No. 22-108

In the
Supreme Court of the United States

RICHARD R. WATKINSON,

Petitioner,

v.

ALASKA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Richard R. Watkinson is serving a lengthy sentence for two convictions of first-degree murder. In prison, he practices the Asatru religion and worships at bonfires while drinking juice and honey. Watkinson challenged the Alaska Department of Corrections' refusal to purchase firewood for his faith group with an institution's prisoner welfare fund (an account limited to funding charitable, recreational, and educational programs). Watkinson also challenged the Department's refusal to allow him and his faith-group peers to create a virtual account for their benefit within the prisoner welfare fund and then use the fund to make discounted orders of juice and honey.

The questions presented are:

1. For a prisoner to establish that a prison violated his rights under the Free Exercise Clause, must he show that the prison substantially burdened his religious exercise?

2. Under the Religious Land Use and Institutionalized Persons Act, did a prison substantially burden a prisoner's religious exercise without a compelling governmental interest when it maintained a fund for charitable, recreational, and educational purposes and refused to use the fund to subsidize the prisoner's religious purchases?

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OPINIONS BELOW

The memorandum disposition of the court of appeals (Pet. App. A1–A5) is unreported. The decision of the district court (*id.* at A6–A37) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2022. Pet. App. A1. The petition for a writ of certiorari was filed on August 1, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. The Alaska Department of Corrections (the Department) maintains a prisoner welfare fund at each of its prisons. See C.A. E.R. 187. Under Department policy, a prisoner welfare fund can be used, at the discretion of a prison superintendent, to make "loans or grants to prisoners or prisoner organizations for activities not funded by general appropriations." *Ibid.* The fund is the sole source of money for prisoner organizations such as cultural clubs, study or self-help groups, and inmate counsels. *Id.* at 216–17. It pays for "special events, recreation equipment, special programs and appliances purchased for prisoner use and/or benefit." *Id.* at 216. Prisoner welfare fund expenditures must be for "charitable, recreational and educational purposes." *Id.* at 188.

Typical prisoner welfare fund purchases might include gym equipment or special food for events like talent shows or Juneteenth celebrations. See C.A. E.R.

78, 168. The Goose Creek Correctional Center in Wasilla, Alaska uses its prisoner welfare fund to buy, among other things, firewood for a sweat lodge operated by its Alaska Native cultural group. *Id.* at 112, 139–40 ¶15, 151 ¶15.

A prisoner welfare fund's revenue comes from surcharges at the prison commissary but can also come from special fundraising, donations, and earned interest. C.A. E.R. 188, 218. Prisoners cannot dedicate donations to the benefit of specific prisoners or prisoner groups. *Id.* at 99–100. And the Department prohibits its institutions from setting up any pooled, virtual accounts within a prisoner welfare fund—that is, sub-accounts held for the benefit of particular prisoners or groups. *Ibid.* Prisoners can submit proposals for prisoner welfare fund expenditures, but the superintendent has no obligation to approve them. See *id.* at 101, 218.

Separate from its prisoner welfare fund policies, the Department has a faith and chaplaincy policy "to allow prisoners to participate in faith-based programs and practices consistent with facility security and available resources." C.A. E.R. 220. Under that policy, prisoners designate their faith group and are then "allowed to practice that faith consistent with guidelines provided by the Chaplaincy Coordinator, including services, property, special events and special dietary needs for that faith group." *Id.* at 221.

Prisoners are allowed to possess personal religious property. C.A. E.R. 223–24. And the institutions will hold and secure faith group property. *Id.* at 224.

Faith group property can be "donated for use in the institution by an approved faith group organization." *Ibid.* Prisoners cannot donate faith group property without superintendent approval. *Ibid.* Under its faith and chaplaincy policy, the Department "is not responsible for the procurement of any faith group property or equipment." *Ibid.*

2. Petitioner Richard Watkinson was sentenced to prison for 100 years after he murdered his father and stepmother. *Watkinson* v. *State*, 980 P.2d 469, 470 (Alaska Ct. App. 1999). In 2015, he was incarcerated at the Goose Creek Correctional Center in Wasilla, Alaska.[1] At that time, Goose Creek violated the Department's statewide policies by allowing Watkinson and other prisoners practicing the Asatru religion to have special access to the institution's prisoner welfare fund.

Asatru is a polytheistic religion in which adherents worship ancient Norse deities such as Thor, Odin, and Freya. C.A. E.R. 139 ¶6, 150 ¶6. At Goose Creek, Asatru prisoners have organized a congregation called the Blodtryggr Kindred. *Id.* at 139 ¶4, 149–50 ¶4. They hold weekly ceremonies known as "blots" where

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[1] Watkinson has since been transferred to Spring Creek Correctional Center in Seward, Alaska. C.A. E.R. 79–80; VINE, Richard R. Watkinson Custody Record, https://vinelink.vineapps.com/person-detail/offender/1330205;tabIndexToSelect=0 (last visited Oct. 19, 2022). Watkinson's transfer to Spring Creek mooted his claims for declaratory and injunctive relief against Goose Creek employees Earl Houser and Scott Dial, but not his claims challenging statewide policies against the Department and its chaplaincy coordinator James Duncan.

they build a bonfire and drink juice and honey. *Id.* at 69, 73–74. Between August 2015 and May 2017, Goose Creek allowed Asatru inmates to donate money to the institution's prisoner welfare fund to be held in a virtual account. The prisoners could then use the prisoner welfare fund to buy juice and honey in bulk. *Id.* at 141 ¶25, 152 ¶25. In response to a grievance from Watkinson, Goose Creek also began using its prisoner welfare fund to buy firewood for Asatru blots. See *id.* at 140 ¶19, 152 ¶19, 205.

