IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

LENORA SANTOS, JUNELL FAITH ALIVIADO, JAMIQUIA GLASS, and MARGARET AMINA,

Plaintiffs,

vs.

SHARI KIMOTO, Mainland Branch Coordinator, Department of Public Safety, State of Hawaii, in her individual and official capacities; JEANETTE BALTERO, Contract Monitor, Department of Public Safety, State of Hawaii, in her individual and official capacities; JODIE MAESAKA-HIRATA, Director, Department of Public Safety, State of Hawaii, in her official capacity; and DOES 1-30,

Defendants.

CIV. NO. 12-00259 SOM/BMK

[CIVIL RIGHTS ACTION]

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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MEMORANDUM IN SUPPORT OF MOTION

"We have wedding rings that we bought about five years ago, but they're just sitting in a box waiting."

- Declaration of Plaintiff Junell Faith Aliviado, ¶10.

I. INTRODUCTION

Defendants have repeatedly prevented Plaintiffs and their fiancés – prisoners at the Saguaro Correctional Facility in Eloy, Arizona – from marrying, notwithstanding a twenty-five-year-old United States Supreme Court decision explicitly prohibiting state officials from preventing prisoners (or their civilian fiancées) from marrying. *Turner v. Safley*, 482 U.S. 78 (1987). The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") informed Defendant Kimoto and then-Director of the Department of Public Safety ("DPS") Clayton Frank a year and a half ago that these actions were unlawful. Unfortunately, Defendants Shari Kimoto Jeanette Baltero continue to violate Plaintiffs' fundamental rights; they continue to believe that they have the power – by virtue of their positions as government bureaucrats – to prohibit the marriage based on their beliefs about what marriage is and what a marriage needs to be "successful." Some of the Plaintiffs have been applying to be married for five or six years, and Defendants continue to issue blanket orders barring them from marrying.

Plaintiffs seek preliminary injunctive relief to compel Defendants to cease interfering with Plaintiffs' fundamental right to marry, as guaranteed by the Fourteenth Amendment to the United States Constitution. Defendants' ongoing and persistent violations of Plaintiffs' constitutional rights have caused, and continue to cause, irreparable injury to Plaintiffs.

II. STATEMENT OF FACTS

A. Defendants Have Prohibited Plaintiffs From Marrying

Plaintiffs wish to marry their fiancés, all of whom are incarcerated by the State of Hawaii and housed at the Saguaro Correctional Facility in Arizona. Declaration of Lenora Santos ("Santos Decl."), ¶2; Declaration of Junell Aliviado ("Aliviado Decl."), ¶2; Declaration of Jamiquia Glass ("Glass Decl."), ¶2; Declaration of Margaret Amina ("Amina Decl."), ¶2. All the couples meet the statutory requirements for marriage in either Arizona or Hawaii: they are over eighteen years old, they are not already married, they are not related to one another, and they can pay the minimal fee for the marriage license. Santos Decl. ¶11; Aliviado Decl. ¶12; Glass Decl. ¶15; Amina Decl. ¶12. Defendants have denied each of them the right to marry their fiancés.

All four Plaintiffs want to marry their fiancés for the same kinds of reasons most people want to get married: as a demonstration of their love and commitment to one another; to seal their union in the eyes of God; and/or to formalize their

relationship to their partners and best friends. Santos Decl. ¶¶3, 10; Aliviado Decl. ¶9; Glass Decl. ¶¶4, 12, 14; Amina Decl. ¶¶5-7. One Plaintiff has an adult daughter with her fiancé, Santos Decl. ¶3; one Plaintiff – like many would-be spouses in the United States – also speculates that there may be tax advantages to marrying. Amina Decl. ¶8.

Plaintiffs Santos, Aliviado, and Glass have been attempting to get married for years. Plaintiff Santos and her fiancé first applied in 2006, and have applied approximately four or five times. Santos Decl. ¶7. Plaintiff Aliviado and her fiancé have been trying to get married for approximately five years. Aliviado Decl. ¶4. Plaintiff Glass and her fiancé have submitted three applications (and a number of appeals) over the last two years. Glass Decl. ¶¶5-8, 10-11. Plaintiff Amina and her fiancé applied for the first time in early 2011. Amina Decl. ¶9. All four Plaintiffs have applied at least once within the last two years. Santos Decl. ¶8; Aliviado Decl. ¶¶5, 7; Glass Decl. ¶¶5, 6, 8; Amina Decl. ¶9.

The details of each Plaintiff's application to be married are set forth in section C, *infra*; section B, below discusses Defendants' knowledge of their unconstitutional actions and their refusal to remedy the problems.

