No. 03-636

In The Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

JAMES GOMEZ and JAMES ROWLAND,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General

FRANCES T. GRUNDER
Senior Assistant Attorney General
Counsel of Record

SARA TURNER
Supervising Deputy Attorney General

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5723
Facsimile: (415) 703-5843
Counsel for Respondents Gomez and Rowland

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

California prison officials have limited information about inmates' gang affiliations, enemy concerns, and potential for violence when the inmates are first received at a prison. Thus, inmates generally are not double-celled with inmates of another race until information is received to determine that it is safe to do so. That information is gathered during the sixty-day initial classification process. In most prison cases, *Turner v. Safley*, 482 U.S. 78 (1987) is used to evaluate the constitutionality of prison officials' actions.

1. Should the courts continue to give prison officials deference in the day-to-day management of prisons, or should strict scrutiny be used to evaluate whether California's initial double-celling practice is constitutional?

2. Does California's initial double-celling practice violate the Equal Protection Clause?

OBJECTION TO THE DESIGNATION OF PARTIES

Respondents disagree with petitioner's designation of the respondents. The only respondents are James Gomez and James Rowland, both former directors of the California Department of Corrections, who were granted qualified immunity from damages by the lower courts. Neither the State of California nor any other defendant is a respondent here, as Gomez and Rowland were the only parties to the appeal that is the subject of review.

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STATEMENT

A. The Impact of Race-Based Prison Gangs in California Prisons.

"Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). This case involves state prison officials' efforts to defuse this behavior in one place and one place only, namely, the two-man cell in which inmates are initially housed upon their arrival in the California prison system. It concerns those officials' efforts to address one dominant factor in the lives of inmates, whether newly received or already established: the race-based prison gang.

Modern observers of prisons recognize that prison gangs are "the most significant reality" in prisoners' lives. Willens, Jonathan A., *Structure, Content and the Exigencies of War: American Prison Law after Twenty-five years 1962-1987*, 37 AM. U. L. REV. 41, 56 (1987); see also DiIulio, John J., Jr., *Governing Prisons: A Comparative Study of Correctional Management* 129 (1987) (referring to prison gangs as "the chief operational fact of life inside California prisons"). Observers recognize that "gangs create the prisoner's new identity by recognizing the skills he has learned on the street and providing a way and a reason to use them in prison. The gangs also affirm the 'race consciousness' of the ghetto. They teach that the prison is a political place where being Black, white or Hispanic defines the prisoner's political position and where following the gang gives the prisoner political power." Willens at 57. They acknowledge that "prison can be a homecoming, provided that the man is a gang member who is assigned to the prison his gang controls. Then

the gang provides food and cigarettes, visits and gifts coordinated by allies outside, information about friends and enemies in the prison, and protection from the thieves and rapists who prey on new men." *Id.*

"Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism and religious bigotry. Protecting staff from prisoners and prisoners from each other is a constant challenge." *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996). "'[T]he association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings.'" *Washington v. Lee*, 263 F. Supp. 327, 332 (M.D. Ala. 1968), quoting *Edwards v. Sard*, 250 F. Supp. 977 (D.C. Dist. 1966).

There are five major prison gangs in California: Mexican Mafia (EME), Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders. Nuestra Familia (NF) created a subgroup called the Nuestra Raza, which currently enforces the interests of the NF while its members are isolated in security housing units. The Aryan Brotherhood is allied with the EME and is friendly with other white gangs such as the Hells Angels and the Nazi Low Riders. California Department of Justice, *Organized Crime in California 2003* 15-17 (2003) [hereafter California Department of Justice, *Organized Crime*].[1] California Hispanic inmates are divided geographically into Norteños (Northerners) and Sureños (Southerners). See California Department of Justice, *Gangs 2000: A Call to Action* 30

[1] Available at http://caag.state.ca.us/publications/org_crime.pdf

(1993);[2] *People v. Aguilera*, 51 Cal.App.4th 1151, 1156 n.3 (1996); see also J.A. 185a (inmates from California Avenue in Bakersfield or northward cannot be housed with Southern Hispanic inmates).

The prison gang culture is, above all, violent: "It includes forced prostitution and armed robbery. It also includes the violence necessary for its enforcement such as attacks on prisoners who interfere with prostitution or tell secrets." Willens at 61-62. It is common knowledge that some gangs require one inmate to kill another ("make your bones") in order to become a gang member. See *United States v. Santiago*, 46 F.3d 885, 888 (9th Cir. 1995) (Mexican Mafia); *United States v. Silverstein*, 732 F.2d 1338, 1341 (7th Cir. 1984); see also Grann, David, "The Band: How the Aryan Brotherhood became the most murderous prison gang in America," THE NEW YORKER 156 (Feb. 16 & 23, 2004).

Prison gangs operate both inside and outside of prison and control the activities of many street gangs. California Department of Justice, *Organized Crime*, *supra*, at 15 (2003). One of the primary sources of new prison gang members is street gangsters who are sent to prison, and some of the prison gangs are actively recruiting to bolster their ranks. *Id*. at 16. For example, the Black Guerrilla Family is experiencing a resurgence due to its recruiting efforts, and the Aryan Brotherhood is actively recruiting to compensate for some recent setbacks suffered as a result of gang-related federal indictments. *Id*. The increased recruiting efforts by the gangs and the resurgence of the Black Guerilla Family will lead to increased rivalries and

[2] Available at http://www.cgiaonline.org.

violence in the prisons. *Id*. at 17. The close affiliation between street gangs and prison gangs ensures that their rivalries and associated violence are factors from the moment new inmates – who may be street gang members – and repeat offenders – who may be prison gang members – arrive.

Violence in California prisons is well documented. The Ninth Circuit took notice of a series of race-based riots at Pelican Bay State Prison that resulted in one death and twenty-five injured inmates being transported to outside hospitals, as well as many other instances of violence that were reported in the media. Pet. App. 16a-18a n.9. The reported incidents include a race riot between Hispanics and African-Americans at Adelanto Prison during which six prisoners were injured, one critically, and after which 100 inmates had to be transferred; a lockdown following a riot at Lancaster Prison when large groups of Latino and white inmates rushed each other and ten inmates were injured; and a disturbance between 100 African-American and Latino inmates in an exercise yard at Folsom State Prison which led to the death of one prisoner and injuries to thirteen others. *Id*.

It is widely recognized that prison gangs are formed and organized along racial lines. *Harris v. Greer*, 750 F.2d 617, 619 (7th Cir. 1984) (taking judicial notice of fact that prison gangs are organized along racial lines). And courts have regularly acknowledged the ruthlessness of prison gangs. The Aryan Brotherhood, for example, has been recognized as "a singularly vicious prison gang," *United States v. Fountain*, 840 F.2d 509, 516 (7th Cir. 1988), that has a "hostility to black inmates," *United States v. Silverstein*, 732 F.2d 1338, 1341 (7th Cir. 984). The Mexican Mafia has been declared an "extraordinarily violent

organized criminal enterprise" whose members have engaged in murders, attempted murders, and conspiracies to commit murder; have testified falsely and threatened, assaulted, killed, or attempted to kill potential witnesses in pending cases; have vowed a "code of silence" to deny the existence of and membership in the Mexican Mafia; and have interfered with the judicial process by subpoenaing inmates under the guise of needing them as witnesses in their case, then attacking those persons in attorney visiting rooms. *United States v. Shryock*, 342 F.3d 948, 972 (9th Cir. 2003).

Prison gang politics dictate social protocols that must be honored. In California prison dormitories, for example, adjacent bunks may be white, African-American, or Hispanic, but problems occur if an inmate of one race is placed on a bunk above an inmate of another race. J.A. 190a-191a (fights have occurred when this was mistakenly done).

