No. 18-355

IN THE
Supreme Court of the United States

PRISON LEGAL NEWS,
Petitioner,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

BRIEF OF FAITH ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici Curiae, Central Pacific Conference United Church of Christ, Freedom Through Christ Prison Ministry, Muslim Advocates, Muslim Urban Professionals, National Council of Jewish Women, National Religious Campaign Against Torture, the Sikh Coalition, and T'ruah, are organizations that work to protect and advance the rights and liberties of people of all faiths, including those of America's incarcerated population. Amici are deeply concerned about overbroad restrictions on the ability of incarcerated persons to receive publications or news—including religious materials—and the impact such restrictions will also have on incarcerated persons' ability to obtain religious materials and exercise their faith. The Eleventh Circuit Court of Appeals exercised nearly unbridled deference to the Florida Department of Corrections's ("FDOC") establishment of prison regulations that substantially limit incarcerated persons' First Amendment rights. This decision places Amici's members and beneficiaries at great risk of far more direct restrictions on their ability to distribute religious materials and impinges on the free exercise rights of incarcerated persons.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, or its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief by filing a letter documenting consent with the Court. The parties have also been given appropriate notice.

The Central Pacific Conference United Church of Christ ("CPC") is a community of United Church of Christ congregations in Oregon, southern Idaho, and southern Washington. This family of forty-five congregations shares a commitment to ministry and missions. The CPC provides spiritual and material resources and encouragement to its 7,600 members, including ministry resources for Christian education programs. The CPC assists and encourages local congregations and their members in working together to explore, communicate, support, and pursue the ministry and mission of the church, and provides a channel for effective relationships with the UCC and with other faith communities.

Freedom Through Christ Prison Ministry ("FTCPM") is a "pen pal" letter and mail-based ministry, connecting incarcerated persons with volunteer ministers, churches, and individuals of faith outside of prison. These volunteers correspond and share letters, provide spiritual support, and engage in Bible study with members of the prison population. FTCPM is a registered member of the International Network of Prison Ministries, a global coalition of approximately 4,800 prison ministries, chaplains, and volunteers that provide incarcerated persons and their families with resources such as counseling services, religious literature, Bible study courses, and prayer request support. Although registered in Florida, FTCPM is a nationwide ministry organization with an average annual membership of 5,000 incarcerated persons across the United States.

Muslim Advocates works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. In pursuit of this vision, Muslim Advocates's mission

is to promote equality, liberty, and justice for all by providing leadership through legal advocacy, policy engagement, and civic education, and by serving as a legal resource to promote the full and meaningful participation of Muslims in American public life. The organization has advocated for incarcerated persons in cases where prison policies overly restrict the practice of their religion, including a federal complaint filed in June 2018 on behalf of Muslims prevented from practicing their religious beliefs in a federal correctional facility. Muslim Advocates has also previously joined the American Civil Liberties Union and diverse faith organizations in opposing a Bureau of Prisons rule depriving incarcerated persons of access to religious materials.

Muslim Urban Professionals ("Muppies") is a nonprofit, charitable organization dedicated to empowering and advancing Muslim business professionals to be leaders in their careers and communities. Its mission is to create a global community of diverse individuals who will support, challenge, and inspire one another by providing a platform for networking, mentorship, and career development. Muppies represents an engaged group of Muslim professionals that believe the rights of all Americans, including incarcerated persons, should be protected from infringement. Muppies opposes any policy that results in a reduction of opportunity or inclusion for any individuals or groups.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions

state that NCJW resolves to work for "[t]he enactment, enforcement, and preservation of laws and regulations that protect civil rights and individual liberties for all."

National Religious Campaign Against Torture ("NRCAT") is a membership organization committed to ending torture and cruel, inhuman, and degrading treatment in the United States. Since its formation in January 2006, more than 320 religious organizations have joined NRCAT, and over 67,000 individual people of faith have participated in its activities. These participants include evangelical Christians, Roman Catholics, Orthodox Christians, mainline Protestants, Muslims, Jews, Sikhs, Hindus, Baha'is, and Buddhists. Member organizations include national denominational and faith group bodies, regional entities such as state ecumenical agencies, and local religious organizations and congregations. NRCAT advances interfaith principles of dignity, community, and restorative justice to guide its work related to the United States prison system.

