No. 21-11982-H

In the

United States Court of Appeals

for the Eleventh Circuit

Ralph Harrison Benning,
Plaintiff/Appellant,

v.

Commissioner, Georgia Department of Corrections, et al.,
Defendants/Appellees.

On Appeal from the United States District Court for the Middle District of Georgia, Macon Division.
No. 5:18-cv-00087 —Tilman E. (Tripp) Self, *Judge*

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case:

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Self, Tilman E. (Tripp), United States District Judge;

Teaster, Susan E., Sr. Asst. Attorney General, Attorney for Defendants/Appellees;

Ward, Timothy, Defendant/Appellee;

Weigle, Charles H., United States Magistrate Judge for the Middle District of Georgia.

/s/ *Rodney H. Atreopersaud*
Rodney H. Atreopersaud

STATEMENT REGARDING ORAL ARGUMENT

Appellees do not request oral argument in this case. The facts and legal arguments are adequately presented in the briefs, and oral argument would not significantly aid the decisional process.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

STATEMENT OF ISSUES

1. *Turner v. Safely* sets the standard for analyzing any regulation that infringes on the constitutional rights of prisoners. *Shaw v. Murphy*, 532 U.S. 223, 229 (2001). The district court applied *Turner* to analyze two rules issued by the Georgia Department of Corrections (GDC) that resulted in four of Ralph Benning's emails being withheld over a two-year period. Did the district court err?

2. Did the district court err in finding that Mr. Benning does not have a protected liberty interest in his outgoing emails and thus his Fourteenth Amendment due process claim fails on the merits?

3. There is ambiguity about the correct legal standard to apply to regulations affecting out-going emails. Did the district court err in finding that Appellees Edgar and Patterson were entitled to qualified immunity because they violated no clearly established laws?

4. The Prison Litigation Reform Act (PLRA) requires that any injunctive relief be narrowly drawn and be the least intrusive means necessary to correct any constitutional violation. 18 U.S.C. § 3626(a)(1). Benning asked for an injunction requiring GDC to

remove any "restrictions on the use of [Mr. Benning's] electronic communications by non-incarcerated persons." Did the district court err in rejecting that request, under to the PLRA, because it was overly broad?

INTRODUCTION

Appellant Ralph Benning sent well over one hundred emails during a two-year period of incarceration with the Georgia Department of Corrections (GDC). Of those, four were withheld because they failed to comply with GDC's regulations concerning the use of its email system. He has now sued, alleging that his constitutional rights were violated.

But the Supreme Court and this Court have repeatedly made clear that running a prison "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources," and thus mandates "due deference to … prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline." *Turner v. Safely*, 482 U.S. 78, 85 (1987); *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005). While prison walls "do not form a barrier separating prison inmates from the protections of the Constitution," a prison regulation that "impinges on inmates' constitutional rights, … is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 84.

Here, straightforward application of the *Turner* standard confirms that GDC's modest email regulations are reasonably related to security and safety for inmates, security guards, and

members of the public. GDC's prisons allow inmates the privilege of communicating through emails, but all inmates choosing to utilize the email system must abide by the regulations and procedures contained in Standard Operating Procedure (SOP) Number 204.10. Those regulations include, as relevant here, a prohibition on inmates seeking to have their emails forwarded to anyone other than the intended recipient, and a prohibition on emails containing information about another inmate. They are meant to protect the public, prison staff, and other inmates from intimidation, harassment and threats. Thus, they satisfy the *Turner* standard.

Rather than meaningfully dispute that, Mr. Benning argues that this Court should rely on an old case, involving written letters, which the Supreme Court has limited to its facts. *See Procunier v. Martinez*, 416 U.S. 396 (1974). But this Court and others have repeatedly made clear that *Turner*, not *Martinez*, governs inmate claims like this one. So Mr. Benning has not shown a constitutional violation.

Mr. Benning's other claims fail too. He cannot show a due process violation because he does not have a protected liberty interest in his outgoing emails. Appellees Jennifer Edgar and Margaret Patterson are entitled to qualified immunity because

they did not violate Mr. Benning's constitutional rights, and even if they had, those rights were not clearly established. Finally, the district court correctly found that Mr. Benning's requests for injunctive relief fail because those requests were partially moot, unviable under *Ex parte Young* in any event, and Mr. Benning asked for relief beyond the district court's authority to grant.

Accordingly, the district court's judgment should be affirmed.

STATEMENT OF THE CASE

Appellant Ralph Benning brings this 42 U.S.C. § 1983 action alleging that Appellees Jennifer Edgar, Margaret Patterson and Timothy Ward[1] violated his constitutional rights by withholding four emails he attempted to send while incarcerated because they violated GDC rules. Docs. 1, 19, 28. The district court granted Appellees' motion for summary judgment. Doc. 108. Mr. Benning appeals here.

[1] Mr. Benning was allowed to proceed with his official capacity claims for injunctive relief against GDC Commissioner Gregory Dozier. However, Timothy Ward replaced Dozier as Commissioner and was thereafter substituted as the appropriate defendant. Fed. R. Civ. Pro. 25(d); *see also* Doc. 64-1, p. 1, n. 1.

