

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION**

Julia Amos, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 2:14-cv-4011 GAF
	)	
Michele Higgins,	)	
	)	
Defendant.	)	

**SUGGESTIONS IN SUPPORT OF MOTIONS FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

**I. Introduction**

Plaintiffs have moved for entry of a temporary restraining order and preliminary injunction enjoining the statutory requirement that a marriage license application be signed in the presence of a recorder of deeds or her deputy when an applicant, like each Plaintiffs' fiancé, is incarcerated and, thus, unable to appear. Plaintiffs ask this Court to require Defendant and her officers, agents, servants, and employees, to issue marriage licenses to Plaintiffs without requiring each Plaintiff's incarcerated fiancé to appear before her or her deputy upon receiving such alternate assurance of identity of the applicant as this Court deems appropriate. In the alternative, Plaintiffs seek an order requiring Defendant to travel to Tipton Correctional Center, or send a deputy, to witness the signature of each Plaintiff's respective fiancé on a marriage license application.

**II. Background**

Plaintiffs are both unmarried women who reside in Missouri. *Affidavit of Julie Amos* (Ex. A) at ¶¶ 2-3; *Affidavit of Wendy Downing* (Ex. B) at ¶¶ 2-3.12 Plaintiffs are over the age of eighteen. Ex. A at ¶ 1; Ex. B at ¶ 112. Plaintiffs are engaged to be married to inmates in the custody of the Missouri Department of Corrections. Ex. A at ¶ 5; Ex. B at ¶ 5. Plaintiffs' fiancés

are men. Ex. A at ¶ 6; Ex. B at ¶ 6. They, too, are over the age of 18. Ex. A at ¶ 6; Ex. B at ¶ 6. Each Plaintiff is not related to her respective fiancé. Ex. A at ¶ 6; Ex. B at ¶ 6.

Plaintiffs' fiancés are currently incarcerated at the Tipton Correctional Center. Ex. A at ¶ 5; Ex. B at ¶ 5. The Missouri Department of Corrections allows marriages to be solemnized on two dates each year at each facility. At Tipton, marriages are scheduled for the last Monday in February and the last Monday in August. *Affidavit of Chaplain Jim Hogue* (Ex. C) at ¶ 9. Plaintiffs are scheduled to be married at Tipton on February 24, 2014. *Id.*

Before she can be married, each Plaintiff is required to obtain a marriage license. Missouri law criminalizes the solemnization of any marriage unless a marriage license has been issued. Mo. Rev. Stat. § 451.120. What is more, a marriage solemnized without a license is not recognized as valid. Mo. Rev. Stat. § 451.040.1. This is where Defendant scuttles Plaintiffs' planned nuptials.

Missouri law requires both applicants for a marriage license to sign the application "in the presence of the recorder of deeds or their [*sic*] deputy." Mo. Rev. Stat. § 451.040.2. Plaintiffs' fiancés are in custody twenty-four hours each day. They are not at liberty to leave the facility. Thus, each Plaintiff's ability to wed the person of her choice is contingent on the Recorder of Deeds accommodating her right to be married in some fashion. Defendant refuses to travel to the location where Plaintiffs' fiancés are incarcerated, or send a deputy, and refuses to do so in the future. Ex. C at ¶ 8; *Affidavit of Grant R. Doty* (Ex. D) at ¶ 5.

In two separate Missouri counties, this problem has been remedied by a court holding the statute unconstitutional as applied. For instance, in Cole County, an injunction provides that:

[U]pon reasonable written proof of as to the authenticity of the signature of an incarcerated applicant on a marriage license application, upon reasonable written proof of the fact that one or both of the marriage license applicants is incarcerated at the time

the application is completed, and upon receipt of all fees and other documents required for the issuance of a marriage license under the laws of the State of Missouri, [the Cole County Recorder of Deeds], his successors in office, and their deputies, officers, agents, servants, and employees, are hereby required to issue marriage licenses to any such individual without requiring any such incarcerated applicant to execute or sign a marriage license application in the presence of the Recorder of Deeds for the County of Cole, State of Missouri or any deputy of that official.

