No. 21-11982

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RALPH HARRISON BENNING,

Plaintiff-Appellant,

v.

COMMISSIONER GREGORY C. DOZIER, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF OF APPELLANT RALPH HARRISON BENNING

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1(a), the undersigned counsel hereby certifies that the following persons or entities may have an interest in the outcome of this litigation:

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14. Pacious, Kathleen M. (counsel for Appellees)
15. Patterson, Margaret (Appellee)

16. Piper, Tina M. (counsel for Appellees)

17. Self, Tilman E. (U.S. District Judge)

18. Teaster, Susan E. (counsel for Appellees)

19. Ward, Timothy (Appellee)

20. Weigle, Charles H. (U.S. Magistrate Judge)

No publicly traded company or corporation has an interest in the outcome of the case or appeal.

/s/ Janine M. Lopez
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would significantly aid the Court's decisional process in this case. Fed. R. App. P. 34(a)(2)(C). This appeal presents a number of complex legal issues, including whether restrictions on prisoner email should be subject to the same constitutional standards as restrictions on prisoner mail. The nature of the issues and the potential implications for prisoners and prison administrators alike counsel in favor of holding oral argument in this case.

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INTRODUCTION

The First Amendment undisputedly protects a prisoner's right to communicate with individuals outside the prison walls. The standards for assessing restrictions on prisoners' correspondence have been clearly established for decades: A prison may regulate correspondence *entering* the prison if the regulations are "reasonably related to legitimate penological interests," but it can restrict *outgoing* correspondence only if the regulations are necessary and narrowly drawn to further the government's interest in security, order, or rehabilitation. *See Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Turner v. Safley*, 482 U.S. 78 (1987); *Procunier v. Martinez*, 416 U.S. 396 (1974). The reasons for applying heightened scrutiny to restrictions on outgoing correspondence are simple. First, because the recipients are individuals *outside* the prison environment, these communications are considerably less likely to threaten security *inside* the prison. Second, because outgoing messages that do pose a security threat are more likely to fall within certain identifiable categories (*e.g.*, escape plans), prison officials can protect their interests with more closely tailored restrictions on speech.

This case challenges two of the Georgia Department of Corrections' (GDC) restrictions on email correspondence. One policy prohibits prisoners from asking an email recipient to forward the email to other individuals; the other prohibits emails that contain any information whatsoever about other prisoners. Applying

these policies, GDC employees censored four emails sent by Appellant Ralph Harrison Benning—three addressed to his sister and one to a religious organization.

If prison officials applied these policies to outgoing *physical* mail, no one disputes that the heightened standard announced in *Procunier v. Martinez* would apply. The district court, however, refused to treat outgoing email as the type of "outgoing correspondence" that triggers the *Martinez* standard. That decision was plainly incorrect. Email is simply electronic mail, and the Supreme Court's justifications for treating outgoing mail as categorically less dangerous than incoming mail apply equally to their electronic counterparts.

Had the district court properly applied *Martinez*, it could not have granted summary judgment for the defendants on Mr. Benning's First Amendment claim. Neither of the challenged policies is remotely necessary to protect the asserted interest in prison security, given that the prison already reviews outgoing emails for threats, escape plans, and other dangerous content under appropriately tailored regulations. At minimum, both policies are considerably broader than necessary to protect the prison environment, as the censorship of Mr. Benning's emails illustrates. The Court should therefore reverse the district court's grant of summary judgment and remand the case for trial.

The district court erred in other ways as well. First, the court erroneously granted summary judgment for the defendants on Mr. Benning's due process claim. Because prisoners have a protected liberty interest in corresponding with individuals outside the prison, the Supreme Court has required prisons to provide minimum procedural safeguards before censoring their correspondence. Yet the GDC undisputedly fails to provide notice or *any* other process to prisoners whose emails are censored. Second, the district court incorrectly held that the defendants sued in their individual capacities are shielded by qualified immunity even if they violated Mr. Benning's constitutional rights. Finally, the district court erroneously held that Mr. Benning will not be entitled to *any* injunctive relief even if he prevails on the merits of his constitutional claims. The district court's judgment must be reversed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on May 3, 2021. A305 (Doc. 109). Mr. Benning timely appealed on May 28, 2021. A306 (Doc. 111). This Court has jurisdiction to review the district court's judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. First Amendment. The district court granted summary judgment for Defendants on Mr. Benning's claim that the censorship of his emails under GDC policy violated the First Amendment. The issues presented for review are:

A. Whether the standard announced in *Procunier v. Martinez*, 416 U.S. 396 (1974), which governs restrictions on prisoners' outgoing correspondence, applies to restrictions on prisoners' outgoing emails.

B. Whether there is a triable issue of material fact as to whether the policies under which Defendants censored Mr. Benning's emails—the forwarding policy and the inmate-information policy—violate the First Amendment under *Martinez*.

C. If the Court concludes that the standard announced in *Turner v. Safley*, 482 U.S. 78 (1987), applies, whether there is a triable issue of material fact as to whether the forwarding policy and the inmate-information policy violate the First Amendment under *Turner*.

II. Due Process. Whether the district court erred in holding that Defendants' failure to provide any procedural safeguards to prisoners upon censoring their emails does not violate the Due Process Clause as a matter of law.

III. Qualified Immunity. Whether the district court erred in granting qualified immunity to the defendants sued in their individual capacity, where it has

been clearly established for decades that prison officials may not censor outgoing correspondence unless necessary to further an important governmental interest.

IV. Injunctive Relief. Whether the district court erred in concluding that Mr. Benning would not be entitled to injunctive relief even if he prevailed on the merits of his constitutional claims.

STATEMENT OF THE CASE

A. Factual Background

This case arises from the censorship of four emails sent by Mr. Benning, a prisoner at the Wilcox State Prison. The Georgia Department of Corrections (GDC) operates that prison and others across the state, and has partnered with a private company, JPay, to provide electronic mail services to incarcerated individuals. The GDC has adopted policies and procedures to govern prisoners' use of electronic mail, several of which are at issue here.

1. The GDC's Regulation of Prisoners' Emails

GDC prisoners can access JPay's email services in one of two ways: (1) by using JPay kiosks installed throughout the facilities, or (2) by using a GDC-issued tablet known as a Georgia Offender Alternative Learning (GOAL) device. Every email sent or received by a prisoner requires a JPay stamp, which cost $0.35 at all relevant times. A48 (Doc. 28, p. 12).

All emails are routed through the GDC's Central Intelligence Unit and automatically screened for certain key words and phrases. A89 (Doc. 64-4, p. 5);

A130 (Doc. 70-1, p. 188). An email containing one of the key words or phrases is flagged for additional review by the Intelligence Unit; the email cannot reach its intended recipient unless an employee in that unit reviews the email and releases it to the recipient. A130-31 (Doc. 70-1, pp. 188-89). If the employee does not release the email, he can either "indefinitely detain[]" the email or "discard[] [it] entirely." A131 (Doc. 70-1, p. 189). In those cases, the GDC employee "has the *option* to notify the customer and/or offender if and why the message was discarded." *Id.* (emphasis added).

The GDC has imposed a number of restrictions on prisoners' ability to communicate by email. At some point in recent years, the GDC adopted a policy restricting prisoners to emailing individuals who had passed a criminal background check and been cleared to communicate with the prisoner. *See* A91 (Doc. 64-4, p. 7) ("[I]nmates are only allowed to email with those who have been cleared by security personnel to visit Plaintiff[.]"). During the course of the litigation, however, the GDC removed the restrictions on the individuals prisoners are permitted to email. A176 (Doc. 80-5, p. 1). Mr. Benning is presently permitted to correspond by email with individuals who are not on his approved visitor list. *Id.*

The GDC has also issued Standard Operating Procedure (SOP) 204.10, a written policy governing the use of J-Pay kiosks and GOAL devices, though the

parties dispute whether the GDC makes prisoners aware of the policy in practice.[1] Section IV.D of the policy sets forth specific rules and restrictions on the content of prisoners' electronic communications. A97-99 (Doc. 64-4, pp. 13-15). As relevant here, Section IV.D provides:

> 13. Offenders shall not request emails to be forwarded, sent, or mailed to others.
>
> 14. Customers and offenders shall not request or send information on behalf of or about another offender. …
>
> 16. Customers and offenders will be advised of these Rules and that communications which violate this policy will be intercepted without explanation and no refund will be provided to the sender.

