NO. 09-504

In The Supreme Court of the United States

DAVID PAUL HAMMER,
Petitioner,

v.

JOHN D. ASHCROFT, *ET AL.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONER

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SUMMARY OF ARGUMENT[1]

Proscription of in-person communication between death row inmates and members of the press is an affront to the First Amendment of the U.S. Constitution where, as here, the proscription is based either on the anticipation that the speech will be offensive to government officials or on a generalized desire to keep certain viewpoints out of the public discourse. The Bureau of Prisons' interest in preserving security within the penal system does not permit it to censor speech absent a legitimate concern requiring the restriction of this fundamental right to free speech and free association.

The speech silenced here is at the core of what the First Amendment is designed to protect, and is essential to the proper functioning of our system. The general public has a right to hear, through the media, first-hand accounts of current conditions in prison, whether they reveal unsafe and abusive behavior or simply the banal realities of life on death row and what brought them there. In-person communication also affords the wrongly accused a forum to proclaim their innocence — a message that public officials are loathe to hear. Failure to provide direct media access to these inmates reduces the chance that their claims of innocence will be heard and investigated. Each of these essential communications reveal facts unlikely to be brought

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[1] Pursuant to Rule 37, counsel for all parties received timely notice of the intent to file this brief and letters of consent from counsel for all parties are being filed contemporaneously with this Brief. No counsel for any party authored this brief in whole or in part or made any monetary contribution for the preparation or submission of this brief.

to light otherwise, deprecating the ongoing review and debate of controversial public policy. As such, the Court owes not deference but the most exacting of First Amendment inquiry.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for fundamental principles of human and civil rights including the protection of rights guaranteed by the United States Constitution. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles.

The Guild is the only bar association in the United States that includes in its membership Jailhouse Lawyers, including those on death row. As the progressive arm of the legal profession, it has argued on behalf of prisoners' rights for over 70 years. Guild members have brought litigation aimed at raising awareness of and correcting unconstitutional practices in correctional facilities. *Amicus* is co-author, with the Center for Constitutional Rights, of *The Jailhouse Lawyer's Handbook*, an updated version of the Jailhouse Lawyer's Manual, originally published by the Guild in 1974.

Guild attorneys defended inmates in lawsuits arising from the 1971 Attica prison uprising in New York State, the most violent uprising in American

history that resulted in the deaths of 39 men on September 13, 1971. *Inmates of the Attica Corr. Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971). More recently, Guild attorneys exposed a pattern of abuse of over 450 female inmates who alleged that they had been sexually assaulted by male employees of the Michigan Department of Corrections over a five-year period. The trial team provided litigation and social services to the inmates for over 12 years. *Neal v. the Michigan Department of Corrections*, 232 Mich. App. 730, 592 N.W.2d 370 (Mich. Ct. App., 1988), *appeal after remand*, 2009 Mich. App. LEXIS 182 (Jan. 27, 2009).

Amicus submits that its intimate familiarity with the United States criminal justice system, and its decades of representing death row inmates, renders its perspective on the issues of inmate communications with members of the press of value to the Court in evaluating the issues presented.

ARGUMENT

I. INTRODUCTION

This Court should accept review of this matter in part because the stakes are so high. The curtailed speech is essential to creating the sort of robust exchange of ideas that our system relies upon to ensure a democratic check on policies in the extremely delicate area of capital punishment. By denying death row inmates uncensored access to the press, the general public is denied access to accurate information about the conditions inside prisons. Issues such as guard brutality against inmates,

inadequate health care, sexual harassment of inmates and inmate-on-inmate violence should necessarily be of concern to the public, including legislators and government officials. Without media coverage of such issues, there can be no effective watchdog role by outsiders and interested organizations. Thus, inmates, reporters, and the public as a whole are denied essential rights under the First Amendment.

