No. 18-761

In the Supreme Court of the United States

DENNIS DAHNE,

PETITIONER,

v.

THOMAS RICHEY,

RESPONDENT.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Seeking to distract from the importance of the question presented here and the Ninth Circuit's profound conflict with decisions of other circuits and this Court, Respondent Richey claims that this petition is interlocutory and the record incomplete. Neither claim withstands the slightest scrutiny. The Court should grant certiorari and provide clarity to prison administrators nationwide about their authority to restrict abusive language in grievances.

ARGUMENT

A. The Ninth Circuit Ruling is Final and the Record is Fully Developed

Richey's primary arguments are that the petition is interlocutory and that the question presented requires a more developed factual record. BIO 8-17. These arguments lack merit.

1. The decision below is final, not interlocutory

There is nothing interlocutory about the Ninth Circuit's resolution of the question presented. The Ninth Circuit affirmed summary judgment for Richey on his claim that Dahne violated his First Amendment rights. App. 3a ("We affirm the district court's grant of summary judgment to Richey on his right to petition claim[.]"). The only thing left for the trial court to resolve is damages.

In arguing to the contrary, Richey relies on *Johnson v. Jones*, 515 U.S. 304 (1995), but that case actually proves the State's point. There, this Court held that it would be inappropriate to review a lower court ruling *denying* summary judgment when the

issue left for trial was a factual one. *Johnson v. Jones*, 515 U.S. at 313. But the Court emphasized that a ruling *granting* summary judgment for the plaintiff would obviously be a reviewable final order. *Id.* at 318 ("[I]f the District Court in this case had determined that [the defendants] violated clearly established law, petitioners could have sought review of *that* determination.").

Richey also suggests that before reaching the question presented here, the Court would have to resolve in the first instance whether his grievances amounted to "true threats" or defamation. BIO at 9. But Officer Dahne's argument has never been that Richey's language falls into these categories of speech that would be unprotected outside of prison. Rather, Dahne's argument is that prisons can restrict abusive and disrespectful language—even language that would be protected outside prison—because doing so is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). That is the argument the Ninth Circuit and district court rejected based on published Ninth Circuit decisions holding "that no legitimate penological interest is served by prison rules prohibiting disrespectful language in grievances." App. 4a (citing *Brodheim v. Cry*, 584 F.3d 1262, 1273 (9th Cir. 2009)); App. 15a-16a (citing same case and holding that "the issue is one of law, and . . . Richey has shown a violation of his constitutional right to freedom of speech"). There is nothing interlocutory about this legal conclusion, which the Court could consider without further factual development if it grants certiorari.

2. The record is fully developed

There are no facts that need to be developed by a lower court for this Court to decide whether "prison inmates have a First Amendment right to include threatening, abusive, and irrelevant language in grievances." Petition i.

Richey agrees that the relevant test for the Court to apply comes from *Turner*, 482 U.S. 78, but he argues that this test cannot be applied without additional facts, specifically as to whether his objectionable language actually harmed the prison. BIO 16. This is clearly incorrect under this Court's precedent.

The *Turner* test asks whether prison rules serve legitimate penological interests, not whether a prison had a good reason to apply those rules in a particular circumstance. *See, e.g.*, *Shaw v. Murphy*, 532 U.S. 223, 230 (2001) ("[T]he *Turner* factors concern only the relationship between the asserted penological interests and the prison regulation.").

