No. 98-1452

# In the Supreme Court of the United States

JOSEPH AMATEL, ET AL., PETITIONERS

*v.*

JANET RENO, ATTORNEY GENERAL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly applied this Court's decisions in *Turner* v. *Safley*, 482 U.S. 78 (1987), and *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), in upholding a federal statute that bars federal prisoners from receiving commercially published materials that are sexually explicit or feature nudity.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 156 F.3d 192. The opinion of the district court (Pet. App. 50a-62a) is reported at 975 F. Supp. 365.

### JURISDICTION

The judgment of the court of appeals was entered on September 15, 1998. The petition for rehearing was denied on December 11, 1998 (Pet. App. 63a-64a). The petition for a writ of certiorari was filed on March 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

The Ensign Amendment, which Congress enacted as part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 614, 110 Stat. 3009-66, bars the Federal Bureau of Prisons (BOP) from using appropriated funds to distribute to prison inmates commercial material that "is sexually explicit or features nudity." The United States District Court for the District of Columbia enjoined enforcement of the Ensign Amendment, ruling that it violated the First Amendment rights of prison inmates. Pet. App. 50a-62a. The court of appeals reversed that ruling, vacated the injunction, and remanded the case for further proceedings. *Id.* at 1a-49a.

1. Before the enactment of the Ensign Amendment, the BOP regulated prisoners' receipt of publications through regulations and an internal policy that generally permitted an inmate to receive hardcover publications from the publisher, a book club, or a bookstore and to receive softcover publications, such as books, newspaper clippings, or magazines, from any source. See 28 C.F.R. 540.70-540.71 (1996); Program Statement (PS) 5266.06 (Apr. 26, 1985). Under Section 5b, the warden had authority to inspect incoming publications and could reject a publication if he determined that it was "detrimental to the security, good order, or discipline of the institution" or that "it might facilitate criminal activity." *Ibid.* The warden could not reject a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant." *Ibid.* Section 5 b.(7) of PS 5266.06 contained a nonexclusive list of types of publications that could be rejected, including "sexually explicit material which by its nature

or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity." *Ibid.* This Court had rejected First Amendment challenges to an earlier, substantially similar version of that Program Statement, PS 5266.05 (Jan. 2, 1985). See *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989); Pet. App. 3a.

2. In 1996, Congress enacted the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009. Section 614 of that Act—commonly known as the "Ensign Amendment"—provides:

> None of the funds made available in this Act to the Federal Bureau of Prisons may be used to distribute or make available any commercially published information or material to a prisoner when it is made known to the Federal official having authority to obligate or expend such funds that such information or material is sexually explicit or features nudity.

110 Stat. 3009-66. Representative Ensign proposed that amendment on the ground that "[m]agazines that portray and exploit sex acts have no place in the rehabilitative environment of prison, nor should we pay Bureau of Prison[s] staff to distribute them." 142 Cong. Rec. 18,883 (1996).

The BOP implemented the Ensign Amendment by interim rule, effective December 1, 1996. See 61 Fed. Reg. 57,568. The interim rule, among other things, added a section to BOP regulations dealing with statutory restrictions requiring the return of commercially published material that is sexually explicit or features nudity. See 28 C.F.R. 540.72(a). The new section of the regulations also defined some terms in the Ensign Amendment, including "nudity," "features,"

and "sexually explicit." "Nudity" was defined to mean "a pictorial depiction where genitalia or female breasts are exposed." 28 C.F.R. 540.72(b)(2). "Features" was defined to mean that "the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues. Publications containing nudity illustrative of medical, educational, or anthropological content may be excluded from this definition." 28 C.F.R. 540.72(b)(3). "Sexually explicit" was defined to mean "a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation." 28 C.F.R. 540.72(b)(4).[1]

In addition, the BOP issued a revised Program Statement, PS 5266.07 (Nov. 1, 1996), on incoming publications. That revision included essentially all of the prior version upheld in *Thornburgh* but also added a new Section 6, which provided instructions for the return of publications covered by the Ensign Amendment, along with an explanation of the revised regulations. Pet. App. 71a-75a. Program Statement 5266.07 gave examples of commercial publications that could be distributed to inmates even though they may *contain* nudity, because they do not *feature* nudity: National Geographic; Our Body, Our Selves; Sports Illustrated (Swimsuit Issue); and the Victoria's Secret catalog.

