No. 22-594

IN THE
Supreme Court of the United States

HJALMAR RODRIGUEZ, JR., *Petitioner*,

v.

EDWARD H. BURNSIDE, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE MUSLIM ADVOCATES & MUSLIM JUSTICE LEAGUE IN SUPPORT OF PETITIONER

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February 15, 2023

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INTERESTS OF *AMICI CURIAE* [1]

Amicus curiae Muslim Advocates is a nonprofit organization that works on the frontlines of civil rights to advocate for freedom and justice for Americans of all faiths. The issues at stake in this case directly relate to Muslim Advocates' work to support prisoners by promoting in carceral settings the availability of religious freedom, including opportunities to perform or abstain from acts mandated or prohibited by one's faith. Muslim Advocates' litigation on behalf of incarcerated people, both within the Eleventh Circuit and in other circuits, relies on the framework set out in *Turner v. Safley*, 482 U.S. 78 (1987), at issue in this petition.

Amicus Muslim Justice League is committed to supporting the fair treatment of people afflicted by the criminal legal system in the United States. Muslim Justice League's mission is to organize and advocate for communities whose rights are threatened under the national security state in the United States. Led by Muslims, their organizing brings justice for all communities deemed "suspect."

Amici write to highlight how the Eleventh Circuit's interpretation of *Turner* in this case will close

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[1] All parties received notice of *amici's* intention to file this brief at least 10 days prior to the deadline to file the brief. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

the courthouse doors to many incarcerated religious practitioners' valid claims arising from denials of basic religious accommodations. Such claims cannot succeed under the Eleventh Circuit's conflicting requirements of identifying a prison-wide policy change that would create a *de minimis* cost to the facility.

SUMMARY OF ARGUMENT

Petitioner Hjalmar Rodriguez Jr. lived under horrific conditions in the Georgia Diagnostic and Classification Prison's Special Management Unit ("SMU"). An expert who toured the facility in 2018 to prepare a report in separate litigation described it as "one of the harshest and most draconian facilities [he had] seen in operation anywhere in the country."[2] Prisoners in the SMU experience "nearly around-the-clock periods of in-cell confinement" and a "near-total deprivation of any social contact or positive environmental stimulation from any source outside the cell" resulting in "extremely harsh day-to-day living conditions."[3]

Federal courts must ensure that such facilities respect the rights guaranteed to prisoners by the Federal Constitution irrespective of their confinement. Among those guarantees is the free exercise of religion protected by the First Amendment.

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[2] Expert Report and Declaration of Professor Craig Haney, Ph.D., J.D. at ¶ 19, *Gumm v. Sellers*, No. 15-0041 (D. Ga. Feb. 12, 2015), ECF No. 159-1.
[3] *Id.* at ¶ 36.

In conditions like those at the SMU, faith practices are not luxuries, but tools of survival that states may not prohibit without running afoul of the Constitution.

Yet that is what happened in this case. Mr. Rodriguez was categorically prevented from performing pre-prayer bathing (*ghusl*) and from protecting his religiously required modesty.[4] One relevant central tenet of Islam is the obligation for adult Muslims to perform daily prayers (*salah*). Before prayer one must be physically clean—including, for many Muslims, the daily need to bathe in running water (*ghusl*)—and protective of one's modesty. Prayer performed with an unclean body does not satisfy the obligation to perform *salah*. Despite Mr. Rodriguez's requests for daily pre-prayer bathing and modesty, he was transported to the unit showers only three times per week and not permitted to cover himself during transport. Pet'r's Br. at 8.

