

No. 12-2194

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

MICHELLE L. KOSILEK,
PLAINTIFF-APPELLEE,

v.

LUIS S. SPENCER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF CORRECTION,
DEFENDANT-APPELLANT.

**On Appeal from the United States District Court
for the District of Massachusetts**

**BRIEF OF GAY & LESBIAN ADVOCATES & DEFENDERS,
EQUALITYMAINE, HUMAN RIGHTS CAMPAIGN, MASSEQUALITY,
MASSACHUSETTS TRANSGENDER POLITICAL COALITION,
NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL
GAY & LESBIAN TASK FORCE, AND TRANSGENDER NEW
HAMPSHIRE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-
APPELLEE AND IN SUPPORT OF AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the *amici* (with the exception of TransGender New Hampshire, an unincorporated association), is a non-profit organization. None has a parent corporation or issues any stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Gay & Lesbian Advocates & Defenders (GLAD) is a New England-wide legal rights organization dedicated to ending discrimination based on sexual orientation, gender identity and expression, and HIV status. GLAD's Transgender Rights Project litigates cases that promote legal respect for and recognition of the lives of transgender individuals and their families, including *Rosa v. Park West Bank*, 214 F.3d 213 (1st Cir. 2000), *Doe v. Yunits*, 15 Mass.L.Rptr. 278 (Mass. Super. Ct. 2001), and *O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010).

EqualityMaine works to secure full equality for lesbian, gay, bisexual, and transgender people in Maine through public education, community organizing and collaboration. EqualityMaine helped pass state legislation in 2005 to protect people from discrimination based on sexual orientation and gender identity and expression in employment, housing, education, credit and public accommodations, and has also advocated for similar protections at the federal level. EqualityMaine works alongside members of the transgender community to articulate priorities for affecting public policy on issues of concern to transgender people in Maine.

Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where lesbian, gay,

¹ No party's counsel authored this brief in whole or in part. No party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the *amici curiae*, their members or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 1.5 million members and supporters, including more than 24,000 in the Commonwealth of Massachusetts, and is committed to eliminating barriers to medically-necessary care for transgender people.

MassEquality is the leading statewide grassroots advocacy organization in Massachusetts working to ensure that everyone across Massachusetts can thrive from cradle to grave without discrimination and oppression based on sexual orientation, gender identity, or gender expression. It works to achieve the full equality of transgender people in all spheres of society through advocacy in the legislative and executive branches and through public education.

Massachusetts Transgender Political Coalition (MTPC), founded in 2001, is dedicated to ending discrimination on the basis of gender identity and gender expression. It envisions a world where persons of all genders are treated with respect and fully participate in all areas of society, free from fear of discrimination, harassment or violence based on their gender identity and/or expression.

National Center for Transgender Equality is a national social justice organization devoted to ending discrimination and violence against the transgender community through education and advocacy on national issues of importance to the transgender community. It empowers transgender people and their allies to

educate and influence policymakers and others, and facilitates a strong and clear voice for transgender equality in our nation's capital and around the country. In 2011, it issued the National Transgender Discrimination Survey with the National Gay & Lesbian Task Force.

National Gay and Lesbian Task Force works to build the grassroots power of the lesbian, gay, bisexual and transgender (LGBT) community. It does this by training activists, equipping state and local organizations with the skills needed to organize broad-based campaigns to defeat anti-LGBT referenda and advance pro-LGBT legislation, and building the organizational capacity of the LGBT movement. The Task Force's Transgender Civil Rights Project provides legislative and strategy assistance for organizations working to pass laws that prohibit discrimination against transgender people. It conducted the National Transgender Discrimination Survey, issued in 2011, with the National Center for Transgender Equality.

TransGender New Hampshire (TG-NH) is an organization created to promote transgender visibility, education, support and civil rights in the state of New Hampshire. TG-NH provides resources, community building, educational programs and advocacy to assist transgender NH residents, as well as significant others, friends, families, allies and helping professionals. The organization's primary goal is to foster acceptance for transgender people.

