No. 04-1739

In the Supreme Court of the United States

JEFFREY A. BEARD, PETITIONER

v.

RONALD BANKS

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, under the standard set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987), prison officials may deny newspapers, magazines, and photographs to the most dangerous and recalcitrant inmates until they exhibit improved behavior.

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INTEREST OF THE UNITED STATES

This case raises the question whether, under the standard set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987), prison officials may deny newspapers, magazines, and photographs to the most dangerous and recalcitrant inmates until they exhibit improved behavior. The United States has a substantial interest in the proper application of *Turner* to claims by inmates raising First Amendment challenges to restrictions on their privileges. The Federal Bureau of Prisons (BOP) operates more than 100 penal institutions, which house more than 180,000 inmates. Under BOP regulations, prison officials have discretion to suspend or limit the privileges of inmates who violate prison rules in order to create incentives for good behavior. See 28 C.F.R. 541.13 table 4, para. 2(g). BOP regulations also impose significant limitations on the privileges of inmates placed in disciplinary segregation for their misconduct, including impoundment of personal property and restrictions on the books that any such inmate may possess. See 28 C.F.R. 541.21(c)(7)-(8). The United States has participated as an amicus or party in several cases involving the application of *Turner* to prison restrictions challenged under the First Amendment. See, *e.g.*, *Overton* v. *Bazzetta*, 539 U.S.

126 (2003); *Shaw* v. *Murphy*, 532 U.S. 223 (2001); *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989).

STATEMENT

Before the nineteenth century, imprisonment was rarely used as punishment for criminal offenses in America and, instead, more harsh measures were commonly applied. See Lawrence M. Friedman, *Crime and Punishment in American History* 48 (1993). The modern prison system took root in the nineteenth century as States adopted rehabilitation as a primary goal of the penal system. See *id.* at 76-80, 159-163. Since then, prison administrators at the state as well as the federal level have expended great effort—often through experimentation with different approaches—to finding ways of encouraging inmates to behave within prison walls and rehabilitating them for introduction back into society. The prison restrictions at issue in this case represent one State's efforts to encourage better behavior among inmates who have proven themselves to be among the most dangerous and recalcitrant inmates in the State's prison system.

1. a. In Pennsylvania's prison system, inmates housed in the general population who commit disciplinary infractions and disrupt the orderly operation of their facility are subject to transfer to a more secure housing unit and a corresponding restriction of their privileges. Pennsylvania maintains three levels of secure housing units for inmates segregated from the general population because of their misconduct: (i) Restricted Housing Units (RHUs); (ii) Special Management Units (SMUs); and (iii) a Long Term Segregation Unit (LTSU). At each level, there is a graduated increase in security measures and an associated reduction of privileges available to inmates. Pet. App. 47a; Br. in Opp. App. 50-51, 59.

Among the three levels, RHUs contain the least restrictive conditions, and serve principally to house inmates placed in disciplinary custody for their misconduct. The next level, SMUs, "house inmates who exhibit behavior that is continu-

ally disruptive, violent, dangerous or a threat to the orderly operation of their assigned facility," and who "may have been repeatedly subject to disciplinary action or investigation(s)." The most restrictive level, the LTSU, houses "the extremely disruptive, violent and problematic inmates," who "have demonstrated an inability or unwillingness to conform to the requirements of general population." Inmates may be considered for transfer to the LTSU if they "have continually manifested a negative influence on the safety and security of the [Pennsylvania] Department of Corrections, have not suitably progressed in an SMU, or have reportedly perpetuated criminal activity that threatens the community." Br. in Opp. App. 59; see Pet. App. 3a-4a.

The LTSU "provide[s] extremely high levels of security and sharply reduce[s] the privileges permitted." Br. in Opp. App. 59. LTSU inmates must wear physical restraints when they leave their cells and must be escorted by two corrections officers, and only one LTSU inmate is permitted outside his cell at any particular time. Pennsylvania presently maintains one LTSU, and has determined that no more than 40 of its 38,000 inmates statewide may be assigned to the LTSU. The LTSU population thus is limited to the 0.1% of the Commonwealth's prison population that presents the most intractable disciplinary problems and that, accordingly, presents the greatest challenges in maintaining institutional order and in achieving the Commonwealth's rehabilitative goals. Pet. App. 3a n.1, 4a, 35a; Br. in Opp. App. 92, 94-95, 111.

b. Inmates who are transferred to an SMU or the LTSU generally have no fixed date of release from those restricted units, but they can gain a relaxation of the restrictions on their privileges—and ultimately can obtain their release back into the general population—by demonstrating progress in their behavior and adjustment. An SMU contains five phases, with the last phase amounting to a probationary period in the general population. SMU inmates are "given the opportunity to progress through [the] specific phases * * * based upon

their behavior and ability to adjust under reduced levels of supervision." Br. in Opp. App. 65. Promotion from one phase to another, for instance, can result in increased visitation, radio, television, telephone, and commissary privileges, and can also earn an inmate the ability to leave his cell without physical restraints. *Id.* at 66, 71, 73-75, 77; see Pet. App. 47a.

The LTSU is principally comprised of inmates who failed to progress in an SMU. Br. in Opp. App. 21, 95. When this litigation commenced, the LTSU contained two phases, LTSU1 and LTSU2.[1] All inmates reassigned to the LTSU must initially spend a minimum of 90 days in LTSU2, the more restrictive of the two phases. *Id.* at 93. After that initial 90-day period, LTSU2 inmates receive an individualized progress review every 30 days, *id.* at 20, and inmates "who have demonstrated a satisfactory adjustment" may be promoted to LTSU1 status, *id.* at 21, 26-27, 67-68. LTSU1 "provides for increased programming and privileges," including with respect to visitation, telephone, and commissary privileges, as well as educational programs. *Id.* at 21-22, 32, 77; see Pet. App. 47a. Prison officials also have discretion to authorize additional privileges for an LTSU1 inmate on an individualized basis. Br. in Opp. App. 21-22.

An inmate ultimately can gain release from the LTSU by demonstrating "positive adjustment." Br. in Opp. App. 20. LTSU inmates "may be considered for release at any time and at least annually," and release "can be to a SMU, RHU, general population or other appropriate facility." *Id.* at 28.

c. Pennsylvania's general policy of granting and withholding inmate privileges as a means of inducing good behavior is reflected in the rules concerning the extent to which SMU and LTSU inmates may keep newspapers, magazines, and photographs in their cells. While each SMU inmate may possess at

[1] We are advised by Pennsylvania that it has recently modified the LTSU such that it now contains four phases instead of two. That modification does not affect the Court's consideration of this case, as the initial stage continues to contain the same restrictions that are at issue here.

least one newspaper and ten photographs in his cell, the number of magazines that he may retain varies from zero to ten, depending on his progress through the five SMU phases. See Pet. App. 47a; Br. in Opp. App. 70, 77. SMU inmates who reach the final, probationary phase may retain in their cells the same number of newspapers, magazines, and photographs as inmates in the general population. *Id.* at 70.

