

No. 02-94

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM OVERTON, Director of Michigan Department of Corrections,
MICHIGAN DEPARTMENT OF CORRECTIONS,
Petitioners

v.

MICHELLE BAZETTA, et al.,
Respondents

On Writ of Certiorari To The United States Court of Appeals
For the Sixth Circuit

BRIEF OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY; CHILD WELFARE LEAGUE OF AMERICA; JUVENILE JUSTICE COMMITTEE OF THE CRIMINAL LAW SECTION OF THE AMERICAN BAR ASSOCIATION; CENTER FOR CHILDREN OF INCARCERATED PARENTS; NATIONAL ASSOCIATION OF SOCIAL WORKERS; MICHIGAN CHAPTER OF NATIONAL ASSOCIATION OF SOCIAL WORKERS; CENTERS FOR YOUTH AND FAMILIES; CENTER FOR THE STUDY OF SOCIAL POLICY; ARKANSAS VOICES FOR THE CHILDREN LEFT BEHIND; FAMILY AND CORRECTIONS NETWORK; CHEYENNE RIVER SIOUX TRIBE; MICHIGAN COUNCIL ON CRIME AND DELINQUENCY; MICHIGAN FEDERATION FOR CHILDREN AND FAMILIES; CHILDREN AND FAMILY JUSTICE CENTER; MICHIGAN PROTECTION AND ADVOCACY SERVICE; NATIONAL NETWORK FOR WOMEN IN PRISON; LEGAL SERVICES FOR PRISONERS WITH CHILDREN; UNIVERSITY OF ARKANSAS AT LITTLE ROCK SCHOOL OF SOCIAL WORK; CHICAGO LEGAL ADVOCACY TO INCARCERATED MOTHERS; MICHIGAN ASSOCIATION FOR CHILDREN WITH EMOTIONAL DISORDERS; PRISON REFORM ADVOCACY CENTER; PORTIA PROJECT/PROJECT LINK-UP; PRISON ACTIVIST RESOURCE CENTER; YOUTH LAW CENTER; ROSEMARYSARRI, Ph.D.; AARON MCNEECE Ph.D.; HAROLD S. GAZAN, M.S.W.; JAMES E. ROLLIN, Ph.D.; PATRICIA RIDEOUT; ROSARIO CEBALO, Ph.D.; TOM CROXTON, M.S.W.; BARBARA BADEAR ALDAVE AND MICHIGAN STATE SENATORS ELIZABETH BRATER; GILDA JACOBS; AND MARTHA G. SCOTT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND SEEKING AFFIRMANCE

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
INTERESTS OF THE AMICI CURIAE.....	1
ARGUMENT	6
I. CHILDREN ARE SIGNIFICANTLY HARMED WHEN THEY CANNOT VISIT THEIR PARENTS OR OTHER CLOSE RELATIVES IN PRISON.....	6
A. The Number Of Children Who May Be Affected.....	6
B. The MDOC Regulations Restrict Children From Visiting Incarcerated Parents And Other Close Relatives.....	8
1. Minor nieces and nephews of prisoners may not visit.	8
2. Children for whom parental rights have been terminated may not visit their parents.....	9
3. Prohibition of visits by former prisoners who are not immediate family members can exclude the only adult available to accompany a visiting child.....	10
4. The requirement that visiting children be accompanied by an adult immediate family member or legal guardian denies visitation to children.	11
5. Permanent bans on visitation completely exclude children from visits.....	12
C. Failure To Visit Imprisoned Parents Or Other Close Family Members Causes Significant Emotional, Psychological And Developmental Harm To Children.	13
D. State And Federal Policies And Practices Encourage And Facilitate Visitation Between Parents And Children, And Presume That Such Visitation Is Beneficial.	17

II. THE PLAINTIFFS, INCLUDING THE CHILDREN, HAVE A FUNDAMENTAL RIGHT TO FAMILY INTEGRITY, INCLUDING THE RIGHT TO NON-CONTACT VISITATION.....	19
A. Familial Relationships Are Protected By The First And Fourteenth Amendments.....	19
III. THE MDOC REGULATIONS ARE NOT REASONABLY RELATED TO A LEGITIMATE PENOLOGICAL INTEREST.....	21
A. There Is No Valid Connection Between The Regulations Restricting Visitation By Children And A Legitimate Penological Interest.....	22
B. There Are No Adequate Alternative Means Available To Exercise The Right To Familial Association Other Than Visitation.	24
CONCLUSION.....	26

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<i>M.L.B. v. S.L.J.</i> , 519 U.S. 102 (1996).....	25
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	25
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977).....	25
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	25
<i>Quilloin v. Walcott</i> , 434 U.S. 246 (1978)	25
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984).....	25
<i>Santosky v. Kramer</i> , 455 U.S. 745	25
<i>Smith v. OFFER</i> , 431 U.S. 816 (1977).....	26
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972).....	25
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000).....	14
<i>Turner v. Safley</i> , 482 U.S. 78 (1987).....	26
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	25
 <u>Statutes and Rules</u>	
28 C.F.R. § 540.40.....	24
Adult Education and Family Literacy Act, Title II of, Workforce Investment Act of 1998, Pub. L. 105-220	31
Even Start Family Literacy Act, Pub. L. 106-554	31
Federal Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a)(E)	14
Mich. Admin. Code R. 791.6609 et seq.....	passim.
Mich. Comp. Laws § 712A.13a(11).....	17, 23
Mich. Comp. Laws § 722.27a(1)	24
Mich. Comp. Laws § 722.27a(3)	24
 <u>Treatises, Articles, and Other Publications</u>	
American Correctional Assoc. Standard 3-4440	29

