No. 24-2707

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ANTHONY SCHMITT,

Plaintiff-Appellant,

v.

JOLENE REBERTUS, IN HER OFFICIAL CAPACITY AS ASSISTANT COMMISSIONER OF THE MINNESOTA DEPARTMENT OF CORRECTIONS; PAUL SCHNELL, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE MINNESOTA DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

On Appeal from the United States District Court of Minnesota
Honorable John R. Tunheim
Case No. 0:24-cv-00034-JRT-LIB

BRIEF *AMICUS CURIAE* OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Freedom From Religion Foundation, Inc. ("FFRF") is a nationally recognized 501(c)(3) educational nonprofit incorporated in 1978. FFRF has no parent corporation and issues no stock.

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INTEREST OF AMICUS[1]

FFRF's purposes are to educate the public about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF works as an umbrella for those who are free from religion (free-thinkers, atheists, agnostics, and nonbelievers). FFRF currently has nearly 40,000 U.S. members. FFRF ends hundreds of state/church entanglements a year through education and persuasion, while also litigating, publishing a newspaper, and broadcasting educational programming.

Amicus seeks to protect the right of conscience of Americans, including those who are incarcerated. *Amicus* also seeks to ensure that no government entity unconstitutionally gives preference to any one religion, or religion generally, over non-religion. This concern is particularly heightened in the prison context, where government actors

[1] All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

maintain substantial power over religious minorities and non-religious prisoners.

ARGUMENT

Plaintiff-Appellant Anthony Schmitt is an outsider who wishes to present videos to prisoners that inculcate homophobia, toxic masculinity, and other reprehensible views. After being denied access to prisoners due to his program conflicting with the prison's programming policies, Schmitt now argues that the U.S. Constitution gives him the right to enter a prison and show his program to prisoners, regardless of prison officials' need to direct prison programming. But Schmitt cannot change one crucial fact: he is an outsider without a direct First Amendment interest in accessing materials inside of a prison.

If this Court agrees with the Department of Corrections that DOC programming is government speech, then the Defendant-Appellees win outright. Schmitt simply has no constitutional interest in directing the government to speak. If instead this Court—like the lower court—finds that DOC programming is not government speech, this Court must apply *Turner* scrutiny, balancing constitutional rights and security concerns. *See Turner v. Safley*, 482 U.S. 78 (1987). Amicus Curiae's brief expands upon the DOC's argument, *see* Appellees' Br. at 13, explaining why *Turner* requires the Court to affirm.

After analyzing Schmitt's faulty claims under *Turner,* this amicus brief goes on to identify the mechanism by which the DOC's policies could legitimately be challenged, should an actual party with a direct interest wish to bring a claim. Federal courts routinely recognize legal challenges to state prison policies when plaintiffs assert them under the Religious Land Use and Institutionalized Persons Act (RLUIPA), which is a *statutory right*. 42 U.S.C. § 2000cc *et seq*. Both prisoners and the federal government may assert claims under RLUIPA. 42 U.S.C. § 2000cc-2(a) & (f). Because Schmitt is neither, only *Turner* applies and the District Court did not err. This Court should affirm.

I. *Turner* applies to the instant dispute.

When a plaintiff asserts a federal constitutional right to attack a prison policy, the Supreme Court's four-factor test in *Turner v. Safley* controls. 482 U.S. 78. That has been the case for all individual rights within the First Amendment, and those included under the Fourteenth Amendment. This Court should apply *Turner* and affirm the District Court's decision that Schmitt's claims fail under *Turner*.

A. *Turner* applies to First Amendment rights.

Multiple clauses within the First Amendment have received *Turner* scrutiny. Even prior to *Turner*, the Supreme Court already applied something close to *Turner* scrutiny to a Free Press Clause claim in *Pell v. Procunier*, 417 U.S. 817 (1974). In *Pell*, California restricted the ability for journalists and prisoners to communicate via mail. *Id.* at 819. Pell—an outside journalist—brought claims along with other journalists and prisoners that this policy violated the Free Press Clause. *Id.* at 820. In concluding that the restrictions did not violate the Free Press Clause, the Supreme Court applied a *Turner*-like analysis, upholding California's prison guidelines prohibiting "media interviews with specific individual inmates." *Id.* at 820. The *Pell* court went on to say that "challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system…." *Id.* at 822; *see also Beard v. Banks*, 548 U.S. 521, 528 (2006) (holding that *Turner* "contain[s] the basic substantive legal standards governing this case" in challenge to a prison policy denying newspapers, magazines, and photographs to long-term segregation unit inmates).