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. The Sikh Coalition joins this brief out of the belief that the religious liberties deserve protection under any circumstances, but particularly in situations involving incarcerated or institutionalized persons

who depend on adequate laws to protect their access to freedoms of speech and religious expression.

T'ruah: The Rabbinic Call for Human Rights ("T'ruah") is an organization bringing together rabbis and cantors from all streams of Judaism, as well as all members of the Jewish community, to advance the human rights of all people. T'ruah's wide-ranging work is fundamentally based in protecting and expanding human rights. Related to incarcerated individuals, T'ruah works in coalition with groups that are led by formerly incarcerated people and their families to support a criminal justice system that keeps all members of society safe, that protects the dignity and humanity of those convicted of crimes, and that prioritizes forgiveness over punishment. T'ruah works, in part, to ensure human rights protections for incarcerated individuals.

SUMMARY OF THE ARGUMENT

Over three decades ago, this Court held that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Now, in a case that touches upon our Nation's most cherished constitutional freedoms—the freedoms of speech and of the press—the Eleventh Circuit has given prison administrators near-unbridled discretion to infringe upon these, and consequently other, fundamental rights.

This case is about the Eleventh Circuit's unprecedented exercise of deference to the FDOC. The FDOC imposed a blanket ban on the distribution of *Prison Legal News*, a monthly publication distributed

to prisons nationwide that deals with issues of interest to incarcerated persons, including unlawful prison practices and civil rights prison litigation. Despite evidence showing that this regulation was an "exaggerated response" to the claimed security concerns, the Eleventh Circuit upheld that blanket ban. Instead of requiring the FDOC to provide meaningful factual support demonstrating that its regulation was "reasonably related to legitimate penological interests"—as it must under *Turner*, 482 U.S. at 89—the Eleventh Circuit inexplicably relied upon unsubstantiated, wide-ranging "deference" to side-step the FDOC's evidentiary burden. In essence, the Eleventh Circuit provided prison officials with unrestrained authority to stop—based on supposition and absent any evidentiary support—the flow of information and ideas into prisons, including (in this case) information about incarcerated persons' basic legal rights. Such uncritical deference is inappropriate under this Court's precedents, and the Eleventh Circuit's reliance on deference, over evidence, is in direct conflict with the application of the *Turner* standard in at least three other Circuits. Further, this exercise of deference puts incarcerated persons' other constitutional rights, including their free exercise rights, at great risk of infringement by prison regulations.

Amici are concerned by this development, which threatens to give unbridled deference to decisions made by prison officials, regardless of the evidence supporting those decisions or their impact on the rights of incarcerated persons. The Eleventh Circuit's extraordinary deference to the FDOC has

consequences that go far beyond the single publication at issue in this case and could extend to religious publications sent to incarcerated persons. Petitioner alone sends out thousands of issues of *Prison Legal News* each month to incarcerated subscribers in all fifty states and has been involved in more than fifty suits challenging similar publication bans in prisons. *See* Human Rights Defense Center, *2017 Annual Report* 3, 16-23, https://bit.ly/2EJhHlh; Prison Legal News, *HRDC Litigation Project* (last visited Oct. 18, 2018), https://bit.ly/2RZsHgI. Moreover, the *Turner* standard of review is regularly litigated in court, with more than 15,000 case and litigation citations to the case on Westlaw—many those cases addressing prison regulations that infringe on the religious practice of incarcerated persons—exemplifying the threat that the Eleventh Circuit's decision, which upholds deference without supporting evidence, would bear on such free exercise.

