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

JASON TUCKER and DANIEL BARRON, individually and on behalf of all similarly situated individuals,	)	18 cv 3154
Plaintiffs,	)	
v.	)	
JOHN BALDWIN, in his official capacity as Director of the Illinois Department of Corrections,	)	Judge Lee Magistrate Judge Martin
Defendant.	)	

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Pursuant to Fed. R. Civ. Pro. 65, Plaintiffs respectfully move this Court for entry of a preliminary injunction prohibiting the Illinois Department of Corrections ("the Department") from continuing to enforce its unconstitutional policy prohibiting all individuals who are required to register as sex offenders having access to the Internet while on mandatory supervised release ("MSR"). Plaintiffs do not challenge the ability of the Department to impose restrictions on Internet access in appropriate cases. Rather, Plaintiffs challenge the lack of procedural fairness in how the Department imposes such restrictions.

FACTUAL BACKGROUND

Nature of the Case

The Department has an official policy whereby it prohibits individuals who are required to register as sex offenders from having access to the Internet while on MSR even if their crime had no relation to use of the Internet. Plaintiffs Jason Tucker and Daniel Barron are subject to the challenged restrictions. Plaintiffs, individually and on behalf of a class of similarly situated parolees, allege that the policy violates their rights under the First and Fourteenth Amendment of the United States Constitution and seek class-wide injunctive and declaratory relief.

The Challenged Policy

Illinois law gives the Department discretion to decide whether individuals on MSR who are required to register as sex offenders can access the Internet. In particular, 730 ILCS 5/3-3-7 (b)(7.6)(i) provides that people required to register as

sex offenders, if convicted for an offense committed on or after June 1, 2009, must "not access or use a computer or any other device with Internet capability *without the prior written approval of the Department*" (emphasis added) while on parole or mandatory supervised release. In accord with this statute, the Prisoner Review Board (the "PRB"), an independent body responsible for setting parole conditions and determining parole eligibility, imposes the following MSR condition for people required to register as sex offenders: "You shall not possess, access, or use computer or any other device with internet capability without prior written approval of an agent of the Department of Corrections." Ex. 1, Condition No. 27.

This case challenges the Department's exercise of the discretion it has been granted. The Department severely and unnecessarily burdens the First Amendment rights of Plaintiffs and all others similarly situated by imposing a blanket policy prohibiting parolees released on MSR for sex offenses from having access to the Internet, except under rare exceptions. As a rule, the Department refuses to consider individual parolee's requests for variances from this policy. An individual who is on MSR for a sex offense faces the possibility of criminal sanctions and re-incarceration if he or she attempts to access the Internet. The Department also prohibits anyone who is required to register as a sex offender from residing at a host site where there is Internet access, computers and/or any other device with Internet capability while on MSR.

These policies are set forth in the Department's written materials in at least three places:

(1) The Department's Parole School handout, titled "Parole Requirements for Offenders with an Active Sex Offender Registry Requirement," which is distributed to all persons required to register as sex offenders who are preparing a parole plan in anticipation of release on MSR, provides in relevant part as follows:

> [Sex offenders are] [p]rohibited from having internet access of any type through a computer, Web TV, cell phone, personal digital assistant (PDA), or any other device without prior approval by the parole agent. Approval for internet access may only be made for employment and school related activities.

Ex. 2;

(2) The Department's "Sex Offender Supervision Unit Protocols," the manual setting forth the responsibilities of parole agents who supervise parolees who have been convicted of sex offenses, provides in relevant part as follows: (a) "Items prohibited in the prospective host site … [include] Computers, routers, internet related devices" Ex. 3 at 9; and "[Parolees] are prohibited from accessing any Internet server account without prior approval of your agent." *Id*. at 17.

(3) The Department's "Parole Instructions," which are distributed to all persons on parole for a sex offense, provide in relevant part as follows:

> There shall be no computers allowed in your residence. You are not allowed to have internet access of any type either by computer or web TV. If a computer is found in your residence, regardless of ownership, you will be violated and the computer and all of its peripherals will be confiscated and forensically examined by the FBI.

Ex. 4 at 1.

The Department allows parole agents to make limited exceptions to the ban on Internet access. In particular, "approval for internet access may only be made for employment and school related activities." Ex. 2 at 1. In practice, the Department's process for allowing parolees to seek access to the Internet is constitutionally flawed due to the lack of any procedural protections. This is so for at three reasons: (1) there are no criteria constraining the parole agent's discretion to decide whether to

allow Internet access; (2) there is no explanation of the steps a parolee must follow to seek access to the Internet; and (3) there is no time frame in which the Department must consider a parolee's request.