In 2017, Goose Creek stopped granting the Asatru prisoners special access to the prisoner welfare fund. See C.A. E.R. 141 ¶28, 153 ¶28, 208, 215. Goose Creek no longer allowed the Asatru prisoners to pool their money in a virtual balance and stopped using the fund to buy them firewood. *Id.* at 208, 215. However, Goose Creek erected a woodshed in the visitor parking area to accept donated firewood, and it allowed the prisoners to buy juice and honey from the commissary. *Id.* at 206, 215. In a letter to Watkinson, the Department explained, "It is not a function of the Prisoner Welfare Fund to finance religious faith groups but to benefit all prisoners with respect to special events, recreation equipment, and special programs and appliances." *Id.* at 227.

3. Watkinson sued the Department and several of its employees. He sought a declaration that (1) the defendants violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), the First Amendment, and the Fourteenth Amendment by depriving "him of the right to compete for [prisoner welfare]

funds to purchase firewood and food/beverage products"; (2) that Department policies "are illegal insofar as they categorically exclude religious organizations from being eligible to obtain [prisoner welfare] funds"; and (3) that "Watkinson and other religious practitioners can individually or collectively donate funds to reimburse the [prisoner welfare fund] for purchases that would not otherwise have sufficiently broad appeal to merit [prisoner welfare fund] purchase without inmate reimbursement, subject to the Superintendent's ability to deny particular requests for religiously neutral reasons." C.A. E.R. 132. Watkinson further asked the court to order the defendants to "cease discrimination against religion in general and Asatru in particular with respect to the [prisoner welfare fund]" and to "develop criteria independent of religion for evaluating [prisoner welfare fund] requests." *Id.* at 133.

At a one-day bench trial, Watkinson testified that the Goose Creek Asatru group would burn about $1000 worth of firewood each year. C.A. E.R. 71. When Goose Creek stopped buying them firewood, Watkinson and the others relied on donations or purchased wood with their own money. *Id.* at 73. At times, the group lacked wood for a blot while they waited to collectively earn enough money or for family members to donate. *Ibid.* Watkinson found it "uneconomical" to purchase juice and honey through the prison commissary rather than "bringing out gallons" via the prisoner welfare fund. *Id.* at 76. Watkinson asserted there were times when the Asatru group was "waiting on" family for donations and "didn't have the financial accommodations to be able to buy enough juice for [their] service." *Ibid.*

A Department administrator testified that Goose Creek was "in direct violation" of state policy when it gave the Asatru prisoners special access to the prisoner welfare fund. C.A. E.R. 88–89. As for allowing the Asatru prisoners to maintain a virtual balance in the institution's fund, the administrator testified that the Department had "a significant concern about possible fraud and other crimes being committed in using other accounts that people can trade back and forth, people paying off debt, strong-arming, and that can go on under the guise of a club, organization, or religious practice."[2] *Id.* at 97. Except for a long-standing greenhouse and plant sale project at a women's prison, whose financial arrangement with a prisoner welfare fund had been grandfathered in, no other Department

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[2] Watkinson asserts that the administrator testified, with respect to virtual balances, that he was "unaware of any security problems that did or could arise in that process." Pet. 8. This is incorrect. That testimony was with respect to using the fund's money to purchase firewood, not letting inmates pool money:

> Q: But as far as you know there weren't any, say, security problems that necessitated the prohibition on purchasing firewood for Asatru from the Prisoner Welfare Fund, right?
>
> A: I'm unaware of any security problems that did or could arise in that process.
>
> Q: Because they're still allowed to have the firewood, just from a different source?
>
> A: Right. C.A. E.R. 180.

With respect to pooling funds, the Administrator testified at his deposition that he "would not deem it a security issue," but conceded he is "a layman when it comes to security" and "you should talk to someone from security." *Id.* at 183. At trial he testified that there was, in fact, "a significant concern." *Id.* at 97.

prisoner organization maintains a virtual balance in a prisoner welfare fund. *Id.* at 97–98. The Alaska Department of Administration and banking institutions have otherwise prohibited virtual balances. *Id.* at 90, 97.

The administrator also explained that, in his understanding, it would not be legally permissible to use a prisoner welfare fund to purchase faith group property. C.A. E.R. 91. Were the Department to allow that, however, it would "have to treat everybody equitably and not . . . favor one religious group over another." *Ibid.* To do so would be "extremely hard" and "not feasibly administratively possible." *Id.* at 89, 91. In the end, if the prisoner welfare fund were used for religious purchases, the administrator testified it "would wind up being a hundred percent sucked into that because that's where the push would be." *Id.* at 92. The district court found the administrator's testimony credible. Pet. App. A15–A16.

Following trial, the district court held that the Department did not violate Watkinson's rights under the First Amendment's Free Exercise Clause. Pet. App. A26–A32. At the outset, Watkinson failed to show that his religious practice was burdened. *Id.* at A27. While the Department's "failure to administer the [prisoner welfare fund] in a way that subsidizes firewood, juice, and honey may be inconvenient to Mr. Watkinson, it does not amount to a prohibition on his ability to practice his religion or a punishment for doing so." *Ibid.* But even if Watkinson had shown a burden on his religious exercise, the district court held the Department's policies were still reasonably related

to legitimate penological interests. *Id.* at A28 (citing *Turner* v. *Safley*, 482 U.S. 78 (1987)). The district court walked through the four factors identified in *Turner* as "relevant in determining the reasonableness of the regulation at issue." 482 U.S. at 89–90;[3] Pet. App. A28–A32.

