

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WILLIAM OVERTON, DIRECTOR, :

4 MICHIGAN DEPARTMENT OF :

5 CORRECTIONS, ET AL. , :

6 Petitioners :

7 v. : No. 02-94

8 MICHELLE BAZZETTA, ET AL. :

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10 Washington, D. C.

11 Wednesday, March 26, 2003

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:07 a.m.

15 APPEARANCES:

16 THOMAS L. CASEY ESQ., Michigan Solicitor General,

17 Lansing, Michigan; on behalf of the Petitioners.

18 JEFFREY A. LAMKEN, ESQ, Assistant to the Solicitor

19 General, Department of Justice, Washington, D. C. ;

20 on behalf of the United States, as amicus curiae,

21 supporting Petitioners.

22 DEBORAH LABELLE, ESQ., Ann Arbor, Michigan; on behalf

23 of Respondents.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 02-94, William Overton v. Michelle Bazzetta.
Mr. Casey.

ORAL ARGUMENT OF THOMAS L. CASEY
ON BEHALF OF THE PETITIONERS

MR. CASEY: Mr. Chief Justice, and may it please
the Court, the lower courts in this case were wrong for
two reasons. First, because the Constitution does not
give prison inmates a right to receive in-person visits
since that activity is inherently inconsistent with the
status as a prisoner and with legitimate penological
objectives and second, because the Michigan visitation
rules are rational and reasonably related to legitimate
penological interest.

The Court has recognized the right of intimate
association with certain people in certain circumstances
outside of the prison context in cases such as Roberts v.
United States Jaycees.

In Turner v. Safley, the Court examined the
question of how to evaluate a right which is recognized
outside of the prison context and determine whether it
applies inside the prison.

The right there was the right to marry. The

1 Court said you should look at the elements or incidents of
2 the rights to determine whether it is affected by
3 incarceration or the pursuit of legitimate corrections
4 goals. In Roberts, the Court also identified several
5 attributes of the right of intimate association which
6 respondents assert.

7 These rights include a high degree of
8 selectivity and decisions regarding the affiliation,
9 seclusion from others, relative smallness of the group.

10 Our contention is that all of the these
11 attributes are significantly affected by incarceration and
12 they are inherently inconsistent with incarceration. And
13 so the --

14 QUESTION: Well, does the right to association
15 while in prison survive in some form, do you think?

16 MR. CASEY: In -- the right to have the
17 relationship which is what was actually at issue in Safley
18 with marriage and in the Jones case with prisoner -- with
19 the union membership. That status can survive. There's
20 no effect on the relationship here. What this case is
21 about is activity --

22 QUESTION: Noncontact visits, aren't we talking
23 about here?

24 MR. CASEY: Noncontact visits but it involves
25 activities inside the secure prison walls in furtherance

1 of the relationship. There's no impact on the
2 relationship itself, the question is, can prison officials
3 -- do the necessities of prison have an impact on the
4 right of association.

5 QUESTION: What would exist outside -- what
6 relationship are you talking about?

7 MR. CASEY: The relationships that the prisoners
8 are asserting are family members beyond the definition of
9 the Michigan prison system -- has adopted particularly
10 minor nieces and nephews. One of the problems with --

11 QUESTION: Well, presumably children of the
12 prisoner are included, are they not?

13 MR. CASEY: Children of the prisoner are
14 included within the definition --

15 QUESTION: There are limited -- they have to be
16 accompanied by, what is it, a legal guardian?

17 MR. CASEY: By a family member within the
18 definition or a legal guardian, that's the Michigan
19 regulation.

20 QUESTION: As I understand it, the regs
21 originally would have prohibited visits from minor
22 siblings of the prisoner and that has been changed by
23 statute; is that correct?

24 MR. CASEY: There was a statute passed, right at
25 the close of the district court opinion that permitted the

1 Department to permit visits by siblings, the Department
2 changed the regulation to include siblings, minor sibling
3 visits, so that issue is no longer before the courts.

4 QUESTION: Excuse me. I'm sorry.

5 MR. CASEY: Pardon.

6 QUESTION: On the class of visitor eligibility
7 then, what we're arguing about is nieces and nephew, minor
8 nieces and nephews?

9 MR. CASEY: That is the class with respect to
10 minor children, they also have a contention about former
11 inmates and --

12 QUESTION: That's, that's what I meant. What is
13 the State's interest in -- in restricting visits from
14 minor nieces and nephews of the prisoner?

15 MR. CASEY: The prison officials testified
16 uniformly that there were serious overcrowding problems,
17 prison management problems, concerns about safety, so the
18 overriding interest was to reduce the volume of visitors.

19 QUESTION: So it's simply a means of reducing
20 volume? There's nothing peculiar to the niece/nephew
21 relationship?

22 MR. CASEY: That's correct.

23 QUESTION: You just want to keep the numbers
24 down and this is one way to do it.

25 MR. CASEY: To keep the numbers down, the

1 Department is permitted to draw lines. And that is to
2 draw a line --

3 QUESTION: Is it also of some concern with the
4 activities of children within the prison as opposed to
5 adults?

6 MR. CASEY: Oh, absolutely. That -- there was
7 -- there is extensive testimony that not only was there a
8 problem with overcrowding and management, just because of
9 the volume in general, but particularly, because of
10 children.

11 QUESTION: Mr. Casey, I would like to back up to
12 go where you were when you were responding to Justice
13 O'Connor's question. Do I take it that your position is
14 whatever rights there may be to have a relationship, for
15 example, by telephone call, correspondence, there is
16 absolutely no right to any visitation, even noncontact, so
17 that whatever you permit is a matter of administrative
18 grace? Is that your starting position?

19 MR. CASEY: Yes. In response to --

20 QUESTION: There is no right to visitation,
21 noncontact visitation at all?

22 MR. CASEY: That's correct.

23 QUESTION: So everything that we're arguing
24 about -- you -- in your view of this is a matter of
25 administrative grace?

1 MR. CASEY: That's correct.

2 QUESTION: Do you have a fallback position from
3 that? And if so, what is it?

4 MR. CASEY: The Court specified three issues and
5 the first issue is whether there is a right to visitation
6 at all. Our position on that question is there is no
7 constitutional right. It's a privilege. It's not a
8 right.

9 The second question was whether assuming there
10 is some limited right, are the Michigan regulations
11 rational and reasonably related to legitimate
12 correctional goals.

13 QUESTION: Mr. Casey, would you explain -- you
14 have been very clear of what is your position about --
15 round one of this case in the lower courts, when you
16 clarified that your regulations went only to contact
17 visits and then you came around and said it applies to all
18 visits.

19 MR. CASEY: The way the case evolved -- the
20 regulations on their face apply to all visitation. The
21 restrictions apply to both contact and noncontact. When
22 the case was initially filed, there were motions for
23 summary judgment. There was a 3-day hearing on that
24 motion and most of the testimony that was introduced
25 related to contact visitation. So when the case first

1 went to the court of appeals, the court of appeals
2 mistakenly viewed the case as relating only to contact
3 visitation.

4 QUESTION: Well, I got the impression that the
5 State had represented that they -- that they covered only
6 contact visitation?

7 MR. CASEY: There were statements in the brief
8 referring to contact visitation, largely because that was
9 the evidence that was adduced at the summary judgment
10 proceeding. But the complaint challenged the regulations
11 in their entirety. And the parties, I believe, understood
12 that it applied to both contact and noncontact.

13 QUESTION: But the Court thought it only applied
14 to contact visitation --

15 MR. CASEY: In the court of appeals' first
16 opinion it held that it applied only to contact. Then it
17 went back to the district court and then we had longer
18 trial, more elaborative evidentiary proceeding.

