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

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

THEODORE T. APPEL (#AT0014941)
Direct Dial: (319) 861-8769
Email: tappel@bradleyriley.com
of
BRADLEY & RILEY PC
2007 First Avenue SE
P.O. Box 2804
Cedar Rapids, IA 52406-2804
Phone: (319) 363-0101
Fax: (319) 363-9824

Brent Appel (#AT000558)
Direct Dial: (515)-238-4586
Email:brentrappel@gmail.com
10901 180th Ave
Ackworth, Iowa

PRO BONO ATTORNEYS FOR
PLAINTIFFS-APPELLANTS FOR
PLAINTIFFS-APPELLANTS
GREGORY, RADEKE, O'GEARY,
WELSH, NEWELL, HRBEK, FENTON,
AND LAWRENCE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Iowa Constitution:

Statutes:

Iowa Court Rules:

Secondary Sources:

ARGUMENT

I. Iowa Code section 904.310A(1)'s Bar on Nudity Content Violates the Unique and Broad Free Speech Protections in the Iowa Constitution.

A. The Standard of Review is *De Novo* for Factual Findings.

The State summarily argues that the District Court's fact finding in its final bench order should be evaluated through the substantial evidence standard. State's Am. Br. at 26–27. But "[g]enerally, our review of a decision by the district court following a bench trial depends upon the manner in which the case was tried to the court." *Carroll Airport Comm'n v. Danner*, 927 N.W.2d 635, 642 (Iowa 2019) (internal citation omitted). Factors include the "pleadings, relief sought, and the nature of the case," as well as handling evidentiary objections. *Passehl Est. v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006).

The Plaintiffs sought injunctive relief with no request for monetary damages in this declaratory judgment action. *Id.*; *see* D0003, Petition at ¶¶ 20–25 (09/26/18); *see also* D0070, Hrbek Intervener Pet. at ¶¶ 49–57 (06/05/19). The District Court liberally received evidence, despite ruling on objections. D0734, Bench Trial Order at 4–5 (04/25/24) (Farrell, J.) (discussing the evidentiary record). Review should be *de novo* considering those reasons, and constitutional significance of the issues presented. *Cf. Polk Cty. Sheriff v. Iowa Dist. Ct. for Polk Cty.*, 594 N.W.2d 421 (Iowa 1999) (applying *de novo* review under *Turner* in certiorari proceeding).

Even if substantial evidence is the appropriate standard, the represented Plaintiffs' appellate briefing did not concede all factual findings. *Cf.* State's Am. Br. at

27. The represented Plaintiffs questioned many factual determinations in whether State sufficiently established a valid, logical connection to their legitimate goals. Rep. Plfs.' Am. Br. at 44–55. Regardless, the substantial evidence standard cuts both ways, such as the District Court's determination that Tatman's testimony was insufficient for programs outside the SOTP in Newton, which the State does not appear to contest. *See* D0734 at 26.

B. The Court Should Adopt a Heightened Scrutiny Standard under the Iowa Constitution's Free Speech Clause which Through its Express Language is More Demanding than the First Amendment to the United States Constitution.

The State does not dispute the basic notion that "nudity" is a protected "subject" and that Iowa's inmates are "every person" which may express and receive that subject under Article 1, Section 7. But the State claims Iowa courts cannot deviate from the *Turner* standard because Iowa has summarily held Article 1, Section 7 is "co-extensive" with the First Amendment. State's Am. Br. at 36 (collecting cases).

The State's cases do not provide significant, if any, analysis into the deliberate textual differences between the dueling federal and state free speech clauses. In particular, the State's main citation for this principle, *City of West Des Moines v. Engler*, 641 N.W.2d 803, 805 (Iowa 2002), is out of context. State's Am. Br. at 37. *Engler* focused on whether Iowa's free speech clause and other state free speech constitutional provisions are "not limited to abuses by state action." 641 N.W.2d at 805. That issue is distinctly different from the question in this appeal which involves government

restrictions on regulating protected free speech for prisoners. Simply put, Iowa's courts have not been presented with a clear opportunity to truly examine the significant textual difference that Plaintiffs put forward.

"As one particular: when a federal interpretation of a federal provision 'is not consistent' with the text of the Iowa Constitution as originally understood, 'the federal interpretation should not govern our interpretation' of the Iowa Constitution." *See State v. White*, 9 N.W.3d 1, 11 (Iowa 2024) (quoting *State v. Burns*, 988 N.W.2d 352, 360 (Iowa 2024)). Again, Article 1, section 7, applies to "every person" for speech on "all subjects," a provision that is textually broader than the First Amendment. Any notion that Iowa law must follow federal law in lockstep essentially repeals the independent provision of the Iowa Constitution. Indeed, many courts have hold their state constitution free speech provisions textually provide more protection than the First Amendment, cases that Iowa precedent has not appeared to have considered. Rep. Plfs.' Am. Br. at 40 (collecting cases); *see, e.g., State v. Noah*, 9 P.3d 858, 870 (Wash. Ct. App. 2000) ("The Washington free speech provision affords greater protection to free speech than its federal counterpart."); *State v. Stummer*, 194 P.3d 1043, 1048 (Ariz. 2008) (en banc) ("Arizona's free speech provision, in contrast, guarantees each individual's right to speak freely . . . [which] indicates the Arizona framers' intent to rigorously protected freedom of speech."); *Pap's A.M. v. City of Erie*, 812 A.2d 591, 601 (Penn. 2002) ("[T]his Court has long construed the freedom of expression provision in Article 1, § 7 as providing greater protection of expression than its federal counterpart.").