Barnhill, Presentation at <i>Woman Offender Symposium: Through the Eyes of a Child</i> (Sept. 19-20, 2000).....	21
Bernert& Ikle, <i>Evacuation and the Cohesion of Urban Groups</i> , 58 Amer. J. Sociology 133 (1952)	24
Brooks & Bahne; <i>Its a Family Affair: The Incarceration of the American Family: Confronting the Legal and Social Issues</i> , 28 U.S.F.L. Rev. 271 (1994)	24
Dowden. & Andrews., <i>What Works For Female Offenders: A Meta-Analytic Review</i> , 45 Crime & Delinquency 438 (1999).....	25
Florida Corrections Commission 2001 Annual Report.....	24
Hairston, <i>Family Ties During Imprisonment: Do They Influence Future Criminal Activity?</i> 52 Federal Probation 48 (1988)	24
Hairston, <i>Prisoners and Families: Parenting Issues During Incarceration</i> , prepared for U.S. Dept. of Health and Human Svcs. "From Prisons to Home" Conference (Jan. 2002)	24
Gauch, <i>When Mothers Go To Prison: When You're Behind Bars, Does Your Family Life Have To Crumble?</i> 16 Human Relations 33 (1959).....	23
Krisberg & Temin, <i>The Plight of Children Whose Parents Are in Prison</i> , Fed. Sentencing Report (Jan. 2001).....	22
Mumola, <i>Incarcerated Parents and Their Children</i> , U.S. Department of Justice, Bureau of Justice Statistics Special Report (Aug. 2000).....	11
<i>On Prisoners and Parenting: Preserving the Tie That Binds</i> , 87 Yale L.J. 1408 (1978)	24
Parke & Clarke-Stewart, <i>Effects of Parental Incarceration on Young Children</i> , prepared for U.S. Dep't of Health & Human Svcs."From Prison to Home" Conference (Jan. 2002)	23
<i>Rallying the Armies of Compassion</i> , White House News Report (Jan. 2001).....	12
Sack & Seidler, <i>Should Children Visit Their Parents in Prison?</i> 23 Law & Human Behavior 261 (1978)	24
Sarri, <i>Children of Incarcerated Mothers</i> , in <i>What About Me? Children of Incarcerated Parents</i> (E. Trzeninski, D. Satyanathan & L. Ferro, ed.) (March 2002).....	26

Satyanathan, *Overview contained in What about Me? Children with Incarcerated Parents* (E. Trzeinski, D. Satyanathan & L. Ferro, ed.) (March 2002) 12

Skinner & Swartz, *The Consequences for Preschool Children of a Parent’s Detention: a Preliminary South African Clinical Study of Caregiver’s Reports*, 30 *Child Psychology & Psychiatry & Allied Disciplines* 243 (March 1989) 20

Slaight, *Family And Offender Treatment; Focusing On The Family In The Treatment Of Substance Abusing Criminal Offenders*, 19 *J. Drug Education* 53 (1999)..... 25

Travis, Waul, & Solomon, Amy, *The Impact of Incarceration and Re-entry on Children, Families and Communities*, for the U.S. Dept. of Health & Human Svcs. “From Prisons to Home” Conference (Jan. 2002) 11

Understanding and Supporting Foster Children With Incarcerated Parents, Jordan Institute for Families (Jan. 2002) 22

United Nations Minimum Rules for the Treatment of Prisoners, Rule 37..... 29

INTERESTS OF THE AMICI CURIAE¹

Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief. Letters confirming such consent have been filed with the Court.

The National Council on Crime and Delinquency is a nonprofit organization dedicated to preventing and reducing crime. It, and the **Michigan Council on Crime and Delinquency**, are interested in this case because there is strong evidence that contact between children and their incarcerated parents ameliorates the children's problems and helps the parents upon release.

The Juvenile Justice Committee of the Criminal Law Section of the American Bar Association is interested because the ABA Legal Status of Prisoners Standard 23-6.2(d) states, "prisoners should be able to receive any visitor not excluded by correctional authorities for good cause." The **Children and Family Justice Center** is a children's law center serving the children of Chicago. The **Youth Law Center** is a non-profit public interest law office serving abused and at-risk children.

The Child Welfare League of America

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* has authored this brief in whole. Dykema Gossett PLLC, *amici's* counsel, has paid entirely for the preparation and submission of the brief as part of its *pro bono* program.

