STATE OF MICHIGAN
COURT OF APPEALS

M.M., by her next friend Danielle McDonald, C.P. and A.P., by their next friend Brianna Griffin, MARIE BILLS, and KATHLEEN TANTON, individually and on behalf of a class of similarly situated persons,

Plaintiffs-Appellants,

v

SHERIFF MAT KING, ST. CLAIR COUNTY, SECURUS TECHNOLOGIES, LLC, PLATINUM EQUITY, LLC, TOM GORES, MARK BARNHILL, and DAVID ABEL,

Defendants-Appellees.

COA No. 372342

On appeal from the 31st Circuit Court
LC Case No. 24-000546-CZ
Before the Honorable Michael L. West

PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this appeal under MCR 7.203(A) and MCL 600.308(1). The Circuit Court for the County of St. Clair issued a decision on the merits granting the County Defendants' motion for summary disposition on July 19, 2024. On August 14, 2024, the court issued a final order under MCR 7.202(6) disposing of the remaining claims against Securus, David Abel, and the Platinum Defendants on the same grounds. Under MCR 7.204(A)(1), Plaintiffs timely filed their claim of appeal on September 4, 2024.

STATEMENT OF QUESTIONS

I. **Under the Michigan Constitution, does a constitutional right to family integrity exist?**

Plaintiffs answer: Yes.

Defendants answer: No.

The Circuit Court answered: No.

II. **Under the Michigan Constitution, do children and parents retain their fundamental liberty interest in family integrity even if one of them is jailed?**

Plaintiffs answer: Yes.

Defendants answer: No.

The Circuit Court answered: No.

III. **Does government interference with the fundamental liberty interest in family integrity require heightened scrutiny under the Michigan Constitution?**

Plaintiffs answer: Yes

Defendants answer: No.

The Circuit Court answered: No.

IV. **Is a complete and permanent ban on all in-person family visits by the children and parents of incarcerated people in a county jail unconstitutional under any standard of review applied?**

Plaintiffs answer: Yes.

Defendants answer: No.

The Circuit Court answered: No.

INTRODUCTION

Children and parents of individuals detained in the St. Clair County Jail ("the Jail") allege that Sheriff Mat King and St. Clair County (together "the County") enforce a family visitation ban that violates their fundamental liberty interests under the Michigan Constitution. Plaintiffs allege the ban on family visits is part of a conspiracy between Securus Technologies, LLC ("Securus"), Platinum Equity, LLC, Tom Gores, Mark Barnhill, and David Abel (together "Securus Defendants"), and the County to generate revenue. In concert, Defendants have entirely banned free, in-person visits to force families to spend money on phone and video calls, with Defendants dividing the profits. The Jail's total ban is arbitrary, overbroad, and unnecessary to further any conceivable penological interest.

In 2017, the Jail eliminated family members' ability to visit loved ones in person, providing only recorded, low-quality video and phone calls. The Jail implemented this policy to make millions of dollars from a new commission-based agreement giving a monopoly on phone and video calls to Securus, a for-profit telecommunications company that operates in jails and prisons. The ban on family visits causes severe harm, including lifelong psychological damage to children. In contrast, allowing visits benefits children and parents and improves jail administration by reducing misconduct, boosting staff morale and retention, and decreasing violence and recidivism.

A complete and permanent ban on in-person visitation between parents and children to generate revenue is an unprecedented policy. As a matter of first impression, this case asks the court to consider whether such permanent elimination of all child-parent in-person contact in a jail setting is constitutional in Michigan, and whether such a profound intrusion by the state on such a foundational relationship can be undertaken primarily to generate money. Plaintiffs—non-incarcerated children and parents who have suffered grievously under this policy—ask that this Court find such a severe and arbitrary policy cannot withstand judicial scrutiny.

The Circuit Court decision dismissing the case applies the wrong legal standards, misreads the case law, and holds for the first time that "[t]here is no liberty interest or family integrity right to association in a penal institution under the Michigan Constitution." Opinion ("Op"), Appellants' Appendix ("Appx") at 11. The court applied a deferential federal standard for reviewing prison policies that the Michigan Supreme Court has not adopted and that has never been applied anywhere to justify policies permanently banning child-parent visits, or developed for the purpose of revenue, in jail or prison. It then misapplied even that deferential standard and contravened basic principles of the adversarial process by improperly crediting Defendants' assertions over Plaintiffs' allegations. As a result, it became the first court in the country to uphold a complete ban on in-person family visits.

The Circuit Court analysis is wrong at every level, and it should be overturned. First, there is no exception to the fundamental rights to family integrity and association based solely on a family member being jailed. While Michigan courts have never settled on a standard for scrutinizing jail policies generally, precedent supports the application of heightened scrutiny to policies that infringe on certain fundamental liberties. Defendants' total ban on child-parent visits fails this test because it is not necessary or narrowly tailored to serve any compelling state interest.

Second, even if Michigan courts were to endorse a more deferential standard of review for prison policies like that announced in *Turner v Safley*, 482 US 78 (1987), and to apply that policy to jails that also detain presumed innocent people prior to trial, the Jail's policy of eliminating all in-person contact with family members would still be unconstitutional because the policy does not further a "legitimate penological interest" within the jailers' expertise and is an exaggerated to response to any asserted interest. *Id.* at 89. Every federal appellate court to consider a complete and permanent ban on visits under *Turner* has held such a ban is not. See *Manning v Ryan*, 13 F4th

705, 708 (CA 8, 2021) (per curiam); *Easterling v Thurmer*, 880 F3d 319, 323 (CA 7, 2018) (per curiam). Defendants cite no case in which a court has upheld a policy theirs.

Third, the court reached its flawed conclusion only by relying on disputed assertions in an affidavit Defendants submitted. See Op, Appx at 13 ("[T]he affidavit of Lt. Richard Olejnik [Defendants' Exhibit 1] . . . provides the basis of the Court's application of *Turner*."). Contrary to the claims in that affidavit, Plaintiffs allege that the Jail's policy bears no connection to any legitimate penological interest and undermines each of a jail's traditional goals. On a motion for summary disposition under MCR 2.116(C)(8), the court must accept Plaintiffs' factual allegations as true. Summary judgment under MCR 2.116(C)(10) would also have been improper, because there were numerous disputed facts, which must be addressed after discovery at trial.

Based on its erroneous reasoning the court dismissed the case, including Plaintiffs' Motion for Preliminary Injunction, seeking an urgent end to the Jail's practice. Numerous class members are enduring this harm as we speak. This Court should remand expeditiously so the Circuit Court can apply the appropriate legal standards and rule promptly on Plaintiffs' Preliminary Injunction motion.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Statement of Facts

A. Plaintiffs are unable to see, touch, or hug their loved ones.

For years, when a parent was confined at the Jail, a child could lessen the pain of separation by visiting their mom or dad in person. Like most jails in the United States ("US"), the Jail encouraged in-person visits, and families used them to maintain essential relationships.[1] On

[1] The prior policy permitted family members to have contact visits with detained loved ones, if they were employed by the Jail, in the wide hallways outside residential pods. The family members of all other people detained visited loved ones through glass, which unjustifiably limited physical

September 22, 2017, St. Clair County implemented a new policy, completely banning people from visiting family members detained at the Jail. The ban ensured that parents and children of people in the Jail would not be able to hug their loved one, look into their eyes, hold their hand, or have an intimate conversation. It made phone and video calls the sole way for Plaintiffs to talk with their loved ones inside the Jail.

B. Defendants prohibit in-person visits to make money.

In 2017, the St. Clair Sheriff's Office solicited proposals for a plan to provide phone and video calls that would come at "no cost" to the County and would "generat[e] the maximum revenue allowable." Complaint ("Compl") ¶ 204, Appx at 87; Exhibit ("Ex") F, Appx at 283–84. The Jail quickly agreed to a new proposal from Securus, which already provided phone call technology to the Jail, to add video calls. The company promised to "maximize[] the revenue opportunities for the County." Compl ¶ 204, Appx at 88; Ex G, Appx at 308–09.

Under the agreement, still in effect, Securus pays the County cash kickbacks based on the number of video and phone calls the County generates for the company. The County receives 50% of all money from video calls—for which the parties agreed to charge $12.99 for 20 minutes—and 78% of all money generated from phone calls—at a rate of $0.21 per minute. Compl ¶ 5, Appx at 32; Ex H, Appx at 495–521. Based on their negotiations, representations, and policies, the contract promises the County a minimum annual payment of $190,000, plus kickbacks for each call. *Id.*

To further incentivize the visitation ban, the contract allows Securus to pay the County less money if the daily jail population decreases by more than 5%, "to renegotiate payment [] or discontinue the services" if the County fails to reach a minimum number of monthly paid video calls, to bill the County directly if the number of paid calls does not "allow [Securus] to recover

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contact but at least permitted eye contact and unrecorded communications.

[its] upfront funding," and "to renegotiate or terminate" the entire agreement in the event of a "material reduction in inmate population or capacity." Compl ¶ 206, Appx at 88; Ex H, Appx at 500, 514.

Both the County and Securus understood and intended that, to fulfill their end of the bargain, the County would ban all in-person visits. Securus even paid to install video kiosks in the Jail lobby as part of their agreement with the County, knowing these kiosks would be used to replace in-person visits with on-site video calls.

After the contract went into effect, the County quickly began reaping financial rewards. The County increased its Securus revenues from $154,130 in 2017 to $404,752 in 2018. Compl ¶ 212, Appx at 89, 137. County employees celebrated those increases. On February 15, 2018, the Jail Administrator emailed her colleagues, "Well that is a nice increase in revenues!" The County's Accounting Manager responded, "Heck yes it is! Keeps getting bigger every month too ☺." Compl ¶ 213, Appx at 90; Ex J, Appx at 536. By 2022, Securus was paying the County nearly $500,000 in annual kickbacks. Compl ¶ 212, Appx at 89, 137.

County employees are anxious to protect the revenue generated by eliminating in-person visits. On June 30, 2021, the Jail Administrator emailed the County Finance Director, copying Sheriff King and his staff. The email referenced a newspaper article about a Louisville jail that had eliminated fees on jail phone calls. The Administrator stated, "I do think moves such as this in Louisville will sweep the nation . . . . We will have to continue to monitor closely[.]" Compl ¶ 215, Appx at 92; Ex K, Appx at 537. The Finance Director forwarded the email to the County Controller, with a warning: "This is about $400,000 in revenues if this goes away completely." Compl ¶ 216, Appx at 93; Ex L, Appx at 538.

C. The ban causes grievous and irreparable harm to Plaintiffs.

The County's ban on family visits has profound consequences. The intimacy between a

child and their parent is unparalleled. They share countless cherished moments, both spectacular and mundane. Now, Defendants' policy has caused Plaintiffs to endure months of total physical separation from the people they need the most.

