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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

A.B.O. COMIX, KENNETH ROBERTS, ZACHARY GREENBERG, RUBEN GONZALEZ-MAGALLANES, DOMINGO AGUILAR, KEVIN PRASAD, MALTI PRASAD, and WUMI OLADIPO,

Plaintiffs,

v.

COUNTY OF SAN MATEO and CHRISTINA CORPUS, in her official capacity as Sheriff of San Mateo County

Defendants.

Case No. 23-CIV-01075

*Assigned for All Purposes to:*
*Hon. V. Raymond Swope, Dept. 23*

**DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF RE: *TIEDEMANN V. VON BLANCKENSEE***

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## I. INTRODUCTION

Justice Souter warned that courts should be wary of advocates who demand an "absolutist implementation of the standard they espouse[]." *Wash. v. Glucksberg* (1997) 521 U.S. 702, 761 (Souter, J., concurring). Plaintiffs' Supplemental Brief ("SB") illustrates the wisdom of those words. Citing *Tiedemann v. von Blanckensee* (9th Cir. 2023) 72 F.4th 1001, Plaintiffs claim the *Turner* test can *never* be "resol[ved] on the pleadings." SB at 2:5-7. Not so. "[D]ismissal on the pleadings" is appropriate under *Turner* "when a common-sense connection exists between [a] prison regulation and [an] asserted, legitimate governmental interest." *Whitmire v. Ariz.* (9th Cir. 2002) 298 F.3d 1134, 1136. Cases adopting this proposition are legion.[1]

In fact, *Ward v. Walsh* (9th Cir. 1993) 1 F.3d 873—the seminal case on which Plaintiffs claim to root their "understanding of *Turner*"—actually confirms this. *See* SB at 2:24-3:9. *Ward* upheld a rule preventing an inmate from having "candles in his cell" because "[t]he *Turner* factors ***clearly* weigh[ed] in favor of the [jail] on this claim**." 1 F.3d at 879 (emphasis added). This was so because allowing inmates to handle fire "clearly" poses "serious safety and security concerns." *Id.* If Plaintiffs were correct, "nuanced balancing" supported by "detailed factual findings" would have been required to uphold this rule. *See* SB at 2:6-7. But *Ward* recognized that a rule barring inmates from starting fires "clearly" is "reasonably related to a legitimate penological purpose." 1 F.3d at 879. Requiring more would make "common sense … the mere handmaiden of social science data or expert testimonials." *Amatel*, 156 F.3d at 199. Likewise, such data is not needed to

[1] *E.g.*, *Munson v. Gaetz* (7th Cir. 2012) 673 F.3d 630, 635-36; *Wolf v. Ashcroft* (3d Cir. 2002) 297 F.3d 305, 308; *Amatel v. Reno* (D.C. Cir. 1998) 156 F.3d 192, 199; *Giano v. Senkowski* (2d Cir. 1995) 54 F.3d 1050, 1054-55; *Uhuru v. Bonnifield* (C.D. Cal. Oct. 27, 2020) 2020 WL 6534087, at *12; *Fields v. Paramo* (E.D. Cal. Sept. 24, 2019) 2019 WL 4640502, at *6; *Sessing v. Beard* (E.D. Cal. June 29, 2015) 2015 WL 3953501, at *4; *Pegues v. Kibby* (C.D. Ill. Dec. 13, 2011) 2011 WL 6179207, at *2-3; *Smego v. Ashby* (C.D. Ill. Dec. 9, 2011) 2011 WL 6140661, at *2-3; *Lingle v. Kibby* (C.D. Ill. Dec. 7, 2011) 2011 WL 6091736, at *2; *Schloss v. Ashby* (C.D. Ill. Oct. 11, 2011) 2011 WL 4804868, at *5; *Belton v. Singer* (D.N.J. July 8, 2011) 2011 WL 2690595, at *12; *Tomasi v. Hayman* (D.N.J. Mar. 14, 2011) 2011 WL 890676, at *10-12; *Klein v. Tocci* (D. Mass. July 1, 2010) 2010 WL 2643414, at *2-3; *Lewis v. Ollison* (C.D. Cal. 2008) 571 F.Supp.2d 1166, 1172-73; *see also In re Long Term Admin. Segregation of Inmates* (4th Cir. 1999) 174 F.3d 464, 469 ("*LTASI*") (noting that *Turner* "chose the most deferential possible standard of review") (abrogated on other grounds by *Latson v. Clarke* (4th Cir. 2019) 794 F. App'x 266, 270).

