No. 08-1345

In The
Supreme Court of the United States

MICHELLE BAZZETTA, et al.,

Cross-Petitioners,

v.

PATRICIA L. CARUSO, Director of Michigan Department of Corrections;
MICHIGAN DEPARTMENT OF CORRECTIONS,

Cross-Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether Cross-Petitioners are prevailing parties where they obtained a ruling that was not overturned on appeal that required Cross-Respondents to allow visitation between people in prison and their minor siblings, resulted in the elimination of the permanent ban on all visits for substance abuse misconducts, successfully established a fundamental Constitutional Right of Association which survives incarceration, and expanded the ability of children to visit their incarcerated parents by striking down a restriction.

II.

Whether the lower court erred in affirming the dismissal of the case and vacating Cross-Petitioners' fee award without any determination of reasonableness based upon the success achieved.

PARTIES TO THE PROCEEDING

Cross-Petitioners are Michelle Bazzetta, Stacy Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Branaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton, and Artur Bunton through his next friend, Valerie Bunton on behalf of themselves and others who are similarly situated, in a class comprised of incarcerated individuals, together with their family members and community advocates who challenged certain visitation restrictions by the Michigan Department of Corrections as violative of their constitutional rights.

Cross-Respondents are the Michigan Department of Corrections and its current Director, Patricia L. Caruso.

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On August 28, 2008, the United States Court of Appeals for the Sixth Circuit issued an unpublished opinion affirming an order vacating an award of attorney fees and judgment of dismissal of the case, addressing Cross-Petitioners' cross-appeal. Cross-Respondents filed a petition for writ of certiorari which was docketed on March 9, 2009, to which Cross-Petitioners submit this conditional cross-petition for review.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681, *et seq.*], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d, *et seq.*], or section 40302 of the Violence Against Women Act of

1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

1. Statement of Facts

These Petitions involve a dispute over attorney fees and costs at the conclusion of Cross-Petitioners' challenge to the Michigan Department of Corrections' restrictions and prohibitions on visitation between incarcerated individuals and their family and friends. In 1995 the Michigan Department of Corrections announced a series of severe restrictions on visitation with people in prison. The rules were greeted with widespread public opposition, based on the punitive nature of the restrictions and the negative impact on rehabilitation and recidivism. A class of incarcerated individuals, together with their family members and community advocates, were certified as a class to challenge the restrictions as violative of their constitutional rights.

Following lengthy pretrial litigation, including two opinions by the Court of Appeals for the Sixth Circuit, the Plaintiff class prevailed on all issues after

several weeks of a bench trial.[1] The District Court held that the visitation regulations and policies violated Cross-Petitioners' constitutional rights and found the process by which Cross-Respondents had implemented the permanent ban also violated Cross-Petitioners' procedural due process rights. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813, 858 (E.D. Mich. 2001). The District Court's decision was affirmed on appeal in its entirety and Cross-Respondents' request to stay the remand, requiring the reinstatement of all visitation, while they sought review by this Court was denied by both the Circuit Court and this Court. *Bazzetta v. McGinnis,* 286 F. 3d 311 (6th Cir. 2002).

Upon remand, the District Court reinstated visitation between Cross-Petitioners in prison and their siblings, children, nieces and nephews. The District Court also lifted the permanent visitation bans that had been imposed on Cross-Petitioners without adequate due process, allowing those in prison and their family members to visit for the first time in seven years. The District Court also barred

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[1] Respondents initially obtained a Temporary Restraining Order preventing the visitation restrictions from taking effect. Respondents thereafter lost a preliminary injunction hearing as to the restrictions on contact visits. The Court of Appeals affirmed in part but remanded for a ruling on whether Petitioners' restrictions, as applied to non-contact visits, were violative of Respondents' rights and for determination of the constitutionality of Petitioners' permanent ban on all visits for people in prison with substance abuse problems. *Bazzetta v. McGinnis*, 133 F. 2d 382 (6th Cir. 1998). The parties went to trial on these issues in 2001.

future implementation of the challenged visitation restrictions. Cross-Respondents' attempt to stay this order was denied by both the Circuit Court and this Court, on May 16, 2002. All Cross-Petitioners (both those who were incarcerated and their hopeful visitors) who had been permanently banned from visiting each other because of the Michigan Department of Corrections' policy of permanently banning all visits if a person in prison was found guilty of two substance abuse tickets – which included possession or use of alcohol, over the counter drugs or illegal substances – had their visits reinstated. This relief was permanent as the Court of Appeals' ruling that a permanent ban was unconstitutional under the procedure that existed prior to 2002, was never reversed. The result was the permanent lifting of over one thousand permanent visitation bans that had been placed on class members since 1995. Order For Payment of Interim Attorneys Fees, June 27, 2002, Pet. App. 35a-36a.