The **National Association of Social Workers** (“NASW”) is a professional organization with 150,000 members. The NASW and the **Michigan Chapter of the NASW** are interested in this case because the NASW Statement on Correctional Social Work states that social workers should develop and advocate necessary family programs for incarcerated individuals. The **School of Social Work at the University of Arkansas at Little Rock** is interested in this case because the denial of visitation is detrimental to children already traumatized by parental incarceration. The **Center for the Study of Social Policy** is interested in this case because it believes that children have the right, and need, to see their incarcerated family members.

The **Centers for Youth and Families** and the **Arkansas Voices of the Children Left Behind** are professionals and volunteers serving incarcerated parents and their children in Arkansas. **Family and Corrections Network** is a nonprofit organization of agencies and individuals concerned with issues facing families of prisoners. The **Center for Children of Incarcerated Parents** is a nonprofit organization which provides programs for children of incarcerated parents. The above are interested in this case because they believe that visitation with

incarcerated family members is fundamental to the well-being of children and families.

The **National Network for Women in Prison** advocates on behalf of female inmates nationwide and **The Portia Project/Project Link-Up** provides services to women in Oregon prisons. **Legal Services for Prisoners with Children** and **Chicago Legal Advocacy to Incarcerated Mothers** provide legal services to incarcerated parents and their children.

The **Michigan Federation for Children and Families** is a statewide association of child and family service agencies, interested in this case because they believe visitation with imprisoned parents is critical to children's development and adjustment. The **Michigan Protection and Advocacy Service** is a non-profit organization designed to protect and advocate the rights of individuals with disabilities, including prisoners. The **Michigan Association for Children With Emotional Problems** is a nonprofit organization that wants to ensure that children with emotional disorders are not deprived of visitation with incarcerated family members, which is essential to the children's development.

The **Prison Activist Resource Center** in Oakland, California and the **Prison Reform Advocacy Center** in Cincinnati, Ohio are interested in this case because they provide advocacy and resources to prisoners and their family and friends.

The **Cheyenne River Sioux Tribe** of South Dakota is a federally recognized tribe of 13,270 Native Americans, interested in this case because Native Americans are significantly over-represented in state prisons, therefore, such children are disproportionately impacted by family visitation restrictions.

Prof. Emeritus Rosemary Sarri, Ph.D., Univ. of Mich. social worker, has found that women prisoners often encounter problems in parental legal matters due to the fact that courts expect there will be some face-to-face contact between mother and child. **Prof. Aaron McNeece, Ph.D.**, Florida State Univ. social worker, has found that inmates who have regular visits from their families adjust better within the prison and have a reduced likelihood of recidivism. **Harold Gazan, M.S.W.** served as Director of the Mich. Dep't. of Social Services, Bureau of Child and Family Services, and believes that visitation by children with their incarcerated parents is necessary to maintain the child's emotional bonds with the parent. **Prof. James Rollin**, Jane Addams College of Social Work, believes that children who fail to bond with their parents by lack of contact are at increased risk of social problems.

Patricia Rideout, J.D. has twenty-two years experience as a guardian *ad litem*, Juvenile Court referee, and child welfare agency administrator, and believes the regulations at issue are detrimental to most children of prisoners, especially those in foster care. **Prof. Emeritus Tom Croxton, J.D., M.S.W.**, Univ. of Mich.,

is a former juvenile court director who believes that the regulations at issue unfairly punish children and are counterproductive. **Prof. Rosario Ceballo, Ph.D.**, Univ. of Mich. Dep't. of Psychology, believes visitation between children and incarcerated parents are in the best interest of the child. **Barbara Bader Aldave** is a Professor at the Univ. of Oregon School of Law. **Elizabeth S. Brater, Gilda Jacobs, and Martha G. Scott** are Michigan State Senators from the 18th, 14th, and 2nd Districts, respectively.

SUMMARY OF ARGUMENT

Over one and a half million children in the United States have a parent in prison. Social science data demonstrates that visitation with imprisoned parents or other close family members benefits, rather than harms, children. Moreover, such visitation is a necessary and indispensable component of the right of familial association, long recognized by this Court as one of the most fundamental of Constitutional rights. The visitation restrictions at issue are not reasonably related to a legitimate penological interest, and there are no adequate alternative means to exercise the right of familial association other than visitation. It must be borne in mind that the petitioners are applying the restrictions at issue to non-contact visits, the very nature of which eliminates many of the concerns expressed by the MDOC. *Amici curiae* urge the Court to affirm the decision of the United States Court of Appeals of the Sixth Circuit, and strike down the regulations as unconstitutional.

ARGUMENT

I. CHILDREN ARE SIGNIFICANTLY HARMED WHEN THEY CANNOT VISIT THEIR PARENTS OR OTHER CLOSE RELATIVES IN PRISON.

The challenged regulations have the effect of denying children, who are not responsible for the incarceration, the opportunity to visit their imprisoned parents and other close relatives. Studies show that the children will be emotionally, psychologically, and developmentally harmed by this additional forced separation from their loved ones. In addition, the regulations are directly contrary to well-settled policies, which hold that children have a right to visitation with parents and other relatives when it is in their best interest, even if their parents may have been found to be neglectful or abusive in the past.

