No. 03-

IN THE
Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

JAMES H. GOMEZ and JAMES ROWLAND,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state's practice of routine racial segregation of state prisoners for at least a 60-day period subject to the same strict scrutiny generally applicable to all other challenges to intentional racial segregation, or is it excused from such scrutiny and subject only to the more relaxed review afforded under *Turner v. Safley*, 482 U.S. 78 (1987)?

2. Does California's practice of routine racial segregation of state prisoners for at least a 60-day period violate the Equal Protection Clause?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 321 F.3d 791 (9th Cir. 2003). Pet. App. at 1a. The Ninth Circuit affirmed the July 30, 2001, decision of the United States District Court for the Central District of California, which is unreported. Pet. App. at 32a. The Ninth Circuit's opinion denying a petition for rehearing with suggestion for rehearing en banc (with four judges dissenting) is reported at 336 F.3d 1117 (9th Cir. 2003). Pet. App. at 36a.

STATEMENT OF JURISDICTION

The court of appeals' judgment was entered on February 25, 2003. Pet. App. at 1a. A timely petition for rehearing with suggestion for rehearing en banc was denied on July 28, 2003. Pet. App. at 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 2.

Title 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

For more than 25 years, the California Department of Corrections (CDC) has followed a practice of segregating prisoners by race in two-person cells upon arrival at or on transfer between its institutions. CDC administrators contend that security concerns related to possible violence among inmates necessitate its segregationist practice. When petitioner Garrison S. Johnson (Johnson), an African-American, first arrived at a CDC institution in 1986, CDC personnel told him that he had to be placed in a "black cell." On each subsequent occasion when the CDC transferred Johnson to a different institution, his initial cell assignment was based on his race and he was placed in a cell with another African-American.

Johnson filed his original complaint on February 24, 1995, alleging that the CDC's policy of racial segregation violated his right to equal protection under the Fourteenth Amendment. In ultimately rejecting Johnson's position, the Ninth Circuit declined to follow this Court's decision holding such segregation unlawful in *Lee v. Washington*, 390 U.S. 333 (1968), and also declined to follow this Court's decisions in a long line of cases holding that all state actions discriminating on the basis of race are subject to strict scrutiny, most recently *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003),

and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003). Instead, the court applied the more relaxed standard articulated in *Turner v. Safley*, 482 U.S. 78 (1987), which evaluated whether certain prison regulations *that were not race-based* were reasonably related to legitimate penological interests. While noting that the standard of review was outcome determinative, the Ninth Circuit declined to apply the strict scrutiny ordinarily accorded racial classifications. Pet. App. at 11a. Applying *Turner's* relaxed review, the court upheld the CDC's policy of racial segregation.

A. The CDC's Policy of Routine Racial Segregation

All newly arriving CDC inmates, whether on first assignment or on transfer, are initially housed in a "reception center." The CDC requires such inmates to complete a form that asks only: "Name/Number," "Security/Custody Level," and "Ethnicity/Race." The CDC admittedly "use[s] . . . race as *the* predominant factor" to determine double-cell housing assignments in the reception center. *Id.* at 3a, 20a (emphasis added).

Prison officials' testimony demonstrated that this CDC segregation practice stems from anecdotally-based views of the tendencies that inmates of particular races have to be violent toward inmates of other races, rather than from specific data or evidence. *Id.* at 3a-4a. The CDC bases its practice of racial segregation on the grounds that "in its experience, race is very important to inmates and it plays a significant role in antisocial behavior." *Id.* at 3a. Thus, the CDC immediately classifies inmates as "black, white, Asian, and other." *Id.* Officials further subclassify inmates based on national origin. By CDC practice, inmates of particular national origins are not housed together because, according

to CDC administrators, "they tend to be at odds with one another." *Id.* "[F]or example[,] Japanese and Chinese inmates are not housed together, nor are Laotians, Vietnamese, Cambodians, and Filipinos." *Id.* In support of its policy, the CDC offered no evidence of particular instances of racial tension in two-person cells causing damage to prison security, discipline, or order. The CDC instead relied on generalized accounts of racial conflict in certain prisons (not prisons in which Johnson has resided), without specific discussion of any relation between housing assignments and the outbreak of violence.

