IN THE

Supreme Court of the United States

DAVID PAUL HAMMER,

Petitioner,

v.

JOHN D. ASHCROFT, HARLEY G. LAPPIN, KATHLEEN HAWK-SAWYER, and KEITH OLSON,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under 28 C.F.R. § 540.63, federal prisoners may be interviewed face-to-face by the press, unless the warden determines after an individualized inquiry that the interview would endanger the interviewer or "probably cause serious unrest or disturb the good order of the institution." However, after the broadcast of an interview with Timothy McVeigh, Attorney General John Ashcroft banned all face-to-face press interviews with male federal death row inmates. The Attorney General cited no security reasons, but stated that such prisoners should be denied "a podium" to communicate their ideas. Two questions are presented:

1. Whether the *en banc* Seventh Circuit erred in upholding this abridgement of First Amendment rights, when it held, contrary to decisions of the Second, Third, Eighth, and Ninth Circuits, that the "legitimate penological interest" required by *Turner v. Safley*, 482 U.S. 78 (1987), may be established as a matter of law through *post-hoc* litigation declarations referring to "security concerns," or, alternatively, by a court's ability to imagine or hypothesize such concerns, even where the stated reason for the abridgement was unconstitutional.

2. Whether the *en banc* Seventh Circuit erred by ignoring the four factor test set forth in *Turner* and by adopting a test of its own, under which it held that a permanent ban on face-to-face press interviews with male-death-row inmates, a sub-class of federal prisoners, does not violate the First Amendment.

PARTIES TO THE PROCEEDING

Petitioner David Paul Hammer was the plaintiff-appellant below. Respondents John D. Ashcroft, Harley G. Lappin, Kathleen Hawk-Sawyer, and Keith Olson were defendants-appellees below.

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David Paul Hammer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit, by a vote of 5-to-3, reversed the unanimous panel decision in this case. The majority and dissenting opinions of the *en banc* court are reported at 570 F.3d 798 (7th Cir. 2009) and reprinted at App. 1a-30a. The panel opinion is reported at 512 F.3d 961 (7th Cir. 2008) and reprinted at App. 31a-48a. The memorandum opinion and order of the United States District Court for the Southern District of Indiana, which granted summary judgment in favor of respondents and dismissed petitioner's *pro se* amended complaint, is not reported, but is reprinted at App. 49a-62a. An earlier Seventh Circuit opinion, reversing the district court's dismissal of petitioner's original *pro se* complaint for failure to state a claim, is reported at 42 F. App'x 861 (7th Cir. 2002) and reprinted at App. 63a-70a. The district court's memorandum opinion and order dismissing the original complaint is not reported, but is reprinted at App. 71a-79a.

STATEMENT OF JURISDICTION

The Seventh Circuit entered judgment on June 25, 2009. (App. 1a). On September 15, 2009, Justice Stevens extended the time in which to file a petition for a writ of certiorari to and including October 23,

2009. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments to the United States Constitution and the pertinent provisions of Section 540.63 of Title 28, Code of Federal Regulations, and Institution Supplement THA-1480.05A are reprinted at App. 80a-84a, 103a-111a.

STATEMENT OF THE CASE

A. Introduction

To strike a proper balance between First Amendment rights and prison security, the Federal Bureau of Prisons ("BOP"), after notice-and-comment rulemaking, promulgated 28 C.F.R. § 540.63, which allows federal inmates to participate in face-to-face press interviews, unless the warden determines, after a individualized inquiry, that the interview would "endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution." (App. 82a). Absent such a finding, the interview must proceed.

Following a nationally-televised interview with Timothy McVeigh, however, Attorney General John D. Ashcroft banned face-to-face interviews with all male federal death row inmates. (App. 90a). The Attorney General did not rely on any security concern or other "legitimate penological purpose," but on his personal view that such prisoners should

be prevented from communicating their ideas to the public. (App. 90a). He ordered the ban "to restrict a mass murderer's access to the public podium" and to prevent the "irresponsible glamorization of a culture of violence." (App. 90a). Warden Harley G. Lappin, who was then the warden at the United States Penitentiary at Terre Haute, Indiana ("USP-TH") (which houses all male federal death row inmates), subsequently memorialized the ban in Institution Supplement THA-1480.05A. (App. 103a-111a).