Thus, the *stare decisis* doctrine on whether Article 1, section 7's free speech clause is "co-extensive" with the First Amendment is inapplicable. State's Am. Br. at 38–39; *see, e.g., In re Marriage of Hutchinson*, 974 N.W.2d 466, 478 (Iowa 2022) (refusing to give *stare decisis* treatment to case that provided "little precedential support" toward ultimate issue). Even if *stare decisis* does apply, the doctrine does not preclude the Appellate Court from reconsidering its line of conclusory statements that Iowa's free speech protection is "coextensive" with the First Amendment. *See Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 83 (Iowa 2022) (outlining limited effect stare decisis has for constitutional questions). The significant textual differences between the two provisions, the wealth of state supreme courts agreeing with the represented Plaintiffs regarding the broader, textual protection, and how *stare decisis* has limited application in constitutional matters all support such a change. *Id.*

Regardless, Iowa's appellate courts can deviate from *Turner* as a matter of constitutional law irrespective if the text is similar as a matter of state constitutional law. *See, e.g., Puntenney v. Iowa Utilits. Bd.*, 928 N.W.2d 829, 848 (Iowa 2019) (adopting Justice O'Connor's dissenting view on eminent domain despite identical takings clauses). The represented Plaintiffs' appellate briefing identified several compelling reasons to adopt a heighted scrutiny standard, beyond the broader constitutional text, many of which the State does not attempt to refute. Those include revisions to the 1857 Iowa constitution identifying that prisoners are not "slaves of the state" in Article 1, section 23, early Iowa's wardens reports recognizing the importance of inmates to have reading material

in Iowa's prisons, *Turner*'s shaky jurisprudential foundation especially considering a sufficient *Martinez* test, how *Turner* fails to adequately balance inmate's fundamental rights in the important context of an inmate's isolation in prison, all layered over the specific backdrop that Iowa inmates have had access to such protected material for decades as identified in the *Dawson* cases. Rep. Plfs.' Am. Br. at 43–46.

Fundamental rights should be treated as fundamental rights, even in Iowa's prisons. Heightened scrutiny in the context of a content ban on protected speech is warranted as consistent with broad free speech protections of the Iowa Constitution.[1]

C. The State's Regulation of Nudity Fails to Survive *Turner*.

Turner is not "toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). It is not the equivalent of a "watered down" rational basis test. State's Am. Br. at 46–48. "Although similar in part (and sometimes in description) to ordinary rational basis review, the *Turner* standard requires more searching, four part inquiry." *Williams v. Pryor*, 240 F.3d 944, 950 (11th Cir. 2001) (identifying that "cases decided under the *Turner* standard . . . are inapplicable to cases . . . concerning the constitutional protection accorded by ordinary rational basis scrutiny to citizens in free society."). "Though the *Turner* standard is a deferential one, this does not mean that this Court is required to

[1] Adopting a heightened standard of scrutiny "need not be a death sentence." *See Free Speech Coal., Inc. v. Paxton*, _ U.S. _, 2025 WL 1773625, at *23 (2025) (Kagan, J., dissenting). "To the contrary, [the] State exercising care [c]ould be able to devise a regulatory means of achieving its objective consistent with" the free speech protections. *Id.*

blindly accept Defendants' conclusion asserting that the chosen action passes constitutional muster." *Tariq v. Chatman*, No. 1:11–CV–159 (WLS), 2012 WL 3637729, at *3 (M.D. Ga. Aug. 22, 2012); *see also Ramirez v. Pugh*, 379 F.3d 122, 129–30 (3d Cir. 2004) ("[C]ourts may not abdicate their responsibility to scrutinize carefully the government's reasons for infringing that right."). Notably, in the few times Iowa's appellate courts have applied *Turner*, they have carefully scrutinized the restriction with an evidentiary record rather than relying on generic "common sense." *See, e.g., Polk Cty. Sheriff,* 594 N.W.2d at 424 (reviewing significant testimony from jail medical director, chief jailer, and psychiatrist); *Bryson v. Iowa Dist. Ct.*, 515 N.W.2d 10, 11 (Iowa 1994) (per curium) *overruled on other grounds by James v. State*, 541 N.W.2d 864 (Iowa 1995) (describing that rational connection was made with testimony and reviewing to determine if there was "substantial evidence" in the record to rebut the presumption with remaining *Turner* factors); *Johnson v. State*, 542 N.W.2d 1, 3 (Iowa Ct. App. 1995) (evaluating for "evidence in the record").