The Effects of the Policy

The Department's broad restriction on parolees' access to the Internet constitutes a serious infringement of their First Amendment rights. It severely inhibits parolees' ability to access information, communicate with others and renders nearly all the activities of life incalculably more difficult in the modern age. As the Supreme Court recognized in *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017), the Internet constitutes "what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.* at 1737.

The Department's no-Internet policy also has substantial effects on the First Amendment rights of parolees' families. As explained above, parolees who have committed sex offenses are prohibited from living at a host site that has Internet access and/or computers. As a result, family members who seek to provide a place for their loved ones to live must give up access to computers and other Internet-accessible devices in their own homes to assist their loved ones with housing.

Facts Pertinent to the Named Plaintiffs

Daniel Barron

Plaintiff Daniel Barron, 24, was convicted in May 2014 of Criminal Sex

Assault for an offense he committed in September 2012. Barron was sentenced to four years in prison at 85 percent and received an MSR term of three years to life. Ex. 5, Decl. of Barron, at ¶1–4. Barron's crime had nothing to do with the Internet or computers and did not involve a minor. *Id*. at ¶5. Barron was 18 years old at the time of his offense, when, during his second month as a freshman at Illinois State University in Normal, Illinois, he over-imbibed and inappropriately touched an adult woman while she was sleeping. *Id*. at ¶3.

Barron was incarcerated from August 2014 to December 11, 2017, when he was released to his parents' home in Downers Grove, Illinois, on MSR. *Id*. at ¶¶6-7. Barron currently resides at his parents' home and is employed full time at a sandwich shop. *Id*. at ¶8. The Department's Internet restriction places a severe burden on Barron in several ways, including following:

(1) Barron's efforts to find new employment are severely hampered due to his inability to look at job listings online;

(2) Barron is prohibited from visiting friends' and family members' homes because he is prohibited from going to any residence that has Internet access;

(3) Barron is prohibited from taking on-line courses, which he seeks to do, and from using a computer to write a paper in Microsoft Word; and

(4) Barron is cut off from news, information and entertainment sources that he seeks to use.

Id. at ¶9.

As a condition of Barron's release to his parents' home, his parents were also required to abide by the Department's Internet restriction in their home. This includes not having any personal computers in the home and/or other Internet-

enabled devices like a Smart TV. *Id*. at ¶10. The Department's restriction on Internet-capable devices in a parolee's home imposes a substantial burden on Barron's parents and other family members who live in the home with Barron. For example, Barron's mother, in anticipation of her son's arrival home from prison, had to take a day off of work to access and print out relevant information from the Illinois Department of Employment Security for Barron concerning "Reentry Illinois," a state program that provides parolees with information to assist them in meeting their parole needs. Such information otherwise would have been unavailable to Barron. In addition, Barron's mother, who is unemployed, is currently looking for a job but cannot search for a job from her home due to the Department's prohibition on computers in a parolee's home. *Id*. at ¶10.

Because Barron has an indeterminate term of MSR (*i.e.* "three years to life") his ability to access the Internet may be restricted indefinitely.

Jason Tucker

Plaintiff Jason Tucker, 40, was convicted of predatory criminal sexual assault of a minor in 2011 for an offense he committed in May of 2009. Tucker was sentenced to seven years in prison at 85 percent, plus an MSR term of three years to life. Ex. 6, Decl. of Tucker, ¶1–2. Tucker's crime had nothing to do with the Internet or with computers. *Id*. at ¶3.

On April 20, 2015, Tucker completed his prison sentence and became eligible for release on MSR. Due to the Department's Internet restriction, Tucker was forced to remain in prison for 31 additional months. *Id*. at ¶4-6. In particular, Tucker

sought to live with his mother, but the Department would not approve her house because it had Internet access. Tucker's mother was unable to give up access to the Internet because that is the only way she communicates with her other son who lives in New Zealand. Tucker's only other option for housing was a house owned by his friend's parents in Alton, Illinois, but this house was also denied due to its having Internet access (as well as having a dog). *Id*.

