No. 99-1613

In the Supreme Court of the United States

ROBERT SHAW, ET AL., PETITIONERS

v.

KEVIN MURPHY

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the court of appeals erred in holding that respondent's conduct was protected by a First Amendment right of prison inmates to provide legal assistance to other inmates.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether a prison inmate has a First Amendment right to provide assistance with pending criminal charges to another inmate who is represented by appointed defense counsel. The United States has a substantial interest in the resolution of that question. First, the Federal Bureau of Prisons (BOP) operates more than 90 penal institutions across the country, and has adopted regulations governing inmate legal activities, see 28 C.F.R. 543.10-543.16, and inmate correspondence on legal and other matters, see 28 C.F.R. 540.10-540.25.[1] The Court's

[1] For example, BOP regulations permit inmates to provide legal assistance to other inmates in the same institution, but provide that "[t]he Warden at any institution may impose limita-

decision in this case could bear on the constitutionality of those provisions or their enforcement, and affect the ability of BOP to advance legitimate penological interests by regulating such inmate activities. Second, the Attorney General is charged with protecting the constitutional rights of prisoners under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.* The Court's decision in this case could affect that interest as well.

STATEMENT

1. This case arises from a state prison inmate's effort to communicate with a fellow inmate about criminal charges pending against the latter. In 1995, respondent was incarcerated at the Montana State Prison in Deer Lodge, Montana, where he was confined in the high security compound. As part of a prison program, respondent was trained as an "inmate law clerk" and, in that capacity, provided assistance with various matters to other inmates, including inmate Pat Tracy. In early 1995, respondent learned that Tracy had been charged by state authorities with the felony assault of a prison guard, Officer Glen Galle. The State had appointed a lawyer to represent Tracy, and prison authorities had

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tions on an inmate's assistance to another inmate in the interest of institution security, good order, or discipline." 28 C.F.R. 543.11(f)(1) and (4). Correspondence between inmates at the same institution may be restricted with respect to inmates placed in segregation or presenting security risks. 28 C.F.R. 540.15, 540.16. Correspondence between inmates at separate institutions is not allowed unless inmates are immediate family members or witnesses or parties in the same legal action. 28 C.F.R. 540.17. Incoming correspondence from courts or attorneys is treated as "special mail" and may be inspected but generally is not read or copied by prison officials; outgoing special mail from inmates to courts or attorneys is labeled as such and neither screened nor opened by prison officials. See 28 C.F.R. 540.18, 540.19.

transferred him to the prison's maximum security unit while the charges were pending. See Pet. App. 2-3, 19, 46.

Tracy requested respondent's assistance in defending against the charges. Pet. App. 3, 49. Prison officials denied that request because prison policy prohibited high security inmates, including respondent, from meeting with maximum security inmates, including Tracy. *Id.* at 3, 19. Prison officials sent a low security inmate law clerk to confer with Tracy, but Tracy declined to meet with him. *Id.* at 49. Respondent learned that Tracy had requested his assistance and began his own investigation into the altercation with Officer Galle. *Id.* at 3. On February 16, 1995, respondent sent Tracy the following letter:

> Dear Pat:
>
> How ya doing? I haven't wrote before now. I been busy fighting my charges. Finally got everything taken care of. I can't come up to max anymore. [T]he lowside clerks go up there now. [T]hat's why I haven't called you out like I used to. I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty because we can get at least 100 witnesses to testify that Galle is an over zealous guard who has a personal agenda to punish and harrass [*sic*] inmates. He has made homosexual advances toward certain inmates and that can be brought up into the record. There are petitions against him and I have tried to get the Unit Manager to do something about what he does in Close II, but all that happened is that I received two writeups from him myself as retaliation. So we must pursue this out of the prison system. I am

> filing a suit with everyone in Close I and II named against him. So you can use that too!
>
> Another poiont is [*sic*] that he grabbed you from behind. You tell your lawyer to get ahold [*sic*] of me on this. Don't take a plea bargain unless it's for no more time.
>
> I seen Damie for a little while when I was out. I never came over to Butte much. Lenny is living in lower D still and I don't speak to him much. His sister did something to Ted from what I heard. I don't know what. Well I will write again when I get this thing against Galle finished.
>
> Later. . . .
>
> Murph

Id. at 46-47 (bracketed material in original).

The letter was intercepted in accordance with prison policy and read by petitioner Robert Shaw, an officer in the maximum security unit. Pet. App. 4.[2] On the basis of this letter, Shaw reported respondent for violations of three rules contained in the Inmate Disciplinary Policy (J.A. 6-33): "Insolence" (Rule 009); "Interference with Due Process Hearings" (Rule 022); and "Conduct Which Disrupts or Interferes with the Security or

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[2] Under the prison's Inmate Correspondence Policy (J.A. 34-51), "[m]ail from other correctional facilities and mail to prisoners in Maximum Security and Administrative Segregation may be read." J.A. 46; see J.A. 97. This policy sets forth special provisions governing "privileged correspondence" with "licensed attorneys" and certain public officials. J.A. 34-36. But correspondence with "inmate law clerks" is not subject to those provisions. See J.A. 97.

Orderly Operation of the Institution" (Rule 025).[3] In his report, Shaw stated that the letter "accused CO Galle of being an over zealous guard who punishes and harasses inmates for a personal pleasure"; "accused CO Galle of making homo-sexual advances towards inmates"; and stated "that CO Galle retaliated against [respondent] by writing him up." J.A. 52. Shaw also reported that the letter "trie[d] to persuade Inmate Tracy to pursue certain actions that may disrupt a court hearing in which [respondent] is no part of," and that "[t]here is no evidence of any of the statements in th[e] letter to be fact." J.A. 54.