Turner itself illustrates this point. The rule at issue there restricted inmate-to-inmate correspondence based on general concerns about the risks posed by such correspondence, and without "individual review of each piece of mail." *Turner*, 482 U.S. at 82. The Court upheld the rule and specifically held that individual review of inmate-to-inmate correspondence was not constitutionally required. *Id.* at 93. The dissent complained that the majority had upheld the rule based on the "logical connection" between that rule and penological interests, and without finding that the prison's interests would in

fact be harmed by any "particular correspondence." *Turner*, 482 U.S. at 103 (Stevens, J., dissenting). This makes clear that "how Richey's grievance *actually* affected Dahne, other prison staff, or broader prison operations" (BIO 16) is irrelevant under *Turner*.[1]

Richey also claims that the Court would need more evidence in the record to judge the need for this type of regulation. BIO 16. But it is Richey's burden to prove that Washington's rules fail to serve legitimate interests, not the other way around. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it."). In any event, in assessing whether prison regulations serve legitimate penological interests, this Court has looked to exactly the types of evidence available here: declarations of prison officials, rules in other states, and amicus briefs from other prison administrators. *Id.* at 134 (citing amicus brief for proposition that "numerous other States have implemented similar restrictions"); *Beard v. Banks*, 548 U.S. 521, 530 (2006) (Breyer, J., plurality) (citing affidavit of prison official and relying on "inferences [that] accord deference to the views of prison authorities"); *Turner*, 482 U.S. at 91, 93, 93 n.* (citing testimony from prison officials, rules of other prison systems, and amicus brief of State of Texas and the United States).

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[1] *See Hale v. Scott*, 371 F.3d 917, 920 (7th Cir. 2004) ("But merely to show that the needs of the prison did not require that the regulation be enforced in the particular case against a particular prisoner and by means of the particular sanction chosen by the prison authorities does not justify federal judicial intervention.").

In short, there is nothing left for a lower court to decide or investigate to determine whether prison officials may restrict abusive language in prison grievances. This Court can address the question presented on the existing record, just as it was addressed below.

B. The Ninth Circuit Decision Reflects an Intractable Conflict with Five Other Courts of Appeals and with this Court

Five circuits disagree with the Ninth Circuit on whether prisons have legitimate penological interests for restricting abusive language in grievances. The Court should see through Richey's attempt to minimize that conflict based on the precise constitutional lens at issue and immaterial factual distinctions. And his attempt to defend the Ninth Circuit's unique rule based on this Court's precedent addressing outgoing prison mail also fails.

1. The circuit split is real

Richey argues that the circuit split "is not as pronounced" as the Petition shows. BIO 20. That argument relies on meaningless distinctions.

Richey points out that three of the decisions from other circuits concern claims that prison restrictions violated "free speech" rights, rather than specifically claiming violation of a right to petition. BIO 20-21 (citing *Smith v. Mosley*, 532 F.3d 1270 (11th Cir. 2008); *Ustrak v. Fairman*, 781 F.2d 573 (7th Cir. 1986); *Hale v. Scott*, 371 F.3d 917 (7th Cir. 2004)). Similarly, Richey points out that the inmate in

Hadden v. Howard, 713 F.2d 1003, 1009 (3d Cir. 1983), relied on due process, not the right to petition. BIO 20. But the *Turner* standard applies to all constitutional claims, whether free speech, due process, or anything else related to prison rules. *Shaw*, 532 U.S. at 229 ("[I]n *Turner* we adopted a unitary, deferential standard for reviewing prisoners' constitutional claims[.]"). Each of these cases thus assessed the same fundamental question and held that prisons have legitimate penological interests in restricting disrespectful language in grievances. *See Mosley*, 532 F.3d at 1277 (holding that prisons have legitimate penological interests for prohibiting "insubordinate remarks" in grievance letters); *Ustrak*, 781 F.2d at 580 (regulation of insolence serves interest in prison discipline); *Hale*, 371 F.3d at 919 (following *Ustrak*); *Hadden*, 713 F.2d at 1006-07 (upholding discipline based on disrespect in a grievance to avoid "serious problems of staff morale and prison discipline"). In contrast, the Ninth Circuit has repeatedly held "that no legitimate penological interest is served by prison rules prohibiting disrespectful language in grievances." App. 4a. This shows a real conflict that goes to the crux of the question presented.

