IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TEENA FOY,

Plaintiff,

v. Case No.: 4:24-cv-00140-MW/MAF

RICHARD D. DAVISON, in his official capacity, DAVID A. WYANT, in his official capacity and MELINDA N. COONROD, Chairperson and Commissioner, Florida Commission on Offender Review, in her official capacity,

Defendants.

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DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR PRELIMINARY INJUNCTION

Ms. Foy's Renewed Motion for Preliminary Injunction must be denied because she cannot show a substantial likelihood of success on the merits or that the balance of equities and the public interest favor the issuance of a preliminary injunction. In addition, this case falls within the purview of *Turner v. Safley*, 482 U.S. 78 (1987) and Defendant's special condition of Mr. Graham-Foy's release is reasonably related to the State of Florida's penological interests. Finally, Ms. Foy lacks standing to challenge the special condition of Mr. Graham-Foy's release from prison.

When Mr. Graham-Foy pled guilty to brutally assaulting his mother, he acknowledged that his actions had consequences. In this case two things are simultaneously true – Ms. Foy is Mr. Graham-Foy's mother, and the no-contact condition of Mr. Graham-Foy's release from incarceration has nothing to do with Ms. Foy being his mother. Mr. Graham-Foy is prohibited from contacting the *victim* of his crime, and it is an unfortunate but ultimately inconsequential reality that his victim is also his mother, whom he attacked while they were living together. That reality is no one's fault but his own.

LEGAL STANDARD

"A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to the four requisites." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). As set forth below, Plaintiff cannot meet this burden and her Renewed Motion for Preliminary Injunction must be denied.

ARGUMENT

I. Plaintiff is unlikely to succeed on the merits.

Ms. Foy fails to state a claim for relief as to all counts in her Second Amended Complaint, or at the very least is unable to show a substantial likelihood that she will succeed on the merits. For that reason alone the Renewed Motion for Preliminary Injunction must be denied.

A. First Amendment

Plaintiff claims that she has a right to intimate association under both the First Amendment *and* the Fourteenth Amendment, (*See* ECF 42 at 10-11, 16; ECF 43 at 11, 20), but Supreme Court precedent makes clear that the right to familial association does not arise under the First Amendment. In *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) the Supreme Court stated:

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human 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. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.

In *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), the Supreme Court stated that "[w]hile the First Amendment does not in terms protect a 'right of association,' our cases have recognized that it embraces such a right in certain circumstances." Id. at 23-24. The Court then quoted the same language from *Roberts* quoted above, and then held that "[i]t is clear beyond cavil that dance-hall patrons, who may number 1,000 on any given night, are not engaged in the sort of 'intimate human relationships' referred to in Roberts. The Texas Court of Appeals, however, thought that such patrons were engaged in a form of expressive activity that was protected by the First Amendment. We disagree."

In *Roberts* and *Stanglin,* the Supreme Court clearly differentiated between the right to enter and maintain intimate relationships, which receives protection as a fundamental element of personal liberty under the Due Process Clause of the Fourteenth Amendment, and the right to associate in order to engage in activities protected by the First Amendment. *See also McCabe v. Sharrett*, 12 F. 3d 1558, 1562-63 (11th Cir. 1994) (citing to the Supreme Court's distinction in *Roberts* between the right to intimate association, which is protected as "a fundamental aspect of personal liberty," and the right of "expressive association" protected by the First Amendment.); *Gaines v. Wardynski*, 871 F. 3d 1203, 1212 (11th Cir. 2017) (same). As Judge Posner explained in *Swank v. Smart,* 898 F. 2d 12471251-52 (7th Cir. 1990) "Some [] nonenumerated substantive liberties receive broader protection…under

such rubrics as 'right of privacy,' 'fundamental right,' and 'right of association' in a nonexpressive sense," citing to *Roberts*, 468 U.S. at 617-20.[1] "[I]t is sometimes suggested – erroneously, in light of *Roberts* and *Stanglin* – that the First Amendment protects nonexpressive associations."[2] *Swank*, 898 F. 2d at 1252. Like the unsuccessful plaintiff in Swank, Plaintiff erroneously suggests that the nonenumerated right to intimate familial relationships arises under the First Amendment.

