No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD REYNOLDS, JOHN VIVO, DWIGHT G. PINK, ANDRES R. SOSA, AKOV ORTIZ, AND VICTOR SMALLS,

Petitioners,

v.

ANGEL QUIROS, COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF CORRECTION, IN HIS OFFICIAL CAPACITY,

Respondent.

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Palak Sharma
DAY PITNEY LLP
One Jefferson Road
Parsippany, NJ 07054

Matthew J. Letten
Counsel of Record
Joseph K. Scully
Elizabeth P. Retersdorf
Rosendo Garza, Jr.
DAY PITNEY LLP
242 Trumbull Street
Hartford, CT 06103
(860) 275-0100
mletten@daypitney.com

QUESTION PRESENTED

Whether a state administrative agency, based upon the recommendation of an *ad hoc* committee, can deny access to publications protected by the First Amendment—specifically, pictorial sexually explicit materials—simply because the plaintiffs are incarcerated within a facility operated by the Connecticut Department of Correction or whether the Department's administrative rule violates the First Amendment based on the factors set out in *Turner v. Safley*, 482 U.S. 78 (1987).

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard Reynolds, John Vivo, Dwight G. Pink, Andres R. Sosa, Akov Ortiz, and Victor Smalls respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a–28a) is reported at 25 F.4th 72 (2d Cir. 2022). The opinion of the district court entering judgment for Respondent following a bench trial is included at Pet. App. 29a–52a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on February 3, 2022. Pet. App. 1a. Justice Sotomayor granted Petitioners' timely application to extend the time to file until June 20, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This Court has repeatedly affirmed that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," and prisoners are not stripped of their constitutional rights and privileges the moment the prison doors close. *Turner v. Safley*, 482 U.S. 78, 84 (1987); *accord*

Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *Pell v. Procunier*, 417 U.S. 817, 822 (1974). It follows that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect [prisoner's] constitutional rights." *Turner*, 482 U.S. at 84 (alteration in original) (quotation marks omitted). In particular, federal courts must carefully review prison regulations and policies that infringe on constitutional rights and should only permit those restrictions that are "reasonably related" to legitimate government interests. *Id.* at 89. Courts should strike down prison regulations and policies that are an "exaggerated response" to penological objectives. *Id.* at 87. Courts must remain ever vigilant to protect constitutionally enshrined individual rights from abridgement by unelected officials of the administrative state.

In this case, the Connecticut Department of Correction ("DOC") implemented revisions to an existing regulation, Administrative Directive 10.7 ("AD 10.7"), such that every inmate in a state prison facility in Connecticut is now prohibited from receiving or possessing pictorial sexually explicit materials, including photographs, magazines, and books. The DOC adopted this radical abridgement of constitutional rights based upon the recommendation of an *ad hoc* committee of DOC personnel.

In sweeping fashion, AD 10.7 prohibits state prisoners from possessing personal photographs of a loved one that contain nudity, a *National Geographic* magazine that includes stray nude images, an

instructional art book that shows how to draw the nude human form, as well as those materials that are more traditionally classified as pornography. It is undisputed that prisoners have a First Amendment right to these materials, whatever moral value we assign to them. *E.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 234 (2002); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997).

Given the obvious constitutional concerns presented by AD 10.7, Petitioners—all current inmates in different state prison facilities in Connecticut—filed multiple lawsuits alleging violations of their First Amendment rights that were later consolidated into this case. When pressed to defend the constitutionality of AD 10.7, Respondent, the DOC Commissioner, cited familiar penological interests that are routinely invoked in prison litigation, including the security of prison facilities, the rehabilitation of inmates, and workplace conditions for prison staff.

These interests are, standing alone, legitimate objectives for prison officials. But over the course of a multi-day bench trial, Petitioners demonstrated with expert testimony, prison records, their own testimony, and the testimony of DOC officials and employees that AD 10.7 was not rationally related to prison security, rehabilitation, or workplace conditions. Rather, these interests were merely window dressings meant to obscure the DOC's moral

judgment that sexually explicit materials[1] are objectionable and prisoners should not have them for that reason. A prison's moral judgment that prisoners should not have access to certain First Amendment materials is, however, plainly insufficient to justify this type of restriction.

