IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 24-0885
Polk County Case No. CVCV057085

LEONARD GREGORY, DEE J. RADEKE, SEAN O'GEARY, JERRY NEWELL, JOHN HRBEK, CHAD WELSH, CLARENCE FENTON, JACK HAYS and JOSEPH LAWRENCE,

Plaintiffs-Appellants,

ZACHARY ZIMPEL, PHILIP STACY, RICHARD CORTEZ, GENE COOK, DONTE GILMORE and MELVIN DENNIS,

Plaintiffs,

v.

STATE OF IOWA, IOWA STATE LEGISLATURE and IOWA DEPARTMENT OF CORRECTIONS
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HON. JEFFREY FARRELL AND
HON. LAWRENCE MCLELLAN

AMENDED BRIEF OF PLAINTIFFS-APPELLANTS LEONARD GREGORY, DEE J. RADEKE, SEAN O'GEARY, JERRY NEWELL, JOHN HRBEK, CHAD WELSH, CLARENCE FENTON, and JOSEPH LAWRENCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes and Regulations:

Iowa Court Rules:

Secondary Sources:

STATEMENT OF ISSUES

I. **Iowa Code section 904.310A(1)'s Bar on Nudity Content Violates Fundamental Rights Secured by the Iowa Constitution.**

II. **The Courts Allowance of Tatman's Expert Testimony Constitutes Reversible Error**

III. **The Court Incorrectly Limited the Plaintiffs' Claim to Printed Materials.**

ROUTING STATEMENT

This appeal presents novel free speech challenge under the Iowa constitution to a statute that effectively bars Iowa's inmates access to materials featuring "nudity" while incarcerated. *See* Iowa Code § 904.310A(1)(2018). The appeal should be retained. Iowa R. App. P. 6.1101(2)(*a*)

NATURE OF THE CASE

Plaintiffs are inmates in Iowa's prison system. *See generally* D0003, Petition (09/26/18). They appeal following a final order holding Iowa Code section 904.310A(1), which bars funds appropriated to the Iowa Department of Corrections or other funds to be "used to distribute or make available any commercially published information or material to an inmate when such information or material . . . features nudity," is facially constitutional under the Iowa Constitution. *See generally* D0734, Bench Trial Order (04/25/24).

Plaintiffs contend the Court failed to fashion a test sufficiently protective of the free speech rights of incarcerated inmates under the Iowa Constitution by incorporating the federal test developed by the Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987) and overbreadth challenge. Alternatively, the Court erroneously admitted the untimely designated and disclosed "non-retained" expert without cause. Finally, the Court erred by ruling that challenges involving the regulation of the content of TV and other media were not before the court.

STATEMENT OF THE FACTS

I. Plaintiffs' Challenge Iowa Code section 904.310A(1) Under the Iowa Constitution.

A. Pre-Trial Proceedings.

Iowa Code section 904.310A previously provided the following:

> The director shall, as necessary, provide suitable space for reading material for inmates. For purposes of this section, 'reading material' does not include material depicting or describing the genitals, sex acts, masturbation, excretory functions, or sadomasochistic abuse which the average person, taking the material as a whole and applying contemporary community standards with respect to what is suitable material for inmates, would find appeals to the prurient interest and is patently offensive; and the material, taken as a whole, lacks serious literary, scientific, political, or artistic value.

Iowa Code § 904.310A (2017); *see also* Iowa Admin. Code r. 201-20.6(6–7) (09/26/2018) (implementing regulations).

This legislative scheme allowed psychologically approved inmates in Iowa's prisons to possess sexually explicit content but required such content to be reviewed in a "reading room" since the late 1980's. D0734 at 5; *Dawson v. Scurr*, 986 F.2d 257, 259 (8th Cir. 1993) (explaining the history of the "reading room"); *see* D0695, State's Exh. A., April 2016 Incoming Publications Policy (providing regulations implementing the "reading room"). Iowa inmates were also able to possess other types of sexually explicit or nudity content in their individual cells under this scheme. *See* D0734 at 5.

This balance shifted in 2018. 2018 Iowa Acts ch. 1168 § 21 (H.F. 2492). Iowa Code section 904.310A(1) now provides that:

> Funds appropriated to the department or other funds made available to the department shall not be used to distribute or make available any commercially published information or material to an inmate when such information or material is sexually explicit or features nudity.

Iowa Code § 904.310A(1) (2018). The Iowa Administrative Code defines several terms. *Id.* § 904.310A(2). "Commercially published information or material as "any book, booklet, pamphlet, magazine, periodical, newsletter, photograph or other pictorial depiction, or similar document." Iowa Admin Code r. 201-20.2 (10/10/2018). "Sexually explicit material" is defined as "a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation. Sexually explicit material does not include material of a news or information type. Publications concerning research or opinions on sexual, health, or reproductive issues should be admitted unless the publications are otherwise a threat to legitimate institutional interests." *Id.* "Nudity" is defined as "a pictorial depiction where genitalia or female breasts are exposed. When the pictorial depiction of the female breast displays the areola or nipple, this material will be rejected." *Id.* This new legislation is substantially similar to current federal code, 28 U.S.C. § 530C(*b*)(6)(*d*), colloquially referred to as the Ensign Amendment. *See* 28 C.F.R. § 540.72 (providing similar definitions for "sexually explicit" and "nudity"); s*ee generally* Adam K. Spease, Note, *Looking the Other Way: Porn, 'Playhouse' Prisons, and the*

Culture of Judicial Deference, 91 Iowa L. Rev. 1117, 1123–24 (2006) (discussing the legislative history of the Ensign Amendment).

Several Plaintiffs (Leonard Gregory, Dee J. Radeke, Sean O'Geary, Jerry Newell, Chad Welsh, and Clarence Fenton) sought injunctive and declaratory relief against the State of Iowa, Iowa State Legislature, and Iowa Department of Corrections [collectively "the State"] on the grounds that the new legislation and subsequent censorship of nudity in prison was unconstitutional. *See generally* D0003. The Petition cited various constitutional grounds including the free speech guarantees of Article 1, Section 7. D0003 at ¶ 12. Plaintiff-Appellant John Hrbek separately filed an intervenor petition in June 2019, raising issues with the State's censorship of television, movies and music. Plaintiff-Appellant Jason Lawrence filed his respective intervenor petition in November 2019. D0070, Hrbek Intervener Pet. (06/05/19); D0245, Gilmore & Lawrence Intervener Pet. (11/18/19). They were granted intervention on January 29, 2020. D0283, Order on Pending Mots. (01/29/20).

Early in litigation, the Court entered a ruling partially granting the Plaintiffs' request for temporary injunctive relief on this new amendment. *See* D0039, Order on Mot. for Temporary Inj. (04/03/19) (Rosenberg, J.). While the Court denied temporary injunctive relief regarding enforcement of the "sexually explicit" content provision, the Court ordered that the State "shall not prevent the distribution of materials to the

Plaintiffs and other inmates similarly situated that features mere, non-sexually explicit, nudity" due to significant overbreadth concerns. *Id.* at 7–10. This injunction later was interpreted to solely cover "written materials" but not "edited television programming, music and rented videos." D0384, Order Re: Mot. for Clarification at 2–3 (07/15/20) (McLellan, J.). Despite the unambiguous injunction, the State "acted willfully in denying nude content" throughout the pending litigation. D0734 at 13, 33–35 (describing three editions of previously approved Playboy magazine denied to Plaintiff Welsh).

The State filed a summary judgment motion on March 6, 2020. *See* D0302, State's Mot. for Summ. J. (03/06/20). The Court partially granted and denied the State's motion on March 19, 2021. D0454, Order Re: Mot. and Cross Mot. for Summ. J. (03/19/21) (McLellan, J.). The Court declared that "Plaintiffs waived any challenge to defendants' ban on sexually explicit materials when they stated during the hearing that they are only challenging the ban on nude materials, not sexually explicit materials." *Id.* at 6; *see* D0734 at 2–3 (restating this waiver). The Court separately concluded that Iowa Code section 904.310A(1)'s definition of "commercially published information or material" only included "printed materials" and that the Plaintiffs' petition only challenged those materials. D0454 at 5–6; *see* D0734 at 2 (restating this holding).

In partially denying summary judgment, the Court determined that the State must provide "evidence demonstrating a connection between legitimate government

interest and the ban and/or scientific support for their rationale" under *Turner*. D0454 at 7. The Court explained that an evidentiary approach was consistent with rational basis analysis for Iowa constitutional challenges and would appropriately safeguard prisoners' legitimate constitutional rights from being curtailed on unsupported and conclusionary allegations from prison officials. *Id.* at 7–8 (citing *Aiello v. Letscher*, 104 F.Supp.2d 1068 (W.D. Wis. 2000)). The Court determined that the summary judgment record, mainly an affidavit from one prison official, was "simply conclusory without specific evidence of the connection" to the State's goals. *Id.* at 8. Consequently, the Court denied summary judgment on the free speech (including overbreadth), equal protection, substantive due process, and search and seizure claims. *Id.* at 15. The State was granted interlocutory appeal but voluntarily dismissed the appeal. D0455, State's Interlocutory Appeal Appl. (03/30/21); D0470, Order Granting Application (05/10/21); D0492, Procedendo (08/24/22). The case proceeded to trial.

B. Bench Trial Proceedings.

Judge Farrell conducted a bench trial from February 19 through 22, 2024. *See* D0734 at 3. The Plaintiffs testified in the narrative regarding why Iowa Code section 904.310A(1)'s bar on nudity content was unconstitutional. *Id.* The Court generally admitted Plaintiffs' various exhibits, subject to certain limitations. *Id.* at 4.

