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

ROBIN FRAZIER, BRANDI EDWARDS, JENNIFER TYREE, CELINA MONTOYA, and SHARON FRAZIER, as guardian and next friend of T.F., a minor, individually and on behalf of all others similarly situated,	)	Case No. 18 CV 1991
Plaintiffs,	)	
v.	)	
JOHN BALDWIN, in his official capacity as Director of the Illinois Department of Corrections,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

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Plaintiffs Robin Frazier, Brandi Edwards, Jennifer Tyree, Celina Montoya, and Sharon Frazier, as guardian and next friend of T.G., a minor, by their undersigned attorneys, pursuant to Fed. R. Civ. Pro. 65, respectfully move this Court for entry of a temporary restraining order and a preliminary injunction prohibiting Defendant John Baldwin, director of the Illinois Department of Corrections, from continuing his unconstitutional policies of prohibiting parents who are on mandatory supervised release ("MSR") for sex offenses from living with or having contact with their minor children. In support thereof, Plaintiffs state as follows:

FACTUAL BACKGROUND

I. Nature of the Case

The Illinois Department of Corrections ("IDOC" or "the Department") has an official policy prohibiting parents who are on MSR for a sex offense from having contact with or living in the same residence as their own minor children. The Department imposes this policy without regard to whether the parent has ever abused or neglected her child, and without conducting any assessment of whether the parent poses a risk of harming her child.[1] Plaintiffs Robin Frazier, Brandi Edwards, Jennifer Tyree and Celina Montoya are parents of minor children and subject to these policies. Plaintiffs, individually and on behalf of a class of similarly situated parents, allege that the Department's policies violate their rights under the Fourteenth Amendment of the United States Constitution and seek class-wide injunctive and declaratory relief. Plaintiff T.G. is Plaintiff Frazier's minor daughter.

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[1] Throughout this brief, Plaintiffs use "she" or "her" as the singular pronoun when referring to a generic parent. The policies are applicable to both women and men.

T.G. is currently prohibited from living with and/or having any contact with her mother, who has been on MSR since February 24, 2018. T.G. alleges violations of her Fourteenth Amendment rights and seeks an injunction individually and on behalf of a class of similarly situated children of Illinois parolees.[2]

II. The Challenged Policy

Illinois law gives the Department of Corrections discretion to decide whether an individual being released on MSR for a sex offense can live with and/or have contact with her child. In particular, 730 ILCS 5/3-3-7 (b-1)(9) provides that people required to register as sex offenders must "refrain from all contact, directly or indirectly, personally, by telephone, letter, or through a third party, with minor children *without prior identification and approval of an agent of the Department of Corrections*" while on MSR. (Emphasis added).

Rather than deciding on a case-by-case basis what contact a particular parolee will be allowed to have with her children, the Department has a blanket policy prohibiting contact between all parents released on MSR for sex offenses and their minor children. A parent who is on MSR for a sex offense faces the possibility of criminal sanctions and re-incarceration if she makes any attempt to contact her minor child while on MSR, whether it be in person, by phone, by letter, or through a third party.

[2] The Illinois criminal code no longer allows traditional parole (*i.e.*, the potential for early release from an incomplete prison sentence). Rather, all prisoners sentenced to serve time in the IDOC after February 1, 1978, are also sentenced to a separate term of community supervision (called "mandatory supervised release") that occurs after they have finished their prison sentences. See, 730 ILCS 5/5-8-1. Generally speaking, however, the Department uses the terms "parole" and "MSR" interchangeably, as does this motion.

The Department also has the responsibility to investigate and approve "host sites" for people released on MSR. The Department imposes a blanket rule forbidding anyone on MSR for a sex offense from residing at a host site where her own minor child lives. In imposing these policies, the Department does not take into account the individual characteristics of the parolee and will not consider individual parolees' requests for variance from the policies.

These policies are set forth in writing in the IDOC's Parole School handout, which it distributes to all persons required to register as sex offenders who are preparing a parole plan in anticipation of release on MSR. See, Ex. 1. This document is titled: "Parole Requirements for Offenders with an Active Sex Offender Registry Requirement." It provides in relevant part as follows:

> Sex offenders are not allowed to live with or have contact with children. Upon release, the sex offender will be enrolled in sex offender counseling. If at some point the offender is doing well on parole and requests to have contact with children, there is a process that must be followed that includes meetings and approvals with the parole agent, parole supervisor, sex offender therapist and possibly the Department of Children and Family Services and may include a polygraph examination. *Id*. at 2.

While the IDOC states that it provides "a process" for a parolee to seek contact with her children "[i]f at some point the offender is doing well on parole," this process provides no criteria constraining the parole agent's discretion to decide whether to restore the parolee's parental rights; 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.[3]

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[3] Plaintiffs Montoya and Edwards were also told that the IDOC would consider allowing them visitation with their children if they obtained a "court order." This policy was never

Even if a parolee has already undergone sex offender therapy prior to being released on MSR, IDOC will not consider allowing that person to reside with or have contact with her children when released. For example, for more than a year prior to her incarceration, Plaintiff Montoya voluntarily attended sex offender therapy with the same treatment providers who provide treatment to paroled sex offenders. Ex. 2, Decl. of Montoya, at ¶ 6. The treatment providers wrote a letter on Montoya's behalf stating that they support her living with her daughter when she is released. *Id*. Yet, IDOC still will not approve Montoya's family home as a host site. *Id*. at ¶9; Ex. 6, Letter from Alyssa Williams-Schafer.

