SUPREME COURT OF THE UNITED STATES

No. 04–1739

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* RONALD BANKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 28, 2006]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

By ratifying the Fourteenth Amendment, our society has made an unmistakable commitment to apply the rule of law in an evenhanded manner to all persons, even those who flagrantly violate their social and legal obligations. Thus, it is well settled that even the "'worst of the worst'" prisoners retain constitutional protection, specifically including their First Amendment rights. See*, e.g.*, *O'Lone* v. *Estate of Shabazz,* 482 U. S. 342, 348 (1987). When a prison regulation impinges upon First Amendment freedoms, it is invalid unless "it is reasonably related to legitimate penological interests." *Turner* v. *Safley,* 482 U. S. 78, 89 (1987). Under this standard, a prison regulation cannot withstand constitutional scrutiny if "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational," *id.*, at 89–90, or if the regulation represents an "exaggerated response" to legitimate penological objectives, *id.*, at 98.

In this case, Pennsylvania prison officials have promulgated a rule that prohibits inmates in Long Term Segregation Unit, level 2 (LTSU–2), which is the most restrictive condition of confinement statewide, from possessing any

secular, nonlegal newspaper, newsletter, or magazine during the indefinite duration of their solitary confinement. A prisoner in LTSU–2 may not even receive an individual article clipped from such a news publication unless the article relates to him or his family. In addition, under the challenged rule, *any* personal photograph, including those of spouses, children, deceased parents, or inspirational mentors, will be treated as contraband and confiscated. See App. 176.

It is indisputable that this prohibition on the possession of newspapers and photographs infringes upon respondent's First Amendment rights. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought . . . ." *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965) (citation omitted). See also *Kaplan* v. *California,* 413 U. S. 115, 119–120 (1973) (explaining that photographs, like printed materials, are protected by the First Amendment). Plainly, the rule at issue in this case strikes at the core of the First Amendment rights to receive, to read, and to think.

Petitioner does not dispute that the prohibition at issue infringes upon rights protected by the First Amendment. Instead, petitioner posits two penological interests, which, in his view, are sufficient to justify the challenged rule notwithstanding these constitutional infringements: prison security and inmate rehabilitation. Although these interests are certainly valid, petitioner has failed to establish, as a matter of law, that the challenged rule is reasonably related to these interests. Accordingly, the Court of Appeals properly denied petitioner's motion for summary judgment, and this Court errs by intervening to prevent a trial.

Turning first to the security rationale, which the plurality does not discuss, the Court of Appeals persuasively explained why, in light of the amount of materials LTSU-2 inmates may possess in their cells, petitioner has failed to demonstrate that the prohibition on newspapers, magazines, and photographs is likely to have any marginal effect on security.

> "[E]ach [LTSU–2] inmate is given a jumpsuit, a blanket, two bedsheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, several envelopes, carbon paper, three pairs of socks, three undershorts and three undershirts, and may at any point also have religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup. Many of these items are flammable, could be used [to start fires, catapult feces, or to create other dangers] as effectively as a newspaper, magazine or photograph, and have been so used by [LTSU–2] inmates." 399 F. 3d 134, 143 (2005) (case below).

In fact, the amount of potentially dangerous material to which LTSU-2 inmates are seeking access is quite small in comparison to the amount of material that they already possess in their cells. As the Court of Appeals emphasized, LTSU-2 inmates "are not requesting unlimited access to innumerable periodicals," rather, they are seeking "the ability to have *one* newspaper or magazine and some small number of photographs in their cells at one time." 399 F. 3d, at 144 (emphasis added). In light of the quantity of materials that LTSU–2 inmates are entitled to have in their cell, it does not follow, as a matter of logic, that preventing inmates from possessing a single copy of a secular, nonlegal newspaper, newsletter, or magazine will have any measurable effect on the likelihood that inmates will start fires, hide contraband, or engage in other dan-

gerous actions. See, *e.g.*, *Mann* v. *Smith*, 796 F. 2d 79, 81 (CA5 1986) (Higginbotham, J.) (invalidating a county jail's ban on newspapers and magazines because, "[i]n view of the jail's policy of allowing inmates to possess other material that was flammable and capable of being used to interfere with the plumbing," the rule was "too underinclusive" to be constitutional).[1]

Moreover, there is no record evidence in this case to support a contrary conclusion. Deputy Superintendent Joel Dickson, whose deposition is a major part of the sparse record before us, did not identify any dangerous behavior that would be more likely to occur if LTSU-2 inmates obtained the limited access to periodicals that they are seeking. He did, however, make clear that inmates could engage in any of the behaviors that worried prison officials without using banned materials:

> "Q. Wouldn't it be fair to say that if an inmate wants to start a fire, he could start a fire using writing paper in combination with a blanket or in combination with clothing or linen, bedding materials? He could do that; couldn't he?
>
> "A. Yes.
>
> "Q. If he wants to throw feces, he could use a cup for that; true?
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> "A. Yes.
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> "Q. Or if he wants to throw urine, he can use his cup to throw the urine?