Inmates transferred to the LTSU are subject to more substantial restrictions on their possession of newspapers, magazines, and photographs. LTSU2 inmates are barred from possessing any newspapers or magazines in their cells, but a promotion to LTSU1 enables an inmate to retain one newspaper and five magazines. See Pet. App. 3a-4a; Br. in Opp. App. 32, 70, 77. In addition, both LTSU2 and LTSU1 inmates are barred from possessing any personal photographs. LTSU inmates may, however, retain two leisure books, and may also receive unlimited personal correspondence. The correspondence may include clippings from newspapers and magazines only if the particular article concerns the inmate or his family. Pet. App. 4a; Br. in Opp. App. 32, 104, 106. The LTSU restrictions do not extend to religious and legal materials. See Pet. App. 4a.

2. a. Respondent was confined in the LTSU, and held as a "Phase 2," *i.e.*, LTSU2, inmate. Br. in Opp. App. 2. On October 18, 2001, respondent, on behalf of a class of all LTSU2 inmates, brought this action against petitioner, the Secretary of the Pennsylvania Department of Corrections. The action alleges that Pennsylvania's policy of denying newspapers, magazines, and photographs to LTSU2 inmates is invalid under the First Amendment, and it seeks declaratory and injunctive relief that would categorically bar enforcement of that policy. Pet. App. 5a; Br. in Opp. App. 8-9.[2] On March 22,

[2] Although the complaint is not explicitly styled as either a facial or an as-applied challenge, the suit is framed in the nature of a facial challenge to the prison restrictions. The complaint was filed as a class action on behalf of all LTSU2 inmates, it alleges that the prison restrictions are unconstitutional

2002, the district court granted respondent's motion for class certification. Pet. App. 6a.

The only witness to give deposition testimony during discovery was Joel Dickson, a Deputy Superintendent of Corrections who is responsible for supervising the LTSU. See Pet. App. 5a, 36a; Br. in Opp. App. 90. Dickson observed that LTSU2 inmates "are the most incorrigible, the most difficult, problematic" inmates, and that they "have demonstrated the most behavior conflicts." *Id.* at 95. He further testified that the "most important" reason for imposing the challenged restrictions on those inmates' privileges "is as a means of behavior modification. And by that, I mean that a privilege is an earned thing based on compliance and modification of negative behaviors." *Id.* at 110; see *id.* at 113.

Dickson explained that, "we try to give and provide the inmate every opportunity to progress through this system and to be able to obtain these privileges. We're very limited * * * in what we can and cannot deny or give to an inmate, and these are some of the items that we feel are legitimate as incentives for inmate growth." Br. in Opp. App. 110. In the LTSU, accordingly, "the privilege of being able to read a newspaper or a magazine" is viewed as "an earned privilege," in the sense that an inmate, by adjusting his behavior, "can earn their right to have those items in his cell and read them at his leisure." *Id.* at 111. The ultimate objective is "to do the best we can to modify the inmate's behavior so that" he can "integrate into the general population in the institution" and

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because they "categorically" deny LTSU2 inmates access to newspapers, magazines, and photographs, Br. in Opp. App. 8, and it seeks declaratory and injunctive relief that would prevent application of the restrictions against any LTSU2 inmate, *id.* at 9. In addition, the court of appeals entertained respondent's challenge as a facial challenge to the restrictions, holding that they were invalid without any analysis of their application to particular facts. See Pet. App. 25a; see also *id.* at 26a (Alito, J., dissenting) ("The question before us is whether these * * * restrictions are facially unconstitutional under the standard set out in *Turner* v. *Safley*."). In any event, the court of appeals' analysis is erroneous as applied to respondent for the reasons explained below.

"eventually * * * can become a more productive citizen." *Id.* at 110.

b. In September 2002, the parties filed cross-motions for summary judgment. Pet. App. 6a. Petitioner did not dispute that inmates retain a First Amendment right to receive newspapers, magazines, and photographs, but argued that Pennsylvania's policy represented a valid restriction of that right under the analysis set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987). See Pet. App. 8a n.5, 39a n.33. On January 10, 2003, the district court, adopting the magistrate judge's recommendation, granted summary judgment to petitioner. The court held that the State's policy of denying newspapers, magazines, and photographs to LTSU2 inmates does not violate the First Amendment under *Turner*. The court explained that the restrictions are reasonably related to the legitimate penological interest of "furthering prison security and encouraging compliant behavior in particularly disobedient and rebellious inmates," *id.* at 39a, and, indeed, that the restrictions are "imperative to the success of the LTSU," *id.* at 40a.

3. A divided court of appeals vacated the district court's decision and remanded the case. Pet. App. 1a-29a.

a. The panel majority acknowledged that the objective of deterring inmate misconduct is legitimate under the *Turner* standard, but viewed the challenged restrictions as bearing no rational relationship to that objective. Pet. App. 11a-14a. According to the majority, "the rehabilitation justification [is] illogical given the nature of LTSU confinement." *Id.* at 12a. The majority reached that conclusion on the basis that LTSU2 confinement has no fixed duration and that promotion to LTSU1 is "entirely within the discretion of prison administrators." *Id.* at 11a. The majority also emphasized that Pennsylvania had "offered no evidence that the [LTSU restrictions] achieve[] or could achieve [the] stated rehabilitative purpose." *Id.* at 12a-13a. The majority explained that, in its view, the requirement of producing such evidence is a "complementary part of the [*Turner*] analysis in determining

whether an asserted goal is logically connected to the prison regulation." *Id.* at 14a n.10.

