STATE OF MICHIGAN
IN THE COURT OF APPEALS

Appeal from the 31st Circuit Court

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,	)	COA No.: 372342 Trial Court No.: 24-000546-CZ
Plaintiffs-Appellants,	)	
v.	)	
SHERIFF MAT KING, ST. CLAIR COUNTY, SECURUS TECHNOLOGIES, LLC, PLATINUM EQUITY, LLC, TOM GORES, MARK BARNHILL, and DAVID ABEL,	)	
Defendants-Appellees.	)	

BRIEF FOR RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST[1]

The Roderick & Solange MacArthur Justice Center (RSMJC) is a nonprofit public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC attorneys have played a key role in civil rights cases concerning important criminal justice issues like police misconduct, wrongful conviction, excessive sentencing, and the treatment of incarcerated people. RSMJC attorneys also have specific experience with *amicus* briefings on issues involving the Michigan Constitution. *See, e.g.*, Brief For Roderick & Solange MacArthur Justice Center As *Amicus Curiae* Supporting Defendant-Appellant, *People v. Poole*, 510 Mich. 851 (2022); Brief For Roderick & Solange MacArthur Justice Center As *Amicus Curiae*, *People v. Stewart*, 512 Mich. 472 (2023); Brief For The State Law Research Initiative And Roderick & Solange MacArthur Justice Center As *Amici Curiae* Supporting Defendant-Appellant, *People v. Langston*, No. 163968 (Mich. Dec. 23, 2024).

[1] Counsel for a party did not author this brief, in whole or in part, and did not make a monetary contribution intended to fund the preparation or submission of this brief. Nor did any person or organization other than the *amicus curiae* make any monetary contributions towards the writing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

A total ban on in-person and contact visitation violates the Michigan Constitution's expansive protections for family integrity. As *amicus curiae* here demonstrates, the Michigan Due Process Clause, Article 1, § 17, provides broader protection for familial association rights than the federal Fourteenth Amendment, and a ban on in-person visitation offends that broader right. This brief proceeds in three parts.

First, *amicus curiae* shows that Michigan courts have an obligation to interpret the Michigan Constitution independently from the federal Constitution. As a result of that obligation, this Court "need not, and cannot, defer to the United States Supreme Court" in interpreting Article 1, § 17. *See People v. Tanner*, 496 Mich. 199, 221–22 (2014).

Second, *amicus curiae* analyzes how Article 1, § 17 should be construed in light of the factors the Michigan Supreme Court has identified. Those factors point to broader due process protections for family integrity than the federal Fourteenth Amendment, including in jail and prison settings. This is shown by the constitutional text and precedent interpreting Article 1, § 17, the structure and peculiar state interests in child wellbeing and familial privacy that are embodied in the

Michigan Constitution, and preexisting law in Michigan that reflects the state's strong commitment to the rehabilitation of incarcerated people. As several other state courts have held, a total ban on contact visitation is anathema to the kinds of protections provided by Article 1, § 17.

Finally, *amicus curiae* addresses how the Circuit Court wrongly interpreted the Michigan Constitution. The Circuit Court relied on three conclusions: that the ban did not implicate a protected liberty interest at all; that even if there were a protected interest, it would be entitled only to protection under the federal standard from *Turner v. Safley*, 482 U.S. 78 (1987); and that under *Turner,* the jail's ban passes muster. Each of these conclusions constituted error. The ban squarely implicates the protections of Article 1, § 17 by cutting off parents and children from one another. In applying those protections, this Court should reject the under-protective *Turner* test and instead follow several state courts that have adopted a more protective approach to evaluating similar claims in jail and prison settings. Even under *Turner*, moreover, plaintiffs have demonstrated that the ban on in-person visitation lacks a reasonable relationship to any legitimate purpose.

Accordingly, this Court should reverse the decision below.

ARGUMENT

I. Michigan Courts Have An Obligation To Interpret The Michigan Constitution Independently From The Federal Constitution, Especially Where Michigan Provides Broader Constitutional Protections.

The Michigan Constitution is the "preeminent law of" the state, *Mays v. Snyder*, 323 Mich. App. 1, 33 (2018)—the "enduring expression of the will of 'we, the people' of [Michigan]," *People v. Tanner*, 496 Mich. 199, 221 (2014). When presented with a state constitutional question, it is thus "this Court's obligation to independently examine our state's Constitution to ascertain the intentions of those in whose name our Constitution was 'ordain[ed] and establish[ed].'" *Id.* at 222.

To aid in this analysis, the Michigan Supreme Court has laid out six factors that courts should consider: (1) the text of the state constitution, (2) the significance of any textual differences with the federal constitution, (3) state constitutional and common law history, (4) state law preexisting the adoption of the constitution, (5) structural differences between the state and federal constitutions, and (6) matters of peculiar state or local interest. *Sitz v. Dep't of State Police*, 443 Mich. 744, 763 n.14 (1993). While these factors "will often prove helpful . . . in the interpretation of particular state constitutional provisions," the

"ultimate task" before the court is not to conduct a rigid accounting of the factors, but rather to "undertake by traditional interpretive methods to independently ascertain the meaning of the Michigan Constitution." *Tanner*, 496 Mich. at 223 n.17.

In conducting this analysis, Michigan courts "need not, and cannot, defer to the United States Supreme Court in giving meaning to the latter charter." *Tanner*, 496 Mich. at 221–22. In *Tanner*, the Michigan Supreme Court specifically addressed prior cases that had suggested there is a burden for Michigan courts to identify a "compelling reason" to interpret the Michigan Constitution differently from the U.S. Constitution. *Id.* at 222 n.16. Rejecting that view, *Tanner* reasoned that this standard "cannot precisely describe [Michigan courts'] relationship with the federal judiciary," because within "our structure of constitutional federalism," the interpretation of the Michigan Constitution cannot be "delegated to another judicial body." *Id.*

These pronouncements are not just mere words, as Michigan courts have a robust tradition of expansive constitutional interpretation. Just one year after the ratification of the Fourteenth Amendment, and eighty-five years before *Brown v. Board of Education*, the Michigan Supreme

Court "outlawed racial segregation in public schools." *People v. Bullock*, 440 Mich. 15, 28 n.9 (1992); *see People ex rel. Workan v. Detroit Bd. of Ed.*, 18 Mich. 400, 408-10 (1869). Michigan courts have also extended broader protections against excessive sentencing under the state's "cruel or unusual punishment" clause both to juveniles[2] and adults;[3] have afforded greater protections with respect to double jeopardy[4] and unreasonable search and seizure;[5] and, as *amicus curiae* discusses below,

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[2] *See People v. Stovall*, 510 Mich. 301, 322 (2022) (holding that a "parolable life sentence for a defendant who commits second-degree murder while a juvenile" violates Article 1, § 16).

