No. 11-653

# In The
# Supreme Court of the United States

JOHN McGINNESS, in his official capacity
as the elected Sheriff of Sacramento County,

*Petitioner,*

v.

CRIME, JUSTICE & AMERICA, INC.,
a California corporation and
RAY HRDLICKA, an individual,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. WHETHER A PUBLISHER HAS A FIRST AMENDMENT RIGHT TO COMMUNICATE WITH COUNTY JAIL INMATES THROUGH AN UNSOLICITED PUBLICATION.

2. WHETHER A COUNTY JAIL MAY PROHIBIT THE DISTRIBUTION OF AN UNSOLICITED PRIVILEGED PUBLICATION TARGETED SPECIFICALLY AT COUNTY JAIL INMATES.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. Civ. P. 26.1 and 28, it is hereby affirmatively stated that respondent CRIME, JUSTICE & AMERICA, INC. is not a publically held corporation and there is no parent company that owns ten percent (10%) or more of its stock, or any of its stock at all.

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## INTRODUCTION

Petitioner has failed to demonstrate any "compelling reason" for granting his request for a Writ of Certiorari. Quite simply, Petitioner fails to establish that the Ninth Circuit's Opinion of January 31, 2011 conflicts with a decision of another United States Court of Appeals, a state court of last resort, or a relevant holding of the United States Supreme Court. *See* Sup. Ct. R. 10. As a result, Petitioner has had to rely heavily, if not exclusively, upon his own opinion that the Ninth Circuit's Opinion consists of erroneous factual findings and a misapplication of a properly stated rule of law.

Petitioner himself has manipulated the facts and misapplied the law in an anemic attempt to construct an argument that the Ninth Circuit's opinion conflicts with decisions of this Court and other Courts of Appeals. Petitioner's argument is also based on the flawed premise that a publisher, or any other person or entity, does not have a First Amendment right to communicate with an inmate unless the inmate specifically has requested to receive the communication. Petitioner's reasoning has no grounding in the law and runs contrary to this Court's First Amendment jurisprudence. Never has any court ruled that an individual's right to speak freely is contingent upon another person requesting to hear what he has to say.

The remainder, and crux, of Petitioner's argument focuses on his belief that the Ninth Circuit erroneously applied the properly stated rule of *Turner*

*v. Safley,* 482 U.S. 78 (1987) in considering whether a ban on all unsolicited publications in a jail constituted a lawful and proper restriction of a publisher's First Amendment rights.

Petitioner first asserts that the *Turner* test only applies to those prison regulations impacting the rights of prisoners. In so doing, he ignores a clearly established rule of this Court: *Turner* also should be used to evaluate regulations affecting the ability of outsiders to communicate with those on the inside.

Next, Petitioner claims that the Ninth Circuit misapplied *Turner* by failing to afford full and unfettered deference to the views of prison authorities. Petitioner has misconstrued *Turner* to mean that in all circumstances and in every case, the decision-making authority of prison administrators must go unchecked.

In claiming that the lower court wrongfully placed the burden on him to prove the reasonableness of the regulation, Petitioner has ignored that the publisher successfully demonstrated the lack of any rational connection to legitimate penological interests.

Petitioner also claims that in making its findings, the Ninth Circuit engaged in improper consideration of the subject matter of a publication, and that its ruling requires him to do the same on a regular basis. However, Petitioner fails to grasp that such a consideration is permissible under *Turner* and in a non-public forum. Moreover, the Ninth Circuit's reference to the nature of the intended audience occurs within

the context of its determination that no alternative method of expression remains open to the publisher.

Petitioner cannot and does not present a true conflict between the Ninth Circuit's Opinion and that of any other U.S. Court of Appeals or this Court, nor has he shown that the lower court misapplied the law. He has failed to present any valid reason for this Court to grant him certiorari, and his petition should be denied.

## STATEMENT OF THE CASE

*Crime, Justice & America* is a quarterly, 40-page publication bearing 90 percent substantive written material. In contract, at least 50 percent of the space within a typical magazine is given over to advertising. Only four pages of *Crime, Justice & America* displays advertisements – offering services uniquely needed by the audience intended, recent arrestees in custody.

First published in May 2002, *Crime, Justice & America*'s mission is to educate inmates about their legal rights, the legal process, and help them avoid repeating their mistakes. *Crime, Justice, & America* includes articles written by attorneys, reformed offenders, and professionals from the fields of law enforcement, probation, as well as from departments of correction. *Crime, Justice & America* contains detailed analysis of the adjudicative process – from

the point of arrest to that of conviction and sentencing.

Since 2002, more than one million copies of *Crime, Justice & America* have been printed and distributed. The magazine currently is being distributed without any problems, or has been authorized for distribution without any resistance, in detention centers located in approximately 65 counties throughout 12 states, including California, Washington, Oregon, Arizona, Maryland, Florida, Michigan, Kansas, Missouri, Ohio, and Illinois. Correctional facilities in 32 of the largest California counties receive, or have agreed to receive, and distribute copies of the publication, including Los Angeles and San Diego Counties.

The magazine has been received enthusiastically and lauded for the depth of its insight and analysis by county jail inmates as well as by independent sources. Thousands of inmates who received and read *Crime, Justice & America* have written letters of appreciation to the publisher expressing gratitude for a publication which they said constituted their sole access to the particular kinds of information they critically needed and desired. *Fortune Small Business* described *Crime, Justice & America* as a "surprisingly professional-looking 40-page upstart quarterly with articles written by lawyers and other criminal-justice-system professionals and spotlighting issues most glossies prefer to avoid."

*Crime, Justice & America* is also well-regarded by the California Department of Corrections' Principal Librarian, who has recommended it as an acceptable donation to the California Department of Corrections Law Library.

Crime, Justice & America, Inc. distributes *Crime, Justice & America* in one of two manners: (1) direct mailing to the inmates or (2) general distribution. In the case of direct mailings to inmates, Crime, Justice & America, Inc. addresses the magazine to individual inmates and sends them weekly through the U.S. Postal Service at a ratio of one issue for every ten inmates. In order to achieve direct mailings, the Respondents obtain a facility's full inmate roster using a public records request. The information that the Respondents request, obtain, and utilize is public record information that is only related to changes to the inmate population roster, i.e., who is in jail and when did they get there.

