Case No. 18-5643

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Christopher Sullivan, Nathan Haskell, and William Gentry,

Plaintiffs – Appellants,

v.

Sam Benningfield and Oddie Shoupe,

Defendants – Appellees.

On Appeal from the United States District Court for the
Middle District of Tennessee
Case No: 2:17-cv-00052

BRIEF OF APPELLANTS

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Date: August 7, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, Appellants hereby make the following disclosures:

(1) Is said party a subsidiary or affiliate of a publicly owned corporation? **No.**

(2) Does a publicly owned corporation or its affiliate, not a party to the appeal, have a financial interest in the outcome? **No.**

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III. STATEMENT REGARDING ORAL ARGUMENT

Appellants aver that oral argument is unnecessary and will not aid in resolving the instant appeal. The record is brief, the facts of this case are not in dispute, and this appeal turns on straightforward questions of law.

IV. STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this case was removed to federal court by the Defendants-Appellees pursuant to 28 U.S.C § 1441 and Plaintiffs' claims arise under federal law.[1]

The district court entered a final judgment dismissing Plaintiffs' claims as moot on June 18, 2018.[2] The Plaintiffs-Appellants timely appealed on June 19, 2018.[3] Accordingly, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because the Plaintiffs are appealing a final judgment.

[1] Notice of Removal, R. 1, Page ID ## 1-2.

[2] Order, R. 54, Page ID # 582.

[3] Notice of Appeal, R. 56, Page ID # 584.

V. INTRODUCTION

This case challenges the constitutionality of multiple court orders that expressly condition the length of inmates' jail sentences upon whether or not they agree to become surgically sterilized.[4] Beyond merely discriminating based on inmates' exercise of their fundamental right to procreate,[5] the challenged Sterilization Orders also facially discriminate on the basis of an inmate's gender.[6] Specifically, the Sterilization Orders contemplate potentially irreversible vasectomies of men, while calling for surgically inserted but removable birth control implants for women.[7]

The Plaintiffs—three male White County inmates subject to the challenged orders—filed the instant lawsuit to secure injunctive relief

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[4] Defs.' Resp. to Pls.' Statement of Undisputed Material Facts, R. 43, Page ID ## 505-06.

[5] Defs.' Resp. to Pls.' Statement of Undisputed Material Facts, R. 43, Page ID # 505; Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID ## 345-48.

[6] Defs.' Resp. to Pls.' Statement of Undisputed Material Facts, R. 43, Page ID # 505 ("Any such female inmate who receives the free nexplanon implant or any such male inmate who has the free vasectomy as a result thereof shall be given an additional thirty (30) days credit toward completion of his/her jail sentence."); Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID # 348.

[7] Defs.' Resp. to Pls.' Statement of Undisputed Material Facts, R. 43, Page ID ## 505-06.

terminating the Defendants' inmate sterilization program and declaratory relief declaring the Defendants' sterilization-for-sentencing-credits policy to be unconstitutional. The Plaintiffs' lawsuit—which was initially filed in state court, but was voluntarily removed to federal court by the Defendants[8]—was premised upon multiple federal and state constitutional violations.[9] The Plaintiffs also sought an award of attorney's fees, which—if awarded—are to be assigned to "the United States Holocaust Memorial Museum and the Tuskegee History Center."[10]

The challenged orders cannot withstand constitutional scrutiny for multiple reasons.[11] Most narrowly, however, because the Sterilization Orders facially discriminate based upon the exercise of a fundamental right, they are presumptively unconstitutional and subject to strict constitutional scrutiny.[12] Further, because the Sterilization Orders also facially

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[8] Notice of Removal, R. 1, Page ID ## 1-2.

[9] Am. Compl., R. 13, Page ID ## 141-44.

[10] *Id.* at Page ID # 144, ¶ 4. *See also* Order, R. 37, Page ID # 461, Feb. 22, 2018 ("any attorneys' fees recovered by a Plaintiff would be available for charitable donations.").

[11] *See generally* Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22; Pls.' Reply to Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 44, Page ID ## 510-15.

[12] *See infra* pp. 29-35.

discriminate based upon an inmate's gender, they are presumptively unconstitutional on that basis as well, and they are subject to intermediate constitutional scrutiny as a result.[13]

As such, the Defendants bore the heavy burden of establishing the Sterilization Orders' constitutionality before the district court by proving that the orders were sufficiently narrowly tailored to achieve both compelling and important governmental interests. In response to a dispositive Motion for Partial Summary Judgment that was fully briefed and pending decision at the time that the instant case was dismissed,[14] however, the Defendants failed to meet their burden. Indeed, in attempting to resist summary judgment, the Defendants failed to introduce any evidence to support the constitutionality of their Sterilization Orders *at all*.[15] Consequently, the Plaintiffs' Motion for Summary Judgment should have been granted.

Independently, the Defendants' Sterilization Orders have been ruled

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[13] *Id.*

[14] Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID ## 340-55; Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 42, Page ID ## 487-99; Pls.' Reply to Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 44, Page ID ## 510-15.

[15] Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 42, Page ID ## 487-99.

unlawful in a binding state judicial proceeding.[16] Specifically, in a final and unappealed state judgment, the Tennessee Board of Judicial Conduct publicly reprimanded Defendant Benningfield for enacting the Sterilization Orders in violation of the canon of Tennessee's Code of Judicial Conduct that requires "Compliance with the Law."[17] The Board also made a factual determination that the orders "could unduly coerce inmates into undergoing a surgical procedure which would cause at least a temporary sterilization, and it was therefore improper."[18]

For purposes of the instant case, the Tennessee Board of Judicial Conduct's legal and factual determinations carry preclusive effect. However, the district court repeatedly refused to rule on the Plaintiffs' claim that the Tennessee Board of Judicial Conduct's public reprimand against Defendant Benningfield in a parallel state proceeding was subject to claim preclusion.[19]

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[16] *See infra*, pp. 35-42.

[17] *See* Public Letter of Reprimand, R. 38-3, Page ID # 478.

[18] *Id.* at Page ID # 479.

[19] Order, R. 37, Page ID # 463, Feb. 22, 2018 (involuntarily converting Plaintiffs' motion for claim preclusion into a motion for partial summary judgment, and thus, striking it because it was filed without advance permission); Order, R. 41, Page ID # 485, Mar. 1, 2018 (holding that Plaintiffs' re-filed motion for claim preclusion must instead be re-filed again as a motion in limine); Order, R. 54, Page ID # 582 (denying Plaintiffs' motion in limine seeking claim preclusion as moot).

Even so, Defendant Benningfield's public reprimand constituted a final state court judgment that carries preclusive effect in this case—a conclusion that provides another independent basis for awarding the declaratory relief that the Plaintiffs have demanded.[20]

All of the Plaintiffs' claims before the district court—including an unopposed motion to certify state law claims—went unadjudicated for many months. While their claims were pending, on May 1, 2018, Tennessee enacted a new law that expressly forbids by statute what the Fourteenth Amendment and the Tennessee Constitution have long forbidden as a matter of constitutional law. Specifically, Tennessee's new law provides that: "A sentencing court shall not make a sentencing determination that is based in whole or in part on the defendant's consent or refusal to consent to any form of temporary or permanent birth control, sterilization, or family planning services, regardless of whether the defendant's consent is voluntarily given."[21] Critically, however, the new statute is expressly limited in its application in that it only applies to sentencing determinations "made on or after [its] effective date" of May 1, 2018.[22] The new law indisputably does not

[20] *See infra* pp. 35-42.

[21] Senate Bill No. 2133, R. 50-2, Page ID # 557.

[22] *Id.* at Page ID ## 557-58.

apply retroactively to sentences from 2017.[23]

Notably, none of the sentences at issue in this case post-date May 1, 2018. Accordingly, Tennessee's new statute prohibiting inmate sterilization has no application in the instant case. Further, as to 2017 sentences, *the Defendants' own theory of the case* acknowledges that they "did not renege" on their sterilization-for-sentencing-credits policy, which still remains in effect.[24] Accordingly, this case continues to present a live case and controversy because the Defendants continue to insist that their ongoing sterilization-for-sentencing-credits program is constitutionally sound.

Overlooking the statute's effective date, however, on June 18, 2018, the district court dismissed the Plaintiffs' lawsuit and all of the Plaintiffs' pending claims as moot on the basis that "the General Assembly in Tennessee has now made it illegal to reduce the length of someone's sentence

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[23] *Id.*

[24] *See, e.g.*, Initial Case Management Order, R. 27, Page ID # 404 (setting forth the Defendants' theory of the case as follows: "The Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction in the jail sentence for those individuals that had already received, or had signed up to receive, the family planning services offered by the Tennessee Department of Health."). *See also* Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID # 501 ("eligible inmates that had already complied with the Standing Order of May 15, 2017 (either by having the procedure or signing up with the intent to have the procedure) would receive the promised benefit. . . .").

based upon willingness to undergo birth control or sterilization procedures."[25] Further, despite *the Defendants themselves* indicating repeatedly that they had "not renege[d]" on their sterilization-for-sentencing-credits program with respect to pre-2018 sentences,[26] the district court ruled that the instant case was also moot because "the challenged behavior has stopped."[27] Neither determination is accurate.