On appeal, the Second Circuit adopted many of the speculative arguments put forth in defense of AD 10.7. Instead of the thorough reasonableness review that this Court endorsed in *Turner v. Safley*, 482 U.S. 78 (1987), the Second Circuit almost entirely deferred to the DOC's arguments concerning the value of AD 10.7, no matter how attenuated or lacking in evidentiary support these arguments were. In the process, the Second Circuit embraced an extreme view of deference, such that it is hard to imagine a scenario where a federal court would strike down a prison regulation as unreasonable—at least so long as prison officials invoke the right buzzwords like "prison security" or "prisoner rehabilitation."

Because the Second Circuit's decision is inconsistent with this Court's precedent, wrongly decided, and presents this Court with an opportunity to clarify the nature of reasonableness review under *Turner*, Petitioners request that this Court grant certiorari.

---

[1] For purposes of this Petition, "sexually explicit materials" refers to pictures, not written words. Petitioners have not challenged AD 10.7 as it applies to written materials.

I. FACTUAL BACKGROUND

A. The DOC's Review of AD 10.7

In August 2010, the Commissioner of the DOC ordered a review of the DOC's existing regulation regarding the possession of sexually explicit materials. Pet. App. 8a. At the time, DOC reviewed all incoming letters, magazines, books, and newspapers pursuant to AD 10.7. In 2010, AD 10.7 prohibited prisoners in Connecticut from receiving certain categories of sexually explicit materials, including sadomasochism, bestiality, and non-consensual sexual activity. Pet. App. 8a, Pet. App. 110a. Outside of these categories, prisoners could receive and possess sexually explicit materials, including photographs that included nudity or sexual activity. Indeed, AD 10.7 prohibited the DOC from rejecting a publication "solely because its content is . . . sexual, or because its content is unpopular or repugnant." Conn. Agencies Reg. § 18-81-39.

The Commissioner asked a committee of six DOC personnel (the "DOC Committee") to consider whether AD 10.7 should be revised along the lines of a dual-tiered system where inmates could possess pictorial depictions of nudity, but not explicit sexual activity. Pet. App. 8a. In his charge to the DOC Committee, the Commissioner expressed concern that AD 10.7 allowed inmates to possess "offensive and pornographic depictions of sexual activity," which some inmates would display in their cells in violation of existing DOC policy. *Id.* at 33a.

The DOC Committee—which did not solicit any

input from inmates and only met once a month for six months—quickly decided that the Commissioner's proposed two-tiered system would be difficult to implement because it would require the "ongoing, subjective" monitoring of inmate mail. *Id*. Of course, the DOC was already monitoring inmate mail pursuant to AD 10.7 and applying subjective criteria as to what sexually explicit materials were prohibited.

The DOC Committee also purportedly considered whether a two-tiered system could be implemented based on inmate status, where sex offenders would be prohibited from receiving or possessing sexually explicit materials. Pet. App. 33a. The DOC Committee rejected this system as difficult to administer because sex offenders are not segregated from non-sex offenders and sexually explicit materials can be bartered among inmates. *Id.* This has not stopped the DOC, however, from imposing other restrictions on sex offenders that do not apply to the general inmate population. Moreover, as discussed below, inmate cells are routinely searched for contraband and there was no indication that DOC staff could not search for sexually explicit materials when searching the cells of sex offenders.

Instead of recommending a two-tiered system, as asked by the Commissioner, that would preserve at least some modicum of inmate rights, the DOC Committee recommended that the DOC radically revise AD 10.7 to prohibit *all* pictorial depictions of nudity and sexual activity. Pet. App. 34a. The DOC Committee claimed its recommendation was guided by the safety and security of DOC facilities, the

rehabilitation of DOC inmates, and reducing the exposure of DOC staff to sexually explicit materials and acts of public indecency by some inmates. *Id.* at 33a.