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[1] Even less apparent is the security risk that would be posed by respondent's alternative suggestion, which is that LTSU-2 inmates be able to access news periodicals in the LTSU mini-law library, where inmates are already permitted to go to view legal materials during 2-hour blocs of time pursuant to a first-come, first-serve roster of requests. See 399 F. 3d 134, 147 (2005) (case below).

"A. Yes." App. 196–197.[2]

The security-based justification for the ban on personal photographs is even weaker. There is not a single statement in Superintendent Dickson's deposition suggesting that prisoners have used, or would be likely to use, photographic paper to start fires or hurl excrement. Cf. *id.,* at 196 (stating that paper products are generally used to start fires).

Perhaps, at trial, petitioner could introduce additional evidence supporting his view that the challenged regulation is in fact reasonably likely to enhance security or that respondent's request for limited access to newspapers and photographs would, for some as yet undisclosed reason, require an unduly burdensome expenditure of resources on the part of prison officials. However, the above discussion makes clear that, at the very least, "reasonable minds could differ as to the import of the evidence" introduced thus far concerning the relationship between the challenged regulation and petitioner's posited security interest, *Anderson* v. *Liberty Lobby, Inc.,* 477 U. S. 242, 250 (1986). Accordingly, petitioner's valid interest in security is not sufficient to warrant judgment as a matter of law. See *id.*, at 250–251.

The second rationale posited by petitioner in support of the prohibitions on newspapers, newsletters, magazines, and photographs is rehabilitation. According to petitioner, the ban "provides the [l]evel 2 inmates with the prospect of earning a privilege through compliance with orders and remission of various negative behaviors and serves to encourage the progress and discourage backsliding by the

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[2] See also App. 194 ("I would say there's any number of ways [LTSU–2 inmates hurl feces]. Oftentimes it's with the cups that they're given for their drinks, things like that, any type of container; or . . . a piece of paper or whatever wrapped up that they can use to give a little leverage and fling the materials.").

level 1 inmates." App. 27. In the plurality's view, in light of the present record, this rationale is sufficient to warrant a reversal of the judgment below.

Rehabilitation is undoubtedly a legitimate penological interest. However, the particular theory of rehabilitation at issue in this case presents a special set of concerns for courts considering whether a prison regulation is consistent with the First Amendment. Specifically, petitioner advances a deprivation theory of rehabilitation: Any deprivation of something a prisoner desires gives him an added incentive to improve his behavior. This justification has no limiting principle; if sufficient, it would provide a "rational basis" for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior. See *Kimberlin* v. *United States Dept. of Justice*, 318 F. 3d 228, 240 (CADC 2003) *(per curiam)* (Tatel, J., concurring in part and dissenting in part) (noting that "regulations that deprive prisoners of their constitutional rights will *always* be rationally related to the goal of making prison more miserable"). Indeed, the more important the constitutional right at stake (at least from the prisoners' perspective), the stronger the justification for depriving prisoners of that right. The plurality admits as much: "If the policy (in the authorities' view) helps to produce better behavior, then its absence (in the authorities' view) will help to produce worse behavior. . . ." *Ante*, at 9.

Not surprisingly, as JUSTICE THOMAS recognizes, see *ante*, at 5-6, this deprivation theory does not map easily onto several of the *Turner* factors, which are premised on prison officials presenting a secondary effects type rationale in support of a challenged regulation. For instance, under the deprivation theory of rehabilitation, there could never be a "ready alternative" for furthering the government interest, because the government interest is tied

directly to depriving the prisoner of the constitutional right at issue.

Indeed, the strong form of the deprivation theory of rehabilitation would mean that the prison rule we invalidated in *Turner* would have survived constitutional scrutiny if the State had simply posited an interest in rehabilitating prisoners through deprivation. In *Turner*, we held that a Missouri regulation that forbade inmates from marrying except with the permission of the prison superintendent was facially unconstitutional. See 482 U. S., at 97–99. We rejected the State's proffered security and rehabilitation concerns as not reasonably related to the marriage ban. See *ibid.* Taken to its logical conclusion, however, the deprivation theory of rehabilitation would mean that the marriage ban in *Turner* could be justified because the prohibition furnished prisoners with an incentive to behave well and thus earn early release. Cf. *Safley* v. *Turner*, 586 F. Supp. 589, 593 (WD Mo. 1984) (noting that, under the Missouri regulations partially invalidated by *Turner*, 482 U. S. 78, inmates had been threatened with the loss of parole for attempting to exercise their marriage rights).