Following a hearing, respondent was found guilty of violating Rules 009 and 022 (but not Rule 025), and given a suspended sentence of 10 days' detention along with three reclassification points. Pet. App. 4. The Rule 009 violation was based on a finding that the letter states that "c/o Galle retaliated against inmate Murphy," and that this "statement indicates unprofessional actions which stand to intimidate the employee." J.A. 60. The Rule 022 violation was based on a finding that the statement in the letter "referring to c/o Galle making homo sexual advances to another inmate would result in disciplinary action against [the] stated em-

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[3] The prison's rules are set forth at J.A. 10, 14, and 15, along with other provisions of the Inmate Disciplinary Policy. BOP's inmate disciplinary policy is set forth at 28 C.F.R. Pt. 541. Under that policy, inmates may be disciplined for similar misconduct, including "[i]nsolence towards a staff member" (Code 312); "[l]ying or providing a false statement to a staff member" (Code 313); "[u]sing abusive or obscene language" (Code 404); "[u]nauthorized use of mail" (Code 406); and "[c]onduct which disrupts or interferes with the security or orderly running of the institution" (Code 499). 28 C.F.R. 541.13 (Table 3).

ployee." J.A. 62. Respondent's administrative appeal was denied. Pet. App. 4-5, 21.[4]

2. a. In October 1995, respondent filed this class action in the District Court for the District of Montana, seeking declaratory and injunctive relief pursuant to 42 U.S.C. 1983. The complaint alleged that the actions of the named prison officials (petitioners here) in disciplining respondent in connection with the February 16, 1995, letter violated respondent's First Amendment rights, including the right "to provide legal assistance to other inmates"; abridged "the rights of inmates to access the courts by denying them the assistance of an inmate law clerk"; and violated due process on the ground that the regulations on which the disciplinary action was based are unduly vague or overbroad. J.A. 66-67. Respondent styled the suit as a class action on behalf of "all current and future inmates who may rely on inmate law clerks or 'jailhouse lawyers,'" and all inmates who rely on such "inmate law clerks or 'jailhouse lawyers.'" Pet. App. 43 (quoting Pl.'s Mot. to Certify Class).

b. Following discovery, the parties filed cross-motions for summary judgment. The magistrate judge (Pet. App. 28-44) recommended summary judgment for petitioners with respect to respondent's "access to the courts" claim, explaining that, by communicating with Tracy, respondent "was not attempting to pursue any legal claims or defenses on his own behalf." *Id.* at 37. But the magistrate judge recommended denial of summary judgment with respect to the remaining claims, finding that material disputed facts existed as to whether petitioners' actions were "rationally related to

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[4] Tracy did not receive a copy of respondent's letter until June 1996, by which time he had pleaded guilty to the felony assault charges. Pet. App. 49.

a legitimate penological interest," in accordance with the inquiry established by *Turner* v. *Safley*, 482 U.S. 78 (1987), for reviewing constitutional challenges to prison regulation. Pet. App. 38; see *id.* at 37-40. The magistrate judge further recommended denial of class certification. *Id.* at 43-44.

c. The district court (Pet. App. 25-26) granted summary judgment in its entirety for petitioners and ordered that the case be dismissed. With respect to the First Amendment claim, the court first found that "[respondent] was not acting as an inmate law clerk when he wrote and sent the February 16, 1995, letter to inmate Pat Tracy," and that respondent's claims accordingly "must be analyzed without consideration of any privilege that law clerk status might provide." *Id.* at 23-24. The court then held that respondent's First Amendment claim failed under the "test of *Turner* v. *Safley*," "find[ing] that there is a valid, rational connection between the prison inmate correspondence policy and the objectives of prison order, security, and inmate rehabilitation." *Id.* at 25. The court further held that "[respondent's] First Amendment right to assist other inmates is, in this instance, inconsistent with his status as a prisoner and with the legitimate penological objectives of [the prison]." *Id.* at 24-25.

3. The Ninth Circuit reversed. Pet. App. 1-17. The court of appeals premised its analysis on the proposition that "inmates have a First Amendment right to assist other inmates with their legal claims." *Id.* at 6 (citing *Rizzo* v. *Dawson*, 778 F.2d 527, 531 (9th Cir. 1985)). The court next concluded that the "undisputed facts" concerning respondent's training as an inmate law clerk and his prior efforts to assist Tracy in that capacity "are enough to raise th[is] First Amendment right," and that "the Prison's decision to discipline [respondent] * * *

undoubtedly interferes with that right." *Id.* at 8, 9.[5] Finally, applying the *Turner* v. *Safley* inquiry, the court of appeals held that petitioners violated this First Amendment right in disciplining respondent, because their actions were an "'exaggerated response' to the Prison's interest in security and order." *Id.* at 15.

