No. 04-1739

IN THE

Supreme Court of the United States

JEFFREY BEARD,
Petitioner

v.

RONALD BANKS,
Respondent

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does a prison policy that denies newspapers, magazines, and photographs to the most difficult inmates in the prison system in an effort to promote security and good behavior violate the First Amendment under the standards of *Turner v. Safley*, 482 U.S. 78 (1984) and *Overton v. Bazzetta,* 539 U.S. 126 (2003)?

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 2005. A petition for rehearing was timely filed and was denied on March 22, 2005 by a vote of 6-5. Pet. App. 30a-31a. The petition for certiorari was filed within 90 days thereafter, on June 20, 2005. The Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST., Amend. I.

STATEMENT OF THE CASE

This is a class action by a group of state prisoners challenging the conditions of confinement in the Long Term Segregation Unit operated by Pennsylvania's Department of Corrections. The Long Term Segregation Unit (LTSU) is a small unit, specifically designed to house those prisoners who are the "worst of the worst," that is, those prisoners with the very worst behavioral histories in the prison system. The incorrigible prisoners assigned to the LTSU lose a variety of privileges, which they may earn back by their behavior; among the privileges lost is access to non-religious

newspapers, magazines and photographs. The issue is whether this restriction violates these prisoners' First Amendment rights, under the standard articulated by the Court in *Turner v. Safely*, 482 U.S. 78 (1984), and *Overton v. Bazzetta*, 539 U.S. 126 (2003).

1. a. The LTSU is the most severe of a series of disciplinary regimes with which the Department of Corrections responds to prisoner misconduct. Lesser infractions, such as smoking in a prohibited area or failing to report to work, may be dealt with by the loss of specific privileges – television, commissary, visitation, and so forth – while the prisoner himself remains in the general prison population.[1] Serious or repeated misconduct, however, such as murder, assault, or possession of drugs, may result in placement in one of several special, and increasingly severe, housing units.

Thus, each prison has a Restricted Housing Unit (RHU), to which prisoners may be assigned for up to ninety days for each infraction. Among other restrictions, prisoners in an RHU spend 23 hours a day in their cell. They are not permitted tobacco, radio or television; are permitted only one (non-contact) visit per month and only from their immediate family; and are allowed to purchase only toilet articles from the prison commissary.[2] J.A. 102. They may, however, have one newspaper and ten photographs in their cell.[3]

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[1] *See* PA. DEPT. OF CORRECTIONS, Policy Statement DC-ADM 801, "Inmate Discipline," §§ VI.D, VI.J, *available at* http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_801_Inmate_Discipline.pdf (visited Dec. 23, 2005).

[2] Prisoners who are in the general population are permitted to have tobacco, and to have radios and televisions in their cells. They may have at least one contact visit per week with anyone on their approved visitors list; and may spend up to $45 per week to buy a wide variety of snacks, toiletries and other personal items at the commissary. *See* (continued ...)

The Department of Corrections has also established two Special Management Units (SMU's) to house prisoners who are "continually disruptive, violent, dangerous, or a threat to the orderly operation of their assigned facility." J.A. 85. The SMU's are multi-phased programs, structured to "to change or modify behaviors to a more acceptable level." J.A. 136. At the beginning, most restrictive level, prisoners in an SMU are subject to the same restrictions they would face in an RHU. In addition, they face more severe restrictions on their commissary privileges – they are permitted to buy only writing materials – and they lose their magazine privileges entirely. They are still, however, permitted to have one newspaper and ten photographs, J.A. 102. By modifying their behavior, they can progress from one SMU level to another, through five levels, regaining privileges as they progress. J.A. 86-88.

b. The last stop on the disciplinary continuum is the LTSU. Prisoners eligible for the LTSU include those who have an escape history, who have a predilection for

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PA. DEPT. OF CORRECTIONS, Policy Statement DC-ADM 812, "Inmate Visiting Privileges," §VI.A, *available at* http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_812_Inmate_Visiting_Privileges.pdf (visited Dec. 23, 2005); PA. DEPT. OF CORRECTIONS, Policy Statement DC-ADM 815, "Personal Property, Basic State Issued Items and Commissary," Approved Master Commissary List, *available at* http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_815_Personal_Property-_Basic_State_Issued_Items-_and_Commissary.pdf (visited Dec. 23, 2005).

[3] The record is not entirely clear on what, if any, magazines prisoners in the RHU may have. One witness testified that they are not permitted to have any. J.A. 162. *But see* DC-ADM 801, "Inmate Discipline," *supra*, § VI.M (prisoner in disciplinary custody may have up to ten magazines).

assaultive behavior with an intent to cause death or serious injury, or who otherwise present a serious threat to prison security: prisoners, for example, who have engaged in or instigated riots, who are members of prison gangs, or who have a history of sexual predation. J.A. 85-86. Simply put, the LTSU was designed to house the most recalcitrant and incorrigible prisoners in Pennsylvania's prisons. As a practical matter, most of the prisoners assigned there have "flunked out" of an SMU, and thus have few privileges left to lose. J.A. 136-137.

The LTSU, like the SMU's, is a multi-phase program aimed primarily at behavior modification. J.A. 124-125, 189. Prisoners begin at Level 2,[4] the most restrictive level, where they face the same restrictions as in the most restrictive level of an SMU. In addition, they lose all commissary privileges, and are not permitted to have any newspapers or photographs. They are, however, allowed to have religious reading material in their cell, and they may order recreational reading from the prison library. They are permitted legal and personal correspondence, which may include newspaper or magazine articles having some personal connection to the prisoner. J.A. 102, 154-155. They are allowed monthly visits with family members, and may receive unlimited visits from legal counsel. J.A. 98-99. They receive daily visits from a Facility Chaplain. J.A. 100. And they may visit, one at a time, the mini-law library maintained in the LTSU.[5] J.A. 157.

