IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DARNELL M. GOINGS, Plaintiff, v. COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA, Defendant.	Case: 1:11-cv-00501 Assigned To : Howell, Beryl A. Assign. Date : 3/9/2011 Description: TRO/PI **Hearing Within 21 Days Requested**

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Since October 22, 2010, Defendant Court Services and Offender Supervision Agency for the District of Columbia ("CSOSA") has forbidden Plaintiff Darnell Goings to make contact of any sort with his three children, all of whom are under the age of twelve. Defendant has informed Mr. Goings, a probationer, that if he lives with, personally visits, makes telephone contact with, or even writes a letter to any of his children, he will be in violation of his probation, and thus subject to revocation and incarceration.[1] Defendant has imposed the "no contact" condition despite the fact that the Florida judge who sentenced Mr. Goings to probation explicitly ordered that it include no sex offender conditions. Indeed, the condition was not imposed at the order of any court, nor has it been reviewed by any court. Instead, Defendant made the decision to impose it unilaterally, without providing Mr. Goings any opportunity to contest it.

[1] Hereinafter, Plaintiff refers to this probation condition as the "no contact" condition.

CSOSA has imposed numerous other conditions on Mr. Goings' probation in the same fashion, including requirements that he undergo sex offender "evaluation" and complete sex offender "therapy"; submit to polygraph examinations regarding his sexual history; comply with Global Positioning System monitoring; refrain from using a computer with internet access without Defendant's written consent; avoid any place primarily used by minor children; and make no unsupervised contact with children (in addition to his own) under the age of 18.[2]

The "no contact" condition deprives Mr. Goings of a fundamental liberty interest—the right to maintain a relationship with his children—and is not narrowly tailored to serve a compelling government interest. By imposing it, therefore, Defendant has violated Mr. Goings' Fifth Amendment substantive due process rights. Additionally, by imposing all of the challenged conditions without providing Mr. Goings any process whatsoever, Defendant has violated Mr. Goings' Fifth Amendment procedural due process rights.

Mr. Goings has been, and continues to be, irreparably harmed by the challenged conditions, and in particular the "no contact" condition. He therefore respectfully moves this Court for a preliminary injunction ordering Defendant to refrain from enforcing any of the challenged conditions, pending adjudication of this matter on the merits. Pursuant to Local Civil Rule 65.1(d), Plaintiff requests a hearing on this motion within 21 days.

STATEMENT OF FACTS[3]

In the spring of 1995, while employed as a corrections officer at Franklin County (Florida) Jail, Mr. Goings had consensual sex with a sixteen-year-old female inmate. He was twenty-three years old at the time. Although he was fired by the jail, Mr. Goings was not

[2] Hereinafter, Plaintiff refers to these probation conditions collectively, along with the "no contact" condition, as "the challenged conditions."

[3] In addition to the facts specifically discussed below, Plaintiff incorporates into this Statement of Facts all of the facts set forth in his Complaint.

arrested or indicted. Months passed. Finally, in January 1996, Mr. Goings decided to move from Florida back to his native D.C. after he and his then-girlfriend broke up. Complaint ¶¶ 27-28.

On March 8, 1996, Mr. Goings was charged by information in Franklin County Circuit Court with sexual battery by a person in a position of custodial authority. A warrant issued for his arrest on March 11, 1996. Mr. Goings was unaware of the charge and warrant, and the Florida authorities made no effort to contact or arrest him in D.C. *Id.* ¶¶ 29-30.

Mr. Goings lived in the D.C. area for the next thirteen years and ten months, from January 1996 to November 2009. During that period, he committed no sexual misconduct. To the contrary, he spent that time raising a family. He fathered and helped raise three children: D.G., his eleven-year-old son; J.G., his three-year-old son; and A.G., his two-year-old daughter. He maintained a long-term relationship with Anika Davis, the mother of D.G. and A.G., to whom he is now engaged to be married. He held jobs at National Airport and Walter Reed Hospital, among other places, and was active in the community as a football coach and PTA member. *Id.* ¶¶ 15-19, 31.