[3] *Compare e.g., Bullock*, 440 Mich. at 37 (holding that a mandatory LWOP for possession of 650 or more grams of cocaine was so "grossly disproportionate" as to be "cruel or unusual punishment"), *with Harmelin v. Michigan*, 501 U.S. 957 (1991) (holding that the same sentence was permissible under federal law); *see also People v. Parks*, 510 Mich. 225 (2022) (striking down mandatory LWOP sentences for 18-year-olds under Article 1, § 16).

[4] *Compare People v. Cooper,* 398 Mich. 450, 456-61 (1976) (double jeopardy in the context of successive prosecutions by different sovereigns), *with Bartkus v. Illinois,* 359 U.S. 121 (1959); *People v. White,* 390 Mich. 245, 255-58 (1973) (adopting the "same transaction" test for double jeopardy in the context of successive prosecutions), *with Grady v. Corbin,* 495 U.S. 508 (1990).

[5] *Compare, e.g.*, *Sitz v. Dep't of State Police*, 443 Mich. 744 (1993) (holding that sobriety checkpoints are prohibited by Article 1, § 11, which forbids "unreasonable searches and seizures"), *with Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (holding such checkpoints permissible under the Fourth Amendment).

have recognized broader due process and familial integrity rights than federal courts interpreting parallel clauses in the U.S. Constitution.

By contrast, where Michigan courts have deferred to the federal Constitution, they have often done so because they did not receive adequate briefing on why the state and federal rights differ. In those circumstances, to avoid the "unprincipled creation of state constitutional rights," Michigan courts sometimes treat the two sets of rights as "coextensive . . . for the purposes of [the instant] appeal." *People v. Sierb*, 456 Mich. 519, 523 (1998).

That approach is inapplicable where, as here, the court is presented with a principled argument for more expansive rights under Michigan's state constitution. It is this Court's "basic responsibility"—just as it is the Michigan Supreme Court's—to "conduct a searching examination . . . to determine the law 'the people [of Michigan] have made.'" *People v. Antkoviak*, 242 Mich. App. 424, 439 (2000).

As Section II demonstrates, a "searching examination" of the Michigan Constitution reveals that the *Sitz* factors collectively point towards broader state constitutional rights to familial association for incarcerated parents and their children than the U.S. Constitution. It is

precisely in these circumstances—when the state constitution affords broader protections—that the duty to interpret the state constitution independently is most important.

II. The Michigan Constitution Provides Broader Due Process Protections For Family Integrity Than The Federal Fourteenth Amendment, Including In Jail and Prison Settings.

The Michigan Due Process Clause, Article 1, § 17, guarantees both parents and their children a fundamental right to family integrity. *In re Rood*, 483 Mich. 73, 91 (2009); *Reist v. Bay Cnty. Cir. Judge*, 396 Mich. 326 (1976) (Levin, J.). This right is animated by the "mutual support and society" that the child-parent relationship fosters. *Reist*, 396 Mich. at 341 (Levin, J.). Its protections encompass an incarcerated parent's "constitutional right to direct the care of his or her children while incarcerated." *See In re Sanders*, 495 Mich. 394, 420-21 (2014) (describing this right under federal law); *Matter of Render*, 145 Mich. App. 344, 348 (1985) (applying the same right under the state Due Process Clause). At issue here is whether that right prohibits a ban on in-person jail visitation, which, as the Circuit Court acknowledged, is a "question of first impression" under the Michigan Constitution. Op. 4.

To answer that question, this Court should first apply the Michigan rules of constitutional interpretation to determine that the state's fundamental right to family integrity provides broader protections than federal law. That is shown by (a) the constitutional text and precedent interpreting Article 1, § 17; (b) the structure and peculiar state interests embodied within the Michigan Constitution; and (c) preexisting law in Michigan that reflects the state's strong commitment to the rehabilitation of incarcerated people. Having properly construed Article 1, § 17's scope, this Court should conclude that a ban on in-person visitation contravenes Michigan's broader protection for family integrity.

A. Text and Precedent

Article 1, § 17 provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." MICH. CONST. art. 1, § 17. Despite the "textual similarities" between that language and the federal Fourteenth Amendment, Michigan courts are "not bound by federal precedent interpreting the Due Process Clause." *Bauserman v. Unemployment Ins. Agency*, 503 Mich. 169, 185 n.12 (2019). The Michigan Supreme Court has made clear that "the United States Supreme Court's interpretation of the United States Constitution" is not

controlling on Michigan state constitutional interpretation "even where the language is identical." *People v. Goldston*, 470 Mich. 523, 534 (2004) (citation omitted).