Mr. Rodriguez proposed an easy and available solution: move him into an empty cell with an in-unit shower, where he could bathe and maintain his modesty as demanded by his faith, eliminating both burdens on his religious practice in a single move—*and*

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[4] Mr. Rodriguez believes that he must perform *ghusl* every twenty-four hours. Rodriguez Dep. 58, ECF 175-3. He performs *ghusl* every day by washing the right side of his body twice and the left side of his body twice and repeating this process three times. *Id.* at 59. He believes that, if *ghusl* is not performed, his daily prayers are not accepted. *Id.* Furthermore, Mr. Rodriguez believes he must "guard [his] bod[y]" by ensuring he is covered "from mid-stomach or the naval to the bottom of the knees." *Id.* at 64-65.

at no cost to the facility. *Id.* at 9. The prison refused. *Id.* In a ruling faithless to *Turner*, the Eleventh Circuit created a categorical rule narrowing the inquiry under *Turner v. Safley*, 482 U.S. 78, 90 (1987), to consider only "an obvious alternative policy that could replace the current one on a prison-wide scale." *Rodriguez v. Burnside*, 38 F.4th 1324, 1333 (11th Cir. 2022).

The Eleventh Circuit's interpretation of *Turner* will reverberate far beyond the facts at bar. The decision to curtail *Turner* will gut the possibility of relief for heretofore meritorious claims of incarcerated people seeking to maintain their right to practice their faith protected by the First Amendment. Furthermore, the requirement that alternative policies apply on a prison-wide scale will render the claims of minority religious adherents particularly difficult because it will often be simply impossible to construct a rule applicable to everyone that accommodates a practice in which, by definition, most people in the facility do not partake.

Imagine an imprisoned man who sincerely believes in the importance of fasting during daylight hours during the Muslim holy month of Ramadan. He proposes an accommodation from the prison policy of serving meals during daylight hours that would allow him to eat before astronomical twilight and to break his fast after sunset but would make no changes to the timing of others' meals. Under the Eleventh Circuit's rule, he could not challenge a denial of his request for the absurd reason that his proposed policy did not apply to *everyone*, i.e., did not require all imprisoned

persons to take meals before astronomical twilight and after sunset. This is an illogical reading of *Turner* that guts First Amendment protections for incarcerated people of faith, especially minority religious practitioners. This Court should grant the petition and undo this perversion of *Turner*.

ARGUMENT

I. The Court's Oversight of First Amendment Protections for the Most Vulnerable Is Indispensable to Respect for Religious Exercise.

A. The Free Exercise Clause Gives Practical Meaning to the Protections of the First Amendment.

The freedom to practice one's religion is central to the laws of the United States. "[T]he promise of the free exercise of religion [is] enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754 (2020). The freedom is among "the cherished rights of mind and spirit" protected by the Constitution. *Malloy v. Hogan*, 378 U.S. 1, 5 (1964). As Justice Murphy noted, "nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions." *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (Murphy, J., concurring). By including protection for the free exercise of religion in the First Amendment to the Constitution, "the people of this nation have ordained

in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

B. Protections for Religious Minorities Are Essential to a Strong Free Exercise Clause

"The free exercise clause . . . was especially concerned with the plight of minority religions." *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring) (quoting Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1159 (1991)). Indeed, "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-33 (1993) (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986)). Minority religious practice—often unfamiliar to society at large or unpopular—is where the Free Exercise Clause is most vulnerable and therefore where its robust defense is most essential. "Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

This Court has a long history of supervising lower courts' oversight of the scope of the Free Exercise Clause. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142

S. Ct. 2407 (2022); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719 (2018); *Employment Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (abrogated in part by statute); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Braunfield v. Brown*, 366 U.S. 599 (1961); *Reynolds v. United States*, 98 U.S. 145 (1878). The Court has routinely rejected efforts to improperly constrain minority religious practice, even practices considered controversial. *See, e.g.*, *Murphy v. Collier*, 139 S. Ct. 1475 (2019) (Buddhist); *Holt v. Hobbs*, 574 U.S. 352 (2015) (Muslim); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (Christian sect that receives communion by drinking hallucinogen); *City of Hialeah*, 508 U.S. (Santeria); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish); *Cooper v. Pate*, 378 U.S. 546 (1964) (Muslim); *Sherbert v. Verner*, 374 U.S. 398 (1963) (abrogation recognized by *Holt*, 574 U.S. 352) (Seventh Day Adventist); *Cantwell*, 310 U.S. 296 (1940) (Jehovah's Witness).