19 QUESTION: In the district court the first time
20 around the district court didn't think it was limited to
21 contact?

22 MR. CASEY: The district court dismissed the
23 complaint in its entirety on our motion. There was no
24 misrepresentation. There may have been some unintentional
25 statements which led the court of appeals to conclude in

1 the first view --

2 QUESTION: But the district court understood
3 that it was dismissing the complaint with respect to any
4 visitation, contact and noncontact, or we just don't know?

5 MR. CASEY: The first order of the district
6 court dismissed the complaint in its entirety. And the
7 complaint, the initial complaint, did not say we are
8 challenging only contact. The -- as I say, because of the
9 way the summary judgment evidence went in, it evolved that
10 the -- the court of appeals thought it was related only to
11 contact. But the rules on their face don't make a
12 distinction between contact and noncontact.

13 QUESTION: May I ask this question? The rules as
14 I understand are at page 174 of the appendix of the cert
15 petition and they don't tell us anything, at least I
16 couldn't find anything, about the number of visits a
17 person can have or how often. Do the rules regulate that
18 the number of times a particular visitor may visit an
19 inmate?

20 MR. CASEY: Yes. At page 111 of the joint
21 appendix, there's a memorandum that was issued in April of
22 1995, which sets out hours of visitation for different
23 institutions -- it varies between institutions.

24 QUESTION: 111 of the joint appendix?

25 MR. CASEY: Of the joint appendix.

1 QUESTION: I see.

2 MR. CASEY: Yes. And it varies -- excuse me,

3 Your Honor.

4 QUESTION: It limits the number at any one time.

5 But does it limit, you know, you can only have so many

6 visitors a month?

7 MR. CASEY: Yes.

8 QUESTION: Why isn't that sufficient to solve

9 the problem of overcrowding and too many -- too many

10 people? If -- if you have too many people, an easy way to

11 solve it is just to reduce the number of visits each one

12 of the inmates is allowed to have per month.

13 MR. CASEY: That would have been one solution.

14 The Department chose a solution where they evaluated the

15 visitors and concluded that it would be best to make

16 quality visits for close family members following

17 essentially --

18 QUESTION: Is there any evidence they found out

19 how many nephews and nieces would be excluded by the rules

20 and, therefore, worked that into the quantity

21 determination, that's a strange way to regulate quantity.

22 MR. CASEY: They did not know in advance how

23 many nieces and nephews. We simply don't keep that kind

24 of record.

25 QUESTION: Is there a specific anti-niece -- I

1 didn't understand this case, I guess. I thought there's a
2 simple determination by the prison authorities, we don't
3 want children in the room, period. Now, we'll make an
4 exception for that if they're your children.

5 MR. CASEY: That's essentially what they did.

6 QUESTION: And the reason had nothing to do --
7 it had something to do with a lot of people, but basically
8 they think children are more dangerous to the child or
9 more disruptive, because they're younger, harder to
10 discipline, they might run around in the room. They might
11 learn things that -- that they don't want children exposed
12 to the language or behavior of the prisoners, et cetera.
13 So I just thought it was -- now maybe you're telling me,
14 no no, that's not the reason it was totally different.

15 MR. CASEY: No. That's --

16 QUESTION: This is quite interesting to me.

17 MR. CASEY: No, that's one of the bases, it
18 would possible to prohibit all children in prisons.

19 QUESTION: No, they don't prohibit all children.
20 They say generally children are more of a problem than
21 adults to have in visits.

22 MR. CASEY: That's correct.

23 QUESTION: So we draw a line. We say no
24 children except for your own children.

25 MR. CASEY: That's correct.

1 QUESTION: Right.

2 MR. CASEY: That's our position.

3 QUESTION: So why don't you defend it on that
4 basis, if that's what it is?

5 MR. CASEY: Well, I thought I was, I'm sorry if
6 I didn't make that clear, Your Honor. The Department made
7 decisions on who is to visit. And they said we are going
8 to permit visits with close family members, children,
9 grandchildren, at some point they have to draw a line, as
10 you've said, Justice Kennedy -- and they drew a line to
11 eliminate certain extended family members.

12 One of the problems is -- is -- if the Court
13 finds that there is a right to visitation, the -- there
14 will be -- I suspect a great deal of additional litigation
15 on where those lines can appropriately be drawn.

16 Michigan, for example, has very generous rules
17 concerning times of visitation, they permit visits on
18 evenings, on weekends and holidays, some States don't do
19 that. If there's a right to visitation, I suspect there
20 will be litigation on --

21 QUESTION: Is there any limit on the number of
22 times the same person can come in a given month?

23 MR. CASEY: No. There -- inmates, for example,
24 in the lowest security level are entitled to eight visits
25 per month. And the time is -- is not regulated either. It

1 depends on overcrowding and situations like that.

2 QUESTION: What adults are permitted? Suppose I
3 don't have any children, I don't have any spouse, I don't
4 even have any siblings.

5 MR. CASEY: The rule permits an inmate to
6 designate immediate family members as defined by the
7 Department and 10 other individuals.

8 QUESTION: Ten others, okay.

9 MR. CASEY: Now, there are certain prohibitions,
10 former prisoners are prohibited, I think, unless they're a
11 family member and receive the warden's permission. That
12 is being challenged here as well, but --

13 QUESTION: In relation to the family, this one
14 last question, a child must be accompanied by an adult and
15 you cut that back from any adult on the filing of the
16 affidavit to only an immediate family member. Does an
17 immediate family member include an unwed father?

18 MR. CASEY: No, it includes spouses, but it
19 would include, it would include --

20 QUESTION: But an unwed father would not be a
21 spouse? This is the child -- the mother is incarcerated,
22 the child is brought to visit her. Can the person who
23 brings the child be that child's biological father, maybe
24 even care-giving father?

25 MR. CASEY: The child can visit if the child,

1 you know, is the biological child, but the child has to be
2 brought by a member of the immediate family.

3 QUESTION: But the unwed father would be a
4 member of the child's immediate family.

5 MR. CASEY: That's correct.

6 QUESTION: Although not of the mother's
7 immediate family?

8 MR. CASEY: That's correct. Someone other than
9 the unwed mother would have to bring that child under the
10 rules.

11 QUESTION: The mother is in prison?

12 MR. CASEY: But someone other than the unwed
13 father would have to bring --

14 QUESTION: The unwed father would not qualify?

15 MR. CASEY: He is not qualified --.

16 QUESTION: Unless he's the guardian? Unless
17 he's the guardian?

18 MR. CASEY: If he is the legal guardian, yes.

19 QUESTION: If he's the legal guardian, he would?

20 MR. CASEY: Yes. If the mother, the custodial
21 parent, has gone through legal guardianship.

22 QUESTION: That's enough family relationship
23 despite the lack of the wedding bond, he would probably be
24 the guardian, I would guess, wouldn't he?

25 MR. CASEY: The guardian in fact, perhaps, but

1 the Department is permitted to insist on enough evidence
2 to demonstrate the legal relationship. And, again, this
3 case is about drawing lines, and the prison officials here
4 drew reasonable lines based on a perception that they
5 observed in --

6 QUESTION: This is a facial challenge not as an
7 as-applied? Would an as-applied challenge be possible,
8 assuming we recognize some right of visitation?

9 MR. CASEY: These rules could be challenged as
10 an -- on an as-applied basis but we did go through a
11 complete trial on the merits here. There is evidence.