A98-99 (Doc. 64-4, pp. 14-15). A prisoner's violation of these rules can result in a disciplinary report or warning, the suspension of email access, or the suspension of the use of J-Pay kiosks or the GOAL device. A99 (Doc. 64-4, p. 15).

2. The GDC's Censorship of Mr. Benning's Emails

In September and October 2017, Mr. Benning attempted to send three emails to his sister, Elizabeth Knott. All three emails raised concerns about gang activity and corruption at the prison:

- **September 24, 2017:** Mr. Benning's email included a letter seeking to raise awareness about corruption at the GDC. *See* A123-26 (Doc. 64-6, pp. 7-10). He asked Ms. Knott to send a copy of the letter to his other sisters and to "anyone else [she] think[s] might be interested." Defendant

[1] Though the effective date of the policy is listed as August 15, 2017, Mr. Benning was not made aware of SOP 204.10 until discovery in this case. Doc. 64-3, p. 43.

> Patterson reviewed the email and censored it. The reason provided in the GDC's internal database was "Entering into a Contract/Engaging in Business." A123 (Doc. 64-6, p. 7).

- **October 9, 2017:** Mr. Benning sent a lengthy email to Ms. Knott, again including a letter that expressed his concerns about corruption among prison officials. Due to a character limit, he sent the email as three separate messages. At the end of the email, Mr. Benning mentions that Ms. Knott could send the letter to U.S. Congressmen and Senators. A112-13, A115-16 (Doc. 64-5, pp. 7-8, 10-11). Two of the three email messages were flagged for further review; Defendant Edgar reviewed those messages and censored them. The reason provided was "J-Pay - Unauthorized Communication." *Id.*

Consistent with GDC policy, prison officials did not notify Mr. Benning that any of these emails had been censored and did not provide any explanation for the censorship decisions. A41, A47 (Doc. 28, pp. 5, 11). Nor did officials give Mr. Benning an opportunity to challenge those decisions. A47 (Doc. 28, p. 11). Mr. Benning subsequently learned the emails had not been delivered, at which point he filed a grievance. The GDC employee reviewing the grievance contacted a project manager—not any of the employees who censored Mr. Benning's emails—for a response. Doc. 70-2, pp. 266-67. The project manager's statement provided no specific details about the reasons for censoring the correspondence; it indicated only that the emails must have violated one of the prison's email policies. *Id.* That statement was then copied nearly verbatim into the form denying the grievance:

> Based on the investigation, the use of the GOAL device and kiosk machine is a privilege; not a right. If your email is being censored, it is because of the content that is being sent or received from the outside that may be violating the policy, terms and conditions for acceptable use.

A128 (Doc. 70-1, p. 11). Mr. Benning unsuccessfully appealed the denial of his grievance. A129 (Doc. 70-1, p. 12).

The following year, Mr. Benning attempted to send an email to the Aleph Institute, a nonprofit Jewish organization that provides religious and other assistance to individuals in institutional environments, including prisons.[2] The email principally concerned Mr. Benning's request for a Kosher diet in prison and other religious matters. At the end of the email, he asked the Institute to "ensure that Jason Iran Harris' address is corrected to show he is now at Wilcox State Prison." A105 (Doc. 64-4, p. 21). A GDC employee, Romita Keen, censored the email with the comment "another inmate's information." A82, A105 (Doc. 64-4, pp. 6, 21). Mr. Benning again received no notice of the censorship decision; he independently learned that the email had not been delivered six months after he had attempted to send it. A41 (Doc. 28, p. 5). The prison did not explain why the email had been censored and did not provide an opportunity to challenge the censorship decision. A47 (Doc. 28, p. 11).

B. Procedural History

Mr. Benning filed suit in March 2018, alleging that the censorship of his emails violated his First and Fourteenth Amendment rights. The Magistrate Judge

[2] Aleph Institute, *About Us*, https://aleph-institute.org/wp/about/ (last visited Sept. 22, 2021).

screened the complaint under the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915A(a), and allowed Mr. Benning's claims to proceed. *See* A25-36 (Doc. 7). The operative complaint names three individuals as defendants: the GDC Commissioner in his official capacity[3] and two of the GDC employees who censored his emails, Jennifer Edgar and Margaret Patterson. The complaint seeks declaratory and injunctive relief, $0.35 per censored email in compensatory damages, $10 in nominal damages, and $1,000 in punitive damages. A42, A49 (Doc. 28, pp. 6, 13).

After discovery, Defendants moved for summary judgment, arguing that Mr. Benning has no constitutional right to email access and that any restrictions on his emails survive scrutiny under the deferential standard announced in *Turner v. Safley*, 482 U.S. 78 (1987). To support the regulations' validity, Defendants submitted a declaration from Richard Wallace, a GDC supervisor. A86-87 (Doc. 64-4, pp. 2-3). Mr. Wallace cited "security concerns" as the reason for barring prisoners from sending emails that ask the recipient to forward their contents: "This rule prevents the inmate from communicating with those who have not been cleared to communicate with him and thereby preventing possible threats to citizens and prison personnel." A91 (Doc. 64-4, p. 7). Defendants relied on this

[3] At the time, the GDC Commissioner was Gregory Dozier. The current Commissioner is Timothy Ward.

assertion in their statement of material facts, alleging that "only those who have agreed to submit to a criminal background check[], and cleared said background checks, are allowed [to] communicate with Plaintiff through email." A78 (Doc. 64-2, p. 2). Mr. Wallace similarly invoked "security concerns" as the justification for the rule prohibiting emails from referencing other prisoners: "This rule protects staff and other inmates from threats posed by having an inmate sending identifying information of staff and other inmates to third parties outside the prison." A91 (Doc. 64-4, p. 7).

In his opposition, Mr. Benning argued that the standard announced in *Procunier v. Martinez*, 416 U.S. 396 (1974), governs the constitutionality of restrictions on prisoners' "outgoing correspondence," including correspondence by email. A137-38 (Doc. 80, pp. 5-6) (citing *Thornburgh v. Abbott*, 490 U.S. 401 (1989)). He explained that there is no justification for treating email correspondence differently from physical correspondence for purposes of the First Amendment analysis, noting other contexts in which courts had rejected attempts to distinguish between electronic and physical communications. *Id.* Mr. Benning also pointed to multiple disputed facts that are material to resolving whether Defendants' policies violate the First Amendment. For example, he explained that the GDC had stopped requiring background checks for individuals seeking to communicate with him by email—a fact that entirely undermines Defendants'

asserted justification for the forwarding policy. A134, A143-44 (Doc. 80, pp. 2, 11-12). Finally, Mr. Benning reiterated that Defendants denied him due process by failing to provide any procedural safeguards before censoring his emails. A149 (Doc. 80, p. 17).

The Magistrate Judge recommended granting Defendants' motion for summary judgment, applying the *Turner* standard to the First Amendment claim. A192-201 (Doc. 84). Mr. Benning objected on several grounds, including that the Magistrate Judge failed to address his due process claim. A203 (Doc. 87-2, p. 2). The district court then recommitted the matter to the Magistrate Judge to consider Mr. Benning's due process claim. A223-28 (Doc. 89).

On remand, the Magistrate Judge again concluded that Defendants had not violated Mr. Benning's First Amendment rights. A229-42 (Doc. 90). The Magistrate Judge further held that Mr. Benning had abandoned his due process claim and that the claim would fail in any event. *Id.*

Mr. Benning filed objections to the report and recommendation. He reiterated that the GDC had "amended the email policy" in response to his lawsuit, "remov[ing] the restriction … allowing [him] to email only those who have passed security and background checks necessary to physically enter the prison." A252 (Doc. 105, p. 2). Defendants did not dispute this assertion, arguing instead that the

GDC's censorship rules are valid regardless of whether the GDC limits Mr. Benning to emailing individuals on an approved list. A248-49 (Doc. 103, pp. 6-7).

