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

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| ALLEN WOODS, et al., | : | |
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| Plaintiffs | : | |
| | : | |
| v. | : | CIVIL ACTION NO. 17-cv-4443 |
| | : | |
| SEAN MARLER, | : | |
| | : | |
| Defendant | : | |

**DEFENDANT'S REPLY BRIEF IN SUPPORT OF HIS MOTION TO DISMISS**

While Woods' and Campbell's opposition may be long on emotional appeal, the absence of precedent in support of its arguments that the FDC Philadelphia's visitation policy for pre-trial detainees violates any constitutional right requires that the complaint be dismissed. Plaintiffs cite no case that reaches the result they ask the Court to reach here: that a prison policy, which allows visitation of children under the age of 16 if accompanied by the inmates' mother, father, step-parent, foster parent, brother, sister, or spouse, is unconstitutional. *See* Memorandum of Law in support of Motion to Dismiss ("Memo."), Ex. B, p. 6.

I. Plaintiffs have plead themselves out of standing.

Although the children's mothers cannot visit the FDC Philadelphia, the Policy does not prohibit plaintiffs' children from visiting. In fact, the Policy allows visits from minor children accompanied by seven different categories of family members. The minor children's mothers, absent any influence from the Policy, choose to prevent their children from visiting and, as a result, plaintiffs do not have standing to bring their claims.

Plaintiffs claim to meet their standing burden despite conceding that the children's mothers are the direct cause of the alleged harm. Plaintiffs' Opposition Brief ("Op.") at 5.

Plaintiffs argue that the policy "intended to motivate" the mothers to decide that their children cannot visit the FDC Philadelphia. *Id.*[1] As the Third Circuit has explained, a plaintiff may have standing in one of two ways even though the direct source of the injury is a third-party:

> First, a federal court may find that a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the government's action. Second, standing has been found where the record present[s] substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and likelihood of redress.

*Constitution Party of Pennsyl. v. Aichele*, 757 F.3d 347, 366 (3d Cir. 2014) (citing *Bloomberg L.P. v. CFTC*, 949 F. Supp. 2d 91, 116 (D.D.C. 2013)). Here, only the second variety could apply.

Plaintiffs fail to show that the Policy has a causal relationship with the mothers' decision to not allow the children to visit the FDC Philadelphia with an immediate family member. *Id.* Plaintiffs cannot make this showing because at least one mother made her decision wholly independent of the Policy. Indeed, Campbell cites his girlfriend's "difficult relationship" with his mother as the reason that the girlfriend has decided not to allow Campbell's mother to take the child to visit the FDC Philadelphia. Compl. ¶ 55. Woods, on the other hand, fails to offer any explanation for why Chamira Williams, the mother of his child, will not allow one of Woods' two approved visitors to accompany the child to the FDC Philadelphia.[2]

On the facts pleaded, plaintiffs fail to allege anything to even suggest that the Policy

[1] Plaintiffs even go so far as to claim that the Policy prevents the mothers from "excercis[ing] discretion at all" in deciding whether or not to allow their children to visit the FDC Philadelphia with the inmates' respective immediately family members. Op. at 6.

[2] In their opposition, plaintiffs attempt to discredit this argument with speculative facts. Plaintiffs argue that "qualified family members of an inmate *may be* complete strangers to both the mother and the child"; they argue that "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"; and finally, Plaintiff's note that "*in other cases*, there are no living adult immediate family members" to take the children. Op. at 6 n.4. Their complaint pleads no facts like the ones suggested in their opposition brief.

played any role in the mothers' decision to prevent their children from visiting the FDC Philadelphia. In fact, one plaintiff specifically cites a reason completely divorced from the Policy—his girlfriend's "difficult relationship" with his mother—in support of his allegation as to why his child cannot visit with an immediate family member. Compl. ¶ 55. Because plaintiffs do not—and cannot—show that the Policy caused the mothers to prohibit their children from visiting the FDC Philadelphia, plaintiffs do not have standing to bring these claims.

II. Plaintiffs' reliance on cases involving complete bans to child visitors fails to support their contention that the Policy is unconstitutional.

In support of their arguments that the Policy violates their First Amendment rights, plaintiffs cite wholly distinguishable cases that involve *complete* bans to visitation, to telephone use, or both. Plaintiffs rely on *Owens-El v. Robinson*, a Western District of Pennsylvania case where the Court found that a prison's complete ban on telephone use violated the inmate's First Amendment right to communicate with "friends, relatives, attorneys, and public officials." 442 F. Supp. 1368, 1386 (W.D. Pa. 1978). Plaintiffs also cite *Valentin v. Englehardt*, where the District of New Jersey found that a complete ban on all minor children visiting inmates was unconstitutional, but only because prison officials purported to create the rule for the non-penological purpose of serving the best interest of the child. 474 F. Supp. 294 (D.N.J. 1979). The Policy at issue here is not a complete ban on any contact—be it in-person visitation, telephone, or email—with the outside world.[3] Unlike the complete bans in *Valentine* and *Owens-El*, the Policy allows child visitors under the age of 16 to visit the FDC Philadelphia if accompanied by the inmates' mother, father, step-parent, foster parent, brother, sister, or spouse. Memo., Ex. B a p. 6. Moreover, Warden Marler does not purport to maintain the Policy for the non-penological

[3] In addition, the *Owens-El* case is distinguishable because, unlike access to a telephone, e-mail, or written correspondence, in-person visits present unique penological challenges to the safety and security of the facility.

purpose offered in *Valentine*.