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[4] The text describes the LTSU program as it existed at the time of the district court proceedings. Currently, the LTSU comprises four levels rather than two, but there has been no material change in the restrictions imposed at the beginning, most restrictive level.

[5] For security reasons, the mini-law library seats only one prisoner at a time. *See* J.A. 191 (only one LTSU prisoner at a time may leave his cell).

The restrictions imposed upon prisoners in the LTSU, including the restrictions on newspapers, magazines and photographs, are essentially a program of behavior modification, aimed at the behaviors which have the most potential to undermine individual and institutional security. By treating access to newspapers and magazines as a privilege to be earned (or retained), the LTSU program provides an incentive for good behavior and a deterrent to bad behavior. The recalcitrant prisoners who are already in the LTSU are encouraged to change their behavior and begin progressing toward reintegration into the general prison population and, if their sentences permit, into civil society; while prisoners who are not in the LTSU are encouraged to continue their good behavior so as not to lose their privileges. The LTSU program thus simultaneously serves the interrelated penological goals of rehabilitation and security. J.A. 135-137, 188-190.

The restrictions on newspapers and magazines also further prison security within the LTSU even apart from their role in modifying behavior. First, the less property these dangerous prisoners have in their cells, the more difficult it is for them to hide contraband among their possessions. Second, both newspapers and magazines can be fashioned into crude tools and weapons, and provide material for starting cell fires. J.A. 189.

Prisoners remain at Level 2 for at least ninety days. J.A. 32. At that time, and every thirty days thereafter, their progress is reviewed by a committee who, applying prescribed criteria, can recommend promotion to the less restrictive conditions of Level 1. J.A. 40, 88-89. At Level 1, prisoners are permitted one newspaper and five

magazines.[6] Prisoners may be released from the LTSU altogether at any time, to an SMU, an RHU or into the general prison population; and they are considered for such release at least annually. J.A. 41. But if a prisoner's behavior fails to improve, he may be held at the LTSU indefinitely.

The LTSU was established in April of 2000, and was located within the State Correctional Institution at Pittsburgh.[7] J.A. 123. It is a small unit, capable of housing a maximum of forty-eight prisoners but ordinarily housing no more than forty, or about one-tenth of one percent of the total prison population. J.A. 127, 136, 188. In August of 2002, for example, it housed thirty-nine prisoners, of whom thirty-six were in Level 2 and three were in Level 1, although typically the proportion in Level 1 is somewhat higher. J.A. 130-131. Another ten prisoners had "graduated" out of the LTSU altogether. J.A. 138.

The LTSU holds "extremely disruptive, violent and problematic inmates," and is therefore an area of "extremely high levels of security." J.A. 80-81 Prisoners ordinarily spend 23 hours a day in their cells; and for a prisoner to leave his cell – for example, to visit the mini law library – requires an escort of two corrections officers. Only one LTSU prisoner at a time may leave his cell, wearing handcuffs and leg irons and tethered to one of his two escorts. J.A. 191.

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[6] Level 1 prisoners are also permitted to spend $5 per week on commissary items, and may receive two visits per month instead of one. J.A. 102.

[7] The LTSU is now located within the State Correctional Institution at Fayette, about fifty miles south of Pittsburgh, near Brownsville in Fayette County, and thus still within the Western District of Pennsylvania. *See* J.A. 3 (certifying class of present and future LTSU prisoners "within the Western District of Pennsylvania").

2. Respondent Ronald Banks brought this action pursuant to 42 U.S.C. § 1983 against the petitioner, the Secretary of the Pennsylvania Department of Corrections, challenging the constitutionality of the policy denying entry-level inmates of the LTSU access to newspapers, magazines and photographs, and seeking declaratory and injunctive relief. The District Court certified a class comprising all prisoners within the Western District of Pennsylvania who are or will be confined in Level 2 of the LTSU.[8] J.A. 3. After the completion of discovery, the parties filed cross motions for summary judgment. Pursuant to the District Court's local rules, the petitioner filed, along with his motion, a statement of undisputed material facts. J.A. 25. Respondent did not respond to this statement or file a similar statement of his own, and the facts stated by the petitioner were therefore deemed admitted under the local rules.[9]

The District Court granted petitioner's motion for summary judgment and denied that of the respondent.[10] The District Court, applying the four-part analysis of *Turner v. Safley*, 482 U.S. 78 (1984), first held that the challenged policy is rationally related to

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[8] Banks himself left the LTSU in July of 2005, and is currently housed in a Restricted Housing Unit at another prison.

[9] The Local Rules of the Western District of Pennsylvania require a party opposing a motion for summary judgment to file a responsive statement admitting or denying each fact, and setting forth the basis for each denial. All facts presented by the moving party not controverted in this way "will, for the purpose of deciding the motion for summary judgment, be deemed admitted...." L.R. 56.1(C)(1), (E).