Thereafter, this Court granted Cross-Respondents' petition for certiorari limited to certain issues, *Overton v. Bazzetta*, 537 U.S. 1043 (2002). This Court did not grant certiorari on either the facial or as applied procedural due process ruling, reversed on the issues that were considered by this Court, and remanded for further proceedings in conformity with the opinion. *Overton v. Bazzetta*, 539 U.S. 126 (2003), *reh'g denied*, 539 U.S. 982 (2003).

After this Court issued its opinion, Cross-Respondents moved for reversal of the District Court's fee

award pending before the Circuit Court and peremptory dismissal of the case below.[2] The Circuit Court denied Cross-Respondents' motion and on August 28, 2003, remanded the case to the District Court for further consideration in light of *Overton*. *Bazzetta v. McGinnis*, 73 Fed. Appx. 842 (6th Cir. 2003).

On remand, the District Court reaffirmed Cross-Petitioners' status as prevailing parties in accordance with the standards established by *Hensley v. Eckerhart,* 461 U.S. 424 (1983), holding:

> Based on this standard, it is apparent that Plaintiffs remain a prevailing party. They have prevailed on a number of significant issues including the procedural due process violation, their request for injunctive relief, expanded visits for minor children, and recognition of constitutional limits on prisoner visitation restrictions. Given the decision by the Supreme Court, however, it seems that there should be some further consideration of the reasonableness of the attorney fees previously ordered.

Opinion and Order, December 23, 2003, Pet. App. 116a-117a.[3]

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[2] The fee appeal had been stayed pending a ruling in *Overton*.

[3] On remand, Petitioners also requested that the District Court order that Respondents place the interim attorney fees in escrow. The District Court ruled that:

(Continued on following page)

Subsequent to, and in compliance with, the *Overton* decision, the Michigan Department of Corrections revised the visitation restrictions for substance abuse misconducts, deleting the permanent ban provisions and revising the procedures for future restrictions of visits. Cross-Petitioners challenged these revised rules as facially violative of Cross-Petitioners' due process rights and the District Court enjoined their implementation. Cross-Respondents appealed and the Circuit Court reversed the finding of unconstitutionality as to the facial challenge. The Circuit Court, however, did not disturb the earlier ruling or relief that lifted the permanent ban for over 1,000 prisoners based upon Cross-Petitioners' "as applied" challenge to the old rules, affirming that:

> Our reversal is without prejudice to any claim by an individual prisoner that the regulation, as applied to that prisoner, imposes an "atypical and significant hardship" thus implicating a protected liberty interest.

Bazzetta v. McGinnis, 430 F. 3d 795, 805 (6th Cir. 2005).

> [W]ith respect to the issue of escrow, the Court finds such a request to be untimely and unnecessary. Defense counsel missed their opportunity to request that the funds be put in escrow at the outset, and have cited no legal authority to support their argument that nearly eighteen months after the money has been paid, the Court can order it into escrow.

Opinion and Order, December 23, 2003, Pet. App. 117a. Petitioners did not appeal this ruling.

Upon remand from this ruling it remained for the District Court to determine a reasonable award of attorney fees and costs for Cross-Petitioners in light of its prior determination of prevailing party status. Cross-Respondents opposed any fees and further asked the District Court to order repayment of undisputed attorney fees paid to Cross-Petitioners in 2002. The District Court denied the request for repayment of the interim fees, and Cross-Respondents appealed.

The District Court, in the same order denying Cross-Respondents' request for repayment of interim fees, vacated in total its award of attorney fees and costs entered on August 19, 2002, subsequent to this Court's decision in *Overton*. The District Court had reaffirmed Cross-Petitioners' prevailing party status after the Supreme Court's opinion, and ordered the parties to submit briefs on the reasonableness of the Court's prior award in light of the Cross-Petitioners' reduced success. The District Court, rather than consider the reasonableness of its prior award of disputed fees in light of the partial success obtained by Cross-Petitioners in this complex litigation, simply vacated the entire fee award and dismissed the case. Cross-Petitioners cross-appealed on these issues and the Circuit Court, without any analysis and without identifying any clear error in the District Court's finding that Cross-Petitioners were prevailing parties, affirmed the dismissal and vacated the entire award, stating only that Cross-Petitioners "achieved only a transient victory in *Bazzetta II* [430 F. 3d 795]

and eventually left the courthouse empty", in reliance upon the wholly distinguishable case of *Sole v. Wyner*, 551 U.S. 74 (2007).

REASONS FOR GRANTING CROSS-PETITION

The failure to award attorney fees in this lengthy legal battle to establish recognition of fundamental rights for an ever increasing number of our citizens, undermines the purpose and value of 42 U.S.C. § 1988, warranting review and clarification by this Court that the type of benefits the Plaintiff class obtained in this case render them prevailing parties entitled to attorney fees. In the event the Court grants Certiorari to the Cross-Respondents, Cross-Petitioners ask the Court to also grant review on the issues Cross-Petitioners include herein, because these issues are intertwined.

