

APPENDIX

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APPENDIX A

[PUBLISH]

[Dated: June 23, 2023]

**In the
United States Court of Appeals
for the Eleventh Circuit**

No. 21-11982

RALPH HARRISON BENNING,

Plaintiff-Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF
CORRECTIONS MARGARET PATTERSON, Georgia
Department of Corrections, JENNIFER EDGAR,
Georgia Department of Corrections,

Defendants-Appellees,

GEORGIA DEPARTMENT OF CORRECTIONS INMATE
EMAIL CENSOR,

Defendant.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:18-cv-00087-TES-CHW

Before JORDAN and ROSENBAUM, Circuit Judges, and SCHLESINGER¹, District Judge.

JORDAN, Circuit Judge:

An email, as the term itself implies, is a message, note, or letter sent by electronic means over a computer system. *See, e.g.*, The American Heritage Dictionary of the English Language 582 (4th ed. 2009). The questions presented in this appeal largely revolve around how emails generated by inmates in the custody of the Georgia Department of Corrections are to be treated for purposes of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

I

An inmate in a Georgia Department of Corrections facility is “allowed to send emails through JPay kiosks . . . or through Georgia Offender Alternative Learning (‘GOAL’) devices which are provided to [inmates].” D.E. 64-4, Exh. B at 3. JPay Kiosks and GOAL devices are electronic devices used for, among other things, “sending and receiving email messages.” D.E. 64-4, Attachment B-1 at 10. Each email costs 37 cents to send, with the GDC receiving 15% of the fees. *See* D.E. 64-3, Exh. A at 38.

One of the GDC’s Standard Operating Procedures, SOP 204.10, governs the use of JPay Kiosks and GOAL devices. SOP 204.10, which became effective on August 15, 2017, “explains the rules and sanctions that can be imposed if a [GOAL]

¹ The Honorable Harvey Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

device or [JPay] Kiosk is misused.” D.E. 64-4, Attachment B-1 at 10. It sets out, among other things, 16 policies governing video visitations and emails. Two of those policies are relevant here: (1) “[o]ffenders shall not request emails to be forwarded, sent, or mailed to others;” and (2) “[c]ustomers and offenders shall not request or send information on behalf of or about another offender.” *Id.* at 14–15.

Under SOP 204.10, “[a]ll communications sent or received via the GOAL device or the [JPay] Kiosk are subject to inspection and review for security reasons, and neither the sender, nor receiver, has an expectation of privacy in any of these communications.” *Id.* at 13. Any communications that violate SOP 204.10 “will be intercepted without explanation and no refund will be provided to the sender.” *Id.* at 15. The screening and review of inmate emails is conducted by analysts at the GDC’s Central Intelligence Unit through an intranet system. *See* D.E. 64-4, Exh. B at ¶¶ 16–19.

A

Ralph Harrison Benning is serving a life sentence in Georgia and is in the custody of the GDC. As an inmate, his communications with those on the outside are governed by GDC policies and regulations.

In September and October of 2017, Mr. Benning attempted to send three emails to his sister, Elizabeth Knott—one on September 24, 2017, and two on October 9, 2017. Those emails were intercepted by the GDC and never delivered to Ms. Knott due to violations of SOP 204.10. All three emails were about gang problems and fraud and corruption in the GDC.

Margaret Patterson, a GDC analyst, intercepted the September 24 email because Mr. Benning had asked Ms. Knott to forward it to third parties. *See* D.E. 64-6, Exh. D at ¶¶ 11–13. Jennifer Edgar, another GDC analyst, intercepted the October 9 emails for the same reason. *See* D.E. 64-5, Exh. C at ¶¶ 10–12. Neither Ms. Patterson nor Ms. Edgar notified Mr. Benning that his emails had been intercepted and withheld. Nor did they give him an opportunity to appeal their decisions to a different GDC official. *See, e.g.*, D.E. 80-5 at ¶ 14.

Another email Mr. Benning tried to send, this time to the Aleph Institute on February 6, 2018, was similarly intercepted and never sent. *See* D.E. 64-4, Exh. B at ¶ 27. In this email, Mr. Benning discussed receiving a declaration and a “Kosher Authorities Template,” and expressed gratitude. *See* D.E. 64-4, Attachment B-3 at 21. But he also asked that another inmate’s address be “corrected to show he is now at Wilcox State Prison.” *Id.* GDC analyst Romita Keen intercepted this email because it “contained information about another inmate.” D.E. 64-4, Exh. B at ¶ 27. Ms. Keen did not inform Mr. Benning that the email had been intercepted, and did not give him the opportunity to appeal her decision to a different GDC official.

Mr. Benning mailed Ms. Knott handwritten copies of the emails he had tried to send her in September and October of 2017. *See* D.E. 64-3, Exh. A at 74–75. To Mr. Benning’s knowledge, his sister received those letters. *See id.* at 76. Mr. Benning did not send a handwritten version of his February 2018 email to the Aleph Institute. *See* D.E. 80-5 at 4.

B

In 2018, Mr. Benning filed a pro se civil rights suit pursuant to 42 U.S.C. § 1983. His complaint named the GDC Commissioner (then Gregory Dozier, now Timothy Ward) and Ms. Patterson and Ms. Edgar—the GDC analysts who had intercepted his emails in September and October of 2017—as defendants. It did not name Ms. Keen—the GDC analyst who intercepted the email to the Aleph Institute in February of 2018—as a defendant.

Mr. Benning alleged that the GDC, Ms. Patterson, and Ms. Edgar unconstitutionally censored certain emails he tried to send, and failed to provide him notice, thereby violating his rights under the First Amendment and the Due Process Clause of the Fourteenth Amendment. He requested specific declaratory and injunctive relief, as well as compensatory, nominal, and punitive damages.

The defendants filed a motion for summary judgment. They argued in part that Mr. Benning did not have a constitutional right to communicate through email and that, even if he did, the interception and withholding of his emails was constitutional. Ms. Patterson and Ms. Edgar also asserted that they were entitled to qualified immunity from Mr. Benning's claims for damages.

The district court granted summary judgment in favor of the defendants. Mr. Benning appealed, and counsel thereafter appeared on his behalf.

II

We review questions of constitutional law *de novo*. See *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1239 (11th Cir.

2018). The same plenary standard governs our review of the district court's grant of summary judgment. *See Marbury v. Warden*, 936 F.3d 1227, 1232 (11th Cir. 2019). Summary judgment is warranted "when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and compels judgment as a matter of law in favor of the moving party." *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1307 (11th Cir. 2013) (citation omitted).

We first address Mr. Benning's Fourteenth Amendment due process claims, and then turn to the First Amendment claims.

III

As noted, in September and October of 2017 Ms. Patterson and Ms. Edgar censored (i.e., intercepted) three emails which Mr. Benning sought to send to his sister. They did so because the emails violated SOP 204.10's prohibition against requesting forwarding to third parties. Mr. Benning alleged that Ms. Edgar and Ms. Patterson did not provide him with any notice that his emails had been intercepted and were not going to be sent, and did not provide him with an opportunity to appeal their decisions to a different GDC official. He alleged that these failures violated his Fourteenth Amendment due process rights.²

² Mr. Benning also alleged that a fourth email, the one he sent in February of 2018 to the Aleph Institute, was intercepted and withheld because it violated SOP 204.10's prohibition against discussing another inmate's information. The summary judgment record indicates (and Mr. Benning does not dispute) that this email was withheld by Ms. Keen, another GDC

The district court entered summary judgment against Mr. Benning and in favor of Ms. Patterson and Ms. Edgar on the due process claims. The court concluded that Mr. Benning did not have any protected liberty interest in the emails he generated because emails should not be treated the same as outgoing physical mail. And without such a liberty interest, he was not entitled to any due process protections when his emails were censored. *See* D.E. 108 at 26–27. The court also ruled that Ms. Edgar and Ms. Patterson were, in any event, entitled to qualified immunity on Mr. Benning’s due process claims. Even if Mr. Benning had a liberty interest in the emails he generated, the law to that effect was not clearly established in September and October of 2017, when the three emails to his sister were censored. *See id.* at 27–28.

We hold that Mr. Benning had a protected liberty interest in his outgoing emails, and as a result he was entitled to notice and other procedural safeguards when the three emails to his sister were intercepted and withheld. But we agree with the district court that Ms. Edgar and Ms. Patterson are entitled to qualified immunity on Mr. Benning’s due process claims for damages because the law to that effect was not clearly established in September and October of 2017.³

analyst. *See* D.E. 64-4, Exh. B at ¶ 27; Br. for Appellant at 19. Mr. Benning, however, did not name Ms. Keen as a defendant.

³ We address the merits of the due process claims because, as explained later, Mr. Benning’s requests for declaratory relief as to those claims are not barred by qualified immunity.

A

The first question is whether Mr. Benning had a liberty interest in his emails that triggered due process protections. See *Dorman v. Aronofsky*, 36 F.4th 1306, 1315 (11th Cir. 2022) (“Before addressing what process is due, we first examine whether Mr. Dorman has a liberty interest that triggers due process protections.”). We conclude that he did.

The Supreme Court has held that “[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a ‘liberty’ interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment. As such, it is protected from arbitrary governmental invasion.” *Procunier v. Martinez*, 416 U.S. 396, 418 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413–414 (1989). As we have explained, under *Martinez* “both prisoners and their correspondents have a liberty interest in uncensored communication by letter[.]” *Perry v. Sec’y, Fla. Dep’t of Corr.*, 664 F.3d 1359, 1367 (11th Cir. 2011). See also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500 (1952) (“[T]he liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action.”).

When an inmate’s outgoing correspondence is censored, *Martinez* requires prison officials to provide certain procedural safeguards to satisfy the Due Process Clause. Here is how we have described

those safeguards: “(1) the inmate must receive notice of the rejection of a letter written by or addressed to him; (2) the author of the letter be given ‘reasonable opportunity to protest that decision,’ and (3) ‘complaints be referred to a prison official other than the person who originally disapproved the correspondence.’” *Perry*, 664 F.3d at 1368 & n.2 (quoting *Martinez*, 416 U.S. at 418–419).⁴

This case, of course, involves the censoring of emails rather than physical letters. So, like the district court, we must decide whether emails are the equivalent of physical letters for purposes of a liberty interest.