In the cases of general distribution, which requires less resources than direct mailing, Crime, Justice & America, Inc. has negotiated with a majority of the correctional institutions to provide a weekly distribution of magazines at the same ratio of approximately one issue for every ten inmates. The magazines are then placed in small stacks in the common areas at the same time when most jails distribute their daily newspaper, or weekly and monthly magazines. These arrangements have been made to accommodate the facilities' desire to avoid any potential

administrative costs from distributing direct mailings to inmates.

Crime, Justice & America, Inc. contacted Sacramento County Sheriff's Department in September 2003, prior to sending any direct mailings to Sacramento County inmates in order to discuss the pending distributions. Sacramento County was informed that *Crime, Justice & America* would be mailed directly to inmates on a weekly basis, at a rate of one magazine per every ten inmates. Sacramento County was also offered general distribution if Sacramento County preferred. Sacramento County declined general distribution, but agreed that direct mailings would be delivered to the listed inmate-addressees.

In May 2005, Sacramento County jail administration declined to continue acceptance of unsolicited copies of *Crime, Justice & America*, citing jail policies. In support of its new ban on unsolicited publications, Sheriff McGinness cited jail security and jail resources as penological interests which the regulation sought to protect.

The jail has in place regulations limiting the amount of written materials an inmate is permitted to keep in his or her cell at any given time. Regardless, Petitioner states that the unsolicited nature of the mail in and of itself presents an issue because it means that the inmate lacks a connection to the mail, and that lack of connection increases the likelihood that the unsolicited mail will be used in a nefarious

act, such as starting fires, passing notes or contraband, covering windows, or clogging toilets.

Crime, Justice & America, Inc. contended that use of a certain type of mail, unsolicited or otherwise, in a nefarious act does *not* relate to the type of mail *causing* the act. Stated another way, the nefarious act would occur regardless of the presence of unsolicited mail. The unavailability of unsolicited mail merely would result in the inmate choosing another piece of mail or paper to perform the act. It is simply beyond reason to conclude that the availability of unsolicited mail has any *causal* link to a nefarious act.

Petitioner presented no response to this challenge, as none exists.

Moreover, the position of the Sacramento County Sheriff's Department is in direct conflict with its own actions. Until 2006, even at the time that Sacramento County denied *Crime, Justice & America,* the Sheriff purchased (without a request of any inmate) the *Sacramento Bee* for the inmates. That practice was discontinued solely because the newspaper began to disparage the Sheriff's administration. Thereafter, the Sheriff purchased *USA Today* for the inmates (again without a request of any inmate). *USA Today* was discontinued because the Sheriff no longer wished to pay for the subscription.

The Sheriff's distribution to inmates on a daily basis of newspapers *of his choosing* presented no security issues for the jail. Yet, inexplicably, the

Sheriff now claims that unsolicited copies of *Crime, Justice & America* presents such an issue.

In addition, a Sacramento County jail inmate who has finished reading a subscribed periodical is permitted to leave it in a day room for other inmates to read should they choose. The other inmates have no connection to the magazines left in the day room, and they did not subscribe to the publications. Yet, inexplicably, it is claimed by Petitioner that the unsolicited nature of *Crime, Justice & America* poses the security issue for the Sacramento County jail.

Crime, Justice & America, Inc. also challenged Petitioner's assertion that distribution of *Crime, Justice & America* to ten percent of the inmate population would materially affect jail resources. Sacramento County jail holds an average of 2,340 inmates daily. Approximately 60 jail staffers handle mail daily. Weekly, 234 copies of *Crime, Justice & America* would be (and were) distributed to Sacramento County jail – an average of 39 copies per day. Thus, on average, 39 of the 60 persons dedicated to daily mail tasks would see an increase of one (1) piece of mail per day. Quite simply, common logic dictates that such a minimal increase would be equivalent to the normal flux in daily mail.

Crime, Justice & America, Inc. maintains that the ban on *Crime, Justice & America* in Sacramento County jail has no rational relationship with any legitimate penological interests. Accordingly, the publisher filed suit seeking a court's confirmation that a

First Amendment right exists to distribute *Crime, Justice & America* in the Sacramento County correctional facility – under the four-prong test in *Turner v. Safley,* 482 U.S. 78, 89 (1987).

Petitioner filed for summary judgment. The trial court granted summary judgment, finding that the ban on *Crime, Justice & America* was rationally related to jail security, that alternative avenues existed for Crime, Justice & America, Inc. to reach the inmates, that the effect of 39 of 60 jail mail staff personnel distributing one (1) extra piece of mail per day was excessive, and that there are no obvious alternatives for the jail to reach the stated goals regarding jail security.

Upon appeal to the Ninth Circuit Court of Appeals, the Ninth Circuit overturned the district court's decision. The Ninth Circuit confirmed that a publisher has a First Amendment right to communicate with inmates that is separate and independent from the inmates' First Amendment right to receive the communication. This was *not* the creation of a "special right," but an affirmation of the same basic right afforded all persons and entities.

Thus, the Ninth Circuit found the *Turner* reasonableness standard to be the correct standard to determine whether the regulatory ban on all unsolicited mail was constitutional. It is the proper standard to apply in this context. The Ninth Circuit determined that the jail regulation prohibiting unsolicited

mail failed the first part of the *Turner* test – rational connection related to legitimate penological interest. The ban bears no valid, rational relationship to jail security, and no valid, rational relationship to jail resources.

Even though the first *Turner* factor is *sine qua non*, meaning lack of a rational relationship to a legitimate penological interest ends the inquiry, the Ninth Circuit analyzed the remaining three parts of the test for reasonableness. Finding no viable alternate avenue for reaching its intended audience open to *Crime, Justice & America,* no evidence that distribution would materially impact jail resources, and existence of obvious, easy alternatives suggestive of an exaggerated response, the Ninth Circuit decided the remaining factors weighed against the regulation.



