No. 11-1392

IN THE

Supreme Court of the United States

STATE OF LOUISIANA, ET AL.,

Petitioners,

—v.—

HENRY LEONARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Petitioners' prisonwide ban of *The Final Call*, the official publication of the Nation of Islam, survives strict scrutiny under RLUIPA, where (1) *The Final Call* was Respondent's sole source of religious teachings and other printed materials, (2) Petitioners do not offer any other Nation of Islam-related services or publications, and (3) there was no evidence or indication of any security problems related to *The Final Call*.

2. Whether the Fifth Circuit's factbound, unpublished, one-paragraph, *per curiam* opinion affirming Respondent's summary judgment win on both RLUIPA and the First Amendment warrants this Court's rare intervention, where (1) Petitioners failed to preserve both their RLUIPA and First Amendment arguments below, and (2) the principal basis for review – a perceived conflict over which First Amendment standard should apply – is of little or no consequence in light of Respondent's strong RLUIPA claim.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union Foundation of Louisiana has no parent corporations, and no publicly held corporation owns 10% or more of the American Civil Liberties Union Foundation of Louisiana.

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STATEMENT OF THE CASE

I. Facts

Henry Leonard is an inmate at Louisiana's David Wade Correctional Center (DWCC), and a member of the Nation of Islam (NOI). Like many NOI faithful, Leonard reads the NOI's official publication, a weekly journal known as *The Final Call*.

The Final Call is integral to Leonard's religious exercise for several reasons: first, it is the organ of record by which the NOI ministry communicates spiritual teachings and guidance to NOI members. App. 14.[1] Second, it is the only channel through which Leonard can acquire other NOI publications, such as books and recordings. *Id*. Third, David Wade Correctional Center offers no NOI-specific services and keeps no other NOI religious materials on hand, limiting its Muslim offerings to "traditional," orthodox Islam. *Id*. Fourth, the tenets of NOI are substantively different from those of orthodox Islam,[2] such that Leonard could not meaningfully exercise his faith by substituting the latter for the former. App. 15, 31-32.

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[1] References to "Pet." and "App." are to the petition for certiorari and appendix thereto.

[2] Nation of Islam members adopt the teachings of orthodox Islam, but add the belief that in the 1930s, Allah came to the United States in the person of W. Fard Muhammad, with a message intended to enlighten and empower America's black communities. App. 19-22, 31. Orthodox Islam rejects those additional beliefs as blasphemy. App. 14, 31-32.

A typical issue of *The Final Call* is about forty pages, and includes sermons and spiritual guidance from NOI leaders, NOI lifestyle and cultural teachings, NOI-relevant news articles and editorial content, and advertisements for additional NOI publications and religious accessories. In addition, every issue sets forth on the second-to-last page "The Muslim Program," a statement of NOI principles written by NOI leader Elijah Muhammad in the early 1960s. App. at 16-22.

"The Muslim Program" has appeared in every issue of *The Final Call* since the magazine first was published in 1965 under the title *Muhammad Speaks*. App. 28. While its rhetoric reflects the social upheaval and political turbulence of the Civil Rights Movement, it is, at bottom, a demand that black Americans be given "full and complete freedom," "equal justice under the law" and "equality of opportunity." App. at 16, Paras. 1-3. It also requests, among other things, the release of all Muslims from federal prisons, the release of black men and women awaiting capital punishment, and – if justice and equal opportunity cannot be obtained under existing US laws – the creation of a separate, sovereign black nation using land donated by the United States. *Id.* at Para. 5. In keeping with NOI teachings, it does not counsel violence of any kind. App. 16-22, Supp. App. 5a.

In any event, *The Final Call* – including "The Muslim Program" – had been permitted at DWCC and throughout Louisiana's correctional facilities for many years. App. 38. Leonard subscribed shortly after arriving in July 2005, and began receiving issues in October. App. 15. His subscription abruptly

ended in June 2006, however, when prison officials banned *The Final Call* after deciding the language of the last page – "The Muslim Program" – was so racially inflammatory as to pose a security threat to DWCC. App. 15. The ban did not flow from any specific incident or articulable threat to security, but solely from the words of "The Muslim Program."[3] App. 15-16, 24.

When DWCC imposed the ban, Leonard immediately stopped receiving new issues. Supp. App. 2a, para. 15. However, prison officials initially did not bother to collect the back issues Leonard had in his cell, so Leonard occasionally was able to order supplemental NOI reading materials. Supp. App. 4a, para. 3. In 2008, however, Leonard was placed on lockdown for an unrelated infraction, and his back issues and other reading materials were confiscated. Since then, even now out of lockdown, he has had no access to NOI publications of any kind.

II. Procedural History

Leonard challenged the ban with this action, suing under both the First Amendment and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq*. (RLUIPA).