The Plaintiffs presented evidence, however, that the DOC Committee's true motivation was removing sexually explicit materials from DOC facilities because the committee members disliked pornography. For example, one of the committee members would later testify that the DOC should assume the role of thought police and prohibit inmates from viewing sexually explicit because inmates have "sexist and inappropriate attitudes and perceptions of women" and sexually explicit materials "reinforce[] those attitudes and perceptions." Pet. App. 39a–40a; *accord id.* at 39a (testimony from the same committee member that sexually explicit materials can cause "deviant sexual arousal").

Moreover, the DOC already had numerous regulations on the books that were meant to address the various concerns cited by the DOC Committee. At the time, inmates were prohibited from displaying sexually explicit materials in their cells; indeed, existing regulations severely restricted the quantity of pictures that inmates could post on their walls. Pet. App. 30a, 111a.[2] Regulations already prohibited

---

[2] Inmates in dormitory housing units could not post more than five "pictures or decorative items" and inmates in celled or cubicle units were limited to a designated wall space of not more than six square feet. Pet. App. 111a. Inmates in restrictive housing units were not permitted to display any pictures or wall decorations. *Id.*

public indecency, including masturbating in front of female staff, and classified public indecency among the most serious class of offenses that could result in punitive segregation, forfeiture of good time credits, and loss of recreation, telephone, and commissary privileges. *Id.* at 31a. Inmates were prohibited from bartering with one another and, like every prison, fighting among inmates was prohibited and not tolerated. *Id.* at 32a. Instead of focusing on the enforcement of these existing rules or increasing the available punishment for violations, the DOC Committee recommended a total ban on sexually explicit materials based on scant evidence.

B. The DOC's Revision of AD 10.7

Despite being inconsistent with his original charge, the Commissioner ultimately adopted the DOC Committee's recommendation and a revised version of AD 10.7 went into effect in June 2012. Pet. App. 34a. As revised, AD 10.7 stated that "any visual depiction of sexual activity or nudity" will be rejected as part of the review of incoming publications "unless those materials . . . taken as a whole, are literary, artistic, educational or scientific nature." *Id*. The possession of these same materials is also deemed a Class A offense under AD 10.7. *Id.* at 35a.

Confusingly, the revised version of AD 10.7 left in place language suggesting the DOC will only prohibit sexually explicit material that "poses a threat to the security, good order, or discipline of the facility" and "may not reject a publication solely because its content is . . . sexual." Pet. App. 34a. As a practical matter, however, these qualifiers are toothless. AD

10.7 now operates as a *de facto* ban on visual depictions of sexual activity or nudity subject only to the narrow exception for literary, artistic, educational or scientific materials, which is referred to as the "artistic exception." *Id.* at 35a–36a.

Today, all incoming publications are still reviewed by mailroom staff for compliance with AD 10.7. Pet. App. 35a. In the case of books, if even a single page of the book contains a sexually explicit photograph, the entire book is rejected. *Id.* In the case of magazines, the entire magazine will be rejected if it has roughly six or more objectionable pages. *Id.* If a magazine has fewer objectionable pages, the DOC will rip them out and give the inmate the altered magazine. *Id.*

II. PROCEEDINGS BELOW

A. District Court Proceedings

Soon after the DOC announced the revisions to AD 10.7, several prisoners filed *pro se* constitutional challenges to the regulation. Pet. App. 11a. The district court eventually consolidated these several cases into one action and appointed undersigned counsel as pro bono counsel for Petitioners. *Id.* Petitioners filed an amended complaint alleging violations of their rights under the First and Fourteenth Amendments to the United States Constitution. *Id.* at 30a.[3]

---

[3] Petitioners further alleged that AD 10.7 violated the Constitution of the State of Connecticut and that the DOC had violated state law by amending AD 10.7 without following the

