No. 22-594

In The

Supreme Court of the United States

HJALMAR RODRIGUEZ, JR.,

Petitioner,

v.

EDWARD H. BURNSIDE, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE AND THE JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICI CURIAE* SUPPORTING PETITIONER

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

Howard Slugh
JEWISH COALITION FOR RELIGIOUS LIBERTY
2400 Virginia Ave N.W. C619
Washington, DC 20037

Theodore A. Howard
*Counsel of Record
Krystal B. Swendsboe
William Turner
WILEY REIN LLP
2050 M St NW
Washington, DC 20036
202.719.7314
thoward@wiley.law

Counsel of Record for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

The Jewish Coalition for Religious Liberty ("JCRL") is an organization of Jewish rabbis, lawyers, and professionals who are committed to defending religious liberty. JCRL aims to protect the ability of all Americans to freely practice their faith and foster cooperation between Jews and other faith

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[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than amici or their counsel, made a monetary contribution to fund the brief's preparation or submission. All parties in this case were provided timely notice of amici's filing of this brief.

communities. To that end, JCRL is committed to defending First Amendment precedent, like *Turner v. Safley*, 482 U.S. 78 (1987), that offers broad protection for religious liberty.

JCRL is particularly interested in ensuring prisoners' religious liberty. As its members may adhere to practices many in the majority may not know or understand, JCRL has an interest in ensuring that prisoners are able to practice the tenets of their faith without unconstitutional limitation and that government actors are held to the appropriate legal standard when burdening a prisoner's religious exercise. To protect that interest, JCRL has filed amicus briefs in the Supreme Court of the United States, as well as in state supreme courts and lower federal courts, and it has submitted op-eds to prominent news outlets.

SUMMARY OF ARGUMENT

This case is about protecting prisoners' First Amendment right to freely exercise their faith in prison. Petitioner Hjalmar Rodriguez is a devout Muslim who seeks to exercise his faith through a daily ritual bathing (*ghusl*) and personal modesty. He is prevented from doing so by a prison policy that limits him to three showers a week—rendering his prayers "void," Pet.App. at 36a–38a—and requires him to strip to his boxers to travel to and from the showers. *See* Pet.App. at 3a–4a. This policy severely impairs Petitioner's ability to exercise his faith and he has been denied all accommodations that would allow him to exercise his faith as described. And, due to the Eleventh Circuit panel's misinterpretation and distortion of Supreme Court precedent, all prisoners are at risk of similar infringement.

More than 35 years ago, in *Turner v. Safley*, 482 U.S. 78 (1987), this Court articulated a four-factor test to evaluate whether a prison policy violates the First Amendment rights of prisoners. *See id.* at 89. To that end, *Turner* held that "several factors are relevant in determining the reasonableness of the regulation at issue." *Id.* "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* (citation omitted). Second, courts consider "whether there are alternative means of

exercising the right that remain open to prison inmates." *Id.* at 90. Third, courts are required to assess "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* And, finally, courts must consider "the absence of ready alternatives [as] evidence of the reasonableness of a prison regulation." *Id.* Each of the four factors plays an important role in determining whether a restriction on a prisoner's constitutional rights is acceptable in light of the prison setting.

Due to the unique circumstances of a prison, the *Turner* standard seeks to balance prisoners' fundamental rights and the government's institutional and penological interests. *See id.* at 85 ("Our task . . . is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" (citation omitted)). At bottom, the *Turner* standard is designed to protect prisoners' fundamental First Amendment rights and, taking into account the need for deference to prison officials' judgments regarding issues of safety and cost, it is an important check on broad government power over prisoners. As the Court clearly established, "[p]rison

walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.* at 84.

The Eleventh Circuit panel disregards and imperils this important precedent in several ways. Critically, the Eleventh Circuit panel misinterpreted the *Turner* standard, effectively ignoring the majority of the *Turner* factors and reducing it to a mere "rational connection" test under which the government will undoubtedly always win. The *Turner* decision made clear that each of the four factors "are relevant in determining" whether a prison regulation implicating constitutional rights may be upheld. *Id.* at 89. Although the Eleventh Circuit panel purported to apply the *Turner* standard, it failed to engage with each of the factors, giving short shrift to three of the four factors this Court commanded lower courts to consider. To justify its error, the panel distorted additional Supreme Court precedent, twisting it to make pronouncements this Court has never made.

