No. ____

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

PETITION FOR WRIT OF CERTIORARI

BARRY LEVENSTAM
Counsel of Record
HOWARD S. SUSKIN
SHORGE K. SATO
JENNER & BLOCK LLP
330 N. Wabash Ave.
Chicago, IL 60611
(312) 222-9350

Attorneys for Petitioner

February 27, 2007

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QUESTIONS PRESENTED

This case involves a prisoner's attempt to send outgoing mail to a retail publication and the State's decision to censor that mailing because the prisoner used a swastika symbol as part of a political message criticizing the prison system.

1. What is the correct First Amendment standard of review for cases involving censorship of outgoing prisoner mail under *Thornburgh v. Abbott*, 490 U.S. 401 (1989) and *Procunier v. Martinez*, 416 U.S. 396 (1974)?

2. Does the First Amendment permit censorship of a prisoner's outgoing mail on general rehabilitative grounds?

PARTIES TO THE PROCEEDING

The parties below were (1) Joseph D. Koutnik, an inmate incarcerated in the State of Wisconsin and, at all times relevant hereto, at the Wisconsin Secure Program Facility and (2) Lebbeus Brown, a corrections officer at the Wisconsin Secure Program Facility, Gerald A. Berge, the Warden at the Wisconsin Secure Program Facility, and Matthew J. Frank, the Secretary of the Wisconsin Department of Corrections.

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OPINIONS BELOW

This petition seeks the review of the decision of the United States Court of Appeals for the Seventh Circuit in *Koutnik v. Brown*, reprinted at Pet. App. A, 1a - 13a, and published at 456 F.3d 777. The Seventh Circuit affirmed an order issued by the United States District Court for the Western District of Wisconsin (per Crabb, C.J.) in the same matter.

The District Court opinion and order granting defendants' summary judgment motion is reprinted at Pet. App. B, 14a - 35a and is unreported. The Seventh Circuit order denying rehearing and rehearing *en banc*, with three judges dissenting, is reprinted at Pet. App. C, 36a - 37a and is not otherwise published.

JURISDICTION

The Seventh Circuit entered judgment on August 8, 2006. Mr. Koutnik's petition for rehearing and rehearing *en banc* was denied on November 30, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment of the United States Constittuion provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The pertinent regulatory provisions of the Wisconsin Administrative Code are reprinted in an appendix to this petition. Pet. App. D, 38a - 39a.

STATEMENT OF FACTS

In December 2002, Petitioner Joseph D. Koutnik ("Mr. Koutnik"), an inmate at the Wisconsin Secure Program Facility (the "WSPF"), attempted to send a letter and some of his own political drawings to Northern Sun Merchandising ("Northern Sun"), a retail catalog that merchandises t-shirts, posters, and other politically-themed materials. Pet. App. E, 40a - 43a. One of Mr. Koutnik's drawings was a cartoon swastika filled with prison bars, with the captions, "Department of Corruptions" and "Keeping Kids in Kages." *Id.* at 43a. His mailing also included a cover letter and other drawings with similar captions. *Id.* at 41a - 42 a. In his letter, Mr. Koutnik wrote that he "noticed that prison reform is not as well represented as is needed and [I] am therefore including some of my ideas you should consider using." *Id.* at 41a.

WSPF prison officers (the "State") seized and destroyed Mr. Koutnik's outgoing mail to Northern Sun. Pet. App. F, 44a. The "reason for non-delivery" was that the mail "concern[ed] an activity which, if completed, would violate the laws of Wisconsin, the United States or the Administrative Rules of the Department of Corrections." *Id.* The Notice also stated that the "[d]rawing of swastika violates DOC 30320 Warning issued." *Id.*[1]