Petitioner David Paul Hammer, a male federal death row inmate, brought this *pro se* action to challenge the constitutionality of the ban. The district court dismissed his complaint for failure to state a claim (App. 79a), but the Seventh Circuit reversed and remanded, with instructions that the case proceed to discovery. (App. 70a). On remand, respondents refused to answer any of Mr. Hammer's *pro se* discovery requests. (7th Cir. JA at 76-86). The district court nonetheless granted respondents' motion for summary judgment and again dismissed Mr. Hammer's *pro se* claims. (App. 62a). On appeal, a panel of the Seventh Circuit unanimously reversed the district court's dismissal order, and once again remanded for discovery and trial. (App. 48a).

The Seventh Circuit granted respondents' petition for rehearing *en banc*. By a 5-to-3 vote, the *en banc* court reversed the panel decision, holding that respondents were entitled to summary judgment because Mr. Hammer was not entitled to discovery and had not presented a triable issue. (App. 15a). According to the Seventh Circuit

majority, and contrary to the decisions of every other circuit to have considered the question, respondents' actual reasons for adopting the total ban were not relevant to the inquiry mandated by *Turner v. Safley*, 482 U.S. 78 (1987). According to the majority, *Turner*'s "legitimate penological interest" requirement may be satisfied, as a matter of law, by the submission of conclusory, *post-hoc* declarations as to the existence of "security concerns." (App. 10a-11a). Indeed, the majority held that *Turner* would be satisfied even without such declarations, if a court could simply imagine or hypothesize a "legitimate penological interest" for violating First Amendment rights. (App. 5a). Thus, summary judgment was appropriate, according to the majority below, even though Attorney General Ashcroft had cited only constitutionally impermissible reasons to justify the ban at the time he announced it.

B. Statement of Facts

Mr. Hammer, who was sentenced to death for killing a cellmate, resides at the Special Confinement Unit ("SCU") of USP-TH. (7th Cir. JA at 125).[1] The

[1] Although Mr. Hammer's death sentence was later vacated, no date has been set for resentencing, and the government has been granted an extension of time to April 28, 2010 to state its intentions with respect to resentencing. *See United States v. Hammer*, No. 96-CR-239 (M.D. Pa. Aug. 27, 2009) (order granting United States an extension of eight months to indicate whether it will request a new death penalty phase trial); *United States v. Hammer*, 404 F. Supp. 2d 676 (M.D. Pa. 2005), *appeals dismissed*, 564 F.3d 628 (3d Cir. 2009). As respondents concede, Mr. Hammer continues to reside on death row and is subject to the policy. (App. 4a, 32a n.1).

SCU houses all male federal prisoners who have been sentenced to death. (7th Cir. JA at 200). In addition, the SCU houses prisoners who have not been sentenced to death, but who have been placed on "administrative detention status." (7th Cir. JA at 200).

Mr. Hammer has received many requests for press interviews to discuss conditions on death row, his own case, and other matters related to his confinement. In 1999, Mr. Hammer participated without incident in three face-to-face press interviews. (7th Cir. JA at 126-28). Those interviews were conducted under 28 C.F.R. § 540.63, which permits federal prisoners to participate in face-to-face interviews unless a warden determines, after an individualized inquiry, that the interview would "endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution." (App. 82a).

On March 12, 2000, "60 Minutes" aired an interview with Timothy McVeigh, a federal death row inmate known as the Oklahoma City Bomber. (7th Cir. JA at 175). The public outcry was immediate. Among other things, on March 14, 2000, Senator Byron Dorgan sent a letter to BOP Director Kathleen Hawk-Sawyer, to demand that the BOP prohibit future interviews with federal death row inmates. (7th Cir. JA at 175).

No other face-to-face interview with a male federal death row inmate was ever allowed.[2] In late 2000 and early 2001, Mr. Hammer attempted to communicate with the press through press releases issued by his attorney, through personal written correspondence, and by using his ordinary 15-minute daily allotments of telephone time. Even in these contexts, Warden Lappin repeatedly warned Mr. Hammer that he was prohibited from disclosing "*any* information about another inmate through any manner of communication (oral, written, etc.)." (7th Cir. JA at 172) (emphasis in original).