I. The Circuit Court Erred in Holding that Cross-Petitioners Were Not Prevailing Parties

The proper standard for determining whether Cross-Petitioners are a prevailing party was addressed by the District Court in its August 19, 2002 opinion, finding Cross-Petitioners to have met the threshold:

> [T]he *Hensley* Court indicated that "[a] typical formulation is that Plaintiffs may be

> considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F. 2d 275, 278-79 (1st Cir. 1978).

Order Granting Plaintiffs' Motion For Attorney Fees, August 19, 2002, Pet. App. 48a.

The District Court also relied upon *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), which rejected the argument that a plaintiff needed to prevail on a "central issue" in their lawsuit, holding that:

> If the plaintiff has succeeded on any significant issue in the litigation which achieved some of the benefit the parties sought in brining the suit, the plaintiff has crossed the threshold to a fee award.

Id. at 792.

This concept of "prevailing party" is to be interpreted in a practical manner by inquiring whether a plaintiff obtained any benefit as a result of their litigation either in terms of monetary damages or injunctive relief. While the degree of Cross-Petitioners' success in this case was reduced by both *Overton* and the Circuit Court's ruling on the facial challenge to Cross-Respondents' revised rules, it did not undermine Cross-Petitioners' prevailing party status. After

Overton, the District Court ruled that Cross-Petitioners' remained prevailing parties, because:

> They have prevailed on a number of significant issues including the procedural due process violation, their request for injunctive relief, expanded visits for minor children, and recognition of constitutional limits on prisoner visiting restrictions.

Opinion and Order (1) Denying Defendants' Motion for Summary Judgment; (2) Granting Plaintiffs' Motion To Enforce Compliance; and (3) Denying Defendants' Motion To Place Attorney Fees in Escrow, December 23, 2009, Pet. App. 116a. As the District Court held in its post-*Overton* ruling reaffirming Cross-Petitioners' prevailing party status, "[t]he degree of the Plaintiffs' overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award". *Id.* (quoting *Texas State Teachers Ass'n, supra*). Cross-Petitioners obtained concrete benefits as a result of judicial rulings on major issues that were not reversed on appeal by any appellate ruling making them prevailing parties within the meaning of § 1988, to wit:

A. Cross-Petitioners Obtained a Judicial Ruling That Was Not Overturned on Appeal, Requiring Cross-Respondents to Allow Visitation Between People in Prison and Their Minor Siblings

A significant issue in this case was the decision of the state Cross-Respondents to prohibit all visitation between minor siblings and their incarcerated brothers and sisters. Over half of the named Plaintiff class representatives in this case were brothers and sisters under the age of 18 who were banned from any visits with their siblings. Cross-Petitioners argued that a fundamental right of prisoners and their family was implicated and under the balancing test of *Turner v. Safley*[4] the prohibition on these visits was unconstitutional. The District Court, after performing a *Turner* analysis, found on behalf of the Cross-Petitioners, the Circuit Court affirmed on this issue and in 2002 this Court refused to stay the mandate.

The result was that on May 16, 2002, and continuing to the present the Cross-Petitioners, who had been prohibited from seeking each other – for seven years – began visiting. Thousands of prisoners and their family members have been able to visit as a result of the Cross-Petitioners' case and the Court's ruling in this matter. Cross-Respondents did not challenge this ruling before this Court and this Court's ruling in *Overton* did not disturb the District

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[4] *Turner v. Safley*, 482 U.S. 78 (1987).

Court's decision on this point. Cross-Petitioners obtained both a judgment on the merits and judicial relief and a concrete benefit.

As the District Court found in its December 23, 2003 decision reaffirming Cross-Petitioners' prevailing party status after this Court's ruling, "Plaintiffs obtained a judicial sanctioned change in the legal relationship between the parties that resulted in an actual benefit to the Plaintiffs". *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813, 849 (E.D. Mich. 2001) ("Plaintiffs prevailed on the merit of their claims for expanded visits for minor children" includes Cross-Petitioners' success on their challenge to Cross-Respondents' prohibition to visitation by minor siblings.); and ("Therefore the Court finds that Cross-Petitioners have prevailed in establishing the unconstitutionality of the MDOC regulations excluding minor siblings . . . "). This ruling was not reversed on appeal and minor siblings continue to visit.

Cross-Respondents have previously cited legislation enacted *after* the ruling of the District Court on this issue to argue that the issue was either mooted by the legislation or that Cross-Petitioners' success was based on a catalyst theory, therefore stripping Cross-Petitioners of prevailing party status as to this issue. Neither argument is correct. It is undisputed that the legislation, referenced by Cross-Respondents, was enacted over a month after the District Court's ruling in Cross-Petitioners' favor on this issue. *Grier v. Goetz*, 421 F. Supp. 2d 1061, 1071 (M.D. Tenn. 2006) (catalyst cases apply only where there has been

a "voluntary change and behavior *before* a court has considered and ruled on the merits of the lawsuit"); *Jackson v. Illinois Prisoner Review Bd.*, 856 F. 2d 890, 895 (7th Cir. 1988) ("[If Plaintiff] could not recover fees then any public defendant could always defeat a § 1988 fee award in a declaratory judgment case by acknowledging the violation and changing its rule to moot the case".).[5]

