IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLEN WOODS, *et al.*,	:	
	:	CLASS ACTION
	:	
	:	Case No. 2:17-cv-4443
Plaintiffs,	:	
	:	
v.	:	
	:	
SEAN MARLER,	:	
	:	
	:	
Defendant.	:	

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiffs, by and through their undersigned counsel, respectfully submit this Memorandum of Law in Opposition to Defendant's Motion to Dismiss.

Plaintiffs are pre-trial inmates in the Federal Detention Center of Philadelphia ("FDC"). Defendant, Sean Marler, is the FDC's Warden, and he implements a policy that makes it impossible for Plaintiffs and many other pre-trial inmates to see their children. This visitation policy for pre-trial inmates is unprecedentedly cruel and arbitrary, and it violates Plaintiffs' First and Fifth Amendment rights. Warden Marler argues that none of this is his fault, and that the Court should not consider whether his policy is unconstitutional, even though discovery has not begun. For the reasons set forth below, his motion to dismiss should be denied.

STATEMENT OF FACTS

I. The FDC Policy

On July 1, 2016, the FDC instituted a new visitation policy (the "FDC Policy") that severely restricts the ability of pre-trial inmates[1] to see their children. Compl. ¶ 8. The policy limits non-legal visits to immediate family members only, narrowly defining that group as an inmate's spouse, parent,[2] children, and siblings. An inmate's child under the age of 16 cannot visit unless accompanied by an adult immediate family member of the inmate. *Id*.

A consequence of this policy is that Plaintiffs are unable to see their minor children because the children's mothers (who are not married to the inmates) are not permitted to bring them, and no other adult immediate family members of the Plaintiffs are available to do so.

[1] "Pre-trial inmate" refers both to an inmate who is awaiting trial and to an inmate who is awaiting sentencing. "Although it is a misnomer, the case law often refers to an inmate awaiting sentencing—even if he has pled guilty to his crimes or been convicted after trial—as a 'pre-trial detainee." *Bistrian v. Levi*, 696 F.3d 352, 367 n.6 (3d. Cir. 2012).

[2] Step-parents and foster parents are also allowed to visit.

Compl. ¶ 9. The FDC Policy has a devastating impact on families: without in-person visitation, it is all but impossible for inmates to maintain relationships with their children. This is especially acute for parents of children too young to write letters or talk on the phone, as they are denied any meaningful contact. Comp. at ¶¶ 3, 37.

The FDC houses two types of inmates: pre-trial inmates and sentenced inmates (including inmates serving sentences in the FDC and inmates who are brought to the facility because of a writ). Compl. ¶¶ 31–32. The Policy applies only to pre-trial inmates, many of whom sit in the FDC for months or years awaiting trial. Compl. ¶¶ 10–11, 27. In addition, inmates can be further penalized for their lack of visitors if and when they are convicted and sentenced to incarceration, because one of the factors for determining an inmate's community ties, which then determines his security level, is the number of visitors he has. Compl. ¶¶ 35–36.

The FDC Policy is bad for both the children and their incarcerated parents. Numerous studies have found that sustaining close ties with family members improves post-release outcomes and that visitation can reduce prison violence and help to break the intergenerational cycle of incarceration that exists in some families. Compl. ¶¶ 4–5. The FDC Policy is also out of step with the BOP's regulations on visiting, which state: "The Bureau of Prisons encourages visiting by family, friends, and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members or others in the community." Compl. ¶ 7 (quoting 28 C.F.R. § 540.40). The FDC Policy is the most draconian of its kind in any federal facility that Plaintiffs are aware of, and even inmates at high-security federal penitentiaries enjoy much more liberal visiting policies, which allow them to see not only their children, but "friends and associates" as well. Compl. ¶ 12.

II. The Named Plaintiffs

Prior to his incarceration for possession with the intent to distribute marijuana in June 2016, Plaintiff Allen Woods saw his six-year-old son D.W. several times a week. Compl. ¶ 46. He is no longer romantically involved with D.W.'s mother, a nurse with no criminal history, but they maintain a friendly relationship. Compl. ¶¶ 44–45. Mr. Woods has not seen his son in more than eighteen months. Compl. ¶ 42.

