IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

Matthew Prow,
Petitioner

v.

Tom Roy, et. al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Petitioner is an artist currently in the custody of the Minnesota Department of Corrections (DOC). He commenced this civil rights action under 42 U.S.C. 1983 against Respondents (DOC officials) alleging violations by Respondents, who through policy and practice overly restricted Petitioner's ability to create and view art. This case falls under the Reasonable Relationship Standard ("The Standard" or "*Turner* analysis") for review of Constitutional infringements in the prison context. Broadly limned, the question is as to what is the proper methodology of applying the standard, and if the courts below did so; Pursuant to Supreme Court Rule 14(1)(a) the Court should construe that Prow means to include fairly within this all factors of analysis on all points.

Supreme Court rule 14 (1)(a) prescribes that questions must be presented concisely and without unnecessary detail, but also prescribes that any question not presented will not be considered. Petitioner is *pro se*, and due to the lower courts' almost complete ignoring of his arguments, has difficulty complying with both rules. Petitioner's best effort is to be very concise, relying on the Court to be liberal in construing that "fairly included therein" are all individual points of analysis performed, incorrectly performed, or not at all performed under The Standard by the courts below, and append materials the Court may wish for elaboration.

In addition to the overarching issue of The Standard, the following specific questions are presented for review.

Did the District Court, and Eighth Circuit by unelaborated affirmance, err by:

1. Not performing overbreadth analysis
2. Not performing as-applied analysis
3. Not ruling there is a blanket ban in effect on some genres of art
4. Not giving treatment to the issue raised that there is a blanket ban in effect, on any creation of an image with content of nudity
5. Not considering Prow's arguments as movant but only those responsive to respondents'
6. Not analyzing the specific challenges petitioner made to the multiple specific restrictions encompassed by the policies
7. Not considering expert testimony provided by petitioner
8. Not reviewing all of petitioner's objections to the report and recommendation (R&R)
9. Not making findings of fact in the light most favorable to the non-moving party on disputed facts, or alternatively not granting summary judgment, most notably over the dispute over the actual manner policies were applied, and the true intent of the restrictions
10. Not considering alternative policies petitioner put forth of which respondents did not refute (both hobby craft and contraband) the *de minimis* nature
11. Not reviewing physical evidence submitted by petitioner

12. Not granting the declaratory relief petitioner sought when respondents admitted to the point of declaration being sought (rendering Prow non-prevailing when he nonetheless achieved some of the relief sought)
13. Not giving treatment to the fact that staff are trained to apply policy different than respondents explain it is applied
14. Not analyzing petitioner's argument that respondents' so-called "featuring" exception for certain nudity is invalid because, *inter alia*, "features" is not even defined in policy
15. Not ruling the specific hobby craft restrictions which Prow raised as invalid but which Respondents did not specifically refute
16. Disregarding expert testimony that the specific hobby craft restrictions challenged caused free speech infringement with no alternative means for expressing the right
17. Ruling *de minimis* alternatives to the hobby craft policy don't exist, when petitioner in fact proffered multiple alternatives which the respondents did not refute as not being *de minimis* and have been held as *de minimis* by other courts

PARTIES

Petitioner, Matthew Prow ("Prow"), is plaintiff and appellant. Prow is an artist and prisoner in the custody of the Minnesota Department of Corrections ("DOC").

Respondent, Tom Roy, was at the time and currently is the Commissioner of the DOC. Roy in his official capacity has ultimate authority over the policies at issue; further, because Prow directly requested from him redress for the denials he has personal involvement. Roy was sued in his official and individual capacities.

Respondents, John King, Sandra O'hara, Steve Hammer, Mary McComb, Carol Kripner, Regina Stepney, Lt. Lindell, and Sgt. Hillyard were staff employed by the DOC at the time and were all personally involved in denying photographs, photocopies, books, and art supplies to Prow. Above Respondents were sued in their individual and official capacities.

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JURISDICTION

The judgment for the Eighth Circuit, affirming the District court decision, was entered on April 3, 2018. An order denying petition for rehearing and rehearing *en banc* was entered on May 7, 2018, and a copy of that order is attached in appendix B to this petition. Jurisdiction is conferred by 28 U.S.C. 1254(1).

