

No. 07-_____

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**In The
Supreme Court of the United States**

WARDEN HUGH SMITH and
SANCHE MARTIN,

Petitioners,

v.

JAMIL AL-AMIN,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether prison officials violate the First Amendment rights of a convicted felon when they open – but do not read – his legal mail outside of his presence.
2. Whether it was clearly established in the Eleventh Circuit, for qualified immunity purposes, that prison officials violate the First Amendment rights of a convicted felon when they open – but do not read – his legal mail outside of his presence.

PARTIES TO THE PROCEEDINGS

The parties are as shown in the caption of the case.

Petitioners before this Court and Appellants/Defendants below are: Sanche Jackson, Administrative Assistant at Georgia State Prison and Hugh Smith, Warden at Georgia State Prison;

Respondent before this Court and Appellee/Plaintiff below is Jamil Al-Amin.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Warden Hugh Smith and Sanche Jackson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

**OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 511 F.3d 1317 (11th Cir. 2008), and is further reproduced in the Appendix to this Petition ("Pet. App.") 1. The order of the Court of Appeals denying the petition for rehearing *en banc* is not reported but is reproduced in Pet. App. 63. Neither the district court order denying the motion for summary judgment nor the order denying the motion for reconsideration are reported, but they are reproduced in Pet. App. 56 and Pet. App. 42.

**STATEMENT OF JURISDICTION**

The judgment of the Court of Appeals was entered on January 7, 2008. Pet. App. 1. A timely filed motion for rehearing *en banc* was denied on February 27, 2008. Pet. App. 63.



**STATUTES INVOLVED:
RELEVANT PROVISIONS INVOLVED**

Respondent Jamil Al-Amin seeks damages for an alleged violation of his First Amendment rights pursuant to 42 U.S.C. § 1983. The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.” U.S. Const. amend. I.

STATEMENT

This case presents the issue of whether the mere opening, but not reading, of legal mail outside the presence of an inmate violates the inmate’s First Amendment rights. The Eleventh Circuit held that it does – even though the court acknowledged that doing so does not violate the inmate’s right to access-to-courts, even though no other category of mail must be opened in the inmate’s presence, and even though this Court held in *Shaw v. Murphy*, 532 U.S. 223 (2001), that prison officials do not need to carve out content-based exceptions to their general rules regarding prison communications. In so holding, the Eleventh Circuit also expanded an existing circuit split on the issue.

This case also presents an important issue regarding the scope of the qualified immunity defense. The Eleventh Circuit held that petitioners are not entitled to qualified immunity on respondent's *free speech* claim because a prior ruling of the court held that opening inmates' mail outside their presence violates their right to access-to-courts. Moreover, the court relied on its earlier access-to-courts ruling even though it acknowledged that this Court's decision in *Lewis v. Casey*, 518 U.S. 343 (1996), meant that prisoners cannot make out access-to-courts claims based on mail being opened outside their presence. All told, the Eleventh Circuit's decision constitutes a dramatic shrinking of state officials' qualified immunity.

1. District Court Proceedings

Jamil Al-Amin, formerly known as H. Rap Brown, is serving a life sentence for the shooting of two and killing of one law enforcement officer.¹ He filed suit, *pro se*, in the United States District Court for the Southern District of Georgia claiming that the Warden and Administrative Assistant (hereinafter petitioners) at the maximum security prison in which he was housed violated his right to access-to-courts and his First Amendment right to free speech by

¹ See *Al-Amin v. Wetherington*, 165 Fed. Appx. 733 (11th Cir. 2006).

opening letters from his counsel outside of his presence.² Al-Amin asserted that petitioners opened legal mail from his attorney and wife, Karima Al-Amin. (R1-1).