B. The ACLU Attempted To Resolve This Issue In 2010, And In 2011 The Department Of Public Safety Implemented A New Policy

In 2010, a Saguaro prisoner and his fiancé on Oahu (who was not, and is not, incarcerated) submitted an application to be married. Defendant Kimoto denied that application. In a letter to the prisoner dated November 3, 2010, Defendant Kimoto wrote:

> As a Ward of the State incarcerated in a correctional facility, you are incapable of providing the necessary emotional, financial and physical support that every marriage needs in order to succeed. . . .
>
> We believe that a healthy relationship effort (marriage) established at this time while you are in prison and unable to work and communicate effectively face-to-face with your fiancée will be detrimental to any future re-integrative efforts. Both husband/wife must work uniformally [sic] on individual and marital issues that come up throughout any successful marriage. This union may be successful overall for both individuals when you are reunited outside of the facility's walls allowing the proper opportunity to work together, develop and establish appropriate relations as necessary.

Declaration of Daniel M. Gluck ("Gluck Decl."), Ex. 1. As set forth in Section C, infra, at least two of the Plaintiffs in the instant case have received letters with this identical language.

On December 1, 2010, Plaintiffs' counsel sent a letter to Defendant Kimoto on behalf of the Oahu woman, demanding that Defendant Kimoto cease interfering with the fundamental rights of the couple to marry and further demanding that the

Department of Public Safety review and revise all necessary policies. Gluck Decl., Ex. 2. The letter referenced *Turner* and explained that the woman had a fundamental right to marry. *Id.*

On December 6, 2010 – just five days after sending the letter to Defendant Kimoto – counsel for Plaintiffs had a telephone conversation with Thomas Read, then the Offender Management Administrator within the Department of Public Safety. Gluck Decl. ¶10. During that conversation, Mr. Read stated that the Department of Public Safety would amend its then-current marriage policy and would re-evaluate the marriage request. *Id.* Mr. Read also indicated that prisoners' requests to get married were not unusual. *Id.*

In a letter dated December 7, 2010, Mr. Read stated that the prisoner's request to marry had been "reconsidered" and was conditionally granted. Gluck Decl., Ex. 3. The prisoner and his fiancée were married in March 2011 in Arizona. *See* ACLU of Hawaii, "Annual Report – 2010" at 1, available at http://acluhawaii.files.wordpress.com/2011/10/annrept2010.pdf.

On or about June 8, 2011, the Department of Public Safety promulgated a new policy, COR.14.13, on prisoner marriages. Gluck Decl., Ex. 4. This policy purports to restrict prisoners' right to marry when "the proposed marriage presents a threat to the security or the good government of the institution or to the

protection of the public." *Id*. at 1. A similar federal policy, set forth in 28 C.F.R. § 551.10,[1] was referenced, favorably, by the *Turner* Court. *Turner*, 482 U.S. at 98.

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1 The current version of this rule provides:

> The Warden shall approve an inmate's request to marry except where a legal restriction to the marriage exists, or where the proposed marriage presents a threat to the security or good order of the institution, or to the protection of the public. The Warden may approve the use of institution facilities for an inmate's marriage ceremony. If a marriage ceremony poses a threat to the security or good order of the institution, the Warden may disapprove a marriage ceremony in the institution.

In publishing the final rule, the Bureau of Prisons responded to a comment about the language giving too much discretion to prison officials:

> A comment that § 551.10(a) is unnecessarily vague and provides insufficient guidance fails to recognize that the intent of this section is to broadly define the rule's purpose and scope. The sections of eligibility and on application to marry offer the necessary specificity. We do not consider it realistic to more narrowly define the terms "threat to security or good order" or "protection of the public". While these phrases are by necessity broad in their scope, they are not overly broad. *The presumption of the Bureau's rule is that the Warden shall approve an inmate's request to marry. . . . Further, the rule's specificity, and the appeal procedure, dilutes the likelihood, as suggested by a commenter, that staff will impose their own personal views, theories, and prejudices.*

Control, Custody, Care, Treatment, and Instruction of Inmates; Marriages of Inmates, 49 Fed. Reg. 18384-01 (April 30, 1984) (to be codified at 28 C.F.R. § 551.10) (emphases added). It appears that the text of 28 C.F.R. § 551.10 has remained unchanged since the Court's decision in *Turner* (though the Bureau of

The language of COR.14.13 is identical to language regarding visitation. According to PSD Policy COR.15.01, "[v]isitation may be denied if it is determined that a visitor is detrimental to the rehabilitation and/or reintegration of an inmate or there is a threat to the security and/or good government of the facility concerned." Gluck Decl., Ex. 5 at 1.[2] Each of the Plaintiffs has been able to visit her fiancé without incident – that is, each of the Plaintiffs passes the "security and/or good government" standard. Santos Decl. ¶5; Aliviado Decl. ¶3; Glass

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Prisons consolidated the text of the regulation into one paragraph rather than two separate paragraphs (thus explaining the reference to 551.10(a) when subsection (a) no longer exists). *See* Institutional Management; Editorial Amendments, 63 Fed. Reg. 5218-01 (January 30, 1998) (to be codified at 28 C.F.R. § 551.10).

