TURNER'S INSURMOUNTABLE BURDEN: A THREE-CIRCUIT SURVEY OF PRISONER FREE SPEECH CLAIMS

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ABSTRACT

The last case in which the Supreme Court struck down a prison regulation for violating the federal Constitution was the landmark case of *Turner v. Safley*, handed down nearly thirty-five years ago. *Turner* also marked the first time the Court established a clear standard to evaluate all such constitutional challenges to prison policies and regulations. As the Court built deference to prison officials into the *Turner* standard, and has issued little guidance as to interpretation of the evidentiary standard in the decades since, circuit courts have been left the weighty task of filling in the jurisprudential gaps. This dearth of guidance is especially troubling in the context of First Amendment free speech restrictions, which impinge on the ability of prisoners to communicate with legal counsel and loved ones. Constraints on face-to-face communication stemming from the COVID-19 pandemic have only further highlighted the importance of written communication and access to printed publications in the prison environment.

Deficiencies in the *Turner* standard (and prisoner-led litigation generally) have been discussed at length by prominent scholars in the criminal justice field. This Note builds on existing scholarship by reviewing roughly fifteen years of circuit court case law in which the standard is applied. Because *Turner* challenges rarely come before the Supreme Court, this review offers valuable insight as to how lower courts typically dispense with prisoners' free speech claims, and identifies several evidentiary innovations that are worth exploration and adoption by sister circuits. In addition to these evidentiary reforms, which could be adopted unilaterally by lower courts, this Note offers large-scale reforms that could be undertaken by the Supreme Court and Congress.

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INTRODUCTION

Although the Supreme Court has repeatedly declared that "prison walls do not form a barrier separating inmates from protections of the Constitution," the Court has erected a barrier of its own through jurisprudence.[1] As a result of the Court's landmark decision in *Turner v. Safley*,[2] challenges to prison regulations alleged to violate the Constitution are subject to a standard of review that places a heavy evidentiary burden on the inmate-plaintiff.[3] The Supreme Court has provided little guidance as to what evidence is sufficient to prove that a challenged prison regulation is arbitrary or overreaching,[4] leaving circuit courts to develop disparate standards or none at all.[5] The lack of a clear "roadmap" to success offered by circuit courts has made it difficult for pro se litigants and practitioners to challenge suspect prison regulations in the face of significant judicial deference to prison officials' judgment.[6]

First Amendment challenges to prison regulations are often heavily fact-dependent and therefore especially unlikely to succeed under *Turner*'s deferential standard.[7] Although Congress carved out an exception for First

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1. Turner v. Safley, 482 U.S. 78, 84 (1987); *see also* Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

2. 482 U.S. 78 (1987).

3. *See, e.g.*, Overton v. Bazzetta, 549 U.S. 126, 132 (2003) (explaining that the burden is on the prisoner to disprove the validity of the prison regulation); Shaw v. Murphy, 532 U.S. 223, 232 (2001) (noting that to prevail, inmate-petitioner must surmount the presumption that prison officials acted validly within their "broad discretion" and that this burden of proof is "heavy" (citing Thornburgh v. Abbott, 490 U.S. 401, 413 (1989))).

4. *See* discussion *infra* Section I.C.

5. *See, e.g.*, Dimitrios Korovilas, *Pornless Prisons: An Unreasonable Restriction?*, 39 U.C. DAVIS L. REV. 1911, 1915 (2006) (discussing the split in reasoning between the Third and D.C. Circuits, which applied different evidentiary burdens in *Turner* challenges dealing with the Ensign Amendment's prohibition on sexually explicit material in prisons and jails).

6. *See* discussion *infra* Part I.

7. As most challenges to regulations are as-applied, rather than facial, courts often must choose between the rationale of the prison administrator in rejecting a book, for example, or the rationale of the prisoner as to why the application was unreasonable. Deference to prison administrators almost always leads courts to resolve these claims in favor of the state. *See* discussion *infra* Part II; *see also* Sanford L. Bohrer & Matthew S. Bohrer, *Just the Facts, Ma'am—Determining the Constitutional Claims of Inmates to the Sanctity of Their Legal Mail*, 63 U. MIAMI L. REV. 893, 903 (2009) (arguing, after an analysis of *Turner*, that decisions in prisoner mail cases often turn on the facts, with varying levels of deference afforded to prison officials depending on those facts); Sharon Dolovich, *Prison Litigation Reform Act: Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 245 (2012)

Amendment *free exercise* challenges—creating a statutory cause of action for these claims that requires heightened scrutiny—free speech challenges must still be brought under *Turner*'s "reasonableness" standard of review.[8] This lax protection of prisoners' First Amendment free speech rights is particularly striking when compared to the strict scrutiny review applied to free speech challenges among the general public.[9] As a result of *Turner*, expansive bans on books, newspapers, correspondence, and other reading materials have been consistently upheld as "reasonably related" to broad goals of "security" or "rehabilitation."[10] These restrictions often make news headlines for their seemingly arbitrary application, such as a regulation in Ohio that banned a biology book due to nudity, or a federal prison in Colorado that prevented a prisoner from receiving a copy of Barack Obama's autobiography over "national security" concerns.[11] Advocates have likened First Amendment free speech litigation to "the game Whac-a-Mole": as soon

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(noting that deference in prisoners' rights cases before the Supreme Court also functions to frame the facts in a manner sympathetic to prison officials as defendants).

8. Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-1. The differing standards of review between the statutory cause of action under RLUIPA and the constitutional cause of action subject to *Turner* have demonstrated the important role a less deferential standard plays in protecting prisoners' fundamental constitutional rights. There are a number of examples where prisoners have prevailed on their RLUIPA statutory claim while losing on their constitutional free exercise claim under *Turner*, despite the same facts. *See* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 979 (2016) [hereinafter *Lenient in Theory*] (citing cases in the Fourth, Eighth, Tenth, and Eleventh Circuits where prisoners have prevailed under RLUIPA, but lost under *Turner* in the same case); *see also infra* Section III.B.2 (discussing RLUIPA).

9. *See* discussion *infra* Part I. For clarity and consistency with court precedent, this Note does not use person-first language. For example, the Supreme Court's open-ended use of the term "prisoner" in early case law led to subsequent challenges by those in pretrial detention. *See* discussion *infra* Section I.A. Because these distinctions in terminology were important, particularly in such early case law, this Note replicates the language used by the courts. Person-first language (that is, "incarcerated person," not "inmate" or "prisoner") is the preferred method of referring to persons affected by the criminal legal system and should be used where possible. For a brief discussion of the issue, see TaLisa J. Carter, *Person-First Language Is Not Enough*, URB. INST. (May 28, 2021), https://www.urban.org/urban-wire/person-first-language-not-enough [https://perma.cc/J4U4-K7ET].

10. *See* discussion *infra* Parts I, II.

11. Mihir Zaveri, *Prison Book Bans Called 'Arbitrary and Irrational'*, N.Y. TIMES (Sept. 27, 2019), https://www.nytimes.com/2019/09/27/us/banned-books-week-prisons.html [https://perma.cc/GH2X-M6BF]; PEN AMERICA, LITERATURE LOCKED UP: HOW PRISON BOOK RESTRICTION POLICIES CONSTITUTE THE NATION'S LARGEST BOOK BAN 3–4 (2019), https://pen.org/wp-content/uploads/2019/09/literature-locked-up-report-9.24.19.pdf [https://perma.cc/X4NT-RGCJ].

as one unlawful prison regulation falls, more are enacted in different jurisdictions.[12]

This Note surveys opinions of the Third, Fifth, and Ninth Circuits to examine how circuit courts are formulating the evidentiary burden under *Turner* and the likelihood of plaintiffs' claims succeeding under those frameworks. [13] The circuit courts' significant deference to the state, regardless of how the evidentiary burden was formulated, highlights the need for reforms to evidentiary requirements in order to help curb excessive judicial deference under *Turner*. Part I traces the development of the *Turner* standard of review, provides an overview of the *Turner* standard itself, and discusses subsequent case law that dictates when and how *Turner* is applied in the context of free speech case claims. [14] Part II details circuit court interpretations of the evidentiary burden required under *Turner*, resulting from a survey of prisoner free speech jurisprudence from 2006 to late 2020. Finally, Part III discusses possible reforms to these disparate standards to increase the likelihood of success for prison regulation challenges.

I. Development and Application of the *Turner* "Reasonableness" Standard

For nearly two centuries after the United States' founding, prisoners were considered "slaves of the State,"[15] outside the bounds of constitutional protection.[16] The only protections granted to prisoners could be found in state law, should a state choose to afford them.[17] During this period, federal courts largely refused to consider the merits of claims brought by prisoner-plaintiffs, an approach that came to be known as the "hands-off" doctrine.[18]

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12. David L. Hudson Jr., *Ex-Con Fights for Prisoner Rights and Battles Censorship*, A.B.A. J. (Oct. 1, 2016, 4:50 AM), https://www.abajournal.com/magazine/article/prison_legal_news_wright_profile [https://perma.cc/FX5Z-NTES].

13. For an explanation as to why these particular circuits were chosen, see *infra* notes 145–146 and accompanying text.

14. The Court's pre-*Turner* case law is explored at length to demonstrate the convoluted path to *Turner*, which has made circuit court application of the *Turner* standard more difficult to this day. *See* discussion *infra* Section II.D (exploring circuit splits regarding pre-*Turner* case law, which the Court's subsequent precedent, including *Turner* itself, has not fully clarified).

15. Ruffin v. Commonwealth, 62 Va. 790, 795–96 (Va. 1871).

16. *See* Johnson v. California, 543 U.S. 499, 528 n. 2 (2005) (Thomas, J., dissenting) (explaining the origin of the "hands-off" approach and its duration until the 1960's (citations omitted)); Shaw v. Murphy, 532 U.S. 223, 228 (2001) (summarizing the history of federal courts' approach to prisoners' rights challenges).

17. *Johnson*, 543 U.S. at 528–29.

18. *See* Procunier v. Martinez, 416 U.S. 396, 404 (1974); *see also Shaw*, 532 U.S. at 228 (summarizing the history of federal courts' approach to prisoners' rights challenges).

Courts were reluctant to "subvert prison discipline" and believed they lacked the expertise of officials maintaining prisons and jails, rendering them ill-suited to rule on challenges to conditions of confinement or treatment of prisoners.[19] Courts also feared overstepping the separation of powers, as operation and funding of correctional facilities are creatures of the legislative and executive branches, rather than the judicial branch.[20]

Beginning in the 1950's, prison riots became a regular occurrence, often due to inadequate treatment and conditions of confinement.[21] The need for reform gradually drove the Warren Court to shift away from their "hands-off" approach and rule on the merits of prisoners' rights claims, directly addressing the unconstitutionality of prison conditions and treatment of prisoners.[22] Despite the increase of judicial review in the mid-to-late 1960's, growth in the U.S. prison population over the next decade furthered existing tension in penal institutions. Beginning in 1972, the rate of U.S. imprisonment grew dramatically, with annual increases in the prison population of six to eight percent.[23] Prison administrators faced the difficult task of maintaining order in institutions with immense overcrowding, which contributed to increases in violence and difficulty maintaining adequate

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19. *See* Ronald L. Goldfarb & Linda R. Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 (1970) (explaining the rationales for the judiciary's "hands-off" doctrine).

20. *Id.*

21. *Id.* at 176 (detailing prison riots across the country beginning in the 1950's); *Johnson*, 543 U.S. at 528 n. 2 (Thomas, J., dissenting) (citations omitted).

22. *See, e.g.*, Cooper v. Pate, 373 U.S. 546 (1964) (overruling a motion to dismiss granted for failure to state a claim where a prisoner in Illinois state prison had brought a First Amendment free exercise claim against the warden); Lee v. Washington, 390 U.S. 333, 333–34 (1968) (affirming district court ruling that applied the Fourteenth Amendment to prisons and jails, prohibiting racial segregation of prisoners); *see also* Lauren Salins & Shepard Simpson, *Efforts to Fix a Broken System:* Brown v. Plata *and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1162 (2013) ("Beginning in the late 1960s . . . courts transitioned to a more hands-on approach with respect to inmates' rights as the need for prison reform began to outweigh separation of powers concerns."); Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 313–14 (1983) (describing how the "hands off" approach transitioned to "judicial activism with the 1960s litigation over barbaric conditions in the Arkansas prisons" (footnote omitted)).

23. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 34–35 (Jeremy Travis, et al. eds., 2014); *see also* Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 299 (2007) (describing how the U.S. incarceration rate began rising in the mid-1970s, and was further accelerated over the following two decades by the War on Drugs and "three-strikes" laws that penalized repeat offenders with heightened sentencing).

supervision of prisoners.[24] Another wave of litigation followed, again challenging conditions of confinement and inmate treatment.[25]

Early lawsuits during this second wave of litigation revealed that prison officials frequently could not justify or even explain their procedures, leading courts to call for reforms.[26] Consent decrees that professionalized and bureaucratized corrections management, along with written prison regulations, emerged as the principal remedies.[27] Written regulations served the dual purpose of providing courts with a benchmark for evaluating prison conditions and a guide for prison officials trying to avoid further lawsuits.[28] It quickly became clear, however, that regulations themselves, although initially considered beneficial by courts and reformists, tended to impinge on prisoners' other fundamental, constitutional rights.[29] Courts thus faced the difficult question of how to "discharge their duty to protect [inmates'] constitutional rights,"[30] while still affording appropriate deference to the judgment of newly "professionalized" prison administrators as to what regulations were truly necessary to maintain safe prison environments.[31]

Inmates' First Amendment free speech claims were among the first challenges to prison regulations reviewed by the Supreme Court.[32] Outside of prison walls, any restriction or regulation of speech that is based on

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24. Demetria D. Frank, *Prisoner-to-Public Communication*, 84 BROOK. L. REV. 115, 123–24 (2018) (describing problems resulting from the increase in prison populations in the U.S.).

25. Shay & Kalb, *supra* note 23, at 298 (noting that the Attica riot in 1971 led civil rights organizations like the American Civil Liberties Union to "aggressively and systemically litigat[e] prison cases," leading to an initial period of prison reform).

26. James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80*, *in* CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 429, 458 (Norval Morris & Michael Tonry eds.,1980) (citing litigation as the driver of reforms to "organizational structure, increased funding, new administrators, changes in personnel policies, new facilities . . . improved management procedures, etc.").

27. Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 332, 335 (2009); Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 435–36, 438 (2004) (describing the "double-edged sword" of prison bureaucratization that resulted from litigation).

28. Shay, *supra* note 27, at 335.

29. Jacobs, *supra* note 26, at 458; *see also* Procunier v. Martinez, 416 U.S. 396, 406 (1974) (noting that failure of the Supreme Court to address the "tension between the traditional policy of judicial restraint" and the need to protect constitutions rights in the prison context had led to inconsistent approaches in the lower courts).

30. *Martinez*, 416 U.S at 405–06.

31. *Id.* at 404–05.

