

STATE OF MICHIGAN
IN THE COURT OF APPEALS

S.L., T.L.L., T.I., M.L., J.L., N.L., D.I., and
H.L., by their next friend Onisha Lyle,
Z.T.E., Z.W., K.W., by their next friend
Monica Garfield, A.H., by her next friend
Karla Darling, A.B. and E.B., by their next
friend Brya Bishop, O.W., by her next friend
Martreanna Browning, LE’ESSA HILL,
FLORENCE MARBLE, and PAUL
MARBLE, individually and on behalf of a
class of similarly situated persons,

Plaintiffs-Appellants,

COA Case No. 374111
Genesee Circuit Court
Case No. 2024-0000120601-CZ

v

SHERIFF CHRISTOPHER SWANSON,
GENESEE COUNTY, GLOBAL TEL*LINK
CORPORATION (D/B/A VIAPATH
TECHNOLOGIES), and DEB ALDERSON,

Defendants-Appellees.

**AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
OF MICHIGAN, THE CATO INSTITUTE, AMERICAN FEDERATION OF TEACHERS
MICHIGAN, CRIMINAL LAW SECTION OF THE STATE BAR OF MICHIGAN,
CHILDREN’S LAW SECTION OF THE STATE BAR OF MICHIGAN, THE
ELECTRONIC FRONTIER FOUNDATION, MICHIGAN CENTER FOR YOUTH
JUSTICE, DETROIT JUSTICE CENTER, SAFE & JUST MICHIGAN, THE
MICHIGAN COALITION FOR HUMAN RIGHTS, THE MICHIGAN STATE
PLANNING BODY, NATIONAL LAWYERS GUILD MICHIGAN-DETROIT
CHAPTER, BLACK LIVES MATTER – FLINT, STREET DEMOCRACY, PRISON
POLICY INITIATIVE, SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT
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STATEMENT OF QUESTIONS

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

The circuit court answered: No.
Plaintiffs-Appellants answer: Yes.
Defendants-Appellees answer: No.

Amici answer: Yes.

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

The circuit court answered: No.
Plaintiffs-Appellants answer: Yes.
Defendants-Appellees answer: No.

Amici answer: Yes.

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

The circuit court answered: No.
Plaintiffs-Appellants answer: Yes.
Defendants-Appellees answer: No.

Amici answer: Yes.

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

The circuit court answered: No.
Plaintiffs-Appellants answer: Yes.
Defendants-Appellees answer: No.

Amici answer: Yes.

INTEREST OF AMICI CURIAE¹

The American Civil Liberties Union of Michigan (“ACLU”) is the Michigan affiliate of a nationwide, nonpartisan organization with approximately 1.6 million members dedicated to protecting civil rights and civil liberties. The ACLU regularly files amicus curiae briefs on constitutional questions pending before this court, the Michigan Supreme Court, and federal courts. In particular, the ACLU regularly litigates cases involving the rights of the incarcerated, see, e.g., *Malam v Adducci*, 452 F Supp 3d 643 (ED Mich, 2020), and cases involving comparative differences between the rights guaranteed by Michigan’s 1963 Constitution and the United States Constitution, see, e.g., Amicus Curiae Brief of American Civil Liberties Union of Michigan and National Lawyers Guild, Michigan-Detroit Chapter, *Bauserman v Unemployment Ins Agency*, 509 Mich 673; 983 NW2d 855 (2022).

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato’s Project on Criminal Justice focuses on the scope of substantive criminal liability, the role of police in their communities, the protection of legal safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability.

American Federation of Teachers Michigan (“AFT Michigan”) is a union of 35,000 educators and healthcare workers. Its members work in K-12 and intermediate school districts, community colleges, and universities and hospitals across the state. AFT Michigan believes in strong inclusive unions that empower workers. AFT Michigan also advocates for policies that

¹ Pursuant to MCR 7.312(H)(5), amici state that no counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amici curiae, their members, or their counsel made any such monetary contribution.

enhance educational outcomes for all children and youth including those with complex needs and circumstances.

The Criminal Law Section of the State Bar of Michigan is a recognized section of the State Bar of Michigan, with over 2300 attorneys, consisting of judges, prosecutors, defense attorneys and other members working in Michigan's criminal justice system to promote the effective correction and rehabilitation of individuals convicted of violating criminal laws of our state. The instant case is of particular interest to the Criminal Law Section because the case involves a policy which inhibits the rehabilitation of incarcerated individuals, creates barriers to reentry, and increases recidivism. Furthermore, the policy in question puts children through unnecessary trauma and actually increases the likelihood of those children engaging in criminal behavior when they become adults.

The Children's Law Section of the State Bar of Michigan ("CLS") is a recognized section of the State Bar of Michigan, with over 400 attorney and judge members working in Michigan's child welfare and juvenile justice systems. The instant case is of particular interest to the CLS because the case involves the constitutionally-protected relationship between parents and children, and a county's untenable rules banning in-person visits between incarcerated parents and their children.