C. State Prisons Are Where the Court's Intervention to Protect Free Exercise Has Been Most Needed

The Court has rightly referred to prisons as among those state-run institutions "in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005). Indeed, religious minorities in prison suffer from the type of discrimination the First Amendment was designed to prevent, at the hands of the very state

actors tasked with protecting their rights. "[P]risoners do not shed all constitutional rights at the prison gate," *Sandin v. Conner*, 515 U.S. 472, 485 (1995), and "clearly retain" the protection of the Free Exercise Clause, "including its directive that no law shall prohibit the free exercise of religion." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (citations omitted).

1. Muslim Religious Practice Is Uniquely Vulnerable in Prison Settings.

Muslims are overrepresented in prisons[5] and experience disproportionate rates of discrimination by

[5] Muslims are overrepresented in prisons for reasons that include governmental policies and practices that target Muslims for surveillance, entrapment, and sentencing enhancements. *See* Sarah Beth Kaufman, *The Criminalization of Muslims in the United States, 2016*, 42 QUALITATIVE SOCIO. 521, 525 (2019); KUMAR RAO & CAREY SHENKMAN, EQUAL TREATMENT? MEASURING THE LEGAL AND MEDIA RESPONSES TO IDEOLOGICALLY MOTIVATED VIOLENCE IN THE UNITED STATES (2018), available at https://www.imv-report.org/ (prosecutors impose more serious charges and seek sentencing enhancements); Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609 (2015) (majority of post-9/11 terrorism prosecutions, contained indicia of entrapment or outrageous governmental conduct); FAIZA PATEL & MEGHAN KOUSHIK, COUNTERING VIOLENT EXTREMISM (2017), available at https://www.brennancenter.org/our-work/research-reports/countering-violent-extremism (federally funded surveillance conflating Muslim identity with criminality); AMITH GUPTA, SPYING ON THE MARGINS: THE HISTORY, LAW, AND PRACTICE OF U.S. SURVEILLANCE AGAINST MUSLIM, BLACK, AND IMMIGRANT COMMUNITIES AND CONTEMPORARY STRATEGIES OF

prison officials.[6] As one scholar notes, "[the] combination of animus against Islam and Blackness [. . . motivates] officials who act with impunity and intentionally disobey the law [to] make life in prison far more painful than a mere prison sentence."[7] In the words of another scholar, "[w]hile other minority religious prisoners face considerable discrimination, the situation facing Muslim prisoners is both larger and more complex. This is due to their substantial percentage of the prison population, concerns about Islamic radicalization in prison, and particular animosities held towards members of the Muslim faith."[8] Indeed, "since prison officials perceive 'the close unity of Muslims' under their authority as a threat thereto, 'officials in most prisons, at one time or another, have banned the practice of Islam or imposed

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RESISTANCE (2021), available at https://projectsouth.org/wp-content/uploads/2021/04/FINAL-Project-South_Spying-on-the-Margins_04.26.2021.pdf (documenting the long history of U.S. government targeting of Muslim and Black communities); *Hassan v. City of New York*, 803 F.3d 277 (3d Cir. 2016) (challenging the New York Police Department's "intrusive investigation and pervasive surveillance" of Muslims on account of their faith).

[6] *See* U.S. COMM'N ON CIVIL RTS., ENFORCING RELIGIOUS FREEDOM IN PRISON 26 (2008).

[7] SpearIt, *Muslims in American Prisons: Advancing the Rule of Law Through Litigation Praxis*, 3 J. ISLAMIC L. 29, 36 (2022) [hereafter *Muslims in American Prisons*].