## REASONS TO DENY CERTIORARI

### I. The Ninth Circuit's Opinion Confirming A Publisher's Separate And Distinct First Amendment Right To Reach Inmates Is Not In Conflict With U.S. Supreme Court Or Other Courts Of Appeals Decisions.

The U.S. Supreme Court consistently has viewed the First Amendment rights of non-prisoners to mail written materials to them as separate, distinct, and independent from the First Amendment rights of inmates to receive written materials sent to them.

In *Procunier v. Martinez*, the Court explained that while 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 is not dependent on the other*, and it matters not who initiated the interaction. *Procunier*, 416 U.S. 396, 408-09 (1974) (overruled on other grounds).

> Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication.

*Id.* at 408-09. The *Martinez* Court held that "censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners." *Id.* at 409.

The Court in *Turner v. Safley,* 482 U.S. 78 (1987) affirmed the controlling view that the rights of nonprisoner/outsiders exist separately from those of inmates. In its discussion of the impacts of a rule allowing an inmate to marry only with special permission, the *Turner* Court noted that the prohibition

also affected "civilians" hoping to marry inmates. *See Turner*, *supra*, 482 U.S. at 97.

Two years later, the Court in *Thornburgh* held that "the *Turner* reasonableness standard" should be used to evaluate prison regulations affecting all incoming mail, regardless whether the sender was an inmate at another facility or a non-prisoner. *See Thornburgh v. Abbott,* 490 U.S. 401, 411, n. 9 and 413 (1989). In the same decision, the Court once again confirmed its view that the First Amendment interest of an outsider and that of an inmate are separate and independent from each other:

> "It is [ ] certain that '[p]rison walls do not form a barrier separating [ ] inmates from the protections of the Constitution,' nor do they bar free citizens from exercising *their own* constitutional rights by reaching out to those on the 'inside.' "

*Id.* at 407 (emphasis added), *citing Turner*, 482 U.S. at 84 and at 94-99; *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); and *Pell v. Procunier*, 417 U.S. 817 (1974).

In *Pell v. Procunier*, 417 U.S. 817 (1974), the Court devoted separate analysis to the media's argument that their rights, as members of the press, existed "irrespective[ly] of what First Amendment liberties may or may not be retained by prison inmates." *See id.* at 829. While the Court decided the new prison media interview policy "[did] not abridge

the constitutional right of a free press," it did *not* find that a reporter's right to talk to an inmate was dependent on the inmate's willingness to speak to him. *See id.* at 829-35.[1]

Neither this Court nor any Court of Appeals has found the free speech rights of a publisher or distributor of information to be contingent upon the recipient first requesting the material in any context. *See Martin v. City of Struthers*, 319 U.S. 131 (1943) (finding that leaflet distributors have a First Amendment right to go door-to-door seeking communication with homeowners, regardless of whether the latter wants the material); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (deciding that publisher of commercial speech has a First Amendment right to send material to members of the general public at their home addresses); *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (voiding municipal law requiring door-to-door advocates to register with mayor; homeowners unwilling to hear advocates' message can hang "no soliciting" sign on front door); *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009) (holding that publisher of

[1] The *Pell* court noted that the Constitution "does not [ ] require government to accord the press special access to information not shared by members of the public generally." *Id.* at 834. By mailing material to individually named inmates, Hrdlicka is not seeking "special access" to inmates or the interior of the jail. Rather, his action is expectant of no greater degree of protection than that of any outsider/non-prisoner that mails a letter to a particular inmate.

commercial speech has a First Amendment right to leave literature on windshields of cars parked on city streets, even when drivers do not desire the material).

In evaluating regulations affecting the First Amendment rights of a publisher and an inmate-reader, the Tenth Circuit in *Jacklovich v. Simmons*, like the Fourth Circuit in *Montcalm Publ. v. Beck*, held that a publisher has a right separate from that of an inmate to be notified if prison officials refuse to deliver the publication to the inmate. *See Jacklovich*, 392 F.3d 420, 433 (10th Cir. 2004). The Court was not persuaded by prison officials' argument that a publisher's right to notice arose only if the inmate had informed the publisher to the fact that the material had been rejected: "We agree with the Fourth Circuit that the publisher's rights *must not be dependent* on [prison officials] notifying the inmate." *Id.*, *citing Montcalm*, 80 F.3d 105, 109 (4th Cir. 1996), *cert. denied*, 519 U.S. 928 (1996).[2] The Courts' view that the publisher's First Amendment right is separate and distinct from that of the inmate is implicit in these two holdings. Thus, according to the Tenth and Fourth Circuits, the former cannot be made dependent on the

[2] "An inmate who cannot even see the publication can hardly mount an effective challenge to the decision to withhold that publication, and while the inmate is free to notify the publisher and ask for help in challenging the prison authorities' decision, the publisher's First Amendment right must not depend on that." *Montcalm*, *supra*, 80 F.3d at 109.

latter, and the existence of the latter does not "trigger" the existence of the former.

In its determination that a publisher's First Amendment right to distribute a publication to an inmate is independent, separate and distinct from the right of the inmate, the Ninth Circuit's decision is consistent with decisions of the U.S. Supreme Court and other Courts of Appeals. Thus, certiorari should not be granted on this issue.

## II. The Ninth Circuit's Application Of *Turner* Factors Is Not In Conflict With U.S. Supreme Court Or Other Courts Of Appeals Decisions.

The Ninth Circuit appropriately applied the *Turner* factors in addressing the regulation prohibiting distribution of unsolicited publications mailed directly to inmates, consistent with U.S. Supreme Court and other Courts of Appeals decisions. The Ninth Circuit's determination that the regulation was not rationally related to penological interests aligns it with U.S. Supreme Court and other Courts of Appeals decisions. The Opinion did not improperly shift the burden to the Petitioner and, thus, does not conflict with U.S. Supreme Court and other Courts of Appeals decisions.

### A. The Ninth Circuit's Decision to Apply *Turner* Factors Is Consistent with U.S. Supreme Court and Other Courts of Appeals Decisions.

