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Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE 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

PLAINTIFFS' SUPPLEMENTAL BRIEF RE *TIEDEMANN v. VON BLANCKENSEE*

Judge: Hon. V. Raymond Swope
Hearing: January 31, 2024
Time: 2:00 pm
Dept.: 23

Action Filed: March 9, 2023
Trial Date: None Set

ARGUMENT

As requested by the Court at the December 4, 2023 hearing on Defendants' Motion for Judgment on the Pleadings, Plaintiffs submit this brief to address the application of *Tiedemann v. von Blanckensee* (9th Cir. 2023) 72 F.4th 1001, to this case. *Tiedemann* states clearly that the *Turner* test "requires factual determinations ill-suited to resolution on the pleadings." (*Id.* at 1004; *see also id.* at 1013–1014.) In particular, *Tiedemann* illustrates that *Turner* requires nuanced balancing of the four *Turner* factors based on detailed factual findings, not inference or conclusory assertions by jail officials. *Tiedemann* thus counsels that the Court reserve judgment on all four *Turner* factors until the parties have had an opportunity to develop the factual record.[1]

I. *Tiedemann* Affirms the Fact-Intensive Nature of the *Turner* Test

In *Tiedemann*, an incarcerated plaintiff challenged the application of a regulation limiting prisoner phone calls to 300 minutes per month, alleging that it violated his First and Fifth Amendment rights of familial association with his three children. The defendants moved to dismiss, arguing both that Tiedemann's claims were moot and that he had failed to state a claim. The district court dismissed the case as moot and declined to reach the defendants' arguments on the merits. The Ninth Circuit reversed, holding that the case was not moot and that Tiedemann had plausibly alleged a constitutional violation under *Turner*. (*Tiedemann*, 72 F.4th at 1015.)

In so holding, the Ninth Circuit stressed that the *Turner* test is "not a blank check, and instead requires some assessment of the actual relationship between the prison policy and the penological interests asserted." (*Tiedemann*, 72 F.4th at 1013.) Indeed, the court explained that "application of ***each*** *Turner* factor requires what is ultimately a factual assessment" (*id.*, emphasis added), and therefore should not be conducted "on a sparse factual record" (*id.* [quoting *Shakur v. Schriro* (9th Cir. 2008) 514 F.3d 878, 893].)

As the Ninth Circuit noted, this understanding of *Turner* builds on two prior decisions

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[1] In this supplemental brief, Plaintiffs address *Tiedemann*'s application of the *Turner* test. Plaintiffs maintain, however, that intermediate scrutiny is the appropriate standard of review for their free expression claim. (Pls. Opp. to Defs.' Mot. for Judgment on the Pleadings, Sec II.A. at 10–11.)

underscoring the critical importance of factual findings to the *Turner* analysis. In *Shakur v. Schriro* —a case challenging a prison's denial of a dietary accommodation—the Ninth Circuit reversed a grant of summary judgment as "premature" because the record evidence was insufficient—even after years of litigation—to evaluate the third and fourth *Turner* factors. (*Tiedemann*, 72 F.4th at 1013–1014 [citing *Shakur*, 514 F.3d at 885–888, 891–892].) Similarly, in *Ward v. Walsh*, the Ninth Circuit reversed a judgment in favor of prison officials after a bench trial, again because the district court had neither made "specific factual findings [nor] . . . engage[d] in a careful balancing of all the *Turner* factors." (*Tiedemann*, 72 F.4th at 1014 [quoting *Ward v. Walsh* (9th Cir. 1993) 1 F.3d 873, 879].)

Applying this line of cases to Tiedemann's claims, the Ninth Circuit concluded that ***none*** of the *Turner* factors could be resolved at the pleading stage.[2] Addressing the first *Turner* factor—whether the policy bears a rational relationship to a legitimate government interest—the Ninth Circuit explained that "while fairness may require equalizing phone time among prisoners at some level, it is not obvious from the pleading stage that a 300-minute cap, as opposed to some higher cap, is needed," especially because Tiedemann had alleged he was previously housed in a prison with no such cap.[3] (*Tiedemann*, 72 F.4th at 1014.) As to the second *Turner* factor—whether Tiedemann had "adequate 'alternative means of exercising'" his associational rights—the court found no basis in the record to conclude that in-person visitation or letter writing were viable alternatives to additional phone time between Tiedemann and his children, "whom Tiedemann allege[d] live[d] sufficiently far away as to make visitation difficult and whose reading and writing skills [we]re unknown." (*Ibid.*) In other words, the mere existence of those alternative

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[2] Although *Tiedemann* involved a pro se complaint, which the court took into account in analyzing the mootness question, the court did not mention the pro se nature of the complaint in applying the *Turner* test. (*Tiedemann*, 72 F.4th at 1009.)

