No. 21-_____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES PAUL DESPER,

Petitioner,

v.

HAROLD CLARKE, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Overton v. Bazzetta*, 539 U.S. 126 (2003), this Court recognized that a prison regulation that permitted visitation with a prisoner's own minor children, stepchildren, grandchildren, and siblings but prohibited visitation with all other children under age eighteen was facially valid. *Id.* at 129, 133. Four circuits have since recognized that an arbitrary and indefinite denial of visitation between a parent and minor child violates the constitutional right of association. In the decision below, the Fourth Circuit held that an individual "who has committed a sex offense against a minor" has no constitutional right to "in-person visitation with his minor daughter." App. 10a–12a. It reached that conclusion and affirmed a dismissal in this case despite allegations that, for over five years, prison officials have barred a father and his daughter from seeing one another for, in the prison's words, "no specific reason," App. 140a.

The questions presented are:

I. Whether a prison's indefinite ban on visitation between a minor child and her parent without any particularized justification violates the right of familial association.

II. Whether the decision below should be summarily reversed.

PARTIES TO THE PROCEEDING

Petitioner James Paul Desper was the plaintiff in the U.S. District Court for the Western District of Virginia and the plaintiff-appellant in the U.S. Court of Appeals for the Fourth Circuit.

Respondents Harold Clarke, Director of the Department of Corrections; A. David Robinson, Chief of Operations; Jane/John Doe, for each member of the Sex Offender Visitation Committee and the Sex Offender Program Director; Jane/John Doe, Corrections Operations Administrator; Maria Stransky; and Marie Vargo were defendants in the U.S. District Court for the Western District of Virginia and defendants-appellees in the U.S. Court of Appeals for the Fourth Circuit.

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INTRODUCTION

This Court has explained that the intimate relationship between a parent and child deserves "constitutional protection." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984) (cited in *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)). Even in prison, where the state may impinge upon an individual's constitutional rights, the Court has declined to "imply," let alone conclude, "that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners." *Overton*, 539 U.S. at 131.

The *Overton* Court had no occasion to address that question because it reviewed a regulation that allowed prisoners to share visits with members of their "immediate family," including minors who were the "children, stepchildren, grandchildren, or siblings of the inmate." *Id.* at 129. The regulation only barred from visitation *other* children, such as minor nieces, nephews, and children for whom "an inmate's parental rights have been terminated." *Id.* This Court upheld the regulation, but only after applying its well-established test for whether a prison administrative decision that "impinges on inmates' constitutional rights . . . is reasonably related to legitimate penological interests." *See*

Turner v. Safley, 482 U.S. 78, 89 (1987); *Overton*, 539 U.S. at 131–32. And the Court had no need to address a prison's "de facto permanent ban on all visitation," *id.* at 134, or the application of that type of restriction "in an arbitrary manner to a particular inmate," *id.* at 137.

Five circuits have now stepped into the gap *Overton* left: Four agree that a prison's arbitrary and indefinite denial of visitation between a parent and minor child violates the constitutional right of association. These courts recognize that "prison officials may not restrict an inmate's visitation with family members without balancing the inmate's interests against legitimate penological objectives." *Easterling v. Thurmer*, 880 F.3d 319, 323 n.6 (7th Cir. 2018).

The Fourth Circuit has refused to follow this approach for any parent previously convicted of a sexual offense involving a minor. In the Fourth Circuit, such a prisoner has no constitutional right to "in-person visitation with his minor daughter." App. 10a–12a. It reached that conclusion even though the prison imposed an indefinite ban on visitation between a father and his daughter for, in the prison's words, "no specific reason," App. 140a. It went on to question whether *any* aspect of the constitutional right of intimate familial association exists in prison. *See*

App. 11a–12a. In doing so, the Fourth Circuit rejected the reasoning of *Overton* and lower courts that call for a particularized inquiry into whether prison administrators' visitation restrictions have "a rational connection" to "a legitimate governmental interest." *Wirsching v. Colorado*, 360 F.3d 1191, 1199–1201 (10th Cir. 2004). And it did so despite other courts' view that a "prisoner—even a sex offender—who alleges that a permanent ban on visits with his minor children has no legitimate justification states a valid constitutional claim," *Easterling*, 880 F.3d at 322–23 & n.6.