In addition to making mootness determinations that are disproven by the record, the district court's order must also be reversed because it failed to make required findings with respect to Plaintiffs' claims for injunctive relief and attorney's fees. With respect to the Plaintiffs' claims for injunctive relief, the district court failed to make a required determination that the Defendants had met their "formidable burden" of proving that their wrongful conduct was not reasonably likely to recur.[28] Similarly, with respect to

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[25] Mem. Op., R. 53, Page ID # 580.

[26] Initial Case Management Order, R. 27, Page ID # 404.

[27] Mem. Op., R. 53, Page ID # 580.

[28] *See id.* at Page ID ## 576-81. *But see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) ("a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.") (citing *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

Plaintiffs' claim for attorney's fees, the district court failed to rule on the matter at all, leaving Plaintiffs' claim unadjudicated despite their uncontested assertion that they had already substantially prevailed.[29] Accordingly, the Plaintiffs timely appealed.

Given this context, the instant case presents a confluence of three extraordinary circumstances:

(1) A governmental program that is both presumptively unconstitutional and so obviously unconstitutional that the Defendants did not even ***attempt*** to introduce evidence to meet their burden of proving its constitutionality;

(2) A lawsuit against a sitting state judge that is unencumbered by any claim of immunity or (credible) claim for abstention, given that this action was voluntarily removed to federal court by the Defendants themselves; and

(3) A mootness determination that not only conflicts with the statute that supposedly necessitated it, but which also conflicts with the Defendants' own stated theory of the case.

For all of these reasons, this case is not moot, and it presents a clean vehicle for adjudicating multiple vitally important constitutional questions

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[29] *See* Mem. Op., R. 53, Page ID ## 576-81.

on their merits. Independently, even if the district court were correct in every determination that it made below, its judgment would still require reversal. Specifically, even assuming the accuracy of the district court's conclusion that the Defendants' challenged practice "has stopped,"[30] the district court failed to make a mandatory determination that the Defendants' wrongful conduct was not reasonably likely to recur.[31] In addition, given that the Plaintiffs secured a significant modification to the Defendants' sterilization program through the instant litigation, the Plaintiffs had already substantially prevailed at the time the district court dismissed their claims as moot. As such, the district court also erred in failing to adjudicate the Plaintiffs' claim for attorney's fees.

For all of these reasons, the district court's order should be **REVERSED**.

[30] *Id.* at Page ID # 580.

[31] *See Friends of the Earth, Inc.*, 528 U.S. at 190.

VI. STATEMENT OF THE ISSUES

I. Whether the district court erred when it dismissed the Plaintiffs' claims as moot based on a statutory change and based on its conclusion that the challenged behavior has stopped.

II. Whether the Plaintiffs were entitled to summary declaratory relief as to the illegality of the Defendants' sterilization-for-sentencing-credits program.

III. Whether the district court failed to consider the appropriate legal standard with respect to the Plaintiffs' claim for an injunction.

IV. Whether the district court erred by failing to adjudicate the Plaintiffs' claim for attorney's fees.

VII. STATEMENT OF THE CASE

On August 24, 2017, the Plaintiffs sued the Defendants in White County Chancery Court.[32] On September 13, 2017, the Defendants removed the Plaintiffs' lawsuit to the U.S. District Court for the Middle District of Tennessee.[33] The material facts of this case being largely undisputed, the Parties filed competing dispositive motions on October 30, 2017[34] and November 13, 2017,[35] respectively. On November 15, 2017, the Tennessee Board of Judicial Conduct also publicly reprimanded Defendant Sam Benningfield—the White County General Sessions Judge who developed and implemented White County's sterilization-for-sentencing-credits program—in relation to the challenged orders at issue in this case.[36]

The Parties' competing dispositive motions—as well as Plaintiffs' unopposed motion to certify state law claims[37]—went unadjudicated by the

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[32] Notice of Removal, R. 1, Page ID # 1.

[33] *Id*.

[34] Mem. Supporting Defs.' Mot. to Dismiss, R. 16, Page ID ## 280-96.

[35] Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID ##340-54.

[36] *See* Public Letter of Reprimand, R. 38-3, Page ID ## 477-78.

[37] Pls.' Mot. to Certify Questions of State Law, R. 20, Page ID ## 332-36.

district court for several months. While they were pending, on May 1, 2018, Tennessee enacted a law that established—as a statutory matter—what the Constitution had long established as a constitutional one: that sterilizing inmates in exchange for sentencing credits is illegal.[38]

After Senate Bill No. 2133 became law, Defendants filed a supplement to their Motion to Dismiss that claimed this action had become moot.[39] The sole basis for the Defendants' mootness claim was that "[o]n May 1, 2018, Governor Haslam signed Senate Bill No. 2133 into law," which "prohibits the very conduct Plaintiffs have requested this Honorable Court to enjoin and declare unconstitutional."[40] According to the Defendants, Senate Bill No. 2133—which was "a direct result of Judge Benningfield's Standing Order and the backlash that followed"[41]—afforded the Plaintiffs sufficient relief that "there is no longer a controversy that this Court should rule upon."[42]

The Plaintiffs objected to dismissal on several bases, including that

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[38] Senate Bill No. 2133, R. 50-2, Page ID # 557.

[39] Defs.' Suppl. Br. Supporting Their Mot. to Dismiss and Resp. to Pls.' Mot. for Partial Summ. J., R. 51-1, Page ID ## 561-64.

[40] *Id.* at Page ID # 561.

[41] *Id.*

[42] *Id.*

Senate Bill No. 2133 expressly indicates that it does not apply to pre-2018 sentences, and, thus, that it did not affect their claims at all.[43] Nonetheless, the district court granted the Defendants' Motion to Dismiss on mootness grounds, and it dismissed all of the Plaintiffs' claims and pending motions as a result.[44] In addition to finding that Tennessee's new statute mooted the instant action, the district court also asserted, *sua sponte*, another basis for mootness that even the Defendants did not claim.[45] Specifically, despite Defendants' own contention that they had "not reneged" on their sterilization-for-sentencing-credits program with respect to inmates whose sentences predated July 24, 2017,[46] the district court determined that the Defendants' challenged behavior "has stopped."[47]

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[43] Pls.' Resp. to Defs.' Mot. to Suppl., R. 52, Page ID ## 565-74.

[44] Mem. Op., R. 53, Page ID ## 576-81.

[45] *Id.* at Page ID # 580 ("In any event, the challenged behavior has stopped.").

[46] *See, e.g.*, Initial Case Management Order, R. 27, Page ID # 404 (setting forth the Defendants' theory of the case as follows: "The Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction in the jail sentence for those individuals that had already received, or had signed up to receive, the family planning services offered by the Tennessee Department of Health.").

[47] Mem. Op., R. 53, Page ID # 580.

VIII. SUMMARY OF ARGUMENT

Tennessee Senate Bill 2133 did not moot the Plaintiffs' claims. By its express terms, the new statute applies only to sentences that post-date May 1, 2018, which are not implicated in this case.

The Plaintiffs' claims also are not moot on the basis that the challenged behavior has stopped. There is no evidence in the record to support that determination. To the contrary, the Defendants themselves contended otherwise, candidly acknowledging that they had "not renege[d]" on their challenged sterilization-for-sentencing-credits program with respect to pre-July 2017 sentences.[48]

The district court also erred by failing to grant the Plaintiffs' claims for summary declaratory relief. The challenged Sterilization Orders discriminate based on both the exercise of a fundamental right and an inmate's gender.[49] Specifically, identically situated inmates serve sentences that vary in length by 30 days depending solely on whether they agree to forgo their fundamental right to procreate.[50] Similarly, the Sterilization

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[48] Initial Case Management Order, R. 27, Page ID # 404.

[49] Defs.' Resp. to Pls.' Statement of Undisputed Material Facts, R. 43, Page ID ## 505-06.

[50] *Id.*

Orders treat male and female inmates differently, contemplating potentially irreversible vasectomies of men, while calling for surgically inserted but removable birth control implants for women. Thus, the Sterilization Orders are presumptively unconstitutional, and the Defendants bore the heavy burden of establishing that they were narrowly tailored to achieve compelling and important governmental interests.

In resisting summary judgment, however, the Defendants did not introduce any evidence at all. Accordingly, they failed to meet their burden, and the Plaintiffs' Motion for Partial Summary Judgment should have been granted. Plaintiffs' Motion for Partial Summary Judgment also should have been granted based on the preclusive effect of the public reprimand that the Tennessee Board of Judicial Conduct issued against Defendant Benningfield in a parallel state proceeding.