On November 28, 2017, Tucker was released from prison to an approved host site, a single-family home located in Alton, Illinois, where he presently lives alone. *Id*. at ¶7. He is employed full-time as a laborer at a warehouse. *Id*. at ¶8. The Department's Internet restriction places a severe burden on Tucker in several ways, including the following:

(1) Tucker's ability to find a new job is severely restricted because almost all jobs require applicants to apply on line. He has had to rely on his family and friends to fill out his job applications, which has resulted in inaccuracies on his resume and difficulties communicating with potential employers who seek to correspond with applicants via e-mail;

(2) Tucker's ability to communicate with his family has been severely restricted. In particular, Tucker cannot communicate via email and Facetime with his brother who lives in New Zealand and whom Tucker has seen only once in the past nine years;

(3) Tucker's attempts to apply for health insurance have been made much more time consuming and costly. Because he cannot access healthcare.gov, he was forced to take off a day of work to apply for his health insurance in person at the offices of a registered insurance agent;

(4) Tucker's access to news and media has been greatly restricted. He is unable to afford cable TV and thus his media options are limited to watching movies on DVD and listening to music on an MP3 player. Tucker is unable to learn about news stories that are important to him;

(5) Tucker cannot communicate with his lawyers, friends, family, support

groups, or government (*i.e.,* IRS, Illinois Department of Employment Security, and Department of Human Services) via email or the Internet;

(6) Tucker's ability to follow the developments in litigation related to his status as a registered sex offender is severely limited by his being prevented from downloading court documents from the Internet; and

(7) Tucker cannot download tax forms or manage his finances on line.

Id. at ¶9. Because Tucker has an indeterminate term of MSR (*i.e.*, "three years to life"), his ability to access the Internet may be restricted indefinitely.

ARGUMENT

To be entitled to 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 he will suffer irreparable harm if the injunction is not granted; and (4) the balance of hardships tips in his favor. *Ty, Inc. v. Jones Group, Inc*., 237 F.3d 891, 895 (7th Cir. 2001). As set forth below, Plaintiffs meet this standard and therefore request that the Court grant a preliminary injunction prohibiting the Department from continuing its unconstitutional policy.

I. Plaintiffs Are Likely To Succeed on the Merits of their Fourteenth Amendment Claims

As explained in full below, Plaintiffs have a substantial likelihood of success on their claim that the Department's policy prohibiting all parolees who have been convicted of sex offenses from having access to the Internet while on MSR violates their Fourteenth Amendment right to procedural due process.

Plaintiffs' argument below proceeds as follows: First, Plaintiffs show that the Department's blanket no-Internet policy infringes on their First Amendment rights.

Second, Plaintiffs discuss the standard of review applicable to parole conditions that burden fundamental rights. Third, Plaintiffs show that the Department's categorical, one-size-fits-all policy banning people on parole for sex offenses from accessing the Internet is at odds with due process requirements because it does not take into account the individual characteristics of the parolee; the nature of the parolee's offense; or whether the offense involved the use of a computer or the Internet. And fourth, Plaintiffs identify the due process protections that are necessary before the Department can deprive Plaintiffs and others similarly situated of their First Amendment right to access the Internet.

A. The Department's Policy Infringes Upon Plaintiffs' First Amendment Rights

The fundamental constitutional right under the First Amendment to speak and to receive information is well established. "Freedom of speech is not merely freedom to speak; it is also freedom to read." *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005). The Seventh Circuit has noted that the Internet is a "vast repository offering books, newspapers, magazines, and research tools" and thus "a total restriction [on a parolee's access to the Internet] rarely could be justified." *United States v. Scott*, 316 F.3d 733, 737 (7th Cir. 2003) (citing *United States v. Sofsky*, 287 F.3d 122, 126-27 (2d Cir.2002); *United States v. Peterson*, 248 F.3d 79, 82-84 (2d Cir.2001); and *United States v. White*, 244 F.3d 1199, 1206 (10th Cir.2001)). Accordingly, the Department's total ban on Plaintiffs' access to the Internet implicates fundamental First Amendment rights.

B. Standard of Review

The Seventh Circuit has held that parole conditions that impinge on constitutional rights are analyzed under the test set forth in *Turner v. Safley*. *Felce v. Fiedler*, 974 F. 2d 1484, 1494 (7th Cir. 1992) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). In *Turner*, the Supreme Court held that a prison regulation that impinges on constitutional rights is only valid if "it is reasonably related to legitimate penological interests," taking into account the following: (1) "whether there is a valid, rational connection between the regulation and the legitimate governmental interest put forward to justify it"; (2) whether alternative means of exercising the burdened constitutional right remain open; (3) the impact accommodation of the asserted constitutional right will have on "the allocation of prison resources"; and (4) "the existence or absence of ready alternatives" to the challenged restriction. *Felce*, 974 F.2d 1495, n.6 (citing *Turner*, 482 U.S. at 89–91).