A. The Number Of Children Who May Be Affected.

Although the regulations at issue are currently in place only in Michigan, Petitioners have asked this Court to rule that there is no constitutional right whatsoever to visitation. Such a ruling would, of course, apply to all states and the federal system. It is therefore important to point out the number of children who will be affected by this Court's decision.

As of 2000, almost 1.5 million children in the United States had a parent in prison. Christopher Mumola, *Incarcerated Parents and Their Children*, U.S. Department of Justice, Bureau of Justice Statistics Special Report (Aug. 2000). (Attached as Appendix A.) Fifty-six percent of all state and federal prisoners have

minor children. (*Id.*) Fifty-eight percent of the children with incarcerated parents are under ten years old, with a mean age of eight. (*Id.*) Twenty-two percent of these children are under age five. There are racial and ethnic disparities as well: almost seven percent of all African-American children, three percent of all Hispanic children, and one percent of all white children in the total population have a parent in prison. (*Id.*)

These children are already considered to be at high risk by social workers and child welfare agencies. They typically live in poverty, suffer feelings of fear, anxiety, abandonment, embarrassment and guilt, and are at increased risk for poor academic performance, gang participation, substance abuse, teen pregnancy and juvenile delinquency. *See, e.g.,* Jeremy Travis, Michelle Waul & Amy Solomon, *The Impact of Incarceration and Re-entry on Children, Families and Communities*, a Background Paper for the U.S. Dept. of Health & Human Svcs. “From Prisons to Home” Conference (Jan. 2002); Deborah Satyanathan, *Overview* contained in *What about Me? Children with Incarcerated Parents* (E. Trzeinski, D. Satyanathan & L. Ferro, ed.) (March 2002). (Attached as Appendix B.) President Bush has recognized the special needs of these children, initiating a federal program providing grants to organizations providing services to the children of prisoners, and calling for volunteers to serve as mentors to these children. *See,*

e.g., Rallying the Armies of Compassion, White House News Report (Jan. 2001).

As then Governor George Bush said at the 2000 NAACP Convention:

More than a million children have one or both parents in prison. These are forgotten children – almost six times more likely to go to prison themselves. And they should not be punished for the sins of their fathers. . . . Let us bring help and hope to these innocent victims of crime.

B. The MDOC Regulations Restrict Children From Visiting Incarcerated Parents And Other Close Relatives.

Each of the MDOC visitation policies at issue results in the denial of visitation to children, as specified below.

1. Minor nieces and nephews of prisoners may not visit.

Under Mich. Admin. Code R. 791.6609(2)(b) only minors who are children, stepchildren, grandchildren or siblings of the prisoner may visit.² By excluding minor nieces, nephews or cousins, the regulation terminates the ability of these children to visit family members who often play a significant role in their lives. Should the regulation again be changed to exclude siblings, it would be all the more harsh. Minor nieces and nephews are unable to visit, even if the prisoner served as the child's surrogate parent prior to incarceration.³ This restriction also

² After the district court entered its opinion, MDOC changed its regulations to allow visits from minor siblings, which had previously been prohibited. However, because the MDOC appears to assert its right to impose this restriction again if it so desires, *amici* address this restriction herein.

³ Illogically, the regulations define aunts and uncles who served as the *prisoner's* surrogate parent as immediate family members (Mich. Admin. Code R. 791.6609(9)(k)), but fail to recognize that the prisoner *him or herself* may have played the same role for nieces and nephews.

ignores the structure of modern families, where aunts and uncles can be as close to a child as a parent or grandparent. As this Court noted in *Troxel v. Granville*, 530 U.S. 57, 63 (2000), “the demographic changes of the past century make it difficult to speak of an average American family.” The important role of extended family members is especially true in African-American and Hispanic families, which make up the majority of children of prisoners.

2. Children for whom parental rights have been terminated may not visit their parents.

The regulations at issue also prohibit children from visiting their parents if the parental rights have been legally terminated. Mich. Admin. Code R. 791.6609(6)(a). In the prison setting, the legal termination of parental rights often *does not* signal the intended end of the parent-child relationship. Prisoners often voluntarily terminate parental rights in order to enhance their child’s stability by allowing relatives and friends to adopt them. The adoptive parents, however, have every intention of allowing the child to continue his or her relationship with the prisoner parent. (*See* testimony of Dr. Terry Kupers at TR Vol. 6, pp. 147-148; Suellyn Scarnecchia at TR Vol. 1, pp. 195-197.) Therefore, the regulations cut off a parent-child relationship even where all involved intend the relationship to continue.

Or, in a Catch-22 situation, parental rights may be terminated due to the incarceration itself. Almost ten percent of mothers in prison report that their

children are in foster care during their incarceration. *Mumola*, Appendix A at 1a. Under the Federal Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a)(E), if a child is in foster care for fifteen of the last twenty-two months, the state can begin proceedings to terminate parental rights. Moreover, imprisonment itself may be considered neglect or abandonment, resulting in the termination of parental rights. Satyanathan, *What About Me?*, Appendix B at 19a. Thus, the fact of the parent's imprisonment, or the child's placement in foster care during the incarceration, may result in the termination of parental rights, which then results in the loss of visitation under the regulations.