Even if the district court were correct in every determination that it made below, its judgment would still require reversal. Specifically, even if it were true that the Defendants' sterilization-for-sentencing-credits program "has stopped" as a result of the Defendants' voluntary termination of their challenged behavior,[51] the district court was required to determine whether the Defendants had met their "formidable burden of showing that it is

[51] Mem. Op., R. 53, Page ID # 580.

absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."[52] The Defendants utterly failed to meet that burden. By contrast, the Plaintiffs met their burden of proving that the Defendants' wrongful behavior was not only "likely [to] occur or continue,"[53] but that it was and still is continuing.

The district court also erred in failing to adjudicate the Plaintiffs' claim for attorney's fees, even though a claim for attorney's fees may be considered after the merits of an action have become moot and independently under federal courts' equitable jurisdiction. Because the Plaintiffs had already substantially prevailed at the time the instant case was dismissed, the district court should have awarded the Plaintiffs their attorney's fees. The Plaintiffs should be awarded their reasonable attorney's fees as a result, which are to be assigned "to the United States Holocaust Memorial Museum and the Tuskegee History Center."[54]

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[52] *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

[53] *Id.*

[54] Am. Compl., R. 13, Page ID # 144, ¶ 4; Order, R. 37, Page ID # 461, Feb. 22, 2018 ("This case is different from the other three cases involving sentence reductions in that it seeks only injunctive relief and provides that any attorneys' fees recovered by a Plaintiff would be available for charitable donations.").

IX. ARGUMENT

A. THIS ACTION IS NOT MOOT, BECAUSE TENNESSEE SENATE BILL 2133 HAS NO BEARING ON THE PLAINTIFFS' CLAIMS, AND THE DEFENDANTS' UNLAWFUL CONDUCT HAS NOT STOPPED.

In ruling that all of the Plaintiffs' claims were moot, the district court erred in several respects:

First, the district court ignored Tennessee Senate Bill 2133's express indication that it does not apply to sentences that predate its effective date of May 1, 2018. Because it is undisputed that Defendants' sterilization-for-sentencing-credits policy remains ongoing with respect to certain inmates who were sentenced in 2017, however, a live case and controversy over the constitutionality of the Defendants' inmate sterilization program persists.

Second, the district court found that the challenged practice "has stopped" despite the Defendants themselves indicating that they had "not renege[d]" on their sterilization-for-sentencing-credits policy with respect to pre-2018 sentences.

Third, the district court erroneously concluded that "even if" the challenged sterilization-for-sentencing-credits policy is ongoing—and it is—Defendants' policy does not give rise to an equal protection violation because it involved disbursing sentencing *credits*, rather than resulting in an increase to any inmate's sentence.

Fourth, the district court disregarded the fact that all of the relief that Plaintiffs sought was not provided by Senate Bill 2133, preventing the new law from mooting all of Plaintiffs' claims.

1. Tennessee Senate Bill 2133 does not apply to sentences that predate May 1, 2018, and Defendants' illegal sterilization-for-sentencing-credits policy remains ongoing with respect to inmates who were sentenced in 2017.

In its Memorandum Opinion dismissing the Plaintiffs' claims as moot, the district court determined that Tennessee Senate Bill 2133 fully resolved the instant action.[55] The district court's Memorandum Opinion states:

> On May 1, 2018, Tennessee Governor Bill Haslam signed into law Senate Bill 2133, which expressly forbids conditioning the length of any criminal sentence on the defendant's submitting to any form of temporary or permanent birth control, sterilization or family planning services. (Doc. No. 50-2). Therefore, the alleged misconduct is now illegal by statute.[56]

As a result, the district court concluded that "the General Assembly in Tennessee has now made it illegal to reduce the length of someone's sentence based upon willingness to undergo birth control or sterilization procedures,"[57] and "[i]f Defendants were to continue the challenged practice,

[55] Mem. Op., R. 53, Page ID # 578.

[56] *Id.*

[57] *Id.* at Page ID # 580.

they would be violating a specific state statute."[58] Accordingly, the district court opined that "[i]t is unncecessary [sic] and imprudent to determine the constitutionality of the Standing Order that has been rescinded and made illegal in future [sic]."[59]

As the Plaintiffs observed in response to the Defendants' mootness claim, however, the text of Senate Bill 2133 makes clear that it did not moot the instant action in any regard.[60] Tennessee Senate Bill 2133 took effect on May 1, 2018.[61] By its terms, it also provides that it only applies to a "plea agreement or plea of nolo contendere entered into or sentencing determination ***made on or after the effective date.***"[62] As a consequence, sentences that predate May 1, 2018 are wholly unaffected.[63]

None of the sentences at issue in this case post-date May 1, 2018.[64]

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[58] *Id*. at n.4.

[59] *Id*. at Page ID # 580.

[60] Pls.' Resp. to Defs.' Mot. to Suppl., R. 52, Page ID ## 565-75.

[61] Senate Bill No. 2133, R. 50-2, Page ID ## 557-58.

[62] *Id*. at Page ID # 557 (emphasis added).

[63] *Id*.

[64] Am. Compl., R. 13, Page ID ## 130-45.

Further, with respect to certain inmates whose sentences *predate* May 1, 2018, it is undisputed that the Defendants continue to disburse sentencing credits pursuant to their challenged sterilization-for-sentencing-credits policy[65]—a policy that discriminates both on the basis of gender and based on whether inmates agreed to forgo their fundamental right to procreate by submitting to surgical sterilization.

Specifically, the challenged sterilization-for-sentencing-credits policy is still in effect as to certain inmates who were sentenced in White County in 2017.[66] The Defendants candidly acknowledge that they are still disbursing sentencing credits pursuant to that policy.[67] The effect of that policy is also to subject similarly situated inmates to unequal treatment based on their gender and their exercise of a fundamental right in violation of the Fourteenth Amendment.

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[65] *See* Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID # 501 ("eligible inmates that had already complied with the Standing Order of May 15, 2017 (either by having the procedure or signing up with the intent to have the procedure) would receive the promised benefit. . . .").

[66] *Id.*

[67] *See id. See also* Initial Case Management Order, R. 27, Page ID # 404 (setting forth the Defendants' theory of the case as follows: "The Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction in the jail sentence for those individuals that had already received, or had signed up to receive, the family planning services offered by the Tennessee Department of Health.").

Stated differently: The Defendants' most recent and still-active Standing Order concerning their sterilization program is wholly unaffected by Tennessee Senate Bill 2133, and Defendants' newest order remains in effect.[68] For a wealth of reasons, it also violates multiple constitutional provisions.[69] Accordingly, Tennessee Senate Bill 2133 did not moot the instant action, and the district court should have adjudicated the Plaintiffs' claims pursuant to "the 'virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'" *Associacao Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 618 (6th Cir. 2018) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

The Defendants, for their part, contest the Plaintiffs' assertion that their still-active sterilization order is unlawful, and they continue to argue that their sterilization-for-sentencing-credits policy can withstand constitutional scrutiny.[70] As such, the constitutionality of Defendants' ongoing disbursement of sentencing credits based on inmates' agreement to

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[68] *See* Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID # 501 ("eligible inmates that had already complied with the Standing Order of May 15, 2017 (either by having the procedure or signing up with the intent to have the procedure) would receive the promised benefit . . . .").

[69] *See generally* Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID ## 340-55.

[70] *See* Defs.' Resp. to Pls.' Mot. for Summ. J., R. 42, Page ID ## 487-99.

relinquish a fundamental right remains a live and continuing controversy. So, too, does Plaintiffs' claim that those sentencing credits are being disbursed through a program that discriminates on the basis of gender. For the reasons provided below, however, given the Defendants' failure to muster any evidence to justify their presumptively unconstitutional conduct, that controversy is easily resolved in the Plaintiffs' favor.

2. The district court's finding that the challenged behavior "has stopped" is unsupportable based on the Defendants' own position that its sterilization-for-sentencing-credits policy remains in effect.

In determining that the instant action was moot, the district court additionally found that "the challenged behavior has stopped."[71] The district court did not cite to the record to support that finding.[72] That omission is also unsurprising, given that *the Defendants themselves* indicated that they had "not renege[d]" on their sterilization-for-sentencing-credits policy with respect to certain 2017 inmates.[73] Indeed, the Defendants' current Standing

[71] Mem. Op., R. 53, Page ID # 580.

[72] *Id.*

[73] *See, e.g.*, Initial Case Management Order, R. 27, Page ID # 404 (setting forth the Defendants' theory of the case as follows: "The Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction in the jail sentence for those individuals that had already received, or had signed up to receive, the family planning services offered by the Tennessee Department of Health.").

Order concerning their program makes clear that "the promised benefit"—the disbursement of sentencing credits that is at the heart of Plaintiffs' claims—is still being provided to certain inmates who were sentenced in 2017.[74]

In fact, the Defendants *repeatedly* acknowledged that their sterilization-for-sentencing-credits policy remained in effect.[75] Accordingly, the district court's unsupported finding that "the challenged behavior has stopped"[76] represented clear error and should be reversed.