Neither petitioner nor his supporting amici dispute the existence of significant racial tension in California prisons. Petitioner himself admitted that he couldn't ask a white inmate to move in with him: "You can't cross races. That will start racial tension right there. So I know I can't go to a white guy and say, 'Hey, I want to move with you' because he is not going to move with me." J.A. 109a. Petitioner's fear appears to be a generalized one of cross-racial violence directed at him because he is African-American. See J.A. 117a.

In California, as in almost all prison systems, it has sometimes been necessary to take protective measures based on race (*e.g.*, after a race-based prison riot). See, *e.g.*, Pet. App. 16a-18a n.9. At issue in this case, specifically, is

California's process for assigning cells at the prison reception centers, to which we now turn.

B. Cell assignment in the reception center

The practice at issue in this case takes place only at "reception centers." Reception centers for men are located within seven of California's thirty-two prisons. When an inmate first enters the California state prison system, he is sent to a reception center where he undergoes processing and screening to determine his custody level and an appropriate permanent prison placement. In 2003, the seven reception centers for male inmates processed more than 40,000 newly admitted inmates and almost 72,000 inmates who were returned from parole. California Department of Corrections, *Movement of Prison Population* 3 (2003).[3] In addition, those seven reception centers processed a portion of the 254,000 already admitted male inmates who were moved from one facility to another over the course of the year. *Id*.; see n.9, *infra*.

When an inmate arrives at a reception center, prison officials have only limited information about him, particularly if he has never been housed at a California Department of Corrections (CDC) facility. The only information that counties are required to provide to the CDC when they deliver a convicted defendant to the CDC's custody is (1) a certified abstract of judgment or minute order, (2) a Criminal Investigation and Identification number, and (3) a confidential Medical/Mental Health Transfer Form indicating that the inmate is medically capable of being

[3] Available at http://www.corr.ca.gov/OffenderInfoServices/Reports/Annual/Move5/MOVE5d2003.pdf

transported. Cal. Penal Code § 1216 (West 2004). Any other information is gathered during the classification process itself. J.A. 303a. During this process, a thorough evaluation of each inmate's physical, mental and emotional health is completed. *Id*. In addition, he is given a battery of tests to determine his vocational and educational skills and goals. *Id*. The prisoner's criminal history, history in jail, and any previous prison or jail commitments are reviewed to determine his security needs and classification level.[4] *Id*. at 304a. During this time, classification staff determine whether or not the inmate has enemies elsewhere in prison, including people who may have testified against him in the past or in his criminal case, or inmates with whom he may have had disputes during previous jail or prison placements. J.A. 303a-304a.

In reception centers, inmates are usually housed two to a cell or in dormitories. J.A. 303a. Single cells are at a premium because California's seven reception centers for male inmates are operating far in excess of design capacity, from the least crowded at 200 percent, to the most crowded at 393 percent. See California Department of Corrections, *Weekly Report of Population as of Midnight July 7, 2004*.[5] Single-celling at reception centers is reserved for inmates who present special security problems, including those convicted of very notorious crimes; those in need of protective custody because of their effeminate appearance, extreme youth or old age, or small stature;

[4] There are four general classification levels, I-IV. Level I is equal to minimum security, level IV is maximum security. Petitioner is classified level IV.

[5] Available at: http://www.corr.ca.gov/OffenderInfoServices/Reports/WeeklyWed/TPOP1A/TPOP1Ad040707.pdf. The total male inmate population at reception centers was 17,130 and design capacity is 7,776 (CDC design capacity is defined as one inmate per cell).

former law enforcement officers; known informants; and known gang leaders. See, *e.g.*, CDC Dep't Operational Manual, § 61010.11.3 (2004).

In deciding cellmate assignments for this initial screening period, the principal concern of prison officials is the safety of the inmates and staff, and security of the prison. J.A. 303a. Officials seek to minimize the possibility of incompatibility, working with the limited information available at the time. For example, prison officials look at the relative ages of the potential cellmates, avoiding the placement of an older inmate with a much younger inmate. J.A. 244a, 249a. Similarly, prison officials look at the relative size of the potential cellmates, avoiding the placement of a large inmate with an inmate of a much slighter build. To the extent that they have the information at the time of housing placement, prison officials will also consider "case factors" and "custody concerns," which include the inmate's family relationships, education, past employment and military service, the need for psychiatric or specialized medical care, criminal and escape history, the need for protective or confidential placement, prison gang or street gang affiliation, and other individual safety concerns. J.A. 304a; see, *e.g.*, Cal. Code Regs tit. 15, § 3375.2 (discussing specific case factors and custody concerns). Officials try to discern gang affiliation from a number of visual cues including race, tattoos, haircut, or displays of gang colors on items of clothing or items carried on the person. See J.A. 184a.

Racial identification is far from the only factor considered in making initial cell assignments in reception centers, but it is an important one. J.A. 305a-306a. Race-based gang involvement is part of many inmates' backgrounds, and is generally found to play a role in those

inmates' anti-social, criminal behavior. J.A. 305a. Based on their day-to-day experience, prison officials know that the race of a cellmate can be the source of tension and possible violence. See J.A. 250a. Indeed, one prison administrator testified that if race were not considered in making this initial housing assignment, she felt certain there would be racially based conflict in the cells and in the prison yard. She was unwilling to knowingly disregard racial factors and place an inmate in jeopardy, and would not compromise inmate safety through actions that she felt certain would result in violence and conflict. J.A. 251a. This view was supported by then-acting Director of Corrections Steven Cambra. J.A. 305a-306a.[6] Because prison officials at the reception center generally lack complete information on inmates who are to be celled together, a newly arrived inmate is generally housed with an inmate of his own race. *Id*. But reception center inmates may cell with inmates of other races, upon request, if the inmates provide information that they are compatible. J.A. 183a-184a.

Housing in the close quarters of a two-man cell is the only context in which race is taken into consideration in the reception center. The confined nature of the reception center cells makes them potentially more dangerous than other areas of the prison. Staff cannot see into the cells without going directly up to them, and inmates sometimes place coverings over the windows so that staff cannot see

[6] Prison officials also testified to being concerned that, if they did not take race into consideration in double-celling and injury resulted, they would be accused of "setting up" the conflict. J.A. 198a, 201a-202a. See, *e.g.*, *Mooring v. San Francisco Sheriff's Dep't*, 289 F. Supp.2d 1110, 1111 (N.D. Cal. 2003) (deputy accused of deliberately double-celling a Norteño with a Sureño inmate).

into them at all. J.A. 306a. Because of the currently high levels of gang-related racial violence in areas where inmates are easily observed and staff is able to rapidly intervene, administrators are concerned that inmates would be in greater danger in areas where staff may not easily observe them, the inmates have no ability to elude their adversaries, and staff could not safely respond in time to prevent injuries. J.A. 306a. Moreover, reception-center inmates are confined to their cells for much of the day. *Id*.

