No. 20-15642

In The United States Court of Appeals for the Ninth Circuit

EDWARD LEE JONES, JR.,
Plaintiff-Appellant,

v.

S. SLADE, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
NO. 2:18-CV-02034-MTL-JZB
THE HONORABLE MICHAEL T. LIBURDI

Appellant's Opening Brief

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INTRODUCTION

The Arizona Department of Corrections (ADC) screens all publications mailed to prisoners confined in Arizona's ten state facilities. Incoming publications must comply with Department Order 914, a policy that gives prison officials discretion to censor mail based on a number of broad prohibitions. 2-ER197-199. In this case, ADC officials used the "prohibited publications" provisions of Department Order 914.07 to prevent Edward Lee Jones, Jr. from obtaining several music CDs and essential religious texts. These exclusions violated both the First Amendment and the Religious Land Use and Institutionalized Persons Act (RLUIPA).

First, ADC officials violated Mr. Jones's First Amendment right to receive publications by failing to apply Department Order 914.07 in a neutral manner. The ADC ostensibly enacted Department Order 914 to support broad penological goals such as the furtherance of "rehabilitation and treatment objectives" and the "prevent[ion of] a hostile environment." 2-ER197. But evidence presented by Mr. Jones indicates that officials *apply* the order to suppress certain forms of expression—Rap and Rhythm & Blues (R&B) music written by black artists. This non-neutral application of the policy is inconsistent with the protections of the First Amendment. And while the

district court recognized that Mr. Jones raised this argument, it failed to address the merits of his neutral-application challenge altogether.

ADC officials separately impinged on Mr. Jones's religious freedom, in violation of RLUIPA and the Free Exercise Clause. Relying on Department Order 914, ADC officials prohibited Mr. Jones from reading two religious texts written by Prophet Elijah Muhammad—*Message to the Blackman in America* and *The Fall of America*—during Ramadan. All agree that Nation of Islam members consider those texts essential to their faith and that officials prohibited Mr. Jones from studying them during the holy month of Ramadan, a period of spiritual reflection that embraces the study of religious texts. Under this Court's precedent, this outright ban qualifies as a substantial burden on the study of essential Nation of Islam texts during Ramadan.

Nonetheless, the district court held that, because Mr. Jones allegedly observed Ramadan in the past without Prophet Elijah Muhammad's texts, he did not suffer a burden sufficient to support his RLUIPA and free-exercise claims. This holding imposes a forfeiture rule that has no basis in RLUIPA or Free Exercise jurisprudence. Prisoners can, and often do, grow in their faith. This Court should ensure the proper application of the laws that allow them to do so and reverse the district court's grant of summary judgment.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Mr. Jones's claims under 28 U.S.C. §§ 1331 and 1343. That court entered a final judgment on March 3, 2020. 1-ER21. Mr. Jones signed his Notice of Appeal on April 3, 2020, but his conditions of confinement prevented officials from docketing that notice until April 9, 2020. 2-ER285-286. This Court ordered Mr. Jones to show cause as to why the appeal should not be dismissed as untimely. Mr. Jones then filed a motion to extend the time for appeal, which the district court granted. ECF No. 98. As a result, on November 18, 2020, this Court discharged its jurisdictional order to show cause and set a new briefing schedule for Mr. Jones's appeal. The Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

I. Whether the district court erred in granting summary judgment on Mr. Jones's First Amendment free-speech claims.

II. Whether the district court erred in granting summary judgment on Mr. Jones's RLUIPA claims.

III. Whether the district court erred in granting summary judgment on Mr. Jones's First Amendment free-exercise claims.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISONS

An addendum to this Brief contains the relevant constitutional and statutory provisions.

STATEMENT OF THE CASE

A. ADC Inmate Mail Policies and Procedures

In the ADC prison system, inmates cannot receive publications by mail until officials review and approve the publications under Department Order 914.07. That order, among other things, sets out a list of "prohibited publications" in 20 broad categories. 2-ER197-199. For instance:

- Section 1.2.4 prohibits "[d]epictions or descriptions of street gangs and/or Security Threat Groups (STG), and related gang/STG paraphernalia, including, but not limited to, codes, signs, symbols, photographs, drawings, training material, and catalogs." 2-ER197.
- Section 1.2.7 prohibits "[d]epictions or descriptions, or promotion of drug paraphernalia or instructions for the brewing of alcoholic beverages or the manufacture or cultivation of drugs, narcotics or poisons." 2-ER197.
- Section 1.2.8 prohibits "[c]ontent that is oriented toward and/or promotes racism and/or religious oppression." 2-ER198.

- Section 1.2.16 prohibits "[p]ictures, depictions or illustrations that promote acts of violence." 2-ER198.
- Section 1.2.17 prohibits publications that "could reasonably be anticipated to, could reasonably result in, is or appears to be intended to cause or encourage sexual excitement or arousal or hostile behaviors." 2-ER198.
- Section 1.2.20 acts as a catch-all provision, prohibiting publications that "may . . . be detrimental to the safe, secure, and orderly operation of the institution." 2-ER199.

The ADC states that these prohibitions "assist with rehabilitation and treatment objectives, reduce sexual harassment and prevent a hostile environment for inmates, staff and volunteers . . . ." 2-ER197.

The ADC reviews publications at each of its ten facilities. 2-ER208; 2-ER216. Each prison designates staff to inspect and review all incoming publications, including books, photographs, pamphlets, magazines, catalogs, periodicals, newsletters, CDs, cassettes, newspaper clippings, and copies of material from the internet. 2-ER208; 2-ER210.

The ADC's publication review process operates as follows: First, when the prison obtains a prisoner's mail and identifies a publication, ADC officials

check the status of the publication in the ADC's Publications Review Database, which details publications that officials have excluded or permitted in other ADC facilities. 2-ER176-177; 2-ER217. If ADC officials previously allowed the publication under review, then publication review staff generally permit the prisoner in question to receive the publication. 2-ER177; 2-ER217. Conversely, if ADC officials previously excluded the publication under review, publication review staff generally prevent the prisoner in question from receiving the publication. 2-ER177; 2-ER217. When a publication is not in the database, an individual member of the publication review staff decides whether the publication complies with Department Order 914.07. 2-ER176-177; 2-ER199-201; 2-ER216-217.

If the publication review staff excludes a publication, an official provides the prisoner with a Notice of Result to inform the prisoner of the decision. 2-ER199. A prisoner who disagrees with the exclusion has 30 days to appeal the decision to the Office of Publication Review. 2-ER199. That office may (1) overturn the exclusion and permit the prisoner to access the publication, (2) allow the prisoner to access the publication after officials redact certain content, or (3) uphold the exclusion of the publication in its entirety. 2-ER200. Appeal decisions by the Office of Publication Review are final. 2-ER200.

B. Factual Background

Plaintiff Edward Lee Jones, Jr. is a prisoner in the custody of the ADC. In late 2017 and early 2018, Mr. Jones ordered several CDs and religious texts, which ADC officials classified as contraband under Department Order 914.07.

