UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

KEVIN HOULE and HARVEY REESE,

Plaintiffs,

v.

BARBARA SAMPSON, chair of the Michigan Parole Board, and the nine board members: JAMES ATTERBERRY, MIGUEL BERRIOS, CHARLES BROWN, PAUL CONDINO, STEPHEN DEBOER, ARTINA HARDMAN, ANTHONY KING, DAVID KLEINHARDT, and LAURIN THOMAS, in their official capacities,

Defendants.

File No. 2:09-cv-10504

Hon. Marianne O. Battani

Mag. Judge Donald A. Scheer

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES PRESENTED

1. Can the Parole Board impose parole conditions prohibiting (a) contact with children, (b) marriage or personal relationships, and (c) attendance at church, where the conditions are not directly related to rehabilitation or to the protection of the public?

2. Can the Parole Board impose such parole conditions without considering the plaintiffs' individual circumstances, and without providing notice and an opportunity to be heard?

3. Are such parole conditions void for vagueness?

CONTROLLING AUTHORITY

United States Constitution, Amend. I

United States Constitution, Amend. XIV

U.S. v. Ritter, 118 F.3d 503 (6th Cir. 1997)

Jordan v. De George, 341 U.S. 223 (1951)

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Statement of Facts

Plaintiffs Harvey Reese and Kevin Houle were each separately convicted of criminal sexual conduct for having intimate relations with an underage girl. Both served time in prison and were then released on parole. There is no evidence that either Mr. Houle or Mr. Reese is a sexual predator of young children, or that either would be a threat to his own children. The plaintiffs' facts are set forth in detail in the complaint and in the attached exhibits. *See* Complaint, ¶¶ 5-35; Exhs. 1-13. Notably, while in prison both plaintiffs were allowed to visit with their own children and to maintain phone and written contact with them.

Nevertheless, the defendants have imposed Special Parole Conditions 1.0, 1.1, 1.3, 1.6, 1.7, and 1.8 on the plaintiffs upon their release from prison. *See* List of Default Conditions of Parole, Exh. Q. These parole conditions (a) bar them from having any contact with their children or minor siblings, whether in person, by phone, or in writing; (b) restrict them from marrying or maintaining personal relationships; and (c) forbid them from going to church. As set forth in the complaint and in the attached exhibits, the Michigan Parole Board imposed these conditions without considering the plaintiffs' individual circumstances and without giving either plaintiff notice or an opportunity to be heard. *See* Complaint, ¶¶ 39-61; Exhs. 1, 2, 9, 10, 17-20. The plaintiffs challenge their conditions of parole under 42 U.S.C. § 1983 as a violation of their constitutional rights.

Standard of Review

To be valid, parole conditions must be "directly related to advancing the individual's rehabilitation and to protecting the public from recidivism." *U.S. v. Ritter*, 118 F.3d 503, 505 (6th Cir. 1997). Moreover, if parole conditions result in deprivation of constitutionally-protected liberty interests, they will only be upheld "if the deprivation is narrowly tailored to serve a com-

pelling government interest." *U.S. v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005); *see also Ritter*, 118 F.3d at 504 (stating that conditions implicating fundamental rights are subject to careful review); *U.S. v. Hughes*, 964 F.2d 536, 542 (6th Cir. 1992) (same). Thus, parole conditions affecting fundamental rights may not result in "a greater deprivation of liberty than is necessary" to promote rehabilitation and to prevent recidivism.[1] *Myers*, 426 F.3d at 126.

ARGUMENT

In ruling on a motion for a preliminary injunction, the Court must consider whether: (1) the movant is likely to prevail on the merits; (2) the movant would suffer irreparable injury if the Court does not grant the motion; (3) a preliminary injunction would cause substantial harm to others; and (4) the injunction would be in the public interest. *See G & V Lounge v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994). The Court is authorized to "exercise[e] its discretion to issue a preliminary injunction if the movant has … shown serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued." *Six Clinics Holding Corp. v. Cafcomp Systems, Inc.*, 119 F.3d 393, 399 (6th Cir. 1997).