In addition to concluding that the restrictions had no logical connection to the objective of inducing good behavior, the majority observed that LTSU2 inmates had no alternate means of obtaining "access to a reasonable amount of newspapers, magazines, and photographs." Pet. App. 20a. The majority suggested two, less-restrictive policies that Pennsylvania could adopt: (i) establishment of specific "reading periods" in "which guards deliver a single newspaper or magazine to an [LTSU2] inmate's cell"; or (ii) a program under which an LTSU2 inmate could be escorted by guards "to the secure mini-law library to read a periodical of [his] choosing." *Id.* at 22a-23a.

b. Judge Alito dissented. Pet. App. 25a-29a. In his view, it was rational for prison officials to believe that the challenged restrictions could deter inmates from violating prison rules and could induce inmates already in the LTSU to reform their behavior. *Id.* at 27a. Judge Alito concluded that the panel majority had misapplied *Turner* by requiring "empirical evidence that the regulation in fact serves" those objectives, rather than assessing whether the restrictions bear a "*logical connection*" to the asserted goals. *Id.* at 28a (quoting *Turner*, 482 U.S. at 89) (emphasis added by Judge Alito). In addition, Judge Alito observed that LTSU2 inmates can ultimately remove the restrictions on access to reading materials and photographs by modifying their behavior. *Ibid.* Judge Alito also explained that the two alternate policies suggested by the majority would impose significant burdens on prison administration. Accordingly, Judge Alito concluded that, under *Turner*, "the challenged regulations are not facially unconstitutional." *Id.* at 29a.[3]

[3] In the proceedings below, Pennsylvania advanced two penological justifications for the challenged restrictions. The "first and most important," or "primary" justification offered by Pennsylvania was that the restrictions deter inmate misconduct and induce LTSU inmates to reform their behavior. Br. in

SUMMARY OF ARGUMENT

Respondent's First Amendment challenge to Pennsylvania's policy restricting the possession of newspapers, magazines, and photographs by its most incorrigible inmates is governed by the deferential standard set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987). As this Court has repeatedly recognized, *Turner* is grounded on the recognition that courts should defer to the reasonable judgments of prison officials on the difficult and sensitive matters of prison administration. Under *Turner*, accordingly, a prison regulation is valid as long as it is reasonably related to legitimate penological interests. In addition, in a facial challenge, like this one, a prison regulation is valid as long as it is capable of being applied in a manner that meets that reasonable-relationship test. See *Overton* v. *Bazzetta*, 539 U.S. 126, 134 (2003).

The central consideration under *Turner*'s reasonableness framework is whether the challenged regulation bears a "logical" connection to legitimate penological goals. *Turner*, 482 U.S. at 89. The challenged restrictions on LTSU2 inmates aim to deter inmate misconduct and to induce the most dangerous and recalcitrant prisoners in Pennsylvania's prison system to change their ways. Those objectives relate directly

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Opp. App. 110, 113; see Pet. App. 5a, 36a. Pennsylvania also offered as a secondary justification that the restrictions promote security by limiting the amount of materials in an inmate's possession in which contraband could be hidden, and by preventing use of the prohibited materials as weapons or instruments of harm. See Pet. App. 5a, 36a-37a; Br. in Opp. App. 110. Judge Alito would have sustained the restrictions based solely on the primary, rehabilitation rationale, and he did not discuss the secondary rationale advanced by Pennsylvania below. Likewise, because it is a sufficient basis to uphold the restrictions under *Turner*, the Commonwealth's principal rehabilitation rationale is the focus of this brief as well. The Commonwealth's rehabilitation objective, however, has an important security dimension because encouraging inmates to reform their deviant behavior promotes institutional order and, thus, security within the prison walls. See pp. 16-17, *infra.* That is particularly true with respect to the special class of inmates subject to the restrictions at issue in this case, *i.e.*, the "worst of the worst." Br. in Opp. App. 111.

to promoting rehabilitation of recalcitrant inmates and preserving institutional order by encouraging good behavior and discouraging misconduct, and they unquestionably are "legitimate" objectives under the *Turner* standard.

The challenged restrictions on LTSU2 inmates also bear the requisite, logical connection to those governmental interests. The "authority to offer inmates various incentives to behave" is an "essential tool of prison administration," and the "Constitution accords prison officials wide latitude to bestow or revoke these perquisites as they see fit." *McKune* v. *Lile*, 536 U.S. 24, 39 (2002) (plurality opinion). The Court therefore has upheld the suspension of visitation privileges for inmates who commit multiple disciplinary infractions, on the rationale that denial of those privileges is a valid means of inducing acceptable inmate behavior. *Overton*, 539 U.S. at 134. The same conclusion follows in this case with respect to the denial of newspapers, magazines, and photographs to the most dangerous and recalcitrant inmates within Pennsylvania's prison system (*i.e.*, those inmates housed in the LTSU). That restriction not only bears a rational connection to the goal of deterring inmate misconduct, but it is an integral aspect of Pennsylvania's graduated approach of granting and withholding privileges to induce acceptable behavior.

The court of appeals erred in reasoning that, because LTSU2 confinement has no preset duration, the challenged restrictions are incapable of deterring inmate misconduct. The uncertain duration of LTSU2 confinement does not remove the incentive of *non*-LTSU inmates to refrain from misconduct so as to avoid transfer to the LTSU, or the incentive of LTSU2 inmates to reform their behavior in the hopes of earning a relaxation of the restrictions, which is possible as soon as the initial 90-day period has expired. The uncertain duration of LTSU2 detention also is entirely rational as penological policy. Rather than impose a predetermined limit on the length of LTSU2 confinement, Pennsylvania sensibly accords prison officials discretion to reinstate the privileges of

the most recalcitrant inmates only upon an individualized determination that any such inmate has in fact reformed his behavior.

The court of appeals also erred in supposing that Pennsylvania was required under *Turner* to accumulate record proof of the efficacy of the challenged restrictions, and in engrafting that evidentiary burden on to *Turner*'s logical-connection test. Under *Turner*, the burden "is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton*, 539 U.S. at 132. Moreover, the *Turner* standard only requires that the restrictions logically advance the asserted governmental interest, not that they be demonstrated to do so by empirical proof. In addition, the challenged restrictions advance the State's interest in inducing behavior as a matter of common sense. Unless the fact that the privileges withheld here implicate First Amendment rights somehow makes the privileges inviolate, there is no basis for shifting the burden to the State or requiring empirical proof that prisoners respond to the extension and withdrawal of privileges.

Finally, the remaining considerations under *Turner*'s reasonableness framework reinforce the validity of the challenged restrictions. Because LTSU2 inmates are permitted to receive books and unlimited personal correspondence, they are not barred from possessing all forms of expressive materials. Although inmates have no alternative means of receiving newspapers, magazines, and photographs while they remain in LTSU2, the very object of the restrictions is to deny those materials in order to induce behavioral reform, and LTSU2 inmates retain the alternative of earning reinstatement of their right to receive those materials by demonstrating good behavior. In addition, there is no obvious, ready alternative to the challenged restrictions. Indeed, allowing LTSU2 inmates limited access to newspapers or magazines would negate the basic object of the challenged restrictions by allowing access to those materials without any demonstration of behav-

ioral change, and also would divert corrections officers from other vital institutional functions.