In contrast to the restrictions imposed on parents on MSR, parents who are imprisoned and have been convicted of sex offenses are not prohibited from having contact with their children. Plaintiffs Frazier, Edwards, Tyree, and Montoya all maintained regular contact through letters, phone calls, and in-person visits with their children while incarcerated. Ex. 2 at ¶5; Ex. 3, Decl of Edwards, ¶10; Ex. 4, Decl of Tyree, ¶6; Ex. 5, Decl. of Frazier, ¶6. Yet when that same individual is released on MSR, the IDOC abruptly cuts off all contact between the parolee and her children. Faced with the prospect of having their relationships with their children severed, some parents opt to remain in prison during the entirety of their MSR. Plaintiff Edwards is currently in this situation. Although she was approved

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set forth in writing, and the Plaintiffs never received any instructions about how or from whom to obtain such an order. Nonetheless, Plaintiffs Edwards, Montoya and Tyree all tried to obtain such orders. As explained in §II(C)(2) below, the IDOC's policy requiring a parolee to obtain a court order before allowing her to have contact with her child is inconsistent with Illinois law and the U.S. Constitution.

for release on MSR by the Prisoner Review Board ("PRB") in January 2018, Edwards has opted to "max out" her MSR in prison rather than leave prison and lose contact with her seven-year-old daughter for up to two years.[4] Ex. 3 at ¶20. Likewise, Plaintiff Tyree is currently attempting to create a parole plan in anticipation of her release on MSR in August 2018. Unless the IDOC changes its policy and allows contact between Tyree and her two minor children when she is released, Tyree will also opt to serve her MSR in prison so she can remain in contact with her kids. Ex. 4 at ¶13.

Parents with an indeterminate term of MSR (*e.g.,* three years to natural life) do not have the option to "max out" their MSR time in prison. Pursuant to 730 ILCS 5/3-14-2.5(e), the running of MSR time "toll[s] during any period of incarceration" for people sentenced to indeterminate MSR. Thus, for such parolees the only hope of reestablishing contact with their children is to find a place to live apart from their children; cease all contact with their children; ask their parole agent for the right to see their children again; and hope that the Department will eventually see fit to grant the request. Plaintiff Frazier is currently in this situation. She was released on MSR on February 24, 2018. Ex. 5 at ¶4. She is living alone and is prohibited from having any contact with her child. *Id*. at ¶11. Frazier has requested that she be allowed contact with her daughter, but her parole agent told her that it is unlikely that the Department will even consider her request before her daughter

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[4] Plaintiff Edwards can "max out" her two-year MSR term by serving an extra year in prison because prisoners who are eligible for statutory credit while imprisoned continue to receive that credit during any period of incarceration on MSR. 730 ILCS 5/3-6-3(a)(2.1).

turns 18, which is seven months from now. *Id*. at ¶13–14.

III. Facts Pertinent to the Named Plaintiffs

A. Robin Frazier and T.G.

Robin Frazier was convicted in 2014 of one count of criminal sexual assault. Ex. 5 at ¶2. The victim was a 17-year-old resident of a facility at which Frazier worked. *Id*. She was sentenced to serve four years in the Illinois Department of Corrections at 85 percent. *Id*. at ¶3. She was released from Logan Correctional Center on MSR on February 24, 2018. *Id.* at ¶4. She has an indeterminate MSR period of "three years to natural life." *Id.* Frazier has two children. Her younger daughter, T.G., is a minor. T.G. turned 17 in September. *Id.* at ¶5. While Frazier was incarcerated, she and her daughters stayed in regular and consistent contact. They talked on the phone two or three times a week. They wrote each other letters regularly, and T.G. visited her mother in prison three or four times a month. *Id.* at ¶6.

At the time of Frazier's offense and criminal charges, both of her children were minors and Frazier had sole custody of them. *Id.* at ¶7.While she was out on bond, she was allowed to continue living with her children. After she was found guilty, her children continued living with her for six months until she began serving her prison sentence in October 2014. *Id*.

While Frazier was in prison, her mother Sharon (T.G.'s grandmother) had temporary guardianship of her children. The relevant guardianship documents state that custody of T.G. will be returned to Frazier upon her release from prison. *Id.* at ¶8; Ex. 8, Temporary Guardianship Agreement. Frazier wanted to serve her

MSR time while living at her mother Sharon's home with her minor daughter. (Frazier's older daughter is now away at college). Frazier proposed Sharon's address as a "host site," but the Department denied approval of the host site because T.G. lives there. *Id.* at ¶9.

Because the Department barred Frazier from serving her MSR while living at her mother's house with her daughter, Frazier's parents took out a second mortgage to buy a separate property for Frazier. *Id.* at ¶10. The Department approved this address and Frazier is currently living there alone. *Id.* at ¶11. Frazier is not allowed to call, see or write T.G. *Id.* at ¶11, 13. Frazier cannot even ask her mother to pass along a message that she loves her daughter. *Id.* After her release on MSR, Frazier asked her parole agent, Officer Rucker, how soon she can complete a safety plan so she can be in touch with her daughter. *Id.* at ¶12. Officer Rucker stated that it is unlikely that the Department will even consider a request for a safety plan before T.G. turns 18 (in September 2018). *Id.*

There is no evidence that Frazier poses a risk to her daughter. Frazier has never been accused of abuse or misconduct of any kind toward her children. *Id.* at ¶14. Frazier has never been found by a court to be unfit to be a parent and no proceedings have ever been instituted to terminate her rights as a parent. *Id.* Frazier is a devoted and attentive mother and believes it is in her daughter's best interests to continue to have a close relationship with her. *Id.* at ¶15.

