STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Case Type: Discrimination

Christina Lusk,

Plaintiff,

v.

Minnesota Department of Corrections; Commissioner Paul Schnell, Deputy Commissioner Michelle Smith, Medical Director James Amsterdam,

Defendants.

Court File No. 62-CV-22-3284
The Honorable Judge Sara R. Gerwig

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL DISMISSAL

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INTRODUCTION

Christina Suzanne Lusk,[1] a woman incarcerated with the Minnesota Department of Corrections ("DOC") at the men's facility in Moose Lake, sued the Minnesota Department of Corrections, Commissioner Paul Schnell, Deputy Commissioner Michelle Smith, and Medical Director James Amsterdam (collectively, "Defendants") for violations of the Minnesota Human Rights Act ("MHRA") and Minnesota Constitution. Though they could have answered her detailed allegations, Defendants chose to file a sprawling motion seeking to dismiss most of Ms. Lusk's claims.[2]

In their memorandum of law ("Mot."), Defendants state, without support, that the DOC is "committed to ensuring all offenders are treated with dignity and it has some of the most progressive transgender offender policies in the nation."[3] Almost 30 years ago, Minnesota became the first state in the country to expressly protect transgender people in our state discrimination law.[4] In light of this, the DOC ***should*** treat transgender inmates with dignity and have some of the most, if not the most, progressive policies in the country.

According to Ms. Lusk's Complaint, which must be taken as true for the purposes of this Motion, the following is how Ms. Lusk is treated by Defendants who tout "some of the most progressive transgender policies in the nation."[5] Though Ms. Lusk is recognized by the State of

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[1] Compl. ¶ 23. Defendants mistakenly refer to her as "Christina M. Lusk." *See* Mot. at 1.
[2] Defendants' Notice of Motion and Motion was filed at Index #15. Defendants' Memorandum of Law is Index #18.
[3] Mot. at 1.
[4] Minn. Stat. § 363A.03 subd. 44; 22 H.F. No. 585 (1993) (https://www.revisor.mn.gov/laws/1993/0/Session+Law/Chapter/22/). *See also* Emma Margolin, *How Minneapolis Became First U.S. City to Pass Trans Protections,* NBC News (June 3, 2016), https://www.nbcnews.com/feature/nbc-out/how-minneapolis-became-first-u-s-city-pass-trans-protections-n585291 (noting that "in 1993, Minnesota became the first state in the nation to enact a law banning discrimination against transgender people").
[5] Mot. at 1.

Minnesota as female, she was put in a male prison because the DOC bases all of their gender-based placement decisions on genitalia and places all transgender women in male prisons;[6] when a fellow transgender inmate who has also had breast augmentation surgery reported being raped at Moose Lake she was moved to a different ***male*** facility;[7] Ms. Lusk is routinely harassed, bullied and harmed by staff and inmates (including when she has repeatedly been put into group cells), at times so severely that she has been on suicide watch;[8,9] though she was approved for female-only searches, she is routinely searched by male staff;[10] when she is in segregation she is inexplicably forced to wear men's underwear;[11] she has been denied jobs based on her transgender status;[12] staff at the DOC, including her medical and mental health treatment team, refer to her by a male name that she has had legally changed and has not used in years; [13] Ms. Lusk was even denied a "discretionary" name change to her legal female name;[14] Ms. Lusk's care provider at the DOC has acknowledged that the misnaming and misgendering causes Ms. Lusk significant distress;[15] Ms. Lusk's care provider at the DOC acknowledged that Ms. Lusk feels "great torment" being in a male prison, that she is a target for harassment given her "female secondary sex characteristics," and that the DOC's treatment of her exacerbates her gender dysphoria to the point that even medical intervention would not be sufficient to counteract the harm;[16] Ms. Lusk does not receive competent gender-affirming medical care for her "persistent,

[6] Compl. ¶¶ 21-23, 45-48, 52.
[7] *Id*. ¶ 54.
[8] *Id*. ¶¶ 53, 114-115.
[9] *Id*. ¶¶ 49-53, 55-59.
[10] *Id*. ¶¶ 111, 113.
[11] *Id*. ¶ 116.
[12] *Id*. ¶ 117.
[13] *Id*. ¶¶ 100, 103-109.
[14] *Id*. ¶ 100.
[15] *Id*. ¶ 103.
[16] *Id*. ¶¶ 56-59.

well documented gender dysphoria" and her own psychiatrist at the DOC misgenders her in her medical records;[17] Ms. Lusk is denied medical necessary gender affirming care supported by the relevant prevailing standards of care;[18] Ms. Lusk has submitted numerous kites and grievances over the years prior to filing this lawsuit, yet the DOC continues its mistreatment of her to this day;[19] and the DOC runs afoul of the plain language of the MHRA, violates the Minnesota Constitution, and does not even meet the bare minimum requirements of the Prison Rape Elimination Act ("PREA").[20]

It is difficult to fathom how Defendants could have responded to a review of Ms. Lusk's Complaint by stating that they are "committed to ensuring all offenders are treated with dignity."[21] Ms. Lusk remains in a men's facility at the DOC, despite Defendants' aspirational statements in support of their Motion. Regardless, Ms. Lusk has thoroughly pled her claims in a detailed 29-page complaint that far exceeds Minnesota's liberal notice pleading requirements. Defendants' Motion to Dismiss misconstrues the pleading standard and relevant substantive legal standards and more, depends on select and self-serving case law espousing decidedly regressive views of what should be afforded to transgender inmates. For these reasons and those described below, the Defendants' Motion should be denied.

[17] *Id*. ¶¶ 65-88.
[18] *Id*. ¶¶ 68, 20.
[19] *Id*. ¶¶ 50, 80, 85, 109, 114, 118.
[20] *Id*. ¶ 43-46; Counts I – VI.
[21] Mot. at 1.

ARGUMENT

I. MINNESOTA'S NOTICE PLEADING STANDARD REQUIRES ONLY A SHORT AND GENERAL STATEMENT OF THE FACTS.

Minnesota is a notice-pleading state: "short and general statements of fact in complaints are adequate." *Walsh v. U.S. Bank, N.A*., 851 N.W.2d 598, 605 (Minn. 2014). "All pleadings shall be so construed as to do substantial justice." Minn. R. Civ. P. 8.06. As such, "a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Halva v. Minn. State Coll. & Univ.*, 953 N.W.2d 496, 501 (Minn. 2021) (quoting *N. States Power Co. v. Franklin*, 265 Minn. 391, 122 N.W.2d 26, 29 (1963)).

When deciding a motion to dismiss, the court considers only the facts alleged in the complaint," accepts those facts as true, and construes "all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.,* 663 N.W.2d 550, 553 (Minn. 2003). The Court must deny Defendants' Motion to Dismiss "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh*, 851 N.W.2d at 603.