Moreover, this Court should accept review in order to clarify that its rulings granting deference to prison authorities in some respects is not to be read as circumventing the most fundamental free speech guarantees in our system — namely, that viewpoint discrimination and the purposeful shutting down of the marketplace of ideas is unconstitutional. The decision below represents a departure from the judiciary's longstanding respect for free speech and association, the bedrock on which representative democracy is built. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964) (noting our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

In denying certain inmates face-to-face access with members of the press, the government relies upon its caricature of a "jailhouse-celebrity" seeking a public forum and celebrity status and — most essentially — espousing viewpoints the government finds distasteful. The government provides no evidence of actual danger. Rather, its sole basis seems to be then-Attorney General John Ashcroft's concern that death row inmates' speech will have a negative effect on society.

II. THE GOVERNMENT MAY NOT SHROUD THE REALITIES OF THE SYSTEM IT OPERATES

An essential purpose of the First Amendment is to allow for an informed public that can serve as a democratic check on the judiciary and criminal justice system. As this Court has noted regarding its own precedent:

> There is certainly language in our opinions interpreting the First Amendment which points to the importance of "the press" in informing the general public about the administration of criminal justice. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-492, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975), for example, we said "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-573, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980). No one could gainsay the truth of these observations, or the importance of the First Amendment in protecting press freedom from abridgement by the government.

Wilson v. Layne, 526 U.S. 603, 612-13 (1999).

Perhaps the most controversial power exercised by this system today is the sentence of death and process of execution. For the government to deny reporters and their viewers first-hand accounts of a death row inmate's conditions of confinement and mental and physical condition while awaiting execution is to create an unconstitutional shroud, hiding essential information about the exercise of the state's ultimate power over its citizens.[2]

If the reactions of jurists around the world and commentators in this country are any indication, a public that fairly and impartially considered the real conditions of death row would demand change. Scholars and advocates are increasingly concerned with the real effects of death row, and several nations have refused to extradite persons to the United States, not because they ultimately would be put to death, but because the mental and other tortures of awaiting death in our system are so horrific as to violate basic human rights. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H. R. Rep. 439 (1989); *Pratt v. Attorney General for Jamaica*, (1994) 2 A.C. 1 (Privy Council 1993)(Jamaica); *U.S. v. Burns*, [2001] 1 S.C.R. 283 (Canada) (noting "the death row

[2] The United States correctional population has skyrocketed over the past two decades, with a record number of Americans serving time in corrections systems in 2007. One in every 31 adults is serving time in jail or prison and is on probation or on parole. In 1982, one in 77 adults was in the system. At year end 2007, 35 states and the federal prison system held 3,220 prisoners under sentence of death. Department of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/cp.htm. Given these numbers, it is in society's best interest to have access to information about prison conditions.

phenomenon"); Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 Mich. J. Int'l L. 103 (2002); Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?*, 11 Eur. J. Int'l L. 833, 846 (2000); Natalia Schiffrin, *Current Development: Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, 92 Am. J. Int'l L. 563, 565 (1998); Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study*, 40 St. Louis U.L.J. 699, 704 (1996); Florencio J. Yuzon, *Conditions and Circumstances of Living on Death Row - Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the "Death Row Phenomenon*", 30 Geo. Wash. J. Int'l L. & Econ. 39, 57 (1996); Avi Salzman, *Killer's Fate May Rest on New Legal Concept*, N.Y. Times, Feb. 1, 2005, at B6.

This case calls upon the Court to ensure transparency and public oversight. In order to inform the public about conditions in correctional facilities, it is essential that inmates are afforded the opportunity to communicate directly with members of the media, without prison intervention and censorship. Prison bureau regulations that are not related to valid penological concerns should not be permitted to stand as a barrier to a transparent system.