The Ninth Circuit's confirmation of a publisher's First Amendment right separate and distinct from an inmate is consistent with U.S. Supreme Court and other Courts of Appeals decisions regarding restrictions of speech in non-public forums. Use of the *Turner* standard to weigh regulations affecting publisher distributions to inmates is consistent with U.S. Supreme Court and other Courts of Appeals holdings, as is the standard consistently applied to prison regulations which impact outsiders' speech.

#### 1. The Ninth Circuit's Confirmation of a Publisher's First Amendment Right to Reach Jail Inmates Is Consistent with U.S. Supreme Court and Other Courts of Appeals Decisions Pertaining to Governmental Restriction of First Amendment Rights in a Non-Public Forum.

The Ninth Circuit's application of the *Turner* factors is in harmony with the rules for assessing a regulation impacting speech in a non-public forum. In fact, both the *Turner* analysis and the one for weighing speech restrictions in non-public fora are tests for reasonableness.

In a non-public forum, a challenged regulation restricting free speech is permissible if it is *reasonable* and as long as it is not an effort to suppress speech due to disagreement with the speaker's viewpoint. *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 45-51 (1983); *citing United States Postal Service v. Counsel of Greenburgh Civic Associations,* 453 U.S. 114, 131, n. 7 (1981). This expressly-stated standard was derived from decades of non-public forum decisions by the Court. *See Adderley v. Florida,* 385 U.S. 39 (1966) (found the Sheriff to have acted reasonably in protecting order and security at jail when arresting protestors in non-public areas outside the jail); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (card space on city transit car was not typical public area, and prohibition of political advertising are reasonable objective to minimize chance of abuse, appearance of favoritism, and risk of imposing on a captive audience).

While a regulation in a non-public forum must be viewpoint-neutral, distinctions based on the subject matter are allowable and "implicit in the concept of the nonpublic forum." *See id.* at 49, and *see Cornelius v. NAACP Legal Defense and Educational Fund*, *Inc.*, 473 U.S. 788, 806 (1985) ("[A] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum," *citing Lehman* and *Perry*.). The *Perry* Court found that such subject-matter distinctions are "reasonable" if they are "wholly consistent" with the

government's "legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated," *Perry*, 460 U.S. at 50, *citing Greenburgh*, 453 U.S. at 129-30.

Roughly the same time as it was developing the standard for evaluating government-imposed speech limitations in non-public fora, this Court reviewed a series of cases involving restrictions of First Amendment rights in the particular setting of a prison and applied the same reasonableness standard it was using in its non-public fora decisions. Then, the *Turner* Court formally adopted this standard of review, which focuses on the *reasonableness* of the prison rules and where "the relevant inquiry is whether [prison officials' actions [were] 'reasonably related to legitimate penological interests.'" *See Thornburgh*, *supra*, 490 U.S. at 409.

The *Turner* standard, and the inquiry involved, mirrored that which the Court developed for assessing speech limitations in non-public fora. *See Perry*, *supra*, 460 U.S. at 46-55. In *Turner*, the Court characterized the line of Free Speech-in-prison cases it intended to draw from as follows: "In none of these four 'prisoners' rights' cases [*Pell*, *Jones*, *Wolfish*, and *Block v. Rutherford*, 468 U.S. 576 (1984)] did the Court apply a standard of heightened scrutiny, but instead inquired whether a prison regulation that burdens fundamental rights is '*reasonably related*' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *Turner*, *supra*, 482 U.S. 78, 87 (emphasis added).

Although the *Turner* Court did not cite *Perry*, it adopted the "reasonableness" and "rational connection" or "reasonable relationship" standard through the Court's decisions dealing specifically with First Amendment restrictions in prison settings: "If *Pell*, *Jones*, and *Bell* have not already resolved the question [ ], we resolve it now; when a prison regulation impinges on an inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

The *Turner* Court laid out the test "for determining the reasonableness of the [prison] regulation at issue," and lifted the four parts of the test from the texts of its decisions in *Pell*, *Wolfish*, *Jones*, and *Block*. *See Turner*, 482 U.S. at 89-91. These factors mirror those for determining the reasonableness of free speech restrictions in other non-public fora. The requirement that there be a "'valid rational connection'" between the prison regulation and the "legitimate governmental interest put forward to justify it," mirrors the requirement that discrimination in non-public fora be reasonably connected to the use of the property. *Turner* Court's elaboration that "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational" bears a striking resemblance to the *Lehman* Court's prohibition of Free Speech restrictions in non-public fora that are "arbitrary, capricious, or invidious." *See Turner*, 482 U.S. at 89-90; *Adderley*, *supra*, 385 U.S. at 47; *Lehman*, *supra*, 418 U.S. at 303; *Greenburgh*,

*supra*, 453 U.S. at 130; *Cornelius*, *supra*, 473 U.S. at 806; *Perry*, *supra*, 460 U.S. at 50; and *Lehman,* 418 U.S. at 303.

In the inquiry as to whether "alternative means of exercising the right [] remain open," the *Turner* Court mirrors the test for speech restrictions in non-public fora. *See Perry*, *supra*, 460 U.S. at 53; and *Greenburgh*, *supra*, 453 U.S. at 119.

In *Thornburgh*, the Court further refined the *Turner* analysis to specifically include viewpoint-neutrality as opposed to subject matter neutrality. *Thornburgh*, *supra*, 490 U.S. at 415-16. The *Thornburgh* Court recognized that it was upholding regulations which provided for discrimination based on the subject matter (but not on the viewpoint). *See id.* at 416. These rules "distinguish[ed] between rejection of a publication 'solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant' (prohibited) and rejection because the publication [was] detrimental to security (permitted)." *Thornburgh*, *supra*, 490 U.S. at 415. The Court acknowledged that "[b]oth determinations turn, to some extent, on content" and then addressed the intended meaning of the phrase from *Turner*, "operated in a neutral fashion, without regard to the content of expression":

> [T]he Court's reference to 'neutrality' in *Turner* was intended to go no further than its requirement in *Martinez* that 'the regulation or practice in question must further an important or substantial governmental interest

> unrelated to the suppression of expression.' Where, as here, prison administrators draw distinctions between publications *solely on the basis of their potential implications for prison security*, the regulations are 'neutral' in the technical sense in which we meant and used that term in *Turner*.

