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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Richard R. Watkinson respectfully offers the following Reply in support of his Petition for Writ of Certiorari.

ARGUMENT

I. This Petition Is an Adequate Vehicle.

Contrary to the Opposition's claim, this Petition will allow the Court to clarify the standards for addressing claims of religious discrimination in prison and, in the process, to stop the religious discrimination that Mr. Watkinson currently faces.

Because of applicable Circuit precedent, the Ninth Circuit below never subjected Mr. Watkinson's claims of religious discrimination to strict scrutiny, on either statutory or, as he believes should be required, constitutional grounds. *See* [A2-A5]. Given that Mr. Watkinson seeks accommodations that he not only previously received but that are also currently provided to secular activities—all without any documented incident—supposed security concerns cannot allow the Alaska Department of Corrections ("DOC") to prevail. Thus, this Court will squarely confront the question of whether a state prison can, on purported Anti-Establishment Clause fears, prohibit the accommodations that the Anti-Establishment Clause not only permits—but that the Free Exercise Clause requires. *See, e.g.*, *Espinoza v. Mont. Dep't of Revenue*, __ U.S. __, 140 S. Ct. 2246, 2254 (2020) ("We have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs." (collecting cases)). The discrimination here would never be tolerated in the ci-

vilian context. This Court can and should say that it will not be tolerated in a prison context, either.

Insofar as the Opposition claims that Mr. Watkinson would not benefit if the DOC stopped its anti-religious discrimination, the Opposition is wrong. True, the DOC could shut down the entire prisoner welfare fund ("PWF"). *See Espinoza* at __ U.S. __, 140 S. Ct. at 2261 ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."). It has, however, not said definitively that it would adopt that course rather than undertake the more modest step of (re)creating neutral policies and procedures. Even if had done so, ending religious discrimination is an end in and of itself. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, __ U.S. __, 137 S. Ct. 2012, 2022 (2017) ("The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant. Trinity Lutheran is a member of the community too…."). Furthermore, every case involving discrimination in discretionary funding brings with it the possibility that states will shut down funding programs rather than operate them lawfully. That possibility was no more of a basis to deny *certiorari* in *Trinity Lutheran* than it is here.

Another reason exists for this Court to review the Ninth Circuit's judgment. The Opposition says that, as to Respondents Houser and Dial only, the case was mooted when Mr. Watkinson was transferred to another facility. [Opp. at 3 n.1]. As Mr. Watkinson argued in his briefing in the Ninth Circuit below in

response to that claim, the Opposition is wrong. The case remains live as to those individuals because Mr. Watkinson is administratively challenging the reclassification that resulted in his transfer. Furthermore, they would be bound in their official capacities by any injunction that Mr. Watkinson obtains against the DOC and its system-wide policies. Fed. R. Civ. Pro. 65(d)(2)(A)-(B) (providing that, after notice, an injunction binds not only the "parties" but also "the parties' officers, agents, servants, employees, and attorneys"). But the Ninth Circuit should have explicitly engaged with the mootness analysis before entering a judgment in their favor, given that "[m]ootness is a jurisdictional question…." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (citations omitted). That the Ninth Circuit did not engage in the constitutionally required analysis suggest that it did not give proper treatment to *any* of the claims in this case, and *certiorari* would be independently appropriate as "an exercise of this Court's supervisory power." U.S. Sup. Ct. R. 10(a).