On April 12, 2001, Attorney General Ashcroft and BOP Director Hawk-Sawyer held a press conference announcing a categorical ban on face-to-face interviews with male federal death row inmates. That ban (which was not adopted pursuant to notice-and-comment rulemaking) permanently and categorically prohibits male federal death row inmates (but not female death row inmates, non-death row inmates housed on the SCU, or, indeed, any other inmate in the federal prison system) from having face-to-face interviews with any print or broadcast journalist on any subject at any time. (App. 95a-96a). The Attorney General explained:

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[2] From March 2000 until April 16, 2001, USP-TH Warden Lappin denied all media requests for face-to-face interviews with male federal death row inmates, including nine such requests for interviews with Mr. Hammer. (7th Cir. JA at 177-92). After April 16, 2001, THA-1480.05A was specifically invoked to bar such interviews. (App. 105a).

> As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. On an issue of particular importance to me as Attorney General of the United States, I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims. . . . I'm concerned about irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly.

(App. 90a, 97a).

Four days later, Warden Lappin signed Institution Supplement THA-1480.05A, which purportedly was designed to "provide guidelines for implementing" the case-by-case review process required by 28 C.F.R. § 540.63. (App. 103a). In fact, THA-1480.05A did not "implement" the regulation; it negated the regulation insofar as death row inmates were concerned. In place of the case-by-case review required by 28 C.F.R. § 540.63, THA-1480.05A substituted a permanent and total ban, stating that "in-person interviews (including video-recorded interviews) will not be permitted." (App. 105a). In addition to banning the broadcast of recorded interviews, the policy banned all face-to-face interviews, even non-recorded interviews with print journalists. (App. 105a).

It is undisputed that THA-1480.05A does not apply (a) to prisoners housed on the SCU on "administrative detention status," (b) to female federal prisoners sentenced to death, (c) to other

federal prisoners who have been convicted of murder, but not sentenced to death, or (d) to other federal prisoners who may be objects of acute public interest because of who they are or what crimes they have committed. (App. 35a, 105a). With respect to each of those four groups of prisoners, interview requests remain subject to the case-by-case policy set forth in 28 C.F.R. § 540.63. (App. 81a-84a).

C. Procedural History

Mr. Hammer filed an amended *pro se* complaint on January 2, 2003, claiming that THA-1480.05A violated both his First Amendment rights and his Fifth Amendment right to equal protection of the laws. He sought declaratory and injunctive relief, as well as damages, under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (7th Cir. JA at 26-40).[3] Mr. Hammer served three separate *pro se* discovery requests. (7th Cir. JA at 56-62). Respondents objected to all of those requests and moved for summary judgment, without complying with any of the requests. (7th Cir. JA at 63-65, 76-86).

Mr. Hammer filed a *pro se* motion to extend the time for discovery under Fed. R. Civ. P. 56(f), but the district court denied that motion. (7th Cir. JA 87-90,

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[3] Mr. Hammer filed his original *pro se* complaint on April 24, 2001. The district court dismissed that complaint for failure to state a valid claim for relief. (App. 79a). Mr. Hammer filed a *pro se* appeal. The Seventh Circuit reversed and remanded the case for further proceedings, including discovery, on July 25, 2002. (App. 70a).

225). Thereafter, the district court granted summary judgment against Mr. Hammer, holding that "Hammer has not identified a genuine issue of material fact as to his claims . . . ." (App. 62a). Mr. Hammer filed a timely notice of appeal, and the Seventh Circuit later appointed counsel to assist Mr. Hammer with the briefing and argument of his appeal. (7th Cir. JA at 238-39).

On January 15, 2008, a panel of the Seventh Circuit unanimously reversed the district court's grant of summary judgment. The panel held that Mr. Hammer had raised a triable issue of fact as to whether the "proffered [security] justification for the policy banning face-to-face interviews is pretextual." (App. 32a). That was so, according to the panel, because Attorney General Ashcroft's contemporaneous explanation conflicted with respondents' litigation declarations and showed that the actual purpose of the ban was "to control a disfavored message rather than to secure the SCU." (App. 41a).

The Seventh Circuit granted respondents' petition for rehearing *en banc*. (App. 3a).