Upon realizing that Ms. Al-Amin's letters came from a law office, the Warden asked Al-Amin to identify his attorneys. Al-Amin did so but did not include the name of his wife on the list. (R2-19, Ex. B, C, and D). As a result, petitioners treated Ms. Al-Amin's mail as non-legal mail. *Id.* Al-Amin alleges that, after he complained that his wife's mail should be treated as legal mail, petitioners continued to open his mail from his wife. (R1-1-4-5, Ex. A-E). While Al-Amin offered evidence that the envelopes containing the correspondence had been opened outside his presence, he never offered any evidence as to the contents of the envelopes and made no showing that the envelopes actually contained privileged materials. *Id.*

Petitioners filed a motion for summary judgment and argued, among other things, that even if Al-Amin's mail had been opened, there was no showing of harm or a breach of privilege as a result of their alleged conduct and thus no constitutional violation occurred. (R1-17). Alternatively, the petitioners

² Initially Al-Amin alleged that prison officials read his mail but this claim was abandoned on appeal. For purposes of the proceedings in this Court, petitioners do not dispute that Ms. Al-Amin was acting as her husband's attorney.

argued that they were entitled to qualified immunity because it was not clearly established that their conduct amounted to a constitutional violation. *Id.* The district court disagreed and found that the opening of legal mail outside of the presence of the inmate constituted a denial of access to the courts and a violation of the First Amendment.³ Pet. App. 42. The district court further found that petitioners were not entitled to qualified immunity because it was clearly established that prison officials could not open legal mail outside the presence of the inmate. *Id.* Petitioners filed a motion for reconsideration which was denied. R2-28; Pet. App. 52. Petitioners filed an interlocutory appeal on the denial of qualified immunity.

2. Court of Appeals Proceedings

The Eleventh Circuit appointed counsel and the parties agreed that the sole issue for appeal was the opening of Al-Amin's legal mail after prison officials were notified by Al-Amin that his legal mail was being opened. Pet. App. 10 n.13. In its decision, the Court of Appeals reversed the district court on Al-Amin's access-to-courts claim. The Court of Appeals noted that in *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976), and *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir.

³ The parties consented to transfer the case to a magistrate judge for disposition. In order to be consistent with references by the court of appeals, petitioners will use the term "district court."

1978), the pre-1981 Fifth Circuit (whose decisions are binding precedent in the Eleventh Circuit) held that opening legal mail outside an inmate's presence violates the inmate's access-to-courts right. The Eleventh Circuit then analyzed whether *Taylor* and *Guajardo* controlled in light of this Court's intervening decisions in *Turner v. Safley*, 482 U.S. 78 (1987), and *Lewis v. Casey*, 518 U.S. 343 (1996). The court concluded that *Taylor* and *Guajardo* survive *Turner*, but that Al-Amin's access-to-courts claim must fail under *Casey*. In *Casey*, this Court held that a constitutional claim for a violation of the right to access-to-courts requires evidence of actual harm to a non-frivolous lawsuit. The Eleventh Circuit ruled that, because Al-Amin failed to allege or present evidence of actual injury or damage to any case, his access-to-courts claim must fail. Pet. App. 33.

The Eleventh Circuit, however, affirmed the district court's ruling that petitioners violated Al-Amin's free speech rights. In so doing, the court specifically held that "(1) Al-Amin's free speech claim is distinct from his access-to-courts claim; (2) [petitioners'] conduct violated his right to free speech; and (3) [Al-Amin] need not show any actual injury beyond the free speech violation itself to state a constitutional claim." Pet. App. 33. In making its decision, the Court of Appeals relied on the principle that the use of mail is a protected free speech right and that inmates retain that right. Pet. App. 33. The court ruled that opening incoming privileged mail "interfere[d]" with Al-Amin's ability to communicate with

his attorney and thus constituted a violation of his right to free speech, even absent a showing of actual harm to any case. Pet. App. 33.