T.G. is now a senior in high school. She wants to return to living with her mother. T.G. is preparing to attend college next fall. *Id.* at ¶15. She is currently

deciding between Bradley University and Southern Illinois University. She wants to discuss her options with her mother and obtain her guidance about choosing a school, paying for college, and where to live. *Id*. T.G. also wants her mother to be involved with helping her prepare for the many milestones associated with her senior year, including graduation, senior prom, and her extracurricular activities as a cheerleader and member of her high school's track and soccer teams. Both Frazier and T.G. are severely distressed that they are unable to speak to one another and will not be allowed to see each other for the next seven months. *Id*. at ¶16.

B. Brandi Edwards

Brandi Edwards was convicted in 2015 of one count of criminal sexual abuse. The victim of her offense was a 16-year-old male student at a school where she was working as an intern. Ex. 3, Decl of Edwards, at ¶2. Edwards was sentenced to serve six years in the Illinois Department of Corrections at 50 percent, plus a two-year term of MSR. *Id.* at ¶3. Edwards has completed her sentence and the PRB found her to be eligible for release from Logan Correctional Center on MSR on January 5, 2018. *Id.* at ¶4. However, Edwards has chosen to serve out her MSR sentence in prison because of the IDOC policies challenged in this case. *Id*.

In particular, Edwards is the mother of a seven-year-old daughter (B.P.) who is in second grade. *Id.* at ¶5. Before her incarceration, Edwards and B.P. lived with Edwards' parents in Homer Glen, Illinois. *Id.* at ¶6. B.P.'s father pays child support, but he is not otherwise involved in his daughter's life. *Id.* at ¶5. During Edwards' incarceration, her parents have temporary guardianship of B.P. *Id.* at ¶9. Under the

temporary guardianship agreement, Edwards will regain custody of her daughter when she is released from prison. *Id*. Throughout her prison sentence, Edwards has stayed in contact with her daughter. They talk on the phone twice a week; write letters and notes to each other once or twice a month; and Edwards' parents bring B.P. to visit Edwards in person twice a month. *Id.* at ¶10. Edwards has never been accused of abuse or misconduct of any kind toward her daughter. She has never been found by a court to be unfit to be a parent and no proceedings have ever been instituted to terminate her rights as a parent. *Id.* at ¶8.

Approximately five months before the end of her prison term, Edwards began preparing her parole plan. *Id.* at ¶11. She submitted paperwork to the field services office (a division of the parole department responsible for assisting inmates with preparation of their parole plans) to request approval to live at her parents' house while on MSR. *Id.* at ¶12. An IDOC parole agent investigated Edwards' parents' house in August 2017. The agent denied approval for Edwards to live there upon learning that Edwards' daughter also lived at the house. *Id.* at ¶12, 13. The agent stated that Edwards' would be prohibited from having contact with her daughter while on MSR. *Id*.

Edwards met with three members of the PRB in September 2017 to discuss the conditions of her parole. During this meeting, Edwards told the PRB about the parole agent's statement and asked whether she would be prohibited from seeing her daughter while on MSR. *Id.* at ¶14-15. Kenneth Tupy, one of the PRB members at the meeting, told her that IDOC would allow her to have contact with her

daughter if she obtained a court order. *Id.* at ¶15. At the bottom of the PRB order, Tupy wrote "inmate can see child pursuant to a court order." *Id.*; Ex. 9, PRB Order. Edwards immediately requested a court order allowing her to have contact with her daughter from both the Circuit Court of Cook County (where she was sentenced) and the Circuit Court of Will County (where she was awarded full custody of her daughter in 2011). *Id.* at ¶16, 17. Neither court responded to her request. *Id.*

Edwards is the only active parent in her daughter's life, and she believes it would be harmful to her daughter to be cut off from contact with her mother. *Id.* at ¶19. Faced with the options of remaining in prison, where she is allowed to see, talk to and write her daughter, or leaving prison on MSR, where she will be completely barred from having any contact with her daughter, Edwards has decided to "max out" her MSR time in the Department of Corrections. *Id.* at ¶20.

C. Jennifer Tyree

Jennifer Tyree is currently incarcerated at Decatur Correctional Center. Ex. 4, Decl. of Tyree, at ¶2. She was convicted in 2015 of aggravated criminal sexual abuse. The victim of her offense was a 17-year-old male student at a school where Tyree was a teacher. *Id*. Tyree was sentenced to serve seven years in the Illinois Department of Corrections at 50 percent, plus a two-year term of MSR. *Id.* at ¶3-4. Tyree is eligible for release from prison on MSR on August 10, 2018. *Id*.

Tyree has three children. When she is released from prison, two of them will be minors—a 17-year-old son and a 13-year-old daughter. *Id.* at ¶5. While Tyree has been incarcerated, she has had regular contact with her children. They visit once or

twice a month; she mails them letters and cards approximately once a week; and she talks to them on the phone regularly. *Id.* at ¶6.

While Tyree was out on bond for nearly three years awaiting trial on the charge of criminal sexual abuse, she had custody of and lived with her children. *Id.* at ¶7. Even after her conviction, she was allowed to continue living with her children before she began serving her prison sentence. *Id*. While Tyree has been in prison, her children have been living with their father (Tyree's ex-husband). *Id.* at ¶8. When Tyree is released from prison, she wants to continue the close relationship she has always had with her children and plans to share custody of her children with their father, who is supportive of Tyree's maintaining a close relationship with their children. *Id.* at ¶8, 9.

There is no evidence that Tyree poses a risk to her children if she has contact with them when she is released from prison on MSR. Tyree has never been accused of abuse or misconduct of any kind toward her children. *Id.* at ¶11. She has never been found by a court to be unfit to be a parent, and no proceedings have ever been instituted to terminate her rights as a parent. *Id*.