INTRODUCTION AND SUMMARY

The district court's factual findings in this case present a chilling scenario: a government official who would subject a person to the risk of death because of fear of public controversy and criticism.² The Department of Correction's (DOC) conduct raises the question of how to understand both this case, where DOC rejected its own medical experts' recommendations for "the only form of adequate medical care" for Michelle Kosilek, as well as other cases where DOC has "repeatedly denied transsexual prisoners prescribed treatment for reasons that the courts have found to be improper."³

That critical question is answered by insight into the widespread social hostility towards transgender people and the common myths and stereotypes about sex reassignment surgery. The *amici* submit this brief in order to provide the Court

² See *Kosilek v. Spencer*, No. 00-12455, 2012 U.S. Dist. LEXIS 124758 *18 (D. Mass. Sept. 4, 2012) (Kosilek experiences "intense mental anguish" that "places him at high risk of killing himself if his major mental illness is not treated adequately"); *id.* at *75 (Commissioner Dennehy understood that "Kosilek was still suffering from a severe gender identity disorder, that the experts retained to advise the DOC were recommending sex reassignment surgery, and that there was a significant risk that Kosilek would try to kill himself if his hope of getting the surgery was lost"). See also *id.* at *6 ("Security concerns are a pretext to mask the real reason to deny him sex reassignment surgery -- a fear of controversy, criticism, ridicule and scorn").

³ *Kosilek*, 2012 U.S. Dist. LEXIS 124758, at *2 (citing *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *Soneeya v. Spencer*, 851 F.Supp.2d 228 (D. Mass. 2012); *Brugliera v. Comm'r of Mass. Dep't of Corr.*, No. 07-40323, 2009 U.S. Dist. LEXIS 131002 (D. Mass. Dec. 16, 2009); *Kosilek v. Maloney*, 221 F.Supp.2d 156 (D. Mass. 2002), *related hearing at Kosilek v. Spencer*, No. 00-12455, 2012 U.S. Dist. LEXIS 124758 (D. Mass. Sept. 4, 2012)).

with the social context for DOC's resistance to providing necessary medical care for Michelle Kosilek and other transsexual inmates. *Amici* make the following points:

(1) DOC's actions reflect – and, sadly, affirm – the deeply-rooted discomfort with transgender people prevalent in our society. Transgender people are subject to widespread negative attitudes and social disapproval and face discrimination at alarming rates in every sphere of society. Transgender people have not achieved the gains in social acceptance and understanding that lesbians and gay men have; the place of transgender people in our society is more akin to what lesbians and gay men experienced decades ago. (*See* Argument I, *infra*).

(2) DOC's conduct also reflects the disparity between the scientific consensus that sex reassignment surgery is essential medical care and the popular perception that it is frivolous and bizarre. A long history of sensationalized accounts of “sex change” operations from the 1930s to the present has significantly contributed to this public misunderstanding. In fact, there has been a relative scarcity of media that advances in the popular consciousness an accurate medical understanding of the need for sex reassignment surgery and the profound harm caused by withholding such treatment. (*See* Argument II, *infra*).

ARGUMENT

I. TRANSGENDER PEOPLE ARE SUBJECT TO PERVASIVE SOCIAL DISAPPROVAL AND DISCRIMINATION.

Discrimination against transgender people “permeates every aspect of life” in private and public spheres.⁴ As the authors of the 2011 National Transgender Discrimination Survey (“National Survey”) conclude, “[i]t is part of social and legal convention in the United States to discriminate against, ridicule, and abuse transgender and gender non-conforming people within... [n]early every system and institution.”⁵ In fact, 63% of the 6,450 transgender people who participated in the National Survey reported experiencing a “serious act of discrimination,” described

⁴ Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392, 393 (2001). See also Aaron T. Norton & Gregory M. Herek, *Heterosexuals’ Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, Sex Roles 2 (Jan. 10, 2012) (published online), available at

http://www.academia.edu/1220851/Heterosexuals_Attitudes_Toward_Transgender_People_Findings_from_a_National_Probability_Sample_of_U.S._Adults (“Transgender people face widespread prejudice and discrimination”).