First, refusing to use the prisoner welfare fund for Watkinson's religious activities was rationally related to the Department's legitimate interest in fairly and equitably administering the fund. Pet. App. A28. Using the fund for religious activities "would effectively end the use of the fund for its intended purpose: funding activities for all inmates to enjoy regardless of religious affiliation." *Id.* at A28–A29.

Second, the court found that Watkinson still had alternative means of practicing the exact same religious right he asserted was burdened. Pet. App. A29. He still could hold blots and obtain firewood, juice, and honey. *Ibid.*

Third, the court found that using the prisoner welfare fund to subsidize Watkinson's religious purchases would negatively impact the prison and other

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[3] The *Turner* factors include the "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; "whether there are alternative means of exercising the right that remain open to prison inmates"; "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and "the absence of ready alternatives" or "the existence of obvious, easy alternatives." 482 U.S. at 89–90 (cleaned up).

inmates. Pet. App. A29–A30. The court noted that Watkinson sought "an exemption from [the Department's] policy that it is not responsible for the procurement of faith group property." *Id.* at A30. But giving him that exemption "would be unfair to other religious groups" and to "the general inmate population that benefits from the secular activities the fund is intended to sponsor." *Ibid.* The court also noted that allowing Watkinson and the other Asatru prisoners to pool money in the fund raises a possibility of "fraud and other criminal activity" and could result in "resentment and unrest" or "in the elimination of the [prisoner welfare fund] altogether." *Ibid.*[4]

And fourth, the district court analyzed whether there were "obvious, easy alternatives" that the Department could adopt to accommodate Watkinson. Pet. App. A31–A32. The court found it would be "administratively burdensome, and in some ways impossible, to fashion an alternative to [the Department's] religious property procurement policy that still achieves its interests with regard to administering the [prisoner welfare fund]." *Id.* at A32. The district court

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[4] Watkinson states that "the district court recognized that the DOC had 'produced no evidence of actual fraud that has occurred' in connection with virtual accounts." Pet. 7–8. But he leaves off the first half of the court's sentence: "*It is of no consequence* that Defendants produced no evidence of actual fraud that has occurred." Pet. App. A30 (emphasis added) (citing *Friedman* v. *Arizona*, 912 F.2d 328, 332–33 (9th Cir. 1990) (explaining that under *Turner* prisons may anticipate security problems and adopt solutions)).

held the Department did not violate Watkinson's free exercise rights. *Ibid.*

In addition to rejecting the free exercise claim, the district court held that the Department did not violate Watkinson's rights under RLUIPA. Pet. App. A20–A26. RLUIPA "explicitly denies creating a right for religious organizations to receive funding from the government." *Id.* at A20–A21 (citing 42 U.S.C. § 2000cc-3(c)). The Act was "[d]irected at *obstructions* institutional arrangements place on religious observances"; it "does not require a State to pay for an inmate's devotional accessories." *Id.* at A21 (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 n.8 (2005) (emphasis added)). Declining to subsidize the Asatru group's religious purchases placed no substantial burden on Watkinson's ability to practice his religion. *Id.* at A20–A22.

And even if Watkinson had shown he suffered a substantial burden, the district court held the Department's policies were "the least restrictive means of furthering compelling government interests." Pet. App. A23–A26. These included the Department's interests in staving off the threat to institutional security posed by allowing prisoners to pool money in a virtual account or by stoking interreligious strife with favoritism to select religious groups. *Id.* at A25. The court also found compelling the Department's interest in "ensuring it does not violate the Constitution's establishment clause by institutionally supporting religious activities of the Asatru faith group." *Id.* at A24. The court held that prohibiting the Asatru group from having special access to the prisoner welfare fund was the

least restrictive means of furthering the Department's compelling interests. *Id.* at A26.

Watkinson appealed to the Ninth Circuit. In an unpublished memorandum disposition, the Ninth Circuit affirmed. Pet. App. A1–A5.

Addressing the RLUIPA claim first, the Ninth Circuit held that the Department did not substantially burden Watkinson's religious exercise in violation of the Act. Pet. App. A3. It explained that the Department's policies "do not deny [Watkinson] access to any item necessary for his religious ceremonies, and [Watkinson] may procure all necessary items without access to the [prisoner welfare fund]." *Ibid.*

The Ninth Circuit likewise rejected Watkinson's free exercise claim. Pet. App. A3–A4. The court explained that "[a]s with the RLUIPA, a prisoner asserting a free exercise claim must show that the government policy has substantially burdened his practice of religion." *Id.* at A4 (citing *Jones* v. *Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015)). The Ninth Circuit reiterated that Watkinson's religious exercise had not been substantially burdened, but even if it had been, the Department's policies "were reasonably related to legitimate penological interests." *Ibid.* These interests included "avoiding constitutional issues that might arise from funding one specific religious group, maintaining prison security, avoiding favoritism, and ensuring that [prisoner welfare] funds support charitable, recreational, and educational opportunities available to the entire prison population." *Ibid.* (citing *Thornburgh* v. *Abbott*, 490 U.S. 401, 415 (1989);

Walker v. *Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015)). The Ninth Circuit held there was no free exercise violation. *Ibid.*

Watkinson's petition to this Court followed.