sustain this Court's findings that the County "might reasonably have thought" digitizing mail will reduce the entry of "opioids by mail," that "exposure to Fentanyl is dangerous," or that allowing physical mail will "increase the risk of fentanyl entering the jail and would require allocating more time, money, and personnel to detecting [it]."[2] *See* Tentative Ruling "("TR") § IV-B.

## II. ANALYSIS

### A. *Turner* Is Applicable at the Pleading Stage

#### 1. Whether *Turner* Can Be Judged on the Pleadings Is Context Dependent

It is *not* appropriate to take "any 'categorical approaches'" regarding whether "an evidentiary showing" is required to apply *Turner*. *Wolf*, 297 F.3d at 308. Rather, "officials may or may not need evidence to demonstrate" a "rational connection between the regulation … and the interest asserted" depending on the nature of the rule at issue. *Klein*, 2010 WL 2643414, at *2.

Some rules—particularly ones concerned solely with resource allocation—present "situations in which the connection is not so apparent and does require factual development." *See Wolf*, 297 F.3d at 308. But the reasonableness of other rules is "a matter of common sense … such that a ruling on th[e] issue based only on the pleadings [is] appropriate." *Id.* Requiring more would make "common sense … the mere handmaiden of social science data or expert testimonials." *Amatel*, 156 F.3d at 196, 199. Whether a rule can be upheld "on the basis of 'common sense' will depend on the nature of the right, the nature of the interest asserted, the nature of the prohibition, and the obviousness of its connection to the proffered interest." *Wolf*, 297 F.3d at 308-09.

*Tiedemann* recognized that while *Turner* is a very "deferential standard," it "requires *some* assessment of the actual relationship between the [rule] and the penological interests asserted." 72 F.4th at 1013 (emphasis added). There, that "assessment" required evidence because it clearly was "not obvious" that the rule at issue was "reasonably related to legitimate penological objectives." *Id.* at 1013-14. A review of the case shows this was true for at least two reasons.

[2] Plaintiffs' last-minute reliance on *Tiedemann*—a case they never cited in their briefs—is also dubious because it was issued months *before* the County filed its motion. Courts should "not consider arguments asserted for the first time at oral argument." *People v. Garcia* (2023) 93 Cal.App.5th 416, 428. A court cannot even "take judicial notice of a case that was not cited in the briefs." *Grosz v. Cal. Dep't of Tax & Fee Admin.* (2023) 87 Cal.App.5th 428, 447 fn. 12.

First, the inmate's "complaint was silent as to the prison's asserted rationale" for the challenged rule. SB at 3:26-27. This was critical because a "court may only look to the facts alleged in the complaint when deciding whether to grant a … motion [to dismiss]." *Baker v. Elko Cnty.* (D. Nev. 1993) 828 F.Supp. 798, 799. The jailers defended the rule—which "limit[ed] … prisoners to 300 minutes … per month of phone time"—in general terms, arguing it *could* "ensur[e] fairness of phone access among different prisoners." *Tiedemann*, 72 F.4th at 1014. But it was not established *what* "penological interests" they actually "asserted" when they enacted it. *See id.* at 1013-14. Indeed, the trial court's decision did not even try to identify any such interest. It simply "dismissed the case as moot" without addressing the *Turner* factors. SB at 2:14-15. The jailers asked the circuit court to address the *Turner* test *for the first time on appeal*, arguing that it could "affirm based on any ground supported by the record." *Tiedemann*, 72 F.4th at 1012. But, again, the record did not established *what* "governmental interest" they "put forward to justify [the rule]" in the first place. *See id.* at 1013-14. To apply *Turner*, a court must "describe[] the interest purportedly served by [the rule]." *Wolf*, 297 F.3d at 308. A jail cannot—as the *Tiedemann* defendants attempted—defeat a suit by positing "theories" in "general terms" regarding hypothetical goals the rule might serve. *See id.* Here, in contrast, Plaintiffs admit the goal the County "put forward to justify [the mail policy]." It "announced that the … policy [is] meant to prioritize ... safety" due to "concerns regarding fentanyl exposures with the old mail system." AC ¶¶ 9, 49. Similarly, *Munson* affirmed dismissal of an inmate's suit on the pleadings because his "complaint provided the prison's legitimate interest." 673 F.3d at 635. As the court explained, the inmate "pled himself out of court by saying too much." *Id.* (quotation omitted). So too here.

