

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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*JANE DOE *

Plaintiff *

vs. *

CIVIL ACTION

No. 17-12255-RGS

*MASSACHUSETTS DEPARTMENT OF *

CORRECTION, et al. *

Defendants *

* * * * *

BEFORE THE HONORABLE RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE
HEARING ON MOTIONS
February 28, 2018

Courtroom No. 21
1 Courthouse Way
Boston, Massachusetts 02109

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1 APPEARANCES:

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3 GAY & LESBIAN ADVOCATES & DEFENDERS, (By Jennifer
4 L. Levi, Esq., and Bennett H. Klein, Esq.), 30 Winter
Street, Suite 800, Boston, Massachusetts 02108, on
behalf of Plaintiff

5 GOODWIN PROCTER, LLP, (By J. Anthony Downs, Esq.),
6 10 Northern Avenue, Boston, Massachusetts 02210, on
behalf of Plaintiff

7
8 PRISONERS' LEGAL SERVICES, (By Elizabeth Matos,
9 Esq.), 10 Winthrop Square, 3rd Floor, Boston,
Massachusetts 02110, on behalf of Plaintiff

10 COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF
11 CORRECTION, (By Richard C. McFarland, Esq.), 70 Franklin
12 Street, Suite 600, Boston, Massachusetts 02110, on
13 behalf of the Defendants
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P R O C E E D I N G S

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2 THE CLERK: All rise.

3 (Whereupon, the Court entered the courtroom.)

4 THE CLERK: This is Civil Action No. 17-12255, Jane
5 Doe versus Massachusetts Department of Correction.

6 Would counsel please identify themselves for the
7 record.

8 MS. LEVI: Good afternoon, your Honor, Jennifer
9 Levi on behalf of the plaintiff.

10 MR. KLEIN: Good afternoon, your Honor, Bennett
11 Klein for the plaintiff.

12 MR. DOWNS: Tony Downs, from Goodwin Procter, also
13 for the plaintiff.

14 MS. MATOS: Elizabeth Matos, also for the
15 plaintiff.

16 MR. McFARLAND: Richard McFarland for the
17 defendants, your honor.

18 THE COURT: Who will be addressing the Court for
19 the plaintiff?

20 MS. LEVI: I will be, your Honor.

21 THE COURT: All right, there are before the Court
22 two motions. There is, of course, the motion to dismiss
23 brought by the Department of Correction, and then the Jane
24 Doe motion for a preliminary injunction.

25 As I understand it, we all agree now that the state

1 claims are no longer part of the suit, that those have been
2 voluntarily dismissed, leaving us with the claims under the
3 Americans with Disabilities Act, or ADA, the Rehabilitation
4 Act, and the Fourteenth Amendment claims as a separate
5 matter.

6 I think, given the structure of the case, it would make
7 sense for the Department of Correction, Mr. McFarland, for
8 you to begin because it is your motion, and then perhaps,
9 Ms. Levi, you could argue both the opposition and introduce
10 us to the preliminary injunction argument, and then we will
11 go back to Mr. McFarland for any reply DOC wishes to make.

12 Just a couple of things in reading the briefs that at
13 this point are just thoughts that I have, and perhaps it
14 will help focus counsel on either moving me in a different
15 direction or perhaps taking some cue from what I was
16 thinking.

17 The first issue to me, and this may go to the heart of
18 the case, is whether there is a meaningful distinction
19 between gender dysphoria and gender identity disorder that
20 would support a reading of gender dysphoria as not covered
21 by the statutory exclusion under ADA.

22 Constitutional avoidance, is an approach, in some of
23 the cases that you've given me, that other courts have
24 taken. The Supreme Court decision yesterday in Jennings v.
25 Rodriguez was not very friendly to the constitutional

1 avoidance canon. As I understood the majority in Jennings,
2 they were saying that the avoidance canon should only be
3 applied when a statute is ambiguous or, plainly on its face,
4 susceptible to more than one reading, that constitutional
5 avoidance is not an invitation for a court to simply adopt a
6 preferred interpretation of an otherwise unambiguous
7 statute, that is, to read its own statute into the existing
8 statute.

9 If the Court were to find -- that's a fancy word we use
10 to describe yourself -- if I was to find that gender
11 dysphoria is sufficiently like gender-identify disorder to
12 fall within the exclusion in the ADA, is there any way,
13 given what appears to be a background of obvious animus and
14 misconceptions about gender identify that would allow the
15 exclusion to remain constitutionally within the statute? I
16 think that was the direction the amicus brief was trying to
17 point me.

18 When we get to the Fourteenth Amendment claims, if we
19 do, if you think those should be addressed today, there
20 obviously is an issue about the appropriate level of
21 scrutiny that ought to be applied to the equal protection
22 claim.

23 And then the last issue that, again, I think I have to
24 be concerned with as a federal judge is that we have a long
25 line of cases, tracing to Sandin v. O'Connor, that make it

1 clear to federal district judges that we have no business
2 trying to run prisons, particularly when it comes to matters
3 of transfer of inmates and housing situations in state
4 prisons, and federal prisons for that matter.

5 So, again, to the extent that this is an issue in the
6 case, how should this be approached by the Court?

7 Those are a few of my preliminary thoughts.

8 Mr. McFarland, would you like to begin with your motion
9 to dismiss?

10 MR. MCFARLAND: Yes. Thank you, your Honor.

11 As you mentioned earlier, that the state law claims
12 have been dismissed by the plaintiffs, that cuts down a
13 little bit of my argument.

14 I do have a question, though, your Honor. With regard
15 to the plaintiff's filing a notice of Constitutional
16 question under Rule 5.1, and it does provide for the U.S.
17 Attorney's Office to get involved, I am not sure if I should
18 address some of these issues with the Court, or should I
19 wait for the U.S. Attorney's Office to perhaps step in
20 and --

21 THE COURT: I've gotten no indication from the
22 Department of Justice that they had an interest in
23 intervening or appearing in the suit. And I see no one here
24 that is eagerly stepping forward to take that role, so
25 perhaps you may want to say what you wish to say on the

1 issue, and, you know, if you wish, I'll remind them that
2 they have the right to be heard if they wish to be heard.
3 I've gotten no indication from them.