Finally, the Eleventh Circuit held that petitioners were not entitled to qualified immunity because *Taylor* and *Guajardo* put them on notice that their actions violated clearly established law. Pet. App. 38. Even though the Court of Appeals found no access-to-courts violation, the court concluded that *Taylor* and *Guajardo* (which were access-to-court cases) “clearly establish[] that a prison official violates an inmate’s constitutional rights when the official opens attorney mail outside the inmate’s presence.” Pet. App. 38-41. And as to petitioners’ assertion that prior precedent regarding access-to-courts claims does not clearly establish the law with respect to inmates’ free speech rights, the court ruled that “[w]e have never required that, in order for an official to know that his conduct is unlawful, a reasonable official must be able to cite by chapter and verse all of the constitutional bases that make his conduct unlawful.” Pet. App. 39. It is from this decision that the prison officials seek certiorari.

REASONS FOR GRANTING THE PETITION

A writ of certiorari is warranted because the Eleventh Circuit’s decision expands a split among the circuits that have considered the underlying constitutional question of whether the opening, but not

reading, of an inmate's legal mail amounts to a First Amendment violation separate and distinct from an access-to-courts claim. Moreover, the holding wrongly creates a new prophylactic legal rule whose very premise is that prison officials are unwilling to abide by the Constitution. The Eleventh Circuit's qualified immunity holding also warrants this Court's review. Its conclusion that prior circuit precedent on the right to access-to-courts provided "fair notice" that petitioners were violating respondent's free speech rights dramatically shrinks the protections qualified immunity is intended to provide state officials.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE ELEVENTH CIRCUIT'S HOLDING THAT INMATES HAVE A FIRST AMENDMENT "FREE SPEECH" RIGHT TO HAVE THEIR LEGAL MAIL OPENED ONLY IN THEIR PRESENCE.

This Court conclusively decided that inmates have a right to receive and send mail. *Thornburgh v. Abbott*, 490 U.S. 401, 412 (1989); *Procunier v. Martinez*, 416 U.S. 396, 413-414 (1974). The Court has repeatedly clarified, however, that this right is not absolute and that prison officials may subject inmates' mail to inspection or perusal. *Id.*; *Turner v. Safley*, 482 U.S. 78 (1987). And the Court has specifically held that prison officials may inspect legal mail when opened in the presence of the inmate. *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974). In *Wolff*, the Court ruled that, by opening legal mail in the presence

of the inmate, prison officials “have done all, and perhaps even more than the constitution requires.” *Id.* at 577. The Court thereby left open the question whether the Constitution permits prison officials to open and inspect an inmate’s legal mail *outside* the presence of the inmate.

After *Wolff*, many Courts found that the opening of legal mail outside an inmate’s presence constituted a violation of the inmate’s right to access to the courts. This Court discredited these holdings in *Lewis v. Casey*, 518 U.S. 343, 349 (1996), when it ruled that an inmate cannot establish an access-to-courts claim absent a showing of actual harm to a specific case. It is difficult to imagine a prisoner making that showing based on the mere opening of his legal mail by prison officials. That did not resolve the opening-legal-mail issue once and for all, however, because prisoners separately asserted that opening legal mail outside their presence violated their free speech rights. Many lower courts have addressed that issue, and they have reached conflicting results. In holding that prison officials are constitutionally barred from opening inmates’ legal mail outside their presence, the Eleventh Circuit not only deepened that conflict, but failed to abide by this Court’s precedents, and diminished prison officials’ ability to manage their institutions.

A. The Courts of Appeals Are Deeply Divided On The Issue.

The Eleventh Circuit's decision creates a 4-2 split on whether opening inmates' legal mail outside their presence violates their free speech rights. The Eleventh Circuit decision directly conflicts with a materially indistinguishable Fifth Circuit decision. In *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), the Fifth Circuit held that prison officials did not violate an inmate's right to access-to-courts or his rights under the First Amendment when the prison officials opened – but did not read – the inmate's legal mail outside of his presence. In overturning its decisions in *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976), and *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978), the court found that where the inmate did not “allege that [his] mail has been censored,” the violation of the legal mail policy did not state a cognizable constitutional claim. *Brewer*, 3 F.3d at 825. The Fifth Circuit specifically relied upon this Court's reasoning in *Turner v. Safely* and acknowledged that while prisoners have a right to receive mail, that right did not extend freedom from inspection. *Id.*