The court noted that while *Turner* does not impose "a least restrictive alternative test," if a parolee "can point to an alternative that fully accommodates [his 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.*[1]

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[1] Similarly, when analyzing federal supervised release conditions, the Seventh Circuit has held that restrictions must be reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant, (2) deterring criminal conduct, (3) protecting the public from further crimes, and (4) providing the defendant with needed care or treatment. *U.S. v. Holm*, 326 F.3d 872, 876 (7th Cir. 2003) (citing 18 U.S.C. § 3553(a)(1)-(2)). In addition, "post-release conditions cannot involve a greater deprivation of liberty than is reasonably necessary to achieve" those goals. *Id.*

C. A Blanket Ban on Internet Access Imposed Without Regard to the Parolees' Individual Characteristics Cannot Withstand Scrutiny Under *Turner*

Plaintiffs do not contend that there are no circumstances under which the Department could properly restrict a parolee's access to the Internet. But a virtually blanket ban on access to the Internet imposed without regard to the individual characteristics of the parolee cannot survive constitutional scrutiny. A blanket ban lacks a "valid, rational connection" to rehabilitation, prevention of recidivism, or any other legitimate goal when applied to parolees such as Plaintiffs, whose offenses were unrelated to computers or the Internet. To the contrary, the Internet ban interferes with Plaintiffs' rehabilitation by hampering their ability to find work, participate in the community, stay abreast of the news, and maintain relations with friends and family—all activities that foster rehabilitation and reintegration. Moreover, as shown below, there are numerous alternatives to a blanket ban that could accommodate parolees' constitutional rights at a *de minimis* cost to valid penological interests.

1. The Internet Restriction Is Oftentimes Unrelated to the Parolee's Offense

The Department does not make any effort to tailor its Internet restriction to the circumstances of the individual parolee, and thus in many cases the condition bears no rational relation to the offense. The Plaintiffs, for example, did not use the Internet in conjunction with their crimes; did not meet their victims via the Internet; and did not communicate with their victims though the Internet. Due process dictates a more finely-tuned, individualized approach before restricting

First Amendment rights. This is not to say that the Department cannot restrict sex offender parolees' access to the Internet, only that it cannot do so without first making an individualized determination as to the rationality of imposing such a restriction on individual parolees.

Federal courts have generally evaluated the permissibility of comparable restrictions in light of whether a defendant's offense involved the use of computer/Internet technology. The Seventh Circuit has been highly critical of parole conditions that restrict parolees' Internet access where, as here, the restriction is imposed without a sufficient nexus between the restriction and the parolee's crime. For example, in *United States v. Holm*, 326 F.3d 872 (7th Cir. 2003), the Seventh Circuit vacated a special condition of parole barring Internet access for a defendant who had been convicted of receiving child pornography. *Id*. at 878. The *Holm* court cited numerous cases from other jurisdictions that "declined to uphold a total ban on Internet access by defendants convicted of receiving child pornography without at least some evidence of the defendant's own outbound use of the Internet to initiate and facilitate victimization of children." *Id*.; citing *United States v. Freeman*, 316 F.3d 386, 391-92 (3d Cir.2003) (vacating absolute Internet prohibition in absence of evidence that defendant had used Internet to contact children); *Sofsky*, 287 F.3d at 126-27 (vacating strict Internet prohibition where defendant pleaded guilty to only receipt of child pornography); *White,* 244 F.3d at 1205 (finding ban on all Internet and computer use to be "greater than necessary" to serve goals of supervised release where defendant had been convicted only of possession of child

pornography).

Similarly, in *United States v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009), the First Circuit struck down a total ban on the defendant's use of the Internet at home "where the defendant has no history of impermissible internet use and the internet was not an instrumentality of the offense of conviction." *Id*. at 69. The panel noted its accord with other courts:

> Our sister circuits have upheld broad restrictions on internet access as a condition of supervised release where (1) the defendant used the internet in the underlying offense; (2) the defendant had a history of improperly using the internet to engage in illegal conduct; or (3) particular and identifiable characteristics of the defendant suggested that such a restriction was warranted.... Conversely, in cases where there is an insufficient nexus with a defendant's conduct or characteristics, courts have vacated supervised release conditions restricting internet access.