The initial screening and classification period typically takes around sixty days. J.A. 305a. After the classification period, the inmate is either retained in the permanent housing area of that prison or he is transferred to another institution. The re-screening process for transferred inmates is typically completed within fourteen days, as is required by the CDC's own policies.[7] To maximize the inmate compatibility and minimize the possibility of violence in the general prison population, inmates are permitted to select their own cellmates once they move to permanent housing. J.A. 311a. Both inmates must sign forms indicating that they would like to share a cell. When inmates request to be housed together, officials do not

[7] Although petitioner claims that an inmate undergoes a sixty-day classification period whenever the inmate is transferred within CDC, that is untrue. See, *e.g.*, Pet. Br. at 9, 37; see also U.S. Br. at 23. Transferred inmates are generally processed quickly at the new institution. The CDC Departmental Operations Manual section 62010.8.3 mandates that each inmate be reviewed and classified by a committee within fourteen days of arrival at the new institution. Regulations available online at: http://www.cdc.state.ca.us/Regulations Policies/PDF/DOM/Chapter%206%20Classification/Chapter%206.pdf. In any event, petitioner "explicitly disavowed" any challenge to the transfer policy at oral argument in the Ninth Circuit. Pet. App. 6a n.2.

consider race, and ordinarily grant the requests unless there are security reasons for denying them. J.A. 311a-312a.

All other aspects of an inmate's life in prison – both while at the reception center and afterwards – are managed without reference to his race or that of his fellow inmates. J.A. 250a. California expressly forbids racial discrimination in its prisons. See, *e.g.*, Cal. Code. Regs. tit. 15, § 3004(c) (2004). There is no distinction based on race for jobs, meals, yard and recreational time, or vocational and educational assignments. *Id*. And of course there is no evidence to suggest that certain cells are "set aside" in the reception center for occupation by only one race or another. In fact, the evidence showed that no cells are designated for any particular race and that the racial composition of the cells changes regularly. J.A. 188a.

C. The proceedings below

Petitioner Garrison Johnson, a California state prisoner serving a sentence of thirty-six years to life, contends that CDC's practice violates equal protection. Petitioner entered the California Institution for Men in Chino on June 22, 1987. J.A. 257a. Petitioner's classification process was completed twenty-eight days later. J.A. 259a-262a. Petitioner admits that before entering prison he was a member of the predominantly African-American Crips[8] street gang. J.A. 93a. Although he admits that he has never requested to be celled with an inmate of another

[8] See generally Alonso, Alejandro A., M.S., *African-American Street Gangs in Los Angeles*, National Alliance of Gang Invest. Ass'n (1998), available at http://www.nagia.org/Crips_and_Bloods.htm.

race (J.A. 112a),[9] Petitioner nonetheless sued California Department of Corrections' former Directors Gomez and Rowland for damages, and he has sued the Director[10] in her official capacity for injunctive relief.

Johnson filed his original complaint in 1995.[11] After a series of amendments in response to motions to dismiss, Johnson filed a Third Amended Complaint. The State again moved to dismiss and the district court dismissed the complaint without leave to amend for failing to state a claim under *Turner v. Safley*, 482, U.S. 78 (1987). J.A. 25a-26a; see July 1, 1997 Report and Recommendation of United States Magistrate Judge at 10, citing *Turner*, adopted in its entirety by district court's January 8, 1998 Order, district court docket numbers 58 and 62, respectively ("Plaintiff must plead that the Defendant's alleged

[9] It is questionable whether petitioner even has standing to pursue his claim. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief). Petitioner is challenging a practice that has not applied to him since 1987. J.A. 259a-262a. And he has expressly waived any challenge to the process that applies to inmates transferring between prisons. Pet. App. 6a n.2. Inmates have been granted requests to cross-racially cell during the classification process. See J.A. 183a-184a, 199a. Petitioner has never asked to cell with an inmate of another race and, thus, he has never been expressly denied the opportunity. J.A. 112a. Because of petitioner's admitted pre-prison affiliation with the African-American Crips street gang, and not because of his race, petitioner would not have been eligible to double-cell with a white cellmate while he was being classified at the reception center.

[10] Jeanne Woodford is the current CDC Director. The injunction proceedings are stayed in the district court pending conclusion of this proceeding.

[11] Petitioner's claim is not barred by the statute of limitations for California life-prisoners that was in effect at the time the complaint was filed.

action in segregating inmates was not reasonably related to any legitimate penological interest").

The Court of Appeals for the Ninth Circuit reversed in part and remanded, holding that petitioner had sufficiently alleged an equal protection claim for racial discrimination, citing *Turner*, and that he should be given an opportunity to amend portions of his complaint. J.A. 158a-168a.

Both parties then conducted discovery and cross-moved for summary judgment on the equal protection claims. The district court denied petitioner's motion and granted in part and denied in part respondents' motion. J.A. 421a. Specifically, the court denied summary judgment for respondents on the basis of qualified immunity and denied summary judgment as to petitioner's claim against the current Director for injunctive relief. J.A. 420a-425a.

Nine days later, however, this Court decided *Saucier v. Katz*, 533 U.S. 194 (2001), providing further guidance in the proper application of qualified immunity. In view of *Saucier*, respondents Gomez and Rowland moved for reconsideration of the qualified immunity ruling. The district court granted reconsideration, and found that Gomez and Rowland were entitled to qualified immunity because their actions were not clearly unconstitutional. Pet. App. 32a-35a.

The district court entered judgment for Gomez and Rowland under Federal Rule of Civil Procedure 54(b), J.A. 40a, docket 133, and petitioner immediately appealed only the grant of qualified immunity. There has been no final judgment with respect to the current CDC director, who is

sued for injunctive relief only, and no appearance was ever entered for the State of California.

On appeal, the parties no longer contended that anything other than the initial sixty-day policy was relevant; "Johnson's counsel at oral argument explicitly disavowed any challenge to the continuing effects of the CDC's housing policy and limited the challenge only to the sixty-day policy itself." Pet. App. 6a n.2. Thus, the only question before the appellate court was whether the CDC's use of race as a factor in making the temporary sixty-day housing decision violated the Equal Protection Clause.

The Ninth Circuit found that while this Court's per curiam decision in *Lee v. Washington*, 390 U.S. 333 (1968), held that segregated cell blocks were unconstitutional, this Court's *Turner* opinion expanded *Lee*'s definition of "particularized circumstances" and "necessity for security and discipline," and imposed a heavy burden on inmates seeking to prove a particular practice unconstitutional. Pet. App. 9a-13a. The appellate court found that to the extent that *Lee* and *Turner* diverged, it was bound to follow *Turner*. *Id*.

In applying *Turner*, the appellate court found that respondents' practice met all four *Turner* factors: (1) whether the officials' actions are rationally related to a legitimate, neutral objective; (2) whether alternative means exist to exercise the inmates' rights; (3) the impact that any accommodation of the asserted right would have on guards, inmates, and resources; and (4) whether there are ready alternatives to the policy. Pet. App. 14a-31a. Because the appellate court found that there was no constitutional violation, it ended its inquiry there. Pet. App. 31a.

Petitioner sought rehearing and rehearing *en banc*. The petition for rehearing was denied.

SUMMARY OF ARGUMENT

Every day, prison officials are called upon to make decisions that require balancing inmates' individual liberties against the needs of the institution as a whole, and against the competing constitutional rights of other inmates. Recognizing the complex and dynamic nature of this enterprise, and respecting the constraints imposed on courts by principles of federalism and separation of powers, this Court has traditionally reviewed prison officials' decisions with considerable deference. Thus, *Turner v. Safley* sets forth a four-part test for assessing prisoners' constitutional claims. An action that impinges on inmates' constitutional rights is generally valid if it is reasonably related to a legitimate penological interest.

Since *Turner* was decided, this Court has repeatedly held that its standard applies to a wide variety of fundamental rights, including freedoms of speech and association, access to courts, and substantive due process claims under the Fourteenth Amendment. Even where *Turner* has not expressly been applied, as in Eighth Amendment cases and claims of procedural due process violations, the Court has announced highly deferential standards designed to leave prison officials with an unusual degree of discretion. *E.g., Sandin v. Conner*, 515 U.S. 472 (1995); *Whitley v. Albers*, 475 U.S. 312 (1986).