The Seventh Circuit reached the same conclusion in an unpublished decision. In *Lewis v. Cook County Bd. of Commissioners*, 6 Fed. Appx. 428 (7th Cir. 2001), the court found that where prison officials opened an inmate's legal mail outside of his presence his First Amendment rights were not violated. Specifically the Court found that, although the inmate claimed that the opening of his legal mail had a

“chilling effect” on his speech, absent either an allegation of a content-based prison practice or an allegation that the legal mail was lost or delayed, he failed to state a valid claim under the First Amendment. *Id.* at 430. *See also Vasquez v. Raemisch*, 480 F. Supp. 2d 1120 (D. WI 2007) (attorney-client privilege is not a constitutional right and thus opening of legal mail does not amount to a constitutional violation subject to the *Turner v. Safley* reasonableness analysis).

In contrast, the Second, Third, Sixth, and Eleventh Circuits have held that prisoners have a First Amendment right to have their legal mail opened in their presence. In *Davis v. Goord*, 320 F.3d 346 (2nd Cir. 2003), the Second Circuit held that the opening of an inmate’s legal mail outside of his presence implicates both his right to access to the courts and his right to free speech. In doing so, the Court limited its holding by noting that “an isolated incident” would not support a claim. *Id.* at 351.

Likewise, in *Jones v. Brown*, 461 F.3d 353 (3rd Cir. 2006), the Third Circuit determined that the Department policy requiring that mail be opened off site to avoid potential contamination from anthrax was an unconstitutional infringement of the inmates’ First Amendment rights. In so finding, the court found that the prison failed to show any evidence of a connection between the mail policy and the threat of an anthrax attack on New Jersey’s prisons. *Id.* at 364. *See also Bieregu v. Reno*, 59 F.3d 1445 (3rd Cir. 1995). And in *Muhammad v. Pitcher*, 35 F.3d 1081 (6th Cir. 1994), the Sixth Circuit held that a policy of opening

legal mail from the Office of the Attorney General outside his presence constituted a violation of the inmate's right to free speech. The court reasoned that, even though there was no privileged communication in the opened letters, the inmate's First Amendment rights were violated because of the potential chilling effect on the inmate's free speech. *Id.* at 1083; *see also Powell v. Kelley*, 782 F.2d 1043 (6th Cir. 1985).

Only this Court can resolve the circuit split and ensure that constitutional limits on prison officials' authority are uniform throughout the country. There is no reason to believe that the conflict will disappear. The Court's decisions in *Lewis v. Casey* and (as discussed below) *Shaw v. Murphy*, 532 U.S. 223 (2001), should have led the lower courts to agree with the Fifth Circuit. Instead, the conflict is only increasing as courts such as the Eleventh Circuit continue to hamstring prison officials unnecessarily.

B. The Eleventh Circuit's Decision Conflicts With Decisions of This Court.

In reaching its decision the Eleventh Circuit relied on precedent that predated this Court's decisions in *Turner v. Safley*, 482 U.S. 78 (1987), and *Shaw v. Murphy*, 532 U.S. 223 (2001). It is undisputed that prison officials may open prisoners' mail outside of their presence to inspect for contraband. *Id.* This Court in *Shaw* rejected the idea that district courts can carve out content-based exceptions in applying the *Turner* test, and specifically rejected

carving out an exception for legal advice (there, provided from one inmate to another). The Court held that courts are not “permitted to enhance constitutional protection based on their assessments of the content of particular communications” and that the “*Turner* test, by its terms, simply does not accommodate valuations of content.” *Shaw*, 532 U.S. at 228. The decision of the Eleventh Circuit conflicts with this holding by awarding “enhance[d] constitutional protection” based on the presumed legal content of the mail.

