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I. INTRODUCTION

An unfortunate and inevitable aspect of incarceration is separation from the outside world. The various constraints on communication exemplify one of the many ways through which incarceration creates this divide.[1] Maintaining the connections that incarcerated people have with their loved ones and communities is essential for fostering a vital support system, facilitating the exchange of information, aiding in successful reintegration, and reducing recidivism upon release.[2] Unfortunately,

*To Professor Anne Johnson, my faculty advisor, thank you for your generous time, supportive guidance, and invaluable feedback throughout this journey. To Professor Sarah Gerwig, thank you for your profound wisdom and guidance on this topic. To my loved ones, your endless support, love, and encouragement have been my lifeline. Finally, to all who have nurtured my growth as a writer, your contributions are deeply cherished.

1. Ruth Delaney et al., *Examining Prisons Today*, VERA INST. OF JUST. (Sept. 2018), https://www.vera.org/reimagining-prison-web-report/examining-prisons-today [https://perma.cc/E2AW-FQ33].

2. *Prisoner Rights*, ACLU GA., https://www.acluga.org/en/know-your-rights/prisoner-rights [https://perma.cc/A7EE-CCGF] (last visited Mar. 29, 2024); Leah Wang, *Research roundup: The positive impacts of family contact for incarcerated people and their families*, PRISON POL'Y INITIATIVE (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/ [https://perma.cc/DEC7-VCZP]; *G.O.A.L. Devices Expand Offender Education Opportunities, Strengthen Family Ties*, GA. DEP'T OF CORR. (Jan. 12, 2016), https://gdc.georgia.gov/press-releases/2016-01-12/goal-devices-expand-offender-education-opportunities-strengthen-family [https://perma.cc/56RP-G2QW] ("[O]ffenders can send and receive secured email through the kiosk, which helps them keep their relationships with family intact while they are incarcerated.").

instead of encouraging and safeguarding this communication, prisons often curtail it through restrictive methods: visitation is limited, phone calls are costly, physical mail involves a time-consuming and intrusive process, and now, email[3] is being constrained.[4]

The Georgia Department of Corrections (GDC) maintains Standard Operating Procedures (SOP) governing email correspondence, authorizing prison officials and analysts to intercept and censor, or withhold emails that violate the SOP regulations without providing any notice or opportunity to challenge the decision.[5] Consequently, incarcerated people attempting to communicate via email with people outside of the prison system not only face infringements on their freedom of speech, but are also deprived of procedural due process safeguards.[6]

In *Benning v. Commissioner, Georgia Dep't of Corrections*,[7] the United States Court of Appeals for the Eleventh Circuit assessed how incarcerated persons' outgoing emails are to be treated, specifically

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3. The email service available to incarcerated individuals is quite different from the email service those outside of the prison system know. The United States Court of Appeals for the Eleventh Circuit nonetheless considers it "a message, note, or letter sent by electronic means over a computer system." Benning v. Comm'r, Ga. Dep't of Corr., 71 F.4th 1324, 1326 (11th Cir. 2023). *See generally* Mike Wessler, *SMH: The rapid & unregulated growth of e-messaging in prisons*, PRISON POL'Y INITIATIVE (Mar. 2023), https://www.prisonpolicy.org/reports/emessaging.html [https://perma.cc/7RRK-7KGW] (explaining the difference between email and the e-messaging service that prison communication corporations, such as JPay, provide); Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send An Email*, WIRED (Aug. 3, 2018, 7:00 AM), https://www.wired.com/story/jpay-securus-prison-email-charging-millions/ [https://perma.cc/ZB6P-DFGW] ("[F]acilities across the country are adding e-messaging, a rudimentary form of email that remains disconnected from the larger web.").

4. Delaney, *supra* note 1 ("[W]hile advancements in technology theoretically should make it easier for people to stay in touch remotely through phone, email, and video calls, these opportunities are also often restricted and can be quite costly."); Wang, *supra* note 2; *Incarcerated People's Communications Services*, FED. COMMC'NS COMM'N (Sept. 22, 2023), https://www.fcc.gov/incarcerated-peoples_communications_services [https://perma.cc/K3RU-X3GK].

5. *204 Policy Facilities-Technology*, GA. DEP'T OF CORR., https://gdc.georgia.gov/organization/about-gdc/agency-activity/policies-and-procedures/204-policy-facilities-technology [https://perma.cc/EQN2-28M7] (last visited Mar. 7, 2024); *Georgia Department of Corrections Standard Operating Procedures*, POWERDMS, https://public.powerdms.com/GADOC/documents/187122 [https://perma.cc/MK4H-LVKC] (last visited Mar. 7, 2024).

6. *Benning*, 71 F.4th at 1329.