[10] The District Court adopted as his own the report and recommendation of the Magistrate Judge to whom the motions had been referred. Pet. App. 32a.

the legitimate penological goals of rehabilitation and prison security. Pet. App. 37a-41a. The policy encourages compliance with prison rules by especially obdurate intractable prisoners, by using access to newspapers, magazines and personal photographs as an incentive for their good behavior. Pet. App. 39a. By depriving especially dangerous and difficult prisoners of materials they could use to fashion crude weapons or to start cell fires, the policy also rationally advances prison security. Pet. App. 40a-41a. The District Court thought it rational to conclude, as a matter of security, that inmates would be more likely to use magazines and newspapers for illicit purposes than legal papers and religious texts they were permitted to have in their cells. Pet. App. 40a. The District Court did not think the rationality of the policy was undermined by the fact that recalcitrant and dangerous prisoners in other segregation units were not completely deprived of periodicals. LTSU inmates had not progressed in other, less restrictive programs, and the District Court believed it "not only rational to impose more restrictive conditions in an effort to encourage compliant behavior but imperative to the success of the LTSU." Pet. App. 40a.

The District Court also held that inmates have alternative means of exercising their rights: first, by modifying their behavior so as to be assigned a custody status which entitles them to newspapers, magazines, and photographs, and second, by visitation and correspondence. Pet. App. 41a-42a. And he concluded that accommodating their interest was not reasonably possible: "[H]aving already found ample evidence to support a finding that access to magazines, newspaper, and photographs presents a threat to the security of both guards and other prisoners in the LTSU, it appears that accommodating plaintiffs' asserted right would have the very 'ripple effect' referred to in *Turner* ...." Pet. App. 43a. Finally, the District Court rejected the idea that there were 'ready alternatives" to the

challenged policy, such as providing inmates with reading periods. This suggestion, the District Court said, would not alleviate the security concerns occasioned by newspapers and magazines and "would not be without sacrifice to the prison's behavioral modification goals." Pet. App. 45a.

3. A divided panel of the Court of Appeals reversed the District Court's judgment. While the Court of Appeals likewise applied the four-part *Turner* standard, the Court of Appeals did not mention the Court's more recent decision in *Overton v. Bazzetta*, 539 U.S. 126 (2003).[11] Moreover, in applying *Turner*, the panel majority disagreed with the District Court's conclusions at virtually every turn.

a. The panel majority acknowledged that "the deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates," but noted that "the [petitioner] has offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose." Pet. App. 12a, and thought it "unclear how the policy would achieve the deterrence that it seeks", Pet. App. 11a-17a, in view of the indefinite period of confinement in the LTSU and the discretionary nature of decisions regarding custody status. The majority also discounted the prison officials' security concerns because "there [was] no evidence in the record of the misuse of periodicals or photographs in any of the ways described by the DOC," Pet. App. 14a.[12] The majority also thought that, because LTSU

[11] The Court decided *Overton* in June of 2003, six months after the District Court's decision in this case, and more than a year before the decision of the Court of Appeals.

[12] For example, the majority acknowledged the evidence that cell fires had in fact been started in the LTSU, and that paper products had been used to start them, Pet. App. 15a n. 11, but criticized the lack of evidence that "particular fires" (continued ...)

prisoners could commit similar misbehaviors with other materials, Pet. App. 16a-17a, the ban on papers, magazines and photographs "may be too attenuated to be reasonable." Pet. App. 17a.

The majority also rejected the District Court's conclusion that inmates have alternative means of exercising their rights. The majority defined the right in question as a "First Amendment right of access to a reasonable amount of newspapers, magazines and photographs," Pet. App. 20a, and found that the policy's "blanket prohibition" left no way for prisoners to exercise that "right." Pet. App. 19a-20a. Thus, the "blanket prohibition" on photographs left prisoners with "no way to look at images of loved ones," and the availability of actual visits from those loved ones was not, in the majority's view, a satisfactory alternative. Pet. App. 19a. The majority rejected the possibility that LTSU prisoners could regain their privileges by simply modifying their behavior because "segregation in Level 2 is not linked to a particular infraction and is of potentially unlimited duration," Pet. App. 19a-20a, and because there were no affidavits in the record from those who made decisions regarding custody level or documentation of the review process. Pet. App. 20a.

Turning to the last two elements of the *Turner* standard, the panel majority thought that the prison could accommodate the prisoners' interests by establishing "reading periods" during which corrections officers could deliver, and then retrieve, newspapers and magazines, or by escorting prisoners individually to

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had been started with these specific materials, Pet. App. 14a-15a, or that LTSU prisoners had a specific history of misusing them, Pet. App. 15a, and the lack of specific testimony "as to the effect such a ban has had on the frequency of fires, be it in the LTSU or elsewhere." Pet. App. 15a.

a secure mini library "to read a periodical of their choosing." Pet. App. 22a-24a. The majority "fail[ed] to see" Pet. App. 23a, 24a, how these alternatives could be thought either burdensome or dangerous. Finally, the majority rejected the idea that extending these privileges to LTSU prisoners would impose "more than a *de minimis* cost" to the program's goal of behavior modification, because prison officials could still seek that goal by granting and withholding other privileges. Pet. App. 25a.

b. Judge Alito dissented because he thought the panel majority had misapplied *Turner*, "a standard that instructs courts to extend considerable deference to judgments of correctional officials." Pet. App. 26a. In Judge Alito's view, each of the four *Turner* factors counseled in favor of upholding the challenged policy.

