IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

CHRISTOPHER SULLIVAN, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 2:17-CV-00052
	)	Chief District Judge Crenshaw
SAM BENNINGFIELD, *et al.*	)	Magistrate Judge Brown
	)	JURY DEMANDED
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs challenge a May 15, 2017 Standing Order (Doc. No. 13-1) issued by the White County General Sessions Court, which was rescinded on July 26, 2017 by the Order Rescinding Previous Standing Order (Doc. No. 13-2).[1] Plaintiffs seek a declaratory decree that the Challenged Orders violate the Equal Protection and Substantive Due Process Clauses of the Fourteenth Amendment. Plaintiffs' Motion for Partial Summary Judgment and Memorandum (Doc. Nos. 21 and 22). Initially, as set forth below, Plaintiffs' lack standing to seek declaratory relief because the Challenged Orders are no longer in effect and therefore there is no proof of "actual present harm or a significant possibility of future harm." *Grendell v. Ohio Supreme Ct.*, 252 F.3d 828, 833 (6th Cir.2001)

Plaintiffs' Motion for Partial Summary Judgment should also be denied because there remains questions of material fact, *i.e.*, the government interests involved. *See Ctr. for Bio-Ethical*

[1] Judge Benningfield subsequently entered an Order Clarifying Order Rescinding Previous Standing Order, which is attached to this Response as **Exhibit A**. These orders shall be referred to collectively herein as the "Challenged Orders."

Reform, Inc. v. Napolitano, 648 F.3d 365, 379 (6th Cir. 2011)(noting an equal protection claim requires an inquiry into the basis for government action); s*ee also, Mitchell v. McNeil*, 487 F.3d 374, 376 (6th Cir. 2007)(To state a cognizable substantive due process claim, the plaintiff must allege conduct intended to injure in some way unjustifiable by any government interest.)(quotations and citation omitted). Plaintiffs offer no proof of the government interest behind the Challenged Orders other than pointing to the plain language of the orders. Plaintiffs attempt to liken the Challenged Orders to previously discredited eugenics programs, but Plaintiffs fail to establish facts that could lead a juror to find that the Challenged Orders were a form of eugenics, or forced sterilization. The Challenged Orders clearly state that the free contraceptive services were optional. Defendants submit that the government interest at issue is preventing the birth of drug addicted babies and otherwise encouraging inmates to take advantage of free medical services offered by the Tennessee Department of Health.

Furthermore, there is a stay of discovery in two sister cases. *See Garrett v. Shoupe, et al.*, Case No. 2:17-cv-59 (Doc. No. 38); *see also Stall v. Shoupe, et al.*, Case. No. 2:17-cv-60 (Doc. No. 31). In order to uncover the bases for the government's interest being furthered, discovery from the Department of Health and the Defendants themselves would be required, which would run afoul of the discovery stays in the other cases. Because material facts are in dispute, this Court should deny Plaintiffs' Motion for Partial Summary Judgment.

Even if there is no disputed facts on this issue, this Court is required to interpret the evidence, including all reasonable inference to be drawn therefrom, in the light most favorable to Defendants (the nonmovants). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Interpreting the Challenged Orders in this light, this Court should find that the government entered the Challenged Orders to encourage inmates to think about taking responsibility for their lives

outside of jail, avoiding unwanted pregnancies and the associated risks of Neonatal Abstinence Syndrome. *See* https://www.cbsnews.com/news/opioid-crisis-tennessee-judge-neonatal-abstinence-syndrome-birth-control-inmate/ (last visited on March 21, 2018). This government interest is relevant to Defendants' request to deny Plaintiffs' equal protection and substantive due process claims.

For these reasons, as explained below, Plaintiffs' Motion for Partial Summary Judgment should be denied.