⁵ Jaime M. Grant et. al., *Injustice at Every Turn – A Report of the National Transgender Discrimination Survey* 8 (Nat’l Center Transgender Equality and Nat’l Gay & Lesbian Task Force 2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf. The social phenomenon of “emotional disgust” or “revulsion” toward “transgender individuals who do not conform to society’s gender expectations” has been labeled as “transphobia” or “anti-transgender prejudice.” See Esther N. Tebbe & Bonnie Moradi, *Anti-Transgender Prejudice: A Structural Equation Model of Associated Constructs*, 59 J. Counseling Psychol. 251, 251 (2012) (quoting D.B. Hill & B.L.B. Willoughby, *The Development and Validation of the Genderism and Transphobia Scale*, 53 Sex Roles 531, 533 (2005)).

as “events that would have a major impact on a person’s quality of life and ability to sustain themselves financially or emotionally.”⁶

Transgender people face substantial discrimination in employment. It is the experience of the *amici* that discrimination against transgender people constitutes the most frequent type of direct discrimination experienced by people in the lesbian, gay, bisexual and transgender community today. In one case, for example, a New Hampshire college wrote a letter to an employee stating, “you recently disclosed ... your transsexual status. Upon consideration, you are immediately relieved of your duties and ... your employment with the College will terminate effective June 30, 2004.”⁷

Harassment or mistreatment at work is a near universal experience for transgender people. Ninety percent of National Survey respondents reported experiencing harassment or mistreatment on the job, or took actions like hiding who they are to avoid it.⁸ More specifically, 47% of respondents in the National Survey said that they had experienced an adverse outcome such as not being hired

⁶ Grant, *supra* note 5, at 8. These acts of discrimination included loss of a job due to bias, eviction due to bias, school bullying or harassment so severe causing one to drop out, sexual assault due to bias, and denial of medical service due to bias.

⁷ Exhibit C of Complaint, *Blanchette v. Saint Anselm College*, No. 1:05-cv-183 (D. N.H. May 26, 2005), available at <http://www.glad.org/work/cases/blanchette-v-saint-anselm-college/>.

⁸ Grant, *supra* note 5, at 3.

or denied a promotion because they are transgender.⁹ Twenty-nine percent report losing a job due to bias.¹⁰ A 2007 review of studies confirms this rampant employment discrimination against transgender people, pointing to studies which show that 15% to 57% of transgender people have been fired, harassed, or otherwise discriminated against at work.¹¹

Transgender people commonly experience discrimination and harassment in housing and public accommodations. Nineteen percent of transgender people report being refused a home or apartment and 11% report being evicted due to their gender identity or expression.¹² Fifty-three percent of National Survey respondents reported being verbally harassed or disrespected in a place of public accommodation such as a hotel, restaurant, bus or airport.¹³ One transgender woman was denied a motel room after the owner equated her to a “hooker...selling drugs.”¹⁴ Forty-four percent of transgender people were denied equal treatment or

⁹ Grant, *supra* note 5, at 51.

¹⁰ *Id.* at 53.

¹¹ M.V. Lee Badgett et. al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination* 7 (Williams Institute, 2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf>

¹² Grant, *supra* note 5, at 4.

¹³ *Id.* at 124.

¹⁴ *Id.*

service in at least one place of public accommodation.¹⁵ Eight percent of respondents reported being physically attacked in a public accommodation.¹⁶

Transgender people are at a “heightened risk for violence because of their gender identities and expression.”¹⁷ Though gender identity-related hate crimes are still not reported by the Federal Bureau of Investigation and thus nationwide data on these crimes is unavailable, an independent study found 206 reported hate crimes against transgender people in 13 U.S. regions in 2008.¹⁸ In a survey of studies assessing violence against transgender people, the author found that “transgender people [report] suffering from physical assaults, sexual assaults, and harassment in public places by strangers.”¹⁹ This survey also concluded that the majority of transgender people are likely to experience hate crime-related violence in their lifetimes and are likely to experience repeated violence and harassment as

¹⁵ Grant, *supra* note 5, at 124.

¹⁶ *Id.*

¹⁷ Norton & Herek, *supra* note 4, at 2.

¹⁸ Avy A. Skolnik, et al., *Hate Violence against Lesbian, Gay, Bisexual, and Transgender People in the United States* 5 (Nat’l Coalition Anti-Violence Programs 2009), available at http://www.ncavp.org/common/document_files/Reports/2008%20HV%20Report%20smaller%20file.pdf . The 13 reporting regions were San Francisco, CA, Los Angeles, CA, Colorado, Minnesota, Houston, TX, Kansas City, KS, Milwaukee, WI, Chicago, IL, Michigan, Ohio, Pennsylvania, Rochester, NY, and New York City, NY.