The State also notes that most caselaw holds that content bans in prisons, like the Ensign Amendment, have been held constitutional under *Turner*. State's Am. Br. at 44–45, 65–66. But "[w]e do not shape our jurisprudence based upon a 'majoritarian numbers game.' " *State v. Brown*, 16 N.W.3d 288, 294 (Iowa 2025) (quoting *State v. Hauge*, 973 N.W.2d 453, 466 (Iowa 2022)). While other cases can provide some insight, each case contains different facts to be evaluated in different contexts. Rep. Plfs.' Am. Br. at

47; *see, e.g., Ramirez*, 379 F.3d at 130 n.3. And here, the State has failed to meet its burden under *Turner* with this specific record.

It bears repeating the State ignores some specific points in this specific record. First, this case is about nudity – not all "pornography"; the factual analysis must be tethered to this narrow issue. Second, Iowa's inmates have had access to nudity material in Iowa's prisons for decades. *See, e.g., Dawson I*. Yet, the State still failed to provide any firm data or testimony, beyond vague non-specific anecdotes, that their goals have been hindered by nudity materials. This argument is amplified considering materials featuring nudity were allowed for five years prior to trial, and despite the State's bold claim that allowing such material in prisons will create issues, they failed to identify any incident. D0020, State's Mem. in Resisting Inj. Relief at 9 (01/02/19); D0039, Order on Mot. for Temporary Inj. (04/03/19) (Rosenberg, J.). Third, Lamb, the State's only prison administrator who testified at trial, affirmatively declared that he had no issues with nudity.

The State's inability to connect its proffered interests to goals with actual data, with affirmative testimony to the contrary, is exactly what *Turner* was concerned about. In *Turner*, a prison's marriage ban was not "reasonably related" to the claimed legitimate interests because prison officials "generally . . . had experienced no problem with the marriage of male inmates" and "such marriages had routinely been allowed as a matter of practice at Missouri correctional institutions prior to adoption of the rule." 42 U.S. 78, 98–99 (1987). The same fundamental concerns, affirmative testimony regarding a

lack of harm by nudity material and widespread existence of nudity material prior to Iowa Code section 904.310A(1), are clearly evident in this record. *Turner*'s basic holding alone dictates reversal.

1. The State Still Fails to Prove a Valid, Rational Connection to Rehabilitation.

The State argues that barring nudity prevents "addiction" to more obscene material as well as "fueling deviant factors" that hinder rehabilitation. State's Am. Br. at 48–55. However, this argument fails to reconcile the difference in Iowa's statutory and regulatory definition of nudity (and its exemptions) with Tatman's broader clinical definition of "pornography." Tatman's broader definition of "pornography" includes content that is still permissible under the ban, such as legitimate "art" or pictures of swimsuit models in a *Sports Illustrated Swimsuit* edition, which could both harm rehabilitation. *See* D0789, Tr. Day Three of Bench Trial at 103:14–104:11, 105:20–106:14; *cf. Dawson II* at 6 (identifying that even non-pornographic pictures, such as picture of a clothed child in a magazine, could harm rehabilitation). Nor does this law, according to the State, cover "private drawings" or "personal photos," "movies-and-television" that would be labeled by Tatman as "pornography." State's Am. Br. at 33; *Cf.* D0789 at 135:6–10 (Tatman identifying the studies he relied on did not distinguish between types of media). Essentially, the State's nudity ban does not ban the floor at which Tatman's definition of "pornography" begins.

This distinction is important. Tatman's testimony solely establishes that all "pornography," whether it be obscene, sexually explicit, nudity, or legitimate art, in any

media form, equally hinders rehabilitation. It follows that the State's rehabilitation claim fails as a matter of common sense because materials that fuel the "addiction" process and "deviant factors" still exist and would circulate in Iowa's prisons irrespective of the ban. *Cf. State v. Mitchell*, 757 N.W.2d 431, 439 (Iowa 2008) ("[A] statute may be unconstitutional if it is so overinclusive and underinclusive to be irrational.").

The State further argues that its blanket ban would effectively stop circulation of such nudity material. State's Am. Br. at 51. That problematic logic assumes the State can effectively ban all material from entering prisons. *Cf. Reynolds v. Cook*, No. 3:13-cv-388 (SRU), 2020 WL 1140885, at *16 (D. Conn. Mar. 9, 2020) *aff'd Reynolds v. Quiros*, 25 F.4th 72 (2d Cir. 2022) (acknowledging underground market for such materials despite Ensign Amendment). Trial testimony revealed that sexually explicit materials were still being brought into Iowa's prisons, in spite of enforcement of the sexually explicit content provision of Iowa Code section 904.310A(1) during litigation. D0791, Tr. Day One of Bench Trial at 43:10–20 (Hays testimony), 63:1–64:24 (Cook testimony); *see also* D0788, Tr. Day Four of Bench Trial at 28:14–29:19 (Lamb acknowledging this issue). Presumably, this underground market also applies to nudity materials and that material would circulate across Iowa's prisons. *See Thornburgh*, 490 U.S. at 412. Thus, "rehabilitation" is unlikely considering the fact that such material will still circulate in Iowa's prisons irrespective of Iowa Code section 904.310A(1).

