No. 09-504

IN THE
Supreme Court of the United States

DAVID PAUL HAMMER, PETITIONER,

v.

JOHN D. ASHCROFT, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TWENTY-THREE NEWS MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND REGULATIONS

OTHER

Blank Page

STATEMENT OF INTEREST[1]

Amici curiae, described in Appendix A, are twenty-four of the nation's leading news media organizations — The Reporters Committee for Freedom of the Press, Advance Publications, Inc., The American Society of News Editors, The Association of American Publishers, Inc., The Citizen Media Law Project, Community Newspaper Holdings, Inc., Cox Media Group, Inc., The E.W. Scripps Company, The First Amendment Coalition, The Foundation for National Progress, Gannett Co., Inc., The Hoosier State Press Association, The Hoosier State Press Association Foundation, The Human Rights Defense Center, MediaNews Group, National Press Photographers Association, The New York Times Company, Newspaper Association of America, The Newspaper Guild – CWA, The Radio-Television Digital News Association, The Society of Professional Journalists, Stephens Media LLC, Tribune Company, and The Washington Post.

This case concerns an issue critical to the press and the public in general: whether the federal government may prohibit death row inmates from talking to the press about the abuse, mistreatment, and

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[1] Pursuant to Sup. Ct. R. 37, counsel for the *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk.

actions of other inmates; whether it may prohibit all in-person interviews with death row inmates; and whether these draconian restrictions may be valid even where the officials responsible for the rules admitted they were motivated by a desire to keep disfavored viewpoints from reaching the public.

SUMMARY OF ARGUMENT

David Hammer, like other men on the federal government's death row, was prohibited from speaking in person with the press. He also was prohibited from discussing any other inmate whether in person, by phone, or by letter. *Amici* urge the Court to accept this case and make clear that the Constitution does not allow prison rules that provide inmates no means of uncensored communication with the press — especially rules enacted with the *express purpose* of suppressing distasteful viewpoints.

Prohibitions on inmate interviews imperil vital communication. Through interviews with inmates, journalists regularly expose prison rape and other abuse, document poor conditions and unhealthy environments in the nation's prisons and jails, allow the public to monitor how its tax dollars are spent within prisons, and spur reforms across the country. *See* infra, Section I.

Recognizing the importance of the First Amendment even in the prison context, this Court in *Turner v. Safley* ruled that prisoner speech can be curtailed only when a regulation "is reasonably related to legitimate penological interests." 482 U.S. 78, 89 (1987). Among other factors, the test considers whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it," and whether "alternative means of exercising" First Amendment rights "remain open to prison inmates." *Id.* at 89-91. This Court repeatedly has made clear that the *Turner* factors are "the basic substantive legal standards" for judging regulations like the ones

at issue here. *Beard v. Banks*, 548 U.S. 521, 528-29 (2006).

But the *en banc* majority below did not even purport to apply the *Turner* test, relying instead on earlier cases.[2] As a result, the court approved restrictions that prevented death row inmates from having *any* uncensored contact with the news media. The Special Confinement Unit (SCU) Media Policy, as enforced, prohibited Hammer from speaking by *any means* about the treatment, conditions, and activities of other prisoners. Hammer produced evidence that this was the case, and requested the opportunity to develop more via discovery. But the case was dismissed before he could do so. *See* infra, Section II.

Moreover, the *en banc* court ratified rules that are unrelated to penological interests. Indeed, there was not even a pretext of penological concern until after the rules were implemented. The Attorney General who ordered the rules announced, at a press conference, that his interest was in preventing the public from hearing the distasteful viewpoints of federal death row prisoners. *See* infra, Section III.

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[2] For example, the *en banc* opinion begins by noting that reporters "have no constitutional right of access to prisons or their inmates beyond that afforded to the general public." App. 1a (quoting *Pell v. Procunier*, 417 U.S. 817, 834 (1974)). This misses the point. *Pell* dealt with the rights of reporters to gain access to prisons. This case, like *Turner*, deals with the related but analytically distinct right of an *inmate* to speak with the press.

Amici do not dispute that incarceration necessitates some limits on inmate rights and privileges. At the same time, however, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. This is *especially* important in the death row context, because journalists generally cannot learn about prison conditions from former death row inmates. The Court should accept this case and make clear that restrictions on prisoner speech must leave open some means of uncensored communication with the news media, and they must be motivated by penological, rather than merely political, interests.

