No. 22-594

In the Supreme Court of the United States

HJALMAR RODRIGUEZ, JR., PETITIONER,

v.

EDWARD H. BURNSIDE, ET AL.

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

REPLY BRIEF FOR PETITIONER

ATTEEYAH HOLLIE
GERRY WEBER
ALISON GANEM
SOUTHERN CENTER FOR HUMAN RIGHTS
60 Walton St. N.W.
Atlanta, GA 30303

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

JEREMY C. MARWELL
Counsel of Record
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Statutes

Statutes—Continued: **Page(s)**

Other Authorities:

REPLY BRIEF FOR PETITIONER

For nearly 40 years, *Turner* v. *Safley*, 482 U.S. 78 (1987), has provided a stable framework to balance the constitutional rights of imprisoned persons with the legitimate interests of prison administration. The Eleventh Circuit has now gutted *Turner* by categorically excluding from that calculus individualized accommodations, which are most likely to protect constitutional rights while avoiding burdens on prison-administrator interests. As courts uniformly understood until now, the existence of a ready alternative that can be implemented at *de minimis* burden to prison administrators is powerful evidence that a policy is not reasonably related to legitimate goals.

Amidst the hyperbole of Respondents' kitchen-sink opposition, one point stands out: they studiously ignore the actual alternative Petitioner proposed, of simply housing him in one of the *already available* cells with its own shower, so he could respect his religion's cleanliness and modesty dictates without any burden on prison resources. In years of litigation, Respondents have never explained why that alternative (rather than their preferred strawman of daily shower transport) was problematic. If the Constitution is to have any relevance within prison walls, surely administrators can be expected to articulate some justification for enforcing policies that substantially burden religious exercise. The Eleventh Circuit excused Respondents from meeting even that minimal burden by disqualifying individualized accommodations from *Turner* scrutiny.

Respondents lead with several arguments never mentioned or decided below. Putting aside forfeiture, those range from the obviously meritless (*i.e.*, the notion that the Religious Land Use and Institutionalized Persons Act (RLUIPA) repealed § 1983 actions based on free-exercise claims) to the deeply troubling (*i.e.*, the suggestion that prison administrators may deliberately discriminate against religious exercise to sanction misconduct). Those points are linked only by their lack of doctrinal basis and their irrelevance to this case.

On any fair reading of caselaw, the Eleventh Circuit split sharply from *Turner* and other circuits. Respondents cite irrelevant portions of the decisions and ignore key portions of the courts' rationales and holdings. This head-in-the-sand approach cannot dispel the split.

As to the merits, Respondents barely defend the Eleventh Circuit's gutting of *Turner*, asserting a vague policy interest in "uniformity" while ignoring Petitioner's careful analysis of the text of *Turner* and its progeny. And they ignore that the Eleventh Circuit's approach invites *greater* judicial interference in prison affairs, forcing plaintiffs to propose (and courts to adjudicate) wholesale prison-wide changes in policy. In any other context, state officials would doubtless be lauding the benefits of targeted, as-applied challenges.

On qualified immunity, Respondents' argument rests again on ignoring critical language in the Eleventh Circuit's decision, which makes clear that the panel's qualified immunity analysis was intertwined with its misreading of *Turner*. The Court

should reaffirm that *Turner* means what it says, and remand for the panel to reconsider qualified immunity.

I. The Question Presented Is Live and Extraordinarily Important.

Given glaring weaknesses in their position on the merits, split, and qualified immunity, Respondents' lead argument (Opp. 13-20) is that the question here is unimportant. Defending that counterintuitive position is a heavy lift. The question presented relates to the protection of virtually *every constitutional right* in the prison context. Pet. 29. And the decision below undermines the constitutional rights of some 150,000 incarcerated people in Alabama, Florida, and Georgia alone. See E. Ann Carson, Dep't of Just. Bureau of Just. Stat., *Prisoners in 2021—Statistical Tables*, Table 2 (2022). The diverse array of amici supporting Petitioner attest to the decision's significance for people of all religious faiths.

