No. 03-636

In the Supreme Court of the United States

GARRISON S. JOHNSON, PETITIONER

v.

STATE OF CALIFORNIA, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

1. Whether state-imposed racial classifications in prisons are subject to strict scrutiny under the Equal Protection Clause.

2. Whether California's policy of segregating prisoners by race in two-person cells for a minimum of 60 days each time a prisoner enters a new institution violates the Equal Protection Clause.

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INTEREST OF THE UNITED STATES

The United States has an interest in what constitutional standard applies to claims alleging racial discrimination in violation of the Equal Protection Clause in prisons. This Court has held that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, proscribes only those racial classifications that would violate the Equal Protection Clause. See, *e.g.*, *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2347 (2003). The Attorney General has enforcement responsibility for Title VI and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3789d(c), which is modeled after Title VI, with respect to prisons that receive federal financial assistance. In addition, the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, authorizes the Attorney General to investigate conditions of confinement in correctional facilities when it is alleged

that prisoners are being deprived of constitutional rights pursuant to a pattern or practice of resistance to the full enjoyment of those rights. Finally, the United States, through the Bureau of Prisons (BOP), is responsible for ensuring compliance with the equal protection component of the Fifth Amendment in the 104 institutions it administers. Regulations governing BOP likewise prohibit racial discrimination in the making of administrative decisions and in the provision of access to work, housing, and programs. 28 C.F.R. 551.90.

STATEMENT

1. Petitioner, Garrison Johnson, is an African-American prisoner in the California Department of Corrections (CDC). He was initially incarcerated in 1987, and, since then, has been housed at a number of different CDC facilities. At each facility, he was double-celled with another African-American inmate. Pet. App. 2a.

All male inmates within the CDC,[1] upon arrival at a CDC institution either as a new inmate or as a transfer from another facility, are initially housed at a reception center for at least 60 days. During that period, inmates undergo a number of evaluations to determine where they should ultimately be placed. To determine inmates' initial double-cell housing placements at the reception center, the CDC looks at a number of factors, including race. Although race is not the sole factor, "it is a dominant factor." Pet. App. 3a. The CDC itself indicated that "the chances of an inmate being assigned

[1] Because petitioner is male, this case addresses only male housing policies. The court of appeals opinion does not indicate whether female inmates are similarly segregated by race. See Pet. App. 2a n.1.

a cell mate of another race [are] '[p]retty close' to zero percent." *Ibid.* Reception center officials further divide inmates within each racial category (black, white, Asian, and "other") by national origin or geography. For example, Asians of Japanese and Chinese descent are generally not housed together, nor are Hispanics from Northern California and Hispanics from Southern California. The CDC claims that race is considered because, in its experience, race is important to inmates and plays a significant role in antisocial behavior. *Id.* at 2a-4a.

Although race is used to determine initial double-cell placements, the rest of the prison is fully integrated. After 60 days at the reception center, the inmate either is assigned a cell within the current institution where he will be permanently housed or is transferred to another institution where his classification indicates that he would be better suited. If the inmate is transferred, he again goes through the initial race-based screening process. If the inmate stays at the institution and has the appropriate security classification, he may be transferred to a dormitory or a single cell or remain in a double cell. Race is not used as a factor in any of those placements, and inmates who remain in double cells are allowed to choose their own cell mate. Within each dormitory, however, the CDC attempts to maintain a racial balance so as to reduce the likelihood of racial violence. Pet. App. 4a-5a.

2. On February 24, 1995, petitioner filed his original complaint *pro se* in the Central District of California, alleging that the CDC's reception center housing policy violated his constitutional rights by assigning inmates' cell mates on the basis of race. In January 1998, the district court dismissed his third amended complaint without leave and petitioner appealed. The Ninth Cir-

cuit reversed, holding that petitioner's allegations were "sufficient to state a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." Pet. App. 5a-6a.

On remand, petitioner was appointed counsel and granted leave to amend his complaint. The district court granted summary judgment on behalf of the respondents on the ground that they were entitled to qualified immunity because their actions were not clearly unconstitutional. Pet. App. 6a-7a.

3. a. The court of appeals affirmed. The court held that the constitutionality of the CDC's race-based housing policy should be evaluated under the relaxed, deferential standard of review this Court articulated in *Turner* v. *Safley*, 482 U.S. 78, 89 (1987), rather than the strict scrutiny standard normally applied to government-imposed racial classifications. Pet. App. 8a-13a. The court acknowledged this Court's decision in *Lee* v. *Washington*, 390 U.S. 333 (1968), which held that racial segregation in prisons violates the Equal Protection Clause of the Fourteenth Amendment. It also noted that a three-Justice concurrence in that case recognized that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." Pet. App. 9a. The court of appeals, however, refused to apply *Lee*'s presumption of unconstitutionality to the racial classification at issue in this case, explaining that "[i]n 1987, in recognition of the unique circumstances that prisons present, the Supreme Court promulgated a new deferential test for examining the constitutional rights of prisoners [in] *Turner* v. *Safley*." *Id.* at 11a. Under that deferential standard, the court explained, "when a prison regulation impinges on inmates' constitutional

rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 12a (quoting *Turner*, 482 U.S. at 89).

