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)

BRIEF FOR APPELLEES

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INTRODUCTION

The Federal Bureau of Prisons (BOP or Bureau) has statutory responsibility for the "management and regulation of all Federal penal and correctional institutions," 18 U.S.C. § 4042(a)(1), and "prison officials have broad administrative and discretionary authority over the institutions they manage," *Hewitt v. Helms*, 459 U.S. 460, 467 (1983). As one aspect of its duties, BOP has promulgated nationwide regulations encouraging family and friends to visit inmates, while at the same time recognizing that a Warden of an individual facility may always "restrict inmate visiting when necessary to ensure the security and good order of the institution." 28 C.F.R. § 540.40. Under the plain language of the regulations, BOP officials can decline to permit even an inmate's immediate family members to access BOP facilities where "strong circumstances . . . preclude visiting." *Id.* § 540.44(a). Consistent with its control over its own facilities and its need to ensure security, BOP has also established regulations and procedures governing prisoners' ability to marry while incarcerated—and importantly, those procedures are designed to work in tandem with its visitor regulations. In order to marry, a prisoner must submit a request, which is evaluated

by BOP officials, who send a written report regarding any security or public-safety concerns presented by the proposed marriage to the Warden, who makes the final decision whether to permit the marriage. *See id.* § 551.13(a). This careful "scrutiny" of marriage requests enables BOP officials to learn more about the relationship underlying the marriage and ensure that an inmate is not "circumvent[ing] existing Bureau visiting policy thereby posing a threat to institution security or good order." GSA-23.[1]

This case concerns BOP's response to an inmate's request for visits from a spouse he married in contravention of BOP's marriage regulations and procedures. Rather than affording BOP an opportunity to evaluate whether a newly-acquired spouse would pose any security risks before marriage by submitting a request to marry, it is uncontested here that plaintiff Shannon Agofsky—an inmate of BOP's highest-security facility who is serving a capital sentence for previously murdering a prisoner within a BOP facility—entered into a telephonic marriage without BOP's knowledge or permission. Under such

[1] References to the Short Appendix appended to the Opening Brief are denoted SA-XX. References to the Government's Supplemental Appendix are denoted GSA-XX.

circumstances, when Agofsky filed a request to expand his visitor list to include a new spouse whom BOP had never previously approved and who is not reflected in his Presentence Investigation Report, BOP sought more information about their prior relationship. This case concerns whether the district court abused its discretion in denying Agofsky a preliminary injunction forbidding BOP from seeking or considering such information in adjudicating his request to permit his newly-acquired spouse to visit him at BOP's Special Confinement Unit for those with capital sentences.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court issued its order denying Agofsky's motion for a preliminary injunction on May 6, 2024. *See* SA-1–16. Agofsky filed a notice of appeal on June 7, 2024. *See* Dkt. No. 47; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it denied Agofsky's request for a preliminary injunction to enjoin the Bureau of

Prisons from considering whether an inmate had a prior relationship with a person the inmate married in contravention of BOP regulations when determining whether to add that person to the inmate's visitor list.

PERTINENT STATUTES AND REGULATIONS

Pertinent regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Regulatory Background

The Federal Bureau of Prisons has broad discretion for the "management and regulation of all Federal penal and correctional institutions" and is responsible for "provid[ing] suitable quarters" and "the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(1)–(2). Pursuant to its federal statutory authority, the Bureau promulgates rules to implement its statutory responsibilities.

1. Inmate Visitation

As relevant here, rules governing visitation for inmates are codified at 28 C.F.R. § 540.40 *et seq*. Section 540.40 provides that "[t]he Warden shall develop procedures consistent with this rule to permit inmate visiting" and "may restrict inmate visiting when necessary to ensure the

security and good order of the institution." 28 C.F.R. § 540.40. An inmate who seeks to have regular visitors must submit a list of proposed visitors to prison officials for consideration as to whether they may visit. *Id.* § 540.44. Staff compile a visiting list for each inmate "after suitable investigation." *Id.* Per Bureau regulations, members of the inmate's "immediate family," defined to include parents, siblings, children, and spouses, "are placed on the visiting list, absent strong circumstances which preclude visiting." *Id.* § 540.44(a) (emphasis omitted). The "visiting privilege" also will "ordinarily" be extended to friends and associates that had "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." *Id.* § 540.44(c).

The Bureau has also issued a Program Statement on *Visiting Regulations*. *See* GSA-1–20 (BOP, No. 5267.08, *Program Statement: Visiting Regulations* (May 11, 2006)). This Program Statement provides that inmates will be "permitted visits by family, friends, and community groups consistent with the security and orderly running of the institution." GSA-2. "Ordinarily, an initial visiting list is prepared

and distributed within seven days of receiving the required information to process the visiting list," and "[a]dditional family members and friends may be added following the completion of an appropriate investigation." GSA-13. The Program Statement notes that "background checks may also be completed on immediate family members." GSA-6.

The Bureau has also directed "[e]ach institution [to] develop local procedures and guidelines required to administer th[e] Program Statement." GSA-18. The Institution Supplement for the Federal Correctional Complex at Terre Haute, Indiana (FCC-Terre Haute), where plaintiff is housed, reiterates that "[i]mmediate family members will be placed on the visiting list absent strong circumstances which would preclude visiting." GSA-28; *see* GSA-27–44 (BOP, No. THX-5267.08E, *Institution Supplement: Visiting Regulations* (April 14, 2014)). "Potential visitors who are not members of the inmate's immediate family" may still be added to the visiting list after they complete a form providing their "consent to release information for a background check." GSA-28. If that background check "reveals visiting privileges for the individual would present security concerns or disrupt

the orderly running of the institution, the visitor may be denied visiting privileges." GSA-28.

2. Inmate Marriage

The Bureau has also developed procedures for inmates who wish to marry while incarcerated—procedures designed in part to ensure that inmates do not undermine facility security by by-passing BOP's restrictions on visiting. *See* GSA-21 (BOP, No. 5326.05, *Program Statement: Marriage of Inmates* (Sept. 22, 2011)); GSA-23. Accordingly, there is a multi-step process for BOP to approve a marriage request; only the Warden or Acting Warden of a facility may approve such a marriage, and only after BOP staff have evaluated security concerns. *See* 28 C.F.R. § 551.11(a). First, "[a] federal inmate confined in a Bureau institution who wants to get married shall submit a request to marry to the inmate's [U]nit [T]eam." GSA-23 (quoting 28 C.F.R. § 551.13). Next, the Unit Team will evaluate the request, determining, for example, whether the inmate is mentally competent and legally eligible to marry, as well as whether the marriage would pose a "threat to institution security or good order, or to the protection of the public." 28 C.F.R. § 551.12(d); *see id.* § 551.13(a). The Unit Team then submits a

written report and recommendation to the Warden. *Id.* § 551.13(a). The "Warden shall approve an inmate's request to marry except where a legal restriction to the marriage exists, or where the proposed marriage presents a threat to the security or good order of the institution, or to the protection of the public." GSA-21 (quoting 28 C.F.R. § 551.10).

