UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Corionsa Ramey, Plaintiff, v. Michael L. Parson, *et. al*, Defendants.	No. 22-cv-04171-BCW **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION (DOC. 3)**

INTRODUCTION

Defendants have no plausible or rational basis to bar Corionsa Ramey, an adult, from witnessing her father's execution. It is undisputed that Defendants are barring her solely on the basis of her age; if she were 21 years old rather than 19, she would have the right to be present. It is also undisputed that Missouri is virtually alone among U.S. death penalty states in imposing a minimum age of 21 for family to witness an execution (the "under-21 ban"),[1] and that for a considerable part of the state's history, persons under 21 *were* allowed to witness executions. *See* n.6, *infra.*

Section 546.740, as applied to Ms. Ramey, cannot be justified even under the most deferential and government-friendly standards of review. The Court should grant a preliminary injunction ordering that Ms. Ramey be allowed to witness her father's execution.[2]

ARGUMENT

The central theme of Defendants' argument is that Section 546.740 is essentially immune from judicial review. The Missouri legislature could ban all persons under 33, or all persons over

[1] *See* Doc. 8 at 16-17 & n. 10. Citations to documents previously filed in this case are to page numbers assigned by the ECF system.

[2] Plaintiff's father, Kevin Johnson, Jr., is currently scheduled for execution on November 29, 2022. If this date changes due to a stay or postponement, Plaintiff respectfully requests that any order granting her Motion remain in force regardless of the ultimate date that is set for execution.

56, or all persons between 37 and 43, from witnessing executions, Defendants say, and this Court would be powerless to intervene. Needless to say, that is not the law. *See Turner v. Safley*, 482 U.S. 78, 84 (1987) ("federal courts must take cognizance of . . . valid constitutional claims" in the prison context); *Pargo v. Elliott*, 49 F.3d 1355, 1357 (8th Cir. 1995) (prison regulations are not "immune from judicial review"). It is the duty of this Court to determine whether the under-21 ban, as applied to Ms. Ramey, passes muster under governing legal standards. It does not.

I. Plaintiff Has Shown a Reasonable Likelihood That She Will Prevail on the Merits of Her Claims

A. Plaintiff Has Shown a Reasonable Likelihood of Prevailing on Her First Amendment Claim

The First Amendment protects the associational rights of incarcerated people and those who wish to associate with them. *See* Doc. 8 at 13-14; *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) ("We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners"); *see also Turner*, 482 U.S. at 96, 99 (invalidating ban on prisoners marrying without the prison superintendent's prior approval). Defendants claim that "Ramey cites no case that has ever held that there is a right to prison visitation or a right to witness an execution." Doc. 18 at 16 (citation omitted). That is both false (*see* Doc. 8 at 14 n. 5, citing *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 877 (9th Cir. 2002) (recognizing "a First Amendment right to view executions")), and beside the point. The question is not whether there is a freestanding right to witness an execution; it is whether Defendants' arbitrary exclusion of Ms. Ramey based solely on her age burdens her First Amendment right of association with her father. Because it unquestionably does, the under-21 ban as applied to her must satisfy the four-part test set forth in *Turner*, 482 U.S. 78.[3]

[3] Defendants' citation of *Desper v. Clarke*, 1 F.4th 236 (4th Cir. 2021), is misleading in at least two respects. First, they cite it for the proposition that "the object of the death penalty is permanent separation from society." Doc. 18 at 15. But *Desper* did not involve the death penalty and says no such thing. Second, while Defendants use *Desper* to argue that the under-21 ban need not be subjected to scrutiny under *Turner*, the *Desper* court applied *Turner* to the visiting restriction at issue there. 1 F.4th at 244. Finally, as an out-of-circuit case, *Desper* does not control.

Having erroneously assumed that the First Amendment is not implicated by the under-21 ban as applied to Ms. Ramey, Defendants entirely fail to apply the *Turner* test. *See* Doc. 8 at 14-18. They ignore the numerous cases in which the Eighth Circuit has invalidated under *Turner* prison regulations that were far more plausibly related to penological objectives than is the under-21 ban at issue here. *See id*.; *see also Thongvanh v. Thalacker*, 17 F.3d 256, 259-60 (8th Cir. 1994) (invalidating English-only correspondence policy); *Quinn v. Nix*, 983 F.2d 115, 118-19 (8th Cir. 1993) (invalidating ban on certain hairstyles); *cf. Murphy v. Mo. Dept. of Corrs.*, 372 F.3d 979, 986 (8th Cir. 2004) (applying *Turner* and concluding that MODOC's "documented reason for censoring [a magazine] is too conclusory to support [summary] judgment in its favor").