The court further explained that it read *Turner* as at least partially overturning this Court's prior decision in *Lee*. According to the court, "*Turner* was not merely a cosmetic change in the Court's language"; instead, it "ostensibly expanded the definition of 'particularized circumstances' and 'necessary for security and discipline'"—*i.e.*, the limited circumstances that the concurring Justices in *Lee* suggested would be sufficient to justify a race-based prison housing policy—and, more generally, it "lowered the prison administrators' burden to justify race-based policies." Pet. App. 13a. Under *Turner*, therefore, the plaintiff, rather than the prison administrators, bears the "heavy burden" of proving that a race-based prison policy is unconstitutional. *Ibid.* Thus, the court held that "[t]o prevail, [Johnson] must overcome the presumption that the prison officials acted within their 'broad discretion'" in adopting their racial segregation policy. *Ibid.* (citation omitted). The court further held that to the extent that *Turner* and *Lee* "point to divergent paths, we are bound to follow *Turner*." *Ibid.*

In applying *Turner*'s test to the facts of this case, the court of appeals held that the CDC's race-based housing policy was reasonably related to prison administrators' concern about increased violence. Pet. App. 13a-31a. The court emphasized, however, that this was a "close case," in which "the standard of review is paramount." *Id.* at 11a. It acknowledged that there "may be many ways in which to achieve the state's objective in reducing racial violence in the CDC" and that "[i]f this policy were implemented beyond the prison walls, undoubtedly, we would strike it down as unconstitu-

tional." *Id.* at 31a. Nevertheless, it held that "[t]he prison system * * * is inherently different and we must defer our judgment to that of the prison administrators until presented evidence demonstrating the unreasonableness of the administrators' policy." *Ibid.* Here, the court concluded, petitioner "presented little to no evidence and could not rebut the presumption of constitutionality that the [prison] administrators are afforded" under the *Turner* standard. *Ibid.* Because the court held that petitioner did not prove that the CDC policy was unconstitutional, it did not reach "the ultimate question of whether the CDC administrators are entitled to qualified immunity." *Ibid.*

b. On July 28, 2003, the court of appeals denied petitioner's petition for rehearing, and a majority of the court voted to deny petitioner's suggestion for rehearing en banc. Judge Ferguson, joined by three other judges, dissented on the ground that the panel's opinion "impermissibly construes the Court's decision in *Turner* v. *Safley* * * * to overrule *Lee*." Pet. App. 38a. The dissenters explained that "[t]he panel's decision ignores the Supreme Court's repeated and unequivocal command that all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny and fails to recognize that [the] *Turner* analysis is inapplicable in cases, such as this one, in which the right asserted is not inconsistent with legitimate penological interest." *Ibid.* (internal quotation marks and citations omitted). They noted that "[l]ike the Eighth Amendment prohibition of cruel and unusual punishment, the Fourteenth Amendment's ban on invidious state discrimination specifically contemplates a limitation on state power that is 'complementary' to the goals of effective imprisonment." *Id.* at 48a-49a (citation omitted). They therefore distinguished

this case from all other cases to which *Turner* has been applied, noting that the rights asserted in those cases, unlike "the right to be free from state-sponsored segregation," are not "central to the legitimacy of our system of justice, including the penal system." *Id.* at 49a.

The dissenting judges also rejected the panel's suggestion "that strict scrutiny of race-based policies would unnecessarily limit prison officials' ability to effectively manage prisons or open the floodgates to frivolous litigation." Pet. App. 46a. They pointed out that this Court has explicitly recognized "unique circumstances under which a race-based classification may be permissible," *ibid.*, and stated that "it is possible, even likely, that prison officials could show that the current policy meets the test," *id.* at 47a.

SUMMARY OF ARGUMENT

1. The court of appeals erred in applying the deferential "reasonably related" standard articulated in *Turner* v. *Safley*, 482 U.S. 78 (1987), to determine whether the CDC's race-based housing policy violates the Equal Protection Clause of the Fourteenth Amendment. This Court has repeatedly held that *all* racial classifications imposed by government are subject to strict scrutiny review. This Court's decision in *Turner* did not change the longstanding principle that such racial classifications, which are suspect on their face, must be narrowly tailored to achieve a compelling government interest. In *Lee* v. *Washington*, 390 U.S. 333 (1968), this Court affirmed a district court's invalidation of a law requiring racial segregation in prisons on the ground that it was not narrowly tailored to the State's interest in maintaining prison security and discipline. The Ninth Circuit's decision in this case

erroneously construes *Turner* to overrule *Lee*. Nothing in the *Turner* opinion purports to overrule *Lee*. To the contrary, *Lee* remains viable and continues to be cited for the proposition that racial segregation in prisons is unconstitutional.