The Program Statement provides that in evaluating whether to approve a marriage request, "staff shall review closely the marriage request of all inmates housed in Medium, High, and Administrative Security Level institutions." GSA-23. "This scrutiny is to ensure the request is not made to circumvent existing Bureau visiting policy thereby posing a threat to institution security or good order." GSA-23. Staff also evaluate other considerations including, for example, whether an inmate's request presents immigration-related concerns or could impact "a potential witness in litigation pending against that inmate." GSA-24.

FCC-Terre Haute has also implemented an Institution Supplement regarding inmate marriage. *See* GSA-45–49 (BOP, No. THX-5326.05E, *Institution Supplement: Marriage of Inmates* (Jan. 3, 2022)). The Institution Supplement provides that an inmate is required to fill out a

Request for Permission to Marry Form and submit it to their Case Manager so that the Case Manager can request information from the U.S. Probation Office or the intended spouse's family. *See* GSA-45–46. Any application for marriage is evaluated for whether it "poses a threat to institution security." GSA-46.

B. Factual Background

Plaintiff Shannon Agofsky is an inmate in the Special Confinement Unit at the U.S. Penitentiary in Terre Haute Indiana, a self-contained unit specifically for inmates with capital sentences, subject to BOP's maximum-security level custody. *See* SA-2; GSA-51. Agofsky received a sentence of death in 2004 for murdering another inmate while incarcerated at a federal penitentiary in Texas by "striking him and then repeatedly stomping his head and neck after he fell to the concrete floor." *See United States v. Agofsky*, 516 F.3d 280, 281 (5th Cir. 2008). At the time he was convicted of this murder, Agofsky was already serving a life sentence after having been convicted for killing the president of a bank during a bank robbery by "tying him to a chair and throwing him into a lake." *Id.* at 281–82.

Agofsky's fatal assault on a fellow inmate is not his only misconduct within BOP facilities. In addition to a lengthy prior criminal history, he has an extensive disciplinary record within the Bureau, including "Assaulting an Inmate Without Serious Injury," "Disruptive Conduct," "Possessing a Dangerous Weapon," and "Rioting." GSA-50–51 (Decl. of Todd Royer ¶¶ 3-4); *see also* Admin. Record pp. 72-75 (Dkt. No. 43-11 at 1-4) (Inmate Disciplinary Record).

In December 2019, despite having never submitted a marriage request or afforded BOP an opportunity to evaluate whether his marriage would pose security concerns to BOP facilities, Agofsky married Laura Rettenmaier, a German citizen residing in Germany, by telephone. *See* SA-2; *see also* GSA-52 (Decl. of Todd Royer ¶ 9). The "first time" Agofsky's Unit Manager "learned about the marriage was in connection with Agofsky's request for visitation privileges for his wife after the marriage had occurred." GSA-52 (Decl. of Todd Royer ¶ 9).

That unauthorized marriage "raised some red flags" for BOP officials, given that there was no record that Agofsky had followed the process outlined in BOP's marriage regulation, thus evading a "pre-approval inquiry [that] can include whether the inmate had a

relationship with the spouse prior to incarceration, as well as other circumstances relating to the relationship." GSA-52–53 (Decl. of Todd Royer ¶ 9). Agofsky's visitation request based on his unapproved marriage implicated "several safety and security factors," including "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." GSA-52 (Decl. of Todd Royer ¶ 8). Accordingly, even "[b]efore all of those factors would be considered and a determination made on the request for visitation privileges, the Warden first requested that Agofsky provide evidence as to whether he had a prior relationship with his wife prior to his incarceration, which might have mitigated some of the concerns." GSA-52. Thus, in responding to Agofsky's informal complaint, a BOP staff member explained that the "visitor has not been denied" but that "[m]ore information was requested for processing," noting that the "prospective visitor will need to prove that you had a relationship prior to incarceration." SA-17. Where "no prior relationship

has been established[,] nor can your visitor be verified on your [Presentence Investigation Report (PSI)]," the official explained that "[o]nly the Warden can give this exception." SA-17.

Agofsky, however, construed the "refusal to process" his request without further information as a "refusal of visit," and he and his counsel pursued remedies within BOP between 2020 and 2021. SA-18; *see* SA-18–33. He asserted that spousal visitation required "only proof of valid marriage," contended that he had already provided "adequate proof of valid marriage," and requested an administrative remedy to "approve [his wife] for visitation." SA-18. The Warden promptly responded to this request, explaining to Agofsky that his "Unit Team has requested more information for processing of the proposed visitor," given that he was "not married in [his PSI]," and thus needed to "provide more documentation to verify this relationship." SA-19.

Agofsky appealed to the Regional Director, again asserting that "[n]o proof of prior relationship is required" since "[s]ufficient proof of valid marriage has been given," and that his marriage was accepted "in both the state of Kansas, and the country of Germany." SA-20. The Regional Director explained the scope of "each Warden's discretion to approve or

deny visitors"; that "when determining whether someone is an appropriate visitor," areas of consideration could include "establishment of a relationship prior to incarceration . . . and whether the person could present a security concern if allowed to visit"; and that Agofsky's "[U]nit [T]eam is awaiting [him] to provide additional documentation to verify [his] relationship as [his] Pre-Sentence Investigation Report does not indicate [he] w[as] married." SA-21. When Agofsky appealed again, making similar arguments, SA-23, the Central Office concurred with the Warden and Regional Director's responses, noting the "discretionary authority of the Warden" regarding visiting privileges, SA-27.

By the time Agofsky's counsel sought reconsideration of BOP's disposition of his visitation request in September 2021, *see* SA-28, the Warden indicated that BOP "recognize[d] Mr. Agofsky's marriage," but that nonetheless, as the official responsible for facility security, the Warden had determined that "review of [Agofsky's] in-person visitation request under the prior relationship requirement is still necessary due to the security concerns presented," SA-32. In particular, the Warden explained that "[a]llowing inmates to effectively avoid the scrutiny of the prior relationship requirement creates a myriad of security concerns

and risks which are simply non-negotiable" and that BOP had not provided "a loophole to get around those security concerns." SA-32. The Warden did not state that a prior relationship is a prerequisite for any visitation request by an immediate family member, focusing instead on his evaluation of what information was necessary in light of his "review of [Agofsky's] request to have in-person visitation with his new wife." SA-32. The letter also noted that "Mr. Agofsky retains his ability to communicate regularly with his new wife through correspondence and the telephone." SA-32.