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[1] The regulations also defined "commercially published information or material" to mean "any book, booklet, pamphlet, magazine, periodical, newsletter, or similar document, including stationery and greeting cards, published by any individual, organization, company, or corporation which is distributed or made available through any means or media for a commercial purpose. This definition includes any portion extracted, photocopied, or clipped from such items." 28 C.F.R. 540.72(b)(1).

Pet. App. 74a. It explained that publications with sexual content that were not returned under Section 6 were still subject to rejection under Section 5 b.(7), the provision carried forward from earlier versions of the Program Statement dealing with sexually explicit material that, by its nature or content, poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity. Pet. App. 75a; PS 5266.07.

3. The current litigation began as three separate actions initiated by prison inmates, which the district court consolidated. Appointed counsel filed an amended complaint on behalf of the three inmates and also on behalf of Playboy Enterprises, Inc., publisher of Playboy magazine; General Media Communications, Inc., publisher of Penthouse magazine; and the Periodical and Book Association of America, Inc., which describes itself as a trade association of magazine and paperback book publishers. See Pet. App. 4a, 51a.

The amended complaint challenged the Ensign Amendment on its face and as applied to petitioners, claiming that the statute and implementing regulations were not rationally related to a legitimate penological interest, were unconstitutionally overbroad, improperly singled out one class of protected speech (pictorials) without banning other protected speech (text), and were excessively vague in violation of the First and Fifth Amendments. Petitioners moved for a preliminary injunction, and the government moved to dismiss. Neither side submitted any materials outside the pleadings. The district court ruled that the Ensign Amendment is "facially violative of the First Amendment," Pet. App. 61a, and permanently enjoined enforcement of the statute, *id.* at 50a-62a.

The district court first concluded that the Ensign Amendment should be reviewed under the reasonableness standard of *Turner* v. *Safley*, 482 U.S. 78 (1987), and *Thornburgh* v. *Abbott*, *supra*. Pet. App. 56a. Under that test, prison regulations are valid if they are "reasonably related to legitimate penological interests." *Safley*, 482 U.S. at 89. This Court has identified four considerations that are relevant to that determination: (1) whether the government objective is legitimate and neutral and the regulations are rationally related to that objective; (2) whether alternative means remain open for inmates to exercise the right at issue; (3) whether setting aside the regulations may adversely affect others, including guards and other inmates; and (4) whether the regulations are an "exaggerated response" to prison concerns. See *Thornburgh*, 490 U.S. at 414-419. The district court concluded that the Ensign Amendment does not satisfy the first of those four considerations. See Pet. App. 56a-57a. The court recognized that rehabilitation—the interest asserted by the government here—is a legitimate penological interest, but it held that the Ensign Amendment nevertheless imposes an unconstitutional restriction on prisoner rights because it is content-based and therefore not "neutral." *Id.* at 57a-60a.

4. The court of appeals reversed. Pet. App. 1a-49a. The court of appeals concluded, at the outset, that the district court had misunderstood *Turner*'s and *Thornburgh*'s references to "neutrality." *Id.* at 10a-11a. In evaluating whether Congress has a neutral objective, the district court had "looked at the statute itself, not the goal." *Id.* at 10a. The court of appeals explained that "'neutral' here means no more than that 'the regulation or practice in question must further an important or substantial governmental interest unrelated

to the suppression of expression.'" *Ibid.* (quoting *Thornburgh*, 490 U.S. at 415). The court reasoned that "rehabilitation, and such character-moulding as may be implicit therein, constitute legitimate and neutral goals as those are understood in [*Turner*]." *Id.* at 13a.

The court of appeals then considered the four factors set out in *Turner* and *Thornburgh* and concluded that the Ensign Amendment does not violate the First Amendment. The court first determined that Congress could properly find that there is a "valid, rational connection" between restricting inmates' access to pornography and promoting their rehabilitation. Pet. App. 14a-18a. The court explained that it is not unreasonable for Congress to believe that pornography could "thwart the character growth of its consumers," *id.* at 14a, and that, even if that legislative judgment is debatable, it is "within the realm of reason under the standards applicable to the political branches' management of prisons." *Id.* at 18a. The court of appeals next observed that the Ensign Amendment continues to afford prisoners an opportunity to receive a "broad range" of alternative reading materials, *id.* at 19a (quoting *Thornburgh*, 490 U.S. at 418), including "all written forms of smut not barred by the regulations upheld in *Thornburgh*." *Id.* at 19a n.7. The court noted that setting aside the Ensign Amendment could adversely affect guards and other inmates in light of the prospect that distribution of pornography in prison could increase the risk of prison rape. *Id.* at 19a. Finally, the court concluded that the most obvious alternative to the Ensign Amendment's categorical ban—"a detailed prisoner-by-prisoner (and presumably publication-by-publication) sifting to determine whether a particular publication will harm the rehabilitation of a particular prisoner"—would impose

serious administrative burdens that a general ban would avoid. *Id.* at 20a.

