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IN THE SUPREME COURT OF THE UNITED STATES

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GARRISON S. JOHNSON, :

Petitioner :

v. : No. 03-636

CALIFORNIA, ET AL. :

- - - - -X

Washington, D.C.

Tuesday, November 2, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

BERT H. DEIXLER, ESQ., Los Angeles, California; on behalf of the Petitioner.

PAUL D. CLEMENT, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

FRANCES T. GRUNDER, ESQ., San Francisco, California; on behalf of the Respondents.

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2 (10:59 a.m.)

3 JUSTICE STEVENS: We'll hear argument in Johnson
4 against California.

5 Mr. Deixler.

6 ORAL ARGUMENT OF BERT H. DEIXLER

7 ON BEHALF OF THE PETITIONER

8 MR. DEIXLER: Justice Stevens, and may it please
9 the Court:

10 This case presents the issue of whether the
11 California Department of Corrections, unlike every other
12 State in the Federal Bureau of Prisons, may continue its
13 more than 28-year, unexamined practice of routine, blanket
14 racial segregation of its prisoners.

15 The unitary practice in question here was
16 applied more than 350,000 times last year, not just to the
17 40,000 new prisoners entering the California system, but
18 to all 72,000 returning parolees and hundreds of thousands
19 of transfer prisoners such as the petitioner in this case,
20 Garrison Johnson, a petitioner who had been housed for
21 more than 15 years in the California prison system. This
22 unexamined, routine practice effectively erected whites
23 only, blacks only, Hispanics only signs over the portals
24 of the California prison system, and it is a practice
25 which is rooted in racial stereotype and the belief that

1 all persons of a race think alike and act alike.

2 California's needless and dangerous policy fails
3 both the strict scrutiny test, which the Ninth Circuit
4 should have applied, and the Turner deference standard,
5 which the Ninth Circuit wrongly applied.

6 JUSTICE O'CONNOR: Is California the only State,
7 to your knowledge, to apply this procedure?

8 MR. DEIXLER: Yes, Justice O'Connor, it is.

9 The --

10 JUSTICE KENNEDY: The -- the statistics showed
11 that there were -- I'm sorry. I don't have it right at my
12 fingerprints -- fingertips -- only about 200,000
13 processing incidents a year, 200,000 people a year to be
14 processed. I take it that includes some people that are
15 being transferred?

16 MR. DEIXLER: Yes, correct, Your Honor. In --
17 in the circumstances in this case, Petitioner Johnson, for
18 example, during his 15 years, had been transferred on five
19 separate occasions, and the circumstances which he
20 experienced are not unusual within the California prison
21 system. Indeed, an outside-the-record fact: within the
22 last three weeks, he's been informed that he's to be
23 transferred yet again within the California prison system
24 to another facility called Corcoran.

25 JUSTICE SOUTER: May -- may I put aside for a

1 moment the question of the strength of your argument in
2 transfer situations and simply go to the circumstances of
3 the original receipt of the prisoner for the first time
4 into the prison system? What do the other States -- you
5 say California is the only one that -- that makes this
6 racial assignment like this. What do the other States do
7 to guard against an -- an explosive team-up in -- in
8 double-celled prisoners when -- when they're taking them
9 in for the first time?

10 MR. DEIXLER: The circumstances in other States,
11 which we've been able to identify, include a range of --
12 of circumstances, which include -- as is available in
13 California under the penal code section, which requires
14 the delivery of a presentence report, together with a
15 commitment order, is analysis on a particularized
16 circumstance basis of the individuals who are coming into
17 the prison and making a -- an estimate as to what may
18 occur. Other States use a random assignment circumstance,
19 and giving no consideration whatever to race. And a third
20 group of States apparently consider race as part of an
21 overall or holistic bit of analysis with regard to trying
22 to equalize the prison populations.

23 JUSTICE SCALIA: Do you know if there are in
24 these other States the same incidents of racial riots or
25 racial killings or racial attacks?

1 MR. DEIXLER: Well, the best empirical evidence
2 which exists that we're familiar with was reported in the
3 Trulson study, which the dissenters in the Ninth Circuit
4 petition for rehearing en banc relied upon and which the
5 amici have filed with this Court. And in that
6 circumstance, it suggests, over a 10-year study in Texas,
7 that only five percent of all of the interracial -- of -- of
8 all of the incidents of violence in -- in the Texas prison
9 system were what was described by Professor Trulson as
10 having racial motivations. And of that five percent, only
11 one-quarter, or about 1.2 percent, were interracial
12 circumstances where there had been interracial cellmates
13 involved in the racial violence. And that seems to be, as
14 far as anyone has been able to produce in this case in any
15 part of the record, the best empirical data which might
16 respond to your question, Justice Scalia.

17 JUSTICE GINSBURG: Were there any incidents in
18 California's prisons of same cellmates of different races
19 having episodes of violence? Or -- this is an old policy.
20 So were there incidents like that that led to the
21 development of the policy?

22 MR. DEIXLER: Justice Ginsburg, one of the
23 interesting things about the record in this case is that
24 the State of California has been unable to identify a
25 single incident of a -- of interracial violence between

1 cellmates. The record is bereft of that kind of
2 information. Rather, they've spoken of information about
3 violence which occurs in more --

4 JUSTICE SCALIA: Well, they say that that proves
5 that their policy is very effective. I mean, that's --

6 (Laughter.)

7 MR. DEIXLER: I think the -- I think the record
8 suggests, as at least in the testimony of Mr. Johnson,
9 that it is a de facto segregation system which exists
10 after the 60-day period and outside the transfer 60-day
11 period, and so it would be hard for the State of
12 California to provide -- to provide that data.

13 JUSTICE KENNEDY: Suppose you were to prevail in
14 this case and a court were to enter a decree forbidding
15 this practice. A month later, there is an incident in
16 which one prisoner is seriously injured in a -- in a
17 prison cell because of the interracial assignment policy.
18 Would that be grounds for rethinking the decree?

19 MR. DEIXLER: Well, Justice Kennedy, it seems to
20 me that under the Court's strict scrutiny analysis, which
21 in my judgment should have applied here, and under the
22 particularized circumstance test announced in the Lee case
23 in the concurrence, that a circumstance involving a single
24 prisoner in a single prison cell on one occasion ought not
25 to give rise to a systematic change in -- in a policy

1 which is rooted in racial stereotype. With regard to
2 those prisoners involved in that particular circumstance,
3 of course, some period of -- of segregation would be
4 appropriate as a means of controlling and ensuring that
5 there's not going to be some kind of wholesale racial
6 violence. That --

7 JUSTICE SCALIA: What is -- what is sacrosanct
8 about the -- about the constitutional right not to be
9 subjected to racial stereotype? There are a lot of other
10 constitutional rights that people in prison give up.
11 That's one of the consequences of committing a crime and
12 being sent to prison, the most fundamental constitutional
13 right, the right to -- to walk around and -- and not be
14 seized. Why -- why is it that this -- this one
15 constitutional right cannot yield to what prison
16 authorities believe is -- is a useful, not necessarily
17 essential, but a useful means of -- of maintaining order
18 in prison?

