No. _____

In The Supreme Court of the United States

ROBERT J. AYERS, JR., et al.,

Petitioners,

v.

DEANNA FREITAG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964 supports a female prison guard's action for sexual harassment against a state prison when (a) the action is based on an allegedly hostile work environment caused by prisoners' lewd sexual misconduct, and (b) the guards are hired and trained to confront this sort of prisoner misconduct.

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are the California Department of Corrections and Rehabilitation, Robert Ayers, Theresa Schwartz, and Deanna Freitag.

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STATUTES

The California Department of Corrections and Rehabilitation, Robert Ayers, and Theresa Schwartz, petitioners, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case, after Petition for Rehearing/Rehearing En Banc, on November 3, 2006.

OPINION BELOW

The September 13, 2006 opinion of the United States Court of Appeals for the Ninth Circuit appears at Appendix, 39-74, and is reported at 463 F.3d 838. The November 3, 2006 order denying petitioners' petition for rehearing and rehearing en banc, and amended opinion appears at Appendix, 1-38, and is reported at 468 F.3d 528.

STATEMENT OF JURISDICTION

The original judgment of the court of appeals was entered on September 3, 2006, and the order and decision denying the petition for rehearing and rehearing en banc was entered on November 3, 2006. The jurisdiction of this Court applies pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 701(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(2), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

1. Pelican Bay State Prison is a maximum security prison located in the remote northwest corner of California. Pelican Bay comprises three facilities, a maximum security prison which in 1998-1999 confined approximately 2000 general population inmates, a small minimum security facility, and the Security Housing Unit ("SHU"), a special unit within the prison that confines approximately 1500 of the most dangerous and incorrigible inmates.

SHU inmates present the prison with serious, continuous management problems, committing a wide range of crimes and rules violations, constantly fabricating weapons used to assault staff and inmates, committing violent acts against inmates, staff, and prison property at Pelican Bay, and instigating violence at other prisons. SHU inmates commonly "act out," yelling or beating cell doors for an entire work shift, exposing themselves, threatening staff and inmates, "gassing" staff or other inmates, and "holding the pod hostage." An inmate gasses staff by throwing milk, water, urine or feces at the correctional officer. An inmate holds a pod hostage by refusing to return to his cell or by jerking handcuffs into his cell for use as a weapon on staff, causing all activity in the cell area to cease until the inmate is returned to his cell or the

weapon is recovered. There are many incorrigible inmates in SHU who urinate out the cell doors, throw feces, fight with staff every time they leave their cell, and physically hurt staff and themselves.

During a seven-month period in 2000, 2139 disciplinary offenses were reported by correctional officers at Pelican Bay, including 155 inmate assaults against staff, 101 deadly assaults by inmates against inmates, 243 reports of inmate possession of a deadly weapon or of materials for manufacture of such a weapon or explosive device, 77 instances of inmate indecent exposure, and 30 gassings. Reports of disciplinary offenses at Pelican Bay ranged from an average 400 to 750 per month in 1997 to an average of 250 to 300 per month as of 2000.

2. Deanna Freitag was employed as a correctional officer with the California Department of Corrections and Rehabilitation (CDCR) from September 1994 to June 2000. She started work at Pelican Bay on January 1, 1996, and in the Pelican Bay SHU in September 1998. Freitag's duties as a correctional officer were to maintain institutional security and inmate discipline, and supervise, monitor and control inmates. Correctional officers maintain staff and inmate security and inmate supervision using a variety of controls in response to inmate misconduct, including the inmate disciplinary process, physical restraints, revocation of privileges, and referrals for criminal prosecution. Freitag received training with respect to all aspects of her peace officer duties maintaining institutional security and inmate discipline. Specifically, she received training on inmate exhibitionist masturbation and how to respond to it as a correctional officer. The prison informed her that she would be exposed

to inmate exhibitionist masturbation in the course of her duties.

In the year that she worked in the SHU, Freitag witnessed a total of ten incidents of indecent exposure by three inmates. Pursuant to her duties, Freitag filed disciplinary reports against the inmates. Pelican Bay acted on those reports. The record shows that the prison disciplined two of the inmates – indeed, one was referred for criminal prosecution, prosecuted, convicted, and sentenced to an additional six years in state prison. The third inmate received six months of weekly counseling to curb his exhibitionist masturbation and other lewd behavior.[1]

3. On June 27, 2000, Freitag filed a complaint in the United States District Court for the Northern District of California. She alleged, inter alia, that the CDCR was liable under Title VII of the Civil Rights Act of 1964 for a sexually hostile work environment created by the Pelican Bay inmates. She sought compensatory damages and injunctive relief.