I. THE PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Challenged Parole Conditions Deprive the Plaintiffs of Fundamental Rights

Parole Conditions 1.0, 1.1, 1.3, 1.6, 1.7 and 1.8, restrict the plaintiffs' fundamental rights, including the right to have contact with their children and siblings, to marry and maintain personal relationships, and to exercise their faith. Because these conditions are not directly related

[1] While the plaintiffs are bringing only federal claims, it is notable that under the Michigan Administrative Code parole conditions must be "reasonably necessary to assist a parolee to lead a law-abiding life. There shall be a reasonable relationship between parole conditions and both the prisoner's previous conduct and present capabilities. All conditions shall be sufficiently specific to guide both supervision and conduct." Mich. Admin. Code R. 791.7730(1).

to advancing the plaintiffs' rehabilitation or protecting the public, and because they are not narrowly tailored to serve a compelling government interest, they must be struck down as applied.

1. The Restrictions on Contact with the Plaintiffs' Own Children Are Unconstitutional

Parents have a fundamental constitutional right to maintain a relationship with their children. *See Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (O'Connor, J.) ("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 this Court"); *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").

The challenged parole restrictions prohibit the plaintiffs from having any contact with their children. The plaintiffs cannot live with, see, call, or write their children. They cannot pick up their children at daycare or at school, or take their children to a park. They cannot purchase toys or clothes for their children. They cannot even pass a message along that "Daddy loves you." As long as they are on parole, they are cut off from their children's lives entirely.

Courts have been highly critical of supervised release conditions that deprive parolees of the ability to maintain relationships with their children, even when the parolees' convictions involve child pornography or molestation – crimes which are not at issue here. For example, in *U.S. v. Davis*, 452 F.3d 991, 995 (8th Cir. 2006), the court struck down a condition prohibiting a defendant convicted of child pornography from having unsupervised contact with his daughter. The court said:

> [t]here is no evidence in the record that [the defendant] has ever sexually abused a child or that he would try to abuse his daughter once released from prison. Because no such evidence exists, 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.

Similarly, in *U.S. v. Myers*, 426 F.3d 117, 120, 128 (2d Cir. 2005), a pedophile 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. Thus even a pedophile may not be deprived of contact with his child, absent an individualized showing that the deprivation is narrowly tailored to meet the legitimate goals of advancing rehabilitation or protecting that child.

In *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 on-line. 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. In other words, although 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." *Id*.

In *U.S. v. Loy*, 237 F.3d 251, 270 (3rd Cir. 2001), the court upheld a condition preventing a child pornographer from having unsupervised contact with minors, but construed that condition to exempt his own children. The court concluded that "[g]iven the severe intrusion on … family life" that would result if the condition were to apply to the defendant's own children, the condition should be construed to apply only to other people's children.

Given that courts have struck down parent-child contact restrictions imposed on defendants with histories of child pornography or molestation, it is clearly unconstitutional to impose such restrictions where, as here, there is no evidence that the plaintiffs pose a danger to children at all, let alone to their own children. In fact, the evidence shows that Mr. Reese's and Mr. Houle's children might well be harmed by enforcement of these restrictions. *See* Rosenblum Declaration, Exh. P.

Where no evidence suggests that a parolee has a particular problem, a condition targeting that problem cannot be upheld. *See U.S. v. Modena*, 302 F.3d 626, 627 (6th Cir. 2003) (striking condition regarding alcohol/drugs because the defendant had no record of alcohol/drug problems); *U.S. v. Carter*, 463 F.3d 526, 530 (6th Cir. 2006) (condition requiring sex offender treatment not reasonably related to firearm conviction, and 17-year-old conviction for CSC was too remote to justify forced treatment). Given the lack of evidence that the plaintiffs are a threat to children, there is no justification for barring them from having contact with their own children, and certainly no justification for depriving them of a fundamental right.