A. Factual Background

1. Georgia Department of Corrections (GDC) Email System

Ralph Benning is serving a life sentence and has been in GDC's custody since 1986. Doc. 64-2, ¶ 5. GDC allows inmates in its custody to communicate through emails using either a tablet that the inmate owns or J-Pay Kiosks located in prison dorms. *Id.*, ¶¶ 6-7, 9, 16-17.

On August 23, 2016, Mr. Benning signed an "Offender G.O.A.L. Device Acknowledgement Form" upon receiving his tablet wherein he acknowledged that using the tablet—for any purpose, including emailing—is a privilege and not a right. Doc. 64-4, p. 19. Whenever Mr. Benning uses the kiosks, for emailing or any other purpose, he must also click on a button stating that he understands and agrees to the terms and conditions of using the kiosks. Doc. 64-2, ¶ 11-12. GDC rules governing the use of both the tablets (GOAL Device) and J-Pay kiosks are contained in Standard Operating Procedure (SOP) Policy Number 204.10 (email SOP). *Id.*, ¶ 20; *see also* Doc. 64-4, pp. 10-17.

The email SOP sets forth certain rules with respect to inmates' email communication. *Id.* As relevant here, the email SOP states that "[u]se, of the GOAL device and Kiosk, is a

privilege and not a right," Doc. 64-4, Sec. I; that "[o]ffenders shall not request emails be forwarded, sent, or mailed to others," *Id.*, Sec. IV(D)(13); that "[c]ustomers and offenders shall not request or send information on behalf of or about another offender," *Id.*, Sec. IV(D)(14); and that "communication which violate this policy will be intercepted without explanation and no refund will be provided to the sender" *id.*, Sec. IV(D)(16). Additionally, the email SOP provides that neither the sender nor the receiver of emails has any expectation of privacy and that emails would be subject to inspection and review for security purposes. *Id.*, Sec. IV(C)(7).

All emails are routed through GDC's Central Intelligence Unit where they are electronically screened for certain keywords. Doc. 62-2, ¶ 26. If an email contains a keyword, it is flagged for review by an analyst working in the Intelligence Unit. *Id.*, ¶ 27. If the keyword is used in an innocuous context, then the analyst will release that email. However, if the keyword is used in a manner that violates the email SOP, then the analyst may withhold that email. *Id.*, ¶¶ 28-29.

2. Mr. Benning's Four Emails that Failed to Comply with the Email SOP

In 2017, Mr. Benning sent sixty-four emails. *Id.*, ¶ 30. Of those, three were withheld. *Id.*, ¶¶ 35, 40. The first was an email

to Elizabeth Knott that was electronically flagged because it contained keywords methamphetamine, tobacco and gangs. *Id.*, ¶ 31. Ms. Patterson reviewed that email, found that Mr. Benning wanted Ms. Knott to forward Mr. Benning's email to others in violation of the email SOP, and subsequently withheld that email. *Id*, ¶¶ 32-35. A month later, Mr. Benning sent two emails to Ms. Knott that were electronically flagged because they contained keywords methamphetamine and blood. *Id.*, ¶¶ 37-38. Ms. Edgar reviewed those emails, saw that Mr. Benning wanted Ms. Knott to forward his emails to others in violation of the email SOP, and thereafter withheld those emails. *Id.*, ¶¶ 37, 39, 40. Mr. Benning sent handwritten versions of all three emails from 2017 to Ms. Knott through traditional mail, and Ms. Knott received them. *Id.*, ¶¶ 36 & 41.

In 2018, Mr. Benning sent forty-eight emails of which one was withheld. *Id.*, ¶ 43 & 46. On February 6, 2018, Mr. Benning sent an email to the Aleph Institute that was flagged because it contained the keyword "zip," which in prison is slang for marijuana. *Id.*, ¶ 44-45. Analyst Romita Keen withheld this email because it contained information about another inmate in clear violation of the email SOP. *Id.*, ¶ 46. Mr. Benning sent a

handwritten version of this email to the Aleph Institute through traditional mail. *Id.*, ¶ 48.

Altogether, Mr. Benning sent one hundred and twelve emails, of which four were withheld because they violated the email SOP prohibiting prisoners from having their emails forwarded to others and prohibiting prisoners from sending emails with information about another prisoner. *Id*, ¶ 30, 35, 40, 43, 46-47. Richard Wallace, an investigator with GDC's Criminal Intelligence Unit, testified that the rules in the email SOP which Mr. Benning violated, are designed to keep society, other prisoners and prison staff safe. *Id.*, ¶ 50; *see also* Doc. 64-4, pp. 2-8.

B. Proceedings Below

On March 9, 2018, Mr. Benning filed his initial complaint under 42 U.S.C. § 1983. After a frivolity review, he was allowed to proceed with only his First Amendment claims challenging the alleged censorship of three emails he attempted to send using GDC's email system. Doc. 1 (complaint) & Doc. 7 (Report and Recommendation). Mr. Benning did not object to the Magistrate Judge's recommendation and the district court adopted it.[2] Doc. 15.

[2] For that reason, Defendants did not brief, or otherwise litigate, Mr. Benning's procedural due process claim prior to the

Appellees answered Mr. Benning's complaint (Doc. 35), and after extensive discovery, they moved for summary judgment. Doc. 64. In his response, Plaintiff raised his purported procedural due process claim for the first time. Doc. 80, p. 10.

