No. 24-2707

In the United States Court of Appeals for the Eighth Circuit

Anthony Schmitt,

Plaintiff-Appellant,

v.

Jolene Rebertus, in her official capacity as Assistant Commissioner of the Minnesota Department of Corrections; Paul Schnell, in his official capacity as Commissioner of the Minnesota Department of Corrections,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
District Court No. 0:24-cv-00034-JRT

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, GOOD NEWS GLOBAL, ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE, JEWISH COALITION FOR RELIGIOUS LIBERTY, AND THE NATIONAL ASSOCIATIONS OF EVANGELICALS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A) and 26.1 and Eighth Circuit Local Rule 26.1A, amici represent they are not corporations, have no parent entities, and issue no stock.

Dated: October 23, 2024

/s/ Steven T. McFarland
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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Christian Legal Society ("CLS") is a nonprofit association of Christian attorneys and law students in every state and over 125 law schools. CLS believes that free religious expression of citizens should be and is legally protected regardless of whether its beneficiaries are incarcerated. CLS was active in the passage of the Religious Land Use and Institutionalized Persons Act and has filed amicus briefs in many of the cases cited herein.

Good News Global (aka "Good News Jail & Prison Ministry") is a nondenominational, nonprofit ministry that supplies chaplains under contract to local jails in 22 states. Founded in 1961, the mission of the organization since its founding is to place chaplains in jails and prisons to minister to the spiritual needs of all who are behind bars. Because Good News Global trains volunteers and clergy of all faiths to engage with inmates, it is greatly concerned by the district court's holding below.

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[1] Both parties have consented to the filing of this amicus brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

The **Islam and Religious Freedom Action Team of the Religious Freedom Institute** ("IRF") serves as a Muslim voice for religious freedom grounded in the traditions of Islam. To this end, IRF engages in research and education and advocates for the right of everyone to believe, speak, and live in accord with their faith. Accordingly, IRF has an interest in defending the religious freedom of all prisoners and those who minister to them.

The **Jewish Coalition for Religious Liberty** ("JCRL") is an organization of Jewish rabbis, lawyers, and professionals who are committed to defending religious liberty. As members of a minority faith that adheres to practices that many in the majority may not know or understand, the JCRL has an interest in ensuring that courts are prohibited from evaluating the validity of religious adherents' sincerely held beliefs.

The **National Association of Evangelicals** is the largest network of evangelical churches, denominations, colleges, and independent ministries in the U.S. It serves forty member denominations, as well as numerous evangelical associations, missions,

social-service charities, refugee and humanitarian aid agencies, colleges, seminaries, and independent churches.

SUMMARY OF THE ARGUMENT

Appellant Schmitt has been expressly forbidden from teaching the Quest program because of the religious beliefs Schmitt expresses in the program. Indeed, the Department of Corrections ("DOC") in telling Schmitt his "program conflicts with the diversity, equity, and inclusivity values of the [DOC] by defining manhood . . . through a biblical lens of what a 'real man looks like'" admitted they discriminated against Schmitt's religious viewpoint. J.App.Vol. 1 91; R.Doc. 16-2; Schmitt Decl., Ex. B at 3. This viewpoint discrimination must surmount strict scrutiny under both the Free Speech and Free Exercise Clauses of the First Amendment. *Turner v. Safley*, 482 U.S. 78 (1987) should not apply here. Non-inmates should not suffer dilution of their First Amendment religious expression rights just because their audience is incarcerated. The penological interests of prison administrations in protecting the safety of inmates and staff are appropriately weighed in the "compelling government interest" element of strict scrutiny. The district court erred in failing to apply such scrutiny.

Moreover, this case is distinguishable from prior precedent in this circuit, as those cases involved categorical bans and did not have facts comparable to the targeted, unfettered discretion involved here.

Amici also respectfully urge this Court to follow the reasoning of the Eleventh Circuit in *Jarrard v. Sheriff of Polk Cnty.*, 115 F.4th 1306 (11th Cir. 2024), a very recent decision involving a prison minister being excluded because of his religious viewpoint.

ARGUMENT

I. The District Court Erred in Failing to Apply Strict Scrutiny When Appraising Schmitt's Free Exercise of Religion Claim.

Strict scrutiny should apply to Appellant's free exercise of religion claim. State policy burdening religious exercise is ordinarily subject to strict scrutiny unless the policy is neutral and generally applicable. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759 (8th Cir. 2019).