The Eleventh Circuit panel further erred by refusing to evaluate the individualized accommodations proposed by Petitioner. This refusal is inconsistent with *Turner* and, in refusing, the panel created a circuit split. *Turner* made no statement disqualifying individualized accommodations from consideration, and every circuit to address the matter—except the Eleventh Circuit—has found that individualized accommodations, or as-applied

challenges, to prison policies are appropriate. And on a purely practical level, the panel's refusal hamstrings a prisoner seeking redress of constitutional infringement by requiring him or her to propose sweeping, prison-wide policy changes that will no doubt be refused as expensive, burdensome, and impractical to implement.

The Eleventh Circuit panel's failure to faithfully interpret and apply the *Turner* factors threatens the free exercise of prisoners across the United States. *Turner* is designed to be a constitutional check on prison power, and the panel's undermining of that standard in the Eleventh Circuit weakens that check elsewhere. Indeed, examples of unconstitutional prison policies that were rejected elsewhere but would pass muster in the Eleventh Circuit under the panel's opinion are abundant.

Finally, and perhaps most immediately, the panel's refusal to consider Petitioner's proposed individualized accommodations creates a perverse result that further undermines *Turner*. By refusing to consider individualized accommodations, the panel perversely requires prisoners to seek broad, prison-wide policy changes. To the extent these proposed accommodations are not rejected out of hand for being too expensive and disruptive to the prison, they are certain to disrupt the daily maintenance of a prison that belies *Turner*'s policy of "judicial restraint." *Id.*

at 85. Further, by eliminating consideration of a wide scope of accommodations that may be used to show a prison policy is not reasonable, courts are less able to correct infringement based on pretextual or exaggerated policy responses. These sorts of arbitrary or irrational policies are the precise harm that *Turner* sought to prevent. *See id.* at 89–90.

The Court, therefore, should grant review to correct the Eleventh Circuit's erroneous interpretation of the *Turner* four-factor standard and to ensure that the important interests protected by the First Amendment—including a prisoner's right to freely practice a sincerely held religious belief—are upheld.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE ELEVENTH CIRCUIT'S OPINION GUTS THE *TURNER* STANDARD AND CREATES A CIRCUIT SPLIT.

The four-factor *Turner* standard is designed to protect prisoners from unconstitutional infringement of their fundamental rights. As discussed above, the *Turner* factors are a robust test of the reasonableness of a prison's policy. But under the panel's opinion, if the "rational connection" between a prison regulation and the prison's legitimate penological interests

"exists, the policy will stand." Pet.App. at 7a–8a. The legal conclusions resulting from the panel's abridged test cannot be reconciled with—and, indeed, distort—the approach that this Court has embraced in *Turner* and its progeny.

Moreover, compounding its own error, the Eleventh Circuit panel misapprehends the scope an accommodation must take under *Turner*, conflicting with *Turner* and creating a circuit split with all other circuits to have addressed the issue. At bottom, the panel penalizes Petitioner (and any other potential litigant) for seeking a modest "individual exemption"—rather than seeking sweeping policy reform that would be expensive and burdensome to implement—by denying the exemption as inappropriate under *Turner*. Pet.App. at 11a. That logic not only contradicts the approach of every other circuit to address the issue but is also nonsensical as a practical matter.

