No. 07-1485

IN THE

Supreme Court of the United States

WARDEN HUGH SMITH and SANCHE MARTIN,

Petitioners,

v.

JAMIL AL-AMIN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether allegations that prison officials repeatedly opened incoming mail from an inmate's attorney outside of his presence, in violation of the prison's own regulations and without a legitimate penological purpose, state a claim for violation of the inmate's free speech rights.

2. Whether, for purposes of qualified immunity, Eleventh Circuit law clearly established that an inmate has a right not to have attorney mail opened outside his presence without a legitimate penological purpose.

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INTRODUCTION

Petitioners seek review of an interlocutory decision refusing to extend qualified immunity to prison officials' opening of legal mail outside of an inmate's presence. This issue will not resolve this case, because Mr. Al-Amin also alleges that Petitioners "read" his legal mail. Because the district court ruled in Mr. Al-Amin's favor on the mail "opening" issue, it did not reach the "reading" claim. In these circumstances, where further proceedings involving the same facts and the same defendants will be necessary in any event, review of this case in the present interlocutory posture would be especially unwarranted.

Petitioners and state amici assert that various penological interests might justify opening legal mail outside an inmate's presence. This claim was not raised below, and no evidence has been presented to establish any legitimate penological interests. To the contrary, Petitioners' conduct directly violated Georgia prison regulations mandating that legal mail be opened only in the inmate's presence. Thus, this case is a particularly poor vehicle for the Court to address the First Amendment question presented.

Where the prison has not claimed or established legitimate penological interests supporting the opening of legal mail outside an inmate's presence, the courts of appeals uniformly have allowed the constitutional claim. The one published decision cited by Petitioners as being to the contrary involved *pro se* inmate litigants who conceded the prison had a legitimate penological interest in opening legal mail outside of their presence. Accordingly, there is not, as Petitioners assert, a conflict in the circuits on this issue.

Petitioners identify no circuit conflict on the second question presented. Both the district court and the court of appeals found that Petitioners had explicit notice that the precise factual conduct at issue was prohibited.

Accordingly, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Throughout his incarceration, Respondent Jamil Al-Amin has received legal mail from Karima Al-Amin, Esq., his lawyer and wife. In accordance with the procedures governing legal mail at the Georgia State Prison in Reidsville, Georgia (where Mr. Al-Amin was housed at the time of the events giving rise to this dispute), Ms. Al-Amin labeled her mail "Legal Mail" and identified herself as an "Attorney at Law." Pet. App. 2-3.

Under the prison's regulations, legal mail may be externally inspected for contraband, may not be read, and may be opened only in the presence of the inmate. *Id.* at 6. After numerous letters from Ms. Al-Amin were opened outside his presence in 2002 and 2003, Mr. Al-Amin filed an administrative grievance. *Id.* at 4. During the investigation of that grievance, one of the Petitioners acknowledged that she had read Ms. Al-Amin's mail, describing it as being "of a personal nature." *Id.*

Ultimately, Mr. Al-Amin's grievance was upheld, and Petitioners were directed to cease opening legal mail from Ms. Al-Amin outside of his presence. *Id.* at 6.

Petitioners, however, continued to open properly marked legal mail from Ms. Al-Amin outside Mr. Al-Amin's presence, resulting in a second grievance and a second recognition by the prison grievance appeal officer that the prison regulations precluded such opening. *Id.* at 7-8 n.9.

After the initial grievance ruling in Mr. Al-Amin's favor on November 25, 2003, at least thirteen additional legal mail letters from Ms. Al-Amin were opened outside of Mr. Al-Amin's presence. *Id.* at 7. Mr. Al-Amin then filed this suit *pro se* under 42 U.S.C. § 1983, alleging that Petitioners continued "to open and read all of Al-Amin's privileged mail" outside of his presence, in violation of the prison regulations and his "constitutional rights." *Id.* at 9. Mr. Al-Amin sought, *inter alia*, a permanent injunction against Petitioners' continuing violations. *Id.* at 9-10.