ARGUMENT

I. The decision below imperils valuable communication between inmates and the press.

Inmate interviews are valuable for exposing abuse, documenting poor conditions and waste in prisons, and promoting social reform and fiscal responsibility. In recent decades, prisoner interviews and correspondence have allowed the press to report about prison rape, prison violence, and the treatment of vulnerable inmates.[3]

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[3] *Amici* do not "confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment." *See Houchins v. KQED*, 438 U.S. 1, 13 (1978). But these examples show that the decision below is especially important to correct because its effects stretch far beyond Hammer and similarly-situated inmates, to affect the public's understanding of the penal system.

All of this is possible because reporters and authors were able to interview inmates without government censorship. But the decision below permitted blanket restrictions on the speech of death row inmates. And the court's reasoning is so broad that it would seem to give prison officials the discretion to curtail *any* inmate's speech whenever a court can "imagine" a legitimate reason for the restrictions (*See* App. 5a).[4]

A. Inmate interviews expose abuse and spur prison reform.

Communications between prisoners and the press, including discussions about other inmates, have long played a valuable role in exposing inhumane conditions and abuse in the country's prisons and jails.

For example, *The Washington Post* published a Pulitzer Prize-winning investigative series on inmate rape in 1982. The series told a litany of stories about men detained at a Maryland jail — many later acquitted — whose reports of rape were ignored by corrections officials. The piece included the story of

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[4] The First Amendment rights of pretrial detainees and those of post-conviction prisoners are analytically distinct. *See, e.g., Procunier v. Navarette*, 434 U.S. 555, 564 & n.11 (1978). *Amici* discuss examples involving both because the public interest in speaking with both detainees and prisoners, in both the state and federal systems, is similar. Indeed, there is a *stronger* interest in interviewing death row inmates, who presumably will never return to society, than those held at facilities former inmates of which can be interviewed after they leave.

Ronald Fridge, an 18-year-old waiter who was briefly jailed after a verbal dispute with his landlady over rent. Fridge told reporters that another inmate raped and assaulted him while he was awaiting trial. He said he complained to corrections officials after the first rape but was left in a cell with the aggressor for two days, during which time he was raped "again and again." Another inmate interviewed by a reporter said he helped the alleged aggressor rape Fridge.[5] The story provided a unique window into a dysfunctional jail, and it had two important effects: three months after the story ran, the paper reported that conditions had improved at the detention facility due to new safety measures enacted in response to the exposé.[6] And the next month, a grand jury indicted seven men implicated in sexual assaults uncovered in the inmate interviews.[7]

Nor is this example unique. In 1994, the Massachusetts Department of Corrections launched an effort to curb prison rape after a *Boston Globe* series focused on inmates who told reporters they were sexually assaulted — and, in at least one case, in-

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[5] Loretta Tofani, *Terror Behind Bars: Most Victims of the Sexual Attacks are Legally Innocent*, THE WASHINGTON POST, Sept. 26, 1982, at A1.

[6] Loretta Tofani, *Improved Conditions Reduce Assaults in P.G. Jail*, THE WASHINGTON POST, Dec. 31, 1982, at B1.

[7] Loretta Tofani and Tom Vesey, *Seven Are Indicted in Sexual Assaults at Prince George's Jail*, THE WASHINGTON POST, Jan. 14, 1983, at A1.

fected with HIV — behind bars.[8] Five months later, the state prosecuted its first-ever prison rape case.[9] In another case, a Florida death-row inmate alerted a newspaper about beatings that later resulted in an inmate's death, imploring that someone "get the Feds in here ... to stop this before someone gets killed."[10]

B. Inmate interviews provide unique insight into prison conditions.

Aside from coverage of rape and other violence against inmates, media interviews have exposed unhealthy conditions and prisons' failures to provide medical assistance to inmates. For example, a 2007 *Boston Globe* series on prison conditions for the mentally ill incarcerated in Massachusetts examined the soaring number of inmate suicides in the state dur-

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[8] Charles M. Sennott, *Prison system enacts reforms to stop inmate rape*, THE BOSTON GLOBE, Nov. 9, 1994, at B1; *see* Charles M. Sennott, *Prison's hidden horror: Rape Behind Bars*, THE BOSTON GLOBE, May 1, 1994, at B1, Charles M. Sennott, *AIDS adds a fatal factor to prison assault: Rape Behind Bars*, THE BOSTON GLOBE, May 2, 1994, at B1.