2 The policy expressly prohibits the denial of visitation on the basis that the proposed visitor has a criminal background (an issue relevant to the denial of Plaintiff Glass's marriage applications):

> No person shall be denied the opportunity to visit any inmate solely on the basis of:
>
> Such person has been convicted in any court of any misdemeanor, felony or is an active probationer or active parolee in any correctional system. Such persons shall be required to notify the facility of their status as a convicted person, parolee, or probationer and shall be granted access as visitors if the Warden in the exercise of sound discretion decides such visits will aid or will not impede the reintegration of the inmate into society.

Gluck Decl., Ex. 5 at 1-2 (COR.15.01). *See also* Gluck Decl., Ex. 6 at 2 (COR.15.04, entitled "Visitation," which provides in relevant part: "[V]isitation is integral to the correctional and rehabilitative process of inmates. Visitation encourages the maintenance of positive familial and community ties and positive inmate motivation.").

Decl. ¶¶3, 9; Amina Decl. ¶6.

Unfortunately, as discussed in the next section, neither ACLU intervention nor a new PSD policy was sufficient to stop Defendants from violating Plaintiffs' fundamental rights.

C. Neither A Demand Letter From The ACLU, Nor A New Department Of Public Safety Policy, Was Enough To Stop Defendants From Violating Plaintiffs' Rights

When Plaintiff Glass, Plaintiff Aliviado, and their respective fiancés first applied to be married, they received a letter from Defendant Kimoto denying the applications and stating the following:

> As a Ward of the State incarcerated in a correctional facility, you are incapable of providing the necessary emotional, financial and physical support that every marriage needs in order to succeed. . . .
>
> We believe that a healthy relationship effort (marriage) established at this time while you are in prison and unable to work and communicate effectively face-to-face with your fiancée will be detrimental to any future re-integrative efforts. Both husband/wife must work uniformally [sic] on individual and marital issues that come up throughout any successful marriage. This union may be successful overall for both individuals when you are reunited outside of the facility's walls allowing the proper opportunity to work together, develop and establish appropriate relations as necessary.

Glass Decl., Ex. 1 (denial letter dated October 4, 2010); Aliviado Decl., Ex. 1 (denial letter dated August 9, 2011). Plaintiff Santos' most recent marriage

application was denied around the end of 2010 or early 2011, for similar reasons. Santos Decl. ¶8.

The ACLU's December 1, 2010 letter to Defendant Kimoto (cc'd to the then-Director of Public Safety, Clayton Frank, and the then-Deputy Director for Corrections, Tommy Johnson), should have caused Defendants to re-evaluate their response to marriage applications, but this was not the case. Gluck Decl., Ex. 2.

After receiving the denial letter dated October 4, 2010, Plaintiff Glass and her fiancé submitted another application. Glass Decl. ¶6. In a letter dated May 17, 2011 – less than six months *after* the ACLU's December 1, 2010 letter – Defendant Kimoto denied the marriage application of Plaintiff Glass and her fiancé again, using the identical language of her previous letter. Glass Decl., Ex. 2. Plaintiff Amina also reports that her application to marry her fiancé in late 2010 or early 2011 was never answered. Amina Decl., ¶9.

The Department of Public Safety appears to have implemented its new policy on prisoner marriages, COR.14.13, on June 8, 2011. Gluck Decl., Ex. 1. A new policy should have caused Defendants to re-evaluate their response to marriage applications, but this was not the case.

Plaintiff Aliviado personally delivered the marriage application for herself and her fiancé on July 5, 2011 – nearly a month after the new policy had been implemented. Aliviado Decl. ¶5; Gluck Decl., Ex. 4. In a letter dated August 9,

2011 – a full two months after COR.14.13 had been implemented – Defendant Kimoto denied the application, again using the identical language quoted above. Aliviado Decl., Ex. 1.

Plaintiffs Aliviado and Glass both sought to appeal the denials. Plaintiff Aliviado e-mailed the Office of the Ombudsman for the State of Hawaii on October 22, 2011. Aliviado Decl. ¶6. On November 22, Herbert Almeida (an official with the Ombudsman's office) called Plaintiff Aliviado and suggested that she re-apply. *Id*. Six days later, on November 28, 2011, Plaintiff Aliviado walked the application into the Department of Public Safety office on Ala Moana Boulevard herself. *Id.* ¶7.

Plaintiff Aliviado's application was again denied. In a letter to Plaintiff Aliviado's fiancé, dated December 20, 2011, Defendant Kimoto stated in relevant part:

> Records indicate that you were convicted of sexually assaulting your biological child from the age of 8 to 17. Ms. Aliviado currently has a minor in her care and custody.
>
> In accordance with PSD Policy COR.14.13, your conviction of sexually assaulting your own biological child who was a minor at the time of the assaults and knowing that your fiancé [sic], Ms. Aliviado has a minor child in her care and custody, presents a threat to the protection of the public.