On June 25, 2009, the Seventh Circuit, by a 5-to-3 vote, held that "Institution Supplement THA 1480.05A is consistent with the Constitution." (App. 15a). In an opinion by Chief Judge Easterbrook, the court held that respondents' actual reasons for adopting the ban were not relevant because "[i]t is not clear why one bad motive would spoil a rule that is adequately supported by good reasons." (App. 10a). The "good reasons," of course, were not those

stated at the time the ban was adopted, but those that respondents put forth in defense of Mr. Hammer's litigation, some three years later. Indeed, according to the majority, it was not necessary for respondents to provide any reasons at all, even after the fact. So long as a court could hypothesize "good reasons" for the ban, there was no need for discovery or a trial concerning the abridgement of Mr. Hammer's First Amendment rights. (App. 5a, 10a-11a). The majority further held that "[t]he Supreme Court did not search for 'pretext' in *Turner*; it asked whether a rule is rationally related to a legitimate goal. That's an objective inquiry." (App. 10a).

Three judges dissented. Judge Rovner, joined by Judge Bauer, noted that:

> With scarcely a reference to *Turner*, today's opinion holds that a ban on face-to-face interviews in the prison system is justified if a judge can "imagine" a legitimate basis for its existence, glosses over facts regarding the application of the relevant policies, and concludes with the astonishing proposition that the government may limit a prisoner's access to the media based on its distaste for the anticipated content of the prisoner's speech.

(App. 16a).

Judge Wood dissented separately. Among other things, she noted that "the majority has . . . adopt[ed] a rule permitting wholesale censorship in prisons — one that goes much farther than anything the

Supreme Court sanctioned in *Pell v. Procunier*, 417 U.S. 817 (1974), or *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974)." (App. 24a).

REASONS FOR GRANTING THE WRIT

1. This case raises a fundamental question of First Amendment law on which the courts of appeals are divided. In a 5-3 decision with far-reaching consequences, the *en banc* court held that a federal prisoner could not challenge the constitutionality of a policy prohibiting him from having face-to-face access to print or broadcast journalists, even if there was evidence to show that the ban was adopted for unconstitutional, content-based purposes.

Indeed, the evidence here was compelling: Attorney General Ashcroft stated that the purpose of the ban was to prohibit death row inmates from communicating their ideas to the public, not because of any reason related to prison security, but because the Attorney General deemed such prisoners, and any ideas they might express, to be repugnant and unworthy of First Amendment protection. (App. 90a, 97a). That evidence was irrelevant, according to the majority below, because respondents had provided litigation declarations asserting that the ban served a "legitimate penological interest." That evidence was also irrelevant, according to the majority below, because a court could "imagine" a legitimate purpose that might be furthered by the ban.

This Court has never held that the abridgement of First Amendment rights may be justified by after-the-fact or imagined reasons, or that the actual,

unconstitutional reasons for an abridgement of First Amendment rights should be ignored.

Clearly, the decision below conflicts with this Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987). In addition, the decision below conflicts with decisions of the Second, Third, Eighth, and Ninth Circuits, all of which have held that the existence of a "legitimate penological interest," and thus the constitutionality of restrictions placed on a prisoner's First Amendment rights, must be measured by reasons that were put forth at the time the policy was adopted. In those courts, unlike the Seventh Circuit, First Amendment rights do not give way to *post-hoc*, let alone hypothetical, explanations. *See Salahuddin v. Goord*, 467 F.3d 263, 276-77 (2d Cir. 2006); *Abu-Jamal v. Price*, 154 F.3d 128, 132-34 (3d Cir. 1998); *Quinn v. Nix*, 983 F.2d 115, 118-19 (8th Cir. 1993); *Walker v. Sumner*, 917 F.2d 382, 385-87 (9th Cir. 1990).

2. Although this Court has held that prison restrictions on First Amendment rights are to be evaluated under the four-part test articulated in *Turner v. Safley*, 482 U.S. 78 (1987), the Seventh Circuit barely mentioned any of the *Turner* factors and effectively created an analytical framework that stands in competition with *Turner*. The Seventh Circuit's decision did not even purport to address the question whether THA-1480.05A "is reasonably related to legitimate penological interests" under the four-factor *Turner* test, and it never considered whether the ban provided male federal death row inmates with any reasonable alternative means for

communicating with the press. *See Turner*, 482 U.S. at 89-90. Furthermore, the decision below constitutes a dangerous innovation in First Amendment law: no other reported decision has ever upheld the constitutionality of a *permanent* restriction on the First Amendment rights of a *sub-class* of prisoners, particularly a sub-class identified solely based on gender and sentence. Indeed, this Court previously has expressed skepticism that a permanent ban on the First Amendment rights of a sub-class of prisoners could ever be deemed "reasonable" under the *Turner* criteria. *Beard v. Banks*, 548 U.S. 521, 535-36 (2006); *Overton v. Bazzetta*, 539 U.S. 126, 134 (2003). This case squarely presents that question.

