IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBIN FRAZIER, *et al.*,	)	
	)	
Plaintiffs,	)	No. 18 CV 1991
	)	
v.	)	
	)	
JOHN BALDWIN,	)	Judge Feinerman
	)	
Defendant.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs seek a preliminary injunction prohibiting the Illinois Department of Corrections ("the Department") from continuing to enforce its unconstitutional blanket rule prohibiting all parents who are on mandatory supervised release ("MSR") for sex offenses from having any contact with their minor children for at least six months. Plaintiffs do not challenge the ability of the Department to impose restrictions on parent-child contact in appropriate cases. Rather, this case is about the utter lack of procedural fairness in how the Department imposes this rule.

In its brief, Defendant acknowledges that some change in the policy is warranted. Def. Br. at 2 (stating that the Department is considering "revisions to its policy"). However, Defendant claims that Plaintiffs are not entitled to a preliminary injunction, arguing that (1) Plaintiffs will not suffer irreparable harm if an injunction is denied; (2) Plaintiffs have not established a likelihood of success on the merits of their claims; and (3) the public interest disfavors issuance of an injunction. As set forth below, none of Defendant's arguments defeat Plaintiffs' arguments in support of their entitlement to a preliminary injunction to preserve their constitutional rights and to halt Defendant's unconstitutional interference with family relationships.

ARGUMENT

I. An Injunction Is Necessary to Prevent Irreparable Harm

Defendant tries to downplay the urgency of this motion, contending that there is no need for "immediate relief." Def. Br. at 1 ("[T]here may be disputed questions of

fact and law that this Court will have to resolve eventually, but none that cannot wait for more factual development or a final ruling on the merits.") In particular, Defendant claims that there is no risk of irreparable harm to Plaintiffs Robin Frazier and T.G. because they currently have phone contact pursuant to this Court's temporary restraining order (ECF No. 14); no risk of irreparable harm to Plaintiff Brandi Edwards because she has chosen to remain in prison while on MSR and is allowed to see and talk to her daughter from prison; and no risk of irreparable harm to Plaintiffs Jennifer Tyree and Celina Montoya because they have not yet begun their MSR time. Def. Br. at 2, 9.

Defendant's arguments strain credulity, fundamentally misunderstanding the circumstances faced by the named Plaintiffs. As explained in Plaintiffs' opening brief (Plfs. Br. at 29–31), each Plaintiff has an urgent need for an injunction.

- **Robin Frazier**: In the absence of injunctive relief, Plaintiff Frazier will be prohibited from having any face-to-face contact with her daughter (supervised or unsupervised) for the next six months;

- **Brandi Edwards**: Edwards currently remains in prison three months beyond her release date because of the challenged policy. Unless preliminary injunctive relief is granted, Edwards will stay in prison for another nine months to "max out" her MSR time and be able to return home to her daughter without restrictions;

- **Jennifer Tyree:** Tyree's scheduled release on MSR is less than four months away. If the Department is not enjoined from continuing its policy, she will also choose to "max out" her MSR in prison (by serving an extra year) so she can remain in contact with her two minor children. Tyree will only seek a host site outside of prison if she knows that she will be able to have contact with her children while on MSR. The process of securing compliant housing and obtaining Department approval often takes six months, so her family

must take immediate steps to secure housing if Tyree is going to get out on her MSR date. See, Ex. 2, Dep of Dion Dixon, p. 28-30.[1];

- **Celina Montoya:** Montoya is married to her children's father and her minor daughter currently lives at home with him. Montoya wants to serve her MSR time while living at home with her daughter and husband, both of whom want her to come home. In the absence of injunctive relief, she will not be allowed to live with them and will be prohibited from having contact with her child for at least the first six months of her MSR. Although she is not due to be released until next year, Montoya's situation is urgent because her family will have to save the money necessary to buy or rent a separate place for Montoya to live if she cannot return home.