In sum, rehabilitation is a valid penological interest, and deprivation is undoubtedly one valid tool in promoting rehabilitation. Nonetheless, to ensure that *Turner* continues to impose meaningful limits on the promulgation of rules that infringe upon inmates' constitutional rights, see *Thornburgh* v. *Abbott,* 490 U. S. 401, 414 (1989) (stating that *Turner*'s reasonableness standard "is not toothless"), courts must be especially cautious in evaluating the constitutionality of prison regulations that are supposedly justified primarily on that basis. When, as here, a reasonable factfinder could conclude that challenged deprivations have a tenuous logical connection to rehabilitation, or are exaggerated responses to a prison's legitimate interest in rehabilitation, prison officials are not entitled to judgment

as a matter of law.

Petitioner argues that, because the various deprivations in the levels of disciplinary confinement short of LTSU–2 are also severe, prison officials have no choice but to deprive inmates of core constitutional rights in LTSU–2 in order to make LTSU–2 more unattractive than other types of segregation. The fact that most States and the Federal Government run their prisons without resorting to the type of ban at issue in this case, see Brief for American Civil Liberties Union et al. as *Amici Curiae* 21,[3] casts serious doubt upon the need for the challenged constitutional deprivations.

In any event, if we consider the severity of the other conditions of confinement in LTSU–2, it becomes obvious that inmates have a powerful motivation to escape those conditions irrespective of the ban on newspapers, magazines, and personal photographs. Inmates in LTSU–2 face 23 hours a day in solitary confinement, are allowed only one visitor per month, may not make phone calls except in cases of emergency, lack any access to radio or television, may not use the prison commissary, are not permitted General Educational Development (GED) or special education study, and may not receive compensation under the inmate compensation system if they work as a unit janitor. Although conditions in LTSU–1 are also harsh, in several respects unrelated to the challenged regulation, they are far more appealing than the conditions in LTSU–2. LTSU–1 inmates may have two visitors and may make one phone call per month; they have access to the commis-

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[3]This is presumably the type of evidence the plurality suggests that respondent should have presented through an affidavit or deposition in response to petitioner's motion for summary judgment. See *Jacklovich* v. *Simmons*, 392 F. 3d 420, 428–429 (CA10 2004) (noting that plaintiffs challenging a prison regulation that limited access to publications had introduced such evidence and concluding that prison officials were not entitled to summary judgment).

sary; they are permitted in-cell GED or special education study; they are permitted a wider range of counseling services; and they are eligible to obtain compensation under the inmate compensation system. See App. 43, 102; 399 F. 3d, at 148 (case below). The logical conclusion from this is that, even if LTSU–2 prisoners were not deprived of access to newspapers and personal photographs, they would still have a strong incentive to gain promotion to LTSU–1.

In addition, prisoners in LTSU–1 do *not* regain access to personal photographs, which means that the ban on photographs cannot be justified by petitioner's "'hope'" that inmates will respond to the constitutional deprivations in LTSU–2 by improving their behavior so they may graduate into LTSU–1, 399 F. 3d, at 142 (quoting petitioner's counsel). Prisoners who "graduate" out of the LTSU–1 and back into the general prison population do regain their right to possess personal photographs, but they also regain so many additional privileges—from ending their solitary confinement to regaining access to television and radio—that it strains credulity to believe that that the possibility of regaining the right to possess personal photographs if they eventually return to the general prison population would have any marginal effect on the actions of prisoners in LTSU–2.

In sum, the logical connection between the ban on newspapers and (especially) the ban on personal photographs, on one hand, and the rehabilitation interests posited by petitioner, on the other, is at best highly questionable. Moreover, petitioner did not introduce evidence that his proposed theory of behavior modification has any basis in human psychology, or that the challenged rule has in fact had any rehabilitative effect on LTSU–2 inmates. *Ibid.*[4]

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[4] I emphasize the lack of evidentiary support for petitioner's position because I believe that, in light of the record currently before the Court,

Accordingly, at least based on the present state of the record, a reasonable factfinder could conclude that prisoners would have a sufficiently powerful incentive to graduate out of LTSU–2 even absent the challenged rule, such that the rule is not likely to have any appreciable behavior modification effect.