7. 71 F.4th 1324 (11th Cir. 2023). Benning filed a petition for writ of certiorari on December 15, 2023, seeking review of the Eleventh Circuit's judgment, particularly on the issue of qualified immunity. Petition for Writ of Certiorari, Benning v. Oliver, 2023 U.S. S. Ct. Briefs Lexis 4050 (2023) (No. 23-664). The Supreme Court of the United States denied Benning's petition for certiorari on April 29, 2024. Petition for Writ of Certiorari, Benning v. Oliver, 2024 U.S. Lexis 1943 (2024) (No. 23-664).

addressing issues of First Amendment[8] and Fourteenth Amendment[9] rights within the prison context.[10] As a matter of first impression, the Eleventh Circuit determined which standard of review—*Martinez*[11] or *Turner*[12]—is applicable to outgoing email correspondence.[13] Ultimately, the Eleventh Circuit held that the *Martinez* standard of review controls, and pursuant to *Martinez*, incarcerated people have a protected due process liberty interest, grounded in the First Amendment, in outgoing emails.[14]

II. FACTUAL BACKGROUND

Ralph Harris Benning is currently serving a life sentence in the custody of the GDC.[15] As an incarcerated person, his interactions with individuals outside of the prison system are governed by the policies and regulations established by the GDC.[16] In particular, his email communications are subject to SOP 204.10,[17] which sets out policies related to the use of JPay Kiosks and Georgia Offender Alternative Learning (GOAL) devices.[18]

In September and October of 2017, the GDC intercepted three outgoing emails sent by Benning to his sister for violating SOP 204.10 by requesting forwarding to third parties.[19] In February 2018, another email that Benning attempted to send to the Aleph Institute was intercepted for the same SOP violation, as it contained details about the transfer of another incarcerated individual. On each of these occasions, Benning did not receive any notification regarding the interception of his emails,

8. U.S. CONST. amend. I.

9. U.S. CONST. amend. XIV.

10. *Benning*, 71 F.4th at 1326.

11. Procunier v. Martinez, 416 U.S. 396 (1974) *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

12. Turner v. Safley, 482 U.S. 78 (1987).

13. *Benning*, 71 F.4th at 1329–30, 1334.

14. *Id.* at 1330.

15. *Id.* at 1327.

16. *Id.*

17. The two policies relevant here are as follows: "Offenders shall not request [emails] to be forwarded, sent, or mailed to others," and "offenders shall not . . . send information on behalf of another offender." *Georgia Department of Corrections Standard Operating Procedures, supra* note 5, at 8. The Eleventh Circuit did not address the constitutionality of these two policies under the First Amendment. *Benning*, 71 F.4th at 1338.

18. *Benning*, 71 F.4th at 1326–27. Individuals incarcerated within a GDC facility are permitted to use JPay Kiosks or Georgia Offender Alternative Learning (GOAL) devices to send emails. The cost to send each email is $0.37, with 15% of the fees going to the GDC. *Id.*

19. *Id.* at 1327.

consequently depriving him of the opportunity to appeal the decision to a different GDC official.[20]

Pursuant to 42 U.S.C. § 1983,[21] Benning filed a *pro se* civil rights suit naming as defendants the GDC Commissioner and the two GDC analysts who intercepted the September and October emails.[22] Benning alleged that the GDC and the two analysts unconstitutionally censored emails that he attempted to send and failed to provide him notice of such interception, thus infringing upon his First Amendment rights and violating the Due Process Clause of the Fourteenth Amendment. In response, the defendants filed a motion for summary judgment, arguing that Benning did not have a constitutional right to email, and that email interception was constitutional under *Turner*.[23] Benning responded to the motion for summary judgment, asserting that *Martinez* is the applicable standard regarding outgoing email correspondence.[24] The United States District Court for the Middle District of Georgia granted summary judgment in favor of the defendants.[25]

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed in part, reversed in part, and remanded the case.[26] The Eleventh Circuit found that Benning had a protected liberty interest in his

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20. *Id.*

21. 42 U.S.C. § 1983 (1996). Section 1983 enables individuals to take action against certain government entities and officials for civil rights violations.

22. *Benning*, 71 F.4th at 1327–28. Benning requested specific declaratory and injunctive relief, as well as compensatory, nominal, and punitive damages. *Id.*

23. *Id.* at 1328. The defendants alleged that, even if such right existed, the interception and withholding of emails was constitutional under the *Turner* standard of review. Moreover, the two GDC analysts asserted that they were entitled to qualified immunity from the claims for damages. *Id.*

24. Benning v. Dozier, No. 5:18-cv-00087, 2021 U.S. Dist. LEXIS 82957, at *5, *11 (M.D. Ga. Apr. 30, 2021). Benning argued that email should be treated the same as physical mail, that due process should be provided when an email is intercepted, and that the law was clearly established for purposes of qualified immunity. *Id.*

25. *Benning*, 71 F.4th at 1328. The district court acknowledged that the determination as to which standard governs outgoing email correspondence policies is a "close call." *Benning*, 2021 U.S. Dist. LEXIS 82957, at *19. Given the novelty of the case and the potential unknown impacts on prison administration, the district court hesitated in applying the more stringent *Martinez* standard, ultimately opting for the *Turner* standard. *Id.* at *20. Applying the *Turner* standard, the district court found that Benning's emails were withheld pursuant to a legitimate penological interest. *Id.* at *23 ("SOP 204.10 is meant to protect citizens and prison officials from intimidation and threats and to ensure prison security and safety. Protecting the public, prison officials, and offenders are legitimate penological interests. And the email restrictions in SOP 204.10 are reasonably related to those legitimate penological interests.") (internal citations omitted).