If an injunction is not granted, the Department's policy will continue to unnecessarily deprive children of the love and companionship of their parents; deprive parents of their ability to nurture their children; and force many people to choose between their freedom and their ability to stay in touch with their kids. This policy and its consequences implicate immediate and ongoing constitutional concerns that warrant prompt court intervention, for even short interruptions in the parent-child relationship can cause severe harm. See, *e.g.*, *In re Nicholson*, 181 F. Supp. 2d 182, 185 (E.D.N.Y. 2002) ("relatively short separations may hinder parent-child bonding, interfere with a child's ability to relate well to others, and deprive the child of the essential loving affection critical to emotional maturity.")

II. Plaintiffs Have a Likelihood of Success on the Merits

As explained in full in Plaintiffs' opening brief, the due process clause requires that (absent emergency circumstances) a parent must receive pre-deprivation

[1] Deon Dixon was deposed in *Murphy v. Madigan*, 16 C 11471 (Kendall, J.), in which the plaintiffs have challenged the constitutionality of the Department's policy of keeping sex offenders in prison beyond their release dates solely because they are unable to obtain compliant housing. Dixon, the deputy chief of the DOC's parole division, was identified as the DOC's 30(b)(6) witness in that case.

process before being denied custody of her children. *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Similarly, "a child's right to be nurtured by his parents cannot be denied" without due process. *Id*. See discussion in Plfs. Br. at 24–28. Based on this well-established law, the Department has the responsibility to provide a pre-release assessment and hearing to determine what restrictions, if any, a parent should have on contact with her child when released on MSR.

In response, Defendant claims (1) that providing a pre-release evaluation would undermine safety and rehabilitation and (2) that it would be "difficult, if not impossible" for the Department to undertake pre-release evaluations, claiming that implementing such a procedure would require new staff and significant disruption of the Department's operations. Def. Br. at 10. Both of these representations are mere assertions unsupported by any evidence. As shown below, a pre-release hearing is consistent with the mandates of due process and readily feasible based on existing DOC procedures.

A. IDOC Already Performs a Pre-Release Risk Assessment of All People Who Have Been Convicted of Sex Offenses

Under Illinois law, the DOC is legally required to conduct a pre-release evaluation of all persons who have been convicted of sex offenses. In particular, the Sexually Violent Persons Commitment Act, 725 ILCS 207/1 *et. seq*., vests the DOC with the responsibility to determine whether anyone who has been convicted of a

"sexually violent offense" should be subject to civil commitment.[2] *Id*. The Department is required "not later than 6 months prior to the anticipated … entry into mandatory supervised release" of any person who has been convicted of a sex offense to "send written notice to the State's Attorney in the county in which the person was convicted" of the person's "anticipated release date and that the person will be considered for commitment." 725 ILCS 207/9. No later than three months prior to a sex offender's anticipated release, the Department must make a recommendation concerning whether the offender should be referred for civil commitment based on "a comprehensive evaluation of the person's mental condition … conducted in conformance with the standards developed under the Sex Offender Management Board Act and by an evaluator licensed under the Sex Offender Evaluation and Treatment Provider Act." 725 ILCS 207/10.

Accordingly, the Department by law undertakes a psychological evaluation of all people who have been convicted of sex offenses to determine whether they pose a substantial risk of re-offending when they are released. These evaluations are conducted approximately six months before each offender's release by qualified professionals. Plaintiffs Frazier, Tyree and Edwards have all undergone this evaluation in anticipation of their release on MSR. Ex. 1, Second Decl of Frazier at ¶3. Montoya also obtained a similar evaluation at her own expense. Decl of Montoya at ¶6. The mandated assessment consists of an extensive interview with an

[2] The Act defines "sexually violent offense" to include convictions for criminal sexual assault, aggravated criminal sexual assault, criminal sexual assault of a child, criminal sexual abuse, indecent solicitation of a child, and possession of child pornography. 725 ILCS 207/5 (e).

evaluator employed by the Department of Corrections that examines the individual's offense, criminal history, sexual history, psychological adjustment, family, relationships, and plans for the future. Ex. 1 at ¶4.

