninan) ("Lotusflower") respectfully requests that the Court grant her Motion for Partial Summary Judgment and declare that the DOC's blanket surgery ban policy violates the Eighth Amendment and enjoin DOC from enforcing it.

II. ARGUMENT

A. DOC HAS NOT LIFTED ITS UNCONSTITUTIONAL BLANKET BAN ON GENDER AFFIRMING SURGERY

DOC mischaracterizes Plaintiff's Motion as relying on "conversations last year" and providing "no current evidence to indicate the Department continues to prohibit gender modification surgery." *See* Dkt. #52 at 4:16-20. But Plaintiff's Motion relied on and attached as evidence the March 16, 2018 OHP[1], *see* Exhibit C at Dkt. 49-1, the very policy now cited by DOC. And the OHP expressly refers to and incorporates language outlined in the Gender Dysphoria Protocol, which reads, in relevant part: "Offenders with [gender dysphoria] and [transgender] identification are NOT eligible for: cosmetic or elective surgical procedures for the purpose of reassignment. Such interventions are considered Level III by the Offender Health Plan (OHP)." *See* Exhibit A at Dkt. #50-1. The Gender Dysphoria Protocol, dated July 3, 2017, further states it is "[v]alid until rescinded." *Id.*

[1] Notably, Ms. Lotusflower filed this lawsuit on September 5, 2017. The Court then granted the parties' joint motion to stay and stayed the case until April 13, 2018. It was not until March 16, 2018, just before the end of the stay, that DOC revised its OHP.

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DOC has not presented any evidence that the Protocol has been rescinded. In fact, DOC completely ignores the existence of the Gender Dysphoria Protocol in its Opposition and focuses solely on the fact that gender dysphoria is now listed as a Level II condition in the OHP. DOC's submission fails to clarify its gender affirming surgery policy—although the OHP now implies that some treatment for gender dysphoria is covered when it is deemed medically necessary, the document still incorporates by reference a blanket ban on gender affirming surgery.

A couple days after the Motion was filed and nearly two weeks before DOC filed its Opposition, Plaintiff informed DOC of the inconsistency between the revised OHP of March 16, 2018 and the Gender Dysphoria Protocol of July 3, 2018.[2] *See* Exhibit A to Declaration of Kristina Markosova. Plaintiff also requested a copy of the updated Gender Dysphoria Protocol, to the extent one exists. *Id.* DOC neither provided any such Protocol nor addressed the Protocol in its Opposition. *See id.* In the absence of any evidence to the contrary, DOC has maintained its unconstitutional blanket ban on gender affirming surgery.

B. DEFENDANTS CANNOT EVADE REVIEW BY VOLUNTARY CESSATION OF UNLAWFUL CONDUCT

Even if DOC had actually lifted the blanket ban on gender affirming surgery—which it did not—any argument that Plaintiff's claim is moot fails because "[a] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Otherwise, "the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways,'" *id.* at 289 n.10 (alteration in original) (citation omitted), meaning that "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his

[2] DOC's counsel failed to recognize that Plaintiff relied on the most up-to-date version of the OHP in her Motion and did not even rely upon the actual OHP to support the response.

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1 unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013); *see, e.g.*, *TRW, Inc. v.*
2 *FTC*, 647 F.2d 942, 953 (9th Cir. 1981) ("promises to refrain from future violations, no matter
3 how well meant, are not sufficient to establish mootness"); *United States v. W.T. Grant Co.*,
4 345 U.S. 629, 633 (1953) ("Here the defendants told the court that the interlocks no longer
5 existed and disclaimed any intention to revive them. Such a profession does not suffice to
6 make a case moot[.]"). Therefore, "a defendant claiming that its voluntary compliance moots
7 a case bears the formidable burden of showing that it is absolutely clear the allegedly
8 wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v.*
9 *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 190 (2000). For DOC to meet its formidable
10 burden through a policy change, it must show that the change is "entrenched" and
11 "permanent." *See Bell v. City of Boise*, 709 F.3d 890, 900 (9th Cir. 2013).
12 Far from satisfying its formidable burden to demonstrate that its unlawful conduct will
13 not recur, DOC merely asserts that there is "no blanket ban" in reliance on a policy that
14 suggests that the ban, in fact, remains. In *Gluth v. Kangas*, the Ninth Circuit dismissed a
15 similar line of conclusory arguments in a case involving plaintiffs who alleged that the
16 Arizona Department of Corrections policies concerning the prison law library denied them
17 meaningful access to the courts. 951 F.2d 1504, 1507 (9th Cir.1991). The *Kangas* defendants
18 opposed the plaintiffs' motion for summary judgment relying solely on an argument that a
19 new policy rendered the plaintiffs' claims moot. *Id.* The Court explained, "The Department's
20 new policy did not undermine any part of the factual record submitted in support of the
21 inmates' motion for summary judgment. Because those facts remained uncontroverted and
22 showed that unconstitutional conditions existed at the prison, the inmates were entitled to
23 summary judgment." *Id.* The Ninth Circuit held that voluntary cessation of an
24 unconstitutional prison policy did not render moot inmates' claims where the prison had a
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1 history of violations, the new policy was vague, and it could not be said "with assurance" that
2 there is no "reasonable expectation" that alleged violations will not recur. *Id.*