In applying *Turner*, the court of appeals acknowledged that "as a general matter" the regulations pursuant to which respondent was disciplined are rationally related to the prison's legitimate penological interests in promoting "security and order," and therefore might pass muster "as applied to inmate correspondence generally." Pet. App. 11. But the court reasoned that the regulations must be scrutinized "as applied to legal correspondence between an inmate performing the functions of a law clerk and the inmate he is advising," and held that when viewed from the perspective of this "particular category of protected expression," the regulations were an "exaggerated response" to the stated penological concerns. *Id.* at 11-13. According to the court, "the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential legal matter," whereas the inmate's "First Amendment right

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[5] In his brief in opposition (at 5), respondent argued that he was not acting in his capacity as an "inmate law clerk" when he sent his letter. This argument is contradicted by respondent's prior statements, see Br. in Opp. App. 2 ("On or about February 16, 1995, I wrote a letter to Pat Tracy, in which I gave him legal advice concerning the charges pending against him."); accord J.A. 75, 78, as well as the allegations set forth in his Complaint (¶ 13), J.A. 65. In any event, for the reasons explained below, we agree that whether respondent in fact was attempting to provide legal assistance to Tracy is "immaterial" (Br. in Opp. 5) to the resolution of his First Amendment claim.

to provide legal assistance to fellow inmates" is squarely implicated by such communications. *Id.* at 12.

The court of appeals remanded for the entry of summary judgment in favor of respondent, and for crafting of "an appropriate remedy." Pet. App. 17.[6]

SUMMARY OF ARGUMENT

One of the consequences of lawful incarceration is the loss of those First Amendment freedoms that are inconsistent with an individual's status as a prisoner and the legitimate penological objectives of the State. Inmates retain free speech rights, but prison regulation of inmate expression satisfies First Amendment review if it is "'reasonably related' to legitimate penological objectives," and "is not an 'exaggerated response' to those concerns." *Turner* v. *Safley*, 482 U.S. 78, 87 (1987). The court of appeals erred in holding that because respondent's letter contained an offer of legal assistance, it implicated not only the general right of free speech, but also a special First Amendment right to provide legal assistance to other inmates. That holding finds no support in precedent or principle, and should be rejected.

When inmates have no reasonable alternative to legal assistance from other inmates to gain access to the courts, a State may not prohibit inmates from providing such assistance. *Johnson* v. *Avery*, 393 U.S. 483 (1969). But even in that circumstance, this Court has recognized only a right of inmates to receive available legal

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[6] The court of appeals did not reach respondent's "'right of access to the courts' arguments." Pet. App. 15. The court reached and rejected respondent's due process challenge, concluding that "[w]hile clearer language could be imagined, the challenged regulations are the sort that every prison enforces in order to maintain order." *Id.* at 16. Neither the "right of access" nor the due process claim is before this Court. See Pet. i.

assistance, and not a right of inmates to *dispense* such assistance. Such a right would be especially unwarranted where, as here, an inmate is attempting to assist an inmate who is represented by appointed counsel. Likewise, this Court has recognized that the State may not interfere with an inmate's right of access to the courts by, for example, precluding access to law libraries or otherwise closing the door to judicial review. *E.g.*, *Bounds* v. *Smith*, 430 U.S. 817 (1977). But *Bounds* does not create "an abstract, freestanding right to * * * legal assistance"; rather, it establishes a "right of *access to the courts*." *Lewis* v. *Casey*, 518 U.S. 343, 350 (1996).

Outside the prison context, the Court has held that individuals enjoy a First Amendment right to associate with others for legitimate common goals and to use litigation to advance those goals. *E.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963). But introducing that principle to the prison context would be inconsistent with the dictates of prison life. In *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125-126 (1977), this Court recognized that "[p]erhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls." In light of that fact, *Jones* held that inmates do not enjoy a First Amendment right to engage in union activities, even though such conduct lies within the heartland of protected First Amendment activity outside the prison walls. For similar reasons, the diminishment of "litigating capacity," especially the capacity to litigate on behalf of others, "is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Casey*, 518 U.S. at 355.

As this Court has often recognized, prisons are populated by dangerous individuals with a demonstrated proclivity for anti-social behavior. When such individuals attempt to confer with one another, regardless of their stated purpose for doing so, legitimate penological concerns are implicated. The practice of "jailhouse lawyering" presents particular concerns. Inmates may use legal assistance to gain influence over other inmates, and for other means of self-aggrandizement, profit, or power. In addition, inmate-to-inmate correspondence on legal matters, as on other matters, can be used to pass contraband, form escape plans, develop or sustain gangs or other informal organizations, or threaten institutional security and safety in other ways. Holding that inmate legal assistance activities are entitled to special constitutional protection under the First Amendment would seriously undermine the ability of prison officials to address such concerns.

While respondent's conduct was not protected by a First Amendment right to dispense legal assistance, it does implicate the general right to free speech. *Turner* v. *Safley* supplies the standard for determining whether an inmate's free speech rights are violated in this context. Inmate correspondence may be restricted if prison officials establish that such regulation is "reasonably related" to valid penological objectives, and is not an "exaggerated response" to those objectives. 482 U.S. at 93. The court of appeals below purported to apply *Turner*, but it did so under the influence of its erroneous belief that respondent's conduct was protected by a First Amendment right to provide legal assistance to other inmates. That mistaken premise led the court of appeals, in effect, to treat the letter at issue as if it were entitled to heightened First Amendment

protection simply because it touched on a pending legal proceeding against another inmate.