Plaintiffs indicated that nudity content to them is part of "all the things that are in the entire human culture that give us an idea what this is about, what life is about, what we're supposed to be doing as human beings." D0791 at 32:4–6 (Hays). Several Plaintiffs testified that they had never seen or experienced any issues related to inmate and staff safety based on inmates' possession of nudity publications. *See, e.g.,* D0791 at 22:22–24 (Hays), 43:14–18 (same), 48:24–49:1 (Cook), 84:4–5 (Cortez); 166:4–7 (Lawrence); D0790, Tr. Day Two of Bench Trial at 28:9-12 (Radeke), 32:20–22 (Fenton), 38:8–11 (Newell), 105:5–10 (Stacy). Plaintiffs further identified that various nudity content was being denied including but not limited to "pictures of art sculptures, paintings, things that deal with culture all around the world" for an art class at Grinnell college, a woman who was being used as an altar, and she was simply nude" in the *The Secret Life of a Satanist* by Anton Levy, "cherub angels" in *The Complete Works of William Bouguerau.* D0791 at 37:6–13, 167:19–168:10; D0790 at 135:1–18. Other arguments included lack of sexual violence against inmates according to PREA reports, lack of sex offender treatment (SOTP) outside of one prison in Newton, and how other regulatory options for meeting the State's interest were available. D0734 at 12–14.

The State presented three witnesses: Rebecca Bowker, Nicholas Lamb, and Anthony Tatman. *See* D0734 at 9, 15. Bowker was the head of the State's publication review committee [PRC]. D0789, Tr. Day Three of Bench Trial at 18:14–19, 19:24–

20:22. Lamb had general prison administration experience who had recently worked at three Iowa prisons from 2021 to 2024. D0788, Tr. Day Four of Bench Trial at 11:19–20, 12:15–22, 13:6–8 (02/22/24). Tatman, the State's untimely designated and disclosed expert witness, was a "clinical services director overseeing the supervision and treatment and evaluation of sex offenders" in the Fifth Judicial District of Iowa. D0789 at 89:17–19; D0630, State's Second Designation of Expert Witness (12/21/23).

Bowker testified about the PRC process for reviewing incoming material. D0789 at 19:24–24:22. She identified various types of material that was denied to inmates, including material that was inappropriately denied during the pendency of this litigation. *id.* at 29:18–32:6; *see also* D0734 at 9, 14. For example, she denied pictures of "a woman bending over and displaying her genital area even while wearing a thong swimsuit." D0734 at 15.

Lamb separately speculated that sexually explicit material possessed by inmates impacted internal security and treatment toward staff, though he failed to quantify the frequency and amount of such issues. D0788 at 15:9–17:14, 48:20–49:5; *see also* D0734 at 10. He offered the candid and unqualified admission that he "never had any issue since [he had] been working here with the nudity, just pornography." D0788 at 26:15–16, *id.* at 55:21–56:8 (explaining to his knowledge, various disciplinary reports for sexual assault were not due to nudity content); *see* D0734 at 11 (identifying that

"Lamb used the term ["porn"] to describe sexually explicit materials . . . [and] separated materials merely displaying nudity from his definition of porn").

Tatman testified about his treatment of sex offenders following their release from prison. D0789 at 91:13–94:20; D0734 at 9–10. However, he explained that he did not work directly with incarcerated individuals. D0789 at 97:10–13, 154:21–155:4; *see* D0734 at 26 (noting this limitation). Notwithstanding, he claimed that pornography, which he dramatically conflated between obscene and mere nudity, may reinforce problematic scripts for his released patients. D0789 at 95:12–22, 102:1–103:10; *see* D0734 at 9–10. He further claimed that various studies generally found that pornography consumption is correlated to aggression. D0789 at 110:9–113:17. But he also admitted that the studies did not establish pornography causes aggression, a reasonable academic debate existed on whether pornography was even correlated with aggression, and identified no studies involving specific analysis of pornography, let alone nudity, impacting prison conditions. *Id.*, 150:14–17, 131:14–17.

The State submitted six exhibits. D0659, State's Exh. List at 1 (02/05/24). Exhibits A through E included various Department of Correction policies regarding review of material subject to Iowa Code section 904.310A(1), and Exhibit F included Tatman's C.V. *Id.*; *see* D0789 at 26:14–15, 28:23–24, 91:12. Two studies discussing

pornography and aggression, Exhibits J and K, were denied admission, though submitted with an offer of proof. D0659 at 1; *see* D0789 at 143:9–146:25, 171:15–24.[1]

C. The Court Finds Iowa Code section 904.310A(1) Constitutional.

The Court entered its ruling on April 25, 2024. *See generally* D0734. The Court acknowledged the Plaintiffs sought relief under the Iowa Constitution but "did not find any constitutional provisions that were materially different between the Iowa and federal constitutions." *Id.* at 15. The Court proceeded to analyze the Plaintiffs' state constitutional free speech claim under *Turner*. D0734 at 17–18. The Court applied the legal framework for *Turner* laid out in the first summary judgment order, though doubted *Turner* required an evidentiary approach. *Compare id.* at 19 *with* D0454 at 7–8.

The Court identified three legitimate penological interests advocated by the State: "rehabilitation, safety for inmates, and safety for staff." *Id.* at 26. The Court first determined that the State's evidence, namely Tatman's testimony, was *insufficient* to justify barring nudity content for all inmates on the ground that it could benefit sex offender rehabilitation at all of Iowa prisons. *Id.*

However, the Court concluded that the State did establish a valid, rational connection between "inmate and staff safety" through Tatman's generalized

[1] Further trial testimony and exhibits will be discussed as necessary.

recollection of different studies and Lamb's nonspecific testimony that incidents occurred outside of Iowa. *Id.* at 26–27. The Court also noted that there "may be some ancillary rehabilitation benefits" in limiting content featuring nudity in Iowa prisons because sex offenders are housed in all Iowa prisons. *Id.* at 27. The Court determined that the State had sufficiently established the remaining *Turner* factors and upheld Iowa Code section 904.310A(1) as constitutional against the Plaintiffs' free speech rights. *Id.* at 27–28. The Court also rejected the Plaintiffs' other constitutional challenges. *Id.* at 28–32.

II. The State's Expert Designation and Disclosure Issues.

The State first designated an expert, Tracy Thomas, on November 22, 2019. D0246, State's First Designation of Expert (11/22/19). No information, beyond Thomas's name, was provided. *See id.*; *see also* D0307, Order Re: Pending Mots. (03/12/20) (McLellan, J.) (postponing a previously granted *Daubert* hearing because "the expert designated by the defendants has not issued a report or offered any opinions for the court to review").

A trial scheduling order was issued on February 26, 2020. *See* D0296, Trial Scheduling Order at ¶ 1 (02/26/20). This order provided the State's expert witness deadline was October 22, 2020. *Id.* at ¶ 7(*b*). The plan also required that "The expert witness's report of opinions is due on the date of designation." *Id.* at ¶ 7(*a*). The State

made no further designation or disclosure of any expert witness from November 2019 to October 2020. *See generally* Docket. This deadline lapsed prior to entry of the first summary judgment order and was not amended. *See* D0453, Order Continuing March 2021 Trial (02/25/21); *see also* D0509, Order Setting Trial for February 2024 (12/28/22).

The State untimely designated and disclosed a new expert, Tatman, as a "non-retained" expert on December 21, 2023, only sixty days before trial and three years after their October 22, 2020 deadline. *See* D0670, Ruling on Pending Mots. at 3 (02/06/24) (Farrell, J). Plaintiffs filed several motions explaining the State was in violation of this deadline. *See, e.g.,* D0638, Combined Mot. for Daubert Hearing and Strike Expert (01/11/24); D0640, ASP Plfs.' Resistance and Obj. to State's Designation of Expert Witness (01/11/24). The Plaintiffs requested that Tatman be excluded as an expert witness or that trial be continued to allow further discovery of Tatman such as a *Daubert* hearing. D0640 at 2.

Despite acknowledging that the "State does not have a good reason for the late designation" and disclosure, the Court declined to exclude Tatman at trial or continue the case to allow further expert discovery of Tatman. D0670 at 3–4. The Court reaffirmed its decision on the first day of trial. D0791 at 15:14–19.

III. Plaintiffs' Case Was Incorrectly Limited to Published Materials.

The Plaintiffs' petition sought relief against the State for any censorship of nudity material "that is visual, written, *auditory, video* or photographic." *See* D0003 at 3 n. * (emphasis added). Plaintiff-Appellant Hrbek's intervention petition more specifically identified that television shows, movies, and music lyrics were also being censored. D0070 at ¶¶ 14–15.

Plaintiffs respectfully alerted the Court that both pleadings challenged content bans for nudity on such mediums. D0353, Stacy Mot. to Include TV Programming at ¶ 2 (05/28/20) ("T.V. programming and movies are also considered an art"); D0381, Mot. for Clarification (06/02/20) (pointing to the arts definition in the original petition and Hrbek's intervenor petition). The Court acknowledged summary judgment evidence indicating that the State "believes section 904.310A encompasses movies and TV programming" but stated that "it must determine whether section 904.310A is applicable to the distribution of TV programming and/or movies." D0375, Order Re: Mots. to Compel at 6 (06/30/20) (McLellan, J.); D0305, Defs. Appendix at 43 (03/06/20) (Sperfslage affidavit indicating that the new law "limits violence, explicit sexual content, or nudity in *any* media format" (emphasis added)).

Nevertheless, the Court ruled that the "plaintiffs limited their challenge to the new law and did not separately challenge television or movies." D0454 at 5–6. The issue

was again raised at trial but the Court felt it was constrained by the summary judgment ruling whether it "was correct or not." *See* D0791 at 75:22–80:7. However, Plaintiffs were allowed to present various offers of proof on television censorship. *See, e.g., id.* at 83:4–84:12 (Cortez). A motion for reconsideration on the pleading question was denied in the final order, and the Court did not rule on television and movie censorship. *See* D0734 at 3 n.3.