*Fuller v. Norman*, 936 F.Supp.2d 1096, 1097 (W.D. Mo. 2013). Similarly, in Washington County, an injunction provides that:

[U]pon reasonable written proof as to the authenticity of the signature of an incarcerated applicant on a marriage license application, upon reasonable proof of the fact that one or both of the marriage license applicants is incarcerated at the time the application is completed, and upon receipt of all fees and other documents required for the issuance of a marriage license under the laws of the State of Missouri, [the Washington County Recorder of Deeds], her successors in office, and their deputies, officers, agents, servants, and employees are hereby required to issue marriage licenses to any such individual without requiring any such incarcerated applicant to execute or sign a marriage license application in the presence of the Recorder of Deeds for the County of Washington, State of Missouri or any deputy of that official.

*Nichols v. Moyers*, 4:13CV735 CDP, 2013 WL 2418218, \*2 (E.D. Mo. June 3, 2013). Defendant refuses a similar accommodation here absent a court order. Ex. C at ¶ 7; Ex. D at ¶ 9.

Absent an injunction, each Plaintiff will remain unmarried because of a statute that has been declared unconstitutional as applied to these very circumstances. If Plaintiffs are unable to secure a marriage license soon, then there will be inadequate time to obtain security clearances for a February wedding.

### **III. Argument**

The Eighth Circuit has consistently held that in considering whether to issue a preliminary injunction, courts should weigh (1) the probability that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between such harm and the injury that granting the injunction will inflict on the other interested parties; and (4) whether the issuance of an injunction is in the public interest. *Dataphase Sys. v. C L Sys. Inc.*, 640 F.2d 109, 114 (8th Cir. 1981); *accord Lane v. Lombardi*, 2:12-CV-4219-NKL, 2012 WL 5873577, \*1 (W.D. Mo. Nov. 15, 2012). The standard for a temporary restraining order is the same as the standard for a preliminary injunction. *See Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991).

This Court should grant Plaintiffs' requests for a temporary restraining order and a preliminary injunction because they are likely to succeed on the merits, each Plaintiff is irreparably harmed by the statute's requirement that her fiancé appear before the Recorder of Deeds, there will be no harm to Defendant, and the public interest favors the preservation of constitutional rights.

#### **A. Likelihood of Success on the Merits.**

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citations omitted); *see also Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (reaffirming that the right to marry is fundamental). "[T]he designation of 'marriage' itself ... expresses validation, by the state and the community, and ... serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly

important.” *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012).<sup>1</sup>

The fundamental nature of Plaintiffs’ right to marry is not altered by the fact that their fiancés are incarcerated. “[T]he decision to marry is a fundamental right” and it survives despite a party to the marriage being incarcerated. *Turner v. Safley*, 482 U.S. 78, 95 (1987). There can be no distinction between actively prohibiting the exercise of the right to marry and action that completely frustrates the right. *See Toms v. Taft*, 338 F.3d 519, 527 (6th Cir. 2003). Application of the challenged statute here operates to completely frustrate Plaintiffs’ right to marry.

Where a statute significantly interferes with the exercise of a fundamental right, “it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki*, 434 U.S. at 388. “Legislation infringing a fundamental right must survive strict scrutiny—the law must be narrowly tailored to serve a compelling state interest.” *Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012)(internal quotations omitted).

Missouri law criminalizes the solemnization of any marriage unless a marriage license has been issued. Mo. Rev. Stat. § 451.120. A marriage solemnized without a license is not recognized as valid. Mo. Rev. Stat. § 451.040.1. “Before applicants for a marriage license shall receive a license, and before the recorder of deeds shall be authorized to issue a license, the parties to the marriage shall present an application for the license, duly executed and signed in the presence of the recorder of deeds or their deputy.” Mo. Rev. Stat. § 451.040.2.