This Court has recognized many legitimate penological interests in restricting inmate correspondence. The fact that such correspondence concerns a legal matter may or may not bear on the legitimacy of the stated interests, or the relation between those interests and the particular correspondence at issue. The record before this Court does not conclusively demonstrate whether petitioners' decision to discipline respondent on the basis of his letter is reasonably related to legitimate penological interests, or is an exaggerated response to those interests. Accordingly, we suggest that the Court should reverse the judgment below and remand for further consideration of respondent's First Amendment claim under a conventional *Turner* analysis, one that is not premised on the notion that inmates enjoy a First Amendment right to provide legal assistance to other inmates.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY HELD THAT RESPONDENT'S CONDUCT WAS PROTECTED BY AN INDEPENDENT FIRST AMENDMENT RIGHT TO ASSIST OTHER INMATES IN LEGAL MATTERS

A convicted and imprisoned felon "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974). In a series of cases, this Court has considered the free speech rights of inmates to communicate with one another and with individuals on the outside. In *Turner* v. *Safley*, 482 U.S. 78 (1987), this Court upheld a state regulation prohibiting inmates from corresponding with inmates at other institutions.

See *id.* at 91-93. As 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 89. The Court reached a similar result in *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), where the Court, applying the *Turner* "reasonableness standard," upheld a BOP regulation restricting the types of publications inmates may receive from the outside. *Id.* at 413. See also *Bell* v. *Wolfish*, 441 U.S. 520, 550-551 (1979) (upholding BOP regulation restricting incoming mail because it was a "rational response" to legitimate security concerns).

As the court of appeals observed, the letter at issue in this case, like the correspondence restricted in *Turner* and *Abbott*, "itself constitutes speech that, outside of the prison context, would doubtless enjoy the protection of the First Amendment." Pet. App. 8-9. Thus, in determining whether petitioners violated respondent's First Amendment rights by disciplining him on the basis of that letter, the court of appeals properly invoked the *Turner* standard. See *id.* at 10-14. But the court applied *Turner* based on an erroneous premise: that in addition to a general free speech right, prisoners enjoy a special "First Amendment right to assist other inmates with their legal claims." *Id.* at 6. Based on that premise, the court of appeals reasoned that respondent's letter fell into a "particular category of protected expression"—"legal correspondence between an inmate performing the functions of a law clerk and the inmate he is advising"—and that it, in effect, enjoyed heightened constitutional protection. *Id.* at 11. That was error, and that error tainted the court of appeals' entire *Turner* analysis. This Court has never recognized a First Amendment right of prison inmates

to assist other inmates in legal affairs, and it should not do so here.

A. Prisoners Do Not Enjoy A First Amendment Right To Assist Other Inmates In Legal Matters

1. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner* v. *Safley*, 482 U.S. at 84. See *Bell* v. *Wolfish*, 441 U.S. at 545. Thus, "[i]nmates clearly retain protections afforded by the First Amendment." *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987). See *Pell* v. *Procunier*, 417 U.S. at 822. These protections include the right to free speech, *Thornburgh* v. *Abbott*, 490 U.S. at 407; to petition the government for the redress of grievances, *Johnson* v. *Avery*, 393 U.S. 483 (1969); and to free exercise of religion, *O'Lone*, 482 U.S. at 348. At the same time, however, "[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." *O'Lone*, 482 U.S. at 348 (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)). See also *Sandin* v. *Conner*, 515 U.S. 472, 485 (1995); *Wolff* v. *McDonnell*, 418 U.S. 539, 555 (1974); *Hudson* v. *Palmer*, 468 U.S. 517, 530 (1984) ("prisoners have no legitimate expectation of privacy and * * * the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells").

Accordingly, this Court has held that, "[i]n a prison context, an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (quoting *Procunier*, 417 U.S. at 822). The prison cell block is a starkly different world from the one in which First Amendment activity flourishes in free society.

Prisons "are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance." *Ibid.* "Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagation." *Id.* at 132. See *McDonnell*, 418 U.S. at 561-562. Not surprisingly, in this dangerous and volatile world, prisoners' First Amendment rights are substantially circumscribed compared with the rights enjoyed by individuals on the outside.

Taking into account the practical realities of prison life and the need for institutional safety and security, this Court has upheld under the First Amendment substantial restrictions on inmate-to-inmate correspondence, *e.g.*, *Turner*, 482 U.S. at 91-93; receipt by inmates of certain types of publications, *Abbott*, 490 U.S. at 419; *Wolfish*, 441 U.S. at 551; inmate contacts with the media, *Procunier*, 417 U.S. at 828; inmate efforts to engage in union activities, *Prisoners' Labor Union*, 433 U.S. at 129-133; and inmate contact visits, *Block* v. *Rutherford*, 468 U.S. 576, 589 (1984). The Court has also upheld prison work assignment rules that have the effect of preventing prisoners from attending religious services. *O'Lone*, 482 U.S. at 350-353. More generally, the Court has emphasized that behind prison bars First Amendment rights "must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration." *Abbott*, 490 U.S. at 407 (quoting *Turner*, 482 U.S. at 85).

2. This Court has not recognized a constitutional right—in the First Amendment, or any other part of our National Charter—of prison inmates to dispense legal advice. As this Court has long recognized, the

Constitution does guarantee inmates a "right of *access to the courts*." *Lewis* v. *Casey*, 518 U.S. 343, 350 (1996) (citing *Bounds* v. *Smith*, 430 U.S. 817 (1977)). But in *Casey*, the Court emphasized that the constitutional "right of access" does not confer on inmates "an abstract, freestanding right to * * * legal assistance." *Ibid.* When prison inmates do not enjoy a "freestanding" constitutional right to *receive* legal assistance, it follows that they have no right to *dispense* such assistance. Inmate efforts to assist one another in legal affairs may be entitled to First Amendment protection as speech or expressive conduct. But the First Amendment does not cloak such activities with any added protection in the form of a constitutional right to practice "jailhouse law."

a. In *Johnson* v. *Avery*, the Court held unconstitutional a Tennessee regulation prohibiting inmates from assisting other inmates in "prepar[ing] Writs or other legal matters." 393 U.S. at 484. In so holding, the Court emphasized that "Tennessee does not provide an available alternative to the assistance provided by other inmates," such as a "public defender system." *Id.* at 488-489. "[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief," the Court concluded that "it may not validly enforce a regulation * * * barring inmates from furnishing such assistance to other prisoners." *Id.* at 490. At the same time, however, the Court acknowledged that, "[e]ven in the absence of such alternatives, the State *may* impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of [legal] assistance." *Ibid.* (emphasis added).