Defendant CDCR moved for summary judgment on the Title VII hostile environment claim, asserting that a prison guard cannot maintain an action for sexual harassment based on common sexual misconduct by inmates. The district court (Judge Thelton Henderson) denied the motion for summary judgment.

At trial plaintiff's expert in correctional management testified regarding a number of measures which, in his

[1] The Ninth Circuit decision contains detailed descriptions of the lewd conduct but not the discipline or counseling of the prisoners.

opinion, prison officials could have used at Pelican Bay in 1999-2000 to control inmate exhibitionist masturbation. These measures included: 1) progressive discipline, beginning with counseling inmates orally or in writing about indecent exposure to filing administrative disciplinary charges against the inmates; 2) assigning inmates escorts whenever they move from their cells; 3) revoking yard privileges; 4) shackling inmates while on the exercise yard; 5) videotaping inmates while they engage in indecent exposure; 6) applying lexan to cell fronts; 7) denying inmates opportunity to shower in upper tiers where there is greater visibility for exhibitionist masturbation; 8) applying mirrored film on the control booth windows; 9) meeting with the local District Attorney to encourage prosecution of inmate indecent exposure; 10) housing inmates who engage in indecent exposure in one unit without female correctional officers; and 11) counseling inmate exhibitionist masturbators. Plaintiff's expert, as well as state Inspector General investigators, opined that Pelican Bay had not responded appropriately to the concerns expressed by female officers about exhibitionist masturbation, and the institution had not taken adequate steps to correct the problem.

During the period that Freitag worked at Pelican Bay, however, prison officials did counsel, discipline, and refer for criminal prosecution, inmates who directed indecent exposure at Freitag. At trial, prison administrators explained that they considered, but rejected for reasons of institutional security, staff morale, or doubtful constitutionality, the suggestions to shackle inmates while in the exercise yard; apply lexan to cell fronts; apply mirrored film on control booth windows; and house inmates in units without female correctional officers.

At the close of evidence, the CDCR moved for judgment as a matter of law, asserting, again, that Title VII does not impose liability on a state prison for common sexual misconduct by inmates, which the court later denied.

On April 3, 2003, the jury found the CDCR liable under Title VII for a hostile working environment and awarded Freitag $500,000 in economic damages and $100,000 in non-economic damages. The CDCR again moved for judgment as a matter of law, asserting that Title VII does not impose liability on a state prison for prison inmate misconduct. The district court denied the motion.

On May 15, 2003, Freitag moved to amend the judgment to include permanent injunctive relief. With respect to Freitag's request that the court mandate specific measures to alleviate the problems related to the inmate conduct, the district court referred the matter to a special master with the authority to develop a remedial plan to address inmate indecent exposure and monitor the CDCR's compliance with the injunction.

The CDCR is currently subject to injunctive relief and a remedial plan developed by a court-appointed special master, monitored by the special master and plaintiff's counsel, and overseen by the district court. The injunctive relief authorizes the special master to mandate that the state prison implement a variety of measures to address inmate indecent exposure, including mandatory inmate discipline, mental health intervention, modification of prison facilities and equipment, training for all correctional staff, and promulgation and amendment of administrative regulations.

4. The Ninth Circuit affirmed the judgment. In the opinion (by Reinhardt, J., with Noonan & Hawkins, JJ.),

the court concluded that the inmates created a hostile environment by repeatedly exposing Freitag to lewd behavior and comments. When the CDCR argued that the court must consider the social context of a prison – an inherently harsh, dangerous environment in which prisoners' lewd behavior is common, and the guards are hired to control precisely this sort of misconduct – the court ruled that "even in an inherently dangerous working environment, the focus remains on whether the employer took reasonable measures to make the workplace as safe as possible." App., 19. The court held that the CDCR was liable for the prisoners' sexual harassment in the same manner that an ordinary business can be liable for harassment of its employees by third parties, such as casino patrons. App., 16. The Ninth Circuit further warned that a state prison may be liable for a hostile environment resulting from even a single instance of inmate misconduct directed at a correctional officer. App., 21. The Ninth Circuit also affirmed the injunctive relief, which subjects the CDCR to the remedial plan that was developed by the special master and that is monitored by the special master and plaintiff's counsel.

