

No. 04-1739

IN THE
Supreme Court of the United States

JEFFREY BEARD,
Petitioner,

v.

RONALD BANKS,
Respondent.

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

**BRIEF FOR PRISON LEGAL NEWS, REPORTERS
COMMITTEE FOR FREEDOM OF THE PRESS, THE
FREEDOM TO READ FOUNDATION, THE ASSOCIATION
OF AMERICAN PUBLISHERS, THE AMERICAN
BOOKSELLERS FOUNDATION FOR FREE EXPRESSION,
AND PUBLISHERS MARKETING ASSOCIATION AS
AMICI CURIAE IN SUPPORT OF RESPONDENT**

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February 16, 2006

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INTEREST OF THE AMICI CURIAE¹

Amici curiae, publishers, reporters, librarians, retailers, and other disseminators of books, newspapers and magazines, carry on the strong historic tradition recognizing the importance of an informed citizenry and thus provide communicative works, both serious and entertaining, which for more than 200 years have been protected by the First Amendment. *Amici* file this brief because the Pennsylvania Department of Corrections' blanket policy banning access for an indefinite period to virtually any and all newspapers, magazines and photographs, irrespective of content, by Level 2 inmates is an unconstitutional infringement on the rights of those prisoners. The extreme broad-brush policy impermissibly stifles the constitutionally protected free flow of information and communication in the prison context. The right to open access to the media, including sources for discussions of current national and worldwide news and events, is a fundamental right safeguarded by the First Amendment. The policy imposed by Pennsylvania violates the prisoners' ability to exercise this basic right and also unnecessarily interferes with the public interest in bringing to light possible abuse or inhumane conditions in prisons.

Access to media reports of, and discussion of issues related to, current news and events is critical. Prisoners should not be denied the right to full information concerning the United States and countries around the world, particularly against the backdrop of recent geopolitical events. Nor should prisoners be prohibited from reading short stories, reports about what is happening in sports and other areas of general interest, or lighter materials. The ability to access information by reading newspapers and

¹ No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been filed with this Court.

magazines is essential to the education and advancement of all persons—including, in particular, those who presently are in prison but may return to society.

The statements of interests of the individual *amici curiae* are set forth in the Appendix.

STATEMENT OF THE CASE

This case is about the free speech rights of prisoners and their media correspondents. Pennsylvania imposes a set of prison regulations that impermissibly curtails the First Amendment rights of newspaper and magazine publishers and writers to transmit ideas and information. Unless a publication is deemed by prison officials to be religious or legal in nature, publishers have no way of sending newspapers and magazines to individuals housed in Level 2 of Pennsylvania's Long Term Segregation Unit ("LTSU"). *Banks v. Beard*, 399 F.3d 134, 137 (3d Cir. 2005). Whether a publication falls into one of these categories is left to the standardless discretion of prison officials. As the exceptions have been applied, the free speech rights of some religious publishers have been infringed, *see* Jt App 179 (Level 2 inmates not permitted to receive the *Christian Science Monitor*, a weekly newspaper published by the First Church of Christ, Scientist), as have the rights of legal news publishers, *see* Jt App 49 (Level 2 inmates not permitted to receive *Graterfriends*, a monthly publication containing news on legal and other developments affecting prisoners).

A prisoner may be kept at Level 2 indefinitely. Jt App 131 (the duration of a prisoner's classification at Level 2 is a minimum of 90 days and has in some cases lasted months and even years). Prison officials encourage inmates entering LTSU to cancel all newspaper and magazine subscriptions. Jt App 158. If the prisoner does not cancel the subscription, the publications are kept in a property box for him; after the box capacity is filled, the publications are destroyed or otherwise disposed of. Jt App 159.

SUMMARY OF ARGUMENT

This case strikes at the heart of the First Amendment's protection of the exchange of information and enlightened participation of all citizens in a democratic government. Although the direct effect of the challenged prison regulation is to block the flow of information into the prison, its impact extends beyond prison walls. It treads heavily on the rights of the print media and interferes with the media's central function as "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Houchins v. KQED*, 438 U.S. 1, 17 (1978) (Stewart, J., concurring). The media's ability to fulfill its function as the so-called Fourth Estate depends on its access to the darkest corners of the nation, "acting as the 'eyes and ears' of the public," and, at times, as its voice. *Id.* at 8 (opinion of Burger, C.J., announcing judgment of the Court).