3. Prohibition of visits by former prisoners who are not immediate family members can exclude the only adult available to accompany a visiting child.

If a child's unrelated legal custodian happens to be a former prisoner, regardless of the offense or the date of the offense, he or she cannot, because of the regulations, accompany the child to visit in prison, thus excluding the child from visits altogether. Mich. Admin. Code R. 791.6609(7). For example, a child's unmarried father could not accompany the child to visit because he is not the mother's immediate family member and had a conviction twenty-three years ago. (*See* testimony of Dr. Terry Kupers, TR Vol. 6, p. 146.) This also prevents former prisoners who have turned their lives around from assisting current prisoners on a professional or volunteer basis. (*See* testimony of Joyce Dixson, TR Vol. 7, pp.

130-32, former prisoner who is now a social worker working with children of the incarcerated, but who may not take these children to visit their parents.)

4. The requirement that visiting children be accompanied by an adult immediate family member or legal guardian denies visitation to children.

This rule, Mich. Admin. Code R. 791.6609(5), excludes two different groups of children from visiting. First, the requirement that a child be accompanied by an adult immediate family member excludes appropriate adults from accompanying children due to the regulation's definition of "immediate family",⁴ which excludes relatives who may be the child's caretaker, such as the prisoner's sister- or brother-in-law, cousin, niece or nephew, and excludes friends or neighbors serving as caretaker. Significantly, the Dep't. of Justice statistics show that over ten percent of prisoners report that during their incarceration, their children were placed with friends or other persons to whom the prisoner was not related. *Mumola*, Appendix A at 3a. The restriction also excludes foster parents or foster care workers, and ten percent of children of prisoners are in foster care. *Id.*

Second, a legal guardianship in Michigan requires the filing of papers with the court, the payment of a fee, and regular reports to the court, and can require one or more court appearance. (*See* testimony of Prof. Scarnecchia, TR Vol. 1, pp.

⁴ Immediate family is defined as a "grandparent, parent, stepparent, spouse, mother-in-law, father-in-law, child, step-child, grandchild, sibling, stepbrothers and sisters. An aunt and uncle may be included if adequate verification is provided that they served as a surrogate parent." Mich. Admin. Code R. 791.6609(9).

190-91.) In addition, a legal guardianship places the parent's right to regain custody after incarceration at risk. *See* Mich. Comp. Laws § 712A.2(b)(3-5) (guardianship is a basis for taking abuse/neglect jurisdiction over child); Mich. Comp. Laws §712A.19b(3)(d-f) (guardianship is a basis for termination of parental rights). There is an alternative legal means available to provide custody to a non-parent. A parent may provide a power of attorney to the caretaker, by filling out a single form and having his or her signature witnessed and notarized. Typically, there is no cost or court involvement and, most significantly, the parent does not place his or her parental rights at risk. (*See* testimony of Prof. Scarnecchia, TR Vol. 1, p. 189.) Under the regulations, however, children who are in the custody of an unrelated adult with a legal power of attorney cannot be accompanied by that adult to visit, thus denying the child visitation.⁵

5. Permanent bans on visitation completely exclude children from visits.

When a prisoner is banned permanently from all visitation under Mich. Admin. Code R. 791.6609(11), the prisoner's children and minor relatives are also completely barred — even from non-contact visits. The next section outlines the

⁵ Prior to the regulations at issue, a power of attorney was sufficient. Although the MDOC's purported reason for changing the regulation was that powers of attorney were too easy to forge (*see* testimony of Marjorie Van Ochten, TR Vol 1, p. 85; Kenneth McGinnis, TR Vol. 8, p. 36), the MDOC provided no evidence of any instance of forgery of a power of attorney.

severe impact on children of this permanent ban, as well as the other denials of visitation described above.

C. Failure To Visit Imprisoned Parents Or Other Close Family Members Causes Significant Emotional, Psychological And Developmental Harm To Children.

Dr. Terry Kupers testified in the district court as follows:

[L]iterature in the mental health field stresses the importance of visitation [between parents and children] to somehow counteract those...negative tendencies of separation. Separation is an extremely traumatic event for children. If separation is relatively benign, it is relatively benign to have a divorce in the family and to have both parents remain in close contact with the child, still children experience this as a massive trauma depending on their age and situation. Well, having a parent in prison is a much more massive trauma, and then being cut off from that parent is just often insurmountable in terms of the child's psychological development.

(TR Vol. 6, pp. 148-149.)

When parents and children are separated, regardless of the reason, the child typically focuses more on what may happen to the parent than on what may happen to them. Donald Skinner & Leslie Swartz, *The Consequences for Preschool Children of a Parent's Detention: a Preliminary South African Clinical Study of Caregiver's Reports*, *Child Psychology & Psychiatry & Allied Disciplines* 243 (March 1989). Studies indicate that children are more stressed by being separated

from parents than by being with them in unsafe places.⁶ Children also fear the unknown, and suffer anxiety if they cannot picture where their parent is and see for themselves that Mom or Dad is all right. “Children need to know where their mothers are, what it is like there, and that their mothers are safe.” Sandra Barnhill, Executive Director, Aid for Children of Imprisoned Mothers, Presentation at *Woman Offender Symposium: Through the Eyes of a Child* (Sept. 2000).

