No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

ASKARI DANSO MS LUMUMBA

F/K/A DALE LEE PUGHSLEY,

PETITIONER,

V.

JEFFREY KISER,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred by holding, in conflict with this Court's decision in *United States v. Stevens*, 559 U.S. 460 (2010), that a prison regulation was not overbroad because facially expansive terms could be narrowed by reference to "context."
2. Whether the Fourth Circuit erred by holding, in conflict with other Circuits, that prison regulation of outbound inmate correspondence is governed by the extremely deferential balancing test of *Turner v. Safley*, 482 U.S. 78 (1987), rather than the more speech-protective standard this Court adopted in *Procunier v. Martinez*, 416 U.S. 396 (1974).
3. Whether the Fourth Circuit erred by applying *Turner* balancing to a First Amendment overbreadth claim.

TABLE OF CONTENTS

PETITION APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Demonstration, Oxford English Dictionary (Sept. 2023), https://doi.org/10.1093/OED/5416852043 12

Evan Bianchi & David Shapiro, *Locked Up, Shut Up: Why Speech in Prison Matters*, 92 St. John's L. Rev. 1 (2018) 13

Group, Merriam-Webster, https://www.merriam-webster.com/dictionary/group (last visited Nov. 8, 2023) 12

Samuel J. Levine, Note, *Restricting the Right of Correspondence in the Prison Context:* Thornburgh v. Abbott *and Its Progeny*, 4 Fordham Intell. Prop. Media & Ent. L.J. 891 (1994)..... 22

Va. Dep't of Corr., Operating Procedure 830.5 (Nov. 1, 2020), https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-5.pdf. 5

Work Stoppage, American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=work+stoppage (last visited Nov. 8, 2023)..... 13

Work Stoppage, Merriam-Webster, https://www.merriam-webster.com/dictionary/work%20stoppage (last visited Nov. 8, 2023) 13

JURISDICTIONAL STATEMENT AND OPINIONS BELOW

Petitioner Askari Lumumba filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the U.S. District Court for the Western District of Virginia. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 2241 and 28 U.S.C. § 2254. The district court granted Respondent's motion to dismiss the petition. Pet.App.30a-38a (2022 WL 228318). The district court granted a certificate of appealability. Pet.App.28a-29a. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 2253(c)(1)(A) and 28 U.S.C. § 1291, and granted Petitioner *in forma pauperis* status. Pet.App.103a. The Fourth Circuit issued its opinion on September 6, 2024. Pet.App.1a-27a (reported at 116 F.4th 269). This Court has jurisdiction over this timely petition for certiorari pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

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

INTRODUCTION

Virginia Department of Corrections ("VDOC") regulation Offense Code 128 prohibits "participating in, or encouraging others to participate in, a work stoppage or a group demonstration." On its face, that regulation is breathtakingly broad. It prohibits inmates from encouraging others to pray in groups, and from writing a letter to the newspaper in support of labor strikes or political protest outside the prison. Petitioner Askari Lumumba ("Lumumba") lost one hundred eighty days of

statutory good time credit—an additional six months in prison—because he expressed, in abstract terms and in communications to persons outside the prison, a desire to educate other inmates and to accomplish reform through non-violent protest. The district court and Fourth Circuit considered only whether Offense Code 128 is facially overbroad or facially void-for-vagueness, and held that it is not.

The Fourth Circuit's decision conflicts with decisions of this Court and other Circuits in several respects that merit review. First, the Fourth Circuit held that Offense Code 128 is not overbroad only by giving the facially expansive language of that regulation an artificially narrow construction based on ostensible clues from the regulatory context. That is exactly the approach this Court rejected in *United States v. Stevens*, 559 U.S. 460 (2010), when holding that the Depictions of Animal Cruelty Act could not be limited to depictions of animal cruelty as conventionally understood in the law but instead should be read, literally and expansively, to embrace images of lawful hunting. The Fourth Circuit's limiting construction is inconsistent with how the Federal Bureau of Prisons ("BOP") interprets its almost identically worded rule, as revealed in reported decisions across the country. And that construction is not even binding on VDOC or the state courts, so it will not prevent the literal sweep of Offense Code 128 from chilling the constitutionally protected speech of Virginia prisoners.

Second, the Fourth Circuit erred and exacerbated an existing Circuit split by holding that a regulation punishing prisoners for the content of *outgoing* correspondence is governed by the highly deferential balancing test of *Turner v.*

Safley, 482 U.S. 78 (1987), rather than the more speech-protective standard this Court adopted in *Procunier v. Martinez*, 416 U.S. 396 (1974).

Finally, by applying *Turner*'s deferential standard the Fourth Circuit effectively read the overbreadth doctrine out of the law entirely in the prison context. This Court has made clear that *Turner* is the standard for assessing individual rights claims when full protection of the right in question is inconsistent with the needs of incarceration. But the overbreadth doctrine is not about the individual rights of the litigant before the court, and it is not inconsistent with the needs of incarceration. There is no penological reason to write prison regulations in a way that chills *protected* inmate speech, just as there is no penological justification for racial discrimination. *See Johnson v. California*, 543 U.S. 499 (2005). Certainly the overbreadth analysis in the prison context would look to the *Turner* standard (in part) when deciding whether the rule's unconstitutional applications are substantial in relation to its legitimate sweep, because many (though not necessarily all) of the rule's applications may be governed by *Turner*. But the *Turner* factors cannot be applied again to nullify the overbreadth doctrine itself.

