

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

CHRISTOPHER SULLIVAN, *et al.*,

Plaintiffs,

v.

SAM BENNINGFIELD, *et al.*

Defendants.

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Case No. 2:17-cv-00052

Judge Crenshaw

**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Plaintiffs have moved for partial summary judgment based on the following: (1) the undisputed existence of the Defendants' Sterilization Orders; (2) the Sterilization Orders' facial discrimination on the basis of an inmate's exercise of a fundamental right; (3) the Sterilization Orders' facial gender-based discrimination; and (4) the Defendants' acknowledgement that the Sterilization Orders are still operative and being enforced.¹ See Doc. #21; Doc. #22. In response, the Defendants have opposed summary judgment for several reasons. See Doc. #42. Each is unpersuasive.

1. The Plaintiffs have standing to bring Equal Protection claims.

The Defendants insist that "being offered free contraceptive services, even being encouraged to except [sic] the free contraceptive services, is not an injury that establishes standing." Doc. #42, p. 4. Critically, however, the Defendants mischaracterize the injury Plaintiffs have alleged. The injury to be redressed is Plaintiffs' denial of equal treatment,

¹ Plaintiffs have also moved for summary judgment based on the Sterilization Orders' "establishment of a government-sponsored inmate sterilization policy that shocks the judicial conscience, abuses government power, and interferes with the exercise of a fundamental right." See Doc. #22, pp. 10-14. Because Plaintiffs' Reply is restricted to five pages, however, this Reply focuses on Plaintiffs' Equal Protection claims alone.

which indisputably establishes standing. *See, e.g., Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 657 (1993) (“the ‘injury in fact’ element of standing in such an equal protection case is the denial of equal treatment . . . , not the ultimate inability to obtain the benefit.”). The Sterilization Orders at issue—which “speak for themselves,” Doc. #43, p. 2—facially discriminate on the basis of gender, and they disburse benefits based on an inmate’s exercise of a fundamental right. *See* Doc. #43, pp. 1-2. Such classifications are *presumptively* unconstitutional. *See* Doc. #22, pp. 7-8. Accordingly, Defendants’ claim that “Plaintiffs lack standing” fails. Doc. #42, p. 3.

2. The Defendants’ Sterilization Orders remain pending.

The Defendants also contend that the Plaintiffs “lack standing to seek declaratory relief because the Challenged Orders are no longer in effect and therefore there is no proof of actual present harm or a significant possibility of future harm.” *See* Doc. #42, p. 1 (quotation omitted). However, the record incontrovertibly proves otherwise.

In *their own theory of the case*, Defendants stated that they “did not renege on the offer” being challenged. *See* Doc. #27, p. 3; Doc. #18, p. 2. This reality is also reflected by the plain text of Defendants’ July 26, 2017 Sterilization Order. *See* Doc. #13-2 (stating that inmates who “hav[e] the procedures or agree[] to have same will not be denied the credit.”). Further, Defendants’ Third Sterilization Order similarly reflects that “the promised benefit” that is at the heart of this action is still being disbursed. Doc. #42-1, p. 2. 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.

3. The Government’s claimed interests—and whether the Sterilization Orders are narrowly tailored to achieve them—are questions of law, not fact.

Defendants also insist that “there remains [sic] questions of material fact, *i.e.*, the government interests involved,” which preclude summary judgment. Doc. #42, p. 1. Defendants further claim that “[i]n order to uncover the bases for the government’s interest being furthered, discovery from the Department of Health and Defendants themselves would be required. . . .” *Id.* at p. 3. Defendants are mistaken on both counts.

The Plaintiffs have alleged that the Sterilization Orders discriminate based on the exercise of both a fundamental right and an inmate’s gender. *See* Doc. #22, pp. 6-9. Classifications based on the exercise of fundamental rights trigger strict scrutiny, which requires Defendants to prove that the Orders “are narrowly tailored measures that further compelling governmental interests.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Similarly, gender-based classifications are subject to intermediate scrutiny, which requires the Defendants to prove that an “exceedingly persuasive justification” exists to justify their discrimination. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Critically, however, 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.² Thus, questions of fact concerning the Government’s interests are not in dispute, and discovery regarding them is unnecessary.³

² *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*.”).