On November 20, 2009, a Metropolitan Police Department officer ran a background check using Mr. Goings' driver's license and discovered the outstanding 1996 Florida arrest warrant. This was Mr. Goings' first notice that the warrant had issued. He was arrested and returned to Florida. On June 17, 2010, he pled no contest to one count of sexual battery by a person in a position of custodial authority. *Id.* ¶¶ 32-33.

The complaining witness from Mr. Goings' Florida case testified on his behalf at his June 17, 2010 plea hearing. She testified that their sex had been consensual, and she requested that Mr. Goings serve no jail time. On August 27, 2010, Judge James C. Hankinson of Franklin

County (Florida) Circuit Court conducted a sentencing hearing and placed Mr. Goings on five years' probation, including 11 months and 29 days of jail time, with credit for 277 days of time served. The judge also ordered that Mr. Goings register in Florida as a sex offender, as required by law. However, he included in the Order of Probation a specific instruction that there be no sex offender conditions imposed on Mr. Goings during his probation. *Id.* ¶¶ 34-36.

During Mr. Goings' brief jail term, his Florida probation officer arranged for his return to D.C. upon the day of his release, pursuant to the Interstate Compact for Adult Offender Supervision ("Interstate Compact"). The Interstate Compact mandates that the receiving state (here, D.C.) "shall supervise an offender transferred under the interstate compact in a manner determined by the receiving state and consistent with the supervision of other similar offenders sentenced in the receiving state." *Id.* ¶¶ 26, 37.

Mr. Goings was released from jail on October 19, 2010. He left Florida for D.C. that morning and arrived home to Ms. Davis, D.G., and A.G. that evening. *Id.* ¶ 39.

On the morning of October 20, 2010, Mr. Goings reported to CSOSA, as he had been instructed to do by his Florida probation officer. He met with Community Supervision Officer Aprille Cole. Ms. Cole told him that he must move out of his home, and that he must make no contact of any sort with his children. This verbal order was the first notice that Mr. Goings received of any of the conditions that CSOSA had decided to impose on his probation. Mr. Goings referred Ms. Cole to the record of his Florida court case, which showed that Judge Hankinson had ordered that no sex offender conditions be imposed on his probation. She told him, "That's not how we do it here." *Id.* ¶¶ 40-41.

With CSOSA's permission, Mr. Goings spent the nights of October 20 and 21, 2010, at home with his family. At CSOSA's orders, he moved out on October 22. He initially moved in

with his brother, but in early November 2010, CSOSA ordered him to move out of his brother's apartment because a daycare center had opened up in the building next door.[4] Mr. Goings then moved in with a cousin. *Id.* ¶¶ 42-43.

CSOSA did not provide Mr. Goings with a written list of the conditions governing his probation until on or about November 12, 2010. The document that he finally did receive, dated October 29, 2010, listed seventeen "Special Conditions" that CSOSA had imposed on his probation, including the following challenged conditions:

- Special Condition 15: "You shall have no unsupervised contact with children under the age of 18 without knowledge and permission from CSOSA." When he was provided with Special Condition 15, Mr. Goings was again instructed orally that it extended to his own children, and that despite its literal terms, CSOSA would enforce it to foreclose contact of any sort, whether supervised or not, including in-person, telephone, and mail contact.[5]

- Special Condition 2: "You shall undergo evaluation and complete sex offender therapy, to include submitting to polygraph exams, if deemed appropriate by CSOSA . . . ."

- Special Condition 7: "You shall comply with Global Positioning System (GPS) monitoring to enforce a curfew and/or exclusion zones, if deemed appropriate by CSOSA."

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[4] CSOSA also rejected the idea of Mr. Goings moving in with his father, because his step-mother's grandson sometimes visited the residence. *Id.* ¶ 21.

[5] Special Condition 15 has also dramatically limited Mr. Goings' contact with his large extended family in the D.C. area, including siblings, nieces, nephews, and other relatives. Mr. Goings cannot attend family events or spend time at the homes of his relatives, including his mother, because of the presence of children who reside there. As a result of this condition, for example, Mr. Goings was forced to spend both Christmas and Thanksgiving alone. *Id.* ¶¶ 21-22.

- Special Condition 9: "You shall not possess or use a computer with access to any online computer service at any location (including employment) without the written consent of CSOSA. . . ."

