No. 11-651

In the Supreme Court of the United States

PERRY L. RENIFF, IN HIS OFFICIAL CAPACITY AS SHERIFF OF THE COUNTY OF BUTTE, CALIFORNIA,
Petitioner,

v.

RAY HRDLICKA, AN INDIVIDUAL; CRIME, JUSTICE & AMERICA, INC., A CALIFORNIA CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

BRUCE S. ALPERT
Butte County Counsel
BRAD J. STEPHENS
Chief Deputy County Counsel
Counsel of Record
Office of the Butte County Counsel
25 County Center Drive, Suite 210
Oroville, CA 95965
(530) 538-7621
bstephens@buttecounty.net

Counsel for Petitioner

January 3, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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The Ninth Circuit held that publishers have a constitutional right to demand distribution of unsolicited publications to inmates, and that the Sheriff does not have a legitimate reason for refusing to continuously distribute the Respondents' unsolicited publications. That unprecedented decision was only reached by disregarding the Sheriff's content-neutral policy, and ignoring a long line of this Court's precedents. The far reaching impacts of the Ninth Circuit's erroneous decision warrant review.

A. THE UNDISPUTED FACTS IN THIS CASE PROVIDE A PERFECT VEHICLE FOR DETERMINING WHETHER COMMERCIAL PUBLISHERS HAVE A RIGHT TO DEMAND DISTRIBUTION OF UNSOLICITED PUBLICATIONS TO INMATES.

The Respondents' Opposition brief does not address the question presented in this case, but merely tries to obscure the issue. For example, the Respondents contend that the Sheriff is arguing "that a publisher, as well as any other person or entity, does not have an independent First Amendment Right to communicate with jail inmates, but rather that this right is contingent upon an inmate's specific prior request for the communication." Opp. Brief pg. 1. That contention is incorrect. This case does not involve personal correspondence, or a publisher who is seeking to send an inmate a requested publication. The question presented in this case is whether commercial publishers have special right of access to jails and prisons that allows them to demand distribution of unsolicited publications to inmates.

The Respondents also attempt to portray the Sheriff's petition as relying "heavily, if not exclusively" upon a claim that the Ninth Circuit made "erroneous factual findings" in reaching its decision. Opp. Brief pg. 1. That contention is also unavailing. The facts in this case are straightforward and not in dispute.

The Respondent solicits bail bond companies and criminal defense attorneys to place paid advertisements in his publication by promising that their ads will be sent to "thousands of inmates in immediate need of their services." App. 24a, 45a. In order to uphold that promise, the Respondent obtains the names of inmates through public records, and then pressures jail administrators to continuously distribute his unsolicited publications, or face a burdensome and costly lawsuit. App. 44a, 45a-46a. By operating in this manner, the Respondent avoids having to "spend the time and money that all other members of the press spend in an effort to convince inmates (or non-inmates) to request his publication." App. 27a. Instead, the Respondent is able to "externalize the cost of increasing his readership" on "any jail that he chooses to target." App. 27a, 46a.

In short, the undisputed facts in this case provide a perfect vehicle for determining whether publishers have a right, protected by the First Amendment, to demand that jails and prisons distribute unsolicited publications to inmates.

B. THE NINTH CIRCUIT'S DECISION ESTABLISHES A CONTENT-BASED STANDARD THAT CONFLICTS WITH THIS COURT'S DECISIONS, CREATES CONFUSION, INVITES REPETITIVE LITIGATION, AND REQUIRES THE PERPETUAL INVOLVEMENT OF FEDERAL COURTS IN WHAT SHOULD BE A BASIC ASPECT OF PRISON ADMINISTRATION.

In an effort to obscure the fact that numerous decisions of this Court conflict with the Ninth Circuit's unprecedented ruling, the Respondents selectively quote and cite to cases that involve either personal correspondence or requested publications. For instance, Respondents cite to *Procunier v. Martinez* 416 U.S. 396, 408 (1974) for the proposition that "the First Amendment interest of an outsider seeking to send written word to an inmate, and that of an inmate seeking to correspond with the outsider, are 'inextricably enmeshed,' one not dependent on the other, and it matters not who initiated the interaction." Opp. Brief pg. 9.