After exhausting his administrative remedies, Mr. Koutnik brought a *pro se* civil rights claim pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331 alleging that the censorship of his outgoing mail violated his constitutional rights under the First and Fourteenth Amendments. Mr. Koutnik stated that he had intended the Swastika Drawing solely as a political statement comparing the state prison system to the Nazi "system of warehousing Jews, Slavs, and other 'undesirables' in concentration camps." Pet. App. G, 46a. Mr. Koutnik also denied that he was promoting white supremacist beliefs and stated that, as a person of Slavic descent, he abhors Nazis. *Id.*

The State contended that its censorship was justified because the Swastika Drawing was incompatible with Mr. Koutnik's general rehabilitative interests, and the District Court granted summary judgment on that basis. Pet. App. B, 31a - 32a. In reaching this determination, the District Court deferred to the conclusions of Lebbeus Brown ("Officer Brown"), a corrections officer and defendant in this case,

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[1] The notation "DOC 30320" refers to Wisconsin Administrative Code § 303.20, which prohibits inmates from "participating in any activity with an inmate gang" or "possess[ing] any gang literature, creed, symbols, or symbolisms." Pet. App. B, 19a - 20a; Wis. Admin. Code § 303.20(3).

who contended that "allowing plaintiff to merchandise political messages that contained symbols associated with white supremacist groups interfered with the facility's interest in rehabilitating plaintiff." *Id.* at 31a.

The District Court granted summary judgment to the State on this rehabilitative ground even though it found that Mr. Koutnik was not "affiliated in any way with the Ku Klux Klan or Nazi groups." *Id.* at 15a. The District Court concluded that, even though Mr. Koutnik was not a white supremacist, "[p]rison officials have an interest in suppressing *all* gang-related activity and expression, not merely symbols that associate an inmate with one specific gang." *Id.* at 33a. The District Court further reasoned that even though Mr. Koutnik only intended to make a political statement, censorship was justified simply "because of the presence of the swastika and the coded reference to the Ku Klux Klan." *Id.* at 32a

Mr. Koutnik filed a *pro se* appeal. Pet. App. A, 1a - 13a. The Seventh Circuit did not accept the District Court's premise that the State was justified in suppressing *all* gang-related symbols, even those without a connection to an existing inmate gang or group. *Id.* at 7a ("Strictly read, DOC § 303.20 would not authorize prison administrators to ban the symbolism of white supremacy groups if there were no inmate groups associated with that cause."). Moreover, no white supremacist inmate gangs have ever been identified as existing at WSPF, and Mr. Koutnik denied that any such "inmate gangs" could exist because "everybody is segregated" at WSPF. Pet. App. H, 48a. The Seventh Circuit also did not discuss Mr. Koutnik's lack of affiliation with white supremacy gangs or that Mr. Koutnik intended to convey a pro-prison reform political message through his Swastika Drawing.

Instead, the Seventh Circuit affirmed the District Court by concluding that the Swastika Drawing was "an effort to appeal to groups that would hinder, rather than foster, respectful human interaction, both inside and outside of prison," and that Mr. Koutnik's attempt to "market symbols affiliated with racially intolerant groups obviously thwarted the State's legitimate goals" of teaching general civic values, such as racial tolerance and non-violence, to its inmates. *Id.* at 13a. The Seventh Circuit deferred to Officer Brown's assessment that a swastika is a "gang-related symbol" and concluded that "Mr. Koutnik's correspondence was not an effort to establish 'constructive, wholesome contact' with the outside community that would foster successful reintegration into society." *Id.*

After this decision, Mr. Koutnik obtained *pro bono* counsel to file his petition for rehearing, with a suggestion for rehearing *en banc*. The petition for rehearing was denied, with three judges voting to grant the petition for rehearing *en banc*. Pet. App. C., 36a - 37a.

REASONS FOR GRANTING THE WRIT

For over thirty years, the "medium of written correspondence" has offered prisoners an "open and substantially unimpeded channel of communication with persons outside the prison." *Pell v. Procunier*, 417 U.S. 817, 824 (1974). This case presents an important issue for review not only for prisoners, but also for the consequential rights of all American citizens with whom such prisoners might correspond. *See Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

This Court should grant this petition for writ of certiorari to settle a conflict among the Courts of Appeals as to whether and to what extent the First Amendment standard

of review articulated in *Martinez* survived *Thornburgh* as to the censorship of outgoing prisoner mail.