Second, the *Tiedemann* complaint could not have been adjudicated on the pleadings in any event because it involved a pure allocation-of-resources rule that could not be judged based on common sense. The rule "limited … prisoners to 300 minutes … per month of phone time." *Id.* at 1014. The court found it was "not obvious from the pleading stage"—i.e., not a matter of *common sense*—"that a 300-minute cap, as opposed to some higher cap" was "reasonably related to legitimate penological goals." *Id.* at 1012, 1014. This was because the rule applied "systemwide" to myriad jails with different populations and technical capabilities and "not all jails are the same"

in this regard. *Id.* at 1014. In other words, "it [was] not obvious" from the pleaded facts that jails with lower populations and more phones could not reasonably accommodate a higher cap. *See id.*

**2. Plaintiffs' Own Authority Refutes Their Absolutist Interpretation**

Plaintiffs claim their "understanding of *Turner*" rests on "two prior decisions" relied on by *Tiedemann—Shakur v. Schriro* (9th Cir. 2008) 514 F.3d 878 and *Ward*, 1 F.3d 873. SB at 2:24-3:1. But neither of these cases justify Plaintiffs' absolutist reading of *Turner*.

In *Shakur*, a Muslim inmate who requested kosher meals because "kosher meat is consistent with Islamic Halal requirements" challenged a rule that restricted "kosher [meals] to Jewish inmates." 514 F.3d at 882. The court held that this rule could not be judged on the pleadings because common sense did not answer the question of whether "providing kosher meat to Muslim inmates" in addition to Jewish inmates would impose an "extensive cost." *Id.* at 891.

In *Ward*, an inmate challenged jail rules that denied him "a kosher diet" and prohibited him from "hav[ing] candles in his cell." *Ward*, 1 F.3d at 876. With regard to the dietary rule, the court found that evidence was needed to evaluate "the financial impact of accommodation" as "it may be possible" to offer foods that "comply with" the "Jewish dietary law … at de minimis cost." *Id.* at 879. But the court held such nuanced balancing was *not* needed to judge the rule banning "candles in [the inmate's] cell." *Id.* "The *Turner* factors ***clearly weigh[ed] in favor of the [jail] on this claim***" because common sense shows "serious safety and security concerns [are] raised by allowing inmates to possess and use candles." *Id.* (emphasis added).

**3. Record Evidence Is Less Important in Cases Involving Security Rules**

*Ward*'s divergent treatment of the jail's rules regarding food and fire illustrates an important aspect of *Turner* review. Evidence is almost always needed to evaluate rules that relate solely to the allocation of a jail's resources. In contrast, rules addressing security are often subject to common sense evaluation. *See, e.g.*, cases cited in Part II-A-4, *infra*. This follows from the fact that promoting security is regarded as "the most legitimate penological goal." *Overton*, 539 U.S. at 127. Security rules are also entitled to the greatest deference because such matters "are peculiarly within the province and professional expertise of corrections officials." *Turner*, 482 U.S. at 86.

When addressing resource allocation rules, courts have focused their inquiry on whether

providing the additional resources requested by the inmate can be accomplished "at de minimis cost." *Ward*, 1 F.3d at 879; *see also Tiedemann*, 72 F.4th at 1013-14 (whether limiting inmate phone use to 300 minutes per month reasonably "ensur[es] fairness of phone access among … prisoners" was "not obvious from the pleading stage"); *Shakur*, 514 F.3d at 891 (common sense did not answer the question whether "providing kosher meat to Muslim inmates" would impose an "extensive cost"). In other words, courts addressing rules justified *solely* on resource allocation grounds have required jails to proffer evidence that the rules actually serve their desired ends.