The temporal character of LTSU–2 status further undermines petitioner's argument that the ban on newspapers and photographs at issue in this case is reasonably related to a legitimate penological interest. All LTSU inmates must spend 90 days in LTSU–2 status. After that, they receive a review every 30 days to determine if they should be promoted to LTSU–1. That determination is made at the discretion of prison administrators, and is not linked to any specific infraction or compliance. Petitioner acknowledges that "[a]n inmate in the LTSU can remain on Level 2 status indefinitely." App. 26. Indeed, as of August 2002, which is the most recent date for which there is record evidence, roughly three-quarters of inmates placed in LTSU–2 had remained in that status since the inception of the LTSU program over two years earlier. See *id.,* at 138. See also *ante*, at 9 (plurality opinion). In short, as the Court of Appeals explained:

> "[T]he LTSU Level 2 is a unique kind of segregation with characteristics of both disciplinary and administrative segregation. Inmates come to LTSU because of 'unacceptable behaviors' in other institutions, but

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the logical connection between petitioner's stated interest in rehabilitation and the prohibition on newspapers and photographs is exceedingly tenuous. When the logical connection between prison officials' stated interests and the restrictions on prisoners' constitutional rights is not self-evident, we have considered whether prison officials proffered any evidence that their regulations served the values they identified. See, *e.g.*, *Turner* v. *Safley,* 482 U. S. 78, 98 (1987) (discussing lack of evidence in the record to support a ban on marriage as related to prison officials' stated objectives).

> they have not all been adjudicated by a hearing officer to have violated the [Department of Corrections'] rules. The LTSU is not a place where inmates are sent for a discrete period of punishment, pursuant to a specific infraction, but is a place for 'Long Term' segregation of the most incorrigible and difficult prisoners for as long as they fall under that umbrella." 399 F. 3d, at 141 (citation omitted).

The indefinite nature of LTSU–2 confinement, and the fact that as of August 2002 a significant majority of inmates confined at LTSU–2 had remained there since the inception of the program over two years earlier, suggest that the prohibition on newspapers, magazines, and personal photographs is an exaggerated response to the prison's legitimate interest in rehabilitation. It would be a different case if prison officials had promulgated a regulation that deprived LTSU-2 inmates of certain First Amendment rights for a short period of time in response to specific disciplinary infractions. The indefinite deprivations at issue here, however, obviously impose a much greater burden on inmates' ability to exercise their constitutional rights. Absent evidence that these indefinite deprivations will be more effective in achieving rehabilitation than shorter periods of deprivation, a reasonable factfinder could conclude that the challenged regulation "sweeps much more broadly than can be explained by [prison officials'] penological objectives," *Turner*, 482 U. S., at 98, and is hence an exaggerated response to petitioner's legitimate interest in rehabilitation.

In short, as with regard to the current state of the record concerning the connection between the challenged regulation and its effect on prison security, the record is insufficient to conclude, as a matter of law, that petitioner has established a reasonable relationship between his valid interest in inmate rehabilitation and the prohibition

on newspapers, magazines, and personal photographs in LTSU–2.

* * *

What is perhaps most troubling about the prison regulation at issue in this case is that the rule comes perilously close to a state-sponsored effort at mind control. The State may not " 'invad[e] the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control.' " *Wooley* v. *Maynard,* 430 U. S. 705, 715 (1977) (quoting *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624, 642 (1943)). In this case, the complete prohibition on secular, nonlegal newspapers, newsletters, and magazines prevents prisoners from "receiv[ing] suitable access to social, political, esthetic, moral, and other ideas," which are central to the development and preservation of individual identity, and are clearly protected by the First Amendment, *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 390 (1969). Similarly, the ban on personal photographs, for at least some inmates, interferes with the capacity to remember loved ones, which is undoubtedly a core part of a person's "sphere of intellect and spirit." Moreover, it is difficult to imagine a context in which these First Amendment infringements could be more severe; LTSU-2 inmates are in solitary confinement for 23 hours a day with no access to radio or television, are not permitted to make phone calls except in cases of emergency, and may only have one visitor per month. They are essentially isolated from any meaningful contact with the outside world. The severity of the constitutional deprivations at issue in this case should give us serious pause before concluding, as a matter of law, that the challenged regulation is consistent with the sovereign's duty to treat prisoners in accordance with "the ethical tradition that accords respect to the dignity and worth of every individual." *Overton* v. *Bazzetta,* 539 U. S. 126, 138 (2003)

(STEVENS, J., joined by SOUTER, GINSBURG, and BREYER, JJ., concurring) (citation and internal quotation marks omitted).[5]

Because I believe a full trial is necessary before forming a definitive judgment on the whether the challenged regulation is reasonably related to petitioner's valid interests in security and rehabilitation, I respectfully dissent.

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[5] In contrast to this case, the constitutional right at issue in *Overton* involved freedom of association, which, "as our cases have established . . . is among the rights least compatible with incarceration." *Overton* v. *Bazzetta,* 539 U. S. 126, 131 (2003).