A. The Eleventh Circuit's Opinion Renders Three of the Four *Turner* Factors a Nullity.

Rather than faithfully interpreting the *Turner* standard, the Eleventh Circuit panel created its own, abbreviated standard. Instead of engaging with the four *Turner* factors, the panel relied entirely on the first *Turner* factor, concluding that "if the [rational]

connection exists" between the prison regulation and a legitimate governmental interest, "the policy will stand." Pet.App. at 7a–8a. Under the panel's opinion, this inquiry is all but dispositive. Indeed, the panel states that the last three factors are merely additional "angles" to consider. Pet.App. at 7a. More than poor wording, the panel's cursory application of factors two through four demonstrates that it fails to take them seriously. For example, and of particular concern, the panel unquestioningly accepted the prison's fatuous argument that allowing Petitioner additional access to the showers to complete his daily bathing ritual, or allowing him to wear a shirt when walking to the showers, would unduly strain prison resources. Pet.App. at 11a, 14a. Indeed, the panel accepted these assertions without considering, as it must under factor four, easy alternatives that would impose no more than a *de minimis* burden on prison officials, including application of the prison's ***pre-existing*** clothing policies. *See* Pet.App. at 14a.

This panel's emphasis on a single *Turner* factor, to the exclusion of others, is incorrect as a matter of law. To be sure, the first factor of the *Turner* test can be dispositive. But only to the extent that "the connection between the regulation and the asserted goal is 'arbitrary or irrational.'" *Shaw v. Murphy*, 532 U.S. 223, 229–30 (2001) (citing *Turner*, 482 U.S. at 90). Under those circumstances, "the regulation fails,

irrespective of whether the other factors tilt in its favor." *Shaw*, 532 U.S. at 229–30.[2] The inverse, however, is not true. When a prison satisfies the first *Turner* factor, as this Court has explained, the lower "courts should consider [the] three other factors[.]" *Id.* And the importance of the latter three *Turner* factors is readily acknowledged and given effect by other courts. *See, e.g.*, *Heyer v. United States Bureau of Prisons*, 984 F.3d 347, 357 (4th Cir. 2021) ("[C]ourts must still analyze Factors Two through Four to determine the reasonableness of the policy."); *Whitney*

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[2] Notably, although the panel recognized "[i]f that rational connection is missing, 'the regulation fails,'" it upheld the prison's arbitrary policy of not allowing inmates to wear t-shirts to the showers despite the prison unit's "Standard Operating Procedures" which allowed inmates to be safely removed from their cells while wearing t-shirts. Pet.App. at 7a, 13a-14a. The panel did not require any justification from the prison as to why t-shirts were safe in one circumstance but not another, claiming "we do not nitpick whether a policy could be adjusted to accommodate a prisoner's interest." Pet.App. at 13a. This is incorrect. Under *Turner*, it is a court's duty to determine "whether a policy could be adjusted to accommodate a prisoner's interest" to effectively safeguard prisoners' First Amendment rights. Thus, even if the panel were correct in its interpretation of the *Turner* factors (it is not), it failed to apply even that reduced standard.

v. Brown, 882 F.2d 1068, 1076 (6th Cir. 1989) (courts "continue with [their] analysis" after factor one).

The panel purports to justify its misapplication of *Turner* by distorting other important precedents of this Court. For example, the Eleventh Circuit Opinion cites *Beard v. Banks*, in which this Court stated that the *Turner* factors are not a balancing test. Pet.App. at 7a. But the panel below made a logical leap that went far beyond the Court's holding in *Beard* to suggest that the rational connection between a prison regulation and a legitimate penological interest is dispositive. *See* Pet.App. at 7a–8a. *Beard* demands "more than simply a logical relation" between policy and prison interest; indeed, it requires courts to consider "whether [prison officials] show[] a *reasonable* relation." *Beard v. Banks*, 548 U.S. 521, 533 (2006) (emphasis in original).

The Eleventh Circuit Opinion similarly distorts *Shaw v. Murphy*. Indeed, relying on *Shaw*, the panel claimed that "[w]e do not inquire whether the prison could make an individualized exception for the complaining inmate—we assess 'only the relationship between the asserted penological interests and the prison regulation.'" Pet.App. at 6a (quoting *Shaw*, 532 U.S. at 230). Read in context, however, *Shaw* does not support the panel's refusal to consider individual accommodations. Rather, the quoted text from *Shaw* merely makes clear that under the four-part *Turner*

analysis courts do not grant special status to certain kinds of speech based on its value. *Shaw*, 532 U.S. at 230 ("But the *Turner* test, by its terms, does not accommodate valuations of content."). *Shaw* simply does not address whether or not an individualized accommodation is appropriate. The panel's choice to read out three-quarters of the *Turner* standard, therefore, cannot be justified based on this Court's precedent.