Plaintiffs M.M. and Marie Bills have not been able to see or touch their father for five months.[2] M.M. is 12 years old and in seventh grade. She loves her dad. "When we can be together in person, my dad is always making funny jokes and singing even though he's not a good singer," says M.M. Ex E-2 ¶ 3, Appx at 267. M.M. struggles to communicate openly with her father now. "It's . . . hard to say so much on email," she continues. "It's better to see him in person and talk to him about my emotions more." *Id.* ¶ 6 at 268. "If I could visit my dad, I would give him a big hug." *Id.* ¶ 7.

Marie is 23 years old. "I hate that M.M. is missing [visiting our dad] right now." Ex E-3 ¶ 7, Appx at 269. "When I was young, and my dad was in prison, my grandma would drive my sister and me two hours to visit my dad in person. It was so meaningful and important to me that I got to see him, and it really helped strengthen our relationship . . . . Things would feel better if we got to see him and reassure each other through our presence together." *Id*. ¶¶ 5, 7 at 269.

Plaintiff Kathleen Tanton has been physically separated from her son for over four months. "Before Bobby was in jail, we would see each other at least twice or three times a week," Kathleen says. Compl ¶ 114, Appx at 60; Ex E-4 ¶ 4, Appx at 271. "Bobby is my everything." *Id*. ¶ 3 at 271. Being unable to visit him has added to Kathleen's sadness and fear. Last Thanksgiving, "I arrived at the jail with my daughters . . . [b]ut the call didn't work again! We were in the jail. He was in the jail. He was so close by it was painful, but not only could I not hug my Bobby, I couldn't even see or hear him on Thanksgiving day. I cried in the car[.]" Compl ¶ 59, Appx at 45; Ex E-4

[2] The facts are alleged as of the time of filing the complaint and preliminary injunction motion.

¶ 10, Appx at 271–72. Technical problems are constant. "The glitches eat up our time together," Katie explains. Sometimes, "I can see him, but the video quality is so poor his face looks like it is melting. Sometimes the phone cuts in and out, so Bobby and I keep repeating ourselves." *Id.* ¶ 9 at 271. "I would visit him every day if they let me. He's my son and I love him." *Id.* ¶ 11 at 272.

There are dire consequences to child-parent separation. Professor Julie Poehlmann, PhD, explains that children's well-being depends on their ability to maintain healthy attachments to caregivers. Compl ¶¶ 103–11, Appx at 56–59; Ex B ¶ 19, Appx at 156. Repeated and regular contact—especially physical touch—is essential to those attachments, and such physical contact remains essential as children grow older. Compl ¶¶ 95–101, 123, Appx at 54–56, 63; Ex B ¶¶ 20–26, Appx at 156–57. Children with incarcerated parents experience increased risk of delinquency, poor academic achievement, and social and emotional problems. Compl ¶¶ 105–11, Appx at 57–59; Ex B ¶¶ 20–26, Appx at 156–57. Parents with incarcerated children experience financial strain, emotional distress, and physical challenges. Compl ¶¶ 112–19, Appx at 59–62. Without opportunities for face-to-face interaction and contact, family bonds weaken and a parent and child's health and well-being suffer.

D. Banning visits harms the jail population, jail staff, and the public.

Empirical data demonstrates that in-person visits promote the safety of incarcerated persons, jail staff, and the public at large. Banning them makes jails less safe. For incarcerated people, visits are the primary avenue for developing optimism and preparing for reentry. According to Dora Schriro, a former corrections administrator with decades of experience in jails and prisons, "[i]n-person contact visits are also a highly effective means to decrease violence and other forms of misconduct in the facility." Ex D ¶ 32, Appx at 250; see also Compl ¶¶ 285–92, Appx at 110–12. Empirical data supports these professional observations. As Professor Joshua Cochran, Ph.D., observes, "[r]esearch finds a consistent, statistically significant relationship between visitation and

reduced disciplinary infractions during incarceration[,]" and visitation is particularly beneficial when it starts early in a period of incarceration. Ex C ¶¶ 16–17, Appx at 216. From this, Cochran concludes that visitation in jails "may pose particular benefits for improving behavior and other outcomes among people detained." *Id*. ¶ 18 at 216. In addition, in-person visitation "is linked to reduced likelihoods of self-harm and suicide." *Id.* ¶ 15 at 215.

In-person visits also boost staff safety and morale. As Schriro explains, "[t]hroughout my career, I have observed that the more productively engaged inmates are, the greater their confidence in their future becomes, and the better their interactions with the workforce become as well." Ex D ¶ 42, Appx at 254. Visits keep people engaged. Schriro further finds that "[i]n-person contact visits improve staff safety and job satisfaction, both of which contribute to improvements in staff recruitment and retention." *Id*. ¶ E at 254.

Finally, banning visits harms the public. Most notably, it undermines community safety. In-person visits are linked to an average 26% reduction in recidivism. Compl ¶ 295, Appx at 114; Ex C ¶ 21, Appx at 217. Additionally, people who receive visits are more likely to reestablish social and familial roles and more likely to be employed. Compl ¶ 296, Appx at 114–115; Ex C ¶¶ 27, 30, Appx at 219–20.

The evidence is clear that "more contact visits are correlated with a decrease in the severity and number of inmate-on-inmate, inmate-on-staff, and staff-on-inmate incidents of violence, as well as a decrease in acts of self-harm, uses of force, the trafficking of contraband, and revocations or recidivism after their release." Compl ¶ 286, Appx at 111; Ex D ¶ 51, Appx at 257. Conversely, "if institutions further restrict access to visitation, or shut it down altogether, . . . we would see worse outcomes in recidivism, mental health, optimism, buy-in, and so on." Ex C ¶ 31, Appx at 221.

II. Procedural History

Plaintiffs sued on March 15, 2024, and filed concurrently a Motion for Preliminary Injunction seeking an emergency order allowing children and parents to visit their loved ones. Plaintiffs submitted affidavits and expert reports with their preliminary injunction motion and incorporated those exhibits into their opposition to Defendants' motions for summary disposition.

On July 19, 2024, the Circuit Court granted the County's Motion for Summary Disposition under MCR 2.116(C)(8) and denied the preliminary injunction motion as moot. On August 14, 2024, the Circuit Court dismissed the remaining claims against the Securus Defendants in a final order. Plaintiffs timely appealed.

STANDARD OF REVIEW

The trial court issued its decision "pursuant to MCR 2.116(C)(8)." Op, Appx at 15. The "trial court must accept all factual allegations as true," and may grant such a motion only if "no factual development could possibly justify recovery." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019). A trial court's decision granting a motion for summary disposition under that rule is reviewed de novo. *Id*. at 159.

ARGUMENT

I. The ban on family visits implicates the fundamental right to family integrity.

The Michigan Constitution safeguards the fundamental right to family integrity by prohibiting government interference with the child-parent relationship unless narrowly tailored to serve a compelling interest. The Circuit Court misread Michigan law in holding, for the first time in the State's history, that "[t]here is no liberty interest or family integrity right to association in a penal institution under the Michigan Constitution." Op, Appx at 11. By preventing all in-person, face-to-face, and physical contact between parents and children, the County's blanket ban on in-person visits infringes that fundamental right.

A. There is a fundamental liberty interest in family integrity and association.

The family is the most basic building block of society. Michigan courts have long understood family relationships as fundamental to personal liberty and protected by the Michigan Constitution, including the Due Process Clause. See, e.g., *Reist v Bay Co Circuit Judge*, 396 Mich 326, 342 (1976) ("The family entity is the core element upon which modern civilization is founded.");[3] Const 1963, art 1, §§ 3, 17, 23; see also *In re Rood*, 483 Mich 73, 91 (2009) (the right is protected by article 1, § 17 of the Michigan Constitution); *In re Sanders*, 495 Mich 394, 409 (2014) (holding that the interest of children and parents in associating with each other without undue government interference is "protected by due process"). As the Michigan Supreme Court has explained, "[t]he interest of parent and child in their mutual support and society are of basic importance in our society and their relationship occupies a basic position in this society's hierarchy of values." *Reist*, 396 Mich at 341–42. "[T]he right stems from the emotional attachments that derive from the intimacy of daily association between child and parent.'" *Sanders*, 495 Mich at 409. Given its importance, courts have "zealously" guarded "the integrity of the family unit." *Reist*, 392 Mich at 342; see, e.g., *DeRose v DeRose*, 469 Mich 320, 333–34 (2003) (striking down a statute as unconstitutional because it infringed on parents' fundamental right to raise their children by not requiring deference to their preferences about who could visit the child).

This right to family integrity is reciprocal, meaning it is enjoyed by parents and children alike. *Reist*, 396 Mich at 345 ("[T]he child as well as the parent has an interest in the preservation of their relationship."); *Rood*, 483 Mich at 91 ("[P]arents and children have fundamental rights in their mutual support and society."). And the fundamental right encompasses this mutual

[3] Citations and quotations marks are omitted from parentheticals throughout this brief.

connection, regardless of age. The Supreme Court has recognized that parents "provide their children with society, companionship, nurturance and guidance long after the children themselves become parents" and that some children either never leave home or "become the devoted caretakers and companions of aged parents, whose society and companionship play a prominent role in their lives." *Berger v Weber*, 411 Mich 1, 31 (1981). This reciprocal, ageless companionship depends on the ability to touch each other and look into each other's eyes.

This fundamental liberty interest survives when a parent or child is incarcerated. See *Sanders*, 495 Mich at 420–21. In *Sanders*, a child-protection case, the Michigan Supreme Court held that a father retained a fundamental right to raise his sons despite his incarceration, *id.* at 401 because "[a]n incarcerated parent *can* exercise the constitutional right to direct the care of his or her children while incarcerated." *Id.* at 420–21. In doing so, the court "affirm[ed] that an old constitutional right," that of family integrity, "applies to *everyone*, which is the very nature of constitutional rights." *Id.* at 422. Applying *Sanders*, this Court has repeatedly recognized that incarceration does not extinguish a person's fundamental liberty interest in family integrity. See, e.g., *In re Pops*, 315 Mich App 590, 595 (2016) (holding incarceration is an insufficient basis for terminating parental rights and citing *Sanders*); *In re Searles*, No. 319879, 2014 WL 5409063, at *4 (Mich App, Oct 23, 2014) (same).