- Special Condition 16: "You shall not spend time at or loiter near places primarily used by minor children (i.e. schoolyards, swimming pools, playgrounds, public libraries, arcades, etc) unless approved by CSOSA."

- Special Condition 17: "You shall not be employed, volunteer, or otherwise participate in activities where you have interaction with minor children unless approved by CSOSA." *Id.* ¶ 44.[6]

The challenged conditions were not imposed by the order of any court, nor have they been reviewed by any court. Instead, CSOSA itself decided to impose the conditions, without providing Mr. Goings any opportunity to object to them before or after their imposition. CSOSA has also, itself, claimed the right to modify, relax, or remove the conditions. CSOSA has made clear to Mr. Goings that his supervising officers would be responsible for the discretionary decision of when and if these conditions would be removed—that is, when, among other things, he would be allowed to speak to, write to, or visit with his children. *Id.* ¶¶ 45-46.

On February 9, 2011, counsel for Mr. Goings wrote to CSOSA on his behalf and requested that it remove, or at the very least modify, the challenged conditions. CSOSA has not responded to the letter and has not altered the conditions. *Id.* ¶ 47.

ARGUMENT

A plaintiff is entitled to a preliminary injunction if he establishes "(1) that he is substantially likely to succeed on the merits of his suit, (2) that in the absence of an injunction,

[6]As a further consequence of the challenged conditions, Mr. Goings was unable to attend Watch Night services at his church on December 31, 2010. *Id.* ¶ 22.

he would suffer irreparable harm for which there is no adequate legal remedy, (3) that the injunction would not substantially harm other parties, and (4) that the injunction would not significantly harm the public interest." *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1505-06 (D.C. Cir. 1995).

I. Plaintiff Is Highly Likely to Succeed on the Merits.

Mr. Goings has advanced two claims in his Complaint, both pursuant to the Due Process Clause of the Fifth Amendment to the United States Constitution: (1) that Defendant has imposed the "no contact" condition in violation of his substantive due process rights; and (2) that Defendant has imposed all of the challenged conditions in violation of his procedural due process rights. He is substantially likely to succeed on both claims.

A. Plaintiff Is Likely to Succeed on His Substantive Due Process Claim.

The constitutional right to due process of law includes "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) (emphasis in original); *see also United States v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005) (holding that a supervised release condition involving deprivation of a fundamental liberty interest must be "narrowly tailored to serve a compelling government interest"[7]); *United States v. Loy*, 237 F.3d 251, 256 (3d Cir. 2001) (finding that a condition "that restricts fundamental rights must be narrowly tailored" (quotation marks omitted)). Defendant has deprived Mr. Goings of a fundamental liberty interest: the right to maintain a relationship with his children. Because the deprivation is not narrowly tailored to

[7] While *Myers* and a number of the other cases Plaintiff cites in this section involve conditions of supervised release, rather than of probation, "the distinction is without a difference" for purposes of determining the propriety of the conditions. *United States v. Voelker*, 489 F.3d 139, 144 n.2 (3d Cir. 2007).

serve a compelling government interest—for there is no evidence that Mr. Goings represents a danger to his children—it violates his substantive due process rights under the Fifth Amendment.[8]

1. Defendant Has Deprived Mr. Goings of His Fundamental Right to Maintain a Relationship With His Children.

There can be no doubt that a parent has a fundamental liberty interest in maintaining a relationship with his children. The Supreme Court has called "the interest of parents in the care, custody, and control of their children . . . perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). According to the Court, "the interest of a parent in the companionship, care, custody, and management of his or her children" is "essential" and qualifies as one of the "basic civil rights of man." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *see also Santosky v. Kramer*, 455 U.S. 745, 753-754 (1982) (recognizing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (recognizing that "the relationship between parent and child is constitutionally protected," and holding that it is "firmly established that freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" (alteration in original, quotation marks omitted)); *In re A.G.*, 900 A.2d 677, 680 (D.C. 2006) (citing the "basic principle that parents have a due process right to make decisions concerning the care, custody, and control of their children" (internal quotation marks and citations omitted)).[9]

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[8] Because this case involves due process violations by a federal agency, the Fifth Amendment, rather than the Fourteenth Amendment, applies.