Moreover, *Turner* itself makes clear that its deferential standard applies only to rights that are inconsistent with proper incarceration. *Turner* thus applies to cases involving rights, such as associational, privacy, and First Amendment rights, that are inconsistent with the status of a prisoner or with legitimate penological objectives. But other rights, like the rights to be free from racial discrimination or cruel and unusual punishment, are not inconsistent with proper prison administration, and indeed bolster the legitimacy of our criminal justice system, including the penal system. For this reason, this Court has never applied *Turner* in the Eighth Amendment context, and a number of lower courts have refused to apply *Turner* to suspect-classification equal protection claims. Indeed, application of *Turner*'s highly deferential standard of review to evaluate the constitutionality of racial classifications would undermine the purpose of the Fourteenth Amendment, which is to limit States' discretion in matters of race. Applying *Turner* to suspect classifications would undermine a basic premise of this Court's equal protection jurisprudence by effectively subjecting all classifications, including those along expressly racial lines, to rational basis review.

Continuing to apply strict scrutiny to racial classifications in the prison context would not preclude prison administrators from using race in certain, limited circumstances, or courts from applying appropriate deference to such judgments. To the contrary, *Lee* explicitly recognizes that there may exist some par-

ticularized circumstances in which race may be used for the necessities of prison security and discipline. Indeed, this Court has repeatedly disclaimed the view that strict scrutiny is strict in theory, but fatal in fact. Strict scrutiny clearly permits courts to distinguish between efforts to restore order in the immediate wake of a prison disturbance with racial overtones, and the kind of permanent, institutionalized use of race to segregate inmates at issue here and in *Lee*.

2. The CDC's race-based housing policy cannot survive strict scrutiny. The State has identified a compelling interest in maintaining prison security and minimizing racial violence, but it has failed to demonstrate that its segregation policy is narrowly tailored to advance that interest. The record is devoid of specific, widespread instances of such violence in the reception-center cells. Yet, the plan applies to all inmates housed in reception centers at all CDC facilities, including transferred inmates who have established records of nonviolence. This fact contradicts the CDC's contention that race-based housing assignments are justified in the reception centers because officials need at least 60 days to determine whether inmates pose a danger to others. Moreover, at the same time respondents argue that segregation is necessary to minimize racial violence, they assert that racial integration is used to minimize that same violence in prison dormitories. Accordingly, the CDC's race-based housing policy is not narrowly tailored, but arbitrary. Indeed, the policy would even fail the relatively undemanding *Turner* standard, if that standard were applicable.

ARGUMENT

I. STRICT SCRUTINY, RATHER THAN *TURNER*'S "REASONABLY RELATED" STANDARD, APPLIES TO THE CDC'S RACE-BASED HOUSING POLICY

A. All Race-Based State Actions Must Satisfy Strict Scrutiny

The court of appeals erred in applying the deferential "reasonably related" standard articulated in *Turner* v. *Safley*, 482 U.S. 78 (1987), to determine whether the CDC's race-based housing policy violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that no State shall "deny to any persons within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. "Because the Fourteenth Amendment 'protect[s] *persons*, not *groups*,' *all 'governmental action based on race*—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.'" *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2337 (2003) (emphasis added) (quoting *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995)).

Thus, it is well-settled that "*all racial classifications imposed by government* 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 123 S. Ct. at 2337, 2338 (emphasis added) (quoting *Adarand*, 515 U.S. at 227). This Court has repeatedly explained that:

> "[a]bsent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*

Grutter, 123 S. Ct. at 2338.

Indeed, without any indication that it was applying anything other than the traditionally searching review of racial classifications under the Fourteenth Amendment, this Court, in *Lee* v. *Washington*, 390 U.S. 333 (1968), "smoked out" one such illegitimate use of race by prison officials more than 35 years ago. In *Lee*, this Court rejected the State's contention that requiring desegregation of prisons would fail to "make * * * allowance for the necessities of prison security and discipline." 390 U.S. at 334. Three Justices concurred "to make explicit something that is left to be gathered only by implication from the Court's opinion[]," namely "that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Ibid.* The concurring Justices were quick to add, however, that they were "unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this

Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Ibid.*

As the *Lee* concurrence makes clear, the majority did not relax the standard of review for race-based equal protection claims in the prison context. To the contrary, *Lee* suggests only that "necessities of prison security and discipline" might provide a compelling government interest sufficient "in particularized circumstances" to justify the use of a narrowly tailored racial classification, not that the use of race to address such necessities is presumptively constitutional. See, *e.g.*, *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972) ("[R]acial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline.'") (quoting *Lee*, 390 U.S. at 334); *Grutter*, 123 S. Ct. at 2352 (Thomas, J., concurring in part and dissenting in part) (citing *Lee* for the proposition that "protecting prisoners from violence might justify narrowly tailored racial discrimination"); *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (citing *Lee* for the proposition that "[a]t least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens'" (citations omitted)); cf. *Sockwell* v. *Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (relying on *Lee* to hold that prison authorities' "generalized or vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation").