32. *See* discussion *infra*, Section I.A.

content is presumptively unconstitutional,[33] and is only justified if the government can prove that the restriction on speech is narrowly tailored to serve compelling state interests, i.e., if it survives strict scrutiny.[34] For content-neutral speech restrictions, the Court still applies intermediate scrutiny, requiring the state or federal government to show that the restriction is narrowly tailored to serve an important or substantial government interest and that alternative means of communication exist.[35] Content-neutral restrictions are often referred to as "time, place, and manner" regulations, as they restrict when, where, and how speech can be expressed, but do not prohibit speech based on the content of the communication.[36] A classic example would be a city ordinance preventing the use of megaphones in a park. The use of strict and intermediate scrutiny to review First Amendment free speech claims is consistent with the Court's position that where a regulation impinges on fundamental rights, less deference is owed to the state.[37] For the same reason, review for both content-based and "time, place, manner" restrictions places the burden of proof on the state when the constitutionality of regulations affecting speech is challenged.[38]

Despite the Supreme Court's broad protection of First Amendment free speech rights among the general public by means of heightened scrutiny, the Court has been far more lenient in prison settings, primarily citing the

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33. Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015) ("[A] government . . . has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972))).

34. *Reed*, 576 U.S. at 163. The Supreme Court has gone as far as striking down a municipal code that regulated publicly posted signs on the basis of content. *Id.* at 172.

35. RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE AND PROCEDURE § 20.47(a) (2020).

36. *Id.*; *see also, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 98–99 (1972) (explaining potentially permissible "time, place and manner" regulations in the context of picketing).

37. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest. . . .'" (citations omitted)); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969) (explaining that the franchise is the "foundation of our representative society" and therefore deference usually afforded to the judgment of legislators does not extend to decisions about who may participate in public elections).

38. Phila. Newspapers v. Hepps, 475 U.S. 767, 777 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." (citing, among other cases, First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Speiser v. Randall, 357 U.S. 513 (1958))); *see also Kramer*, 395 U.S. at 627–28 (explaining that where fundamental rights are involved, the state is not afforded the same presumption of constitutionality that they would receive under rational basis review).

need for deference to prison officials.[39] From 1974 to 1984, the Court took up a string of free speech challenges involving regulations that restricted inmate mail, communication with press, and incoming books, magazines, and news.[40] The "compelling interest" and "substantial interest" standards for public speech restrictions were gradually turned on their head when applied to prison regulations, culminating in a standard of review under *Turner v. Safley*[41] that asks whether prison regulations that impinge on constitutional rights are *reasonably* related to a legitimate government interest.[42] Under *Turner*, the burden of proof also rests with the inmate-plaintiff, who, in contrast to free speech challenges among the public, must overcome a presumption of constitutionality as to the challenged regulation.[43]

As a result of this case law, prisoners' First Amendment free speech challenges, which already face significant statutory hurdles and adverse judicial doctrines, [44] stand little chance of succeeding on the merits under *Turner*. Communication and access to information, fundamental American rights, are therefore heavily restricted in prisons and jails with little recourse for affected inmates. The following subsection traces the development of the *Turner* standard, which is based primarily on First Amendment free speech jurisprudence.

A. Pre-*Turner* Case Law: *Martinez* Through *Wolfish*

In *Procunier v. Martinez*,[45] the Supreme Court began its decade-long struggle to find an appropriate standard of review for constitutional challenges to prison regulations.[46] *Martinez* involved a First Amendment free

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39. *See* discussion *infra* Section I.A.

40. *See* discussion *infra* Section I.A.

41. 482 U.S. 78 (1987).

42. *Id.* at 89; *see also* discussion *infra* Section I.B (detailing *Turner*'s "reasonableness" test).

43. *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (explaining that the burden is on the prisoner to disprove the validity of the prison regulation); Shaw v. Murphy, 532 U.S. 223, 232 (2001) (noting that to prevail, inmate-petitioner must surmount the presumption that prison officials acted validly within their "broad discretion" and that this burden of proof is "heavy" (quoting Thornburgh v. Abbott, 490 U.S. 401, 413 (1989))).

44. *Lenient in Theory*, *supra* note 8 (describing how the Prison Litigation Reform Act and the judicial doctrine of qualified immunity, among other obstacles, have made it difficult for prisoners to litigate claims).

45. 416 U.S. 396 (1974).

46. During the preceding decade, the Supreme Court struck down a number of unconstitutional *practices* of prisons, but *Martinez* dealt with the relatively novel issue of prison *regulations* that burdened the constitutional rights of prisoners. *See supra* notes 26–31 and accompanying text for the import of this distinction. The Court had indicated its

speech challenge to California Department of Corrections ("CDC") regulations that censored incoming and outgoing personal letters.[47] The restrictions were content-based, specifically prohibiting statements that were critical of a prison administration or deemed "inflammatory,"[48] and reflected the CDC's general policy toward prisoner mail, which considered the sending and receiving of mail an inmate privilege, not a right.[49] Federal appellate and district courts, including the district court in *Martinez*, had struggled with the applicability of First Amendment rights to prison inmates for a number of years.[50]

According to the district court in *Martinez*, the majority of recent cases had adopted a standard of review formulated by the District Court for the Southern District of New York in a case called *Carothers v. Follette*.[51] The *Carothers* standard required that any regulation or practice that restricts the right of prisoners' free expression be "related both reasonably and necessarily to the advancement of some justifiable purpose of imprisonment."[52] A few other courts, in contrast, had required that the state show a compelling interest for the restriction, as they would with regulations that burdened speech among the general public.[53]

The Supreme Court, however, rejected the district court's framing of the issue, finding that an inquiry into the applicability of First Amendment rights to prison inmates was unnecessary.[54] *Martinez* presented a "narrower basis of decision," namely the rights of inmates' correspondents, who

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willingness to strike down any such regulation a few years prior in *Johnson v. Avery*, 393 U.S. 483 (1969), where the Court held that "discipline and administration of state detention facilities are state functions . . . subject to federal authority only where paramount federal constitutional or statutory rights supervene." *Id.* at 486 (striking down a regulation that burdened the constitutional and statutory rights of inmates to petition for writs of habeas corpus).

47. *Martinez*, 416 U.S. at 398–99.

48. *Id.* at 399–400. In total, three separate regulations came before the Court which specifically prohibited the content of speech. *See* Transcript of Oral Argument at 11–12, Procunier v. Martinez, 416 U.S. 396 (1974) (No. 72-1465).

49. Martinez v. Procunier, 354 F. Supp. 1092, 1095 (N.D. Cal. 1973), *aff'd* 416 U.S. 396 (1974); *see also* Transcript of Oral Argument at 12, Procunier v. Martinez, 416 U.S. 396 (1974) (No. 72-1465) ("Our first position is that . . . social mail is not a constitutional right but is a matter for prison administration.").

50. *Martinez*, 354 F. Supp. at 1096.

51. 314 F. Supp. 1014 (S.D.N.Y. 1970).

52. *Carothers*, 314 F. Supp. at 1024; *see also Martinez*, 354 F. Supp. at 1096 (discussing *Carothers* standard).

53. *Martinez*, 354 F. Supp. at 1096 (citing Morales v. Schmidt, 340 F. Supp. 544 (W.D. Wis. 1972)); Fortune Society v. McGinnis, 319 F. Supp. 901, 904 (S.D.N.Y. 1970).

54. *Martinez*, 416 U.S. at 408.

enjoyed full constitutional protections.[55] The Court identified the First Amendment interest of non-prisoner correspondents as an interest in uncensored correspondence, grounded in the First Amendment's guarantee of freedom of speech and the derivative First and Fourteenth Amendment protections against "unjustified governmental interference with . . . intended communication[s]."[56] Having adopted that framing, the Court turned to the question of an appropriate standard of review.

The prison regulations at issue in *Martinez* sought to restrict inmates' speech, rather than their correspondents' speech, meaning the restriction on non-prisoner correspondents' communication was purely incidental.[57] To develop an appropriate standard of review, the Court looked to prior case law where government regulations had resulted in incidental restrictions on speech among the general public,[58] deciding to modify the standard of review applied in those cases to the prison environment.[59] This adapted standard of review called for strict scrutiny, and, as the incidental restriction on speech was content-based, the Court struck down the regulation.[60] Because this standard was developed solely to determine the

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55. *Id.* ("In determining the proper standard of review for prison restrictions on inmate correspondence, we have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand."). The Court's avoidance of prisoners' rights here is especially striking given that the non-prisoner correspondents were not parties to the suit. *See id.* at 398; *Martinez*, 354 F. Supp. at 1093. The Court appears to have unilaterally decided on this framing, as the distinction is not mentioned in the lower court opinion nor the oral argument transcript. *See generally* Martinez v. Procunier, 354 F. Supp. 1092 (N.D. Cal. 1973), *aff'd* 416 U.S. 396 (1974); Transcript of Oral Argument, Procunier v. Martinez, 416 U.S. 396 (1974) (No. 72-1465).

56. *Martinez*, 416 U.S. at 408–09.

57. *Id.* at 409.

58. *Id.* at 409–11 (citing Healy v. James, 408 U.S. 169 (1972); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); United States v. O'Brien, 391 U.S. 367 (1968)).

59. The Court ultimately adapted language from the landmark case of *United States v. O'Brien*, 391 U.S. 367 (1968), in creating its final standard of review. *O'Brien* announced a four-part standard of review to determine whether a law prohibiting the burning of a draft card impermissibly violated the free speech rights of plaintiff O'Brien, who had burned his card in protest of the Vietnam War. *Id.* at 369, 377. *Martinez* consolidated the *O'Brien* standard to develop a two-criteria test: first, the challenged policy or regulation must "further an important or substantial governmental interest unrelated to the suppression of expression;" second, the restriction of First Amendment freedoms may be "no greater than is necessary or essential" to protect the asserted government interest. *Martinez*, 416 U.S. at 410–11, 413–14.

60. *Martinez*, 416 U.S. at 415 ("Appellants have failed to show that these broad restrictions on prisoner mail were in any way necessary to the furtherance of a governmental interest unrelated to the suppression of expression.").

extent of *non-prisoner* correspondents' rights, however, the extent of *prisoners'* First Amendment rights after *Martinez* remained unclear.

The Court faced the standard of review question for a second time that term in the case of *Pell v. Procunier*.[61] *Pell* again raised a First Amendment free speech challenge against the California Department of Corrections, brought by both California prison inmates and professional journalists.[62] The regulations at issue in this case only allowed journalists to speak with randomly-selected inmates, rather than specifically-selected inmates, out of prison officials' concerns that its previous "laissez-faire" policy regarding inmate interviews had led to an increase in disciplinary problems.[63] As opposed to *Martinez*, the Court squarely addressed the First Amendment rights of prisoners, holding that:

> [A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, 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 . . . .[64]

The Court thereby settled the issue that lower courts had been debating since at least 1968,[65] choosing to adopt a standard of review for First Amendment rights similar to the *Carothers* "reasonable and necessary" formulation from the Southern District of New York.[66] Simply stated, the

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61. 417 U.S. 817 (1974).

62. *Id.* at 819.

63. Hillery v. Procunier, 364 F. Supp. 196, 198–99 (N.D. Cal. 1973). Inmates also could not initiate interviews themselves. *Id.* at 198. Officials were concerned about inmates becoming "prison celebrities" as a result of press coverage and believed that the 1971 escape attempt at San Quentin, resulting in the death of three staff and two inmates, was the climax of interview policy-related disciplinary problems. *Id.* at 199.

64. *Pell*, 417 U.S. at 822. Whereas in *Martinez*, the Court could avoid the weighty question of what First Amendment rights survive incarceration by framing the question as the rights of non-prisoners, the Court did not have such an out in *Pell*. Supreme Court precedent had firmly established that the First Amendment does not guarantee the press "a constitutional right of special access to information not available to the public generally." *Id.* at 833–34 (quoting Branzburg v. Hayes, 408 U.S. 665 (1972)).

65. For a discussion of the varying standards of review applied by courts to examine prisoners' First Amendment challenges in the lead up to *Pell*, see Martinez v. Procunier, 354 F. Supp. 1092, 1096 (N.D. Cal. 1973).

66. Note that the Supreme Court was not as explicit as *Carothers* in its formulation of a standard of review. The district court in *Pell* had combined the competing lower court precedents, holding that a compelling state interest must be shown to curtail a prisoner's First Amendment rights, in addition to a showing that the regulation was "reasonably and necessarily" related to the advancement of that justifiable, compelling government

question for courts after *Pell* became whether a challenged regulation impinging upon First Amendment rights was "reasonably and necessarily" related to legitimate policies and goals of the corrections system, a more lax formulation of rational basis review.[67]

Turning to the facts of the case, the Court first identified the "legitimate penal objectives" in *Pell* as deterrence of crime via isolation of the prisoner, rehabilitation, and the "central" correctional goal of security.[68] To determine the extent of the burden placed on prisoner communication by the regulation, the majority also considered the alternative means of personal communication afforded to prisoners.[69] Such available alternatives included visits from friends, family, and legal counsel, and also communication by letter (which the Court noted was recently safeguarded by its decision in *Procunier v. Martinez*).[70]

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interest. *Hillery*, 364 F. Supp. at 201–02. The Supreme Court's language qualifying prisoners' First Amendment rights made clear that it was rejecting the district court's implication that First Amendment rights of prisoners are as robust as the general public's and therefore require the same strict scrutiny review. *See Pell*, 417 U.S. at 822; *see also Hillery*, 364 F. Supp. at 201 ("It is a fundamental precept of constitutional law that when a state restricts a First Amendment right, especially when that restriction is imposed prior to publication, it must be able to show a *compelling* interest advanced by that regulation."). "Compelling interest" language does not appear anywhere in the Court's decision in *Pell*. *See* Pell v. Procunier, 417 U.S. 817 (1974).

67. *See supra* note 66. Note that the dissent in *Pell* also indicates "reasonable and necessary" is the Court's adopted standard. *Pell*, 417 U.S. at 837–38 (Douglas, J., dissenting) ("But the prisoners here do not contend that prison officials are powerless to impose reasonable limitations on visits by the media which are necessary in particularized circumstances to maintain security, discipline, and good order.").

68. *Pell*, 417 U.S. at 822–23.

69. *Id.* at 823–25 ("In order properly to evaluate the constitutionality of [the challenged regulation], we think that the regulation cannot be considered in isolation . . . ."). The majority did not intend to minimize the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning," but believed alternative means of communication were relevant when balancing First Amendment rights against legitimate governmental interests. *Id.* at 823–24.

70. *Id.* at 823–24. Under the district court's "compelling interest" standard, it had rejected the state's asserted interests to justify the limitation on press interviews, but noted that other reasonable "time, place, and manner" restrictions on interviews could be imposed, such as limiting the length of interviews. *See Hillery*, 364 F. Supp. at 202. The Supreme Court, in contrast, likened the challenged regulation itself to a reasonable "time, place, manner" restriction. *Pell*, 417 U.S. at 826–27. As previously noted, the Court refused to apply strict scrutiny to its analysis, which ordinarily accompanies "time, place, manner" restrictions among the general public, but did discuss alternative means of communication in order to decide the reasonableness of the regulation. Turner v. Safley, 482 U.S. 78, 88 (1987) (explaining that *Pell* discussed alternative means of communication to determine "the scope of the burden" that the regulation imposed on inmates' First Amendment rights).