Ignoring all of this precedent, the Circuit Court broke new ground by holding that whether a "constitutionally protected fundamental right" exists *at all* depends on the "context" and that no liberty interest in family integrity exists at all once a parent or child is jailed. Op, Appx at 10; see also Op, Appx at 3 (declaring that "[i]t is undisputed" that the right to family integrity "has never been found to exist in a jail or prison setting"). No case in Michigan—or anywhere—has adopted this sweeping rule. The trial court reached its flawed outcome by misconstruing the legal

question in this case, holding that the Jail's ban on family visits does not implicate *any* interest. Properly framed, however, the issue this case raises is not whether the child-parent liberty interest *exists* if a person is jailed—it clearly does—but whether the circumstances of a parent's or child's incarceration justify the infringement on that interest that Plaintiffs challenge. The court also misconstrued the underlying caselaw, in which each court assumed that an underlying interest *did* exist and focused, appropriately, on whether the government's infringement was justified considering the specific facts.[4]

Rather than acknowledging the well-established fundamental right to family integrity and asking what curtailments of that right within the jail setting are justified by the evidence before it, the court instead improperly asked "whether a constitutional right exists to in-person contact visits." Op, Appx at 2. Framed this way, and referring to a jail with predominantly pretrial detainees as a "penal institution," the court concluded simply that such a right does not exist, and that therefore policies that cut off family ties do not require *any* constitutional scrutiny. This is akin to a court concluding that a jail can constitutionally prohibit pretrial detainees from sending any letters to journalists because people detained in jails lack an absolute right to send letters to whoever they want whenever they want—rather than acknowledging a right to communicate with other people that is rooted in the First Amendment and then considering whether a specific policy

[4] For example, in *Blank v Dep't of Corrections*, 222 Mich App 385 (1997), the Court assessed whether various restrictions on visitation – none of which eliminated in-person contact between parents and children – violated a First Amendment right to association, the right to counsel, or freedom of religion. *Id.* at 408. Likewise, in *Bazzetta v Dep't of Corrections Dir*, 231 Mich App 83 (1998), the Court assumed a liberty interest existed, even though the policy restricting some visits did not impact child-parent visits, and determined that "the appropriate inquiry is whether the regulations are reasonably related to and supportive of legitimate penological interests." *Id.* at 87–88. See also *Faler v Lenawee Co Sheriff*, 161 Mich App 222 (1987) (assuming certain underlying rights and analyzing the validity of the visitation restriction as to that right); *Block v Rutherford*, 468 US 576 (1984) (same).

restricting communication with journalists is justified by good reasons in light of less restrictive alternatives.

In *Reist*, the Michigan Supreme Court clarified the broad nature of the right to family integrity, and held that this "fundamental human relationship" is "protected" such that any government policy that "affects" it requires justification, which must be *tailored to the circumstances*. *Reist,* 396 Mich at 341–42. Instead of engaging in this analysis, the court below simply defined the liberty interest out of existence, permitting it to sidestep its duty to properly analyze whether the jail policy burdened the child-parent relationship. This is simply not how the Michigan Supreme Court examines intrusions on fundamental liberty interests. For example, in *Rushing v Wayne Co*, 436 Mich 247, 262–65 (1990), the Supreme Court first recognized that an individual has a right to privacy, and then considered whether a policy permitting male guards to observe a naked woman's body while she was on suicide watch was justified given the jail setting, or whether less restrictive alternative existed.

Plaintiffs do not ignore the jail context or argue that they should have unlimited, unfettered access to their loved ones. They argue more simply that the total ban on all in-person contact is a restriction on a constitutional right that requires justification. The question is not whether an interest exists or whether that interest is burdened by a ban on visitation. The answer to those questions is obviously yes. This Court must decide what level of scrutiny applies to that restriction, and whether the restriction withstands it.

B. Defendants' ban burdens these rights.

The Circuit Court also improperly concluded as a matter of fact that the total ban does not burden the child-parent relationship, apparently because it viewed recorded video calls as indistinguishable from in-person contact visits. This factual assumption is baseless, contradicted by Plaintiffs' allegations, and procedurally improper.

In-person contact during incarceration is essential to maintaining the child-parent bond. It is associated with more post-release child-parent contact, increased odds of child-parent residence, and increased relationship quality. Compl ¶¶ 120–26, Appx at 62–64; Ex B ¶ 42, Appx at 163. It strengthens child-parent relationships far more than correspondence by mail or by phone—and is more beneficial than visits with barriers that prevent family members from holding hands, hugging, or cradling a newborn. *Id.* Children who maintain better relationships with their incarcerated parents subsequently exhibit less depression and loneliness and improved feelings of purpose. *Id.* ¶ 44 at 163–64. More frequent child-parent visits are also beneficial for incarcerated parents, resulting in improved mental health, fewer behavioral infractions, more optimal co-parenting, and better post-incarceration adjustment. Ex D ¶¶ 29–36, Appx at 249–52; see also Compl ¶¶ 120–26 Appx at 62–64.

Digital calls do not meet a child's elemental need to be held, or a parent's need to look their child in the eyes. Unlike in-person visits, video calls are low quality, glitch-ridden, and non-private. Compl ¶¶ 52–60, 139–45, Appx at 43–45, 68–70; Ex B ¶¶ 51–52, Appx at 166; Ex E-4 ¶ 12, Appx at 272 ("I try to make eye contact, but I can't tell if [Bobby] is seeing me. Knowing he is close but being unable to physically see him, I get anxiety."). And they are not even an option for many. Marie Bills often has been unable to afford the calls which are "not even close to being the same as seeing each other in person." Compl ¶¶ 261–62, Appx at 104; Ex E-3 ¶¶ 4–5, Appx at 269.

The total ban on contact visits also results in months of separation that would not occur if in-person visits were possible. For example, at the time of filing, M.M. and Marie Bills had been unable to see or touch their father for five months. Plaintiff Kathleen Tanton had been separated from her son for over four months. Many class members endure far longer periods of isolation from family.

The Circuit Court made no mention of any of these allegations or evidence. Instead, the court adopted wholesale the County's unsupported factual claim that on-site video calls—requiring loved ones to come in person to the Jail to talk with their jailed parent or child on a tiny video screen in the lobby—constitute "visits," and that the County's policy thus does not ban visits at all. See Op, Appx at 2 (finding that video calls constitute "visits"; denying that there is a visitation ban because people can do video calls; and determining that "families are still entitled to the same number of visits . . . as existed under the old policy"). Sitting at a video kiosk and staring at a grainy screen, which often fails or cuts out, Compl ¶¶ 52–54, 58, Appx at 43–44, does not constitute a "visit" and does not confer the critical benefits of in-person child-parent contact.

The Circuit Court's factual finding that video calls and physical contact visits are the same is impermissible at this stage. Plaintiffs' allegations show that they are not, and Plaintiffs will prove this with actual evidence at the appropriate time.[5] "Intimate association . . . implies an expectation of access of one person to another particular person's physical presence, some opportunity for face-to-face encounter."[6] Such access is now completely unavailable at the Jail.

II. Defendants' ban violates the Michigan Constitution under any legal standard.

This case presents an issue of first impression: what level of scrutiny applies to a jail's decision to permanently ban family visits for the purpose of making a profit. No court *anywhere* has sanctioned such a policy. The trial court assumed that the deferential standard from *Turner v Safley*, 482 US 78 (1987) must apply, but the Michigan Supreme Court has not adopted or consistently applied a particular test under the Michigan Constitution for examining jail policies that infringe on fundamental rights of family integrity—much less on the rights of individuals who

[5] In fact, the evidence Plaintiffs already submitted at the preliminary injunction stage creates a genuine dispute about this material fact.

[6] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale LJ 624, 630 (1980).

are not incarcerated. The highly deferential *Turner* test did not exist when the Michigan Constitution was ratified in 1963. It was developed decades later to reduce federal judicial scrutiny when prison officials adopted policies within their specific areas of expertise. This Court is not bound to apply *Turner* here, nor should it. For reasons of history, legal precedent, policy, and the specific factual allegations made here, the Court should apply heightened scrutiny to the total ban on family visits. However, the ban fails any potentially applicable legal standard.

When addressing a novel legal question under the Michigan Constitution, courts conduct a "searching examination to discover what law the people have made." *Sitz v Dep't of State Police*, 443 Mich 744, 759 (1993). It is not sufficient for Michigan courts to simply import federal court standards, "even where the language [of the constitutional provision] is identical." *People v Goldston*, 470 Mich 523, 534 (2004). Indeed, Michigan courts "need not, and cannot, defer to the United States Supreme Court in giving meaning" to the Michigan Constitution. *People v Tanner*, 496 Mich 199, 221–22 (2014). And while the Michigan Supreme Court is the final arbiter of the meaning of the Michigan Constitution, the "basic responsibility . . . to conduct a searching examination" extends equally to the Michigan Courts of Appeal. *People v Antkoviak*, 242 Mich App 424, 439 (2000).

A. The infringement of a fundamental liberty interest requires heightened scrutiny.

1. The ban must be a "close fit" to a substantial governmental interest.

Under the Michigan Constitution, a government policy that burdens a fundamental interest may be upheld only if the policy is the least restrictive means of furthering a compelling state interest. See *Rose v Stokely*, 258 Mich App 283, 299–300 (2003). This "least restrictive means" test presumes that a government infringement on fundamental rights is invalid unless it is "precisely tailored to serve a compelling governmental interest." *Doe v Dep't of Social Servs,* 439 Mich 650, 662 (1992). If the state cannot meet its burden to prove both elements, the challenged

policy is unconstitutional. This analysis applies to fundamental rights generally because courts have recognized that the government must have very good reasons to infringe on the most precious liberty interests, and may only do so without unnecessary additional damage to individual liberty. See *People v Kevorkian*, 447 Mich 436, 542 (1994) (LEVIN, J., concurring in part) ("Substantive due process cases invariably address those rights that are considered so fundamental that they cannot be unduly burdened by the state.").

When a policy implicates a fundamental right, the existence of alternative means to achieve a government interest that are less burdensome on the right means that the policy is not necessary and, thus, is not constitutional. Put another way, "even assuming such compelling state interest, the regulation cannot stand if any less drastic way of satisfying its intended purpose appears." *People v Smith*, 75 Mich App 64, 67 (1977). Courts look to these alternatives to understand whether a given infringement is justified. For instance, this Court has previously held a loitering ordinance that restricted the fundamental right to movement was unconstitutional, because there were "less drastic" means of "curtailing drug traffic." *Id.* at 68–69.

Michigan courts apply this protective standard when the government seeks to interfere with the fundamental child-parent relationship. See, e.g., *In re AH*, 245 Mich App 77, 83–84 (2001) (upholding a statute that infringed the fundamental right to family integrity only after finding it was "precisely tailored" to achieve the compelling interest in protecting children "from unreasonable risks of harm"). For example, in reviewing a policy that restricted the right of parents to make reasonable educational choices, the Michigan Supreme Court held that the policy "can be justified only by a compelling state interest and by means necessary to achieve the objective." *In re Proposal C*, 384 Mich 390, 431 (1971).