4 MR. McFARLAND: That's fine, your Honor. Thank.
5 You.

6 Initially, I just want to go through some of the facts
7 in this case. The plaintiff is a male-to-female transgender
8 inmate who is currently incarcerated at MCI-Norfolk. She is
9 serving a three- to four-year sentence for a drug offense.
10 She is eligible for parole in September of this year, and
11 has a release date of September of 2019.

12 The plaintiff has been diagnosed with gender dysphoria,
13 and she receives treatment in the form of hormones,
14 psychotherapy, clothing and canteen that are the same as
15 available for female offenders, facial hair removal that's
16 been provided, and she's had a mammogram. The plaintiff
17 also has a single cell and access to an alternative time
18 period where she can shower apart from other inmates.

19 Recently, the plaintiff completed a six-month substance
20 abuse program, the Correctional Academy program, and she has
21 had a job assignment, and engaged in programs during her
22 stay at MCI in Norfolk.

23 We have -- and I can get into additional facts when we
24 get to the preliminary injunction phase, your Honor.

25 But we have initially moved to dismiss the claims under

1 the ADA and the Federal Rehabilitation Act based on he
2 language that's currently present in the statute, under 42
3 U.S.C. Section 12211(b)(1), which excludes from the
4 definition of disability a number of individual groups,
5 including transgenderism and gender-identity disorder
6 without a physical impairment.

7 This case was -- and our position is that the GID
8 definition that's identified in the statute, which was in
9 the DSM-IV, and the change in the description to general
10 dysphoria, GD, in DSM-5 is very similar. They both look at
11 an individual who has an incongruence between their birth
12 sex, birth gender, and their identified gender at this time.
13 And both diagnoses require that the individual have a
14 clinically significant distress or impairment in social,
15 occupational or other areas.

16 So we maintain that the two diagnoses are very similar
17 in their basic diagnosing of the gender disorders.

18 THE COURT: Does DSM-5 define them separately?
19 I've forgotten.

20 MR. McFARLAND: I'm sorry, your Honor?

21 THE COURT: Does the DSM define them as separate
22 disorders or as disorders as being in a more aggregated
23 form of the underlying --

24 MR. McFARLAND: My understanding in the DSM-IV and
25 earlier DSMs, they used the term "gender identity disorder."

1 But then when they came out with the DSM-5, they changed all
2 that and now call it "gender dysphoria," and no reasons for
3 doing that clinically. But the bottom line appears to be
4 you still have an individual who has experienced --
5 experiences incongruence with their gender, that believes
6 that their -- the gender they were born with is not the
7 gender that they identify with, and then to either
8 diagnosis, either GD or GSM -- GID, you still must show the
9 presence of a clinically significant distress and impairment
10 in social, occupational, or other areas.

11 Now, when the Court addressed it in the Blatt case in
12 the Eastern District of Pennsylvania, from my reading of the
13 decision from the judge, it appeared that she was splitting
14 up -- dividing GID and GD into groups where one individual
15 who may just experience incongruence, and that's it, for the
16 gender assigned and preferred, but then the other group
17 would be those who had gender incongruence as well but also
18 feel that there is a substantial physical -- or a
19 substantial clinical distress or impairment.

20 And in that case the judge found that for those
21 individuals who merely have an incongruence in their gender
22 dysphoria -- in their gender, they would fall under the
23 current GID definition and be excluded.

24 But those individuals who were incon -- had
25 incongruence but also had experienced a clinically

1 significant distress and dysphoria, would be taken outside
2 of the exclusion and that they could be -- have their claim
3 adjudicated under the ADA.

4 Now, our position has been that you really can't have
5 either/or. Either you're gender dysphoric or gender -- or
6 GID, or you're not. You have to have -- you can't be --
7 once you have determined that you have gender incongruence,
8 it's a diagnosis, you also have to have the clinically
9 significant dysphoria, the distress or the impairment in
10 your social --

11 THE COURT: Let's try this sort of as a
12 quasi-hypothetical.

13 Not everyone, but I am sure any number of people, none
14 of them write novels, have toyed with the idea of what it
15 would be like to be of another gender, or maybe even drifted
16 toward, Wouldn't it be better if I had been... whether
17 that's just a form of thought-play or a curiosity, or a
18 creativity, in the case of someone, a novelist trying to
19 write in a woman's voice or a woman novelist writing in a
20 male voice; whereas, the American Psychiatric -- so assume
21 that that is something that people might toy with, and it
22 wouldn't be considered a disorder, it just might be
23 considered more curiosity or creativity; whereas, a paper I
24 read from the America Psychiatric Association that talks
25 about the symptomology of gender dysphoria, they seem to use

1 the word "strong" before every symptom that they assign,
2 which suggests to me that they're treating dysphoria as an
3 aggravated case of the underlying gender identity disorder.

4 I can understand why a judge might want to separate the
5 two, which is why I asked whether there was enough daylight
6 between the two to permit that, because then you open the
7 door, if that is your inclination to do, to constitutional
8 avoidance, which is one way to duck what seems to me an
9 underlying difficult issue in the case.

10 MR. MCFARLAND: I understand, your Honor, and I
11 think certainly it would be helpful if the U.S. Attorney
12 General had given us their wisdom with regard to this
13 construction of the statute. But we -- at this point we do
14 believe that there isn't a lot of daylight between the two,
15 gender dysphoria or gender identity disorder. There are
16 some semantical issues, but they basically have an
17 incongruence between one's birth gender and then with what
18 they now identify with as a gender.

19 And then you have to have, to have a diagnosis, you
20 have to show the clinicians that you -- or the powers that
21 bring the diagnosis, that you have in addition a clinically
22 significant distress or dysphoria or impairment in such
23 areas as social, occupational, or other areas.

