No. 23-664

In The
Supreme Court of the United States

RALPH HARRISON BENNING,

Petitioner,

v.

TYRONE OLIVER, COMMISSIONER,
GEORGIA DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner Ralph Harrison Benning is serving a life sentence for murder. Between September 2017 and February 2018, prison officials with Georgia's Department of Corrections withheld four of Benning's outgoing emails because they violated the Department's email policy: they requested the recipient to forward them and/or provided information about other inmates. Benning sued various prison officials in federal court, asserting that those withholding decisions were unconstitutional. The Eleventh Circuit held, erroneously, that the Department's policy of withholding certain emails without particularized notice and an opportunity for administrative appeal violated his right to due process. But it also held that the officials involved are entitled to qualified immunity.

The question presented is whether the Eleventh Circuit correctly granted qualified immunity to prison officials who withheld outgoing emails that violated Department policy, where the court wrongly identified a constitutional violation in the first place.

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INTRODUCTION

Petitioner Ralph Benning asks this Court to fundamentally rethink or outright abolish qualified immunity. That would be an unnecessary task in any case, but it is especially so in *this* case, where not only did the Eleventh Circuit correctly apply the doctrine to a novel issue, but the Eleventh Circuit got the underlying substantive question *wrong*. In other words, there should not have been any need for qualified immunity because the Eleventh Circuit should have held there was no constitutional violation. Inmates have no right to particularized notice and an opportunity for an administrative appeal where their emails are withheld for violating a plainly reasonable prison policy.

Benning, an inmate in Georgia's Department of Corrections, sent many emails from prison between 2016 and 2018. The Department withheld four of those emails because they violated policies prohibiting prisoners from sending emails with requests to forward the message to third parties or with information about other inmates. After Benning filed suit, the Eleventh Circuit ultimately held that the Respondent prison officials had violated his due process rights by failing to provide notice of, and an opportunity to appeal, every decision to withhold a noncompliant email. That was error, but the Eleventh Circuit correctly rejected any damages claims, holding that nothing had clearly established Benning's supposed entitlement.

Benning now argues that certiorari is warranted because Respondent prison officials should have

known of their allegedly unconstitutional conduct, but that argument would fundamentally transform qualified immunity—which seems to be Benning's goal, since he also asks this Court to abandon the doctrine entirely. The prison officials should have known of their supposed constitutional duties, Benning says, because of this Court's decision in *Procunier v. Martinez*, 416 U.S. 396 (1974). There, the Court said prisoners are entitled to procedural safeguards when prison officials censor outgoing physical mail based on rules that discriminate as to content, like whether the prisoner is complaining about the prison. But this Court has not applied *Martinez* since, has overruled much of it, and has never suggested it should be extended to new factual contexts. No part of the Eleventh Circuit's qualified immunity determination merits review.

Even if the Court did want to act as a Court of "first view," *McLane Co. v. EEOC*, 581 U.S. 72, 85 (2017), and address the issue of qualified immunity with respect to due process requirements and prisoner email access, this would be a terrible case to do so. The Court would have to decide the merits of Benning's due process claim to reach the qualified immunity analysis because, of course, for a rule to be *clearly established* it has to be the *correct* rule to begin with. But the Eleventh Circuit got the underlying merits questions wrong. The court all but skipped over the question of whether Benning even has a protected liberty interest that could support a due process claim. The constitution does not create such an interest here—indeed, Benning even acknowledges that the Department need

not provide him *any* access to email. *Benning v. Commissioner*, No. 18-cv-87, ECF Doc. 80 at 6 (M.D. Ga. Mar. 9, 2018). Yet the Eleventh Circuit announced with minimal analysis that because emails are speech and *Martinez* recognized a liberty interest in communication by physical letter, Benning must have a liberty interest in uncensored email communication.

The Eleventh Circuit is wrong. Inmates lose all manner of constitutional rights, and it is error to assume that simply because email is generally "speech," an inmate has a liberty interest in uncensored email requiring due process. Likewise, the casual conflation of physical mail with electronic mail makes no sense—email is a fundamentally different manner of communication than physical letters, implicating a host of security concerns that don't apply to physical mail. Nor has the State somehow *created* a liberty interest through its email policies, as the Department's withholding policies are the furthest thing from an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

And even if Benning had some liberty interest, he would not be due any additional process, as his interest in additional procedures is virtually non-existent and the State's contrary interests are powerful. The Department's policies are objective: additional process will almost never identify any errors. Indeed, Benning has admitted that his emails *did* violate the prison policies. ECF Doc. 80 at 4–5. And the additional burden on the Department would be immense. That means no

additional procedures are required. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("Due process is flexible and calls for such procedural protections as the particular situation demands." (alteration accepted) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))).

Finally, Benning asks the Court to overrule its entire qualified immunity jurisprudence, without even mentioning *stare decisis*. Qualified immunity is a matter of statutory interpretation, based on the understanding that Congress intended "to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Benning does not explain why qualified immunity is unworkable, egregiously wrong, or what reliance interests there are, much less explain why *this* case would be a vehicle for overruling decades of precedent.

Without a split of authority, without reason to doubt the Eleventh Circuit's immunity holding, and without any reason to question qualified immunity itself, there is no reason to grant review. The Court should deny certiorari.

STATEMENT

A. Factual Background

1. Since at least 2015, the Georgia Department of Corrections has allowed inmates to send electronic correspondence—email—subject to certain limitations. *Benning*, No. 18-cv-87, ECF Doc. 73-1 at 54.