*Id.* at 415-16 (emphasis added).

As the *Thornburgh* Court explained, the *Jones* Court had "upheld *content distinctions* . . . because the distinctions had a rational basis in [a] legitimate penological interest." *See id.*, n. 13 at 415 (emphasis added). Allowance of such differentiation mirrors the *Perry* Court's finding that subject-matter discrimination is valid in a non-public forum, as long as it relates to the specific purpose of the property. *See Perry*, *supra*, 460 U.S. at 55. Circuit courts of appeals have held consistently in the same manner. *See Van den Bosch v. Raemisch,* 658 F.3d 778, 788 (7th Cir. 2011) (upholding ban of newsletter issue containing article encouraging inmates to riot); and *Jones v. Salt Lake Cnty.*, 503 F.3d 1147 (10th Cir. 2007) (validating prison ban on obscene magazines).

Since the Ninth Circuit's application of the *Turner* factors is consistent with this Court's and other Courts of Appeals' non-public fora decisions, certiorari should not be granted.

### 2. The U.S. Supreme Court Specifically Has Held That *Turner* Applies to Prison Regulations Affecting Publisher's Distribution to Inmates.

In *Thornburgh v. Abbott*, this Court held that "regulations affecting the sending of a 'publication' to a prisoner must be analyzed under the *Turner* reasonableness standard." *Thornburgh,* 490 U.S. 401, 413 (1989). Not only was this statement so clearly made by the U.S. Supreme Court, but the Court's prior decisions regarding challenges to prison or jail regulations support and are consistent with this decision.

The Court had found two years earlier in *Turner* that a regulation impinging on an inmate's constitutional rights was valid if it was "reasonably related to a legitimate penological interest." *Turner v. Safley*, 482 U.S. 78, 89 (1987). The rules at issue in *Turner* prohibited prisoners who were not immediate family members and were located in different institutions to exchange written correspondence unless "each inmate's classification/treatment team deem[ed] it in the best interests of both inmates" and allowed an inmate to marry only on the condition that the prison superintendent found "compelling reasons" to grant permission. *Id.* at 78. After applying a "reasonableness" standard to both rules, the Court upheld the former and struck the latter. *Id.* at 79.

In applying the "reasonableness standard" to evaluate regulations impacting the First Amendment

right of publishers, the *Thornburgh* court cited the same line of "prisoners' rights" cases relied upon by the *Turner* Court in formulating the four-prong test for determining the reasonableness of a prison regulation which impinged upon an individual's constitutional right.[3] *See id.* at 411, and *see Turner*, 482 U.S. at 89-91. In addition to impacting the rights of prisoners, the rules in these four cases also happened to affect the rights of outsiders seeking either to meet face-to-face with those on the inside or send written word to them. *See Thornburgh*, 490 U.S. at 409, and *see Block v. Rutherford*, 468 U.S. 576, 585-86 (1984). In these four pre-*Turner* cases, the Court "focus[ed] on the reasonableness of [the] prison regulations" and questioned "whether the actions of prison officials were 'reasonably related to legitimate penological interests.'" *Thornburgh*, 490 U.S. at 409. *See also Pell v. Procunier*, 417 U.S. 817 (1974); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119

[3] In determining the reasonableness of a regulation under *Turner*, a Court inquires as to: (1) whether there is a "valid rational connection" between the prison regulation and a "legitimate, neutral" government interest; (2) whether alternative means of expressing the right remain open; (3) the extent of the impact of accommodating the asserted right on guards, other inmates and on allocation of prison resources; and (4) whether there is an absence of ready alternative methods for accommodating the right thus evidencing the reasonableness of a regulation (and conversely, existence of "obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns"). *See Turner*, *supra*, 482 U.S. at 89-91.

(1977); *Bell v. Wolfish*, 441 U.S. 520 (1979); and *Block v. Rutherford*, *supra*, 468 U.S. at 586.

When evaluating rules concerning inbound material, the *Thornburgh* Court decided that no distinction should be made between that sent by a non-inmate and that sent by an inmate, because to do so would be "out of step" with the holdings in *Pell*, *Jones* and *Wolfish*. *See Thornburgh*, *supra*, 490 U.S. at 410 n. 9.

> Any attempt to justify a [] categorical distinction between incoming correspondence from prisoners . . . and incoming correspondence from nonprisoners would likely prove futile, and we do not invite it. To the extent that *Martinez* itself suggests such a distinction, we today overrule.

*Id.* at 413.

The Ninth Circuit's application of the *Turner* factors to the Petitioner's regulation prohibiting publishers from sending inmates mail is perfectly in keeping with the Court's decisions and that of other Courts of Appeals.

### 3. The U.S. Supreme Court and Courts of Appeals Consistently Apply *Turner* Factors to Regulations Affecting the Rights of Non-Prisoner/Outsiders.

In *Overton v. Bazzetta*, the Court used the *Turner* test to assess the reasonableness of a set of prison

visitation rules impacting inmates and their prospective visitors, both of whom had filed suit. *See Overton*, 539 U.S. 126, 132-34 (2003). The regulations prohibited nieces and nephews under the age of 18, a child to whom an inmate's parental rights had been terminated, and all former inmates from seeing their relatives or friends in the correctional facility. *Id.* at 129. The Court applied the *Turner* test in considering the rules' impact on child visitors and found a "rational relation" between the regulations and the state Department of Corrections' "valid interest" in "protecting child visitors from exposure to sexual or other misconduct or from accidental injury." *Id.* at 133.

The Sixth Circuit stated clearly that the *Turner* test should be applied to regulations affecting the First Amendment right of an outsider when "the impinged association or speech [is] *with* a prisoner." *Akers v. McGinness*, 352 F.3d 1030, 1043 (6th Cir. 2003), *cert. denied*, 543 U.S. 1020 (2004) (emphasis orig.), *citing Overton*, *Thornburgh*, and *Keeney v. Heath*, 57 F.3d 579, 581-82 (7th Cir. 1995).

