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' 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 brief in support of their motion for partial summary judgment.

ISSUES PRESENTED

1. Is summary judgment proper on plaintiff Moaton's as-applied challenge to the Inmate Sex Change Prevention Act where no admissible expert testimony supports that hormone therapy is medically necessary to treat his gender identity disorder?

2. Is summary judgment proper on the plaintiffs' facial challenge to the Inmate Sex Change Prevention Act where the act is not unconstitutional in all applications?

3. Should plaintiffs Sundstrom and Blackwell and defendants Humphreys and Nygren be dismissed where the only relief requested is injunctive and declaratory relief, where these plaintiffs are no longer in prison, and where

none of the incarcerated plaintiffs are housed at Racine Correctional Institution?

4. Are the defendants entitled to summary judgment on the plaintiffs' equal protection claim where the Inmate Sex Change Prevention Act is rationally related to DOC's legitimate penological goals of safety and security?

STATEMENT OF THE CASE

The plaintiffs, all current or former inmates in the Wisconsin prison system, filed this action on January 24, 2006, against the defendants, all Wisconsin Department of Corrections (DOC) officials. The plaintiffs have all be diagnosed as suffering from some form of gender identity disorder. In their Third Amended Complaint (Complaint), the plaintiffs challenge the Inmate Sex Change Prevention Act (the Act), Wis. Stat. § 302.386(5m), which prevents state or federal resources to be used to provide hormone therapy or sexual reassignment surgery to Wisconsin prisoners. The statute defines "hormonal therapy" as "the use of hormones 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). It also defines "sexual reassignment surgery" as "surgical procedures to alter a person's physical appearance so that the person appears more like the opposite gender." Wis. Stat. § 302.386(5m)(a)(2).

The Complaint sets forth essentially three claims: (1) the Act, as applied to the plaintiffs, violates the Eighth Amendment; (2) the Act, on its face, violates the Eighth Amendment; and (3) the Act violates the plaintiffs' Fourteenth Amendment equal protection rights. As relief, the plaintiffs request injunctive relief against DOC's enforcement of the Act against them, along with declaratory relief holding the Act, both on its face and as applied to plaintiffs, violates the Eighth and Fourteenth Amendments to the constitution.

By this motion, the defendants seek summary judgment on the following claims: (1) Plaintiff Moaton's Eighth Amendment as-applied challenge to the Act; (2) the Eighth Amendment facial challenge to the Act; (3) all claims brought by plaintiffs Sundstrom and Blackwell; (4) all claims brought against defendants Humphreys and Nygren; and (5) the Fourteenth Amendment equal protection claim.

STANDARD OF REVIEW

Under Federal Rules of Civil Procedures 56(c), summary judgment "shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

The opposing party "may not rest upon the mere allegations or denials" in the pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e). Also, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corporation,* 475 U.S. 574, 586 (1986). "[A] party must produce specific facts showing that there remains a genuine issue for trial and evidence 'significantly probative' as to any [material] fact claimed to be disputed." *Branson v. Price River Coal Company*, 853 F.2d 768, 771-72 (10th Cir. 1988). In order for a party "to avoid summary judgment that party must supply evidence sufficient to allow a jury to render a verdict in his favor." *Williams v. Ramos*, 71 F.3d 1246, 1248 (7th Cir. 1995).

Presenting only a scintilla of evidence is not sufficient to oppose a motion for summary judgment. *Walker v. Shansky*, 28 F.3d 666, 671 (7th Cir. 1994). Moreover, more than mere conclusory allegations are required to defeat a motion for summary judgment. *Mills v. First Fed. Sav. & Loan Ass'n of Belvidere*, 83 F.3d 833, 840 (7th Cir. 1996).

The requirements for a valid injunction are found in Fed. R. Civ. P. 65(d), which provides, so far as pertinent here, that "[e]very order granting an injunction ... shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Fed. R. Civ. P. 65(d). Before a court may award permanent injunctive relief, a party must demonstrate (1) it has succeeded on the merits; (2) no adequate remedy at law exists; (3) the moving party will suffer irreparable harm without injunctive relief; (4) the irreparable harm suffered without injunctive relief outweighs the irreparable harm the nonprevailing party will suffer if the injunction is granted; and (5) the injunction will not harm the public interest. *Old Republic Ins. Co. v. Employers Reinsurance Corp.*, 144 F.3d 1077, 1081 (7th Cir. 1998), citing, *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546 n. 12 (1987).