[9] Charles M. Sennott, *Prison system enacts reforms to stop inmate rape*, THE BOSTON GLOBE, Nov. 9, 1994, at B1.

[10] Meg Laughlin, *Inmate Letter Warned of Beatings*, THE MIAMI HERALD, July 27, 1999, at A1; *see also* Beth Kassab, *5 Guards Go Free in Killing: Charges will be dropped in the fatal beating death of death-row inmate Frank Valdes*, ORLANDO SENTINEL, May 11, 2002, at A1; Noah Bierman and John Pacenti, *State drops effort to try guards for inmate's death*, THE PALM BEACH POST, May 11, 2002, at 1A; Rich Rucker, *Prisons work to cut inmate abuse*, FLORIDA TIMES-UNION, Nov. 17, 2001, at B1.

ing a two-year period.[11] A special investigative team interviewed a 28-year-old mentally-ill inmate who twice had attempted suicide and described the horrors of solitary confinement that had driven him to the brink and other inmates over the edge.[12] In the wake of the series, state lawmakers called for swift action to change the state's treatment of the mentally ill behind bars.[13]

Similarly, the *Chicago Tribune* profiled a former death row inmate who developed paranoid schizophrenia while on death row.[14] A 2008 book for young adult readers featured interviews with death row inmates sentenced for crimes they committed when they, too, were teenagers.[15] And the *Denver Westword News*'s correspondence with inmate Troy Anderson prompted a news report that the inmate had been seeking evaluations for medications for two

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[11] Beth Healy, *Breakdown: The Prison Suicide Crisis; A system strains, and inmates die*, THE BOSTON GLOBE, Dec. 9, 2007, at A1.

[12] Jonathan Saltzman and Thomas Farragher, *Breakdown: The Prison Suicide Crisis; Guards, inmates a volatile dynamic*, THE BOSTON GLOBE, Dec. 11, 2007, at A1.

[13] Michael Rezendes and Thomas Farragher, *Patrick aide spurns prison policy change; Rejects call to ban solitary confinement for the mentally ill*, THE BOSTON GLOBE, Dec. 12, 2007, at B1.

[14] Barbara Brotman, *Hard Time: Killer Says Prison Caused the Mental Illness That's Now Keeping Him There*, CHICAGO TRIBUNE, Dec. 1, 1991, at 1.

[15] Susan Kuklin, NO CHOIRBOY: MURDER, VIOLENCE, AND TEENAGERS ON DEATH ROW (2008).

years and was told he would not be released from solitary confinement without them. Days after the alternative weekly newspaper inquired about the delay, Anderson saw a psychiatrist.[16]

Journalists' communications with immigrants detained in federal facilities also have helped shed light on the post-Sept. 11, 2001 operation of immigration detention centers. This included, for example, stories about an Ivory Coast pilot held as a material witness in a hijacking probe for four months before being interviewed,[17] and a U.S. resident fighting deportation who reported being unable to get proper care for tumors and other medical problems in an Arizona prison.[18]

C. Inmate interviews help citizens monitor how their tax dollars are spent.

Inmate health and safety aside, prisons and jails represent a massive public investment. Interviews

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[16] Alan Prendergast, *Head Games*, DENVER WESTWORD NEWS, September 21, 2006, *available at* www.westword.com/2006-09-21/news/head-games.

[17] *See* Amy Goldstein, *'I Want to Go Home'; Detainee Tony Oulai Awaits End of 4-Month Legal Limbo*, THE WASHINGTON POST, Jan. 26, 2002, at A1; Amy Goldstein, *A Sept. 11 Detainee's Long Path to Release; After Final Glitch, Ivory Coast Native is Home*, THE WASHINGTON POST, Nov. 12, 2002, at A3.

[18] *See* Amy Goldstein and Dana Priest, *In Custody, In Pain; Beset by Medical Problems as She Fights Deportation, a U.S. Resident Struggles to Get the Treatment She Needs*, THE WASHINGTON POST, May 12, 2008, at A1.

with inmates provide one way for the public to monitor how its money is being spent.

Today, only Medicaid costs are growing faster than criminal corrections spending, which outpaces state budget growth in education, transportation, and public assistance.[19] Correctional facilities cost states $47 billion in 2008, according to a Pew Center of the States Report that revealed that one in thirty-one adults, or 7.3 million Americans, are either in prison, on parole, or on probation. The Pew report found that fifteen states now spend more than $1 billion of their annual budgets on their correctional systems. Michigan, for example, dedicates 22% of its general fund spending to its correctional systems.