[9] *See also M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance to our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect" (internal quotation marks and citation

Nor can there be any dispute that the "no contact" condition, which stands as an absolute prohibition on Mr. Goings' association with his children, constitutes a deprivation of that fundamental right. The condition precludes him not just from living with his children, but even from calling them, sending them an email, or mailing them a birthday card. According to Defendant, Mr. Goings' supervising probation officers can, under threat of incarceration, bar him from contact with his children for the entirety of his five-year probationary term, or for some lesser undisclosed period of time, in the exercise of their unreviewable discretion. It is a truly extraordinary deprivation. *See Loy*, 237 F.3d at 270 (construing a "no contact" condition as not extending to supervisee's own children, "[g]iven the severe intrusion on [his] family life that would otherwise result").[10]

The sole question dispositive of Mr. Goings' substantive due process claim, then, is whether the deprivation is narrowly tailored to serve a compelling government interest. As discussed below, it clearly is not.

2. The Deprivation Is Not Narrowly Tailored to Serve a Compelling Government Interest: Neither Mr. Goings' Offense of Conviction Nor His History Indicates That He Is a Danger to His Children.

The only conceivable rationale behind the "no contact" condition is that it is necessary to protect Mr. Goings' children.[11] Even granting that the government has a compelling interest in ensuring the safety of children, the "no contact" condition cannot withstand substantive due process scrutiny, for it is anything but narrowly tailored to achieve that end. That is because,

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omitted).); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that "liberty" protected by the Due Process Clause includes the right to "marry, establish a home and bring up children").

[10] The extraordinary nature of this condition is highlighted by the fact that it is a far more severe intrusion on Mr. Goings' parental rights than he experienced while incarcerated. *See* Complaint Ex. 1 (Goings Dec.) ¶ 6 (explaining that Mr. Goings had telephone, mail, and in-person contact with D.G. and A.G. while incarcerated in Florida).

[11] Defendant has offered no official justification for the condition.

quite simply, the government has provided no evidence that Mr. Goings presents a danger to his children.[12] His offense of conviction provides no basis to conclude that he is a danger to any children, let alone his own. Moreover, the offense took place nearly sixteen years ago, and Mr. Goings' conduct in the interim has made abundantly clear that he presents no danger.

Given the fundamental liberty interest involved, appellate courts reject "no contact" conditions imposed on probationers and supervised releasees in the absence of convincing evidence that the person subject to the condition represents a serious danger to his children. In *United States v. Davis*, 452 F.3d 991, 996 (8th Cir. 2006), for instance, the Eighth Circuit struck down a release condition that would have prevented appellant, who had pled guilty to receiving child pornography, from making unsupervised contact with his daughter.[13] Recognizing that "[t]he relationship between a parent and child is a fundamental liberty interest protected by the due process clause," the court invalidated the condition because there was "no evidence in the record that [appellant] has ever sexually abused a child or that he would try to abuse his daughter once released from prison." *Id.* at 995; *cf. United States v. Smith*, 606 F.3d 1270, 1284 (10th Cir. 2010) (remanding on issue of propriety of "no contact" condition imposed on defendant, who had been convicted of sexual assault, because "the record does not unambiguously support a finding that Smith is a danger to his own child or minor siblings").

The Third Circuit vacated a similar condition in *United States v. Voelker*, 489 F.3d 139, 142 (3d Cir. 2007). There, the district court had imposed a "no contact" condition on a man who

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[12] The Government bears the burden of justifying release conditions. *United States v. Weber*, 451 F.3d 552, 558-59 (9th Cir. 2006).

[13] Notably, insofar as it accommodated supervised contact between appellant and his daughter, the "no contact" condition struck down in *Davis* was considerably less severe than the one at issue here. Similarly, the "no contact" conditions addressed in the *Loy* case, *supra*, and the *Smith*, *Voelker*, and *Myers* cases, discussed *infra*, all allowed for authorized and/or supervised contact.

had been convicted of possessing child pornography, had exposed his three-year-old daughter's buttocks over a webcam, and had allegedly offered his daughter for sex online. *Id.* at 142-43. Faced with "a condition that so drastically interferes with one's right to associate with one's own children," the Third Circuit vacated the condition and remanded to the district court for further fact-finding on the issue of dangerousness: "Parents can lose custody of their children or have restrictions placed on their parental rights when there is sufficient evidence to support a finding that children are potentially in danger from their parents. . . . [Absent such evidence,] the states' interest cannot be said to be compelling, and thus interference in the family relationship is unconstitutional." *Id.* at 155 (quotation marks and citations omitted).