The Supreme Court applied *Turner* to the Free Speech Clause's right to association in *Overton v. Bazzetta*. 539 U.S. 126 (2003). There, Michigan limited the time that outside visitors, including family members, could visit prisoners. *Id*. at 129. The District Court and Sixth Circuit applied heightened scrutiny. *Id*. at 130. The Supreme Court unanimously reversed, applying *Turner*. *Id*. at 128. Notably, the *Overton* plaintiffs were "prisoners, their friends, and their family members," *id*. at 130, which demonstrates that even outside groups that assert constitutional rights against a prison policy must overcome *Turner*. Despite Schmitt's assertions, *see* App's. Br. at 36, his Free Speech claim should similarly receive *Turner* scrutiny.

As with free press and free speech, the Supreme Court has similarly concluded that the right to peaceful assembly receives *Turner* scrutiny. *See Jones v. N. C. Prisoners' Lab Union., Inc.*, 433 U.S. 119 (1977). Earlier this year, the Seventh Circuit held that *Turner* applied to the First Amendment right to petition. *Decker v. Sirevald*, 109 F.4th 975 (7th Cir. 2024). This Court set out *Turner* as the applicable standard for a challenge to a prison's postcard-only policy in *Human Rights Def. Ctr. v. Baxter Cnty., Ark.*, 999 F.3d 1160 (8th Cir. 2021), and

affirmed that *Turner* applied to the First Amendment just months ago. *See Human Rights Def. Ctr. v. Union Cnty., Ark.*, 111 F.4th 931 (8th Cir. 2024). Thus, for Schmitt's Free Speech claims, *Turner* controls.

B. *Turner* applies to other constitutional rights as well.

Turner's applicability does not stop at the First Amendment. The Supreme Court and other federal courts have applied *Turner* when balancing other constitutional rights with prison security concerns.

In *Turner* itself, the Supreme Court employed the same balancing test for two different fundamental constitutional rights: free speech and the right to marry within the Due Process Clauses of the Fifth and Fourteenth Amendments. *Turner*, 482 U.S. 78. The *Turner* court held that an inmate-to-inmate correspondence prohibition was facially valid, but invalidated provisions prohibiting inmate marriage without warden approval. 482 U.S. at 99. The *Turner* court went on to say that "the almost complete ban on the decision to marry is not ***reasonably related to legitimate penological objectives***. We conclude, therefore, that the Missouri marriage regulation is facially invalid." *Id*. at 99 (emphasis added). As the emphasized language indicates, the Court applied *Turner*'s standard—not strict or intermediate scrutiny—to the

policy being challenged under the Due Process Clauses. Thus, *Turner* reaches beyond the First Amendment, as evidenced by *Turner* itself.

The Supreme Court similarly held that *Turner* was the applicable standard in a case regarding the constitutional right to access the courts. *See Lewis v. Casey*, 518 U.S. 343 (1996). And this Court recently affirmed an application of *Turner* to procedural due process violations. *See Baxter Cnty., Ark.,* 999 F.3d 1160.

Schmitt asserts that the Equal Protection Clause does not receive *Turner*'s factor test. App't Br. at 49. Two Circuit Courts of Appeal have held otherwise. *See Martinez v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 16775338 at *2 (11th. Cir. 2022) (unpublished) (holding that *Turner* applies to Equal Protection race discrimination claims); *Barnowski v. Hart*, 486 F.3d 112, 122 (5th Cir. 2007) ("'*Turner* applies with corresponding force to equal protection claims.'"(quoting *Freeman v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 863 (5th Cir. 2004))). While it is true that the Supreme Court has declined to extend *Turner* to cases involving claims of facial race discrimination, *see Johnson v. California*, 543 U.S. 499 (2005), Schmitt does not allege racial discrimination or any race-based classification. In fact, all of Schmitt's claims arise out of

the First Amendment, and thus, all of his claims should be properly evaluated under *Turner*, not *Johnson*.

For all Due Process, Confrontation Clause, Free Speech, Free Press, Petition, and Assembly challenges to prison policies, *Turner* has long been the applicable standard. No jurisprudence from either the Supreme Court or this Court gives any indication that if faced with a challenge to a prison policy under the only unaddressed First Amendment right—the Free Exercise Clause—any framework other than *Turner* should apply. And rightfully so, as applying a different standard solely to Free Exercise challenges would impermissibly privilege religion.

C. Free Exercise Claims receive *Turner* scrutiny.

The Free Exercise Clause is a constitutional right within the First Amendment. Therefore, it receives the same *Turner* scrutiny as the other clauses within the First Amendment, and other constitutional rights. Holding otherwise would inexplicably privilege religion.