Plaintiff Keith Campbell lived with his two-year-old son S.C. until his arrest. Compl. ¶ 47. For several months, Mr. Campbell was held in a state facility in Delaware where he saw his son twice a month on appointed visiting days. Compl. ¶ 49. Since he was moved to the FDC in April 2017, he has not seen S.C., who keeps pictures of his father on the wall over his bed. Compl. ¶¶ 51–53. The mothers of D.W. and S.C. would bring their sons to visit their fathers regularly, if the FDC allowed it. Compl. ¶¶ 44, 55. There are no other suitable family members eligible to bring D.W. or S.C. as visitors. Compl. ¶¶ 43, 54–56.

This lawsuit has been brought as a class action, and attorneys for Plaintiffs have reason to believe that there are scores, if not hundreds of pre-trial inmates in the FDC who are being denied visits from their minor children because of the FDC Policy. *See* Compl. ¶¶ 57–64.

LEGAL STANDARD

Warden Marler's Motion to Dismiss cites both Fed. R. Civ. P. 12(b)(1) and 12(b)(6). His challenge to Plaintiffs' standing is a facial Rule 12(b)(1) challenge, *see Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016) ("Standing is a jurisdictional matter."), and his remaining arguments are Rule 12(b)(6) challenges. "Under Rule 12(b)(6), a motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff's claims lack facial plausibility." *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013) (en banc) (internal quotation

marks and citation omitted). The Rule 12(b)(1) standard for facial challenges is the same as the Rule 12(b)(6) standard. *E.g.*, *Constitution Party v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014).

ARGUMENT

I. Plaintiffs' inability to visit with their children is traceable to Defendant's FDC Policy.

Plaintiffs have standing to pursue their claims because the FDC's visitation policy is the proximate cause of a harm to them—their inability to visit with their children. Simply put, Warden Marler (or his predecessor) created the harms at issue in this case by changing the FDC's visitation policy to disallow visits between fathers (or occasionally mothers) and children, unless the children's mothers would allow them to enter the jail in the company of different relatives of the inmate, who may not exist, and with whom the children may not have a positive relationship, or any relationship at all.

A plaintiff has standing when (1) the plaintiff suffered an injury in fact, (2) a causal connection exists between the injury and the defendant's alleged conduct, and (3) the plaintiff's injury will be redressed by a favorable decision. *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 415 (3d Cir. 2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The first and third elements are undisputedly present here. The "causal connection" element of standing ensures that a plaintiff's alleged injury flows from the challenged conduct of the defendant—that the harm is "fairly . . . trace[able]" from the defendant's action. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976). Assessing causation often turns on the degree of attenuation between the plaintiff's injury and the defendant's alleged conduct. *See id.* at 41–42. In *Simon*, for instance, the Court regarded petitioners' theories about likely changes in access to hospital services in a complicated medical marketplace that would result from changes in tax policy as "purely speculative," noting that hospitals might well make decisions "without regard

to the tax implications." *Id.* at 42–43. *Lujan*, following *Simon*, cautions that causation may be "more difficult to establish" when it "depends on the *unfettered* choices made by independent actors not before the court and whose exercise of *broad and legitimate discretion* the courts cannot presume to either control or to predict." *Lujan*, 504 U.S. at 562 (emphasis added).