In this case, the scope of injunctive relief must also comply with the requirements of the *Prison Litigation Reform Act*, 18 U.S.C. § 3626 (PLRA). The PLRA requires that, prior to granting prospective relief, a court must find that the relief is: (1) narrowly drawn; (2) extends no further than necessary to correct the violation of the Federal right; and (3) is the least intrusive means necessary to correct the violation of the Federal right. 18 U.S.C. § 3626(a)(1). Not only must these findings be made, but the court must also give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.* Moreover, in order to obtain an injunction an inmate must prove that a prison official is, at the

time of trial, "knowingly and unreasonably disregarding an intolerable risk of harm, and…will continue to do so." *Farmer v. Brennan,* 511 U.S. 825, 846 (1994).

ARGUMENT

I. SUMMARY JUDGMENT IS PROPER ON PLAINTIFF MOATON'S AS-APPLIED CHALLENGE TO THE INMATE SEX CHANGE PREVENTION ACT BECAUSE NO ADMISSIBLE EXPERT TESTIMONY SUPPORTS THAT HORMONE THERAPY IS MEDICALLY NECESSARY TO TREAT HIS GENDER IDENTITY DISORDER.

Before the court can order any of the injunctive relief sought by plaintiffs, they must first succeed on their Eighth Amendment claim. The Eight Amendment forbids cruel and unusual punishment, but it does not require the most intelligent, progressive, humane, or efficacious prison administration. *Oliver v. Deen*, 77 F.3d 156, 161 (7th Cir. 1996). It is well established that prisoners have a right to receive adequate medical care. *Estelle v. Gamble*, 429 U.S. 97 (1976). This right has been interpreted to require prisons to treat serious psychiatric needs of their prisoners. *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (citing *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987)); *But see Lewis v. Sullivan*, 279 F.3d 526, 529 (7th Cir. 2002) (prisoners "do not have a *fundamental* right to psychiatric care at public expense") (dicta) (emphasis in original).

Although prisons have a duty to provide psychiatric care to those inmates who need it, failure to provide care only rises to the level of an Eighth Amendment violation when there is "deliberate indifference to a serious medical need." *Estelle v. Gamble*, 429 U.S. 97 (1976). "'Deliberate indifference' is simply a synonym for intentional or reckless conduct, and…'reckless' describes conduct so dangerous that the deliberate nature of the defendant's

actions can be inferred." *Foelker v. Outagamie County*, 394 F.3d 510, 513 (7th Cir. 2005)(quoting *Qian v. Kautz*, 168 F.3d 949, 955 (7th Cir. 1999)). A 'serious' medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Foelker*, 394 F.3d at 512 -513 (quoting *Jackson v. Illinois Medi-Car, Inc.,* 300 F.3d 760, 765 (7th Cir. 2002)).

In the case at bar, the premise behind the Act is that inmates do not have a serious medical need for hormone therapy and/or sex reassignment surgery for the treatment of GID. *See, Maggert,* 131 F.3d at 671 ("it does not follow that the prisons have a duty to authorize the hormonal and surgical procedures that in most cases at least would be necessary to 'cure' a prisoner's gender dysphoria"). Indeed, even the Harry Benjamin International Gender Dysphoria Association's *Standards of Care for Gender Identity Disorders* (SOC) cited by the plaintiffs recognizes that not all persons with GID need hormone therapy or surgery (DFOF ¶ 13). Thus, to prove their as-applied Eighth Amendment claim, the plaintiffs will have to provide qualified testimony to support that they have a serious medical need to remain on female hormone therapy. *See, Foelker*, 394 F.3d at 512 -513.

However, given plaintiff Moaton's invocation of the Fifth Amendment in his deposition on an issue relevant to his Eighth Amendment claim and on information he freely discussed his expert, Dr. Randi Ettner's report and conclusions concerning his need for hormone therapy must be excluded. *See, Defendants' Motions in Limine*, Argument I, filed herewith. The line of questioning Moaton refused to answer directly concerned his previous withdrawal from female hormone therapy (DFOF ¶¶ 17, 18). The consequence of exercising his Fifth Amendment rights when questioned by the defendants in deposition on this issue is exclusion, especially where he freely discussed these facts with his retained expert (DFOF ¶ 19). Without Dr. Randi Ettner's

opinions that Moaton has a serious psychological need for hormone therapy, his as-applied Eighth Amendment challenge to the Act must fail, and the defendants are entitled to summary judgment on this claim.