Inmates can send emails through two means: (1) kiosks stationed in Department-operated facilities and (2) mobile tablets used for educational, administrative, entertainment, and correspondence purposes. Pet.App.2a. Kiosk and tablet use is "a privilege and not a right," and is subject to various limitations. ECF Doc. 64-4 at 10–17. For the timeframe relevant here, the Department articulated its email policies and limitations in Standard Operating Procedure 204.10. Pet.App.2a–3a. Procedure 204.10 prohibited inmates from sending emails that, among other things, request they "be forwarded, sent, or mailed to others," or "request or send information on behalf of or about another offender." *Id.* at 3a. It also stated that inmates "will be advised of these Rules and that communications which violate this policy will be intercepted without explanation." ECF Doc. 64-4 at 15.

All inmate emails are filtered through the Department's Central Intelligence Unit, where they are electronically screened for a list of key words. *Id.* at 5. Emails not containing any key words are automatically released to the recipient, while emails with key words are flagged for review. *Id*. An analyst reviews every flagged email for compliance with Procedure 204.10. *Id.* The analyst then releases compliant emails to the recipient and withholds noncompliant emails. *Id.*; ECF Doc. 64-5 at 3; ECF Doc. 64-6 at 3; Pet.App.3a.

Before an inmate can send emails, either through a kiosk or a tablet, they must agree to Procedure 204.10's restrictions. Pet.App.2a–3a; ECF Doc. 64-4 at 15. Inmates can access kiosks only after clicking a

terms and conditions button, ECF Doc. 64-3 at 42, and they can access tablets only after signing a form describing applicable restrictions and stating that "[a]ll communications sent or received via the [tablet] or [kiosk] are subject to inspection and review by [the Department]." Pet.App.3a; ECF Doc. 64-4 at 17; ECF Doc. 64-3 at 47. Though it is unclear exactly how often inmates must check the kiosk acknowledgement, it is required "quite frequently." ECF Doc. 64-3 at 45.

2. Petitioner Ralph Harrison Benning is serving a life sentence for murder. Pet.App.3a; ECF Doc. 64-3 at 19, 22. He briefly served in the Navy but was removed from the service after, in his own words, "seeking revenge on the people that killed [his] family." ECF Doc. 64-3 at 21. Shortly after being forced out of the Navy, Benning was arrested and convicted for murdering an eight-year-old boy. He has been incarcerated since 1986, and in that time he has personally prepared and filed at least ten civil lawsuits against various defendants. *Id.* at 19, 23. *See Benning v. Jester*, No. 94-cv-180 (S.D. Ga. Nov. 22, 1994); *Benning v. Garner*, No. 98-cv-3690 (N.D. Ga. Dec. 28, 1998); *Benning v. Brady*, No. 00-cv-27 (S.D. Ga. Mar. 22, 2000); *Benning v. Hall*, No. 01-cv-31 (S.D. Ga. Feb. 28, 2001); *Benning v. Amideo*, No. 02-cv-139 (S.D. Ga. Dec. 18, 2002); *Benning v. Med. Coll. of Ga.*, No. 03-cv-108 (S.D. Ga. July 14, 2003); *Benning v. Wetherington*, No. 03-cv-51 (S.D. Ga. Apr. 30, 2003); *Benning v. Georgia*, No. 08-cv-435 (M.D. Ga. Dec. 12, 2008); *Benning v. Dep't of Corr.*, No. 14-cv-389 (M.D. Ga. Sept. 26, 2014); *Benning v. Deal*, No. 17-cv-152 (M.D. Ga. Aug. 9, 2017).

In 2016, Benning was incarcerated at Wilcox State Prison. ECF Doc. 64-3 at 36. Benning arrived at Wilcox with a Department-issued tablet assigned at Autry State Prison, *id.* at 40, where he received the device upon signing an acknowledgment form noting applicable policies and stating that tablet use is a privilege rather than a right, *id.* at 47; ECF Doc. 64-4 at 19. Kiosks present a similar message and require users to agree to the terms and conditions of use. ECF Doc. 64-3 at 45. Benning read and agreed to those terms and conditions, both when he first accessed a kiosk and several times after. *Id.* at 45–46. Procedure 204.10 took effect on August 15, 2017. Pet.App.2a.

On September 24, 2017, Benning sent an email to his sister that requested she forward it to two of his other sisters and a prisoner advocacy organization. *Id.* at 3a; ECF Doc. 64-6 at 7. Department officials intercepted the email for noncompliance with Procedure 204.10. Pet.App.4a. On October 9, 2017, Benning sent two more emails to his sister that were intercepted because Benning requested they be forwarded to federal legislators. *Id.* at 3a–4a; ECF Doc. 64-5 at 11. Finally, on February 6, 2018, Benning attempted to email a nonprofit organization, but the message was intercepted and withheld because it contained information about another inmate. Pet.App.4a. Benning contacted the email system's internet provider on October 12, 2017, and learned that three of his emails to his sister had been withheld. ECF Doc. 7 at 4–5. Benning sent handwritten copies of the withheld 2017 emails to his

sister—by traditional mail—which she received. Pet.App.4a.

B. Proceedings Below

Benning then filed suit against the Department Commissioner and two Department analysts who withheld his noncompliant emails. Pet.App.5a. He alleged that Procedure 204.10 infringed his claimed right to free expression and his claimed right to notice for each withheld email, a written explanation for the decision to withhold the email, and an opportunity to challenge each withholding determination. *Id.* Benning asked the district court for (among other things): (1) a declaration that the Department must treat inmate email correspondence the same as written correspondence; (2) a declaration that the Department must notify inmates each time an email is withheld for violating Procedure 204.10; (3) a declaration that the Department must provide inmates the ability to respond to each decision to withhold a noncompliant email; (4) a declaration that the Department provide inmates with a written explanation each time a noncompliant email is withheld; (5) an order requiring the Commissioner to adopt a new email policy; and for (6) compensatory, nominal, and punitive damages for his alleged injuries. *Id.* at 36a–37a.