The State also cites "character growth" as a "rehabilitation" goal to justify its content ban. State's Am. Br. at 54–55. While the State seeks categorize all nudity content

as "degrading," others may validly see such material as a consenting adult's pursuit at empowerment or attempt at inspiration. The State's "character growth" argument is a value judgment in the eyes of the beholder, a judgment that is "inherently problematic in its [free speech] implications . . . [and] is the antithesis of [Article 1, section 7] freedoms." *See Amatel v. Reno,* 156 F.3d 192, 210 (D.C. Cir. 1988) (Wald, J., dissenting); *cf. State v. Kool*, 212 N.W.2d 518, 521 (Iowa 1973) ("But the framers of the constitutional guarantees must have known they were taking some risk when they inserted the free speech clauses, for many utterances of unpopular ideas are fraught with the possibility of retaliatory action."); *Cohen v. California*, 403 U.S. 15, 22–23 (1971) (identifying that the "general assertion that the State, acting as guardian of public morality, may properly remove this offensive word from the public vocabulary . . . is plainly untenable").

Indeed, if the government cannot bar material that "contain[s] racist views" under *Turner*, then surely the State cannot bar mere nudity because it is "demeaning." *See McCabe v. Arave*, 827 F.2d 634, 638 (9th Cir. 1987). The State's rationale is a serious "slippery slope" of potentially unconstitutional law under the guise of "character growth." *See Amatel,* 156 F.3d at 210 (providing hypotheticals of what other material may be banned). This claimed aspect of "rehabilitation" should be summarily rejected as not a "neutral" interest under *Turner*.

2. The State Still Fails to Prove a Valid, Rational Connection to Institutional Security.

The State argues that that elimination of nudity material removes violent thoughts from inmates based on Tatman's testimony from various studies. State's Am. Br. at 55–59. Much like the rehabilitation interest, this interest fails for a similar reason. Tatman, and the studies he cites, fail to appreciable distinguish how "types" of pornography, that again is broader than the statute's definition, may lead to more or less fights.

The State also argues that elimination of nudity material removes a cause for conflict based on Lamb's testimony. State's Am. Br. at 53–54. Again, as acknowledged by the State, Lamb's "pornography" definition excluded nudity. D0788 at 25:11–16. And he affirmatively testified that he had experienced no problems with the nudity. *Id.* Nor did he ever quantify the amount of fights or problems he experienced with sexually explicit material that would suggest that it is appreciable over any other kind of issues, such as fights over commissary or tattoos. *See* Rep. Plfs.' Am. Br at 51.

But even assuming Lamb's testimony that fights based sexually explicit materials could be expanded to nudity materials, "common sense" also suggests the opposite. For example, "rudimentary supply-and-demand economics" would establish that the "underground price of sexually explicit material" would rise. *See Reynolds*, 2020 WL 1140885, at *16; *see also Reynolds*, 25 F.4th at 87 (affirming rationale); *see also* D0788 at 28:14–29:19. A price increase for such material could lead to increased prison debts and thus more fights. *Id.* Thus, common sense suggests fights could occur either way.

The State further argues that "potential danger" is enough to establish a valid, rational connection. State's Am. Br. at 58–59. But, again, *Turner* does not stand for the notion that such hypothetical goals can be divorced from facts.

3. The State's New Non-Hostile Work Environment Interest Procedurally, Legally, and Factually Fails.

Seeing that their case is in serious jeopardy, the State, for the first time on appeal, now claims that they established a legitimate interest in a non-hostile work environment. State's Am. Br. at 61–64. The State's trial filings confirm it did not advance a non-hostile work environment interest. D0660, Defs.' Trial Br. at 6 (02/05/24) ("At trial, Defendants will offer testimony from two corrections officials finding that possession and viewing of content that is either sexually explicit or features nudity undermines *prison security and inmate rehabilitation*." (emphasis added)); D0706, Defs.' Proposed Order at 14 (03/05/24) ("The State offered sufficient evidence to establish its rational connection between prohibiting publications that feature nudity and legitimate penological interests of *institutional security and rehabilitation*." (emphasis added)).

Although the bench trial order did reference how other Courts determined a non-hostile work environment could be a separate legitimate interest, it did not list that interest in recounting the State's rationales. *Compare* D0734 at 22 *with id.* at 26 ("DOC argued that the law is rationally connected to its interest in rehabilitation, safety for inmates, and safety for staff."). The Order's passing reference to "harassing female staff" is, at best, in relation to staff safety. *Id.* at 27. Based on the record, the State failed

to adequately present, and the District Court failed to find, such an interest. Therefore, this interest cannot be presented anew on appeal. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (explaining that even the winning party must advance an alternative argument at the district court to be considered on appeal); *Sisney v. Kaemingk*, 15 F.4th 1181, 1190 (8th Cir. 2021) (requiring the State to advance the interest under *Turner*).