Certiorari is warranted.

STATEMENT OF THE CASE

Statement Of The Facts

The state court expressly declined to consider Lumumba's claims, Pet.App.7a-8a n.3, and the district court granted defendants' motion to dismiss, Pet.App.30a-38a.

Accordingly, there are no factual findings to defer to, and the following summary credits the allegations of Lumumba's federal habeas petition. *See* Pet. App. 39a-60a.

At the time of this incident, Lumumba was incarcerated at Sussex I State Prison. Pet.App.67a. While incarcerated, Lumumba used the means lawfully available to him, particularly the JPay email system and the telephone at the prison, to communicate with persons outside the facility. Pet.App.67a-68a.

On July 6, 2018, Lumumba sent an email to Margaret Breslau, a non-incarcerated third party. *Id.* Part of Lumumba's email was titled "For H," who prison officials allege is "H. Shabazz," an offender incarcerated at a different institution in Virginia. *Id*. In this email sent to Breslau, Lumumba wrote, "Look, these S1/S2 joints are severely understaffed! Word! Burh, I've been talking to brothers about a Gandhian Attica. Word, 'Blood in the Water' you feel me? Hundreds of people check in at once! We all want to go to the STAR[1] program!" Pet.App.68a. Then he stated, "Man, I'm telling you it's time to use the Art of War!" Pet.App.68a.

The next day, Lumumba sent another email to Breslau, which was forwarded to an inmate housed at a female facility in Virginia. *Id.* This email read, "This involves a radical re-education! I use the religious institutions that are legitimized by the state to do this." *Id.* Further, the communication stated that "I'm New Afrikan and so I personally like to sue the Rastafarian (sic) class to teach New Afrika(sic)/Pan

[1] STAR appears to be a reference to "Steps to Achieve Reintegration" program, which VDOC explains is "[a] program operated at designated institutions for offenders who, motivated by fear, refuse to leave restorative housing and enter general population." *See* Va. Dep't of Corr., Operating Procedure 830.5 (Nov. 1, 2020), https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-5.pdf.

Afrikanism(sic)/Afrikan(sic) Internationalism. It's tricky and require[s] a bit of Artistry but people will begin to respond." *Id*. Lumumba made no mention of organizing any specific inmates for any particular cause or purpose.

During an investigation into these emails, prison administrators discovered a phone call made days earlier, on July 2, 2018, where Lumumba was speaking to his wife, who also is not incarcerated. Pet.App.68a-69a. During that call, Lumumba said, "Do you know how hard I'm fighting not to organize? Seeing you is the only reason I'm not acting crazy." Pet.App.68a. Lumumba also stated that some gang members had approached him about being their "Big Homie," and he noted that "[n]igg*s is primed and ready. These young boys are ready to go." *Id*.

The Intelligence Unit at Sussex I became aware of these communications on July 9, 2018—after they had been sent out. Pet.App.67a. The following day, Lumumba was interviewed by Intelligence Officers. *Id*. Although he acknowledged that he was the author of the emails and phone calls, Pet.App.65a, Lumumba asserted that he was not attempting to organize anything amongst the other offenders. Pet.App.68a. Rather, he clarified that he was writing to Breslau, who is a member of the public. *Id*. Additionally, Lumumba told the investigators that he is "all about peaceful reformations of the prison system," so he "tell[s] other offenders to write up their issues, without using violence." *Id*. When asked about his use of the term "Gandhian Attica," Lumumba stated that he was referring to Gandhi, the political figure known for non-violent protest. *Id*.

On July 10, 2018, Lumumba was transferred to Red Onion State Prison and served with a disciplinary offense report. Pet.App63a. The report accused him of violating Disciplinary Offense Code 128, which prohibits "[p]articipating in, or encouraging others to participate in, a work stoppage, or a group demonstration." JA66. Lumumba plead not guilty to the charge. Pet.App.64a.

On July 19, 2018, Officer Counts conducted Lumumba's disciplinary hearing. Pet.App.69a. At the hearing, Lumumba told the officer that he is a non-violent person and that he did not intend to cause a disruption. *Id*. But Officer Counts relied primarily on the conclusions of Investigator Issac, who determined that Lumumba had "attempted to garner support for a group demonstration that would disrupt the orderly operation of the institution." *Id*. Neither official identified the type of "demonstration" for which they alleged Lumumba was gathering support. Nevertheless, the hearing officer characterized these communications as an invitation to violence. *Id.* ("[T]he intentions of offender [Lumumba] was to encourage others to participate in acts of violence against DOC" which would "severely disrupt the operations of the state facilities."). The hearing officer found Lumumba guilty and imposed a penalty of one hundred eighty (180) days of lost statutory good time credit—the equivalent of adding an additional six months to his sentence—and thirty days disciplinary segregation. Pet.App.69a-70a. That punishment was upheld in administrative appeals.