This case also presents the opportunity for this Court to address whether the First Amendment permits censorship of a prisoner's outgoing mail based upon the State's conclusion that the content of the prisoner's speech is inconsistent with the prisoner's general rehabilitative interest.

I. Certiorari Should Be Granted Because There Is Substantial Conflict In The Courts Of Appeals Concerning The First Amendment Standard Of Review Regarding Censorship of Outgoing Prisoner Mail.

This Court granted certiorari in *Martinez* because of the "variety of widely inconsistent approaches" that federal courts had adopted to resolve "the tension between the traditional policy of judicial restraint regarding prisoner complaints and the need to protect constitutional rights." *Martinez*, 416 U.S. at 406. This uncertainty led to the "haphazard" protection of important First Amendment interests, while making it "impossible for correctional officials to anticipate what is required of them," perpetuating "repetitive, piecemeal litigation." *Id.* at 407.

This same inconsistency has reemerged in the federal courts in the wake of *Thornburgh*, which provided commentary as to how *Martinez* should be interpreted. The Courts of Appeals have once again adopted a "variety of widely inconsistent approaches" to the issue of censorship of outgoing prisoner mail to the detriment of First Amendment rights of expression. *Id.* at 406.

A. *Thornburgh* Did Not Establish A Clear First Amendment Standard Of Review For Adjudication Of Outgoing Mail Censorship.

In *Martinez*, this Court held that prison officers could not censor prisoner correspondence with non-prisoners unless a showing was made that the regulation or practice (1) furthered an important state interest, and (2) was "no greater than is necessary or essential to the protection" of that interest. 416 U.S. at 413. Central to the *Martinez* holding was this Court's rejection of "any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners." *Id.* at 409. This Court also recognized that "[w]hatever the status of a prisoner's claim to uncensored correspondence with an outsider, ... censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners." *Id.* at 408-09.

In *Turner v. Safley*, 482 U.S. 78 (1987), this Court upheld a restriction on prisoner-to-prisoner correspondence while rejecting a restriction on inmate marriages. *Turner* did not overturn *Martinez*. Instead, *Turner* established a standard of review for speech-restrictive prison regulations that operated only within the prison environment. 482 U.S. at 89. Under *Turner*, such prison regulations would be upheld where they were "reasonably related to [a prison's] legitimate penological interests." *Id.* However, such regulations would not be upheld where the "logical connection" between the regulation and the asserted goal was "so remote as to render the policy arbitrary or irrational." *Id.* at 89-90. Further, *Turner* held that the asserted goal must operate "without regard to the content of the expression." *Id.* at 90. One test suggested by *Turner* of whether a "reasonable relationship" existed between a

regulation and a state interest was whether an inmate could "point to an alternative that fully accomodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 91.

Because *Turner* "focuses on the reasonableness of the prison official's actions," whereas *Martinez* "focuses on whether the prison official's actions were necessary to further a substantial governmental interest," *Turner* represents a standard of review that is more deferential to the discretion of prison officials than the *Martinez* standard of review. *Altizer v. Deeds*, 191 F.3d 540, 548 n.13 (4th Cir. 1999).

Then came *Thornburgh*. Whereas *Martinez* invalidated regulations that restricted both *incoming* and *outgoing* prisoner mail, *Thornburgh* held that the *Turner* standard of review (which is more deferential to the State) should apply to incoming correspondence, while expressly reserving the heightened *Martinez* standard of scrutiny for outgoing prisoner mail. 490 U.S. at 412 (holding that in cases of outgoing mail censorship, the State should be afforded a "lesser degree of case-by-case discretion" and that "a closer fit between the regulation and the purpose it serves may safely be required"). This Court reasoned that "the implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials." *Id.* at 413.