Avery does not establish a constitutional right of prison inmates to provide legal assistance. *Avery* protects only the ability of inmates to gain "access * * * to the courts." 393 U.S. at 485. See *Casey*, 518 U.S. at 350. Because Tennessee did not make available to its inmates other means of legal assistance, the Court found that the State's rule preventing inmates from assisting one another had the "effect[]" of "forbidding illiterate or poorly educated prisoners to file habeas corpus petitions." 393 U.S. at 487. See *ibid.* ("For all practical purposes, if such prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court."). The Court therefore invalidated that rule "until the State provides some reasonable alternative to assist inmates in the preparation of petitions," *id.* at 490, in order to ensure that inmates would be afforded adequate access to the courts.[7]

In claiming a First Amendment right to assist other inmates in legal matters, respondent does not argue

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[7] In *Wolff* v. *McDonnell*, *supra*, a prison inmate challenged a state regulation permitting prison authorities to open and inspect incoming mail from attorneys. In arguing that this practice was unconstitutional, the inmate relied in part on the constitutional right of "access to the courts" recognized in *Avery*. 418 U.S. at 576. This Court rejected that rationale, stating that this right "has not been extended * * * to apply further than protecting the ability of an inmate to prepare a petition or complaint." *Ibid.* The plaintiff in *Wolff* also challenged a prison regulation preventing inmates from assisting one another in civil actions. Drawing from *Avery*, the Court held that the key issue was whether the prison provided a "reasonable alternative" to inmate legal assistance in such actions, and remanded for a determination whether having one inmate serve as a "legal adviser" amounted to adequate "legal assistance under the reasonable-alternative standard of *Avery*." *Id.* at 580.

that such assistance is necessary to ensure access to the courts, for himself or anyone else.[8] Nor could he, inasmuch as the inmate he sought to assist was represented by appointed counsel. Pet. App. 3. Instead, respondent claims, and the court of appeals embraced, something entirely different: a "First Amendment right to assist other inmates with their legal claims," without regard to whether such assistance is necessary for them to enter the courts. *Id.* at 6.

This right finds no support in the cases following *Avery*, affirming the "right of *access to the courts*." *Lewis* v. *Casey*, 518 U.S. at 350. See *Bounds* v. *Smith*, 430 U.S. at 821 ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts.").[9] As this Court recently recounted in *Casey*, the Court has given effect to "that right by prohibiting state prison officials from actively interfering with inmates' attempts to prepare legal documents or file them, and by requiring state courts to waive filing fees or transcript fees for indigent inmates." 518 U.S.

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[8] Respondent has raised a separate "right of access" claim, but that claim is not presented here. See note 6, *supra*. In addition, his request to certify this action as a class action on behalf of himself and other inmates was denied, Pet. App. 43-44, and also is not before this Court.

[9] Neither *Bounds* nor this Court's subsequent cases has positively identified the source of this constitutional right. See *Lewis* v. *Casey*, 518 U.S. at 367 ("We have described the right articulated in *Bounds* as a 'consequence' of due process, as an 'aspect' of equal protection, or as an 'equal protection guarantee. In no instance, however, have we engaged in rigorous constitutional analysis of the basis for this asserted right.") (Thomas, J., concurring) (citations omitted); see also *Hudson* v. *Palmer*, 468 U.S. at 523 ("prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts").

at 350 (citations omitted). Respondent does not, and could not, claim that the State is creating any such interference here. Nor does respondent claim that, as a result of petitioners' actions, he was actually "hindered [in] his efforts to pursue a legal claim," as required by *Casey*. *Id.* at 351. His First Amendment claim accordingly finds no footing in *Bounds*.

b. Beyond *Bounds*, the court of appeals suggested that the inmate's right to undertake "legal activities on behalf of other inmates implicated *associational rights* protected by the First Amendment." Pet. App. 9 (emphasis added; citing *Rizzo* v. *Dawson*, 778 F.2d 527, 531 (9th Cir. 1985)); see also Br. in Opp. 5. In particular, the Ninth Circuit (see *Rizzo*, 778 F.2d at 531) has reasoned that this activity is akin to the conduct this Court held protected under the First Amendment in *NAACP* v. *Button*, 371 U.S. 415 (1963), and *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971). This Court, however, has never extended the reasoning of *Button* or its progeny to the prison context and, as we explain, doing so here would require overlooking the fundamental restriction in associational rights that is a necessary and constitutional fact of lawful imprisonment.