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[74] *See* Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID # 501 ("eligible inmates that had already complied with the Standing Order of May 15, 2017 (either by having the procedure or signing up with the intent to have the procedure) would receive the promised benefit. . . .").

[75] *See* Initial Case Management Order, R. 27, Page ID # 404; Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID # 501; Defs.' Resp. to Pls.' Statement of Undisputed Material Facts, R. 43, Page ID # 508 ("Defendants admit that the July 26, 2017 Order, as clarified in the Order Clarifying Order Rescinding Previous Standing Order (attached as Exhibit A to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment) would continue to grant a 30-day sentence reduction for those individuals that agreed to accept the free contraceptive services offered by the Department of Health, but had yet to receive those services prior to the entry of the July 26, 2017 Order Rescinding Previous Standing Order. Defendants deny that after July 26, 2017, inmates could agree to receive free contraceptive services in exchange for a sentence reduction.")

[76] Mem. Op., R. 53, Page ID # 580.

3. The district court erred in finding that disbursing sentencing credits cannot give rise to an Equal Protection claim.

As an alternative to its finding that "the challenged behavior has stopped,"[77] the district court additionally found, in a footnote, that "[e]ven if it is true that Defendants are still operating the allegedly unconstitutional program of birth control for sentence credits, Plaintiffs have not alleged that they are in any way affected by this post-Complaint behavior."[78] There are two critical problems with this finding.

First, the referenced behavior was not "post-Complaint." To the contrary, the Plaintiffs' Complaint is specifically premised upon their claim that *even as modified by a supplemental order on July 26, 2017*, the Defendants' still-operational policy of trading sentencing credits for an inmate's agreement to be surgically sterilized is unconstitutional.[79] The

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[77] *Id.*

[78] *Id.* at Page ID # 580, n.5.

[79] *See generally* Am. Compl., R. 13, Page ID ## 141-44. *See also id.* at Page ID #131, ¶ 11 ("Despite claiming to be an 'Order Rescinding [his May 15, 2017] Standing Order,' however, Defendant Benningfield's July 26, 2017 Supplemental Order states unequivocally that inmates who fail to 'demonstrate[] to the court their desire to improve their situations and take serious and considered steps toward their rehabilitation by having the [specified long-term surgical sterilization] procedures or agreeing to have same' will still be incarcerated for 30 days longer than similarly situated inmates who do acquiesce to surgical sterilization."); Page ID # 136, ¶ 50 ("Notwithstanding Defendant Benningfield's claim to have rescinded his

Defendants' November 9, 2017 modification to their July 26, 2017 Order also "clarified" that with respect to pre-July 2017 sentences, the challenged policy very much remains in effect.[80]

Second, the Plaintiffs absolutely alleged that they were "affected" by this behavior.[81] Specifically, the Plaintiffs complained that they did not want to be sterilized, and as a consequence, they would be forced to "serve jail sentences that are 30 days longer than similarly situated-inmates who do submit to surgical sterilization."[82]

Thus, the problem was not that the Plaintiffs failed to allege a

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May 15, 2017 Standing Order, Defendant Benningfield's Supplemental July 26, 2017 Order states that inmates who do not 'demonstrate[] to the court their desire to improve their situations and take serious and considered steps toward their rehabilitation by having the [surgical sterilization] procedures or agreeing to have same' will serve jail sentences that are 30 days longer than similarly situated-inmates who do submit to surgical sterilization.").

[80] Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID # 501 ("eligible inmates that had already complied with the Standing Order of May 15, 2017 (either by having the procedure or signing up with the intent to have the procedure) would receive the promised benefit . . . .").

[81] *See generally* Am. Compl., R. 13; *see also id.* at Page ID # 140, ¶ 87 ("All male inmates to whom Defendant Benningfield's May 15, 2017 Standing Order and Defendant Benningfield's July 26, 2017 Supplemental Order applied are required to serve 30 more days in the White County jail than they would serve if they had agreed to permit a Government doctor to give them a vasectomy.")

[82] *Id.* at Page ID # 136, ¶ 50.

constitutional injury. Instead, the problem was that the district court did not consider a denial of equal treatment based on the disbursement of sentencing credits to be an injury at all, because the challenged policy did not *increase* the Plaintiffs' original sentences.[83] Specifically, the district court held that:

> Plaintiffs argue that the Standing Order subjected them to an additional thirty days in jail if they were unwilling to get a vasectomy. That characterization is misleading. Plaintiffs' sentences were not *increased* if they did not get the procedures. Under the Standing Order, failure to get a vasectomy did not change an inmate's sentence; rather, getting the procedure entitled the inmate to a *credit* toward his sentence. In other words, Plaintiffs did not serve longer than they were originally sentenced because they did not agree to vasectomies. Their claim actually concerns whether the alleged denial of a sentence credit violated their constitutional rights. Plaintiffs have not alleged a viable constitutional right to a sentence credit.

Id.

In other words: although the Plaintiffs directly alleged that they were "affected" by the Defendants' ongoing sterilization-for-sentencing-credits policy, the district court found that no injury was involved because the challenged policy itself did not give rise to a denial of equal treatment. In this regard, the district court's Memorandum Opinion reflects its conclusion that the government's unequal disbursement of *benefits* (in this case,

[83] Mem. Op., R. 53, Page ID ## 579-80.

sentencing credits) cannot give rise to an equal protection claim.

This, of course, is not the law. *See, e.g., Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) ("Laws granting or denying benefits 'on the basis of the sex of the qualifying parent,' our post–1970 decisions affirm, differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee.") (collecting cases). Whether styled as a benefit or a punishment, the end result is the same: "inmates who fail to 'demonstrate[] to the court their desire to improve their situations and take serious and considered steps toward their rehabilitation by having the [specified long-term surgical sterilization] procedures or agreeing to have same' will [] be incarcerated for 30 days longer than similarly situated inmates who do acquiesce to surgical sterilization."[84]

The district court's opinion on the matter notwithstanding, the government's disbursement of benefits—particularly when based on gender and the exercise of a fundamental right—can unquestionably give rise to an equal protection claim. *See, e.g., Sessions*, 137 S. Ct. at 1689. Accordingly, the district court's contrary holding must be reversed.

[84] Am. Compl., R. 13; Page ID # 131, ¶ 11.

4. All of the relief that Plaintiffs sought has not been provided by Tennessee Senate Bill 2133.

In holding that Senate Bill 2133 mooted the instant action, the district court also erred by disregarding the fact that the new law did not afford the Plaintiffs all of the relief that they were seeking. The Plaintiffs did not merely demand *prospective* equitable relief—namely, the termination of Defendants' illegal sentencing program. They also demanded *retrospective* equitable relief—namely, equal treatment with respect to sentencing credits that were disbursed to other similarly situated inmates.[85]

As Plaintiffs argued in their Motion for Summary Judgment, either of two separate remedies would enable the retrospective relief that the Plaintiffs demand. *See* Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID ## 348-49 ("When a claim of equal protection is raised, the Supreme Court has instructed that 'a court may either [1] declare the [policy] a nullity and order that its benefits not extend to the class that the [policy] intended to benefit, or [2] it may extend the coverage of the [policy] to include those who are aggrieved by the exclusion.'") (quoting *Califano v.*

[85] *Id.* at Page ID # 141, ¶ 94. Notably, given the many collateral consequences associated with criminal convictions, this relief—a reduction in a defendant's sentence—remains important even after an inmate's period of incarceration has concluded. For instance, longer reported periods of incarceration affect a defendant's employment prospects.

Westcott, 443 U.S. 76, 89 (1979) (alterations omitted)). Senate Bill 2133 does not provide either remedy.

Thus, although the Defendants contended that Senate Bill 2133 afforded the Plaintiffs sufficient relief to moot the instant action, the Defendants' position on the matter is irrelevant. *Cf. Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 567 (6th Cir. 2013) ("An offer limited to the relief the defendant believes is appropriate does not suffice. . . ."). Here, because all of the relief demanded by the Plaintiffs has not yet been provided, the case cannot be deemed moot. *Id.* ("[M]ootness occurs only when . . . the defendant indeed offers to provide every form of individual relief the claimant seeks in the complaint."). Accordingly, the district court's order should be reversed.

B. THE PLAINTIFFS WERE ENTITLED TO SUMMARY DECLARATORY RELIEF AS TO THE ILLEGALITY OF THE DEFENDANTS' STERILIZATION-FOR-SENTENCING-CREDITS PROGRAM.

1. The Defendants sterilization-for-sentencing-credits program was presumptively unconstitutional, and the Defendants failed to meet their burden of establishing its constitutionality.