12 Our position is we submitted evidence to
13 demonstrate the reasonable relationship under Turner v.
14 Safley. So if there is a right, then we satisfied the
15 requirements of -- of permitting our rules to take -- to
16 take a --

17 QUESTION: A particular person brought this
18 action, did they not? Michelle Bazzetta?

19 MR. CASEY: Yes. It's a class action. Inmates
20 and --

21 QUESTION: And she was an inmate somewhere?

22 MR. CASEY: She was an inmate. So -- I have not
23 addressed the Court's third question, the cruel and
24 unusual punishment. If there are no questions on that,
25 I'll rely on the briefs.

1 And I would like to reserve my remaining time
2 for rebuttal.

3 QUESTION: Very well, Mr. Casey.

4 Mr. Lamken.

5 ORAL ARGUMENT OF JEFFREY A. LAMKEN

6 AS AMICUS CURIAE, SUPPORTING PETITIONERS

7 MR. LAMKEN: Mr. Chief Justice and may it
8 please the Court. The right asserted here for inmates to
9 receive in-person visits other than those permitted by
10 Corrections Department rules is consistent neither with
11 inmate status nor with the legitimate penological
12 interests underlying Michigan's rules.

13 QUESTION: But, Mr. Lamken, you are then
14 agreeing with Mr. Casey that there is no right of -- no
15 right to any visitation, contact, noncontact, that what
16 right -- what privilege is extended is a matter of
17 administrative grace?

18 MR. LAMKEN: That is our initial position, yes.
19 And we also have two backup positions.

20 QUESTION: On your initial position, in your
21 view, under a scheme like this could complete discretion
22 be given to the warden to determine who gets the
23 visitation and who does not? He said, you know, you
24 didn't really -- you've been looking sloppy for a couple
25 of days so I'm going to take away your visiting

1 privileges?

2 MR. LAMKEN: Not necessarily. The fact that the
3 Federal Constitution itself does not create a liberty or a
4 property interest in visitation, does not preclude the
5 possibility that State prison regulations or State law
6 might create that type of interest. It could not be taken
7 away under --

8 QUESTION: I know it isn't an issue here. But
9 one of the reasons I'm asking is because if the warden
10 doesn't have complete discretion, then that indicates that
11 maybe there's some right that's either conferred by the
12 statute or by the Constitution. You say the warden has
13 complete discretion?

14 MR. LAMKEN: The answer is not necessarily. And
15 that is the Court would have to examine under the
16 standards established by -- in Sandin v. Conner, whether
17 or not State law provides a property or a liberty interest
18 that can't be taken away without sufficient process.

19 And that --

20 QUESTION: As you read these regulations, does
21 the warden have the complete discretion?

22 MR. LAMKEN: Well, it's not a question of what
23 the content of the regulations are. That was -- Sandin v.
24 Conner got rid of that inquiry. Instead, the question is
25 whether it is a grievous deprivation or an adverse -- or

1 excuse me, an atypical hardship that is contrary to the
2 typical norms of incarceration.

3 QUESTION: And under that standard, do you think
4 the warden should have complete discretion to deny anybody
5 for any reason visiting privileges?

6 MR. LAMKEN: We think that's a very difficult
7 question. If push came to shove, our answer would be the
8 warden should have that discretion but I should point out
9 that Bureau of Prison regulations and the State of
10 Michigan both provide extensive hearing procedures before
11 such rights are withdrawn. And such that the type of --
12 for example, in Michigan, you can challenge the underlying
13 finding of misconduct if your rights are going to be taken
14 away for the minimum 2-year period ban that's at issue
15 here. And you get not only an investigation, you get a
16 hearing, you get administrative review, you get judicial
17 review. And we believe that those types of procedures are
18 certainly sufficient in terms of due process.

19 The answer to our question would be if push came
20 to shove, we would say no, it could be a matter of --

21 QUESTION: Then how would you distinguish the
22 holding in Turner against Safley pertaining to the right
23 to marry?

24 MR. LAMKEN: On two bases, Justice Stevens.
25 First, marriage has or can have a religious, that is free

1 exercise element, and it also has an effect on property
2 rights and the rights to certain benefits outside the
3 prison context. Neither is true of the right to -- of
4 visitation.

5 Second, incarceration as a form of punishment
6 necessarily places a barrier between the prisoner and
7 those with whom he would otherwise associate. The very
8 essence of the punishment is that separation and the
9 vesting of control over exceptions to that separation, in
10 the State and corrections authority.

11 Marital status in contrast, such as free
12 exercise of religion, doesn't have the necessary
13 relationship to incarceration as a form of punishment.

14 QUESTION: But if you say there's --

15 QUESTION: Do all prisons allow some form of
16 visitation for prisoners? Isn't that a pretty universally
17 accepted practice?

18 MR. LAMKEN: It is a universally accepted
19 practice, that for certain prisoners under proper
20 conditions, certain visits, will aid in rehabilitation and
21 that is the accepted view and one that the Bureau of
22 Prisons firmly supports.

23 QUESTION: Right. If you're going to release
24 somebody back into society, you don't want to cut off all
25 contact with family members or friends who might help that

1 person on release, do you?

2 MR. LAMKEN: Well, that, Justice O'Connor, is a
3 matter of penological philosophy, but not a matter of
4 constitutional right. And as a matter of sound
5 penological philosophy, the Bureau of Prisons, for
6 example, does allow visits. But it will restrict those
7 visits rather severely if the -- if the circumstances
8 provide. And we believe that one --

9 QUESTION: Well, why isn't the Turner/Safley
10 rule quite adequate here to deal with this?

11 MR. LAMKEN: Well, Your Honor, you could decide
12 it -- actually Turner v. Safley, as we read it has two
13 components. On page 95 in particular, it says that an
14 inmate retains those rights that are not inconsistent with
15 incarceration or with the penological interests of the
16 corrections system. And so we believe that this Court
17 could resolve it under either of the inconsistent-with-
18 inmate status problem, which is to say that there is no
19 right. Or it could go into the Turner v. Safley balancing
20 and determine that, in fact, Michigan's rules do have the
21 requisite relationship to legitimate penological
22 objectives.

23 QUESTION: But as to the first, if you're right
24 on the first point, which is what is disturbing about the
25 first point, a prisoner would have no right whatsoever to

1 any kind of visit or communication or association with
2 outside people, even if there were virtually no
3 penological reason for doing that? And that's -- why do
4 you have to go that far?

5 MR. LAMKEN: Justice Breyer, I think part -- when
6 you say communication, I wouldn't go that far. We are
7 saying that --

8 QUESTION: You say that because that's what's
9 that the cases seem to say. Communication, association.

10 MR. LAMKEN: Well, in fact, what incarceration
11 cuts off and what the punishment of incarceration is is
12 the physical separation of the inmate from the rest of
13 society. The inmate, for example, it's not inconsistent,
14 for example, for a corrections official to have authority
15 to give an inmate a furlough to go outside to work for
16 example. But it is inconsistent, for an inmate to say you
17 must give me a furlough to go outside because your failure
18 to do so interferes with my in-person associational
19 rights. The very essence --

20 QUESTION: You're thinking of cases where that's
21 justified what the prison is doing. And if you win on
22 your first point, you better think of cases where the
23 prison is unjustified, but it still wins.

24 MR. LAMKEN: Well, I think the answer is, the
25 very essence of the punishment of incarceration is

1 separation from society and the vesting of exceptions
2 thereto in corrections officials. That is the punishment
3 and that is the difference between, for example, a broader
4 right to communicate, which wouldn't necessarily be cut
5 off. A broader right --

6 QUESTION: You would say that even if -- even if
7 the prison -- even if the prison administration is
8 unjustified in refusing to allow the prisoner a furlough
9 out into society, even if a thoroughly trustworthy
10 prisoner, you'd still say he has no right to that?