But even if the Appellate Court was inclined to review this new interest, it fails. First, the interest is not a legitimate *penological* governmental interest, rather than a labor issue. *Jewell v. Gonzales*, 420 F. Supp. 2d 406, 437 (W.D. Penn. 2006); *see also Brittain v. Beard*, 932 A.2d 324, 332 (Pa. Commw. Ct. 2007) *aff'd in part rev'd in part Brittain v. Beard*, 974 A.2d 479 (Pa. 2009); *accord* Rep. Plfs.' Am. Br. at 57 n.8. Moreover, "given the rigors normally associated with conditions in the prison setting – not the least of which is regular interaction with hardened criminals – it strains credulity to believe that individuals who have chosen corrections work as an avocation would be strongly offended by" nudity material as a matter of common sense. *Jewell*, 420 F. Supp. 2d at 437. "It is one thing for the jail to ban offensive displays that drive some women from the workplace, and another to ban receipt and possession even without display." *Mauro v. Arpaio*, 188 F.3d 1063, 1071 (9th Cir. 1999) (Kleinfeld, J., dissenting).

The State sole reliance on Lamb is also misguided to establish this new interest. State's Am. Br. at 61–63. Again, Lamb's testimony only goes to sexually explicit material causing issues with guards; and he expressly disavows any issues, which presumably includes a non-hostile work environment, with nudity. Nor did the State present any

other independent evidence that any non-hostile work environment issues were created because of such material, material that existed for decades in Iowa's prisons. And the District Court did a thorough analysis of the legislative history that firmly established that the law was passed to limit non-hostile work environment claims. *See* D0734 at 7–8. Therefore, the State has procedurally, legally, and factually failed to establish this interest.

4. Iowa Code section 904.310A(1)'s nudity ban still fails under the other Turner *factors.*

The State argues that alternative means remain open for the expression of this speech because Iowa Code section 904.310A(1) only applies to pictorial depictions. State's Am. Br. at 64. "If alternative means are illusory, impractical, or otherwise unavailable," then this factor would favor the Plaintiffs. *See Human Rights Def. Ctr. v. Baxter Cnty. Ark.*, 999 F.3d 1160, 166 (8th Cir. 2021). It is apparent at trial that "alternative means" for expressing the right at issue did not seriously exist in other mediums, such as television-and-movies and pictorial drawings. *See, e.g.,* D0791 at 113:06–114:16 (admitting Hrbek's affidavit (H-15) "regarding edited television censorship evidence" for purposes of offer of proof located in court file at D0205–D0237); *cf. State v. Iowa Dist. Ct. for Jasper Cnty.*, No. 23-1556, 2025 WL 412547, at *3 (Iowa Ct. App. Feb. 5, 2025).

The State claims that there may be a "ripple effect" with the circulation of nudity. State's Am. Br. at 67. Again, the claim that there will be a "ripple effect" of sufficient

magnitude is negated considering the fact that such material has circulated in Iowa's prisons for decades, with no apparent incident. *Cf. Turner*, 482 U.S. at 96.

Although the State claims that there is no *de minimis* cost, the Court "need not accept its 'piling of conjecture upon conjecture' about potential costs." *Human Rights Def. Ctr.* v. *Baxter Cnty., Ark.*, 129 F.4th 498, 506 (8th Cir. 2025). Bowker's testimony cited by the State amounts to general speculation without detail as to staffing and specific costs.

II. The State's "Cloak-and-Dagger" Tactics With Tatman Mandates Reversal and/or Remand.

A. The State was Required to Designate and Disclose Their Expert Prior to Procedendo.

The State claims that the October 22, 2020, deadline only applied to the expert disclosure of a retained expert. State's Am. Br. at 73–75; D0296, Trial Scheduling Order at ¶ 7(*a*) (02/26/20). The argument misses the mark.

First, and to be clear, Plaintiffs are arguing the State failed to meet both its expert disclosure *and designation* obligations for Tatman. Rep. Plfs.' Am. Br. at 59–64. Expert *designation* obligations are distinct from expert disclosure obligations. *McGrew v. Otoadesse*, 969 N.W.2d 311, 320 (Iowa 2022); *see Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756 (7th Cir. 2004) ("[A]*ll* witnesses who are to give expert testimony under the Federal Rules of Evidence must be disclosed under Rule 26(a)(2)(A)" (emphasis in original)); *compare* Iowa R. Civ. P. 1.500(2)(*a*) *with* Iowa R. Civ. P. 1.500(2)(*b*), (*c*).

"Formal d[esignation] of experts is not pointless." *Musser*, 356 F.3d at 756. "The rationale for requiring that testifying experts be identified . . . [is to] alert the opposing party to need to take certain steps associated with experts, such as attempting to disqualify the witness or retained a rebuttal expert." 6 Jones on Evidence § 50:7 (7th ed. Dec. 2024 Update); *Musser*, 356 F.3d at 756 (listing similar rationales). For example, the Plaintiffs attempted to do those "certain steps" when they asked for, and were granted, a "*Daubert*" hearing following the State's first limited expert designation of Tracy Thomas. D0283, Order on Pending Mots. at 4 (01/29/20) (Beattie, J.).