Likewise, the infrastructure for a pre-release hearing concerning the propriety of imposing a restriction on parent-child contact is already in place. The Prisoner Review Board conducts monthly hearings at every IDOC facility concerning "parole violations, Mandatory Supervised Release conditions, Statutory Parole conditions and Revocation and Restoration of time taken by the Illinois Department of Corrections." See, Illinois Prisoner Review Board, Operations and Hearing Information (available at: https://www2.illinois.gov/sites/prb/Pages/Operations.aspx) (last visited April 27, 2018).[3]

Given the existing infrastructure to perform pre-release hearings, Defendant's unsupported claims that it would require the hiring of new staff and an "overhaul" of existing procedures to provide pre-deprivation process before deciding whether to restrict parent-child contact are unavailing and should be rejected. There is no reason to believe that the Department cannot competently assess whether a parolee should be restricted from living with or having contact with her minor child prior to her release on MSR and no reason to believe that it would pose an unreasonable administrative burden for IDOC to provide a pre-release hearing.

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[3] As explained in Plaintiffs' Complaint and opening brief, the restriction on parent-child contact at issue in this case is not imposed by the Prisoner Review Board as a condition of MSR. Rather, the restriction is imposed as a matter of IDOC policy (through the parole department). ECF No. 1 at ¶12–16. Therefore, Plaintiffs are denied any opportunity to contest the imposition of this restriction when they appear before the Board and receive their parole conditions.

B. The DOC's Policy Undermines Public Safety

Defendant claims that "some period of time after the offender leaves prison before allowing the offender contact with his or her children" is necessary to preserve public safety and promote rehabilitation. Def. Br. at 5–6. But upon analysis the policy actually undermines public safety and rehabilitative goals in at least two ways.

First, strong family bonds and supportive community connections are crucial to rehabilitation, and it is thus counterproductive to unduly restrict family contact. See Urban Institute, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, 20 (2001) ("[S]trong family involvement or support was an important indicator of successful reintegration across the board."); Vera Institute of Justice, *The Front Line: Building Programs that Recognize Families' Role in Reentry*, 1 (Sept. 2004) ("family support can help make or break a successful transition from prison to community"); Council of State Governments, *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community*, at 319 (available at: https://csgjusticecenter.org/wp-content/uploads/2013/04/1694-11.pdf) (noting the "connection between the stability of family networks and a returning prisoner's outcomes.")

Second, the Department's policy runs counter to public safety because it will lead to many people who have been convicted of sex offenses "maxing out" their MSR time in prison and then returning to the community with no restrictions on with whom they live, no supervision by the parole department, no supportive services,

and no therapy.[4] This obviously runs counter to the rehabilitative mission of MSR that Defendant claims it is trying to promote.

C. The Department's Policy Exacerbates the Pervasive Problem of the Lack of Housing Available to Sex Offenders

It is widely known that people who have been convicted of sex offenses have difficulty finding housing that complies with the myriad restrictions on where they are allowed to live. The Seventh Circuit has recognized this as "a pervasive problem." See *Werner v. Wall*, 836 F.3d 751, 766 (7th Cir. 2016) (Hamilton, J., dissenting). The lack of housing has serious consequences for Illinois prisoners because the DOC will not release any person who has been convicted of a sex offense on MSR unless the person identifies a "host site" that meets the Department's approval. There are currently no transitional housing facilities in Illinois that will accept a person who has been convicted of a sex offense, and it is thus incumbent on the offender or her family to pay for housing outside of prison. If an offender can't afford housing and doesn't have someone on the outside who can pay for her housing, she will be forced to serve her entire period of MSR in prison, which for some sex offenders can mean staying in prison for life.[5]

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[4] For purposes of clarification, "maxing out" refers to opting to stay in prison until the expiration of one's period of MSR. The Department's policy leads to people "maxing out" their MSR time in two ways. First, as explained in §II(C), the DOC policy makes it more difficult to obtain compliant housing by foreclosing people from living with their families while on MSR. Second, the policy leads some people who have been convicted of sex offenses, such as Plaintiffs Edwards and Tyree, to remain in prison during the MSR period in order to stay in contact with their children.