26. *Benning*, 71 F.4th at 1340. Counsel appeared on Benning's behalf. *Id.* at 1328.

outgoing emails and was entitled to due process safeguards.[27] The Eleventh Circuit also found that, since there was no law on point regarding outgoing email correspondence, the GDC analysts were entitled to qualified immunity.[28]

III. LEGAL BACKGROUND

A. Constitutional Rights of Incarcerated People

The Supreme Court of the United States has definitively stated that "[p]rison walls do not form a barrier separating inmates from the protections of the Constitution."[29] Nonetheless, when individuals are imprisoned, their constitutional rights become limited as a result. Specifically, incarcerated people retain some level of protection under the First Amendment and the Due Process Clause of the Fourteenth Amendment, albeit these protections are curtailed in consideration of "legitimate penological interests."[30] When examining prison policies and their impact on the freedom of speech of incarcerated individuals, courts employ either the *Martinez* or *Turner* standards of review.[31] Prior to *Benning*, these two standards of review had not been applied to cases involving email correspondence.[32]

B. The Evolution of the First Amendment Standard of Review for Prison Policy

1. The *Martinez* Heightened Scrutiny Standard

The Supreme Court of the United States first addressed the First Amendment rights of incarcerated people in *Procunier v. Martinez*,[33] and

27. *Id.* at 1329.

28. *Id.* at 1334, 1338.

29. *Turner*, 482 U.S. at 84.

30. *Id.* at 89; *see e.g.,* Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[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."); Wilson v. Jones, 430 F.3d 1113, 1117 (10th Cir. 2005) ("The Fourteenth Amendment prohibits states from depriving citizens of liberty without due process of law. Although their due process rights are defined more narrowly, that guarantee applies to prisoners as well.").

31. *See* Kevin Francis O'Neil, *Rights of Prisoners*, MTSU FREE SPEECH CTR. (February 18, 2024), https://firstamendment.mtsu.edu/article/rights-of-prisoners/ [https://perma.cc/Y2Q8-MGJQ].

32. *Benning*, 71 F.4th at 1334.

33. 416 U.S. 396, *overruled on other grounds by Thornburgh*, 490 U.S. 401.

in doing so, established a standard of review for prison regulations restricting freedom of speech.[34]

In *Martinez*, the appellees brought a class action challenging the rules of California State Prisons relating to mail censorship.[35] These rules authorized prison officials to open, read, and censor any mail containing content that was considered to "'unduly complain' or 'magnify grievances,'" "'express[] inflammatory political, racial, religious or other views,'" or be deemed "'defamatory or otherwise inappropriate.'"[36] The Court noted that these regulations granted significant deference to prison officials, allowing them to use their personal prejudices and opinions as criteria for mail censorship.[37]

In formulating a standard of review, the Court recognized that the case raised an issue of First Amendment rights of incarcerated people but decided to focus heavily on the implications for those outside of prison attempting to correspond with incarcerated people.[38] The act of mail censorship involves and implicates both parties of the correspondence, thus working as a consequential restriction on the First and Fourteenth Amendments rights of those outside of the prison system seeking to contact those within.[39]

Rather than granting absolute deference to prison officials as permitted by the prison regulations, the Court held that censorship is justified only if it furthers an "important or substantial governmental interest unrelated to the suppression of expression" and is "no greater than is necessary or essential to the protection of the particular governmental interest involved."[40] Further, the Court agreed with the lower court's determination that minimum procedural safeguards—notice and a reasonable opportunity to protest the decision to a new prison official—are not unduly burdensome and thus must accompany the decision to censor or intercept letters.[41]

In its decision, the Court only resolved the standard of review for prison restrictions on correspondence between incarcerated people and

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34. *Martinez,* 416 U.S. at 406, 413–14.

35. *Id.* at 398

36. *Id.* at 398–400.

37. *Id.* at 415.

38. *Id.* at 408–09.

39. *Id.* at 409 ("[C]ensorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners").

40. *Id.* at 413.

41. *Id.* at 417–19. *Martinez* requires that the individual be "notified of the rejection of a letter written by . . . him," and that he be "given a reasonable opportunity to protest that decision," with his complaint being "referred to a prison official other than the person who originally disapproved the correspondence." *Id.* at 417–18.

people outside of the prison system.[42] As the decision's rationale was rooted in the rights of individuals outside of prison,[43] the question of how to treat the First Amendment rights of incarcerated peoples was left undecided.

2. The *Turner* Reasonable Relationship Test

Thirteen years later, in *Turner v. Safley*,[44] the Supreme Court of the United States revisited the standard of review for prison regulations that restrict freedom of speech.[45] In addition to a regulation governing marriage within prisons, this class action suit challenged a prison rule that prohibited correspondence between incarcerated people within the Missouri State penal system.[46] Since the issue pertained exclusively to the rights of individuals within the prison system and not those outside of it, the Court determined that the *Martinez* standard of review was inapplicable.[47] In an effort to address the issue left open by *Martinez*, the Court established a new standard of review concentrating on the rights of incarcerated individuals.[48]

The Court recognized that incarcerated people retain constitutional rights while in prison.[49] However, the Court also recognized that courts are ill-equipped to address issues of prison administration and reform, which led to reservations about excessive federal court involvement in prison cases.[50] To reconcile these considerations, the Court held that according deference to prison authorities and employing a lesser standard of scrutiny is appropriate when assessing the constitutionality of prison regulations, thereby formulating the *Turner* standard of review.[51]

This new standard of review was called the "reasonable relationship" test and it stipulated that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interest."[52] The Court reasoned that,