REASONS FOR DENYING THE PETITION

No law requires a State to directly subsidize a prisoner's worship. Yet that is what Watkinson sought. The Department properly denied him special access to the prisoner welfare fund. It did so because the Department reserves prisoner welfare funds for "charitable, recreational and educational purposes"; the Department does not finance faith group property; and the Department prohibits prisoners from creating virtual, pooled accounts within the fund. C.A. E.R. 100, 188, 224, 227. Refusing to use the prisoner welfare fund to subsidize Watkinson's worship placed no "obstructions" on his religious exercise. *Cutter*, 544 U.S. at 720 n.8. To the contrary, the Department let Watkinson hold blots, allowed him to purchase juice and honey through the commissary, and facilitated his acquisition of firewood by purchase or donation. C.A. E.R. 73, 76, 206, 215. The lower courts were correct—the Department did not violate Watkinson's right to freely exercise his religion.

Certiorari should be denied for three reasons:

1. Watkinson's petition is a poor vehicle for addressing the threshold showing for a prisoner free exercise claim because the issue is simply not dispositive of his case. Both lower courts held that even if he had shown a substantial burden (and thus by extension,

even if no such showing was required), his constitutional claim still failed under the *Turner* reasonableness analysis. Moreover, because his identical RLUIPA claim also failed under that statute's more protective standard, his parallel free exercise claim necessarily could not succeed under the less protective constitutional test. No matter the result of his free exercise arguments, Watkinson's case—and his religious exercise—will remain unaffected.

2. Even if this petition were an appropriate vehicle, there is no need for this Court to review the constitutional free exercise standards. First, the courts of appeals are not deeply divided. The overwhelming majority of circuits that have addressed the issue require a substantial burden, with one potentially unclear circuit and one outlier. And requiring a burden on religious exercise as a prerequisite is rooted in this Court's precedent. Second, the alleged circuit split is disconnected from Watkinson's core argument that recent government benefits precedent should be imported into the prison context. In fact, no courts of appeals—including the Ninth Circuit in this case—appear to have yet addressed that question. And third, stepping beyond the threshold inquiry, Watkinson identifies no persuasive reason for this Court to wholly abandon *Turner*'s reasonableness analysis, which has been the longstanding prisoner free exercise standard since *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987).

3. The Ninth Circuit's nonprecedential, unpublished application of RLUIPA to the facts of Watkinson's case likewise presents no issue worthy of this Court's review.

This Court should deny Watkinson's petition for certiorari.

I. Watkinson's case is a poor vehicle for analyzing the substantial burden issue.

Prisoners retain the right to freely exercise their religions. But not at the expense of an institution's valid penological objectives. Incarceration "brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *O'Lone*, 482 U.S. at 348 (quoting *Price* v. *Johnson*, 334 U.S. 266, 285 (1948)). "To ensure that courts afford appropriate deference to prison officials," this Court has "determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Id.* at 349. A prison regulation that "impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests." *Ibid.* (quoting *Turner*, 482 U.S. at 89).

When they rejected Watkinson's free exercise arguments, the Ninth Circuit and the district court applied the analysis set out in *O'Lone* and *Turner*. Pet. App. A4, A28–A32. Watkinson concedes that across the country "the lower courts all believe" this is the proper analysis. Pet. 12. He takes issue, however, with

the Ninth Circuit's requirement that to sustain a free exercise claim he must first show that the Department has substantially burdened his religious practices. *Id.* at 12–14. But the question is not dispositive of his case, making this a poor vehicle for discerning whether the substantial burden test is the appropriate threshold inquiry. In the end, substantial burden test or not, Watkinson's free exercise claim fails.

Both the Ninth Circuit and the district court held that even if Watkinson had shown a substantial burden on his religious exercise, his claim was still futile because the Department's policies were reasonably related to legitimate penological interests. Pet. App. A4, A28–A32. As the Ninth Circuit explained, these interests included "avoiding constitutional issues that might arise from funding one specific religious group, maintaining prison security, avoiding favoritism, and ensuring that [prisoner welfare] funds support charitable, recreational, and educational opportunities available to the entire prison population." *Id.* at A4. Thus, even if this Court were to agree with Watkinson that the "substantial-burden prerequisite is wrong" (Pet. 14), he would be entitled to no remedy. His free exercise claim fails the *Turner* reasonableness analysis.

If this Court went further and accepted Watkinson's invitation to abandon *Turner* and substitute it with strict scrutiny (Pet. 14–15), Watkinson would still be entitled to no relief. In rejecting Watkinson's RLUIPA claim, the district court held that the Department satisfied RLUIPA's statutorily mandated strict

scrutiny test because its policies are "the least restrictive means of furthering compelling governmental interests." Pet. App. A23–A26. The same would be true for a parallel constitutional claim. The district court explained that the Department had a compelling interest in mitigating the threats to institutional security posed by allowing prisoners to pool money in a virtual account and by showing favoritism to a religious group. *Id.* at A25. The court also held that the Department had a compelling interest in avoiding the constitutional issues that might flow from institutionally supporting a single faith group's worship activities. *Id.* at A24. And given that it would be "effectively impossible" to maintain a virtual balance in the prisoner welfare fund and that "Watkinson proposed no alternatives" to using the fund to purchase his religious items, the Department's practices were, the court held, "the least restrictive means of furthering their compelling governmental interests." *Id.* at A26. The district court was correct, and Watkinson's claim fails even under strict scrutiny.

Finally, if Watkinson were to succeed on all of his arguments, there is no assurance that his religious exercise would be tangibly affected. Below, he sought the ability to "compete for [prisoner welfare] funds to purchase firewood and food/beverage products" for his religious worship and to pool money in the prisoner welfare fund "subject to the Superintendent's ability to deny particular requests for religiously neutral reasons." C.A. E.R. 132. Any individual disbursement from the prisoner welfare fund would be within a prison superintendent's discretion. *Id.* at 187, 218. Watkinson cannot contest that a superintendent could

still deny his purchase request as not in line with the prisoner welfare fund's charitable, recreational, and educational purposes. See *id.* at 188. Moreover, the Department could satisfy Watkinson's claim by doing away with its prisoner welfare funds entirely. In either event, Watkinson's demands would be met but his religious exercise would remain unchanged.