The court of appeals rejected petitioners' request for a remand to allow them to introduce evidence in support of their position, stating that they had "misconceive[d] the legal issue under [*Turner*]." Pet. App. 23a. The court explained that the issue is "not whether curtailment of pictorial smut *will* advance the prisons' rehabilitative project, but whether Congress could reasonably have believed that it would do so." *Ibid.* The court added that "[t]he studies cited [by *amici*], coupled with Congress's implicit appeal to ethical norms against the undue stimulation of carnal appetites, indicate the reasonableness of such a belief." *Ibid.* The court did remand, however, for consideration of petitioners' vagueness claim, which the district court had not addressed. *Id.* at 23a-24a.

Judge Wald dissented, reasoning that, while a more limited prohibition might be permissible, the record did not support a connection between the Ensign Amendment's prohibition of the materials and the goal of rehabilitation. Pet. App. 24a-49a.

**ARGUMENT**

The court of appeals properly applied the analysis set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987), and *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), to the Ensign Amendment and correctly concluded that the district court erred in declaring the statute unconstitutional. That court is the first and only court of appeals to address the constitutionality of the Ensign Amendment. There accordingly is no conflict among the courts of appeals on the issue warranting this Court's review.

1. This Court has properly recognized that prisoners cannot claim the same breadth of constitutional rights as ordinary citizens, because prisoners' rights are circumscribed by the fact of their incarceration. See *Bell* v. *Wolfish*, 441 U.S. 520, 545-547 (1979). "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* at 545-546 (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)). "The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977).

This Court does not generally apply strict or heightened scrutiny when reviewing prison regulations affecting First Amendment interests. See *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987) (the standard of review is "less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"). A "prison regulation [that] impinges on inmates' constitutional rights * * * is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89; see *Thornburgh*, 490 U.S. at 409. Strict scrutiny, or even heightened scrutiny, "simply [is] not appropriate" in the context of prison regulations. *Id.* at 409-410. Rather, a deferential standard is "necessary if 'prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Turner*, 482 U.S. at 89 (quoting *Jones*, 433 U.S. at 128)). A more demanding standard would "distort the decisionmaking process" in prison regulation by allowing courts to "become the

primary arbiters of what constitutes the best solution to every administrative problem." *Ibid.*

When, as in the case presented here, Congress itself, rather than prison officials, establishes a penological policy, judicial review should be especially deferential. That conclusion follows from two related considerations. First, whenever the Court adjudicates the "constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform'—the Court accords 'great weight to the decisions of Congress.'" *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citations omitted). Second, in a challenge to a policy involving prisons, judicial deference is predicated on separation-of-powers concerns as well as on administrative expertise. Judicial deference is required because "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Bell*, 441 U.S. at 548; see *Turner*, 482 U.S. at 84-85; *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974).

2. The court of appeals correctly applied those principles in rejecting petitioners' First Amendment challenges to the Ensign Amendment. Congress enacted the Ensign Amendment to exclude from prison those commercial publications that are sexually explicit or feature nudity.[2] Congress did so based on its judgment

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[2] Petitioners misstate the language of the statute, changing the word "feature[]" to "contain[]." Pet. 14 ("material containing nudity"); Pet. 15 ("material containing mere nudity"); Pet. 24 ("magazines containing mere nudity"). "Featur[ing]" means more than simply *containing* nudity; it means *giving special prominence to* nudity. As the regulations implementing the statute interpret the term, "features" means that "the publication contains depictions of nudity or sexually explicit conduct on a routine or regular

that those publications have the potential to interfere with the rehabilitation of federal prisoners, whose criminal acts have led to their placement in a restrictive prison environment. As Representative Ensign explained, "Congress should not be fueling the sexual appetites of offenders, especially those who have been convicted of despicable sex offenses against women and children. Magazines that portray and exploit sex acts have no place in the rehabilitative environment of prison, nor should we pay Bureau of Prison[s] staff to distribute them." 142 Cong. Rec. 18,883 (1996). "While a number of factors determine whether a prisoner will become a law abiding citizen upon release from prison, cutting prisoners off from their sexually explicit magazines will certainly do no harm." *Ibid.*[3]

The court of appeals properly recognized that rehabilitation is a legitimate penological interest under *Turner* and *Thornburgh*. Pet. App. 9a-10a. Petitioners do not seriously dispute that point.[4] The court of

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basis or promotes itself based upon such depictions in the case of individual one-time issues." 28 C.F.R. 540.72(b)(3).