The Michigan Supreme Court has not announced a separate standard for reviewing

infringements on fundamental rights that occur as part of jail policies. Given Michigan courts' careful approach to protecting fundamental rights of children and parents, there is no reason in Michigan law, history, or the available evidence to carve out an exception to the Michigan Constitution's fundamental-rights analysis for jail policies.[7] To be sure, when *applying* this standard in the jail setting, certain restrictions on the child-parent relationship will inevitably be justified as necessary. But the mere fact that some policies infringing the fundamental right to family integrity could withstand a constitutional challenge does not absolve the government from demonstrating that the infringement of such an important right—and one held by people who are *not* detained and whose loved ones are presumed innocent—is necessary to serve a compelling government interest. Put differently, while a county government may have reasons to jail a parent—whether for lack of ability to pay cash bond, for administrative pretrial detention, or even as punishment for an offense that does not warrant state prison transfer—that does not mean that the government can, once the person is detained, unduly burden the fundamental rights of the person's children *in ways that do not serve compelling interests*. Particularly here, where banning child-parent contact *undermines* the government's interests in security and order—and has devastating consequences for the child-parent relationship—requiring a strong connection between an important government interest and the burden on the right at hand is paramount. Without such scrutiny, the court risks sanctioning a policy that infringes the most sacred rights

[7] There is nothing special about jails that requires a lower standard of judicial review. For example, federal courts have had no difficulty administering the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which essentially requires application of strict scrutiny to any jail or prison policy that substantially burdens the religious exercise of an incarcerated person. 42 USC § 2000cc-1(a). Experience with RLUIPA demonstrates that such a test—requiring that a policy infringing religious freedom be narrowly tailored to a compelling government interest—can be applied in jails to protect expressive freedoms "without compromising prison security, public safety, or the constitutional rights of other prisoners." *Cutter v Wilkinson*, 544 US 709, 725 (2005).

when the government could have accomplished any legitimate goals without doing so.

By way of example, the test for federal constitutional violations in the prison setting prior to *Turner*, found in *Procunier v Martinez*, 416 US 396 (1974), required that rules infringing on the rights of non-incarcerated people "must be no greater than is necessary or essential" to further one of the "substantial governmental interests of security, order, and rehabilitation." *Id.* at 413, overruled in part by *Thornburgh v Abbott*, 490 US 401 (1989). This standard called for a balancing of interests and "a close fit between the challenged regulation and the interest it purport[s] to serve" while offering prisons "some latitude." *Abbott*, 490 US at 409, 411. The standard also distinguishes between generalized and particularized restrictions, noting that if a restriction "sw[eeps] too broadly" and "require[s] a lesser degree of case-by-case discretion" by burdening everyone's rights across the board, there must be "a closer fit" found between policy and penological objective. *Id.* at 412.

The Michigan Supreme Court's approach to another case involving a fundamental right in the jail setting that jail authorities claimed was simply incompatible with incarceration is instructive. In *Rushing v Wayne County*, 436 Mich 247 (1990), the plaintiff alleged her fundamental liberty interest in bodily privacy was violated under a policy that forced her to be completely naked under the observation of male guards while on suicide watch. *Id.* at 250. The Court did not look to *Turner* and instead applied something akin to the *Martinez* test, carefully weighing the fundamental interest at stake and focusing on whether there were alternative options available for pursuing the jail's goals.[8] The Court first considered the importance of the fundamental liberty interest in privacy. *Id.* at 262–63. It then recognized that such a

[8] *Rushing* also involved the deliberate indifference standard for municipal liability, 436 Mich at 266–67, but the relevant parts here are where the Court assesses whether there was an underlying constitutional violation, *id.* at 262–66, 267.

"constitutionally protected" right could not be infringed upon unless the state action "was *reasonably necessary in maintaining [plaintiff's] otherwise legal detention*." *Id*. at 265 (emphasis added). The defendant county argued that the plaintiff's exposure was reasonably necessary to comply with her court-ordered suicide prevention plan. *Id.* at 265–66. Applying this "reasonably necessary" standard, the Supreme Court held that a directed verdict in favor of defendants in the lower court was improper because "[t]he jury could have concluded" there were less restrictive alternatives available to meet the jail's interests, such as "provid[ing] naked detainees with protective covering or [] hous[ing] them in an isolated area." *Id.* at 267. Thus it found that the policy was not "reasonably necessary" to advance the government's penal interests.

The Court's analysis in *Rushing* is consistent with the "close fit" scrutiny implemented in *Martinez*, which asks whether a jail policy that burdens a fundamental right is necessary to further the specific government interests implicated by detention. *Martinez*, 416 US at 413. *Rushing* illustrates that when less restrictive alternatives exist, a policy infringing a fundamental right is not necessary. Moreover, *Rushing* demonstrates that the Michigan Supreme Court will not blindly defer to jail administrators' purported justifications for extreme policies that impinge on fundamental liberty interests—it relies on the adversarial process to test facts that call those purported justifications into question.

2. *Defendants' ban on visits is neither narrowly tailored nor a "close fit," and fails any conceivable balancing test.*

A complete ban on in-person family visits by children and parents at a jail fails any standard of scrutiny that requires balancing the interests at stake. Prohibiting all in-person contact between parents and children is not necessary to maintain the detention of those inside the jail. See *Rushing*, 436 Mich at 265. Nor is it "precisely tailored" to serve some other "compelling governmental interest." *Doe,* 439 Mich at 662.

First, preventing children and parents from seeing their jailed loved ones is not itself a governmental interest. Nor is profit. In *Champion v Sec'y of State*, 281 Mich App 307 (2008), this Court observed that "[i]t would indeed be troubling to conclude that Michigan can, without state constitutional ramifications, effectively burden a citizen's free exercise of religion, or any constitutional right, if sufficient monies are thrown in its direction." *Id.* at 318 n 6. The Court held that "a desire for federal funds is not a compelling interest." *Id.*

While public safety and jail security are valid interests, a total ban on family visits does not further them. Instead, the blanket prohibition on visits undermines these interests by increasing the likelihood of violence in the Jail, see Compl ¶¶ 286–89, Appx at 111; Ex C ¶¶ 16–19, Appx at 216–17; harming staff safety, see Compl ¶¶ 286–89, Appx at 111; Ex D ¶¶ 42–45, Appx at 254–55; and making it more likely that the people inside the Jail will be rearrested for new offenses following their release, see Compl ¶¶ 292–95, Appx at 112–114; Ex C ¶¶ 20–24, Appx at 217–18. Visits buoy the psychological and social health of incarcerated people; decrease misconduct, violence, and disciplinary action; and increase safety for both jail staff and people in their custody. Compl ¶¶ 278–89, Appx at 109–11. Nor is visitation a significant source of contraband, as baselessly claimed by Defendants. *Id.* ¶ 286 at 111; Ex D ¶¶ 37–41, Appx at 252–53.

Second, even if the evidence showed that restricting visits could improve security, a total, undifferentiated, and permanent ban is not a "close fit" or "necessary" to attain that goal—which is why most corrections facilities do not enforce such a ban, and why St. Clair County itself permitted visits without significant or unmanageable problems for decades. Even without full discovery, Plaintiffs presented numerous reasonable alternatives that could further jail security without taking visits away from everyone. For example, alternative mechanisms like searches, scanners, individualized pat-downs, requiring personal belongings to be locked outside the visiting

area, and supervision are widely used and recommended alternatives that readily address those concerns. Ex D ¶¶ 24–25, 37, Appx at 247–48, 252. And visits to specific detained individuals can be limited based on an "individualized determination" that visits will cause security problems. See Ex D ¶¶ 24–25, Appx at 247–48. County jails and state prisons—including every prison in Michigan—implement these alternatives every day. In fact, Michigan prisons are *required* to permit children and parents to visit each other in person. Compl ¶¶ 147–51, Appx at 70–71.

Those federal courts that have grappled with the issue have held that blanket bans on family visits violate the US Constitution. Several federal courts, including in Michigan, have struck down policies that ban all contact visits—but still permit partitioned visits—because the government failed to show they were narrowly tailored. See, e.g., *O'Bryan v Saginaw Co, Mich*, 437 F Supp 582, 598 (ED Mich, 1977) (jail visit ban unconstitutional because "[a]ny infringement on [the family relationship] [is] forbidden unless such infringement is necessitated by a compelling state interest");[9] *Rhem v Malcolm*, 371 F Supp 594, 625 (SDNY), supplemented, 377 F Supp 995 (SDNY, 1974) , aff'd 507 F2d 333 (CA 2, 1974) ("[T]he doctrine of least necessary restraint requires, as a matter of due process, that jail visiting conditions be curbed only to the extent needed to assure institutional security and administrative manageability."). In recent years, even the federal courts applying the more deferential *Turner* standard have rejected blanket bans. See, e.g., *Manning*, 13 F4th at 708 (holding that "prison officials who permanently or arbitrarily deny an inmate visits with family members" violate the Constitution when they do not engage in

[9] *O'Bryan v Saginaw Co, Mich*, 437 F Supp 582 (ED Mich, 1977) was reconsidered in light of a new deferential standard in *Bell v Wolfish*, 441 US 520 (1979), even though *Bell* did not consider fundamental child-parent interests. 529 F Supp 206 (ED Mich, 1981). Plaintiffs do not suggest *O'Bryan* or any federal case is binding authority. Rather, given the issue of first impression in this Court, it is a persuasive example of the analysis that should apply to violations of the Michigan Constitution that implicate fundamental rights, like a ban on family visits.

individualized balancing of the interests at stake); *Easterling*, 880 F3d at 323 (same). Given the severity of a total ban on visits between parents and children and the availability of alternatives, the prohibition on all family visits is not necessary to further a compelling state interest.

B. The trial court erred in applying the federal standard in *Turner*.

The federal test from *Turner v Safley*, 482 US 78 (1987), entails a deferential review of prison policies that infringe on constitutional rights, finding "[a] regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.

The Circuit Court erred in concluding that it should apply *Turner*. First, as explained above, the right to family integrity occupies a critical place in the Michigan Constitution such that the generic *Turner* standard is inconsistent with the specific protections afforded the child-parent relationship in Michigan, particularly for claims implicating the rights of non-incarcerated individuals. Second, even if this Court decides *Turner* should apply generally to claims under the Michigan Constitution, that would not sanction the total ban enacted *for the purposes of making money*, because generating revenue is not a legitimate penological interest and the policy is an exaggerated response. Third, considering only the pleadings—or viewing the record in the light most favorable to Plaintiffs—requires finding that the ban does not advance any legitimate penological interest, such that summary disposition was inappropriate.

1. Turner *is inconsistent with longstanding protections in the Michigan Constitution.*

Federal courts have gradually eroded constitutional protections in prisons. Michigan is not required to follow this path and should reject it. Fifty years ago, federal courts applied *Martinez*'s "close fit" standard to balance whether governmental interests in safety and security in prisons required specific infringements on the basic rights of those impacted by them, including those outside the prisons. Such a standard did not require courts to become experts in jail administration, but only to perform their duty to maintain a floor of constitutional protections above which prison

officials can exercise their expertise. Upholding individual constitutional protections essential to our society's conception of liberty is a judicial responsibility, and jail administrators lack the expertise of courts to recognize and uphold fundamental rights.