II. This Court Should Review the Law Governing Prisoners' Free-Exercise Claims.

As even the Opposition concedes, at least some conflict exists between the binding precedent in the Fifth Circuit and that of other Circuits. While the Opposition seeks to call that Circuit a singular "outlier", [Opp. at 21], Mr. Watkinson respectfully submits that it not. The precedents of the Third and Eighth Circuits that Mr. Watkinson cited in his Petition likewise require no substantial burden. *Williams v. Morton*, 343 F.3d 212, 217 (3d Cir. 2003) ("Officials argue that it is…a prerequisite for the inmate to establish that the challenged prison policy

'substantially burdens' his or her religious beliefs. There is no support for that assertion."); *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 983 (8th Cir. 2004) ("In analyzing this [Free Exercise] claim, we consider first the threshold issue of whether the challenged governmental action infringes upon a sincerely held religious belief and then apply the *Turner* factors to determine if the regulation restricting the religious practice is reasonably related to legitimate penological objectives." (quotations omitted)). While the Opposition tries to minimize the conflict by pointing to later cases from those Circuits, it does not claim that any *en banc* decision has repudiated the earlier precedents. Accordingly, they still stand. *See, e.g.*, *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("We definitively rule today, in accordance with the almost universal practice in other federal circuits, that when faced with conflicting panel opinions, the earliest opinion must be followed as it should have controlled the subsequent panels that created the conflict." (citations and quotations omitted)); 3rd Cir. Internal Operating Procedure 9.1 ("[N]o subsequent panel overrules the holding in a precedential opinion of a previous panel.").

Even if the majority rule in the Circuits were correct such that a substantial burden ought to be required, this Court should say definitively that Mr. Watkinson showed one. The district court specifically found that after the DOC withdrew the previously provided accommodations, "there were times when [Mr. Watkinson] was not able to obtain the items [needed for his religious practice] because the Asatru faith group did not have the 'financial accommodations' to be able to buy enough, or the families of

members were unable to donate items or funds in time for the ceremony." [A14-A15 ¶9].

The Opposition is wrong, however, to suggest that current caselaw in the civilian context requires a substantial burden before the Constitution can provide relief from religious discrimination. *See* [Opp. at 22-23]. In *Trinity Lutheran*, __ U.S. __, 137 S. Ct. 2012, this Court held unconstitutional on Free Exercise grounds a church's exclusion from a grant program for playground resurfacing. Even though "[t]he consequence [of the exclusion on religious grounds was], in all likelihood, a few extra scraped knees," this Court determined that "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand." *Id.* __ U.S. at ___, 137 S. Ct. at 2024-25. No showing of a "substantial" burden was required.

Insofar as the Opposition claims that prisons should be allowed a "reasonable" amount of room to discriminate against religion in ways that civil government cannot, *see* [Opp. at 26], Mr. Watkinson respectfully disagrees. After all, there is no penological harm in removing state obstacles to prisoners as they practice their religion—so that they might obtain pardon for the (often terrible) things that resulted in their incarceration and so that they might obtain spiritual tools to avoid those things again, whether inside a prison or back in civilian life. Religious discrimination is not an incident of incarceration that this Court should be prepared to tolerate.

III. The Statutory Claim Also Merits Review.

The Opposition makes the strange claim that Mr. Watkinson's lawsuit is somehow designed to impose an "obligation" on the DOC to subsidize his religion. [Opp. at 28]. Far from it. As the Opposition itself notes, Mr. Watkinson seeks only the right "to *compete* for prisoner welfare funds to purchase firewood and food/beverage products for his religious worship *to pool [donated] money* in the prisoner welfare fund subject to the Superintendent's ability to deny particular requests for religiously neutral reasons." [Opp. at 16 (quotation omitted) (emphasis added)]. In other words, Mr. Watkinson seeks merely to remove the regulatory barriers that discriminate against religion. Indeed, with respect to the juice and honey, he is not even asking the DOC to ever itself fund those items at all. Rather, he and the other practitioners of his faith want to be able to use *their own money* to buy those items, in a pooled account—as they were previously permitted to do without problem.

Mr. Watkinson has presented the statutory claim to the Court to provide a non-constitutional basis to end the discrimination that Mr. Watkinson faces. The Opposition does not dispute that this Court generally prefers to resolve cases on statutory grounds when possible. That makes the statutory claim a good companion to the constitutional one.

CONCLUSION

For the forgoing reasons, this Court should grant this Petition and reverse the judgment below.

Dated: November 14, 2022

Respectfully submitted,

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