I. The Decision Below Conflicts With Prior Decisions Of This Court, And With Decisions Of Other Federal Courts Of Appeals, By Holding That *Turner's* "Legitimate Penological Interest" Requirement May Be Satisfied By *Post-Hoc*, Litigation Declarations Or By Purely Hypothetical Explanations, Even Where Contemporaneous Statements Show That The Restriction Was Adopted For Patently Unconstitutional Reasons.

This Court has long recognized that "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . . justified by the considerations underlying our penal system.'" *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (*quoting Price v. Johnson*, 334 U.S. 266, 285 (1948)). But this Court also has recognized that

there is no "iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

Indeed, this Court has recognized that the ability to share one's ideas and opinions with others is a fundamental right that is central to the concept of human personhood and citizenship in a democratic society. As Justice Brandeis noted long ago:

> Those who won our independence . . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The right to communicate one's thoughts — a right that is no less important to those who have lost their physical freedom — is not extinguished by conviction and incarceration. Once the requirements of prison security have been satisfied, "a prison inmate retains those First Amendment rights that

are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *see also Johnson v. California*, 543 U.S. 499, 510 (2005). In that way, our law gives recognition to the fundamental principle that "persons are sent to prison as punishment, not for punishment." *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977); *see also* Mary Bosworth, *The U.S. Federal Prison System* 53 (2004).

To reconcile the First Amendment rights of prisoners with legitimate penological demands, this Court, in *Turner v. Safley*, 482 U.S. 78, 89-90 (1987), announced a framework for evaluating the constitutionality of prison regulations. In *Turner*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. To structure that inquiry, the Court adopted a four-factor test, focused on: (1) whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether "alternative means of exercising the right . . . remain open to prison inmates"; (3) whether accommodating the constitutional right will significantly impact prison resources; and (4) whether there are "ready alternatives" that could address the penological interest without infringing on constitutional rights. *Id.* at 89-91.

In *Turner*, this Court did not specifically explain how, in the context of *Turner*'s first requirement, the requisite reasonable relationship between a restriction and a legitimate penological purpose was to be established. *Id.* at 89. In subsequent cases, the Court likewise has not had occasion to consider whether a "legitimate penological interest" must be articulated at the time the policy is adopted. Thus, while this Court has held that *Turner* requires courts to "accord substantial deference to the professional judgment of prison administrators," *Bazzetta*, 539 U.S. at 132, the Court did not consider whether such deference must be given to non-contemporaneous explanations offered only in litigation declarations authored by lawyers long after the fact. Certainly, no case from this Court suggests that a *post-hoc* explanation will be given conclusive effect in the face of contemporaneous statements which admit that the contested action was taken for constitutionally impermissible reasons. Moreover, relevant decisions from the courts of appeals have categorically rejected that notion.

In addition, this Court has never suggested that the *Turner* test will be satisfied whenever the reviewing court can "imagine" a legitimate penological interest. Indeed, the holding below simply negates this Court's decision in *Turner*, which assumed that the courts would inquire into the adequacy of the real reasons for administrative action, rather than some hypothetical reason that might be conjured to justify the administrative

determination. That is not the standard by which administrative action is evaluated.[4]

The Seventh Circuit held otherwise. The Seventh Circuit noted that Mr. Hammer had presented evidence (including the Attorney General's contemporaneous explanation for his actions) to show that "those who adopted or approved THA 1480.05A took content or viewpoint into account"

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[4] This Court often has had occasion to hold that administrative determinations may be upheld only on grounds that the agency actually relied on at the time it acted, and that the propriety of an agency's action must be evaluated based on a properly developed administrative record. *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("*Chenery I*"); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*"); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50-52 (1983). "It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Chenery II*, 332 U.S. at 196-97.