Procedural History

Lumumba sought relief by a petition for habeas corpus in the Supreme Court of Virginia, but that Court held that challenges to the revocation of good time credits are not cognizable under state law. *See* Pet.App.7a-8a n.3.

After exhausting his claim in the Virginia state courts, Lumumba filed a timely 28 U.S.C. § 2254 petition in the U.S. District Court for the Western District of Virginia. Pet.App.39a-60a. Lumumba presented both First Amendment and vagueness arguments, all subsumed within the due process guarantees of the Fourteenth Amendment. Pet.App.43a, 60a-60.2a. Lumumba argued that "[t]he present case involves a dispute over the scope of the Petitioner's constitutionally protected free speech liberty" and that "Petitioner contends that he has a right to speak critically of the government in outgoing correspondence even if inflammatory language is used when doing so." Pet.App.60a. Citing *Martinez*, Lumumba argued that "[t]he government does not have a right to restrain the Petitioner's First Amendment liberty or censor his 'outgoing' correspondence" unless doing so "furthers an important substantial government interest unrelated to the suppression of expression" and "is no greater than necessary o[r] essential to the protection of the government interest involved." *Id.* (citing *Martinez*, 416 U.S. at 413). Lumumba also contended that Offense Code 128 is both void-for-vagueness and overbroad. Pet.App.59a-60.2a. He contended that an evidentiary hearing was necessary for "a determination on the factual basis of the petitioners claim." Pet.App.60.2a.

The district court held that Offense Code 128 is not overbroad. Pet.App.36a-37a. Despite the petition's request for an evidentiary hearing and its clear

identification of a dispute about "the scope of the Petitioner's constitutionally protected free speech liberty" and his "right to speak critically of the government in outgoing correspondence," Pet.App.60a, the district court treated the case as presenting only whether Offense Code 128 is "facially unconstitutional." Pet.App.34a. The court held that *Martinez* did not provide the proper standard of review for the overbreadth question because "VDOC officials did not burden Lumumba's ability to send or receive mail." Pet.App.36a. Rather, VDOC only "punished [Lumumba] for what he said in his outgoing communications." *Id.* Instead, the court applied the *Turner v. Safley* multi-factor test for evaluating prison regulations that burden inmates' individual constitutional rights, and concluded that there is a "valid, rational connection" between prohibiting advocacy of group demonstrations and the prison's interest in maintaining order. Pet.App.36a-37a. Following a remand from the Fourth Circuit, the district court granted a certificate of appealability on January 25, 2022. Pet.App.28a-29a. It held that Lumumba "has shown a substantial denial of a constitutional right that reasonable jurists might disagree about," concerning both the overbreadth and void-for-vagueness doctrines. *Id.*

The Fourth Circuit affirmed. The Court of Appeals acknowledged that Lumumba had requested an evidentiary hearing, Pet.App.6a, but nonetheless held that his *pro se* habeas petition had failed to present any as applied claim and that the certificate of appealability did not encompass one. Pet.App.8a n.4. Judge Wynn dissented on that issue, arguing that the majority misunderstood Lumumba's

reference to *Martinez* and should have interpreted his petition generously. Pet.App.24a-27a.

The Fourth Circuit "refuse[d] to abandon *Turner* in this context," holding that this Court's decision in *Johnson* did not "distinguish[] between rights based and 'structural' challenges" but instead between "rights inconsistent and consistent with proper incarceration." Pet.App.10a. It held that "First Amendment rights—including the freedom of speech—*do* fall within *Turner*'s ambit," without distinguishing between claims that a prisoner's own First Amendment rights have been violated and claims that a regulation is facially void because of its chilling effects on others. Pet.App.10a-11a. The Fourth Circuit also held that the less deferential standard this Court articulated in *Martinez* applies only "to cases involving *censorship* of *outgoing* personal correspondence from prisoners." Pet.App.11a n. 7. "For all other First Amendment free-speech claims brought by prisoners, *Turner* supplies the controlling standard." *Id.*

Relying heavily on "context" clues from the "surrounding language," the Fourth Circuit held that the word "demonstration" in Offense Code 128 "is most plausibly read to prohibit only" a "public display of group opinion on political or other issues, such as a protest or rally" and "not the broader kind of individual demonstration that Lumumba identifies." Pet.App.12a-13a. Although the text of Offense Code 128 broadly prohibits encouraging "others" to participate in group demonstrations, the Fourth Circuit also held that "context" shows that "[t]he most plausible reading of 'others,' . . . is that it refers only to other Virginia prisoners, not to anyone in the

world." Pet.App.14a-15a. The Court of Appeals acknowledged that "Lumumba may be right that Offense Code 128, read in a vacuum, has a wide ambit," but held that when "read in context" the regulation only "prohibits prisoners from participating in or encouraging other prisoners to participate in public displays of group opinion on political or other social issues within Virginia correctional facilities." Pet.App.15a.

Against the backdrop of that limiting construction, and applying the highly deferential *Turner* balancing test, the Fourth Circuit held that Offense Code 128 has "a valid, rational connection" to a "legitimate penological interest." Pet.App.15a (quoting *Turner*, 482 U.S. at 89).

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision conflicts with decisions of this Court and other Circuits on three important issues that merit review.