Political shifts in the US Supreme Court triggered an unraveling of constitutional protections inside jails and prisons. In 1986, the Rehnquist Court was formed, and Justice Antonin Scalia took his seat on the Court. The following year, in a 5–4 decision in *Turner v Safley*, the Court broke from precedent to establish a more deferential standard of review for policies that infringe the constitutional rights of people incarcerated in prison post-conviction. Though *Turner* set out to "formulate a standard . . . that is responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to protect constitutional rights," *Turner*, 482 US at 85, the standard failed to create the balance for which it was designed in practice.

In the decades since, some federal trial courts have turned the *Turner* standard into a rubber stamp. Four Justices in the *Turner* dissent-in-part had warned of such a future, urging that

> [a]pplication of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication.

Turner, 482 US at 100–01 (STEVENS, J., concurring in part and dissenting in part). These Justices worried that lower courts might defer to mere speculation by correctional officials and thereby permit draconian policies, without requiring some showing in reality that the policies were necessary to ensure safety. *Id.* at 100–01, 113. Over the past decades of *Turner*'s application, the dissenting Justices' fears have materialized. While some lower federal courts have given deference while still assessing for constitutional violations, other lower federal courts have implemented

Turner to uphold prison policies no matter how arbitrary or severe. See, e.g., *Green v Roberts*, No. 2:06-CV-667-WKW, 2008 WL 4767471, at *8 (MD Ala, Oct. 29, 2008) (approving issuance of red jumpsuits to publicly identify inmates with AIDS); *Willson v Buss*, 370 F Supp 2d 782, 791 (ND Ind, 2005) (approving a ban on general interest news magazines aimed at gay community "to keep out of the prison anything that would lead a prisoner to believe another prisoner was homosexual"); *Covino v Patrissi*, 967 F2d 73, 75 (CA 2, 1992) (approving random, nightly, visual body-cavity searches of pretrial detainees). Its vague standard invites inconsistent application.

The *Turner* standard is inconsistent with Michigan's constitutional history, which affords Michigan residents more protection than the federal constitution in many areas of the law and always requires good reasons for the deprivation of important rights. *People v Bullock*, 440 Mich 15, 28, n 9 (1992).[10] And, in line with the Michigan courts' "ultimate responsibility for determining a question of state law," *Antkoviak*, 242 Mich App at 438, Michigan courts "[have], on occasion, led rather than followed the United States Supreme Court." *Bullock*, 440 Mich at 28, n 9 (describing how the Michigan Supreme Court "outlawed racial segregation in schools" in 1868, eighty-five years before the US Supreme Court did so in *Brown v Board of Ed,* 347 US 483 (1954)). Michigan courts should not abdicate their judicial duty to safeguard basic constitutional guarantees.

[10] Compare, e.g., *Delta Charter Twp. v Dinolfo*, 419 Mich 253 (1984) (granting the right of unrelated persons to share a house in an area zoned for "single-family residences"), with *Belle Terre v Boraas*, 416 US 1 (1974) (upholding zoning ordinance prohibiting unrelated persons from sharing single-family residences); *People v Jackson,* 391 Mich 323 (1974) (granting the right to counsel at photographic displays), with *United States v Ash*, 413 US 300 (1973) (no Sixth Amendment right to counsel at photographic display); *People v. Turner*, 390 Mich 7 (1973) (adopting an objective test for criminal entrapment), with *United States v. Russell*, 411 US 423 (1973) (upholding a subjective standard for criminal entrapment).

When the Michigan Constitution was ratified in 1963, *Turner* did not exist. In choosing language similar to the federal constitution, the framers of the Michigan Constitution would have contemplated greater protections against infringements of the rights of individuals impacted by jail and prison policies, in line with federal law at that time. Many federal courts then recognized that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." *Coffin v Reichard*, 143 F2d 443, 443 (CA 6 1944) (per curiam); see also *Martinez*, 416 US at 428 (DOUGLAS, J, concurring) ("Prisoners are still 'persons' entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process."). In fact, Michigan's Constitution was ratified at a high-water moment in federal court protection of rights within jails and prisons. In 1961, in its sweeping decision *Monroe v Pape*, 365 US 167 (1961), the Supreme Court gave prisoner plaintiffs a federal cause of action for challenging constitutional violations via 42 USC § 1983. Then in 1964, the Court held there was no categorical bar to constitutional lawsuits by incarcerated people in *Cooper v Pate*, 378 US 546 (1964) (per curiam). See generally Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 Cornell L Rev 357, 368 (2018). In addition, the framers of the Michigan Constitution would have understood that the rights of parents and children to family integrity were deemed "essential to the orderly pursuit of happiness by free men," *Meyer v Nebraska*, 262 US 390, 399 (1923), among the "basic civil rights of man," *Skinner v Oklahoma*, 316 US 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v Anderson*, 345 US 528, 533 (1953). Based on prevailing federal law at that time, the framers of the Michigan Constitution would have expected Michigan courts to apply scrutiny to government action—including jail policies—that interfered with fundamental constitutional rights.

2. This Court is not bound to apply Turner.

Despite the lack of support in precedent, the Circuit Court apparently felt obligated to adopt the federal test articulated in *Turner*. See Op, Appx at 13 ("[T]he *Turner* standard is widely recognized in Michigan and should be applied here."). The Michigan Supreme Court has never cited *Turner*, and neither it nor any Michigan court has considered whether *Turner* should control claims raising fundamental child-parent rights under the Michigan Constitution or policies enacted to generating revenue.

The case law cited by the Circuit Court, Op, Appx at 11–13, is cursory and neither dispositive nor persuasive. Each case dealt with different, lesser visitation restrictions that do not permanently ban all in-person contact between parents and children, and they involved different legal claims than the fundamental right to the child-parent relationship. Moreover, none evaluate a ban (or restrictions, for that matter) implemented for the goal of financial profit, as alleged here. While, taken together, the cases indicate a deference by courts to various *restrictions* on visitation put in place for valid security and order purposes, none sanctions a *permanent ban on all visits* between parents and children. Most critically, none of the cases engages in a "searching examination" of what the law is under the Michigan Constitution. See *Sitz*, 443 Mich at 759. Individually or collectively, the cases do not bind this Court to apply *Turner* under Michigan law either generally to prison condition cases or to the specific claims here.

The first case, *Bazzetta v Dep't of Corrections Dir*, 231 Mich App 83 (1998), involved a policy that required visitors to be on an approved-visitor list. The list could include immediate family members, and the policy did not prohibit contact between parents and their children. The suit alleged violations of rights of equal protection and integrity in family relationships. *Bazzetta* was first heard by the Sixth Circuit for a ruling on the federal constitutional claims, and then a panel of the Michigan Court of Appeals considered the state claims. While the panel recognized

that it was "not bound by the Sixth Circuit Court of Appeals' application of [the reasonableness] standard" from *Turner*, the Court deemed it "persuasive" given that "plaintiffs have offered no compelling reason to depart from it." 231 Mich App at 88. The question squarely presented here is: are there persuasive reasons to adopt the *Turner* test in this context?

The Circuit Court concluded that *Bazzetta* "adopted" *Turner*, Op, Appx at 13, but the court in *Bazzetta* only assumed without deciding to apply *Turner*. *Bazzetta* did not conduct the "searching" inquiry required by *Antkoviak*, 242 Mich App at 438, 439, and it does not control in a case in which Plaintiffs specifically *do* provide reasons to depart from *Turner*. Unlike the plaintiffs in *Bazzetta*, Plaintiffs in this case offer myriad compelling reasons why *Turner* should not apply generally and here specifically. First, and most obviously, *Bazzetta* did not involve complete separation of children and parents, and it is inconsistent with Michigan precedent on the child-parent relationship, as well as the specific standard applied by the Michigan Supreme Court in *Rushing* to jail policies that implicate fundamental liberty interests. *Bazzetta* had no occasion to consider the standard for total deprivations of the rights at issue here, because the case challenged the Michigan Department of Corrections' policy, which notably requires that all Michigan prisons permit convicted prisoners to have in-person visits with intimate family. This Court could refuse to apply *Turner* here without deciding whether it is an appropriate test generally for evaluating jail policies that do not implicate fundamental rights.

Moreover, Plaintiffs have explained in this case several other reasons not to import *Turner,* including that: *Turner* is inconsistent with Michigan's constitutional history requiring good reasons for the deprivation of vital liberty interests; some lower federal court interpretations of *Turner*'s vague test have resulted in inconsistency, the weakening of constitutional rights, and the sanctioning of worsening prison conditions; and the Court need not decide the question of whether

Turner applies generally because this case involves a policy enacted for money, and pecuniary motives are an inappropriate basis on which to invoke *Turner*'s deference to jail security expertise.

Likewise, neither *Doe v Michigan Department of Corrections*, 236 Mich App 801 (1999), opinion vacated and superseded sub nom *Doe v Department of Corrections*, 240 Mich App 199 (2000), nor *Cain v Department of Corrections*, 254 Mich App 600 (2002), both of which applied *Turner*, conducted even a bare analysis, made any holding, or stated any reason why *Turner* was the proper test. Neither case involved child-parent rights, family integrity, or the rights of non-incarcerated people. Both involved convicted prisoners, not jail settings.

Similarly, *Faler v Lenawee Co Sheriff*, 161 Mich App 222 (1987), and *Blank v Dep't of Corrections*, 222 Mich App 385 (1997), do not bind this Court to apply *Turner*. Neither case cited *Turner* and neither case considered *state* constitutional violations. Like *Bazzetta, Faler* and *Blank* involved restrictions on visitation for plaintiffs convicted of felonies, and neither involved a *total, permanent ban* on visits. See *Faler*, 161 Mich App at 228 ("The restriction of a prisoner's [First Amendment] associational right is the result of a proceeding conducted according to the strictest of due process: a criminal trial.").

Faler is the only case cited by the Circuit Court to even temporarily prevent a child-parent visit. In *Faler*, which is not a model of clarity and contains only cursory analysis of *federal* law, a man convicted of a felony challenged a two-month, temporary inability to see his daughter. *Id.* at 225. But the policy he challenged permitted visits if he made a specific request to the jail's leadership, and he conceded that he had not made such a request. *Id.* Most importantly, the prisoner did not raise the legal claims made here—*Faler* considered only a federal First Amendment right of *ideological* association and an equal protection claim. He did not raise the fundamental child-parent relationship under Michigan law. As to the federal constitution, *Faler*

ultimately held only that those rights did not include a right to visitation "without restrictions." *Id.* at 229–30.[11] Notably, the panel emphasized the "temporary" nature of the policy when considering its constitutionality. *Id.* The Court's holding is unremarkable because imprisonment entails *some* restrictions on when people can see loved ones, and even the US Supreme Court has noted the fundamental difference between some restrictions and complete bans. See *Overton v Bazzetta*, 539 US 126, 137 (2003) ("If the withdrawal of all visitation privileges were permanent . . . or if it were applied in an arbitrary manner . . . the case would present different considerations.").