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.

A. Overview of the law.

Facial challenges to statutes are "especially to be discouraged." *Sabri v. United States*, 541 U.S. 600, 609 (U.S. 2004). Moreover, because "facial invalidation is, manifestly, strong medicine," it must be employed "sparingly and only as a last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998).

The standard applied to facial challenges is derived from the Supreme Court's decision in *U.S. v. Salerno*, in which the Court stated, "a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). As a result, a facial challenge should not succeed based on an analysis of the worst-case scenario. *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990). The *Salerno* rule has been applied repeatedly in the Seventh Circuit. *E.g., Joelner v. Village of Wash. Park*, 378 F.3d 613, 621 (7th Cir. 2004); *Doe v. Heck*, 327 F.3d 492, 528 (7th Cir. 2003); *Home Builders Ass'n v. United States Army Corps of Eng'rs*, 335 F.3d 607, 619 (7th Cir. 2003); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 708 (7th Cir. 2003).

Although there are two exceptions to the *Salerno* "no set of circumstances" standard, the case at bar clearly does not fall within either of the exceptions. In First Amendment cases, courts

frequently apply overbreadth or vagueness standards to limit chilling effects on speech. *See, e.g., Ashcroft v. ACLU*, 535 U.S. 564 (2002). In abortion cases, courts generally apply an "undue-burden" test. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Since the plaintiff's Eighth Amendment and equal protection challenges do not fall within one of these well-defined exceptions, *Salerno* is the appropriate standard to apply.

B. The plaintiffs' facial challenge to the Act cannot succeed because it is not unconstitutional in all applications.

Defendants' motion for summary judgment must be granted on this issue because there are many instances in which the Act can be applied without constituting cruel and unusual punishment. Clearly, DOC must provide medically necessary treatment. *See, e.g., Estelle v. Gamble,* 429 U.S. 97 (1976). However, a prisoner is not entitled to whatever treatment he desires. *Means v. Cullen*, 297 F. Supp. 2d 1148, 1154 (W.D. Wis. 2003). Therefore, even if the court was to find that hormone therapy or sexual reassignment surgery is required for some inmates who have been diagnosed with the disorder, the Act applies to all inmates, regardless of their diagnosis status:

> The department may not authorize the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy or sexual reassignment surgery for a resident or patient specified in sub. (1).

Wis. Stat. § 302.386(5m)(b).

As was noted by Dr. Randi Ettner, GID is "extremely rare," occurring in only 1 in 11,900 males and 1 in 30,400 females. (DFOF ¶ 20). Given this, there is no question that the Act's prohibition of hormone therapy and/or sexual reassignment surgery only has a minute effect on the inmate population it covers. For those who do not have any medical need for these procedures because they have no gender issues, the Act does not run afoul of the Eighth

Amendment. Hence, the plaintiffs cannot meet the requirement of demonstrating that there are no possible circumstances in which the Act can be applied constitutionally.

In fact, even when the pool of inmates is reduced to those with gender issues, the SOC and the plaintiff's own experts concur that the Act may not have any effect in some applications. Under the SOC, "not all persons with gender identity disorders need or want all three elements of the triadic therapy," which includes hormones and surgery (DFOF ¶¶ 12, 13). The SOC goes on to state that "[g]enital surgery is not a right that must be granted upon request." (DFOF ¶ 16). According to Dr. Randi Ettner, "not all persons with bona fide gender identity disorders desired or were candidates for sex reassignment surgery," (DFOF ¶ 21), and surgery would only be recommended "[i]n select cases" (DFOF ¶ 22). Similarly, plaintiff's expert Dr. George Brown, opined that sexual reassignment surgery "is a last resort treatment, reserved for those who have not been able to find less invasive ways to treat their condition" (DFOF ¶ 23).

Even in this case, neither the plaintiffs nor their experts contend that the plaintiffs have a medical need for sexual reassignment surgery. For example, Blackwell acknowledges that he is not ready for surgery (DFOF ¶ 24), Fields does not want the surgery to be done by the DOC, (DFOF ¶ 25), and Sundstrom does not feel DOC should provide him with surgery (DFOF ¶ 26).