19 MR. DEIXLER: Well, Justice Scalia, the
20 fundamental teachings on the Fourteenth Amendment of this
21 Court demonstrate that race is different, that the
22 government use of race is presumed to be unlawful --

23 JUSTICE SCALIA: Oh, it's -- it's different from
24 First Amendment rights? Prisoners can't hold news
25 conferences. I mean, there are all sorts of very

1 important constitutional rights that I think are no more
2 important than the Equal Protection Clause which prisoners
3 yield when they're in prison.

4 Now, do we subject the taking away of all of
5 these rights to strict scrutiny when the prison
6 authorities do it? I don't think so. I think we say if
7 it's -- if it's the judgment of the -- of the prison
8 authorities, we -- we generally defer to it.

9 MR. DEIXLER: Yes. The Turner standard
10 certainly reflects a consideration by this Court that
11 deference is appropriate with regard to rights which are
12 inconsistent with incarceration.

13 JUSTICE O'CONNOR: Well, even First Amendment
14 rights.

15 MR. DEIXLER: Even First Amendment rights.

16 JUSTICE O'CONNOR: Isn't that so?

17 MR. DEIXLER: Yes, Justice O'Connor.

18 JUSTICE O'CONNOR: Which is a terribly important
19 set of rights for individuals, is it not?

20 MR. DEIXLER: Yes. The First Amendment rights
21 are very important.

22 JUSTICE O'CONNOR: Right.

23 MR. DEIXLER: However, in the context of
24 incarceration, a sacrifice of the right to assembly, the
25 right to correspond in certain circumstances, to contact

1 visits are things which are well within the ambit of what
2 a prison needs to control.

3 JUSTICE SCALIA: No, I don't think so. I -- why
4 would holding a news conference disrupt a prison? It
5 wouldn't. You say it's too much trouble. We don't want
6 news conferences in prison.

7 MR. DEIXLER: And in -- and in the circumstances
8 that the Court's test has been announced in Turner, that's
9 certainly within the ambit of a right which the prison
10 authorities might properly exercise.

11 JUSTICE SCALIA: And why is this not one?

12 MR. DEIXLER: Well, because this Court
13 decided --

14 JUSTICE SCALIA: Because it -- it is no -- there
15 is no doubt that there are racial gangs in prison, the
16 Aryan Brotherhood and -- and Hispanic gangs and -- and
17 black gangs. There's no doubt that that exists. Is it --

18 MR. DEIXLER: There's no doubt -- Justice
19 Scalia, there's no doubt that there are racial gangs in
20 prison, but this policy of California is directed not to
21 the gang aspect of it but to the race aspect. The record
22 is clear that there's a near zero percent chance that any
23 black person could be housed with any white person, that
24 any white person could be housed with any Hispanic person,
25 without reference to the gang question. And this is a

1 transfer policy which recurs and recurs, five times in the
2 case of -- of --

3 JUSTICE STEVENS: Mr. Deixler, do you think you
4 lose if we apply Turner?

5 MR. DEIXLER: No, Your Honor. We believe that
6 even under Turner --

7 JUSTICE STEVENS: Well, why isn't that the right
8 approach to the case then if that's the -- we don't have
9 to meddle with the rules governing the -- the conduct of
10 prisons, if you can prevail under that theory?

11 MR. DEIXLER: We would -- we would be pleased to
12 -- to prevail under -- under Turner, Justice Stevens. It
13 seems that consistent with the Court's teachings under the
14 Fourteenth Amendment and the most recent considerations by
15 the Court of equal protection and strict scrutiny, that
16 the use of race by California in this context should
17 trigger a strict scrutiny analysis, should lead to an
18 analysis of whether there has been narrow tailoring. But
19 under the Turner test, we believe properly applied, the
20 petitioner should prevail as well.

21 Under the Turner test, it seems that at least
22 two of the four elements which are announced in Turner
23 couldn't possibly be met here. The first one is it seems
24 to be no -- there is no reasonable relationship between
25 the government regulation which is at issue and the

1 announced policy. The notion that one can determine by
2 race alone a violent propensity seems irrational,
3 unreasonable, and contrary to the only empirical evidence
4 which exists, the Trulson study.

5 JUSTICE KENNEDY: Suppose you have a population
6 in which 50 percent of all the members of a particular
7 race are a member of a -- of a gang, a gang such as we've
8 read about in -- in the record, Bloods, Crips, et cetera.
9 50 percent are members of the gang. Would that allow you
10 to segregate?

11 MR. DEIXLER: No, I don't think such a
12 statistic --

13 JUSTICE KENNEDY: Is -- is that because you
14 don't equate race gangs with race animosity?

15 MR. DEIXLER: Well, in fact, in part that's
16 correct, Justice Kennedy. The -- the --

17 JUSTICE KENNEDY: And -- because it does seem to
18 me that part of your submission, or at least an inference
19 that I drew, was that race-based gangs do not constitute
20 race-based threats. Am I right in saying that that's your
21 submission?

22 MR. DEIXLER: Without more, Justice Kennedy,
23 that inference cannot be drawn, and I'll give the Court
24 the example of the Crips and the Bloods --

25 JUSTICE KENNEDY: You mean the inference that

1 the -- which inference? That they are or are not a
2 threat?

3 MR. DEIXLER: That they are not to the extent
4 that, Justice Kennedy, you're asking whether it is an
5 interracial threat. It is -- it is undoubtedly true,
6 taking the example of the Crips and the Bloods, that they
7 are intra-racial threats, and indeed prison policy directed
8 towards separating Crips and Bloods because of the -- of
9 the intraracial problem is certainly one which would be
10 something that the -- the prison system should address.

11 JUSTICE KENNEDY: -- assume that a gang poses an
12 interracial threat?

13 MR. DEIXLER: The -- there's no evidence which
14 has been produced in this record which would suggest that
15 the policy can be tied from skin color to gang membership
16 and from gang membership to interracial violence.

17 JUSTICE KENNEDY: I -- I asked -- I asked about
18 gang membership. Can gang membership be equated with an
19 interracial threat in any significant number of -- of
20 gangs?

21 MR. DEIXLER: Not in the record of this case,
22 Justice Kennedy.

23 JUSTICE SCALIA: I don't -- you -- you don't
24 need it in the record. You -- you know what the Aryan
25 Brotherhood is. It -- it is a white group that is hostile

1 to blacks in particular, and you know what the Bloods are.
2 It is a black group that -- that is hostile to whites.
3 And -- and does it take any more than common sense to know
4 that if you put a tattooed member of one group in with a
5 tattooed member of the other group, the likelihood of
6 violence in that cell is going to be greater? And is any
7 more than that needed for -- for the -- for the prison not
8 to cell them together?

9 Would you acknowledge that at least if the --
10 not just on the basis that one is white and one is black,
11 but if the prison knows that -- that one is a member of
12 the Aryan Brotherhood and the other is a member of the
13 Bloods, the prison can refuse to -- to assign them to the
14 same cell?

15 MR. DEIXLER: Yes.

16 JUSTICE SCALIA: Okay.

17 JUSTICE BREYER: What is the --

18 JUSTICE KENNEDY: All right. Now -- now suppose
19 -- I didn't mean to intrude on Justice Breyer, but just
20 following this question, suppose that 50 percent of all
21 the inmate population in a particular small prison is a
22 member of one of these gangs. Then could you segregate on
23 account of race?

