No. 09-504

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

Contrary to Respondents' assertions (Opp. 11-18), the *en banc* majority decision does not faithfully follow this Court's prior decisions; it directly conflicts with several of those decisions, most notably *Turner v. Safley*, 482 U.S. 78 (1987). The decision below also conflicts with numerous decisions from other federal appellate courts addressing inmate challenges to unconstitutional prison restrictions.

On an issue of fundamental First Amendment import, the court below substituted judicial abdication for deference. The court did not just provide a means to "weed out baseless claims before trial," as Respondents assert (Opp. 22), but effectively put all First Amendment violations in the prison context beyond redress.

Here, Mr. Hammer, a *pro se* plaintiff who was prevented from taking any discovery, nonetheless offered substantial evidence concerning Respondents' real reasons for the ban, including Attorney General Ashcroft's own explanation, made just four days before the adoption of THA-1480.05A:

> I want to restrict a mass murderer's access to the public podium. . . . 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). Neither this Court nor any other federal appellate court has previously countenanced ignoring such contemporaneous statements of administrative reasons — the hallmark of administrative justice in a democratic society. Nor has any prior decision held that First Amendment rights are adequately protected whenever prison officials — or a reviewing court — can "imagine" a possible justification for their curtailment after the fact. Indeed, such an approach is inconsistent with *Turner*'s first factor, which requires that the "governmental objective" served by such a restriction "must be a legitimate and neutral one." *Turner*, 482 at 90. Clearly, such a "legitimate and neutral" objective must be rooted in reality, not in imagination.

Respondents concede that the decision below undertakes no *Turner* analysis (Opp. 13-18) and directly conflicts with numerous federal appellate decisions. (Opp. 11, 23). Respondents also expressly admit "the possibility that in an unusual case a prison official might misrepresent the penological goal behind the challenged policy during litigation." (Opp. 22). But Respondents do not explain why the Court should ignore that reality and pretend that First Amendment rights are well-protected by a form of judicial review that takes no account of contemporaneous reasons and puts its faith in reasons that may be imagined by administrators or courts after the fact. Instead, Respondents downplay the Seventh Circuit majority's abandonment of *Turner* and its ratification of an exclusive and

permanent First Amendment restriction on male death row inmates. Respondents state that the decision below "does not conflict with any decision of this Court," but that is incorrect. Respondents do not even claim that the decision below does not conflict with other federal appellate decisions, but simply assert that the "conflict with other courts of appeals is overstated." (Opp. 11). That assertion also is incorrect.

The majority decision below seriously conflicts with prior decisions of this Court and with the decisions of other courts of appeals on an important question of federal constitutional law and therefore warrants review by this Court.

I. The Divided, *En Banc* Seventh Circuit's Decision Is Inconsistent With Prior Decisions Of This Court.

Respondents concede (Opp. 13-14) that the majority decision below did not apply "the four-factor test announced in *Turner*," but contend that review is not warranted because the decision below correctly "appl[ied] this Court's controlling precedent in *Pell* [*v. Procunier*, 417 U.S. 817 (1974),] and [*Saxbe v.*] *Washington Post* [*Co.*, 417 U.S. 843 (1974)]."

Respondents' argument is incorrect. *Turner*'s four-factor analysis provides the controlling law for evaluating prison restrictions that impinge on constitutional rights; it is not simply an alternative mode of analysis that federal courts can choose to use or disregard at their own discretion. This Court

has made that clear on numerous occasions. *See, e.g., Beard v. Banks*, 548 U.S. 521, 528 (2006) (*Turner* "contain[s] the basic substantive legal standards governing" an inmate's challenge to restriction on periodicals for recalcitrant prisoners); *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (*Turner*'s four-factor test is proper method of "deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge").[1]

If Turner is to be relegated to the status of an alternative method of analysis, that is a matter for this Court to decide, not the Seventh Circuit or Respondents.

Furthermore, as both Judge Rovner and Judge Wood noted in dissent, nothing in *Pell* or *Washington Post* supports THA-1480.05A's exclusive and total ban on face-to-face press interviews with male death row inmates. (App. 22a, 24a, 28a-29a).[2] While

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[1] As we have shown (Pet. 23-29), triable issues exist with respect to each of the four *Turner* factors. 482 U.S. at 89-91.

[2] It is undisputed that THA-1480.05A applies exclusively to male death row inmates. (App. 35a, 105a). Respondents argue that the gender-based differential treatment issue "was never raised below at any stage of this litigation and thus is not properly before the court." (Opp. 14). In fact, Mr. Hammer has consistently argued that the ban violates his right to equal protection (see 7th Cir. J.A. at 26-40), and Mr. Himmelfarb, one of Respondents' attorneys, was specifically asked about the gender-based differential treatment under THA-1480.05A during the Seventh Circuit *en banc* argument:

Respondents correctly note that this Court "explicitly endorsed the 'jailhouse-celebrity' rationale" in *Pell* and *Washington Post* (Opp.12), there was no dispute in those cases (unlike here) as to the actual reasons for the prison officials' actions. *Pell*, 417 at 827, 830 (noting "the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these [security] considerations" and that "this regulation is not part of an attempt by the State to conceal the investigation and reporting of [prison] conditions"); *Washington Post*, 417 U.S. at 848 (noting that restriction was "not part of any attempt by the Federal Bureau of Prisons to conceal from the public the conditions prevailing in federal prisons" and that it was "motivated by the same disciplinary and administrative considerations that underlie" the policy in *Pell*).