A. Death Row Interviews Are an Important Part of a Variety of Discussions That Are Deserving of First Amendment Protection

The former Attorney General's basis for imposing these restrictions is anathema to core Constitutional values. Rather than keeping offensive views out of the public discourse, it is axiomatic that the First Amendment ensures an open marketplace of views and ideas[3] and may "best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

The government itself notes that persons sentenced to death and their advocates frequently seek out media attention in hopes of creating public discussion about their case and the legitimacy of the death penalty as a whole. That in-person interviews, as a critical means of allowing the public to see death row inmates as real human beings, are an important aspect of one side's arguments is perhaps too obvious for comment. *See e.g. Writing for their*

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[3] The principle that ideas should be tested in an open marketplace rather than deemed unacceptable by the government is traceable to a dissent by Justices Holmes and Brandeis. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) ("The ultimate good desired is better reached by free trade in ideas — the . . . best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."). This would become one of our most widely accepted values. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

Lives (Marie Mulvey-Roberts, Ed., 2007); Mumia Abu-Jamal, *Live from Death Row* (Harper Perennial 1996).

But supporters of the death penalty also seek out personal interviews with death row inmates, and use these interviews in the ongoing public debate over capital punishment. *See e.g.* Robert Blecker, *Current Issues in Public Policy: But Did They Listen? The New Jersey Death Penalty Commission's Exercise in Abolitionism: A Reply*, 5 Rutgers J. L. & Pub. Pol'y 9 (2007) (relying on personal interviews with death row inmates to argue for the death penalty, and complaining of lack of access to the New Jersey death row and the resulting lack of specific information for his testimony before the legislature, which ultimately eliminated the death penalty).

Just outside the debate over the ultimate legitimacy of capital punishment, the extreme circumstances under which people on death row live need to be explored — fully, openly, and in a manner befitting a free and democratic society — so the public can consider its impact on other important public policy questions. The case of Ambrose Harris is instructive in this regard. No opponent of the death penalty would ever use Mr. Harris as its poster boy. He was "[s]o remorseless . . . for raping and shooting a young Pennsylvania woman in the back of the head that he mockingly dabbed his eyes with a handkerchief as the victim's father sobbed on the witness stand." Jeremy Peters, *Revisiting Violent Past on Eve of New Jersey Death Penalty Vote*, N.Y. Times, Dec. 10, 2007. Yet as people learned of his abusive upbringing, mental condition, and the system's failure to deal with him despite

multiple encounters with him when he was young, his story became a significant touchstone as the public considered these factors in broad discussions about personal accountability, social services, and the importance of good early intervention in child abuse cases. *Id.*

Even apart from any political agenda, criminologists and sociologists rely upon personal interviews with death row inmates in order to advance scientific understandings. *See e.g.* Amy Smith, *Not 'Waiving' But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. Pub. Int. L.J. 237 (2008); Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 Ind. L.J. 155 (2005); Michael L. Radelet, *Families, Prisons, and Men with Death Sentences: The Human Impact of Structured Uncertainty*, 4 J. Fam. Issues 593 (1983); Doug Magee, *Slow Coming Dark: Interviews on Death Row* (Pilgrim Press, 1980) (one sociology professor reviewing the book noted that, "the author does not excuse the inmates for crimes committed, [but] the interviews do provide an interesting, humanistic perspective generally absent in discussions of capital punishment among both learned and lay persons," Dennis L. Peck, *Book Review*, 11 Crim. Just. Rev. 59 (1986)).

Often, the arts dramatize real events in socially valuable ways that cannot be accomplished absent access to death row inmates. *See* Udani Samarasekera, *Theatre: Surviving Death Row*, 367 Lancet 894 (2006) (theater review in the renowned medical journal of the play "The Exonerated [which] tells the true stories of six innocent survivors of

death row; the words are taken verbatim from legal documents, personal interviews, and newspaper articles. The dramatization reveals the human consequences of gross miscarriages of justice, and exposes the disturbing flaws in the USA's legal system.")