24 MR. DEIXLER: I think on race alone, the prison
25 system would run afoul of the Constitution in making that

1 determination. If it -- if race were analyzed in the
2 context of gang membership, as part of an overall analysis
3 of proclivity to violence based upon a series of facts
4 existing in that prison, particularized circumstances, as
5 suggested in the Lee case, I think that would be a proper
6 analysis and constitutional. It's --

7 JUSTICE SOUTER: Well, would it be a proper
8 analysis simply to -- to separate or not based on gang
9 membership?

10 MR. DEIXLER: Yes, Justice Souter.

11 JUSTICE SOUTER: No. Your answer to Justice
12 Scalia stands on that. So you would not be making an
13 argument that gang membership is merely a surrogate for
14 race in that case if that were the policy.

15 MR. DEIXLER: Yes. In that particular case,
16 gang membership is not a surrogate for race. In the
17 California policy, race is a surrogate for gang
18 membership.

19 JUSTICE SOUTER: Okay.

20 MR. DEIXLER: I'd like to reserve the balance of
21 my --

22 JUSTICE GINSBURG: May I -- may I ask just one
23 question? I understand the -- your position that Turner
24 is enough to cover this, but you're going-in position was
25 that race is different, even different than the First

1 Amendment. And you gave one other example, the Eighth
2 Amendment. It may be convenient, make things easier for
3 the administration of a prison if prisoners are tortured
4 every now and then to keep them in line, but obviously,
5 the Eighth Amendment prevails over that. Is there
6 anything else that you say is -- is so fundamental that we
7 don't do it, like torture? And -- and you say race
8 segregation belongs in that category. Anything else?

9 MR. DEIXLER: Yes. Well, in this Court's
10 opinion in the McKune case under a Fifth Amendment
11 analysis, it was found that that didn't -- it was not
12 analyzed under a Turner standard. And even in the Harper
13 case, before the determination of the liberty right being
14 taken under the Turner standard, the Court relied upon
15 procedural due process rights which were exercised in --
16 in the State of Washington with regard to -- to the
17 prisoner.

18 I'd like to reserve the balance of my time.

19 JUSTICE STEVENS: Mr. Clement.

20 ORAL ARGUMENT OF PAUL D. CLEMENT

21 ON BEHALF OF THE UNITED STATES,

22 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

23 MR. CLEMENT: Justice Stevens, and may it please
24 the Court:

25 This case presents the Court with an opportunity

1 to reaffirm that all government policies based on race are
2 subject to strict scrutiny. The deference generally owed
3 to the sound judgment of prison officials does not require
4 this Court to modify its repeated statements that all
5 government action based on race should be subject to
6 strict scrutiny.

7 JUSTICE SCALIA: We say the same about the First
8 Amendment, don't we? All government actions restricting
9 speech are subject to strict scrutiny. Right? And yet,
10 we allow that to occur in prison.

11 MR. CLEMENT: Well, I think that this Court has
12 recognized in a variety of contexts, including when they
13 have -- when justices have made reference to prison
14 policies, that all government actions based on race are
15 subject to strict scrutiny.

16 JUSTICE SCALIA: Unlike the First Amendment.

17 MR. CLEMENT: The First Amendment obviously has
18 been subjected, at least when you're talking about things
19 other than outgoing prisoner mail, to be subjected to the
20 Turner analysis, but note -- this Court has never suggested
21 that the Turner analysis applies to race.

22 JUSTICE STEVENS: Mr. Clement, will you tell us
23 how the Government would come out applying the Turner
24 analysis in this case?

25 MR. CLEMENT: Absolutely, Justice Stevens. I

1 think if the Turner analysis is correctly applied in this
2 case, this policy does not even survive Turner analysis.
3 I would suggest it's very analogous to the marriage policy
4 that the Court struck down in Turner applying the Turner
5 analysis because there the State identified a concern with
6 inmate marriages and particularly with inmate-to-inmate
7 marriages, and yet they adopted a policy that prohibited
8 all inmate marriages.

9 Here there's a concern that's expressed with
10 newly arriving inmates, about whom California says it
11 knows very little. Yet, it applies its policies to
12 transferring inmates, as well as to returning parolees.

13 JUSTICE SCALIA: And why should we decide the
14 constitutional question?

15 MR. CLEMENT: Well, I think either one of those
16 would be a constitutional --

17 JUSTICE SCALIA: Well, it's --

18 MR. CLEMENT: -- holding of this Court, and I
19 think either under Turner or under strict scrutiny, it's
20 still equally a constitutional holding. And I think it
21 would send an improper message to suggest that there's
22 some element of government decision-making that is somehow
23 exempt from strict scrutiny. I think in a variety of
24 contexts, this Court, where it generally reviews a
25 government action deferentially -- take, for example, jury

1 selection, peremptory challenges. Take, for example,
2 military policy. Take, for example, congressional
3 districting. Those are all government policies this Court
4 generally refuse -- reviews under a highly deferential
5 standard. Yet, nonetheless, when it comes to government
6 policies based on race, this Court applies strict
7 scrutiny.

8 And in that sense, I think the racial
9 districting cases provide a very good example because
10 there, generally, as the Vieth case from last term
11 illustrates, this Court is very reluctant to do any review
12 of the districting lines that are drawn. Yet, when race
13 is identified as being the cause for the lines being
14 drawn, as in Miller against Johnson, this Court emphasizes
15 that strict scrutiny applies.

16 JUSTICE SOUTER: Is -- is there an argument to
17 be made that the reason we make that emphasis and -- and
18 an argument for you in this case that there is somehow a
19 greater fragility to -- to the effective standards to
20 prevent racial classification than there is to the
21 possibility of enforcing speech rights and so on? Is
22 there something to worry about here more than in the case
23 of -- of enumerated rights that -- that gets the Turner
24 analysis?

25 MR. CLEMENT: Well, I think that's part of it,

1 Justice Souter. I think one thing is that particularly
2 because of the history of this country and the use of --
3 of race by governments, including in prisons, there is a
4 concern that all government uses of race must be subjected
5 to very heightened scrutiny.

6 JUSTICE SOUTER: Yes, but there's a pretty
7 frightening history about speech restriction too.

8 MR. CLEMENT: Well, again, I think, though, that
9 there is almost a uniquely pernicious history involving
10 race in this country, and I think, again, it is completely
11 wrong to suggest that somehow prisons were exempt from
12 that history. To the contrary. Throughout the Nation
13 before Brown against Board of Education, it was common for
14 prisons to be segregated on the basis of race.

15 JUSTICE SCALIA: This is not a permanent
16 segregation in these California prisons. It's just
17 temporary, isn't it? How long does it last?

18 MR. CLEMENT: It lasts 60 days, is the best
19 evidence.

20 JUSTICE SCALIA: Until -- until they -- they
21 have assurance that -- that the individuals are -- are not
22 members of a gang and likely to, in -- in their view,
23 commit racial violence if -- if co-celled with another
24 prisoner.

25 MR. CLEMENT: With respect, Justice --

1 JUSTICE SCALIA: If it were permanent, your
2 argument about this, you know, this is a long tradition of
3 our prisons. We -- we keep the blacks and the whites
4 separate. That -- that's not what they're doing in
5 California. It's a temporary -- it's a temporary measure.