At the time the district court dismissed the instant action as moot, the Plaintiffs had filed a Motion for Partial Summary Judgment[86] that had been

[86] Pls.' Mot. for Partial Summ. J., R. 21, Page ID # 338.

fully briefed by the Parties and was pending adjudication.[87] The Plaintiffs specifically sought summary declaratory relief based on multiple constitutional infirmities inherent in the Defendants' sterilization-for-sentencing-credits program.[88] Most pertinently, however, the Plaintiffs' Motion for Partial Summary Judgment argued that the Defendants' Sterilization Orders discriminated on the basis of both an inmate's gender and an inmate's exercise of the fundamental right to procreate.[89]

The Defendants forthrightly acknowledged that the challenged Sterilization Orders had been adopted and enforced, and the contents of those Orders speak for themselves.[90] By their express terms, the Orders treat men and women differently.[91] The Orders also expressly discriminate on the

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[87] Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID ## 340-55; Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 42, Page ID ## 487-99; Pls.' Reply to Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 44, Page ID ## 510-15.

[88] Pls.' Mot. for Partial Summ. J., R. 21, Page ID # 338.

[89] Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID ## 345-48; Pls.' Reply to Defs'. Resp. to Pls.' Mot. for Partial Summ. J., R. 44, Page ID ## 510-15.

[90] Defs.' Resp. to Pls.' Statement of Undisputed Material Facts, R. 43, Page ID ## 505-06.

[91] *Id.* at Page ID # 505 ("Any such female inmate who receives the free nexplanon implant or any such male inmate who has the free vasectomy as a

basis of a fundamental right—the right to procreate—with inmates who exercise that fundamental right being subject to sentences that are 30 days longer than inmates who agree to forgo it.[92] Accordingly, the Sterilization Orders were presumptively unconstitutional and subject to both intermediate and strict constitutional scrutiny.[93]

Familiar standards of review instruct that discrimination on the basis of gender renders state action presumptively unconstitutional and subject to intermediate scrutiny, while classifications that affect fundamental rights are presumptively unconstitutional and subject to strict scrutiny. *See Dubay v. Wells*, 506 F.3d 422, 429 (6th Cir. 2007). Most critically, however, both intermediate and strict scrutiny shift the burden of proving the constitutionality of state action to *the Government*. As this Court has explained:

> If the [government's] official classification is based on gender, [] the justification must be "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 532–33, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)). For such

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result thereof shall be given an additional thirty (30) days credit toward completion of his/her jail sentence.").

[92] *Id.* *See also* Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID ## 345-48.

[93] Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID ## 345-48.

> classifications, **the burden is on the state** to demonstrate that the legislation serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* (internal quotation marks removed); *accord Nguyen v. INS*, 533 U.S. 53, 60, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001); *Hogan*, 458 U.S. at 724, 102 S.Ct. 3331; *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Finally, classifications affecting fundamental rights "are given the most exacting scrutiny." *Clark*, 486 U.S. at 461, 108 S.Ct. 1910. Under strict scrutiny, a regulation infringing upon a fundamental right will only be upheld if it is narrowly tailored to serve a compelling state interest. See, e.g., *Reno v. Flores*, 507 U.S. 292, 305, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

Dubay, 506 F.3d at 429 (emphasis added). *See also Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000) ("Government actions that burden the exercise of [] fundamental rights or liberty interests are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest."); *Johnson v. California*, 543 U.S. 499, 505 (2005) ("**under strict scrutiny, the government has the burden** of proving that [challenged] classifications are narrowly tailored measures that further compelling governmental interests.") (emphasis added) (quotation omitted).

That burden-shift is outcome-determinative in the instant case, because in attempting to resist summary judgment, the Defendants failed to introduce a shred of evidence—not a single document or affidavit—to

overcome the program's presumptive unconstitutionality.[94] Instead, the Defendants insisted—incorrectly—that *the Plaintiffs* had the burden of *disproving* the Government's claimed interests.[95]

The Defendants alternatively posited—without evidence—that the Sterilization Orders were justified by compelling or important governmental interests.[96] Specifically, the Defendants argued that "the government interest being asserted was protected [sic] unborn children and offering inmates free access to contraceptive services."[97]

Even assuming that these interests are compelling and important, however, Defendants failed to make any attempt to demonstrate that the Sterilization Orders were narrowly tailored to achieve them.[98] As Plaintiffs observed, they were not narrowly tailored in any regard, and they were

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[94] Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 42, Page ID ## 487-99.

[95] *Id*. at Page ID # 488 ("Plaintiffs offer no proof of the government interest behind the Challenged Orders other than pointing to the plain language of the orders.").

[96] *Id*. at Page ID #498.

[97] *Id*.

[98] *See generally* Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 42, Page ID ## 487-99.

simultaneously both underinclusive and overinclusive in their reach.[99] The Defendants also erroneously insisted that whether their stated interests were compelling represented questions of fact, rather than questions of law.[100]

In sum: The Defendants failed to muster any evidence to satisfy their heavy burden of overcoming the Sterilization Orders' presumptive unconstitutionality. As a consequence, in resisting summary judgment, the Defendants failed to carry their burden of proof. Accordingly, the Plaintiffs'

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[99] *See* Pls.' Reply to Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 44, Page ID ## 513-14 (observing that the orders are glaringly underinclusive and overinclusive, defeating any claim of narrow tailoring).

[100] *See* Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 42, Page ID # 487 ("Plaintiffs' Motion for Partial Summary Judgment should also be denied because there remains [sic] questions of material fact, i.e., the government interests involved."). *But see* Pls.' Reply to Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 44, Page ID # 512, n.2 (noting that whether the Defendants' asserted governmental interests are compelling—and whether the Sterilization Orders were narrowly tailored to achieve them—are questions of law, not questions of fact) (citing *Lomack v. City of Newark*, 463 F.3d 303, 307 (3d Cir. 2006) ("The existence of a compelling state interest, however, is a question of law that is subject to plenary review."); *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002) ("Whether something qualifies as a compelling interest is a question of law."); *Citizens Concerned About Our Children v. Sch. Bd. of Broward Cty., Fla.*, 193 F.3d 1285, 1292 (11th Cir. 1999) (holding that whether an alleged governmental interest "qualifies as a compelling interest for Fourteenth Amendment purposes . . . is a question of law, capable of resolution on motion for summary judgment."); *United States v. Doe*, 968 F.2d 86, 88 (D.C. Cir. 1992) ("Whether the regulation meets the 'narrowly tailored' requirement is of course a question of law, to be reviewed by an appellate court de novo.")).

Motion for Partial Summary Judgment should have been granted.

2. The Defendants' program was previously determined to be unlawful in a binding state proceeding.

On November 15, 2017, the Tennessee Board of Judicial Conduct publicly reprimanded Defendant Benningfield in relation to the challenged program at issue in this case.[101] The Board's Public Reprimand conclusively determined the unlawful nature of Defendant Benningfield's sterilization-for-sentencing-credits program and also resolved several factual disputes against him.[102] Accordingly, the Plaintiffs repeatedly moved the district court to preclude Defendant Benningfield from taking positions in the instant litigation that conflicted with the Tennessee Board of Judicial Conduct's final order in a binding state proceeding.[103] However, the district court denied Plaintiffs' requested relief on each occasion.[104]

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[101] *See* Public Letter of Reprimand, R. 38-3, Page ID ## 477-78.

[102] *Id*.

[103] *See* Pls.' Mem. In Supp. of Pls' Mot. for Estoppel, R. 31, Page ID #419; Pls.' [Refiled Proposed] Mot. for Estoppel Against Def. Benningfield Based on Def. Benningfield's Public Reprimand, R. 38-1, Page ID # 468; Pls.' Mot. in Lim. Against Def. Benningfield Based on Def. Benningfield's Public Reprimand, R. 45, Page ID # 516.

[104] Order, R. 37, Page ID # 463, Feb. 22, 2018 (involuntarily converting Plaintiffs' motion for claim preclusion into a motion for partial summary judgment and thus striking it on the basis that it was filed without advance

Defendant Benningfield's Public Reprimand specifically reflected that the Tennessee Board of Judicial Conduct issued a final judgment that resolved—in a formal state proceeding to which he was a party—the following issues of fact and law against him:

> 1. "[D]uring a hearing regarding a probation violation hearing, [Defendant] Benningfield threatened to end the house arrest program which was then a practice in [his] court, and order persons currently under house arrest to be put in jail, if the defendant's attorney did not withdraw a valid objection that he had made concerning certain records being admitted in the probation violation, which [Defendant Benningfield] acknowledged at the time was a valid objection."
>
> 2. Defendant Benningfield entered the May 15, 2017 and July 26, 2017 Orders that are the subject of the Plaintiffs' Amended Complaint.
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> 3. Defendant Benningfield acknowledged that the May 15, 2017 Order "could unduly coerce inmates into undergoing a surgical procedure which would cause at least a temporary sterilization, and it was therefore improper."
>
> 4. The above described actions were not in compliance with the law, as required by Rule 1.1. of Canon 1 of the Tennessee Code of Judicial Conduct.
>
> 5. The above described actions similarly violated Rule 1.2 of the Canon 1 of the Tennessee Code of Judicial Conduct, which provides that: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and

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permission); Order, R. 41, Page ID # 485, Mar. 1, 2018 (holding that Plaintiffs' re-filed motion for claim preclusion must instead be re-filed as a motion in limine); Order, R. 54, Page ID # 582 (denying Plaintiffs' motion in limine seeking claim preclusion as moot).

> impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."
>
> 6. Defendant Benningfield's intended purpose in entering the May 15, 2017 Order was to "prevent[] the birth of substance addicted babies[.]"[105]

Tennessee law provides that a sanction issued by the Tennessee Board of Judicial Conduct represents "a formal finding of fact and opinion." Tenn. Code Ann. § 17-5-309(b). Facts and opinions issued by the Board of Judicial Conduct also constitute the "entry of [a] judgment" that is appealable *de novo* "as a matter of right" to the Tennessee Supreme Court. *See* Tenn. Code Ann. § 17-5-310(a) ("Within thirty (30) days from and after entry of the judgment of the board of judicial conduct, the aggrieved judge may appeal to the supreme court, as a matter of right."); Tenn. Code Ann. § 17-5-310(b)(1) ("The review in the supreme court will be de novo on the record made before the board of judicial conduct."). *Cf. In re Bell*, 344 S.W.3d 304, 321 (Tenn. 2011) ("we affirm the Court of the Judiciary's judgment").

Here, Defendant Benningfield accepted a formal Public Reprimand "pursuant to [an] agreement with an investigative panel of th[e] Board."[106] Accordingly, he did not appeal the Board's judgment. As such, under the

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[105] Public Letter of Reprimand, R. 38-3, Page ID ## 477-79.

[106] *Id.* at Page ID # 477.

doctrine of collateral estoppel, Defendant Benningfield's November 15, 2017 Public Reprimand constituted a final judgment against him, and the factual and legal determinations set forth in the Board's Public Reprimand should have been given preclusive effect.

"Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Critically, collateral estoppel—better termed "issue preclusion"—bars relitigation of both issues of fact *and issues of law* that were resolved by a prior judgment. *See Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016) ("issue preclusion ordinarily bars relitigation of an **issue of fact or law** raised and necessarily resolved by a prior judgment.") (emphasis added). As a result, Defendant Benningfield should have been precluded from contesting any of the factual findings or legal conclusions resolved against him in the Board's November 15, 2017 Public Reprimand, including the underlying illegality of his program.

Collateral estoppel can be used for either offensive or defensive purposes. "[Offensive] collateral estoppel precludes relitigation of an issue decided against a defendant in a previous case." *Vogt v. Emerson Elec. Co.*,

805 F. Supp. 506, 509 (M.D. Tenn. 1992). To the extent that Tennessee law controls the inquiry,[107] Tennessee law is in accord with federal law in rejecting mutuality of the parties as a requirement for the offensive use of collateral estoppel, with the Tennessee Supreme Court having recently opted to utilize the Second Restatement of Judgments' approach instead. *See Bowen ex rel. Doe v. Arnold*, 502 S.W.3d 102, 115 (Tenn. 2016) ("when determining whether to apply offensive or defensive collateral estoppel in a particular case, Tennessee courts should be guided by the general approach set out in section 29 of the Restatement (Second) of Judgments"). This approach "generally precludes relitigation of issues decided in prior lawsuits unless the party against whom collateral estoppel is asserted lacked a full and fair opportunity to litigate the issue in the first action or some other circumstance justifies affording that party an opportunity to relitigate the issue." *Id.* at 116.

Critically, a party's ability to use collateral estoppel offensively is also unaffected by the type of prior proceeding at issue. Thus, the doctrine also

[107] In diversity cases—which this is not—"federal common law borrows the state rule of collateral estoppel to determine the preclusive effect of a federal judgment where the court exercised diversity jurisdiction." *CSX Transportation, Inc. v. Gen. Mills, Inc.*, 846 F.3d 1333, 1340 (11th Cir. 2017). *See also Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

applies with full force to a judgment—like the Tennessee Board of Judicial Conduct's—issued by a prosecuting authority. *See id.* ("[a] judgment in favor of [a] prosecuting authority is preclusive in favor of a third person in a civil action. . . ." (quoting Restatement (Second) of Judgments § 85)).

To prevail on a claim of collateral estoppel, a party must establish:

> (1) that the issue to be precluded is identical to an issue decided in an earlier proceeding, (2) that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding, (3) that the judgment in the earlier proceeding has become final, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded.

Bowen, 502 S.W.3d at 107 (quoting *Mullins v. State*, 294 S.W.3d 529, 535 (Tenn. 2009)). The same essential requirements govern the use of offensive collateral estoppel under federal law. *See In re Dickson*, 655 F.3d 585, 591 (6th Cir. 2011).

In the instant case, all of these factors were established. In moving for summary judgment, the Plaintiffs sought to rely on the previously determined issues of both law and fact that were set forth in the Tennessee Board of Judicial Conduct's Public Reprimand against Defendant Benningfield. Defendant Benningfield's Public Reprimand also reflected that several issues regarding which the Plaintiffs sought preclusive effect

were raised and decided on the merits against him.[108] Further, the Board's Public Reprimand was an appealable final judgment, *see* Tenn. Code Ann. § 17-5-310(a), and Defendant Benningfield was indisputably a party to the proceeding.[109] Further still, there is no indication that Defendant Benningfield did not have a full and fair opportunity to contest the legal and factual issues determined against him by the Board. Instead, these issues were resolved against him *by agreement*.[110] Finally, Defendant Benningfield opted to forgo his automatic right to *de novo* review by the Tennessee Supreme Court by declining to appeal the Board's legal and factual determinations against him. *See* Tenn. Code Ann. § 17-5-310(b)(1) ("The review in the supreme court will be de novo on the record made before the board of judicial conduct.").

Accordingly, Defendant Benningfield's Public Reprimand carried preclusive effect as to all of the issues of fact and law that the Tennessee Board of Judicial Conduct previously determined against him. *See Bowen*, 502 S.W.3d at 107; *In re Dickson*, 655 F.3d at 591. Additionally, because those determinations precluded Defendant Benningfield from supporting

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[108] Public Letter of Reprimand, R. 38-3, Page ID ## 477-78.

[109] *Id.*

[110] *Id.* at Page ID # 477.

his claim that his sterilization-for-sentencing-credits policy was a lawful and narrowly tailored effort to achieve compelling governmental interests, summary judgment was independently warranted based on collateral estoppel.

C. THE PLAINTIFFS' CLAIM FOR AN INJUNCTION IS NOT MOOT, AND THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD IN FINDING THAT IT WAS.

1. The district court failed to make a mandatory determination as to whether "the allegedly wrongful behavior could not reasonably be expected to recur."

The district court's holding that the Plaintiffs' claim for injunctive relief was moot was premised upon its finding that "the challenged behavior has stopped."[111] Thus, the district court concluded, "[a]s to any allegation of present or future injury, Plaintiffs' claim is moot."[112] Making unmistakably clear that this finding was specifically premised upon the Defendants' supposed voluntary abandonment of the program, the district court further held that "the Standing Order has been rescinded and clarified such that it is no longer in effect."[113]

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[111] Mem. Op., R. 53, Page ID # 580.

[112] *Id.*

[113] *Id.*

As noted previously, the district court's conclusion that "the challenged behavior has stopped"[114] was not based on any evidence in the record. And indeed, the Defendants themselves repeatedly took the position that they had *not* stopped their sterilization-for-sentencing-credits program.[115]

Even if the district court's conclusion that the Defendants voluntarily abandoned their program had been supported by evidence in the record, however, the Plaintiffs' claim for an injunction *still* would not have been

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[114] *Id.*

[115] *See, e.g.*, Initial Case Management Order, R. 27, Page ID # 404 (setting forth the Defendants' theory of the case as follows: "The Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction in the jail sentence for those individuals that had already received, or had signed up to receive, the family planning services offered by the Tennessee Department of Health."). *See also* Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID # 501 ("eligible inmates that had already complied with the Standing Order of May 15, 2017 (either by having the procedure or signing up with the intent to have the procedure) would receive the promised benefit . . . ."); Defs.' Resp. to Pls.' Statement of Undisputed Material Facts, R. 43, Page ID # 508 ("Defendants admit that the July 26, 2017 Order, as clarified in the Order Clarifying Order Rescinding Previous Standing Order (attached as Exhibit A to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment) would continue to grant a 30-day sentence reduction for those individuals that agreed to accept the free contraceptive services offered by the Department of Health, but had yet to receive those services prior to the entry of the July 26, 2017 Order Rescinding Previous Standing Order. Defendants deny that after July 26, 2017, inmates could agree to receive free contraceptive services in exchange for a sentence reduction.")

moot, and dismissing the Plaintiffs' claim for an injunction constituted reversible error as a result. *See, e.g.*, *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("the court's power to grant injunctive relief survives discontinuance of the illegal conduct."). The Supreme Court of the United States has established that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (citing *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). In the instant case, the district court never determined whether the Defendants made that showing, and they did not.