In addition, the Eleventh Circuit’s decision allows prisoners to avoid the “actual injury” limitation outlined in *Casey* by simply reclassifying the claim as one under the First Amendment. The Court found that the opening of Al-Amin’s legal mail “chilled” his speech. The court made no finding that the “chilled” speech would have related to a particular case or that Al-Amin was otherwise unable to communicate with his counsel. To the contrary, the Court specifically acknowledged that the evidence provided by Al-Amin did not show an injury to “specific cases or claims being pursued, nor any deadlines missed.” Courts have consistently held that mail can be opened and searched. The alleged “injury” of chilled speech exists as to all mail, not just legal mail; absent evidence (not alleged here) that the right to counsel or access to the courts has been impeded, there is basis in the Constitution to treat legal mail any differently than regular mail.

Finally, even assuming that the “chilling of speech” in this context amounts to a constitutional violation, it is the reading of mail not the opening of the mail that creates the chilling effect. The Eleventh Circuit’s ruling imposes, as a constitutional requirement, a prophylactic measure designed to avoid that effect. Even in the criminal context where the accused is clearly entitled to greater protection, the failure to provide prophylactic protection, such as *Miranda* warnings, does not in and of itself amount to a constitutional claim. See *United States v. Patane*, 542 U.S. 630, 641 (2004). The claim from the failure to provide a prophylactic measure arises only when the constitutional violation occurs, not from the failure to properly administer the protection. Since Al-Amin and other inmates suffer from no actual harm from the simple opening of their legal mail, they do not state a valid claim absent some prejudice to an existing constitutional right such as the right to counsel or access to the courts. In finding to the contrary, the Eleventh Circuit improperly created a new constitutional right without the requisite showing of injury.

C. The Eleventh Circuit’s Decision Impedes The Safe and Secure Operation of Prisons.

Neither the Eleventh Circuit decision nor Al-Amin suggests that a prison does not have a right to open and search non-legal mail outside of the inmate’s presence. Rather, the court adopted the premise that there is a right to have legal mail treated

differently. Once the Court accepted that there were valid security reasons to search mail, the inquiry should have stopped there. The question is not, "Is it better to search legal mail in the presence of the inmate," but rather is it constitutionally required to treat legal mail differently than other mail outside of the context of the Sixth Amendment and the right to access to the Courts. Since there is no such constitutional right, the test for mail should be equally applied.

The distinction drawn by the Eleventh Circuit is based upon the unrealistic belief that mail that appears to be from an attorney is somehow less likely to be forged or contain contraband and thus requires a different application of the *Turner* analysis. First, in this era of computer graphics, color copiers and printers, the ingenuity of those seeking to circumvent prison mail procedures should not be underestimated. Moreover, just because an item is marked as legal mail and is arguably from a legitimate source does not necessarily mean that it is devoid of contraband. See *United States v. Young*, 146 Fed. Appx. 824 (6th Cir. 2005) (inmates planned to smuggle hacksaw blade into institution under guise of legal mail); *Felton v. Lincoln*, 429 F. Supp. 2d 226 (D. Mass. 2006) (inmate bragged that he had fraudulently communicated with friends who sent letters in phony attorney envelopes); *Harper v. Beard*, 2:05CV01803, 2007 U.S. Dist. LEXIS 55044 (D. Pa. April 23, 2007) (noting that escape attempt was facilitated through use of mail marked as legal mail). To presume that every letter

that appears to be from a lawyer warrants constitutional protection beyond that applied to other mail expands the protections afforded by the Constitution and in doing so jeopardizes the safety of the prisons.

II. THE ELEVENTH CIRCUIT DECISION IS CONTRARY TO THIS COURT'S QUALIFIED IMMUNITY PRECEDENT

The lower court's decision is contrary to this Court's qualified immunity precedent. The Eleventh Circuit found that the law was clearly established despite the existence of intervening Supreme Court precedent that overrules or diminishes the circuit court authorities that purportedly "clearly established" the law. In addition, the Eleventh Circuit mistakenly held that the law regarding a specific constitutional right, in this case an inmate's right to access-to-courts, can "clearly establish" the law of a separate and distinct constitutional right, in this case the First Amendment right to free speech.