Blank turned on the Administrative Procedures Act and arguments of improper delegation. 222 Mich App at 389. Insofar as *Blank* briefly addressed the federal constitution, it addressed claims by sentenced prisoners, asserting federal rights, against a policy that *allowed* visits between parents and children. *Id.* at 408.

Finally, the federal case *Block v Rutherford*, 468 US 576 (1984), examined a policy that permitted "unmonitored" family and friend visits for twelve hours every day through "clear glass panels separat[ing] the inmates from the visitors," but prohibited visits without glass partitions. *Block*, 468 US at 578 n 1. This policy allowed for copious in-person visits between families, where they could look each other in the eyes and speak intimately face-to-face in private. *Block* does not resolve the question presented here, where a policy eliminates all partitioned, non-contact visits as well as contact visits, leaving no avenue for parents and children to physically see, speak privately, or be present together whatsoever. Although *Block* applied extreme deference to jail administrators' 12-hour unlimited visiting policy under federal law, *Block*

[11] Additionally, because it was decided before November 1, 1990, *Faler* is not binding precedent. MCR 7.215(J)(1).

specifically does so based on a robust trial record demonstrating that the reason for the policy was security. *Id.* at 588. Most importantly, its reasoning does not apply to claims under Michigan law, and its factual record developed at trial is materially different from the facts alleged here on the key question of the importance of human contact.[12]

One of the reasons for the lack of law directly on point is the relatively unprecedented nature of the recent elimination of in-person visits to generate revenue from expensive phone and video calls. These kinds of contracts, with their accompanying visitation bans in pursuit of profit, have emerged only in recent years. Courts simply have not had occasion to consider blanket policies that remove all in-person visits for everyone, let alone with allegations that such a policy was pursued for financial gain, harms the security of the facility, and presents catastrophic harm to some of our society's most important constitutionally protected interests based on decades of research. To the extent this case is breaking new ground, it does so in response to new policies that our legal system has never confronted before.

3. Turner *deference does not apply to a policy adopted primarily to make money.*

Even if the Court concludes *Turner* generally should be the test in Michigan for evaluating the constitutionality of prison or jail regulations—and further that *Turner* should apply to policies governing fundamental rights and to jail visits between parents and children—*Turner* deference does not apply where a policy is not promulgated based on security expertise, but rather to turn a profit. Federal courts are clear about their rationale for using a deferential standard of review: the administration of penal institutions includes making "judgments regarding prison security" that

[12] One of the factual questions on remand when applying the correct legal standard will be to examine how important contact is, weighing the last forty years of evidence that contact is an essential part of the liberty interest at stake, in particular for the attachment, development, and wellbeing of young children impacted by the policy. Compl ¶¶ 94–126, Appx at 54–64; Ex B Appx at ¶¶ 20–34; 156–60.

"are peculiarly within the province and professional expertise of corrections officials." *Turner*, 482 US at 86. *Turner* extends deference to jail administrators only when they exercise their institutional expertise in adopting and enforcing a policy for "legitimate penological interests:" deterrence of crime, rehabilitation of prisoners, and security. *Pell v Procunier*, 417 US 817, 822–23 (1974). In the context of jails, rather than prisons, those penological interests are substantially reduced. See *Benjamin v Fraser*, 264 F3d 175, 187 n 10 (CA 2, 2001) ("Although some of the concerns of pretrial detention, especially protection against further criminal conduct, overlap with the concerns of penology, there are important differences."); *Demery v Arpaio*, 378 F3d 1020, 1028 (CA 9, 2004) (*Turner* does not apply to claims involving pretrial detainees).

But here the policy at issue was not instituted for reasons of security. It was designed for money. Therefore, deference to the expertise of jail administrators is not implicated. Generating revenue is not a recognized governmental interest, let alone a legitimate *penological* interest for jail policies that infringe fundamental rights. See *Champion*, 281 Mich App at 318 n 6 ("[A] desire for federal funds is not a compelling interest."). In their complaint, Plaintiffs alleged that the total ban was negotiated to generate money for Defendants. Compl ¶¶ 194–222, Appx at 85–95. The contract itself and relevant procurement documents make this clear. *Id.* at 87–89. And Plaintiffs included other relevant documents showing that revenue was a primary driver of the decision to implement the policy. For example, internal emails showed Defendants' representatives bragging about the increase in revenues resulting from the change in policy. See *supra* Part I.B.[13]

[13] Plaintiffs well-pleaded facts are to be taken as true on a motion for summary judgment as granted by the Circuit Court under MCR 2.116(C)(8). Defendants attempted to rebut those allegations through the self-serving Olejnik Affidavit, which purported to offer different reasons for the policy. The Olejnik Affidavit, however, did not dispel that money was the primary factor. In fact, the Olejnik Affidavit conceded that one of the reasons for the change in the policy was that "[t]he financial components . . . were favorable to the County." Olejnik Aff, Appx at 619.

To the extent Defendants dispute that the primary reason for their policy is generating revenue notwithstanding the structure of their contract, the timing of the ban, the lack of other evidence warranting it, and their own admissions, this is a disputed issue of material fact for a factfinder to resolve after the development of a full record. But as a matter of law, Plaintiffs cannot find a single court case applying *Turner*'s deference to a policy promulgated primarily to generate revenue.

Ultimately, what test and level of deference applies to review jail or prison regulations will not dictate the outcome here. The Court need not reach the question of whether *Turner* should be the *general* test either for jail or prison regulations affecting incarcerated people. It could determine that *Turner* does not apply to cases narrowly involving the fundamental child-parent relationship or to cases in which the basis for the policy is to generate revenue. But even if *Turner* applies, Defendants' policy fails that deferential review.

C. Even if *Turner* applies, summary disposition was improper.

Even if the Court decides that *Turner*'s test should apply 1) to Michigan Constitutional claims generally, 2) to the deprivation of fundamental family integrity rights including those of non-incarcerated people, 3) in jails where pretrial individuals are detained, and 4) where the primary motivation for the policy is making money, Defendants' complete ban on family visits fails *Turner*. Every federal court to consider a total ban under *Turner* has indicated that such a policy would be unconstitutional. Summary disposition was also improper because *Turner*'s fact-intensive inquiry relies on questions of disputed fact that must be tested in discovery and presented to a neutral factfinder.

In *Turner*, the Supreme Court established that a prison regulation is invalid if it is not "reasonably related to legitimate penological interests," *id.* at 89, and instituted a four-factor test: (1) There must be "a valid, rational connection between the prison regulation and the legitimate

governmental interest" that is not "so remote as to render the policy arbitrary or irrational," *id.* at 89–90. If the connection is too remote, "the regulation fails, irrespective of whether the other factors tilt in its favor." *Shaw v Murphy*, 532 US 223, 229–30 (2001); (2) "whether there are alternative means of exercising the [asserted constitutional] right" available. *Turner*, 482 US at 90; (3) the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.*; and (4)"the absence of ready alternatives," which is "evidence of the reasonableness of a prison regulation." *Id.* Conversely, the availability of reasonable and less intrusive alternatives "may be evidence that the regulation is not reasonable" and is instead "an exaggerated response to prison concerns." *Id.*

Turner itself analyzed two prison regulations: a prohibition on certain "inmate-to-inmate correspondence" and a ban on prisoner marriage unless the prison found "compelling reasons." *Id.* at 82, 91. After a trial and based on an extensively developed factual record, *Turner* upheld the mail regulation but struck down the ban on prisoner marriage. Prison officials attempted to justify the marriage ban on security and rehabilitation grounds. *Id.* at 97. Applying its four-factor test, the Court noted that other policies short of banning marriages could satisfy the security concerns, *id.* at 98; that allowing people inside the prison to marry people outside the prison would not have a "ripple effect" on security that might "justif[y] a broad restriction on . . . rights," *id.*; and, finally, that the ban's purported rehabilitative goal was unsupported by evidence, *id.* at 99. The ban was, therefore, an "exaggerated response" to the prison's stated concerns and unlawful. *Id.* at 98–99.

1. Defendants' ban on visits fails Turner.

Defendants' total ban on all in-person child-parent visits fails all four *Turner* factors.

First, the ban is not reasonably related to a legitimate penological interest. The ban was not instituted for a legitimate interest like jail security. Instead, Defendants adopted the ban to generate revenue from kickbacks provided by Securus. Compl ¶¶ 194–222, Appx at 85–95.

Making money is not a penological interest. Plaintiffs have alleged in detail with specific factual allegations that the ban *undermines* jail security and administration. *Id.* ¶¶ 277–302 at 109–17. Those allegations must be taken as true at this stage.

The lower court improperly assumed that the ban furthered "the legitimate governmental interest of greater supervision of visitations in general, an easier visitation process for both visitors and jail staff and the elimination of the risk visitors can pass contraband during visitation." Op, Appx at 13. This was an egregious error of procedure. Plaintiffs' allegations entirely contradict these findings. Not only was it improper to ignore the allegations and rely instead on contested assertions by Defendants, but the preliminary evidentiary record assembled for the purposes of Plaintiffs' motion for preliminary injunction contains overwhelming evidence that the total ban does not further these purported interests. As to contraband, banning all visits does not advance the goal of reducing contraband. See, e.g., Compl ¶ 286, Appx at 111; Ex D ¶ 41, Appx at 253 ("[V]isitation does not significantly contribute to contraband.").[14] Even if restricting some visits could improve security, a total, undifferentiated, and permanent ban does not advance that end. See, e.g., Compl ¶¶ 277–302, Appx at 109–17; Ex C ¶ 16, Appx at 216 ("Research finds a consistent, statistically significant relationship between visitation and reduced disciplinary infractions during incarceration."). This is why correctional best practices recommend practices like searches and lockers to mitigate risks, and permit facilities to limit visits to specific detained

[14] *See also* Ex D ¶ 37, Appx at 252 ("[V]isitation is not the primary way that contraband enters a facility"; "[E]liminating contact visits would not make a material difference in the number or nature of the contraband that is introduced and passed"); *id.* ¶ 38 at 252 ("[M]ost of the contraband . . . is attributed to staff . . . who bring it in on their person or their personal property or . . . in the deliveries of laundry, commissary, and food stuffs"); *id.* ¶ 40 at 253 ("Simple security measures, such as gender-neutral pat downs, walking through a correctly calibrated metal detector, and/or wanding visitors with a handheld device, are exceptionally effective means to deter or detect any visitor contemplating the transmission of contraband.").

individuals based on an "individualized determination" that visits will cause security problems. See PI Mot, Appx at 147; Ex D ¶ 24, Appx at 247–48.