Defendants' discussion of *Turner* is a single sentence in which they recite four purported justifications for the under-21 ban. Doc. 18 at 17. But that falls far short of satisfying *Turner*.

First, *Turner* requires prison officials to submit evidence to support the asserted rational relationship between their policies and legitimate penological objectives. *See Davis v. Norris*, 249 F.3d 800, 801 (8th Cir. 2001) ("it was impossible to determine on this record whether the [challenged] policy advanced [the asserted] interest" when "Defendants did not submit to the Court . . . any evidence supporting their argument"); *see also Turner*, 482 U.S. at 98 (noting the lack of evidence offered by prison officials to support a ban on prisoner marriages). Here, Defendants submit no declarations from prison officials, no documentary evidence — no evidence at all.

Second, officials may not defend a policy based upon penological objectives that were not the actual motivation for the policy. *Quinn*, 983 F.2d at 118-19. Defendants do not even assert, let alone show with any evidence, that the under-21 ban was actually motivated by any of the four *post hoc* justifications they now assert.

Third, officials may not justify their policies based upon larger societal interests that do not implicate prison operations. *Goodwin v. Turner*, 908 F.2d 1395, 1399 n. 7 (8th Cir. 1990). But Defendants do precisely this. Their purported concerns for "preventing teenagers from witnessing death" and "ensuring the witnesses can give reliable accounts of the execution" in subsequent litigation are "not legitimate *penological* interests because they . . . have nothing to do with prison

administration." *Id*. (emphasis in original). Indeed, Defendants cite no authority that either of these rationales has ever been recognized by any court as a legitimate penological interest that can satisfy *Turner*.[4]

Finally, *Turner* requires officials to do more than assert some conceivable hypothetical connection between the challenged policy and the penological interests they cite. *See Beard v. Banks*, 548 U.S. 521, 533 (2006) (plurality opinion) ("The real task . . . is. . . determining whether the Secretary [of Corrections] shows more than simply a logical relation, that is, whether he shows a *reasonable* relation") (emphasis in original). There is simply no reasonable relation between Defendants' interests in "preserving the solemnity of the execution" and "maintaining the safety and security of the prison" and barring Ms. Ramey from sitting in the witness room with other witnesses—particularly when it is undisputed that she is being excluded solely because she is 19 years old. *See Ramirez*, 142 S. Ct. at 1280 ("there is no indication in the record that Pastor Moore would cause the sorts of disruptions that respondents fear"). Defendants are doing exactly what they may not: "the piling of conjecture upon conjecture" in a post-hoc attempt to justify the challenged policy. *Salaam v. Lockhart*, 905 F.2d 1168, 1174 (8th Cir. 1990) (quotation omitted).[5]

B. Plaintiff Has Shown a Reasonable Likelihood of Prevailing on Her Equal Protection Claim

If the Court concludes that Plaintiff has shown a likelihood of success on her First Amendment claim, the Court need not reach her equal protection claim. But Plaintiff has shown a likelihood of success on the latter claim as well.

Defendants repeatedly mis-cite caselaw and misrepresent Plaintiff's arguments with regard to her claim that Section 546.740, as applied to her, violates her Fourteenth Amendment right to

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[4] Defendants assert that these interests were recognized in *Ramirez v. Collier*, 142 S. Ct. 1264 (2022) (Doc. 18 at 1), but that is false; *Ramirez* contains no mention of them.

[5] Defendants repeatedly cite *Ramirez*, 142 S. Ct. 1264, but fail to mention that the Supreme Court *rejected* prison officials' proffered rationales —many of which are echoed in Defendants' filing here— for barring the condemned prisoner's spiritual adviser from being in the execution chamber, praying over him and laying hands upon him during his execution. *Id*. at 1279-81. Here, Plaintiff Ramey seeks to only sit unobtrusively in the witness area with all other witnesses.

equal protection of the laws. Moreover, none of the *post-hoc* justifications offered by Defendants for Section 546.740's application to Ms. Ramey hold any water. [6]

1. Defendants Misrepresent the Law

Defendants repeatedly cite *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) as supportive of many of their assertions regarding the legal standard to be used when examining statutes that adversely classify young people and cite it for the proposition that "the Court has never found that legislative age classifications violated the equal protection clause." Doc. 18 at 8. This reliance is misplaced. *Kimel* did not involve an equal protection challenge at all, but rather focused on the meaning of Section 5 of the Fourteenth Amendment, the enforcement clause. The case analyzed whether the Age Discrimination in Employment Act (ADEA), which Congress enacted to protect older workers, validly abrogated states' 11th Amendment immunity. *Kimel*, 528 U.S. at 67.