1. The Fourth Circuit approached the overbreadth analysis as if its task was to find a "plausible" way to read the facially broad language of Offense Code 128 as narrowly as possible. That approach is flatly inconsistent with this Court's decision in *Stevens*. On its face, Offense Code 128 is exceptionally broad and will chill constitutionally protected speech. The Federal Bureau of Prisons does not understand its nearly-identical regulation in a manner consistent with the Fourth Circuit's limiting construction, and there is no reason to think Virginia officials will either.

2. The Fourth Circuit also erred by holding that a prison regulation punishing prisoners for the content of outgoing communications should be evaluated under the *Turner* balancing test rather than the more searching review required by *Martinez*.

The Fourth Circuit held that *Martinez* governs only actual censorship of outgoing correspondence, not after-the-fact punishment for the content of that speech. That distinction makes no sense and is inconsistent with precedent of other Circuits.

3. Finally, the Fourth Circuit erred by applying *Turner* deference to a First Amendment overbreadth claim. The overbreadth doctrine asks whether the unconstitutional applications of a regulation are substantial in relation to its plainly legitimate sweep. *Turner* and *Martinez* certainly feed into that analysis by supplying the as-applied standards governing many potential applications of Offense Code 128. But it is not appropriate to use *Turner* deference *again* to give VDOC a free pass on the overbreadth analysis itself—as if the needs of the penological environment somehow justify writing prison rules in a way that prohibits substantial inmate speech that would be constitutionally protected even under the *Turner* standard. The Fourth Circuit's approach effectively writes the overbreadth doctrine out of the law in the prison context.

I. THE FOURTH CIRCUIT ERRED, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, BY READING OFFENSE CODE 128 NARROWLY TO AVOID ITS FACIAL OVERBREADTH

On its face, Offense Code 128 applies to a remarkable range of constitutionally protected speech. It prohibits "[p]articipating in, or encouraging others to participate in, a work stoppage, or a group demonstration." JA66. To date, Virginia courts do not appear to have construed the scope of Offense Code 128. And the terms "encourage," "others," "work stoppage," "group," and "demonstration" are not defined in the Offense Code. JA59–60, JA66.

Merriam-Webster defines a "demonstration" to include any "outward expression or display," or "public display of group feelings toward a person or cause." *Demonstration*, Merriam-Webster, https://www.merriam-webster.com/dictionary/demonstration (last visited Nov. 8, 2023). Definitions in the *Oxford English Dictionary* include "[a]n exhibition or outward display of a quality or feeling," "outward exhibition of feeling; demonstrative behaviour," and "a public march or rally expressing an opinion about a political or other issue; *esp.* one in protest against or support of something." *Demonstration*, Oxford English Dictionary (Sept. 2023), https://doi.org/10.1093/OED/5416852043. The *American Heritage Dictionary* defines "demonstration" as "[a] public display of group opinion, as by a rally or march: *peace demonstrations*." *Demonstration*, American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=demonstration (last visited Nov. 8, 2023). A "group" is just "two or more figures forming a complete unit in a composition" or "a number of individuals assembled together or having some unifying relationship." *Group*, Merriam-Webster, https://www.merriam-webster.com/dictionary/group (last visited Nov. 8, 2023).

All of those definitions encompass a broad range of conduct and statements that are plainly constitutionally protected, even in prison. Inmates participating in a worship service, sitting in a prayer circle, organizing a workout, creating an art project, composing music, or observing a religious or patriotic holiday are all engaging in a group display of feeling or the expression of an opinion. Inviting other inmates to participate in such activities would be "encouraging" a forbidden "group"

"demonstration." Indeed, a single inmate inviting another individual inmate to pray together could be punished under Offense Code 128.

Offense Code 128 is not even facially limited to encouragement of "group" "demonstration" within that prison, or any other prison facility. And since "others" is also not limited to inmates, the regulation facially applies to an inmate who encourages persons outside the prison to attend a political rally or march, organize a letter-writing campaign to Congress, or attend worship services. Prisons have no legitimate penological interest in preventing prisoners "from participating in public discourse, especially with regard to criminal justice and mass incarceration matters," and "unrestrained prison censorship excludes prisoners' voices from the discussion of political and public issues that is central to facilitating democratic decision-making." Evan Bianchi & David Shapiro, *Locked Up, Shut Up: Why Speech in Prison Matters*, 92 St. John's L. Rev. 1, 3 (2018).

"[W]ork stoppage" is similarly defined as a "concerted cessation of work by a group of employees usually more spontaneous and less serious than a strike," *Work Stoppage*, Merriam-Webster, https://www.merriam-webster.com/dictionary/work%20stoppage (last visited Nov. 8, 2023), and as "[a] cessation of work by a group of employees as a means of protest," *Work Stoppage*, American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=work+stoppage (last visited Nov. 8, 2023). Even assuming that prisons would be entitled to punish prisoners for the advocacy of non-violent work stoppages *within the prison system*, nothing about Offense Code 128 is so limited. It permits punishment of an inmate who emails

relatives working in the automobile industry to encourage them to participate in the United Auto Workers strike.