When Tyree is released from prison, she wants to live in the Springfield area near her children. *Id.* at ¶14. Tyree's parents, her sister and her sister's spouse are all willing to help Tyree obtain housing while on MSR. *Id*. Tyree is approximately five months away from her release date. She was told by the Department's field services office that she should already be preparing a parole plan and identifying potential host sites because it takes significant time for the Department to

investigate and approve proposed host sites. *Id.* at ¶15. Tyree is unable to make a parole plan because she does not plan to leave prison unless she will be allowed to have contact with her children while on MSR. *Id*. Unless the Department's policies change, Tyree will choose to remain in prison for the entire period of her MSR (an additional year behind bars) in order to maintain contact with her children. *Id*.

Tyree has tried to obtain a court order allowing her contact with her children, but these efforts have been unsuccessful. *Id*. at ¶16. In particular, in April 2017, Tyree filed a motion for an amended mittimus with her sentencing judge. She requested that her sentencing order be amended to reflect that she has permission to have contact with her minor children while on MSR. She sent copies of the motion to the judge, the state's attorney, and the clerk of court. She has received no response to date.

D. Celina Montoya

Celina Montoya is currently incarcerated at Logan Correctional Center. Ex. 2, Decl of Montoya, ¶2. She was convicted in 2015 of one count of criminal sexual assault. The victim was a 14-year-old male student at a school where she was a teacher. *Id*. Montoya was sentenced to serve four years in the Department of Corrections at 85 percent, plus an MSR period of three years to natural life. She is eligible for release from prison on MSR on April 26, 2019. *Id.* at ¶3.

Montoya is married. She and her husband have three children. *Id.* at ¶4. Their youngest daughter will still be a minor when Montoya is released from prison. *Id.* While Montya has been incarcerated, she has had regular and consistent contact

with her children and her husband. *Id.* at ¶5. They visit her; Montoya writes them letters; and they talk on the phone. Montoya, who was a math teacher before her conviction, often helps her daughter with her school work over the phone. *Id.*

For more than a year before she was incarcerated, Montoya voluntarily attended sex offender therapy with the same treatment providers who work with the Illinois Department of Corrections to provide treatment to paroled sex offenders. *Id.* at ¶6. The treatment providers wrote a letter on Montoya's behalf stating that they would support her living with her daughter when she is released on MSR. *Id*. Montoya also obtained an assessment by Gerald Blain, a psychologist experienced in the treatment and evaluation of people who have committed sex offenses. *Id*. It was his conclusion that Montoya posed a "very low to low range of risk" for re-offense, and he recommended that Montoya be permitted to live with her family and that her contact with her children not be restricted. *Id.*

Montoya wants to serve her MSR while living at her home with her husband and her daughter, both of whom want her to live with them. *Id.* at ¶7. Montoya has filled out paperwork requesting a Parole Plan to obtain approval to live at home with her husband and daughter while on MSR. *Id.* at ¶8. Field Services responded that it will not approve her home as a "host site" because her minor daughter lives there. *Id*. at ¶9.

Montoya filed a motion in the Circuit Court of Lake County in January 2017 asking her sentencing judge to amend her mittimus to provide that she has "permission to have contact with her minor children while on MSR." *Id.* at ¶12. In

response, she received a handwritten document labeled "Agreed Order" signed by her sentencing judge that states she will be "permit[ted] to have contact with her biological children" while on MSR. *Id*. Montoya forwarded this Order to Alyssa Williams-Schafer, who was at the time a supervisor of Field Services representatives. In response, Williams-Schafer wrote Montoya a letter stating that even with this Order, the Department would still restrict her contact with her daughter. Ex. 6, Williams-Schafer Letter. In her letter, Williams-Schafer explained that the Department would require her to "work with [a] sex offender treatment provider to establish a safety plan" before she would be allowed to have contact with her children and would not allow Montoya to live with her daughter "until [she is] evaluated by the sex offender treatment provider to be at no risk to offender (sic) against a child." *Id*. The letter further stated that the Department will not begin the process of developing a safety plan until "after [she is] released." *Id*.

There is no evidence that Montoya poses a risk of causing harm to her daughter if she lives with her and her husband while on MSR. Ex. 2 at ¶10. Montoya has never been accused of abuse or misconduct of any kind toward her children. She has never been found by a court to be unfit to be a parent, and no proceedings have ever been instituted to terminate her rights as a parent. *Id*.

ARGUMENT

I. Temporary Restraining Order and Preliminary Injunction Standards

To be entitled to a temporary restraining order a plaintiff must demonstrate "(1) some likelihood of succeeding on the merits and (2) that he has 'no adequate remedy at law' and will suffer irreparable harm" if relief is denied. *Abbott Laboratories v. Mead Johnson & Co.,* 971 F.2d 6, 11 (7th Cir. 1992) (internal citations omitted). If these two elements are established, a court should consider "(3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties." *Id.* In deciding this motion, the court "[is] sitting as would a chancellor in equity," and should weigh all four factors "seeking at all times to minimize the costs of being mistaken." *Id.* Similarly, in order to obtain a preliminary injunction, a plaintiff must establish four elements: (1) some likelihood of success on the merits; (2) the lack of an adequate remedy at law; (3) a likelihood that they will suffer irreparable harm if the injunction is not granted; and (4) the balance of hardships tips in the moving party's favor. *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001).

