No. 24-2007

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SHANNON WAYNE AGOFSKY,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF PRISONS, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana, No. 2:24-cv-00051-JPH-MKK
(Hon. James P. Hanlon)

OPENING BRIEF AND REQUIRED SHORT APPENDIX FOR PLAINTIFF-APPELLANT

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July 22, 2024

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Appellate Court No: 24-2007

Short Caption: Shannon Agofsky v. BOP, et al

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Attorney's Signature: /s/ Kathryn Ali Date: July 22, 2024

Attorney's Printed Name: Kathryn Ali

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Meghan Palmer Date: June 13, 2024

Attorney's Printed Name: Meghan Palmer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTRODUCTION

Bureau of Prisons ("BOP") regulations encourage visiting by family, and contain a strong presumption that immediate family, including spouses, will be allowed to visit, "absent strong circumstances which preclude visiting." 28 C.F.R. § 540.44(a). Visiting requests for friends and associates, by contrast, are subject to a prior relationship requirement, meaning the prisoner must have known the person prior to confinement. BOP assured the public during the rulemaking process that the prior relationship requirement did not apply to immediate family. These regulations apply to all BOP prisoners and facilities, including people on death row, like Plaintiff Shannon Agofsky.

Now, however, Defendants have apparently implemented an unannounced amendment to their regulations, extending the prior relationship requirement to apply to immediate family. Plaintiff has been requesting a non-contact visit with his wife—an immediate family member under § 540.44(a)— for more than four years. The sole reason Defendants provided for denying that request—repeated by five different BOP officials in six separate denials—is that Plaintiff did not have a relationship with his wife prior to his confinement. That goes against the plain text of Section 540.44 and BOP's previous assurance. Altering the standards in binding regulations without formal rulemaking or even public acknowledgement violates the Administrative Procedure Act ("APA"). And even if the Court were to find that BOP

hasn't amended the regulation, the denial of Mr. Agofsky's family visit request still was arbitrary and capricious because Defendants failed to follow their own regulations and departed from a prior policy without explanation. What's more, BOP's procedurally and substantively improper action also violated Mr. Agofsky's First Amendment right to family association: Defendants have arbitrarily and permanently denied Plaintiff his only opportunity for a (non-contact) visit with his wife.

After Mr. Agofsky filed this litigation, Defendants did a complete about-face in their explanation of why they denied Mr. Agofsky's request. Rather than defend the sole reason offered in the administrative record—failure to satisfy the prior relationship requirement—they claimed for the first time via a made-for-litigation declaration that they had security concerns about Mrs. Agofsky. But these supposed concerns do not appear anywhere in the robust administrative record, and fundamental principles of administrative law prohibit this maneuver of offering a new narrative for administrative action once an agency has to defend an action in court. BOP's denial here should rise and fall on the sole reason provided through six contemporaneous administrative responses.

Mr. Agofsky sought a preliminary injunction, citing irreparable harm given that he is on death row and Defendants have effectively banned Mrs. Agofsky from ever visiting him. The district court denied relief. This was error. Mr. Agofsky is

likely to succeed on the merits of his three APA claims, and it is unquestionably in the public interest to require an agency to follow its own regulations. This Court should reverse.

JURISDICTIONAL STATEMENT

Shannon Agofsky filed this action pursuant to 5 U.S.C. § 702 in the United States District Court for the District of Columbia. ECF No. 1. The action was subsequently transferred to the Southern District of Indiana. ECF No. 22. The district court had jurisdiction over Mr. Agofsky's claims under 28 U.S.C. § 1331 (federal question jurisdiction). The district court denied Mr. Agofsky's Motion for a Preliminary Injunction on May 6, 2024. SA-001. Mr. Agofsky timely noticed his appeal on June 7, 2024. ECF No. 47; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction to review the district court's interlocutory order denying a preliminary injunction under 28 U.S.C. § 1292(a)(1).

STATEMENT CONCERNING ORAL ARGUMENT

Appellant respectfully requests that oral argument be granted because this case raises important issues regarding a federal agency's obligations to follow the strictures of the APA and adhere to its own written regulations, as well as a federal prisoner's First Amendment right to intimate family association. In addition, cases involving prisoners' rights are often litigated pro se—both in the district courts and

this Court—and so this counseled case provides a good vehicle for this Court to reiterate and clarify the applicable law.

ISSUES PRESENTED

1. Whether the district court erred in finding Mr. Agofsky not likely to succeed on his claim that Defendants violated the APA by constructively amending their visitation regulations to apply a prior relationship requirement to immediate family members?

2. Whether the district court erred in finding Mr. Agofsky not likely to succeed on his claim that Defendants' spousal visit denial was arbitrary or capricious, where Defendants departed from a previous policy without explanation and violated their own regulations?

3. Whether the district court erred in finding Mr. Agofsky not likely to succeed on his claim that Defendants' permanent ban on Mr. Agofsky's ability to have a non-contact, in-person visit with his wife violated his First Amendment right to associate with intimate family members?

STATEMENT OF THE CASE

I. Factual Background

A. History of Section 540.44

Federal prisoners are permitted to receive visitors in accordance with federal regulations codified at 28 C.F.R. § 540.44. BOP first promulgated these regulations

in 1980 and later substantively amended them in 2003. Both times, the agency followed the notice-and-comment rulemaking procedures of the APA.

The regulation states that "[a]n inmate desiring to have regular visitors must submit a list of proposed visitors to the designated staff." 28 CFR § 540.44. Section 540.44(a) includes a strong presumption in favor of visitation by "[m]embers of the immediate family," including an inmate's "spouse": immediate family members "are placed" on the visiting list "absent strong circumstances which preclude visiting." *Id.* § 540.44(a). Visits by "other relatives" are covered under Section 540.44(b). These individuals "may be placed on the approved list if the inmate wishes to have visits from them regularly and if there exists no reason to exclude them." *Id.* § 540.44(b). BOP "encourages visiting by family . . . to maintain the morale of the inmate and to develop closer relationships between the inmate and family members . . . ." *Id.* § 540.40.

The visiting list may also include "friends and associates," but—unlike family members—these visitors are generally subject to a prior relationship requirement—that is, the prisoner needs to have known the person before their incarceration. As the regulation states:

> The visiting privilege ordinarily will be extended to friends and associates having an established relationship with the inmate prior to confinement, unless such visits could reasonably create a threat to the security and good order of the institution. Exceptions to the prior relationship rule may be made, particularly for inmates without other

> visitors, when it is shown that the proposed visitor is reliable and poses no threat to the security or good order of the institution.

28 C.F.R. § 540.44(c).

When BOP first promulgated Section 540.44 in 1980, subsection (c)'s prior relationship rule was narrower. It mandated only the "existence of an established relationship prior to confinement for friends and associates of inmates" in Security Level 4-6 Institutions—now known as Medium and High Security Level Institutions[1]—as well as in Administrative Institutions. *Control, Custody, Care, Treatment, and Instruction of Inmates*, 45 Fed. Reg. 44220, 44226 (June 30, 1980); *see id.* at 44233 (setting forth relevant text of Section 540.44(c)). Meanwhile, there was no prior relationship rule for friends and associates visiting prisoners in Security Level 1-3 (*i.e.*, Minimum and Low Security Level) Institutions. Rather, for those low-security prisoners, "[t]he visiting privilege [would] ordinarily be extended to friends and other non-relatives, unless visits could reasonably create a threat to the security and good order of the institution[.]" *Id.* According to BOP, the "increased security level required" in Level 4-6 Institutions mandated this difference in visiting requirements. *Id.* at 44226.

[1] *See Control, Custody, Care, Treatment and Instruction of Inmates; Security Level Designations*, 56 Fed. Reg. 4158, 4159 (Feb. 1, 1991) (changing naming of security levels).

In 2003, BOP sought to expand the prior relationship rule by amending Section 540.44(c) to require that regular visits at *all* institutions, regardless of security level, would "ordinarily be extended to friends and associates only when the relationship had been established prior to confinement." *Visiting Regulations: Prior Relationship Requirement*, 68 Fed. Reg. 10656, 10657 (Mar. 6, 2003). According to BOP, the change would "provide for uniformity of visiting procedures for all security levels and . . . maintain the security and good order of the institution while continuing to afford inmates with reasonable and equitable access to visiting." *Id.* Further, "[t]he heightened security measures were deemed necessary to better ensure that inmates do not abuse visiting privileges or use them to further criminal activity." *Id.*

BOP sought public comments on this proposal to expand the prior relationship rule. In response to "concerns about the impact on family visits (for example, children born after the inmate was incarcerated and new extended family members)," BOP assured the public "that the prior relationship requirement pertains to friends and associates (28 C.F.R. 540.44(c))" and "does not apply to immediate family members (28 C.F.R. 540.44(a)) and other relatives (28 C.F.R. 540.44(b))." *Visiting Regulations: Prior Relationship Requirement*, 68 Fed. Reg. at 10657. Thus, pursuant to BOP's notice-and-comment rulemaking procedures, Section 540.44(c)'s prior

relationship rule applied strictly to "friends and associates"—not to "immediate family," including spouses like Mrs. Agofsky.

B. Mr. Agofsky's Immediate Family Visitation Request

Mr. Agofsky is a prisoner on federal death row currently housed in the Special Confinement Unit ("SCU") of the U.S Penitentiary at Terre Haute, Indiana. ECF No. 43-14 at 2. He has been there for approximately the past two decades. ECF No. 43-12. BOP has approved his requests to include his mother, sibling, and aunt on his visitation list. ECF No. 6-1 ¶ 9.

Mr. Agofsky married his wife Laura in 2019. ECF No. 6-2 (Agofsky Marriage Certificate). He did not obtain prior approval from the facility to get married, but the Terre Haute warden subsequently affirmed that "[t]he Bureau of Prisons (BOP) recognizes Mr. Agofsky's marriage[.]" SA-032. He and his wife exchange emails daily, and they typically speak by phone multiple times each week. ECF No. 6-1 ¶ 3. However, Mrs. Agofsky has never been permitted to visit Plaintiff in person. ECF No. 6-1 ¶ 13.

Shortly after their marriage, Plaintiff asked to place Mrs. Agofsky on his visiting list for a non-contact visit. SA-017; ECF No. 6-1 ¶ 5. Mrs. Agofsky submitted all the requisite documentation, including a background check form, her identification, and a copy of their marriage license, to the facility in March 2020. ECF No. 6-1 ¶ 6. BOP denied the request. SA-017. The sole reason BOP provided

for the denial was that Mr. Agofsky did not know his wife prior to his incarceration. *Id.*

In May 2020, Mr. Agofsky filed an informal resolution. SA-017. He wrote that the "unit manager refuses to process my wife for visiting, based on no proof of prior relationship," and stated that this was error because "the prior relationship rule applies to 'friends and associates,' not to immediate family." *Id.* He noted that he had provided adequate proof that his wife was immediate family—specifically, a valid marriage certificate. *Id.*

A BOP official responded, providing, again, a single basis for the refusal to add Mrs. Agofsky to the visiting list: failure to establish a prior relationship. SA-017. Quoting the Terre Haute Institution Supplement to the BOP visiting regulations, the responding official stated: "Your prospective visitor will need to prove that you had a relationship prior to incarceration." *Id.* The official also stated that "[t]he inmate's immediate family must be verified by the U.S. Probation Officer on the inmate's Presentence Investigation Report (PSI)." *Id.* In Mr. Agofsky's case, the official explained, "[t]he Unit Manager does not have the authority to approve your visitor, as no prior relationship has been established, nor can your visitor be verified on your PSI." *Id.*

Mr. Agofsky timely appealed the denial to the Warden. SA-018. He reiterated that "[s]pouse is immediate family, so requires no proof of prior relationship, only

proof of valid marriage, which I have provided." *Id.* He also noted that it is unsurprising that Mrs. Agofsky is not on his PSI: "My PSI was done in 1992, my marriage took place in 2019. In the course of 27 years, there are many legitimate reasons for family circumstances to change." *Id.*

The Warden affirmed the denial of his request on the same grounds previously given. SA-019. The Warden reiterated: "Your prospective visitor will need to prove that you had a relationship prior to incarceration. Proof of prior relationship may include co-signed leases, utility bills, dated and signed letters, etc." *Id.*

Mr. Agofsky next appealed to the BOP Regional Director, SA-020, who affirmed, finding "the Warden's decision is supported." SA-021. The Regional Director explained that "[s]everal areas are considered when determining whether someone is an appropriate visitor," and the grounds invoked here fell within the ambit of those considerations—the lack of "documentation to verify your relationship." *Id.*

Finally, Mr. Agofsky appealed to BOP Central Office. SA-023. He reiterated that the prior relationship requirement should not apply to his spouse, and reminded BOP that "no security claim was raised" about his wife. *Id.*

Central Office affirmed the earlier decisions. SA-027. The responding official stated: "We have reviewed documentation relevant to your appeal, and based on the information gathered, concur with the manner in which the Warden and Regional

Director addressed your concerns." *Id.* Central Office provided no additional reasons for the denial; it merely found that lower-level officials had "acted in accordance with the guidelines[.]" *Id.*

Through each of these five rounds of administrative responses, the sole reason BOP provided for the denial was the prior relationship requirement.

In September 2021, in an effort to avoid unnecessary litigation, Mr. Agofsky's counsel asked the then-Warden to reevaluate the denial of Plaintiff's visiting request. Counsel noted that "the text of [Section 540.44(a)] has strong protections in place for the visitation rights of spouses." SA-029. In this case, she explained, BOP's grievance responses show that "the warden denied visitation because Mr. Agofsky did not have a relationship with his wife prior to entering the BOP[,]" SA-028, but "[b]ased on the plain language of the regulation, the prior relationship requirement only applies to friends and associates and not to immediate family." SA-029. Counsel also cited BOP's 2003 statement in the Federal Register, when promulgating Section 540.44(c) as currently published, that "[t]he prior relationship requirement does not apply to immediate family members." *Visiting Regulations: Prior Relationship*, 68 Fed. Reg. at 10657. She emphasized that "[p]ermitting Mr. Agofsky's wife to visit him does not pose a security risk, and the BOP has made no such allegation." SA-030. "The fact that he is on death row, means that he will *never* see his wife. This type of extreme deprivation, without any penological or security

justification thus violates both the Constitution, in addition to violating the BOP's own regulation." SA-031.

