No. 22-5922 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ANDREW S. ANDERSEN — PETITIONER
(Your Name)

vs.

JENNIFER SHAFFER — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NINTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANDREW ANDERSEN F39343
(Your Name)

Valley State Prison P.O. Box 96
(Address)

Chowchilla, CA 93610
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1) When a plaintiff alleges that he or she was denied a valuable governmental benefit based on his or her beliefs and thoughts and that the receipt of that benefit is conditioned on adopting, internalizing, and voicing government approved ones, is he or she also required to additionally allege and prove that suppression of speech is a motivating factor of the government to state a claim upon which relief may be granted under the First Amendment?

2) When the aim of a governmental practice is to inhibit and coerce belief and thought, is not that the same as an aim to suppress speech?

3) Is a Turner v. Safley, 482 U.S. 78 (1987) test, as is, appropriate for a challenge of parole suitability determination regulations where the regulations are used to penalize, inhibit, and coerce parole candidate beliefs and thoughts; where day-to-day operation of a prison are not involved; and where there are no institutional safety and security concerns?

4) Was an adverse ruling using the Turner test premature in this case before plaintiff had an opportunity to fully develop the record and were the first and second parts of the test correctly used?

5) Are parole suitability determination regulations allowed to be challenged facially under the Due Process Clause?

6) Is the Turner test appropriate for a facial challenge of regulations under the Due Process Clause?

7) Did the appellate court error by not permitting an Opening Brief to be filed on the ground that the questions raised were "too insubstantial"?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 21, 2022.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including October 19, 2022 (date) on September 20, 2022 (date) in Application No. 22A244.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

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

United States Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

California Penal Code § 3041 subd. (b)(1) see Appendix C

California Code of Regulations, Title 15, § 2240 see Appendix D

California Code of Regulations, Title 15, §§ 2281 subd. (b) and (d)(3) see Appendix E

STATEMENT OF THE CASE

In his first amended complaint that included new related supplemental claims, the petitioner alleged that in 2020, the California Board of Parole Hearings (BPH) denied him the valuable governmental benefit of parole soley based on his beliefs and way of thinking in violation of the First Amendment. He alleged that the BPH is conditioning parole suitability on relinquishing his right to believe and think freely and on adopting, internalizing, and voicing certain approved viewpoints of the BPH commissioners that are not related to legitimate penological interests. He alleged that the BPH issued a statement of reasons for parole denial that specifically stated that the reason for denial of parole was soley based on his thinking. He alleged that his thinking that he was penalized for was based on his belief in science and evidence-based rehabilitation. He also alleged that one condition for parole suitability is for him to adopt, internalize, and voice a religious-based 12-Step doctrine that he additionally objects to as a violation of the Establishment Clause and Freedom of Religion Clause. He further alleged that the conditions were not sufficiently precise and narrowly tailored to that interest. He also alleged that there existed obvious, ready available alternatives less restrictive to the right to belief and think at less cost to staff and inmates that achieve the same interest. He is seeking declaratory and injunctive relief to invalidate these conditions and enjoin the BPH from the use of these conditions at future parole suitability determination hearings.

The petitioner also challenged the parole suitability determination statutes that were used to produce such conditions as overbroad under the First Amendment referencing United States v. Stevens, 559 U.S. 460 (2010). He alleged that BPH commissioners are mandated by statute to consider the present mental state of each parole candidate at each hearing that by-itself chills a substantial

amount of beliefs, thoughts, and related content of speech. Having a BPH-approved mental state is a parole suitability condition. He alleged that based on the the application of the statutes as applied to him in 2015 and 2020 and thousands of other parole candidates, a substantial number of applications of the statutes were unconstitutional, judged in relation to the statutes' plainly legitimate sweep.

The petitioner also alleged that the current procedures lacked constitutionally adequate standards and procedural safeguards for governmental benefit determination based on the beliefs and thoughts of benefit applicants.