Consistent with that guidance, Michigan courts have repeatedly held that Article 1, § 17 provides "distinctive due process protections . . . broader than have been afforded under [the Fourteenth Amendment]." *AFT Michigan v. State of Michigan*, 497 Mich. 197, 245 n.28 (2015); *see, e.g.*, *Charter Township of Delta v. Dinolfo*, 419 Mich. 253 (1984); *People v. Victor*, 287 Mich. 506 (1939); *Matter of Render*, 145 Mich. App. at 348.[6] For example, in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Supreme Court held that the Fourteenth Amendment of the U.S. Constitution does not require appointment of counsel at parental

[6] Defendants argue that the "Due Process Clause of the Michigan Constitution affords no greater protection than the federal guarantee." *See* Platinum Response Br. 7 (quoting *Am. State Ins. Co., v. State Dep't of Treasury*, 220 Mich. App. 586, 589 n.1 (1996)); *see also* Securus Response Br. 16 n.4 (citing several federal cases making similar cursory statements). That is incorrect; as this section demonstrates, there are numerous examples in which both this Court and the Michigan Supreme Court have held the opposite. The case on which Defendants primarily rely, *American State Insurance Company*, only assumed that the two due process clauses were coextensive because "Plaintiffs do not argue that the Due Process Clause of either constitution provides broader protection than the other." 220 Mich. App. at 589 n.1.

deprivation hearings. *Id.* at 31. Under the Michigan Constitution, however, "Michigan Courts have reached the opposite conclusion," as a result of the "great deference accorded parental rights under Michigan law." *Render*, 145 Mich. App. at 348-50. For example, in *Reist*, the Michigan Supreme Court held that indigent parents have a right to appointed appellate counsel in parental termination proceedings. 396 Mich. at 343.[7] Following *Reist* and *Lassiter*, this Court has recognized "that an indigent parent has a [state] constitutional right to counsel at a hearing that may involve termination of parental rights." *In re Hudson*, 483 Mich. 928, 939 (2009) (Corrigan, J. concurring) (citing *In re Powers*, 244 Mich. App. 111, 121 (2000) and *In re Cobb*, 130 Mich. App. 598 (1983)).

[7] Defendants try to downplay *Reist* and its progeny by arguing that the cases stand for "nothing more than that parental rights cannot be terminated without the provision of due process." *See* Securus Technologies Response Br. 19 (arguing as a result that the cases lack "even tangential relevance to any constitutional issue before the Court"). But the "right[] ever to visit" one's children—which *is* the right at issue in this case—is a component of a parent's fundamental liberty interest in retaining their parental rights. *See Santosky v. Kramer*, 455 U.S. 745, 749 (1982). *Reist* shows that, in the context of people's rights to the "intimacy of daily [parent-child] association," *Sanders*, 495 Mich. at 409, the Michigan Due Process Clause, Article 1, § 17, goes further than the federal Constitution to protect child-parent relationships.

This recognition that parents possess a state constitutional right to counsel at parental termination hearings is not the only way that "the [Michigan] courts . . . have done more than react to federal mandates" in parental rights cases. *Render*, 145 Mich. App. at 348. Michigan courts, for example, "embraced the 'clear and convincing evidence' standard" in parental termination cases "long before" the U.S. Supreme Court did. *Id.* (citing *In the Matter of Laflure*, 48 Mich. App. 377 (1973), and *Santosky v. Kramer*, 455 U.S. 745 (1982)). And critically here, whereas Michigan state courts have long recognized that children, like their parents, possess reciprocal state constitutional rights to family integrity, *Reist*, 396 Mich. at 345 (Levin, J.); *Rood*, 483 Mich. at 91, the U.S. Supreme Court has "never explicitly held that a child could assert a constitutional interest in her family against state intervention." *See* Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARVARD C.R.-C.L. L. REV. 267, 269-70 (2021). In fact, "many federal circuit courts"—including the Sixth Circuit—have likewise "yet to rule on this issue." *Id.* at 270, 282; *Chambers v. Sanders*, 63 F.4th 1092, 1097 n.1 (6th Cir. 2023). Thus, the text and precedent of the Michigan Due Process

Clause support more expansive protections for the right to family integrity.

B. Structure and Peculiar State Interests of the Michigan Constitution

A broader interpretation of Article 1, § 17's familial rights protections is also more consistent with the structure of the Michigan Constitution. True to the longstanding view that the family is an area of "traditional state regulation," *United States v. Morrison*, 529 U.S. 598, 615 (2000), the Michigan Constitution, unlike the U.S. Constitution, contains multiple provisions pertaining to children and familial privacy. For example, Article 1, § 28 guarantees every individual a "fundamental right to reproductive freedom," and Article 8, § 2 provides that the legislature "shall maintain and support a system of free public education and secondary schools as defined by law." MICH. CONST. art. 1, § 28; *id.* art. 8, § 2. Likewise, Article 6, §§ 15 and 16 organize the system of probate courts in Michigan. MICH. CONST. art. 6, §§ 15-16.

The Michigan Constitution's greater attentiveness to the domain of children and their families is further evidenced in the drafting history of the provisions concerning the organization of the probate courts. In debates at the 1961 Constitutional Convention, delegates emphasized

the need for the jurisdiction of the probate court to be responsive to the "terrific increase in the problems of family life in our urban areas." OFF. REC. OF FRED I. CHASE, SEC'Y OF THE CONVENTION, AUSTIN C. KNAPP, EDITOR, AND LYNN M. NETHAWAY, ASSOC. EDITOR *in* University of Michigan Library Digital General Collection, at 1401, https://name.umdl.umich.edu/1749827.0001.001 [hereinafter 1961 Constitutional Convention Debates]. As one delegate argued, "the neglected, the abandoned, the abused children" must be "taken care of" when setting up Michigan's probate court system. *Id.* at 1406.[8] By contrast, issues like these "would never have occurred as a subject of constitution-writing to the U.S. Constitution's drafters, since they deemed [children and family] issues both 'private' and 'local.'" *See* Barbara B. Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 25 (1999).

[8] In fact, another delegate touted that Michigan had been a model for other states in this area. As he argued, "other states look to us" in fashioning their own probate and family court systems because Michigan had long been "one of the forerunners and front runners in the concept of, by constitution, guaranteeing that children" would be not be forced to appear in adversarial adult courts. 1961 Constitutional Convention Debates at 1408.