Social workers emphasize the need in most cases for children to maintain close ties with their imprisoned parent. See, e.g., *Understanding and Supporting Foster Children With Incarcerated Parents*, Jordan Institute for Families (Jan. 2002); Barry Krisberg & Hon. Carolyn Engel Temin, *The Plight of Children Whose Parents Are in Prison*, prepared for the Federal Sentencing Report (Jan. 2001) (attached as Appendix C) at 32a-33a. In fact, the two major determinants of a child’s emotional stability during a parent’s incarceration are the quality of care provided by the alternate caregiver and the opportunities to maintain contact with the incarcerated parent. Ross D. Parke & K. Allison Clarke-Stewart, *Effects of Parental Incarceration on Young Children*, prepared for U.S. Dep’t of Health &

⁶ Doris Odlum, *Psychological Effects of the War on British Children*, 2 American Medical Women’s Ass’n 172 (1947) (children evacuated from London to other areas during World War II without their parents had far more behavioral problems related to separation from their parents than children who remained in London with their families); Eleanor Bernert & Fred Ikle, *Evacuation and the Cohesion of Urban Groups*, 58 Amer. J. Sociology 133 (1952) (children prefer to remain with parents in the city despite the risk of air attacks, even when the family home has been lost).

Human Svcs. “From Prison to Home” Conference (Jan. 2002) (attached as Appendix D) at 58a. Parke and Clarke–Stewart report that studies show no evidence of long-term negative consequences of prison visits on children and state that, to the contrary, “visiting can calm children’s fears about their parent’s welfare as well as their concerns about the parent’s feelings for them.” *Id.* at 61a.

One study found that the children’s chances for delinquency increase dramatically when they are denied visits. Sarah Gauch, *When Mothers Go To Prison: When You’re Behind Bars, Does Your Family Life Have To Crumble?* 16 *Human Relations* 33 (1959). Another study of children of male prisoners showed that visitation served as an important link to continuity in the parental relationship and counteracted the children’s fears regarding their father’s incarceration. W.H. Sack & J. Seidler, *Should Children Visit Their Parents in Prison?* 23 *Law & Human Behavior* 261 (1978).⁷

It must also be borne in mind that, upon release, many of the prisoners will return to live with their children. Rosemary Sarri, *Children of Incarcerated Mothers*, in *What About Me? Children of Incarcerated Parents*, *supra*, p. 18

⁷ *See also*,; Florida Corrections Commission 2001 Annual Report, Section 3(A)(1)(C) (“child welfare literature supports the importance of frequent, regular parent-child visitation following separation to diminish children’s risk factors”); Creasie Finney Hairston, *Prisoners and Families: Parenting Issues During Incarceration*, prepared for U.S. Dept. of Health and Human Svcs. “From Prison to Home” Conference (Jan., 2002) (attached as Appendix E) at 92a (“the maintenance of family ties for incarcerated individuals has been found to be important for juveniles as well as adults.”))

(March 2002). (Attached as Appendix F.) It cannot be denied that maintaining contact between parents and children during incarceration will help the family make this later transition.⁸

The MDOC has produced no sociological data whatsoever to support its suggestion that visitation is harmful to children. MDOC Deputy Director Dan Bolden admitted at trial that he had read no studies or literature that supports the view that children may become too comfortable with the prison environment when visiting. (TR Vol 3, pp. 23-24.) The MDOC also admitted in discovery requests that a survey of all state correctional facilities revealed no records reflecting any incidents of sexual abuse or misconduct of minors occurring during a non-contact visit since January 1, 1984. (Dist. Ct. Opinion, p. 28.) The MDOC also admitted that it knew of no instances of children being injured in the visitation waiting rooms. (Testimony of Mr. Bolden, TR Vol 3, pp. 39-40.)

In sum,

⁸Visitation benefits the prisoners as well as the children. Studies have shown that male prisoners who maintain strong family ties during imprisonment have higher rates of post release success than those who do not. Creasey Finney Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity?* 52 Federal Probation 48 (1988). Likewise, family relationships during incarceration were the strongest predictor of female offenders' post-release success. C. Dowden & D.A. Andrews, *What Works For Female Offenders: A Meta-Analytic Review*, 45 Crime & Delinquency 438 (1999). See also E. Slaight, *Family And Offender Treatment; Focusing On The Family In The Treatment Of Substance Abusing Criminal Offenders*, 19 J. Drug Education 53 (1999) (finding family relationships have significant influence on relapse prevention among parolees).

It is clear...that separation from a parent jeopardizes the psychological and emotional development of a child; any state practice, therefore, that invariably separates a child from her parent while the parent is incarcerated and that does not provide for maintenance of the parent-child relationship during the period of separation undermines the state goal of protecting the best interests of the child.

Note, *On Prisoners and Parenting: Preserving the Tie That Binds*, 87 Yale L.J. 1408, 1419 (1978).