ARGUMENT

I. Iowa Code section 904.310A(1)'s Bar on Nudity Content Violates Fundamental Rights Secured by the Iowa Constitution.

A. Error was Preserved.

"It is fundamental doctrine of appellate review that issues ordinarily be raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Plaintiffs sufficiently raised the issue of whether Iowa Code section 904.310A(1) was constitutional under the Iowa Constitution, particularly under Article 1, Section 7, in their petition, at trial, and through post-trial briefing. *See, e.g.,* D0003; D0788 at 88:18–92:2; D0709, ASP Plfs. Post Trial Br. (03/12/24). The Court ruled on Plaintiffs' constitutional claims. *See generally* D0734. Error has been preserved. *Meier*, 641 N.W.2d at 537.

B. Standard of Review.

Constitutional questions are reviewed de novo. *State v. Middlekauff*, 974 N.W.2d 781, 791 (Iowa 2022). "Under a de novo review, 'we make an independent evaluation of the totality of the circumstances as shown by the entire record.' " *Interest of N.S.*, 13 N.W.3d 811, 820 (Iowa 2024) (internal citation omitted).

C. Fundamental Free Speech Principles, Development of Constitutional Test for Prison Regulations Infringing on Inmates Free Speech, and the *Dawson* Cases.

1. Article 1, Section 7 Includes the Right to Possess Speech that Features Nudity.

Article 1, Section 7 of the Iowa Constitution provides: "Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press." Iowa Const. Art 1, § 7. "The framers of our present state Constitution served a people already organized into a popular form of government in which freedom of speech, thought, and opinion was universally accepted as a fundamental right." *State v. Sargent*, 124 N.W. 339, 347 (Iowa 1910). This fundamental right "is a vital right in an open society. We cannot lose sight of that basic constitutional principle although we have an unconventional [speech] which disturbs our sensibilities." *State v. Kool*, 212 N.W.2d 518, 520 (Iowa 1973).

"As a general principle, [free speech] bars the government from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).

"In 1973, the Supreme court decided the now famous case, *Miller v. California*, 413 U.S. 15 (1973)." *State v. Groetken*, 479 N.W.2d 298, 300 (Iowa 1991). Although, "[t]he court [in *Miller*] held obscene material is unprotected by Amendment 1 of the United States Constitution . . . state statutes regulating them must be carefully limited." *State v. N.D.D., Inc.*, 228 N.W.2d 191, 192 (Iowa 1975). Since *Miller*, the United States Supreme Court has identified that "sexual expression which is indecent but not obscene is protected by" free speech provisions. *Sable Cmm'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989); *cf. Mall Real Est., L.L.C v. City of Hamburg*, 818 N.W.2d 190, 200 (Iowa 2012) (identifying that live nude dancing "involves delicate issues of free speech under the Iowa Constitution"). That includes the mere nudity at issue in this appeal. *See Jenkins v. Georgia*, 418 U.S. 153, 161 (1974). Iowa Code section 904.310A(1), which operates as a content regulation on constitutionally protected speech, would normally be subject to strict scrutiny. *U.S. v. Playboy Ent. Grp.*, 529 U.S. 803, 812 (2000); *State v. Musser*, 721 N.W.2d 734, 744 (Iowa 2006).

2. Inmates Retain Their Constitutional Rights, including Free Speech, While Incarcerated.

This appeal presents a unique situation. Plaintiffs are all inmates of Iowa's prison system seeking to exercise their fundamental and protected free speech rights. The past half century of caselaw clearly reflects that prisoners retain such free speech rights while incarcerated.

Historically, inmates were deprived of all constitutional rights while incarcerated. "Indeed, for much of this country's history, the prevailing view was that a prisoner was a mere 'slave of the state,' who 'not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him.' " *Shaw v. Murphy*, 532 U.S. 223, 228 (2001) (internal citation omitted); *see, e.g., Ruffin v. Commonwealth,* 62 Va. 790, 791 (1871) ("The bill of rights is a declaration of general principles to govern a society of freeman, and not of convicted felons . . . [t]hey are slaves of the State . . . while in this state of penal servitude, they must be subject to the regulations of the institution."). As such, "courts ha[d] adopted a broad hands-off attitude toward problems of prison administration." *Procunier v. Martinez*, 416 U.S. 396, 405 (1974) *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989). One early opinion in Iowa appears to reflect this sentiment. *State v. Cahill*, 194 N.W. 191, 194 (Iowa 1923) ("Prisoners should understand at all time that absolute obedience to the rules of the prison must be observed.")[2]; *but cf. id.* (indicating that an Iowa inmate has a

[2] For example, early Iowa's prison systems adopted the "Auburn System" – a system that enforced a silence code on its prisoners. *See* Joyce McKay, *Reforming Prisoners and Prisons: Iowa's State Prisons – The First Hundred Years*, 60 Annals of Iowa 139, 142 (2001). One of Iowa's earliest wardens reflected how "the enforced silence imposed upon prisoners during the week, [was] so contrary to the laws of nature, association and habit, is one of the severest modes of punishment . . . " clearly contrary of basic free speech principles. Report of the Warden of the Iowa State Penitentiary at Fort Madison at 18 (1875) (available at

constitutional right under Article 1, section 17 of the Iowa Constitution for "clean and sanitary surroundings . . . and nothing less will serve the purposes and demands of society").

Courts began to abandon this "hands-off" attitude in the 1960's. *See* Stacy A. Miness, Note, *Pornography Behind Bars*, 85 Cornell L. Rev. 1702, 1705–06 (2000); *see, e.g., Sostre v. Preiser*, 519 F.2d 763, 764 (2d Cir. 1975) ("There was a time, of course, when prison inmates had no rights. That time is past." (internal citations omitted)). As the United States Supreme Court boldly declared "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974). Iowa courts soon recognized this unambiguous promise. *Fichtner v. Iowa State Penitentiary*, 285 N.W.2d 751, 756 (Iowa 1979) (en banc) *overruled on other grounds in Speller v. State*, 534 N.W.2d 445 (Iowa 1995) ("[O]ccupants of penal institutions, although prisoners, are persons, and they are not beyond the pale of the Constitution."); *see, e.g., Rudd v. Ray*, 248 N.W.2d 125, 132–33 (Iowa 1976) (indicating that Iowa's inmates have a "guaranteed right to exercise" religion under Article 1, section 3 of the Iowa Constitution).

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https://publications.iowa.gov/35570/1/Report_of_Waden_Iowa_State__Penitentiary_Fort_Madison_.pdf) [1875 Fort Madison Report].

Those retained constitutional rights include "free speech rights." *Risdal v. State*, 573 N.W.2d 261, 263 (Iowa 1998); *cf. Sink v. State*, No. 15-0264, 2016 WL 5930337, at *5 (Iowa Ct. App. Oct. 12, 2016) ("It is not true, as Sink would have it, that prisoners retain *no* right to unwritten entertainment." (emphasis in original)). Free speech "guarantees, often taken for granted in the free world, assume far greater significance in the total isolation of prison life." *See Nichols v. Nix*, 810 F. Supp. 1448, 1462 (S.D. Iowa 1993). "The simple opportunity to read a book . . . supplies a vital link between the inmate and the outside word." *Id.* (quoting *Wolfish v. Levi*, 573 F.2d 118, 129 (2d Cir. 1978) *rev'd Bell v. Wolfish*, 441 U.S. 520 (1979)). Such opportunity "nourishes the prisoner's mind despite the blankness and bleakness of [their] environment." *Id.* (quoting *Wolfish*, 573 F.2d at 129); *see Martinez*, 416 U.S. at 128 (Marshall, J., concurring) ("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.").

3. Federal Development Regarding the Appropriate Standard of Scrutiny on Inmates Retained Constitutional Rights.

Despite judicial acceptance that prisoners retain constitutional rights while incarcerated, courts also recognized that prison administration is a difficult task. *Martinez*, 416 U.S. at 405 (majority opinion). The United States Supreme Court first

attempted to articulate an appropriate constitutional test to balance these concerns in *Martinez*. *Id.* at 407. Under *Martinez*,

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . . [Prison officials] . . . must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Risdal, 573 N.W.2d at 264 (quoting *Martinez*, 416 U.S. at 413). *Martinez* has been frequently discussed as a "heightened standard of constitutional scrutiny." *Risdal,* 573 N.W.2d at 264; *see also* Miness, 85 Cornell L. Rev. at 1710–11 (indicating that *Martinez* created an intermediate scrutiny test). A vast majority of lower federal courts generally applied *Martinez* to "conte[n]t based censorship of books, periodicals, and newspapers mailed to prisoners" in the following decade and a half. *See Nichols*, 810 F. Supp. at 1457 n.16 (collecting cases); *see, e.g., Trapnell v. Riggsby*, 622 F.2d 290, 292–94 (7th Cir. 1980) (applying *Martinez* to a prison regulation that barred incoming pornographic and nude photographs not published for commercial use).

A narrow 5-4 majority of the United States Supreme Court deviated from *Martinez* in 1987 to create a new four factor test to determine the constitutionality of statutes and regulation impinging on inmates constitutional rights. *See Turner*, 482 U.S. at 86. These four factors are:

> 1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) the "absence of ready alternatives," or, in other words, whether the rule at issue is an "exaggerated response to prison concerns."

Risdal, 573 N.W.2d at 264 (quoting *Turner*, 482 U.S. at 89–90). The United States Supreme Court explained that it established the *Turner* factors because *Martinez* standard "was not appropriate for consideration of regulations that are centrally concerned with the maintenance of order and security within prisons." *Thornbugh*, 490 U.S. at 409–10.