Unless the lower courts examine all four factors, *Turner*'s already deferential standard will become a dead letter for prisoners of all religions in Florida, Georgia, and Alabama. The *Turner* factors two through four are safeguards to protect prisoners' rights and to hold prison officials accountable. And the *Turner* standard, and its application to prison policies, is clearly established. The panel's opinion, however, effectively provides a constitutional free pass to prison administrators once they invoke discipline and security concerns and allows any regulation that burdens free exercise to survive provided that the prison can imagine some connection to a legitimate government interest. This cannot be the case. The Eleventh Circuit's failure to require more renders illusory the promise that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner* 482 U.S. at 84.

B. Compounding the Eleventh Circuit's Misapplication of the *Turner* Factors, the Panel's Refusal to Consider Individualized Accommodations Conflicts With *Turner* and Every Other Circuit to Address the Issue.

The panel's error in misinterpreting the *Turner* standard is further compounded by its refusal to consider Petitioner's proposed individualized accommodations. This refusal conflicts with *Turner*, and it is out of step with every other circuit to address the possibility that individual accommodations might resolve a *Turner* claim.

As an initial matter, the Eleventh Circuit Opinion's refusal to consider Petitioner's proposed accommodation is inconsistent with *Turner*. As alluded to above, the panel refused to consider Petitioner's proposed accommodations and required Petitioner to "present an obvious alternative policy that could replace the current one on a prison-wide scale," Pet.App. at 12a, and provides a single citation to *Turner* for this strict standard. Nothing in *Turner*, however, disqualifies individualized accommodations from consideration. And, as noted above, the same is true of *Shaw*. Instead, in *Turner*, this Court explained that "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."

Turner, 482 U.S. at 90. Here, the multiple accommodations proposed by Petitioner are just such "obvious, easy alternatives." *See* Pet. at 11.

In addition to *Turner* itself, every other circuit to consider the question has left open the possibility of individual accommodations or as-applied challenges for a *Turner* claim. For example, the Ninth Circuit has rejected an interpretation of the *Turner* standard that avoids considering individual accommodation. Indeed, in that case, the Ninth Circuit ordered remand, finding that the trial court had failed to examine all proposed accommodations, including "provid[ing] a special meal for one prisoner." *Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1993), *cert. denied*, 510 U.S. 1192 (1994). The Fourth Circuit similarly rejected a trial court's conclusion that "a system-wide solution would be required." *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 217 (4th Cir. 2017); *see also Jehovah v. Clarke*, 798 F.3d 169, 178–79 (4th Cir. 2015) (reversing summary dismissal, in part, because "[a] reasonable jury could find" that the man's individualized "accommodation to drink wine" was an "alternative . . . so 'obvious' and 'easy' as to suggest that the ban [wa]s 'an exaggerated response'" (citation omitted)), *cert. denied*, 578 U.S. 962 (2016). And the Third and Sixth Circuits have similarly assessed the viability of individualized accommodations without requiring plaintiffs to propose prison-wide

alternatives. *See, e.g.*, *Dehart v. Horn*, 390 F.3d 262, 271–72 (3d Cir. 2004) (considering plaintiff's individualized diet request); *Flagner v. Wilkinson*, 241 F.3d 475, 486–87 (6th Cir. 2001) (allowing as-applied challenge and finding that having the individual plaintiff "search his own beard" was a viable alternative under *Turner*), *cert. denied*, 534 U.S. 1071 (2001); *see also* Pet. at 20–25 (discussing circuit split).

The benefits of considering individualized accommodations make this approach eminently sensible. Individualized accommodations can help courts determine whether a policy is "an exaggerated response to speculative security objectives, and, therefore, . . . invalid." *Whitney*, 882 F.2d at 1078. Accommodations recognize that legitimate security concerns are not always disturbed by those who merely want to exercise a religious tradition. *See Flagner*, 241 F.3d at 487 (noting that Orthodox Jewish prisoner's sidelocks did not implicate the security concerns that inspired prison grooming policy). And individual accommodations might be warranted where prison policies are non-responsive to the issue presented. *See Figel v. Overton*, 121 F. App'x 642, 646 (6th Cir. 2005) (addressing prison's allowance of certain religious literature that came from a religious institution that had not yet been approved to provide such literature). And there is no question that

Petitioner provided just such sensible, "easy" alternatives here. *See* Pet.App. at 11a, 14a.