Aliviado Decl., Ex. 2. Plaintiff Aliviado has four children; the oldest is thirty-one

years old, and the youngest is sixteen. Aliviado Decl. ¶8. Her fiancé will be incarcerated for approximately ten more years. *Id*. ¶8. In other words, by the time her fiancé is released, Plaintiff Aliviado will not have any minor children in her care or custody.

Plaintiff Glass's attempts to resolve this issue through other avenues were similarly unsuccessful. Plaintiff Glass's fiancé sent a letter to Defendant Maesaka-Hirata in late June 2011, appealing the May 17, 2011 denial of the marriage application. Glass Decl. ¶7. Michael Hoffman, the Institutions Division Administrator for the Corrections Division of the Department of Public Safety, sent Plaintiff Glass's fiancé a letter dated October 8, 2011. In that letter, Mr. Hoffman wrote:

> After review of the matter, I believe you should initiate another request. Once I receive your request from the Mainland Branch, I will take your appeal into consideration and render a decision since *at this time it does not appear there are any reasons for a denial*. This letter should not be construed as an approval for marriage as the second request needs to be initiated and the approval/disapproval will be made at that time.

Glass Decl., Ex. 3 (emphasis added).

After receiving Mr. Hoffman's letter, Plaintiff Glass and her fiancé submitted another application. Glass Decl. ¶8. Defendant Kimoto denied this application as well. In a letter dated January 11, 2012, Defendant Kimoto wrote:

> Records indicate that Ms. Glass has been convicted of Conspiracy to Rob 5 Banks, Bank Robbery, and Conspiracy to Commit Bank Robbery and served probation/prison time under the Bureau of Prisons and the U.S. Probation Office. In addition, she was convicted of Theft of Property and was held under the care and custody of the Alabama Department of Corrections.
>
> In accordance with PSD Policy COR.14.13, associating or being in the company of a convicted felon (state/federal) presents a threat to the security and good government of the facility.

Glass Decl., Ex. 4. Plaintiff Glass was convicted of three felonies in the late 1990s, for acts committed when she was twenty years old. Glass Decl. ¶9. She served approximately two and a half years in prison; she was released from prison in 2000 and has had no legal trouble since then. *Id.* Her past convictions have not presented any security or "good government" concern to date, however: Plaintiff Glass and her fiancé speak on a near daily basis, and they visit in person approximately once a month. Glass Decl. ¶¶3, 9. There is no cognizable reason why a change in Plaintiff Glass's legal status vis-à-vis her marriage to her fiancé would present a security threat to the Saguaro Correctional Facility, when in-person visits and daily phone calls do not.

Plaintiff Glass followed up with Defendants Kimoto and Baltero over the telephone. On or about February 9, 2012, Defendant Baltero told Plaintiff Glass that marriage is a privilege, not a right; that Plaintiff Glass's fiancé did not have any rights because he was incarcerated; and that two felons are prohibited from

getting married. Glass Decl. ¶10. Defendant Baltero told Plaintiff Glass that the answer to the marriage application was "no" and that the answer would not change, and further stated that Plaintiff Glass was a security risk. *Id.* Defendant Kimoto also told Plaintiff Glass that she would not be able to marry her fiancé because of her criminal background. *Id.* Meanwhile, around the end of January 2012, Plaintiff Glass's fiancé sent a letter to Defendant Kimoto asking for an explanation as to why his fiancé's criminal record would preclude them from marrying. Glass Decl. ¶11. Defendant Baltero responded in a letter dated February 27, 2012, in which she wrote:

> The Department of Public Safety denied your marriage to Ms. Glass based on information provided in both your applications and institutional file. Ms. Glass had a criminal history and although her convictions was [sic] years ago, the Department determined that based on policy associating or being in the company of a convicted felon presents a threat to the security and good government of the facility and does not recommend marriage at this time.

Glass Decl., Ex. 5.

Again, Plaintiff Glass does not anticipate that being married to her fiancé would change anything as far as the Saguaro Correctional Facility or the State of Hawaii are concerned. Glass Decl. ¶12. The change in legal status would, however, provide both Plaintiff Glass and her fiancé with immeasurable emotional and other benefits. *Id.*

III. STANDARD OF REVIEW

To obtain a Preliminary Injunction, a plaintiff must demonstrate that (1) she is likely to succeed on the merits; (2) in the absence of preliminary relief she is likely to suffer irreparable harm; (3) the balance of equities tips in her favor; and (4) an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). The Ninth Circuit has "also articulated an alternate formulation of the *Winter* test, under which 'serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.'" *Farris v. Seabrook*, ___ F.3d ___, 2012 WL 1194154, *4 (9th Cir. April 11, 2012) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)) (internal quotation signals omitted).