D. State And Federal Policies And Practices Encourage And Facilitate Visitation Between Parents And Children, And Presume That Such Visitation Is Beneficial.

Michigan law presumes that children have the right to regular access to their parents.⁹ Even when a child has been removed from the home because of parental abuse or neglect, the Michigan Juvenile Code requires “regular and frequent parenting time between the child and his or her parent,” comprising *at least* once weekly visits. Mich. Comp. Laws § 712A.18f (3)(e). “[I]f parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time.” Mich. Comp. Laws § 712A.13a(11). The court may not deny visitation based on its own assessment; an expert evaluation is required.

⁹Visitation is referred to as “parenting time” in the Michigan Code.

The Preamble to the Michigan Child Custody Act states that it is an act “to declare the *inherent rights* of minor children” and states:

It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent....

Mich. Comp. Laws § 722.27a(1) (emphasis added).

The Federal Bureau of Prisons also presumes the importance of visitation:

The Bureau of Prisons encourages visiting by family, friends, and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members or others in the community.

28 C.F.R. § 540.40. Similarly, the American Correctional Association standards provide that “inmates should not be denied access to visits with persons of their choice except when the warden/superintendent...can present clear and convincing evidence that such visitation jeopardizes the safety and security of the institution or the visitors.” A.C.A. Standard 3-4440. Even the United Nations Minimum Rules for the Treatment of Prisoners, Rule 37, provide that “prisoners shall be allowed...to communicate with their family...at regular intervals, both by correspondence and by receiving visits.”

Children who are prohibited from seeing their parents and other close relatives in prison are denied the right of regular visits which are otherwise

guaranteed under Michigan law, and which the state and federal government have deemed to be in everyone's best interest.

II. THE PLAINTIFFS, INCLUDING THE CHILDREN, HAVE A FUNDAMENTAL RIGHT TO FAMILY INTEGRITY, INCLUDING THE RIGHT TO NON-CONTACT VISITATION.

It must be borne in mind that the plaintiff class in this matter consists not only of prisoners, but also of their family members, including children. The plaintiffs, including the non-prisoner plaintiffs, have a constitutionally protected right to relationships with their parents and other family members. The denial of visitation resulting from the MDOC regulations violates the Constitutional right to family integrity.

A. Familial Relationships Are Protected By The First And Fourteenth Amendments.

The severance of family ties through the denial of visitation to the children implicates well-settled constitutional rights. This Court has repeatedly recognized a family member's fundamental right to familial association under the First and Fourteenth Amendments. As the Court stated in *Troxel*, "the liberty interest at issue in this case – the interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by the Court." 530 U.S. at 65. The Court went on to state:

The child is not the mere creature of the State, those who nurture him and direct his destiny have the right, coupled with the highest duty, to recognize and prepare him for

additional obligations....[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody and control of their children.

530 U.S. at 66. This Court has also stated that “the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” *Wisconsin v. Yoder*, 406 U.S. 205 (1972).¹⁰

In fact, the right to family integrity is one of the most fundamental of all human rights. This Court has had “the unanimous view that “[f]ew consequences of judicial action are so grave as the severance of natural family ties.”” *M.L.B. v. S.L.J.*, 519 U.S. 102, 109 (1996), quoting *Santosky v. Kramer*, 455 U.S. 745. Nor is the fundamental right of familial association limited solely to parents and children. In *Moore v. City of East Cleveland*, 431 U.S. 494, 505 (1977), this Court recognized the constitutionally protected nature of the extended family relationship:

¹⁰ See also, *Roberts v. United States Jaycees*, 468 U.S. 609, 617 (1984) (the First Amendment provides certain “highly personal relationships a substantial measure of sanctuary from unjustified interference by the State” and “family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life”); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (“we have recognized on numerous occasions that the relationship between parent and child is constitutionally protected”); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982).

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.

Similarly, in *Smith v. OFFER*, 431 U.S. 816, 843 n. 49 (1977), the Court noted “the scope of these rights extends beyond natural parents.”

III. THE MDOC REGULATIONS ARE NOT REASONABLY RELATED TO A LEGITIMATE PENOLOGICAL INTEREST.

It is well settled that prisoners retain most of their Constitutional rights. “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84 (1987). Hence, unless and until MDOC can show otherwise, it is presumed that Respondents retain their constitutional right to familial association. In *Turner*, this Court noted the difficulty when determining the constitutionality of prison regulations between balancing a prisoner’s constitutional rights and acknowledging the expertise of corrections officials. Thus, the rule set forth in *Turner* is that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to a legitimate penological interest.” 482 U.S. at 89. It is important to note that this test does not give carte blanche to corrections departments, and prison regulations are not immune from meaningful scrutiny. Rather, a number of factors are looked at in determining the reasonableness of the

subject restriction, including whether there is a rational connection between the regulation and the legitimate government interest asserted, and whether there are alternative means available for exercising the right.

A. There Is No Valid Connection Between The Regulations Restricting Visitation By Children And A Legitimate Penological Interest.