³ Despite claiming to need discovery to resist summary judgment, **the Defendants have also declined to move to lift the Parties’ discovery stay—even though this Court expressly afforded them that option if their summary judgment response required it.** *See* Doc. #41, p. 1 (“Any party is free to request a lift of the stay upon . . . a proper showing under Rule 56 that discovery is needed on the motion for partial summary judgment.”). Fed. R. Civ. P. 56(d) also requires the non-movant to “show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition,” which

4. The Defendants have not demonstrated that their Sterilization Orders are sufficiently narrowly tailored to survive constitutional scrutiny.

The Defendants claim that their Sterilization Orders advance two governmental interests: (1) “preventing the birth of drug addicted babies,” and (2) “encouraging inmates to take advantage of free medical services offered by the Tennessee Department of Health.” Doc. #42, p. 2. Even assuming, *arguendo*, that these interests qualify as compelling, however, summary judgment is appropriate because the Defendants have failed to demonstrate that their Sterilization Orders are narrowly tailored to achieve them.

Defendants’ Sterilization Orders facially discriminate on the basis of both the exercise of a fundamental right (which Defendants contend is permissible⁴) and an inmate’s gender (which Defendants claim is practically necessary). Doc. #43, pp. 1-3; Doc. #42, pp. 5-9. Accordingly, the Orders are *presumptively* unconstitutional, and Defendants bear the heavy burden of establishing their constitutionality. Doc. #22, pp. 7-8. Defendants having failed to demonstrate that the Sterilization Orders are narrowly tailored to achieve their stated objectives, however, summary judgment is appropriate.

Here, Defendants’ Orders plainly are not narrowly tailored to achieve their stated objectives. Thus, they cannot survive strict or intermediate scrutiny. Instead, the Orders are glaringly underinclusive and overinclusive, which defeats a claim of narrow tailoring.⁵

Defendants have failed to do. *Id.* Further, Defendants make reference to a separate discovery stay that expressly *permits* them to take discovery from the White County Department of Health. See Case 2:17-cv-00060, Doc. #31. Finally, although a stay regarding the *taking* of discovery is pending in that case, nothing prohibits “the Defendants themselves” from *providing* discovery here. Doc. #42, p. 2.

⁴ Defendants claim that discrimination based on inmates’ exercise of the right to procreate is permissible based on cases that have upheld subsidized childbirth. See Doc. #42, p. 7. The comparison is grossly misplaced. Here, the only way to access the benefit provided by Defendants’ Sterilization Orders is to relinquish one’s fundamental right to procreate. Inmates who refuse to do so spend 30 days longer in jail than similarly situated inmates who do. See Doc. #43, pp. 1-3.

⁵ See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 79 (1974) (striking down provision aimed at achieving compelling interest because it was “both overinclusive and underinclusive”); *Cabell v. Chavez-Salido*, 454

For example, the Sterilization Orders are underinclusive with respect to “preventing the birth of drug addicted babies,” because, by their terms, they apply only to “inmates serving a sentence for the General Sessions Court,” rather than arrestees, Criminal Court defendants, or White County residents generally. *See* Doc. #43-2, pp. 1-2.

Similarly, the Orders are wildly overinclusive with respect to both “preventing the birth of drug addicted babies” and “encouraging inmates to take advantage of free medical services offered by the Tennessee Department of Health” for several reasons. First, men cannot become pregnant, so giving male inmates vasectomies does not advance any interest in preventing the birth of drug addicted babies.⁶ The Orders also apply to inmates who do not have substance abuse problems; who cannot become pregnant; and who are already using contraception. Perhaps most conspicuously, there is no rational reason why the Defendants could not have achieved their stated interest in “encouraging inmates to take advantage of free medical services” without conditioning the length of inmates’ jail sentences on their becoming surgically sterilized—a policy that Defendant Benningfield has since acknowledged “could unduly coerce inmates. . . .” Doc. #42-1, p. 5. Given these numerous fatal deficiencies, the Defendants cannot satisfy their heavy burden of proving that the Orders are sufficiently narrowly tailored to withstand constitutional scrutiny.

V. Conclusion

For the foregoing reasons, Defendants’ Sterilization Orders, and their continued enforcement, should be **DECLARED** unconstitutional and permanently **ENJOINED**.

U.S. 432, 440 (1982) (“a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends.”).

⁶ Defendants also try to justify their gender discrimination on the basis that they “are not aware of any long-acting, reversible male contraceptives similar to Nexplanon.” Doc. #42, p. 9. However, Defendants do not assert any compelling state interest in “long-acting, reversible” contraception specifically, *see* Doc. #42, p. 2, and none exists. Non-permanent forms of male contraception—such as condoms—were plainly feasible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2018, a copy of the foregoing was sent via CM/ECF to the following parties:

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