The Warden wrote back that he would not reconsider the denial. SA-032. He confirmed that "the Bureau of Prisons (BOP) recognizes Mr. Agofsky's marriage; however, my review of his in-person visitation request under the prior relationship requirement is still necessary due to the security concerns presented." *Id.* The only security concern he identified was the risk of "avoid[ing] the scrutiny of the prior relationship requirement." *Id.*

The BOP has relied upon the prior relationship rule to deny at least one other prisoner's request to include his spouse on his visiting list at USP Terre Haute: Defendants denied spousal visitation to Daniel Troya for the same reason. *See* Compl., *Troya v. FBOP*, No. 1:22-cv-00767 (D.D.C. Mar. 21, 2022), ECF No. 1. Mr. Troya initiated legal action against Defendants, who ultimately settled and allowed visitation between Mr. and Mrs. Troya. *See* Settlement Agreement, *Troya v. FBOP*, No. 1:22-cv-00767 (D.D.C. Aug. 30, 2022), ECF No. 14-1.

In the more than four years since he first requested a non-contact visit with his wife, Mr. Agofsky has resubmitted the request several times, his wife has resubmitted her application and paperwork, and counsel sent another letter seeking reconsideration to the warden. SA-034; ECF No. 6-1 ¶ 9, 12; ECF No. 1 ¶ 50. Defendants never responded to these requests. ECF No. 1 ¶ 51.

II. The Proceedings Below

In May 2023, Mr. Agofsky filed a complaint in the District Court for the District of Columbia, alleging that BOP officials had violated the APA and First Amendment by expanding the prior relationship requirement to cover immediate family visitation requests, in contravention of their own regulations. *Agofsky v. Fed. Bureau of Prisons, et al.*, No. 1:23-cv-01511 (D.D.C. May 25, 2023), ECF No. 1.

Mr. Agofsky brought three claims—that BOP violated the APA when it: (i) amended Section 540.44 by expanding the prior relationship requirement to immediate family without adhering to notice-and-comment procedures; (ii) departed from a previous policy without explanation and violated its own regulations; and (iii) violated Mr. Agofsky's First Amendment right to familial association. Mr. Agofsky sought injunctive and declaratory relief. ECF No. 1 ¶¶ 52–72.

Two weeks later, Mr. Agofsky moved for a preliminary injunction, seeking to enjoin Defendants from unlawfully applying the prior relationship requirement to his immediate family visitation request. ECF No. 5. Mr. Agofsky argued that he was likely to succeed on the merits of his APA and First Amendment claims, and that he is currently suffering the irreparable harm of being indefinitely denied an in-person, non-contact visit with his wife. ECF No. 6.

Defendants opposed the motion. ECF No. 15. For the first time, BOP asserted it had not imposed a prior relationship requirement on Mr. Agofsky's request, and

in fact had not denied it at all, but only requested more information. *Id.* at 8, 11. Defendants also supplied new justifications for refusing to add Mrs. Agofsky to the visiting list, none of which appear anywhere in the administrative record. These new justifications were introduced via a declaration from Todd Royer, an official at Terre Haute, ECF No. 15-2, and included: "the BOP's inability to run a thorough background check on the spouse, a German citizen and resident; Agofsky's failure to follow BOP policy by marrying without first seeking permission as required by BOP policy; and Agofsky's special security factors, including the danger he posed to the inmate population and staff based on his prior violent conduct." ECF No. 15-2 ¶ 8.

In reply to this opposition, Mr. Agofsky argued, among other things, that the court should disregard the Royer Declaration, citing the "foundational principle of administrative law" that "judicial review of agency action is limited to the grounds that the agency invoked when it took the action." ECF No. 17 at 12 (quoting *Dep't of Homeland Sec'y v. Regents of the Univ. of Calif.*, 591 U.S. 1, 20 (2020)).

While briefing the motion for preliminary injunction, Defendants also moved to transfer the case to the Southern District of Indiana. ECF No. 15 at 25. Mr. Agofsky opposed the motion to transfer, noting (among other things), that transfer

would result in further delay, and that he had already waited nearly four years to have a non-contact visit with his wife. ECF No. 17.[2]

On February 2, 2024, the District Court for the District of Columbia granted Defendants' motion to transfer. ECF No. 22. The court found that although venue was proper in the District of Columbia, and although the balance of private and public interest factors was "not heavily tilted, it nonetheless weigh[ed] in favor of transfer." ECF No. 21 at 15. The court declined to reach the merits of the preliminary injunction motion "in deference to the decision of the transferee court." ECF No. 21 at 1. Mr. Agofsky promptly refiled the motion in the transferee district. ECF No. 33.

On May 6, 2024, the district court for the Southern District of Indiana denied Mr. Agofsky's motion for preliminary injunction without oral argument. SA-001. The court began by setting out the preliminary injunction standard: the party seeking an injunction must demonstrate "some likelihood of succeeding on the merits, and . . . that it has no adequate remedy at law and will suffer irreparable harm if preliminary relief is denied." SA-004 (quoting *Int'l Ass'n of Fire Fighters, Local 365 v. City of E. Chicago*, 56 F.4th 437, 446 (7th Cir. 2022)). The court only reached

[2] Mr. Agofsky originally filed in the District of Columbia because Defendants had, in a recent case where another federal death row prisoner raised the same claims based on the same factual predicate as this one, disclaimed that venue in the Southern District of Indiana was proper, leading that plaintiff to ultimately have to re-file in D.C. *See* Amended Answer of Official Capacity Defendants at 4 ¶ 2, *Troya v. Hurwitz, et al.*, No. 2:18-cv-311 (S.D. Ind. May 20, 2019), ECF No. 44.

the first issue, finding that Mr. Agofsky had not shown "some likelihood of succeeding on the merits" on any of his three claims, and therefore declining to reach the other factors. As to Mr. Agofsky's first claim, that BOP constructively amended Section 540.44, the district court concluded that although BOP's administrative responses "referenced a prior-relationship requirement," that did not mean it had amended its regulations. SA-006. The court believed Mr. Agofsky had submitted "no evidence to support his allegation that the BOP broadly applies the prior-relationship requirement to immediate family members." *Id.* In a footnote, it dismissed Mr. Agofsky's evidence about BOP's identical treatment of another prisoner, Daniel Troya, reasoning that BOP's settlement of that lawsuit to allow visits meant that BOP could not have amended its visiting regulation to disallow such visits. SA-007 n.2.

The district court also rejected Mr. Agofsky's second claim, that BOP's denial was arbitrary and capricious. SA-009–13. The court recognized that BOP's binding regulation states that "immediate family will be allowed to visit 'absent strong circumstances which preclude visiting.'" SA-011. And yet it found that Defendants reasonably applied that standard when denying the visit request on the basis of a prior relationship requirement for two reasons. First, it interpreted the text of the regulation to not explicitly *prohibit* considering the existence of a prior relationship. SA-010. Second, it believed that the administrative record, "when read in context,"

reflected that the BOP decision-makers were basing their decisions on "reasonable consideration of security concerns presented by Mr. Agofsky's request rather than rote application of the visiting regulation." *Id.* The court also suggested that the denial may have been entirely unreviewable because "the ultimate visitation decision is committed to the Warden's discretion." SA-012.

Finally, the district court rejected Mr. Agofsky's third claim, that BOP's denial infringed his First Amendment right to family association. Citing the new justifications asserted for the first time in the Royer Declaration more than three years after the actual agency action, the court concluded that BOP had identified legitimate security concerns connected to the denial of visitation, and that there therefore was no First Amendment violation. SA-014–15.

Mr. Agofsky timely noticed his appeal. ECF No. 47.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Bevis v. City of Naperville*, 85 F.4th 1175, 1188 (7th Cir. 2023) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "[T]he threshold for establishing likelihood of success is low." *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 782 (7th Cir. 2011).

This Court reviews an interlocutory order on a motion for preliminary injunction under a "hybrid standard of review." *Bevis v. City of Naperville*, 85 F.4th 1175, 1188 (7th Cir. 2023). The court "review[s] the district court's findings of fact for clear error, its legal conclusions *de novo*, and its balancing of the factors for a preliminary injunction for abuse of discretion." *Id.* (quoting *Doe v. Univ. of S. Ind.*, 43 F.4th 784, 791 (7th Cir. 2022)); *see also Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011).

SUMMARY OF ARGUMENT

By its plain text, Section 540.44(c)'s prior relationship rule applies only to "friends and associates"—not spouses or other immediate family members, whose visits are separately governed by the provisions of Section 540.44(a). Section 540.44(a), by contrast, contains a strong presumption that immediate family will be allowed to visit, "absent strong circumstances which preclude visiting." And yet, Defendants denied Mr. Agofsky's immediate family visit request, repeatedly, over several years of consistent administrative responses, on the sole ground that he had failed to prove a prior relationship. As Mr. Agofsky is likely to be able to show in this case, this action violated the APA in three ways.

First, Defendants constructively amended their binding visitation regulations—a change which requires notice and comment. In an unannounced revision, Defendants have extended the prior relationship requirement to immediate

family requests, and have swapped 540.44(a)'s strong presumption in favor of visitation for this new, more onerous standard. Altering the standards in a binding regulation without notice and comment violates the APA. The district court thought that Mr. Agofsky had not adequately shown that Defendants constructively amended their regulations, but this ignores several pieces of evidence in the record confirming that this was not an isolated case, but rather one exemplar of a broader rule change. For example, Mr. Agofsky submitted evidence that Defendants had rejected the visit request of another prisoner who met his spouse after his incarceration on identical grounds.

Second, Defendants' denial was arbitrary and capricious. The denial was contrary to BOP's own regulations and a departure from prior policy—including BOP's previous assurance to the public that the prior relationship requirement did not apply to immediate family. BOP therefore violated the fundamental tenets of administrative law that an agency must follow its own rules and provide an explanation if it is changing them. The district court made both legal and factual errors in reaching the unsupportable conclusion that automatic denial based on failure to prove a prior relationship is a reasonable application of Section 540.44(a)'s strong presumption in favor of immediate family visitation.

Finally, Defendants violated Mr. Agofsky's First Amendment right to associate with family members by imposing a permanent, arbitrary ban on his ability

to see his wife in a non-contact setting. The district court rejected this claim by relying entirely on Defendants' made-for-litigation affidavit. The affidavit contained new security reasons for denying Mr. Agofsky's visit request, reasons that appeared nowhere in any of the six separate denials Defendants issued at the time when they were actually deciding the appeals. The district court erred in relying on that affidavit and crediting its *post-hoc*, self-serving assertions, especially given that the new reasons, which primarily center around "security factors," are implausible: Defendants allow Mr. Agofsky visits from others—including visits by non-immediate family members subject to Section 540.44(b)'s more burdensome standard—and Mrs. Agofsky has no criminal history.

Mr. Agofsky easily satisfies the other preliminary injunction factors. He is currently suffering the irreparable harm of being permanently denied the ability to see his wife in person. There also can be no harm to Defendants from requiring them to comply with their own regulations, especially given that BOP's publicly stated position is the same as Mr. Agofsky's: that the prior relationship rule does not apply to immediate family. For all these reasons, Mr. Agofsky is entitled to an order enjoining Defendants from applying the prior relationship requirement to his immediate family visit request and vacating the denial of his particular request, and the district court erred in concluding otherwise.

ARGUMENT

Under the APA, a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions" in several circumstances, including if the action is "arbitrary, capricious, [or] an abuse of discretion"; "contrary to constitutional right"; or "without observance of procedure required by law." 5 U.S.C. § 706(2). As the robust administrative record in this case shows, Mr. Agofsky is likely to show that Defendants' unannounced rule change and denial of his request violated these three subsections of the APA. Preliminary injunctive relief is necessary to prevent the irreparable injury of permanent deprivation of an in-person, non-contact visit with his spouse.

I. Mr. Agofsky Is Likely to Succeed on the Merits of his Claim that BOP Has Unlawfully Amended its Immediate Family Visitation Policy.

A. Defendants Amended Section 540.44(a) Without Proper Procedure.

The APA prescribes that federal administrative agencies promulgating "legislative rules" must issue those rules through notice-and-comment rulemaking. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95–96 (2015). Legislative rules are rules that have the "force of law," and which "affect[] individual rights." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979) (internal quotations omitted); *see also Perez*, 575 U.S. at 96. When an agency enacts such a rule—or when it amends or repeals one—it must follow the notice-and-comment process. *See* 5 U.S.C. § 551(5);

see also F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (noting the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action").

As Defendants have never contested in this litigation, Section 540.44—the regulation which sets forth the rules governing federal prisoners' ability to receive non-legal visitors—is a legislative rule subject to notice and comment. When BOP initially promulgated the regulation in 1980, it acknowledged that notice-and-comment requirements were applicable, and followed them. *See Control, Custody, Care, Treatment, and Instruction of Inmates*, 45 Fed. Reg. at 44228. When it amended the regulation in 2003, to extend the prior relationship requirement for friends and associates to apply at all institutions, BOP again complied with notice and comment procedures. *Visiting Regulations: Prior Relationship*, 68 Fed. Reg. 10656, 10658 (Mar. 6, 2023).

Once a substantive regulation is promulgated pursuant to notice-and-comment rulemaking, any substantive revision to that regulation—especially one that abruptly departs from the prior regulation—requires the same notice and opportunity for comment. It is a maxim of administrative law that if an agency "adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy," that action will be construed as effectively amending the regulation, and therefore requires notice and comment. *Mendoza v.*

Perez, 754 F.3d 1002, 1021, 1024 (D.C. Cir. 2014) (holding guidance letters which "alter[ed] the standards imposed on" regulated entities were substantive rules requiring notice and comment). An agency "may not constructively rewrite [a] regulation, through internal memoranda or guidance directives that incorporate a totally different interpretation and effect a totally different result." *Nat'l Fam. Plan. & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992); *see also Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987) (similarly recognizing that a "*volte face*" constitutes alteration of a rule that triggers notice-and-comment rulemaking requirements).