As set forth below, Plaintiffs Robin Frazier and T.G. are entitled to a temporary restraining order to halt the Department's ongoing deprivation of their right to have contact with one another. All Plaintiffs are entitled to a preliminary injunction prohibiting the Department from continuing its unconstitutional policies.

II. Plaintiffs Are Likely to Succeed on the Merits of their Fourteenth Amendment Claims

The Department of Corrections' blanket policy prohibiting all parolees who have been convicted of sex offenses from living with, or having contact with, their children violates the due process clause of the Fourteenth Amendment. As explained in full below, the policy fails constitutional scrutiny because it severely impairs the Plaintiffs' fundamental liberty interests in their parent-child relationships without regard to whether there is any evidence suggesting that a particular parolee poses a danger to her own children. Courts nationwide, including the Seventh Circuit, have been highly critical of parole conditions that impair parental relationships in the absence of sufficiently reliable evidence supporting the restriction. Based on this law, Plaintiffs have a substantial likelihood of success on their claims.

A. The Policy Interferes with Fundamental Rights

The "fundamental right of parents to make decisions concerning the care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court]." *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (O'Connor, J.); see also, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance to our society, rights sheltered against the State's unwarranted usurpation, disregard, or disrespect").

Courts have also recognized that children have a "reciprocal" interest in their relationships with their parents. *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding

that an individualized determination concerning parental fitness before termination of parental rights is essential to safeguard the constitutional rights of "both parent and child."); *Southerland v. City of New York*, 680 F.3d 27, 42 (2d Cir. 2012) ("[c]hildren have a parallel constitutionally protected liberty interest in not being dislocated from the emotional attachments that derive from the intimacy of daily family association.") (quoting *Kia P. v. Mclntyre*, 235 F.3d 749,759 (2d Cir. 2000)); *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987) ("The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship."); *Franz v. United States*, 707 F.2d 582, 599 (D.C. Cir. 1983) ("[a] child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsive, reliable adult.")

The Supreme Court has emphasized that familial association rights "occup[y] a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. 'Far more precious than property rights,' parental rights have been deemed to be among those 'essential to the orderly pursuit of happiness by free men.'" *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) (quoting multiple Supreme Court cases) (individual citations omitted).

The challenged policies interfere with this fundamental right. Parents on MSR for sex offenses are cut off from their children's lives entirely. Plaintiffs and others

subjected to the policies cannot live with, see, call, or write their children. They face re-incarceration if they so much as try to send their children a message that they love them.

B. The Challenged Policy Is Subject to Heightened Constitutional Scrutiny

There is some confusion in the law concerning the precise standard to be applied in cases that challenge the constitutionality of parole restrictions. Where, as here, a parole condition impacts a fundamental right, several courts have applied strict scrutiny, requiring the government to bear the burden of showing that the restriction is "narrowly tailored to serve a compelling government interest." *U.S. v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005) (Sotomayor, J.) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *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.")

Other courts have phrased the standard somewhat differently. For example, the Seventh Circuit has explained that supervised release conditions must be "tailored to [the defendant's] needs" and must involve "no greater deprivation of liberty than is reasonably necessary to achieve the goals of deterrence, protection of the public, and rehabilitation." *U.S. v. Goodwin*, 717 F.3d 511, 524-25 (7th Cir. 2013); see also *U.S. v. Wolf Child*, 699 F.3d 1082, 1089-90 (9th Cir. 2012) ("Conditions affecting fundamental rights … are reviewed carefully and must: (1) be reasonably related to the goals of deterrence, protection of the public, and/or defendant rehabilitation; (2) involve no greater deprivation of liberty than is reasonably necessary to achieve

those goals…") (citations omitted); *U.S. v. Schoenherr*, 504 Fed.Appx. 663, 670–71 (10th Cir. 2012) ("conditions … that restrict a defendant's freedom of speech and association" must "bear a reasonable relationship to the goals of probation.").

Whatever precise wording is used, reasonableness and appropriate tailoring to the individual subject to the restriction are the touchstones of any analysis. As explained below, the IDOC policies at issue fail constitutional scrutiny because they are neither reasonably related to goals of public safety, deterrence and rehabilitation nor appropriately tailored to advance those goals.

C. Numerous Courts Have Invalidated Restrictions on Parolees' Contact With their own Children

The Seventh Circuit has been highly critical of conditions that deprive parolees of the ability to maintain relationships with their children, even when the parolees' convictions involve sex crimes against minors. For example, in *United States v. Quinn*, 698 F.3d 651 (7th Cir. 2012), the Seventh Circuit vacated a sentence that included a term of supervised release that prohibited "unsupervised contact" between the defendant (who had been convicted of possessing child pornography) and his child without "advance approval." *Id*. at 652. The Court found that there was inadequate evidence in the record that the defendant posed a risk to his child to support the imposition of this condition. The Court wrote: "Putting the parent-child relationship under governmental supervision for long periods … requires strong justification." *Id*. at 652. The Seventh Circuit reached similar conclusions in *U.S. v.*

Baker, 755 F.3d 515, 526 (7th Cir. 2014); *U.S. v. Poulin*, 745 F.3d 796, 802 (7th Cir.2014); and *U.S. v. Goodwin*, 717 F.3d 511, 524 (7th Cir. 2013).[5]

Courts across the country have been similarly critical of parole restrictions that interfere with the parent-child relationship, particularly where, as here, the restriction is imposed in the absence of evidence establishing that such a restriction is necessary to advance rehabilitative goals or protect children.