C. Prior Proceedings

In May 2023, Agofsky filed a complaint in the U.S. District Court for the District of Columbia alleging that BOP had violated the Administrative Procedure Act (APA) and the First Amendment in denying his visitation request. SA-3. The case was transferred to the Southern District of Indiana in February 2024. SA-3. Agofsky filed a motion for a preliminary injunction asking the district court to "vacate[] and reverse[] Defendants' denial of [his] visitation request," SA-4 (first and second alterations in original), and "enjoin [the Bureau] from applying the prior relationship rule to visiting requests for immediate

family," Memorandum in Support of Motion for Preliminary Injunction at 4 (Dkt. No. 33-1). As part of its response to the motion for a preliminary injunction, BOP submitted a declaration providing additional context regarding its decisionmaking from Todd Royer, who was the Special Confinement Unit's Unit Manager at the relevant time. *See* GSA-50; GSA-52 (Decl. of Todd Royer ¶¶ 1, 8).

On May 6, 2024, the district court denied Agofsky's request for a preliminary injunction. The court considered the three counts brought in the complaint—(1) that the Bureau constructively amended 28 C.F.R. § 540.44(a) to incorporate a prior-relationship requirement; (2) that BOP's adjudication of Agofsky's request was arbitrary and capricious; and (3) that the decision denying visitation violated the First Amendment—and concluded that Agofsky was unlikely to succeed on the merits of his claims. *See* SA-16.

Specifically, the district court explained that the Bureau acted in an adjudication rather than in rulemaking when it resolved Agofsky's visitation request and subsequent grievance, which did not require notice and comment and did not function as a constructive amendment to 28 C.F.R. § 540.44(a), which BOP did not reference in its

decisionmaking. *See* SA-5–8. Moreover, the court found that the decision was not arbitrary and capricious because "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." SA-10.

In addition, the court noted that the Bureau receives "substantial deference" in "'carrying out its statutory mandate' to regulate visitors." SA-11 (quoting *Bonacci v. Transportation Sec. Admin.*, 909 F.3d 1155, 1161 (D.C. Cir. 2018)). When "read in context," the court explained, it was "fair to conclude that [the Warden's] decision was based on his reasonable consideration of security concerns presented by Mr. Agofsky's request rather than rote application of the visiting regulation." SA-11.

Finally, the court held that Agofsky was unlikely to be able to demonstrate a constitutional violation because BOP has "identified legitimate security concerns connected to its denial of visits." SA-14. Namely that "Mr. Agofsky has an extensive criminal history and [inmate] disciplinary history, and disregarded BOP policy when he

married Ms. Agofsky without first seeking approval as required." SA-14. In addition, the Bureau "can[not] 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.'" SA-15 (quoting GSA-52–55). Lastly, the court noted that Agofsky has not shown at this point that the denial of visits is permanent. *Id.*

This appeal followed.

SUMMARY OF ARGUMENT

Agofsky's request for this Court to direct the entry of a preliminary injunction constraining the Bureau's discretion over visitors to its death-row facilities fails at every level. The district court correctly concluded that Agofsky was unlikely to succeed on the merits of his claim that the Bureau acted unlawfully in seeking more information regarding his prior relationship with his wife—whom he married while incarcerated in contravention of Bureau regulations—before processing his request to add her to his visiting list. Even apart from the merits, he has identified no irreparable harm that could support the entry of extraordinary relief while this litigation proceeds, and the equities

would in any event weigh decisively against the intrusion he seeks on the Bureau's efforts to ensure the security of its highest-risk units. The judgment below should be affirmed.

I. After Agofsky married while incarcerated, without complying with Bureau regulations designed to ensure a marriage presents no security risks, the Bureau properly sought information about whether Agofsky had a prior relationship with his new wife, who is a foreign national residing abroad. The district court correctly explained that the Bureau's resolution of Agofsky's visitation request and administrative grievance was "based on [the Warden's] reasonable consideration of security concerns presented by Mr. Agofsky's request." SA-11; *see also Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (BOP is entitled to broad deference on judgments about what is necessary to maintain institutional security).

The Bureau's visiting regulations reserve to the Warden significant discretion to evaluate whether any visitor request would conflict with "the security and good order of the institution." 28 C.F.R. § 540.40. Nothing in Section 540.44 in any way limits the Warden's discretion to make determinations about whether allowing particular visitor access to a particular Bureau facility is consistent with the significant security

considerations that undergird the Bureau's administration of the prison-visitation program. On the contrary, 28 C.F.R. § 540.44(a) specifically contemplates that circumstances may exist that preclude such family members to visit.

Moreover, the visiting regulations operate in concert with the regulations governing inmate marriage, which provide that BOP shall review requests by inmates to marry to ensure that requests are not made to circumvent BOP visiting policy. Because Agofsky married in contravention of those regulations, the first time his Unit Manager learned of Agofsky's marriage was in connection with his visitation request, at which point BOP reasonably sought the type of information it would have had an opportunity to secure had Agofsky complied with the Bureau's marriage regulations—specifically, additional information about his prior relationship with his newly-acquired wife.

II. The district court rightly concluded that Agofsky is unlikely to succeed in showing that the Bureau acted arbitrarily and capriciously. BOP's request for more information about Agofsky's relationship with a newly-acquired wife whom he married in contravention of the marriage procedures presents "a rational connection between the facts found and

the choice made." SA-13 (quotation omitted). In addition, Ms. Agofsky is a foreign national residing abroad, which at minimum complicates BOP's ability to investigate her background. It was not arbitrary and capricious to seek more information under these circumstances.

The presence of an express prior-relationship requirement in the text of Section 540.44(c) does not preclude individual consideration of whether a visitor had a prior relationship with an inmate under Section 540.44(a). And the administrative record supports the district court's conclusion that BOP's responses were driven by security concerns rather than a reflexive application of a prior-relationship requirement.

The Bureau also did not constructively amend Section 540.44(a) and the Bureau has not violated Agofsky's First Amendment rights. The Bureau adjudicated Agofsky's request to add his wife for visitation, which does not require notice-and-comment rulemaking, and none of the documents resolving Agofsky's request cite Section 540.44(a). Nor does the resolution of his request reflect the application of a visiting regulation that has been amended *sub silentio*. Because the denial of the visitation request was rationally related to a legitimate penological interest, it also does not violate the First Amendment. *See Easterling v.*

Thurmer, 880 F.3d 319, 322 (7th Cir. 2018) (per curiam); *Turner v. Safley*, 482 U.S. 78, 95–96 (1987).