We conclude that under *Martinez* Mr. Benning had a protected liberty interest, grounded in the First Amendment, in the emails he generated and sought to send to his sister. We do so for a number of reasons.

First, those emails—which contained communications from Mr. Benning to his sister—undoubtedly constituted speech under the First Amendment. The First Amendment “protects material disseminated over the [I]nternet as well as by the means of communication devices used prior to the high-tech era.” *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148, 1151 (9th Cir. 2000) (citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997)). See also Jeremy Harris Lipschultz, *Free Expression in the Age of the Internet: Social and Legal Boundaries* 202 (2000)

⁴ In a later case, the Supreme Court limited *Martinez* “to regulations concerning outgoing correspondence.” *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989). Because Mr. Benning’s intercepted emails were outgoing communications, *Martinez* governs the Fourteenth Amendment due process claims.

(“Sometimes, computer-based communication approximates a letter. In other situations, it is like a business memorandum. At still other times, it is like a telephone call.”); Brennen J. Johnson, *Jail (E)Mail: Free Speech Implications of Granting Inmates Access to Electronic Messaging Services*, 11 Wash. J.L., Tech. & Arts 285, 290 (2016) (“Internet communications, such as emails, presumptively fall within the ambit of free speech protections.”). And the Supreme Court has told us that First Amendment scrutiny is not more relaxed in cyberspace. *See Reno*, 521 U.S. at 868 (explaining that the justifications permitting regulations of speech in the broadcast medium “are not present in cyberspace”).

Second, it seems to us that the rationale of *Martinez* is concerned with correspondence from inmates, regardless of the form (or medium) the correspondence takes. *See Bonner v. Outlaw*, 552 F.3d 673, 677 (8th Cir. 2009) (“Although [*Martinez*] discusses letters, that is because letters were simply the form of correspondence at issue in that specific case. Nothing about the reasoning of [*Martinez*] justifies treating packages differently than letters for purposes of the notice that should be given an inmate when correspondence addressed to that inmate is rejected.”). As the Eighth Circuit persuasively explained in rejecting an argument that *Martinez* applies only to letters and does not govern packages, the “reasoning of [*Martinez*] applies to all forms of correspondence addressed to an inmate. It is the inmate’s interest in ‘uncensored communication’ that is the liberty interest protected by the due process clause, regardless of whether that communication occurs in the form of a letter,

package, newspaper, magazine, etc.” *Id.* We have applied *Martinez* to magazines, see *Prison Legal News v. Sec’y, Fla. Dep’t of Corr.*, 890 F.3d 954, 976–77 (11th Cir. 2018), and other circuits have done the same with similar forms of communication. See *Frost v. Symington*, 197 F.3d 348, 353–54 (9th Cir. 1999) (holding that inmate was entitled to notice that his incoming magazines were being withheld by prison authorities); *Montcalm Pub. Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996) (applying *Martinez* to magazines); *Moyler v. Fannin*, 2023 WL 2541131, at *7–8 (W.D. Va. Mar. 16, 2023) (applying *Martinez* to photographs).

In the 1970s, when *Martinez* was decided, correspondence consisted only of physical letters (or similar notes or messages) handwritten or typed on paper and sent by regular mail. Today, almost 50 years later, correspondence is not so limited and emails serve as the electronic equivalent of physical letters (i.e., correspondence). See Johnson, *Jail (E)Mail*, 11 Wash. J.L., Tech. & Arts at 288 (explaining that by 2017 the number of email accounts was expected to rise to 4.9 billion). Thanks to computers and the Internet, we can now correspond with others digitally through email, and for due process purposes it makes both doctrinal and practical sense to treat outgoing email the same as physical letters. See, e.g., *Tory v. Davis*, 2020 WL 2840163, at *4 (W.D. Va. June 1, 2020) (“[A]n inmate has a due process right to receive notice when his email communication has been censored.”). Just as the Fourth Amendment protects against searches by technology unknown in the 18th century, see *Kyllo v. United States*, 533 U.S. 27, 34–38 (2001), the First

Amendment protects correspondence transmitted by means developed in the 20th or 21st centuries.

Third, GDC officials themselves treat outgoing emails from inmates like physical letters for screening and review. Inmate emails are not immediately transmitted to their intended recipients, but instead go to the Central Intelligence Unit for screening and inspection by way of an intranet system. Emails are sent on their way only when GDC analysts at the Unit are satisfied that they comply with SOP 204.10.

In other words, just as a physical letter is not immediately delivered when an inmate places it in the prison's mail system, an email is not immediately transmitted as soon as an inmate hits "send." SOP 204.10 makes clear that "[b]ecause of the need" for inspection, email "communications may not be received by the in-tended recipient on the same day as sent by the sender." D.E. 64-4, Attachment B-1 at 13. From the perspective of the GDC, emails are the functional equivalent of letters written or typed on paper. And we can think of no persuasive reason why prison officials should not be required to provide notice and other procedural safe-guards when they intercept or otherwise censor emails sent by inmates.⁵

⁵ In his concurring opinion, our colleague suggests that other circuits have applied *Turner v. Safley*, 482 U.S. 78 (1987), rather than *Martinez*, in addressing the due process claims of inmates whose mail has been censored or intercepted, and he argues that we should do the same. With respect, we think our colleague is mistaken. The cases he cites involve substantive First Amendment challenges to the actions of prison officials in censoring or withholding mail, and not procedural due process claims arising from the failure of such officials to provide

B

The defendants argue that Mr. Benning did not have a protected liberty interest because using the email system is a privilege, and not a right, for inmates in the custody of the GDC. *See* Br. for Appellees at 39–40. This argument misses the mark, and does so by the proverbial country mile. For over 50 years the Supreme Court has “fully . . . rejected the wooden distinction between ‘rights’ and ‘privileges’ that once seemed to govern the applicability of procedural due process rights.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). “[T]he question,” therefore, “is not whether a person has a right to something denied by the government, but whether the government acted

inmates with safeguards like notice. *See, e.g., Bacon v. Phelps*, 961 F.3d 533, 543–44 (2d Cir. 2020) (addressing First Amendment protection afforded to outgoing letter for which inmate was disciplined).

As far as we can tell, no federal court has applied *Turner* in the due process context. That is not surprising, for *Turner* does not govern the procedural due process claims of inmates. *See* Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 Denver L. Rev. 457, 479 (2018) (explaining that *Turner* does not apply to “procedural due process issues” in the prison setting). Indeed, the Supreme Court’s more recent due process cases involving inmates do not apply *Turner*. *See, e.g., Wilkison v. Austin*, 545 U.S. 209, 224–230 (2005) (applying framework from *Matthews v. Eldridge*, 424 U.S. 319 (1976), to determine the process due to inmates whom the state seeks to place in so-called “super-max” prisons).

lawfully in depriving him of it.” *Thompson v. Gallagher*, 489 F.2d 443, 446 (5th Cir. 1973).⁶

As a result, whether Mr. Benning had a free-standing constitutional or statutory right to use the GDC email system does not affect or resolve the procedural due process question under *Martinez*. In any event, it is the First Amendment—and not state law—which creates a liberty interest here. See *Martinez*, 416 U.S. at 418. And as we have explained, email is a form of correspondence.

C

We next take up whether Ms. Patterson and Ms. Edgar denied Mr. Benning his due process rights under *Martinez*. On this summary judgment record, a jury could reasonably find that they did.

When outgoing physical letters are intercepted or censored by prison officials, *Martinez* requires that the inmate be “notified of the rejection of [the] letter written by . . . him,” and that he be “given a reasonable opportunity to protest that decision,” with his complaint being “referred to a prison official other than the person who originally disapproved the correspondence.” 416 U.S. at 418–19. In other words, “any decision to censor or withhold delivery of letters must be accompanied by procedural safeguards,” such as notice and an opportunity to contest the decision to a different prison official. See *Perry*, 664 F.3d at 1367–68 & n.2.⁷

⁶ *Thompson* constitutes binding precedent in the Eleventh Circuit under *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

⁷ Our sister circuits read *Martinez* the same way. See *Vogt v. Wetzel*, 8 F.4th 182, 187 (3d Cir. 2021); *Hopkins v. Collins*,

Mr. Benning submitted an affidavit stating that, when the emails to his sister were intercepted in September and October of 2017, he was denied (a) “any process” and (b) an “administrative remedy” to challenge the decisions because of SOP 204.10. *See* D.E. 80-5 at ¶ 14. That affidavit, based as it was on Mr. Benning’s personal knowledge, sufficed to create an issue of fact. *See United States v. Stein*, 881 F.3d 853, 857 (11th Cir. 2018) (en banc).

The evidence in the summary judgment record also supports the lack-of-notice and lack-of-remedy assertions. SOP 204.10 expressly states that “communications which violate [the] policy will be intercepted without explanation.” D.E. 64-4, Attachment B-1 at 15 (emphasis added). Richard Wallace, a GDC supervisor, confirmed in his declaration that SOP 204.10 provides for no explanation when emails are intercepted for a violation. *See* D.E. 64-4, Exh. B at ¶ 13. Moreover, Ms. Patterson and Ms. Edgar stated in their declarations that they acted pursuant to SOP 204.10, and they did not claim that they notified Mr. Benning of their decisions or provided him with an administrative remedy. *See* D.E. 64-5, Exh. C at ¶¶ 10–12; D.E. 64-6, Exh. D at ¶¶ 11–13. It is therefore reasonable to infer that, in accordance with SOP 204.10, they did not tell Mr. Benning that his emails were intercepted and did not provide him with an appeal to a different GDC official.

548 F.2d 503, 504 (4th Cir. 1977); *Johnson v. El Paso Cnty. Sheriff's Dep't*, 51 F.3d 1041, at *5 (5th Cir. 1995); *Martin v. Kelley*, 803 F.2d 236, 243 (6th Cir. 1986); *Miller v. Downey*, 915 F.3d 460, 466 (7th Cir. 2019); *Ping v. Raleigh*, 205 F.3d 1347, at *1 (8th Cir. 2000); *McKinney v. De Bord*, 507 F.2d 501, 505 (9th Cir. 1974).

Given this evidence, the district court should not have granted summary judgment in favor of Ms. Patterson and Ms. Edgar on whether they violated Mr. Benning's due process rights. Mr. Benning had a protected First Amendment liberty interest in his outgoing emails, and a reasonable jury could find that he was not provided any notice of the interceptions or of his right to challenge the decisions. *See Martinez*, 416 U.S. at 418–19; *Perry*, 664 F.3d at 1367–68 & n.2.