A. PLAINTIFFS LACK STANDING TO SEEK A DECLARATORY DECREE

Plaintiffs seek a declaratory decree that Judge Benningfield's Challenged Orders and Sheriff Shoupe's enforcement of the Challenged Orders violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. Plaintiffs' Motion for Partial Summary Judgment should be denied because declaratory relief is not available to them. They were not injured by the entry or enforcement of the Challenged Orders. Even if they were injured, a judgment in their favor would not redress those injuries. And finally, there is no threat of immediate or future injury. Therefore, Plaintiffs lack standing sufficient to obtain declaratory relief.

> To establish Article III standing, the plaintiff must allege that: (1) he has suffered an injury-in-fact that is both "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is fairly traceable to the defendant's conduct; and (3) it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999). In the case of a plaintiff seeking equitable relief, as Binno does here, the claimant must allege "actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-enforcement review." *Daubenmire v. City of Columbus*, 507 F.3d 383, 388 (6th Cir. 2007) (internal quotation marks and citation omitted). "The party seeking to invoke federal jurisdiction bears the burden to demonstrate standing and he 'must plead its components with specificity.' " *Id.* (quoting *Coyne*, 183 F.3d at 494).

Binno v. Am. Bar Ass'n, 826 F.3d 338, 344 (6th Cir. 2016), *cert. denied sub nom. Binno v. The Am. Bar Ass'n*, 137 S. Ct. 1375, 197 L. Ed. 2d 554 (2017).

> To have standing to seek declaratory relief, a plaintiff must show that he or she is "subject to 'an actual present harm or a significant possibility of future harm.' " *Grendell v. Ohio Supreme Ct.*, 252 F.3d 828, 833 (6th Cir.2001) (quoting *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 279 (6th Cir.1997)). A previous injury may confer standing upon a plaintiff to seek damages. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). However, the prior injury itself does not confer standing upon a plaintiff to seek declaratory relief. *Grendell*, 252 F.3d at 832. Instead, a prior injury only constitutes "'evidence bearing on whether there is a real and immediate threat of repeated injury.' " *Id.* at 833 (quoting *Lyons*, 461 U.S. at 102, 103 S.Ct. 1660.)

Kelley v. Shelby Cty. Bd. of Educ., 198 F. Supp. 3d 842, 849 (W.D. Tenn. 2016)

In this case, Plaintiffs cannot establish an injury. Being offered free contraceptive services, even being encouraged to except the free contraceptive services, is not an injury that establishes standing. *See* Section B below. Plaintiffs did not receive vasectomies and their right to procreate has not been hindered in any way. Plaintiffs' sentences were not increased; rather, they are serving their sentences as originally ordered. The Standing Order (Doc. No. 13-1) has been rescinded. *See* Order Rescinding Previous Standing Order. (Doc. No. 13-2). The Order Rescinding Previous Standing Order put a stop to the practice of offering a 30-day sentence reduction in exchange for receipt of free contraceptive services, but gave jail credit to individuals that agreed to the free contraceptive services prior to the entry of Order Rescinding Previous Standing Order. *See* Order Clarifying Order Rescinding Previous Standing Order (attached hereto as **Exhibit A**). Therefore, there is no risk that Plaintiffs will face a similar "injury" as is claimed from when the Standing Order was in effect. Further, even if this Court were to declare the Challenged Orders unconstitutional, this would not redress any of the alleged injuries. Plaintiffs would continue to serve their sentences as ordered. Plaintiffs lack standing and their Amended Complaint and Motion for Partial Summary Judgment should be dismissed.

B. PLAINTIFFS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED.

1. Plaintiffs' Equal Protection Claims Fail Because The Standing Order Did Not Burden A Fundamental Right And Plaintiffs Were Not Treated Differently Than Similarly Situated Individuals.

Plaintiffs seek a declaration that their rights protected by the Fourteenth Amendment Equal Protection Clause were violated. Their equal protection claim is twofold: (1) the Standing Order discriminated against them on the basis of their exercise of a fundamental right–the right to procreate; and (2) they were treated differently than female inmates who were offered Nexplanon implants while Plaintiffs were offered vasectomies. Plaintiffs' Memorandum (Doc. No. 22, PageID # 345-349). As set forth below, neither of these bases can support an equal protection claim.