This Court should decline to grant certiorari to take up issues that will change neither the outcome of the case nor Watkinson's religious exercise.

II. The law governing prisoner free exercise claims does not require this Court's review.

Watkinson asserts that the circuits are "deeply divided" over whether a prisoner's religious exercise must be substantially burdened for the prisoner to sustain a constitutional free exercise claim.[5] Pet. 12. He urges the Court not only to do away with a threshold substantial burden inquiry, but to wholly abandon the reasonableness test adopted in *O'Lone*. Pet. 14–15. The divide on the threshold inquiry is not nearly so deep, nor so consequential, as Watkinson argues. Nor does it implicate Watkinson's core argument that recent government benefits case law should be imported to the prison context. The alleged split does not war-

[5] Watkinson made this argument to the Ninth Circuit in a single sentence in his reply brief. C.A. Reply Br. 12 (Dkt. 32). The Ninth Circuit did not address it. See Pet. App. A1–A5.

rant certiorari. Moreover, Watkinson raises no persuasive reason for abandoning the Court's settled prisoner free exercise precedent.

1. The asserted tension among the courts of appeals is largely abstract. While there is one outlier on the substantial burden question, across the circuits prisoners must show some infringement of their religious exercise to support a free exercise claim—no circuits appear take up bare challenges to policies that have no impact on a prisoner's religious exercise.

The overwhelming majority of circuits that have addressed the question have adopted a "substantial burden" test as the measure of infringement that may trigger a prisoner free exercise claim. This includes the D.C., Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. See *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) (noting "[t]his requirement accords with the Supreme Court's discussion in *O'Lone*"); *Green Haven Prison Preparative Mtg. of Religious Soc'y of Friends* v. *N.Y. State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 84 (2d Cir. 2021) ("The prisoner must show at the threshold that the disputed conduct substantially burdens his sincerely held religious beliefs." (quoting *Salahuddin* v. *Goord*, 467 F.3d 263, 274–75 (2d Cir. 2006))), cert. denied 142 S. Ct. 2676 (2022); *Wright* v. *Lassiter*, 921 F.3d 413, 418 (4th Cir. 2019) (explaining the first stage of the analysis is "essentially the same" for First Amendment and RLUIPA claims: "the plaintiff must show that the prison's policies imposed a substantial burden on his exercise of sincerely held religious beliefs"); *Koger* v. *Mohr*, 964 F.3d 532, 543 (6th Cir. 2020)

(rejecting inmate's free exercise challenge to a grooming policy where he failed to show a substantial burden); *Thompson* v. *Holm*, 809 F.3d 376, 379 (7th Cir. 2016) (holding that to establish a free exercise claim a prisoner had to demonstrate the defendants "personally and unjustifiably placed a substantial burden on his religious practices" (citing, *inter alia*, *Hernandez* v. *C.I.R.*, 490 U.S. 680, 699 (1989))); *Mbonyunkiza* v. *Beasley*, 956 F.3d 1048, 1053 (8th Cir. 2020) ("[T]o warrant a *Turner* analysis of penological interests, the inmate must show the challenged regulation 'substantially burdens' his sincerely held belief.");[6] *Jones* v. *Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015); *Kay* v. *Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007) ("[T]he prisoner–plaintiff must first show that a prison regulation 'substantially burdened . . . sincerely-held religious beliefs.'" (quoting *Boles* v. *Neet*, 486 F.3d 1177, 1182 (10th Cir. 2007))).

The Eleventh Circuit has also effectively applied a substantial burden requirement, although by a different route. The Eleventh Circuit has recognized that "[i]f a claim fails under the RLUIPA—which embeds a heightened standard for government restrictions of the free exercise of religion—it necessarily fails under the First Amendment." *Dorman* v. *Aronofsky*, 36 F.4th 1306, 1313 (11th Cir. 2022). Thus, if a prisoner cannot meet RLUIPA's statutory substantial burden test, 42 U.S.C. § 2000cc-1(a), he or she likewise

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[6] In light of *Mbonyunkiza*, 956 F.3d at 1053, Watkinson is incorrect to argue that the Eighth Circuit does not apply a substantial burden requirement. See Pet. 13 n.3.

has no claim under the First Amendment's less-protective free exercise framework. *Dorman*, 36 F.4th at 1313–14.

The Third Circuit applies a threshold inquiry focused on the prisoner's beliefs, but not necessarily a substantial burden test. That court emphasizes that "only those beliefs which are both sincerely held and religious in nature are entitled to constitutional protection." *Williams* v. *Morton*, 343 F.3d 212, 217 (3d Cir. 2003) (quoting *DeHart* v. *Horn*, 227 F.3d 47, 51 (3d Cir. 2000)). In *Williams* the Third Circuit rejected prison officials' argument that an inmate had to make a threshold showing that a policy denying Halal meats to Muslim inmates substantially burdened religious beliefs. *Ibid.*