But that does not end the matter, for Ms. Edgar and Ms. Patterson asserted qualified immunity as to Mr. Benning's claims for damages for the alleged procedural due process violations. We therefore turn to qualified immunity.

D

Government officials sued in their individual capacities for money damages “are entitled to qualified immunity with respect to ‘discretionary functions’ [they have] performed[.]” *Ziglar v. Abbasi*, 582 U.S. 120, 150 (2017). In intercepting and withholding Mr. Benning's three emails pursuant to SOP 204.10, Ms. Patterson and Ms. Edgar were carrying out discretionary tasks. As a result, Mr. Benning has the burden of showing that qualified immunity is in-appropriate. *See Terrell v. Smith*, 668 F.3d 1244, 1250 (11th Cir. 2012).

In this case qualified immunity “turns on the ‘objective legal reasonableness’” of the actions of Ms. Patterson and Ms. Edgar. *See Ziglar*, 582 U.S. at 151 (citation omitted). The Supreme Court recently summarized this aspect of the qualified immunity inquiry:

Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Although this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.

Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7–8 (2021) (internal quotation marks and citations omitted). For purposes of qualified immunity, decisions of the Supreme Court, the Eleventh Circuit, or the appropriate state supreme court can announce clearly established law. *See Gaines v. Wardynski*, 871 F.3d 1203, 1208 (11th Cir. 2017).

It is true, as Mr. Benning says, that by September and October of 2017—when his emails were withheld—some courts had applied *Martinez* to correspondence other than letters. *See, e.g., Bonner*, 552 F.3d at 677 (holding that *Martinez* applied to packages). This case, however, involves email correspondence, and “courts must not define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.” *District of*

Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) (internal quotations marks omitted).

Email is created and transmitted in a different medium than physical mail. Although we have concluded that the *Martinez* due process requirements apply to email correspondence in the prison setting, before today there were no Supreme Court, Eleventh Circuit, or Georgia Supreme Court decisions on point. As far as we can tell, only two district courts have specifically ruled that the *Martinez* due process framework governs emails generated by in-mates, and those courts issued their decisions in June of 2020 and November of 2018, well after Ms. Patterson and Ms. Edgar intercepted Mr. Benning’s emails. *See, e.g., Tory*, 2020 WL 2840163, at *4; *Emery v. Kelley*, 2018 WL 5779593, at *2 (E.D. Ark. Oct. 3, 2018), report and recommendation adopted, 2018 WL 5779505 (E. D. Ark. Nov. 2, 2018). So even if district court decisions from other jurisdictions could create clearly established law—they cannot and do not—those two cases do not help Mr. Benning overcome qualified immunity because they post-dated the events in this case. *See Wesby*, 138 S. Ct. at 589.

In sum, at the time Ms. Patterson and Ms. Edgar acted there was no governing and materially similar precedent concerning the due process implications of confiscating, intercepting, or censoring outgoing emails generated by inmates. We recognize that a prior case on all fours (or nearly all fours) is not always necessary to give an official fair notice that his conduct is wrongful. *See, e.g., Taylor v. Rojas*, 141 S. Ct. 52, 53–54 (2020) (reversing grant of qualified immunity to officers who violated the Eighth Amendment by placing inmate in a “shockingly

unsanitary” cells for six days). Although the issue is close, we conclude that this is not one of those cases where the lack of notice and procedural safeguards “so obviously violates [the] [C]onstitution that prior case law is unnecessary.” *Corbitt v. Vickers*, 929 F.3d 1304, 1312 (11th Cir. 2019). The law, as it existed in September and October of 2017, did not place the constitutionality of the conduct at issue “beyond debate.” *Wesby*, 138 S. Ct. at 590. *See also Crosby v. Paulk*, 187 F.3d 1339, 1344–45 (11th Cir. 1999) (explaining that qualified immunity gives government officials “the benefit of the doubt, provided that the conduct was not so obviously illegal in the light of then-existing law”) (internal quotation marks omitted).

E

In addition to seeking damages against Ms. Patterson and Ms. Edgar, Mr. Benning requested declaratory relief with respect to his due process claims. He asked that the district court issue a judgment which declared (a) that he “has a right to be notified when email correspondence is censored,” (b) that he “has a right to [the] written reasons for any decision to censor” his email correspondence, and (c) that he “has a right to respond to any decision to censor [his] email correspondence before the decision is finalized.” *See* D.E. 28 at 6.⁸

⁸ Mr. Benning also requested that the district court issue a judgment which declared “inmate email correspondence” to be the same as “written/paper correspondence.” *See* D.E. 28 at 6. Because Mr. Benning has not claimed that any particular policy within SOP 204.10 is unconstitutional in its differential treatment of email correspondence and written/paper correspondence, we do not consider this claim.

As we have explained, qualified immunity “is only a defense to personal liability for monetary awards resulting from government officials performing discretionary functions,” and “may not be effectively asserted as a defense to a claim for declaratory or injunctive relief.” *Ratliff v. DeKalb County*, 62 F.3d 338, 340 n.4 (11th Cir. 1995). See also *D’Aguanno v. Gallagher*, 50 F.3d 877, 879 (11th Cir. 1995) (“[B]ecause qualified immunity is a defense only to claims for monetary relief, the district court erred in granting summary judgment on plaintiffs’ claims for injunctive and declaratory relief.”). So the entitlement of Ms. Patterson and Ms. Edgar to qualified immunity with respect to damages does not resolve the requests for declaratory relief.

The district court, having rejected Mr. Benning’s due process claims on the merits, did not have to confront the issue of declaratory relief. But we have held that a reasonable jury could find that Ms. Patterson and Ms. Edgar violated Mr. Benning’s due process rights by intercepting his emails and by failing to provide him notice and an opportunity to appeal to a different GDC official. Those due process claims will have to be put to a jury so that the district court can address the propriety (and scope) of declaratory relief should Mr. Benning prevail. *Cf. Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir. 2001) (explaining that the grant of qualified immunity to individual prison officials did not preclude an inmate “from going forward with his as-applied challenge to the Ohio prison grooming regulation insofar as he seeks declaratory and injunctive relief” to “prevent the defendants from forcibly cutting his beard and sidelocks in the future”); 1 Sheldon H. Nahmood, *Civil Rights and*

Civil Liberties Litigation § 5:3 (2021-22 edition) (by “the terms of” the Declaratory Judgment Act, “neither injunctive relief nor damages need be sought as a condition precedent to obtaining a declaratory judgment”).

We note that Mr. Benning asserted his due process claims against all of the defendants, including the Commissioner of the GDC. *See* D.E. 28 at 11–12. Insofar as he is being sued in his official capacity for declaratory relief, and due to his implementation of SOP 204.10, the Commissioner may not assert qualified immunity as a defense. *See Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (“The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment.”); *Universal Amusement Co. v. Hofheinz*, 646 F.2d 996, 997 (5th Cir. 1981) (“Government officials sued in their official capacity may not . . . assert [qualified] immunity as a defense.”).

Although a prayer for declaratory relief generally seeks a declaration of both past and future conduct, the Supreme Court has explained that such relief is permitted in an official-capacity suit against a state official for prospective relief under *Ex parte Young*, 209 U.S. 123 (1908), because “[i]nsofar as the exposure of the State is concerned,” it adds “nothing to the prayer for [an] injunction.” *Verizon Md., Inc. v. Pub. Serv. Com’n of Md.*, 535 U.S. 635, 646 (2002). Mr. Benning did not seek injunctive relief as to his due process claims, but his requests for declaratory relief as to those claims are worded in the present tense, and do not simply seek a declaration of past wrongdoing. We therefore cannot say on this record

that declaratory relief against the Commissioner is barred should Mr. Benning prevail on his due process claims. *See S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1204 (11th Cir. 2019) (“Some suits requesting injunctive or declaratory relief against state officials are not considered suits against the state and thus are not barred by sovereign immunity.”) (citing *Ex parte Young* and *Verizon Md.*). Should Mr. Benning prevail on his due process claims against Ms. Patterson, Ms. Edgar, and the Commissioner on remand, the district court will need to address the requests for declaratory relief.

IV

We now pivot to Mr. Benning’s First Amendment claims. Mr. Benning alleged that two of the policies set out in SOP 204.10—the prohibition on requesting forwarding to third parties and the prohibition on sending information about other inmates—violated his First Amendment rights. The parties, as they did below, debate which of two Supreme Court cases provides the proper standard for addressing the censorship of inmates’ outgoing emails.

Martinez, which has been limited to outgoing correspondence, *see Thornburg*, 490 U.S. at 413, holds that “censorship of prisoner mail is justified” if “the regulation or practice . . . further[s] an important or substantial governmental interest unrelated to the suppression of expression” and if “the limitation of First Amendment freedoms [are] . . . no greater than is necessary or essential to the protection of the particular governmental interest involved.” *Martinez*, 416 U.S. at 413. On the other hand, *Turner v. Safley*, 482 U.S. 78, 89 (1987), holds

that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” Mr. Benning argues that *Martinez* provides the governing standard, while the defendants assert that *Turner* governs.

A

Mr. Benning alleged that two policies set out in SOP 204.10 violated his First Amendment rights under *Martinez*. As stated, these were the policy prohibiting inmates from asking recipients to forward their outgoing emails (the forwarding policy) and the policy prohibiting inmates from discussing other inmates in their out-going emails (the inmate-information policy). Mr. Benning did not argue that he had an “independent, stand alone, right to electronic correspondence if . . . no email service of any sort was offered by the defendants.” D.E. 80 at 6. Instead, he asserted that “[t]he standard to be applied for review of the censorship of outgoing electronic correspondence is the same as that for outgoing physical correspondence set out in [*Martinez*].” *Id.* at 16. His position before the district court was that the policies did not pass muster under *Martinez*, and that summary judgment in favor of the defendants was not appropriate because the record did not establish that the restrictions were “no greater than necessary or essential to protect important or substantial interests.” *Id.* at 17.