24 So that's one of -- that's our position at this point,
25 your Honor.

1 We also maintain that while there is some scientific
2 evidence that has been pointed to by the plaintiffs that
3 show that gender dysphoria has genetic or physiological
4 underpinnings, we believe that those studies that are
5 mentioned in Dr. Ettner's affidavit do not reach the level
6 of a clear scientific consensus.

7 And even if you look at the DSM-5 and their discussion
8 of genetics and physiological, even their own discussion is
9 couched in, We have a long way to go. They acknowledge that
10 there are studies that this is an interesting area, but
11 nowhere do they say that -- do they conclude that gender
12 dysphoria is strictly a result of genetics or simply a
13 result of biological hormonal changes or physiological
14 changes. So we would argue that the evidence is really not
15 scientifically clear in the community.

16 THE COURT: So you would argue that -- in fact, you
17 do argue that the exemption applies, and I know that,
18 prudently, you have not taken a position on the
19 constitutionality of the exemption, so it may be advisable
20 that I do ask, I don't know whether there would be a
21 response, for the Department of Justice to give us what the
22 position of the United States is on the constitutional
23 aspects. So I do not expect you to address that because I
24 know in your brief you explicitly --

25 MR. McFARLAND: I think it would be helpful to us

1 and to the Court, I would think, and to all parties.

2 I would also further say that if the Court was to find
3 that the ADA and the Rehabilitation Act apply in this case,
4 then we would argue that there is no discrimination shown by
5 the department's actions, that we do not have a blanket
6 policy that prohibits a transgender or a gender dysphoric
7 inmate from being transferred to a prison where their gender
8 identity is accepted. So having a male-to-female
9 transgender preoperatively could go to, say, Framingham.

10 Our policy, our gender dysphoria policy -- and a copy
11 of that was given to the Court in our pleadings opposing
12 preliminary junction -- talks about that policy, and that
13 policy is mentioned in our motion to dismiss. So we would
14 argue that that policy itself does not discriminate.

15 Now, with regard to the issue of the strip searches
16 that the plaintiff undergoes at MCI-Norfolk, they are done
17 by male officers at this time. We argue that even if this
18 was determined to be a violation, discrimination, or -- and
19 that the plaintiffs want a -- request an accommodation of
20 having only female COs at MCI-Norfolk search the plaintiff,
21 we would argue that there are numerous issues that are
22 raised by that operationally and security-wise.

23 THE COURT: Can I ask a question, because I do not
24 know the answer.

25 Framingham is the main women's prison in the

1 Massachusetts system?

2 MR. McFARLAND: That's correct, your Honor.

3 THE COURT: Do males serve as correction officers
4 in Framingham?

5 MR. McFARLAND: Yes. I think there -- my
6 understanding is that there are many more female COs,
7 correction officers, at Framingham than there are at
8 Norfolk, but there are male COs that work at MCI-Framingham.

9 THE COURT: I assume that is part of, among other
10 things, a collective bargaining arrangement?

11 MR. McFARLAND: That's very true, your Honor.
12 Officers and C -- correction officers can bid for a certain
13 facility that may be near their home, or a variety of
14 reasons why they can do that, but they are able to bid. But
15 Framingham does have many more female correction officers
16 and senior staff than you would find at MCI-Norfolk.

17 With regard to the transfer to MCI-Framingham requested
18 by the plaintiff as an accommodation, we have indicated that
19 there is a policy and a procedure for providing transgender
20 or gender dysphoric inmates with an individualized
21 assessment of their medical and mental health needs, their
22 treatment for GD, their history of crimes and disciplinary
23 histories, as well as program needs. And those are
24 conducted every six months under the GD policy. But it is
25 based on each individual inmate, a review of their needs,

1 their vulnerabilities, their predatory behaviors. And that
2 comes in -- that runs up in the decision with regard to a
3 placement within the DOC system.

4 And again with regard to the due process claim raised
5 by the plaintiffs in their complaint, we would argue that
6 the classification of an inmate within the DOC does not
7 create a liberty interest, and that's been established by
8 many, many years of federal and state constitutional
9 decisions, and that the plaintiff is unable to show that she
10 is subjected to an atypical and significant hardship during
11 her incarceration at MCI-Norfolk.

12 And we would also say that the plaintiff is unable to
13 show -- to succeed on a claim of substantive due process,
14 where she's unable to present facts which would show that
15 she is subjected to outrageous, uncivilized, and intolerable
16 acts, acts that shock the conscience.

17 So we would ask the Court to dismiss the claims raised
18 by the plaintiffs on those grounds, your Honor.

19 THE COURT: All right. Thank you, Mr. McFarland.

20 Ms. Levi.

21 MS. LEVI: Thank you, your Honor.

22 I want to make a couple of introductory remarks, and
23 then I am happy to address specifically the questions that
24 you've raised.

25 My client is a 53-year-old transgender woman who's

1 currently serving four years in a men's correctional
2 facility. She has diagnosis of gender dysphoria, about
3 which there is no dispute in the record.

4 Gender dysphoria is a condition that results when a
5 person's identity, their brain sex, is inconsistent with
6 their assigned birth sex. And there is no dispute but that
7 it's a serious medical condition for which there is also an
8 established course of treatment. And that course of
9 treatment includes gender transition.

10 She has been on female hormones and antiandrogens now
11 for nearly four decades, and the result of that care and
12 treatment has been a significant -- has had a significant
13 impact on her body and has brought her body into conformity
14 with her female identity, including having typical female
15 breast development, female body fat distribution, reduction
16 in body hair, softing of her skin, and the expert in the
17 case has testified that her hormone levels are that of a
18 typical female with her range and background and experience.

19 And so the ADA really provides a unique framework for
20 addressing the challenges that she has been experiencing in
21 the men's correctional facility.

22 I want to address -- actually, if I can put up, I want
23 to address specifically -- and, in particular, which is to
24 say she is having to live as a woman in a men's facility,
25 and the rules and experiences that she's had, which have

1 included some horrific experiences in term of treatment by
2 other inmates and guards, undermines her ability to live and
3 function as a woman, which is the treatment goal for the
4 medical condition that she experiences.