In preventing Schmitt from continuing to teach classes, Appellee Rebertus stated that the state's diversity, equity, and inclusion (DEI) goals conflicted with how Schmitt defined masculinity through a "biblical lens" in his Quest classes. J.App.Vol. 1 91; R.Doc. 16-2; Schmitt Decl., Ex.

B at 3. In other words, Appellees expressly pointed to Schmitt's religious beliefs as a reason to prevent him from teaching. *See id*. In addition, Appellees seemingly have discretion to decide on an individualized basis what types of teachings are allowed in the prison, as all that was needed to justify forcing Schmitt not to teach was a mere explanation about the importance of DEI. *See id.* This exercise of power by Appellees—pursuant to an ill-defined state DEI policy—was not neutral or generally applicable. *See id; see also Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) (holding that "Government fails to act neutrally when it [is] intolerant of religious beliefs" and "A law is not generally applicable if . . . the government . . . consider[s] the particular reasons for a person's conduct by providing '"a mechanism for individualized exemptions."'"); *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). A law is also not generally applicable if it targets religious conduct based on hostility to particularly disliked religious views, even if it does so in a masked way. *Lukumi*, 508 U.S. at 534, 538. This is because protecting diverse religious beliefs, including the ability to live them out is the "important work" that the Free Exercise Clause does. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 523-24 (2022). Strict scrutiny thus applies.

As explained below, amici respectfully submit that *Turner v. Safley* should not change or disturb the above analysis. This is because a) the Supreme Court, in the *Turner* line of cases, treats categorical bans differently than viewpoint-based censorship in the prison context; b) *Turner* does not apply when appraising a *non-inmate's* free exercise of religion rights; c) cases by this Court applying *Turner* to non-inmates are distinguishable; and d) the state's penological concerns can be addressed in the "compelling government interest" element of strict scrutiny.

A. The Supreme Court, in the *Turner* line of cases, treats categorical bans differently than viewpoint-based censorship in the prison context.

The Supreme Court's commitment to avoid "arbitrary governmental invasion," when it found a prison policy giving too much discretion for censorship to officials, *see Procunier v. Martinez*, 416 U.S. 396, 418 (1974), has not changed. The Court has upheld content-neutral categorical bans on types of communications using a deferential reasonableness standard (both before and *after Turner* was decided), deferring to prison expertise. *See Pell v. Procunier,* 417 U.S. 817, 824 (1974) (upholding a ban on media interviews with inmates); *Bell v.*

Wolfish, 441 U.S. 520, 549-51 (1979) (upholding a prohibition on hardback books); *Turner*, 482 U.S. 78 (upholding a categorical restriction on correspondence between inmates who are not family members); *Beard v. Banks*, 548 U.S. 521 (2006) (upholding a policy prohibiting categories of materials). Yet when content evaluation and censorship are involved, the Court is not as quick to defer. *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (finding "procedural safeguards" crucial when there was discretion given to officials to review content). In fact, a key factor in the *Bell* court finding there was no First Amendment violation was because "the rule operates in a neutral fashion, *without regard to the content of the expression*." 441 U.S. at 551 (emphasis added). In *Thornburgh,* the Court specifically noted that it was important that the policies included criteria that the warden had to follow in reviewing materials, and that he could not reject a publication because it was of a particular view, or even "repugnant." 490 U.S. at 405.

In this case, the policy does not involve a categorical ban without reference to content. In fact, Commissioner Rebertus specifically rejected the religious content because of what it communicated and because it was not consistent with the "values of the department." *Schmitt v. Rebertus*,

No. 24-34 JRT/LIB, 2024 WL 3904665, at *1 (D. Minn. 2024); J.App.Vol. 1 91; R.Doc. 16-2; Schmitt Decl., Ex. B at 3. The policy here does not include the kind of "procedural safeguards" that were persuasive in *Thornburgh*, 490 U.S. at 406, as Appellee Rebertus merely indicated that she rejected the religious program after applying her own subjective judgment to the content. Neither is the policy neutral in application, as the level of discretion given and the specific targeting for disfavor of the religious beliefs expressed demonstrate there is a system of individualized review that, when it burdens religious exercise, should trigger strict scrutiny under *Fulton*, 593 U.S. at 533. Therefore, *Turner* is not applicable to Schmitt's free exercise rights in this case.