Given the availability of these alternative means of communication, and the apparent content-neutral operation of the rule, the Court held that, on balance, the regulation was not overly burdensome, but rather was consistent with rules and regulations to which "prisoners necessarily are subject."[71] The Court further held that determining the appropriate means to accomplish legitimate penological objectives, such as security in this case, is a matter of corrections officials' expertise.[72] Absent "substantial evidence" in the record to suggest that officials have exaggerated their response to such legitimate interests, courts therefore owed deference to officials in their determinations.[73] Although security and other penological considerations in this case would not reasonably support a *complete* ban on inmate expression or communication, the Court held that the prison officials' security considerations were "sufficiently paramount" to justify the regulation restricting inmates' at-will access to press.[74]

Three years later, the Supreme Court considered a First Amendment prison regulation challenge for a third time. In the case of *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[75] a prisoners' union brought suit after North Carolina Department of Correction regulations "prohibited inmates from soliciting other inmates to join [the Union], barred all meetings of the Union, and refused to deliver packets of Union publications that had been mailed in bulk to several inmates for redistribution among other prisoners."[76] The prisoner-plaintiffs alleged these practices violated their First Amendment rights of free speech and association.[77] The Department of Correction, for its part, alleged that the very existence of the union would increase administrative burdens and feared the inmates would undermine security by forming a power bloc via the Prisoners' Labor Union.[78]

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71. *Pell*, 417 U.S. at 828–29.

72. *Id.* at 827–28.

73. *Id.* This evidentiary standard builds significant deference into the prisoners' rights case law. As Sharon Dolovich explains, "[A]lthough it is ordinarily the job of the trier of fact to hear witness testimony—including expert testimony—and to weigh the evidence presented . . . in prison cases, unless there is 'substantial evidence' to suggest that officials' response was 'exaggerated,' courts are to presume the correctness of defendants' assertions." Dolovich, *supra* note 7, at 247 (citing Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 127–28 (1977)).

74. *Pell*, 417 U.S. at 827. The *Pell* Court appeared to place significant weight on the availability of alternatives, mentioning several times that the regulation at issue restricted only *one* form of communication, alternative means of communication were available, and they would look more critically at a *complete* ban on inmate communication. *Id.* at 823–28.

75. 433 U.S. 119 (1977).

76. *Id.* at 121.

77. *Id.*

78. *Id.* at 123.

While the Supreme Court had decided *Pell* in the context of First Amendment free speech rights, *Jones* dealt with the novel issue of prisoners' First Amendment right to assembly.[79] The Supreme Court was critical of the lower court's decision in favor of the union on this claim,[80] asserting that the court "got off on the wrong foot" by not affording "appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement."[81] The Court made clear that the "reasonableness" review first employed in *Pell* did not change regardless of whether the asserted First Amendment rights were speech or association.[82] Citing *Pell*, the Court reiterated that inmates retain only those First Amendment rights that are not inconsistent with incarceration, and associational rights are one of the most "obvious" rights curtailed by incarceration.[83] "Equally as obvious" to the Court was the fact that inmates' prisoner status and additional operational considerations required some restrictions on their ability to associate among each other.[84]

In deciding which restrictions on association were necessary, the Court noted that judges should afford deference to prison officials out of respect for their institutional expertise.[85] Again pointing to *Pell*, the Court stated that the burden is not on officials to show that the union would thwart the asserted, legitimate goals of the Department in actuality.[86] Rather, in "absence of substantial evidence in the record" that officials' beliefs were unreasonable, courts must defer to corrections officials' judgment.[87] The Court therefore rejected the prisoners' First Amendment associational claim.[88]

As for the inmates' free speech claim, the Court found that rights to free speech were "barely implicated" by the challenged regulations, as

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79. *Id.* at 122.

80. The three-judge panel of the North Carolina district court hearing the case chose not to directly address whether prisoners retained the right of association, as both parties agreed that the state-defendants permitted inmates to join the Union. N.C. Prisoners' Lab. Union, Inc. v. Jones, 409 F. Supp. 937, 940–41 (E.D.N.C. 1976).

81. Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 125 (1977).

82. *Id.* at 129.

83. *Id.* at 125–26 (citing Pell v. Procunier, 417 U.S. 817, 822 (1974)).

84. *Id.* at 126.

85. *Id.* (discussing Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

86. *Id.* at 127–28. This finding by the Court is particularly noteworthy, as the Court placed the burden of proof on prisoner-plaintiffs bringing claims. Recall that when members of the public bring First Amendment free speech claims, the burden of proof is placed on the state. *See supra* note 43 and accompanying text.

87. *Id.* at 128 (quoting *Pell*, 417 U.S. at 827).

88. *Id.* at 133.

inmates still retained mail rights, just not the right to mail in *bulk*.[89] Here, where officials enacted reasonable regulations for the legitimate objectives of security and order, and plaintiffs did not show that such concerns were "conclusively" wrong, the Court held that the state's interests were "sufficiently weighty to prevail" over the inmates' First Amendment interests, both associational and speech.[90] This last sentiment regarding a "conclusive" showing was especially significant, as the Court indicated that prison administrators did not need to prove that the lack of a regulation would be detrimental to order and security.[91] Instead, their *belief* that such a threat to security was likely sufficient.[92]

Bell v. Wolfish[93] was the final case to touch on First Amendment free speech challenges to prison regulations prior to *Turner*. *Wolfish* involved a First Amendment free speech challenge to the Federal Bureau of Prisons' so-called "publisher-only" regulation. [94] Under the rule, inmates and pre-trial detainees could only receive hardback books by mail if they were directly ordered from a publisher.[95] Despite the Second Circuit's assertion that courts should not "second-guess" the choices of administrators "in using reasonable means to insure that its legitimate interests in security are safeguarded," the court nevertheless struck down the regulation.[96]

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89. *Id.* at 130–31. The three-judge panel below read *Pell* to say "prisoners have a First Amendment right to talk about any subject of interest to them that does not conflict with legitimate penological objectives of the institution," and given that corrections officials permitted the Union, they could find no justified substantial interest in prohibiting inmates from soliciting additional members to join or providing information about the Union. N.C. Prisoners' Lab. Union, Inc. v. Jones, 409 F. Supp. 937, 943 (E.D.N.C. 1976). Instead of reasonableness review, the district court also applied *Martinez*'s "least restrictive means" test. *Id.* at 944.

90. *Jones.*, 433 U.S at 132–33.

91. *Id.*

92. *Id.* ("Responsible prison officials must be permitted to take reasonable steps to forestall such a threat, and they must be permitted to act before the time when they can compile a dossier on the eve of a riot.").

93. 441 U.S. 520 (1979).

94. *Id.* at 528.

95. *Id.* at 548–49. The "publisher-only" rule formulated before the district court and Second Circuit was significantly stricter than the amended rule that the Supreme Court considered. *Id.* The rule considered by the lower courts required that books and magazines of any kind come directly from publishers or book clubs, with no exceptions. *Id.* After the Second Circuit's decision affirming the district court's ruling, the Bureau of Prisons amended the rule to apply solely to *hardback* books. *Id.* at 549.

96. Although the Second Circuit appeared to restate *Pell*'s reasonableness review standard at the outset of its holding for the free speech claim, the heart of its analysis instead cited *Martinez*, among other cases, for the proposition that "courts have jealously protected the inmate in his exercise of First Amendment prerogatives." Wolfish v. Levi, 573 F.2d 118, 129 (2d Cir. 1978) (citations omitted). Accordingly, the court found that the First

Once again, the Supreme Court reversed the circuit court, finding fault with the Second Circuit's failure to "heed its own admonition" and afford appropriate deference to prison administrators' judgment.[97] The Court held that the principles of *Pell* governed the constitutionality of the challenged regulation and applied equally to convicted inmates and pre-trial detainees.[98] Here, as in *Pell*, the Court found the limited restriction on inmates' and detainees' ability to receive hardback books to be a "rational response to an obvious security problem." [99] The Court was further convinced of the regulation's reasonableness given its limited duration, neutral operation (without regard to content), and the alternative means of obtaining reading materials available to inmates and detainees, such as the purchase of soft-bound materials. [100] Because the record contained no evidence suggesting the rule was an exaggerated response to security concerns, the Court deferred to the judgment of corrections officials and upheld the rule.[101]

In sum, the Supreme Court carried several themes and a consistent standard of review through these pre-*Turner* cases. The most salient principles announced by the Court were that: (1) prisoners, both convicted and detained, have constitutionally-afforded rights,[102] which courts have a duty to protect;[103] (2) a prisoner retains only those First Amendment rights

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Amendment restriction was inconsistent with previous Supreme Court and circuit court case law. *Id.* at 130.

97. *Wolfish***,** 441 U.S. at 544–45 (noting that despite the Second Circuit stating that courts should not "second-guess" the choices of administrators, when reasonable, to safeguard legitimate interests in security, the court "failed to heed its own admonition").

98. *Id.* at 545–48 (repeating the established principles that convicted prisoners do not forfeit all constitutional protections, but these rights are subject to restrictions and limitations, such as those necessary to maintain security and order, and that prison administrators should be given deference in determining policies and practices necessary to preserve and maintain security, order, and discipline). Note that the "publisher-only" regulation examined by the Court on appeal differed from that of the lower courts. *See supra* note 95.

99. *Wolfish***,** 441 U.S. at 550–51 (noting that hardback books are "especially serviceable for smuggling contraband" into prisons).

100. *Id.* at 551–52 (pointing out that the rule may only operate for about 60 days and, although the rule may increase costs of obtaining published materials, cost advantages do not implicate free speech values). Note that these alternatives differed from those available under the "publisher-only" rule formulated before the appellate court, but the Court was only considering the amended rule in its analysis. *See supra* note 95.

101. *Wolfish***,** 441 U.S. at 551.

102. *Id.* at 545; Jones v. N.C. Prisoners' Lab. Union, 433 U.S. 119, 129 (1977); Pell v. Procunier, 417 U.S. 817, 822 (1974).

103. *See, e.g.*, *Pell*, 417 U.S. at 827 ("Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties."); Procunier v. Martinez, 416 U.S. 396, 405–06 (1974) ("When a prison regulation or practice offends a

that are not inconsistent with their incarceration;[104] (3) prison officials may additionally restrict the rights of prisoners if the purpose of the restriction is legitimate; [105] and (4) courts should afford prison administrators "wide-ranging" deference in determining the policies and practices necessary to maintain order, discipline, and security.[106] In reviewing First Amendment challenges to prison regulations, the Court looked to whether the regulation reasonably advanced a legitimate penological interest, such as security, and deferred to officials' judgment in crafting these regulations absent "substantial evidence" that the rules were exaggerated responses to legitimate interests.[107] To determine if the regulations were proportionate responses to the asserted penological interests, the Court considered a number of factors, such as the alternatives available to exercise the impinged right and whether the regulation was content-neutral.[108]

B. *Turner*'s "Reasonableness" Standard

It was not until 1987 that the Supreme Court decided on a universal standard of review for constitutional challenges to prison regulations. *Turner v. Safley*[109] involved a First Amendment challenge to a regulation restricting

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fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.").

104. *See, e.g.*, *Jones*, 433 U.S. at 125 ("The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." (citing *Pell*, 417 U.S. at 822)).

105. *See, e.g.*, *Wolfish*, 441 U.S at 547 ("[E]ven when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security."); *Jones*, 433 U.S. at 129 ("In seeking a 'mutual accommodation between institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application,' this Court has repeatedly recognized the need for major restrictions on a prisoner's rights." (quoting Wolff v. McDonnell, 418 U.S. 539, 566(1974))); *Pell*, 417 U.S. at 822, 826 (noting that rights to face-to-face communication in prison must give way to "accepted and legitimate policy objectives" of the carceral system); *Procunier*, 416 U.S. at 412–13 ("[T]he legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence.").

106. *See, e.g.*, *Jones*, 433 U.S. at 128 (explaining that courts "should ordinarily defer to [the] expert judgment" of corrections officials); *Pell*, 417 U.S. at 827 (same). The Court has noted that courts should afford this deference both because of prison administrator expertise and because the operation of correctional facilities is a matter with the discretion of the legislative and executive branches. *Procunier*, 416 U.S. at 405.

107. Note that the same principles and mode of analysis applied to pretrial detainees. *Wolfish*, 441 U.S. at 545–46.

108. The Court was never explicit as to how much these factors weighed in its analysis. *See generally* discussion *supra* Section I.A.

109. 482 U.S. 78 (1987).

correspondence between inmates detained in different institutions,[110] as well as a Fourteenth Amendment challenge to a regulation prohibiting inmates from unsanctioned marriages.[111] The *Turner* Court reviewed its past jurisprudence to synthesize what it believed to be a coherent standard for evaluating these and future claims.[112] The cases from Section I.A of this Note featured prominently in the Court's analysis, which explained that the post-*Martinez* case law had not used a standard of heightened scrutiny.[113] The *Martinez* Court had indeed applied heightened scrutiny, but the Court framed the constitutional rights violation in that case as a violation of *non-prisoners*' right to correspondence. *Martinez* was therefore not relevant in determining what standard of review applied to the inmate-to-inmate correspondence regulation in *Turner*.[114]

The Court found that the Eighth Circuit below had incorrectly distinguished the Supreme Court's post-*Martinez* decisions as either "time, place, or manner" regulations or regulations restricting "presumptively dangerous" inmate activities, believing that the Court had applied heightened scrutiny to those categories of regulations.[115] The Court itself, however, held that the cases had instead applied a "reasonableness" standard, "inquir[ing] whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns."[116] The *Turner* Court also markedly expanded the breadth of prison regulation challenges subject to

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110. *Id.* at 81, 93.

111. *Id.* at 81, 96.

112. *Id.* at 89.

113. *Id.* at 87 ("In none of these four 'prisoners' rights' cases did the Court apply a standard of heightened scrutiny . . . ."). Note that the Court seems to have implicitly included challenges brought by pretrial detainees in its new standard by including *Wolfish* and another pretrial detainee case, *Block v. Rutherford*, 468 U.S. 576 (1984), in its discussion of "prisoners' rights" cases.

114. Turner v. Safley, 482 U.S. 78, 85–86 (1987).

115. *Id*. at 87–88 ("We disagree with the Court of Appeals that the reasoning in our cases subsequent to *Martinez* can be so narrowly cabined."); *see also, e.g.*, *id*. at 88 ("*Pell* thus simply teaches that it is appropriate to consider the extent of this burden when we are called upon to balance First Amendment rights against legitimate governmental interests." (citations omitted)).