The Electronic Frontier Foundation ("EFF") is a San Francisco-based, member-supported, nonprofit civil liberties organization that has worked for more than 30 years to protect free speech, privacy, security, and innovation in the digital world. With more than 30,000 members, EFF represents the interests of technology users in court cases and policy debates regarding the application of law to the internet and other technologies. EFF advocates for a world in which digital technologies enhance, rather than curtail, everyone's rights. In support of its

mission, EFF has urged the Federal Communications Commission to adopt rules that promote both in-person and digital access to people incarcerated in prisons and jails and is also counsel to plaintiffs challenging a California jail's privacy-invasive, speech-chilling, and dehumanizing practice of digitizing, and then destroying, physical mail sent to individuals detained in the facility.

Michigan Center for Youth Justice ("MCYJ") is dedicated to advancing equitable and restorative juvenile justice policies that prioritize the needs of youth, and families. MCYJ is deeply concerned about the harm caused to children by policies that eliminate in-person visits with incarcerated parents. We join this brief to affirm the fundamental importance of family connection in reducing harm, fostering positive outcomes, and promoting justice for all.

Detroit Justice Center ("DJC") is a non-profit law firm working alongside communities to create economic opportunities, transform the criminal legal system, and promote just cities. DJC seeks to build equitable communities free from racial and socio-economic discrimination, based on the principle that it is not possible to build inclusive cities where everyone is safe and has what they need to thrive, without remedying the effects of mass incarceration. DJC is committed to protecting the constitutional rights of those impacted by the criminal legal system.

Safe & Just Michigan ("SJM") is a nonpartisan, nonprofit criminal justice policy advocacy organization based in Lansing, Michigan. SJM advocates for evidence-based best practices in jail and prison administration, including in-person visitation, and believes that this case raises important legal and policy issues related to the elimination of in-person visitation in jails.

The Michigan Coalition for Human Rights ("MCHR") strongly supports the restoration of in-person visitation, recognizing its critical role in preserving family bonds, reducing harm to

children, and fostering positive outcomes for incarcerated individuals. Decades of research affirm that in-person contact is essential for mitigating the psychological toll of separation and advancing rehabilitation, which benefits families, communities, and public safety.

The Michigan State Planning Body (“MSPB”) is an unincorporated association of forty-three individuals—leaders in the judiciary, the State Bar, state and regional advocacy programs, and community organizations who are interested in Michigan’s indigent civil legal aid and indigent defense systems. MSPB acts as a forum for planning and coordinating the state’s efforts to deliver civil and criminal legal services to the poor. MSPB coordinates pro bono legal services and advocates on behalf of the state’s indigent population to the State Supreme Court, the State Bar, and the State Court Administrative Office.

The National Lawyers Guild, Detroit-Michigan (“NLG Detroit-Michigan Chapter”) is the Michigan chapter of the National Lawyers Guild, the first racially integrated bar association in the nation. The NLG Detroit-Michigan Chapter’s membership consists of lawyers, law students, legal workers, and jailhouse lawyers. The NLG Detroit-Michigan Chapter is committed to supporting and protecting the rights of those who have been underrepresented and under-protected under the law, including the rights of incarcerated people, those who have been impacted by the criminal legal system, and those who have their constitutional and civil rights violated.

Black Lives Matter – Flint is a community-based organization that seeks to empower Black individuals, whole families, and urban communities. Black Lives Matter – Flint is a grassroots organization focused on education, civic duties, advocacy, public health, neighborhood revitalization, and entrepreneurship. It seeks to collaborate with organizations and service providers to develop systemic programs and special projects.

Street Democracy (“SD”) is a nonprofit law firm combating poverty through holistic legal defense and advocating for a justice system that addresses poverty without criminalization. Through its Street Outreach Court Detroit and Functional Sentencing initiatives, SD seeks to shift the response to poverty-related offenses away from punitive measures and toward community-based providers of services such as job training, education, or mental health treatment, services that address the underlying causes of these challenges and reduce recidivism.

Prison Policy Initiative is a non-profit, non-partisan organization that conducts research and engages in advocacy regarding the harms caused by mass incarceration. It is a national leader in producing research about how visitation promotes well-being of both incarcerated people and their families and how prisons and jails restrict access to in-person visitation. Prison Policy Initiative has a special interest in the ways that video calling has replaced in-person visitation in many jails, and has participated in advocacy campaigns to protect incarcerated people and their families from predatory fees charged by video visitation companies.

The Surveillance Technology Oversight Project (“S.T.O.P.”) is a non-profit advocacy organization and legal services provider based in New York. S.T.O.P. advocates for the protection of civil rights in light of technological advancements, with a particular focus on the discriminatory impact of surveillance on marginalized communities. S.T.O.P. pursues its goals through a combination of litigation, legislative reform, civil rights advocacy, and public education. In 2020, S.T.O.P.’s created a report that detailed how prison technology firms infringe the rights of incarcerated individuals and their families. S.T.O.P. regularly files briefs on constitutional questions involving technology and civil rights pending in state and federal courts nationwide.

Doctor Rebecca Shlafer is a developmental child psychologist with additional training in maternal and child public health. She is a national expert on the impacts of incarceration for children and families, with more than 80 peer-reviewed publications on this topic, and conducted some of the seminal work on children's experiences visiting incarcerated parents.