The Michigan people recently reminded the courts of their "peculiar state or local interest" in expansive familial privacy rights. *See Tanner*, 496 Mich. at 221, 223 n.17. For decades, the Michigan Supreme Court had assumed that if the Michigan Constitution recognized a right to abortion, it was "coextensive with the federal right." *See Doe v. Dep't of Soc. Servs.*, 439 Mich. 650, 658-59, 670 (1992) (reversing a lower court decision that had recognized a broader state constitutional right to abortion). However, in 2022, Michigan voters repudiated *Doe* when they adopted a ballot proposal constitutionalizing a "fundamental right to reproductive freedom," including the right to make all decisions about prenatal care, childbirth, contraception, and abortion. MICH. CONST. art. 1, § 28(1). In addition to constitutionalizing the right to an abortion, the ballot proposal also reaffirmed that when a fundamental right is involved, the proper standard to be applied is strict scrutiny. *See* MICH. CONST. art. 1, § 28(1) (requiring that all restrictions on the right to reproductive freedom be "justified by a compelling interest achieved by the least restrictive means").

Whereas the Michigan Constitution robustly addresses familial matters, the federal Constitution is silent precisely because the family is

the "paradigmatic turf" of the states. *See* Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 11, 18 (2004), Thus, while the U.S. Supreme Court has recognized that parents have a fundamental liberty interest in the care, custody, and control of their children, *see e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), on the whole, federal courts have shown "deep reluctance" to interfere with state regulation of the family. Ezer, *supra*, at 18.

Michigan courts, by contrast, have always understood the right as a dignitary one of "mutual support," which "occupies a basic position in this society's hierarchy of values." *Reist*, 396 Mich. at 341-42 (Levin, J.). Thus, because this court should look to the "specific intention of *its* [state constitutional] ratifiers, and not those of the federal Constitution," *Tanner*, 496 Mich. at 222 n.16, it should honor the framers' distinctive concern for the wellbeing of children by more expansively construing the due process rights of children and parents.

C. Preexisting Law

Finally, the law preexisting Michigan's 1963 Constitution also supports recognizing broader protections because it reflects the state's deep commitment to the rehabilitation of incarcerated people. Michigan's

robust commitment to rehabilitation is as old as the state itself. To offer just a few examples:

- In 1846, animated by a belief that "the true design of all punishment is to reform," Michigan legislators enacted a statute making Michigan both the first U.S. state—and the first English-speaking government in the world—to functionally abolish the death penalty.[9]

- In 1850, numerous delegates to the 1850 Constitutional Convention—including the person who introduced Michigan's "cruel or unusual" punishment clause—"endorsed rehabilitation as the primary purpose of criminal punishment."[10]

- In 1869, Michigan became "one of the very first states to move to the modern, rehabilitative model of sentencing via use of the indeterminate sentence."[11]

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[9] Eugene G. Wanger, *Historical Reflections on Michigan's Abolition of the Death Penalty*, 13 T.M. COOLEY L. REV. 755, 759 (1996) (quoting THE MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835-36 DEBATES AND PROCEEDINGS 466, (Harold M. Dorr ed. 1940)); *see also* JOHN F. GALLIHER, ET AL., AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY, at 11 (2002) (noting that even in the decade between statehood and abolition, Michigan did not execute anyone).

[10] *See* David Shapiro & Molly Bernstein, *The Meaning of Life, In Michigan: Mercy from Life Sentences Under the State Constitution*, at 2, 4-5, (Oct. 19, 2024), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4993230 (collecting quotes from delegates); *see e.g.*, 1961 Constitutional Convention Debates at 298 ("[T]he object of punishment [is] the reformation of crime").

[11] Anne Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U. MICH. J. L. REFORM 645, 647 (2014).

Still other examples of Michigan's rehabilitative commitment include its 1885 parole law,[12] a 1902 ballot initiative constitutionalizing Michigan's indeterminate sentencing scheme,[13] pre-1970s clemency practices,[14] and the drafting history of Michigan's constitutional provision abolishing capital punishment.[15]

Given this history, Michigan courts construing the state constitution have "long recognized" Michigan's special "rehabilitative considerations in criminal punishment." *People v. Lorentzen*, 387 Mich. 167, 179 (1972). Not only is "rehabilitation . . . a specific goal of [Michigan's] criminal-punishment system," but in the state's cruel or unusual punishment jurisprudence, it "is the only penological goal enshrined in our proportionality test as a 'criterion rooted in Michigan's legal traditions.'" *Parks*, 510 Mich. at 265 (quoting *Bullock*, 440 Mich. at 34).

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[12] Yantus, *supra*, at 647.

[13] *See People v. Cook*, 147 Mich. 127, 132 (1907) (describing the scheme as being "design[ed]" to "reform criminals").

[14] Shapiro & Bernstein, *supra*, at 7-15, 17.

[15] *See* MICH. CONST. of 1963, art 4, § 46; 1961 Constitutional Convention Debates at 595 (describing an execution's "demoralizing" effect on officials "dedicated to rehabilitating individuals").

This commitment to rehabilitation also intersects with Michigan's peculiar state interest in the wellbeing of children. For example, in *People v. Stovall*, the Michigan Supreme Court held that life with parole sentences for children who commit second-degree murder while a juvenile are unconstitutional. 510 Mich. at 320–21. Central to its holding was a concern that these children faced significant obstacles to release because they were given lower priority for educational and rehabilitative programming even though "[a]ccess to these programs is vital, especially for juvenile offenders, to enhance their growth and rehabilitative potential." *Id.*

Even in the context of pretrial detention, where rehabilitation is generally not considered a purpose of confining the "yet untried," *Cooper v. Morin*, 49 N.Y.2d 69, 81 (1979), this rehabilitative commitment should still inform the Court's due process analysis. After all, people in pretrial detention are generally entitled to greater protections than convicted prisoners. *See Gordon v. Maesaka-Hirata*, 143 Haw. 335, 358 (2018). Thus, people who have not yet been convicted should not receive less protection for their right to family integrity than people who have been convicted—especially in the context of a ban on in-person visitation.