B. *Turner* does not apply when appraising a *non-inmate's* free exercise of religion rights.

Turner v. Safley should not override the proper use of strict scrutiny here when there is a non-neutral policy burdening a non-inmate's free exercise of religion. *Turner* only dealt with the *prisoners*' claims to the right to correspond and the right to marry. 482 U.S. at 82. Indeed, *Turner* held that regulations impinging upon "*inmates'* constitutional rights" needed to be reasonably related to a legitimate penological interest. *Id.* at 88 (emphasis added). Over three decades later, the Supreme Court in

Fulton and *Tandon* never implied that citizens lose their strict scrutiny protection when they volunteer to help to rehabilitate prisoners. *See generally Fulton*, 593 U.S. 522; *Tandon*, 593 U.S. 61. Thus, Schmitt, who only seeks to teach and help prisoners, should not lose strict scrutiny protection simply because he is serving in a prison setting.

Cases by the Supreme Court and this Court that applied *Turner* to non-prisoners can be distinguished. In *Thornburgh*, the Supreme Court held that a regulation allowing state officials to prevent outside mail from being delivered into the prison did not violate the constitutional rights of non-prisoner publishers of the mail material. 490 U.S. at 404, 412-13. *Thornburgh* only stated, however, that in cases of "incoming correspondence"—when outside publishers wanted to have their material disseminated in prison—did *Turner* apply to non-prisoners. *See Thornburgh*, 490 U.S. at 414-15.

Here, Schmitt was exercising his free exercise of religion rights to help rehabilitate male prisoners, a situation not contemplated in the holding of *Thornburgh*. *See id.* He is not a publisher, and he is providing voluntarily accessed religious training for those who want it. And when it comes to free exercise of religion rights, the Supreme Court in *Lukumi*,

Fulton, and *Tandon*—all decided after *Thornburgh*—expressed the need to use strict scrutiny when a state policy or law burdening religious exercise was not neutral and generally applicable. *Lukumi*, 508 U.S. at 531-32; *Fulton*, 593 U.S. at 533; *Tandon*, 593 U.S. at 62. Nothing in the plain text of the First Amendment indicates any exemption either. *See* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

This Court should not rely on *Turner* when free exercise of religion rights (in tandem with free speech rights of religious expression) are at stake, particularly when the challenged policy's application involves targeting of disfavored views. This Court should instead defend those rights with the same fervor as current Supreme Court jurisprudence does.

To apply *Turner* to non-inmates' free exercise rights in this setting, refusing to apply the entire Supreme Court body of law on free exercise, in fact uniquely dilutes their free exercise rights even compared to the inmates they serve, who are given heightened review under the Religious Land Use And Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. ("RLUIPA") (2000). This result is absurd and illogical.

Amici respectfully submit that unincarcerated volunteers using their free exercise of religion rights to help prisoners should not enjoy lesser protection just because their audience is incarcerated.

C. Cases by this Court applying *Turner* to non-inmates are distinguishable.

This Court has previously applied *Turner* in several cases when appraising non-inmates' constitutional rights in the prison context. *Human Rights Def. Ctr. v. Baxter Cnty.*, 999 F.3d 1160, 1164, 1166 (8th Cir. 2021) ("*Human Rights I*"); *Human Rights Def. Ctr. v. Union Cnty.*, 111 F.4th 931 (8th Cir. 2024) ("*Human Rights II*"); *Rice v. Kempker*, 374 F.3d 675, 678 (8th Cir. 2004). These cases, however, did not involve free exercise of religion claims. *See Human Rights I*, 999 F.3d at 1165; *Rice* 374 F.3d at 678. And, as stated above, applying *Turner* here would defeat the protections to religious exercise that *Lukumi*, *Fulton*, and *Tandon* extended against state policies that were not neutral and generally applicable. Indeed, *Human Rights I* recognizes this potential conflict, explicitly stating that a "ban on access to inmates may violate the separate First Amendment rights of outsiders." *Human Rights I*, 999 F.3d. at 1165. In addition, those cases did not have facts comparable to the targeted, unfettered discretion involved here. Thus, amici

respectfully ask this Court to not follow *Turner* based off cases with inapposite facts and to instead use strict scrutiny to protect the free exercise of religion as the caselaw demands.

1. The *Human Rights* cases are distinguishable.

The *Human Rights* cases can be distinguished from the present case on several grounds: the postcard-only policy involved a categorical ban without reference to content evaluation; they involved unsolicited speech that could be considered commercial and therefore afforded less protection; and they did not involve crucial free exercise interests.