Turner generally remains the test for prisoner's constitutional right litigation under the Federal Constitution. *See Johnson v. California,* 543 U.S. 499, 510 (2005) (collecting various constitutional claims applying *Turner*). *Turner* has also been applied to similar bans on sexually explicit and nudity content in prisons. D0734 at 19–26 (collecting cases).

4. Iowa Regulations on Limiting Inmates Sexually Explicit Content Tested in Dawson.

Iowa's appellate courts have not examined a *Turner* attack on Iowa Code section 904.310A(1). However, federal courts assessed the predecessor scheme in the "*Dawson*" cases. *See* D0734 at 5–6, 21; *see, e.g., Dawson v. Scurr*, No. 81-873-D (S.D. Iowa

Mar. 1, 1988) (Bremer, Magistrate Judge) [hereinafter *Dawson I*][3]; *Dawson v. Scurr*, No. 81-873-D (S.D. Iowa. Sept. 16, 1991) (Bremer, Magistrate Judge) *rev'd Dawson v. Scurr*, 986 F.2d 257 (8th Cir. 1993) [hereinafter *Dawson II*][4]; *Dawson v. Scurr*, 986 F.2d 257 (8th Cir. 1993).

In *Dawson I*, inmates constitutionally challenged an administrative rule that "regulate[d] inmates' receipt of certain types of sexually explicit publications." *Dawson I* at 15. This regulation allowed the PRC to deny a publication if "it present[ed] danger to the security or order of an institution or is detrimental to the rehabilitation of inmates." *See* Iowa Admin. Code r. 291-20.6(4) (1985). One of the "authorized reasons" for denial was if the publication "contain[ed] material portraying bestiality, sado-masochism, child nudity, or child sexual activity, or photographic portrayal of fellatio, cunnilingues, masturbation, ejaculation, sexual intercourse, or male erection." *Id.* r. 291-20.6(4)(*b*).

Magistrate Judge Bremer held that the State failed establish a valid, rational connection between the regulation and "security problems" under *Turner*. *Dawson I* at 21–24; *but see also id.* at 21 (believing that *Martinez* was more appropriate than *Turner*

[3] Attached pursuant to Iowa R. App. P. 6.904(2)(*a*)(2)(2). This order is from an appeal appendix for *Dawson II*.

[4] Attached pursuant to Iowa R. App. P. 6.904(2)(*a*)(2)(2). This order is also from an appeal appendix for *Dawson II*.

because it was a "content-specific regulation and absolute censorship"). The Court identified that the regulation was too "varied application" from PRC members on which material should be barred, and in any event, certain sexually explicit materials were still allowed into the individual cells that raised "the same or greater security concerns as those displays which are banned." *Id.* at 22. Second, the Court explained that "general feeling" of security problems from the testimony of two prison administrators was insufficient, considering the regulation applied "regardless of the security level of the institution to which the inmate is sent" and the State had a ready alternative to ban any specific publication that "is likely to be disruptive or produce violence." *Id.* The Court also observed that several institutions outside of Iowa did not ban such content which "demonstrates the lack of a legitimate government interest in security and order by banning only certain types of sexually explicit portrayals." *Id.* at 23–24. Magistrate Judge Bremer's report and recommendation was subsequently adopted, with minor changes, and the State chose not to appeal. *Dawson,* 986 F.2d at 259.

The State amended its regulations following *Dawson I*. *See Dawson II* at 2–3. Material that was a "portrayal of fellatio, cunnilingus, masturbation, ejaculation, sexual intercourse, male erection, or other sexually explicit materials" was denied if that material was "detrimental to the rehabilitation of an individual inmate, based on psychological/psychiatric recommendation." *Id.* at 3 n.3. However, psychologically fit

inmates could review such material in a "designated controlled area" or "reading room." *Id.*

Inmates again challenged this regulation. *Dawson II* at 13–15. Magistrate Judge Bremer, again, held that the record could not "support a finding that there is a rational connection between the regulation" and the State's security and rehabilitation concerns. *Id.* at 14. The Court explained that that there was a sufficient disciplinary system in place to deter trading materials to those who were psychologically unfit. *Id.* The Court also identified the lack of evidence as to why a reading room was more cost effective than searching the cells of the few psychologically unfit inmates. *Id.* at 14–15. Lastly, the Court also pointed to continued unpredictable interpretation by the PRC of certain sexually explicit terms. *Id.* at 14–15.

The Eighth Circuit reversed Magistrate Judge Bremer. *See generally Dawson v. Scurr*, 986 F.2d 257 (8th Cir. 1993). The Eighth Circuit noted that "unlike a complete prohibition, [the rule] merely restricts the time and place of access to certain sexually explicit materials" which was an acceptable accommodation to advance prison security and inmate rehabilitation *Id.* at 261. The Eighth Circuit further identified that "[p]rison officials had testified that screening all of the inmates would be expensive, create a tremendous administrative burden, and require an inordinate amount of administrative

staff time." *Id.* at 261–62. The Eighth Circuit concluded that individualized cell searches was not an easy alternative *de minimis* cost to a reading room. *Id.* at 262.

Although the Eighth Circuit upheld the "reading room" regulation, the Eighth Circuit made several caveats. First, the Eighth Circuit identified that the regulation "does not *ban* such materials from prison" and that "inmates are allowed to keep many sexually explicit materials in their cells" including nudity content. *Id.* at 261–62 (emphasis in original). Rather, the regulation operated as more of a time, place, and manner restriction than a content-ban. *Id.* Second, the Eighth Circuit identified that the State's "expert witness testified that the restricted publications, which depict sex acts, are more detrimental to rehabilitation" than pictures of mere nudity. *Id.* at 262; *see id.* n. 8 (explaining the regulations "appears to be a lawful attempt to limit access to those depictions which are especially problematic.").

D. Heightened Scrutiny Is Appropriate For Inmate Constitutional Rights Claims Under the Iowa Constitution.

Notwithstanding the federal framework, this appeal involves significant novel issues for prisoner constitutional claims under the Iowa Constitution. Although Iowa's courts have applied *Turner* to inmate constitutional claims under the Federal Constitution, Iowa has not clearly held whether *Turner* should be the appropriate constitutional standard for a content-based ban on a prisoner's free speech rights under the Iowa Constitution. *See, e.g., Bryson v. Iowa Dist. Ct.,* 515 N.W.2d 10, 11 (Iowa 1994)

(per curiam) *overruled on other grounds by James v. State,* 541 N.W.2d 864 (Iowa 1995) ("The issue presented in this case is whether Bryson's *First Amendment* rights were violated . . ." (emphasis added)).

Iowa's courts "jealously guard [the] right to construe a provision of [the] state constitution differently than its federal counterpart, though the two provisions may contain nearly identical language and have the same general scope, import, and purpose." *State v. Brown*, 930 N.W.2d 840, 847 (Iowa 2019). "We have emphasized that federal court opinions about the *Federal* Constitution do not dictate *our* interpretation of the Iowa Constitution." *State v. White*, 9 N.W.3d 1, 10 (Iowa 2024) (emphasis in original).

Plaintiffs repeatedly noted these axiomatic principles in their pleadings and pre-trial filings. *See, e.g.,* D0003 at ¶ 12C; D0070 at ¶ 13. D0024, ASP Mot. for Inj. at ¶¶ 11–14 (01/16/19) (arguing that the "reasonably related" standard should not apply under the Iowa Constitution and citing the *Martinez* standard); D0408, ASP Plfs. Mem. in Resistance to State's Mot. for Summ. J. at 3–4 (08/06/20). Plaintiffs continued this argument at trial and in post-trial filings. *See, e.g.,* D0789 at 98:10–100:6 (colloquy between Plaintiffs Hrbek, Hays, and Judge Farrell regarding whether *Turner* should be the appropriate standard under the Iowa Constitution); D0788 at 88:18–92:2 (Hrbek's

closing argument); D0709 at 14 (seeking the Court to "expand on those rights, pursuant, to our State's constitution, article 1, section 7").

Plaintiffs' filings and testimony demonstrate they sought a heightened standard of review for their state constitutional claims than *Turner*. *Id.*; *see Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994) (explaining "some leeway must be accorded from precision in draftsmanship" of pro se filings). Therefore, Plaintiffs affirmatively request adoption of a heightened scrutiny test, beyond *Turner*, for prisoner constitutional right litigation under the Iowa Constitution, at least as applied to content-based restrictions on fundamentally protected free speech.[5]

1. The Iowa Constitution Provides Broad Individual Rights Protections Particularly Free Speech Rights, Even for Iowa's Incarcerated.

Iowa has previously identified the strong emphasis of individual rights enshrined in Iowa's Bill of Rights. *State v. Short*, 851 N.W.2d 474, 482–84 (Iowa 2014). Notably, the Iowa Constitution provides broad free speech protection for Iowans at Article 1, Section 7. *White*, 9 N.W.3d at 6–7 (identifying the text of the Iowa

[5] It is equally true that federal constitutional law does not provide a floor under the Iowa Constitution. *State v. Wright*, 961 N.W.2d 396, 403 (Iowa 2021). But as litigation developed, the State appeared to concede that the Iowa Constitution provides for at least a *Turner* test. D0706, Defs.' Proposed Order at 8–11 (03/05/2024) (discussing how statute passed *Turner* scrutiny). The Court should apply *Turner* if it declines to adopt a heightened scrutiny test. *See, e.g., Planned Parenthood of the Heartland v. Reynolds*, 865 N.W.2d 252, 254 (Iowa 2015) (applying the undue burden test under the Iowa Constitution due to State's concession).