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XVI, § 1. "The Supreme Court has stated that this language 'embodies the general rule that States must treat like cases alike but may treat unlike cases accordingly.'" *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005)(citing *Vacco v. Quill*, 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997)). "The states cannot make distinctions which either burden a fundamental right, target a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference." *Id.* (citing *Vacco*, 521 U.S. at 799; *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)). The "threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir.2006).

Plaintiffs' first basis for establishing an equal protection violation—an alleged unconstitutional classification based solely on an inmate's refusal to relinquish the right to procreate—fails because it does not satisfy the threshold requirement of disparate treatment.

Plaintiffs were not treated differently than other similarly situated inmates; all inmates were extended the same offer of a sentence reduction in exchange for agreeing to accept free contraceptive services. *See* Standing Order (Doc. No. 13-1). Further, the Standing Order may have made a vasectomy an attractive option, thereby influencing an inmate's decision, but it imposed no restrictions on the ability to procreate. Therefore, the Standing Order did not burden a fundamental right.

In attempting to establish the Challenged Orders burdened a fundamental right, Plaintiffs ignore the threshold requirement of establishing that similarly situated inmates were treated differently. "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011)(citing *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich.*, 470 F.3d 286, 299 (6th Cir.2006))(internal quotations omitted). The Standing Order applies to all White County inmates serving a sentence from the general sessions court. *See* Standing Order (Doc. No. 13-1). The Standing Order also offered all inmates the same sentence reduction. *Id.* While Plaintiffs take issue that some inmates received a sentence reduction (those that agreed to get free contraceptive care), those inmates were not "similarly situated persons" because those inmates took measures that Plaintiffs did not—they agreed to receive the free contraceptive services. *See Napolitano*, 648 F.3d at 379. Because Plaintiffs fail to establish the threshold element of disparate treatment, there is no need to determine whether a fundamental right was burdened and their equal protection claim should be dismissed.

Even if this Court determines that it is necessary to address whether the Standing Order burdened a fundamental right, it should conclude that it did not. Plaintiffs argue that the Standing Order burdened their "fundamental right to procreate." *See* Plaintiff's Memorandum (Doc. No. 22, PageID # 344). This argument fails because Defendants did not place any barriers or restrictions on Plaintiffs' ability to procreate. Rather, Judge Benningfield encouraged inmates to take advantage of free contraceptive services and Sheriff Shoupe merely followed court orders, as he is required to do. Prior Supreme Court precedent concerning the right to an abortion is instructive on this matter.

In *Harris v. McRae*, 448 U.S. 297, 313, 100 S. Ct. 2671, 2686, 65 L. Ed. 2d 784 (1980), the Supreme Court explained that even when the government favors childbirth over abortion by means of subsidization of one and not the other, such regulation does not impinge on the constitutional freedom to make those decisions because it imposed no governmental restriction on access to abortions. Specifically, the *McRae* Court reasoned:

> In *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484, the Court was presented with the question whether the scope of personal constitutional freedom recognized in *Roe v. Wade* included an entitlement to Medicaid payments for abortions that are not medically necessary. At issue in *Maher* was a Connecticut welfare regulation under which Medicaid recipients received payments for medical services incident to childbirth, but not for medical services incident to nontherapeutic abortions. The District Court held that the regulation violated the Equal Protection Clause of the Fourteenth Amendment because the unequal subsidization of childbirth and abortion impinged on the "fundamental right to abortion" recognized in *Wade* and its progeny.
>
> It was the view of this Court that "the District Court misconceived the nature and scope of the fundamental right recognized in *Roe*." 432 U.S., at 471, 97 S.Ct., at 2381. The doctrine of *Roe v. Wade*, the Court held in *Maher*, "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy," *id.*, at 473–474, 97 S.Ct., at 2382, such as the severe criminal sanctions at issue in *Roe v. Wade*, *supra*, or the absolute requirement of spousal consent for an abortion challenged in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788.