But courts evaluating a rule that advances jail security have found that it is inappropriate to ask "whether the regulation in fact advances the government interest" asserted. *Amatel*, 156 F.3d at 199. They simply ask whether the administrators that adopted it "***might reasonably have thought that [it] would***." *Mauro v. Arpaio* (9th Cir. 1999) 188 F.3d 1054, 1060) (emphasis added). This is because *Turner* empowers jails "to anticipate security problems" ***before they ever arise*** and "adopt innovative solutions." *Turner*, 482 U.S. at 89.

**4. Cases Upholding Common Sense Rules on the Pleadings Are Legion**

Cases applying "common sense" to dismiss *Turner* claims are legion. For example, *Amatel* upheld a rule banning "sexually explicit" material because it was "reasonably related" to the goal of "rehabilitat[ing]" inmates. 156 F.3d at 194, 196, 198-99. The court noted there "[wa]s, of course, no 'record evidence' and certainly no sophisticated multiple regression analyses or other social science data" presented to support this finding. *Id.* at 199. None was needed. "Common sense tells us that prisoners are more likely to develop the now-missing self-control and respect for others" if they are prevented from viewing materials that "elevate the value of the viewer's immediate sexual gratification over the values of respect and consideration for others." *Id.*

Likewise, *Munson* upheld a rule banning "books contain[ing] drug-related content." 673 F.3d at 635. The court rejected the inmate's claim that the "[trial] court erred in dismissing his complaint [on the pleadings] before taking evidence," finding "common sense" so clearly showed the rule's reasonableness under the *Turner* factors that "[t]here was little else to say." *Id.* at 633, 635. The court in *Giano* agreed with this approach, finding no "intensive empirical support" was needed to uphold a rule "banning nude photographs of inmate's wives" because "common sense"

showed that such "photographs may provoke violence." 54 F.3d at 1055. Similarly, *Sessing*, echoing *Ward*, applied *Turner* at the pleadings stage to uphold a rule banning inmates from using fire during religious exercises because "[t]he link between prison security and allowing inmates to use fire is obvious." 2015 WL 3953501, at *4. And *Tomasi* dismissed "on the pleadings" an inmate's challenge to a rule barring him from "operating a business." 2011 WL 890676, at *10-12. The court held that it was a matter of "common sense" that "operating a business inside a correctional facility" can "result in the introduction of contraband." *Id.* at *12. Examples abound of other cases holding that *Turner*'s "factors may be considered at the pleading stage" and dismissing claims because the "link" between the targeted rule and its goal was "obvious."[3]

**5. *Turner*'s Low Bar Refutes Plaintiffs' Absolutist Reading**

Plaintiffs' Supplemental Brief portrays *Turner* as an exacting test that always "requires nuanced balancing." SB at 2:5-7. This ignores the deferential standard of review applicable to *Turner* and other rational-basis challenges. As Justice Brown recognized, in civil rights litigation "the outcome in every case" is "foreordained" by "the … [standard of] review" precedent applies to the asserted right. *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 504 (Brown, J., concurring). Cases "that impact rights the [High] [C]ourt deems 'fundamental,' warrant strict (read 'fatal') scrutiny." *Id.* In contrast, most other classifications "warrant rational basis (read 'anything goes') review."