During discovery, no witness for the Petitioners could describe any concrete security

[3] This case is strictly about whether "The Muslim Program" is so inflammatory as to justify a complete ban of *The Final Call*. Defendants have stated that but for "The Muslim Program," *The Final Call* would be acceptable at Louisiana correctional facilities. App. 24. Moreover, all the parties agree that if a particular article actually poses a security threat, that article or issue can be withheld.

threat posed by "The Muslim Program." App. 30. None could remember or cite a single instance of institutional unrest or prison violence related to "The Muslim Program" or *The Final Call*, either in Louisiana or anywhere else in the United States. Supp. App. 4a, para. 30. Petitioners could not identify any passage within "The Muslim Program" or article of *The Final Call* that actually advocated violence, and could not identify any other prison in the nation that has banned the publication. Supp. App. 4a, para. 29.

Both parties moved for summary judgment, and faced with a dearth of evidence that *The Final Call* posed a security threat, the district court sided with Leonard. App. 10. The court first took note of *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969), in which the Fifth Circuit had examined "The Muslim Program" as it had appeared in *Muhammad Speaks* – the 1960's precursor of *The Final Call* – and determined as a factual matter that the language, unchanged over time, was not so inflammatory as to pose a prison security risk. *Id*. at 29. Indeed, the *Walker* panel noted that the language of "The Muslim Program" was mostly benign or even positive, as it encouraged NOI members to "improve their material and spiritual condition of life by labor and study." *Id*. at 28.

With *Walker's* factual conclusions in mind, the district court then applied both strict scrutiny under RLUIPA and the four-factor "reasonableness" test set forth by this Court in *Turner v. Safley*, 482 U.S. 78 (1987). The court concluded that the Petitioners had failed to present any evidence whatsoever that "The Muslim Program" posed a threat to DWCC, and

granted Leonard's motion under both the *Turner* and RLUIPA standards. App. 10.

Petitioners appealed to the Fifth Circuit, but fared no better there. At oral argument, when asked outright to identify the security threat posed by "The Muslim Program," counsel for the state did not point to any particular incident, but replied only, "the words themselves." The Fifth Circuit affirmed in a brief, unpublished, *per curiam* opinion, stating only that the record did not justify a ban. App. 4.

Petitioners subsequently sought rehearing *en banc*, but the appeals court unanimously rejected their application. This petition followed.

REASONS FOR DENYING THE PETITION

This case is unsuitable for review on both the facts and the law. On the facts, Leonard filled the record with evidence that *The Final Call* posed no threat to DWCC, and Petitioners presented no evidence otherwise, so the Fifth Circuit affirmed Leonard's summary judgment award in a factbound, unpublished, one-paragraph opinion.

On the law, Petitioners failed to raise in the district court any defense to Leonard's RLUIPA claim, thereby waiving their RLUIPA arguments before both the Fifth Circuit and this Court. Likewise, they did not argue in the district court that *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990) has superseded *Turner v. Safley*, 482 U.S. 78, 89 (1987) in the area of prison Free Exercise cases, or that there is a circuit split on the issue, thus failing to preserve those issues as well. Finally, even if Petitioners properly had preserved the *Turner*/*Smith* issue for appeal,

resolution of that question would have no practical effect here, as Leonard's RLUIPA claim completely resolves this matter.

Taken together, all of those factors make this case unsuitable for review.

I. Leonard's Straightforward RLUIPA Claim Resolves This Entire Case.

Even if the First Amendment issues raised by Petitioners somehow merited review by this Court – and they surely do not, *see infra* Part II – *certiorari* would still be unwarranted here because Respondent's successful RLUIPA claim completely resolves this case. The district court's unremarkable RLUIPA decision properly provided Respondent with all of his requested relief (receipt of the challenged publication), rendering the First Amendment issues irrelevant. Because "this Court reviews judgments, not opinions," *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), any review of Respondent's First Amendment claims would result in an advisory opinion. *See Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

A. Petitioners have waived their defenses to Leonard's RLUIPA claim.

As a threshold matter, Petitioners failed to raise any defense to Respondent's RLUIPA claim in

the district court, and so have waived any right to litigate RLUIPA issues before this Court.

Appellate courts ordinarily do not consider issues not raised or preserved below. "Recognition of this general principle has caused this Court to say on a number of occasions that the reviewing court should pass by, without decision, questions which were not urged before the [lower court]." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). While appellate courts have the discretion to take up an argument for the first time on appeal, they generally will not unless "the proper resolution [of the question] is beyond any doubt . . . or where injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

Here, although Respondent extensively briefed the merits of his RLUIPA claim in the trial court, Petitioners declined to respond on that issue, ignoring the district court's explicit statements, App. 34-35, n.2, confirming the ongoing viability of Leonard's RLUIPA claims for injunctive relief against the official-capacity defendants. As Respondent argued in the court of appeals, Petitioners therefore have waived any RLUIPA defenses on appeal. The Fifth Circuit's one-paragraph affirmance of the district court's judgment included no references to or analysis of the RLUIPA claim, and this Court likewise should not consider Petitioners' untimely RLUIPA defense.