On April 30, 2021, the district court entered an order granting Appellees' motion for summary judgment. Doc. 108. The district court rejected Mr. Benning's First Amendment claim because the email regulations survived constitutional scrutiny under *Turner*. Doc. 108, pp. 18-23. Furthermore, the district court found that Eleventh Amendment immunity barred Mr. Benning's request for injunctive relief against Commissioner Ward, and that qualified immunity barred the claims brought against Ms. Edgar and Ms. Patterson. *Id.*, pp. 6-8 & pp. 27-28. The district court rejected Mr. Benning's Fourteenth Amendment due process claim because he had no protected liberty interest in his outgoing emails. *Id.*, p. 27. Mr. Benning filed a timely notice of appeal. Docs. 109 & 111.

C. Standard of Review

The district court's ruling on a motion for summary judgment is reviewed *de novo*. *Smith v. Fla. Dep't of Corr.*, 713 F.3d 1059, 1063 (11th Cir. 2013). The Court may affirm the judgment of the

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Magistrate Judge's recommendation on Defendants' motion for summary judgment.

district court on any ground that appears on the record. *Bass v. Fewless*, 886 F.3d 1088, 1092-93 (11th Cir. 2018).

SUMMARY OF ARGUMENT

This Court should affirm the judgment for Defendant-Appellees.

First, GDC did not violate the First Amendment when it withheld four of Mr. Benning's emails for violation of GDC rules. Binding precedents from the Supreme Court and this Court mandate the use of the *Turner* standard for such challenges. *Turner v. Safely*, 482 U.S. at 89. Under *Turner*, a prison regulation is valid if it is reasonably related to a penological interest. *Id*. The regulations here satisfy that standard because they are reasonably related to protecting the public, prison personnel and other inmates from threats. And Mr. Benning's reliance on *Procunier v. Martinez* is unavailing. That case has been limited to its facts by the Supreme Court. In other words, *Turner* displaced *Martinez*, not the other way around. *Thornburg v. Abbott*, 490 U.S. 401, 410 (1989).

Second, Mr. Benning's Fourteenth Amendment due process claim fails because he does not have a constitutional right to communicate through email. Mr. Benning again relies on *Procunier v. Martinez*, but that case does not establish a protected

liberty interest in purely outgoing email communication. And because no protected liberty interest has been violated, Mr. Benning has not shown a due process violation.

Third, the district court correctly found that Ms. Edgar and Ms. Patterson are entitled to qualified immunity, in their individual capacities. The defendants did not violate Mr. Benning's constitutional rights. And they certainly did not violate his rights under clearly established law.

Finally, the district court properly denied Mr. Benning's request for broad injunctive relief. Mr. Benning had already received some of the injunctive relief he seeks, rendering those claims moot. Plus, *Ex Parte Young* only waives Eleventh Amendment immunity for constitutional violations, and there were none here. Moreover, Mr. Benning's requests would essentially remove all prison regulations of emails and allow inmates unfettered access to email communication. Neither the PLRA nor case law supports this result.

ARGUMENT

I. The district court properly granted judgment for Appellees on Mr. Benning's First Amendment claims.

A. The district court used the correct standard, under *Turner*, to examine the constitutionality of the two regulations at issue here.

The Supreme Court has long and consistently held that the unique and inordinate challenge of managing a prison requires deference to the experience and expertise of prison officials. *Procunier v. Martinez*, 416 U.S. at 404; *Turner v. Safley*, 482 U.S. at 85 and *Cutter v. Wilkinson*, 544 U.S. at 723. Courts are ill-equipped to deal with the urgent and complex problems of prison management. *Shaw v. Murphy*, 532 U.S. 223, 230 (2001); *see also Martinez*, 416 U.S. at 405. Accordingly, "prison officials are to remain the primary arbiters of the problems that arise in prison management." *Shaw*, 532 U.S. at 230. That said, prison walls "do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. But those constitutional protections are "more limited in scope than the constitutional rights held by individuals in society at large" and are further limited to the extent that they are not inconsistent with the inmate's status as a prisoner. *Shaw v. Murphy*, 532 U.S. at 229. In *Turner*, the Court balanced the need for deference to

prison officials with the real, though limited, constitutional protections afforded to prisoners and created "a unitary, deferential standard for reviewing prisoners' constitutional claims." *Id.* When a regulation "impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

The Supreme Court has applied the *Turner* standard consistently and repeatedly to analyze a host of regulations that impinge on inmates' constitutional rights. *Shawn v. Murphy*, 532 U.S. at 228 (holding that *Turner*, and not some heightened version of *Turner*, is the standard to analyze First Amendment free speech claims involving one inmate providing legal advice to another inmate); *Lewis v. Casey*, 518 U.S. 343, 361 (1996) (using *Turner* to analyze rules affecting inmates' First Amendment access-to-court rights); *Thornburg v. Abbott*, 490 U.S. 401, 404 (1989) (holding that *Turner*, and not *Martinez*, was the proper standard to analyze regulations impacting First Amendment rights to send and receive certain publications in prisons); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 347 (1987) (using the *Turner* standard to analyze regulations infringing on prisoners' First Amendment religious rights); and *Beard v. Banks*, 548 U.S. 521 (2006) (using

the *Turner* standard to analyze whether restricting certain "dangerous" inmates from receiving newspapers, magazines and photographs violated the First Amendment).