A reviewing court "must judge the propriety of such action solely by the grounds invoked by the agency [at the time it acted]. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.* at 196; *accord Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 419-20 (1971). Contrary to the decision below, untested, *post-hoc* litigation affidavits cannot fill that void, particularly where, as here, the affidavits directly contradict the rationale given by the decision-maker at the time he acted. *See Overton Park*, 401 U.S. at 419; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962); *Chenery I*, 318 U.S. at 87.

when they adopted the permanent ban. (App. 7a, 8a-9a). According to the Seventh Circuit, however, a contemporaneous admission of an unconstitutional purpose was not relevant to *Turner*'s "legitimate penological interest" requirement, so long as the court record contained a *post-hoc* litigation declaration asserting that the challenged action furthered some legitimate penological interest. (App. 10a-11a). Indeed, the Seventh Circuit held that a court could enter summary judgment so long as it could hypothesize a plausible permissible penological interest, even where a patently unconstitutional, contemporaneous explanation had been given. (App. 5a, 10a-11a). The Seventh Circuit majority stated: "It is not clear why one bad motive would spoil a rule that is adequately supported by good reasons." (App. 10a).

The Seventh Circuit's decision clearly conflicts with decisions of the Second, Third, Eighth, and Ninth Circuits, which have held that the only relevant "penological interest" is that which *actually* motivated the policy's adoption.

In *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006), the Second Circuit reversed a district court's dismissal, on summary judgment, of a prisoner's challenge to a rule requiring Sunni and Shi'ite Muslim inmates to participate in joint Ramadan services, as well as the dismissal of his claim that he was denied the opportunity to participate in Islamic holiday services while placed in disciplinary keeplock. The Second Circuit held that "[u]nder both *Turner* and *O'Lone*, once a prisoner shows that a

prison regulation impinges on a protected right, prison officials must show that the disputed official conduct was motivated by a legitimate penological interest." *Salahuddin*, 467 F.3d at 276-77. According to the Second Circuit, *Turner*'s "legitimate penological interest" standard "requires the government to close the circle — prison officials must have been pursuing the interest in inmate safety when limiting" First Amendment rights. *Id.* at 277. "This requirement makes good sense because it ensures that prison officials actually had, not just could have had, a legitimate reason for burdening protected activity." *Id.*

In *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998), the Third Circuit ordered the district court to issue a preliminary injunction enjoining enforcement of a policy that prohibited inmates from running businesses after the policy was challenged by a death row inmate who was publishing articles, books, and radio commentaries. In that case, as here, the inmate had presented evidence to show that the "[t]he Department [of Corrections] began its investigation [into the inmate's press communications] under public pressure to do so, and because of the content of [his] writing," and that the decision to enforce the policy against him was "motivated, at least in part, by the content of his articles." *Abu-Jamal*, 154 F.3d at 134. Based on this evidence of an improper purpose, the Third Circuit held that the policy did not satisfy *Turner*'s "legitimate penological interest" requirement. *Id.* at 134, 137.

In *Quinn v. Nix*, 983 F.2d 115 (8th Cir. 1993), the Eighth Circuit likewise held that a "pretextual" *post-hoc* articulation of security concerns could not satisfy *Turner*, because "[p]rison officials are not entitled to the deference described in *Turner* and *Procunier* [*v. Martinez*, 416 U.S. 396, 404-05 (1974)] if their actions are not *actually* motivated by legitimate penological interests at the time they act." *Quinn*, 983 F.2d at 118 (emphasis added).

Finally, in *Walker v. Sumner*, 917 F.2d 382 (9th Cir. 1990), the Ninth Circuit held that "[p]rison officials must 'put forward' a legitimate governmental interest to justify their regulation, and must provide *evidence* that the interest proffered is the reason why the regulation was adopted or enforced." *Id.* at 385-86 (internal citations omitted). *Post-hoc* declarations created for litigation were not sufficient to satisfy *Turner*. "Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests." *Id.* at 386.

The Seventh Circuit's holding directly conflicts with these decisions, as Judge Rovner recognized:

> With scarcely a reference to *Turner*, today's opinion holds that a ban on face-to-face interviews in the prison system is justified if a judge can "imagine" a legitimate basis for its existence, glosses over facts regarding the

> application of the relevant policies, and concludes with the astonishing proposition that the government may limit a prisoner's access to the media based on its distaste for the anticipated content of the prisoner's speech. The *en banc* opinion thus authorizes the government to deny the public a chance to hear directly from prisoners who can offer a glimpse of situations that may embarrass the government, such as torture and prisoner abuse, by invoking pretextual justifications for policies that are unrelated to security.

(App. 16a).

There is no constitutional right more precious in a democratic society than the right to speak, convey information about the workings of government, and communicate one's ideas, whatever they may be. Equally important is the right to receive information and to hear what others have to say about matters of public concern. In our day, much public attention has been given to the administration of the death penalty and to the proper treatment of prisoners. Indeed, these matters have been the subject of acute public attention and vigorous debate. In this context, the ban ordered by Attorney General Ashcroft does not simply abridge the First Amendment rights of those with special knowledge and a particular viewpoint, it impedes the right of all of us to hear what those individuals know and think.