- ***U.S. v. Davis*, 452 F.3d 991 (8th Cir. 2006)**: The Court struck down a condition prohibiting a defendant convicted of child pornography from having unsupervised contact with his daughter because "[t]here is no evidence in the record that [the defendant] ... would try to abuse his daughter once released from prison." *Id*. at 995. The Court wrote: "[A] condition of supervised release that limits [the defendant's] access to his daughter is not reasonably necessary either to protect [his] daughter or to further his rehabilitation.... Because the condition at issue here would interfere with [the defendant's] constitutional liberty interest in raising his own child, the government may circumscribe that relationship only if it shows that the condition is no more restrictive than what is reasonably necessary." *Id*.

- ***U.S. v. Myers*, 426 F.3d 117 (2d Cir. 2005)**: A defendant who had convictions for child pornography and sexual misconduct with young children was prohibited from spending time alone with his son, absent advance authorization. The court found that while it was reasonable to restrict the defendant's contact with other children, the record did not show that the defendant was a danger to his own child and thus could not be deprived of contact with his child, absent an individualized showing that the deprivation

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[5] In *Baker*, the Court vacated a condition of supervised release that prohibited "unsupervised contact" between the defendant (who had been convicted of multiple sex offenses) and his own children because there was "no evidence that Baker has abused or attempted to abuse his own children, or that he is a danger to his own family." *Baker* 755 F.3d at 526. In *Poulin*, the Court vacated a term of supervised release that prohibited "unsupervised contact with minors, including [the defendant's] own son and family members" because the record lacked the necessary evidence to impose such a restriction. *Poulin*, 745 F.3d at 802. In *Goodwin*, the Court vacated a condition of supervised release prohibiting contact with minors without the supervision of an adult approved by the probation department "[b]ecause the district court has not provided any explanation of how this condition is reasonably related to [the defendant's] offense and background or to the goals of punishment, involving no greater deprivation of liberty than is reasonably necessary to achieve these goals." *Goodwin,* 717 F.3d at 524.

is narrowly tailored to meet the legitimate goals of advancing rehabilitation or protecting that child. *Id*. at 120, 128.

- ***U.S. v. Voelker*, 489 F.3d 139 (3rd Cir. 2006):** The court considered a ban on parent-child contact in a case where the defendant had offered his three-year-old daughter for sex online. Given a factual dispute about whether the defendant was simply "role-playing," the court remanded, and warned the district court to "proceed cautiously in imposing any condition that could impact [the defendant's] parental rights absent sufficiently reliable supporting evidence." *Id*. at 155. Even where the record suggested that the defendant might be capable of exploiting his own children, the court said that there must be sufficient evidence "to support a finding that children are potentially in danger from their parents" before a court could impose a parole restriction interfering with the parent-child relationship. *Id*.

- ***U.S. v. Wolf Child*, 699 F.3d 1082 (9th Cir. 2012)**: The court found that "a special condition of supervised release" which prohibited a person convicted of a sex offense "from residing with or being in the company of any child under the age of 18, including his own daughters … unless he had prior written approval from his probation officer" imposed in the absence of an "individualized examination of [the defendant's] relationship with the affected family members" was "substantively unreasonable" and violated the Fourteenth Amendment. *Id*. at 1088.

- ***Blair v. Gentry*, 2016 WL 5408003, 5:15-cv-02167 (N.D. Ala., August 26, 2016) (Putnam, J.)**: On a merits review of a *pro se* prisoner complaint, the court found that plaintiff stated a meritorious claim that a provision of the Alabama Sex Offender Registration and Community Notification Act that "expressly and affirmatively prohibits plaintiff from residing with his own minor daughter … even though there is no evidence that he is a danger to harm her" violated substantive due process.

D. The Policy Is Not Narrowly Tailored to Serve a Compelling Interest

While a state undoubtedly has a compelling interest in protecting minors from abuse, "a state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that the child has been abused or is in imminent danger of abuse." *Croft v. Westmoreland County Children and Youth Services*, 103 F.3d 1123, 1126 (3d Cir.

1997) (child abuse investigator should not have removed father from home without objectively reasonable basis to do so); see also, *Stanley v. Illinois*, 405 U.S. 645, 647-48 (1972) (finding no compelling interest was served by a statute that automatically terminated the parental rights of single, unwed fathers on the "presumption" that they were "unfit to raise their children"). If there is not sufficient evidence "to support a finding that children are potentially in danger from their parents, the state's interest cannot be said to be 'compelling,' and thus interference in the family relationship is unconstitutional." *U.S. v. Loy*, 237 F.3d at 269-70.

Plaintiffs do not contend that there are no circumstances under which the Department could show that a restriction on contact between a particular parent on parole for a sex offense and his or her minor child was necessary to advance a compelling interest. For example, the state could potentially establish that a compelling interest justifies interference in the parent-child relationship if a parent sexually abused or exploited her own child. But the Department cannot establish a compelling interest served by imposing a blanket policy that treats all persons required to register as sex offenders identically. In fact, this policy causes substantial harm to children and threatens to destroy relationships between parents and their children. Ex. 2, Decl of Montoya, ¶10; Ex. 3, Decl of Edwards, ¶19; Ex. 4, Decl of Tyree, ¶12; Ex. 5, Decl of Frazier, ¶15.[6]

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[6] Likewise, the policy cannot be said to serve the state's interest in rehabilitation because the challenged policy actually undermines Plaintiffs' rehabilitation. The restrictions deny the Plaintiffs the opportunity to be responsible and engaged parents and to live with their loving and supportive families—activities that would foster their success on MSR. National research demonstrates that family support is critical to successful reentry. See Urban Institute, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, 20

Even if the Department could establish a compelling interest served by its policy, the restriction would still fail constitutional scrutiny because it is not appropriately tailored. This is so in two respects. First, the Department does not make any effort to tailor the restrictions to the circumstances of the individual parolee. For example, Plaintiff Frazier, who has never harmed her children and who was allowed to reside with her children for months after her conviction, is subject to restrictions identical to those imposed on parolees who sexually abused their own children. Second, the policy fails a narrow tailoring analysis because the Department has made no effort to consider less onerous restrictions that would serve its interests in protecting children from abuse without completely severing parent-child relations (*i.e.*, allowing supervised visitation, phone calls and letters, if there is reason to believe a child would be endangered by unsupervised visits). Rather, the Department applies an extraordinarily harsh rule prohibiting all contact between parolees and their children—including supervised and unsupervised visits and all interactions by mail, phone, or through a third party.