The Third Circuit has "described this requirement as akin to 'but for' causation and found the traceability requirement met even where the conduct in question might not have been a proximate cause of the harm, due to intervening events." *Edmonson*, 725 F.3d at 418. In fact, the Third Circuit has already had occasion to address causation when a government regulation intended to motivate a third party to take particular actions, as here, succeeds in producing the desired effect—and found that plaintiffs had standing to challenge the regulation as the cause of their injury. *See Pitt News v. Fisher*, 215 F.3d 354, 360–61 (3d Cir. 2000). In *Pitt News*, the Commonwealth of Pennsylvania had required third parties to cease advertising in the plaintiff's newspaper as part of new law. *Id*. When third parties did, as expected, cease advertising, the Court regarded the injury as "not only reasonably foreseeable when the Commonwealth decided to enact and enforce [the Act]," but that "it was the very goal of the statute." *Id*. at 361.[3]

This case presents no problem of speculation or attenuation. Plaintiffs cannot see their children because of a policy Warden Marler implements that specifically aims at "reducing the number of visitors, and reducing the number of child visitors." *See* Mem. of Law in Supp. of Def.'s Mot. to Dismiss ("Br.") 9. Here, Warden Marler's policy is designed to reduce visitation by the children of Plaintiffs and other pre-trial inmates, and he now seeks to blame the mothers

[3] *See also Hassan v. City of New York*, 804 F.3d 277, 293 (3d Cir. 2015) (relying on *Pitt News* in finding that an indirect causal relationship satisfies the traceability requirement of standing); *Focus on the Family v. Pinellas Suncoast Transit Auth*., 344 F.3d 1263, 1273 (11th Cir. 2003) (citing *Pitt News* for the proposition that indirect harm is "fairly traceable"); *Citizens for Health v. Thompson*, No. 03-cv-2267, 2004 U.S. Dist. LEXIS 5745, at *31–33 (E.D. Pa. Apr. 4, 2004) (a defendant's "coercive effect" on a third party, which produces injury, satisfies causation).

when his policy worked as intended. Unlike the third parties not before the Court in *Simon* or *Lujan*, the mothers here cannot exercise discretion at all—they cannot bring their children to the FDC because Warden Marler has barred them from doing so. Nor, indeed, need the Court speculate as to what those third parties would do in the absence of the FDC policy—as Plaintiffs have alleged, the children's mothers would bring their children to visit their fathers in the FDC if only the policy did not bar them from doing so. Compl. ¶¶ 44, 55. Incredibly, Warden Marler suggestion that the real problem is the mothers' unwillingness to turn their children over to, potentially, strangers.[4] His stance flies in the face of the Supreme Court's approving assessment of a policy specifying that a "visiting child [be] accompanied and supervised by those adults charged with protecting the child's best interests," *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003)—that is, parents or legal guardians—and willfully misunderstands the nature of causation in the standing context.

II. The FDC Policy violates Plaintiffs' First Amendment rights.

The FDC's restrictive visitation policy effectively forbids Plaintiffs and the other class members to see their children. Numerous courts have recognized that strict inmate visitation policies may violate the First Amendment. *E.g.*, *Azzara v. Scism*, No. 4:11-cv-1075, 2012 U.S. Dist. LEXIS 27459, at *17 (M.D. Pa. Mar. 1, 2012) ("[T]o the extent not inconsistent with their status as prisoners or with legitimate penological objectives, inmates have a First Amendment right to communicate with friends, relatives, attorneys, and public officials by means of visits,

[4] This blame-shifting further emphasizes that the FDC Policy was designed without much thought as to the family structures of FDC pre-trial inmates. Warden Marler's suggestions that the mothers are unreasonable in their decision-making ignores that in many cases, qualified family members of an inmate may be complete strangers to both the mother and the child. For example, the only living adult immediate family member of an inmate may be a sibling of the inmate whom the child and the child's mother have never met. Any mother might reasonably not want to entrust her child to a stranger to go into a federal jail. In other cases, there are no living adult immediate family members of the inmate available at all.

correspondence, and telephone calls." (quotation marks and citations omitted)); *Valentine v. Englehardt*, 474 F. Supp. 294, 301 (D.N.J. 1979) (ban on child visitation was unconstitutional because "this prohibition is not reasonably related to any legitimate goal of the Passaic County Jail"); *Owens-El v. Robinson*, 442 F. Supp. 1368, 1386 (W.D. Pa. 1978) ("Inmates have a constitutional right, protected by the First Amendment, to communicate with friends, relatives, attorneys, and public officials by means of visits, correspondence, and telephone calls.").