Regardless of whether this Motion is construed as a request for a prohibitory injunction or a mandatory injunction, Plaintiffs meet their burden. This Court recently set forth the appropriate standard of review for both prohibitory and mandatory injunctions:

> There are two types of preliminary injunctions—a prohibitory injunction that "preserve[s] the status quo pending a determination of the action on the merits[, versus a] mandatory injunction [that] orders a responsible party to 'take action.'" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th

> Cir.2009) (citations and quotations omitted). "A mandatory injunction 'goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.'" *Id*. (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir.1980)). The status quo means "the last, uncontested status which preceded the pending controversy." *Marlyn Nutraceuticals, Inc.*, 571 F.3d at 879.
>
> Where a claimant seeks a mandatory injunction, "courts should be extremely cautious about issuing a preliminary injunction," and "should deny such relief 'unless the facts and law clearly favor the moving party.'" *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319–20 (9th Cir.1994) (quoting *Anderson*, 612 F.2d at 1114). In general, mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Anderson*, 612 F.2d at 1115; *see also Little v. Jones*, 607 F.3d 1245, 1251 (10th Cir.2010) (describing that "the movant must make a heightened showing of the four factors" (citation and quotation signals omitted)).

Korab v. McManaman, 805 F. Supp. 2d 1027, 1034 (D. Haw. 2011) (alterations in original). *See also Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984) (when a party "seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction"); *Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (upholding district court's grant of mandatory preliminary injunction, and explaining that it is appropriate to issue a mandatory preliminary injunction when both "the facts and law clearly favor the moving party"). *Cf.*

ACLU of Illinois v. Alvarez, No. 11–1286, ___ F.3d ___, 2012 WL 1592618, *4 n.1 (7th Cir. May 8, 2012) ("The State's Attorney argues that a preliminary injunction is inappropriate here because it would grant the ACLU affirmative relief rather than preserving the status quo. The Supreme Court has long since foreclosed this argument." (citing *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975))).

IV. ARGUMENT

Plaintiffs easily meet the standard for a preliminary injunction. First, Plaintiffs have a substantial likelihood, if not a near certainty, of success on the merits of their claims. Defendants' interference with Plaintiffs' fundamental right to marry is clearly unlawful, as set forth by the United States Supreme Court twenty-five years ago in *Turner*. Second, Plaintiffs are suffering – and are likely to continue suffering – irreparable harm, insofar as their constitutional rights are being violated. "An alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984) (citing 11A CHARLES A. WRIGHT & ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948, 440 (1973)). Third, the balance of equities tips in Plaintiffs' favor: there is no hardship to Defendants in permitting Plaintiffs to marry, insofar as a change in Plaintiffs' (and their fiancés') legal status would not change anything with respect to the prison's ability to maintain safety

and security for the institution or the public at large. Fourth, remedying constitutional violations is in the public interest.

A. Plaintiffs Are Clearly Likely To Succeed On The Merits

1. The right to marry is fundamental

Plaintiffs and their fiancés have a fundamental right to marry, guaranteed by the Fourteenth Amendment to the United States Constitution. *See*, *e.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down Wisconsin statute requiring a non-custodial parent under an existing child-support order from a court to obtain court approval before marrying, pursuant to the Equal Protection Clause of the Fourteenth Amendment; reaffirming that the right to marry is fundamental and that restrictions on that right are subject to strict scrutiny); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" (quoting *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942)), and striking down Virginia's anti-miscegenation law under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the Due Process Clause of the Fourteenth Amendment includes the right to marry); *Buck v. Stankovic*, 485 F. Supp. 2d 576 (M.D. Pa. 2007) (granting preliminary injunction and prohibiting defendant from requiring plaintiff to prove that he was lawfully present in the United States as a condition of obtaining a

marriage license). *See also M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society. . . .") (citation omitted)); *Cleveland Bd. of Educ. v. Lafleur*, 414 U.S. 632, 639-40 (1974) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

Marriage's status as a fundamental right protected by the Due Process Clause of the Fourteenth Amendment means that a party may state a claim directly under the Due Process Clause.

Prisoners retain this fundamental right to marry. *Turner*, 482 U.S. at 96 (holding that a complete ban on prisoners' right to marry, except in compelling circumstances, was facially unconstitutional). "[W]here the inmate wishes to marry a civilian, the decision to marry (apart from the logistics of the wedding ceremony) is a completely private one." *Id.* at 98. *See also Toms v. Taft*, 338 F.3d 519, 527 (6th Cir. 2003) (holding that prison officials violated the plaintiff-prisoner's constitutional right by not affirmatively assisting him in obtaining a marriage license, but granting prison officials qualified immunity as to plaintiffs' damages claims: "[W]e now hold that the 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.").[3]

2. *Regardless of the standard used to evaluate Defendants' actions – strict scrutiny or "legitimate penological interest" – Defendants' actions are unlawful*

Outside the prison context, any state action that intrudes on the fundamental right to marry is subject to strict scrutiny, *see Zablocki*, 434 U.S. at 388. The standard is lessened for prisoners, however. As the Court explained in *Turner*, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