(2001) ("[S]trong family involvement or support was an important indicator of successful reintegration across the board. Returning prisoners who indicated that their families or friends were supportive of their efforts to rebuild their lives had lower levels of drug use, greater likelihood of finding a job, and less continued criminal activity."); 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"). Because of the "connection between the stability of family networks and a returning prisoner's outcomes," it is counterproductive to limit a parolee's contact with her family, absent evidence that that family contributes to the individual's criminality. 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).

E. Plaintiffs Are Entitled to Procedural Due Process Before Being Deprived of a Fundamental Right

As the Supreme Court has long instructed, "[t]he essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*,424 U.S. 319, 348-49 (1976) (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)). Under the *Mathews* test, "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)).

It is well established that parental rights to custody of their children cannot be denied without providing the parent an opportunity "to be heard at a meaningful time and in a meaningful manner." *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000) (citing *Mathews v. Eldridge*, 424 U.S. at 333). Similarly, "a child's right to be nurtured by his parents cannot be denied without an opportunity to be heard in a meaningful way." *Id*. The Seventh Circuit has explained that, while the amount of process due before an interference with parental rights will vary based on the "particular situation," it requires "minimally" that governmental officials will

not deprive a parent of custody without "an investigation and pre-deprivation hearing resulting in a court order of removal, absent exigent circumstances." *Id*. (citing *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir.1997)).

The Court went on to explain that in "extraordinary circumstances" when a child's safety is imminently threatened, the government may be justified in removing a child from his parent's custody for a short period of time without a pre-deprivation hearing, provided that post-deprivation process is made available "promptly." *Id*. at 1020–21. But in such situations, "the constitutional requirements of notice and an opportunity to be heard are not eliminated, but merely postponed." *Id*. at 1021 (citing *Weller v. Department of Soc. Serv.,* 901 F.2d 387, 393 (4th Cir.1990). Thus, due process guarantees that the post-deprivation judicial review of a child's removal from his parent's custody be "prompt and fair." *Id*. See also, *e.g.*, *Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir.1998) (procedural due process guarantees prompt and adequate post-deprivation judicial review in child custody case); *Jordan by Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) ("the requirements of process may be delayed where emergency action is necessary to avert imminent harm to a child provided that adequate post-deprivation process to ratify the emergency action is promptly accorded.").[7]

[7] An Illinois statute (750 ILCS 50/0.01, *et seq*.) sets forth in detail the procedure that must be followed before parental rights can be terminated in the state. The law calls for the filing of a "petition to terminate parental rights." During proceedings to terminate parental rights both parent and child are entitled to counsel. The petitioning party that seeks to terminate a parents' rights must prove by "clear and convincing evidence" that the parent is "unfit" based on criteria set forth in the statute. And the parent has an opportunity to appear, present evidence on her behalf, and to rebut the claims of unfitness.

The fact that a person has been convicted of a crime does not suspend the requirements of due process before the state can interfere with her fundamental right to the custody of her children; nor does the mere fact that a person is on parole justify a suspension of parental rights without due process. See, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

1. The Department's Policy Denies Parolees Due Process

By its very terms, the Department's policy denies parolees access to any process whatsoever before they are cut off from contact with their children. Ex. 1, Parole School Handout. ("Sex offenders are not allowed to live with or have contact with children.") While the Department claims that it provides "a process" for someone to seek contact with her children after her release "[i]f at some point the offender is doing well on parole," (*id.*) this process is inadequate for numerous reasons, including the following:

- The Department deprives parolees of their fundamental right to parent-child relationships based on a presumption that all persons required to register as sex offenders are dangerous to their own children. The Department imposes these restrictions without undertaking any individualized assessment of whether a particular parolee poses a danger to her own child and without taking into account the particular characteristics of the parolee, the nature of the offense, or the identity of the victim;

- Parolees are given no pre-deprivation notice and opportunity to contest imposition of restrictions on their parental rights;

- The Department has no set criteria for granting a parolee's request for restoration of her parental rights and provides no clear process for a parolee to follow; and
- The Department sets no time frame in which the Department must consider a parolee's request for restoration of contact with her children.

The evidence establishes that, in practice, there is nothing "prompt" about the Department's process for considering restoration of contact between parolees and their children. After her release, Frazier requested that she be allowed contact with her daughter, but her parole agent told her that it is unlikely that the Department will even consider her request before her daughter turns 18, which is seven months from now. Ex. 5, Decl of Frazier, ¶12.

2. Allowing Parolees to Seek a 'Court Order' Allowing them to Have Contact with their Children Does Not Satisfy the Requirements of Due Process

As explained above, Plaintiffs Montoya and Edwards were told that the IDOC would consider allowing them visitation with their children if they obtained a "court order." It is unclear whether this is Department policy or simply the statement of individual Department employees. Assuming *arguendo* that it is Department policy to allow a parolee on MSR for a sex offense to have contact with her child if she obtains a court order, such a policy does not satisfy due process.