Defendants cite *Maryland v. Craig*, 497 U.S. 836, 852 (1990) for the proposition that "the State has an interest in preventing young people, including eighteen to twenty-year-olds from witnessing death." Doc. 18 at 9. This citation is similarly wide of the mark; the case did not involve either witnessing death or persons 18 to 20 years old, but rather a defendant's confrontation clause rights vis-à-vis a 6-year-old alleged sex abuse victim. The cited page discusses the state's interest "in protecting children who are allegedly victims of child abuse from the trauma of testifying

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[6] Citing no source, Defendants assert that all witnesses under 21 have been banned in Missouri "[s]ince at least 1909." Doc. 18 at 8. This is false. Between 1887 and 1937, the relevant statute provided that "no person under twenty-one years of age, ***not related to the convict***, shall be allowed to witness the execution." L. 1887, p. 169 (emphasis added); *see also* Rev. Stat. Mo. 1909, § 5274 (same); Rev. Stat. Mo. 1929, § 3724 (same)). *See* Declaration of Scout Katovich, filed herewith, Exs. 1-3. The fact that, for fifty years, the state allowed persons under 21 to witness the execution of a relative fatally undermines any claim that the current under-21 ban is rationally related to legitimate penological interests.

There is also no evidence that the 1937 legislature was concerned with younger adults witnessing death or negatively affecting the solemnity, safety, or security of an execution. *See* Doc. 18 at 17. The thrust of the 1937 legislation that excised the familial exception to the age requirement was to require that all executions in the State be administered centrally at the Jefferson City State Penitentiary by lethal gas. *See* Katovich Decl. Ex. 4 (L. 1937, p. 221-223) ("[S.B. 115.] Criminal Procedure: Relating to Duty of Court in Capital Cases; Providing Manner of Inflicting Punishment of Death Shall be by Administration of Lethal Gas in State Penitentiary at Jefferson City.").

against the alleged perpetrator." *Craig*, 497 U.S. at 852. Similarly, Defendants' citation of *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) and their entire discussion of a state interest in "safeguarding the physical and psychological well-being of a minor" (Doc. 18 at 9) is irrelevant here; at age 19, Ms. Ramey is not a "minor."[7]

Finally, Defendants place great weight on *F.C.C. v. Beach Comm., Inc*., 508 U.S. 307, 315 (1993). Doc. 18 at 9. But that case did not involve an age classification at all; rather, it involved an FCC order about cable television antennae and broadcast distribution in multi-unit buildings. The distinction at issue there was not between people of different ages, but rather between companies based on whether their cable television system rebroadcasting was within a building or across multiple buildings. *Beach Comm.* has little or no relevance to the age-based equal protection challenge at issue here.

Tellingly, Defendants entirely fail to respond to Plaintiffs' argument that the usual rationale for upholding age-based classifications that discriminate against younger people— that "such requirements do not result in an absolute prohibition but merely postpone the opportunity to engage in the conduct at issue," *Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990) — does not apply here. Doc. 8 at 12-13. If the under-21 ban is upheld as applied to Ms. Ramey, she will have forever lost the opportunity to be present with her father as he dies. *See id*. Defendants' failure to respond to this argument operates as a waiver of any argument to the contrary. *Beaulieu v. Ludeman*, 690 F.3d 1017, 1045 n. 15 (8th Cir. 2012) (incarcerated people waived their claim by failing to respond to prison officials' argument).

2. Defendants' Rationales for the Exclusion of Ms. Ramey Do Not Survive Rational Basis Review

As explained in Plaintiffs' opening brief (Doc. 8 at 11-13), application of the under-21 ban to Ms. Ramey fails even under rational basis review. As but one example, Defendants' third

[7] While Defendants cite a smattering of federal laws that establish age cut-offs higher than age 18, they cite not a single Missouri law that does so – except the statute whose application Ms. Ramey challenges here. Doc. 18 at 12-13.

proffered justification for a statutory prohibition on Ms. Ramey's attendance at an execution — namely, "ensuring that each execution witness can give a reliable account" of what she observed— is meritless. Doc. 18 at 10. Defendants invoke the specter of frequent "litigation about the conduct of executions" involving testimony from witnesses, but fail to cite a single example where this has actually happened. *Id.* at 11. Even if such litigation occurs, Defendants' rationale for excluding a 19-year-old because she is not "old enough to comprehend the events they observe and give reputable testimony," *id.*, is squarely at odds with Missouri law, which "presumes a person ten years of age or older competent to testify" in court. *See State v. Brown*, 902 S.W.2d 278, 286 (Mo. 1995) (citing Mo. Ann. Stat. § 491.060(2) (West 1994)). It is also contrary to the portion of the statute that allows the person being executed to select witnesses without any requirement that the condemned person's witnesses be unbiased, legally competent, or otherwise suitable to testify in future litigation.