TABLE OF CITATIONS

Lower Court Citations

Except where noted, all citations are from the District Court R&R

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Mack v. Dillon, 594 F. 3d 620, 622 (8th cir. 2010)	Appellate opinion 2
Turner v. Safley, 482 U.S. 78 (1987)	Appellate opinion 2
Libertarian Party of Ark. V. Martin, 876 F. 3d 948, 952 (8th cir. 2017)	Appellate opinion 2
Phillips v. Norris, 320 F. 3d 844, 847 (8th 1993)	Appellate opinion 2
Buckley v. Barlow, 997 F. 2d 494, 495 (8th Cir. 2017)	Appellate opinion 2
Hess v. Ables, 714 F. 3d 1048, `1051 n. 2 (8th Cir. 2013)	Appellate opinion 2

Prow Citations

Citations from Prow's Memorandum in Support of Summary Judgment

Turner v. Safley, 482 U.S. 78 (1987)

Thornburgh v. Abbott, 490 U.S. 401

Couch v Jabe, 479 F. Supp. 2d 569 (2006, WD Va)

Williams v. Brimeyer, 116 F. 3d 351 (1997, 8th cir.)

Mann v Smith, 796 F. 2d 79 (1986, 5th cir.)

Nichols v. Nix, 16 F. 3d 1228 (1994, 8th cir.)

Amatel v. Reno, 156 F. 3d 192; 332 U.S. App. D.C. 191 (1998)

Walker v. Sumner, 917 F. 2d 382 (1990, 9th cir.)

Prison Legal News v. Lehman, 397 F. 3d

692 (2005, 9th cir.)

Cline v. Fox, 319 F. Supp. 2d 685 (2003, N.D. W. Va.)

Waterman v. Verniero, 12 F. Supp. 378 (1998, D. N.J.)

Murphy v. Missouri Department of Corrections, 372 F. 3d 979 (2004, 8th cir.)

Hodgson v. Fabian 2012 U.S. Dist. Lexis 104665

Charles v. Vernhagen 220 F. Supp. 2d 937 (W.D. Wis. 2002)

Saucier v. Katz, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)

Muhammad v. Dipaolo, 393 F. Supp. 2d 80

Wright v. Smith, 21 F. 3d 496 (1994 2nd cir.)

Aiello v. Litscher, 104 F. Supp. 2d 1068, 2000 U.S. Dist Lexis 13154

Trobaugh v. Hall 176 F. 3d 1087, 1999 U.S. App Lexis 9055 (8th cir.)

Haynes v. Stephenson, 588 F. 3d 1152, 2009 U.S. App. Lexis 27433 (8th cir.)

United States v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435, 2010 U.S. LEXIS 3478

Murchison v. Rogers, 779 F. 3d 882; 2015 U.S. App. Lexis 4056

Charleston Housing Authority v. United States Department of Agriculture, 419 F. 3d 729, 740 (8th Cir. 2005)

Friends of the Earth, inc. v. Laidlaw, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000).

Koger v. Dart, 114 F. Supp. 3d 572 (N.D.ILL. 2015)

George v. Tritt, 467 F. Supp. 2d 906

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment I to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for redress of grievances

The Amendment is enforced by Title 42, section 1983, United States Code:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

Petitioner, Matthew Prow, is an artist in the custody of the DOC, practicing predominantly in the mediums of graphite, charcoal, pen and ink, and paint (acrylic and water-mixable oil). As this Court has established, free speech extends also to receiving speech because it is necessary for the cultivation of ideas to express. Prow has especial appreciation for the art genres of Biomech, Impressionism, Fantasy, and of classical painting.

Prow brought civil rights action in Federal District Court for the District of Minnesota alleging that the Respondents unconstitutionally infringed on his rights to view and create art not of a pornographic or "sexually explicit" nature (terms Prow uses synonymously and which caselaw uses interchangeably). Prow brought facial and as-applied challenges to the policies, and to specific denials of books, photocopies, photographs, and art supplies.

At issue are DOC policies 301.030 Contraband, 204.047 Hobby Craft and its Allowable Items List, and collaterally 302.020 Property (referred to collectively as "policy" except where differentiated". Each policy includes multiple specific restrictions. For example Contraband policy covers all forms of contraband including drugs, cellphones, and pornography. In regards to pornography, like those of many states, Contraband policy begins by banning any instance of nudity, and then by an exceptions clause exempting forms of nudity which do not implicate the interest in security and rehabilitation. As found in *Stevens* and *Mauro (and et.*

al.), such a form of clause must protect a sufficient amount of material which does not implicate the interest. The difference is that under The Standard less material must be protected; however, the standard does establish that there is a point where a policy is invalid for being underinclusive if it does not cover enough of the material which implicates the interesst, or overbroad because it covers too much material which does not implicate the interest. The caselaw subsequent to *Turner* does not establish, and the Circuits as well as this Court, are split on where those lines of validity reside.