Professor Margo Schlanger is the Wade H. and Dores M. McCree Collegiate Professor of Law and Director of Civil Rights Litigation Clearinghouse, University of Michigan Law School. Prof. Schlanger is the author of *Incarceration and the Law: Cases and Materials* (West Academic) and many articles about prisoners' rights litigation. She was also the Reporter for the American Bar Association's Treatment of Prisoners standards. She joins this brief in her individual capacity.

Professor Vivek Sankaran is a clinical professor of law at the University of Michigan Law School who advocates for the rights of children and parents in the foster care system. He joins this brief in his individual capacity.

INTRODUCTION

After the COVID-19 pandemic, every parent or grandparent knows that a video call is no substitute for face-to-face contact with a child, let alone a hug. We all experienced the loneliness and isolation that comes from human connection solely through a screen. Unsurprisingly, decades of data bears out this lived experience in the context of incarceration. Cutting parents off from any in-person contact with their children is intensely harmful to those children, who may suffer psychological consequences for the rest of their lives. An essential way to mitigate that harm is through family visitation, where a child can see that their parent is alright and maintain the bonds formed on the outside. For parents, too, contact with children is something to which they can look forward and such contact maintains a sense of normalcy while incarcerated. In-person family visitation therefore reduces prison violence, as well as smooths the reentry process and reduces recidivism rates after incarceration.

By eliminating in-person visitation and replacing it with patchy and expensive video calls, the defendants in this case are harming not only the children of incarcerated parents but the very penological interests that they claim to be pursuing. Under any test that this Court applies, defendants' justifications cannot stand regardless of the applicable level of scrutiny. Family rights have long occupied a special place in the constitutional order, especially when the Michigan Constitution was ratified in 1963. After decades of empirical evidence showing not only that in-person visitation is the best way to mitigate the significant psychological harms of parental incarceration, but that it reduces crime both inside and outside the prison walls, this Court should hold the ban on in-person visitation unconstitutional under the Michigan Constitution.

ARGUMENT

I. The rights of the family have long been understood to extend into the carceral sphere under any standard.

The right to family association is a fundamental constitutional right with roots in the common law. As early as 1923, the United States Supreme Court emphasized that the right “to marry, establish a home and bring up children” was “long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Meyer v Nebraska*, 262 US 390, 399; 43 S Ct 625; 67 L Ed 1042 (1923). Over the last century, that Court has repeatedly reaffirmed the right to family association under the Fourteenth Amendment. See *Pierce v Society of Sisters*, 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925) (protecting the private realm of family life from state intrusion); *Skinner v Oklahoma*, 316 US 535, 541; 62 S Ct 1110; 86 L Ed 1655 (1942) (describing the right to family association as “one of the basic civil rights of man”); *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944) (affirming that there is a “realm of family life which the state cannot enter” without substantial justification). That commitment carries into the present day with the recognition that “[t]he first bond of society is marriage; next children; and then the family.” *Obergefell v Hodges*, 576 US 644, 657; 135 S Ct 2584; 192 L Ed 2d 609 (2015), quoting Cicero, *De Officiis* 57 (W Miller transl, 1913).

“[I]n seeking for [the Michigan Constitution’s] real meaning,” the Michigan Supreme Court considers “the times and circumstances under which the State Constitution was formed—the general spirit of the times and the prevailing sentiments among the people.” *Sitz v Dep’t of State Police*, 443 Mich 744, 764; 506 NW2d 209 (1993), quoting *People v Harding*, 53 Mich 481, 485; 19 NW 155 (1884) (COOLEY, C.J.). When the Michigan Constitution was ratified in 1963, the federal constitutional right to family association was particularly salient. Around the time the constitutional convention would have been commencing, the Michigan Supreme Court

emphasized that the “well established” rights of parents and children were “entitled to great consideration,” not to be intruded upon absent “extremely good cause.” *Herbstman v Shiftan*, 363 Mich 64, 67; 108 NW2d 869 (1961). And just two years after ratification, the United States Supreme Court would draw together the rights to family association from earlier cases into a constitutionally protected “zone of privacy” for the family sphere. *Griswold v Connecticut*, 381 US 479, 485; 85 S Ct 1678; 14 L Ed 2d 510 (1965). That “right of privacy,” the Court reasoned, was “older than the Bill of Rights—older than our political parties, older than our school system.” *Id.* at 486.

At the same time, the number of people incarcerated in jails was rapidly expanding. The daily population of jails expanded by almost 40% between 1950 and 1960, and again by over 30% between 1960 and 1970. See Cahalan, Bureau of Justice Statistics, US Dep’t of Justice, *Historical Corrections Statistics in the United States, 1850–1984*, NCJ No. 102529 (December 1, 1986), p 76 tbl 4-1² (documenting an expansion in the daily national jail population from 86,492 in 1950 to 119,671 people in 1960 and 160,863 people in 1970).