Respondents suggest that *Turner*'s direction to consider alternatives to a challenged prison policy is not "dispositive" and can be ignored. Opp. 14, 24. But *Turner* itself was crystal clear that the existence of ready alternatives can show that a rights-infringing policy lacks a reasonable relation to legitimate penological interests. Pet. 13-15, 28. The ultimate question under *Turner* is whether the prison "shows more than simply a logical relation, that is, whether [it] shows a *reasonable* relation." *Beard* v. *Banks*, 548 U.S. 521, 533 (2006) (plurality op.). The existence of ready alternatives can be outcome-determinative. *E.g.*, *Ashelman* v. *Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997) ("The existence of reasonable alternatives

decisively tips the balance in favor of Ashelman's free exercise right."); *Jones* v. *Caruso*, 569 F.3d 258, 272 (6th Cir. 2009) ("Defendants' arguments are undermined by the fact that reasonable alternatives [to a prison ban on possessing certain legal materials] exist at what appears to be a minimal cost.").

Respondents' suggestion that *Turner* was overruled by *Employment Division* v. *Smith*, 494 U.S. 872 (1990), appears nowhere in their briefing below or in the panel's decision, and is wrong. Whatever "tension" Respondents perceive between *Smith* and *Turner*, they cite no court that has *ever* held that *Smith* repealed *Turner* for free-exercise claims. Indeed, cases cited in the Opposition dutifully apply *Turner*. *E.g.*, *Boles* v. *Neet*, 486 F.3d 1177, 1181-1182 (10th Cir. 2007) (collecting cases); cf. *Grayson* v. *Schuler*, 666 F.3d 450, 453 (7th Cir. 2012) (finding it unnecessary to resolve the issue and ruling for plaintiff on other grounds). As even Respondents grudgingly concede, *Smith* has come under withering scrutiny, including from members of this Court. Opp. 17. This Court has applied the *Turner* framework in post-*Smith* decisions, see Pet. 18 (discussing cases), and has emphasized the importance of religious accommodations, particularly where secular exceptions are made, *e.g.*, *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1880 (2021); *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 73-74 (2021) (Kavanaugh, J., concurring). Here, some prisoners enjoy in-cell showers by happenstance or other reasons, but Respondents summarily denied Petitioner's request for the same treatment even where it would have avoided substantial burdens on his religious exercise.

The suggestion that RLUIPA bars § 1983 claims for free-exercise violations was not mentioned or decided below, and rests on an indefensible misreading of *Cavin* v. *Michigan Department of Corrections*, 927 F.3d 455 (6th Cir. 2019). *Cavin* held simply that § 1983 does not "provide[] a separate cause of action to enforce [claims under] RLUIPA" itself. *Id.* at 459-460. The court made no similar holding as to § 1983 claims (like Mr. Rodriguez's) asserted under the Free Exercise Clause. To the contrary, the court analyzed a § 1983 First Amendment claim on the merits, ultimately ruling on qualified immunity. *Id.* at 460-461. RLUIPA does not occupy the field of religious rights. See *Fulton*, 141 S. Ct. at 1894 (Alito, J., concurring in the judgment).

In suggesting RLUIPA provides all the constitutional protection incarcerated persons could ever need, Respondents again ignore the elephant in the room: defendants can moot pending claims under RLUIPA (which offers only injunctive relief) by discontinuing a practice or transferring a plaintiff to another facility. Indeed, that happened here. A meaningful damages remedy under § 1983 is a critical safeguard against States exercising unilateral control over which constitutional violations face judicial scrutiny.

II. The Decision Below Is Wrong.

Relegating the merits to the last few pages of their brief, Respondents offer three halfhearted arguments: (1) this Court once supposedly discussed *Turner* in a way that "does not suggest" alternatives may be individualized; (2) individualized alternatives disserve "uniformity"; and (3) *Turner* should not apply if prison

officials deliberately target constitutional rights as a sanction for misconduct. Opp. 28-34.