Nor does the under-21 ban, as applied to Ms. Ramey, further any public interest in executions being attended by reliable witnesses. Any such public interest is embodied in the "at least eight reputable citizens" required to attend the execution by law, in addition to the five witnesses chosen by the condemned person. Mo. Rev. Stat. § 546.740; *see also Woodford*, 299 F.3d at 871, 875-76 (distinguishing the 12 "official witnesses," who "act as representatives for the public at large," from the "up to five individuals requested by the prisoner"). Indeed, in 1887, when the Missouri legislature first required that executions be performed in a space "sufficiently close to exclude the view of persons on the outside" it required "twelve reputable citizens of the county" over the age of 21 to be present, but specifically excluded attendees "related to the convict" from any age requirement. *See* Katovich Decl. Ex. 1 (L. 1887, p. 169). And even today, procedures apply to the selection of "reputable citizen" witnesses that do not extend to the five relatives or friends selected to attend by the defendant. *See, e.g.*, *McDaniel v. Lombardi*, 227 F. Supp. 3d 1032, 1034, 1039 (W.D. Mo. 2016), *aff'd sub nom. McDaniel v. Precythe*, 897 F.3d 946 (8th Cir. 2018) (describing "the application used to select witnesses for an execution").

II. Plaintiff Will Suffer Irreparable Harm If She Is Barred from Witnessing Her Father's Execution Solely Because of Her Age

Defendants cite no authority in support of their conclusory assertion that "Ramey's legal interests will not be harmed." Doc. 18 at 17. Instead, they complain of Ms. Ramey's alleged "delay in bringing suit." *Id.* at 17-18. The facts tell a different story. Mr. Johnson first submitted his list of requested witnesses, including Ms. Ramey, on November 8, 2022, after he was provided the witness form. Doc. 10 at 2. When he received no response to that request or a second one submitted on November 14, his counsel emailed Gregory Goodwin, Chief Counsel of the Public Safety Section of the Missouri Attorney General's Office, inquiring as to the status of Mr. Johnson's request. *Id*. On Thursday, November 17, 2022, Mr. Goodwin formally denied Mr. Johnson's request to have Ms. Ramey witness his execution. *Id*. Plaintiff filed this action two business days later, on the morning of Monday, November 21, 2022. Doc. 1. Had she filed suit as soon as Mr. Johnson's execution date was set in August, or before he had requested her as a witness and been denied, Defendants would almost certainly have argued that her suit was premature, and not yet ripe because she had not been selected as a witness by Mr. Johnson and no official had evidenced any intent to enforce the under-21 ban against her, so any harm was speculative. Any delay (if any there was any) was on the part of Mr. Johnson, not Plaintiff, and cannot be attributed to her.

III. The Balance of Equities Favors Plaintiff

Defendants entirely fail to address this prong of the test for preliminary relief set forth in *Dataphase Sys., Inc. v. C.L. Sys., Inc.,* 640 F.2d 109, 113-14 (8th Cir. 1981) (en banc). *See generally* Doc. 18. Plaintiff rests on her submission in her opening brief. *See* Doc. 8 at 19.

IV. The Injunctive Relief Sought by Plaintiff Serves the Public Interest

Defendants cite their "important interests in enforcing lawful criminal judgments without federal interference," Doc. 18 at 18, but entirely fail to explain how allowing Ms. Ramey to be present with other witnesses to her father's execution would interfere with the enforcement of any criminal judgment or otherwise "harm . . . important public interests." *Id.* By contrast, enforcement and protection of constitutional rights is always in the public interest, *D.M. by Bao Xiong v. Minn.*

State High Sch. League, 917 F.3d 994, 1004 (8th Cir. 2019), and "state laws are preempted when they conflict with federal law." *Arizona v. United States*, 567 U.S. 387, 399 (2012).

CONCLUSION

Plaintiff has shown her entitlement to preliminary injunctive relief under the *Dataphase* standard. The Court should grant the requested relief. [8]

Dated: November 23, 2022

Respectfully submitted,

/s/ *Corene T. Kendrick*

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[8] Plaintiff's Motion sought a Temporary Restraining Order prohibiting Defendants from taking any action to execute Plaintiff's father, Kevin Johnson, Jr., until this Court considered and decided Plaintiff's Motion for Preliminary Injunction. Doc. 3 at 1. If this Court issues its decision and order before Mr. Johnson's scheduled execution date of Nov. 29, 2022, then Plaintiff concedes that this portion of her request is moot.

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2022, a true and correct copy of the foregoing document was electronically filed using the Court's CM/ECF online case filing system, where it will appear to all counsel of record.

/s/ Corene T. Kendrick