The district court dismissed plaintiff's unconstitutional parole suitability conditions claims under the Prison Litigation Reform Act (PLRA) screening requirement on the ground that he failed to show in the complaint that suppression of speech was a motivating factor behind the adverse actions and conditions. The court held that "[i]n order to demonstrate a First Amendment violation, a plaintiff must provide evidence showing that 'by his actions [the defendant] deterred or chilled [the plaintiff's] political speech and that such deterrence was a substantial or motivating factor in [defendant's] conduct'" citing Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999). Plaintiff did allege that the conditions are chilling a substantial amount of content of his speech revealing the penalized beliefs and thoughts; however, he only alleged that suppression and coercion of beliefs and thoughts are the motivating factor for the adverse action and conditions. Therefore, according to the district court, the plaintiff did not meet the Ninth Circuit requirement of Mendocino for a First Amendment claim upon which relief may be granted. The complaint was dismissed without leave to amend on the ground that the district court saw no path for the petitioner to meet the Mendocino requirement. Apparently, this requirement also applies to Establishment Clause and freedom of religion claims.

For the supplemental Establishment Clause and freedom of religion claims,

there is no mention of these claims in the district court's ruling. If there were other problems with these claims, the petitioner was never notified of the deficiencies and given at least one opportunity to amend. He can only assume that he is required to prove intent to suppress speech as well and that the court found that it was not possible for him to do so.

For the petitioner's facial challenges, as part of the PLRA screening process, the district court conducted a Turner v. Safley, 482 U.S. 78 (1987) test of California Code of Regulations, Title 15 (CCR), § 2240 ignoring California Penal Code § 3041(b)(1) and CCR §§ 2281(b) and (d)(3) and ruled that 2240 passed the first two parts of the test and dismissed that facial challenges without even one opportunity to amend to fix any deficiences. The petitioner did allege in the complaint that institutional safety and security was not a concern and board psychologists and board members are not involved in the day-to-day operations of the institution. Also, the petitioner alleged that in every application, beliefs and thoughts are evaluated for parole benefit denial and that a substantial number of parole denials are based on beliefs and thoughts that are not related to legitimate penological concerns in violation of the First Amendment. He alleged that penalizing just one belief penalizes a substantial amount of content of speech related to that belief.

When petitioner attempted to appeal the district court's decision on these issues, the Ninth Circuit would not permit the filing of an Opening Brief on the ground that the questions raised were "too insubstantial" for further argument. The Ninth Circuit simply stated that it summarily upheld the district court's ruling.

REASONS FOR GRANTING THE PETITION

The holding of the courts below that suppression of speech must be alleged and proven as a motivating factor for a belief and thought interference claim and any First Amendment claim in order to state a claim upon which relief may be granted is directly contrary to the holding of other federal circuits including within the Ninth. The common requirement for a First Amendment claim is to show that the exercise of a First Amendment right was a motivating factor for the adverse action or that the right was restricted or burdened: Espinal v. Goord, 558 F.3d 119, 128 (2nd Cir. 2009); Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999); Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004); Rhodes v. Robinson, 408 F.3d 599, 567-568 (9th Cir. 2005). In this case, petitioner alleged that his protected beliefs and way of thinking motivated the adverse action and conditions. For coerced belief: Grossart v. Dinaso, 758 F.2d 11221 (7th Cir. 1985) where the court found that motivation to coerce belief is the same as motivation to suppress speech. Using the reasoning in Grossart, the petitioner met the intent to suppress speech requirement by alleging that the aim was to coerce believe. For Establishment and freedom of religion clauses claims, the requirement to prove intent to suppress speech cannot be found: Turner v. Hickman, 342 F.Supp.2d 877 (E.D. Cal. 2004); Inouye v. Kemna, 504 F.3d 705 (9th Cir. 2007)[listing Hickman and other circuit cases]; Marrero-Mendez v. Calixto-Rodriques, 830 F.3d 38 (1st Cir. 2016) [listing other circuit rulings where there is no requirement to prove that suppression of speech was a motivating factor]. For unconstitutional conditions doctrine claims: Blaisdell v. Frappiea, 729 F.3d 1237 (9th Cir. 2013) no such requirement is found. For the Turner v. Safley test, the general consensus across federal circuits appears to be that Turner test is a "fact-intensive inquiry" requiring a fully