Ms. Foy relies upon *Roberts* to support her First Amendment claim for a right of intimate association with her son, ECF 42 at ¶ 48, but as explained above the Supreme Court has not recognized a right of intimate association under the First Amendment. Ms. Foy also relies upon *Trujillo v. Bd. of Cnty. Comm'rs*, 768 F. 2d 1186 (10th Cir. 1985), but that case is also unavailing. In discussing the Supreme Court's *Roberts* decision, *Trujillo* noted that "[w]hile the court anchored the freedom of expressive association in the First Amendment, it identified the freedom of intimate association as 'an intrinsic element of personal liberty.'" *Trujillo*, 768 F. 2d 1188. While the *Trujillo* Court analyzed the right to intimate association on the same

[1] "[I]n § 1983 cases grounded on alleged parental liberty interest, we are venturing into the murky area of unenumerated constitutional rights." *McCurdy v. Dodd*, 352 F. 3d 820, 825 (3d Cir. 2003).

[2] *Swank* identified "[t]he principle case" erroneously suggesting that the First Amendment protects nonexpressive association as *Wilson v. Taylor,* 733 F. 2d 1539, 1542-44 (11th Cir. 1984). "*Wilson* was decided three weeks before *Roberts* and did not survive it." *Swaim,* 898 F. 2d at 1252.

basis as the right to expressive association under the First Amendment,[3] it also recognized that the right to intimate association did not arise from the First Amendment. "*Despite different constitutional roots*, both interests protect interpersonal relationships from unwarranted intrusion by the state." *Id*. at 1190 (emphasis added).

Ms. Foy's reliance on the Eleventh Circuit's decision in *Robertson v. Hecksel*, 420 F. 3d 1254 to support her claim for violation of a right for familial association under the First Amendment is also unavailing. As a threshold matter, *Robertson* did not involve a claim alleging a right of intimate association under the First Amendment. Robertson "alleged, pursuant to 42 U.S.C. § 1983, a deprivation of her Fourteenth Amendment right to a relationship with her adult son," *id.* at 1256, who had been killed by a police officer during a traffic stop. *Id.* at 1255-56. *Robertson* does not support Ms. Foy's claim that Defendants' actions violate a First Amendment right to her intimate association with Mr. Graham-Foy. Further, as will be discussed below, *Robertson* is also fatal to Ms. Foy's claim that she has a right to intimate association with her adult son under the Fourteenth Amendment.

Because the First Amendment cannot be read to guarantee a right of intimate familial association, Ms. Foy does not have a substantial likelihood of success on

[3] "We believe that freedom of expressive association provides the most appropriate analogy for freedom of intimate association." *Trujillo*, 768 F. 2d at 1189. "These common features and values may best be safeguarded by similar doctrinal analysis." *Id*. at 1190.

the merits and her Renewed Motion seeking a preliminary injunction on that basis must be denied.

B. Fourteenth Amendment Due Process Clause

"A parent's due process right in the care, custody, and control of her children is 'perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.'" *Robertson*, 420 F. 3d at 1257, quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000). "A parent's right to care, custody, and control of her minor children has also been the source of added procedural protections." *Robertson* at 1257, citing to *Stanley v. Illinois*, 405 U.S. 645, 658-59 (1972). "While this right provides parents with both substantive and procedural protections, the Supreme Court cases 'extending liberty interests of parents under the Due Process Clause focus on relationships with *minor* children." *Robertson* at 1257, quoting *McCurdy*, 352 F. 3d at 827 (emphasis in original). In analyzing a claim of first impression for the Eleventh Circuit, the Court held "that the Fourteenth Amendment's substantive due process protections do not extend to the relationship between to the relationship between a mother and her adult son." *Robertson* at 1255.