¹⁹ Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 *Aggression & Violent Behav.* 170, 177 (2009).

opposed to an isolated incident of violence over a lifetime.²⁰ This violence often starts at a young age.²¹ More than half of transgender students report that they have been physically harassed and approximately one quarter have been physically assaulted.²²

Law enforcement and correctional settings are frequently hostile and unsafe for transgender people. Twenty-two percent of respondents who interacted with police reported harassment by police due to bias.²³ Thirty-seven percent of National Survey respondents who served time in jail reported harassment by correctional officers.²⁴

Transgender people face substantial barriers to health care, including care that is not related to their gender transition. Nineteen percent of respondents in the National Survey were refused medical care due to their transgender or gender nonconforming status.²⁵ Twenty-eight percent reported being the victims of verbal harassment in a medical setting.²⁶ Doctors and health care practitioners openly inform transgender patients that they turn them away due to their discomfort

²⁰ Stotzer, *supra* note 19, at 177-178.

²¹ *Id.* at 178.

²² Emily A. Greytak et. al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools*, at xi (Gay, Lesbian & Straight Educ. Network 2009), available at <http://www.eqcai.org/atf/cf/%7B8CCA0E2F-FAEC-46C1-8727-CB02A7D1B3CC%7D/Harsh%20Realities.pdf>

²³ Grant, *supra* note 5, at 158.

²⁴ Grant, *supra* note 5, at 158.

²⁵ *Id.* at 72.

²⁶ *Id.* at 74.

treating them.²⁷ The results can be tragic. In Washington, D.C. ambulance workers realized that a woman who had been hit by a car was transsexual.²⁸ They made jokes, insulted her, and stopped providing medical care, resulting in her death.²⁹ In another extreme case, a psychiatrist told a transsexual male diagnosed with cervical cancer that his contraction of the disease should make him “deal with the fact that he is not a real man.”³⁰ Subsequently, twenty gynecologists over a period of ten months refused to treat him, often justifying the refusal based on their concern that other patients would be uncomfortable sitting next to him in the waiting room.³¹ Although the man ultimately located a treating physician, he died from the cancer that had spread untreated for almost a year.³²

The social psychologists Norton and Herek examined attitudes toward transgender people from a national sample and found that “negative attitudes are widespread.”³³ They pointed to two social roots of the antipathy towards transgender people. First, longstanding research demonstrates that there is a

²⁷ Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 Colum. J. Gender & L. 88, 98 (2002) (noting as one example a hospital representative who informed one patient that they did not treat her “kind.”)

²⁸ *Id.* See also Maria Elena Fernandez, *Death Suit Costs City \$2.9 Million; Mother of Transgendered Man Wins Case*, Wash. Post, Dec. 12, 1998, at C1.

²⁹ Hong, *supra* note 27, at 98. See also Fernandez, *supra* note 28, at C1 (noting \$2.9m wrongful death jury award).

³⁰ Hong, *supra* note 27, at 99.

³¹ *Id.*

³² *Id.* at 99 n.53.

³³ Norton & Herek, *supra* note 4, at 14.

“widespread and taken-for-granted belief that people can be classified into one of only two ‘natural’ and invariant gender categories, each of which is determined by the presence of particular genitals and for which exceptions are temporary or pathological.”³⁴ Recent psychological studies confirm that “most people conceptualize gender in terms of dichotomous, mutually exclusive categories.”³⁵ For these reasons, “transgender identities pose a challenge to the widespread assumptions that gender and biological sex are binary categories and that individual expressions of gender necessarily correspond to either a male or female bodily form.”³⁶ It is therefore hardly surprising that “many people respond negatively to deviations from normative gender role expectations.”³⁷

Second, Norton and Herek note that violations of gender norms are also viewed in our society as “a form of *moral* transgression that extends beyond the realm of gender to encompass a gender-variant person’s overall character.”³⁸ They explain that negative attitudes about transgender people have long been posited to reflect a belief that transgender people are “perpetrators of a ‘fraud’” and are “deceiving themselves and others by pretending to be something they are not.”³⁹

The historian Joanne Meyerowitz has also observed the popular belief that

³⁴ Norton & Herek, *supra* note 4, at 3.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 14 (emphasis in original).