2. The Restrictions on Marriage, Personal Relationships and Contact with Minor Siblings Are Unconstitutional

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). *See also M.L.B.*, 519 U.S. at 116 ("choices about marriage … are among association rights this Court has ranked as of basic importance in society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard or disrespect"). The U.S. Supreme Court has protected this right even in the prison context, holding that a prison cannot forbid marriage because such a prohibition is not reasonably related to a legitimate penological interest. *See Turner v. Safley*, 482 U.S. 78, 99 (1987).

Individuals have not only a fundamental right to marry, but also a fundamental right to intimate association:

> [C]hoices to enter into and maintain certain intimate relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984). *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972). The plaintiffs plainly have a fundamental right to marry or maintain personal relationships with their romantic partners.

Associational parole restrictions are valid only if the association would undermine the parolee's rehabilitation or endanger public safety. *See U.S. v. Bortels*, 962 F.2d 558, 559-60 (6th Cir. 1992) (restriction on defendant's contact with fiancé valid because crime resulted directly from that relationship); *U.S. v. Brandenburg*, 157 Fed. Appx. 875, 879 (6th Cir. 2005) (unpub. op.) (finding restriction on cohabitation with females was "directly related to the dual goals of the defendant's rehabilitation and the protection of the public" because the defendant had a lengthy history of domestic violence, had engaged in domestic violence against a cohabitant while under supervision, and was likely to abuse any female with whom he lived). In *U.S. v. Worthington*, 145 F.3d 1335 (6th Cir. 1998) (table), the Court struck down a condition prohibiting a drug offender from residing with unrelated females. It was "unclear what relation the condition bears to the nature and circumstances of the offense, rehabilitation of the offender, or protecting the public." *Id*. at *51. The Court distinguished *Bortels*, where the defendant was barred from associating with "a particular person who had gotten her into trouble before." *Id*. By contrast, the cohabitation restriction in *Worthington* was "poorly designed to accomplish" the government's "speculative goals." *Id*.

Thus, in this circuit restrictions on marital or intimate relationships will only be upheld if the partner was involved in the defendant's prior criminal activity, or if contact between the parties would endanger the public. Published cases from other jurisdictions go even further, striking down prohibitions on contact even when both partners were involved in criminality. *See e.g., U.S. v. Jacques*, 321 F.3d 255, 266 (2d Cir. 2003) (reading condition prohibiting contact with felons to exclude the defendant's husband because "constitutional difficulties could arise if the associational condition were construed to interfere with [the defendant's] relationship with her family"); *U.S. v. Roberts*, 2007 U.S. Dist. LEXIS 55950, at *30 (July 31, 2007 E.D. Pa.) (striking down condition prohibiting contact between gay partners/co-defendants as violating right to intimate association); *Dawson v. Alaska*, 894 P.2d 672 (Alaska Ct. App.. 1995) (striking down condition requiring probationer's contact with wife to be pre-approved because, although wife had been complicit in the crime, this condition unconstitutionally "delegates to [the] probation officer unconditional and unlimited authority to regulate [the probationer's] marital relationship"); *Oregon v. Martin*, 282 Ore. 583, 588 (1978) (invalidating condition prohibiting probationer from having contact with husband who was allegedly responsible for involving her in criminal activities).

Here, the conditions prohibiting Mr. Reese from marrying Ms. Parker (*see* Parole Conditions of Harvey Reese, Exh. B) are not based on a shared criminal history, nor on any allegations that Mr. Reese is a danger to Ms. Parker, nor on any concerns that contact with Ms. Parker would be detrimental to Mr. Reese's rehabilitation.

Finally, the constitutional right to maintain certain intimate relationships extends not just to romantic partners, but also to other family members, such as siblings. *See U.S. Jaycees*, 468 U.S. at 617-18. Because the restriction prohibiting Mr. Reese from having contact with his

younger brother Derrick does not promote his rehabilitation or protect the public, it too is unconstitutional.