The TSDP unambiguously required that the State designate "an expert witness," whether retained or non-retained, by October 22, 2020. D0296 at ¶ 7(*b*); *accord McGrew*, 969 N.W.2d at 320. The fact that TSDP later states that "The expert witness's report of opinions is due on the date of designation" simply replaced the stock TSDP paragraph 8(*b*) on when an expert *disclosure* was to occur. *Compare* D0296 at ¶ 7(*a*) *with* Iowa Ct. R. 23.5–Form 3 at ¶ 8(*a*), (*b*) (2020). And the State does not dispute that Tatman was only designated well after the October 2020 designation deadline. D0630, State's Second Designation of Expert Witness (12/21/23).

Second, the Plaintiffs do not agree that the non-retained expert *disclosure* deadline should be evaluated from a "reset" ninety day deadline to the February 2024 trial. Even assuming the TSDP's reference to expert disclosure obligations were not at the same time as the designation for a non-retained expert, the non-retained expert disclosure deadline would have been ninety days from the March 2021 trial. That deadline clearly

lapsed by the time trial was continued in February 2021. D0453, Order Continuing March 2021 Trial (02/25/21) (McLellan, J.).

The State fails to contest in their appellate briefing that they specifically advocated that discovery deadlines were not "reset" or revived following procedendo, and that the District Court agreed with that concept in multiple other different contexts. *Compare* Rep. Plfs.' Am. Br. at 62–63 *with generally* State's Am. Br. The State cannot get the benefit of having their non-retained expert designation and disclosure obligations "reset" when they advocated, and were successful in other contexts, that no other deadlines were extended following procedendo. *Cf. Winnebago Indus. v. Haverly*, 727 N.W.2d 567, 573–76 (Iowa 2006) (discussing judicial estoppel doctrine).

The Appellate Court should measure the State's violations of the separate expert designation and disclosure issues from the deadlines identified in the February 2020 TSDP and/or the March 2021 trial, both of which had lapsed prior to Tatman's designation and disclosure, not ninety days prior to February 2024 trial.

B. The Plaintiffs Were Prejudiced. Exclusion of Tatman or Another Remedy Was Required.

A violation of Iowa's expert designation and disclosure obligations requires exclusion of the evidence under Rule 1.517(3)(*a*). *See Kellen v. Pottebaum*, No. 18-1034, 2019 WL 2371924, at *3 (Iowa Ct. App. June 5, 2019) ("[O]ur rules are automatic."); *accord* Fed R. Civ. P. 37, 1993 cmt. to Rule 37(c) (describing the parallel federal rule as a "self-executing sanction"). The State has the burden to prove that their untimely

designation and disclosure was substantially justified or harmless. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001) ("[T]he burden is on the party facing sanctions to prove harmlessness."). The State does not contest that their untimely designation and disclosure of Tatman was not "substantially justified" (under any deadline) and solely focus on harmlessness. State's Am. Br. at 73–79.

The State claims that there was no prejudice because there was some inkling of potential expert testimony from previous filings. *Id.* at 76. But knowing that expert testimony may be presented is not the same thing as knowing who is going to be an expert, particularly considering the State's first content bare expert designation for Thomas. *Cf. Musser*, 356 F.3d at 756. "If the expert d[esignation] requirements fell away every a time a party could infer the likely use of an expert from a party's legal position, the rule would have little applicability in most civil litigation and no real teeth as an enforcement mechanism." *In re Marriage of Bolger*, No. 22-1201, 2023 WL 7378490, at *5 (Iowa Ct. App. Nov. 8, 2023).

The State also argues that the Plaintiffs could have gotten a rebuttal expert. State's Am. Br. at 76. This was not a realistic considering the State's late designation and disclosure, the proximity to trial, and the Plaintiffs' incarcerated status. *Cf. Bolger*, 2023 WL 7378490, at *5 (explaining that an untimely disclosure would hamstring opposing parties attempt to prepare expert or lay testimony). Furthermore, if discovery was closed as the State claimed, this hypothetical rebuttal expert witness would have very little information available to give testimony to adequately rebut Tatman.

The State further argues that the District Court's standing order for a *Daubert* or expert qualification hearing was not necessary. State's Am. Br. at 77. The larger issue is that Plaintiffs were deprived of an opportunity to conduct any expert witness discovery under Rule 1.508 to determine Tatman's qualifications and reliability. *See McConkey on Behalf of B.M. v. Huisman*, No. 18-1399, 2019 WL 3317373, at *4 (Iowa Ct. App. July 24, 2019) (concluding that exclusion of expert was justified when untimely expert designation deprived Plaintiff "of an opportunity to conduct expert witness discovery under Iowa Rule of Civil Procedure 1.508"); *see* D0791 at 11:1–13 (Hrbek describing inability to conduct expert discovery due to late designation and disclosure).