The district court overruled Mr. Benning's objections, adopted the Magistrate Judge's recommendation, and granted summary judgment for Defendants. The court began by considering the specific forms of injunctive relief requested in Mr. Benning's complaint, denying each of them in turn. A281-84 (Doc. 108, pp. 6-9). The court denied the request for an order prohibiting Defendants from limiting the individuals with whom Mr. Benning can correspond by email. Relying on Mr. Benning's representation that Defendants had "removed [that] restriction," the court found the request "moot." A282 (Doc. 108, p. 7). Mr. Benning's other requests for injunctive relief were, in the court's view, too "sweeping and broad" to satisfy the limits imposed by the PLRA, 18 U.S.C. § 3626(a)(1). A283 (Doc. 108, p. 8). The court thus held that "any possible claim for injunctive relief related to ongoing conduct" necessarily failed—before the court had even considered the merits of Mr. Benning's constitutional claims. A284 (Doc. 108, p. 9).

The district court next analyzed whether the two defendants sued in their individual capacities—the GDC employees who censored his emails—could be held liable for damages. Mr. Benning did not dispute that the employees were acting within the scope of their discretionary authority. A284 (Doc. 108, p. 9).

Accordingly, the court explained, qualified immunity would protect the employees from liability unless their conduct violated Mr. Benning's clearly established rights. *Id.*

The court concluded that Defendants had not violated Mr. Benning's First Amendment or due process rights. As to the First Amendment, the court recognized that whether *Martinez* or *Turner* governs restrictions on outgoing prisoner email is "an issue of first impression." A293 (Doc. 108, p. 18). The court chose to apply *Turner*, reasoning that neither the Supreme Court nor this Court "ha[d] considered whether outgoing email should be treated the same as outgoing traditional mail" in this context. *Id.* The court then found that the censorship of Mr. Benning's emails under SOP 204.10 did not violate the First Amendment under *Turner*, summarily holding that the SOP's email restrictions are "reasonably related" to "legitimate penological interests" in protecting the public, prison officials, and other offenders. A296 (Doc. 108, p. 21).

Turning to Mr. Benning's due process claim, the court appeared to acknowledge that prisoners have a protected liberty interest in uncensored "communication by letter" under *Martinez*. A301-02 (Doc. 108, pp. 26-27). But the court held that Mr. Benning had no protected liberty interest in his outgoing *emails*, reiterating that "email should not be treated the same as outgoing physical mail." A302 (Doc. 108, p. 27). Finally, the court concluded that even if

Defendants had violated Mr. Benning's rights, qualified immunity would shield them from liability because the rights at issue were not "clearly established." A302-03 (Doc. 108, pp. 27-28).

SUMMARY OF ARGUMENT

I. Defendants' censorship of Mr. Benning's outgoing emails violated his First Amendment rights, and the district court concluded otherwise only by applying the wrong legal standard. The Supreme Court has long held that prison officials may regulate "outgoing correspondence" only if the regulation advances an important governmental interest and is "no greater than is necessary" to protect that interest. *Thornburgh*, 490 U.S. at 413; *Martinez*, 416 U.S. at 413-14. The district court refused to treat outgoing email as "outgoing correspondence," reasoning that *Martinez* itself involved only physical mail. But the district court failed to account for the Supreme Court's *reasons* for subjecting restrictions on outgoing mail to heightened scrutiny—most notably, that outgoing mail is much less likely than incoming mail to threaten security *inside* the prison. Because the Court's reasoning applies equally to outgoing email, and because outgoing email is indisputably a form of "outgoing correspondence," the district court should have applied *Martinez* to the restrictions challenged here.

Defendants are not entitled to summary judgment under the *Martinez* standard. Three of Mr. Benning's emails were censored under a GDC policy

prohibiting prisoners from asking email recipients to forward an email to others. Defendants claim this policy is necessary to prevent prisoners from threatening individuals with whom they are not cleared to communicate directly. But the prison no longer restricts the individuals with whom a prisoner may communicate by email, and the prison already prohibits outgoing emails that contain any kind of threat. Defendants similarly justify the policy prohibiting emails that contain any information about other inmates—even publicly available information—as a security measure. But again, the prison *already* prohibits communications containing threats. Accordingly, there are triable issues of fact as to whether either policy serves an important governmental interest and, at minimum, whether the policies are broader than necessary to achieve those ends.

For similar reasons, Defendants are not entitled to summary judgment even if the Court concludes that the *Turner* standard applies. The critical question under *Turner* is whether a "rational connection" exists between the prison policies and a legitimate penological objective. As explained, there are triable questions of fact as to whether the challenged policies rationally serve any legitimate ends.

II. GDC policy expressly authorizes prison officials to censor emails without providing any notice to the prisoner, any explanation for the decision, or any opportunity to respond. That policy violates the Due Process Clause under well-settled law. *Martinez* held that because prisoners have a protected liberty

interest in uncensored communication, any censorship decision must be accompanied by minimum procedural safeguards. A number of courts have correctly held that *Martinez*'s due process requirements apply when a prison withholds emails, newspapers, magazines, and other forms of communication beyond physical mail. This Court should hold the same.

III. The district court held that even if Defendants violated Mr. Benning's constitutional rights, he would not be entitled either to damages or injunctive relief. Neither conclusion is correct. Qualified immunity cannot shield the individual-capacity defendants from liability for damages, since it has been clearly established for decades that a prison may not lawfully censor outgoing correspondence that poses no plausible threat to prison security. The district court can also grant appropriately tailored injunctive relief if Mr. Benning prevails on his claims. The court can, for example, enjoin Defendants from enforcing the challenged policies as to outgoing emails.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. *Perry v. Sec'y, Fla. Dep't of Corr.*, 664 F.3d 1359, 1363 (11th Cir. 2011). Summary judgment is proper 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). The court "must construe the facts and draw all

inferences in the light most favorable to the nonmoving party," and may not make credibility choices. *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013). If any "conflicts arise between the facts evidenced by the parties, [the court must] credit the nonmoving party's version." *Id.*

ARGUMENT

I. Defendants Are Not Entitled to Summary Judgment on the Claim That the GDC's Email Restrictions Violate the First Amendment

The threshold question in this case is a narrow one: Once a prison has made email services available to prisoners, what standard should courts use to assess whether the censorship of prisoners' emails violates the First Amendment? The Supreme Court's cases provide a ready answer. Because *outgoing* emails generally pose a minimal risk to prison security, censorship of those emails is subject to the heightened standard announced in *Procunier v. Martinez*, 416 U.S. 396 (1974), and reaffirmed in *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

The district court acknowledged that *Martinez* remains the governing standard for restrictions on "outgoing correspondence." A289 (Doc. 108, p. 14); *see also Thornburgh*, 490 U.S. at 413; *Perry v. Sec'y, Fla. Dep't of Corr.*, 664 F.3d 1359, 1365 (11th Cir. 2011). But the court refused to treat prisoners' outgoing emails—*i.e.*, their electronic mail—as the type of "outgoing correspondence" to which *Martinez* applies. The court instead applied *Turner v. Safley*, 482 U.S. 78 (1987), but that default standard governs restrictions on prisoners' rights *only if* the

Court has not specified that another standard applies. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 510-11 (2005) (holding that strict scrutiny, not *Turner*, applies to prisoners' racial discrimination claims); *Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008) (rejecting the argument that *Turner* should apply to a prison's strip-search practices, since the Supreme Court had previously announced a more "specific" standard that governs such claims).

Here, the Supreme Court has expressly held that *Martinez*, not *Turner*, applies to restrictions on outgoing correspondence. *See Thornburgh*, 490 U.S. at 413. Although Mr. Benning would prevail under either standard, this Court should hold that restrictions on outgoing email—the dominant means of correspondence in today's world—trigger scrutiny under *Martinez* in the same manner as restrictions on other types of outgoing messages.