Robertson continues to reflect the state of the law in the Eleventh Circuit. In *Gunn v. City of Montgomery*, No. 2:16-cv-557-WKW, 2018 WL 1740933 (M.D. Ala. April 11, 2018), the Court held that the mother of an adult son did not have a claim under 42 U.S.C. § 1983 for her loss of companionship and support resulting from

the death of her adult son at the hands of a police officer. Id. at *2, 7. The plaintiff in *Gunn* attempted to distinguish *Robertson* by claiming that her "loss of consortium damages are not couched as familial association claims, but are instead derivative of, and require proof of, the unconstitutional deprivation of her son's constitutional equal protection and due process rights." *Id*. at *7. The Eleventh Circuit rejected that argument, holding that "the relevant point of *Robertson* is that, between a parent and deceased adult child, there is no constitutionally or federally protected right of companionship and support, particularly where (as here) the defendant's wrongful conduct was not directed at the parent or at the decedent's familial association with the parent."[4] *Id*.

Robertson reflects the position of the majority of the federal Circuit Courts of Appeal on the question of whether parents have a right under the federal constitution to recover for the intimate association of an adult child. *See Russ v. Watts*, 414 F. 3d 783, 783-84, 788 (7th Cir. 2005) (parents had no constitutional right to recover for loss of society and companionship of 22 year old son where state action did not specifically target parent-child relationship)[5]; *McCurdy v. Dodd*, 352 So. 3d 820, 830

[4] Ms. Foy attempts to circumvent this aspect of *Gunn* and *Robertson* by alleging that "Defendants acted with intent to interfere with the relationship between Plaintiff and Graham-Foy…" ECF 42 at ¶ 42. However, this effort at circumvention is unavailing because Ms. Foy does not have a constitutional claim for deprivation of an intimate familial relationship with her adult son under either the First or Fourteenth Amendments.

[5] *Russ v. Watts* overruled *Bell v. City of Milwaukee,* 746 F. 2d 1205 (7th Cir. 1984), which "held that a parent's constitutional liberty interest in his relationship with his adult son was violated when

(3d Cir. 2003) ("[W]e hold that the fundamental guarantees of the Due Process Clause do not extend to a parent's interest in the companionship of his independent adult child."); *Butera v. District of Columbia,* 235 F. 3d 637, 656 (D.C. Cir. 2001) ("Therefore we hold that a parent does not have a constitutionally-protected liberty interest in the companionship of a child who is past minority and independent."); *Valdivieso Ortiz v. Burgos*, 807 F. 2d 6, 10 (1st Cir. 1986) ("Our conclusion is simply that, in light of the limited nature of the Supreme court precedent in this area, it would be inappropriate to extend recognition of an individual's liberty interest in his or her family or parental relationship to the facts of this case.")[6]

Ms. Foy therefore does not have a constitutionally protected interest in the intimate association with Mr. Graham-Foy under the Due Process Clause of the Fourteenth Amendment. Ms. Foy therefore does not have a substantial likelihood of success on the merits of her claims for violation of the Fourteenth Amendment's guarantees of procedural and substantive due process and her Renewed Motion for Preliminary Injunction must be denied on those grounds.

C. First Amendment Rights of Freedom of Religion and of Speech.

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his son was killed by police." *Russ*, 414 F. 3d at 783-84. *Trujillo v. Bd. of Cnty Comm'rs*, 768 F. 2d 1186 (10th Cir. 1985), cited in the Second Amended Complaint, ECF 42 at ¶ 48, relied upon *Bell* in support of its ruling that 42 U.S.C. § 1983 provided a claim for violation of a parent's right to companionship with an adult child. Ms. Foy therefore cannot rely on *Trujillo* to support a claim for loss of intimate association with her adult son under either the First Amendment or the Fourteenth Amendment.