³⁹ *Id.*

transsexuals are “social frauds” who “misrepresent themselves, deceive themselves (and presumably others) as they attempt to pass as something they are not.”⁴⁰ The argument that transgender people are a “fraud” has, for example, been used as part of the defense in murder cases involving a transgender victim.⁴¹

Notably, Norton and Herek observe that attitudes towards transgender people “were significantly more negative than attitudes toward” lesbian, gay and bisexual people.⁴² They conclude that “some heterosexuals who express positive attitudes towards sexual minorities (and, presumably, accept the notion of equality for them) may ‘draw the line’ at accepting transgender people.”⁴³ They reason that “[t]his may result from a perception that transgender people violate social norms in a more fundamental way than do lesbian, gay and bisexual people.”⁴⁴

In light of the overwhelming hostility towards transgender people, it is not surprising that some government officials, such as Commissioner Dennehy and other DOC personnel, would either hold these negative views themselves or fear provoking the negative reactions of others. This is hardly a unique phenomenon.

⁴⁰ Joanne Meyerowitz, *How Sex Changed* 12 (2002).

⁴¹ Norton & Herek, *supra* note 4, at 14. *See also* Richard M. Juang, *Transgendering the Politics of Recognition*, in *Transgender Rights* 242, 253-254 (Paisley Currah et. al. eds., 2006) (mistrial declared in the murder of Gwen Araujo, a 17 year old transgender woman who was tortured and strangled to death; the prosecution noted that Araujo had committed the “sin of deception,” while defense counsel accused Araujo of “sexual fraud”).

⁴² Norton & Herek, *supra* note 4, at 12.

⁴³ *Id.* at 13.

⁴⁴ *Id.*

See, e.g., Henderson v. Thomas, No. 2:11cv224, 2012 U.S. Dist. LEXIS 180690 (N.D. Ala., Dec. 21, 2012). In that case, the court declared unconstitutional Alabama’s policy of segregating HIV-positive prisoners because it was based on “outdated and unsupported assumptions about HIV” and reflected an “intentional bias against HIV-positive people.” *Id.* at *133. The court chided Alabama corrections officials for declaring that “[W]e live in Alabama... Prejudices... die hard in Alabama,” in response to the question of why the policy was continued after the facts of HIV transmission had become known. *Id.* at *134. This case, like the Alabama case, requires this Court to override the biases of government officials where “powerless or unpopular segments of the population require constitutional protection.” *Inmates of Occoquam v. Barry*, 844 F.2d 828, 850 (D.C. Cir. 1988).

II. A LONG HISTORY OF SENSATIONALIZED MEDIA ACCOUNTS OF “SEX CHANGE” OPERATIONS FROM THE 1930S TO PRESENT HAS SIGNIFICANTLY CONTRIBUTED TO THE PUBLIC’S BIAS AGAINST TRANSSEXUALS AND MISPERCEPTION OF SEX REASSIGNMENT SURGERY.

DOC’s fear of public ridicule and criticism must be viewed through the lens of popular misperceptions of sex reassignment surgery. Much of the public today does not understand that sex reassignment surgery is a legitimate, medically necessary and even life-saving treatment for a profound medical condition. Rather, as demonstrated by *Boston Globe* columnist Brian McGrory’s description of

Michelle Kosilek’s surgery as “bizarre,”⁴⁵ there remains a widespread view that sex reassignment surgery is weird and frivolous.

Much of the popular misperception of sex reassignment surgery has been created by a long history of sensationalized media coverage beginning in the 1930s. Popular media has most often depicted transsexuals as freaks, focused on the beauty and glamour achieved by some transsexuals through surgery, disproportionately portrayed male to female transsexuals who became entertainers, and emphasized lurid, sexual details. What is most remarkable about the trajectory of this portrayal is that many media stories about transsexual people and sex reassignment surgery today are indistinguishable from those appearing from the 1930s to 1960s. In contrast, media that advances understanding of the medical need for sex reassignment surgery – and the harmful consequences of foregoing treatment, such as suicide, self-castration, and profound psychological distress – has been the rare exception, leaving myths and stereotypes to dominate the popular consciousness.