These cases considered restrictions on the delivery of mail solicitations based on a categorical postcard-only policy. *See Human Rights I*, 999 F.3d at 1165-66. There, this Court appraised First Amendment and Due Process claims by a publisher who wanted to deliver its unsolicited sample materials to prisoners in order to "solicit new subscribers." *Id*. at 1163; *see also Human Rights II*, 111 F.4th at 934. The Court noted that the state had important penological interests in keeping "'institutional security and preserving internal order.'" *Human Rights I*, 999 F.3d at 1164 (citation omitted). The *Human Rights* cases applied *Turner* (and *Thornburgh*) to balance the need for state discretion

to pursue those interests and the need to protect some commercial speech. *See Human Rights I*, 999 F.3d at 1164; *Human Rights II*, 111 F.4th at 934. The First Amendment rights in those cases involved categorical bans on commercial speech selling subscriptions; there was no content-based restriction. Thus, the prison policy at issue just had to reasonably relate to a legitimate penological interest to be constitutionally valid. *Id.*

The categorical ban on anything other than postcard mail that was not privileged or legal did not ban any materials based on an evaluation of content. *Human Rights I*, 999 F.3d at 1162-63; *Human Rights II*, 111 F.4th at 933-34. While it burdened some speech, the policy did not allow officers to individually evaluate content or make discretionary exclusions; it therefore did not trigger the heightened free speech concerns that arise with viewpoint discrimination or the heightened free exercise concerns that arise from targeting of religious practice. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 828, 829 (1995); *Lukumi*, 508 U.S. at 534. The direct mailings by the publisher of its large pamphlets simply did not qualify for delivery because they were not postcards, and the County Detention Center accordingly rejected

them. *Human Rights I,* 999 F.3d at 1163. As we noted above in section I.A., the Supreme Court has regularly treated categorical bans without reference to content with more deference than situations where officers are given broad discretion to individually censor.

In addition, unlike Appellant Schmitt here, the publisher in the *Human Rights* cases was engaging in *commercial* speech because it was "solicit[ing] new subscribers" amongst the prisoners and sent "subscription order forms" alongside these materials. *Id.* Commercial speech "propos[es] a commercial transaction" or is an "expression related solely to the economic interests of the speaker and its audience." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). "[A]dvertising pure and simple" is commercial speech. *See Zauderer v. Off. of Disciplinary Couns. of Sup. Ct.*, 471 U.S. 626, 637 (1983). These publications in the *Human Rights* cases, samples of which were sent for marketing purposes, were commercial insofar as they functioned as advertisements meant to solicit subscriptions and have prisoners consume more content by the publisher. *See Crime Justice & Am., Inc. v. Honea*, 876 F.3d 966, 970 (9th Cir. 2017) (sending to prisoners unsolicited

magazines with articles about navigating the criminal justice system, as well as advertising from attorneys and bail bondsmen were "commercial mail" though the nonprofit publisher did not offer subscriptions);[2] *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 n.20 (1978) (noting the "purely commercial" nature of advertisements).

The commercial nature of the publisher's speech in the *Human Rights* cases thus also distinguishes those cases from this one. The Supreme Court has held that commercial speech is subject to less constitutional protection compared to other First Amendment rights. *Cent. Hudson*, 447 U.S. at 563; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011). All the state must do to survive constitutional scrutiny when its statute burdens commercial speech is to show that it "directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989) (citing *Cent. Hudson*, 447 U.S. at 566).[3]

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[2] There is an even stronger argument in the *Human Rights* cases that the publications are commercial, as the publications there were *specifically* sent to solicit subscriptions from prisoners.

[3] In addition, nothing about the *Human Rights* publisher's *message or nonprofit status* changes the fact that it engaged in commercial speech. Linking an advertisement to a "current public debate"—like prison

In contrast, the instant case is not about mere commercial speech, but rather about upholding free exercise of religion rights as current Supreme Court jurisprudence demands. Schmitt's right to freely express and exercise his religious beliefs when teaching prisoners who voluntarily attend his classes is a strongly protected interest. "Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *see also Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (citation omitted) (noting "'(i)f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is