1. *CDs*. In December 2017, Mr. Jones ordered a number of music CDs. In prior years, Mr. Jones and other prisoners had been able to obtain rap music, even if the music contained explicit language. 2-ER164; 2-ER167-168; *see also* 2-ER32; 2-ER94. Starting in 2015, however, ADC officials began disproportionately excluding rap and R&B music written by black artists. 2-ER167. When Mr. Jones's new order arrived, the ADC excluded six CDs as violating Department Order 914.07:

(1) "Untitled Unmastered" (2016), a critically-acclaimed, billboard-topping[1] album by the Grammy and Pulitzer Prize-winning artist Kendrick Lamar,[2] under the violence and sexual excitement provisions, §§ 1.2.16, 1.2.17;

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[1] Eric Diep, *The First Week Numbers for Kendrick Lamar's 'untitled unmastered' Are In*, *Complex* (March 13, 2016), https://www.complex.com/music/2016/03/kendrick-lamar-untitled-unmastered-project-billboard-200-chart.

[2] The Pulitzer committee recognized that Kendrick Lamar's music uses "vernacular authenticity and rhythmic dynamism" to "offer[] affecting vignettes capturing the complexity of modern African-American life." *The Pulitzer Prizes*, *The 2018 Pulitzer Prize Winner in Music*,

(2) "Tha Blue Carpet Treatment" (2006), an album by the Grammy-nominated artist Snoop Dogg, under the drug and violence provisions, §§ 1.2.7, 1.2.16;

(3) "Street Gospel," (1997) by Suga Free under the sexual intercourse, gangs, drugs, violence, and sexual excitement provisions, §§ 1.2.2.3, 1.2.4, 1.2.7, 1.2.16, and 1.2.17;

(4) "Trials and tribulations," (2013) by Ace Hood under the sexual intercourse, violence, and sexual excitement provisions, as well as the catch-all provision, §§ 1.1, 1.2.2.3, 1.2.16, 1.2.17, and 1.2.20;

(5) "The D-Boy Diary Book 1," (2016) by E-40 under the gang, drug, and violence provisions, as well as the catch-all provision, §§ 1.2.4, 1.2.7, 1.2.16, and 1.2.20; and

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https://www.pulitzer.org/winners/kendrick-lamar (last visited Jan. 28, 2021). Mr. Lamar has used his music and platform to give back to his community, receiving the 35th California Senate District's Generational Icon Award for his charitable work. Kory Grow, *Kendrick Lamar Named 'Generational Icon' by California Senate*, *Rolling Stone* (May 12, 2015 4:10 PM), https://www.rollingstone.com/music/music-news/kendrick-lamar-named-generational-icon-by-california-senate-162939/.

(6) "Trilogy," (2012) a triple-platinum album[3] by three-time Grammy Award-winning artist The Weeknd, under the drug and sexual excitement provisions, §§ 1.2.7 and 1.2.17. *See* 2-ER179-180; 2-ER221.

Mr. Jones appealed the exclusion decisions. On appeal, defendant Diane Miller—a member of the Office of Publication Review—personally reviewed the CD from Snoop Dogg, *Tha Blue Carpet Treatment*, as well as the CD from Kendrick Lamar, *Untitled Unmastered.* 2-ER218. Defendant Jamie Guzman reviewed the remaining CDs. 2-ER219. Defendants Miller and Guzman upheld all of the exclusions and designated Mr. Jones's CDs as contraband. 2-ER218-219.

2. *Religious Text*s. ADC officials also withheld from Mr. Jones two religious texts. Mr. Jones is a member of the Nation of Islam. 2-ER157-158; *see also* 2-ER45. He believes that Allah came to Earth in the 1930s in the form of a man named W. Fard Muhammed, who provided teachings to Elijah Muhammed, the "last prophet" of Allah. 2-ER166; *see also* 2-ER48; 2-ER157; 2-ER168. Mr. Jones "follow[s] the teachings of the Honorable Elijah

[3] *Trilogy Triple Platinum Certification*, Recording Industry Association of America (March 18, 2019), https://www.riaa.com/gold-platinum/?tab_active=default-award&ar=The+Weeknd&ti=Trilogy.

Muhammad (Prophet of Allah)," 2-ER157, and the study of Muhammad's written texts forms a "central" part of his belief system. 2-ER166. Mr. Jones averred that reading those texts "during Ramadan . . . is how [he] practice[s] and express[es] [his] religious exercise." 2-ER166.

In January 2018, the ADC reclassified Mr. Jones and transferred him to a different housing unit. 2-ER87. Around that time, Mr. Jones decided to purchase his own copies of two texts by Elijah Muhammad, *Message to the Blackman in America* and *The Fall of America*. *See* 2-ER43; 2-ER67. But when the books arrived, the ADC excluded them as contraband. 2-ER71.

On March 23, 2018, Mr. Jones appealed the exclusion of Elijah Muhammad's writings. 2-ER77; 2-ER79. Defendant Miller, however, informed Mr. Jones that the Office of Publication Review had already reviewed the publications and previously excluded them under Department Order 914.07 § 1.2.8, the provision addressing racism and religious oppression. 2-ER85; 2-ER218-219. The ADC excluded *Message to the Blackman in America* on May 11, 2012—47 years after its original publication—and excluded *The Fall of America* on July 6, 2015—43 years after its original publication. *See* 2-ER81, 2-ER83. The ADC declined to reconsider those

exclusions. 2-ER218-219; *see also* 2-ER200. Thus, Mr. Jones did not have access to Elijah Muhammad's texts during Ramadan in 2018. 2-ER275.

C. Procedural History

In June 2018, approximately two weeks after the end of Ramadan, Mr. Jones sued a number of ADC officials, alleging violations of the Free Speech Clause, RLUIPA, and the Free Exercise Clause. 2-ER263-284.

In his complaint, Mr. Jones challenged the application of the ADC's censorship regulations to two classes of material: rap music and religious texts. First, he alleged that the defendants violated the First Amendment by censoring the CDs he received "because of the nature of its content," applying Department Order 914.07 to exclude "black created" rap and R&B music "with apparent bias." 2-ER267-268; 2-ER282; *see also* 2-ER278. Second, Mr. Jones claimed that the defendants prevented him from "practic[ing] [his] religious beliefs" in violation of RLUIPA and the Free Exercise Clause by denying him the "right to read his Nation of Islam text during Ramadan as he normally does every year." 2-ER275. Mr. Jones sought both monetary damages as well as equitable relief. 2-ER284.

Because Mr. Jones sought relief against a governmental entity or employee, the district court conducted a statutorily required screening of the

complaint under 28 U.S.C. § 1915A. 2-ER238-262. As relevant here, the court permitted Mr. Jones's suit to proceed against ADC Director Charles Ryan in his official capacity and against defendants Slade, Miller, and Guzman in their individual capacities. 2-ER245-246; 2-ER249. The court later dismissed defendant Guzman for failure to serve, ECF No. 42, and substituted newly appointed ADC Director David Shinn for former Director Ryan, ECF No. 87.

On March 3, 2020, the district court granted summary judgment in favor of the defendants on all claims. 1-ER2-20. First, the court addressed Mr. Jones's First Amendment free-speech claim, conducting a facial analysis and an as-applied analysis. 1-ER11-17. The district court concluded that, on its face, Department Order 914.07 had a rational connection to a legitimate governmental interest and complied with the First Amendment under *Turner v. Safley*, 482 U.S. 78 (1987). 1-ER12-16. As part of its facial-challenge analysis, the court also noted Mr. Jones's argument that "a majority of the [ADC's] exclusions targeted black artists, and that [the Office of Publication Review] is not and has never been consistent in publication decisions." 1-ER13. The court, however, stated that "such arguments only implicate whether the policy *as-applied* violated Plaintiff's rights, not whether it *facially* violates his rights." 1-ER13 (emphasis in original).