The Court should therefore grant *certiorari* to correct the Eleventh Circuit's misinterpretation and distortion of the *Turner* standard and to address the circuit split created by the panel's refusal to consider Petitioner's individual accommodations.

II. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE BECAUSE THE FAILURE TO FAITHFULLY APPLY THE *TURNER* FACTORS THREATENS FREE EXERCISE BY PRISONERS.

If allowed to stand, the Eleventh Circuit's weakening of *Turner* would undermine protections for prisoners of all faiths. As discussed above, *Turner* already takes account of the unique circumstances of a prison, expressly recognizes the extent to which a prison's internal safety and security concerns may inevitably conflict with prisoners' exercise of their religious rights and, in that specific context, crafted a test to ensure that these rights would not be ***unduly*** burdened. It is for this reason that the Eleventh Circuit panel's failure to give effect to the *Turner* standard is especially troubling and pernicious. Indeed, policies that were previously struck down as unconstitutional by other courts applying *Turner* would be acceptable under the panel's opinion, as all that is required to infringe a prisoner's free exercise

would be for the prison to come up with a "rational connection" between the challenged policy and some penological interest.

The panel's opinion also threatens prisoners, of a majority or minority faith, by perversely encouraging courts to reject modest, individualized accommodations on the nonsensical basis that such proposed remedies are too narrow in scope. Under the panel's misinterpretation, a prisoner is ***required*** to "replace" a challenged prison policy with "one on a prison-wide scale." Pet.App. at 12a. Not only does this set up prisoners for failure—requiring them to propose broad accommodations that are, by definition, more expensive, cumbersome, and less practical than an individualized or limited accommodation—but it also conflicts with the principles of judicial restraint and equal protection espoused in *Turner*.

A. The Eleventh Circuit's Opinion Validates Unconstitutional Policies and Threatens Free Exercise For All Prisoners.

Examples suggesting the harm to prisoners likely to flow from the panel's opinion are unsurprisingly abundant. Indeed, certain regulations that courts in other jurisdiction have held failed the *Turner* analysis and violated the First Amendment would be upheld under the panel's opinion.

A very different result, for example, would have come about if *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1993), were decided in the Eleventh Circuit. In *Ward*, the trial court failed to make sufficient factual findings regarding the latter three *Turner* factors, effectively determining—like the Eleventh Circuit here—that only the logical connection between the prison's policy and the legitimate governmental interest mattered. The Ninth Circuit reversed, clarifying that "[t]he right to the free exercise of religion is to be jealously guarded," and "[i]t is not a right to be readily trammeled by the state." *Id.* at 876. The fact that a court must also consider the prison's interests allows courts to take into account "the degree of intrusiveness into the right of free exercise" as well as "the cost of accommodation, giving appropriate deference to prison officials' assessment of the costs," and each of the *Turner* factors must be considered to "help focus this determination." *Id.* at 877. The trial

court's failure to give appropriate consideration to three of the four factors, "[made] it [] impossible for [the Ninth Circuit] to determine whether the denial of a kosher diet is reasonably related to the prison's legitimate interest in streamlined food service." *Id.* at 879. The Ninth Circuit ultimately determined that, although the first *Turner* factor weighed in favor of the prison, the latter three factors all weighed in Ward's favor, clearly demonstrating that the prison's policy was "not reasonably related to a legitimate penological interest." *Ward v. Hatcher*, 172 F.3d 61, *3 (9th Cir. 1999) (Table Opinion).