This case presents no occasion for carving out an exception to the unbroken tradition of deference to prison officials' informed judgments. Unlike other equal-protection

contexts where strict scrutiny has been applied to race-based decision making, the practice at issue here is uniquely a product of the volatile prison environment, and it neither benefits nor burdens one group or individual more than any other group or individual. While lower courts have reached differing interpretations of this Court's statements in *Lee v. Washington*, 390 U.S. 333 (1968), *Turner* and its progeny may be fully harmonized with *Lee*. Furthermore, the four factors of the *Turner* test are rigorous and searching enough to root out any invidious discrimination against prisoners.

Applying the *Turner* standard to the facts of this case, the practice of housing each newly arrived inmate with another of his own race is seen to be constitutional. The unassailably legitimate purpose of the practice is to reduce the threat of racial violence between inmates, a threat that is deadly serious in light of California's experience with violent, race-based prison gangs. Even though inmates are assigned to share cells with inmates of their own race at reception centers, all other aspects of prison life, inside the reception center and out, are integrated. Disregarding race, on the other hand, would expose reception-center inmates to an unacceptable risk of harm, as courts have concluded in other prison contexts. And, since no one has come forward with an obvious, easy alternative solution, the practice satisfies the standard set forth in *Turner*.

Even under a strict scrutiny analysis, the temporary double-celling practice would meet constitutional requirements. Respondents suggest that, if strict scrutiny is to be applied in this case, the parties and the court should have the benefit of additional opportunities to discover and present relevant evidence. But even if not, the record

would support affirmance. The state's interest in curtailing prison violence is not merely legitimate; it is compelling. Further, the double-celling practice is narrowly tailored to address a pervasive risk of violence in a narrow, but urgent context: Where will an inmate rest, wait, and sleep the day he "gets off the bus," and for up to 60 days thereafter while prison officials gather the information they need to make a permanent housing assignment? While peace among all inmates may be the ultimate penological goal, the fact that rival prison gangs are divided along racial lines requires prison officials, as a matter of Eighth Amendment law, to consider race as one factor in initial cell assignments.

Finally, because the issue of which legal standard should apply to their conduct has been an open question until now, respondents assert that they must be entitled to qualified immunity from damages in any event.

ARGUMENT

I.

THE *TURNER* STANDARD IS APPROPRIATE TO DETERMINE WHETHER THE CDC'S TEMPORARY DOUBLE-CELLING POLICY IS CONSTITUTIONAL, BECAUSE IT AFFORDS PRISON OFFICIALS NEEDED DEFERENCE AND IS ADEQUATE TO SAFEGUARD INMATES' CONSTITUTIONAL RIGHTS.

A. *Turner v. Safley* Expresses the Long-Standing Principle that Courts Are to Defer to Prison Administrators' Expert Judgments.

Courts have long recognized that prison administrators, not courts, are best equipped to deal with the daily

operations of prisons. This principle was at the crux of this Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987). In *Turner*, this Court reconciled the obligation of federal courts to "take cognizance of the valid constitutional claims of prison inmates," *id*. at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405), on the one hand, with the recognition that, among the three branches of government, "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," *id*. (quoting *Martinez* at 405). Neither petitioner nor any of his supporting amici comes close to showing how courts are better equipped to deal with the problems of race-based gang violence in prisons than they are equipped to deal with issues of inmate correspondence or inmate desires to marry.

Deference to the particular expertise of prison officials in the difficult task of managing daily prison operations did not begin with the *Turner* decision and will not end with this case. This Court, in numerous prison cases both before and after *Turner*, has repeatedly instructed federal courts to defer to legitimate institutional needs in the operations of state prisons. See, *e.g.*, *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977) (noting that the judicial branch must give "appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement"). This Court knows that "'the problems of prisons in America are complex and intractable, and . . . not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.'" *Rhodes v. Chapman*, 452 U.S.

337, 351, n.16 (1981), quoting *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974).

It is the nature of prison life that an inmate's individual liberties must be balanced not only against the interests of the state, but also against the constitutional rights of other inmates. This Court considered prison officials' duty to protect inmates in *Farmer v. Brennan*, 511 U.S. 825 (1994), and held that prison officials violate the Eighth Amendment when they know of and disregard a substantial risk of serious harm to an inmate. *Id.* at 827. The *Farmer* Court understood that, "[h]aving incarcerated persons with demonstrated proclivities for antisocial, criminal, and often violent conduct, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer v. Brennan*, 511 U.S. at 833. Moreover, Justice Blackmun recognized that many inmates are sent to prison for non-violent offenses and characterized the responsibility of prison officials to protect inmates from harm as an "affirmative duty . . . not to be taken lightly." *Id.* Recognizing that prison administrators are regularly called on to balance competing constitutional interests under highly dynamic conditions, this Court has traditionally afforded them considerable deference in their decision making. See *Turner*, 482 U.S. at 89.

This tradition of deference stems not only from the recognition that prison officials have special expertise, but also from principles of federalism and separation of powers. See *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a state has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the

administration of prisons"); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) ("the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial").

The delicate balance of deference, federalism, and the separation of powers led this Court to craft the *Turner* test and make clear that whenever "a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. In applying the *Turner* reasonable-relationship test, four factors are relevant in determining whether the prison practice is constitutional: whether the practice has a valid, rational connection to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the practice. *Overton v. Bazzetta,* 539 U.S. 126, 132 (2003); *Turner*, 482 U.S. at 89-91. The *Turner* Court recognized that strict scrutiny was inappropriate in the prison context because, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id*.

B. Deferential Standards Are Applied to All Constitutional Claims Made by Prisoners.

Since *Turner* was decided, this Court's opinions have repeatedly emphasized that the *Turner* test applies to prisoners' constitutional claims regardless of the standard

of review that would be applied outside prison walls. In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), this Court held that even when strict scrutiny otherwise would apply to the policy in question, the exigencies of prison administration require only that the regulations be reasonably related to a legitimate penological interest. *Id*. at 407-09, 412 (prisoner correspondence). In *Washington v. Harper*, 494 U.S. 210 (1990), this Court addressed a prisoner's Fourteenth Amendment due process claim and reaffirmed its intent that *Turner* be followed, declaring, "[W]e made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Id*. at 223-24. And in *Lewis v. Casey*, 518 U.S. 343 (1996), this Court applied *Turner* to prisoners' access-to-the-courts claims, even though that fundamental right would otherwise be subject to strict scrutiny. *Id*. at 361.

The *Turner* standard and the principle of deference to prison administrators were again recently reaffirmed in *McKune v. Lile*, 536 U.S. 24 (2002) (prison officials' requirement that sex offenders admit guilt in order to be eligible for treatment program); *Overton v. Bazzetta,* 539 U.S. at 131 (freedom of association claims relating to family visitation); and *Shaw v. Murphy*, 532 U.S. 223, 228 (2001) (First Amendment challenge to prison regulation restricting inmate correspondence). These cases underscore the continuing vitality of the *Turner* standard for evaluating constitutional claims in the prison context.

Both the petitioner and amici United States and the ACLU argue that this case is different from the many cases in which this Court has applied *Turner*. Petitioner argues that *Turner* has never been applied to an equal protection claim by a suspect class. Pet. Br. at 27. The

ACLU argues that *Turner* applies only when rights are "exercised" rather than "enjoyed." ACLU Br. at 17. And both the United States and the ACLU argue that consideration of race should be subjected to a different test just as the Eighth Amendment cases receive their own tests. U.S. Br. at 15-16, ACLU Br. at 17-21.