[5] These facts were taken from the deposition of Dion Dixon. Ex. 2 at 154-55 ("Q: I believe you told us earlier that there are currently no transitional housing facilities or halfway houses in the state that will accept a person who's been convicted of a sex offense, true? A: That's true. Q: So it is incumbent on either the offender or their family or friends in the

The policy prohibiting people from living with their own families exacerbates this problem. If someone cannot return home to live with her family while on MSR due to the presence of her own minor child, she will only be able to get out of prison on MSR if her family can afford to pay for *two separate residences*—one where the child will live and one where the parolee will live. Both Plaintiff Edwards and Plaintiff Montoya face this problem. They both plan to return to living with their families and children as soon as the Department will allow, but neither will have an opportunity to seek permission to live with her family unless she can first locate and afford to pay for a separate residence.

Given the already severe shortage of compliant housing and the potentially dire consequences of prohibiting someone from living with her family while on MSR, it is all the more necessary that the Department be required to base its restrictions on evidence and that parolees be given a pre-release opportunity to contest the imposition of restrictions on living with their families.

D. Defendant's Current Policy Should Be Enjoined

Even if, in the interests of circumspection and a desire to better understand the DOC's current practices and its justifications for them, the Court is not persuaded that a mandatory pre-release evaluation and hearing should be ordered to take place immediately, Defendant should still be enjoined from continuing its current

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community to locate and pay for housing outside of prison, right? A: That's correct. Q: The department of corrections will not release someone [who has been convicted of a sex offense] into homelessness, right? A. That's correct. Q: Is it possible for a sex offender with an indeterminate MSR term who, A, does not have money to pay for his own housing, and, B, does not have family or friends on the outside who can pay for his housing to ever get out of the Illinois Department of Corrections? A: … Using those criteria, no.")

policy. As discussed in Plaintiffs opening brief, the IDOC policy concerning parolees' contact with their children provides no criteria constraining parole agents' discretion; no explanation of the steps a parolee must follow to seek restoration of her parental rights; and no time frame in which the Department must consider a request for restoration of parental rights. See Plfs. Br. at 3-4. The parole department imposes the policy in a blanket fashion without consideration of the individual circumstances and characteristics of the particular parolee and without reliance on any evidence. *Id*. Parolees are given no opportunity to contest imposition of the restriction. *Id*. Nothing in Defendant's brief indicates that there are any limits on the parole agents' discretion to limit parent-child contact or any process by which a parolee can challenge the imposition of this restriction. Def. Br. at 3 ("the therapist and parole agent can do an initial investigation about the person's adjustment and whether there are threats to public safety. A polygraph examination is often part of the process.")

A right as important as parent-child contact cannot be left to the unconstrained whim of individual parole agents or therapists. In *Bleeke v. Server*, 1:09-CV-228, 2010 WL 1138928, at *5 (N.D. Ind., Mar. 19, 2010), a case on which Defendant relies, the Court granted a preliminary injunction against the Indiana Parole Board and found that "before the state can impose the parole condition of preventing [plaintiff] from contacting his children" the plaintiff was entitled to a hearing "presided over by a person or panel of people not personally involved in his supervision." *Id*. at *7. The Court found that due process requires, at a minimum,

that the plaintiff must receive advance notice, be permitted to appear in person, to call witnesses, to present evidence, and to confront and cross-examine witnesses. *Id.* The Court gave the parole board 60 days to comply with this order.[6] *Id.* at *6. The Court emphasized the importance of a pre-deprivation hearing, writing that "conditions totally limiting [plaintiff's] contact with his own children may only be imposed after an appropriate hearing and a finding that [he] constitutes a threat to his children by reason of his lack of sexual control." *Id.* at *3; see also *Id.* at *2 ("the risk of erroneous deprivation is high where a mandatory parole condition interfering with the right [to family integrity] is imposed without regard to the specific history or characteristics of a particular parolee.")

