No. 19-7899

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL NIGL and
SANDRA JOHNSTON,

Petitioners,

v.

JON LITSCHER, MICHAEL,
MEISNER, SARA HUNGERFORD,
and ZACHARY SCHROEDER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether prison officials may, consistent with the Fourteenth Amendment, prohibit a former prison employee and a prisoner from marrying where prison officials' summary judgment material: (a) argues that the first *Turner v. Safley*, 482 U.S. 78 (1987), factor standing alone is sufficient to support their decision to prohibit petitioners' right to marry; and (b) fails to present *credible* evidence sufficient to demonstrate that petitioners are flagrant rule violators.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioners, who were appellants below, are Paul Nigl and Sandra Johnston. Counsel for petitioners was Mark G. Weinberg, 3612 N. Tripp Avenue, Chicago, Illinois 60641; and Adele D. Nicholas, 4510 N. Paulina St. 3E, Chicago, Illinois 60630.

Respondents, who were appellees below, are Jon Litscher, Michael Meisner, Sara Hungerford, and Zachary Schroeder, in their individual and official capacities. Counsel for respondents was Steven C. Kilpatrick, Assistant Attorney General, Wisconsin Department of Justice, Post Office Box 7857, Madison, Wisconsin 53707-7857.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Seventh Circuit is reported as *Nigl v. Litscher*, 940 F.3d 329 (7th Cir., (Wis.) Oct. 7, 2019), rehearing and rehearing *en banc* denied (Nov. 21, 2019); appear in Appendix A attached hereto.

The order of the United States District Court for the Eastern District of Wisconsin, Milwaukee Division; is reported as *Nigl v. Litscher*, 378 F.Supp.3d 729 (E.D. Wis. Mar. 29, 2019); it appears in Appendix B attached hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit affirming the District Court decision declaring the respondents application of its regulations concerning marriage constitutional pursuant to 42 U.S.C. § 1983. Pursuant to 28 U.S.C. § 2101(c), the present petition for a writ of certiorari was required to be filed, within ninety (90) days of the entry of the judgment, on or before February 17, 2020. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42 U.S.C. § 1983, provides as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF CASE

The petitioners initiated this lawsuit by filing a complaint for declaratory and injunctive relief, as well as damages in the Eastern District of Wisconsin. At summary judgment, the District Court, the Honorable JP Stadtmueller presiding, held that Respondents' decision to deny Petitioners' request to marry was reasonably related to a legitimate penological interest.[1]

Notice of Appeal was filed by the petitioners and briefs were submitted to the Appeals Court of the Seventh Circuit. The respondents did not seek to appeal any portion of the decision of the District Court.

On appeal, in an opinion filed October 7, 2019, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's order finding that the denial was reasonably related to legitimate penological interests as petitioners were engaged in a pattern of rule-breaking and deception up to and through the date of the marriage request.

ARGUMENT

The real task in this case is not balancing the *Turner* factors but determining whether the respondent's summary judgment material shows not just a logical relation but a *reasonable* one.

The first rationale posited by respondents in support of the prohibition on marriage is prison security. Security is undoubtedly a legitimate penological interest. However, petitioners will argue that reasonable minds could differ as to the import of the evidence introduced thus far concerning the relationship between the application of the marriage regulation and the defendants' posited security interests. It is the petitioners' position that they have marshaled substantial evidence that, given the importance of the right to marry, the particular application of

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[1] Significantly, the district court correctly recognized that the Defendants do not argue that any *Turner* factors other than the first one support their decision to prohibit petitioners from marrying; nor could they reasonably justify the marriage denial with reference to the remaining factors. *See* ECF No. 79 at 12 fn.4; Exhibit B.

the marriage regulation is not a reasonable one. Indeed, it is not inconceivable that petitioners' counsel, through the presentation of physical evidence and rigorous questioning of prison officials, could demonstrate genuine issues of material fact at trial for which a reasonable jury could render a verdict in the petitioners favor. For instance, a reasonable jury could conclude that when Petitioner Johnston was rehired by DOC at its central office she complied with written DOC policies and procedures by following Executive Directive 16 and submitted a fraternization policy exception request to her immediate supervisor. *See* DOC-2270 Fraternization Policy Exception Request; it appears in Appendix C attached hereto.