The Supreme Court's review in this case did not address whether prohibition of all minor siblings would meet the *Turner v. Safley* test, because Cross-Respondents did not pursue the challenge. However, Cross-Respondents' decision not to pursue it does not deprive Cross-Petitioners of prevailing party status. *Young v. City of Chicago*, 202 F. 3d 1000, 1001 (7th Cir. 2000) ("a defendant cannot defeat a plaintiffs' right to attorneys' fees by taking steps to moot the case after the plaintiff has obtained the relief he sought for in such a case mootness does not alter the plaintiffs' status as a prevailing party"); *Richard S. v. Dept. of Developmental Services*, 317 F. 3d 1080, 1088 (9th Cir. 2003) (compliance after a judicial ruling which moots the issue does not deprive Plaintiffs of prevailing party status). On this issue

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[5] *See also* the Sixth Circuit's ruling in *Bazzetta*, 286 F.2d 311, 318 n. 1 (2002) "Michigan did not make the change until after the District Court ruled and still defended their right to put on restrictions" as to the sibling issue; therefore, the Sixth Circuit went ahead and ruled in affirming the District Court on this matter.

alone, Cross-Petitioners are prevailing party and entitled to a determination of reasonable fees.

B. Cross-Petitioners' Litigation Resulted in the Elimination of the Permanent Ban on All Visits for Substance Abuse Misconducts

Cross-Petitioners challenged the state's imposition of permanent bans on all visitation for any prisoner who was found guilty of two substance abuse misconducts as violative of Cross-Petitioners' Eighth Amendment rights and substantive and procedural due process rights. Cross-Respondents began imposing these permanent bans in 1995. At the time that Cross-Petitioners received a judgment after trial, there were over one thousand prisoners and thousands of their Plaintiff family members who had not been able to see each other for over seven years because they had been placed on a permanent visitation ban.

Cross-Respondents insisted on their right to put a permanent ban on prisoners because they argued that neither people who were in prison nor their visitors had any **rights of visitation or associational rights** and, therefore, no rights were implicated by a permanent ban on all visits.

The District Court found the permanent ban to constitute an Eighth Amendment violation. Finding that it had been imposed with "a callousness that could serve as the definition of deliberate indifference", the court also struck down the ban as violating

the Cross-Petitioners' substantive due process rights and infringing on First and Fourteenth Amendments associational rights. Finally, the court found specifically as to the bans that they had been arbitrarily applied without any process for imposing them or procedure for reinstating them which violated those Cross-Petitioners', who were on a permanent ban, due process rights.

When the Circuit Court affirmed, the District Court ordered over 1,000 individuals, who were on the permanent ban, to have immediate visitation. Thousands of people, husbands and wives, children, siblings, grandparents, aunts and uncles, visited for the first time in years. The Cross-Respondents' attempts to stop this order were rejected on May 16, 2002, and the visits began and the relief obtained was permanent. Cross-Petitioners have, therefore, prevailed on this issue for several reasons:

First, this Court did not grant certiorari on any of the due process rulings that formed a basis for the District Court's rulings lifting the permanent visitation bans. The status quo was that over a thousand prisoners had been permanently banned from any visits, many for seven years. After *Overton* was decided, Cross-Respondents conceded that the lifting of the permanent visitation restriction was a significant result sought and obtained by Cross-Petitioners

by a favorable judicial ruling.[6] The *Overton* Court neither reviewed nor reversed this ruling and Cross-Petitioners kept the benefits as a result of the District Court's order.

Second, Cross-Respondents never challenged the District Court's order with regard to the permanent ban to this Court. Cross-Respondents argued for a limited ban that would be subject to review after two years and argued that this did not constitute a violation of the Eighth Amendment. This Court, in *Overton*, addressed Cross-Respondents' argument and,

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[6] Petitioners conceded this at a hearing after remand, following *Overton*, asserting that they had limited the permanent visitation bans. Petitioners asserted,

> In addition, all of the inmates that were at issue in the third amended complaint, as facts were established by the trial before this Court, every single one of those inmates, we can – I believe the total was 1,124 but I won't take issue with the number, somewhere between 1,100 and 1,200 inmates were given the injunctive relief and the declaratory relief that they sought when this Court [ ] ordered us to remove them from the visitation restriction May 17, 2002.