But in the prison setting, every test for constitutionality is deferential to prison officials regardless of whether the test fits squarely within *Turner's* ambit. For example, excessive force in prison is unconstitutional only if it is inflicted maliciously and sadistically for the very purpose of causing harm. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986). In contrast, excessive force outside of prison is unconstitutional if it is merely unreasonable. *Graham v. Conner,* 490 U.S. 386, 395 (1989).

Due process claims are similarly restricted in prison. This Court applied the *Turner* test to a substantive due process claim challenging involuntary medication of a mentally ill inmate. *Washington v. Harper*, 494 U.S. at 221-23. In that case, the Washington Supreme Court had declined to apply the *Turner* standard to the policy at issue, reasoning that the inmate's liberty interest was distinguishable from the First Amendment rights at issue in both *Turner* and *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987). *Washington v. Harper,* 494 U.S. at 223. But this Court reversed, emphasizing that the *Turner* standard was "based upon the need to reconcile [the Court's] longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration. These two principles apply in all cases in which a prisoner asserts that a prison regulation violates the

Constitution, not just those in which the prisoner invokes the First Amendment." *Id*. at 223-24 (internal citations omitted). The *Turner* standard is not limited to just those rights that are expressive or passively "enjoyed" as amicus ACLU contends.

Although this Court did not apply the *Turner* standard when it analyzed an inmate's due process rights in *Sandin v. Conner*, 515 U.S. 472 (1995), it did apply a very deferential standard to determine whether state regulations had created liberty interests. *Id*. at 484. Later, this Court recognized in *McKune v. Lile*, 536 U.S. 24, 37 (2002) that "*Sandin* and its counterparts underscore the axiom that a convicted felon's life in prison differs from that of an ordinary citizen" and that *Sandin*'s limitations were grounded in *Turner*'s deferential standard: "The limitation on prisoners' privileges and rights also follows from the need to grant necessary authority and capacity to federal and state officials to administer the prisons," and "[f]or these reasons, the Court in *Sandin* held that challenged prison conditions cannot give rise to a due process violation unless those conditions constitute 'atypical and significant hardship[s] on [inmates] in relation to the ordinary incidents of prison life.'" *McKune*, 536 U.S. at 37 citing and quoting *Sandin*, 515 U.S. at 484 and citing *Turner*, 482 U.S. 78 (alterations in original).

Thus, every constitutional standard applied in prison is informed by the unique environment of prison and its operational challenges and affords the deference necessary to accommodate those factors.

C. This Court Should Not Craft an Equal Protection Exception to *Turner*.

Petitioner and amici argue that strict scrutiny is the proper test in this case and that recent cases support the view that all state racial classification claims are subject to strict scrutiny. See *Gratz v. Bollinger*, 539 U.S. 244 (2003) (using racial preferences in undergraduate admissions subject to strict scrutiny); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (race-conscious law school admissions policy subject to strict scrutiny); *Adarand Construction, Inc. v. Pena*, 515 U.S. 200 (1995) (providing financial incentives to hire minority contractors subject to strict scrutiny); and *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (minority contracting quotas subject to strict scrutiny). But none of those cases arose in the prison context, where competing constitutional concerns and the need to safely administer a volatile, violent environment are paramount.

Furthermore, unlike here, all of those cases involved a benefit conferred or a burden suffered by the parties. There is no evidence that the practice at issue here works a deprivation on either cellmate, *cf. Loving v. Virginia,* 388 U.S. 1 (1967) (equal application of prohibition against mixed-race marriage implicated Fourteenth Amendment and burdened each of the parties on account of race); nor is there evidence that the practice works to the advantage of either cellmate on account of his race, *cf. Grutter v. Bollinger*, 539 U.S. 306 (2003) (race as a factor in college admissions); *Shaw v. Reno*, 509 U.S. 630 (1993) (district lines drawn to maximize minority voting strength).

This Court first faced a prisoner's racial discrimination claim in *Lee v. Washington*, 390 U.S. 333 (1968),

which affirmed the unconstitutionality of state statutes that required completely segregated prisons and jails. Predating *Turner*, *Lee* struck down a state statute that required the complete racial segregation of prisons and jails.[12] Although some courts have interpreted *Lee* to invoke a strict scrutiny analysis, there is no discussion of strict scrutiny in the short per curiam opinion. On the other hand, the concurring opinion emphasized 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." *Lee*, 390 U.S. at 334 (Black, Harlan, Stewart, JJ., concurring).

The lack of clear direction in *Lee* led the circuit courts to apply inconsistent standards for prison racial equal protection claims. The Ninth Circuit (in this case and one other) and the Fourth Circuit have both used the *Turner* standard, while the Fifth Circuit has used *Lee*'s "particularized circumstances" with no discussion of strict scrutiny, and the Seventh Circuit has used the strict scrutiny standard. *Walker v. Gomez*, 370 F.3d 969 (9th Cir. 2004) (applying *Turner* to find that inmate's rights were violated when, after three prison lockdowns, he was not allowed to resume his prison job until after similarly-situated inmates of other races); *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001) (applying *Turner* to find that inmate's rights were violated when officials denied him Native American religious items because he wasn't Native American); *Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994)

[12] In contrast, California expressly forbids discrimination in its prisons on the basis of race. See, *e.g.*, Cal. Code. Regs. tit. 15, § 3004(c) (2004).

(finding no "particularized circumstances" to justify permanent segregation of two-man cells where white inmates received preferential treatment); *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987) (applying strict scrutiny to inmate's claim of racially discriminatory job assignments).[13]

It is not necessary to overrule *Lee* in order to apply the *Turner* standard in this case because *Lee* is consonant with *Turner*. *Turner* provides the specific standard to be used when reviewing a prison operational rule, taking into account the "particularized circumstances" that the *Lee* Court recognized could justify separating prisoners on the basis of race.

Good faith and particularized circumstances are implicit in the *Turner* standard; it requires that the officials' actions, policies, or practices be rationally related to a legitimate and neutral objective, and that the existence of ready alternatives be examined. Actions taken in bad faith would not further a legitimate and neutral objective, nor would they be rationally related to it. The particularized circumstances contemplated in *Lee* are encompassed by the *Turner* standard's examination of

[13] Although not directly at issue in this case, courts have also applied inconsistent standards in evaluating quasi-suspect classes in prison. *Compare Veney v. Whyde*, 293 F.3d 726 (4th Cir. 2002) (*Turner* applied to claim of gender bias in practice prohibiting double-celling homosexuals); *Oliver v. Scott*, 276 F.3d 736 (5th Cir. 2002) (*Turner* applied to challenge cross-gender strip searches); *and Yates v. Stalder*, 217 F.3d 332 (5th Cir. 2000) (*Turner* applied to gender-based claim of disparate conditions between male and female prisons); *with Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989) (strict scrutiny applied to inmate's gender-based equal protection claim); *and Pargo v. Elliott*, 49 F.3d 1355 (8th Cir 1995) (strict scrutiny applied to inmate's gender-based claim).

whether there are ready, obvious alternatives to the challenged policy. The absence of ready alternatives would counsel that particularized circumstances exist that cannot otherwise be addressed.

Although the *Turner* standard is a deferential one, it is not without force. Prison policies and practices involving suspect classes and fundamental rights have been struck down using *Turner*, including a post-*Johnson* decision by the Ninth Circuit. See *Walker v. Gomez*, 370 F.3d 969 (9th Cir. 2004) (affirming that prison officials' race-based actions violated inmate's equal protection rights); see also *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001) (affirming injunction against prison officials in race-based discrimination claim); *Bear v. Kautzky*, 305 F.3d 802 (8th Cir. 2002) (affirming preliminary injunction against prison officials in access to courts claim); *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001) (affirming preliminary injunction against prison officials in free exercise of religion claim); *Hakim v. Hicks*, 223 F.3d 1244 (11th Cir. 2000) (affirming that prison policy violated inmates' free exercise of religion). Thus, the *Turner* standard provides courts with an effective tool to protect inmates' rights while at the same time according officials the needed deference to administer the prisons.