6 MR. CLEMENT: With respect, Justice Scalia, in
7 Lee against Washington, this Court upheld the integration
8 not just of the Alabama prisons, but the Alabama jails,
9 and the evidence before the Court there -- and this is
10 clear from the three-judge opinion -- is that the average
11 stay in the Birmingham city jail was seven to 15 days.
12 Nonetheless, this Court said that seven to 15 days of
13 racial segregation was too much.

14 JUSTICE SOUTER: Okay, but we didn't announce a
15 standard.

16 JUSTICE SCALIA: That was for the whole stay.

17 MR. CLEMENT: Well, that's true, Justice Souter.
18 I mean, I think if you look at Brown against Board of
19 Education itself and you look at the various per curiam
20 opinions that this Court issued in the wake of Brown v.
21 Board, I don't think any of those decisions have a
22 hallmark of being elaborate about the standard of review
23 that the Court has applied. Nonetheless --

24 JUSTICE SCALIA: What does seven -- what does
25 seven to 15 days have to do with anything? It was for

1 the whole stay that they were segregated. The stay may
2 have been short, but the fact that during their entire
3 period they were segregated showed that there was no other
4 purpose to this thing except to keep the races separate.
5 Whereas, here, they are kept separate for -- for the time
6 which the California prison believes it needs in order to
7 assure that there won't be violence, and once that
8 assurance is given, the races are -- are mixed. That's a
9 totally different situation.

10 MR. CLEMENT: With respect, Justice Scalia, I
11 disagree. The entire time these prisoners are kept at the
12 reception center, which is a separate part of the facility
13 where the incoming inmates go, that entire time they are
14 segregated on the basis of race.

15 Now, the Bureau of Prisons, for example, has a
16 similar entry section in its various prisons. It's called
17 the admissions and orientations process, and there, using
18 the presentence reports that are provided for by
19 California law, the Federal officials evaluate prisoners
20 and their risk levels and have no need to segregate those
21 prisoners on the basis of race.

22 JUSTICE GINSBURG: One of -- one of California's
23 response said, well, the Feds have mostly income tax
24 evaders, maybe some drug dealers, but the State prisoners
25 are the real tough guys, the real violent criminals.

1 So --

2 JUSTICE SCALIA: They have a high class of
3 felons in the Federal prison basically.

4 MR. CLEMENT: With respect, Your Honors, that
5 misdescribes the -- the population of the Federal prisons.
6 Part of where I think they get off on the wrong step is
7 they do their analysis only on the offense of conviction.
8 But a lot of the individuals in the Federal prisons are,
9 say, for example, convicted felons who are convicted for
10 felony in possession. And the underlying felony that led
11 them to be, say, a 924(c) defendant was a violent felony.
12 And so we -- there are also agreements by which the Bureau
13 of Prisons, on request from States, will house the
14 State's most violent criminals. So I think that's an
15 unfair description of what the Bureau of Prisons policy --
16 or population looks like.

17 And I think the fact that the Bureau of Prisons
18 and virtually every other State that's looked at this
19 issue has found a mechanism to deal with the problem of
20 incoming inmates without resorting to race is a powerful
21 indication that this kind of use of race is unnecessary.

22 And the problem with applying Turner, rather
23 than strict scrutiny, I think is well illustrated by this
24 case and this policy. This is a policy that is expressly
25 acknowledged to take race into account, and it is nowhere

1 written down. If you pull the Department of Correction
2 manual for the California prison system, there's a 94-
3 page chapter on the classification of inmates. Yet, this
4 policy doesn't appear there. It's an unwritten policy.

5 Justice Ginsburg, you asked, well, was this
6 policy introduced in response to specific incidents of
7 violence in a cell. The answer to that is unknowable
8 because nobody even knows how long this policy has been in
9 place. The official responsible for administering it
10 acknowledged it's been in place for 25 years.

11 JUSTICE O'CONNOR: Why -- why does that affect
12 the Turner analysis? I'm sorry. I don't understand.

13 MR. CLEMENT: What I'm suggesting, Justice
14 O'Connor, is what the -- the application of Turner to this
15 policy allowed. It's to allow an unwritten policy where
16 -- of uncertain origins --

17 JUSTICE O'CONNOR: I thought you told us earlier
18 it wouldn't survive Turner. I -- I don't understand your
19 argument.

20 MR. CLEMENT: Well, it wouldn't survive a proper
21 analysis under Turner. That is correct. But the -- the
22 court of appeals here, applying its version of Turner,
23 upheld this policy. And I think one way of looking at the
24 choice between Turner and strict scrutiny is whether there
25 is a greater threat that frequent judicial approvals of

1 prisons' use of race will have the effect of diluting the
2 strict scrutiny rigor or whether frequent disapprovals of
3 prisons' use of race will have the effect of undermining
4 the Turner deference. And the concern of the Federal
5 Government is exactly that, that by having race policies
6 evaluated under Turner, there will be a necessary
7 temptation to bump up the Turner analysis in a way that
8 strikes down racial policies.

9 JUSTICE STEVENS: You're concerned about
10 evaluating prison race policies. Are there any other
11 prison policies in the country that adopt a racial test
12 like that?

13 MR. CLEMENT: Well, I think -- I think
14 California -- it's -- it's best described as California is
15 one of at most a couple of States that have a comparable
16 cell-based policy of segregation. And so I think it
17 really is kind of the outlier in terms of that analysis.

18 Now, there may be situations -- and we think
19 strict scrutiny can account for them -- where States want
20 to take race into account in particularized circumstances.
21 And I think testing those under strict scrutiny is the
22 proper mode of analysis.

23 JUSTICE KENNEDY: Your --

24 JUSTICE STEVENS: Thank you, Mr. Clement.

25 MR. CLEMENT: Thank you, Your Honor.

1 JUSTICE STEVENS: Mr. -- Ms. Grunder.

2 ORAL ARGUMENT OF FRANCES T. GRUNDER

3 ON BEHALF OF THE RESPONDENTS

4 MS. GRUNDER: Justice Stevens, and may it please
5 the Court:

6 Turner's unitary deferential standard of review
7 balances inmates' rights with the exceptionally dangerous
8 and difficult job of running a prison. The Turner
9 standard applies here because the need for prison
10 deference doesn't change with the nature of the right
11 asserted.

12 California is Ground Zero for raced-based prison
13 and street gangs. The Aryan Brotherhood, the Black
14 Guerilla Family, the Mexican Mafia, and the Nuestra
15 Familia --

16 JUSTICE STEVENS: Is there any evidence in the
17 record that the initial placing of two inmates in the same
18 cell has ever had -- has ever produced a racial incident?

19 MS. GRUNDER: In the reception center, Your
20 Honor?

21 JUSTICE STEVENS: Pardon me?

22 MS. GRUNDER: In the reception centers?

23 JUSTICE STEVENS: Yes.

24 MS. GRUNDER: No, because the -- the inmates are
25 not interracially housed.

1 JUSTICE STEVENS: You've never tried it.

2 MS. GRUNDER: There's nothing in the record,
3 Your Honor. The policy has been in effect for a
4 considerable length of time, and -- and during that time,
5 they have not interracially housed inmates in the same
6 cell. I think it's important to remember here that the
7 policy only applies in the reception center areas and in
8 the cells.

