IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

KARI SUNDSTROM, ANDREA FIELDS, LINDSEY BLACKWELL, MATTHEW DAVISON, and VANKEMAH MOATON,

Plaintiffs,

v. Case No. 06-C-0112

MATTHEW J. FRANK, et al.,

Defendants.

DEFENDANTS' REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Matthew J. Frank, James Greer, Judy P. Smith, Thomas Edwards, Robert Humphreys, and Susan Nygren by their attorneys, J.B. Van Hollen, Attorney General, and Jody J. Schmelzer, Assistant Attorney General, hereby submit this reply brief in support of their motion for partial summary judgment.

As a preliminary note, Plaintiff Vankemah Moaton has agreed to waive his Fifth Amendment privilege and answer questions concerning his prior use (and possible withdrawal) of hormone therapy, along with prior feminizing procedures he has had done. Given this stipulation, the defendants hereby withdraw their motion for summary judgment on Moaton's as-applied challenge to Wis. Stat. § 302.386(5m), Argument I in the defendants' brief-in-chief.

ARGUMENT

II. SUMMARY JUDGMENT IS PROPER ON THE PLAINTIFFS' FACIAL CHALLENGE TO THE INMATE SEX CHANGE PREVENTION ACT BECAUSE THE ACT IS NOT UNCONSTITUTIONAL IN ALL APPLICATIONS.

In order to show that the statute at issue here is facially unconstitutional, plaintiffs must show that there is no set of circumstances under which the Act would be valid. This they cannot do.

The plaintiffs suggest that the class of cases relevant for purposes of their facial claim is limited to those inmates who desire hormone therapy and/or sexual reassignment surgery and whose physicians would otherwise prescribe those treatments. As the defendants discussed in their brief in chief, even assuming, *arguendo*, that this is the appropriate class, plaintiffs cannot show that there is no set of circumstances under which the Act could be constitutionally applied.

An inmate has a right to medical treatment for a serious medical condition. He does not, however, have a right to any treatment he desires. Specifically, under the Eighth Amendment, an inmate does not have the right to hormonal and surgical procedures—even if such procedures would be necessary to "cure" gender dysphoria. In 1997, the Seventh Circuit held: "We conclude that, except in special circumstances that we do not at present foresee, the Eighth Amendment does not entitle a prison inmate to curative treatment for his gender dysphoria." *See Maggert v. Hanks*, 131 F.3d 670, 671-72 (7th Cir. 1997).

Other cases are consistent with *Maggert.* In *Supre v. Ricketts*, 792 F.2d 958, 962-63 (10th Cir. 1986), the Tenth Circuit concluded: "We also are unable to conclude that federal law requires prison officials to administer female hormones to a transsexual inmate . . . At most, plaintiff might have made a case for negligence or medical malpractice [based on denial of

estrogen therapy], but he could not have established a constitutional violation." And in *Farmer v. Hawk*, 991 F. Supp. 19, 29 (D.D.C. 1998), a prisoner challenged on Eighth Amendment grounds a prison policy that denied hormone therapy to prisoners not already receiving it prior to incarceration. The court rejected the inmate's argument that the policy violated the Eighth Amendment:

> [T]he BOP's refusal to provide Farmer with female hormone therapy does not, in and of itself, constitute cruel and unusual punishment. Again, Farmer has a right to receive treatment for her transsexualism, but not a right to receive a specific treatment.

Farmer, 991 F. Supp. at 29. The court remanded the case for a factual determination of the parties' dispute as to whether the prison had satisfied the Eighth Amendment, which it would have satisfied by providing regular counseling to Farmer. *See id.* at 29-30; *but see Kosilek v. Maloney*, 221 F. Supp.2d 156, 194 (D. Mass. 2002) (suggesting that the plaintiff could have a right to hormone therapy under particular facts).