Here, the Defendants did not even ***attempt*** to satisfy their burden of proving that "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *id.*—presumably because the Defendants never actually took the position that they had terminated their program.[116] The district court also failed to hold the Defendants to their "formidable burden," *see id*, making no finding at all as to whether "the allegedly wrongful

[116] *See id.*

behavior could not reasonably be expected to recur." *Id.* Accordingly, the district court's order dismissing the Plaintiffs' claim for an injunction should be reversed and remanded for consideration of the proper legal standard.

2. The Defendants' wrongful behavior is ongoing, and constitutional injury is certainly impending.

Notwithstanding the district court's conclusion that the challenged behavior "has stopped," as noted previously, the Defendants themselves never actually claimed that the instant case was moot based on their voluntary compliance. Instead, they took the distinctly different position that they had *not* terminated their sterilization-for-sentencing-credits with respect to certain inmates sentenced in 2017,[117] and they argued further that the challenged program was not illegal.[118] Accordingly, the burden of establishing that an injunction was warranted should properly have been assigned to *the Plaintiffs*, who were thus obliged to "demonstrat[e] that, if

[117] *See* Initial Case Management Order, R. 27, Page ID # 404 (setting forth the Defendants' theory of the case as follows: "The Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction in the jail sentence for those individuals that had already received, or had signed up to receive, the family planning services offered by the Tennessee Department of Health.").

[118] *See generally*, Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 42, Page ID ## 495-98.

unchecked by the litigation, the [Defendants'] allegedly wrongful behavior will likely occur or continue and that the threatened injury is certainly impending." *Friends of the Earth, Inc.*, 528 U.S. at 170.

The Plaintiffs, for their part, met that burden. During the proceedings below, the Plaintiffs demonstrated that the Defendants' wrongful behavior was not only "likely [to] occur or continue," *see id.*, but that it *was and still is presently continuing*.[119] The Plaintiffs also introduced evidence to the effect that:

(1) Defendant Benningfield had previously agreed—in a formal judicial

[119] *See, e.g.*, Initial Case Management Order, R. 27, Page ID # 404 (setting forth the Defendants' theory of the case as follows: "The Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction in the jail sentence for those individuals that had already received, or had signed up to receive, the family planning services offered by the Tennessee Department of Health."). *See also* Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID # 501 ("eligible inmates that had already complied with the Standing Order of May 15, 2017 (either by having the procedure or signing up with the intent to have the procedure) would receive the promised benefit . . . ."); Defs.' Resp. to Pls.' Statement of Undisputed Material Facts, R. 43, Page ID # 508 ("Defendants admit that the July 26, 2017 Order, as clarified in the Order Clarifying Order Rescinding Previous Standing Order (attached as Exhibit A to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment) would continue to grant a 30-day sentence reduction for those individuals that agreed to accept the free contraceptive services offered by the Department of Health, but had yet to receive those services prior to the entry of the July 26, 2017 Order Rescinding Previous Standing Order. Defendants deny that after July 26, 2017, inmates could agree to receive free contraceptive services in exchange for a sentence reduction.").

proceeding—to terminate his program as to all inmates, but he did not do so;[120]

(2) Independent of his sterilization-for-sentencing-credits program, Defendant Benningfield had exhibited a willingness to engage in egregiously unconstitutional conduct that he knew was clearly unlawful, and thus, that "there is strong reason to believe that only a federal injunction will prevent recurrent illegal conduct";[121]

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[120] *See* Pls.' Resp. to Defs.' Mot. to Suppl., R. 52, Page ID # 568 ("Defendant Benningfield has continued to enforce his sterilization-for-sentencing-credits policy even after receiving a public reprimand and even after telling The Tennessee Board of Judicial Conduct that he had entered an order 'indicating that this credit is no longer available to **any** inmate.' *See* Doc. #42-1, p. 5 (emphasis added). *But see* Doc. #42-1, pp. 1-2 (expressly indicating that the credit is indeed still available to certain inmates).").

[121] Pls.' Resp. to Defs.' Mot. to Suppl., R. 52, Page ID # 568 ("Defendant Benningfield has independently demonstrated that he is unconstrained by clearly established law even when he knows his actions are illegal. *See* [Public etter of Reprimand, R. 38-3, Page ID # 477] (further reprimanding Defendant Benningfield because: "Complaint B17-7052 deals with a case in which, during a hearing regarding a probation violation hearing [sic], you threatened to end the house arrest program which was then a practice in your court, and order persons currently under house arrest to be put in jail, if the defendant's attorney did not withdraw a valid objection that he had made concerning certain records being admitted in the probation violation, which you acknowledged at the time was a valid objection."); Am. Compl., R. 13, Page ID #141, ¶ 91 (noting that Defendant Benningfield retaliated against a defendant and threatened numerous non-party litigants if the defendant did not withdraw a valid hearsay objection). *See also* Tr. of Hr'g in White Cty. Gen. Sessions Ct., R. 13-3, Page ID ## 148-202, May 16, 2017 (undertaking knowingly illegal retaliation).

(3) The challenged program was clearly unlawful prior to the enactment of Senate Bill 2133, but the Defendants implemented it anyway;[122]

(4) Rather than agreeing that the challenged practice was unlawful, the Defendants continue to insist that it is not;[123] and, most importantly:

(5) The Defendants' program is still causing and will continue to cause constitutional injuries.[124]

Based on these facts, the Plaintiffs carried the burden necessary to "force [Defendants'] compliance" with constitutional requirements. *Friends*

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[122] Pls.' Resp. to Defs'. Mot. to Suppl., R. 52, Page ID ## 568-69 ("for multiple reasons, Defendants' sterilization-for-sentencing-credits policy—which is also replete with gender-based discrimination—has never even conceivably been lawful. *See generally* [Pls.' Mem. in Supp. of Pls.' Mot. for Partial Summ. J., R. 22, Page ID ## 345-48]; [Pls.' Reply to Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 44, Page ID ## 510-15]. Even so, Defendants implemented and still defend it today regardless, and they have continued to enforce it with respect to past inmates throughout the course of the instant litigation. *See* Doc. #42-1, p. 2.").

[123] *See generally* Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 42, Page ID ## 495-98.

[124] *See, e.g.*, Pls.' Reply to Defs.' Resp. to Pls.' Mot. for Partial Summ. J., R. 44, Page ID #511 ("Defendants' Third Sterilization Order similarly reflects that 'the promised benefit' that is at the heart of this action is still being disbursed. [Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID # 501.] Because that 'benefit' turns upon prior disparate treatment based on both the exercise of a fundamental right and an inmate's gender, the Defendants are still today continuing to violate the Constitution, and both injunctive and declaratory relief remain appropriate.").

of the Earth, Inc., 528 U.S. at 170. Consequently, rather than being dismissed, their claim for an injunction should have been granted. *Id.* Because the district court failed to consider the standards that governed Plaintiffs' claim for an injunction, however, its order dismissing Plaintiffs' claim for an injunction should be reversed.

D. THE DISTRICT COURT ERRED BY FAILING TO ADJUDICATE THE PLAINTIFFS' CLAIM FOR ATTORNEY'S FEES.

1. At the time of dismissal, Plaintiffs had already substantially prevailed. Thus, they are entitled to their reasonable attorney's fees, which should have been awarded even if the merits of this action were moot.

Independent of the status of the merits of the instant action, the district court erred by dismissing the Plaintiffs' claim for attorney's fees. Here, the Plaintiffs lodged a compelling claim for attorney's fees that was dismissed as moot along with all of the Plaintiffs' other claims.[125] Accordingly, the Plaintiffs' claim for attorney's fees—which are to be assigned "to the United States Holocaust Memorial Museum and the Tuskegee History Center"[126]—was never adjudicated.

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[125] Mem. Op., R. 53, Page ID # 581.

[126] *See* Am. Compl., R. 13, Page ID # 144, ¶ 4; Order, R. 37, Page ID # 461, Feb. 22, 2018 ("This case is different from the other three cases involving sentence reductions in that it seeks only injunctive relief and provides that any attorneys' fees recovered by a Plaintiff would be available for charitable donations.").