The Fourth Circuit's decision reflects the need for this Court to answer the question *Overton* left open. No bond is as close or as important as a constitutional matter as that shared by immediate family members. This bond "involve[s] deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts*, 468 U.S. at 619–20. Yet the Fourth Circuit construed *Overton* to provide sweeping discretion for prison administrators to ban visitation in this case without any stated justification, let alone regard for the particular relationship between a

father and his minor daughter who longs to see him. This Court should intervene and conclude that such a ban violates the right of familial association.

In the alternative, this Court should summarily reverse. The Fourth Circuit considered the allegations of an arbitrary denial of parent-child visitation in this case to be implausible because, in the Fourth Circuit's view, the prison had a reason for its denial. But the Fourth Circuit reached that conclusion in the absence of any explanation from any prison official about why the prison denied the request. The Fourth Circuit instead substituted its own reasons for why *it* might have explained the denial of visitation. That approach disregarded this Court's longstanding precedent that leaves "administrative judgment" to prison officials, not to courts to invent their own explanations when officials provide none or—as here—affirmatively disclaim having any. *See Turner*, 482 U.S. at 89.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fourth Circuit (App. 1a–22a) is reported at 1 F.4th 236. The opinion and order of the

U.S. District Court for the Western District of Virginia are unreported and are available at App. 24a–36a.

JURISDICTION

The Fourth Circuit, exercising jurisdiction under 28 U.S.C. § 1331, entered judgment on June 15, 2021. App. 23a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The Fourteenth Amendment to the U.S. Constitution provides, in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

1. James Paul Desper is father to a fifteen-year-old daughter, K.D., and the only parent active in her life. App. 114a, 84a. Mr. Desper is incarcerated at the Augusta Correctional Center in Virginia, where he

and his daughter initially enjoyed six years of regular, in-person visits. App. 131a, 137a, 140a. Mr. Desper's daughter was accompanied by her legal guardian, who described the regular visits as "very good" and beneficial to K.D. App. 84a.

In March 2014, the Virginia Department of Corrections amended its regulations governing visitation. According to the amendment:

> Offenders with any conviction requiring registration in the *Sex Offender and Crimes against Minors Registry* will not be allowed to visit with any minor until granted a sex offender visitation exemption. (Minors currently approved for such visits on the effective date of this operating procedure may be allowed to continue visiting pending review for an exemption.)

App. 66a. The regulation and its exemption process applied to Mr. Desper, who had a conviction requiring registration after he pleaded guilty to one count of indecent liberties with a sixteen-year-old when he was twenty-three years old. App. 97a, 101a–02a, 138a; *see also* App. 83a (acknowledging additional conviction for a sexual offense involving an adult of limited mental capacity). Officials initially permitted Mr. Desper and his daughter to continue regular visits after the regulation took effect. App. 137a. Around December 2015, officials removed K.D. from Mr. Desper's visiting list "without notice" and began denying her requests to visit him. App. 134a–35a.

Mr. Desper applied for an exemption from the Department's regulation to continue receiving visits from his daughter in March 2016. App. 135a. Mr. Desper met the regulation's threshold eligibility requirements: He had not had any disciplinary charges for more than six months; the minor visitor was his biological child; and no court order restricted visitation. App. 66a, 83a, 134a–36a.

The regulation next requires that the prospective visitor's guardian complete a questionnaire and that the applicant complete a questionnaire as well as an assessment that includes a mental status evaluation. *See* App. 66a–67a. Mr. Desper completed each step, and his daughter's guardian submitted a questionnaire explaining the benefits of visitation to K.D. *See* App. 83a–84a, 135a.

A Sex Offender Visitation Committee reviews the application materials and makes a recommendation regarding whether to permit the parent and child visitation. App. 67a. A Corrections Operations Administrator reviews the recommendation and makes a final decision. App. 67a. Applicants denied visitation must wait one year before they may reapply. App. 67a.