In finding a prison regulation barring marriage between prison guards and inmates reasonable per *Turner*, the Seventh Circuit stated, "[T]he Supreme Court [in *Thornburgh*] made clear that, so far as challenges to prison regulations as infringing constitutional rights are concerned, the standard is the same whether the rights of prisoners or of non-prisoners are at stake." *Keeney*, 57 F.3d at 581.

Likewise, in affirming under *Turner* the reasonableness of a prison media policy prohibiting outside organizations from photographing and audio or videotaping executions, the Eighth Circuit stated, "[T]he status of a person as prisoner or non-prisoner does not determine whether the *Turner* test applies to prison regulations that may affect both prisoners and non-prisoners." *Rice v. Kempker*, 374 F.3d 675, 681 (8th Cir. 2004).

The Ninth Circuit consistently has applied the *Turner* reasonableness standard to assess regulations affecting the First Amendment rights of publishers to send literature to inmates. In *Prison Legal News v. Cook* ("*PLN I*"), the Court applied the *Turner* test and struck down a bulk (or "standard")-rate-mail ban, as it had been applied to subscription-based, non-profit publications. *See* "*PLN I*," 238 F.3d 1145, 1151 (9th Cir. 1999). The Court noted that "the receipt of such unobjectionable mail [does not] implicate penological interests." *Id.* at 1149. In *Prison Legal News v. Lehman* ("*PLN II*"), the Court held unconstitutional a "non-subscription bulk mail" ban, which prison officials had used to justify their refusal to distribute publications that inmates had requested but not purchased. *See* "*PLN II*," 397 F.3d 692, 699 (9th Cir. 2005). The Court decided such a sweeping prohibition "[was] not rationally related to a neutral government objective." *Id.* at 699. In "*PLN I*" and "*PLN II*," both publisher PLN and the inmates sued over the regulations, and in both cases, the Ninth Circuit applied the *Turner* test to rules which it recognized had

implicated the free speech interests of both sender and recipient. *See id.* at 699 and "*PLN II*," 397 F.3d at 1149. In *Morrison v. Hall*, the Ninth Circuit applied *Turner* when it voided a regulation banning incoming mail sent by bulk rate and by third or fourth class. *See Morrison*, 261 F.2d 896, 905 and 907 (9th Cir. 2001).

The Tenth Circuit applied *Turner* to regulations the Court determined had implicated the First Amendment rights of both publisher PLN and the inmates, and under which gift subscriptions were banned and a dollar limit on inmates' purchase of publications was imposed. *See Jacklovich v. Simmons*, 392 F.3d 420, 426 and 433 (10th Cir. 2004).

The *Jacklovich* Court stated:

> Resolution of the [ ] claims requires balancing between the constitutional rights retained by inmates and *those who send them publications* against the deference owed to prison authorities when it comes to prison administration.

*Id.* at 426, *citing Turner*, *supra*, 482 U.S. 84-85 (emphasis added).

Just like the Ninth Circuit in *Hrdlicka v. Reniff*, 631 F.3d 1044 (9th Cir. 2011), the Tenth Circuit in *Jacklovich* held that the record did not show a "valid and rational connection between the regulation and policies in question" and prison officials' "legitimate interest in security and behavior management." *Id.* at 420. In addition, the *Jacklovich* Court found that

questions of fact existed as to whether alternative means of exercising plaintiffs' First Amendment rights remained open, what effect accommodating these rights would have on the prison, and whether there was an absence of ready alternatives to the regulations. *See id*.

Other circuits also have applied the *Turner* test to regulations affecting publishers as well as inmates. For example, the Fourth Circuit in *Montcalm* recognized that "both inmates and publisher have a right to procedural due process when publications are rejected." *Montcalm*, 80 F.3d 105, 109 (4th Cir. 1996).

Because this Court and other U.S. Courts of Appeals consistently have applied *Turner* to regulations affecting outsiders seeking to communicate with inmates and publishers wishing to send materials to them, no reason to grant certiorari on this issue exists.

Furthermore, *Hrdlicka* is not an appropriate vehicle for the Court to "rethink" the *Turner* approach for evaluating rules impinging on constitutional rights. *See Overton*, *supra*, 539 U.S. at 139-44 (J. Thomas concurring); and *Beard v. Banks*, 548 U.S. 521, 536-42 (2006) (J. Thomas concurring).

According to J. Thomas, *Turner*'s "shortcomings" are revealed when its "framework is applied to prison regulations seek[ing] to modify inmate behavior through privilege deprivation" and where the deprivation is part of the punishment. *See* Thomas' concurrences in *Beard*, 548 U.S. at 540 and *Overton*, 539 U.S. at 139-40. Here, however, neither the publisher, Hrdlicka,

nor the pre-trial detainees comprising much of the Sacramento County jail population (and county jails in general), have been convicted of any crime. Hence, the policy at issue in this case cannot be justified as a discretionary one established for a disciplinary purpose, nor can it be viewed as a deprivation of rights included with a particular form of punishment or implicit in the terms of a sentence. *See* Thomas' concurrences in *Overton*, 539 U.S. at 140 and *Beard*, 548 U.S. at 538-40.

### B. The Ninth Circuit's Determination That Petitioner's Regulation Was Not Rationally Related to Penological Interests Is Not in Conflict with U.S. Supreme Court and Other Courts of Appeals Decisions.

Petitioner cites the following paragraph from *Thornburgh* in support of his argument to the contrary:

> In this case, there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners.

*Thornburgh*, 490 U.S. at 408.

However, the presence of the words "through subscription, willingly seek their point of view" has nothing to do with the Court's decision to establish use of the *Turner* test for evaluation of prison regulations

affecting incoming mail; nor does it bear any relation to the Court's legal reasoning for upholding the regulations in light of their impact on the rights of publishers seeking to send material into the facility. Rather, these words are present merely because they relate to the specific facts of the case.

In the part of its ruling in which it found *Turner* applicable to rules affecting incoming mail, the *Thornburgh* Court adopted the definition of "publication" as set forth in the statute:

> . . . [W]e now hold that regulations affecting the sending of a 'publication' (see the regulations' specific definition of the word, n. 4, *supra*) to a prisoner must be analyzed under the *Turner* reasonableness standard.