Second, on form DOC-2270, in the section titled "NATURE OF EMPLOYEE RELATIONSHIP TO OFFENDER" it provides: "OTHER – CLEARLY DEFINE RELATIONSHIP (explain how you met, the length of the relationship, and the purpose of your relationship)." Here, Petitioner Johnston used her common sense to interpret the question asked of her and checked the box marked "OTHER," and wrote "MET AT WCI APPROXIMATELY 04/13. RELATIONSHIP → PROFESSIONAL." Further, on that same form in the section titled "CHECK ALL OF THE FOLLOWING THAT WOULD APPLY REGARDING YOUR PROPOSED RELATIONSHIP," Petitioner Johnston checked the box marked "[h]aving personal contacts ... such as ... being in a social or physical relationship ...." *See* Appendix C.

Relatedly, any allegation that Petitioner Johnston continued to break rules up to and through the marriage request by writing that she was Nigl's "friend" on the visitor questionnaire is the epitome of an exaggerated response to which courts owe no deference. Indeed, on the visitor form in the section titled "WHAT RELATIONSHIP ARE YOU TO THE OFFENDER – BE SPECIFIC," it provides: "(e.g. Father, Mother, Brother, Sister, Stepfather, Stepmother, Spouse, Friend)." *See* DOC-21AA Visitor Questionnaires; they appear in Appendix D attached

hereto. Here, Johnston is not Nigl's Mother, Sister, Stepmother, or Spouse; however, she is Nigl's "Friend." Significantly, respondents have not introduced evidence that a proposed visitor must disclose that they are in a romantic relationship on a visitor questionnaire. A reasonable jury could conclude both that Petitioner Johnston was not being deceptive in furtherance of petitioners' relationship when she identified herself as a "friend" on the visitation forms and that she did not "misrepresent" how and when she met Nigl, or the nature of that particular relationship; that is, Petitioner Johnston honestly answered that she met Nigl at WCI in April of 2014 in her official capacity.

Third, a reasonable jury could conclude that any phone calls/letters/photos (some of which were sent under the alias "Cassie Fox" or "Cass"), were unable to be connected to the time frames when Johnston was employed by DOC. *See* DOC email; it appears in Appendix E attached hereto. Moreover, defendants did not introduce any evidence that the Department prohibits a private citizen from establishing a phone account under an alias or using one when communicating with an inmate. Prison officials must support their justification with some evidence, not speculation. Here, petitioners did not concede that use of an alias when communicating with an inmate is prohibited. To the contrary, petitioners disputed that there even is such a policy.

Turning to the Psychology Examining Board's findings that Petitioner Johnston violated rules aimed to protect psychologists' clients; the panel's decision suggests the Board's findings are conclusive against Johnston, it's not. *See Simpson v. Nickel*, 450 F.3d 303, 306 (7th Cir. 2006)("Wisconsin's judiciary does not treat the factual conclusions of prison disciplinary boards (or any other state agency) as beyond the power of a court to examine."). Here, a reasonable jury could conclude that Nigl was not Johnston's "client" within the meaning of the Wis. Admin.

Code §§ PSY 5.01(14)(a) and (b). *See* Wis. Admin. Code § PSY 1.02(3)("'Client' means the individual ... for whom the licensee of the board provides professional services."); *see also State v. DeLain*, 2005 WI 52 (totality of the circumstances determines whether there was an ongoing therapist-patient relationship). Indeed, the defendants have failed to introduce evidence that Johnston provided Nigl with psychotherapy.