The Fourth Circuit reached a different conclusion only by adopting an elaborate limiting gloss on the plain text of Offense Code 128, based on a variety of supposed "context" clues. The Court of Appeals concluded, for example, that although the words "demonstration" and "group" may have very broad meanings, when used *together* they necessarily refer to a "public display of group opinion on political or other issues, such as a protest or rally." Pet.App.12a-13a. It also held that "context" shows that "[t]he most plausible reading of 'others,' . . . is that it refers only to other Virginia prisoners, not to anyone in the world." Pet.App.14a-15a. The Fourth Circuit repeatedly acknowledged that much broader understandings of Offense Code 128 were "plausible;" it simply held that its narrow limiting construction was the "most plausible." Pet.App.12a-14a.

That approach to interpretation is inconsistent with this Court's decision in *Stevens*, and with the core purposes of the overbreadth doctrine, and with precedent of other Circuits. In *Stevens*, this Court considered the constitutionality of the Depictions of Animal Cruelty Act, 18 U.S.C. § 48, which then criminalized trafficking in visual depictions in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." Stevens argued that the words "wounded" and "killed" could embrace constitutionally protected depictions of lawful hunting. The government argued that the statute reached only depictions of cruelty to animals as conventionally understood, pointing to context clues from the Act's title (the

"Depictions of Animal Cruelty Act") from the *noscitur a sociis* implications of the words "maimed, mutilated, [and] tortured," and from the statute's requirement that the depicted conduct must be "illegal." *Stevens*, 579 U.S. at 474-75. This Court rejected those arguments, pointing out that the words "wounded" and "killed," *read in isolation*, "contain[ed] little ambiguity" and "should be read according to their ordinary meaning," and that a depiction of a wounded animal could show conduct that is "illegal" for a reason other than animal cruelty. *Id.* The interpretation of 18 U.S.C. § 48 advanced by the Solicitor General on behalf of the United States in *Stevens* was certainly "plausible," and grounded in context clues at least as persuasive as anything the Fourth Circuit pointed to here. Nonetheless this Court insisted on reading the words according to their broad plain meaning.

The Fourth Circuit's approach implicates an existing circuit split concerning whether this Court's decision in *Stevens* modified prior precedent. In older cases, this Court has suggested that the overbreadth doctrine should not be invoked "when a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *see also, e.g., Erznoznick v. City of Jacksonville*, 422 U.S. 205, 216 (1975) ("a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts"). Circuits regularly invoke that principle. But as the Fifth Circuit pointed out in *Serafine v. Branaman*, this Court elected "not to 'rely upon' the canon of constitutional avoidance in the overbreadth context" in *Stevens*. 810 F.3d 354, 369 (5th Cir. 2016) (quoting *Stevens*, 559 U.S. at 481). In *Sisney v. Kaemingk*, the Eighth

Circuit "respectfully disagree[d] with the Fifth Circuit's reading of *Stevens*" on that issue. 15 F.4th 1181, 1198 (8th Cir. 2021). Although the Fourth Circuit did not explicitly invoke the canon in this case, its elaborate efforts to narrow Offense Code 128 seem clearly motivated by constitutional avoidance.

This Court's approach to interpretation in *Stevens* better serves the underlying purposes of the overbreadth doctrine. As this Court recently reaffirmed, the overbreadth doctrine "provides breathing room for free expression" because overbroad laws "may deter or 'chill' constitutionally protected speech.'" *United States v. Hansen*, 599 U.S. 762, 769–70 (2023) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). The doctrine is further concerned with the danger that broadly drafted laws will facilitate standardless and discriminatory decision-making by public officials. *Stevens*, 559 U.S. at 467 (noting the court below determined the statute "'might also be unconstitutionally overbroad,' because it . . . 'sweeps [too] widely' to be limited only by prosecutorial discretion" (alteration in original) (quoting 533 F.3d 218, 235 n.16 (3d Cir. 2008))). "The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992). Hunting for "context" clues to hypothesize an artificially narrow scope for a literally broad regulation, as the Fourth Circuit did here, undermines those core purposes of the overbreadth doctrine—particularly when a federal court is evaluating state law rules. The fact that a court can hypothesize a "plausible" construction of a broad statute does not ameliorate concerns about chilling and excessive discretion. Persons regulated by the facially broad rule will still be chilled

by it, and the officials charged with enforcing it will still have inappropriately broad discretion.

At least in *Stevens* this Court could have given 18 U.S.C. § 48 an authoritative limiting construction that would have bound the Department of Justice and the lower federal courts. The Fourth Circuit's "plausible" limiting construction of Offense Code 128 will provide no comfort to Virginia inmates and no constraint on Virginia prison officials. Offense Code 128 is Virginia law, and the Fourth Circuit's efforts to narrow it are purely advisory.