Here, there is no evidence that Mr. Goings presents a danger to his children. Certainly none can be gleaned from his offense of conviction, which involved sexual intercourse between Mr. Goings, then a twenty-three-year-old corrections officer, and a sixteen-year-old female inmate. The inmate herself testified that the sex was consensual, as part of the following colloquy with defense counsel at Mr. Goings' June 17, 2010 plea hearing:

> Q.: . . . This matter, when in occurred back in 1995, was it a consensual matter?
>
> A.: Yes, all the way.
>
> Q.: Would you consider this to be a matter or situation in which you were the instigator or that you were as much responsible for it as he was?
>
> A.: Yes, sir.
>
> Q.: And obviously at the time Mr. Goings was a correctional officer, he was in charge of providing supervision to you because you were an inmate. . . . [D]id Mr. Goings force himself on you in any way?
>
> A.: No, sir.
>
> Q.: Did he ever threaten you in any way to make you –
>
> A.: No, sir.

Q.: – comply and y'all have sexual relations?

A.: No, sir.

Q.: Purely consensual from the start?

A.: Yes, sir.

Complaint Ex. 4 (Transcript of June 17, 2010 Plea Hearing) at 15-16. The inmate also testified that, in her view, Mr. Goings should not receive any jail time. *Id.* at 15.

The idea that Mr. Goings' offense—which involved consensual intercourse that he engaged in as a twenty-three-year-old—could substantiate a claim that today, as a thirty-nine-year-old father, he is dangerous to his children, is beyond far-fetched. The offense is not evidence that Mr. Goings has a sexual interest in young children. It does not indicate that incest appeals to him. It is not a sign that he engages in homosexual sex. How, then, could it suggest that he presents a sexual threat to D.G., an eleven-year-old boy, or to J.G. and A.G., who are aged three and two, respectively?

Moreover, the offense took place nearly sixteen years ago. Appellate courts frequently strike down sex offender conditions based on old offenses, particularly when the supervisee, like Mr. Goings, has not re-offended in the interim. *See, e.g., United States v. Carter*, 463 F.3d 526, 531-32 (6th Cir. 2006) (two 17-year-old sex offense convictions—rape during burglary and assault with intent to commit rape—were too remote in time to justify supervised release condition requiring sex offender treatment); *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003) ("The fact that T.M. has lived the last twenty years without committing a sex offense suggests that he no longer needs to be . . . shielded from the public.").[14] Here, the window

[14] *See also United States v. Scott*, 270 F.3d 632, 633-36 (8th Cir. 2001) (vacating sex offender conditions based on defendant's 15-year-old rape conviction because "[t]he government

between Mr. Goings' offense and his conviction provided a revealing testing ground for the necessity (or lack thereof) of any "no contact" condition, even in advance of its imposition—and Mr. Goings passed that test beautifully. He committed no sexual misconduct. He committed no misconduct against his children. To the contrary, as both his fiancée (the mother of two of his children) and his oldest son have attested, he has been a loving, dedicated, and compassionate father who has played a vitally important, and overridingly positive, role in his children's lives. Complaint Ex. 2 (Davis Dec.) ¶¶ 3-7; Complaint Ex. 3 (D.G. Dec.) ¶¶ 1-6.

Courts have found "no contact" conditions unjustified even when they have been imposed on supervisees with histories far less sympathetic than that of Mr. Goings. The appellant in *Myers*, 426 F.3d at 120-21, for instance, was a diagnosed pedophile who had been convicted of receiving child pornography after posing online as a teenaged boy in order to entice a thirteen-year-old girl to send him explicit photographs of herself. He had previously pled guilty to second-degree child abuse, for inappropriately touching the eight-year-old niece of his girlfriend. *Id.* at 120. Despite his history, the Second Circuit, in an opinion by then-Judge Sotomayor, held that the record was insufficient to establish that the defendant was a danger to his son. *Id.* at 128 (noting that the defendant's past offenses had been committed against girls, and that "[t]he government offered no evidence to show that Myers's child, a male, was in any danger from his father").

