IN THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NORTHEASTERN DIVISION

CHRISTOPHER SULLIVAN, NATHAN HASKELL, and WILLIAM GENTRY,	)	
Plaintiffs,	)	
v.	)	Case No. 2:17-cv-00052
SAM BENNINGFIELD and ODDIE SHOUPE,	)	Judge Crenshaw
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Come now the Plaintiffs, by and through undersigned counsel, and respectfully respond in opposition to the Defendants' Motion to Dismiss (Doc. #15). For the reasons provided herein, the Plaintiffs have standing to sue, they have stated multiple cognizable claims for relief under the Fourteenth Amendment, and their injuries are fully redressable. Accordingly, the Defendants' Motion to Dismiss should be denied.

I. Introduction

This is a case about two court orders that expressly condition the length of an inmate's jail sentence upon whether the inmate agrees to submit to long-term, surgical sterilization. The Plaintiffs are three White County inmates who were and remain subject to the Defendants' Sterilization Orders. All of them would prefer not to relinquish their right to procreate in order to receive the equal treatment to which they are constitutionally entitled. Accordingly, the Plaintiffs have filed the instant lawsuit seeking both injunctive and declaratory relief to terminate White County's ongoing sterilization program.

The Plaintiffs' Amended Complaint states several cognizable claims for relief under the Equal Protection and Due Process clauses of the Fourteenth Amendment. The Plaintiffs are also experiencing concrete, fully redressable, and *ongoing* constitutional injuries that afford them clear standing to sue. Accordingly, the Defendants' Motion to Dismiss should be denied as to all claims. Further, because the Defendants have presented multiple matters outside the pleadings in responding to Plaintiffs' Amended Complaint, the Defendants' Motion to Dismiss must be treated as one for summary judgment under Rule 56.[1] *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").

The Defendants' additional claims regarding the propriety of adjudicating this lawsuit in a federal forum are similarly without merit. Although the Plaintiffs are presently experiencing constitutional injuries arising from Defendants' ongoing Sterilization Orders, the Plaintiffs' state court proceedings are final, rendering *Younger* abstention inapposite. *See Younger v. Harris*, 401 U.S. 37, 41 (1971) (noting "the national policy forbidding federal courts to stay or enjoin **pending** state court proceedings except under special circumstances.") (emphasis added). Thus, "[j]urisdiction existing, th[e Supreme] Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). "Parallel state-court proceedings do not detract from that obligation." *Id.*

[1] Defendants' do not merely seek to have this Court take judicial notice of dates contained in the exhibits they have filed in support of their Motion to Dismiss. Instead, in an attempt to contravene multiple factual allegations in Plaintiffs' Amended Complaint, the Defendants seek to use these exhibits to support opposing *inferences* about whether Defendants' Sterilization Orders applied to the Plaintiffs. *See* Doc. 16, pp. 3-4.

Moreover, the Defendants abandoned any serious claim to improper venue, federal abstention, or failure to exhaust state remedies by voluntarily removing this lawsuit—which was initially filed in state court—to the instant federal forum *themselves*.[2] *See* Doc. #1 (Defendants' Notice of Removal). Given that the Defendants availed themselves of the instant federal forum, this Court has both the authority and the obligation to adjudicate the federal claims alleged in this lawsuit, which are plainly within this Court's jurisdiction to resolve. *See Sprint Commc'ns,* 134 S. Ct. at 590-91 ("Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'") (quoting *Cohens v. Virginia,* 6 Wheat. 264, 404, 5 L.Ed. 257 (1821)). In fact, given that the existence and contents of the Defendants' Sterilization Orders are undisputed, the Plaintiffs are entitled to an immediate and *final* judgment regarding their claims that the Defendants' July 26, 2017 Supplemental Order violates the Fourteenth Amendment. Accordingly, the Plaintiffs have filed an accompanying *Motion for Partial Summary Judgment* contemporaneously herewith.

With respect to Plaintiffs' state law claims, however, the Plaintiffs acknowledge that their allegations turn on three dispositive legal questions of first impression that are more appropriate for resolution by the Tennessee Supreme Court. As such, the Plaintiffs have contemporaneously filed a *Motion to Certify Questions of State Law* as well.

II. Summary of Argument

The essential facts of this case are not in dispute. On May 15, 2017, Defendant Benningfield entered a Standing Order that treated identically situated White County inmates differently depending on whether or not they agreed to submit to surgical

[2] Plaintiffs also emphasize that much of the relief they seek—a declaration that Defendants' orders are unconstitutional and an injunction prohibiting their continued enforcement—would not have any bearing on Plaintiffs' sentences or their criminal proceedings, rendering the cited abstention doctrines inapplicable.

sterilization in the form of a Nexplanon implant (for women) or a vasectomy (for men). *See* Doc. #16, p. 2; Doc. #18, p. 2. Thereafter, on July 26, 2017, Defendant Benningfield issued a Supplemental Order that purported to "rescind[]" his prior May 15, 2017 Order. Doc. #16, pp. 2-3; Doc. #18, p. 2. Despite its title, however, the text of Defendant Benningfield's still-pending July 26, 2017 Supplemental Order makes plain that the Defendants are continuing to treat identically situated White County inmates differently depending solely on whether or not they "hav[e] the procedures or agree[] to have same." Doc. #16, pp. 2-3; Doc. #13-2. The Defendants further acknowledge that the July 26, 2017 Supplemental Order operates to keep the May 15, 2017 Order in effect. Doc. #18, p. 2 ("The [July 26, 2017] Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction . . . .").