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42. *Id.* at 409.
43. *Id.*
44. 482 U.S. 78.
45. *Id.* at 85–86.
46. *Id.* at 81–82.
47. *Id.* at 85–86.
48. *Id.* at 85–86, 89.
49. *Id.* at 84.
50. *Id.* at 84–85.
51. *Id.* at 85, 89.
52. *Id.* at 89–91. The Court set out a four factor test to determine reasonableness: (1) is there a valid, rational connection between the prison regulation and the legitimate

when the free speech rights of people outside of the prison system are not involved, it is appropriate to defer to the prison officials to determine necessary policies.[53] Consequently, since the Missouri regulation under this new standard of review was found to be reasonably related to legitimate prison security concerns, the Court upheld its constitutionality.[54]

While *Martinez* focused on the implications that prison regulations have on the free speech of those outside of the prison system and established a test involving heightened scrutiny,[55] *Turner* centered on the rights of incarcerated people exclusively and established a reasonable relationship test.[56]

3. Clarity from *Thornburgh*

Two years later, in *Thornburgh v. Abbott*,[57] the Court reexamined the two standards, making a clear distinction between them.[58] Specifically, the Court held that the *Turner* standard applies to incoming correspondence and the *Martinez* standard applies to outgoing correspondence, effectively overruling *Martinez* in part.[59]

In *Thornburgh*, the plaintiffs filed a class action alleging that the Federal Bureau of Prisons regulations concerning the censorship of incoming publications violated the First Amendment rights of incarcerated people as evaluated under the *Martinez* standard of review.[60] The regulations authorized prison officials to reject incoming publications if they were deemed to be "'detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.'"[61]

The Court determined that *Martinez* was not applicable to the case reasoning that the strict scrutiny standard is unsuitable since it fails to

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governmental interest put forward to justify it; (2) are there alternative means of exercising the right that remains open to incarcerated individuals; (3) what impact will accommodation of the asserted constitutional right have on prison officials, incarcerated people, and prison resources; and (4) are readily available alternatives that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests available. *Id.*

53. *Id.* at 90, 92.
54. *Id.* at 93.
55. *Martinez,* 416 U.S. at 409, 413–14.
56. *Turner*, 482 U.S. at 85–86, 89.
57. 490 U.S. 401.
58. *Id.* at 413–14.
59. *Id.*
60. *Id.* at 403.
61. *Id.* at 404–05 (quoting 28 C.F.R. § 540.71(b) (1988)).

account for the necessary level of discretion required within the context of a prison setting.[62] Further, the Court determined that *Martinez* was not applicable because the original focal point of the standard was outgoing correspondence, which carries lesser implications than incoming correspondence.[63] The Court therefore limited the scope of *Martinez* to outgoing correspondence only.[64] Since the implications of incoming communications for prison security are of greater magnitude than outgoing, and deference to prison officials to determine appropriate policies regarding incoming communications is vital, the Court determined that the reasonable relationship test of *Turner* was applicable.[65]

Thornburgh brought clarity to the standards of review for First Amendment free speech claims within the prison context, and these standards remain in effect today.[66] The *Turner* reasonable relationship test applies to both the free speech rights of incarcerated people and the free speech rights of those outside the prison system seeking to communicate with incarcerated people.[67] Conversely, the *Martinez* heightened scrutiny standard governs only situations in which incarcerated people are seeking to correspond with those outside of the prison system.[68]

IV. COURT'S RATIONALE

In *Benning v. Commissioner, Georgia Dep't of Corrections*,[69] the United States Court of Appeals for the Eleventh Circuit issued an opinion addressing how incarcerated persons' outgoing emails should be treated for purposes of the First and Fourteenth Amendments, and determined the appropriate standard of review in regard to incarcerated persons' outgoing email correspondence.[70] In the majority opinion joined by Circuit Judge Robin S. Rosenbaum, Circuit Judge Adalberto J. Jordan held that the *Martinez* standard of review is applicable and, pursuant to *Martinez*, incarcerated people have a protected due process liberty interest, grounded in the First Amendment, in outgoing emails.[71] In a

62. *Id.* at 412–13.
63. *Id.* at 413.
64. *Id.*
65. *Id.* at 413–14.
66. *Id.*
67. *Id.*
68. *Id.*
69. 71 F.4th 1324 (11th Cir. 2023).
70. *Id.* at 1330.
71. *Id.* at 1329–30.

concurring opinion, District Judge Harvey E. Schlesinger expressed his agreement with the lower court's determination that *Turner*, rather than *Martinez*, is applicable.[72]

A. The Martinez Majority

1. First Amendment Liberty Interest

The Eleventh Circuit started the analysis by noting that the Supreme Court of the United States has held that the interest of incarcerated people and their correspondents to uncensored communication by letter, albeit restricted by the circumstances of incarceration, is grounded in the First Amendment and thus constitutes a liberty interest within the meaning of the Fourteenth Amendment.[73] Since the present case involved email correspondence, which has yet to be addressed, the Eleventh Circuit first decided whether emails operate as the equivalent of physical letters for purposes of a liberty interest.[74]

Emails were found by the court to undoubtedly constitute speech under the First Amendment, which safeguards communication across various mediums including the internet.[75] In determining whether an email is the equivalent to a physical letter, the court pointed to *Martinez*, stating that the rationale behind the decision was concerned with the outgoing correspondence of incarcerated people, regardless of the medium of that correspondence.[76] Additionally, the court explained that when *Martinez* was decided, correspondence was limited to physical letters sent by mail, however, technological advancements over the past fifty years have expanded correspondence to digital mediums.[77]

Further, in assessing the SOP, the court determined that the GDC treats outgoing emails as the functional equivalent of physical mail for screening and review purposes.[78] Just as physical letters undergo screening before being delivered to the recipient, emails are subject to screening by GDC analysts before delivery to ensure compliance with the SOP.[79] Thus, the court found that the policies governing emails are

72. *Id.* at 1340 (Schlesinger, J., concurring).