[6] *Valdivieso Ortiz* involved a claim under § 1983 brought by parents and siblings for deprivation of the companionship for their adult son and brother allegedly beaten to death by prison guards.

Ms. Foy's claims that the condition of Mr. Graham-Foy's release prohibiting *him* from contacting *her* violate her freedom of religion and speech under the First Amendment do not pass constitutional muster. Ms. Foy offers no convincing argument that the no-contact provision prevents her from freely practicing her Catholicism or from fully forgiving Mr. Graham-Foy for the violent crimes he committed against her. The Renewed Motion for Preliminary Injunction baselessly suggests that Mr. Graham-Foy's conditional release will be revoked, and he will be returned to prison if he and Ms. Foy inadvertently attend mass at the same Catholic church at the same time[7] or if she contacts him indirectly by mail. ECF 43 at 16-18, Ex. 12 at ¶ 14. In any event, Ms. Foy's stated concerns about how her unfettered exercise of her First Amendment rights of freedom of religion and speech would affect Mr. Graham-Foy's conditional release are entirely overblown.

"To support a revocation of supervised release, the state must prove that a violation of a condition of supervision was both willful and substantial." *Houck v. Fla. Parole Comm'n*, 953 So. 2d 692 (Fla. 1st DCA 2007), citing to *State v. Carter*, 835 So. 2d 259, 262 (Fla. 2002). In *Brown v. McNeil*, 591 F. Supp. 2d 1245 (M.D. Fla. 2008), Judge Corrigan held that the conditional release of a Florida inmate

[7] A Google internet search for "Catholic churches in Jacksonville, Florida" identifies 20 different Catholic churches. Presumably each of these 20 different churches offers multiple weekly options for attending mass. Although the Renewed Motion for Preliminary Injunction hints at it, Ms. Foy cannot claim that FCOR violates her First Amendment right to freedom of religion because she and Mr. Graham-Foy cannot currently attend mass together. To be sure, she cites to no authority supporting such a claim.

pursuant to section 947.1405, Florida Statutes, could not be revoked absent a finding of a substantial and willful violation supported by the greater weight of the evidence, citing to the Florida Supreme Court's *Carter* decision. *Id*. at 1248, 1258; *see also Watts v. Fla. Comm. on Offender Rev*., No. 4:21-cv-221-MW-EMT, 2022 WL 1158001 at *2 (N.D. Fla. Jan. 11, 2022), report and recommendation adopted *Watts v. Fla. Comm. on Offender Rev.,* No. 4:21-cv-221-MW-EMT, 2022 WL 1156018 (N.D. Fla. April 19, 2022) (conditional release properly revoked where releasee willfully violated conditions of release); *Ellard v. Fla. Comm. on Offender Rev.,* No. 3:20-cv-5520-MCR, 2021 WL 3232450 (N.D. Fla. March 26, 2021), report and recommendation adopted *Ellard v. Fla. Comm. on Offender Rev*., No. 3:20-cv-5520-MCR-EMT, 2021 WL 3209911 (N.D. Fla. July 29, 2021) (conditional release properly revoked where releasee from Florida prison willfully failed to inform his conditional release supervisor upon his release from federal prison); *Hebert v. Fla*., No. 24-cv-20104-Altman, 2024 WL 1254225 (S.D. Fla. March 25, 2024) (conditional release properly revoked where releasee willfully left county of residence without permission of his conditional release supervisor); *Lincoln v. Fla. Parole Comm'n,* 643 So. 2d 668, (conditional release properly revoked where releasee failed to report as required); *Shoemaker v. Jones,* No. 3:15-cv-002-LC-CAS, 2017 WL 927627 at *1, n. 5, (N.D. Fla. Feb. 6, 2017), report and recommendation

adopted *Shoemaker v. Jones*, no. 3:15-cv-002-LC-CAS, 2017 WL 924474 (N.D. Fla. Mar. 8, 2017).