It is the Plaintiffs' position that the above-described classification is unlawful and contravenes the Constitution's guarantees of Equal Protection and Due Process. Accordingly, the Plaintiffs' Amended Complaint seeks, *inter alia*, an order declaring the Defendants' July 26, 2017 Supplemental Order unconstitutional and enjoining them from continuing to enforce it. The Plaintiffs' Amended Complaint details the existence of the Defendants' Sterilization Orders, sets forth their contents, and contains dozens of specific factual allegations establishing that all three Plaintiffs were and remain subject to their terms. Both injunctive and declaratory relief should issue accordingly.

In response, Defendants' Motion to Dismiss acts as if the still-pending July 26, 2017 Supplemental Order had no function other than to rescind Defendant Benningfield's May 15, 2017 Order. Accordingly, the Defendants limit their motion almost exclusively to disputing whether the Plaintiffs can sue over the contents of Defendant Benningfield's previous May 15, 2017 Order. Defendants specifically insist that the Plaintiffs' substantive

claims are no longer susceptible to redress because "the [May 15, 2017] Standing Order has been rescinded." Doc. #16, p. 10. Critically, however, the actual *contents* of the July 26, 2017 Supplemental Order prove otherwise. *See id.* at p. 2. Further, Defendants have acknowledged separately that the July 26, 2017 Supplemental Order operates to keep the May 15, 2017 Order in effect. *See* Doc. #18, p. 2 ("The [July 26, 2017] Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction . . . ."). Consequently, because Defendants' July 26, 2017 Supplemental Order—both as written and as applied—indicates that it did not merely function to rescind the May 15, 2017 Order, Defendants' claim is without merit. Doc. #13-2; Doc. #18, p. 2.

With respect to the Plaintiffs' standing to sue, the Defendants also candidly acknowledge—albeit via exhibits outside the pleadings—that Plaintiff Nathan Haskell is currently being held at the White County Jail and is right now subject to the jurisdiction of both Defendant Benningfield and his still-pending July 26, 2017 Supplemental Order. *See* Doc. #16, p. 3; Doc. #15-4. Accordingly, Mr. Haskell has clear standing to challenge the unconstitutional classification drawn by the July 26, 2017 Supplemental Order, which subjects him to an additional 30 days in jail solely because he is unwilling to relinquish his right to procreate. *See* Doc. #13-2. Defendants further acknowledge that another of the Plaintiffs—William Gentry—is also presently incarcerated at the White County jail, and that "Mr. Gentry signed up for the [vasectomy] program before it was rescinded." Doc. #16, p. 1. This, too, confers clear standing to challenge the constitutionality of the Defendants' still-pending July 26, 2017 Supplemental Order, because in order to avoid being "denied the credit," the July 26, 2017 Supplemental Order requires Mr. Gentry to "demonstrate[] to the court [his] desire to improve [his] situation[] and take serious and considered steps toward [his] rehabilitation by having the procedure[] or agreeing to have

same." *See* Doc. #16, p. 2; Doc. #13-2. Mr. Gentry, however, does actually not wish to have a vasectomy. Doc. #13, ¶ 27. He also submits that this requirement contravenes the Constitution. As such, Mr. Gentry has standing to pursue his claim that Defendants' Sterilization Orders are unconstitutional as well.

Defendant Sullivan, too, has standing to challenge the constitutionality of the Orders for the same reason as Plaintiff Gentry. Although he is a Criminal Court defendant, the Plaintiffs' Amended Complaint contains extensive factual allegations demonstrating that the Orders were extended beyond their stated terms to Criminal Court defendants as well. *See, e.g.*, Doc. #13, ¶¶ 61, 62, 64, 65, 66, 67, 68, 70, 84, & 86. As such, Plaintiff Sullivan and other Criminal Court defendants were similarly subject to the Orders at issue, and they also have standing to challenge their constitutionality. *Id.*

In sum, the text of Defendant Benningfield's July 26, 2017 Order makes plain that at this very moment, the Defendants are continuing to treat similarly situated inmates differently: (1) based on whether they agree to relinquish their constitutional right to procreate; and (2) based on their gender. Doc. #13-2; Doc. #16, pp. 2-3; Doc. #18, p. 2. Plaintiffs contend that the classifications drawn by this Order—the contents and existence of which are not disputed—violate the Equal Protection clause. *Id.* Further, the ongoing injury created by this unconstitutional classification shocks the conscience and interferes with the exercise of a fundamental right. The Order has also been enforced without any lawful basis or procedural safeguards. As such, Plaintiffs have stated cognizable claims for relief under the Fourteenth Amendment's Equal Protection and Due Process clauses. The Defendants' Motion to Dismiss these claims should be denied accordingly.