In so holding, the Eleventh Circuit reasoned as follows: "[O]ur precedent . . . clearly establishes that a prison official violates an inmate's constitutional rights when the official opens attorney mail outside the inmate's presence. *See Taylor*, 522 F.2d at 462; *Guajardo*, 580 F.2d at 748. Thus, we conclude that defendants had fair and clear notice that opening Al-Amin's attorney mail outside his presence was unlawful and violated the Constitution." Slip Op. 37. It does not matter, held the Eleventh Circuit, that *Taylor* and

Guajardo involved access-to-court claims, while Al-Amin's only surviving claim is based on the Free Speech Clause. The court stated, "We have never required that, in order for an official to know his conduct is unlawful, a reasonable official must be able to cite by chapter and verse all of the constitutional bases that make his conduct unlawful." Slip Op. 37.

That reasoning misreads *Lewis v. Casey*, wrongly conflates access-to-court claims and free speech claims, ignores the Fifth Circuit's rejection of *Taylor* and *Guajardo*, and dilutes the fair notice requirement. Prior to the Eleventh Circuit's decision, the law in the Eleventh Circuit did *not* clearly establish that prison officials violate the Free Speech Clause when they open a prisoner's legal mail outside his presence. The Eleventh Circuit's holding to the contrary over-deters prison officials and merits this Court's review.

A. The Opinion Below Misreads *Lewis v. Casey*.

The Eleventh Circuit's reasoning is premised on the notion that petitioners did, in fact, violate Al-Amin's clearly established constitutional right of access-to-courts. In the Court of Appeals' view, Al-Amin may lack standing under *Lewis v. Casey* to assert that constitutional violation, but this does not negate the fact that petitioners had "fair warning" . . . that that their precise conduct (opening an inmate's attorney mail outside his presence) is unlawful and a constitutional violation." Slip Op. 36. That

reasoning fundamentally misconstrues the holding of *Lewis v. Casey*.

In *Casey*, this Court clarified that the right protected by the access-to-courts doctrine is not “the right to a law library or to legal assistance,” but rather is the “right of *access to the courts*.” 518 U.S. at 350 (emphasis in original). A prisoner who cannot show that prison officials “hindered his efforts to pursue a legal claim,” *Id.* at 351, has failed to establish an essential element of his access-to-courts claim. *Casey* thereby instructed prison officials throughout the country that they do *not* violate the Constitution when they impede access to legal assistance in a manner that does not “hinder[.]” a prisoner’s “efforts to pursue a legal claim.” It follows that petitioners were *not* given “fair notice” that their practice of opening Al-Amin’s legal mail outside his presence – which undisputedly did not impede his access-to-courts – violated the Constitution.

To be sure, the Court in *Casey* described the “actual injury” requirement as being related to the standing doctrine. *See id.* at 349. Any assessment of that requirement, however, required a precise definition of the right in question. As the Court observed, if “the right at issue – the right to which the actual or threatened harm must pertain – were the right to a law library or to legal assistance,” a mere claim that the prison law library was inadequate would state a claim. *Id.* at 350. But, as noted, the Court held that “the right at issue” was far narrower and requires a showing that prison officials were blocking a prisoner’s “efforts to

pursue a legal claim.” When prison officials do not “hinder[]” a prisoner’s “efforts to pursue a legal claim,” they do not violate the constitutional right of access-to-courts. It is undisputed that Al-Amin has not made that showing here. The Eleventh Circuit was therefore wide of the mark when it concluded that, even though petitioners did not violate Al-Amin’s right to access-to-courts, they had “fair warning” that opening Al-Amin’s legal mail outside his presence somehow still violated the Constitution.