The Third Circuit has not, however, clearly rejected a substantial burden test for all prisoner free exercise claims. For example, the court implied a substantial burden requirement when, in the federal prison context, it rejected a prisoner's free-exercise-based *Bivens* claim because the Religious Freedom Restoration Act (RFRA) already provided a "comprehensive remedial scheme for violations of substantial burdens on his religious exercise." See *Mack* v. *Warden Loretto FCI*, 839 F.3d 286, 305 (3d Cir. 2016). Like RLUIPA, RFRA requires a claimant to show a substantial burden. 42 U.S.C. § 2000bb-1(a). The Third Circuit also applies a substantial burden threshold to free exercise claims outside of the prison context. See *Anspach ex rel. Anspach* v. *City of Philadelphia, Dep't of Pub. Health*, 503 F.3d 256, 272 (3d Cir. 2007) ("[T]he

First Amendment is only implicated if the governmental burden on religion is 'substantial.'" (quoting *Hernandez*, 490 U.S. at 699)). And the Third Circuit has applied the substantial burden test to prisoner free exercise claims in non-precedential unpublished decisions. See, e.g., *Robinson* v. *Superintendent Houtzdale SCI*, 693 F. App'x 111, 115 (3d Cir. 2017) ("The threshold question in any First Amendment or RLUIPA case is whether the prison's challenged policy or practice has substantially burdened the practice of the inmate–plaintiff's religion."); *Thompson* v. *Ferguson*, 849 F. App'x 33, 36 (3d Cir. 2021) (holding a prisoner failed to state a free exercise claim when he did not allege a substantial burden).

The outlier is the Fifth Circuit, which "[g]enerally . . . has not required a preliminary showing that a regulation substantially interferes with an inmate's religious rights." *Butts* v. *Martin*, 877 F.3d 571, 585–86 (5th Cir. 2017). Still, even in the Fifth Circuit a plaintiff must show that a religious practice was in some way infringed or restricted to raise a free exercise claim. See, e.g., *Randall* v. *McLeod*, 68 F.3d 470, 1995 WL 581973, at *4 (5th Cir. 1995) (per curiam) (unpublished[7]) (affirming the dismissal of a free exercise claim as frivolous where a prisoner could not show that "failure to provide him with a pork-free meal on two separate occasions burdened his right to freely exercise his religious beliefs"); cf. *DeMarco* v. *Davis*, 914 F.3d 383, 389–90 (5th Cir. 2019) (holding a prisoner

[7] Unpublished Fifth Circuit opinions issued before January 1, 1996, are precedent in that court. Fifth Circuit Rule 47.5.3.

stated a free exercise claim where he alleged that seizing books "placed a substantial burden on his practice of reading religious literature" and his pleadings established the prison "burdened a sincere religious practice").

The Fifth Circuit's different tack does not reveal a deep conflict over the law demanding this Court's intervention. Indeed, requiring prisoners to make some showing that a policy burdens their religious exercise before they can raise free exercise claims is rooted in this Court's precedent. *Turner* only applies when "a prison regulation *impinges* on inmates' constitutional rights." *Turner*, 482 U.S. at 89 (emphasis added). And the substantial burden inquiry itself derives from free exercise precedent outside of the prison context. See *Ford* v. *McGinnis*, 352 F.3d 582, 591 (2d Cir. 2003) (Sotomayor, J.) ("The notion that a plaintiff must establish a substantial burden on his religious exercise to claim constitutional protection is derived from the Supreme Court's test in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) . . . .").

Moreover, given that *O'Lone*, 482 U.S. at 349, established a higher burden for prisoner free exercise claims by applying the *Turner* reasonableness analysis, it would be illogical for it simultaneously to have done away with a threshold inquiry to which even non-prisoners are held. See *Levitan*, 281 F.3d at 1320 (reasoning that *O'Lone*, which did not discuss the substantial burden inquiry, "assumed the importance of the relevant ritual to the prisoners"). The Ninth Circuit has thus merely incorporated the same threshold for prisoner claims as it has applied to non-prisoner free

exercise claims. See *Jones*, 791 F.3d at 1031 (citing *Graham v. C.I.R.*, 822 F.2d, 844, 851 (9th Cir. 1987)); see also Pet. App. A4 (citing *Jones*, 791 F.3d at 1031). The Ninth Circuit's substantial burden test originates in *Graham* v. *C.I.R.*, a tax case where the court explained that "interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." 822 F.2d 844, 850–51 (9th Cir. 1987) (citing, *inter alia*, *Hobbie* v. *Unemp't App. Comm'n of Fla.*, 480 U.S. 136, 141 (1987); *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963); *Thomas* v. *Review Bd.*, 450 U.S. 707, 717–18 (1981)). This Court affirmed *Graham* in *Hernandez v. C.I.R.* and held, "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice . . . ." 490 U.S. at 699.

The Ninth Circuit's substantial burden inquiry is thus rooted in this Court's free exercise jurisprudence and is applied by the overwhelming majority of circuits. There is no deep divide requiring this Court's intervention.

2. The asserted circuit split is, moreover, disconnected from Watkinson's core argument that the Court should apply its recent government benefits cases to the prison context. See Pet. 14 (citing *Carson* v. *Makin*, __ U.S. __, 142 S. Ct. 1987 (2022); *Espinoza* v. *Montana Dep't of Revenue*, __ U.S. __, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Colombia* v. *Comer*, __ U.S. __, 137 S. Ct. 2012 (2017)). In *Trinity Lutheran Church of Colombia*, this Court applied "the

most exacting scrutiny" to Missouri's decision to categorically disqualify a church from receiving a playground resurfacing grant (for which it was otherwise eligible) merely because it was a church. 137 S. Ct. at 2021–22. In *Espinoza*, the Court held the same when a Montana law barred religious schools from a public scholarship program merely because of their religious character. 140 S. Ct. at 2255. And in *Carson* this Court held that Maine penalized the free exercise of religion when it refused to provide otherwise eligible students with private-school tuition assistance solely because of their schools' religious character. 142 S. Ct. at 1997.