SUMMARY OF REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit erroneously held that Title VII allows prison guards to maintain an action for a hostile work environment based on common prisoner misbehavior that the guards were hired and trained to confront. The court erred in two respects. First, contrary to this Court's teachings in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which requires courts to examine the

social context of each case, the Ninth Circuit removed the inmates' behavior from the inherently harsh context of a prison and, instead, focused on the prisoners' words and conduct in isolation. As a result, the court held that Title VII imposes a duty on prisons to ensure that prisoners meet the same standards of civility as customers in an ordinary business, such as a restaurant or casino. Second, the court failed to determine whether the prisoners' conduct was so severe that it *altered* the terms and conditions of the guard's employment, as this Court requires. The inmates' misbehavior is part of the guard's work environment, and confronting it is part of the guard's job.

The Ninth Circuit's decision conflicts with *Oncale* and other decisions of this Court, and, if it stands, it effectively makes prisons liable for requiring guards to perform their jobs.

2. The Ninth Circuit's decision conflicts with decisions of this Court, conflicts with circuit court decisions, and compromises the traditional discretion of prison administrators over issues of inmate discipline and safety by using Title VII to impose minimal standards on prisoner conduct and to alter prison facilities. Under *Turner v. Safley*, 482 U.S. 78, 84-85 (1987), and *Dothard v. Rawlinson*, 433 U.S. 321 (1977), courts generally defer to prison administrators' judgments regarding inmate discipline and institutional security. Several circuits have deferred to prison administrators, citing *Turner*, in Title VII actions. The Ninth Circuit not only failed to grapple with *Turner* but also second-guessed the administrators' decisions on safety and prisoner discipline. It approved a court-appointed special master and a remedial plan that require

the prison to construct new facilities and alter the prison's procedures for inmate discipline. Under the Ninth Circuit's approach, Title VII effectively trumps prison officials' discretion on matters of safety and inmate discipline.

Prison officials in California – the nation's largest prison system – face enormous institutional challenges. The Court should clarify that Title VII does not require them to curb inmates' vulgar behavior at the expense of prison safety.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Decision Undermines the Application of *Oncale* and *Clark County* to Prisons by Holding Them to the Same Standards as Ordinary Businesses and Ignoring the Reality of Their Inherently Dangerous Work Environments.

Under Title VII of the Civil Rights Act of 1964, "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of the individual's sex, race, religion, color, and national origin. 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1993), this Court recognized that a hostile work environment can be sufficiently discriminatory to violate Title VII. At issue here is the application of two key requirements

for determining how Title VII applies in the harsh environment of a prison in which the guards are hired and trained to confront abusive sexual misconduct by prisoners.

First, Title VII is not one-size-fits-all. As this Court explained in *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (1998), courts must consider the social context in which the alleged harassment takes place – in particular, the expectations of the parties, their relationship, and the surrounding circumstances. *Oncale*, 523 U.S. at 82. Words or conduct that might be hostile and abusive in one context may be considered normal in another. A football coach does not sexually harass a football player "if the coach smacks him on the buttocks as he heads onto the field" because, in the context of a player-coach relationship, that sort of behavior is normal and expected. *Id*. It would be abusive, however, if the coach smacked his secretary's buttocks, given their relationship and the normal expectations of people that work in an office. *Id*.; *see Barbour v. Browner*, 181 F.3d 1342, 1348-49 (D.C. Cir. 1999) ("Barbour's protestation is like that of a waitress who complains that her customers are sometimes rude: treatment that would be objectionable in other contexts is an inevitable part of the job.").

Second, when examining the social context, the critical question is whether the "behavior is so objectively offensive as to alter the conditions of the victim's employment." *Oncale,* 523 U.S. at 1003. This Court has repeatedly insisted "that sexual harassment is actionable under Title VII only if it is so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment." *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001) (per curiam) (quotations omitted); *Faragher v. Boca Raton*, 524 U.S. 775, 786

(1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (Only conduct that is "severe and pervasive" can produce "constructive alterations in the terms and conditions of employment"); *Oncale*, *supra*, 523 U.S. at 81 (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment").