Press interviews with inmates have long helped the public keep an eye on these essential, but very expensive, public institutions. In North Carolina, for example, journalists who interviewed an inmate discovered that a prison doctor who was earning $110,000 for full-time employment actually spent less than two hours a day in the facility. After the report, a class action suit against the doctor emerged, the doctor resigned, and officials stepped up plans to expand medical facilities for prisoners.[20]

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[19] *One in 31: The Long Reach of American Corrections*, THE PEW CENTER ON THE STATES, March 2, 2009, *available at* http://www.pewcenteronthestates.org/report_detail.aspx?id=49382.

[20] Gloria Romero, *Access Needed to Report on Prison Conditions*, THE DAILY NEWS OF LOS ANGELES, April 29, 2004, at N17.

II. The court below erred in approving a policy that allows no method of uncensored communication with the press.

Despite the value of prisoner interviews, the SCU Media Policy limits "all avenues of communication" between prisoners and the press, providing what Judge Wood called "an all-too-effective way to prevent the public from ever learning about" prisoner abuse or unhealthy conditions. (App. 28a). The Policy, by forbidding one inmate from discussing another inmate under any circumstances and regardless of the medium, eviscerates prisoners' First Amendment rights and undermines the public's access to a unique and important source of information about prisons.

The First Amendment demands more. This Court repeatedly has suggested that abridgements of inmates' First Amendment rights are tolerated if, and only if, alternative means of communication with the press and other members of the public are available. The lack of *any* free channel of communication between journalists and inmates is contrary to established jurisprudence regarding prisoners' rights and this Court's recognition that the conditions in U.S. prisons are a matter that is both newsworthy and of great public importance. *See Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974).

A. Previous limits on inmate speech allowed some means of uncensored communication.

Prisoners retain constitutional rights even while incarcerated, including free speech rights and the

First Amendment right to petition the government for a redress of grievances. *Turner*, 482 U.S. at 84 (citing *Johnson v. Avery*, 393 U.S. 483 (1969)). These rights may be regulated as a consequence of incarceration, but only if "there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90.

The Court explained in *Procunier v. Martinez* that the interest of "prisoners and their correspondents in uncensored communication ... grounded as it is in the First Amendment, is ... protected from arbitrary governmental invasion." 416 U.S. 396, 417-18 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989) (citations omitted). In addition to the speech interests at stake, contact with the press is one essential method of petitioning the government. Indeed, media coverage not only describes the criminal legal process, but also "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *see also Nolan v. Fitzpatrick,* 451 F.2d 545, 547 (1st Cir. 1971) (recognizing a constitutional "right to send letters to the press concerning prison matters" and adding that "[t]he argument that the prisoner has the right to communicate his grievances to the press and, through the press, to the public is thus buttressed by the invisibility of prisons to the press and the public: the prisoners' right to speak is enhanced by the right of the public to hear").

When this Court has approved restrictions on prisoner speech, it has done so in part because the restrictions were narrow enough to allow alternative, unfettered means of expression. Thus, in *Saxbe*, the

Court allowed a policy barring face-to-face communication in part because the policy allowed unlimited, uncensored outgoing correspondence with journalists, and prison authorities were required to "give all possible assistance" to press representatives "in providing background and a specific report" concerning any inmate complaints. *Saxbe v. Washington Post Co.*, 417 U.S. 847-48 (1974). In *Pell*, the Court noted that prison officials should be accorded deference with regard to regulating "the entry of people into the prisons for face-to-face communication with inmates." *Pell*, 417 U.S. at 826. But this was only the case "[s]o long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved" in the policy. *Id.* Thus, the *Pell* Court approved restrictions on in-person interviews in part because "it is clear that the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison, including representatives of the news media." *Id.* at 824. Both cases thus held that "[d]enying media access to conduct face-to-face interviews with inmates is constitutional *as long as* alternative means for communicating with the media are available." *Johnson v. Stephan*, 6 F.3d 691, 692 (10th Cir. 1993) (emphasis added).

B. The Media Policy, as enforced, allows death row prisoners no unfettered communication with the press.

The *en banc* majority recognized this Court's admonition that regulations on prisoner speech should include some manner of unfettered communication with the press. "A system of rules that permitted

prison administrators to conceal beatings or starvation of prisoners, violations of statutes and regulations, and other misconduct would be intolerable," it conceded. (App. 13a). "The Court said as much in *Pell* and [*Saxbe*]. It was important to both decisions that all prisoners could correspond freely with reporters, even though face-to-face interviews were impossible." (*Id.*).