B. The district court correctly applied RLUIPA.

In any event, nothing in the district court's RLUIPA analysis warrants this Court's review.

Petitioners point to no colorable conflict with the statute itself, any decisions of this Court, or the consistent application of RLUIPA in the lower courts.[4] Instead, Petitioners essentially dispute the application of settled law to the facts of this case. This is both an insufficient reason for granting the writ, *see* S. Ct. Rule 10(c), and flatly wrong on its own terms.

Petitioners' blanket rejection of *The Final Call* could not possibly survive the strict scrutiny mandated by RLUIPA. Petitioners banned the sole source of religious literature for Respondent's faith, with absolutely no evidence or indication of any security problems, either with Respondent's prior possession and use of the publication, or with its use in any other prison system across the country. Under these circumstances, the RLUIPA violation is plain.

In passing RLUIPA, Congress recognized that prisoners' religious liberty is especially vulnerable because they "are unable freely to attend to their religious needs and are therefore dependent on the

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[4] At most, Petitioners either offer general citations to this Court's decisions on other issues, *see* Pet. at 17-18 (*citing Sossamon v. Texas*, 131 S. Ct. 1651 (2011) (rejecting monetary damages against states under RLUIPA); and *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (holding RLUIPA constitutional)); highlight a case applying the *Turner* test, rather than RLUIPA, *see* Pet. at 19-20 (*citing Thornburgh v. Abbott*, 490 U.S. 401 (1989)); or attempt to distinguish consistent decisions from other circuits, *see* Pet. 16 (discussing *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007)); Pet. 18-19 (discussing *Sutton v. Rasheed*, 323 F.3d 236 (3d Cir. 2003)).

government's permission and accommodation for exercise of their religion." *Cutter*, *supra*, 544 U.S. at 721.[5] The statute therefore requires that courts apply strict scrutiny to any state action that imposes a "substantial burden" on the religious exercise of an incarcerated person. 42 U.S.C. § 2000cc-1. Under this standard, once a prisoner demonstrates a substantial burden, the state must prove that the challenged policy furthers a "compelling governmental interest" and is the "least restrictive means of furthering" that interest. *Id.* These provisions must be "construed in favor of a broad protection of religious exercise." *Id.* at § 2000cc-3g.

The district court's judgment here fit well within that statutory command. The court correctly recognized that Petitioners' total ban on *The Final Call* – the only Nation of Islam text available to Respondent[6] – substantially burdened the exercise of Leonard's faith. It is well-settled that the receipt of religious publications constitutes religious exercise. The lower courts consistently have acknowledged this basic aspect of religious practice, both with respect to the very publication at issue here, *see Sutton v. Rasheed*, *supra*, 323 F.3d at 255-56 & n.33

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[5] In particular, Congress found that RLUIPA was necessary because, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Id.* at 716 (internal quotation marks omitted).

[6] Petitioners have wisely abandoned any argument that traditional Muslim texts serve as adequate substitutes to adherents of the Nation of Islam. As the district court explained, "there are profound and distinct differences between the two." App. 31.

(concerning various Nation of Islam texts, including *The Final Call*); *Walker v. Blackwell*, *supra*, 411 F.2d at 29 (involving *Muhammad Speaks*, predecessor to *The Final Call*), and others, *see*, *e.g.*, *Washington v. Klem*, *supra*, 497 F.3d at 282; *Williams v. Brimeyer*, 116 F.3d 351, 354-55 (8th Cir. 1997); *Johnson v. Boyd*, 676 F. Supp. 2d 800, 808-10 (E.D. Ark. 2009); *cf. Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam) (recognizing prisoner's right to receive religious publications). Leonard's receipt of *The Final Call* undoubtedly met the expansive statutory definition of "religious exercise."[7]

A complete prohibition on the publication, then, certainly amounts to a "substantial" burden here. As the district court explained, Respondent had "no alternative means to practice his religion without receipt of *The Final Call*." App. 31. *The Final Call* served both as a religious text for Leonard, and as "the only vehicle from which [he] may order additional religious materials from the [Nation of Islam], such as readings, cassette tapes, and featured excerpts." *Id.* at 32. Without it, he simply could not practice his faith in any meaningful way, and nothing in the record suggests otherwise.[8]

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[7] RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). As this Court has noted, reviewing the legislative history of RLUIPA, Congress was concerned about a variety of religious-liberty violations in prison, including instances in which religious texts, "such as the Bible, the Koran, the Talmud . . . were frequently treated with contempt and were confiscated, damaged or discarded" by prison officials. *Cutter*, 544 U.S. at 717 n.5.