Dec. 4, 2003 Motion Hearing. (The transcript of this motion hearing is referenced in Petitioners' Appendix, but is not complete; it does not include pages containing these quotations. Petitioners' Appendix also includes a document stricken from the record: 140a was stricken by the October 20, 2006 Order of the District Court.) Petitioners also recognized that this occurred as a result of a judicial ruling, stating: "[B]ecause here there was a declaration by the Court that what we were doing was procedurally unconstitutional, and there was an order entered requiring us to take certain conduct." *Id.*

specifically, twice, cautioned Cross-Respondents that **"if the withdrawal of all visitation privileges were permanent, or for a much longer period [than the two years Defendants proposed], or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations"**. *Overton*, 537 U.S. at 137. This Court also cautioned that if the bans were to become de facto permanent in the future, "we might reach a different conclusion" as to the constitutionality of the bans. *Overton,* 537 U.S. at 134. Cross-Petitioners obtained two very important, practical benefits as a result of the Court's ruling in this matter, that were not overturned on appeal: 1) all the permanent bans were lifted and Cross-Petitioners began visitation which continues to this day; and 2) the permanent ban is dead and this Court "admonished" Cross-Respondents (the Circuit Court's language in *Bazzetta*, 430 F. 3d at 799) that they could not re-impose a permanent ban and that the ban could not be applied in an arbitrary manner.

Third, Cross-Petitioners established a right to due process protections in visitation restrictions. After *Overton*, Cross-Respondents revised their restrictions on visits for substance abuse and proposed a two year ban with review. Cross-Petitioners again challenged, arguing Cross-Respondents had not cured the procedural due process problems found by the District Court. After the District Court enjoined the new rules, the Circuit Court held that the new rules

were not facially violative of due process but, specifically refused to accept Cross-Respondents' argument that visitation restrictions could never implicate a prisoner's due process rights, stating its ruling was without prejudice to any prisoner's right to claim that the rules as applied constituted an "atypical and significant" hardship. 430 F. 3d at 805. For all Cross-Petitioners it was clear that a fundamental right was recognized that required some procedural protections prior to lengthy visit restrictions.

C. Cross-Petitioners' Litigation Successfully Established a Fundamental Constitutional Right of Association Which Survives Incarceration

All of the above areas in which Cross-Petitioners prevailed were as a result of formal decisions by the Court and resulted in very concrete, practical relief to many Cross-Petitioners. But perhaps just as important was the basic change in the legal relationship of the parties in this case. In this case the state argued from 1995 until this case reached this Court in 2003 that there are no constitutionally protected rights associated with prisoners' visitation with their family members, including their children; that there are no associational rights; that there are no substantive or procedural due process rights; that there are no First Amendment rights; and that a permanent ban implicated no rights of people in prison. As a result of this argument, Cross-Respondents must have filed the **only civil rights brief to this Court involving**

prisoners in the last 20 years that does not reference or even cite *Turner v. Safley*.

The *status quo* and the relationship of the parties was significantly changed by the recognition that there are constitutional limits on the power of corrections officials to place restrictions on visits with prisoners. Cross-Respondents defended this case from the beginning by asserting that visitation was a privilege, and there was no basis for a court to inquire into, or restrict the Michigan Department of Corrections' regulations on visitation. Cross-Respondents argued that prisoners retained no due process rights with regard to visitation restrictions and the MDOC could restrict any or all visits, for any length of time, for any reason or no reason at all. In *Overton*, this Court accepted the existence of a constitutional right at issue and performed a detailed analysis under *Turner*, *supra*, to determine whether Cross-Respondents' infringement on Cross-Petitioners' rights was unconstitutional under the First Amendment. *Overton v. Bazzetta*, 539 U.S. at 132-36. Further, in analyzing Cross-Petitioners' Eighth Amendment claim, this Court cautioned:

> If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations. An individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, however, would not support the ruling of the

> Court of Appeals that the entire regulation is invalid.

Id. at 137. This Court rejected Cross-Respondents' assertion that their discretion to eliminate visits is boundless and unreviewable.

As the District Court found, Cross-Petitioners retained prevailing party status based on this Court's recognition of constitutional limits on prisoner visiting restrictions. *Overton* has been interpreted as affirming prisoners' fundamental right to intimate association. *Maydak v. United States*, 363 F. 3d 512, 516 (D.C. Cir. 2004) (recognizing that *Overton* confirms the proposition that prisoners retain a right of intimate association that may be curtailed under appropriate circumstances); *Johnson v. California*, 336 F. 3d 1117, 1122 (9th Cir. 2003) ("*Cf. Overton* applying *Turner* to freedom of association claims relating to family visitation".); *Kelly v. Lewis*, 88 Fed. Appx. 282 (9th Cir. 2004) ("recognizing that right to association survives incarceration", citing *Overton*); *Yoder v. Wisconsin Dept. of Corrections*, 2004 WL 602647 (W.D. Wis. 2004) ("The Supreme Court has assumed that prisoners retain some right of familiar association", citing *Overton*). This Court has extended its analysis of prisoners' associational rights to another First Amendment protected right, in *Beard v. Banks*, 548 U.S. 521 (2006) (a challenge to a ban on high security prisoner's access to newspapers, magazines, and photographs).