Petitioners moved for summary judgment on multiple grounds, including qualified immunity. *Id.* at 10-11. The district court denied the motion, rejecting Petitioners' factual challenge to Ms. Al-Amin's status as one of Mr. Al-Amin's lawyers and further finding that Mr. Al-Amin had created a genuine issue of fact as to whether he suffered actual injury as a result of Petitioners' conduct. *Id.* at 45-48. With respect to qualified immunity, the district court found that an inmate's right to have legal mail opened only in his or her presence was clearly established. *Id.* at 52 (citing *Wolff v. McDonnell*, 418 U.S. 539, 576-77 (1974), and *Lemon v. Dugger*, 931 F.2d 1465, 1467-68 (11th Cir. 1991)).

Petitioners moved for reconsideration, challenging the court's finding that Mr. Al-Amin had presented sufficient evidence of "actual injury" to withstand summary judgment. Pet. App. 56-57. In denying that motion, the court discussed two separate bases for an inmate's right to receive unopened and unread legal mail: (1) the right of meaningful access to the courts, and (2) the First Amendment right to freedom of speech. *Id.* at 58. First addressing the right of access to courts, the court agreed with Petitioners that "actual injury" was required under *Lewis v. Casey*, 518 U.S. 343, 349 (1996). The court noted that Mr. Al-Amin had identified two distinct actual injuries: a "chilling effect" on his ability to correspond with and be advised by his lawyer, and the "unfair advantage" resulting from prison officials' access to Mr. Al-Amin's attorneys' communications and work product in connection with a separate § 1983 action. *Id.*

The court also found that Petitioners' conduct violated Mr. Al-Amin's right of free speech, a right "provided for directly by the Constitution" and therefore actionable without the need for showing "any consequential injury beyond the violation itself." *Id.* at 61 (citing *Jones v. Brown*, 461 F.3d 353, 359-60 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 1822 (2007)). Petitioners' practice of "interfering with privileged communications strips such communications of their confidentiality and impinges on the First Amendment's guarantee of freedom of speech." *Id.*

The court further found that Petitioners were not entitled to qualified immunity: "At the time of this incident, it was clearly established that prison officials

were not to open privileged legal mail as determined from the envelope outside of the presence of the inmate." *Id.* at 62.

Petitioners immediately appealed the interlocutory denial of qualified immunity to the Eleventh Circuit, which appointed counsel for Mr. Al-Amin. Pet. 5. The court of appeals affirmed in part (on the free speech claim) and reversed in part (on the court access claim). Pet. App. 1-41. In its decision, the court of appeals emphasized that Mr. Al-Amin was not challenging the prison's regulations governing legal mail. *Id.* 12. Rather, Mr. Al-Amin's claim was that Petitioners, "in repeatedly opening his attorney mail outside his presence, violated not only that prison policy but also his constitutional rights to access to the courts and free speech." *Id.*

Turning to Petitioners' legal contentions, the court of appeals addressed the claim that the binding decisions in *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976), and *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978) – which prohibited prison officials from opening marked legal mail outside of an inmate's presence – were "no longer good law" due to this Court's ruling in *Turner v. Safley*, 482 U.S. 78 (1987).

Addressing the single appellate decision finding such a change in the law, *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), the court of appeals emphasized several key concessions by the *pro se* inmates in that case, most notably that the prison had a "legitimate penological objective" in opening their mail. *Id.* at 23. The court also noted that post-*Turner* decisions from the Second, Third, Sixth, Seventh, and Eighth Circuits "have

concluded that opening properly marked legal attorney mail outside a prisoner's presence infringes the constitutional right of access to the courts." *Id.* at 23-27 & nn.25-30.

The Eleventh Circuit then analyzed the *Turner* factors and agreed that inmates retained the right not to have properly marked legal mail opened outside of their presence. Pet. App. 27-28. As for the "valid, rational connection" between the prison practice (here, a practice that violated the prison's own regulations), and a "legitimate governmental interest," the court observed that Petitioners had not attempted to articulate "a legitimate security interest in opening properly marked legal mail outside Al-Amin's presence." *Id.* at 28.