Neither petitioner nor amici has established why this Court should depart from its repeated admonition that any impingement of prisoners' constitutional rights is to be measured under a deferential standard. This Court's opinions repeatedly express the view that "such a standard is necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Turner*, 482 U.S. at 89

quoting *Jones v. North Carolina Prisoners' Union*, 433 U.S. 128.

This Court should not craft an equal protection exception to the *Turner* test because the same principles that guide the application of *Turner* for other constitutional claims also apply here.

II.

THE CDC'S CONSIDERATION OF RACE AS ONE FACTOR IN ASSIGNING TEMPORARY CELLMATES SATISFIES THE *TURNER* STANDARD AND IS THUS CONSTITUTIONAL.

Under *Turner*, the petitioner bears the burden of overcoming "the presumption that the prison officials acted within their broad discretion." *Shaw v. Murphy*, 532 U.S. at 232. Courts should look to four factors to determine if the *Turner* standard is met. Each of the four *Turner* factors is addressed in turn here.

A. There is a valid, rational connection between CDC's practice and the legitimate penological interest of preventing violence.

The issue at the heart of the *Turner* test is whether there is a valid, rational connection between the regulation and the asserted goal. A regulation or practice "cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. The objective must be both legitimate and neutral. *Id*. at 90.

This Court has long held that prevention of inmate violence is a legitimate goal in prisons: "[M]aintaining institutional security and preserving internal order and discipline are essential goals," and "[p]rison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel. . . . " *Bell v. Wolfish*, 441 U.S. at 546-47.

In addition to serving a legitimate goal, the practice must be applied in a neutral manner. *Turner*, 482 U.S. at 90. Here, violence prevention is a goal that cuts across all racial lines, and all of the evidence showed that the CDC's cell assignment practice operates in a neutral manner. There are no cells designated for any particular race and the racial composition of the cells changes regularly as inmates move in and out. J.A. 188a. There is no evidence that any race enjoys a benefit or suffers a burden, or that any race is granted a more favorable location or special privileges. The practice is applied to all inmates regardless of their race. See, *e.g.*, J.A. 305a.

The practice must also be rationally related to the objective. *Thornburgh v. Abbott*, 490 U.S. at 414. Prison administrators here use race as one of many factors in making their initial housing assignments; at no institution is race the sole factor in a housing decision. J.A. 305a. The initial period in prison is a critical time for prison officials and inmates alike. It is essential that the inmates be protected from one another until sufficient information is obtained to make a more in-depth determination about their compatibility with other inmates. The fact that prison and street gangs divide along racial lines is a distasteful reality, but a reality that must be taken into account when little information is available about the inmates other than their race.

Although petitioner contends that there is no evidence supporting the connection between the CDC's practice and its goal of preventing violence, that is simply untrue. Gang and race-related violence is a harsh reality in California prisons. As the Ninth Circuit noted after citing to many documented instances of violence in California prisons, "This is hardly a case where the prison administrators are acting on an unsubstantiated record." Pet. App. 18a n.9. Other systems have experienced similar violence. The worst prison riot in Ohio's history and one of the worst in United States history occurred after a consent decree mandated that inmates be integrated in double-cells. See *White v. Morris*, 832 F. Supp. 1129 (S.D. Ohio 1993). Nine inmates and one correctional officer were murdered and many others were injured during the eleven-day standoff. During negotiations, as well as after the riot, prisoners repeatedly cited integrated double-celling as a factor contributing to the tense atmosphere there. The siege finally ended when the court agreed to review the double-celling policy. *Id*. at 1130. The integrated double-celling policy was cited as a primary factor in the riot. *Id*.

It is crucial that officials making initial cell assignments be given the discretion and flexibility to protect incoming inmates until more information, including any gang affiliation, is known. Prison officials exercise this duty to protect by not double-celling inmates who are potentially members of rival gangs. Because race is a primary factor in gang affiliation, newly arrived inmates are generally celled with members of their own race. While this is not a fail-safe method because members of the same race may also be rivals, it is one way to reduce potential violence. Visual cues like tattoos, haircuts, displays of gang colors on clothing or personal items also assist

officials in determining gang affiliation and are taken into consideration in cell assignments. J.A. 184a.

Officials may not make "[r]outine and automatic" assertions that every step taken to protect prisoners' "constitutional rights will lead to a breakdown in institutional discipline and security." *Cleavinger v. Saxner*, 474 U.S. 193, 207 (1985). But neither must they wait until violence occurs before acting and may instead "anticipate security problems and . . . adopt innovative solutions to the intractable problems of prison administration." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, quoting *Procunier v. Martinez*, 416 U.S. at 405.

Because prison officials put forth evidence that, in their experience, racial tensions would be exacerbated if race were not considered as a factor in double-celling inmates at the reception centers, they met their burden of establishing a logical connection between the celling practice and the goal of preventing violence. The Ninth Circuit found that petitioner did not meet his burden of refuting the connection between the CDC's practice and its goal of preventing violence. Pet. App. at 21a-22a. Johnson argued that because racial violence continues to permeate the CDC, the double-celling practice must not work, and that because not all gangs are formed along racial lines, the practice is irrational. Pet. App. 20a-21a. But simply because the CDC practice is not a "magical elixir," "does not mean that pre-existing policies do not work to reduce violence from being more pervasive than it already is." Pet. App. 21a. There is no one practice or policy that can ameliorate all concerns. Prison officials do their best under the trying circumstances presented to them.

The CDC's practice furthers a legitimate goal of preventing violence, operates in a neutral manner that

neither benefits nor burdens any one race, and is rationally related to the goal.

B. There Are Alternative Means of Exercising the Constitutional Right.

Courts should be particularly conscious of the measure of judicial deference owed to corrections officials where other avenues remain available for the exercise of the asserted right. *Turner*, 482 U.S. at 90. Petitioner asserts that his right is to be free of race-conscious decision making by CDC officials. Pet. App. 23a. As the Ninth Circuit correctly analyzed it, the right at issue must be viewed expansively and sensibly.[14] *Thornburgh v. Abbott*, 490 U.S. 417. Thus, the court viewed the right "at a macro level" in terms of the right to be free from racial discrimination generally, rather than at the micro level of forcing officials to disregard race entirely in temporary cellmate assignments. Pet. App. 23a. This is consistent with the approach this Court used in *Turner* when it viewed the right at stake as "freedom of expression" in its totality, rather than as the specific right to communicate with inmates at other prisons. *Turner*, 482 U.S. at 92.

Here, all other aspects of prison life are fully integrated. Inmates from all races participate together in jobs; vocational, and educational assignments; dining halls; exercise yards; and recreation time. J.A. 250a. After the

[14] For purposes of these proceedings, respondents do not contest the conclusion that petitioner's claim of "racial classification" implicates the Fourteenth Amendment. But while respondents concede that the practice at issue here is "race conscious," that "consciousness" is only of the racial dissimilarity between two potential cellmates; the race *per se* of either of the cellmates is of no consequence.

brief period at the reception center, the CDC's practice is for inmates to select their own cellmates regardless of race. J.A. 251a, see J.A. 307a. The inmates' requests are then usually granted unless there are individualized security reasons for denying them. *Id*. The goal in this process is for inmates to find cellmates with whom they are compatible. *Id*.