Although officials denied Mr. Desper and his daughter's application in mid-June 2016, Mr. Desper and his daughter's guardian did not learn that until roughly seven months later. App. 90a. In February 2017, after Mr. Desper had written to the Department of Corrections asking about the application, his daughter's guardian received an email from the Department. App. 90a, 106a, 112a. The email notified her that the Department had denied K.D. visitation with her father and indicated she could reapply one year after the denial, in June 2017. App. 112a. Mr. Desper followed up by sending a letter to the Department to ask for "reasons why" it had denied visitation. App. 108a. He received no response. App. 139a.

In June 2017, Mr. Desper and his daughter applied for an exemption a second time. App. 139a. Again, the Department denied the application and did not notify either Mr. Desper or his daughter's guardian about the denial. App. 139a–40a.

K.D.'s guardian then called to ask about the denial. App. 140a. A Department official told her: "there was no specific reason why the visitation was disapproved." App. 140a. Mr. Desper and his daughter have not had any form of visitation since December 2015—they have not

seen one another's faces in person or on a screen for almost six years. *See* App. 137a.

2. Mr. Desper filed pro se a 42 U.S.C § 1983 suit asserting, in relevant part, a violation of his constitutional right to familial association under the First Amendment, as incorporated against the States through the Fourteenth Amendment. App. 39a–42a. His complaint alleged that named Department officials (collectively, "the Officials") arbitrarily and indefinitely denied his daughter visitation with him. App. 40a–42a.

The Officials moved to dismiss for failure to state a claim. App. 117a. They argued that prisoners have no constitutional right to visitation. App. 120a–24a. They also argued that, even if such a right existed, the Department's regulations governing visitation were supported by legitimate interests in safety and rehabilitation. App. 121a–22a.

The district court granted the motion to dismiss. App. 24a. It doubted that the First Amendment protects any right to visitation in prison. App. 28a–29a. It then held that, even if the First Amendment does protect such a right, the Department's regulations were reasonably related to "the state's interest in protecting children from sexual

misconduct and in promoting sex offender treatment success." App. 29a–31a.

3. Mr. Desper appealed, and the Fourth Circuit appointed undersigned counsel. The Fourth Circuit heard argument and affirmed the dismissal.

The Fourth Circuit concluded that no constitutional right "requires a prison to allow an inmate who has committed a sex offense against a minor to have in-person visitation with his minor daughter." App. 10a–12a. It explained that allowing such an individual to have in-person visitation with his daughter "seems directly 'inconsistent with proper incarceration.'" App. 11a–12a (quoting *Overton*, 539 U.S. at 131). The Fourth Circuit then reasoned that, even if there were such a right, Mr. Desper failed to state a claim that Department Officials "arbitrarily denied [him] visitation in a way that violated the associational right he assert[ed]." App. 14a. Although the Fourth Circuit acknowledged Mr. Desper's allegation that a prison official told his daughter's guardian "that 'there was no specific reason why the visitation was disapproved,'" the court viewed Mr. Desper's claim of an unreasoned denial to be

implausible in light of the court's own review of Mr. Desper's application for visitation. App. 14a.

REASONS FOR GRANTING THE WRIT

The breadth and impact of the decision below on intimate familial relationships demonstrate the need for this Court to provide guidance on question it left unanswered in *Overton*. *Overton* upheld a prison regulation that denied visitation with children under age eighteen other than "those children closest to" a prisoner. *Overton*, 539 U.S. at 129–30, 133. The regulation allowed visitation with the prisoner's own children, stepchildren, grandchildren, and siblings. *Id.* at 129–30. And *Overton* left open the possibility of challenges to a "de facto permanent ban on all visitation," *id.* at 134, and the application of that type of visitation restriction "in an arbitrary manner to a particular inmate," *id.* at 137. Four circuits have now recognized that a prison's arbitrary and indefinite denial of visitation between a parent and minor child violates the constitutional right of association. Not the Fourth Circuit. It has closed the door to even that narrow right for a parent who has been convicted of a sexual offense involving a minor. The Fourth Circuit reached that conclusion after emphasizing that *Overton* had left for another day the question of whether a prisoner has *any* constitutional right to parent-child visitation. This Court should answer that question and conclude

that a prison's indefinite ban on visitation between a parent and minor child without any particularized justification violates the right of familial association.