The second *Turner* factor – the availability of other means to protect Mr. Al-Amin's constitutional right – likewise favored Mr. Al-Amin, because opening attorney mail in the inmate's presence "ensures that the inmate's correspondence with his attorney is not inhibited or chilled by his fear that this correspondence may be read by prison officials." *Id.*

The court noted that Petitioners offered no evidence relative to the third *Turner* factor, *i.e.*, that opening mail in the inmate's presence unduly burdens prison resources. *Id.* at 29. To the contrary, Georgia's own prison policy "already requires opening attorney mail in an inmate's presence." *Id.* Finally, the Eleventh Circuit held that opening legal mail in the inmate's presence balances the inmate's rights and the prison's interests and "fully accommodates the prisoner's rights

as *de minimis* cost to valid penological interests." *Id.* (citing *Turner*, 482 U.S. at 91). Thus, the court concluded that all four *Turner* factors weighed in Mr. Al-Amin's favor.[1]

Nevertheless, the Eleventh Circuit rejected Mr. Al-Amin's court access claim, on the ground that he had not established the "actual injury" required to pursue a claim for interference with his right of access to the courts. *Id.* at 31-33. The court of appeals disagreed with the district court's finding that Mr. Al-Amin had presented sufficient evidence of "actual injury" to his other pending cases as a result of Petitioners' violations. *See* Pet. App. 47-48, 59-60.

The court of appeals unanimously agreed, however, with the district court's ruling that Petitioners' conduct constituted a violation of Mr. Al-Amin's free speech rights, *id.* at 36, and that Mr. Al-Amin need not show further consequential injury to proceed on this claim. *Id.* at 38. The court followed the Third Circuit's reasoning in *Jones v. Brown*, 461 F.3d 353, 359-60 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 1822 (2007), which held that "the practice of opening attorney mail outside of the inmate's presence 'deprives the expression of confidentiality and chills the inmate's protected expression, regardless of the state's good-faith protestations that it does not, and will not, read the

1. The court of appeals buttressed its conclusion by citing *Lemon v. Dugger*, 931 F.2d 1465 (11th Cir. 1991), a post-*Turner* decision which noted that opening mail in an inmate's presence "'insures that prison officials *will not read the mail*' and thus does not chill attorney-inmate communications." Pet. App. 30 (quoting 931 F.2d at 1367 (quoting *Wolff*, 418 U.S. at 577)).

content of the communications.'" *Id.* at 35-36. This is so because "'the only way to ensure that mail is not read when opened . . . is to require that it be done in the presence of the inmate to whom it is addressed.'" *Id.* at 36 (quoting *Jones*, 461 F.3d at 359). Thus, Mr. Al-Amin could pursue a claim for violation of the "fundamental constitutional right" of free speech without establishing further consequential injury, because "'protection of an inmate's freedom to engage in protected communication is a constitutional end in itself.'" *Id.* at 37 (quoting *Jones*, 461 F.3d at 359-60).

The court of appeals rejected Petitioners' argument that the prohibition on their conduct was not "clearly established." Pet. App. 38-40. The court found the proper inquiry to be whether the conduct at issue shares a "high degree of factual similarity with conduct previously held unlawful and unconstitutional." *Id.* As "exact factual identity exists between prior case law and defendants' factual conduct," Petitioners had "fair and clear notice that opening Al-Amin's attorney mail outside his presence was unlawful and violated the Constitution." *Id.* at 40. Accordingly, the court remanded for further proceedings on the free speech claim.

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS A POOR VEHICLE FOR CONSIDERING THE QUESTIONS PRESENTED.

A. An inmate's right not to have legal mail opened and read outside his presence has long been clearly established. *See Sallier v. Brooks*, 343 F.3d 868, 873-74, 877, 879 (6th Cir. 2003) (citing *Muhammad v. Pitcher*, 35 F.3d 1081 (6th Cir. 1994)); *Lemon v. Dugger*, 931 F.2d 1465, 1467 (11th Cir. 1991). Petitioners "do not contend that they are entitled to read Al-Amin's attorney mail. Nor do [they] deny that the law is well established that Al-Amin has a constitutional right that precludes them from reading Al-Amin's attorney mail." Pet. App. 10 n.13.