Judge Alito thought that it was rational for corrections officials to think that inmates who are not in Level 2 will be deterred from engaging in serious misconduct because they do not want to be transferred to that unit and thus be subjected to the restrictions that accompany that assignment." Pet. App. 26a. "It is also 'rational'," Judge Alito continued, "for corrections officials to think that inmates who are in Level 2 will be deterred from engaging in serious misconduct while in that unit because they wish to be transferred out and thus to escape such restrictions." Pet. App. 26a-27a. He also thought that the majority, in demanding empirical evidence to support the policy, had misconstrued the nature of the first *Turner* factor:

> This factor requires us to determine whether there is a '*logical connection* between the regulation and the asserted goal,' *see* 482 U.S. at 89 (emphasis added), not whether there is empirical evidence that the regulation in fact serves that goal. The entire system of prison discipline might be imperiled if each sanction for prison misconduct could not be

> sustained without empirical evidence that the sanction provided some incremental deterrent.

Pet. App. 27a-28a.

Judge Alito thought that the second *Turner* factor – alternative means of exercising the right – was the "most troubling," but still not sufficient to "support the majority's conclusion that the regulations are facially invalid." Pet. App. 28a. Judge Alito found it significant that inmates in Level 2 could still read books and receive letters, and had the option of modifying their behavior so as to be promoted to Level 1. *Ibid*.

Finally, as to the availability and impact of accommodation, Judge Alito thought that the modifications to prison policies proposed by the majority would be, at best, "time consuming," Pet. App. 29a, and at worst would impose a "significant burden" in the handling of the "most violent and disruptive" prisoners. *Ibid*.

4. The full Court of Appeals denied petitioner's request for *en banc* rehearing, by a vote of 6-5.

SUMMARY OF ARGUMENT

Crystallizing the principle that courts must accord substantial deference to the judgment of prison administrators, the Court in *Turner v. Safely*, 482 U.S. 78 (1987), articulated the now-familiar rule that, "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id*. at 89. This principle of deference, the Court has said, applies with special force when applied to policies which pertain to inmates with special disciplinary and security problems. *Lewis v. Casey*, 518 U.S. 343 (1996).

The respondent in this case represents a prisoner class - LTSU Level 2 inmates - whose histories of violent and disruptive prison behavior necessitate their confinement at the highest level of security. They challenge, on First Amendment grounds, a policy that denies Level 2 inmates access to non-religious periodicals and photographs. That policy, however, is clearly constitutional; applying the four factors that *Turner* recites as relevant to the "reasonable relationship" inquiry establishes that the policy is reasonably related to the legitimate penological objectives of prisoner rehabilitation and prison security.

1. Aimed primarily at behavior modification, the policy is logically connected to the interrelated goals of rehabilitation and security; it encourages Level 2 inmates to improve their behavior and begin progressing toward reintegration into the general prison population, while discouraging other inmates from behavior that could cause their assignment to Level 2. The policy also reduces the opportunity for further misconduct by Level 2 inmates.

2. Level 2 inmates retain ample alternative means of receiving information and communications from the outside world: they are allowed monthly visits from family members and unlimited visits from counsel; they are visited daily by a Facility Chaplain; they may order books from the prison library; and they may correspond with family and friends. They can also improve their behavior and regain access to periodicals upon transfer to Level 1 and access to photographs upon transfer from the LTSU.

3. Accommodating the asserted right would compromise the purpose of the LTSU. Level 2 inmates are the highest-security prisoners in the Pennsylvania prison system, at the apex of a progressive discipline regime where few privileges remain. Accommodation would diminish the severity of Level 2, reducing its

value both as a deterrent to serious misconduct by other inmates and as a means of reforming Level 2 inmates so they can rejoin the general population as less a threat. Accommodation would also increase the risk to LTSU guards and other prison staff who must enter the unit.

4. Accommodations suggested by respondent, such as a specified reading period, could not be accomplished without substantial costs, in the form of increased demands on personnel resources and increased security risks.

In the closely similar case of *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court upheld, against a First Amendment challenge, a prison policy that withdrew visitation privileges for at least two-years from prisoners with two or more substance abuse violations. Applying *Turner*, the Court concluded that "withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." *Id*. at 134. The Court found it a sufficient alternative that prisoners could still communicate with persons outside the prison by letter and phone, and rejected suggested accommodations, such as shortened visitation periods, as not "go[ing] so far toward accommodating the asserted right with so little cost to penological goals that they meet *Turner's* high standard." *Id*. at 136.

The Court of Appeals, in a divided-panel decision, grossly misapplied the *Turner* factors, disregarded the principle of deference on which they rest, completely ignored *Overton*, and assigned no significance whatsoever to the special disciplinary, high-security context from which this case arises. Contrary to the Court's direction in *Turner*, *Overton* and numerous other decisions, the panel majority subjected the challenged policy to an exacting and hostile scrutiny,

imposing on prison officials, rather than the prisoners, the burden of proving that the policy is valid. Its decision should be reversed.

ARGUMENT

I. The Court Of Appeals Subjected Pennsylvania's Policies To An Exacting and Hostile Scrutiny Which Is Contrary To This Court's Decisions.

A. In assessing the constitutionality of restrictions upon prisoners, the Court has consistently required deference to the judgment of prison officials.

The Court has long recognized that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Prisoners "clearly retain" the protections of the Constitution, including those afforded by the First Amendment. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). Nevertheless, those rights are not unlimited: "Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003). Prisoners' constitutional rights are limited both by "the fact of incarceration" and by "valid penological objectives — including deterrence of crime, rehabilitation of prisoners and institutional security." *O'Lone*, 482 U.S. at 348.

The Court has likewise long recognized that prison officials face "Herculean obstacles" to the discharge of their responsibilities, which require "expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Procunier v. Martinez*, 416 U.S. 396, 404-

405 (1974). That "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," the Court has said, "reflects no more than a healthy sense of reality." *Id*, at 405.