The CDC contends that the confined nature of cells makes them different from non-segregated facilities within CDC prisons. *Id.* at 4a. Because they have been largely unsuccessful in preventing the existing level of racial violence in areas where staff can easily observe the inmates, CDC administrators worry that they would be unable to protect inmates in their cells from the violence they believe would likely arise from interracial assignments. *Id.* The CDC argues that each prison routinely needs a 60-day period of racial segregation to determine whether a newly arrived inmate poses a danger to others. *Id.* After 60 days, the inmate is assigned a cell or transferred to another institution, where, during its reevaluation, the CDC will continue to racially segregate him for another 60 days. *Id.* at 4a-5a.

B. Proceedings in the District Court

After having been racially segregated numerous times, Johnson filed a complaint, in pro per, in federal district court alleging that the CDC's policy violated his constitutional rights. On January 8, 1998, the district court dismissed the Third Amended Complaint without leave to amend and

Johnson appealed. The court of appeals reversed in part the district court's dismissal on March 21, 2000, and remanded, holding that Johnson's allegations were sufficient to state a claim for racial discrimination in violation of the Fourteenth Amendment. *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000) (relying on *Lee v. Washington* and citing *Turner v. Safley*).

On remand, the district court appointed counsel for Johnson and granted leave to file a Fourth Amended Complaint, in which Johnson sought monetary damages and injunctive relief. Discovery was conducted and all parties sought summary judgment on the equal protection claims. On June 11, 2001, the district court denied the summary judgment motions, as well as the CDC administrators' motion for summary judgment based on qualified immunity. After the Supreme Court decided *Saucier v. Katz*, 533 U.S. 194 (2001), however, respondents Rowland and Gomez successfully moved for reconsideration of the denial of their motion for summary judgment based on qualified immunity. On July 30, 2001, the district court granted this motion, holding that under *Saucier* the former administrators were entitled to qualified immunity because their actions were not clearly unconstitutional. Pet. App. at 34a-35a.

C. Proceedings in the Ninth Circuit

The Ninth Circuit Court of Appeals affirmed the district court, holding that the segregation policies were entitled to a presumption of constitutionality and that Johnson had not rebutted that presumption. *Id.* at 31a.

The court recognized that under *Lee v. Washington*, racial segregation in prisons violates equal protection, except when

prison authorities, acting in good faith, find segregation necessary in particularized circumstances to maintain security, discipline, and order. *Id.* at 8a-9a. The court discounted decisions from sister circuits[1] applying *Lee* to invalidate segregationist prison policies, reasoning that in those cases — which it characterized as featuring more invidious and pervasive racial segregation — "the standard of the court's review probably did not matter." *Id.* at 11a. By contrast, the panel saw this case as a close one requiring determination of the applicable standard of scrutiny. *Id.*

The court applied *Turner's* "relaxed standard" to Johnson's racial equal protection claim, rather than the strict scrutiny evidently applied in *Lee*, based on its understanding that the *Turner* standard applied to determine the constitutionality of *all* prison regulations, *including* those involving racial segregation.[2] *Id.* at 11a-13a. The court also relied on *Washington v. Harper*, 494 U.S. 210, 224 (1990), in which this Court, considering a substantive due process claim related to forced administration of anti-psychotic drugs, described the *Turner* standard as applicable when the needs

1. The court discounted *United States v. Wyandotte County*, 480 F.2d 969, 971 (10th Cir. 1973), *cert. denied*, 414 U.S. 1068 (1973), in which the Tenth Circuit held that an unsubstantiated fear of racial violence does not provide authority to segregate inmates on the basis of race into separate tanks or cell blocks. Pet. App. at 10a-11a. The court similarly discounted the Fifth Circuit's ruling, in *Sockwell v. Phelps*, 20 F.3d 187, 191-92 (5th Cir. 1994), that permanent segregation of cell mates based on race violated the Equal Protection Clause. Pet. App. at 10a-11a.