Sex reassignment using modern surgical techniques began in Europe in the 1920s and 1930s.⁴⁶ During this time, a small number of Americans went to

⁴⁵ *Kosilek*, 2012 U.S. Dist. LEXIS 124758, at *21.

⁴⁶ Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in *Transgender Rights* 171, 175 (Paisley Currah et. al. eds., 2006); Meyerowitz, *supra* note 40, at 29-30. In contrast, although a handful of American doctors had privately performed sex reassignment surgery by the late

Germany for surgery.⁴⁷ Importantly, stories of these sex-change surgeries in Europe reached the United States not through the medical profession, but through popular culture.⁴⁸ As the historian Joanne Meyerowitz concluded, since the 1930s, American newspapers and magazines “published a stream of sensational stories” that “attempted to lure readers with shocking accounts of unusual crossgender behavior, rare biological problems, and astonishing surgical solutions” for an “inexplicable sense of being the other sex.”⁴⁹

These stories typically used provocative headlines such as “SEX REPEAL,” which appeared in *True Magazine* in 1939.⁵⁰ A 1937 article about two transgender women who returned to the United States after obtaining surgery abroad, for example, focused on the surgeries as strange science resulting in beauty. The headline read: “When Science Changed a Man into a Woman! The Cases of Two Girls Who Are Being Transformed into Two Boys Parallel the Extraordinary Drama of the Danish Painter Who Became a Beauty.”⁵¹ Another typical

1950s and early 1960s, it was not until the late 1960s that more American surgeons began to perform sex reassignment surgery. Meyerowitz at 48, 97.

⁴⁷ Meyerowitz, *supra* note 40, at 29-30.

⁴⁸ *Id.* at 15.

⁴⁹ Meyerowitz, *supra* note 40, at 39, 32, 49. The word “transsexual” did not appear as a medical category until the late 1940s and early 1950s. *Id.* at 15. Psychiatrist David Caudwell and endocrinologist Harry Benjamin coined and publicized the term when the story of Christine Jorgensen first appeared in the press. *Id.* See also Dallas Denny, *supra* note 46, at 175.

⁵⁰ Meyerowitz, *supra* note 40, at 32.

⁵¹ *Id.* at 30-31.

characterization in 1941 portrayed Barbara Ann Richards, who petitioned the Superior Court of California for a change of name from Edward and the full legal status of a woman. Reporters presented the case as one of “spontaneous metamorphosis” and newspapers used headlines such as “Prank by Mother Nature Turns Los Angeles Salesman into Woman” and “My Husband is a Woman.”⁵² A 1949 article entitled “Psychopathia Transsexualis” depicted transsexuals as nonhuman. It contained a surreal illustration of a double-headed man/woman binding his/her breasts.”⁵³

In the 1950s and 1960s the public most associated sex reassignment surgery with Christine Jorgensen. As Meyerowitz explains, Jorgensen’s story began a “new era of comprehensive, even obsessive coverage” that “made *sex change* a household term.”⁵⁴ The coverage of Jorgensen focused on beauty and glamour as if she were a “Hollywood starlet on the rise.”⁵⁵

Upon Jorgensen’s return from surgery in Copenhagen, the New York Daily News announced on December 1, 1952: “Ex-GI Becomes Blonde Beauty.”⁵⁶ As Meyerowitz notes, that language “did not just capture a step from man to woman, but suggested a larger cultural leap ... from the quintessential postwar masculine

⁵² Meyerowitz, *supra* note 40, at 39-40.

⁵³ *Id.* at 42-43.

⁵⁴ *Id.* at 49, 51 (emphasis in original).

⁵⁵ *Id.* at 1.

⁵⁶ *Id.*

presentation to ‘blonde beauty,’ the hallmark of the 1950s white feminine glamour.”⁵⁷ Jorgensen adopted a feminine style that played on a “postwar cult of glamour, especially for ‘blonde bombshells.’”⁵⁸ She was depicted in photos as a stylish woman in tailored suits, gowns and furs.⁵⁹ Reporters were enchanted by her beauty.⁶⁰ One reporter admitted, “I Could Have Gone for the He-She Girl” and another headline proclaimed “Beautiful Christine Dazzles Newsmen.”⁶¹

Meyerowitz explains that the popular discomfort with sex reassignment surgery was revealed by a genre of “Christine” jokes that were “ubiquitous” in the 1960s.⁶² These jokes “mostly... toyed nervously with the indeterminacy of her sex.”⁶³ Lewder jokes dwelled primarily on Jorgensen’s surgery and the amputation of her penis or construction of her vagina.⁶⁴ These privately circulated jokes that focused on genitals “revealed the anxious sexual undertow of Jorgensen’s celebrity.”⁶⁵

⁵⁷ Meyerowitz, *supra* note 40, at 62.