When conducting its as-applied analysis, though, the court never returned to what it had classified as Mr. Jones's as-applied claim regarding the application of Department Order 914.07 to target black artists and rap music. It did not address Mr. Jones's neutral-application argument against Director Shinn in his official capacity. Nor did it address the neutrality arguments against defendants Slade and Miller in their individual capacities. Instead, the court focused solely on whether the excluded CDs fell within the scope of Department Order 914.07. With respect to defendant Miller, the court stated that Mr. Jones "does not allege that the CDs Miller reviewed did not violate [Department Order] 914.07, nor does he present any evidence that Miller incorrectly applied [Department Order] 914.07." 1-ER17. Therefore, the court granted summary judgment in defendant Miller's favor on Mr. Jones's free-speech claim. 1-ER17.[4]

The district court also granted summary judgment to the defendants on Mr. Jones's claims under RLUIPA and the Free Exercise Clause. The court acknowledged the specific religious exercise at issue—the denial of "the right

[4] With respect to his First Amendment free-speech claim, Mr. Jones does not challenge the district court's decision as it relates to defendant Slade in her individual capacity.

to read . . . Nation of Islam text during Ramadan"—and recognized that Mr. Jones had "demonstrated that his religious beliefs are sincerely held." 1-ER17-18. But the court rejected Mr. Jones's claims on the ground that defendants' conduct did not substantially burden Mr. Jones's religious exercise. Specifically, the court faulted Mr. Jones for failing to "articulat[e] why he was able to successfully observe Ramadan for the 10 years prior to [his request for Elijah Muhammad's texts], or what has occurred to render him now unable to successfully observe Ramadan without the books he requested." 1-ER18 (emphasis omitted). The Court declined to reach the defendants' contention that the individual defendants were entitled to qualified immunity from money damages. 1-ER-17.

The district court entered a final judgment in defendants' favor on March 3, 2020. 1-ER21. Although Mr. Jones completed and signed his Notice of Appeal on April 3, 2020, his confinement conditions prevented the notice from being docketed until April 9, 2020. 2-ER285-286. Mr. Jones filed a motion to extend the time for appeal in the district court, which granted the motion and deemed Mr. Jones's Notice of Appeal timely filed. ECF No. 98. The district court denied the defendants' motion to reconsider. ECF No. 101.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014). Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a genuine issue of material fact exists, "a court must view the evidence in the light most favorable to the opposing party." *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam) (internal quotation marks omitted). All of the opposing party's "evidence is to be believed, and all justifiable inferences are to be drawn in [that party's] favor." *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (internal quotation marks omitted). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The movant bears "both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment." *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1188 (9th Cir. 2016) (internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. The First Amendment requires prison regulations that burden a prisoner's fundamental right to receive publications to "operat[e] in a neutral fashion, without regard to the content of the expression." *Turner v. Safley*, 482 U.S. 78, 90 (1987). This "neutrality" requirement allows officials to ban publications based on legitimate penological goals, but otherwise forbids officials from suppressing expression through content-based exclusions.

Here, Mr. Jones alleges that ADC officials applied Department Order 914.07 in a non-neutral manner, targeting rap and R&B music written by black artists for exclusion. And Mr. Jones supported these allegations with ample evidence to establish a genuine issue of material fact on this point. The district court, however, altogether failed to analyze this neutral-application challenge or the evidence submitted in support thereof—ignoring a dispositive issue under *Turner*'s first factor.

Beyond the evidence of a non-neutral application, other factors outlined by the Supreme Court in *Turner* provide further support to Mr. Jones's challenge. The ADC's application of Department Order 914.07 to disproportionately exclude rap and R&B music leaves no adequate alternative for Mr. Jones to exercise his First Amendment rights, as other forms of music

do not communicate a substitutable form of expression. And permitting Mr. Jones to obtain rap and R&B music will have little, if any, impact on the guards, inmates, or prison visitors because the content purportedly requiring the ADC's censorship is freely available in ADC facilities. Finally, the ADC has an easy alternative to the current censorship policy: allow prisoners to obtain "clean versions" of rap and R&B music. The district court thus erred in granting summary judgment in favor of the defendants on Mr. Jones's free-speech claim.

II. In addition, the defendants substantially burdened Mr. Jones's religious exercise under RLUIPA. Mr. Jones sought the right to engage in a particular religious practice—the study of essential Nation of Islam texts during Ramadan. But the defendants thwarted Mr. Jones's religious exercise by depriving him of those texts. That deprivation is a *per se* substantial burden: this Court has had "little difficulty in concluding that an outright ban on a particular religious exercise is a substantial burden on that religious exercise." *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008).

Nonetheless, the district court erroneously held that Mr. Jones failed to establish a substantial burden. First, the district court misidentified the "religious exercise" at issue—focusing on the observance of Ramadan

generally, rather than a specific religious practice (the study of essential Nation of Islam texts) that occurs during Ramadan. Second, the court grafted an atextual forfeiture rule on to the substantial-burden inquiry, contradicting a bevy of cases that reject the notion that prisoners forfeit their religious rights by failing to scrupulously observe a specific religious practice in the past. Finally, the court ignored evidence suggesting that Mr. Jones did, in fact, study Elijah Muhammad's texts in prior years, improperly drawing inferences *against* Mr. Jones on this score.

III. Lastly, the defendants' deprivation of essential Nation of Islam texts during Ramadan impinged on Mr. Jones's First Amendment free-exercise rights. As with the RLUIPA claim, the defendants' complete ban of essential Nation of Islam texts constitutes a burden under the Free Exercise Clause. In fact, the Third Circuit has already recognized a claim under the First Amendment for the deprivation of the very same "sacrosanct and fundamental" Elijah Muhammad texts at issue in this case. *Sutton v. Rasheed*, 323 F.3d 236, 257 (3d Cir.) (per curiam), *as amended* (May 29, 2003). This Court should reverse the district court's contrary conclusion to avoid creating a circuit split.

ARGUMENT

I. The District Court Erred in Granting Summary Judgment on Mr. Jones's First Amendment Free-Speech Claim.

A prisoner's First Amendment "right to receive information while incarcerated" includes "[t]he right to receive publications." *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1151 (9th Cir. 2004) (per curiam) (internal quotation marks omitted). Prison officials may burden this right only if the restrictions imposed "reasonably relat[e] to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987); *see also Morrison v. Hall*, 261 F.3d 896, 906 (9th Cir. 2001). To determine whether restrictions are permissible, this Court considers four factors outlined by the Supreme Court in *Turner v. Safely*: "(1) whether the regulation is rationally related to a legitimate and neutral governmental objective; (2) whether there are alternative avenues that remain open to the inmates to exercise the right; (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials." *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001). While flexible, the Supreme Court has cautioned that this test "is not toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989).