The Eleventh Circuit also has a consistent history of applying *Turner* to determine the constitutionality of prison regulations. Indeed, the Eleventh Circuit held that "*Turner* set out the ground rules for evaluating prisoners' constitutional claims." *Pesci v. Budz*, 935 F.3d at 1165. Neither the Supreme Court, nor the Eleventh Circuit, has carved out exceptions or conditions to this rule. Like the Supreme Court, the Eleventh Circuit has used *Turner* to evaluate a host of prison regulations that infringe on First Amendment rights. *See Pesci v. Budz*, 935 F.3d at 1167-68 (using *Turner* to analyze regulation that prohibited the publication of a monthly newspaper critical of Florida Civil Commitment Center, while noting that those civilly committed have more rights than those criminally incarcerated); *Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954, 964 (11th Cir. 2018) (using *Turner* to analyze rule preventing inmates access to Prison Legal News—a publication with advertisements that the prison found problematic); *Pope v. Hightower*, 101 F.3d 1382, 1384 (11th Cir. 1996) (analyzing limitation on telephone calls under *Turner*); *Davila v. Gladden*, 777 F.3d 1198, 1212 (11th Cir. 2015)

(using *Turner* to analyze prison regulation that infringes on inmates' religious rights).

Despite all this, Mr. Benning argues that the district court should have used an altogether different standard. He argues that the district court should have applied the more demanding standard, announced in *Procunier v. Martinez*, to regulations affecting his outgoing emails. Benning Br. at 28. The *Martinez* standard asks whether the regulation advances a substantial governmental interest unrelated to the suppression of expression and whether the regulation is no greater than necessary to protect the governmental interest. *Martinez*, 416 U.S. at 413-414. That standard does not apply here for several reasons.

First, binding precedents mandate using *Turner's* reasonableness standard instead of *Martinez's* heightened standard. Mr. Benning ignores the case law as developed in the almost fifty years since *Martinez*—especially post *Turner*. Indeed, Mr. Benning's brief mentions none of the cases cited above in which the Supreme Court used *Turner* to analyze rules that impinge on prisoners' constitutional rights. But more to the point, a unanimous Supreme Court has categorically stated that *Turner* is the "unitary" standard for reviewing prisoners' constitutional claims. *Shaw v. Murphy*, 532 U.S. at 229. The Court made no

exception for outgoing email correspondences. Nor has the Eleventh Circuit. *Pesci*, 935 F.3d at 1165 ("*Turner* set out the ground rules for evaluating prisoners' constitutional claim.").

Indeed, *Turner* came after and displaced *Martinez*, which was decided in 1973, over a decade before *Turner*, and when the Court's prison rights jurisprudence was at its infancy. The Court in *Martinez* relied on *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) and *United States v. O'Brien*, 391 U.S. 367 (1968) to find that prisoners, like their brothers in free society, have protected free speech rights. *Martinez*, 416 U.S. at 409-11. *Tinker* concerned the free speech rights of high school students and *O'Brien* concerned the free speech rights of Selective Service registrants. *Id* at 410. The Court has since concluded that prisoners have diminished First Amendment rights compared to their free brothers—be they students or Service members. *Shaw v. Turner*, 532 U.S. at 229.

Second, applying *Martinez* here would contradict other controlling precedents involving the First Amendment rights of inmates. The United States Supreme Court applies *Turner* when reviewing inmates' religious liberty or right to associate claims. *O'Lone*, 482 U.S. at 349 (using *Turner* standard to analyze regulations impeding on religious rights) and *Jones v. N.C.*

Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (using reasonableness standard in analyzing regulations affecting First Amendment right to associate). Importantly, Mr. Benning admits that *Turner* applies to incoming mail. Benning Br. at 32. It is only out-going emails that he believes need greater protection. *Id.* Adopting his argument would thus lead to the curious consequence of not only affording Mr. Benning's outgoing emails more protection than his incoming emails, but also result in more protection for his outgoing emails than his First Amendment religious rights or associational rights. In other words, just outgoing emails—not all emails—would enjoy favored status and heightened protection over other First Amendment rights.

Third, Mr. Benning focuses on the potential disruption and security risks created by mail entering prison. That may be true. But GDC is required to consider more than that narrow view of prison security. GDC is not merely concerned with maintaining tranquility in prions, it is also obligated to protect GDC's staff and the public *outside* the prison. Doc. 64-4, p. 7. Not only that, Mr. Benning minimizes the threats posed by outgoing emails by arguing that they are "likely to fall within certain 'readily identifiable categories"—such as "threats, extortions attempts, or escape plans." Benning Br. at 33-34.

Take, for example, the obvious, and unfortunately common scenario of an inmate sending an email to a relative and asking that relative to forward a message to the inmate's minor niece telling her that her uncle loves her and thinks of her all the time. Let's assume further that the inmate referred to the niece by a nickname that all family members know, but that is unknown to prison officials. This facially innocuous email poses no "readily identifiable" threats. But if that inmate was convicted of sexually assaulting his minor niece, then that email becomes not merely threatening, but traumatizing. GDC has an obligation to protect the public, such as the niece in this example, from inmates by enacting rules that are reasonably related to curtailing such threats. Moreover, by Mr. Benning's argument, he and courts—not experienced prison officials—determine the scope of threats presented by outgoing emails, and do so narrowly without affording flexibility to consider the nuances of modern and sophisticated threats. As the Supreme Court has repeatedly found, prison officials are best positioned to handle this Herculean task. *Martinez*, 416 U.S. at 404; *Cutter v. Wilkinson*, 544 U.S. at 723. That is precisely why the Court has chosen the "express flexibility of the *Turner* reasonableness standard" to analyze prison regulations. *Thornburg*, 490 U.S. at 414.