Perhaps unsurprisingly, given the well-understood rights of parents intersecting with a rise in incarceration, by the 1970s, some federal courts had extended the right to family association to jail visits. Both the Second and Fifth Circuits recognized the constitutional right of pretrial detainees not only to visitation, but to contact visits, i.e., supervised visits with loved ones where family members can physically hug, hold hands, and similarly contact each other. In a series of cases, both circuits upheld lower court orders mandating programs of contact visits in the jail context. See *Rhem v Malcolm*, 507 F2d 333, 338 (CA 2, 1974) (upholding “contact visit” requirement for pretrial detainees who do not require maximum security custody); *Miller v*

² Available at <<https://www.ojp.gov/pdffiles1/pr/102529.pdf>>.

Carson, 563 F2d 741, 748–749 (CA 5, 1977) (upholding court order requiring a “program of ‘contact visitation’ for pretrial detainees”).³ Although these cases have been overtaken as a matter of *federal* constitutional law by modern United States Supreme Court tests for jail conditions as society has become more hardened to the conditions experienced by incarcerated people, they remain powerful evidence of how courts analyzed the right to family association in the jail context closer in time to the ratification of the Michigan Constitution.

Even under the most stringent modern federal-law tests governing the rights of incarcerated people, however, courts treat the right to family association with special solicitude in the prison context. In *Turner v Safley*, the Court held that a ban on correspondence between two incarcerated people was reasonably related to legitimate security interests. 482 US 78, 91; 107 S Ct 2254; 96 L Ed 2d 64 (1987). But it also held that a prohibition on marriage was *not* reasonably related to penological or rehabilitative interests. *Id.* at 97–99. Even though the right to marriage might be “subject to substantial restrictions as a result of incarceration,” the relationship still transcended the prison walls. *Id.* at 95. A marriage still stood as an “expression[] of emotional support and public commitment,” and the relationship was expected to continue after “parole or commutation.” *Id.* at 96. These “incidents of marriage,” the Court reasoned, “are unaffected by the fact of confinement or the pursuit of legitimate corrections goals,” and “form a constitutionally protected marital relationship in the prison context.” *Id.* at 96. The same is equally true of parent-child relationships, which continue throughout and after a person’s incarceration, and are similarly protected as a fundamental right. Cf. *Moore v City of East*

³ But see *Oxendine v Williams*, 509 F2d 1405, 1407 (CA 4, 1975) (per curiam) (asserting, without discussion or citation, that the *pro se* incarcerated plaintiff had no constitutional right to physical contact with his family); *Feeley v Sampson*, 570 F2d 364, 372–373 (CA 1, 1978) (noting that “[a] refusal . . . to allow the ordinary detainee any visitation privileges . . . would be unconstitutional,” but evaluating contact visit restriction only for arbitrariness, not as a “constitutional guarantee”).

Cleveland, 431 US 494, 499; 97 S Ct 1932; 52 L Ed 2d 531 (1977) (plurality opinion by Powell, J.) (recognizing that when the government “undertakes . . . intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate”).

II. In-person visits are essential for families and for jail administration.

The incarceration of a parent is extremely harmful to children and can have lifelong consequences. Decades of research shows that parent-child contact is the only way to mitigate this harm, with greater degrees of contact mitigating it to the greatest extent. Similarly, decades of research shows that in-person visitation keeps incarcerated people connected to their community and humanity in ways that have positive outcomes for jail administration. This research is critical not simply to show that the denial of in-person visitation is bad policy. Rather, it also demonstrates that because the policies at issue cut against decades of research on maintaining family connections and effective jail administration, they must fail to satisfy whichever degree of constitutional scrutiny this court ultimately applies.

A. In-person visits mitigate the harm of incarceration to children and parents.

Children often suffer lifelong consequences from the incarceration of a parent. Children require “warm, intimate, and continuous connections with their parents or parental figures” to form healthy attachments as a foundation for healthy relationships in the future. Cramer et al., Urban Institute, *Parent-Child Visiting Practices in Prisons and Jails: A Synthesis of Research and Practice* (April 2017), p 6.⁴ When those relationships are disrupted, children are less likely to trust and feel connected to their parents and caregivers. See *id.* Children who are too young to understand why they are separated from an incarcerated parent may feel abandoned or rejected. *Id.* Even if they are able to form a bond with a new caretaker, a child may still become “clingy,

⁴ Available at <https://www.urban.org/sites/default/files/publication/89601/parent-child_visiting_practices_in_prisons_and_jails.pdf>.

anxious, and angry,” and have difficulty reestablishing a bond with the parent upon release. McMillen, *I Need to Feel Your Touch: Allowing Newborns and Infants Contact Visitation with Jailed Parents*, 2012 U Ill L Rev 1811, 1824 (2012). Incarceration affects children differently from other forms of parental loss like death, divorce, or military deployment because of the societal stigma associated with it and the uncertainty over the length of the separation, particularly in jails before trial. See *Parent-Child Visiting Practices in Prisons and Jails*, p 6.