The hobby craft policy and specific denials fall in the same jurisprudent domain as the restriction of imagery, and thus would be duplicative to repeat here. Excerpts from Prow's Memorandum in Support of Summary Judgment are appended if the Court wishes to give cursory review of some of the specific arguments presented. Suffice for here is to explain that the restrictions encompass the types and quantities of materials which may be purchased through the prison canteen and through the approved outside vendor. Prow has alleged invalidity of many of the specific restrictions, not the validity of having restrictions. Prow challenged, *inter alia,* the nature of the restrictions on paper, colored pencils, painting canvases, paint volume, paint container type limit, number of paintbrush limit, total purchase and possession limit. Prow's challenges were not refuted by Respondents and not analyzed under The Standard by the courts. The courts found, essentially, that the validity of having restrictions justifies any restriction made, and that *Turner* precludes courts from analyzing them.

Prow's as-applied challenges were to denials of the book "Biomech Art: Surrealism, Cyborgs and Alien Universes," photographs and photocopies of photographs by the artist Robert Alvarado, photographs of the statues "Venus de Milo" and "David," and various specific art supplies.

Prow also raised challenge to the then-recent banning of the use of self-addressed stamped envelopes. Prow maintains the ban is invalid; however, to maintain focus on the above issues did not raise the challenge on appeal.

The parties submitted cross motions for summary judgment. The Court's Report and Recommendation ("R&R") in effect treated Prow's submissions as only responsive as it did not analyze Prow's arguments which were not responsive to Respondents' motion. The court also overlooked disputes of material fact which under standards for summary judgment had to be either viewed in a light favorable to Prow or else preclude summary judgment. Prow filed timely objections to the R&R claiming, *inter alia*, that the Court's methodology for applying The Standard was incorrect, his arguments had not been considered, that no overbreadth analysis was performed, and that no as-applied analysis was performed.

Overbreadth is Prow's foremost argument. The policies and practices are also vague, arbitrary, and exaggerated responses, both related to materials which implicate the penalogical interest and those which do not. Zero overbreadth analysis was performed. In fact, the word only ever appears once in the R&R, where it states Prow makes the challenge. The R&R does not then analyze the challenge. The R&R

uses a circuitous logic to in effect conclude that under The Standard there is no such thing as overbreadth, that prison officials do not need to support their assertions, and that having a valid penalogical interest itself justifies any method of achieving it no matter the collateral impact.

Simply summarized, Prow's argument is that prisons may ban Penthouse magazine but not the art of Michelangelo; may ban dangerous art supplies like spray paint which can be made into flamethrowers but not safe ones like chalk pastels; may ban the creation of pornography but cannot make a blanket ban on the creation of any instance of nudity whatsoever. Prow argues that because the respondents do all these things they have unconstitutionally infringed on his rights. The courts ruled oppositely

BASIS FOR FEDERAL JURISDICTION

This case raises questions of interpretation of the Freedom of Speech clause to the First Amendment to the Constitution. The District Court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. 1331.

ARGUMENT

REASONS FOR GRANTING WRIT OF CERTIORARI

1. Courts of appeal have entered conflicting decisions

2. The Eighth Circuit has entered a decision in conflict with its own past decisions
3. The courts below have entered decisions in conflict with decisions of the Supreme Court
4. There is are important questions of law that have not, but should be, decided by the Supreme Court
5. The Supreme Court has entered decisions in conflict with its own decisions

COURTS OF APPEAL HAVE ENTERED CONFLICTING DECISIONS

Not only as to decisions on specific issues, the courts differ greatly in their base methodology of applying The Standard. Following *Turner*, no court has deviated from using the reasonable relationship standard in prison litigation, so accordingly every conflicting decision becomes a conflict and impeachment of the standard as a whole. As this Court does not consider matters pertinent only to the instant case, the following is structured as addressing issues which affect most or all cases, but the points all conflict in the instant case.