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reform or the status of prisoner rights—does not alter the fact that the advertisement is commercial speech. *See Zauderer*, 471 U.S. at 637 n.7 (1983). What matters is that the publisher sent those materials *to advertise itself*, not just to communicate the messages the publisher wanted in those advertising materials. Neither is the analysis changed by the fact that the publisher was a nonprofit organization. *See Missouri Broad. Ass'n v. Lacy*, 846 F.3d 295, 299-300 (8th Cir. 2017) (assuming that a nonprofit corporation promoting the broadcast industry engaged in commercial speech); *see also Crime Justice & Am.*, 876 F.3d at 970 (treating the message as "commercial mail" despite the fact that publisher was a nonprofit organization). Like in *Lacy* where a nonprofit organization engaged in commercial speech, the publisher in the *Human Rights* cases promoted an entity (itself) when it sent its publications to solicit subscriptions. Thus, in the *Human Rights* cases, neither the messages the publisher communicated nor the publisher's status as a nonprofit organization affected this Court's analysis that the speaker engaged in commercial speech.

constitutionally invalid even though the burden may . . . only [be] indirect.'"). Any state policy burdening religious exercise that is not neutral and generally applicable is subject to strict scrutiny. *Fulton*, 593 U.S. at 533; *Tandon*, 593 U.S. at 62. The Assistant Commissioner's policy here was neither; *see* section I.A., *supra*. The state's penological interests can be weighed consistently with Supreme Court precedents that protect the right to freely exercise one's faith. *See* section I.D., *infra*. The *Human Rights* cases thus do not apply here.

2. *Rice* involves an unburdened and tenuous "right" to film an execution.

Rice considered restrictions on the public to watch executions. 374 F.3d at 678. In *Rice*, this Court assessed a First Amendment right of public access by plaintiffs who wanted to videotape an execution of a prisoner. *Id.* This Court explicitly held that "the First Amendment does not protect the use of video cameras . . . in the execution chamber." *Id.* While this Court went on *in dictum* to apply *Turner*, this Court flatly rejected the constitutional claim before any *Turner* analysis was wielded. *See id.* at 678. This Court held that there was no First Amendment right that was burdened. *Id.*

Rice is thus a far cry from this case. Appellant Schmitt's constitutional rights of free exercise and free speech were at least burdened by Appellees barring him from teaching. Whatever the *dictum* in *Rice* may mean in applying *Turner*, it does not apply here where First Amendment rights are unquestionably burdened, triggering strict scrutiny under very recent Supreme Court free exercise holdings. *Fulton*, 593 U.S. at 533; *Tandon*, 593 U.S. at 62; *see also Lukumi*, 508 U.S. at 531-32. Indeed, even *Human Rights I* explicitly states that a "ban on access to inmates may violate the separate First Amendment rights of outsiders." *Human Rights I*, 999 F.3d at 1165. Thus, this Court should not follow *Rice* in this case, where no such First Amendment right was burdened.

In sum, amici respectfully urge this Court not to follow the two cases applying *Turner* because they involved either a) no constitutional burden, b) categorical bans that do not involve individualized review and censorship of content, or c) commercial speech that is not as well protected as the free exercise of religion. Rather, this Court should apply strict scrutiny as both recent and original Supreme Court free exercise precedents demand.

D. The state's penological concerns can be addressed in the "compelling government interest" element of strict scrutiny.

To satisfy strict scrutiny, the state must show that its policy is pursuant to a compelling government interest by means "narrowly tailored in pursuit of those interests." *Tandon*, 593 U.S. at 64–65 (citation omitted). Strict scrutiny does not preclude the state from arguing that its policies advance penological interests like inmate and staff safety; in fact, part of the strict scrutiny analysis is to evaluate if the government has a compelling interest in the policy under dispute. *Fulton*, 593 U.S. at 533. The prison officials can thus argue in this case that DEI or other penological concerns were sufficiently compelling to justify stopping Schmitt from continuing to teach voluntary classes in the prison. Strict scrutiny can exist alongside the state bringing forth their reasons to why they needed to implement policy that burdens religious exercise.

The Court has carefully applied strict scrutiny in the prison context without hesitation in its RLUIPA cases and found it deeply concerning when free exercise violations were summarily justified. *Holt v. Hobbs*, 574 U.S. 352 (2015). Because the claimant's "sincere exercise of religion is being substantially burdened," *id.* at 363, the Court noted that the

interest in safety and security should not be viewed too "broadly" so as to apply "a degree of deference that is tantamount to unquestioning acceptance" of anything occurring in the prison context. *Id*. at 364. It also expressed concern when prison officials' claims came down to too much "conjecture" and "speculation." *Ramirez v. Collier*, 595 U.S. 411, 430 (2022). The Eighth Circuit has also found it appropriate to balance out deference to prison administrators with significant free exercise concerns in its RLUIPA cases, showing it can also apply strict scrutiny in the prison context. *Native Am. Council of Tribes v. Weber*, 750 F.3d 742 (8th Cir. 2014) (finding that the evidence didn't suggest security was really the primary concern).