Judge Wood illustrated this point with a vivid example:

> It is likely that the military authorities running the infamous Abu Ghraib prison would not have wanted the inmates talking to the media, either about their own experience or those of their fellow prisoners (some of whom may have been too injured, or too intimidated, to speak for themselves). Closer to home, the sad but true fact is that abuse by prison guards or police has not been entirely abolished. One prisoner might want to write letters that are self-aggrandizing, just as the authorities feared, but another might want to alert the media to the fact that human rights abuses were occurring in a place like the Special Confinement Unit.

(App. 28a).

The rights to speak and hear are too important in themselves, and play too important a role in the workings of a democratic society, to be extinguished by executive fiat simply because the Attorney General, no matter how wise or well-meaning, finds communications from a subset of federal prisoners to be personally repugnant. Justice Jackson identified the genius of our governmental system, and its relationship to First Amendment freedoms, when he wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Mr. Hammer may have been convicted of serious crimes, but he retains the right to speak, subject to the legitimate demands of prison security. And the rest of us, subject to those demands, have the right to hear what Mr. Hammer has to say. Neither the Attorney General nor the court below paid sufficient attention to that basic fact of democratic government, and the decision below requires review for that reason.

II. The Decision Below Departs From This Court's Prior Holdings By Disregarding *Turner* And Upholding The Constitutionality Of A Permanent Restriction On The First Amendment Rights Of A Sub-Class Of Prisoners.

This Court has repeatedly held that *Turner*'s four-factor analysis "contain[s] the basic substantive legal standard[s]" and is the proper inquiry for evaluating constitutional challenges to prison regulations. *Banks*, 548 U.S. at 528-29; *Bazzetta*, 539 U.S. at 132; *Thornburgh v. Abbott*, 490 U.S. 401, 404, 413-14 (1989); *O'Lone*, 482 U.S. at 348-50. The decision below warrants review for the additional reason that the Seventh Circuit simply disregarded *Turner* and its progeny, and chose to create its own standard for reviewing the constitutionality of prison restrictions.

Instead of assessing Mr. Hammer's claims under the *Turner* framework, the court below used the opinions in two older cases — *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*,

417 U.S. 843 (1974) — to fashion an alternative test. (App. 1a-2a, 4a-7a, 13a-14a).

Obviously, it is not the business of an intermediate appellate court to improve on this Court's jurisprudence. Even if it were, the court below erred because neither *Pell* nor *Washington Post* would support upholding THA-1480.05A. Unlike the policy upheld in this case, the press restrictions in *Pell* and *Washington Post* applied equally to all inmates in their respective prison systems. *Pell*, 417 U.S. at 819; *Washington Post*, 417 U.S. at 844. In addition, and also unlike the case at bar, it was undisputed in both *Pell* and *Washington Post* that the restrictive policies were actually motivated by legitimate "security" concerns. *Pell*, 417 U.S. at 826; *Washington Post*, 417 U.S. at 848-49.

Moreover, neither policy restricted an inmate's ability to communicate with the press through written correspondence (*Pell*, 417 U.S. at 824, 827-28; *Washington Post*, 417 U.S. at 847-48), whereas Mr. Hammer has been prohibited from communicating to the press "*any* information about another inmate through any manner of communication (oral, written, etc.)." (7th Cir. JA at 172). As Judge Wood stated in dissent:

> [N]either *Pell* nor *Washington Post* approved a total ban on contact with the media. To the contrary, *Pell* relied on the existence of "alternative methods of communication that are open to prison inmates," 417 U.S. at 504, and *Washington Post* made clear that

> "members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there," 417 U.S. at 518. *Washington Post* mentioned specifically the fact that "[o]utgoing correspondence from inmates to press representatives is neither censored nor inspected." *Id.* To the extent that the majority's opinion has swept away the need to show adequate alternative avenues for communication [under *Turner*'s second factor], it has, in my view, overstepped an important boundary that the Court has drawn.

(App. 29a). Unlike *Pell* and *Washington Post*, Mr. Hammer presented evidence creating a triable question as to whether any "reasonable alternatives" existed for him to communicate with the press regarding his case or his observations of prison conditions — both being subjects that he was prohibited from discussing in *any* manner because of the ban on communications regarding fellow inmates. (App. 110a; 7th Cir. JA at 172).