B. *Turner*'s "Reasonably Related" Standard Does Not Apply To The Fourteenth Amendment's Prohibition Of Racial Discrimination

By applying *Turner*'s "reasonably related" standard to a suspect-classification equal protection claim, the Ninth Circuit effectively construed *Turner* to overrule *Lee* and this Court's repeated command that "all" governmental racial classifications be subject to strict scrutiny analysis. See Pet. App. 13a ("Thus, to the extent, if any, that *Turner*'s 'reasonably related' standard and *Lee*'s 'particularized circumstances' inquiry point to divergent paths, we are bound to follow *Turner*."). But *Turner* did no such thing. Rather, *Turner* considered the constitutionality of prison regulations related to correspondence between inmates and inmates' right to marry. 482 U.S. at 81-82. This Court began its analysis by reaffirming the longstanding principle that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," and that prisoners retain a number of constitutional rights, including, under *Lee*, the right to be "protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 84. This Court also explained that "[p]rison administration is * * * a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint." *Id.* at 85. Accordingly, the *Turner* Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. The Court explained that "such a standard is necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional opera-

tions.'" *Ibid.* (citation omitted). However, this Court has never applied this standard, or otherwise exercised "judicial restraint," in evaluating claims of invidious racial discrimination under the Equal Protection Clause.

Indeed, this Court has suggested that *Turner*'s deferential standard applies only to rights that are "inconsistent with proper incarceration." *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003). In *Shaw* v. *Murphy*, 532 U.S. 223 (2001), for example, the Court explained:

> [T]he constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large. 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." We have thus sustained proscriptions of media interviews with individual inmates, prohibitions on the activities of a prisoners' labor union, and restrictions on inmate-to-inmate written correspondence. Moreover, because the "problems of prisons in America are complex and intractable," and because courts are particularly "ill equipped" to deal with these problems, we generally have deferred to the judgments of prison officials in upholding these regulations against constitutional challenge.

Id. at 229 (citations omitted); see *O'Lone* v. *Shabazz*, 482 U.S. 342, 348 (1987) ("[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." (citation omitted)). The cases to which this Court has applied the *Turner* standard are markedly different than this

one, in that they involved restrictions on the exercise of rights which, by their very nature, may be incompatible with legitimate penological interests. See, *e.g.*, *Overton*, 539 U.S. at 131 (freedom of association claims relating to family visitation); *Shaw* v. *Murphy*, 532 U.S. 223, 228 (2001) (First Amendment challenge to prison regulation restricting inmate correspondence); *Washington* v. *Harper*, 494 U.S. 210, 221-223 (1990) (due process challenge to involuntary medication of mentally ill prisoner); *Thornburgh* v. *Abbott*, 490 U.S. 401, 407 (1989) (First Amendment challenge to prison regulations governing receipt of subscription publications); *O'Lone*, 482 U.S. at 349-350 (Free Exercise Clause challenge to prison work rules that had the effect of limiting prisoners' attendance at particular religious services).

In contrast, the right to be free from invidious racial discrimination under the Equal Protection Clause of the Fourteenth Amendment is not only fully consistent with proper prison administration, but it bolsters the legitimacy of the criminal justice system, including the penal system. See, *e.g.*, *Rose* v. *Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *Batson* v. *Kentucky*, 476 U.S. 79, 99 (1986) ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."). In this respect, petitioner's asserted right is akin to the right to be free from cruel and unusual punishment under the Eighth Amendment, violations of which, even after *Turner*, are judged according to the Eighth Amendment "deliberate indifference" standard, rather than a "reasonably related" standard. See, *e.g.*, *Hope* v. *Pelzer*, 536 U.S. 730, 738 (2002). Accordingly,