The penological interests the MDOC asserts for the restrictions on visitation by children are to better supervise the children; to prevent the children from being subject to physical or emotional abuse; and to prevent them from being used to smuggle contraband into the prison. (Petitioner's Brief, p. 29.) As for the first goal, the MDOC is presumably referring to its argument at trial that small children who are not properly supervised during a visit may be physically injured. However, as shown above, the MDOC has offered no evidence that any child has ever been injured during a visit. In addition, MDOC officials testified at trial that their visiting rooms are safe and secure. (Testimony of Dan Bolden, TR Vol. 3, p. 66; Pamela Withrow, MDOC Warden, TR Vol. 8, p. 146; Joan Yukins, MDOC Warden, TR Vol. 6, p. 52.)

As for the goal of preventing abuse, the state makes much of two incidents where a child reportedly witnessed sexual activity by a prisoner. While it is certainly regrettable if this occurred, these are only two out of hundreds of thousands of visits. To drastically restrict children's visitation as a result of these

very few incidents is using the proverbial cannon to kill a fly. Nor did the MDOC provide any evidence that visitation is emotionally harmful for children. Indeed, the social science data summarized earlier makes clear that the far greater danger to children comes from being prevented from seeing their loved ones. Most importantly, the regulations run directly contrary to *Troxel*, which holds that it is the province of the parent, not the state, to make decisions regarding the care of their children. For example, if a prisoner determines that his or her child would benefit from visitation, the child should be able to visit, even if he or she is, for example, in the care of a friend or non-immediate family member. Similarly, if a non-prisoner parent determines that it is in their child's best interest to visit an incarcerated family member, such as an aunt or uncle, the child should be allowed to visit. Under the regulations, neither such visit is possible.

The third goal, the prevention of smuggling of contraband, is, unlike the prior two, clearly a legitimate penological objective, however, the restrictions on visitation by children are not reasonably related to this goal. The MDOC has provided no evidence that children are more likely to smuggle contraband into a prison than adult visitors, even the suggestion defies common sense. Moreover, this case concerns non-contact visitation, in which, according to the MDOC's own witnesses, the possibility for smuggling is extremely remote. (See testimony of Barry Mintzes, former MDOC Warden, TR Vol 5, p. 133; Mr. Bolden, TR Vol 4,

pp. 65-66 (admitting he has no proof of smuggling in non-contact visits); Marjorie VanOchten, MDOC administrator, TR 1, p. 77 (non-contact visitation eliminates the opportunity to smuggle)). The regulations directed at eliminating or reducing visits by children specifically are not reasonably related to a legitimate penological objective.

B. There Are No Adequate Alternative Means Available To Exercise The Right To Familial Association Other Than Visitation.

The MDOC argues that phone calls and letters are adequate alternative means available to Petitioners to exercise their right to familial association. The MDOC is wrong. Regardless of the specific number of prisoners who are functionally illiterate, it cannot be debated that a significant number of them are.¹¹ Nor can it be debated that infants, toddlers, and pre-schoolers are not capable of writing letters to, or reading letters from, incarcerated family members. (Recall that the average age of a child in the United States with an incarcerated parent is eight. (Mumola, Appendix A at 1a.)) In addition, twenty-five percent of women are pregnant or have recently given birth when they enter prison. *Sarri*, Appendix F, p. 3. For these children, it will be many years before they are able to make

¹¹ Indeed, the federal government has specifically included prisoners and their families in recent federal legislation aimed at combating illiteracy. *See* Even Start Family Literacy Act, Pub. L. 106-554 and the Adult Education and Family Literacy Act, Title II of the Workforce Investment Act of 1998, Pub. L. 105-220, § 225(c).

phone calls or write letters and, if restricted to these methods of communication, there will be many years of missed contact with their parent.

As for the alleged alternative of phone calls, the calls must be initiated by the prisoner, and must be made collect. Such calls are extremely expensive – three to five times more expensive than calls made from the outside, and are frequently disconnected or interrupted. (Testimony of Dr. Kupers, TR Vol. 6, p. 144.) According to one author, a thirty minute phone call from a prison once a week can cost \$125 or more. Hairston, *Prisoners and Families*, p. 7. The cost alone is prohibitive for many families of prisoners, most of whom live in poverty, and foster parents may not accept collect phone calls from the parents of their foster children due to their substantial cost.

Finally, when it comes to maintaining family relationships, phone calls and letters are simply not an adequate substitute for face-to-face contact. As discussed above, children need to physically see their parent in order to assure themselves that the parent is okay. The same is true for incarcerated parents, who want to see the children for themselves to ensure that their children are being adequately cared for. As any parent or child can testify, although the sound of your loved one's voice, or a letter from your loved one, are wonderful, they are simply no substitute for seeing your child's face or your parent's face.

CONCLUSION

The combination of the severe, almost unthinkable, harm suffered by emotionally vulnerable children who are denied visitation with their parents and other loved ones, the clear legal presumption favoring visitation reflected in the law, and the extraordinarily weak and factually unsupported justifications offered by MDOC for the unprecedented violations of the constitutional rights of the Petitioners, requires affirmance of the Sixth Circuit Court of Appeals' decision.

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