Were Ms. Foy and her son to inadvertently attend mass at the same Catholic church at the same time, or if Ms. Foy were to send emails, text messages, letters, or packages to her son, Mr. Graham-Foy could not be deemed to willfully violated the no-contact provision of his conditional release if he reported those contacts to his supervising officer. Because Mr. Graham-Foy would not be willfully violating the no-contact provision under those circumstances, his conditional release could not be revoked and he could not be returned to prison. Consequently, Ms. Foy's freedom of religion and freedom are not impaired by the no-contact provision. To the extent that Ms. Foy's freedom of speech may be impaired by Mr. Graham-Foy's inability to respond to her, any such impairment is merely incidental to the lawful no-contact provision imposed on Mr. Graham-Foy as a condition of his release. *See Zargarpur v. Townsend*, 18 F. Supp. 3d 734, 737 (E.D. Va. 2013) (holding that a student-victim failed to allege a concrete injury in seeking to quash the no-contact provision of teacher-offender's probation); *Drollinger v. Milligan,* 552 F.2d 1220, 1227 n.5 (7th Cir. 1977) (concluding that a father failed to allege an injury in challenging his daughter's terms of probation); *Clark v. Prichard*, 812 F.2d 991, 999 (5th Cir. 1987) (Hill, J., concurring) (adding that probationer's children lacked standing to "contest the conditions of their mother's probation").

D. Violation of Article I, Section 16 of the Florida Constitution

Ms. Foy's claim that the no-contact condition of Mr. Graham-Foy's release from prison violates her rights under the Florida Crime Victims' Bill of Rights, Article 1, Section 16(b) of the Florida Constitution, is predicated on the unusual notion that as a victim of crime she has veto authority over the conditions imposed on her attacker's release from prison. Article 1, Section 16(b)(3), while providing victims of crime the right to be reasonably protected from the accused, also provides that "nothing contained herein is intended to create a special relationship between the crime victim and any law enforcement agency or office absent a special relationship or duty as defined by Florida law." Ms. Foy does not, and cannot, allege a special relationship that creates a duty on the part of FCOR or its commissioners that would allow her the authority to dictate or challenge the conditions of Mr. Graham-Foy's release.

"A law enforcement officer's duty to enforce the law and protect the public safety is generally considered a matter of governance for which there has never been a common-law duty of care." *Labance v. Dawsy*, 14 So. 3d 1256, 1259 (Fla. 5th DCA 2009), citing to *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985). "However, when an officer exercises his discretion to enforce the law, Florida law has consistently recognized that a special relationship may arise between an officer and a tort victim when the officer's conduct creates a foreseeable zone of

risk to a determinate individual or group." *Labance*, 14 So. 3d at 1259; *see also City of Pinellas Park v. Brown,* 604 So. 2d 1222, 1226(Fla. 1992); *Kaiser v. Kolb*, 543, So. 2d 732, 734 (Fla. 1989).

The Defendants' discharge of their duties in setting the conditions of Mr. Graham-Foy's release does not create a duty or special relationship between them or FCOR and Ms. Foy as described in *Labance* and *City of Pinellas Park*. First and foremost, Ms. Foy alleges that Defendants have violated the Florida Constitution, not committed a tort under which the question of a duty of care might arise. Second, FCOR is not a "law enforcement agency or office" and Defendants are not law enforcement officers. Finally, Ms. Foy does not allege that Defendants violated Article I Section 16(b) by failing to protect her as a victim of crime. To the contrary, she alleges that Defendants violate her rights under the Florida Constitution by imposing a special condition of release intended to protect her from the habitual felony offender who viciously attacked her.

Special relationships occasionally arise under Florida law which create a legal duty to control the conduct of third parties, including employer-employee, landlord-tenant, landowner-invitee, and school-minor student employees. *Doe v. Faerber,* 446 F. Supp. 2d 1311, 1318-19 (M.D. Fla. 2006). Again, those special relations arise in the context of tort law, not in the context of alleged violations of constitutional rights. In any event, Ms. Foy has plead no basis that would establish that she enjoys a

special relationship with Defendants under Florida law. Consequently, no such special relationship is created by the enactment of Section I, Article 16 of the Florida Constitution.