Accordingly, the Court has "often said" that in balancing these factors, "the evaluation of penological objectives is committed to the considered judgment of prison administrators, 'who are actually charged with and trained in the running of the ... institution.'" *O'Lone*, 482 U.S. at 349, *quoting Bell v. Wolfish*, 441 U.S. 520, 562 (1979). The Court has accorded prison officials "wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. at 547 (citations omitted). Absent "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations," the Court has said, "courts should ordinarily defer to their expert judgment in such matters." *Id*., at 548 (citation omitted).

In *Turner v. Safley*, the Court, crystallizing these principles, articulated a standard of review "that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" *Id*. at 85, *quoting Procunier v. Martinez*, 416 U.S. at 406. Recognizing that subjecting the daily decisions of prison officials to a strict scrutiny analysis "would seriously hamper their ability to anticipate security problems" and to "adopt innovative solutions to the intractable problems of prison administration," *Turner*, 482 U.S. at 89, the Court instead stated a more flexible rule: "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Ibid*. This less restrictive standard was necessary, the Court

emphasized, if "prison administrators . . . and not the courts [are] to make the difficult judgments concerning institutional operations." *Ibid.* (internal quotations and citations omitted).

To determine whether a prison regulation is "reasonably related to a legitimate penological interest," *Turner* and its progeny have explained that four factors are relevant. First, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89 (internal quotations and citations omitted). In this regard, "[w]e must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton*, 539 U.S. at 132. Thus, prison officials need not produce evidentiary proof that a challenged regulation will or has been actually effective in accomplishing those goals; all that is required is "a *logical* connection," *Turner,* 482 U.S. at 94 n.* (emphasis in original), between the two.

Second, a court should determine "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. The absence of such alternatives does not necessarily condemn a regulation, but is "properly considered a factor in the reasonableness analysis." *O'Lone,* 482 U.S. at 349 n. 2; *Overton*, 539 U.S. at 135. In any event, the "right" in question must be viewed "sensibly and expansively," not narrowly. *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989). *See, e.g., Turner,* 482 U.S. at 92 (ban on inmate-to-inmate correspondence did not deprive prisoners of "all means of expression"); *O'Lone*, 482 U.S. at 352 (regulation preventing attendance at particular religious ceremony did not deprive prisoners of "all forms of religious exercise").

The third factor is "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; in the prison environment, "few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Turner*, 482 U.S. at 90. Finally, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Ibid*. This, the Court emphasized in *Turner*, is *not* a "least restrictive alternative" test, *ibid*; indeed, the Court specifically rejected any regime in which every administrative judgment "would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Turner*, 482 U.S. at 89. But an "obvious, easy alternative" that "accommodates the prisoner's rights at *de minimis* cost to valid penological interests" may be evidence that the regulation is an "exaggerated response to prison concerns." *Id.*, at 90-91.

Since the *Turner* decision was announced, the Court has termed it "a unitary, deferential standard for evaluating prisoners' constitutional claims," *Shaw v. Murphy*, 532 U.S. 223, 121 S.Ct. 1475, 1479 (2001), and, although the standard is "not toothless," *Thornburgh v. Abbott*, 490 U.S. at 414, the Court has consistently made clear that it commands substantial deference to the judgment of prison administrators. In fact, the Court has said that *Turner*'s principle of deference has "special force" when applied to policies, as here, which pertain to inmates with special disciplinary and security problems. *Lewis v. Casey*, 518 U.S. 343, 361 (1996). *See Procunier v. Martinez*, 416 U.S. at 413 n. 12 (striking down regulations censoring prison mail, but not reaching validity of "temporary prohibition of correspondence ... as a disciplinary sanction").

In the twenty years since it was decided, the Court has applied *Turner* to sustain a number of prison regulations against challenges based on the First Amendment. In *Turner* itself, of course, the Court held that a regulation restricting correspondence between inmates was constitutional,[13] and in *Turner*'s companion case of *O'Lone v. Shabazz*, the Court upheld regulations limiting the ability of Muslim inmates to attend Friday religious services, "reaffirm[ing] our refusal, even where claims are made under the First Amendment, to 'substitute our judgment on . . . difficult and sensitive matters of institutional administration.'" 482 U.S. at 353, *quoting Block v. Rutherford*, 468 U.S. 576, 588 (1984).

In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Court considered and upheld regulations that prevented inmates from receiving publications found by a prison warden to be detrimental to prison security. The Court concluded that the regulation was logically related to security concerns, and that alternative means of exercise were available because the regulation permitted a broad range of other publications to be sent and received. The Court went on to say that the right in question could not be accommodated without "significantly less liberty and safety for everyone else," since the regulation proscribed only publications which were a threat to the order and security of the prison. *Id.* at 418. Finally, the Court rejected proposed alternatives to the rule – such as tearing out the rejected portions and admitting the rest of the publication – refusing to second-guess the prison officials' view that this procedure would cause "more discontent than the current practice." *Id.* at 419. The Court said, "[w]hen prison officials are able to demonstrate that they have

[13] The Court also struck down a regulation that restricted inmates from marrying other inmates or civilians without permission of the prison superintendent.

rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under *Turner*." *Id*.