Constitution as the starting point for constitutional interpretation); *cf. Rasheed v. Comm'r of Corr.*, 845 N.E.2d 296, 301–04 (Mass. 2006) (deviating from *Turner* factors claims based on the "right of religious exercise to inmates" due to the text of the Massachusetts Constitution).

Article 1, Section 7 states that "*Every person* may speak, write, and publish his sentiments *on all subjects*, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the *liberty of speech*, or of the press." Iowa Const. Art. 1, § 7 (emphasis added). Although Iowa caselaw has summarily indicated that Article 1, Section 7 is generally co-extensive with the First Amendment, several state supreme courts have found that more analogous state constitutional free speech provisions textually provide greater protection than the First Amendment. *Bierman v. Weier*, 826 N.W.2d 436, 451 (Iowa 2013) ("[T]he Iowa constitution generally imposes the same restrictions on regulation of speech as does the federal constitution.") *with Wilson v. Sup. Ct.*, 532 P.2d 652, 659 (Cal. 1975) (*en banc*) ("A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press.") *and State v. Henry,* 732 P.2d 9, 15 (Or. 1987) ("The text of Article 1, section 8, is broader [than the First Amendment] and covers any expression of opinion . . . and also covers 'any subject whatever' . . .").

As plainly interpreted, Article 1, Section 7's guarantees apply to "any subject whatsoever" which includes materials featuring nudity. *Accord Henry*, 732 P.2d at 12 ("The Oregon constitutional provision also covers "any subject whatever" and does not contain any express exception for obscene communications."). This expansive right "is not a right belonging only to the press: It is the right of every person." *Bierman*, 826 N.W.2d at 474 (Hecht, J., concurring in part and dissenting in part). Article 1, Section 7 provides no specific limiting language for this constitutional protection for Iowans, incarcerated or otherwise.

The only limiting textual feature in Iowa's Bill of Rights regarding incarcerated Iowans is Article 1, Section 23. That provision states "There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime." Iowa Const. Art. 1, § 23. Notably, this provision was purposively amended from the 1846 Iowa Constitution to remove slavery as a tool for the State to punish incarcerated Iowans. *Compare id. with* Iowa Const. Art. 1., § 23 (1846); *see* 1 *The Debates of the Constitutional Convention; of the State of Iowa* 209 (1857) ("I wish to change the phraseology of this section, so as to declare that slavery shall not exist in this State under any circumstances; and that involuntary servitude, and not slavery, shall be the punishment of crime."); *see also Rivas v. Brownell*, No. 23-1829, 2025 WL 645109 at *5 (Iowa Feb. 28, 2025) (recognizing textual changes to the Iowa Constitution as important tool in

constitutional interpretation). This deliberate textual change demonstrates that Iowa's founders sought to limit the State's ability to deprive an incarcerated individuals' rights and is certainly inconsistent with American jurisprudence describing a prisoner as a "slave of the state." *Ruffin*, 62 Va. at 791; *see* Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 Ariz. L. Rev. 983, 1022 (2009) (contrasting Article 1, section 23 with *Ruffin's* holding).

Early Iowa accounts recognize the fundamental importance of prisoners ability to have sufficient reading material consistent with basic free speech principles. *See Wright*, 961 N.W.2d at 402 (explaining that the Iowa Constitution is reviewed under the "lamp of precedent, history, custom, practice"). One of Iowa's first prison wardens recognized reading material was "a source of great benefit to the prisoners." *See* Warden's Office, Report of the Warden of the Iowa Penitentiary, to the Governor of the State of Iowa at 8 (1862) (available at https://publications.iowa.gov/38047/1/report_of_warden_of_IA_penitentiary_J87.I8%201861-62.pdf). This Warden later explained a "large per cent. of [prisoners] are fond of reading, and should be afforded every opportunity of storing the mind with something useful . . . ." Biennial Report of the Warden of the Iowa Penitentiary to the Governor and Eleventh General Assembly at 7 (1866) (available at

https://publications.iowa.gov/36066/1/biennial_report_of_the_warden_of_the_iowa_penitentiary_J87.I8%201866%20V.2.pdf). Several reports echoed a similar embrace in the later half of the nineteenth century. 1875 Fort Madison Report at 21 ("To these books the prisoners have free access at all times . . . a privilege which all who are able to read eagerly avail themselves of and greatly enjoy."); Biennial Report of the Warden of the Penitentiary to the Governor: September 30, 1879 at 55 (1880) (available at https://publications.iowa.gov/35452/1/biennial_report_of_the_warden_of_the_penitentiary_J87.I8%201880%20V.4.pdf) ("A good book is always a friend to the reader, but a good book is more highly appreciated by a prisoner than it would be under conditions of freedom. Its perusal . . . breaks the monotony of prison life and labor . . . ."). These accounts are consistent with the modern recognition of the importance of free speech inside prison walls. *Nichols*, 810 F. Supp. at 1462.

2. Turner *Is Inapt For Fundamental Free Speech Protections.*

Turner has been subject to a wide variety of criticism. It first rests on a hotly contested jurisprudential foothold. *See Turner*, 482 U.S. 78, 100–16 (Stevens, J., concurring in part and dissenting in part). As explained in the partial dissent, the new "logical connection" test could be considered "virtually meaningless." *Id.* at 100. Justice Stevens feared *Turner* could "uphold restrictions on prisoners' First Amendment rights" "whenever the imagination of the warden produces a plausible security concern"

"rather than on the basis of evidence that the restrictions are needed to further an important governmental interest." *Id.* at 100, 101 n. 1. For example, *Turner* could conceivably allow for "the use of bullwhips on prisoners" as a logical connection to prison discipline, or "a total ban on inmate communication," much like the "silence codes" in Iowa's early prisons. *Id.*; *see* McKay, 60 Annals of Iowa at 142.

The subsequent academic literature has also been critical of a lenient *Turner* standard. James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoner Rights*, 10 N.Y. City L. Rev. 97, 115–23 (2006); Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 B.Y.U. L. Rev. 857, 905–915 (1992). Consistent with Justice Steven's concerns, scholars have noted that *Turner* fails to adequately recognize prisoner's constitutional rights and has reinforced unnecessary government intrusion into a particularly vulnerable population of society. Robertson, 10 N.Y. City L. Rev. at 119; Gutterman, 1992 B.Y.U. L. Rev. at 913. More problematically, *Turner* "draw[s] no distinction between 'weak' (non-fundamental) and 'strong' (fundamental) rights." Robertson, 10 N.Y. City L. Rev. at 120. The application of *Turner* has drawn particular academic ire as applied to fundamental right to read. Alicia Bianco, *Prisoners' Fundamental Right to Read: Courts Should Ensure That Rational Basis is Truly Rational*, 21 Roger Williams U. L. Rev. 1, 34–35 (2016) (noting the disconnect between the overly deferential *Turner* test and importance of free speech); *see also* Miness,

85 Cornell L. Rev. at 1728–29 (same). Consistent with this concern, several courts, including Magistrate Judge Bremer in *Dawson I*, identified that heightened scrutiny was more appropriate to apply to content-based free speech claims prior to clarification in *Thornburgh. Nichols*, 810 F. Supp. at 1458 n.16; *Dawson I* at 20–21.

The fundamental premise of *Turner*, that prison administration is difficult, also has limited application in this particular content ban. Iowa Code section 904.310A(1)'s ban does not arise because of an exercise of discretion by department officials after internal deliberation to develop prison policy but rather questionable legislative motives. Spease, 91 Iowa L. Rev. at 1123–34 (examining that Ensign Amendment was based on hostility toward prisoners). With content bans, there is no true deference or judgment by prison officials being made, but rather simply following a legislative directive.

Turner should not be applied to strong fundamental retained rights that arise under the Iowa Constitution. Article 1, Section 7, textually contains broad protections and its guarantees do not discriminate between those inside or outside prison walls. The importance of prisoner free speech protections, particularly the right to read, is amplified in the isolation of prison life, a point agreed with by Iowa's earliest prison administrators. And applying *Turner* to a legislatively created content ban utterly fails to appreciate this strong fundamental right.

The Iowa Supreme Court should adopt a heightened scrutiny approach under the Iowa Constitution, whether that is strict scrutiny or apply a previously well-established *Martinez* test, and remand for further proceedings. *Johnson*, 543 U.S. at 515 (remanding for application of heightened scrutiny).

E. The Record Fails to Establish That Iowa Code section 904.310A(1) is Constitutional, Even Under *Turner*.

If the Appellate Court seeks to apply its chosen scrutiny to the record in this appeal, it is important to set a brief framework.[6] It must critically review the record to ensure that the State's evidence is specifically tied to the challenge at issue: *nudity* content. In other words, the proffered evidence should not simply conflate nudity under the general label of "pornography," that includes obscenity, sexually explicit, and nudity, and use this overbroad term to justify a ban on nudity. To do so would disrespect the plain text of Iowa Code section 904.310A(1) and different administrative regulations separately defining those terms. *see* Iowa Admin. Code r. 201-20.2 (10/10/2018) (separately defining "sexually explicit" or "nudity"); *Middlekauff,* 974 N.W.2d at 794 (explaining how the term "or" operates in statutory interpretation).

[6] Plaintiffs proceed to analyze this record under *Turner* without waiving a higher standard of review is warranted under the Iowa Constitution. There is no doubt that if the statute is unconstitutional under *Turner*, then the State would also fail to meet *Martinez* or the typical strict scrutiny test. *See, e.g., Dawson I* at 21–24 (applying *Turner* to conclude regulation failed *Turner* and *Martinez* scrutiny).