Richey next claims that the Eighth Circuit's position is unclear because the case petitioner Dahne cited considers this issue quickly and another case supposedly reaches a different conclusion. BIO 22 (citing *Cowans v. Warren*, 150 F.3d 910 (8th Cir. 1998) (per curiam); *Loggins v. Delo*, 999 F.2d 364 (8th Cir. 1993)). But *Cowans* upheld discipline against an inmate for including "insulting" language in a grievance, finding that because the rule prohibiting

such language was valid, the inmate could not claim retaliation when he was punished for violating it. *Cowans*, 150 F.3d at 912.[2] And the *Loggins* case Richey cites demonstrates no different rule, as it addressed the use of insulting language in outgoing mail, which this Court had already specifically addressed in *Procunier v. Martinez*, 416 U.S. 396 (1974).

Richey also claims that factual differences among cases dispel the conflict. He observes that the inmate in *Smith v. Campbell*, 250 F.3d 1032 (6th Cir. 2001), threatened staff and displayed aggressive behavior. BIO 21. But the plaintiff's legal claim was "that he was retaliated against *because of the grievances that he filed*[.]" *Campbell*, 250 F.3d at 1037 (emphasis added). And the Sixth Circuit's holding was that "although Smith may have had a right to file grievances against prison officials . . . he did so in a manner that violated legitimate prison regulations[.]" *Id.*

Similarly, Richey argues that two circuit decisions concern oral insults or "disorderly" complaints, not written grievances. BIO 22 (citing *Lockett v. Suardini*, 526 F.3d 866, 874 (6th Cir. 2008) (inmates have no First Amendment right to insult prison employee during a hearing); *Watkins v. Kasper*, 599 F.3d 791, 798 (7th Cir. 2010) (First Amendment does not protect "confrontational, disorderly manner in which [inmate] complained about the treatment of

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[2] Richey's purported distinction of *Cowans* based on its retaliation claim context is further undermined because the Ninth Circuit decision on Richey's petition claim squarely relies on *Brodheim*, 584 F.3d at 1269-72, a retaliation case. App. 5a.

his personal property")). But regardless of whether the grievances were oral or written, these cases recognize prisons' legitimate interests in restricting disrespectful language.

In short, the Petition accurately shows that five circuits recognize legitimate penological interests that justify restricting or punishing disrespectful language in grievances. The Ninth Circuit has repeatedly rejected that view. The Court should accept review to resolve this intractable conflict.

2. This Court's case law does not support the ruling below

Richey also questions the conflict by arguing that the Ninth Circuit decision is consistent with this Court's precedent. He relies on a strained theory that a prison's interest in regulating inmate grievances is analogous to a prison's interest in regulating outgoing mail. BIO 18-19. The cases that address prison authority over outgoing and incoming mail, however, actually support Petitioner Dahne's arguments and do not alleviate the conflict.

Richey relies on *Thornburgh v. Abbott*, 490 U.S. 401 (1989). But *Thornburgh* held that the "security implications" of materials sent outside the prison are "of a categorically lesser magnitude" than materials within or coming into the prison, where prisons have strong interests in control. *Thornburgh*, 490 U.S. at 413. Richey's reliance on these cases ignores how prison grievances occur *within* the prison. Inmates retain copies at each level of the system (ER 72, 74, 76), and grievances are shared with staff (ER 68, 107). Thus, *Thornburgh* supports upholding the restrictions here because "the impact of the

correspondence on the internal environment of the prison was of great concern," and prison officials should "be given broad discretion" to deal with "inside communications." *Thornburgh*, 490 U.S. at 413.

Finally, there is no merit to Richey's claim that inmate mail cases creates a rule protecting inmate speech to all "non-inmates." BIO 18-19. He cites no case where the Court applies *Thornburgh* or other cases to limit a prison's ability to restrict inmate communications to staff or communications retained in the prison by inmates. Moreover, *Turner* describes the outgoing mail cases as applying to correspondence from inmates to the "general public" and "outsider[s]," not any "non-inmate" as argued by Richey. *Turner*, 482 U.S. at 85.