Most recently, in *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court considered the constitutionality of prison regulations that imposed various restrictions on inmates' visitation privileges, one of which banned visits from family and friends, for at least two years, for prisoners who had committed certain disciplinary infractions.[14] The District Court and the Court of Appeals had held that the regulation impermissibly infringed the inmates' First Amendment right of association, but the Court disagreed. It emphasized again that it was proper to "accord substantial deference to the professional judgment of prison administrators," and that "the burden . . . is not on the state to prove the validity of prison regulations but on the prisoner to disprove it." *Id*. at 132. Applying *Turner*, it concluded that the regulation banning visitation for substance abusers served a legitimate purpose: "withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to

[14] The two-year ban was imposed upon prisoners with two or more substance-abuse violations. Visits from clergy and attorneys were permitted. *Overton*, 539 U.S. at 130. The Court also reviewed, and approved as constitutional, restrictions on non-contact with minor nieces and nephews and children as to whom parental rights had been terminated; on inmate visits with former inmates, a regulation which required children visiting the prison to be accompanied by a family member or legal guardian. *Id*., at 129-130.

lose." *Id*. at 134. The Court further concluded that prisoners subject to the ban had alternative means of exercising their rights, since they could still communicate with those outside the prison by letter and by phone. With respect to the availability of "ready alternatives," the Court refused to second guess the prison officials, rejecting arguments that the duration of the visitation restriction could be shortened or only imposed on the most serious violators, saying that "these alternatives do not go so far toward accommodating the asserted right with so little cost to penological goals that they meet *Turner's* high standard." *Id*. at 136.[15]

B. The Court of Appeals failed to adhere to this standard.

The Court of Appeals' approach to this case was a far cry from the deferential review required by *Turner*, *Overton*, and the other cases just discussed. The Court of Appeals got off on the wrong foot from the start, beginning its analysis with the observation that "in some cases" the constitutional rights of prisoners "may" be limited, Pet. App. 8a, thus implying that such limitations are the exception rather than the rule. But, at least in the First Amendment context, surely the reverse is more nearly true. A prisoner retains only "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); and as the Court's cases demonstrate, there are few aspects of First Amendment rights that may *not* be limited by imprisonment. *See Overton* (freedom of association), *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977)(same); *Shaw v. Murphy*, 532 U.S. 223

[15] The Court also concluded that accommodation would cause a significant reallocation of financial resources.

(2001)(correspondence); *Turner* (same); *Lewis v. Casey* (access to courts); *Thornburgh v. Abbott* (incoming publications); *O'Lone v. Estate of Shabazz* (attendance at religious services).

The Court of Appeals then purported to apply the *Turner* standard to Pennsylvania's policy, while ignoring the principle of deference to the judgment of prison officials which animates *Turner* and this Court's other cases. In fact, the Court of Appeals mentioned deference only once, in passing and limited to the idea that prison officials should receive "significant deference" in "interpreting" and "implementing" their own regulations. *See* Pet. App. 8a. The Court of Appeals did not mention this Court's repeated admonitions that such deference must also be exercised in assessing the constitutionality of such regulations; rather, the Court of Appeals chose to emphasize its own role in the "policing of prison policy." Pet. App. 9a. Nor did the Court of Appeals in fact extend such deference: to the contrary, the Court of Appeals demanded that prison officials prove that the restrictions involved in this case were narrowly tailored to respond to specific problems, and demanded that they support their informed judgment with empirical data. *E.g.*, Pet. App. 12a, 14a, 15a. In this respect, the Court of Appeals' approach is remarkably similar to that of the Sixth Circuit in *Overton*, and to its own earlier approach in *O'Lone* — both of which this Court rejected. [16]

[16] In *Overton*, the Sixth Circuit criticized the State for not offering "data or expert testimony," but only "anecdotal evidence" and the "vast experience" of its prison officials, to support its visitation restrictions. *See Bazzetta v. McGinnis*, 286 F.2d 311, 319, 322 (6th Cir. 2002). In *O'Lone*, the Third Circuit thought that prison officials should be required to "produce convincing evidence that they are unable to satisfy their institutional goals in any way that does not infringe inmates' free exercise rights." *See Shabazz v. O'Lone*, 782 F.2d 416, 419 (1986).

The panel majority thus grossly misapplied the *Turner* factors, disregarded the principle of deference on which they rest, completely ignored *Overton*, and assigned no significance whatsoever to the context in which this case arises: the LTSU, which houses the most incorrigible prisoners in the Pennsylvania prison system, whose dangerous and disruptive behavioral histories necessitate their confinement at the highest level of security until their behavior improves. Contrary to the Court's direction in *Turner*, *Overton* and numerous other decisions, the panel majority subjected the challenged policy to an exacting and hostile scrutiny, imposing on prison officials, rather than the prisoners, the burden of proving that the policy is valid - a burden that, according to the panel majority, could be met only by empirical proof that the policy could achieve its goal of rehabilitation and was narrowly tailored to respond to specific, demonstrated security risks.

This exacting and hostile scrutiny is completely at odds with this Court's settled approach to these issues. We turn then to the proper application of the governing principles to this case.

II. The Restrictions Which Pennsylvania Imposes On The Most Recalcitrant Prisoners In Its System Are Reasonably Related To The Legitimate Penological Objectives Of Rehabilitation And Security.

A. The restrictions on access to periodicals and photographs are rationally connected to improving the behavior of the most difficult and dangerous prisoners, and to enhancing prison security.