ARGUMENT

A STATE MAY SEEK TO INDUCE IMPROVED BEHAVIOR ON THE PART OF ITS MOST DANGEROUS AND INCORRIGIBLE INMATES BY DENYING NEWSPAPERS, MAGAZINES, AND PHOTOGRAPHS TO THOSE INMATES UNTIL THEY EXHIBIT ACCEPTABLE CONDUCT

In *Turner* v. *Safley*, 482 U.S. 78, 84 (1987), this Court made clear that prison officials rather than courts are to make the difficult judgments inherent in the inordinately difficult task of managing prison inmates, and that the judgments of those officials thus are to be upheld unless they lack a reasonable relationship to valid penological goals. The *Turner* framework rests on "separation of powers concerns" about judicial interference with a task—prison administration—that is "committed to the responsibility of [the executive and legislative] branches," and calls for added deference where, as here, the federal courts are asked to review the judgment of State prison administrators. *Turner*, 482 U.S. at 85. In concluding that the challenged restrictions on LTSU2 inmates have no logical connection to the goal of inducing prisoners to refrain from misconduct, the court of appeals fundamentally misapplied *Turner*, and thus intruded on the prerogatives of the State in responding to an intractable problem of prison administration—*i.e.*, encouraging those inmates who have repeatedly demonstrated an unwillingness to conform their conduct to prison rules to reform their ways.

A. Respondent's First Amendment Challenge Is Governed By The Deferential Standard Set Forth In *Turner* v. *Safley*

1. Although "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner*, 482 U.S. at 84, the nature of confinement dictates

that "[m]any of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner," *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003). "[I]ncarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives." *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987) (citation and internal quotation marks omitted); see *Overton*, 539 U.S. at 131; *Shaw* v. *Murphy*, 532 U.S. 223, 229 (2001); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977).

"In the First Amendment context, for instance, some rights are simply inconsistent with the status of a prisoner or 'with the legitimate penological objectives of the corrections system.'" *Shaw*, 532 U.S. at 229 (quoting *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974)); see *Jones*, 433 U.S. at 129. In addition to recognizing that the exercise of First Amendment privileges by inmates is subject to "the legitimate penological objectives of the corrections system," *ibid.*, this Court has emphasized the need to "accord substantial deference to the professional judgment of prison administrators" when examining "the legitimate goals of a corrections system and * * * the most appropriate means to accomplish them." *Overton*, 539 U.S. at 132; *Shaw*, 532 U.S. at 229; *Turner*, 482 U.S. at 85, 89; *Jones*, 433 U.S. at 126, 128. The Court, accordingly, has "reaffirm[ed] [its] refusal, even where claims are made under the First Amendment, to substitute [its] judgment on . . . difficult and sensitive matters of institutional administration, for the determinations of those charged with the formidable task of running a prison." *O'Lone*, 482 U.S. at 353 (citation and internal quotation marks omitted). Deference to prison officials should be at its zenith when the policy at issue does not deny the exercise of First Amendment rights entirely, but withdraws or extends such rights as part of the process of providing incentives for good behavior.

2. To give effect to those principles, the Court, in *Turner* v. *Safley*, *supra*, established "a unitary, deferential standard for reviewing prisoners' constitutional claims." *Shaw*, 532 U.S. at 229; see *Johnson* v. *California*, 125 S. Ct. 1141, 1149 (2005) (discussing "the deferential standard of review articulated in *Turner* v. *Safley*"). Under *Turner*, a challenged prison regulation is valid as long as it "is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

Turner identified four specific considerations that inform the overarching reasonableness inquiry: (i) whether the challenged restriction is rationally connected to a legitimate government interest; (ii) whether inmates have alternate means of exercising the asserted constitutional right; (iii) whether accommodation of the asserted right would adversely affect other inmates, prison personnel, or prison resources; and (iv) whether there are ready alternatives for achieving the governmental objectives. *Turner*, 482 U.S. at 89-91; see *Overton*, 539 U.S. at 132; *Shaw*, 532 U.S. at 229-230. In applying *Turner*, the burden "is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton*, 539 U.S. at 132.[4]

It is undisputed that *Turner*'s deferential inquiry governs the resolution of respondent's challenge to the restrictions on possession of newspapers, magazines, and photographs by LTSU2 inmates. See Pet. App. 5a, 37a-38a. As a general matter, "*Turner* provides the test for evaluating prisoners' First Amendment challenges." *Shaw*, 532 U.S. at 230. And of

[4] As the government has explained in *United States* v. *Georgia* and *Goodman* v. *Georgia*, Nos. 04-1203 & 04-1236, although the *Turner* inquiry affords broad discretion to prison officials, it differs from the minimal rational-basis review applied in the equal protection and due process contexts. See U.S. Reply Br. 13-14. For example, unlike rational-basis review, *Turner* calls for an assessment of the existence of ready and obvious alternatives to the challenged restrictions. See *Turner*, 482 U.S. at 90. Because the court of appeals' decision invalidating the restrictions at issue is fundamentally flawed for the reasons explained below, there is no need in this case for this Court to explore the precise distinctions between rational-basis review and the *Turner* analysis.

particular relevance, the Court has "relied on *Turner* in addressing First Amendment challenges to prison * * * restrictions on receipt of subscription publications" by inmates. *Johnson*, 125 S. Ct. at 1149 (citing *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989)); see *Abbott*, 490 U.S. at 413 ("[W]e now hold that regulations affecting the sending of a 'publication' * * * to a prisoner must be analyzed under the *Turner* reasonableness standard."). Significantly, although the Court has confronted a number of First Amendment challenges to prison regulations since *Turner*, it has yet to sustain any of those First Amendment claims. See *Johnson*, 125 S. Ct. at 1148 (reviewing decisions applying *Turner* to First Amendment claims); *Overton*, 539 U.S. at 128, 131-136; *Shaw*, 532 U.S. at 230-232; *Abbott*, 490 U.S. at 414-419; *Turner*, 482 U.S. at 91-93; see also *O'Lone*, 482 U.S. at 349-353 (claim under Free Exercise Clause). There is no basis for reaching a different result in this case.

B. The Restrictions At Issue Are Part Of A System Of Incentives For Good Behavior And Bear A Rational Connection To Legitimate Government Interests

The "[f]irst and foremost" question under *Turner* is whether there is a "'valid, rational connection' between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it." *Shaw*, 532 U.S. at 229 (quoting *Turner*, 482 U.S. at 89) (second alteration in original); see *Overton*, 539 U.S. at 132 (if a regulation "bear[s] a rational relation to legitimate penological interests," that "suffices to sustain the regulation"); *Amatel* v. *Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998) ("the first [*Turner*] factor looms especially large"), cert. denied, 527 U.S. 1035 (1999). The governmental interests asserted in this case are undeniably legitimate, and the challenged restrictions are rationally related to those interests.