Id. at 70–71 (citations omitted).

Here, the Department's decision to categorically restrict parolees' Internet access regardless of whether they actually employed a computer or used the Internet in the commission of their crimes constitutes a "greater deprivation of liberty than is reasonably necessary to deter illegal conduct and protect the public." *United States v. Love*, 593 F.3d 1, 12 (D.C.Cir. 2010) (quotations omitted). In the absence of any evidence that a parolee has misused the Internet in the commission of his crime or while on parole, the Department cannot categorically prohibit Internet access to sex offender parolees.

2. Less Onerous Restrictions Would Serve the State's Interests in Promoting Rehabilitation, Preventing Recidivism, and Protecting the Public

There are several alternatives to the Department's categorical ban. First, the Department could monitor parolees' use of the Internet via monitoring software. The use of Internet-monitoring software is an option explicitly granted to the Department under existing state law. 730 ILCS 5/3-3-7 (a) (7.1) (iii) (requiring people convicted of certain sex offenses to "submit to the installation … at the offender's expense, one or more hardware or software systems to monitor the Internet use.")

Second, the Department could narrow its total Internet ban to a ban on selected sites. Such a restriction would be in accord with the guidance offered by the Supreme Court in *Packingham* and the Seventh Circuit in *Holm* and *Scott*. In *Packingham*, the court held that North Carolina's ban on all registered sex offenders' accessing social media and social networking websites violated the First Amendment, finding that North Carolina restriction "unprecedented in the scope of First Amendment speech it burdens." 137 S.Ct. at 1737; see also *Id*. at 1741 (Alito, J., concurring) ("The fatal problem for [the law] is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child."). This was the case even though North Carolina's ban involved only social media and social networking websites and was thus significantly narrower in its scope than the total Internet ban at issue here.

Similarly, in *United States v. Holm*, 326 F.3d 872 (7th Cir. 2003), the Seventh

Circuit called a total prohibition on Internet access "a drastic measure" that amounted to the "21st century equivalent of forbidding all telephone calls, or all newspapers." *Id*. at 878-79. The court wrote as follows:

> [S]uch a ban renders modern life—in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website—exceptionally difficult. Various forms of monitored Internet use might provide a middle ground between the need to ensure that Holm never again uses the Worldwide Web for illegal purposes and the need to allow him to function in the modern world.

Id. at 877-78.

Likewise, in *United States v. Scott*, 316 F.3d 733 (7th Cir. 2003) the court vacated a sentence that imposed a parole condition prohibiting "access to any Internet Services without prior approval of the probation officer." Although the defendant in *Scott* had been found to have possessed child pornography, the court found that the absolute ban was unreasonably broad. The court urged the district court to consider less restrictive alternatives to a complete ban such as "requir[ing] Scott to install filtering software that would block access to sexually oriented sites, and to permit the probation officer unannounced access to verify that the filtering software was functional." See also *Id*. at 737 ("There is no need to cut off ... access to email or benign internet usage when a more focused restriction ... can be enforced by unannounced inspections of material stored on [the defendant's] hard drive or removable disks.") (citing *United States v. Freeman,* 316 F.3d at 392).[2]

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[2] Indeed, Illinois law provides that all people on MSR shall "consent to a search of his or her person, property, or residence under his or her control" as a condition of MSR. 730 ILCS 5/3-3-7(10). Likewise, people convicted of certain sex offenses must "consent to search

D. Under the Three-Part test of *Matthews v. Eldridge*, Plaintiffs Are Entitled to a Pre-Deprivation Hearing 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)). An analysis of these factors demonstrates that the Department must provide some process, including the opportunity to be heard by a neutral decisionmaker, before prohibiting Internet access.

1. A Fundamental Right Is At Stake

As to the first *Mathews* factor, there can be serious no dispute that interests at stake here involve fundamental First Amendment rights to speak and receive information. See supra at §I(A)

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of computers, cellular phones and other devices capable of accessing the internet or storing electronic files" as a condition of their parole. 730 ILCS 5/3-3-7 (7.9).