the Ninth Circuit itself previously refused to apply *Turner* to a prisoner's Eighth Amendment claim, explaining that "*Turner* has been applied only where the constitutional right is one which is enjoyed by all persons, but the exercise of which may necessarily be limited due to the unique circumstances of imprisonment." *Jordan* v. *Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993). Similarly, other circuit courts have refused to apply *Turner* to suspect-classification equal protection claims. See *Pitts* v. *Thornburgh*, 866 F.2d 1450, 1454 (D.C. Cir. 1989) (refusing to apply *Turner* to a gender-based equal protection claim); *Sockwell*, 20 F.3d at 191 (post-*Turner* decision applying *Lee* to hold unconstitutional racial segregation of prisoners in two-person cells, despite prison authorities' asserted interest in prison security); *Black* v. *Lane*, 824 F.2d 561, 562 (7th Cir. 1987) (post-*Turner* decision holding that "absent a compelling state interest, racial discrimination in administering prisons violates the Equal Protection Clause of the Fourteenth Amendment"); see also *Pargo* v. *Elliott*, 49 F.3d 1355, 1357 (8th Cir. 1995) (noting that "*Turner* does not foreclose all heightened judicial review"). But cf. *Morrison* v. *Garraghty*, 239 F.3d 648, 652, 655 (4th Cir. 2001) (applying *Turner* to equal protection challenge to prison policy that "requests for acquiring or maintaining existing articles of Native American faith will only be considered for those inmates who are bona fide Native Americans") (emphasis omitted).

In *Pitts*, for example, the D.C. Circuit held that *Turner*'s "reasonably related" standard was inappropriate for a case arising under the Equal Protection Clause because such a case "touches upon important concerns that the Supreme Court has clearly held call for stepped-up scrutiny." 866 F.2d at 1454. The court

further explained that suspect-classification equal protection claims "differ in kind from challenges to limitations upon personal rights" that are subject to *Turner*'s "reasonably related" standard. *Id.* at 1455. As the court explained:

> While an equal protection claim, too, is in one sense a personal right—*i.e.*, the right not to be discriminated against—the claim is also a demand that governmental action that affects an individual not be predicated upon constitutionally defective reasoning. The claim charges invidiousness, rather than an unwarranted interference with constitutionally secured liberties. This difference is illustrated by the many cases finding that even [when] the government favors a traditionally protected class * * *, its acts are still subject to heightened scrutiny.

Ibid.

Indeed, application of *Turner* to state imposed classifications based on race in prisons would require courts to presume the constitutionality of inherently suspect uses of race based on the "common-sense" of state officials. Pet. App. 19a-22a. But the "sensibility" of States in matters of race was the primary concern behind the Fourteenth Amendment's Equal Protection Clause, see, *e.g.*, *Rose*, 443 U.S. at 554-555. Moreover, application of *Turner* to race-based prison policies would allow the government to use race when there are race-neutral means to accomplish the same goal and when the policy does not even advance that goal, but prison administrators might reasonably believe that it does. Cf. Pet. App. 22a. A policy of judicial deference that presumes that a State's use of race is appropriate unless the inmate overcomes a "high burden" of proving

to the contrary would therefore undermine the very purpose of the Fourteenth Amendment. See, *e.g.*, *Pitts*, 866 F.2d at 1455 ("The court may not slight the task more directly committed to it in a live case or controversy and which is peculiarly within its competence and historic mission: rooting out invidious discrimination condemned by the Constitution.").

Allowing *Turner*'s deferential standard of review to trump strict scrutiny of racial classifications would undermine a fundamental premise of this Court's Equal Protection Clause jurisprudence. Under the analysis adopted by the court below, all government classifications in the prison context would effectively be subject to rational basis review without regard to whether the classification is drawn along racial lines. But this Court's decisions make clear that racial classifications are uniquely invidious and particularly likely to lead to abuse. For that reason, in many contexts where government action generally is reviewed deferentially or not at all, government action based on race is subject to strict scrutiny. For example, despite the deference generally given to prosecutors in employing peremptory challenges, see *Batson*, 476 U.S. at 89 (noting that "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried" (citation omitted)), the use of peremptory challenges to strike jurors on the basis of race is forbidden, *id.* at 89-96. Similarly, despite this Court's recognition of the difficulties of imposing judicially manageable standards for reviewing redistricting decisions, see generally *Vieth* v. *Jubelirer*, 124 S. Ct. 1769 (2004), racial gerrymandering is forbidden, see *Shaw* v. *Reno*, 509 U.S. 630, 650 (1993) ("[N]othing in our case law compels

the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." (citation omitted)). And as the dissenting judges below noted, notwithstanding the high degree of deference generally owed to the political branches in the conduct of military affairs, see, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981), even "military officials acting during wartime are subject to strict scrutiny" when they take expressly race-based actions. Pet. App. 42a. It necessarily follows that "prison officials engaging in the routine performance of their duties should be subject to [strict scrutiny] as well." *Ibid.*

C. Application Of Strict Scrutiny Would Preserve Any Legitimate Need For Flexibility By Prison Officials

Application of strict scrutiny to racial classifications in the prison context would not foreclose the use of such classifications in certain "particularized circumstances." *Lee*, 390 U.S. at 334. Indeed, *Lee* explicitly recognized that "necessities of prison security and discipline" could provide a compelling justification for a narrowly tailored use of race. *Ibid.*; accord *Grutter*, 123 S. Ct. at 2352 (Thomas, J., concurring in part and dissenting in part); *Croson*, 488 U.S. at 521 (Scalia, J., concurring). This Court has repeatedly stated that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'" *Grutter*, 123 S. Ct. at 2338 (citation omitted). Rather, as the Court explained in *Grutter*, "[c]ontext matters when reviewing race-based governmental action under the

Equal Protection Clause." *Ibid.* "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context." *Ibid.*

Applying heightened scrutiny to a gender-based equal protection claim in the prison context, for example, the D.C. Circuit explained that the "inquiry must still acknowledge the importance of the state's interest in the prison context. * * * This acknowledgment of the difficulties inherent in the prison context does not reduce or eviscerate heightened scrutiny, but it does recognize that those difficulties do not disappear once a party raises a discrimination claim." *Pitts*, 866 F.2d at 1455.