In *Clark County*, the Court rejected a Title VII action by a school district employee who was offended by a vulgar statement in a job application. The Court observed, "The ordinary terms and conditions of respondent's job required her to review the sexually explicit statement in the course of screening job applicants." Though a tame example, *Clark County* illustrates the fact that employees in a variety of jobs – from police assigned to the vice squad to actors in R-rated movies – must routinely confront sexual language or sexual conduct. *Cf. Lyle v. Warner Bros. Television Productions*, 132 P.3d 211, 226 (Cal. 2006) (rejecting hostile environment claim based on crude sexual banter by writers of the adult-theme television program *Friends*). The question is not whether the employee is exposed to offensive language or behavior – which may simply be part of the job – but whether it is so severe and pervasive that it *alters* the terms and conditions of employment. *See Randolph v. Ohio Department of Youth Services*, 453 F.3d 724, 734 (6th Cir. 2006) (evaluating prisoner's sexual assault of kitchen staffer in context of hostile prison environment); *Cain v. Blackwell*, 246 F.3d 758, 760-61 (5th Cir. 2001) (rejecting hostile environment claim by nurse because crude sexual insults from Alzheimer's patients were part of the nurse's "daily routine," but suggesting that physical assaults may be actionable).

The Ninth Circuit's decision eviscerates the application of *Oncale* and *Clark County* to prisons and effectively

makes prisons liable under Title VII for requiring guards to perform their jobs. The court removed the inmates' behavior from its unique social context and, instead, focused on the prisoners' words and conduct in isolation: "Freitag was repeatedly exposed to conduct of a sexual nature. . . . witnessed inmates masturbating in an exhibitionist manner, oftentimes while they directed verbal taunts and crude remarks at her." App., 20. The court saw no distinction between the work environment of Pelican Bay State Prison and that of an ordinary commercial business, like a casino. App., 16 (citing *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754 (9th Cir. 1997)). Unlike customers in a casino, inmates at Pelican Bay commonly engage in lewd sexual misconduct, and, unlike casino employees, the guards expect the inmates to do so. The inmates' behavior did not alter the terms of Freitag's employment; she was hired and trained to deal with it.[2]

By failing to follow the teachings of *Oncale* and *Clark County*, the Ninth Circuit has put state prison officials in a quandary. The officials employ guards to control an inherently vulgar and hostile environment and to maintain minimal standards, but they may now be liable under Title VII for requiring the guards to do their jobs.

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[2] The court cited the Sixth Circuit's decision in a prison case, *Slayton v. Ohio Department of Youth Services*, 206 F.3d 669 (6th Cir. 2000). In dicta, the *Slayton* court said that prisons "cannot be held liable for a hostile work environment created by prison inmates. . . . ," but then suggested an exception where the prison "fails to take appropriate steps to remedy" the inmates' behavior. The *Slayton* court made no attempt to reconcile these statements with *Oncale*. In any case, *Slayton* concerns a hostile environment created by a co-employee, a fellow guard who used inmates to torment the victim. *Id*. at 674 and 678.

B. The Ninth Circuit's Decision Compromises the Federal Courts' Traditional Deference to Prison Administrators on Prisoner Discipline and Safety, under *Turner v. Safley*.

1. The Ninth Circuit's use of Title VII to impose minimal standards on prisoner conduct and to alter prison facilities compromises the discretion of prison administrators regarding inmate discipline and safety. In *Turner v. Safley*, 482 U.S. 78, 84-85 (1987), this Court explained:

> The problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Under *Turner*, courts generally defer to prison administrators' judgments regarding inmate discipline and institutional security. *Id*. at 89.

Following *Turner*, several circuits have deferred to prison administrators in Title VII actions by prison guards who claim that prisons improperly discriminated when they hired only male or female guards. *Everson v. Michigan Dept. of Corrections*, 391 F.3d 737 (6th Cir. 2004) (upholding prison officials' decision to employ only female guards); *Robino v. Iranon*, 145 F.3d 1109 (9th Cir. 1998)

(same); *Tharp v. Iowa Dept. of Corrections*, 68 F.3d 223 (8th Cir. 1995); *Torres v. Wis. Dept. of Health and Social Services*, 859 F.2d 1523 (7th Cir. 1988) (en banc). Title VII permits gender-based discrimination where sex "is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). The circuit courts deferred to the prison officials' judgment that safety considerations justified the discriminatory hiring practices.