It is unclear what standard applies in the instant case, where a prisoner seeks to marry a non-prisoner. The language of *Turner* itself suggests that strict scrutiny still applies, *see Turner*, 482 U.S. at 98 ("[W]here the inmate wishes to marry a civilian, the decision to marry (apart from the logistics of the wedding ceremony) is a completely private one."). The *Turner* Court, however, expressly reserved that question. *Id.* at 97 ("[T]his implication of the interests of nonprisoners may support application of the *Martinez* standard, because the regulation may entail a 'consequential restriction on the [constitutional] rights of those who are not

3 In contrast, in the instant case, Plaintiffs do not seek Defendants' affirmative assistance in obtaining the marriage license itself; instead, Plaintiffs seek an order prohibiting Defendants from interfering with their ability to marry. The illegality of Defendants' conduct was made clear by *Turner*.

prisoners.' *See Procunier v. Martinez*, 416 U.S.[396, 409 (1974)]. We need not reach this question, however, because even under the reasonable relationship test, the marriage regulation does not withstand scrutiny." (second alteration in original)). A more recent case, *Johnson v. California*, 543 U.S. 499 (2005), referred only to the legitimate penological interest standard as the appropriate standard for prisoner marriages, but the Court did not distinguish between prisoner-prisoner marriages and prisoner-civilian marriages (as the *Turner* Court did). *See id*. at 509-510 ("In *Turner*, we considered a claim by Missouri prisoners that regulations restricting inmate marriages and inmate-to-inmate correspondence were unconstitutional. We rejected the prisoners' argument that the regulations should be subject to strict scrutiny, asking instead whether the regulation that burdened the prisoners' fundamental rights was 'reasonably related' to 'legitimate penological interests.'" (citations omitted)). *See also Vasquez v. New Jersey Dept. of Corr*., 791 A.2d 281, 284 (N.J. Sup. Ct. App. Div. 2002) (discussing *Turner* and stating that "the Court indicated that security concerns ordinarily could justify denial of a request for permission to marry only if an inmate desired to marry another inmate").

In the instant case, Defendants' actions affect both non-prisoners (Plaintiffs) and prisoners (Plaintiffs' fiancés). Insofar as Plaintiffs are not incarcerated, Plaintiffs contend that the appropriate standard is strict scrutiny, rather than the

Turner "legitimate penological interest" standard. Defendants' actions cannot survive strict scrutiny: the government has no interest in preventing people from marrying (or in ensuring that the marriage will be healthy or successful as set forth in Defendant Kimoto's letters), insofar as those decisions are between the would-be spouses; the regulations are not narrowly tailored, insofar as Defendants appear to have a blanket policy prohibiting all prisoners from marrying; and whatever possible interest the government might have could certainly be accomplished with less restrictive measures than prohibiting all marriages. Defendants' policies and actions "interfere directly and substantially with the right to marry." *Zablocki*, 434 U.S. at 387. Accordingly, their actions are subject to strict constitutional scrutiny. *Id.* at 388.

Nevertheless, Defendants' actions cannot survive even under the more deferential "legitimate penological interest" standard. Again, to be clear, *Turner* already evaluated this exact question and already determined that a near-complete ban on prisoner marriages did not further a legitimate penological interest – as such, the Court may begin and end its analysis there.

Even if this Court were inclined to re-visit this question, however, Defendants cannot meet their burden. *Turner* identified four factors as being relevant to the question of whether a regulation that infringes on a constitutional right furthers a legitimate penological interest:

> First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Moreover, the governmental objective must be a legitimate and neutral one. . . .
>
> A second factor relevant in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates. . . .
>
> A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . .
>
> Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an "exaggerated response" to prison concerns. . . .

Turner, 482 U.S. at 89-90 (internal citations omitted). The *Turner* Court has *already* applied these four factors and has *already* determined that a near complete ban on prisoner marriages (as in the instant case) is unconstitutional. *Id.* at 99 ("[T]he almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives."). Nevertheless, each of the four factors is discussed in turn.

a. Defendants have no legitimate interest in prohibiting Plaintiffs and their fiancés from marrying

i. Defendant Kimoto's initial denial letters prohibit the marriages based on her personal belief that that the marriages will be unsuccessful

First, Defendants have no cognizable interest in preventing Plaintiffs, who are not incarcerated, from marrying prisoners, and it is unclear what legitimate public policy reason there could be for preventing such a marriage. In the letters sent to Plaintiffs Aliviado and Glass, Defendant Kimoto first denied the applications because, in her words, the marriages would be unsuccessful. Aliviado Decl., Ex. 1; Glass Decl., Exs. 1, 2 (denying the marriage applications because, "[a]s a Ward of the State incarcerated in a correctional facility, you are incapable of providing the necessary emotional, financial and physical support that every marriage needs in order to succeed.") Simply put, there is no legitimate government interest in prohibiting a marriage because a government bureaucrat thinks it might fail; the *Turner* Court clearly rejected any paternalistic interest in "protecting" women from entering into unsound unions, and confirmed that prisoners retain the fundamental right to marry.