III. Standard of Review

It is elementary that "[i]n reviewing a motion to dismiss, [courts] construe the

complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). Further, "[a]ssessment of the facial sufficiency of the complaint must ordinarily be undertaken without resort to matters outside the pleadings." *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011). Consequently, a trial court commits reversible error when it "reache[s] outside of the pleadings to justify dismissal of [a Plaintiff's] claims." *Davis v. Davis*, No. 14-5247, 2015 WL 13187145, at *1 (6th Cir. Mar. 25, 2015).

IV. Dispositive Factual Allegations That Are True for Purposes of Defendants' Motion

The Plaintiffs have set forth several detailed, factual allegations that must be taken as true for purposes of this motion and which forbid dismissal. *Directv*, 487 F.3d at 476. The Plaintiffs are also entitled to all reasonable inferences based upon these facts. *Id.*

The Plaintiffs have specifically alleged that "[p]ursuant to a Standing Order transmitted to the White County Sheriff [on May 15, 2017] at 2:05 p.m., Defendant Benningfield ordered that the length of time that 'any White County inmate serving a sentence for the General Sessions Court' would be required to spend in jail would depend on whether or not the inmate submitted to surgical sterilization." Doc. 13, ¶ 2. Accordingly, "[c]ompared with similarly-situated inmates who agreed to be sterilized, Defendant Benningfield's Standing Order provided that inmates who refused to relinquish their reproductive rights would be required to serve 'an additional thirty (30) days' in the White County jail." *Id.* at ¶ 3.

"Thereafter, in response to intense national outrage and widespread condemnation, Judge Benningfield issued a Supplemental Order on July 26, 2017 that

purported to rescind his May 15, 2017 Standing Order." *Id.* at ¶ 10. "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." *Id.* at ¶ 11.

Plaintiff Haskell was (and remains) subject to the jurisdiction of Defendant Benningfield and the General Sessions Court of White County, Tennessee, while both orders were in effect. *Id.* at ¶ 19-20. Plaintiff Haskell does not wish to become surgically sterilized. *Id.* at ¶ 21. Based on the "offer" presented in the orders, however, if Plaintiff Haskell has a vasectomy, then he will be freed from jail 30 days earlier than he would be otherwise. *Id.* at ¶ 22. Plaintiff Haskell wishes to receive the same benefits as other White County inmates without having to become sterilized. *Id.* at ¶ 78.

Plaintiff Gentry was also extended—and he accepted—Defendants' offer to receive a vasectomy in exchange for a 30-day sentence reduction while his charges were pending before Defendant Benningfield in White County General Sessions Court. *Id.* at ¶ 26. However, Plaintiff Gentry does not actually wish to be sterilized, either. *Id.* at ¶ 27. Plaintiff Gentry only accepted the offer and signed up for a vasectomy in the hopes of being released from jail early enough to witness the birth of his first grandchild and care for his ailing mother, who is extremely ill. *Id.* at ¶ 73. "Thereafter, despite confirming that he had been enrolled in Defendants' sterilization-for-early-release program on several occasions, Plaintiff Gentry did not receive Defendants' promised 30-day sentence

reduction." *Id.* at ¶ 29. *See also id.* at ¶ 74 ("Plaintiff Gentry never received his 30-day jail credit despite accepting Defendants' offer of long-term, surgical sterilization.").

While incarcerated, Plaintiff Sullivan was similarly subject to—but did not accept—Defendants' offer to become sterilized. *Id.* at ¶ 31; ¶ 66. Like Plaintiff Gentry, Plaintiff Sullivan was extended Defendants' offer even though he was sentenced in Criminal Court. *Id.* at ¶ 66. Despite their stated terms, Defendants' Sterilization Orders were extended to White County inmates like Plaintiff Sullivan (and Plaintiff Gentry) who were not serving sentences for the White County General Sessions Court. *Id.* at ¶¶ 61, 62, 64, 65, 66, 67, 68, 70, 84, & 86. Plaintiff Sullivan does not wish to become sterilized, either. *Id.* at ¶ 80.

As applied to the Plaintiffs, Defendants' Sterilization Orders would carry long-term consequences if accepted, because a vasectomy is a form of long-term, surgical sterilization. *Id.* at ¶ 39. Both procedures set forth in Defendant Benningfield's May 15, 2017 Standing Order are long-term in nature, carry risks of severe complications, and can be irreversible. *Id.* at ¶ 40. Even so, dozens of White County inmates agreed to submit to surgical sterilization in order to reduce the length of their respective jail sentences. *Id.* at ¶ 41. Many inmates who accepted Defendants' sterilization offers did so for the jailtime reduction alone. *Id.* at ¶¶ 42, 43. *See also id.* at ¶¶ 28, 73. For example, after accepting Defendants' offer, one White County inmate attempted to cut her Nexplanon implant out of her arm with a razor blade while she was incarcerated. *Id.* at ¶ 42. Another White County inmate who did not submit to sterilization stated publicly that many of the inmates who had accepted Defendants' sterilization offer "were coming off drugs" and "weren't in clear judgment to make this decision" when they did so. *Id.* at ¶ 43.