Clearly, the Act is not unconstitutional in all applications. In fact, the plaintiffs have, at best, only presented evidence that of the over 20,000 inmates it covers, the Act may only run afoul of the constitution as it applies to seven (7) individual inmates' need for hormones (*see generally*, Schmelzer Exhibits 526, 527), (2) two of which the Act no longer effects (*see*, DFOF ¶¶ 1, 3; Argument III, *infra.*). Entertaining a facial challenge to the Act in this case would only invite what the Supreme Court recently cautioned against when addressing a facial challenge to a partial-birth abortion law in *Gonzales v. Carhart*, 127 S. Ct. 1610, (2007):

> As the previous sections of this opinion explain, respondents have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases. *Casey, supra,* at 895, 112 S.Ct. 2791 (opinion of the Court). We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *United States v. Raines,* 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (internal quotation marks omitted). For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication." Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L.Rev. 1321, 1328 (2000).

Gonzalez, 127 S. Ct. at 1639. Under this same jurisprudence, and given the evidence presented in this case, there is no dispute that the plaintiffs fail to meet the requirements for a facial challenge under *Salerno*, and summary judgment is appropriate.

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.

This case is moot for plaintiffs Sundstrom and Blackwell for purposes of declaratory and injunctive relief because they have been released from prison. Therefore, the conditions about which they complain no longer exist for them, and they should be dismissed from the suit.

Article III of the Constitution requires an actual case or controversy. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968). A case becomes moot when the issues presented are no longer "live." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*). A case is moot if a decision will not touch the current legal relations of the parties. *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (*per curiam*). A past exposure to illegal conduct does not itself show a present case or controversy for injunctive relief. *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). To satisfy constitutional

jurisdictional requirements, controversy must be existent at all stages of review, not only when complaint is filed. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1996).

Prisoner claims for injunctive and/or declaratory relief concerning the conditions of their confinement are moot after they are released from prison. *See, Kerr v. Farrey,* 95 F.3d 472, 475 (7th Cir. 1996) (prisoner's release on parole renders his claim for injunctive relief based upon First Amendment violation moot); *McKinnon v. Talladega County,* 745 F.2d 1360, 1363 (11th Cir. 1984) (a prisoner's transfer or release from a jail moots his individual claim for declaratory and injunctive relief); *Martin v. Sargent,* 780 F.2d 1334, 1337 (8th Cir. 1985) (a prisoner's claim for injunctive and declaratory relief to improve prison conditions is moot if he or she is no longer subject to those conditions); *Wirsching v. Colorado,* 360 F.3d 1191, 1196 (10th Cir. 2004) (released prisoner's claim for declaratory judgment and injunctive relief is moot where "entry of declaratory judgment in [a prisoner's] favor would amount to nothing more than a declaration that he was wronged"); *Abdul-Akbar v. Watson,* 4 F.3d 195, 206-07 (3d Cir. 1993) (a prisoner's transfer or release from prison moots his claims for injunctive or declaratory relief since he is no longer subject to the conditions he alleges are unconstitutional); *Muhammad v. City of New York Dep't. of Corr.,* 126 F.3d 119, 123 (2d Cir. 1997) (same); *Lavado v. Keohane,* 992 F.2d 601, 605 (6th Cir. 1993) (holding that inmate's suit for declaratory judgment as to whether correctional officers violated his constitutional rights by opening his privileged mail outside his presence was rendered moot by inmate's release from prison); *Dilley v. Gunn,* 64 F.3d 1365, 1368 (9th Cir. 1995) ("An inmate's release from prison while his claims are pending generally will moot any claims for injunctive relief relating to the prison's policies unless the suit has been certified as a class action"); *Burton v. Frank,* 2004 WL 1176171, *1 (W.D. Wis. 2004) (plaintiff's First

Amendment free exercise claim for injunctive relief is moot because he has been released from prison since instituting the action).

Similarly, this case has been mooted in regard to plaintiffs Blackwell and Sundstrom because they are no longer being held in prison. Blackwell was released on October 10, 2006, and Sundstrom was released on December 17, 2006. (DFOF ¶¶ 1, 3). Regardless of whether they were or were not exposed to unconstitutional conduct in the past, the issues presented are no longer live. All these plaintiffs request is injunctive and declaratory relief to change conditions they were subjected to only while they were confined. They are no longer confined, and these plaintiffs are free to obtain hormone therapy and/or surgery as they deem necessary. The outcome of this case will not effect the current legal situation of plaintiffs Blackwell and Sundstrom. Therefore, they must be dismissed.