To support his contention that incoming traditional mail has, and should, be more closely examined compared to outgoing mail, Mr. Benning focuses on the risks of disruption created by inflammatory messages in incoming mail. *See e.g.* Benning Br. at 33. However, this narrow focus misses the fact that incoming mail is often examined for contraband such as cellphones, controlled substances and weapons. Not only is it impossible to smuggle those contraband items through emails, but the general flow of contraband is from outside to inside the prison—not the other way around.

Where does this all leave *Martinez*? It has not been directly overruled, but as this Court has found, "the *Martinez* standard was applied once by the Supreme Court—in *Martinez* itself." *Perry v. Fla. Dep't of Corr.*, 664 F.3d 1359, 1365 (11th Cir. 2011). Subsequent cases have made clear that *Martinez* is limited to its specific facts—an overly broad ban on outgoing mail "expressing inflammatory political, racial, religious or other views or beliefs." *Thornburg*, 490 U.S. at 413 (quoting *Martinez*, 416 U.S. at 399). In the over forty-eight years since *Martinez*, the Supreme Court has consistently "erode[d] the high standard it set and, instead, show greater deference to prison administrators." *Perry*, 664 F.3d at 1364; *citing to Pell v. Procunier*, 417 U.S. 817 (1974); *Jones v.*

N.C. Prisoners' Labor Union, 433 U.S. 119 (1977) and *Bell v. Wolfish*, 441 U.S. 520 (1979). The *Turner* standard formalizes that deference in a framework that is intended to generally govern claims that prison rules infringe on prisoners' constitutional rights.

For these reasons, the district court did not err in using *Turner's* reasonableness standard to analyze the two regulations here that resulted in four of Mr. Benning's over one hundred emails being withheld.

B. The district court correctly analyzed the two regulations at issue here under *Turner*.

Contrary to Mr. Benning's assertion that "the district court here provided no analysis whatsoever," under *Turner* (Benning Br. at 45), the district court's order thoroughly analyzed the two regulations here under *Turner* and correctly found that they survive constitutional scrutiny. Doc. 108, pp. 19-23. Under *Turner*, a prison regulation is valid if it is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. The email rules Mr. Benning challenges are closely related to a legitimate penological interest.

As the district court found, the legitimate penological interest is security. Doc. 64-2, p. 6; *see also Johnson v. California*, 543

U.S. 499, 534 (2005) ("The protection of inmates and staff is undeniably a legitimate penological interest."). Richard Wallace, who worked in GDC's Criminal Intelligence Unit, testified that the rule prohibiting inmates from having their emails forwarded to someone other than the intended recipient, and the rule prohibiting inmates from providing information about other inmates in their emails, are designed to keep society, other inmates and prison staff safe. Doc. 64-2, ¶ 50; *see also* Doc. 64-4, pp. 2-8.

The regulations reasonably further that interest. To determine reasonableness, *Turner* sets out a four-prong test asking whether:

> (1) there is a valid, rational connection between the regulation and a legitimate government interest put forward to justify it; (2) if there are alternative means of exercising the asserted constitutional right that remain open to the inmate; (3) the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and the allocation of prison resources generally; and (4) whether the regulation represents an "exaggerated response" to the prison concerns.

Turner, 482 U.S. at 89-91; *Pesci*, 935 F.3d at 1166. While this standard is deferential, it is not toothless. *Pesci*, 935 F.3d at 1167. Nevertheless, the burden is on the prisoner challenging a

regulation to show that the regulation is unreasonable. *Id.* at 1166 (*citing to Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); and *Jones*, 433 U.S. at 128 (stating that "the burden was not on [the prison] to show affirmatively" that the creation of an inmate union "would constitute a present danger to security and order")). Here, Mr. Benning has not shown that the two regulations are unreasonable, nor has he pointed to any evidence that contradicts the district court's findings.

As Mr. Benning concedes, the first prong of the *Turner* analysis—whether there is a rational connection between the regulations and the penological objective—is the most important. Benning Br. at 33; citing to *Pesci*, 935 F.3d at 1167. In its analysis of this prong, the district court drew on similarities between the regulations here and those in *Pope v. Hightower*, 101 F.3d 1382 (11th Cir. 1996). In *Pope*, this Court considered the constitutionality of a policy limiting the number of people an inmate could communicate with over the telephone to ten. *Id.* at 1383. A computer system automatically blocked calls made to a number that did not appear on the ten-person list. *Id.* This Court found that "reduction of criminal activity" is a "legitimate governmental objective … [and] the connection between that objective and the use of a ten-person calling list is valid and

rational because it is not so remote as to render the prison telephone policy arbitrary or irrational." *Id.*, at 1385 (*citing to Turner*, 482 U.S. at 89). Similarly, the district court found that the rules here preventing prisoners from having their email forwarded to others and preventing prisoners from having information about other inmates in their emails, were not "arbitrary and irrational," and logically connected to the security objective of protecting other inmates, prison staff, and the public. Doc. 108, p. 21.