"Notwithstanding Defendant Benningfield's claim to have rescinded his 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." *Id.* at ¶ 50. Accordingly, Defendant Benningfield's July 26, 2017 Supplemental Order still remains in effect today. *Id.* at ¶ 83.

Defendant Benningfield's sterilization-for-early-release offers were extended by Defendant Shoupe, by or through Lieutenant Daniels, to White County inmates who were not serving sentences for the White County General Sessions Court. *Id.* at ¶ 62. Lieutenant Daniels maintained a sign-up sheet reflecting White County inmates who had accepted the sterilization-for-early-release offers. *Id.* at ¶ 63. The sign-up sheet includes White County inmates, like Plaintiff Gentry, who were not serving sentences for the White County General Sessions Court. *Id.* at ¶ 64. Further, pamphlets advertising Defendants' sterilization-for-early-release offers were placed in the White County jail's general population areas, where inmates who were not serving sentences for the White County General Sessions Court resided. *Id.* at ¶ 65.

V. Plaintiffs' Cognizable Claims for Relief

Taking the above-stated facts as true—and drawing all reasonable inferences concerning them in favor of the Plaintiffs—the Plaintiffs' Amended Complaint states legally cognizable claims for relief as to all claims presented. Further, all of Defendants' claimed bases for contesting standing or the propriety of attorney's fees are meritless.

A. Equal Protection

The Plaintiffs' first Equal Protection claim is premised on the fact that "[c]ompared with similarly-situated inmates who agreed to be sterilized, Defendant Benningfield's

Standing Order provided that inmates who refused to relinquish their reproductive rights would be required to serve 'an additional thirty (30) days" in the White County jail.'" Doc. #13, p. 1, ¶ 3. The Orders also facially discriminate based on gender. Doc. #13-1; #13-2.

The Defendants have drawn an unconstitutional classification based on White County inmates' exercise of their constitutionally protected right to procreate. Doc. #13, p. 1, ¶ 3. Under the express terms of both the Defendants' May 15, 2017 Standing Order and their subsequent July 26, 2017 Supplemental Order, the length of identically situated inmates' sentences turns exclusively on whether or not they submit to surgical sterilization. *See* Docs. #13-1; #13-2. As such, inmates who do not submit to surgical sterilization must serve a jail sentence that is 30 days longer than those who do. *Id.*

Thus, on their face, Defendants' Sterilization Orders punish inmates with more severe jail sentences if they exercise their right to procreate. *See id.* Defendants do not dispute this reality. They do, however, characterize the Orders as "offer[ing] a 30-day *reduction*" to inmates who *do* relinquish their right to procreate, rather than a 30-day *penalty* for those who do *not*. *See* Doc. #18, p. 2 (emphasis added). Regardless, however, drawing any classification on the basis of a citizen's exercise of a fundamental right presumptively violates the Equal Protection clause. *See, e.g., Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 681–82 (6th Cir. 2011) ("The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference."); *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006) ("Fundamentally, the Clause protects against invidious discrimination among similarly-situated individuals or implicating fundamental rights. 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."). *See also Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005) ("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.").

The right to procreate has achieved fundamental status. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.") (collecting cases) (internal citations omitted). *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (holding that the Fourteenth Amendment "encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."). Accordingly, Defendants' policy draws an unconstitutional classification based on a fundamental constitutional right. *See id. Cf. Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and

disappear."). As such, Defendants' Sterilization Orders are presumptively unconstitutional and subject to strict judicial scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (holding that if a classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution," then "strict judicial scrutiny" is required). *Cf. Skinner*, 316 U.S. at 541 ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.").

The Defendants' Sterilization Orders also facially discriminate on the basis of gender. Doc. #13-1; #13-2. Under both Orders, female inmates are subject to long-term sterilization, while male inmates are subject to potentially *permanent* sterilization. *Id.*; Doc. #13, ¶ 39. Such gender-based discrimination is subject to intermediate judicial scrutiny, which compels the Defendants to demonstrate that an "exceedingly persuasive justification" exists to support the Orders' constitutionality. *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.").

Further, contrary to Defendants' contentions otherwise, Plaintiffs' injuries are fully redressable. In fact, when a claim of equal protection is raised, two separate remedies are available: "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." *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (cleaned up). *See also Heckler v. Mathews*, 465 U.S. 728, 740 (1984) ("when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal

of benefits from the favored class as well as by extension of benefits to the excluded class."). "How equality is accomplished—by extension or invalidation of the unequally distributed benefit or burden, or some other measure—is a matter on which the Constitution is silent." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426–427 (2010).[3]

Thus, notwithstanding Defendants' claim that "Plaintiffs cannot establish their injuries will be redressed by a favorable decision from this Court," *see* Doc. #16, p. 9, two separate remedies are available, and Plaintiffs would benefit from both of them. *Id.* Equal treatment is itself the remedy that the Plaintiffs are seeking, and the Supreme Court has held that Equal Protection claims are redressable in two forms. *Levin*, 560 U.S. at 426–427. The Plaintiffs have also stated claims for both available equality remedies: (1) an injunction prohibiting continued enforcement of the Defendants' sterilization orders (representing withdrawal of benefits from the favored class), and (2) conferral of the 30-day sentencing credit that has already been extended to others (extension of benefits to the excluded class). *Id.* Both remedies would ensure equal treatment, and the latter would extend the Plaintiffs valuable sentencing benefits that others have already received.