D. Cross-Petitioners' Litigation Expanded the Ability of Children to Visit Their Incarcerated Parents by Striking Down a Restriction

Cross-Petitioners also challenged the state policy that limited who could bring minor children to visit their incarcerated parent. The question was one of great practical significance. The District Court found that the limitation placed by the Cross-Respondents was arbitrary, implicated a fundamental right of association between a parent and her or his child, and did not meet the *Turner* standard. The Circuit Court affirmed, stating that the "justification of this policy is weak, but the harm done is readily apparent". Cross-Respondents did not pursue this ruling on appeal to this Court, and this Court specifically adopted Cross-Petitioners' urged, expanded interpretation that a child may visit when accompanied by the broader universe of adults which included, "an adult who is an immediate family member of the child or of the inmate". *Overton*, 539 U.S. at 130.[7] These visits also began on May 16, 2002, and continue to this date.

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[7] Petitioners acknowledged in argument before this Court that absent this ruling, a child's biological father could not bring the child to visit the child's incarcerated mother and Defendants argued below that only parents or spouse of the prisoner could bring the child. Transcript of Oral Argument, March 26, 2003 (U.S. Docket No. 02-94) at 14-16.

Cross-Petitioners were thus successful in expanding the opportunity for visits between prisoners and their children by broadening application of the term "immediate family", an issue the District Court found to be of "great practical significance" to class representatives, such as Tamara Prude, an incarcerated single mother, and all others similarly situated. Under Cross-Respondents' policy prior to Cross-Petitioners' lawsuit and the judicial ruling on this issue, a child's biological father, if not married to the incarcerated mother, was not able to bring the child to visit his or her mother. The District Court struck down this rule, *Bazzetta*, 148 F. Supp. at 833, n. 30, and this Court affirmed, recognizing that the limited number of adults who could bring a child to visit her or his incarcerated parent under Cross-Respondents' scenario would constitute for many prisoners a complete, "ban on visits from their children". *Bazzetta,* 286 F. 3d at 320-21.

This Court adopted an expanded rule that a child may visit when accompanied by a broader universe of adults which included "an adult who is an immediate family member of the child *or* of the inmate", thus allowing Cross-Petitioners' children to be brought by their biological father. *Overton v. Bazzetta*, 539 U.S. at 130 (emphasis added). This Court's decision to interpret the rule more broadly to include immediate family members of both the prisoner and the child has allowed Cross-Petitioners such as Tamara Prude and her minor child to visit again. The *Overton* decision has provided significant relief that would not

have occurred but for Cross-Petitioners' litigation and the rulings of the Courts.

II. The Circuit Court Erred in Affirming the Dismissal of the Case and the Vacating of Cross-Petitioners' Fee Award Without Any Determination of Reasonableness of Cross-Petitioners' Fees Based on the Success Achieved

The Circuit Court's decision, asserting that Cross-Petitioners "essentially left the courthouse empty" is completely at odds with the factual reality in this case. If left to stand, the decision seriously undermines the value of § 1988, the purpose of which is precisely to encourage the bringing of cases just like this one. This is a case which addressed arbitrary and unnecessarily harsh and severe restrictions on incarcerated people that had an actual negative impact on the penological goals of rehabilitation and the society at large. The entire sub-class of Cross-Petitioners' siblings continue to visit today, not because of Cross-Respondents' largesse, but because of a ruling that was never overturned, and, indeed, never really challenged on appeal. Thousands of Respondent prisoners and Respondent family members were reunited after denial of visits based on a permanent ban that was voided by the District Court and never reinstated. Children can now visit their incarcerated mothers by being brought by their father. This only occurred by this litigation and its related judgments. Although overturned in part, it

sufficed to significantly change the legal relationship between the parties.

Cross-Petitioners, as the District Court found, meet the threshold for being considered a "prevailing party" within the meaning of 42 U.S.C. § 1988. The question remains as to what fees are reasonable in light of the degree of Cross-Petitioners' success in this lengthy, multi-issued and procedurally complex class litigation. *Northcross v. Board of Ed. of Memphis Schools*, 611 F. 2d 624, 636 (6th Cir. 1979) (once a plaintiff is determined to be a prevailing party they are entitled to recover attorney fees for all time reasonably spent on the matter, including hours expended on unsuccessful research or phases of the litigation unless the positions asserted are frivolous or in bad faith); *Murray v. City of Onawa, Iowa,* 323 F. 3d 616, 619 (8th Cir. 2003) (plaintiff who sought $500,000 in damages and received an award of $1 was prevailing party entitled to attorney fees where he obtained some relief, significant legal issues were involved and the litigation had a public goal); *S.D. Edmonds v. FBI*, 417 F. 3d 1319 (D.C. 2005) (reversing a district court's denial of fees to plaintiffs by noting that plaintiffs' success in obtaining an order to expedite a response to an FOIA request amounted to a "judicially sanctioned change in the legal relationship of the parties", entitling plaintiffs to prevailing party status).