[8] Petitioners argue that Leonard's religious exercise was not substantially burdened because he had access to other NOI

Likewise, there is no reason to revisit the district court's conclusion that Petitioners' complete ban on *The Final Call* was not the least restrictive means of serving any compelling state interest. In the prison context, security is, of course, critical, and it can constitute a compelling interest. *See Cutter*, 544 U.S. at 722. But generalized and speculative claims of security, without more, do not satisfy the state's strict-scrutiny burden. While Congress contemplated that courts applying RLUIPA would give "due deference to the experience and expertise of prison and jail administrators," it also warned that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." 146 Cong. Rec. S7774, S7775 (2000) (internal citations omitted). Instead, prisons must identify particular security risks, establish that they are compelling, and offer credible evidence that the challenged policy addresses those

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reading materials. Pet. at 18. That argument reflects an outright disregard for the record that Petitioners have shown at every level of this case.

The record itself is clear: after the ban, Leonard had access to other materials only because he was able to order them using back issues of *The Final Call* that were not taken from his cell when the ban was imposed. App. 33. Leonard subsequently was placed on lockdown and his back issues and additional materials were confiscated. Supp. App. 4a, para. 33. Since lockdown, and even after his release therefrom, Leonard has had no access to any NOI publications at all. Disregarding that undisputed factual record, Petitioners continue to insist that Leonard has access to other NOI materials.

risks.[9] *Cf. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 438 (2006) (holding that, under strict scrutiny, the "invocation of general interests," such as safety, "standing alone, is not enough"); *id.* at 431 (courts must "look beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize the asserted harm of granting specific exemptions to particular religious claimants").

Here, Petitioners offered nothing, beyond pure speculation, to justify an outright ban of *The Final Call*. Not only did Petitioners fail to note any problem with Respondent's prior receipt of the publication in the state system; they were also "unable during briefing or oral argument to provide an example of an[y] instance of violence or unrest in an institutional setting that could be attributed to

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[9] *See, e.g.*, *Washington v. Klem*, *supra*, 497 F.3d at 283 ("Even in light of the substantial deference given to prison authorities, the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement. Rather, the particular policy must further this interest. A conclusory statement is not enough.") (internal citation omitted); *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007) ("[M]erely stating a compelling interest does not fully satisfy RIDOC's burden on this element of RLUIPA; RIDOC must also establish that prison security is furthered by barring [plaintiff] from engaging in any preaching at any time."); *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) ("A governmental body that imposes a 'substantial' burden on a religious practice must *demonstrate*, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest") (emphasis in original) (RFRA case).

The Final Call." App. 30.[10] Indeed, Petitioners could not even point to a single negative incident related to *The Final Call* in any facility across the country, nor could they cite any other correctional system in the U.S. that rejects *The Final Call*. Supp. App. 4a, paras. 29, 30 and 32.

The district court correctly recognized that Petitioners' bare conjecture – particularly in the face of their prior experience with *The Final Call*, and that of other jurisdictions around the country[11] – comes nowhere near meeting the State's statutory

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[10] *See also* App. 32 ("Plaintiff has provided evidence that *The Final Call* has been received at DWCC and other DOC facilities without any incidents of violence."); *id*. at 33 ("There is no evidence in the record that the previous copies of *The Final Call* had a negative impact on the security of the prison, the inmates or the guards."); *id*. at 38 ("Prior to the decision in May 2006 to reject *The Final Call*, the same material had been consistently allowed into the prison, apparently without incident.").

[11] *See Procunier v. Martinez*, 416 U.S. 396, 414 n. 14 (1974) ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."); *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) ("[T]he failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means."); *Spratt*, *supra*, 482 F.3d at 33 ("[I]n the absence of any explanation by RIDOC of significant differences between [its prisons] and a federal prison that would render the policy unworkable, the FBOP policy suggests that some form of inmate preaching could be permissible without disturbing prison security.").

burden.[12] Review of the lower courts' decisions is therefore unwarranted.

II. The Fifth Circuit properly evaluated Leonard's First Amendment claims under *Turner v. Safley*.

Petitioners argue that (1) the reasonableness standard set forth in *Turner v. Safley*, 482 U.S. 78 (1987), which has governed prison First Amendment cases for twenty-five years, was supplanted in Free Exercise matters by the neutrality standard of *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990); (2) there is a circuit split on the issue; and (3) even without a circuit split, the district court and Fifth Circuit misapplied *Turner* here. Petitioners did not raise the first two issues in the district court; the Fifth Circuit did not opine on any of the issues; and at any rate, Petitioners are wrong on all points. Thus, even if Respondent's RLUIPA claim somehow did not render these issues superfluous, *see supra* Part I, this Court still should decline to grant the writ.