3. The Restrictions on Religious Observance Are Unconstitutional

Mr. Reese's parole conditions, as applied by his parole agent, bar him from attending his church. This violates Mr. Reese's rights under the First Amendment to the U.S. Constitution. As the U.S. Supreme Court held long ago in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), under the First Amendment no state "can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."

The prohibition on church attendance also violates the requirement in *Ritter*, 118 F.3d at 505, that parole conditions be directly related to rehabilitation and public protection. Church attendance would contribute to, rather than undermine, Mr. Reese's rehabilitation. *See* Reese Declaration, Exh. A. Moreover, there is no evidence to suggest that Mr. Reese poses any danger to parishioners worshipping beside him in the sanctuary pews. Finally, while Mr. Reese's parole conditions prohibit him from going to places primarily used by children under the age of 17 (such as playgrounds and public swimming pools), they do not prohibit him from going to other public places that are not primarily used by children, but where children may be present (such as grocery stores, shopping centers, or museums). *See* List of Default Conditions of Parole, #1.7, Exh. Q. Given that Mr. Reese can go to other venues where minors may be present, there is no justification for depriving Mr. Reese of his fundamental right to go to church just because children may also worship there.

4. The Challenged Parole Conditions Are Not Narrowly Tailored to Serve a Compelling Government Interest

In order to survive constitutional scrutiny, any restrictions on the plaintiffs' fundamental rights to have contact with their children, marry and maintain personal relationships, and exercise their faith must be "narrowly tailored to serve a compelling government interest." *Myers*, 426 F.3d at 126. With respect to the restrictions prohibiting the plaintiffs from having contact with their children, the state undoubtedly has a compelling interest in protecting minors from abuse. But "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). 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." *Loy*, at 269-70.

Here, there is no evidence that the plaintiffs are a threat to their children so as to justify restrictions on the parent/child relationship. Even if this Court were to find that the defendants do have a compelling interest in interfering with the plaintiffs' family relationships, the challenged conditions are not narrowly tailored. The plaintiffs suffer under the same restrictive conditions as pedophiles who abused their own children for years. There was no effort to tailor the restrictions to the plaintiffs' individual circumstances. Mr. Houle and Mr. Reese are not even allowed supervised parenting time, phone calls, or mail contact.

The restrictions on the plaintiffs' ability to marry or maintain personal relationships also fail the test of narrow tailoring. For example, Mr. Reese is prohibited from marrying Ms. Parker

even if they live in separate households. *See* Bowker Letter, Exh. F. Assuming for the sake of argument that the defendants have a legitimate interest in restricting contact between Mr. Reese and children to whom he is not related, the absolute prohibition on marriage is not narrowly tailored. For example, Mr. Reese could marry Ms. Parker, while still being prohibited from having unsupervised contact with any of Ms. Parker's children to whom he is not related. *See e.g., Dawson*, 894 P.2d at 680 (to preclude association between spouses was an "extreme restriction of liberty," and therefore it was necessary "to tailor a closer fit between the scope of the order restricting marital association and the specific needs of the case at hand").

5. Because the Challenged Restrictions Would Be Unconstitutional as Applied to Prisoners, They Are Necessarily Unconstitutional as Applied to Parolees

Perhaps the most striking feature of the challenged parole restrictions is that they are not, and constitutionally could not be, imposed on prisoners. As parolees, the plaintiffs are absolutely barred from having any relationship with their children. While they were incarcerated, however, Mr. Houle and Mr. Reese had regular contact with their children. As a parolee, Mr. Reese is prohibited from dating or marrying his partner. While in prison, however, he was able to marry and maintain partner relationships. Indeed, Mr. Reese and Ms. Parker sought to marry while Mr. Reese was incarcerated, but could not only because of his unexpected transfer to another facility, and a scheduling problem. *See* Reese Declaration, Exh. A; Parker Declaration, Exh. G. Finally, as a parolee, Mr. Reese cannot attend church. While in prison, he exercised his right to attend worship services.