Petitioners' assertion that this case involves "opening, but not reading, of legal mail outside the presence of an inmate" (Pet. 2) is not an accurate description of the record and proceedings below. Mr. Al-Amin's Complaint alleges repeatedly that his attorney mail was opened and read outside his presence.[2] In rejecting Petitioners' summary judgment motion, the

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2. *See* Compl. (R1-1) ¶¶ 4, 5, 9, 10, 14, 15, 16, 17, 19, 21, 22; Pet. App. 10 n.13. Mr. Al-Amin's deposition testimony likewise described the factual bases for his claim that prison officials were "opening and reading" his legal mail, which he asserted was retaliatory. *See, e.g.*, R2-19-Ex. F, at 15. In denying Petitioner's motion for reconsideration, the district court referred to Petitioners as having "potentially obtained an unfair advantage in defending themselves against his claims of separate constitutional violations by reading his legal mail." Pet. App. 60.

district court found the "opening" of the legal mail outside Mr. Al-Amin's presence sufficient to establish a constitutional violation, without having to determine whether Petitioners read the mail. Pet. App. 46-48, 52, 60-62.

Having prevailed before the district court, Mr. Al-Amin had no basis to appeal the trial court's failure to reach the reading issue. Thus, there is no basis for Petitioners' assertion that Mr. Al-Amin's reading claim was "abandoned on appeal." Pet. 4 n.2.[3]

Before the court of appeals, Petitioners challenged only the "opening" ruling and the denial of qualified immunity for that claim. *Id.* The Eleventh Circuit and the parties addressed the purely legal issue raised by the qualified immunity challenge and focused their arguments and decision on (a) the constitutional grounds for the right of an inmate to receive unopened legal mail and (b) whether this right was so clearly established the petitioners could not avoid liability under a qualified immunity defense.

No matter the answers to those questions, resolution of the "opening and reading" claim will require district court litigation over the same facts and against the same defendants involved in the interlocutory ruling at issue here. *See generally* Eugene

3. There likewise is no basis for Petitioners' assertion that "the parties agreed that the sole issue for appeal was the opening of Al-Amin's legal mail." *Id.* at 5. No such "agreement" was proposed by Petitioners or entered by the parties at any time during the proceedings below, nor was such an agreement acknowledged or relied upon by the court of appeals.

Gressman, et al., *Supreme Court Practice* § 4.18 (9th ed. 2007) (noting that, ordinarily, certiorari should not be granted to review decisions on appeal from an interlocutory order). In these circumstances – where the action will proceed without regard to any ruling by this Court concerning the more limited "opening mail" claim – this consideration has special force, because it serves little purpose to determine either the merits or the qualified immunity issue with respect to only one aspect of the claims at issue when the remainder will be subject to further proceedings in any event. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation").

B. The Petition briefly notes, and the amicus brief asserts in detail, security risks allegedly presented by requiring legal mail to be opened in the presence of an inmate. Pet. 14-16; Amici Br. 1-3, 4-9, 16-18. In this case, however, there is no evidence of such security concerns or other governmental interests. In fact, it is undisputed that Petitioners' actions violated the applicable prison regulations, which mandate that properly marked legal mail be opened only in the presence of the inmate. *See* Ga. Dep't of Corrections, SOP IIB04-0001 (quoted in Pet. App. 3-4).[4] Given that Georgia's own regulations accept that legal mail must be opened in the inmate's

4. The Federal Bureau of Prisons has a similar regulation. *See* 28 C.F.R. § 540.18(a); U.S. Bureau of Prisons, Mail Management Manual §§ 305-06 (Program Statement 5800.10) (1998), *available at* www.bop.gov/DataSource/execute/dsPolicyLoc ("Staff shall open inmate special mail [including legal mail] in the inmate's presence."); States' Amicus Br. 14 ("Such policies, like Georgia's in this case, are now widespread.").

presence, and given that the state amici rest their arguments on security interests not advanced by Georgia, this case is a poor vehicle for weighing prison security interests against an inmate's free speech rights.