But the Respondents fail to mention that *Martinez* was expressly limited to regulations that apply to "direct correspondence between inmates and those who have a particularized interest in communicating with them." *Martinez*, 416 U.S. at 408. In circumstances like the one here, in which a publisher is seeking to force a Sheriff to continuously distribute unsolicited publications to county jail inmates – whoever they may be – solely because such inmates are potentially in need of the services advertised in his unsolicited

publications, *Martinez* recognized that "different considerations may come into play.[1]" *Id*. at n.11.

The Respondents' limited discussion of *Thornburgh v. Abbott* is misleading for the same reason. Opp. Brief pg. 10. *Thornburgh* makes it clear that the *Turner* standard only applies *after* a determination is made that the party seeking to challenge a prison regulation has a legitimate constitutional interest at stake. *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) ("[P]ublishers have a legitimate interest in accessing inmates who, through subscription, willingly seek their point of view.") This Court has applied that same framework in other cases. *Overton v. Bazzetta,* 539 U.S. 126, 131 (2003) ("We first consider the contention, accepted by the Court of Appeals, that the regulations infringe on a constitutional right of association."); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 797 (1985) ("[W]e must first decide whether solicitation in the context of the CFC is speech protected by the First Amendment, for, if it is not, we need go no further.")

The Ninth Circuit refused to follow that framework, and instead reasoned that because the publisher in

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[1] Although no court has squarely addressed the question presented in this case, other circuit courts have discussed this portion of the decision in *Martinez*. See *Brooks v. Seiter*, 779 F.2d 1177, 1180 (6th Cir. 1985) (Noting that a requested publication more closely resembles personal correspondence than a mass mailing, and is therefore entitled to First Amendment protection.) See also *Montcalm Publishing Corp. v. Beck*, 80 F.3d 105, n.2 (4th Cir. 1996) ("[A] publisher who wished to send a particular publication to each and every inmate at a given institution could be said to be undertaking a mass mailing.")

this case is seeking to challenge a jail regulation, the *Turner* test automatically applies, and the fact that this case only involves unsolicited publications was merely a factor that the court "may" consider in its *Turner* analysis. App. 13a. In the order denying the Sheriff's petition for en banc review, Judge Reinhardt elaborated further on the court's reasoning: "[B]ecause the value of CJA to inmates is greatest when they first arrive in the jail, it is unrealistic to insist, as a condition for applying the *Turner* test, that inmates have already subscribed to CJA." App. 44a.

In other words, in order to determine whether a particular publisher has a constitutional right to demand distribution of unsolicited publications, and whether an analysis of the *Turner* factors is necessary, courts must review the *content* of the unsolicited publications in each case, and determine whether the content, including any advertising, has a level of value to inmates that requires continuous, unsolicited distribution.

The confusing, content-based standard adopted by the Ninth Circuit is "completely untethered" from this Court's decisions, and gives life to problems that this Court has sought to resolve for decades. *Procunier v. Martinez*, 416 U.S. 396, 406-407 (1989) (Noting that lower courts had adopted widely different standards of review, and the resulting uncertainty "made it impossible for correctional officials to anticipate" what was required of them, which in turn invited "repetitive, piecemeal litigation on behalf of inmates," and the ongoing and unnecessary involvement of the "federal courts in affairs of prison administration.")

The series of errors committed by the court in its resulting *Turner* analysis further demonstrates the problems created by the court's finding that *Turner* even applies in this scenario. As set out in the petition, the Sheriff's content-neutral policy applies to *all* unsolicited publications, and therefore, the question before the court was whether the Sheriff's policy is logically connected to legitimate and neutral interests. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

But rather than determine that issue, the court only analyzed the application of the Sheriff's policy to the unsolicited publications in this particular case, while simultaneously shifting an "onerous burden" onto the Sheriff's to quantify how accommodating this particular publisher's demands would interfere with the orderly functioning of the jail. Pet. pg. 21-23. As Judge O'Scannlain recognized, the court's failure to properly analyze the Sheriff's policy as it applies to *all* unsolicited publications prevented the court from considering "the impact its ruling produces beyond these jails and this publication" and the "many practical concerns that will arise from requiring jails to distribute an unknown quantity of unsolicited mail." App. 52a. Respondents Opposition brief does not address this fundamental error. Opp. Brief pg. 25-27.