5 The exclusion from the ADA that you've asked about that
6 I put up on the screen includes an exclusion for gender
7 identity disorder, not resulting from physical impairment,
8 as you know.

9 And in answer to your question, the diagnosis of gender
10 identity disorder no longer exists in the DSM. The most
11 recent version of the DSM refers to gender dysphoria, and
12 there's a good reason for that. It's because the consensus
13 of the medical community is that the core feature of the
14 condition is different than the core feature of the prior
15 diagnosis that was in the DSM, and, in particular,
16 Dr. Ettner explains that distinction in Paragraph 7 of her
17 expert report, but, in particular, the critical element of
18 gender dysphoria is the incongruity between the individual's
19 brain sex, their gender identity, and the expression of the
20 features of their body. It's not the disorder of the
21 person's gender identity, which was the core component of
22 the diagnosis of gender identity disorder.

23 Attorney McFarland's focus on the clinical distress is
24 really -- is not really related to the issues. There's many
25 diagnoses within the Diagnostic and Statistical Manual that

1 require clinically significant distress associated with the
2 core component or the core feature of the condition. So
3 it's a distinct and different diagnosis.

4 And in response to your question with regard to the
5 constitutional avoidance principle, it's our argument that,
6 based on the plain language of the statute, there is no
7 exclusion for gender dysphoria, which is the medical
8 condition from which Ms. Doe suffers in this case.

9 THE COURT: When was the amendment inserted?

10 MS. LEVI: 2013.

11 It's not an amendment. It's a revision. It's a
12 complete revision.

13 THE COURT: I mean of the ADA. When did this
14 exclusion, that goes back to the original --

15 MS. LEVI: It does. It goes back to the original
16 adoption of the Americans with Disabilities Act, and then
17 the Federal Rehab Act was, after the fact, revised to
18 include the same exclusion that didn't originally include
19 that exclusion.

20 But as the amicus refers to it, it was through, you
21 know, a process of negotiated compromise about the scope of
22 the ADA that the exclusion was included, and it does reflect
23 very significant animus against a group of individuals.

24 THE COURT: I was thinking it's hard for me to
25 believe, given the background that the amicus paints, that

1 the authors of the exclusion would not have included
2 dysphoria if they thought of it.

3 MS. LEVI: Well, if I might address that.

4 THE COURT: If it existed as a diagnosis at the
5 time.

6 MS. LEVI: I mean, I can't speculate on that, of
7 course, and, you know, consistent with the Supreme Court's
8 also direction about the court needing to focus on the
9 language of the statute as being the basis for its
10 assessment of its meaning, in particular in the case of
11 Oncale v. Sundowner, you know, even if there would have been
12 an intention at the time to include a medical condition
13 which wasn't included, this Court would be rejecting the
14 approach of the Court in Oncale v. Sundowner with regard to
15 following the language of the statute to incorporate an
16 intention to exclude an unrelated condition into the
17 statute.

18 But, more than that, I do want to point out, as I know
19 you focused on, that gender identity disorder not resulting
20 from physical impairments are not included within the
21 exclusion, which may have been a reflection of even the
22 understanding at the time, that medical understanding and
23 scientific understanding, of a particular condition could
24 change significantly over time.

25 And in -- you know, there is no question. In fact,

1 it's the statement of Dr. Ettner that it does reflect the
2 scientific consensus at this point in time that the origins
3 in any case of gender dysphoria are physiological. While
4 it's true that there might not be a precise agreement about
5 the specific origins, there is an agreement that the origins
6 of the condition are physiological, or biological, and, in
7 fact, that is the position that the United States has now
8 taken in three separate cases, which we cite in particular
9 the statement of the United States from the cases of Doe v.
10 Arrisi and Dzurenda, as well as the Blatt case, in which the
11 United States took the position regarding the
12 constitutionality of the statute in light of a narrowed
13 interpretation of that provision.

14 THE COURT: Well, in support of what you are
15 saying, the analogy that occurs to me might be fibromyalgia,
16 which, when it originally was given a name, was thought to
17 be a, basically, yuppy flu, was what it was scoffed at as
18 simply an excuse for being too tired.

19 MS. LEVI: Yeah.

20 THE COURT: And then I think over time it has been
21 recognized as an actual -- has actual symptomatology and
22 probably chemical causes. Although no one is quite sure,
23 but has evolved now into something that doctors, who used to
24 dismiss it as simply complaining --

25 MS. LEVI: Yeah -- yes.

1 THE COURT: -- now take seriously as -- oh, sorry.

2 MS. LEVI: Yes, your Honor.

3 I mean, the DSM really has a number of different
4 medical conditions which were misunderstood at the time of
5 their original identification as being either not serious or
6 not rooted in a physiological origin. Even, you know,
7 conditions like epilepsy, for example, or schizophrenia,
8 which were understood not to have physiological origin, are
9 now recognized as a consensus position across the medical
10 community.

11 So to the extent that the language is clear that there
12 is not an exclusion, even for gender identity disorders not
13 resulting from physical impairments, our argument is based
14 on a plain reading of the statute and not based on a need to
15 interpret it beyond the specific language that it includes.

16 But I do want to address the other question that you
17 raised, which is, to the extent that the Court were to
18 interpret it even beyond the terms of the specific
19 exclusion, along the lines of what the defendant would argue
20 here, it does create an exclusion from the statute for
21 anyone with -- or any transgender individuals who have a
22 medical condition associated with that identity, and it does
23 rise to the level of a classification which would subject
24 the statute to strict scrutiny, we would argue, and, at a
25 minimum, heightened review. We have included within our

1 briefing the cases, of which there are now many, that
2 recognize that a transgender classification is subject to,
3 at minimum, a heightened level of review, including the four
4 cases currently challenging an exclusion from military
5 service for transgender individuals, as well as cases
6 involving challenges to the exclusion from facilities for
7 transgender students. That means that there would need to
8 be, at a minimum, an exceedingly persuasive justification
9 for excluding individuals who have the particular medical
10 conditions, including gender dysphoria, associated with
11 being transgender.