Warden Marler correctly notes that *Overton* describes limits on First Amendment association rights for inmates. However, a de facto ban on visits from children falls into exactly the set of circumstances the *Overton* Court warned might violate those rights. Considered in reference to the *Turner v. Safley* factors that guide courts' consideration of policies burdening inmates' constitutional rights, *see* 482 U.S. 78, 89–91 (1987), the FDC Policy is unjustified and arbitrary—in no small part because the FDC has a ready alternative with such a de minimis impact that it is the default policy for other classes of prisoners in the same facility. As such, the FDC Policy violates Plaintiffs' First Amendment association rights.

A. Pre-trial inmates have a First Amendment right of association to at least some visitation with their own children.

Although incarceration necessarily involves some loss of rights, a facility's regulations and practices must comply with fundamental constitutional guarantees or federal courts will "discharge their duty to protect constitutional rights." *Procunier v. Martinez*, 416 U.S. 396, 405–06 (1974). Rights to associate with others are among those most limited by incarceration. As the Supreme Court has written, however, even while upholding a prison visitation restriction: "We do not hold, and we do not imply, that *any right* to intimate association is altogether terminated by incarceration . . . ." *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003) (emphasis added).

In *Overton*, the Supreme Court upheld a visitation policy imposed by a prison that had previously suffered problems from an influx of contraband drugs, as applied to individuals being held subsequent to conviction. *Id*. at 129–30, 137. Even under that policy, an inmate was allowed ten non-family visitors and a child could be accompanied into the facility by an adult who was an immediate family member or guardian of the child, regardless of that person's relationship to the inmate. *Id.* at 129–30. In upholding the prison's policy in *Overton*, which did not allow nieces and nephews of an inmate to visit, the Court stated that "a line must be drawn and the categories set out by these regulations are reasonable." *Id*. at 133. The FDC Policy, by contrast, crosses the line.[5] *Cf. Wirsching v. Colorado*, 360 F.3d 1191, 1201 (10th Cir. 2004) ("The complete ban upon Mr. Wirsching's visits with his children is indeed a harsh restriction, significantly more severe than the ban on family visits upheld in *Overton*.").[6]

B. The FDC Policy is not rationally related to maintaining safety and security at the FDC because it is applied arbitrarily and is inconsistent with the stated interest of the Bureau of Prisons in prisoners' maintaining community ties.

Prisoners' constitutional rights continue "unless those rights interfere with prison regulations reasonably related to legitimate penological interests." *Prison Legal News v. Livingston*, 683 F.3d 201, 214 (5th Cir. 2012). In the Third Circuit, courts undertake the assessment as to "whether a prison regulation is reasonably related to legitimate penological interests," as the first step of a two-step *Turner* analysis. *Jones v. Brown*, 461 F.3d 353, 360 (3d Cir. 2006); *see also Turner*, 482 U.S. at 89. The burden of putting forward the legitimate governmental interest and showing the rational connection to the challenged regulation falls to

[5] *Overton* found the policy was also rationally related to the goal of ensuring that "the visiting child is accompanied and supervised by those adults charged with protecting the child's best interests," 539 U.S. at 133. Warden Marler now encourages the opposite, proposing that mothers hand over children to adults *not* charged with protecting their best interests. *See* Br. 4.

[6] The Tenth Circuit nonetheless upheld the ban on his visits, because there was unrebutted evidence that Mr. Wirsching, a child sex offender, posed a risk to his daughter. *Id.* at 1194, 1200.

the prison and the officials asserting it. *See Turner*, 482 U.S. at 89; *see also Sharp v. Johnson*, 669 F.3d 144, 156 (3d Cir. 2012). Although prison officials' determinations about facility security receive deference,[7] *Turner* "requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535 (2006).