That is what has happened here: as Mr. Agofsky is likely to be able to show, BOP has effectively amended Section 540.44. As written, and as in effect since 2003, Section 540.44(a) states that immediate family members, including a spouse, "are placed on" a federal prisoner's visiting list "absent strong circumstances which preclude visiting." 28 C.F.R. § 540.44(a). There is no prior relationship requirement. BOP has affirmed this, stating in 2003 in the Federal Register that "[t]he prior relationship requirement does not apply to immediate family members." *Visiting Regulations: Prior Relationship*, 68 Fed. Reg. at 10657. By contrast, 28 C.F.R. § 540.44(c), which applies to "friends and associates," does require prisoners to demonstrate an "established relationship with the inmate prior to confinement." And that subsection (along with 28 C.F.R. § 540.44(b), which applies to other relatives)

does not share the same strong presumption that the visitation privilege will be granted. *Compare* 28 C.F.R. § 540.44(a) (stating immediate family members "*are* placed on the visiting list absent strong circumstances"), *with* 28 C.F.R. § 540.44(b) (stating other relatives "*may be* placed on the approved list . . . if there exists no reason to exclude them") (emphases added).

Now, however, BOP has "alter[ed] the standards," *see Mendoza*, 754 F.3d at 1024, extending the prior relationship requirement to immediate family members—but this time without proper procedure. That BOP is now systematically applying a prior relationship requirement to immediate family member requests is evident both from Defendants' treatment of Mr. Agofsky's request, and from several other pieces of evidence in the record. First, in Mr. Agofsky's case, Defendants told Mr. Agofsky in no uncertain terms that he must prove a prior relationship with his wife. SA-017 (requiring "[p]roof of prior relationship"). They repeated this same, singular reason for the denial through five stages of administrative review. SA-017–27. As the record reflects, this was presented not as a matter of individualized consideration of the circumstances of his request, but rather as a rote requirement applicable to all requests like his. Then, over his protestations that a prior relationship requirement should not apply to his spouse, high-level BOP officials affirmed the denial and the reasons for it. SA-021, SA-027.

Mr. Agofsky also supplied evidence of BOP's identical treatment of another federal prisoner, Daniel Troya, who met his spouse after becoming incarcerated. *See* Compl., *Troya v. FBOP*, No. 1:22-cv-00767 (D.D.C. Mar. 21, 2022), ECF No. 1. There, too, Defendants rejected the visit requests by citing the sole reason that Mr. Troya did not know his wife before his incarceration. *Id.* ¶ 11. Terre Haute policy documents confirm that these cases are not outliers. The Terre Haute Institution Supplement to BOP Visiting Regulations states that immediate family "must be verified by the U.S. Probation Officer on the inmate's Presentence Investigation Report (PSI)." ECF No. 43-4 at 2. That is the same as imposing a prior relationship requirement, since a Presentence Investigation Report is prepared, by definition, before someone is sentenced to prison time. All this evidence points to the conclusion that Defendants are routinely, and as a matter of policy, applying a prior relationship requirement to immediate family member visiting requests.

Mr. Agofsky is therefore likely to be able to show that BOP has made a substantive change to its visiting regulations, without the requisite notice and comment. BOP has extended the prior relationship requirement to a new category of visiting requests—an amendment they previously acknowledged requires notice and comment. The new rule also reflects a significant departure from the standard embodied in Section 540.44(a): a strong presumption that immediate family will be permitted to visit. Automatic denial based on failure to prove a prior relationship

completely upends this presumption. Where, as here, an agency's interpretation "runs 180 degrees counter to the plain meaning of the regulation," that is evidence of constructive amendment of the regulation. *See Nat'l Fam. Plan. & Reprod. Health Ass'n*, 979 F.2d at 235; *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6–7 (D.C. Cir. 2011) (concluding that Transportation Security Administration's new policy changing passenger screening technology "effect[ed] 'a substantive regulatory change' to the statutory or regulatory regime," requiring notice and comment); *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (holding Environmental Protection Agency "guidance" document "significantly broadened" an existing regulation and thus was an effective amendment that it "cannot legally do without complying with [APA] rulemaking procedures"). Because Defendants altered the visiting standards "without observance of procedure required by law," a reviewing court must set aside the unlawfully altered standards. *See* 5 U.S.C. § 706(2)(D).

B. The District Court Clearly Erred in Concluding Otherwise.

The district court's contrary conclusion rested on two fundamental errors: First, it held that Mr. Agofsky had "provide[d] no evidence" that BOP broadly applies the prior relationship requirement to immediate family members, as opposed to just in his case. SA-006. Second, the court concluded that the agency action in question was exempt from notice-and-comment because Mr. Agofsky was

challenging an adjudication based on a guidance document, not a regulatory amendment. SA-007–08. Neither premise is correct.

The district court's finding that there was no evidence of a widespread policy amendment is blatantly contradicted by the record. In fact, as already enumerated, there are several pieces of evidence—BOP's rote responses to Mr. Agofsky's administrative appeal, BOP's treatment of other similar requests, and BOP's own policy documents—that BOP now broadly applies the prior relationship requirement to immediate family members. In Mr. Agofsky's case, the fact that supervisory BOP officials—from the Warden of Terre Haute all the way up to the Administrator of National Inmate Appeals at BOP Central Office—reviewed and sanctioned the application of the prior relationship requirement—over Mr. Agofsky's clear protestations that such a requirement shouldn't apply to his wife—demonstrates that this was not an outlier case, but routine and fully consistent with BOP policy. *See* SA-0017 at 2 ("The prior relationship rule applies to 'friends and associates,' not to immediate family."); *id.* at 3 ("Spouse is immediate family, so requires no proof of prior relationship."); SA-020 ("My wife is immediate family, and not subject to the prior relationship rule."); SA-022 ("They state I muszt [sic] provide additional documents to prove relationship. This is false.").

BOP's identical treatment of Daniel Troya provides additional support. The district court acknowledged but dismissed this evidence in a footnote, on the grounds

that BOP settled the lawsuit with Mr. Troya and allowed visitation, which it "presumably would not have done if it had constructively amended its binding regulation to require otherwise." SA-007 n.2. This makes no sense: the fact that BOP allowed the visit as a way of ending litigation tells us little about the state of their policies as to everyone else who hasn't brought a lawsuit. What is far more telling is BOP's treatment of Mr. Troya prior to litigation: which was to apply a prior relationship requirement to his request for visitation from an immediate family member, exactly as in this case.

Finally, as already explained, BOP's own policy document, the Terre Haute Institution Supplement, shows that Defendants are uniformly applying a prior relationship requirement to immediate family member visiting requests. *See* ECF No. 43-4 at 2.

The district court completely overlooked much of this evidence, and the one piece it acknowledged it dismissed based on faulty reasoning. This renders its factual findings clearly erroneous and warrants reversal. *See Ray v. Clements*, 700 F.3d 993, 1017 (7th Cir. 2012) (reversing where district court fact finding process improperly rested on inferential leaps and ignored record evidence); *Owen v. Duckworth*, 727 F.2d 643, 647 (7th Cir. 1984) (finding of fact clearly erroneous where "directly contrary" to evidence in the record).

The district court went further astray in its legal analysis. The district court apparently thought that Defendants' citation in its administrative responses to BOP's program statement and its Terre Haute supplement precluded a constructive amendment claim because that suggests Defendants relied not on the legislative rule (Section 540.44), but rather on interpretive rules or guidance documents. SA-007. But that misses the point: regardless of the label on the document, an agency "may not constructively rewrite [its] regulation[s] . . . through internal memoranda or guidance directives that incorporate a totally different interpretation and effect a totally different result." *Nat'l Fam. Plan.*, 979 F.2d at 236; *see also Air Transport Ass'n of America, Inc. v. F.A.A.*, 291 F.3d 49, 55 (D.C. Cir. 2002) ("[I]t is well established that an agency may not label a substantive change to a rule an interpretation simply to avoid the notice and comment requirements."). Nor would citation to such a document in Mr. Agofsky's particular request preclude an APA claim where there has been an unannounced regulatory amendment behind the scenes. What's more, the Terre Haute supplement also provides evidence that Defendants' treatment of Mr. Agofsky's request is the norm and the official policy at the facility: immediate family are, in fact, subject to a prior relationship requirement. The district court had the import of this evidence exactly backwards.[3]

[3] Even if this Court finds that Defendants relied on interpretive rules or guidance documents exempt from notice-and-comment, that would merely support Mr.

Finally, the district court erred in construing Mr. Agofsky's challenge to be solely about an individual adjudication, rather than constructive amendment of a regulation. SA-007–08. To be sure, BOP's adjudication of Mr. Agofsky's request is central to this lawsuit—but its relevance to this first claim is that it was the context in which Mr. Agofsky became aware that BOP had changed its visitation regulations. He then supplied additional evidence, outside the context of his own adjudication, that such a change had occurred. The fact that this case involves an adjudication does not transform the fundamental nature of the claim.

In its flawed analysis of this issue, the district court cited *Abraham Lincoln Memorial Hosp. v. Sebelius*, 698 F.3d 536 (7th Cir. 2012), for the principle that an agency can "announc[e] new principles in an adjudicative proceeding." *Id.* at 559. That is not what happened here. In *Abraham Lincoln Memorial Hospital*, the agency in question announced in adjudication new principles that filled a gap in existing regulations: they comported with the relevant statutes and regulations, were a reasonable interpretation of them, and did not reflect a departure from longstanding policy. *Id.* at 552, 555. Here, BOP did not merely fill a gap; it transformed the

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Agofsky's Claim 2, *see infra* § II. As explained further below, even if an agency's new policy is interpretive, it is still required to provide some rationale acknowledging a change in position. *See Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987) ("A change in interpretation announced in administrative adjudication may avoid the formal requirements of notice and comment, but it too requires reasons."). Defendants have not explained, nor even publicly acknowledged, the policy change here.

standard and reneged on a decades-old assurance that the prior relationship requirement did not apply to immediate family. That reflects a procedurally defective constructive amendment. Mr. Agofsky's allegations are amply sufficient to establish a likelihood of success on the merits of this claim, which, as this court has repeatedly reminded, is a "low threshold." *Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018) (quoting *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999)).

II. Mr. Agofsky Is Likely to Succeed on his Claim That Defendants' Expansion of the Prior Relationship Requirement and Denial of his Request Was Arbitrary And Capricious.

A. Defendants Departed from a Prior Policy Without Explanation and Violated Their Own Regulations.

Defendants' expansion of the prior relationship rule to cover immediate family also violates the APA because it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agencies cannot "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books," *Fox Television*, 556 U.S. at 515, yet that is exactly what BOP has done here.

First, BOP expanded Section 540.44(c)'s prior relationship rule to cover Section 540.44(a)'s "immediate family" provision without any reasoned explanation. It is well-established that when an agency decides to change existing policy, "the agency must at a minimum acknowledge the change and offer a reasoned

explanation for it." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (collecting caselaw); *Cook Cnty., Ill. v. Wolf*, 962 F.3d 208, 229–30 (7th Cir. 2020) (requiring a "reasoned explanation" "when an agency changes course" (quoting *Fox Television*, 556 U.S. at 515–16)); *Lone Mountain Processing, Inc. v. Sec'y of Lab.*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970))). This principle applies equally to longstanding practices and "established pattern[s] of agency conduct" as it does to formal policies. *See Am. Wild Horse Pres. Campaign*, 873 F.3d at 927; *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. N.L.R.B.*, 802 F.2d 969, 974 (7th Cir. 1986).

Failing to supply an explanation renders the agency's action arbitrary and capricious. *See Am. Wild Horse Pres. Campaign*, 873 F.3d at 927. "It follows that an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Encino Motorcars LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)) (brackets and quotation marks omitted).

Here, BOP offered *no* reason for expanding Section 540.44(c)'s prior relationship rule to spouses and departing from the strong presumption that immediate family will be allowed to visit. Instead, Defendants' simply rejected Mrs. Agofsky's potential visit because she was not married to Plaintiff at the time of his Presentence Investigation Report and did not meet the "prior relationship requirement." *See* SA-021; SA-032. Nor did Defendants ever attempt to explain their contradiction of BOP's own public reassurance that "the prior relationship requirement does not apply to immediate family members." *Visiting Regulations: Prior Relationship*, 68 Fed. Reg. at 10657; *see Int'l Union*, 802 F.2d at 974 ("[A]n administrative agency is not allowed to change direction without some explanation of what it is doing and why."); *Am. Wild Horse Pres. Campaign*, 873 F.3d at 932 (looking to agency's "past treatment of and official statements about the" prior policy and determining it has impermissibly changed course without explanation).

Second, by applying Section 540.44(c)'s prior relationship rule to Plaintiff's immediate family visitation request instead of applying Section 540.44(a) as written, Defendants violated BOP's own binding regulations. "Under deeply rooted principles of administrative law, not to mention common sense, government agencies are generally required to follow their own regulations." *Fed. Defs. of N.Y. v. Fed. Bureau of Prisons*, 954 F.3d 118, 130 (2d Cir. 2020); *see also Ortiz v. Sec'y of Def.*, 41 F.3d 738, 742 (D.C. Cir. 1994) ("The [agency], of course, is bound to

follow its own regulations . . . .") (citing, *inter alia*, *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954)). An agency "may not depart, sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case." *Saget v. Trump*, 375 F. Supp. 3d 280, 355 (E.D.N.Y. 2019) (quoting *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1090 (N.D. Cal. 2018)).

Section 540.44(a) requires Defendants to "place[]" spouses and other immediate family members "on the visiting list, absent strong circumstances which preclude visiting." Nowhere in any of Defendants' five written denials of Plaintiff's visiting request did Defendants ever flag any security concerns or other "strong circumstances" specific to Mrs. Agofsky. Nor could they, given that she has no criminal history (and so would have passed a background check if Defendants actually conducted one) and would be limited to visiting Plaintiff in a non-contact setting, separated by a pane of thick plexiglass. *See* L. Agofsky Decl. ¶ 10. Instead, Defendants demanded proof of a prior relationship and rejected the request when Mr. Agofsky could not provide that proof. *See* SA-017, SA-021, SA-032. By adding a prior relationship requirement where Section 540.44(a) contains none and supplanting the strong presumption of allowing visitation, Defendants acted arbitrarily and violated BOP's own regulations. *See Nat'l Env't Dev. Ass'n Clean Air Project v. E.P.A.*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("[A]n agency action may be set aside as arbitrary and capricious if the agency fails to 'comply with its own

regulations.'" (quoting *Environmentel, LLC v. F.C.C.*, 661 F.3d 80, 85 (D.C. Cir. 2011))); *see also Caldwell v. Miller*, 790 F.2d 589, 609–10 (7th Cir. 1986) (reversing grant of summary judgment to BOP defendants where BOP failed to "conform its actions to the procedures that it ha[d] adopted").