*Id.* at 413.

In sum, the paragraph cited by petitioner is indicative of no true or real conflict between the Ninth Circuit's holding and that of the *Thornburgh* Court, just differing sets of facts.

Moreover, if the *Thornburgh* Court were faced with the exact same facts as those addressed by the Ninth Circuit, it also likely would find that the record showed no rational connection between the Sacramento County jail rules and a legitimate, neutral, penological interest.

In *Thornburgh*, the Court upheld the regulations, because it believed that as constructed, the rules would help protect safety and security in the facility

while establishing a neutral decision-making process aimed at exclusion of only that material which "although not necessarily likely to lead to violence, [was] determined to create an intolerable risk of disorder under the conditions of the particular prisons at a particular time." *Id.* at 417. The Court explained that the criteria set forth to guide the warden and the provisions prohibiting him from rejecting written material addressing particular listed topics greatly would diminish any risk of arbitrary and unnecessary censure of protected speech. *See id.* at 404-05.

"These [regulations] generally permit an inmate to subscribe to, *or* to receive, a publication without prior approval, but authorize the warden to reject a publication in certain circumstances" the Court noted. *Id.* at 404 (emphasis added). The warden's ability to reject a publication turned on whether he believed its subject matter conceivably could threaten prison security, not whether an inmate had subscribed to it or requested it. *See id.* According to the rules, the warden could reject a piece of literature only "if it [was] determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." *Id.*, *quoting* 28 C.F.R. § 540.71(b). The warden was prohibited from excluding a publication "solely because its content [was] religious, philosophical, political, social or sexual, or because its content [was] unpopular or repugnant," *id.*, but a publication could be rejected if it met certain listed "criteria," such as "depict[ing] procedures

for the construction or use of weapons, ammunition, bombs, or incendiary devices" or "methods of escape." *Id.*, n. 5 at 405, *citing* § 540.71(b).

The *Thornburgh* Court also emphasized the fact that the rules required the warden to make a determination on an issue-by-issue basis ("each issue of a subscription publication is to be reviewed separately") and could not ban outright a particular publication or "establish an excluded list." *Id.* at 405, *citing* § 540.71(c) and *id*. at 417, *citing* same. "Indeed," the court stated, "the regulations expressly reject shortcuts that would lead to needless exclusions." *Id*. at 417.

In contrast, by prohibiting distribution of all unsolicited commercial mail and all unsolicited publications, the Sacramento County rules at issue in *Hrdlicka* do not require or in any way involve a review of the incoming literature's subject matter. Hence, the regulation and policy are not aimed at exclusion of only that material which conceivably could undermine the safety and security of inmates and jail personnel. In short, the *Thornburgh* Court would deem Petitioners' rules impermissibly overbroad. The statutes upheld in *Thornburgh* required the warden to review the topics addressed in each issue of a magazine. *Id.* at 404-05. Under the Sacramento County jail ban on unsolicited material, Petitioner does not even have to crack the cover of a publication before deciding to exclude it.

In the pre-*Turner* case of *Jones v. North Carolina Prisoners' Labor Union, Inc.*, the Court found reasonable prison officials' decision to allow the Jaycees, Alcoholics Anonymous, and the Boy Scouts to mail in bulk publications for redistribution to prisoners while refusing to permit the Prisoners' Labor Union to do the same. *See Jones*, *supra*, 433 U.S. at 134. The Court's holding stemmed from "the recognized fact that the Jaycees [were] substantial citizens from the free community who [were] most unlikely to attempt to smuggle contraband [ ] or disseminate subversive propaganda" (*see id.*, n. 8 at 131) and from prison officials' affidavits stating that AA and the Scouts "served a rehabilitative purpose, work[ed] in harmony with [administrators'] goals and desires," and "had been determined not to pose any threat to the order or security [ ] in the institution." The union, on the other hand, had "pursue[d] an adversary relationship," according to the affidavits. *See id.* at 134-36.

In short, in analyzing the reasonableness of prison officials' discriminatory mail policy, the *Jones* Court did not consider it important to ascertain whether any inmates actually had requested receipt of materials from the favored organizations. *See id.* at 131 and 134-36.

In addition, Petitioners cannot claim that the Ninth Circuit's decision is indicative of a split between the U.S. Courts of Appeals as to whether it matters if an outsider or an inmate initiated the latter's receipt of a magazine containing primarily non-commercial speech. For example, the Tenth Circuit did not see fit

to find reasonable a rule preventing non-prisoners from paying for inmates' subscriptions simply on the grounds that the inmates had not initiated the process or paid for the publications. *See Jacklovich*, 392 F.3d at 428.

Likewise, in *Crofton v. Roe*, the Ninth Circuit found unreasonable a regulation under which prison officials refused to let an inmate have a book ordered for him by his stepfather. *See Crofton*, 170 F.3d 957, 960-61 (9th Cir. 1999). Although the state had been given "ample opportunity to develop a record," the Court found that it had offered "no justification for a blanket ban on the receipt of all gift publications." *Id.*

Furthermore, the Ninth Circuit noted in "*PLN II*" that it "[could] perceive no principled basis for distinguishing between publications specifically ordered by a recipient from letters written to that inmate, for purposes of first amendment protection." "*PLN II*," 397 F.3d at 701.[4]

[4] In noting that "it is the fact that a request was made by the recipient, and not the fact that the recipient is paying to receive the publication, that is important," the "*PLN II*" Court was explaining that the question of whether the inmate or an outsider paid for the inmate's receipt of material should not be determinative of the *inmate*'s First Amendment rights; it was not suggesting that the question of whether the inmate had requested or initiated receipt should be determinative of the outsider-publisher's right to send the material to him. *See* "*PLN II*," 397 F.3d at 700.

In finding unreasonable a jail policy prohibiting distribution specifically of an *unsolicited* magazine, the Ninth Circuit did not establish a conflict with the U.S. Supreme Court or create a split with any other Court of Appeals. Therefore, the matter of "solicited or unsolicited" does not provide grounds for this Court to grant certiorari.

### C. The Ninth Circuit Did Not Improperly Shift the Burden to the Petitioner, and Is Not in Conflict with U.S. Supreme Court and Other Courts of Appeals Decisions.