The magistrate judge screened Benning's claims for frivolity and allowed his First Amendment official capacity claim against the Commissioner to proceed. *Id.* at 36a; ECF Doc. 7 at 7. Benning filed no objections, and the district court adopted the magistrate judge's

recommendation. ECF Doc. 15. Respondent prison officials then moved for summary judgment. Benning responded, and for the first time mentioned due process concerns. ECF Doc. 80 at 17. He alleged the Respondents unconstitutionally denied him "any due process," *id.* at 17, 23, but otherwise focused on alleged First Amendment violations, *id.* at 1–16, 17–22. The magistrate judge recommended the Respondents' motion be granted and noted that Benning's due process argument was not properly before the court because he did not object to the magistrate judge's first recommendation and did not raise due process violations until his response to the summary judgment motion. ECF Doc. 84.

Nonetheless, after Benning objected to the second recommendation, the district court recommitted the matter to the magistrate judge to consider Benning's new due process arguments. Pet.App.38a. The magistrate judge then issued a final recommendation, advising that the Respondents' motion for summary judgment be granted. *Id.*

Ultimately, the district court adopted the final recommendation and granted summary judgment to the Respondents. *Id.* at 61a. The court began by rejecting his substantive First Amendment claim because the prison email policy was "reasonably related to legitimate penological interests." *Id.* at 56a. The court also concluded that Benning fell short on his threadbare due process argument, holding that Benning had no liberty interest in sending uncensored emails with forwarding requests or inmate information. *Id.* at 59a.

The court held as well that, even if it were wrong about the absence of a constitutional violation, Benning's case was the first of its kind, entitling the prison officials to qualified immunity anyway. *Id.* at 60a–61a.

Benning appealed and a panel of the Eleventh Circuit affirmed in part and reversed in part. *Id.* at 31a. The panel held that Benning *had* sufficiently alleged a due-process-based constitutional violation but that qualified immunity barred the damages claims. *Id.* at 30a. The court began with Benning's due process claim, first considering whether he had a liberty interest that could trigger due process protections. *Id.* at 8a. The panel held that because "email is a form of correspondence"—and because the Supreme Court had held in *Martinez* that inmates retain a First Amendment interest in sending physical correspondence free from policies that discriminate based on subjective standards like whether the inmate complains about the prison—Benning also retained a liberty interest, "grounded . . . in the First Amendment" in sending emails, as a general matter. *Id.* at 9a, 14a. The panel then held that Benning was entitled to particularized notice of each withheld email, "a reasonable opportunity to protest that decision," and referral to a "prison official other than the [one] who originally disapproved" the email. *Id.* at 14a–16a. The panel did not apply *Mathews v. Eldridge*, 424 U.S. 319 (1976), or any other analysis for determining the process due—it simply ported over the requirements this Court had noted in *Martinez*. Pet.App.16a. Nevertheless, the panel affirmed qualified immunity on Benning's

damages claims because "no governing and materially similar precedent" existed at the time of the disputed conduct. *Id.* at 18a.

The panel did not address Benning's First Amendment claims on the merits because, whether or not Procedure 204.10 violated the First Amendment, "[no] materially similar cases" put the prison officials on notice of any potential constitutional violation. *Id.* at 26a. The court remanded the case to the district court for further proceedings. *Id.* at 30a–31a.

REASONS FOR DENYING THE PETITION

This case does not warrant this Court's review, for numerous reasons. *First*, no other court of appeals has addressed the issues in this case, including whether inmates have a liberty interest in email communications (much less communications that violate objective, reasonable prison policies); if so, whether inmates are entitled to certain procedures; what those procedures should be; what violates those procedures; and whether prison officials are entitled to qualified immunity if responsible for such supposed violations. To create a supposed split in authority, Benning points to an Eighth Circuit decision that has little in common with this case: it involved incoming, physical mail—packages, no less—from an inmate's attorney. Pet. at 9–10. That decision does not conflict with the decision below.

Second, this case is a bad vehicle to resolve any of the questions Benning posits. Benning disputes the court's holding that the prison officials were entitled to

qualified immunity, but the Eleventh Circuit was *wrong on the underlying merits* so this Court would have no need to reach the qualified immunity question. Even if the merits question were debatable, it is beyond debate that the Court would have to *address* it before addressing qualified immunity, so there is a strong possibility this Court could not even reach the question presented.

Third, the Eleventh Circuit was also correct as to qualified immunity, the only aspect of the case that Benning now challenges. Prison officials had no way of knowing that withholding emails that violate prison policy would somehow violate Benning's constitutional rights. Benning points to *Procunier v. Martinez*, but that case has been partially overruled; it has never been applied by this Court since it was decided; it applied to physical mail, not electronic communication (a fundamentally different medium); and it addressed a prison policy that censored on the basis of subjective and questionable rules, like a prohibition on letters that "unduly complain" or "magnify grievances." 416 U.S. at 399. That decision does not come close to clearly establishing the result in this case.

Finally, the Court should not grant this case to consider overruling dozens of cases and eliminating qualified immunity entirely. Benning provides virtually no reason to do so and does not even mention *stare decisis*, which is at its apex where this Court is interpreting a statute rather than the Constitution. There is no reason to reconsider qualified immunity, and there is certainly no reason to do so here.

I. There is no split of authority or any other reason to address these questions now.

Until the Eleventh Circuit's decision here, no circuit court had addressed any of the issues in this case, such as whether an inmate has the sort of protected liberty interest Benning asserts, what standard governs that alleged interest, whether that interest merits procedural protections (and what kinds), or whether qualified immunity applies to any supposed violation of that supposed right. If this Court were to dive into the case right now, it would be a paradigm case of "first view" rather than "review." *McLane Co.*, 581 U.S. at 85 (quotation omitted).