The Court should use this case to do so. The issue is important, as it affects the most intimate relationship subject to the right of association: that of parents and their minor children. It also involves the unique ability of parents to nurture bonds with their children through face-to-face conversations. Yet, without guidance from this Court regarding the extent to which prison officials may interfere with these intimate relationships, the Fourth Circuit read *Overton*'s reasoning about prison visitation in general to reach its sweeping conclusion.

The decision below is also wrong and, if this Court does not order merits briefing, it should summarily reverse. Although the Fourth Circuit considered Mr. Desper's allegations of an arbitrary and indefinite denial of parent-child visitation to be implausible, it did so only by reviewing the visitation application Mr. Desper submitted to prison officials and relying on reasons those officials never gave for denying visitation. Both aspects of the decision below are contrary to this Court's precedents governing review of prison administrative decisions.

I. The Fourth Circuit's Answer to the Question this Court Left Open in *Overton* Conflicts with that of Four Other Circuits.

This Court should address the question it had no need to decide in *Overton*. Lower courts have consistently recognized since *Overton* that a prison's arbitrary and indefinite denial of parent-child visitation violates the constitutional right of familial association. The Fourth Circuit acknowledged this trend and that *Overton* itself declined to "'imply[] that any right to' familial association 'is altogether terminated by incarceration or is always irrelevant to claims made by prisoners.'" App. 8a, 12a (quoting *Overton*, 539 U.S. at 131). But because *Overton* did not directly address this question, the Fourth Circuit refused to follow the "weight of authority" that limits prison officials' ability to "restrict an inmate's visitation with family members" unless the officials first balance "the inmate's interests against legitimate penological objectives." *See Easterling*, 880 F.3d at 323 n.6. The breadth of the decision below and its divergence from four other circuits' approach to *Overton* calls out for this Court's review.

1. *Overton* rejected a facial challenge to a regulation that allowed a prisoner to receive visits from "those children closest to him or her." *Overton*, 539 U.S. at 129. So long as prisoners maintained parental

rights, they could share visits with their own children, as well as "stepchildren, grandchildren, or siblings." *Id.* at 129–30, 133. The regulation at issue in *Overton* barred visitation only with children further removed from a prisoner's immediate family, like "minor nieces and nephews and children as to whom parental rights have been terminated." *Id.* at 133. In upholding that regulation, this Court applied its well-established standard to examine whether a prison regulation is valid even though it "impinges on inmates' constitutional rights," *Turner*, 482 U.S. at 89. *See Overton*, 539 U.S. at 132. And the Court decided the regulation was valid after reviewing a well-developed trial record establishing that "the regulation ha[d] a 'valid, rational connection' to a legitimate governmental interest." *Id.* at 132–36 (quoting *Turner*, 482 U.S. at 89).

Although *Overton* left undecided whether prison officials must have a legitimate penological justification to bar a minor child from seeing her incarcerated parent, it was not silent on the issue. This Court recognized "that the Constitution protects 'certain kinds of highly personal relationships'" and acknowledged precedent "outside the prison context" considering "a right to maintain certain familial relationships,

including association among members of an immediate family and association between grandchildren and grandparents." *Id.* (quoting *Roberts*, 468 U.S. at 618, 619–620; citing *Moore v. East Cleveland*, 431 U.S. 494 (1977) (plurality op.), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

Overton concluded by expressly declining to address whether "a de facto permanent ban on all visitation for certain inmates," *id.* at 134, or application of that type of provision "in an arbitrary manner to a particular inmate," *id.* at 137, would survive constitutional scrutiny.

2. Today, four circuits have stepped into the vacuum *Overton* left and agreed that an arbitrary and indefinite denial of visitation between a minor child and her incarcerated parent would violate the constitutional right of association.

The Seventh Circuit's decision on this question is instructive. *Easterling*, 880 F.3d at 323 n.6. It recognized this Court's precedent protecting prisoners' "limited constitutional right to intimate association." *Id.* at 322 (citing *Turner*, 482 U.S. at 95–96, and *Overton*, 539 U.S. at 131–32). And it concluded "that prison officials may violate the Constitution by permanently or arbitrarily denying an inmate"—

even one previously convicted of a sexual offense—"visits with family members in disregard of the factors described in *Turner* and *Overton*." *Id.* at 321, 323.