The court below nevertheless approved the SCU Media Policy's interview restriction, in part because it assumed that written correspondence provided an inmate with a reasonable alternative means of communication. "As far as we can tell," the *en banc* majority found, the prohibition on speaking about other inmates "applies to interviews (in person or by telephone) but not to correspondence." (App. 13a). The majority assumed that "an inmate's letters to reporters are not subject to inspection or censorship" and concluded that if "another inmate is beaten and unable to talk, Hammer remains free to send a letter informing a reporter about that event. *Pell* and [*Saxbe*] held that free correspondence supplies the needed channel of communication." (App. 2a, 14a-15a).

But the record reflects a different reality, Judge Rovner noted, in which "an inmate could be disciplined for informing the media — whether on the phone or by letter — that another inmate is being abused by a guard." (App. 20a). Contrary to the majority's assumptions, the government *conceded* that "death-row inmates are not allowed — through any method of communication — to discuss other inmates with members of the media." (App. 19a-20a). It also conceded that "all mail sent by inmates at the Spe-

cial Confinement Unit must be given to prison officials unsealed for inspection before it is mailed." (App. 20a). And "[w]hen asked what would be the consequence to an inmate who sends a letter discussing another inmate, counsel for the government had no answer." (*Id.*). Indeed, the record reveals that Warden Harley Lappin told Hammer that: "You are hereby ordered not to provide any information concerning other inmates during news media interviews, social calls, or correspondence with the media." (App. 25a). At one point, prison officials even "disciplined Hammer for providing information about a fellow death row inmate to a reporter." (App. 33a).

Hammer was not permitted discovery in order to fully develop the record — rather than respond to his discovery requests, the government sought, and received, summary judgment in its favor. (App. 36a); *cf. Prison Legal News v. Cook*, 238 F.3d 1145, 1150 (9th Cir. 2001) ("When the inmate presents sufficient ... evidence that refutes a common-sense connection between a legitimate objective and a prison regulation, ... the state must present enough counter-evidence to show that the connection is not so remote as to render the policy arbitrary or irrational") (internal citations omitted). On the anemic and fuzzy record that did exist, Judge Wood noted, the court was left to guess "whether there is any satisfactory alternative for inmates at the Special Confinement Unit to give the media any information that involves other inmates." (App. 20a). The majority simply assumed that, "[a]s far as we can tell," inmates were able to send uncensored mail to journalists. (App. 13a).

And this is no small assumption. "Without the linchpin provided by its assumption that correspon-

dence is free," Judge Wood argued, "the majority's rationale collapses." (App. 20a). At the very least, Hammer deserves the opportunity to prove his claim that the Policy, as enforced, left him with no means of unfettered communication with the media.

III. Public oversight of prisons will suffer if this decision, allowing the content-based suppression of speech, stands.

The primary test of whether a regulation on inmate speech is permissible is whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (internal quotation omitted).

To meet this test, "the governmental objective must be a legitimate and neutral one. We have found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression." *Id.* at 89-90 (citing *Pell*, 417 U.S. at 828; *Bell v. Wolfish*, 441 U.S. 520, 551 (1979)). Moreover, "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. These considerations are "[f]irst and foremost" among the *Turner* factors — if "the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor." *Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001).

Other circuits have interpreted *Turner* as requiring that "prison officials actually had, *not just could have had*, a legitimate reason for burdening protected activity." *Salahuddin v. Goord*, 467 F.3d 263, 277 (2nd Cir. 2006) (emphasis added); *see also Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) ("Prison officials are not entitled to the deference described in *Turner* ... if their actions are not actually motivated by legitimate penological interests *at the time they act.*") (emphasis added). Because "deference does not mean abdication," *Turner* requires authorities to "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. An evidentiary showing is required as to each point." *Walker v. Sumner*, 917 F.2d 382, 385-87 (9th Cir. 1990); *see also Swift v. Lewis*, 901 F.2d 730, 731 (9th Cir. 1990), *superseded by statute on other grounds* (reversing summary judgment grant where officials failed to show "that the interests they have asserted are the actual bases for their grooming policy"); *Kimberlin v. Quinlan*, 199 F.3d 496, 502 (D.C. Cir. 1999) ("even if appellants provide an objectively valid reason for their actions in this case, the District Court must still inquire into whether there is a disputed issue of fact as to whether appellants were actually motivated by an illegitimate purpose").