ii. Defendant Kimoto's subsequent rejection letters are similarly baseless

Defendant Kimoto's subsequent rejections of the marriage applications of Plaintiffs Aliviado and Glass – after representatives of the Ombudsman's Office

and Department of Public Safety, respectively, recommended that the couples re-apply – were similarly baseless. In the letter sent to Plaintiff Aliviado, Defendant Kimoto rejected the proposed marriage because of her fiancé's conviction for sexual assault of a minor and the fact that Plaintiff Aliviado has a minor child at her home. Aliviado Decl., Ex. 2. There is no rational relationship to a legitimate government interest, however, insofar as (1) Plaintiff Aliviado's only minor child is sixteen years old, and (2) Plaintiff Aliviado's fiancé will be incarcerated for approximately ten more years (such that Plaintiff Aliviado's minor child will be approximately twenty-six years old, and no longer a minor).[4] Aliviado Decl. ¶8.

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4 The particular facts of Plaintiff Aliviado's case demonstrate the absurdity of Defendants' purported rationale, but even if Plaintiff Aliviado's fiancé were due to be released imminently – and even if Plaintiff Aliviado had minor children in her home at the time her then-husband was released – Defendant Kimoto's justification for denying the application would still be untenable insofar as "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90.

If this type of logic were permitted, then Defendants could prohibit virtually every marriage application based on sheer speculation that the prisoner might commit the same kind of crime to (or near) his new family. The State could deny marriage applications of any prisoner convicted of theft (because, presumably, their would-be spouses might have some cash or jewelry lying around, and the prisoners might steal again); the State could prohibit marriage applications of any prisoner convicted of drunk driving (because the prisoner might drive drunk with his new spouse in the car); the State could prohibit marriage applications of any prisoner convicted of assault (because the prisoner might assault his new spouse or step-children); or the State could prohibit marriage applications of any prisoner convicted of a drug offense (because the prisoner might use drugs in front of his new spouse). In other words, government bureaucrats would be able to deny a prisoner's marriage application based on the applicant's status as a prisoner – thus eviscerating the holding of *Turner*.

In the letter sent to Plaintiff Glass, Defendant Kimoto rejected the proposed marriage because of Plaintiff Glass' criminal record. Again, there is no rational relationship to a legitimate penological interest: Plaintiff Glass and her fiancé already speak on the phone daily, visit one another in person once a month, and write each other frequently. Glass Decl., ¶¶3, 9. Neither the Department of Public Safety nor the Saguaro Correctional Facility has identified any security or "good government" concerns so as to limit the couple's communications or visits; there is no reason to believe that a change in the couple's legal marital status would somehow threaten the good government of the Saguaro Correctional Facility or the public welfare at large. In short, the first *Turner* factor weighs in favor of Plaintiffs and against Defendants.

b. Plaintiffs have no alternative means by which to exercise their constitutional right to marry

Second, Plaintiffs and their fiancés have no alternative means by which to exercise their fundamental rights. They want to get married, and there is no substitute for marriage. They must get Defendants' approval before they can arrange a ceremony and get married, and Defendants have refused to grant them permission. *See* Aliviado Decl., Exs. 1-2; Glass Decl., Exs. 1, 2, 4, 5; Santos Decl., Ex. 1 and ¶¶7, 8, 10; Amina Decl. ¶9 (application was not answered). The second *Turner* factor weighs in favor of Plaintiffs and against Defendants.

c. Accommodation of Plaintiffs' right to marry will have no negative impact on guards or other prisoners

Third, there is no evidence that accommodation of the asserted constitutional right will have any negative impact on guards and other inmates. There is no dispute that the prison facility itself must be involved in determining the logistics of the wedding ceremony itself. *See Turner*, 482 U.S. at 99 ("It is undisputed that Missouri prison officials may regulate the time and circumstances under which the marriage ceremony itself takes place."). The Supreme Court, however, rejected any contention that this one-time scheduling matter was the type of impact on the facility that could trump the constitutional right to marry. Once the ceremony is complete, there is no additional strain on prison resources: Plaintiffs will continue to call, write, and (when possible) visit their fiancés, as they do now. Indeed, at least one couple has already been married at the Saguaro Correctional Facility since 2011. *See* ACLU of Hawaii, "Annual Report – 2010" at 1, available at http://acluhawaii.files.wordpress.com/2011/10/annrept2010.pdf.