Button involved a challenge to a state law preventing the NAACP and its members and lawyers from "associat[ing] for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights." 371 U.S. at 428. The Court concluded that the activities at issue were "modes of expression and association protected by the First and Fourteenth Amendments," and set aside the state law. *Id.* at 428-429. In doing so, the Court explained that "the State has failed to advance any substantial regulatory interest, in the form of substan-

tive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed." *Id.* at 444. *United Transportation Union* is to the same effect. It involved a challenge to a state decree that prevented a union from providing legal assistance to its members or their families. Drawing from *Button*, the Court held that this activity was protected by the First Amendment, and that the decree prohibiting it was invalid. 401 U.S. at 580-581, 585. See also *In re Primus*, 436 U.S. 412, 434 (1978).

Button and its progeny thus recognize a First Amendment right to associate with others for legitimate common goals and to use litigation to advance those goals. Cf. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (distinguishing between the First Amendment "right to associate collectively for the common good," and "the individual interest in best prosecuting a claim"). But the considerations on which that principle is grounded do not readily apply in the prison context. Indeed, this Court has recognized not only that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights" enjoyed by the free, but also that "[p]erhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 125-126 (citation omitted); see also *id.* at 126 (an "inmate's 'status as a prisoner' and the operational realities of a prison dictate restrictions on the associational rights among inmates."). Among the associational rights necessarily curtailed by lawful incarceration is the right to associate for the purpose of providing legal advice.

Prisoners' Labor Union involved a First Amendment challenge to the actions of state prison officials prohibiting inmates from soliciting other inmates to join a prisoners' labor union, barring the union from meeting, and blocking the bulk distribution of union publications. 433 U.S. at 121. These activities squarely implicated First Amendment rights enjoyed by individuals outside the prison walls. See, *e.g.*, *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945). But this Court concluded that the State's ban on such activities inside the prison walls was permissible, and that "[t]he invocation of the First Amendment, whether the asserted rights are speech or associational, does not change this analysis." 433 U.S. at 129. In so holding, the Court emphasized the importance of considering the "prison context" in analyzing First Amendment challenges to prison regulation, *id.* at 129, and, in particular, recognized that "numerous associational rights are necessarily curtailed by the realities of confinement" and "must give way to the reasonable considerations of penal management *Id.* at 132.

For similar reasons, lawful imprisonment curtails the right of inmates to assist one another in legal matters. Indeed, this Court has recognized that, while prisoners are entitled to access to the courts to attack their own sentences or conditions of confinement, "[i]mpairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Casey*, 518 U.S. at 355. Legitimate penal objectives support that conclusion when it comes to the practice of "jailhouse law." While supervised inmate legal assistance programs can serve many valuable ends, it is "indisputable" that jailhouse lawyers "are sometimes a menace to prison discipline," and that prisoners have an "acknowledged propensity * * * to abuse both the giving and the seeking of

[legal] assistance." *Johnson* v. *Avery*, 393 U.S. at 488, 490. In his dissent in *Avery*, Justice White elaborated on these concerns:

> Many assert that the aim of the jailhouse lawyer is not the service of truth and justice, but rather self-aggrandizement, profit, and power. According to prison officials, whose expertise in such matters should be given some consideration, the jailhouse lawyer often succeeds in establishing his own power structure, quite apart from the formal system of warden, guards, and trusties which the prison seeks to maintain. Those whom the jailhouse lawyer serves may come morally under his sway as the one hope of their release, and repay him not only with obedience but with what minor gifts and other favors are available to them. When a client refuses to pay, violence may result, in which the jailhouse lawyer may be aided by his other clients.

Id. at 499-500 (footnote omitted).[10]

Cloaking inmate legal assistance activities with special First Amendment protection would raise other legitimate penological concerns. For example, it would

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[10] See also, *e.g.*, *Schenck* v. *Edwards*, 921 F. Supp. 679, 684 (E.D. Wash. 1996) (acknowledging "problems [experienced by prison authorities] with inmates blackmailing and extorting one another based on debts incurred for legal work performed," and with "inmates becoming angry and violent with inmates who drafted and/or filed pleadings or legal materials for inmate litigators when litigators' expectations were not met or the consequences of the legal action turned out to be detrimental to the litigators"), aff'd, 133 F.3d 929 (9th Cir. 1998) (internal quotation marks omitted); *Weaver* v. *Toombs*, 756 F. Supp. 335, 339 (W.D. Mich. 1989) (prison authorities have legitimate interest in preventing "potential exploitation" by inmates providing legal assistance), aff'd, 915 F.2d 1574 (6th Cir. 1990).

confer on inmates who provide legal assistance a type of special status that often is disruptive in the prison world, where uniformity is vital to ensuring order. Cf. *Prisoners' Labor Union*, 433 U.S. at 127-129. And it would present additional opportunities for inmates—under the guise of providing legal assistance—to formulate escape plans, pass contraband through correspondence designated as "legal," and carry out other illegal activities both inside and outside the prison walls. As we discuss below, this Court has recognized many of these same concerns in upholding regulations restricting inmate correspondence on general matters. See pp. 25-26, *infra*.[11]

At the same time, inmate legal assistance programs serve many salutary ends, including helping to ensure that illiterate or non-English speaking inmates have meaningful access to the courts. Prison officials may permit inmates to provide legal assistance to other inmates. Indeed, many States have adopted "inmate law clerk assistance" programs like that of Montana, and permit inmates to assist one another in legal matters in accordance with other prison rules. Similarly, BOP regulations permit an inmate to provide legal assistance to another inmates in the same institution, though they provide that "[t]he Warden at any institution may impose limitations on an inmate's assistance to another inmate in the interest of institution security, good order, or discipline." 28 C.F.R. 543.11(f)(1) and (4). Properly managed, those programs can assist inmates without undermining valid correctional