"[V]isiting is indispensable to any realistic program of rehabilitation," with "[n]o single factor" being more "directly correlated" with success for those who have been incarcerated. *Brandon v. State, Dep't of Corr.*, 938 P.2d 1029, 1032 n.2 (Alaska 1997) (quoting 2 Michael Mushlin, *Rights of Prisoners* § 12.00 (2d ed. 1993)); *see also Cordova v. LeMaster*, 136 N.M. 217, 224 (2004) (same). Michigan's commitment to rehabilitation counsels in favor of ensuring that everyone in custody—especially those who are presumed innocent, like people detained in jail pretrial—have access to this basic necessity.

Accordingly, consistent with the other factors identified by the Michigan Supreme Court, the law preexisting Michigan's Constitution points to a broader interpretation of the Michigan Due Process Clause than the federal clause.

D. A Total Ban On In-Person Visitation Violates The Michigan Constitution's Broader Due Process Protections For Family Integrity.

Based on the Michigan Constitution's more expansive protections for the right to family integrity, this Court should hold that depriving incarcerated parents and their children of in-person jail visitation violates Article 1, § 17. At least two different state courts have recognized

that a ban on contact visitation would violate the right to family integrity under their state constitutions. *See Cooper*, 49 N.Y.2d at 81-82; *Wickham v. Fisher*, 629 P.2d 896, 901 (Utah 1981). In addition, at least two other state courts guarantee incarcerated parents a right to visitation. *See Brandon*, 938 P.2d at 1032 n.2; *In re Smith*, 112 Cal. App. 3d 956, 969 (Ct. App. 1980).[16] These decisions reflect the same kind of expansive protection for families embodied in the Michigan Constitution.

Michigan courts have a history of looking to cases "from other jurisdictions construing their own state constitutions" for guidance on novel state constitutional questions. *See, e.g.*, *Charter Twp.*, 419 Mich. at 273 (interpreting the Michigan Due Process Clause); *Reist*, 396 Mich. at 343-44 (Levin, J.) (construing the state constitutional right to family integrity based on decisions by state courts in Washington, Maine, New York, Nebraska, Oregon, and Pennsylvania). For example, in *Charter Township of Delta v. Dinolfo*, the Court relied on three state court

[16] Still, a fifth state has held in the child custody context that "incarcerated parents retain the right of reasonable visitation with their children" and that as a result, an incarcerated parent should be "denied the right of visitation only under extraordinary circumstances." *Michael M. v. Arizona Dep't of Econ. Sec.*, 202 Ariz. 198, 200 (Ct. App. 2002).

decisions interpreting their own constitutions to hold that a zoning ordinance violated Article 1, § 17, even though the United States Supreme Court had upheld an ordinance that was "in all significant respects identical to the ordinance in question." *See* 419 Mich. at 273-76, 276 n.7.

In the same way, this Court should look to decisions from its sister states to hold that a total ban on in-person visitation is anathema to Michigan's broader right to family integrity. There are three reasons.

First, the "relationship between parent and child is so basic to the human equation" as to be akin to "housing, food, clothing, and certain other necessities" that jailers cannot deny an incarcerated person. *Smith*, 112 Cal. App. 3d at 969; *see also Reist*, 396 Mich. at 341-42 (Levin, J.) (similarly recognizing the "basic position" that the right to family integrity occupies "in this society's hierarchy of values"). The California Court of Appeals has thus held that even upon a "good faith claim of maintaining jail security," it is "not within the purview of jail administrators to deny equally basic child visitation rights" to people detained pretrial. *Id.* at 968-69; *see also Cooper*, 49 N.Y.2d at 81 (invalidating a ban on contact visitation given that "so fundamental a

right as the maintenance . . . [of] relationships with family and friends is involved").

Second, depriving children of in-person interaction with their incarcerated parents causes them acute harm. In the "early stages of confinement of a pretrial detainee," children experience "shock and tension" at the loss of a parent and "need the reassurance of contact visitation, not the disquieting, if not devastating experience of 'visits' through an impenetrable barrier." *Cooper*, 49 N.Y.2d at 81 n.6. Likewise, "[t]he right to touch, see and hear visitors has an important psychological impact upon persons who are confined." *Wesson v. Johnson*, 195 Colo. 521, 523 (1978); *see also Block v. Rutherford*, 468 U.S. 576, 598 (1984) (Marshall, J., dissenting) (holding that robust correctional and psychological evidence shows that contact visitation is "crucial" to maintenance of "familial bonds" and that denial of this physical contact with loved ones is "very traumatic treatment" and "threatens mental health").

Third, banning in-person visitation also contravenes the Michigan Constitution's commitment to rehabilitation. As the Alaska Supreme Court recognized, "[v]irtually every statement on visitation by prison

officials . . . and every major textbook on corrections stresses the critical nature of visitation." *Brandon*, 938 P.2d at 1032 n.2 (quoting *ABA Standards for the Administration of Criminal Justice*, 14 AM. CRIM. L. REV. 377, 502 (1977)). That is reflected in modern correctional standards, which direct that incarcerated people be permitted contact visitation, "especially [with] minor children." *See* Am. Bar Ass'n, *ABA Standards for the Administration of Criminal Justice*, 23-8.5(d)-(e) (2011) (recommending contact visitation for prisoners held longer than thirty days and stating that people incarcerated pretrial should receive even greater visitation rights).[17]

Thus, once the Michigan Due Process Clause's broad protections for family integrity are properly construed, it becomes clear that banning in-person jail visitation contravenes those protections. Such a ban deprives Plaintiffs of a basic element of the child-parent relationship and frustrates Michigan's deep commitment to child wellbeing and the rehabilitation of incarcerated people. Consequently, the ban violates Article 1, § 17.

[17] https://www.americanbar.org/groups/criminal_justice/resources/standards/treatment-of-prisoners/.

III. The Circuit Court Wrongly Interpreted The State Constitution In Lockstep With The Federal Constitution To Uphold The Total Ban On In-Person Visitation.