9 JUSTICE STEVENS: But it applies in the
10 reception center area for someone who has been transferred
11 as well as the -- an initial incarceration.

12 MS. GRUNDER: It's a very shortened period for a
13 transferee. It's only 14 days under the California
14 regulations, and it only applies if they are put in a
15 cell. If there is someone who is eligible to be housed in
16 a dormitory, that is, somebody who has been convicted of a
17 less violent offense or they have more information about,
18 then the dormitories are fully integrated, as well as
19 every other aspect of the reception center.

20 JUSTICE SOUTER: But -- I'm sorry. Even in the
21 case of -- of housing in cells, what's the justification
22 for it? The argument is -- excuse me -- on the initial
23 intake, we don't know enough about them. Well, on -- on
24 the transfer, you've had plenty of time to know about
25 them. Why is it justifiable even for 14 days on -- on the

1 transfer?

2 JUSTICE SCALIA: That's what I don't understand
3 too. That -- that's really what most troubles me about
4 this case. Why -- why do you do this to the transferees
5 at all?

6 MS. GRUNDER: There's a -- there's a couple of
7 reasons, Your Honors. First of all, as much as you may
8 know about the transferring individual, you may not know
9 the information about their prospective cellmate at the
10 transfer institution because they may be somebody who's a
11 newly received cellmate, somebody who is going through a
12 reception center process themselves.

13 JUSTICE SOUTER: Well, unless you house them
14 with the cellmate, what are you going to learn from
15 segregating them for 14 days?

16 MS. GRUNDER: What happens when they arrive at
17 the receiving institution is there needs to be time for a
18 record review. The records do not arrive at the exact
19 same time as the inmates. And so they convene a
20 classification committee and at which point they review
21 the records.

22 JUSTICE SOUTER: Well, if we have a choice
23 between segregating by race and speeding up the delivery
24 of records, isn't it constitutionally preferable to get
25 the records delivered on time?

1 MS. GRUNDER: The records need to stay with the
2 inmate at the old prison until the inmate leaves on the
3 bus for the new prison because --

4 JUSTICE SOUTER: Why? Don't you have xeroxes?

5 (Laughter.)

6 MS. GRUNDER: Well, in the case of California,
7 there's over 165,000 inmates. In Mr. Johnson's case, his
8 records probably are many, many banker's boxes full of
9 records. So that's the type of --

10 JUSTICE KENNEDY: When -- when -- there's a
11 transferee from prison A to prison B and he goes to the
12 reception center. Does that transferee get housed with
13 other transferees or is he also housed, from time to time
14 or often, with new entrants into the system?

15 MS. GRUNDER: He may be housed with new entrants
16 into the system and that -- that's the reason --

17 JUSTICE KENNEDY: So -- so as to one-half of the
18 people in that -- in that instance, you don't know what
19 the other inmate's record is.

20 MS. GRUNDER: That's correct, Your Honor. And I
21 would like to --

22 JUSTICE SCALIA: You could house transferees
23 only with other transferees, I assume.

24 MS. GRUNDER: That's --

25 JUSTICE SCALIA: Is that -- is that too hard to

1 figure out?

2 MS. GRUNDER: That's possible, Your Honor. That
3 currently is not the practice, but that is possible.

4 JUSTICE O'CONNOR: Ms. Grunder, is this policy a
5 -- an unwritten policy of California?

6 MS. GRUNDER: It is -- yes, it is a practice. I
7 wouldn't characterize it a policy. It's a practice.

8 JUSTICE O'CONNOR: An admitted practice but not
9 written.

10 MS. GRUNDER: That's correct, Your Honor.

11 JUSTICE O'CONNOR: And is -- does any other
12 State have such a policy, written or otherwise?

13 MS. GRUNDER: Yes, they do, Your Honor, and I
14 would like to address that. The two largest States of
15 inmate population, California and Texas, together comprise
16 about 300,000 inmates, which is about 20 percent of the
17 total inmate prison population in the United States,
18 including the Bureau of Prisons. Those two States have a
19 similar policy.

20 In addition, Oklahoma --

21 JUSTICE O'CONNOR: What is Texas' policy? Is
22 that in writing?

23 MS. GRUNDER: Yes, I believe it is, Your Honor.
24 When Texas was subjected to the integration decree, the
25 one area of the prison that was not part of the decree

1 that they did not require them to integrate was the area
2 that is the equivalent of our reception center. There --
3 there in --

4 JUSTICE SCALIA: Is in the briefs? I don't
5 remember it from the briefs. Did -- did you discuss this
6 in --

7 MS. GRUNDER: Yes, Your Honor, it is in the
8 briefs. It's -- it has to do with the Trulson study, and
9 the Trulson study indicated that the intake diagnostic
10 centers of Texas were not required to be integrated.

11 JUSTICE SOUTER: All right. If we -- if we
12 exclude Texas and California, on your recording, we've
13 still got 80 percent of the -- the prison population in
14 the United States, and apparently neither the Federal
15 prisons nor any State does -- apart from Texas, has this
16 policy. Why -- I mean, how do you account for the fact
17 that there doesn't seem to be any evidence that -- that
18 they are having explosive incidents involving new members
19 based upon racial animosity?

20 MS. GRUNDER: Your Honor, actually there's
21 another State, Oklahoma, which has a very similar policy
22 that says that --

23 JUSTICE SOUTER: Okay. We've still got 47
24 States left.

25 How -- how do you explain the fact that -- and

1 -- and some of them don't have your racial problems.
2 There's no question about it. I come from one that does
3 not. But some do. And -- and how do you explain the fact
4 that there is no sort of confirmatory record of what
5 happens when you don't follow your policy?

6 MS. GRUNDER: Well, I think the answer is that
7 they don't have the same problems that California has.
8 California has the most prison gangs, the -- they are
9 race-based. It's an extraordinarily difficult situation.
10 And even the Bureau of Prisons takes race into account
11 when it balances its prisons and that's in the United
12 States' brief.

13 JUSTICE GINSBURG: May I go back to Texas?
14 Because one of the pieces of information that was featured
15 by the other side was this study in Texas that showed a
16 decline in interracial violence when there was an increase
17 in racial integration. So that empirical study showed
18 just the opposite, that when you integrate, you get less
19 violence than when you separate.

20 MS. GRUNDER: Yes, Your Honor. The Trulson
21 study, however, only looked at inmates after they had left
22 the reception center, only looked at inmates in -- in the
23 integrated settings of the prison, equivalent to the areas
24 that California integrates. So we don't dispute that once
25 you have enough individualized information about an

1 inmate, then you can house them according to an
2 individualized information.

3 JUSTICE GINSBURG: On the individualized, there
4 was something that I didn't grasp. You say we don't know
5 anything about these people, so we have to have that 60-
6 day period to find out about them. The presentence report
7 we're told accompanies the conviction, the prisoner's
8 conviction. So the presentence report will have a fair
9 amount of information about the offender, will it not?

10 MS. GRUNDER: It would have a fair amount of
11 information. However, in California, the presentence
12 report does not always accompany the inmate and frequently
13 does not. It follows some period of time later from the
14 county.