Thus, *Turner* upheld a restriction on correspondence because there was testimony that the restriction "was promulgated primarily for security reasons" and "[p]rison officials testified that mail between institutions can be used to communicate escape plans and to arrange assaults and other violent

acts." *Turner*, 482 U.S. at 91. Conversely, the Third Circuit ordered a district court to enjoin a prison policy because prison authorities investigated an inmate "under public pressure to do so, and because of the content of [his] writing." *Abu-Jamal v. Price*, 154 F.3d 128, 134 (3rd Cir. 1998); *see also Kimberlin*, 199 F.3d at 503 (citing lower court finding that "no reasonable prison official could believe that interfering with an inmate's access to the press because of the content of the inmate's speech could be lawful").

The court below rejected this reading of *Turner*, finding it irrelevant whether the government's asserted interest was pretextual and rejecting the idea that "one bad motive would spoil a rule that is adequately supported by good reasons." (App. 10a). "The Supreme Court did not search for 'pretext' in *Turner*; it asked instead whether a rule is rationally related to a legitimate goal. That's an objective inquiry," the court ruled. (App. 10a). This reading eviscerates *Turner*. It also creates a split with the Second, Third, Eighth Ninth, and District of Columbia circuits with regard to an important federal question. *See* Sup. Ct. R. 10(a).

A. The record shows the rules were an attempt to keep the viewpoints of death row inmates from the public.

There is no evidence in the record, beyond *post-hoc* assertions, suggesting that the SCU Media Policy was motivated by any penological interest. To the contrary — the record shows that the policy was motivated by political concerns over suppressing particular viewpoints rather than a concern for safety.

Federal regulations have long allowed inmates to participate in face-to-face press interviews, "not subject to auditory supervision," unless the warden determines that a specific interview would "endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution," or other specific criteria are met. 28 C.F.R. § 540.63. The SCU Media Policy creates an exception for death row inmates, flatly prohibiting in-person interviews and barring any discussion of other inmates.[21]

The Policy was created just after Timothy McVeigh appeared on the television news program *60 Minutes*. North Dakota Senator Byron L. Dorgan blasted prison officials for allowing McVeigh to speak with a television news crew. "The American people have a right to expect that the incarceration of a convicted killer will not only remove him physically from society," he said, "but will also prevent him from further intrusion in our lives through television interviews and from using those forums to advance his agenda of violence." (App. 8a). Dorgan's letter demanded that the Bureau of Prisons revise its regulations and curtail prisoner access to the media so as not to further "dishonor" crime victims. (7th Cir. JA at 175). Of course, the letter reveals Dorgan's personal distaste for the content of what an inmate said,

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[21] As Hammer notes, singling out male death row inmates also creates equal protection concerns. *See* Cert. Pet. 13 ("no other reported decision has ever upheld the constitutionality of a permanent restriction on the First Amendment rights of a subclass of prisoners, particularly a subclass identified solely based on gender and sentence") (emphasis omitted).

rather than any concern that the prisoners and employees of the SCU were being put at risk by McVeigh's comments.

Dorgan's viewpoint-based motivation was echoed by Attorney General John Ashcroft during a press conference announcing the new SCU media policy in April 2001. Standing with Bureau of Prisons Director Kathleen Hawk Sawyer, Ashcroft invoked his distaste for McVeigh's appearance on *60 Minutes* to justify the new ban. "As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium," he said. (App. 90a). "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." (*Id.*).

For these reasons, Ashcroft said, he was ordering that "[m]edia access to special confinement unit inmates will be limited to each inmate's ordinary allotment of telephone time." (*Id.*) Warden Harley Lappin formalized the ban with Institution Supplement THA-1480.05A just three days after the Attorney General's statement. (App. 9a). Ashcroft's statement made clear that his preferences about viewpoints suitable for American culture motivated the interview ban. This frank admission belies any notion that security threats, either real or potential, were at the heart of the ban.