A. The *Martinez* Standard Applies to the Censorship of Prisoners' Outgoing Emails

The district court recognized that *Martinez* continues to "appl[y] to 'regulations concerning outgoing correspondence,'" A289 (Doc. 108, p. 14), but concluded that outgoing email does not qualify as "outgoing correspondence" in this context. That conclusion is incorrect, as the Supreme Court's cases on prisoner correspondence make clear.

1. The Supreme Court has explained that censorship of a prisoner's correspondence with individuals outside prison walls infringes on the First

Amendment interests of prisoners and non-prisoners alike. In *Martinez*, the Court considered the constitutionality of California's prison correspondence regulations, which, among other things, authorized prison officials to censor messages that "magnif[ied] grievances" or expressed "inflammatory" views. 416 U.S. at 399-400. The Court first determined that courts must apply heightened scrutiny when deciding "whether a particular regulation or practice relating to inmate correspondence" violates the First Amendment. *Id.* at 413. Prison officials must first demonstrate that "a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation." *Id.*; *see also id.* (regulation "must further an important or substantial governmental interest unrelated to the suppression of expression"). And prison officials must also show that "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* Accordingly, the Court made clear that a regulation that serves an important governmental interest "will nevertheless be invalid if its sweep is unnecessarily broad." *Id.* at 413-14. The Court ultimately struck down California's regulations as "far broader than any legitimate interest in penal administration demands." *Id.* at 416.

The Court returned to the appropriate standard for prisoner correspondence in *Thornburgh*, where it drew for the first time a clear distinction between

incoming and outgoing prisoner correspondence. Two years earlier, the Court had decided *Turner*, which involved incoming correspondence from other prisoners. *Turner* had declined to apply heightened scrutiny under *Martinez*, holding instead that restrictions on prisoner-to-prisoner correspondence—like other restrictions that are "centrally concerned with the maintenance of order and security *within* prisons"—are subject to a more deferential reasonableness standard. *See Thornburgh*, 490 U.S. at 410 (emphasis added); *id.* at 413 (noting that the "impact … on the internal environment of the prison was of great concern" in *Turner*).

In *Thornburgh*, the prisoner argued that the *Martinez* standard should still apply to restrictions on incoming mail from non-prisoners (a category of mail not at issue in *Turner*). But the Court rejected this argument, finding that *all* incoming mail implicates concerns about potential "disruptive conduct" inside the prison. *Id.* at 412-13. The Court thus "overrule[d]" *Martinez* to the extent the decision suggests that incoming mail from non-prisoners should be treated differently from incoming mail from prisoners. *Id.* at 413-14.

Rather than do away with the *Martinez* standard altogether, the Court "limited [*Martinez*] to regulations concerning outgoing correspondence." *Id.* at 413; *see also Perry*, 664 F.3d at 1365 (describing *Thornburgh* as "limit[ing] *Martinez* to regulations involving only outgoing mail"). The Court explained that restrictions on outgoing correspondence are properly subject to heightened scrutiny

for two principal reasons. First, because the recipients of outgoing mail are individuals *outside* the prison environment, these communications are far less likely to threaten security *inside* the prison. *Thornburgh*, 490 U.S. at 411-12. Second, because outgoing messages that do pose a security threat are more likely to fall within "readily identifiable" categories (*e.g.*, escape plans, threats), prison officials "require a lesser degree of case-by-case discretion" in order to protect the prison's interests. *Id.* at 412.

2. Both the language and reasoning of *Thornburgh* establish that outgoing emails should be treated as outgoing correspondence for purposes of the First Amendment analysis. To start, *Thornburgh* expressly indicates that *Martinez* would continue to apply to "regulations concerning outgoing correspondence." *Id.* at 413. Emails sent by a prisoner are plainly a form of "outgoing correspondence." The GDC itself defines "[e]lectronic mail" as "[*c*]*orrespondence* sent electronically over an authorized network through a [k]iosk." A94 (Doc. 64-4, p. 10) (emphasis added). And the Supreme Court has recognized since the 1990s that "[e]-mail enables an individual to send an electronic message—*generally akin to a note or letter*—to another individual or to a group of addressees." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997) (emphasis added); *see also* Merriam-Webster, *Correspondence*, https://www.merriam-webster.com/dictionary/correspondence (last visited Sept. 22, 2021) (defining "correspondence" as

"communication by letters *or email*" and "the letters *or emails* exchanged" (emphases added)).

Thornburgh's reasoning—and, in particular, its rationale for distinguishing between incoming and outgoing correspondence—likewise supports applying *Martinez* to restrictions on outgoing email. The Court explained that outgoing mail poses considerably less risk to prison order and security than incoming mail, which can be circulated among prisoners and potentially lead to heightened tensions or riots. *Thornburgh*, 490 U.S. at 411-12; *see also Martinez*, 416 U.S. at 416 (explaining that risk of outgoing correspondence causing a riot was minimal). That reasoning applies here as well. Outgoing email is directed to individuals *outside* the prison and is therefore unlikely to cause disruption inside the prison walls.[4]

Thornburgh also explained that "dangerous" outgoing mail is likely to fall within certain "readily identifiable" categories, which means prison officials can adequately protect their interests by adopting more closely tailored regulations prohibiting such content. This, too, is equally true of outgoing email. Prison

[4] This distinction explains why the Magistrate Judge erred in relying on *Pope v. Hightower*, 101 F.3d 1382, 1384 (11th Cir. 1996), a case involving a limit on the number of individuals a prisoner could call, to conclude that *Turner* applied. *See* A236 (Doc. 90, p. 8) (reasoning that "email presents greater risks than the telephone"). Telephone conversations are necessarily two-way communications, *i.e.*, they involve both incoming and outgoing messages, and prison officials cannot censor dangerous messages before prisoners receive them. Telephone conversations thus have a greater potential to create security risks *inside* the prison, and are in that sense categorically different from purely outgoing correspondence.

officials can easily prohibit prisoners from sending letters *or emails* that contain dangerous content, such as threats, extortion attempts, or escape plans. The First Amendment thus appropriately requires a "closer fit" between restrictions on outgoing email and the security interests those restrictions allegedly serve. *Thornburgh*, 490 U.S. at 412.

3. In rejecting Mr. Benning's argument that *Martinez* applies, the district court concluded that email is "just different" from traditional mail. A276 (Doc. 108, p. 1). But the court failed to identify a single difference between the two types of correspondence that could justify treating censorship of prisoner email differently from censorship of prisoner mail. A276, A292-93 (Doc. 108, pp. 1, 7-8). Defendants, for their part, seemed to argue below that restrictions on email should be subject to a lower standard because a prisoner whose emails are censored still has access to traditional mail. *See* A62 (Doc. 64-1, p. 7) ("Plaintiff was not prevented from communicating with the outside world. He was merely prevented from utilizing the email system on three occasions."). That argument is irreconcilable with *Martinez*, where the Court applied heightened scrutiny to restrictions on traditional mail even though prisoners could still "communicat[e] with the outside world" (*id.*) through in-person visits. The Court thus made clear that the availability of alternative means of communication is not enough to avoid the *Martinez* standard of review.

Nor is it relevant (as Defendants contended below) that the GDC's policies describe email as a privilege rather than a right. The district court correctly recognized that "the privilege-versus-right distinction" does not determine the appropriate constitutional standard. A286-87 (Doc. 108, pp. 11-12). Mr. Benning is not arguing for a positive right to email access; his claim is instead that once a prison makes email available to prisoners as a means of communication, the First Amendment protects the prisoners' interests in exercising their right to communicate free of unjustifiable censorship. *See* A138-39 (Doc. 80, pp. 6-7); *cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 427-28 (1993). *Martinez* is again directly on point. California maintained in that case that personal correspondence was "a privilege, not a right." *Martinez*, 416 U.S. at 399. But the majority held that whether prisoners had a "right" to correspondence was beside the point. *Id.* at 408. The Court thus made clear that whether a prisoner has a "right" to a particular method of communication does not resolve the question at hand—namely, which standard applies when the government gives prisoners access to a method of communication but then restricts their ability to use that method to communicate with the outside world.