3 In this case, DOC seeks to evade judicial review by suggesting it has lifted its blanket
4 ban with a vague new policy. Just like the plaintiffs in *Kangas,* Ms. Lotusflower has shown
5 that DOC has a history of violating the rights of transgender prisoners by maintaining a
6 blanket ban on medically necessary treatment. *See e.g.* Exs. B-C to Dkt. No. 50-1. And, just
7 like the defendant in *Kangas,* DOC responded to Ms. Lotusflower's Motion by relying solely
8 on its vague new policy, which purports to provide access to gender affirming surgery when
9 medically necessary but also expressly incorporates a policy that creates a blanket ban on
10 such surgery regardless of medical need. Therefore, because DOC can hardly argue that it is
11 "absolutely clear" that the blanket ban will not remain in place, DOC's voluntary cessation of
12 the ban does not moot Ms. Lotusflower's claim.

13 Here, the vagueness of DOC's alleged policy fix is compounded by the glaring failure
14 of DOC to admit any fault or wrongdoing. Because nothing in DOC's Opposition indicates
15 any recognition that the blanket ban on gender affirmation surgery violated the Constitution,
16 DOC simply cannot meet the "formidable" burden of demonstrating that there is no
17 reasonable expectation that it would reimplement its former policy. *See DeJohn v. Temple*
18 *Univ*., 537 F.3d 301, 310 (3d Cir. 2008). Furthermore, "it is the duty of the courts to beware
19 of efforts to defeat injunctive relief by protestations of repentance and reform, especially
20 when abandonment seems timed to anticipate suit, and there is probability of resumption."
21 *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952). DOC has not
22 offered protestation of repentance and reform; in fact, DOC's reasoning for allegedly
23 changing the plan remains a mystery. DOC's alleged abandonment of the policy was also
24 timed entirely in anticipation of this litigation, as they waited until a few weeks before the
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stay was lifted to publish this purported change. These factors further support the high probability of resumption.

Lastly, unilateral agency action is not sufficient to defeat or moot the issue of DOC's unconstitutional policy. Although "[a] statutory change . . . is usually enough to render a case moot, . . . repeal or amendment of an ordinance by a local government or agency does not necessarily deprive a federal court of its power to determine the legality of the practice." *Bell v. City of Boise*, 709 F.3d 890, 899 (9th Cir. 2013) (quoting *Chem. Producers & Distribs. Ass'n v. Helliker,* 463 F.3d 871, 878 (9th Cir.2006)). In *Bell*, this Court explained that an internal policy of a local government agency "is not a formal written enactment of a legislative body and thus was not subject to any procedures that would typically accompany the enactment of a law." 709 F.3d at 900. Thus, even assuming a lack of intent to resume the challenged conduct, "the ease with which the [defendant] could do so counsels against a finding of mootness," in contrast to cases in which a statute was repealed or expired. *Id.* In this case, the DOC could easily revert back to the blanket ban on the gender affirmation surgery because their vague policy does not explicitly prohibit doing so. Thus, the issue cannot be properly resolved without a ruling from this Court that finds the DOC's policy unconstitutional.

III. CONCLUSION

For these reasons and those stated in Ms. Lotusflower's Motion, Ms. Lotusflower respectfully requests that the Court grant her Motion for Partial Summary Judgment against DOC, declare that the Policy violates the Eighth Amendment, and enjoin DOC from to continuing the use of the Policy.

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DATED this 11th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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