11 MR. LAMKEN: Absolutely. That is the nature of
12 incarceration as punishment, Justice Scalia.

13 Turning to the Turner balance argument --

14 QUESTION: So you say there can be solitary
15 confinement for life, if that's what the State wants?

16 MR. LAMKEN: Justice Kennedy, solitary
17 confinement should be distinguished from merely cutting
18 off visitors from outside. And the answer to your
19 question is, yes, under certain circumstances, solitary
20 confinement for life would be permissible, but one would,
21 as the Court has pointed out in various cases, have to --

22 QUESTION: Well, then under all circumstances
23 under your view?

24 MR. LAMKEN: Well, the barrier for solitary
25 confinement for life would be whether or not that's cruel

1 and unusual punishment. But the reality of prison life is
2 that prisoners don't get to choose who their cellmates
3 are. They don't get to choose who they bunk with. They
4 don't get to choose who they dine with. They don't get
5 to choose the institution in which they're incarcerated.
6 Even though each of those personal choices may be
7 protected outside.

8 QUESTION: Well, presumably, the prison allows
9 prisoners to send mail?

10 MR. LAMKEN: Yes, that's correct.

11 QUESTION: Okay. How about phone calls?

12 MR. LAMKEN: In this case the prison does allow
13 phone calls for outside, which are other means by which
14 general First Amendment community rights --

15 QUESTION: So a prisoner who doesn't know how to
16 read and write and who has -- whose family has no
17 telephone, what are they supposed to do without a contact
18 visit?

19 MR. LAMKEN: Well, the Court --

20 QUESTION: Or a noncontact visit?

21 MR. LAMKEN: The Court actually addressed that
22 in Pell, which is to say that that's not a problem unless
23 the State precludes the prisoner from getting aid in
24 writing letters. And Pell actually addressed the specific
25 claim that the prisoners were unable to write. And

1 there's no evidence in this case that the State precludes
2 prisoners from getting aid in writing or reading letters
3 so that they may communicate with the outside world. But
4 the --

5 QUESTION: Are you saying that there is a right
6 to communicate to that extent, or you've been candid and
7 upfront and said there's no right to visitation.

8 MR. LAMKEN: That's exactly the line we draw,
9 Justice.

10 QUESTION: Do you extend that as well to
11 telephone calls and writing letters?

12 MR. LAMKEN: No. There may be -- there may or
13 is a distinct First Amendment and societal interest in
14 allowing general communications between inmates and the
15 outside world. In that sense it's important to
16 distinguish between the two rights at issue. One is a
17 substantive due process in-person associational right, and
18 the other is a more general First Amendment right to
19 communicate or like a more general First Amendment right
20 to free exercise of religion. The former is what
21 incarceration cuts off. The latter is something that
22 incarceration may limit but generally only to --

23 QUESTION: But you would agree that the inmate
24 could be -- have a visit from his lawyer?

25 MR. LAMKEN: Yes, Your Honor. The inmate would

1 have a visit from the lawyer and potentially clergy as an
2 exception as well. And that's because of the distinct and
3 hybrid nature of the right. It's not merely an
4 associational right, but the right to a fair trial may be
5 at issue, the right to petition for redress of grievances,
6 the right to free exercise of religion may also be at
7 issue in the case of clergy. That's why almost all of
8 these limits, except clergy and lawyers.

9 Turning to the Turner balance, the Court below
10 invalidated the -- these rules as applied to noncontact
11 visits based on the principle that noncontact visits do
12 not raise the penological concerns that contact visits do.
13 That was incorrect for three reasons. First, many prisons
14 including Federal Bureau of Prisons' facilities, lack
15 noncontact facilities. The construction of new facilities
16 is not the type of de minimis or ready alternative this
17 Court contemplated in Turner.

18 Second, the portable noncontact booths used by
19 the State of Michigan separate the visitor from the --

20 QUESTION: Are there any high-security prisons
21 that don't have noncontact facilities? I know there's
22 some --

23 MR. LAMKEN: No.

24 QUESTION: -- low security.

25 MR. LAMKEN: No. No. In fact, the Federal

1 Bureau of Prisons' facilities, if they are high security
2 or pretrial detention centers, they will have noncontact
3 facilities. If they are lower security --

4 QUESTION: Well, shouldn't we decide the case on
5 the assumption that we're dealing with facilities that can
6 have noncontact visits?

7 MR. LAMKEN: The facilities in these cases --
8 may I answer the question, Chief Justice? I see I'm out
9 of time.

10 CHIEF JUSTICE REHNQUIST: Yes, you can.

11 MR. LAMKEN: Okay. The facilities at issue in
12 these cases are portable booths, which separate the inmate
13 from its visitor but not the visitor from all the inmates
14 who are having contact visits so they do not address the
15 problems of the child visitors having contact with
16 inmates.

17 CHIEF JUSTICE REHNQUIST: Thank you Mr. Lamken.

18 Ms. LaBelle, we'll hear from you.

19 ORAL ARGUMENT OF DEBORAH LABELLE

20 ON BEHALF OF THE RESPONDENTS

21 MS. LABELLE: Mr. Chief Justice, and if it
22 please the Court. The Court -- I would like to clarify
23 quickly the administrative proceedings before we got to
24 trial in this Court, because the Court asked an inquiry.
25 We did have a 3-day trial and a preliminary injunction

1 hearing and at that time the Corrections Department
2 represented that the rules were only as to contact visits
3 and the Court, recognizing that there were some smuggling
4 and contraband issues, thereafter denied a preliminary
5 injunction and followed with the summary judgment, summary
6 disposition based solely on the understanding that it was
7 limiting -- these rules only limited contact visits. And
8 that's how it went to the Sixth Circuit.

9 QUESTION: So there's nothing in the district --
10 in the district court's opinion or order that clarifies
11 that?

12 MS. LABELLE: No. The district court ruled only
13 with regard to thinking it was contact and the Sixth
14 Circuit accepted it that way, when it became clear, when
15 it was sent down, that the visits were being applied to
16 ban all visits for certain categories of people, we asked
17 for a rehearing in the Sixth Circuit, they used a
18 clarifying opinion and then said that, no, the
19 justification is given for limiting contact visits,
20 smuggling and contraband did not suffice for limiting all
21 visits for these categories of visitors.

22 QUESTION: Did the case go to the Sixth Circuit
23 twice?

24 MS. LABELLE: Yes, Your Honor.

25 It went to the Sixth Circuit after a whole --

1 first on the initial preliminary injunction, then it went
2 back down, it was tried on the issue of noncontact visits
3 and the permanent ban. The permanent ban, Mr. Chief
4 Justice, was not tried in the first go-around, because
5 they indicated that they had not yet implemented it in any
6 form, so it was not yet right.

7 QUESTION: Is that particular procedural history
8 significant in what we decide on the issues before us?

9 MS. LABELLE: I think that it is not
10 significant, only to clarify one point, the issue of
11 whether the siblings are before this Court. It was after
12 the district court's decision that the Department chose to
13 pass -- that a rule was passed voluntarily allowing the
14 Department to allow siblings in, which they have, but they
15 have put a position throughout the case and up through the
16 Sixth Circuit that they had the right, at any time, to
17 withdraw that voluntary choice to allow siblings. So I
18 think the siblings issue is still very much before this
19 Court.