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<sup>1</sup> In addition to being deprived of the right to marry, the inability of Plaintiffs to marry deprives them of the benefits of federal and state law accorded to persons who are married, including, by way of example only, the right to make funeral arrangements for one’s spouse (Mo. Rev. Stat. § 194.119), give consent to experimental treatment, tests, or drugs on behalf of a spouse who is unable to consent (Mo. Rev. Stat. § 431.064), eligibility for social security survivor benefits, take leave to care for a spouse under the Family and Medical Leave Act, and the marital exemption from the federal estate tax (26 U.S.C. § 2056(a)).

The requirement that all parties to the marriage be present before the Recorder of Deeds or her deputy, as applied where one or both parties to the prospective marriage is incarcerated, makes it impossible for each Plaintiff to be married to the person of her choice. Plaintiffs' fiancés are inmates confined to the Tipton Correctional Center. They may not leave the Tipton Correctional Center. Defendant chooses not to go to the Tipton Correctional Center or send a deputy to witness the application of Plaintiffs' fiancés.

This is not a facial challenge. Even assuming, *arguendo*, that in many of its applications the in-the-presence-of-the-Recorder requirement of § 451.040.2 does not completely frustrate the right to marry, it does so as it is applied here. Each Plaintiff cannot be married to the individual of her choice in Missouri because it is impossible for Plaintiffs and their respective fiancés to comply with § 451.040.2.

The State of Missouri can advance any interests furthered by § 451.040.2's requirement without preventing Plaintiffs' marriages. In Hawaii, for instance, "[a]n inmate's fiancée may pick up a marriage license and an affidavit from the clerk's office and take the documents to the prison, where they can be signed in front of a notary. The inmate's fiancée would then return the signed documents to the clerk's office." *Aliviado v. Kimoto*, CIV. 12-00259 SOM, 2012 WL 3202222, \*12 (D. Haw. Aug. 2, 2012)(citation omitted). In Tennessee, if "either individual [applying for a marriage license] be incarcerated, the inmate shall not be made to appear but shall submit a notarized statement containing the name, age, current address and a name and address of the individual's parents, guardian or next of kin." Tenn. Code Ann. § 36-3-104. In North Carolina, "[i]f an applicant for a marriage license is over 18 years of age and is unable to appear in person at the register of deeds' office, the other party to the planned marriage must appear in person on behalf of the applicant and submit a sworn and notarized affidavit in lieu of

the absent applicant's personal appearance.” N.C. Gen. Stat. Ann. § 51-8.2. In Texas, “[i]f an applicant is unable to appear personally before the county clerk to apply for a marriage license, any adult person or the other applicant may apply on behalf of the absent applicant.” Tex. Fam. Code Ann. § 2.006(a); *see also id.*(b)(stating requirements). Kansas requires the presence of only one applicant. Kan. Stat. Ann. § 23-2505; *see also* Fla. Stat. Ann. § 741.04 (affidavit, not presence, required); Md. Code Ann., Fam. Law § 2-402 (one party must appear in person). As applied in this case, the statutory requirement that Plaintiffs’ fiancés appear in the presence of the Recorder of Deeds or her deputy before Plaintiffs can be married prevents Plaintiffs from being married. In the circumstances of an incarcerated party to a marriage license application, § 451.040.2 is not narrowly tailored to serve a compelling government interest. Any interest can be satisfied by allowing Plaintiffs’ fiancés to complete their license application before a notary public rather than the Recorder of Deeds. Thus, Plaintiffs are likely to succeed on their as-applied challenge to § 451.040.2’s requirement that both parties to a marriage license application must sign the application in the presence of the Recorder of Deeds or her deputy.

In this case, the likelihood of Plaintiffs’ success on the merits is strengthened by the fact that two courts have recently considered this precise issue on the merits and declared § 451.040.2 unconstitutional as applied. *See Nichols v. Moyers*, 4:13CV735 CDP, 2013 WL 2418218 (E.D. Mo. June 3, 2013); *Fuller v. Norman*, 936 F.Supp.2d 1096 (W.D. Mo. 2013). There is no reason to expect a different result in this case.