1. The objectives of inducing acceptable behavior by inmates and thereby promoting prison order and security constitute legitimate governmental interests

The challenged restrictions on LTSU2 inmates aim generally to encourage good behavior, and specifically, to induce reformed behavior in inmates who have repeatedly demonstrated an unwillingness to abide by prison rules. See Pet. App. 5a, 9a-10a; Br. in Opp. App. 95, 110-111. The court of appeals did not dispute that those interests qualify as "legitimate" for purposes of *Turner*. See Pet. App. 10a-11a. And the legitimacy of those interests is well-settled. Indeed, this Court has characterized the "interest in preserving order and authority in the prisons" as "self-evident," *O'Lone*, 433 U.S. at 132, and has explained that "preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of * * * convicted prisoners," *Bell* v. *Wolfish*, 441 U.S. 520, 546 (1979); see *id.* at 548 n.30.

The interests in promoting discipline and order also bear a direct and obvious connection to preserving institutional security, "perhaps the most legitimate of penological goals." *Overton*, 539 U.S. at 133; see *Cutter* v. *Wilkinson*, 125 S. Ct. 2113, 2124 n.13 (2005) ("It bears repetition * * * that prison security is a compelling state interest."); *Abbott*, 490 U.S. at 415. That interest is all the more forceful in this case in view of the particular focus of the LTSU on those inmates who present the greatest threat to institutional security—*i.e.*, the "most incorrigible" and "extremely disruptive, violent and problematic inmates," those with "serious behavioral problems and a high potential for repeating that behavior." Br. in Opp. App. 50, 59, 95. Encouraging such recalcitrant inmates to reform their behavior has long been one of the most pressing challenges of prison administration, and is precisely the sort of "intractable problem[] of prison administration" that calls out for "innovative solutions." *Turner*, 482 U.S. at 89.

The *Turner* analysis is specifically designed to encourage rather than stifle such innovation. *Ibid.*[5]

2. The denial of newspapers, magazines, and photographs to LTSU2 inmates is logically connected to the State's legitimate penological interests

a. It is a matter of common sense that withholding desirable inmate privileges—as a sanction for misbehavior—may deter prisoner misconduct and induce behavioral reform. See *Sandin* v. *Connor*, 515 U.S. 472, 485 (1995) ("Discipline by prison officials in response to a wide range of misconduct * * * effectuates prison management and prisoner rehabilitative goals."). The entire system of prison discipline—and indeed a basic rationale for modern criminal punishment—operates on such an assumption. Accordingly, as this Court has recognized, "[a]n essential tool of prison administration * * * is the authority to offer inmates various

[5] Under *Turner*, the asserted governmental interest must be both "legitimate" and "neutral." See *Abbott*, 490 U.S. at 414-415. Respondent has not suggested that the challenged LTSU2 restrictions infringe the "neutrality" requirement. As a general matter, those restrictions bar possession of newspapers, magazines, and photographs, without regard to the content of those materials. Although there is an exception for legal and religious materials, that exception does not cast doubt on the "neutrality" of the restrictions under *Turner*. A restriction is neutral for *Turner* purposes as long as it furthers a governmental interest that is unrelated to suppression of expression. *Abbott*, 490 U.S. at 415; see *Amatel*, 156 F.3d at 197 ("[N]eutrality, in the [*Turner*] sense is quite different from the familiar First Amendment notion of 'content-neutrality.'"). There could be no serious contention that Pennsylvania's exception for legal and religious materials—which implicates the affirmative rights of inmates to have access to the courts and to engage in the free exercise of religion—somehow suggests an illicit interest in suppression or "censorship" of certain ideas. *Abbott*, 490 U.S. at 416 n.14; see *Overton*, 539 U.S. at 130, 134 (upholding suspension of visitation privileges for inmates with misconduct infractions, where suspension contains exception for visits by attorneys and members of the clergy); *Abbott*, 490 U.S. at 415-416 (When "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 [the Court] meant and used that term in *Turner*.").

incentives to behave," and the "Constitution accords prison officials wide latitude to bestow or revoke these perquisites as they see fit." *McKune* v. *Lile*, 536 U.S. 24, 39 (2002) (plurality opinion). The challenged restrictions in this case fit squarely within that category, and, like the privileges at issue in *McKune*, are designed to address a special class of prison inmates—*i.e.*, "the most disruptive and dangerous .1% of [Pennsylvania's] prison population," Pet. App. 25a (Alito, J., dissenting).[6]

The Court's recent decision in *Overton* v. *Bazzetta*, *supra*, is instructive. The Court there upheld certain restrictions on inmates' visitation privileges, including a prohibition against receipt of any visitors for at least two years (except attorneys and members of the clergy) in the case of any inmate who accumulates more than one substance-abuse violation. See 539 U.S. at 130, 134. The Court upheld that sanction and viewed the objections to it as meriting only relatively brief discussion. The Court explained: "Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." *Id.* at 134.

So too here. Just like the withdrawal of visitation privileges in *Overton* for multiple substance-abusers, the withdrawal of the privilege of possessing newspapers, magazines,

[6] In the specific context of privileges denied only as a result of constitutionally adequate disciplinary procedures, the proper focus of analysis may well be the level of First Amendment rights an inmate can enjoy within prison walls, not the situation faced by those inmates who would enjoy substantially greater First Amendment freedoms but for their failure to comply with valid prison rules. At a minimum, the courts must view the denial of access to outside materials as a disciplinary sanction much more leniently than a comparable denial to all inmates. The process of calibrating the extension and withdrawal of privileges to provide adequate incentives for compliance with prison rules is peculiarly ill-suited to judicial second-guessing, and the "ready alternative" of compliance with prison rules to obtain enhanced privileges should figure prominently in the *Turner* analysis. See *Turner*, 482 U.S. at 90.

and photographs for LTSU2 inmates—who by definition have demonstrated a difficulty in following prison rules—"is a proper and even necessary management technique to induce compliance with the rules of inmate behavior." 539 U.S. at 134. The propriety of the restrictions at issue here is especially manifest because LTSU2 inmates are "high-security prisoners who have few other privileges to lose." *Ibid.* The challenged restrictions on LTSU2 inmates thus plainly bear the requisite, logical connection to Pennsylvania's asserted interests in encouraging good behavior and inducing the most recalcitrant prisoners to refrain from further misconduct.[7]