The first *Turner* factor asks whether there exists a valid, rational connection between the challenged regulation and the legitimate governmental interest on which it is predicated. The restrictions on access to newspapers, magazines and photographs for Level 2 inmates are rationally connected to the legitimate goals of prisoner rehabilitation and prison security. They serve those goals, first by contributing to a program of behavior modification, presenting to Level 2 inmates the incentive of regaining access to such materials by improving their behavior, and presenting to other inmates the disincentive of losing access to such materials by engaging in serious misconduct; and second by reducing the opportunity for further misconduct by LTSU prisoners.

1. Behavior modification, of course, is a fundamental goal of incarceration itself, and of the entire function of prison administration. Prisoners are segregated from society and subjected to a rigorous regimen of behavior regulation, which includes the granting, withdrawal and restoration of privileges, programs and opportunities. All of this is directed toward the immediate goals of maintaining prison security and rehabilitating in-prison behavior, and toward the ultimate goal, sentence permitting, of rehabilitating prisoners for re-entry into society.

In a comprehensive effort to modify the behavior of prisoners who engage in serious, in-prison misconduct, Pennsylvania prison officials have instituted a system of progressively restrictive confinement and progressively restrictive privileges and opportunities, which, for the most dangerous and disruptive prisoners, culminates in Level 2 of the LTSU. The rationality of restricting access to periodicals and photographs in LTSU Level 2 must be viewed in this context – and, so viewed, is unassailable.

The Court in *Overton* observed unequivocally that "[w]ithdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, *especially for high-security prisoners who have few other privileges to lose*." *Overton*, 539 U.S. at 134 (emphasis added). The parallel is obvious: LTSU Level 2 inmates are the highest-security prisoners in the Pennsylvania prison system, at the apex of a progressive discipline regime where indeed there are few privileges left to lose. Withdrawing access to periodicals and photographs for such inmates, like withdrawing access to visitors for the high-security prisoners in *Overton*, is a proper, and of course rational, technique for managing their behavior.

Yet the panel majority ignored both *Overton* and the high-security context from which both *Overton* and this case arise, occupying itself instead with its various concerns that assignment of a prisoner to the LTSU is not the product of a particular adjudication for a particular violation of prison rules, that a prisoner's term in the LTSU is indefinite, that the petitioner ostensibly offered no evidence that the restrictions achieve or could achieve rehabilitation, and that the district court failed to consider whether petitioner's "deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates." Pet. App. pp. 11a-13a. In its musings and conjectures, the panel majority strayed far

from the proper *Turner* analysis, which asks not whether there is empirical evidence that the regulation serves its stated goal, but rather whether there exists a "logical connection between the regulation and the asserted goal." *Turner*, 48 U.S. at 89.

That assignment to the LTSU is usually the product of cumulative serious misconducts - most if not all of which undoubtedly resulted in adjudicated violations - as opposed to a particular adjudicated misconduct, has no bearing on whether the challenged restrictions are "logically connected" to the goal of rehabilitation. The same is true with respect to the indefinite term of a prisoner's confinement in the LTSU, which is reviewed every thirty days after a mandatory initial term of ninety days. The two-year ban on visitation privileges in *Overton* was similarly indefinite in that reinstatement at the end of two years was discretionary. The Court agreed that "the restriction is severe," *Overton*, 539 U.S. at 134, but did not see that as undermining the regulation's rationality.

Nor is it even accurate that the petitioner offered no evidence that the challenged restrictions achieve or could achieve the goal of rehabilitation. In the first two years of the LTSU's operation, numerous prisoners progressed from Level 2 to Level 1 and graduated from the LTSU altogether. While no amount of proof could isolate the contribution of the challenged restrictions to that outcome, it is a fair inference that the desire of Level 2 inmates to free themselves of the restrictions indeed contributed to their improved behavior.

Finally, the panel majority's skepticism about the efficacy of granting and withdrawing privileges as a means of encouraging desired behavior — what it called a "deprivation theory of behavior modification" — is itself difficult to credit. In *Overton*, the Court had no difficulty recognizing a similar regime as "a proper and even necessary management technique to induce

compliance with the rules of inmate behavior." This "deprivation theory of behavior modification" informs a vast array of policies both within prisons and – as any parent who has ever "grounded" a teenager can attest – outside them as well; indeed, as we discussed above, the very idea of incarceration is grounded in such ideas. If prison officials must prove the validity of such theories, then the core tenet of *Turner* that courts should defer to the professional judgment of prison officials is meaningless. *Overton*, of course, counsels otherwise, as the Court rejected the similarly misguided approach of the lower court in that case.

2. The logical connection between the restrictions on access to periodicals and photographs, as instruments of behavior modification for inmates in the highest security setting in the Pennsylvania prison system, and the interrelated goals of prisoner rehabilitation and prison security is itself sufficient to satisfy the first *Turner* factor. The challenged restrictions, however, serve the goal of prison security even beyond their role in behavior modification, by reducing the opportunity to hide contraband and by withdrawing material that can be fashioned into crude tools and weapons or used to start cell fires.

Here again the panel majority indulged in exacting scrutiny, decrying the absence of proof that periodicals and photographs had actually been used in the ways suggested, that the restrictions had reduced the frequency of fires, or that "any LTSU inmates were transferred there because they had created a security risk with periodicals or photographs." Pet. App. pp. 14a-15a. Because LTSU inmates are permitted to have other material in the cells that they could misuse, the panel majority thought that "the relationship between the policy and the penological interest [in security] may be too attenuated to be reasonable." Pet. App. p. 17a.