A specific example of how the State's untimely designation and disclosure prejudiced the Plaintiffs' ability to conduct expert discovery relates to the "*Daubert*" hearing. With the State's untimely designation and disclosure, the State effectively sidestepped the District Court's standing order for a hearing to occur. This "*Daubert* hearing," whether or not it was required under Iowa law, would have certainly facilitated the Plaintiffs' preparation for trial regarding Tatman, such as whether Tatman's testimony should be limited on rehabilitation. *Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677, 685–86 (Iowa 2010) (identifying Daubert factors as relevant inquires for the Court); *cf.* D734 at 26.

Lastly, the State indicates Lamb's testimony was sufficient to ban nudity even without Tatman under *Turner*. State's Am. Br. at 78–79. Again, Lamb affirmatively testified that he had no issues with nudity which was corroborated by the Plaintiffs

themselves as well as the State's inability to present any statistical evidence of the alleged harms, despite several decades of nudity circulating in Iowa's prisons. D0788 at 26:14–16; D0734 at 11, 27. Without Tatman, the State cannot establish a rational connection for banning nudity material or sufficiently rebut the Plaintiffs' claim that the proffered interests for a nudity ban is exaggerated under *Turner*.

At bottom, the State's argument appears to be that they can designate and disclose any new expert sixty days out from trial on an important constitutional issue, but the Plaintiffs could not conduct any expert discovery. That's illogical. *See Huisman*, 2019 WL 3317373, at *4. Tatman should have been excluded or the Plaintiffs should have received other appropriate relief listed under Rule 1.517(3). At a minimum, a new trial is required considering the District Court's heavy reliance of Tatman's testimony in its final bench trial order. *See id.*

III. The Television-and-Movie Censorship Claim Must be Remanded for Further Proceedings.

The State's appellate briefing does not appear to dispute that the Plaintiffs' petition has effectively pled, including the legal ramifications of how Hrbek's unresisted intervention petition "amplified" this claim, that there is some unconstitutional government television-and-movie censorship in Iowa's prisons.[2] *See* Rep. Plfs.' Am. Br. at 65–66. The dispute centers on whether Iowa Code section 904.310A(1) applies to

[2] The State claims that this issue is not a pleading issue, but the District Court clearly concluded as much. *See* D0791 at 80:10–12 ("[Judge McLellan] made that finding based upon what was in the petition.").

this specific censorship and what the appropriate remedy regardless of whether the statute applies or not.

Confusingly, the State appears to have changed its positions at times as to when Iowa Code section 904.310A(1) could apply other media besides "publications." D0411, State's Resistance Memo. at 4 (08/12/2020) ("[T]he restrictions in Iowa Code § 904.310A would apply in a situation . . . regardless of whether a magazine, *movie, television program,* commercially published photograph or otherwise." (emphasis added)). Furthermore, Warden Sperfslage's summary judgment affidavit indicates that the revision to the television and movies policies was because of the passage of, and are in lockstep with, the changes made by Iowa Code section 904.310A(1), a point the State's appellate briefing acknowledges. D0305, App. in Support of Summ. J. at 45 (03/06/20); *see also* D0304, State's Memo. for Summ. J. (03/06/20) ("Iowa has focused all types of media – whether it is publications, movies or television shows."); State's Am. Br. at 34 (acknowledging that Warden Sperfslage's "affidavit . . . could be interpreted to suggest" Iowa Code section 904.310A(1) applied to television-and-movie censorship). The Plaintiffs reiterated this point at trial in response to the State's objection to present this issue. *See* D0791 at 79:7–19 ("They admitted to using 904.310A in our grievance responses. An even in their affidavit he said that it was piggy-backing, and that's why they censored it."). The District Court should have considered how the television-and-movie censorship impacts the constitutional overbreadth argument because Iowa law

looks at both the "quoted statue and department rules together, not as unrelated provisions." *See Richards v. Iowa Dept. of Rev.*, 360 N.W.2d 830, 833 (Iowa 1985).

The State alleges that this appeal point is instead an evidentiary error for their challenge to 904.310A(1), essentially a relevancy issue. State's Am. Br. at 79–80; D0791 at 75:24–76:5 (State's initial objection). If Iowa Code section 904.310A(1) applies to television-and-movie censorship, then such evidence would be relevant to their claim. Furthermore, even if the Plaintiffs' challenge was appropriately limited to the defined "publication" challenge, the television-and-movie censorship would still be relevant to the second *Turner* factor that measures the existence of "alternative means of exercising the right" in question. 482 U.S. at 90.