Indeed, as Respondent pointed out below, federal prison regulations include functionally identical rules prohibiting "[e]ngaging in or encouraging a group demonstration,"as well as "[e]ncouraging others to refuse to work, or to participate in a work stoppage." 28 C.F.R. § 541.3 (213–214). The reported decisions reveal that the Bureau of Prisons does not understand that regulation as limited in the ways that the Fourth Circuit hypothesized for Offense Code 128. In *Antonelli v. Rios*, for example, the regulation was charged against an inmate who circulated a letter from the state psychology board that confirmed two counselors at the prison were not licensed psychologists under state law. *See* No. 06-cv-00283, 2009 WL 790171, at *1 (E.D. Ky. Mar. 24, 2009). And in *Best v. Lake*, it was used to charge an inmate who "fast[ed] to avoid contaminated food and to draw attention to the meal problems" at the prison. No. 19-cv-00026, 2019 WL 3409868, at *2 (E.D. Cal. July 29, 2019), *report and recommendation adopted*, 2019 WL 5420208 (E.D. Cal. Oct. 23, 2019). Neither of those cases involved a "protest or rally." Pet.App.12a-13a. If the BOP can interpret

this language more broadly than what the Fourth Circuit considers the "most plausible" interpretation, then so can (and will) the VDOC. So the Fourth Circuit's interpretive gymnastics have no bearing on the real-world overbreadth of Offense Code 128's actual language. That problem further confirms the wisdom of this Court's approach in *Stevens*.

II. THE FOURTH CIRCUIT ERRED, IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS, BY HOLDING THAT *TURNER* RATHER THAN *MARTINEZ* GOVERNS PUNISHMENT FOR THE CONTENT OF OUTGOING COMMUNICATIONS

In *Martinez*, this Court held that "censorship of prisoner mail is justified" if it "further[s] an important or substantial governmental interest unrelated to the suppression of expression" and "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest." 416 U.S. at 414. *Thornburgh v. Abbott* clarified that the holding of *Martinez* was limited to regulations on outgoing communications, and that regulation of incoming communications is governed by the more deferential standard articulated in *Turner*. 490 U.S. 401, 413–14 (1989). This Court explained that the "implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials." *Thornburgh*, 490 U.S. at 413.

The Fourth Circuit held in this case that the *Martinez* standard applies only to the actual *censorship* of outgoing mail, and that prison regulations *punishing* inmates for the content of communications with persons outside the prison are—like regulation of purely internal prison matters—governed only by *Turner*. Pet.App.11a n.7. That holding is incorrect, and deepens an existing circuit split.

Neither *Martinez* nor *Thornburgh* rested on any distinction between prior censorship and subsequent punishment. In some contexts (particularly regulation of the press) First Amendment doctrine has indeed recognized a "long-held distinction between prior restraints and subsequent punishments," *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 350 n.8 (4th Cir. 2005) (citation omitted), with the former singled out as almost categorically barred. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (pre-publication restraint is permissible only in "exceptional cases" such as "publication of the sailing dates of transports or the number and location of troops" in wartime). But this Court did not apply prior restraint doctrine to the California policies challenged in *Martinez*, and did not condemn those policies because they involved pre-mailing review rather than post-mailing punishment. To the contrary, the regulations at issue gave prison officials a *choice* to: "(1) refuse to mail . . . the letter and return it to the author"; "(2) submit a disciplinary report, which could lead to suspension of mail privileges or other sanctions"; or "(3) place a copy of the letter or a summary of its contents in the prisoner's file." *Martinez*, 416 U.S. at 400. The district court's injunction against the policy did not distinguish among those options, *see Martinez v. Procunier*, 354 F. Supp. 1092, 1099 (N.D. Cal. 1973), and this Court did not either when it affirmed. Instead, this Court explained that "[t]he issue before us is the appropriate standard of review for prison regulations restricting freedom of speech" generally, *id.* at 406, and held that "any regulation or practice that restricts inmate correspondence must be generally necessary to protect" legitimate penological interests, *id.* at 414.

When *Thornburgh* limited the *Martinez* standard to outgoing correspondence, this Court also drew no distinction between prior review and subsequent punishment, but held simply that "the logic of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations concerning outgoing correspondence." *Thornburgh*, 490 U.S. at 413. This Court explained that *Martinez* had rested on the Court's "recognition that the regulated activity centrally at issue in that case—outgoing personal correspondence from prisoners—did not, by its very nature, pose a serious threat to prison order and security," *id.* at 411, and emphasized that the "implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials" and are "far more predictable." *Id.* at 412–13; *see also* Demetria D. Frank, *Prisoner-to-Public Communication*, 84 Brook. L. Rev. 115, 136 (2018) ("The Supreme Court naturally assumes that intra-prison speech is more likely to threaten the penological interest of correctional facilities than speech aimed outside the prison walls."). This Court spoke broadly about "regulations *concerning* outgoing correspondence," not exclusively about prior restraints by the prison which censored communications from being mailed. *Thornburgh*, 490 U.S. at 413 (emphasis added).

A strong distinction between prior censorship and punishment also would make little sense. Subsequent punishment can chill the protected speech of individuals just as effectively as prior review and censorship. Indeed, prison punishment, including a loss of good time credits, is almost certainly a greater deterrent for most prisoners than a mere refusal to send their outgoing mail.