[3] *Uhuru*, 2020 WL 6534087, at *12 (collecting cases); *accord*, *e.g.*, *Fields*, 2019 WL 4640502, at *6 (dismissing challenge to rule denying inmate a circumcision because common sense and precedent showed "all four *Turner* factors favor[ed] [the] defendants"); *Pegues*, 2011 WL 6179207, at *2-3 (dismissing challenge to rule prohibiting "personally owned computer[s]" on the pleadings because "the legitimate penological reasons for the rule are … obvious"); *Smego*, 2011 WL 6140661, at *2-3 (same); *Lingle*, 2011 WL 6091736, at *2 (dismissing challenge to rule prohibiting video games on the pleadings because "the legitimate penological reasons for the rule [were] obvious"); *Schloss*, 2011 WL 4804868, at *5 (same); *Belton*, 2011 WL 2690595, at *12 (dismissing at pleadings stage sexually violent inmate's challenge to rule barring "thumb drives" because common sense showed the rule was "reasonably related" to the jail's "legitimate penological interests" of "maintaining security, preserving internal order and rehabilitation"); *Klein*, 2010 WL 2643414, at *2-3 (dismissing challenge to rule barring inmates from "[f]iling five or more grievances in any week" because limiting the number of grievances an inmate can file was "a common sense way of serving this interest because absent limits, an inmate could flood the grievance system"); *Lewis*, 571 F.Supp.2d at 1172-73 (dismissing inmate's challenge to a rule allowing him "to purchase [only] one … bottle of prayer oil" per month because precedent upholding similar rules showed that his claims were "inconceivable").

*Id.* This is because "***[t]he rational basis test is, more or less, a judicial rubber stamp***." *U.S. v. Sahhar* (9th Cir. 1990) 917 F.2d 1197, 1291 fn. 5 (emphasis added). In contrast, "strict scrutiny is 'strict' in theory and fatal in fact." *Hill v. NCAA* (1994) 7 Cal.4th 1, 31. As Justice Mosk noted, this "binary theory" requires courts to "appl[y] either a standard that is virtually always met (the rational relationship test) or one that is almost never satisfied (the strict scrutiny test)." *Hays v. Wood* (1979) 25 Cal.3d 772, 796 (Mosk, J., concurring).

Tacitly recognizing this fact, Plaintiffs have argued that a made-up "intermediate scrutiny" standard governs their claims.[4] But rules "regarding … [inmate] mail are evaluated under the standards set forth in *Turner*." TR § IV-B. And *Turner* is "a rational-basis test." *Evans v. Skolnik* (9th Cir. 2021) 997 F.3d 1060, 1071 fn. 8. By invoking "the language of rational basis scrutiny [*Turner*] chose the most deferential possible standard of review for cases presenting … issues of prison administration." *LTASI*, 174 F.3d at 469. And a California Court may dismiss—"on the pleadings"—a challenge to a rule subject to "rational basis" review if common sense shows the rule "bears a reasonable relation" to "a legitimate [objective]." *Sievert*, 60 Cal.App.3d at 236-37; *accord Beeman*, 58 Cal.4th at 334, 339 ("judgment on the pleadings" proper if rule "is subject to rational basis review" and it is "reasonably related to [a] legitimate objective"). It would make no sense for *Turner*—which invokes "rational basis scrutiny"—to require a higher standard.

### B. Common Sense Shows All the *Turner* Factors Are Met Here

#### 1. The Mail Policy Furthers Legitimate Penological Objectives

Plaintiffs claim "physical mail bans in other facilities have not reduced drug use." SB at 5:3-4. But *Turner*'s first prong does *not* ask "whether the regulation in fact advances the government interest" of reducing drugs. *See Amatel*, 156 F.3d at 199. It asks whether the County "might reasonably have thought that [it] would." TR § IV-B-1. It "makes logical sense" that "ban[ning] … [physical] mail" will reduce "access to opioids." *HRDC*, 654 F.Supp.3d at 91, 99. Thus, the Court correctly found this prong is met because the County "might reasonably have thought that the policy" would limit "access to opioids that can be sent by mail." TR § IV-B-1.

[4] *See* Plaintiffs' Opposition to Motion for Judgment on the Pleadings at 6:20-21; 11:2-12:13.

**2. The Mail Policy Provides Alternative Means to Use the Mail**

Precedent establishes that providing inmates digital copies of mail on either tablets or kiosks is "an adequate substitute for … paper copies." *Honea*, 876 F.3d at 970, 976; *accord HRDC*, 654 F.Supp.3d at 99. Plaintiffs claim the Court must ignore these holdings because *Shakur* held that a "court could not just rely on findings of other cases considering similar policies." SB at 5:11-12. Not so. *Shakur* reversed the trial court's dismissal because it relied solely on "cursory case citations" without "actually balanc[ing] the four *Turner* factors." 514 F.3d at 885. In fact, courts *are* permitted to rely on precedent evaluating analogous rules when applying *Turner*. For example, *Lewis* upheld a rule stating that "an inmate may possess no more than 12 ounces of [prayer] oil." 571 F.Supp.2d at 1166-67. In so holding, the court relied on *Perez v. Frank* (W.D. Wis. 2006) 433 F.Supp.2d 955, which upheld a similar rule. *Lewis*, 571 F.Supp.2d at 1172. Based on this precedent, the *Lewis* court held that "[i]t [wa[s] inconceivable that [the inmate] [could] demonstrate" that the rule violated *Turner*. *Id*. at 1173.