Moreover, Georgia's regulations accord with binding precedent disapproving the conduct at issue here. *See Guajardo*, 580 F.2d 748; *Taylor*, 532 F.2d 462. The Petition identifies no security breach resulting from these precedents during the many years in which they have governed the behavior of prison officials in the Eleventh Circuit. Likewise, post-*Turner* appellate decisions in other circuits over the past 15 years state the same holding as the decision below, *see infra* at 13-14, and Petitioners offer no evidence to suggest that these decisions have led to any interference with the operation of prisons in those jurisdictions.

The States' amicus brief (at 4-8) argues that there may be legitimate reasons to open mail, including legal mail, outside the presence of the inmate. The decision below does not preclude prison systems from promulgating regulations attempting to authorize such conduct in the context of a specific "penological interest." No such regulations, however, are at issue here. Likewise, the States' concern (Amici Br. 8) about what types of mail, other than attorney-client mail, must be opened in the inmate's presence is not presented here.

Indeed, the States' amicus brief indicates that Pennsylvania has enacted a more restrictive legal mail regulation, with district courts reaching different decisions as to its constitutionality. Amici Br. 6-7 & n.3.

These decisions currently are on appeal to the Third Circuit. *See id.* In such a case, the evidence supporting the government's security assertions would have been subject to lower court factual review before they came to this Court. In this case, in contrast, there is no evidentiary record whatsoever on which the Court could determine whether penological interests ever justify opening legal mail outside the inmate's presence. Thus, in the event the Court wishes to review the First Amendment question raised here, the Third Circuit's forthcoming decision would provide a far superior vehicle than the present case.

II. THE FIRST QUESTION PRESENTED BY THE PETITION DOES NOT WARRANT CERTIORARI REVIEW.

A. The Petition acknowledges that the Eleventh Circuit joined the Second, Third, and Sixth Circuits in holding that inmates have a First Amendment free speech right to communicate with their attorneys by mail and that opening attorney mail outside the inmates' presence infringes that right. *See Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 1822 (2007); *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003); *Muhammad v. Pitcher*, 35 F.3d 1081 (6th Cir. 1994). As noted by the court of appeals, the Eighth Circuit also recognizes a constitutional claim based on the opening of inmate legal mail outside of his presence. Pet. App. 24 (citing *Powells v. Minnehaha County Sheriff Dept.*, 198 F.3d 711, 712 (8th Cir. 1999)).

As further noted by the court below, the Seventh Circuit agrees with these circuits. Pet. App. 23-24 (citing

Kaufman v. McCaughtry, 419 F.3d 678, 686 (7th Cir. 2005) ("Inmates have a First Amendment right both to send and receive mail," and "when a prison receives a letter for an inmate that is marked with an attorney's name and a warning that the letter is legal mail, officials potentially violate the inmate's rights if they open the letter outside of the inmate's presence.")); *see also Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1995) (allegations that legal mail was opened, that mail was delayed, and that mail was stolen stated First Amendment claim); *Castillo v. Cook County Mail Room Dep't*, 990 F.2d 304, 305-06 (7th Cir. 1993); *cf. Rowe v. Shake*, 196 F.3d 778, 782 (7th Cir. 1999) (distinguishing case involving opening of non-legal mail from *Antonelli* and *Castillo*, which "held that prisoners had stated a cause of action under the First Amendment").

