No. 06-1171

IN THE
Supreme Court of the United States

JOSEPH D. KOUTNIK,
Petitioner,

v.

LEBBEUS BROWN, GERALD A. BERGE,
AND MATTHEW J. FRANK,
Respondents.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 31, 2007

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ARGUMENT IN REPLY

In their Brief in Opposition, Respondents concede that the Courts of Appeals are in clear conflict about the appropriate standard of review for censorship of outgoing prisoner mail. Opp. at 5. Respondents also concede that a substantial controversy exists over whether censorship of outgoing prisoner mail can ever be justified in the name of general inmate rehabilitation. Opp. at 11. On both questions presented, Respondents' arguments merely highlight the reasons this Court should grant, not deny, this Petition.

I. This Court Should Grant This Petition To Resolve The Circuit Split Over The Appropriate Standard Of Review To Apply To Claims Of Outgoing Prisoner Mail Censorship.

The first question presented by Petitioner is whether, and to what degree, this Court's opinion in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), preserved, reversed, or modified the First Amendment standard of review established in *Procunier v. Martinez*, 416 U.S. 396 (1974), in the context of state censorship of outgoing prisoner mail. Petitioner has identified a substantial circuit split on this question. Pet. at 9-11. Some courts believe that *Thornburgh* implicitly reversed *Martinez*, even in the outgoing prisoner mail context. *Id.* at 9-10. These courts apply the "reasonableness" standard set forth in *Turner v. Safley*, 482 U.S. 78 (1978). Pet. at 9-10. Other courts hold that *Thornburgh* preserved the *Martinez* standard of review for outgoing prisoner mail. Pet. at 10-11.

Respondents' arguments fail to acknowledge that *Martinez*, which established "intermediate scrutiny" as the standard of review for prisoners' claims of outgoing mail censorship, is still fundamentally distinct from *Turner*, which established "rational basis" review for speech restrictions within prison walls.

A. The Cases Cited By Respondents Reflect A Minority View That Is Contrary To This Court's Precedent That *Martinez* And *Turner* Are Distinct.

While conceding the existence of this circuit split, Respondents attempt to downplay its significance, claiming that "a close reading of the cases applying *Martinez* and those applying *Turner* indicates that the difference between the two standards is largely superficial." Opp. at 5. Citing to language from a Third Circuit and an Eighth Circuit decision, Respondents contend that this circuit split is not a "compelling" reason to grant certiorari. *Id.* at 7.[1]

Respondents cite, however, to only one side of the circuit split. Several circuits, including the First, Sixth, Ninth, and Tenth Circuit Courts of Appeals, continue to apply *Martinez* as a distinct standard to claims of censorship of outgoing prisoner mail. Opp. at 5; Pet. at 10-11. Respondents concede that the decisions that they cite conflict directly with the decision in this case, where the Seventh Circuit "rejected respondents' argument that the court should apply the *Turner* standard to out-going prisoner mail." Opp. at 7.

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[1] The Third Circuit case, *Nasir v. Morgan*, 350 F. 3d 366 (3d Cir. 2003), involved a challenge to a prison policy regulating inmate correspondence with former prisoners. *Id.* at 368-69. The Third Circuit first determined the standard of review, concluding that *Thornburgh* preserved *Martinez* for outgoing mail. *Id.* at 370. The Court reviewed the policy on incoming mail under *Turner*, and then reviewed the policy on outgoing mail under *Martinez*. *Id.* at 371. Although the Court noted in its *Martinez* discussion that "much of the discussion, therefore, that proceeded in *Turner* is relevant here," the Court still performed the substantial, additional analysis concerning whether the policy was "narrowly drawn" and "no greater than necessary or essential" under *Martinez*. *Id.*

Moreover, the decisions cited by Respondents also conflict with *Martinez* and *Thornburgh*, impermissibly so. Courts of Appeals must follow this Court's precedent and may not conclude that more recent Supreme Court cases "have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). It remains this Court's sole prerogative to overrule its own precedent (although *Martinez* should *not* be overruled). *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Respondents' argument that the existing circuit split should be disregarded as "superficial" is based on their flawed assumption that *Martinez* could be rendered obsolete by lower courts.

B. Respondents' Assertion That *Martinez* And *Turner* Are "Extremely Similar In Application" Ignores The Substantial Difference Between "Rational Basis" Review And "Intermediate Scrutiny."

Respondents argue that the *Martinez* and *Turner* tests are "extremely similar in application" because the "first prong of both tests asks whether there is a relationship between the prison regulation and a legitimate government interest." Opp. at 6. Respondents assert that the "latter portion of each test examines the strength of the relationship between the regulation and the government interest." *Id.* Aside from this asserted facial resemblance, however, the two tests ask fundamentally different questions.

Turner provides for "rational basis" review. *See Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). The first *Turner* factor states that a regulation is justified where the government can show a "valid, rational connection" between the prison regulation and the legitimate penological interest. 482 U.S.

at 89.[2] Other courts have also noted the similarity between *Turner* and "rational basis" review. *See Waterman v. Farmer*, 183 F. 3d 208, 215 (3d Cir. 1999) (describing the *Turner* test as "similar to rational-basis review.") (Alito, C.J.); *Amatel v. Reno*, 156 F. 3d 192, 198-99 (D.C. Cir. 1998) (observing that *Turner* is "if not identical, something very similar" to rational basis review).