Thus, interviews with death row inmates are important to a variety of socially valuable discussions. By and large, the public relies upon the media to bring this information to them. The elimination of journalistic interviews with death row inmates would harm the civic discourse as well as remove a wealth of material worthy of scientific study, legislative consideration, and critical artistic exposition.

B. Media Coverage Increases the Rate of Exonerations of Innocent Death Row Inmates

It is an undeniable fact: innocent people are languishing on death row, and the media has played an intractable role in investigating and publicizing erroneous convictions. From when the Supreme Court reinstated the death penalty in 1976, *Gregg v. Georgia*, 482 U.S. 153 (1976), until November 2009, some one hundred thirty-nine former death row prisoners have been exonerated. Death Penalty Information Center, www.deathpenaltyinfo.org; *see also* Michael L. Radelet, *Given That We Know We Sometimes Convict Innocent People, What, If Anything, Does That Say About the Death Penalty?: The Role of The Innocence Argument in*

Contemporary Death Penalty Debates, 41 Tex. Tech. L. Rev. 199 (2008).

It has long been recognized that "an unpredictable element which can affect whether an innocent person is released is the involvement of the media." *See* Staff Report, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, 103d Cong. (issued October 21, 1993).

The sources that members of the press rely on can greatly shape public perception, and even the legal outcomes, of capital defendants' cases. Many reporters depend on the police and prosecutors' versions of events, giving virtually no coverage of the defense attorneys or defendants. Dramatic coverage from the victim's perspective often obscures reporting on problematic witness identification. *See* Jon Whiten, *Enabling False Convictions: Exoneration Coverage Overlooks Media Role*, Fairness & Accuracy in Reporting, November/December 2007.

On the other hand, investigative journalism that relies upon in-person interviews can not only bring injustices to light but provide a sufficient "public face," so as to move lawyers and others to action. Thus:

- In 1988 the television program 60 Minutes featured a segment on the case of Walter McMillian, who had been erroneously convicted of murder on the basis of perjured testimony of three eyewitnesses even though the defense produced two witnesses placing him at a church fundraiser when the murder

occurred. The news report was central in securing McMillian's 1993 exoneration and release from prison. Stanley Cohen, *The Wrong Men: America's Epidemic of Wrongful Death Row Convictions* (Da Capo Press, 2003) at 185, 187.

- Film producer Errol Morris uncovered evidence of prosecutorial misconduct in the case of Randall Dale Adams. A year after he presented Adams's story in the 1988 film *The Thin Blue Line*, Adams was freed. *Id.* at 51-53.

- Investigations by the Detroit News about a key prosecution witness's lies contributed to the dropping of charges and death sentences in 1976 against Thomas Gladish, Richard Greer, Ronald Keirie, and Clarence Smith. *Id.* at 90.

Limiting journalists' in-person contact with death row inmates renders it difficult for reporters to engage in true investigative journalism and to evaluate a case from all perspectives, not just that of the prosecution or victim. In this respect the prison regulations at issue serve to impede fair reporting on death row cases, including those involving the possibility of innocence and exoneration.

C. The Rules at Issue Effectively Eliminate a Singular Viewpoint

Given the heightened security concerns and political context of death row, information coming

directly from death row is already highly restricted. *See e.g.* Mumia Abu-Jamal, *All Things Censored* (Seven Stories Press, 2003) (documenting political pressures that led to cancellation of NPR radio broadcasts from death row). A recent study documented several impediments to journalistic access, including denial of face-to-face interviews with certain inmates (even with the inmates' permission), virtual lack of access to maximum security prisons and segregation units, lack of confidentiality for inmate and staff interviews, inability to shield inmates from retaliation for speaking to members of the press, limitations to using cameras and audio records and even paper and pens, and "a sense that responses to their requests are arbitrary rather than reflecting a thoughtful, consistently-applied policy." John J. Gibbons and Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons* (Vera Institute of Justice, 2006) at 97-98.