Turner requires according "substantial deference to the professional judgment of prison administrators" with respect to "defining the legitimate goals of a corrections system and * * * *determining the most appropriate means to accomplish them*." *Overton*, 539 U.S. at 132 (emphasis added). The judgments of prison officials are particularly deserving of deference when, as here, they concern how to deal with inmates who present pronounced disciplinary challenges and threaten institutional order, a subject that lies at the heart of those officials' expertise. The Court therefore has recognized that "*Turner*'s principle of deference has special force with regard to" the treatment of "inmates presenting special disciplinary and security concerns," *Lewis* v. *Casey* 518 U.S. 343, 361 (1996), and that prison officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve

[7] Respondent relies heavily (Br. in Opp. 12-16) on this Court's invalidation in *Turner* of a regulation permitting inmates to marry only with the permission of the prison superintendent. See *Turner*, 482 U.S. at 94-99. In invalidating that restriction, however, the Court reasoned that "[c]ommon sense * * * suggest[ed that there is no logical connection between the marriage restriction" and the security concerns raised by the possible "formation of love triangles." *Id.* at 98. In this case, by contrast, there is a common-sense, logical connection between the denial of desirable inmate privileges and the objective of inducing behavioral reform—a connection that this Court specifically recognized in *Overton*. See 539 U.S. at 134.

internal order and discipline," *Bell*, 441 U.S. at 547. See *Cutter*, 125 S. Ct. at 2124 n.13 ("prison security is a compelling state interest, and * * * deference is due to institutional officials' expertise in the area"); *McKune*, 536 U.S. at 39 (plurality opinion).

In view of the common-sense connection between withholding valued inmate privileges and inducing good behavior, as well as the deference owed to prison officials on the precise means of effectuating that objective, there is no basis for concluding that the "logical connection" between the challenged restrictions on LTSU inmates "and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. Far from being arbitrary or irrational, those restrictions are an integral part of Pennsylvania's graduated inmate disciplinary system. That system generally reflects the view that adjusting the privilege of possessing magazines, newspapers, and photographs, constitutes an important means of inducing good inmate behavior, and is part and parcel of a broader common-sense philosophy that granting and withholding privileges is a valuable means of encouraging desirable prisoner conduct. See pp. 2-5, *supra*. Consistent with that general approach, it is entirely rational that, for the worst of the worst inmates, Pennsylvania would deny the privilege of possessing newspapers, magazines, and photographs, until such inmates demonstrate that they are capable of behavioral reform.

b. In concluding that the challenged restrictions on LTSU inmates bear no logical connection to Pennsylvania's asserted interests, the court of appeals focused on Pennsylvania's election to continue LTSU2 confinement until prison officials deem promotion of the inmate to be appropriate, and the resulting fact that the Commonwealth does not spell out exactly when an LTSU2 inmate might earn relaxation of the restrictions. See Pet. App. 11a-12a. That approach is deeply flawed and unduly constrains the discretion of prison officials concerning the precise contours of a disciplinary scheme.

As an initial matter, the court of appeals' approach cannot be squared with this Court's decision in *Overton*. The prohibition in that case against visitation privileges for inmates with multiple substance-abuse infractions was imposed for a minimum period of two years, after which an inmate could apply for restoration of visitation privileges at the discretion of the warden. See 539 U.S. at 130. In upholding that restriction, the Court specifically rejected the argument that it bore no rational connection to the asserted governmental interests because restoration of visitation was "not automatic even at the end of two years." *Id.* at 134. The Court "agree[d] the restriction is severe," but concluded that its severity and indefinite duration did not warrants its invalidation "in all instances." *Ibid.* This case, like *Overton*, involves a categorical challenge to the validity of the challenged restrictions brought on behalf of all LTSU2 inmates. And just as in *Overton*, the uncertain duration of the restrictions with respect to any particular inmate, and the discretion accorded prison officials in that regard, affords no basis for invalidating the restrictions as a categorical matter.[8]

Moreover, the court of appeals erred in concluding that the uncertain duration of LTSU2 confinement renders the challenged restrictions "illogical" and incapable of deterring inmate misconduct. Pet. App. 12a. The court's reasoning would apply to all privileges denied to LTSU2 inmates—not just the bar against possession of newspapers, magazines, and photographs—and it is unsound in several respects. First, the

[8] The Court suggested in *Overton* that, if it were confronted with evidence in a subsequent as-applied challenge that the visitation restriction were "treated as a *de facto* permanent ban on all visitation for certain inmates, [it] might reach a different conclusion in a challenge to a particular application of the regulation." 539 U.S. at 134. Similarly, as Judge Alito observed below, "[a]n as-applied challenge by an inmate subjected to lengthy confinement in Level 2 despite a record of reformed behavior would present different considerations, but the majority's opinion is not limited to such a case." Pet. App. 28a (dissenting opinion).

uncertain duration of LTSU2 confinement does not remove the deterrent effect on inmates who have yet to be transferred into the LTSU. See Pet. App. 27a (Alito, J., dissenting). The challenged restrictions similarly serve as an inducement for those LTSU inmates who have been promoted to LTSU1 status to avoid demotion and re-transfer to LTSU2 confinement. With respect LTSU2 inmates, finally, even if uncertainty about the duration of LTSU2 confinement "may have an impact on the degree of the incentive" to "refrain from disruptive behavior in the hope of obtaining a transfer out of the unit," there "is no reason to *suppose* that the incentive is wholly destroyed," *id.* at 27a-28a (Alito, J., dissenting) (emphasis added), and certainly respondent has not met his burden of *showing* that the incentive is "wholly destroyed."

Accordingly, notwithstanding the uncertain duration of LTSU2 confinement, Pennsylvania prison officials acted well within their discretion in concluding that the challenged restrictions bear a logical connection to the objectives of deterring inmate misconduct and inducing behavioral reform. Uncertainty about the duration of the challenged restrictions in fact is likely to enhance—rather than diminish—the degree to which they serve as a deterrent.[9] Indeed, for the recalcitrant inmates in LTSU2 confinement, as to whom standard methods of discipline have proved unfruitful, withholding privileges for a preset duration may do little more than encourage the inmate to wait out the period.