In April 2019, the district court held a three-day bench trial in the consolidated action. Pet. App. 11a. Petitioners testified as to the negative effects of AD 10.7 on their mental well-being and the environment inside Connecticut prisons. *Id.* at 37a. Petitioners explained how they experience increased stress, anxiety, and depression because they no longer have a healthy outlet to find sexual release. *Id.* at 37a–38a. Petitioners also testified that, if anything, the ban on sexually explicit materials means they now view female prison staff in a *more* sexual manner and the climate inside prisons is therefore *worse* for female staff. *Id.*

In addition, Petitioners testified as to the arbitrary manner in which AD 10.7 is enforced, particularly with respect to the so-called "artistic exception" for materials "which, taken as a whole, are literary, artistic, educational or scientific in nature." Pet. App. 34a, 36a. There was testimony and evidence that Petitioner Dwight Pink—who had taken up drawing in prison and sought art books, some with nude pictorials, in order to further this legitimate artistic endeavor—had numerous instructional art books with depictions of nude models rejected as sexually explicit. *Id.* at 36a. Not surprisingly, prison staff admitted that application of this exception turns on largely subjective determinations of a publication's purpose and nature. *Id.*

---

required procedures. Pet. App. 8a. The district court dismissed these state law claims without prejudice, concluding that it lacked supplemental jurisdiction. *Id.*

The district court also heard expert testimony from Dr. Robert Selverstone, a psychologist who was qualified as an expert in human sexuality and typical human behavior. Pet. App. 40a. Dr. Selverstone opined that exposure to sexually explicit materials and sexual arousal can have a positive effect on one's mental well-being. *Id.* He further opined relevant studies show that the availability of sexually explicit materials is correlated with fewer instances of sexual crimes and positive attitudes towards woman. *Id.*

In March 2020, the district court issued a written opinion and entered judgment in favor of Respondent. The district court concluded that AD 10.7 survived constitutional scrutiny based on the factors set out in *Turner v. Safley*, 482 U.S. 78 (1987). Pet. App. 41a–47a. The district court also concluded that AD 10.7 was not unconstitutionally overbroad or vague. *Id.* at 48a–49a.

Focusing on the *Turner* factors, the district court considered (1) whether a valid and rational connection exists between the regulation and the legitimate government interest it protects; (2) whether inmates have alternative means for exercising the constitutional right; (3) the impact accommodating the right will have on guards, other inmates, and the allocation of prison resources; and (4) whether alternatives readily exist that would accommodate the prisoner's rights. *Turner*, 482 U.S. at 89–91.

The district court accepted three penological interests as justifying AD 10.7: (1) the safety and security of prison facilities; (2) the rehabilitation of

sex offenders; and (3) the promotion of a non-hostile work environment for female staff. Pet. App. 43a–45a. The district court also found that inmates had alternative means of receiving "sexually explicit communications" (second *Turner* factor), *id.* at 45a, that accommodating First Amendment rights would have a ripple effect on other inmates and staff (third *Turner* factor), *id.* at 46a, and that there was not a readily available alternative to AD 10.7 (fourth *Turner* factor), *id.*

B. The Second Circuit's Decision

On appeal, the Second Circuit affirmed, concluding that AD 10.7 was reasonably related to the same penological interests identified in the district court's decision. Pet. App. 13a. The Second Circuit also held that the remaining *Turner* factors weighed in favor of affirming AD 10.7 *Id.* at 21a–24a.

First, Respondent argued AD 10.7 was justified by prison safety and security because the measure would improve the efficacy of "cell shakedowns" where inmate's cells are searched for contraband and also reduce inmate aggression. Pet. App. 16a.[4] The Second Circuit found that the mere presence of sexually explicit materials in an inmate's cell made it more likely that a corrections officer would miss something

---

[4] Respondent also argued that AD 10.7 would lead to less bartering of sexually explicit photographs and therefore fewer fights between inmates. Pet. App. 16a. Both the district court and Second Circuit rightly rejected this argument because, if anything, a ban on these materials would make them more valuable and thus lead to more bartering among inmates. *Id.*

during their search because of "embarrassment," "disgust," and "concerns for hygiene." *Id.* at 17a. The Second Circuit also agreed that sexually explicit materials lead to inmate aggression based on speculative testimony that sex offenders used pornography to "manipulate" victims of sexual assault within prison. *Id.*