Again, the question here is whether the standard that undisputedly applies to outgoing mail should apply to outgoing email as well. In a range of First Amendment contexts, the same constitutional standard applies irrespective of

whether individuals expressed themselves by mail or email. If a public employee claims First Amendment retaliation based on her speech, the analysis is no different if the employee spoke out by email or traditional letter. *See, e.g.*, *Burton v. City of Ormond Beach, Fla.*, 301 F. App'x 848, 852-53 (11th Cir. 2008) (unpublished); *Lucero v. New Mexico Lottery*, 685 F. Supp. 2d 1165 (D.N.M. 2009). Whether certain words amount to obscenity or commercial speech for First Amendment purposes similarly does not depend on whether the words are conveyed by email. *See Everett v. Cobb Cnty., Ga.*, 823 F. App'x 888, 892 (11th Cir. 2020) (obscenity); *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 258 (4th Cir. 2017) (commercial speech). There is no reason for making censorship of prisoner mail the unusual area of the law where the First Amendment protections for email are governed by an entirely different standard from regular mail.

B. There Are Triable Issues of Fact as to Whether Defendants' Email Policies Survive Under *Martinez*

Defendants are not entitled to summary judgment on Mr. Benning's First Amendment claim, since neither the forwarding policy nor the inmate-information policy withstands scrutiny under *Martinez*.

1. There are factual disputes as to whether the forwarding policy is necessary to preserve prison security

Defendants censored three of Mr. Benning's emails to his sister under a policy prohibiting prisoners from "request[ing] emails to be forwarded, sent, or mailed to others." A98 (Doc. 64-4, p. 14). Defendants bear the burden of demonstrating that this policy *actually* furthers "an important and substantial government interest unrelated to the suppression of expression"—*i.e.*, "security, order, [or] rehabilitation." *Martinez*, 416 U.S. at 413; *see id.* at 416 (concluding that prison officials failed to meet their burden when they did not explain "*how* the [censored emails] … could possibly lead to flash riots" and did not "specify what contribution the suppression of [the emails] makes to the rehabilitation of criminals").

Defendants rely exclusively on prison security as the justification for the forwarding policy. According to a GDC official, the policy "prevents the inmate from communicating with those who have not been cleared to communicate with him and thereby prevent[s] possible threats to citizens and prison personnel." A91 (Doc. 64-4, p. 7); *see also* A66 (Doc. 64-1, p. 11) (arguing that the forwarding policy "prevents Plaintiff from communicating indirectly with someone he cannot communicate with directly"). One crucial problem with this rationale is that it assumes the GDC only allows prisoners to email individuals who have been "cleared" by the prison. But no such policy appears to exist. Mr. Benning

submitted an affidavit explaining that the GDC *no longer* limits the universe of people with whom he can correspond by email. A176-77 (Doc. 80-5, pp. 1-2). He stated that he now corresponds with individuals who do not appear on his list of approved visitors and thus have not undergone any security screening. *Id.* Defendants have not disputed Mr. Benning's representations or produced any written policy indicating that a clearance requirement still exists, and the district court expressly relied on the absence of any restrictions on email recipients to deny Mr. Benning's request for injunctive relief as moot. A282 (Doc. 108, p. 7). At the very minimum, there is a genuine issue of fact as to whether this restriction exists. And that fact is obviously material: If there are no restrictions on the people Mr. Benning can email, then the forwarding policy cannot be justified as a means of preventing prisoners from circumventing such restrictions.

The forwarding policy is also not necessary to serve the prison's interest in "preventing possible threats to citizens and prison personnel." A91 (Doc. 64-4, p. 7). First of all, if prisoners are not limited to emailing individuals who have been "cleared," they can theoretically email threats directly to their targets. More important, regardless of whether the clearance requirement exists, the forwarding policy is unnecessary because GDC regulations *already* prohibit outgoing emails containing threats. *See* Ga. Comp. R. & Reg. 125-3-3-.07 (writings that "contain threats against an individual" are "considered abuses of the mailing privilege" and

can lead to disciplinary action). GDC officials already review every flagged email; if officials determine that a prisoner has threatened a third party, they can lawfully intercept that message on those grounds. The forwarding policy thus adds only "the most limited incremental support" for the prison's asserted interest in preventing threats. *Cincinnati*, 507 U.S. at 426-27.

Even assuming the policy serves some security purpose, it fails under *Martinez* because "its sweep is unnecessarily broad." *Martinez*, 416 U.S. at 413-14. The rule is not directed at specific "categories" of emails that present a clear risk to prison order and security. *See, e.g.*, *Thornburgh*, 490 U.S. at 413 (prisons may constitutionally prohibit messages containing escape plans and threats of blackmail and extortion); *see also Martinez*, 416 U.S. at 413 (describing censorship of such messages as "justifiable"). There is nothing about the class of emails at issue here—emails that ask the recipient to forward their contents—that gives rise to similar institutional concerns.

On the contrary, emails censored under the forwarding policy could serve important public functions—for example, seeking to raise public awareness of prison conditions. The policy's application to Mr. Benning's emails illustrates this concern; Mr. Benning asked his sister to forward his information about GDC corruption and retaliation to policymakers and other interested parties who might be able to intervene. *See Adams v. James*, 784 F.2d 1077, 1081 (11th Cir. 1986)

(discussing prisoners' right to engage in "free expression … as an agent of social change"); *cf. Pesci v. Budz*, 730 F.3d 1291, 1300 (11th Cir. 2013) ("Deference to facility administrators and concerns relating to safety and security cannot be used as a pretext to silence undesirable speech."). Other emails censored under the policy could be entirely benign; a prisoner might ask his sister to pass along a message to his mother who does not have her own email account or to a friend whose email address he does not know.

The policy is thus "far broader than necessary" to serve any legitimate interest in prison security. *Martinez*, 416 U.S. at 416. Defendants' inconsistent enforcement of the policy only underscores this point. As Mr. Benning explained, he has sent other emails asking recipients to forward their contents—including emails virtually identical to the ones at issue here—and those emails have not been censored, presumably because they do not raise any security concerns. A180-81 (Doc. 80-5, pp. 5-6); *see also* A47 (Doc. 28, p. 11). There is simply no need for a sweeping policy that prohibits *any* forwarding requests regardless of the substance of the underlying message.

2. There is a factual dispute as to whether the inmate-information policy is necessary to protect prisoners and staff from threats

The second policy relevant here prohibits prisoners from including *any* "information … about another offender" in their correspondence. A99 (Doc. 64-4,

p. 15). Defendants again rely on prison security as the sole rationale for the policy, claiming that it "protects staff and other inmates from threats posed by having an inmate sending identifying information of staff and other inmates to third parties outside the prison." A91 (Doc. 64-4, p. 7). This policy cannot withstand scrutiny under *Martinez*, which "require[s] a close fit between the challenged regulation and the interest it purported to serve." *Thornburgh*, 490 U.S. at 411.

To start, the policy does not even plausibly advance the asserted interest in protecting staff members, as it in no way bars prisoners from discussing prison staff in their emails. The policy reads in full: "Customers and offenders shall not request or send information on behalf of or about *another offender*." A99 (Doc. 64-4, p. 15) (emphasis added). As to the protection of other prisoners, the policy adds nothing to existing regulations that already prohibit prisoners from sending emails that contain "threats to another individual." *See supra* pp. 28-29. And Mr. Benning presented evidence that Defendants do not consistently enforce the policy, again demonstrating that the policy is not actually necessary to any legitimate interest. *See* A179 (Doc. 80-5, p. 4) ("I have sent JPay emails containing information about another inmate that have not been censored.").