Rather than recognize the Michigan Due Process Clause's broad protections for family integrity, the Circuit Court interpreted the Michigan Due Process Clause in lockstep with the federal clause. That interpretation led the court to conclude that (1) a total ban on in-person visitation in jail does not implicate a protected liberty interest at all; (2) even if there were such a right, it would be protected only by the federal standard from *Turner v. Safley*, 482 U.S. 78 (1987); and (3) under *Turner*, the ban passes muster. Op. 11; *see also* Platinum Response Br. 2, 6. All three holdings constituted error.

A. The Circuit Court Wrongly Held That The Ban On In-Person Visitation Does Not Implicate A Protected Liberty Interest.

The Circuit Court erred in holding that the jail's ban on in-person visitation does not implicate a protected liberty interest. Op. 11. Defendants echo this, claiming that "overwhelming established precedent" holds that "there is no fundamental constitutional right to in-person visitation with incarcerated persons, under both the Michigan and United States Constitution." Securus Response Br. 2-3. In support,

both the Circuit Court and Defendants cite three Michigan state court cases, as well as a number of federal cases concerning prison and jail visitation rights. *See, e.g.*, Platinum Equity, LLC Response Br. 7 (citing *Faler v. Lenawee Cnty. Sheriff*, 161 Mich. App. 222 (1987), *Blank v. Dep't of Corr.*, 222 Mich. App. 385 (1997), and *Bazetta v. Dep't of Corr. Dir.*, 231 Mich. App. 83 (1998)); *see also* Op. 6-10 (citing the same state court cases). But none demonstrates that the Michigan Due Process Clause fails to protect family integrity in jails and prisons.

First, as Plaintiffs point out, *Faler* and *Block* involved only federal constitutional and state Administrative Procedure Act issues. *See* Plaintiff-Appellants' Br. 31-32. In *Faler*, for example, the plaintiff alleged only a federal First Amendment right to "associate *ideologically*." 161 Mich. App. at 228 (emphasis added). Likewise, *Block* primarily concerned whether the Department of Corrections had legal authority to promulgate a new visitation policy, and to the extent it ruled on the constitutionality of that policy, it relied entirely on *Faler* and made no mention of either the right to family integrity or Article 1, § 17. *See* 222 Mich. App. at 407-408. As discussed above, the federal Constitution is substantially more limited in this regard than Michigan's, precisely

because families are a matter of traditional state concern. It is the Michigan Constitution's broader protections that apply here—protections that continue to apply in jails and prisons. *See supra*, at 8-24; *see, e.g.*, Cooper, 49 N.Y.2d at 80-81; *see also Render*, 145 Mich. App. at 348 (demonstrating that the fundamental right to direct the control of children survives incarceration).[18]

Second, while *Bazetta* did involve a state constitutional claim, it does not control the outcome here. As an initial matter, *Bazetta* is not binding on this Court because its reasoning for deferring to the federal constitutional standard has since been rejected by the Michigan Supreme Court. In *Bazzetta*, the court acknowledged that it was "not bound" by federal cases applying the *Turner* test, but it nonetheless deferred to those decisions because the plaintiffs had failed to demonstrate a "compelling reason to depart" from *Turner*. 231 Mich. App. at 88. After *Bazzetta*, the Michigan Supreme Court in *Tanner* disavowed the "compelling reason" requirement, holding that it "cannot precisely

[18] For the same reason, the federal visitation cases that Defendants cite are similarly inapposite to the question here. *See* Securus Response Br. 10-11 (discussing *Overton v. Bazzetta*, 539 U.S. 126 (2003), *Block v. Rutherford*, 468 U.S. 576 (1984), and *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454 (1989)).

describe" the Michigan courts' relationship to the federal judiciary to impose "some specific burden on this Court to identify a 'compelling reason' or justification" for independently construing its own constitution. *Tanner*, 496 Mich. at 222 n.16. As a result, *Bazetta* provides no guidance for how to properly interpret the Michigan Constitution's independent and broader protections for family integrity.

On top of that, *Bazetta* did not even hold that incarcerated persons and their loved ones lack a protected liberty interest in family integrity while incarcerated. Rather, the court simply found that the "regulations that allegedly impinge[d] on prisoners' constitutional rights" satisfied the federal *Turner* test. 231 Mich. App. at 88-89. In other words, contrary to Defendants' characterization of the case, *Bazetta* proceeded on the assumption that a fundamental liberty interest *was* implicated by the regulations. The Circuit Court wrongly concluded the opposite.[19]

[19] The Circuit Court made a similar mistake in citing the U.S. Supreme Court's decision in *Overton v. Bazzetta*, 539 U.S. 126 (2003), for the rule that incarcerated persons lack a fundamental right to familial association in prison. *See* Op. 5-6. Not only is *Overton* not controlling on the state constitutional question here, but in actuality, the Court in *Overton* said the opposite: "[w]e do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration." *See* 539 U.S. at 131-32. The court did reason that "[s]ome curtailment of [the] freedom [of association]" is allowed within prisons,

Once this Court recognizes that a total ban on in-person visitation implicates a protected liberty interest, it should then consider the subsequent question of whether the infringement is justified under the appropriate standard of scrutiny. As explained below, no matter the standard this Court applies, the ban violates the Michigan Due Process Clause.

B. The Circuit Court Erred In Importing The Federal *Turner* Standard To The Michigan Constitution.

The Circuit Court erred by determining that, even if there were a constitutional right implicated, it would only be protected by the federal *Turner* standard. Op. 13. Defendants make the same argument, claiming that this Court should uphold the ban as long as "it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89; *see* Securus Response Br. 22. But simply importing *Turner* or the similar standard laid out in *Bell v. Wolfish*, 441 U.S. 520 (1979), into the Michigan Constitution was error.

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but this reasoning was, like that in *Bazetta*, relevant only to the level of scrutiny to be applied—not whether a right to familial association existed in the first place. *See id.* at 131.