The absolute prohibition on in-person accounts from inmates and the other obstacles created by the policies at issue in this case go too far. In denying face-to-face visits, the Bureau of Prisons denies the public and government of its oversight role. *Id.* at 98. In order to facilitate this role, the media must have as wide access as possible to prisons, constrained only by reasonably tailored measures based on valid security concerns.

III. THESE RULES ARE NOT BASED ON LEGITIMATE PENOLOGICAL INTERESTS

Attorney General Ashcroft said that the ban on one-on-one interviews was to prevent death row inmates from influencing our "culture" by in effect glamorizing a culture of violence. (App. 90a.) He is not the first government official to associate public communication or broadcasting of death row inmates with "glamorization."[4] Yet, just because some in society may deem death row inmates heinous criminals and their speech unpopular does not mean that this Court can permit the government to inhibit their speech. As Justice William Brennan said, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989).

The rule at issue in this case contravenes the Amendment's protection of unpopular speech. Time and time again this Court has reaffirmed the need to protect unpopular speech. This case presents the Court with the chance to uphold the heart of the

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[4] For example, in 2000 United Colors of Benetton featured an advertising campaign featuring interviews with and pictures of death-row inmates. Response from the public and from advertisers was immediate and negative. Sears pulled all brands owned by global parent company Benetton in response. The California Assembly called the ads a "pathetic glamorization of heinous criminals," House Leader Scott Baugh (R-67th district) drafted a resolution, which passed by an overwhelming 59-8, urging all California State residents to boycott Benetton until they killed the campaign.

First Amendment in a situation in which society's least popular — death row inmates — seek to communicate in person and without censorship to members of the press, thereby showing that fundamental protections apply equally to all in society. As Justice John Paul Stevens wrote, the isolation of inmates in strict confinement situations, and the severity of constitutional deprivations, should cause the Court to ensure that a prison regulation complies with "the sovereign's duty to treat prisoners in accordance with 'the ethical tradition that accords respect to the dignity and worth of every individual.'" *Beard v. Banks*, 548 U.S. 521 (2006) *citing Overton v. Bazzetta*, 539 U.S. 126, 139 (2003).

The dissent in the court below made clear that there is ample evidence that that the rationale for these rules is to silence unpopular viewpoints, in violation of longstanding and essential First Amendment values:

> [The majority ignores] Attorney General Ashcroft's statement that "as an American who cares about our culture" and is "concerned about the irresponsible glamorization of a culture of violence," he wanted to prevent death-row inmates, and only death-row inmates, from engaging in face-to-face interviews with the media on any subject. This rationale for censorship assumes that what death-row inmates have to say, if broadcast outside the prison, necessarily corrodes American culture. But First Amendment

> jurisprudence is grounded in the idea that the government may not prevent a person, including a prisoner, from speaking merely because it disapproves of the speaker or what the speaker might say. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (noting that "content-based restrictions are presumptively invalid"); *Turner [v. Safley]*, 482 U.S. [78,] 90 [(1987)] (stating that prison regulations that infringe on inmates' First Amendment rights must operate "in a neutral fashion, without regard to the content of the expression"); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations that permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

Hammer v. Ashcroft, 570 F.3d 798, 806 (7th Cir. 2009) (Rovner, J., joined by Bauer, J., dissenting).

This Court has the opportunity to uphold the fundamental right to free speech and to afford transparency to the penal system's workings by reversing a recent trend of curtailing inmate's rights. This Court's past decisions granting deference to corrections officials are premised upon a limited judicial role in policymaking. But the wisdom of the Constitution in leaving policy decisions to the more democratically responsive branches is undermined if this Court does not uphold First Amendment principles that ensure an informed public, able to

serve as a meaningful check on those branches and the danger of policymaking based on prejudice rather than facts. By permitting one-on-one access between death row inmates and members of the media, the Court will restore a foundational right in our system.

CONCLUSION

For the foregoing reasons, *Amicus* urges the Court to grant certiorari in this matter and reverse the decision below.

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