The Eleventh Circuit's extreme deference has particularly troubling ramifications for the protection of other First Amendment rights. Incarcerated persons' religious practices, and access to religious texts, are frequently limited by prison regulations. Religious minorities often bear the brunt of those regulations due to prison officials' lack of knowledge, understanding, or even bias towards certain faiths and practices. The Eleventh Circuit's opinion creates a grave risk that such regulations will be given improper deference in the future and will interfere with the ability of Amici to distribute religious materials to prisoners and impinge on the free exercise rights of incarcerated persons. Rather than

allow these risks to persist for the tens of thousands of incarcerated persons who identify as religious—and the approximately twenty-five percent of federal incarcerated person who identify as members of a religious minority, United States Commission on Civil Rights, *Enforcing Religious Freedom in Prison* 13 (Sept. 2008) ("*Enforcing Religious Freedom in Prison*")—this Court should grant certiorari to correct the Eleventh Circuit's distortion of the relevant legal standard.

ARGUMENT

I. Introduction

This Court has repeatedly held that incarcerated persons, and publishers who wish to communicate with them, do not sacrifice their First Amendment rights at the prison gates. "[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Further, "there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989).

The unique circumstances of incarceration led the Court, in *Turner*, to establish a separate legal standard for determining "when a prison regulation impinges on inmates' constitutional rights." 482 U.S. at 89. Under the *Turner* standard, a prison regulation is "valid if it is reasonably related to legitimate

penological interests." *Id.* This standard is designed to balance the "policy of judicial restraint regarding prisoner complaints and . . . the need to protect constitutional rights." *Id.* at 85. To determine whether a reasonable relationship exists, a court must consider four factors, including whether there is "a 'valid rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89 (citation omitted).

The Eleventh Circuit's decision represents a drastic and unwarranted expansion of *Turner* that if left unchecked will harm Amici's ability to minister to, and advocate on behalf of, incarcerated persons. This expansion will also severely interfere with the ability of incarcerated persons to exercise their faith. The FDOC's blanket ban on the distribution of *Prison Legal News* to Florida incarcerated persons should have been a clear First Amendment violation. As Petitioner ably argued in the lower courts, the FDOC failed to demonstrate a reasonable relationship between the blanket ban on publications and specific concerns about institutional security, namely that the ad content in *Prison Legal News* encouraged incarcerated persons to violate prison rules. Indeed, the evidence presented below demonstrated that the regulation was an "exaggerated response" to the FDOC's security concern, not least because no other corrections department impounds *Prison Legal News* based on its ad content.

When confronted with Petitioner's challenge, however, the Eleventh Circuit misconstrued this Court's precedents, granting to the FDOC unquestioning deference regarding the ban. This error

creates a dangerous standard that, if left uncorrected, will significantly impact Amici's activities, as well as the free exercise of incarcerated persons' religious practices.

II. The Supreme Court Should Grant Certiorari to Correct the Eleventh Circuit's Exercise of Unquestioning Deference to the FDOC.

The Eleventh Circuit exercised an unprecedented and improper level of deference to the FDOC. The Eleventh Circuit's decision distorted this Court's *Turner* standard and allowed the FDOC to shirk its evidentiary burden in the name of "deference" to institutional expertise. Such deference goes far beyond this Court's precedents, and that of the other circuits, and creates a dangerous precedent for future First Amendment challenges to prison regulations by incarcerated persons.

A. The Unquestioning Deference Exercised by the Eleventh Circuit is Contrary to this Court's Precedents.

Turner explains that courts should give some deference to prison officials in matters that are within their specific area of expertise. That standard does not require the extensive deference the Eleventh Circuit exercised here. As this Court has explained before, the "reasonableness standard is not toothless." *Thornburgh*, 490 U.S. at 414. Prison officials must "show[] more than simply a logical relation." *Beard v. Banks*, 548 U.S. 521, 533 (2006). Instead, prison officials must demonstrate "a *reasonable* relation"

between a prison regulation and a legitimate penological objective. *Id.* The exercise of deference does not relieve the prison officials' burden to demonstrate that reasonable relationship when regulations infringe on important constitutional rights.