15 JUSTICE GINSBURG: But again, that's the kind of
16 administrative problem that would seem easily fixable. I
17 thought the -- the rule or the regulation was that the
18 presentence report is supposed to accompany the
19 conviction.

20 MS. GRUNDER: But the fact of the matter is,
21 Your Honor, the counties aren't preparing the presentences
22 -- presentence reports in a timely fashion, and -- and
23 they're not sending them --

24 JUSTICE GINSBURG: Well, maybe something should
25 be done about that.

1 MS. GRUNDER: Yes, with the counties, perhaps.

2 But another issue with the presentence report is
3 it doesn't deal with in-prison behavior, and that's what
4 the prison officials need a -- need time to take a look
5 at, is how the inmate is going to react once they get in
6 the prison environment, which is a wholly different
7 environment than a jail environment.

8 JUSTICE STEVENS: May I ask what's probably a
9 stupid question? We're concerned, I suppose, about say, a
10 black prisoner who's just coming into prison for the first
11 time and you hope he won't join one of the black gangs.
12 So wouldn't the safest thing to do for the first 20 days
13 is to put him with a cellmate who's not black?

14 MS. GRUNDER: No, Your Honor, because in prison
15 the animosity between the gangs is purely race-based, and
16 that inmate may be subjected --

17 JUSTICE STEVENS: Between the gangs. But I'm
18 assuming a new prisoner who you have no information about.
19 Do you presume he's a member of a gang or presume he's
20 somebody who may not be a member of a gang?

21 MS. GRUNDER: There's not a presumption that the
22 person is a member of the gang. But there is a
23 presumption --

24 JUSTICE STEVENS: Well, if he's not a member of
25 the gang, isn't the danger that he'll become affiliated

1 with the gang increased by insisting on putting him with
2 the same race as -- as he is?

3 MS. GRUNDER: That may be, but there is also a
4 danger that if he is housed interracialy and subjected to
5 gang pressures on the yard, that he will then be in a
6 situation to go back to his cell, when the door is closed
7 and the lights are out, and commit violent acts upon his
8 cellmate at -- because of pressures that he's receiving
9 from members of his own race.

10 JUSTICE STEVENS: Of course, you -- you have
11 never -- no evidence that that's ever happened because
12 you've never tried it.

13 MS. GRUNDER: In the reception centers, no. The
14 -- it has been a policy of not cross-racially housing the
15 inmates in the cells only. That's correct, Your Honor.

16 JUSTICE SOUTER: You -- you said a second ago
17 that there's a significant difference between the
18 conditions in the jails and the conditions in -- in the
19 prisons. Is that significant difference the -- the
20 organization of -- of racially based gangs in the prisons
21 as distinct from the jails?

22 MS. GRUNDER: Yes, I think that's true. And
23 there's also a difference I think in the attitude of -- of
24 the inmates when they're in -- in a state of flux in a
25 jail as opposed to when they arrive to serve their many

1 years-long sentence, in the case of Mr. Johnson, 37 years
2 to life. And then I think the reality sets in and -- and
3 things do change. Prison is very different.

4 JUSTICE SOUTER: Apart from the gang situation,
5 is there reason to think that their minds change in the
6 sense of inclining them to interracial violence simply
7 because they say, gee, I'm in for a long time?

8 MS. GRUNDER: Yes, I -- I believe it is.

9 JUSTICE SOUTER: And do we have any evidence to
10 that effect?

11 MS. GRUNDER: Well, the reality in prison is
12 that people are pressured to join gangs and to -- you
13 either hang with your own or you don't and --

14 JUSTICE SOUTER: But that -- I mean, that goes
15 back to the gang membership situation. It seems to me
16 that's your strongest argument.

17 MS. GRUNDER: Yes, it's true. But even for
18 members -- people who are not actually members of the gang
19 are subjected to the gang pressures. For instance, if --
20 if there was going to be a fight, a planned fight, that
21 was going to break out on a yard, members of a prison gang
22 would tell members of -- of their same race that once the
23 fight breaks out, you better be with us because if you're
24 not, we'll deal with you later. And that's even for
25 people who aren't gang members. So the racial pressures

1 in prison are very, very severe. Something --

2 JUSTICE STEVENS: But it still seems to me that
3 a new inmate is more likely to be subjected to that
4 pressure with the -- his cellmates than with somebody out
5 in the yard.

6 MS. GRUNDER: And he may well be, Your Honor,
7 but what --

8 JUSTICE STEVENS: And it seems to me insurance
9 against him joining a racial gang is cell -- cell him with
10 somebody who's not of the same race.

11 MS. GRUNDER: But you -- but to do that would be
12 to invite danger to the -- to the other inmate. The --
13 the level of interracial violence in prison is high, and
14 that can't be disregarded. And if we weren't here
15 today --

16 JUSTICE GINSBURG: How does it compare to
17 intraracial violence?

18 MS. GRUNDER: There hasn't, as -- as we've
19 talked about, been a problem with interracial violence in
20 the cells because they're not housed that way. There are
21 problems with --

22 JUSTICE GINSBURG: I mean --

23 MS. GRUNDER: In general.

24 JUSTICE GINSBURG: -- overall.

25 MS. GRUNDER: There are some problems with

1 intraracial violence, but they're generally more founded
2 in personal relations as opposed to a race-based -- you
3 know, some other sort of animosity. The same sort of
4 reasons that people have fights on the outside --

5 JUSTICE GINSBURG: But there -- is there any
6 figures on the prison population as a whole, the incidents
7 of interracial violence as opposed to intraracial
8 violence?

9 MS. GRUNDER: No, Your Honor. In this case
10 there's -- it's not in the record.

11 JUSTICE GINSBURG: And do we know -- does this
12 record tell us what happens after the 60 days? To what
13 extent where there are double cells, does the same race
14 policy, although not formally adopted, continue? After
15 the 60 days, what is the incidence of different race
16 double-celling and same race double-celling?

17 MS. GRUNDER: What we do have in the record,
18 Your Honor, is that the policy and the practice does not
19 apply after the 60 days. Inmates are allowed to request a
20 cell together and can choose their own cellmates so long
21 as the other cellmate agrees.

22 JUSTICE GINSBURG: So we just don't have any
23 information whether this line between the 60 days is
24 imaginary.

25 MS. GRUNDER: We do, Your Honor. The -- it is

1 not -- it does not happen outside of the reception center
2 cell practice. Once they get to their permanent housing
3 assignment, they may choose their own cellmates.

4 JUSTICE SOUTER: When -- when they do choose
5 that, do you respect a choice to cell with -- with another
6 member of -- of the -- of -- do you respect the choice
7 when two members of a gang want to cell together?

8 MS. GRUNDER: Two members of the same gang?

9 JUSTICE SOUTER: Same gang.

10 MS. GRUNDER: It -- it would depend on if they
11 are -- what level of gang membership they are. California
12 has a very complex system for what -- doing what they call
13 validating gang membership. If they are a validated gang
14 member, generally they are sent to a special prison, and
15 yes, they are housed with members of their own gangs in a
16 very high security setting.

17 JUSTICE SOUTER: Do you -- do you have a -- do
18 you have any record of -- of requests by different --
19 members of different gangs to cell together?