Finally, Ms. Foy's allegation that Defendants' violation of her rights under the Florida Crime Victims' Bill of Rights constitutes a further violation of her First and Fourteenth Amendment rights, ECF 42 at ¶ 94, is unavailing. As discussed supra, Ms. Foy cannot set forth a § 1983 claim for interference with an intimate familial relationship under either the First Amendment or the Due Process Clause of the Fourteenth Amendment. Defendants respectfully submit that she has failed to allege a cause of action for violation of the Florida Constitution, either. To be sure, she has failed to demonstrate a substantial likelihood of success on the merits necessary for entry of a preliminary injunction on her claim that Defendants have violated Article I Section 16(b) of the Florida Constitution.

E. Claim for Declaratory Relief

Count VII of the Second Amended Complaint seeks a declaratory judgment that she "may opt out of the protections afforded by Art. I, § 16(b)(3) of the Florida Constitution, when they are applied to the victim's detriment. ECF 42 at ¶ 104. "Plaintiff seeks a declaratory judgment from this court that she has voluntarily and permanently disgorged herself of 'victim status'…" *Id.* at 107." However, as argued above, Ms. Foy cannot simply invalidate the no victim contact provision of Mr.

Graham-Foy's condition release by making the unilateral decision that she no longer wishes to be the victim of a violent crime.

There is no escaping the unfortunate fact that Ms. Foy was the victim of a violent criminal attack by Mr. Graham-Foy on June 16, 2011, while he was residing with her in her home. The no-contact condition of Mr. Graham-Foy's release is reasonably related to Defendants' legitimate penological interests in supervising the release back into the community of those offenders who pose the greatest threat to the public safety. Accordingly, under *Turner* this Court should exercise restraint and defer to Defendants' efforts to achieve the delicate balance of meeting their statutory duty to protect the public from the most dangerous class of offenders while reintegrating those offenders back into the community. That restraint and deference includes the recognition that Ms. Foy has not alleged an actual, bona fide dispute as to whether she can or cannot veto the no-contact condition of Mr. Graham-Foy's release by electively disavowing the indisputable fact that she was the victim of violent crimes. Her claim to the contrary is at best potentially frivolous. Bacardi USA, Inc. v. Young's Market Co., 273 F. Supp 3d 1120, 1129 (S.D. Fla. 2016).

Pursuant to 28 U.S.C. § 2201(a), "[i]n a case of actual controversy within its jurisdiction…any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party…" However, Plaintiff's borderline frivolous claim that she can avoid the no-contact

condition of Mr. Graham-Foy's conditional release by unilaterally disavowing her status as a crime victim does not create an actual dispute. Consequently this Court lacks subject-matter jurisdiction over Ms. Foy's claim for declaratory judgment. See United Marine Mktg Group, LLC v. Jet Dock Systems, Inc., No. 8:10-cv-02653-T-30TBMC, 2011 WL 3897950 at *3 (N.D. Fla. Sept. 6, 2011); DeCurtis LLC v. Carnival Corp., No. 20-22945-Civ-Scola-Torres, 2021 WL 7539904 (S.D. Fla. Feb. 9, 2021). Further, this "Court has substantial discretion to decline jurisdiction. Issuing a declaratory judgment regarding potentially frivolous claims over which there is no evidence of an actual dispute is an abuse of the Declaratory Judgment Act - not to mention judicial resources." Bacardi USA, 273 Fed. Supp. 3d at 1130.

II. The Balance of Equities and the Public Interest Favor Denying the Motion.

The balance of equities and the public interest further support denying Plaintiff's Renewed Motion. They are best addressed together in this case because, as the Eleventh Circuit noted in *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010), "[w]hen the state is a party, the third and fourth [preliminary injunction] considerations are largely the same." *Id*. (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1455 (11th Cir. 1986)).