The brief period at the reception centers when inmates are generally assigned to share a cell with someone of the same race does not constitute an impingement on Johnson's right to be free from racial discrimination generally.[15] Given the full integration of the prisons at every other level, the CDC's practice meets the alternative means prong of the *Turner* test.

C. There Would Be a Significant Impact on Prison Personnel, Other Inmates, and Resources in Assigning Reception Center Cellmates Differently.

Courts must also consider what impact accommodating the inmate's asserted right would have on prison personnel, inmates, and the allocation of prison resources. *Turner*, 482 U.S. at 90.

Disregarding race altogether in making initial reception center housing assignments would lead to increased gang-related racial violence both in the cells and in the

[15] Amicus United States criticizes respondents for applying the normal practice to petitioner Johnson when he transferred prisons, inasmuch as he had already been in the prison system for several years. U.S. Br. at 23. But the United States ignores the fact that, whatever information respondents may have had about Mr. Johnson, they likely had much less information about the inmate with whom Mr. Johnson would be celled during this transition period.

common areas of the prison. J.A. 250a-251a, 305a-306a. CDC administrators state that disregarding race would violate their obligations under the Eighth Amendment to protect inmates from a known danger. J.A. 201a, 251a, 305a. Because of the limited number of staff available to oversee the many cells, it "would be very difficult to assist inmates if the staff were needed in several places at one time." J.A. 306a. Consequently, both staff and inmate safety would be compromised because violence would increase and staff resources would be stretched beyond the capacity to adequately respond. Additionally, when prison resources are diverted to tend to one area of concern, they are necessarily displaced from other operations, leading to disruption of services.

Staff would have a difficult time controlling problems in the individual cells if race were disregarded entirely, and there would be fights in the cells that would later spill over to the exercise yards. J.A. 306a, see also 187a. This "ripple effect" of violence spreading from the cells to the yards and endangering both inmates and staff is exactly the kind of thing that the *Turner* Court counseled requires particular deference: "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90.

Prison officials proffered sufficient evidence to show that not considering race at all when assigning reception center cellmates would have a negative impact on guards, inmates and prison resources.

D. There Are Presently No Reasonable Alternatives.

Lastly, courts must examine whether reasonable alternatives exist that would fully accommodate the prisoner's rights at minimal cost to valid prison interests. *Turner*, 482 U.S. at 91. While the practice need not be a perfect fit to the goal, it cannot be an exaggerated response. *Id*. at 90. But "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id*. at 90-91. The burden is on the prisoner challenging the regulation, not on the prison officials, to show that there are obvious, easy alternatives to the practice or regulation. See *O'Lone*, 482 U.S. at 350.

Petitioner offers no reasonable alternatives. He suggests that officials could inquire into an inmate's gang affiliation, or whether he has a psychological profile involving racial animus, or whether he has a history of racial violence. J.A. 333a. These suggestions, however, ignore the fact that such inquiries can take time, and the inmates still need to be assigned a place to sleep in the meantime.

With respect to gang affiliation, the Ninth Circuit pointed out, "There is little chance that inmates will be forthcoming about their past violent episodes or criminal gang activity so as to provide an accurate and dependable picture of the inmate." Pet. App. 28a, see also J.A. 314a ("gang culture is that [they] do not talk to staff"). If gang affiliation is known, however, it is taken into account in the initial cell assignment. J.A. 315a ("[it's] first and foremost").

As for the psychological profile or history of violence, there is no evidence in the record to suggest that there is

time to administer and analyze the necessary history or testing before the first housing decision is made, nor that the cost would be minimal. See *Turner*, 482 U.S. at 91. Even if officials have information regarding an inmate's behavior outside of prison, that is not always an accurate predictor of in-prison behavior. The Ninth Circuit correctly observed that "[t]he CDC cannot accurately gauge an inmate's propensity for violence without first observing him in this new environment." Pet. App. 29a.

It is important to remember that the practice at issue is what officials do when prisoners first "get off the bus" after arriving at the prison. They must be housed somewhere, and the decisions must be made immediately. Processing more than 110,000 inmates per year does not allow officials the luxury of relaxed reflection when inmates are first arriving. Overcrowding at the reception centers is acute, and single-cells must be limited to accommodating the most serious safety- or inmate-management concerns.

Further, once reception center cellmates have been assigned, it would make no sense to reassign cellmates before the classification process is complete and the inmates are transferred to their permanent assignments. To do so would result in constantly rehousing inmates, further expending already strained prison resources. Moreover, if the point would be to remedy the initial race-conscious cellmate assignment, officials would have to make a second race-conscious decision in order to ensure maximum integration. And if the inmate would end up double-celling with a member of his own race upon reassignment, as will inevitably happen in some cases according to the rules of chance, then the reassignment would have been pointless. Therefore, once the initial assignment

is made and the classification process has started, it is best to allow that process to be completed without making more temporary housing assignments.

Not only has petitioner not shown any ready alternatives to the CDC's practice, he has failed to consider the duty of the officials to take reasonable measures to protect inmates from a known risk of harm. The Ninth Circuit, however, did not ignore that duty when it recently denied qualified immunity to officials who *did not* take inmates' race into account when releasing them to exercise yards, concluding that the officials were aware that placing inmates of different races on the exercise yards at the same time presented a serious risk of harm. J.A. 30a, *Robinson v. Prunty*, 249 F.3d 862, 866-68 (9th Cir. 2001). Just as with yard releases, officials must be cognizant of the dangers presented and take reasonable measures to deter violence when placing unknown inmates together in small cells.

The CDC's practice is not an exaggerated response; it is a measured response that is done to protect inmates and staff from in-cell violence. The practice satisfies the fourth prong of the *Turner* test.

III.

EVEN UNDER A STRICT SCRUTINY ANALYSIS, THE CDC'S TEMPORARY HOUSING PRACTICE IS CONSTITUTIONAL.

A. Remand is Appropriate.

If this Court decides that strict scrutiny is the appropriate standard and if it finds the CDC's practice does not meet that standard on the evidence presented, the Court

should consider remanding that issue to the district court because the evidentiary record was not developed with the aim of proving compliance with the strict scrutiny standard. See *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1033 (1992) (when new legal standard announced, case remanded to develop necessary facts). When the Ninth Circuit first considered this case, it reversed a Federal Rule of Civil Procedure 12(b)(6) dismissal and cited both *Lee* and *Turner* for the proposition that inmates may not be discriminated against; there was no discussion of strict scrutiny in the opinion. *Johnson v. State of California*, 207 F.3d 650, 655 (9th Cir. 2000). Moreover, the district court's order that was the subject of the first appeal specifically stated that *Turner* applied to the equal protection claim.[16] The defendants' discovery, which was taken after remand, was focused on meeting the rational relationship test of *Turner*, rather than strict scrutiny, given the Ninth Circuit's and the district court's citations to *Turner* and the absence of any indication by either court that strict scrutiny applied.

Under a *Turner* analysis, evidence of alternative means is not material unless a plaintiff shows that the officials' actions are an exaggerated response. See, *e.g.*, *Turner*, 482 U.S. at 90. As the Ninth Circuit found, petitioner did not meet his burden on that prong. Pet. App. 27a-31a. There was, therefore, no reason for respondents to produce evidence regarding alternative means that

[16] "Plaintiff must plead that the Defendant's alleged action in segregating inmates was not reasonably related to any legitimate penological interest." July 1, 1997 Report and Recommendation of United States Magistrate Judge at 10, citing *Turner*, adopted in its entirety by the district court's January 8, 1998 Order. District Court docket numbers 58 and 62, respectively. See J.A. 25a-26a.

would now be relevant to determine whether their actions were narrowly tailored to further the purpose of minimizing violence. Also, the burden to refute the officials' justification for the challenged policy lies with the inmate, not the prison officials. *Overton*, 539 U.S. at 132. Because respondents would have a higher evidentiary threshold and production burden to meet if strict scrutiny applied, it would be equitable to the parties and beneficial to the court below to further develop the evidentiary record.