The policy also fails under *Martinez* because "its sweep is unnecessarily broad." *Martinez*, 416 U.S. at 413-14. Again, the class of emails targeted by this policy includes emails that pose no institutional risks whatsoever. Mr. Benning's

email to the Aleph Institute is a good example. The primary subject of his email was his request for a Kosher diet to accommodate his religious beliefs. A105 (Doc. 64-4, p. 21). At the very end of his email, he stated that another Georgia prisoner—who was also a member of the Aleph Institute, *see* A144 (Doc. 80, p. 12)—had been moved to the Wilcox prison. A105 (Doc. 64-4, p. 21). This "information" about another inmate plainly does not present any kind of threat either to the prisoner or to prison security more broadly; indeed, the very same information is accessible to *anyone* on the GDC's website. *See* Ga. Dep't of Corr., Find an Offender, http://www.dcor.state.ga.us/GDC/Offender/Query (last visited Sept. 22, 2021). Yet Mr. Benning's passing reference to this information resulted in the censorship of an email on a matter of great religious importance.

The number of emails that could be censored under this policy is staggering, as it sweeps in virtually *any* correspondence in which the prisoner discusses day-to-day interactions with other prisoners (including, for example, a roommate). Because the policy is "not narrowly drawn" to reach only information that might endanger another prisoner, the policy cannot survive under *Martinez*, 416 U.S. at 416. At minimum, there is a genuine dispute of material fact as to whether a more targeted policy could adequately serve the prison's interest in protecting prisoners and staff from threats.

C. Even If *Turner* Applies, There Are Triable Issues of Fact as to Whether the Policies Are Reasonably Related to Legitimate Penological Interests

Even if the Court concludes that *Turner* is the appropriate standard, Defendants are not entitled to summary judgment on Mr. Benning's First Amendment claim. The *Turner* standard, though deferential, is "not toothless," *Pesci*, 730 F.3d at 1299, and prison authorities "cannot avoid court scrutiny by reflexive, rote assertions," *Shimer v. Washington*, 100 F.3d 506, 610 (7th Cir. 1996) (internal quotation marks omitted)). This Court has accordingly reversed a grant of summary judgment in a prison's favor where the prison offered only "blanket and conclusory" assertions in support of a ban on certain materials. *See Daker v. Warren*, 660 F. App'x 737, 744 (11th Cir. 2016) (unpublished) (two sentences in a prison official's affidavit, "assert[ing] in a blanket and conclusory manner that hardcover books could be used as weapons and to smuggle contraband items," were not sufficient basis to grant summary judgment). That is all Defendants have offered to support the challenged email policies.

1. There are factual disputes as to whether the forwarding policy and the inmate-information policy are rationally connected to prison security

The "most important" factor in the *Turner* analysis is whether there is a "rational connection" between the policy and a legitimate penological objective. *Pesci*, 935 F.3d at 1167. This factor must weigh in the prison's favor for the

prison to prevail: "If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor." *Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001).

A prison cannot prevail on this factor by simply invoking security, public safety, or some other legitimate penological objective; courts demand "more than a formalistic logical connection … between the policy and the problems it purports to solve." *Pesci*, 935 F.3d at 1167; *see also Daker*, 660 F. App'x at 744-45; *see also Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (invalidating ban on prisoners' receiving material downloaded from the internet, where prison "did not support its assertion that coded messages are more likely to be inserted into internet-generated materials than word-processed documents"). In *Al-Amin v. Smith*, 511 F.3d 1317, 1331 (11th Cir. 2008), for example, this Court applied *Turner* and held that prison officials failed to "articulate[] a legitimate security interest in opening properly marked attorney mail outside [the prisoner's] presence," even though the mail could theoretically contain contraband. Similarly, in *Canadian Coalition Against the Death Penalty v. Ryan*, 269 F. Supp. 2d 1199 (D. Ariz. 2003), a district court struck down a statute that prohibited prisoners from accessing the internet despite the prison's assertions that the policy protected the public from fraud and other criminal activity. The court relied heavily on the fact

that "existing regulations and statutes already preclude[d]" such activity and the prison "ha[d] methods in place to enforce these existing regulations." *Id.* at 1202.

As these cases illustrate, some analysis of whether the policy serves its stated goal is necessary before a court can conclude that this factor weighs in the prison's favor. The district court here provided no analysis whatsoever, instead accepting Defendants' invocation of security concerns at face value. *See* A296 (Doc. 108, p. 21) ("Protecting the public, prison officials, and offenders are legitimate penological interests. And the email restrictions in SOP 204.10 are reasonably related to those legitimate penological interests."). As explained, however, Defendants' justification for the forwarding policy is that it prevents prisoners from communicating with individuals who have not been "cleared" by the prison, and there is a factual dispute as to whether any clearance requirement exists. *See supra* pp. 27-28. Defendants also suggest that the forwarding policy prevents prisoners from directing "threats" to other individuals, but that is simply not the case. The GDC's regulations independently prohibit messages containing threats, and GDC employees already screen prisoners' emails for compliance with those regulations. *See supra* pp. 28-29; *Canadian Coal. Against the Death Penalty*, 269 F. Supp. 2d at 1202 (finding this factor weighed against the prison where "existing regulations … already preclude[d]" the relevant conduct).

Similarly, Defendants' justification for the inmate-information policy is that it protects against threats on other prisoners and staff members. But the policy does not even prohibit individuals from discussing staff, and again, the regulations separately prohibit emails that contain threats. The policy also irrationally prohibits emails, like Mr. Benning's, that contain only *publicly available* information about another prisoner (*e.g.*, their present location). *See supra* p. 32. There are accordingly triable issues of fact as to whether any "valid, rational connection" exists between the email policies and the penological objectives they allegedly serve. *Turner*, 482 U.S. at 89.

2. There are factual disputes as to the remaining *Turner* factors

Because the policies have no rational connection to a legitimate penological goal, they "fail[]" the *Turner* standard "irrespective of whether the other factors tilt in [their] favor." *Shaw*, 532 U.S. at 230. Even so, the remaining factors confirm that the policies violates the First Amendment.

The second *Turner* factor—whether the plaintiff has "alternative means" of exercising the right—weighs in Mr. Benning's favor. 482 U.S. at 90. Although Mr. Benning retains the ability to communicate with family and friends by traditional mail, "the existence of other alternatives does not extinguish altogether any constitutional interest on the part of the [prisoners] in [a] particular form of access." *Pell v. Procunier*, 417 U.S. 817, 823 (1974) (alterations omitted). In

today's world, email is a substantially more effective way to disseminate information to a broad audience. *See, e.g.*, The White House, How You Can Write or Call the White House, https://www.whitehouse.gov/get-involved/write-or-call/ (last visited Sept. 22, 2021) ("If possible, email us! This is the fastest way to reach the White House."); Atlanta Journal-Constitution, Newsroom Contact Information, https://ajc.zendesk.com/hc/en-us/articles/1500005894842 (last visited Sept. 22, 2021) (listing only email addresses where individuals can send investigative tips and story ideas).

Indeed, email may be the *only* effective alternative if the information is time-sensitive, as might be the case if, for example, an altercation took place at the prison or a development emerged in a prisoner's legal case. Yet Defendants' policies do not offer prisoners any option to request exceptions to the challenged policies in such circumstances. *See, e.g.*, *Torres v. Fla. Dep't of Corr.*, 742 F. App'x 403, 407 (11th Cir. 2018) (finding that second *Turner* factor favored the prison in part because the rule "provide[d] a mechanism for requesting an exception … from the warden"). Accordingly, there are disputes of fact as to whether the alternative of traditional mail is a sufficient alternative under *Turner*.

The third *Turner* factor is the impact that accommodating the right would have on prisoners, guards, and prison resources generally. *Turner*, 482 U.S. at 90. Eliminating the forwarding and inmate-information policies would have no impact

on prison staff or resources. The GDC would still need to review emails for compliance with the valid aspects of their policies—namely, the sections that prohibit messages containing threats, escape plans, and other dangerous content. *See supra* pp. 28-29; *cf. Lindell v. Frank*, 377 F.3d 655, 659-60 (7th Cir. 2004) (allowing prisoners to receive publication clippings would not impose a large burden where "the defendants are already screening personal mail").