developed record before a Turner analysis is conducted: Halloway v. Magnes, 666 F.3d 1076 (8th Cir. 2012; Ramirez v. Pugh, 379 F.3d 122 (3rd Cir. 2004); Holbrook v. Kingston, 2012 U.S. Dist. Lexis 89763, 15-16. Also see Vance v. Barrett, 345 F.3d 1083, 1092 (9th Cir. 2002)["It is unclear in this situation whether Turner applies and the extent of deference owed to prison officials" (referencing a Taking Clause issue)].

This case presents four fundamental questions: 1) Whether intent to suppress speech is a required element for a plaintiff to allege and prove to prevail in a belief and thought interference claim or any other First Amendment claim such as freedom of religion and Establishment Clause claims, which includes the question of interpretation of West Virginia Board of Education v. Barnette (1943) 319 U.S. 624; Elrod v. Burns (1976) 427 U.S. 347; Rutan v. Republican Party of Ill. (1990) 497 U.S. 62; and Lee v. Weisman (1992) 505 U.S. 577; 2) the application of the Turner v. Safley test in a parole suitability determination context where beliefs and thoughts are restricted; 3) the interpretation of Turner and Beard v. Banks, 548 U.S. 521 (2006) regarding allowing prisoners to fully develop the record before a Turner analysis is conducted and the use of the first and second part of the test when personal beliefs and thoughts are restricted; and 4) whether a Turner test rather than a Mathews v. Eldridge, 424 U.S. 319, 335 (1976) test is appropriate for facial challenges under the Due Process Clause, and the interpretation of Wilkinson v. Dotson, 544 U.S. 74 (2005). The first question presented is of great public importance for it affects the rights of any citizen denied a valuable governmental benefit soley based on a citizen's beliefs and thoughts and coerced to change them as a condition to receive the benefit. The second question is of great public importance to all prisoners subject to parole suitability conditions that restrict and coerce beliefs and thoughts throughout the United States. The third and fourth questions are of great public importance to all sentenced prisoners in all prisons and jails in all 50 states and the

District of Columbia.

For the first question, the petitioner is asserting a similar assertion as petitioner Moore in Rutan, supra, 497 U.S. at 79 that his application for parole was set aside because of his beliefs and thoughts and the receipt of the benefit is conditioned on him relinguishing those rights and adopting and voicing beliefs and thoughts approved of by the BPH commissioners. There is no requirement in Barnette, Elrod, or Rutan for a plaintiff to additionally allege and prove that suppression of speech is the motivating factor for belief and thought interference claims. A plaintiff need only allege and prove that a valuable governmental benefit was denied or lost based on him or her possessing a disapproved belief or way of thinking or allege that he or she is being coerced to voice an objected-to-belief. In Grossart, supra, 758 F.2d at 1233-1235, the court held that intent to coerce belief is the same as intent to suppress speech. Based on that holding, the petitioner met the requirement by alleging intent to inhibit and coerce belief.

As for the Turner test, the first question is whether the Turner test, as is, should be applied to parole suitability determination regulations when beliefs and thoughts are alleged to be routinely penalized and coerced, and the regulations are not related to institutional safety and security concerns. The petitioner contends that it either should not be used or should at least be modified. The second question is whether the district court applied Turner prematurely before the petitioner had an opportunity to fully develop the record when institutional safety and security is not at issue. Using the Turner test on regulations with the purpose of rehabilitation within a prison institution, the court in Ramirez v. Pugh, supra, 379 F.3d at 130 held that the second, third, and fourth Turner factors are "fact-intensive" requiring "contextual, record sensitive analysis." Furthermore, when the legitimate penological interest is rehabilitation, as it is in the present case, the district court must "identify with particularity" the claimed interest in rehabilitation underlying the regulation so that parties