These cases are consistent with this Court's decision in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), which predated the BFOQ exception. In *Dothard*, Alabama argued that the conditions in several of its prisons were so egregious that the State could legally refuse to hire female guards. *Id.* at 334. Indeed, a federal court had declared the prison conditions unconstitutional. *Id*. (*citing Pugh v. Locke*, 406 F.Supp. 318, 325 (M.D. Ala. 1976)). Notably, the danger to female guards was largely attributable to Alabama's prison administrators: because of "inadequate staff and facilities," the administrators made no attempt to segregate the inmates according to their level of dangerousness, "a procedure that, according to expert testimony, is essential to effective penological administration." *Id*. The Court noted that other States (including California) used effective measures that ensured adequate safety for female guards. *Id*. at 336 n. 23. Nevertheless, the Court agreed with the prison administrators that the conditions were unsafe for women guards. "In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed

of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians." *Id.* at 335-36.

Although *Dothard* and the circuit court decisions concerned discriminatory hiring practices under Title VII, rather than a hostile work environment, they conflict with the decision below. First, whereas these courts deferred to the prison officials, the Ninth Circuit not only failed to grapple with *Turner* but also second-guessed the officials' decisions on safety and prisoner discipline. The Ninth Circuit believed, for example, that the prison should have installed semi-opaque film on control towers and cells, App., 21-22, despite prison officials' testimony that semi-opaque film would raise safety concerns. And although prison officials disciplined two of the three inmates cited in the Ninth Circuit's opinion – a fact not acknowledged in the opinion; indeed, one inmate received an additional *six years* of incarceration for his misbehavior – the Ninth Circuit deemed that the prison had failed to invoke the measures "sufficiently" and so upheld the jury's verdict. App., 22. Under the Ninth Circuit's approach, Title VII effectively trumps the discretion that *Turner* grants to prison officials on matters of safety and inmate discipline.

Second, the Ninth Circuit's use of Title VII as a prison reform statute conflicts with *Dothard*. The *Dothard* Court rejected the dissent's position that Title VII required Alabama officials to "take swift and sure punitive action against the inmate offenders" and to correct their "antisocial behavior patterns" so that the prisons are safe for women guards. *Dothard*, 433 U.S. at 346 (Marshall, J., concurring and dissenting). Instead, the Court accepted the egregious conditions of Alabama's prisons as it found them, notwithstanding the fact that the conditions were

largely caused by correctable problems like inadequate staff and facilities. *See Dothard*, 433 U.S. at 334-35. Here, however, the Ninth Circuit used Title VII to modify both the prisoners and the prison facilities, approving a special master to develop a court-imposed "remedial plan" to curb prisoners' antisocial behavior and to shield the guards from it. App., 14-15, 35-37.

Finally, the conflict between the BFOQ cases and this case undermines the fundamental purpose of Title VII. Jurisdictions like California that choose to provide employment opportunities for women guards in male prisons now face liability – and federal court oversight – for common prisoner misconduct. As the Ninth Circuit warned, even a single incident can suffice. App., 21. Thus, the decision below will encourage prison officials to limit their liability by hiring only male guards whenever they can invoke the BFOQ exception. Obviously, the whole point of Title VII is to prevent gender-based discrimination, not encourage it.

2. Although the decision governs only prisons within the Ninth Circuit, the Court should review this case rather than wait for other circuit courts to consider the issue further. The decision places California's prison officials in a difficult position. The prison system is presently operating under several federal court oversight decrees that require considerable investments of State resources for pressing, institutional problems. In *Coleman v. Wilson*, 912 F.Supp. 1282 (E.D. Cal. 1995) and *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995), the district courts oversee ongoing remedial plans to improve inmates' physical and mental health services. In *Plata v. Schwarzenegger*, No. C01-1351; 2005 U.S. Dist. LEXIS 43796 (N.D. Cal. October 3, 2005), the district court appointed a

permanent receiver to manage the State prisons' health care delivery system and require its Department of Corrections to appropriate funds, dedicate personnel, and revise its procedures. With many demands and limited resources, prison officials need to know whether Title VII potentially imposes liability for inmates' lewd behavior. Indeed, following *Freitag*, female prison guards are pursuing a class action lawsuit under Title VII – in the same district court that decided the case at bar – alleging sexual harassment due to inmate misconduct at several prisons, *Berndt v. California Department of Corrections*, U.S.D.C., N.D., California, No. C03-3174 (N.D. Cal. filed July 9, 2003), thus raising the prospect that federal courts will eventually use Title VII to oversee inmate exhibitionism throughout the nation's largest state prison system.

To provide certainty for prison officials and courts, this Court should clarify that Title VII does not require prison officials to curb inmates' vulgar behavior at the expense of prison safety, nor does Title VII supercede the deference that courts grant to prison officials under *Turner*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: February 1, 2007

Respectfully submitted,

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