State v. Coreau, 651 A.2d 319, 320 (Me. 1994), involved an appellant with an even grimmer history: he had been convicted of sexually assaulting a fourteen-year-old girl at

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presented no evidence that Scott has a propensity to commit any future sexual offenses, or that Scott has repeated this behavior in any way since his 1986 conviction"); *United States v. Reynolds*, No. 99-30186, 2000 U.S. App. LEXIS 4873, at *4 (9th Cir. Mar. 21, 2000) (vacating supervised release condition requiring sex offender treatment when only supporting evidence was 20-year-old rape conviction).

knifepoint, during which act he had inserted cocaine into her mouth and vagina and threatened to kill her if she told anyone. His prior convictions included two counts of rape and assault with a firearm. *Id.* at 320. Nonetheless, the Supreme Judicial Court of Maine held that the trial court had abused its discretion by prohibiting all contact between appellant and his minor children, since there was "no evidence that Coreau has abused any of his own children, and there is nothing in the record to indicate that his presence would be psychologically damaging to his children." *Id.* at 321.[15] In so holding, the court observed that "[t]he cases in which similar probation conditions have been upheld generally involved instances in which the defendant has abused his own children," and that even "many of [those cases] do not impose flat prohibitions against any contact with minor children and often allow for approved visits. *Id.* at 321 n.4 (citing cases from numerous states).

Finally, courts have found absolute "no contact" conditions unconstitutional even when the appellant has a history of abusing his own children. In *State v. Ortiz*, 848 A.2d 1246, 1250, 1260 (Conn. App. Ct. 2004), the defendant had been convicted of assaulting the mother of three of his children, and previously had so severely abused his children by another woman that one of them suffered brain damage. Even so, the court held that a total ban on contact between appellant and the children whose mother he assaulted would be "violative of [his] constitutional rights," and thus ordered that reasonable mail contact be permitted. *Id.* at 1261.

The rigorous scrutiny to which courts subject even "no contact" conditions less restrictive on the fundamental rights of a parent than the one at issue here speaks to the unique and extraordinary nature of Defendant's deprivation of Mr. Goings' rights. The caselaw demonstrates that, in the absence of any evidence that Mr. Goings presents a danger to his

[15] The court also noted that the condition "unnecessarily punishes" appellant's children and "does nothing to further Coreau's rehabilitation and reintegration into society." *Id.* at 322.

children, and especially given a "no contact" condition as absolute as the one Defendant has crafted, Mr. Goings is exceedingly likely to prevail on his claim that the "no contact" condition violates his substantive due process rights.[16]

B. Plaintiff Is Likely to Succeed on His Procedural Due Process Claim: Defendant's Addition of Intrusive Probation Conditions Without Any Process Is Plainly Unconstitutional.

Mr. Goings is equally likely to succeed on his claim that Defendant violated his Fifth Amendment right to procedural due process by imposing all of the challenged conditions without providing him any process at all.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (quotation marks omitted). Courts "examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State, [and] the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citation omitted).

As discussed in Section I.A, it is beyond dispute that Defendant has deprived Mr. Goings of a fundamental liberty interest by deciding to prohibit him from making any contact with his children. The other challenged conditions, which CSOSA has likewise decided to impose on Mr.

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[16] Mr. Goings notes that all probation conditions in the District of Columbia, regardless of whether they infringe on fundamental liberties, must be "reasonably related to the rehabilitation of the defendant and the protection of the public." *Belay v. District of Columbia*, 860 A.2d 365, 369 (D.C. 2004). In light of the complete absence of evidence that the "no contact" condition will contribute to his rehabilitation or protect his children (or anyone else, for that matter), the condition fails even under this standard. *See Davis*, 452 F.3d at 995 (holding that, because there is no evidence that defendant presents danger to his daughter, "a condition of supervised release that limits Mr. Davis's access to his daughter is not reasonably necessary either to protect Mr. Davis's daughter or to further his rehabilitation").