Challenges to infringements of the free speech clause, unfortunately, are most often raised about the controversial issue of pornography. Consequently all free speech infringements become governed by the naturally deep split about pornography amongst the circuits, and mired by the controversy. The only other relevantly

citable cases deal with the also controversial topic of racist literature. See *Williams v. Brimeyer.*

Again, though this case DOES NOT challenge restriction of pornography, because it is governed by pornography cases, the circuit split regarding pornography bans is relevant. Some uphold pornography bans; see *Bahrampour v. Lampert.* Some strike down pornography bans; see *Couch v Jabe.* Some find a limited right to sexual materials (usually ruling that verbal descriptions which are permitted satisfy the *Turner* factor of an alternative means to imagery) see *Amatel v. Reno, Mauro v. Arpaio.* The split is so established as to not need extensive citation until briefing on the merits

The similarity in all cases whether affirming or reversing pornography bans is the citation to *Turner* as supporting the decision. Also notable is that the assertions put forth by prison officials in these cases is often near verbatim restatement of the supposed connections put forth in previous litigation (typically originating in *Mauro v. Arpaio*) and not supported at all as to why those points are relevant or even exist their facilities. In the affirming cases this lack of support is sufficient for the court and in the reversing cases the lack of support is insufficient, and this is the split in *Turner* methodology which occurs in all prison cases. This is a real and embarrassing conflict worthy of this Court's attention.

Thankfully, the conflict need not be resolved upon such a controversial form of speech. This case is not about the politically charged topic of pornography; just the

opposite, in fact. Prow has continually asked the courts to demur from rendering an opinion as to pornography bans, saving them from the controversy. Prow has raised challenge for protected speech decidedly not pornographic. This case provides the opportunity to clarify *Turner* without entering the political arena. This case deals with the speech for which the First Amendment was enacted, and by taking this case the Court will provide clarification for the lower courts to deal with the speech which benefits from mere incidental protection.

THE APPELLATE COURT HAS ENTERED A DECISION IN CONFLICT WITH ITS OWN AND OTHER CIRCUIT DECISIONS

The courts below have entered decisions in conflict with all of the following doctrines. Because the District Court, and Appellate by affirmance, have deviated from these decisions on so many of Prow's challenges, elaboration and citation here would cumulate to the recitation of the record; thus for brevity Prow does not cite to the record, and asks leave to supplement with such citation if this is insufficient for the Court.

It is established that:

1. the conclusory assertions of DOC officials are not sufficient to support a reasonable relationship. See *Murphy v. Missouri Department of Corrections; Williams v. Brimeyer,; Nichols v. Nix.* Some evidential showing beyond their own affidavit assertions is required. See also *Amatel v. Reno; Feagans v. Norris.*

2. when officials' claimed connection to the valid interest is challenged, the challenge is conceded if it is not refuted, or else there is a dispute of material fact precluding summary judgment. See *Singer v. Raemisch 593 F. 3d 529 (7th cir. 2010)*; *Murphy v. Missouri Department of Corrections; Nissan fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F. 3d 1099 (9th Cir.); Walker v. Sumner.*
3. when an as-applied challenge is made to specific denied items, the court must review those items if presented and analyze the challenge as to each one; such analysis is not a review of the professional judgment of the official, which would be afforded deference. See *Murchison v.Rogers,; Murphy v. Missouri Department of Corrections; Williams v. Brimeyer,; Nichols v. Nix; Murphy v. Missouri Department of Corrections; Couch v Jabe,.*
4. policies must in actual practice operate in a valid manner not merely be worded validly. See *Williams v. Brimeyer.*
5. banning art or historical images clearly not pornographic is "bizarre" and thus not reasonably related to a legitimate interest. See *Amatel v. Reno (also frequently cited in subsequent cases).*
6. the government's promises to forego application of a policy when it would be unreasonable to apply it does not then legitimize the policy. See *United States v. Stevens, 559 U.S. 460.*

7. *Turner* analysis is not as to the reasonableness of the claimed interest but as to the reasonableness of the restriction's claimed connection to it. See *Williams v. Brimeyer; Couch v Jabe.*
8. mootness of injunctive relief does not moot declaratory relief and punitive damages. See *Nelson v. Miller.*
9. use of staff time, absent a showing that such use is more than *de minimis*, is not a valid penalogical interest. See *Mann v Smith.*
10. prisoners need not prove that they have a right; it is presumed that all citizens' rights presumptively extend to them. See *Turner.*
11. when a regulation does not include enough of the circumstances that implicate the stated interest, the restrictions it does make which do not implicate the interest render it invalid for being underinclusive. See *Mann v Smith.*
12. One medium of communication is not an alternative to a different one. See *Mann v Smith.*