For those reasons, there is nothing arbitrary or irrational about Pennsylvania's decision to impose the challenged restrictions without also establishing an inflexible, predeter-

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[9] See, *e.g.*, Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 Cardozo L. Rev. 1535, 1581 (2005) ("even risk-preferring individuals —who might be undeterred by normal threats of sanctions—could find uncertainty to be a significant disincentive"); Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 Iowa L. Rev. 443, 445 (2004) ("uncertain sanctions * * * achieve more deterrence than certain sanctions").

mined limitation on the duration of LTSU2 confinement. LTSU2 inmates, by definition, present extraordinary disciplinary problems; indeed, most have found their way to the LTSU because they have failed to respond to standard disciplinary measures including in many cases sanctions of a finite duration. See Br. in Opp. App. 95. It is entirely rational in that context to accord prison officials discretion to continue an inmate's LTSU2 confinement until the officials perceive adequate, individualized indicia of behavioral reform. That is particularly true insofar as promotion from LTSU2 confinement might presage an eventual release to the general inmate population. Cf. *Hewitt* v. *Helms*, 459 U.S. 460, 477 n.9 (1983) ("The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner * * * and on the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for 'proof' in any highly structured manner.").[10]

[10] In addition to relying on the uncertain duration of LTSU2 confinement, the court of appeals also pointed to a perceived lack of clarity concerning the precise forms of misconduct that result in transfer to the LTSU, as well as the precise sorts of behavioral reforms that can result in an LTSU inmate's promotion from LTSU2 status. See Pet. App. 11a. Those perceived uncertainties offer no more basis for invalidating the challenged restrictions than does the uncertainty surrounding the duration of LTSU2 confinement. Moreover, the sound reasons that support Pennsylvania's decision to refrain from imposing an inflexible limitation on the duration of LTSU2 confinement also support preserving the discretion of prison officials to determine, based on individualized assessments, both whether an inmate's misconduct is sufficiently severe to warrant transfer to the LTSU and whether an LTSU2 inmate has reformed his behavior in a manner warranting advancement to LTSU1 status. See *id.* at 3a n.2 (enumerating conduct that can warrant transfer to LTSU); Br. in Opp. App. 26-27 (setting forth considerations that bear on propriety of promotion from LTSU2). The court of appeals also appeared to misperceive the potential grounds for transfer to the LTSU. The court indicated that an inmate could be transferred to the LTSU in the absence of any misconduct infraction at all, see Pet. App. 11a, but the record does not support that understanding. The portion of the deposition testimony cited by the court of appeals indicates that an inmate, in atypical circumstances, might be

c. The court of appeals reasoned that Pennsylvania had failed to accumulate sufficient record proof that the challenged restrictions in fact advance the objectives of deterring misconduct and inducing behavioral reforms. Pet. App. 12a-14a. In the court's view, prison officials were required to demonstrate that their "deprivation theory of behavior modification" has a "basis in real human psychology, or ha[s] proven effective with LTSU inmates." *Id.* at 13a. That analysis is contradicted by this Court's precedents.

Turner does not require a State to amass evidentiary proof to justify its prison rules. *Turner* requires only that prison regulations "logically advance[]" a legitimate penological interest, not that they be empirically proven to have the desired effect. 482 U.S. 93; see *id.* at 91, 93. *Turner* itself illustrates the point. In upholding restrictions on correspondence between inmates in different institutions based on concerns about the possibility of communicating escape plans or coordinating acts of violence, the Court explained that there need only be "a *logical* connection between [those] security concerns * * * and a ban on inmate-to-inmate correspondence," not "a searching examination of the record to determine whether there was sufficient proof that inmate correspondence had actually led to an escape plot, uprising, or gang violence." *Id.* at 93-94 n.*. Indeed, the absence of the need for empirical proof and factual findings is what distinguished the *Turner* standard from strict scrutiny. See *ibid.*[11]

transferred to the LTSU without first having been assigned to an SMU, not that an inmate could be transferred to the LTSU without any predicate determination of misconduct at all. See Br. in Opp. App. 95.

[11] As the District of Columbia Circuit explained in upholding restrictions on inmates' possession of pornographic publications, "[t]here is, of course, no 'record evidence,' and certainly no sophisticated multiple regression analysis or other social science data, to support [the] belief" that excluding pornography from prisons advances the asserted interest in prisoner rehabilitation. *Amatel*, 156 F.3d at 199. The court did "not think, however, that common sense must be the mere handmaiden of social science data or expert testimonials." *Ibid.* Instead, while "scientific studies can have a corrective effect by establishing an

Because the existence of a rational connection between the challenged restrictions on inmates and the asserted governmental interests is evident as a matter of common sense, respondent bore the burden of disproving the rationality of the restrictions. See *Jones*, 433 U.S. at 127-128 ("Without a showing that [the] beliefs" of prison administrators "were unreasonable, it was error for the District Court to conclude that [they] needed to show more."). As a practical matter, the court of appeals' approach shifted that burden and erroneously placed it on the State. See *Overton*, 539 U.S. at 132; see also *Johnson*, 125 S. Ct. 1146 n.1 & 1151 (rejecting application of *Turner* analysis in race context because burden of proof in considering government's use of race should not be on the inmate). Indeed, the court of appeals accepted, in the absence of any record proof, the common-sense conclusion that various restrictions on the privileges of LTSU2 inmates other than the ones challenged in this case (such as restrictions on visitation, telephone calls, commissary use, compensation, and in-cell educational programs) advance Pennsylvania's "behavior modification goals." Pet. App. 25a. The court had no basis for imposing any different burden with respect to the challenged restrictions on newspapers, magazines, and photographs.[12]

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apparently implausible connection or refuting an apparently obvious one, * * * conformity to commonsensical intuitive judgments is a standard element of both reasonableness and rationality." *Ibid.*; accord *Mauro* v. *Arpaio*, 188 F.3d 1054, 1059-1060 (9th Cir. 1999) (en banc), cert. denied, 529 U.S. 1018 (2000).

[12] Respondent's claim ultimately requires adopting the view that privileges that implicate First Amendment interests are categorically different from other privileges. But that position cannot be sustained either practically or legally. As a practical matter, many of the most desirable privileges—from watching television to receiving visitors—implicate First Amendment interests. And the extension and withdrawal of privileges provide effective incentives precisely because they are desirable. As a legal matter, moreover, this Court has made clear that *Turner* deference is fully applicable to all First Amendment claims, and that deference is particularly appropriate when such privileges are withdrawn as part of an effort to induce compliance with prison rules. See *Overton*, 539 U.S. at 134. The court of appeals speculated that the

Finally, imposing an evidentiary burden on States to prove that a challenged prison regulation advances particular penological objectives would discourage if not prevent States from pursuing "innovative solutions to the intractable problems of prison administration," *Turner*, 482 U.S. at 89, because it would be difficult and costly for prison administrators to amass the necessary data to sustain such a burden. *Turner*'s deferential standard, however, was designed to promote creative approaches to prison administration with full appreciation of the fact that innovative approaches may be needed to address persistent problems— such as encouraging reform among the prison's most incorrigible inmates.