Defendants argued below that allowing prisoners to request forwarding would require the GDC to "do background checks on the limitless number of possible recipients that Plaintiff's emails could be forwarded to." A67 (Doc. 64-1, p. 12). But that position makes no sense if, as the district court held, the prison currently does not require background checks for *any* email recipients. The district court thus correctly found that the elimination of the background check requirement "cut[s] against the Government's showing on this factor." A297 (Doc. 108, p. 22). Similarly, Defendants claimed that allowing prisoners to include information about other prisoners in their emails "would require more investigative resources from GDC to determine if information is a potential threat." A68 (Doc. 64-1, p. 13). Again, it is not clear why that is the case; GDC employees are *already* charged with screening emails for potential threats.

Importantly, Defendants made no attempt to argue below that changing the email policies would require them to allocate more resources to maintaining

internal security (*e.g.*, hiring more guards to monitor prisoners). That is consistent with what the Supreme Court recognized in both *Martinez* and *Thornburgh*—namely, that *outgoing* correspondence is far less likely to create disruptions inside the prison walls. *Cf. Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954, 973 (11th Cir. 2018) (explaining that allowing magazines inside the prison would require prison officials to "allocate more time, money, and personnel in an attempt to detect and prevent security problems engendered by the ads in the magazines").

Finally, the fourth *Turner* factor asks whether there is an "obvious, easy alternative[]" to the challenged policies. *Turner*, 482 U.S. at 90. The answer here is yes: The prison could simply rely on more targeted regulations prohibiting dangerous, threatening correspondence. Mr. Benning agrees that such rules are appropriate—indeed, essential—measures to preserve prison security. Relying on these rules protects Mr. Benning's rights "at *de minimis* cost to valid penological interests," which is persuasive evidence that the challenged policies are "an 'exaggerated response' to prison concerns." *Id.* at 90-91.

The district court, however, failed to properly analyze this factor. The court relied exclusively on this Court's decision in *Pesci*, 935 F.3d at 1162, which held that a prison could reasonably ban a newsletter published by a civilly detained sex offender. The court reasoned that "[i]f the total ban [in *Pesci*] was not an

'exaggerated response,'" then the censorship of four of Mr. Benning's 112 emails could not be either. A298 (Doc. 108, p. 23). This reasoning is flawed in multiple respects. First, the relevant question is whether the email *policies* are an "exaggerated response" to purported security concerns. Because the policies apply broadly to all prisoners and likely cover a substantial percentage of outgoing messages, *see supra* p. 32, the number of Mr. Benning's emails that were actually censored is irrelevant. *Cf. Al-Amin*, 511 F.3d at 1331 (discussing chilling effect of unconstitutional mail policy).

Second, the *Turner* inquiry is highly fact-dependent; the ultimate outcome in *Pesci* says nothing about the proper resolution of this case, given their vastly different facts. In *Pesci*, the Court credited testimony about the significant, concrete security threat posed by the newsletter's circulation *inside* the prison; among other things, the publication had "denigrated individual staff members by name in 'increasingly inflammatory' stories," giving rise to fears that "violence was going to break out in the facility." *Pesci*, 935 F.3d at 1167. Moreover, the prison had "attempt[ed] to regulate [the newsletter] through a less restrictive printing policy," but that alternative failed to "quell the rising tensions" in the facility. *Id.* at 1171. The circumstances here bear no resemblance to that situation. The policies regulate *only* outgoing emails; a readily available alternative remains

untested; and no prison official has offered a concrete explanation of the security risks posed by the prohibited content.

Accordingly, even if the Court concludes that *Turner* applies, Defendants are not entitled to summary judgment. There are, at minimum, triable issues of material fact as to whether the email policies are "reasonably related to legitimate penological objectives, or whether [they] represent[] an exaggerated response to those concerns." *Turner*, 482 U.S. at 87.

II. Defendants Are Not Entitled to Summary Judgment on Mr. Benning's Claim That Censoring His Emails Without Any Procedural Safeguards Violated His Due Process Rights

A third aspect of the GDC's email censorship policy violates Mr. Benning's constitutional rights. SOP 204.10 advises prisoners that any emails that violate the policies "will be intercepted *without explanation* and no refund will be provided to the sender." A99 (Doc. 64-4, p. 15). Although GDC employees are allowed to inform prisoners when their emails are censored, they have no obligation to do so, and no one provided notice to Mr. Benning in this case. *See supra* pp. 6-8. Because Defendants' policies are a clear violation of the Due Process Clause, the district court erred by granting summary judgment for Defendants on this claim.[5]

[5] The district court correctly concluded that Mr. Benning did not abandon his due process claim. Mr. Benning raised the due process argument in his complaint by alleging that he failed to receive notice of Defendants' censorship or an

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The Supreme Court explained in *Martinez* that "[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment[.]" *Martinez*, 416 U.S. at 418. Prison officials must therefore provide "minimum procedural safeguards" before censoring a prisoner's mail. *Id.* "Those safeguards are: (1) the inmate must receive notice of the rejection of a letter written by or addressed to him; (2) the author of the letter [must] be given 'reasonable opportunity to protest that decision,' and (3) 'complaints [must] be referred to a prison official other than the person who originally disapproved the correspondence.'" *Perry*, 664 F.3d at 1368 n.2 (quoting *Martinez*, 416 U.S. at 418-19).[6] These safeguards are critical to protecting prisoners' First Amendment rights; "without notice of rejection, censorship of protected speech can escape detection by inmates and therefore go unchallenged." *Martin v. Kelley*, 803 F.2d 236, 243 (6th Cir. 1986).

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opportunity to be heard, and he diligently pursued his claim throughout discovery. A299-301 (Doc. 108, pp. 24-26).

[6] In *Perry*, this Court held that a lower due process standard applies where the censored correspondence is a "mass mailing[]," *i.e.*, correspondence sent to all prisoners. 664 F.3d at 1368. That is not the case here; the GDC's policies apply to emails sent from individual prisoners to specific recipients. *Cf. Prison Legal News*, 890 F.3d at 976 n.19 (magazines sent to subscribers are not "mass mailings" because they are not "sent to each and every inmate at a given institution").

This Court has readily enforced these due process requirements in other prison cases. In *Prison Legal News*, for example, the Court held that a publisher "must receive notice and an opportunity to be heard *each time* the Department impounds an issue of [its] magazine." 890 F.3d at 976 (emphasis added). And the prison itself must provide the notice; it is "not enough" that the sender may ultimately learn of the impoundment by other means. *Id.* at 976 n.19.

Defendants' policy undisputedly fails to provide these minimum safeguards. The district court nonetheless granted summary judgment in their favor, holding that a prisoner's liberty interest in "uncensored communication by letter" does not extend to email correspondence. A302 (Doc. 108, p. 27). That reasoning is incorrect, as this Court and others have recognized in applying *Martinez* to communications other than letters. *See, e.g.*, *Daker*, 660 F. App'x at 742 (prison must provide safeguards when "reject[ing] a letter, mail, *or package*" (emphasis added)). The Eighth Circuit, for example, has explained that *Martinez*'s reasoning "applies to *all* forms of correspondence"; "[i]t is the inmate's interest in 'uncensored communication' that is the liberty interest protected by the due process clause, regardless of whether that communication occurs in the form of a letter, package, newspaper, magazine, etc." *Bonner v. Outlaw*, 552 F.3d 673, 677 (8th Cir. 2009) (emphasis added); *see also id.* ("Although [*Martinez*] discusses

letters, that is because letters were simply the form of correspondence at issue in that specific case.").

Courts therefore "routinely" require prisons to provide notice to prisoners upon intercepting any of these forms of correspondence. *Id.*; *see also Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004) (applying due process requirements to rejection of newspapers); *Montcalm Publ'g Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996) (applying due process requirements to rejection of magazines). And the same should hold true where the prison intercepts and censors email communications—*i.e.*, the electronic counterparts of the traditional letters at issue in *Martinez*. *See, e.g.*, *Tory v. Davis*, 2020 WL 2840163, at *4 (W.D. Va. June 1, 2020) ("an inmate has a due process right to receive notice when his email communication has been censored").[7]

This Court should therefore reverse the district court's judgment on Mr. Benning's due process claim.