The defendants responded that Mr. Benning did not have a constitutional right to communicate through email. And they asserted that even if he had such a right, the challenged policies would survive constitutional scrutiny under *Turner*. That is, they

argued that the two policies are “rationally related to [the] GDC’s security interest”—“[b]oth policies exist to curb criminal activity and ensure security and are therefore ‘rationally connected to [GDC’s] security and safety interests.’” D.E. 64-1 at 11–12. *See also* D.E. 64-4, Exh. B at 7. Specifically, the forwarding policy “prevents [inmates] from communicating with those who have not been cleared by GDC’s security personnel and who may have a record of criminal activity,” and the inmate-information policy “prevents [inmates] from including information that could endanger the safety and security of anyone related or connected to the inmate named in [the] email.” *Id.* at 11. The defendants further asserted that Mr. Benning had other means of communicating besides email (i.e., physical letters), that accommodating Mr. Benning’s forwarding request would require the GDC to invest more resources “to do background checks on the limitless number of possible recipients that [inmates’] emails could be forwarded to,” and that the prohibitions set forth by the policies “are not exaggerated responses to GDC’s security concerns.” *Id.* at 12–13.

Ms. Edgar and Ms. Patterson additionally argued that they were entitled to qualified immunity. In their view, “there [was] no clearly established law that would have put them on notice that performing their job responsibilities of withholding emails that did not comply with the email [policies] was clearly unlawful.” *Id.* at 15.

The district court decided to apply the standard set out in *Turner* and ruled that the challenged policies were constitutional under that standard. The district court alternatively concluded that Ms. Patterson and Ms. Edgar were entitled to qualified

immunity such that Mr. Benning would not be entitled to damages from them. *See* D.E. 108 at 10–29.

On appeal, the parties essentially restate the positions they took in the district court.

Mr. Benning makes three principal arguments. First, he maintains that *Martinez*—rather than *Turner*—provides the appropriate standard for reviewing restrictions on outgoing emails and that under *Martinez* issues of material fact preclude summary judgment. *See* Br. for Appellant at 28–42. Second, he contends that even if *Turner* applies material issues of fact exist as to whether the forwarding policy and the inmate-information policy are constitutional. *See id.* at 43–51. Third, he asserts that Ms. Patterson and Ms. Edgar are not entitled to qualified immunity. *See id.* at 59–60.

The defendants argue that “straightforward application of the *Turner* standard confirms that [the] GDC’s modest email regulations are reasonably related to security and safety for inmates, security guards, and members of the public.” Br. for Appellees at 13–14. They also contend that the district court correctly found that Ms. Edgar and Ms. Patterson were entitled to qualified immunity. *See id.* at 41–45.

B

As set out earlier, the Supreme Court’s cases provide that qualified immunity “attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,” and explain that for a right to be clearly established “existing precedent must have placed the statutory or

constitutional question beyond debate. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Rivas-Villegas*, 142 S. Ct. at 7–8 (internal quotation marks and citations omitted).

We conclude that qualified immunity applies with respect to Mr. Benning’s claims for damages against Ms. Patterson and Ms. Edgard. In September and October of 2017, when Ms. Patterson and Ms. Edgar intercepted Mr. Benning’s emails, there was no clearly established law (in the Supreme Court, the Eleventh Circuit, or the Georgia Supreme Court) holding or indicating that the forwarding policy or the inmate-information policy (or similar policies) violated the First Amendment when applied to outgoing emails from inmates. There was also no clearly established law addressing which First Amendment standard—the one in *Martinez* or the one in *Turner*—governs prison regulations like the ones at is-sue here.

Mr. Benning cannot point to any materially similar cases—and we have not found any ourselves—but he argues that a reasonable prison official would have understood that emails are a form of outgoing correspondence under *Martinez*. See Br. for Appellant at 56. But we have already rejected Mr. Benning’s similar argument against qualified immunity with respect to the due process claims. And the recognition that emails constitute correspondence for due process purposes says little about the constitutionality of the forwarding and inmate-information policies under the First Amendment. Under the circumstances, the unconstitutionality of those policies was not “beyond debate.” *Wesby*, 138 S. Ct. at 590. See also *Rodriguez*

v. Burnside, 38 F.4th 1324, 1334 (11th Cir. 2022) (granting qualified immunity, in a First Amendment free exercise case, to prison officials implementing policies that limited and governed showers for inmates housed in a special management unit, and explaining that *Turner* drew no “bright lines” between lawful and unlawful policies).

Thus, because the law was not clearly established, we affirm the district court’s ruling that Ms. Edgar and Ms. Patterson are entitled to qualified immunity on Mr. Benning’s First Amendment claims for damages. In light of our decision, we need not and do not address the constitutionality of the forwarding and inmate-information policies.

C

That leaves the First Amendment claims against the Commissioner in his official capacity. Mr. Benning did not seek declaratory relief on those claims, but he did seek certain injunctive relief. *See Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (explaining that *Ex parte Young* “allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law”).

As relevant here, Mr. Benning requested that the district court (1) “order the defendants to not limit the length of outgoing emails,” (2) “order the defendants to allow [him] to email anyone except for persons who have specifically requested to be restricted to [him],” and (3) “order the defendants to not impose restrictions on the use of [his] electronic

communications by non-incarcerated persons.” D.E. 28 at 13.

The district court denied Mr. Benning’s claims for injunctive relief because they were moot or because they did not comply with the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1) (requiring, among other things, that injunctive relief as to prison conditions “extend no further than necessary to correct the violation of the Federal right of a particular plaintiff” and be “narrowly drawn”). *See* D.E. 108 at 7–8. Mr. Benning contends that the district court erred, but we disagree.

While the case was pending in the district court, the GDC rescinded the policy in SOP 204.10 preventing inmates from emailing anyone not cleared to physically visit them at their facility. *See* D.E. 80-5 at 1. The district court concluded that, as to this aspect of SOP 204.10, Mr. Benning’s request for injunctive relief was moot. *See* D.E. 108 at 7. Mr. Benning does not challenge that conclusion on appeal, so we address only his other two requests, unrelated to monetary damages, for injunctive relief—ordering the GDC not to limit the length of outgoing emails and not to impose restrictions on the use of his communications by non-incarcerated persons.

Mr. Benning argues that the district court acted prematurely in rejecting his claims for injunctive relief, and asserts that it should have waited to see if he prevailed on any of his First Amendment claims. *See* Br. for Appellant at 58–60. If a preliminary injunction is not sought, it generally makes sense for a district court to leave the matter of equitable remedies until the end of the case. At that point the

court will know what claims, if any, the plaintiff has prevailed on and will be able to determine the propriety and scope of injunctive relief. *See United States v. Baxter, Int'l, Inc.*, 345 F.3d 866, 909 (11th Cir. 2003).

Under Rule 54(c) of the Federal Rules of Civil Procedure, the “demand for relief in the pleadings does not limit, except in cases of default, the relief a court may grant when entering judgment.” *Sapp v. Renfroe*, 511 F.2d 172, 176 n.3 (5th Cir. 1975). But “Rule 54(c) creates no entitlement to relief based on issues not squarely presented” in the pleadings. *Cioffe v. Morris*, 676 F.2d 539, 541 (11th Cir. 1982). The problem for Mr. Benning is that his requested injunctive relief bore no relationship to the First Amendment claims he asserted. As a result, even if he prevailed on the merits of those claims he would not have been entitled to the injunctive relief he sought.

“[T]he scope of injunctive relief is dictated by the extent of the violation established.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). And that remains the case under the PLRA. *See* 18 U.S.C. § 3626(a)(1)(A) (“Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs.”). *See also Thomas v. Bryant*, 614 F.3d 1288, 1323 (11th Cir. 2010) (PLRA case: “[T]he case law has long established that the scope of an injunction should not exceed the identified violation.”). With respect to his First Amendment claims, Mr. Benning requested an order prohibiting the GDC from limiting the length of outgoing emails and an order prohibiting the GDC from restricting in any way how his emails are used

by non-incarcerated persons. As to the first request, Mr. Benning never claimed that the GDC's limitation on the length of outgoing emails (one of the policies set out in SOP 204.10) was unconstitutional. As to the second request, SOP 204.10 does not by its terms place any limits on what recipients of inmate emails can do with them once they are received—the restriction is on the inmate asking recipients of emails to forward the communications—and in any event there was no allegation in the complaint that any such restriction was unconstitutional.

Although we review pro se filings liberally, we cannot “rewrite [a] . . . pleading” to request a different form of relief. *See Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014). Given the complete lack of connection between the claims pled and the injunctive relief requested, the district court did not err in ruling that such relief was overbroad and inappropriate. *See* § 3626(a)(1)(A); *Thomas*, 614 F.3d at 1323. As with Ms. Patterson and Ms. Edgar, we do not address the constitutionality of the forwarding and inmate-information policies under the First Amendment.

V

On Mr. Benning's due process claims, we affirm in part and reverse in part. Mr. Benning had a First Amendment liberty interest in his outgoing emails. As a result, he was entitled to procedural safeguards when his emails in September and October of 2017 were intercepted. Although Ms. Patterson and Ms. Edgar are entitled to qualified immunity on Mr. Benning's requests for damages on the due process claims, those claims must be tried to a jury. The requests for declaratory relief on the due process

claims are not barred by qualified or sovereign immunity, and a reasonable jury could find that the defendants—in promulgating and following SOP 204.10—violated Mr. Benning’s due process rights.

With respect to Mr. Benning’s First Amendment claims relating to the forwarding and inmate-information policies, we affirm. Ms. Patterson and Ms. Edgar are entitled to qualified immunity, and the requested injunctive relief against the Commissioner was not connected to the policies that Mr. Benning challenged.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

* * *

Schlesinger, J., Concurring

SCHLESINGER, District Judge, Concurring:

I concur in the result and agree with much in the majority opinion. But I write separately because I would affirm the district court’s determination that *Turner* rather than *Martinez* controls. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Procunier v. Martinez*, 416 U.S. 396, 418 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413–414 (1989).