Thus, even for inmates who are diagnosed with GID, and even for those whose physician might otherwise prescribe hormonal and surgical procedures as treatment for their GID, there is no violation for Eighth Amendment purposes where prison policy or statute forbids those treatments, as long as the physician evaluates serious medical needs and prescribes an alternate treatment to address the inmate's symptoms.

Here, the plaintiffs could prevail on their facial challenge only if they showed that, for every inmate seeking hormone therapy or surgery, only those treatments—not the myriad of treatments that remain available to inmates—could provide even palliative care. The case law forecloses that claim, and the plaintiffs do not even assert it.

The plaintiffs do not contend that hormone treatment or sexual reassignment surgery is the sole treatment option to address the symptoms of every prisoner with GID. They do not assert that, for every inmate, the fact that a physician might have prescribed hormone surgery and/or sexual reassignment surgery absent the Act means that those treatments would have been the *only* means to alleviate the inmates' symptoms. Indeed, they acknowledge that there are a wide range of treatments that address the symptoms of GID (DFOF ¶¶ 13, 14, 16, Responses and Replies). Thus, the statute easily survives the plaintiffs' facial challenge.

The plaintiffs also suggest a procedural right—that, regardless of their right to receive any particular treatment, that they have a constitutional right to have their physicians' discretion as to their treatment options be unfettered. This is not the law. If inmates have no constitutional right to hormone therapy or sexual reassignment surgery, it cannot be unconstitutional to provide a menu of treatment options that does not include those treatments.[1] Indeed, *Supre* and *Hawks* involved policies that limited how prisons treated prisoners presenting GID-related symptoms. *See Supre*, 792 F.2d at 960; *Hawk*, 991 F. Supp. at 21.

The cases cited by the plaintiffs do not support the premise that a policy or law limiting treatment options, without more, amounts to a constitutional violation.[2] Two of the cases have nothing to do with statutes or policies limiting treatment options for a given condition. *See Jones v. Simek*, 193 F.3d 485, 488-91 (7th Cir. 1999) (dispute regarding whether a doctor showed deliberate indifference in failing to follow the advice of specialists); *Chance v. Armstrong*, 143

[1]As a general matter, physicians treating inmates are constrained in their treatment options by a number of factors, including the availability and legality of the treatment they might otherwise consider ideal. A plaintiff could not contend, for example, that his rights under the Eighth Amendment are impaired by the illegality of medical marijuana, even though his physician might consider that the most effective treatment for a particular condition.

F.3d 698, 704 (2d Cir. 1998) (doctors improperly made treatment recommendations based on the "ulterior motives" of personal financial gain).

The other cited cases provide no more support for the plaintiffs' theory of the law. *De'lonta v. Angelone*, 330 F.3d 635 (4th Cir. 2003), made no ruling regarding the authority of a prison policy to set treatment guidelines. Facing a claim by an inmate who contended that no treatment was being provided for her condition, the district court had concluded that the litigation reflected the inmate's disagreement with her physician's judgment—a dispute long held non-cognizable for Eighth Amendment purposes. The Fourth Circuit reversed, but not because the non-treatment resulted from a policy rather than a physician's judgment. Instead, the court held only that, if the decision resulted from a prison policy rather the physician's judgment, that the case was not barred as a medical judgment dispute. *See De'lonta*, 330 F.3d at 635-36.

In *Barrett v. Cohen*, 292 F. Supp.2d 281, 286 (D.N.H. 2003), and *Kosilek*, 221 F. Supp.2d at 193, the courts concluded that particular prison policies violated the plaintiffs' constitutional rights if they prevented them from being psychologically assessed or treated. The courts did not, however, invalidate the prison's general right to use a policy to set standard treatment options, or suggest that any limitation on the treatment options open to physicians constitutes a *per se* violation.

The *Kosilek* case could bear on the plaintiffs' *as-applied* claims because it holds, contrary to the Seventh Circuit's discussion in *Maggert*, as well as *Supre* and *Farmer*, that, under particular facts, a plaintiff can have a constitutional right to hormone therapy and sexual reassignment therapy. *Kosilek*, however, does nothing to advance the plaintiffs' *facial* challenge.