Even in the face of complete bans, the cases Woods and Campbell cite uphold the constitutionality of policies more strict than the Policy at issue here. Plaintiffs direct the Court to *Azzara v. Scism*, an unpublished decision from the Middle District of Pennsylvania that found a two-year ban on plaintiff's phone and visitation privileges for violation of prison rules did not violate constitutional rights. No. 4:11-cv-1075, 2012 WL 722342, at *6 (M.D. Pa. Mar. 1, 2012). Plaintiffs also cite to *Wirsching v. Colorado*, where the court upheld a categorical ban on child visitors to the plaintiff. 360 F.3d 1191, 1201 (10th Cir. 2004). In reaching that decision, the court noted that Wirsching's arguments to overturn the ban— including the rehabilitative effect of visitation, an argument plaintiffs make here—"ignores the substantial deference we must accord 'to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.'" *Id.* at 1200 (citing *Overton*, 539 U.S. 126, 123 S.Ct. 2162, 2167 (2003)).

Plaintiffs attempt to undercut the deference prison officials receive in these matters relies on overturned case law. They claim that the "deference to prison officials in *federal* facilities—such as the FDC—is less 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." Opp. at 9 n.7 (emphasis in original). In support of this assertion, plaintiffs cite to *Procunier v. Martinez*, 416, U.S. 396 (1974), but the Supreme Court explicitly overturned that case, explaining that: "*Martinez* was too readily understood as failing to afford prison officials sufficient discretion to protect prison security." *Thornburgh v. Abbott* 490 U.S. 401, 413 (1989).

Moreover, *Bell v. Wolfish* undermines plaintiffs' argument. In *Bell*, the Supreme Court rejected a constitutional, conditions-of-confinement suit by pre-trial detainees in a federal prison and instructed lower courts to "accord[ ] wide-ranging deference" to prison administrators "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 441 U.S. 520, 547 (1979).

III. Plaintiffs' Fifth Amendment claims similarly fail.

In light of the deference entitled to prison administrators, the legitimate interests offered in the Program Statement, and the arguments advanced in Warden Marler's motion to dismiss (pp. 7-11), the Policy is not "arbitrary or irrational." *See Waterman v. Farmer*, 183 F.3d 208, 217 (3d Cir. 1999) (citation omitted). Moreover, while plaintiffs suggest "[t]here are ready alternative policies," Opp. at 10, the Third Circuit reminds prison litigants that, "the Supreme Court was careful to explain in *Bell* that '[g]overnmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional.'" *Steele v. Cicchi*, 855 F.3d 494, 506 (3d Cir. 2017) (citing *Bell*, 441 U.S. at 542 n.25).

Plaintiffs also attempt to buttress their Fifth Amendment Equal Protection claim by arguing that Warden Marler has not explained the distinction between pre-trial detainees and other inmates. Without repeating its arguments, Warden Marler points the Court to its opening brief at pages 9 and 14, which address this very issue. Memo. at pp. 9, 14.

Plaintiffs plead for discovery, but discovery is not necessary here. As the Third Circuit held in *Wolf v. Ashcroft*, in some circumstances the connection between the prison's legitimate interest and the rule "may be a matter of common sense" and "a ruling on this issue [may be] based only on the pleadings." 297 F.3d 305, 308. That type of common sense applies here. As the Supreme Court said in *Block v. Rutherford* while upholding a more strict, complete ban on

contact visits for pretrial detainees, the "rational connection" between the Policy and the government's interest in promoting security is "too obvious to warrant extended discussion." *See* 468 U.S. at 589.

The Court need not go beyond the face of the complaint to grant Warden Marler's motion. Woods and Campbell clamor for discovery without explaining what it is that they expect to discover. Presumably, they will seek to explore the bases for the Policy, but putting aside some outlandish explanation for the rule—and plaintiffs have alleged no such thing—the stated purpose of the policy is clearly provided in the Program Statement the Policy implements. Despite plaintiffs' claim that this "assume[s] facts not alleged in the Complaint," Opp. at 11, the Program Statement is a key document underlying plaintiffs' allegations and the Court may consider it in deciding this motion to dismiss. *See In re Rockefeller Center Props., Inc. Sec. Litig.*, 184 F.3d 280, 287 (3d Cir. 1999) ("a court can consider a 'document integral to or explicitly relied upon in the complaint.") (internal citations and quotations omitted). Plaintiffs gloss over the Program Statements' explicitly stated purpose in an attempt to open the doors to discovery. Not only do Plaintiffs fail to plead sufficient facts to unlock those doors, discovery and motions for summary judgment will inexorably embroil the Court in a substitution of its judgment for that of prison officials; an undertaking that settled Supreme Court law flatly rejects.

Accordingly, plaintiffs' complaint should be dismissed with prejudice.

Respectfully submitted,

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Dated: January 12, 2018

**CERTIFICATE OF SERVICE**

I hereby certify this 12th day of January, 2018 that a copy of the foregoing Motion to Dismiss was served electronically on counsel of record and by United States Mail, postage prepaid, first-class on:

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