But *Turner* does not require that prison officials wait for a specific security problem to arise, that they limit their response to a narrowly drawn and empirically tested policy, or that they forego a response that diminishes but does not eliminate a security risk. *Turner* itself involved a ban on inmate-to-inmate correspondence, which prison officials justified on the ground that such correspondence can be used to arrange escapes, assaults and other acts of violence. *Id.*, at 92. The Court found no need to determine "whether there was sufficient proof that inmate correspondence had actually led to an escape plot, uprising or gang violence," but asked only whether there was a "*logical* connection between the security concerns ... and the ban." *Id.*, at 93 n* (emphasis in original).

Turner thus requires that the courts allow prison officials "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner*, 482 U.S. at 89. More exacting review, the Court admonished, would "distort the decision-making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *Id.*

B. Prisoners subject to these restrictions retain ample alternative means of receiving information and communications from the outside world.

The second *Turner* factor asks whether there are alternative means of exercising the right that remain available to the affected inmates. Addressing this factor, the Court of Appeals defined the right in question here very narrowly as "the right of access to a reasonable amount of newspapers, magazines and photographs." Pet. App. p.20a. The Court's decisions applying *Turner*, however, have stressed that "the right in question must be viewed reasonably and expansively." *Thornburgh v. Abbott*, 490 U.S. at 417.

Turner itself set the tone. Analyzing a regulation that restricted correspondence between inmates, the Court did not "look to see whether prisoners had other means of communicating with each other, but instead examined whether the inmates were deprived of 'all means of expression.'" *O'Lone v. Shabazz*, 482 U.S. 342, 352 (1987), *quoting Turner*, 482 U.S. at 92. Analyzing policies that prevented Muslim inmates from attending Jumu'ah service, the Court in *O'Lone* examined whether such inmates "retain the ability to participate in other Muslim religious ceremonies." *Id*. Analyzing the withdrawal of visitation privileges in *Overton*, the Court examined whether inmates "have alternative means of associating with those prohibited from visiting." *Overton*, 539 U.S. at 135. Noting that "inmates may communicate with persons outside the prison by letter and telephone," the Court emphasized that "[a]lternatives to visitation need not be ideal...; they need only be available."

Here, the right in question, "viewed reasonably and expansively," is not "the right of access to a reasonable amount of newspapers, magazines and photographs," but rather the right to receive information and

communications from the outside world. *See Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (recognizing well established First Amendment right to "receive information and ideas"). LTSU Level 2 inmates have ample alternative means of exercising that right: they are allowed monthly visits with immediate family, and unlimited visits from legal counsel; they receive daily visits form a Facility Chaplain; they may order books from the prison library; and they may send letters to and receive letters from family, friends and others, which may include newspaper or magazine articles with a personal connection to themselves. Because it defined the right so narrowly, the panel majority barely mentioned and didn't consider these alternatives. Level 2 inmates, of course, can also improve their behavior and regain the privilege of access to periodicals upon transfer to Level 1 and access to photographs upon transfer from the LTSU.

C. The right asserted cannot be accommodated without imposing substantial costs.

The third and fourth *Turner* factors ask what impact accommodation of the right would have on guards and other inmates and whether there are ready alternatives to the challenged policy. Regarding the third factor, *Turner* counsels that '[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of prison officials." *Turner*, 482 U.S. at 90. Regarding the fourth factor, *Turner* emphasizes that "[t]his is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id*. At 90-91.

Accommodating the asserted right of access to periodicals and photographs would compromise the purpose of the LTSU. Again, LTSU Level 2 inmates are

the highest-security prisoners in the Pennsylvania prison system, at the apex of a progressive discipline regime where few privileges remain. Excluding those privileges from the management arsenal of prison administrators would diminish the severity of Level 2, with the "ripple effect" of diminishing its value both as a deterrent to serious misconduct by other inmates and as a means of reforming Level 2 inmates to where they can rejoin the general population as less a threat to other inmates. Accommodating the right has the additional 'ripple effect" of increasing the risk to LTSU guards and other prison staff who must enter the unit.

The panel majority suggested that the asserted right of access to periodicals could be accommodated by a guard delivering a periodical to an inmate's cell and retrieving it at the end of a specified reading period, or by a guard escorting the inmate to the mini law library - a privilege permitted already for access to legal material - to read a periodical of the inmate's choosing. Neither accommodation, however, could be implemented without the imposition of substantial costs, in the form of increased demands on personnel resources and increased security risks. Again, the majority panel ignored the context of the high-security LTSU, discounting, for example, the increased difficulty that would attend increased demand to visit the mini law library. Perversely, the majority panel went so far as to suggest that the small number of inmates in the LTSU, compared with the entire prison population, would minimize the cost of accommodation. But, though small in number, the inmates of the LTSU require greatly disproportionate expenditure of resources to ensure security.

As a means of accommodating the asserted right to view photographs, the majority panel suggested limiting "the total number of photographs that an inmate could have in his cell at one time." Pet. App. p.22a. And as a means of limiting its own suggested accommodations,

the panel majority suggested that access to periodicals and photographs could be withheld from prisoners who "pose a risk given their records or...who have abused their use of periodicals or photographs." Pet. App. pp. 22a-23a. About such intense second-guessing of prison officials, little more need be said than that the court missed for the forest for the trees - the prisoners in LTSU Level 2 universally "pose a risk given their records" – and that such fine-tailoring is way beyond the province of the courts under *Turner* and its progeny.

In summary, all four *Turner* factors support the conclusion that the challenged policy is rationally connected to the legitimate penological objectives of rehabilitation and security. Thus the policy is clearly constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded with instructions to affirm the judgment of the District Court.

Respectfully submitted,

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