These feelings of shame, guilt, anger, or abandonment can lead to significant developmental issues. The trauma they experience may “manifest as depression, anxiety, irritability, aggression, social isolation, difficulty sleeping, behavioral regression (especially in young children), and an inability to regulate emotions and behaviors.” *Id.*; Seymour, *Children With Parents in Prison: Child Welfare Policy, Program and Practice Issues*, 77 Child Welfare 469, 472–473 (1998) (children with incarcerated parents “may exhibit low self-esteem, depression, and emotional withdrawal from friends and family”).⁵ Suddenly removing a parent from a child’s life by incarcerating them can create an intergenerational cycle of incarceration as these behavioral challenges lead to greater interactions with the criminal system. See *Children With Parents in Prison*, p 472 (children with incarcerated parents “may also begin to act out inappropriately, become disruptive in the classroom, or engage in other antisocial behaviors”); *Allowing Newborns and Infants Contact Visitation*, 2012 U Ill L Rev at 1824 (a “disorganized attachment relationship during infancy is the strongest predictor of excessive hostile behaviors toward peers in preschool”). “As many as 70% of children with incarcerated parents demonstrate a violent temper and almost 30% are labeled as “delinquents.” Harris & Boudin, *Parents in*

⁵ Available at
<<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=5fe12e64d6f515ed5fedd452dd1f0689b77dcc6d>>.

Prison, in *The Encyclopedia of Child & Adolescent Development* (Hupp & Jewell eds, 2020), p 6.

Decades of substantial empirical evidence shows that “frequent, high-quality visitation” can “break the intergenerational cycle of incarceration.” Boudin, Stutz & Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 *Yale L & Pol’y Rev* 149, 151 & nn 3–4 (2013); see also *Allowing Newborns and Infants Contact Visitation*, 2012 *U Ill L Rev* at 1826 (“[C]ontact visitation can facilitate the establishment and maintenance of strong bonds that lessen the child’s risk for future criminal behavior.”).⁶ The most effective way to maintain the parent-child bond is through contact visitation, where a child can physically touch their parent and maintain a semblance of normalcy. *Parent-Child Visiting Practices in Prisons and Jails*, p 7 (listing studies); NM Courts, Child Protection Best Practices Bulletin, *Connecting Children with Incarcerated Parents* (2011), p 2 (“Contact visitation helps normalize the situation and the interaction between parent and child, and benefit[s] children emotionally and behaviorally.”). Contact visits can reduce children’s feelings of anxiety and abandonment occasioned by incarceration, let them know that their parent is okay and give them reassurance that they are still wanted and loved. *Parent-Child Visiting Practices in Prisons and Jails*, p 7 (listing studies).

Based on this research, best practices for visitation consistently recommend contact visits, especially for children. The American Bar Association recommends that “[f]or prisoners whose confinement extends more than [30 days], correctional authorities should allow contact visits between prisoners and their visitors, especially minor children, absent an individualized determination that a contact visit between a particular prisoner and a particular visitor poses a

⁶ Available at <https://law.yale.edu/sites/default/files/area/center/liman/document/prison_visitation_policies.pdf>.

danger.” ABA Standards for Criminal Justice: Treatment of Prisoners (3d ed), Standard 23-8.5(e), p 259; see also NM Courts, Child Protection Best Practices Bulletin, p 2 (“Contact visitation is recommended in most cases unless contact with parents is determined not to be in the child’s best interest by the court.”).⁷ For similar reasons, the Federal Bureau of Prisons requires that all institutions “have a designated Children’s Center to accommodate children from infancy through age 12,” that contains toys, board games, books, and building blocks for contact visits with parents incarcerated there. Federal Bureau of Prisons, US Dep’t of Justice, *Parenting, Children, and Families*, Program Statement No. 5355.05 (April 14, 2022), pp 9-10.⁸

In contrast, when offered without in-person visitation, video calls can be actively damaging for children who do not understand why they cannot touch their parent and may have traumatic reactions. See Rabuy & Wagner, Prison Policy Initiative, *Screening Out Family Time: The For-Profit Video Visitation Industry in Prisons and Jails* (January 2015), pp 8–9.⁹ Video call software is plagued by distorted images and a lack of eye contact. *Id.* pp 7–10. The camera for the incarcerated parent is often placed above or offset from the screen, which gives the impression that the parent is looking to the side and prevents meaningful eye contact. *Id.* In contrast to the reassurance of physical touch and attention, a child cannot connect meaningfully with their parent and may feel that they are distracted. See *id.* Similarly, as anyone who has experienced the daily frustrations of Zoom court can easily understand, the internet connections for video calls are often unreliable. That unreliability can exacerbate the anxiety and alienation felt by children already

⁷ Available at <https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/treatment_of_prisoners.pdf>.

⁸ Available at <https://www.bop.gov/policy/progstat/5355_004.pdf>.

⁹ Available at <<https://www.prisonpolicy.org/visitation/report.html>>.

suffering through the uncertain period of a parent’s incarceration. *Parent-Child Visiting Practices in Prisons and Jails*, p 12 (noting that video calls “are shorter, on average, than in-person visits and can end abruptly with no warning before families have a chance to say goodbye.”).