II. MS. LUSK STATES A VIABLE CLAIM UNDER THE MHRA.

A. Official and Vicarious Immunity Do Not Bar Ms. Lusk's Claims.

Defendants claim that Ms. Lusk's housing and medical related claims under the MHRA are barred by official and vicarious immunity. The party asserting immunity has the burden of showing particular facts that indicate entitlement to immunity. *Fear v. Indep. Sch. Dist. 911*, 634 N.W.2d 204, 209 (Minn. Ct. App. 2001). Defendants have not met that burden.

"The law concerning a motion to dismiss for failure to state a claim is not hospitable to the doctrine of official immunity." *Stresmann v. Jesson*, No. A13–1967, 2015 WL 7693339 at *2

(Minn. Ct. App. 2015). In light of the standards for motions to dismiss, this Court must only look at the facts in the complaint and assume they are all true. *See supra*, Part I. Defendants only prevail at this stage if they demonstrate ***both*** that immunity applies ***and*** that "it appears to a certainty that no facts, which could be introduced consistent with the pleading" could defeat their claim of immunity. *See supra* Part I; *Stresmann*, 2015 WL 7693339, at *2; *Franklin*, 122 N.W.2d at 29.

To determine whether a public official is entitled to official immunity, courts conduct a three-step inquiry:

First, the court identifies "the conduct at issue." *Kariniemi v. City of Rockford*, 882 N.W.2d 593, 600 (Minn. 2016). The conduct at issue identified by Defendants for their claim of immunity is their placement of Ms. Lusk in a male facility and their denial of Ms. Lusk's gender affirming surgery, in violation of the Minnesota Human Rights Act. *See* Mot. at 8.

Second, the Court determines whether the conduct is discretionary or ministerial. *See Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998). Conduct is discretionary if it "requires the exercise of individual judgment in carrying out the official's duties." *Kari*, 582 N.W.2d at 923. Conduct is ministerial if it arises from duties that are "absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts." *Kelly v. City of Minneapolis,* 598 N.W.2d 657, 664 (Minn. 1999) (cleaned up). Ministerial conduct is not eligible for a claim of official immunity. *See Gleason v. Metropolitan Council Transit Operations*, 563 N.W.2d 309, 315 (Minn. Ct. App. 1997).

Here, Defendants incorrectly argue the Complaint establishes that their conduct was discretionary. *See* Mot. at 8. They claim that the DOC's housing policy is "to consider the unique circumstances of each transgender offender in making housing and health care

recommendations" and their gender-based housing decision is therefore discretionary. *See* Mot. at 8. Ms. Lusk's allegations—which are taken as true at the Motion to Dismiss stage—establish that the DOC's housing policy for transgender individuals is discretionary only on paper. It does not apply to ***gender-based*** placement. Rather than make "placement decisions" on a case-by-case basis, the DOC makes its actual, ***gender-based*** placement decisions on the basis of genitalia. Compl. ¶ 45-46; Count VI.

As Ms. Lusk expressly alleges, even where transgender inmates are legally recognized by the state of Minnesota as female (*id*. ¶ 23), have been on feminizing hormones for years (*id.* ¶ 21), have breasts and are required by the DOC to wear a bra (*id.* ¶ 22, 54, 112), are incarcerated for a non-violent drug offense (*id*. ¶ 32), even if the DOC's own medical provider finds that the DOC's gender-based placement is severely harmful to that inmate's well-being (*id*. ¶ 56-59), even if they have been raped in a male facility (*id*. ¶ 54), transgender women are only eligible for placement in the DOC's male facilities because the DOC bases all of their gender-based placement decisions on genitalia. *Id*. ¶ 45-46.[22] Thus, Defendants have not demonstrated that gender-based housing determinations for transgender inmates cannot be considered ministerial decisions under any reading of Ms. Lusk's complaint.

The same is true for Defendants' denial of Ms. Lusk's gender-affirming surgery. Ms. Lusk alleges that the surgery is medically necessary. *Id*. ¶ 68. Ms. Lusk further alleges that under the prevailing standards of care for treatment of gender dysphoria, "medically necessary treatments should not be denied on the basis of" a person's placement in prison. *Id.* ¶ 20.

[22] Discovery will clarify how the DOC makes their gender-based placement decisions for transgender inmates, how they did so for Ms. Lusk in particular, and whether there are any underlying policy reasons their conduct. At this stage, however, the DOC has not met their burden of establishing, on the face of Ms. Lusk's Complaint, that their placement of Ms. Lusk in a male facility could only have involved a case-by-case exercise of discretion.

Assuming all the facts alleged in the complaint are true, then there are only two possibilities: (1) the DOC has a policy that allows it to deny any incarcerated person medically necessary care, where that care is supported by prevailing medical standards, based on some sort of exercise of discretion; ***or*** (2) for reasons unknown at this stage of the case, the DOC deems genital surgery to treat gender dysphoria as elective or cosmetic. If it is the latter, then Defendants' decision to deny Ms. Lusk gender affirming surgery was not an exercise of discretion. It, too, was a ministerial decision that is not protected by official immunity.[23] At this stage, Defendants have not established that their denial of Ms. Lusk's surgery must have been based on a discretionary act, and Defendants have not met their burden.

Finally, even if the Complaint plainly established that Defendants engaged in discretionary conduct (and it does not), a public official is not entitled to immunity if their conduct was willful or malicious. *See Kariniemi*, 882 N.W.2d at 600; *Kelly*, 598 N.W.2d at 664. In the context of immunity, malice does not necessarily refer to "animus," "depraved heart" or other such legal terms of art; rather, "[m]alice in the context of official immunity means intentionally committing an act that the official has reason to believe is legally prohibited." *Kelly*, 598 N.W.2d at 663. Willful or malicious conduct includes conduct that is legally unreasonable. *Cf. Gleason,* 563 N.W.2d at 317. An act is "legally unreasonable if the official commits those acts while having reason to believe they are prohibited." *Davis v. Hennepin*

[23] Defendants' memorandum on this topic is somewhat perplexing. Defendants acknowledge that, according to the plain language of the DOC policy, "[t]he DOC 'provides transgender, gender non-conforming, and intersex offenders with ***appropriate*** gender-related mental health and medical services throughout their incarceration." Mot. at 4 (emphasis added). Defendants later discuss how "medical necessity" and "appropriate" are not synonymous, and they deny that they provide anyone with healthcare simply because it is "appropriate." *Id.* at 10. Discovery will clarify how the DOC makes their medical decisions for transgender inmates, how they did so for Ms. Lusk in particular, and whether there are any underlying policy reasons their conduct.