Here, Mr. Jones presented evidence that ADC officials applied Department Order 914.07 in a non-neutral manner—targeting rap and R&B music for exclusion—and therefore failed to satisfy the first *Turner* factor. This evidence, viewed in the light most favorable to Mr. Jones, creates a genuine issue of material fact sufficient to preclude summary judgment. Regardless, Mr. Jones has established that Department Order 914.07 fails to satisfy the remaining *Turner* factors, providing an additional basis to reverse the district court's grant of summary judgment in favor of the defendants.

A. The Evidence Creates a Triable Issue under the First *Turner* Factor as to the Neutral Application of the ADC's Regulations.

1. The first *Turner* factor requires a "valid, rational connection between the [challenged] prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (internal quotation marks omitted). In determining whether such a connection exists, courts evaluate "whether the governmental objective underlying the policy is (1) legitimate, (2) neutral, and (3) whether the policy is rationally related to that objective." *Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999) (en banc) (internal quotation marks omitted).

To satisfy *Turner*'s neutrality requirement, a regulation must be "neutral" on its face. *Turner*, 482 U.S. at 90. Where the regulation "draw[s] distinctions between publications *solely on the basis of their potential implications for prison security*, the regulations are 'neutral' in the technical sense in which . . . [*Turner*] meant and used that term." *Thornburgh*, 490 U.S. at 415-416 (emphasis added). In other words, courts allow prison regulations to draw content-based distinctions if the regulation "'further[s] an important or substantial governmental interest unrelated to the suppression of expression.'" *Mauro*, 188 F.3d at 1059 (quoting *Thornburgh*, 490 U.S. at 415).

But facial neutrality is not enough. Prison officials must also *apply* regulations in a "neutral" manner—that is, the regulation must "operat[e] in a neutral fashion, without regard to the content of the expression." *Pell v. Procunier*, 417 U.S. 817, 828 (1974); *see also Turner*, 482 U.S. at 90. Officials cannot "justify a policy based on a legitimate interest applicable to the overall prison population, while applying the policy in an arbitrary or discriminatory manner in violation of a particular subgroup's First Amendment rights." *Mayfield v. Tex. Dep't Crim. Just.*, 529 F.3d 599, 609 (5th Cir. 2008); *cf. Prison Legal News v. Lehman*, 397 F.3d 692, 703 (9th Cir. 2005). "Requiring neutrality ensures that the prison's application of its policy is actually based

on the justifications it purports, and not something more nefarious." *Mayfield*, 529 F.3d at 609.

2. In this case, a genuine issue of material fact exists as to whether the defendants applied Department Order 914.07 in a neutral manner. Mr. Jones alleged that the ADC violated the First Amendment by censoring his mail "because of the nature of its content," applying Department Order 914.07 with "apparent bias" to exclude "black created" rap and R&B music that "attract[s] a certain fan base." 2-ER267-268; 2-ER282; *see also* 2-ER25-26; 2-ER278.

Mr. Jones then supported these allegations with testimony that creates a triable issue of fact. First, Mr. Jones provided a sworn declaration stating that the ADC's policy "targets black artist[s] more than any other ethnic group," 2-ER172, and that "a majority" of the exclusions between 2015 and 2018 "targeted black artist[s]." 2-ER167. Second, Mr. Jones presented sworn declarations from two inmates who testified that the ADC has not applied the censorship policy consistently. 2-ER94; 2-ER102. Finally, in opposing summary judgment, Mr. Jones explained that "a majority, if not all, rap and [R&B music from the 1980s-2000s] . . . by black artists [is] being completely banned," 2-ER49; *see also* 2-ER55, and produced testimony that officials even prohibit "clean" versions of "rap and R&B CDs," 2-ER102; 2-ER162; 2-

ER171. This evidence alone creates a genuine issue of material fact as to whether the defendants neutrally applied Department Order 914.07.

Further, Mr. Jones provided record evidence that suggests ADC officials used Department Order 914.07 to deliberately suppress disfavored expression. Evidence demonstrates that the ADC provided prisoners access to a plethora of media containing the very content that purportedly justified the censorship of his rap CDs—media involving gangs, drugs, violence, and sexuality. For example, prisoners could watch shows like Snowfall, Drugs, Inc., Weed Country, and Moonshiners, 2-ER95; 2-ER161, even though these shows contain "[d]epictions or descriptions" of drugs, drug paraphernalia and the illegal production of alcohol. 2-ER197 (Dep't Order 914.07 § 1.2.7). Prisoners could watch shows like Dexter, The Americans, The Aryan Brotherhood, and American Gangster, 2-ER95; 2-ER99; 2-ER161, which contain "depictions . . . that promote acts of violence" 2-ER198 (§ 1.2.16), and "depictions and descriptions of street gangs," 2-ER197 (§ 1.2.4). And prisoners could read books from the prison library, like James Patterson's *Kiss the Girls*, that involve fantasies of the capture, rape, and murder of young women. *E.g.*, 2-ER115. In another case before this Court, the ADC admitted that "Arizona prison inmates have access to . . . library books that have sexual

content, and television programs that have sexual content," Opening Br. 48, *Prison Legal News v. Ryan et al.*, No. 19-17449 (filed June 15, 2020), ECF No. 11, despite the ADC's sweeping ban of publications that "could reasonably result in . . . sexual excitement or arousal," 2-ER198 (§ 1.2.17).

That officials prohibit Mr. Jones's CDs for containing the precise content that ADC freely provides to prisoners underscores that the application of the defendants' censorship policy targets disfavored music. Other circuits have recognized as much, stating that the inconsistent application of a prison regulation may suggest that officials are using the regulation to suppress expression, rather than for penological purposes. *See Abu-Jamal v. Price*, 154 F.3d 128, 134 (3d Cir. 1998); *cf. Murchison v. Rogers*, 779 F.3d 882, 890 (8th Cir. 2015). More broadly, courts have considered the inconsistent application of a policy as evidence of an ulterior motive for a decision in other contexts, too. *See Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 51 (2d Cir. 1998) (holding that a company's "inconsistent application of its disciplinary policy was sufficient for the jury to have decided properly that the employer's defense was simply a pretext for discrimination" in violation of Title VII).

Given the evidence presented by Mr. Jones, a rational factfinder could undoubtedly conclude that the defendants failed to apply Department Order

914.07 in a neutral manner. Indeed, Mr. Jones presented even stronger evidence than the plaintiff in the analogous case of *Mayfield v. Texas Department of Criminal Justice*, 529 F.3d 599 (5th Cir. 2008). There, a prisoner challenged a facially neutral prison regulation that required an outside volunteer to oversee all religious services. *Id.* at 607-610. The prison submitted evidence that officials imposed this regulation "uniformly," but the prisoner countered with testimony indicating that officials selectively enforced the regulation against some religious groups and not others. *Id.* at 608. After recognizing "the importance of neutrality to [the] First Amendment analysis," the court concluded that the prisoner's evidence created an issue of fact concerning the neutral application of the policy at issue and, as a result, denied summary judgment. *Id.* at 610. Here, Mr. Jones not only provided testimony establishing the targeted application of Department Order 914.07, *see supra* p. 22-23, he also produced extensive record evidence showing an inconsistent approach to censorship, providing further support for his claim that ADC officials use the order to suppress disfavored expression, *see supra* p. 23-24. Thus, as in *Mayfield*, a genuine issue of material fact exists on Mr. Jones's neutrality argument.