To make matters worse, in considering the second *Turner* factor, the court again focused on the content of the unsolicited publications at issue in this case. Specifically, the court emphasized that the publications contain ads for bail bonds and defense attorneys, and reasoned that if inmates did not receive an unsolicited copy of the Respondent's publication "as soon as they arrive at the jail ... the advertising in CJA is of little or no use." App. 20a.

In a previous case that resulted in a unanimous reversal of the Ninth Circuit, this Court explained that if courts were to follow the court's reasoning and "enhance constitutional protection based on their assessment of the content of the particular communications, courts would be in a position to assume a greater role in decisions affecting prison administration." *Shaw v. Murphy* 532 U.S. 223, 230-231 (2001) But in seeking to avoid "unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration," *Shaw* unanimously rejected "an alteration of the *Turner* analysis that would entail additional federal-court oversight." *Id.*

The court's refusal to follow *Shaw* not only perpetuates the involvement of federal courts in the affairs of state-run jails and prisons, but it puts jail and prison administrators in an untenable position. A "governmental objective must be a legitimate and neutral one," and must operate "in a neutral fashion, without regard to the content of the expression." *Turner v. Safley* 482 U.S. 78, 90 (1987), citing *Pell v. Procunier*, 417 U.S. 817, 828 (1974), *Bell v. Wolfish,* 441 U.S. 520, 551 (1979). The Sheriff's content-neutral policy complies with that requirement. But as was pointed out in both dissents, as a result of the court's erroneous decision, facilities must abandon their content-neutral policies and either allow all unsolicited publications into their facilities, or conduct an improper evaluation into the content of unsolicited publications, which is "impossible under Supreme Court precedent." App. 28a, 52a.

In sum, the Ninth Circuit's decision to ignore the Sheriff's content-neutral policy, and create a standard of review that is based on the content of unsolicited

publications, produces a confusing and inconsistent standard, which invites repetitive litigation, and requires federal courts to micro-manage an issue that only concerns the ability of private companies to profit by utilizing jail and prison resources.

C. A FINDING THAT PUBLISHERS DO NOT HAVE A SPECIAL RIGHT TO DEMAND DISTRIBUTION OF UNSOLICITED PUBLICATIONS TO INMATES WOULD FURTHER EACH OF THE POLICIES ARTICULATED BY THIS COURT.

Conversely, a ruling that publishers do not have a special, free-standing right to access inmates with unsolicited publications would further this Court's policies. Most importantly, a standard based on the unsolicited nature of a publication, as opposed to whether its content is "good" or "bad," would provide a clear and workable standard that is internally consistent with the requirement that regulations be content-neutral.

A content-neutral standard would also provide a narrowly tailored, common-sense limitation on the scope of publishers' First Amendment rights. Jails and prisons are non-public forums, and publishers are not entitled to a distribution method that provides access to the greatest number of inmates, or the most extensive, profitable, or cost-effective means of distributing commercial publications. *Cornelius*, 473 U.S. at 809 ("The First Amendment does not demand unrestricted access to a non-public forum merely because use of that forum may be the most efficient means of delivering the speaker's message.");

Houchins v. KQED, Inc., 438 U.S. 1, 12 (1978); *United States Postal Service v. Council of Greenburgh Civic Assn's*, 453 U.S. 114, 129 (1981)

Furthermore, jail and prison administrators will always have legitimate reasons for not wanting to dedicate resources to distributing unsolicited publications and dealing with the problems such publications cause. And publishers will always have an alternative means to express their rights by sending their publications to inmates who request them, just as the vast majority of publishers already do. The problems caused by the Ninth Circuit's refusal to follow this Court's decisions provides a prime example of why there is no need to repeatedly litigate these issues, and perpetually involve federal courts in what should be a basic aspect of jail and prison administration.

CONCLUSION

Petitioner, the elected Sheriff of Butte County, California, respectfully requests that this honorable Court grant Certiorari, or alternatively, summarily reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

BRUCE S. ALPERT
Butte County Counsel
BRAD J. STEPHENS
Chief Deputy County Counsel
Counsel of Record
Office of the Butte County Counsel
25 County Center Drive, Suite 210
Oroville, CA 95965
(530) 538-7621
bstephens@buttecounty.net

Counsel for Petitioner

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