[3] Those pre-enactment statements refute petitioners' claim that the government's invocation of rehabilitation is a "post hoc assertion." Pet. 14; see Pet. 18.

[4] This Court has repeatedly made that point. See, *e.g.*, *O'Lone*, 482 U.S. at 348 ("limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security"); *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974) ("since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody"); *Martinez*, 416 U.S. at 404 ("Prison administrators are responsible * * * for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody."); see also, *e.g.*, *Dawson* v. *Scurr*, 986 F.2d 257, 260 (8th

appeals also correctly held that the Ensign Amendment and its implementing regulations are "reasonably related" to that legitimate objective. *Id.* at 10a-18a. The court explained that Congress "could rationally have seen a connection between pornography and rehabilitative values." *Id.* at 14a. It noted that Congress's judgment found support in legal and sociological literature, as well as in common experience. *Id.* at 14a-18a. "Common sense tells us that prisoners are more likely to develop the now-missing self-control and respect for others if prevented from poring over pictures that are themselves degrading and disrespectful." *Id.* at 16a. Congress's judgment is at least sufficiently sensible "to place the legislative judgment within the realm of reason under the standards applicable to the political branches' management of prisons." *Id.* at 18a. See *Turner*, 482 U.S. at 89-90 (the "logical connection" between the regulation and the asserted good may not be "so remote as to render the policy arbitrary or irrational"); *Bell*, 441 U.S. at 539 ("arbitrary or purposeless").

Petitioners contend that the court of appeals' decision is wrong because it subjects prison regulations to "mere rational basis review." Pet. 13. The court of appeals,

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Cir.) ("[r]ehabilitation is also a legitimate objective" for rules limiting access to sexually explicit materials), cert. denied, 510 U.S. 884 (1993). We note that, under the Sentencing Reform Act of 1984, rehabilitation is not a basis for *imposing* a sentence of imprisonment. 18 U.S.C. 3582(a). However, with respect to persons who have been sentenced to prison to further another penological goal (punishment, deterrence, or incapacitation), rehabilitation is of great importance. Since the vast majority of federal prisoners will return to society at some point, it is a matter of the highest concern that those prisoners not return to a life of crime upon their release.

however, relied on exactly the standard that this Court enunciated in *Turner* and *Thornburgh*: "the relevant inquiry is whether the actions of prison officials [are] 'reasonably related to legitimate penological interests.'" *Thornburgh*, 490 U.S. at 409 (quoting *Turner*, 482 U.S. at 89). The court of appeals explicitly considered the four factors that the Court stated "are relevant to, and that serve to channel, the reasonableness inquiry." *Id.* at 414. See Pet. App. 14a-20a. There is no merit to petitioners' contention that the court of appeals departed from the *Turner-Thornburgh* framework. The court of appeals simply applied that reasonableness standard to a congressional enactment and concluded that Congress's judgment withstands analysis under this Court's decisions, which recognize that the setting of prison policies is a matter "peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 85.

3. No other court of appeals has addressed the constitutionality of the Ensign Amendment, and there accordingly is no conflict among the courts of appeals respecting the statute's validity. Petitioners nevertheless contend that the court of appeals' decision conflicts in principle with other appellate decisions that have applied *Turner* and *Thornburgh* to various other questions of prison administration. See Pet. 13-27. Petitioners primarily argue that those decisions have required a stronger showing of the reasonableness of the prison policy at issue than the showing that the court of appeals accepted here. See, *e.g.*, Pet. 16-19, 22-23. Petitioners' reliance on those decisions is misplaced.

First, each of the cases that petitioners cite as requiring the government to provide "evidence" to support the need for a particular prison regulation, Pet.