III. Finally, the public interest and the balancing of harms support the district court's decision denying the request for preliminary relief and would provide an alternate basis for affirmance even if this Court disagrees with the district court on Agofsky's likelihood of success on the merits. The equities strongly disfavor Agofsky's request for a preliminary injunction that would interfere with the Bureau's discretion to control visitor access to maximum-security institutions. The public interest favors maintaining the Bureau's discretion to balance inmate requests for visitation with paramount concern in ensuring the security and good order of the extremely sensitive facilities into which Agofsky proposes his chosen visitor be allowed. And Agofsky has shown no irreparable harm that would result from awaiting the conclusion of district court proceedings. This is particularly true given that Agofsky's requested relief on appeal would not necessarily remedy his asserted injury by resulting in his wife being added to his visiting list. This Court should affirm the district court's denial of a preliminary injunction.

STANDARD OF REVIEW

A district court's denial of a request for a preliminary injunction is reviewed for abuse of discretion, but to the extent the district court based its decision on a question of law, this Court's review is de novo. *See United States v. NCR Corp.*, 688 F.3d 833, 837 (7th Cir. 2012).

ARGUMENT

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To justify a preliminary injunction, a plaintiff must show "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." *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020) (quoting *Winter*, 555 U.S. at 20).

Here, the district court correctly concluded that Agofsky did not show even "some likelihood of success on his claims that [BOP] violated the Administrative Procedure Act," SA-1, let alone make the "strong showing that [he] is likely to succeed on the merits" necessary for a

preliminary injunction, *Pritzker*, 973 F.3d at 762. On the contrary, the Bureau properly sought information regarding Agofsky's prior relationship with his newly-acquired wife, consistent with Bureau regulations and the First Amendment. SA-5–15. In addition, even if this Court were to determine that the district court erred in this conclusion, the remaining equitable factors cannot support the extraordinary remedy of a preliminary injunction intruding on the Bureau's control over the processes it uses to ensure that visitors do not compromise the security of its maximum-security facility.

I. The Bureau Properly Sought Information Regarding Agofsky's Prior Relationship With A Spouse He Married In Contravention Of BOP Regulations.

After Agofsky married while incarcerated, without complying with Bureau regulations designed to ensure a marriage presents no security risks, the Bureau properly sought information about whether Agofsky had a prior relationship with his new wife, who is a foreign national residing abroad. The Bureau is entitled to "wide-ranging deference" regarding its judgments about which "policies and practices . . . are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). As

such, the Supreme Court has "repeatedly [recognized] . . . that prison officials have broad administrative and discretionary authority over the institutions they manage," including control over inmate visitation. *Hewitt v. Helms*, 459 U.S. 460, 467 (1983); *see also Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 461 (1989) ("The denial of prison access to a particular visitor 'is well within the terms of confinement ordinarily contemplated by a prison sentence'" (citation omitted) (quoting *Hewitt*, 459 U.S. at 468)). That discretion was properly exercised in a case-specific fashion in response to Agofsky's request.

A. Through regulations, Program Statements, and FCC-Terre-Haute-specific Institution Supplements, the Bureau has outlined a basic framework for ensuring security and order of the maximum-security facility where Agofsky is housed while permitting visitors into that facility, including inmates' immediate family members. That framework retains significant discretion for the Bureau, and particularly the Warden of each institution, to make decisions about inmate visitation. *See, e.g.*, 28 C.F.R. § 540.44(a), (c); *see also id.* § 540.40. Indeed, the regulations specifically reserve to the Warden the discretion to deny

visitation whenever "necessary to ensure the security and good order of the institution." *Id.* § 540.40.

The visiting regulations impose a requirement to make "[f]riends and associates" "ordinarily" eligible to be added to an inmate's visiting list: "an established relationship with the inmate prior to confinement." 28 C.F.R. § 540.44(c) (emphasis omitted). The provisions governing both immediate and extended family members contain no such across-the-board requirement. *See id.* § 540.44(a), (b). But as the district court correctly explained, although Section 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." SA-10. Indeed, nothing in Section 540.44 in any way limits the Warden's discretion reserved in Section 540.40 to make determinations about whether allowing particular visitor access to a particular Bureau facility is consistent with the significant security considerations that undergird the Bureau's administration of the prison-visitation program. On the contrary, Section 540.44(a) specifically recognizes that there may be "strong circumstances [that] preclude [an immediate family

member from] visiting" and imposes no barriers to the Bureau's ability to ascertain whether such circumstances attend a visitor request. 28 C.F.R. § 540.44(a).

The Bureau's discretion to seek more information from *any* proposed visitor serves an important role, since allowing immediate family members unexamined access to Bureau facilities could pose grave security risks. That is particularly true given that while incarcerated, inmates may acquire *new* immediate family members about whom Bureau officials have little information. The Bureau's marriage regulations thus establish a regime designed to ensure that inmates are not using marriage to "circumvent existing Bureau visiting policy thereby posing a threat to institution security or good order." GSA-23. Accordingly, the Bureau's regulations and Program Statement require that before an inmate marries, Bureau officials must "review closely" a marriage request through a multi-step process, including evaluation of security concerns attending a particular proposed spouse in a written report presented to the Warden. *See* 28 C.F.R. §§ 551.11(a), 551.12(d), 551.13(a); *see also* GSA-21 ("The Warden shall approve an inmate's request to marry except where a legal restriction to the marriage exists,

or where the proposed marriage presents a threat to the security or good order of the institution, or to the protection of the public." (quoting 28 C.F.R.§ 551.10)).

B. Agofsky's unauthorized marriage and subsequent request to permit visiting access to his new spouse highlights the importance of the Bureau's discretion over visits from immediate family members. Because Agofsky did not comply with 28 C.F.R. § 551.13, he denied the Bureau the opportunity to determine whether his marriage to Laura Rettenmaier poses any security concerns or was undertaken for an improper purpose. *See* 28 C.F.R. §§ 551.10-551.13. The Bureau was unable to investigate whether Agofsky "had a relationship with [her] prior to incarceration, as well as other circumstances relating to the relationship," GSA-52–53 (Decl. of Todd Royer ¶ 9), before Ms. Rettenmaier became Agofsky's spouse under Kansas law by virtue of a telephonic ceremony. Thus, the "first time" Agofsky's Unit Manager "learned about the marriage was in connection with Agofsky's request for visitation privileges for his wife after the marriage had occurred." GSA-52 (Decl. of Todd Royer ¶ 9).

Unsurprisingly, Agofsky's unauthorized marriage "raised some red flags" and "safety and security" concerns for BOP officials. GSA-52 (Decl. of Todd Royer ¶¶ 8, 9). In addition to Agofsky's circumvention of a pre-marriage investigation into his relationship, those concerns included "BOP's inability to run a thorough background check on the spouse, a German citizen and resident" and "Agofsky's special security factors, including the danger he posed to the inmate population and staff based on his prior violent conduct." *Id.* (Decl. of Todd Royer ¶ 8).