B. The District Court Erred in Finding that Defendants Did Not Violate Their Own Regulations.

The district court made several legal errors in its rejection of this claim. First, it did not address the direct conflict between Defendants' insistence that Mr. Agofsky prove a prior relationship and BOP's 2003 assurance that the prior-relationship requirement does not apply to immediate family. It also placed great weight on the fact that the Warden stated that the prior relationship requirement is subject to exceptions. *See* SA-010. The possibility of exceptions, however, does not change the fact that this requirement goes against the regulation's plain language. Even when legitimately applied to friends and associates, the prior relationship requirement contains the carveout. *See* 28 C.F.R. § 540.44(c). That only makes clearer that Defendants were improperly extending the standard from subsection (c) to Mr. Agofsky's immediate family request. Additionally, the record in this case demonstrates how meaningless that carveout is: for Mr. Agofsky, failure to prove a prior relationship meant a complete and permanent dead end.

As to Mr. Agofsky's second argument, that Defendants' visit request denial was arbitrary and capricious because they failed to follow their own regulations, the

district court wrongly concluded that BOP's denial comported with Section 540.44(a). The court reasoned that Section 540.44(a) does not explicitly prohibit BOP from considering the existence of a prior relationship, so Defendants were acting reasonably within the regulations when they did so. SA-010. But reaching this conclusion requires completely ignoring the text and structure of the regulation, as well as what Defendants actually did in this case. Defendants did not merely consider whether a prior relationship existed. They imposed a strict prior relationship *requirement*, and denied the request on the basis of failure to satisfy that atextual prerequisite. SA-017 ("Your prospective visitor will need to prove that you had a relationship prior to incarceration."); *see also id.* (referring to "prior relationship requirement"); SA-019 ("The Inmate *must have known* the proposed visitor(s) prior to incarceration.") (emphasis added); SA-032 (referring to "prior relationship requirement").

Second, the district court's conclusion that this handling of the request was consistent with Section 540.44(a) is contradicted by the plain text of the regulation. As already discussed, Section 540.44(a) contains an unusually strong presumption that immediate family will be allowed to visit. It is not consistent with that regulation to automatically deny a visiting request based on failure to prove a prior relationship requirement. That would strip the presumption of all meaning.

Nor is the district court's reading of the regulation plausible in light of the structure of the regulation. The regulation contains three separate subsections applicable to different categories of potential visitors, with significant difference in language between subsections (a), (b), and (c). Those differences must be given effect under basic canons of statutory interpretation. *See USA Gymnastics v. Liberty Ins. Underwriters, Inc.*, 27 F.4th 499, 516 (7th Cir. 2022) (citing the harmonious-reading canon, which provides that "the provisions of a text should be interpreted in a way that renders them compatible" (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012))). Section 540.44(a) contains a strong presumption in favor of allowing visitation; subsection (b) contains a weaker standard; and subsection (c) contains the weakest language, and imposes a prior relationship requirement. Here, Defendants applied the standard from subsection (c). Approving that as a reasonable reading of subsection (a) requires giving absolutely no effect to significant textual differences between the provisions. If the lack of a prior relationship were enough to automatically deny a visit for an immediate family member, the regulation's tripartite structure would make no sense.

The district court did not directly grapple with this problem, however, because it made an additional error—finding that Defendants in fact had a different reason for denying the request: security concerns. SA-011. This is a clearly erroneous view

of the record and appears to be driven by impermissible consideration of Defendants' litigation affidavit.

The district court found that (1) the Warden's response was "based on his reasonable consideration of security concerns presented by Mr. Agofsky's request rather than rote application of the visiting regulation."; (2) that the appeal responses similarly reflected consideration of other security-related concerns; and (3) that "the Warden's decision was based on the specific facts presented in Mr. Agofsky's case." SA-011–12. All three factual findings are clearly erroneous.

The first—and only—time Defendants mentioned the word "security" in any of their responses to Mr. Agofsky's visit request was in the Regional Director's response, where he provided a generic list of "several areas" that are permissible for officials to consider "when determining whether someone is an appropriate visitor." SA-021. Outside that stray mention—which again, had nothing to do with the actual basis for the decision—the only reason given, through all six administrative responses, was that Mr. Agofsky failed to prove a prior relationship.

The Warden's subsequent letter, a year later, similarly consists of, in totality, a defense of the application of the prior relationship requirement (and the Warden calls it just that—a "prior relationship requirement"). SA-032. The only security concern he mentions is the prior relationship requirement itself. SA-032 ("Allowing inmates to effectively avoid the scrutiny of the prior relationship requirement creates

a myriad of security concerns and risks which are simply non-negotiable."). In sum, there's no support in the record for the district court's conclusion that any of these decisionmakers based their decisions on "reasonable consideration of security concerns presented by Mr. Agofsky's request rather than rote application of the visiting regulation." *See* SA-011.

The first time individualized security concerns were raised by Defendants was in a post-hoc declaration, created and submitted after this litigation began, and more than three years after Defendants actually denied Mr. Agofsky's request. That declaration claims that Defendants denied the request due to inability to run a background check, Mr. Agofsky's failure to get prior approval for his marriage, and Mr. Agofsky's "prior violent conduct." ECF No. 15-2 ¶ 8. Those justifications appear nowhere in the agency record and provide a brand new narrative for the agency's decision that deviates significantly from the actual record. They therefore should have no role in this litigation. It is a maxim of administrative law that "judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Regents*, 591 U.S. at 20 (quoting *Michigan v. E.P.A.*, 576 U.S. 743, 758 (2015)); *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Agencies may not justify actions with declarations that "offer[] an entirely new theory" for

administrative action. *Consumer Fed'n of Am. & Pub. Citizen v. U.S. Dep't of Health & Hum. Servs.*, 83 F.3d 1497, 1506 (D.C. Cir. 1996) (explaining that "[e]ven if this rationale might have passed as sufficient grounds for the agency's decision . . . the critical fact is that [the agency] did not proffer it during the rulemaking process"); *see also Regents*, 591 U.S. at 22 (refusing to consider "impermissible *post hoc* rationalizations" for agency action). This principle is crucial to the sound functioning of the administrative process. *Regents*, 591 U.S. at 23 ("Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply convenient litigating positions. Permitting agencies to invoke belated justifications, on the other hand, can upset the orderly functioning of the process of review, forcing both litigants and courts to chase a moving target.") (internal citations omitted).

The district court's clearly erroneous factual findings credited Defendants' invocation of security concerns and thus strongly suggests that the declaration infected its analysis. The court stated that "when read in context," Defendants' responses suggested "reasonable consideration of security concerns." SA-011. The only "context" that could have supported this logical leap is the post-hoc declaration. This violates fundamental principles of administrative law and is sufficient basis alone to reverse the district court. *See Consumer Fed'n of Am. & Pub. Citizen*, 83 F.3d at 1507. But even if this Court were to set aside this error, it should still

conclude that the district court's factual findings were clearly erroneous, for all the reasons above, and that Defendants contravened their own regulations in denying the request.[4]

III. Mr. Agofsky Is Likely to Succeed on His Claim that Defendants Have Arbitrarily and Permanently Denied Him the Ability to Visit with His Family Member, in Violation of the First Amendment.

Mr. Agofsky is also likely to succeed on the merits of his third claim, that Defendants violated his First Amendment right to family association when they extended the prior relationship requirement to cover immediate family members, including his spouse.

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[4] The district court also suggested, but did not hold, that this claim may not be justiciable at all because "ultimate visitation decision[s]" are "committed to agency discretion by law." SA-012. This is wrong. The Supreme Court "has noted the 'tension' between the prohibition of judicial review for actions committed to agency discretion and the command in § 706(2)(A) that courts set aside any agency action that is . . . an abuse of discretion." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 23 (2018) (quoting *Heckler v. Chaney*, 470 U.S. 821, 829 (1985)). Therefore, "[t]o give effect to § 706(2)(A)" and to honor the "strong presumption favoring judicial review of administrative action," the Court has "read the exception in § 701(a)(2) quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). Here, there are plainly standards against which to judge Defendants' exercise of discretion: the visitation regulations codified at Section 540.44. *See Head Start Family Educ. Program, Inc. v. Coop. Educ. Serv. Agency 11*, 46 F.3d 629, 632 (7th Cir. 1995) (holding that "[a] review of the statutes and regulations allegedly violated by the [conduct at issue] reveals that there is ample 'law to apply' by a reviewing court"). This case does not fall in one of the narrow categories that courts have found committed to agency discretion; rather, it falls in the heartland of APA claims: "An agency's failure to follow its own regulations has traditionally been recognized as reviewable under the APA." *Id.* at 633.

The First Amendment guarantees that prisoners "retain a limited constitutional right to intimate association" with relatives, including visitation with family members. *Easterling v. Thurmer*, 880 F.3d 319, 322 (7th Cir. 2018) (per curiam) (citing *Overton v. Bazzetta*, 539 U.S. 126, 131–32 (2003), and *Turner v. Safley*, 482 U.S. 78, 95–96 (1987)); *accord Manning v. Ryan*, 13 F.4th 705, 708 (8th Cir. 2021) (per curiam). "[S]ome curtailment" of the freedom of association occurs in the prison context, *see Overton*, 539 U.S. at 131, but such curtailment is only appropriate if it is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89 (invalidating restrictions on prisoner marriages as unconstitutional). In applying this standard, courts have been clear that prison officials may not "permanently or arbitrarily deny[] an inmate visits with family members." *Easterling*, 880 F.3d at 323; *see also Overton*, 539 U.S. at 137 (upholding restrictions on non-contact visits but cautioning that "the withdrawal of all visitation privileges" may not survive scrutiny if it "were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate"); *Manning*, 13 F.4th at 708 (joining *Easterling* "in holding that prison officials who permanently or arbitrarily deny an inmate visits with family members in disregard of the factors described in *Turner* and *Overton* have acted in violation of the Constitution").

Turner identifies four factors relevant to determining whether restrictions on a constitutional right that survives incarceration can withstand a constitutional

challenge: "[1] whether the regulation has a 'valid, rational connection' to a legitimate governmental interest; [2] whether alternative means are open to inmates to exercise the asserted right; [3] what impact an accommodation of the right would have on guards and inmates and prison resources; and [4] whether there are 'ready alternatives' to the regulation." *Overton*, 539 U.S. at 132 (quoting *Turner*, 482 U.S. at 89–91). Here, Defendants' application of the prior relationship rule amounts to a permanent and arbitrary ban on Plaintiff's ability to receive visits from his wife and is therefore unconstitutional.

The first *Turner* factor asks courts to consider whether prison officials' actions bear a "valid, rational connection" to any legitimate government interest. *Riker v. Lemmon*, 798 F.3d 546, 552–53 (7th Cir. 2015). Prison officials must "'articulate their legitimate governmental interest' . . . and provide some evidence supporting their concern." *Id.* at 553 (quoting *Van den Bosch v. Raemisch*, 658 F.3d 778, 786 (7th Cir. 2011)). Defendants have not done so. The only interest they ever asserted in applying the prior relationship rule to spouses was a generalized need for institutional security. *See* SA-021, SA-032. But BOP's own regulations undermine that claim: They state that immediate family members are not subject to a prior relationship requirement, and that they presumptively "are placed" on the visitor list absent "strong circumstances which preclude visiting"—a standard that BOP has apparently determined is adequate to meet its security needs. 28 C.F.R. § 540.44(a).

Additionally, BOP has made the decision that these regulations apply to all federal prisoners, including prisoners on death row—reflecting a judgment that these standards provide sufficient accommodation of security needs at *all* facilities.

Nor do any particular circumstances surrounding this immediate family visit request suggest that BOP's longstanding policy should be replaced with a much stricter standard. The administrative record does not reflect any individualized security concerns related to Mrs. Agofsky, whose lack of criminal history would have been apparent had Defendants ever conducted a background check. *See* ECF No. 6-1 ¶¶ 6–7, 10; SA-017, SA-021, SA-032. Additionally, Defendants permit Mr. Agofsky to receive non-contact visits from other individuals, confirming that BOP has concluded that he can receive visitors consistent with the facility's security needs. ECF No. 6-1 ¶ 9. Mr. Agofsky is therefore likely to show that Defendants have not justified their infringement of his First Amendment rights. *See Turner*, 482 U.S. at 89–90 ("[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.").

The first *Turner* factor is the only factor the district court considered. The court's analysis relied entirely on the post-hoc litigation declaration, finding based on the new supposed security justifications that Defendants had adequately justified their infringement of Mr. Agofsky's constitutional rights. SA-014. The court should

not have rejected Mr. Agofsky's claim based on these belated, made-for-litigation justifications. As with any other APA claim, a reviewing court is limited to judging the agency action based on the reasons the agency gave at the time it made its decision. *See supra* § II.B. The district court justified its departure from this fundamental principle by stating, without any on-point caselaw, that "[b]ecause the *Turner* factors require broader evidence, the First Amendment analysis is not 'limited to the grounds that the agency invoked when it took the action.'" SA-015 n.5 (quoting *Regents of the Univ. of Calif.,* 591 U.S. at 20). This is incorrect. Although Mr. Agofsky alleges a constitutional violation, even that claim is still an APA claim, subject to the normal rules of judicial review of agency action. Judicial review is therefore "limited to" the agency's "contemporaneous explanation in light of the existing administrative record." *See Dep't of Comm. v. New York*, 588 U.S. 752, 790 (2019) (Thomas, J., concurring in part and dissenting in part) (confirming that this standard of review applies to the "six specified standards" for setting aside agency action under Section 706(2)).