Those logical connections between the regulations here and the security interest are easily apparent. As discussed above in the hypothetical with an inmate's niece, the rule against forwarding email correspondences is logically connected to protecting victims. Furthermore, one can easily imagine a scenario where an inmate belonging to a criminal street gang directs coded email messages to be forwarded to a gang leader outside the prison walls. With respect to the rule against emails containing information about other inmates, again, it is not fantastical to envision a scenario where an inmate sends out the information about another inmate in an attempt to target those connected to the other inmate in the free world for reprisals, harassment or even collusion. In other words, GDC security

"concerns are not theoretical." *Smith v. Owens*, 13 F.4th 1319, 1329 (11th Cir. 2021). Accordingly, the district court correctly found a logical connection between the rules and the penological objective.

Mr. Benning responds to the district court's analysis and findings by arguing that these rules are not warranted since GDC already has rules prohibiting messages containing threats. Benning Br. at 45. However, Mr. Benning's cramped view of "threats" should not prevail over those of experienced prison officials. *Martinez*, 416 U.S. at 404. As discussed above, a facially innocuous email could be extremely threatening and prison officials should not be prevented from regulating those. Furthermore, regulations targeting express threats should not prevent GDC from issuing these regulations that target emails that may contain implied and indirect threats.

Mr. Benning also challenges the district court's comparison of the regulations here with those in *Pope*, and argues that telephone conversations are "categorically different from purely outgoing correspondence." Benning Br. at 33 n. 4. Yet, as the district court found, emailing and telephoning are similar in several relevant ways. As Mr. Benning concedes, like telephone calls, emailing is "a substantially more effective way of

disseminating information to a broad audience." Benning Br. at 47. Email is also instantaneous, like telephone conversations. Indeed, Mr. Benning admits that the effective and instantaneous nature of email makes it a preferable mode of communication. *Id.* For these reasons, however, emailing is a more effective way to communicate threats to the outside world. Indeed, the mere fact that emails "*could* create a safety issue is dispositive." *Pesci*, 935 F.3d at 1168 (emphasis in original). Accordingly, the district court correctly found that if the rules regulating telephone conversations survive constitutional scrutiny, then so do the rules here. Doc. 108, p. 21.

The district court's judgment should be affirmed on this basis alone. But, as the district court found, the other *Turner* prongs—whether there are alternative means of exercising the asserted constitutional right and whether the regulation represents an exaggerated response—also confirm that the regulations are constitutional, too. *Id.*, pp. 22-23. There is no disputing that Mr. Benning could write the same emails as letters and mail them to Ms. Knott and the Aleph Institute. He did so, sending those letters through traditional mail, and at least Ms. Knott received her letters. Doc. 64-2, pp. 6-7. Accordingly, the district court did not err in finding that Mr. Benning had

alternative means of exercising his constitutional rights. The fact that Mr. Benning might prefer email communication over other alternatives, Benning Br. at 47, does not change that.

The district court also did not err in finding that the two email regulations here were a proportional response to security concerns. As the district court found, only four of Mr. Benning's 112 emails were withheld under these regulations during a two-year period. Doc. 108, p. 23. That small fraction confirms that the email regulations in question are narrow and targeted. In response, Mr. Benning speculates that "all prisoners" have emails withheld. Benning Br. at 50. The suggestion that other inmates have had a greater proportion of emails withheld is pure speculation. This is not a class action suit and there is no evidence on the record to suggest the type of widespread constitutional violations Mr. Benning suspects.

Accordingly, the district court did not err in its analysis of the *Turner* factors and its finding that the two regulations here are reasonable responses to a valid penological objective. For these reasons, the district court's judgment with respect to Mr. Benning's First Amendment claim should be affirmed.

II. The district court did not err in finding that Mr. Benning's due process claim fails on the merits.

The district court correctly found that Mr. Benning's due process claim fails on the merits because he does not have a protected liberty interest in his outgoing emails that would trigger the Fourteenth Amendment guarantee of due process. Doc. 108, p. 27.

A procedural due process claim requires a plaintiff to prove three elements: "(1) a deprivation of a constitutionally-protected liberty [] interest; (2) state action; and (3) constitutionally-inadequate process." *Carson v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) (citing to *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). Mr. Benning's claim fails on the first element because he does not have a constitutionally protected liberty interest in email communication. *Solan v. Zickefoose*, 530 Fed. Appx. 109, 111 (3rd Cir. 2013) (no liberty interest implicated in refusing to provide prisoner access to email); *Grayson v. Federal Bureau of Prisons*, 2012 U.S. Dist. LEXIS 13839, 2012 WL 380426, * 3 (N.D. W.Va. Feb. 6, 2012) ("[P]risoners have no First Amendment constitutional right to access email."); *Bristow v. Amber*, 2012 U.S. Dist. LEXIS 75989, 2012 WL 1963577, at *2-3 (S.D. Ohio May 31, 2012) (prisoners do not have a First Amendment right to access email); *Holloway v. Magness*, 2011

U.S. Dist. LEXIS 6190, 2011 WL 204891, at *7 (E.D. Ark. Jan. 21, 2011) ("[T]he First Amendment [does not require] that the government provide telephones, videoconferencing, email, or any of the other marvelous forms of technology that allow instantaneous communication across geographical distances; the First Amendment is a limit on the exercise of governmental power, not a source of positive obligation.").