The balance of equities here favors the Defendants and weighs against the extraordinary remedy of preliminary injunctive relief. As discussed above, the Commissioners' decision does not infringe on any of Plaintiff's constitutional rights,

but rather follows the Commissioners' duty to protect the public from the offenders which the Florida Legislature has determined to be the greatest threat to the public safety. *See* Fla. Stat. § 947.1405(8).

Additionally, the Commissioners' decision plainly promotes public safety such that the interests of the State and the public coincide. And, where "there is any question as to whether the public safety and welfare is threatened, the Court must rule on the side of that public interest." *Martinez v. Sch. Bd. of Hillsborough Cnty.*, 675 F. Supp. 1574, 1582 (M.D. Fla. 1987).

III. The *Turner* standard applies to Plaintiff's constitutional claims.

Ms. Foy claims that the no contact condition violates a number of her own constitutional rights, and therefore this Court should apply the highest level of constitutional scrutiny. But the penological context of this case demands a different approach. Criminal offenders do not enjoy the same freedoms as law-abiding citizens. *U.S. v. Knight*, 534 U.S. 112, 119 (2001). Thus, when analyzing a constitutional claim challenging the conditions of release of a habitual felony offender,[8] the Court should apply the level of scrutiny appropriate to a criminal offender, not a law-abiding citizen. The appropriate level of scrutiny for this context was articulated in *Turner v. Safley*, 482 U.S. 78 (1987), in which the Supreme Court

[8] It is undisputed that Scott Graham-Foy was sentenced as a habitual felony offender pursuant to section 775.084(1)(a), Florida Statutes.

held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner, at 89. Plaintiff denies the applicability of Turner by arguing that (1) it only applies to cases adjudicating incarcerated inmates' constitutional rights; and (2) it is limited to regulations within the prison walls. ECF 43 at 8. Neither argument succeeds.

First, the Supreme Court has expressly articulated that the *Turner* standard applies to "outsiders" as well as inmates. *Thornburgh v. Abbott*, 490 U.S. 401, 410 n.9 (1989). Second, the *Turner* standard applies to cases in which a criminal offender is still "in custody" for the purposes of serving their sentence. *Montoya v. Jeffreys*, 565 F. Supp. 3d 1045, 1063 (N.D. Ill. 2021). Even though he is no longer "behind bars" Mr. Graham Foy is still "in custody" because he is required to complete his sentence subject to conditional release. *See Montoya*, 565 F. Supp. 3d at 1063. ("A prisoner who has been placed on parole is still 'in custody' under his unexpired sentence.") (cleaned up) (citing *Maleng v. Cook*, 490 U.S. 488, 491 (1989).

Like the Plaintiffs in *Montoya*, Plaintiff asks this Court to defer to *United States v. Myers*, 426 F.3d 117 (2d Cir. 2005) and *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001)[9] because both cases "subjected federal supervised release conditions implicating fundamental rights to strict scrutiny." *See Montoya*, 565 F. Supp. 3d at

[9] ECF 43 at 7.

1063. But neither case addressed the question of whether *Turner* applied. *Id*. Additionally, both *Myers* and *Loy* dealt with conditions of supervised release imposed by a sentencing court, not an executive branch commission like FCOR. This difference is significant because *Turner* urges judicial restraint where the responsibilities of the legislative and executive branches for state penal systems are involved. *Turner*, 482 U.S. at 85.

"[T]he *Turner* Court held that a prison regulation affecting constitutional rights is valid as long as 'it is reasonably related to legitimate penological interests." *Prison Legal News v. Sec'y, Fla. Dept. of Corr.,* 890 F. 3d 954, 965 (11th Cir. 2018), citing to *Turner* at 85, 89. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner,* 482 U.S. 84-85. "Those branches are responsible for prison administration, which means that 'separation of powers concerns counsel a policy of judicial restraint' and deference to prison officials' management decisions." *Prison Legal News,* 890 F. 3d at 965;*see also Pope v. Hightower,* 101 F. 3d 1382, 1384 n. 2 (11th Cir. 1996) ("Federal courts must scrupulously respect the limits on their role by not thrusting themselves into prison administration; prison administrators must be permitted to exercise wide discretion within the bounds of constitutional requirements."); *Al-Amin v. Smith*, 511 F. 3d 1317, 1328 (11th Cir.