#### **B. The Irreparable Harm to Plaintiff**

The second factor to consider in determining whether to issue a temporary restraining order and preliminary injunction is the threat of irreparable harm to the movant. *Dataphase*, 640 F.2d at 114.

Plaintiffs cannot be married on February 24, 2014, if Defendant does not issue a marriage license soon. The deprivation of the marriage constitutes irreparable harm to Plaintiffs and their respective fiancés. “[I]nmate marriages, like others, are expressions of emotional support and public commitment.” *Turner*, 482 U.S. at 95. “[F]or some inmates and their spouses...the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.” *Id.* at 96.

“It has been recognized by federal courts at all levels that a violation of constitutional rights constitutes irreparable harm as a matter of law.” *Cohen v. Cohama County, Miss.*, 805 F.Supp. 398, 406 (N.D. Miss. 1992). *See also Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir. 1977) (a showing that a law interferes with the exercise of constitutional rights supports a finding of irreparable harm). “[T]he violation of a fundamental constitutional right constitutes irreparable harm, even if temporary.” *Jones ‘El v. Berge*, 164 F.Supp.2d 1096, 1123 (W.D. Wis. 2001).

Irreparable harm has been found in the exact circumstances of this case. *Fuller*, 936 F. Supp. 2d at 1098; *Nichols*, 2013 WL 2418218 at \*2.

### **C. Balance of Harms**

The third factor to consider in determining whether to issue a temporary restraining order and an injunction is the balance of the threat of irreparable harm to the Plaintiffs and the injury that granting the temporary restraining order and injunction will inflict on other interested parties. *Dataphase*, 640 F.2d at 114.

There will be no harm to Defendant that outweighs the irreparable harm to Plaintiffs of continuing to deny each Plaintiff’s constitutional right to marry her fiancé. This factor weighs in favor of entry of a temporary restraining order and a preliminary injunction unless Defendant can



demonstrate some harm from entry of a temporary restraining order and an injunction. *See Sambo v. City of Troy*, No. 4:08-CV-01012(ERW), 2008 WL 4368155 (E.D. Mo. Sept. 18, 2008). Defendant cannot demonstrate any harm that will occur to her.

Courts have found that the balance of harms favors entry of an injunction in these circumstances. *Fuller*, 936 F. Supp. 2d at 1098; *Nichols*, 2013 WL 2418218 at \*2.

#### **D. Public Interest**

It is in the public interest to grant a temporary restraining order and a preliminary injunction. “[I]t is always in the public interest to protect constitutional rights.” *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 902 (W.D. Mo. 2012) (quoting *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) *overruled on other grounds by Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012)). It is in the public interest that the government not be permitted to prevent any adult from marrying the person of her choice. “[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates. ... Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner*, 482 U.S. at 84.

Courts have held that the public interest favors an injunction in these circumstances. *Fuller*, 936 F. Supp. 2d at 1098; *Nichols*, 2013 WL 2418218 at \*2.

#### **IV. Conclusion**

For the foregoing reasons, Plaintiffs request this Court issue a temporary restraining order and a preliminary injunction directing Defendant, her agents, servants, employees, and attorneys to accept the application for marriage executed by Plaintiffs’ fiancés in the presence of a notary public and treat that application in the same manner as if they had been executed in her presence

or the presence of her deputy, or provide such other injunctive relief as is appropriate and will allow Plaintiffs and their respective fiancés to secure a marriage license.

Respectfully submitted,

/s/ Anthony E. Rothert

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Certificate of Service

I certify that a copy of the foregoing was served upon defendants by placing the same in the First Class mail addressed as set forth below on January 14, 2014:

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In addition, a courtesy copy was email to Defendant at her request and sent by facsimile to Defendant's attorney.

/s/ Anthony E. Rothert