Watkinson identifies no circuit opinions, let alone conflicting opinions, that apply this precedent in the prison context. Pet. 14. The fact is that the circuit courts have not yet been confronted with whether do so. This Court should decline to grant certiorari on an issue that has received no direct treatment in the circuit courts.

At any rate, the government benefits cases would not do away with the substantial burden inquiry in the prison context. Rather, both the government benefits cases and prisoner substantial burden cases apply the same underlying principles—albeit in markedly different settings. In prison or not, the First Amendment protects against being put "to a choice between being religious or receiving government benefits." *Espinoza*, 140 S. Ct. at 2257. As this Court explained in *Thomas*, when a State "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because

of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior to violate his beliefs, a burden upon religion exists." 450 U.S. at 717–18. These considerations underly the substantial burden analysis, which likewise asks if a policy "tends to coerce the individual to forego her sincerely held religious beliefs or to engage in conduct that violates those beliefs." *Jones*, 791 F.3d at 1033 (citing, *inter alia*, *Sherbert*, 374 U.S. at 404; *Thomas*, 450 U.S. at 717–18).

In the prison context, the substantial burden inquiry ensures prisons must defend only those policies that truly infringe on an inmate's religious exercise. Being "put to a choice" in prison might arise where the government benefit is a necessity regulated and distributed by the prison. If, for example, a prison provided no religious dietary accommodations, a religious inmate might, at the extreme, be "forced to choose between violating his religious beliefs and starving to death." *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1325 (10th Cir. 2010) (Gorsuch, J., concurring) (analyzing substantial burden under RLUIPA). No doubt that would be a substantial burden. *Ibid.* But an inmate is not put to a choice in all circumstances where a prison refuses to provide religious variances. Watkinson's push to use an institution's prisoner welfare fund to finance his religious purchases is an example. He was put to no choice to abandon his religious exercise merely because the prison maintained a fund to finance charitable, recreational, and educational activities for all inmates (which Watkinson admitted he participated in, e.g., C.A. E.R. 80–81).

3. Stepping beyond the threshold inquiry, there is no support for Watkinson's assertion that "the *Turner* reasonableness test should not even apply at all here." Pet. 14–15. In *O'Lone* this Court clearly endorsed *Turner* as the "proper standard" for reviewing a prisoner's alleged violation of free exercise rights. 482 U.S. at 349. Watkinson invokes this Court's application of strict scrutiny review to racial classifications in prison in *Johnson* v. *California*, 543 U.S. 499, 510 (2005). Pet. 15. Even there, however, this Court distinguished the right to be free from racial discrimination from rights that fall under *Turner*—including "First Amendment challenges." *Johnson*, 543 U.S. at 510 (citing *O'Lone*, 482 U.S. at 348).

Alaska agrees that religious discrimination is "odious to our Constitution." Pet. 15 (quoting *Trinity Lutheran Church of Colombia*, 137 S. Ct. at 2025). But the *Turner* reasonableness test remains the undisputed standard for protecting religious rights in prison while ensuring "that courts afford appropriate deference to prison officials." *O'Lone*, 482 U.S. at 349. As this Court explained, the reasonableness standard strikes the proper balance among several competing factors, among them convicted prisoners' retained free exercise rights, the "necessary withdrawal or limitation of many privileges and rights" attendant to incarceration, and valid penological objectives "including deterrence of crime, rehabilitation of prisoners, and institutional security." *Id.* at 348–49. Indeed, in *O'Lone*, this Court took the "opportunity to reaffirm [its] refusal, even where claims are made under the First Amendment, to 'substitute our judgment on . . .

difficult and sensitive matters of institutional administration,' . . . for the determinations of those charged with the formidable task of running a prison." *Id.* at 353 (quoting *Block* v. *Rutherford*, 468 U.S. 576, 588 (1984)).

This Court should refuse Watkinson's invitation to abandon its prisoner free exercise precedent.

III. The Ninth Circuit correctly affirmed the district court's factual findings and application of RLUIPA.

Watkinson urges this Court, in the alternative, to grant certiorari to review the Ninth Circuit's nonprecedential and unpublished application of RLUIPA to the facts of his case. Pet. 15–18. But a petition for certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. This Court should decline to grant certiorari to review the Ninth Circuit's application of RLUIPA. In any event, the Ninth Circuit's ruling was correct.

RLUIPA gives inmates a statutory free exercise cause of action that is more protective than the First Amendment. See *Van Wyhe* v. *Reisch*, 581 F.3d 639, 651 (8th Cir. 2009). Under RLUIPA, States are prohibited from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution." 42 U.S.C. § 2000cc-1(a). A substantial burden is permitted only if it is the least restrictive means of furthering a compelling governmental interest. *Ibid.*

The Ninth Circuit affirmed the district court's finding that the Department had not substantially burdened Watkinson's religious exercise. Pet. App. A2–A3. Because Watkinson's RLUIPA claim failed at that threshold, the Ninth Circuit did not analyze the district court's alternative finding that the Department's policies were the least restrictive means of furthering compelling governmental interests. See *id.* at A3, A23–A26.