For all these reasons, video calls are recommended only as a *supplement* to in-person visits, not as a replacement. See ABA Standards for Criminal Justice: Treatment of Prisoners (3d ed), Standard 23-8.5(e), p 259 (stating that video calls “are not a replacement for opportunities for in-person contact.”); *Parent-Child Visiting Practices in Prisons and Jails*, p 12 (recognizing that video calls “may be a viable supplement and useful option for some families but they should not replace in-person visits entirely.”). This is consistent with the principle that digital technologies should enhance, rather than limit people’s ability to communicate with their loved ones in person. See *Comments of EFF In the Matter of Rates for Interstate Inmate Calling Services*, Docket No. 12-375 (January 19, 2016).¹⁰ Even the American Correctional Association’s official policy recommends the use of “emerging technologies” such as video calls only “as enhancements to existing in-person visitation.” American Correctional Association, *Public Correctional Policy on Family-Friendly Communication and Visitation 2016-1* (ratified by the American Correctional Association Delegate Assembly in Nashville, TN on August 14, 2021).¹¹ In other words, there is a resounding and virtually uncontested consensus that video calls cannot replace the benefits of in-person visitation to children suffering the trauma of an incarcerated parent. In fact, when, as here, it replaces any form of visitation offered, a video call

¹⁰ Available at
<https://www.eff.org/files/2016/01/19/eff_prison_video_comments_final_01.19.16.pdf>.

¹¹ Available at
<[https://www.aca.org/common/Uploaded%20files/Publications/ACA%20Policy%202024%20-%20Each%20policy%20\(ordered\).pdf](https://www.aca.org/common/Uploaded%20files/Publications/ACA%20Policy%202024%20-%20Each%20policy%20(ordered).pdf)>.

may even exacerbate a child's feelings of anxiety and abandonment. Moreover, digital communication services deployed by jails enable a level of surveillance of those inside and outside facilities that was not previously possible, raising significant additional privacy and free speech concerns. See Joseph & Nathan, *Prisons Across The U.S. Are Quietly Building Databases of Incarcerated People's Voice Prints*, *The Intercept* (January 30, 2019),¹² Gordon, *Prison Mail Surveillance Keeps Tabs on Those on the Outside, Too*, *Vice* (March 24, 2021).¹³

B. In-person family visits improve jail administration.

In-person family visits not only mitigate the harm to children from incarcerating their parents; these visits also improve jail administration and reduce crime by decreasing prison violence, smoothing the reentry process, and decreasing recidivism. When incarcerated people are better able to maintain connections to their community, they are less likely to act aggressively while incarcerated and have an easier time readjusting the life on the outside after their release.

A growing body of empirical studies has shown that visitation is associated with reduced prison misconduct and aggressive behavior and increased adjustment to the prison environment. Cochran & Mears, *Social Isolation and Inmate Behavior: A Conceptual Framework for Theorizing Prison Visitation and Guiding and Assessing Research*, 41 *J Crim Just* 252, 255 (2013) (collecting studies); *Prison Visitation Policies: A Fifty-State Survey*, 32 *Yale L & Pol'y Rev* at 149 (“[P]roviding prisoners with access to the outside world through visitation decreases prison violence and facilitates rehabilitation.”). For example, an investigation by the Ohio Department of Corrections found a statistically significant relationship between increased visitation and decreased rule infractions. See Mohr, *An Overview of Research Findings in the Visitation*,

¹² Available at <<https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus>>.

¹³ Available at <<https://www.vice.com/en/article/wx8ven/prison-mail-surveillance-company-keeps-tabs-on-those-on-the-outside-too>>.

Offender Behavior Connection, Ohio Dep't of Rehab & Corrections (2012). The investigation found that even one visit had a positive impact on prisoner behavior. *Id.* Visits by family members are especially important, as they allow incarcerated people to maintain social and familial roles to mitigate the effects of stigma. See *Social Isolation and Inmate Behavior*, 41 J Crim Just at 257 (collecting studies). For parents in particular, in-person visits with their children may motivate them “to comply with facility rules, leading to fewer disciplinary reports, and [to] participate in correctional programming.” *Parent-Child Visiting Practices in Prisons and Jails*, p 8.

Incarcerated people who can maintain these family ties also find it easier to reenter the free world. *Id.*; *Prison Visitation Policies: A Fifty-State Survey*, 32 Yale L & Pol'y Rev at 151 n 5 (collecting studies). Family provide greater support in finding housing, employment, and healthcare, and providing transportation. *Social Isolation and Inmate Behavior*, 41 J Crim Just, at 257 (collecting studies). Perhaps unsurprisingly, incarcerated people who maintain family ties after incarceration are therefore more likely to find employment and less likely to recidivate. *Id.*, at 254–255 (collecting studies). “Studies evaluating the impact of family connections on recidivism have consistently found a strong positive effect.” *Prison Visitation Policies: A Fifty-State Survey*, 32 Yale L & Pol'y Rev at 178 n 127 (collecting studies). Even more specifically, numerous studies have shown “that parents who receive more visits from their children have lower rates of recidivism after release.” *Parent-Child Visiting Practices in Prisons and Jails*, p 8 (collecting studies). Similarly, a 2013 study by the Minnesota Department of Corrections tracked 16,000 people after their release from prison and found a significant decrease in recidivism among those who received visits during incarceration. Duwe & Clark, *Blessed Be the Social Tie That Binds: The Effects of Prison Visitation on Offender Recidivism*, 24 Crim Just