Critically, however, a wealth of authority dictates that when plaintiffs succeed in obtaining relief and "'an intervening event render[s] the case moot on appeal, plaintiffs are still prevailing parties for the purposes of attorney's fees for the district court litigation.'" *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 552 (6th Cir. 2014) (quoting *Diffenderfer v. Gomez–Colon*, 587 F.3d 445, 454 (1st Cir.2009)). *See also Schell v. OXY USA Inc.*, 814 F.3d 1107, 1123 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 376 (2016), *and cert. denied*, 137 S. Ct. 446 (2016) (reasoning that "[a] claim for attorneys' fees may remain viable even after the underlying cause of action becomes moot"); *Brock v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., (UAW)*, 889 F.2d 685, 695 (6th Cir. 1989) (noting that the fact that an attorney's fee claim may still be pending does not pretermit mootness of the merits of an action); *Dahlem by Dahlem v. Bd. of Educ. of Denver Pub. Sch.*, 901 F.2d 1508, 1511 (10th Cir. 1990) ("While a claim of entitlement to attorney's fees does not preserve a moot cause of action, the expiration of the underlying cause of action does not moot a controversy over attorney's fees already incurred.") (internal citations omitted) (collecting cases); *Texas v. United States*, 49 F. Supp. 3d 27, 42 (D.D.C. 2014), *aff'd*, 798 F.3d 1108 (D.C. Cir. 2015) ("mootness does not necessarily obviate a litigant's prevailing-party status"); *Monzillo v. Biller*, 735 F.2d 1456, 1463 (D.C. Cir.

1984) ("In *Crowell v. Mader*, 444 U.S. 505, 100 S.Ct. 992, 62 L.Ed.2d 701 (1980), [] the Supreme Court held that a state legislature's enactment of a new reapportionment plan mooted plaintiffs' attack on a previous plan. The Court stated, however, that the plaintiffs could still apply for attorneys' fees in the district court. *Id.* at 506, 100 S.Ct. at 992. We have held that a court can decide whether attorneys' fees should be awarded 'in cases which have never reached final adjudication on the merits.'") (quoting *Yablonski v. United Mine Workers of Am.*, 466 F.2d 424, 431 (D.C. Cir. 1972)). *See also generally* Matthew D. Slater, *Civil Rights Attorney's Fees Awards in Moot Cases*, 49 U. CHI. L. REV. 819, 820 (1982) (concluding that "attorney's fees should be awarded where the plaintiff achieved some of the relief he desired, the relief resulted at least in part from the lawsuit, and the complaint stated a legally cognizable civil rights claim."). Consequently, rather than dismissing the Plaintiffs' claim for attorney's fees based on the status of the merits of this action, the district court should instead have determined whether the Plaintiffs had already substantially prevailed.

"[T]he notion of 'prevailing party' is to be interpreted in a practical, not formal, manner." *Northcross v. Bd. of Educ. of Memphis City Sch.*, 611 F.2d 624, 636 (6th Cir. 1979), *abrogated on other grounds by Louisville Black Police Officers Org. v. City of Louisville*, 700 F.2d 268 (6th Cir. 1983). Here,

as the Plaintiffs argued before the district court,[127] the Plaintiffs had already prevailed substantially even before Senate Bill 2133 was enacted, because they had secured a significant component of the relief over which they filed suit. Accordingly, they are prevailing parties. *See id*. *See also Diffenderfer*, 587 F.3d at 453 ("in the mootness context, a 'prevailing party' is a party who managed to obtain a favorable, material alteration in the legal relationship between the parties prior to the intervening act of mootness").

The Plaintiffs specifically filed the instant lawsuit to bring an end to the Defendants' July 26, 2017 Supplemental Order, which kept the Defendants' illegal sterilization program substantially in effect.[128] The Plaintiffs' claim that the Defendants' July 26, 2017 Supplemental Order similarly required termination represented both a critical component of the Plaintiffs' Complaint and a central theory of their case.[129] Notably, the Plaintiffs' direct challenge to the Defendants' July 26, 2017 Order—rather than just the

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[127] Pls.' Resp. to Defs.' Mot. to Suppl., R. 52, Page ID ## 570-73.

[128] *See* Am. Compl., R. 13, Page ID # 140, ¶ 83 (complaining that "Defendant Benningfield's July 26, 2017 Supplemental Order still remains in effect today.").

[129] *See* Initial Case Management Order, R. 27, Page ID # 403 ("The original Standing Order was only partially rescinded via a Supplemental Order on July 26, 2017, and the July 26, 2017 Supplemental Order still remains in effect.").

Defendants' May 15, 2017 Order—was also one of several unique features of the Plaintiffs' lawsuit that was not shared by the "three other cases that are factually related to the claims in this case,"[130] and the cases were not consolidated accordingly.[131]

During the course of prosecuting their claims, the Plaintiffs secured the termination of the July 26, 2017 Supplemental Order. Specifically, in response to the instant litigation, Defendant Benningfield rescinded the July 26, 2017 Supplemental Order by entering a third Standing Order on November 9, 2017.[132] The Defendants' November 9, 2017 Standing Order largely—though not entirely—terminated the Defendants' unconstitutional sterilization program and substantially restricted its temporal scope.[133] Specifically, the November 9, 2017 Standing Order ended "the 30-day jail sentence credit for anyone who promised to undergo these surgical procedures **after** the entry of the Order Rescinding Previous Order . . . ."[134]

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[130] Order, R. 41, Page ID # 485, Mar. 1, 2018.

[131] *Id.* at Page ID # 486.

[132] *See* Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID ## 500-01.

[133] *See id.*

[134] *Id.* at Page ID # 501.

As noted above, the Defendants' sterilization-for-sentencing-credits program still remains in effect as to inmates who submitted to participation in the program **before** the entry of Defendant Benningfield's second standing order.[135] Accordingly, although the Plaintiffs have yet to secure the full measure of relief that they are seeking—to wit, wholesale termination and invalidation of the Defendants' sterilization program—they nonetheless won substantial relief by securing the rescission of the Defendants' July 26, 2017 Standing Order, which restricted the Defendants' unconstitutional program temporally.[136] Ironically, in holding that the challenged program "has been rescinded [completely] and clarified such that it is no longer in effect" *at all*,[137] the district court's Memorandum Opinion reflects that the

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[135] Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID # 501. (stating that "eligible inmates that had already complied with the Standing Order of May 15, 2017 (either by having the procedure or signing up with the intent to have the procedure) would receive the promised benefit . . . ."); Initial Case Management Order, R. 27, Page ID # 404 ("The Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction in the jail sentence for those individuals that had already received, or had signed up to receive, the family planning services offered by the Tennessee Department of Health.").

[136] *See* Order Clarifying Order Rescinding Previous Standing Order, R. 42-1, Page ID ## 500-01.

[137] Mem. Op., R. 53, Page ID # 580.

Plaintiffs secured even greater relief than they did.

Consequently, the Plaintiffs have already secured substantial civil rights relief through prosecuting this action. As such, they qualify as prevailing parties. *See, e.g.*, *Diffenderfer*, 587 F.3d at 453. Further, as noted above, their claim for attorney's fees remains viable independent of the status of the merits of this action. *See, e.g.*, *Schell*, 814 F.3d at 1123. The Plaintiffs should be awarded their reasonable attorney's fees—which should be assigned "to the United States Holocaust Memorial Museum and the Tuskegee History Center"—as a result.[138]

2. Claims for attorney's fees survive independently under the Court's equitable jurisdiction.

The Plaintiffs' claim for attorney's fees also survives independently under this Court's equitable jurisdiction. *See, e.g.*, *Century Sur. Co. v. Belmont Seattle, LLC*, 691 F. App'x 427, 430 (9th Cir. 2017) ("attorney's fees, though ancillary to the underlying action, survive independently under the Court's equitable jurisdiction"); *Cottrell v. Bendix Corp.*, 914 F.2d 1494 (6th Cir. 1990) ("A federal court may determine the legal fees with respect to the

[138] *See* Am. Compl., R. 13, Page ID # 144, ¶ 4. *See also* Order, R. 37, Page ID # 461, Feb. 22, 2018 ("This case is different from the other three cases involving sentence reductions in that it seeks only injunctive relief and provides that any attorneys' fees recovered by a Plaintiff would be available for charitable donations.").

work performed for a case properly before the court, even if the underlying action is dismissed."). Whether equities compel an attorney's fee award after the underlying action has become moot is a question "to be decided on the record as it exists in the underlying action, i.e., there is no right to review or redetermine any of the issues in the underlying action solely for the purpose of deciding the attorney's fees question." *United States v. Ford*, 650 F.2d 1141, 1144, n.1 (9th Cir. 1981).

For the reasons detailed in the preceding section, the record reflects that the Plaintiffs are prevailing parties who secured substantial civil rights relief.[139] Equity compels an attorney's fee award as a result. At the very least, the instant action should be remanded with instructions to consider whether the Plaintiffs should be awarded attorney's fees under this Court's equitable jurisdiction. *See, e.g., Century Sur. Co.*, 691 F. App'x at 430.

X. CONCLUSION

For the foregoing reasons, the district court's order should be **REVERSED**, and this Court should remand this case with instructions to grant the Plaintiffs' motion for summary declaratory relief and award the Plaintiffs their reasonable costs and attorney's fees.

[139] *See supra*, pp. 49-56.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,672 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Georgia font.

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I hereby certify that on this 7th day of August, 2018, a copy of the foregoing was filed electronically through the appellate CM/ECF system and sent via CM/ECF to the following parties:

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