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[12] Petitioners rely on *Thornburgh v. Abbott*, *supra,* 490 U.S. 401 (1989), to justify their refusal to consider less restrictive alternatives to a complete ban on *The Final Call*, such as redacting the last page of the publication. In so arguing, Petitioners neither explain why the more deferential standard articulated in *Thornburgh*, rather than the strict scrutiny required by RLUIPA, should apply here, nor provide any record evidence or further explanation for the claim that "redaction could cause prisoner discontent and unnecessary burden on staff." Pet. 21.

A. Petitioners waived any challenge to application of the *Turner* standard.

The parties agreed before the district court that *Turner* governed Leonard's First Amendment claim. Indeed, Petitioners affirmatively stated in their summary judgment brief that "Leonard's right to exercise freedom of religion claims, therefore, should be evaluated under the *Turner v. Safley* factors. . ." Supp. App. 7a. Petitioners did not raise *Smith* until their appeal, and the Fifth Circuit did not address it, ruling only that the factual record did not justify banning *The Final Call*.

As noted in part I.a., *supra*, appellate courts ordinarily do not consider issues not raised or preserved below. Here, the alleged *Turner/Smith* conflict was not properly preserved, as Petitioners withheld the argument from the district court and the Fifth Circuit did not address the question. Because neither court analyzed the issue, this Court need not review it.

B. There is no circuit split.

Petitioners have muddied the waters on this point, so it should be said clearly: there is no circuit split.

i. The Fourth, Seventh and D.C. Circuits have not "expressly rejected" *Turner*.

The Fourth, Seventh and D.C. Circuits have not "expressly rejected" *Turner* for *Smith*, Pet. 8, and the state's claims otherwise are incorrect.

First, *Smith v. Ozmint*, 578 F.3d 246 (4th Cir. 2009) did not involve religious publications, and the

opinion does not "expressly reject" *Turner*. Indeed, in evaluating an inmate's RLUIPA challenge to a grooming policy, the Fourth Circuit did not even mention *Turner*; it simply noted that *Smith* permits otherwise neutral rules to incidentally burden religious practice. The court then cautioned that the application of *Smith*'s neutrality principle did not foreclose a remedy under RLUIPA. *Id.* at 251.

Likewise, *Kaemmerling v. Lappin*, 553 F.3d 669 (D.C. Cir. 2008), also did not involve religious publications, and the D.C. Circuit did not discuss or apply *Turner*. Instead, the court cited *Smith*'s neutrality principle in rejecting an inmate's religious objection to a federal DNA collection statute, noting that because the inmate had not alleged the law was not neutral, he had failed to state a claim. *Id.* at 677. Significantly, the court also held that the inmate had failed to state a claim under the "substantial burden/compelling interest" test of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4. *Id.*

Lastly, *Borzych v. Frank*, 439 F.3d 388 (7th Cir. 2006), the only religious publication case of the three, again comes nowhere near "expressly reject[ing]" *Turner*. There, the Seventh Circuit did not mention the interplay between *Turner* and *Smith*; rather, it decided the case under the strict scrutiny standard of RLUIPA, and simply noted in passing that a neutrality standard applied to the rejection of three Odinist books that *openly and enthusiastically advocated violence* against persons of other races. *Id.* at 391. *Borzych* actually supports Leonard's position; the Seventh Circuit expressly held that under any standard, it was the books'

advocacy of violence – not their racist language, however overt – that justified the ban. *Id.* [13]

In short, Petitioners point to no case "expressly rejecting" this Court's *Turner v. Safley* reasonableness test for *Smith*'s neutrality standard. There is therefore no considered conflict, and no need for this Court to grant review.

ii. The Second, Third, Tenth and Eleventh Circuits have not "signaled" a change.

Similarly, the Second, Third, Tenth and Eleventh Circuits have not "signaled" a change from *Turner* to *Smith*, Pet. 9, n.4., and Petitioners' claim on that too is exaggerated.

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[13] Far from expressly rejecting *Turner*, the Seventh Circuit consistently has applied it where appropriate. *See e.g.*, *Grayson v. Schuler*, 666 F.3d 450 (7th Cir. 2012) (acknowledging *Turner/Smith* tension but noting that *Smith* was not a prison case and *Turner* had not been overruled); *Vinning–el v. Evans*, 657 F.3d 591 (7th Cir. 2011) (applying *Turner* and declining to address *Smith* because it was not raised until oral argument on appeal); *Maddox v. Love*, 655 F.3d 709 (7th Cir. 2011); *Bridges v. Gilbert*, 557 F.3d 541 (7th Cir. 2009); *Ortiz v. Downey*, 561 F.3d 664 (7th Cir. 2009); *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005); *Tarpley v. Allen County, Indiana*, 312 F.3d 895 (7th Cir. 2002); *Sasnett v. Litscher*, 197 F.3d 290 (7th Cir. 1999) (directly addressing the *Turner/Smith* conflict and stating that while *Smith* was later, "it was not a prison case and it did not purport to overrule or limit *Turner*. . ."); *Mack v. O'Leary*, 151 F.3d 1033 (7th Cir. 1998); *Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir. 1994); *Arnhold v. McGinnis*, 9 F.3d 112 (7th Cir. 1993); *Bullock v. McGinnis*, 14 F.3d 604 (7th Cir. 1993); *Nobles v. Hoffman*, 1 F.3d 1244 (7th Cir. 1993); *Jackson v. Hanlon*, 983 F.2d 1072 (7th Cir. 1992); *Al-Alamin v. Gramley*, 926 F.2d 680 (7th Cir. 1991); *Young v. Lane*, 922 F.2d 370 (7th Cir. 1991).