Both lower courts were correct in concluding that Watkinson failed to meet his initial RLUIPA burden of showing that his religious exercise was substantially burdened. See *Holt* v. *Hobbs*, 574 U.S. 352, 361 (2015). The Department had no obligation to use its prisoner welfare fund to subsidize Watkinson's religious purchases. RLUIPA is "[d]irected at obstructions institutional arrangements place on religious observances" and, therefore, "does not require a State to pay for an inmate's devotional accessories." *Cutter*, 544 U.S. at 720 n.8. By its terms, RLUIPA creates no right "of any religious organization to receive funding or other assistance from the government, or of any person to receive government funding for a religious activity." 42 U.S.C. § 2000cc-3(c). Yet that is what Watkinson sought: that the Department subsidize his religious juice and honey by letting him create a virtual account in an institution's prisoner welfare fund and that the Department purchase his religious firewood.

It is of no moment that for a time the Goose Creek Correctional Center exceeded the requirements of RLUIPA when, in contravention of Department pol-

icy, it subsidized Asatru purchases with that institution's prisoner welfare fund. When the subsidies stopped, no doubt Watkinson experienced new "expense, delay, and uncertainty." See Pet. 17. But this was, at most, "a moderate impediment to—and not a constructive prohibition of—his religious exercise." *Abdulhaseeb*, 600 F.3d at 1325 (Gorsuch, J., concurring). And it was not because of any *obstructions* placed by the Department. See *Cutter*, 544 U.S. at 720 n.8. To the contrary, Watkinson was still permitted to hold his blots and to purchase or arrange for donations of wood, juice, and honey. See C.A. E.R. 73, 215. The Department even installed a woodshed at Goose Creek to accept donations. *Id.* at 206. The Department did not substantially burden Watkinson's religious exercise.

The Ninth Circuit correctly stopped its analysis there. With no substantial burden, Watkinson's RLUIPA claim fails. But even if this Court were to rule to the contrary, the Ninth Circuit should be given the first opportunity to review the district court's further conclusion that the Department's policies are the least restrictive means of serving compelling governmental interests. See *Cutter*, 544 U.S. at 718 n.7 (declining to consider arguments not addressed by the circuit court and noting that this Court is "a court of review, not of first review").

Even so, the district court's strict scrutiny analysis was sound. Giving Watkinson religious subsidies from a prisoner welfare fund would have violated policies that taken together, serve compelling govern-

ment interests. See Pet. App. A23–A25. The Department prohibits prisoners from dedicating donations or creating pooled accounts in the prisoner welfare fund. C.A. E.R. 100. It does not buy property for individual faith groups. *Id.* at 224. And prisoner welfare fund expenditures are limited to "charitable, recreational and educational purposes." *Id.* at 188.

As the district court explained, the Department had an interest "in preventing . . . illegal criminal activity (fraud, strong-arming, debt payoff)." Pet. App. A25. "[P]rison security is a compelling state interest, and . . . deference is due to institutional officials' expertise in this area." *Cutter*, 544 U.S. at 725 n.13. Allowing prisoners to pool money in virtual accounts within a prisoner welfare fund raises a "significant" security concern. C.A. E.R. 97; Pet. App. A25. The Department has a compelling interest in refusing to allow that practice. The Department also furthers security by "preventing interreligious strife that may be stoked by showing favoritism to certain groups over others." Pet. App. A25. It takes little imagination to see how using discretionary expenditures from an institution's prisoner welfare fund to support specific religious groups could foster strife, especially since the account is intended to provide opportunities for all inmates and is funded with commissary surcharges. C.A. E.R. 188, 227. The district court's decision did not rest on implausible explanations. See Pet. 18 (citing *Holt*, 574 U.S. at 371 (Sotomayor, J., concurring)). And it does not matter that Goose Creek apparently experienced no security issues during the aberrant period when it violated Department policy by giving the Asa-

tru prisoners special access to the institution's prisoner welfare fund. The Department did not need to wait for a security problem before it could enforce policies intended to prevent one.

The district court also did not err in concluding that the Department had compelling establishment concerns with subsidizing Asatru faith group purchases. Pet. App. A24. Watkinson sued when the Department refused to use the prisoner welfare fund to buy property for Asatru worship and to allow its members the unusual practice of maintaining a virtual account within the fund. C.A. E.R. 140–41 ¶¶ 23, 28; 152–53 ¶¶ 23, 28. The Department had "more than merely a good faith belief," Pet. App. A24, that it was constitutionally required to avoid improperly "favor[ing] one religious group over another." C.A. E.R. 91; see *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 703 (1994) (noting "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion"). And the district court found the Department administrator's testimony credible that it was "not feasibly administratively possible" to give all religious groups a "fair share"—to do so would consume the prisoner welfare fund and "run counter to its goals of providing recreational and educational activities for the benefit of the entire prisoner population." Pet. App. A16.

Watkinson's reliance on *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) is misplaced. See Pet. 17. There, this Court held

that the Establishment Clause did not require a university to deny copying funds for a student journal because of its religious viewpoint. *Rosenberger*, 515 U.S. at 845. But *Rosenberger* does not stand for the proposition that there are no establishment concerns with directly funding a faith group's religious worship. In fact, had the student organization been formed for the purpose of practicing religious devotion (like the Asatru faith group), rather than as a student journal, it would have been eligible for no funding at all. *Id.* at 826, 840. And although it did not confront such a case, this Court noted the "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Id.* at 842; see also *id.* at 841 (noting that the student activity fund at issue could not be used for "the illegitimate purpose of supporting one religion").

Finally, refusing to use the prisoner welfare fund to subsidize Watkinson's religious purchases was the least restrictive means of furthering the Department's interests. The district court correctly explained that the Department did not need to "dream up alternatives" for furthering its interests when Watkinson proposed nothing other than using the prisoner welfare fund in contravention of compelling policies. Pet. App. A26 (quoting *Walker*, 789 F.3d at 1137).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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