It is ironic that harsher restrictions are imposed on parolees than on prisoners, given that parole conditions are subject to a much higher level of scrutiny than prison conditions. Parole conditions must be "directly related to advancing the individual's rehabilitation and to protecting the public from recidivism," *Ritter*, 118 F.3d at 505, and must – if they involve the deprivation of

a fundamental right – be "narrowly tailored to serve a compelling government interest." *Myers*, 426 F.3d at 126. By contrast, prison regulations need only be reasonably related to legitimate penological interests. *See Turner*, 482 U.S. at 89-90.

Two factors account for the very different standards applicable to parolees *versus* prisoners. First, incarceration by its very nature must restrict prisoners' rights in order "to accommodate a myriad of institutional needs and objectives…, chief among which is internal security." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). Prisoners cannot live with their families or attend community worship services. Prisoners, however, retain those rights "that are not inconsistent with [their] status … or with the legitimate penological objectives of the corrections system." *Turner*, 482 U.S. at 95. Thus prisoners can visit, call, write, buy gifts, send messages, and remain otherwise fully involved in their children's lives. They can marry and maintain personal relationships. And they can attend worship services in prison.

Because parolees are not incarcerated, the same institutional imperatives do not apply. The challenged parole conditions do not serve institutional security concerns, nor are they necessarily incident to being on parole. Indeed, most parolees reside with their families, interact with their children, marry, date, and go to church. Like prisoners, parolees should at a minimum retain those constitutional rights which are not inconsistent with their status. *See Coleman v. Dretke*, 395 F.3d 216, 222 (5th Cir. 2004) (if parole conditions depart dramatically from ordinary life, then procedural protections must be provided before imposition). Surely seeing one's children, getting married, maintaining personal relationships, and going to church are not only consistent with being on parole, they are precisely the relationships and behaviors that parole should seek to foster. *See* Fluent Declaration, Exh. M; Marroquin Declaration, Exh. H.

Second, parole conditions are subject to higher scrutiny than prison conditions because the status of parolees is fundamentally different from that of prisoners. As the U.S. Supreme Court explained in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the

> liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime…. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison. He may … be living a relatively normal life.

Id. at 482. Thus, it is "patently without merit" to contend that just because a condition may be imposed in prison, it can be imposed on a parolee. *Loy*, 237 F.3d at 265.

Here, the defendants cannot even argue that the conditions imposed on the parolees are imposed in prison. The conditions are not imposed in Michigan's prisons, and would be unconstitutional if they were, since they would not survive the *Turner* test. *See Turner*, 482 U.S. at 89-90 (striking down marriage prohibition as exaggerated response to rehabilitation and security concerns); *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003) (DOC never questioned prisoners' right to receive visits from their own children; court upheld restrictions on visitation by extended family members only because of institutional security concerns and because prisoners had an alternative means of communicating, such as calling and writing to those barred from visiting); *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (requiring prisons to provide opportunities for prisoners to exercise their faith). Rather, the defendants are left to argue that they can impose more severe restrictions on parolees than could constitutionally be applied to prisoners. Since these restrictions fail the *Turner* test, they necessarily fail the more stringent *Ritter/Myers* test.

6. The Challenged Parole Conditions Undermine Rather than Support Rehabilitation

The validity of parole conditions depends in part on whether the conditions are "directly

related to advancing the individual's rehabilitation." *Ritter*, 118 F.3d at 505. Here, the challenged restrictions actually *undermine* the plaintiffs' rehabilitation. The restrictions deny the plaintiffs the opportunity to parent children, live with and marry their partners, and go to church – all activities that would knit them into a pattern of family life, provide community support, and promote spiritual growth. The challenged parole conditions are thus counterproductive to the goal of achieving rehabilitation. *See* Fluent Declaration., Exh. M; Marroquin Declaration, Exh. H. National research also demonstrates that family support is critical to successful reentry:

> [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.