20 QUESTION: But their position is they have the
21 right to say no to all children?

22 MS. LABELLE: That's correct, Your Honor,
23 including siblings, children, that it is all a matter of
24 discretion.

25 QUESTION: So their position is not different

1 with respect to a child, a grandchild, a sibling. They
2 say whatever we want to do, it's up to us to do in our
3 judgment and you have no right at all, whatever you get is
4 a privilege.

5 MS. LABELLE: That's correct, Your Honor.

6 And I think that that is why the case has gotten
7 so far. It is because that the insistence that families
8 and prisoners do not retain the rights of intimate
9 association past the prison door.

10 QUESTION: Is it unconstitutional then, and this
11 is why I'm reluctant to get this Court into a whole new
12 line of constitutional law -- is it unconstitutional to
13 send a prisoner from the East Coast to a prison far
14 removed from his family and friends?

15 MS. LABELLE: Certainly not, Justice Scalia.

16 QUESTION: Why not?

17 MS. LABELLE: Because that is a collateral
18 consequence of something that happens to prisoners. They
19 get moved. They get transferred. This Court addressed
20 that in *Olim*. That's not what happened.

21 QUESTION: Suppose they do it for the purpose of
22 denying the prisoner the contact?

23 MS. LABELLE: I think that if they are targeting
24 the intimate associational rights at issue, if that is the
25 purpose that we are going to target the intimate

1 associational rights, then a fundamental right has arisen
2 and then it's a Turner question.

3 QUESTION: You're not targeting the rights.
4 Their object is not to cut off those rights. Their object
5 is to reduce the number of children in the room, to reduce
6 the number of visitors, just as in the other case, their
7 object is to use prison facilities that are more -- that
8 are cheaper, that are -- that are more readily available,
9 so they send the inmates somewhere else.

10 But if you have a constitutional right to the --
11 to the visitations you're talking about, it doesn't seem
12 right to me that you should be able to be removed from the
13 people who could possibly visit you.

14 MS. LABELLE: I think that, Your Honor, what's
15 going on here is that the decision to slice deeply into
16 the family and to make that decision as to who gets to
17 visit and who doesn't goes directly to, and that's exactly
18 what they did, they said, here are minors and we're going
19 to select out certain intimate associations, we're going
20 to slice --

21 QUESTION: We're going to have to pass on one by
22 one nieces, nephews, grandchildren, illegitimate children,
23 children of -- one by one, all of these are constitutional
24 questions, on the theory, I suppose, that what is truly
25 stupid must be unconstitutional.

1 MS. LABELLE: I think you don't have to for two
2 reasons, Your Honor. One I think if this Court affirms
3 that the intimate associational rights that are at issue
4 here do pass through the doors for the families, that you
5 will have Departments of Corrections exercising their
6 discretion and their expertise under Turner, which they're
7 allowed to do, something that is clearly not evident here.

8 They didn't -- there is no expertise in their
9 decision.

10 QUESTION: What -- what is the basis of the --
11 is this some kind of a facial challenge to the whole
12 scheme of regulating noncontact visits?

13 MS. LABELLE: No, Your Honor. I think that --

14 QUESTION: What is it? Is it an as-applied
15 challenge, of some kind?

16 MS. LABELLE: Thank you, Your Honor.

17 With regard to the categorical restrictions,
18 they are challenged as both facially and as-applied under
19 Turner, because I think Turner is a very fact-intensive
20 question.

21 QUESTION: Well, what -- what happened to Mrs.
22 Bazzetta who wrote this -- who brought this action? Did
23 she ask for all these things and was denied them?

24 MS. LABELLE: The -- Your Honor, the -- it was a
25 class action. And she represented --

1 QUESTION: I know it was a class action.

2 MS. LABELLE: -- one of the -- what happened is

3 that she -- her sister wanted to bring in her newborn

4 child to visit Ms. Bazzetta and that would have been the

5 nieces and nephews which were precluded. There were other

6 class representatives --

7 QUESTION: But her sister wanted to. I mean

8 shouldn't her sister have brought the action, then?

9 MS. LABELLE: The -- Ms. Bazzetta was denied the

10 visit with her niece and nephew. Her sister was also a

11 class representative.

12 QUESTION: Ms. Bazzetta is the inmate?

13 MS. LABELLE: Is the inmate. There were -- the

14 class representatives were both the prisoners on the

15 inside and the family members on the outside who joined

16 together to bring this action.

17 QUESTION: And what else did Ms. Bazzetta

18 challenge that had happened to her, besides the visit from

19 her sister?

20 MS. LABELLE: Ms. Bazzetta challenged only the

21 denial of her ability to see her nieces and nephew. Ms.

22 Bunton challenged the ability to see her children. Ms.

23 Barker challenged --

24 QUESTION: Well, how -- how can one of them

25 represent an entire class then if each of them is

1 challenging something different?

2 MS. LABELLE: We had class representatives, Your
3 Honor, that were certified as adequate to represent each
4 of the interests in which we presented to the Court.

5 QUESTION: Is the claim a First Amendment claim or what?
6 What -- what is -- what provisions of the Constitution
7 specifically are you looking to?

8 MS. LABELLE: With regard to the categorical
9 restrictions on the minor siblings, children, nieces and
10 nephews, it is both a First and Fourteenth Amendment claim
11 of intimate association, and family association. And what
12 we have said here is that the Department can make its
13 decisions to limit people. They can do it either
14 neutrally by volume, they can say we're going to say
15 neutrally that you can only have so many minors, just as
16 they do adults. You can only have so many minors come to
17 visit at any time and we are not going to slice into who
18 -- who is your most intimate family member. Or we can do
19 it with regard to the further-out reaches, which is they
20 can say cousins, I suppose, or even further, but they
21 can't go into --

22 QUESTION: What, where -- where --

23 MS. LABELLE: I'm sorry, Your Honor.

24 QUESTION: Where do you get this out of the
25 Constitution?

1 MS. LABELLE: I think that I get it from the
2 Court's decisions in Moore, in Roberts and that this Court
3 has already said that --

4 QUESTION: Well, Roberts was a case involving
5 whether you can get into the Jaycees or not, not whether
6 you could get out of prison.

7 MS. LABELLE: I think that you're correct, Your
8 Honor, in that the Roberts dicta, which everyone has
9 relied upon in this case, is what I'm referring to. But
10 Moore directly says that you have to protect certain
11 intimate family relationships and by anyone's
12 understanding of what it means to be family --

13 QUESTION: Well, Moore was a zoning case. I
14 mean, it had nothing to do with prisons.

15 MS. LABELLE: It had nothing to do with prisons,
16 Your Honor, but it did identify that there are intimate
17 associational rights involved in families choosing --

18 QUESTION: But -- but when in the prison
19 context, we've had specific cases and have tried to
20 articulate some governing principles outlined largely in
21 Turner v. Safley about what the prison can do and not do.
22 Should we just look to that case and analyzing this rather
23 than the -- some zoning cases and other things?

24 MS. LABELLE: I think that -- I think that
25 Turner is the governing case in here and in fact, I think

1 if -- further that if these rules, if this is not affirmed
2 it would be -- do great damage to the Turner case, because
3 what Turner says is when you have these fundamental
4 rights, that then you look to extreme deference to the
5 Corrections Department.

6 QUESTION: But Turner assumes the question that
7 we've been immediately discussing, that there is a
8 fundamental right. Before you get to the Turner
9 questions, you have to establish that there is a -- a
10 right to -- to -- to visitation in prison. If you talk
11 about intimate -- the right to intimate family
12 association, I suppose there is no more stronger right to
13 intimate family association than the right of -- of -- of
14 a man and wife to cohabit, and that's -- that's eliminated
15 in prison, unless you think that conjugal visits are
16 constitutionally required.