2. The Department's Policy Presents a Serious Risk of Erroneous Deprivations

As to the second *Mathews* factor, the risk of an erroneous deprivation under the Department's current policy is great. By its very terms, the Department's policy denies parolees access to any process whatsoever. See, Ex. 1, Parole School Handout ("[Sex offenders are] [p]rohibited from having internet access of any type through a computer, Web TV, cell phone, personal digital assistant (PDA), or any other device without prior approval by the parole agent. Approval for internet access may only be made for employment and school related activities.") The Department imposes this policy without taking into account the individual characteristics of the parolee and without reliance on any evidence concerning whether the parolee has a history of misusing the Internet. Likewise, the Department vests parole agents with total discretion to decide whether to allow Internet access. The parole agents' decisions are unconstrained by any criteria, and a parolee has no opportunity to contest the restrictions.

In *United States v. Scott*, the Seventh Circuit expressed serious concern about vesting a parole officer with unconstrained discretion to make decisions about whether a parolee should be allowed to access the Internet.

> Courts should do what they can to eliminate open-ended delegations, which create opportunities for arbitrary action—opportunities that are especially worrisome when the subject concerns what people may read. Is the probation officer to become a censor who determines that Scott may read the New York Times online, but not the version of Ulysses at Bibliomania.com? Bureaucrats acting as guardians of morals offend the first amendment as well as the ideals behind our commitment to the rule of law. The rule of law signifies the constraint of arbitrariness in the exercise of government power.... It means that the agencies of

> official coercion should, to the extent feasible, be guided by rules—that is, by openly acknowledged, relatively stable, and generally applicable statements.... The evils to be retarded are caprice and whim, the misuse of government power for private ends, and the unacknowledged reliance on illegitimate criteria of selection. The goals to be advanced are regularity and evenhandedness in the administration of justice and accountability in the use of government power.

Id. at 736. The *Scott* court was also highly critical of the decision to impose this restriction without providing prior notice. *Id*. ("Scott is entitled to a new proceeding, at which he can offer alternatives to a flat ban [on internet access].") See also, *Felce*, 974 F.2d at 1486-88 (finding that a prisoner was entitled to due process before being required to take antipsychotic drug injections as a condition of his parole and that the decision to require the parolee to receive the injections could not be rendered by his parole agent and an examining psychiatrist."); *Hadley v. Buss*, 385 Fed. Appx. 600, 603 (7th Cir.2010) (holding that due process requires "that a prisoner receive written notice of the charges at least 24 hours in advance of the hearing; an opportunity to present testimony and evidence to a neutral decisionmaker; and a written explanation supported by some evidence in the record" before "good time credits" could be taken away for failure to participate in therapy). Similar procedural protections are warranted here to appropriately balance Plaintiffs' rights and the Department's interests.

3. Providing Due Process Would Not Compromise the Department's Interests

As to the third *Mathews* factor, the Department's interests in preventing crime and promoting rehabilitation are of course important. However, absent specific evidence that a parolee is likely to use the Internet in commission of

criminal conduct, the Department's interest in imposing an absolute ban on Internet use cannot be said to be compelling.

Accordingly, based on the three-part *Mathews* test, if the Department seeks to prohibit a parolee from accessing the Internet and/or having Internet-accessible devices in the home, it should afford a parolee a hearing concerning the need for this condition. At a minimum, a parolee should have an opportunity to present evidence and rebut evidence presented against him or her; and the decision about whether Internet access should be restricted should be rendered by a neutral decision-maker rather than by a parole agent.

As for the fiscal or administrative burden that providing procedural due process would entail, the Department already has in place the infrastructure to provide the process that Plaintiffs request. The Prisoner Review Board conducts monthly hearings at every IDOC facility concerning parole conditions, revocations and other related matters. See, Illinois Prisoner Review Board, Operations and Hearing Information (available at: https://www2.illinois.gov/sites/prb/Pages/Operations.aspx).

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 procedural due process claim.

II. 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 a preliminary injunction. The Supreme Court and other federal courts have all held that a showing of a colorable First Amendment speech claim is sufficient to satisfy the irreparable injury requirement for a preliminary injunction. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Plaintiffs Tucker and Barron are both suffering irreparable harm because they remain subject the challenged policies.

At the same time, any possible harm to the Defendant will be minimal; they simply need to provide individualized determinations about the necessity of banning Plaintiffs from having access to the Internet, 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 is 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 preliminary injunction enjoining Defendant from continuing to enforce its unconstitutional policies prohibiting individuals who are on MSR for sex offenses from having access to the Internet and grant such additional and further relief as the Court deems just and proper.

Respectfully submitted,

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