In addition, because Blackwell was the only plaintiff in the suit residing at the Racine Correctional Institution (RCI) (*see,* DFOF ¶¶ 1-5), defendants Robert Humphreys and Susan Nygren should also be dismissed from this case. Humphreys is the Warden at RCI, and Nygren is the Manager of the Health Services Unit at RCI (DFOF ¶¶ 10, 11). There is no evidence that any of the currently-confined plaintiffs will be transferred to RCI in the future. Thus, injunctive and/or declaratory relief issued in this case against Humphreys and Nygren will not touch the current legal relations of the parties, and they should also be dismissed.

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.

A. Overview of the law.

The Fourteenth Amendment's guarantee of equal protection of the laws must coexist with the fact that almost all legislation classifies people in one way or another. *Romer v. Evans*, 517 U.S. 620, 624 (1996) (citing *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 271-272 (1979)). These principles have been reconciled by the approach that courts will uphold laws that do not burden a protected class or the exercise of a fundamental right as long as the law can pass rational basis review. *E.g.*, *Romer*, 571 U.S. at 624; *Heller v. Doe*, 509 U.S. 312, 319 (1993); *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462 (1988); *Hodel v. Indiana,* 452 U.S. 314, 331-332 (1981). Rational basis scrutiny must be applied in this case because the Act does not target a protected classification, such as a race, *see, e.g., Loving v. Va.*, 388 U.S. 1, 11 (U.S. 1967), nor does it effect a fundamental right, such as the right to vote, the right to privacy, or the right to travel between states. *See, e.g., Miller v. Carter*, 547 F.2d 1314, 1320 (7th Cir. 1977). Even if this Court was to find that the Act discriminated against people with GID despite the fact that the distinction does not exist within the statute, neither GID diagnosis nor a broader category of sexual orientation is a protected class. *See Nabonzy v. Podlesky*, 92 F.3d 446 (7th Cir. 1996); *Ben-Shalom v. Marsh,* 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied,* 494 U.S. 1004 (1990).

Under rational basis review, 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). Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* Similarly, it does not

"authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *Heller*, 509 U.S. at 319 (citations omitted). Therefore, legislatures must be given a presumption that they acted within their constitutional power. *Nordlinger v. Hahn* 509 U.S. 1, 10 (1992).

B. The Act is rationally related to prison safety and security, which are legitimate governmental interests.

There can be no dispute that the provision of security must be central to all other prison goals. *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989). Courts are obligated to defer to prison officials' adoption of policies necessary to preserve security and internal order. *Hewitt v. Helms*, 459 U.S. 460, 474 (1983). In the prison environment, "safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration." *Id.* at 473. The Seventh Circuit has repeatedly recognized this principle:

> Judges should be cautious about disparaging disciplinary and security concerns expressed by the correctional authorities. American jails are not safe places, and judges should not go out of their way to make them less safe.

Keeney v. Heath, 57 F.3d 579, 581 (7th Cir. 1995).

> Less-restrictive-alternative arguments are too powerful: a prison always can do something, at some cost, to make prisons more habitable, but if courts assess and compare these costs and benefits then judges rather than wardens are the real prison administrators. *Wolfish* emphasized what is *the* animating theme of the Court's prison jurisprudence for the last 20 years: the requirement that judges respect hard choices made by prison administrators.

Johnson v. Phelan, 69 F.3d 144, 145 (7th Cir. 1995), *cert. denied*, 519 U.S. 1006 (1996)(emphasis in original).

Indeed, the duty imposed by the Eighth Amendment on prison officials to "provide humane conditions of confinement," *Farmer*, 511 U.S. at 832, requires prison officials to take reasonable measures to "'protect prisoners from violence at the hands of other prisoners."

Farmer, 511 U.S. at 833 (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.), *cert. denied*, 488 U.S.823 (1988)). Violent assaults, of course, are not "part of the penalty that criminal offenders pay for their offenses." *Rhodes v. Chapman*, 452 U.S.337, 347 (1981).