1. The State Failed to Establish a Valid, Rational Connection to Inmate and Staff Safety.

The first *Turner* factor is that "there must be a 'valid, rational connection' between the prison regulation and the legitimate prison interest put forward to justify it." *Turner*, 482 U.S. at 89. "Generally, the prison bears the burden of proving the existence of a 'rational connection' between the challenged regulation and a legitimate governmental interest." *Sisney v. Kaemingk*, 15 F.4th 1181, 1190 (8th Cir. 2021); *see also Turner*, 482 U.S. at 89 (explaining the government must "put forward" the legitimate governmental interest). "If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor." *Shaw*, 532 U.S. at 229–30. Significant debate exists as to whether the government must provide independent evidence or can use common sense to establish a "valid, rational connection" as aptly recognized by both Judge McLellan and Judge Farrell. *Boyd v. Stalder*, No. 03-1249-P, 2008 WL 2977363, at *3 (W.D. La. Aug. 1, 2008) (noting circuit split between *Ramirez v. Pugh*, 379 F.3d 122 (3d Cir. 2004) and *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998)); *compare* D0454 at 7–8 *with* D0734 at 19. Regardless of what evidence is brought forward, courts owe a deference to prison officials on their judgment when evaluating the record. *See Turner*, 482 U.S. at 86. However, that deference does not extend to "their statements of what the facts are." *Sawyer v. MacDonald*, 768 Fed. Appx. 669, 672 (9th Cir. 2019).

The Court determined the State established a valid, rational connection to generalized notions of "inmate and staff safety." D0734 at 26–27 (indicating more specific goals of inmate fights and harassment of female staff). The Court pointed to: 1) Tatman's testimony that "studies support a link between materials containing nudity and violence in prisons"; and 2) Lamb's testimony that he had witnessed incidents involving sexually explicit material. *Id.* This evidence is wholly insufficient.

First, jurists have cautioned about the use of studies in these challenges. *Ramirez*, 379 F.3d at 129–130 (3d Cir. 2004); *Amatel*, 156 F.3d at 203–214 (Wald, J., dissenting). For example, in *Ramirez*, the Third Circuit refused to accept that general studies could establish a rational connection to "the entire federal inmate population." *Id.* at 129. The Appellate Court should recognize the same concerns, particularly with a record in which no study was admitted. *See id.* 130 n. 3 ("We are unclear from its passing reference to 'the scholarly findings detailed in *Amatel*' whether the District Court actually examined and considered the scholarship at issue, and therefore reject the argument that its reliance on these findings was sufficient for establishing the requisite rational connection.").

Tatman's[7] testimony further reveals that the studies he referenced stand on shaky theoretical underpinnings and have questionable relevance. First, he admitted that his testimony on studies did not separate "pornography," a term that equally conflates obscene, sexually explicit, or mere nudity content including art, which creates an overbroad sample size to apply to this particular issue. *See Amatel*, 56 F.3d at 209 (Wald, J., dissenting) ("[T]here is no evidence that simply viewing nonpornographic nudity or depictions of sexual activities (as opposed to pornography) has any effect at all."); *Aiello*, 104 F. Supp.2d at 1079 ("However, although defendants insist that there is a rational connection between banning 'the materials' prohibited by the regulation and furthering these legitimate objections, they failed to explain which materials they mean."). Second, he also admitted that studies only establish pornography is merely correlated to aggression, not causative. D0789 at 150:14–17. Third, he conceded that there was reasonable academic debate on whether pornography was even correlated to aggression. D0789 at 131:14–17, 136:22–137:1; *see Amatel*, 56 F.3d at 209 (collecting studies indicating pornography is not correlative with aggression). Fourth, he candidly admitted the studies "do not involve specifically the inmate population." *Id.* at 113:14–17, 134:15–17; *see Dawson I* at 10 (indicating the lack of a study of Iowa's prisons as a reason

[7] Plaintiffs object to the Court using Tatman's expert testimony as an untimely designated and disclosed expert as explained in Section II.

for unconstitutionality). Fifth, his testimony does not establish how heightened aggression further translates into issues with inmate safety and staff harassment. These reasons establish that Tatman's testimony on studies are of hardly any value. *See Ramirez*, 379 F.3d at 130 n.3.

The shaky theoretical foundation of these studies is amplified when considering the historical context. Iowa's incarcerated have had access to nudity content since at least the late 1980's, including through litigation due to the 2019 injunction. *Dawson II* at 2; D0039; *see also* D0734 at 9, 15 (noting that nudity content was circulated in Iowa's prison during litigation despite the State's willful violation of the injunction). If nudity content had any reliable correlation to inmate and staff safety issues, as the State claimed in resisting the injunction request, then such correlation should be well-established through fact in the five years, let alone thirty-five years, prior to trial. *See* D0020, State's Mem. in Resisting Inj. Relief at 9 (01/02/19) ("If the law is not allowed to be enforced, *there will be* potential issues related to security and rehabilitation." (emphasis added)); *see also Turner*, 482 U.S. at 98 (noting that marriage ban was not reasonably related when "marriages had been routinely been allowed as a matter of practice at Missouri correctional institutions prior to adoption of the rule").

But the only evidence regarding incidents of inmate discipline and staff harassment based on any content was Lamb's testimony. *See* D0734 at 26–27. And

Lamb affirmatively testified, in no uncertain terms, that he had "**never had any issue since [he] been working here with the nudity**." D0788 at 26:14–16 (emphasis added). He further testified that he had no knowledge that prison sexual assaults were due to nudity content. *Id.* at 55:21–56:8. Lamb's testimony was consistent with the Plaintiffs' testimony that nudity content did cause inmate fights or staff safety. *See, e.g.,* D0791 at 22:22–24. Notably, Lamb's lack of a problem with nudity parallels one of the main reasons *Turner*'s marriage ban "sweeps much more broadly then can be explained by petitioners' penological objectives." *Turner*, 482 U.S. at 98 (noting that "Missouri prison officials testified that generally they had experienced *no problem* with the marriage of male inmates" (emphasis added)).

Lamb's general testimony that he had seen "some" incidents of inmate safety and staff harassment in his thirty years of experience should also face serious scrutiny. D0791 at 12:1–22. He never quantifies the number of incidents that he referred to in total or how frequent these issues arose. *Id.* at 48:20–49:5. Nor did he connect the amount of those incidents to specific nudity content. *Id.* at 11:8–19:14. His speculative testimony that fights or harassment are correlated with nudity has about just as much correlation to fights that occur over "tattoos" and "commissary." *Id.* at 35:1–3, 43:12–17. At best, Lamb's limited testimony is "general feeling that security problems would occur" which is insufficient to establish a valid, rational connection. *Dawson I* at 22.

The State failed to establish a valid, rational connection for banning nudity content to support inmate safety and staff safety goals given the limited application of their studies and failure to substantiate their theory in fact. The Court erred in concluding otherwise.

2. The State Failed to Establish a Valid, Rational Connection to "Ancillary" Rehabilitation.

Despite correctly concluding that Tatman's testimony failed to establish a valid, rational connection to a rehabilitation goal, the Court identified that there "may" be "some" "ancillary" "rehabilitation benefits to barring materials with nudity in prisons." D0734 at 27. The Court concluded that barring nudity content in all of Iowa's prisons could benefit the rehabilitation sex offenders housed in all Iowa prisons "even though they are not in a sex offender treatment program at that time." *Id.*; D0789 at 14:2–3, 19:20–21 (testimony regarding sex offenders and prison); *see generally Bomgaars v. State,* 967 N.W.2d 41 (Iowa 2021) (explaining SOTP at Newton).

Again, courts have reflected skepticism with a general rehabilitation justification for sex offenders can justify a full-throated content ban for all inmates – let alone an "ancillary" one. *See Ramirez*, 379 F.3d at 127–30; *see also Amatel*, 156 F.3d at 209 ("[I]t needs to be stressed that the assertion of 'rehabilitation' impinging on prisoner's First Amendment rights is particularly disconcerting in its potential for abuse."). As *Ramirez* explained, "even though the connection between the amendment

and the rehabilitation of federal sex offenders may be obvious . . . that connection becomes attenuated upon consideration of the entire population of BOP inmates." 379 F.3d at 128. For example, there is a "possibility that the proscription rationally applies to such a small percentage of the BOP inmate population that its connection to the government's rehabilitative interest 'is so remote as to render [it] arbitrary and irrational.' " *Id.* at 130 (quoting *Turner*, 482 U.S. at 89–90)).

The State provided no data to indicate how many sex offenders are in Iowa's prisons or how many are typically housed in each of Iowa's prisons as compared to general inmates. D0734 at 10; *but see id.* at 14 (indicating that 20 percent of Iowa's prison population are sex offenders based on certain Plaintiffs' testimony). Without that data, the State faces an initial issue in establishing a valid, rational connection to a rehabilitation objective for sex offenders not in treatment. *Ramirez*, 379 F.3d at 130.

Tatman's testimony on rehabilitation should be met with extreme skepticism. First, as the Court correctly held, Tatman's testimony does not describe what rehabilitation efforts exist for sex offenders incarcerated in Iowa's prison, outside of SOTP at Newton and probation. D0789 at 89:13–115:6; D0734 at 26. The logical consequence of this holding should have also been Tatman's testimony is unable to connect how nudity content impacts sex offender rehabilitation in an undiscussed "ancillary" rehabilitation program. D0734 at 26. Second, Tatman's testimony does

nothing to dissuade, or at least certainly conflicts, with the State's previous expert testimony in *Dawson* that nudity material impacts sex offender rehabilitation to a lesser degree than sexually explicit content. 986 F.2d at 261, n.8; *see Amatel*, 156 F.3d at 209 ("[T]here is no evidence simply viewing nonpornographic nudity or depictions of sexual activities (as opposed to pornography) has any effect at all"). Third, Tatman's testimony indicates that sex offender rehabilitation may be equally impacted content outside the scope of the statute such as writings or non-nude pictures. D0789 at 105:7–19 (indicating the written depictions of sexually explicit content, such as Fifty Shades of Grey, may impact rehabilitation), 105:22–106:15 (discussing pictures of non-nude Sports Illustrated Swimsuit Edition models may impact rehabilitation); *accord Dawson II* at 6 (indicating sex offender rehabilitation can be impacted by "non-sexually explicit materials such as a Sears catalog to obtain pictures for their sexual fantasies").