Policies may fail at the first step of the *Turner* analysis in multiple ways. First, the proffered connection fails if it is "so remote as to render the policy arbitrary or irrational." *Jones*, 461 F.3d at 361; *Beard*, 548 U.S. at 542 (Stevens, J., dissenting); *see also, e.g.*, *Monmouth Cty. Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 336 (3d Cir. 1987) (striking down "simply inexplicable" policy that required court-ordered release for inmates to receive elective abortions but not other medical treatments); *Mann v. Smith*, 796 F.2d 79, 82 (5th Cir. 1986) (purported concerns about fires and clogged toilets could not save jail's ban on newspapers and magazines, when inmates were allowed other papers in their cells). Second, the connection fails when "the regulation represents an exaggerated response" to the legitimate governmental interest it purports to address. *Jones*, 461 F.3d at 361. The FDC Policy fails for both of these reasons.

Here, the FDC Policy is arbitrary and inexplicable, because it applies only to pre-trial inmates. If Warden Marler's proffered interest is security of the visitation rooms, prevention of contraband, or indeed, even an extra-constitutional desire to have fewer well-behaved children around,[8] why apply the policy only to some inmates? Correctional facilities need not adopt the

[7] But importantly, deference to prison officials in *federal* facilities—such as the FDC—is lesser than the deference given to prison officials in *state* facilities, because no federalism concerns are implicated when federal courts opine as to the constitutionality of policies at BOP facilities. *See Procunier*, 416 U.S. at 405; *see also Lenz v. Washington*, 444 F.3d 295, 305 (4th Cir. 2006).

[8] FDC policies already allowed staff to remove or otherwise prohibit children who did not behave to the standards of the staff. Br. Ex. A, at 5.

least restrictive policy possible, but the policy adopted must not be disproportionately restrictive relative to the stated interest, especially absent evidence in the record that the restriction is necessary. *See Turner*, 482 U.S. at 98–99.

C. There are ready alternative policies that would impose a de minimis impact on prison resources.

Even presuming that Warden Marler could show—as a matter of law—that the FDC Policy is rationally related to a legitimate governmental interest, "not all prison regulations that are rationally related to such an interest pass *Turner*'s 'overall reasonableness' standard." *DeHart v. Horn*, 227 F.3d 47, 58 (3d Cir. 2000) (en banc); *Jones*, 461 F.3d at 360 (3d Cir. 2006). Rather, determining whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it" is simply the first step of the *Turner* inquiry. *Jones*, 461 F.3d at 360; *see also Wolf v. Ashcroft*, 297 F.3d 305, 309 (3d Cir. 2002) (quoting *DeHart*, 227 F.3d at 53) ("[T]he determination that there is a rational relationship between the policy and the interest 'commences rather than concludes our inquiry' as 'not all prison regulations that are rationally related to such an interest pass *Turner*'s 'overall reasonableness standard.'").

The second step that reviewing courts undertake entails assessing the remaining three factors of the *Turner* test. *Jones*, 461 F.3d at 360. These factors are (1) whether the inmate has an alternative means of exercising the right at issue; (2) whether the proposed accommodation overly burdens prison resources; and (3) whether ready alternatives to the challenged policy exist that fully accommodate prisoners' rights at de minimis cost to the legitimate penological interests. *Turner*, 482 U.S. at 89–91.

Each of these three factors favors the Plaintiffs, and none of them is ripe for resolution at the Rule 12(b)(6) stage.[9] As for the first factor, the alternative "opportunity [prison defendants] provide inmates to exercise the asserted right must be meaningful." *Monmouth Cty.*, 834 F.3d at 337. Small children such as Plaintiffs' sons S.C. and D.W., ages two and six, cannot meaningfully communicate with their fathers in letter or brief phone calls. Even the policy upheld in *Overton* "did not bar visits with the prisoner's *own* children," as this policy does. *Wirsching*, 360 F.3d at 1199 (emphasis in original); *see also id.* at 1198 (collecting Supreme Court cases about the parent-child bond as a constitutionally protected interest).