20 MS. GRUNDER: We don't have any record of that,
21 but I -- I can tell you that if members of opposing gangs
22 were to request a cell together, first of all, they would
23 both have to agree, which would be highly unlikely, and
24 there -- it would probably be viewed with a bit of
25 suspicion as to what was going on. But maybe if -- if

1 they had disavowed their gang membership and -- and these
2 particular people could get along, it would certainly be
3 considered. The -- the object, once they get to the
4 permanent housing, is cellmate compatibility. So there
5 are a lot of things that are looked at.

6 JUSTICE O'CONNOR: Ms. Grunder, do you agree
7 with opposing counsel that even if evaluated under the
8 Turner rule, properly applied, that California's policy
9 would not survive?

10 MS. GRUNDER: I do not agree with counsel. I
11 believe that the Ninth Circuit did properly apply the
12 Turner standard in this case and that California would
13 pass and does pass the Turner test in this case.

14 JUSTICE SOUTER: It wouldn't -- it wouldn't pass
15 if -- would it, if we do not accept your argument that
16 California cannot efficiently get records sent along with
17 inmates so that, at the time at least of transfers, the
18 prisons are in a position to know what they're getting?
19 If we -- if we say, look, we're not going to accept the
20 argument from administrative efficiency, then you can't
21 survive Turner, can you?

22 MS. GRUNDER: Well, it may be more than just
23 administrative efficiency because every prison is
24 different and there are different gang pressures at each
25 prison. And I think it's important for the prison to be

1 allowed an opportunity to bring that transferred inmate in
2 and look at them and how they're going to fit into that
3 prison and have a chance to evaluate their records. It's
4 true that --

5 JUSTICE SOUTER: Well, that's --

6 MS. GRUNDER: I'm sorry, Your Honor.

7 JUSTICE SOUTER: No. I don't want to cut your
8 argument short, but here's what's bothering me. I -- I
9 can see there's a possible plausibility in what you're
10 saying, but in fact is that the reason? Is there any
11 evidence in the record to the effect that that is
12 necessary in transfer situations?

13 MS. GRUNDER: The officials have deemed that
14 that is an appropriate policy. I think the record is a
15 bit scant in this case.

16 JUSTICE SOUTER: Okay. Look, if -- if we accept
17 that officials have deemed it, we will not have many
18 arguments in -- in this Court. I mean, they will be over
19 before they start. I -- I mean, we've got to have
20 something more than simply the decision under attack. Is
21 there anything more in this case in -- with respect to the
22 transferee situation?

23 MS. GRUNDER: Not with respect to the
24 transferees, Your Honor, and it's true that the transfer
25 policy certainly is more in jeopardy under the Turner

1 standard. But the -- the overall policy of considering
2 race when there is a -- a lack of information certainly
3 would pass the Turner standard and should pass the Turner
4 standard as it was properly applied by the Ninth Circuit.

5 JUSTICE GINSBURG: You said that --

6 JUSTICE STEVENS: May I ask just one other
7 question about the -- the purpose you're trying to
8 achieve? Is it to protect the two inmates who are first
9 celled together from fighting with one another, or is it
10 to avoid the danger that one of them will somehow start a
11 riot later on in -- in the general prison population?

12 MS. GRUNDER: It's multi-fold, Your Honor.

13 JUSTICE STEVENS: It's what?

14 MS. GRUNDER: It's multi-fold. The purpose is
15 multi-fold. First, yes, it is to protect the inmate from
16 -- from having harm done to him in the cell, which is a
17 very difficult area to protect. It's a small area and not
18 easily visible into the -- into the cell directly. Also,
19 that's where they sleep, so at some point the lights will
20 be out. So it's a very difficult situation.

21 Also, they're afraid -- and this is in the
22 record from the testimony of the officials -- that there
23 will be a ripple effect and that the interracial violence,
24 if they were to cell them together, would spill out onto
25 the yards and create the exact ripple effect that Turner

1 -- is one of the considerations in the Turner test.

2 JUSTICE GINSBURG: There was something --

3 JUSTICE STEVENS: May I ask -- excuse me. Go
4 ahead.

5 I want to ask one other question. You -- you
6 mentioned the Texas system and you discussed it in your
7 brief. Is that correct? I didn't find it in your
8 discussion as to the Texas case.

9 MS. GRUNDER: Yes, Your Honors, at page 41 of
10 the brief. It would be the -- the second paragraph where
11 they examine double-celling only after initial screening.
12 And also note 13 of the Trulson study indicates that it
13 did not apply in Texas' equivalent of California's
14 reception centers.

15 The Turner standard is the appropriate standard
16 here because it does give the prison officials --

17 JUSTICE GINSBURG: Let -- let me ask --

18 MS. GRUNDER: I'm sorry.

19 JUSTICE GINSBURG: -- about that standard at
20 least as the Ninth Circuit applied it. They said that you
21 presume the practice constitutional and the challenger has
22 the burden to show that if there were no segregation by
23 race, that violence would not increase. Now, how does
24 someone go about proving that negative?

25 MS. GRUNDER: Well, in this case the inmate put

1 forth no experts of any kind. There was an opportunity
2 for the inmate to rebut the evidence put forth by the
3 prison officials, and -- and there was no evidence
4 submitted. So in this case he didn't --

5 JUSTICE GINSBURG: But how would an inmate who
6 was objecting to this racial segregation go about proving
7 such a case? You said one would have to rely on experts.

8 MS. GRUNDER: That would be one way, Your Honor.

9 JUSTICE GINSBURG: And so one could put in that
10 Texas study, but you said that wouldn't be good enough.

11 MS. GRUNDER: Well, the Texas study doesn't --
12 doesn't apply to the initial intake process.

13 JUSTICE GINSBURG: So you -- you -- supposing an
14 inmate who would have to call a bevy of experts that he
15 has no wherewithal to -- to pay for -- I mean, you are
16 essentially saying an inmate cannot challenge this policy.

17 MS. GRUNDER: No, Your Honor. Actually this
18 policy was applied in a California case after the Johnson
19 case was decided in California to strike down a race-
20 based prison policy. So there -- there certainly are
21 instances when the inmate could --

22 JUSTICE GINSBURG: Well, I asked how would an
23 inmate prove this, and you said you would need experts.
24 So for experts, you need money to pay experts. How does
25 an inmate do that?

1 MS. GRUNDER: Well, the same way the inmate
2 would do it in any other litigation that is brought by an
3 inmate. The burden is on a litigant to prove their case,
4 and it doesn't change because that litigant is in prison.

5 JUSTICE BREYER: Now, why -- why should you use
6 the Turner standard? The Turner standard says to the
7 prison, you can do this as long as you have a modestly
8 good reason. Strict scrutiny says you have to have a very
9 good reason. With free speech, of course, people
10 understand prisons are different. Of course, people's
11 speech rights will be controlled and it won't hurt the
12 rest of society. With racial discrimination, as you heard
13 your opponents argue, it's a terrible symbol, a symbol
14 that we would tolerate without the best of reasons
15 discrimination, invidious discrimination, based on race,
16 which is divisive to the whole society. Now, that they
17 say is a very good reason for not applying the Turner
18 standard but, rather, applying strict scrutiny, which
19 gives you freedom to discriminate on this basis if you can
20 prove you really have to.