This case presents an opportunity to address how prison officials should treat First Amendment issues. The majority concludes, “under *Martinez* Mr. Benning had a protected liberty interest grounded in the First Amendment, in the emails he generated and sought to send to his sister.” Maj. Op. at 10. But the issue is not so plain. Other Circuits have recently

addressed similar instances and have followed *Turner*. See *Murdock v. Thompson*, No. 20-6278, 2022 WL 17352171, at *1 (4th Cir. Dec. 1, 2022) (relying on *Turner* to affirm the denial of an inmate’s claim his right of access to the court was violated when he was prohibited from sending a “Motion for a Speedy Trial” by certified mail); *White v. True*, 833 F. App’x 15, 18 (7th Cir. 2020) (considering a First Amendment claim, in a *Bivens* action, of an inmate barred from sending mail to his daughter, but the court, citing *Turner*, determined “the restriction on outgoing mail” served “a legitimate penological interest”); *Sebolt v. Samuels*, 749 F. App’x 458, 459 (7th Cir. 2018) (citing *Turner* when addressing an inmate’s contention his First Amendment rights were violated because he was denied access to the institution’s email program because of his criminal history and concluding inmates do not have an unrestricted First or Sixth Amendment right to receive publications or consult counsel by electronic mail); *Aguilar v. Recktenwald*, 649 F. App’x 293, 295 (3d Cir. 2016) (applying *Turner* to decide whether an inmate had “a constitutionally protected interest in the use and maintenance of his Facebook account”). While others have followed *Martinez*. See *Stow v. Davis*, No. 22-1264, 2023 WL 2944991, at *1 (1st Cir. Jan. 4, 2023) (applying *Martinez* standard when addressing a possible outgoing mail censorship question); *Bacon v. Phelps*, 961 F.3d 533, 543-44 (2d Cir. 2020) (concluding *Martinez* applied to a prison policy that allowed an inmate to be disciplined for a letter sent to his sister.).

It is for this reason, and to provide sharper guidance to district courts, I suggest we should have more fully developed whether *Turner* applies to Mr.

33a

Benning's claim. In my view the challenged email policies survive constitutional scrutiny under *Turner*.

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

RALPH HARRISON BENNING, <i>Plaintiff,</i> v. COMMISSIONER GREGORY C. DOZIER, <i>et al.</i> , <i>Defendants.</i>	[FILED April 30, 2021] CIVIL ACTION NO. 5:18-cv-00087- TES-CHW
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**ORDER ADOPTING THE UNITED STATES
MAGISTRATE JUDGE’S REPORT AND
RECOMMENDATIONS**

Should censorship of prisoner email be treated the same as censorship of traditional prisoner mail when deciding whether that censorship violates the First Amendment or the Fourteenth Amendment’s guarantee of procedural due process? This case requires the Court to grapple with that question. And it’s a much tougher question than it appears at first blush. After considerable research, the Court agrees with the Magistrate Judge that email is just different. Accordingly, the Court **ADOPTS** the Magistrate Judge’s Report & Recommendation (“R&R”) that the Defendants’ Motion for Summary

Judgment be granted and Benning's case be dismissed.¹

BACKGROUND

Ralph Harrison Benning ("Benning"), an inmate at Wilcox State Prison, complains that the Georgia Department of Corrections ("GDC") censored the following four emails he sent through the inmate email service, known as "JPay," to persons outside of the prison:

- a September 24, 2017, email Benning sent to his sister, Ms. Elizabeth Anne Knott, intercepted by Defendant Patterson,
- two emails Benning sent on October 9, 2017, to his sister, Ms. Elizabeth Anne Knott, intercepted by Defendant Edgar, and
- February 6, 2018, email Benning sent to the Aleph Institute, intercepted by Defendant Patterson. [Doc. 28, p. 5].

Benning filed suit, claiming that none of the four emails reached their intended recipient because the GDC withheld them because their content violated GDC policy, and the Commissioner implemented this

¹ At the outset, the Court finds it necessary to address Benning's Motion for Investigation of Harassment and Intimidation [Doc. 107] filed on April 22, 2021. Benning's allegations, if true, should concern the Defendants, Georgia's Governor and Attorney General, and this district's Acting United States Attorney as much as it disturbed the Court. While the Court **DENIES** Plaintiff's "motion" [Doc. 107] because district courts don't investigate, the Court will ensure that Benning's allegations are forwarded to the Acting United States Attorney for the Middle District of Georgia and Georgia's Attorney General.

policy. [Doc. 1, p. 11]; [Doc. 28, pp. 5, 11–12]. The particular policy—SOP 204.10—is intended to curb criminal activity and ensure security by preventing prisoner threats to citizens and prison personnel. [Doc. 64-1, pp. 11–12]; [Doc. 64-4, ¶ 28]. Relevant here, SOP 204.10 prohibits inmates from requesting that emails be sent, forwarded, or mailed to persons other than the original recipient. [Doc. 64-4, pp. 14–15]. SOP 204.10 also prohibits inmates from requesting information about another offender. [*Id.*]. The parties do not dispute that Benning’s four withheld emails violated this policy. [Doc. 80, pp. 4–5].

The magistrate judge screened Benning’s claims pursuant to 28 U.S.C. § 1915A(a). [Doc. 7]. The magistrate judge found that Benning sought relief under 42 U.S.C. § 1983 and could “proceed with his claims against Defendant Dozier in his official capacity.” [*Id.* at pp. 1, 7]. Later, the court allowed Benning to add Patterson and Edgar as defendants via an amended complaint. [Doc. 28].

Benning claimed compensatory damages of \$0.35 per censored email, \$10 in nominal damages from each defendant, \$1,000 in punitive damages from each defendant, and litigation costs. [Doc. 28, p. 13]. Benning also sought declaratory and injunctive relief. [*Id.* at pp. 6, 13]. Specifically, Benning asked the Court to:

1. Declare that email correspondence be considered the same as written/paper correspondence.
2. Declare that Plaintiff has a right to be notified when email correspondence is censored.

3. Declare that Plaintiff has a right to respond to any decision to censor email correspondence before the decision is finalized.
4. Declare that Plaintiff has a right to written reason(s) for any decision to censor email correspondence.
- ...
11. Order the defendants to not limit the length of outgoing emails.
12. Order the defendants to allow Plaintiff to email anyone except for persons who have specifically requested to be restricted to Plaintiff.
13. Order the defendants to not impose restrictions on the use of Plaintiff's electronic communications by non-incarcerated persons.

[Doc. 28, pp. 6, 13].

Defendants filed a Motion for Summary Judgment [Doc. 64], arguing that Benning has no constitutional right to communicate via email, that his use of the prison email system is a privilege and not a right, and the GDC preventing Benning from using his email on three occasions is not a constitutional violation. [Doc. 64-1, pp. 6–9]. Defendants also argue that even if Benning has a constitutional right to communicate via email, the abridging of that right passes the applicable level of constitutional scrutiny, and that Defendants Edgar and Patterson are entitled to qualified immunity for the suits against them in their individual capacities. [*Id.* at pp. 9–17]. Lastly, Defendants argue that

Benning is only entitled to nominal damages and is not entitled to injunctive relief. [*Id.* at 17–19].

Benning responded to Defendants’ Motion for Summary Judgment, arguing that electronic and paper correspondence should not be treated differently for the purposes of a First Amendment analysis, that due process should be provided when a prisoner’s email correspondence is restricted, that limiting the length of email correspondence is unconstitutional, that it is unconstitutional for the Defendants to restrict the speech of non-incarcerated persons, and that the applicable law is clearly established for the purposes of qualified immunity. [Doc. 80]; [Doc. 80-1].

The Magistrate Judge recommended that Defendants’ Motion for Summary Judgment be granted. [Doc. 84]. After initially reviewing Benning’s objections [Doc. 87] to the Magistrate Judge’s R&R, the Court recommitted the matter to the Magistrate Judge “to consider Benning’s Procedural Due Process claim in the manner he sees fit.” [Doc. 89, p. 6]. The Magistrate Judge then issued another R&R [Doc. 90] considering Benning’s procedural due process claim and elaborating on his First Amendment analysis. After granting Benning a request for extension of time to file objections, the Court did not timely receive objections from Benning and adopted the R&R after reviewing for clear error pursuant to 28 U.S.C. § 636(b). [Doc. 92]; [Doc. 93]. Judgment was entered against Benning. [Doc. 94]. Benning again requested more time to file objections and the Magistrate Judge denied this request. [Doc. 95]; [Doc. 96]. Benning then moved for relief from the judgment pursuant to Rule 60(b). [Doc. 97]. The Court granted this motion and ordered the judgment

entered against Benning to be set aside. [Doc. 98]. Benning moved to exceed the page limit for his objections (and filed objections exceeding the page limit), and the Court denied that request and ordered him to submit objections conforming with the twenty-page limit. [Doc. 100]; [Doc. 101]; [Doc. 102].

Defendants then filed a response [Doc. 103] to Benning's (now-stricken and over-the-page-limit) objections [Doc. 101]. Benning then re-filed his objections [Doc. 104] and arguments [Doc. 105] within the applicable page limit.² Benning also filed a reply [Doc. 106] to the Defendants' response.

DISCUSSION

A. Benning's Claims for Injunctive Relief

Benning seeks injunctive relief against the Defendants. *See* [Doc. 28, pp. 6, 13 (Asking the Court to order Defendants to not limit length of emails, to not limit who Benning may email, and to not place restrictions on what the email recipients do with Benning's emails)]. The Magistrate Judge allowed Benning's claim against the Commissioner of the GDC to proceed under the doctrine of *Ex Parte Young* because he asked for injunctive relief for ongoing violations of his federal rights against the Commissioner in his official capacity. [Doc. 7]. When the Magistrate Judge allowed the claim for injunctive relief to proceed against the Commissioner, he did so because Benning alleged the

² Benning filed a list of objections [Doc. 104], and then a "brief in support" of objections [Doc. 105]. The brief contains the objections and supporting arguments and is within the twenty-page limit (not counting attached exhibits).

violation was done pursuant to a “formal policy” or “custom.” [*Id.*]. In other words, the Magistrate Judge determined that Benning requested injunctive relief to address a continuing constitutional violation.

Ex parte Young, 209 U.S. 123 (1908), provides an exception to the Eleventh Amendment for “suits against state officers seeking prospective equitable relief to end continuing violations of federal law.” *Florida Ass’n of Rehab. Facilities, Inc. v. State of Fla. Dep’t of Health & Rehab. Servs.*, 225 F.3d 1208, 1219 (11th Cir. 2000) (citation omitted). *Ex parte Young*’s doctrine is only available when the plaintiff seeks prospective injunctive relief. *Id.* It does not apply, however, when a federal law has been violated at one time or over a period of time in the past. *Id.* A plaintiff may not use the doctrine to adjudicate the legality of past conduct. *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999).