Moreover, even under strict scrutiny, the expertise of prison officials must be taken into account, and some flexibility must be accorded prison officials who, "acting in good faith and in particularized circumstances," adopt race-based policies for the purpose of "maintaining security, discipline, and good order in [their] prisons and jails." *Lee*, 390 U.S. at 334 (concurring opinion). Such deference, properly constrained, is not inconsistent with the application of strict scrutiny in this type of highly specialized context. Cf. *Grutter*, 123 S. Ct. at 2339 (affording "a degree of deference" to judgments by law school officials about importance and benefits of diversity in achieving their educational goals); *id.* at 2349 (Scalia, J., concurring in part and dissenting in part) (noting that affording university officials "a degree of deference" in using race to achieve their goal of diversity "does not imply abandonment or abdication of judicial review") (citing *Miller-El* v. *Cock-*

rell, 537 U.S. 322, 340 (2003)). In sum, strict scrutiny allows courts to distinguish between the use of race "in particularized circumstances," such as the restoration of order in the immediate aftermath of a prison disturbance with racial overtones and the kind of systematic, institutionalized racial discrimination condemned in *Lee* and at issue here.

II. THE CDC'S RACE-BASED HOUSING POLICY VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT IS NOT NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST

To withstand strict scrutiny, the State must establish that it has a compelling interest in using race to determine housing placements at CDC reception centers and that its race-based housing policy is narrowly tailored to achieve that goal. *Adarand*, 515 U.S. at 227. The record is more than adequate for this Court to conclude that, even though the State has a compelling interest in the security and safety of its prisons, its race-based housing policy is not narrowly tailored to achieve that goal. Indeed, both the court of appeals and the district court concluded that the CDC policy passes muster only under the highly deferential "reasonably related" standard articulated in *Turner*, and that it would likely fail under any heightened standard of review. See Pet. App. 31a, 33a-35a.

A. The CDC Has A Compelling Interest In The Security, Discipline, And Good Order Of Its Prisons

As suggested by this Court's decision in *Lee*, the State has a compelling interest in "the security, discipline, and good order" of its prisons. 390 U.S. at 334 (concurring opinion). Indeed, this Court has repeatedly acknowledged the vital need of prison officials to maintain the security and safety of their institutions.

See, *e.g.*, *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977) (Burger, C.J., concurring) (noting that "[p]risons, by definition, are closed societies populated by individuals who have demonstrated their inability, or refusal, to conform their conduct to the norms demanded by a civilized society"); see also *Pell*, 417 U.S. at 826-827 ("The 'normal activity' to which a prison is committed—the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence—necessarily requires that considerable attention be devoted to the maintenance of security.").

B. The CDC's Segregation Policy Is Not Narrowly Tailored To Achieve Its Compelling Interest In Prison Security

As *Lee*'s concurring opinion makes clear, a State's compelling interest in the security, discipline, and good order of its prisons does not relieve state prison officials of their constitutional obligation to ensure that any consideration of race as a means of achieving those goals is narrowly tailored. 390 U.S. at 334. "The purpose of the narrow tailoring requirement is to ensure that the means chosen fit . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Grutter*, 123 S. Ct. at 2341 (internal quotation marks and citations omitted). Thus, narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the [compelling government interest]." *Id.* at

2345. Race-based policies, therefore, that use race in lieu of any individualized consideration generally do not satisfy strict scrutiny. See, *e.g.*, *id.* at 2343 (distinguishing constitutional race-conscious law school admissions program that "engages in a highly individualized, holistic review of each applicant's file" from undergraduate admissions program that awards automatic "bonuses" to applicants on the basis of race).

Even taking the expertise of prison officials into account and affording them an appropriate level of flexibility in determining the best way to address their concerns for prison security, the record, as summarized by the court of appeals, fails to establish that the CDC's race-based housing policy is narrowly tailored to achieve a compelling government interest. The CDC policy, which does not even seem to exist in written form, applies to *all* CDC institutions and to *all* inmates, including transfers from other CDC facilities, no matter how long inmates have been institutionalized without incident and regardless of their propensity to engage in racial violence. The fact that the policy applies to transfers as well as new arrivals substantially detracts from the prison administrators' argument that segregation is justified in the reception centers because "they need 60 days to analyze each inmate on an individual basis to determine whether the inmate poses a danger to others." Pet. App. 4a. Petitioner, for example, has been an inmate in the CDC for almost twenty years and, during that period, has been transferred a number of times. By now the CDC has undoubtedly gauged his propensity to engage in racial violence, yet it continues to subject him, and all other inmates, to the race-based housing policy every time he is transferred to a new institution.

