No. ____

In the Supreme Court of the United States

CHARLES E. SISNEY,
Petitioner,

v.

DENNY KAEMINGK, ET AL.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. It is settled that inmates in state and federal prisons retain First Amendment rights consistent with the application of the four factors set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *Turner* has been applied consistently in many prisons and many states to restrict from inmates' access a broad range of otherwise First Amendment-protected materials. It has also, however, worked to leave open a space for inmates to access a broad swath of such materials. In this case, the prison managed by the respondents that houses the petitioner applies a "pornography" policy. That policy functions to prevent inmates from receiving a wide range of written and pictorial texts, including, but certainly not limited to, *National Geographic Magazine*; *Smithsonian Magazine*; *U.S. Weekly*; *Wired Magazine*; *Yoga Journal*; and (as admitted by the respondents) the Holy Bible. This policy is one of unprecedented scope in the history of such policies in state and federal prisons in the United States. It serves to prohibit inmates from reading mainstream texts in areas such as current events, sociology, religion, art, technology, and personal health. Should the Eighth Circuit's approval of this policy stand, other prisons are sure to adopt it. Is such a broad "pornography" policy consistent with this Court's jurisprudence on First Amendment overbreadth?

STATEMENT OF RELATED PROCEEDINGS

U.S. District Court, South Dakota, No. 4:15-cv-4069, *Charles E. Sisney v. Denny Kaemingk, et al.*, September 29, 2016.

Eighth Circuit Court of Appeals, No. 16-4313, *Charles E. Sisney v. Denny Kaemingk, et al.*, March 30, 2018.

U.S. District Court, South Dakota, No. 4:15-cv-4069, *Charles E. Sisney v. Denny Kaemingk, et al.*, June 24, 2020.

Eighth Circuit Court of Appeals, No. 20-2460, *Charles E. Sisney v. Denny Kaemingk, et al.*, October 15, 2021.

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PETITION FOR CERTIORARI

This case offers the Court the opportunity to clarify the limits to which a prison may go to restrict the very types of materials we would hope inmates would read: mainstream, educational texts on current events, religion, sociology, technology, health, and other important topics. In clarifying the limits, this Court will uphold the principles of the First Amendment, which apply no less to inmates than to the rest of us. It will therefore stem the inevitable tide of other prisons that will invariably follow the respondents' simple, but overly broad policy. If that is allowed to happen, inmates will no longer enjoy the First Amendment protection to consider world cultures and current events via texts such as *National Geographic* or *Newsweek*. They will no longer be sure that they can read *Parents* magazine, in preparation for their release to care for their families. They will no longer have confidence that their books and magazines on yoga and Buddhism will come to them unimpeded, so that they may practice mindfulness or their chosen religion. And they will, as the respondents have admitted, not have the First Amendment guarantee of possessing and reading the Holy Bible.

Were this to happen, inmates from around the country would no longer have the opportunity to educate themselves, to better themselves, or to rehabilitate themselves. Were this to happen, the *Turner v. Safley* factors would be rendered a mockery, and the First Amendment would be terribly harmed.

This Court should grant this petition for writ of certiorari in order to protect the First Amendment.

OPINION BELOW

The Eighth Circuit's opinion (Pet.App.1) is available at 15 F.4th 1181 (8th Cir. 2021).

JURISDICTION

The Eighth Circuit rendered its decision on October 15, 2021. This Court has jurisdiction based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution is reproduced in the appendix.

STATEMENT OF THE CASE

The South Dakota State Penitentiary ("SDSP"), where the petitioner resides as a prisoner, applies a "pornography" policy that the respondents defend. SDSP has used this policy to ban a wide range of texts from inmates' possession and access, including *National Geographic*; *Smithsonian Magazine*; *U.S. Weekly*; *Mad Magazine*; *Wired*; *In These Times*; *Tricycle: A Buddhist Review*; *Yoga Journal*; *Buddhadharma*; *W*; *Esquire*; *Guns, Germs, and Steel*; *The Barnes Review*; *Details*; *Elle*; *Vogue*; *In Style*; *Lucky*; *Glamour*; *Islands Magazine*; *Maxim Magazine*; *Merck's Manual*; *OK! Magazine*; *Skin & Ink*; *Special Operations Forces Medical Handbook*; *Top 100 Horror Movie Guide*; *Hot Bike Magazine*; *Men's Fitness*; *Cosmopolitan*; and *Parents* magazine. (DCD 1-3; DCD 105, p. 12).

The respondents have represented in court that the Holy Bible is also subject to ban under their policy. (DCD 183, p. 20).

Virtually none of the texts at issue are what people, applying common sense, would refer to as "pornography."

The current policy at issue in this case prohibits inmates' possession, manufacture, and sending of "pornographic material" even where the intended recipient of the material is not in custody or otherwise under state supervision. (DCD 27-1).

Under the policy, "pornographic material" is anything that "feature[s] nudity or 'sexually-explicit' conduct." "Nudity" means "a pictorial or other graphic depiction where male or female genitalia, pubic area, buttocks or female breasts are exposed." "Sexually explicit" covers both images and writing that describe actual or simulated sexual acts. Id.