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[2]Consistent with Circuit Rule 32.1, this brief does not discuss *Allard v. Gomez,* 9 Fed. Appx. 793 (9th Cir. June 8, 2001), an unpublished case issued prior to 2007.

Kosilek does not suggest, and the plaintiffs here do not assert, that, as to *every* inmate with GID, a treatment menu without hormone therapy and sexual reassignment surgery is tantamount to no treatment at all.

As the U.S. Supreme Court reiterated most recently in *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007), plaintiffs who bring a facial challenge bear a "heavy burden" to prove their claim. The plaintiffs here cannot meet that burden. The plaintiffs' facial challenge fails because there are circumstances under which the Act can be validly applied.

III. PLAINTIFFS SUNDSTROM AND BLACKWELL SHOULD BE DISMISSED BECAUSE THE ONLY RELIEF REQUESTED IS INJUNCTIVE AND DECLARATORY RELIEF, BECAUSE THESE PLAINTIFFS ARE NO LONGER IN PRISON, AND BECAUSE NONE OF THE INCARCERATED PLAINTIFFS ARE HOUSED AT RACINE CORRECTIONAL INSTITUTION.

In their brief, the plaintiffs do not oppose dismissal of defendants Robert Humphreys and Susan Nygren on mootness grounds (Plaintiff's Brief, p. 14, n. 9). However, they argue that because plaintiffs Sundstrom and Blackwell are on supervised release out in the community, their case for injunctive relief is not moot (Plaintiff's Brief, pp. 14-16). The basis for their reasoning is that there is a reasonable likelihood that in the future these plaintiffs will again be subjected to prison. Besides demonstrating a lack of faith in the ability of these inmates to live crime-free and/or abide by the conditions of their release, the plaintiff's argument rests on the *possibility* that they will be returned to prison, and this possibility is insufficient to establish an actual case or controversy. Thus, their case is moot.

In order to invoke Article III jurisdiction, a plaintiff seeking injunctive relief must show that he is in immediate danger of sustaining some direct injury. *City of Los Angeles v. Lyons,* 461 U.S. 95, 105 (1983). In *Knox v. McGinnis,* 998 F.2d 1405, 1413-15 (7th Cir. 1993), the court held that a

prisoner lacked standing to seek injunctive relief against the future use of a "black box" on prisoners in segregation because he had been released from segregation and returned to the general prison population where he was no longer subjected to the use of the "black box." In reaching its decision, the court relied upon *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983) and *O'Shea v. Littleton,* 414 U.S. 488 (1974).

In *Lyons,* the plaintiff sued the City of Los Angeles and several police officers, alleging that the officers stopped him for a routine traffic violation and applied a choke hold without provocation. He sought an injunction against future use of the choke hold unless the suspect threatened deadly force. The Supreme Court held that the plaintiff lacked standing to seek injunctive relief because he could not show a real or immediate threat of future harm. *Lyons,* 461 U.S. at 105. The Court relied upon its earlier decision in *O'Shea* in which the Court stated that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *O'Shea,* 414 U.S. at 495-96. In *O'Shea,* the plaintiffs had alleged discriminatory enforcement of criminal laws. The Court held that there was no case and controversy because "the threat to plaintiffs was not 'sufficiently real and immediate.' " *Id.* at 496-497. Similarly, in *Lyons,* the Court found that, although an allegation of an earlier choking was sufficient to confer standing for a damage claim, it did "nothing to establish a real and immediate threat" that the plaintiff would again be stopped for a traffic violation and a choke hold put on him. *Lyons,* 461 U.S. at 105.