⁵⁸ *Id.* at 67.

⁵⁹ *Id.* at 65.

⁶⁰ *Id.* at 63.

⁶¹ *Id.*

⁶² *Id.* at 77.

⁶³ *Id.* For example, enlisted soldiers in the demilitarized zone of Korea selected Jorgensen as “Miss Neutral Zone of 1953.” Moreover, when asked whether he planned to return to his homeland, Denmark, comedian Victor Borge said: “No ... I might come back as Hildegarde.” *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

The coverage of Christine Jorgensen generated intense interest in “sex change” operations in the media and popular culture of the 1950s and 1960s. One tabloid magazine described a “rash of glamorous sex-switches,” including a belly dancer who called herself the “first Eskimo sex-change.”⁶⁶ Tamara Rees, for example, returned from sex reassignment surgery in Holland in 1954 and began to perform a striptease act in burlesque clubs advertised as “From GI Paratrooper to Burlesque QUEEN!”⁶⁷ 1950s pulp magazines printed a number of sensational confessional accounts of sex reassignment surgery.⁶⁸ *HE Magazine* published “I Was Forced into ‘Manhood,’” a tale in which an “overambitious medical man” changed the sex of an unwilling girl.⁶⁹ Other magazines printed stories like “Sex Surgery While You Wait!” and “The Weird Psychology of Sex Changes.”⁷⁰

In the 1960s and 1970s media increasingly included eroticized accounts of people who had received sex reassignment surgery.⁷¹ Tabloid newspapers and pulp publishers produced a stream of articles and cheap paperback books on male to female transsexuals who worked as female impersonators, strippers, or prostitutes.⁷² They were often illustrated with pin-up style photos that revealed

⁶⁶ Meyerowitz, *supra* note 40, at 86 & 306 n.108.

⁶⁷ *Id.* at 85.

⁶⁸ *Id.* at 88

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 197-198.

⁷² *Id.* at 197.

breasts, legs and buttocks.⁷³ *The National Insider*, for example, had numerous stories on sex change, including a story of Hedy Jo Star that included her love life with men and photos of her, after she had breast implants, in stiletto heels, fishnet stockings and pasties.⁷⁴ It was published as a paperback, “*I Changed My Sex!*,” claiming that “even Christine’s bizarre experiences cannot compare with Hedy Jo Star’s.”⁷⁵ Other pulp publications used provocative headlines, such as “I Once Had a Penis!,” and a front page article in the *National Mirror* carrying the banner “Sex-Changed Son Raped by Father” next to an “obviously staged photo of the alleged attack.”⁷⁶ By the late 1960s and 1970s the sexualization of male to female transsexuals entered mainstream culture.⁷⁷ In 1970, for example, *Look* magazine ran an article that mentioned the sex lives of postoperative male to female transsexuals “picking up men in bars and charging for their favors.”⁷⁸

Meyerowitz observes that in the 1970s mainstream newspapers and magazines continued to feature stories on transsexuals focusing mostly on a handful of “stars,” such as tennis player Renee Richards.⁷⁹ In the 1980s and 1990s,

⁷³ Meyerowitz, *supra* note 40, at 197-198.

⁷⁴ *Id.* at 198.

⁷⁵ *Id.*

⁷⁶ *Id.* at 200.

⁷⁷ *Id.* at 201-202.

⁷⁸ *Id.* at 203 & 326 n.100.

⁷⁹ *Id.* at 277.

transsexuals appeared increasingly on the television tabloid genre.⁸⁰ As Bernice L. Hausman concluded in *Changing Sex*, television shows about transsexuals focused on a ‘bare your soul’ narrative that obscures medical science.⁸¹ Indeed, shows from the 1990s to present most often avoided political issues and “centered most often on family conflicts or confessional testimonies.”⁸²

Today, as Meyerowitz has concluded, the popular culture media frequently casts transsexuals as “freaks” or “perverts.”⁸³ Many popular depictions of transgender people and sex reassignment surgery today cannot be viewed as advancements from the 1930s to 1960s. In fact, much of the media’s portrayal of transgender people today is more overtly hostile than in past decades.