The Tenth Circuit also recognizes that parents retain a right of association with their minor children. *See Wirsching*, 360 F.3d at 1198, 1201. As with all prison administrative decisions that "imping[e] on inmates' constitutional rights," it applied *Turner* to decide whether a prison's decision to ban visitation between a father—who refused to participate in a "treatment program for sex offenders"—and his minor child withstood constitutional scrutiny. *See id.* at 1195, 1198–1201. Although the *Turner* inquiry demands deference to prison administrative judgments, the Tenth Circuit emphasized that a prison's ban on visitation between a father and "his children is indeed a harsh restriction, significantly more severe than the ban on family visits upheld in *Overton*." *Id.* at 1201 (footnote omitted). The Tenth Circuit, in turn, cautioned prison officials "to ensure that restrictions upon visitation with a prisoner's children are justified by the circumstances" and suggested that officials "seriously consider less draconian restrictions—such as closely monitored, noncontact visitation," *id.*

The Ninth Circuit similarly explained that a parent's relationship with "his or her child, even in prison, merits some degree of protection." *Dunn v. Castro*, 621 F.3d 1196, 1205 (9th Cir. 2010). And it followed *Overton* in expressly declining to "hold or imply that incarceration entirely extinguishes the right to receive visits from family members." *Id.* (citing *Overton*, 539 U.S. at 131–32). Rather, it asked whether prison officials "arbitrarily or irrationally" restricted an incarcerated parent's visitation with his minor child. *Id.* Even review of a temporary restriction on visitation between a prisoner "believed to have engaged in improper conduct with a minor" and that prisoner's "own children" was "'by no means open and shut'" as a matter of constitutional law. *Id.* (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).

Recently, the Eighth Circuit followed these circuits' lead. The Eighth Circuit had not previously attempted to decide whether prison officials may apply a "blanket prohibition on visitation" between pretrial detainees and their "minor children." *Manning v. Ryan*, 13 F.4th 705, 707 (8th Cir. 2021). But "[t]he time [wa]s ripe . . . to clearly establish that such behavior may amount to a constitutional violation in the future." *Id.* at 708. The Eighth Circuit reached that conclusion by

relying, in part, on *Overton*'s reasoning that "limitations on visitation privileges may be unconstitutional if 'applied in an arbitrary manner to a particular inmate.'" *Id.* (quoting *Overton*, 539 U.S. at 137).

3. The Fourth Circuit has rejected this approach. In the decision below, it refused to recognize that the right of association persists in prison and protects against indefinite and unreasoned bans on visitation between minor children and their incarcerated parents. Faced with an ongoing visitation ban and no stated justification for applying that ban to a particular parent and child, it concluded that "an inmate who has committed a sex offense against a minor" has no constitutional right to "in-person visitation with his minor daughter." App. 10a–12a

To reach this anomalous result, the Fourth Circuit cited broad statements from *Overton* about the limits incarceration necessarily places on the right of association. To the Fourth Circuit, "most, if not all," of the goals of imprisonment this Court has described "cut[] against" any decision that a "registered sex offender whose crime involved a minor" has any constitutional right to "in-person visitation with his minor daughter." *See* App. 10a–12a. But *Overton* itself assumed that prisoners maintain a right of association and applied *Turner* to decide

whether a particular visitation restriction that did *not* involve parent-child relationships bore "a rational relation to legitimate penological interests." *Overton*, 539 U.S. at 129–30, 132. Unlike its sister circuits, the Fourth Circuit refused to follow that approach for prisoners convicted of sexual offenses involving minors, foreclosing altogether the possibility of as-applied challenges and protections for even "highly personal relationships" like those of parents and their minor children in this circumstance. *See id.* at 131 (quoting *Roberts*, 468 U.S. at 618, 619–20).