Contrary to the plaintiff's argument, the principles established in *Lyons, O'Shea,* and *Knox* certainly support the Seventh Circuit's decision in *Kerr v. Farrey,* 95 F.3d 472 (7th Cir. 1996), and they have been applied in other circuits as well to specifically reject the argument set forth by the plaintiffs—that conditional release presents a reasonable likelihood that they will be returned to

prison to defeat a mootness defense. In *McAlpine v. Thompson*, 187 F.3d 1213, 1215 (10th Cir. 1999), an inmate plaintiff sought an injunction to force the prison warden to provide peyote at Native American Church ceremonies. The plaintiff was subsequently released from custody into supervised release. Noting the jurisdictional implications, the *McAlpine* court concluded

> the issue before us is whether a claim of a prison inmate seeking prospective mandamus relief solely related to conditions of confinement becomes mooted by that inmate's subsequent release on parole or supervised release. We answer that question in the affirmative.

Id. Other courts are in accord. *See Hickman v. Missouri,* 144 F.3d 1141, 1141-43 (8th Cir. 1998) ("Because plaintiffs have been released on parole and are no longer confined at WMCC, their claims [for equitable relief] are moot." (citing *Martin v. Sargent,* 780 F.2d 1334, 1337 (8th Cir. 1985) (ordinarily claim "to improve prison conditions is moot if [plaintiff is no longer subject to those conditions]"))); *Black v. Parke,* 4 F.3d 442, 444 n. 2 (6th Cir. 1993) ("Black was paroled. Therefore, his request for preliminary and permanent injunctive relief is moot."); *Dorman v. Thornburgh,* 955 F.2d 57, 58 (D.C. Cir. 1992) ("Dorman has been paroled since noting this appeal. Consequently, his plea for injunctive relief is now moot."); *Gillespie v. Crawford,* 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc) ("Gillespie too has now been paroled and his claims for equitable and declaratory relief for himself have become moot."); *Garcia v. De Batista,* 642 F.2d 11, 12 (1st Cir. 1981) ("Plaintiff's prayer for injunctive relief became moot when he was released on parole."); *Winsett v. McGinnes,* 617 F.2d 996, 1003 (3d Cir. 1980) (en banc) ("Winsett's demand for injunctive relief is now moot.... Because Winsett has now received a conditional parole, is no longer subject to Delaware's jurisdiction, and shows no interest in returning ...."); *see also Freeman v. Johnson,* 961 F.2d 211 (4th Cir. 1992) (unpublished disposition) ("Where a party seeks solely equitable relief concerning prison conditions or regulations, and is subsequently paroled, the claims

are moot."); *McKinnon v. Talladega County, Ala.,* 745 F.2d 1360, 1363 (11th Cir. 1984) ("The general rule is that a prisoner's transfer or release from a jail moots his individual claim for declaratory and injunctive relief.")

In the instant case, plaintiffs Sundstrom and Blackwell cannot establish a real and immediate threat that they will be returned to a DOC prison. The mere possibility that they may again be incarcerated is too speculative and does not establish a real and immediate case or controversy. *Knox,* 998 F.2d at 1413-14; *see also Robinson v. City of Chicago,* 868 F.2d 959 (7th Cir. 1989). In Sundstrom's case, there are many possibilities, but no reasonable or "virtual certainty," that he will be back in prison some day. First, he will, apparently, have to be located and found. Second, he must be found to have violated his conditions of release. Third, his parole will have to be revoked and/or he must be found guilty of new criminal offenses punishable by time in prison. And, fourth, he will have to be returned to prison. As to Blackwell, there is not even any indication or assertion that he will or has violated any conditions of his parole, so the possibility of a return to prison is even more attenuated. Until proven otherwise, and as noted by the Court in *O'Shea*, it is to be assumed that "[plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction." *O'Shea*, 414 U.S. at 497. The plaintiffs' beliefs that they will be returned to prison does not amount to a "showing" or a "demonstration" of the likelihood of return; they have not pointed to anything in the record supporting their estimate of "virtual certainty." *See, Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. 1996).