3. The district court plainly erred in rejecting Mr. Jones's First Amendment claim, because the court failed to address the merits of Mr. Jones's neutrality argument altogether. At the outset of the court's analysis, the court specifically noted Mr. Jones's contention that "since 2015 'a majority of the exclusions targeted black artists,' and that '[the Office of Publication review] is not and has never been consistent in publication decisions.'" 1-ER13. The court classified this argument as an as-applied challenge to ADC's policy, 1-ER13, but then failed to return to this argument in the court's as-applied analysis or anywhere else in the opinion. The court thus bypassed the lynchpin of Mr. Jones's challenge, and never should have granted summary judgment on this First Amendment claim.

Start with ADC Director Shinn, whom Mr. Jones sued in his official capacity. The district court declined to address Mr. Jones's neutrality arguments against Director Shinn because the "arguments only implicate whether the policy *as-applied* violated Plaintiff's rights, not whether it *facially* violates his rights." 1-ER13 (emphasis in original). But, regardless whether Mr. Jones's neutrality argument is properly classified as facial or as-applied, it must be addressed: Both facial *and* as-applied suits against officers in their official capacity are common. *See, e.g.*, *Thornburgh*, 490 U.S. at 403; *Hargis v.*

Foster, 312 F.3d 404 (9th Cir. 2002). Challenges against officers in their official capacities are not somehow limited to facial challenges. Thus, the district court erred by failing to even consider whether a genuine issue of material fact exists as to the neutral application of Department Order 914.07 by ADC officials.

Mr. Jones also sued defendant Miller in her individual capacity. The district court dismissed Mr. Jones's neutrality claim against Miller on the theory that Mr. Jones "does not allege that the CDs Miller reviewed did not violate [Department Order] 914.07" and "does [not] . . . present any evidence that Miller incorrectly applied [Department Order] 914.07." 1-ER17. But the question is whether Miller participated in the non-neutral application of Department Order 914.07 to target rap music, not whether the excluded CDs conceivably fall within the boundless provisions of that order. Again, the district court simply failed to address the pertinent question.

4. Because the defendants failed to satisfy *Turner*'s first factor, summary judgment is not appropriate. The "first *Turner* factor is a *sine qua non*," *Hrdlicka v. Reniff*, 631 F.3d 1044, 1051 (9th Cir. 2011), and neutrality is absolutely necessary to establish that factor, *see Turner*, 482 U.S. at 89–90; *Mauro*, 188 F.3d at 1059. The neutrality requirement ensures that prison

restrictions maintain a direct connection to the penological interest justifying them. *See Mauro*, 188 F.3d at 1059. If the application of a regulation does not relate "to a legitimate and *neutral* governmental objective, a court need not reach the remaining three factors." *Lehman*, 397 F.3d at 699 (emphasis added); *see also Mayfield*, 529 F.3d at 609-610; *Bretches v. Kirkland*, 335 F. App'x 675, 677 (9th Cir. 2009) (unpub.). That is, a policy "applied in a discriminatory fashion based on the content of the material . . . would clearly violate [Mr. Jones's] First Amendment rights." *Lehman*, 397 F.3d at 703. "[B]ecause the record reveals disputed issues of fact concerning the neutrality of [the ADC's] application of its . . . policy, summary judgment was inappropriate." *Mayfield*, 529 F.3d at 610.

B. The Remaining *Turner* Factors Weigh in Favor of Mr. Jones.

The remaining *Turner* factors independently show that the ADC's application of Department Order 914.07 was not "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. This Court should reverse on this additional basis.

1. The second *Turner* factor asks "whether there are alternative means of exercising the right [impinged upon] that remain open to prison inmates." *Turner*, 482 U.S. at 90. Courts view the relevant right "sensibly and

expansively," *Thornburgh*, 490 U.S. at 417, focusing on whether the prison regulation has "deprive[d] prisoners of all means of expression," *Turner*, 482 U.S. at 92; *see also Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995) (analyzing whether the regulation left open "effective" avenues for "substitutable" exercises of expression). For example, in *Mauro*, this Court defined the right at issue as the "right to receive sexually explicit communications" and concluded that sexually explicit letters or articles constituted substitutable alternatives to sexually explicit pictures. 188 F.3d at 1061.

In this case, the ADC impinged upon Mr. Jones's right to receive music of expressive significance to him. "Music, as a form of expression and communication, is protected under the First Amendment." *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). The specific form of expression at issue—rap and R&B music—has, for decades, served as a vehicle for social commentary that highlights the plight of people living in urban America, particularly young people of color. Today, rap music is everywhere. It has fueled a multi-billion dollar industry that pervades American culture—in television, movies, advertising, fashion, politics, and theater. Paul Butler, *Let's Get Free: A Hip-Hop Theory of Justice* 124-125 (2010). Rappers have used their artistic abilities to create music that appeals to millions of people, while

simultaneously conveying important messages on issues of race, inequality, and police misconduct.

The ADC afforded no suitable alternatives for Mr. Jones to exercise his First Amendment right to hear this social commentary. The ADC applied its censorship policy in a manner that largely prevented prisoners from obtaining rap and R&B music. ADC officials excluded even "clean versions" of rap and R&B music, an obvious alternative at hand. 2-ER102; 2-ER162; 2-ER171; *see also Orr v. Clements*, 2011 WL 13189845, at *1 (W.D. Mo. Jan. 24, 2011) (recognizing alternative where plaintiff could "acquire the edited version of the recorded music which is substantially the same except that the explicit language is blocked out").

The district court disagreed, but its portrayal of other genres of music as fungible substitutes just underscores the problems with ADC's discriminatory policy. The court pointed to the availability of "country music, rock, metal, Spanish music, blues, or reggae" to show "there is other material available [to Mr. Jones]—it is just not the content [Mr. Jones] has chosen." 1-ER14. But "esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (internal quotation marks omitted).

Prohibiting Mr. Jones from obtaining rap and R&B music does not just deprive him of a preference, it forecloses the relevant expression altogether. *See Turner*, 482 U.S. at 92. The expression in heavy metal music or Christian rock does not compare to the expression in rap or R&B, any more than the expression conveyed in Dr. Seuss's *Green Eggs and Ham* compares to the expression in Harper Lee's *To Kill a Mockingbird*. And music sung in a language that Mr. Jones does not even understand—like the music available on one of the only two radio stations available at the prison, 2-ER171—surely cannot be considered an adequate substitute. The mere fact that messages are communicated using the same medium (in this case music) does not render them substitutable forms of expression.

Even were the Court to conclude that other genres of music constitute an "alternative means of exercising the right," *Turner*, 482 U.S. at 90, the second factor still does not weigh in favor of the defendants. If ADC officials applied Department Order 914.07 in a neutral manner, most albums of "country music, rock, metal, . . . blues, or reggae," 2-ER14, would be excluded too. Take country music, which like rap often features dramatic narratives of

murder, mayhem, sex, and substance abuse.[5] As a matter of basic fairness and common sense, prison officials cannot establish the availability of "alternatives" under the second *Turner* factor by simply pointing to other genres that they do not discriminatorily target for exclusion.