Goings without providing him any process, also implicate important liberty interests. These conditions—which include requirements that Mr. Goings undergo intense sex offender treatment involving polygraph examinations that probe the most intimate details of his private life and history;[17] have all of his movements tracked by Global Position System monitoring; refrain from unapproved use of any computer with internet access; and stay away from numerous locations throughout the District that are "primarily used by minor children," *see* Complaint ¶ 44—infringe on liberties that, while perhaps not as foundational as the parental right, nonetheless involve Mr. Goings' basic rights to privacy, freedom of movement, and freedom of association. *See United States v. Scott*, 270 F.3d 632, 635 (8th Cir. 2001) (invalidating imposition of numerous sex offender conditions similar to those involved here because "conditions imposed cannot involve a greater deprivation of liberty than is reasonably necessary" based on the circumstances of the case (internal quotations removed) (emphasis added)); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (holding that the Constitution protects "the individual interest in avoiding disclosure of personal matters"); *Thorne v. El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983) (holding that the constitution protects forced disclosure of "information regarding personal sexual matters"); *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) (holding that a prisoner "has the right to the privacy of his own thoughts, which cannot be probed by use of polygraph examinations"); *United States v. Perazza-Mercado*, 553 F.3d 65, 72-73 (1st Cir. 2009) (invalidating condition banning use of internet in offender's home because it constituted a greater "deprivation of liberty" than necessary).

[17] These examinations have included enormously intrusive questioning on matters of the most private nature, including: when, with whom, and how often Mr. Goings has engaged in various sexual activities with consenting adult female partners; when and how often he has masturbated throughout his life; whether he has been attracted to animals; whether he is a transvestite or transsexual or has had a history of such desires; whether he has used a prostitute; the number of prior sexual partners he has had; and how frequently he has looked at pornography.

In enforcing these conditions, CSOSA has twice forced Mr. Goings to move out from the home in which he was living. Complaint Ex. 1 (Goings Dec.) ¶¶ 8, 10-11. Moreover, because the restrictions prevent him from making contact with any family members (in addition to his own children) who are under the age of 18, including nieces, nephews, and cousins, they effectively bar him from all family events with his siblings, parents, and large extended family in the District. *Id.* ¶ 15. They also significantly intrude on his ability to visit his own mother's house, impede his association with most of his close friends, and have required him to spend both Thanksgiving and Christmas alone and avoid church on New Year's Eve. *Id.* ¶¶ 15-16; *cf., e.g., United States v. Reeves*, 591 F.3d 77, 82 (2d Cir. 2010) (explaining why sex offender condition that interferes with familial or similar associational rights was an unjustifiable deprivation of liberty).

Probation conditions are also part of a criminal punishment, imposed at a sentencing hearing. Mr. Goings faces imprisonment pursuant to his criminal judgment if he violates any of the challenged conditions. Effectively, CSOSA claims to have modified Mr. Goings' criminal sentence. Mr. Goings can now be incarcerated, based on the relatively low "preponderance-of-the-evidence" standard, if he violates any of the new conditions that Defendants have imposed. *Young v. United States*, 863 A.2d 804, 810 (D.C. 2004). The challenged conditions, then, implicate not only the liberty interests that they themselves infringe, but also Mr. Goings' fundamental interest in freedom from confinement. *See Meyer*, 262 U.S. at 399 (citing "freedom from bodily restraint" as chief among liberty interests protected by due process clause).

Given that Defendant has deprived Mr. Goings of such important liberty interests, the remaining question is "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrections*, 490 U.S. at 460. That question must

be answered in the negative, for CSOSA provided Mr. Goings no process at all before it decided to impose the new conditions. Defendant gave Mr. Goings no notice of the new conditions prior to their imposition, Defendant offered no formal reasons or evidence to support or explain its decision, and Defendant has afforded Mr. Goings no opportunity to object to the conditions. No court has weighed in on the validity of any of the conditions.