A close look at the *Turner* opinion demonstrates that, contrary to the Eleventh Circuit's analysis, deference does not obviate prison officials' obligation to prove a reasonable relationship between the challenged regulation and any identified security concern. The *Turner* opinion addressed two regulations: one regulation barred correspondence between incarcerated persons and the other strictly regulated marriage for incarcerated persons. The Court upheld the first regulation, specifically relying on the evidence presented by the prison officials, the absence of "[o]bvious, easy alternatives," and the existence of similar restrictions imposed by "[o]ther well-run prison systems." *Turner*, 482 U.S. at 93. In contrast, the Court rejected the second regulation because evidence demonstrated the existence of easy alternatives and showed that prison officials generally had "experienced no problem with the marriage of male inmates," prior to the implementation of the regulation. *Id.* at 98. Deference was not applicable because the regulation "represent[ed] an exaggerated response" to the identified security concerns and the evidence failed to demonstrate a connection between those security concerns and the regulation imposed. *Id.* at 97-98. Thus, in *Turner*, deference was only appropriate after the prison officials had met their evidentiary burden.

Later cases by the Supreme Court do not change this approach: deference to prison official expertise is only appropriate after the prison officials have demonstrated the proper relationship between the challenged regulation and the identified security concerns. In *Beard v. Banks*, for example, the Court upheld the challenged prison regulation because the prison officials submitted summary judgment evidence that supported the connection between the regulation and a particular security concern, and Banks did not present any counter evidence, thereby admitting to the facts as presented by the prison officials. 548 U.S. at 529-30. Similarly, in *Overton v. Bazzetta*, the Court upheld challenged prison regulations because the prison officials had demonstrated that the regulations were reasonably related to legitimate penological interests; the evidence revealed that alternative means of exercising the right were available and that the regulation was not an exaggerated response. 539 U.S. 126, 135-36 (2003). Indeed, the Court noted that "if faced with evidence that [the] regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, [it] might reach a different conclusion." *Id.* at 134. Finally, in a similar case addressing the exercise of deference, this time under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, this Court overturned a restriction on a Muslim incarcerated person's ability to grow a beard. *See Holt v. Hobbs*, 135 S. Ct. 853, 866-67 (2015).[2] This

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[2] RLUIPA requires the application of heightened scrutiny to prison regulations that "impose a substantial burden on the religious exercise" of an incarcerated person. 42 U.S.C. § 2000cc-

Court rejected the Eighth Circuit's contention that it was "bound to defer to the Department's assertion that allowing [the] petitioner to grow such a beard would undermine its interest in suppressing contraband." *Id.* at 864. Instead, this Court found that the expertise of prison officials did not justify "the abdication of the responsibility conferred by Congress, to apply RLUIPA's rigorous standard," disclaiming the exercise of "deference that is tantamount to unquestioning acceptance." *Id.*

Simply put, this Court has repeatedly held that deference should be exercised only after prison officials have met their burden of connecting the challenged regulation to the identified security interest. This standard protects the fragile balance between institutional security and protecting the constitutional rights of incarcerated persons. In the present case, however, the Eleventh Circuit utilized deference as a thumb on the scale in weighing the evidence. Thus, the blanket ban on *Prison Legal News* was allowed to survive, despite the absence of evidence satisfying the *Turner* standard.

1; *Holt*, 135 S. Ct. at 860. The *Turner* standard, in contrast, applies to other constitutional challenges to prison regulations, including those brought by publishers of religious material or entities, like the Amici, that would seek to provide religious material. *See Beard*, 548 U.S. at 528-29. Thus, the misapplication of the already lower and more deferential *Turner* standard is of great concern to Amici as external groups who would seek to engage in prison ministry or provide incarcerated persons with religious texts or materials.

B. To Resolve Conflicting Standards of Deference Among the Circuits, this Court Should Clarify the Showing Required to Satisfy the First *Turner* Factor.