[3] While Tiedemann's complaint was silent as to the prison's asserted rationale for the phone policy, the court nonetheless considered the prison's argument in its motion to dismiss that the phone policy was rationally related to providing more equitable phone access to a rapidly expanding population of incarcerated people. The court still found that resolution of this factor at the pleading stage would be premature. (*Tiedemann*, 72 F.4th at 1014.)

communication avenues was not sufficient to let a court evaluate their adequacy. Finally, addressing the third factor[4]—the impact of an exception for Tiedemann on other prisoners and/or guards—the court found that the absence of record evidence prevented it from engaging in the required analysis. (*Ibid.*) The court also noted that the policy's provision for "good cause" exceptions implied that the impact of an exception for Tiedemann might be manageable. (*Ibid.*)

II. *Tiedemann* Counsels Against the Court's Tentative Ruling on Several *Turner* Factors Without a Factual Record

The pleadings do not allow for the "specific factual findings" and "careful balancing" that *Tiedemann* and *Turner* demand. (*See Tiedemann*, 72 F.4th at 1014 [quoting *Ward*, 1 F.3d at 879].) The parties should be permitted to develop the factual record on each of the *Turner* factors with respect to the free expression claims of both the incarcerated and non-incarcerated plaintiffs.[5]

Factor 1: "Whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." (*Turner v. Safley* (1987) 482 U.S. 78, 89.) As in *Tiedemann*, Plaintiffs' Amended Complaint does not provide the Court with a factual basis to conclude that Defendants' mail policy is rationally related to a legitimate penological goal. To the extent the County provided any rationale for its ban on physical mail, it claimed in passing that it sought to protect jail personnel from the harms of fentanyl exposure. (AC ¶ 49.) At this stage, however, there is no record evidence to suggest that a physical mail ban would reduce such harms. (*Cf. Tiedemann*, 72 F.4th at 1014 ["[W]hile fairness may require equalizing phone time among prisoners at some level, it is not obvious from the pleading stage that [the challenged] 300-minute cap . . . is needed."].)

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[4] The *Tiedemann* court did not specifically address the fourth factor—whether the policy was an exaggerated response. Here, however, this Court's tentative ruling properly finds that the fourth prong requires additional factual development.

[5] As discussed at the December 4 hearing, constitutional guarantees of freedom of expression include not only the right to speak but also the right to receive information—rights that belong to both incarcerated and non-incarcerated individuals. (*See, e.g., Clement v. Cal. Dept. of Corrections* (9th Cir. 2004) 364 F.3d 1148, 1151 ["Prisoners retain their First Amendment right to receive information while incarcerated"]; *Jones v. Slade* (9th Cir. 2022) 23 F.4th 1124, 1134 ["Prisoners have a First Amendment right to receive information while incarcerated"] [citing *Clement*]; *In re Collins* (2001) 86 Cal.App.4th 1176, 1181.)

To the contrary, the Amended Complaint alleges that (i) based on scientific consensus, harm from incidental fentanyl exposure is simply not possible (AC ¶ 9); and (ii) physical mail bans in other facilities have not reduced drug use or overdoses (AC ¶ 53)—allegations that must be taken as true for purposes of this motion. (*Cf. Tiedemann*, 72 F.4th at 1014 [citing need for evidence regarding efficacy of policy].) Defendants ask the Court to disregard Plaintiffs' allegations and to assume that Defendants' broadbrush assertions in their briefing and at oral argument are the equivalent of facts in the record sufficient to rule in their favor on this *Turner* factor and the *Turner* test as a whole. That is plainly incorrect under *Tiedemann* and the precedents on which it relies. They attempt to circumvent fact development by relying on (and requesting improper judicial notice of) the reasoning of other courts considering other policies, but that is not a permissible basis to decide this factor. (*See Shakur*, 514 F.3d at 885 [court could not just rely on findings of other cases considering similar policies].) Defendants may still attempt to prove their factual assertions later, but not at the pleadings stage. (*See Tiedemann*, 72 F.4th at 1014.) Moreover, the County's mail policy goes beyond just a ban on physical mail; it also entails digitizing and retaining mail in an investigative database, which is chilling Plaintiffs' expressive activity. (AC ¶ 8.) Defendants have not even attempted to identify a rational connection between that component of the mail policy and their asserted goal.