County, 559 N.W.2d 117, 122 (Minn. Ct. App. 1997). Ms. Lusk's complaint amply alleges conduct that is legally unreasonable, and if she succeeds on the merits of her MHRA claim, she will also show that the Defendants were willful or malicious—negating any claim for immunity. *Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994) ("there are few circumstances where a public official might be deemed to have committed a discriminatory act under [the public services provision of the MHRA] and yet be deemed not to have committed a malicious or willful wrong under the [willful and malicious standard]").[24]

Though Defendants assert that there is no "decision" that would have "unequivocally put DOC officials on notice" that they are "clearly violat[ing]" any law, this is not the correct legal standard. Mot. at 10. A clearly established law can be a statute, and Defendants must simply have "reason to believe" their conduct is prohibited. *Davis*, 559 N.W.2d at 122. In *Gleason,* for example, Defendant appealed a denial of summary judgment on the basis of immunity in the context of the MHRA. 563 N.W.2d at 314. Plaintiff alleged disability discrimination in public accommodation where a bus driver refused to help a passenger in a wheelchair, belittled her, told all passengers to get off the bus, and then refused to drive with the wheelchair-bound passenger. *Id.* Defendant argued that it behaved legally reasonably because there was "no clearly established law" prohibiting the conduct. *Id.* at 318. The Court rejected this argument because the plaintiff

[24] The Court has acknowledged in *Beaulieu* that governmental immunity could pose a significant threat to the "essential remedial purpose of the MHRA," to "eradicate discrimination in the provision of public services." *Beaulieu*, 518 N.W. 2d at 570. However, it further explained that immunity in the context of MHRA claims does not, in practice, pose a significant threat because "[a] comparison of the standards we have articulated for a finding of discrimination under [the public services provision of the MHRA] with a standard requiring a finding of willfulness or malice indicates that the practical impact of allowing official immunity to be asserted as a defense to discrimination claims under [the public services provision] will be at most negligible." *Id.*

alleged discrimination in public accommodation under the MHRA, which includes disability as a protected class and transportation as a form of public accommodation. *Id.* at 320.

In the present case, Ms. Lusk alleges discrimination in public services on the basis of her status as a transgender woman, conduct prohibited by the plain language of the MHRA. Minn. Stat. § 363A.12. As was the case in *Gleason*, Ms. Lusk alleges discrimination under the MHRA by defendants expressly prohibited from discriminating based on her membership in an expressly protected class.

Additionally, though the court need not look beyond the plain language of the MHRA to find that Ms. Lusk's Complaint supports a claim that Defendants behaved legally unreasonably, there are additional statues and case law that put defendants on ample notice. Defendants urge this Court to look at select cases involving federal constitutional claims where courts have found that transgender inmates have not met their burden (*see* Mot. at 10), but those cases do not support Defendants' position because they are factually distinguishable and because the Defendants' analysis is incomplete and self-serving.

The case law Defendants cite is inapposite for two reasons. First, Defendants cite cases where the plaintiffs established different facts that those alleged by Ms. Lusk in her Complaint. *Campbell v. Kallass*, 936 F.3d 536, 539 (7th Cir. 2019) (granting official immunity at the summary judgment stage on a cruel and unusual punishment claim where the record established at summary judgment demonstrated that the prison ***"followed accepted medical standards."***); *Guy v. Espinoza*, 2020 WL 309525 (E.D. Cal. 2020) (dismissing ***cisgender*** woman's claim that her rights are violated by being housed with transgender woman where "Plaintiff is not alleging that she is transgender, and is not challenging her own classification."). Second, the Defendants' analysis of federal constitutional cases is self-serving, in that they disregarded cases that

unequivocally support Ms. Lusk's claim. *Compare* Mot. at 10 *with Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019) (denial of gender affirming surgery for transgender inmate constitutes deliberate indifference even where other forms of gender-affirming care were provided when DOC did not abide by prevailing standards of care) *and Diamond v. Owens*, 131 F. Supp. 3d 1346 (denying official immunity in claim for cruel and unusual punishment for failure to provide gender affirming medical care to inmate).[25] To the extent that federal constitutional case law is helpful to the Court, the decisions that protect the health and wellbeing of transgender inmates are more aligned with the purpose of the MHRA and its statutorily-mandated liberal construction. The underlying purpose of the MHRA is "to secure for persons in this state, freedom from discrimination . . . because "[s]uch discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy." Minn. Stat. § 363A.02 subd. 1. To this end, the MHRA must "be construed liberally." Minn. Stat. § 363A.04. Given this guidance, to the extent the federal cases are persuasive, the cases that Defendants ***did not cite*** are the very ones the Court should look to.

There are additional places Defendants could have looked when conducting their analysis. Under PREA, for example, which applies to all prisons in the country, prisons must make placement decisions for transgender inmates on a case-by-case basis, 28 C.F.R. § 115.42,

[25] *See also Keohane v. Fla. Dep't of Corr. Sec'v,,* 952 F.3d 1257, 1267 ("Unsurprisingly to us, other courts considering similar policies erecting blanket bans on gender-dysphoria treatments—without exception for medical necessity—have held that they evince deliberate indifference to prisoners' medical needs in violation of the Eighth Amendment."); *Norsworthy v. Beard,* 87 F. Supp. 3d 1164, 1191 (N.D. Cal. 2015) (noting that "'any [blanket] policy [barring SRS] would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs'" (quoting *Kosilek v. Spencer,* 774 F.3d 63, 91(1st Cir. 2014)) (alterations in original)*; Edmo,* 935 F.3d 757 (collecting cases where blanket bans on gender-affirming surgery were found to constitute deliberate indifference).

[26] not categorically by genitalia, as Ms. Lusk alleges. Compl. ¶¶ 21-23, 45-48, 52. Failure to follow PREA guidelines for transgender inmates is legally unreasonable.

Further, "Minnesota courts may look to federal court decisions interpreting similar anti-discrimination statutes for guidance when evaluating claims under the MHRA." *N.H. v. Anoka Hennepin Indep. Sch. Dist. 11*, 950 N.W.2d 553, 562 (Minn. Ct. App. 2020) (noting that courts have looked to the ADA, Title VII, Title IX and other federal anti-discrimination statutes for guidance). Federal cases confirm that singling out and excluding gender-affirming surgery from other medically necessary care constitutes discrimination against transgender people, as does forcing transgender people to use facilities that do not match their gender identity.[27] Additionally, our own Court of Appeals has held that under the education provision of the MHRA, "a transgender student barred from using gendered facilities available to students of the gender with which the student identified and to which the student has socially transitioned states

[26] PREA requires prisons to make placement decisions for transgender inmates on a case-by-case basis, a standard that would be largely meaningless if these decisions can be based on solely on genitalia—particularly where, as here, the DOC also refuses to provide transgender women with genital surgery that is medically necessary and supported by prevailing standards of care. *See* 28 C.F.R. § 115.42; PREA Standards in Focus, National PREA Resource Center, https://www.prearesourcecenter.org/sites/default/files/library/115.42%20SIF_0.pdf (under regulation 115.42, making placement decisions on a case-by-case basis means that "[h]ousing and programming decisions for transgender inmates cannot be based solely on genital status").

[27] *See Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018) (singling out gender affirming surgery from other medically necessary care for exclusion constitutes discrimination against transgender people in the context of the Affordable Care Act' prohibition on discrimination against transgender people); *Flack v. Wis. Dept. of Health Servs*., 328 F. Supp. 3d 931 (W.D. Wisc. 2018) (government singling out gender affirming surgery from other medically necessary care for exclusion constitutes discrimination against transgender people under the Affordable Care Act); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 WL 2191733 (W.D. Wisc. 2018) (government singling out gender affirming surgery from other medically necessary care for exclusion constitutes discrimination against transgender people under both Title VII and the Affordable Care Act); *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017) (forcing transgender boy to use girls' facilities is discrimination under Title IX, which prohibits discrimination against transgender people).

a claim upon which relief can be granted of sexual orientation discrimination under [the education provision of the MHRA]." *N.H.*, 950 N.W.2d at 565.