Where the venue is under the exclusive control of the government, as with prisons, several principles deserve consideration. It is true that the Constitution's guarantees of free speech and press do not grant the media a freestanding right to enter governmental institutions. *See Pell v. Procunier*, 417 U.S. 817, 834 (1974). Its access can, and has been, tightly circumscribed. *See, e.g., id.* (prisons may deny journalists access to face-to-face interviews with specific prisoners); *KQED*, 438 U.S. 1 (jail can prohibit use of sound and image recording devices and can restrict media tours). But the media's interest in access to prisons is not limited to direct investigative reporting. Printed publications convey information as well as provide a forum for discussion and response. An inmate who has access to newspapers and magazines might, for example, read a news article discussing matters he is personally familiar with—perhaps prison conditions—and respond to the editor by offering relevant information or a unique perspective. Only his receipt of the

news publication enables this important mechanism of exchange to occur. The media entities' and prisoners' speech rights are, in this manner, "inextricably meshed." *Procunier v. Martinez*, 416 U.S. 396, 409 (1974).

Here, the constriction on media access is too tight for the Constitution to tolerate. Pennsylvania's policies destroy the mechanism of expressive exchange between print media entities and the affected class of prisoners. Its attempt to amputate a segment of the prison population from the outside world harms the rest of society, and is precisely the type of government action that the First Amendment was designed to restrain. Under the circumstances created by the near-absolute ban on newspapers and magazines, the competing interest of allowing the government broad discretion in the administrative duties of running a prison cannot trump the weighty concerns of the press and the public in fostering the healthy exchange of ideas.

Aside from personal letters, news clippings related to the inmate or his family, and a narrowly drawn category of religious and legal materials, the only written materials available to Level 2 inmates are "leisure books" from the prison library. *Banks*, 399 F.3d at 137; Jt App 48. As a result, inmates effectively are cut off from news of current events and other developments in the outside world. *See id.* (inmates are shut in single occupancy cells for twenty-three hours a day with no radio or television and permitted only one visit per month with immediate family members). Prison policies provide for a behavioral review where, subject to the discretionary decision of prison officials, an inmate can be promoted to a less restricted status. *Banks*, 399 F.3d at 141; Jt App 26. Due to the subjective nature of the review, there is no reasonable assurance that even exemplary behavior in Level 2 status will earn a relaxation of the restrictions. *Accord* Chase Riveland, U.S. Dep't of Justice, *Supermax Prisons: Overview and General Considerations* 8-9 (1999) ("[A]dministrative segregation of

an inmate...is an approved remedy [in some institutions] without application of objective criteria or verified misconduct.... Following periodic reviews, segregation of such inmates may then be continued, despite exemplary behavior in segregation....”).

Publishers, editors, and writers have little effective means of communicating with these inmates. Direct personal letters to individual prisoners are not a realistic option for print media since ideas and information expressed through printed publications lose fundamental characteristics if redirected through individual letters. Personal letters to prisoners cannot contain the same breadth of information, juxtaposition of different opinions, or graphics and photographs, or capture the common experience enjoyed by those who read the same article in a publication. Corresponding this way is practically impossible for publishers and writers given the fundamental purpose of the printed publication to facilitate widespread dissemination of information at minimal cost. Although an inmate can initiate correspondence with the editor of a particular publication by sending a personal letter, the Level 2 policies deny the inmate access to the materials most likely to cause him to correspond in the first instance—the publications themselves. In this way, the prison’s ban on general publications disrupts the basic discursive function of informative or opinion pieces, which catalyze idea exchange by presenting views likely to generate responsive expression.

First Amendment rules applicable to non-public fora govern the Court’s review of the Pennsylvania policy. In the prison context, these rules are set forth in a multifactor test that requires federal courts to balance cautiously the legitimate needs of prison administration and “the need to protect constitutional rights.” *Turner v. Safley*, 482 U.S. 78, 85 (1987) (alteration omitted). The manifold nature of the *Turner* test recognizes the tension between these competing goals. At risk on one hand is judicial disruption of the