As several sister states have recognized, the federal standards fail to adequately reflect the greater protections provided by state constitutions like Michigan's. Cases like *Turner* and *Bell* offer so "one-sided a concept of due process," *see Cooper*, 49 N.Y.2d at 79, as to permit jails and prisons to abandon the state's commitment to rehabilitation while also trampling over Article 1, § 17's robust protections for familial rights. After all, "[a]lmost any restriction on detainees . . . can be found to have some rational relation to institutional security," *Bell*, 441 U.S. at 567 (Marshall, J. dissenting), so the "requirement that restraints have a rational basis provides an individual with virtually no protection," *id.* at 585 (Stevens, J. dissenting); *see also Cooper*, 49 N.Y.2d at 80 (citing approvingly to the dissents in *Bell*). The result is devastating for incarcerated people as courts, "[g]uided by an unwarranted confidence in the good faith and 'expertise' of prison administrators," exhibit a willingness to "sanction any prison condition for which they can imagine a colorable rationale, no matter how oppressive or ill-justified that condition is in fact." *Block*, 468 U.S. at 596 (Marshall, J. dissenting); *see also* Plaintiffs-Appellants' Br. 26-27 (citing examples of the severe policies that courts have upheld under *Turner*).

As a result, several states have expressly rejected the federal rule in favor of more protective standards tailored to each state's constitution. *See Cooper*, 49 N.Y.2d at 79; *McGinnis v. Stevens*, 543 P.2d 1221, 1238 & n.51 (Alaska 1975). In *Cooper*, for example, the New York Court of Appeals held that, under its state due process clause, jails could not bar contact visitation "unless sustained by a strong showing of necessity." 49 N.Y.2d at 81; *see also Bell,* 441 U.S. at 570-71 (Marshall, J. dissenting) (arguing that when jail regulations implicate a fundamental right, they should only survive constitutional review if justified by a "compelling necessity of jail administration"). The court reasoned that the "detrimental effect upon spousal and parent-child relationships" had been established in the record and county officials had "candidly admitted that contact visits would be beneficial and a more humane method of detention." 49 N.Y.2d at 80. The court rejected the justifications provided by the jail relating to the added costs and personnel requirements for contact visitation, concluding that these concerns failed to rise to the level of "a strong showing of necessity." *Id.* at 81. The court emphasized that "to exalt economic considerations over

the rights of our citizens is nothing more than abdication of this court's constitutional responsibility." *Id.* at 81-82.

That is especially true in the context of pretrial detention, which requires greater protections than post-conviction imprisonment since its only purpose is "for safe custody and not punishment." *Cooper*, 49 N.Y.2d at 80 (quoting 4 Blackstone Commentaries, p. 300); *Wesson*, 195 Colo. at 521 (explaining "[t]he sole purpose of their detention is to secure their presence at trial"). Because those in pretrial detention must be presumed innocent, they must be treated "with the utmost humanity" and therefore subject only to those hardships "absolutely requisite for the purpose of confinement." *Cooper*, 49 N.Y.2d at 80 (4 Blackstone Commentaries, p. 300); *see also Bell*, 441 U.S. at 568 (Marshall, J. dissenting) (same); *Gordon*, 143 Haw. at 358 (2018) (holding that the rights of persons not yet convicted "must be more closely scrutinized"). The *Turner* standard fails to ensure that level of scrutiny.

Defendants respond by citing several cases in which this Court made cursory mention that *Turner* applied under the Michigan Constitution. *See* Securus Response Br. 22-24 & n.7 (citing *Bazetta*, 231 Mich. App. at 88, *Doe v. Michigan Dep't of Corr.*, 236 Mich. App. 801, 809

(1997), *Mann v. Dep't of Corr.*, 2007 WL 601448, at *3 (Mich. Ct. App. 2007), and *Koser v. Michigan Dep't of Corr.*, 2003 WL 21278910, at *2 n.1 (Mich. Ct. App. 2003)); *see also* Op. 11-13 (citing several of these same cases). For several reasons, none controls the issue here.

First, rather than performing an independent interpretation of the Michigan Constitution, these cases applied *Turner* only by default. *See, e.g.*, *Bazzetta*, 231 Mich. App. at 88 ("Although we are not bound by the Sixth Circuit Court of Appeals' application of [the *Turner*] standard . . . plaintiffs have offered no compelling reason to depart from it."). These cases thus reflect the practice of Michigan courts assuming that state and federal constitutional rights are "coextensive" in the absence of adequate briefing on the differences between the constitutional protections. *See Sierb*, 456 Mich. at 523. Here, in contrast, this Court has briefing from both the Plaintiffs and *amicus curiae* demonstrating that *Turner* is not an appropriate standard for the greater protections of the Michigan Constitution.

Second, *Doe*, *Mann*, and *Koser* are distinguishable because they did not involve fundamental rights claims, much less family integrity claims. In *Doe*, the court held that *Turner* was the proper standard for analyzing

an equal protection claim involving a classification based on HIV status, which is not a suspect classification. *See* 236 Mich. App. at 809. Similarly, *Mann* and *Koser* involved equal protection and procedural due process claims related to disciplinary hearing procedures and a person's gang designation. *See Mann*, 2007 WL 601448, at *1; *Koser*, 2003 WL 21278910, at *1. That is critical because fundamental rights receive greater protection than other rights claims. *See Cooper*, 49 N.Y.2d at 79.[20]

Third, all four cases involved claims brought by convicted prisoners, not people detained before trial in a jail setting. That distinction is significant since one of the reasons for rejecting *Turner* here is that pretrial detention's only purpose is "for safe custody and not punishment," thereby barring jailers from imposing restrictions on constitutional rights unless they are "absolutely requisite for the purpose of confinement." *Cooper*, 49 N.Y.2d at 80 (quoting 4 Blackstone

[20] Notably, even where a fundamental right is not involved, the court in *Cooper* rejected *Turner* in favor of a standard that balances the harm a jail regulation causes to an individual against the benefit sought by the government for its enforcement. *Cooper*, 49 N.Y.2d at 79; *see also McGinnis*, 543 P.2d at 1238 & n.51 (adopting the same test); *Bell,* 441 U.S. at 570 (Marshall, J. dissenting) (arguing that for non-fundamental rights, the Government should bear the burden of "showing that a restriction is substantially necessary to jail administration").