Petitioners overstate the Second and Third Circuits' suggestions of a *Turner/Smith* conflict. In *Salahuddin v. Goord*, 467 F.3d 263, 274 n.3 (2d Cir. 2006), the Second Circuit applied *Turner* to an inmate's claim that he had been denied various Muslim services. The court offered no opinion on *Smith* because neither party had raised it.[14] Similarly, in *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002), the Third Circuit approved under *Turner* a New Jersey correctional facility's decision to restrict the activities of the Five Percent Nation, a religious sect conclusively linked to brutal prison violence and riots. *Id.* at 513. Writing for the majority, then-Judge Alito mentioned *Smith* in a footnote, remarking that because nobody had raised the issue below, the court would not decide "whether the regulations at issue here would violate the Free Exercise Clause if applied outside the prison context." *Id.* at 515 n.5.

Petitioners flatly misstate the Tenth Circuit's holding in *Boles v. Neet*, 486 F.3d 1177 (10th Cir. 2007), arguing that the court criticized *Turner*'s applicability in light of *Smith* but did not address the issue *solely* because counsel did not raise it. Pet. 9, n.4. In fact, the Tenth Circuit noted that *Turner* and *Smith* were at odds, but applied *Turner* only after

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[14] The Second Circuit consistently has applied *Turner* to prison free exercise cases. *See*, e.g., *McEachin v. McGuinnis*, 357 F.3d 197 (2d Cir. 2004) (applying both RLUIPA and *Turner*); *Shakur v. Selsky*, 391 F.3d 106 (2d Cir. 2004); *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003); *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996) (applying both *Turner* and the "compelling interest" test of the Religious Freedom Restoration Act (RFRA), which was incorporated into RLUIPA after this Court held RFRA inapplicable to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

explaining at considerable length that (1) "*Smith* was not a prison case and it did not purport to limit or overrule *Turner*. . ." *Boles*, 486 F.3d at 1181; (2) while other appellate courts had questioned the effect of *Smith*, only one actually had applied *Smith*'s neutrality standard to a First Amendment case, and even that court also had applied *Turner*, *Id.* at 1182 (collecting cases); and (3) even after *Smith*, the Tenth Circuit had continued routinely to apply *Turner* to prison free exercise cases. *Id.* (*citing Beerheide v. Suthers*, 286 F.3d 1179 (10th Cir. 2002) and *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001)). The court then noted counsel's decision not to raise *Smith*, took that decision as counsel's agreement that *Smith* did not apply, and, considering all of the above factors, decided the matter under *Turner*. *Id.*

Neither did the Tenth Circuit "signal a change" in *Kay v. Bemis*, 500 F.3d 1214 (10th Cir. 2007). There, the panel cited *Smith* in admonishing the district court for inquiring into the centrality of a Wiccan's religious practices, *Id.* at 1220, granted the inmate relief under *Turner*, and mentioned the *Turner/Smith* issue only in a footnote, adding hypothetically that if *Smith* applied, the regulation at issue might be constitutional under the neutrality principle, but still challengeable under RLUIPA. *Id.* at 1219, n.3.

Lastly, in *Hakim v. Hicks*, 223 F.3d 1244 (11th Cir. 2000), the Eleventh Circuit mentioned the *Turner/Smith* relationship only in a footnote, declining to discuss the issue because counsel had not raised it. *Id.* at 1247, n.3. The court went on to rule in favor of the inmate under both *Turner* and RLUIPA.

iii. The Fifth Circuit consistently has applied *Turner*.

Finally, Petitioners incorrectly assert that "the Fifth Circuit has not yet directly determined *Turner*'s relevance in light of *Smith*." Pet. 10. This too is flatly wrong. The Fifth Circuit consistently and unwaveringly has applied *Turner* to prison free exercise claims, even after *Smith*. *See*, *e.g.*, *McAlister v. Livingston*, 348 Fed. Appx. 923, 931 (5th Cir. 2009); *Mayfield v. Texas Dept. of Criminal Justice*, 529 F.3d 599, 607 (5th Cir. 2008); *Baranowski v. Hart*, 486 F.3d 112, 120 (5th Cir. 2007); *Adkins v. Kaspar*, 393 F.3d 559, 564 (5th Cir. 2004); *Freeman v. Texas Department of Criminal Justice*, 369 F.3d 854, 860 (5th Cir. 2004); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 335 (5th Cir. 2009).[15]

Petitioners' claim of a circuit split is a significant exaggeration. No circuit has expressly rejected *Turner* for *Smith* and, rightly, no circuit has claimed that *Turner* has been overruled. As a result, there is no conflict warranting correction by this Court.