Next, the trial court's conclusion that banning visits serves a purported interest in "an easier visitation process for [] visitors," Op, Appx at 13, was entirely unsupported. The notion that Plaintiffs would prefer the "ease" of not being allowed to visit their loved ones at all is nonsensical and contradicted by the record. Plaintiffs alleged and submitted numerous affidavits establishing that banning visits created a substantial burden on their relationships with loved ones. Compl. ¶¶ 87–126, Appx at 52–64; see, e.g., Ex E-1, Appx at 266; Ex E-4, Appx at 271–72. Even for jail staff there is a dispute as to whether the ban provides an "easier [] process." The record shows that jail staff benefit from in-person visits. Compl ¶ 290, Appx at 112, 78; Ex D ¶¶ 42–45, Appx at 254–55. At best, the interests on which the Circuit Court relied are disputed. At worse, they are outright non-existent.

This first *Turner* factor is dispositive. Without a policy grounded in a legitimate penological interest that is "reasonably related" to that interest, the policy is unconstitutional. A complete and permanent ban on all in-person family visits is not logically connected to the security interests of the facility, and was not implemented to further those interests. It was implemented to increase the profitability of the Jail-Securus contract. Based on the facts alleged, the visitation ban fails this first basic step of the *Turner* test.

Second, without contact visits, Plaintiffs have no alternate means of adequately exercising their fundamental rights to family integrity and intimate association. Compl ¶¶ 127–45, Appx at 64–70. Whether phone and video calls are an "*adequate* alternative means" of exercising fundamental rights is a factual inquiry. Plaintiffs' allegations establish that repeated and regular contact through *physical* touch, freedom to speak intimately, and eye contact is necessary to foster

child well-being. Compl ¶¶ 94–126, Appx at 54–64; Ex B ¶¶ 20–34, Appx at 156–160. "[T]here is no substitute for an in-person contact visit with a member of one's family or other approved visitor. The alternative forms of communication . . . do not provide the same benefits." Ex D ¶ G, Appx at 256. [15]

Third, accommodating Plaintiffs' constitutional rights would not impose a substantial burden on the Jail or its staff and would make the Jail safer. Compl ¶¶ 277–302, Appx at 109–17. Generally speaking, "[a] jail can provide in-person contact visits with minimal impact on the agency's budget, and, typically, little or no space modifications are needed to accommodate them." Ex D ¶ F, Appx at 255. Again, the Circuit Court relied on Defendants' assertions to find, contrary to Plaintiffs' allegations, that in-person visits "required significantly more personnel and resources than what is required under the new policy" and that banning visitation "provides for greater security within the housing area within the jail." Op, Appx at 14. Taking Plaintiffs' facts as true—as the Court must at this stage—the visitation ban again fails under the third factor.

Fourth, a complete and permanent ban on in-person contact for children and parents is an exaggerated response to any legitimate penological concerns that Defendants assert. There are obvious alternatives to a total ban on visits: for example, a policy permitting contact visits with certain reasonable conditions, including the ability to prohibit visits where individualized security risks are present. Other facilities follow standard industry practices to run highly effective, efficient visitation programs using appropriate shift scheduling, notice of rules, camera placement, searches,

[15] The Circuit also determined that calls give people "greater privacy" despite Plaintiffs' well pleaded allegations that Plaintiffs "have no privacy" on the calls; that Plaintiffs are unable to share personal information or "have genuine and honest conversations" with family on the calls because they are being recorded; and that, via these calls, Plaintiffs are subjected to sophisticated surveillance and data mining by Securus. Compl ¶¶ 55, 65, 144, 257, 267–76, Appx at 43, 46–47, 69, 103, 106–08. These allegations were not accepted as true by the Circuit Court.

and supervision. See Ex A ¶¶ 18, 25–27, 29–33, Appx at 543, 546–48. At minimum, the widely used available alternatives create a factual dispute as to whether the ban is an "exaggerated response." See, e.g., *Jehovah v Clarke*, 798 F3d 169, 179 (CA 4, 2015) (where plaintiff identifies "obvious" alternatives, jury must determine whether the policy is an "exaggerated response").

2. Applying the four Turner *factors demands evidence.*

Turner, is not, as the Circuit Court applied it, a rubber stamp that skips the development and testing of disputed factual issues. See *Williams v Pryor*, 240 F3d 944, 950 (CA 11, 2001) ("Although similar in part (and sometimes in description) to ordinary rational basis review, the *Turner* standard requires a more searching, four-part inquiry."). Rather, *Turner* "requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Beard v Banks*, 548 US 521, 535 (2006).

Engaging in *Turner's* "evaluati[on] [of] whether there is a legitimate penological interest that permits a restriction on the constitutional rights of incarcerated individuals . . . is not normally an exercise that can be undertaken in the context of a motion to dismiss." *Mayberry v Humphreys Co*, No. 3:11–0855, 2012 WL 4506027, at *9 (MD Tenn, Sept 4, 2012), *report and recommendation adopted*, 2012 WL 4490809; *Smith v Hamm*, No. 2:23-cv-656, 2024 WL 116303, at *13 (MD Ala, Jan 10, 2024) (noting that, "even if there was [evidence of a penological interest], the court cannot consider it for purposes of the Defendants' motion to dismiss"). Nor is the *Turner* standard one that is amenable to application at such an early stage of proceedings when there has been almost no discovery to probe the government's purported penological interest and available alternatives. See, e.g., *Fort v Weirich*, No. 3:23 CV 136, 2023 WL 4029766, at *4 (ND Ohio, June 15, 2023) (penological interest "caselaw is largely based on cases at the summary judgment rather than motion to dismiss stage").

Indeed, in reaching its conclusion, *Turner* itself considered an extensively developed

factual record, including trial testimony. See *Turner*, 482 US at 91, 97–99. "Prison authorities cannot rely on general or conclusory assertions" but must "first identify the specific penological interests involved and then demonstrate *both* that those specific interests are the actual bases for their policies *and* that the policies are reasonably related to the furtherance of the identified interests." *Walker v Sumner*, 917 F2d 382, 386 (CA 9, 1990) (emphasis added). "An evidentiary showing is required as to each point." *Id.*; see also *Reed v Faulkner*, 842 F2d 960 (CA 7, 1988) (opinion by POSNER, J.) (finding, after a bench trial, "no evidence" for the challenged regulation and instead that it was supported only with the "piling of conjecture on top of conjecture").[16]

In nearly every case that the Circuit Court cited to support its holding that the County's policy is reasonably related to a legitimate penological interest, the court had a fully developed trial record at its disposal—and considered the evidence in its entirety—before reaching its decision. See, e.g., Op, Appx at 13; *Overton*, 539 US at 133 ("trial testimony"); *Block*, 468 US at 589 (same). *Turner* requires a much more robust record than the one at hand when the parties dispute the key facts on which that test turns—a record that includes evidentiary hearings and witness testimony produced at trial. See *id; Walker v Sumner*, 917 F2d at 386 (requiring "an evidentiary showing" as to each point of the *Turner* analysis).

3. Under Turner*, permanent, jail-wide bans are unconstitutional.*

Numerous courts have found permanent bans unconstitutional, including under *Turner*. See, e.g., *Manning*, 13 F4th at 708 (holding that "prison officials who permanently or arbitrarily

[16] See also *Bretches v Kirkland*, 335 F Appx 675, 677 (CA 9, 2009) ("At this early stage in the litigation, without supporting evidence, we cannot conclude that the decision barring Bretches from publishing his book furthers an important or substantial interest unrelated to the suppression of Bretches's expression."); *Harnage v Murphy*, No. CV145037637, 2020 WL 749946, at *6 (Conn Sup Ct, January 13, 2020) (denying motion to dismiss because "there is no evidence in the record for the court to evaluate the penological legitimacy of the strip searches alleged").

deny an inmate visits with family members" violate the Constitution); *Easterling*, 880 F3d at 323 n 6 ("[P]rison officials may not restrict an inmate's visitation with family members without balancing the inmate's interests against legitimate penological objectives."); *Valentine v Englehardt*, 474 F Supp 294, 301 (DNJ, 1979) (finding ban on child visits not reasonably related to any legitimate goal of the Passaic County jail).[17] The Circuit Court here is the first to uphold a complete and permanent ban on family visits as constitutional under *Turner*.

The cases relied on by the Circuit Court confirm how unprecedented its holding is. In *Overton*, 539 US 126, the Supreme Court considered the validity of the Michigan Department of Corrections' policy restricting visitation rights for sentenced prisoners. While it upheld the policy at issue (which continued to allow visits for children and parents), the Court explained that limits on family visits with a prisoner may violate *Turner* if "permanent or for a [long] period" or if "applied in an arbitrary manner." *Id.* at 137. The Court cautioned that its holding did not imply acceptance of a complete ban. *Id.* at 134 ("[I]f faced with evidence that MDOC's regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion."); see also *Beard*, 548 US at 535 ("[A]s in *Overton*, we agree that the restriction is severe, and if faced with evidence that [it were] a *de facto* permanent ban . . . we might reach a different conclusion.").

III. The Court below misapplied procedural standards.

The Circuit Court decision is awash in procedural errors. On remand, in addition to

[17] Treating blanket bans differently from policies tailored to individual circumstances makes sense. *Turner*'s standard is rooted in the need for prison officials to have discretion when exercising "day to day judgments." *Turner*, 482 US at 89. But when administrators adopt a restriction that "sw[eeps] too broadly" and "require[s] a lesser degree of case-by-case discretion," burdening everyone's rights across the board, there must be "a closer fit" between policy and penological objective. *Abbott*, 490 US at 411–12.

applying a correct legal standard, the Circuit Court must be directed to properly apply the basic rules of civil litigation.

A. The court failed to take Plaintiffs' allegations as true.

The Circuit Court granted Defendants' motion for summary disposition under MCR 2.116(C)(8), a rule that permits dismissal only when plaintiffs have "failed to state a claim on which relief can be granted." Op, Appx at 15; MCR 2.116(C)(8). But this well-established standard requires a court to "accept all factual allegations [in the complaint] as true, deciding the motion on the pleadings alone." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160 (2019). When considering a motion under MCR 2.116(C)(8), the court must additionally construe all well-pleaded factual allegations "in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119 (1999).

Instead of conducting this elementary inquiry, the Circuit Court ignored the well-pleaded facts in the complaint and relied solely on a contested affidavit submitted by Defendants. See Op, Appx at 13 ("Defendants have provided the Court as Exhibit 1 to their motion the affidavit of Lt. Richard Olejnik. . . . [This affidavit] provides the basis for the Court's application of *Turner*."). In basing its legal analysis only upon the factual allegations of Defendants' single affiant, discounting Plaintiffs' well-pleaded allegations, and assuming Plaintiffs' factual claims to be false (even where the allegations were supported by sworn evidence submitted in support of Plaintiffs' preliminary injunction motion), the Circuit Court committed a grave error that requires reversal. *See El-Khalil*, 504 Mich at 155, 166 (reversing and remanding because the lower court erroneously "considered evidence beyond the pleadings and required evidentiary support for plaintiff's allegations rather than accepting them as true").