The Eleventh Circuit concluded that adherence to *Turner* mandated upholding of the FDOC's blanket ban on *Prison Legal News*. Yet other Circuits applying *Turner* have struck down prison mail regulations in similar contexts. The key difference among the Circuits stems from application of the first *Turner* factor, i.e., whether there is "a 'valid rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89. This "rational relationship factor . . . is a sine qua non" of the *Turner* test, *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001), and "can act as a threshold factor regardless of which way it cuts," *Singer v. Raemisch*, 593 F.3d 529, 534 (7th Cir. 2010). The Eleventh Circuit's approach to this factor is overly broad, categorically requiring no evidence to support an identified security concern. *See* App-26; *see also Perry v. Sec'y, Fla. Dep't of Corrs.*, 664 F.3d 1359, 1363, 1366 (11th Cir. 2011) (rejecting a challenge to a prison regulation that banned pen-pal solicitation correspondence because, "[a]lthough the FDOC does not cite any specific instances of fraud within Florida," the court determined there was a logical connection between such correspondence and preventing incarcerated persons from using pen-pal solicitation services to defraud people). This approach results in almost *per se* deference to prison officials. The appropriate first-

factor analysis employed by other Circuits requires at least some evidence to connect the challenged regulation to the penological interests that the prison claims to advance. To rectify the disparate application of a test that affects core First Amendment rights—including the ability of incarcerated persons to obtain religious texts and to freely practice their religion—this Court should confirm that a reasonable evidentiary threshold must be satisfied under the first *Turner* factor.

In a series of cases, the Ninth Circuit has struck down prison mail policies where there was an "insufficient connection between the mail policy at issue and the asserted justification" for the policy. *Crime Justice & America, Inc. v. Honea*, 876 F.3d 966, 975 (9th Cir. 2017). In one of these decisions, the court explicitly recognized *Prison Legal News* as "core protected speech" and invalidated a regulation that prevented the publication from being delivered to incarcerated persons. *Prison Legal News*, 238 F.3d at 1149. The Ninth Circuit determined that "the receipt of such unobjectionable mail [does not] implicate penological interests." *Id.* As to the evidence required to satisfy the first *Turner* factor, the Ninth Circuit has only been persuaded to uphold a restrictive mail policy when the prison officials provide substantive evidence connecting the policy to a "persistent problem" at the particular correctional facility, such as the abuse of paper. *Crime Justice & America*, 876 F.3d at 970.

In similar fashion, the Third and Seventh Circuits have rejected overly deferential analyses under the first factor. Although the Third Circuit has recognized that establishing a logical connection "may

be a matter of common sense in certain instances," other situations will "require factual development." *Wolf v. Ashcroft*, 297 F.3d 305, 308 (3d Cir. 2002). Thus, to satisfy the first *Turner* factor, a court "must describe the interest served, consider whether the connection between the policy and the interest is obvious or attenuated—and, thus, to what extent some foundation or evidentiary showing is necessary." *Id.* at 309. The Seventh Circuit goes further still, requiring the government to "present some evidence to show that the restriction is justified." *Brown v. Phillips*, 801 F.3d 849, 854 (7th Cir. 2015) (internal quotation marks and citation omitted) (rejecting a ban on sex offenders' viewing of sexually explicit material because the government's evidence was "too feeble" to justify the policy). In the instant case, both the Third and Seventh Circuits' approaches would require the prison officials to present some evidence connecting the blanket ban on *Prison Legal News* to the security interests alleged to be advanced.

Notably, Justices Stevens, Brennan, Marshall, and Blackmun, the four dissenting Justices in *Turner,* foresaw that lower courts might interpret the first factor too broadly, warning that the "logical connection" standard adopted by the Court may be "virtually meaningless." *Turner*, 482 U.S. at 100 (Stevens, J., dissenting). The dissenting Justices worried that the "logical connection" standard "would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection" to the challenged regulation. *Id.* at 100-

01. They presciently observed that the "'reasonableness' standard makes it much too easy to uphold restrictions on prisoners' First Amendment rights on the basis of administrative concerns and speculation about possible security risks." *Id.* at 101 n.1.