Mr. Benning argues that *Martinez* created a positive liberty interest to communicate through emails. Benning Br. at 52. But *Martinez* found only a liberty interest in prisoners' "uncensored communication by *letter*." *Martinez*, 416 U.S. at 243 (emphasis added). And, as discussed above, the Supreme Court has not expanded *Martinez* to cover outgoing emails. Indeed, the Court has done the opposite and limited *Martinez* to the specific facts and context of that case. *Thornburg*, 490 U.S. at 413.

Furthermore, the email SOP states that using the email system is a privilege and not a right, and Mr. Benning acknowledged the same upon receiving his tablet and whenever he used the kiosks to send emails. Doc. 64-2. This is not to say that Mr. Benning can contract away constitutional protections. Rather, it is an admission by all parties involved that prisoners

have no constitutional right to email access the moment the prisoner decides to communicate through email.

Mr. Benning points to *Prison Legal News* as an example where this Court held that a publisher must receive some due process whenever a prison impounds its publications. Benning Br. at 53. However, the procedural protections in that case were statutorily created. *Prison Legal News*, 890 F.3d at 976 (Fla. Admin. Code r. 33-501.401(8)(b) required prison to send publisher an explanation why its publication was impounded). *Prison Legal News* did not create a liberty interest in either incoming or outgoing mail, and more precisely, did not do so for outgoing emails. *Id.* The statutory scheme in that case provided some due process for publishers whenever their publications were impounded. *Id.* However, as discussed above, prisoners have diminished liberties compared to their free brothers. *Shaw v. Turner*, 532 U.S. at 229.

Accordingly, the district court did not err in finding no constitutionally protected liberty interest in Mr. Benning's outgoing emails that would trigger Fourteenth Amendment due process protections.

III. The district court **correctly** found that Appellees Edgar and Patterson were entitled to qualified immunity.

The district court correctly found that Ms. Edgar and Ms. Patterson, sued in their individual capacities for nominal and punitive damages, Benning Br. at 55, n. 8, were entitled to qualified immunity because Mr. Benning failed to show a violation of his constitutional right, or that even if Mr. Benning's rights were violated, that those rights were clearly established. Doc. 108. Pp. 27-28.

Qualified immunity protects governmental defendants sued in their individual capacities, while acting within the scope of their discretionary authorities, so long as their conduct does not violate clearly established laws. *Crawford-El v. Britton*, 523 U.S. 574, 588 (1988); *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (citation omitted). Here, Mr. Benning does not dispute that Ms. Edgar and Ms. Patterson were acting within their discretionary authorities as government employees. *See generally* Benning Br. at 55-58.

So the qualified immunity analysis turns on whether the Defendants violated Mr. Benning's constitutional rights. For all the reasons stated in Section I & II above, the district court correctly found that Ms. Edgar and Ms. Patterson did not violate Mr. Benning's First Amendment free speech rights or his

Fourteenth Amendment due process rights. And even if this Court were to find otherwise, Mr. Benning has not shown that those rights were clearly established.

For the law to be clearly established to the point that qualified immunity does not apply, it must have been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors that "what he is doing violates federal law." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In other words, existing law must have placed the constitutionality of the government actor's conduct "beyond debate." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2014)).

That means Mr. Benning must show "that a materially similar case has already been decided," that "a broader, clearly established principle should control the novel facts" of a particular situation, or that his case "fits within the exception of conduct which so obviously violates [the] constitution that prior case law is unnecessary." *Corbitt v. Vickers*, 929 F.3d 1304, 1312 (11th Cir. 2019). He must carry this burden by "looking to the law as interpreted at the time by the United States Supreme Court, the Eleventh Circuit, or the [Georgia] Supreme Court." *Gaines v. Wardynski*, 871 F.3d 1203, 1208 (11th Cir. 2017) (internal

citations omitted). Moreover, the Eleventh Circuit has observed on several occasions that "if case law, in factual terms, has not staked out a bring line, qualified immunity almost always protects the defendant." *Corbitt*, 929 F.3d at 1312, (*citing to Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009) and *Priester v. City of Rivera Beach*, 208 F.3d 919, 926 (11th Cir. 2000)).

As argued above, there is no binding precedent suggesting that Mr. Benning has a right to communicate through emails or that *Martinez's* heightened standard, and not *Turner's* reasonableness standard, applies to regulations affecting his emails. If this Court rules otherwise, it would necessary follow that the previous law was not clearly established.

None of the sources of law Mr. Benning points to change that. Benning Br. at 56 (citing *Martinez*, *Thornburg* and GDC's Orientation Handbook).

The Handbook is irrelevant because a violation of GDC policy does not amount to a constitutional violation. Section 1983 provides a remedy for a violation of a federally protected right, not a department policy. *See Baker v. McCollan*, 443 U.S. 137 (1979). Any alleged failure to follow department policy does not amount to a constitutional violation. *See Knight v. Jacobson,* 300 F.3d 1272, 1276 (11th Cir. 2002); *Taylor v. Adams*, 221 F.3d 1254, 1259 (11th

Cir. 2000). So even if Mr. Benning could point to some passage in the Handbook that suggests his emails were wrongfully withheld, that does not create a constitutional problem.

Second, *Martinez* does not clearly establish anything with respect to withheld emails. That case was decided in 1974—well before emailing became commonplace—and thus could not clearly establish that rules for inmate email communication violate the Constitution.