B. Substantive Due Process

As the Sixth Circuit has explained:

> Substantive due process is "[t]he doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (internal quotation marks omitted). It protects a narrow class of interests, including those enumerated in the Constitution, those so rooted in the traditions of the people as to be ranked fundamental, and the interest in freedom from government actions that "shock the

[3] The continuing availability of either remedy to cure an equal protection violation was recently reaffirmed by the United States Supreme Court in its 2017 term. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) ("There are two remedial alternatives, our decisions instruct, when a statute benefits one class . . . and excludes another from the benefit.") (cleaned up).

> conscience." *Bell v. Ohio State Univ.*, 351 F.3d 240, 249–50 (6th Cir.2003). It also protects the right to be free from "arbitrary and capricious" governmental actions, which is another formulation of the right to be free from conscience-shocking actions.

Range v. Douglas, 763 F.3d 573, 588 (6th Cir. 2014)

The Plaintiffs' Amended Complaint states cognizable claims for relief under all four of these related but distinct substantive due process theories.

First, the Plaintiffs have contended that Defendants' offer of early-freedom-for-sterilization is "profoundly coercive," *see* Doc. 13, ¶ 23, and that such coercion interferes with the Plaintiffs' fundamental constitutional right to procreational autonomy. As detailed with respect to the Plaintiffs' Equal Protection claim, the right to procreate has long been protected as fundamental. *See, e.g.*, *Eisenstadt*, 405 U.S. at 453; *Casey*, 505 U.S. at 851 (1992) (collecting cases); *Paris Adult Theatre I*, 413 U.S. at 65. Accordingly, Plaintiffs have stated a cognizable substantive due process claim based on Defendants' interference with their fundamental constitutional right to procreate. *Id.*

Second, it is the Plaintiffs' position that *regardless* of the procedures employed, the Defendants can *never* trade sterilization for reduced jail time without violating the Constitution. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331–32 (1986) ("by barring certain government actions regardless of the fairness of the procedures used to implement them, [the Due Process Clause] serves to prevent governmental power from being 'used for purposes of oppression.'") (quoting *Murray's Les v. Hoboken Land & Improvement Co.*, 15 L.Ed. 372 (1856)). There is little doubt that government-sponsored sterilization can be used "for purposes of oppression," and there also is a great deal of profoundly disturbing human history to support Plaintiffs' contentions that no adequate procedural safeguards can ever exist to prevent its abuse. *See* Doc. #13, p. 2, ¶ 8 ("International law

declares enforced sterilization to be a crime against humanity. From mass sterilizations in Nazi Germany to eugenics experimentation in Tuskegee, Alabama, eugenics is anathema to any conception of morality and represents one of the most disturbing chapters in the dark history of human cruelty."). As such, Plaintiffs' Amended Complaint states a cognizable claim for relief under the substantive due process theory that prohibits the use of oppressive government power. *See Cale v. Johnson*, 861 F.2d 943, 949 (6th Cir. 1988) ("this court has recognized that an 'egregious abuse of governmental power' may be sufficient to state a claim based on the violation of substantive due process.") (citing *Vinson v. Campbell County Fiscal Ct.*, 820 F.2d 194, 201 (6th Cir.1987), *abrogated on other grounds by Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999)).

Third, substantive due process forbids governmental actions that "shock the conscience." *Braley v. City of Pontiac*, 906 F.2d 220, 224–25 (6th Cir. 1990) (collecting cases). *See also United States v. Salerno*, 481 U.S. 739, 746 (1987) ("substantive due process prevents the government from engaging in conduct that shocks the conscience") (cleaned up). Plaintiffs' claims that Defendants' Sterilization Orders are "anathema to any conception of morality" and bear disturbing similarity to historical eugenics programs that represent "the most disturbing chapters in the dark history of human cruelty" easily place the allegations in Plaintiffs' Amended Complaint within this subset of substantive due process claims. Doc. 13, ¶ 8. *Cf. Skinner*, 316 U.S. 535, 541 (1942) ("The power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."). As such, the Plaintiffs have adequately stated a claim for relief under this substantive due process theory as well. *Id. See also Rochin v. California*, 342 U.S. 165, 172 (1952); *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("the

cognizable level of executive abuse of power [is] that which shocks the conscience.").