A prison official may enact a security measure, even one that impinges on medical needs, if the measure "was applied in a good faith effort to maintain or restore discipline." *Whitley v. Albers,* 475 U.S. 312, 320-21 (1986). In such situations, an official is liable only for acting "maliciously and sadistically for the very purpose of causing harm." *Id.* Constraints facing a prison official are relevant to whether his conduct can be characterized as "wanton." *Wilson v. Seiter,* 501 U.S. 294, 303 (1991). Thus, the "realities of prison administration" are relevant to the issue of deliberate indifference. *Helling v. McKinney,* 509 U.S. 25, 37 (1993).

Hence, prison officials, acting reasonably and in good faith, do not violate the Eighth Amendment because the resulting infliction of pain on the inmate would not be unnecessary or wanton. Rather, such a decision would be reasonable. Prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause. *Farmer*, 511 U.S. at 845.

> In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure 'reasonable safety,'…a standard that incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'

Id. (citations omitted); *see also White v. Farrier,* 849 F.2d 322, 325 (8th Cir.1988) ("Denial of medical care that results in *unnecessary* suffering in prison is inconsistent with contemporary standards of decency and gives rise to a cause of action under 42 U.S.C. § 1983. Actions *without penological justification* may constitute an unnecessary infliction of pain.") (emphasis added).

It is undisputed that denial of hormonal therapy and sex reassignment surgeries is rationally related to prison safety and security. Even Plaintiffs' prison security expert, Walter L. Kautzky, acknowledged that "Gender Identity Disorder and the presentation of effeminate characteristics create challenges in a prison system" (DFOF ¶ 27), and there is no question that the intent of hormone therapy and sexual reassignment surgery is to increase the presentation of feminine characteristics. *See,* Wis. Stat. § 302.386(5m)(a)(1). Kautzky also concedes that inmates who display effeminate characteristics are viewed as sexually available, which increases the possibility that the prisoner may be sexually assaulted by other prisoners (DFOF ¶ 28). There is no dispute that male inmates who appear more feminine are at an increased risk of victimization (DFOF ¶ 30) According to Kautzky, inmates presenting themselves as highly effeminate in a male prison present additional security concerns (DFOF ¶ 29). Kautzky also agrees that institutions should not crate conditions that would make inmates more vulnerable to assault. (DFOF ¶ 31).

Plaintiff Matthew Davison, unfortunately, has first-hand knowledge of the effects his hormone therapy has upon his safety in prison. Davison was both raped and molested while in prison, and is constantly harassed by other inmates. (DFOF ¶¶ 32, 33). Davison agrees that he is more of a target for this type of aggression by other male inmates because of the physical effects his body has seen on hormone therapy. (DFOF ¶ 32).

The crux of Kautzky's report is an attempt to mitigate the difficulty posed by inmates who use hormones to increase their femininity by comparing them to other inmates who pose difficulties, such as inmate who have HIV or are mentally ill. However, the fact that other inmates pose security difficulties in the prison has no bearing on whether the legislature had a rational basis for passing Wis. Stat. § 302.386(5m). The legislature need not "strike at all evils at

the same time or in the same way." *Sutker v. Illinois State Dental Soc*., 808 F.2d 632, 635 (7th Cir. 1986) (citing *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610 (1935)). It is sufficient that there is a problem "at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-88 (1955). In this case, it is undisputed that limiting prisoners' access to hormone therapy and sexual reassignment surgery makes them less effeminate, and as a result, less likely that they will be victimized by other inmates. DOC has an undisputable security interest in preventing these types of assaults. As this is a "conceivable state of facts" that provides a rational basis for state action, the defendants are entitled to summary judgment on plaintiff's equal protection claim.

CONCLUSION

Based upon the foregoing arguments, the defendants respectfully submit that they are entitled to summary judgment on the following claims: (1) Plaintiff Moaton's Eighth Amendment as-applied challenge to Wis. Stat. § 302.386(5m); (2) plaintiffs' Eighth Amendment facial challenge to Wis. Stat. § 302.386(5m); (3) all claims brought by plaintiffs Sundstrom and Blackwell; (4) all claims brought against defendants Humphreys and Nygren; (5) the plaintiffs Fourteenth Amendment equal protection claim.

Dated at Madison, Wisconsin, this 31st day of July, 2007.

Respectfully submitted,

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