Martinez provides for "intermediate scrutiny." The second prong of *Martinez* provides that restrictions on outgoing prisoner mail are permitted only where they are "no greater than is necessary or essential" to advance legitimate penological interests. Pet. at 7. This Court has "repeatedly stated" that such language denotes the "intermediate scrutiny" standard of review. *Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 476-77 (1989). For example, in *Central Hudson Gas & Electric Corp.*, 447 U.S. 557 (1980), this Court described intermediate scrutiny as requiring evidence that a speech restriction is "not more extensive than is necessary to serve that interest." *Id.* at 566. As the district court in this case noted, this "intermediate scrutiny" standard for commercial speech restrictions is "strikingly similar to the standard announced in *Martinez*." Pet. App. at 25a (citing *Central Hudson*).

Although "intermediate scrutiny" is not a "least-restrictive means" test, this Court has observed that it is still "far different . . . from the 'rational basis' test." *Fox*, 492 U.S. at 480. Under "rational basis" review, "it suffices if the law could be thought to further a legitimate governmental goal,

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[2] This Court recently recognized that "the second, third, and fourth factors," which Respondents assert are the limiting portions of *Turner*, "add little, one way or another, to the first factor's basic logical rationale." *Beard v. Banks*, 126 S. Ct. 2572, 2580 (2006).

without reference to whether it does so at inordinate cost." Id. (emphasis added). Conversely, "intermediate scrutiny" requires "the cost to be carefully calculated." *Id.*

In this case, while the Seventh Circuit ostensibly applied the *Martinez* standard of review, it failed to apply the second *Martinez* prong, and thus provided only "rational basis" review. Pet. at 11-12. This hybrid or half-*Martinez* approach only exacerbates the confusion among the courts. Respondents' argument in defense of the Seventh Circuit—that "in application," the boundaries between the two distinct standards of *Turner* and *Martinez* are becoming blurred—reveals the confusion in the Courts of Appeals as to whether, and to what degree, *Thornburgh* preserved, modified, or reversed the *Martinez* standard. It is a reason to grant, not deny, this Petition.

II. This Court Should Grant This Petition To Resolve Whether The State May Censor Outgoing Prisoner Mail Based On Its View That The Mail's Content Is Inconsistent With The State's General Rehabilitation Goals.

As for Petitioner's second question, Respondents concede that the Third Circuit and the D.C. Court of Appeals are in direct conflict about whether the First Amendment permits content-based censorship in furtherance of a general interest in inmate rehabilitation. Pet. at 14 - 16. Respondents do not defend the original basis for the Seventh Circuit's opinion. Instead, Respondents argue that this Court should abstain from reviewing Petitioner's claim out of deference to prison administrators. Opp. at 7-8. Respondents also raise the rejected claim that allowing Petitioner's correspondence would have been detrimental to institutional security. Opp. at 9-10. Neither position has any merit.

A. The Seventh Circuit Decision Contradicts *Martinez*, Which Does Not Permit Censorship Of Outgoing Prisoner Mail Because Its Content Is Merely Inconsistent With General Rehabilitation Goals.

The Seventh Circuit held that the censorship was permissible because prison officials deemed the content of Petitioner's letter to be insufficiently "constructive" or "wholesome." Pet. App. at 13a. This ruling reflected Officer Brown's original justification, that allowing Petitioner to "merchandize his design was . . . incompatible with the facility's efforts to rehabilitate him." Pet. App. at 3a; Opp. at 10.

Allowing the censorship of outgoing prisoner mail because the State deems its content to be insufficiently "constructive" or "wholesome," or because it is otherwise "incompatible" with the State's general rehabilitation goals, would allow the censorship of the very speech protected in *Martinez*, which struck down a policy generally authorizing the censorship of outgoing mail containing "inflammatory political, racial, religious, or other views" or "otherwise inappropriate" content. Pet. at 12-13. In their Brief, Respondents fail to address this contradiction, choosing to simply repeat the Seventh Circuit's flawed analysis, almost word-for-word. *Compare* Opp. at 12-13 *with* Pet. App. at 12a-13a.

B. This Court Should Not Abstain From Reviewing This Important Question Out Of Deference To Prison Officers Or Unsupported Security Concerns.

Respondents argue that this Court should abstain from reviewing this important question out of broad deference to prison officers. Opp. at 7-8. Although some deference may be accorded to determinations made in the day-to-day administration of prisons, this policy of deference is not a

broad "hands off" posture towards prisoners' Constitutional claims. *See Martinez*, 416 U.S. at 406 (noting and rejecting the "hands off posture" of lower courts); *see also Turner*, 482 U.S. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.")

Respondents attempt to bolster their call for deference to prison officials by introducing an alternative basis for censorship: the State's broad interest in institutional security. Opp. at 9-10. But this Court has already concluded that outgoing correspondence "cannot reasonably be expected to present a danger to the community *inside* the prison" merely because it "contains inflammatory racial views." *Thornburgh*, 490 U.S. at 411-12. Citing *Thornburgh*, the District Court specifically rejected Respondents' argument that Petitioner's correspondence with a retail catalog presented any plausible security threat to the WSPF prison environment. Pet. App. at 29a-30a. Respondents' reassertion of this same "security" rationale is merely an effort to dodge the question actually framed by the decision below: whether the First Amendment permits a prison officer to censor outgoing mail in furtherance of general inmate rehabilitation. It is not a basis to deny the Petition.[3]

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, this Court should grant Joseph D. Koutnik's petition for writ of certiorari.

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[3] Even if this Court were persuaded that this alternative "security" justification had merit, the appropriate response would be for this Court to grant the Petition and remand, not to deny it outright. *See Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 468 (1947).

Respectfully submitted,

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