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[11] Recognizing a First Amendment right of inmates to practice jailhouse law also would invite a new avenue for prisoner litigation challenging the adequacy of prison libraries or other legal support services that this Court has recently sought to quell. Cf. *Lewis* v. *Casey*, *supra*.

objectives. But whether or not such programs are viewed as good prison policy, the Federal Constitution does not guarantee inmates the right to assist other inmates in legal matters. Cf. *Prisoners' Labor Union*, 433 U.S. at 137 (Burger, C.J., concurring).[12]

B. Respondent's First Amendment Claim Is Governed By A Conventional *Turner* Analysis

1. Prison inmates do enjoy a First Amendment right of free speech. See *Thornburgh* v. *Abbott*, 490 U.S. at 407. And they retain that right when they speak on

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[12] Most courts of appeals that have considered the issue agree that inmates do not enjoy a constitutional right to provide legal assistance. See, *e.g.*, *Goff* v. *Nix*, 113 F.3d 887, 890 (8th Cir. 1997) ("A jailhouse lawyer has no independent right to provide legal advice."); *Gibbs* v. *Hopkins*, 10 F.3d 373, 378 (6th Cir. 1993) ("[T]here is no constitutional right to assist other prisoners with their legal matters."); *Smith* v. *Maschner*, 899 F.2d 940, 950 (10th Cir. 1990) (inmates "do[] not have a protected interest in providing legal representation to other inmates"); *Gassler* v. *Rayl*, 862 F.2d 706, 708 (8th Cir. 1988) ("[A]n inmate simply does not have the right to provide his fellow inmates with legal assistance."). Accord *Tighe* v. *Wall*, 100 F.3d 41, 43 (5th Cir. 1996) (per curiam); *Williams* v. *Nix*, 1 F.3d 712, 716 (8th Cir. 1993). As the Eighth Circuit reasoned in *Gassler*, "[i]t is well established that inmates have a constitutional right of access to the court." 862 F.2d at 707. " This right entitles inmates to receive legal assistance from fellow inmates unless prison officials provide reasonable alternative assistance." *Ibid.* (citing *Johnson* v. *Avery*, *supra*). But "an inmate simply does not have the right to provide his fellow inmates with legal assistance." *Id.* at 708.

Similarly, there is no basis in our history or tradition for recognizing a First Amendment right of prisoners to provide legal assistance to other inmates. Cf. *Lewis* v. *Casey*, 518 U.S. at 382 ("The rise of the prison law library and other legal assistance programs is a recent phenomenon, and one generated largely by the federal courts.") (Thomas, J., concurring) (citing studies).

legal matters. As a result, there remains the question whether respondent was impermissibly penalized under the First Amendment based on the content of his letter. *Turner* v. *Safley* supplies the standard for analyzing that question. In *Turner*, the Court held that prison regulation of inmate correspondence is permissible if it is "reasonably related to valid corrections goals," including "institutional security and safety," and "it is not an exaggerated response to those objectives." 482 U.S. at 93.[13] The *Turner* analysis governs both "facial" and "as applied" challenges. See *id.* at 99-100 (upholding "facial validity" of regulation, but remanding for determination whether regulation was valid as applied); *Thornburgh* v. *Abbott*, 490 U.S. at 419 (same). Respondent brings an as-applied challenge to the enforcement of petitioners' disciplinary rules against him on the basis of the content of his February 16, 1995, letter. See J.A. 66 (Compl. ¶ 17); Br. in Opp. 3, 8-9.

2. a. This Court has recognized many legitimate penological interests in restricting, and even prohibiting, forms of inmate correspondence. "[C]ommunication with other felons is a potential spur to criminal behavior." *Turner*, 482 U.S. at 91. Inmate correspondence

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[13] In determining whether a regulation passes muster under *Turner*, the Court considers four criteria. First, the Court looks to whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89 (internal quotation marks omitted). Second, the Court looks to whether "there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third, the Court considers the "impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Ibid.* Fourth, the Court looks for "the existence of obvious, easy alternatives." *Ibid.* See *Abbott*, 490 U.S. at 414-418 (discussing factors).

"can be used to communicate escape plans," "arrange assaults and other violent acts," and develop prison gangs and other "informal organizations that threaten the core functions of prison administration, maintaining safety and internal security." *Id.* at 92 (citing G. Camp & C. Camp, U.S. Dep't of Justice, *Prison Gangs: Their Nature and Impact on Prisons* 64-65 (1985)). Correspondence among inmates in heightened security units "present[s] special disciplinary and security concerns." *Casey*, 518 U.S. at 361; see 62 Fed. Reg. 4890, 4891 (1997) (legal assistance to inmates in special housing is restricted "[f]or reasons of security, discipline, and good order"). In explaining the Montana inmate correspondence policy, petitioners have cited many of the same considerations. See J.A. 96-97.

In reviewing restrictions on inmate speech, it is imperative to take into account the prison context. Language that may be deemed simply vulgar or tasteless outside the prison can amount to "fighting words" within it. Thus, for example, BOP regulations specifically authorize prison authorities to restrict inmate correspondence containing "gratuitous profanity." 28 C.F.R. 540.15(5); see also 28 C.F.R. 541.13 (inmates may be disciplined for "abusive or obscene language") (Table 3, Code 404); *Abbott*, 490 U.S. at 407 (conduct that is "seemingly innocuous to laymen" may "have potentially significant implications for the order and security of the prison"). Language that "draw[s] inferences about [others'] beliefs, sexual orientation, or gang affiliation" can be particularly disruptive in the prison yard. 490 U.S. at 412. "Insolence" also threatens prison order. 28 C.F.R. 541.13 (Table 3, Code 312). In addition, prison officials need not wait for disturbances to erupt; it is "rational" for authorities to restrict communications "that, although not necessarily 'likely' to lead to

violence, are determined * * * to create an intolerable risk of disorder under the conditions of a particular prison at a particular time." *Abbott*, 490 U.S. at 417.