73. *Id.* at 1329 (quoting *Martinez*, 416 U.S. at 418).

74. *Id.* at 1330.

75. *Id.* ("[T]he Supreme Court has told us that First Amendment scrutiny is not more relaxed in cyberspace.").

76. *Id.* at 1330.

77. *Id.* at 1331. ("[T]he First Amendment protects correspondence transmitted by means developed in the 20th or 21st centuries.")

78. *Id.*

79. *Id.*

essentially the same as those for physical letters, with the exception of certain due process requirements.[80]

The court then acknowledged the defendants' argument that Benning did not have a protected liberty interest because it is a privilege for incarcerated people to use email rather than a right, but swiftly dismissed the notion.[81] In response, the court pointed out that the Supreme Court has already rejected the distinction between rights and privileges governing the applicability of procedural due process rights.[82] Therefore, the court explained, whether Benning's access to and utilization of email is characterized as a privilege or a right does not affect the analysis.[83] Moreover, the court emphasized that the First Amendment itself creates the liberty interest in question, and as established, email qualifies as a form of correspondence protected under the First Amendment.[84]

2. Procedural Due Process Safeguards

After determining that Benning did have a protected liberty interest grounded in the First Amendment in his outgoing emails, the procedural due process safeguards, or lack thereof, was assessed by the Eleventh Circuit.[85] The court, citing to *Martinez*, explained that any decision to intercept, censor, or withhold outgoing physical letters must be accompanied by procedural due process safeguards such as notice and an opportunity to appeal the decision.[86]

The court noted that Benning submitted an affidavit stating that he was denied proper process and the opportunity to challenge the decision.[87] This affidavit, based on Benning's own knowledge, raised a genuine dispute of fact, precluding summary judgment.[88] The court further noted that the evidence presented in the summary judgment record supported the contention that Benning experienced both a lack of notice and a remedy when his emails were intercepted.[89] The record provided that the SOP policy in question expressly states that "'communications which violate [the] policy will be intercepted without

80. *Id.*
81. *Id.* at 1331–32.
82. *Id.* at 1332.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* (citing *Martinez*, 416 U.S. at 417–19).
87. *Id.*
88. *Id.*
89. *Id.* at 1332–33.

explanation.'"[90] Moreover, the record showed that the GDC supervisor and analysts corroborated this evidence by confirming that the SOP provides for no explanation and that they acted in accordance with the regulation by not providing any notice or avenue for remedy.[91]

Based on this evidence, the court determined that a reasonable jury could find that Benning was not given any notice or opportunity for a remedy.[92] Consequently, the court concluded that the district court erred in granting summary judgment in favor of the defendants regarding whether Benning's due process rights were violated.[93] The Eleventh Circuit therefore found that, because Benning had a First Amendment liberty interest in his outgoing emails, he was entitled to procedural due process safeguards when his emails were intercepted.[94]

3. Qualified Immunity

The Eleventh Circuit then addressed the analysts' qualified immunity defense as to Benning's claims for damages.[95] The court explained that this defense applies to government officials sued in their official capacity for monetary damages when they are engaging in discretionary functions, such as intercepting emails.[96]

Prior to the Eleventh Circuit's consideration of this case, there were no decisions that definitively established the legal framework for matters related to email correspondence, the applicable standard of review, and the due process requirements in this context.[97] While some courts had applied the *Martinez* standard of review to correspondence other than letters when Benning's emails were intercepted, the Eleventh Circuit

90. *Id.* at 1333.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1340.

95. *Id.* at 1333, 1337–38.

96. *Id.* at 1333. Under the qualified immunity doctrine, officials may be shielded from liability as long as their "'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Benning*, 71 F.4th at 1333 (quoting Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 7 (2021)). Decisions made by the Supreme Court, the Eleventh Circuit, or the proper state supreme court can announce clearly established law for qualified immunity purposes. *Id.* For purposes of qualified immunity, "'courts must not define clearly established law at a high level of generality[;]'" instead, the inquiry should consider the specific context in which the violations occurred. *Id.* at 1334 (quoting D.C. v. Wesby, 583 U.S. 48, 63–64 (2018)).

97. *Id.* at 1334, 1338.

noted that it had not yet been applied to email correspondence.[98] Given the absence of clearly established law or materially similar precedent in this context, the Eleventh Circuit found that the analysts were entitled to qualified immunity with respect to Benning's First Amendment and due process claims for damages.[99]

B. The Turner Concurrence

In the concurring opinion, District Judge Schlesinger wrote separately to state that he would affirm the district court's finding that *Turner*, rather than *Martinez*, is applicable.[100] Further, Judge Schlesinger expressed that, in his view, the challenged email policies would have survived constitutional scrutiny under the *Turner* standard.[101]

In expressing that the issue of which standard to apply is not as plain as the majority made it, Judge Schlesinger highlighted a circuit split in which other circuits addressed similar instances.[102] Specifically, the United States Court of Appeals for the Fourth, Third, and Seventh Circuits followed *Turner*,[103] whereas the United States Court of Appeals for the First and Second Circuits opted for the *Martinez* standard of review.[104] With the aim of providing guidance to both prison officials on how to treat First Amendment issues and to lower courts facing similar

98. *Id.*

99. *Id.* at 1334, 1338, 1340.