Urban Institute, From Prison to Home: The Dimensions and Consequences of Prisoner Reentry, 20 (2001). *See also* 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 his family, absent evidence that that family contributes to the individual's criminality. Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community, 319.

B. The Plaintiffs Are Entitled to Due Process Before Imposition of Parole Conditions that Deprive Them of Their Fundamental Rights

The challenged parole conditions not only violate the plaintiffs' fundamental rights, but also deprive them of procedural due process. The Parole Board apparently imposes these conditions automatically on all parolees convicted of sex offenses or offenses with a child victim or witness. *See* List of Default Conditions of Parole, Exh. Q. Moreover, although the conditions

affect the plaintiffs' fundamental rights, they were not given notice that the conditions would be imposed, nor were they given an opportunity to be heard.

In *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court struck down a law that made children of unwed fathers wards of the state upon the mother's death. The Court held that the statute unconstitutionally presumed that unmarried fathers were unfit parents. While recognizing that the state had a legitimate interest in protecting children, the Court held that the state could not simply assume that certain parents were unfit:

> What is the state interest in separating children from their fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goal when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family….
>
> [I]t may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case…. Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.

Id. at 652-57 (citations omitted).

The principles of *Stanley* are equally applicable to the challenged restrictions on contact with children, personal relationships, and religious worship. While the defendants have an interest in protecting children, that interest is not served by an automatic, irrebuttable presumption that the plaintiffs should have no contact with their children, should not have marital/romantic relationships with custodial parents, and should not attend church. While there may be cases where such restrictions are appropriate, they are wholly unwarranted for many parolees, including the plaintiffs here.

Courts reviewing parole conditions have demanded robust procedural protections where conditions restrict parent/child contact. In *U.S. v. Davis*, 452 F.3d 991 (8th Cir. 2006), the defendant, who had a child pornography conviction, challenged a condition barring unsupervised contact with minors, including his daughter. The Eighth Circuit held that:

> A court may not categorically impose such a condition in every child pornography case that comes before it; since the relevant statutory and constitutional considerations look to whether the condition is more restrictive than what is needed to satisfy the governmental interest in a specific case, the district court must decide whether to impose such a condition based on specific facts.… That inquiry must take place on an individualized basis; a court may not impose a special condition on all those found guilty of a particular offense.

Id. at 995. Here, there was no such individualized assessment; the conditions were imposed based merely on offense classifications. *See* List of Default Conditions of Parole, Exh. Q; *see also Voelker*, 489 F.3d at 155 (remanding case to resolve a factual dispute about whether the defendant actually posed a threat to his own children); *Myers*, 426 F.3d at 128 (restriction on contact with own child required not just evidence of danger to children, but "develop[ment] of a record demonstrating danger to that child"); *Oregon v. Martin*, 282 Ore. 583, 588 (1978) (invalidating condition prohibiting contact with husband, because no record that the restriction on probationer's marital privacy was needed for her rehabilitation).

Parolees subject to restrictions that interfere with their fundamental rights are entitled not just to an individualized assessment, but also to notice and an opportunity to be heard. In *U.S. v. Edgin*, 92 F.3d 1044, 1049 (10th Cir. 1996), the district court had prohibited contact between the defendant and his son after the defendant was convicted of threatening the child's mother. The court found error because the defendant had not been given notice or an opportunity to be heard,

as well as because the lower court failed to make factual findings or provide any reasons for imposing the condition.[2]

No doubt it is more time-consuming for the Parole Board to consider cases individually, and to tailor restrictions to each parolee's circumstances. But the Parole Board cannot evade its constitutional obligation to provide case-by-case consideration on the grounds of cost. *See Voelker*, 489 F.3d at 147 n.7 (overly broad parole restrictions that affect fundamental rights cannot be justified based on cost). Moreover, individualized consideration is clearly feasible, and there are clinical instruments available to help predict the risk of recidivism with some accuracy. *See* Fluent Declaration, Exh. M; Marroquin Declaration, Exh. H, Simpson Declaration, Exh. O.