Arguing that Seventh Circuit law does not recognize a First Amendment claim, Petitioners cite *Lewis v. Cook County Board of Commissioners*, 6 Fed. Appx. 428 (7th Cir. 2001). That unpublished decision relied on *Rowe*, which addressed non-legal mail, to hold that the plaintiff's allegation that his legal mail was opened outside his presence was insufficient, without more, to state a First Amendment claim. Unlike *Kaufman v. McCaughtry*, *Antonelli*, and *Castillo*, the unpublished decision in *Lewis v. Cook County* has no precedential value in the Seventh Circuit. *See* 7th Cir. R. 32.1.[5]

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5. The States' amicus brief cites an additional unpublished opinion, *Kaufman v. Karlen*, No. 07-2712, 2008 WL 744140 (7th Cir. Mar. 20, 2008). There, in a one-paragraph discussion, the court affirmed summary judgment against a *pro se* inmate,

(Cont'd)

Petitioners principally rely on *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), where the Fifth Circuit held that opening incoming legal mail outside the presence of inmates did not violate their First Amendment rights. There, however, the two *pro se* inmate plaintiffs "concede[d] that such mail was opened and inspected for [a] 'legitimate penological objective.'" *Id.* at 825. The significance of this concession is shown by the court's holding with regard to inmate Brewer's *outgoing* mail claim. Finding that Brewer had asserted a clearly established constitutional violation based on the handling of his outgoing mail, the Fifth Circuit stated: "Appellant Brewer has not conceded that some legitimate penological interest justified the alleged removal of legal material." *Id.* at 826 (internal punctuation omitted).

The Fifth Circuit has not considered an incoming legal mail claim in a case in which the plaintiffs did not concede mail was opened to further a legitimate penological interest. Here, Mr. Al-Amin expressly disputes that Petitioners acted in furtherance of a legitimate penological interest when opening his attorney mail outside his presence and in violation of the applicable prison regulations. The decision below expressly held that "all four *Turner* factors weigh in [his] favor" on this point. Pet. App. 29.

(Cont'd)

where the inmate offered no evidence that his legal mail had been opened intentionally and no argument that opening his legal mail had interfered with his right to counsel or access to courts. *Id.* at *4. As the States acknowledge (at 12), the opinion "did not explicitly consider whether opening the inmate's incoming legal mail outside his presence could amount to a separate free speech violation."

B. Petitioners briefly argue that the decision below is inconsistent with *Shaw v. Murphy*, 532 U.S. 223 (2001), and *Lewis v. Casey*, 518 U.S. 343 (1996). Petitioners are incorrect. The question in *Shaw* was whether inmates possess a special First Amendment right to provide legal assistance to fellow inmates, 532 U.S. at 227, 232, and the Court held that regulations about inmate-to-inmate communication need not take into account the content of the communication. That case did not address incoming attorney mail and is inapposite here.

In *Casey*, this Court held that an inmate asserting a § 1983 claim based on denial of the constitutional right of access-to-courts must show a consequential injury to proceed with the claim. 518 U.S. at 349. In this case, the court of appeals has applied that holding, rejecting Mr. Al-Amin's access-to-courts claim based on *Casey*. *See* Pet. App. 31, 33.

The Eleventh Circuit did not extend *Casey* to free speech claims, and no federal court of appeals appears to have done so. The Eleventh Circuit followed the Third Circuit's holding that a state prison's opening of attorney mail outside the inmate's presence "interferes with protected communications, strips those communications of their confidentiality, and accordingly impinges upon the inmate's right to freedom of speech." Pet. App. 35 (quoting *Jones v. Brown*, 461 F.3d at 359). This violation of a "fundamental constitutional right" is actionable without further consequential injury, because "'protection of an inmate's freedom to engage in protected communications is a constitutional end in itself.'" *Id.* at 37 (quoting *Jones*, 461 F.3d at 359-60); *see*

also Taylor v. Sterrett, 532 F.2d 462, 476 (5th Cir. 1976) (discussing inhibitory effect on attorney-client communications of opening legal mail outside inmate's presence). This is especially so where, as here, the inmate sought injunctive relief against further violations as well as nominal damages. Pet. App. 9-10, 37-38.