16-19, involved a challenge to a prison official's determination of an administrative policy, and not a challenge to Congress's determination of a legislative policy. The courts' requirement that prison officials provide "evidence" in support of their policies arises largely as a matter of administrative law, which dictates that "the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943); see *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Life Ins. Co.*, 463 U.S. 29, 43 (1983) (a court "may not supply a reasoned basis for the agency's action that the agency itself has not given"). The Administrative Procedure Act requires that "an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 654 (1990). That approach, however, does not apply to congressional enactments. Courts "never require a legislature to articulate its reasons for enacting a statute." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

Second, the courts use the term "evidence" somewhat loosely in those cases to refer generally to the agency's rationale for the policy, rather than to conventional trial evidence. For example, the court stated in *Swift* v. *Lewis*, 901 F.2d 730, 731-732 (9th Cir. 1990), that prison officials had "failed to provide *any* evidence that the interests they have asserted are the actual bases for their grooming policy" and that they must produce "some evidence that their policies are based on legitimate penological justifications" or else "judicial review of prison policies would not be meaningful." The court's use of the term "evidence" in that context refers to an explanation of the policy's purpose. Similarly, in

*Shimer* v. *Washington*, 100 F.3d 506 (7th Cir. 1996), the court was troubled by the fact that the prison authorities submitted in court only "the prison regulations, which do not contain the disputed policy, and an affidavit of Patricia Lubben, manager of the prison policy unit, who states only the policy, with *no illumination as to its purpose.*" *Id.* at 510 (emphasis added).[5]

Third, the cases cited by petitioners indicate that the courts require "evidence" in support of a prison policy when the prison officials' policy is contrary to common sense. See, *e.g.*, *Shimer*, 100 F.3d at 510 ("We, in fact, are reduced to speculation when not provided with evidence, and, having speculated, find it difficult to establish a connection between the prison administration's unsubstantiated justifications and its policy."); *Walker* v. *Sumner*, 917 F.2d 382, 387 (9th Cir. 1990) ("Not only is there a complete absence of evidence as to why the officials conducted the mandatory blood tests, but the record does not reveal what, if anything, the officials intended to do with the information obtained."); *Reed* v. *Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) ("No evidence of such a danger [of racial conflict] was pre-

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[5] As another example, petitioners quote (Pet. 19) the court's reference to "evidence" in *Mann* v. *Reynolds*, 46 F.3d 1055 (10th Cir. 1995). That reference, however, is sandwiched between a statement that the court found it "disturbing in the *Turner* context" that the prison officials "have not provided an explanation why they have singled out attorneys for the restricted contact," *id.* at 1060, and another statement criticizing "the State's failure to provide any rationale for its non-contact policy." *Id.* at 1061. See also *Walker* v. *Sumner*, 917 F.2d 382, 385 (9th Cir. 1990) (stating that prison officials "must provide *evidence* that the interest proferred [sic] is the reason why the regulation was adopted or enforced").

sented, and in any event it is not easy to see how forcing Rastafarians to cut their hair is going to change this belief [that blacks are superior to whites].").[6] Here, in contrast, common sense supports Congress's statutory policy, as the court of appeals made clear. Pet. App. 15a. See *Giano* v. *Senkowski*, 54 F.3d 1050, 1055 (2d Cir. 1995) ("common sense" is enough to support prison policy lacking factual support in record).[7]

In short, the decisions cited by petitioners do not support their broad proposition that the court of appeals erred in failing to require Congress to provide evidence in support of its policy judgment. There is no conflict between those decisions and the court of appeals' decision below that would warrant this Court's review.

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[6] See also *Mann*, 46 F.3d at 1060-1061 ("record demonstrates a lack of rationality in the denial of contact between Inmates and their counsel," and prison officials failed to provide "any evidence the restrictions on contact were reasonably related to prison security"); *Muhammad* v. *Pitcher*, 35 F.3d 1081, 1085 (6th Cir. 1994) ("In light of the fact that the prison is already opening legal mail from private attorneys, courts, and legal assistance organizations, in the presence of the inmates who submit such requests, it seems to us that opening mail from the Attorney General's Office in the presence of these inmates would entail little or no additional burden.").

[7] The congressional policy here, in any event, finds support in a variety of studies on the effects of pornography. See Pet. App. 16a-17a. While there may be a difference of opinion on the relationship between pornography and inmate recidivism, the issue here is only whether the Ensign Amendment policy has a reasonable relationship with the goal of rehabilitation. As this Court has held, "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude" in addressing such problems. *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997). See Pet. App. 17a-18a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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