Also, the case of *Sisney v. Kaemingk* is currently on remand from the Eighth Circuit *886 F. 3d 692 (2018)* in the District Court of South Dakota. *Sisney* is jurisprudently almost identical. Sisney challenged the anti-pornography policy as overbroad in that prison system. The court found that it was in fact overbroad and vague because "features" was not even defined in its exceptions clause. The Court in fact cited to Minnesota District cases, showing how because "features" was defined the past South Dakota policy was valid but the newly changed one which removed the

definition was not. The clauses in that case were worded the same, and then changed to the same new wording. The Minnesota District Court ignored the change and found the policy valid; the South Dakota Court found the change invalidated the policy. In Sisney the Eighth Circuit remanded with instruction to perform as-applied analysis before facial analysis, and to perform that analysis in relation to the revised policy rather than the previous one. To Prow's knowledge at the time of filing, the case is pending resolution. Therefore the Court should grant writ here.

It is especially illustrative to take a closer look at the cases of *Williams v. Brimeyer,* as *Brimeyer* is the controlling standard for all matters of prison litigation in the Eighth Circuit; further, it is regularly cited as authoritative by many other Circuits.

In support of summary judgment Prow cited heavily to *Brimeyer.* In *Brimeyer*, upon summary judgment injunction, and $1,000 in punitive damages were awarded to Harold Williams, a prisoner who was denied materials from a church which espouses racial separation. The defendants claimed the denials were reasonably related to the interest in facility security, and that the connection was in preventing material which may incite violence. The district court reviewed the specific materials. It found that the prison officials' assertions that the denial was reasonably related to the interest in preventing violence were too conclusory. The court found that although it is obviously plausible that racist views might conceivably incite someone to violence, the officials had not put forth any evidence to support some level of probability. The court in so doing affirmed that under *Turner* they need not show violence had occurred or even that it was likely to occur,

only that there was some likelihood beyond mere plausibility, and that an evidentiary showing of such is required. Part of what plagues post-*Turner* cases is that it has not been clearly established what level of probability is required for a sufficient showing of a reasonable relationship. The court found that there was a valid interest in facility security, and THEN went on to perform *Turner* analysis. The court also found that despite the official wording of the policy there was in effect a blanket ban on those materials. The Court found that because Williams post facto to the denial notified the defendants that they were in violation of law established in *Nichols v. nix,* their refusal to correct the violation constituted callous indifference sufficient to justify punitive damages. The appellate court further expounded, "Prison authorities have not been consistent in rejecting these materials, a fact which leads us to believe that rejection, when it occurred, was an exaggerated response." Prow argued all of these points in his memorandum in support of summary judgment and in his appellate brief. The courts below did not analyze any argument based on *Brimeyer*; in fact, no opinion or order from the courts below utter the citation even once.

Prow raised these failures in his objections, and the court did not review them. Prow raised these failures on appeal, and the appellate court did not review them. The incidents and evidences are well-established in the record, and for brevity in a petition will not be repeated here; however, the story of one denied item is humorously illustrative: the denial of a photograph of Michelangelo's statue "David." In *Amatel v. Reno,* the D.C. Appellate Court opined it would be "bizarre"

(their term) to deny a picture of "David," and in context was saying such a denial would evidence an overbroad, arbitrary, and vague policy. On two occasions Prow had a photograph of "David" sent in. One time Respondents Kripner and Stepney denied it, and one time allowed it. Defendant McComb likewise was inconsistent in her application of policy on the photo. Further, in her ECF 99 Affidavit she states policy clearly and without exception bans the photo. She goes on to state she would directly violate the policy and allow it. She states she would directly violate the policy because sometimes the policy "Produce[s] unreasonable results." The saga then continues. Unrelated, Prow was later transferred from and then returned to MCF-Stillwater. Upon return, his legal papers (in violation of policy and law) were searched page by page, and among other submitted affidavit exhibits "David" was seized. The seizure was performed by Officer Cox (non-party), then affirmed by her superior, Respondent Hillyard. The next two levels of command affirmed the denial. When Prow contacted Respondents' attorney regarding the violation of his legal materials, their attorney, despite knowing McComb's sworn statement "David" would be allowed, himself upheld the denial. Just days later he then reversed his position. This policy is so unconstitutional even the Minnesota Attorney General's Office can't consistently apply it.