Defendant's current policy, which vests parole agents with complete and unconstrained discretion to deny parent-child contact clearly falls short of the minimum dictates of due process and should be enjoined.

E. Defendants Other Arguments Do Not Defeat Plaintiffs' Request for Injunctive Relief

In defending its policy, Defendant argues that parole restrictions should be analyzed under the test set forth in *Turner v. Safley*, which holds that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner,* 482 U.S. 78, 89 (1987). Def. Br. at 5–6. It is far from clear that *Turner* supplies the proper standard of review here. Most federal courts have applied a standard closer to strict

[6] This was not, as Defendant contends (Def. Br. at 7), an endorsement of the reasonableness of a 60-day delay to "conduct an investigation."

scrutiny when analyzing parole conditions that interfere with fundamental rights. See, *e.g.*, *U.S. v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005) (Sotomayor, J.) (finding that where "a parole condition impacts a fundamental right," the government bears the burden of showing that the restriction is "narrowly tailored to serve a compelling government interest.") (citations omitted); *U.S. v. Loy*, 237 F.3d 251, 256 (3rd Cir. 2001) ("a condition that restricts fundamental rights must be narrowly tailored and directly related to deterring [the defendant] and protecting the public.").

Even if this Court applies *Turner*, the Defendant's policy fails constitutional scrutiny. While *Turner* does not require a prison to show that it has chosen the "least restrictive means" of advancing its legitimate interests, the touchstone of the analysis is still reasonableness. If a ready alternative to a challenged policy accommodates constitutional rights "at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id*. at 91. Here, Defendant has acknowledged that it does not need six months to conduct a review before allowing any parent-child contact (Def. Br. at 6, stating that "the six-month ban [can be] shortened"); likewise, it has acknowledged that an across-the-board ban on *all* contact (including phone calls and letters) is unnecessary with regard to some parolees, including Plaintiff Frazier. (Def Br. at 2, stating that "The Department will not be contesting" Frazier's right to have phone calls with her minor daughter). Thus, even if the Court applies the *Turner* standard here, Plaintiffs are entitled to injunctive relief.

Defendant also claims that Plaintiffs cannot demonstrate a likelihood of success on the merits of their substantive due process claim because they can only bring a direct challenge to parole conditions through *habeas corpus*. Def. Br. at 8. Plaintiff disputes this contention. The Seventh Circuit has entertained §1983 challenges to parole conditions on numerous occasions. See, *e.g.*, *Werner v. Wall*, 836 F.3d 751 (7th Cir. 2016) (§1983 challenge to Wisconsin Department of Community Corrections' administrative directive concerning conditions of release for paroled offenders who could not locate approved housing); *Felce v. Fiedler*, 974 F.2d 1484 (7th Cir. 1992) (§1983 challenge to parole condition requiring parolee to take an antipsychotic drug). Indeed, the Seventh Circuit has noted that "only those claims that, if successful, would 'necessarily' invalidate the fact or duration of the prisoner's confinement are restricted to *habeas*." *Savory v. Lyons*, 469 F.3d 667, 671 (7th Cir. 2006).

In any event, the Court need not consider this argument when ruling on this preliminary injunction because Defendant acknowledges that Plaintiff's procedural due process claims are properly brought under §1983 and thus this Court can properly enter an injunction. Def. Br. at 8 ("challenges to procedures used by parole authorities … may be raised in a §1983 case.")

IV. Relief Sought

A. The Court Has Discretion to Fashion Appropriate Injunctive Relief

This motion is not the all-or-nothing exercise that Defendant makes it out to be. That is, the Court is not facing a binary choice between granting Plaintiffs all of the

relief they ultimately seek or no relief at all. The Supreme Court has recently reaffirmed that district courts have broad discretion to determine the nature and scope of preliminary injunctions. See, *Trump v. Intern. Refugee Assistance Project*, 137 S.Ct. 2080, 2087 (2017) ("[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents."); *City of Chicago v. Sessions*, No. 17-2991, Slip Op. at 28, 2018 WL 186832 (7th Cir., April 19, 2018) ("[O]nce a court determines that preliminary relief is required, the court must be able to engage in the 'equitable balancing' to determine the relief necessary.")