Lower courts outside the Fourth Circuit have made clear since *Overton* that prison officials cannot deny parent-child visitation for indefinite lengths of time without circumstance-specific justifications. Without attempting to reconcile its ruling with that clear principle, the Fourth Circuit simply emphasized the absence of precedent from this Court on whether *any* associational right persists after incarceration. *See* App. 11a–12a. Yet the Fourth Circuit answered *Overton*'s open question in a way that is at odds with the reasoning of *Overton* itself, as other circuits have explained. That "inmates do not have an *absolute* right to visitation" does not mean prison officials may ban "visitation with family members without balancing the inmate's interests against

legitimate penological objectives." *Easterling*, 880 F.3d at 323 n.6 (emphasis added). To protect the parent and minor-child relationship, these circuits rightfully recognize that such bans will violate the Constitution if prison officials apply them in a "permanent" or "arbitrary" manner. *See Overton*, 539 U.S. at 137; *Easterling*, 880 F.3d at 322–23; *Wirsching*, 360 F.3d at 1201.

The Fourth Circuit suggested it was following *Overton*, but its holding shows otherwise. The Fourth Circuit affirmed a dismissal in spite of Mr. Desper's allegations that—after six years of healthy visits with his daughter—prison officials began denying visitation between them for an indefinite period of time and, in the prison's words, for "no specific reason," App. 140a. *See* App. 12a ("[T]o find in the present context that this right 'survives incarceration' to 'the extent' [Mr.] Desper asserts would ignore the rationale for his confinement" (quoting *Overton*, 539 U.S. at 132)). That the Fourth Circuit could rely on reasoning from this Court about the general "rationale for [Mr. Desper's] confinement" to reach its result demonstrates the need for this Court to clarify that parents may bring as-applied challenges to denials of visitation with

their minor children that extend indefinitely and are imposed arbitrarily. *See* App. 12a.

II. This Court Should Answer the Important and Recurring Question this Case Presents.

This Court should grant certiorari to fill the vacuum *Overton* left. The issue in this case is important and recurring. And the decision below is wrong in a way that reflects why this Court should clarify how to apply *Overton*'s reasoning to prison administrators' restrictions on visitation when minor children wish to see their parents.

1. Many lower courts attempting to chart a course after *Overton* have not doubted that the parent-child relationship is "the most fundamental family relationship." *See M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996). Courts, in turn, have recognized the need to protect this relationship, even in prison. *See Wirsching*, 360 F.3d at 1201 ("Even inside the prison walls, that relationship is generally deserving of some form of protection.").

The issue of how prison administrators should treat parent-child relationships in connection with visitation restrictions is recurring, as reflected by the five circuits to have addressed the issue. And Virginia is not alone in giving discretion to prison officials to decide whether to

permit minor children to see their incarcerated parents. *See Easterling*, 880 F.3d at 321 (describing a Wisconsin policy that gives a warden "discretion to deny visits" on a series of listed grounds); *Wirsching*, 360 F.3d at 1195 (explaining that Colorado Department of Corrections officials only would permit visitation between a parent and a child after an individualized evaluation of the parent).[1]

2. Yet, without guidance from this Court about how to apply its precedent regarding parent-child relationships within prisons, courts will continue to struggle with "the analytical lacunae" and "uncertainty" this Court left for another day. *See Flynn v. Burns*, 289 F. Supp. 3d 948, 965 (E.D. Wis. 2018). The decision below reflects how far courts may go in this state of uncertainty.

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[1] That this issue is recurring is not surprising, given that "there are more children with incarcerated parents than there are people in prison"—in 2007, there were 1,518,535 people in prison and an estimated 1,706,000 children with incarcerated parents. *See* Chesa Boudin, Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship, 101 J. Crim. L. & Criminology 77, 77 (2011); Lauren E. Glaze & Laura M. Maruschak, Bureau of Justice Statistics, Dep't of Justice, Special Report: Parents in Prison and Their Minor Children 1 (2008), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf (cited in Boudin, *supra*, 101 J. Crim. L. & Criminology at 77 n.4).