2. The court conceded, however, that *Turner* is not in fact applied to determine the constitutionality of all prison regulations. As the court noted, the Ninth Circuit has refused to apply *Turner* in the Eighth Amendment context. Pet. App. at 12a n.6.

of prison administration implicate constitutional rights. Pet. App. at 12a.

Johnson petitioned unsuccessfully for rehearing with a suggestion for rehearing en banc. Four judges dissented from the denial of rehearing. *Id.* at 38a. For the dissenters, Judge Ferguson observed that this Court has not overruled *Lee*, and distinguished *Turner* because it was not a case involving racial segregation:

> [G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Id. at 41a n.1 (alteration in original) (quoting *Cohens v. Virginia*, 19 U.S. 264, 399 (1821)). Judge Ferguson also noted that "[b]oth the Fifth and Seventh Circuits have refused to accord such extreme deference [to racial segregation by prisons], recognizing that, in the context of race, more must be required." Pet. App. at 44a. The dissenting judges found *Lee* controlling, especially in light of this Court's recent and repeated command that lower courts apply strict scrutiny to all race-based classifications. *Id.* at 39a-40a, 42a. Opining that the panel had effectively overruled *Lee*, the dissenters maintained that the panel was not free to apply *Turner* rather than *Lee*:

> [T]he panel simply does not have the authority to interpret *Turner* as requiring a different level of review. "If a precedent of th[e Supreme] Court had direct application in a case, yet appears to rest

> on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions."

Id. at 41a (Ferguson, J., dissenting) (alteration in original) (quoting *Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

Unlike the panel, the dissenters concluded that *Turner* did not supply the standard applicable to a state's practice of intentional racial segregation in the prison setting. Taking issue with the panel's analysis that Johnson has "a 'reasonable alternative' to exercise his right to be free from discrimination because he is not subject to segregation during meals and recreational time," Judge Ferguson pointed out that "the panel essentially asserts that if the state only discriminates sometimes, no harm is done." Pet. App. at 45a-46a (Ferguson, J., dissenting) (quoting *Johnson v. California*, 321 F.3d 791, 804 (9th Cir. 2003)).

REASONS FOR GRANTING THE PETITION

Johnson respectfully requests that this Court grant the petition, and either summarily reverse or set this case for briefing and argument.

This case raises important, recurring questions relating to the scope of the Equal Protection Clause's prohibition of state-imposed racial segregation. The decision below is in direct conflict with decisions of this Court and two circuit courts. More specifically, the decision below conflicts with: (a) the Court's decision in *Lee v. Washington*, holding that the Equal Protection Clause bars racial segregation in prisons,

except where found necessary in particularized circumstances to maintain security, discipline, and order; (b) the Court's decisions in *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), holding that all intentional state racial segregation is subject to strict scrutiny when challenged under the Fourteenth Amendment; (c) decisions from the Fifth and Seventh Circuits, holding that intentional state racial segregation in prisons always requires strict scrutiny; and (d) decisions from the District of Columbia and Eighth Circuits, holding that prison regulations that discriminate based on suspect classifications require heightened scrutiny. Moreover, the Ninth Circuit's extension of the relaxed standard of review employed in *Turner v. Safley* to claims of racial segregation raises an important issue that was either settled by this Court in *Lee*, or should be settled now. Permitting the Ninth Circuit's decision to stand would excuse state prison officials from having to justify their intentional racial segregation under strict judicial scrutiny, notwithstanding that intentional state racial segregation has been outlawed in this country for over half a century.