In these circumstances, it was entirely reasonable for BOP to exercise the discretion it retains under 28 C.F.R. §§ 540.40 and 540.44 to seek additional information from Agofsky before processing his visitor request—indeed, to seek the very sort of information it would have had the opportunity to gather before his marriage had Agofsky complied with 28 C.F.R. § 551.13. That case-specific inquiry was supposed to be the start of the Bureau's consideration of Agofsky's visitation request, not the end of it. Even "[b]efore all of those [security] factors" that Agofsky's unauthorized marriage and resultant spousal-visitation request raised "would be considered and a determination made on the request . . . the Warden first requested that Agofsky

provide evidence as to whether he had a prior relationship with his wife prior to his incarceration, which might have mitigated some of the concerns." GSA-52 (Decl. of Todd Royer ¶ 8). Instead of answering the Bureau's question about this potentially mitigating circumstance, however, Agofsky insisted through multiple levels of administrative grievances that he did not need to provide anything more regarding their relationship than "proof of valid marriage." SA-18; *see* SA-20 (Agofsky's assertion that "[s]ufficient proof of valid marriage has been given"); SA-17–32. At no point did Agofsky heed the Bureau's repeated explanations that it needed "more information for processing of the proposed visitor" and "more documentation to verify this relationship" given that Agofsky was "not married in [his] Pre-Sentence Investigation Report." SA-19; *see* SA-17. As the district court accurately summarized, "when read in context it's fair to conclude that [the Warden's] decision was based on his reasonable consideration of security concerns presented by Mr. Agofsky's request." SA-11.

II. The District Court Correctly Concluded That Agofsky Is Unlikely To Succeed On Any Of His Challenges To BOP's Response To His Visitation Request.

Agofsky challenged BOP's adjudication of his visitation request under the APA on three grounds—(1) that BOP's decision denying Agofsky's request was arbitrary and capricious; (2) that the Bureau constructively amended 28 C.F.R. § 540.44(a) to incorporate a prior-relationship requirement; and (3) that the decision declining to approve visitation violated the First Amendment. The district court correctly concluded that Agofsky was unlikely to succeed on the merits of any of these claims.

A. The Bureau's Decision Was Not Arbitrary and Capricious.

1. The Bureau's response to Agofsky's administrative grievance was not "arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence in the case or not in accordance with the law." *Little Co. of Mary Hosp. v. Sebelius*, 587 F.3d 849, 853 (7th Cir. 2009); *see also* 5 U.S.C. § 706(2). The "APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 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.*; *see also Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs*, 893 F.3d 1017, 1024 (7th Cir. 2018). Instead, the court asks "whether the decision [of the agency] was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Sauk Prairie Conservation All. v. U.S. Dep't of the Interior*, 944 F.3d 664, 670 (7th Cir. 2019) (quoting *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 952–53 (7th Cir. 2003)).

Here, the district court correctly recognized that the Bureau's "adjudication presents 'a rational connection between the facts found and the choice made.'" SA-13 (quoting *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 292 (2016)). Far from being arbitrary, as reflected in "the reasons the BOP gave in the grievance appeals process," the Bureau's inquiry into whether Agofsky and his spouse had "a prior relationship is relevant to whether 'strong circumstances . . . preclude visiting' under 28 C.F.R. § 540.44(a)." SA-11 (alteration in original).

As outlined above, the Bureau had ample reason to inquire into Agofsky's prior relationship with a new spouse, acquired without the

Bureau's knowledge or permission and in contravention of express BOP regulations, whom the Bureau was not given an opportunity to investigate pre-marriage, and who did not appear in Agofsky's PSI. *See supra* pp. 23–29; *see also* GSA-54–55 (Decl. of Todd Royer ¶ 15) (explaining that "because Agofsky married without seeking prior approval, [the Bureau] know[s] little about how Agofsky met his wife, during what time period and under what circumstances"). In particular, "[w]hen there is not a prior relationship, there is a greater risk that the inmate has pursued the relationship, and is seeking visitation privileges for the individual in question, for an improper purpose." GSA-53 (Decl. of Todd Royer ¶ 9). Indeed, if the Bureau failed to inquire into an inmate's prior relationship with a spouse acquired in circumvention of BOP's marriage regulations, it would be "[a]llowing inmates to effectively avoid the scrutiny of the prior relationship requirement" that attends non-family visitors, thus "creat[ing] a myriad of security concerns and risks." SA-32.

Moreover, the administrative record reflects not only the Bureau's unheeded requests for information about the Agofskys' prior relationship but also security concerns about his request, particularly

as his newly-acquired wife is a foreign national residing abroad, which at minimum complicates BOP's ability to investigate her background. GSA-53 (Decl. of Todd Royer ¶ 9). As the district court explained, "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.'" SA-11–12 (alteration in original) (quoting SA-20); *see also* SA-27. And BOP was "clear that Mr. Agofsky had not provided documentation to alleviate those concerns." SA-12.

2. Agofsky's challenges to the district court's conclusions are meritless. First, he argues that because Section 540.44(c) contains an express prior-relationship requirement, the absence of such a requirement in Section 540.44(a) affirmatively precludes the Bureau from considering whether a prior relationship existed between the inmate and any immediate family member, even on a case-by-case basis. But the text of Section 540.44 makes clear that Agofsky's reading is erroneous. *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 667 (2021) ("Today, our statutory interpretation cases almost

always start with a careful consideration of the text, and there is no reason to do otherwise here."). Section 540.44(c)'s inclusion of a "prior relationship rule" for friends and associates across the board does not demonstrate the Bureau is prohibited from considering whether particular immediate family members had a pre-incarceration relationship when making visiting decisions.[2] Section 540.44(a)'s text specifically acknowledges that individual circumstances may preclude any family member from visiting, *see, e.g.*, 28 C.F.R. § 540.44(a) ("strong circumstances [may] preclude visiting" by immediate family members); *id.* § 540.44(b) (other relatives may visit "if there exists no reason to exclude them"). And nothing in Section 540.44(a)'s text withdraws the Warden's broad discretion to "restrict inmate visiting when necessary to ensure the security and good order of the institution," *id.* § 540.40; *see supra* pp. 23–27. Reading Agofsky's proposed, atextual limitation into Section 540.44(a) would create a startling loophole, permitting inmates

[2] While Agofsky appears to limit his textual argument to immediate family members addressed in Section 540.44(a), his reading of the regulation also appears to bar the Bureau from asking about a prior relationship with *any* family member, given that Section 540.44(b), governing "Other Relatives," also lacks an express, categorical prior-relationship requirements.

to avoid one of the first and most basic inquiries underlying the Bureau's security review of potential non-family visitors by the simple expedient of marrying without BOP permission.