In light of the foregoing, the equitable claims[3] of plaintiffs Sundstrom and Blackwell are moot and must be dismissed.[4]

IV. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE PLAINTIFFS' EQUAL PROTECTION CLAIM BECAUSE THE INMATE SEX CHANGE PREVENTION ACT IS RATIONALLY RELATED TO DOC'S LEGITIMATE PENOLOGICAL GOALS OF SAFETY AND SECURITY.

In their response, the plaintiffs assert that the proper standard to apply to their equal protection claim is the one set forth in *Turner v. Safely*, 482 U.S. 78 (1987). In *Turner*, the Court held that prison regulations that impinge on an inmate's constitutional rights are valid if they are "reasonably related to legitimate penological interest." *Id.* at 89-90. By introducing and relying upon the *Turner* standard, the plaintiffs concede that inmates with GID are not a suspect class, and that this case does not involve the exercise of a fundamental right (*see,* Plaintiff's Brief, pp. 19-20) ("the *Turner* standard is the standard under which a court evaluates a classification that is neither a suspect class such as race nor involves a fundamental right.").

However, the Seventh Circuit has expressly rejected application of the *Turner* standard when the prison regulation does not involve "a fundamental constitutional right and does not involve a suspect class; consequently, the *Turner* analysis is inapplicable." *Hatch v. Sharp*, 919 F.2d 1266, 1268-1269 (7th Cir. 1990). Even the case of *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988), cited and relied upon by the plaintiffs, only applied a rational basis test for the equal

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[3] Where claims for injunctive relief are moot, declaratory relief claims must also be dismissed. *Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. 1996).

[4] It should further be noted that, in light of plaintiffs' evidence that Sundstrom has "absconded," his location is unknown, and there is a warrant out for his arrest, that dismissal is also appropriate under "fugitive disentitlement" doctrine. *Sarlund v. Anderson*, 205 F.3d 973, 975 (7th Cir. 2000) (in a § 1983 case brought by plaintiff who was now a fugitive from justice, "the district judge should [] invoke[] the doctrine and dismiss[] the suit without further ado, rather than put the defendants to the expense of defending on the merits.").

protection claim: "[u]nequal treatment among inmates, however, is justified if it bears a rational relation to legitimate penal interest." *Id.* at 881. This only makes sense, since there is no basis anywhere in the law for holding state laws applying to prisons to any *greater* scrutiny than other types of laws. Indeed, courts that have addressed specific inmate equal protection challenges to the availability of treatment for GID have similarly applied a rational basis test. *See Brown v. Zavaras,* 63 F.3d 967, 972 (10th Cir.1995) (applying rational basis test to affirm the dismissal of an equal protection claim alleging the denial of estrogen treatment to a transsexual prisoner); *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120, 127 (D.D.C. 1999) ("Assuming, *arguendo,* that Plaintiff could establish that individuals with gender identity disorder were similarly situated to individuals with other mental illnesses, Plaintiff would still have to show that BOP's policy lacked a rational basis for its differential application."). Hence, the rational basis test applies.

Under the rational basis test, there is no constitutional violation if "any reasonably conceivable state of facts" would provide a rational basis for government action. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The rational-basis test is a lenient standard; the government's action simply "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and *some* legitimate governmental purpose." *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006), citing *Discovery House, Inc. v. Consol. City of Indianapolis,* 319 F.3d 277, 282 (7th Cir. 2003). The government need not have articulated a reason for the challenged action at the time the decision was made. *Id.* Rather, "the burden is upon the challenging party to eliminate any 'reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Id.* This basic formulation applies whether the plaintiff challenges a statute on its face, as applied, or challenges some other

act or decision of government. *Id.* In addition it is the plaintiff's burden to prove the government's action irrational.