I. The Ninth Circuit's Decision Conflicts with This Court's Decisions Subjecting All Government Racial Classifications, Including Those in Prisons, to Strict Scrutiny

The standard of review applied by the Ninth Circuit conflicts with the Court's applicable precedents. The Court has repeatedly and definitively held that all governmental racial classifications are subject to strict scrutiny. This unwavering standard of scrutiny was reaffirmed last term

in *Grutter*, 123 S. Ct. 2325, and *Gratz*, 123 S. Ct. 2411, and has applied to state actors since 1989, when the Court decided *Croson*, 488 U.S. 469; *accord Adarand*, 515 U.S. 200. The Court has been unambiguous on this issue: "*[A]ll* racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 123 S. Ct. at 2337-38 (quoting *Adarand*, 515 U.S. at 227) (emphasis added); *accord Gratz*, 123 S. Ct. at 2427 ("It is by now well established that 'all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.' ") (quoting *Adarand*, 515 U.S. at 224). The Court applies "strict scrutiny to all racial classifications to 'smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.' " *Grutter*, 123 S. Ct. at 2338 (alteration in original) (quoting *Croson*, 488 U.S. at 493).

This Court has also made clear that strict scrutiny applies to racial segregation practiced by state prison authorities. This was established in the Court's opinions in *Lee v. Washington*, by the Fifth Circuit decision summarily affirmed in *Lee*, and by subsequent reference to *Lee* by this Court and its members.

The holding in *Lee* was that racial segregation in prison violates the Equal Protection Clause. Nothing in the decision reflects any different standard than that applied in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny. The Court noted the state's objection that "the specific orders directing desegregation of prisons and jails make no allowance for the necessities of prison security and discipline," but stated that it did not read the district court's

order to bar consideration of those factors in implementing a remedy. *Lee*, 390 U.S. at 333-34. Similarly, the concurrence of Justices Black, Harlan, and Stewart cautioned the states that the reference to those considerations should not be taken "as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Id.* at 334. The decision of the three-judge court summarily affirmed in the brief decision was itself squarely based on the principle of strict scrutiny reflected in "*Brown v. Board of Education* and the numerous cases implementing that decision, [namely that] racial discrimination by governmental authorities in the use of public facilities cannot be tolerated." *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (citations omitted).

This Court's repeated citation to *Lee* demonstrates the case's continued vitality and plainly reflects that strict scrutiny, not any lesser standard, was applied. The Court cited *Lee* in *Hudson v. Palmer*, for example, for the holding "that invidious racial discrimination is as intolerable within a prison as outside, except as may be *essential* to 'prison security and discipline.' " 468 U.S. 517, 523 (1984) (quoting *Lee*, 390 U.S. at 334) (emphasis added). More recently, Justice Scalia specifically noted that *Lee's* "necessities" exception is applicable "only [in] a social emergency rising to the level of imminent danger to life and limb . . . [such as] a prison race riot." *Croson*, 488 U.S. at 521 (Scalia, J., concurring). Last term, Justice Thomas cited *Lee* as "indicating that protecting prisoners from violence *might* justify narrowly tailored racial discrimination." *Grutter*, 123 S. Ct. at 2352 (Thomas, J., dissenting) (emphasis added).

The more relaxed level of judicial scrutiny held applicable to different claims by prisoners, which the Ninth Circuit panel applied (and indicated was outcome-determinative here), was not formulated in a case involving racial segregation. In *Turner v. Safley*, the Court fashioned a standard of review for prisoner's constitutional claims that would accommodate a policy of judicial restraint necessitated by the special problems of prison management. *Turner*, 482 U.S. at 85. Reviewing prison rules that were claimed to violate prisoners' rights of expression and the right to marry, the *Turner* Court determined that a lower level of scrutiny was appropriate. Although these claims implicated important constitutional rights, the Court in *Turner* was not called upon to consider issues or cases related to equal protection, let alone race or other suspect classifications historically accorded heightened scrutiny under the Court's equal protection jurisprudence.

In *Turner*, the Court held that the proper standard for determining the validity of the First Amendment and due process claims then before it was to ask whether the regulation is "reasonably related to legitimate penological interests." *Id.* at 89. Thus, to evaluate whether those prison regulations could withstand scrutiny under the First Amendment and the Due Process Clause of the Fourteenth Amendment, the Court first applied a test comparable to rational basis review. *See, e.g., Harper*, 494 U.S. at 224-25 (describing the *Turner* test as requiring "rational" connection between the prison regulation and government interest put forward to justify it); *Pargo v. Elliott*, 49 F.3d 1355, 1356 (8th Cir. 1995) (same).