Third, *Thornburg* actually undermines Mr. Benning's claim. In that case, the Court applied the *Turner* standard to upload prison regulations impacting prisoners' access to certain publications and limited *Martinez* to the facts of that case. *Thornburg*, 490 U.S. at 413. Neither *Thornburg*, nor any subsequent case, has expanded *Martinez's* reach to cover rules regulating outgoing emails. Instead, the Court has consistently eroded *Martinez's* high standard. *Perry*, 664 F.3d at 1364. So *Thornburg* strongly suggests that the withheld emails here were *not* a violation of clearly established law.

Similarly, there is no clearly established law that Mr. Benning has any liberty interest in his outgoing emails to sustain his due process claim. Again, Mr. Benning points to *Martinez*. However, *Martinez* applies to "communication by letter," and not

emails. *Martinez*, 416 U.S. at 418. As discussed above, *Martinez's* reach has not expanded to cover emails. Instead, federal courts have consistently and repeatedly held that inmates have no liberty interest in access to email. *Solan v. Zickefoose*, 530 Fed. Appx. at 111; *Holloway v. Magness*, 2011 U.S. Dist. LEXIS 6190 at *7.

For these reasons, the district court did not err in granting qualified immunity to Ms. Edgar and Ms. Patterson.

IV. The district court correctly found that Mr. Benning was not entitled to the injunctive relief he requested.

The district court did not err in denying Mr. Benning the injunctive relief he sought against Commissioner Ward. Mr. Benning asked the court to:

> declare that inmate email correspondences be considered the same as written/paper correspondences, declare that he has a right to be notified when his email correspondence is censored, declare that he has a right to respond to any decision to censor email correspondences before the decision is finalized, declare that he has a right to written reason(s) for any decision to censor email correspondences, order Defendants to not limit the length of outgoing emails, order Defendants to allow him to email anyone except for persons who have specifically requested that he not contact them, and to order Defendant to not impose restrictions on the use of his electronic communications by non-incarcerated persons.

Doc. 28, pp. 6 & 13. Mr. Benning faults the district court for analyzing his actual request under *Ex parte Young* and the PLRA, and argues instead that the district court should have interpreted his complaint as requesting altogether different reliefs. Benning Br. at 59.

Ex parte Young pierces the State's Eleventh Amendment immunity by allowing suits for "for prospective equitable relief to end continuing violations of federal law." Doc. 108, p. 7; citing to *Florida Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1229, 1219 (11th Cir. 2000).

But, as Mr. Benning admits, some of the regulations he challenges no longer exist. *See* Doc. 105, p. 16. For example, Mr. Benning had asked the court to order "Defendants to allow him to email anyone except for persons who have specifically requested that he not contact them, and to order Defendant to not impose restrictions on the use of his electronic communications by non-incarcerated persons." Doc. 28, pp. 6 & 13. But Mr. Benning subsequently argued that there were "no limits to whom [Mr. Benning] can correspond with via email other than the establishment of a J-Pay.com account which any person in the world can do." Doc. 105, p. 16. So Mr. Benning now admits he has

unobstructed use of the email system. Given all this, the district court correctly found that "at least some of the violations he seeks injunctive relief to address are not ongoing." Doc. 108, p. 7. Accordingly, the district court found, Mr. Benning is not entitled to prospective injunctive relief under *Ex parte Young* as to those claims for relief.

Mr. Benning is not entitled to the other injunctive relief he requests, either, because *Ex parte Young* only permits injunctive relief when there is a constitutional violation. *Ex parte Young*, 209 U.S. at 150-51. As discussed above, Mr. Benning has not shown a constitutional violation and is thus not entitled to any relief under *Ex parte Young*.

Even if the district court had rewritten his requested relief, as Mr. Benning asks, and construed them as "(i) an order enjoining the enforcement of the challenged email policies as to outing emails and (ii) an order requiring Defendants to provide minimum procedural safeguards prior to censoring emails," Benning Br. at 59, those requests would still run afoul of the PLRA and case law.

First, Mr. Benning is asking this Court to sit as super-wardens and draft policies regulating the use of prison email systems. This is contrary to *Turner*. *Pesci*, 935 F.3d at 1166

(*Turner* "recognizes that courts do not sit as super-wardens, and ensures that prison officials, rather than judges, will 'make the difficult judgments concerning institutional operations.'") (quoting *Turner*, 482 U.S. at 89). That is a job that should be left for experienced prison officials.

Second, the district court correctly found Mr. Benning's request for a court order that GDC remove any "restrictions on the use of [Mr. Benning's] electronic communications by non-incarcerated" persons to be extremely sweeping and broad. The PLRA requires courts to provide only such injunctive relief that is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." Doc. 108, p. 8; 18 U.S.C. § 3626(a)(1). Mr. Benning's broad request does just the opposite, and so it is contrary to the express dictates of the PLRA. *Hoffer v. Fla. Dep't of Corr.*, 973 F.3d 1263, 1279 (11th Cir. 2020).

Accordingly, the district court did not err in denying Mr. Benning's request for injunctive relief against Commissioner Ward.

CONCLUSION

For the reasons set out above, this Court should affirm the judgment of the district court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 8542 words as counted by the word-processing system used to prepare the document.

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2021, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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