Benning stakes his request for review on the argument that qualified immunity is improper because this Court's rulings in *Procunier v. Martinez*, 416 U.S. 396 (1974), and *Thornburgh v. Abbott*, 490 U.S. 401 (1989), clearly establish that a prisoner is entitled to due process protections every time a prison official intercepts an outgoing email that violates email use policies. Pet. at 7. That is wrong. Indeed, it is doubly wrong—not only is there no clearly established law on that question, but the correct outcome should be that Benning loses on the merits. *See infra* Part II. Benning has no constitutional right to additional procedural protections when prison officials block outgoing emails that violate objective, plainly reasonable prohibitions.

But whatever one thinks of those underlying merits questions, the Eleventh Circuit is the *only* court of appeals to address this issue. Hunting for a split of

authority, Benning can point only to an inapposite Eighth Circuit ruling in *Bonner v. Outlaw*, 552 F.3d 673 (8th Cir. 2009). *See* Pet. at 9–10. According to Benning, *Bonner* departs from the decision here because the court denied qualified immunity to prison officials in a case involving prisons and mail. *Id.* at 9. But the similarities end there; *Bonner* does not conflict with or even address the issues the Eleventh Circuit addressed here. In *Bonner*, the court addressed due process requirements for withholding *physical* packages from an *attorney*, sent *to* their incarcerated client. 552 F.3d at 675. It denied qualified immunity on the basis that withholding a physical package and withholding a physical letter are so similar that *Martinez*—which ostensibly required due process protections for the latter—clearly established the law in this area. *Id.* at 680. That is a highly contestable ruling on its own—the qualified immunity analysis should not proceed at such a high level of generality, *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018)—but it also has nothing to do with the case here, where the Eleventh Circuit analyzed *email* communication, from the *inmate* (who was also able to and did communicate by physical letter), as opposed to a *physical* package sent by an *attorney* (which of course raises a host of additional issues, given the separate rights regarding attorney access that might be at play). Indeed, the fact that Benning can send physical letters makes this case fundamentally distinct, as email is simply an additional outlet not required by the Constitution in the first place. There is nothing inconsistent about *Bonner* and the decision here.

And as a practical matter, there is nothing particularly important about Benning's case, specifically. The handful of email interceptions Benning challenges are hardly egregious even if one believes there was some constitutional violation. The emails *did* violate policy, so they would be withheld even if he had additional procedural rights. Benning agrees, "admit[ting] that he requested that [the recipient] forward his September 24, 2017 and October 9, 2017 emails." *Benning*, No. 18-cv-87, ECF Doc. 80 at 4. And he impliedly admits that the final email violated policy, claiming that "information [about another inmate] contained in [Benning's] February 6, 2018 email was open public information available to anyone." *Id.* at 5. He wants review to obtain damages for officials failing to impose significantly more burdensome procedures that would have led to the *exact same* result.

Moreover, Benning still had general access to other forms of communication: telephones, video calls, physical mail, in-person visits, and email subject to certain constraints. ECF Doc. 64-3 at 37, 54, 60; ECF Doc. 73-3 at 54; ECF Doc. 73-4 at 33. Benning was able to send physical letters containing the same communications to his sister. ECF Doc. 64-3 at 74. Even if the prison officials erred (and they did not), and even if the Eleventh Circuit erred in granting qualified immunity (and it did not), this case hardly cries out for Supreme Court intervention.

II. This case is not a vehicle to resolve qualified immunity questions because the Eleventh Circuit was wrong on the antecedent liability question.

There is a critical problem with Benning's petition: not only was the Eleventh Circuit correct to grant qualified immunity, it was wrong to hold there was constitutional liability. Were the Court to grant review, the primary issue would not be whether an officer should have *known* his actions violated the Constitution, it would be *whether* those actions violate the Constitution, and the answer to that question is *no*, they don't.

The Eleventh Circuit erred both in holding there was a liberty interest at all (there can be no due process violation without a liberty interest) and then in improperly foisting a burdensome administrative appeal regime on state prisons (just because there is a liberty interest doesn't mean the state must engage in all manner of procedure). Even if there is some question on the underlying merits, *that* would be the primary question for the Court to answer, making it unlikely or at least uncertain that the Court could even reach the questions Benning proposes.

1. To show a Fourteenth Amendment Due Process Clause violation a plaintiff must first show that "there exists a liberty or property interest of which [they have] been deprived." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). That is necessary because no one is entitled to due process unless they are deprived of "life, liberty, or property." U.S. Const. amend. XIV, § 1;

Meachum v. Fano, 427 U.S. 215, 223–24 (1976). A liberty interest can "arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,'" or it can "arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

Constitutional liberty interests are typically limited to those contained in the Bill of Rights, *Paul v. Davis*, 424 U.S. 693, 710 n.5 (1975), or those "careful[ly] descri[bed]" interests that are "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it was sacrificed," *Kerry v. Din*, 576 U.S. 86, 93 (2015) (lead op.) (alteration accepted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)). The Court defines those interests narrowly. *See*, *e.g.*, *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (holding prisoner entitled to due process protections before "involuntary commitment to a mental hospital"); *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (recognizing a prisoner's liberty interest in "avoiding the unwanted administration of antipsychotic drugs"); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (describing protected liberty interests as those "long recognized as essential to the orderly pursuit of happiness by free men" (alteration accepted) (quotation omitted)).