This principle is even stronger in the *Turner* context: Courts adjudicating *Turner* claims have emphasized the importance of constraining prison officials to the reasons they gave at the time they actually took an action, as opposed to litigation-based post hoc explanations. *See, e.g.*, *Salahuddin v. Goord*, 467 F.3d 263, 277 (2d Cir. 2006) ("Post hoc justifications with no record support will not

suffice."); *Haze v. Harrison*, 961 F.3d 654, 659 n.3 (4th Cir. 2020) (declining to credit prison officials' explanation where "the record does not reflect that this was the actual reason" for their actions); *Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) (prison officials are not entitled to *Turner* deference "if their actions are not actually motivated by legitimate penological interests at the time they act"); *Greybuffalo v. Kingston*, 581 F. Supp. 2d 1034, 1045 (W.D. Wis. 2007) ("The inquiry the Court has made under *Turner* is what *actually* motivated the restriction, not what could have motivated it."); *Jarrard v. Moats*, No. 4:20-cv-2, 2022 WL 18586257, at *4 n.6 (N.D. Ga. Sept. 27, 2022) (explaining that "litigation-based pretextual justifications" cannot "save conduct that would otherwise be unconstitutional under *Turner*" and collecting caselaw). Just as in the APA context, therefore, prison officials cannot supply new reasons for their actions when it comes time to defend themselves in court. The district court erred in deferring to Defendants' justifications in the Royer declaration, and in finding Defendants satisfied their burden under *Turner*. SA-015.[5]

[5] The district court suggested that Mr. Agofsky, like Defendants, relied on "evidence outside the administrative record" in his own argument. *See* SA-015 n.5. The court appears to be referring to a declaration from Mrs. Agofsky, as well as a footnote about a particular BOP volunteer visitor program. As to the first, Mrs. Agofsky submitted a declaration, to which she attached the forms she submitted at the time of her original request. In other words, these documents were part of the contemporaneous agency record (and that puts Mrs. Agofsky's declaration in a very different posture than Mr. Royer's, which introduced facts that are not documented in any contemporaneous records from the actual time of the decision). Mr. Agofsky also cited BOP's Prisoner Visitation and Support program to argue that BOP's

The Court should decline to consider Defendants' attempts to retroactively inject new security justifications into their decision through the Royer declaration. In any event, the assertions in the affidavit do not change the analysis. Defendants already allow Mr. Agofsky visitors, so they have clearly made the judgment that none of their claimed concerns about Mrs. Agofsky visiting in a non-contact setting warrant denying him visitation outright. And none of those claimed concerns arises out of Mr. Agofsky's visitation history (much less his non-contact visitation history). What's more, Defendants' reliance on Mr. Agofsky's "special security factors" (specifically, his past violent conduct) presumably would apply to everyone on death row—and perhaps even to every one of the thousands of federal prisoners convicted of murder or other serious violent crime. Such generalized concerns cannot be sufficient to deny visitation given the strong presumption in favor of visitation in 540.44(a).

This Court should therefore conclude that Mr. Agofsky is likely to show that Defendants did not have a valid justification for infringing his First Amendment rights. The other *Turner* factors also favor Mr. Agofsky. As to the second *Turner* factor, there are no alternative means for Plaintiff to visit with Mrs. Agofsky.

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security justifications are exaggerated. ECF No. 33-1 at 23 n.5. This stray citation in a footnote was both tangential to Mr. Agofsky's argument and also information in the public record—it makes little sense to equate this to BOP's attempt to revise the administrative record.

Defendants have periodically asserted that Plaintiff's ability to virtually communicate with Mrs. Agofsky is an adequate alternative. *See, e.g.*, ECF No. 44 at 23. The Court should reject this outright. "*Turner* . . . requires a contextualized inquiry into the scope of the right" that a plaintiff "seeks to vindicate," and whether there are alternative means of exercising *that* particular right. *Heyer v. U.S. Bur. of Prisons*, 984 F.3d 347, 357–58 (4th Cir. 2021). Here, the right Plaintiff seeks to vindicate is the right to visit with his spouse—and absent visitation, there are no alternative means to exercise this right. The lack of such alternatives is itself "evidence that the regulations are unreasonable." *Id.* at 357 (internal quotations and alteration omitted).

The third *Turner* factor is the impact accommodation of the right would have on corrections officers, prisoners, and prison resources. *See Turner*, 482 U.S. at 90. Following their own regulations would not negatively affect the prison. Nor would allowing a visit from Mrs. Agofsky: Her visit would be subject to the same non-contact procedures that already govern Plaintiff's visits with other regular non-legal visitors—both relatives and non-relatives alike. Given Mrs. Agofsky's lack of criminal history—and the fact that she would pass a background check if Defendants ever conducted one—her visit would place no greater strain on prison resources than any other non-contact visit. *See* ECF No. 6-1 ¶¶ 6–7, 10. As in *Heyer*, any "hypothetical risks" associated with her visit are outweighed by the fact that BOP

"already utilizes resource-efficient means of mitigating the risks" associated with in-person visits, namely background checks and non-contact settings. *See* 984 F.3d at 364–65.

Finally, with respect to the fourth *Turner* factor, there is an obvious and easy alternative to BOP's new policy "that accommodate[s] the right [in question] while imposing a *de minimis* burden on the pursuit of security objectives." *See Turner*, 482 U.S. at 98. Defendants can simply comply with Section 540.44 as written (and as BOP explained it in 2003), by applying the prior relationship rule only to friends and associates and not to immediate family, while still subjecting Mrs. Agofsky to background checks and any non-contact restrictions when visiting. The existence of that "obvious, easy alternative[]" is evidence that BOP's new policy "is not reasonable, but is an exaggerated response to prison concerns." *See id.* at 90 (quotation marks omitted). For Defendants to treat Plaintiff's marriage as inherently threatening is the kind of "exaggerated response" that *Turner* rejected when invalidating prison restrictions on the right to marry. *See* 482 U.S. at 90.[6]

The district court therefore erred in finding Mr. Agofsky had not established a likelihood of success on this claim. The court further erred in its analysis when it suggested that Mr. Agofsky had not shown "that the denial of visits is permanent."

[6] Moreover, despite Section 540.44(a)'s inclusion of "spouse," "step-parents," and "foster parents" in defining "immediate family," Defendants seem to apply different standards to a prisoner's "new wife." SA-032.

SA-015. This finding is clearly erroneous. Defendants informed Mr. Agofsky repeatedly that he "must" supply proof of a prior relationship—proof that doesn't exist—and then refused to budge on that requirement when Mr. Agofsky persistently appealed it over the course of several years. *See* SA-017–37. That amply shows that the denial is a permanent ban.

IV. The Remaining Factors Favor Granting Preliminary Injunctive Relief.

The district court did not reach the remaining preliminary injunction factors, SA-016, but these, too, favor granting injunctive relief. Defendants' unpublicized, unreasoned, and unconstitutional regulatory revision constitutes irreparable harm to Mr. Agofsky. By refusing to let Mrs. Agofsky visit because of the prior relationship rule, Defendants have placed a permanent ban on Mr. Agofsky's ability to receive in-person, non-contact visits from his wife. The loss of First Amendment freedoms, as well as the deprivation of the procedural protections of the APA, are both well-recognized to constitute irreparable injury warranting preliminary injunctive relief. *Int'l Ass'n of Fire Fighters, Local 365*, 56 F.4th at 451 ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also id.* at 450–51 ("Under Seventh Circuit law, irreparable harm is presumed in First Amendment cases."); *Eli Lilly & Co. v. Cochran*, 526 F. Supp. 3d 393, 408 (S.D. Ind. 2021) (finding plaintiffs established irreparable injury where they showed "a

likelihood of establishing that their procedural right to advance notice and comment was violated"). Plaintiff—like all federal death row prisoners, is housed in extremely restrictive conditions with very limited privileges and few opportunities to congregate with anyone, much less outside visitors. Non-contact visits are one of Plaintiff's few (and still infrequent) opportunities to have meaningful in-person interactions. Defendants' interference with his family relationship constitutes irreparable injury.

Furthermore, enjoining BOP from applying Section 540.44(c)'s prior relationship rule to immediate family would not harm Defendants in any way. *See Eli Lilly & Co.*, 526 F. Supp. 3d at 409 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding the balance of harms and the public interest factors "merge when, as in this case, the government is the defendant"). "There is no harm to the Government when a court prevents unlawful practices." *Banks v. Booth*, 468 F. Supp. 3d 101, 124 (D.D.C. 2020); *accord N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) ("The public interest is served when administrative agencies comply with their obligations under the APA."); *Cook Cnty., Ill. v. McAleenan*, 417 F. Supp. 3d 1008, 1029 (N.D. Ill. 2019), *aff'd sub nom. Cook Cnty., Ill. v. Wolf*, 962 F.3d 208 (7th Cir. 2020) ("[T]here is generally no public interest in the perpetuation of unlawful agency action.") (citation omitted); *Ind. Fine Wine & Spirits v. Cook*, 459 F. Supp. 3d 1157, 1171 (S.D. Ind. 2020) ("[S]urely, upholding

constitutional rights serves the public interest.'") (quoting *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004))).

Additionally, the notion of any harm to BOP is belied by the fact that BOP *itself* has until recently read the regulation as Plaintiff does. When faced with public comments that the proposed prior relationship rule might apply to immediate family members, BOP reassured the public that this requirement would *not* apply to immediate family members. *See Visiting Regulations: Prior Relationship*, 68 Fed. Reg. at 10657. Plaintiff merely seeks to stop Defendants from imposing a categorical requirement that their own regulations make crystal clear *does not apply* in this context.

CONCLUSION

This Court should reverse the district court's denial of Plaintiff's motion for a preliminary injunction, and vacate the denial of his particular request.

Dated: July 22, 2024

Respectfully submitted,

/s/ *Kathryn Ali*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28(a)(1) and 32(g)(1), I hereby certify that the foregoing Opening Brief for Appellant complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B)(i) and Circuit Rule 32(c). According to the word count feature of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 12,336 words.

I further certify that the foregoing brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: July 22, 2024

/s/ *Kathryn Ali*
Kathryn Ali

STATEMENT CONCERNING THE APPENDIX

Pursuant to Circuit Rule 30(d), I certify that all the materials required by Circuit Rules 30(a) and(b) are included in the attached appendix.

Dated: July 22, 2024

/s/ *Kathryn Ali*
Kathryn Ali

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ *Kathryn Ali*
Kathryn Ali

REQUIRED SHORT APPENDIX

TABLE OF CONTENTS TO SHORT APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

SHANNON AGOFSKY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:24-cv-00051-JPH-MKK
	)	
BUREAU OF PRISONS,	)	
COLETTE S. PETERS,	)	
ANDRE MATEVOUSIAN,	)	
STEVEN KALLIS,	)	
	)	
Defendants.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Shannon Agofsky, a death-row inmate at the United States Penitentiary in Terre Haute, Indiana, married a German citizen while he was incarcerated. After the Bureau of Prisons denied his request to allow visits, Mr. Agofsky brought this case challenging that denial under the Administrative Procedure Act. Dkt. 1. He seeks preliminary injunctive relief that would vacate and reverse that denial. Dkt. [33]. Because on this record Mr. Agofsky has not shown some likelihood of success on his claims that the Bureau of Prisons violated the Administrative Procedure Act, his motion for a preliminary injunction is **DENIED**.

I.
Facts & Background

The parties have filed administrative records and other documentary evidence, the relevant parts of which are uncontested. *See* dkt. 6; dkt. 43.

Neither party requested an evidentiary hearing, *see* dkt. 41, so these facts are based on that designated evidence.

Shannon Agofsky is incarcerated in the Special Confinement Unit ("SCU") at the United States Penitentiary in Terre Haute, Indiana. Dkt. 43-12; dkt. 44-1 at 2. The SCU is a maximum-security unit for inmates who have been sentenced to death, including Mr. Agofsky, who was sentenced to death in 2004 for killing another federal inmate. Dkt. 44-1 at 1–2. Mr. Agofsky also has a Bureau of Prisons ("BOP") disciplinary record for assault, disruptive conduct, possessing a dangerous weapon, and rioting. *Id.*

In December 2019, while incarcerated in the SCU, Mr. Agofsky married German citizen Laura Rettenmaier—now Laura Agofsky—in a telephonic ceremony. Dkt. 6-1; dkt. 6-2. Mr. Agofsky did not follow the BOP's requirement to seek permission before marrying. Dkt. 44-1 at 3; *see* 28 C.F.R. § 551.13 ("A federal inmate confined in a Bureau institution who wants to get married shall submit a request to marry."). Ms. Agofsky then began planning to visit Mr. Agofsky. Dkt. 6-1 at 1.

The BOP's visitor regulation requires that proposed visitors be approved onto a visiting list. *See* 28 C.F.R. § 540.44. That regulation provides that "immediate family," including a spouse, "are placed on the visiting list, absent strong circumstances which preclude visiting." *Id.* § 540.44(a) "Friends and associates," however, must have had "an established relationship with the inmate prior to confinement" unless an exception is approved. *Id.* § 540.44(c). When the BOP amended that regulation in 2003, its commentary explained

that "[t]he prior relationship requirement does not apply to immediate family members." 68 Fed. Reg. 10656-01. The BOP also follows a Program Statement on visitors that says "[w]hen deemed appropriate, background checks may also be completed on immediate family members." Dkt. 43-2 at 6. Each BOP institution must supplement that Program Statement with local procedures, and under Terre Haute's supplement, "immediate family members must be verified by the U.S. Probation Officer on the inmate's Presentence Investigation Report." Dkt. 43-4 at 2.

In May 2020, Mr. Agofsky filed a grievance requesting approval for Ms. Agofsky to visit him. Dkt. 43-6 at 2. The SCU Unit Team denied Mr. Agofsky's visitation request, explaining that the Agofskys had to "prove that [they] had a relationship prior to incarceration" or receive an exception from the Warden. *Id.* Mr. Agofsky appealed to the Warden, who responded that he "must approve any exception to [the] prior relationship requirement," and he was waiting on more information. *Id.* at 2–3. Mr. Agofsky then appealed to the Regional Director and the Office of General Counsel, both of which upheld the Warden's response. Dkt. 43-7; dkt. 43-8.

Mr. Agofsky brought this case on May 25, 2023, in the District for the District of Columbia, alleging that the BoP's actions violated the Administrative Procedure Act ("APA"). Dkt. 1. The case was transferred to this district in February 2024, dkt. 23, and Mr. Agofsky then filed a motion for a preliminary injunction under Federal Rule of Civil Procedure 65, requesting that the Court

"vacate[ ] and reverse[ ] Defendants' denial" of Mr. Agofsky's visitation request, dkt. 33.