"In the volatile prison environment, it is essential that prison officials be given broad discretion" in determining what steps are necessary "to prevent * * * disorder." *Abbott*, 490 U.S. at 413. This Court has acknowledged "that the judiciary is ill-equipped to deal with the difficult and delicate problems of prison management," and therefore "afford[s] considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world." *Id.* at 407-408 (internal quotation marks omitted). See *Turner*, 482 U.S. at 77-78. When, as here, "a state penal system is involved, federal courts have * * * additional reason to accord deference to the appropriate prison authorities." *Id.* at 85.

b. Inmate-to-inmate correspondence on legal matters may, or may not, raise the sort of legitimate penological concerns implicated by other types of inmate correspondence. As the letter at issue in this case demonstrates, inmate correspondence on legal matters can easily touch on non-legal matters.[14] While routine discussion of legal matters or proceedings may not raise legitimate concerns, accusations, threats,

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[14] Recognizing a First Amendment right of inmates to provide legal assistance to other inmates—and to correspond on such matters—would invite fact-intensive litigation over whether an inmate was acting in his capacity as a law clerk or assistant when he undertook a particular act, or whether an inmate was offering legal advice or assistance, and thus was entitled to such protection. Indeed, respondent here has taken inconsistent positions on whether he was in fact acting as a law clerk when he sent the February 16, 1995, letter. See note 5, *supra*.

gratuitous profanity, or other disruptive or inflammatory remarks made before, after, or in the course of discussing legal matters or proceedings may well raise legitimate concerns. Inmate correspondence on legal matters, like inmate correspondence on other matters, can also be used to pass contraband, speak in code, form disruptive prison alliances, or prompt illegal activity or prison unrest. In short, the fact that an inmate's letter discusses a legal matter or proceeding, in itself, does not eliminate the legitimate penological concerns presented by inmate correspondence in general.[15]

On the other hand, consistent with the First Amendment, prison officials may not penalize inmates simply because they disagree with the "content of the[ir] expression," or for an "arbitrary or irrational" reason. *Turner*, 482 U.S. at 90. Cf. *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (even in a nonpublic forum, government may not "suppress expression merely because public officials oppose the speaker's view"). This Court has held, however, that when prison administrators "draw distinctions" between different types of speech or communications "solely on the basis of their potential implications for prison security," they are regulating in a "neutral" and, thus, constitutional fashion—provided that their actions

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[15] This case does not present any occasion to consider whether, or to what extent, inmates are constitutionally entitled to correspond with licensed legal counsel outside the prison walls. The Court has recognized, however, that such correspondence presents similar concerns to those presented by inmate-to-inmate correspondence. See *Abbott*, 490 U.S. at 413; cf. *Wolff* v. *McDonnell*, 418 U.S. at 575. On the other hand, incoming and outcoming correspondence with lawyers implicates the First Amendment rights of those who are not prisoners. BOP and virtually all States, including Montana, have adopted separate rules governing the handling of such legal mail. See notes 1, 2, *supra*.

are "rationally related" to asserted penological interests such as safety or security. *Abbott*, 490 U.S. at 415-416.

3. The court of appeals applied *Turner* in determining whether petitioners properly disciplined respondent on the basis of his letter. See Pet. App. 10-14. But it did so based on the mistaken premise that respondent enjoyed a First Amendment right to provide legal services to other inmates. Thus, the court of appeals emphasized that it was dealing with a "particular category of protected expression"—"legal correspondence between an inmate performing the functions of a law clerk and the inmate he is advising." *Id.* at 11. The court noted that "the enforcement of the prison regulations against Murphy infringes on [respondent's] First Amendment right to provide legal assistance to fellow inmates." *Id.* at 12. And the court observed that "the Prison's interest in security and order is at a low ebb when the correspondence in question is legal advice relating to a pending or potential case." *Ibid.* In short, the court treated respondent's letter as if it were entitled to heightened constitutional protection because it was sent by an "inmate law clerk," and, at the same time, unduly discounted the legitimate penological interests in restricting inmate correspondence on all matters, including on legal matters.

Because the court of appeals decided respondent's First Amendment claim based on an erroneous legal standard, we suggest that the appropriate relief is to reverse and remand for application of the correct legal standard. While petitioners have provided substantial reasons for adopting the inmate correspondence policy that permitted them to review respondent's letter to inmate Tracy, see J.A. 95-98, we do not believe that the summary judgment record before this Court con-

clusively demonstrates the particular penological objectives relied upon by petitioners in disciplining respondent in connection with his letter, or whether under the circumstances petitioners' actions amounted to an "exaggerated response" to those objectives. Accordingly, we do not take a position on whether, under a proper application of *Turner*, petitioners impermissibly disciplined respondent based on his letter. Cf. *Turner*, 482 U.S. at 100 (remanding for determination whether "correspondence regulation had been applied by prison officials in an arbitrary and capricious manner"); *Abbott*, 490 U.S. at 419 (remanding for "examination of the validity of the regulations as applied" to particular publications).

CONCLUSION

The judgment of court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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