As this Court stated in *Thornburgh*, the *Turner* reasonableness standard "is not toothless." *Thornburgh*, *supra*, 490 U.S. at 414. *See also Jacklovich*, *supra*, 392 F.3d at 426 ("[The *Turner*] factors do not mean every prison regulation is insulated from review no matter what the facts may be."); *Shakur v. Selsky*, 391 F.3d 106 (2d Cir. 2004) (finding no rational connection between prison's interest in preventing gang activity and prohibition of materials from "unauthorized" organizations).

The *Turner* decision itself illustrates the *Thornburgh* Court's point. In *Turner*, the Court exercised its "common sense" and decided that prison officials' justifications for the marriage restriction, including a need to prevent formation of "love triangles," did not explain why they had chosen to adopt such a

"sweep[ing]" rule. Based on the record and the existence of "obvious, easy alternatives," the Court found that the marriage ban was not "reasonably related to the articulated [] goals" or "legitimate penological objectives" and represented an "exaggerated response" by prison administrators. *See id.* at 97-99. Implicitly, the marriage holding in *Turner* means that where the testimony and evidence is not indicative of a "valid, rational connection" between the rule and the interest put forward by prison officials, courts should not defer to their judgment.

By declining to defer to Petitioner's judgment the Ninth Circuit did not position itself in conflict with this Court's decisions in *Shaw v. Murphy*, 532 U.S. 223 (2001); *Overton*; or *Beard*.

*Shaw* can be distinguished from *Hrdlicka*, because unlike the inmate petitioner in *Shaw*, publisher Hrdlicka is not asking that his magazine be afforded greater protection than that allowed under *Turner*. *See Shaw*, 532 U.S. at 225.

In *Overton*, the new visitor policy came in response to an assortment of difficulties identified as resulting from an increase in the number of prison visitors over the past decade. *See Overton*, *supra*, 539 U.S. at 129. The problems included an increased amount of drug smuggling and trafficking as well as substance abuse within the facilities. *See id.* In addition, prison administrators testified convincingly that the growing number of child visitors had resulted in

an increased burden on resources, due to the need for "special care" and supervision to ensure their protection. *See id*.

In this particular context, where the need to reduce the number of visitors had been established, the Court found a rational connection between the particular methods chosen by prison officials to effectuate this goal – prohibiting visitations by former inmates, children with whom parental rights had been terminated, and nieces and nephews – and the legitimate interests put forward. *See id.* at 133. Given that former prisoners as well as prohibited children still could speak with one another on the telephone and exchange written correspondence and the "significant reallocation of prison resources" which accommodation of the plaintiffs' demands would cause, the Court deferred to the judgment of prison administrators and upheld the new policy. *See id*. at 135-36.

In *Beard*, the restriction at issue applied only to the relatively few inmates who had killed or injured other inmates and staff, tried to escape more than once, or in other ways posed severe and constant threats to prison security. *See Beard*, *supra*, 548 U.S. at 526. Because all other efforts to get these prisoners, who already were in solitary confinement, to improve their behavior had failed, the Court found that denying them access to newspapers, magazines, and photographs – "virtually the last privileges left" – at least for the first 90 days following admission to

the Long Term Segregation Unit, was "logical" and "reasonable." *See id.* at 531-32.

The *Beard* Court explained, however, that its decision should not be interpreted to mean that courts always should defer to prison administrators' judgment:

> [W]e do not suggest that deference owed prison authorities makes it impossible for prisoners or others attacking a prison policy . . . to succeed or to survive summary judgment. After all, the constitutional interest here is an important one. Turner requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective . . . [I]t is not inconceivable that plaintiff's counsel, through rigorous questioning of officials by means of depositions, could demonstrate genuine issues of fact for trial.

*Id.* at 535.

That is exactly what happened in *Hrdlicka*, as reflected in the Ninth Circuit's review of the record and the testimony offered on behalf of Petitioner.

The decision in *Hrdlicka* is consistent with this Court's application of the *Turner* test, and thus, there is no reason to grant certiorari on this issue.

## III. This Case Is Unique And Not Of National Importance. Petitioner Cannot Show A Significant Impact On County Jail.

Because Petitioner cannot point to a true conflict between the Ninth Circuit and the U.S. Supreme Court or a split with other Courts of Appeals on any of the main issues in this case, the burden on him to demonstrate that the issues are of national importance is greater.

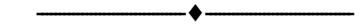
### A. The Factual Circumstances Are Unique; No Other Case with These Specific Facts Has Come Before This Court or Another Court of Appeals.

Never has this Court or any Court of Appeals addressed a situation in which the publisher of magazine consisting primarily of non-commercial speech and bearing content solely aimed at county jail inmates (and not state or federal prisoners) has been prohibited from mailing issues to jail inmates solely because the inmates did not first request receipt. Respondent knows of no other magazine containing content almost exclusively of interest to county jail inmates. PLN is different; the topics it covers are primarily of interest to prisoners.

### B. Petitioner's "Flood" of Publications Argument Is Not Valid; Petitioner Cannot Show a Significant Impact on County Jails Across the Country.

(i) Each week, Respondent mails weekly one issue to every tenth inmate listed on the jail roster. He is not trying to send his publication to every single inmate, nor is he attempting to "flood" jails with his publication.

(ii) The fact that PLN has filed suit seeking to send a very limited number of publications to particular jail inmates in two counties does not indicate the Ninth Circuit's decision will result in jails across the country becoming swamped with incoming unsolicited publications.



## CONCLUSION

While some courts have upheld bans on catalogues and advertising flyers sent by bulk rate to inmates, no court has found rejection of a magazine consisting primarily of non-commercial speech reasonable simply because the inmate did not ask to receive the publication. Under the ruling, prison officials may continue to reject a single issue of *Crime, Justice & America* or any other publication containing certain objectionable subject matter, restriction of which would be rationally related to legitimate penological interests in security and order. The decision is

not in conflict with U.S. Supreme Court law. For these reasons, petitioner's request for Certiorari should be denied.

Respectfully submitted,

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