Second, Respondent argued that eliminating prisoner's access to sexually explicit materials was reasonably related to their rehabilitation. Pet. App. 18a. The Second Circuit, like the district court before it, declined to take any position on whether AD 10.7 could be justified as a rehabilitative measure for all inmates in the general prison population. *Id.* Rather, the Second Circuit only agreed that AD 10.7 was reasonably related to the rehabilitation of sex offenders, who represent a portion of the overall prison population. *Id.* Respondent claimed it would be "impossible" to limit AD 10.7's ban on sexually explicit materials to just these inmates, *id.* at 20a, despite the fact that inmates are routinely subject to different levels of privileges and restrictions.

Finally, Respondent argued that a prohibition on sexually explicit materials would improve workplace conditions for female staff because some prisoners have, in the past, displayed these images in their cells and masturbated in front of female staff. Pet. App. 14a. Existing prison regulations prohibited both practices and masturbating in front of female staff was among the highest class of offense for prisoners. *Id.* at 30a–31a. There was also testimony that depriving inmates of a healthy outlet for sexual release would, if anything, worsen the workplace

conditions for female staff. *Id.* at 37a–38a. Nonetheless, the Second Circuit found it reasonable for the DOC to permanently ban sexually explicit materials in order to address the isolated, problematic conduct of particular prisoners. *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Is Inconsistent With This Court's Precedent Regarding the Constitutional Review of Prison Regulations.

Petitioners do not dispute that this Court has affirmed sometimes severe restrictions on the constitutional rights of prisoners. But the scope and breadth of AD 10.7 distinguish it from prior cases involving restrictions on the publications inmates can receive and possess. *See Beard v. Banks*, 548 U.S. 521 (2006); *Thornburgh*, 490 U.S. at 401; *Turner*, 482 U.S. at 78. The Second Circuit overlooked or downplayed these features, which confirm that there must be a particularly strong showing of reasonableness in this case.

First, AD 10.7 prohibits *all* pictorial sexually explicit materials, subject only to the narrow and inconsistently applied artistic exception. This is unlike other cases where a prison restricts a narrow class of materials, leaving prisoners with ample, alternative means of exercising their First Amendment rights. For example, in *Turner*, the Missouri Department of Corrections prohibited inmates from corresponding with inmates at other

institutions unless the inmates were immediate family, the correspondence concerned "legal matters," or was pre-approved by prison officials. *Turner*, 482 U.S. at 81–82. The Court emphasized that this restriction did not "deprive prisoners of all means of expression" and barred communications "only with a limited class of other people with whom prison officials have particular cause to be concerned." *Id.* at 92. In *Thornburgh*, the restriction was even narrower and concerned a federal regulation that authorized the prison's warden to reject a publication if the warden determined that the publication was detrimental to the "security, good order, or discipline" of the facility or might facilitate criminal activity. *Thornburgh*, 490 U.S. at 404–05. Again, the Court noted that the regulation permitted a "broad range of publications to be sent, received, and read" and thus afforded alternative means of expression. *Id.* at 417–18.

Here, prisoners in Connecticut lack adequate alternatives under AD 10.7 to exercise their right to possess and view pictorial depictions of nudity and sexual activity. The Second Circuit defined the right at issue as the right to receive "sexually explicit communications" and cited the availability of written depictions of nudity and sexual activity and the artistic exception as alternative means of expression. Pet. App. 21a. This ignores the appreciable differences between these types of materials. It is well accepted that a picture is worth a thousand words. And to put it bluntly, an erotic novel or an art book with fleeting images of nudity or sexual activity is not a reasonable substitute for *Playboy*.