Similarly, under the panel's opinion here, the challenge in *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989), would have turned out very differently. In *Whitney*, after weighing each of the *Turner* factors in turn, the Sixth Circuit found that the prison's policy of denying Jewish prisoners intercomplex travel to weekly Sabbath services and annual Passover Seders was unreasonable. *Id.* at 1074, 1078. In so holding, the court criticized the generalized argument of the prison officials, which was effectively adopted by the panel here, that "[a]ny time the normal routine of an institution is altered, the good order and security of that facility are potentially compromised." *Id.* at 1074 (quoting Prison Officials' Brief); *see* Pet.App. at 13a (rejecting Rodriguez's request to wear a t-shirt to the shower because "[q]uite simply, more clothing

presents a greater safety threat"). The Sixth Circuit observed that the prison officials "seem to read *Turner* and *O'Lone* as saying that anything prison officials can justify is valid because they have somehow justified it." *Whitney*, 882 F.2d at 1074. But this is incorrect. Neither precedent requires federal courts to "uphold prison policies which can somehow be supported with a flurry of disconnected and self-conflicting points." *Id.* Indeed, the Sixth Circuit explained, this "misunderstanding" of the applicable legal standard is "[p]erhaps the greatest weakness in the prison officials' arguments," as "prison officials do not set constitutional standard by fiat." *Id.*; *Rich v. Woodford*, 210 F.3d 961, 964–65 (9th Cir. 2000) (Reinhardt, J., dissenting from denial of *en banc* rehearing) ("'[D]eference does not mean abdication. . . . The *Turner* standard is 'not toothless' . . . .").

The panel opinion's refusal to consider less-than-prison-wide accommodations would similarly allow otherwise unconstitutional policies to stand. For example, in *Jehovah v. Clarke*, 798 F.3d 169 (4th Cir. 2015), the Fourth Circuit reversed the trial court's award of summary judgment, in part because the trial court failed to consider the various accommodations presented, including an individualized accommodation that would allow the prisoner to drink communion wine. In reversing, the Fourth Circuit

noted that "at least one of these alternatives is so 'obvious' and 'easy' as to suggest that the ban is 'an exaggerated response.'" *Id.* at 179 (quoting *Turner,* 482 U.S. at 90); *see also Salaam v. Lockhart*, 905 F.2d 1168, 1174 (8th Cir. 1990) (finding that trial court misapplied *Turner*'s accommodation factor because it overestimated cost of accommodation for a prison to recognize or use converted prisoner's new legal name); *Emad v. Dodge Cnty.*, No. 19-CV-0598, 2022 WL 1408044, at *6 (E.D. Wis. May 3, 2022) (finding that *Turner* factors weighed in favor of rejecting prison policy that prohibited individual worship in prison day room, in part because prison officials had failed to articulate any legitimate penological interest in the policy and worshipping in the day room provided an "obvious, easy alternative[]" that allowed the prisoner to "pray elsewhere in his cell pod in rooms without a toilet, all of which were already supervised by officers").

There is no question regarding the importance of individualized accommodations in the context of a *Turner* claim. Individualized accommodations are an important avenue by which prisoners may obtain relief from constitutional infringement, particularly prisoners of minority faiths, of whom there may be few in a prison population. *See, e.g.*, *Flagner*, 241 F.3d at 479. And individualized accommodations are a cost-effective means for prisons to resolve policy

challenges. Yet the panel's opinion wholly excludes them from consideration.

B. The Eleventh Circuit's Opinion Creates Perverse Results and Undermines *Turner*'s Core Principles.

The panel's categorical refusal to consider potential individualized accommodations also encourages the perverse result of championing large, prison-wide policy changes over modest measures that largely maintain the status quo. That is, under the panel's opinion, requests for sweeping change that are more likely to burden prison officials are cognizable, but the courthouse door is closed to prisoners seeking limited remedies crafted to address particular needs. This result is illogical and runs counter to the principles of judicial restraint and equal protection this Court embraced in *Turner*.

Notably, the RLUIPA accommodation rubric for individualized exemptions simply does not capture all of these circumstances. As this case demonstrates, for many reasons, there are instances where RLUIPA claims do not proceed and only a First Amendment challenge to a specific prison policy remains in litigation. Thus, the Court should not rely on RLUIPA alone to avoid the conundrum arising from the decision below.