The Supreme Court recognized this in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). In *O'Lone*, Muslim prisoners attacked their prison's policy of having them work outside, even during their holy

day. *Id.* at 344–45. The plaintiffs asserted only the Free Exercise Clause. *Id.* at 345. They prevailed before the Court of Appeals; but the Supreme Court reversed. *Id.* at 343. In reversing, the Supreme Court applied *Turner*. *Id.* at 350–51. While Justice Brennan wrote a dissenting opinion in which he urged the Court to apply strict scrutiny, *see id*. at 354 (Brennan, J., dissenting), this view lost the day.

Every Circuit Court of Appeals, including this Court, has followed the Supreme Court's lead and applied *Turner* to Free Exercise claims in this context. *See, e.g.*, *Mbonyunkiza v. Beasley*, 956 F.3d 1048, 1053 (8th Cir. 2020) (citing *O'Lone* and *Turner* as establishing the applicable test for a Free Exercise challenge); *Hudson v. Spencer*, 2018 WL 2046094 (1st Cir. 2018) (unpublished); *Kravitz v. Purcell*, 87 F.4th 111 (2d. Cir. 2023); *Vo v. Wetzel*, 2022 WL 1467978 (3d. Cir. 2022) (unpublished); *Coleman v. Jones*, 2022 WL 2188402 (4th Cir. 2022) (unpublished); *Mungaray v. Collier*, 2024 WL 1826243 (5th Cir. 2024) (unpublished); *Mustin v. Wainwright*, 2024 WL 3950810 (6th Cir. 2024) (unpublished); *Sims v. Jester*, 2024 WL 3965887 (7th Cir. 2024) (unpublished); *Smith v. Gipson*, 2023 WL 4421389 (9th Cir. 2023) (unpublished); *Colo. Springs Fellowship Church v. Williams*, 2022 WL 2118440 (10th Cir.

2022) (unpublished); *Dorman v. Aronofsky*, 36 F.4th 1306 (11th Cir. 2022); *Levitan v. Ashcroft*, 281 F.3d 1313 (D.C. Cir. 2002). Schmitt nevertheless ignores *O'Lone* entirely—not even mentioning it in his opening brief. Schmitt urging this Court to apply strict scrutiny is an invitation to ignore Supreme Court guidance and improperly overrule this Court's own precedent as established in *Mbonyunkiza*. *See* 956 F.3d 1048; App's. Br. at 44–49 (neglecting to cite *O'Lone*). This Court should reject that invitation.

Schmitt seeks to distinguish himself from this wall of bad cases by leaning on his status as an outsider. *See* App's. Br. at 48. That was irrelevant to the Supreme Court in *Overton* and *Pell*, yet Schmitt urges this Court to ignore these cases too. *Overton* and *Pell* establish that outsider challenges to prison regulations must survive *Turner*'s bite and *O'Lone* instructs this Court to apply *Turner* to Free Exercise challenges specifically. Schmitt simply cannot escape that all of his First Amendment claims are subject to *Turner*.

II. The alleged violation implicates First Amendment rights belonging to a hypothetical prisoner, not to Schmitt, and would be better resolved under RLUIPA.

Schmitt is an outsider trying to assert a constitutional right that simply does not exist: a right to show videos to prisoners. Even if the prison programming at issue is not government speech, as Schmitt asserts, he cannot overcome his burden under *Turner*, which applies to all of his First Amendment claims. To the extent that the DOC's policies implicate First Amendment rights, those rights belong to *prisoners*, who could allege infringement on their First Amendment interest in accessing information or in practicing their sincerely held religious beliefs (if, indeed, such a religious belief exists).

If brought by prisoners themselves, a cognizable Free Exercise claim would be much stronger, as it would not be subject to *Turner*, but would instead be evaluated under the Religious Land Use and Institutionalized Persons Act (RLUIPA), which Congress saw fit to enact specifically for such situations. *See* 42 U.S.C. § 2000cc *et seq*. Ultimately, Schmitt is the wrong party bringing the wrong claims.

As an outsider, Schmitt cannot bring an RLUIPA claim; RLUIPA can only be asserted by an institutionalized person or the federal

government. *See* 42 U.S.C. § 2000cc-2(a) & (f). Had the government or a hypothetical prisoner saw fit to challenge the DOC's policies here, this Court would have a very different case before it. As it stands, however, the wrong party—an outsider to the prison—is before the Court and his claims can be easily dismissed under *Turner*. *See* Sec. I, *supra*.