Amici recognize the discretion this Court has granted to prison administrators to curtail in-person interviews with inmates when legitimate interests are at stake and alternatives for communication are present. *See Pell*, 417 U.S. at 822; *Saxbe*, 417 U.S. at

847. *Amici* respectfully suggest that *Pell* and *Saxbe* underestimated the importance of in-person prisoner interviews.[22] But there is no need to revisit *Pell* and *Saxbe* in order to clarify that, where such restrictions are put in place, they must legitimately be motivated by the security concerns present in those cases. The Constitution does not permit the government to cloak content-based restrictions on prisoner speech in *post-hoc* claims of security concerns. Nor does it permit regulations, like these, aimed at suppressing objectionable points of view. *See, e.g., Martinez*, 416 U.S. at 415 (invalidating regulations that "authorized, *inter alia*, censorship of statements that 'unduly complain' or 'magnify grievances,' expression of 'inflammatory political, racial, religious or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate'").

B. The government failed to justify its "jail celebrity" rationale in this context.

The court below found that the SCU Media Policy is justified by security concerns unique to death row inmates. (App. 57a). But these *post-hoc* assertions are not sufficient even under the deferential scrutiny articulated in *Turner*.

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[22] There is no wholly adequate alternative to the in-person interview. *See, e.g., Saxbe*, 417 U.S. at 854 (Powell, J., dissenting) (citing expert testimony and adding that "[o]nly in face-to-face discussion can a reporter put a question to an inmate and respond to his answer with an immediate follow-up question"). This is particularly true for broadcasters, who rely on images and recordings to tell their stories. *See Houchins v. KQED*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring in the judgment).

The court defended singling out death row prisoners based on a concern they will become "jail celebrities" if they are allowed face-to-face interviews with the press. It is common for prison officials to make similar claims in support of restrictions upon media access to inmates. *See, e.g., Pell*, 417 at 831-832. The *Saxbe* Court thus found that "inmates who are conspicuously publicized because of their repeated contacts with the press tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison." 417 U.S. at 848-849. The concern under this theory is that media interviews with this type of inmate "increase their status and influence and thus enhance their ability to persuade other prisoners to engage in disruptive behavior." *Id.* at 866 (Powell, J., dissenting).

The concerns presented in *Pell* and *Saxbe* may be reasonable in their specific factual settings, but the government produced no evidence that they apply with any special force to death row prisoners. As Judge Rovner noted, "[i]t is unclear why speaking in-person with a journalist would give an unknown death-row inmate more influence over other prisoners than would, for example, allowing Martha Stewart or George Ryan to give face-to-face interviews during their incarceration, which they would have been or are free to do under the Bureau's policies." (App. 22a).

If anything, the day-to-day conditions of life on death row make it far *less* likely that an inmate could wreak havoc with his or her perceived status as a celebrity. The isolated lives of Hammer and his fellow SCU inmates hardly present an opportunity for Hammer to use any prestige or notoriety he may re-

ceive from an in-person media interview to encourage disruptive behavior in others. Life in the SCU is tightly regulated. There are three classifications for inmates, only one of which allows any contact between inmates. (7th Cir. JA at 200). Even that allowed contact is highly regulated — only four inmates may be placed in the same recreation enclosure. (*Id.* at 206). If a prisoner needs to leave the SCU for any reason, he must be "restrained in front with full restraints, handcuffs, black box, martin chain and leg irons." (*Id.* at 200). During such an outing, the prisoner must be escorted by no fewer than three guards. (*Id.*) And, regardless of their classification, inmates are not allowed contact social visits. (*Id.* at 208).

At the very least, Hammer deserves the opportunity to take discovery on the sincerity and reasonableness of the asserted penological interest. But the government refused to answer his *pro se* discovery requests, and the court below nevertheless affirmed the defendants' motion for summary judgment and dismissed Hammer's claims. (App. 36a).

CONCLUSION

The government has imposed a broad ban on prisoner interviews, motivated by a professed desire to gag unwelcome content and disfavored viewpoints. Such a broad and ill-conceived ban infringes on Hammer's rights, but the effects go far beyond the harm to any individual prisoner.

The SCU Media Policy broadly suppresses valuable speech, and the record suggests it does so by design. As the panel decision below noted, "it can be an

easy thing for an inmate to allege that prison officials are lying about the rationale behind a prison restriction." (App. 45a). But where, as here, an inmate "back[s] up his allegations with admissible evidence from which a reasonable jury could infer that an illegitimate reason lies behind the interview ban," he deserves the opportunity to prove his case. (*Id.*).

Amici respectfully request that the Court accept review of the decision below.

Respectfully submitted,

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November 25, 2009

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