2008) ("[U]nder Turner we owe 'wide ranging' and 'substantial' deference to the decisions of prison administrators because of the 'complexity of prison management, the fact that responsibility therefore is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems.")

That same policy of judicial restraint and deference must also be applied to Defendants' decisions concerning conditions of release to be applied to "the population of offenders who…poses the greatest threat to the public safety of the groups of offenders under community supervision." § 947.1405(8), Fla. Stat. As discussed above, *Turner* applies to those offenders "in custody" and under supervision outside prison walls as well as inside. *See Thornburgh*, 490 U.S. at 410 n.9; *Montoya*, 565 F. Supp. 3d at 1063. The no-contact special condition of Mr. Graham-Foy's community supervision following his release from incarceration is "reasonably related to [Defendants'] legitimate penological interests" in protecting the public safety. Ms. Foy therefore has no likelihood, let alone a substantial likelihood, of success on the merits and her Renewed Motion for Preliminary Injunction must be denied.

IV. Plaintiff lacks standing as to all counts.[10]

[10] Defendants are cognizant of this Court's May 7, 2024 Order Denying Plaintiff's Motion for Preliminary Injunction finding that Ms. Foy has stated an injury-in-fact. ECF 37 at 6. Defendants mean no disrespect to the Court or its May 7, 2024 Order, but restate their arguments that Ms. Foy lacks standing to insure that no argument can later be made that they waived that defense.

Federal court jurisdiction is limited to actual cases and controversies. U.S. Const., Art. III, § 2. To establish standing, Plaintiff must show (1) injury-in-fact, meaning a concrete and particularized invasion of a legally protected interest; (2) a causal connection between that injury and the complained-of conduct; and (3) redressability, meaning a favorable decision would eliminate the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Ms. Foy fails to allege a discrete, concrete injury, which is the bare minimum requirement for standing, because Plaintiff's allegations involve a restriction on a person other than herself. Plaintiff alleges the "no victim contact" term of Mr. Graham-Foy's conditional release violates several of her own constitutional rights, but the condition can only be enforced against Mr. Graham-Foy. Plaintiff is free to exercise all of her own constitutional rights without any consequence to her.

Mr. Graham-Foy's conditions of release, and any consequences of violating those conditions, are personal to Mr. Graham-Foy. *See Zargarpur v. Townsend*, 18 F. Supp. 3d at 737 (E.D. Va. 2013); *Drollinger v. Milligan*, 552 F.2d at 1227 n.5; *Clark v. Prichard*, 812 F.2d at 999. Plaintiff does not point to any condition imposed by the Commissioners that requires her to do, or refrain from doing, anything at all. Plaintiff acknowledges that the conditions of release only limit Mr. Graham-Foy's actions. ECF 43 at 12 ("[p]unishment for violating the condition falls upon Graham-Foy").

Because Plaintiff fails to allege a legally cognizable injury, she lacks standing and cannot demonstrate a substantial likelihood of success on the merits.

CONCLUSION

Based on the foregoing, Plaintiff's Renewed Motion for Preliminary Injunction should be denied.

Respectfully submitted,

ASHLEY MOODY
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WORD LIMIT CERTIFICATION

The undersigned certifies that this document complies with the 8,000 word limit set forth in Local Rule 7.1(F) and contains 5,474 words.

/s/ Timothy L. Newhall

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served via the Court's CM/ECF system, which provides notice to all parties, on this 10th day of June, 2024.

/s/ Timothy L. Newhall