Fourth, substantive due process "protects the right to be free from 'arbitrary and capricious' governmental actions, which is another formulation of the right to be free from conscience-shocking actions." *Range*, 763 F.3d at 588. The claimed purpose of Defendants' Sterilization Orders is to prevent the birth of drug-addicted babies. *See, e.g.*, Derek Hawkins, *Tennessee judge, under fire, pulls offer to trade shorter jail sentences for vasectomies*, THE WASHINGTON POST (Jul. 28, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/07/28/tennessee-judge-under-fire-pulls-offer-to-trade-shorter-jail-sentences-for-vasectomies/?utm_term=.9cc24040cb5b. As applied to the Plaintiffs, however, this policy cannot survive even rational basis review. The Plaintiffs are male. They are incapable of giving birth. Accordingly, Defendants' Sterilization Orders are arbitrary, capricious, and fail to advance any conceivably legitimate governmental purpose.

C. Procedural Due Process

"[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). "[O]nce it is determined that the Due Process Clause applies, 'the question remains what process is due.'" *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

The instant lawsuit implicates several protected liberty interests. "The right to be free of state-sponsored invasion of a person's bodily integrity is protected by the Fourteenth Amendment guarantee of due process." *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 810–11 (S.D. Ohio 1995). So, too, is the right to procreate. *See Albright v. Oliver*, 510 U.S. 266, 272 (1994). Federal courts have also recognized "a protected liberty

interest in being free from wrongful, prolonged incarceration." *Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004). In the instant case, the operative effect of the Defendants' Sterilization Orders is to subject the Plaintiffs to an additional 30 days in jail because they are unwilling to relinquish their reproductive freedom. *See* Docs. #13-1, #13-2. The Plaintiffs contend that extending inmates' incarceration for an additional 30 days for refusing to relinquish their right to procreate violates their protected liberty interest in being free from "wrongful, prolonged incarceration" as well. *Id.*

Thus, given that multiple liberty interests are implicated by Defendants' Sterilization Orders, *see id.*, the only question remaining is "what process is due." *Cleveland Bd. of Educ.*, 470 U.S. at 541 (quoting *Morrissey*, 408 U.S. at 481). Plaintiffs submit that the "process" surrounding Defendants' Sterilization Orders is constitutionally inadequate. For example, the Orders do not advise inmates of the serious potential complications associated with surgical sterilization. *See* Docs. #13-1, #13-2. They also make no effort to determine whether informed and genuinely voluntary consent exists before inmates accept Defendants' offer to become sterilized, or whether inmates have instead accepted sterilization for coercive or other reasons. *Id. Cf.* Doc. #13, ¶ 23 ("[Defendants'] 'offer' is both illegal and profoundly coercive."); ¶ 42 ("After accepting Defendants' offer, one White County inmate attempted to cut her Nexplanon implant out of her arm with a razor blade while she was incarcerated."); ¶ 43 ("Another White County inmate who did not submit to sterilization stated publicly that many of the inmates who had accepted Defendants' offer 'were coming off drugs' and 'weren't in clear judgment to make this decision' when they did so.); ¶ 73 ("Plaintiff Gentry accepted the offer because he hoped that doing so would allow him to witness the birth of his first grandchild and permit him to return home earlier to care for his ailing mother, who is extremely ill. He

did not actually wish to receive a vasectomy."). None of this is surprising, given that there is no conceivable source of legal authority for Defendants' sterilization program. Doc. #13, ¶¶ 97-106. Neither the legislature nor the judiciary has ever contemplated developing any process to administer such a program, and accordingly, no process exists.

In sum: Notwithstanding the fact that the Defendants' Sterilization Orders were presented in a manner that purports to be voluntary, the process associated with accepting Defendants' sterilization offers—or lack thereof—is inadequate to prevent an unconstitutional deprivation of Plaintiffs' right to bodily integrity and their right to procreate. *See id.* Separately, extending inmates' jail sentences as a consequence of refusing the Defendants' sterilization offers subjects inmates to an unlawfully prolonged period of incarceration that violates due process as well. The Plaintiffs have stated cognizable procedural due process claims as a result.

D. State Law Claims

Plaintiffs also state claims for relief under the Tennessee Constitution, asserting that the Defendants' Sterilization Orders violate both the Tennessee Constitution's law of the land clause, *see* Tenn. Const. art. I, § 8, and its proscription against governmental "control or interfere[nce] with the rights of conscience." *See* Tenn. Const. art. I, § 3.

With respect to Tenn. Const. art. I, § 8, the Tennessee Supreme Court has held:

> The language of the "due process" provisions in the United States Constitution differs from the "law of the land" provision found in the Tennessee Constitution. Although the terms on occasion have been viewed as synonymous, *Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739, 743 (1965), the United States Supreme Court's interpretations of the United States Constitution establish a minimum level of protection while **this Court, as final arbiter of the Tennessee Constitution, is always free to extend greater protection to its citizens.**

Seals v. State, 23 S.W.3d 272, 277 (Tenn. 2000) (emphasis added).