SDSP rejects material if it contains a picture that shows any "definition" of breast or groin, even if fully clothed, or if the material depicts or describes an "excessive" amount of inner thigh, breast or buttock. (DCD 1, pp. 4-5).

The current policy does not explicitly define "feature." The respondents have provided inconsistent statements regarding this provision. They have claimed that the current policy incorporates the definition of "feature" set forth in the June 2008 version of the policy, (DCD 64-4, p. 5), which provided: "'Feature' means that the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues." (DCD 68-1).

But the respondents have repeatedly suggested that the "feature" provision of the policy has no force. One respondent explicitly denied that the above definition of "feature" is part of the current policy, stating that "[w]hether or not a published material 'features' sexually explicit material would be totally dependent upon the material in question and would vary from case to case." (DCD 95-5, pp. 2-3; DCD 95-6, p. 4). The respondents elsewhere have represented that material may be rejected "on the basis of a single picture or article contained therein," (DCD 99, p. 6), or if incoming or outgoing correspondence includes "any material that depicts pornography, sexually explicit conduct and/or nudity." (DCD 70-14, p. 3). SDSP will also reject material if it simply "contains" "pornography." (DCD 70-15, p. 2).

The policy contains an exception for material "illustrative of medical, educational or anthropological content." (DCD 27-1). However, the respondents refused to respond to the petitioner's discovery request for instances in which the prison applied this exception. (DCD 94, p. 4; DCD 99, p. 4).

Unlike its prior iterations, the current policy bans "[a]ll incoming and outgoing" material that contains pornography; the "manufacturing" of pornography; and "graphic" and "writing[]" forms of pornography. (DCD 27-1).

The petitioner filed a complaint in April 2015 and a supplemental complaint in the next month. (DCD 1; DCD 8-1).

Among other claims, the petitioner claimed that the current policy is unconstitutional on its face because it completely bans all sexually explicit materials, denying him the right to receive sexually explicit communication, and

because it bars him from sending out sexually explicit materials to people in the general public, thus denying people who are not in any incarcerative setting the right to receive sexually explicit communications. (DCD 8-1, pp. 9-10). The petitioner also claimed that the policy is unconstitutional as applied because the prison's interpretation of "pornography" was overbroad. Id. at 10.

In their answer, the respondents asserted a panoply of traditional, legitimate penological interests in support of the policy. (DCD 35, pp. 25-26). They also claimed that the policy did not impose a global ban on all materials, just on materials that "feature" nudity or sexual conduct. Thus, "a single nude photo in a publication generally will not lead to a ban on the publication." Id. at 30. Elsewhere, however, the respondents admitted that "a single picture or article in a magazine or publication" provides a basis for rejecting the entire magazine or publication. (DCD 94, p. 3; DCD 99, p. 3).

The respondents' response to the petitioner's discovery requests was the very picture of recalcitrance. On October 19, the petitioner sent to the respondents a request for production of documents. (DCD 53). The respondents failed to respond within the allotted time. The petitioner sent to them a letter of inquiry, attempting to confer in good faith regarding any discovery disputes the respondents might have had. Id. at 1-2. The respondents did not respond. Id. at 2.

Instead, the respondents filed a motion for a protective order, (DCD 41), claiming that the petitioner's requests were irrelevant to his as applied challenge. Id. at 3-4. The respondents did not state why the request was irrelevant, and they

ignored the existence of the petitioner's facial challenge. (DCD 41). The court denied this motion, finding no indication that the respondents conferred with the petitioner in good faith, in violation of Fed. R. Civ. P. 26(c). (DCD 43).

The respondents continued down their road of recalcitrance. On December 9, the petitioner filed a motion to compel production of discovery documents, claiming that the respondents had refused to respond to his discovery requests. (DCD 51). The petitioner specifically referred to his facial challenge. (DCD 53, p. 3).

Two days later, the magistrate judge filed an order granting in part and denying in part the petitioner's motion to compel. (DCD 56). The court ordered the respondents to "immediately or as soon as possible serve Mr. Sisney with written responses to his October 19, 2015 discovery requests." Id. at 3.

On the same day, the petitioner filed a motion to compel answers to interrogatories. (DCD 59). These answers were due on December 23, 2015. Id. at 2. On December 24, the petitioner received a partial response to his interrogatories, with one respondent refusing to respond to any of the petitioner's interrogatories until the court directed her to do so. Id. at 2-3.

Three days later, the respondents filed a renewed motion for a protective order, arguing that the court had already disposed of the petitioner's facial challenge, and thus that discovery about other inmates was not relevant. (DCD 72, pp. 2-3).

On May 25, the magistrate judge denied the respondents' motion for protective order and granted the petitioner's motion to compel discovery as to his

facial challenge. The court ordered the state to serve the petitioner with all responses to his interrogatories. (DCD 104, p. 7). The court gave the respondents 30 days to comply. Id. The respondents never complied. The court also granted the petitioner's motion to resolve his facial challenge, concluding that his facial challenge survived. Id. at 6.