The first argument is a makeweight. *Overton* v. *Bazzetta*, 539 U.S. 126, 137 (2003), expressly recognized as-applied challenges, and did not purport to supersede *Turner* or other decisions expressly including individualized alternatives in the *Turner* calculus. Pet. 13-20.

On the second point, Respondents' real complaint is with *Turner* itself, since almost any accommodation of constitutional rights (whether for an individual or similarly situated group) arguably disserves "uniformity." Respondents emphasize the "burden which non-uniform rules place on prison staff." Opp. 32 (citation omitted). But concerns about burdens on administrators are fully and separately considered under *Turner* and cannot justify categorically excluding individualized alternatives from consideration. *Kuperman* v. *Wrenn*, 645 F.3d 69, 76 (1st Cir. 2011). Respondents' cases (Opp. 31-32) discuss uniformity in other doctrinal contexts, and do not support disqualifying individual accommodations from the *Turner* inquiry. *E.g.*, *Sandin* v. *Conner*, 515 U.S. 472 (1995) (procedural due process challenge to a prison disciplinary committee); *Moss* v. *Clark*, 886 F.2d 686 (4th Cir. 1989) (habeas challenge to allocation of good time credits); *Lovelace* v. *Lee*, 472 F.3d 174, 221 (4th Cir. 2006) (Wilkinson, J., concurring) (procedural due process challenge).

Respondents' newfound interest in uniformity is also ironic, given that many individuals in the Special Management Unit (SMU) already have shower-equipped cells. Petitioner sought only to be treated

similarly to them, because transport-related shower policies burdened his religion. Pet. 3. Respondents have never proven or even explained how that accommodation burdens them.

Respondents opine (Opp. 32-34) about how the *Turner* factors overall should be analyzed here. But the question presented focuses on *Turner*'s general framework. The possibility that Petitioner might not prevail on remand after this Court corrects the *Turner* error is no barrier to certiorari; this Court routinely reviews cases where it is uncertain whether a petitioner would ultimately prevail after this Court corrects a legal error. *E.g.*, *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201-202 (2012).

To the extent it matters here, it bears reiterating what Petitioner's requested accommodation was: being housed in an available shower-equipped cell. Pet. 3. A reader would never know that from Respondent's brief, which ignores that accommodation while knocking down strawmen. See Opp. 32 (complaining incorrectly that Petitioner seeks the "deploy[ment of] more officers, more often, to guard" him). Respondents have never explained why Petitioner's alternative is problematic. That silence is deafening.

Finally, Respondents assert that *Turner* should not apply if prison officials deliberately discriminate against religious exercise (or other constitutional rights) as a sanction for "[the plaintiff's] own actions." Opp. 28. Petitioner's case does not present that issue; the challenged policy is a generally-applicable SMU shower-transport rule, and Respondents have never before claimed the rule was imposed as a sanction for Petitioner's conduct. Pet. App. 8a-9a, 13a

(Respondents justified policy based on "safety and security" concerns); accord Resp. C.A. Br. 27, 29. In any event, this troubling argument runs contrary to *Turner*'s admonition that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." 482 U.S. at 84. Respondents' only authority is off-point, merely recognizing that "motivat[ing] better behavior" is a legitimate penological interest and upholding a specific regulation after conducting a *Turner* inquiry. *Beard*, 548 U.S. at 530-531 (plurality op.).