Because Defendants have not clearly established that they are entitled to immunity based on the facts pleaded in the complaint, there is no need to determine whether the DOC has vicarious immunity. But even if the Court did determine that qualified immunity applies, under Minnesota law, vicarious immunity for government entities does not automatically follow. *Sletten v. Ramsey County*, 675 N.W.2d 291, 300 (Minn. 2004). Vicarious governmental immunity is narrower in scope than official immunity, and "not infrequently a governmental entity is required to compensate for the harm done by a public official even though the official is not held personally liable." *Holmquist*, 425 N.W.2d at n.1. The question of whether or not to apply vicarious immunity to a government employer is a fact-specific policy question, the focus of which is on whether "failure to grant it would focus 'stifling attention' on an official's performance 'to the serious detriment of that performance.'" *Sletten*, 675 N.W.2d at 300*; Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 664 (Minn. 2004) (citing *Olson v. Ramsey County*, 509 N.W.2d 368 (Minn. 1993)).

The Defendants have not acknowledged that vicarious immunity is its own inquiry, nor have they argued that there is a specific policy reason to grant vicarious immunity. *See generally* Mot. at 6-10. Ms. Lusk has not put forward any policy reasons for granting vicarious immunity in her Complaint, and the Court cannot consider any facts outside the complaint at this time. *Supra* Part I. There is little risk of stifling any discretionary behavior particularly where, as here, Plaintiff alleges that, when it comes to transgender women, the DOC does not engage in a true or meaningful exercise of discretion. Rather, the DOC automatically treats all transgender women as men for the purposes of gender-based housing and refuses to provide them with medically

necessary care. Assuming these claims are true, which the Court must do at this stage, the Complaint does not provide the Court with a basis to grant the DOC vicarious official immunity.

Defendants have not demonstrated that the complaint supports their claim of qualified or vicarious immunity and also that there is no possible reading of the complaint that could possibly overcome that claim. Their immunity arguments must be rejected.

B. The DOC's Healthcare and Name Change Policies, As Alleged, Clearly Discriminate Against Transgender People in Violation of the MHRA

1. Ms. Lusk more than adequately alleges medical necessity, and demonstrates healthcare discrimination

Defendants assert that Ms. Lusk has failed to state a claim for health care discrimination because she "has not alleged that any medical professional has ever indicated SRS is medically necessary." Mot. at 10-11. In so doing, they appear to concede that, in the event that Ms. Lusk has alleged that gender affirmation surgery is medically necessary, she would state a claim under the MHRA related to discrimination as to the DOC's provision of healthcare. *Id.*

Though she need not expressly do so to support her claim under Minnesota's liberal notice pleading requirements (*see supra* Part I) Ms. Lusk has expressly alleged that the surgery is medically necessary. For example, Ms. Lusk alleges "[w]hen she entered DOC custody in March 2019, Ms. Lusk submitted a request for gender-affirming surgery. She noted she had been approved by the University of Minnesota and Mayo Clinic for this ***medically necessary treatment***, provided the names of her healthcare providers, and asked for the surgery." Compl. ¶ 68 (emphasis added). Ms. Lusk additionally alleged that "[o]n January 15, 2020, Ms. Lusk . . . clarified that the University of Minnesota, rather than the Mayo Clinic, indicated she was approved for surgery, ***and that her therapist, psychiatrist, gender specialist, primary care physician, and Behavioral Health case manager all concurred that surgery was necessary in***

her case." *Id.*, ¶ 84 (emphasis added). Ms. Lusk also alleged facts that imply medical necessity even without using that precise phrase, such as where she described in detail her grievance requesting a vaginoplasty, citing her doctors' authorizations and the relevant portions of the WPATH Standards,[28] and also describing its necessity due to severe gender dysphoria, which had led to multiple suicide attempts. *Id.*, ¶ 80. Ms. Lusk repeatedly alleges medical necessity of her gender affirmation surgery—both explicitly, using that phrase, and by implication, through alleging facts that are consistent with medical necessity, such that the Defendants are on notice of that claim.

The DOC does not argue—nor could it—that it withholds medically necessary surgeries from cisgender inmates. *See, e.g.*, *Stahlmann v. Minnesota Dep't of Corr*., No. A15-2043, 2016 WL 3582802, at *2 (Minn. Ct. App. July 5, 2016) (deliberate failure to provide "necessary medical care" violates ban on cruel and unusual punishment).[29] Given that Ms. Lusk has explicitly and implicitly notified the DOC that it failed to provide her medically necessary surgery—while the DOC is obligated to afford and does afford medically necessary surgeries to

[28] The DOC goes outside of the pleadings and cites to the WPATH Standards, arguing that they do not assert that gender reassignment surgery is medically necessary. *See* Mot. at 11 n.6. To the extent the WPATH standards need to be considered to determine the sufficiency of the complaint, they do in fact state that gender reassignment surgery is medically necessary. *See* WPATH Standards, 7th Version at p. 54 ("Sex Reassignment Surgery Is Effective and Medically Necessary"). That the DOC has put into issue the meaning and application of the WPATH Standards shows that its arguments are not appropriate for a motion to dismiss, and instead, the case should proceed to discovery and establishment of a factual record, at which time such arguments would be appropriate for adjudication.

[29] *Stahlmann* is important here because it states the minimum standard for what the DOC must do—provide medically necessary care to its inmates. On the other hand, *Stahlmann* itself provides a roadmap for what is ***not*** sufficient for a deliberate indifference claim. There, Mr. Stahlmann argued his doctors should have considered "alternative treatments—treatments that Stahlmann says he discovered in medical journals." 2016 WL 3582802, at *2. Here, in stark contrast, and as further explained *infra* Part IV, Ms. Lusk has alleged that the DOC is ignoring the recommendations of qualified medical professionals who have provided a treatment plan consistent with internationally-recognized treatment standards.

cisgender inmates— the Defendants' arguments fall apart. *See supra* n. 27 (citing cases supporting conclusion that singling out gender affirming care from other medically necessary care for exclusion is unlawful discrimination). Ms. Lusk has more than adequately alleged that she was treated differently from non-transgender inmates who require medically necessary surgery, and the Defendants make no other argument why her MHRA claim as to her request for surgery should fail. The motion to dismiss as to the healthcare discrimination theory of the MHRA claim should be denied.

2. As alleged, the name change policy is discriminatory to transgender inmates including Ms. Lusk

Defendants argue that there can be no MHRA claim as to its commitment name policy, because that policy "applies to all offenders, regardless of sex or gender identity," such that a "cisgender offender who desires a name change is subject to the same restrictions as Ms. Lusk." Mot. at 11. Defendants are mistaken on three grounds.