The petitioner's attempts at discovery provided the respondents a perfect opportunity to prove that their pornography policy was necessary. The petitioner requested information on the incidence of inmate sexual misconduct and the incidence of prison staff reporting a sexually hostile environment. (DCD 95-1, pp. 2-3). The respondents' response was that these requests were "absurd." (DCD 95-3, pp. 5-6).

The petitioner asked for a definition of "feature" from a past policy and whether that definition was still applicable. (DCD 95-1, p. 2). The respondents refused to respond. (DCD 95-3, p. 5).

The petitioner asked for the number of materials that the prison had rejected as pornographic, information regarding these materials, and for the number of disciplinary incidents or investigations the prison performed regarding pornographic material. (DCD 95-2, pp. 2-3). The respondents refused to respond, claiming this information was irrelevant. (DCD 95-4, pp. 4-5).

The petitioner asked whether any exceptions had been made to the policy. (DCD 95-2, pp. 4-5). In response, the respondents referred the petitioner to the

current policy, claiming only that "the language contained therein is self-explanatory." (DCD 95-4, p. 6).

The petitioner asked whether the respondents' interpretation of the terms "nudity" and "sexually explicit" applied to Michelangelo's Statue of David, a picture of the Sistine Chapel ceiling, or a picture of a naked child in *National Geographic*. (DCD 64-15, p. 3). One respondent refused to answer. (DCD 64-6, p. 4).

Counsel for the respondents, indeed, informed the petitioner that no respondent would respond to any discovery request regarding other inmates based on the erroneous claim that the petitioner was making only as "as applied" challenge, and not a facial challenge. (DCD 64-7).

On January 7, 2016, the respondents filed their motion for summary judgment. (DCD 67). The petitioner, too, had filed a motion for summary judgment.

On September 29, the district court filed its order. It granted the petitioner's motion for summary judgment on his facial challenge and found that the current policy is unconstitutional. It detailed how the four factors in *Turner v. Safley* were not satisfied (further discussion of this follows *infra*).

The respondents appealed to the Eighth Circuit. On March 30, 2018, the Eighth Circuit found that the district court erred in its analysis, and remanded the case for further consideration.

On June 24, 2020, the district court issued a new memorandum opinion and order, finding once again that the respondents had failed to satisfy the *Turner* factors. The district court considered the respondent's facial overbreadth claim and

found that portions of the policy were unconstitutionally overbroad. It edited the policy in an attempt to save it from complete invalidation.

The respondents again appealed to the Eighth Circuit. On October 15, 2021, the Eighth Circuit filed its opinion. It found that the petitioner's facial challenge as to the policy's prohibition on "nudity" was moot, and that his facial challenge as to the policy's prohibition on "sexually explicit content" was not unconstitutionally overbroad.

Judge Stras filed a concurring and dissenting opinion. He rejected the panel's conclusion that the petitioner's overbreadth claim was at all moot. Judge Stras did, however, find no evidence of substantial overbreadth.

REASONS FOR GRANTING THE PETITION

This Court is faced with a prison "pornography" policy that seemingly operates to prohibit every type of text that even remotely touches upon issues of sex, and a wide variety of texts that do not. There is virtually no actual pornography at issue in this case. The vast majority of texts are neither obscene, as they do not appeal to a prurient interest in sex, are not patently offensive, and *are* often of highly redeeming social value. *Miller v. California*, 413 U.S. 15, 21 (1973). Nor are most of the texts pornography as common sense might define it. *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Steward, J., concurring) (As to pornography, Justice Steward "[knew] it when [he saw] it.").

The overwhelming amount of texts prohibited are high-value texts that are not prohibitable under *Turner v. Safley*. The respondents' policy is content-based,

not neutral. It infringes on the First Amendment rights of people who are not inmates, and who might communicate with inmates. And the policy at issue is unprecedented in the history of similar policies.

For all of these reasons, the policy is unconstitutionally overbroad and thus facially unconstitutional.

I. SDSP inmates have the First Amendment right to access both high-value material and sexually explicit material

"Inmates clearly retain protections afforded by the First Amendment." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987); *see also Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (convicted persons "do not forfeit all constitutional protections by reason of their conviction and confinement in prison."); *Procunier v. Martinez*, 416 U.S. 396, 418 (1974) (inmates "plainly" retain the First Amendment right to receive and send "uncensored communication"). These protections are only stronger when inmates wish to communicate with individuals not in custody, because "censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights" of both the inmate and the person with whom the inmate is corresponding. *Martinez*, 416 U.S. at 409.

This right protects high-value speech, but it also protects sexually explicit speech. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding that the protection of obscenity is "fundamental to our free society"); *see also Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment.").

Indeed, the Eighth Circuit has held that inmates "clearly have a right to receive" sexually explicit publications. *Carpenter v. South Dakota*, 536 F.2d 759, 761 (8th Cir. 1976). In *Thibodeaux v. South Dakota*, for example, that court recognized an inmate's "sensitive First Amendment rights" as to his possession of *Mature*, a magazine dedicated to "gay life, swinging, swapping, S & M, AC-DC, and discipline." 553 F.2d 558, 559-60 (8th Cir. 1977).