The discouraging of challenges that seek modest or individualized accommodation to an unconstitutional prison policy defies logic and common sense. The Sixth Circuit case of *Flagner v. Wilkinson*, 241 F.3d 475 (6th Cir. 2001), demonstrates the absurdity of this approach. In that case, Flagner was the only Orthodox Jew in a prison population of more than 2,500 prisoners, and he requested an exemption to the prison grooming policy that prohibited him from growing his beard and sidelocks in a manner consistent with his religious beliefs and, on multiple occasions, resulted in the forcible cutting of his hair. *Id.* at 479, 487. Under the panel opinion below, an Orthodox Jew like Flagner would have to seek to completely reshape an otherwise reasonable and constitutional prison grooming policy to obtain relief. Such a wholesale change might have undue negative impacts on the prison community and its resources and could not be successful.

The decision below is doubly damaging for prisoners. On the one hand, requiring a request for broad policy change makes it more difficult for certain prisoners who merely want a small accommodation to get to court in the first place. On the other, prisoner plaintiffs who do make it to court will have difficulty showing why a broad change to the policy should satisfy the *Turner* standard, which requires evaluating the cost of accommodation in light of the

burden imposed on the prison. Put differently, the Eleventh Circuit's approach deprives courts of important context. Because the panel excludes individual accommodations from consideration, courts may uphold a policy due to security concerns where those concerns are, in fact, an "exaggerated response," *Turner* 482 U.S. at 90, as applied to a particular plaintiff. This might lead to courts rubberstamping all but the most extreme violations of religious exercise rights.

Moreover, *Turner* demands "a policy of judicial restraint." *Id.* at 85. This approach furthers the Constitution's separation of powers principles. *Id.* By imposing a requirement that a prisoner bringing a free exercise claim under the *Turner* framework demand change on "a prison-wide scale," Pet.App. at 12a, the panel invites courts to delve further into constitutionally sensitive terrain. What's more, the institutional and litigation costs prisons face when responding to policy challenges—including determining whether a proposed alternative is as "easy" and "obvious" as it appears at first glance—undoubtedly increase when the proposed alternative is a prison-wide policy change, as compared to a more limited accommodation. Thus, the panel's opinion has the consequence of also increasing the burden on prisons in responding to policy challenges.

Even more perversely, the panel's interpretation of the *Turner* standard would work to ***prevent*** challenges where the asserted penological interest in the policy is pretextual or an exaggerated concern. For example, in *Flagner*, the prison argued that its policy allowing the forcible shaving of Flagner's beard and sidelocks "reduce[d] gang activity by suppressing 'gang identifiers.'" *Flagner*, 241 F.3d at 485. But the Sixth Circuit recognized the absurdity of claiming that an Orthodox Jew's beard and sidelocks could be "mistaken for a 'gang identifier," and it further noted that "the fact that the defendants managed to wait five years before forcibly cutting Flagner's beard and sidelocks . . . only further suggests that the defendants may be exaggerating their response to the potential security threats." *Id.* at 486–87.

This is the precise scenario that *Turner* sought to prevent. Indeed, *Turner* was adopted, in large part, to prevent prisons from creating policies "where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89–90; *see id.* at 99 (noting that Missouri's asserted "rehabilitative objective" supporting policy of allowing prisoner marriages only with the warden's approval was "itself suspect" because it was applied more stringently to female prisoners and marriages of male prisoners were "routinely approved"). Absent

correction, bigoted, prejudiced, and plainly irrational policies are no longer checked by the *Turner* standard in the Eleventh Circuit. This has severe consequences for all prisoners and courts that look for guidance in addressing these complicated constitutional issues.

This Court must step in to correct the panel's misinterpretation and, ultimately, its evisceration, of the *Turner* standard.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

Howard Slugh
JEWISH COALITION FOR
RELIGIOUS LIBERTY
2400 Virginia Ave N.W. C619
Washington, DC 20037

Theodore A. Howard
*Counsel of record
Krystal B. Swendsboe
William Turner
WILEY REIN LLP
2050 M St NW
Washington, DC 20036
202.719.7314
thoward@wiley.law

Counsel of Record for Amici Curiae

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