C. The Challenged Parole Conditions Are Void for Vagueness

A law that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" violates due process. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. De George*, 341 U.S. 223, 231-32 (1951). The same principle applies to parole conditions. *See U.S. v. Schave*, 186 F.3d 839 (7th Cir. 1999); *Loy*, 237 F.3d at 262. In other words, unclear parole conditions violate due process.

The challenged conditions are unconstitutionally vague. For example, condition 1.0, which prohibits contact with minors, does not require that the parolee be aware of the individual's age, nor does it exempt incidental contact. Yet associational restrictions may not consti-

[2] The situation of parolee Barbara Janoskey amply demonstrates the danger of failing to give parolees notice and an opportunity to be heard. *See* Janoskey Declaration, Exh. N. The Parole Board imposed a no-contact-with-children restriction based on inaccurate information in Ms. Janoskey's file, forcing her to be separated from her children for eight months. Had Ms. Janoskey been given due process, the error might easily have been corrected.

tutionally extend to incidental contacts. *See Arciniega v. Freeman*, 404 U.S. 4, 4 (1971) (condition prohibiting association with ex-convicts did not extend to incidental contacts at job since this "would render a parolee vulnerable to imprisonment whenever his employer, willing to hire ex-convicts, hires more than one"). Condition 1.3, which prohibits marrying, dating, or romantic involvement with persons having custody of minors, does not define those terms, leaving it unclear what level of friendship could result in re-incarceration. (Is flirting a parole violation? What about dinner and a movie, but no kiss?)

Courts have repeatedly struck down restrictions similar to those at issue here. In *Iowa v. Hall*, 2007 Iowa App. LEXIS 939, at *12-13 (Ct. App. Iowa, Sept. 6, 2007) (unpub. op.), the court invalidated a condition prohibiting the probationer from communicating with any child under the age of 18 because the provision did "not include an exception for incidental communication, such as with a minor grocery store clerk, movie ticket taker, or fast-food clerk," and because "it is hard to imagine how one could function in modern society without communicating with any minors." Similarly, in *Ellis v. State*, 221 G. App. 103 (Ct. App. Ga., 1996), the court invalidated conditions that prohibited a probationer from lingering at locations were children were present or working at a business that provides services to children. While restrictions on the probationer's contact with children were reasonable, given his conviction for child molestation, "such conditions should be stated with reasonable specificity so that [the probationer] has notice of the groups and locations he must avoid and so that the conditions are not so broadly worded as to encompass groups and locations not rationally related to the purpose of the sentencing objective." *Id.* at *2.

II. THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF PRELIMINARY INJUNCTIVE RELIEF IS NOT GRANTED, AND THE HARM TO THE DEFENDANTS WILL BE MINIMAL

The loss of constitutionally protected freedoms for even minimal periods of time constitutes irreparable injury. *See Connection Distributing v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992). The challenged parole conditions deprive the plaintiffs of constitutionally protected freedoms, namely the right to contact with their children, the right to marry and maintain personal relationships, and the right to free exercise of their faith. The plaintiffs will continue to suffer irreparable harm unless preliminary injunctive relief is granted. The harm to the defendants will be minimal; they simply need to make narrowly tailored individualized determinations, as the Constitution requires.