116. *Id.* at 89–90. The Court had never set out the reasonableness review standard employed in pre-*Turner* case law as clearly as it is set out in *Turner*. In fact, the language used by the Court in this quote is pulled from a separate line of case law, i.e., due process challenges to conditions of confinement. *See Rutherford*, 468 U.S. at 586; Bell v. Wolfish, 441 U.S. 520, 539 (1979). When examining First Amendment challenges to prison regulations, the Court used murkier language and cited to the principles announced in *Pell*. *See supra* note 66 and accompanying text (explaining that the Court was not entirely explicit in adopting a standard of review for First Amendment challenges to prison regulations).

this "reasonableness" review by holding that the same standard applied to *all* constitutional challenges to prison regulation, rather than the limited subset of constitutional challenges it had considered prior to *Turner*.[117]

To clear away any remaining confusion stemming from the post-*Martinez* case law, the *Turner* Court formally restated the "reasonableness" test as follows: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[118] To help guide lower courts in deciding whether a regulation is "reasonably related to legitimate penological interests," the Court set out four factors or "prongs" based on language and principles from *Martinez* and its progeny:[119]

1) Whether there is a "valid, rational connection" between the prison regulation and the government interest said to justify the regulation;[120]
2) Whether there are "alternative means" of exercising the right that is limited by the regulation;[121]
3) What impact accommodation of the asserted constitutional right would have on prison administrators, inmates, and prison resources;[122] and
4) Whether there are "ready alternatives" to the chosen regulation.[123]

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117. *Turner*, 482 U.S. at 89. Prior to *Turner*, the Court had only considered constitutional challenges involving First Amendment and (a limited subset of) Fourteenth Amendment rights. *See* discussion *supra* Section I.A; *supra* note 116.

118. *Turner*, 482 U.S. at 89.

119. *Id.* at 89–92. The factors adopted by the Court reflect the same considerations that *Pell* and subsequent case law addressed. *See* discussion *supra* Section I.A. In this way, the Court appeared to preserve the balancing test approach employed by *Pell*.

120. *Turner*, 482 U.S. at 89 (quoting *Rutherford*, 468 U.S. at 586). This government interest must be legitimate and neutral, "without regard to the content of the expression." *Id.* at 89–90 (noting that a regulation will not be considered legitimate if the "logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational" and that prison regulations restricting First Amendment rights must "operate in a neutral fashion, without regard to the content of the expression" (quoting Pell v. Procunier, 417 U.S. 817, 828 (1974); *Wolfish*, 441 U.S. at 551)).

121. *Id.* at 90 (Jones v. N.C. Prisoners' Lab. Union, 433 U.S. 119, 131 (1977); *Pell*, 417 U.S. at 827).

122. *Turner*, 482 U.S. at 90. This factor looks to whether accommodating the right will have a "ripple effect," i.e., give rise to other prison administrator concerns or overly drain resources. *Id.* As an example of a "ripple effect," the Court cited its decision in *Jones*, a case in which prison officials were concerned that allowing a prisoners' union to meet and solicit new members could lead to an aggrieved prisoner bloc, threatening security. *Jones*, 433 U.S. at 123.

123. *Turner*, 482 U.S. at 90 (citing *Rutherford*, 468 U.S. at 587). The "existence of obvious, ready alternatives" may suggest that the regulation is an "exaggerated response"

Having outlined this new standard for evaluating claims, the Court proceeded through each prong to evaluate the regulations at issue in *Turner*. Although the Court took issue with the "almost complete ban" on inmate marriages, ultimately striking down the regulation, the Court found the correspondence ban to be a reasonable restriction for the purpose of legitimate security concerns.[124] The dissent was critical of the Court's "highly selective use of factual evidence" in upholding the correspondence ban,[125] noting that the testimony relied upon by the majority was without proof or special knowledge of the conditions at the prison.[126] Such a finding, however, is consistent with pre-*Turner* case law that required substantial evidence in the record to indicate that challenged regulations were an "exaggerated" response to legitimate penological interests.[127]

C. Post-*Turner*: The Court's Subsequent Free Speech Case Law

Only a handful of cases applying the *Turner* "reasonableness" standard, and even fewer dealing with free speech specifically, have made it

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to prison concerns. *Id.* at 90. The Court explicitly noted that this fourth factor is not a "least restrictive alternative" test of the kind advanced in *Martinez*, but rather evidence to consider in weighing a regulation's "reasonableness." *Id.* at 90–91; *see also supra* note 59 and accompanying text (describing the "least restrictive means" test of *Martinez*).

124. *Turner*, 482 U.S. at 99. In short, the Court held that: (1) the prohibition on correspondence was logically related to legitimate security concerns; (2) correspondence was only banned "with a limited class of other people"; (3) permitting inmate-to-inmate correspondence would come at the cost of liberty and safety for other inmates and guards; and (4) there were no "obvious, easy alternatives" to the correspondence ban. *Id.* at 92. The majority therefore believed the regulation was constitutionally permissible. *Id.* at 91–93. Although there was "no doubt" that "legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry," the Court found the marriage regulation in *Turner* to be an exaggerated response to security concerns with "obvious, easy alternatives." *Id.* at 97.

125. *Id.* at 105 (Stevens, J., dissenting) (arguing that the majority did not explicitly disagree with any of the District Court's findings of fact, but rejected the District Court's conclusion that the ban on correspondence was "unnecessarily sweeping" and advanced its own reasons in support of its decision, none of which had sufficient basis in the record); *see also id.* at 113 (Stevens, J., dissenting) (arguing that the Court's differing views as to security concerns between prison marriages and prison mail were "inexplicable," for example dismissing expert speculation as to the danger of "love triangles," but accepting speculation about a potential "gang problem" and use of code in prison mail).

126. *Id.* at 106–07 (Stevens, J., dissenting) (pointing out that the prison superintendent's testimony offered no proof, merely bald assertions of security risks, and that outside witnesses had only discussed the case with the superintendent and visited the prison for a few hours).

127. *Id.* at 86 (citing Pell v. Procunier, 417 U.S. 817, 827 (1974)).

up to the Supreme Court in the years since *Turner* was decided.[128] As predicted by Justice Stevens in his *Turner* dissent, "plausible security concern[s]" and courts' deference to prison officials have continuously trumped inmates' constitutional rights.[129] In fact, the only case in which the Supreme Court struck down a prison regulation of any kind under the *Turner* test was in *Turner* itself, almost thirty-five years ago.[130]

There has also been little guidance from the Supreme Court since *Turner* as to when a regulation burdening free speech is properly considered "arbitrary or irrational" as opposed to reasonable, and, more importantly, what evidence is sufficiently "substantial" to disprove the reasonableness of a regulation. The Court has, for example, upheld regulations that allowed wardens to selectively reject incoming publications purportedly for "order and security,"[131] with no evidence in the record that publications would cause disruptions, nor any evidence that an incoming publication had caused a disciplinary or security problem.[132] The case dealing with this selective censorship regulation, *Thornburgh v. Abbott*,[133] also made clear that the heightened scrutiny applied in *Martinez* was cabined solely to prisoners' outgoing correspondence, and that the content- or viewpoint-specific speech restrictions at issue in the case were subject to the same *Turner* "reasonableness" standard as the content-neutral restrictions previously examined by the Court.[134]

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128. Specifically, eight cases have come down from the Court since *Turner*, half of which dealt with First Amendment rights, but only two of which specifically dealt with free speech claims. *See* Beard v. Banks, 548 U.S. 521 (2006); Thornburgh v. Abbott, 490 U.S. 401 (1989).

129. *Turner*, 482 U.S. at 100–01 (Stevens, J., dissenting) ("Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation.").

130. *Lenient in Theory*, *supra* note 8, at 983. Note that the regulation struck down did not involve a First Amendment challenge, but rather a substantive due process challenge. *Turner*, 482 U.S. at 94–95.

131. *Thornburgh*, 480 U.S. at 404, 419 (holding as facially valid two regulations that allow a warden to reject incoming publications based on considerations of security, order, and discipline of the institution).

132. *Id.* at 430 (Stevens, J., dissenting).

133. *Id.* at 401.

134. *Id.* at 413 ("[W]e acknowledge today that the logic of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations concerning outgoing correspondence."); *see also id.* at 414–17 (interpreting *Turner*'s requirement that prison regulations restricting First Amendment rights operate "neutrally" to mean that the purpose of the regulation is to promote security by restricting certain content, rather than seeking to restrict content as the end goal).

Most extraordinarily, in the last case in which the *Turner* test was applied to a free speech challenge by the Supreme Court, the Court held that "deprivation" of prisoners' access to reading materials and photographs is reasonably related to prisoner rehabilitation and security.[135] In *Beard v. Banks*,[136] the Court upheld a prison policy whereby officials denied access to newspapers, magazines, and personal photographs for certain classes of prisoners in order to "'motivate' better 'behavior' . . . by providing them with an incentive to move [to lower security levels]."[137] As Justice Stevens noted in his dissent in *Beard*, there is no "limiting principle" to this "deprivation theory of rehabilitation."[138] Any number of constitutional rights could therefore be limited in the name of rehabilitation.[139] The deprivation theory also renders the other *Turner* factors meaningless. For example, there inherently are no ready alternatives to the policy of deprivation under *Turner*'s second factor, because the government interest of rehabilitation is "tied directly to depriving the prisoner of the constitutional right at issue."[140]

As the most recent case of *Beard* demonstrates, prisoners' free speech challenges essentially stand or fall with the first prong of *Turner*, i.e., whether there is a valid, rational connection between a prison regulation and the purported government interest.[141] The Supreme Court does not appear

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135. Beard v. Banks, 548 U.S. 521, 525 (2006) (holding that, on the basis of the record before the Court, prison officials have provided adequate legal support for a policy denying newspapers, magazines, and photographs to a particular inmate class).

136. *Id.*

137. *Id.* at 530–31 (quoting the affidavit of Deputy Prison Superintendent Dickson, who explained the "penological rationales" for the deprivation policy).

138. *Id.* at 546 (Stevens, J., dissenting) ("Any deprivation of something a prisoner desires gives him an incentive to improve his behavior.").

139. *Id.* (Stevens, J., dissenting) (noting that deprivation theory would provide a "rational basis" for any deprivation of a constitutional right, so long as there exists a "theoretical possibility" that the right can be restored by modifying behavior).

140. *Id.* at 547 (Stevens, J., dissenting). The procedural posture of *Beard* was admittedly unique in that the prisoners opposing summary judgment before the Supreme Court did not submit any "fact-based or expert-based refutation" alleging the unreasonableness of the regulation. *Id.* at 534. Without any "substantial evidence" from the prisoners' refuting the policy as reasonable, the prison officials' assertion that their deprivation policy was reasonably related to their goal of rehabilitation stood as the only version of facts in the record. *Id.* at 535. The Court did leave open the possibility of challenges to similar policies surviving summary judgment, particularly if the policy operates as a "de facto permanent ban." *Id.* at 536.

141. *See* Melissa Rivero, *Melting in the Hands of the Court: M&M's, Art, and a Prisoner's Right to the Freedom of Expression*, 73 BROOK. L. REV. 811, 832 (2008) (pointing to *Beard's* cursory discussion of *Turner* factors two through four, and the Court's belief that these factors "add little . . . one way or another, to the first factor's basic rationale" (quoting Beard v. Banks, 548 U.S. 521, 532 (2006))); *see also Beard*, 548 U.S. at 532 (noting that in *Overton v. Bazzetta*, the Court only analyzed the other *Turner* factors after finding that the

willing to revisit the standard of review question, having consistently reaffirmed *Turner* and denied certiorari to cases involving *Turner* since *Beard* in 2006.[142] Because the Court has provided little guidance as to what evidence is sufficient to challenge the "valid, rational" connection between a prison regulation and the purported government interest, as well as what volume and kind of evidence amounts to "substantial evidence" that the plaintiff has the burden of producing, circuit courts have had difficulty applying the *Turner* test uniformly.[143]

II. *Turner* in the Circuit Courts

This Part reviews the various ways circuit courts apply *Turner* and the evidence they require a prisoner-plaintiff to provide to disprove a "valid, rational connection" between a regulation and government interest, in absence of meaningful guidance from the Supreme Court. The survey focuses on First Amendment free speech challenges to prison regulations brought in the Third, Fifth, and Ninth Circuits. These particular circuits were chosen to: (1) examine how courts are formulating the plaintiff's evidentiary burden for free speech challenges under *Turner*; and (2) determine if there is a significant difference in the formulation of the evidentiary burden between courts that are thought of as more traditionally "liberal" and "conservative."[144] These circuits include states with the highest prisoner

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regulations at issue met the first *Turner* factor, but such analysis was unnecessary, as the rational relationship to legitimate interests was enough to sustain the regulations).

142. *See, e.g.*, Hammer v. Ashcroft, 570 F.3d 798 (7th Cir. 2009), *cert. denied*, 559 U.S. 991 (2010) (declining to review a case challenging communication restrictions on death row inmates in federal prison); Prison Legal News v. Sec'y, Fla. Dep't of Corr., 890 F.3d 954 (11th Cir. 2018), *cert. denied*, Prison Legal News v. Jones, 139 S. Ct. 795 (2019) (declining to review a case challenging a Florida Department of Corrections regulation as-applied that banned *Prison Legal News* based on its advertisements).

143. *See* discussion *infra* Part II.

144. The Ninth Circuit has historically been thought of as the most liberal, whereas the Fifth, located in the Deep South, has traditionally been thought of as conservative. Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative than Others?*, 45 L. & SOC'Y REV. 171, 180 (2011). The Third Circuit has been described as both liberal and conservative. *Id.* This spectrum of ideologies lent itself well to the limited survey of this paper. After speaking with advocates who litigate *Turner* claims nationally, these three circuits were also ideal case studies due to their varied willingness to overturn prison regulations over time. Anecdotally, the Ninth Circuit is known to be most favorable to prisoners' claims, the Third Circuit occasionally will overturn regulations, and the Fifth Circuit is known to be more hostile to prisoners' claims. This spectrum mirrors the ideological reputations of the three circuits.

populations in the country, meaning courts in these jurisdictions have also likely had more opportunities to develop precedent under *Turner*.[145]

The survey is limited to cases brought between June 28, 2006, the decision date in *Beard*, and December 15, 2020.[146] *Beard* was the last major Supreme Court case to address *Turner* free speech claims and upheld a prison regulation under the expansive "deprivation theory of rehabilitation," as discussed in Section I.C.[147] Cases decided after *Beard* would therefore be expected to use a relatively consistent mode of analysis for *Turner* free speech claims, as no additional case law has come down from the Supreme Court for guidance.