At a minimum, there is no reason to believe that the CDC could not address its security concerns through a system that was "flexible enough to ensure that each [inmate] is evaluated as an individual and not in a way that makes [his] race or ethnicity the defining feature of his [placement]." *Grutter*, 123 S. Ct. at 2343. This Court has repeatedly characterized the importance of such individualized consideration in the context of race-based state action as "paramount," see, *e.g.*, *id.* at 2343, and it has never upheld a State's use of a racial classification without at least ensuring that the State has afforded each person subject to the racial classification individualized consideration.

Moreover, the CDC's view that segregation is necessary to minimize "racially based conflict in the cells and in the yard," Pet. App. 4a, is inconsistent with its position that maintaining racial integration within the dormitories it uses to house prisoners after the initial segregated period "reduce[s] the likelihood of racial violence," *id.* at 5a. In petitioner's case, for example, he has been repeatedly transferred from an institution's general population where racial integration is the preferred means of promoting security to a new institution's reception center where racial segregation is applied to the same end.

The CDC's racial segregation policy is also inconsistent with the expert determinations of the Federal Bureau of Prisons (BOP) and virtually all other States, which address concerns of prison security through individualized consideration without the use of racial segregation, unless warranted as a necessary and temporary response to a race riot or other serious threat of race-related violence. Federal regulations and BOP policy expressly forbid racial segregation in the federal prison system. The governing regulation, 28 C.F.R.

551.90, entitled "Non-Discrimination Toward Inmates," provides:

> Bureau staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.

Ibid. In furtherance of that regulation, BOP Program Statement 1040.04 (Jan. 29, 1999), directs each Warden to "review and, as necessary, establish local procedures to ensure that inmates are provided essential equality of opportunity in being considered for various program options, work assignments, and decisions concerning classification status." While rejecting the kind of segregation reflected in the policy at issue here, BOP does consider race as one of many demographic factors, such as age, nationality, religion, and gang affiliation, to promote integrated and diverse institutions and housing units. Thus, although generally not a factor in making housing determinations, BOP monitors the racial composition of its institutions and may consider race in overseeing the population of an institution as necessary to ensure that the institution does not become de facto segregated.

Thus, while BOP recognizes the serious problem of racial violence in the prison context, it does not accept generalized assumptions that persons of different races cannot safely be housed together. Rather, federal prisons are committed to a policy of non-discrimination in housing, as well as in all other prison programs. In BOP's judgment and experience, this policy leads to less violence in BOP's institutions and better prepares inmates for re-entry into society. For these same

reasons, BOP does not allow inmates to choose their cellmates.

Moreover, in addressing more particularized concerns about racial violence, BOP focuses on inmate behavior, not race. If an inmate is disruptive to particular inmates, he is removed and placed in a higher security environment to remove the threat to others. Any such judgment, however, is based on an individualized assessment of a prisoner's behavior and background, not on assumptions based on race.

Like BOP, most States follow a non-discrimination policy in making inmate housing determinations.[2] Moreover, BOP is not aware of any State that follows

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[2] See generally Martha L. Henderson et al., *Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells*, 80 Prison J. 295, 301-307 (2000); see also, *e.g.*, Ariz. Corr. Reg. § 908.02(1.5) (Sept. 1, 1996) (prison administrators shall "[b]ase inmate housing assignments on sound correctional classification practices and not discriminate against any individual or group of inmates when assigning inmate housing"; "[i]nmates shall be assigned to a cell on a random basis"); Colo. Corr. Reg. § 850-15 (Oct. 15, 2003) ("ensur[ing] that offender program access, work assignments, and administrative decisions are made without regard to offenders' race"); Conn. Corr. Reg. § 9.2(1) (Mar. 5, 2003) ("The [inmate] classification system shall not foster discrimination in status, including housing, programming, job assignment, or on the basis of race, creed, color, or national origin."); Tenn. Corr. Reg. § 506.14(VI)(A)(4) (Aug. 15, 2003) (housing assignments "shall not be made on the basis of race, color, national origin, religion, or political views unless it is justified by legitimate and documented security concerns (i.e., opposing or rival security threat group affiliation)"); accord American Corr. Ass'n, *Standards for Adult Correctional Institutions* 76 (4th ed. 2003) (Standard 4-4277: requiring "[w]ritten policy, procedure, and practice prohibit[ing] discrimination based on an inmate's race * * * in making administrative decisions and in providing access to programs").