> But the constitutional freedom recognized in *Wade* and its progeny, the *Maher* Court explained, did not prevent Connecticut from making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." 432 U.S., at 474, 97 S.Ct., at 2382. As the Court elaborated:
>
> > "The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation." *Ibid.*
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> The Court in *Maher* noted that its description of the doctrine recognized in *Wade* and its progeny signaled "no retreat" from those decisions. In explaining why the constitutional principle recognized in *Wade* and later cases—protecting a woman's freedom of choice—did not translate into a constitutional obligation of Connecticut to subsidize abortions, the Court cited the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." 432 U.S., at 475–476, 97 S.Ct., at 2383 (footnote omitted). Thus, even though the Connecticut regulation favored childbirth over abortion by means of subsidization of one and not the other, the Court in *Maher* concluded that the regulation did not impinge on the constitutional freedom recognized in *Wade* because it imposed no governmental restriction on access to abortions.

McRae, 448 U.S. at 313–15.

Applying this reasoning to the case at bar, the Standing Order did not place any restrictions on the ability to bear children. By refusing the offer of free vasectomies, Plaintiffs ability to have children was no different than if the Standing Order had never been entered. The fact that the Standing Order made it more attractive to receive a vasectomy does not make the Standing Order constitutionally unsound. *Supra.* Because Defendants did not place any barriers or restrictions on the ability to have children, their conduct did not burden a fundamental right. As such, Plaintiffs'

equal protection claim, insofar as it relies on the burdening a fundamental right portion of the analysis, is not actionable.

Plaintiffs also allege that they were discriminated against based on their gender in violation of the Equal Protection Clause. *See* Plaintiffs' Memorandum (Doc. No. 22, PageID 344, 348). The basis of this claim is that women were offered a Nexplanon implant, a long-term contraceptive, and males were offered a vasectomy, which Plaintiffs assert is potentially permanent. *Id*. at PageID 348. Government action that differentiates on the basis of gender is not unconstitutional if the "[challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690, 198 L. Ed. 2d 150 (2017) (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996). In this case, the government objective being sought is the offer of free contraceptive services to inmates, which is aimed at preventing babies being born addicted to drugs, and unwanted pregnancies and related associated problems. Offering women Nexplanon implants and men vasectomies is substantially related to this objective. At this point, Defendants are not aware of any long-acting, reversible male contraceptives similar to Nexplanon. *See* http://www.popcouncil.org/research/ment-subdermal-implants-for-men (last visited March 21, 2018)(discussing progress is being made for such male implants, but they are not yet available). Because the offer of different contraceptive services is substantially related to the achievement of providing all inmates free contraceptive services, this does not violate the Equal Protection Clause.

2. Encouraging Inmates To Accept Free Contraceptive Services From The State Of Tennessee Does Not Violate The Substantive Due Process Clause.

Plaintiffs fail to allege sufficient facts to establish the type of coercion that shocks the conscience necessary to set forth a cognizable claim under the Fourteenth Amendment's

Substantive Due Process Clause. "The standard for establishing that executive-branch officials (as well as executive-branch agencies) have violated an individual's substantive due process rights is not an easy one to satisfy." *Mitchell v. McNeil*, 487 F.3d 374, 376 (6th Cir. 2007). Rather than guaranteeing an individual the right to a fair decision-making procedure, the concept of substantive due process prevents the state from taking certain actions even if it provides procedural safeguards. However, as the Supreme Court has emphasized, "only the most egregious official conduct" can be said to be arbitrary in the constitutional sense. *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). To state a cognizable substantive due process claim, the plaintiff must allege conduct intended to injure in some way unjustifiable by **any** government interest" and that is "conscience-shocking" in nature." *Mitchell*, 487 F.3d at 377 (emphasis added)(quoting *County of Sacramento*, 523 U.S. at 849).