100. *Id.* at 1340 (Schlesinger, J., concurring).

101. *Id.* at 1341 (Schlesinger, J., concurring).

102. *Id.* (Schlesinger, J., concurring). In response, the majority disagreed with the validity of these findings, pointing out that the cases applying the *Turner* standard "involve substantive First Amendment challenges to the actions of prison officials in censoring or withholding mail, and not procedural due process claims arising from the failure of such officials to provide inmates with safeguards like notice." *Id.* at 1331 n.4.

103. *Id.* at 1340–41 (Schlesinger, J., concurring); *see* Murdock v. Thompson, No. 20-6278, 2022 U.S. App. LEXIS 33198, at *14 (4th Cir. Dec. 1, 2022) (relying on *Turner* to examine mail prison policies that prohibited an individual from sending a Motion for Speedy Trial by certified mail); White v. True, 833 F. App'x 15, 18 (7th Cir. 2020) (applying *Turner* to determine that a "restriction on outgoing mail" served a "legitimate penological interest" in a *Bivens* action); Sebolt v. Samuels, 749 F. App'x 458, 460 (7th Cir. 2018) (citing *Turner* to conclude that incarcerated individuals do not have an unrestricted First and Sixth Amendment right to receive publications or consult counsel through an email program); Aguiar v. Recktenwald, 649 F. App'x 293, 295–96 (3d Cir. 2016) (applying *Turner* to determine that a policy preventing the use and maintenance of a Facebook account was "reasonably related to legitimate penological interests").

104. *Benning*, 71 F.4th at 1341 (Schlesinger, J., concurring); *see* Stow v. Davis, No. 22-1264, 2023 U.S. App. LEXIS 9122, at *2 (1st Cir. Jan. 4, 2023) (applying *Martinez* to address a potential outgoing mail censorship issue); Bacon v. Phelps, 961 F.3d 533, 543-44 (2d Cir. 2020) (concluding that *Martinez* applied to a prison policy that allowed an incarcerated individual to be disciplined for a letter sent to his sister).

issues, Judge Schlesinger suggested that the majority should have engaged in a more comprehensive analysis to determine which standard is indeed the appropriate standard of review to apply to outgoing email correspondence.[105]

V. IMPLICATIONS

In holding that outgoing email is to be treated on par with other forms of outgoing correspondence, such as letters and packages, the United States Court of Appeals for the Eleventh Circuit is expressly expanding the application of *Martinez* to encompass email.[106] In doing so, the right of incarcerated individuals to communicate with those outside of the prison system through an additional, electronic method is safeguarded.[107] This decision not only establishes precedent for lower courts to follow, but also encourages sister circuits to adopt a similar approach.

Further, the Eleventh Circuit is providing "an opportunity to address how prison officials should treat First Amendment issues."[108] This decision makes it clear that prison officials and administrators are limited in their ability to censor outgoing email. Consequently, it has the potential to trigger an assessment of various prison policies, especially those tied to fundamental constitutional rights. This decision may serve as a catalyst for reviewing such policies under the *Martinez* heightened scrutiny standard.

A. Technological Advancements and Legal Email[109]

Beyond its immediate implication of the standard of review for outgoing email correspondence within the Eleventh Circuit,[110] *Benning* may be far-reaching especially in the context of emerging technological advancements and their impact on correspondence within the prison system. With the growing prevalence of digital communication methods

105. *Benning*, 71 F.4th at 1341 (Schlesinger, J., concurring).

106. *Id.* at 1330.

107. *Id.*

108. *Id.* at 1340 (Schlesinger, J., concurring).

109. Legal mail is written correspondence between an incarcerated individual and courts, public officials, and attorneys. This correspondence is protected by the Sixth Amendment right to effective assistance of counsel and the attorney-client privilege. COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER'S MANUAL, ch. 19, 652–57 (12th ed. 2020), https://jlm.law.columbia.edu/files/2021/02/26.-Chapter-19.pdf [https://perma.cc/LP7P-LW82].

110. *Benning*, 71 F.4th at 1330.

within the prison system,[111] it is imperative to craft prison policies and legal standards that account for these technological developments in society.

As digital communication methods continue to expand in the prison system, it is foreseeable that email will soon emerge as the primary and preferred method of correspondence for incarcerated individuals.[112] However, this transition raises significant privacy concerns, particularly in attorney-client communication.[113] In urgent scenarios where direct calls are not possible, traditional mail poses timing challenges, and in-person visitation may be impracticable, email offers a potential solution.[114] It has the potential to substantially enhance the attorney-client relationship by providing a cost-effective, quicker, and generally more efficient channel of communication.