Benning concedes that at least some of the violations he seeks injunctive relief to address are not ongoing. Benning states in his latest objections that the Defendants have removed the limit on who Benning may email, and have removed the requirement that those Benning emails have undergone background checks. *See* [Doc. 105, p. 19]. This makes moot Benning’s request that the Court “Order the defendants to allow Plaintiff to email anyone except for persons who have specifically requested to be restricted to Plaintiff,” [Doc. 28, p. 13], and that claim is therefore **DENIED**.

Further, to the extent Benning’s concessions do not moot his other two requests for injunctive relief—that the Court “Order the defendants to not limit the length of outgoing emails,” and “Order the

defendants to not impose restrictions on the use of Plaintiff's electronic communications by non-incarcerated persons"—do not conform with the limits on injunctive relief imposed by the Prison Litigation Reform Act.

Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1). As explained below, and as Benning himself concedes, he has no stand-alone right to email. Nor does Benning point to any law that would require him to have access to emails over a certain length. Because Benning can point to no federal right to send an email over the page limit, this claim for injunctive relief is due to be **DENIED**. Further, Benning's request that the Court order Defendants to remove any "restrictions on the use of Plaintiff's electronic communications by non-incarcerated persons" is extremely sweeping and broad, and does not conform to the "narrowly drawn" or "least intrusive means" requirements of § 3626(a)(1). That claim is therefore **DENIED**.

Therefore, since any possible claim for injunctive relief related to ongoing conduct against the Commissioner is denied as either moot or as a violation of § 3626(a)(1), all claims against the Commissioner fail. See *Ex parte Young*, 209 U.S. 123 (1908).

Further, the claims for injunctive relief against Defendants Patterson and Edgar also fail for the same mootness and § 3626(a)(1) reasons explained above. Therefore, only Benning's claims for nominal damages, compensatory damages, and punitive damages against these remaining defendants are left.³

B. Remaining Claims Against Defendants Patterson and Edgar

Because the remaining claims against Defendants Patterson and Edgar are for damages, the doctrine of qualified immunity may shield them from any liability to Benning. Qualified immunity will protect Patterson and Edgar if they were acting within the scope of their discretionary authority, and if Benning can demonstrate that they violated one of his clearly established constitutional rights. See *Smith v. Ford*, 488 F. Supp. 1314, 1323 (M.D. Ga. Sept. 22, 2020). It is not disputed—and plainly obvious—that Patterson and Edgar were acting within the scope of their discretionary authority. Therefore, whether Benning's claims against Patterson and Edgar prevail will hinge on whether they violated (1) one of his constitutional rights that

³ Benning's requests for declaratory relief are all questions that must be answered as the Court considers the merits of Benning's claims against Defendants Patterson and Edgar.

was (2) clearly established. *Id.* The Court will first consider whether Benning has established that Edgar or Patterson violated his rights guaranteed by the First Amendment or the Due Process Clause. Then, the Court will consider whether either of those rights were clearly established.

1. First Amendment Claim

The Magistrate Judge recommends that the Court grant Defendants’ Motion for Summary Judgment as to Benning’s First Amendment claim because the First Amendment doesn’t protect prisoners from having their email censored. [Doc. 84, pp. 4–10]; [Doc. 90, pp. 7–13].⁴ Benning objects, arguing that (1) the *Martinez* standard should apply to the censorship of outgoing emails—not *Turner*; (2) his claims survive under the *Martinez* standard; and (3) even if *Turner* is the right standard, Benning’s

⁴ To tidy things up a bit, the Court notes that the first R&R [Doc. 84] analyzed Benning’s First Amendment claim and found that it should be dismissed. Benning filed objections [Doc. 87] to this R&R and attacked in detail the Magistrate Judge’s analysis. The Court recommitted the R&R to the Magistrate Judge because it disagreed with the Magistrate Judge’s finding that Benning did not raise a due process claim until his Response to Defendants’ Motion for Summary Judgment. *See* [Doc. 89]. In the Magistrate Judge’s latest R&R [Doc. 90], he defends and elaborates upon his original First Amendment analysis in [Doc. 84]. *See* [Doc. 90, pp. 7–13]. In the interest of being as fair to Benning as possible given the admittedly confusing procedural posture of this case, the Court will perform a “de novo determination of those portions of the report . . . or recommendations to which objection is made,” regardless of whether Benning makes the objection in his initial objections [Doc. 87] or in his latest objections [Doc. 105]. 28 U.S.C. § 636(b)(1).

First Amendment claim nonetheless survives. *See* [Doc. 87-2, pp. 4–16]; [Doc. 105, pp. 9–20].

i. Is prisoner access to email a constitutional right or an administrative privilege?

The Court must first decide whether prisoner access to email is a privilege or a constitutional right protected by the First Amendment. The answer to this critical question is important because if no constitutional right is implicated, then the Court will not have to apply either *Turner* or *Martinez*, because those standards only apply when prisoners' *constitutional rights* are impinged. *See Turner v. Safley*, 482 U.S. 78, 89 (1987). And, if no constitutional rights are at play, then the remaining Defendants will be protected by qualified immunity.

When finding that *Turner* is the correct standard for censorship of outgoing email, the Magistrate Judge concluded that “[a]ccess to email, like access to telephone or other advanced technologies, is a privilege that is above and beyond the ordinary right to correspondence.” [Doc. 90, p. 8]. The Court agrees that prisoner access to email is a privilege. So does Benning. [Doc. 80, p. 6 (“Plaintiff does not have an independent, stand-alone right to electronic correspondence.”)]. But the analysis doesn’t end there.

Prisoners, of course, have First Amendment rights. *See Pesci v. Budz*, 935 F.3d 1159, 1165 (11th Cir. 2019) (“[P]rison walls ‘do not form a barrier separating prison inmates from the protections of the Constitution.’” (citing *Turner*, 482 U.S. at 84)). And, a prisoner’s First Amendment rights include having access to incoming and outgoing communication. In

other words, prisoners have a right to communication; they do not have a right to a specific form of communication, such as telephone or email, but those forms of communication can be a way an inmate exercises his First Amendment right to communicate. *See e.g., Solan v. Zickefoose*, 530 F. App'x 109, 110 (3d Cir. 2013) (recognizing that “e-mail can be a means of exercising” the First Amendment right of communicating with non-inmates); *Bonner v. Outlaw*, 552 F.3d 673, 677 (8th Cir. 2009) (“[T]he reasoning of [*Martinez*] applies to all forms of correspondence addressed to an inmate. It is the inmate's interest in ‘uncensored communication’ that is the liberty interest protected by the due process clause, regardless of whether that communication occurs in the form of a letter, package, newspaper, magazine, etc.” (citing *Martinez*, 416 U.S. at 407)). Benning’s claim does not hinge on his desire to be able to access email and the prison’s refusal to provide him with that access. Benning’s claim focuses on whether Defendants violated his First Amendment rights by censoring four of his emails sent using the email system made available to eligible inmates. Therefore, since the privilege-versus-right distinction does not resolve this question, the Court must still decide whether to apply the *Turner* or *Martinez* standard before it can determine the constitutionality of the censorship of Benning’s four emails.

ii. What is the correct standard of review to apply to regulations of outgoing prisoner email?

The Court begins by considering Benning’s argument that the less-deferential standard from *Procunier v. Martinez*, 416 U.S. 396 (1974) is the

governing standard for restrictions of purely outgoing prisoner emails. In *Martinez*, the Supreme Court determined the appropriate standard of review for prison regulations restricting freedom of speech—specifically censorship of prisoner mail. 416 U.S. at 406–08. It held that a prison could censor prisoner mail if it met two criteria: (1) “the regulation or practice in question must further an important or substantial government interest unrelated to the suppression of expression;” and (2) “the limitation on First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular government interest involved.” *Id.* at 413. The *Martinez* decision was not intended to resolve “broad questions of prisoners’ rights,” but was specific to regulation of “personal correspondence between inmates and those who have a particularized interest in communicating with them.” *Id.* at 408.

Then, in *Turner*, the Supreme Court articulated the standard to be used when scrutinizing regulations of prisoners’ rights in general. 482 U.S. at 89. The two practices at issue in *Turner* were prohibitions on inmate-to-inmate correspondence and restrictions on inmate marriage. *Id.* at 81–82. The Supreme Court held that the same test should be applied to both the inmate-to-inmate correspondence regulation and the inmate marriage regulation: “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Id.* at 89.

After *Turner*, it appeared that *Martinez* was superseded and courts now had one test to apply to all prison regulations infringing on prisoners’

constitutional rights—including those related to prisoner mail. After all, *Turner* uses all-inclusive, sweeping language like “when a prison regulation impinges on inmates’ constitutional rights.” *Id.* But, the Supreme Court then decided the case of *Thornburgh v. Abbott*, which considered the validity of a regulation that allowed prison officials to block prisoners’ receipt of incoming published material, like books, if the material was found to be a security risk. 490 U.S. 401, 403 (1989). The Court of Appeals had applied the *Martinez* test. *Id.* The Supreme Court disagreed with the Court of Appeals and held that the *Turner* test was the proper inquiry for regulation of incoming published materials to inmates. *Id.* at 404. When explaining why *Turner* was to be applied instead of *Martinez*, the Supreme Court reasoned: “the logic of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations concerning outgoing correspondence.” *Id.* at 413 (emphasis added). Therefore, we know that *Martinez* is still alive, and it applies to “regulations concerning outgoing correspondence.” 490 U.S. at 413. What is not clear is whether “outgoing correspondence” includes outgoing prisoner email, or instead only includes traditional hard-copy mail—the kind with envelopes, stamps, etc. 490 U.S. at 413. The Magistrate Judge concludes that *Martinez* is limited to traditional outgoing prisoner mail and not outgoing prisoner email. *See* [Doc. 90, p. 7 (“[*Martinez*] has been limited to its facts, specifically to regulation of outgoing written communication by mail.”)]. Benning objects, arguing that “outgoing correspondence” includes outgoing prisoner email. *See* [Doc. 105].