THE DECISION CONFLICTS WITH THOSE OF THE SUPREME COURT

Variances occur between Supreme Court cases as to how The Standard is to be applied in practice; thus, inescapably, the decision entered by the courts below conflict with some of them. Foremost, it conflicts with the method of application in

Turner itself, which is why this case affects the greater public and is thus worthy of granting writ.

In *Turner,* analysis of the marriage ban was an application of the four factors as to the overbreadth of the restriction, not, in conflict here, with the validity of having some form of restriction. The *Turner* court found a valid penalogical interest in institutional order and prisoner rehabilitation, THEN performed four factor analysis as to the CONNECTION; however, analysis was performed only as to the validity of the interest as to the inmate to inmate correspondence challenge. Here, the analysis was only to the prerequisite interest. This failure is occurring frequently in the lower courts; thus, to salvage the standard the court should grant writ and clarify the methodology. Most law reviews deride the standard and are in favor of returning to least restrictive means; however, by taking this case the court may forego such consideration. See for example "When to Turn to Turner? The Supreme Court's Schizophrenic Prison Jurisprudence." (22 J. L. & Politics 135); "The Rehnquist Court and 'Turnerization' of Prisoners' Rights" (10 N.Y. City L. Rev. 97); "Melting in the Hands of the Court: M&M's, Art, and a Prisoner's Right to Freedom of Expression" (73 Brook. L. Rev. 811). The standard is salvageable, but only if its deficiencies are corrected. We have a sufficient body of caselaw, and body of evidence in this case, so as to know in fact not speculation what those deficiencies are.

The decisions from the courts below conflict with *U.S. v. Stevens. Stevens* fell under least restrictive means; however, it is still relevant, as it explicitly codifies the

methodology for overbreadth analysis. *Turner* establishes that overbreadth exists and that analysis is to be performed; *Stevens* solidifies how to perform it. The only thing *Turner* changes is least restrictive means; it changes only how far beyond the interest validity extends. *Stevens* overbreadth methodology was not applied here. Foremost, no overbreadth analysis was performed at all. Further, *Stevens* sets that the first and second steps in analysis are to determine the intended breadth and secondly the breadth which in fact occurs. Even as to Prow's other challenges, neither of those steps was correctly performed.

THERE ARE IMPORTANT QUESTIONS OF LAW WHICH HAVE NOT, BUT SHOULD BE SETTLED BY THE SUPREME COURT

In challenging for the physical means for free expression, Prow raises an issue of law never before presented in the Federal Courts.

Respondents have argued that Prow, as a prisoner, does not have a right to art supplies and that he has the burden of proving he does. This is incorrect. It is well-established that prisoners retain ALL rights presumptively; any restriction is presumptively invalid until rescued under The Standard, which, yes, the prisoner then has the burden of disproving. It is obvious that freeworld citizens have rights to the physical objects necessary for free expression; otherwise, free expression would extend only to vocal, real-time speech. It would be absurd, under any

standard, to claim the government could ban Monet's paintbrushes and for a court to require him to prove he had a right to them.[1]

Except for the Second Amendment's right to bear arms, the Constitution nowhere grants a right to any certain property item. A citizen's right to any certain physical item is founded upon the right for which it facilitates. Due to obviousness, such an issue would never rise up to need Supreme Court attention except for in the prison context. It now here does.

This is an opportune time to take up the issue. Civil rights actions are certainly going to be appearing suing for the right to the means for communication, and the state of the law is not prepared for it. There are now methods of communication the *Turner* court could not have dreamed of. It is for this exact reason that *Stare decisis* is not eternally binding. The courts will soon see suits for cellphones, computer tablets, video visitation, and partial internet access. Currently some states and the Bureau of Prisons have some or all of these things, and some do not. The Minnesota

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[1] It must be noted that Respondents cited to *Tarselli v. Harkelroad* and *Grant v. Riley*. These are the only cases ever to even mention art supplies. These cases were dismissed because the courts found that they were essentially tort claims attempting to masquerade as civil rights issues. *Tarselli* in fact spoke nothing on the right to art supplies but instead said, "it will assume, for the purpose of this analysis, that such an interest exist[s]."