As for the second factor, Warden Marler argues that a change in policy would likely lead to a "flood" of additional visitation requests and visitors, which would have a "significant impact on prison resources." Br. 10. This grossly overstates the case and, more to the point, asks the Court to assume facts not alleged in the Complaint. The third factor is also not suitable for resolution without evidentiary development; in addition, regulations promulgated by the BOP itself show that the BOP has determined as a matter of nationwide policy that visits with non-immediate family members are beneficial and are generally to be permitted. Compl. ¶ 7.

[9] The Third Circuit noted in *Wolf*, 297 F.3d at 310:

> As to the need for a foundation for these three prongs, it is worth noting that we have historically viewed these inquiries as being fact-intensive. We have said that evaluations of prison restrictions under *Turner* require "a contextual, record-sensitive analysis." *DeHart*, 227 F.3d at 59 n.8 (remanding "so that the parties may more fully develop the record"). We have also indicated that courts of appeals ordinarily remand to the trial court where the *Turner* factors cannot be assessed because of an undeveloped record. *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001). If the District Court concludes that the *Turner* analysis cannot be undertaken on an undeveloped record, then the Court should treat the matter as on summary judgment, and rule only after considering the factual basis developed by affidavits or depositions.

III. The FDC Policy violates Plaintiffs' due process rights.

"[P]retrial detainees (unlike convicted prisoners) cannot be punished at all." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015). "[I]n the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail [on a due process claim] by showing that the actions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" *Id.* at 2473 (quoting *Bell v. Wolfish*, 441 U.S. 520, 561 (1979)); *accord Stevenson v. Carroll*, 495 F.3d 62, 68 (3d Cir. 2007) ("[A] particular measure amounts to punishment when there is a showing of express intent to punish on the part of detention facility officials, when the restriction or condition is not rationally related to a legitimate non-punitive government purpose, or when the restriction is excessive in light of that purpose." (alteration in original) (citation omitted)).

> If a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.' Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Bell, 441 U.S. at 539 (footnote omitted).

At the current Rule 12(b)(6) stage, the Court must accept as true the well-pleaded facts of the Complaint. Among these well-pleaded facts:

- "Sentenced inmates in the FDC, including those who are brought into the FDC on writ or who are serving a sentence at the FDC, are allowed to have as visitors not only immediate family members, but also more distant relatives, as well as unrelated friends." Compl. ¶ 11.

- "The FDC Policy is significantly more restrictive for pre-trial inmates than policies at numerous federal facilities for sentenced inmates with heightened security concerns." Compl. ¶ 12.

- "While the FDC's policy allows for the inmate's child to come into the facility with the inmate's immediate family member, if such a person is available, the

policy does not allow the child's mother or legal guardian to accompany the child if she is not married to the child's father, even though the mother or guardian is emotionally and legally responsible for the child's well-being." Compl. ¶ 13.

- "The BOP's own system for determining the security level of sentenced inmates . . . can penalize inmates who had few or no visitors prior to sentencing." Compl. ¶ 35. "Thus, if they are convicted and sentenced, Plaintiffs and other Class members may be given higher security designations and sent to less desirable prisons after sentencing because they have been denied visitation from their children." Compl. ¶ 36.

On these facts, Warden Marler does not explain—and cannot explain—the rational relationship to a legitimate nonpunitive governmental purpose of barring Plaintiffs and other unmarried pre-trial inmates from visits with their children. He suggests that the policy is necessary to "maintain[] security, order, and discipline, and to prohibit contraband from entering the FDC," Br. 12, but this assumes facts found nowhere in the Complaint. *See generally Steele v. Cicchi*, 855 F.3d 494, 505 (3d Cir. 2017) ("Of course, [jail] officials' discretion is not unbridled. They cannot insulate themselves from liability under the Due Process Clause by mechanically citing to broad internal security interests, regardless of how insignificant or unlikely to occur a particular threat might be."). Nor can Warden Marler explain, on the basis of the well-pleaded facts, why it is not excessive in relation to legitimate purposes to prohibit pre-trial inmates from visits with their children, when sentenced inmates in the same facility and in high-security United States Penitentiaries are subject to less-restrictive visitation policies. Nor can he explain why it is not excessive for an inmate to be permitted visits with his children if they are accompanied by a noncustodial uncle or aunt (i.e., the inmate's sibling) but not if accompanied by their unmarried mother. In short, there are no facts before the Court to support Warden Marler's assertions that the FDC Policy is rational and not excessive.