Plaintiffs' substantive due process claims are based on their assertion that the Challenged Orders "shock the conscience." Plaintiffs' Memorandum (Doc. No. 22, Page ID # 351). To support this conclusion, Plaintiffs liken the Challenged Orders to mass sterilizations in Nazi Germany and eugenics experimentation in Tuskegee, Alabama. *Id.* Plaintiffs do not provide any admissible evidence as to what the Nazi sterilization or Tuskegee experimentation entailed; rather, they merely point to the allegations in their Amended Complaint. *Id.*; *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 259, 106 S. Ct. 2505, 2515, 91 L. Ed. 2d 202 (1986)(discussing that a party may not rely upon mere allegations in a pleading in order to support or defend against a motion for summary judgment). Plaintiffs rely almost exclusively on the inflammatory and improper use of the term "eugenics" to describe the Challenged Orders that were designed to encourage inmates to avail themselves of free healthcare services offered by the state of Tennessee. Dictionary.com defines "eugenics" as: "the study of or belief in the possibility of improving the qualities of the

human species or a human population, especially by such means as discouraging reproduction by persons having genetic defects or presumed to have inheritable undesirable traits (negative eugenics) or encouraging reproduction by persons presumed to have inheritable desirable traits (positive eugenics)." *See* http://www.dictionary.com/browse/eugenics (last visited on March 20, 2018). There is no factual evidence in the record that suggests the Challenged Orders were designed to prevent the birth of individuals with genetic defects. Defendants would assert drug addiction, as is the case with NAS, is not a genetic defect.

Furthermore, the offer of free medical services in this case was completely optional, unlike the Oklahoma statute at issue in *Skinner v. State of Okl. ex rel. Williamson,* 316 U.S. 535, 541 (1942), which is cited by Plaintiffs. In *Skinner*, the Supreme Court dealt with an Oklahoma statute that forced sexual sterility on certain repeat criminal offenders. *Id.* That is a far cry from what is at issue in this case, which is an offer of free medical services to individuals that might benefit from them. Even though Plaintiffs did not get a vasectomy, they baldly alleged that the Challenged Orders violated their due process rights. They offer no additional facts to support this claim, instead relying on the inflammatory use of terms like "eugenics." The Standing Order at issue encourages individuals to attend a program offered by the Department of Health which is aimed at informing inmates on the dangers of drug use and Neonatal Abstinence Syndrome, which affects drug addicted babies. (Doc. No. 13-1). Neonatal Abstinence Syndrome is a very real problem in Tennessee. *See* https://www.tn.gov/health/nas.html (last visited on March 20, 2018). In an effort to prevent or reduce the risks associated with Neonatal Abstinence Syndrome, the Department of Health offered free contraceptive services. (Doc. No. 13-1)*; see also* **Exhibit A**. In order to encourage individuals to attend the NAS program, Judge Benningfield offered a two-day sentence reduction. (Doc. No. 13-1). In order to encourage inmates to receive free contraceptive services

offered in conjunction with the NAS program, Judge Benningfield offered a 30-day sentence reduction. *Id.*

As set forth above, the Standing Order did not place any impediments or restrictions on an inmate's right to procreate. Rather, the Standing Order can be viewed as encouraging individuals to accept free contraceptive services. If an inmate desires to procreate, that inmates may do so without any restrictions or impediment resulting from the Standing Order. While it is true that they will have to serve their full sentences, this does not shock the conscience. Furthermore, Plaintiffs fail to allege Defendants lacked any justifiable government interest. *Mitchell*, 487 F.3d at 377. As set forth above, the government interest being asserted was protected unborn children and offering inmates free access to contraceptive services. The Sixth Circuit has noted that a government's interest in protecting children is just as compelling as the parents' "abstract fundamental liberty interest in family integrity." *Kottmyer v. Maas*, 436 F.3d 684, 690 (6th Cir.2006).

Because Plaintiffs fail to identify any conduct that shocks the conscience that lacks any justifiable government interest, they have failed to state a claim for violation of their substantive due process rights.

WHEREFORE, Defendants respectfully request that this Honorable Court deny Plaintiffs' motion for partial summary judgment.

Respectfully Submitted By,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2018 a true and correct copy of the foregoing Response has been served via email through the Court's CM/ECF system on the following:

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