Many of the claims in the reviewed cases involved additional issues with qualified immunity, requirements of the Prison Litigation Reform Act, and the ability to recover damages for First Amendment violations under 42 U.S.C. § 1983, all of which are outside the scope of this Note.[148] The findings below are cabined solely to the courts' application of *Turner*, made possible by the fact that the courts often proceed through analysis of inmates' free speech claims even when these other issues are present and/or serve to invalidate the claim.[149]

A. Third Circuit

The Third Circuit has formulated an evidentiary burden of sorts in evaluating *Turner* claims. Rather than the four-factor test set out in *Turner*,

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145. Texas and California have the highest prisoner populations by state, with a respective 163,628 inmates and 128,625 inmates at last count. E. ANN CARSON, U.S. DEP'T. OF JUST., PRISONERS IN 2019, at 4 (2020). Pennsylvania is sixth highest, with 47,239 inmates. *Id.*

146. *See* Beard v. Banks, 548 U.S. 521 (2006).

147. *See* discussion *supra* Section I.C.

148. For a discussion of the doctrine of qualified immunity and its many deficiencies, see Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018). For a discussion of how qualified immunity, the Prison Litigation Reform Act, *Turner*, and other situational barriers collectively prevent effective prisoner litigation, see David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021 (2018). *A Jailhouse Lawyer's Manual* also provides a comprehensive discussion of qualified immunity, prisoner litigation under 42 U.S.C. § 1983, and the Prison Litigation Reform Act. COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER'S MANUAL, chs. 14, 16, 19 (12th ed. 2020).

149. Note that this survey was inherently limited by the cases made available to legal research databases, such as LexisNexis and Westlaw. Between the three circuits, 107 cases were identified as dealing with First Amendment free speech claims under *Turner* and analyzed for this Part. Many of these cases were not published in an official reporter and are therefore not precedential. Such cases cited in this Note can be readily identified by their citation to the Federal Appendix.

the Third Circuit has consolidated the *Turner* standard into a two-step inquiry: the first step asks whether the first *Turner* prong is met, i.e., whether there is a valid rational connection, and the second step considers the additional three *Turner* factors.[150] In line with *Turner*, the Third Circuit requires that inmates bear the "ultimate burden" of demonstrating that a prison regulation or policy is unconstitutional under *Turner*.[151] The court has held that prison officials, however, bear the initial burden of demonstrating that a rational connection exists between the regulation/policy and a legitimate penological interest.[152] According to the court, this burden, while slight, must amount to more than a conclusory assertion; but in some instances, where the court finds that the connection is a matter of common sense, no evidence may be required.[153] Whether "common sense" is sufficient to uphold the regulation "will depend on the nature of the right, the nature of the interest asserted, the nature of the prohibition, and the obviousness of its connection to the proffered interest."[154] Only when neither common sense nor evidence support the connection will the Third Circuit strike down the regulation or find the regulation unconstitutional as-applied.[155]

In short, under Third Circuit precedent, prison officials bear the burden of production for the first step of *Turner* (which may amount to common sense) whereas inmate-plaintiffs bear the burden of production at the second step and the overall burden of persuasion.[156] For example, there are some cases where the court upholds prison regulations based on an extensive record, complete with reports detailing the exact nature of the security concern a regulation sought to uphold, but other cases where the court found bare assertions that policies were "necessary to maintain prison

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150. *See, e.g.*, Jones v. Brown, 461 F.3d 353, 360 (3d Cir. 2006) (organizing the *Turner* prongs into two, rather than four, steps).

151. *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (explaining that the burden is on the prisoner to disprove the validity of the prison regulation); Shaw v. Murphy, 532 U.S. 223, 232 (2001) (noting that to prevail, inmate-petitioner must surmount the presumption that prison officials acted validly within their "broad discretion" and that this burden of proof is "heavy" (quoting Thornburgh v. Abbott, 490 U.S. 401, 413 (1989))).

152. *Jones*, 461 F.3d at 360. Although this reasoning is consistent with *Turner* and subsequent Supreme Court precedent, the Court has never explicitly noted that prison administration bears the burden of production as to *Turner's* first prong.

153. *Id.* at 360–61.

154. *Id.* (citing Wolf v. Ashcroft, 297 F.3d 305, 308–09 (3d Cir. 2002)).

155. *Jones*, 461 F.3d at 361.

156. The evidentiary burden for the first step of the court's *Turner* analysis therefore functions as a sliding-scale burden of production, which turns on how "obvious" the connection between the regulation and the legitimate penological interest put forward by administrators is. *Id.* at 360–61 (citing *Wolf*, 297 F.3d at 308–09).

security and to further rehabilitative goals" or prevented "an adverse impact on the prison library" to be sufficient under *Turner*.[157]

When reviewing motions to dismiss for claims against regulations alleged to have improperly impinged on inmates' First Amendment rights, the Third Circuit appears to construe the claims quite liberally. Out of twenty-three identified First Amendment free speech challenges to prison regulations during the fourteen-year period of analysis, only three of these cases came before the court on appeal from motions to dismiss that were adverse to the inmate-plaintiff, one of which was reversed in favor of the plaintiff.[158] The remaining two cases were affirmed, as one case involved a plaintiff who had failed to allege that a prison institution's practice served no legitimate penological objective,[159] and the other case failed to establish a legal mail violation claim consistent with the court's interpretation of necessary elements to such a claim.[160] So long as inmate-plaintiffs' pleadings contained a cognizable First Amendment injury that the plaintiff asserted

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157. *Compare* Fontroy v. Beard, 559 F.3d 173, 177–78 (3d Cir. 2009) (upholding regulation that allowed prison administrators to open incoming legal mail not deemed "Privileged Correspondence" where record contained two extensive reports detailing how prior legal mail policy was abused), *and* Solan v. Zickefoose, 530 F. App'x 109, 110 (3d Cir. 2013) (per curiam) (upholding motion to dismiss granted to prison warden where inmate challenged his bar on access to prison email system; warden based her decision on the fact that inmate had extensive prior knowledge with computer systems and documented misuse of prison computer systems), *with* Brooks v. Bledsoe, 682 F. App'x 164, 168–69 (3d Cir. 2017) (per curiam) (finding that prison met its *slight* burden to show rational connection between regulation and Ensign Amendment, which barred nude/sexually explicit materials from prison), *and* Aulisio v. Chiampi, 765 F. App'x 760, 764 (3d Cir. 2019) (per curiam) (summarily agreeing that a policy preventing inmate library workers from working on personal matters while on duty satisfied *Turner*'s first step). In *Brooks*, the district court found that plaintiff had not met his burden as to *Turner*'s second step, i.e., *Turner* prongs two through four. This lack of evidence did not, however, influence the district court judge's opinion as to the first *Turner* factor.

158. Nixon v. Sec'y Pa. Dep't of Corr., 501 F. App'x 176 (3d Cir. 2012) (per curiam) (affirming the lower court's dismissal); Newman v. Beard, 617 F.3d 775 (3d Cir. 2010) (affirming the lower court's dismissal); Gattis v. Phelps, 344 F. App'x 801 (3d Cir. 2009) (per curiam) (reversing a motion to dismiss for plaintiff's First Amendment free speech claim, as lower court did not apply *Turner* to plaintiff's specific circumstances, namely confinement on death row). It is also noteworthy that the bulk of the period of analysis for this research, 2006–2020, fell after the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Iqbal* heightened the civil pleading requirement to prohibit claims based on "conclusory statements," instead requiring plaintiffs to plead particularized facts establishing each element of the claim. *Id.* at 678–79. Despite the more rigorous pleading requirement, the court appears to have maintained a low bar to inmate-plaintiffs bringing claims.

159. *Newman*, 617 F.3d at 781.

160. *Nixon*, 501 F. App'x at 178.

was not the result of a legitimate penological interest, the Third Circuit generally seemed to allow such cases to advance to discovery.[161]

Despite the court explicitly dividing the evidentiary burden between inmate-plaintiffs and prison administrators, and its liberal construction of inmate-pleadings, inmates bringing claims in the Third Circuit do not seem to fare much better than those in sister circuits with less clear parameters. From 2006 through 2020, the Third Circuit only struck down a single regulation that impinged upon inmates' First Amendment rights.[162] Notably, the regulation at issue allowed prison officials to read incoming legal mail.[163] The court held that inmate legal mail could only be inspected in the presence of the addressed inmate,[164] a right that had largely been protected by the Supreme Court in the 1974 case of *Wolff v. McDonnell* and by the Third Circuit in a 1995 case called *Bieregu v. Reno*.[165] The court declined to move a step beyond *Wolff*'s holding, however, later upholding regulations that functionally allowed prison officials to read inmates' legal mail when the *sender* had not complied with prison regulations, well beyond the control of inmates whose rights were being infringed.[166]

B. Fifth Circuit

The Fifth Circuit applies an evidentiary burden similar to the formulation of the Third Circuit, where the plaintiff bears the burden of disproving that the regulations are reasonably related to legitimate penological objectives, but prison administrators must do more than show "a formalistic logical connection between [the challenged practice or policy]

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161. There are valid policy reasons for this approach: inmates need access to discovery to make proper claims, meaning a lenient pleading standard makes sense from a due process perspective. Additionally, inmates face resource shortages and are often proceeding pro se. *See, e.g.*, Smith v. Johnson, 202 F. App'x 547, 549 (3d Cir. 2006) (noting in a case dealing with a prisoner's First Amendment free exercise claim that the court has "an obligation to liberally construe *pro se* civil rights complaints" (citations omitted)).

162. *See* Jones v. Brown, 461 F.3d 353, 355 (3d Cir. 2006) (holding that the prison had not demonstrated its legal mail policy, which allowed officials to open mail outside inmates' presence, was reasonably related to asserted interest in safety and security).

163. *Id.* at 355–56.

164. *Id*.

165. Wolff v. McDonnell, 418 U.S. 539, 576–77 (1974); Bieregu v. Reno, 59 F.3d 1445, 1458 (3d Cir. 1995) *abrogated on other grounds by* Lewis v. Casey, 518 U.S. 343 (1996).

166. Fontroy v. Beard, 559 F.3d 173, 180–81 (3d Cir. 2009) (upholding a prison policy that allowed prison officials to read incoming legal mail unless the sender had used a "Control Number" on the envelope obtained by the prison, despite finding that "some attorneys and all courts have refused the Inmates' repeated requests" to obtain and use a control number).

and a penological objective."[167] This language does not significantly expand on Supreme Court precedent, but does make clear that prison administrators bear some burden of production when prisoners challenge regulations alleged to be unreasonable.[168] Out of fifty-nine identified First Amendment cases reviewed by the Fifth Circuit since *Beard*, twenty-two involved a free speech claim. Twelve of the cases were appeals on motions to dismiss, ten on motions for summary judgment, and one from final judgment. In the fourteen-year span of case law examined, the Fifth Circuit did not strike down a single prison regulation that restricted First Amendment free speech rights as unreasonable under *Turner*.

The Fifth Circuit applies the *Turner* test very stringently in reviewing motions to dismiss.[169] The vast majority of free speech claims that failed at this stage in a suit were challenges to regulations as-applied. Because these challenges often amounted to disputes about whether or not the application of a regulation to an inmate's *particular* circumstances was reasonably related to the government's asserted interest, the court essentially had to decide between the official's logic and the inmate's logic, and deference to officials almost always won the day.[170] For example, in the case of *Marino v. Maiorana*,[171] an inmate studying cybersecurity was denied receipt of books teaching computer hacking methods under a regulation that prohibited receipt of publications detrimental to security.[172] Marino argued the application of the regulation to his publications violated his First Amendment rights, as he did not intend to use the books for nefarious purposes and had no internet connection. [173] The court found such an argument irrelevant, holding that officials were due deference in their

167. Prison Legal News v. Livingston, 683 F.3d 201, 215 (5th Cir. 2012) (quoting Beard v. Banks, 548 U.S. 521, 535 (2006)).

168. In stating this burden, for example, the Fifth Circuit cited directly to *Overton v. Bazzetta*, 539 U.S. 126 (2003), *Beard v. Banks*, 548 U.S. 521 (2006), and *Turner v. Safley*, 482 U.S. 78 (1987) itself. *Livingston*, 683 F.3d at 215.

169. *See, e.g.*, Samford v. Dretke, 562 F.3d 674, 674 (5th Cir. 2009) (per curiam) (affirming a motion to dismiss where inmate-plaintiff challenged application of a regulation to his circumstances and put forward evidence disputing the reasonableness of the regulation beyond mere assertions). Note that the Fifth Circuit was exacting in reviewing claims even prior to *Iqbal*'s heightened pleading requirement, as *Samford* demonstrates. *See supra* note 158 and accompanying text.

170. The sole exception to this de facto rule seems to be cases where the inmate alleges that the interest asserted by the prison administration was pretextual. *See infra* note 177 and accompanying text.

171. 707 F. App'x 812 (5th Cir. 2018) (per curiam).

172. *Id.* at 812.

173. *Id.* at 812–13.

determination that the books posed a security risk inside prison walls, and, in any case, hacking was not limited to networked or desktop computers.[174]

The cases that successfully progressed to discovery during this fourteen-year period and came before the court on appeal from motions for summary judgment primarily fell into one of three categories: (1) challenging a regulation where the state had not provided a sufficiently specific interest in the disputed regulation;[175] (2) challenging a regulation where the state had asserted no interest to uphold the regulation whatsoever;[176] and (3) alleging that the interest asserted by the state was pretextual.[177] It is noteworthy that the cases that progressed to discovery largely dealt with a specific, demonstrable flaw in the state's asserted interest, rather than merely a challenge to a regulation as-applied. Moreover, even when the court found that prison officials failed to provide an adequate interest for a challenged regulation, officials were allowed to amend their claims with further post hoc rationales to uphold the regulation.[178] As a result, it appears that only truly egregious practices or those explicitly barred by the Supreme Court would be struck down by the Fifth Circuit under their current approach to reviewing *Turner* free speech challenges.

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174. *Id.* at 813.

175. *See, e.g.*, Spence v. Nelson, 533 F. App'x 368, 372 (5th Cir. 2013) (per curiam) (reviewing a motion for summary judgment where prison official had rejected packages from Iran due to "security problems," but did not state why an absolute ban was necessary to address the "non-specific and unattributed security concerns"); Wells v. Vannoy, 546 F. App'x 340, 342 (5th Cir. 2013) (per curiam) (granting motion for summary judgment, as prison officials had pointed to specific information in the rejected publication over the course of litigation that was grounds for security concerns).

176. *See, e.g.*, Keys v. Torres, 737 F. App'x 717, 718 (5th Cir. 2018) (per curiam) (reviewing a motion for summary judgment where plaintiff alleged prison officials had only cited an interest in rejecting one publication, but had subsequently rejected several publications with no asserted interest for doing so); Turner v. Cain, 647 F. App'x 357, 364 (5th Cir. 2016) (per curiam) (overturning a motion for summary judgment and instructing the lower court to bear in mind on remand that the prison official had only provided a "general justification" for his assertion that the restricted speech was unprotected, and did not point to any legitimate penological interest in restricting plaintiff-inmate's speech).

177. *See, e.g.*, Ayers v. Johnson, 247 F. App'x 534, 535 (5th Cir. 2007) (per curiam) (reviewing a motion for summary judgment where plaintiff had asserted the prison's denial of his publications for the stated interest of preventing racial conflict was pretextual).