The Ninth Circuit's decision extends *Turner's* relaxed standard of review to prisoners' race-based equal protection

claims. If strict scrutiny applies to determine the constitutionality of well-intentioned policies such as affirmative action in higher education, *see Grutter* and *Gratz*, this Court's cases should not be construed as abandoning that standard when the challenged decision involves segregation of African-American prisoners, especially given the history of stigma and racial discrimination that such segregation calls to mind. As this Court has repeatedly held, equal protection demands strict scrutiny because racial classifications have the potential to cause severe societal harm. *Adarand*, 515 U.S. at 236. Racial classifications — let alone racial segregation — must be demonstrated to be "unquestionably legitimate" to counter their "pernicious" effects. *Id.*

II. The Decision Below Conflicts with Holdings of Four Other Circuit Courts That Prison Regulations Based on Suspect Classifications Require Heightened Scrutiny

Four courts of appeal — the Fifth, Seventh, Eighth, and District of Columbia Circuits — have held that the strict scrutiny prescribed by this Court's equal protection jurisprudence applies to governmental racial (or gender) discrimination in jails and prisons. *See, e.g., Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (applying heightened scrutiny to a policy of segregating two-person cells based on race; racial segregation of offending individual prisoners would require prison officials to make "an individualized analysis" that such action was "needed to stifle particular instances of racial violence"); *Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987) (applying strict scrutiny in a case of racial segregation of prisoners, holding that "absent a compelling state interest, racial discrimination in administering prisons

violates the Equal Protection Clause");[3] *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. Cir. 1989) (heightened scrutiny applies, notwithstanding *Turner*, in cases involving gender-based discrimination by prison officials, citing *Lee v. Washington*); and *Pargo*, 49 F.3d at 1356-57 (8th Cir. 1995) ("Not all reviews of prison policies or practices require judicial deference. . . ."; holding that the district court erred in applying *Turner's* relaxed scrutiny, instead of the heightened scrutiny traditionally accorded gender-based equal protection claims).[4]

By contrast, two circuit courts of appeals — the Ninth Circuit in this case and the Fourth Circuit — apply the rational basis standard of *Turner*. *See Morrison v. Garraghty*, 239 F.3d 648, 654-66 (4th Cir. 2001) ("This more deferential standard applies even when the alleged infringed constitutional right would otherwise warrant higher scrutiny, such as when an inmate claims that his constitutional right to equal protection of the laws has been violated by the prison's implementation of a racial classification.") (citations omitted).

3. The Seventh Circuit decided *Black v. Lane* 12 days after the Supreme Court decided *Turner v. Safley*, and the precedent continues to bind courts in that circuit. *See, e.g., Wilson v. Schomig*, 863 F. Supp. 789, 793 (N.D. Ill. 1994) (citing *Black v. Lane* in context of prison racial equal protection claim).

4. Consistent with *Pargo*, district courts within the Eighth Circuit have held that strict scrutiny applies to prison racial classifications. *See Mason v. Schriro*, 45 F. Supp. 2d 709, 714 (W.D. Mo. 1999) (strict scrutiny applied to examine claim that prison officials used race as a primary factor for making housing assignments); *accord Betts v. McCaughtry*, 827 F. Supp. 1400, 1404 (W.D. Wis. 1993) ("Racial discrimination in the administration of prisons violates the [E]qual [P]rotection [C]lause, unless it is justified by a compelling state interest.") (citing *Black v. Lane*, 824 F.2d at 562).