Second, AD 10.7 represents a blanket determination that *all* sexually explicit materials are problematic and must be rejected. This puts the regulation at odds with the approach the Court endorsed in *Thornburgh*, where the prison warden made a specific determination that a particular publication was actually detrimental to legitimate penological objectives. *Thornburgh*, 490 U.S. at 404–05. In that case, the Court was "comforted by the ***individualized nature of the determinations required by the regulation***," which rejected "certain shortcuts that would lead to needless exclusions." *Id.* at 416–17 (emphasis added); *accord Owen v. Willie*, 117 F.3d 1235, 1237–38 (11th Cir. 1997) (dismissing claim brought by prisoner who had specific nude photographs rejected following an individualized review, but noting that "[d]efense counsel does not contest that a blanket ban on nude photographs would be unconstitutional").

Along the lines of *Thornburgh*, the DOC could have revised AD 10.7 in a manner that prohibited certain categories of sexually explicit materials that were deemed especially problematic. Indeed, the Commissioner initially proposed exactly this type of two-tiered system whereby inmates could possess depictions of nudity, but not sexual activity. Pet. App. 33a. Yet the DOC Committee ultimately (and unreasonably in Petitioners' view) rejected this two-tiered system in favor of an all-or-nothing approach.

Finally, AD 10.7 applies to *all* inmates. This is different from prior cases where the most severe restrictions on publications were tailored to specific categories of inmates. For example, in *Beard v.*

Banks, 548 U.S. 521 (2006), this Court reviewed a tiered-policy restricting access to newspapers, magazines, and photographs for certain problematic inmates placed in the most restrictive level of the prison's long-term segregation unit. The deprivation of First Amendment rights was severe—in some cases a complete ban on all publications—but the Court ultimately agreed that the policy bore a reasonable relation to incentivizing improved behavior for problem inmates, after which point the restrictions would be lifted. *Id.* at 531; *accord Overton v. Bazzetta*, 539 U.S. 126, 134–35 (2003) (affirming visitation restrictions on inmates with multiple substance-abuse violations because the restriction was a "proper and even necessary management technique to induce compliance with the rules of inmate behavior").

Again, DOC could have drafted a narrower version of AD 10.7 that, for example, prohibited sex offenders or inmates with disciplinary issues from receiving or possessing sexually explicit materials. But having failed to do so, there must be an especially strong showing of reasonableness to justify a constitutional deprivation applicable to all inmates. This is particularly true where, as discussed below, many of the alleged concerns underlying AD 10.7 are limited to sex offenders or other problematic inmates who decide to violate existing regulations.

II. The Second Circuit's Decision Is Wrong.

While each of the *Turner* factors weigh in favor of striking down AD 10.7, the first factor—whether there is a "valid, rational connection" between the between regulation and the legitimate government

interest put forth to justify it—looms large in the analysis. *Turner*, 482 U.S. at 89. Indeed, "[i]f the connection between the regulation and the asserted goal is 'arbitrary and irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor." *Shaw v. Murphy*, 532 U.S. 223, 229–30 (2001).

The Second Circuit agreed that three penological interests—safety and security, rehabilitation of sex offenders, and workplace safety—were reasonably related to banning pictorial sexually explicit materials from DOC facilities. But the evidence at trial proved otherwise. In each case, these interests had, at best, an attenuated connection to AD 10.7 that does notwithstanding the reasonableness review this Court described in *Turner*. Accordingly, AD 10.7 is not rationally justified by legitimate government interests and the Second Circuit erred in applying *Turner* and dismissing Petitioner's claims

Safety and Security. Because safety and security are omnipresent concerns for a prison facility, Respondent "cannot merely brandish the words 'security' and 'safety'" and expect judicial deference—otherwise, every regulation would survive constitutional scrutiny. *Campos v. Coughlin*, 854 F. Supp. 194, 207 (S.D.N.Y. 1994).

Here, the Second Circuit found a rational connection between AD 10.7 and improving the efficacy of cell shakedowns because prison staff, particularly female staff, *might* be disinclined to search sexually explicit materials and *might* miss something during the search. Pet. App. 17a. This sort

of speculative analysis is a poor excuse for depriving Petitioners of their First Amendment rights. It is the quintessential "exaggerated response" to otherwise legitimate prison concerns that this Court warned about in *Turner*. *Turner*, 482 U.S. at 87. Cell shakedowns would undoubtedly be improved if prisons banned the possession of all books, magazines, newspapers, political flyers, and religious texts that might distract or upset the sensibilities of prison staff. Hopefully courts would swiftly reject these sorts of restrictions as an unreasonable and exaggerated response to prison contraband. The result should be no different just because the publication contains sexually explicit materials.