[8] Kenneth L. Marcus, *Jailhouse Islamophobia: Anti-Muslim Discrimination in American Prisons*, 1 RACE & SOC. PROBLEMS 36, 37 (2009).

tight restrictions on Muslims but not on other religious denominations.'"[9]

Although it has been clear since *Cooper* in 1964 that prison officials must respect the religious rights of their wards, Muslims have needed repeated judicial intervention to ensure their right to practice elemental requirements of the Islamic faith, including the ability to pray,[10] to receive adequate nutrition,[11] to observe Ramadan,[12] and to access religious literature.[13] The Court's intervention is needed to correct the Eleventh Circuit's revisionist

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[9] *Muslims in American Prisons*, *supra* note 7, at 45 (quoting William Bennett Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 484 (1971)).

[10] *See Sabir v. Williams*, 52 F.4th 51 (2d Cir. 2022) (policy restricting prayer in groups of two); *Soriano v. Spearman*, No. 2:17-CV-1617, 2018 WL 4292270, at *1 (E.D. Cal. Sept. 7, 2018) (prohibiting prayer inside chapel); *Wright v. Stallone*, No. 9:17-CV-0487, 2018 WL 671256, at *5 (N.D.N.Y. Jan. 31, 2018) (prohibiting prayer in the prison yard); *Knott v. McLaughlin*, No. 5:17-CV-36, 2017 WL 6820151, at *1 (M.D. Ga. Nov. 1, 2017), *report and recommendation adopted*, No. 5:17-CV-36, 2018 WL 327288 (M.D. Ga. Jan. 8, 2018) (prohibiting prayer in dorms); *McEachin v. McGuinnis*, 357 F.3d 197 (2d Cir. 2004) (guard punished plaintiff after intentionally issuing an order during prayer, knowing that plaintiff believed he may not respond until completing prayer).

[11] *See McEachin*, 357 F.3d. 197; *Watford v. Harner*, No. 18-CV-1313, 2018 WL 3427805, at *2 (S.D. Ill. July 16, 2018) (denial of Eid feast, *halal* meals, and Ramadan meals).

[12] *See Henderson v. Muniz*, 196 F. Supp. 3d 1092 (N.D. Cal. 2016) (denying hot meals during Ramadan).

[13] *See Roddy v. Banks*, 124 Fed. Appx. 469 (8th Cir. 2005) (denying religious books).

interpretation of *Turner* that would make accommodations for religious practice nearly impossible to obtain.

2. The Human Cost of Restrictions on Religious Practice is Extreme.

Denying accommodations for religious practice in prison harms incarcerated people of faith. Religious practice in prison has been found to "promot[e] survival" during incarceration[14] and to "support [] rehabilitation through healthier self-conceptions."[15] Studies on the role of religion in prisoner rehabilitation demonstrate "that religious involvement is associated with successful rehabilitation and that involvement with Islam is particularly successful."[16] The rehabilitative power of Islam is often attributed to its norms of collective worship, egalitarianism, and mutual support, all of which have particular resonance in prison. "The bonding power of communal worship offers a new circle of community, one connected by a scriptural emphasis on egalitarianism and belief in God and

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[14] Todd R. Clear et al., *The Value of Religion in Prison: An Inmate Perspective*, 16 CONTEMP. CRIM. J. 53, 73 (2003).

[15] SPEARIT, FACTS AND FICTIONS ABOUT ISLAM IN PRISON: ASSESSING PRISONER RADICALIZATION IN POST-9/11 AMERICA 16 (2013), *available at https://www.ispu.org/wp-content/uploads/2012/12/ISPU_Report_Prison.pdf.* [hereinafter FACTS AND FICTIONS]

[16] SpearIt, *9/11 Impacts on Muslims in Prisons*, 27 MICH. J. RACE & L. 233, 242 (2021) (summarizing studies).

righteous conduct, as opposed to skin color or political creed."[17]

Indeed, many imprisoned people speak of the value of Islam in managing the isolation, deprivation, loss of freedom, threat of violence, and criminalizing influences that are central features of life in prison.[18] Put simply, practicing Islam helps many Muslims survive their incarceration.