To be sure, courts give deference to prisons with a "hands-off attitude toward problems of prison administration." *Martinez*, 416 U.S. at 404. This deference, however, is limited, and courts recognize that inmates still possess "fundamental constitutional guarantee[s]." *Id.* at 405. Courts will, therefore, "discharge their duty to protect [inmates'] constitutional rights." *Id.* at 405-06.

Because courts seek to protect inmates' constitutional rights, categorical bans on sexually explicit material are suspect. *Stanley*, 394 U.S. at 565. Just as Georgia could not show that exposure to the materials that Stanley possessed could lead to deviant sexual behavior or crimes of sexual violence, *id.* at 566, the respondents in this case have demonstrated no actual danger to the possession of any of the texts at issue. *See id.* at 567 ("the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.").

A. The starting point of this Court's analysis must be protecting the petitioners's constitutional rights, not upholding the prison's censorship policy

The starting point for any question involving prison regulations that limit inmates' constitutional rights must be a presumption that those rights are protected, subject only then to reasonable restrictions. As the Supreme Court noted in *Turner v. Safley*, "The first of [the] principles [that frame federal courts' analysis of prisoners' constitutional claims] is that federal courts must take cognizance of the valid constitutional claims of prison inmates." 482 U.S. 78, 84 (1987). "Because prisoners retain these rights, '[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.'" *Id.* at 84 (citing *Martinez*, 416 U.S. at 405-06).

To be sure, this Court must balance the petitioner's constitutional rights against the right of the respondents to secure their prison, but courts are clear that protecting inmates' constitutional rights is the first of these two principles. *Mauro v. Arpaio*, 188 F.3d 1054, 1058 (9th Cir. 1999).

B. Where the right at issue is a First Amendment right, this Court must take particular care to vindicate the petitioner's right

Just as this Court must seek first to protect the petitioner's constitutional rights, so too must it take special care to protect the petitioner's *First Amendment* rights, which are among the most important in our constellation of rights. *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 245 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment

generally prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment) (observing "government's lack of power to engage in content discrimination"); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("above all else, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

This concern with the First Amendment extends to unpopular speech as much as any other type of speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."); *Rodriguez v. Maricopa County Community College Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) ("The right to provoke, offend and shock lies at the core of the First Amendment.").

It is not easy to live up to such principles when the speech in question exists inside a prison. Yet our First Amendment jurisprudence recognizes that these

protections will not long endure if we abandon them when the state invokes penological interests that are under no threat from the speech at issue in service of the speech's complete censorship. This Court has been dedicated to providing First Amendment activities with "breathing space," *Boos v. Barry*, 485 U.S. 312, 322 (1988), where the gossamer specter — but not the concrete actuality — of danger looms.

Thus, this Court has protected rhetorical calls to break individuals' necks in connection to a boycott of anti-black businesses, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982), and to put President Johnson in a gun sight, where the context was a Vietnam war protest. *Watts v. U.S.*, 394 U.S. 705, 706 (1969). The Court has protected a KKK rally and has held that the First Amendment protects calls to lawless conduct unless they meet the test for incitement. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). At the First Amendment's core is the proposition that speech is protected unless the government can prove the actual potential for some real harm.

Most of the speech that SDSP bans under its policy is high-value — few in our society can doubt the social value of religious texts, *National Geographic*, or *Guns, Germs, and Steel*. But if some of the other speech at issue is of lesser value, that is of no moment, since the state cannot justify regulation on the assumption that "the speech is not very important," *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 826 (2000), or that it lacks redeeming social importance. *United States v. Stevens*, 559 U.S. 460, 479 (2010) ("*Most* of what we say to one another

lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation.") (emphasis in original).

C. This Court must consider the importance of the petitioner's First Amendment rights and whether the respondents' censorship actually serves any legitimate penological interest

The respondents would have this Court treat its *Turner* analysis of this case as it treats equal protection rational basis analyses: as long as there is some theoretical interest underlying a government's limit on a citizen's liberty, courts will uphold that limit, whether or not it is based on an actual interest, and even if it is wildly overbroad or underinclusive. *See*, e.g., *Heller v. Doe*, 509 U.S. 312, 320-21 (1993). This is an incorrect statement of the law and a dangerous precedent to set.

a. *Turner* requires more than a rational basis analysis

Instead of applying near-dispositive deference to prison policies, this Court in *Turner* instructed that lower courts must engage in a true balancing test that weighs prisons' concerns against inmates' rights. *Turner*, 482 U.S. at 85 (adopting a unique "standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint . . . and [to] the need to protect constitutional rights") (internal quotes omitted); *Salaam v. Lockhart*, 905 F.2d 1168, 1171 n. 6 (8th Cir. 1990) ("[r]easonableness in this [*Turner*] context refers . . . to the balance struck between the needs of the prison administrators and the constitutional rights of prisoners.").