First, Ms. Lusk does not allege in her complaint that the DOC policy applies to all offenders equally. The DOC grants exceptions in the interest of safety, but they refused to do so for Ms. Lusk. Compl. ¶¶ 93, 100. The DOC also grants exceptions for inmates who are members of a protected class based on religion, but refuses to do so for transgender people who are also members of a protected class. *Id.* ¶ 92. She also alleges that they failed to use her correct name even after her initial commitment expired, which was the triggering event for their policy. *Id.* ¶¶ 89-90, 99, 105, 109. The DOC can and does use appropriate names for inmates regardless of what is on the original warrant of commitment, but refused to do so for Ms. Lusk because she is transgender.

Second, Defendants' use of a male name for Ms. Lusk, a transgender woman, is contrary to the recognized and prevailing standards of care. Compl. ¶ 107. The DOC was fully aware of

the harm they were causing, given that their own psychiatrist noted that the DOC's use of Ms. Lusk's male name caused her significant distress. *Id.* ¶ 103. Their use of her male name exacerbated her dysphoria with every communication. *Id.* ¶ 104. This allegation is not only part of Ms. Lusk's claim of medical discrimination based on transgender status, but Defendants are also creating a prohibited hostile environment based on her transgender status. *See N.H*, MDHR's Compl. in Intervention at 18-21, No. 02-CV-19-922 (10th Dist. Minn., filed Mar. 21, 2019) (MDHR takes the position that the prohibition on discrimination based on sexual orientation encompasses the prohibition of the creation and perpetuation of a hostile environment based on transgender status) (attached as Exhibit 1 to the concurrently-filed Braverman Declaration); *see also Minn. Mining & Mfg. Co. v. State*, 289 N.W.2d 396, 399-400 (Minn. 1979) (noting that the MDHR's interpretation of the MHRA is entitled to "great weight").

Third, even if Defendants were correct and this policy did apply to all incarcerated people in the same manner (though, as established above, it does not), that would not preclude this court from finding that the application of the policy to transgender women in general and/or to Ms. Lusk in particular, amounts to unlawful discrimination. As the Supreme Court of Minnesota acknowledges, "[a]n act of discrimination may involve a situation so unique that such a comparison is impossible." *City of Minneapolis v. Richardson*, 239 N.W.2d 197, 202 (Minn. 1976). If the DOC established a policy requiring ***all*** inmates to accept Jesus Christ as their lord and savior, it would not be difficult to recognize that this policy both applies to every single inmate and also is discriminatory against Muslim inmates. If the DOC established a policy requiring ***all*** inmates to work on Saturdays (i.e., the Jewish Sabbath) or face discipline, it would not be difficult to recognize that this policy both applies to every single inmate and is also discriminatory against Jewish inmates. The MHRA is to be construed liberally, and its

prohibition on discrimination against transgender people cannot possibly be read to permit the government to force a transgender woman to use a male name that is not even legally recognized by the State of Minnesota, that she has not used in years, and that DOC officials acknowledge causes her great distress and exacerbates her dysphoria. Compl. ¶ 103.

Additionally, to the extent that the DOC is correct that there is no case law directly on point that interprets the MHRA public services provision asserted here (*see* Mot. at 7 n.5) in this important case of first impression, it would be unjust to dispose of the case at the motion to dismiss stage. *Cf. Halva*, 953 N.W.2d at 501 ("[A]ll pleadings shall be so construed as to do substantial justice.") (quoting Minn. R. Civ. P. 8.06).

C. The Reprisal Claim is Adequately Pleaded.

Defendants move to dismiss Count II of the Complaint, where Ms. Lusk asserts that Defendants unlawfully engaged in reprisal against her because she opposed sex and sexual orientation discrimination, in violation of Minn. Stat. § 363A.15. Under the MHRA, the plaintiff must allege facts sufficient to show that she (1) engaged in statutorily-protected conduct; (2) that Defendants took a adverse action against her; and (3) a causal connection between the two. *See Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983).

At the pleading stage, a plaintiff raising a discrimination or retaliation claim "need not plead facts establishing a prima facie case[.]" *Mell v. Minnesota State Agric. Soc'y*, 557 F. Supp. 3d 902, 911 (D. Minn. 2021) (quoting *Warmington v. Bd. of Regents of Univ. of Minn.*, 998 F.3d 789, 796 (8th Cir. 2021)). "The prima facie standard is an evidentiary standard, not a pleading standard, and there is no need to set forth a detailed evidentiary proffer in a complaint." *Blomker v. Jewell*, 831 F.3d 1051, 1056 (8th Cir. 2016) (quoting *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49 (1st Cir. 2013)). The elements of the prima facie case are not irrelevant

at the pleading stage, but rather are "part of the background against which a plausibility determination should be made." *Mell*, 557 F. Supp. 3d 902, 911 (D. Minn. 2021) (citing *Blomker,* 831 F.3d 1051, 1056 (8th Cir. 2016)). Here, Ms. Lusk has pled sufficient facts to establish her reprisal claim, and dismissal is improper.

First, a plaintiff may engage in statutorily-protected conduct by opposing discriminatory practices a person "has a good faith reasonable belief" violate the MHRA. *Bahr v. Capella Univ*., 788 N.W.2d 76, 82 (Minn. 2010); *Harrell v. Handi Med. Supply, Inc*., 920 F.3d 1154, 1157 (8th Cir. 2019). In this case, and contrary to Defendants' assertions, Ms. Lusk alleged that she complained numerous times throughout the course of her incarceration through written and verbal means of the specific and ongoing discriminatory treatment she received from Defendants based upon her transgender status, to no avail. *See* Compl. ¶¶ 39, 47, 50, 55, 57, 60-61, 68, 74, 80, 84, 85, 100, 118.

Second, Ms. Lusk has also alleged sufficient facts showing that Defendants singled her out for adverse action against her, and that these adverse actions were causally connected to her opposition to unlawful practices. The Eighth Circuit has observed that it is "proper to consider the cumulative effect of…alleged retaliatory conduct." *Fercello v. Cty. of Ramsey*, 612 F.3d 1069, 1083–84 (8th Cir. 2010). Defendants do not dispute that Ms. Lusk alleged that she has consistently been singled out for discipline based for issues unique to her transgender status such as failing to wear to bra while hers were in the wash and wearing a nightgown without wearing pants underneath. Compl. ¶ 112. Ms. Lusk also identifies that she was approved for female searches, yet male staff continued to search her, watch her change clothing, and comment on her breasts. *Id.* ¶ 114. When disciplined, Ms. Lusk has been forced to wear men's undergarments, and she has been denied the best-paying industry jobs. *Id.* ¶¶ 116-17. These actions have all

taken place after Ms. Lusk submitted numerous grievances about her treatment based on her transgender status, and the retaliatory actions alleged uniquely relate to her transgender status. *See Id.* ¶¶ 39, 47, 50, 55, 57, 60-61, 68, 74, 80, 84, 85, 100, 112, 114, 116-117, 118. "A pattern of adverse actions that occur just after protected activity can supply the extra quantum of evidence to satisfy the causation requirement." *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 832 (8th Cir. 2002).