may adduce sufficient evidence whether there is a rational connection between ends and means. Id. at 128. "To say, however, that rehabilitation legitimately includes the promotion of 'values,' broadly defined, with no particularized indentification of an existing harm toward which rehabilitative efforts are addressed, would essentially be to acknowledge that prisoners' First Amendment rights are subject to the pleasure of their custodians." Ramirez at 128. It is unknown at this point why the parole board needs so much discretion to set parole suitability conditions based on beliefs and thoughts based on subjective judgment of panel members. The petitioner contends that if the Turner test is required to be used for parole suitability determination regulations, he should at least be allowed to create a complete record that would answer these and other questions before a district court conducts a Turner test.

Moreover, this Court in Beard, supra, 548 U.S. 521, 524 explained how important it is to allow prisoners to engage in discovery in an attempt to show that a regulation does not pass the Turner test. Plaintiff Banks made it to summary judgment. In the present case, the petitioner could not even pass the PLRA screening stage. The petitioner might be able to show in a fully developed record that even if the need for the regulations are legitimate, in operation they are content-based and the amount of discretion given the decision-makers for a belief and thought control system is an exaggerated response to legitimate penological concerns. He might be able to show obvious, ready alternatives that are more precise, narrowly tailored, and at less cost to inmates and staff that achieve the same interests. The petitioner did allege such an alternative in the complaint.

The next question is whether the district court applied the Turner test properly. It ruled that CCR § 2240 passed the first and second part of the test. For the first part of the test, the plaintiff contends that the analysis is premature. He alleged that in operation the intent of the regulation is to

suppress beliefs and thoughts deemed by the decision makers as dangerous and coerce alternative beliefs and thoughts that are deemed not dangerous. In Grossart, supra, 758 F.2d at 1233-1235, the court engaged in an analysis of a potential coerced belief claim where it found that where the purpose is to coerce belief then the purpose would be related to suppression of expression. Therefore, per Grossart, the intent of the government for all the statutes is to suppress related content of speech and fails the first part of the test. Also, petitioner might be able to show that in operation, the regulation is belief and thought-based making it content-based. Lukumi Babalu Aye. Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993)[apart from the test, the effect of a law in its real operation is strong evidence of its object]. In the complaint, the petitioner alleged as such. For the second part of the test, there is only one means to receive the benefit; therefore, there is no alternative "channels" to believe or speak at the designated forum to receive the benefit. It is absurd to argue that there are alternative ways to believe without relinguishing the right. Furthermore, the district court erred by focusing on freedom of verbal expression rather than freedom of believing and thinking. In short, petitioner contends that the second part of the test is inappropriate to use for belief and thought regulations. For verbal expression, the district court ruled that plaintiff had alternative channels of communication outside the parole board forum; however, petitioner alleged that anything said in the prison forum can and has been used in the parole board forum as evidence about what a parole candidate believes and thinks. For example, he alleged that he was penalized for teaching prisoners evidence-based rehabilitation. A record of that First Amendment activity in the prison contect was used as evidence of a disapproved way of thinking at the parole hearing. That activity is now chilled. The petitioner was given no opportunity to amend his complaint at least once on this claim.

This Court in Thornburgh v. Abbott, 450 U.S. 401 (1989) considered a facial challenge of an incoming publication regulation against a completely developed record. The issue in that case was the suppression of ideas from outside the prison that could threaten institutional safety and security. In the present case, beliefs and thoughts that a parole candidate already possesses are being penalized. Candidates are being coerced to adopt the beliefs and thoughts of parole board members. The only constraint to a board member's discretion is "public safety." Unlike the regulation at issue in Thornburgh, in this case there is no list of beliefs and thoughts that are not subject to being penalized or coerced and there is no independent administrative review. Current regulations and practice casts a chill on all parole candidates' beliefs and thoughts and related expression in both parole and prison forums. See, United States v. Alverez, 587 U.S. 709, 723 (2012).