The State's theoretical fears regarding rehabilitation for an unknown amount sex offenders for an undescribed "ancillary" rehabilitation goal is also not demonstrated in fact. Again, if the State's theoretical argument is to be believed, then Tatman should have been able to provide ample evidence which demonstrates sex offender rehabilitation has been significantly impacted by the circulation of nudity content in Iowa's prisons. D0020 at 9; *see* D0789 at 89:17–19, 92:13–15. But Tatman's testimony never makes it that far. D0789 at 89:13–115:6.

The State failed to prove that a valid, rational connection to "ancillary" rehabilitation benefits for banning nudity in Iowa prisons. While the Court indicated other cases that identify a rehabilitation interest, it did not properly review this underlying interest to the facts of this case, and erred in concluding a connection had been met. D0734 at 27; *Ramirez*, 379 F.3d at 130 n.3 ("We further note that 'while a court can bolster its finding of a connection by reference to decisions of other courts on the same issue' it must engage in at least some independent analysis of whether the connection is rational." (internal citation omitted)).

3. Iowa Code section 904.310A(1) Fails to Meet the Other Turner *Factors.*

The Court need not address the remaining *Turner* factors as the Court improperly held the State established a valid, rational connection to their goals. *Shaw*, 532 U.S. at 229–30. But "[a]ssuming the regulation satisfies the first threshold requirement, the court must determine the regulation's constitutionality by balancing the remaining three factors." *Sisney*, 15 F. 4th at 1190. These factors also require a "fact-intensive" analysis. *Ramirez*, 379 F.3d at 130; *see Bryson,* 515 N.W.2d at 12 ("Courts are to defer to correctional officials' judgments in these matters unless *substantial evidence in the record* indicates they have exaggerated their response." (emphasis added)). However, the Plaintiffs proved a content ban on nudity fails to meet the other *Turner* factors as well.

While the second *Turner* factor requires the free speech right be viewed "sensibly and expansively," the right "cannot be viewed so broadly as to eliminate any reason for analysis." *Amatel*, 156 F.3d at 212. Iowa Code section 904.310A(1) is not a time, place, and manner regulation like a reading room in *Dawson* but rather a "complete prohibition" on an entire area of protected speech. 986 F.2d at 261. Further, the State's own evidence seemed to indicate that it was using Iowa Code section 904.310A(1) to bar nudity on any media format despite the regulations only limiting its apparent reach to only printed publications. D0454 at 2, 5. "Because [Iowa Code section 904.310A(1)] eliminates a wide variety of publications that feature nudity for artistic and other reasons, prisoners do not have sufficient means of exercising their right to receive many constitutionally protected materials." *Amatel*, 156 F.3d at 212.

On the third factor, the evidence suggests that there is no serious impact or "ripple effect." Deputy Lamb affirmatively testified that he had *no* problems with mere nudity, and the State did not provide any actual data establishing their shaky theoretical correlation despite thirty-five years of nudity allowed in Iowa's prison. As applied to "ancillary rehabilitation," Tatman never testified about how material in prison impacted sex offenders outside of his treatment nor did he explain how nudity content in prison later impacts rehabilitative treatment at SOTP and on probation. Regardless, "[r]ehabilitation is a gradual process, and it is entirely possible that any momentary

lapses caused by the inadvertent receipt of an inappropriate publication may be reversed with additional rehabilitative efforts." *Amatel*, 156 F.3d at 213.

The drastic response was also exaggerated.[8] "[Q]uite clearly alternative regulations to address these concerns exist." *Couch v. Jabe*, 737 F.Supp.2d 561, 573 (W.D. Va. 2010). "One such alternative comes immediately to mind: the pre Amendment policy." *Amatel*, 156 F.3d at 213. This would be the previous reading room regulations the Eighth Circuit explained was adequate for sex offender rehabilitation. *Dawson*, 986 N.W.2d at 262.

Or at least some sort of individualized determination of the material consistent with *Thornburgh*. 490 U.S. at 406; *Mauro v. Arpaio*, 147 F.3d 1137, 1144 (9th Cir. 1998) *rev'd Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999) (en banc) ("There is no issue by issue determination of whether a particular depiction of nudity might cause unwanted consequences the prison seeks to avoid."). Individualized determination is particularly

[8] Plaintiffs claimed that Iowa Code section 904.310A(1) was an improper response to a lawsuit against the State by a prison guard. D0734 at 6–7; *Sink v. State*, No. 15-0264, 2016 WL 5930337 (Iowa Ct. App. Oct. 12, 2016). To the extent this new legislation was based on a "fear-of-litigation justification" such a justification would be "tenuous." Clay Calvert & Kara Carnley Murrhee, *Big Censorship in the Big House – A Quarter-Century After Turner v. Safley: Muting Movies, Music & Books Behind Bars*, 7 Nw. J. L. & Soc. Pol'y 257, 271 (2021). "If censorship of speech can be justified by the possible reaction that government officials – prison security guards – might have to the speech, then censorship is a certain result. This justification has nothing to do with either protecting or treating prisons but has everything to do with protecting the government from expensive lawsuits." *Id.*

appropriate when the testimony reflected several legitimate works of art being denied. *Aiello*, 104 F. Supp. 2d at 1082 (explaining the regulation was impermissibly overbroad and exaggerated response when it covered legitimate works of art). The extensive prior allowance of nudity for decades in Iowa's prisons and lack of any testimony establishing a true problem with nudity establishes that this statute is clearly exaggerated response and sweeps too broadly under *Turner*. 482 U.S. at 98–99.

F. The Bar on Nudity Content is Facially Overbroad Under Article 1, Section 7 and Article 1, Section 9.

"To prevail on an overbreadth claim, the challenger to the rule must establish the rule prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Neff*, 5 N.W.3d 296, 311 (Iowa 2024) (internal citations omitted). The United States Supreme Court has justified this doctrine on the grounds that it may deter or chill constitutionally protected speech. *Neff*, 5 N.W.3d at 311; *but see Waterman v. Farmer*, 183 F.3d 208, 212 (3d Cir. 1999) (applying *Turner* to overbreadth claim); *accord Couch*, 737 F. Supp.2d at 566–67 (same).

The record adequately demonstrates the significant overbreadth concerns regarding the enforcement of Iowa Code section 904.310A(1)'s bar on nudity. For example, texts in an art course, were denied despite no evidence in the record establishing how such material would impact security and rehabilitation. D0791 at 37:6–13; *see Aiello*, 104 F. Supp. 2d at 1080. Furthermore, the record reflects that the entire

publication is denied, not just the picture with nudity. *see* Ex. C at 6 (explaining what happens to a publication following denial); *see, e.g.,* D0792 at 137:1–3. Third, the regulations appear to have been applied to certain television programming including CNN, Fox News, and HBO Max. D0454 at 5; *see, e.g.,* D0791 at 103:9–104:12. Surely, the prohibition in this case "sweeps within its ambit those actions ordinarily deemed to be constitutionally protected" and should be held to be unconstitutional. *State v. Todd,* 468 N.W.2d 462, 465 (Iowa 1991).

II. The Courts Allowance of Tatman's Expert Testimony Constitutes Reversible Error.

A. Error was Preserved.

Several plaintiffs moved to address the State's untimely designation and disclosure. *See, e.g.,* D0636. The Court issued an order denying any remedy and reaffirmed its ruling during trial. *See* D0670; D0791 at 15:14–19. Error is preserved. *Meier*, 641 N.W.2d at 537.

B. Standard of Review.

"We reviewed whether a district court properly admitted expert testimony for abuse of discretion. But when we review the interpretation of a rule of civil procedure, such as rule 1.500(2), our review is for errors at law." *McGrew v. Otoadesse*, 969 N.W.2d 311, 318–19 (Iowa 2022) (internal citations omitted).

C. The Court Abused Its Discretion Allowing Tatman to Testify When the Designation and Disclosure was Three Years Late, Contradictory to Other Orders, and Deprived the Plaintiffs of a Court-Order *Daubert* Hearing.

The February 2020 trial scheduling order clearly laid out the date for the State to make their expert designation: October 22, 2020. *See* D0296 at ¶ 7(*b*)(2); *cf. McGrew,* 969 N.W.2d at 320 ("Notably, this portion of the rule [1.500(2)(*a*)] covers all expert testimony, regardless of the basis for the expert opinion."). Persuasive caselaw demonstrates that discovery orders establishing expert deadlines cannot be resurrected following remand after an appeal. *Douglas v. Burley*, 134 So. 3d 692, 697 (Miss. 2012) (*en banc*) ("[U]pon remand, prior orders governing discovery remain in place absent a party's motion to extend deadlines and a subsequent order by the trial court."); *but see See, e.g., Kirlin v. Monaster*, 24-0205, 2025 WL 876118, at *7 (Iowa Mar. 21, 2025) ("Usually, we assume that new deadlines will be established following remand."). The State utterly failed to meet this unambiguous designation deadline as applied to Tatman.

The State also failed to timely disclose Tatman as a "non-retained" expert. The State's expert witness disclosures were seemingly due at the same time as the designation. *See* D0296 at ¶ 7(*a*) (requiring that "the expert witness's report of opinions is due on the date of designation"). At the very minimum, the Rules state that a non-retained expert must be disclosed ninety days prior to trial, not sixty. *See* Iowa R. Civ.