Nor does Agofsky's atextual reading of Section 540.44(a) find support in the 2003 BOP rulemaking. There, the Bureau amended its visiting regulations to require that regular visiting privileges "will be extended to friends and associates only when the relationship had been established prior to confinement" at Low- and Minimum-Security Level institutions as well as higher-security facilities. 68 Fed. Reg. 10,656, 10,657 (Mar. 6, 2003). The Bureau stated that the "prior relationship requirement does not apply to immediate family members (28 C.F.R. § 540.44(a)) and other relatives (28 C.F.R. § 540.44(b))." *Id.* This statement accurately reflects the absence of any categorical, default requirement in the regulations that family members establish a prior relationship with an inmate before being added to a visiting list. But it suggests no limits as to what information the Warden may take into account in considering an individual visitor request.

Second, Agofsky is wrong that the record here reflects that his visitation request was denied based on a reflexive application of a prior-

relationship rule rather than an individual consideration of his request. As outlined above, the administrative record reflects that the Warden sought additional information about Agofsky's prior relationship with his wife to address security concerns, which were heightened by the fact that Ms. Agofsky is a foreign national residing abroad and that they had married in contravention of the inmate marriage regulations. *See supra* Part I. And Agofsky himself acknowledged that security concerns were at issue in his appeal to the Office of the General Counsel. *See* SA-22–23. Even if "the Warden's response to Mr. Agofsky's visit request could have been clearer—particularly about the applicable standard," the district court properly recognized that "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." SA-11.[3] And although the district

[3] Agofsky suggests in his brief (Br. 34) that the Bureau's decision could not be validly based on security concerns in light of his representation that Ms. Agofsky has no criminal history. But Agofsky has on appeal dropped his request for a judicial "revers[al]" of the Bureau's decision declining to approve Ms. Agofsky to visit, *see* Motion for Preliminary Injunction p. 21 (Dkt. No. 6), and with good reason. The Warden's ultimate visiting determination is, as the district court recognized and Agofsky does not dispute, committed to agency

Continued on next page.

court did not consider it in connection with its rejection of Agofsky's arbitrary-and-capricious claim, the declaration from Agofsky's Unit Manager leaves no doubt that at the time he received Agofsky's visitation request disclosing the existence of a previously unknown spouse, case-specific concerns sparked by Agofsky's unauthorized marriage to a foreign national residing abroad drove the decision to seek more information regarding his prior relationship. *See supra* pp. 27–29.[4]

Agofsky quibbles with the district court's acceptance of that declaration for any purpose, invoking *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Br. 39. Agencies must explain their actions for the purpose of facilitating "effective judicial review." *Camp v. Pitts*, 411 U.S. 138, 142–

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discretion by law and not subject to APA review. *See* 5 U.S.C. § 701(a)(2); 28 C.F.R. § 540.40; SA-12.

[4] To be clear, Agofsky's failure to answer the Bureau's inquiry regarding his prior relationship with his wife may not be the only barrier to visiting approval. Had Agofsky provided that information, or answers to any follow-up questions about his relationship that his answer may have prompted, the administrative record might have reflected more specific concerns that preclude Ms. Agofsky from visiting. But Agofsky's own refusal to answer even this initial inquiry ended the Bureau's consideration and further development of the administrative record that he now contends is inadequate.

43 (1973) (per curiam). But this Court and others have "allowed reviewing courts to rely on post hoc declarations in certain situations when the declarations have come from the relevant agency decisionmaker." *Rhea Lana, Inc. v. United States*, 925 F.3d 521, 524 (D.C. Cir. 2019) (first citing *Olivares v. Transportation Sec. Admin.*, 819 F.3d 454, 464 (D.C. Cir. 2016); and then citing *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 7 (D.C. Cir. 2006)); *see also Bagdonas v. Department of Treasury*, 93 F.3d 422, 426–27 (7th Cir. 1996). In *Bagdonas*, this Court recognized that while "[i]t is, of course, well settled that courts cannot accept counsel's post hoc rationalization for agency action," a court may consider a declaration providing a contemporaneous "explanation for the agency's action submitted by the officer who had the authority to act [for the agency]." 93 F.3d at 426.

Indeed, this Court acknowledged that doing so "may be, in some instances, the only way to achieve effective and expeditious review of the administrative decision." *Bagdonas*, 93 F.3d at 426–27. Otherwise, a reviewing court would have to remand for agency officials to provide the very explanation the agency had already attempted to put before the court to more fully explicate its "reasoning at the time of the agency

action." *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020) (emphasis and quotation marks omitted) (noting that courts may consider declarations provided on remand supplying such "a fuller explanation"). Courts have sufficient flexibility to avoid pointless remands in these circumstances by considering the affidavit from the relevant decisionmaker "in light of the entire administrative record." *Bagdonas*, 93 F.3d at 427; *see also Camp*, 411 U.S. at 143 (explaining that an agency may submit "such additional explanation of the reasons for the agency decision as may prove necessary"). There is no reason that either the district court or this Court should eschew a declaration from the relevant agency official shedding further light on the Bureau's contemporaneously expressed reasoning.

Finally, Agofsky suggests that the Bureau acted arbitrarily and capriciously because it "expanded Section 540.44(c)'s prior relationship rule to cover Section 540.44(a)'s 'immediate family' provision without any reasoned explanation." Br. 31. This argument simply repackages the claim that the Bureau constructively amended Section 540.44 *sub silentio* and is wrong for the reasons outlined below. *See infra* Part II.B.

B. The Bureau Did Not Constructively Amend Its Own Regulations.

The district court correctly rejected Agofsky's claim that the Bureau's request for additional information regarding his relationship with his wife reflected a constructive amendment to 28 C.F.R. § 540.44(a) without notice and comment in violation of the APA. Notably, the APA creates a cause of action for plaintiffs to challenge particular agency action. *See* 5 U.S.C. § 702. Agofsky's injury arises from the Bureau's resolution of his administrative complaint that the Unit Team had not approved his visitation request, and, in his preliminary injunction request, he asks the Court to vacate that decision.

As the court correctly recognized, the final agency action under review is an adjudication of Agofsky's visitation request, not a rulemaking. Such an adjudication is not subject to the APA's notice-and-comment requirements. *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." (quotation marks omitted) (quoting *City of Arlington v. FCC*, 668 F.3d 229, 242 (5th Cir. 2012)); *see also* SA-8. Nothing in the

final decision purports to alter or amend the Bureau's visiting regulations rather than resolve a case-specific grievance.

The resolution of Agofsky's request also does not reflect the application of a visiting regulation that has been amended *sub silentio*. The Bureau's responses to Agofsky's grievance and appeals do not cite 28 C.F.R. § 540.44(a) at all. Agofsky himself noted that the Regional Director's "main argument is [that] the [W]arden has the right to refuse anyone on security grounds." SA-23. There is also no evidence in the record to support Agofsky's allegation that the Bureau categorically applies a prior-relationship requirement to immediate family members across the board or does so on the ground that Section 540.44 has been amended to require it. *See* SA-6.