12 And, as the amicus brief also points out, there has not
13 been any justification, any legitimate justification, that
14 has been advanced for that exclusion, and, of course, that's
15 in part because the legislative history is really replete
16 with the animus that the exclusion reflects. And so we
17 would argue that the exclusion is unconstitutional and that
18 the provisions of Title II should, you know, otherwise
19 address the issues in this case.

20 I want to turn to the arguments that have been made in
21 particular about the modest changes that have been made in
22 the prison that Ms. Doe has experienced.

23 I do want to highlight that for someone who has lived
24 her entire adult life as a female, and who has never been
25 socialized as a male, it is excruciating for her to be

1 stripped searched by men, to be seen by men when she's
2 changing or showering and have to be made as sexually
3 vulnerable as she has been made to be under the -- in the
4 context in which she has been incarcerated.

5 So I want to -- just if I can pull up -- I want to
6 address a couple of -- that's fine -- a couple of the
7 specific modifications that have been made, which are wholly
8 insufficient to address the problems that she has
9 experienced.

10 I just want to note that since the time she has been
11 incarcerated, she has been moved through many different
12 housing units, including three transfers in the last three
13 months. At the moment, she's currently -- and so that has
14 meant that every time she has used a shower facility, she
15 has had other men walk in while she's showering, coming in
16 specifically to look at her body and have made offensive and
17 really degrading comments while in the shower facility.

18 If we can pull up the -- I want to really --

19 THE COURT: Can I ask just an informational
20 question?

21 MS. LEVI: Sure.

22 THE COURT: And if you don't know -- I'm sure you
23 do -- but Mr. McFarland I'm sure will know.

24 When I was a young lawyer, I was at Norfolk several
25 times, and I am trying to remember if it is the prison I am

1 remembering, that it was not a traditional prison in the
2 sense that Cedar Junction, which we used to know as
3 Walpole -- I think the biggest mistake they made is they
4 should have changed the name of the town to Cedar
5 Junction --

6 (Laughter.)

7 THE COURT: -- because you can't get away from
8 "Walpole."

9 But I remember it as being more a campus-style, with
10 separate housing units. Is that still the case, or has it
11 been --

12 MS. LEVI: Well, when I've gone there, it looks
13 like a traditional prison facility to me, where you walk
14 into an entryway, and then you walk through a courtyard, and
15 then you walk into a building where there are separate --
16 but I have not gone beyond the space where I can speak to my
17 client.

18 Actually, can I ask my co-counsel, Ms. Matos, who is a
19 regular visitor at a number of the correctional facilities
20 across the Commonwealth?

21 MS. MATOS: I am an attorney with Prisoners' Legal
22 Services, so I am familiar with both facilities. And it is
23 distinctly different from Walpole in that way. Still, it's
24 an old building, so it's the same where you visited. It is
25 technically more campus style, but there are very few people

1 who feel like it feels like a college campus versus a
2 prison.

3 (Laughter.)

4 THE COURT: I want to make sure I am remembering it
5 right.

6 MS. LEVI: It doesn't feel like a college campus to
7 me when I visit it.

8 THE COURT: Depends on the college.

9 (Laughter.)

10 MS. LEVI: So I do want to turn the Court's
11 attention to the shower area in particular and note a couple
12 of the really continuing significant problems that Ms. Doe
13 experiences. There is not a door on any of shower rooms in
14 any of the cellblocks throughout the correctional facility,
15 and that means that other inmates, male inmates, can come in
16 at any time while she's in the shower facility, and it's her
17 sworn statement that that does happen regularly.

18 The description of the shower facility suggested that
19 there was in some way some privacy that somebody would have
20 in standing behind the 3-foot long opaque strip on the
21 showers, but at 5-foot-3 standing behind them, she is not
22 covered, including her torso not being covered.

23 But, more than that, it's -- you know, it is completely
24 commonplace that anyone who walks in there could see or look
25 over that 4-foot barrier and will see her unclothed and in

1 the shower.

2 The Court is correct that the shower room where she is
3 -- that she is currently allowed to use has a completely
4 enclosed part in the back, but what that means -- and there
5 is, it is has been reported to me, a sign outside of the
6 room, or maybe just inside the room, that says, you know,
7 other inmates are not allowed to use at particularly
8 designated shower times. My client has said that the shower
9 time that she is actually restricted to is not even listed
10 on that notice outside of the door as prohibiting people
11 from coming in during that time.

12 But, even if it were, again, it's her sworn statement
13 that other inmates do regularly come in, and what it means
14 is that to enforce the private shower time that she has, she
15 would actually have to come out of the shower and show
16 someone the shower letter that she has, three in the last
17 three months, in order to enforce the possibility even of
18 having privacy in the shower facility during the time that
19 it's specified for her to use it.

20 I also want to address, if I may, a couple of other
21 issues, including the statements about there not being women
22 correctional officers to do strip searches on her in the
23 men's facility. And, of course, the accommodation that we
24 are requesting is to have her transferred to Framingham,
25 where that would not be an issue, except to the extent that

1 among the justification for denying the transfer is a
2 statement by the Department of Corrections by the
3 superintendent that he was concerned that female correction
4 officers would not want to do the strip searches that they
5 would otherwise be required to do as part of their job.

6 The other statement that has been submitted to this
7 court as a statement -- as a justification for not providing
8 a transfer is a concern that is included in the affidavit by
9 Mitzi Peterson at Paragraph 18 that it would create a,
10 quote, climate issue with the women inmates at Framingham.

11 And the reason in particular I want to highlight these
12 statements is because these statements are the very kinds of
13 non-specific, generalized, non-objective or concrete
14 speculations, stereotypes about individuals with
15 disabilities that the ADA is intended to address.