To reach its conclusion that *Martinez* is inapplicable to regulations of outgoing prisoner emails, the Magistrate Judge relied principally on two Eleventh Circuit cases. First, the Magistrate Judge relied on *Perry v. Secretary of the Department of Corrections*, 664 F.3d 1359, 1365 (11th Cir. 2011), for the proposition that the Eleventh Circuit has limited *Martinez* to its facts: regulation of outgoing written communication by mail. [Doc. 90, p. 7]. *Perry* did not involve a First Amendment claim by a prisoner based on a restriction of outgoing correspondence, but was a claim by someone outside of prison who challenged a restriction on their ability to correspond with a prisoner. *Perry*, 664 F.3d at 1362. The Eleventh Circuit stated that the Supreme Court in *Thornburgh* “limited *Martinez* to regulations involving only *outgoing mail*.” *Perry*, 664 F.3d at 1365 (emphasis added). The Eleventh Circuit then quoted the language from *Thornburgh* in a footnote—language discussed earlier in this order—that uses the term “outgoing correspondence” instead of “outgoing mail.” *Id.* at 1365 n. 1 (quoting *Thornburgh*, 490 U.S. at 413–14). *Perry*, albeit in dicta, shows us that the Eleventh Circuit believed the “outgoing correspondence” referred to in *Thornburgh* actually means “outgoing mail” and would not include email.

Second, the Magistrate Judge found that the restrictions here are comparable to the ones in *Pope v. Hightower*, 101 F.3d 1382 (11th Cir. 1996), and the *Turner* standard should be used here just as it was used there. [Doc. 90, p. 8]. The regulation at issue in *Pope* was a 10-person limit on the number of persons a prisoner could call. 101 F.3d at 1383. The Eleventh Circuit applied the *Turner* standard. *Id.* at 1384–85.

The Magistrate Judge reasoned that email presents an even greater risk than telephone, and so if *Turner* applied in *Pope*, it should certainly apply to the withholding of Benning's four emails. [Doc. 90, p. 8].

Benning objects to the Magistrate Judge's reliance on *Perry* and *Pope* and points to out-of-circuit district courts that have applied the *Martinez* standard to regulations of prisoner emails. [Doc. 105, p. 11]. In *Doe v. Ortiz*, a prisoner challenged the prison's policy of excluding convicted sex-offenders from accessing email. No. 18-2958 (RMB), 2019 WL 3432228, at *1. (D.N.J. July 30, 2019). The court applied *Martinez* and found that the regulation survived constitutional scrutiny. *Id.* at 4–6. *Familetti v. Ortiz* is like *Doe v. Ortiz* in that it also involves a prisoner's challenge to his denial of access to the prisoner email system, and the court also applied *Martinez* to find the denial constitutional. No. 19-cv-7433 (NLH) (AMD), 2020 WL 5036198, at *3–4 (D.N.J. Aug. 26, 2020). These cases show that some courts apply *Martinez* even when the restriction at issue implicates email instead of traditional mail.

But these two cases are different from Benning's case since Benning does not challenge a denial from access to the JPay system, but instead challenges the prison's withholding of certain emails sent through JPay. However, during the Court's *de novo* review, it discovered another case that is factually similar to Benning's that he did not cite. In *Sutton v. Sinclair*, a prisoner challenged the prison's rejection of several pieces of his outgoing mail and email, and the magistrate judge applied *Martinez* to the withholding of his traditional mail and email alike. No. C19-1119-BJR-MLP, 2020 WL 7248463, at *5–7 (W.D. Wash. Sept. 28, 2020) (Peterson, Mag. J.),

adopted No. C19-1119-BJR, 2020 WL 7241363, at *1 (Dec. 9, 2020). However, even applying *Martinez*, the court found the withholding of the prisoner’s email was constitutional.

The Court recognizes that whether the *Martinez* standard governs regulations of outgoing email is a close call. As shown above, judges have examined the applicable precedent and found that outgoing email is “outgoing correspondence” to which the Supreme Court tells us *Martinez* applies. *Thornburgh*, 490 U.S. at 413; *see Doe v. Ortiz*, No. 18-2958 (RMB), 2019 WL 3432228, at *1. (D.N.J. July 30, 2019); *Familetti v. Ortiz*, No. 19-cv-7433 (NLH) (AMD), 2020 WL 5036198, at *3–4 (D.N.J. Aug. 26, 2020); *Sutton v. Sinclair*, No. C19-1119-BJR-MLP, 2020 WL 7248463, at *5–7 (W.D. Wash. Sept. 28, 2020) (Peterson, Mag. J.). Further, when considering the liberty interest protected by the Due Process Clause, the Eighth Circuit found that whether the prisoner’s communication is made by written mail or by email makes no difference and *Martinez* would apply to both. *Bonner v. Outlaw*, 552 F.3d 673, 677 (8th Cir. 2009).

On the other hand, there is no Eleventh Circuit or Supreme Court precedent that has considered whether outgoing email should be treated the same as outgoing traditional mail for the purpose of knowing whether to apply *Turner* or *Martinez* in the First Amendment context. And, as the Magistrate Judge pointed out, the Eleventh Circuit has suggested, in dicta, that *Martinez* is limited to

“regulations involving *only outgoing mail.*” *Perry*, 664 F.3d at 1365 (emphasis added).⁵

Forced to answer a question that is likely an issue of first impression, the Court holds that *Turner* is the proper standard to apply when reviewing the constitutionality of restrictions of outgoing prisoner email. The Court is hesitant to begin applying the more-exacting *Martinez* standard to a new set of facts that could have unanticipated and unknown implications to the administration of our prisons. See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (“Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”).

iii. Applying the Turner standard

Turner requires that the infringement of a prisoner’s constitutional right must be “reasonably related to legitimate penological interests.” *Turner*, 482 U.S. at 89. The Magistrate Judge found that the Defendants’ censorship of Benning’s four emails pursuant to SOP 204.10 satisfies this test.

Benning objects, arguing that “the entire analysis is based upon a false fact, perjured

⁵ The Court also notes that *Pesci v. Budz*, 935 F.3d 1159, 1165 (11th Cir. 2019) (Grant, J.) is not dispositive of this question. It is factually distinct because it does not concern pure outgoing prisoner correspondence, but distribution of a publication to both other civil detainees and the non-incarcerated public alike. *Id.* Therefore, because the regulation was not one of purely outgoing prisoner correspondence, applying the *Turner* standard was appropriate there and *Pesci* does not change the outcome of the analysis in this case.

testimony, and a policy that does not exist, and never existed at any time relevant to the gravamen of the complaint.” [Doc. 105, p. 17]. Further, Benning also states that the Defendants have “expanded” his ability to communicate with the outside world via email, and that Defendants have “granted Plaintiff the relief that he requested,” and he “has prevailed on this issue.” [*Id.* at p. 19].

To start, Benning argues that summary judgment is inappropriate because there is a dispute of material fact as to whether SOP 204.10 was in effect at the time his emails were withheld. [Doc. 80, p. 3]; [Doc. 105, p. 18]. However, the Magistrate Judge correctly concluded that Benning does not sufficiently contradict the Defendants’ evidence that the policy was in effect when Benning’s emails were withheld. [Doc. 90, p. 10 n. 4]. The Defendants introduce SOP 204.10 into evidence and it shows an effective date of “8/15/2017.” [Doc. 64-4]. Benning’s emails that the GDC withheld were sent from September 24, 2017, to February 6, 2018. [Doc. 28, p. 5]. Benning argues that his affidavit [Doc. 80-5] contradicts the fact that SOP 204.10 was in effect during the withholding of Benning’s four emails. [Doc. 80, p. 3]. However, Benning’s affidavit merely states that “SOP 204.10 was not in effect prior to August 15, 2017.” [Doc. 80-5, p. 2]. Since Benning’s first email was not withheld until September 24, 2017, Benning’s assertion in his affidavit creates no dispute of fact relevant to this analysis.⁶

⁶ The point Benning seems to be trying to make in his Response to the Defendants’ Motion for Summary Judgment, and the fact he attempts to establish in his affidavit, is that SOP 204.10 was not in effect at the time he signed the

The analysis now turns on whether the regulation is reasonably related to a legitimate penological interest. The reasonableness inquiry is guided by four factors:

- (1) whether there is a ‘valid, rational connection’ between the regulation and a legitimate governmental interest put forward to justify it;
- (2) whether there are alternative means of exercising the asserted constitutional right that remain open to the inmates;
- (3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and the allocation of prison resources generally;
- and (4) whether the regulation represents an ‘exaggerated response’ to prison concerns.

Pesci v. Budz, 935 F.3d 1159, 1166 (11th Cir. 2019) (quoting *Pope*, 101 F.3d at 1348). The Magistrate Judge applied these four factors and concluded that the censorship of Benning’s emails survives scrutiny under the *Turner* standard and that summary judgment is appropriate. [Doc. 90, pp. 9–13]. The Court agrees.

Regarding the first factor, Benning’s emails were withheld pursuant to a legitimate penological interest. Benning’s emails were withheld pursuant to

Acknowledgement Form. [Doc. 80-5, p. 2]. Benning signing the Acknowledgement Form in order to access the JPay email system is irrelevant to this analysis, which requires that the infringement of Benning’s rights be “reasonably related to legitimate penological interests.” *Turner*, 482 U.S. at 89. As explained earlier in this Order, the fact that prisoner access to email is a privilege, even one that requires signing an acknowledgement form, does not resolve this dispute.

SOP 204.10 [Doc. 64-4, pp. 14–15]. SOP 204.10, which prevents inmates from requesting their emails be forwarded to another, or from requesting information about other offenders, furthers a legitimate penological interest. SOP 204.10 is meant to protect citizens and prison officials from intimidation and threats and to ensure prison security and safety. [Doc. 64-1, pp. 11–12]; [Doc. 64-4, ¶ 28]. Protecting the public, prison officials, and offenders are legitimate penological interests. *See Pope*, 101 F.3d at 1385. And the email restrictions in SOP 204.10 are reasonably related to those legitimate penological interests. *See id.* (providing that a connection between a legitimate penological interest and a restriction is valid and rational so long as it “is not so remote” as to render the restriction “arbitrary or irrational”).