17 Do think that they're constitutionally required?

18 MS. LABELLE: No, I don't think --

19 QUESTION: It's a pretty intimate family
20 association that you're cutting off there, isn't it?

21 MS. LABELLE: I think that although some States
22 certainly allow it, it's not constitutionally required,
23 because there is two prongs of Turner. One is whether it
24 -- it is inconsistent with incarceration and certainly you
25 can argue that people going outside the prison, the

1 conjugal visits puts certain burdens and may be
2 inconsistent with the general incarceration.

3 QUESTION: You can arrange for it.

4 MS. LABELLE: If every --

5 QUESTION: You can arrange for it.

6 MS. LABELLE: You can arrange for it. And I
7 think that you would not win under a Turner test with that
8 limit on that associational right. But here where they
9 have impinged on the associational and intimate
10 associational right in such a way but if --

11 QUESTION: Well, that's where we have -- Mr.
12 Lamken clarified that -- that there is a right of
13 expression, and that's why he said you couldn't cut off
14 letters. But he maintains that there is not this right of
15 intimate association, that the right doesn't exist at all.
16 So you never get into Turner v. Safley balancing. And I
17 think your first job is to establish that -- that just as
18 a prisoner retains a right of expression, which can be
19 curtailed drastically given incarceration, just as there
20 is that interest and expression, so there is a retained
21 interest in intimate association, which can be shrunk, but
22 not totally eliminated.

23 MS. LABELLE: Yes, I think that's correct,
24 Justice Ginsburg.

25 The -- this -- this Court has on the outside

1 recognized that we have intimate association rights, we
2 have companionship rights. And although they may -- there
3 may be attributes of that right, that are necessarily
4 diminished by -- by having one member of your family in
5 prison, the many attributes of what it means to be a
6 family is not gone. The ability to see your -- your
7 wife's face, the ability to see your child and assure that
8 you're --

9 QUESTION: Well, all that is true, but I thought
10 -- I thought that this case -- it's much more complicated
11 than I thought. I thought it was fairly simple, at least
12 in my mind. I assume with you that Turner is the law and
13 there's some kind of constitutional right here. But I
14 thought we had basically four regulations, one says no
15 children can visit unless they're your own children. The
16 second one says no prisoners can visit unless they're in
17 your family. The third one says that you lose those
18 rights if you're on drugs, you lose them for two years if
19 you have two drug problems. And there was one other,
20 which -- if the children come in, they have to be
21 accompanied by an adult, okay? And I thought that's what
22 the regs say and, in addition, there's another reg which
23 says, warden, if you feel you need to make an exception
24 for a particular visit, you can do it. Okay?

25 Now, that's what the regs were, the district

1 court said those are unconstitutional. The court of
2 appeals said that's right and I would like to know,
3 assuming with you, that Turner is the law, what's
4 unconstitutional about them? It strikes me as the most
5 reasonable thing to say that you can't have children in a
6 prison environment unless they're your own children.

7 What's wrong with that?

8 MS. LABELLE: And I think, Justice Breyer,
9 what's wrong with that is that it's not the business of
10 the Department of Corrections to start making decisions
11 once you decide that family members and children can come
12 in, that to make decisions as to which family members are
13 close -- which -- for those people who are 18, 17, 16, who
14 have no children but wanted to see their only family
15 member, which was their brother or sister, the questions
16 --

17 QUESTION: They've now dealt with that, I take
18 it. And you're saying that -- that we should decide what
19 is a totally hypothetical thing, whether a regulation in
20 -- are they seeking damages? I take it they're seeking --

21 MS. LABELLE: No.

22 QUESTION: -- an injunction. The law is now
23 that they will let the family members in, if you have a
24 brother who's 2 years old, they can bring the brother. So
25 -- so I would think that's pretty hypothetical, but any

1 way, I'll consider that. What about the rest of it?

2 MS. LABELLE: I think that the question is
3 whether it's reasonable to slice off certain family
4 members and there's a penological --

5 QUESTION: They say, sure, it's reasonable?

6 MS. LABELLE: -- interest in doing it.

7 QUESTION: Sure it's reasonable. The reasonable
8 thing is we want as few children as possible. But we're
9 not prepared to say, if they're your own children, you can
10 never see them. That ~~tone~~ sounds like a reasonable thing.
11 Why isn't it?

12 MS. LABELLE: Because it is total discretion on
13 what constitutes the family and who comes in and it
14 interferes with the fundamental right at issue here which
15 is --

16 QUESTION: Can't they -- can't they regulate
17 categorically rather than just tuning it to each
18 particular family to say that your own children are in a
19 different class than siblings or nieces or nephews and say
20 one can -- I mean, the whole thing is line-drawn. You're
21 going to draw lines or slice somewhere as you put it.

22 MS. LABELLE: I think that's true that you can
23 draw lines, and you can draw lines that are content-
24 neutral with regard to the family, because that's what the
25 concern was here, volume. So you can say, you can only

1 have two minors, or you can only -- on your list, or you
2 can only have five minors visit or we're going to limit
3 the number or they can say, we are only going to protect
4 the recognized intimate associations which include your
5 children, your grandchildren, your siblings and your
6 nieces and nephews.

7 QUESTION: Well, of course.

8 QUESTION: You say nieces and nephews are the
9 same as a child, that I guess, that's a matter of
10 judgment. And I take it I can imagine a case where a
11 person and who is a prisoner would have the same
12 relationship with let's say a foster step-child or
13 something that he's raised that I might have or you might
14 have with a natural child. But that's why I thought there
15 is a reg here that permits the warden to make exceptions
16 in unusual cases.

17 Now, why isn't that good enough? So that if the
18 warden turns a person down, where that is the
19 relationship, then that person could complain about it and
20 bring a lawsuit rather than striking down the whole reg.

21 MS. re LABELLE: The -- the record in this case
22 is that the warden had neither discretion or at least the
23 wardens that testified felt they had neither discretion to
24 allow minor siblings in and -- or do they have any
25 discretion whatsoever with regard to the permanent ban.

1 QUESTION: Of course, Ms. LaBelle, once you leap
2 over the -- the prior constitutional question, as Justice
3 Breyer has and go immediately to Turner v. Safley, we are
4 in the line-drawing business. And it becomes a
5 constitutional question, whether it is unreasonable to
6 exclude an nephew or a niece or somebody who has this, is
7 as close to the prisoner as a child might be.

8 Why do we want to get in this line-drawing? Why
9 -- what is the problem here? Is there any real risk that
10 prisons are going to arbitrarily and unreasonably limit
11 visitation? Would -- would any prison -- or any person
12 trying to manage a prison without -- without a revolt
13 arbitrarily cut off visitation? It seems to me a problem
14 in search of a solution.

15 MS. LABELLE: I think that, Your Honor, they did
16 arbitrarily here, they denied all minor siblings --

17 QUESTION: Solution in search of a problem I'm
18 sorry.

19 MS. LABELLE: They denied -- excuse me, Your
20 Honor. They denied all minor siblings coming in. They
21 restricted who can bring the child in to such an extent
22 that there were -- that children were no longer allowed to
23 come in to visit their parents. They denied all
24 biological children.

25 QUESTION: What do you mean they couldn't? The

1 children couldn't visit -- I'm now confused about the
2 facts. I have a reg in front of me, by the way, which
3 says the warden may, quote, allow a single visit between a
4 person and a prisoner and a person not on the approved
5 visitor's list as long as it's in the best interests of
6 the prisoner and there's no threat to order and security.
7 Now, why is it that that reg doesn't give the warden the
8 power to deal with unusual cases?