16 As I said, in this case, other than the particular
17 medical condition from which Ms. Doe suffers, the ADA really
18 provides an appropriate framework to address just this
19 issue. Gender dysphoria is a stigmatized medical condition
20 which is widely understood that, based on the legislative
21 history of the ADA, as the argument has been made by the
22 Department of Corrections, that we would refute, is one that
23 is -- you know, can cause revulsion or offense or discomfort
24 by other individuals. And it's just for that reason that
25 the American with Disabilities Act was passed, to address

1 individuals who experienced discrimination because of a
2 misunderstood medical condition. It's been very effective
3 in doing so, reflecting the kinds of questions you've been
4 asking, and also addressing the kinds of hypotheticals that
5 are in the record of the ADA, where individuals with
6 conditions like cerebral palsy or cosmetic disfigurement or
7 Down syndrome face mistreatment because of bias and
8 stereotypes associated with the condition and having nothing
9 to do with the person's ability to be included within the
10 generalized setting, and that's why she seeks the
11 accommodation of the transfer that we are here to ask the
12 Court for today.

13 I do want to specifically address as well two other
14 issues, and one is with regard to your question about Sandin
15 and whether or not the Court can direct the relief that's
16 being requested here.

17 Transfer to a prison -- to another facility because of
18 a reasonable accommodation is specifically contemplated and
19 addressed in particular within a case that we have cited to
20 the this Court, including Lonergan, where an individual with
21 a skin condition that was exacerbated by exposure to sun
22 could be transferred to another facility where that
23 individual wouldn't be exposed to the amount of sun that
24 made it impossible for him to be integrated within a prison
25 facility where he was regularly exposed that way.

1 Title II of the ADA is really specifically in place to
2 ensure that courts can redress the kind of denials of
3 reasonable accommodation. It defines the denial of the
4 reasonable accommodation as discrimination under the ADA.

5 And while I understand the Court's concern about
6 getting involved in the operation of prisons, that concern
7 also can't render Title II as applied to prisons
8 meaningless. And in this case it is the accommodation
9 that's essential in order for her to be able to function and
10 not experience the kind of harm that she has already
11 experienced because of being in a men's facility.

12 And on that point I do want to address the argument
13 that we have set forth before this Court that she's
14 experienced irreparable harm, and particularly highlight the
15 conclusions of Dr. Ettner, that she has experienced, because
16 of being in the men's facility, post-traumatic stress
17 disorder as well as an anxiety disorder as a direct result
18 of what she has experienced.

19 And the fact of her having a diagnosis of PTSD, which
20 she did not have prior to her incarceration, is a point on
21 which the defendants agree in this case. Now, they would
22 attribute it to other undisclosed and unstated and unnoted
23 prior trauma, but we could suggest, your Honor, that,
24 consistent with Dr. Ettner's report here, Ms. Doe's mental
25 health is significantly declining in the men's facility.

1 Anyway, that's -- unless of you have questions, your
2 Honor?

3 THE COURT: Do you want to say anything about the
4 preliminary injunction?

5 MS. LEVI: Yeah, yeah, absolutely.

6 So, the preliminary injunction is based on our argument
7 that both, as I said, that she is experiencing irreparable
8 harm from being in a men's facility, that her mental health
9 is steadily devolving. She's at further risk of emotional
10 and physical decline.

11 And we have argued that she can show a likelihood of
12 success on the merits both on her ADA claim. That, setting
13 aside the exclusion, which I've addressed, the
14 accommodations -- I should -- that she has been denied the
15 accommodations that she has requested, including being
16 strip-searched by women correctional officers, that could be
17 provided by the transfer to the Framingham facility.

18 We have also argued, your Honor, that she has a
19 likelihood of success on the merits of her equal protection
20 claim, that there are -- she's excluded from the women's
21 correctional facility because she is a transgender woman.
22 Other women, non-transgender women, are routinely placed in
23 the correctional facility. She is not because she's
24 transgender. And that classification, that exclusion from
25 the facility, is a sex-based classification that subjects

1 the classification and placement rule to, as I said, strict
2 scrutiny and, at a minimum, heightened review.

3 To the extent that there is any justification that's
4 being offered for her exclusion from the women's facility,
5 there are none that are proven by this record.

6 She has no disciplinary record that would trigger any
7 kind of safety concerns. You know, she's serving for a
8 non-violent drug offense. And, in any case, to the extent
9 that there was some justification related to safety, a rule
10 that excludes transgender individuals from the women's
11 facility doesn't advance any of those interests, and so it's
12 not substantially related to any kind of underlying concern
13 that would be advanced around safety concerns.

14 The other thing I would argue is that to the extent
15 that there is any public interest that's implicated by this
16 case, it would be in ensuring that someone like Ms. Doe can
17 be appropriately placed at the women's facility.

18 Unless you have any further questions.

19 I mean, the harm that she is experiencing is real and
20 serious and devastating and has, you know -- on a daily
21 basis is really subjecting her to sexual vulnerability,
22 violence, but also mental harm and anguish. And so we would
23 ask this Court to order her to be transferred to the women's
24 facility and, in the alternative, for accommodations that
25 would provide her privacy in the shower facilities, which

1 could include, for example, a guard outside to ensure that
2 men don't walk in routinely. And we would also ask that
3 women correctional officers be assigned to strip search her,
4 as well as ensure that she's regularly referred to as a
5 female, which she regularly is not, at the prison facility.

6 THE COURT: Thank you very much.

7 MS. LEVI: Thank you.

8 THE COURT: Mr. McFarland, do you want the last
9 word?

10 MR. MCFARLAND: Yes, your Honor.

11 Again, I'll cite a few facts that I think are relevant
12 to the preliminary injunction review. That the plaintiff,
13 as a male-to-female transgender inmate, does receive full
14 treatment for the general dysphoria, including hormones,
15 psychotherapy, same clothing and canteen as female
16 offenders, facial hair removal, and access to healthcare,
17 including mammograms.

18 She does have a single cell, with the alternative time
19 periods for showering, and they do have a notice posted in
20 front, such that if a male inmate goes near those showers at
21 that time, they are subject to a disciplinary report and all
22 that comes through that process.