The current policy governing email usage within the prison system not only infringes on First Amendment free speech rights, but also touches on the Sixth Amendment[115] right to effective assistance of counsel.[116]

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111. Given the worldwide transition to a more digital realm driven by the COVID-19 pandemic, it is unsurprising that digital correspondence is increasingly being utilized in prisons. *See* Andrea Fenster, *People in jails are using more phone minutes during the COVID-19 pandemic, despite decreased jail populations*, PRISON POL'Y INITIATIVE (January 25, 2021), https://www.prisonpolicy.org/blog/2021/01/25/covid_call_volumes/ [https://perma.cc/R4D4-TAQG] ("Across the country, COVID-19 cases have ballooned in prisons and jails . . . . As a result, many jails have suspended in-person visitation, leaving phone and video calls as the main way for people to communicate with loved ones.").

112. *See* Wessler, *supra* note 3 ("[A]t least 43 state prison systems and the [Federal Bureau of Prisons] offer some electronic messaging option.").

113. A significant portion of an attorney's daily correspondence occurs through email. Incarcerated individuals may similarly prefer email for corresponding with their attorneys, provided that appropriate safeguards are in place. For a report on the effect of email monitoring prison policies and recommendations to safeguard email communications between attorneys and their incarcerated clients to uphold attorney-client privilege, *see* Nat'l Ass'n of Crim. Def. Laws. & Samuelson Law, Tech. & Pub. Pol'y Clinic, *Preserving Incarcerated Persons' Attorney-Client Privilege in the 21st Century: Why the Federal Bureau of Prisons Must Stop Monitoring Confidential Legal Emails*, NAT'L ASS'N OF CRIM. DEF. LAWS. (2020), https://www.nacdl.org/getattachment/5cba661b-b1b3-4418-b5d4-511e124ba6ad/preserving-incarcerated-persons-attorney-client-privilege-in-the-21st-century-why-the-federal-bureau-of-prisons-must-stop-monitoring-confidential-legal-emails.pdf [https://perma.cc/PAD3-GMPM] [hereinafter *Preserving Incarcerated Persons' Attorney-Client Privilege*].

114. *See Preserving Incarcerated Persons' Attorney-Client Privilege*, *supra* note 113, at 5 ("Email has become an essential tool for providing legal services. It could be a particularly important tool for communicating with incarcerated clients, who can be especially challenging to reach.").

115. U.S. CONST. amend. VI.

116. *Preserving Incarcerated Persons' Attorney-Client Privilege*, *supra* note 113, at 15 ("[D]epriving incarcerated persons of the ability to send confidential legal email

This is because the policy essentially eradicates the notion of attorney-client privilege and prevents attorneys from fulfilling their ethical duties of communication, confidentiality, and diligent representation.[117] Users of JPay Kiosks and GOAL devices must agree to the terms and conditions and adhere to the SOP, both of which entail excessive monitoring and waiver of confidentiality. [118] The terms and conditions and the SOP explicitly state that email communications through the systems, even those that are confidential and privileged, are not protected,[119] leaving attorneys with no choice but to avoid using the system altogether to communicate with their clients.

The decision in *Benning* favors the protection of email correspondence[120] and may pave the way to heightened safeguards for email correspondence containing confidential and privileged information. This ruling could encourage a reassessment and revision of the existing SOP and terms and conditions, or it could catalyze the formulation of new prison policy regarding privileged attorney-client email communications. Additionally, governmental intrusion on the attorney-client relationship may trigger incarcerated individuals to challenge existing policy through legal action, potentially prompting courts explore these issues further.

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undermines their First Amendment right to free speech and Sixth Amendment right to effective assistance of counsel.").

117. *Id.* at 15–17, 21; MODEL RULES OF PRO. CONDUCT r. 1.3 (2021); MODEL RULES OF PRO. CONDUCT r. 1.4 (2021); MODEL RULES OF PRO. CONDUCT r. 1.6 (2023).

118. The relevant portion of the JPay terms and conditions is as follows:

> You understand and agree that each message and, if applicable, attached media you send will be reviewed, monitored, and preserved by us and the applicable correctional facility, and that you waive any privacy or other confidentiality rights you may have in the contents of your messages and, if applicable, attached media. If you are an attorney, you agree you will not use the Messaging Solutions to transmit any confidential or privileged communications, and (on behalf of yourself and your clients) you waive any claim against us or our Facilities for violation of the attorney-client privilege.

General Terms and Conditions Version 1.7, JPAY (August 23, 2023), https://www.jpay.com/LegalAgreementsOut.aspx [https://perma.cc/SS9Q-VEZ8].

The relevant portion of the SOP is as follows:

> All communications sent or received via the GOAL Device or Kiosk are subject to inspection and review for security reasons, and neither the sender, nor receiver, has an expectation of privacy in any of these communications. Attorney-client privilege will not apply to any communications sent or received via the GOAL Device or Kiosk. Because of the need for such inspections, both sent and received communications may be delayed. Communications which violate this policy will be intercepted (censored) without notice or explanation and no refund will be provided to the sender.

Georgia Department of Corrections Standard Operating Procedures, supra note 5, at 7.

119. *Id.*

120. *Benning,* 71 F.4th at 1330.

Moreover, with the ongoing evolution and introduction of new communication methods, situations may arise where these methods are subject to censorship or withholding, resembling the circumstances of *Benning*.[121] In such situations, the issue arises as to whether the analysts responsible for censoring or withholding communications can assert qualified immunity. This could stimulate the development of a more precise legal standard that delineates specific communication parameters.