State-created interests are generally "a right or status . . . recognized and protected by state law." *Paul*, 424 U.S. at 710–11. They are often property interests, which are "not created by the Constitution" but by

state "rules or understandings . . . that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. The interests, like continued receipt of welfare benefits, are typically "a matter of statutory entitlement for persons qualified to receive them." *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). Those laws or policies create protected interests when the benefit recipient "[has] a legitimate claim of entitlement to" that benefit, rather than an "abstract need," "desire," or "unilateral expectation of it." *Roth*, 408 U.S. at 577.

Of course, things are different in prison. Convicted criminals receive due process in their criminal proceedings, and after those proceedings result in conviction, inmates *lose* many of their prior liberties. *Meachum*, 427 U.S. at 224 ("[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system."). Prisoners cannot, for instance, attempt to leave prison and demand procedural rights when prison guards deny them that opportunity. They cannot petition to carry firearms and then demand procedural rights when prison administrators flatly refuse. In the prison context, then, state-created liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the

inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

Benning has neither a constitutional nor a state-created liberty interest in sending uncensored emails. As to the Constitution, Benning even conceded as much below, admitting he has no "independent, stand alone, right to electronic correspondence." *Benning*, No. 18-cv-87, ECF Doc. 80 at 6. That was a wise concession, as prisoners do not have a First Amendment right to access any particular form of communication. *See Pell v. Procunier*, 417 U.S. 817, 823 (1974) (upholding ban on media interviews with some inmates when it merely "restrict[ed] one manner of communication between prison inmates and members of the general public beyond the prison walls"); *Lane v. Williams*, 689 F.3d 879, 884 (7th Cir. 2012) ("As maligned as the United States Postal Service may be, there is no First Amendment right to a means of sending letters superior to the one it provides."). And nothing this Court has said, in *Martinez* or elsewhere, identifies any constitutional provision endowing prisoners with an independent liberty interest in access to uncensored email communication.

The Eleventh Circuit held that inmates have a liberty interest in uncensored email communication, "grounded in the First Amendment," Pet.App.9a, but its minimal reasoning leaves much to be desired. It first declared that emails are "speech." *Id.* No doubt—but prisoners lose *many* First Amendment rights (not to mention Second Amendment rights, Fourth Amendment rights, and so on) by virtue of their crimes.

Simply identifying something as speech does nothing to establish a prisoner has a protected liberty interest in engaging in that speech.

Next, the court asserted that "the rationale of *Martinez* is concerned with correspondence from inmates, regardless of the form (or medium) the correspondence takes." *Id.* at 10a. The court's analysis boils down to the notion that emails serve as the "electronic equivalent" of physical mail. *Id.* at 11a. But that is wrong thrice over. As a practical matter, email is the "equivalent" of physical mail in the same way an airplane flight from Illinois to Oregon is the "equivalent" of the Lewis and Clark expedition. Emails are fundamentally different from physical mail, especially in their immediacy (instantaneous versus multi-day lags), their ease of use (and hence ability to submit high volumes), and the ease of forwarding.

Moreover, applying *Martinez* as a matter of *substantive* law to create a First Amendment liberty interest in uncensored prison email is, at best, highly questionable. This Court all but walked away from *Martinez* in *Thornburgh*, explicitly rejecting "*Martinez*' less deferential approach" as "not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons." 490 U.S. at 409–10. *Martinez* itself is the only time the Court has applied its more stringent substantive standard—in the limited context of a physical letter "written by or addressed to" a prisoner. *Martinez*, 416 U.S. at 418. And *Martinez* bears no factual resemblance to this case, because the former dealt with a

regulatory scheme that permitted prison employees to censor prisoners' letters if they "unduly complain[ed]" or "magnif[ied] grievances." *Id.* at 399. Worse still, "[n]o further criteria were provided to help members of the mailroom staff decide whether a particular letter contravened any prison rule or policy." *Id.* at 400. The Court was understandably concerned about such "extraordinary latitude" to apply "personal prejudices and opinions." *Id.* at 415. That is not a concern here. Procedure 204.10's objective standards, like barring emails with forwarding requests, share nothing with the subjective censorship "standards" the Court analyzed in *Martinez*.

The Court has not applied *Martinez*'s substantive standard in any other context or any other case, *Thornburgh*, 490 U.S. at 413, instead "resolv[ing]" that the standard for a prisoner's alleged substantive constitutional violation is whether the challenged regulation is "reasonably related to legitimate penological interests," *Turner v. Safley*, 482 U.S. 78, 89 (1987). Uncritically relying on *Martinez* to find some previously undiscovered First Amendment liberty interest—without even mentioning *Thornburgh* or *Turner*—is a sufficient reason to reject the Eleventh Circuit's opinion.[1]

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[1] *Martinez* itself is non-committal about where the supposed liberty interests lie. The Court based its holding that prisoners are entitled to send physical letters free of arbitrary censorship not on a prisoner's supposed liberty interest but on the "First . . . Amendment rights of *those who are not prisoners*," 416 U.S. at 409 (emphasis added), that is, the people *outside* prison wanting to communicate with those inside. It is not clear why that would

And the Eleventh Circuit did not even consider that prisoners (including Benning) have numerous means of communicating with the outside world. Uncensored email access would be a different consideration if it were the *only* means of communication, but it is nowhere close.

The Eleventh Circuit's final argument was its weakest: it asserted that the Department itself views emails as "functional[ly] equivalent" to physical letters. Pet.App.12a. That is both objectively false and completely irrelevant. Emails are, as a general matter, instantaneously transmitted. Only if the Department's automated system detects certain words do prison officials review them for compliance before releasing them—so by definition, the Department does not treat them the same as physical correspondence. More importantly, how the Department treats emails as compared to another medium has no bearing on whether the Constitution provides some independent liberty interest to inmates, nor did the Eleventh Circuit explain why it would. *Maybe* it could have relevance to whether the State *created* a relevant liberty interest (although even there it is not obvious how), but it is not clear why anything the Department or its officials do affects whether Benning or other inmates have a preexisting *constitutional* liberty interest in uncensored email communications.