The Fourth Circuit read *Overton* to grant nearly unlimited deference to prison administrators when applying visitation regulations. After Mr. Desper alleged that prison officials both indefinitely denied him and his daughter visitation and affirmatively disclaimed any particularized reason for the denial, the Fourth Circuit reasoned that maintaining an associational right "to 'the extent' [he] asserts would ignore the rationale for his confinement." App. 12a (quoting *Overton*, 539 U.S. at 132). This sweeping decision allows prison officials to indefinitely ban parent-child visitation for any individual previously convicted of a sexual offense without any justification particularized to the parent-child relationship being restricted. *See* App. 11a–12a. It reflects just how far courts may go with *Overton*'s reasoning without clarification from this Court.

The Fourth Circuit went further still: It treated the burden under *Overton* as so heavy—and the deference to prison administrators so great—that a prison need only have a *process* for reviewing applications for parent-child visitation to receive deference for any unreasoned denial that follows. The decision below described the process Department Officials undertook upon receipt of Mr. Desper and his daughter's

visitation applications, including an assessment and review by a committee. App. 5a, 13a–14a. According to the Fourth Circuit, Mr. Desper failed to meet his "heavy" burden under *Overton* because *he* did not explain in his complaint why the process that resulted in denials of visitation for over five years "was not reasonably related to a legitimate penological interest." App. 13a–14a (emphasis in original). Yet notably absent from the decision below is any citation to any reason from prison administrators who denied Mr. Desper and his daughter's applications. The mere fact that prison officials have a process for accepting and reviewing applications for parent-child visitation is not a substitute for exercising "professional judgment" when barring a parent from accepting visits from one's minor child, let alone "professional judgment" based on legitimate "penological goals." *See Overton*, 539 U.S. at 132. Mr. Desper's complaint showed why the *fact* of a process meant nothing: That process resulted in the prison denying visitation indefinitely—after nearly six years of healthy visits—for, in its words, "no specific reason." App. 140a.

III. The Decision Below Misapplied this Court's Well-Established Precedent for Review of Prison Administrative Decisions.

If this Court does not grant certiorari and order merits briefing, it should summarily reverse. Contrary to this Court's precedent, the Fourth Circuit independently reviewed Mr. Desper and his daughter's application for visitation and postulated its own reasons for denying that application.

This Court has emphasized time and again that deference to prison administrators is warranted only when they—not courts—exercise "informed discretion" and actually "make . . . difficult judgments concerning institutional operations." *Jones v. N. Carolina Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 128 (1977); *see also Thornburgh v. Abbott*, 490 U.S. 401, 419 (1989) (upholding facial validity of regulations, but remanding for analysis of as-applied challenges under *Turner*). Rather than properly apply this precedent to Mr. Desper's allegations of an arbitrary and indefinite denial, the Fourth Circuit described the allegations as implausible "in light of [an] 'obvious alternative explanation.'" App. 14a (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (additional quotation omitted)). Yet what the Fourth Circuit

called "obvious" was not an explanation from the prison administrators tasked with reviewing Mr. Desper and his daughter's applications for visitation. Instead, the Fourth Circuit provided its own explanation.

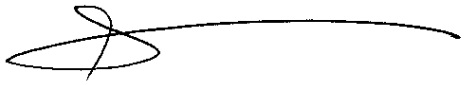
The Fourth Circuit reviewed Mr. Desper's application for visitation and opined that—in the court's view—Mr. Desper "was denied visitation because in his application he failed to grasp the seriousness of his prior offenses and indicated an unwillingness to take responsibility for his criminal sexual history." App. 14a. The decision below therefore substituted the Fourth Circuit's judgment where prison administrators had provided none. That flouts *Turner*. *See Turner*, 482 U.S. at 89 (describing multi-factor analysis for courts to apply *after* prison officials exercise "administrative judgment"); *id.* (rejecting an alternative test that would make courts "the primary arbiters of what constitutes the best solution to every administrative problem").

There is no denying that considerations surrounding visitation "are peculiarly within the province and professional expertise of corrections officials" and that "courts should ordinarily defer to their expert judgment." *Pell v. Procunier*, 417 U.S. 817, 827 (1974). But the Fourth Circuit pointed to no exercise of expertise or judgment here.

CONCLUSION

This Court should grant certiorari and either set this case for briefing and argument or, in the alternative, summarily reverse the erroneous decision below.

Respectfully submitted,



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