The two cases he cites are easily distinguished from the present case. *See Block v. Rutherford*, 468 U.S. 576 (1984); *Bell*, 441 U.S. at 520. Both involved pre-trial facilities where,

unlike in the FDC, most inmates were housed only briefly. *Compare Block*, 468 U.S. at 577–78 ("[T]he vast majority of [pre-trial detainees at Los Angeles County Central Jail] remain at the facility at most a few days or weeks while they await trial."), *and Bell*, 441 U.S. at 524 n.3 ("[O]f the unsentenced detainees, over half spent less than 10 days at the [facility], three-quarters were released within a month and more than 85% were released within 60 days."), *with* Compl. ¶ 27 ("Detainees often remain in the FDC as pre-trial inmates for months or years. To date, Plaintiffs' times in the FDC range from six months to nearly 1½ years."). It is one matter for a father not to see his child for a few days or weeks; it is quite another matter for Plaintiff Woods to go nearly two years without any in-person visitation with his six-year-old son D.W., who has lived one-third of his life so far with his father in the FDC.

There are plenty of other distinctions. In both *Bell* and *Block*, the case reached the Supreme Court after a trial on the merits in the district court, whereas in the present case, there has been no evidentiary hearing, and the only facts at issue are those pleaded in the Complaint. *Bell*, 441 U.S. at 528; *Rutherford v. Pitchess*, 710 F.2d 572, 574 (9th Cir. 1983) ("The district court's original orders were entered in 1979 after a seventeen-day court trial and two personal inspections of the jail."), *rev'd*, *Block v. Rutherford*, 468 U.S. 576 (1984). Moreover, the policies challenged in *Bell* related not to visitation but to double-bunking, books and packages for inmates, and searches of inmates' cells and persons. And *Block* did involve a visitation; there, the plaintiffs challenged a uniform, facility-wide policy on non-contact visitation, and in its place sought a selective visitation policy that would permit "contact visits from friends and relatives" specifically for "low risk detainees incarcerated for more than a month." 468 U.S. at 585. The Supreme Court upheld the jail's "blanket prohibition" on visitation for both this group of inmates as well as high-risk and short-term detainees, on grounds including that "selectively allowing

contact visits to some . . . could well create tension between those allowed contact visits and those not." *Id.* at 587–88. The situation in the FDC is wholly reversed: the FDC selectively allows some inmates (namely, sentenced inmates) to have visits from their children regardless of their marital status, while Plaintiffs seek to have that same treatment extended to themselves and to all other pre-trial inmates. *See* Compl. ¶¶ 33, 72.

IV. By unjustifiably treating pre-trial inmates less favorably than sentenced inmates, the FDC Policy violates the Fifth Amendment's equal protection guarantee.

Plaintiffs have not yet been criminally tried, and they enjoy the presumption of innocence. The same is true for the other pre-trial inmates in the FDC, with the exception of recently convicted inmates who remain while awaiting sentencing. Nonetheless, Warden Marler subjects them to a much more restrictive visitation policy than sentenced inmates. There is no rational basis for his differential treatment of these two groups.

"The Due Process Clause of the Fifth Amendment to the Constitution contains the same guarantee of equal protection under law as that provided in the Fourteenth Amendment." *United States v. Pollard*, 326 F.3d 397, 406 (3d Cir. 2003) (citing *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954)). As alleged in the Complaint, the FDC Policy intentionally, and without rational basis, treats pre-trial inmates differently from sentenced inmates. "At a minimum, intentional discrimination against any 'identifiable group' is subject to rational-basis review, which requires the classification to be rationally related to a legitimate governmental purpose." *Hassan v. City of New York*, 804 F.3d 277, 298 (3d Cir. 2015). Here, the distinction imposed by Warden Marler between pre-trial inmates and sentenced inmates bears no rational relationship to any legitimate governmental purpose.