DOC now has tablets and video visitation. The prison officials in Minnesota have determined that tablets are safe even in super-max custody facilities. How will the standard be applied when prison officials in other states say it is not? What does The Standard say about deference when the officials' opinions within one prison system conflict? Even with video visitation, which does not require a physical object, will some conclusory assertion that at some point some person might accidentally do some upsetting thing in the background of someone's visit justify a ban on video visits? Currently, the standard says it does; it also says it doesn't. And what about when prisons which have allowed in-person visits for hundreds of years suddenly decide they conflict with the penalogical interest in security and they can be banned because video visits are an alternative. Is not their past practice itself an impeachment of the claimed interest? Ineluctably, Circuits are going to render conflicting decisions.

By performing analysis and clarification now, on safe and simple items such as paper and paints, the Court can set the methodology for when more complex decisions arise. It is predictable that the Court will face this issue of the means for communication now on a simple matter or later on a more complex one. Justice Homes once remarked that hard cases make bad law. See *Northern Sec. Co. v. United states, 193 U.S. 197 (Holmes, J. dissenting).*

Also before the Court is the issue of outward expression by prisoners by imagery not merely text. It has been held by all circuits that a blanket ban on receiving any and all images containing nudity is invalid; thus most analysis turns upon the

exceptions clauses in the policies which begin by being based on nudity. Prow argues that the invalidity of a blanket ban applies also to the creation of images with content of nudity. This Court should opine on the issue to avoid the split which has occurred regarding receiving images. Even *Thornburgh* notes that outbound communication is of a lesser security risk, and thus a blanket ban of created nudity is even more invalid. Respondent McComb in her ECF 99 affidavit confirms that there is a total blanket ban on creating any image the DOC deems to contain nudity. Prow raised this issue in his declarations in District Court as well as more directly in his appellate brief. Neither court gave the argument *Turner* analysis.

THIS COURT HAS ENTERED DECISIONS WHICH CONFLICT WITH ITS OWN.

The conflict begins within *Turner* itself. Justice Stevens wrote a brilliant and prophetic dissent in which he pointed out that the marriage ban and inmate-to-inmate correspondence ban analyses applied the new standard with different methodologies. He correctly predicted exactly what has caused the conflicting decisions ever since. Justice Stevens's "bullwhip" is real.

The judicial freedom of the dual methodology is seductive though. Recently, Justice Stevens joined the majority opinion in *Ben-Levi v. Brown, 136 S. Ct. 930,* denying writ based upon the very methodology he dissented in *Turner*. In *Ben-Levi* Justice Alito dissented, pointing out that the analysis was performed on the interest not the connection thereto; he argues an almost obvious overbreadth. In *Kingsley v. Hendrickson,* however, Justice Alito joined the majority opinion which used the methodology he dissented in *Ben-Levi*.

This does NOT indicate or allege arbitrary application by the Court; this shows the opposite. These conflicts show that the dual methodologies are so subtly conflicting that they sneak past our highest authorities. What these conflicts show is not that one side or the other was incorrect in any of the cases, but rather that each side was always correct, because the standard as presently unclarified can validate any decision. The Standard affords discretion to the courts, but the level of discretion is so high that it creates arbitrary decisions.

Most of this Court's decisions on prison litigation come heavily split and vociferously dissented. See the multiple strongly worded dissents in *Florence v. Board of chosen Freeholders, 566 U.S. 318; Beard v. Banks, 548 U.S. 521.*

What is unanimous is that the Court is in favor of keeping The Standard and not reducing its reach. See *Shaw v. Murphy, 532 U.S. 223,* declining to further extend the right for prisoners to assist in legal preparations of other prisoners, and maintaining that analysis falls under The Standard. Granting writ may serve to solidify The Standard, and through clarity reduce the number of cases which rise to this Court.

CONCLUSION

The "intractable" problems of prison administration have disappeared and instead the intractable problem is holding prisons accountable to the Constitution. Regarding The Standard, this Court has cited to separation of powers, but it must

be kept in mind that the separation is for creating checks and balances. The Prison Litigation Reform Act has reduced frivolous suits filed by prisoners, but through *carte blanche* given to prison administrators by the almost insurmountable obstacles of The Standard and the PLRA, has increased actual rights violations. The Standard might not be perfect in dealing with the prison litigation landscape far removed from the one in which it was created; however, it may still be salvaged if updated and clarified. The *Thornburgh* court opined that The Standard is not "toothless." Arguably that may be, but presently it is blind. The above argument asks the Court to grant writ of certiorari and give The Standard eyes to see and ears to hear, so it may know upon whom to use its teeth. Based upon the foregoing, Petitioner asks the Court to grant writ.

Respectfully submitted, Date: June 28, 2018

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