Many articles deride transgender people and convey the negative attitudes and ridicule of precisely the type that DOC officials feared being the subjects of in this case. For example, in a January 13, 2013 story on its website describing new California regulations for transgender health care, *Fox Nation* used a degrading image from the movie “Mrs. Doubtfire” to mock transgender people.⁸⁴ A December 6, 2012 headline in the *New York Post* used a derogatory term,

⁸⁰ Meyerowitz, *supra* note 40, at 278.

⁸¹ Bernice L. Hausman, *Changing Sex* 12 (3d Printing, 2006).

⁸² Meyerowitz, *supra* note 40, at 279.

⁸³ *Id.* at 11.

⁸⁴ Carlos Maza, *Fox Nation Uses Image from “Mrs. Doubtfire” to Mock Transgender People*, Media Matters Blog, Jan. 15, 2013, <http://mediamatters.org/blog/2013/01/15/fox-nation-uses-image-from-mrs-doubtfire-to-moc/192249>.

declaring: “Tranny Model faces off against firefighter ex-boyfriend in sex-assault trial.”⁸⁵ The first two paragraphs of the story said: “In this corner: a gorgeous blonde pre-op transsexual hooker – best known for getting kicked off America’s Top Model in 2006.” And then: “In the other corner: hunky FDNY calendar boy Taylor Murphy, best known as Mr. March, 2011 and now the accused biter, puncher and strangler – to the point of near unconsciousness – of his ex-girlfriend, the above tranny model.”⁸⁶ In September 2011 frequent *Fox News* contributor Dr. Keith Ablow reacted to the news that Chaz Bono was going to be a contestant on *Dancing with the Stars* by mocking gender transition.⁸⁷ Ablow declared: “The last thing vulnerable children and adolescents need, as they wrestle with the normal process of establishing their identities, is to watch a captive crowd in a studio audience applaud on cue for someone whose search for an identity culminated with the removal of her breasts, the injection of steroids and, perhaps one day soon, the fashioning of a make-shift phallus to replace her vagina.”⁸⁸

⁸⁵ Laura Italiano, *Tranny Model Faces off Against Firefighter Ex-Boyfriend in Sex-Assault Trial*, N.Y. Post, Dec. 6, 2012, http://www.nypost.com/p/news/local/tranny_model_faces_off_with_ex_boyfriend_Oabigq93QBRAU43VnXiGHL.

⁸⁶ *Id.*

⁸⁷ Dr. Keith Ablow, *Don’t Let Your Kids Watch Chaz Bono on ‘Dancing with the Stars’*, Fox News Network, Sept. 2, 2011, <http://www.foxnews.com/opinion/2011/09/02/dont-let-your-kids-watch-chaz-bono-on-dancing-with-stars/#content>

⁸⁸ *Id.*

While there has no doubt been increased awareness of the lives of transgender people and the medical necessity of sex reassignment surgery, the popular consciousness is still predominantly formed by myths, stereotypes, ridicule, and hostility. It is this prevailing public view that is so clearly reflected in DOC's resistance to providing Michelle Kosilek with sex reassignment surgery and the district court's factual findings that prison officials' stated security concerns were pretextual.

Stereotyped views can, as here, lead to the deprivation of constitutional rights. This Court "must be especially vigilant to insure that all citizens -- even [inmates and] the most unpopular -- are guaranteed the protections secured by the Constitution." *Lowrance v. Coughlin* 862 F. Supp. 1090, 1121 (S.D.N.Y. 1994).

CONCLUSION

For the foregoing reasons, the *amici* urge this Court to affirm the judgment of the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because it contains 5,373 words, excluding the parts of the brief exempted by Fed. R. App. P.32(a)(7)(B)(iii). This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman font.

/s/ Bennett H. Klein

CERTIFICATE OF SERVICE

On February 27, 2013, I caused to be filed electronically, with the Clerk of the Court for the U.S. Court of Appeals for the First Circuit, using the appellate CM/ECF system, the foregoing Brief for *Amici Curiae*. I further certify that all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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