Further, in interpreting Tenn. Const. art. I, § 3, the Tennessee Supreme Court has held (twice) that issues of procreational autonomy are controlled in part by the Tennessee Constitution's guarantee of the right to conscience. *See Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 13 (Tenn. 2000); *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

Because the Plaintiffs are entitled to relief under the less protective provisions of the federal Constitution's Fourteenth Amendment, they are certainly entitled to relief under the "greater protection" of Tenn. Const. art. I, § 8. *Seals*, 23 S.W.3d at 277. Further, Plaintiffs' factual allegations strike at the heart of Tenn. Const. art. I, § 3's protection of the right procreational autonomy and conscience. *Planned Parenthood*, 38 S.W.3d at 13; *Davis*, 842 S.W.2d at 600. The Plaintiffs have also alleged that as a matter of state law, Defendant Benningfield's orders were clearly in excess of his jurisdiction. *See* Doc. 13, p. 3, ¶ 13; p. 13, ¶ 99; p. 14, ¶ 104. *See also* ¶¶ 98, 100, 101, 102, 103, & 106.

Although this Court is empowered to exercise supplemental jurisdiction over the Plaintiffs' state law claims, the Plaintiffs acknowledge that these claims implicate important and determinative state law questions of first impression that are appropriate for resolution by the Tennessee Supreme Court. Accordingly, for the reasons provided in Plaintiffs' accompanying *Motion to Certify Questions of State Law*, the following three questions of state law should be certified to the Tennessee Supreme Court for decision:

1. Whether Tenn. Const. art. I, § 8 forbids a judge from conditioning the length of a defendant's sentence on his or her agreement to be surgically sterilized;

2. Whether Tenn. Const. art. I, § 3 forbids a judge from conditioning the length of a defendant's sentence on his or her agreement to be surgically sterilized; and

3. Whether Tennessee law reflects that conditioning the length of a defendant's sentence on his or her agreement to be surgically sterilized is clearly in excess of a judge's jurisdiction.

E. The Defendants' contrary claims are without merit.

The Defendants raise three contrary arguments. All of them are without merit. Here, the Plaintiffs have clear standing to sue; they have alleged redressable constitutional injuries; and they have alleged a cognizable claim for attorney's fees.

1. The Plaintiffs have standing to sue.

All three Plaintiffs have standing to maintain this action. Helpfully, however, Plaintiff Haskell's indisputable standing to sue obviates the need to address each Plaintiff's claim to standing individually, because it is blackletter law that "[w]here at least one plaintiff has standing, jurisdiction is secure and the court will adjudicate the case whether the additional plaintiffs have standing or not." *Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011). *See also Horne v. Flores*, 557 U.S. 433, 446–47 (2009) ("Because the superintendent clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so.") (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264, and n. 9, (1977) ("[W]e have at least one individual plaintiff who has demonstrated standing . . . . Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit")); *Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 512 F.3d 252, 259 (6th Cir. 2008) ("Since at least one Plaintiff in this action has standing, there is no need to consider whether the education association Plaintiffs also have standing.") *reh'g en banc granted, opinion vacated* (May 1, 2008); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 471 (5th Cir. 2014) ("It is well

settled that once we determine that at least one plaintiff has standing, we need not consider whether the remaining plaintiffs have standing to maintain the suit."); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) ("if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.").

As Defendants themselves acknowledge, Plaintiff Haskell was serving a sentence for the White County General Sessions Court while Defendants' May 15, 2017 Standing Order was in effect. *See* Doc. #16, p. 3 ("Plaintiff Nathan Haskall [sic] was arrested on February 24, 2017 and served his sentence issued by the White County General Sessions Court until his release on July 25, 2017."). Thereafter, Defendants concede that Plaintiff Haskell was rearrested on August 17th, and that he was again subject to the jurisdiction of the General Sessions Court while Defendants' July 26, 2017 Supplemental Order was (and remains) in effect. *See* Doc. #15-4. As such, Defendants claim only that "Mr. Sullivan and Mr. Gentry were not subject to the General Sessions Court's orders," because Mr. Haskell quite clearly was. Doc. #18, p. 2. Mr. Haskell has standing to sue accordingly.

Further, despite the Sterilization Orders' stated terms, there is no serious doubt that Plaintiff Gentry was similarly subject to the Defendants' May 15, 2017 Standing Order even though he was not serving a sentence for the White County General Sessions Court. As the Plaintiffs pleaded, *see* Doc. #13, ¶¶ 26-29, and as the Defendants acknowledge, *see* Doc. #16, pp. 3-4, Plaintiff Gentry was not only ***extended*** Defendants' sterilization offer—he actually ***accepted*** it while his case was pending in General Sessions Court but before he was sentenced. *Id.* Consequently, because the ongoing July 26, 2017 Supplemental Order purports to guarantee Plaintiff Gentry sentencing credits that he was promised by the May 15, 2017 Standing Order but has never received, *see* Doc. # 13, ¶ 29; ¶ 74, Plaintiff

Gentry has standing to challenge the constitutionality of the orders as well. Moreover, given that he actually accepted Defendants' sterilization offer, Plaintiff Gentry has standing to challenge the procedures that the Defendants' employed in conferring it.

While incarcerated, Plaintiff Sullivan was similarly subject to—but did not accept—Defendants' offer to become sterilized. *Id.* at ¶ 31; ¶ 66. Like Plaintiff Gentry, Plaintiff Sullivan was subject to the orders even though he was sentenced in Criminal Court. *Id.* at ¶ 66. Despite their stated terms, Defendants' sterilization orders were advertised to and extended to Criminal Court defendants like him who were not serving sentences for the White County General Sessions Court. *Id.* at ¶¶ 61, 62, 64, 65, 66, 67, 68, 70, 84, & 86. Plaintiff Sullivan does not wish to become sterilized, either. *Id.* at ¶ 80.