The court below also erred in holding that this Court's decisions in *Pell* and *Washington Post* can be extended to justify First Amendment restrictions applied only to a sub-class of prisoners — especially a sub-class defined solely by gender and sentence. While *Pell* and *Washington Post* may permit prison officials to bar all inmates equally from face-to-face communication with the media, the Constitution does not permit prison officials to grant the right to communicate with the press selectively, or to deny

face-to-face communication with the press to a disfavored group. *See Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) ("The Constitution forbids [the government] to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (holding that government's power to proscribe "fighting words" generally does not include power to punish only "fighting words" directed at particular disfavored topics).

While real differences between male and female death row inmates (or between death row inmates and inmates convicted of similar crimes but not sentenced to death) might necessitate some differences in their conditions of confinement, it is not clear how those differences could ever be relevant to adopting, let alone justifying, differential treatment under the First Amendment. "Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among [groups] on such a wholesale and categorical basis." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). This Court has recognized that "invidious distinctions [in the allocation of constitutional rights] cannot be enacted without a violation of the Equal Protection Clause." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Restricting only male federal death row inmates from face-to-face interviews with both print and electronic media (while allowing such access to all other federal prisoners, including female federal

death row inmates) fails even rational-basis analysis under *Turner*'s first criteria that a restriction be "*reasonably related to legitimate penological* interests." 482 U.S. at 89.

The permanent nature of the Attorney General's ban also offends the Constitution. Indeed, neither this Court nor any other court has approved a permanent restriction on First Amendment rights that applies only to a sub-class of prisoners, let alone a sub-class defined entirely by gender and sentence. This Court has upheld prison restrictions on First Amendment rights in two contexts. First, the Court has upheld "permanent" restrictions that apply equally and neutrally to an entire prison population. *See Abbott*, 490 U.S. at 409-10, 415-16; *Turner*, 482 U.S. at 81, 89-90; *O'Lone*, 482 U.S. at 350-52; *Pell*, 417 U.S. at 828; *Bell v. Wolfish*, 441 U.S. 520, 551 (1979). Second, this Court has upheld *temporary* restrictions on First Amendment rights applied to a sub-class of recalcitrant inmates as a disciplinary sanction. *See Bazzetta*, 539 U.S. at 134; *Banks*, 548 U.S. at 535-36. No reported case, however, has upheld a permanent prison restriction on First Amendment rights applied only to a sub-class of prisoners based on gender and sentence.

Under 28 C.F.R. § 540.63, a federal prisoner will be permitted to participate in a face-to-face press interview unless his warden determines, after a case-specific inquiry, that permitting the interview would endanger the safety of the interviewer or "would *probably* cause *serious* unrest or disturb the good order of the institution." 28 C.F.R. § 540.63(g)(4)

(emphasis added) (App. 82a). Female federal death row prisoners, prisoners housed in the SCU with death row prisoners because of individualized security concerns, and all other non-death row prisoners are entitled to have press interview requests evaluated by their respective wardens, on a case-by-case basis, under the test set forth in 28 C.F.R. § 540.63. (App. 81a-84a).

In the case of male death row prisoners, however, no such case-by-case analysis is available, and the warden has no duty to make the reasoned decision required by 28 C.F.R. § 540.63. Instead, male inmates sentenced to death are categorically prohibited from having face-to-face press interviews by THA-1480.05A. (App. 105a).

This Court has previously expressed skepticism that a permanent restriction on the First Amendment rights of a sub-class of prisoners could ever satisfy the *Turner* standard. In *Bazzetta*, 539 U.S. at 134, the Court stated:

> We agree the restriction is severe. And if faced with evidence that [the] regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation. Those issues are not presented in this case. . . .

539 U.S. at 134; *see also Banks*, 548 U.S. at 536.

Here, of course, those issues are squarely presented. The Seventh Circuit went well beyond this Court's jurisprudence by upholding a ban on

First Amendment rights that was both "severe" and "permanent" and applied only to "certain inmates." It is not surprising that the Seventh Circuit declined to evaluate the ban at issue in this case under the *Turner* framework. The reason is clear: it is inconceivable that the First Amendment restrictions imposed by THA-1480.05A could ever pass muster under *Turner* and its progeny. This case warrants review for that reason as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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