This Court should reject the Defendant's attempt to reframe this motion as solely a question of whether Plaintiffs are entitled to an immediate order that all persons eligible for release on MSR are entitled to a pre-release determination of whether their contact with their children should be restricted. See Def Br. at 5 ("[W]e disagree that … an evaluation of sex offenders before release from prison coupled with a presumption that the offender will be immediately able to contact and live with his or her minor children is constitutionally required.")

While Plaintiffs believe that a pre-release assessment and hearing concerning what restrictions, if any, a parolee should have on contact with her own children is both feasible and consistent with the dictates of due process (see discussion at §II above), that is not the only relief that the Court can grant. For example, if the Court is concerned that the Department cannot immediately implement procedures providing a pre-release assessment and hearing, the Court can give Defendant a

reasonable period of time to implement appropriate procedures that protect parolees' due process rights as the Court did in *Bleeke*. 2010 WL 1138928 at *6. Likewise, the Court can grant interim relief to the named Plaintiffs, requiring Defendants to conduct prompt assessments and hearings concerning whether restrictions on their contact with their children is appropriate.

Plaintiffs request an injunction that protects Plaintiffs' fundamental rights to the maximum extent possible at this early stage in the proceedings, and this Court has substantial discretion to craft the appropriate relief.

B. Class-Wide Relief Is Permitted and Appropriate

In terms of the scope of the injunction, the DOC argues that any preliminary injunction issued by the court in this matter must be limited to the named plaintiffs. Def. Br. at 1. ("While this case brought as a putative class action, no class has been certified and no motion for class certification is currently pending. Thus, the motion for preliminary injunction is limited to the named plaintiffs.") In fact, in fashioning injunctive relief, courts need not limit the scope of their relief to the named Plaintiffs. This principle of was recently affirmed by the Seventh Circuit in *City of Chicago v. Sessions*, 2018 WL 186832 (April 19, 2018), in which the Court upheld a nationwide preliminary injunction against the DOJ, even though the case was not brought as a class action. In so holding, the Seventh Circuit relied on the Supreme Court's recent decision in *Trump v. Intern. Refugee Assistance Project*, 137 S.Ct. at 2087, where, as the Seventh Circuit explained it, "the Court ... approved injunctions that covered not merely those individuals but parties similarly situated

to them nationwide, and the Supreme Court determined that the injunction should remain in place even as to those similarly situated persons." *Sessions*, slip op. at 12.

Thus, the question here isn't whether this Court has the power to fashion a preliminary injunction that includes individuals who are not named plaintiffs in this matter; the question is whether this is a case where such power should be exercised. Plaintiffs believe it is. This is so because the legal issues in this case are not restricted to the named individuals but apply across-the-board and in the same fashion to all other parolees. The Seventh Circuit explained in *Sessions* that a nationwide injunction was appropriate there because the case presented issues "[that] will not vary from one locality to another." *Id*. at 13. As in *Sessions*, so too here. Third parties here are subject to the same harsh rules and suffer the same irreparable harms as the named Plaintiffs and will continue to suffer in the absence of preliminary relief; and, third parties here also have the same likelihood of success on the merits of their claims as the named Plaintiffs. As in *Sessions*, this case, at bottom, presents purely legal questions—namely, the appropriateness of the DOC's blanket restriction on parolees' contact with their own minor children.

CONCLUSION

For the reasons set forth above and in their opening brief, Plaintiffs respectfully request that this Honorable Court grant a preliminary injunction enjoining Defendant from continuing to enforce its unconstitutional policies prohibiting all contact between parents who are on MSR for sex offenses and their minor children and prohibiting parents who are on MSR for sex offenses from living with their

minor children and grant such additional and further relief as the Court deems just and proper.

Respectfully submitted,

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