2. The Plaintiffs have alleged redressable injuries.

The Plaintiffs' injuries are also fully redressable for several reasons.

First, by the stated terms of Defendants' July 26, 2017 Order, Defendants' sterilization program is still very much in effect. *See* Doc. # 13, p. 11, ¶ 83. Accordingly, Defendants' claim that "Plaintiffs were not injured as a result of these orders nor is there any injury that is imminent" is without merit. *See* Doc. #16, p. 7. The Order is presently causing constitutional injuries that are fully redressable through multiple remedies. The Defendants also candidly acknowledge that the July 26, 2017 Supplemental Order operates to keep the May 15, 2017 Order in effect. *See* Doc. #18, p. 2 ("The [July 26, 2017] Order Rescinding Previous Standing Order entered by Judge Benningfield did not renege on the offer of a 30-day reduction . . . ."). As such, the Plaintiffs are entitled to have the Defendants' still-operative Sterilization Orders declared unconstitutional, and they are similarly entitled to move this Court to enjoin Defendant Shoupe—who is sued for injunctive and declaratory relief only and in his official capacity only—from enforcing

them. *See McKay v. Thompson*, 226 F.3d 752, 757 (6th Cir. 2000) ("the Eleventh Amendment permits prospective injunctive relief, but not damage awards, for suits against individuals in their official capacities under 42 U.S.C. § 1983.").

Second, Defendants insist that Plaintiff Gentry—who accepted Defendants' sterilization offer—"does not allege that he has been denied a 30-day reduction." *See* Doc. #16, p. 9. Respectfully, the Defendants are mistaken, and they have misread the Plaintiffs' Amended Complaint. The Plaintiffs set forth this allegation not once, but twice. *See* Doc. # 13, ¶ 29 ("despite confirming that he had been enrolled in Defendants' sterilization-for-early-release program on several occasions, Plaintiff Gentry did not receive Defendants' promised 30-day sentence reduction."); ¶ 74 ("Plaintiff Gentry never received his 30-day jail credit despite accepting Defendants' offer of long-term, surgical sterilization.").

Third, for the reasons previously stated, the Plaintiffs have stated claims for constitutionally cognizable injuries that are fully capable of being redressed. Specifically, Plaintiffs' injuries would be redressed by a declaration that the Sterilization Orders are unconstitutional and equitable relief affording the Plaintiffs equal treatment. As noted, with respect to Plaintiff's Equal Protection claim, the Constitution's mandate of equal treatment would also independently empower this Court to fashion the relief that the Plaintiffs seek even if Section 1983 did not. *See Heckler*, 465 U.S. at 740 ("when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.").

3. The Plaintiffs have properly alleged that they can recover fees and costs against Defendant Benningfield for acting clearly in excess of his jurisdiction.

Defendants also seek "an order stating Plaintiffs cannot recover fees and costs

against Judge Benningfield and dismissing this claim from the Amended Complaint." Doc. #16, p. 16. In support of this claim, Defendants posit that "Plaintiffs do not allege that Judge Benningfield was acting in clear excess of his jurisdiction, nor could they." *Id.*

Respectfully, Defendants badly misread the Plaintiffs' Amended Complaint with respect to this claim as well. The Plaintiffs stated this allegation directly, and they did so repeatedly. *See* Doc. 13, p. 3, ¶ 13 ("Although judicial in nature, both Defendant Benningfield's May 15, 2017 Standing Order and July 26, 2017 Supplemental Order were established in the absence of any lawful jurisdiction."); p. 13, ¶ 99 ("No statute permits a judge to modify the length of an inmate's sentence based on whether or not the inmate has agreed to relinquish his or her constitutional right to reproductive freedom."); p. 14, ¶ 104 ("Defendant Benningfield's May 15, 2017 Standing Order and July 26, 2017 Supplemental Order were instituted in the absence of all jurisdiction and lack any lawful basis."). *See also id.* at ¶¶ 98, 100, 101, 102, 103, 106. Accordingly, Defendants' assertion that the Plaintiffs failed to state a cognizable claim for fees and costs based on the express allowance for such fees and costs contained in 42 U.S.C. § 1988(b) is without merit as well. *See id.* (providing that fees and costs may be assessed against a judicial officer who takes unconstitutional action that "was clearly in excess of such officer's jurisdiction.").

Plaintiffs acknowledge, however, that whether Tennessee law establishes that conditioning the length of a defendant's sentence on his or her agreement to be surgically sterilized is clearly in excess of a judge's jurisdiction is a question of state law that is dispositive as to this particular claim. Thus, for the reasons previously detailed, Plaintiffs have moved to have this question certified to the Tennessee Supreme Court for resolution.

VI. Conclusion

For the foregoing reasons, the Defendants' Motion to Dismiss should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2017, a copy of the foregoing was sent via CM/ECF, and to the following parties:

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