Agofsky points to a similar suit brought by fellow inmate Daniel Troya, but the record in that case does not make clear whether Troya, like Agofsky, circumvented BOP's marriage-related regulations and married without affording BOP an opportunity to vet his proposed marriage and spouse for security concerns. Whether or not Troya is similar to Agofsky in this respect, it is unsurprising that the Warden has twice exercised his discretion over visitors to seek more information

about newly-added family members whose potential to undermine security may not have been evaluated by a U.S. Probation Officer. And more importantly, a single other suit does not demonstrate constructive amendment of the rule found at Section 540.44(a) by the Bureau.

Agofsky also perceives a categorical prior-relationship rule for immediate family members in the Institution Supplement for FCC-Terre Haute, where he is housed. That supplement specifies that an "inmate's immediate family members must be verified by the U.S. Probation Officer on the inmate's Presentence Investigation Report." GSA-28. To the extent Agofsky is arguing this section of the Institution Supplement is a constructive amendment to the regulation, he errs, as this document is not subject to the APA's rulemaking requirements. 5 U.S.C. § 553(b)(3)(A); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (describing Program Statements as "internal agency guideline[s]" that are not subject to the "rigors of the [APA]" and that do not "require notice and comment" (quotation marks omitted)).

Moreover, nothing in the Institution Supplement conflicts with Section 540.44 or should be read as amending the regulation. The Institution Supplement is silent as to what the proper procedure is for

an inmate who acquires a new immediate family member after the Presentence Investigation Report is prepared. BOP's response to Agofsky's request demonstrates, however, that it understood the Warden to retain discretion to add an immediate family member to the visiting list even though that person was not included in the Presentence Investigation Report, and here, sought additional information about Agofsky's prior relationship with his newly-acquired wife in order to inform the exercise of that discretion. *See* SA-19; SA-20; SA-27; SA-32. The district court was correct that nothing in the specific resolution of his request demonstrates a constructive amendment of the Bureau's visiting regulations and thus, Agofsky is unlikely to succeed on the merits of this claim. *See* SA-9.

C. The Bureau's Decision Did Not Violate The First Amendment.

The district court also correctly recognized that the Bureau's decision did not violate Agofsky's First Amendment right to association. As the Supreme Court has explained "freedom of association is among the rights least compatible with incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (first citing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125–26 (1977); and then citing *Hewitt*,

459 U.S. 460). As an initial matter, the Bureau recognizes the Agofskys' marriage and has reiterated that Agofsky may continue to communicate with his wife through correspondence and the telephone. *See* SA-32. The only constitutional question is whether the Bureau's refusal to grant in-person visitation violates the First Amendment.

This Court has held that "limits on prisoners' rights are valid if 'reasonably related to legitimate penological interests.'" *Easterling v. Thurmer*, 880 F.3d 319, 322 (7th Cir. 2018) (per curiam). Constitutional challenges to visitor restrictions are evaluated under the four factors outlined in *Turner v. Safley*, 482 U.S. 78, 95–96 (1987). *See Easterling*, 880 F.3d at 322.[5] As the district court noted, this Court has recognized that the first factor—whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it," *Turner*, 482 U.S. at 89,—"can act as a

[5] Those factors are: (1) whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; *Turner*, 482 U.S. at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)); (2) whether alternate means of exercising the right are available; *id.* at 90; (3) what effect accommodation of the asserted right would have on guards and other inmates; *id.* and (4) whether obvious easy alternatives exist that would accommodate the prisoner's rights, *id.*

threshold factor regardless which way it cuts," and, here, application of the first factor conclusively resolves the inquiry, SA-14 (quoting *Riker v. Lemmon*, 798 F.3d 546, 553 (7th Cir. 2015)); *see also Van den Bosch v. Raemisch*, 658 F.3d 778, 785 n.6 (7th Cir. 2011). Moreover, in considering the first factor, courts give "substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them," and the burden is "on the prisoner to disprove [the validity of the prison regulation]." *Overton*, 539 U.S. at 132.

As outlined above, Agofsky failed to establish that prison officials acted irrationally in requesting more information about his relationship with his wife given the threat he poses to other inmates and prison staff in light of his past, violent conduct, his failure to obtain approval of prison officials to marry in the first instance, and the inability of prison officials to conduct a thorough background check on his wife because she is a foreign national residing abroad. *See supra* pp. 23–29; GSA-53 (Decl. of Todd Royer ¶ 9).

Agofsky contends that the Bureau could not have rationally based its decision on security concerns because the administrative record does not reflect any individualized security concerns related to Ms. Agofsky, who he avers does not have a criminal history. But the simple lack of a criminal history does not obviate all security concerns about granting access to a BOP facility, particularly to visit a death-row inmate in the Bureau's highest-risk unit. "[B]ecause Agofsky married without seeking prior approval, [the Bureau] know[s] little about how Agofsky met his wife, during what time period and under what circumstances." GSA-54–55 (Decl. of Todd Royer ¶ 15). The Warden thus had a legitimate interest in seeking more information about the Agofskys' relationship in order to assess whether to afford her visitation privileges. That the administrative record does not reflect specific concerns in Ms. Agofsky's criminal history is not surprising; the Bureau cannot run a thorough background check on Ms. Agofsky because she is a foreign national residing abroad and, thus, the Bureau does "not know if she has any affiliations with security threat groups or national watchlists." GSA-55 (Decl. of Todd Royer ¶ 15).[6] "A significant security risk . . . can arise

[6] Even if the Bureau did have specific concerns with Ms. Agofsky's

Continued on next page.

when information could be passed between a maximum custody inmate and an unknown member of a foreign community," creating "significant security risks both inside and outside of the institution." GSA-55 (Decl. of Todd Royer ¶ 16). Finally, visits by an unknown member of a foreign community also can put Bureau staff "at risk were a visitor who had not been sufficiently vetted be able to identify staff working in the [Special Confinement Unit], both in their official roles, and as members of the community." *Id.* This concern also undermines Agofsky's contention that the denial could not have been security-related because he has received other visitors at the institution.

Finally, Agofsky has argued that requesting additional information about whether he had a prior relationship with his wife works a permanent denial of her ability to visit him in person in violation of the Constitution. *See* Br. 50. "[P]rison officials may violate the Constitution by permanently or arbitrarily denying an inmate visits with family members in disregard of the factors described in *Turner* and *Overton*." *Easterling*, 880 F.3d at 323. But as discussed, far from disregarding the

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criminal history, the APA would not require them to be disclosed in the administrative record.