B. The Practice Advances a Compelling Governmental Interest.

If this Court concludes that *Turner v. Safley* does not apply in this case, and if it finds that remand is not appropriate, the prison's practice would still satisfy strict scrutiny. When race-based action is necessary to further a compelling governmental interest, such action does not violate equal protection so long as the action is narrowly tailored to the governmental interest. *Grutter v. Bollinger*, 539 U.S. at 327.

All states have a compelling interest in maintaining the order and security of their prisons. 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."). There is no evidence that the CDC's practice is done for any other reason than to further prison security and for the safety of the inmates and staff. The question here is whether the CDC's practice is narrowly tailored to further that compelling interest.

C. The Practice is Narrowly Tailored.

When analyzing whether a race-conscious decision is narrowly tailored, "the inquiry must be calibrated to fit the distinct issues raised." *Grutter*, 539 U.S. at 333-34. The very specific issue here is the propriety of making a race-conscious decision, which generally will only impact the inmate for a maximum of sixty days, and sometimes for as few as fourteen days, in order to protect inmates' and staff members' safety.

In order to pass constitutional muster, a race-conscious practice must "not unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. As previously discussed, this short-term practice applies to every inmate regardless of race; no benefit is conferred nor burden is suffered by any particular race; no specific cells are set aside for any race; and all other aspects of prison life – jobs, meals, and the like – are race neutral. Safety is the primary consideration in the celling process, not the race *per se* of any inmate. It is only the race of the inmate as compared to his prospective cellmate and the potential ensuing hostility from as-yet unknown gang affiliations that is examined.

The *Grutter* Court's opinion also emphasized that an equal protection claim must be analyzed in relation to the specific circumstances under which it arises: "Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . 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 decisionmaker for the use

of race in that particular context." 539 U.S. at 327 (internal citations omitted). In *Grutter*, the Court applied strict scrutiny while deferring to school officials' decisions and "taking into account complex educational judgments in an area that lies primarily within the expertise of the university." *Id*. at 328. Deference in the prison context is at least as critical as in the university setting. Prison is a hostile environment populated by felons – many of whom are murderers – where the prevention of violence is a paramount concern. Managing the complex interaction between inmates with histories of anti-social behavior who are housed together in small, confined cells is a formidable task. Add race-based rivalries and gang affiliations to the brew and the cauldron fairly boils over. The expertise of officials in assessing the risk of danger at the reception centers and exercising caution in their practices until they can make more informed decisions should not be taken lightly.

Amicus former state corrections officials criticize respondents' practices based on studies conducted by Trulson and Marquart after compulsory integration of the Texas Prison System. Those studies, however, examined double-celling only after initial screening and background investigation were completed on the respective cellmates. Notably, the initial diagnostic facilities – Texas's equivalent of California's reception centers – were not required to be integrated at the cell level. See Chad Trulson, James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 LAW & SOC'Y REV. 743, 753 n.13 (2002). Moreover, there is other relevant evidence that "uninformed" compulsory integration in initial receiving facilities can cause an eruption of serious violence. See *White v. Morris,* 832

F. Supp. at 1130 (during negotiations to end Ohio prison riot, and after, inmates repeatedly cited integrated celling as factor contributing to tense atmosphere).

Even under the Texas consent decree and subsequent court orders, the prisons could still take race into account when making permanent housing cell assignments if a particular inmate had been found to be ineligible to share a cell with an inmate of a different race. For instance, if the inmate were a confirmed member of a gang that divided along racial and ethnic lines or if he had previous race-related problems in prison (defined as three racially motivated incidents in the past two years), he would be ineligible for cross-racial double-celling. See Trulson, *supra* at 755. But here, that information is not available upon the inmate's initial entry into the system.

California's practice of celling inmates of the same race together in the reception centers is simply the officials' first cut at separating potentially dangerous enemies from one another. There is no presumption that inmates of one race or another are, in fact, members of a gang. It only makes sense, though, to assume that if one or both of the occupants of a two-man cell *is* a member of a race-based gang, which is generally not known at that point, the cellmates will be likely to engage in cross-racial violence.

If the officials had all of the necessary information to assess the inmates' violence potential when the inmates arrived, perhaps a different practice could be used. But unlike the federal system, where the inmates generally are in federal custody from the moment they are arrested, state inmates are in county custody until they are convicted and later transferred to the custody of the CDC.

And unlike the federal Bureau of Prisons, which can pre-screen its prisoners before they arrive at its prisons, the CDC has no such opportunity.[17] The counties are under no obligation to pre-screen state inmates, and, in fact, the counties are only required to provide the inmates' abstracts of judgments and criminal identification numbers, and proof that they are medically fit to be transported. Cal. Penal Code § 1216. The CDC cannot feasibly pre-screen the inmates either. The CDC receives inmates from all of California's fifty-eight counties and it would be impossible at current staffing levels for the CDC to send its classification, medical, and psychiatric personnel to every one of the hundreds of county facilities to conduct pre-commitment screening procedures. There is no other viable way for the CDC to have all of the necessary information to safely double-cell inmates of different races when they arrive at the reception centers.

In sum, viewing the specific context of the CDC's practice, as *Grutter* requires, shows that the practice is brief, indiscriminate, and narrowly tailored to fit the compelling interest of preventing violence in prison.

[17] And, unlike the BOP's population, 54 percent of whom are incarcerated for drug offenses and only 3.2 percent for murder, aggravated assault, or kidnapping, the CDC's population is comprised of far more violent offenders, 22 percent of whom are incarcerated for homicide, assault with a deadly weapon, or kidnapping. See Bureau of Prisons, Quick Facts, available at http://www.bop.gov/; California Dep't of Corrections, California Prisoners and Parolees 2002 tbl. 9, available at http://www.cdc.state.ca.us/OffenderInfoServices/Reports/Annual/CalPris/CALPRISd2002.pdf

IV.

REGARDLESS OF WHAT STANDARD APPLIES, RESPONDENTS GOMEZ AND ROWLAND ARE ENTITLED TO QUALIFIED IMMUNITY.

Constitutional requirements are not always clear-cut at the time that action is required by officials. *Saucier v. Katz*, 533 U.S. at 205-06. But qualified immunity ensures that officials are on notice that their conduct is unlawful before they are subjected to suit. *Id*. It therefore prevents officials from being distracted from their governmental duties or inhibited from taking necessary discretionary action. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). It also prevents "deterrence of able people from public service." *Id*. And in reference to prisons, it allows officials to utilize their expertise – based on years of observation and practice – to maintain order without fear of liability for doing what seemed reasonable at the time.

In *Saucier v. Katz*, this Court explained that an official is entitled to qualified immunity unless: (1) the plaintiff alleged facts that show a constitutional violation and (2) it was clearly established, at the time, that the conduct was unconstitutional. 533 U.S. at 201. As discussed above and as the Ninth Circuit held, respondents' actions did not violate equal protection. Nevertheless, even if this Court were to disagree and rule that the petitioner has proven a constitutional violation, the state of the law and what constitutional standard applied were unsettled when the officials acted. For these reasons, respondents Gomez and Rowland are entitled to qualified immunity from damages.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California

MANUEL M. MEDEIROS
Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

FRANCES T. GRUNDER
Senior Assistant Attorney General
Counsel of Record

SARA TURNER
Supervising Deputy Attorney
General

Counsel for Respondents
Gomez and Rowland