In short, the panel decision cannot be reconciled with *Turner* by application of the rulings in *Thornburgh* or *Martinez*. Instead, those cases support the circuits that recognize that there are legitimate penological interests at stake when prisons restrict abusive, disrespectful, or threatening language in prison grievances.

C. The Ninth Circuit's Decision Denying Qualified Immunity is Presented Here and Warrants Review if the Court Wishes to Reach it

Richey incorrectly claims that the Ninth Circuit's ruling denying Dahne qualified immunity is not presented here and does not warrant this Court's review. Again, these arguments fail.

1. Whether Richey's claimed right is clearly established is fairly included in the question presented

The propriety of the Ninth Circuit's ruling that Dahne violated Richey's clearly established First Amendment rights is "fairly included" in the question presented under Rule 14.1(a).

Under this Court's precedent, courts may resolve cases in a defendant's favor under 42 U.S.C. § 1983 either by concluding that there was no constitutional violation or by concluding that the right at issue was not clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The Ninth Circuit's ruling in this case addressed both topics, and the State's question presented emphasized both aspects of the Ninth Circuit's ruling, Pet. i (explaining that the Ninth Circuit found a violation of "an inmate's clearly established First Amendment rights"). The petition then addresses both topics at length. Nonetheless, Richey claims that the precise phrasing of the question presented does not allow the Court to address whether the First Amendment right found by the Ninth Circuit was clearly established. Richey cites no decision of this Court taking such a narrow view, which elevates form over substance.

Rule 14.1 has two purposes. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). First, it ensures that the party opposing certiorari knows what issues it must argue, so that it is not forced to defend against

certiorari on grounds not presented. *Yee*, 503 U.S. at 536. Second, it assists the Court in identifying important questions. *Id.* Neither purpose would be served by accepting Richey's argument here.

Richey clearly understands that the State is asking the Court to review the Ninth Circuit's qualified immunity ruling. He simply claims that the precise phrasing of the State's question presented omits that topic. But the Court's "power to decide is not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978).

Similarly, the State's petition makes very clear to the Court that the State seeks review of "The Ninth Circuit's Analysis of Inmate First Amendment Rights" and "The Ninth Circuit's Cursory Denial of Qualified Immunity." Pet. iv. The State's brief devotes five pages of argument to explaining why the Ninth Circuit's qualified immunity analysis conflicts with decisions of this Court. Pet. 26-31.

Richey's contrary argument relies on *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a case that does not speak to the concerns of Rule 14.1(a). *Iqbal* includes a passage explaining that denial of qualified immunity is conceptually distinct from the merits of the plaintiff's claim for purposes of appellate jurisdiction. But that does not help evaluate the question presented here, where deciding that the First

Amendment right was clearly established was a necessary predicate to the Ninth Circuit's ruling.

2. The Ninth Circuit denial of qualified immunity warrants review

Whether inmates have the First Amendment right recognized by the Ninth Circuit warrants review, even if the Court does not reach the "clearly established" law issue, because that Ninth Circuit ruling hobbles grievance programs across the circuit. Pet. 6-7, 31-36. The Ninth Circuit's conclusion that its cases clearly establish Richey's legal rights when other circuits and states reject the Ninth Circuit view provides a further reason for granting the petition, or a reason to summarily reverse.

The Ninth Circuit ruling contradicts this Court's repeated admonition that rights are not clearly established when judges and circuits are divided. Pet. 29-30 (citing cases). Richey's rebuttal to this showing fails. He relies on circuit cases, but none involve a circuit claiming that a constitutional right can be clearly established when the circuit's ruling stands in opposition to multiple circuits and states. BIO 25. Nor do these cases address the conflict between the Ninth Circuit's clearly established law ruling and this Court's rulings, set forth in the Petition at pages 29-31.

CONCLUSION

The Petition should be granted and the Ninth Circuit reversed.

RESPECTFULLY SUBMITTED.

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