In addition, Second Circuit credited the DOC's argument that AD 10.7 was rationally related to reducing inmate aggression because, according to the Committee, some victims of prison sexual assault reported that their attackers used sexually explicit materials as a "tool of manipulation." Pet. App. 17a. The Department did not offer any first-hand evidence of this having occurred within Connecticut prisons. As with cell shakedowns, this is an attenuated chain of reasoning that is insufficient to the task. There must be a rational connection between AD 10.7 and reducing instances of sexual assault within prison. Second-hand evidence suggesting that some victims were shown sexually explicit materials does not mean that removing these materials from prisons is a rational means of combatting these same assaults.

Rehabilitation of Sexual Offenders. The Second Circuit also found that AD 10.7 was reasonably related to the rehabilitation of sexual

offenders. Pet. App. 19a. Petitioners dispute that this is the case because, among other things, sex offenders will have to confront sexually suggestive materials when released and Connecticut was already largely successful in the rehabilitation of sex offenders at the time the DOC revised AD 10.7. *Id.* at 43a. Moreover, Petitioners proved at trial that the recidivism rate among sex offenders within the State of Connecticut actually increased since the institution of AD 10.7. Pet. App. 57a, 107a (arrest rate for sex offenders was 3.6% in a 2010 study compared with 4.2% in a 2017 study).

Nonetheless, even crediting that a ban on sexually explicit materials furthers the rehabilitation of sex offenders, Petitioners are not sex offenders. And outside of this case, Petitioners are not aware of any precedent for banning all prisoners from receiving or possessing constitutionally-protected materials to assist in the rehabilitation in a small subset of the prison population. The Second Circuit explained that it was reasonable for the DOC to conclude that it was "impossible" to stop sex offenders from possessing these materials with anything less than a total ban. Pet. App. 20a. The DOC did not put forth any evidence to support this claim, which ignores that cells are routinely searched for contraband.[5]

---

[5] In addition, the DOC now provides inmates with computer tablets that could be programmed with individualized permissions such sex offenders could not access sexually explicit materials. Conn. Dep't of Corrections, *Tablets for DOC Inmates*, https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Tablet-Information (last visited June 14, 2022).

Moreover, this sets a problematic precedent that can be easily abused because it grants prison officials free reign to impose facility-wide restrictions to address concerns that are only applicable to a small subset of inmates. Prisons routinely classify inmates based on their level of risk and restrictions that might make sense for some prisoners but not others. But based on the Second Circuit's reasoning, restrictions that are justified by concerns with specific inmates can be imposed on all inmates so long as prison officials can make the vague and largely unverifiable claim that it would be impractical to enforce the restriction in a targeted fashion.

Workplace Conditions. Finally, the Second Circuit agreed that there was a rational connection between AD 10.7 and improving the workplace conditions for female staff. Pet. App. 15a. Specifically, the DOC pointed to problematic and inappropriate behavior by certain inmates who would display sexually explicit images in their cells and masturbate in front of female staff. *Id.* at 14a–15a.

Existing regulations, however, already prohibited this behavior. Pet. App. 30a–31a. Accordingly, the most direct and effective way of reducing these infractions would be to vigorously enforce the existing prohibitions or increase the severity of the available punishment. *See Turner*, 482 U.S. at 90 ("[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."). For example, the DOC already classified certain offenses such as assault on a corrections officer as "elevated" Class A offenses that automatically trigger more

punishment and could have done the same with these offenses, which were only committed by an extremely limited number of prisoners. Pet. App. 47a.