California's practice of racially segregating all new inmates in a facility, even those that have been transferred from another institution and that have no gang affiliation or history of race-related violence. That BOP and other States address identical concerns of prison security through race-neutral or more narrowly tailored practices demonstrates that the CDC's segregation policy is substantially overbroad and unnecessary to achieve the compelling interest of prison security. It also places this case in stark contrast to the *Grutter* case, in which the majority of States viewed the consideration of race as necessary to acheive a compelling interest. See *Grutter*, 123 S. Ct. at 2339-2341 (affording deference to law schools' assessments of the educational benefits of racial diversity where those assessments were supported by social science studies and numerous amici in the fields of education, business, and the military).[3]

The Fifth Circuit's decision in *Sockwell* v. *Phelps*, *supra*, is instructive. There, the court struck down a

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[3] Indeed, the CDC's policy is particularly inappropriate in light of recent evidence that integration of two-person cells does not lead to increased violence and that it actually may decrease violence. See, *e.g.*, Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 L. & Soc'y Rev. 743, 774 (2002) (After integration of two-person cells in Texas, "the rate of assaults among desegregated inmates was less than or at least equal to the rate of assaults among inmates who were not desegregated. Integration did not result in disproportionate violence; rather, over the long term, the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated."); see also, *e.g.*, Henderson et al., *supra*, at 304, 307 (noting that the majority of prison wardens surveyed stated that integrating cells would decrease or have no effect on the level of violence in an institution).

Louisiana prison policy that, like the CDC's policy in this case, required segregation of all prisoners housed in two-person cells, although the rest of the prison was fully integrated. 20 F.3d at 190. A deputy warden testified that the policy was motivated by security concerns and past incidents of violence between black and white prisoners. *Id.* at 191. The court, relying on *Lee*, held that the prison administrators' asserted generalized security interest did not justify a systematic, institutionalized policy of racial segregation in two-person cells. Rather, the court explained that "[i]f violent disruptions did occur, we would expect the prison officials to take appropriate action against the offending prisoners, black or white." *Ibid.* The court further held that although "racial segregation of offending individual prisoners would be acceptable if, based on an individualized analysis, the prison officials determined such action would be needed to stifle particular instances of racial violence," the administrators' broad contention "that integrated two-man cells may lead to more violence between black and white prisoners is not tenable." *Ibid.*[4]

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[4] Similarly, on the few occasions in which courts have confronted prison polices, like the CDC's, of temporary racial segregation for newly received inmates, they have not hesitated to strike down the policies. See *Blevins* v. *Brew*, 593 F. Supp. 245, 248-249 (W.D. Wis. 1984) (assigning new inmates to double cells in temporary reception centers based on race in a federal correctional facility "violated clearly established constitutional rights" because "racial segregation is an appropriate response [to racial conflict] only if no other means are available for maintaining prison security or discipline"); *Stewart* v. *Rhodes*, 473 F. Supp. 1185, 1187-1190 (S.D. Ohio 1979) (assigning inmates to double cells based on race in a receiving and processing center was unconstitutional because there was no evidence that integration would lead to increased violence), appeal dismissed, 661 F.2d 934 (6th Cir. 1981).

Likewise here, the CDC's housing policy is not based on individualized analysis, but rather, on general fears of racial violence. As in *Sockwell*, there is no evidence of widespread instances of serious racial violence in CDC reception-center cells across the State. The only evidence offered by the State in support of the policy—testimony conveying prison officials' general fears of racial violence, as well as some anecdotal testimony and newspaper articles relating to race riots that occurred at a single CDC institution, Pelican Bay, several years ago—is simply insufficient to justify a statewide, general policy of segregation. See Pet. App. 4a, 16a-17a n.9. See also *United States* v. *Wyandotte County*, 480 F.2d 969, 971 (10th Cir.) (holding that a vague fear of racial violence on the part of prison authorities is insufficient to justify a broad policy of segregation), cert. denied, 414 U.S. 1068 (1973).

In short, the policy is not narrowly tailored, but arbitrary.[5] As the three-judge district court in *Lee* explained:

> We recognize that there is merit in the contention that in some isolated instances prison security and discipline necessitates segregation of the races for a limited period. However, recognition of such instances does nothing to bolster * * * the general practice that requires or permits prison or jail officials to separate the races arbitrarily. Such * * * practices must be declared unconstitutional in light of the clear principles controlling.

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[5] Indeed, the CDC's race-based housing policy, which would subject even inmates with an established record of nonviolence to racial segregation every time they are transferred to a new institution, would not satisfy a proper application of *Turner*'s "reasonably related" standard, much less strict scrutiny.

Washington v. *Lee*, 263 F. Supp. 327, 331-332 (D. Ala. 1966). The CDC's race-based housing policy for its reception-center cells is therefore unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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