Finally, a reasonable jury could conclude that prison officials filed false disciplinary charges against petitioners. *See Nigl v. Litscher*, No. 19-cv-105-bbc (W.D. Wis. Mar. 27, 2019)(granting leave to proceed on the claim that DOC defendants issued or approved false conduct reports against Nigl because he started and maintained a relationship with a former correctional employee), denied on exhaustion grounds, 2019 WL 6909587 (W.D. Wis. Dec. 19, 2019), appeal filed, (Dec. 27, 2019) *Nigl v. Meisner, et al.,* (No. 19-3523); s*ee also Johnston v. Jess*, 18-cv-882-bbc (W.D. Wis. Mar. 7, 2019)(granting leave to proceed on the claims that DOC and DSPS defendants took action that led to the suspension of Johnston's license without following due process and interfering with her right to intimate association).

The second rationale posited by respondents in support of the prohibition on marriage is rehabilitation. Rehabilitation is also undoubtedly a legitimate penological interest. However, the particular theory of rehabilitation at issue in this case presents a special set of concerns for courts considering whether the application of a prison regulation is consistent with the Fourteenth Amendment. Specifically, respondent advances a deprivation theory of rehabilitation: "Inmates are in prison because they failed to follow the law. An important component of an inmate's rehabilitation is learning how to follow rules. If an inmate is rewarded for breaking rules, the Department fails in its mission to rehabilitate the offenders they serve." *See* ECF No. 57 Declaration of Sara Hungerford.

First, Petitioners will argue this justification has no limiting principle; if sufficient, it would provide a "rational basis" for the application of any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior. *Cf. Beard v. Banks*, 548 U.S. 521, 546 (2006). Moreover, the right to marry extends not only to the virtuous. *Turner* itself invalidated a regulation prohibiting, inter alia, inmate-to-inmate marriages, *see id.*, 482 U.S. at 97, and the very notion of prisoner marriage naturally entails at least one party that has not conformed him- or herself to societal norms. *Cf. Zablocki v. Redhail*, 434 U.S. 374, 388-90 (1978)(upholding the fundamental right to marry as applied to persons who had failed to meet child support obligations).

Second, Petitioners will argue that the deprivation theory advanced does not map easily onto several of the *Turner* factors. For instance, under the deprivation theory of rehabilitation, there could never be a "ready alternative" for furthering the government interest, because the government interest is tied directly to depriving the prisoner of the right to marry. *Beard*, 548 U.S. at 547. Indeed, the strong form of the deprivation theory of rehabilitation would mean that the prison rule that this Court invalidated in *Turner* would have survived constitutional scrutiny if prison officials had simply posited an interest in rehabilitating prisoners through deprivation. *Ibid.*

Finally, petitioners will argue that, at present, there is confusion concerning permissible denials on inmate marriages which needs to be resolved to prevent recurrence. *Cf. Martin v. Snyder*, 329 F.3d 919, 922 (7th Cir. 2003)("*Turner* does not say that every delay violates the Constitution."); *but see Riker v. Lemmon*, 798 F.3d 546 (7th Cir. 2015)(upholding the right to marry a former rule breaking inmate and DOC employee); *see also Cochran v. Ballard*, 2018

U.S. Dist. LEXIS 200289 (S.D. W.V. Nov. 9, 2018)(allowing inmate to marry a former rule breaking DOC employee); *Wolford v. Angelone*, 38 F.Supp.2d 452, 461-62 (W.D. Va. 1999)(finding that policy would not be justified if it had the actual effect of prohibiting marriage between a former rule breaking DOC employee and an inmate); *Waters v. Gaston County*, 57 F.3d 422, 425 (4th Cir. 1995)("not every restriction on the right to marry violate[s] the Constitution; rather 'regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.'")(quoting *Zablocki*, 434 U.S. at 386-87).

CONCLUSION

For the reasons above, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Dated this 17th day of January, 2020.

Respectfully submitted,

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