Once Cross-Petitioners were determined to be prevailing parties, the District Court was required to award attorney fees, in the absence of finding special circumstances. *Berger v. City of Mayfield Heights*, 265

F. 3d 399, 406 (6th Cir. 2001). Based upon the Court's rulings, Cross-Petitioners obtained a judicially sanctioned change in the legal relationship between the parties that resulted in an actual benefit to Cross-Petitioners and are therefore prevailing parties. *Habich v. City of Dearborn*, 331 F. 3d 524, 525, 534-35 (6th Cir. 2003). Once determined a "prevailing party", the district court must then apply certain principles to determine what fee is "reasonable". *Hensley v. Eckerhart*, 461 U.S. at 433; *Blum v. Stenson*, 465 U.S. 886, 888, 893 (1984) (in awarding or denying attorney fees the court should provide a clear and concise explanation of its reasons).

After the initial trial and decision on appeal from this Court, the District Court considered Cross-Petitioners' motion for attorney fees for work performed from 1995 through May of 2002. The District Court first considered whether Cross-Petitioners were prevailing parties pursuant to 42 U.S.C. § 1988. The District Court, relying upon *Hensley v. Eckerhart*, noted that:

> In this regard, the *Hensley* Court indicated that "[a] typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purpose if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit.'" *Id.* 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F. 2d 275, 278-79 (1st Cir. 1978)). Once plaintiffs have crossed this threshold, they are considered a "prevailing party" within the meaning in

> Section 1988 and are entitled to a fee award of some kind. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782, 791-92 (1989). As the Supreme Court explained, "[t]he degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee awarded *vel non*." *Id.* at 793.

Order Granting Plaintiffs' Motion For Attorney Fees, August 19, 2002, Pet. App. 48a.

In its 2002 order, the District Court found that Cross-Petitioners were prevailing parties within the meaning of 42 U.S.C. § 1988 and applied the appropriate factors to determine what would constitute a reasonable fee. Order Granting Plaintiffs' Motion For Attorney Fees, August 19, 2002, Pet. App. 51a-54a. After considering the twelve "Johnson factors" and performing a detailed analysis of Cross-Respondents' objections, the District Court awarded Cross-Petitioners' counsel fees and costs totaling $570,167.35. *Id.* 54a-58a. Cross-Respondents appealed and, after the Supreme Court issued *Overton*, this Court remanded the prevailing party question back to the District Court for its consideration in the first instance. *Bazzetta v. McGinnis*, 73 Fed. Appx. 842 (6th Cir. 2003). The parties again briefed the prevailing party issue in light of *Overton*. On December 23, 2003, the District Court reaffirmed Cross-Petitioners' prevailing party, holding:

> Based on this standard [*Hensley*], it is apparent that Plaintiffs remain a prevailing

> party. They have prevailed on a number of significant issues including the procedural due process violation, their request for injunctive relief, expanded visits for minor children, and recognition of constitutional limits on prisoner visiting restrictions. Given the decision by the Supreme Court, however, it seems there should be some further consideration of the reasonableness of the attorney fees previously awarded. This issue must be briefed before the Court can rule.

Opinion and Order, December 23, 2003, Pet. App. 116a-117a.

Pursuant to the District Court's order, Cross-Petitioners submitted a memorandum on the reasonableness of the prior fee award with proposed reductions of hours for distinct time spent on issues on which Cross-Petitioners did not ultimately prevail. Cross-Petitioners addressed the fact that the case involved a "common core of facts" or were based on "related legal theories" and spoke to the significant relief obtained. *Kelly v. Metropolitan Co. Bd. of Education*, 772 F. 2d 677 (6th Cir. 1985), *cert. denied,* 474 U.S. 1083 (1986) (where the relief obtained arose out of a common core of facts or a challenge to a centralized policy or action, the overall result is the primary factor in determining counsel fees); *see also Wayne v. Village of Sebring*, 36 F. 3d 517, 532 (6th Cir. 1994).

Cross-Petitioners addressed the fact that thousands of prisoners and their families were reunited in

visits as a result of this litigation, providing a rehabilitative benefit that neither Cross-Respondents nor the Courts disputed. *Parton v. GTE North, Inc.*, 971 F. 2d 150, 155-56 (8th Cir. 1992) (a legal issue of some significance that advances the public purpose will support the reasonableness of fees); *Farrar v. Hobby*, 506 U.S. 103, 121-22 (1992) (O'Connor, J., concurring) (a victory that vindicates important rights or deters future violations is an issue that can be considered by the Court in evaluating the reasonableness of fees). Cross-Petitioners also addressed the issue of the time and costs spent on the case necessary to achieve these results. *Ustrak v. Fairman,* 851 F. 2d 983, 988-89 (7th Cir. 1988) (the question is how much time would have been expended by plaintiffs' counsel if they had only sued on their successful claims).