II.
Preliminary Injunction Standard

Injunctive relief under Federal Rule of Civil Procedure 65 is "an exercise of very far-reaching power, never to be indulged in except in a case clearly demanding it." *Cassell v. Snyders*, 990 F.3d 539, 544 (7th Cir. 2021). To obtain such extraordinary relief, the party seeking the preliminary injunction carries the burden of persuasion by a clear showing. *See id.*; *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

Determining whether a plaintiff "is entitled to a preliminary injunction involves a multi-step inquiry." *Int'l Ass'n of Fire Fighters, Local 365 v. City of E. Chicago*, 56 F.4th 437, 446 (7th Cir. 2022). "As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has no adequate remedy at law and will suffer irreparable harm if preliminary relief is denied." *Id.* "If these threshold factors are met, the court proceeds to a balancing phase, where it must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties." *Cassell*, 990 F.3d at 545. This "involves a 'sliding scale' approach: the more likely the plaintiff is to win on the merits, the less the balance of harms needs to weigh in his favor, and vice versa." *Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020). "In

the final analysis, the district court equitably weighs these factors together, seeking at all times to minimize the costs of being mistaken." *Cassell*, 990 F.3d at 545.

III.
Analysis

The Court's analysis begins and ends with one of the threshold requirements for obtaining a preliminary injunction—whether Mr. Agofsky has shown some likelihood of succeeding on the merits of his claims. *See Lukaszczyk v. Cook County*, 47 F.4th 587, 598 (7th Cir. 2022) (observing that likelihood of success on the merits "is often decisive."). Mr. Agofsky argues that he's likely to succeed on his APA claims (1) because the BOP has "constructively amended" its visiting regulation to require a prior relationship for immediate family without following the proper procedures, (2) because the visit denial was arbitrary and capricious, and (3) because the visit denial violates the First Amendment. Dkt. 33-1 at 16–29. The BOP responds that its actions were consistent with its visiting regulation and did not violate the First Amendment. Dkt. 44 at 13–19.[1]

A. Constructive Amendment

"The APA establishes the procedures federal administrative agencies use for 'rule making,' defined as the process of 'formulating, amending, or repealing

[1] The BOP briefly argues that the Court lacks subject matter jurisdiction because regulation of "inmate visitation is committed to agency discretion by law." Dkt. 44 at 14. The Seventh Circuit, however, has held that this rule is not "a limit on subject matter jurisdiction." *Builders Bank v. Fed. Deposit Ins. Corp.*, 846 F.3d 272, 275 (7th Cir. 2017); *accord Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020).

a rule.'" *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 95 (2015). Legislative rules—rules that "have the force and effect of law"—must be issued through a notice-and-comment process that allows public participation and requires the agency to "consider and respond to significant comments." *Id.* at 96. Interpretive rules, by contrast, do not require notice and comment because they merely advise the public of the agency's interpretation of a statute or rule, without the force of law. *Id.* at 96–97.

Here, Mr. Agofsky argues, and the BOP does not dispute, that 28 C.F.R. § 540.44 is a legislative rule with the force of law. *See* dkt. 33-1 at 16. Under that regulation, an inmate must have had a prior relationship with "friends and associates" for them to visit (unless an exception is approved) but "immediate family" do not have that explicit requirement. 28 C.F.R. § 540.44. Mr. Agofsky therefore argues that the BOP constructively amended 28 C.F.R. § 540.44(a) by imposing a prior-relationship requirement on his visitation request. Dkt. 33-1 at 15–22. The BOP responds that instead of revising 28 C.F.R. § 540.44(a), it only adjudicated Mr. Agofsky's specific request for his wife to visit. Dkt. 44 at 16–19.

While the BOP's responses to Mr. Agofsky referenced a prior-relationship requirement, that does not mean that the BOP constructively amended 28 C.F.R. § 540.44, triggering a need for notice-and-comment rulemaking. Mr. Agofsky provides no evidence to support his allegation that the BOP broadly applies the prior-relationship requirement to immediate family members. *See*

dkt. 33-1 at 12–13.[2] In fact, the BOP's responses to Mr. Agofsky's grievance don't cite 28 C.F.R. § 540.44(a) at all—much less express a BOP-wide view that it requires a prior relationship for immediate family to visit. *See* dkt. 6-3 at 2, 4 (unit staff and Warden response); dkt. 6-4 at 3 (regional director response); dkt. 6-5 at 7 (central office response).

Instead, in addressing Mr. Agofsky's grievance, the unit staff and Warden relied on the BOP's program statement and its Terre Haute supplement, interpreting those documents as requiring either a prior relationship or an exception from the Warden. Dkt. 6-3 at 2, 4. Mr. Agofsky admits that this program statement and supplement did not require notice and comment. Dkt. 45 at 10; *Perez*, 575 U.S. at 100 (The APA's "exemption of interpretive rules from the notice-and-comment process is categorical."). The regional director and central office then upheld the Warden's response as within his discretion. Dkt. 6-4 at 3 ("It is within each Warden's discretion to approve or deny visitors."); dkt. 6-5 at 7 ("The approval of visiting privileges falls within the discretionary authority of the Warden."). In other words, Mr. Agofsky has not shown that the BOP requested evidence of a prior relationship *because of* § 540.44(a).[3]

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[2] Mr. Agofsky cites a similar lawsuit brought by fellow inmate Daniel Troya, but even if that suit can be considered in an APA challenge, it does not show that the BOP has constructively amended 28 C.F.R. § 540.44(a). Instead, Mr. Agofsky alleges that the BOP settled that suit and allows visits between Mr. and Mrs. Troya, which the BOP presumably would not have done if it had constructively amended its binding regulation to require otherwise. *See* dkt. 33-1 at 12–13.

[3] Because the BOP did not apply § 540.44(a) to Mr. Agofsky's visitation request, the BOP's 2003 commentary confirming that it does not impose a prior-relationship

The BOP thus referenced a prior-relationship requirement in its adjudicative process of resolving Mr. Agofsky's grievance even though no binding law required it. By doing so in this case—based on non-binding policy documents—the BOP acted in an adjudication rather than in rulemaking. *See Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 559 (7th Cir. 2012) ("Adjudications typically resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals."). Such an adjudication does not require notice and comment—even if the agency applies new adjudicative principles in that proceeding. *See id.* ("[I]t is well-established that an agency is not precluded from announcing new principles in an adjudicative proceeding rather than through notice-and-comment rule-making.").

The cases that Mr. Agofsky cites do not say otherwise. In both cases he relies on, the court was considering broader guidance documents rather than a decision in a specific adjudication. *See Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (considering guidance letters outlining procedures for cattleherder certification and sheepherding operations); *Nat'l Family Planning & Repro. Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992) (considering HHS Directives governing when doctors could counsel on abortion). Mr.

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requirement on immediate family—something the regulation's text already made clear—does not affect this issue. *See* 68 Fed. Reg. 10656-01. When that commentary stated that "[t]he prior relationship requirement does not apply to immediate family members," the context makes clear that it's referring only to § 540.44(c)'s prior relationship requirement rather than cabining the BOP's adjudicative discretion more broadly. *See id.*

Agofsky therefore has not shown that the BOP constructively amended 28 C.F.R. § 540.44(a) by referencing a prior-relationship requirement in his grievance adjudication.

In short, the BOP didn't rely on 28 C.F.R. § 540.44 for a prior relationship requirement, so it couldn't have constructively amended it to impose one. And its decision to adjudicate Mr. Agofsky's grievance under the BOP's program statement and its Terre Haute supplement did not require notice and comment. *See Perez*, 575 U.S. at 100; dkt. 45 at 10. Mr. Agofsky therefore has not shown some likelihood of success on his claim that the BOP constructively amended 28 C.F.R. § 540.44 or was required to complete notice and comment rulemaking.

B. Arbitrary or Capricious

The APA also requires that the BOP's adjudication not be arbitrary or capricious. *Abraham Lincoln Mem'l Hosp.*, 698 F.3d at 547, 554–55. This "arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *F.C.C. v. Prometheus Radio Proj.*, 592 U.S. 414, 423 (2021). "Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *Id.* "A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.*

Mr. Agofsky argues that the BOP acted arbitrarily and capriciously because it expanded 28 C.F.R. § 540.44(c)'s prior-relationship requirement for

friends and acquaintances to also apply to immediate family under 28 C.F.R. § 540.44(a). Dkt. 33-1 at 22–25. The BOP responds that it acted reasonably in adjudicating Mr. Agofsky's grievance because Mr. Agofsky's relationship with Ms. Agofsky raised potential security concerns with visits. Dkt. 44 at 21.

Here, as explained above, the administrative record shows that the BOP did not deny Mr. Agofsky's visitation request under 28 C.F.R. § 540.44(a) but relied on its non-binding policy documents. *See* dkt. 6-3 at 2, 4; dkt. 6-4 at 3; dkt. 6-5 at 7. And while 28 C.F.R. § 540.44(a) does not impose a prior-relationship requirement on immediate family, it also does not prohibit the BOP from considering whether a prior relationship existed or whether it's verified in a Presentence Investigation Report, as the Warden did here. *See* dkt. 6-3 at 4. While the Warden referred to a prior-relationship "requirement," he expressly recognized that he could approve visits without such a relationship. *Id.* And the BOP's appeal responses confirmed the Warden's discretion to approve visits without a prior relationship after considering, for example, the "establishment of a relationship prior to incarceration, criminal history, and whether the person could present a security concern if allowed to visit." Dkt. 6-4 at 3. Mr. Agofsky therefore has not shown that the BOP arbitrarily or capriciously expanded or failed to comply with 28 C.F.R. § 540.44(a). *See ADX Commc'ns of Pensacola v. F.C.C.*, 794 F.3d 74, 82 (D.C. Cir. 2015) (Mr. Agofsky "must show" that the BOP's interpretation "is plainly erroneous or inconstant with the regulations").

Mr. Agofsky next argues that the BOP acted arbitrary and capriciously because it didn't follow 28 C.F.R. § 540.44(a)'s standard that immediate family will be allowed to visit "absent strong circumstances which preclude visiting." Dkt. 33-1 at 24. The deferential arbitrary and capricious standard, however, requires Mr. Agofsky to show that the BOP "fail[ed] to comply" with 28 C.F.R. § 540.44(a). *Nat'l Environ. Dev. Ass'n Clean Air Proj. v. E.P.A.*, 752 F.3d 999, 1009–11 (D.C. Cir. 2014). The administrative record shows that he's unlikely to be able to make that showing here, especially under the "substantial deference" that the BOP receives "in carrying out its statutory mandate" to regulate visitors. *Bonacci v. Transp. Security Admin.*, 909 F.3d 1155, 1161 (D.C. Cir. 2018) ("In cases of this sort, we defer to TSA actions that reasonably interpret and enforce the safety and security obligations of the agency."); *see* 18 U.S.C. § 4042(a).

Indeed, for the reasons the BOP gave in the grievance appeals process, a prior relationship is relevant to whether "strong circumstances . . . preclude visiting" under 28 C.F.R. § 540.44(a). Dkt. 6-4 at 3. While the Warden's response to Mr. Agofsky's visit request could have been clearer—particularly about the applicable standard—when read in context it's fair to conclude that his decision was based on his reasonable consideration of security concerns presented by Mr. Agofsky's request rather than rote application of the visiting regulation. Moreover, the appeal responses from the BOP's regional director and central office referenced the concerns of criminal history, "whether the person could present a security concern if allowed to visit," and "ensur[ing] the

security and orderly operation of the institution." Dkt. 6-4 at 3; *see* dkt. 6-5 at 7. Those responses were clear that Mr. Agofsky had not provided documentation to alleviate those concerns. Dkt. 6-3 at 4; dkt. 6-4 at 3; dkt. 6-5 at 7. On these facts, the Court cannot say that the BOP failed to act "within a zone of reasonableness." *Prometheus Radio Proj.*, 592 U.S. at 423.

Since the record demonstrates that the Warden's decision was based on the specific facts presented in Mr. Agofsky's case, Mr. Agofsky is unlikely to be able to show that the Warden's decision is reviewable under the APA. *See Builders Bank v. Fed. Deposit Ins. Corp.*, 846 F.3d 272, 275 (7th Cir. 2017) ("Section 701(a)(2) [of the APA] prevents review of matters committed to agency discretion by law."). Here, the ultimate visitation decision is committed to the Warden's discretion. *See* 28 C.F.R. § 540.40 ("The Warden may restrict inmate visiting when necessary to ensure the security and good order of the institution"). Courts have therefore found that similar decisions are unreviewable under the APA. *See White v. True*, No. 19-cv-418-JPG, 2020 WL 1352112 at *3 (S.D. Ill. Mar. 23, 2020) (finding "that the decision to restrict Plaintiff's mail communication with [his daughter] is not amenable to APA review"); *Sebolt v. LaRiva*, No. 2:15-cv-353-WTL-MPB, 2017 WL 2271441 at *6 (S.D. Ind. May 23, 2017) ("[F]ederal courts have held that any APA challenge to the TRULINCS [email communication system] Program Statement as 'arbitrary and capricious' is unreviewable by the Court because it falls within the BOP's broad discretionary powers to administer prisons.").

In sum, on this record, the BOP's adjudication presents "a rational connection between the facts found and the choice made." *F.E.R.C. v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016). That's enough to satisfy the APA, since arbitrary and capricious review asks "only . . . whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Sauk Prairie Conserv. Alliance v. U.S. Dept. of the Interior*, 944 F.3d 664, 670 (7th Cir. 2019); *see St. Vincent Med. Grp., Inc. v. U.S. Dept. of Justice*, 71 F.4th 1073, 1076 (7th Cir. 2023) ("The APA allows us to discard an agency's conclusion if the path it took cannot be discerned. Here the dots almost connect themselves."). Because the BOP looked to relevant factors and explained why it denied visitation, Mr. Agofsky has not shown some likelihood of showing that the decision was arbitrary or capricious.