C. The Remaining Considerations Under *Turner* Reinforce The Reasonableness Of The Challenged Restrictions

1. *Turner*'s reasonableness test calls for consideration of three other factors. The first is whether "alternative means of exercising the right" remain available to inmates. *Turner*, 482 U.S. at 90. "Of course if the 'right' at stake is defined in terms of the materials excluded by the ban, any regulation will come up short." *Amatel*, 156 F.3d at 201. The Court thus has emphasized that the right "must be viewed sensibly and expansively." *Abbott*, 490 U.S. at 417. In *O'Lone*, for instance, the Court upheld a regulation even though it eliminated the ability of inmates to attend a weekly Muslim congregational service, reasoning that inmates retained the ability to participate in other Muslim religious exercises. 482

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challenged restrictions "may produce less rather than more compliance in at least some inmates," Pet. App. 14a, a supposition that was based on a handful of statements in judicial opinions generally supporting the abstract notion that "isolating prisoners from the going[s]-on in the outside world tends to undercut any genuine rehabilitation," *id.* at 13a. But *Turner* warns against judges substituting their assessment of proper prison administration for that of prison officials. That admonition cannot be circumvented by relying on the judicial assessments of other judges in earlier reported cases. More fundamentally, that analysis mistakes what is sound prison policy for inmates in general, with the proper way to deal with the most recalcitrant inmates.

U.S. at 351-352. Likewise, in *Overton*, the Court acknowledged that the complete ban on visitation for repeat offenders eliminated any alternative form of visitation, but nonetheless emphasized that the inmates "may communicate with people outside the prison by letter and telephone." 539 U.S. at 135.

The need to view the right at stake "sensibly and expansively" is particularly manifest in the circumstances of this case, as the entire object of the challenged restrictions is to deny access to newspapers, magazines, and photographs, in order to deter misconduct and induce behavioral reform. Because the very purpose of the restrictions is to deny a privilege as a means of inducing good behavior, the most straightforward "alternative means of exercising the right," *Turner*, 482 U.S. at 90, is the inmate's ability to avoid the sanction by complying with prison rules and to earn reinstatement of the privilege by demonstrating modified behavior. In *Overton*, the Court accordingly upheld the prohibition against visitation for multiple substance-abuse violators despite the lack of any means of obtaining visitation other than persuading the warden to reinstate the privilege as a matter of discretion. See 539 U.S. at 130, 134-135.[13]

In addition, LTSU2 inmates are not denied all forms of expressive materials. See *Turner*, 482 U.S. at 92 (upholding restrictions on inmate-to-inmate correspondence that did "not

[13] The court of appeals suggested that there was insufficient record evidence documenting the precise process by which an inmate could obtain promotion from LTSU2 confinement and a resulting reinstatement of newspaper and magazine privileges. See Pet. App. 20a-21a. This case, however, has been litigated by respondent as a facial challenge, not an as-applied challenge in which a particular inmate contends that he has been unfairly denied promotion under facially valid rules. With respect to the facial validity of the restrictions, the record contains the rules setting forth the criteria by which prison officials decide whether promotion from LTSU2 confinement is warranted, see Br. in Opp. App. 26-27, and also contains deposition testimony about the availability of promotion, *id.* at 110. That testimony indicates that some inmates have been promoted from LTSU2 to LTSU1 status, and that some inmates have advanced out of the LTSU altogether. *Id.* at 93-95.

deprive prisoners of all means of expression"). LTSU2 inmates may retain books in their cells, and also have no special restrictions on their receipt of personal correspondence. See Pet. App. 47a. Respondent suggests that LTSU2 inmates nonetheless are denied the ability to keep abreast of "current political, social, and other public events." Br. in Opp. 5. A narrow focus on publications about current events, however, is not a "sensibl[e] and "expansive[]" understanding of the right at stake. *Abbott*, 490 U.S. at 417. At any rate, the restrictions do not prevent LTSU2 inmates from learning about current events through personal correspondence, or through their limited personal visits.

2. The remaining considerations under *Turner* are: (i) the impact on prison personnel, other inmates, and institutional resources, of accommodating the interest of LTSU2 inmates in possessing newspapers, magazines, and photographs; and (ii) the availability of "ready alternatives" to the challenged restrictions. *Turner*, 482 U.S. at 90. Cf. *O'Lone*, 482 U.S. at 352-353 (examining the two considerations together). With respect to the impact on prison personnel and other inmates, the challenged restrictions aim to deter extreme conduct of the kind that warrants transfer to the LTSU, and to induce behavioral reforms in the most unruly inmates. The restrictions thus are grounded in concerns about protecting the safety of prison personnel and other inmates. See *Turner*, 482 U.S. at 92 (deferring to judgment of prison officials that relaxing restrictions on inmate-to-inmate correspondence would threaten safety of "guards and other prisoners alike").

With respect to the availability of ready alternatives and the effect on institutional resources, the Court has emphasized that "*Turner* does not impose a least-restrictive alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Overton*, 539 U.S. at 136. The court of appeals proposed two alternative policies in place

of the one adopted by prison administrators. The first contemplates establishing a prescribed "reading period" during which corrections officers could bring a newspaper or magazine to an inmate's cell, and the second envisions officers escorting inmates to the secure LTSU library to read a newspaper or magazine. Pet. App. 22a-23a. Each of those alternatives would nullify the basic object of the restrictions by partially restoring the denied privileges without any demonstration of improved behavior on the part of LTSU2 inmates. For that reason alone, the court's preferred alternatives cannot be said to impose "so little cost to penological goals that they meet *Turner*'s high standard." *Overton*, 539 U.S. at 136.

The proposed alternatives also would impose potentially significant costs on prison resources by diverting corrections officers from other essential duties, either to facilitate escorting of each LTSU2 inmate to the designated reading area, or to permit delivering the materials to (and retrieving them from) each LTSU2 inmate's cell. See Pet. App. 29a (Alito, J., dissenting); see also *Abbott*, 490 U.S. at 419 (noting that "administrative inconvenience of [the] proposed alternative is also a factor to be considered"). The diversion of corrections officers raises particular concerns in the potentially volatile setting of the LTSU, which houses Pennsylvania's most dangerous inmates. In the LTSU, two officers must be on hand to escort any inmate for any permissible activity outside of his cell, including showers, exercise, disciplinary proceedings, and the like. Pulling officers away from those responsibilities to supervise inmate trips to a recreational "reading room" or to serve as librarians ferrying reading materials to and from inmates' cells would unduly interfere with the significant demands of securing the LTSU. For those reasons, the alternatives proposed by the court of appeals in no sense constitute "obvious, easy alternatives" to the policy chosen by Pennsylvania prison officials for dealing with the State's most dangerous and recalcitrant inmates. *Turner*, 482 U.S. at 90.

CONCLUSION

The judgment of the court of appeals should be reversed.

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