2. The third *Turner* factor considers "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. This inquiry seeks to uncover "ripple effect[s]" that the exercise of the right would have on other parties in the prison context, analyzing whether the asserted right "can

[5] *See, e.g.*, Johnny Cash, CD, *Folsom Prison Blues*, on *At San Quentin* (Columbia Records 1969) ("I shot a man in Reno just to watch him die."); Waylon Jennings, CD, *Cedartown, Georgia*, on *Cedartown, Georgia* (RCA 1971) ("I made up my mind what I'm a gonna do, eased in the pawnshop and bought a .22 . . . Gonna be a lotta kin folks squallin' and a grieving, cause that Cedartown gal ain't breathing."); Willie Nelson, CD, *Whisky River*, on *Shotgun Willie* (Atlantic Records 1973) ("Whiskey river, don't run dry. You're all I've got. Take care of me."); Hank Williams, Jr., CD, *Whiskey Bent and Hell Bound*, on *Whiskey Bent and Hell Bound* (Elektra Records and Curb Records 1979) ("About stoned out of my mind . . . I need to get whiskey bent and hell bound."); Dixie Chicks, CD, *Goodbye Earl*, on *Fly* (Monument Records 1999) ("Earl had to die, goodbye Earl . . . Ain't it dark wrapped up in that tarp, Earl?"); Justin Moore, CD, *Back That Thang Up*, on *Justin Moore* (Valory Music Group 2009) (using farm-based sexual innuendo); Chris Stapleton, CD, *Might as Well Get Stoned*, on *Traveller* (Mercury Nashville 2015) ("The bottle's all I've had to be a friend of mine. And since my whiskey's gone, I might as well get stoned.").

be exercised only at the cost of significantly less liberty and safety for everyone else." *Thornburgh*, 490 U.S. at 418 (internal quotation marks omitted).

This factor favors Mr. Jones. Because the ADC requires prisoners to wear headphones when listening to music and forbids "stereo boxes," 2-ER164, it is hard to see how a prisoner listening to music—audible only through his headphones—could disrupt the guards, visitors to the prison, or other inmates. Far from causing negative ripple effects, prisoners have attested that having access to music of expressive significance (whether the "clean" or "explicit" version) positively influences their ability to cope with incarceration. 2-ER152. Thus, allowing the exercise of Mr. Jones's First Amendment rights will have little, if any, negative impact on anyone else, and will impose no additional "cost" to the "liberty and safety" of anyone. *Thornburgh*, 490 U.S. at 418 (internal quotation marks omitted).

The ADC claims that the ability to listen to "explicit music" would undermine efforts to reduce "gang activity, possession, distribution, and consumption of contraband, [or] inmate violence." Def. Mot. Summ. J. 12, ECF No. 55. But the right at issue here is the right to listen to rap and R&B music, not the right to listen to "explicit music." More importantly, the ADC

cannot explain *how* a prisoner's ability to listen to rap and R&B music would have negative "ripple effect[s]." *Thornburgh*, 490 U.S. at 418. Extensive record evidence demonstrates that the ADC already provides prisoners access to every category of material contained in the excluded rap and R&B CDs. *See supra* p. 23-24. The ADC's "general [and] conclusory assertions to support their policies" under the third *Turner* factor simply do not suffice. *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990).

3. Finally, the fourth *Turner* factor asks whether "the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials." *Hrdlicka*, 631 F.3d at 1054 (internal quotation marks omitted). Courts consider whether the "alternative . . . fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests," *Turner*, 482 U.S. at 91, as well as the "administrative inconvenience of th[e] proposed alternative." *Thornburgh*, 490 U.S. at 419.

Here, an alternative to the current censorship policy exists: allow prisoners access to "clean versions" of rap and R&B music. This alternative would pose little, if any, administrative burden on prison officials. ADC officials already screen all incoming publications. 2-ER184; 2-ER194. The process of determining whether the incoming CD is a "clean" version appears

less burdensome than determining the lyrics of each individual song on a CD. And this alternative would pose, at most, a "*de minimis*" cost to the alleged penological interests at issue—the suppression of gang activity, sexual harassment, drug use, and violence. *See Turner*, 482 U.S. at 90-91. Surely music that has been deemed acceptable for children to purchase will not create a serious impediment to any of these penological purposes. Indeed, other facilities appear to have allowed prisoners to obtain clean versions of rap music. *See Orr*, 2011 WL 13189845, at *1. And "[w]hile not necessarily controlling, the policies followed at other well-run institutions [are] relevant to a determination of the need for a particular type of restriction." *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974), *rev'd on other grounds by Thornburgh*, 490 U.S. 401 (1989); *see also Morrison*, 261 F.3d at 905 (same). The ADC's failure to implement such a policy provides "evidence that the [application of the] regulation does not satisfy the reasonable relationship standard." *Turner*, 482 U.S. at 91.

In sum, while the non-neutrality of ADC's policy suffices to preclude summary judgment, this Court should independently reverse because the other *Turner* factors also weigh in Mr. Jones's favor.

II. The District Court Erred in Granting Summary Judgment on Mr. Jones's RLUIPA Claim.

The defendants also prevented Mr. Jones from reading essential Nation of Islam texts during the holy month of Ramadan. Under a straightforward application of this Court's precedents, this prohibition imposed a substantial burden on Mr. Jones's sincere religious exercise by banning him from engaging in a religious practice. The district court's contrary conclusion misidentifies the religious exercise at issue, imposes a forfeiture rule at odds with settled law, and flouts the summary judgment standard by drawing inferences in favor of the moving party.

A. The Defendants Have Substantially Burdened Mr. Jones's Exercise of a Sincerely Held Religious Belief.

1. RLUIPA provides "very broad protection for religious liberty." *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (internal quotations omitted). Section 2000cc-1(a) states that "[n]o government shall impose a substantial burden on the religious exercise of a [prisoner]" unless "the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). The prisoner must establish that a challenged

practice substantially burdens a sincere religious exercise. *Holt*, 574 U.S. at 360-361. Once a substantial burden is established, the defendants must show that the burdensome practice or regulation is the least restrictive means of furthering a compelling governmental interest. *Id.* at 362. Throughout, courts construe the protections of RLUIPA "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

2. When analyzing a RLUIPA claim, this Court "begin[s] by identifying the 'religious exercise' allegedly impinged upon," *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 987 (9th Cir. 2008), and here the "religious exercise" is the reading of essential Nation of Islam texts during Ramadan.

Under section 2000cc-5(7)(A), the phrase "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." This definition focuses on "particular facet[s] of [one's] religious practice." *Greene*, 513 F.3d at 987. "RLUIPA protects every religious preference, no matter . . . how minor to the inmate's professed religion." *Tanksley v. Litscher*, 2017 WL 3503377, at *5 (W.D. Wis. Aug. 15, 2017), *aff'd*, 723 F. App'x 370 (7th Cir. 2018). Courts have thus cautioned

against characterizing the "religious exercise" protected at a high level of generality. *See Greene*, 513 F.3d at 987.