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support due process rights for inmates, which is probably another reason this Court has not applied *Martinez* since *Martinez*.

And there is no state-created liberty interest here, either, nor does Benning really suggest there is. In the context of prisons, this Court evaluates state-created liberty interests under *Sandin*, which requires a prisoner to show they were subject to an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." 515 U.S. at 484. That hardship must "present a dramatic departure from the basic conditions of the inmate's sentence." *Wilkinson*, 545 U.S. at 223 (alteration accepted) (quoting *Sandin*, 515 U.S. at 484). Because the Due Process Clause "confers no liberty interest in freedom from state action taken within the sentence imposed," procedural protections do not attach to state policies unless the "nature of the deprivation" amounts to "grievous loss of liberty retained *even after sentences to terms of imprisonment*." *Sandin*, 515 U.S. at 480–81 (emphasis added) (quotations omitted).

A few cases decided since *Sandin* illustrate the analysis. The first, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), concerned a death-row inmate's claimed due process interest in state clemency proceedings. *Id.* at 279–80 (lead op.). Applying *Sandin*, Justice Rehnquist said that "the availability of clemency, or the manner in which the State conducts clemency proceedings, does not impose atypical and significant hardship on the inmate[.] . . . A denial of clemency merely means that the inmate must serve the sentence originally imposed." *Id.* at 283 (quotation omitted). Because the inmate was not entitled to clemency in the first place, his interest in the clemency

proceedings themselves was nothing more than a "unilateral hope." *Id.* at 282.

The second, *McKune v. Lile*, 536 U.S. 24 (2002), addressed an inmate's claim that participation in a sex abuse rehabilitation program being conditioned on an admission of guilt for all of the inmate's sexual misconduct violated his privilege against self-incrimination. *Id.* at 29–32 (lead op.). Failure to participate in the program meant the inmate's "visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and other privileges automatically would be curtailed" and he "would be transferred to a maximum-security unit, where his movement would be more limited, he would be moved from a two-person to a four-person cell, and he would be in a potentially more dangerous environment." *Id.* at 30–31. Justice Kennedy analogized an inmate's privilege against self-incrimination to the liberty interests protected—or not protected—by the *Sandin* test. *Id.* at 37–38. Though considering the self-incrimination privilege, the plurality referenced its procedural due process precedents to explain why it rejected the inmate's claim. *Id.* at 39. In *both* contexts, the plurality said, the expectation of continued receipt of discretionary benefits is "too ephemeral and insubstantial to trigger procedural due process protections." *Id.* (quotation omitted).

Woodard and *McKune* illustrate that the "unilateral hope" in continued receipt of most discretionary benefits does not support a due process claim because the loss of those benefits can almost never constitute

an "atypical and significant hardship." *Sandin*, 515 U.S. at 484. In certain rare instances, it might. In *Wilkinson*, for example, the Court held that being sent to a supermax facility "synonymous with extreme isolation . . . for an indefinite period of time" satisfied *Sandin*'s test. 545 U.S. at 214–15. But as *Wilkinson* makes clear, those sorts of hardships must be extreme and atypical for prison life.

The inability to send uncensored email messages that violate prison policy is neither atypical nor significant. The Department's sensible email restrictions are nothing more than a condition attached to receipt of a discretionary benefit. Pet.App.2a–3a. Benning was neither denied a reward nor subject to a penalty. He was not required to accept the email use conditions, and unlike the prisoner in *McKune*, he lost no privileges even for failure to comply with those conditions. At all times Benning was free to access email and send messages compliant with Department policy. And he remains free to access traditional means of communication without losing any other privileges. Like the prisoner in *Woodard*, who had no claim to clemency and thus no liberty interest in clemency proceedings, Benning has no claim to email access per se and thus no liberty interest in any procedure regulating that access. Things might be different if email were the *only* form of communication a state allowed. But where the Department allows multitudinous forms of communication with the outside world, Benning cannot seriously maintain that he has a state-created liberty interest in *uncensored* email communication, where he

agreed that the State is not compelled to provide him email at *all*. ECF Doc. 80 at 6.

In *Sandin* itself the Court held that a thirty-day disciplinary segregation in a single-inmate cell, accompanied by partial revocation of phone and visiting privileges, does not rise to an "atypical, significant deprivation" implicating due process. 515 U.S. at 476 & n.2, 486. It is hard to understand how the interception of outgoing, noncompliant emails points to a state-created liberty interest where 30 days of isolation does not.

"Although the amount and quality of process that [the Court's] precedents have recognized as due under the [Due Process] Clause has changed considerably since the founding, . . . it remains the case that *no* process is due if one is not deprived of life, liberty, or property." *Kerry*, 576 U.S. at 90 (lead op.) (citations omitted). Benning has no liberty interest at stake, so no process was due.

2. Even if Benning did have a protected liberty interest of some sort, the next step would be applying *Mathews v. Eldridge* to identify any required procedures. 424 U.S. 319, 334–35 (1976). As in *Wilkinson*, 545 U.S. at 225, applying the *Mathews* standard requires balancing three factors: (1) the private interest affected; (2) the risk of erroneous deprivation under existing procedures, including the probable value of additional procedures; and (3) the public's interest, including fiscal and administrative burdens. 424 U.S. at 335. The Eleventh Circuit did not bother to mention or

apply this test, Pet.App.14a–16a, and if it had it would have ruled differently.