178. For example, in *Spence v. Nelson*, 603 F. App'x 250 (5th Cir. 2015) (per curiam), the Fifth Circuit granted summary judgment in favor of prison officials on a challenge to a regulation where packages from Iran were rejected due to "security problems." The court had previously denied a motion for summary judgment on the same claim because officials provided insufficient evidence as to the security concerns arising from package delivery from Iran, but, on remand, the defendants submitted additional evidence as to why the policy was constitutional. *Id.* at 255–56.

C. Ninth Circuit

Whereas the Third and Fifth Circuits' "evidentiary burden" tests appear to be little more than a reformulation of the standard of review for summary judgment, the Ninth Circuit has created an evidentiary standard that is significantly more detailed than *Turner* or sister circuits. In analyzing *Turner* claims in the Ninth Circuit, the reviewing court first must look to the pre- or post-trial evidence provided by the inmate-plaintiff, who bears the initial burden of production in the Ninth Circuit.[179] If the evidence is sufficient to "refut[e] a common-sense connection between a legitimate objective and a prison regulation," then the burden of production shifts to prison officials, who must "present enough counter-evidence to show that the connection is not so 'remote as to render the policy arbitrary or irrational.'"[180] Alternatively, if the inmate-plaintiff does not present enough evidence to refute a common sense connection between a prison regulation and the objective that the state asserts the policy was designed to further, *Turner*'s first prong is satisfied so long as the governmental objective is legitimate and neutral.[181] The test therefore works as a burden-shifting device and creates a more specific threshold of evidence for plaintiffs to meet in order to succeed.

Similar to the Third Circuit, the Ninth Circuit appears lenient in reviewing motions to dismiss and motions for summary judgment, often noting in citations that courts should liberally construe pro se filings, particularly in civil rights cases, and should avoid "applying summary judgment rules strictly" to pro se inmates.[182] The most important development in the Ninth Circuit's case law during the fourteen-year period of analysis, however, was the court's creation of clearer benchmarks for inmate-plaintiffs to reach when challenging policies related to legal mail and grievances. The Ninth Circuit, like the Third, requires that inmates be present

179. Frost v. Symington, 197 F.3d 348, 357 (9th Cir. 1999) (reconciling perceived differences in the standards of review put forward for *Turner* in previous cases of *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999) and *Walker v. Sumner*, 917 F.2d 382 (9th Cir. 1990)).

180. *Frost*, 197 F.3d at 357 (quoting Turner v. Safley, 482 U.S. 78, 89-90 (1987)).

181. *Id.*

182. *See, e.g.*, Sawyer v. Macdonald, 768 F. App'x 669, 671 (9th Cir. 2019) ("We have 'held consistently that courts should construe liberally motion papers and pleadings filed by pro se inmates and should avoid applying summary judgment rules strictly.'" (quoting Soto v. Sweetman, 882 F.3d 865, 872 (9th Cir.), *cert. denied*, 139 S. Ct. 480 (2018))); Blaisdell v. Frappiea, 729 F.3d 1237, 1241 (9th Cir. 2013) ("Courts in this circuit have an obligation to give a liberal construction to the filings of pro se litigants, especially when they are civil rights claims filed by inmates."). Out of 60 identified free speech challenges to regulations from 2014–2020, the Ninth Circuit reversed 18 judgments (on both motions to dismiss and motions for summary judgment) that were adverse to inmate-plaintiffs.

when prison administrators read legal mail, but has additionally adopted a rule that two or three pieces of mail "opened in an arbitrary or capricious manner" is sufficient to state a First Amendment claim.[183] As a result of the Ninth Circuit's clear evidentiary threshold, the court was able to overturn an Arizona prison's policy and practice whereby staff visually scanned the contents of outgoing legal mail, often reading at least some words of every page of outgoing correspondence.[184] The creation of this clear standard also resulted in the court reversing two motions to dismiss where inmate-plaintiffs otherwise would not have been able to state a First Amendment free speech claim regarding the legal mail policies of two different prisons.[185]

The Ninth Circuit has additionally held that disrespectful language in a prisoner's grievance is itself protected under the First Amendment, in addition to access to the grievance procedure being protected by the First Amendment. [186] As a result, prisoners cannot be cited for disagreeable language in a grievance because such practice could deter prisoners from filing grievances in the first place.[187] This clear rule regarding speech in inmate grievances led the court to overturn summary judgment adverse to inmate-plaintiffs in two cases where prison officials allegedly retaliated against inmates for the speech they used in grievances.[188]

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183. Hayes v. Idaho Corr. Ctr., 849 F.3d 1204, 1211 (9th Cir. 2017). If the legal mail examined pertains to a criminal matter, inmates can also bring a claim under the Sixth Amendment. The Ninth Circuit is even more protective of Sixth Amendment claims, maintaining that a single incident of a prison official reading inmate legal mail is sufficient to state a claim under the Sixth Amendment. *See* Nordstrom v. Ryan 865 F.3d 1265, 1268 (9th Cir. 2017); Nordstrom v. Ryan, 762 F.3d 903, 911 (9th Cir. 2014).

184. *Nordstrom*, 856 F.3d at 1274 (granting inmate-plaintiff's motion for injunctive relief against the Arizona Department of Correction's mail policy and practice of inspecting inmates' outgoing legal mail, finding that the policy and practice violated inmates' First Amendment right to free speech and Sixth Amendment right to counsel).

185. *Hayes*, 849 F.3d at 1206; Mangiaracina v. Penzone, 849 F.3d 1191, 1203 (9th Cir. 2017). Both *Hayes* and *Mangiaracina* were later decided against the inmate-plaintiffs on the merits of their First Amendment claims due to only two isolated instances of prison officials opening legal mail, with no evidence of "reckless" or "intentional" misconduct on the part of these officials. *Mangiaracina*, 849 F.3d at 1198; Hayes v. ICC-CCA, 2018 U.S. Dist. LEXIS 152165, at *7 (D. Idaho 2018).

186. Richey v. Dahne, 624 F. App'x 525, 525 (9th Cir. 2015) ("We have previously held that disrespectful language in a prisoner's grievance is itself protected activity under the First Amendment." (citing Brodheim v. Cry, 584 F.3d 1262, 1271 (9th Cir. 2009))).

187. Richey v. Dahne, 733 F. App'x 881, 883 (9th Cir. 2018) ("In *Brodheim* we held squarely that no legitimate penological interest is served by prison rules prohibiting disrespectful language in grievances." (citing *Brodheim*, 584 F.3d at 1273)).

188. *See Richey*, 624 F. App'x at 526; *Brodheim*, 584 F.3d at 1262. Unfortunately, qualified immunity barred the inmate-plaintiff in *Richey* from recovering under First Amendment free speech grounds on remand, despite the court finding that the actions taken by defendant-prison official "[was] the sort of content-based discrimination that

Creating bright line rules such as these for legal mail or grievance claims is significant not only because other circuits appear unwilling to do so, but also because these rules are enormously beneficial for inmates challenging regulations.[189] *Turner* created a deferential and murky standard, so supplementing case law with clearly established thresholds for succeeding on claims helps curb excessive judicial deference toward prison administrators in the lower courts. These thresholds also make clear to inmates what elements of a claim are necessary to succeed in challenging a given regulation. As a result, the Ninth Circuit was able to safeguard the right to free speech for inmate-plaintiffs more frequently than the Third or Fifth.

D. Commonalities and Splits Among the Circuits

In reviewing inmates' free speech challenges from 2006 to 2020, several trends among all three circuit courts became apparent and merit additional discussion. These findings are discussed in turn in the subsections below.

1. Commonality: Routine Deference

One striking commonality between the three circuits was the routine handling of as-applied claims once the court had established precedent upholding a particular regulation. In those cases, the reviewing court's *Turner* analysis was dramatically shortened, sometimes amounting to a single declaratory sentence.[190] In a paradigm Ninth Circuit case called

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runs contrary to First Amendment Protections." *Richey*, 733 F. App'x at 883, *cert denied*, Dahne v. Richey, 139 S. Ct. 1531 (2019). The disposition of *Brodheim* is unknown, as the last entry in any legal database is the granting of inmate-plaintiff's motion to submit a fourth amended and supplemental complaint. Brodheim v. Cry, 2010 WL 3943558, at *1 (E.D. Cal. 2010).

189. Bright line rules can also prove advantageous to courts as they allow reviewing courts to dispose of meritless claims more efficiently. *See* discussion *infra* Section III.A.1.

190. In the Third Circuit, see, e.g., Robinson v. Pa. Dep't of Corr., 327 F. App'x 321, 323 (3d Cir. 2009) (per curiam) ("Because we have already considered all of the arguments raised by Appellants in their brief and response to our order, we will summarily affirm the judgment of the District Court for all of the reasons given in *Fontroy v. Beard*." (citing Fontroy v. Beard, 559 F.3d 173 (3d Cir. 2009))); Harper v. Beard, 326 F. App'x 630, 633 (3d Cir. 2009) (per curiam) ("Having received responses from all of the parties to this appeal, we conclude that this appeal presents no 'substantial question,' and will summarily affirm the judgment of the District Court for all of the reasons given in its thorough opinions and in our opinion in *Fontroy v. Beard*." (citing Fontroy v. Beard, 559 F.3d 173 (3d Cir. 2009))). In the Fifth Circuit, see, e.g., Lee v. Smith, 552 F. App'x 331, 331 (5th Cir. 2014) (per curiam) ("[Plaintiff] has failed to show that the placement of his children on the negative mailing list ran afoul of his constitutional rights." (citing Samford v. Dretke, 562

Roberts v. Apker,[191] the court reasoned that, given "baselines" of precedent upholding regulations, the reviewing court "need only ask whether anything changes" as a result of the inmate-plaintiff's particular circumstances.[192] The cases reviewed in this fourteen-year analysis suggest the answer is almost always "no." Similarly, when the Supreme Court had safeguarded the exercise of free speech in a particular fashion, the circuits largely deferred.[193] This practice makes clear just how important Supreme Court precedent is in protecting the free speech rights of inmates and creating a *Turner* "reasonableness" standard that is not toothless.[194]

The varying formulations of the evidentiary standards under *Turner* seemed to have little effect on the number or types of prison regulations that courts struck down. Among the Third, Fifth, and Ninth Circuits, despite differing degrees of specificity in the formulations of their evidentiary standards, only two policies/practices were struck down over the course of fourteen years. [195] Moreover, the two policies/practices that were overturned in the Third and Ninth Circuits infringed upon First Amendment free speech rights by interfering with an inmate's incoming legal mail, which the Supreme Court had already largely safeguarded.[196] The Ninth Circuit's bright-line evidentiary rules for outgoing inmate legal mail and inmate grievance claims appeared more influential in curbing deference than its comparatively plaintiff-friendly evidentiary standard under *Turner*.[197]

F.3d 674 (5th Cir. 2009) (per curiam))). In the Ninth Circuit, see, e.g., Roberts v. Apker, 570 F. App'x 646, 648 (9th Cir. 2014) ("Given the baselines of *Bahrampour* and *Mauro*, we need only ask whether anything changes in the context of a convicted sex offender . . . when the application of the *Turner* factors moves from content that is 'sexually explicit' . . . or contains full-frontal 'nudity' to content that is only 'sexually suggestive' . . . .").

191. *Roberts*, 570 Fed App'x. at 646.

192. *Id.* at 648.

193. As *Turner* free speech claims have not been widely litigated, the sole example available was incoming legal mail, which the Supreme Court had safeguarded in *Wolff v. McDonnell*, 418 U.S. 539 (1975). *See generally* Jones v. Brown, 461 F.3d 353, 355 (3d Cir. 2006) (holding that opening legal mail outside the presence of prisoners impinged upon freedom of speech); Hayes v. Idaho Corr. Ctr., 849 F.3d 1204, 1210 (9th Cir. 2017) (same). The Fifth Circuit was an apparent anomaly. *See* discussion *infra* Section II.D.1.

194. Although the Supreme Court asserted that *Turner*'s reasonableness standard is not "toothless" in the case of *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989), this survey, and the Court's own precedent, would suggest otherwise.

195. *Jones*, 461 F.3d at 353; *Hayes*, 849 F.3d at 1204.

196. *Jones*, 461 F.3d at 353; *Hayes*, 849 F.3d at 1204.

197. As discussed, in addition to the policy and practice struck down by the court in *Hayes*, the Court also overturned motions to dismiss and motions for summary judgment on claims dealing with outgoing legal mail and speech in grievances. *Hayes*, 849 F.3d at 1204; Mangiaracina v. Penzone, 849 F.3d 1191, 1193 (9th Cir. 2017); Richey v. Dahne, 624 F. App'x 525, 525 (9th Cir. 2015); Brodheim v. Cry, 584 F.3d 1262, 1264 (9th Cir. 2009).

This review suggests that the more significant issue with *Turner* claims is the seemingly unbridled deference given to prison officials' judgment, as courts will generally defer absent glaring issues with prison administrators' rationale, Supreme Court precedent, or bright-line evidentiary rules, such as those employed by the Ninth Circuit.[198] More plaintiff-friendly formulations of the evidentiary standard, are, however, marginally beneficial in that they can require prison administrators to provide robust factual evidence, which allows reviewing courts to more easily spot issues or deficiencies in the asserted rationale for prison regulations.[199] Such a standard could, at the very least, aid in identifying grossly pretextual regulations or pretextual application of regulations.

2. Circuit Split: Treatment of Incoming Legal Mail

As discussed in Section II.A, the Supreme Court upheld a regulation that allowed prison guards to open all incoming legal mail in the case of *Wolff v. McDonnell*,[200] but only because the regulation required that inmates were present when the mail was opened.[201] The Court found such a compromise allowed prison officials to address security concerns while still ensuring that prison officials would not read inmates' legal mail and potentially chill attorney-client communications.[202] The *Wolff* Court did not, however, locate the exact source of the constitutional right asserted.[203]

Numerous circuit courts have since examined regulations that allowed prison administrators to read inmates' legal mail in the context of the Sixth Amendment right to counsel and First Amendment right to free speech.[204] At least half of the circuits, including the Third and Ninth, have found First Amendment free speech violations where officials have repeatedly opened legal mail outside the presence of inmates, either

198. For a comprehensive discussion of the forms of deference found in prison law, and how all three forms are present in the Supreme Court's *Turner* jurisprudence, see generally Dolovich, *supra* note 7.

199. *See, e.g.*, Shepard v. Quillen, 840 F.3d 686, 692 (9th Cir. 2016) (rejecting a "general justification" that placing an inmate in administrative segregation was the result of a neutral process and requiring more evidence where the inmate-plaintiff alleged the segregation was retaliatory).

200. 418 U.S. 539 (1974).

201. *Id.* at 576–77.

202. *Id.*

203. *Id.* at 576 ("We need not decide, however, which, if any, of the asserted rights are operative here, for the question is whether, assuming some constitutional right is implicated, it is infringed by the procedure now found acceptable by the State.").