Any deference given to prisons, furthermore, must not be "toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). Instead, courts must look to *Turner*'s 4-part test and decide (1) whether the restriction is reasonably related to a legitimate penological objective and operates in a neutral manner to further that objective; (2) whether alternative means of exercising the asserted right remain open to prison inmates; (3) what impact the accommodation of the constitutional right will have on other prisoners, staff, and resources; and (4) whether there are any ready alternatives that would allow the prisoner to exercise his rights at a minimal cost to the institution. *Turner*, 482 U.S. at 89-90.

With these four factors, the *Turner* Court rejected the deference given to governmental actions under traditional rational basis review. Unlike under rational basis analysis, prisons in the *Turner* context cannot rely on general or conclusory statements regarding their interests. *Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996) ("[t]he prison administration cannot avoid court scrutiny by reflexive, rote assertions" but must instead demonstrate that the interests asserted are the actual bases for their regulations) (internal quotes omitted); *Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995) ("[c]onclusory assertions" that prison security would be threatened by news clippings not sent directly from the publisher "fall short" of establishing the claimed danger from newspaper clippings); *Walker v. Sumner*, 917 F.2d 382, 385, 386 (9th Cir. 1990) ("Prison authorities cannot rely on general or conclusory assertions" but must "first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual

bases for their policies and that the policies are reasonably related to the furtherance of the identified interests.").

It was the *Turner* Court itself that struck down a prisoner marriage restriction despite testimony from prison officials that the ban served the objectives of security and rehabilitation.[1] This Court held that the government failed to demonstrate that the marriage restriction was "reasonably related to the articulated rehabilitation goal" because "the rule sweeps much more broadly than can be explained by petitioners' penological objectives." *Turner*, 482 U.S. at 98. Moreover, because "[t]here [were] obvious, easy alternatives" that accommodated the right to marry while imposing a *de minimis* burden on security, the regulation "represent[ed an unconstitutional] exaggerated response to security objectives." *Id.* at 97-98.

The requirement that "exaggerated responses" be avoided is another hallmark of the *Turner* analysis. This Court has required its district courts under *Turner* to engage in an "independent review of the evidence" to be certain that a prison regulation is not an "exaggerated response" to prison concerns. *Salaam*, 905 F.2d at 1171. Unlike under traditional rational basis review, this Court "cannot validate prison regulations that are clearly broader in their scope or significantly more burdensome in effect than reasonable alternatives." *Id.*

[1] Prison officials testified in *Turner* that the regulation served security concerns because prisoner marriages would result in "love triangles" that might lead to violent confrontations between inmates, and that it served rehabilitation concerns because women prisoners needed to develop skills of self-reliance which would be undercut by marriage. *Turner*, 482 U.S. at 98-99.

Finally, unlike equal protection rational basis, it is the respondents' duty — not the petitioner's — to demonstrate that a legitimate penological interest is actually protected by their censorship policy. *See*, e.g., *Shimer,* 100 F.3d at 509 ("[t]he prison administration must proffer some evidence to support its restriction"); *Frazier v. Dubois*, 922 F.2d 560, 562 (10th Cir. 1990) (reversing dismissal of a complaint alleging retaliatory transfer for exercise of First Amendment rights where the state asserted no reasons for the transfer); *Swift v. Lewis*, 901 F.2d 730, 732 (9th Cir. 1990) ("[P]rison officials must at least produce some evidence that their policies are based on some legitimate penological justifications . . . If it were otherwise, judicial review of prison policies would not be meaningful."); *Walker*, 917 F.2d at 385 (quoting *Turner*, 482 U.S. at 89) ("Prison officials must 'put forward' a legitimate governmental interest to justify their regulation . . . and must provide *evidence* that the interest proffered is the reason why the regulation was adopted or enforced.") (emphasis in original).

b. The respondents suggest a precedent that would eradicate prisoners' First Amendment rights

The respondents' version of the law, entailing vast deference to the state based on rote, conclusory assertions of penological interest, would set a dangerous precedent if applied by this Court.

First, it would effectively eradicate inmates' constitutional rights. The rational basis deference that the respondents advance would equate the restriction of First Amendment rights with an ocean of mundane restrictions on prisoners' activities that do not touch upon the Constitution. Prisons could censor history

books with the same ease that they regulate how many haircuts an inmate may receive each month. Prisons could prevent inmates from sending letters to their loved ones but face the same level of judicial scrutiny they would if they chose to serve donuts only to inmates who have a good disciplinary record. Surely First Amendment rights demand more protection than haircuts and donuts. If they do not, then prison officials would, in effect, be able to "set constitutional standards by fiat." *Whitney v. Brown*, 882 F.2d 1068, 1074 (6th Cir. 1989).[2]

At least one downstream effect of the respondents' position is alarming. If First Amendment rights are eradicated at the first incantation of legitimate penological interests, then other constitutional rights are sure to fall. Indeed, the Eighth Amendment's protection against cruel and unusual punishment would be under threat, since "there is a logical connection between prison discipline and the use of bullwhips on prisoners." *Turner*, 482 U.S. at 101 (Stevens, J., concurring in part and dissenting in part).