Censoring and coercing personal beliefs is much more serious than censoring incoming publications. Thomas Emerson in Toward a General Theory of the First Amendment (1963) 72 Yale L.J. 878, 919 argued that coerced belief is the most destructive of freedom of speech because it cuts speech off at its source. Furthermore, when one parole candidate is penalized for a belief and coerced to believe, it inhibits and coerces beliefs of all other parole candidates seeking the same benefit.

Also, unlike the practice at issue in Thornburgh, the petitioner alleged that a mistake in setting parole suitability conditions based on changing a belief not linked to recidivism causes a parole candidate to use cognitive restructuring tools provided by the prison to mistakenly change neural circuits of his or her brain. This could take 1000s of hours of practice. The cost of error is much higher than merely censoring an incoming publication. It also violates the right of privacy (autonomy) protected by the First Amendment. The petitioner alleged that a substantial number of parole suitability conditions

set in a statement of reasons for denial of parole based on belief and thought are overbroad and impermissibly vague causing substantially more changes in the brain than is necessary to meet the state's vital interests.

Instead of using the Turner test for parole suitability conditions, the approach this Court took in Samson v. California, 547 U.S. 843 (2006) should be used because the aim is the same: prepare a candidate for release into a parolee context. It should be noted that the Turner test was not used in Turner, supra, 342 F.Supp.2d 877 nor mentioned in Inouye, supra, 504 F.3d 705 for parole suitability conditions.

It is not clear what the lower court ruled regarding the facial challenge of current parole suitability procedures and regulations under the Due Process Clause. It appears to be using the Turner test as well. If so, the petitioner contends that a Turner test is inappropriate. A Mathews v. Eldridge, 424 U.S. 319, 335 (1976) test should be used as was used in Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1 (1979).

If the lower court was ruling that a facial challenge of parole suitability procedures under Due Process is unavailable, then that ruling is contrary to Wilkinson v. Dotson, 544 U.S. 74 (2005) where this Court authorized such a challenge. The present case is distinguished from Greenholtz. In Greenholtz, the question was what minimum procedural safeguards are necessary for a state-created liberty interest in parole. In the instant case, the right at issue is the constitutionally protected right of belief and thought, not parole. The question is what minimum standards and procedural safeguards are necessary when the exercise of the protected First Amendment right to believe and think freely is routinely penalized and parole candidates are required to relinquish that right and adopt and voice board member beliefs and thoughts as a condition of receiving the very valuable benefit of parole. The petitioner alleged that current regulations leave the determination of which beliefs and thoughts that predict recidivism,

and not, to the subjective judgment of the board members; that there is insufficient notice before each hearing of what beliefs and thoughts will be penalized and coerced; that during the statement of reasons for denial phase there is no opportunity to challenge conditions of parole suitability when they burden First Amendment freedoms; that there is no administrative appeals process; that the burden of proof rests on the parole candidate to prove that their beliefs and thoughts do not predict recidivism and challenge the coerced beliefs and thoughts; that there is no speedy judicial review for First Amendment infringement; that the regulations do not require suitability conditions based on beliefs and thoughts to be precise, narrowly tailored, and consistent; and other problems. See, Henry Monaghan, First Amendment "Due Process," (1970) Harv. L. Rev. 518; and Waters v. Churchill, 511 U.S. 661, 669 (1994). For this challenge, the lower court did not mention any deficiences with at least one opportunity to amend.

For all of the above, the petitioner should be allowed to at least develop a complete record for such a complex case so that the Court can fully understand the peculiar circumstances surrounding it. Speiser v. Randall, 357 U.S. 513, 521 (1958). He should be allowed at least one opportunity to amend the supplemental claims and those that were reviewed for the first time under the PLRA. He should be allowed one last chance to amend for deficiencies for those that he was given one chance using correct standards of review for First Amendment claims.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Andrew Andersen

Andrew Andersen in Pro Se

Dated: October 10, 2022