Taken together, Plaintiff has sufficiently alleged at this motion to dismiss stage that Defendants retaliated against her for her repeated opposition to the discriminatory treatment she received, in violation of the MHRA.[30]

III. MS. LUSK DOES NOT SEEK DAMAGES UNDER THE MINNESOTA CONSTITUTION.

Defendants argue that Ms. Lusk may not seek damages under the Minnesota Constitution. The court need not determine this issue because Ms. Lusk is not seeking damages under the Minnesota Constitution. Ms. Lusk is seeking damages under the Minnesota Human Rights Act, and Defendants have not argued that she is not entitled to such damages if she were to prevail on her MHRA claims. Compl. Counts I-II, Prayer for Relief at D-K; *see also* Minn. Stat. § 363A.29 subd. 4.

[30] The unreported cases cited by Defendants on the issue of retaliation are inapposite. *See* Mot. at 12-13. In *Clemons v. MRCI Worksource*, a Whistleblower Act case, there was an intervening event between the employee's complaint and the alleged retaliatory discharge that would independently justify the discharge. 2014 WL 2178938 at *6 (Minn. Ct. App. May 27, 2014) (citing *Freeman v. Ace Tel. Ass'n.*, 467 F.3d 695, 698 (8th Cir. 2006)) (analyzing section 181.932 and concluding that "the presence of intervening events undermines any causal inference that a reasonable person might otherwise have drawn from temporal proximity"). In *Beyena v. Sunburst Transit, LLC*, Plaintiff was discharged for speeding and falsifying time cards and based his retaliation claim not on a pattern of behavior, targeted discipline, or adverse treatment, but on nothing more than the fact that he was fired 13 days after filing an EEOC complaint. 2012 WL 6554537 at *6.

IV. THE DOC'S HEALH CARE POLICY VIOLATES THE MINNESOTA CONSTITUTION'S EQUAL PROTECTION GUARANTEE AND BAN ON CRUEL OR UNUSUAL PUNISHMENT.

A. Ms. Lusk Alleged That She Was Treated Unequally to Those Similarly Situated and Therefore States an Equal Protection Claim

To succeed on an equal protection claim, a plaintiff must demonstrate that "similarly situated person have been treated differently." *State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011). If a plaintiff is treated differently than similarly situated people based on her transgender status, then the policy or practice in question is subjected to intermediate scrutiny. *N.H.*, 950 N.W.2d at 569 (holding that intermediate scrutiny applies to equal protection claims based on transgender status). This means that the policy or practice must be "substantially related to an important governmental objective." *Id.* (citing *State v. Craig*, 807 N.W.2d 453 (Minn. Ct. App. 2011)).

Defendants argue that Ms. Lusk is not similarly situated to cisgender inmates who are able to get surgery because she has not alleged on the face of her complaint that her surgery was medically necessary. See Mot. at 14-15. Defendants are, again, demonstrably incorrect. Ms. Lusk has alleged that her gender-affirming surgery is medically necessary, and this allegation must be taken as true at this stage. *See supra*, Section II.B; Compl. ¶¶ 68, 80, 84. Additionally, Defendants do not, and indeed cannot, argue that they withhold medically necessary care from cisgender inmates. *See Stahlmann*, 2016 WL 3582802, at *2 (deliberate failure to provide "necessary medical care" violates ban on cruel and unusual punishment). Ms. Lusk has adequately pled that she is treated differently than similarly situated people. Defendants' Motion as to the Equal Protection claim should be denied.[31]

[31] Defendants do not argue they can establish, on the face of the complaint, that their treatment of Ms. Lusk necessarily must have been "substantially related to an important governmental objective." *N.H.*, 950 N.W.2d at 569. Needless to say, Ms. Lusk has not put forward any such claims in her complaint on which Defendants could urge this Court to base such a determination.

B. The Denial of Ms. Lusk's Gender Affirming Surgery Is Cruel or Unusual

Defendants argue that "[a]s a matter of law," Ms. Lusk's allegations cannot amount to a claim for cruel or unusual punishment under the Minnesota Constitution. Mot. at 17. But in making this argument, they mischaracterize or ignore both the pleading standard and the substantive legal standard.

Defendants pay lip service to the important fact that the Minnesota Constitution's ban against cruel ***or*** unusual punishment "differs from its federal analog." Mot. at 15 n. 11. But they fail to acknowledge that the Minnesota standard is ***more protective***. *See, e.g.*, *State v. Hassan*, 977 N.W.2d 633, 641 (Minn. 2022) ("[T]he distinction between Article I, Section 5, and the Eighth Amendment is 'not trivial.' Because the Minnesota Constitution prohibits cruel punishments that are not unusual, it provides more protection than the United States Constitution." (quoting *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998)). Defendants further excuse themselves from adhering to that more stringent standard, arguing other cases have applied the two "differing" standards identically. Mot. at 15 n.11. But the facts Ms. Lusk alleges are both sufficient under the federal standard the Defendants adhere to and under the more protective Minnesota standard.

Under the federal constitution, "'deliberate indifference to serious medical needs' of prisoners constitutes cruel and unusual punishment." *Edmo*, 935 F.3d at 766 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Where an inmate establishes that her gender dysphoria constitutes a "serious medical need, the appropriate medical treatment is [Gender Confirmation Surgery]," and a prison has "not provided that treatment despite full knowledge of [Plaintiff's] ongoing and extreme suffering and medical needs," then a plaintiff can succeed on a cruel and unusual claim. *Id.* at 767. This is true even where a prison provides an inmate with other forms of gender-affirming care. *Id.*

Defendants argue that so long as Ms. Lusk has received *some* gender affirming care, then she cannot state a deliberate indifference claim. Mot. at 15. They cite nothing to support the novel proposition that so long as an inmate receives *some* healthcare, no matter how incompetent (Compl. ¶¶ 85-86, 88), no matter how arbitrary (*id*. ¶¶ 87), no matter how contrary to the prevailing standards of care (*id*. ¶¶ 18-12, 80, 86, 107), no matter if the providers are disregarding serious medical need (*id*. ¶¶ 20, 68, 84), then, categorically, a plaintiff cannot possibly make a case for cruel or unusual punishment.

To support their assertion that Ms. Lusk's claim amounts to nothing more than a "disagreement" with the treatment she is receiving, Defendants state in a conclusory fashion that Ms. Lusk simply disagrees with her course of treatment. Mot. at 16. Defendants do not cite the Complaint or any other factual material in support. *Id.* at 16. Instead, they reference cases in other jurisdictions where courts have made case-specific determinations that the Plaintiff in question was not being denied medically necessary care. *Id.* But there is no connection between the facts alleged in the Complaint and the conclusions made in other cases on other facts, and the Defendants do not even attempt to make one. In any event, at this stage, the court must only consider the facts laid out in Ms. Lusk's Complaint. *See supra* Part I.