9 MS. LABELLE: The testimony of the warden was if
10 you were not on the -- the visiting list, Your Honor, you
11 could come in during the time that you were waiting to get
12 cleared. But if by policy you were prohibited from coming
13 in, if you were a minor sibling --

14 QUESTION: I don't understand.

15 MS. LABELLE: The testimony of the warden was
16 that if by policy you were prohibited, then there could be
17 no exception to policy. There could be --

18 QUESTION: He said there's no exception, if, in
19 fact, a prisoner has raised a 6-year old child just as
20 it's his own child, but, in fact, there's no formal
21 adoption paper. So there's testimony that he would never
22 let that child in?

23 MS. LABELLE: There's testimony that -- that
24 there was no ability for wardens to make exceptions with
25 regard to policy decisions. If, in fact, the person had

1 not yet been able to clear and be put on the visiting
2 list, but they were allowed, those exceptions could be
3 made, but, for example, the -- the prisoner whose younger
4 brother was begging to come in after their mother had died
5 and this was his only relative, the warden testified she
6 could not make an exception to that.

7 QUESTION: I'm not concerned -- although I
8 believe you also said that there were -- their own
9 children weren't allowed in. What's the example of that?

10 MS. LABELLE: The example of that was actually
11 that there was -- some testimony with regard to Justice
12 Ginsburg's example with regard to the -- the father of the
13 child who was unwed could not -- and who had custody of
14 the child but was not the legal guardian could not bring
15 the child in to visit.

16 There are many --

17 QUESTION: No -- so, in other words, you have to
18 be the legal guardian of the child if it's not your child,
19 in order to have a visit?

20 MS. LABELLE: If you were not -- no. Even if it
21 is your child, your biological child, you must be the
22 legal guardian, if you are not married. So that if you're
23 not married, you cannot bring -- the parent can't bring
24 the child in to visit the other parent, unless you go
25 through the full legal guardianship proceedings. And --

1 QUESTION: The relationship that counts is the
2 relationship to the prisoner, not to the child?

3 MS. LABELLE: Correct, Your Honor.

4 QUESTION: And the unwed parent would not be
5 related to the prisoner, but you have on that list, let's
6 assume we're past the basic question and there is some
7 constitutional right, you have on the list a person whose
8 parental rights have been terminated, and you would allow
9 that person a right that doesn't exist outside the prison,
10 in other words, once a parental relationship has been
11 terminated, there is no visitation right, according in the
12 larger society, but you would say that it's arbitrary in
13 the prison setting to deny that?

14 MS. LABELLE: I think -- yes, Your Honor. I
15 think because it's not a right to visit, you do have a
16 right on the outside to that intimate association. If --
17 and here, I mean you're not precluded from intimate
18 association with your biological child and the parent, the
19 legal parent, can make a decision can make a decision as
20 to whether --

21 QUESTION: Well, then it's no right of yours, if
22 -- if you -- if the legal parent wants to allow someone
23 with no parental rights, but you've -- as far as the law
24 is concerned, as far as any right is concerned, a person
25 who has -- whose parental rights have been terminated is a

1 stranger to the child. And it's one thing to talk about
2 what would be reasonable for a prison to do. But I don't
3 know how you get any right with respect to someone who has
4 no right outside the prison?

5 MS. LABELLE: I think the protection for
6 intimate association on the outside is not limited to
7 legal relationships. In here are legal parents on the
8 outside who are members of this class, and who were class
9 representatives saying, listen, the adoption here was an
10 open adoption.

11 We all agreed that this child, in the best
12 interests of this child, that it should see it -- his or
13 her natural parent. And I'm making a decision that it's
14 in the best interests of this child to come in and visit.
15 And it's the prison saying -- and I have to say the prison
16 didn't say there's some reason for us to do this. They
17 said we never thought about it. We really --

18 QUESTION: So this case -- this case, in other
19 words, it sounds to me from having listened to it and
20 looked at it a little bit, it's a kind of litigation
21 problem, I mean, there's a long litigation history here of
22 contention. And perhaps extreme positions.

23 But given that, is it up to us to say, could we
24 say, look, on their face, these regs are okay, under
25 Turner? If they're not -- if they're being applied in a

1 way that makes really very little sense, let the
2 individual who has this unusual situation of the, you
3 know, adopted child or something like that, let him ask
4 for the visit, let him ask for an exception to be made, if
5 necessary, and then if that doesn't happen, and I would
6 imagine normally, if calm prevails, it would happen, but
7 if it didn't happen, then he could bring his case. Or if
8 there is such a person in this case, you could proceed
9 with that person.

10 MS. LABELLE: Your Honor, assuming the right
11 that exists and we go to Turner --

12 QUESTION: Yes.

13 MS. LABELLE: -- I think there has to be some
14 reasonable justification for infringing on the right. In
15 the case of, for example, the biological children, the
16 guardianship -- which is not just one, Your Honor, but 20
17 percent of the women in prison have their kids in foster
18 care or people who cannot bring them. We're not talking
19 about one or two. We're talking about hundreds of people
20 here.

21 To the extent that they have any reason, but
22 what they said is we just didn't think about it. They
23 didn't exercise their expertise.

24 QUESTION: Ms. LaBelle, are you asking them to
25 exercise their expertise on a subcategory of children

1 basis? Or are you saying as -- is your real point
2 something you mentioned a moment ago, that once they make
3 a decision to allow child visitation, they've got to
4 restrict it? If they restrict it at all on what you call
5 -- I think you called a content-neutral basis. And I
6 believe you meant by that they can put a number on it,
7 only X number of children in Y period of time or something
8 like that, but they cannot -- I thought you were saying --
9 determine subcategories of children who will be privileged
10 and others that will not be.

11 That would be one answer to Justice Breyer and
12 one answer I guess to the problem that we've all got about
13 how are we going to manage this litigation if -- if we've
14 got to do it on a case-by-case basis. Is -- is your basic
15 position the so-called content-neutral position? All you
16 can regulate is number once you allow any in?

17 MS. LABELLE: Yes, because that was the concern
18 articulated. If, in fact -- I suppose there could be one
19 exception. If in fact, there was some evidence of a -- of
20 a wild minor sibling smuggling ring and there was some
21 basis to target certain individuals, they could do it.
22 But what they said --

23 QUESTION: Well, then you would say the burden
24 would be on the -- on the prison to say despite the number
25 regulation, this one can't get in as opposed to the burden

1 on the prisoner saying despite your regulation, an
2 exception ought to be made for me? You're switching the
3 burden?

4 MS. LABELLE: Correct, Your Honor.

5 QUESTION: All right. Now, so --

6 QUESTION: What is your authority for -- in
7 cases from this Court, say, for the content neutral
8 principle?

9 MS. LABELLE: I think that the -- the authority
10 is -- is Turner itself, because what they said --

11 QUESTION: Does it say something about being
12 content-neutral?

13 MS. LABELLE: No, but it did say what you have
14 to do is compare the rationale for the regulation that
15 infringes, you have to see if there's a reasonable
16 penological purpose, are there alternatives and look at
17 the balancing.

18 QUESTION: Well, do you think that's fair? You
19 think that's fair? I have children that want to visit me.
20 They are my children in -- in a stable wedlock situation,
21 they can't visit, because we've adopted an absolute number
22 of children and and some of my coprisoners whose nieces
23 and nephews want to visit, they have been visiting, so I
24 can't see my kids? Does that seem fair to you?

25 MS. LABELLE: The -- the rules themselves, the

1 time, place and manner restriction.