In this case, Appellee Rebertus has labeled Appellant Schmitt's religious beliefs and practice with the most negative lens possible (in direct conflict with how Schmitt describes the program), making a subjective and discretionary evaluation of his religious teachings. J.App.Vol. 1 79-80; R.Doc. 16; Schmitt Decl. ¶¶ 47-48; J.App.Vol. 1 91; R.Doc. 16-2; Schmitt Decl., Ex. B at 3. Yet there is evidence that the materials Mr. Schmitt uses are widely used, that more than a thousand men have been through the program without documented incidents in

the record, and that a recidivism expert reviewed the program in 2018 and suggested skipping one part—a change that Mr. Schmitt made without objection. *Schmitt*, 2024 WL 3904665, at *1; *See also* J.App.Vol. 1 78-79; R.Doc. 16; Schmitt Decl. ¶¶ 41-42; J.App.Vol. 1 85-87; R.Doc. 16-1; Schmitt Decl., Ex. A at 1-4; J.App.Vol. 1 96-100; R.Doc. 17; Dornbush Decl. ¶¶ 11-15 (describing the success and impact of the program in previous years). Under strict scrutiny, a level of deference to prison officials' expertise would be balanced against the clear concerns that some of these factors raise under free exercise jurisprudence.

None of the Supreme Court free exercise cases spanning over six decades have stripped citizens of strict scrutiny protection if the willing recipients happen to be prisoners. *See Sherbert,* 374 U.S. 398 (1963); *Yoder*, 406 U.S. 205 (1972); *Fulton*, 593 U.S. 522 (2021); *Tandon*, 593 U.S. 61 (2021); *see also Kennedy*, 597 U.S. 507. Even *O'Lone*, a pre-RLUIPA case which applied *Turner* when appraising prisoners' rights to exercise their Muslim faith, did not involve the rights of a free citizen expressing his faith while aiding in the prison's rehabilitative mission. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 347 (1987).

Thus, the district court erred when it applied *Turner* to First Amendment claims of non-incarcerated persons solely because of who were the beneficiaries of the exercise of those rights.

II. The District Court Erred in Failing to Apply Strict Scrutiny to Defendants-Appellees' Viewpoint Discrimination in Violation of Plaintiff-Appellant's Free Speech Rights.

A. Appellees violated Schmitt's First Amendment rights by engaging in viewpoint discrimination.

The First Amendment prohibits two forms of content-based discrimination: subject matter discrimination and viewpoint discrimination. When the government engages in content discrimination, it restricts speech on a given subject matter. When it engages in viewpoint discrimination, it singles out a *particular perspective* on that subject matter for treatment unlike that given to other viewpoints. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 110 (2001) (exclusion based on a dislike of the message and its religious nature is viewpoint discrimination).

The government may not "discriminate against speech on the basis of its viewpoint, which is an "egregious form" of the already-disfavored content discrimination. *Rosenberger*, 515 U.S. at 829 ("When the government targets not subject matter but particular views taken by

speakers on a subject, the violation of the First Amendment is all the more blatant." (citations omitted)). Viewpoint discrimination occurs when "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 828; *Gerlich v. Leath*, 861 F.3d 697, 705-06 (8th Cir. 2017) (Iowa State University's "actions and statements show that the unique scrutiny they imposed on one group's trademark applications was motivated by viewpoint discrimination"). It is well established that the government "may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828.

In fact, viewpoint-discrimination concerns commonly arise particularly in relation to protecting religious expression. This is why the *Kennedy* court noticed that free exercise and free speech rights work "in tandem." *Kennedy,* at 597 U.S. at 523.