In the instant case, it is clear that the dissenting Justices' fears have come to pass. The Eleventh Circuit's misapplication of the first *Turner* factor requires no evidence at all and may be satisfied by finding a prison official who will testify that, "[i]n his view," the policy in question "helps" advance security interests. App-41, -43; *see also Perry*, 664 F.3d at 1365 (deferring to prison official's affidavit which stated that correspondence threatens prison security because "pen pals *might* give money to prisoners" (emphasis added)). As discussed in more depth below, reliance on the speculative views of prison officials alone presents a particularly dangerous risk of regulations that target the unfamiliar practices of minority religions. Thus, because the first *Turner* factor has become effectively meaningless in the Eleventh Circuit, and no evidence is required to support a regulation infringing on the First Amendment rights of incarcerated persons, the Court should clarify the evidentiary burden required to satisfy this factor. That burden should not be zero.

III. The Court Should Grant Certiorari Because the Exercise of Unquestioning Deference Greatly Affects the Religious Practices of Incarcerated Persons.

The unprecedented level of deference exercised by the Eleventh Circuit has a significant impact on the free exercise rights of incarcerated persons. The study of religious texts is critical in many faiths, and access to religious materials often comes from individuals or groups outside the prison, who are limited by regulations like the one at issue here. Further, religious practices by incarcerated persons are frequent targets of unconstitutional prison regulation. Religious minorities often bear the brunt of those regulations due to bias or lack of understanding on the part of prison officials. The excessive deference exercised by the Eleventh Circuit creates a grave risk that such regulations will be given unquestioning approval and will interfere with the free exercise rights of incarcerated persons.

A. The Eleventh Circuit's Overly Deferential Review Threatens Incarcerated Persons' Access to Religious Texts

Access to external publications is one of the primary ways that incarcerated persons obtain religious texts and studies. Thus, the Eleventh Circuit's opinion—specifically, the exercise of undue deference to regulations that limit or ban the publication of information in prisons—threatens to

severely limit their ability to exercise their religion through the study of religious texts.

The study of religious texts and other educational materials is critical in many faiths. For example, reading the Qur'an is an Islamic duty, and it is often accomplished in the original Arabic language. *See* Israr Ahmed, *The Obligations Muslims Owe to the Qur'an* 6, 13-14 (1973). Judaism commands the teaching and study of the Torah. *See* Ronald L. Eisenberg, *The 613 Mitzvot: A Contemporary Guide to the Commandments of Judaism* 16-17 (2005). Christianity emphasizes the need for Bible study and reflection through prayer. *See* John MacArthur, *How to Study the Bible* 7-8 (2009). Access to sacred texts and religious studies is thus critical to strengthening faith and exercising religious beliefs.

It is well recognized that religious study and practice has a positive impact on the incarcerated persons who engage in such study and practice. A 1992 study by the Pew Charitable Trusts, Rutgers University, and the National Council on Crime and Delinquency ("NCCD") found that involvement in religious programs helped incarcerated persons adjust to prison by helping them overcome depression, guilt, and self-contempt, as well as reinforcing attitudes and behaviors that circumvent the hustles of prison life. Todd R. Clear, *et al.*, *Does Involvement in Religion Help Prisoners Adjust to Prison?* 7, NCCD Focus (Nov. 1992), https://bit.ly/2P8af6R. Moreover, a 2012 survey of state prison chaplains found that seventy-three percent of chaplains consider access to religious programming to be "absolutely critical" for the successful rehabilitation of incarcerated persons.

Pew Forum on Religion & Public Life, *Religion in Prisons, A 50-State Survey of Prison Chaplains* 11, 74 (Mar. 22, 2012), https://pewrsr.ch/2NQ8k26; *see also* Byron R. Johnson, *Religious Programs and Recidivism Among Former Inmates in Prison Fellowship Programs: A Long-Term Follow-Up Study*, 21 Just. Q. 329-54, Abstract (Aug. 19, 2006) (finding that high rate of participation in Bible studies significantly reduces the hazard of rearrest).