P. 1.500(2)(*d*)(1). And the Court correctly identified that "the 90 day rule applies even if the expert is a State employee." D0670 at 3.

The State's clear failure to timely designate and disclose Tatman was subject to the consequences of Rule 1.517(3)(*a*). This Rule identifies that "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." *Id.*; *see Lawson v. Kurtzhals*, 892 N.W.2d 251, 259 (Iowa 2010) (identifying factors for excluding evidence).

The Court firmly held that the State provided no "good reason" to justify its untimeliness. D0670 at 3. Yet, the Court declined to provide any remedy, presumably on the basis that the non-disclosure was "harmless." D0670 at 3. The Court's decision constituted an abuse of discretion, considering the length of the delay, the State's and Court's contradictory positions related to other scheduling plan issues following remand, and the Court's previous order allowing a *Daubert* hearing following the State's first expert designation.

The length of the State's untimely expert designation and disclosure alone demonstrates an abuse of discretion. Instructive is *Douglas v. Burley*. 134 So. 3d 692 (Miss. 2012) (*en banc*). In *Douglas*, a trial court "allowed the plaintiffs to add an expert following remand where the expert designation and disclosure had expired long before the reversed dismissal order." *Kirlin*, 2025 WL 876118 at *7; *see also Douglas*, So. 3d at

696 (identifying trial court's rationale for not striking expert was to "prevent possible injustice to the Plaintiffs" and that the defendants would suffer 'no actual prejudice.' "). The Mississippi Supreme Court determined that the trial court abused its discretion because there was "no evidence of excusable oversight," and the deviation significantly disrupted the "orderly proceedings." *Douglas*, So. 3d at 699–700.

Here, the State untimely designated and disclosed Tatman following remand, several years after the 2020 scheduling order's deadline, without filing any motion like in *Douglas*. *Compare* D0670 at 3 *with Douglas*, 134 So.3d at 696. The Court found that there was no "good cause" for the tardiness, much like the lack of "excusable oversight" in *Douglas*. *Compare* D0670 at 3–4 *with Douglas*, 134 So.3d at 696. The State's untimely designation and disclosure certainly disrupted the "orderly proceedings" of the trial. 134 So.3d at 698; *see Fry v. Blauvelt*, 818 N.W.2d 123, 130 (Iowa 2012) ("A party's failure to comply with pretrial procedure divests the trial court's control over the administration of justice in the case and places it in the hands of recalcitrant or otherwise dilatory counsel.").

The State's position, and several Court orders related to other scheduling issues further demonstrate an abuse of discretion. The State's position, or at least prior to their second expert designation and disclosure, was that the 2020 February scheduling order applied in attempting to prevent Plaintiffs' meaningful discovery

following remand. *See* D0666, Tr. of Oct. 20, 2023 Hearing at 18:8–11 (02/07/24) ("[O]bviously this Court and the parties are aware that the discovery deadline was nearly three years ago, so we are now three years post the December 2020 discovery deadline."). And the Court regularly denied prospective Plaintiffs' motions to intervene and Plaintiffs' discovery requests solely due to lapsed deadlines from the 2020 scheduling order. *See, e.g.,* D0334, Order Re: Motions to Intervene at 3 (05/19/20) (denying four motions to intervene as untimely); D0510, Order at 1 (12/28/22) (denying motion to intervene as untimely); D0591, Order at 1 (06/30/23) (holding that Plaintiffs' discovery requests that were made "after the discovery deadline of December 15, 2020 are denied").

Plaintiffs further point the Court had also originally determined a "*Daubert* hearing . . . was warranted" for the first expert. D0283 at 4. However, this hearing was indefinitely continued until the State provided a sufficient expert disclosure from Thomas (which the State never did). D0307 at 3; *see also* D0791 at 6:15–21. The State's lengthy delay in designating and disclosing Tatman effectively deprived the Plaintiffs of their court-ordered "*Daubert*" hearing to adequately prepare for trial. D0791 at 10:2–14.

The Court indicated that the prejudice to Plaintiffs was minimal because they would likely not be able to find a rebuttal expert. D0670 at 5. This point utterly fails to appreciate the expediated timeframe to find a rebuttal expert within thirty days of this

disclosure, especially considering the natural delay in Plaintiffs receiving filings. *See* Iowa R. Civ. P. 1.500(2)(*d*)(2); *see also* D0791 at 11:1–13.

It cannot be said that Tatman's testimony was not used to the detriment of the Plaintiffs.[9] The Court used Tatman's expert status under Iowa Rule of Evidence 5.703 to allow testimony of various studies and then uses those studies to improperly extend Lamb's experiences of inmate fighting and harassment over sexually explicit content to nudity content, despite Mr. Lamb's clear concession that nudity material was not an issue in Iowa prisons. *Id.* at 26.

The Appellate Court should find an abuse of discretion. It should strike Tatman's testimony when reviewing the record. *Cf. State v. Brown*, 16 N.W.3d 288, 298 (Iowa 2025) (applying *de novo* review of the "appropriate record" that excluded an impermissible expert opinion from the State under competency statute). Alternatively, it should reverse and remand to allow further expert discovery of Tatman as previously requested and granted to the Plaintiffs.

III. The Court Incorrectly Limited the Plaintiffs' Claim to Printed Materials.

A. Error was Preserved.

[9] Plaintiffs contest that Tatman's testimony is sufficient to pass *Turner*. However, if the Court finds that Tatman's testimony is sufficient, that helps establish prejudice.

Plaintiffs raised the issue of whether their initial petition or Hrbek's intervention petition included a claim regarding the State's censorship of television, movie, and audio. D0353, D0381; D0791 at 75:22–80:7. The Court ruled that this issue was not properly plead in its summary judgment order, and then again at trial. D0453 at 3; D0791 at 78:1, 80:6–7. The Plaintiffs also presented various "offers of proof" throughout trial regarding what their testimony would have been on the television censorship issue. *See* D0791 at 83:4–84:12. Error is preserved. *Meier*, 641 N.W.2d at 537.

B. Standard of Review.

The standard of review of whether a claim has been adequately pled sounds of errors at law analysis. *Cf. Rees v. City of Shenandoah*, 682 N.W.2d 77, 78 (Iowa 2004).

C. Plaintiffs' Petition Sufficiently Included Claims of Television, Audio Censorship. Alternatively, Hrbek's Intervention Petition Sufficiently Amplified the Plaintiffs' Claim.

Iowa is a notice pleading state. *Rees*, 682 N.W.2d at 79. "A petition complies with the 'fair notice' requirement if it informs the defendant of the incident giving rise to the claim and of the claim's general nature." *Id.* The Plaintiffs' petition undoubtedly put the State on notice that their challenge was toward any censorship of nudity "that is visual, written, *auditory, video* or photographic." *See* D0003 at 3 n.* (emphasis added).

Even if this paragraph was insufficient, Hrbek's intervention petition surely "amplified" this claim. The Iowa Supreme Court has held that an intervenor may

"enlarge specifications" of a plaintiffs' claim as a matter of "proper pleading in the setting of an intervention." *Mata v. Clarion Farmers Elevator Co-op*. 380 N.W.2d 425, 425, 430 (Iowa 1986). Applying *Mata*, Hrbek's intervention petition incorporated and enlarged the claims presented by the original Plaintiffs to television, audio, and music censorship. *Id.* Therefore, the intervention petition squarely brought claims regarding television, audio, and music censorship into the case. The Court erred in concluding that "Plaintiffs did not challenge television or movies" through their pleadings. D0454 at 5.

The Court also concluded a challenge on television, audio, and music censorship was inappropriate because the Plaintiffs' "limited to their challenge to" Iowa Code section 904.310A(1) and it only applies to "printed material." D0454 at 5. But this holding was factually and legally improper. Factually, the Court noted the State's evidence, an affidavit from Sperfslage, indicated it was barring television and movies under the guise of Iowa Code section 904.310A(1). *Id.* at 2; *see also* D0305, Defs. Appendix at 43 (03/06/20). The Plaintiffs' clear challenge to Iowa Code section 904.310A(1) should have sufficiently encapsulated banning television and movies considering the State's apparent use of that statute to bar such content. And legally, a request for injunctive or declaratory relief does not require reference to specific statute for adjudication of rights. Iowa R. Civ. P. 1.1101, 1.1501.

As the claim on television, movie, and audio censorship was adequately plead, reversal and remand is required for the District Court to fully engage in an independent analysis on television and movie censorship as applied to the appropriate constitutional test. *Mata*, 380 N.W.2d at 430 (remanding for further proceedings when intervenor amendment amplifying petition was rejected); *see Wolf v. Ashcroft,* 297 F.3d 305, 307 (3d Cir. 2002) (remanding for factual development required under *Turner* for movies and television censorship).

CONCLUSION

Iowa's free speech protections cannot be watered down "by undifferentiated fear or apprehension." *Kool*, 212 N.W.2d at 521. Yet, the Court's final order falls to such fear and apprehension by relying on shaky and improper expert testimony and general feelings that were simply not reflective of the realities of Iowa's prisons.

The Appellate Court should reverse and remand for entry of judgment in favor of the Plaintiffs or for appropriate further proceedings.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument.

Dated March 26, 2025.

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies this brief was electronically filed and served on the 9th day of April, 2025 upon the Clerk of Supreme Court using the Electronic Document Management System, which will send notification of electronic filing and through mail (constituting service):

Theodore T. Appel
Signature

April 9, 2025
Date

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This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Garamond in 14-point type and contains 12,941 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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April 9, 2025
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