III. PETITIONERS HAVE IDENTIFIED NO CIRCUIT SPLIT OR OTHER BASIS FOR REVIEW OF THE SECOND QUESTION PRESENTED.

Petitioners identify no circuit split with regard to the second question concerning the Eleventh Circuit's qualified immunity ruling. Instead, Petitioners argue that this Court's decision in *Casey* undermines the holding that it was "clearly established" that opening legal mail outside the presence of the inmate was unconstitutional. *Casey*, however, does not question (or even address) an inmate's right to have his legal mail opened only in his presence. Rather, rejecting court-ordered changes to provide better library access and legal assistance to inmates throughout Arizona, *Casey* clarifies that in access-to-courts cases, inmate plaintiffs must show consequential injury to satisfy the constitutional prerequisite of standing. *See Casey*, 518 U.S. at 349 & n.1, 351, 353 n.4, 356, 357, 358 (discussing standing and constitutional prerequisite of actual injury). This does not mean that a court-access violation did not occur, only that a prisoner cannot challenge the violation absent a derivative injury to his ability to pursue separate legal matters. Further, *Casey* did not address a direct violation of the fundamental constitutional right of free speech, which is actionable without the need to show further consequential injury.

On the qualified immunity issue presented here, *Casey* has no bearing on Petitioners' "notice" that their specific "conduct" violated the Constitution. "[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks omitted); *see also Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (qualified immunity inquiry looks to whether the law "clearly establish[ed] that the officer's conduct would violate the Constitution"). As the decision below explained, Petitioners had "fair warning" that "their precise conduct (opening an inmate's attorney mail outside his presence) is unlawful and a constitutional violation" at the time they opened Mr. Al-Amin's legal mail. Pet. App. 39, 40 (citing *Guajardo*, 580 F.2d at 748, and *Taylor*, 532 F.2d at 462). Petitioners' subjective understanding of the constitutional basis for Al-Amin's clearly established right not to have his legal mail opened outside his presence is not pertinent to the inquiry where Petitioners indisputably were "on notice their conduct [was] unlawful." *See Hope*, 536 U.S. at 747 (holding qualified immunity analysis is an "objective" test).

Petitioners cite no split among the circuits on this question. Circling back to the Fifth Circuit decision in *Brewer*, however, Petitioners contend that prison officials in the Eleventh Circuit would not have known whether opening legal mail outside the inmate's presence was a constitutional violation because the precedent established by *Taylor* and *Guajardo* (which applied in both the Fifth and Eleventh Circuits) was "repudiated" by the Fifth Circuit panel in *Brewer*. First, petitioners had no reason to rely on post-1981 Fifth

Circuit case law to determine the law of the Eleventh Circuit, because – regardless of subsequent development in Fifth Circuit law – the earlier precedents remain the law of the Eleventh Circuit unless and until the Eleventh Circuit were to overrule them. *United States v. Blanton*, 793 F.2d 1553, 1559 n.6 (11th Cir. 1986) ("The current Fifth Circuit has overruled both *Brooks* and *Nicoll* . . . . When this Circuit was created, we adopted the case law of the former Fifth Circuit as it existed on the day of the split . . . . We are not bound by the subsequent development of the law in the new Fifth Circuit. Accordingly, *Brooks* and *Nicoll* are still good law in the Eleventh Circuit.") (citation omitted).

Second, Petitioners put more weight on *Brewer* than that decision can bear. *Brewer* held that prison officials may open inmates' legal mail outside their presence when justified by a concededly "legitimate penological objective" under *Turner*'s four-part test. Thus, *Brewer* gave petitioners no reason to think that they could open Mr. Al-Amin's mail outside his presence when doing so was *not* reasonably related to a legitimate penological purpose, but instead was done, for example, to retaliate, as is alleged here. At the same time, the case law of every other circuit to address the issue gave notice that an inmate has a right to be present when his legal mail is opened. *See* cases cited *supra* at 13-14.

In any event, the narrow question whether pre-1981 case law remained good law in the Eleventh Circuit or whether that case law was undermined to any degree by a post-1981 Fifth Circuit decision case law does not warrant Supreme Court review. There is no conflict among the circuits on that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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