UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

GENA FULLER, et al., Plaintiffs,	)	
v.	)	No. 2:12-cv- 4300 FJG
JEFF NORMAN, et al., Defendants.	)	

Plaintiffs' Reply to the Suggestions of Defendants Kelly Morriss and Jeff Norman in Opposition to Plaintiffs' Motion for Preliminary Injunction

On November 27, 2012, Plaintiffs filed a motion for preliminary injunction seeking an order from this Court requiring Defendants to stop frustrating Plaintiffs right to marry by facilitating the completion of marriage applications by Plaintiffs' fiancés. (Doc. # 2). Defendant Larry Rademan, the Cole County Recorder, has not filed suggestions in opposition. Defendants Kelly Morriss and Jeff Norman, officials at the Jefferson City Correctional Center, have. (Doc. # 22). Plaintiffs file these suggestions in reply to Defendants Morriss and Norman.

I. Plaintiffs' have a fundamental right to marry, and the right is frustrated.

At the outset, no defendant disputes that Plaintiffs are suffering an ongoing denial of their fundamental constitutional right to marry as a result of the conflict amongst prison officials' requirements for entry, a county official's refusal to disclose his social security number, and a state statute that requires marriage license applications to be executed in the presence of the Recorder of Deeds or his deputy. Morriss and Norman suggest Rademan provide his personal information. (Doc. # 22). Rademan states that this Court should grant "such equitable relief as necessary to direct officials of the Missouri Department of Corrections to permit him to execute

his official duties where he is authorized to do so without having to disclose personal and private information about himself[.]" (Doc. # 23).

"[T]he distinction between actively prohibiting an inmate's exercise of his right to marry and failing to assist is untenable in a case in which the inmate's right will be completely frustrated without officials' involvement." *Toms v. Taft*, 338 F.3d 519, 527 (6th Cir. 2003). In this case, the failure of Defendants, collectively, to assist Plaintiffs' fiancés in obtaining a marriage license effectively prohibits Plaintiffs from being married.

II. *Turner* analysis does not apply to the question of whether Plaintiffs' constitutional rights have been violated.

Morriss and Norman rely on *Turner* analysis to suggest that the constitutional problem here is not caused by them. *Turner* is not applicable here. This challenge is not to individual policies to require background checks, to limit outcounts, or to avoid conflicts. Each policy might be constitutionally sound in isolation. The challenge here is to Morriss and Norman's (and Rademan's) failure to provide the assistance Plaintiffs' fiancés need before Plaintiffs may be married to them.

In *Turner*, the Supreme Court noted that the fact that Missouri's prison-marriage regulation had implications for nonprisoners might support the application of the *Procunier* standard. *Turner v. Safley*, 482 U.S. 78, 97 (1987)(citing *Procunier v. Martinez*, 416 U.S. 396, 421 (1974) *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989)). The Court did not reach the question "because even under the reasonable relationship test, the marriage regulation does not withstand scrutiny." *Turner*, 482 U.S. at 97.

More recently, the Supreme Court has clarified that the "reasonably related to legitimate penological interests" test articulated in *Turner* is applicable "*only* to rights that are 'inconsistent

with proper incarceration.'" *Johnson v. California*, 543 U.S. 499, 509-10 (2005)(emphasis in original; internal citation omitted). The Supreme Court has held that there is a constitutionally protected right to establish a marital relationship in the prison context, establishing that the right to marry is not inconsistent with incarceration. *Turner*, 482 U.S. at 96. In *Bonner v. Outlaw*, the Eighth Circuit expressed doubt about the applicability of *Turner* "to the restriction of a specific constitutional right [that] the Supreme Court has already declared applicable in a given situation." 552 F.3d 673, 678 (8th Cir. 2009).

Given that Defendants and Missouri law, operating together, have denied Plaintiffs the right to marry—precisely the right recognized in *Turner*—Plaintiffs have established a constitutional violation and the only remaining issue is the appropriate remedy. *Turner* is a balancing test—between policies on one hand and a constitutional right on the other. Because those wishing to marry inmates at Jefferson City Correctional Center are completely foreclosed from marrying, there is nothing to balance.

III. Under *Turner* analysis Plaintiffs are likely to prevail.

In the case that established the *Turner* test, the Supreme Court concluded that the Missouri Department of Corrections policy that barred marriage without the prior approval of prison officials was unconstitutional. It should perhaps be obvious, then, that Plaintiffs are likely to prevail in this challenge, where the restriction is *greater* than in *Turner*. Here, despite prison officials having no objections to Plaintiffs' planned nuptials, the right to marry is denied. Application of *Turner* to these *Turner*-like circumstances further portends that Plaintiffs are likely to prevail on the merits.