Pol’y Rev 271, 277, 289 (2013). Those who received visits were 13% less likely to be convicted of a felony after release and 25% less likely to have their probation or parole revoked. *Id.*

Indeed, as a 50-state survey on prison visitation policies has summarized the “substantial empirical evidence”: “[H]igh quality visitation can reduce prison violence, maintain family bonds, break the intergenerational cycle of incarceration, and smooth the reentry process, thereby reducing recidivism rates. In short, smart visitation policies make prison personnel and prisoners safer, decrease crime, save money, and mitigate the damage incarceration wreaks on families and communities.” *Prison Visitation Policies: A Fifty-State Survey*, 32 Yale L & Pol’y Rev at 151–152 (citations omitted).¹⁴

III. Upholding a complete and permanent ban on in-person visits would have catastrophic consequences.

There is no question that cutting off all in-person contact with incarcerated parents harms their children. But video calls, when offered without in-person visitation, may also actively undermine penological interests. Because the technology that enables video calls is

¹⁴ This brief focuses on the benefits of in-person visitation, regardless of the level of contact. But significant data supports that the greater the level of contact, the greater the benefit to children and to penological facilities. For instance, extended family visitation (where an incarcerated person can spend the night with his family) typically allows physical contact with the person’s partner and children. The incarcerated person can help with homework and putting children to bed, and other ordinary incidents of family life. *Prison Visitation Policies: A Fifty-State Survey*, 32 Yale Law & Pol’y Rev at 174. This kind of normalcy can maintain bonds between parents and children and help the parent reintegrate into society more easily after release. In 1980, the New York Department of Corrections publishing findings suggesting that its overnight family visiting program decreased recidivism rates by as much as 67%. *Id.* at 151 n 3, citing MacDonald & Kelly, Nat’l Inst of Justice, *Follow-Up Survey of Post-Release Criminal Behavior of Participants in Family Reunion Program* 6 (1980), available at <<https://www.ojp.gov/pdffiles1/Digitization/82473NCJRS.pdf>>; *id.* at 178 (noting that states that do not have extended family visitation programs “might consider making the investment given their apparent positive impact on offender behavior”). But this form of visitation is also under threat, despite its recognized benefits. In the early 1990s, 17 states allowed for extended family visitation. Hagan, *Controversy and Conjugal Visits*, JSTOR (February 13, 2023), available at <<https://daily.jstor.org/controversy-and-conjugal-visits/>>. In 2023, only 4 states remained. *Id.*

comparatively recent, there is little data on the specific impact of substituting them for in-person visits. The limited data that does exist, however, indicates that replacing in-person visits with video calls decreases overall visitation, makes facilities less safe, and destroys family connections, particularly among impoverished communities and communities of color.

First, removing the significant benefits of in-person visits would disproportionately harm Black and impoverished children. Data on the number of children with incarcerated parents, particularly in jails, is hard to come by. But, by a conservative estimate, 2.7 million children have a parent incarcerated at any given time. *Parent-Child Visiting Practices in Prisons and Jails*, p 1. More than 5 million (or 7% of children in the United States) have had a parent incarcerated at some point in their life. *Id.* For Black and impoverished children, those numbers are significantly higher. One in 9 Black children and 1 in 8 children who live below the federal poverty line will have a parent incarcerated at some point in their life. *Id.* In-person visitation is the most recommended, empirically supported way to reduce the harm to children from incarcerating their parents. When jails cut off in-person visitation to incarcerated parents, the harm falls most heavily on Black and impoverished children.

Second, a 2014 study of the elimination of in-person visits in favor of video calls at the Travis County Correctional Complex showed an increase in violence and contraband. Renaud, *Video Visitation: How Private Companies Push for Visits By Video and Families Pay the Price* (October 2014).¹⁵ The Texas Criminal Justice Coalition made an Open Records Request for Travis County's disciplinary reports after banning in-person visits in May 2013 and allowing only

¹⁵ Available at

<<https://www.prisonlegalnews.org/media/publications/Video%20Visitation%20How%20Private%20Companies%20Push%20for%20Visits%20by%20Video%2C%20Grassroots%20Leadership%2C%202014.pdf>>.

video calls. *Id.*, p 4. The Coalition found that disciplinary cases for possession of contraband increased 54% from May 2013 to May 2014. *Id.* Additionally, assaults on staff increased following the elimination of in-person visits, and the average number of disciplinary infractions also slightly increased. *Id.* Similarly, the Prison Policy Institute showed that the total number of contacts with incarcerated people in Travis County decreased after the ban of in-person visits because of dissatisfaction with video calls. *Screening Out Family Time*, p 18 (noting a 28% decrease). In other words, family members were *less* likely to contact an incarcerated person via video call than via in-person visit at the jail because of how unsatisfactory jail video calls prove to be in the real world. Although more research is needed, these results are hardly surprising given the empirically documented benefits of in-person visits on family relationships and jail administration.¹⁶