B. The Law Regarding Al-Amin’s Free Speech Rights Was Not Clearly Established.

1. The Eleventh Circuit’s next erroneous leap of logic was to assume that, because (in the court’s view) *Taylor* and *Guajardo* clearly established that petitioners’ conduct violated Al-Amin’s right of access-to-courts, it necessarily follows that they had clear notice their actions violated Al-Amin’s free speech rights. That reasoning incorrectly assumes that prisoners’ right of access-to-courts is coterminous with their free speech right. In fact, many access-to-court claims do not state First Amendment claims and *vice versa*. Clear notice concerning the access-to-court doctrine (even were that present here) does not provide clear notice of what conduct violates prisoners’ First Amendment rights.

At its most basic, the right to access guarantees meaningful access to the courts. *Bounds v. Smith*, 430

U.S. 817, 823 (1997). As clarified in *Casey*, it is the right to bring a grievance to court. *Casey*, 518 U.S. at 354. The right is not unlimited, and extends only to providing the tools needed for inmates to attack their sentences and challenge their conditions of confinement. *Id.* at 355. *Casey* recognized that all “other litigating capacity” is incidental to the consequences of conviction and incarceration. *Id.* Thus, as it relates to prison officials, the right to access-to-courts protects only against interference with inmates’ attempts to prepare and file legal documents. *Id.* at 350.

The contours of inmates’ right to free speech are very different. Inmates retain only those free speech rights that are “not inconsistent with [their] status as prisoner[s] or with the legitimate penological objectives of the corrections system.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Inmates’ speech may be curbed if the restriction is related to a legitimate penological objective. *Turner*, 482 U.S. at 89. *Turner’s* fact-based four-part test is used to determine reasonableness, and looks to the relationships between restriction, the governmental interest, the right being exercised, the impact on the allocation of prison resources, and the existence of alternative. *Id.* at 89-90.

Thus, there are substantial differences between the standards that govern these separate and distinct constitutional rights. The analysis for the right to access-to-courts looks to the narrow issue of whether there is interference with attempts to prepare and file legal documents, while the free speech analysis engages in the highly-fact-intensive *Turner* balancing

test that incorporates several different factors. Given these differences, reasonable prison officials would not know that a violation of the access-to-courts doctrine necessarily means a violation of free speech.

2. The Fifth Circuit's ruling in *Brewer v. Wilkinson* further undermines the Eleventh Circuit's conclusion that petitioners were on "fair notice" that their opening of Al-Amin's mail violated the First Amendment. As discussed earlier, in *Brewer* the Fifth Circuit concluded that *Turner v. Safley* undermined its earlier rulings in *Taylor* and *Guajardo*. *Brewer*, 3 F.3d at 823-24. The Fifth Circuit therefore overruled *Taylor* and *Guajardo*, and held that neither the right of access-to-courts nor the First Amendment is violated when prison officials open prisoners' legal mail outside their presence. *Id.*

Prison officials in the Eleventh Circuit surveying the legal landscape between 2003 and 2005 would have had good reason to believe that *Taylor* and *Guajardo* no longer controlled. As even the Eleventh Circuit recognized here, *Lewis v. Casey* undercut those cases' access-to-courts holdings. And the other circuit covered by *Taylor* and *Guajardo* repudiated those decisions. The state of the law with respect to where prisoners' legal mail may be opened was anything but clear.

In this case the Eleventh Circuit relied on case law that has been called into serious doubt as a result of intervening Supreme Court case law. As a result, prison officials could not possibly have been put on

notice that their conduct was unconstitutional. Nor could prison officials have had notice that case law discussing inmates' constitutional rights to access-to-courts clearly established inmates' constitutional rights to free speech. The decision of the lower court puts the law in flux. Prison officials will be hesitant to act in any situation for fear that their conduct may later be found to violate an as yet undefined constitutional right. Such a finding conflicts with the basic purpose of qualified immunity. As stated by this Court, "officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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