In this case, the plaintiffs first attempt to prove the Act is irrational by asserting that the drafters of the Act intended it to discriminates against inmates with GID, and that they had no other penological justifications supporting the Act. However, the government may defend the rationality of an action *on any ground it can muster,* not just the one articulated at the time of decision. *Smith*, 457 F.3d at 652. As noted by the *Smith* court:

> Our various departments and agencies of government make thousands of decisions every day; not every one will come with an explanation. The absence of an explanation, or even an incomplete, inadequate, or inaccurate explanation will not equate to a lack of rational basis-otherwise "the federal courts would be drawn deep into the local enforcement of ... state and local laws." *Hilton,* 209 F.3d at 1008. Accordingly, the reason stated at the time of the challenged action may be relevant but is not dispositive in the application of rationality review.

Id.

The plaintiffs then go on to assert that the Act does not rationally further DOC's interest in maintaining the safety and security of inmates and staff, and the prison system. They argue that because some inmate will still present themselves as effeminate, denying hormones and/or surgery does not rationally reduce the security risks associated with these types of inmates. This argument, however, completely ignores the undisputed facts of this case. There is no dispute that hormones make an male inmate appear more effeminate (DFOF ¶ 27, Response and Reply). The plaintiffs' own expert describes the feminizing effects hormones have on a male inmate:

> Testosterone is a very potent hormone, and reversing its effects is not entirely possible. However, administering estrogen compounds and anti-androgenic compounds creates changes in the brain, and **visible changes in the body**, of a natal male. These include: **Notable increase in breast size, smoothing and softening of skin, change in subcutaneous fat distribution**, shortening of the penis, loss of size and volume of the testes, reduction in the size of the prostate gland, change in lipid profile, and preservation of bone mass.

(DFOF ¶ 27, Reply) (emphasis added). In fact, the Act ***only*** applies when hormones are used "to stimulate the development or alteration of a person's sexual characteristics in order to alter the person's physical appearance so that the person appears more like the opposite gender." Wis. Stat. § 302.386(5m)(a)(1). Similarly, only surgical procedures that "alter a person's physical appearance so that the person appears more like the opposite gender" are prevented under the Act. Wis. Stat. § 302.386(5m)(a)(2). There is also no dispute that the more feminine a male inmate appears, the more likely he will be victimized in prison (DFOF ¶ 30). Given this, along with the undisputed duty prison officials have to protect inmates from this type of victimization, *Farmer*, 511 U.S. at 833, as a matter of law, a rational basis exists supporting the Act.

Lastly, the plaintiffs point out that DOC would not necessarily save costs under the Act. While this issue is not dispositive given the rational relationship the Act has to DOC interests in safety and security, decisions about which activities should receive government subsidies and which should not are matters of policy and discretion and are especially inappropriate for judicial second-guessing under rational-basis review. *Smith*, 457 F.3d at 653, citing *Regan v. Taxation with Representation of Wash.,* 461 U.S. 540, 549 (1983) (granting tax exemptions to nonprofit veterans' lobbying organizations while denying tax exemptions to all other nonprofit lobbying organizations does not violate equal protection rights of nonexempt lobbying organization) and *Harris v. McRae,* 448 U.S. 297, 326 (1980) (upholding Hyde Amendment against constitutional challenge in which it was argued, *inter alia,* that Medicaid's provision of medical subsidies to indigent women who carry their pregnancies to term but not those who undergo abortions violated equal protection). The same principles apply here, and judicial second-guessing at the

cost-savings effects on DOC by not providing hormones or reassignment surgery to inmates should not be entertained.

Therefore, given the record in this case, a "conceivable state of facts" exists to provide a rational basis for the Act, and the defendants are entitled to summary judgment on plaintiffs' equal protection claim.

CONCLUSION

Based upon the foregoing arguments, the defendants respectfully submit that they are entitled to summary judgment on the plaintiffs' Eighth Amendment facial challenge to Wis. Stat. § 302.386(5m); on all claims brought by plaintiffs Sundstrom and Blackwell; and on the plaintiffs' Fourteenth Amendment equal protection claim.

Dated at Madison, Wisconsin, this 19th day of September, 2007.

Respectfully submitted,

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