This alleged evidentiary error is self-evident, and no offer of proof would be needed to address as "the record adequately demonstrates the issue raised." *See State v. Schutz,* 579 N.W.2d 317, 319 (Iowa 1998). Regardless, despite the considerable offers of proof made, remand would be the appropriate legal mechanism because the *Turner* test is fact intensive, carries significant constitutional considerations, and the fact that the State never had the opportunity to rebut the evidence. *See Laing v. State Farm Fire & Cas. Co.*, 236 N.W.2d 317, 320 (Iowa 1975) (determining that "the proper disposition is to remand" despite "an offer of proof having been made" because the evidence at issue needed to be examined with "closet scrutiny"); *see also Ramirez,* 379 F.3d at 130; *see, e.g., Human Rights Def. Ctr.*, 999 F.3d at 165–66 (remanding for further proceedings when

court misapplied "alternative sources" factor when there was "no finding of fact . . . [and] neither party at trial focused on the issue").

Even if Iowa Code section 904.310A(1) does not apply to television-and-movie censorship, remand would still be appropriate. The procedural posture demonstrates substantive claim regarding unconstitutional television-and-movie censorship has been effectively plead. And the District Court's failure to address this censorship issue has been sufficiently brought as an error point in this appeal. *Cf. State v. Christensen*, No. 09-1457, 2010 WL 5276884, at *2 (Iowa Dec. 17, 2010) (per curium) (explaining that the failure "to cite the specific statute or rule in support of an issue . . . is not dispositive" for error preservation purposes). Whether Plaintiffs may have cited a wrong statute or policy for this specific censorship is not fatal under Iowa's notice pleading standards and liberal construction of *pro se* pleadings. *See Adam v. Mt. Pleasant Bank & Tr. Co.,* 355 N.W.2d 868, 871 (Iowa 1984) ("[P]leading the wrong theory is not necessarily fatal"); *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).

Regardless, the offers of proof demonstrate that television-and-movie censorship went well beyond the legitimate goals proffered by the State.[3] *See, e.g.,* D0791

[3] The State claims that the Plaintiffs have waived presenting argument regarding how their offers of proof regarding television-and-movies censorship would have impacted the final holding. State's Am. Br. at 81–82. The State misunderstands the scope of the appellate waiver doctrine. The issue of improper handling of the television-and-movie censorship issue has clearly been raised by the Plaintiffs' appellate brief. The

at 113:06–114:16 (admitting Hrbek's affidavit (H-15) "regarding edited television censorship evidence" for purposes of offer of proof located in court file at D0205–D0237), 83:14–84:12 (Cortez testimony on various movies/television that are being blocked), 103:9–18 (O'Geary testimony on television restrictions). The relevant policy the State cites provides that "videos shall not be shown in an institution that have a greater rating than PG-13" and "television programs with MA rating may be shown, intense sexual content and graphic violence shall be blocked." *See* D0305 at 60; *see also* D0070 at ¶ 6 (describing OP-RA-03). Certainly, the plain text of this policy, as demonstrated by the offers of proof, goes well beyond the specific testimony by Tatman and Lamb which focused solely on "pornographic" material.

Recognizing that this specific censorship issue was properly plead and was likely incorrectly dismissed or limited, the State argues, again for the first time on appeal, that the claim amounts to an improper Chapter 17A challenge. State's Am. Br. at 82–83. Assuming Chapter 17A does apply, any lack of authority argument must be considered waived because the State failed to raise the issue "as soon as practicable" before the District Court. *Alliant Energy-Interstate Power and Light Co., v. Duckett*, 732 N.W.2d 869, 876 (Iowa 2007) (determining lack of authority argument was considered waived when party waited over a year and filed multiple motions); *cf. DeVoss*, 648 N.W.2d at 63. Remand is appropriate to address this unresolved but specifically plead constitutional

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parties just disagree as to the appropriate framework of review as well as the appropriate remedy for this issue.

censorship issue. *See Hager v. M & W Welding*, No. 24-0778, 2025 WL 1824301, at *6–7 (Iowa Ct. App. July 2, 2025) (concluding that remand for new trial on hostile work environment claim was appropriate when the district court erroneously concluded that it was not plead); *accord Mease v. Fox*, 200 N.W.2d 791, 798 (Iowa 1972) (remanding for further proceedings when claim was improperly stricken).

CONCLUSION

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

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/s/ Theodore T. Appel
THEODORE T. APPEL (#AT0014941)
BRADLEY & RILEY PC
2007 First Avenue SE
P.O. Box 2804
Cedar Rapids, IA 52406-2804
Phone: (319) 363-0101
Fax: (319) 363-9824
Direct Dial: (319) 861-8769
Email: tappel@bradleyriley.com

Brent Appel (#AT000558)
Direct Dial: (515)-238-4586
Email:brentrappel@gmail.com
10901 180th Ave
Ackworth, Iowa

PRO BONO ATTORNEYS FOR
PLAINTIFFS-APPELLANTS FOR
PLAINTIFFS-APPELLANTS
GREGORY, RADEKE, O'GEARY,
WELSH, FENTON, AND LAWRENCE,
HRBEK, NEWELL

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The undersigned hereby certifies this brief was electronically filed and served on the 2nd day of September, 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
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Date

Mailed Copy to:

Jack Hays
Newton Correctional Facility
P.O. Box 218
Newton, IA 50208

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Signature

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