Thornburgh also included commentary on how federal courts should interpret *Martinez* with regard to outgoing mail censorship:

> We do not believe that *Martinez* should, or need, be read as subjecting the decisions of prison officials to a strict "least restrictive means" test. As noted, *Martinez* required no

> more than that a challenged regulation be "generally necessary" to a legitimate governmental interest.

Id. at 411. This language in *Thornburgh* has resulted in a substantial degree of confusion within the Courts of Appeals as to the appropriate First Amendment standard of review to apply to censorship of outgoing prisoner mail.

B. The Courts Of Appeals Follow At Least Three Inconsistent Standards of Review Regarding Outgoing Mail Censorship.

After *Thornburgh*, the Courts of Appeals have followed three inconsistent standards of review: *Thornburgh* either (1) reversed *Martinez*, (2) restated *Martinez*, or (3) fully preserved *Martinez* in the context of outgoing prisoner correspondence.

1. Thornburgh Possibly Reversed *Martinez*.

Despite this Court's emphasis in *Thornburgh* upon the "categorical" distinction between incoming and outgoing mail, some Courts of Appeals have suggested that *Thornburgh* effected a complete reversal of *Martinez*, even in the context of outgoing prisoner mail.

The Fifth Circuit has drawn the inference from *Thornburgh* that *Martinez* is no longer good law, suggesting that, despite this Court's attempt to "draw a distinction between incoming and outgoing mail and . . . preserve the viability of *Martinez* with respect to outgoing mail," *Thornburgh*'s "reading" of *Martinez* "suggests that *Turner*'s 'legitimate penological interest' test would also be applied to outgoing mail." *Brewer v. Wilkinson*, 3 F.3d 816, 824 (5th Cir. 1993) (applying *Turner* in a case of inspection, but not censorship, of outgoing prisoner mail).

The Eight Circuit also interprets *Thornburgh* as having completely reversed *Martinez*, even with regard to censorship of outgoing mail. *Ortiz v. Fort Dodge Corr. Facility*, 368 F.3d 1024, 1026 n.2 (8th Cir. 2004) (noting that while *Thornburgh* "left open the possibility of applying a stricter standard to prison regulations involving outgoing mail," the Eight Circuit should apply a more deferential standard of review under *Turner* to all claims of prisoner mail censorship); *Thongvanh v. Thalacker*, 17 F.3d 256, 259 (8th Cir. 1994) ("[W]e have previously held that claims involving inmate mail--both incoming and outgoing--must be measured against the standard set out in *Turner*.")

2. Thornburgh Possibly Restated *Martinez.*

Other courts have interpreted the dicta in *Thornburgh* as restating the second prong of *Martinez* to require only a showing that censorship of outgoing mail was "generally necessary" to protect a legitimate state interest.

The Third Circuit applied a restated *Martinez* standard to a prison policy statement prohibiting outgoing inmate correspondence with former inmates without prior superintendent approval. *Nasir v. Morgan*, 350 F.3d 366, 368 (3d Cir. 2003). The Third Circuit noted that *Thornburgh* "made no judgment as to outgoing mail, and any suggestion that *Martinez* would still apply was dictum." *Id.* at 371. The court noted, however, that "[b]ecause *Thornburgh* holds that *Turner* does not squarely overrule *Martinez* as applied to outgoing mail, we will apply *Turner* to incoming mail and *Martinez* to outgoing correspondence." *Id.* The Third Circuit then took notice of the dictum in *Thornburgh* that reinterpreted the second prong of *Martinez* as not requiring a "least-restrictive means test" and upheld the prison policy statement using a *Turner*-based analysis. *Id.* at 375.

The Sixth Circuit interpreted the dicta of *Thornburgh* as restating the second prong of *Martinez* such that it "requires only that the prison regulation be 'generally necessary' to a government interest." *Bell-Bey v. Williams*, 87 F.3d 832, 838 (6th Cir. 1996). The District Court purported to follow this interpretation of *Thornburgh* in this case. Pet. App. B, 32a.