[2] Under a *Turner*-as-traditional-rational-basis theory, "lawmakers who believe that books on Russian history may lead to disrespect for the United States may ban those books for prisoners; lawmakers who hold pro-life views may prevent prisoners from reading publications describing *Roe v. Wade*; and lawmakers who hold an antiquated view of the role women should play in society may ban the distribution in prisons of publications with feminist themes." *Amatel v. Reno*, 156 F.3d 192, 210 (D.C. Cir. 1998) (Wald, J., dissenting).

D. The four *Turner* factors compel a finding for the petitioner

The respondents' policy fails all four *Turner* factors.

a. The prison's censorship program is not reasonably related to a legitimate and neutral objective

i. The respondents establish no reasonable relation between the prison's policy and legitimate penological interests, and even stonewalled the petitioner's attempts to discover such a relation

It is indisputable, of course, that a censorship policy cannot survive scrutiny if the governmental objective underlying the regulation is not "legitimate." *Turner*, 482 U.S. at 89. The policy must also be reasonably related to an actual problem. While the respondents' interests are legitimate in the abstract, in this case they are unconnected to any real problem. They are post hoc inventions, designed only to save the respondents' doomed case. We know this because when the petitioner issued discovery requests that could have established a reasonable relationship, the respondents refused to respond. Their own recalcitrance left the record bereft of any evidence that might have helped their case.

The global and exaggerated coverage of the policy's prohibition illustrates further why it bears no reasonable relationship to any legitimate penological interest. The respondents certainly cannot claim that banning images of the Sistine Chapel, Christian religious iconography, *National Geographic*, *Wired*, and *Guns, Germs, and Steel* bear any such reasonable relationship. But the implications of SDSP's prohibition are much more startling. The respondents, in fact, admitted in court that their policy should result in a ban of the Holy Bible. In this light,

consider that in 2000, a district court in Wisconsin considered a prison's ban on sexually explicit material. *Aiello v. Litscher*, 104 F.Supp.2d 1068 (W.D.Wisc. 2000). The court in that case noted that the prison's ban should logically include the Holy Bible and Walt Whitman's work for the passages they contained:

- ". . . he saw a woman washing herself; and the woman was very beautiful to look upon . . . . she came in unto him, and he lay with her . . ." *See, e.g., 2 Samuel* 11:1–5 (King James).
- "Thy navel is like a round goblet . . . thy belly like wheat set about with lilies . . . thy stature is like to a palm tree, and thy breasts to clusters of grapes . . . I will take hold the boughs thereof . . ." *Song of Solomon,* 7:1–10 (King James)
- "Copulation is no more rank to me than death is. . . . If I worship one thing more than another . . . firm masculine coulter, it shall be you." *See* Walt Whitman, *Song of Myself,* § 24 (Galway Kinnell ed., Ecco Press 1987)

Id.

More recently, a district court in West Virginia echoed the Wisconsin court. Considering a prison ban that was not as globally restrictive as the policy at issue in this case, *Cline v. Fox*, 319 F.Supp.2d 685, 688 (N.D.W.Va. 2004), that court noted that "literary classics like George Orwell's *1984* and religious texts like the Bible," *id.* at 692, were still banned under the policy.

West Virginia observed that "[i]t is difficult to understand how denying inmates access to such books promotes security, prevents sexual assaults, or furthers rehabilitation." *Id.* And Wisconsin noted that it defied "expert testimony [and] common sense" to think that the global ban on a category of speech could serve any legitimate penological interest. *Aiello*, 104 F.Supp.2d at 1081-82.

ii. The prison's ban is content-based, not neutral

Prison censorship programs must be "operated in a neutral fashion, without regard to the content of the expression." *Thornburgh*, 490 U.S. at 415 (quoting *Turner*, 482 U.S. at 90).

There are two ways that a prison censorship policy may be deemed neutral. It may be neutral on its face, or the government may defend a content-based restriction by proving that the restriction is "unrelated to the suppression of expression." *Id.* at 415-16.

1. The policy is not facially neutral

A statute is facially content-neutral if it makes no reference to content, or if, although it may refer to content, speech is in fact regulated only by reference to criteria other than content. Thus, for example, restrictions allowing prisoners to receive hardcover books only from publishers have been upheld as content-neutral because they make no reference to the content of the books whatsoever. *Bell*, 441 U.S. 520.

Policies may be facially neutral if they provide for content-based bans in conjunction with case-by-case assessments of materials in light of legitimate

penological interests. The *Thornburgh* Court, for example, considered a ban on material that "depicts, describes or encourages activities which may lead to the use of physical violence or group disruption"; material which "encourages or instructs in the commission of criminal activity"; and "sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity." *Thornburgh*, 490 U.S. at 405 n.5.

That Court upheld the policy because the policy expressly forbade the rejection of a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant," and authorized the rejection of any given publication "only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." *Id.* at 404-05.