Decades of Supreme Court and Eighth Circuit precedent show that the First Amendment forbids viewpoint discrimination. In *Healy v. James*, the Supreme Court held that a college that granted numerous privileges to student groups could not deny equal access to a student group that held "abhorrent" views and was reputed to have espoused

"violent and disruptive activities." 408 U.S. 169, 176, 178, 187-88 (1972). In *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, the government violated the First Amendment in denying access to school property to a church "solely to suppress the point of view the [church] espouses on an otherwise includible subject." 508 U.S. 384, 385 (1993). In *Rosenberger*, the Supreme Court held that the government engages in viewpoint discrimination where it targets "not subject matter, but particular views taken by speakers on a subject." 515 U.S. at 829. In *Widmar v. Vincent,* a public university could not claim that its mission to provide a "secular education" meant that it could discriminate against religious speech. 454 U.S. 263, 268-269 (1981). And in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Supreme Court reiterated that a government cannot withhold a "generally available benefit" based on religious views. 582 U.S. 449, 450, 458 (2017). Put simply, "a government violates the Constitution when . . . it excludes religious persons, organizations, or speech *because of religion*." *Shurtleff v. Boston*, 596 U.S. 243, 261 (2022) (Kavanaugh, J., concurring) (emphasis altered).

This Court's rulings are equally clear. In *Gerlich v. Leath*, this Court held that where the government "creates a limited public forum, it

may not engage in viewpoint discrimination within that forum." 861 F.3d at 709. This Court has "said flatly, in light of fifty years of Supreme Court precedents, that denial of participation in a state-sponsored program based on the party's beliefs or advocacy is unconstitutional." *Wishnatsky v. Rovner*, 433 F.3d 608, 611 (8th Cir. 2006). And in *Gay Lib v. Univ. of Missouri*, this Court emphasized that the same rule protected groups whose views may, to some, be "abhorrent, even sickening." 558 F.2d 848, 856 n.16 (8th Cir. 1977).

Viewpoint discrimination is not always written into the text of a speech regulation. More often, it is carried out less visibly—through the exercise of governmental discretion. "Every viewpoint discrimination claim 'requires, by its very nature, that the purposes or motives of government officials be determined.'" *Gerlich*, 861 F.3d at 705 (quoting *Gay & Lesbian Students Assoc. v. Gohn*, 850 F.2d 361, 367 (8th Cir. 1988)).

Here, Rebertus and other prison officials engaged in viewpoint discrimination when they banned Schmitt from teaching his religious views but did not similarly ban others. Other groups may speak about religion, but Schmitt is prohibited from expressing his views on this

subject. J.App.Vol. 1 102; R.Doc. 17-1; Dornbush Decl., Ex. A at 2 (list of other religious programs allowed in the prison in August 2023, right after Quest was canceled); J.App.Vol. 1 136; R.Doc. 22, Rebertus Decl. ¶ 13 (list of Christian programming allowed at MCF).

Additionally, Minn. Stat. § 244.03, subd. 1(5), requires that Defendant Schnell provide faith-based programming at the prison. It is, therefore, required by state law that religious groups be allowed to speak, and the First Amendment forbids the state from discriminating based on their viewpoints.

When the government chooses between religious viewpoints it is impermissibly discriminating among them. *See*, *e.g.*, *Good News Club*, 533 U.S. at 109. This is true regardless of fora. *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (traditional public forum); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (designated public forum); *Rosenberger*, 515 U.S. at 828-29 (limited public forum); *Jarrard*, 115 F.4th at 1325 (prison as non-public forum).

A limited public forum can be created by reserving property "for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829 (citations omitted); *see also Business Leaders in Christ v.*

Univ. of Iowa, 991 F.3d 969, 980 (8th Cir. 2018) (a limited public forum is created "by opening property 'limited to the use by certain groups or dedicated solely to the discussion of certain subjects.'"). Here, by creating a policy that allows religious content from outsiders to be made available to inmates, the government has created a limited public forum. Where the state creates a limited public forum for speech, the state "cannot discriminate against speech on the basis of viewpoint." *Gerlich*, 861 F.3d at 704-05 (quoting *Rosenberger*, 515 U.S. at 829). Therefore, even if some (like Appellee) consider Schmitt's views out-of-date, the First Amendment "counsel[s] mutual respect and tolerance, not censorship and suppression, for religious and non-religious views alike." *Kennedy*, 597 U.S. at 512. Indeed, "the First Amendment's Free Exercise Clause guarantees protection of . . . religious viewpoints even if they may not be found by many to 'be acceptable, logical, consistent, or comprehensible.'" *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 82 F.4th 664, 695 (2023) (citations omitted).