¹⁶ Defendants claim that some literature supports the position that “video calls and conferencing provide[] a satisfactory method for maintaining familial relationships.” Def Br, p 31. In support of that claim, they cite two sources, neither of which concluded that video visitation without in-person visitation is sufficient to provide necessary family contact. The first is a non-peer reviewed blog post from a youth-focused journal that praises some aspects of video calls. See Huebner, *Facilitating Children’s Relationships with Incarcerated Parents Through Video Visits*, Journal of Interdisciplinary Public Policy <<https://jipp.org/blog/facilitating-childrens-relationships-with-incarcerated-parents-through-video-visits>> (accessed July 28, 2025) (emphasizing that video visits should be free or costless and accompanied by measures to ensure internet access to the families of incarcerated individuals); Journal of Interdisciplinary Public Policy, *Our Vision* <<https://jipp.org/our-vision>> (accessed July 28, 2025) (“The Journal of Interdisciplinary Public Policy is a non-partisan space for youth to explore and analyze policy”). Even that blog post emphasizes that it is “essential” that video calls “supplement, not replace existing child support systems,” *id.*—which would of course include in-person visitation. The blog post also praises Pennsylvania and Vermont’s free video visit programs—both of which provide video calls as well as in-person visitation. See Pennsylvania Department of Corrections, *Inmate Visitation* <<https://www.pa.gov/agencies/cor/inmate-visitation>> (accessed July 24, 2025); Hirschfield, *Vermont Prisons Work to Improve Visitation Experiences for Children of Incarcerated Fathers*, Vermont Public (October 7, 2024) <<https://www.vermontpublic.org/local-news/2024-10-07/vermont-prisons-work-improve-visitation-experiences-children-incarcerated-fathers>>. The second source defendants cite in support of their claim is an article about the use of online court proceedings in Texas during the COVID-19 pandemic. That article discusses how virtual court improves access to court proceedings but says nothing at all about video calls between

Finally, bans on in-person visitation seem to have been implemented only where they are least necessary and most harmful. Video calls are most useful in prisons, where communities may be far away and the cost to travel for an in-person visit may be significant. See *Screening Out Family Time*, p 4 (noting in 2014 that video calls are “ironically the least prevalent in state prisons, where [they] would be the most useful given the remote locations of such facilities, and the most common in county jails where the potential benefits are fewer”). Yet they replace in-person visits most commonly in jails, where incarcerated parents have either not been convicted or are serving sentences for only minor offenses. See *Allowing Newborns and Infants Contact Visitation*, 2012 U Ill L Rev at 1819 (describing the “seemingly inexplicable result” that because those incarcerated in jails “are poor or because they committed misdemeanors, they are allowed less contact and connection with . . . children . . . than those convicted of serious, violent offenses”); Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations* (January 10, 2020), p 7 (noting that people in pretrial detention compose approximately 50% of the population in Michigan jails).¹⁷ The uncertainty that accompanies a parent’s pretrial detention, and the often unexpected timing with which it occurs, can be especially traumatic, destabilizing, and confusing for children. As every parent knows, even short, unexplained absences from their children are deeply felt by the child. Since jails are, by their nature, typically closer to home, it is especially inexplicable to deny children the ability to gain reassurance and maintain parental attachments. Furthermore, although some people are only in jail for a short period of time, over 80% of the bed space in Michigan jails is estimated to be

incarcerated people and their family members. See *Equity Issues During the COVID-19 Pandemic*, 2022 Advanced Fam L 43-II (2022).

¹⁷ Available at <<https://www.courts.michigan.gov/48e562/siteassets/committees,-boards-special-initiatives/jails/jails-task-force-final-report-and-recommendations.pdf>>.

occupied at any given time by people who have been there for a month or longer. Michigan Joint Task Force on Jail and Pretrial Incarceration, *Report and Recommendations*, p 11. The record below in this case suggests that the reason for the otherwise inexplicable result of terminating in-person visits for people incarcerated in jails but not prisons is a profit motive. Underfunded local jails are leading a shift towards comprehensive bans on in-person visits not due to penological considerations but to save (and even accrue) money.

Without meaningful legal constraints that prevent jails from banning in-person visits, this practice is likely to continue unabated. In 2015, 74% of jails banned in-person visits when they implemented video calls. *Screening Out Family Time*, p 11.¹⁸ By banning in-person contact between incarcerated parents and their children, jails shred family bonds; exacerbate recidivism; increase tensions and violence in jail; and perpetuate a cycle of poverty, trauma, and incarceration, all at the particular expense of Michigan's least advantaged communities. Regardless of what standard of scrutiny this Court adopts in analyzing plaintiffs' claims, these factors all weigh in one direction: that there is no constitutionally tolerable justification for allowing Michigan's jails to perpetuate this infringement on the family rights of incarcerated people and their children.

CONCLUSION

The Court should reverse the circuit court decision and remand for further proceedings.

Respectfully submitted,

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¹⁸ This may have been due in part to a Securus policy described by the Prison Policy Initiative, which reportedly required a ban on in-person visitation as part of Securus's contract for implementing video calls. See *Screening Out Family Time*, pp 20–21 (describing such contract clauses). Securus has since ended the use of such clauses. See Prison Policy Initiative Press Release, *Securus Ends Its Ban on In-person Visits, Shifts Responsibility to Sheriffs* (May 6, 2015), available at <<https://www.prisonpolicy.org/blog/2015/05/06/securus-ends-ban/>>.

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