B. Martinez as the Appropriate Standard to Balance the Fundamental Constitutional Rights of Incarcerated Individuals with Legitimate Penological Interests

The divergence in views regarding the controlling standard of review for outgoing email correspondence may open the door for the Supreme Court of the United States to provide further clarification on these two standards, particularly within the cyberspace context. As demonstrated in past legal proceedings initiated by incarcerated individuals, courts often defer to prison administration and policy when addressing freedom of speech issues within the prison environment, resulting in the vast majority of these actions being unsuccessful under the deferential *Turner* standard.[122]

The *Turner* standard of review was established because the *Martinez* standard failed to sufficiently consider the judgment of prison authorities when assessing prison policy.[123] According to the *Turner* standard, a prison regulation impinging on the constitutional rights of incarcerated individuals "is valid if it is reasonably related to legitimate penological interests."[124] Under this standard, courts accord significant deference to prisons because they, rather than the courts, possess the expertise necessary "'to make the difficult judgments concerning institutional

121. *Id.* at 1334.

122. The Supreme Court has repeatedly deferred to the judgment of prison administration and policy. *See, e.g.*, Jones v. N. Carolina Prisoners' Lab. Union, Inc., 433 U.S. 119, 126 (1977) ("Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators."); Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."). Another instance is *Benning*, in which the lower court applied the *Turner* standard, deferring to the judgment of prison administration to uphold the challenged prison policy. *Benning*, 71 F.4th at 1337.

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

124. *Id.*

operations.'"[125] Consequently, *Turner* facilitates a relatively easy determination that a policy satisfies the criteria of being related to legitimate penological interests.

Policies that are intrusive and restrictive, like SOP 204.10, should not be reviewed under a standard that excessively favors those responsible for establishing such policies. Such an approach risks encroaching upon the fundamental First Amendment rights of incarcerated individuals.[126] When formulating and applying legal standards, it is imperative to genuinely consider the constitutionally protected rights of incarcerated individuals in conjunction with legitimate penological interests. This decision, coupled with the demonstrated success of applying heightened scrutiny in other cases involving fundamental First Amendment rights,[127] may bolster the idea that implementing a heightened scrutiny standard, such as *Martinez*, is the most effective approach to protect the free speech rights of incarcerated individuals without compromising internal prison security.

VI. CONCLUSION

There are nearly two million people incarcerated in the United States.[128] The utilization of email has the potential to enhance the quality of life for these individuals. However, realizing this potential necessitates the implementation of prison policy that incorporates effective

125. *Id.* (quoting *Jones*, 433 U.S. at 128).

126. *See* David Hudson, *Remembering the High Point of Prisoner Rights*, PRISON LEGAL NEWS (June 15, 2011), https://www.prisonlegalnews.org/news/2011/jun/15/remembering-the-high-point-of-prisoner-rights/ [https://perma.cc/8U3V-S5WQ] ("[T]he import of the [*Turner*] decision was clear—a reduction in prisoners' free-expression rights."); Evan Bianchi & David Shapiro, *Locked Up, Shut Up: Why Speech in Prison Matters*, 92 ST. JOHN'S L. REV. 1 (2018) (suggesting that the *Turner* standard of review is inadequate, leaving prison speech with less protection than it merits).

127. In 2001, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, to address the First Amendment freedom of religion rights of incarcerated individuals. *See* O'Neil, *supra* note 31. RLUIPA reviews policies that significantly burden religious practices under strict scrutiny thereby departing from the *Turner* standard. *Id.* The Supreme Court has emphasized that, while "RLUIPA provides substantial protection for the religious exercise of institutionalized persons, it also affords prison officials ample ability to maintain security." Holt v. Hobbs, 574 U.S. 352, 369 (2015). RLUIPA stresses the importance of protecting a fundamental First Amendment constitutional right and exhibits that a heightened scrutiny standard effectively balances that goal with legitimate penological interests. *Id.* Similarly, there is a comparable significance in protecting the First Amendment right to freedom of speech, justifying the application of heightened scrutiny in cases such as *Benning*, akin to RLUIPA.

128. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (March 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/9SWX-Y5F2].

safeguards, and the application of the appropriate legal standard when assessing such policy.[129]

This Eleventh Circuit decision establishes that incarcerated individuals indeed possess a protected liberty interest in their outgoing email correspondence, entitling them to procedural due process safeguards.[130] The implementation of arbitrary prison policy, justified under the guise of legitimate penological interests, not only undermines the constitutionally protected rights of incarcerated individuals but also devalues their fundamental humanity. [131] This decision signifies the crucial need to recognize incarcerated individuals as human beings deserving of protection, especially in the context of their communication, and emphasizes the necessity of ensuring that their outgoing emails actually do find their intended recipient well.

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129. The two standards of review serve distinct purposes, accentuating the importance of ensuring their proper application. There is a level of deference granted to prison policy and officials with regard to incoming correspondence and correspondence within the prison itself, as these types of communications can present a significantly greater threat to internal security management. Conversely, outgoing correspondence poses a lesser threat to internal prison order and security, leading to greater limitations on prison regulation, and stricter scrutiny of governing policy. *Thornburgh*, 490 U.S. at 413 ("The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials.").

130. *Benning*, 71 F.4th at 1340.

131. Justice Marshall addressed humanity of incarcerated individuals in his concurring opinion in *Martinez*:

> When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment . . . . It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.

416 U.S. at 428 (Marshall, J. concurring).