[7] The Bureau of Prisons expressly requires federal prisons to notify prisoners each time an email is rejected and to explain "the reason(s) for the rejection." Fed. Bureau of Prisons, *Program Statement: Trust Fund Limited Inmate Computer System (TRULINCS) - Electronic Messaging* 8 (Feb. 19, 2009), *available at* https://www.bop.gov/policy/progstat/5265_013.pdf. This practice strongly undermines any contention that providing basic procedural safeguards is unduly burdensome, as does the fact that the GDC already has a standard form for providing notice to prisoners when officials reject physical mail. *See* A168 (Doc. 80-2, p. 11).

III. The District Court Erroneously Held That the Defendants Sued in Their Individual Capacities Are Entitled to Qualified Immunity

The district court further held that even if Defendants Edgar and Patterson *did* violate Mr. Benning's constitutional rights, qualified immunity bars his claims for money damages because those rights were not "clearly established." A302-03 (Doc. 108, pp. 27-28).[8] The court relied heavily on the fact that the constitutionality of a prison's email restrictions was "a question of first impression." *Id.* But a plaintiff can overcome qualified immunity "without showing that 'the very action in question has previously been held unlawful.'" *Garcia v. Riley*, 2021 WL 4127070, at *3 (11th Cir. Sept. 10, 2021) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). So long as the relevant officials had "fair warning" that their conduct was unlawful, qualified immunity does not apply. *Hope*, 536 U.S. at 739-40. A number of sources can provide the necessary notice, including court decisions and existing prison regulations. *See id.* at 741-46 (officials had fair warning that their conduct violated the Eighth Amendment in

[8] Mr. Benning has withdrawn his request for compensatory damages of $0.35 per censored email (*i.e.*, the price of a JPay stamp). A153 (Doc. 80, p. 21). Accordingly, qualified immunity is relevant only to his requests for nominal and punitive damages. Both types of damages should be available if this Court reverses and Mr. Benning prevails at trial. *See Hoever v. Marks*, 993 F.3d 1353, 1357 (11th Cir. 2021) (en banc) (holding that PLRA permits prisoners to recover punitive damages for constitutional violations without showing a physical injury).

light of circuit precedent, prison regulations limiting the practice, and "obvious cruelty" of the conduct).

Here, *Martinez* and cases applying it provided ample warning to Defendants that censoring Mr. Benning's emails under the sweeping restrictions in SOP 204.10 violated his First Amendment rights. *Martinez* and *Thornburgh* explained that a regulation of "outgoing correspondence" must be "narrowly drawn" to serve the asserted interest in prison security. *Thornburgh*, 490 U.S. at 411; *see also Martinez*, 416 U.S. at 415 (invalidating regulation authorizing censorship of "inflammatory" messages because it was not "narrowly drawn to reach only material that might be thought to encourage violence"). A reasonable official would have understood that emails are a form of "outgoing correspondence" subject to this standard, in light of the plain meaning of the term and the prison's own policy describing emails as "[c]orrespondence sent electronically." *See supra* pp. 22-23; *cf.* Ga. Dep't of Corr., Orientation Handbook for Offenders 5 ("Electronic mail is subject to the same policy and procedures as regular mail.").[9] These sources "further undermine any claim by defendants that they were unaware" of the constitutional standards governing their censorship of prisoners' outgoing emails. *Al-Amin*, 511 F.3d at 1336 n.37.

[9] *Available at* http://www.dcor.state.ga.us/sites/all/files/pdf/GDC_Inmate_Handbook.pdf.

A reasonable official likewise would have understood that the censorship of Mr. Benning's emails to his sister and the Aleph Institute could not be justified under *Martinez*. Courts applying *Martinez* have correctly held that prisons cannot constitutionally censor outgoing emails that pose no plausible security risks. *See, e.g.*, *McNamara v. Moody*, 606 F.2d 621, 624 (5th Cir. 1979) (censorship of outgoing letter violated the First Amendment under *Martinez* because "coarse and offensive remarks are not inherently breaches of discipline and security, nor is there any showing that they will necessarily lead to the breaking down of security or discipline"); *Loggins v. Delo*, 999 F.2d 364, 367 (8th Cir. 1993) ("[B]ecause the language in [the prisoner's] letter to his brother did not implicate security concerns, the disciplinary action violated *Martinez*.").

Martinez also clearly established that Mr. Benning had a right to "minimum procedural safeguards," including notice and an opportunity to respond to any censorship decision. 416 U.S. at 418. A reasonable official would have recognized that these requirements apply not only to the censorship of letters, but also to other types of communications between prisoners and individuals outside the prison. The Eighth Circuit in *Bonner* denied qualified immunity to a prison officials for exactly that reason. The prison official argued that "he did not have fair notice [that] *Procunier* applies to packages because *Procunier* only discussed letters." *Bonner*, 552 F.3d at 680. The court held that "such an interpretation of

Procunier strains credulity," as the Supreme Court's reasoning "clearly applies to all forms of correspondence." *Id.* Consistent with that analysis, this Court explained in 2016 that prisons must provide procedural safeguards before "reject[ing] a letter, mail, *or package*," making indisputably clear that *Martinez* applies beyond traditional letters. *Daker*, 660 F. App'x at 742 (emphasis added). Defendants therefore are not entitled to qualified immunity on either of Mr. Benning's constitutional claims.

IV. The District Court Erroneously Held That Mr. Benning Is Not Entitled to Any Injunctive Relief

Before even discussing the merits of Mr. Benning's claims, the district court concluded that he is not entitled to *any* prospective injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). A281-84 (Doc. 108, pp. 6-9). In the court's view, the requests for injunctive relief in Mr. Benning's complaint were all either moot or inconsistent with the PLRA's limits on injunctive relief. *See* 18 U.S.C. § 3626(a)(1)(A) (requiring injunctive relief to be "narrowly drawn" and "the least intrusive means necessary to correct the violation of the Federal right").

The court's analysis puts the cart before the horse. If Mr. Benning prevails on the merits of his constitutional claims, the district court will have to consider (1) whether "injunctive relief is warranted under the traditional equitable considerations" and (2) "the appropriate scope of such relief." *Georgia Advoc. Off. v. Jackson*, 4 F.4th 1200, 1208 (11th Cir. 2021). At that point, the court will not be

limited to considering the specific injunctive relief requested in Mr. Benning's complaint. *See* Fed. R. Civ. P. 54(c) ("Every other final judgment [other than a default judgment] should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.").

That is especially true here, where a court could easily construe Mr. Benning's *pro se* complaint to request appropriate injunctive relief, including (i) an order enjoining the enforcement of the challenged email policies as to outgoing emails and (ii) an order requiring Defendants to provide minimum procedural safeguards prior to censoring emails. *See Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam) (*pro se* pleadings are "held to a less stringent standard than pleadings drafted by attorneys" and therefore "liberally construed"); *cf. Hughes v. Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003) (remanding to determine whether *pro se* prisoner's complaint "could be liberally construed to request" certain relief).[10] Mr. Benning, for example, sought an order enjoining Defendants from limiting non-incarcerated individuals' use of his emails; that request is best construed as a request to enjoin Defendants from enforcing the forwarding policy. A49 (Doc. 28, p. 13); *see also* A42 (Doc. 28, p. 6) (requesting orders requiring Defendants to provide notice and opportunity to respond prior to

[10] In addition, Mr. Benning's initial complaint notably requested "[a]ny such other relief as this Honorable Court deems equitable and just." A24 (Doc. 1, p. 12).

censoring emails). Accordingly, the district court was wrong to conclude that Mr. Benning has no plausible claim for injunctive relief.

CONCLUSION

The Court should reverse the decision below and remand the case for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically on September 22, 2021 and will therefore be served electronically upon all counsel.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Appellant hereby certifies:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because the brief contains 11,322 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because the brief has been prepared using Microsoft Office Word and is set in Times New Roman font in a size equivalent to 14 points or larger.

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