C. The district court correctly applied *Turner* to the facts.

A prison restriction is valid only "if it is reasonably related to legitimate penological

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[15] Petitioners claim that a perceived "lack of uniformity among the district courts of the Fifth Circuit" commands clarification by this Court. Pet. 10-11. Of course, an intra-circuit conflict is not grounds for such review. *See* S. Ct. R. 10. The proper vehicle for resolving such a conflict is rehearing *en banc*, but in this case, Petitioners' application for rehearing *en banc* failed to garner a single vote.

interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Leonard easily satisfies the *Turner* standard, as Petitioners failed to present any factual evidence at all that "The Muslim Program" poses a risk to security at DWCC.

i. The district court did not apply strict scrutiny to Leonard's First Amendment claim.

To get around the inextricably factbound determination that resulted from their failure to present evidence, Petitioners argue that the district court and the Fifth Circuit mistakenly applied an outdated strict scrutiny standard to Leonard's First Amendment claim. Pet. 11-14. This is simply a manufactured controversy; neither court did any such thing.

On the fact question of security, the district court noted that in *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969), the Fifth Circuit had reviewed several issues of *Mohammad Speaks* (*The Final Call*'s predecessor) which included not only controversial political cartoons and an editorial by Elijah Mohammad, but also the "The Muslim Program" – the exact same words to which DWCC objects here – and determined *as a matter of fact* that those materials were not so inflammatory as to pose a security threat to the Georgia prison system. *Id.* at 28; App. 27-29.

With that factual conclusion in mind, the district court then carefully applied *Turner*, analyzing in detail each element of the four-part test articulated therein. App. 29-34. And while Petitioners would have this Court believe that the

district court's mere mention of *Walker* means the court applied a pre-*Turner* strict scrutiny standard, Pet. at 12, even a cursory review of the district court's opinion reveals nothing like that. Nowhere in the district court's analysis of the First Amendment claim does the court say anything about applying strict scrutiny; indeed, nowhere in that section of the opinion does the court even use the phrase "strict scrutiny."

In short, Petitioners conjure their "strict scrutiny" argument out of thin air, so there is no need for this Court to intervene.

ii. *Thornburgh* does not allow Petitioners to arbitrarily declare religious publications a security risk.

Lastly, neither the district court nor the Fifth Circuit misinterpreted *Thornburgh v. Abbott*, 490 U.S. 401 (1989), to require that the ban be justified by a direct link to physical violence. Pet. 12-13. The district court merely recognized that while *Thornburgh* may not require a link to physical violence, it still requires an "intolerable risk of disorder," *Thornburgh* at 417, and that Petitioners had failed to present evidence of even that. App. 30-31. Indeed, the district court expressly stated that DWCC did not have to wait for imminent physical violence; it noted that the facility could ban *The Final Call* if the language ever showed "intent to incite violence" or had a "substantially inflammatory effect on the inmates," App. 31.

The district court correctly recognized that Petitioners had failed to meet even the most minimal

evidentiary burden, and the Fifth Circuit affirmed for precisely that reason. There is no need for this Court to wade into an evidentiary void that has proven inescapable for Petitioners at every step.

CONCLUSION

Both the district court's and the Fifth Circuit's decisions are factbound conclusions made on a record devoid of evidence that *The Final Call* poses a security risk at DWCC. Moreover, even if a conflict existed among the circuit courts on which First Amendment standard applies, it would be immaterial to the outcome of this case, as the lower courts' correct resolution of Leonard's RLUIPA claim fully and independently supports the judgment below. *See* Eugene Gressman, *et al.*, Supreme Court Practice 248 (9th ed. 2007) (where the "resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied") (*citing Sommerville v. United States*, 376 U.S. 909 (1964)). Petitioners' failure to present to the district court the arguments they press here also makes this case uniquely unsuited for review.

For all of these reasons, the petition should be denied.

Respectfully Submitted,

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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

HENRY LEONARD	Civil Action No. 07-0813
VERSUS	Judge Walter
STATE OF LOUISIANA	Magistrate Hornsby

PLAINTIFF'S UNCONTESTED MATERIAL ISSUES OF FACT

NOW COMES Plaintiff HENRY LEONARD who sets forth his Uncontested Material Issues of Fact in support of his Motion for Summary Judgment as follows:

1. Henry Leonard is an inmate incarcerated at David Wade Correctional Center, Homer, Louisiana. He was first housed at David Wade Correctional Center beginning in July of 2005.
2. Henry Leonard is housed in the N-5 Dormitory in protective custody.
3. The N-5 Dormitory is located in a separate building from the general population, and is reserved for prisoners who need protection or are high profile.
4. N-5 Dormitory consists only of single one man cells, so Henry Leonard is housed in a single man cell.
5. Henry Leonard is a member of the Nation of Islam. His belief in the Nation of Islam is sincerely held.