Under RLUIPA, a prisoner must assert that their religious exercise has been substantially burdened. *See* 42 U.S.C. § 2000cc-2(1) *et seq*. In turn, courts apply strict scrutiny, not *Turner*. *See Holt v. Hobbs*, 574 U.S. 352 (2014); *Mast v. Fillmore Cnty., Minn.*, 141 S.Ct. 2430 (2021) (Gorsuch, J., concurring) (urging application of strict scrutiny to RLUIPA claim on remand).

Ten years prior to *Holt*, this Court acknowledged RLUIPA as the more appropriate tool in *Murphy v. Missouri Department of Corrections*, 372 F.3d 979 (8th Cir. 2004). In *Murphy*, a prisoner challenged a prison's censorship of a specific edition of a white-supremacist magazine. *See id.* at 986. While this Court affirmed the district court's dismissal of the prisoner's free speech and free exercise claims under *Turner*, *see id.* at 985, it reversed and remanded for reconsideration of the prisoner's RLUIPA claims, because "although its actions were

justified under the *Turner* reasonableness analysis, there is insufficient evidence to conclude that appellees have satisfied the heavier burden imposed upon them under RLUIPA." *Id.* at 988.

In contrast to *Murphy*, this Court has affirmed dismissal when a prisoner-plaintiff asserted *only* constitutional rights. *See, e.g.*, *Murchison v. Rogers*, 779 F.3d 882, 885 (8th Cir. 2015) (citing *Turner* and *Murphy* to support dismissal). A cognizable claim under RLUIPA is the difference between outright dismissal (*Murchison*) versus consideration of a prisoner's free exercise claims (*Murphy*). *See also Simpson v. Cnty. of Cape Girardeau*, 879 F.3d 273 (8th Cir. 2018) (applying *Turner* to uphold constitutionality of post-card-only mailing policy where plaintiff did not assert an RLUIPA claim); *Watson v. Christo*, 837 Fed.Appx. 877 (3d. Cir. 2020) (unpublished) (citing *Murphy*); *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012) (citing *Murphy*); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 989–90 (9th Cir. 2008) (citing *Murphy*); *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014) (opinion of now-Justice Gorsuch) (citing *Murphy*); *Hudson* 2018 WL 2046094 (remanding one RLUIPA claim for further proceedings while affirming judgment for defendants on First

Amendment claims); *Hudson v. Spencer*, 2021 WL 9494322 (unpublished) (1st. Cir. 2021) (reversing order of summary judgment for institutional defendants on RLUIPA claim, after applying strict scrutiny); *Prison Legal News v. Sec'y, Fla. Dep't of Corr*. 890 F.3d 954, 974 n. 17 (11th Cir. 2018) (applying *Turner* to an outside group's constitutional claims while explicitly contrasting that approach to the strict scrutiny analysis needed under RLUIPA).

RLUIPA is the appropriate method for challenging alleged restrictions on religion in the prison context; this tool simply is not available to Schmitt. If any actual prisoner objected to the DOC's decision to restrict access to Schmitt's materials—and there is no indication in the record that any prisoner has objected—any such prisoner would be able to bring a claim under RLUIPA. And even if no prisoner is willing or able to challenge Schmitt's denial—a fact that is rather telling—Schmitt still is not the best alternative party to assert a claim. RLUIPA instead provides for the federal government to assert claims on behalf of prisoners, *see* 42 U.S.C. § 2000cc-2(f), which the federal government has chosen to do in many instances, *see, e.g.*, *United*

States v. Sec'y Fla. Dep't of Corr., 828 F.3d 1341 (11th Cir. 2016), but has chosen not to do so in this instance.

All of Schmitt's claims fail under *Turner* and its progeny. While a prisoner or the federal government would have a stronger claim and a better chance at winning under RLUIPA, neither a prisoner nor the federal government is before this Court. Schmitt is simply the wrong party bringing the incorrect kind of claim.

CONCLUSION

For all the reasons stated above, the decision below should be affirmed.

Dated: November 27, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished through this Court's CM/ECF system.

Dated: November 27, 2024 Respectfully submitted,

/s/Patrick C. Elliott
Patrick C. Elliott

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(1)(E), 27(d)(2), and 32(a), I hereby certify that the foregoing brief complies with length, typeface, and type-style requirements. This brief contains 3,618 words and was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

The electronic version of the brief has been scanned for viruses and is virus-free.

Dated: November 27, 2024 Respectfully submitted,

/s/Patrick C. Elliott
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