23 In the December -- late November, early December of
24 2017 the plaintiff underwent an individualized assessment
25 with regard to her placement within the DOC custody. The

1 plaintiff had asked to be transferred to MCI-Framingham.
2 The classification was pursuant to the DOC classification
3 regulations and the DOC's gender dysphoria policy.

4 The plaintiff did undergo an individualized assessment
5 as to her criminal and disciplinary history, her medical and
6 mental health needs, her vulnerability to sexual
7 victimization, the potential for predatory behavior on her
8 part, as well as her need for various programs within the
9 facilities.

10 The individualized assessment determined that she, Jane
11 Doe, should remain at MCI-Norfolk based on the review of
12 those factors.

13 They also indicated that the GD Treatment Committee had
14 not recommended that she be placed at MCI-Framingham.

15 The plaintiff appealed the initial classification and
16 GD analysis, and it was reviewed by the Deputy
17 Superintendent, who upheld the decision to remain at
18 Norfolk, and also indicated that there was no recommendation
19 issued by the Gender Dysphoria Treatment Committee.

20 By mentioning this process, we are telling the Court
21 that there is no blanket prohibition restricting GD inmates
22 to the facility of their birth gender. And this is pursuant
23 to the GD policy, which is, I think, Exhibit 2 in our
24 materials, your Honor, that the placement of the GD inmates
25 is -- involves a review of individual factors on a

1 case-by-case basis. And the language in the policy is very
2 similar to the language used in the federal regulations that
3 pertain to the PREA standards.

4 Now, the other side mentioned the fact that in her
5 affidavit Director Peterson said that she had concerns with
6 regard to the -- John Doe's -- the plaintiff, Jane Doe's
7 placement at MCI-Framingham.

8 She has some concerns since she knows and is aware of
9 Jan Doe and is aware of the facility, that placing Jane Doe
10 within the population at MCI-Framingham may lead to some
11 distress and dysphoria if she was rejected by the females.

12 Doctor -- Director Peterson was responding to the
13 statements made by Ms. Ettner -- Dr. Ettner that seemed to
14 say that once you send Jane Doe to Framingham, everything
15 will be fine, hunky-dory, and there will be no issues.

16 So she was pointing out the fact that there may be
17 problems. There may be issues with other offenders, and
18 that it may not be smooth sailing, given the nature of the
19 population and given the plaintiff's transfer.

20 Such concerns are not to be interpreted as a roadblock
21 to any future GD inmate being transferred to Framingham, but
22 an appraisal of the realistic situation that any
23 male-to-female transgender may experience going into that
24 facility.

25 Doctor -- Director Peterson's affidavit also talks to

1 the fact that the DOC does provide training for staff at
2 their facilities that address how staff members should
3 interact and work with inmates who are transgender -- who
4 are gender dysphoric. So that takes place on a regular
5 basis.

6 As I said, the DOC policy is to provide GD inmates with
7 alternative times to shower that are separate from the other
8 inmates on their units.

9 And, as you saw in the photograph, we do provide at
10 MCI-Norfolk the so-called PREA shower curtains, which have
11 AN opaque barrier about a foot off the ground and 3 feet
12 high, so reaching about 4 feet, on the person's torso, which
13 are used in order to discourage any sexual acting out or
14 harassment or offenses while an inmate is in the shower. So
15 the curtains are such that a staff member walking by could
16 see whether or not there were two or more inmates within the
17 shower.

18 With regard to the strip searches at MCI-Norfolk, the
19 affidavit of Superintendent Medeiros sets out the burdens
20 that would be placed upon his facility if they were ordered
21 to have only female COs conduct strip searches of the
22 plaintiff and other GD inmates. In particular, there are
23 only 31 female officers on staff covering three shifts at
24 the facility, as compared to 340 male officers. And to have
25 two female officers taken from their post to conduct a strip

1 search of the plaintiff or the six other GD inmates would
2 be -- would create a lot of disruption, according to the
3 Superintendent.

4 They would have to move people from other posts or
5 replace them. There would be delays. There would be some
6 situations where you don't have enough -- may not have
7 enough female COs on a given shift. There are also concerns
8 that female COs would be restricted from other posts that
9 they may want because they needed to be in a post nearby
10 where they conduct a large amount of the strip searches of
11 inmates.

12 THE COURT: That case seems to be pretty well made
13 with respect to Norfolk.

14 Is Ms. Levi right, that a transfer to Framingham
15 resolves at least that problem?

16 MR. McFARLAND: Well, you would address this issue,
17 but, again, we have conducted a case -- an individualized
18 assessment of Jane Doe just recently, and the determination
19 was that she did not need to be at MCI-Framingham based on
20 all the factors that were considered.

21 So that was the decision by the Administrative
22 Classification Board and review and appeal.

23 So, you know, there are certain issues that do limit
24 the Superintendent at Norfolk with regard to staffing,
25 but --

1 THE COURT: Transfer decisions are made by the
2 Commissioner; am I right?

3 MR. McFARLAND: That's correct, your Honor.

4 And there is a process involved where they can, as I
5 mentioned, and also using -- the GD Treatment Committee also
6 gets involved in making a recommendation as to whether or
7 not the inmate requires to receive treatment or placement at
8 MCI-Framingham.

9 So, your Honor, we believe that we have many plans in
10 place that address some of the concerns raised by the
11 plaintiff.

12 We have, like I said, the separate showering times. We
13 have training for staff. We have the PREA curtains. We
14 have the individualized assessment of each GD inmate as to
15 their placement within the system.

16 We also argue, with regard to the due process, that
17 there is no due process liberty interest in remaining at a
18 particular prison. This has been stated by quite a long
19 history of cases in both the federal and state courts.

20 And again, that the placement -- that Jane Doe's
21 placement at MCI-Norfolk does not reach the level of an
22 outrageous and uncivilized and intolerable act that shocks
23 the conscience.

24 And she has managed to complete a substance abuse
25 program at that facility. She's engaged in programs and has

1 managed to do fine in the prison.