Turner factors, the Bureau's response to Agofsky's visitation request accords with its threshold consideration. And in any event, on this record, it is not clear whether the denial of visitation would be permanent. It may be, given the security concerns surrounding Agofsky, the fact that Ms. Agofsky is a foreign national residing abroad, and Agofsky's decision to flout the BOP marriage regulations, that Agofsky might not be able to provide any information that would mitigate the Warden's concerns sufficiently to allow his wife to visit. But because Agofsky has never provided additional information about his prior relationship with his wife and instead chose to stand on his assertion that all that was required was "only proof of valid marriage," SA-18, BOP did not have an opportunity to evaluate any information Agofsky could offer to verify their relationship or create an administrative record reflecting that evaluation.

III. The Equities Strongly Disfavor Agofsky's Request For A Preliminary Injunction Interfering With The Bureau's Wide Discretion To Control Visitor Access To Maximum-Security Facilities.

The district court's "analysis begins and ends with" its conclusion that Agofsky did not demonstrate even "some" likelihood of success on the merits of any of his claims. SA-1; SA-5. That conclusion was correct,

but even if this Court were to disagree, it should affirm the judgment below on the ground that the equitable factors weigh heavily against Agofsky's request to bar the Bureau from considering certain information in determining which visitors can gain access to a death-row facility upon an inmate's request.[7]

The public interest strongly cuts against preliminary relief constraining the Bureau's discretion in considering Agofsky's request. In exercising their discretion, "courts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Salazar v. Buono*, 559 U.S. 700, 714 (2010) ("[A] court should be particularly cautious when contemplating [injunctive] relief that

[7] As a general matter, it is "for the district court to determine, in the first instance, whether the plaintiffs' showing on a particular claim warrants preliminary injunctive relief." *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011). However, a court may reject arguments that might support such relief in affirming a denial. Thus, if this Court were to conclude that the equities cannot support a preliminary injunction, it may affirm the denial of preliminary relief on that ground. If this Court has any doubt that the equities preclude the extraordinary relief Agofsky seeks, however, the appropriate disposition would not be an order directing the entry of a preliminary injunction but rather to remand for the district court to consider both the equities and the propriety of equitable relief in the first instance.

implicates public interests."). The government and the public writ large have a strong interest in ensuring that BOP's processes allow the Warden to balance inmate visitation with the Bureau's paramount concern in the security and good order of the institution. That concern is particularly weighty where the institution in question is a maximum-security facility housing death-row inmates.

Agofsky's request to prohibit the Bureau from considering information relevant to security concerns underlying a potential visitor strikes directly at the Bureau's discretion to control access to its facilities. At the very minimum, this request is in significant tension with the "wide-ranging deference" courts must afford prison administrators "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547. Moreover, in the context of inmate litigation, Congress has indicated that the public interest disfavors preliminary relief in all but the most extraordinary circumstances, requiring courts to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief." 18 U.S.C.

§ 3626(a)(2) (also requiring any preliminary relief to be "narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief," and "automatically expire on the date that is 90 days after its entry"). Agofsky does not even attempt to reconcile his bid for preliminary relief with these legislative directions.

Balanced against such harms to the government and the public, Agofsky asserts only his interest in securing the Bureau's reconsideration of his visiting request more quickly than awaiting final judgment would permit. That is not an irreparable harm that warrants entry of a preliminary injunction. Agofsky has identified neither a reason that his requested relief would not be equally effective upon final judgment, nor any irremediable harm that would result from awaiting the conclusion of district court proceedings. And in any event, there is a disconnect between Agofsky's dissatisfaction that his wife cannot currently visit him and the requested preliminary injunction. That injunction would not direct the Bureau to allow his wife to visit, but merely require the Bureau to reconsider Agofsky's request without considering whether he had a prior relationship with his new wife. *See* Motion for Preliminary Injunction at 21 (Dkt. No. 6) (requesting "the

Court enter the proposed order enjoining Defendants from applying Section 540.44(c)'s prior relationship rule to inmates' requests for visits by immediate family members"); Br. 20 (similar). Even assuming Ms. Agofsky's inability to enter a maximum-security BOP facility worked any cognizable harm during this litigation, it would not necessarily be remedied by the requested injunction.

Furthermore, to the extent that Agofsky's challenge is rooted in his assertion that the Bureau did not adequately explain in the administrative record the grounds on which it acted, an injunction would be inappropriate even at the conclusion of this case. As outlined above, the appropriate remedy for such a failure would be a remand to BOP to more fully explain its original denial or "'deal with the problem afresh' by taking new agency action" on Agofsky's motion. *Regents*, 591 U.S. at 21 (emphasis omitted). Agofsky has not seriously suggested that the Bureau could not deny a visitation request on remand, even from an immediate family member, where there is a serious security concern or other strong circumstances that would preclude visiting. Thus, BOP could well conclude on remand that in light of the significant security concerns presented by a marriage between an inmate with a significant

and violent criminal history and a foreign national residing abroad that was entered into in contravention of BOP's regulations governing inmate marriage, Ms. Agofsky would not be allowed to visit a maximum-security facility.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,091 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

s/ Laura E. Myron
LAURA E. MYRON

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Laura E. Myron
LAURA E. MYRON

ADDENDUM

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28 C.F.R. § 540.40 Purpose and Scope

The Bureau of Prisons encourages visiting by family, friends, and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members or others in the community. The Warden shall develop procedures consistent with this rule to permit inmate visiting. The Warden may restrict inmate visiting when necessary to ensure the security and good order of the institution.

28 C.F.R. § 540.44(a)-(c) Regular Visitors

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. 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.

(b) Other relatives. These persons include grandparents, uncles, aunts, in-laws, and cousins. They 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.

(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.

28 C.F.R. § 551.12 Purpose and Scope

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

28 C.F.R. § 551.12 Eligibility to Marry

An inmate's request to marry shall be approved provided:

(a) The inmate is legally eligible to marry;

(b) The inmate is mentally competent;

(c) The intended spouse has verified, ordinarily in writing, an intention to marry the inmate; and

(d) The marriage poses no threat to institution security or good order, or to the protection of the public.

28 C.F.R. § 551.13 Application to Marry

(a) A federal inmate confined in a Bureau institution who wants to get married shall submit a request to marry to the inmate's unit team. The unit team shall evaluate the request based on the criteria identified in § 551.12. A written report of the unit team's findings, and its recommendation, shall be forwarded to the Warden for a final decision.

(b) The Warden shall notify the inmate in writing whether the inmate's request to marry is approved or disapproved. A copy of this notification shall be placed in the inmate's central file. When the Warden's decision is to disapprove the inmate's request, the notification to the inmate shall include a statement of reason(s) for that action. The Warden shall advise the inmate that the decision may be appealed through the Administrative Remedy Procedure.

(c) All expenses of the marriage (for example, a marriage license) shall be paid by the inmate, the inmate's intended spouse, the inmate's family, or other appropriate source approved by the Warden. The Warden may not permit appropriated funds to be used for an inmate marriage.