Respondents also suggest that the decision below as a matter of policy represents an improvement upon *Turner*. According to Respondents, "prisoners are resourceful litigators who have little trouble alleging evidence of malfeasance," and the decision below allows courts to "weed out baseless claims before trial." (Opp. 22). But the decision below

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> *Question*: "Do the same rules apply wherever the women [federal death row inmates] are?"
>
> *Mr. Himmelfarb*: "No, this is a special rule that only applies to [the male death row inmates] in Terre Haute."

See http://www.ca7.uscourts.gov/tmp/V20HL7RM.mp3 (last visited on Feb. 9, 2010).

precludes all such actions, not just those that are "baseless." Thus, Respondents' "policy argument" contradicts this Court's holding in *Turner*, which required federal courts to "discharge their duty to protect constitutional rights" of inmates when "a prison regulation or practice offends a fundamental constitutional guarantee." *Turner*, 482 U.S. at 84. *Turner* does not permit courts to accept *post hoc* or "imagined" security justifications in the face of direct evidence of an unconstitutional purpose. The Seventh Circuit disregarded its obligations under *Turner* by ignoring Mr. Hammer's evidentiary showing that THA-1480.05A was adopted for an unconstitutional, content-based purpose. (App. 90a, 97a).

II. The Conflict Between The Decision Below And Holdings Of Other Federal Appellate Courts Is Substantial.

Respondents further contend that the conflict between the Seventh Circuit's decision and decisions of other federal appellate courts is "overstated" (Opp. 11). This argument is disingenuous. As we have previously noted (Pet. 17-23), the Seventh Circuit held that prison officials do not need to be pursuing a legitimate penological interest when they adopt their policy, so long as a "rational basis for [the policy] could be imagined. . . . It is not clear why one bad motive would spoil a rule that is adequately supported by good reasons." (App. 5a, 10a).

This holding conflicts with the holdings in *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006), *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998), *Quinn v. Nix*, 983 F.2d 115 (8th Cir. 1993), and *Walker v. Sumner*, 917 F.2d 382 (9th Cir. 1990). In each of those cases, other courts of appeals made clear that *Turner* requires real, not imagined, penological interests. *Salahuddin*, 467 F.3d at 277 ("[T]he Supreme Court requires the government to close the circle — prison officials must have been pursuing the interest in inmate safety when" adopting a restriction, in order to "ensure[ ] that prison officials actually had, not just could have had, a legitimate reason for burdening protected activity"); *Abu-Jamal*, 154 F.3d at 134 ("[I]t is likely that Jamal can demonstrate that the Department's enforcement of the business and profession rule against him was motivated, at least in part, by the content of his articles and mounting public pressure to do something about them, and hence, the actions were not content neutral as required by *Turner*"); *Quinn*, 983 F.2d at 118-19 ("[P]rison officials in this case were not motivated by the legitimate interests they assert" because "the officials' proffered justification for their actions was pretextual"); *Walker*, 917 F.2d at 385-87 (summary judgment for prison officials was inappropriate where it was unclear that "the interest proffered is the reason why the regulation was adopted or enforced"). Or, as the District of Columbia Circuit has noted, "even if [prison officials] provide an objectively valid reason for their actions . . . the District Court must still inquire into whether there is a disputed issue of fact

as to whether [the prison officials] were actually motivated by an illegitimate purpose." *Kimberlin v. Quinlan*, 199 F.3d 496, 503 (D.C. Cir. 1999).

The Seventh Circuit's decision would allow prison officials to preclude all inquiry into whether a prison First Amendment restriction was adopted for a "legitimate penological purpose" — either by providing a *post-hoc*, litigation affidavit, or because such a purpose could be "imagined." (App. 5a, 10a). Neither *Salahuddin*, *Abu-Jamal*, *Quinn*, *Walker*, nor *Kimberlin* authorizes the granting of summary judgment for prison officials when a prisoner is able to offer evidence showing that the proffered *post-hoc* penological interest was pretextual; to the contrary, those cases hold that prison officials must have been motivated by a legitimate purpose at the time they adopted a restriction. *Salahuddin*, 467 F.3d at 277; *Abu-Jamal*, 154 F.3d at 134; *Quinn*, 983 F.2d at 118-19; *Walker*, 917 F.2d at 385-87; *Kimberlin*, 199 F.3d at 503.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 9, 2010

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