204. The Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits "have recognized that the opening of legal mail outside of a prisoner's presence implicates First Amendment rights." Hayes v. Idaho Corr. Ctr., 849 F.3d 1204, 1210 (9th Cir. 2017).

pursuant to an improper regulation or in absence of sufficient protections to ensure the violation did not occur.[205] The Ninth Circuit only requires an inmate to demonstrate that two or three pieces of mail were "opened in an arbitrary or capricious manner" in order to find such a violation.[206] The Third Circuit, in contrast, has repeatedly held that a single instance of interference with legal mail is not sufficient to state a First Amendment free speech claim, but has not indicated the minimum number of interferences with mail necessary to establish a "pattern or practice."[207]

These courts, like the Supreme Court in *Wolff*, have reasoned that the practice of opening legal mail outside of the presence of the addressee deprives inmates of the expression of confidentiality and chills their protected expression, even if prison administrators maintain that they do not or will not read the contents of the mail.[208] This right to confidentiality in legal mail is noted to be especially important in the prison setting, where inmates' incarceration and potential distance from attorneys makes face-to-face communication or communication by phone difficult or impracticable.[209] The Fifth Circuit, in contrast, has come to the opposite conclusion, reading *Wolff*, *Turner*, and *Thornburgh* to allow such practices so long as officials credibly claim to have done so in furtherance of a legitimate penological interest.[210]

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205. *Id.* The Sixth and Ninth Circuits, for example, have held that "[t]wo or three pieces of mail opened in an arbitrary or capricious way suffice to state a claim" under the First Amendment. *Id.* at 1211; Merriweather v. Zamora, 569 F.3d 307, 317 (6th Cir. 2009) (same).

206. *Hayes*, 849 F.3d at 1211.

207. *See, e.g.*, Schreane v. Holt, 482 Fed. App'x 674, 677 (3d Cir. 2012) (per curiam) ("[A] single instance of opening special mail outside an inmate's presence does not rise to the level of a constitutional deprivation."); Bieregu v. Reno, 59 F.3d 1445, 1452 (3d Cir. 1995) ("We decline to hold that a single instance of damaged mail rises to the level of constitutionally impermissible censorship."), *abrogated on other grounds by* Lewis v. Casey, 518 U.S. 343 (1996).

208. *See, e.g.*, *Hayes*, 849 F.3d at 1209–10 (agreeing with other circuits that the opening of legal mail could dissuade an inmate from further communicating about privileged matters); Jones v. Brown, 461 F.3d 353, 359 (3d Cir. 2006) (holding that the opening of legal mail outside of the presence of the addressee inmate "interferes with protected communications," and "strips those protected communications of their confidentiality").

209. *See, e.g.*, *Hayes*, 849 F.3d at 1210–11 (noting that prisoners' avenues of confidential communication with attorneys is limited, making confidential legal mail that much more important); Al-Amin v. Smith, 511 F.3d 1317, 1333–34 (11th Cir. 2008) (noting that use of mail for prisoners may often be a more important speech right "than the use of their tongues," due to their frequent distance from attorneys).

210. Brewer v. Wilkinson, 3 F.3d 816, 822–25 (5th Cir. 1993).

3. Circuit Split: Treatment of Outgoing Personal Mail

Circuit courts also appear to be analyzing regulations that affect outgoing personal mail under disparate standards. The standard of review set forth in *Procunier v. Martinez* required that a regulation authorizing mail censorship further "an important or substantial governmental interest unrelated to the suppression of expression," and that "the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved." [211] The Supreme Court cabined this standard to outgoing mail in the case of *Thornburgh v. Abbott* and clarified that the test is not a "least restrictive means" test.[212] While a number of circuits have held this standard to be controlling law as applied to claims involving outgoing prison mail, including the Third and Ninth, the Fifth Circuit has again bucked the trend.[213] The Fifth Circuit instead has held that *Thornburgh* can be read to require application of *Turner*'s more lax legitimate interest test, though a distinction between incoming and outgoing mail still exists, as "[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials."[214]

This split in circuit reasoning might not be as significant, however, as *Martinez* named "security, order, and rehabilitation" as "substantial governmental interests." [215] As a result, regardless of whether reviewing courts apply *Martinez* or *Turner* to a claim challenging a regulation that affects outgoing mail, courts will likely reach the same decision more often than not. For example, the Fifth Circuit found no constitutional violation in the case of *Morgan v. Quarterman*,[216] where prison officials disciplined an inmate for crude language in outgoing mail to opposing counsel in order to "rehabilitate" the inmate. [217] In *Barrett v. Belleque*, [218] the Ninth Circuit reversed a district court's decision on a motion to dismiss where the court had applied *Turner* rather than *Martinez* to a similar scenario in which the inmate-plaintiff was disciplined for using crude language in a letter to his

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211. Procunier v. Martinez, 416 U.S. 396, 413–14 (1974).

212. Thornburgh v. Abbott, 490 U.S. 401, 411 (1989) ("We do not believe that *Martinez* should, or need, be read as subjecting the decisions of prison officials to a strict 'least restrictive means' test.").

213. The Third, Eighth, and Ninth hold *Martinez* to be controlling law as applied to outgoing prisoner mail claims. Barrett v. Belleque, 544 F.3d 1060, 1062 (9th Cir. 2008) (per curiam).

214. *Brewer*, 3 F.3d at 825.

215. *Martinez*, 416 U.S. at 413–14.

216. 570 F.3d 663 (5th Cir. 2009).

217. *Id.* at 665.

218. 544 F.3d 1060 (9th Cir. 2008) (per curiam).

grandmother.[219] Per *Turner*, the district court had originally found that the prison had a legitimate penological interest in preventing the inmate-plaintiff from using such "crude and racist" language.[220] On remand from the Ninth Circuit, the district court reached the exact same conclusion under the *Martinez* standard.[221] The holding actually went further than *Morgan*, as the Fifth Circuit had found it relevant that the censored mail was going to opposing counsel in *Morgan*, rather than a personal correspondent.[222]

III. Balancing Deference and Constitutional Protections

As the review in Part II demonstrated, the current formulations of *Turner*'s evidentiary standard do little to combat the routine deference courts afford prison administrators, even in their most plaintiff-friendly formulations.[223] If the Supreme Court were to intervene and mandate a unitary evidentiary standard, such a reform would therefore be unlikely to result in more considered evaluations of prisoners' First Amendment free speech claims. The following classes of reforms, small- and large-scale, seek to instead shore up the evidentiary burden under *Turner* and/or create a different standard of review for prisoners' First Amendment free speech challenges. The reforms classified as "small-scale" are those that can be accomplished unilaterally by the circuit courts, whereas "large-scale" reforms are those that require the intervention of either the Supreme Court or Congress.

A. Small-Scale Reforms

Because the Supreme Court has not granted certiorari on a case involving *Turner* since 2006, it seems unlikely reform will come from the nation's highest court. As discussed in Part II, however, circuit courts have been dealing with thorny questions of *Turner*'s application for years and have created innovative evidentiary requirements that could be adopted

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219. *Id.* at 1061.

220. *Id.*

221. Barrett v. Belleque, 2010 U.S. Dist. LEXIS 141768, at *20 (D. Or. 2010) ("[T]he record before the court will support only the conclusion that the censorship and discipline at issue furthered important governmental interests in prison security, order, and prisoner rehabilitation, and that the limitations imposed upon plaintiff's First Amendment rights were no more onerous than were needed to protect those interests.").

222. Morgan v. Quarterman, 570 F.3d 633, 667 (5th Cir. 2009) (distinguishing a previous Fifth Circuit case where the court had found refusal to mail a personal letter with crude language to violate the First Amendment, as the letter at issue in the case before the court was intended for opposing counsel in connection with pending litigation).

223. *See* discussion *supra* Section II.D.

broadly to the benefit of inmate-plaintiffs. Below are a few noteworthy examples of such innovations.

1. Adoption of Bright-Line Evidentiary Rules for Certain *Turner* Claims

To aid inmates in bringing viable claims and provide clear guidance to lower courts, circuit courts could seek to adopt more bright-line evidentiary rules in reviewing *Turner* claims.[224] The Ninth Circuit's precedents establishing the specific number of legal mail violations necessary to bring a First or Sixth Amendment claim, as well as the complete barring of inmate censorship in grievances, are two such examples.[225] The Ninth Circuit actually modeled the standard for First Amendment free speech claims regarding legal mail after the Sixth Circuit, demonstrating willingness on the part of circuits outside this survey to create such bright-line evidentiary rules.[226]

As with any examination of the benefits of rules versus standards, offering more bright-line rules in the context of *Turner* claims provides the dual benefit of fewer meritless claims coming before circuit courts, allowing them more time and resources to review claims with merit, and more straightforward review in the lower courts, meaning judges would theoretically resort to deference less frequently.[227] *Turner* is a rather open-ended, subjective standard with deference to administrators built into review. Supplementing this deferential standard with bright-line rules that help protect the constitutional rights of inmates works to balance these competing concerns of courts. As demonstrated in Part II, these clear evidentiary rules appeared more significant in safeguarding the rights of

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224. Increasing the number of viable claims brought under *Turner* also allows courts to further develop the law, which creates additional guidance for lower courts via case law.

225. Hayes v. Idaho Corr. Ctr., 849 F.3d 1204, 1211 (9th Cir. 2017) (finding two or three pieces of mail "opened in an arbitrary or capricious way" sufficient to state a First Amendment claim); Richey v. Dahne, 733 F. App'x 881, 883 (9th Cir. 2018) ("[R]ules prohibiting disrespectful language do not serve a legitimate penological interest in the special context of prison grievances . . . ."); Nordstrom v. Ryan, 762 F.3d 903, 910–11 (9th Cir. 2014) (holding that a single instance of a guard reading a prisoner's mail was sufficient to establish a violation of the Sixth Amendment right to counsel).

226. Merriweather v. Zamora, 569 F.3d 307, 318 (6th Cir. 2009).

227. For a discussion of the classic rules versus standards debate, see Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014).

inmate-plaintiffs than courts' overall evidentiary standards, making them an important and easily implemented reform.[228]

2. Barring of Post Hoc Reasoning

One of the practices most detrimental to successful as-applied prison regulation challenges is the use of post hoc rationales by prison officials. As discussed in the review of Fifth Circuit precedent, some of the only challenges that were able to progress to discovery were those that pointed to serious deficiencies in the asserted interest prison officials sought to advance by applying the regulation to the inmate-plaintiff.[229] In some cases, officials completely lacked a rationale or provided only conclusory assertions as to why the regulation was necessary.[230] Similarly, in other circuits, prison officials would assert facially neutral reasons for applying regulations to prisoners, which were not sufficient to overcome the inmate-plaintiffs' allegations that the reasons were pretextual.[231] These small victories were often insignificant, however, as prison officials are able to

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228. *See* discussion *supra* Part II. Although courts are generally reluctant to articulate bright-line rules due to concerns about violating the separation of powers by adopting "judge-made law" and questions of institutional competence, the Ninth Circuit only announced the cited evidentiary rules in order to decide the cases before it. *See, e.g.*, Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1 (2015) (discussing modern criticisms of so-called "judge-made" law). So long as sister circuits adopt these or other bright-line evidentiary rules in the context of a case with applicable facts, there can be no allegations of constitutional impropriety. For a thorough discussion of the bright-line rule quandary, see Colon v. Howard, 215 F.3d 227 (2d Cir. 2000).

229. *See, e.g.*, Spence v. Nelson, 533 F. App'x 368, 372 (5th Cir. 2013) (per curiam) (reviewing a motion for summary judgment where prison official had rejected packages from Iran due to "security problems," but did not state why an absolute ban was necessary to address the "non-specific and unattributed security concerns"); Wells v. Vannoy, 546 F. App'x 340, 342 (5th Cir. 2013) (per curiam) (granting motion for summary judgment, as prison officials had pointed to specific information in the rejected publication over the course of litigation that was grounds for security concerns).

230. *See, e.g.*, Keys v. Torres, 737 F. App'x 717, 718 (5th Cir. 2018) (per curiam) (reviewing a motion for summary judgment where plaintiff alleged prison officials had only cited an interest in rejecting one publication, but had subsequently rejected several publications with no asserted interest for doing so); Turner v. Cain, 647 Fed. App'x 357, 364 (5th Cir. 2016) (per curiam) (overturning a motion for summary judgment and instructing the lower court to bear in mind on remand that the prison official had only provided a "general justification" for his assertion that the restricted speech was unprotected, and did not point to any legitimate penological interest in restricting plaintiff-inmate's speech).

231. *See, e.g.*, Shepard v. Quillen, 840 F.3d 686, 692 (9th Cir. 2016) (rejecting a "general justification" that placing an inmate in administrative segregation was the result of a neutral process and requiring more evidence where the inmate-plaintiff alleged the segregation was retaliatory).

amend the record with post hoc rationales as to why application of the regulation was constitutional. [232] Allowing shifting explanations for application of regulations makes it exceedingly difficult for an inmate-plaintiff to prove a constitutional violation, as prison officials can continue testing out rationales until either the court defers to their "judgment," or inmate-plaintiffs, who are often proceeding pro se, run out of time or money to litigate their claim.[233]

In order to combat this practice, circuit courts could build a presumption of unconstitutionality into their evidentiary standards when prison officials assert a different rationale for applying a regulation to the inmate-plaintiff during litigation than was recorded at the time the regulation was applied. For example, when publications are rejected pursuant to prison regulations for security or when inmates are cited for violating regulations, prison officials are often required to indicate a reason for the rejection or citation. If, over the course of litigation for such violations, prison officials advance different reasoning for rejecting a book or issuing a citation than what the forms indicate, courts could presume such rationale is pretextual unless officials can demonstrate a valid reason for the shift.

Prior to *Turner*, the Fifth Circuit actually appeared to implicitly adopt such a presumption as demonstrated by the 1978 case of *Guajardo v. Estelle*.[234] In *Guajardo*, the court held that prior to rejection of a publication, prison administrators must review the publication and "make a specific, factual determination that the publication is detrimental to prisoner rehabilitation because it would encourage deviate (sic), criminal sexual behavior." [235] Although this decision was grounded on the authority of *Martinez* and since abandoned, such a requirement is not inherently inconsistent with *Turner*'s "reasonableness" review.[236] The lack of a specific, factual determination serves to undermine the "valid, rational" connection between the regulation and asserted interest and is consistent with the

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232. For example, in the case of *Spence v. Nelson*, 603 F. App'x 250, 251 (5th Cir. 2015) (per curiam), the court granted summary judgment for prison officials on a challenge to a regulation where packages from Iran were rejected due to "security problems." The court had initially denied a motion for summary judgment on the same claim, as officials provided insufficient evidence as to the security concerns arising from package delivery from Iran. On remand, however, the court allowed defendants to submit additional evidence as to why the policy was constitutional, leading to the subsequent grant of summary judgment.

233. For a detailed example of shifting prison rationales in practice, see *Lenient in Theory*, *supra* note 8, at 1005–12.

234. 580 F.2d 748 (5th Cir. 1978).

235. *Id.* at 762.