Benning characterizes his interest as "uncensored communication by [email] . . . protected from arbitrary governmental invasion." Pet. at 8 (quoting *Martinez*, 416 U.S. at 418). That interest, Benning claims, entitles him to notice and an opportunity to challenge each and every withheld email. *Id.* at 7. But *Wilkinson* makes clear that his interest, if any, would be much narrower. There, inmates claimed due process rights preceding placement at a supermax facility. The Court held that the placement imposed an "atypical and significant hardship" which created a liberty interest supported by procedural protections. *Wilkinson*, 545 U.S. at 224. Yet for the purpose of the first *Mathews* factor, the Court described their interest as "avoiding *erroneous* placement at [the supermax]." *Id.* at 225 (emphasis added). Like the *Wilkinson* inmates, Benning's real concern is making sure that the claimed deprivation—email interception—is not imposed erroneously. So Benning's interest is not in uncensored email access generally; it is in "avoiding erroneous" interception of outgoing emails. *Id.* Obviously, that interest is far less weighty than avoiding an erroneous, near-total isolation in a supermax facility.

Next, the risk of erroneous deprivation under existing procedures is negligible. This factor considers "the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. Even without the procedures Benning seeks, the risk of erroneous deprivation is low. Determining whether

emails violate Procedure 204.10 is almost entirely objective. ECF Doc. 64-4 at 14–15. The analysts had no trouble recognizing that Benning's withheld emails contained prohibited requests to forward and/or information about another inmate. *Id.* at 21 ("Please ensure that Jason Iran Harris' address is corrected."); ECF Doc. 64-5 at 11 ("Maybe the address . . . could be used to send this one out to US Congressmen and Senators."); ECF Doc. 64-6 at 7 ("Please shoot a copy of this to USPLAP and to VA and PJ and of course anyone else you think might be interested. You can ask USPLAP to send this out also."). And Benning *agrees* the analysts properly applied them to his emails. ECF Doc. 80 at 4–5. He "admits that he requested that [the recipient] forward" two of his emails, *id.* at 4, and that another withheld email "contained information about another offender," *id.* at 5. Benning does not argue that he suffered an erroneous deprivation *in his own case*.

In *Wilkinson*, the risk of erroneous supermax placement was deemed low even though based on largely subjective factors assessing an inmate's "security risk." 545 U.S. at 215, 216, 227. Procedure 204.10's criteria are far more objective, both in an absolute sense and relative to *Wilkinson*. The procedural protections Benning desires *might* reduce the risk of erroneous deprivation by an infinitesimal amount, but that risk is so low in the first place that additional procedures would be all but pointless.

"The third *Mathews* factor addresses the State's interest." *Id.* at 227. And "[i]n the context of prison management . . . this interest is a dominant

consideration." *Id.* It is "[t]he State's first [penological] obligation . . . to ensure the safety of guards and prison personnel, the public, and the prisoners themselves." *Id.* This factor also concerns "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Here, that includes serious security risks from prisoner email access and the administrative challenges of operating a system that deals with high volumes. Prison officials need to be able to quickly identify harmful or noncompliant messages to keep up with the speed of outgoing email. They must be able to process a volume of outgoing emails that can be orders of magnitude higher than outgoing physical letters.

Instant, high-volume transmission makes it easier to send coded messages, coordinate criminal enterprises inside and outside prison, and overwhelm prison administrators with so many outgoing emails that they cannot effectively identify harmful transmissions. Email also presents a special risk in the child crimes context, providing prisoners a quick and easy way to harass their victims. Frank D. LoMonte & Jessica Terkovich, *Orange is the News Blackout: The First Amendment and Media Access to Jails*, 104 Marq. L. Rev. 1093, 1146 (2021) ("When an inmate uses a jail computer to send e-mail, the jail's interests in regulating that communication are heightened; a crime victim who receives harassing or threatening e-mails might justifiably ask why a jail turned an inmate loose with internet access to do harm."). And that is not an

abstract concern here, as Benning tortured the eight-year-old for whose murder he is incarcerated. ECF Doc. 73-6 at 27 ("I tortured and killed an innocent.").

Whatever Benning's private interest (next to none), and whatever value additional procedural safeguards might offer (none), they have to overcome "dominant" concerns about security, public safety, and administrative and fiscal feasibility. *Wilkinson*, 545 U.S. at 227. Benning's interest comes nowhere close.

The Eleventh Circuit opinion, in coming to a contrary conclusion, does not even *analyze* what procedures should be required. It just transfers over *Martinez*'s requirements for physical mail. Pet.App.14a–16a. But that makes no sense. There is an analysis (*Mathews*) for this sort of thing, and the court just did not do it. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (alteration adopted and quotation omitted). But the Eleventh Circuit held that a prisoner is entitled to the *exact same* procedural protections for any and every method of outgoing communication under any and every prison communications policy.

The Eleventh Circuit should have ruled against Benning across the board. This Court need not address

qualified immunity where the lower court did not even get the merits right.

III. The Eleventh Circuit was correct on qualified immunity.

Another reason not to grant certiorari is that the Eleventh Circuit was correct, at least as far as qualified immunity is concerned. No one has contested that the prison officials were performing discretionary functions in the course of their state duties. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). So to overcome qualified immunity, Benning must show that this Court's precedent is so clear that "every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Wesby*, 583 U.S. at 63. A "high degree of specificity" is required. *Id.* (quotation omitted). The rule must be "clearly established at the time" the alleged violation occurs. *Id.* (quotation omitted). And "[a] rule is too general if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that the rule was firmly established." *Id.* at 64 (alteration accepted and quotation omitted).