In the absence of robust and tailored religious accommodations that facilitate religious practice (including Islam) inside prisons, already severe conditions of confinement are made arbitrarily punitive, which is out of step with this Court's free exercise jurisprudence.

D. The Court's Recognition of Constitutional Claims Raised by Practitioners of Minority Faiths Have Furthered the Religious Liberty of All Incarcerated People.

Cases brought by imprisoned practitioners of minority faiths often provide the vehicle through which the Court ensures that the Constitution and other federal laws protect religious exercise in prisons. The landmark case bringing state prisons under the

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[17] FACTS AND FICTIONS, *supra* note 15.

[18] *Id.* at 18; *see generally* Clear, *The Value of Religion in Prisons*, *supra* note 14 (reflecting inmate interviews on how Islamic and Christian practices help people cope with losses of freedom, improve physical safety, admit guilt while building self-esteem, create inner freedom, and build community).

review of federal courts, *Cooper v. Pate*, 378 U.S. 546 (1964), was started by a Muslim man challenging the prison's denial of religious services and imposition of solitary confinement because he identified as Muslim. Likewise, this Court's affirmation of federal courts' responsibility to protect the rights of imprisoned people in *Cruz v. Beto*, 405 U.S. 319 (1972), began with a Buddhist man's federal court complaint seeking access to a spiritual advisor and the freedom to proselytize without being punished with solitary confinement. Since these early cases, this Court has consistently ensured that religious liberty has real, practical meaning in prisons. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015) (allowing a Muslim inmate to grow a half inch beard); *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005) (upholding Religious Land Use and Institutionalized Persons Act, in a challenge brought by Wiccans and other practitioners of "non-mainstream" religions).

Despite the line of cases from the Court upholding religious liberty in prison, prisons too often frustrate the freedom of adherents to minority religions to practice their faith. As one study concluded, "[d]epartments of correction have made it increasingly difficult for many inmates to practice their religious beliefs" with "Muslims and those practicing nontraditional faiths" finding it even 'more difficult' than Christians and Jews."[19]

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[19] Jeffery Ian Ross, *Resisting the Carceral State: Prisoner Resistance from the Bottom Up*, 36 SOC. JUSTICE 28, 32 (2009-10).

That questions about the proper application of the *Turner* factors arise in a case brought by a Muslim individual seeking to vindicate his free exercise rights is unsurprising. Scholars have noted that Islam's foci on justice and care for the vulnerable leads many Muslim prisoners to seek judicial intervention to ameliorate wrongs and to create spaces for religious practice.[20] Indeed, "Muslims . . . 'have largely been responsible for establishing prisoners' constitutional rights to worship.'"[21] "[Muslim] litigation has been described as a 'correctional law revolution, and the beginning of an evolving concern of the courts in correctional matters.'"[22]

The Eleventh Circuit's radical departure from the universal—and only possible—understanding of *Turner* dramatically weakens these tools for all incarcerated religious practitioners and must be corrected.

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[20] *See Muslims in American Prisons*, *supra* note 7, at 42. *See also* U.S. COMM'N ON CIVIL RTS., ENFORCING RELIGIOUS FREEDOM IN PRISON 26 (2008).

[21] *Muslims in American Prisons*, *supra* note 7, at 34.

[22] *Id.* at 31 (quoting Claire A. Cripe, *Proceedings of the 106th Annual Congress of Correction, Denver, August 22-26, 1976*, 25 (1977)).

II. The Eleventh Circuit's Interpretation of *Turner* Would Render Free Exercise Challenges Virtually Impossible, Especially for Religious Minorities.