Plaintiffs are not prisoners; however, their fiancés are. In *Turner,* the Supreme Court stated that in cases involving infringements on prisoners' constitutional rights, the relevant

inquiry is "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *Turner*, 482 U.S. at 87; *see also Thornburgh,* 490 U.S. at 409. In determining the reasonableness of a regulation restricting a prisoner's constitutional right, the court should consider: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether there are "alternative means of exercising the right that remain open to prison inmates"; (3) what impact accommodation of the constitutional right will "have on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether there are "ready alternatives for furthering the government interest available." *Beard v. Banks,* 548 U.S. 521, 529 (2006) (quoting *Turner,* 482 U.S. at 89–90).

Plaintiffs do not dispute that prison officials have a legitimate interest in maintaining security that might require reasonable restrictions on the right to marry. The Supreme Court recognized that there is, "[n]o doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry." *Turner*, 482 U.S. at 97. The issue here is whether those restrictions may be so great, as they were in *Turner*, to prevent marriages.

It may be rational for prison officials conduct a criminal history check on visitors. Whether Morriss and Norman may require Defendant Rademan's social security number to do so, however, is a different question. As Plaintiffs noted, and neither Morriss nor Norman dispute, the federal Privacy Act would seem to prohibit such a requirement. Even Morriss's affidavit suggests it is not necessary. Doc. # 22-3 at ¶ 3. Similarly, Morriss and Norman do not explain why there cannot be an exception for Rademan, who is coming to the prison as part of

his official duties as a government official and has done so for seventeen years. Exceptions are made for others.

The Eighth Circuit has rejected the argument that it is legitimate to eliminate access to a fundamental right to avoid transporting inmates outside a prison. *Roe v. Crawford*, 514 F.3d 789, 796 (8th Cir. 2008). Morriss does not dispute that Missouri Department of Corrections officials frequently transport inmates outside of the prison, but asserts that officials limit those occasions as much as possible, in part, by "provid[ing] as many services to offenders as we can within the secure perimeter." Doc. # 22-3 at ¶ 13. That is fine as far as it goes; however, where a Missouri statute requires a marriage application to be signed in the presence of the Recorder of Deeds and the Recorder cannot, or will not, come to the prison, transporting an inmate to the Recorder's office or another place outside the secured area where the Recorder is available, is necessary to effectuate Plaintiffs' fundamental constitutional right to marry.

Plaintiffs accept that prison officials have an interest in avoiding the appearance of impropriety or conflict of interest.[1] While employment as a deputy Recorder might give Missouri DOC grounds to fire an employee, Morriss and Norman do not explain why whomever is deputized would have to be paid or why Missouri DOC simply could not fire the individual DOC officials selected for this duty.

IV. *Dataphase* Factors

For the reasons stated above, Plaintiffs are likely to succeed on the merits.

Plaintiffs will continue to be harmed absent an injunction. "Plaintiffs are suffering irreparable harm by being continuously denied their right to marry. The Supreme Court has

[1] It is interesting that here Missouri DOC officials argue it is too much of a conflict of interest for them to act as a deputy of the Recorder to witness marriage license application while in *Turner* it was predecessor Missouri DOC officials who sought the right to decide whether any given inmate had a good enough reason to get married. How times have changed.

stated that marriage is an expression of emotional support and public commitment, that marriage carries spiritual significance, and that marriage is often a precondition to the receipt of government benefits, property rights, and other less tangible benefits. *Turner,* 482 U.S. at 95. Every day that Plaintiffs are unable to marry they are denied these benefits." *Aliviado v. Kimoto*, CIV. 12-00259 SOM, 2012 WL 3202222, *11 (D. Haw. Aug. 2, 2012).

The balance of harms and public interest also favor Plaintiffs. Plaintiffs are not asking for Missouri DOC to be enjoined from ever enforcing its policies, but rather for an accommodation necessary to end the denial of their fundamental right to marry. While deference to prison officials is appropriate when possible, that deference cannot be so great that it allows defendants, by their actions and inactions, to extinguish Plaintiffs' constitutional rights, including the right to marry at issue here.

V. Multiple possible remedies are available.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 163 (1803). In their suggestions in support, Plaintiffs asserted several alternatives for how they could be married. Morriss and Norman suggest others. At bottom, it does not matter to Plaintiffs what remedy is employed so long as they can be married.

If government officials cannot be compelled to act so as to effectuate Plaintiffs' constitutional right to marry, then, perhaps, the constitutional problem is the application of the statute requiring application be made in the presence of the Recorder when the requirement is applied to inmates. For this reason, Plaintiffs have amended their complaint to include a claim that MO. REV. STAT. § 451.040.2, which requires that marriage license applications be signed "in the presence of the recorder of deeds or their [*sic*] deputy[,]" is unconstitutional as applied in

instances where one, or both, applicants is incarcerated. An alternative remedy would be enjoinment of the requirement that Plaintiffs' fiancés sign their marriage license applications in the presence of the Recorder or his deputy.

Respectfully submitted,

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Certificate of Service

I certify that on January 18, 2013, a copy of the foregoing was filed using the Court's CM/ECF system and by operation of the system served upon counsel for all parties.

/s/ Anthony E. Rothert