The Ninth Circuit has also used a modified *Martinez* standard in an outgoing prisoner mail inspection case. *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995). The Ninth Circuit emphasized separate dicta in *Thornburgh* which suggested that, although *Martinez* no longer required a "least restrictive means" test, a "closer fit between the regulation and the purpose it serves" should be required in the outgoing prisoner mail context. *Id.* (quotation marks omitted).

3. Thornburgh Possibly Preserved *Martinez.*

Other courts have held that *Thornburgh* had no effect on the rights of prisoners to send outgoing mail to non-prisoners, and that such rights are still "clearly established" under *Martinez*. *Treff v. Galetka*, 74 F.3d 191, 194-95 (10th Cir. 1996). In *Treff*, the Tenth Circuit reviewed a prisoner's claim of outgoing mail censorship under an unmodified *Martinez* standard; it applied the second prong of *Martinez*, which requires that prison censorship be "no greater than necessary or essential to the protection of the particular governmental interest involved." *Id.* at 195. (quotation marks omitted).

In this case, the Seventh Circuit ostensibly applied the original *Martinez* standard and did not cite to *Thornburgh* as having modified this standard. Pet. App. A, 11a. The Seventh Circuit then failed to apply the second prong of *Martinez* and analyze whether the State's censorship in this case was "greater than necessary" to further the state's

rehabilitative interests. *Id.* at 13a (finding only that the censorship "did 'further'" the State's interest in inmate rehabilitation). As a result, the actual standard of review applied by the Seventh Circuit was merely whether the censorship "further[ed]" a legitimate penological goal, without regard to whether the censorship was "reasonable" (*Turner*) or "necessary (*Martinez*) in furtherance of that goal.

This Court should grant the petition for a writ of certiorari, as it did in *Martinez*, to clarify the important First Amendment standard of review concerning censorship of outgoing prisoner mail addressed to non-prisoners.

II. Certiorari Should Be Granted To Resolve Whether The First Amendment Permits Censorship Of A Prisoner's Outgoing Mail On General Rehabilitative Grounds.

This Court should also grant the petition for a writ of certiorari to resolve whether the First Amendment permits prison officers to censor a prisoner's outgoing mail merely because it is allegedly incompatible with the prisoner's general rehabilitative interests.

A. *Martinez* Held That Censorship Of Outgoing Prisoner Mail Is Generally Unnecessary To Further Inmate Rehabilitation.

Martinez held that prisoners retain the First Amendment right to send outgoing mail even if the mailing contains statements that "unduly complain," "magnify grievances," express "inflammatory political, racial, religious or other views," or contain matter that prison officers deem "defamatory" or "otherwise inappropriate." 416 U.S. at 415. *Martinez* further held that a penological interest could be "legitimate" only to the extent it was "unrelated to the suppression of expression." *Id.*

This Court imposed the "no greater than is necessary" second prong of *Martinez* because the invalidated prison regulations "invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship." *Id.* at 413, 415. This Court noted that, "[n]ot surprisingly, prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism." *Id.*

Although this Court recognized in *Martinez* that "rehabilitation" could theoretically serve as a legitimate penological objective, this Court concluded that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation." *Id.* at 412. This Court cited to a federal Bureau of Prisons policy statement, which observed that "[c]onstructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process." *Id.* at 412 n.13. This Court also cited another policy guideline from the Association of State Correctional Administrators, which it found "echoe[d] the view that personal correspondence by prison inmates is a generally wholesome activity." *Id.*

Thus, *Martinez* reasoned that censorship of outgoing prisoner mail is generally unnecessary to further inmate rehabilitation, regardless of the content of the mailing itself. Nothing this Court has said since has contradicted that conclusion, and the reasoning of *Martinez* is still valid today. "Punishing people for speech does not discourage the speech; it only drives it underground." 4 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW § 20.6, at 256 (3d ed. 1999); *see Martinez*, 416 U.S. at 426 (recognizing "[t]he harm censorship does to rehabilitation" as inmates withdraw and "become wary of placing intimate thoughts or

criticisms of the prison in letters.") (Marshall, J., concurring) (quotation marks omitted).