The due process and equal protection rights of a pre-trial inmate are "'at least as great as the Eighth Amendment protections available to a convicted prisoner.'" *Natale v. Camden Cty.*

Corr. Facility, 318 F.3d 575, 581 (3d Cir. 2003) (quoting *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)). As Warden Marler concedes, "'equal protection requires that pretrial detainees not be treated less favorably than convicted persons, unless the difference in treatment is justified by a legitimate government interest.'" Br. 13. The well-pleaded facts in the Complaint do not establish that there is any legitimate interest justifying harsher treatment of pre-trial inmates.

Instead, Warden Marler cites a handful of cases that are factually and procedurally far afield from the present case. *Guilfoil v. Johnson* was decided at the summary-judgment stage, after the warden had submitted evidence showing that the reduced commissary food options for pre-trial inmates in Delaware's Sussex Correctional Institution were justified as part of "an effort to curtail a pest control problem in the pretrial detainee units and to preclude problems with some pretrial detainees who used 'stronghold' tactics to obtain commissary from weaker pretrial detainees." No. 15-cv-733, 2017 U.S. Dist. LEXIS 128211, at *4 (D. Del. Aug. 10, 2017). The case here is at the Rule 12(b)(6) stage, and Warden Marler makes no claim that his differential treatment is justified by some feature of the areas of the FDC where pre-trial inmates are held or by some pattern of conduct particular to pre-trial inmates.

In *Bell v. Wolfish*, the Court noted "it may be that in certain circumstances [pre-trial detainees] present a greater risk to jail security and order." 441 U.S. 520, 546 n.28 (1979). The existence of this possibility scarcely proves that pre-trial inmates *in the FDC* present a greater risk, or that Warden Marler's preferential treatment of sentenced inmates is justified by such a difference. Moreover, the record in *Bell* established that the facility in issue there contained *only* pre-trial inmates facing long sentences and sentenced inmates serving short sentences. *Id*. The FDC has an additional category of inmates: those who been brought to the FDC because of a writ. These prisoners are sometimes high-security inmates serving long terms, but they are

allowed visits from extended family and friends, unlike the pre-trial inmates. *See* Compl. ¶ 11. There is nothing to suggest that the FDC's pre-trial population presents a greater security risk than the population in the facility because of writs. The *Bell* facility's justification for differential treatment of pre-trial and sentenced inmates is thus not applicable here.

Warden Marler's argument that pre-trial inmates may require a more draconian visitation policy because less is known about them and they may be more dangerous than some sentenced inmates, Br. 14, ignores the fact that high-security facilities for sentenced federal inmates, such as USP Canaan, have a more lax visitation policy that allows inmates to have visitors from any "friends and associates." Compl. ¶ 12. USP Canaan is a facility where some of the most dangerous of the FDC pre-trial inmates might be sent after sentencing. If pre-trial detainees are so dangerous that their visitation with their children must be limited, then certainly high-security USPs would have the same policy. They do not.

Warden Marler further argues that the FDC holds a particularly dangerous crop of pre-trial defendants, because only the most dangerous defendants are incarcerated pre-trial. *See* Br. 13. This is not accurate. 18 U.S.C. § 3142(f) establishes a presumption that a defendant should be detained while awaiting trial for a wide range of drug crimes and any significant crime of violence. Besides, there is no evidence before the Court suggesting that the pre-trial population at the FDC is more likely to include dangerous inmates than the sentenced population, including sentenced inmates who are in the facility because of a writ.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that Defendant's Motion to Dismiss be denied in its entirety.

Respectfully submitted,

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Dated: January 5, 2018

CERTIFICATE OF SERVICE

I, Benjamin D. Geffen, counsel for Plaintiffs, hereby certify that on January 5, 2018, a true and correct copy of Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss was filed with the Clerk of the Court and served on all counsel of record using the Court's ECF system.

Dated: January 5, 2018

/s/ Benjamin D. Geffen
Benjamin D. Geffen