C. First Amendment

The APA allows challenges to agency decisions "based on alleged constitutional violations." 5 U.S.C. § 706(2)(B); *see Munsell v. Dept. of Agriculture*, 509 F.3d 572, 589 (D.C. Cir. 2007). "Prisoners retain a limited constitutional right to intimate association" under the First Amendment, so restrictions on visits "are valid if reasonably related to legitimate penological interests." *Easterling v. Thurmer*, 880 F.3d 319, 322 (7th Cir. 2018) (quoting *Turner v. Safley*, 482 U.S. 78, 95–96 (1987)). Constitutional challenges to visitor restrictions are evaluated under the four *Turner* factors:

> (1) whether there was a rational connection between the decision to deny the marriage request and the legitimate penological interest put forward to justify the denial;

> (2) whether alternative means of exercising the right remained open to the plaintiffs;
>
> (3) what impact accommodation of the asserted right would have on guards and other inmates; and
>
> (4) whether obvious, easy alternatives existed to accommodate the plaintiffs' rights at de minimis cost to valid penological interests, tending to show that the denial was an exaggerated response to prison concerns.

Nigl v. Litscher, 940 F.3d 329, 333 (7th Cir. 2019).[4]

Mr. Agofsky argues that he's likely to succeed on this claim because Ms. Agofsky doesn't present a security threat, has no other way to visit Mr. Agofsky, and would not affect prison resources with visits. Dkt. 33-1 at 25–29. The BOP responds that Mr. Agofsky is unlikely to satisfy the *Turner* factors on his First Amendment claim. Dkt. 44 at 23.

The first *Turner* factor is dispositive here because the BOP has identified legitimate security concerns connected to its denial of visits. *Riker v. Lemmon*, 798 F.3d 546, 553 (7th Cir. 2015) ("[T]he first [factor] can act as a threshold factor regardless which way it cuts."). Mr. Agofsky has an extensive criminal history and BOP disciplinary history, and disregarded BOP policy when he married Ms. Agofsky without first seeking approval as required. *See* dkt. 15-2 at 1–4; *Nigl*, 940 F.3d at 333–36 (upholding a marriage request denial because

[4] The BOP argues that the *Turner* factors do not apply here because the Warden merely requested more information instead of denying Mr. Agofsky's visit request. Dkt. 44 at 22. Because the BOP finished adjudicating Mr. Agofsky's grievance and that decision is the one being challenged, at this stage the Court considers the *Turner* factors.

of a "pattern of rule-breaking and deception").[5] The BOP also can't run a thorough background check on Ms. Agofsky since she's not a United States citizen or resident, so it does "not know if she has any affiliations with security threat groups or national watchlists." Dkt. 44-1 at 3–6. The BOP is therefore concerned about visitation "for an improper purpose," including identification of staff and the passage of information between Mr. Agofsky and "an unknown member of a foreign community." *Id.* The Court "must accord substantial deference" to those concerns as "the professional judgment of prison administrators." *Riker*, 798 F.3d at 553. And at least at this stage, Mr. Agofsky has not "present[ed] evidence to call [those] explanation[s] into question." *Id.*

Finally, while the BOP's adjudication of the visit request at issue is complete, Mr. Agofsky has not shown at this stage that the denial of visits is permanent. *See Nigl*, 940 F.3d at 335–36. It may be that, after time, the BOP would be less concerned with Mr. Agofsky's previous policy violations, and he may be able to provide information—as the Warden has invited him to do, dkt. 43-6 at 3—showing that visits would not threaten institutional security. *See Nigl*, 940 F.3d at 335–36.

[5] Because the *Turner* factors require broader evidence, the First Amendment analysis is not "limited to the grounds that the agency invoked when it took the action." *Dept. of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020); *see Miller v. Downey*, 915 F.3d 460, 462 (7th Cir. 2019). Indeed, both parties cite evidence outside the administrative record in evaluating the *Turner* factors. *See* dkt. 33-1 at 27–28; dkt. 44 at 23.

Mr. Agofsky thus has not shown some likelihood of success on his APA claim that the BOP's action violated the First Amendment.

IV.
Conclusion

Because Mr. Agofsky has not shown some likelihood of success on the merits justifying a preliminary injunction, the Court need not address the remaining injunction factors. *See Lukaszczyk*, 47 F.4th at 598 ("If plaintiffs fail to establish their likelihood of success on the merits, [the Court] need not address the remaining preliminary injunction factors.").[6]

The motion for preliminary injunction is therefore **DENIED**. Dkt. [33]. Magistrate Judge Klump is asked to enter a case management plan for resolving this case.

SO ORDERED.

Date: 5/6/2024

James Patrick Hanlon

James Patrick Hanlon
United States District Judge
Southern District of Indiana

Distribution:

All electronically registered counsel

[6] Mr. Agofsky's request for oral argument is denied because he has not shown that it is necessary for resolving the motion for preliminary injunction. *See* dkt. 41.

Attachment A

FCC Terre Haute
BP-8 - Informal Resolution

825

NAME	NUMBER	UNIT
Shannon Agatsley	06267-045	SCU

Notice to Inmate: Be advised, ordinarily, prior to filing a Request for Administrative Remedy, BP-229 (13), you should attempt to informally resolve your complaint through your Correctional Counselor. Please refer to P.S. 1330.18, Administrative Remedy Program and the FCC Terre Haute Institutional Supplement thereto (both available via the Law Library).

1. Briefly state inmate's complaint (One complaint/issue per Form):

Unit manager refuses to process my wife for visiting, based on no proof of prior relationship. The prior relationship rule applies to "friends and associates", not to immediate family. I have provided adequate proof of valid marriage. Spouse is immediate family. No other proof is required to meet standards of policy.

2. Requested Resolution:

Process my wife for visiting approval.

Inmate Signature:	[signature]		
Staff Printed Name/Signature/Date	Scott [signature]		5-14-20
Dept. Assigned for Response:	Unit Team	Due Date:	5-21-2020

3. Staff Response:

Your visitor has not been denied. More information was requested for peocessing.
THX- 5267.08E states: The inmate must have known the proposed visitor(s) prior to incarceration. Your prospective visitor will need to prove that you had a relationship prior to incarceration. Proof of prior relationship may include co-signed leases, utility bills, dated and signed letters, etc. The Unit Manager will review such documentation and approve or deny the visitor.The inmate's immediate family must be verified by the U.S. Probation Officer on the inmate's Presentence Investigation Report (PSI). If unable to establish a prior relationship, the Warden must approve any exception to this prior relationship requirement.
The Unit Manager does not have the authority to approve your visitor, as no prior relationship has been established, nor can your visitor be verified on your PSI.Only the Warden can give this exception.

Section 4: ☐ Informally Resolved/Complaint Withdrawn ☒ No Informal Resolution/Progress to BP-9

Inmate's signature	Staff Printed Name/Signature	Date
	J. Eppler [signature]	5.19.2020

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: agofsky, Shanno W	06267-045	SCU	USP TerreHaute
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A- INMATE REQUEST

Although unit manager choses to quibble over words, refusal to process a visitor equates refusal of visit.
5267.08C (Not E) establishes the prior relationship rule, as related to "friends and associates". It does not apply to immediate family. Spouse is immediate family, so requires no proof of prior relationship, only proof of valid marriage, which I have provided.
Although my marriage is not reflected in my PSI, this is not surprising. My PSI was done in 1992, my marriage took place in 2019. In the course of 27 years, there are many legitimate reasons for family circumstances to change, including birth, marriage, and divorce. I have provided adequate proof of valid marriage.
Process my wife, [redacted] and approve her for visitation.
thank you.

May 21, 2020
DATE

SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: _____

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

Remedy No.: 1021664-F1

FCC Terre Haute, IN

PART B - RESPONSE

This is in response to your Administrative Remedy receipted May 21, 2020, in which you allege your Unit Team refuses to allow your wife to visit. For relief, you request your wife be allowed to visit.

A review of your request reveals your Unit Team has requested more information for processing of the proposed visitor. THX5267.08E, *Visiting Regulations*, states in part, "The Inmate must have known the proposed visitor(s) prior to incarceration." Your prospective visitor will need to prove that you had a relationship prior to incarceration. Proof of prior relationship may include co-signed leases, utility bills, dated and signed letters, etc. The Unit Manager will review such documentation and approve or deny the visitor. The inmate's immediate family must be verified by the U.S. Probation Officer on the inmate's Presentence Investigation Report (PSI). If unable to establish a prior relationship, the Warden must approve any exception to this prior relationship requirement. Your Unit Team is awaiting you to provide more documentation to verify this relationship as you were not married in your Pre-Sentence Investigation Report.

Therefore, this response to your Request for Administrative Remedy is for informational purposes only.

If you are dissatisfied with this response, you may appeal to the Regional Director, North Central Regional Office, Federal Bureau of Prisons, 400 State Avenue, Suite 800, Kansas City, Kansas 66101. Your appeal must be received within 20 calendar days of the date of this response.

5/3/20
Date

T. J. Watson, Complex Warden

U.S. Department of Justice
Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From:	LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION
	Agofsky, Shannon W	06267-045	SCU	USP Terre Haute

Part A - REASON FOR APPEAL

Unit team refuses to process my wife for visitation, for 2 reasons. 1) No proo of prior relationship. 2) Wife not listed in PSI.
Response to reason 1) No proof of prior relationship is reqired. It was stated expreesley by the BOP, when the rule was first instituted,that it was only for "friends and associates". It does not apply to immediate family.(A copy of thi statement is added.) My wife is immediate family, and not subject to the prior relationship rule,.
Response to reason 2) Unit team has been supplied with a copy of our marriage certificate, as well as a copy of wife's national identification. (Copies of both added to this filingg.) So although we were not married at the time the PSI was done, this is proof the marriage is valid adn accepterd in both the state of Kansas, and the country of Germany.Sufficient proof of valid marriag has been given.
Refusal to process a visitor, based on false claims, is not materially differe from refusal of that visitor.Unit team is aware no proof of prior relationshi is necessary. Unit team is aware that my marriage is valid.Please direct them to process my wife and approve her for visitation.,

DATE 6/9/2020 SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER:

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT:

DATE SIGNATURE, RECIPIENT OF REGIONAL APPEAL

USP LVN PRINTED ON RECYCLED PAPER BP-230(13) JUNE 2002

U.S. Department of Justice
Federal Bureau of Prisons
North Central Regional Office

Regional Administrative Remedy Appeal
Part B - Response

Administrative Remedy Number: 1021664-R1

This is in response to your Regional Administrative Remedy Appeal received in this office on June 29, 2020, in which you appeal the decision to deny placement of an individual on your approved visiting list. For relief, you request reconsideration.

We have reviewed your appeal and the Warden's response dated June 3, 2020. Several areas are considered when determining whether someone is an appropriate visitor. Those areas include, but are not limited to, establishment of a relationship prior to incarceration, criminal history, and whether the person could present a security concern if allowed to visit. It is within each Warden's discretion to approve or deny visitors. According to the provisions of Program Statement 5267.08, Visiting Regulations, the Warden may restrict visiting to ensure the security and orderly operation of the institution. As indicated in the Warden's response, your unit team is awaiting you to provide additional documentation to verify your relationship as your Pre-Sentence Investigation Report does not indicate you were married. You have provided insufficient evidence to suggest the decision is contrary to policy. Accordingly, the Warden's decision is supported.

Based on the above, this response to your Regional Administrative Remedy Appeal is for informational purposes only.

If you are dissatisfied with this response, you may appeal to the Office of General Counsel, Federal Bureau of Prisons, 320 First Street, NW, Washington, DC 20534. Your appeal must be received in the Office of General Counsel within 30 days from the date of this response.

8/3/20
Date

J. E. Krueger, Regional Director

RECEIPT - ADMINISTRATIVE REMEDY

DATE: NOVEMBER 28, 2020

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : SHANNON WAYNE AGOFSKY, 06267-045
TERRE HAUTE USP UNT: SCU QTR: X03-310L

THIS ACKNOWLEDGES THE RECEIPT OF THE CENTRAL OFFICE APPEAL IDENTIFIED BELOW:

REMEDY ID : 1021664-A2
DATE RECEIVED : OCTOBER 29, 2020
RESPONSE DUE : DECEMBER 28, 2020
SUBJECT 1 : VISITING LIST
SUBJECT 2 :

U.S. Department of Justice

Central Office Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Agofsky,Shannon,W	06267-045	SCU	USPTerre Haute
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL

I have made complaint that unit team refuses to process my wife for visits. Regional response recieved 8/21/20, as indicated on reciept signed by staff. This response is filed within the 30 day limit.
My wifes refusal was based on 2 issues: No prior relationship,and not listed in my PSI. Region ignores that prior relationships apply onlyto "friends and associates", not to spouse.Their main arguement is the warden has the right t refuse anyone on security grounds.While this is true, no security claim was raised,nor could one be,prior to the processing of the prospective visitor.So this argument is irrelevant.They state I muszt provide additional documents t prove relationship. This is false.I have provided all pertinent documentatior and relationship is proven as per policy.
To continue to refuse to process my wife is contrary to policy,and unsupporte by any legitimate reasoning,.and all arguments against it are spurious.
Process my wife for visitation, and approve her.
Thank you.

8/22/20
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 1021664-A1,AZ

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

SA-023

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

EXTENSION OF TIME FOR RESPONSE - ADMINISTRATIVE REMEDY

DATE: NOVEMBER 28, 2020

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : SHANNON WAYNE AGOFSKY, 06267-045
TERRE HAUTE USP UNT: SCU QTR: X03-310L

ADDITIONAL TIME IS NEEDED TO RESPOND TO THE CENTRAL OFFICE APPEAL IDENTIFIED BELOW. WE ARE EXTENDING THE TIME FOR RESPONSE AS PROVIDED FOR IN THE ADMINISTRATIVE REMEDY PROGRAM STATEMENT.

REMEDY ID : 1021664-A2
DATE RECEIVED : OCTOBER 29, 2020
RESPONSE DUE : DECEMBER 28, 2020
SUBJECT 1 : VISITING LIST
SUBJECT 2 :

TRULINCS 06267045 - AGOFSKY, SHANNON WAYNE - Unit: THP-X-A

FROM: USP SCU Unit
TO: 06267045
SUBJECT: RE:***Inmate to Staff Message***
DATE: 01/31/2021 05:52:02 PM

I will forward your concern to the Admin remedy Clerk.