2 Also, there's opportunities to raise concerns to the
3 staff through the grievance procedures, as well as through
4 staff access, to talk to senior staff, if she has particular
5 problems with any one or two staff members.

6 So we request that the motion for preliminary
7 injunction be denied, your Honor.

8 THE COURT: Okay.

9 A question for counsel, generally, just to make sure I
10 am not misunderstanding what I have to do.

11 Since it is probably clear from the remarks I have made
12 that I am at least willing to entertain a constitutional
13 challenge to the statute, I think I am obligated under Rule
14 5.1 to certify the question to the Attorney General, and, as
15 I remember under the statute, not the rule, the U.S. has 60
16 days to make a decision whether to intervene or not.

17 MR. McFARLAND: I believe that's correct, your
18 Honor.

19 MS. LEVI: I think that's right.

20 We did notify them, your Honor, with regard to the
21 potential issue of the constitutionality of the statute
22 already.

23 THE COURT: So they got that notice probably the
24 beginning of this month?

25 MS. LEVI: Yeah. We submitted it at the time we

1 filed our motion for the preliminary injunction.

2 I can get you the date.

3 MS. LEVI: February 2, my clerk tells me.

4 MR. McFARLAND: I would note --

5 THE COURT: The first thing I should do is
6 certify --

7 MR. McFARLAND: Under Section -- part (b), it says
8 the court must, under 28 U.S.C. Section 2403, certify to the
9 appropriate Attorney General that the statute has been
10 questioned. I am not sure if that's part and parcel --

11 THE COURT: That's my memory.

12 I commented both of you, because most lawyers ignore
13 that altogether. They don't even know that the rule exists.
14 But I think that's the first thing I should do. I am going
15 to, clearly, take the matter under advisement.

16 MS. LEVI: Your Honor, may I respond to some of the
17 arguments?

18 THE COURT: Yes, of course.

19 MS. LEVI: I'll let you finish. I just --

20 THE COURT: No. I was just thinking, as soon as I
21 get back to my office, the first thing I am going to do is
22 certify the question so we can move things along a little
23 more quickly.

24 Yes, please.

25 MS. LEVI: So I do want to address the argument

1 that the Department of Corrections is making that they've
2 done an assessment with regard to the transfer. And it's
3 really important to note that the ADA specifically states
4 that a public entity can impose legitimate safety
5 requirements, but the public entity has to ensure that those
6 safety requirements are based on actual risks, not on mere
7 speculation, stereotypes, or generalizations about
8 individuals with disabilities.

9 And, as I highlighted before, they have identified no
10 specific safety risks associated with my client.

11 As I said, she's a 5-foot-3 woman who's serving for a
12 non-violent drug offense. She has been -- she has
13 transitioned nearly 40 years, and so the statements that
14 other individuals at the women's facility might not -- you
15 know, that it might create, quote, climate issues, which
16 haven't even been specifically identified as associated with
17 my client, is not a justification that meets the standard
18 under the ADA for the denial of a reasonable accommodation.

19 Neither too are the statements that female correctional
20 officers wouldn't want to do strip searches.

21 And I do want to argue to this Court that that supposed
22 individual assessment is operating as a categorical bar in
23 this case. It's hard to imagine an individual with gender
24 dysphoria who could pass that consideration if my client
25 doesn't meet that standard in the context of this case.

1 I do want to address specifically as well that she
2 would request a locked cell as an alternative to the
3 transfer if she's going to remain for any period of time at
4 MCI-Norfolk.

5 And I do also want to respond to the due process
6 arguments which have been made. We haven't pressed those in
7 our reply as the basis for the preliminary injunction.
8 We're relying on the likelihood of success both on the ADA
9 claim and equal protection claim as well, your Honor. But
10 we do argue that there is a set of facts that we can show,
11 and we believe we've shown them, in the context of the
12 allegations of complaint that the experiences that Ms. Doe
13 has had do shock the conscience. But, in any case, there is
14 no basis for dismissing them from -- as a claim in the case.

15 THE COURT: Okay.

16 MR. McFARLAND: Your Honor, just one thing.

17 We received the amicus brief yesterday evening, and I
18 hadn't had a chance to go through it very well. Can I have
19 more time in which to respond to the amicus brief?

20 THE COURT: Yes, of course.

21 At least on the substantive issues, as opposed to the
22 injunctive issues, we are going to have to hear from the
23 United States as to whether it intends to intervene or not.

24 MR. McFARLAND: Okay.

25 THE COURT: So could you get me something within

1 ten days?

2 MR. McFARLAND: Certainly your Honor.

3 THE COURT: It will not be a difficult brief for
4 you to read because you are already well versed, but I think
5 it makes as its strongest argument -- and I say "strongest"
6 not necessarily -- I'm not judging the merits, but the most
7 forcefully argued position is the constitutional position in
8 that brief.

9 MR. McFARLAND: That seems to correct, your Honor.

10 THE COURT: So ten days.

11 MR. McFARLAND: Thank you.

12 THE COURT: Any desire to submit further filings;
13 otherwise, the record will be complete.

14 MS. LEVI: The only thing I would offer, your
15 Honor, is if you would like additional briefing on the
16 constitutional issue, we would certainly respond to that.

17 THE COURT: I think I have the issue down --

18 MS. LEVI: Okay.

19 THE COURT: -- to the point that I doubt there is
20 much more case law that between you and the amicus could be
21 brought to my attention.

22 MR. DOWNS: One housekeeping matter, your Honor.

23 We submitted the affidavit unsigned by Jane Doe. We
24 have now a signed copy, which we will send into the court.

25 THE COURT: That would be appreciated.

1 All right. Thank you for the very coherent and helpful
2 arguments. I will take the matter under advisement.

3 MS. LEVI: Thank you, your Honor.

4 MR. McFARLAND: Thank you, your Honor.

5 THE CLERK: All rise.

6 (Proceeding adjourned.)
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C E R T I F I C A T E

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/James P. Gibbons
James P. Gibbons

April 20, 2018

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