Schmitt has been expressly forbidden from teaching the Quest program because of the religious beliefs Schmitt expresses in the program. Indeed, the DOC in telling Schmitt his "program conflicts with

the diversity, equity, and inclusivity values of the [DOC] by defining manhood . . . through a biblical lens of what a 'real man looks like'" admitted they discriminated against Schmitt's religious viewpoint. J.App.Vol. 1 91; R.Doc. 16-2; Schmitt Decl., Ex. B at 3.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This is precisely what Defendants did here by preventing Schmitt from teaching the Quest program at the prison. Because that exclusion was viewpoint discrimination, Rebertus violated Schmitt's free speech rights under the First Amendment. The decision below should be reversed.

B. This Court should adopt the reasoning of the Eleventh Circuit in the prison setting.

Eighth Circuit case law on viewpoint discrimination has occurred primarily in the realm of public universities. Amici respectfully urge this Court to follow the very recent Eleventh Circuit decision where a prison excluded a non-inmate over his religious viewpoint on baptism.

In *Jarrard v. Sheriff of Polk Cnty.*, 115 F.4th 1306 (11th Cir. 2024), Stephen Jarrard, an Evangelist of the Church of Christ, ministered to inmates at various jails and prisons around Georgia, teaching about

biblical topics such as faith, repentance, and baptism. After several years, Jarrod was excluded from a county's jail volunteer ministry program because of his views on baptism. He was told he could not return to minister in the jail unless he stopped teaching his views on baptism.

In addressing the free speech claim, the Eleventh Circuit employed forum analysis, observing that it has become the "default means of evaluating speech restrictions." *Jarrard*, 115 F.4th at 1316. The U.S. Supreme Court has specified four types of fora to govern analysis of speech restrictions—public, designated public, limited public, and non-public. *See McCullen*, 573 U.S. at 478 (*traditional* public forum); *see also Perry*, U.S. at 46 (*designated* public forum); *Rosenberger*, 515 U.S. at 828-29 (*limited* public forum). In *Jarrard*, the prison administrators claimed the prison was a non-public forum, while Jarrard argued it was a limited public forum. But the Eleventh Circuit held in *Jarrard* last month the result would be the same:

> We needn't resolve their dispute, because we find that a rule common to all forums resolves the question whether, for purposes of Jarrard's First Amendment retaliation claim, his speech was "constitutionally protected"—namely, that any regulation of speech based on the speaker's viewpoint is presumptively invalid and must, at the very least, satisfy strict scrutiny, i.e., it

> 'must be the least restrictive means of achieving a compelling state interest.'"

Jarrard, 115 F. 4th at 1318–19 (citations omitted). The *Jarrard* Court reaffirmed that "[e]ven in a non-public forum, the law is clearly established that the state cannot engage in viewpoint discrimination—that is, the government cannot discriminate in access to the forum on the basis of the government's opposition to the speaker's viewpoint." *Id.* at 1325 (quoting *Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005); *see also, e.g.*, *Perry*, 460 U.S. at 46).

The Eleventh Circuit then analyzed later prison policies and held that they also violated Jarrard's free speech rights because of the "unbridled discretion" they afforded the warden:

> Because the Second and Third Policies contained neither any meaningful substantive guidance for Jail administrators' decisionmaking nor any timeline in which they had to respond, they violated the First Amendment's unbridled-discretion doctrine.

Jarrard, 115 F.4th at 1323.

Here, the prison warden exercised the same "unbridled discretion" over what religious views were taught, and so *Jarrard* provides an alternative analysis for this Court with the same conclusion: the district

court below erred in failing to uphold Appellant Schmitt's free speech rights.

CONCLUSION

Turner was inappropriately applied in this case, resulting in a failure to apply clear Supreme Court precedent on free exercise rights. The Appellee's interests related to the prison context are able to be appropriately weighed in the compelling interest prong of strict scrutiny. This case involves a significant burden on the free exercise right of a non-inmate caused by the targeted application of a non-neutral policy giving high levels of discretion to a government officer. This triggers strict scrutiny under *Fulton*. The strict scrutiny test has not been—and logically should not be—jettisoned just because the audience is in prison.

Alternatively, the government here has violated Schmitt's Free Speech rights by discriminating against his viewpoint.

Under either or both First Amendment grounds, the decision below should be reversed.

October 23, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLAINCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,271 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief has been scanned for viruses and is virus free.

October 23, 2024

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25, I hereby certify that I electronically filed this brief *amici curiae* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system on October 23, 2024. I certify that all participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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