6. Henry Leonard has been a member of the Nation of Islam since 1985

7. The Nation of Islam is a recognized religion

8. The Nation of Islam is a sect of the Islamic faith.

9. *The Final Call* is an official publication of the Nation of Islam. It is published once a week.

10. *The Final Call* contains articles of religious importance to the Nation of Islam.

11. Henry Leonard subscribed *The Final Call* in 2005.

12. Henry Leonard first received the first issue of *The Final Call* by mail at DWCC in October 2005.

13. Henry Leonard first received a notice of refusal of the *The Final Call* signed by DWCC officer Jackie Hamil on June 14, 2006.

14. Henry Leonard received a second notice of refusal of the *The Final Call* signed by DWCC officer Jackie Hamil on August 17, 2006.

15. Since June 14, 2006, Henry Leonard has not received any other issues of *The Final Call.*

16. Major Jackie Hamil in June 2006 was a corrections officer at DWCC.

17. In June 2006 Officer Hamil was in charge of the mail room at DWCC. The mail room receives inmate mail from outside sources.

18. As a part of his duties, Officer Hamil reviewed publications to determine if they violated departmental regulation C-02-009. Exh. 36 is

the regulation in effect in June 2006. Exh 37 is the regulation in effect in January 2007.

19. If Officer Hamil found a publication to violate the regulation, he took the publication to the warden to determine if in fact the pUblication violated the regulation.

20. In June 2006, Officer Hamil brought a current issue of *The Final Call* to Warden Venitia Michael for her review.

21. In 2006, in addition to being warden of DWCC, Venetia Michael was a "regional warden."

22. In June 2006, there were three regional wardens in the State of Louisiana.

23. Regional wardens review publications in an effort to create a uniform decision regarding the refusal of publications by the Louisiana Department of Corrections.

24. In June 2006, the regional wardens, Michael, Cain and LeBlanc reviewed *The Final Call.*

25. Warden Michael rejected the June 2006 issue of *The Final Call.* The decision is documented in an e-mail dated June 27, 2006.

26. DOC has rejected each and every issue of *The Final Call* since June 2006.

27. DOC has rejected each and every issue of *The Final Call* based upon an article entitled The Muslim Program which is included in every issue on the inside page of the back cover.

28. On March 25, 2008, one of the Regional Wardens, Burl Cain, requested the Nation of Islam to issue a "Corrections Version" of the *The*

Final Call. The proposed "Corrections Version" consisted of the publication without The Muslim Program.

29. No jurisdiction outside the State of Louisiana has banned *The Final Call.*

30. No person at DWCC or within the DOC had or has any knowledge of any event of any type of unrest or violence within the DOC that was connected with or caused in part by *The Final Call,* inspired by or caused in part by any teaching or doctrine of the Nation of Islam.

31. There is no objective evidence to support an across the board ban of *The Final Call.*

32. Neither Henry Leonard nor any other DOC inmate has had any incident or has been involved in unrest, a riot or other such thing at DWCC in which *The Final Call* was a contributing factor.

33. From June 14, 2006, until September 2008, Henry Leonard maintained possession of issues of *The Final Call* which he had received before June 3, 2006.

34. Henry Leonard was not involved in any violence or unrest whatsoever from June 14, 2006 until present.

35. *The Final Call* contains information and articles which contribute to the rehabilitation of an inmate. It is a central mission of the Nation of Islam to encourage Black men to improve their lives and be productive, healthy members of society.

36. *The Final Call* and Nation of Islam do not promote or advocate violence. It is absolutely forbidden within the Nation of Islam to carry a weapon of any type.

37. *The Final Call* is the only means by which an incarcerated member of the Nation of Islam can gain access to publications, audio lectures, and timely information pertaining to his religion.

38. DOC permits inmates to view television news broadcasts during permitted times of the day.

39. DOC permits inmates to read daily newspapers.

40. News broadcasts and daily newspapers by their very nature occasionally contain information which is racially inflammatory or which depicts violent acts.

41. DWCC officials did not block news about the shooting death of a black Homer resident by a white police officer, or of the dragging death of James Byrd, Jr., both of which could be considered "racially inflammatory."

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

HENRY LEONARD	Civil Action No. 07-0813
VERSUS	Judge Walter
STATE OF LOUISIANA	Magistrate Hornsby

EXCERPT FROM DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Leonard's right to exercise freedom of religion claims, therefore, should be evaluated under the *Turner v. Safely* [sic] factors explained in *Chriceol* and *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989).