External actors, including Amici, are often the primary providers of religious study material to incarcerated persons. Ministries from various faiths provide religious materials to incarcerated persons via correspondence programs and other means that are subject to many restrictions. For example, the group Prison Fellowship has a program by which individuals may provide or donate Bibles to incarcerated persons. *See* Prison Fellowship, *Providing Bibles for Prisoners* (last visited Oct. 18, 2018), https://bit.ly/2ypEjBE. FTCPM arranges contact between incarcerated persons and volunteers for the purpose of personal correspondence, providing Bible studies, or prayer support. *See* Freedom Through Christ Prison Ministry, *Freedom Through Christ Prison Ministry* (last visited Oct. 18, 2018), https://bit.ly/2S1gSGH. And the Aleph Institute is a Jewish ministry that provides religious publications or educational books to incarcerated persons at little or no cost. *See* Aleph Institute, *Educational Material & Literature* (last visited Oct. 18, 2018), https://bit.ly/2EvUDGh. Unchecked and unduly deferential security regulations could stifle these programs and directly prevent incarcerated persons

from exercising a key component of their faith: the study of religious texts.

Such considerations are not mere conjecture. Misplaced security concerns can make it impossible for incarcerated persons to access religious texts and materials. For example, the Eleventh Circuit has affirmed prison regulations barring pen-pal solicitation correspondence from Christian organizations that connect incarcerated persons with individuals outside the prison for the purpose of providing spiritual guidance, Bible studies, and prayer support. *Perry*, 664 F.3d at 1367. Prisons have also denied access to Muslim periodicals and books because, absent interpretation by a trained Muslim minister, the texts could be subject to inference urging defiance to prison authorities. *See Knuckles v. Prasse*, 435 F.2d 1255, 1256 (3d Cir. 1970); *cf. Cooper v. Pate*, 382 F.2d 518, 520-21 (7th Cir. 1967) (reviewing prison regulations that denied access to "Elijah Muhammad Muslim[]" publications because such beliefs "do not constitute a religion"), *rev'g on remand* 378 U.S. 546 (1964) (per curiam); *Sutton v. Rasheed*, 323 F.3d 236, 254 (3d Cir. 2003) (reviewing prison regulations that denied access to the Nation of Islam materials because prison officials "found the documents were not religious"); *see also Walker v. Maschner*, No. 4:98-CV-10159, 2005 WL 8141553, at *3 (S.D. Iowa July 8, 2005) (reviewing prison regulations that prohibited incarcerated persons from purchasing a copy of the Torah because prison officials "understood a Torah to be a clothing item, rather than a book"), *report and recommendation adopted sub nom. Ben–Kushi v. Kautzky*, No. 4:03-CV-40038, 2005 WL 8136542 (S.D.

Iowa Dec. 20, 2005). The highly deferential standard of review advanced by the Eleventh Circuit severely increases the risk that prison officials' biases or lack of knowledge would be used as grounds for denying incarcerated persons' right to engage in an important faith practice.

The Federal Bureau of Prisons's ("BOP") ill-fated Standardized Chapel Library Project illustrates how perceived security threats can impede access to religious texts. The Project sought "to create lists of a small number of pre-approved religious books for each faith and remove all others from federal prison chapel libraries." *Enforcing Religious Freedom in Prison* at 36. The Project was roundly criticized for its imbalanced and arbitrary treatment of religious texts and materials and was the subject of several First Amendment lawsuits. *See id.*; Aamir Wyne, *Dear God, Give Me Back My Books: The Standardized Chapel Library Project and Free Exercise Rights*, 11 U. Pa. J. Const. L. 1135, 1155-56, 1161 (2009); Laurie Goodstein, *Prisons Purging Books on Faith from Libraries*, N.Y. Times (Sept. 10, 2007), https://nyti.ms/2Cozprn. Facing enormous pressure from the public, BOP suspended the Project just over three months after it launched. *See Enforcing Religious Freedom in Prison* at 36; Neela Banerjee, *Prisons to Restore Purged Religious Books*, N.Y. Times (Sept. 26, 2007), https://nyti.ms/2pWfvwq. Although short-lived, the Project serves as a reminder of how "from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." Joint Statement of Senator Hatch and Senator Kennedy on

the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. S7775 (daily ed. July 27, 2000).