A. Turner *Sets a Constitutional Floor Important to Free Exercise in Prisons.*

Turner established that the Constitution demands burdens on an incarcerated person's constitutional rights be "reasonably related to legitimate penological interests." 482 U.S. at 89. The Court laid out four factors to be considered when assessing a regulation's reasonableness, of which the fourth—the existence of "obvious, easy alternatives"—is particularly relevant here. *Id.* at 90. "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

The contours of the constitutional protection for religious exercise have, for almost four decades, been defined by application of the *Turner* factors. The Eleventh Circuit erred here in closing the courthouse doors to individual litigants who propose tailored alternatives with *de minimis* impact on prison administration rather than prison-wide alternative policies. As Mr. Rodriguez notes, this "deprives plaintiffs of the opportunity to propose tailored solutions that would minimize ripple effects and costs to prison administrators, and that would accordingly

have a reasonable chance of success under *Turner*." Pet'r's. Br. at 16.

B. Turner *Fills an Important Gap in the Statutory Protections for Religious Exercise in Prisons.*

The analysis of First Amendment claims under *Turner* does not exist in a vacuum. Indeed, such claims are usually paired with claims brought under the more protective Religious Land Use and Institutionalized Persons Act ("RLUIPA") 42 U.S.C. § 2000cc-1(a). The practical reason these claims are paired is that RLUIPA, while mandating strict scrutiny analysis, has been interpreted as allowing only injunctive relief. *See, e.g.*, *Washington v. Gonyea*, 731 F.3d 143 (2d Cir. 2013); *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009), *abrogated on other grounds by Bey v. Haines*, 802 Fed. Appx. 194 (7th Cir. 2020); *Rendelman v. Rouse*, 569 F.3d 182 (4th Cir. 2009); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316 (5th Cir. 2009), *aff'd on other grounds*, 563 U.S. 277 (2011); *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), *abrogated on other grounds by Sossamon*, 563 U.S. 277 (2011). First Amendment claims brought via 42 U.S.C. § 1983 are thus the only path to compensation (and its deterrent effect) for a free exercise violation.

Perhaps more consequential, First Amendment claims for damages cannot be mooted by the transfer of an imprisoned litigant, as RLUIPA claims can be. Thus, a genuine possibility of relief under *Turner* lessens the incentive for prison officials sued by their

wards to use involuntary transfers to moot cases because doing so cannot dispose of the entire case.[23]

C. The Eleventh Circuit's Interpretation of Turner *Will Make Free Exercise Challenges Nearly Impossible, Especially for Religious Minorities.*

The conflicting requirements that proposed alternative regulations must both apply prison-wide and create a *de minimis* cost to the facility would render *Turner* claims particularly difficult—if not impossible—for religious minorities. Regulations that burden minority religious practice often have no impact on the majority faith. Such regulations *by definition* only burden the free exercise of religious minorities. Acknowledgment of that fact will be fatal to any claim they could bring under the Eleventh Circuit's interpretation of *Turner*, whereby prison officials can ignore wholesale an obvious, available, and costless way to permit an individual to practice their minority faith—even if they are the only one of that faith—unless and until they can "present an obvious alternative policy that could replace the current one on a prison-wide scale" without costing the

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[23] It must be noted that the decision to involuntarily transfer an incarcerated person can be cruelly disruptive. *See Muslims in American Prisons*, *supra* note 7, at 41-42; *see also* Formerly Incarcerated, Convicted People, and Families Movement, Human Contact, *available at* https://ficpfm.org/demands/ ("Maintaining connections and contact with our families is crucial to surviving prison, and to rejoining our communities as whole people. We place great value on the ability to visit as a means of maintaining our families, friendships, and a genuine relationship with our community.").

prison anything and without burdening others' religious practice. *Rodriguez*, 38 F.4th at 1333.

In the context of a regulation that does not burden majority faith practices but does burden those of minority religions—that is, virtually every relevant regulation—individualized accommodations have to be an option available to balance free exercise rights with the facility's penological interests. Prison-wide alternative policies will inevitably either create new burdens on other religions, generate more than a *de minimis* cost for the facility, or both. Facilities would thus have a get-out-of-court-free card when they burden minority religious practices.