The policy at issue in the instant case is clearly facially content-based: it imposes a global prohibition on sexually explicit material, and this Court has held that such a restriction of "sexually explicit" material "is the essence of content-based regulation." *Playboy Entertainment Group, Inc.*, 529 U.S. at 811-12. This is a ban whose constitutionality this Court should treat with skepticism. *Giano v. Senkowski*, 54 F.3d 1050, 1056 (2d Cir. 1995) ("prohibiting all erotica might be" an exaggerated response to institutional concerns); *Dawson v. Scurr*, 986 F.2d 257, 261 (8th Cir. 1993); *Pepperling v. Crist*, 678 F.2d 787, 791 (9th Cir. 1982) ("[a] blanket prohibition against receipt of publications by any prisoner carries a heavy presumption of unconstitutionality.").

2. The ban is focused on suppressing expression, not furthering any legitimate penological interest

There is no question that a regulation can be neutral under *Thornburgh*, even when it draws distinctions based on content, if the regulation furthers an interest "unrelated to the suppression of expression." *Thornburgh*, 490 U.S. at 415 (quoting *Martinez*, 416 U.S. at 413); *see also City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-48 (1986) (holding that a regulation is neutral if it is "unrelated to the suppression of free expression," that is, if the regulation is not aimed at the speech itself but at the "secondary effects" of such speech). It is the government's burden to demonstrate that the purpose underlying the restriction of speech is unrelated to the content of that speech. "[E]ven when a government supplies a content-neutral justification for the regulation, that justification is not given controlling weight without further inquiry." *Whitton v. City of Gladstone*, 54 F.3d 1400, 1406 (8th Cir. 1995).

Nominally "content-based" regulations may be deemed neutral if the government can establish (1) negative effects of the speech unrelated to its content, and (2) that the regulation was enacted in direct response to those effects. *City of Renton*, 475 U.S. at 44 (to support an ordinance, the government "held public hearings, reviewed the experiences of Seattle and other cities, and received a report from the City Attorney's Office advising as to developments in other cities."); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 646-47 (1994) (determining that Congress's purpose in enacting statute regulating cable industry was unrelated to the suppression of cable companies' expression by looking to the "unusually detailed

statutory findings" and to the design and operation of the statute, which showed that purpose was to protect non-cable households from loss of broadcasting service); *American Library Ass'n v. Reno*, 33 F.3d 78, 88-89 (D.C. Cir. 1994) (obligations on producers of adult material upheld because there was evidence in the record demonstrating that Congress was responding to a very specific detailed request from the Attorney General's Commission on Pornography for legislation that would enhance the ability of law enforcement officials to prosecute those using children in adult movies).

The respondents in the instant case established no such record. Quite the contrary: when invited to do so in response to the petitioner's discovery requests, they demurred.

A neutral policy is workable and ready at hand. In 2015, in *Murchison v. Rogers*, the Eighth Circuit considered a Missouri prison policy that banned materials that "constitute a threat to the security, good order or [] discipline of the institution; may facilitate or encourage criminal activity; may interfere with the rehabilitation of an offender; [or material that] promotes, incites, or advocates violence, disorder or the violation of state or federal law . . . . " The policy explicitly provided that "[c]orrespondence, printed or recorded materials, and pictures may not be rejected because . . . the content is . . . sexual . . . or is unpopular or repugnant . . . . " 779 F.3d 882, 886 (8th Cir. 2015).

Unlike the *Murchison* policy, which was tied directly to legitimate penological interests and explicitly protected inmates' First Amendment rights, SDSP's policy is

unmoored from its stated interests, and instead entails a lazy, global, content-based ban on a constitutionally-protected category of speech.

Furthermore, the case-by-case review of each publication under consideration that gave the *Thornburgh* Court "comfort" is absent here. 490 U.S. at 416. SDSP employees are not required to make any individualized determinations at all, and thus cannot make determinations with reference to a publication's impact on any legitimate penological interest. The policy, therefore, is wholly unlike the restrictions the Eighth Circuit considered in *Dawson*, 986 F.2d 257.

In *Dawson*, the Eighth Circuit upheld a regulation that prohibited certain prisoners from receiving sexually explicit material if prison administrators determined that "the material is detrimental to the rehabilitation of an individual inmate, based on psychological/psychiatric recommendation." 986 F.2d at 259 n. 4. As in *Thornburgh*, the regulation was deemed reasonably related to the government's interest in rehabilitation because the material was rejected or limited with a focus on prison security and rehabilitation, and it was not a categorical ban. *Id.* at 261.

b. The prison's censorship policy contains no alternative means for exercising the right to receive, possess, and mail sexually explicit materials.

The second *Turner* factor asks "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90.

Clearly, policies that permit "a broad range of publications to be sent, received, and read," including those containing nudity and sexually explicit

material, *Thornburgh*, 490 U.S. at 418, will satisfy this factor. "[A] more broadly restrictive rule against admission of incoming publications" might not pass constitutional muster, since "[a]ny attempt to achieve greater consistency by broader exclusions might itself run afoul of the second *Turner* factor." *Id.* at 417 n.15 (citation omitted).

The instant case doesn't involve a narrow policy — it involves a policy that entirely shuts down inmates' First Amendment rights. It even goes beyond sexually explicit material and nudity to prohibit images in which an "excessive" amount of skin is visible (whatever that means).