2 QUESTION: Well, you want an absolute number.
3 Kids are kids. So since some of my coprisoners are seeing
4 nieces and nephews, I can't see my children. There are
5 just too many.

6 MS. LABELLE: I think that that wouldn't occur,
7 Your Honor.

8 QUESTION: It wouldn't occur?

9 MS. LABELLE: Because, first if, in fact, you
10 limited the number of children down to such a minuscule
11 amount of minors that had no relationship with their
12 concerns with --

13 QUESTION: Well, it would be anything under nine
14 just on --

15 QUESTION: You put me in prison, you got big
16 troubles.

17 MS. LABELLE: But they allow that amount, Your
18 Honor. What they said was we need to reduce volume by 10
19 to 15 percent. And we had absolutely no problem with the
20 time, place and manner restrictions it did so. What they
21 did by this sort of overbreadth and basically because they
22 felt there were no rights at issue here, they reduced it
23 over 50 percent.

24 There's -- I think that you have to look to see
25 if there's a reasonable relationship here.

1 QUESTION: Let me ask you --

2 MS. LABELLE: -- and there's not.

3 QUESTION: I'm sorry. I didn't mean to cut you

4 off. Finish your --

5 MS. LABELLE: No, Your Honor. Go ahead.

6 QUESTION: How do you square your argument on

7 content-neutral with respect to child visitation? With

8 other visitation that might be an issue, for example, one

9 of the things that's an issue here is the possible

10 visitation of other prisoners. Would you say that the

11 answer to that is that once the prison allows any adult

12 visitation, the only limitation it can place as a general

13 matter is numbers, and, therefore, the prison would have

14 to object on a specific basis with the burden to establish

15 on a specific basis that the visitation of any prior

16 prisoner would be deleterious?

17 MS. LABELLE: I think that the -- what they do

18 is, for adults, there's a 10 limit there.

19 QUESTION: No, no, just as a threshold question,

20 are you going to apply your -- your content neutral-

21 theory across the board to adults, as well as children?

22 MS. LABELLE: Yes, absent there being a

23 rationale or a specific security concern, which is --

24 QUESTION: And it would be the burden of the

25 prison to show that in a given case?

1 MS. LABELLE: I think that if you're doing a
2 categorical restriction, it is their burden. If they're
3 doing --

4 QUESTION: I thought you were saying the only
5 categorical restriction you can make is visitors,
6 nonvisitors. When you say you can have visitors, the only
7 further restriction is one of numbers given at least this
8 prison's rationale? Is that correct?

9 MS. LABELLE: No, I think that you can have
10 individual requirements as many States do with regard to a
11 rational basis to say someone who has been out of this
12 prison for 6 months, we're not going to allow you to come
13 in, because it's -- there's a rational basis.

14 QUESTION: Okay. If you're going to accept that
15 kind of categorization as legitimate, what's your basis
16 for saying that in the case of child visitation, it's got
17 to be content-neutral?

18 MS. LABELLE: I think because --

19 QUESTION: Or are you merely quantifying?

20 MS. LABELLE: I think that because there was
21 absolutely no basis, the only concerns -- I think because
22 it was a different -- a deference to the different
23 concerns articulated, the concern with regard to minors
24 was simply volume. There was no articulation that any
25 particular group of minors raised any specific concern.

1 QUESTION: So you're -- so you're saying, look
2 we will take their rationale at their word, and if we take
3 it, this is the only limitation that they could put on?

4 MS. LABELLE: That's correct, Your Honor.

5 QUESTION: Okay. And the limitation by the way
6 in --

7 QUESTION: But if you -- but if you spread to
8 other prisoners, then you're going beyond the
9 constitutional right that you've identified as intimate
10 association. I understand that for family. But just a
11 friend who is an ex-prisoner. How does that come with
12 intimate association?

13 MS. LABELLE: May I answer the question, Your
14 Honor?

15 CHIEF JUSTICE REHNQUIST: You may answer the
16 question briefly.

17 MS. LABELLE: I think that the general right
18 there was both a general associational right that you have
19 to companionships with loved ones as well as an equal
20 protection argument.

21 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
22 LaBelle.

23 MS. LABELLE: Thank you, Your Honor.

24 CHIEF JUSTICE REHNQUIST: Mr. Casey, you have 4
25 minutes remaining.

1 REBUTTAL ORAL ARGUMENT OF THOMAS L. CASEY
2 ON BEHALF OF THE PETITIONERS

3 MR. CASEY: I would just like to clear up a
4 couple of points initially. This case is not about visits
5 from lawyers or clergy. It's not about custody level.
6 Persons can be or prisoners can be in minimum custody
7 level and still have these visitor restrictions. So when
8 Justice Kennedy referred to solitary confinement, Justice
9 Breyer, excuse me, we're not talking about that. We're
10 just talking about visitation.

11 And Justice Ginsburg, I stand by my earlier
12 statements about the nature of the arguments in the
13 initial district court proceeding as it proceeded in the
14 first court of appeals. The issue of a distinction
15 between noncontact and contact visits simply didn't come
16 up in that -- -- in the -- in those district court
17 proceedings.

18 QUESTION: And do I understand your position
19 that you don't get to any Turner against Safley question,
20 because there's simply no right to beginning with, no
21 right that can be shown?

22 MR. CASEY: That's our initial position, yes.

23 The limitation to contact -- or to noncontact
24 visits is not a panacea. Children still present problems
25 of the -- they have unique risks and burdens. When a

1 guard and a visitationer is watching a child, they're
2 distracted from watching some other visitation. The
3 Michigan prison system, most facilities with multicustody
4 levels have one large room for visitation. They have
5 tables and chairs for the contact, along one wall, there
6 will be vending machines and along another wall, there
7 will be one or two of these temporary booths. And
8 noncontact prisoners are brought through the contact room
9 to that booth. Visitors for the noncontact prisoner are
10 brought through the contact room. There's ample
11 opportunity for exchange of contraband and visibility of
12 other activity that's going on in this one room.

13 With respect to the argument about content-
14 neutral regulations regarding children, prison officials
15 are entitled to make categorical decisions. The decision
16 here is that it's better to permit the quality close
17 visits based on a parent-child relationship, partly
18 because of limitations on time as Justice Scalia alluded
19 to, there were overcrowding problems before the
20 regulations were put into effect. All of the wardens
21 testified after the regulations were put into effect, the
22 conditions were noticeably better.

23 In closing, I would just like to emphasize, that
24 the -- the judgment of the corrections officials here was
25 a valid exercise of their informed discretion regarding

1 the conditions of confinements. The courts should have
2 deferred to that, this Court has recognized deferral to,
3 deference to prison officials as an important factor.

4 And in summary the court of appeals should be
5 reversed.

6 QUESTION: If you have a minute, I have one
7 factual question?

8 MR. CASEY: I would be happy to.

9 QUESTION: From the brief from the respondents,
10 I just want this clarified, there are a certain number of
11 prisoners who have families and they have children, but
12 they aren't legally married. Now from the briefs, I had
13 the impression that visits are allowed by those children,
14 even though they're not legally married, unless parental
15 rights have been terminated. But from respondents'
16 argument, I had the impression that you could not have a
17 visit from such a child, period, unless you went through
18 some formal adoption procedure. Which is it?

19 MR. CASEY: The -- a child of a prisoner is
20 entitled to visit if they're brought by a member of the
21 immediate family or a legal guardian.

22 QUESTION: Whether they're married or not
23 married?

24 MR. CASEY: That's correct.

25 QUESTION: Thank you.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Casey.
2 The case is submitted.
3 (Whereupon, at 11:08 p.m., the case in the
4 above-entitled matter was submitted.)
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