These basic principles doom Benning's argument. Even assuming there was a constitutional violation—and there was not—it was not *clearly established*. Benning claims the prison officials should have known that the Constitution required them to treat emails and physical letters exactly the same. Pet. at 11. But email bears little resemblance to physical mail. Where physical mail takes days or weeks, email is instant. Even advocates for greater email access in prison

acknowledge that "[e]mail, unlike paper mail, is almost immediate and requires virtually no human intervention between sending and delivery. Therefore, it is much more difficult to monitor than paper mail." Karen J. Hartman, Legislative Review, *Prison Walls and Firewalls: H.B. 2376*, 32 Ariz. St. L.J. 1423, 1433 (2000); *see also* Neil L. Sobol, *Connecting the Disconnected: Communication Technologies for the Incarcerated*, 53 Wake Forest L. Rev. 559, 585 (2018) ("[E]lectronic messaging provides the potential for instantaneous communication and avoids the delays associated with visitation or mail services.").

If not flagged, emails containing coded messages or other sensitive information can reach their recipient immediately. That message, as in the case of Nathan Weekes, one of Georgia's "prison kingpins," could be instructions to assassinate someone outside the prison. *See* Danny Robbins & Carrie Teegardin, *From the Inside: Criminal Kingpins*, Atlanta Journal-Constitution (Dec. 28, 2023), https://www.ajc.com/news/investigations/prisons-kingpins/ (describing Weekes's criminal empire, which he ran while incarcerated, and the three murders he ordered from inside a state prison); *see also* Danny Robbins & Carrie Teegardin, *Hundreds of GA prison employees had a lucrative side hustle: They aided prisoners' criminal schemes*, Atlanta Journal-Constitution (Sept. 21, 2023), https://www.ajc.com/news/investigations/prisons-inside-job/ (detailing one inmate's successful theft of $11 million from a Charles Schwab account while incarcerated). And that risk is multiplied by the fact that the non-incarcerated

recipient can transmit any dangerous message to an unknown third party—also instantly.

Volume compounds that risk. Just as emails can be transmitted instantly, they can be prepared nearly as quickly. Where a physical letter, even a short one, takes time to write, seal, and deposit in the mail, email composition is limited only by a prisoner's typing speed. They could send dozens of emails in the time it would take to prepare and send even a single physical letter. And prison officials already struggle to monitor prison mail. *See*, *e.g.*, Titia A. Holtz, Note, *Reaching Out from Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 Brooklyn L. Rev. 855, 891 n.222 (2002) (at California's Pelican Bay prison, officials must individually screen each one of the "two to five thousand pieces of [physical] mail" opened every weekday).

Benning notes that *Martinez* and *Thornburgh* were decided decades ago, Pet. at 7, which is true enough, but they do not come *close* to establishing that where a prison system voluntarily provides access to email it must also provide particular due process protections to avoid the unlikely and relatively unimportant event of an erroneous withholding of inmate email. Indeed, *Martinez* addressed a completely different prison policy, which forbade inmates from "unduly complain[ing]" or "magnify[ing] grievances." 416 U.S. at 398–400. How would a prison official in 2017 know that the far less controversial policy at issue here, focused on objective prohibitions, would be subject to the same scrutiny? Only clairvoyant prison officials could

have known how the Eleventh Circuit would rule in this case.

Close cases are mutually exclusive with "clearly established" rules that are "beyond debate." *Wesby*, 583 U.S. at 63 (quotation omitted). If anything, this case should have been a clear winner for the prison officials. There is no way it was a clear loser for the prison officials, and this Court need not grant review to decide as much.

IV. This Court should not grant review to eliminate qualified immunity.

Benning asks the Court to abolish, alter, or "clarify" qualified immunity. Pet. at 12. Qualified immunity does not need overhaul or abolition. And even if it did, the case to roll the doctrine back would *not* be a case where courts have disagreed on the underlying constitutional violation, Pet.App.16a, 59a, and the supposed "damages" are the failure to be noticed about emails that obviously and concededly violated Department policy.

The Court has repeatedly, and recently, reaffirmed qualified immunity. *See*, *e.g.*, *City of Tahlequah v. Bond*, 595 U.S. 9, 11 (2021); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6–7 (2021). The Court has often, and recently, declined numerous opportunities to abolish or rework qualified immunity or its application in lower courts. *See*, *e.g.*, *N.S. v. Kansas City Bd. of Police Comm'rs*, 143 S. Ct. 2422 (2023); *Lombardo v. City of St. Louis*, 143 S. Ct. 2419 (2023); *Ramirez v. Guadarrama*, 142 S. Ct. 2571 (2022); *James v. Bartelt*, 142 S. Ct. 4 (2021).

Even if one disagrees with the doctrine, *stare decisis* considerations would be paramount, yet remarkably, Benning does not even mention the term. And "stare decisis carries enhanced force when a decision . . . interprets a statute . . . unlike in a constitutional case." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455–56 (2015). Being grounded in this Court's interpretation of 42 U.S.C § 1983, qualified immunity precedents can be altered by Congress at any time. Decades of cases upholding and applying qualified immunity—and the absence of legislative intervention throughout—are an exceedingly strong basis for leaving them in place. At the very least, Benning must provide some reason the Court should grant review here and then overcome *stare decisis* considerations, and he has provided none at all.

Even if the Court wanted to reexamine qualified immunity, this case would still be a bad vehicle. If paring back qualified immunity were ever advisable, it would be in a case where it shielded a state actor guilty of a constitutional violation that actually harmed someone. But Benning's case is nothing of the sort. The constitutional violation he alleges—the absence of procedures that would make no difference as to the substantive outcome—is hardly egregious. Indeed, it is not clear he suffered *any* harm since he conceded that his emails *did* violate prison policy. And of course, correctly understood, there was not even a constitutional violation. But if there were, it is surely one of the least damaging in the history of the nation. That is no springboard for undoing decades of precedent.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted,

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