Countless cases show that prisons around the country are able to provide alternative means. The Eighth Circiut upheld a policy that gave inmates access to materials in a reading room and allowed them to have certain sexually explicit materials in their cells. *Dawson*, 986 F.2d at 258-59. In *Jones v. Salt Lake County*, the Tenth Circuit upheld a policy because it did "not prohibit sexually explicit prose or pictures of clothed women/men." 503 F.3d 1147, 1156 (10th Cir. 2007). In *Mauro*, the Ninth Circuit upheld a policy because it permitted sexually explicit letters between inmates and others as well as sexually explicit articles and photographs of clothed females. 188 F.3d at 1061. In *Amatel*, the D.C. Circuit upheld a policy that allowed inmates to possess "non-pictorial sexually explicit material." 156 F.3d at 193. The U.S. Bureau of Prisons provides that wardens are *not allowed* to prohibit materials "solely because [their] content is . . . sexual, or because its content is unpopular or repugnant." 28 C.F.R. § 540.71(b). Wardens must, furthermore, review

materials on a case-by-case basis. *Id.* § 540.71(c). The BOP regulation, finally, provides that written text "does not qualify a publication as sexually explicit." *Jordan v. Sosa*, 654 F.3d 1012, 1017 (10th Cir. 2011).

c. The respondents demonstrated absolutely no negative impacts that accommodation of the right would have on others in the prison

The third *Turner* factor concerns "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." 482 U.S. at 90. It asks whether a censorship policy functions to avoid any negative "ripple effect" that will undermine the order and security of the institution. *Thornburgh*, 490 U.S. at 418.

The respondents demonstrated no actual ripple effect and declined the petitioner's invitation in discovery to establish one. Instead, they provided only the theoretical, conclusory suggestion that their global ban served legitimate penological interests.

The respondents, furthermore, would be hard-pressed to show why possession of many of the materials at issue don't in fact *further* the prison's interests. *See Cline*, 319 F.Supp.2d at 694 (where the warden's "arguments remain conclusory and unpersuasive. He fails to explain how allowing inmates to read books that have some literary value but describe sexual conduct will 'create an intolerable risk of disorder,' even if the sexual references are *de minimus* . . . some of the otherwise prohibited literature may benefit inmates."). How could the

possession of the Bible, mainstream political and cultural publications, and scholarly texts undermine the prison's interests? The respondents refused to say.

d. The former policy proves that there is an obvious, less-restrictive alternative to the current censorship policy

The fourth factor in the *Turner* inquiry asks whether the regulation is an unreasonable, "exaggerated response" based on "the existence of obvious, easy alternatives . . . . that fully accommodate[] the prisoner's rights at *de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 90-91. It is the petitioner's burden to establish an alternative to the current policy. *Dean v. Bowersox*, 325 Fed.Appx. 470, 472 (8th Cir. 2009).

Leaving aside the countless policies around the country that have been upheld repeatedly, and leaving aside the BOP's regulations, the respondents themselves supply the petitioner with the alternative: the policy that was in effect prior to the current one. It was used for years with no demonstrable negative effect on legitimate penological interests. It was changed in 2009, but no new danger emerged then to force the change.

Furthermore, the respondents should not be heard to argue that the petitioner has not met his burden, since the petitioner was stymied by the respondents at every turn during discovery, hindering the petitioner's ability to produce any other alternative. He asked the respondents for the harms that the current policy produced; they refused to respond, asserting that such a request was irrelevant. But it certainly would be relevant to someone who is attempting to formulate a reasonable, less-restrictive alternative policy that would adequately

address legitimate penological interests. In this regard, the respondents' hands are unclean.

E. The policy restricts mail that inmates may send to non-inmates, violating the rights of inmates and non-inmates alike

While *Turner* governs inmates' receipt and possession of sexually explicit material, *Martinez* governs policies that restrict inmates' outgoing mail, destined for people who are not in custody. *Martinez*, 416 U.S. at 408-09. *Martinez* protections are higher than *Turner* protections because the penological interests at issue are less urgent. *Thornburgh*, 490 U.S. at 411-12.

Such restrictive policies must meet two factors. First, they must "further an important or substantial governmental interest unrelated to the suppression of expression." Second, they must be no more limiting of First Amendment freedoms "than is necessary or essential to the protection of the particular governmental interest involved." *Martinez*, 416 U.S. at 414; *see also Thornburgh*, 490 U.S. at 413 (holding that *Martinez* continues to apply, post-*Turner*, to restrictions on outgoing mail); *Smith v. Delo*, 995 F.2d 827, 830 (8th Cir. 1993) (holding that *Martinez* continues to apply to censorship of outgoing mail, even where the *Turner* standard now applies to incoming mail).

In district court and on appeal to the Eighth Circuit, the respondents made no argument to defend this aspect of SDSP's policy. They have certainly not met *Martinez*'s heightened standard.

II. Relief requested

This Court should find that the policy is unconstitutionally overbroad and thus facially unconstitutional.

CONCLUSION

This Court should hold that the respondents' "pornography" policy is unconstitutionally overbroad, and therefore hold that it is facially violative of the First Amendment.

Respectfully submitted,

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