Regarding the second *Turner* factor, Benning has “alternative means of exercising the asserted constitutional right” by means of his unhindered access to USPS and can freely send mail to non-inmates. *Pesci*, 935 F.3d at 1166; [Doc. 28, p. 12]; [Doc. 64-3, pp. 73, 78, 80]; [Doc. 80, pp. 4, 16, 19]. Benning objects, pointing to arguments he raised in his Response to the Defendants’ Motion for Summary Judgment. [Doc. 105, p. 19]. Benning argues that electronic correspondence is the preferred method of communication in the modern age. [Doc. 80, p. 14]. He also argues that there are some things that he can only send electronically and not through USPS. [*Id.* at p. 15]. The Court finds these arguments unpersuasive. The essence of the right at issue here is outgoing communication, and Benning can communicate with the outside world via USPS. *See Pope*, 101 F.3d at 1385 (“[T]he Supreme Court has

instructed that the right must be viewed sensibly and expansively.” (citing *Thornburgh*, 490 U.S. at 417)).

Regarding the third *Turner* factor, “whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and the allocation of prison resources generally,” the Magistrate Judge found that the burden on putting an unlimited number of people on a prisoner’s approved email list would result in prison administrators having to do endless background checks at great cost. [Doc. 90, p. 12]. Benning objects, arguing that there is no longer any limit on who he can email, which, according to Benning, proves the burden on the prison wouldn’t be so tough after all. [Doc. 105, p. 19]. Benning also disputes that those on his approved email list must have undergone background checks. Taking Benning at his word, if there is no longer any restriction on who prisoners can email, and no background check requirement, it does cut against the Government’s showing on this factor.

Finally, regarding the fourth *Turner* factor, the regulations here are not an “exaggerated response” to prison concerns. *Pesci*, 935 F.3d at 1166. As the Magistrate Judge reasoned, in *Pesci*, the Eleventh Circuit upheld a total ban on a monthly publication critical of the prison system. *Id.* at 1171. If the total ban was not an “exaggerated response,” then neither was the censorship of 4 of Benning’s 112 emails sent during 2017 and 2018.

The Court’s *de novo* review finds the Magistrate Judge correctly applied *Turner* to find that the censorship of Benning’s four emails passes

constitutional scrutiny. The Defendants make a strong showing on three of the four factors, with only the third factor possibly cutting in Benning's favor. Therefore, since SOP 204.10 is "reasonably related to legitimate penological interests," the Magistrate Judge's recommendation dismissing Benning's First Amendment claim is due to be adopted.

2. Due Process Claim

In his initial R&R, the Magistrate found that Benning attempted to add a due process claim for the first time in his Response to the Defendants' Motion for Summary Judgment, which is too late. [Doc. 84, p. 2 n. 2]. The Court disagreed because Benning sought to state a claim based on a lack of "notice" and "opportunity to be heard," which are classic procedural due process buzzwords, and, in the Court's opinion, is enough to count as alleging a procedural due process claim under the liberal *pro se* pleading standard. [Doc. 28, pp. 5, 11]. The Court recommitted the R&R to the Magistrate Judge for him to consider Benning's procedural due process claim. [Doc. 89]. The Magistrate Judge did so, and now recommends that any Due Process claim Benning alleged be dismissed because he (1) abandoned it, and, alternatively (2) it fails on the merits. [Doc. 90, pp. 2–7].

Benning's first ten objections focus on this portion of the Magistrate Judge's R&R. [Doc. 105, pp. 1–9]. Benning argues that he alleged a due process claim, that he did not abandon it, and that the claim survives on the merits. [*Id.*]. The Court agrees with Benning that his operative complaint stated—or at least attempted to state—a procedural due process

claim. The issue thus becomes whether Benning has abandoned his due process claim since then.

i. Was Benning's due process claim abandoned?

The Magistrate Judge recommends that Benning's procedural due process claim be deemed abandoned for three overlapping reasons: (1) Benning failed to provide adequate notice of this claim to the Defendants or to the Court; (2) the litigants did not have adequate opportunity to examine this claim through discovery; and (3) Benning did not diligently pursue this claim. [Doc. 90, p. 3].

First, as the Court has already explained in its recommit order and in this Order, Benning did raise a procedural due process claim in his complaint even though he did not use the term "due process" or refer explicitly to the Fourteenth Amendment. *See* [Doc. 89]. Under the *pro se* pleading standard, it is appropriate for the Court to construe Benning's complaint of lack of "notice" and "opportunity to be heard" as a Fourteenth Amendment procedural due process claim. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" (quoting *Estelle v. Gamble*, 429 U.S. 97 (1976))); Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice."). *See also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (cleaned up). Therefore, the

Magistrate Judge's first basis for abandonment—that the Court and the Defendants lacked notice of the claim—falls short.

The Magistrate Judge also recommends that Benning's procedural due process claim should be deemed abandoned because he violated Federal Rule of Civil Procedure 41(b) and the Court's screening order by not diligently prosecuting this claim. Specifically, the Magistrate Judge reasoned that discovery in this case was extensive and contested, and that Benning had ample opportunity to perform discovery related to his procedural due process claim but did not. [Doc. 90, p. 4]. The Magistrate Judge cited Benning's Motion to Compel [Doc. 39] and Motion for Contempt [Doc. 61] as examples of opportunities to request discovery on the procedural due process claim that Benning did not take advantage of. [Doc. 90, p. 4]. Benning objects, and cites to his Motion to Compel where he does request discovery directly relevant to his procedural due process claim. [Doc. 105, p. 6]. Specifically, Benning requested the following in his Motion to Compel:

4. All documents that relate to, refer to, describe or are any notice Plaintiff was or was not given that Plaintiff's emails had been censored/intercepted.
5. All documents that relate to, refer to, describe all persons involved in decisions that relate to, refer to or describe Plaintiff's emails during the request period.
7. All documents that relate to, refer to, describe the processes and procedures used for handling offender emails.

[Doc. 39, p. 4]. The Court finds that these requests—especially the one specific to “notice”—counts as a discovery request directly relevant to Benning’s due process claim. Therefore, the Magistrate Judge’s recommendation that Benning’s procedural due process claim should be deemed abandoned because of his failure to prosecute falls short. Accordingly, the Court must consider the merits of Benning’s procedural due process claim.

ii. Does Benning’s due process claim have merit?

On the merits, the Magistrate Judge recommends that Benning had no liberty interest in his outgoing emails so that any deprivation of them triggered the requirements of due process. [Doc. 90, p. 5]. Benning objects, returning to the argument that *Procunier v. Martinez* establishes there is a protected liberty interest in purely outgoing communications. [Doc. 105, p. 8]. For the same reason the Court decides that email should not be treated the same as outgoing physical mail for the purposes of determining which standard to use in a First Amendment analysis, the Court likewise holds that the liberty interest in “communication by letter” identified by the Supreme Court in *Martinez* should not be interpreted to include Benning’s outgoing emails. 416 U.S. at 417. Further, the Court is unable to identify any claim or objection by Benning, in [Doc. 87-2] or [Doc. 105], that argues he has a protected interest on a basis other than a liberty interest based on a *Martinez* theory. In sum, Benning’s due process claim fails on the merits because he does not have a protected liberty interest in his outgoing emails that would trigger the Fourteenth Amendment’s guarantee of due process.

3. Clearly Established

As explained above, the Court finds that Benning has failed to show a violation of either his First Amendment or procedural due process rights. But, even if the Court wrongly concluded that the Defendants did not violate any of Benning's constitutional rights, whether *Martinez* actually governs "outgoing correspondence" or supports Benning's theory that he has a constitutional liberty interest in outgoing emails is far from being clearly established.

First, the Eleventh Circuit has never issued an opinion directly on point. "The usual way of establishing that a constitutional violation was clearly established law is by pointing to a case, in existence at the time, in which the Supreme Court or [the Eleventh Circuit] found a violation based on materially similar facts." *Cantu v. City of Dothan*, 974 F.3d 1217, 1232 (11th Cir. 2020) (citing *Priester c. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000)). The closest the Court comes to finding a case with similar facts that appeared to apply *Martinez* to censorship of outgoing email is a district court opinion from the Western District of Washington. *See Sutton*, No. C19-1119-BJR-MLP, 2020 WL 7248463, at *5–7, *adopted* No. C19-1119-BJR, 2020 WL 7241363, at *1. Here, the Court admits it is a close call as to whether *Martinez* or *Turner* applies to Benning's claim and the Court has grappled with a question of first impression. And, because it is a question of first impression, the Court easily concludes that these rights were not "clearly

established” so that the Defendants are not entitled to qualified immunity.⁷

CONCLUSION

In conclusion, the Court’s *de novo* review reveals the remaining Defendants are entitled to qualified immunity. The Court agrees that Benning’s First Amendment and procedural due process claims fail on the merits. In other words, the Court finds that the Defendants did not violate any of Benning’s constitutional rights. Therefore, qualified immunity shields the Defendants. In the alternative, assuming that Benning suffered a constitutional violation, the Court finds that those Constitutional rights were not clearly established at the time of the violation. Again, the remaining Defendants would be entitled to qualified immunity so that he is not entitled to any form of relief. Accordingly, the Court concludes that the Magistrate Judge was correct to recommend that the Defendants’ Motion for Summary Judgment be granted, albeit for somewhat different reasons. Therefore, the Court **ADOPTS** the Magistrate Judge’s Report & Recommendation [Doc. 90], and the Defendants’ Motion for Summary Judgment [Doc. 64] is **GRANTED**. The Clerk of Court may enter judgment against Benning.

⁷ A constitutional right can be clearly established even without identifying a case with facts directly on point in “extreme factual circumstances” where the violation goes to the “very core” of the constitutional right at issue. *See Cantu v. City of Dothan*, 974 F.3d 1217, 1232–33 (11th Cir. 2020) (cleaned up). This is not one of those cases.

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SO ORDERED, this 30th day of April, 2021.

S/ Tilman E. Self, III
TILMAN E. SELF, III, JUDGE
UNITED STATES DISTRICT
COURT

APPENDIX C

[Dated: August 17, 2023]

**In the
United States Court of Appeals
for the Eleventh Circuit**

No. 21-11982

RALPH HARRISON BENNING,

Plaintiff-Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF
CORRECTIONS MARGARET PATTERSON,
Georgia Department of Corrections,
JENNIFER EDGAR, Georgia Department of
Corrections,

Defendants-Appellees,

GEORGIA DEPARTMENT OF CORRECTIONS
INMATE EMAIL CENSOR,

Defendant.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:18-cv-00087-TES-CHW

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR
REHEARING EN BANC

Before JORDAN and ROSENBAUM, *Circuit Judges*, and Schlesinger, * District Judge.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

* The Honorable Harvey Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.