III. A PRELIMINARY INJUNCTION WILL NOT HARM OTHERS, BUT RATHER WILL SERVE THE PUBLIC INTEREST

"It is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge*, 23 F.3d at 1079. Moreover, it is in the public interest for parents to have contact with their children, and for parents to marry or maintain relationships so as to provide a stable basis for raising their children. It is also in the public interest to release the plaintiffs to a family environment that provides support and fosters responsibility helpful to rehabilitation. And it is in the public interest for parolees to attend church, if practicing their faith will promote their rehabilitation. Failure to issue an injunction would substantially harm (1) the plaintiffs' children, who cannot have contact with their parents; (2) Mr. Reese's girlfriend, who cannot marry or maintain a personal relationship with the man she loves; (3) Mr. Reese's younger brother, who at present cannot have any contact with him; and Mr. Houle's disabled parents, who cannot invite their son into their home while his son and their grandson Travis (over whom they have custody) is present in the home. Finally, given the record in this case, there is no evidence

to suggest that any harm would result to anyone from enjoining enforcement of the challenged conditions.

CONCLUSION

For the reasons set forth above, the plaintiffs ask this Court to enjoin the defendants from enforcing the parole conditions that prevent them from having contact with their children, from marrying or maintaining personal relationships, and from going to church. Specifically, the plaintiffs ask the Court to issue a preliminary injunction that:

a. bars the defendants from imposing the challenged parole conditions in their cases;

b. bars the defendants from imposing the challenged parole conditions without individualized determinations and narrow tailoring;

c. bars the defendants from imposing the challenged parole conditions without notice and an opportunity to be heard; and

d. grants such other relief as the Court deems appropriate.

Respectfully submitted,

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Dated: February 19, 2009

PROOF OF SERVICE

The plaintiffs' motion and brief for preliminary injunction were filed electronically using the Court's ECF system, which will send copies by e-mail to all counsel of record. Because the case was just recently filed, a copy was also served directly upon the Office of the Michigan Attorney, Corrections Division, 525 West Ottawa, Fourth Floor, Lansing, MI 48913, both by email attachment and by pre-paid first-class mail.

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Dated: February 19, 2009

INDEX OF EXHIBITS

Exhibit	Title/Description
A.	Declaration of Harvey Reese (12/15/08)
B.	Parole Conditions of Harvey Reese (04/05/07)
C.	DOC Visitation History for Harvey Reese (07/05)
D.	Psychological Report on Harvey Reese (12/10/03)
E.	Letter from Miriam Aukerman to Parole Agent Bowker (09/19/07)
F.	Letter from Agent Bowker to Miriam Aukerman (10/29/07)
G.	Declaration of Tonja Parker (02/10/09)
H.	Declaration and CV of Arthur R. Marroquin regarding Harvey Reese (12/12/08)
I.	Declaration of Kevin Houle (01/28/09)
J.	Parole Conditions of Kevin Houle (05/13/08)
K.	DOC Visitation History for Kevin Houle (10/01/08)
L.	Psychological Report on Kevin Houle (06/01/04)
M.	Declaration and CV of Thomas Fluent regarding Kevin Houle (01/15/09)
N.	Declaration of Barbara Janoskey (12/06/07)
O.	Declaration of John Simpson, M.A., L.L.P. (12/12/07)
P.	Declaration of Katherine L. Rosenblum, PhD (re Impact on Children) (02/05/09)
Q.	List of Default Conditions of Parole produced by Michigan Department of Corrections in response to a Freedom of Information Act (2/21/07)
R.	Operating Procedure: Order for Parole and Amendment of Orders, 06.04.130G (10/01/02)
S.	Operating Procedure 06.04.100: Probation/Parole Orientation Checklist (10/01/05)
T.	MDOC Policy Directive 03.02.130: Prisoner/Parolee Grievances (07/09/07)
U.	List of Unpublished Cases Cited in the Brief: *U.S. v. Worthington*, 145 F.3d 1335 (6th Cir. 1998); *U.S. v. Brandenburg*, 157 Fed. Appx. 875 (6th Cir. 2005); *Iowa v. Hall*, 2007 Iowa App. LEXIS 939 (Ct. App. Iowa, Sept. 6, 2007)