Finally, the Second Circuit noted that "common sense" dictated that banning sexually explicit materials would improve workplace conditions when the evidence at trial established that, if anything, banning these materials would worsen conditions for female staff. Pet. App. 15a. Lay and expert testimony at trial confirmed that AD 10.7 would contribute to a more sexually charged workplace, with more inmates objectifying female staff. *Id.* at 37a–38a, 40a. Similarly, there was no evidence that sexually explicit materials played any role in any recorded instances of public indecency or that the removal of these materials would lead to fewer instances of public indecency. *See Payton v. Cannon*, 806 F.3d 1109, 1110 (7th Cir. 2015) (noting that masturbation "seems . . . a practice that male inmates can be expected to engage in even if they have no access to nude photographs"). Indeed, Petitioners presented evidence at trial demonstrating that incidents of public indecency were still committed by prisoners while in punitive segregation where they were not allowed *any* publications, let alone sexually explicit publications. *E.g.*, Pet. App. 116a–17a.

III. This Case Presents an Ideal Vehicle for the Court to Clarify Reasonableness Review Under *Turner*.

The touchstone of the analysis described in *Turner* is reasonableness, a standard that by this Court's own admission is not meant to be "toothless." *Thornburgh*,

490 U.S. at 414. The Second Circuit's decision is, however, emblematic of the difficulty lower courts have with applying this standard, particularly when they are also instructed to defer to the "informed discretion of corrections officials." *Turner*, 482 U.S. at 90. Reasonableness review coupled with deference to prison officials, however, creates the inevitable temptation to rubber stamp infringements of inmate's liberty so long so as prison officials can draw some connection—no matter how attenuated—between the restriction and a legitimate government interest.[6]

For example, Petitioners reviewed every court of appeals' decision from 2010 to the present citing *Turner*. Of these approximately 530 reported cases, Petitioners found but a handful of successful challenges to a generally applicable prison regulation where the restrictions at issue were severe and patently unreasonable. *Heyer v. U.S. Bureau of Prisons*, 984 F.3d 347, 366 (4th Cir. 2021) (entering judgment for deaf prisoner in challenge to BOP policy that denied him access to videophone calls in order to communicate with other deaf people); *Nordstrom v.*

---

[6] Petitioners are not the first to observe that, in practice, *Turner* has become largely toothless. *See* Kristen Schnell, *Turner's Insurmountable Burden: A Three-Circuit Survey of Prisoner Free Speech Claims*, 6 Colum. Hum. Rts. L. Rev. Online 123, 155–57 (2022) (reviewing cases from the Third, Fifth, and Ninth Circuits applying *Turner* and concluding that courts have given largely unbridled deference to prison officials); David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 Geo. Wash. L. Rev. 972, 988–95 (2016) (arguing that lower courts afford excessive deference to speech restrictions when applying *Turner*).

Ryan, 856 F.3d 1265, 1274 (9th Cir. 2017) (reversing dismissal of First Amendment claims based on prison policy and practice of inspecting every page of all outgoing legal mail); *Wall v. Wade*, 741 F.3d 492, 499–500 (4th Cir. 2014) (holding that prison policy requiring physical indicia of Islamic faith in order to receive accommodations for the observance of Ramadan fails the *Turner* analysis). The overwhelming majority of cases applying the *Turner* analysis come out the other way.

This appeal thus presents an opportunity for the Court to reaffirm that reasonableness review should not be toothless. Unlike many cases involving alleging violations of inmate's constitutional rights, Petitioners here were represented by counsel and were able to assemble a thorough evidentiary record—including expert testimony and documents and information obtained from Respondent through discovery—confirming that AD 10.7 rests on threadbare assertions of legitimate penological interest that fall apart upon scrutiny.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Palak Sharma
DAY PITNEY LLP
One Jefferson Road
Parsippany, NJ 07054

Matthew J. Letten
Counsel of Record
Joseph K. Scully
Elizabeth P. Retersdorf
Rosendo Garza, Jr.
DAY PITNEY LLP
242 Trumbull Street
Hartford, CT 06103
(860) 275-0100
mletten@daypitney.com

Counsel for Petitioners

June 16, 2022