Here, Mr. Jones brought suit seeking the "right to read his Nation of Islam text during Ramadan." 2-ER275. Nation of Islam members believe that Elijah Muhammad is the last prophet of Allah. *See* 2-ER48; 2-ER157-158; 2-ER168; *see also* Elijah Muhammad, *Message to the Blackman in America* (1973). As a prophet, Elijah Muhammad's writings are "central to the [Nation of Islam]" generally, *Leonard v. Louisiana*, 2010 WL 1285447, at *10 (W.D. La. Mar. 31, 2010) and "central to [Mr. Jones's] belief system" specifically, 2-ER166. These writings "provide critical religious instruction" to members of the Nation of Islam. *Sutton v. Rasheed*, 323 F.3d 236, 255 (3d Cir. 2003) (per curiam); 2-ER171. Among other things, Elijah Muhammad's writings discuss Allah, Islam, prayer, the Bible, and the Holy Qur'an. *See Message to the Blackman in America*, at 1-29, 68-84, 86-98, 135-159. These are "not just the words of Elijah Muhammad . . . . They are the words of Elijah Muhammad . . . as inspired by God." *Sutton*, 323 F.3d at 257. And reading these texts "during Ramadan . . . is how [Mr. Jones] practice[s] and express[es] [his] religious exercise." 2-ER166.

That specific practice—the reading of essential Nation of Islam texts during Ramadan—is the "religious exercise" at issue in this case. Mr. Jones challenged the defendants' ban of a "particular facet of [his] religious practice," *Greene*, 513 F.3d at 987, and this Court analyzes that specific facet as the "religious exercise" under RLUIPA. *See* 42 U.S.C. § 2000cc-1(a); *cf. Washington v. Klem*, 497 F.3d 272, 282-83 (3d Cir. 2007) (recognizing the reading of texts as the pertinent religious exercise in a RLUIPA analysis); *Rowe v. Davis*, 373 F. Supp. 2d 822, 825-826 (N.D. Ind. 2005) (same).

3. After identifying "the 'religious exercise' allegedly impinged upon," this Court "ask[s] whether the prison regulation at issue 'substantially burdens' *that religious exercise.*" *Greene,* 513 F.3d at 987 (emphasis added). Thus, in this case, the question is whether the defendants "substantially burden[ed]" Mr. Jones's practice of studying essential Nation of Islam texts during Ramadan.

The answer is plainly yes: a substantial burden exists when the government "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008) (internal quotation marks omitted). And this Court has had "little difficulty in concluding that an outright ban on a particular religious exercise

is a substantial burden on that religious exercise." *Greene*, 513 F.3d at 988. Numerous circuits have agreed that an outright ban of a religious practice constitutes a substantial burden. *See Fox v. Washington*, 949 F.3d 270, 278 (6th Cir. 2020); *Yellowbear v. Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014); *Davila v. Gladden*, 777 F.3d 1198, 1205 (11th Cir. 2015); *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 749-50 (8th Cir. 2014); *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009).

Mr. Jones's claim easily satisfies this substantial-burden standard. The defendants imposed an "outright ban" on the study of Elijah Muhammad's essential Nation of Islam texts during Ramadan. *Greene*, 513 F.3d at 988. They "flatly prohibit[ed] [him] from participating in an activity motivated by a sincerely held religious belief." *Yellowbear*, 741 F.3d at 56. This ban unquestionably constitutes a substantial burden on the "religious exercise" at issue. *See Greene*, 513 F.3d at 988.

B. The District Court's Analysis Lacks Merit.

The district court instead held that Mr. Jones "failed to demonstrate" that the defendants substantially burdened his religious practice. 1-ER17-18. Specifically, the court held that Mr. Jones failed to "articulat[e] why he was able to successfully observe Ramadan for the 10 years *prior* to 2018, or what

has occurred to render him now unable to successfully observe Ramadan *without* the books he requested." 1-ER18 (emphasis in original). That holding misidentifies the religious exercise at issue, imposes a categorical forfeiture rule that finds no support in RLUIPA, and flouts the summary judgment standard.

1. The district court erred in characterizing the "religious exercise" at issue and thus misapprehended the extent of the burden that ADC officials imposed. At times, the district court properly recognized the "religious exercise" at issue as Mr. Jones's "right to read his Nation of Islam text during Ramadan." 1-ER18 (quoting Mr. Jones's complaint). But when analyzing the burden, the court shifted its focus to Mr. Jones's ability to "observe Ramadan." 1-ER18. Analyzing the burden on Mr. Jones's ability to "observe Ramadan" frames the "religious exercise at issue" at too high a level of generality. *See Greene*, 513 F.3d at 987. Numerous religious practices occur during Ramadan, and RLUIPA's definition of "religious exercise" protects each as a distinct exercise of faith. *See, e.g.*, *Lovelace v. Lee*, 472 F.3d 174, 187-88 (4th Cir. 2006) (recognizing the practice of fasting during Ramadan as distinct from other practices that occur during Ramadan, such as congregational services or group prayer).

Even (improperly) viewing the "religious exercise" at a higher level of generality as the observance of Ramadan, Mr. Jones's claim still satisfies the substantial-burden standard. Elijah Muhammad's writings provide "truth from . . . God" to Nation of Islam Members, *Message to the Blackman* at 100, just as the words of Jesus Christ provide truth to Christians, *id.* at 171 ("I say no more than what Jesus said. He said that he came from God. I say that I am missioned by God."). Without Elijah Muhammad's "critical religious instruction," Nation of Islam Members "could not practice their religion." *Sutton*, 323 F.3d at 255. And if Nation of Islam Members cannot practice their religion without Elijah Muhammad's texts, they certainly cannot properly observe Ramadan. Indeed, the defendants' own evidence shows that Nation of Islam teachings on the topic of Ramadan place considerable weight on Elijah Muhammad's works—including *Message to the Blackman in America*. *See* 2-ER231-232. The study of essential religious texts and prayers given by Elijah Muhammad are thus critical during Ramadan—a holy time for Nation of Islam members that embraces spiritual reflection.

The defendants argued below that Elijah Muhammad's "books are not required to observe Ramadan." Def. Mot. Summ. J. 14, ECF No. 55. As just explained, this argument fails as a factual matter. And regardless, the

defendants' argument that Elijah Muhammad's writings are not required to celebrate Ramadan fails as a legal matter. "[C]ourts must not presume to determine the place of a particular belief in a religion," *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 887 (1990), and "must take care to avoid resolving underlying controversies over religious doctrine," *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 n.10 (2020) (internal quotation marks omitted). "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *see also Greene*, 513 F.3d at 986.[6] Reading Elijah Muhammad's writings "during Ramadan . . . is how [Mr. Jones] practice[s] and express[es] [his] religious exercise," 2-ER166; *see also* 2-ER47, and ADC officials (and the courts) lack the authority to question the necessity of this sincere religious practice.