Plaintiffs should be permitted to inquire into the County's reasons for adopting the mail policy and whether the risk of fentanyl exposure was among them. Other relevant considerations include, but are not limited to, (1) whether and to what extent drugs—including fentanyl—entered the San Mateo County jails through postal mail prior to the ban; (2) whether physical mail bans in other facilities have reduced drug use or overdoses; and (3) how specific features of the mail policy, including the retention of Plaintiffs' digitized mail, relate to the County's asserted interests. (AC ¶¶ 41, 49; *cf. Tiedemann*, 72 F.4th at 1014 [citing need for evidence regarding relationship between problem and specific solution chosen].)

Factor 2: "[W]hether there are alternative means of exercising the right that remain open to prison inmates." (*Turner*, 482 U.S. at 90.) *Tiedemann* was clear that the mere availability of other communication methods was insufficient to tip this factor in the government's favor and

that detailed findings of fact were required. (72 F.4th at 1014.) Here, the Court's analysis should be informed by evidence about, for example, the incarcerated Plaintiffs' access to tablets and kiosks, including the frequency of access and the amount of time given; how reliably the devices function; and limitations on electronic correspondence, phone calls, and visitation as means of exercising Plaintiffs' rights to practice religion, complete homework assignments, and otherwise express themselves, receive information, and maintain familial associations.

Factor 3: "**[T]he impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."** (*Turner*, 482 U.S. at 90.) *Tiedemann* and its predecessor cases demonstrate that the *Turner* test requires a court to consider both whether *and* to what extent accommodating Plaintiffs' rights would have an impact on the facility, including comparison to less restrictive alternatives. (*Tiedemann*, 72 F.4th at 1014; *Shakur*, 514 F.3d at 886–887; *Ward*, 1 F.3d at 878–879.) That analysis must be based on a developed factual record specific to the case; assertions of jail administrators and inferences are not enough. In *Ward*, for example, the court explained that while "common sense" says providing one prisoner a special meal would cause some disruption, this factor could not be resolved without factual findings about *how* disruptive it would be, based on more than the warden's assertions. (1 F.3d at 878–879.) Here, the Court cannot properly analyze this factor without evidence regarding the policy's effectiveness and the availability, cost and relative effectiveness of alternatives.

Factor 4: The presence or "absence of ready alternatives." (*Turner*, 482 U.S. at 90.) The Court correctly concluded in its December 1, 2023 tentative ruling that Defendants' motion did not satisfy *Turner*'s fourth factor. Indeed, as the Ninth Circuit explained in *Shakur* and *Ward*, assessing the fourth factor requires factual development regarding the existence and feasability of alternatives to the challenged policy. (*Shakur*, 514 F.3d at 887; *Ward*, 1 F.3d at 879.) Here, that would include looking into the policy in place before the physical mail ban was instituted as well as alternatives, including any considered by Defendants.

CONCLUSION

In light of *Tiedemann*, the Court should decline to attempt resolution of the fact-intensive *Turner* test at this early stage of the case. Instead, the Court should allow the parties to develop the

factual record on all of the *Turner* factors so that the Court can engage in the "careful balancing" that *Tiedemann* and *Turner* require.

DATED: January 8, 2024

Respectfully submitted,

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PROOF OF SERVICE

I, Victoria Python, declare as follows:

I am over the age of 18 years and not a party to the within action. My business address is 815 Eddy Street, San Francisco, California 94109. I am employed in the office of a member of the bar of this court at whose direction the service was made.

On January 8, 2024, I served the following document entitled:

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I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 8, 2024 at San Francisco, California.

Victoria Python