Defendants' argument that Ms. Lusk's claim should be dismissed because the denial of her surgery represents a disagreement between professionals is similarly unavailing. It is not appropriate to resolve disagreements about fact-intensive issues at the motion to dismiss stage. Questions about whether WPATH provides the widely accepted prevailing standards of care for treatment of gender dysphoria, (Mot. at 17 n.12), and whether surgery constitutes a serious medical need for Ms. Lusk require serious factual examination.[32] As one court explained, "the

[32] Even if the Court were to find that it is appropriate to refer to findings of facts in other cases rather than the complaint itself, there have been courts that have expressly found that WPATH

Court notes that the parties devote significant discussion to whether the refusal to provide gender reaffirming surgery can be considered an act of deliberate indifference under the Eighth Amendment. As with many, if not most, of Doe's claims concerning necessary treatment, this issue cannot be resolved on a motion to dismiss. As the decisions of other courts illustrate, this issue is fact-driven and complex." *Doe v. Pennsylvania Dep't of Corr.*, No. 1:20-cv-23, 2021 WL 1583556, at *24 (W.D. Pa. Feb. 19, 2021), *report and recommendation adopted*, No. 1:20-cv-23, 2021 WL 1115373 (W.D. Pa. Mar. 24, 2021); *see also id.* (collecting cases where courts have allowed deliberate indifference claims based on denial of gender affirming surgery to proceed past a motion to dismiss).[33]

Ms. Lusk has adequately stated a claim of cruel or unusual punishment under the Minnesota Constitution for failure to provide gender affirming care, and this claim must not be dismissed.

V. MS. LUSK'S HAS ADEQUATELY PLEADED HER DECLARATORY JUDGMENT CLAIM

Defendants argue that Ms. Lusk has not succeeded in establishing the merits of her facial challenge to Defendants' housing and medical policies and practices. Mot. at 17-18. At this

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provides the prevailing standards of care, that gender affirming surgery can be medically necessary treatment for gender dysphoria, and that gender affirming surgery may be medically necessary even where other forms for gender affirming care have been provided. *E.g., Edmo*, 935 F.3d at 767. In fact, even Minnesota's own Department of Human Services recognizes WPATH standards "as constituting the prevailing provider practices with regard to medical necessity." *JustUs Health v. Dep't of Human Services*, Amended Order, OAH 60-9029-36557 at 3 (April 21, 2020) (attached as Braverman Decl., Exhibit 2).

[33] Multiple federal circuit courts have indeed "held that denying surgical treatment for gender dysphoria can pose a cognizable Eighth Amendment claim." *Edmo*, 935 F.3d at 796 (citing cases from the Fourth, Seventh, and Ninth Circuits). Given that the Minnesota Constitution is more protective than the federal constitution, Defendants have not provided the court with any persuasive justification for overlooking cases such as *Edmo* when determining whether Ms. Lusk has stated a claim for relief.

motion to dismiss stage, Ms. Lusk need not conclusively prevail on her claim, rather she must provide defendants with notice of claims upon which relief can be granted. *Supra*, Part I. Defendants' arguments that Ms. Lusk has not, at this stage, succeeded on her claim, are premature and inappropriate.

With regard to housing, Defendants claim that Ms. Lusk alleges in her Complaint that the DOC makes case-by-case determinations for placement of inmates, and therefore Ms. Lusk has only brought an as applied challenge regarding their specific determination to place her in a male facility. Mot. at 18-19. Ms. Lusk does indeed bring an as-applied challenge for the DOC's placement of her in a male facility. But she ***also*** brings a facial challenge insofar as the DOC bases all of their ***gender-based*** placement decisions for all transgender inmates, including but not limited to Ms. Lusk, on genitalia. Compl., Count VI, ¶ 2; *supra* Section II.A. There is no set of circumstances under which a categorical policy of relying ***solely*** on genitalia for gender-based placement decisions is lawful under the Minnesota Constitution and the MHRA, and such policy or practice must be declared unconstitutional and unlawful. *See, e.g.*, *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (Minn. 2013); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987). Defendants do not dispute this. Rather, they incorrectly deny that Ms. Lusk has alleged that they have such a policy or practice. Mot. at 18-19. Thus, the Defendants' arguments, based entirely on misstatements of Ms. Lusk's allegations, are inapposite.

Similarly, Ms. Lusk's second requested declaration concerns Defendants' *de facto* policy of denying gender affirming surgery by either denying them outright or by "deferring" them until after incarceration, and she seeks a declaration that states that such a blanket practice is unconstitutional and violates the MHRA. Compl. at Count VI, ¶ 2. Again, the fact that the Defendants have noted that the DOC's written policy, on its face, appears to allow for avenues to

receive gender affirming surgery (Mot. at 18) does not override the fact that Ms. Lusk alleges (and the DOC would concede) that it has *never* provided gender affirming genital surgery to any inmate and it categorically denies such requests or "defers" them until after release, for reasons other than medical need, at which point they are no longer responsible for the inmate's medical care.[34] Again: the Defendants make no arguments that explain why Ms. Lusk's declaratory judgment claim is insufficient, and their motion to dismiss should be denied.

VI. MS. LUSK ADEQUATELY ALLEGES VIOLATION OF HER RIGHT TO BODILY INTEGRITY AND AUTONOMY

In Count V of the Complaint, Ms. Lusk asserts that Defendants violated her right to bodily integrity and autonomy, in violation of the Minnesota Constitution. Defendants have failed to establish that this claim should be dismissed.

In arguing that Ms. Lusk has failed to state a claim for bodily integrity and autonomy, Defendants suggest that such a fundamental right has not already been recognized by Minnesota Supreme Court. Mot. at 20 (noting the Minnesota Supreme Court is "reluctant to expand the concept of substantive due process") (citations omitted). To be clear, Ms. Lusk is not asking this Court to recognize a new fundamental right. Rather, the Minnesota Supreme Court has ***already***

[34] Defendants do not argue that a policy of categorically denying or deferring medically necessary gender affirming care until after release does not violate the Minnesota Constitution or the MHRA, rather they deny that they have such a policy or practice. Mot. at 18-19. For that reason Plaintiff is not addressing this issue here, though she notes she has addressed it throughout her memorandum. *Supra* II, IV. *See also Keohane,* 952 F.3d at 1267 ("Unsurprisingly to us, other courts considering similar policies erecting blanket bans on gender-dysphoria treatments—without exception for medical necessity—have held that they evince deliberate indifference to prisoners' medical needs in violation of the Eighth Amendment."); *Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1191* (N.D. Cal. 2015) (noting that "'any [blanket] policy [barring SRS] would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs'" (quoting *Kosilek,* 774 F.3d at 91) (alterations in original)*; Edmo,* 935 F.3d 757 (collecting cases where blanket bans on gender affirming surgery were found to constitute deliberate indifference).

recognized a deeply rooted constitutional right to bodily integrity and autonomy. Indeed, "the protection of bodily integrity has been rooted firmly in our law for centuries." *Jarvis v. Levine*, 418 N.W.2d 139, 148–49 (Minn. 1988). As the Minnesota Supreme Court stated, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Minnesota Bd. of Health v. City of Brainerd*, 308 Minn. 24 (1976). The Minnesota Supreme Court has held that "[w]hen medical judgments collide with a patient's fundamental rights…it is the courts, not the doctors, who possess the necessary expertise." *Jarvis*, 418 N.W.2d at 147-48.