236. *Id.* at 753–54.

burden of production for this first prong of *Turner* being placed on the state in surveyed circuits.[237]

B. Large-Scale Reforms

As noted, the Supreme Court has not revisited *Turner* since the 2006 case of *Beard v. Banks* and appears unwilling to do so. This dearth of case law may be due to reluctance on the part of the Court to disturb what they consider to be settled law, but it might also be due to the difficulty in litigating a *Turner* free speech case and pursuing that claim all the way to the Supreme Court.[238] The circuit splits discussed in this Note present an opportunity for the Court to reopen *Turner* by clarifying past precedent and avoiding these difficulties on the part of either the Court or litigants. Moreover, the routine deference afforded prison officials absent Supreme Court precedent, as discussed in Section II.D, highlights the need for additional case law from the Court.[239]

Similarly, although major criminal justice reform out of Congress has been stunted and infrequent, the current political climate could allow for progressive policy initiatives.[240] Despite the possibility of congressional gridlock outlasting political will for more substantial legislation, reforms are

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237. In fact, courts do seem to scrutinize post hoc rationales more heavily in the context of free exercise claims. Koger v. Mohr, 964 F.3d 532, 542 (6th Cir. 2020) (denying a motion for summary judgment on an RLUIPA claim where prison officials had not provided a reason for denying an inmate's religious diet requests until litigation began); Davis v. Davis, 826 F.3d 258, 265 (5th Cir. 2016) (noting that post hoc rationales by prison officials are not entitled to deference). This heightened scrutiny, however, is often tied to congressional intent to bar flippant restrictions on religious freedom via the RLUIPA. *See, e.g.*, Rich v. Fla. Dep't of Corr., 716 F.3d 525, 533 (11th Cir. 2013) ("[P]ost-hoc rationales will not suffice to meet [RLUIPA's] requirements."). For a fuller explanation of RLUIPA and its history, see discussion *infra* Section III.B.2.

238. *See, e.g.*, *supra* note 148 (explaining the difficulties associated with litigating prisoner claims, both procedural and situational).

239. *See* discussion *supra* Section II.D.

240. After a summer of protests over racial injustice and police brutality, Congress did signal some political will for criminal justice reform, such as proposed legislation to end qualified immunity. *See, e.g.*, Leah Millis, *US Saw Summer of Black Lives Matter Protests Demanding Change*, REUTERS (Dec. 10, 2020), https://widerimage.reuters.com/story/us-saw-summer-of-black-lives-matter-protests-demanding-change [https://perma.cc/XD6U-SJBB]; Colleen Long, Kat Stafford & R.J. Rico, *Summer of Protest: Chance for Change, But Obstacles Exposed*, AP NEWS (Sept. 6, 2020), https://apnews.com/article/9035ecdfc58d5dba755185666ac0ed6d [https://perma.cc/C6WC-3VVQ]; Ending Qualified Immunity Act Bill, H.R. 7085, 116th Cong. (2020).

worth discussing in the event opportunities arise for incremental steps towards change.[241]

1. Resolution of Circuit Splits

As discussed in Section II.D, there were two splits in circuit reasoning that became apparent over the course of this research: (1) treatment of prisoners' incoming legal mail; and (2) treatment of prisoners' outgoing personal mail.[242] Starting with the first circuit split, it would be beneficial for the Supreme Court to revisit the application of *Turner* to regulations that burden prisoners' incoming legal mail. The Court recognized back in 1974 the importance of safeguarding legal correspondence for inmates, as communication with the outside world is significantly constrained in jails and prisons.[243] Although at least half of the circuit courts have safeguarded legal correspondence by requiring inmates be present when officials inspect incoming legal mail for contraband, the Fifth Circuit refused to do so in 1993 and has consistently affirmed that decision.[244] As the basis for its decision, the Fifth Circuit cited the line in *Wolff* that noted "by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, [prison officials] have done all, *and perhaps even more*, than the Constitution requires."[245] Additionally, the court read *Wolff* as constrained by *Turner* and *Thornburgh*.[246] As lower courts eschew deference most readily

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241. The slim single-party majorities in both chambers of the 117th Congress and increasing political polarization in America could hinder significant bipartisan criminal justice reform. *See* John Wagner et al., *Democrats Win Control of U.S. Senate as Ossoff Defeats Perdue*, WASH. POST (Jan. 6, 2021), https://www.washingtonpost.com/politics/2021/01/06/georgia-senate-election-results-live-updates/ [https://perma.cc/V57P-KAMR]; Claudia Deane & John Gramlich, *2020 Election Reveals Two Broad Voting Coalitions Fundamentally at Odds*, PEW RSCH. CTR. (Nov. 6, 2020), https://www.pewresearch.org/fact-tank/2020/11/06/2020-election-reveals-two-broad-voting-coalitions-fundamentally-at-odds/ [https://perma.cc/CF6P-3VQ9].

242. *See* discussion *supra* Section II.D.

243. *See generally* Wolff v. McDonnell, 418 U.S. 539 (1974).

244. The Second, Third, Sixth, Ninth, Tenth, and Eleventh Circuits "have recognized that the opening of legal mail outside of a prisoner's presence implicates First Amendment rights." Hayes v. Idaho Corr. Ctr., 849 F.3d 1204, 1210 (9th Cir. 2017). The Fifth Circuit came to the opposite conclusion in *Brewer v. Wilkinson*, 3 F.3d 816, 825 (5th Cir. 1993) ("[W]e must also hold that the violation of the prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of prisoner's constitutional rights.").

245. *Brewer*, 3 F.3d at 822 (citing *Wolff*, 418 U.S. at 577).

246. *Id.* at 825–26 ("Although the [*Thornburgh*] Court appeared to draw a distinction between incoming and outgoing mail and to preserve the viability of *Martinez* with respect to outgoing mail, its 'reading' of *Martinez* in *Thornburgh* suggests that

under *Turner* when Supreme Court precedent establishes a right of prisoners, resolution of the split against the Fifth Circuit's rationale would better protect inmates against potential chilling of speech and confidential legal communications by safeguarding the inspection of inmates' legal mail.[247]

The benefits of resolving the circuit split regarding the application of *Martinez*'s heightened scrutiny standard to inmates' First Amendment outgoing mail claims post-*Thornburgh* are less obvious. A comparison between similar cases in the Ninth and Fifth circuits in Section II.D demonstrated that the use of the *Martinez* standard versus the *Turner* standard to examine challenges to prison regulations might have little effect on the outcome.[248] Granting certiorari on this circuit split could, however, provide the Court with an opportunity to explain when deference is appropriate in the context of challenges to regulation on outgoing mail. Review would be especially beneficial if the case involved a particularly egregious regulation on outgoing mail, giving the Court another opportunity to strike down a prison regulation and demonstrate that "deference does not mean the abandonment of review."[249]

Although the Supreme Court is generally unwilling to grant certiorari in cases turning solely on an analysis of the particular facts involved, the two circuit splits discussed in this Note are better categorized as conflicts regarding matters of constitutional law.[250] Regardless of how the facts of the cases are construed, the circuits that have taken minority positions in each split have established *legal principles* under *Turner* and *Wolff* that are seemingly in conflict with Supreme Court precedent.[251] These types of conflicts fall squarely within the character of reasons listed by the Supreme Court's rule for granting certiorari and therefore are well-suited for Court review.[252]

Turner's 'legitimate penological interest' test would also be applied to outgoing mail." (citations omitted)).

247. *See* discussion *supra* Section II.D.

248. *See* discussion *supra* Section II.D.

249. *See Lenient in Theory*, *supra* note 8, at 1026.

250. *See* ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 109–10, 112 (3d ed. 1962).

251. *See, e.g.*, *Brewer* v. Wilkinson, 3 F.3d 816, 825 (5th Cir. 1993) (holding that *Wolff* does not mandate an inmate be present for the opening of legal mail and that the principles of *Turner* can be used to analyze outgoing mail challenges, rather than the principles of *Procunier v. Martinez*).

252. *See* SUP. CT. R. 10 (listing the character of reasons for granting review on writ of certiorari, including where federal court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"

2. Creating a Statutory Cause of Action for Prisoners' Free Speech Claims

The Supreme Court in *Turner* believed heightened scrutiny would undermine the judgment of prison officials, who are in a better position than the judiciary to determine prison administrative needs, such as the oft-cited concerns of security, order, and rehabilitation.[253] As a result, the Court set the standard of review as "reasonableness" review for all constitutional challenges brought against prison regulations.[254] The passing of the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[255] of 2001 and its subsequent application to prison regulation challenges, however, makes clear that such substantial deference to prison administrators is not necessary to maintain orderly and secure prisons or to accommodate the expertise and judgment of prison officials.[256]

RLUIPA prohibits the government from imposing any "substantial burden" (e.g. a prison regulation) on the religious exercise of an institutionalized person unless the government demonstrates that the imposition of the burden: (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means to further that compelling interest.[257] The act therefore creates a statutory cause of action that applies strict scrutiny review to First Amendment free exercise challenges in the prison environment.[258] This cause of action supplements the constitutional cause of action for First Amendment free exercise challenges, which only

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and where a federal court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court").

253. Turner v. Safley, 482 U.S. 78, 89 (1987) ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.")

254. *Id.*

255. RLUIPA, 42 U.S.C. § 2000cc-1. First Amendment free exercise in federal and state prisons was originally protected by strict scrutiny under the Religious Freedom Restoration Act of 1993 ("RFRA"), but the Supreme Court held the Act unconstitutional as applied to states and localities in the 1997 case of *City of Boerne v. Flores*, 521 U.S. 507, 532–36 (1997). Congress responded three years after *City of Boerne* by passing RLUIPA, which was far less sweeping than the original RFRA provision and applies solely to land use and prisons. Cutter v. Wilkinson, 544 U.S. 709, 715 (2005).

256. *See Lenient in Theory*, *supra* note 8, at 1021–25.

257. RLUIPA, 42 U.S.C. § 2000cc-1.

258. Michael Keegan, *The Supreme Court's "Prisoner Dilemma:" How Johnson, RLUIPA, and Cutter Re-Defined Inmate Constitutional Claims*, 86 NEB. L. REV. 279, 324–25 (2007).

requires *Turner* "reasonableness" review.[259] Importantly, there is little evidence that RLUIPA has negatively impacted prison security, and the federal government has recognized that the use of strict scrutiny review has not compromised prison security or public safety.[260] The Supreme Court has also developed jurisprudence under RLUIPA that reasonably accommodates the expertise of prison officials without compromising the constitutional rights of inmates.[261] The creation of RLUIPA has, however, resulted in paradoxical prison environments where religious publications and exercise of religion are allowed despite regulations severely limiting similar secular practices, all in the name of "security" and "rehabilitation."[262]

The passing of RLUIPA suggests that Congress considered *Turner*'s "reasonableness" review to be inadequate to protect fundamental First Amendment free exercise rights.[263] As First Amendment free speech is a similarly fundamental constitutional right, and RLUIPA has proven that strict scrutiny for constitutional claims in the prison setting will not necessarily undermine security or administrative expertise, a similar law requiring strict scrutiny for free speech is warranted.[264] Rather than the other piecemeal

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259. *See generally* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (applying *Turner* to prison regulation challenges brought under the First Amendment Free Exercise Clause).

260. *See Lenient in Theory*, supra note 8, at 1022 n. 378 (citing *Protecting Religious Freedom After* Boerne v. Flores *Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong., app. at 66–67 (1997) (Memorandum from Kim Tucker, Deputy Gen. Counsel to Robert A. Butterworth, Att'y Gen. State of Fla. (July 19, 1996))); *see also* Brief for the United States as Respondent Amici Curiae Supporting Petitioners, Cutter v. Wilkinson, 544 U.S. 709 (2005) (No. 03-9877), 2004 WL 2961153, at *24 ("For more than a decade, the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners.").

261. *See Lenient in Theory*, *supra* note 8, at 1024–25.

262. *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 583 (2005).

263. Congress enacted RFRA to overturn the Supreme Court's ruling in *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990), which held that generally applicable laws that do not target specific religious practices do not violate the free exercise clause. RFRA was meant to restore strict scrutiny review for free exercise claims, which the Court had applied prior to *Smith*. *See Religious Freedom Restoration Act (RFRA) Now Law of Land*, Vol. V, No. 5, CORR. L REP. 65, 67 (1994). The Court's later decision in *City of Boerne*, however, gutted the Act, and after Congress responded with RLUIPA, prisoners were left with heightened free exercise protections as compared to the general public. *See supra* note 255 and accompanying text.

264. *See* Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773 (2008) (providing a comprehensive history of the First Amendment right to free speech in the United States and the values served by the right); *see also* Evan Bianchi & David Shapiro, *Locked Up, Shut Up: Why Speech in Prison Matters*, 92 ST. JOHN'S L. REV. 1 (2018)

protections described above, providing a statutory cause of action with heightened scrutiny for these claims would be the most effective method of curbing judicial deference and safeguarding First Amendment free speech.

CONCLUSION

Under the current *Turner* deference regime, the vast majority of prisoners' First Amendment free speech claims fail, preventing fathers from writing letters to their children, inmates with muscular dystrophy from being accommodated with typewriters, and whole categories of prisoners from accessing books and magazines in the name of "security," "order," and "rehabilitation."[265] With more than 1.4 million Americans incarcerated,[266] widescale censorship and denial of access to information should not be reviewed under a standard where any "plausible security concern" can trump the fundamental First Amendment rights of inmates and detainees.[267] Justice Stevens warned that such an outcome was likely in *Turner* itself, but the Supreme Court has failed to provide meaningful guidance as to when deference to officials is appropriate or how inmates can successfully bring claims under the *Turner* framework in the roughly 35 years since the decision came down.[268] While the proposals offered in this Note in no way guarantee remedies for or prevention of these types of injuries, they could serve to make it easier for inmates to be heard and more likely to have their claims favorably resolved.

(discussing why speech in prison matters based on the free expression rationales most frequently cited by the Supreme Court).

265. *See, e.g.*, Lee v. Smith, 552 F. App'x 331, 331 (5th Cir. 2014) (per curiam) (summarily upholding the placement of an incarcerated father's children on his negative mailing list); Stauffer v. Gearhart, 741 F.3d 574, 578 (5th Cir. 2014) (per curiam) (affirming a motion to dismiss on an inmate's challenge to a regulation as-applied that resulted in the confiscation of several automotive magazines); Lyons v. Skolnik, 502 F. App'x 712, 713 (9th Cir. 2013) (upholding a ban on inmate possession of typewriters, despite the fact that the Nevada Supreme Court ostensibly required typewritten briefs); Samford v. Dretke, 562 F.3d 674, 676 (5th Cir. 2009) (per curiam) (affirming a motion to dismiss for a challenge to a restriction on an incarcerated father's communication with his two sons).

266. CARSON, *supra* note 145, at 3.

267. Turner v. Safley, 482 U.S. 78, 100–01 (Stevens, J., dissenting) ("Application of the [*Turner*] standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation.").

268. *Id.*