2. Moreover, the district court is plainly incorrect that a prison's ban of a religious practice cannot constitute a substantial burden if a prisoner has

[6] *See also Burwell v. Hobby Lobby*, 573 U.S. 682, 724 (2014) (stating that "federal courts have no business addressing . . . whether the religious belief asserted in a RFRA case is reasonable").

adhered to his faith in the past without engaging in that religious practice. 1-ER17-18. The text of RLUIPA imposes no such forfeiture rule. Quite the contrary, section 2000cc-1(a) limits the government's ability to "impose a substantial burden on the religious exercise of a [prisoner]" without requiring prisoners to establish a pattern of faithful observance as a prerequisite to enjoying religious liberty. The district court's forfeiture rule would also flout Congress's insistence that RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

The district court's erroneous premise further contradicts a mountain of precedent. This Court, along with its sister circuits, has squarely rejected the notion that a prisoner forfeits his religious rights if he failed to scrupulously observe a religious practice in the past. *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994), *supplemented*, 65 F.3d 148 (9th Cir. 1995); *see also Grayson v. Schuler*, 666 F.3d 450, 454-456 (7th Cir. 2012); *Moussazadeh v. Tex. Dep't Crim. Just.*, 703 F.3d 781, 791-792 (5th Cir. 2012), as corrected (Feb. 20, 2013). As the Supreme Court has explained, the "timing" of the adoption of a religious practice "is immaterial to [the Court's] determination that [an adherent's] free exercise rights have been burdened." *Hobbie v. Unemployment Appeals*

Comm'n, 480 U.S. 136, 144 (1987). "So long as one's faith is religiously based at the time it is asserted," it does not matter for purposes of analyzing a burden "whether that faith derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible." *Callahan v. Woods*, 658 F.2d 679, 687 (9th Cir. 1981). This understanding has become so fundamental that courts routinely find a substantial burden on an asserted religious exercise without even addressing or inquiring into whether a plaintiff has previously engaged in a religious practice. *See, e.g.*, *Holt*, 574 U.S. at 361; *Greene*, 513 F.3d at 988.

And the implications of applying the district court's rule in RLUIPA analyses are staggering. Would Muslim prisoners who wish to grow a beard have to explain how they previously practiced their faith with a shaven face? *See Holt*, 574 U.S. at 361. What about Muslim prisoners who want to adopt an Islamic name? *See Malik*, 16 F.3d at 333. The district court failed to recognize that prisoners can and do grow in their faith—"for where would religion be without its backsliders, penitents, and prodigal sons?" *Grayson*, 666 F.3d at 454. And the district court's atextual rule perversely makes it harder for people to deepen their faiths, imposing precisely the type of "frivolous or

arbitrary barrier[ ]" that RLUIPA eliminates. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (internal quotation marks omitted).

3. Even under the district court's erroneous view of the relevant legal standards, summary judgment was improper on the RLUIPA claims because the district court departed from this Court's summary judgment standard and overlooked disputed facts.

To start, the summary-judgment standard requires courts to take all inferences in favor of the non-moving party. *See Tolan*, 572 U.S. at 657. Yet the district court drew adverse inferences *against* Mr. Jones, interpreting his statement—that the exclusions "denied [him the] right to read his Nation of Islam text during Ramadan, as he normally does every year," 1-ER18 (emphasis omitted)—to mean that Mr. Jones successfully observed Ramadan in the past *without* the two requested Elijah Muhammad writings.

But Mr. Jones's use of the phrase "as he normally does every year" hardly conceded that he lacked *any* access to the requested texts before. The record shows that Mr. Jones ordered the books around the time that the ADC changed his housing unit. 2-ER67; 2-ER87. The logical inference in Mr. Jones's favor is that Mr. Jones had access to the books from other prisoners in his unit until the time of his transfer. In fact, evidence in the record

indicates that, prior to his transfer, Mr. Jones read Elijah Muhammad's texts every year. *See* 2-ER47; 2-ER166. Thus, had the district court viewed the evidence in the light most favorable to Mr. Jones, the court at a minimum should not have concluded that Mr. Jones had observed Ramadan before without essential Nation of Islam texts.

In addition, the district court erroneously flipped the summary judgment burden by requiring Mr. Jones to provide evidence that "demonstrate[s]" a substantial burden. 1-ER18-19. The Court faulted Mr. Jones for failing to provide evidence explaining "why he was able to successfully observe Ramadan" in the past and "what has occurred to render him now unable to successfully observe Ramadan." 1-ER18. But, as the non-moving party, Mr. Jones had "no obligation to produce anything" until the defendants "carr[ied the] initial burden of" establishing the absence of a genuine issue of material fact on the substantial-burden issue—even with Mr. Jones bearing the burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Co.*, 210 F.3d 1099, 1102-1103 (9th Cir. 2000). And the defendants did not come close to carrying their burden in this case. Thus, the district court erred in requiring Mr. Jones to "demonstrate" a substantial burden.

III. The District Court Erred in Granting Summary Judgment on Mr. Jones's First Amendment Free-Exercise Claim.

Relying on the same substantial-burden analysis, the district court rejected Mr. Jones's constitutional free-exercise claims. As with the RLUIPA analysis, this holding is untenable.

The First Amendment's Free Exercise Clause provides that "no law" shall prohibit the "free exercise of" religion. To make out a free-exercise claim, plaintiffs must identify (1) a religious practice that is "sincerely held" and "rooted in religious belief," *Malik*, 16 F.3d at 333 (quoting *Callahan*, 658 F.2d at 683), (2) that the government imposes a burden on by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). If the prison regulation impinges on a prisoner's free-exercise rights, courts rely on the four *Turner* factors to determine the constitutionality of a challenged regulation. *See Ward v. Walsh*, 1 F.3d 873, 876-877 (1993).

Under this framework, summary judgment was inappropriate on Mr. Jones's free-exercise claim. The sincerity of Mr. Jones's beliefs is undisputed. 1-ER17. And, in their summary judgment briefing, the defendants did not even present arguments under the *Turner* factors. *See* ECF Nos. 55, 80. The only open question is whether a genuine issue of material fact exists as to the

burden that ADC placed on Mr. Jones's exercise of his religious beliefs. And the same arguments that establish a substantial burden under RLUIPA, *see supra* at 38-46, establish a substantial burden under the First Amendment. Under any lens, prohibiting a prisoner from reading essential Nation of Islam texts during Ramadan is a substantial burden on religious exercise.

Indeed, the Third Circuit has already recognized the deprivation of Elijah Muhammad's texts suffices to make out a free-exercise claim. In *Sutton v. Rasheed*, 323 F.3d 236 (3d Cir. 2003), a Nation of Islam member requested access to texts written by Elijah Muhammad, including *Message to the Blackman in America* and *The Fall of America*. *Id.* at 242 n.11. The court concluded that the plaintiff's request for these texts merited First Amendment protection, *id.* at 250-252, noting "the sacrosanct and fundamental quality which the writings of the prophet, Elijah Muhammad, . . . have for members . . . of the Nation of Islam." *Id.* at 257. This Court should not create a circuit split by departing from that conclusion. And, for the reasons discussed above, the district court's erroneous assumption that a prisoner forfeits his religious rights if he failed to scrupulously observe a religious practice in the past offers no basis for a contrary conclusion. *See supra* p. 44-45. The same goes for the district court's disregard of the summary judgment

standard. *See supra* p. 46-47. As with the RLUIPA claim, this Court should reverse the district court's grant of summary judgment on the free-exercise claim.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's judgment below and remand for further proceedings.

s/ *J. Matthew Rice*

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DATED: February 3, 2021

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant Edward Lee Jones, Jr. identifies *Jones v. Shinn*, No. 20-16518, as a related case pending in the Ninth Circuit.

s/ *J. Matthew Rice*
J. MATTHEW RICE

DATED: FEBRUARY 3, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(A) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 10,157 words excluding the parts exempted by Fed. R. App. P. 32(f).

s/ *J. Matthew Rice*

J. MATTHEW RICE

DATED: FEBRUARY 3, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 3, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 3, 2021

Respectfully submitted,

By: /s/ *J. Matthew Rice*

J. MATTHEW RICE

ADDENDUM

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First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 2000cc-1

(a) General Rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

* * * * *