Under Minnesota law, the right to bodily integrity and autonomy is encompassed by both the underlying right to liberty ***and*** the right to privacy. *Jarvis*, 418 N.W.2d at 145, 148. Our right is ***broader*** than that provided by the federal constitution, and does not track limitations of the federal right. *State v. Davidson*, 481 N.W.2d 51, 58 (Minn. 1992) ("[T]he privacy guaranteed under [the Minnesota Constitution] is broader than the privacy right read into the comparable federal constitutional provision.") (citing *Jarvis* , 418 N.W.2d at 147-49); *see also Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (expressly declining to incorporate the limitations of the federal right to privacy on Minnesota's right to privacy). Additionally, the Minnesota Supreme Court has confirmed that our right to bodily autonomy and integrity applies within the confines of government institutions. *Id.* at 148 ("The right begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent. Commitment to an institution does not eliminate this right.").

Defendants' argument that Ms. Lusk fails to state a claim of denial of bodily integrity and autonomy lack merit. They disingenuously attempt to narrow her claim to very specific facts, and

then assert that no court has found a fundamental right in housing placement based on gender identity or receipt of gender affirming surgery. Mot. at 20-21. But that ignores that, as explained above, her actual claim—for denial of bodily integrity and autonomy—is recognized by the Minnesota Supreme Court. Transgender women are not categorically excluded from this right. Moreover, in support of their proposition that Ms. Lusk must fail on the merits they solely cite to case law under the federal constitution, a number of which do even not involve claims by transgender inmates, and none of which expressly involves analyses of claims for denial of bodily autonomy, bodily integrity, and/or privacy. *Id*. This court need not follow those cases as "Minnesota has an interest in assuring those within its borders that their disputes will be resolved in accordance with this state's own concepts of justice." *Gomez*, 542 N.W.2d at 31.

Additionally, Defendants claim that Ms. Lusk must allege that their treatment of her "shocks the conscience." Mot. at 20. While our courts have indeed applied this standard to substantive due process claims challenging executive, as opposed to legislative, action[35] Defendants do not demonstrate that the Complaint solely supports a theory that Defendant's actions were "executive" for the purposes of determining whether the standard applies. *See e.g., Jarvis*, 418 N.W.2d 139 (bodily autonomy challenge to the application of an involuntary medication policy where court did not apply the "shocks the conscience" standard).[36] Even if the standard did apply, they do not argue that Ms. Lusk fails to meet this standard. Mot. at 20-21.

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[35] *State v. Wiseman*, 816 N.W.2d 689, 692 (Minn. Ct. App. 2012) (contrasting challenges to executive action where the "shocks the conscience" standard does apply with challenges to legislative enactments where it does not).

[36] The distinction between what constitutes "executive action" and "legislative action" for the purposes of determining whether the "shocks the conscience" standard applies is not clear cut, is not ultimately determined by the governmental branch of the actor, and requires a fact-intensive inquiry not appropriate at this stage of litigation. *See, e.g*., *Lewis v. Brown*, 409 F.3d 1271, 1273 (11th Cir. 2005); *Hernandez v. Grisham*, 508 F. Supp. 3d 893, 982-83 (D.N.M. 2020); *Abdi v. Wray*, 942 F.3d 1019, 1027-28 (10th Cir. 2019).

Ms. Lusk submits that regardless of whether the standard applies, the facts laid out in her complaint indeed "shock the conscience," particularly in a state that touts itself as being progressive in this area, and which provides robust statutory and constitutional protections to transgender people such as Ms. Lusk. *See* Introduction, *supra*; *Gomez*, 542 N.W.2d at 31 (our Constitution's right to privacy must reflect our state's own concepts of justice).

Finally, Defendants argue that Ms. Lusk is raising a substantive due process claim that is duplicative of her other constitutional claims, and that doing so is prohibited. Mot. at 20. They are incorrect. Ms. Lusk is raising a separate claim of denial of her right to bodily integrity and autonomy. In *State v. Thomas*, cited by Defendants in support of this argument, Plaintiff brought a claim for excessive bail under the fourteenth amendment's right to due process, rather than under the Eight Amendment's express prohibition on excessive bail. 831 N.W.2d 914, 916-917 (Minn. Ct. App. 2013). Because there is an express amendment that covers excessive bail, the court ruled that this was the claim Plaintiff should have brought. *Id.* Here, there is not an express amendment that covers the right to bodily integrity and autonomy. Instead, our courts "have not limited our finding of fundamental rights to those expressly stated in our constitution" and have found a constitutional right to bodily autonomy, integrity, and privacy, not expressly enumerated elsewhere in the Minnesota Constitution. *Gray*, 413 N.W.2d 107 (Minn. 1987). Ms. Lusk's claim is not duplicative.

Defendants wish to categorically exclude transgender women from women's facilities, to categorically exclude gender affirming surgery from other medically necessary care, and now seek to categorically exclude transgender women from the well-established constitutional right of all Minnesotans to bodily integrity, autonomy, and privacy. This Court should not allow it.

VII. THE CLAIMS AGAINST INDIVIDUAL DEFENDANTS SHOULD NOT BE DISMISSED.

Defendants argue that Commissioner Schnell, Deputy Commissioner Smith, and Dr. Amsterdam must be dismissed as parties. As to Commissioner Schnell and Deputy Commissioner Smith, Defendants mistakenly claim that Ms. Lusk alleges that they were only involved in the denial of Ms. Lusk's name change. Mot. at 21. They also mistakenly claim that Ms. Lusk alleges that Dr. Amsterdam was only involved in the denial of her surgery. They argue that since the name and medical claims must be dismissed, the claims against these Defendants must be dismissed as well.

This Court should not dismiss those Defendants. For one, Ms. Lusk has supported all of her claims in her detailed complaint, and no dismissal is warranted. Additionally, Dr. Amsterdam is the medical director and therefore a member of the Transgender Committee. Compl. ¶¶ 6, 40. The Committee was also involved in decisions regarding Ms. Lusk's housing, among other things. *Id*. ¶¶ 40-42, 48-52. Nowhere in her complaint does Ms. Lusk allege that Dr. Amsterdam excused himself from the Committee when it came to decisions other than medical care. Additionally, by statute, Commissioner Schnell, the commissioner of corrections, is charged with "determin[ing] the place of confinement of committed persons in a correctional facility or other facility of the Department of Corrections and to prescribe reasonable conditions and rules for their employment, conduct, instruction, and discipline within or outside the facility." Minn. Stat. § 240.01 Subd. 3a(b). Ms. Lusk challenges the placement-related policies and/or practices of the DOC and does not concede that Commissioner Schnell only had a role in the name-change decision.

CONCLUSION

For the foregoing reasons, Ms. Lusk respectfully requests that this Court deny the Defendants' Motion to Dismiss.

Respectfully submitted,

Dated: September 23, 2022

GENDER JUSTICE

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