III. The Split Is Real.

Respondents profess "surpris[e]" at the possibility of a split. Opp. 20. But their attempt to deny the conflict rests on irrelevancies and ignoring inconvenient language in circuit opinions. Indeed, it is Respondents' view that would surprise (among others) the Sixth Circuit, which explained—in language irreconcilable with the Eleventh Circuit's approach—that "'the plaintiff's individual circumstances' are indeed relevant in applying the *Turner* analysis." *Flagner* v. *Wilkinson*, 241 F.3d 475, 483 n.5 (6th Cir. 2001); see also *id.* at 489, 491 (Nelson, J., dissenting) (criticizing majority's view that "courts can and should discern appropriate occasions for waiving [a] prison * * * regulation on a case-by-case basis").

More generally, Respondents' approach to disclaiming a split collapses with even passing examination of the decisions. Start with the Ninth Circuit. Respondents suggest that court only remanded in *Ward* v. *Walsh*, 1 F.3d 873 (9th Cir. 1993), because the district court "failed to make a number of findings." Opp. 23. But the Ninth Circuit's post-

remand decision reversed summary judgment for defendants because "[r]easonable alternatives exist[ed]"—*i.e.*, individualized dietary plans—"which would allow the prison to accommodate Ward's religious beliefs." *Ward* v. *Hatcher*, 172 F.3d 61, 1999 WL 109669, at *3 (9th Cir. 1999) (unpublished table). In another case, the Ninth Circuit held that the "existence of reasonable alternatives [*i.e.*, an individualized dietary plan] decisively tips the balance in favor of [the plaintiff's] free exercise right." *Ashelman*, 111 F.3d at 678.

Respondents whistle past the graveyard in the Third Circuit by ignoring inconvenient words and authority. True, the Third Circuit eventually affirmed summary judgment for defendants in *DeHart* v. *Horn* because, among other things, "[DeHart's] dietary restrictions cannot be met * * * with only a de minimis cost to the Prison." 390 F.3d 262, 271 (3d Cir. 2004); Opp. 23. But Respondents ignore the Third Circuit's *other* decision in *DeHart* (from the en banc court), which reversed summary judgment for defendants because "DeHart ha[d] made a *prima facie* showing that [the prison could] accommodate his religious needs with the addition of a cup of soy milk," plainly an individualized alternative. *DeHart* v. *Horn*, 227 F.3d 47, 59 (3d Cir. 2000) (en banc) (cited at Pet. 24).

So too in the Fourth Circuit. Respondents argue that the videophone accommodation in *Heyer* v. *United States Bureau of Prisons* was a prison-wide alternative because under the prison's existing telephone policy, "abuses * * * [were] handled on a case-by-case basis," and this approach could be adapted to videophones. 849 F.3d 202, 217 (4th Cir. 2017); see Opp. 22. That

misses the point. The proposed alternative was an individualized accommodation to BOP's general "ban on videophones." *Heyer*, 849 F.3d at 217. The accommodation was "restricted to deaf inmates" in one prison. *Ibid.* Indeed, the court rebuffed the defendant's concern about installing videophones "at all of its 119 institutions," finding that "nothing in the record indicates why a system-wide solution would be required." *Id.* at 216-217.

Respondents also misread *Jehovah* v. *Clarke*. They acknowledge *Jehovah* considered an individualized "accommodation to drink wine," but suggest the court might not have actually relied on that alternative because it said "[a] reasonable jury could find that at least one of [three] alternatives" made the communion wine ban unreasonable. *Jehovah* v. *Clarke*, 798 F.3d 169, 179 (4th Cir. 2015); see Opp. 21. But Respondents ignore what comes next in the opinion: the court held that a genuine issue of material fact existed because "a reasonable jury could find that *exempting Jehovah* from the [wine] ban would have a minimal impact on prison resources" and "that the prison population would not be endangered by a *single inmate* with no history of alcohol abuse consuming a small amount of wine in this setting." *Jehovah*, 798 F.3d at 178 (emphasis added). "How any of this [can be reconciled with] the decision below is a mystery." Opp. 24.