The absurdity of this result is perhaps why courts have not applied *Turner* in this way. For example, in *Forde v. Zickefoose*, 612 F. Supp. 2d 171 (D. Conn. 2009), a Muslim woman was subjected to cross-gender pat-down searches and photographed without her hijab, substantially burdening her sincerely held religious beliefs. *Id.* at 180. The court found both policies—cross-gender pat-downs and maintaining photos without head coverings—to be rationally related to legitimate government interests, satisfying *Turner's* first factor. *Id.* at 181. Nevertheless, it found both policies created a triable issue of fact that the policies were irrational as applied to plaintiff because an "easy, obvious alternative" with little to no cost existed: exempting the plaintiff. *Id.* Had it instead applied the Eleventh Circuit interpretation of *Turner*, the court would have stopped after its analysis of the first factor because the plaintiff did not propose *all* cross-gender searches be banned, or *all* prisoners be

permitted to wear head coverings in photos. Given the legitimacy of the policy in general, the only *de minimis* accommodation was an exemption for the individual whose religious liberty was burdened. The Eleventh Circuit's rule would have precluded the only path to relief, rendering *Turner* meaningless in cases like these.

While religious minorities will be most predictably in this predicament, Christian prisoners will also have a difficult time bringing *Turner* claims under the Eleventh Circuit's rule. A recent case in Indiana, *Wells v. Hendrix*, No. 1:20-CV-01065, 2022 WL 19415 (S.D. Ind. Jan. 3, 2022), involved a Christian prisoner whose Bible was withheld upon transfer to another facility. The reason for this delay was a decision by prison officials to allocate staff away from property processing in the face of a staff shortage. *Id.* at *8. Noting that this delay did, of course, burden the plaintiff's religious exercise, the court applied the *Turner* factors, finding that the staffing decision was rationally connected to a legitimate interest. *Id.* When it analyzed the staffing decision under the third and fourth factors, the court considered a simple alternative: "If digging through Mr. Wells' property to find his Bible was too much trouble given the staff shortage, prison administrators could have provided him a Bible." *Id.* at *9. Given this "easy, obvious alternative," the court found that a reasonable juror could find the staffing decision violated the First Amendment *as applied* to the plaintiff. This could not have resulted under the Eleventh Circuit's rule which would have compelled the court to reject this

alternative because it does not displace the staffing policy altogether.

The cases above illustrate the illogic of the Eleventh Circuit's interpretation of *Turner*. Other circuits to have considered the question have applied *Turner* to requests for individual accommodations from policies rationally related to legitimate penological interests in the general sense. *See Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006); *Flagner v. Wilkinson*, 241 F.3d 475 (6th Cir. 2001); *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 2000) (en banc); *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1993). The Eleventh Circuit's outlier interpretation errs to the detriment of incarcerated people in the circuit.

The Eleventh Circuit's categorical requirement of a facial challenge is incorrect simply as a matter of caselaw. The Sixth Circuit explained it best in *Flagner*, 241 F.3d at 483 n.5: "[T]he proposition that under *Turner*, courts are not to subject challenged prison regulations to 'a four-factor analysis tailored to the plaintiff's individual circumstances' ignores controlling Supreme Court precedent." *Id.* (citations omitted). The Sixth Circuit panel went on to explain that in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), this Court found a prison policy facially valid under *Turner* but remanded the case for analysis of whether it violated the First Amendment on an as-applied basis. *Flagner*, 241 F.3d at 483 n.5. The fact that *Turner* contemplates as-applied challenges to facially valid prison regulations is as clear in 2023 as it was to this Court in 1989 when it decided *Thornburgh*.

These examples illustrate the absurdity of the Eleventh Circuit's interpretation of *Turner* and why it has not been employed by any court, including this one. There must be space for as-applied determinations in appropriate circumstances. The Eleventh Circuit's rule improperly transforms a possible result—that a proposed accommodation to alleviate a burden is too costly—into an inevitability. In so doing, it closes the courthouse doors to the people most reliant on their opening.

CONCLUSION

For the reasons set forth above, amici request that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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February 15, 2023