B. The Circuit Court ignored material issues of fact, relying exclusively on a single affidavit from Defendants.

The Circuit Court did not purport to grant summary disposition under MCR 2.116(C)(10), which permits dismissal where "there is no genuine issue as to any material fact." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5 (2016) (per curiam). For good reason: the case was not ripe for summary judgment. Nonetheless, because the court improperly considered an affidavit in its summary disposition ruling, Plaintiffs briefly address why resolution under MCR 2.116(C)(10) would have been improper. In short: the parties have not completed discovery; Defendants did not comply with the procedural requirements of a summary judgment motion; and factual disputes pervade the record.

First, the Circuit Court was correct not to rule under MCR 2.116(C)(10) because the parties have not completed discovery. In fact, merits discovery in the case *had not even begun.* It is blackletter law that granting a motion under (C)(10) is improper until discovery on all disputed material issues is complete. See *Powell-Murphy v Revitalizing Auto Communities Env't Response Trust*, 333 Mich App 234, 255 (2020). Here, Plaintiffs filed a preliminary injunction motion contemporaneously with their complaint, attaching evidence Plaintiffs were able to obtain during their pre-filing investigation. In preparation for a contested evidentiary hearing on Plaintiffs' preliminary injunction motion, the parties conferred. The parties ultimately agreed to an expedited period of discovery of *eight days*, beginning just two days after the County responded to Plaintiffs' motion. This expedited period would enable the preliminary injunction hearing to occur in a timely manner given the claims of irreparable harm, and specifically limited the discovery available to a deposition of a single affiant, a single document request based on a single affidavit (and not all of the requested documents were produced), and a limited walk-through of the jail at which Defendants would decide what Plaintiffs' counsel and their expert could view. This extremely

expedited, narrow discovery for a preliminary injunction hearing is not a substitute for the full discovery to which Plaintiffs are entitled under the rules, which would, for example, entitle them to numerous depositions, interrogatories, discovery requests not limited to contesting a single affidavit, discovery from the other defendants as well as third parties, significant additional time to pursue discovery and to have their experts review the evidence obtained, and other court-ordered discovery such as a more thorough jail inspection. The case was not ripe under MCR 2.116(C)(10).[18]

More fundamentally, even with the circumscribed discovery period, the record reveals numerous disputed material facts. When reviewing an order granting a motion for summary disposition under MCR 2.116(C)(10), this Court considers "the entire record" construed in the light most favorable to the party opposing the motion. *Auto-Owners Ins. Co v Martin*, 284 Mich App 427, 433 (2009). If the Court's review of the record reveals a disputed issue "upon which reasonable minds might differ," a genuine issue of material fact exists, and the court must reverse. *Johnson v Vanderkooi*, 502 Mich 751, 761 (2018); see *Cuddington v United Health Servs*, 298 Mich App 264, 271, 280–81 (2012) (per curiam).

Here, the Circuit Court had before it evidence that was both extremely limited and heavily disputed. As a preliminary matter, the Olejnik affidavit (the only evidence submitted by Defendants) was not based on Lt. Richard Olejnik's personal knowledge, as required by Michigan Rule of Evidence 602.[19] It was therefore improper and of little evidentiary value. Plaintiffs objected to the affidavit below, and the Court should not have credited it over Plaintiffs' evidence.

[18] The Circuit Court declined to rule on the preliminary injunction, determining the motion to be "moot" based on its decision to grant the motion for summary disposition. Op, Appx at 15.

[19] See, e.g., Olejnik Aff ¶ 7, Appx at 616–17 (describing events another person "became aware of" and "never observed"); *id.* ¶ 7 at 617 (describing events that supposedly happened outside the presence of another person).

Moreover, the County did not "specifically identify the issues" on which they believed there was "no genuine issue as to any fact" as required by MCR 2.116(C)(4) for a motion under MCR 2.116(C)(10). Instead, they labeled the entire factual section of their brief "Undisputed Facts/Allegations in Complaint." Defs' Mot for Summary Disp, Part II, Appx at 597. Each of these alone would preclude a ruling under MCR 2.116(C)(10).

Even if the Olejnik affidavit were admissible and the County had identified the disputed issues of fact, there were numerous material facts in dispute, including but not limited to: (1) whether County Defendants banned visits to generate revenue; (2) whether banning visits benefits jail discipline; (3) whether banning visits reduces misconduct; (4) whether banning visits increases contraband; (5) whether banning visits hinders post-release recidivism; (6) whether and how replacing in-person visits with video calls harms the child-parent relationship; (7) what alternative measures could mitigate purported security concerns without depriving everyone of visits; (8) what security measures are required to facilitate visits and how onerous they are; (9) where in the Jail in-person visits could be securely conducted; (10) whether restricting visits on an individual basis for specific demonstrated problems can adequately address potential misconduct; and many more. That these facts are disputed was supported by extensive "independent evidence," *Powell-Murphy,* 333 Mich App at 255, including the three expert reports and numerous other documents, affidavits, and exhibits submitted in support of Plaintiffs' Motion for Preliminary Injunction, which Plaintiffs incorporated by reference. See Plaintiffs' Opp, Appx at 706. These are factual questions that require discovery, and likely a jury, before this case can be resolved.

The Circuit Court skipped over asking whether there were disputed issues of material fact, ignored all of Plaintiffs' evidence, construed the record in the light most favorable to *Defendants*, and made its legal ruling on that basis. To take just a couple of many examples, Plaintiffs offered

evidence that video and phone calls in which a child could not look into their parent's eyes, hold their parent's hand, or be held by their parent's embrace, were materially different as a factual matter from in-person visits. Compl ¶¶ 94–145, Appx at 54–70; Ex B ¶¶ 20–34, Appx at 156–60; Ex C ¶ 15, Appx at 215. Nevertheless, the court equated in-person contact visits with video calls as a factual matter—insisting that they were all "visits"—and then used that determination as a basis for holding that the Jail's policy did not impact the plaintiffs' liberty interests as a matter of law because it did not constrain "visits" at all. Op, Appx at 2, 9–10. In addition, the Circuit Court made factual determinations that banning all visits made visitation "easier . . . for both visitors and jail staff"—a conclusion entirely undermined by the record. Op, Appx at 13. Plaintiffs presented evidence, including emails between jail administrators, that the total ban on visits was implemented not for safety or security, but to make money. The court inexplicably ignored that evidence and instead credited the directly contradictory and internally inconsistent allegations in Lt. Olejnik's affidavit.

Perhaps most flagrantly, the Circuit Court accepted wholesale Defendants' bare assertions that their total ban serves the interests of "[jail] security," maintenance of order, supervision of visits and visitors, and improving "logistics." Op, Appx at 13–14. Plaintiffs' evidence—including multiple expert reports –shows the exact opposite: banning visits increases misconduct, makes the jail less safe, hurts public safety, does not improve contraband, and has catastrophic effects on families. Compl ¶¶ 277–304, Appx at 109–117; Ex A, Appx at 540–54, Ex B ¶¶ 23–34, 53–68, Appx at 157–60, 167–70; Ex C ¶¶ 12–40, Appx at 214–223.[20] Similarly, Plaintiffs offered

[20] In deposition, Olejnik testified that when Jail officials concluded that the benefits of video calls outweighed the benefits of in-person visitation, they did not even consider the benefits of visitation because, as they admitted, they were "not aware" of those benefits. Ex A ¶ 44, Appx at 549; Ex B Appx at 579, 581.

numerous evidence-backed alternatives to a ban on visits that could serve any conceivable government interest, and neither Defendants nor the court cited any factual support to the contrary. See e.g., Prelim. Inj., Appx at 147; Ex D ¶¶ 24–27, Appx at 247–49.

Indeed, the evidence that emerged in the limited discovery showed that Defendants' pretextual reasons for the ban were wildly unsupported: For example, Defendants appealed to reducing contraband as a justification, yet they failed to establish that contraband (much less, illegal substances) was a genuine problem in the first place, that any such problem could be traced to visits, or that other obvious policy changes could not address such a problem if it were. Olejnik claims that jail staff "became aware of . . . *attempt[s]*" to pass contraband during visits, and that "it is believed that" other incidents may have occurred. Olejnik Aff ¶ 7(c) (emphasis added). But he could not point to any incident of contraband, and Defendants' own records reveal just ***two*** incidents of contraband passed by a visitor in the ***twelve years*** (out of thousands of visits) during which visits were permitted, with the latest occurrence *five years* prior to the ban on visits. See Ex A ¶¶ 13–15, Appx at 542–43. Consistent with this, Ms. Schriro testified that in her 35 years of experience overseeing jails and prisons, in-person visits did not meaningfully increase contraband. Ex D ¶¶ 37–41, Appx at 252–53. There is no connection between contraband and the draconian punishment of a total visitation ban, but the reasons the ban was put in place and whether it is an exaggerated response considering the alternative options are undoubtedly disputed issues of material fact.

Likewise, the evidence overwhelmingly showed that the logistical and supervision issues Defendants complained of were of their own making. They conceded, for example, that they failed to adequately supervise visits. Defs Mot for Summary Disp, Appx at 599–600; Ex A ¶ 20, Appx at 544. They offered no reason why better supervision would be impossible, and they conceded

they could have, and did not, make changes to their procedures to improve logistics and supervision. See Lt Olejnik Transcript, Appx at 587–88. (did not consider altering staffing); *id.* at 587–92 (did not change security protocols); *id.* at 589 (did not consider limiting visits to make supervision more straightforward); *id.* at 582–83 (made no changes to visitation practices except to use caulk on plexiglass visit windows). Other facilities follow standard industry practices to run highly effective, efficient visitation programs using appropriate shift scheduling, notice of rules, camera placement, searches, and supervision. See Ex A, Appx at 540–54. The Jail could easily do the same. The myriad alternatives identified, alongside Defendants' refusal to address their own supposed concerns with a poorly designed policy, creates material issues of fact about why the visitation ban was put in place and whether it is an exaggerated response given the widely used alternatives available.

In order to grant a motion under MCR 2.116(C)(10), the Circuit Court would have needed to first permit formal discovery, and then to ask whether there were material issues of disputed fact. Had it done so, the court's inquiry would have stopped there: extensive factual disputes exist about why the policy to ban visits was put in place, whether phone and video calls are "adequate" alternatives for children and parents, how much of a burden it would be offer in-person visits, and the alternative, widely used policies available that show how a complete ban is an exaggerated response to any legitimate concerns. Under any standard, summary disposition was improper procedurally on the record before the court.

CONCLUSION

For the foregoing reasons, the Court reverse the Circuit Court decision and remand for further proceedings.

Respectfully submitted,

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WORD COUNT: 15,998

Dated: November 4, 2024

CERTIFICATE OF SERVICE

The undersigned certifies that on November 4, 2024, copies of the foregoing were served upon all counsel of record in the above cause by electronic mail delivery only (by agreement) to their respective email business addresses as disclosed by the pleadings of record herein. I declare under penalty of perjury that the above statement is true to the best of my information, knowledge, and belief.

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