Commentaries, p. 300). Defendants' assertion that "privileges enjoyed by other citizens must be surrendered by the prisoner" and that "freedom of association is among the rights least compatible with incarceration [in prison]," is thus entirely beside the point. *See, e.g.*, Securus Response Br. at 10 (quoting *Overton*, 539 U.S. at 131). Moreover, Plaintiffs here are the children and parents of incarcerated people and not incarcerated individuals themselves, so they have even greater claim to argue that *Turner* is inappropriate for protecting their rights.

Finally, the Circuit Court offered one additional rationale for adopting the *Turner* test: that courts are "ill equipped to deal with" issues of jail administration. Op. 12 (quoting *Shaw v. Murphy*, 532 U.S. 223, 230-31 (2001)). But several sister states have demonstrated the opposite. *See Cooper*, 49 N.Y.2d at 79 (finding that its "approach is not novel in relation to prison regulations"); *McGinnis*, 543 P.2d at 1238. This should not be surprising as courts have ample means to assess rights claims under a more protective alternative to *Turner*. They can, for example, "independently" scrutinize the Government's asserted justifications by "examin[ing] evidence of practices in other detention and penal facilities," and they can require that jailers "adduce evidence of the security and

administrative needs" they cite before depriving incarcerated people and their loved ones of fundamental rights. *Bell*, 441 U.S. at 570-71 (Marshall, J., dissenting). Thus, where, as here, a fundamental right like the right to family integrity is at issue, this Court should reject the federal *Turner* standard.

C. The Circuit Court Erred In Concluding That The Ban Passes Muster Under *Turner*.

Finally, the Circuit Court erred by holding that the ban passes muster under the *Turner* standard. Even applying that under-protective standard, a total ban on in-person visitation violates the right to family integrity in light of the distinctive ways Michigan courts must balance the *Turner* factors.

Michigan courts applying the "same rationality test" under their own Due Process Clause must independently assess for themselves whether the government's interest is legitimate, and if it is, they can engage in more rigorous means-ends testing, even if this would mean "reach[ing] a different conclusion" from a federal court. *See Charter Twp.*, 419 Mich. at 276 n.7; *Victor*, 287 Mich. at 517-18. For example, in *Charter Township of Delta v. Dinolfo*, the Court struck down a single-family zoning ordinance under Article 1, § 17 even though the court applied the

"same rationality test" that the United States Supreme Court had in upholding a nearly identical ordinance. 419 Mich. at 265. The Court reasoned that decisions from other states demonstrated that the statute's restrictive definition of a single-family home was simultaneously so over- and under-inclusive as to not be rationally related to the state's interest in preserving traditional family structures. *Id.* at 273, 276 & n.7; *see also Victor*, 287 Mich. at 517-18 (invalidating under Article 1, § 17 a statute that unreasonably prohibited conduct that the court determined—in accordance with other state courts—to be "legitimate trade practice" despite the U.S. Supreme Court having upheld a similar statute after reaching the opposite conclusion regarding the legitimacy of the conduct).

Here too, other jurisdictions present a strong argument for holding that a ban on in-person child visitation "is an excessive response to the limited risk presented by child visitation" and therefore not "reasonably related to a legitimate government objective." *Smith*, 112 Cal. App. 3d at 965, 969. For example, in *Smith*, the court held that, even under the *Bell* framework, banning children from visiting parents who were detained pretrial was not reasonably related to a legitimate state interest. *See id.* The court rejected the jail's justifications that it had

"limited security staff" and that the jail had not been constructed properly to accommodate child visitors, leaving exposed "blind spots" for children to smuggle contraband through. *Id.* at 962-64. The court recognized that, on one hand, "*any* condition or restriction could be condoned" based on purported concerns of "institutional security." *Id.* at 968. On the other hand, the visitation ban threatened "the fundamental nature of the rights between parent and child and the interest of the state in maintaining that delicate relationship." *Id.* at 969. The court concluded that, consistent with "the principles of *Bell*," it was "an excessive response" to ban visitation entirely to address "the limited risk presented by child visitation in these particular facilities." *Id.* at 969; *see also Hoversten v. Superior Ct.*, 74 Cal. App. 4th 636, 641 (1999) ("Limiting parental contact to . . . telephone calls, as was the case here, should be used only as a last resort.").[21]

[21] Similarly, in *Gordon v. Maesaka-Hirata*, the Hawai'i Supreme Court considered whether placing a person detained pretrial for over nine months in solitary confinement satisfied the *Bell* standard. 143 Haw. at 340, 358-59. Rather than deferring to jail administrators' security justifications, the court instead looked to "model practices" prescribed by the American Bar Association regarding when solitary confinement serves a "legitimate administrative and penological tool." *Id.* at 358-59 (finding that, according to the ABA, solitary should be used "sparingly or not at all" and specific conditions should be required before a person is

For the same reasons, Defendants' ban on in-person visitation would fail even under the *Turner* standard. As Plaintiffs demonstrate, the ban was implemented not for legitimate penological reasons, but rather to increase profitability. *See* Plaintiffs-Appellants' Br. 38-40. That kind of justification cannot support Defendants' ban under any standard. *See Cooper*, 49 N.Y.2d at 81-82 (holding that it would be an "abdication of this court's constitutional responsibility" to "exalt economic considerations" over plaintiffs' right to family integrity). Thus, even if *Turner* were the proper standard, the ban would still fail. And as discussed above, the ban clearly violates the stronger protections provided by the Michigan Constitution.

CONCLUSION

For these reasons, this Court should reverse the decision below.

placed in long-term solitary confinement). Based on that careful scrutiny of the state's interests, the court concluded that plaintiff's placement in solitary was excessive in relation to "any legitimate government purpose." *Id.* at 359.

Respectfully submitted,

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Dated: January 27, 2025

CERTIFICATE OF COMPLIANCE

As required by Michigan Court Rule 7.212, I certify that the document contains 8,061 words, excluding the parts of this document that are exempted by Court Rules MCR 7.212(C)(6). I declare under penalty of perjury that the foregoing is true and correct.

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