Here, *Honea* and *HRDC* held digitizing mail "more than satisfie[s] [*Turner*'s] second prong." *HRDC*, 654 F.Supp.3d at 99. Thus, the Court correctly found the mail policy provides "adequate alternatives" because inmates "may access [mail] via tablets and kiosks." TR § IV-B-2.

**3. An Accommodation Will Increase the Risk of Opioids Entering the Jail**

Plaintiffs claim "harm from incidental fentanyl exposure is simply not possible." SB at 5:1-2. But the test is whether the County "might reasonably have thought that the policy" will prevent harm. *See Mauro*, 188 F.3d at 1060. Numerous courts have found "fentanyl can be absorbed through the skin" and "can be deadly if touched." *Walker*, 423 F.Supp.3d at 285 fn. 24. Thus, the County's belief is plainly *reasonable*. And there can be no doubt that preventing inmates from *willingly ingesting* fentanyl will prevent harm. "It is nearly a matter of judicial notice that exposure to Fentanyl is dangerous and sometimes lethal." TR § IV-B-3. Thus, the Court correctly found that this prong is met as "[a]n accommodation would increase the risk of fentanyl entering the jail and would require allocating more time, money, and personnel to detecting [it]." *Id.*

**4. The Policy Is Not an Exaggerated Response to the Jail's Concerns**

*Turner*'s final prong asks if "the [policy] is an exaggerated response to [the jail's]

concerns." *Snow*, 128 Cal.App.4th at 393. Plaintiffs claim this requires the County to disprove the viability of any conceivable "alternatives to the challenged policy." SB at 6:22-23. But *Turner* itself rejected such scrutiny. There, the Court upheld a jail rule banning all "inmate-to-inmate" mail. 482 U.S. at 81. In so holding, the Court admonished the trial court for suggesting that the rule was an exaggerated response because the jail could have conducted a "letter-by-letter" examination for dangerous correspondence. *Id.* at 94 fn. *. This was improper because *Turner*'s "exaggerated response" prong "is not a 'least restrictive alternative' test" and thus jails "do not have to set up and then shoot down every conceivable alternative method." *Id.* at 91. Rather, this prong is satisfied if the inmate's proffered alternatives "would impose more than a de minimis cost on the pursuit of legitimate corrections goals." *Id.* at 93. Requiring a "letter-by-letter" examination would clearly impose such costs. *Id.* at 93, 94 fn. *. Here, using drug-sniffing dogs or scanners to search for fentanyl would also require a costly "letter-by-letter" examination. Such methods would also require physical contact with mail by jail staff and their canine helpers. This would come at a high cost since "fentanyl can be absorbed through the skin." *Walker*, 423 F.Supp.3d at 285 fn. 24.

## III. CONCLUSION

The Court's tentative ruling makes three common sense findings that doom Plaintiffs' case: (1) the County "might reasonably have thought" digitizing mail will reduce the entry of "opioids by mail"; (2) "exposure to Fentanyl is dangerous"; and (3) allowing physical mail will "increase the risk of fentanyl entering the jail and would require allocating more time, money, and personnel to detecting [it]." *See* TR § IV-B. "[N]o sophisticated multiple regression analyses" are required to sustain these findings. *Amatel*, 156 F.3d at 199. Thus, the Court should grant the County's motion.

DATED: January 19, 2024

Respectfully submitted,

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**PROOF OF SERVICE**

**A.B.O. COMIX, et al. v. County of San Mateo, et al.**
**Case No. 23-CIV-01075**

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**Case No. 23-CIV-01075**

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