A change in the couples' legal marital status will not burden the facility in even the slightest way. To the contrary, there is evidence that prisoner marriages help to improve the security and good government of the prison itself. As Plaintiff Amina declares, her fiancé has made a concerted effort to avoid disciplinary problems at the Saguaro Correctional Facility in order to improve his relationship with Plaintiff Amina. Amina Decl. ¶10. Defendants ought to be encouraging these

familial relationships as a way to improve prisoners' behavior while incarcerated (and their chances for successful re-integration into the community once they are released). As such, the third *Turner* factor weighs in favor of Plaintiffs and against Defendants.

d. Defendants' actions are an exaggerated response to an imaginary security concern

Fourth, Defendants' purported response to whatever safety concerns they have imagined is exaggerated. Even if the State had some legitimate goal in barring Plaintiffs from marrying, there are certainly less severe alternatives to a *complete* ban on marriages for all prisoners (based on the faulty premise that the marriage "will be detrimental to any future re-integrative efforts"), Glass Decl. Exs. 1-2; Aliviado Decl. Ex. 1; a *complete* ban on marriages where the civilian fiancée has a criminal record, Glass Decl., Exs. 4, 5 and ¶¶10, 11, 13; and a *complete* ban on marriages based on speculation that the prisoner might commit the same type of crime again, Aliviado Decl., Ex. 2 (*see also* note 4, *supra*).[5] Defendants' purported rationales leave *no* room for a civilian to marry a prisoner under any circumstances. There are certainly less restrictive alternatives than a

5 Such discrimination against individuals with criminal backgrounds is also counter to the State of Hawaii's public policy. For example, Hawaii Revised Statutes ("HRS") § 378-2 prohibits employment discrimination on the basis of "arrest and court record." *See also* HRS § 378-2.5 (providing that an employer may not make employment decisions based on an employee's past criminal convictions unless such a decision has a "rational relationship" to the employee's job duties).

complete ban. The fourth *Turner* factor therefore weighs in favor of Plaintiffs and against Defendants.

B. Plaintiffs Are Suffering Irreparable Harm

Delaying – let alone prohibiting – Plaintiffs' ability to marry harms them irreparably. Every day that passes is a day that they remain outside of the emotional, spiritual, and legal bonds of marriage. Santos Decl. ¶6 (citing health concerns and stating that "I'm living on God's time now."), ¶10 ("We just want to be married."); Aliviado Decl. ¶9 ("I want to marry my fiancé because I feel close to him. It broke my heart when the state officials said 'no.'"); Glass Decl., ¶12 (marriage "would mean everything for my fiancé and me"); Amina Decl. ¶7 ("I love him very much . . . . He knows my thoughts, and I know his thoughts."). The Ninth Circuit has recognized that "[a]n alleged constitutional violation will often alone constitute irreparable harm." *Goldie's Bookstore, Inc.*, 739 F.2d at 472 (citation omitted). Each of the Plaintiffs will continue to suffer these harms unless Defendants are enjoined by this Court. *See* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE §3531.2 (2d ed. 1984) (a plaintiff seeking injunctive relief must show that he or she "can reasonably expect to encounter the same injury in the future") (citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983)).

In *Buck v. Stankovic*, 485 F. Supp. 2d 576 (M.D. Pa. 2007), the District Court granted a preliminary injunction prohibiting the defendant from requiring the plaintiff to prove that he was lawfully present in the United States as a condition of obtaining a marriage license. The Court ruled that the plaintiffs had demonstrated the possibility of irreparable harm: "Here, if the Court did not issue a preliminary injunction, Plaintiffs would suffer irreparable harm. They would be deprived of their fundamental constitutional right to marry." *Id.* at 586. The same is true in the instant case: Plaintiffs are suffering – and, without prompt judicial action, will continue to suffer – irreparable harm.

C. The Balance of Equities Tips in Plaintiffs' Favor

Defendants would suffer no discernable harm by the issuance of an injunction, and the balance of equities tips decidedly in favor of a preliminary injunction. While Plaintiffs will continue to suffer irreparable harm, insofar as they will continue to be deprived of the ability to enjoy a marital relationship with their fiancés, Defendants will not suffer any harm whatsoever. *See id.* at 586 (granting plaintiffs' motion for a preliminary injunction where the hardship to plaintiffs – denial of their fundamental right to marry – outweighed whatever administrative burden might befall defendants); *see also Int'l Soc'y for Krishna Consciousness v. Kearnes*, 454 F. Supp. 116, 125 (E.D. Cal. 1978) (ruling, in a discussion on the First Amendment, that the existence of constitutional questions

"weighs heavily in the balancing of harms, for the protection of those rights is not merely a benefit to plaintiff but to all citizens").

D. <u>A Preliminary Injunction is in the Public Interest.</u>

Securing constitutional rights is clearly in the public interest, and Courts have consistently recognized the significant public interest in protecting fundamental rights. *See United States v. Raines,* 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]"); *Buck,* 485 F. Supp. 2d at 586-87 ("The violation of a fundamental constitutional right constitutes irreparable injury. '[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'" (quoting *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir.1994)) (alteration in original)). In short, a preliminary injunction to enforce the Fourteenth Amendment is in the public interest.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for a Preliminary Injunction.

Dated: Honolulu, Hawaii, May 15, 2012.

Respectfully submitted,

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