Censorship will not induce Mr. Koutnik to forget how to draw a swastika nor would it deter him from drawing a swastika *after* he is released from prison. The State could have easily discovered that there was no rehabilitative reason to censor the Swastika Drawing because Mr. Koutnik did not have ties to white supremacy inmate gangs or hold white supremacist beliefs. Before seizing and destroying the entire mailing, the State could have questioned Mr. Koutnik about the Swastika Drawing, his beliefs on race, his gang history, or even just checked its own records. The State's failure to even attempt to verify its assumptions about the Swastika Drawing suggests that the State's purported rehabilitative goal is exactly the type of pretextual excuse that the second prong of *Martinez* was designed to prevent.

B. The Seventh Circuit Decision Exacerbates An Existing Circuit Split Over Whether General Rehabilitation Can Justify Censorship Of Prisoner Speech.

Certiorari should be granted because the Seventh Circuit's decision exacerbates an existing circuit split between the Third Circuit and the D.C. Circuit over whether a general interest in inmate rehabilitation should serve as a legitimate basis for censorship of prisoner speech.

In *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998), inmates and publishers challenged a federal law (the Ensign Amendment) restricting the Federal Bureau of Prisons from distributing incoming publications containing "sexually explicit material." *Id.* at 194-95. The D.C. Circuit held that "inculcation of values" was a legitimate penological objective and held that Congress reasonably concluded that

allowing inmates to access pornography could stunt their "character growth." *Id.* at 198-99.

Judge Wald dissented, noting that "the assertion of 'rehabilitation' as the reason for impinging on prisoners' First Amendment rights is particularly disconcerting in its potential for abuse." *Id.* at 209. She noted that "undertaking the Herculean task of 'character-molding' is inherently problematic in its First Amendment implications, for it presumably involves casting emerging prisoners in society's own image." *Id.* at 210. Thus viewed, rehabilitation can become "the antithesis of First Amendment freedoms; indeed, '[t]otalitarian ideologies we profess to hate have styled as "rehabilitation" the process of molding the unorthodox mind to the shape of prevailing dogma.'" *Id.* (quoting *Sobell v. Reed*, 327 F. Supp. 1294, 1305 (S.D.N.Y. 1971).

In a similar Ensign Amendment case, the Third Circuit agreed with Judge Wald's dissent in *Ramirez v. Pugh*, 379 F.3d 122 (3d Cir. 2004), and criticized the majority in *Amatel* for "abdicat[ing] their responsibility to scrutinize carefully the government's reasons for infringing that right." *Id.* at 128-29. The Third Circuit concluded that "[t]o say . . . that rehabilitation legitimately includes the promotion of 'values,' broadly defined, with no particularized identification of an existing harm towards which the rehabilitative efforts are addressed, would essentially be to acknowledge that prisoners' First Amendment rights are subject to the pleasure of their custodians." *Id.* at 128.

The Seventh Circuit's decision is squarely at odds with *Ramirez* and Judge Wald's dissent in *Amatel*. Further, the Seventh Circuit's decision is inconsistent with *Amatel* because the majority opinion involved a Congressional finding of a rehabilitative interest. 156 F.3d at 202. By

contrast, in Mr. Koutnik's case, the only "finding" made was the conclusory assertion of Officer Brown.

This Court should grant certiorari to review whether the First Amendment permits the censorship of an inmate's outgoing mail based solely on a prison officer's assessment of the inmate's general rehabilitative best interests.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

BARRY LEVENSTAM
Counsel of Record
HOWARD S. SUSKIN
SHORGE K. SATO
JENNER & BLOCK LLP
330 N. Wabash Ave.
Chicago, IL 60611
(312) 222-9350

Attorneys for Petitioner

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