>>> ~^!"AGOFSKY, ~^!SHANNON WAYNE" <06267045@inmatemessage.com> 1/31/2021 11:14 AM >>>
To: Weyrauch, counselor
Inmate Work Assignment: unassigned

I have the receipt from when it was received. It says it got there on Oct 29, and after the request of a 30 day extension, the response was due Dec 29. That was over a month ago.
Since they are refusing to respond within their own stated timeline, what am I supposed to do ? If I fail to meet a deadline, I automatically lose. Does them missing the deadline mean I automatically win ??
I obviously know that is not the case, but what am I supposed to do now ? I cannot proceed to court filings without their response, and I am not getting a response . So ????
Thanks for your time.
Agofsky, C-307
-----USP SCU Unit on 1/29/2021 10:37 AM wrote:

>
Our records show that it was received and has been under review by Central Office since 11-12-20.

>>> ~^!"AGOFSKY, ~^!SHANNON WAYNE" <06267045@inmatemessage.com> 1/29/2021 9:40 AM >>>
To: Weyrauch, counselor
Inmate Work Assignment: unassigned

I filed a BP-11 quite some time ago. It is not 30 days past the date when I was supposed to receive a response. Is there any way you can check on it ?
Thank you.
Agofsky C-307

U.S. Department of Justice
Federal Bureau of Prisons

Federal Correctional Complex
Terre Haute, Indiana

☐ Institution ☐ Region ☐ Central

SCU Unit

Receipt of Administrative Remedy

Inmate Name:	**AGOFSKY, SHANNON**	Reg. No.:	**06267-045**
Administrative Remedy No.:	**1021664-A1, A2**		

Received on this 26th day of Feb, 2020.

Signature/Title of Staff

If Administrative Remedy is allowed to be resubmitted, it is due to a Unit Team staff member by _____, 2020.

Edits received by Unit Team on this _____ day of _____, 2020.

Signature/Title of Staff

Inmate Copy

Administrative Remedy No. 1021664-A2
Part B - Response

This is in response to your Central Office Administrative Remedy Appeal, in which you allege Unit Team refuses to authorize your wife for social visits. For relief, you request your wife be approved for social visits.

We have reviewed documentation relevant to your appeal, and based on the information gathered, concur with the manner in which the Warden and Regional Director addressed your concerns at the time of your Request for Administrative Remedy and subsequent appeal. We find staff acted in accordance with the guidelines set forth in Program Statement 5267.09 Visiting Regulations. The approval of visiting privileges falls within the discretionary authority of the Warden. We concur with this decision and the responses provided.

Accordingly, your appeal is denied.

2/9/21
Date

Ian Connors, Administrator
National Inmate Appeals

PHILLIPS BLACK, INC.
a nonprofit, public interest law practice

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Jennifer Merrigan†
John R. Mills‡
Joseph J. Perkovich*

September 17, 2021

T.J. Watson, Complex Warden
USP – Terre Haute
U.S. Penitentiary
4700 Bureau Road South
Terre Haute, IN 47802
812.244.4791 (fax)

Re: Shannon Agofsky, 06267-045 – Spousal Visit

Dear Mr. Watson:

I represent Shannon Agofsky, 06267-045, who is incarcerated in the Special Confinement Unit at USP Terre Haute. I write in regard to Mr. Agofsky's request for visitation with his spouse, which the Bureau of Prisons has denied.[1] As outlined below, because the denial is contrary to BOP policy and Constitutional law, I respectfully request that the BOP reconsider the denial, and permit Mr. Agofksy's spouse, Laura Agofsky, visitation privileges.

According to the BOP's grievance responses, the warden denied visitation because Mr. Agofsky did not have a relationship with his wife prior to entering the BOP. The BOP's responses cite to BOP Regulation 5267.09, "Visiting Regulations," 68 Fed. Reg. 10656 (Mar. 6, 2003) (codified at 8 C.F.R. pt. 540, subpart D). In relevant part, the regulation as adopted states:

> An inmate desiring to have regular visitors must submit a list of proposed visitors to the designated staff. See § 540.45 for qualification as special visitor. Staff are to compile a visiting list for each inmate after suitable investigation in accordance with § 540.51(b) of this part.

[1] Mr. Agofsky's grievances and the BOP's responses are attached.

^ Admitted in Texas
¥ Admitted in Texas and inactive in New York
† Admitted in Missouri and Pennsylvania
‡ Admitted in Arizona, California and North Carolina
** Admitted in New York
* Admitted in California

> The list may include:
>
> (a) Members of the immediate family. These persons include mother, father, step-parents, foster parents, brothers and sisters, *spouse*, and children. *These individuals are placed on the visiting list, absent strong circumstances which preclude visiting.*
> […]
> (c) Friends and associates. The *visiting privilege ordinarily will be extended to friends and associates having an established relationship with the inmate prior to confinement*, unless such visits could reasonably create a threat to the security and good order of the institution. *Exceptions to the prior relationship rule may be made, particularly for inmates without other visitors, when it is shown that the proposed visitor is reliable and poses no threat to the security or good order of the institution.*

Regular Visitors, 28 C.F.R. § 540.44 (2021) (emphasis added).

The "established relationship" addition in (c) was the subject of a 2003 addition. Based on the plain language of the regulation, the prior relationship requirement only applies to friends and associates and not to immediate family. 28 C.F.R. § 540.44. Spouses, who fall into the immediate family category in subsection (a), do not fall under the prior relationship requirement. *Id.* Further, the statute specifically states that only "strong circumstances that preclude visiting" can prevent a spouse or other immediate family member from being placed on the visitor list. *Id.* Thus, the text of the regulation itself has strong protections in place for the visitation rights of spouses as opposed to friends or associates, applying the "prior relationship" requirement only to friends and associates.

In addition to the plain language of the statute, the legislative history of the regulation makes clear that lawmakers intentionally excluded immediate family members (including spouses) from the prior relationship requirement. In the Federal Register announcement of the

law, the BOP addressed six comments it had received expressing concerns about the new prior relationship requirement. *Id.* Concerns about family members were dismissed as not applicable. *Id.*

> The Bureau received comments from six respondents. Three commenters expressed concerns about the impact on family visits (for example, children born after the inmate was incarcerated and new extended family members). In response, the Bureau notes that the prior relationship requirement pertains to friends and associates (28 CFR 540.44(c)). *The prior relationship requirement does not apply to immediate family members (28 CFR 540.44(a)) and other relatives (28 CFR 540.44(b)).*

Id. (emphasis added). The legislative history clearly establishes that the regulation was intentionally designed to exclude family members from the prior relationship requirement. *Id.* Notably, the protection extends not only to immediate family members, but also includes more distant relatives.

This designation is in accordance with the constitutional protections afforded to marriage, even in carceral settings. *See Zablocki v. Redhail*, 434 U.S. 374, 383-85 (1978) (addressing the rights of prisoners to marry, and observing that marriage was "sacred," "the foundation of the family in our society," and "one of the basic civil rights of man"). When examining a prison's limitation on familial (including spousal) visitation, courts first evaluate whether there exists valid, rational connection between the regulation and a legitimate governmental interest. In the present case, there exists no rational connection. Permitting Mr. Agofsky's wife to visit him does not pose a security risk, and the BOP has made no such allegation. Nor was the denial issued in furtherance of a punitive measure or in response to a disciplinary infraction. Instead, according to BOP response to the grievances, the sole basis for denial is the misapplication of 540.44(c) "prior relationship" prong to an individual with 540.44(a) status.

Critically, the denial represents a permanent and absolute denial of visitation between Mr. Agofsky and his wife. The fact that he is on death row, means that he will *never* see his wife. This type of extreme deprivation, without any penological or security justification thus violates both the Constitution, in addition to violating the BOP's own regulation.

While the warden of an institution certainly has discretion in regulating visitation, that discretion is not unchecked. The BOP's regulation makes clear that there is a strong presumption in favor of permitting visitation between prisoners and family members—regardless of prior relationship status. In the present case, it is clear that Mr. Agofsky's wife should be placed on his visitation list "*absent strong circumstances which preclude visiting.*" 540.44(a) (emphasis added). Because no such circumstances exist, Mr. Agofksy should be permitted to see his wife. Thus, we respectfully request that you reconsider, and permit Mrs. Laura Agofsky to visit Mr. Agofsky, in accordance with the regulation.

Thank you for your consideration.

Sincerely,

Jennifer Merrigan

cc: Katherine Siereveld, Attorney Advisor
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U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Complex

Office of the Complex Warden

4700 Bureau Road South
Terre Haute, Indiana 47802

September 21, 2021

Jennifer Merrigan
Phillips Black, Inc.
1901 S. 9th St., 608
Philadelphia, PA 19148

RE: Shannon Agofsky, Federal Register Number 06267-045

Dear Ms. Merrigan:

I am in receipt of your correspondence regarding Shannon Agofsky's request to add his new wife to his list of social visitors.

I have reviewed your concerns. The Bureau of Prisons (BOP) recognizes Mr. Agofsky's marriage; however, my review of his in-person visitation request under the prior relationship requirement is still necessary due to the security concerns presented. This review is in line with BOP policy and procedures, in addition to sound correctional judgment. I am ultimately responsible for the safe, secure, and orderly running of the institutions on this complex. Allowing inmates to effectively avoid the scrutiny of the prior relationship requirement creates a myriad of security concerns and risks which are simply non-negotiable. Mr. Agofsky's ability to visit with new extended family members who have been added since his incarceration, as contemplated by the policy to which you refer, has not been affected by my review of his request to have in-person visitation with his new wife.

Furthermore, the amended visitation policy and accompanying BOP comments during the rule amendment process to which you cite, expand the BOP's security concerns regarding the prior relationship requirement. They do not provide a loophole to get around those security concerns. See 68 Fed. Reg. 10656 (Mar. 6, 2003). Specifically, the BOP's comment makes it clear "…that the prior relationship requirement serves a legitimate penological purpose at all security levels, and that it is necessary to extend the prior relationship requirement to minimum and low security level facilities. In extending the restrictions, the Bureau has chosen to retain the Warden's discretion to make exceptions to the prior relationship requirement."

Mr. Agofsky retains his ability to communicate regularly with his new wife through correspondence and the telephone.

I trust this addresses your concerns.

Sincerely,

T.J. Watson
Complex Warden

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September 19, 2022

Steven Kallis, Complex Warden
USP – Terre Haute
U.S. Penitentiary
4700 Bureau Road South
Terre Haute, IN 47802
812.244.4400 (phone)
812.244.4791 (fax)

Re: Shannon Agofsky, 06267-045 – Spousal Visit

Dear Warden Kallis,

I represent Shannon Agofsky, 06267-045, who is incarcerated in the Special Confinement Unit at USP Terre Haute. I write in regard to Mr. Agofsky's request for visitation with his wife, Laura Agofsky, which the Bureau of Prisons has denied.[1] As outlined below, because the denial is contrary to BOP policy and Constitutional law, and in light of the BOP's recent settlement in the *Troya v. FBOP* matter, I respectfully request that the BOP reconsider the denial, and permit Mr. Agofksy's spouse visitation privileges, including video visitation.

According to the BOP's grievance responses, visitation was denied because Mr. Agofsky did not have a relationship with his wife prior to entering the BOP. The BOP's responses cite to BOP Regulation 5267.09, "Visiting Regulations," 68 Fed. Reg. 10656 (Mar. 6, 2003) (codified at 8 C.F.R. pt. 540, subpart D). In relevant part, the regulation as adopted states:

> An inmate desiring to have regular visitors must submit a list of proposed visitors to the designated staff. See § 540.45 for qualification

[1] Mr. Agofsky's grievances and the BOP's responses are attached.

^ Admitted in Texas
¥ Admitted in Texas and inactive in New York
† Admitted in Missouri and Pennsylvania
‡ Admitted in Arizona, California and North Carolina
** Admitted in New York
* Admitted in California

> as special visitor. Staff are to compile a visiting list for each inmate after suitable investigation in accordance with § 540.51(b) of this part.
>
> The list may include:
>
> (a) Members of the immediate family. These persons include mother, father, step-parents, foster parents, brothers and sisters, *spouse*, and children. *These individuals are placed on the visiting list, absent strong circumstances which preclude visiting.*
> […]
> (c) Friends and associates. The *visiting privilege ordinarily will be extended to friends and associates having an established relationship with the inmate prior to confinement*, unless such visits could reasonably create a threat to the security and good order of the institution. *Exceptions to the prior relationship rule may be made, particularly for inmates without other visitors, when it is shown that the proposed visitor is reliable and poses no threat to the security or good order of the institution.*

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> The Bureau received comments from six respondents. Three commenters expressed concerns about the impact on family visits (for example, children born after the inmate was incarcerated and new extended family members). In response, the Bureau notes that the prior relationship requirement pertains to friends and associates (28 CFR 540.44(c)). *The prior relationship requirement does not apply to immediate family members (28 CFR 540.44(a)) and other relatives (28 CFR 540.44(b)).*

Id. (emphasis added). The legislative history clearly establishes that the regulation was intentionally designed to exclude family members from the prior relationship requirement. *Id.* Notably, the protection extends not only to immediate family members, but also includes more distant relatives.

This designation is in accordance with the constitutional protections afforded to marriage, even in carceral settings. *See Zablocki v. Redhail*, 434 U.S. 374, 383-85 (1978) (addressing the rights of prisoners to marry, and observing that marriage was "sacred," "the foundation of the family in our society," and "one of the basic civil rights of man"). When examining a prison's limitation on familial (including spousal) visitation, courts first evaluate whether there exists valid, rational connection between the regulation and a legitimate governmental interest. In the present case, there exists no rational connection. Permitting Mr. Agofsky's wife to visit him does not pose a security risk, and the BOP has made no such allegation. Nor was the denial issued in

furtherance of a punitive measure or in response to a disciplinary infraction. Instead, according to BOP responses to the grievances, the sole basis for denial is the misapplication of 540.44(c) "prior relationship" prong to an individual with 540.44(a) status.

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Thank you for your consideration.

Sincerely,

Jennifer Merrigan

cc: Rob Schalburg, Attorney Advisor
kschalburg@bop.gov

Ken Hyle, General Counsel
E-mail: khyle@bop.gov