Other circuit courts have refrained from deciding whether heightened scrutiny should apply to suspect-class equal protection claims in the prison setting, though some district courts within those circuits have considered the issue. The Sixth Circuit has expressly reserved judgment on the issue, *Glover v. Johnson*, 198 F.3d 557, 561 (6th Cir. 1999) (declining to decide what standard of review applied to prisoners' gender-based equal protection claims because the law of the case and fact-finding below obviated the need to do so), although a district court in that circuit has held that the Equal Protection Clause prohibits discrimination in prisons based on race absent a compelling state interest. *Nedea v. Voinovich*, 994 F. Supp. 910, 916 (N.D. Ohio 1998) (confirming strict scrutiny would apply to an inmate's claim of racially motivated parole denial). Similarly, the Third Circuit has not yet opined on the issue, but a district court in that circuit reached the question, following the rule of *Turner* rather than *Lee*. *Simpson v. Horn*, 25 F. Supp. 2d 563, 572-73 (E.D. Pa. 1998).

Without resolution of this conflict by this Court, lower courts will continue to apply inconsistent standards in adjudicating race-based constitutional claims brought by prisoners.

III. The Issue Presented Is Recurring and of Exceptional Importance

Resolving the proper standard of review for examining segregationist prison policies is essential because of the far-reaching impact of state-sponsored discrimination. Over one hundred thousand California inmates are subject to admittedly segregationist government policies. Under the ruling of the court below, and in spite of this Court's

longstanding insistence that *all* intentional governmental racial segregation be strictly scrutinized, such policies and practices will escape appropriate judicial review in both the Ninth and Fourth Circuits.

The decision below undermines a national imperative to eliminate racial discrimination.[5] The very fact of California's official racial classification is offensive to the Fourteenth Amendment, a "core purpose" of which "was to do away with all governmentally imposed discrimination based on race." *Grutter*, 123 S. Ct. at 2346 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). Furthermore, "[e]nshrining a permanent justification for racial [discrimination] would offend this fundamental equal protection principle." *Grutter*, 123 S. Ct. at 2346. In the face of this significant national goal, the Ninth Circuit's ruling permits the CDC's policy of routine racial segregation to continue without requiring the policy to be either narrowly tailored or to be in direct response to any extraordinary circumstance involving prison security, as required by *Lee*.

As this Court again recognized last term, the Equal Protection Clause prohibits the state from employing policies that look only at skin color and that fail to afford any individualized consideration to persons in recognition that they likely have relevant qualities other than skin color. *See Gratz*, 123 S. Ct. at 2428. It would be incongruous permit the CDC to dispense with the same individualized consideration in prison housing. Certainly strict scrutiny

5. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (entered into force January 4, 1969; *entered into force for the United States* November 20, 1994).

should be required when state actors, in any context, replace individualized treatment with gross racial stereotyping.

The application of a lesser standard of review to prison-based claims of race discrimination not only subverts the Court's jurisprudence; it does so unnecessarily. Since *Lee v. Washington*, prison authorities have had "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." 390 U.S. at 334 (concurrence). While running a prison is inordinately difficult and requires expertise, *Turner*, 482 U.S. at 85, the judiciary is uniquely able to review governmental policies of racial classification. *Croson*, 488 U. S. at 493; *Grutter*, 123 S. Ct. at 2338. Hence, it is for the judiciary to use strict scrutiny to " 'smoke out' illegitimate uses of race." *Grutter*, 123 S. Ct. at 2338 (quoting *Croson*, 488 U.S. at 493).

Strict scrutiny would not prohibit prison officials from acting where "a social emergency rising to the level of imminent danger to life and limb — for example, a prison race riot, requiring temporary segregation of inmates . . . can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens.' " *Croson*, 488 U.S. at 520 (Scalia, J., concurring) (alteration in original) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 35; *see, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); *Grutter*, 123 S. Ct. 2325. If prison policies of racial segregation are required to be narrowly tailored by a compelling government interest, this will not prevent prison authorities from instituting such policies when necessary.

There is no reason, in the prison context or any other context, to dilute the standard of review consistently applied by this Court to government policies of racial segregation.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court grant a writ of certiorari, and either summarily reverse or set the case for full briefing and oral argument.

Respectfully submitted,

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