The Fourth Circuit's holding deepens an existing Circuit split about just how far *Thornburgh* limits the holding of *Martinez*. In *Lane v. Swain*, for example, an inmate challenged the revocation of his good time credits for sending letters that violated the prison's prohibition on "[t]hreatening another with bodily harm or any other offense." 910 F.3d 1293, 1294 (9th Cir. 2018) (alteration in original). Even though each of the letters was "mailed"—and therefore not censored prior to delivery—the Ninth Circuit applied *Martinez* because the case nevertheless involved "interference with outgoing prisoner mail." *Id.* at 1294–95. Similarly, in *Lane v. Feather*, the court held that "[w]hen a prisoner is punished for statements made in outgoing mail, the prisoner's First Amendment rights are implicated, and the regulation authorizing the punishment must satisfy the test outlined in *Procunier v. Martinez*." 610 F. App'x 628, 628 (9th Cir. 2015).

The Fifth Circuit, by contrast, clearly holds that after *Thornburgh* punishment of inmates for the content of their outgoing communications is governed only by *Turner*. Indeed, the Fifth Circuit appears to believe that *Martinez* has been overruled entirely. In *Morgan v. Quarterman*, an inmate challenged the revocation of good time credits for the use of indecent or vulgar language in a note he mailed to opposing counsel. 570 F.3d 663, 665 (5th Cir. 2009). The Fifth Circuit held that wherever "a prison regulation restricts a prisoner's rights with respect to mail, 'the appropriate inquiry is whether the practice is reasonably related to a legitimate penological interest,'" which is the *Turner* standard. *Id.* at 666 (quoting *Brewer v. Wilkinson*, 3 F.3d 816, 824 (5th Cir. 1993)). As the Fifth Circuit explained, "[a]lthough the

[Supreme] Court appeared to draw a distinction between incoming and outgoing mail and to preserve the viability of *Martinez* with respect to outgoing mail, its 'reading' of *Martinez* in *Thornburgh* suggests that *Turner*'s 'legitimate penological interest' test would also be applied to outgoing mail." *Brewer*, 3 F.3d at 824; *see also Samford v. Dretke*, 562 F.3d 674, 678–79 (5th Cir. 2009) ("Although the Supreme Court has indicated that [the *Turner*] standard applies to limitations on prisoners' incoming mail and that the standard articulated in *Procunier v. Martinez* applies to limitations on prisoners' outgoing mail, a panel of this court has interpreted *Thornburgh* to apply the reasonableness standard set forth in *Turner* in both instances." (citations omitted)); Samuel J. Levine, Note, *Restricting the Right of Correspondence in the Prison Context:* Thornburgh v. Abbott *and Its Progeny*, 4 Fordham Intell. Prop. Media & Ent. L.J. 891, 917–26 (1994) (discussing the circuit split in connection with the application of *Turner* to outgoing correspondence).

To the extent the Fifth Circuit believes that *Martinez* has been undermined by the reasoning of subsequent Supreme Court precedent and can no longer be relied on even on its facts, that conclusion violates this Court's warning that lower courts must leave to the Court the prerogative of overruling its own precedent. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). It also conflicts with Eleventh Circuit precedent, which recently applied *Martinez* to a case involving the interception of outgoing email communications. *See Benning v. Comm'r, Ga. Dep't of Corr.*, 71 F.4th 1324 (11th Cir. 2023).

That longstanding and entrenched conflict merits this Court's review.

III. THE FOURTH CIRCUIT ERRED BY GIVING RESPONDENT *TURNER* DEFERENCE IN THE OVERBREADTH ANALYSIS

The Fourth Circuit also committed an important conceptual error, with broad implications meriting this Court's review, by applying the highly deferential *Turner* test to a First Amendment overbreadth claim.

Overbreadth doctrine asks whether a substantial number of the law's applications are unconstitutional, judged "in relation to [the law's] plainly legitimate sweep." *Stevens*, 559 U.S. at 472–73. Of course, that analysis internally takes account of the ways that *Turner* and *Martinez* modify the speech rights of individual inmates. The "plainly legitimate sweep" of a speech regulation in the prison context must be judged under the relatively deferential standards that would govern as-applied claims by inmates in various contexts.

But there is no justification for applying those deference doctrines again, as the Fourth Circuit did here, to modify or water down the overbreadth doctrine *itself*. This Court has emphasized that *Turner* applies "only to rights that are inconsistent with proper incarceration," and that "need necessarily be compromised for the sake of proper prison administration." *Johnson v. California*, 543 U.S. 499, 510 (2005) (internal quotation marks omitted) (citation omitted). It does not apply, for example, to the Fourteenth Amendment's prohibition of discrimination on the basis of race. *Id.* at 510-11. We respectfully submit that *Turner* deference also would not apply to a violation of the First and Fourteenth Amendment's prohibitions against the

Establishment of a state religion, or of Article I § 10's prohibition against States granting titles of nobility. The First Amendment overbreadth doctrine similarly is more a structural constraint on how States can regulate than a matter of the individual prisoner's rights. *Cf. Pitts v. Thornburgh*, 866 F.2d 1450, 1453–54 (D.C. Cir. 1989) (noting that "*Turner* applies to cases involving regulations that . . . restrict the exercise of prisoners' *individual* rights within prisons" and refusing to apply it to a case involving "challenges [to] general budgetary and policy choices" (emphasis added)). And how would a reviewing court even know whether the overbreadth doctrine should be modified by *Turner*, or *Martinez*, or the nearly-inviolate prohibition against viewpoint discrimination, or any of the other First Amendment standards that might govern particular situations? Overbreadth is a doctrine of *facial* invalidity, not of individual rights, and it asks whether the unconstitutional applications of the regulation—looking across countless individual situations governed by different First Amendment standards—are substantial in comparison to its legitimate sweep. The plaintiff's own rights and situation are supposed to be all but irrelevant to that analysis—and yet the Fourth Circuit applied *Turner* deference rather than *Martinez* (or somethig else) to the overbreadth issue because of its conclusion that *Martinez* does not apply *to Lumumba's facts*. Pet.App.11a n. 7. That approach conceptually collapsed the critical distinction between a facial and as-applied analysis.