First, under well-established law, the onus is not on a parent to obtain an order allowing her to have a custodial relationship with her child. Rather, the burden is on the government official that seeks to deprive a parent of custody to prove that the parent is "unfit" and obtain a court order permitting the separation of parent and child. See, *Brokaw*, 235 F.3d at 1020 (citing *Santosky*, 455 U.S. at 753); 750

ILCS 50/0.01, *et seq*. (requiring that parental unfitness be established in an adversarial proceeding by "clear and convincing evidence"). The Department's policy turns this standard on its head.

Second, under Illinois law, criminal courts do not set the conditions that a defendant will have to adhere to while on MSR, and thus they lack the authority to enter an order pertaining to whether a parent should have contact with her child while on MSR. Pursuant to 730 ILCS 5/5-8-1(d), sentencing judges set only the length of the MSR term.[8] Illinois law vests responsibility for setting the conditions of MSR with the PRB. See, 730 ILCS 5/3-3-7(a); (a)(15) (setting forth that the PRB sets the conditions of MSR and the IDOC can give the parolee any instructions consistent with those conditions). Accordingly, the Department lacks a basis to instruct parolees to obtain a "court order" allowing them to have contact with their children because courts do not set the conditions of MSR.

Third, even if it was permissible for the Department to require a parolee to obtain a court order before allowing her to have contact with her children, the Department imposes this requirement in a way that deprives Plaintiffs and other similarly situated parolees of due process. As explained above, Plaintiff Montoya obtained an order from her sentencing judge stating that she should be allowed contact with her minor daughter. But even with this order, the Department has stated that it will still prohibit her from contacting her daughter until her counselor

[8] The federal criminal code, in contrast, vests District Courts with the authority to determine both the length of supervised release (within the sentencing guidelines) and the conditions of supervision. 18 U.S.C. §3583.

and parole agent develop a "safety plan." Ex. 6, Williams-Schafer Letter. The criteria for establishing such a plan are unknown, as is the timeline for when such a plan will be put in place. Moreover, the Department will not allow Montoya to live with her daughter unless a therapist decides she presents "no risk" of committing an offense against a child. *Id*. This condition is impossible to meet. (No one—not even people who have never been convicted of a crime—presents "no risk" of committing an offense. See, R. Karl Hanson, *et al*., Psychology, Public Policy, and Law, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, Vol. 24 at 49 (2018) ("A recent review of 11 studies from diverse jurisdictions … found a rate of spontaneous sexual offenses among people who had never committed a sex offense in the past was between 1 to 2 percent range after 5 years."); see also Ex. 2 at 4 ("We are not ever able to give someone … a 'no risk' classification that is predictive of the future."))

For all of the reasons set forth above, Plaintiffs are entitled to preliminary injunctive relief because they have a likelihood of success on the merits of their Fourteenth Amendment claims.

III. Plaintiffs Are Suffering Irreparable Harm, and Any Harm to the Defendant's Interests Will Be Minimal

In addition to establishing a likelihood of success on the merits of their claim, Plaintiffs lack an adequate remedy at law and will suffer irreparable harm in the absence of a temporary restraining order and preliminary injunction.

Robin Frazier and T.G. are entitled to an immediate temporary restraining order because they suffering ongoing irreparable harm. Their contact is completely

cut off. Courts have observed that because "[c]hildren and parent-child relationships are particularly vulnerable to delays," unwarranted separation of parents and children constitutes irreparable harm, justifying injunctive relief. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 257 (E.D.N.Y. 2002), vacated in part on other grounds, 2004 U.S. App. LEXIS 24601 (2d Cir., Nov. 29, 2004) (irreparable harm found where children separated from parents without due process based on presumed unfitness of parents who were domestic violence victims). "Even 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." *Id*.; see also *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. N.Y. 1984) (citing 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2948, at 440 (1973) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.")).

Plaintiff Edwards is suffering irreparable harm because she remains imprisoned solely because of the challenged policies. She is eligible for release on MSR and has a place to live outside of prison. But she has chosen to remain in prison because the Department will not allow her to see, communicate with, or live with her child if she is released.

Plaintiffs Tyree and Montoya will suffer irreparable injury in the absence of an injunction because they are unable to make plans for their parole due to the Defendant's policies. Tyree was told she should have already proposed host sites for

her MSR, but she is unable to do so because she has decided to stay in prison during her MSR if the Department will not allow her to have contact with her children. Ex. 4, Decl of Tyree, at ¶ 15. Likewise, Montoya is unable to proceed with making a parole plan due to the Department's policies. If Montoya will not be allowed to live with her daughter and husband, her family will have to make alternative arrangements (including saving money to buy or rent a separate place for Montoya to live) .

While the Plaintiffs are suffering severe harm, any possible harm to the Defendant will be minimal. The Department simply needs to make narrowly tailored individualized determinations about contact between parents and their children, as the Constitution requires. Moreover, the public interest is well served by the issuance of an injunction. The public has a powerful interest in protecting constitutional rights that would be well served by granting injunctive relief here. See, *ACLU v. Alvarez*, 679 F.3d 583, 589-90 (7th Cir. 2012) ("[T]he public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional.")

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant a temporary restraining order and 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,

/s/ Adele D. Nicholas
/s/ Mark G. Weinberg
Counsel for Plaintiffs

Law Office of Adele D. Nicholas
5707 W. Goodman Street
Chicago, Illinois 60630
847-361-3869

Law Office of Mark G. Weinberg
3612 N. Tripp Avenue
Chicago, Illinois 60641
773-283-3913