Finally, Respondents veer wide of the mark in analyzing Sixth Circuit precedent. They concede that *Flagner* v. *Wilkinson* reversed summary judgment for the prison because, at least in part, "having Flagner search his own beard [was] an alternative that fully accommodates the plaintiff at *de minimis* cost." 241

F.3d at 486 (internal quotation marks omitted); Opp. 22-23. Respondents suggest the court found this individualized alternative persuasive only because "the prison had already granted the plaintiff an individual exemption for almost seven years." Opp. 23; see also *Flagner*, 241 F.3d at 486-487. But it is hard to see why that matters. Whatever the ultimate weighing of the *Turner* factors, the relevant point is that, in *Flagner*, the existence of an individualized alternative weighed heavily in showing a prison policy's unreasonableness.

Shifting gears, Respondents assert that Petitioner "cites no [case] suggesting that the outcome turned on the fourth factor." Opp. 24 (emphasis omitted). Wrong. *Ward* held that the prison's "refusal to provide Ward with a kosher diet is not reasonably related to a legitimate penological interest" because "[r]easonable alternatives exist which would allow the prison to accommodate Ward's religious beliefs." 172 F.3d 61, 1999 WL 109669, at *3; accord *Ashelman*, 111 F.3d at 678 ("The existence of reasonable alternatives decisively tips the balance in favor of Ashelman's free exercise right.").

IV. Qualified Immunity Does Not Bar Review.

As the Petition explained, if this Court corrects the panel's misreading of *Turner*, it should at minimum remand for reconsideration of the qualified-immunity analysis, which was predicated on that misreading of *Turner*. Pet. App. 16a. In arguing otherwise, Respondents ignore key language in the panel's decision. Far from "assum[ing]" Petitioner's view of *Turner* (Opp. 27), the panel's qualified-immunity analysis *expressly relied on* its misunderstanding of *Turner*. The analysis rested on the premise that *Turner* does not

"ask courts to fine tune a prison's policy to accommodate a prisoner's individual request." Pet. App. 16a. Had the panel applied *Turner* by its terms and consistent with the other circuits' views, it could not have written the qualified-immunity decision that it did. Rather, the panel would have had to grapple with Petitioner's proposed cost-free accommodation that would have addressed the prison's asserted interests (safety and security concerns with out-of-cell movements) better than the prison's own policy. Respondents thus err in focusing on whether cases with analogous facts established a right to daily showers. Opp. 26. Here, *Turner* is the clearly established law requiring consideration of individualized alternatives, and prohibiting arbitrary infringements on constitutional rights.

As Respondents concede, Opp. 26, this Court has "discretion to correct * * * errors at each step" of the qualified immunity analysis. *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 735 (2011). Respondents suggest discretion should be exercised only to prevent courts from "undermin[ing] the values qualified immunity seeks to promote." *Ibid.* In other words, in Respondents' view, this Court should intervene only to help defendants, not plaintiffs. That suggestion is as wrong as it is unseemly. Under *al-Kidd*, the exercise of discretion is appropriate "when the constitutional-law question is wrongly decided," and review is needed to "ensure[] that courts do not insulate constitutional decisions" from scrutiny. *Ibid.* Insulation concerns are particularly important here, as the question presented

involves the *framework* for analyzing conflicts between prison policies and constitutional rights.[1]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ATTEEYAH HOLLIE
GERRY WEBER
ALISON GANEM
SOUTHERN CENTER FOR HUMAN RIGHTS
60 Walton St. N.W.
Atlanta, GA 30303

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

JEREMY C. MARWELL
Counsel of Record
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6507
jmarwell@velaw.com

APRIL 2023

---

[1] In other contexts, the development of constitutional law may not be "entirely dependent on cases in which the defendant may seek qualified immunity." *Pearson* v. *Callahan*, 555 U.S. 223, 242 (2009). But in the prison context, the only other effective opportunity for review is an injunctive claim under RLUIPA—and defendants can moot such claims by transferring a plaintiff to a different facility. See Pet. 30.