Even if the Fourth Circuit is correct that there is no distinction between structural constitutional constraints and individual rights, and that the application

of *Turner* therefor always depends simply on whether a particular constitutional constraint must be "compromised for the sake of proper prison administration," *Johnson*, 543 U.S. at 510, the overbreadth doctrine would not qualify. There is no legitimate penological justification for writing prison regulations so broadly that they prohibit broad swaths of speech that would be protected *even under the deferential standards that apply to prison speech regulation*. Put another way, there is no penological justification for writing prison regulations in a way that chills substantial protected inmate speech and gives prison officials unbridled enforcement discretion to punish protected inmate speech. The Fourth Circuit held that "[p]risons have a strong and legitimate interest in adopting prophylactic rules that head off activities that are likely to cause violence or disruption, even if those activities are not themselves violent or disruptive." Pet.App.18a. That is just another way of saying that the overbreadth doctrine does not apply at all in the prison context—a truly radical proposition that the Fourth Circuit's reasoning does not begin to justify.

The Fourth Circuit's waiver analysis further illustrates the incompatibility between *Turner* and an overbreadth analysis. The main reason that an overbroad regulation would ever flunk the *Turner* standard is the fourth prong, which asks whether there are "obvious, easy alternatives." *See Turner*, 482 U.S. at 90. And indeed, there should always be an obvious, easy alternative in the form of a more narrowly drafted regulation that does not prohibit a substantial scope of constitutionally protected speech. The Fourth Circuit held that Lumumba forfeited any argument on the fourth prong by failing to explain, in prison and in the district

court, exactly how a narrower rule might have been drafted. Pet.App.18a. But the facial overbreadth (or not) of a law turns on an objective judicial appraisal of whether the law's unconstitutional applications are substantial in relation to its plainly legitimate sweep—not whether a particular litigant has explained to the rulemaking or legislating body how it could have done a better job. Again, the Fourth Circuit's approach essentially nullifies the overbreadth doctrine in prison as a practical matter.

The Fourth Circuit also acknowledged the existing Circuit split about whether vagueness doctrine applies independent of the *Turner* standard in prison, and recognized that "there are plausible reasons to think that the right not to be subject to vague laws is consistent with incarceration." Pet.App.20a n.10.[2] "Providing notice of prohibited conduct to regulated parties is 'not only consistent with proper prison administration,'" the Court of Appeals explained, "but arguably the only way good administration is possible—people can only follow rules if they know what the rules demand of them." *Id.* (quoting *Johnson*, 543 U.S. at 510). And "preventing vague prohibitions 'bolsters the legitimacy of the entire criminal justice system,' … as it ensures that every prisoner is treated with fundamental fairness and respect." *Id.*

[2] In the leading cases on vagueness in the prison context, courts have analyzed the *Turner* factors in a separate inquiry. *Reynolds v. Quiros*, 25 F.4th 72, 95–96 (2nd Cir. 2022) ("Thus, here . . . we conduct a separate vagueness analysis apart from the *Turner* test."); *United States v. Beason*, 523 F. App'x 932, 934–36 (4th Cir. 2013) (considering whether a regulation was void-for-vagueness without mentioning the *Turner* factors); *Patel v. Zenk*, 447 F. App'x 337, 340 (3rd Cir. 2011) (same); *Lane v. Salazar,* 911 F.3d 942, 949–51 (9th Cir. 2018) (analyzing whether a prison code satisfied *Martinez* and then conducting a separate vagueness analysis).

(quoting *Johnson*, 543 U.S. at 511). Properly understood, all of those observations are true of the overbreadth doctrine as well—unless the Fourth Circuit means to say that keeping prisoners uncertain about whether their constitutionally protected speech will be respected is consistent with "good administration" and "fundamental fairness and respect."

Other Circuits appear to have committed the Fourth Circuit's error. The Ninth Circuit has held, for example, that the "*Turner* analysis applies equally to facial and 'as applied' challenges." *Bahrampour v. Lampert*, 356 F.3d 969, 975 (9th Cir. 2004); *see also Prison Legal News v. Ryan*, 39 F.4th 1121, 1129 (9th Cir. 2022). And in *Sisney v. Kaemingk*, the Eighth Circuit applied *Turner* to both a facial and as-applied challenge to a prison policy that prohibited inmates from receiving pornographic material, because the regulation "imping[ed] on inmates' constitutional rights and Sisney's constitutional rights in particular." 15 F.4th 1181, 1191 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1454 (2022). This issue recurs regularly in prisoner litigation and merits review, even if the case law has rarely (until now) confronted and analyzed the problem head-on.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

/s/ J. Scott Ballenger

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