It is telling that, in the only open, adversarial, judicial proceedings concerning the facts of this case, the court in Florida—the only court to have considered the issue at all—explicitly ordered that the circumstances did not merit imposition of sex offender conditions on Mr. Goings' probation. The court made that decision after examining the facts of the 1995 incident, hearing from the victim (who appeared before the court in 2010 and testified that her intercourse with Mr. Goings had been consensual, *see supra* at 11-12), listening to counsel for both sides, considering Mr. Goings' lack of any even remotely inappropriate sexual conduct in 15 years, and consulting a presentence report. Despite the judge's finding—and without making any other findings—CSOSA decided to impose a panoply of unfounded restrictions on Mr. Goings' freedom that it told him were now conditions on his probation. That is not process.

According to Defendant, Mr. Goings will be subject to these extraordinary deprivations, under threat of incarceration, until Defendant decides that it is the right time to lift them. These deprivations have been ongoing since late October 2010 and could continue throughout the duration of Mr. Goings' five-year probation term because his supervising officers at CSOSA have claimed the right to impose and lift the challenged conditions at their discretion, based on their assessment of various factors relating to his supervision—factors that remain unknown to Mr. Goings. Not only are the bases for this determination shrouded in mystery, but they are untested and, under Defendant's view, untestable in any kind of adversarial proceeding.

It is axiomatic that the failure to provide any process prior to a significant deprivation is constitutionally impermissible. *Mathews*, 424 U.S. at 349 (holding that procedures must ensure that the deprived person is "given a meaningful opportunity to present [his] case" and approving process given because "the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final");[18] *see generally Vitek v. Jones*, 445 U.S. 480 (1980) (holding that when a protected liberty interest is implicated, deprivation cannot be made without significant protections, and discussing required procedures).

The constitutional violation, therefore, is evident. The Court need look no further to determine that Mr. Goings is likely to succeed on his procedural due process claim.

II. Mr. Goings Will Suffer Irreparable Harm If the Court Does Not Issue a Preliminary Injunction.

The loss of constitutionally protected freedoms for even minimal periods of time constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also* 11A Wright & Miller, Fed. Prac. & Proc. § 2948.1 (2d ed. 2004) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Here, the "no contact" condition causes irreparable injury to Mr. Goings with each additional day that he is kept apart from his children. Complaint Ex. 1 (Goings Dec.) ¶¶ 5, 13-14, 16. The other challenged conditions, by forcing him to avoid his extended family and friends; move residences; have his movement both restricted and perpetually monitored by CSOSA; limit his access to information; and submit to intrusive

[18] Even the basic procedures held in *Mathews* to be necessary to informed decision-making are lacking here. *See Mathews*, 424 U.S. at 343-346.

questioning, therapy, and polygraphing regarding his entire sexual history, are causing him harm that, if not as severe, is nonetheless irreparable. *Id.* ¶¶ 11, 15-16. Mr. Goings will continue to suffer this irreparable harm unless this Court grants his request for injunctive relief.

III. An Injunction Will Not Harm Other Parties. Instead, It Will Serve the Public Interest.

As discussed in Section I.A, an injunction would not harm Mr. Goings' children, for he presents no danger to them. To the contrary, an injunction would benefit his children by providing them a more stable home environment in which their father is allowed to play a meaningful role—an environment in which they had flourished prior to their father's unexpected arrest in 2009 based on an incident in 1995. Allowing Mr. Goings to live with his children will benefit the public interest by facilitating his re-entry into society and promoting his rehabilitation. *See Belay v. District of Columbia*, 860 A.2d 365, 369 (D.C. 2004) ("rehabilitation of the defendant" is one of the chief goals of probation). Moreover, when important liberty interests are at issue, the public benefits from adequate procedures that produce accurate results. *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 28 (1981) (noting that a contested hearing prior to deprivation serves both the government and the parent because the government "shares the parent's interest in an accurate and just decision"). Therefore, by forestalling imposition of the challenged conditions unless and until it is determined, through adequate process, that they are necessary, the injunction will benefit the public.

CONCLUSION

For the reasons stated, the Court should grant Plaintiff's motion and issue a preliminary injunction ordering Defendant to refrain from enforcing any of the challenged conditions, pending adjudication of this matter on the merits.

Respectfully submitted,

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