21 MS. GRUNDER: Unlike in a non-prison setting,
22 there aren't other rights to be balanced. In the prison
23 setting, not only are you balancing the inmate's right to
24 be free from discrimination, but you're balancing the --
25 the rights of all inmates to be free from harm, and as

1 well as the prison officials' duty to protect them from
2 harm. And that is what --

3 JUSTICE KENNEDY: That -- that same argument
4 could have made in -- in arguing about racial segregation
5 in the schools and -- and in the military and everything
6 else. That's -- that's not an acceptable answer.

7 MS. GRUNDER: Well, there's -- there's no -- the
8 prison officials here have an affirmative duty to protect
9 the other inmates under the Eighth Amendment, and --

10 JUSTICE SCALIA: Do you accept that this is
11 invidious discrimination on the basis of race? What --
12 what -- why -- why do you think it's invidious?

13 MS. GRUNDER: We don't think it's invidious,
14 Your Honor. As a matter of fact --

15 JUSTICE BREYER: It's not affirmative action.

16 MS. GRUNDER: This is not affirmative action,
17 no.

18 It is not invidious, Justice Scalia. It is
19 simply one consideration of race to control violence in
20 prison, and as the Bureau of Prisons uses in -- in its
21 prisons, they in the United States' brief say that they
22 consider race to maintain racial balance in their prisons
23 for the purpose of diversity. California also considers
24 race in maintaining racial balance in its prisons, not
25 primarily for the purpose of diversity, but for prison

1 safety to make sure that no one group takes over a prison,
2 thus putting members of another group in a vulnerable
3 situation.

4 There are many circumstances when -- when race
5 should be --

6 JUSTICE SCALIA: Is that -- is that invidious?

7 MS. GRUNDER: No, it is not, Your Honor.

8 JUSTICE SCALIA: Is it affirmative action?

9 MS. GRUNDER: No.

10 There are many instances in which race needs to
11 be considered on a day-to-day basis in prison. For
12 instance, when the prisoners line up to go to the exercise
13 yard, if 10 white prisoners line up first and the 11th
14 prisoner in line is an African American, it would be
15 extraordinarily ill-advised to release those prisoners in
16 the manner in which they have lined up to go to yard. It
17 would require some reshuffling and maybe even some
18 shifting of prisoners from yard to yard based on their
19 race because to do that would put the minority member at
20 extreme risk.

21 Turner is the appropriate test here because
22 courts --

23 JUSTICE KENNEDY: I -- I -- this may -- may be
24 important to me for understanding your argument. I -- I
25 didn't quite understand the hypothetical. You -- you want

1 him to keep the place in line or it's dangerous for him to
2 keep the place in line?

3 MS. GRUNDER: It would be dangerous for the
4 officer to release the inmates onto the yard in the manner
5 that they had self-arrayed because then you would put 10
6 members or more of one group on the yard and then
7 introduce another member to the yard who was not a member
8 of that group, and that would be very dangerous for the --
9 the sole person on the yard.

10 JUSTICE SCALIA: And do -- do other prison
11 systems adopt similar policies to try to keep the races
12 mixed generally in --

13 MS. GRUNDER: Yes, they do, Your Honor. As I
14 pointed out, Bureau of Prisons being one. As a matter of
15 fact, the U.S. Department of Justice's National
16 Corrections Institute statistics -- and this is not a part
17 of the record -- indicate that 96 percent of all States
18 separate prisoners based on disruptive group or gang
19 orientation. So California is not alone in that. It's a
20 -- it's done to prevent violence to other prisoners.

21 In sum, Turner is the only test that provides
22 the flexibility that prison officials need to safely
23 manage their prisons and protect inmates from harm. The
24 Court should apply it here and affirm the lower court.

25 Thank you.

1 JUSTICE STEVENS: Thank you, Ms. Grunder.

2 Mr. Deixler, you have about three and a half
3 minutes.

4 REBUTTAL ARGUMENT OF BERT H. DEIXLER

5 ON BEHALF OF THE PETITIONER

6 MR. DEIXLER: The -- the hypotheticals presented
7 by the State of California, when applied in the context of
8 this case, demonstrate the danger of this position of
9 segregation. The petitioner in this case is not a gang
10 member. He's been in the California prison system since
11 1987 and before. When he reported to the inmate reception
12 center at Chino in 1987, he had already three presentence
13 reports which are reflected in -- in the record of this --
14 of this case at the joint exhibit 259. He's been
15 transferred five times since then -- since then. There's
16 no record of his having had interracial violence ever
17 during the time that he was in prison.

18 And it is his view, as articulated in his
19 deposition at page 109 of the joint appendix, that he is
20 put into peril because he is an African American who is
21 unable to cross race lines and unable to reach out for
22 support in a heavily racialized setting for other persons
23 who are not African Americans and who are not gang
24 members. So he's been marginalized and treated, based
25 upon his race, in a de jure way when he's transferred for

1 the 60-day period.

2 And incidentally, the reference to a 14-day
3 period is not borne out by the record. The regulation in
4 the State of California specifically provides that this
5 organization or evaluation group has to convene within 14
6 days, but not have to reach a decision with regard to
7 transfer characterization and classification in 14 days.

8 But -- but the petitioner in this case, because
9 he's black and has no opportunity to cell initially with a
10 white person or a Hispanic person, is then confined to
11 being in this small group of African Americans who are not
12 gang members and who are unable to have an affinity group
13 in which they will feel safe within the California prison
14 system.

15 The California --

16 JUSTICE SCALIA: The same thing would happen to
17 a white. It's not because he's black. I mean, this --
18 right? The same thing would happen to a white.

19 MR. DEIXLER: Yes. A white --

20 JUSTICE SCALIA: He'd be able to make the same
21 argument.

22 MR. DEIXLER: A white who, for reasons of
23 safety, wished to house with an African American, would be
24 denied that opportunity under California's policy, and the
25 same with an Hispanic who felt it safer for him to house

1 with a black. He could not cross racial lines based upon
2 the evidence in this case, Justice Scalia. That's
3 correct.

4 And the danger which is created in my judgment
5 by a reliance upon a Turner standard in this circumstance
6 is that all that needs to be done is a little bit more of
7 tinkering with the idea of the equivalence between race
8 and gang which cannot exist in this record. And were that
9 to happen, we will create a circumstance where the very
10 arguments rejected in Lee, indeed the very argument
11 advanced by the State of California in this case, will
12 once again be raised time and again, and we will be faced
13 with a circumstance not too far down the slippery slope
14 where, for convenience or for other reasons or for purely
15 invidious reasons, States will be able to return to an era
16 of segregation. This Court's history has demonstrated a
17 commitment to march the country away from the road of
18 segregation, and there should be no turning back.

19 This is a case in which the Ninth Circuit has
20 erred. The judgment of the Ninth Circuit should be
21 reversed. The Court should determine that strict scrutiny
22 should apply, and it should determine that Petitioner
23 Johnson's equal protection rights were violated.

24 JUSTICE STEVENS: Thank you, Mr. Deixler.

25 The case is submitted.

1 (Whereupon, at 11:55 a.m., the case in the
2 above-entitled matter was submitted.)

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