However, neither the District Court nor the Circuit Court undertook any analysis of the continued reasonableness of the prior fees and costs award for work performed from 1995 through May, 2002. Nor did the lower courts address Cross-Petitioners' supplemental fees and costs submitted for subsequent work through 2006. Rather, the District Court, despite its holding that Cross-Petitioners remained prevailing parties, vacated its prior order and, without allowing oral argument, stated:

> Given the decision by the Supreme Court in *Overton* and the Sixth Circuit's decision holding the [sic] there was no facial procedural due process violation, *Bazzetta v.*

> *McGinnis*, 423 F. 3d 557 (6th Cir. 2005), this Court vacates its August 19, 2002 Order awarding Plaintiffs additional attorney fees in the amount of $570,167.35.

Order Denying Defendants' Request to Vacate June 27, 2002 Order For Payment of Interim Attorney Fees; Granting Defendants' Request to Vacate August 19, 2002 Order Granting Plaintiffs' Motion for Attorney Fees; and Vacating August 19, 2002 Order Granting Plaintiffs Attorney Fees, November 20, 2006, Pet. App. 13a-14a. However, the District Court had already ruled, **after** *Overton,* that Cross-Petitioners retained their prevailing party status. Opinion and Order, December 23, 2003, Pet. App. 116a-117a.

The only event that occurred after this was the Circuit Court's ruling on Cross-Petitioners' facial challenge to Cross-Respondents' revised rules. *Bazzetta*, 430 F. 3d 795. This ruling did not deprive Cross-Petitioners of prevailing party status because the District Court recognized, following *Overton*, that Cross-Petitioners met the threshold for prevailing party status by prevailing on "injunctive relief, expanded visits for minor children and recognition of constitutional limits on prisoner visitation restrictions". Opinion and Order, December 23, 2003, Pet. App. 116a-117a. The Circuit Court's 2005 decision also did not impact Cross-Petitioners' legal and actual success when it considered the as applied due process challenge to the former "permanent ban" rules that resulted in the lifting of Cross-Petitioners' visitation

bans. *Bazzetta*, 430 F. 3d at 805. While the District Court has a great deal of discretion in determining the reasonableness of fee awards, it is required to articulate a clear explanation setting forth its reasons. The Circuit Court clearly erred in affirming the District Court's ruling, again, without any analysis. *Hensley*, 461 U.S. at 437.

Courts have interpreted *Hensley's* requirement to require "some indication of how it arrived at the amount of compensable hours to allow for meaningful review", rejecting "meat-ax approaches" and remanding where a court fails to adequately articulate its reasons. *Heiar v. Crawford County*, 746 F. 2d 1190, 1204 (7th Cir. 1984), *cert. denied,* 472 U.S. 1027 (1985). In vacating the district court's decision to simply cut a fee request in half without articulating which parts were excessive, Judge Posner noted, "[w]here as in this case the request is for a large amount of money the judge . . . has to make a judgment – considering the nature of the case and the details of the request, taking evidence if need be, and defending [her] judgment in a reasoned (though brief) opinion on what the case should have cost the party who submitted the request". *Id.*; *see also Northcross v. Bd. of Education*, 611 F. 2d at 637. The District Court's one-time explanation does not suffice to explain its wholesale reduction of Cross-Petitioners' fee award after it had reaffirmed Cross-Petitioners' prevailing party status in light of *Overton*. *Hensley v. Eckerhart*, 461 U.S. 424, 235 (1993) (once a party prevails, a district court should not reduce hours

because a prevailing party did not receive the type or all of the relief originally requested).

Once the District Court determined Cross-Petitioners to have crossed the threshold of prevailing party status, under *Hensley* it "must apply certain principles to determine what fee is reasonable". This, the District Court wholly failed to do. Instead, it simply vacated its fee opinion of August 2002, without explanation, and did not address any fees past 2002. This, Cross-Petitioners believe, is in error.

This case has been pending for fourteen years. There are over 430 docket entries at the District Court, there was a preliminary TRO and injunctive hearing before the Court; there were nine days of bench trial; there have been eleven appeals filed by the state before the Circuit Court; there have been four certiorari petitions filed to date, with one granted. There should at least be an explanation from the District Court limiting Cross-Petitioners' total fees to only those nondisputed interim fees that Cross-Respondents agreed to pay in June of 2002 and vacating all costs awarded. This matter should be remanded to the District Court to follow law and determine what fees are reasonable in light of the success Cross-Petitioners obtained in this case.

CONCLUSION

The courts below erred by finding that Cross-Petitioners were not prevailing parties where they obtained a ruling that was not overturned on appeal that required Cross-Respondents to allow visitation between people in prison and their minor siblings, resulted in the elimination of the permanent ban on all visits for substance abuse misconducts, successfully established a fundamental Constitutional Right of Association which survives incarceration, and expanded the ability of children to visit their incarcerated parents by striking down a restriction as to whom may bring the child to visit. Thus it was error for the Court of Appeals to affirm dismissal of the case and vacating Respondent's Attorneys Fee award without any determination of reasonableness based upon the success achieved.

Cross-Petitioners request that, in the event that Cross-Respondents' petition for a writ of certiorari is granted, that the Court include the issues raised in this conditional cross-appeal because they are interrelated.

Respectfully submitted,

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