B. The Eleventh Circuit's Exercise of Unquestioning Deference Will Harm the Ability of Incarcerated Persons Who Identify with a Minority Religious Practice to Freely Practice Their Faith.

The Eleventh Circuit's decision is particularly threatening to incarcerated persons who engage in minority religious practices. The vast majority of incarcerated persons in the federal and state prison systems identify as religious. *Enforcing Religious Freedom in Prison* at 14-15. At least twenty-five percent of federally incarcerated persons identify as members of religious minorities, and almost ten percent of federal incarcerated persons identify as Muslim. *Id.* at 13. However, requests for religious accommodation coming from members of minority faiths are often "either misunderstood or viewed as a burden on the system." Protecting Religious Freedom After *Boerne v. Flores* (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 3, 38 (1998) (Statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute). Recognition of the need to protect minority faiths from the "extremes of insensitivity of the institutional mindset" inspired Congress to enact the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, after this Court limited the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, in *Boerne v. Flores*, 521 U.S. 507

(1997). As this Court recognized, through the provisions of RLUIPA, Congress intended to provide redress for the "arbitrary barriers [that] impede[] institutionalized persons' religious exercise" that thrive under a deferential standard of judicial review. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (internal quotation marks omitted).

Even with the protections of RLUIPA in place, prison officials frequently regard incarcerated persons' commitment to and practice of religion skeptically. *Enforcing Religious Freedom in Prison* at 31. As a result, even well-intentioned rules are administered unevenly, with the harshest consequences falling upon religious groups, particularly those of minority faiths.[3]

Courts frequently encounter impermissible and unsupported prison regulations that would be acceptable under the Eleventh Circuit's overly deferential application of the *Turner* standard. An application of the *Turner* standard that requires the facility to provide meaningful support for its security concerns is one of the best safeguards of incarcerated persons' religious exercise. For example, the Tenth Circuit rejected a regulation barring incarcerated persons from wearing a yarmulke and tallit katan during transport for medical care, because "Warden Neet has identified nothing . . . and we could find no

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[3] This disparity is reflected in the fact that while Muslims constitute only 9.3% of federal prisons, Muslim prisoners bring the highest percentage of religious discrimination grievances, accounting for 26.3% of all grievances filed. *See Enforcing Religious Freedom in Prison* at Table 2.1 & 26.

evidence in the record of any penological objectives served by his actions." *Boles v. Neet*, 486 F.3d 1177, 1182 (10th Cir. 2007). Similarly, the Second Circuit rejected prison regulations requiring joint Sunni and Shi'ite Muslim religious services for Ramadan, denying religious practices to incarcerated persons in disciplinary keeplock, and denying attendance at Ramadan meals and services on days that incarcerated persons chose to use the law library. *See Salahuddin v. Goord*, 467 F.3d 263, 275-79 (2d Cir. 2006). "[D]efendants have not pointed to anything in the record to show that they relied on legitimate penological justifications. . . . Neither the district court nor this court can manufacture facts out of thin air." *Id.* at 275. These examples demonstrate why it is imperative that this Court correct the Eleventh Circuit's distortion of the *Turner* deference standard and confirm that a reasonable evidentiary threshold must be satisfied under the first *Turner* factor.

Although this case comes before the Court through a secular vehicle, it would be a mistake to overlook the broad significance of the unduly deferential review the Eleventh Circuit articulated for decisions of prison administrators. This Court's precedents demand a more searching inquiry for prison regulations—one that adequately balances legitimate penological goals against the constitutionally protected interests of all prisoners, including members of religious minorities, who are particularly vulnerable to discrimination in prison.

CONCLUSION

For the reasons set forth herein, and in the Petition, Amici Curiae Faith Organizations respectfully request that this Court grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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